

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

USING THE DECISION TREE, PLEASE ANALYZE THE APPROPRIATE GROUPING DECISION FOR EACH SCENARIO.

PLEASE NOTE: The answers to each scenario follow the recommended process outlined in the Multiple Counts Decision Tree found on the previous two pages of this workbook.

1. The defendant pled guilty to one indictment that charged him with violating two counts of 18 U.S.C. § 922(u) (theft of firearm from firearms dealer). The guideline applicable to both counts is §2K2.1. Count one occurred in May 2016. The defendant rammed his vehicle into the gun store, broke in, and stole several firearms. Count two occurred in June 2016. The defendant again rammed his vehicle into the same gun store, broke in, and stole several firearms.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts group under §3D1.2(d).

The two counts use the same guideline (§2K2.1), and that guideline is listed as included under §3D1.2(d). Therefore, §2K2.1 will be applied one time based upon the aggregate relevant conduct for both counts of conviction. The offense level for the aggregate conduct is the offense level for the group of closely related counts.

2. The defendant is charged in two separate indictments. He pled guilty to both indictments. The first indictment is from the Eastern District of Pennsylvania. This indictment charges that the defendant committed both wire fraud and mail fraud from 2006 through 2008. The wire fraud and mail fraud scheme involved the defrauding of federal student loan programs. The applicable guideline is §2B1.1. The second indictment is from the Western District of North Carolina and charges the defendant with access device fraud. This scheme occurred from 2014 through 2015. The defendant fraudulently used stolen credit cards. The applicable guideline in this case is also §2B1.1.

The cases involve different victims and completely separate fraudulent schemes. However, they are being consolidated for sentencing.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts group under §3D1.2(d).

The two counts use the same guideline (§2B1.1), and that guideline is listed as included under §3D1.2(d). Therefore, §2B1.1 will be applied one time based upon the aggregate relevant conduct for both counts of conviction. The offense level for the aggregate conduct is the offense level for the group of closely related counts.

The fact that the defendant is charged in two separate indictments does not affect grouping. The Introductory Commentary to Chapter 3, Part D (Multiple Counts) states that “these rules apply to multiple counts of conviction . . . contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.”

3. The defendant has pled guilty to two counts of robbery (§2B3.1). Count one describes the robbery of the First National Bank on March 11, 2016. The second count describes the robbery of Main Street Bank on June 20, 2016.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts do not group under §3D1.2. Units will be assigned under §3D1.4.

The two counts use the same guideline (§2B3.1), but that guideline is listed as excluded under §3D1.2(d). Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each robbery count. The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter 3 adjustment in one of the robbery counts that embodies the conduct of the other robbery count. The counts do not group under §3D1.2(a) or (b), because the counts do not involve the same victim. Two different banks were the victims of the robberies. By process of elimination, then, units will be assigned under §3D1.4.

4. Defendant is convicted of one count of possession with intent to distribute marijuana (§2D1.1) and one count of re-entry of a removed alien (§2L1.2). Defendant was part of a marijuana conspiracy involving several other participants. Upon his arrest, agents discovered

he was previously deported for aggravated assault and therefore was unlawfully in the United States.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts do not group under §3D1.2. Units will be assigned under §3D1.4.

The two counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter 3 adjustment in one of the counts that embodies the conduct of the other count. The counts do not group under §3D1.2(a) or (b), because the counts do not involve the same victim* as different societal interests are harmed. By process of elimination, then, units will be assigned under §3D1.4.

* “Victim” is defined in Application Note 2 at §3D1.2. It states that “for an offense in which there are no identifiable victims (*e.g.* drug or immigration offenses where society at large is the victim), the ‘victim’ for purposes of subsections (a) and (b) is the societal interest that is harmed.” Application Note 2 further states that one count involving the sale of a controlled substance and another count involving an immigration law violation will not group together because different societal interests are harmed.

5. Defendant is convicted of transportation of aliens (§2L1.1) and illegal reentry (§2L1.2). Defendant was arrested after crossing the border with three other aliens. Defendant served as a brush guide through the New Mexico desert. While being processed by Border Patrol Agents, it was discovered that the defendant had previously been deported after a conviction for drug trafficking.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts group under either §3D1.2(a) or (b).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter 3 adjustment in one of the counts that embodies the conduct of the other count. The counts involve the same victim – the same societal interest (violation of the laws governing immigration) is harmed. The counts do not involve separate instances of fear and risk of harm.

However, the counts involve either the same act or transaction or two or more acts constituting a common criminal objective. As a result, the highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

6. Defendant is convicted of possession with intent to distribute meth (§2D1.1) and false statements (§2B1.1). Defendant is convicted of distribution of 50 grams of methamphetamine (actual). The defendant negotiated several sales of meth with a confidential informant. After arrest, the defendant obstructed justice by providing materially false information to DEA agents. The defendant provided the names of co-defendants who were not, in fact, involved in the drug trafficking.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts group under §3D1.2(c).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. When calculating the guidelines for the drug offense, a two-level increase for obstruction of justice at §3C1.1 applies because the defendant made materially false statements to DEA agents to obstruct the investigation of the drug offense. This Chapter 3 adjustment embodies the conduct of the other count of conviction, the false statements count. As a result, the highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

7. Defendant is convicted of robbery (§2B3.1) and felon in possession (§2K2.1). The defendant robbed a bank in March, 2016. During the robbery, he possessed a Glock pistol and pointed it at the teller as he demanded the money from her drawer. The defendant was arrested months later after finally being identified by authorities. It was during his arrest at his home that agents discovered three handguns, two 9mm pistols, and a .44 Magnum revolver. The Glock pistol possessed during the robbery was never recovered. The conviction for felon in possession names only the guns found during the search of the defendant's residence.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts group under §3D1.2(c).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. When calculating §2K2.1 for the felon in possession count, a four-level increase at §2K2.1(b)(6)(B) will apply because the defendant possessed the Glock pistol “in connection with” the bank robbery. The Glock pistol is relevant conduct to the guns listed in the felon in possession count because possessing the Glock is the same course of conduct/common scheme or plan as the offense of conviction (See §1B1.3(a)(2) and Application Note 5(B).) This specific offense characteristic embodies the conduct of the other count of conviction, the bank robbery.

Interestingly, the other count of conviction, the robbery, also contains a specific offense characteristic that embodies the conduct of the other offense. When calculating §2B3.1 for the robbery count, an increase at §2B3.1(b)(2)(C) will apply because the defendant possessed a firearm during the robbery offense. This specific offense characteristic for firearm possession embodies the conduct of the other count of conviction, the felon in possession count. Grouping under §3D1.2(c), however, does not require that both counts contain an adjustment that embodies the conduct of the other count of conviction. Only one count must contain an adjustment that embodies the conduct of the other count.

As a result, the highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

8. Defendant is convicted of three counts of sexual exploitation of a child (§2G2.1). The counts involve the same victim, who is 13 years of age. The defendant engaged in sexual contact with the child over the course of a weekend on three occasions: May 1, 2 and 3, 2016. On each occasion, the defendant photographed the victim.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts do not group under §3D1.2. Units will be assigned under §3D1.4.

The two counts use the same guideline (§2G2.1), but that guideline is listed as excluded under §3D1.2(d). Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count of sexual exploitation. The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter 3 adjustment in one of the counts that embodies the conduct of the other count. The counts do involve the same victim. However, each count involves a separate instance of fear and risk of harm*. By process of elimination, then, units will be assigned under §3D1.4.

*Application Note 4 at §3D1.2 states that “this provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g. robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).” The application note also provides another example where counts involving the same victim would not be grouped: “two counts of rape for raping the same person on different days.” Sexually exploiting the same child on different occasions does not represent a single composite harm. Rather, multiple instances of sexual exploitation represent separate instances of fear and risk of harm.

9. Defendant is convicted of two counts: possession with intent to distribute cocaine (§2D1.1) and carjacking (§2B3.1). The defendant, over the course of several months, distributed approximately 3 kilos of cocaine. In October 2016, the defendant carjacked the vehicle of a gang rival with the intent to rob his competition’s supply of drugs – the rival gang member stored his drugs in his car. The defendant was armed, although no one was injured. The robbery guideline contains a one-level increase if the object of the offense was to take a controlled substance.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts group under §3D1.2(c).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count. When calculating §2B3.1 for the carjacking count, a one-level increase at §2B3.1(b)(6) will apply because the object of the carjacking offense was the taking of a controlled substance, which is part of the defendant’s drug offense conduct. This specific offense characteristic embodies the conduct of the other count of conviction, the drug trafficking offense.

Interestingly, the other count of conviction, the drug trafficking offense, also contains a specific offense characteristic that embodies the conduct of the other offense. When calculating §2D1.1 for the drug count, an increase at §2D1.1(b)(2) will apply because the defendant used violence during the drug offense by carjacking his rival dealer. This specific offense characteristic for violence embodies the conduct of the other count of conviction, the carjacking. Grouping under §3D1.2(c), however, does not require that both counts contain an adjustment that embodies the conduct of the other count of conviction. Only one count must contain an adjustment that embodies the conduct of the other count.

The highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

10. The defendant pled guilty to one count of bank fraud (§2B1.1) and one count of money laundering (§2S1.1). The defendant was a bank branch manager who used his position to process fraudulent loans that the defendant deposited into his own account for personal gain.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4?

These counts group under §3D1.2(c).

These counts do not use the same guideline. Therefore, the counts do not group under §3D1.2(d). A separate guideline calculation should be completed for each count.

The money laundering guideline (§2S1.1) directs, in Application Note 6, that when the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, “the counts shall be grouped pursuant to subsection (c) of §3D1.2.”

The highest offense level from either of the two counts will be used to determine the combined offense level for this group of closely related counts.

11. The defendant pleaded guilty to three counts of felon in possession (§2K2.1), one count of distribution of oxycodone (§2D1.1), one count of distribution of heroin (§2D1.1), and one count of using a firearm in connection with a drug trafficking offense, a violation of 18 U.S.C. § 924(c). The three firearms that are the subject of the felon in possession counts were carried by the defendant during various drug sales.

Do these multiple counts group under §3D1.2? If so, under which rule? Or, should units be assigned under §3D1.4? (HINT: multiple rules apply in this scenario.)

These counts group under §3D1.2(c) and (d). The 18 U.S.C. § 924(c) count is excluded from the grouping rules in Chapter 3, Part D.

The three counts of felon in possession use the same guideline (§2K2.1) and that guideline is listed as included at §3D1.2(d). Therefore, §2K2.1 will be applied one time based upon the aggregate relevant conduct for the three counts of conviction. The offense level for the aggregate conduct is the offense level for this group of closely related counts.

The two drug distribution counts use the same guideline and that guideline (§2D1.1) is listed as included at §3D1.2(d). Therefore, §2D1.1 will be applied one time based upon the aggregate relevant conduct for both counts of conviction. The offense level for the aggregate conduct is the offense level for this group of closely related counts.

These two count groups, the firearms count group and the drug count group do not use the same guideline. Therefore, these count groups do not group under §3D1.2(d).

When calculating §2D1.1 for the drug counts, an increase at §2D1.1(b)(1) normally would apply because the defendant possessed a firearm during the drug offense. However, because the defendant is also convicted of 18 U.S.C. § 924(c), §2K2.4 prohibits application of this specific offense characteristic. Nonetheless, this specific offense characteristic for possession of a weapon still embodies the conduct of the other count group, the felon in possession count group.

Interestingly, the other counts of conviction, the felon in possession counts, also contain a specific offense characteristic that embodies the conduct of the other count group. When calculating §2K2.1 for the felon in possession counts, a four-level increase at §2K2.1(b)(6)(B) normally would apply because the defendant possessed the firearm “in connection with” the drug trafficking offense. However, because the defendant is also convicted of 18 U.S.C. § 924(c), §2K2.4 prohibits application of this specific offense characteristic. Nonetheless, this specific offense characteristic for possession of a weapon still embodies the conduct of the other count of conviction.

The highest offense level from either of the two count groups will be used to determine the combined offense level for this group of closely related counts.