

Grouping of Multiple Counts

Chapter Three, Part D

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Thursday, June 14, 2012

2:45 - 4:15p.m.

SENTENCING TABLE
(in months of imprisonment)

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

Multiple Counts Rationale

- Determine a single offense level
- Prevent “double-counting”
- Provide incremental punishment
- Limit prosecutorial impact

Process of “Grouping”

The determination as to whether multiple counts of conviction are to be treated as a single composite harm or as separate harms as defined by the guidelines’ “grouping rules”

“Grouping Rules”

§3D1.2

- (a) Same Victim, Same Act
- (b) Same Victim, Two or More Acts
- (c) Conduct Treated by Characteristic
- (d) Based on an Aggregate

Steps in Multiple Counts

1. Grouping

- Group under “Rule (d)”
- Group under “Rules (a), (b), or (c)”

2. Incremental Increases

- Assignment of units
- Additional offense levels

Step 1: Grouping “Rule (d)”

If counts use the same (or similar) Chapter Two guideline

and

If that guideline is included at §3D1.2(d):

Apply the guidelines as in single count application

Offenses **Included** at §3D1.2(d):

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

§2A3.5;

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

§§2C1.1, 2C1.2, 2C1.8;

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

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

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

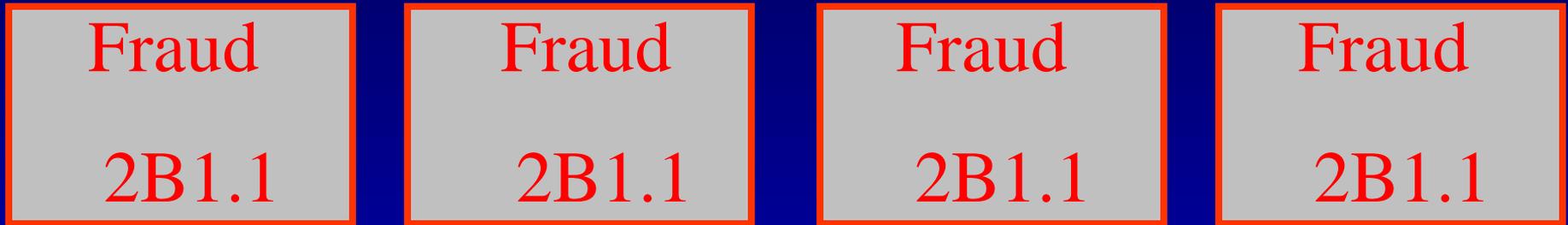
Examples of Chapter Two Guidelines in the Included List at §3D1.2(d)

NOTE: This is the Same List for which “Expanded Relevant Conduct” at §1B1.3(a)(2) Applies

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

Grouping under “Rule (d)”

Example:



One application with the offense level for the group based on the aggregate and the conduct “taken as a whole”

Pointers Regarding “Grouping Rule (d)”

- Guideline application for counts grouped under “Rule (d)” involves
 - The adding (“aggregation”) of the numerical quantities
 - Application for the conduct “taken as a whole”
 - *See* Chapter Three, Part D, Introductory Commentary; 3D1.3, App. Note 3

Single Guideline Application for Counts Grouping under “Rule (d)”

Chapter Two

- Base Offense Level
- Specific Offense Characteristics
- Cross References

Chapter Three

- Victim
- Role
- Obstruction
- Multiple Counts
- Acceptance

Example of Rule (d) - Smuggling Aliens

- Defendant is convicted of three counts of smuggling aliens, each on a specific date; violation of 8 USC § 1324(a); applicable guideline §2L1.1
- Each count involves Defendant smuggling five aliens
- Defendant possessed a firearm during one trip
- Because the applicable guideline for the three counts is in the included list at §3D1.2(d), the counts will group under Rule (d)

Example of Rule (d) - Smuggling Aliens (cont.)

- Because the relevant conduct of three counts includes the smuggling of 15 aliens, that is the number that will be used in the application of the SOC at §2L1.1(b)(2)
- Because the defendant possessed a firearm during one of the offenses, the SOC at §2L1.1(b)(5) for possession of a firearm will apply

Pointers Regarding “Grouping Rule (d)”

- To group under “Rule (d)”, the counts need only be in the “included” list at 3D1.2(d) and use the same (or similar) Chapter Two guideline
- To group under “Rule (d)”, the counts do not have to involve the same victim
 - *See* 3D1.2, Background

Counts Involving Different Chapter Two Guidelines on the “Included” List

3D1.2(d), App. Note 6 & 3D1.3(b), App. Note 3

- Different guidelines do not group under “Rule (d)” merely by being
 - on the “included” list
 - on the same line on the “included” list

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

Offenses Excluded at §3D1.2(d):

Specifically excluded from the operation of this subsection are:

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

§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§2C1.5;

§§2D2.1, 2D2.2, 2D2.3;

§§2E1.3, 2E1.4, 2E2.1;

§§2G1.1, 2G2.1;

§§2H1.1, 2H2.1, 2H4.1;

§§2L2.2, 2L2.5;

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

§§2P1.1, 2P1.2, 2P1.3;

§2X6.1.

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

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

Counts Involving Chapter Two Guidelines on the “Excluded” List

3D1.2(d)

- Counts excluded from grouping under “Rule (d)” are not precluded from grouping under “Rules (a), (b), or (c)” however

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

Count 1

Chapter Two

Chapter Three

- Victim
- Role
- Obstruction

= **adjusted offense level**

Count 2

Chapter Two

Chapter Three

- Victim
- Role
- Obstruction

= **adjusted offense level**

- **Multiple Counts Adjustment**

(Process of Grouping and Assignment of Units)

= **Combined Adjusted Offense Level**

- Acceptance

= **Offense Level Total**

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

Count 1

OL 20

Count 2

OL 23

Must determine whether counts
group under “Rules (a), (b), or (c)”
or whether they do not group and
“units” must be assigned

Steps in Multiple Counts

1. Grouping

- Group under “Rule (d)”
- **Group under “Rules (a), (b), or (c)”**

2. Incremental Increases

- Assignment of units
- Additional offense levels

Step 1: Grouping

“Rules (a), (b), or (c)”

If counts “group” under §3D1.2(a), (b), or (c):

Apply the guidelines separately to get an offense level for each count

Use the highest offense level

Impact of Counts Grouping under “Rules (a), (b), or (c)”



(Analogous to counts running
concurrently with each other)

“Rule (a)”

“When counts involve the *same victim* and the same act or transaction.”

“Rule (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.”

Grouping under “Rule (a)”

Aggravated
Assault
(same victim)
OL 20

Robbery
(same victim)
OL 23

Offense Level 23
for the group

Grouping under “Rule (b)”

Conspiracy to
Rob
(same victim)
OL 23

Robbery
(same victim)
OL 23

Offense Level 23
for the group

“Rule (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.”

Grouping under “Rule (c)”

Robbery
(of bank)
OL 24

SOC addresses
injury to teller

Assault
(of teller)
OL 17

Offense Level 24
for the group

Use of Multiple “Grouping Rules”

More than one “grouping rule”
can be used to group various counts
into a single count group

Grouping under Multiple “Rules”

Fraud
2B1.1

Fraud
2B1.1

Obstruction
2J1.2
OL 17

Rule (d):
Single application
OL 20
Obstruction Adjustment

Rule (c):
Ch. Three Adjustment
OL 20

Steps in Multiple Counts

1. Grouping

- Group under “Rule (d)”
- Group under “Rules (a), (b), or (c)”

2. Incremental Increases

- **Assignment of units**
- **Additional offense levels**

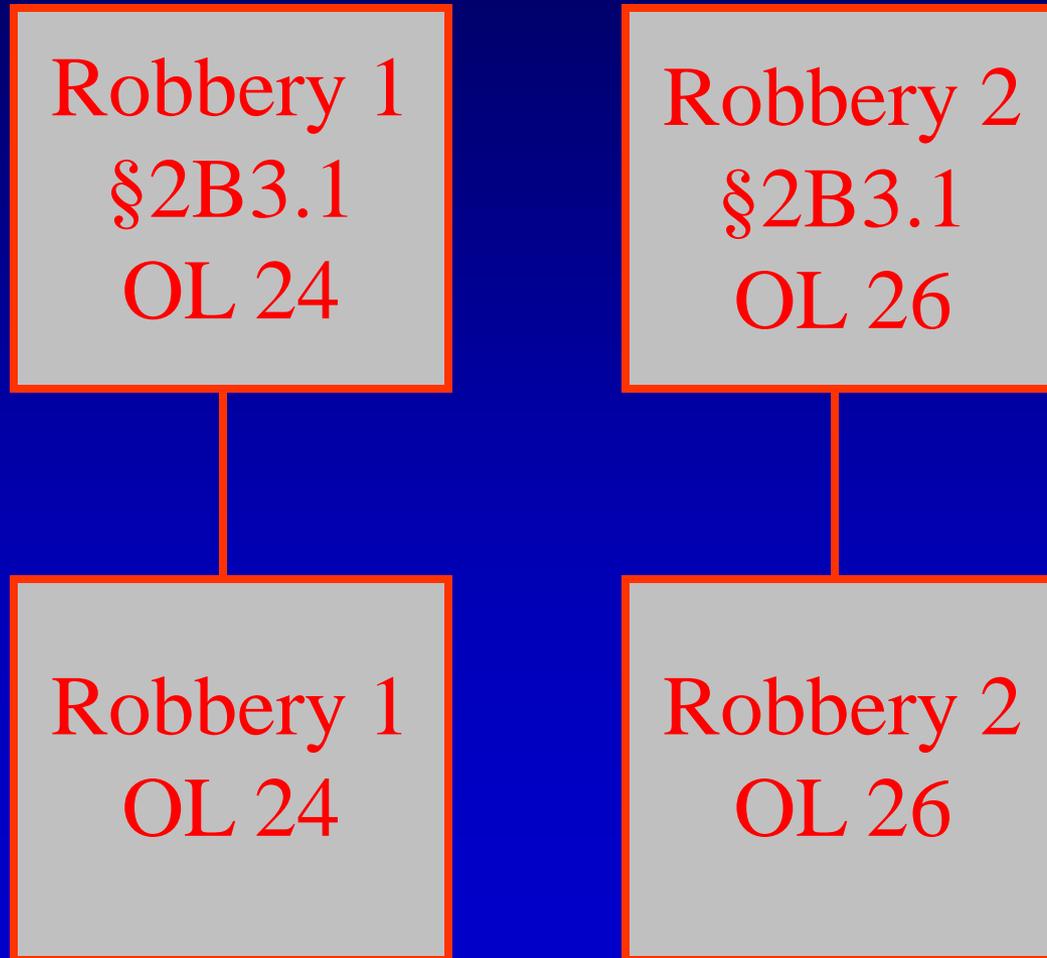
Step 2: Incremental Increases

If more than one group:

- Compare the offense level of the highest group to the offense levels of the other groups, and assign “units”
- Increase the offense level of the highest group according to a guideline table corresponding to the number of “units”

Assign “Units” and Additional Levels

Simple Example:



Assignment of Units (§3D1.4)

Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	1/2
9 or More Levels Less Serious	0

Additional Offense Levels (§3D1.4)

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

Assignment of Units (§3D1.4)

Robbery 1 Group OL 24	Robbery 2 Group OL 26
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Assignment
of Units

1 unit

1 unit

Total Units

2

Additional Offense Levels (§3D1.4)

Total of 2 units = 2 additional offense levels

26 (higher group (Robbery 2))

+ 2 additional offense levels

28 combined offense level

Assign “Units” and Additional Levels

Complex Example:

**5 Counts of
Fraud
OL 23**

**Robbery Ct.
& Assault Ct.
(of same
victim)
OL 24**

**Robbery
OL 28**

Assignment of Units (§3D1.4)

	Fraud Group OL 23	Robbery / Assault Group OL 24	Robbery Group OL 28
Assignment of Units	1/2 unit	1 unit	1 unit
	Total Units		<u>2 1/2</u>

Additional Offense Levels (§3D1.4)

Total of 2½ units = 3 additional offense levels

28 (highest group (Robbery))

+ 3 additional offense levels

31 combined offense level

Multiple Counts and Acceptance of Responsibility

- Acceptance of responsibility is determined only after application of the guidelines for multiple counts has established a single combined adjusted offense level
- Acceptance (the reduction of 2 or 3 offense levels) is based upon consideration of all counts

END