CHAPTER THREE - ADJUSTMENTS

PART A - VICTIM-RELATED ADJUSTMENTS

1. VICTIM-RELATED ADJUSTMENTS

Introductory Commentary

The following adjustments are included in this Part because they may apply to a wide variety of offenses. They are to be treated as specific offense characteristics.

Historical Note: Effective November 1, 1987.

§3A1.1. Vulnerable Victim

If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

Commentary

Application Notes:

1. *This adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile.*

2. *Do not apply this adjustment if the offense guideline specifically incorporates this factor.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 245).

§3A1.2. Official Victim

If--

(a) the victim was a law enforcement or corrections officer; a former law enforcement or corrections officer; an officer or employee included in 18 U.S.C. § 1114; a former officer or employee included in 18 U.S.C. § 1114; or a member of the immediate family of any of the above, and the offense of conviction was motivated by such status; or

(b) during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement or corrections

officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury,

increase by 3 levels.

Commentary

Application Notes:

1. *This guideline applies when specified individuals are victims of the offense. This guideline does not apply when the only victim is an organization, agency, or the government.*

2. *Certain high-level officials, e.g., the President and Vice President, are not expressly covered by this section. The court should make an upward departure of at least three levels in those unusual cases in which such persons are victims.*

3. *Do not apply this adjustment if the offense guideline specifically incorporates this factor. In most cases, the offenses to which subdivision (a) will apply will be from Chapter Two, Part A (Offenses Against the Person). The only offense guideline in Chapter Two, Part A, that specifically incorporates this factor is §2A2.4 (Obstructing or Impeding Officers).*

4. *"Motivated by such status" in subdivision (a) means that the offense of conviction was motivated by the fact that the victim was a law enforcement or corrections officer or other person covered under 18 U.S.C. § 1114, or a member of the immediate family thereof. This adjustment would not apply, for example, where both the defendant and victim were employed by the same government agency and the offense was motivated by a personal dispute.*

5. *Subdivision (b) applies in circumstances tantamount to aggravated assault against a law enforcement or corrections officer, committed in the course of, or in immediate flight following, another offense, such as bank robbery. While this subdivision may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against law enforcement or corrections officers that is sufficiently serious to create at least a "substantial risk of serious bodily injury" and that is proximate in time to the commission of the offense.*

6. *The phrase "substantial risk of serious bodily injury" in subdivision (b) is a threshold level of harm that includes any more serious injury that was risked, as well as actual serious bodily injury (or more serious harm) if it occurs.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 44); November 1, 1989 (see Appendix C, amendments 246-248).

§3A1.3. Restraint of Victim

If a victim was physically restrained in the course of the offense, increase by 2 levels.

Commentary

Application Notes:

1. *"Physically restrained" is defined in the Commentary to §1B1.1 (Application Instructions).*

2. *This adjustment applies to any offense in which a victim was physically restrained in the course of the offense, except where such restraint is an element of the offense, specifically incorporated into the base offense level, or listed as a specific offense characteristic.*

3. *If the restraint was sufficiently egregious, an upward departure may be warranted. See §5K2.4 (Abduction or Unlawful Restraint).*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 249 and 250).

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PART B - ROLE IN THE OFFENSE

Introductory Commentary

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.

Historical Note: Effective November 1, 1987.

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. *A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted.*

2. *In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.*

3. *In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.*

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise

a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1(c).

Historical Note: Effective November 1, 1987.

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

Commentary

Application Notes:

1. *Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.*

2. *It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.*

3. *For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal.*

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.

Historical Note: Effective November 1, 1987.

§3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed in addition to that provided for in §3B1.1, nor may it be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

Commentary

Application Notes:

1. *The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller.*

2. *"Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.*

Background: This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. Such persons generally are viewed as more culpable.

Historical Note: Effective November 1, 1987.

§3B1.4. In any other case, no adjustment is made for role in the offense.

Commentary

Many offenses are committed by a single individual or by individuals of roughly equal culpability so that none of them will receive an adjustment under this Part. In addition, some participants in a criminal organization may receive increases under §3B1.1 (Aggravating Role) while others receive decreases under §3B1.2 (Mitigating Role) and still other participants receive no adjustment.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 303).

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PART C - OBSTRUCTION

§3C1.1. Willfully Obstructing or Impeding Proceedings

If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

Commentary

This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in respect to the instant offense.

Application Notes:

1. *The following conduct, while not exclusive, may provide a basis for applying this adjustment:*

   (a) *destroying or concealing material evidence, or attempting to do so;*

   (b) *directing or procuring another person to destroy or conceal material evidence, or attempting to do so;*

   (c) *testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding;*

   (d) *threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly;*

   (e) *furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court.*

2. *In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant.*

3. *This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision.*

4. *Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury), §2J1.8 (Bribery of Witness), or §2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the*

offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 251 and 252).

PART D - MULTIPLE COUNTS

Introductory Commentary

This Part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. The single, "combined" offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

The rules in this Part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional offenses increases.

Some offenses that may be charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range. For example, embezzling money from a bank and falsifying the related records, although legally distinct offenses, represent essentially the same type of wrongful conduct with the same ultimate harm, so that it would be more appropriate to treat them as a single offense for purposes of sentencing. Other offenses, such as an assault causing bodily injury to a teller during a bank robbery, are so closely related to the more serious offense that it would be appropriate to treat them as part of the more serious offense, leaving the sentence enhancement to result from application of a specific offense characteristic.

In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this Part provides rules for grouping offenses together. Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.

Some offense guidelines, such as those for theft, fraud and drug offenses, contain provisions that deal with repetitive or ongoing behavior. Other guidelines, such as those for assault and robbery, are oriented more toward single episodes of criminal behavior. Accordingly, different rules are required for dealing with multiple-count convictions involving these two different general classes of offenses. More complex cases involving different types of offenses may require application of one rule to some of the counts and another rule to other counts.

Some offenses, e.g., racketeering and conspiracy, may be "composite" in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this Part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses.

Essentially, the rules in this Part can be summarized as follows: (1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (e.g., theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct (e.g., many environmental offenses), add the numerical quantities and apply the pertinent offense guideline, including any specific offense characteristics for the conduct taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the most serious offense in that group. (3) As to other offenses (e.g., independent instances of assault or robbery), start with

the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 121).

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

When a defendant has been convicted of more than one count, the court shall:

(a) Group the counts resulting in conviction into distinct Groups of Closely-Related Counts ("Groups") by applying the rules specified in §3D1.2.

(b) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.

(c) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.

Commentary

Application Note:

1. *Certain offenses, e.g., 18 U.S.C. § 924(c) (use of a deadly or dangerous weapon in relation to a crime of violence or drug trafficking) by law carry mandatory consecutive sentences. Such offenses are exempted from the operation of these rules. See §3D1.2.*

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter 3, Part E (Acceptance of Responsibility) and Chapter 4, Part B (Career Offenders and Criminal Livelihood) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentence) discusses how to determine the sentence from the (combined) offense level; §5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentence) to the "offense level" should be treated as referring to the combined offense level after all subsequent adjustments have been made.

Historical Note: Effective November 1, 1987.

§3D1.2. Groups of Closely-Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. A count for which the statute mandates imposition of a consecutive sentence is excluded from such Groups for purposes of §§3D1.2-3D1.5. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan, including, but not limited to:

(1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. § 994(l)(2).

(2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. § 3584(a).

(3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. § 994(v).

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) Counts are grouped together if the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are specifically included under this subsection:

§§2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B5.2, 2B5.3, 2B5.4, 2B6.1;
§§2C1.1, 2C1.2;
§§2D1.1, 2D1.2, 2D1.5;
§§2E4.1, 2E5.1, 2E5.2, 2E5.4, 2E5.6;
§§2F1.1, 2F1.2;
§2N3.1;
§2R1.1;
§§2S1.1, 2S1.2, 2S1.3;
§§2T1.1, 2T1.2, 2T1.3, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1, 2T3.2.

Specifically excluded from the operation of this subsection are:

all offenses in Part A;
§§2B2.1, 2B2.2, 2B2.3; 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E1.5, 2E2.1;
§§2G1.1, 2G1.2, 2G2.1;
§§2H1.1, 2H1.2, 2H1.3, 2H1.4, 2H2.1, 2H4.1;
§§2L1.1, 2L2.1, 2L2.2, 2L2.3, 2L2.4, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.6, 2M3.7, 2M3.8, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

Commentary

Application Notes:

1. *Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions under such counts are excluded from the determination of the combined offense level. Convictions for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provide a common example. Note that such a conviction usually does affect the offense level for other counts, however, in that in the event of such a conviction the specific offense characteristic for weapon use in the primary offense is to be disregarded. See Commentary to §2K2.4. Example: The defendant is convicted of one count of bank robbery in which he took $5,000 and discharged a weapon causing permanent bodily injury (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together, but the offense level for the bank robbery count is 28 (18 + 4 + 6) rather than 31. The mandatory five year sentence on the weapon-use count runs consecutively, as required by law.*

2. *The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, i.e. to identify and group "counts involving substantially the same harm." Thus, for so-called "victimless" crimes (crimes in which society at large is the victim), the grouping decision must be based primarily upon the nature of the interest invaded by each offense.*

3. *Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.*

   Examples: (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. (5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be grouped together. But: (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts are not to be grouped together. (7) The defendant is convicted of two counts, each for unlawfully bringing one alien into the United States, but on different occasions. The counts are not to be grouped together.

4. *Subsection (b) states the principle that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times.*

Examples: (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole. The counts are to be grouped together. But: (4) The defendant is convicted of two counts of rape for raping the same person on different days. The counts are not to be grouped together.

5. *Subsection (c) provides that when conduct that represents a separate count, e.g., bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).*

A cross-reference to another offense guideline does not constitute "a specific offense characteristic . . . or other adjustment" within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross-reference to the guideline for accessory after the fact for the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross-reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. *Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. "The same general type of offense" is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).*

Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. But: (9) The defendant is convicted of three counts of bank robbery. The counts are not to be grouped together, nor are the amounts of money involved to be added.

7. *A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.*

8. *Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.*

9. *A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. See §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. Example: The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.*

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts ("Group"). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of "victimless" crimes) are grouped together only as provided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this Part and resolving ambiguities, the court should look to the underlying policy of this Part as stated in the Introductory Commentary.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 45); November 1, 1989 (see Appendix C, amendments 121, 253-256, and 303).

§3D1.3. Offense Level Applicable to Each Group of Closely-Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to §3D1.2(a) - (c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply (e.g., theft and fraud), apply the offense guideline that produces the highest offense level.

Commentary

Application Notes:

1. *The "offense level" for a count refers to the offense level from Chapter Two after all adjustments from Parts A, B, and C of Chapter Three.*

2. *When counts are grouped pursuant to §3D1.2(a)-(c), the highest offense level of the counts in the group is used. Ordinarily, it is necessary to determine the offense level for each of the counts in a Group in order to ensure that the highest is correctly identified. Sometimes, it will be clear that one count in the Group cannot have a higher offense level than another, as with*

a count for an attempt or conspiracy to commit the completed offense. The formal determination of the offense level for such a count may be unnecessary.

3. *When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines (e.g., theft and fraud), use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome. In addition, the adjustment for "more than minimal planning" frequently will apply to multiple count convictions for property offenses.*

4. *Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under §3D1.2. The aggravated assault will increase the guideline range for the rape. The robbery, however, will not. This is because the offense guideline for rape (§2A3.1) includes the most common aggravating factors, including injury, that data showed to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However, an exceptionally large property loss in the course of the rape would provide grounds for a sentence above the guideline range. See §5K2.5 (Property Damage or Loss).*

Background: This section provides rules for determining the offense level associated with each Group of Closely-Related Counts. Summary examples of the application of these rules are provided at the end of the Commentary to this Part.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 257 and 303).

§3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

Number of Units	Increase in Offense Level
1	none
1 1/2	add **1** level
2	add **2** levels
3	add **3** levels
4 or 5	add **4** levels
More than 5	add **5** levels

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.

(b) Count as one-half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

(d) Except when the total number of Units is 1 1/2, round up to the next largest whole number.

Commentary

Application Notes:

1. *Application of the rules in §§ 3D1.2 and 3D1.3 may produce a single Group of Closely Related Counts. In such cases, the combined offense level is the level corresponding to the Group determined in accordance with §3D1.3.*

2. *The procedure for calculating the combined offense level when there is more than one Group of Closely Related Counts is as follows: First, identify the offense level applicable to the most serious Group; assign it one Unit. Next, determine the number of Units that the remaining Groups represent. Finally, increase the offense level for the most serious Group by the number of levels indicated in the table corresponding to the total number of Units.*

Background: When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. When this approach produces a fraction in the total Units, other than 1 1/2, it is rounded up to the nearest whole number. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this Part could result in an excessive increase in the sentence

range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.

Historical Note: Effective November 1, 1987.

§3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

Commentary

This section refers the court to Chapter Five (Determining the Sentence) in order to determine the total punishment to be imposed based upon the combined offense level. The combined offense level is subject to adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, Part B (Career Offenders and Criminal Livelihood).

Historical Note: Effective November 1, 1987.

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Illustrations of the Operation of the Multiple-Count Rules

The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step-by-step approach is recommended until the user is thoroughly familiar with the guidelines.

1. *Defendant A was convicted on four counts, each charging robbery of a different bank. Each would represent a distinct Group. §3D1.2. In each of the first three robberies, the offense level was 22 (18 plus a 4-level increase because a financial institution was robbed) (§2B3.1(b)). In the fourth robbery $12,000 was taken and a gun was discharged; the offense level was therefore 28. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half unit for purposes of §3D1.4. Altogether there are 2 1/2 Units (rounded up to 3), and the offense level for the most serious (28) is therefore increased by 3 levels under the table. The combined offense level is 31.*

2. *Defendant B was convicted on the following seven counts: (1) theft of a $2,000 check; (2) uttering the same $2,000 check; (3) possession of a stolen $1,200 check; (4) forgery of a $600 check; (5) possession of a stolen $1,000 check; (6) forgery of the same $1,000 check; (7) uttering the same $1,000 check. Counts 1, 3 and 5 involve offenses under Part B (Theft), while Counts 2, 4, 6 and 7 involve offenses under Part F (Fraud and Deceit). For purposes of §3D1.2(d), fraud and theft are treated as offenses of the same kind, and therefore all counts are grouped into a single Group, for which the offense level depends on the aggregate harm. The total value of the checks is $4,800. The fraud guideline is applied, because it produces an offense level that is as high as or higher than the theft guideline. The base offense level is 6,*

and there is an aggravator of 1 level for property value. However, because the conduct involved repeated acts with some planning, the offense level is raised to 8 (§2F1.1(b)(2)(B)). The combined offense level therefore is 8.

3. *Defendant C was convicted on four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of seventy-five grams of heroin; 4) offering a DEA agent $20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to heroin equivalents. The first count translates into forty-six grams of heroin; the second count translates into thirty grams of heroin. The total is 151 grams of heroin. Under §2D1.1, the combined offense level for the drug offenses is 26. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 28 under §3C1.1 (Obstruction). Because the conduct constituting the bribery offense is accounted for by §3C1.1, it becomes part of the same Group as the drug offenses pursuant to §3D1.2(c). The combined offense level is 28 pursuant to §3D1.3(a), because the offense level for bribery (22) is less than the offense level for the drug offenses (28).*

4. *Defendant D was convicted of four counts arising out of a scheme pursuant to which he received kickbacks from subcontractors. The counts were as follows: (1) The defendant received $27,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received $12,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received $15,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received $20,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by §2F1.1 (Fraud and Deceit). The bribery counts are covered by §2B4.1 (Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is $74,000, which results in an offense level of 14 under either §2B4.1 or §2F1.1. Since these two guidelines produce identical offense levels, the combined offense level is 14.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 303).

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PART E - ACCEPTANCE OF RESPONSIBILITY

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by **2** levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

Commentary

Application Notes:

1. *In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:*

   (a) voluntary termination or withdrawal from criminal conduct or associations;

   (b) voluntary payment of restitution prior to adjudication of guilt;

   (c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;

   (d) voluntary surrender to authorities promptly after commission of the offense;

   (e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

   (f) voluntary resignation from the office or position held during the commission of the offense; and

   (g) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. *Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).*

3. *A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section.*

4. *Conduct resulting in an enhancement under §3C1.1 (Willfully Obstructing or Impeding Proceedings) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.*

5. *The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation.*

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse.

The availability of a reduction under §3E1.1 is not controlled by whether the conviction was by trial or plea of guilty. Although a guilty plea may show some evidence of acceptance of responsibility, it does not automatically entitle the defendant to a sentencing adjustment.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 46); November 1, 1989 (see Appendix C, amendment 258).