



**US Sentencing Commission's Annual National Seminar**  
on the Federal Sentencing Guidelines

# National Seminar

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## **Multiple Counts Answers**



## 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 pleaded guilty to two counts. The first count is distribution of fentanyl resulting in death of victim A. The second count is distribution of fentanyl resulting in death of victim B. The guideline applicable to both counts is §2D1.1. Each offense of conviction establishes that death resulted from the use of the fentanyl.

**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 (§2D1.1), and that guideline is listed as included under §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 the group of closely related counts.

2. The defendant is a pharmacist tech who used her position to generate and create fraudulent scripts for opioid medication. She had access through her position to use the computer to create fake prescriptions and then process them using either children's names or fake names to obtain the pills herself. The defendant pled guilty to five counts of acquiring a controlled substance by fraud, a violation of 21 U.S.C. § 843(a)(3). The guideline applicable to all counts is §2D2.2.

**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(b).**

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The two counts use the same guideline (§2D2.2). However, 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.

The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three adjustment in one of the counts that embodies the conduct of the other count. The counts do involve the same victim\* – the same societal interest (the interests protected by laws governing controlled substances) is harmed. The counts do not involve separate instances of fear and risk of harm, and the counts involve two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. Counts involving the same victim and two or more acts connected by a common criminal objective group under §3D1.2(b). 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.

\*"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."

3. Defendant pleaded guilty to five counts of assault. The applicable guideline for all counts is §2A2.3. The defendant, a former prison guard, pepper sprayed five inmates without cause or justification. The five inmates were all sprayed on the same occasion at the same time.

**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 (§2A2.3). However, 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.

The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three 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

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victim. Five different inmates were the victims of the assaults. None of the grouping rules under §3D1.2 apply. By process of elimination, then, units will be assigned under §3D1.4.

4. The defendant has two counts of conviction. The first count of felon in possession occurred in January 2017. The defendant, a felon, was in possession of a handgun during a traffic stop. The second count is a violation of 18 U.S.C. § 922(o), unlawful possession of a machine gun. This offense occurred in April 2017. The machine gun was found by federal agents when they arrived at the defendant's residence to serve the defendant with an arrest warrant for count one. The guideline applicable to both counts is §2K2.1.

**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.

5. Defendant is convicted of two counts: illegal reentry (§2L1.2) and alien in possession of a firearm (§2K2.1). The defendant was contacted by law enforcement to provide information about his cousin, who was under investigation for a drug offense. During the interview with law enforcement, it was revealed that the defendant had been residing in the United States illegally for almost 10 years. The defendant also revealed that he was asked by his cousin to "hold onto" his cousin's firearm for a while. The defendant kept the firearm in his closet until he turned it over to law enforcement during the interview.

**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.

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The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three 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. Different societal interests are harmed – the interests protected by laws governing firearms and the interests protected by laws governing immigration. None of the grouping rules under §3D1.2 apply. By process of elimination, then, units will be assigned under §3D1.4.

\* When calculating §2K2.1 for the felon in possession count, the four-level increase at §2K2.1(b)(6)(B) will not apply because the defendant did not possess the firearm “in connection with” the illegal entry. The possession of the firearm is not in furtherance of the illegal reentry offense and did not facilitate the illegal reentry offense.

6. Defendant is convicted of robbery (§2B3.1) and felon in possession (§2K2.1). The defendant robbed a bank in November 2017. 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.

The counts group under §3D1.2(c), because one of the counts contains a specific offense characteristic that embodies the conduct of the other 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 of felon in possession (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.

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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.

7. Defendant is convicted of one count of illegally reentering the United States (§2L1.2), and one count of possession of fraudulent naturalization documents (§2L2.2). The defendant had fraudulent identification documents that he used to obtain employment when he was, in fact, unlawfully remaining 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 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 Three adjustment in one of the counts that embodies the conduct of the other count. The counts do involve the same victim – the same societal interest (the interests protected by laws governing immigration) is harmed. The counts do not involve separate instances of fear and risk of harm. The counts can be viewed as either involving the same act or transaction or two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. Counts involving the same victim and the same act or transaction group under §3D1.2(a). Counts that involve the same victim and two or more acts connected by a common criminal objective group under §3D1.2(b). 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.

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8. 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?**

**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 Three, 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).

The counts group under §3D1.2(c), because one of the counts contains a specific offense characteristic that embodies the conduct of the other count. When calculating §2D1.1 for the two 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),

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§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.

9. Defendant is convicted of one count of sexual exploitation of a child (§2G2.1), and one count of distribution of child pornography (§2G2.2). The counts involve the same victim, who is 13 years of age. The defendant persuaded the victim to produce explicit images of herself. The defendant then distributed the images over the dark web.

**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 (c), depending upon whether the cross reference to §2G2.1 at §2G2.2(c)(1) applies.**

If the cross reference to §2G2.1 from §2G2.2(c)(1) does not apply, the counts group under §3D1.2(c) using the following analysis. 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 group under §3D1.2(c) because one count has a specific offense characteristic that embodies the conduct of the other count. When applying §2G2.1, a two-level increase at specific offense characteristic (b)(3) applies, because the defendant “knowingly engaged in distribution” of the images produced. This specific offense characteristic embodies the conduct of the other count, distribution of child pornography. 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.

However, if the cross reference at §2G2.2(c)(1) applies, the counts will group under §3D1.2(a) using the following analysis. The counts use the same guideline, §2G2.1 (the production count directly applies §2G2.1 from Appendix A, and the distribution count is cross-referenced to §2G2.1 after application of §2G2.2(c)(1)). However, §2G2.1 is listed as excluded under §3D1.2(d). Therefore, the counts do not group under §3D1.2(d). The counts do not group under §3D1.2(c), because there is no specific offense characteristic or Chapter Three adjustment in one of the counts that embodies the conduct of the other count. The two counts



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involve the same minor victim and in fact involve the same act of production. The counts do not involve separate instances of fear and risk of harm, because the two guideline calculations are applied based on the same act of production of child pornography. Counts involving the same victim and the same act or transaction group under §3D1.2(a).

10. Defendant pleaded guilty to two counts: burglary of a post office (§2B2.1) and possession of stolen mail (§2B1.1). On December 10, 2017, the defendant unlawfully entered the post office and stole a bag of undelivered mail.

**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 Three 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 – the post office and the individuals whose mail was stolen. None of the grouping rules under §3D1.2 apply. By process of elimination, then, units will be assigned under §3D1.4.