APPENDIX A

United States v. Nava,
957 F.3d 581
(5th Cir. April 30, 2020)

Saldana's proposed range to accommodate its intent to substantially increase his sentence.

[7] Our view is that the district court's desire to increase Rodriguez-Saldana's sentence in relation to prior sentences was a dominant factor. A secondary concern was that some of the criminal-history points were dated and unrelated to illegal reentry. The court accommodated that secondary concern while staying true to its main guidepost for the sentence's length.

Still, we must contend with the court's troubling statements that it imposed the sentence "among other things, so that he will have time to get his eye surgery" and, in the SOR, that the defendant "has a medical issue requiring eye surgery." These comments could indicate, as Rodriguez-Saldana argues, that while the court had other concerns in mind, the eye surgery was at least a dominant factor in the specific sentence it chose. Reviewing the full sentencing transcript, however, we conclude the eye surgery was at most a secondary concern for the sentence. The only argument Rodriguez-Saldana's counsel made for sentence reduction was based on the outdated offenses; he did not argue that the justification for Rodriguez-Saldana's presence in the United States warranted a lighter sentence. When the court pronounced the 24-month sentence, the eye surgery had been mentioned as the reason for Rodriguez-Saldana's presence but most of the minimal information the court learned about the surgery had not yet been offered. After the sentence was pronounced, more information came out about the surgery—that it had already been scheduled, and that Rodriguez-Saldana had paid half and was working to pay the full cost on his own—but Rodriguez-Saldana's counsel did not raise this as a reason for a reduced sentence and the court did not indicate how or whether it adjusted the sentence based on what it knew of the surgery.

In sum, reviewing for clear and obvious error, we do not find enough indication that the district court extended Rodriguez-Saldana's sentence to allow him time to have eye surgery. The district court's statements as to the possible availability of eye surgery are not clear error, nor is the court's recommendation that Rodriguez-Saldana be sent to a specific medical facility. After all, the *Tapia* Court noted that "a court may urge the BOP to place an offender in a prison treatment program."[26]

IV.

Rodriguez-Saldana has not shown clear and obvious error. Accordingly, we affirm the sentence of the district court.

UNITED STATES of America, Plaintiff - Appellee

v.

Jorge Eduardo NAVA, Defendant - Appellant

No. 17-51077

United States Court of Appeals, Fifth Circuit.

FILED April 30, 2020

Background: Defendant was convicted in the United States District Court for the Western District of Texas, Kathleen Cardone, J., of possessing and conspiring to

26. 564 U.S. at 334, 131 S.Ct. 2382.

possess with intent to distribute cocaine, and he appealed.

Holdings: The Court of Appeals, Higginbotham, Senior Circuit Judge, held that:

(1) district court did not commit clear error in that finding methamphetamine seized from defendant's truck was relevant conduct to his cocaine-trafficking convictions;

(2) district court did not violate Due Process Clause by applying preponderance-of-the-evidence standard in its determination that defendant was responsible for uncharged methamphetamine offense; and

(3) district court did not commit plain error in imposing upward adjustment for abusing position of trust.

Affirmed.

1. Sentencing and Punishment ⚿677

Unadjudicated offense is considered part of common scheme or plan under Sentencing Guidelines if it is substantially connected to offense of conviction by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. U.S.S.G. § 1B1.3(a)(2).

2. Sentencing and Punishment ⚿676

Offenses qualify as part of same course of conduct for sentencing purposes if they are sufficiently connected or related to offense of conviction as to warrant conclusion that they are part of single episode, spree, or ongoing series of offenses. U.S.S.G. § 1B1.3(a)(2).

3. Criminal Law ⚿1158.34

District court's determination of what constitutes "relevant conduct" is factual finding, which Court of Appeals reviews for clear error.

4. Criminal Law ⚿1158.1

Finding is not "clearly erroneous" so long as it is plausible in light of record as a whole, and Court of Appeals will find clear error only if review of all evidence leaves it with definite and firm conviction that mistake has been committed.

See publication Words and Phrases for other judicial constructions and definitions.

5. Sentencing and Punishment ⚿979

District court did not commit clear error in finding that methamphetamine seized from defendant's truck was relevant conduct to his cocaine-trafficking convictions for sentencing purposes, even though only direct evidence linking offenses was that truck with methamphetamine was registered in defendant's name, offenses involved different controlled substances, and there was no evidence they were carried out by same drug trafficking organization or same accomplices, where all drug offenses occurred within a few weeks of one another, both cocaine and meth loads were picked up in same town in Mexico, concealed in vehicles connected to defendant, and transported across border into United States, and there was evidence that defendant played supervisory role in both operations. U.S.S.G. § 1B1.3(a)(2).

6. Sentencing and Punishment ⚿676

Factors to consider in course-of-conduct analysis to determine whether uncharged offense constitutes relevant conduct for sentencing purposes include degree of similarity and regularity of offenses, as well as time interval between them. U.S.S.G. § 1B1.3.

7. Criminal Law ⚿1139

Court of Appeals reviews de novo constitutional challenge to district court's application of Sentencing Guidelines.

8. Sentencing and Punishment ⚿973.5

District court may increase defendant's sentence under Sentencing Guidelines based on facts found by court by preponderance of evidence, provided that resulting sentence does not exceed statutory maximum.

9. Constitutional Law ⚿4728
Sentencing and Punishment ⚿973.5

District court did not violate Due Process Clause by applying preponderance-of-the-evidence standard in its determination that defendant was responsible for uncharged methamphetamine offense in sentencing him for possessing and conspiring to possess with intent to distribute cocaine, where defendant's 480-month sentence fell within statutory maximum term. U.S. Const. Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(A)-(B).

10. Sentencing and Punishment ⚿758

Sentencing court must conduct two-step inquiry when considering whether to apply sentencing enhancement for abusing position of trust, first determining whether defendant occupied position of trust at all before proceeding to ascertain extent to which defendant used that position to facilitate or conceal offense. U.S.S.G. § 3B1.3.

11. Criminal Law ⚿1030(1)

Under plain error standard of review, defendant must demonstrate (1) error that (2) is clear or obvious and that (3) affected his substantial rights, and if these three prongs are satisfied, Court of Appeals may exercise its discretion to correct error only if it (4) seriously affects fairness, integrity, or public reputation of judicial proceedings.

12. Criminal Law ⚿1042.3(1)

District court did not commit plain error in imposing upward adjustment for abusing position of trust in sentencing defendant for possessing and conspiring to possess with intent to distribute cocaine based on false information he provided Drug Enforcement Agency (DEA) while acting as government informant, where position-of-trust adjustment raised defendant's total offense level from 46 to 48, which was then reduced by default to 43, the highest offense level available under Sentencing Guidelines.

Appeal from the United States District Court for the Western District of Texas, Kathleen Cardone, U.S. District Judge

Joseph H. Gay, Jr., Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Texas, for Plaintiff-Appellee.

Judy Fulmer Madewell, Assistant Federal Public Defender, Maureen Scott Franco, Federal Public Defender, Federal Public Defender's Office, Western District of Texas, for Defendant-Appellant.

Before OWEN, Chief Judge, and HIGGINBOTHAM and WILLETT, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Appellant Jorge Eduardo Nava challenges the two concurrent 480-month sentences he received after a jury convicted him of drug-trafficking offenses. Nava contends that the district court erred in holding him accountable for an uncharged methamphetamine seizure, both because the seizure did not qualify as relevant conduct under the Sentencing Guidelines and because the district court applied an inappropriate standard of proof in making its relevant-conduct determination. Nava also challenges the offense-level adjustment he received for abusing a position of trust. Finding no reversible error, we affirm.

I.

The Drug Enforcement Administration ("DEA") began investigating Nava on August 15, 2016, when a police officer in Gulfport, Mississippi, stopped a Ford F-150 pickup truck for a traffic violation. A records check revealed that the vehicle was registered to Nava, who had purchased it only a few days earlier. Nava was not with the truck, which was being driven by a person identified in the record as Co-Conspirator 1 ("CC-1"). Upon questioning, CC-1 stated that Nava had registered the vehicle in his own name because CC-1 did not have a valid driver's license. A search of the vehicle revealed 29 kilograms of pure liquid methamphetamine concealed within the gas tank. CC-1 told officers he had picked up the truck in Ciudad Juarez, Mexico, and had been instructed to drive to Atlanta, where he was to contact a man known as "Guacho" for further instructions.[1] CC-1 did not indicate whether Nava played any role in the meth operation beyond purchasing and registering the truck.

A few weeks later, on September 9, agents detained Nava at a border crossing and interviewed him about the methamphetamine seizure. Nava denied any involvement with the Gulfport load, but he volunteered to assist the DEA by providing information about cocaine trafficking. Nava claimed that members of drug-trafficking organizations ("DTOs") frequented a bar he owned in Ciudad Juarez, where he overhead them discussing their operations. In addition, Nava said he was familiar with "a lot of illegal activity" because his father had been involved in a DTO in Mexico.

Nava met with agents again that evening at his apartment in El Paso, Texas, where he signed a confidential source agreement promising to provide information in exchange for money. Over the ensuing days, Nava explained how the Cartel de Jalisco Nueva Generacion DTO moved cocaine from Peru through several stops in Mexico and across the U.S. border into El Paso. Eventually, Nava admitted that he was personally involved with the DTO, serving as a coordinator for cocaine distribution. He told agents about two upcoming cocaine transactions involving a trafficker named Ernesto Lara. Agents observed and documented the first transaction, which occurred as Nava had described on September 12, 2016.

The trouble began with the second transaction, which occurred the following day. First, Nava called Lara and directed him to pick up five bundles of cocaine from Nava's apartment and deliver them to Denver, Colorado. Nava then contacted agents and told them that Lara was headed to Denver with a load of cocaine, but he misled them about the route Lara was taking. Nevertheless, Border Patrol agents stopped Lara's vehicle at an immigration checkpoint in Desert Haven, Texas, and discovered 5.22 kilograms of cocaine in the passenger seat. While Lara was detained, officers permitted him to answer a phone call from Nava. Lara told Nava he had successfully made it through the checkpoint, and Nava instructed Lara to call him when he reached Carlsbad, New Mexico, where Nava had promised to wire him money for a hotel room. Nava then called agents and once again provided false information about Lara's route, in an apparent effort to maintain the benefits of his informant contract without imperiling his drug business.

During a post-arrest interview, Lara admitted to being involved with Nava in additional cocaine transactions. For example, Lara reported that during a weeklong trip

1. The record does not indicate CC-1's gender. Male pronouns are used here for simplicity.

to Arkansas the previous month, he had observed Nava exchanging large quantities of cocaine for bundles of cash. Lara had been paid $1,000 for driving Nava to Arkansas. Additional investigation revealed that Nava had shared several videos on Facebook Messenger that showed him with packages of cocaine, large amounts of money, and firearms.

Nava was arrested on September 20, 2016 and charged with possessing and conspiring to possess with intent to distribute cocaine.[2] He proceeded to trial, where a jury convicted him of both offenses. At sentencing, Nava was held accountable for 18.72 kilograms of cocaine as well as the 29 kilograms of methamphetamine seized in Gulfport. Among other enhancements, Nava received a two-level upward adjustment for abusing a position of trust by misleading agents about Lara's route to Colorado.[3] The district court sentenced Nava to two concurrent terms of 480 months' imprisonment, to be followed by five years of supervised release.

On appeal, Nava raises three challenges to his sentence. First, he contends that the district court erred by attributing the Gulfport methamphetamine seizure to him as relevant conduct. Second, he argues that the district court violated his due process rights by making its relevant-conduct determination under a preponderance standard rather than beyond a reasonable doubt. Finally, Nava challenges the abuse-of-trust adjustment he received for misleading the DEA.

II.

A.

In a drug-trafficking case, the defendant's base offense level is determined by the amount of drugs involved in the crime.[4] In addition to drugs actually seized in the investigation, the district court may attribute to the defendant additional, unadjudicated quantities of drugs that constitute "relevant conduct" as defined by the Sentencing Guidelines.[5] Relevant conduct includes "all acts and omissions ... that were part of the same course of conduct or common scheme or plan as the offense of conviction."[6]

[1, 2] "Particularly in drug cases, this circuit has broadly defined what constitutes 'the same course of conduct' or 'common scheme or plan.' "[7] An unadjudicated offense is considered part of a common scheme or plan "if it is substantially connected to the offense of conviction by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi."[8] Of-

2. *See* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii), 846; 18 U.S.C. § 2. Lara was charged as Nava's co-defendant but only Nava proceeded to trial.

3. *See* U.S.S.G. § 3B1.3. Nava also received offense-level enhancements for maintaining a drug premises and for soliciting an undercover agent to murder Lara to prevent him from testifying at trial. The district court granted Nava's objection to the weapons enhancement contemplated by the presentence investigation report ("PSR"), but Nava received additional upward adjustments for his leadership role in the DTO and for obstruction of justice.

4. *United States v. Rhine,* 583 F.3d 878, 885 (5th Cir. 2009).

5. *Id.*

6. U.S.S.G. § 1B1.3(a)(2).

7. *Rhine,* 583 F.3d at 885 (quoting *United States v. Bryant,* 991 F.2d 171, 177 (5th Cir. 1993)).

8. *United States v. Ortiz,* 613 F.3d 550, 557 (5th Cir. 2010) (internal alterations and quotation marks omitted) (quoting *Rhine,* 583 F.3d at 885).

fenses qualify as part of the same course of conduct "if they are sufficiently connected or related to the offense of conviction as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses."[9]

[3, 4] The district court's determination of what constitutes relevant conduct is a factual finding, which we review for clear error.[10] A finding is not clearly erroneous so long as it is "plausible in light of the record as a whole."[11] We will find clear error "only if a review of all the evidence leaves us with the definite and firm conviction that a mistake has been committed."[12]

B.

Nava contends that the district court erred in finding that the methamphetamine seized in Gulfport was relevant conduct to his cocaine-trafficking convictions because "[t]he only evidence linking these offenses was that the truck with the methamphetamine was registered in Nava's name." He points out that the offenses involved different controlled substances and that there is no evidence they were carried out by the same DTO or the same accomplices.

However, Nava's view of the facts is incomplete. The record reveals several additional commonalities between the cocaine and methamphetamine operations. First, all of the drug offenses occurred within a few weeks of one another: from mid-August to mid-September of 2016. Second, Nava purchased the truck just a few days before the Gulfport seizure. Third, Nava was recorded in an undated Facebook call discussing plans to "burn" a truck—that is, to drive it through a port of entry several times to make it "look[ ] like a daily driver" so "it doesn't look suspicious if it's loaded" with drugs. Finally, in April of 2017, Nava was recorded telling a friend in a jailhouse phone call: "They got me with two persons, one in Mississippi and ... Ernesto [Lara]."[13]

[5] We agree with Nava that the Gulfport methamphetamine seizure does not qualify as part of a common scheme or plan with his cocaine-trafficking activities. Given how little we know about the meth operation, there is scant evidence that the offenses share "common victims, common accomplices, common purpose, or similar modus operandi."[14] However, it was not clear error to attribute the meth to Nava as part of the "same course of conduct" with his charged offenses.

[6] Factors to consider in the course-of-conduct analysis "include the degree of

9. *Id.* at 558 (internal alterations omitted) (quoting U.S.S.G. § 1B1.3 cmt. 5(B)(i)).

10. *United States v. Alford*, 142 F.3d 825, 831 (5th Cir. 1998).

11. *Rhine*, 583 F.3d at 885.

12. *United States v. Barfield*, 941 F.3d 757, 761–62 (5th Cir. 2019) (internal quotation marks omitted) (quoting *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011)).

13. The parties dispute the correct translation of Nava's jailhouse phone call, which was conducted in Spanish. The Government urges the version contained in the PSR, which describes Nava as saying that "two of *his* people were busted." Obviously, this translation is more favorable to the Government because it directly implicates Nava as the organizer of both the Gulfport meth load and the charged cocaine operations. The translation introduced at trial—that "they got me with two persons"—is somewhat more ambiguous. Because this latter version was relied upon by the jury during trial and the district court at sentencing, we use it here.

14. *Rhine*, 583 F.3d at 885. Certainly, the offenses share the common motive of making money, but "the general goal of selling drugs for a profit is insufficient to satisfy the common purpose factor." *Ortiz*, 613 F.3d at 557.

similarity" and "the regularity of the offenses," as well as "the time interval between the offenses."[15] "A weak showing as to any one of these factors will not preclude a finding of relevant conduct; rather, 'when one of the above factors is absent, a stronger presence of at least one of the other factors is required.' "[16] Here, although we do not know the details of the meth operation, we do know that both the cocaine and meth loads were picked up in Ciudad Juarez, concealed in vehicles connected to Nava, and transported across the border into the United States. CC-1's statement that Nava registered the Gulfport truck in his own name because CC-1 lacked a license, together with the jailhouse recording in which Nava admitted that authorities had connected him with activity in Mississippi, suggest that he played a supervisory role in both operations. In addition, the meth and cocaine seizures occurred in close temporal proximity.

No single one of these facts is dispositive, and the district court could reasonably have come out the other way. As Nava points out, a short timeline does not automatically qualify an offense as relevant conduct.[17] In addition, the similarities between the cocaine and meth offenses, while notable, are not overwhelming. Most obviously, they involved different controlled substances, a fact that "suggests distinct crimes."[18] In addition, the Facebook recording discussing "burning" a truck is of little probative value, not only because it is undated but also because there is no evidence that the Gulfport truck was actually driven back and forth across the border.

Still, the district court's decision is "plausible in light of the record as a whole."[19] This case is readily distinguishable from the principal case on which Nava relies, *United States v. Ortiz*, where we held that cocaine found in the same apartment as the charged marijuana could not be attributed to the defendant as relevant conduct.[20] There, the only connection between the drugs was that they "were in the same place at the same time."[21] Moreover, the cocaine was concealed in a suitcase that belonged to a third party, not the defendant.[22] This case is also unlike *United States v. Rhine*, where we concluded that the defendant could not be held accountable for uncharged drug activity that occurred at least 17 months before the offense of conviction and there was no evidence whatsoever that he "engaged in any intervening criminal activity."[23]

Here, though there is an absence of evidence supporting regularity,[24] there is robust temporal proximity and evidence of

15. *United States v. Ocana,* 204 F.3d 585, 590 (5th Cir. 2000) (internal quotation marks omitted) (quoting U.S.S.G. § 1B1.3 cmt. 5(B)(ii)).

16. *Rhine,* 583 F.3d at 886 (internal alterations omitted) (quoting U.S.S.G. § 1B1.3 cmt. 5(B)(ii)).

17. *See United States v. Heard,* 891 F.3d 574, 576 (5th Cir. 2018); *United States v. Chavira,* 530 F. App'x 330, 334 (5th Cir. 2013) (unpublished) (per curiam).

18. *Heard,* 891 F.3d at 576.

19. *Rhine,* 583 F.3d at 885.

20. 613 F.3d 550.

21. *Id.* at 558.

22. *Id.*

23. *Rhine,* 583 F.3d at 887.

24. *See Ortiz,* 613 F.3d at 558 (quoting *Rhine,* 583 F.3d at 890) ("Deciding the 'regularity' of the offense is a search for a 'pattern of similar unlawful conduct directly linking the purported relevant conduct and the offense of conviction.' ").

similarity across the offenses. Critically, Nava's truck registration and jailhouse admissions, together with the similar geographical pattern and close temporal proximity of the transactions, convince us that Nava's role across the transactions was similarly supervisory. Pairing these "distinctive similarities" with the strong temporal proximity, it was not clear error to attribute the methamphetamine seizure to Nava as relevant conduct.[25]

III.

A.

[7] Nava next argues that the district court violated the Fifth Amendment by applying a preponderance-of-the-evidence standard in its determination that Nava was responsible for the methamphetamine offense in Gulfport. Because this relevant conduct increased his Guidelines sentencing range, he argues, the district court should have been required to make its finding beyond a reasonable doubt. We review *de novo* a constitutional challenge to a district court's application of the Sentencing Guidelines.[26]

B.

[8, 9] As Nava concedes, controlling precedent forecloses his constitutional challenge. According to the Supreme Court's settled understanding of the Fifth Amendment, the preponderance standard generally satisfies due process during sentencing even where the court is deciding whether to enhance a sentence based on the defendant's commission of an uncharged crime.[27] As we have noted, "it is well-settled ... that a district court may increase a defendant's sentence under the Sentencing Guidelines based on facts found by the court by a preponderance of the evidence, provided that the resulting sentence does not exceed the statutory maximum."[28] Because Nava's 480-month sentence falls within the statutory maximum term, the district court's factfinding by a preponderance of the evidence did not run afoul of the Fifth Amendment.[29]

IV.

A.

[10] Finally, Nava challenges the upward adjustment he received for abusing a position of trust. Section 3B1.3 of the Sentencing Guidelines provides for a two-offense-level increase where "the defendant abused a position of public or private trust ... in a manner that significantly facilitated the commission or concealment of the offense."[30] A "sentencing court must conduct a two-step inquiry when considering whether to apply the § 3B1.3 enhancement," first determining whether the defendant occupied a position of trust at all before "proceed[ing] to ascertain the ex-

25. *United States v. Wall*, 180 F.3d 641, 646 (5th Cir. 1999) (quoting *United States v. Maxwell*, 34 F.3d 1006, 1011 (11th Cir. 1994)).

26. *United States v. Shakbazyan*, 841 F.3d 286, 289 (5th Cir. 2016).

27. *United States v. Watts*, 519 U.S. 148, 156, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997).

28. *United States v. Hicks*, 389 F.3d 514, 530 (5th Cir. 2004); *see United States v. Hebert*, 813 F.3d 551, 564 (5th Cir. 2015) (noting that Fifth Amendment challenges to the preponderance standard at sentencing "are foreclosed by our precedent ... because we have held that courts can engage in judicial factfinding where the defendant's sentence ultimately falls within the statutory maximum term").

29. *See* 21 U.S.C. § 841(b)(1)(A)–(B); *United States v. Lewis*, 476 F.3d 369, 391 (5th Cir. 2007).

30. U.S.S.G. § 3B1.3.

tent to which the defendant used that position to facilitate or conceal the offense."[31]

[11] Because Nava did not object to the adjustment in the district court, we review for plain error only.[32] Under the four-prong framework of plain-error review, Nava must demonstrate (1) an error that (2) is "clear or obvious" and that (3) "affected [his] substantial rights."[33] If the first three prongs are satisfied, we may exercise our discretion to correct the error only if it (4) "seriously affects the fairness, integrity or public reputation of judicial proceedings."[34]

B.

[12] The district court found that Nava abused his position of trust as a government informant by misleading the DEA about Lara's route to Denver. Nava contends that the court erred at the first step of the § 3B1.3 inquiry because he did not occupy a position of public or private trust. We need not consider the merits of Nava's argument. As Nava concedes, even if the district court committed plain error in imposing the adjustment, he cannot satisfy the third prong of plain-error review, which requires the defendant to prove that the error "affected [his] substantial rights" by "show[ing] a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence."[35] Here, the position-of-trust adjustment raised Nava's total offense level from 46 to 48, which was then reduced by default to 43, the highest offense level available under the Guidelines.[36] Because a two-level reduction from 48 to 46 would still result in a total offense level of 43, Nava cannot prove that any error affected his substantial rights.[37]

V.

For the foregoing reasons, the two concurrent 480-month sentences imposed by the district court are affirmed.

31. *United States v. Ollison*, 555 F.3d 152, 165 (5th Cir. 2009).

32. *United States v. Williams*, 847 F.3d 251, 254 (5th Cir. 2017) (explaining that where an objection is "admittedly unpreserved, we review for plain error").

33. *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009).

34. *Id.* (internal alterations omitted) (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

35. *United States v. John*, 597 F.3d 263, 285 (5th Cir. 2010) (internal alterations omitted) (quoting *United States v. Price*, 516 F.3d 285, 289 (5th Cir. 2008)); *see Molina-Martinez v. United States*, — U.S. —, 136 S. Ct. 1338, 1346, 194 L.Ed.2d 444 (2016).

36. *See* U.S.S.G. Ch. 5, Pt. A, cmt. 2 (providing that in the "rare case[ ]" where a defendant's total offense level exceeds 43, it "is to be treated as an offense level of 43").

37. Nava admits that his abuse-of-trust challenge could succeed only if we reversed the district court on the relevant-conduct issue as well. Together, the relevant-conduct methamphetamine and the abuse-of-trust adjustment contributed eight points to Nava's total offense level, meaning that without them, he would score at 40 instead of 48. This reduction would affect his substantial rights as a score of 40 would yield a lower Guidelines range.

APPENDIX B

U.S.S.G. § 1B1.3 and its commentary

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter One. Introduction, Authority, and General Application Principles (Refs & Annos)
Part B. General Application Principles

USSG, § 1B1.3, 18 U.S.C.A.

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

Currentness

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were--

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

CREDIT(S)

(Effective November 1, 1987; amended effective January 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1992; November 1, 1994; November 1, 2001; November 1, 2004; November 1, 2010; November 1, 2015.)

COMMENTARY

<*Application Notes:*>

<**1. Sentencing Accountability and Criminal Liability.**--The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.>

<**2. Accountability Under More Than One Provision.**--In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.>

<**3. Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).**-->

<**(A) In General.**--A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.>

<In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:>

<**(i)** within the scope of the jointly undertaken criminal activity;>

<**(ii)** in furtherance of that criminal activity; and>

<**(iii)** reasonably foreseeable in connection with that criminal activity.>

<The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (i.e., "within the scope," "in furtherance," and "reasonably foreseeable") is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.>

<**(B) Scope.**--Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the "jointly undertaken criminal activity" is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). In doing so, the court may consider any explicit

agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).>

<In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.>

<A defendant's 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 (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.>

<**(C) In Furtherance.**--The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.>

<**(D) Reasonably Foreseeable.**--The court must then determine if the conduct (acts and omissions) of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was reasonably foreseeable in connection with that criminal activity.>

<Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the jointly undertaken criminal activity (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).>

<With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity.>

<The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).>

<**4. Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).**-->

<**(A) Acts and omissions aided or abetted by the defendant.**-->

<**(i)** Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.>

<In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. See Application Note 2.>

<**(B) Acts and omissions aided or abetted by the defendant; acts and omissions in a jointly undertaken criminal activity.**-->

<**(i)** Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).>

<As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).>

<**(C) Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable.**-->

<**(i)** Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because

the fraudulent scheme to obtain $15,000 was not within the scope of the jointly undertaken criminal activity (i.e., the forgery of the $800 check).>

<**(ii)** Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.>

<**(iii)** Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to the importation of that shipment on the basis of subsection (a)(1)(B) (see the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).>

<**(iv)** Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.>

<**(v)** Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (i.e., the one delivery).>

<**(vi)** Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint

undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.>

<**(vii)** Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).>

<**(viii)** Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. See Application Note 3(B).>

<**5. Application of Subsection (a)(2).**-- >

<**(A) Relationship to Grouping of Multiple Counts.**--"Offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under § 3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in § 3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.>

<As noted above, subsection (a)(2) applies to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. § 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which § 3D1.2(d) would require the grouping of counts, had the defendant been convicted of

both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.>

<**(B) "Same Course of Conduct or Common Scheme or Plan."**--"Common scheme or plan" and "same course of conduct" are two closely related concepts.>

<**(i) Common scheme or plan.** For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).>

<**(ii) Same course of conduct.** Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).>

<**(C) Conduct Associated with a Prior Sentence.**--For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.>

<**Examples:** (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see § 4A1.2(a)(1).>

<Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).>

<**6. Application of Subsection (a)(3).**-->

<**(A) Definition of "Harm".**--"Harm" includes bodily injury, monetary loss, property damage and any resulting harm.>

<**(B) Risk or Danger of Harm.**--If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., § 2K1.4 (Arson; Property Damage by Use of Explosives); § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., § 2A2.2 (Aggravated Assault); § 2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., § 2B1.1(Theft, Property Destruction, and Fraud); § 2X1.1 (Attempt, Solicitation or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. See generally § 1B1.4 (Information to be Used in Imposing Sentence); § 5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with § 2X1.1 (Attempt, Solicitation or Conspiracy) and the applicable offense guideline.>

<**7. Factors Requiring Conviction under a Specific Statute.**--A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "was convicted under 18 U.S.C. § 1956". Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in § 2A3.4(a)(2) ("if the offense involved conduct described in 18 U.S.C. § 2242").>

<Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, § 2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under § 2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. See Application Note 3(C) of § 2S1.1.>

<**8. Partially Completed Offense.**--In the case of a partially completed offense (e.g., an offense involving an attempted theft of $800,000 and a completed theft of $30,000), the offense level is to be determined in accordance with § 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to § 2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under § 2X1.1(c)(1).>

<**9. Solicitation, Misprision, or Accessory After the Fact.**-- In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.>

<***Background:*** *This section prescribes rules for determining the applicable guideline sentencing range, whereas § 1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.*>

<Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by § 1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.>

<Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of § 3D1.2(d), which provides for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would **not** be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)>

<Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (i.e., to which § 3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when § 3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent “double counting” of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to § 3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.>

<Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, § 2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; § 2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.>

Notes of Decisions (797)

Federal Sentencing Guidelines, § 1B1.3, 18 U.S.C.A., FSG § 1B1.3
As amended to 8-3-20

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