

# Basic Individual Guidelines

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Annual National Seminar  
on the Federal Sentencing Guidelines

New Orleans, LA

Wednesday, June 13, 2012

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U.S. Sentencing Commission

# Program Discussion

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- Sentencing in the federal system
- Basic guideline application
  - Robbery scenario
  - Drug scenario
- Sentencing below a mandatory minimum

**U.S.S.C.**

**Website**

***www.usssc.gov***

***HelpLine***

***202-502-4545***

# Sentencing in the Federal System

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*Per Booker, Gall, Kimbrough, et al.*

# The Nature of a Federal Sentence

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## The Sentencing Reform Act of 1984

- Determinate sentences; no parole
- Supervised release
  - Available for all felonies and Class A misdemeanors
  - See 18 USC § 3559(a) and § 3583(b)&(e)(3)
- Good time
  - Maximum of 54 days per year
  - Not available for sentences of one year or less, or for a life sentence
  - See 18 USC § 3624(b)(1)

# Sentencing in the Federal System

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- Sentences are to be based on the factors at 18 USC § 3553(a)(1)-(7)
- Correct guideline application is the required starting point in sentencing
- Sentences are reviewed for “reasonableness”

## § 3553(a)(1) - (7)

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- Factors that must be considered by the district court in imposing a sentence
  - Even for sentences within the guideline range
- Factors that guide appellate courts in determining “reasonableness”

## § 3553(a)(1) - (7) Factors

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The court is to impose a sentence *sufficient but not greater than necessary* to comply with the “purposes of sentencing”

The court shall consider:

- (1) Nature & circumstances of offense;  
history & characteristics of defendant
- (2) “Purposes of sentencing”  
Punishment, deterrence, incapacitation,  
& rehabilitation



## § 3553(a)(1) - (7) Factors (cont.)

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- (3) Kinds of sentences available
- (4) The sentencing guidelines
- (5) The guideline policy statements
- (6) Avoiding unwarranted sentencing disparities
- (7) Need to provide restitution

# *Guidelines Manual*

## **Policy Statements**

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### Include Departure Considerations

- Chapter One, Part A
- Chapter Five, Part K
  - §5K1.1 Substantial Assistance
  - §5K2.0 Grounds for Departure
  - §5K2.1 – 2.23 Various bases for departures
  - §5K3.1 Early Disposition Programs

# *Guidelines Manual*

## **Policy Statements (cont.)**

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### Include Departure Considerations

- Chapter Five, Part H - Specific Offender Characteristics
- §4A1.3 - Inadequacy of Criminal History Category
- Other specific commentary

# 3-Step Approach to Federal Sentencing

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1. Correctly apply and consider the sentencing guidelines, including the guideline range and other aspects of the sentence called for by the guidelines (pursuant to § 3553(a)(4))
2. Consider the guidelines policy statements, including those addressing departures, that might warrant consideration in imposing sentence (pursuant to § 3553(a)(5))

## 3-Step Approach to Federal Sentencing (cont.)

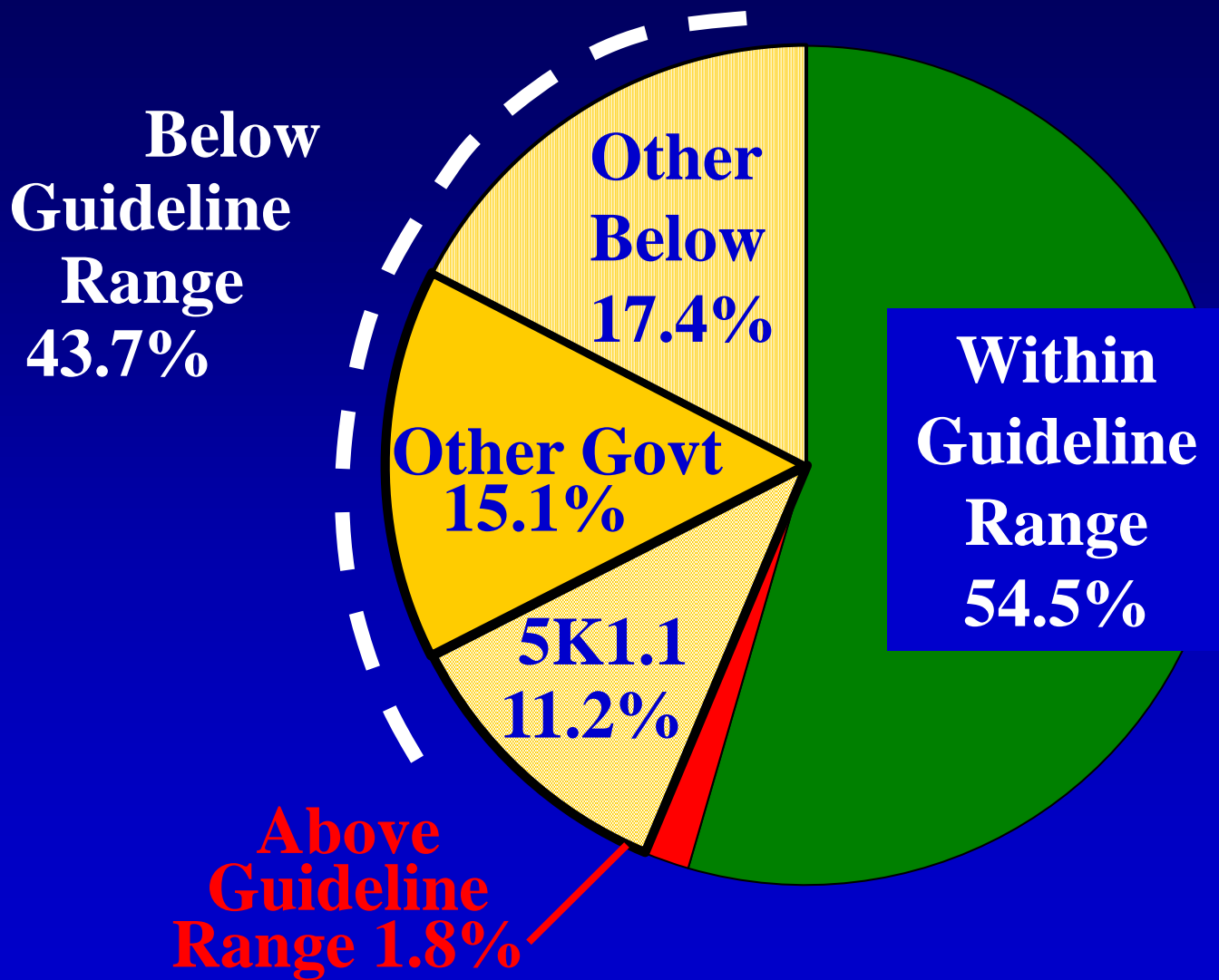
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3. Consider § 3553(a) taken as a whole, and determine if the appropriate sentence is
  - One within the advisory guideline system:
    - a sentence within the guideline range, or
    - a “*departure*”

OR

  - One outside the advisory guideline system:
    - a “*variance*”

# Position of Sentences in Relation to Guideline Range National - FY 2011



SOURCE: U.S. Sentencing Commission, 2011 Datafile USSCFY11: 84,744 of 86,201 cases

# Overview of the Sentencing Process

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- Plea/verdict of guilty
- U.S. probation officer (USPO) does a presentence investigation (PSI) & presentence report (PSR)
  - Gathers facts
  - Applies guidelines
  - Provides PSR to parties

## Overview of the Sentencing Process (cont.)

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- Parties review PSR; advise USPO of any disputes
- USPO resolves disputes as possible; submits amended PSR and addendum of unresolved disputes to parties and the judge
- At the sentencing hearing the judge will resolve disputes as necessary



# Pointers for the Application of the Guidelines

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- The sentencing judge still resolves disputed issues ( 6A1.3)
- Standard of proof: preponderance ( 6A1.3)
- Burden of persuasion: falls on party seeking the adjustment

## Pointers for the Application of the Guidelines (cont.)

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- Rules of evidence do not apply  
(Fed. R. Evid. 1101(d)(3))
- Evidence must have sufficient indicia of  
reliability to support probable accuracy  
( 6A1.3(a))

# Basic Guideline Application

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# *Guidelines Manual*

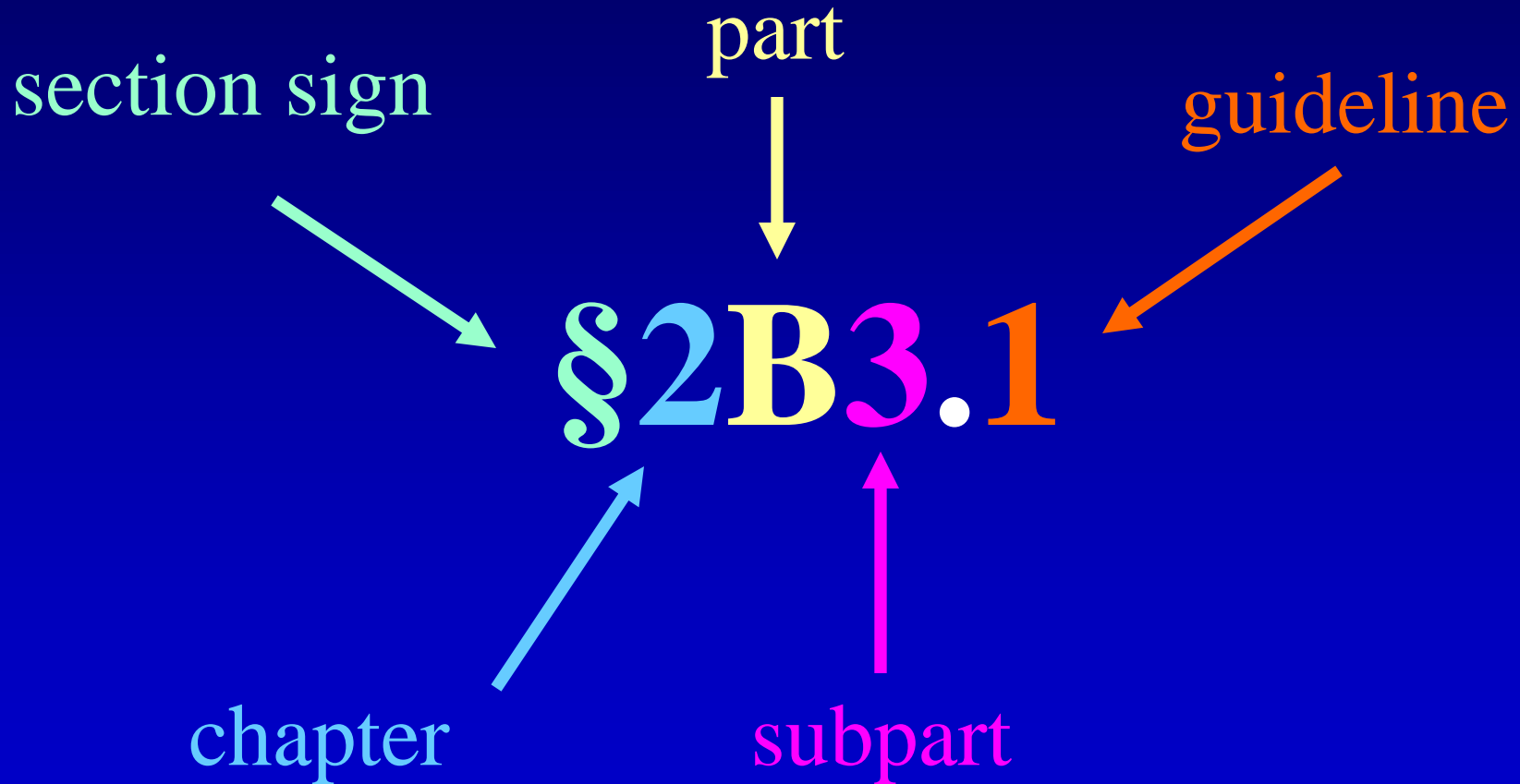
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- Ch. One Introduction, definitions, application principles
- Ch. Two Offense guidelines
- Ch. Three Generic adjustments
- Ch. Four Criminal history

- Ch. Five      Determining the guideline range
- Ch. Six      Sentencing procedures & pleas
- Ch. Seven    Violations of probation  
& supervised release
- Ch. Eight    Sentencing of organizations

# Understanding a Guidelines Cite

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# Structure of a Guideline

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- Guideline cite (*e.g.*, §2B3.1)
  - Note some are designated “(Policy Statement)” (*e.g.*, §4A1.3)
- Introductory commentary (*e.g.*, Chapter Three, Part B)
- Guideline
  - Chapter Two guidelines have
    - Base offense levels
    - Specific offense characteristics
    - Cross references
    - Special instructions

## Structure of a Guideline (cont.)

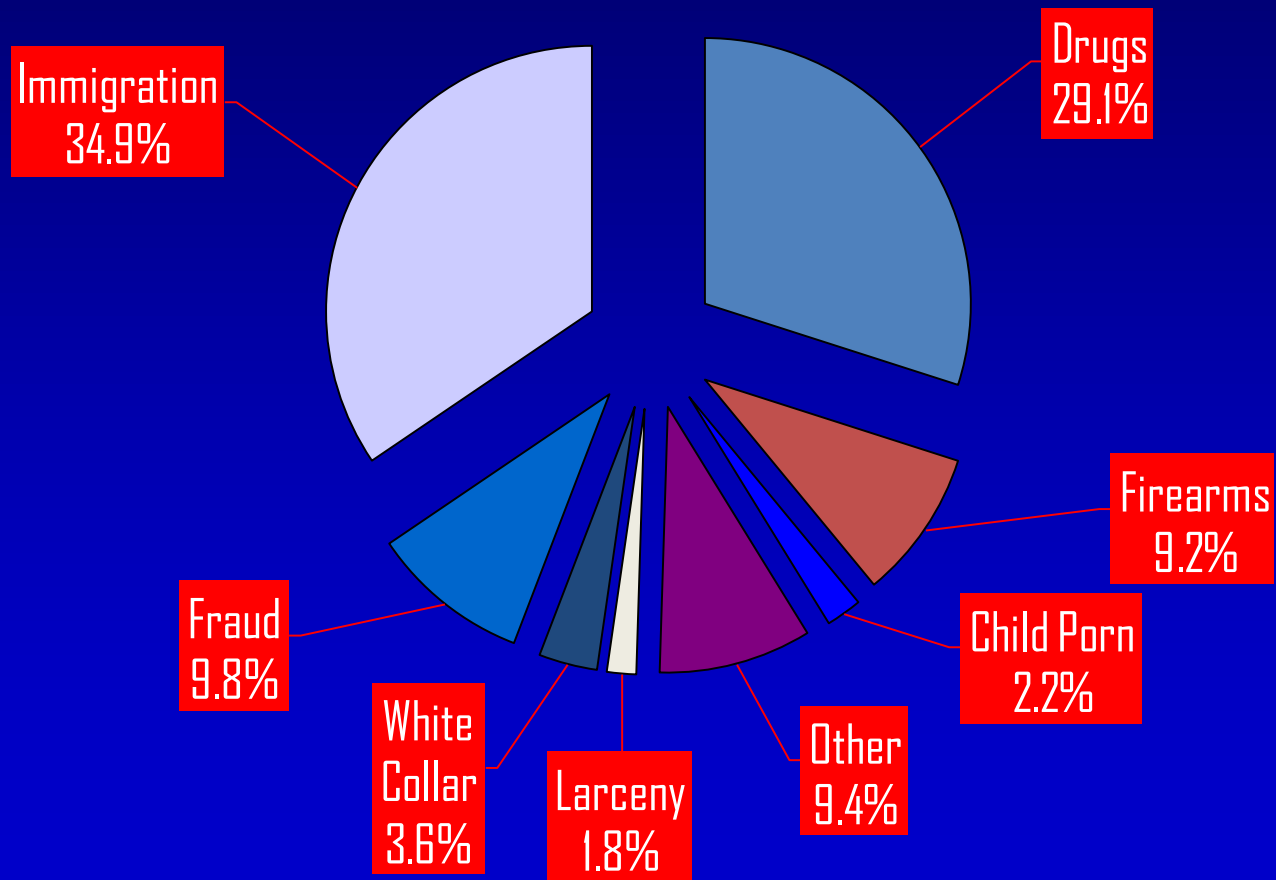
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- Commentary
  - Statutory provisions
  - Application notes
  - Background
  - Historical note



# Primary Offense Types

National - FY 2011



SOURCE: U.S. Sentencing Commission, 2011 Datafile USSCFY11: 85,122 of 86,201 cases

# Robbery Scenario

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# General Approach of the Federal Sentencing Guidelines

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- Begins as an offense of conviction system
- Then considers many real offense characteristics

# The Statutes “Trump” the Guidelines

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Regardless of what sentence the guidelines may call for, the sentence imposed must fall within the restrictions set by statute

*(e.g., statutory maximums  
and mandatory minimums)*

*-See 5G1.1 & 5G1.2*

**SENTENCING TABLE**  
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

# Single Count Application

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## Chapter Two

- Base Offense Level
- Specific Offense Characteristics
- Cross References

## Chapter Three

- Victim
- Role
- Obstruction
- Multiple Counts
- Acceptance

# Determining the Applicable Chapter Two Guideline

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## §1B1.2(a)

- Use the Chapter Two guideline applicable to the offense of conviction
- Refer to the Statutory Index (Appendix A) in this determination
- If no guideline is listed, use §2X5.1 for finding an analogous guideline for a felony (stat. max. over 1 yr.), or §2X5.2 for a Class A misd.

# Appendix A

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## Statute

## Guideline

18 U.S.C. § 2111

2B3.1

18 U.S.C. § 2112

2B3.1

18 U.S.C. § 2113(a)

2B1.1,

2B2.1,

2B3.1,

2B3.2

18 U.S.C. § 2113(b)

2B1.1

18 U.S.C. § 2113(c)

2B1.1

**18 U.S.C. § 2113(d)**

**2B3.1**<sub>32</sub>



- §2B1.1      Larceny, Embezzlement,  
Fraud and Forgery
- §2B2.1      Burglary
- **§2B3.1**      **Robbery**
- §2B3.2      Extortion by Force or Threat  
of Injury or Serious Damage

# §2B3.1 Robbery

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**(a) Base Offense Level: 20**

**(b) Specific Offense Characteristics Levels**

**(1) financial institution or post office +2**

**(2) firearm, weapon, death threat +2 to +7**

**(3) victim injury +2 to +6**

**(max. of 11 offense levels from (b)(2) & (b)(3))**

<b>(b) SOC's (cont.)</b>	<u>Levels</u>
(4) abduction	+4
<b>restraint</b>	<b>+2</b>
(5) carjacking	+2
(6) taking of a firearm, destructive device, or controlled substance	+1
<b>(7) loss of \$10,000+ to \$5 million+</b>	<b>+1 to +7</b>

### (c) Cross Reference

- (1) if victim murdered, apply the guideline for First Degree Murder (§2A1.1)

# Chapter Three Adjustments

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- Victim-Related Adjustments
- Role in the Offense
- Obstruction
- Multiple Counts
- Acceptance of Responsibility

# Victim Related Adjustments

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## Chapter Three, Part A

	<u>Levels</u>
• §3A1.1 Hate Crime Motivation or Vulnerable Victim	+3
W/Large Number	+2
• §3A1.2 Official Victim	+3, +6 or +6
• <b>§3A1.3 Restraint of Victim</b>	<b>+2</b>
• §3A1.4 Terrorism	+12 (floor 32, CHC <sup>v</sup> VI)

# Role in the Offense

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## Chapter Three, Part B

### Levels

- **§3B1.1 Aggravating Role** +4,+3, or +2
- §3B1.2 Mitigating Role -4 (minimal), -3, or -2 (minor)

# Acceptance of Responsibility

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## Chapter Three, Part E

- **2-Level Reduction:**

If defendant clearly demonstrates affirmative acceptance of responsibility for the offense

- **1-Level *Additional* Reduction Possible:**

If offense level 16 or greater, and government motion based on timely notification of guilty plea

# Pointers about Chapters Two and Three Application

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- Offense levels are cumulative (§1B1.1, App. Note 4)
- Within sections, use greatest (§1B1.1, App. Notes 4(A) & 5)
- No issue of “double counting” unless directed by guidelines (§1B1.1, App. Note 4(B))
- “Adjustments” are distinct from “departures” and “variances” (Chapter Three & §5K2.0 & § 3553(a))<sup>40</sup>



# Relevant Conduct in the Robbery Scenario

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1B1.3

# Analysis of Relevant Conduct Acts

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## §1B1.3

- Defendant accountable for acts he/she did in furtherance of the offense of conviction
- Sometimes defendant accountable for certain acts others did in furtherance of the offense of conviction
- For certain offenses defendant accountable for certain acts beyond the offense of conviction (*e.g.*, course of conduct or common scheme or plan)

# §1B1.3(a)(1) & (a)(2): Analysis

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## WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others  
(3-part analysis)

## WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

~~Same course of conduct/  
Common scheme or plan~~

## 3-Part Analysis of (a)(1)(B)

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Determinations required for acts of others  
to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking <sup>44</sup>

# Chapter Four

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## Criminal History and “Overrides”

# Sentencing Table

## Criminal History Category

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	27-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41 <sup>46</sup>

# Criminal History

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§4A1.1(a) – (d)

- ✓ “Prior Sentences”  
(1, 2, or 3 points each)
- ✓ “Status”  
(2 points)

# Criminal History Points

## Prior Offense Committed at 18 or Older

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	>13 months	Within 15 yrs. of prior sentence imposition or release
2	≥60 days	Within 10 yrs. of prior sentence imposition
1 (max of 4)	All others**	Within 10 yrs. of prior sentence imposition

\* If otherwise countable

\*\* Exceptions may apply



# Criminal History Points

## Prior Offense Committed Before 18

Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	Only if convicted as an adult and >13 months	Within 15 yrs. of prior sentence imposition or release
2	≥ 60 days	Within 5 yrs. of prior sentence imposition or release
1 (max of 4)	All others**	Within 5 yrs. of prior sentence imposition

\* If otherwise countable

\*\* Exceptions may apply

# Length of Prior Sentences

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## §4A1.2(a) and App. Note 2

- Set by maximum sentence imposed
  - If sentence or any portion is suspended, the maximum is established by the unsuspended portion
- Unaffected by release
  - *E.g.*, release to parole or for “good time”

# Other Determinations Regarding Prior Sentences - §4A1.2

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- Relationship of prior sentences and relevant conduct (§4A1.2(a)(1) & App. Note 1)
- Types of sentences never counted, *e.g.*,
  - Foreign sentences (§4A1.2(h))
  - Tribal sentences (§4A1.2(i))
  - Certain misdemeanors (§4A1.2(c) & App. Note 12)

- Treatment of multiple prior sentences (§4A1.2(a)(2))
  - Counted separately or as a single prior sentence
  - Additional points for multiple crimes of violence when sentences not counted separately (§4A1.1(e))
- Prior revocations of supervision (§4A1.2(k) & App. Note 11)
- Pardons, set asides, expunged convictions, and diversionary dispositions (§4A1.2(f)&(j) & App. Notes 9 & 10)

# Chapter Three and Chapter Four “Overrides”

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§3A1.4

Terrorism

§§4B1.1 - 4B1.2

Career Offender

§4B1.3

Criminal Livelihood

§4B1.4

Armed Career Criminal

4B1.5

Repeat and Dangerous  
Sex Offender Against  
Minors

# Career Offender Criteria

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## 4B1.1 & 4B1.2

- Defendant at least age 18
- Instant conviction a felony for a crime of violence or a controlled substance offense
- Two predicate felony convictions for crimes of violence or controlled substance offenses

# Career Offender “Override”

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## 4B1.1

- Criminal History Category is **VI**
- Offense level determined by a table based on statutory maximum, unless offense level from Chapters Two and Three is greater

# Chapter Five

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## Sentencing Table and Zones



**SENTENCING TABLE**  
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

# Sentencing Table

## Criminal History Category

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	Zone A		0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	Zone B		8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	Zone C		21-27	24-30
11	8-14	10-16	12-18	15-21	27-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	Zone D		33-41 <sup>58</sup>

# Zone A Options

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	
3	0-6	0-6	0-6	0-6		
4	0-6	0-6	0-6			
5	0-6	0-6				
6	0-6					
7	0-6					
8	0-6					

- Fine
- Straight Probation
- Imprisonment

# Zone B Options

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1						
2						1-7
3					2-8	3-9
4				2-8	4-10	6-12
5			1-7	4-10	6-12	9-15
6		1-7	2-8	6-12	9-15	
7		2-8	4-10	8-14		
8		4-10	6-12			
9	4-10	6-12	8-14			
10	6-12	8-14				
11	8-14					

- Probation plus a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment.
- Imprisonment of at least one month **plus** supervised release with a condition that substitutes community confinement or home detention for imprisonment.
- Imprisonment

# Zone C Options

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
1						
2						
3						
4						
5						
6						12-18
7					12-18	
8				10-16		
9				12-18		
10			10-16			
11		10-16	12-18			
12	10-16	12-18				
13	12-18					

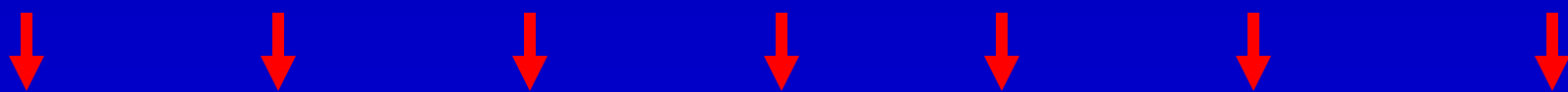
- Imprisonment of at least one half of the minimum term **plus** supervised release with a condition that substitutes community confinement or home detention for imprisonment.

- Imprisonment

# Zone D

Offense Level	I (0 or 1)	II (2 or 3)	III (4,5,6)	IV (7,8,9)	V (10,11,12)	VI (13 or more)
---------------	---------------	----------------	----------------	---------------	-----------------	--------------------

6						
7						15-21
8					15-21	18-24
9					18-24	21-27
10				15-21	21-27	24-30
11				18-24	24-30	27-33
12			15-21	21-27	27-33	30-37
13		15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57



• Imprisonment

# Other Aspects of Sentence

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## Chapter Five

- Probation ( 5B)
- Supervised release ( 5D)
- Restitution, fines, assessments, forfeitures ( 5E)
- Sentencing options ( 5F)
- Undischarged terms (consecutive/concurrent) ( 5G1.3)

# Drug Scenario

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# Drug Scenario Facts

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- Defendant Y convicted of conspiracy to distribute 88 kilos of marijuana from April 1, 2010 to December 31, 2011; in violation of 21/846 & 841(b)(1)(C)
- Stat. max. 20 yrs., no mandatory minimum
- Conspiracy began April 1, 2011, involving 5 individuals, organized by Defendant X
- 1 kilo trafficked per week

## Drug Scenario Facts

---

- Conspiracy underway 52 weeks when Def. Y joined; conspiracy continued for 36 weeks with 36 kilos of marijuana distributed
- Def. Y involved in distribution of all drugs during period of involvement
- Def. Y never carried firearm, but two co-participants did, and Def. Y accompanied them on deliveries
- Conspiracy ended upon arrests of all involved

## Drug Scenario Facts

---

- Within weeks of arrest, Def. Y gave govt. full information and announced plan to plead guilty; govt. to make motion for “full” acceptance of responsibility
- Govt. had sufficient evidence, so no substantial assistance opportunity available
- Def. Y has no prior criminal record

# Appendix A

---

<u>Statute</u>	<u>Guideline</u>
21 U.S.C. § 841(a)	2D1.1
<b>21 U.S.C. § 841(b)(1)-(3)</b>	<b>2D1.1</b>
21 U.S.C. § 841(b)(4)	2D2.1
21 U.S.C. § 841(b)(7)	2D1.1
21 U.S.C. § 841(c)(1),(2)	2D1.11
21 U.S.C. § 841(c)(3)	2D1.13
21 U.S.C. § 841(d)	2D1.9
*****	
<b>21 U.S.C. § 846</b>	<b>2D1.1</b> , 2D1.2, 2D1.5 2D1.6, 2D1.7, 2D1.8 2D1.9, 2D1.10 2D1.11, 2D1.12 2D1.13, 2D2.1 2D2.2, 2D3.1, 2D3.2

# The Drug Guideline

---

2D1.1

## §2D1.1 Drug Trafficking, Etc.

---

(a) **Base Offense Level** (apply the greatest):

(5) the offense level from the Drug Quantity Table

*EXCEPT* if *mitigating* role ( 3B1.2) applies:

<u>BOL</u>	<u>Reduction</u>
32	-2
34 or 36	-3
38	-4

If resulting BOL is greater than 32, and *minimal* role ( 3B1.2(a)) applies, decrease to BOL 32

# Drug Quantity Table

## Base Offense Levels for Marijuana

---

30,000	KG	↑	Level 38
10,000	KG	↑	Level 36
3,000	KG	↑	Level 34
1,000	KG	↑	Level 32
700	KG	↑	Level 30
400	KG	↑	Level 28
100	KG	↑	Level 26

80	KG	↑	Level 24
60	KG	↑	Level 22
40	KG	↑	Level 20
20	KG	↑	Level 18
10	KG	↑	Level 16
5	KG	↑	Level 14
2.5	KG	↑	Level 12
1	KG	↑	Level 10
250	G	↑	Level 8
Less than 250	G	↑	Level 6



# (b) Specific Offense Characteristics

	<u>Level</u>
(1) firearm, dangerous weapon possessed	+2

\*\*\*\*\*

(16) if defendant meets the <u>subdivision criteria</u> (1)-(5) of §5C1.2(a) (“the safety valve”)	-2
--	----

# Relevant Conduct in the Drug Scenario - A Conspiracy Count

---

1B1.3

# §1B1.3(a)(1) & (a)(2): Analysis

---

## WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others  
(3-part analysis)

## WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

Same course of conduct/  
Common scheme or plan

## 3-Part Analysis of (a)(1)(B)

---

Determinations required for acts of others  
to be relevant conduct

- 1. The scope of the defendant's jointly undertaken criminal activity**
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking <sup>76</sup>

# Determining Scope in a Conspiracy

---

## §1B1.3, App. Note 2

Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy

## Determining Scope in a Conspiracy (cont.)

---

### “Bright Line Rule” of §1B1.3, App. Note 2

Relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.

# “Reasonably Foreseeable”

---

## §1B1.3(a)(1)(B), App. Note 2

- Only one part of the 3-part analysis regarding the conduct of others
- Defendant **not** accountable for acts of others that were reasonably foreseeable (or known) if those acts were not within the scope of defendant’s undertaking

# Application of the “Safety Valve SOC”

---

2D1.1(b)(16) vs. 18 USC 3553(f)

- *Any defendant* for whom §2D1.1 is applied can get the 2-level reduction at the SOC at (b)(16) if he/she meets the criteria of **subdivisions (1)-(5)** of §5C1.2(a), including:



## Application of the “Safety Valve SOC” (cont.)

---

2D1.1(b)(16) vs. 18 USC 3553(f)

- A defendant who is not subject to a mandatory minimum (making the statutory “safety valve” at 18 USC § 3553(f) unnecessary)
- A defendant subject to a mandatory minimum but convicted under a statute for which the *statutory* “safety valve” cannot apply

# 2D1.1(b)(16) SOC Criteria

---

## Subdivisions (1) – (5) of §5C1.2(a)

1. Defendant does not have more than 1 Criminal History Point
2. Defendant did not use violence/threats of violence or possess a firearm or other dangerous weapon in connection with the offense
3. Offense did not result in death or serious bodily injury

## 2D1.1(b)(16) SOC Criteria (cont.)

---

### Subdivisions (1) – (5) of §5C1.2(a)

4. Defendant was not an organizer/leader/manager/supervisor of others in the offense; was not engaged in a CCE
5. Defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan

## NOTE:

# Application of the “Firearm” SOC AND the “Safety Valve” SOC

---

§2D1.1(b)(1) and (b)(16)

A defendant may be accountable for  
the firearm SOC *based on the act of another*

**BUT**

The safety valve SOC (as well as the actual  
safety valve) only requires that  
“*the defendant did not ...possess a firearm...  
in connection with the offense*”

**Impact of Terms  
“Offense” and “Defendant”  
Upon the Relevant Conduct  
Used in Application**

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# Definition of “Offense”

---

## 1B1.1, App. Note 1(H)

- “Offense” means the offense of conviction and all relevant conduct (§1B1.3) .....  
unless a different meaning is specified or is otherwise clear from the context

# Use of Term “Defendant”

---

## 1B1.3

- The use of the term “defendant” limits application from including the use of relevant conduct based on the acts of others under §1B1.3(a)(1)(B)
- Pursuant to §1B1.3(a)(1)(A), the “defendant” is accountable for acts he/she committed, aided, abetted, counseled, commanded, induced, procured, and willfully caused

# Sentencing Below a Mandatory Minimum

---

“The Safety Valve”

&

Substantial Assistance



# “Safety Valve”

---

## 18 U.S.C. § 3553(f) & §5C1.2

- Court makes determination; no government motion required
- Sentence *without regard to* mandatory minimums for violations of select drug statutes
  - 21 U.S.C. 841, 844, 846, 960, and 963
- Downward departures or variances for mitigating factors possible

# Substantial Assistance

---

§5K1.1

Permits a sentence *below*  
the minimum of the guideline range

18 USC § 3553(e)

Permits a sentence *below*  
a mandatory minimum

## Substantial Assistance (cont.)

---

### §5K1.1 & 18 USC § 3553(e)

- Each requires a government motion
  - *Wade v. U.S.*, 504 U.S. 181 (1992)
- A separate government motion under 18 USC § 3553(e) is required to go below a mandatory minimum
  - *Melendez v. U.S.*, 518 U.S. 120 (1996)

## Substantial Assistance (cont.)

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### 18 U.S.C. § 3553(e)

- A sentence below mandatory minimum is to be based only on substantial assistance

# Relevant Conduct and the Use of the Same Course of Conduct or Common Scheme or Plan

---

1B1.3(a)(2)

“Expanded Relevant Conduct”

# Analysis of Relevant Conduct Acts

---

## §1B1.3

- Defendant accountable for acts he/she did in furtherance of the offense of conviction ((a)(1)(A))
- Sometimes defendant accountable for certain acts others did in furtherance of the offense of conviction ((a)(1)(B))
- **For certain offenses defendant accountable for certain acts beyond the offense of conviction (e.g., course of conduct or common scheme or plan) ((a)(2))**

# §1B1.3(a)(1) & (a)(2): Analysis

---

## WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others  
(3-part analysis)

## WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

Same course of conduct/  
Common scheme or plan

# Offenses for Which “Expanded” Relevant Conduct Applies

---

## 1B1.3(a)(2) & “Rule (d)”

- The applicable Chapter Two guideline must be one included for grouping at §3D1.2(d) (or be of that type)
- Multiple counts of conviction are not necessary to have “expanded” relevant conduct



# Offenses **Included** at §3D1.2(d):

---

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.8;

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

# Examples of Chapter Two Guidelines on the Included List at §3D1.2(d)

---

“Expanded Relevant Conduct” at §1B1.3(a)(2) Applies

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Counterfeiting
- Bribery
- Other similar offenses

# “Common Scheme or Plan”

---

1B1.3(a)(2); App. Note 9(A)

- Offenses must be connected to each other by at least one common factor, such as:
  - Common victims
  - Common accomplices
  - Common purpose
  - Similar *modus operandi*

# “Same Course of Conduct”

---

1B1.3(a)(2); App. Note 9(B);  
Appendix C, Amendment #503

- Similarity
- Regularity (repetitions)
- Temporal proximity

See: *U.S. v. Hodge*, 354 F.3d 305 (4<sup>th</sup> Cir. 2004)

# Example 1:

## RelCon Includes Same Course of Conduct / Common Scheme or Plan

---

### §1B1.3(a)(2)

- Def. convicted of one count of embezzlement of \$5,000; applicable guideline §2B1.1 which is on the “included list” at §3D1.2(d)
- If determined that Def. took \$5,000 on each of four other occasions, and that those acts were in the same course of conduct or common scheme or plan, those losses will be relevant conduct
- Loss will be \$25,000

## Example 2:

# RelCon Includes Same Course of Conduct / Common Scheme or Plan

---

### §1B1.3(a)(2)

- Def. convicted of sale of 1 kg on a single occasion; applicable guideline §2D1.1 which is on the “included list” at §3D1.2(d)
- If determined that Def. also sold 1 kg per week for 99 weeks, and those acts were in same course of conduct as offense of conviction, that will be relevant conduct
- Application will be based on 100 kg

# Offenses Excluded at §3D1.2(d):

---

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);

§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§2C1.5;

§§2D2.1, 2D2.2, 2D2.3;

§§2E1.3, 2E1.4, 2E2.1;

§§2G1.1, 2G2.1;

§§2H1.1, 2H2.1, 2H4.1;

§§2L2.2, 2L2.5;

§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;

§§2P1.1, 2P1.2, 2P1.3;

§2X6.1.

# Examples of Chapter Two Guidelines in the Excluded List at §3D1.2(d)

---

“Expanded Relevant Conduct” at §1B1.3(a)(2)  
Does Not Apply

- **Robbery**
- Assault
- Murder
- Kidnapping
- Criminal sexual abuse
- Production of child pornography
- Extortion
- Blackmail
- Burglary
- Other similar offenses



# §1B1.3(a)(1) & (a)(2): Analysis

---

## WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others  
(3-part analysis)

## WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

~~Same course of conduct/  
Common scheme or plan~~

# Example:

## RelCon Does NOT Include Same Course of Conduct / Common Scheme or Plan

---

### §1B1.3(a)(1)

- Def. convicted of one count of robbery of \$5,000; applicable guideline §2B3.1 which is on the “excluded list” at §3D1.2(d)
- Even if determined that Def. robbed \$5,000 on each of four other occasions, those losses will not be relevant conduct
- Loss will be \$5,000

# *Ex Post Facto*

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# *Ex Post Facto*

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- 18 U.S.C. § 3553(a)(4)
  - Use guidelines in effect at sentencing
- *Miller v. Florida*, 482 U.S. 423 (1987)
- “Circuit split” as to whether *ex post facto* is implicated under advisory guidelines
- §1B1.11
  - “One Book Rule”

END