



Multiple Counts

2023 National Seminar

August 30 & 31, 2023

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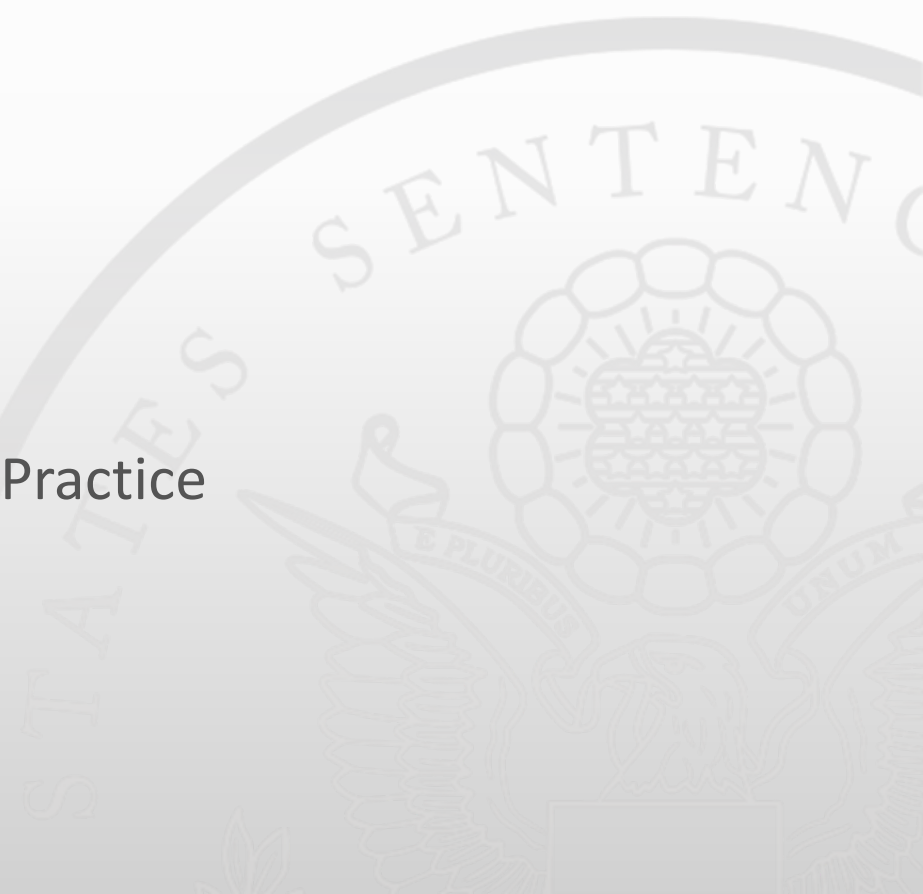
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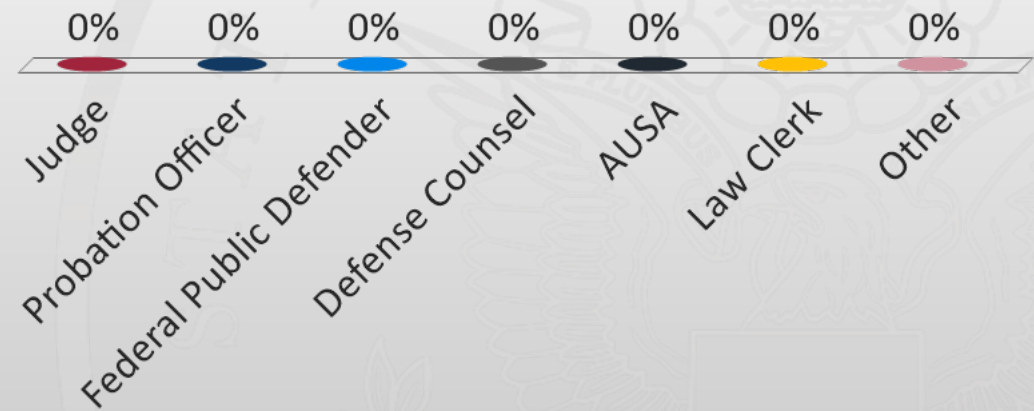
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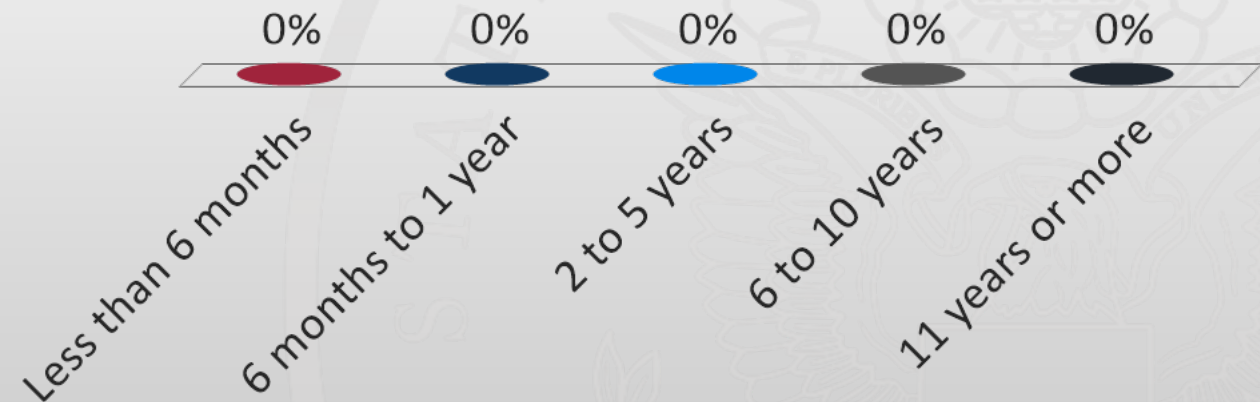
What is your current position?

- A. Judge
- B. Probation Officer
- C. Federal Public Defender
- D. Defense Counsel
- E. AUSA
- F. Law Clerk
- G. Other



How long have you been working in the field of federal sentencing?

- A. Less than 6 months
- B. 6 months to 1 year
- C. 2 to 5 years
- D. 6 to 10 years
- E. 11 years or more



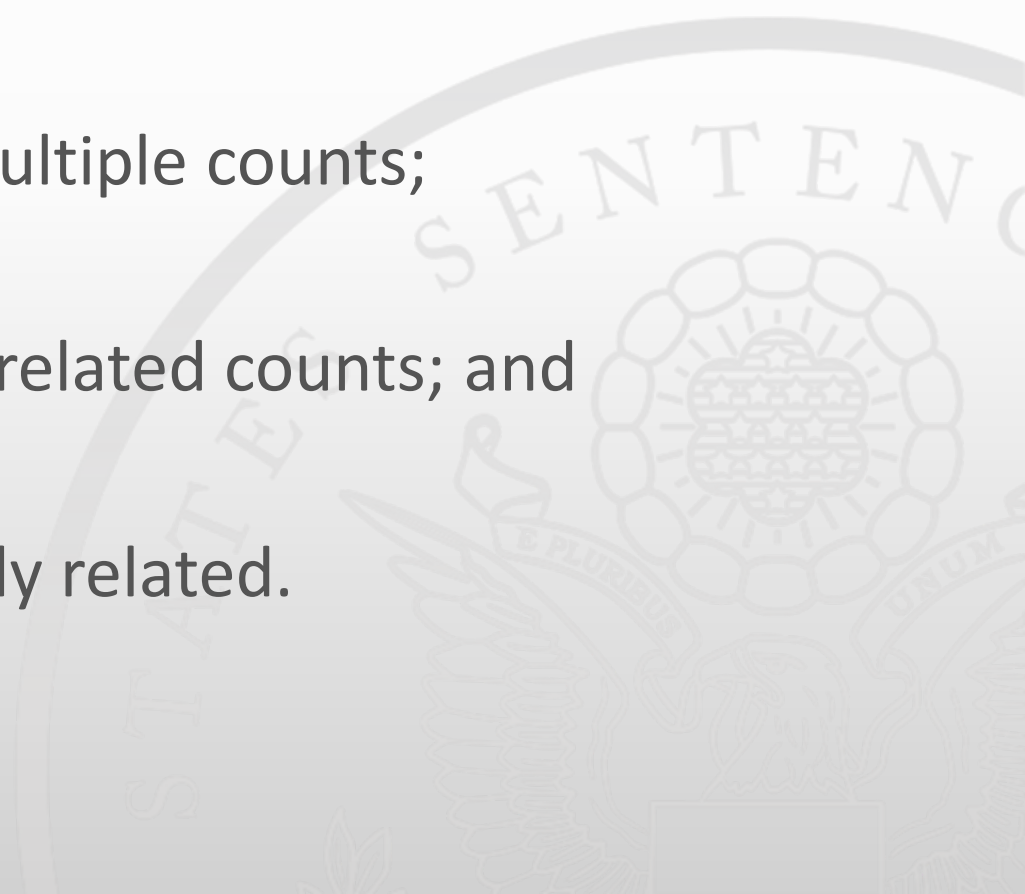
Learning Objectives

By the end of today's session, your active engagement will empower you to:

Describe the rationale for the rules for multiple counts;

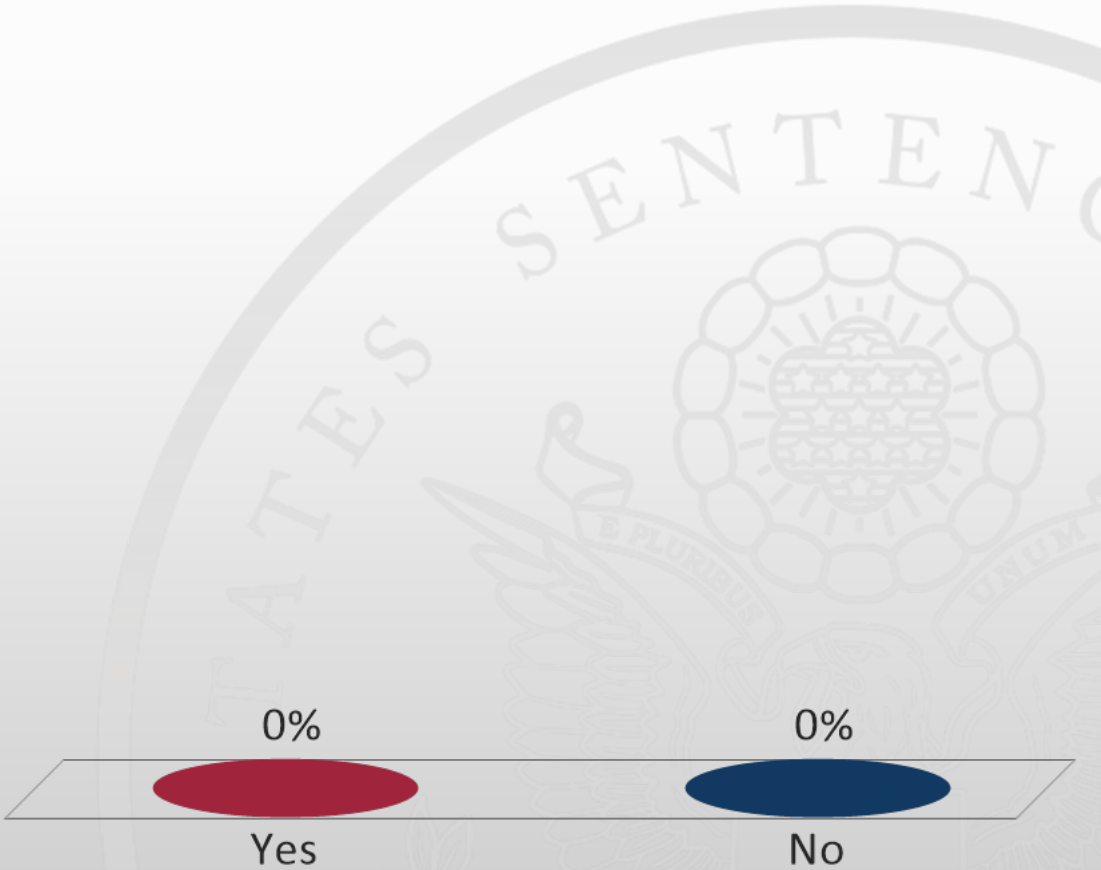
Utilize the decision tree to group closely related counts; and

Assign units for counts that are not closely related.



Have you had a case involving multiple counts of conviction?

- A. Yes
- B. No



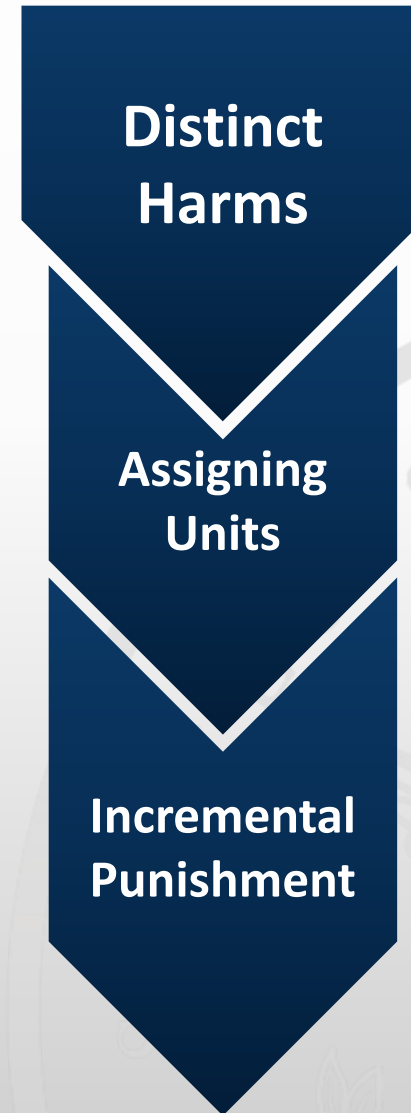
Will there always be one offense level?

YES!

The multiple counts rules are utilized to determine a...

single offense level.

Rationale



Two Sets of Rules

1. “Grouping” (§3D1.2)

- **Closely related counts** are treated as a single, composite harm.
- One offense level represents all counts.



Two Sets of Rules

1. “Grouping” (§3D1.2)

- Closely related counts are treated as a single, composite harm.
- One offense level represents all counts.

2. “Assigning Units” (§3D1.4)

- Provides incremental punishment for multiple counts involving separate, distinct harms.
- Adds offense levels for **significant** additional criminal conduct.

Grouping Closely Related Counts at §3D1.2

Multiple counts involve *substantially the same* harm when:

RULE **a** Same Victim, Same Act

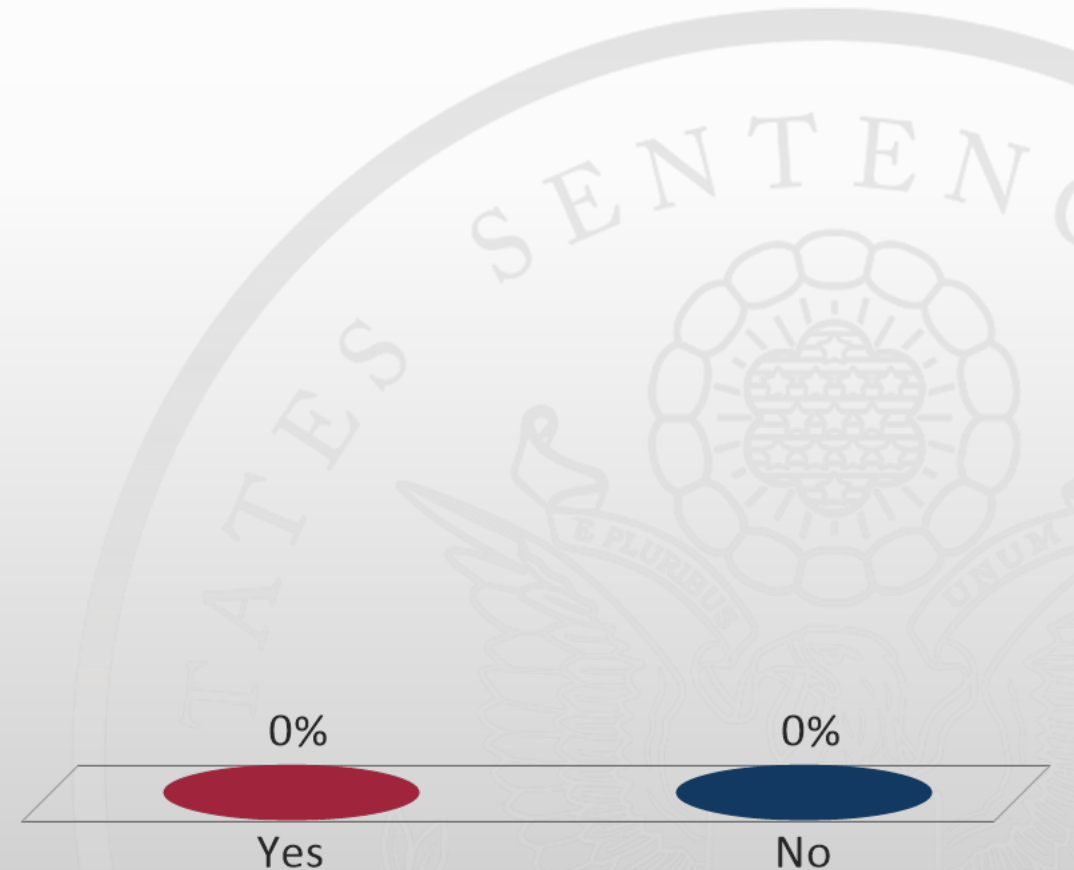
RULE **b** Same Victim, Related Acts

RULE **c** Conduct Accounted for by SOC/Adjustment

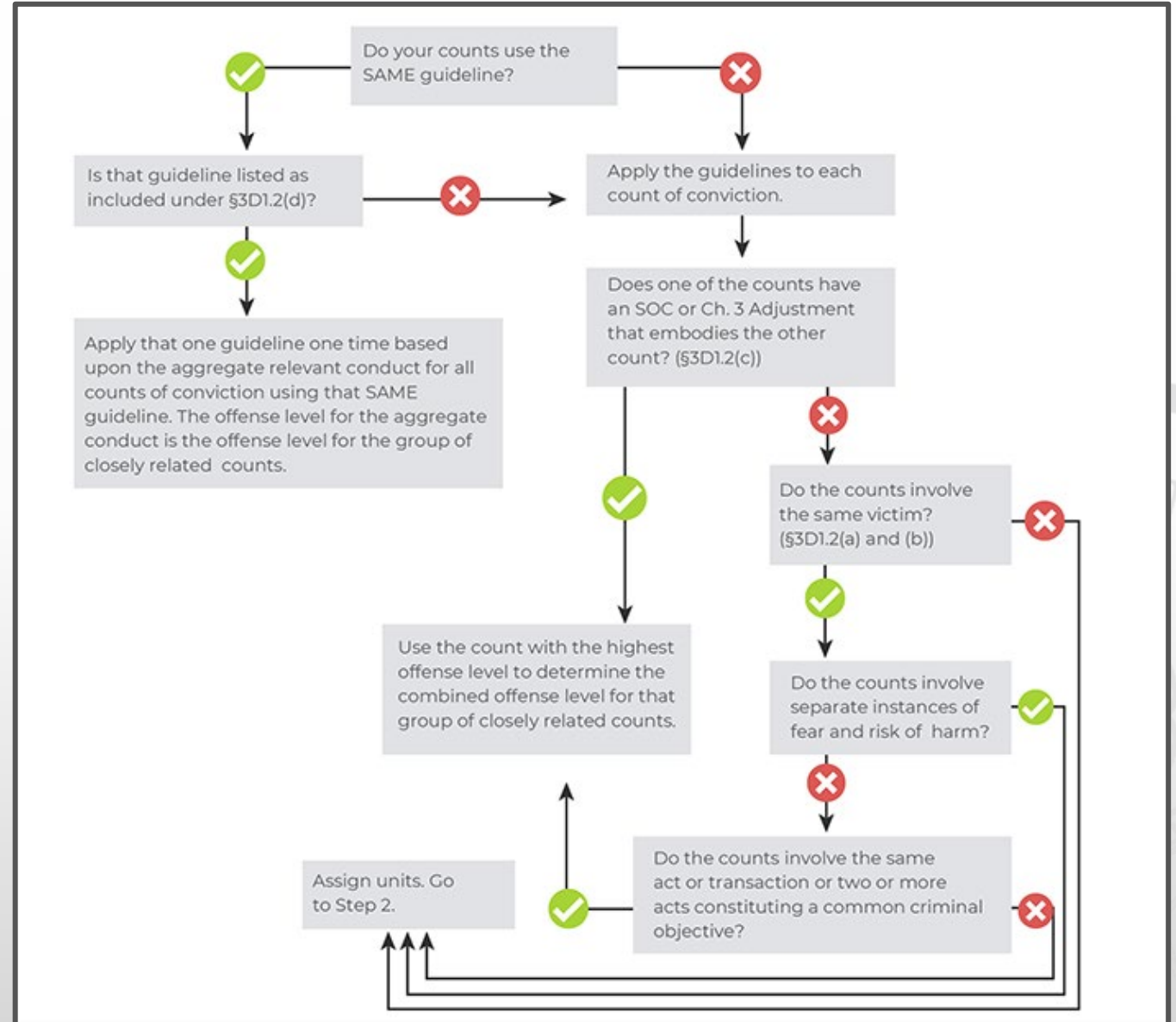
RULE **d** Aggregated Harm Guidelines

Have you used our Decision Tree for Grouping Multiple Counts of Conviction?

- A. Yes
- B. No



Decision Tree: Grouping Multiple Counts of Conviction



Do your counts use the
SAME guideline?

Is that guideline listed as
included under §3D1.2(d)?

RULE

d

GROUPING

Offenses Included at §3D1.2(d)

§3D1.2(d) (p. 367)

Drugs | §2D1.1

Firearms | §2K1.1

Fraud | §2B1.1

Possession, Receipt,
Distribution of Child
Pornography | §2G2.2

Tax Offenses | §2T1.1

Money Laundering | §2S1.1

Bribery | §2C1.1

Alien Smuggling | §2L1.1

Counterfeiting | §2B5.3

Scenario 1

The defendant pled guilty to:

- one count of **felon-in-possession**; and
- one count of **theft from a firearms dealer**

Each count involves two separate firearms, and the applicable guideline for both counts is **§2K2.1**.

Do these offenses group under §3D1.2(d)?

- ✓ A. Yes
- B. No



Offenses Included at §3D1.2(d)

§3D1.2(d) (p. 367)

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.

Firearms - §2K2.1

Do your counts use the
SAME guideline?

Is that guideline listed as
included under §3D1.2(d)?

Apply that one guideline one time based upon the
aggregate relevant conduct for all counts of
conviction using that SAME guideline.

RULE

d

GROUPING

Scenario 1A

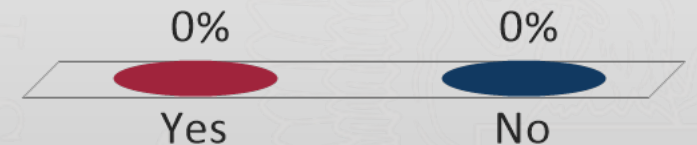
The defendant pled guilty to:

- one count of **felon-in-possession**; and
- one count of **theft from a firearms dealer**

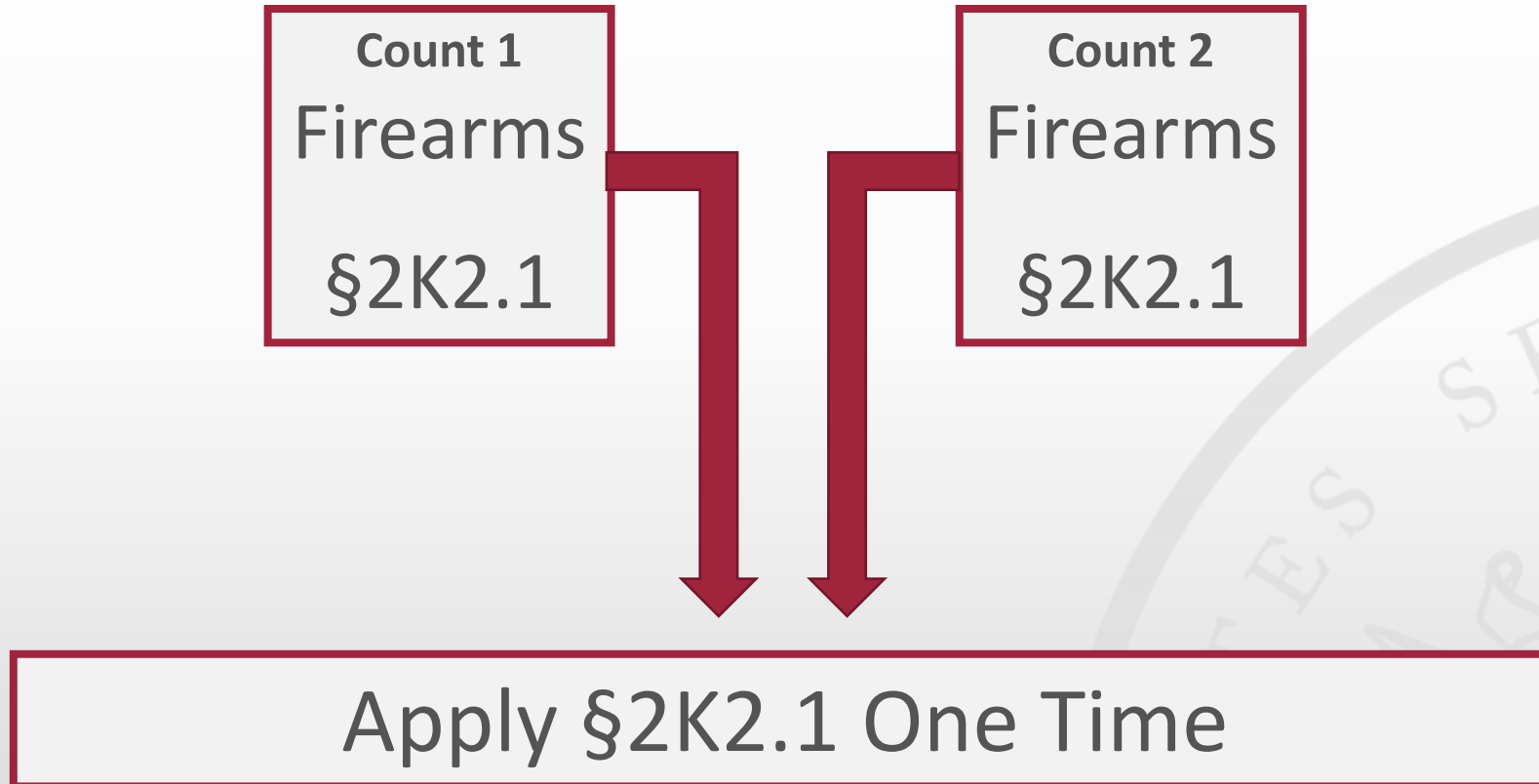
Each count involves two separate firearms, and the applicable guideline for both counts is **§2K2.1**. The guns in count one were not stolen, but the guns in count two were stolen.

Does the 2-level SOC for a “stolen firearm” apply?

- ✓ A. Yes
- B. No



Grouping under “Rule (d)”



Impact of Grouping under “Rule (d)”

Counts 1 + 2

Chapter Two

- §2K2.1(a)(6)(A) = 14
- §2K2.1(b)(1)(A) = +2
- §2K2.1(b)(4)(A) = +2

Chapter Three

- None

18

Adjusted Offense Level

The offense level for the group is the **aggregate quantity** of both offenses.

§3D1.3(b)

Scenario 2

The defendant engaged in an insurance fraud resulting in a loss of \$92,000. When he was arrested at his home, agents found two computers the defendant had stolen from the U.S. Sentencing Commission. The computers were valued at \$2,000 each.

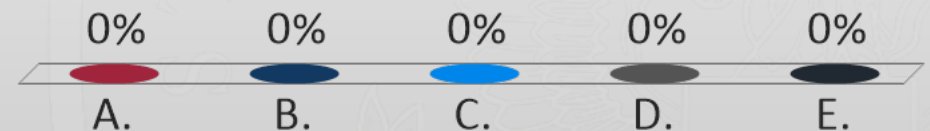
The defendant pled guilty to:

- Count 1: **Wire Fraud**
- Count 2: **Theft**

The applicable guideline for both counts is **§2B1.1**.

These counts . . .

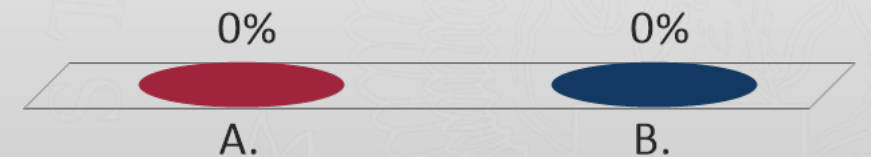
- A. Group under (a)
- B. Group under (b)
- C. Group under (c)
- ✓ D. Group under (d)
- E. Do not group



Scenario 2A

Which of the following is a true statement?

- A. The loss amount at §2B1.1 is \$92,000 because the insurance fraud and the theft are unrelated, and the insurance loss is greater.
- ✓ B. The loss amount at §2B1.1 is \$96,000 because the offenses group under Rule (d).



Scenario 3

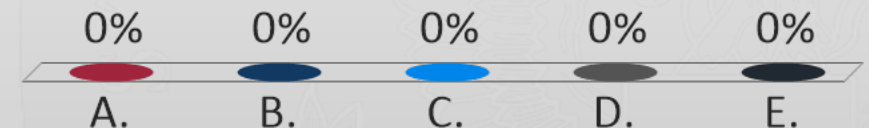
The defendant pled guilty to:

- Count 1: Distribution of fentanyl resulting in the death of **Victim A**
- Count 2: Distribution of fentanyl resulting in the death of **Victim B**

The applicable guideline for both counts is **§2D1.1**.

These counts . . .

- A. Group under (a)
- B. Group under (b)
- C. Group under (c)
- ✓ D. Group under (d)
- E. Do not group



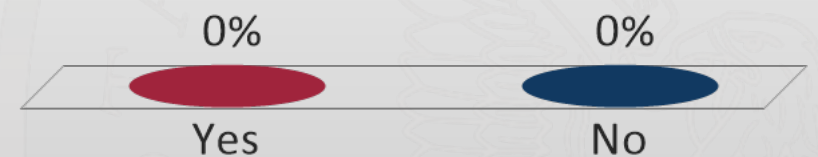
Scenario 4

The defendant pled guilty to two counts of **production of child pornography (§2G2.1)** based on two separate instances of production.

Do these counts group under §3D1.2(d)?

A. Yes

B. No



Do your counts use the
SAME guideline?

Is that guideline listed as
included under §3D1.2(d)?

RULE

d

GROUPING

Offenses **Excluded** at §3D1.2(d)

§3D1.2(d) (p. 367)

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.

§2G2.1 - Production

Offenses **Excluded** at §3D1.2(d)

§3D1.2(d) (p. 367)

Production of Child
Pornography | §2G2.1

Robbery | §2B3.1

Murder | §2A1.1

Kidnapping | §2A4.1

Criminal Sex Abuse | §2A3.1

Assault | §2A2.2

Blackmail | §2B3.3

Extortion | §2B3.2

Burglary | §2B2.1

Scenario 5

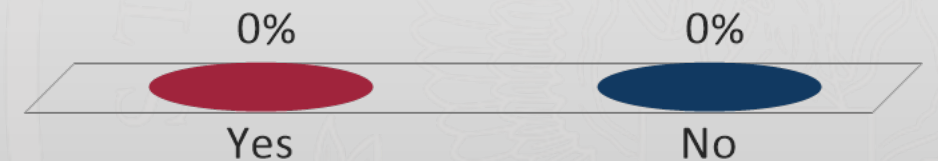
The defendant pled guilty to:

- one count of **felon-in-possession (§2K2.1)**; and
- one count of **distribution of heroin (§2D1.1)**

Do these counts group under §3D1.2(d)?

A. Yes

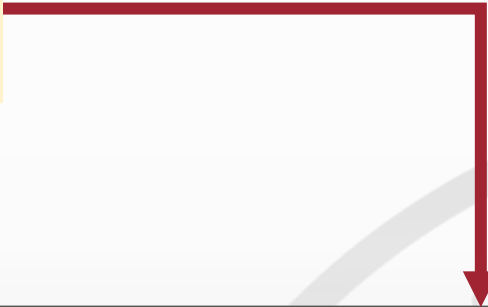
✓ B. No



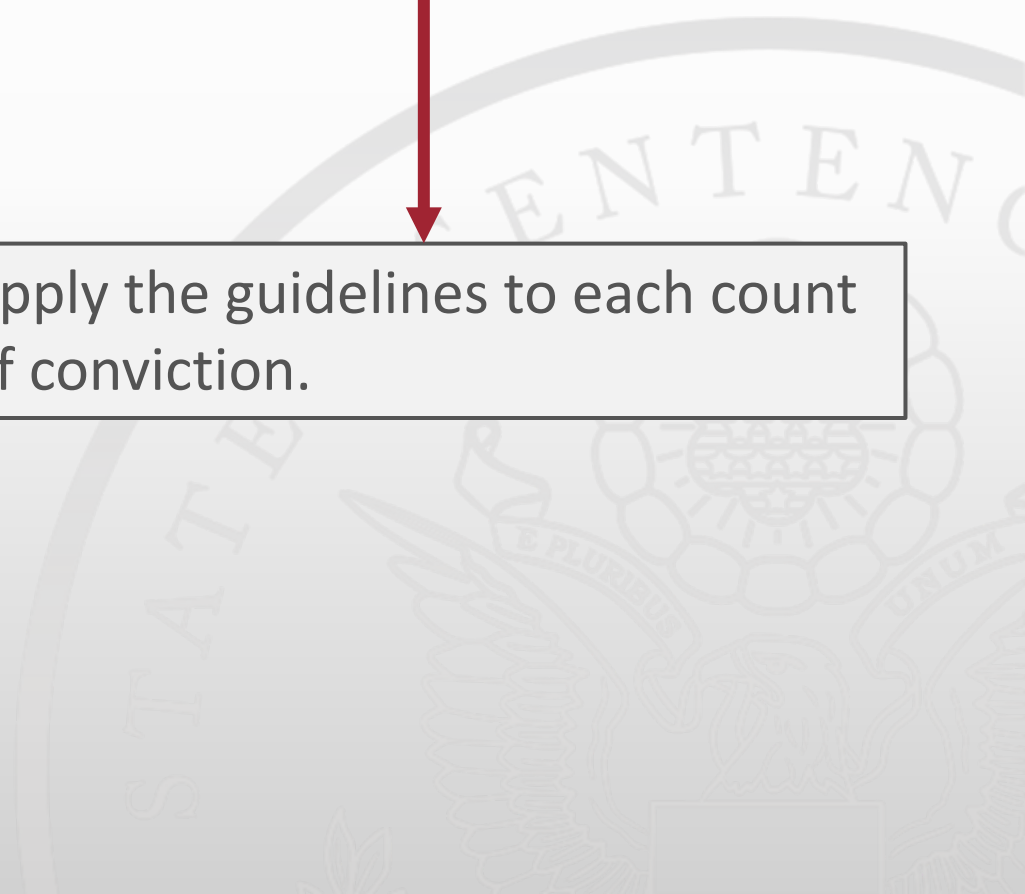
Different Guidelines?



Do Not Group under “Rule (d)”



Apply the guidelines to each count of conviction.



Application of Multiple Counts that **Do Not** Group under “Rule (d)”

Count 1

Chapter Two

- BOL, SOC, CR

Chapter Three

- Victim, Role, Obstruction

Adjusted Offense Level

Count 2

Chapter Two

- BOL, SOC, CR

Chapter Three

- Victim, Role, Obstruction

Adjusted Offense Level

Apply the guidelines to each count of conviction.

Does one of the counts have an SOC or Ch. 3 Adjustment that embodies the other count?



Scenario 5A

The defendant pled guilty to:

- one count of **felon-in-possession (§2K2.1)**; and
- one count of **distribution of heroin (§2D1.1)**

The firearm and drugs were found “**in close proximity to**” one another.

Do these counts group under §3D1.2(c)?

- ✓ A. Yes
- B. No



Explanation of Scenario 5A

Count 1: Firearms

Chapter Two

- BOL 20
- §2K2.1(b)(6)(B) +4 (for drugs)

24

Adjusted Offense Level

Count 2: Drugs

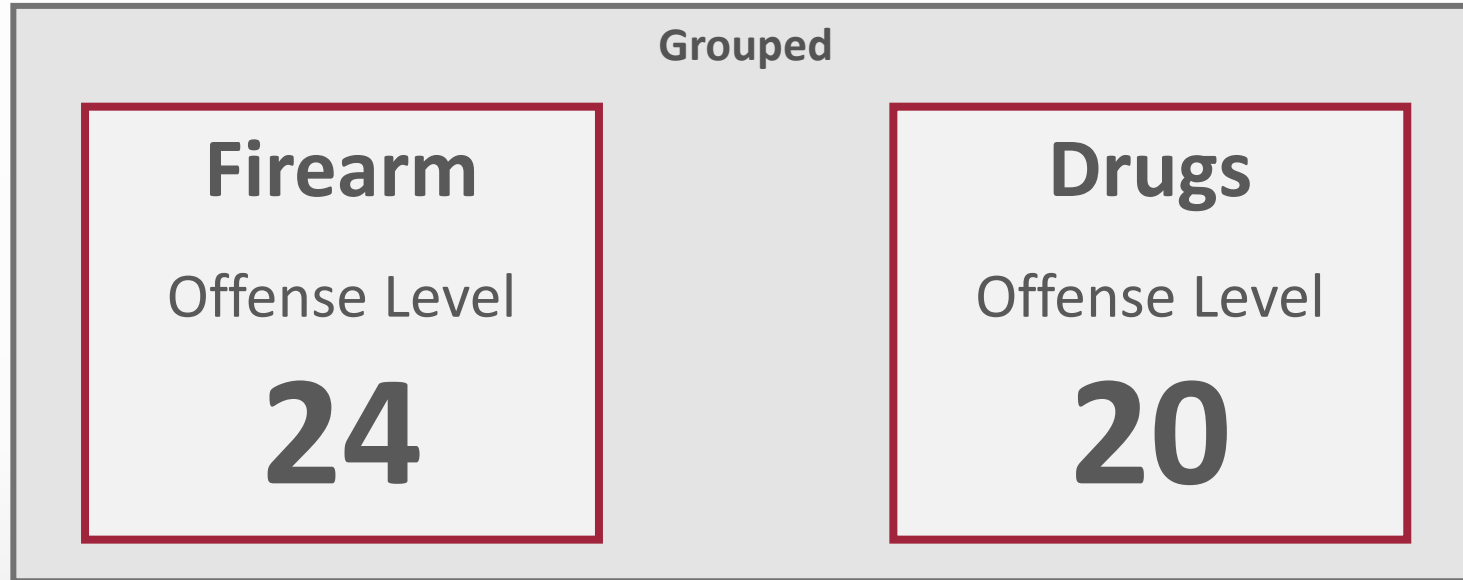
Chapter Two

- BOL 18
- §2D1.1(b)(1) +2 (for gun)

20

Adjusted Offense Level

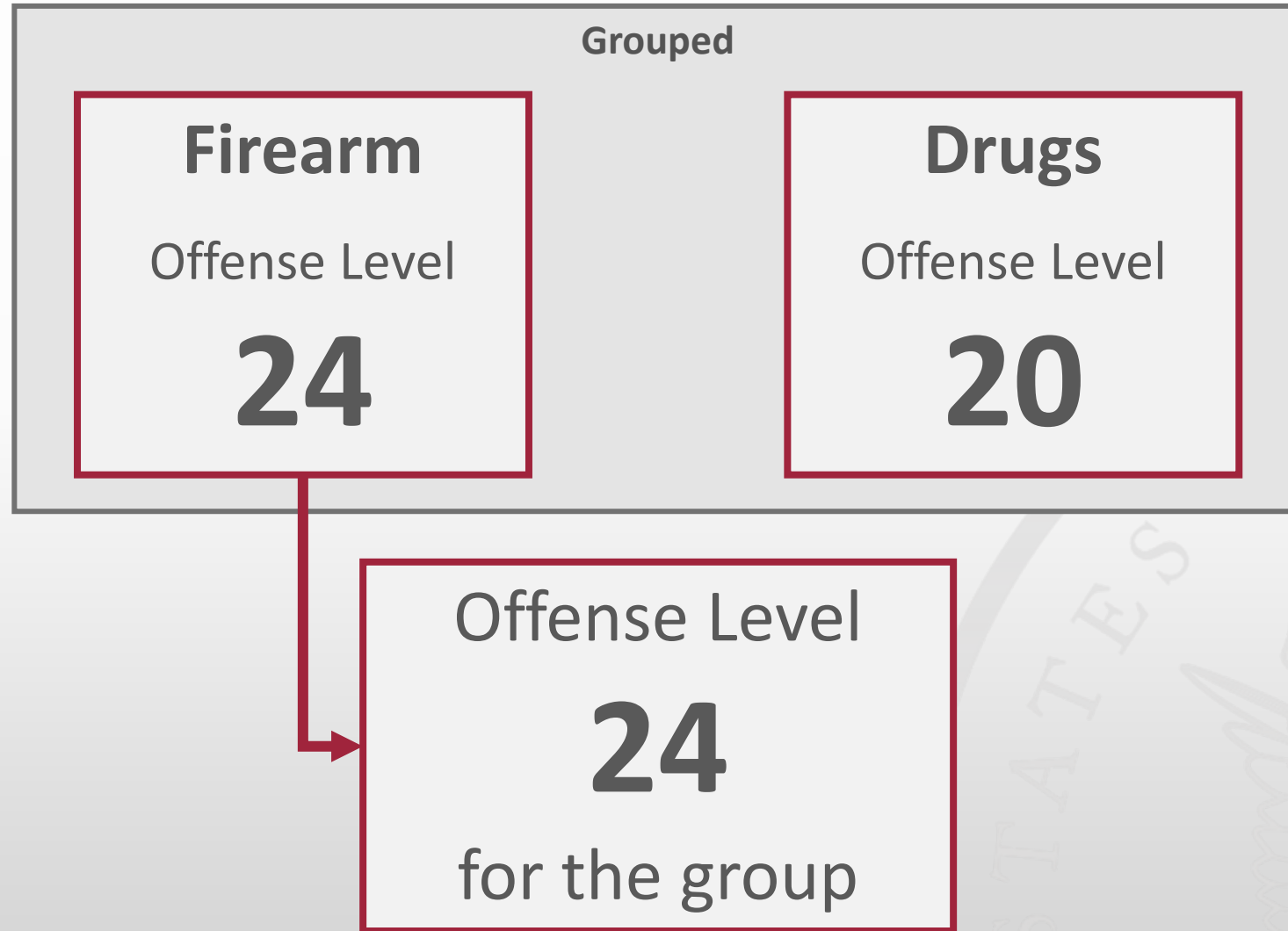
Impact of Counts Grouping under “Rule (c)”



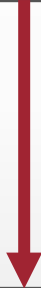
?



Impact of Counts Grouping under “Rule (c)”



Does one of the counts have an SOC or Ch. 3 Adjustment that embodies the other count?



Do the counts involve the same victim?



Grouping Closely Related Counts at §3D1.2

Multiple counts involve *substantially the same* harm when:

RULE **a** Same Victim, Same Act

RULE **b** Same Victim, Related Acts

RULE **c** Conduct Accounted for by SOC/Adjustment

RULE **d** Aggregate Harm Guidelines

Scenario 6

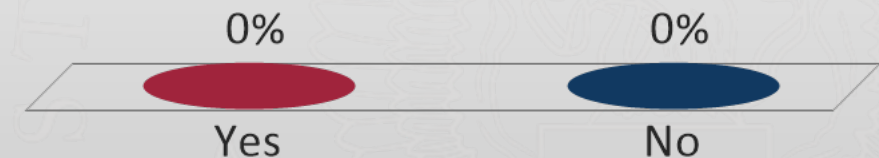
The defendant pled guilty to:

- one count of **illegal reentry (§2L1.2)**; and
- one count of **unlawful possession of a citizenship document (§2L2.2)**

There are no specific offense characteristics or Chapter 3 adjustments in either guideline which embody the other count of conviction.

Do these counts group under 3D1.2(b)?

- ✓ A. Yes
- B. No

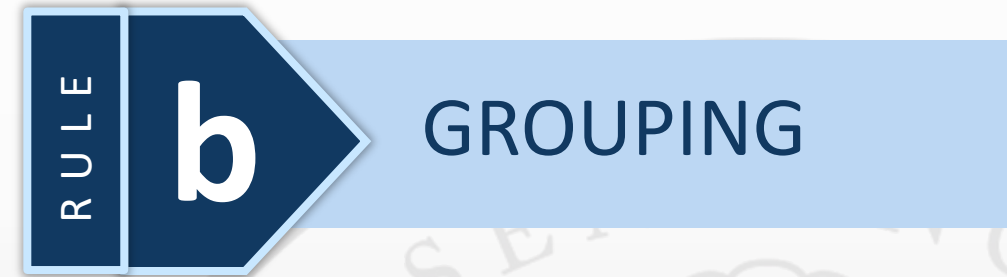


Societal Interest

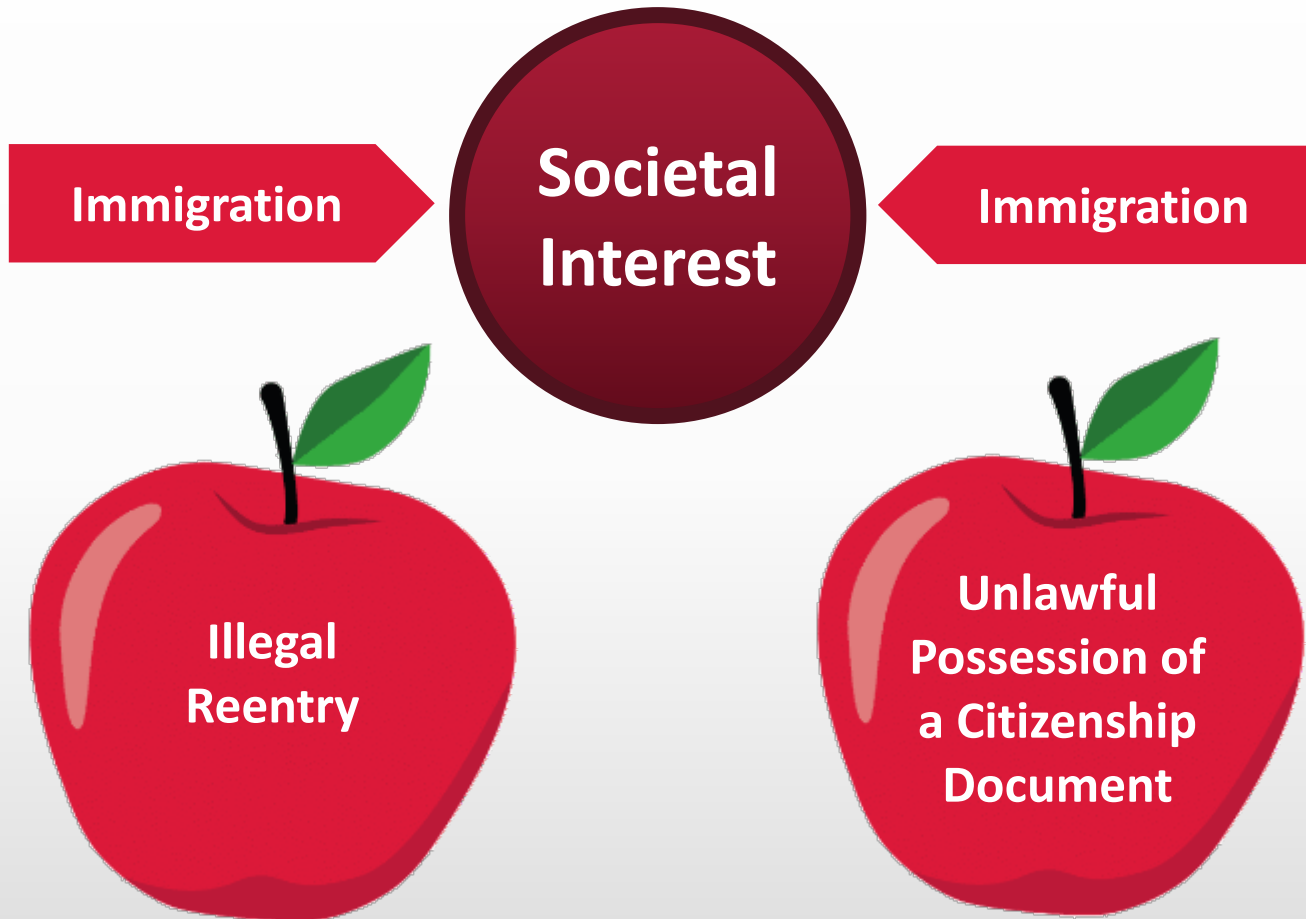
Do the counts involve the same victim?



**Societal
Interest**



Societal Interest



These counts will group under Rule (a) or (b).

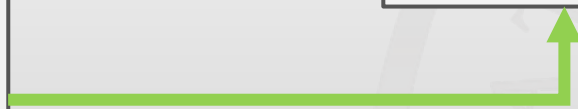
Do the counts involve the same victim?



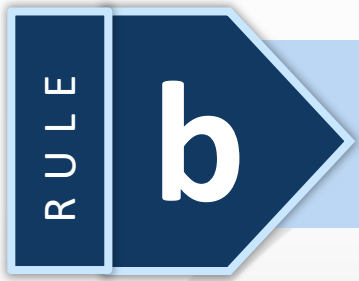
Do the counts involve separate instances of fear and risk of harm?



Do the counts involve the same act or transaction or two or more acts constituting a common criminal objective?

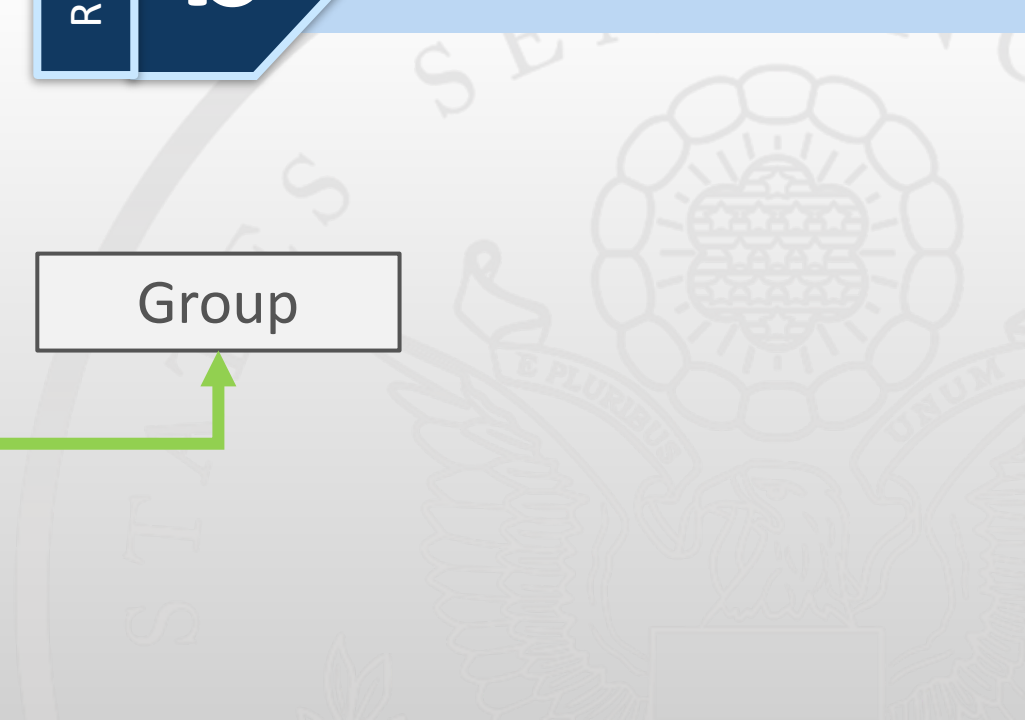


GROUPING



GROUPING

Group



Scenario 7

The defendant pled guilty to:

- one count of **illegal reentry (§2L1.2)**; and
- one count of **distribution of heroin (§2D1.1)**

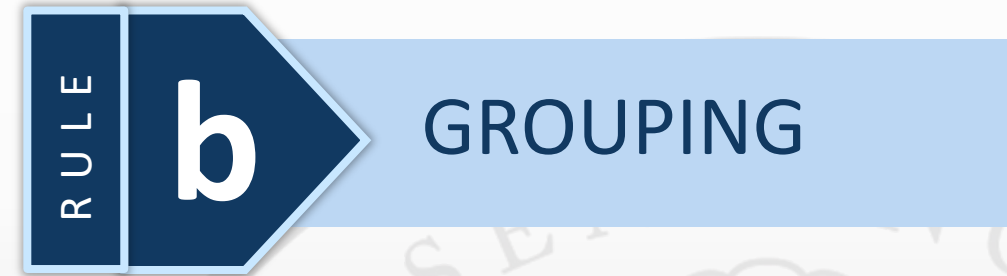
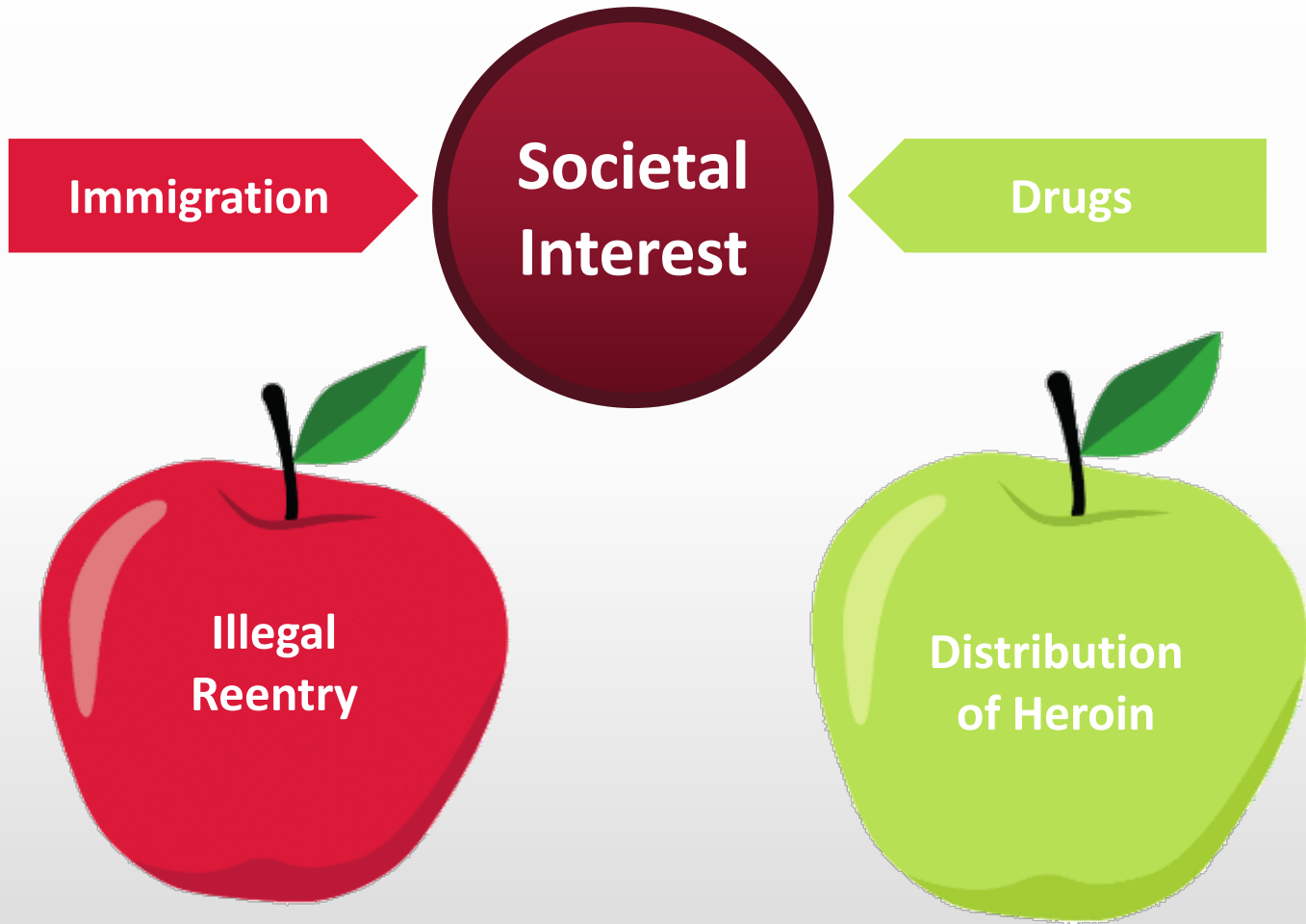
There are no specific offense characteristics or Chapter 3 adjustments in either guideline which embody the other count of conviction.

Do these counts group under 3D1.2(b)?

- A. Yes
- ✓ B. No



Societal Interest



Different societal interests will not group under Rule (a) or Rule (b).

Do the counts involve
the same victim?



Assign Units



Scenario 8

The defendant pled guilty to two counts of **production of child pornography (§2G2.1)**.

The defendant:

- sexually abused the same minor
- on two different days
- filming the abuse on both occasions

Do these counts group under (a) or (b)?

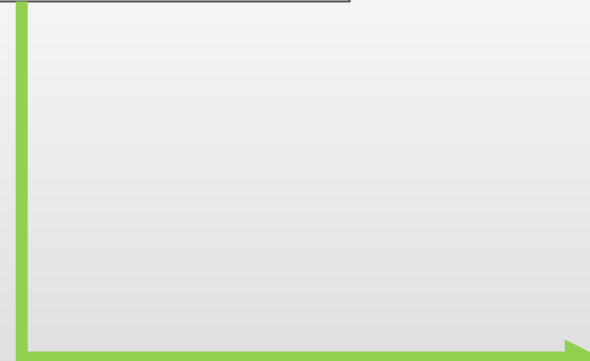
- A. Yes, under either (a) or (b)
- B. Yes, only under (a)
- C. Yes, only under (b)
- ✓ D. No, they do not group



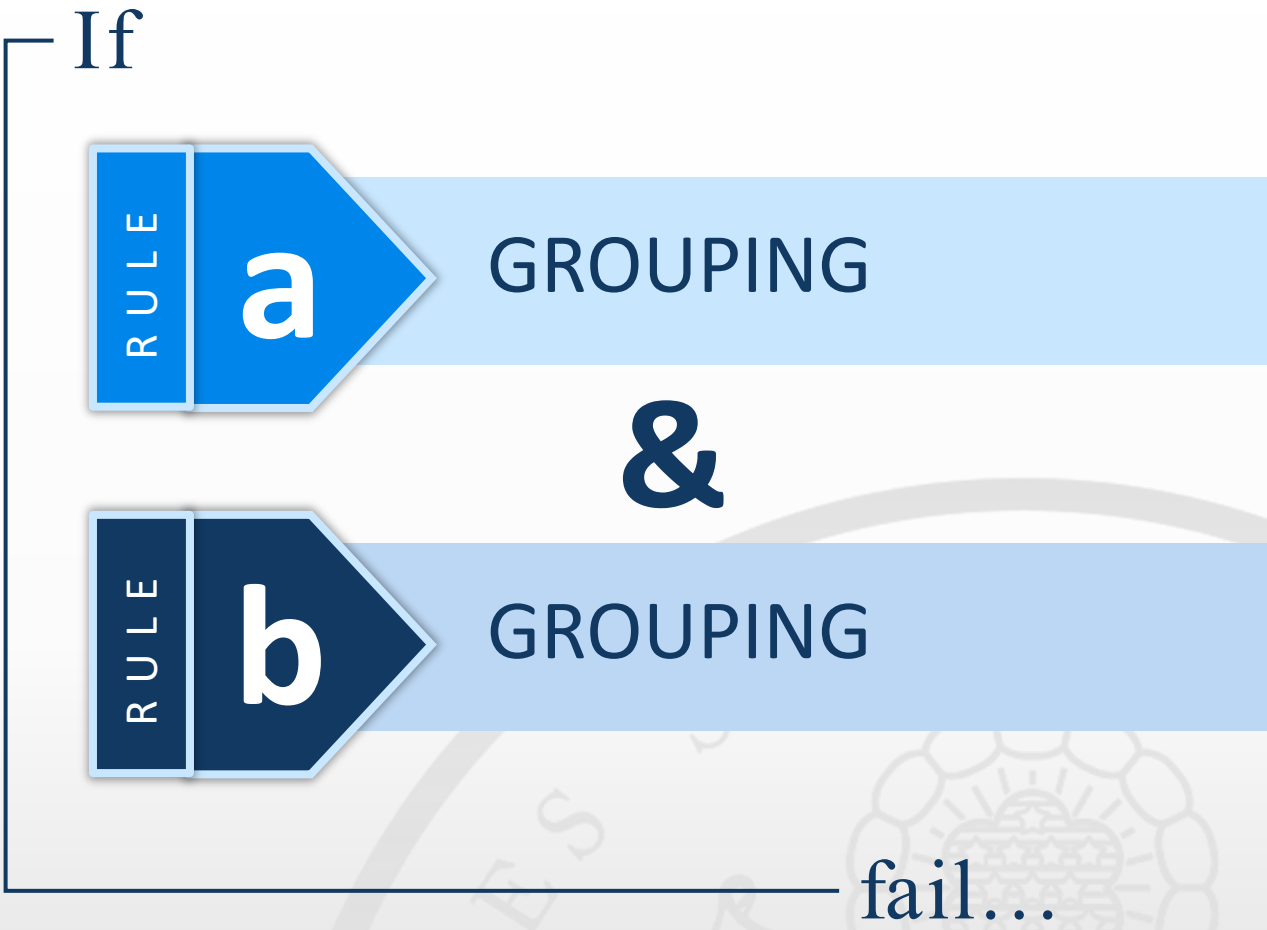
Do the counts involve the same victim?



Do the counts involve separate instances of fear and risk of harm?



Assign Units



Do You Still Have Multiple Counts?

Keep going!



Two Sets of Rules (Reminder)

1. “Grouping” (§3D1.2)

- Closely related counts are treated as a single, composite harm.
- One offense level represents all counts.

2. “Assigning Units” (§3D1.4)

- Provides incremental punishment for multiple counts involving separate, distinct harms.
- Adds offense levels for **significant** additional criminal conduct.

Grouping Multiple Counts of Conviction

Assigning Units

Grouping Multiple Counts of Conviction

Step 2:

Assignment of Units (§3D1.4)

If there are two or more counts* remaining after applying Step 1 to all counts* use this checklist to determine a single combined offense level.

Checklist to Determine a Single Combined Offense Level:

- Identify the count with the highest offense level. If there are two or more counts with the same highest offense level, just select one.
- Compare the count with the highest offense level to the other remaining counts.
- The count with the highest offense level receives one unit.
- Each remaining count that is equally serious or 1 to 4 levels less serious than the count with the highest offense level receives one unit.
- Each remaining count that is 5 to 8 levels less serious than the count with the highest offense level receives one-half unit.
- Any remaining count that is 9 or more levels less serious than the count group with the highest offense level does not receive any units.
- Add up the total amount of units.
- Using the table below, based on the total number of units, add the appropriate number of offense levels to the offense level of the count with the highest offense level.

Total Number of Units	Add to Highest Offense Level
1 ½	+1
2	+2
2 ½ - 3	+3
3 ½ - 5	+4
5+	+5

A reduction for Acceptance of Responsibility (§3E1.1) is determined only after a single combined offense level is established for the multiple counts of conviction. A reduction for Acceptance of Responsibility is based upon consideration of the relevant conduct for all counts.

Assignment of Units

If more than one group:

- Assign 1 unit to the group with the highest offense level;
- Assign 1, $\frac{1}{2}$, or 0 units to the remaining groups; and
- Increase the offense level of the highest group according to the unit chart.

Assignment of Units (§3D1.4)

Comparison of Offense Levels	Number of Units to Assign
Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

Assignment of Units (§3D1.4)

Production 1

§2G2.1

Offense Level

36

1 unit

Production 2

§2G2.1

Offense Level

34

1 unit

Total Units

2

Assignment of Units (§3D1.4)

Total Units

2

Two Additional
Offense Levels

Number of Units	Increase in Offense Level
1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
more than 5	Add 5 levels

Additional Offense Levels (§3D1.4)

Total of **2** units = 2 additional offense levels

Highest
Offense Level

Production 1

§2G2.1

Offense Level

36

+2 additional
offense levels

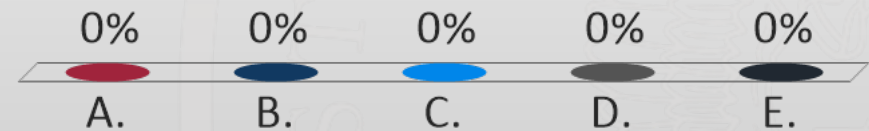
38

combined
offense level

Scenario 9

The defendant pled guilty to three counts of assault (**§2A2.2**). The defendant got into a fight with his three neighbors at the same time. These counts . . .

- A. Group under (a)
- B. Group under (b)
- C. Group under (c)
- D. Group under (d)
- ✓ E. Do not group



Scenario 9A

Assault 1

Offense Level

22

Assault 2

Offense Level

20

Assault 3

Offense Level

17

What is the combined offense level under §3D1.4?

- A. 22
- B. 23
- C. 25
- D. 27



Assignment of Units (§3D1.4)

Comparison of Offense Levels	Number of Units to Assign
Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

Assignment of Units (§3D1.4)

Assault 1
Offense Level
22

1 unit

Assault 2
Offense Level
20

1 unit

Assault 3
Offense Level
17

1/2 unit

Total Units:

2 1/2

Assignment of Units (§3D1.4)

Total Units

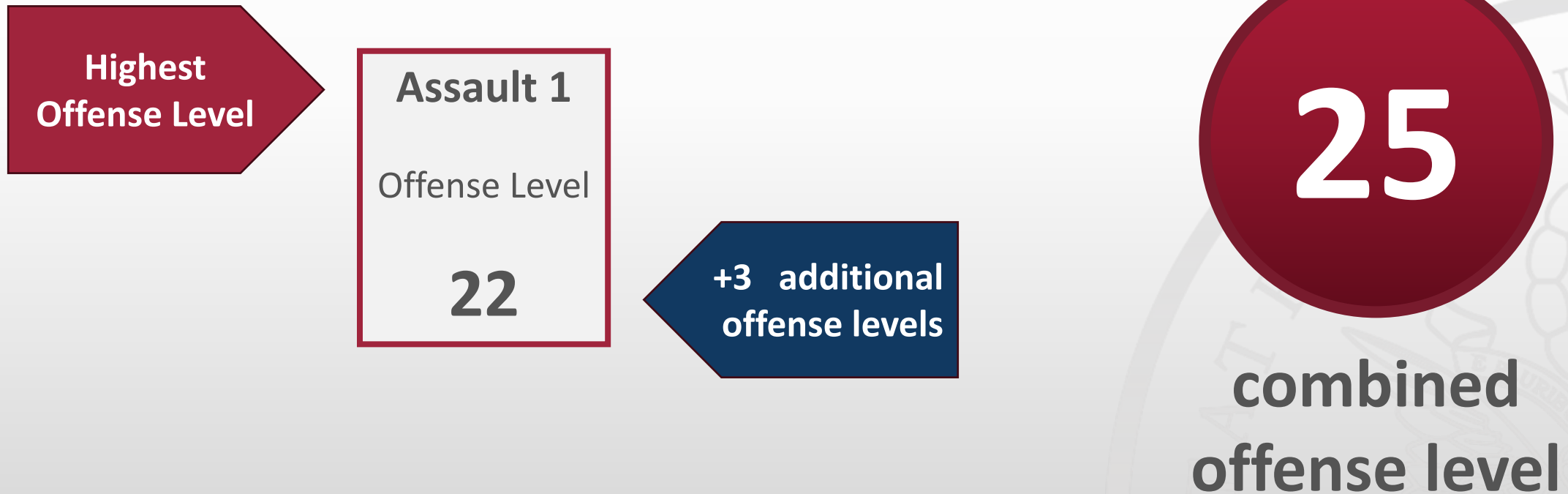
2 1/2

Three Additional
Offense Levels

Number of Units	Increase in Offense Level
1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
more than 5	Add 5 levels

Additional Offense Levels (§3D1.4)

Total of **2 1/2** units = 3 additional offense levels



Scenario 10

The defendant is convicted of 5 counts of bank robbery (**§2B3.1**) and one count of burglary from a residence (**§2B2.1**).

Assume the following guidelines calculation:

Robbery 1	Robbery 2	Robbery 3	Robbery 4	Robbery 5	Burglary
BOL: 20 (b)(1): 2 (b)(2): 2	BOL: 20 (b)(1): 2 (b)(2): 2	BOL: 20 (b)(1): 2 (b)(2): 0	BOL: 20 (b)(1): 2 (b)(2): 5	BOL: 20 (b)(1): 2 (b)(2): 7	BOL: 12 (b)(1): 0 (b)(2): 2
24	24	22	27	29	14

Scenario 10

Robbery 1	Robbery 2	Robbery 3	Robbery 4	Robbery 5	Burglary
Offense Level	Offense Level	Offense Level	Offense Level	Offense Level	Offense Level
24	24	22	27	29	14

What is the combined offense level under §3D1.4?

- A. 29
- B. 31
- C. 33
- D. 34

Assignment of Units (§3D1.4)

Robbery 5	Robbery 4	Robbery 1	Robbery 2	Robbery 3	Burglary
Offense Level	Offense Level	Offense Level	Offense Level	Offense Level	Offense Level
29	27	24	24	22	14

Assignment of Units (§3D1.4)

Comparison of Offense Levels	Number of Units to Assign
Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

Assignment of Units (§3D1.4)

Robbery 5 Offense Level 29	Robbery 4 Offense Level 27	Robbery 1 Offense Level 24	Robbery 2 Offense Level 24	Robbery 3 Offense Level 22	Burglary Offense Level 14
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1 unit

1 unit

1/2 unit

1/2 unit

1/2 unit

0 units

Total Units:

3 1/2

Assignment of Units (§3D1.4)

Total Units

3 1/2

Four Additional
Offense Levels

Number of Units	Increase in Offense Level
1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
more than 5	Add 5 levels

Additional Offense Levels (§3D1.4)

Total of **3 1/2** units = 4 additional offense levels

Highest
Offense Level

Robbery 5

BOL: 20
(b)(1): 2
(b)(2): 7

29

+ 4 additional
offense levels

33

combined
offense level

Summary of Basic Rules

Grouping is a process of elimination:

1. Start with the grouping rules at §3D1.2.
2. Then, if necessary, move to the assignment of units at §3D1.4.
3. In every multiple counts case, the court **MUST** determine **ONE** offense level representative of all the counts of conviction.

Special Rules

1. Some statutes are excluded from the rules for multiple counts, *e.g.*, § 924(c), § 1028A.
2. Some Guidelines have specific rules for multiple counts, *e.g.*, §2J1.2, §2S1.1.

Scenario 11

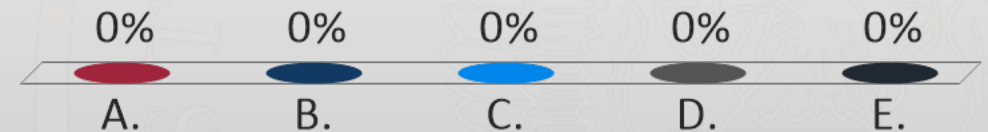
The defendant pled guilty to:

- Count 1: **distribution of methamphetamine (§2D1.1)**
- Count 2: **felon in possession (§2K2.1)**
- Count 3: **money laundering (§2S1.1)**

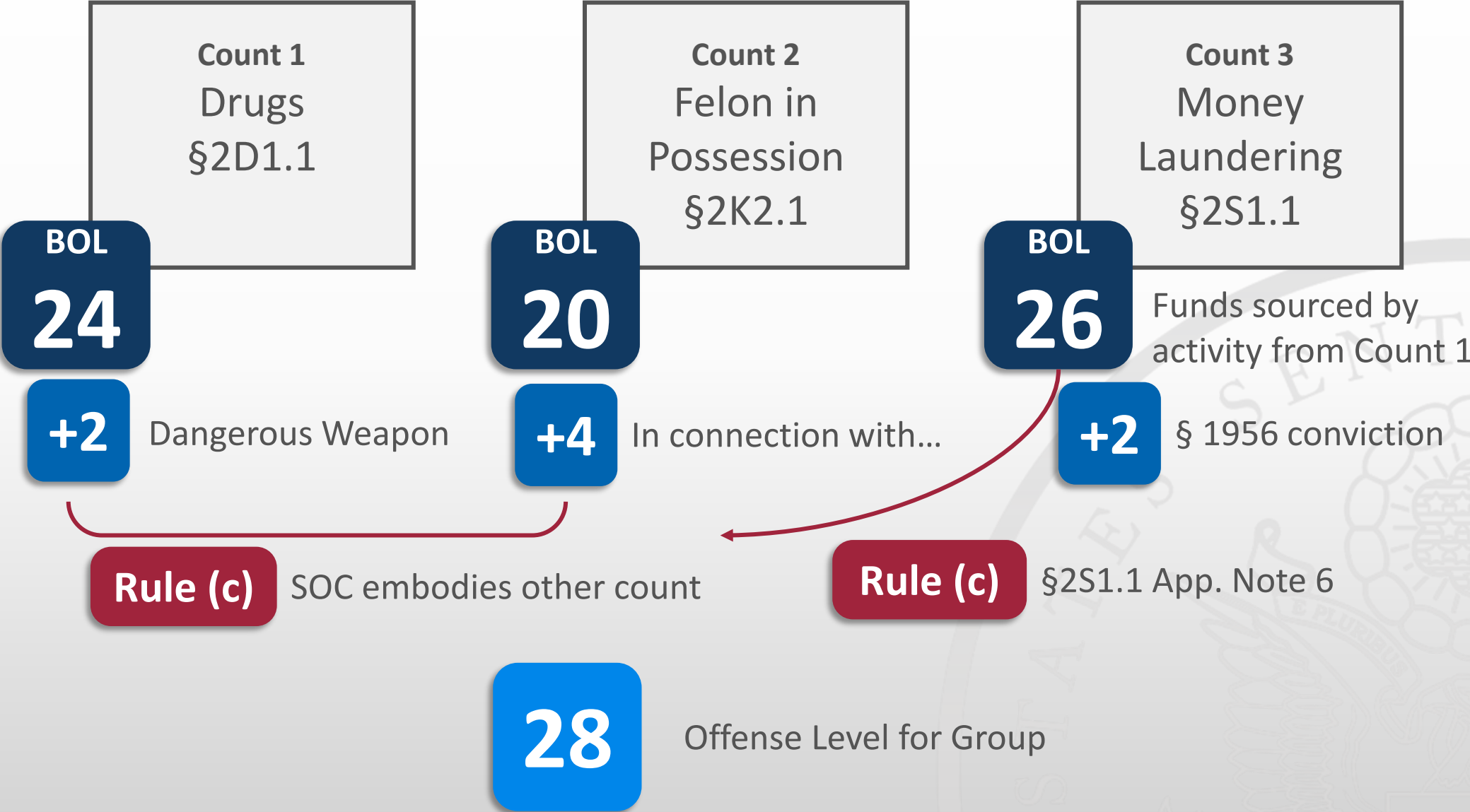
The money laundering count involves the laundering of drug proceeds.

These counts . . .

- A. Group under (a)
- B. Group under (b)
- ✓ C. Group under (c)
- D. Group under (d)
- E. Do not group



Multiple Counts Scenario

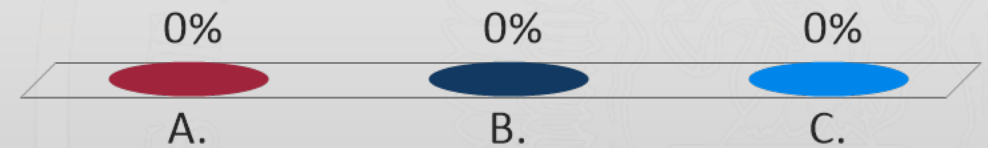


Scenario 11A

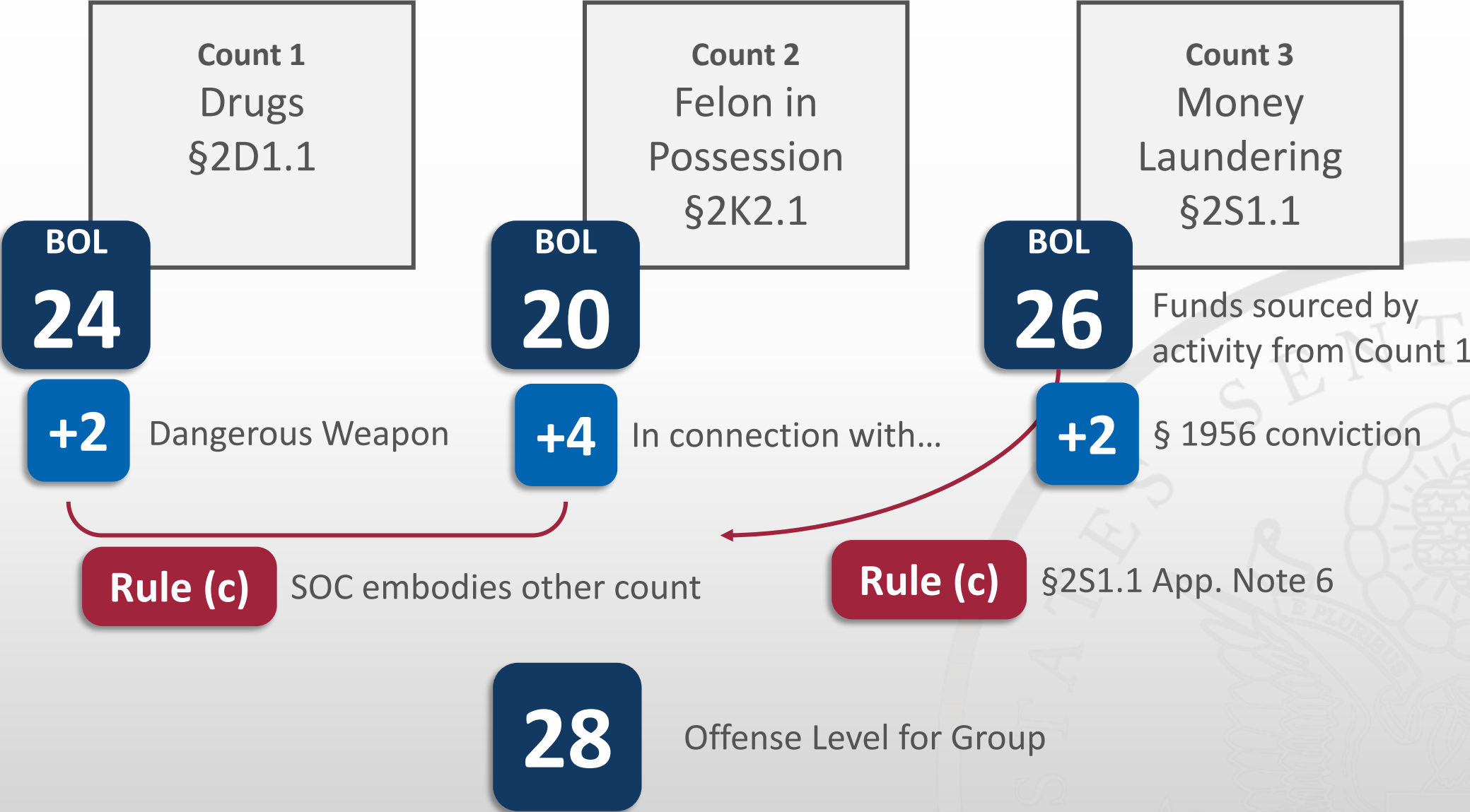
What if the defendant is also convicted of 18 U.S.C. § 924(c)
(possession of a firearm in furtherance of a drug trafficking offense)

The § 924(c) count . . .

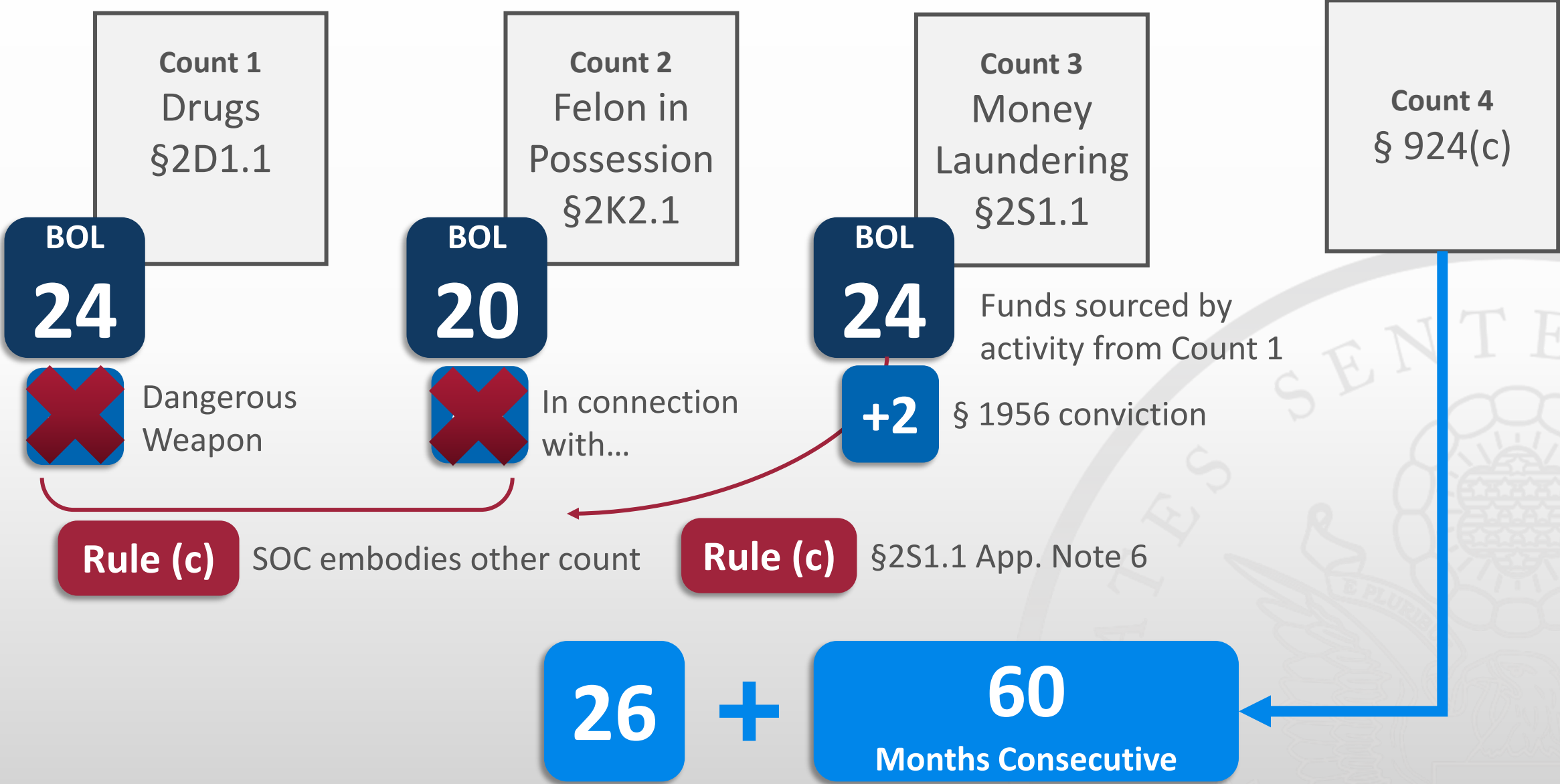
- A. Groups with the other offenses
- B. Prevents the other offenses from grouping with one another
- ✓ C. Does not group with the other offenses and does not prevent the other offenses from grouping with each other



Multiple Counts Scenario



Multiple Counts Scenario



Scenario 12

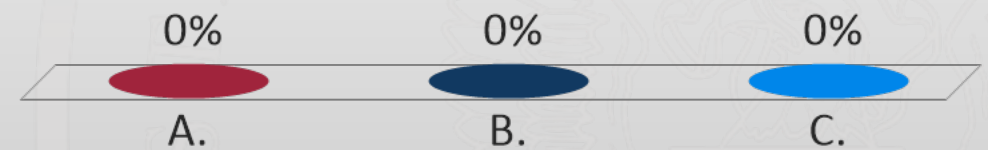
The defendant pled guilty to:

- Count 1: **production of child pornography Victim A (§2G2.1)**
- Count 2: **production of child pornography Victim B (§2G2.1)**
- Count 3: **receipt of child pornography (§2G2.2)**
- Count 4: **possession of child pornography (§2G2.2)**

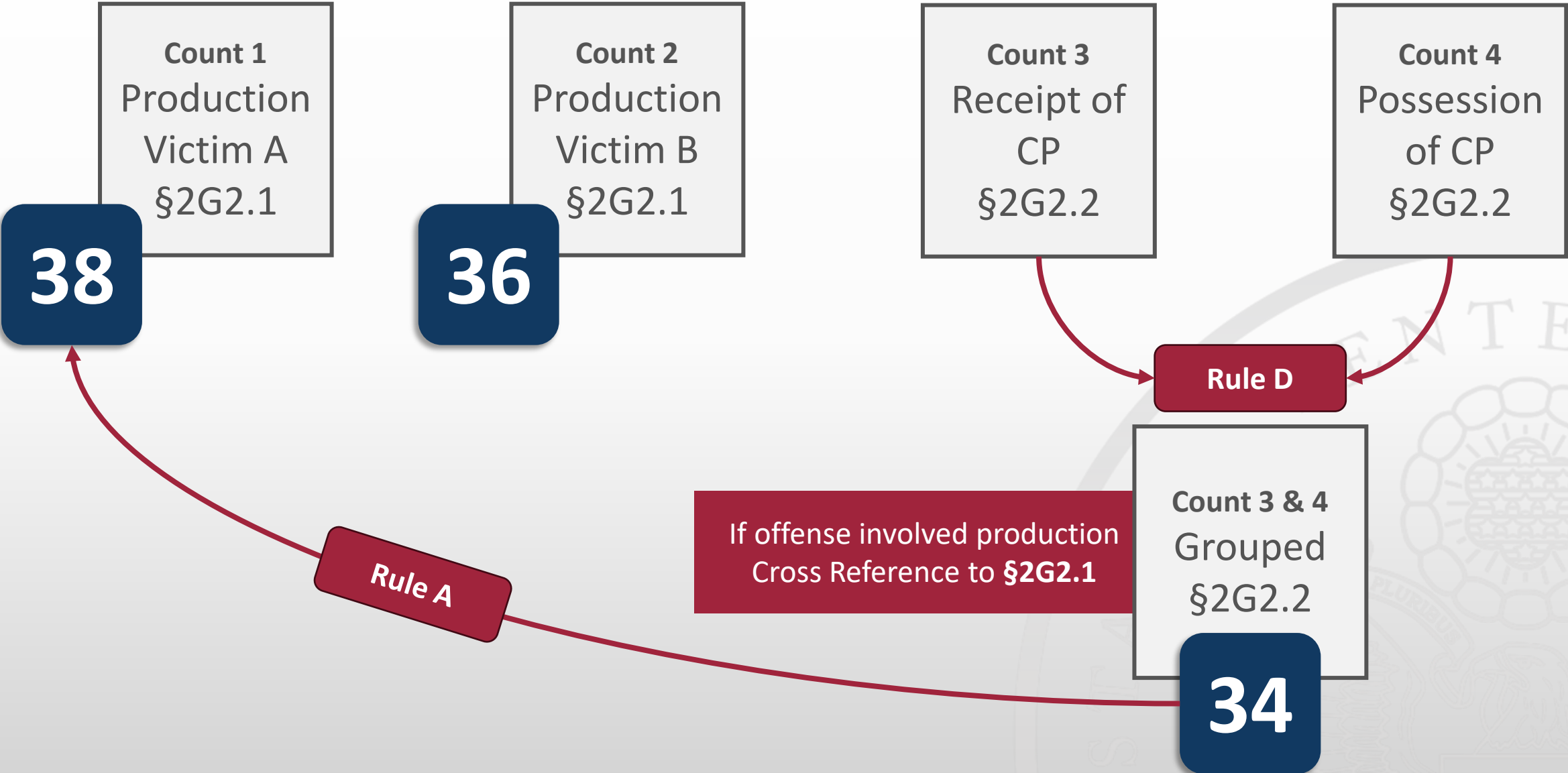
The produced images of Victims A and B are included in the possessed images in Count 4.

These counts . . .

- A. Group together
- B. Don't group – units are assigned
- ✓ C. Group together and units are assigned



Multiple Counts Scenario



Multiple Counts Scenario

Counts 1, 3 & 4
Grouped
§2G2.1

38

1
Unit

Count 2
Production
Victim B
§2G2.1

36

1
Unit



40

Final Offense Level

Units must be assigned

Assignment of Units

Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

Total Units

Additional Levels

1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
5+	Add 5 levels

Grouping Pointers

Chapter 3, Part D

Decision Tree

Use it! Every time!

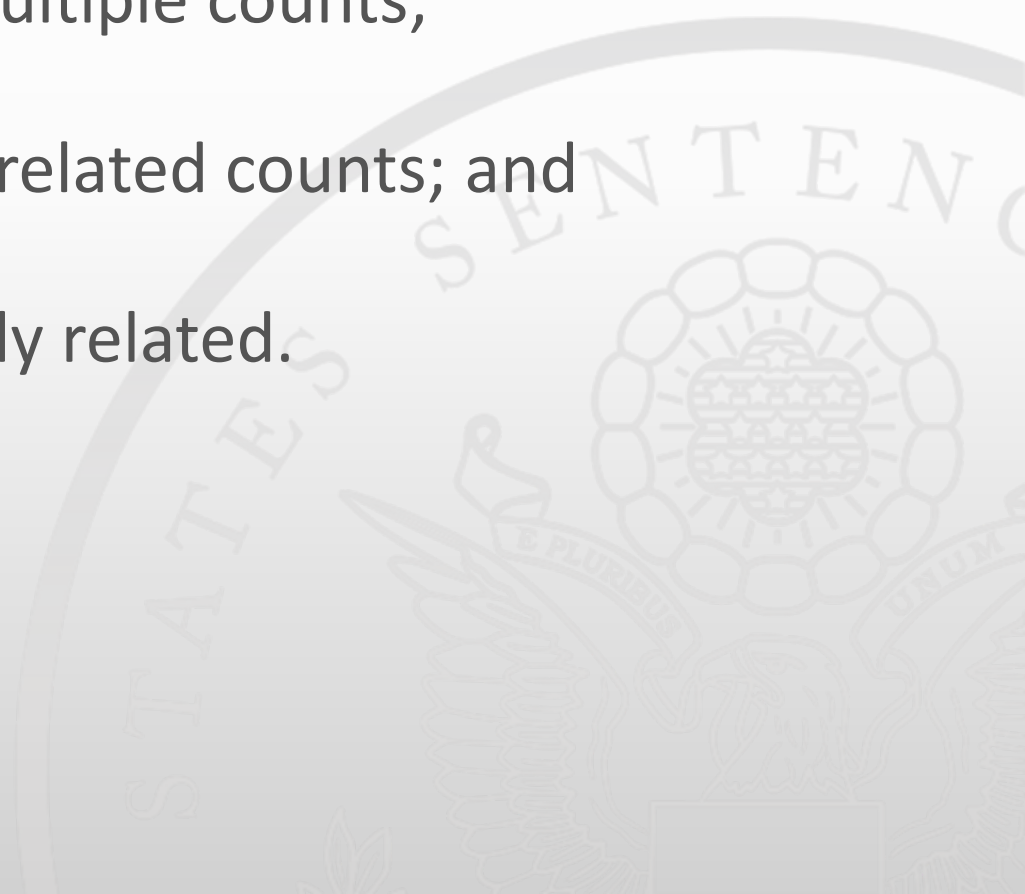
Learning Outcomes

You should now be able to:

Describe the rationale for the rules for multiple counts;

Utilize the decision tree to group closely related counts; and

Assign units for counts that are not closely related.



Questions or Comments



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