

SCENARIOS: DETERMINING THE OFFENSE LEVEL FOR MULTIPLE COUNTS OF CONVICTION

USING THE DECISION TREE, ANSWER THE FOLLOWING QUESTIONS.

1. The defendant pleaded guilty to one count of conspiracy to possess with intent to distribute methamphetamine and three counts of possession with intent to distribute methamphetamine, each occurring on a different date. The guideline that applies to all four counts of conviction is §2D1.1.

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

The counts group under rule (d). All the counts are referenced to §2D1.1, and that guideline is on the list of included offenses at §3D1.2. Apply the guideline one time to all of the conduct in the four counts of conviction.

2. The defendant, a nurse, pleaded guilty to a two-count indictment. Count 1 charged unauthorized use of an access device in violation of 18 USC § 1029. The defendant fraudulently used a patient's credit card. Count 2 charged a violation of 18 USC § 1001(c)(3) (false statements), based on unrelated conduct. The defendant falsified DEA logs after allowing a patient to take ketamine from the drug vault. The guideline that applies to both counts is §2B1.1.

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

The counts group under rule (d). All the counts are referenced to §2B1.1, and that guideline is on the list of included offenses at §3D1.2. The fact that there are two distinct crimes is not relevant to the grouping question. The fact that both counts go to a single guideline that is listed as grouping under rule (d) ends the grouping analysis.

3. The defendant pleaded guilty to a two-count indictment. Count 1 charged distribution of fentanyl resulting in death of victim A. Count 2 charged 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?

The counts group under rule (d). All the counts are referenced to §2D1.1, and that guideline is on the list of included offenses at §3D1.2. The answer doesn't change just because there are

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two victims. If the court decides that the guidelines fail adequately to take into account the additional death resulting from the offense, the court may depart or vary.

4. 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?

Units should be assigned. Using the decision tree, we see that all the counts use the same guideline. However, the guideline is not listed as included under §3D1.2(d). All §2A guidelines (except one) are listed as *excluded* from grouping under rule (d). Therefore, we apply the guideline at §2A2.3 to each count of conviction. No count has an specific offense characteristic or Chapter Three adjustment embodying another count, because you apply the guideline five times, once for each victim; there is no cross-pollination between the distinct guideline applications. The counts do not involve the same victim, so units must be assigned.

5. The defendant has two counts of conviction. The first count of possession of a stolen firearm under 18 U.S.C. § 922(j) occurred in January 2018. The defendant was in possession of a stolen 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 four months later in April 2018. Federal agents found the machine gun when they arrived at the defendant's apartment to serve him with an arrest warrant for count one. The guideline applicable to both counts of conviction in §2K2.1.

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

The counts group under rule (d). Both counts are referenced to §2K2.1, and that guideline is on the list of included offenses at §3D1.2. The fact that there are two distinct crimes is not relevant to the grouping question. The fact that both counts go to a single guideline that is listed as grouping under rule (d) ends the grouping analysis.

6. Defendant is convicted of robbery (§2B3.1) and felon in possession (§2K2.1). The defendant robbed a bank in November 2018. 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 being identified by authorities. It was during the arrest at his home

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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?

The two counts group under Rule (c). The robbery guideline includes a specific offense characteristic at (b)(2) for use of a firearm. The firearms guideline includes a specific offense characteristic at (b)(6)(B) for using or possessing any firearm in connection with another felony offense. It does not matter that the firearm used in the robbery was never recovered. The respective specific offense characteristics embody the conduct represented in the other count of conviction. The higher of the two offense levels becomes the single offense level for both counts of conviction.

7. The defendant pleaded guilty to one count of felon in possession (§2K2.1), one count of 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 firearm that is the subject of the felon in possession count was 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?

Two counts – felon in possession and distribution of heroin – group under Rule (c). The firearms guideline includes a specific offense characteristic at (b)(6)(B) for using or possessing any firearm in connection with another felony offense. The drug trafficking guideline includes a specific offense characteristic at (b)(1) adding two levels if a dangerous weapon (including a firearm) was possessed. It does not matter that, because of the § 924(c) count, you don't actually apply either SOC. The respective SOCs embody the conduct represented in the other count of conviction. The higher of the two offense levels becomes the single offense level for both counts of conviction. The mandatory consecutive sentence for the §924(c) offense is added to the single offense level for the felon in possession and distribution of heroin.

8. Defendant is convicted of two counts related to breaking into a post office. Count 1 charged burglary and count 2 charged theft. Defendant entered the open lobby of a post office, where post office boxes are located, after hours. He then used a metal pipe to break the glass door leading to the locked portion of the post office. There, he stole a laptop computer. The guideline that applies to the burglary is §2B2.1, and the guideline that applies to the theft is §2B1.1. §2B1.1 (theft) is on the list of guidelines that group under Rule (d). However, §2B2.1

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(burglary) is excluded from grouping under rule (d). The prosecutor argues units should be assigned.

Is the prosecutor correct?

No. The counts group under Rule (b). The counts use different guidelines so they can't group under rule (d). However, the counts involve the same victim and two or more acts that constitute a common criminal objective – stealing valuables from the post office.

9. 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 2018. The defendant rammed his vehicle into the gun store, broke in, and stole several firearms. Count two occurred in September 2018. 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?

The counts group under rule (d). All the counts are referenced to §2K2.1, and that guideline is on the list of included offenses at §3D1.2. While the same victim was subjected to separate instances of fear and risk of harm, that is not a consideration when grouping under rule (d).

10. 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 2012 through 2014. 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 2017 through 2018. 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?

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The counts group under rule (d). All the counts are referenced to §2B1.1, and that guideline is on the list of included offenses at §3D1.2. The introductory commentary to Chapter Three Part D of the guidelines says that the grouping 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.”

11. The defendant pleaded guilty to a four-count indictment charging: unlawful manufacture of a firearm; felon in possession of a firearm; possession of a machine gun; and possession with intent to distribute methamphetamine. The machine gun and manufactured firearm were found in the same room as the methamphetamine. The applicable guideline for the firearms offenses is §2K2.1, and the applicable guideline for the drug trafficking offense is §2D1.1.

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

Multiple grouping rules apply to this scenario. The firearms counts group under rule (d) because they are all referenced to §2K2.1. The firearms offenses group with the drug trafficking offense under rule (c) because each guideline contains a specific offense characteristic that embodies the conduct in the other count of conviction. After determining the offense level under both §2D1.1 and §2K2.1, the higher of the two offense levels will be the offense level for the entire group of offenses.

12. Defendant is convicted of two assault charges. Count 1 charged assault resulting in serious bodily injury in violation of 18 USC § 113(a)(6). Count 2 charged assault resulting in substantial bodily injury of a dating partner in violation of 18 USC § 113(a)(7). The counts involve two different women, however in both assaults, the defendant used a knife. The guideline is § 2A2.2, and in each case a three-level enhancement for brandishing a dangerous weapon applies. The defense attorney argues that for this reason the two counts group together, meaning all of the conduct is aggregated and you apply the guideline one time.

Is the defense attorney correct?

No. Units should be assigned. Using the decision tree, we see that all the counts use the same guideline. However, the guideline is not listed as included under §3D1.2(d). All §2A guidelines (except one) are listed as *excluded* from grouping under rule (d). Therefore, we apply the guideline at §2A2.3 to each count of conviction. No count has an specific offense characteristic or Chapter Three adjustment embodying another count, because you apply the guideline five

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times, once for each victim; there is no cross-pollination between these distinct guideline applications. The counts do not involve the same victim, so units must be assigned.

13. Defendant is convicted of three counts of sexual exploitation of a child. The applicable guideline is §2G2.1. The counts involve the same 13-year-old victim. The defendant engaged in sexual contact with the child over the course of a weekend on three occasions: May 1, 2 and 3, 2018. 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?

Units should be assigned. Although the counts involve the same victim, each involves a separate instance of fear and risk of harm.

14. If multiple counts don't group under Rule (d) (aggregate all the relevant conduct and apply the guideline one time), the next step is to add units for the different counts.

True or False

False. The counts might group under Rules (a), (b), or (c).

15. Multiple counts have been consolidated into one sentencing proceeding. **What grouping rules apply?**

All of them. See the Introductory Commentary to §3D1.1.