UNITED STATES SENTENCING COMMISSION

Staff Discussion Paper

Multiple Counts

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

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Introduction

The offense level comprises the vertical axis of the sentencing guideline grid and, in concert with the criminal history category, determines the guideline range. Chapter Two of the Guidelines Manual provides instructions for calculating the offense level for each count of which a defendant is convicted. Chapter Three, Part D provides rules for determining a single combined offense level when a defendant has been convicted of multiple counts.

The Commission created the multiple count rules upon recognizing two important things. First, the Commission acknowledged that an offender who commits five offenses, for example, deserves more punishment than if he commits one, but not necessarily five times the otherwise applicable penalty.[1] Consequently, the guidelines had to provide a mechanism for calculating incremental increases in punishment for multiple offenses.[2] Second, if the guidelines based punishment on the number of offenses of which an offender was convicted, the Commission realized that formal charging decisions could have a tremendous impact on the resulting sentence.[3] Consequently, the Commission had to create guidelines to limit the significance of formal charging decisions to ensure that similar defendants who engage in similar offense behavior will receive similar sentences. With these two policy concerns in mind, the Commission created Chapter Three, Part D. This section provides general rules for aggravating punishment in light of multiple harms charged in separate counts. The rules are written to minimize the possibility that an arbitrary casting of a criminal act into several counts inappropriately will produce a longer sentence.

This report provides a brief review of the content and application of these multiple count rules. Part I describes the rules, focusing on their structure and the intended results. Part II focuses on the application of the rules. Specifically, through a review of application issues and judicial interpretation, this part discusses how well Chapter Three, Part D achieves its intended purposes. Finally, Part III recommends areas in which the working group feels the multiple count rules might be amended to improve their operation.

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[1] *See* United States Sentencing Commission, Guidelines Manual, Ch.1, Part A(4)(e).

[2] Congress directed the Commission to insure that the guidelines reflect the appropriateness of an incremental penalty in light of certain multiple offenses. *See* 28 U.S.C. §994(l).

[3] *See* USSG Ch.3, Pt.D, intro. comment.

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I. Structure of the Multiple Count Rules

In a modified real offense sentencing context, the structure of the formal charges is of less import than the actual conduct the defendant engaged in and the harms caused by this conduct. A single act may simultaneously violate several different statutes, each of which is sentenced under a different offense guideline. Moreover, an offense may be composed of multiple acts, each of which could be prosecuted separately. In addition, a number of Chapter Two offense guidelines, such as those for theft, fraud, and drug offenses, contain provisions addressing ongoing or repetitive conduct and cumulative harm regardless of whether the separate acts or individual harms are the subject of separate counts. Other guidelines, such as those for assault or robbery, are oriented more toward single episodes of criminal behavior based on the notion that each such offense deserves individual consideration. Rules are required to address these various classes of cases.

Grouping Closely Related Counts

As an initial policy matter, the Commission decided that closely related counts should be grouped together. Section 3D1.2 describes the categories of closely related counts. It provides that "[a]ll counts involving substantially the same harm shall be grouped together into a single group." The combined offense level for all of the counts would be the offense level applicable to the most serious count of conviction. Because, in the Commission's view, the separate counts do not really represent significant additional harm, the rules do not provide incremental punishment for additional criminal charges.

(a) Section 3D1.2(a)

Counts that are simply different ways of charging the same conduct are grouped together.[4] A scheme to acquire $10,000 by fraud may simultaneously be charged as a false statement offense, mail fraud, or wire fraud. It may also be charged as a violation of statutes or regulations governing the particular area involved, such as bank fraud, securities fraud, or Medicaid fraud. Under subsection (a), all charges describing the same conduct are grouped together.

(b) Section 3D1.2(b)

[4] USSG §3D1.2(a).

Counts that address separately actionable steps of what is essentially one composite harm are grouped together.[5] If, for example, a defendant conspires or attempts to commit a bank robbery and then carries out the robbery that was the subject of the conspiracy or attempt, both the conspiracy and the robbery are completed offenses that have different elements, and a prosecutor could legally charge both crimes. If the substantive offense and the attempt or conspiracy were each charged separately, §3D1.2(b) provides that the counts are to be grouped.

(c) Section 3D1.2(c)

Counts embodying conduct that is addressed as a specific offense characteristic or other adjustment to a guideline applicable to another count are grouped together.[6] If a defendant is convicted of a substantive offense and convicted of obstructing justice during the investigation or prosecution of that offense, the counts are grouped under §3D1.2(c). With or without a separate substantive count for the obstruction, obstruction of justice is an adjustment to the underlying offense.[7] If there is a separate count for the obstruction, it should be grouped with the underlying offense under §3D1.2(c).

(d) Section 3D1.2(d)

The final category of closely related counts contains counts for offenses covered by guidelines in which the offense level is determined largely on the basis of some aggregate measure of harm and counts for offenses where the conduct is ongoing or continuous in nature if the applicable guideline is written to cover such conduct.[8] If the offense of conviction is fraud, for example, the fraud guideline provides increases for the total amount of loss involved in the defendant's fraud scheme.[9] If the defendant defrauded several victims out of $500,000 in one ongoing scheme, but is convicted of a single count for defrauding one victim out of $10,000, the total loss figure is used to determine the offense level for that single count under §1B1.3

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[5] USSG §3D1.2(b).

[6] USSG §3D1.2(c).

[7] *See* USSG §3C1.1.

[8] USSG §3D1.2(d).

[9] USSG §2F1.1(b)(1). Pursuant to §1B1.3(a)(2), all fraud losses to all victims that occurred during "the same course of conduct or common scheme or plan as the offense of conviction" are taken into account in setting the offense level for the fraud offense that is the subject of the count of conviction.

(Relevant Conduct). If that same defendant instead is convicted of a separate count for each fraud victim, the offense level for each count would be computed in the same manner (*i.e.*, based on the total amount of loss), and all of the counts would be grouped together under §3D1.2(d).

Incremental Punishment for Other Counts

In each of the four categories of cases described above, the combined offense level for the group of counts is the highest offense level of the counts in the group. There is no provision for an incremental increase in offense level in the multiple count rules because all harm has either been considered or is believed to be insignificant. It is presumed, in typical cases, that the court's discretion to choose a sentence within the guideline range provides latitude to address incremental punishment for any harms not adequately captured. When the counts cannot be grouped together as closely related under the provisions of §§3D1.2(a)-(d), §3D1.4 provides a formula for determining a combined offense level that includes incremental increases. Basically, §3D1.4 assigns units to the counts (or groups of counts) remaining after application of §3D1.2. The count or group of counts with the highest offense level is assigned one unit.[10] Each count or group of counts that is equally serious or is one to four offense levels less serious also is assigned one unit.[11] Each count or group of counts that is from five to eight levels less serious than the most serious count or group of counts is assigned one-half unit.[12] All other counts are disregarded.[13]

The total number of units applicable to the counts or groups of counts determines the number of offense levels the court must add to the most serious count to result in a combined offense level that incorporates an incremental increase for additional harm. Consider the example of a defendant convicted of two counts, each with an offense level of 20. Under §3D1.4(a), each count is assigned one unit. With a total of two units, the court is instructed to add two levels to the count resulting in the highest offense level to determine the combined offense level. In this example, the combined offense level would be 22. The application of this rule in this case

[10] USSG §3D1.4(a).

[11] *Id*.

[12] USSG §3D1.4(b).

[13] USSG §3D1.4(c).

increases the sentencing range from 33-41 months, applicable to each count, to a combined range of 41-51 months for both counts.[14]

II. Application of the Multiple Count Rules

The multiple count rules are intended to provide incremental punishment for additional harms described in separate counts, and should limit the effect of individual charging decisions on final sentences. In assessing how well the grouping rules, as currently structured, accomplish these goals, the working group examined the comments and questions the Commission has received on multiple count issues, and case law interpreting or applying the multiple count rules. This Part outlines the categories of issues and concerns raised that the working group believes merit further discussion.

Issues Raised in Comments and Queries to the Commission

The Commission logged a total of 97 hotline calls with comment or queries regarding application of the Chapter Three, Part D guidelines during the last year.[15] A number of questions indicated a lack of familiarity with the grouping rules. Hotline Staff addressed these queries by outlining the proper procedures; these questions do not merit further discussion in this venue. Other questions revolved around anomalous cases that would, in any event, best be handled by departure. These issues are likewise not addressed in this report. Basically, this section outlines issues affecting how well the multiple count rules achieve their desired goals.

(a) Clarification of "Substantially the Same Harm"

A number of hotline questions involved the meaning of "substantially the same harm." Section 3D1.2 provides, by definition, that if any of §§3D1.2(a) - (d) apply, the counts involve "substantially the same harm" and should be grouped. However, a number of questions indicate the misapprehension that counts must involve substantially the same harm *in addition to* meeting

[14] This example assumes the defendant is in criminal history category I. The incremental increase is proportionate across all criminal history categories.

[15] Source: USSC TAS and ATTY Hotline databases. This figure is the sum of 75 calls logged in the TAS database and 22 calls logged in the ATTY database.

the requirements of the various subsections.[16] Moreover, a number of people apparently believe that §3D1.2, comment. (n.4), provided to explain subsection (b), imposes an additional requirement. The note explains that counts are to be grouped under subsection (b) if they are "part of a single course of conduct with a single criminal objective and *represent essentially one composite harm to the same victim*."[17] Callers have questioned whether counts involving the same victim, multiple acts, and a common scheme or plan or common criminal objective, satisfying §3D1.2(b), should nevertheless not be grouped if they represent separate harms.[18]

(b) Use of "Same Victim" to Define Closely Related Counts

Sections 3D1.2(a) and (b) require the counts to involve the same victim before they can be considered closely related. The victim of an offense may be either an identifiable person, society at large, or a particular societal interest. A number of questions indicate that the "same victim" requirement may not be the best mechanism for determining whether counts should be grouped. The questions and comments relating to "victim" in the grouping context can be divided into roughly two general issues. The first issue is how to identify the victim of a particular offense. For example, who is the victim in a case involving the receipt and possession of child pornography? Is it the child whose picture is being viewed, or is it society at large since this defendant had no contact with the child? If the child is the victim, are separate counts relating to

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[16] *See, e.g.*, United States v. Kunzman, 54 F.3d 1522, 1530-31 (10th Cir. 1995)(prohibiting grouping of fraud with money laundering upon finding the harms substantially different).

[17] USSG §3D1.2, comment. (n.4) (emphasis added). Note also that in the first full paragraph of this note, the Commission states generally that offenses against the same person are to be grouped even if they constitute legally distinct offenses occurring at different times. Then, in the examples, example (5) specifically states that two counts for raping the same person on different days are not to be grouped. Does grouping depend then on timing? Or, does it depend on something not explicated in either §3D1.2(b) or the application note?

[18] *See* United States v. Sneezer, 983 F.2d 920 (9th Cir. 1992). In Sneezer, the district court had refused to group two aggravated sexual assault counts against a defendant who had raped the same victim twice during the same episode finding that each act constituted a separate harm. Although the Ninth Circuit reversed, holding that the guidelines required grouping in this instance, the Circuit Court urged the Commission to amend the guidelines to avoid giving the defendant a "free rape." In response to Sneezer, the Commission amended §2A3.1 to provide the court an opportunity for upward departure if the offense involved multiple acts of sexual abuse. *See* Appendix C, Amendment 477, Effective November 1, 1993. Of course, even under the prior version, the defendant did not necessarily get a "free rape." An offender who inflicts multiple harms upon the same victim may well receive a higher sentence than one who does not because the offense guideline contains enhancements for the degree of injury to the victim. *See* USSG §2A3.1(b)(4)(providing a 2-, 3-, or 4-level enhancement for degree of injury). The more harms an offender inflicts upon a victim, the greater the degree of injury is likely to be.

different poses of the same child groupable, while counts relating to pictures of other children are not? Who is the victim when computer graphics programs can alter the age or appearance of video images without ever having the necessity of a live model?

The second major issue with respect to using the "same victim" rationale to define when counts may be grouped is that this requirement sometimes prevents counts from being grouped when they are, in fact, closely related. The Seventh Circuit held that two counts for false arrest via impersonation of a federal agent properly were not grouped with a count for the kidnapping the defendant accomplished by means of his impersonation and false arrest because they involved different victims.[19] Similarly, consider a defendant convicted of money laundering and the distribution of a controlled substance. Technically, the counts might be grouped because the victim of both crimes is society. The counts might not be grouped because the drug laws and the money laundering laws implicate different societal interests.[20]

(c) Clarification of Grouping Under §3D1.2(c)

There has been some confusion about when a count "embodies conduct that is treated as a specific offense characteristic in, or other adjustment to" another count. Clearly, an assault and a robbery could be grouped under this rule (assuming the assault is committed during the course of the robbery) because the robbery guideline contains a specific offense characteristic for the assault. If a defendant is convicted of a drug offense and for laundering the proceeds of that offense, are the counts also to be grouped under rule (c) because §2S1.1 provides a 3-level enhancement if the defendant knew or believed the funds involved in the transaction were the proceeds of a controlled substance offense? If the defendant is convicted of a fraud and for evading taxes on the income acquired through the fraud, are the counts grouped under rule (c) because the tax evasion guideline contains a 2-level enhancement if the defendant failed to report income from criminal activity? In the latter two cases, the Commission hotline staff has been instructed to advise that the counts should be grouped. However, it could be argued that the specific offense characteristics at issue do not fully "embody" the substantive offenses, and therefore the offenses should not be grouped.

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[19] United States v. Brown, 14 F.3d 337 (7th Cir), *cert. denied*, 115 S. Ct. 164 (1994).

[20] *See, e.g.*, United States v. Harper, 972 F.2d 321 (11th Cir. 1992)(affirming district court's refusal to group counts for drug trafficking and money laundering).

(d) Grouping Under §3D1.2(d)[21]

Section 3D1.2(d) provides that counts for which the offense level is determined largely on the basis of some aggregate measure and counts reflecting behavior that is ongoing or continuous in nature should be grouped if the applicable guideline is written to reflect such factors. This provision includes a list of guidelines covering offenses that are grouped and a list of guidelines covering offenses that cannot be grouped under this section. Another area of concern identified in the questions and comments to the Commission is the fact that those lists are not exhaustive. There is some confusion regarding the appropriate treatment of counts sentenced under a guideline that is not on either list. Section 3D1.2(d) provides that whether offenses not listed should be grouped is to be determined on a case-by-case basis upon reviewing the facts of the case and the applicable guidelines.

The standard at the beginning of subsection (d) appears to be clear. However, some people have noted anomalies. First, some of the offense guidelines that are specifically included use a measure of aggregate harm to determine the offense level, but it could not be claimed accurately that the offense level is *determined largely* on the basis of that aggregate measure.[22] Second, if the guideline has to be written to cover the aggregate harm or the ongoing or continuous nature of the offense, some offenses that are not specifically excluded could never be grouped under subsection (d).[23] Third, some offenses that are excluded have offense levels as easily determined by some aggregate measure of harm as offenses that are included. This tends to indicate that there are other factors, perhaps legitimate — albeit unspoken — policy concerns, affecting the grouping decision that are not part of the subsection (d) standard.[24]

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[21] Section 1B1.3(a)(2) incorporates §3D1.2(d) by specific reference. Any changes in the scope of §3D1.2(d) will need to be considered in light of their effects on §1B1.3. In addition, the Commission may wish to revisit the entirety of the multiple count rules in light of amendments, if any, resulting from the Commission's ongoing simplification review.

[22] *See, e. g.*, §2K2.1. The number of weapons can affect the resulting offense level by up to 6 levels, but of much greater impact are the base offense level and the way the weapon was used.

[23] *See, e.g.*, §§2E3.1, 2J1.2, 2L1.2, and 2N1.1. All of these offenses could involve ongoing or continuous behavior, and in some contexts could involve measurable aggregate harm. Since none of the guidelines are written to cover these facets, however, one could argue that they could never be grouped under rule (d).

[24] *See, e.g.*, §2B3.3 (Blackmail and Similar Forms of Extortion). Although the offense level is determined on the basis of the money obtained or demanded, and the behavior is often ongoing in nature, these counts are never grouped under rule (d). One could certainly imagine, however, other considerations influencing this policy.

(d) Unit Calculation

Finally, some comments continue to express dissatisfaction because §3D1.4 limits the effect of multiple counts even when the counts reflect significant additional harms. First, counts that are nine or more levels less than the count producing the highest offense level do not receive any units. Thus, if a person is convicted of one very serious offense resulting in an offense level of 35, there will be no units assigned for any other counts for which the offense level is less than 27. Consequently, counts reflecting quite serious conduct can result in no incremental increase. Second, no matter how many units result after the application of §§3D1.1-1.3, the maximum increase allowed under §3D1.4 is 5 offense levels. A person convicted of twelve bank robberies, that each resulted in an offense level of 28, would have a total of 12 units assigned for the counts of conviction.. However, after the first 5 units have accrued, the incremental increase is limited to 5 offense levels no matter how many units are assigned. The Commission has recognized the principle of diminishing return in capping the incremental increases. The concern is fairly summarized as a sense that perhaps the incremental increase cuts off too quickly. Perhaps five levels just is not enough to provide sufficient incremental punishment.

Appellate Analysis

From the rate at which grouping issues are appealed, it would appear that there is not great dissatisfaction or confusion with the application of the grouping rules. In FY1994, Chapter Three, Part D was involved in only 24 (0.4 percent) of 6,521 issues appealed by the defendant, and in none of the issues appealed by the government.[25] There is little case law to suggest that federal courts are experiencing significant difficulty in interpreting or applying the "grouping" rules for multiple counts set forth at USSG §§3D1.1-3D1.5. In addition to those areas identified in the previous section, there are two issues that need to be addressed. The first is a specific application issue, and the second is a general concern.

First, as to the specific issue, continuing controversy exists among the circuits with respect to grouping money laundering counts with counts for other offenses — even offenses that directly

[25] *See* United States Sentencing Commission Annual Report 1994, Tables 66 & 67. Copies of each of these tables are attached as Appendix A.

generated the proceeds laundered.[26] The Tenth Circuit has held, in a blanket prohibition, that the grouping of fraud and money laundering counts is always prohibited because fraud victimizes individuals while money laundering victimizes society in general. U.S. v. Kunzman, 54 F.3d 1522,1530-31 (1995). The Kunzman court also held that grouping fraud and money laundering counts is impermissible because their respective guidelines, §§2F1.1 and 2S1.1, measure harm differently.[27] The Ninth Circuit agrees with the Tenth to the extent that fraud and money laundering cannot be grouped under §3D1.2 (d) because the respective guidelines for each do not measure harm in a manner which is "essentially equivalent." U.S. v. Taylor, 984 F.2d 298, 303 (1993). The Taylor court left open whether fraud and money laundering could be grouped under a different rule. In contrast, the Third, Fifth, and Eleventh Circuits have held that fraud and money laundering counts may be grouped in situations where the specific facts of a case indicate that the predicate acts of the fraud and those of the money laundering activity are so intimately related as to constitute a "common scheme or plan" as that phrase is used in §3D1.2 (b).[28]

The second issue is a general concern that the circuit courts appear to stress applying the *language* of the grouping rules without understanding the *purpose* of the rules. Consequently, the results are often inconsistent. For example, both the district court and the circuit court in Sneezer focussed on the language and came to different results.[29] Neither court addressed the Commission's goal of preventing prosecutorial charging decisions from unduly affecting the total sentence. An analysis of that goal in the context of the applicable offense guideline should lead to more consistent results where an analysis of the language alone may fail to do so.

Conclusions and Options for Refinement

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[26] During its 1995 amendment cycle, the Commission unanimously passed an amendment to the money laundering guidelines that would have addressed this issue. However, Congress passed a bill, S. 1254, disapproving of this amendment. It was signed by the President on October 30, 1995.

[27] This would prevent grouping money laundering with the underlying counts under §§3D1.2(a), (b), and (d). In another case, the Tenth Circuit held that grouping money laundering with the underlying count is not permitted under §3D1.2(c) either. United States v. Smith, 13 F.3d 1421 (10th Cir.), *cert. denied* 115 S.Ct. 209 (1994).

[28] *See* United States v. Cusumano, 943 F.2d 305 (3d Cir. 1991); United States v. Leonard, 61 F. 3d 1181 (5th Cir. 1995); United States v. Mullens, 65 F. 3d 1560 (1995).

[29] *See* United States v. Sneezer, 983 F.2d 920 (9th Cir. 1992).

The Commission sought to reduce unwarranted sentencing disparity in the treatment of multiple counts by providing general rules for incremental increases in punishment when multiple harms are charged in separate counts. These rules were written to minimize the possibility that an arbitrary casting of a criminal act into several counts inappropriately would produce a longer sentence. After its preliminary review of the multiple count rules, the working group has concluded that sufficient issues affecting consistent application exist to warrant further Commission action. These conclusions are as follows:

- There is a need to clarify that "substantially the same harm" and "essentially one composite harm" are not additional requirements, but merely a principle the Commission uses to describe groupable offense conduct reflected in multiple counts.

- The use of "the same victim" may not be the most useful mechanism for defining the class of offenses the Commission sought to group under §3D1.2(b). Some offenses involving the same victim probably should not be grouped (*e.g.*, multiple rapes against the same victim on different dates), while some offenses involving different victims probably should be grouped (*e.g.*, counts for substantive offenses and counts for laundering the proceeds from those offenses or counts for evading taxes on the income from those offenses). There is also a need to clarify that there is no "same victim" requirement for grouping under §§3D1.2(c) & (d).

- There is a special need to address the grouping of counts like money laundering or tax evasion with counts for the underlying offenses.

- There is a need to clarify the standards for grouping offenses not on either list of §3D1.2(d) in light of the types of offenses that are on the lists. In the alternative, the Commission could also make the lists exhaustive.

- There is a need to examine the application notes to make sure they assist in the comprehension and application of the guidelines.

- There is a need to examine the operation of §3D1.4 to insure that the assignment and treatment of units results in appropriate incremental punishment.

In light of the above, the working group recommends further study of Chapter Three, Part D with the goal of drafting amendment proposals to address the issues affecting consistent application.

Appendix A

Table 66

GUIDELINE INVOLVED IN ISSUES APPEALED BY THE DEFENDANTS [1]
(October 1, 1993, through September 30, 1994)

GUIDELINE		Number	Percent
2D1.1	(Drug Guidelines)	649	10.0
1B1.3	(Relevant Conduct)	443	6.8
3E1.1	(Acceptance of Responsibility)	437	6.7
5K2.0	(Departures)	395	6.1
3B1.1	(Aggravating Role)	305	4.7
3C1.1	(Obstruction of Justice)	260	4.0
3B1.2	(Mitigating Role)	255	3.9
6A1.3	(Resolution of Disputed Factors)	241	3.7
2F1.1	(Fraud and Deceit)	178	2.7
5K1.1	(Substantial Assistance to Authorities)	171	2.6
4A1.2	(Definitions and Instruction of Criminal History)	164	2.5
4A1.3	(Adequacy of Criminal History)	161	2.5
5E1.1	(Restitution)	129	2.0
Constitutional Issues		118	1.8
5E1.2	(Fines for Individual Defendants)	112	1.7
4B1.1	(Career Offender)	109	1.7
4B1.4	(Armed Career Criminal)	98	1.5
4A1.1	(Criminal History Category)	96	1.5
2K2.1	(Firearms)	71	1.1
2B3.1	(Robbery)	60	0.9
7B1.3	(Revocation of Probation or Supervised Release)	54	0.8
3B1.3	(Abuse of Position of Trust or Use of Special Skill)	53	0.8
1B1.11	(Use of Guideline Manual in Effect at Sentencing)	45	0.7
4B1.2	(Definitions for Career Offender)	42	0.6
1B1.10	(Retroactivity of Amended Guideline Ranges)	41	0.6
1B1.2	(Applicable Guidelines)	34	0.5
2B1.1	(Larceny, Embezzlement and Theft)	31	0.5
5G1.3	(Defendant Subject to Undischarged Term of Imprisonment)	31	0.5
5K2.13	(Diminished Capacity)	27	0.4
3D1.2	(Groups of Closely Related Counts)	27	0.4
1B1.0	(General Application Principles)	25	0.4
2K2.4	(Use of Firearm During or in Relation to Certain Crimes)	24	0.4
3A1.1	(Vulnerable Victim)	24	0.4
3C1.2	(Gratuity)	24	0.4
7B1.4	(Term of Imprisonment)	23	0.4
5G1.2	(Sentencing on Multiple Counts of Conviction)	22	0.3
6B1.1	(Plea Agreement Procedure)	22	0.3
2X1.1	(Attempt, Solicitation or Conspiracy)	20	0.3
Other Guidelines		595	9.1
Other Non-guideline Issues		905	13.9
Total		6,521	100.0

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[1]Based on 4,044 appeals defendants with sentencing as at least one of the reasons for appeal. Information on issues was unavailable in 319 cases. Because often more than one issue was appealed, the number of issues is more than the number of defendants. The "Other Guidelines" category includes all issues provided less than 20 times among relevant cases. A description of guidelines used in this table can be found in the Guidelines Manual.

SOURCE: U.S. Sentencing Commission, 1994 Appeals Datafile, APPFY94.

Table 67

GUIDELINE INVOLVED IN ISSUES APPEALED BY THE GOVERNMENT [1]
(October 1, 1993, through September 30, 1994)

GUIDELINE		Number	Percent
5K2.0	(Departures)	38	21.3
2D1.1	(Drug Guidelines)	16	9.4
3E1.1	(Acceptance of Responsibility)	12	6.7
1B1.3	(Relevant Conduct)	10	5.6
4A1.3	(Adequacy of Criminal History)	7	3.9
2F1.1	(Fraud and Deceit)	6	3.4
4B1.4	(Armed Career Criminal)	5	2.8
5K2.12	(Coercion and Duress)	4	2.2
3B1.3	(Abuse of a Position of Trust or Use of Special Skill)	4	2.2
5H1.12	(Lack of Guidance as a Youth and Similar Circumstances)	4	2.2
5K1.1	(Substantial Assistance to Authorities)	4	2.2
3C1.1	(Obstruction of Justice)	3	1.7
5K2.13	(Diminished Capacity)	3	1.7
3B1.2	(Mitigating Role)	3	1.7
5K2.11	(Lesser Harms)	3	1.7
5H1.1	(Age)	3	1.7
1B1.2	(Applicable Guidelines)	2	1.1
5H1.6	(Family Ties and Responsibilities)	2	1.1
3B1.1	(Aggravating Role)	2	1.1
4B1.1	(Career Offender)	2	1.1
5H1.2	(Education and Vocation Skills)	2	1.1
5G1.3	(Imposition of Sentence Subject to Undischarged Term of Imprisonment)	2	1.1
5H1.4	(Physical Condition)	2	1.1
Other Guidelines		23	12.9
Other Non-guideline Issues		16	9.0
Total		**178**	**100.0**

[1] Based on 4,044 appeals defendants with sentencing as at least one of the reasons for appeal. Information on issues was unavailable in 319 cases. Because often more than one issue was appealed,the number of issues is more than the number of defendants. The "Other Guidelines" category includes all issues provided less than two times among relevant cases. A description of guidelines used in this table can be found in the Guidelines Manual.

SOURCE: U.S. Sentencing Commission, 1994 Appeals Datafile, APPFY94.