

119708

UNITED STATES SENTENCING COMMISSION

TRAINER'S MANUAL

UNITED STATES SENTENCING COMMISSION

William W. Wilkins, Jr.
Chairman

Michael K. Block

Stephen G. Breyer

Helen G. Corrothers

George E. MacKinnon

Ilene H. Nagel

Winston S. Moore
Staff Director

TRAINING UNIT

Phyllis J. Newton
Director

L. Russell Burrese

Linda Clemons

Sharon Henegan

Candy Johnson

Pat Macdonald

Paul K. Martin

Jay Meyer

Donald A. Purdy, Jr.

Melissa Seliak

John R. Steer

119708

U.S. Department of Justice
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this ~~document~~ material has been granted by

Public Domain

U.S. Sentencing Commission

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the ~~copyright~~ owner.

NCJRS

SEP 15 1989

ACQUISITIONS

UNITED STATES SENTENCING COMMISSION

1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-9800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Benjamin F. Baer (ex officio)
Ronald L. Garner (ex officio)



ORIENTATION TO TRAIN-THE-TRAINER 1989

Welcome to the United States Sentencing Commission's 1989 Train-the-Trainer conference. Simply stated, the goal of this program is to train probation officers, assistant U.S. attorneys, federal public defenders, and members of the private bar to be guidelines teachers.

The Commission views training not only as a statutory requirement, but as a method of educating the various elements of the federal criminal justice system about the Commission's intent for guidelines application. Naturally, in any dispute involving guidelines application, the language in the Guidelines Manual controls. However, this training session and the corresponding printed materials should assist in understanding how the Commission intended the guidelines to operate.

Disclaimer

It is important to remember that information provided at the Train-the-Trainer seminars and the materials in this Trainer's Manual are offered to assist individuals in applying the sentencing guidelines. The information and materials do not necessarily represent an official position of the Commission, should not be considered definitive, and are not binding upon the Commission, the court, or the parties to any case.

Training Philosophy

First and foremost, the Commission understands that the court will make the ultimate determination as to applicability of guidelines given the facts of individual cases and the language of individual guidelines. When there is doubt whether a particular guideline applies in a specific case, the language of the guidelines should be consulted to support or dispute a position. It is important to learn to build an argument based on the text of the guidelines. The Training Unit believes that its function in this regard is to acquaint participants with the language and operation of the guidelines.

A thorough reading of the Guidelines Manual is critical to correct guidelines application. This point cannot be stressed enough -- always read the guidelines.

When you return to your districts to train, relate your training as much as possible to the Guidelines Manual. Encourage students to follow the program with their books open. Teach the manual. While it may appear simplistic to take participants through each step, the process is an important tool that students will remember and use when they attempt to apply the guidelines on their own.

The Commission has found that training through case example is very effective. Begin with the words from the guidelines and lead into an example. Explain the transition from guideline language to example solution. Teach participants to use the guideline language to support application decisions.

The Commission has developed several tools to assist in guidelines application, notably the worksheets and ASSYST, a computer application program. Neither are intended to be used without the assistance of the Guidelines Manual. Both are only tools that aid in guideline application. They were not designed to consider every nuance in the guidelines or the unique circumstances of individual cases. Using either to the exclusion of the guidelines may well produce misapplication.

Development of Advanced Training Material

The Commission began to anticipate the training needs of the federal criminal justice community long before the separation of powers challenges to the Commission were resolved. The first step in the process was the convening of working groups of federal judges and probation officers. These initial meetings provided the catalyst for development of advanced training materials and training seminars.

Through the assistance of United States Attorney Joe B. Brown, Middle District of Tennessee, a survey was sent to all U.S. Attorney Offices eliciting information concerning training needs. The results of this survey greatly assisted the Commission in designing the training seminars.

Advanced Training Materials

Through the working groups and the survey, the Commission learned that one of the shortcomings of earlier training seminars was the lack of training materials available to trainers to take back to their districts. In an effort to fill this need the Commission has developed materials designed to assist trainers in teaching guidelines application. The resulting Trainer's Manual includes seven sections: Guideline Application, Multiple Counts, Relevant Conduct, Criminal History, Departures, Imposition of Sentence, and ASSYST. To date, materials have been completed for three of the sections: Guideline Application, Multiple Counts, and Relevant Conduct.

Each section is designed as a complete training packet on a specific area of guidelines application. Tab A of each section contains a lecture outline of the subject area. The outlines are comprehensive and will often provide more detail on a topic than a trainer

can cover in most in-district sessions. The hope is that comprehensive information will allow you to subdivide your training by tailoring the materials to the group's individual needs. For example, the lecture material on fines is very thorough. You may decide to take that portion of the lecture and present it at a one hour session, or you may wish to highlight the most important points about fines in a general guidelines application lecture. In addition, the outlines contain a large number of examples that illustrate key concepts. Again, it is not anticipated that all examples will be used in any one lecture.

Tab B of each section provides the overheads noted in the lecture outlines. Again, we have erred on the side of being overly comprehensive. Transparencies will have to be made as needed.

Tab C contains support materials for the lectures, including quizzes that provide a self-testing of guidelines application. Tab C also includes exercises and test cases designed for small group discussions. The Commission has prepared breakout group discussion materials for relevant conduct and multiple counts that it will use at the advanced training seminars. These materials are included at Tab C to aid in designing small group sessions in your districts.

The remaining four sections of the Trainer's Manual will be provided as they are completed.

A Note of Thanks

The Commission has been fortunate to have the assistance of the following U.S. probation officers in developing the training materials: JoAnn Coates (Wisconsin Eastern), Gary Combs (Mississippi Southern), Sharon Henegan (Pennsylvania Eastern), Dave Miller (Ohio Southern), Lee Newton (Georgia Northern), John Shevlin (Florida Southern), Oscar Stephenson (Alabama Northern), and Tommy Whiteside (South Carolina). We offer our sincere thanks to the officers and their chiefs for allowing them to take time from their busy schedules and assist in this enterprise.

The Commission appreciates the services of the following individuals who have served as training faculty at the Train-the-Trainer conferences: John Shevlin (U.S. probation officer, Florida Southern), Jerry Denzlinger (U.S. probation officer, Texas Southern), Dave Miller (U.S. probation officer, Ohio Southern), Tom McDowell (U.S. probation officer, Louisiana Western), Donna Triptow (assistant U.S. attorney, Maryland), Julie Carnes (assistant U.S. attorney, Georgia Northern), Maggie Jensen (Probation Division, AO), Toby Slawsky (General Counsel's Office, AO), and David Adair (General Counsel's Office, AO).

GUIDELINE APPLICATION OVERVIEW

Table of Contents

- I. Introduction**
 - A. Goals
 - B. Guideline Approach
 - C. Guidelines Manual Format

- II. Understanding Guideline Application**
 - A. Determination of Offense Level and Criminal History Category
 - B. Impact of Changes in Offense Levels
 - C. Guideline Worksheets
 - D. Importance of Chapter One
 - E. Application Principles

- III. Determination of Offense Level**
 - A. Chapter Two Guidelines
 - B. Chapter Three Adjustments

- IV. Criminal History Category**
 - A. Criminal History Points
 - B. Assignment of Points
 - C. Time Frame Considerations
 - D. Important Definitional Considerations
 - E. Status
 - F. Recency

V. Career Offender and Criminal Livelihood

- A. Career Offender
- B. Criminal Livelihood

VI. Resulting Guideline Range

- A. Procedure
- B. Structure
- C. Nature of Sentences Under Guidelines
- D. Sentencing Options
- E. Fines

VII. Departures

- A. Statutory Considerations
- B. Guideline Considerations

VIII. Imposing Sentence

- A. Imprisonment
- B. Supervised Release
- C. Fines
- D. Unexpired Sentences
- E. Statement of Reasons

GUIDELINE APPLICATION LECTURE

I. INTRODUCTION

Show sentencing table, page 5.2 - Overhead #1

A. Goals

1. To determine guideline sentencing range.
2. To determine sentencing options and other aspects of the sentence directed by the guidelines:
 - probation
 - supervised release
 - restitution
 - fine
 - cost of imprisonment and supervision

B. Guideline Approach

1. Not based on a single philosophy of punishment, but rather an integrated approach: deterrence, incapacitation, just punishment, rehabilitation.
2. Based on empirical data:
 - a. Base Offense Level: a level assigned as the starting point in determination of the adjusted offense level; generally derived from analysis of "time served" data for past sentences after factoring out the impact of commonly occurring characteristics.
 - b. Specific Offense Characteristics: factors typically found in certain types of offenses (e.g., bank robbery: use of a weapon, restraint or abduction of a victim, amount of money taken, etc.) These characteristics call for increases or decreases in the offense level. Generally derived from data on the impact of the characteristics on time served for past sentences.
 - c. Guidelines written for the "typical" case. See Chapter One, Part A. Where conduct occurs in a statistically insignificant number of cases (such as physical injury in a fraud), no specific offense characteristic is listed. If injury occurs in a fraud case, a judge may use that fact as a basis for sentencing at the high end of the applicable guideline range or for a departure because the Commission has not "adequately considered" physical injury in determining the sentencing range for fraud.

- d. Sentencing ranges reflect past practice, but are not tied to it (28 USC § 994(m)). For example, the Commission, responding to Congressional direction, determined that:
 - (1) property offenses committed by white collar offenders should be treated commensurately with property offenses by others;
 - (2) previous sentences for tax violations and certain other white collar violations were too low;
 - (3) previous sentences for crimes of violence were too low.

C. Guidelines Manual Format

- 1. United States Sentencing Commission Guidelines Manual is referred to as "the guidelines."
- 2. More specifically, the manual contains:
 - a. Guidelines, which are binding (28 USC § 994(a)(1)); Failure to follow a guideline is a misapplication and is subject to appeal (18 USC § 3742(a), (b)).
 - b. Policy Statements, which are guidance to the court; not binding (28 USC § 994(a)(2)); designation "Policy Statement" follows each.
 - c. Application Notes, Background, Statutory Index, and unlabeled text are to be construed as Commentary. Commentary generally has the same force as Policy Statements (§1B1.7).

Note: Failure to follow Commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal (§1B1.7).

- 3. Structure of the guidelines (§1B1.6):
 - a. The manual is presented in numbered chapters divided into alphabetical parts. The parts are divided into subparts and individual guidelines and policy statements.
 - b. Each guideline and policy statement is identified by three numbers and a letter corresponding to the chapter, part, subpart and individual guideline or policy statement. The first number is the chapter, the letter represents the part of the chapter, the second number is the subpart, and the final number is the guideline (e.g., §2B3.1 Robbery; or §5H1.1 Age (Policy Statement)).

II. UNDERSTANDING GUIDELINE APPLICATION

A. Determination of Offense Level and Criminal History Category

Point out the following on the sentencing table - Overhead #1

1. Offense Level - vertical axis (Chapters Two and Three are used to determine this); Captures offense behavior, seriousness of offense, and other offense-related conduct.
2. Criminal History Category - horizontal axis (Chapter Four is used to determine this); Captures frequency, seriousness, and recency of prior criminal record.
3. Intersection of offense level (vertical axis) and criminal history category (horizontal axis) results in the guideline sentencing range expressed in months of imprisonment (Chapter Five).

B. Impact of Changes in Offense Levels

1. An offense level increase generally results in a 12 percent increase from the bottom of one range to the bottom of the range one offense level higher.
2. Ranges overlap and except at lower levels the top of each range is approximately 25 percent greater than the bottom of the range (28 USC § 994(b)(2)).

C. Guideline Worksheets

1. Field tested; consist of Worksheets A, B, C on which computations are made and then transferred to Worksheet D.
2. Worksheet A - computes adjusted offense level
Worksheet B - determines combined adjusted offense level of multiple counts
Worksheet C - used to determine criminal history category
Worksheet D - enter adjusted offense level (or combined adjusted offense level in the case of multiple counts) and criminal history category computed on Worksheets A, B, and C;
 - final determination of offense level and criminal history category;
 - determination of guideline range;
 - record other aspects of sentence as required or permitted by guidelines.

D. Importance of Chapter One

Provides philosophy, application instructions, definitions, other information essential to correct guideline application.

E. Application Principles - Chapter One, Part B

1. Application Instructions (§1B1.1)

Provides steps in correct guideline application

Show §1B1.2 - Overhead #2

2. Applicable Guideline (§1B1.2 and Appendix A, Statutory Index)

a. Count of conviction system - offense of conviction determines the guideline to be used (§1B1.2 and Introduction to Appendix A, Statutory Index).

b. Appropriate guideline - once the guideline is determined (§1B1.2 and Appendix A, Statutory Index), application becomes more real offense in nature and looks to the actual offense as defined by relevant conduct (§1B1.2, Application Note 3).

The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an Infraction (§1B1.9).

c. Use of Appendix A (Statutory Index)

(1) using Appendix A, locate U.S. Code section corresponding to the count of conviction.

(2) with rare exception, Appendix A references an appropriate guideline to be used in Chapter Two.

(3) if more than one guideline is referenced, select the one most appropriate for conduct cited in the count of conviction.

** Example: A defendant is convicted of 18 USC § 666 in an indictment citing theft of property by an Indian agent. The actual criminal conduct, however, indicates that a bribe occurred. Although the indictment in this case charges theft, the statute covers convictions for theft, embezzlement, fraud and bribery. The statutory index for § 666 references four guidelines (§§2B1.1, 2C1.1, 2C1.2, 2F1.1). The language of the indictment guides the determination of the appropriate guideline within the structure of §1B1.2(a), regardless of the underlying real offense conduct. Therefore, the appropriate guideline in this case would be for theft, §2B1.1.*

(4) if the conviction is for violation not cited in the Statutory Index, see §2X5.1. This guideline directs use of the most analogous guideline. Select the guideline most appropriate for conduct cited in the count of conviction.

** Example: The defendant assaulted two people who were parked in their car at a national park campsite. The charges of aggravated assault were brought under the Assimilative Crimes Act, 18 USC § 13, which is not listed in Appendix A. Guideline 2X5.1 instructs that when an offense exists for which no guideline has been expressly promulgated, the most analogous offense guideline is to be used. In this instance the most analogous guideline is that for aggravated assault, §2A2.2.*

- (5) if as part of an agreement to plead guilty (or nolo contendere) the defendant stipulates to a more serious offense than the offense of conviction, the guideline most applicable to the stipulated offense is used (§1B1.2(a)).

Note: Information as to elements of a more serious offense must be part of the plea agreement and not merely information later or otherwise obtained.

** Example: If a defendant pleads guilty to one count of theft, but stipulates to the elements of robbery as part of the plea agreement, the robbery guideline is applied. However, the sentence imposed cannot exceed the maximum statutory sentence for the theft (§1B1.2, Application Note 1).*

** Example: The defendant as part of a plea agreement pleads to the charge of using a communication facility to aid the distribution of drugs (21 USC § 843(b)). The agreement stipulates that he actually distributed drugs (21 USC § 841(a)). The guideline most applicable to the more serious offense is used (in this case §2D1.1 for drug distribution). However, the maximum sentence cannot exceed the statutory maximum for the offense of conviction (or offenses of conviction in the cases of multiple counts). In this instance, the maximum penalty for violation of 21 USC § 843(b) is four years.*

Provide students with Test Case A (located in Tab C); show Statutory Index for correct guideline selection - Overhead #3

3. Relevant Conduct - §1B1.3

Note: For a more detailed treatment of this issue, see Sentencing Commission Trainer's Manual, Relevant Conduct.

Once the guideline is determined, application becomes more real offense in nature and looks to the actual offense as defined by relevant conduct (§1B1.3).

Show §1B1.3 - Overhead #4

- a. Critical for correct guideline application:
- (1) for the offense level (Chapters Two and Three), relevant conduct sets parameters for facts to be considered (§1B1.3(a)(1) - (a)(5));
 - (2) For Criminal History (Chapter Four), relevant conduct extends to factors enumerated in the respective Chapter Four guidelines (§1B1.3)(b)).
- b. Explains what facts beyond just the narrow elements of the offense of conviction can be used to determine guideline range.
- (1) Relevant Conduct sets the parameters for deciding whether conduct is related to the offense of conviction.
 - (2) Chapter Two and Three guidelines require utilization of relevant conduct to direct an increase or decrease in the offense level depending on the presence or absence of specifically enumerated factors (e.g., robbery: gun, injury to victims, abduction). Relevant conduct may also dictate the base offense level for certain crimes (such as drugs), or when a cross reference is appropriate.
 - (3) Guideline 1B1.3(a)(1) defines an offense for purposes of guideline application: all acts and omissions committed or aided and abetted in preparation for the offense, during the offense, in attempting to avoid detection or in furtherance of the offense.

** Example ("during"): During a bank robbery, a defendant takes jewelry valued at \$2,000 from customers in the bank. This amount would be added to the amount of money stolen from the bank in determining the loss. Justification: §1B1.3(a)(1) states that the offense level is determined on the basis of all acts "that occurred during the commission of the offense of conviction."*

** Example ("avoid detection or responsibility"): While fleeing the scene of a robbery in a stolen car, the defendant runs over a bystander. Because this occurred while the defendant was "attempting to avoid detection or responsibility for that offense," this behavior can be used as an adjustment to the offense level (i.e., an increase for bodily injury).*

** Example ("otherwise accountable"): The defendant who planned the robbery was unarmed; however an accomplice carried a gun. Because the unarmed defendant was "otherwise accountable" for the gun, his offense level will be increased for the weapon.*

** Example ("reasonably foreseeable"): Three defendants conspire to rob a bank, with defendant A staying in the car and defendants B and C entering the bank to commit the robbery. During the robbery, B and C shoot the teller. Because injury is a reasonably foreseeable result of robbery, defendant A also receives the offense level adjustment for bodily injury (§1B1.3, Application Note 1).*

** Example (not "in preparation for"): The day prior to the robbery, the defendant, while driving in a stolen car, strikes and injures a pedestrian. The degree of bodily injury to the pedestrian is not included in calculating the offense level for the robbery as this did not occur in preparation for the offense of conviction.*

- (4) For certain types of offenses, wider parameters in §1B1.3(a)(2) direct the consideration of conduct beyond the counts of conviction, specifically, all acts and omissions that are the same course of conduct or part of a common scheme or plan.

Show list of offenses from §3D1.2(d) - Overhead #5

The guidelines for the types of offenses specified in §1B1.3(a)(2) are listed in §3D1.2(d). Guidelines listed include offenses such as theft, larceny, embezzlement, fraud, drug trafficking, tax evasion, money laundering, etc.--offenses that are usually ongoing, continuing, and repetitive in nature. The seriousness of these offenses is primarily determined under the guidelines by an aggregate of some fungible item, such as money or drugs.

** Example: A defendant pleads to a single count of bank embezzlement involving \$10,000. However, during the entire scheme he embezzled \$25,000 from the bank. Because bank embezzlement is an offense "aggregatable" (groupable) under §3D1.2(d), relevant conduct expands what can be considered to include "all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." In this instance, that means the offense level would be based on embezzlement of \$25,000.*

** Example: A defendant pleads to a single count of possession with intent to distribute 500 grams of cocaine. However, at the time of his arrest he was actually in possession of five kilograms of cocaine that he intended to distribute. The offense level is based on the five kilograms because this was part of the same course of conduct as the offense of conviction and the guideline for distribution of drugs is one that is listed as "aggregatable" under §3D1.2(d).*

** Example: A defendant who robbed two banks on the same day using the same procedures pleaded guilty to one count related to the robbery of the first bank. None of the factors related to the robbery of the second bank, such as money, injury, weapon use, can be used in calculation of the offense level for the offense of conviction. Robbery is never grouped under §3D1.2(d) and is listed*

under that guideline along with certain other offenses as specifically excluded from its operation.

- (5) use of certain self-incriminating information obtained under a cooperating agreement with the government that specifies immunity is not to be used in determining the guideline range (§1B1.8).

4. Information Used in Imposing Sentence - §1B1.4

Show §1B1.4 - Overhead #6

- a. This guideline generally directs that any information regarding the background, character, and conduct of the defendant can be considered in deciding (1) the point within the range and (2) whether a departure may be appropriate. See 18 USC § 3661.
- b. Factors present in the offense, including atypical factors that were not included in the determination of the guideline range, may affect the sentence if the court has reliable information.

** Example (information not considered in determining guideline range but appropriate for sentencing): The weight of a drug does not enter into calculation of the offense level for conviction on a telephone count, but might be considered in sentencing (i.e., where to sentence within the range and whether to depart).*

** Example: The guideline for criminal sexual abuse contains a specific offense characteristic for permanent or life threatening bodily injury. In a case where the nature of the injury was particularly heinous, such as the severing of limbs, the court may find this factor so aggravating that it warrants a sentence more severe than that provided for by the guideline-directed offense level increase.*

- c. Other factors unrelated to the offense of conviction might also be considered if the court has reliable information, such as Adequacy of Criminal History (§4A1.3).

** Example: Four separate bank robberies that occurred over a two year period were consolidated for sentencing. The defendant received a sentence of nine years. Because this consolidated sentence would be counted as one sentence of imprisonment in awarding criminal history points, the defendant's criminal history score may not accurately reflect the seriousness of the defendant's criminal history or the frequency with which he commits crimes. The court may use this information in determining the specific point within the guideline range or whether a departure is warranted.*

III. DETERMINATION OF OFFENSE LEVEL

Establishes vertical axis on sentencing table.

A. Chapter Two Guidelines

1. Appropriate guideline - Once the guideline is determined (§1B1.2 and Appendix A, Statutory Index), application becomes more real offense in nature and looks to the actual offense as defined by relevant conduct (§1B1.2, Application Note 3).
2. Base offense level
 - a. Generally a distinct level assigned as the starting point to determine the adjusted offense level.
 - b. Established by the Commission after consideration of "average" past sentences served, less consideration of "typical" factors that resulted in modification of these past sentences.
3. Specific offense characteristics are "typical" factors in Chapter Two guidelines that modify the base offense level.

Show burglary guideline (§2B2.2) - Overhead #7

If, within parameters of relevant conduct these characteristics apply, an increase or decrease in the base offense level will result.

4. Cross references to other guidelines are contained in some Chapter Two guidelines; a cross reference refers to the entire guideline, including base offense level and specific offense characteristics (§1B1.5).

Show Worksheet A for Test Case A. Work through specific offense characteristics to find sum - Overhead #8

B. Chapter Three Adjustments

Follows computation of offense level from Chapter Two; Chapter Three adjustments apply to all counts of conviction.

1. Victim-related adjustments - Chapter Three, Part A

Show §§3A1.1, 3A1.2, and 3A1.3 - Overhead #9

- a. Any or all adjustments may apply: vulnerable victim, official victim, and restraint of victim;

- b. The vulnerable victim guideline would be applied when the victim's vulnerability or susceptibility played any part in the defendant's decision to commit the offense (§3A1.1).

** Example (vulnerable victim (§3A1.1)): The defendant is convicted of multiple counts of mail fraud. The offense involved sending terminally ill cancer patients a letter offering information for \$100 about his "cancer cure" (which was non-existent). The list of patients was obtained from the local Cancer Society. The Chapter Three adjustment for vulnerable victim would be applied because the victims were targeted based on their susceptibility to this type of criminal conduct.*

- c. The official victim guideline would be applied when an official, as specified in the guideline, is targeted as a victim and the crime is motivated by the victim's official status.

** Example (official victim (§3A1.2)): The defendant, after serving a term of imprisonment, returns home seeking revenge toward the FBI agent who investigated the crime that led to the imprisonment. He learns the location of the agent's home and vandalizes the residence, causing \$10,000 damage. This offense was motivated by the status of the victim and was directed at him. The Chapter Three adjustment for official victim would apply.*

** Example (official victim (§3A1.2)): The defendant, in the course of his escape from a bank robbery, shoots and wounds a uniformed police officer. Because the shooting is part of the relevant conduct of the bank robbery offense, the adjustment for official victim would apply.*

- d. If a victim was physically restrained during the course of the offense, a 2 offense level enhancement for restraint of victim applies.

** Example (restraint of victim (§3A1.3)): The defendant is convicted of vandalism of government property (18 USC § 1361). In vandalizing a post office, the defendant used his belt to restrain a building manager who attempted to intervene. The Chapter Three adjustment for restraint of victim is applied because the manager was bound during the commission of the offense.*

- e. Victim-related adjustments are not to be applied if the Chapter Two offense guideline incorporates the factor. This avoids double counting.

2. Role in the Offense - Chapter Three, Part B

- a. Types of role adjustments:

- (1) aggravating, §3B1.1 (increases offense level)
- (2) mitigating, §3B1.2 (decreases offense level)

(3) abuse of a position of trust or use of a special skill, §3B1.3, (increases offense level)

(4) no adjustment, §3B1.4

b. Participation of individuals

(1) Aggravating and mitigating role adjustments reflect the culpability of persons involved in criminal activity in which there was more than one participant.

(2) In assessing the number of participants, an individual need only have been involved in the criminal activity and not necessarily charged. While role adjustments may reflect a continuum of levels of participation that can occur in criminal conduct, aggravating and mitigating adjustments must be considered separately.

c. Aggravating role: the number of participants in the criminal activity and the defendant's responsibility in relationship to the participants dictates the offense level increase.

Show §3B1.1 - Overhead #10

d. Mitigating role: Not the size of the criminal activity per se that dictates, but rather the defendant's relative lesser responsibility or culpability for the criminal activity.

Show §3B1.2 - Overhead #11

e. Abuse of Position of Trust or Use of Special Skill

Show §3B1.3 - Overhead #12

(1) Can be applied if the position or skill was employed in a manner that significantly facilitated the commission or concealment of the offense.

(2) This adjustment cannot be applied if one of the aggravating role guidelines has been applied (§3B1.1), or if the Chapter Two offense guideline states that it has already factored in abuse of trust or use of special skill and therefore the Chapter Three adjustment should not be applied. (Avoid double counting.)

** Example: A defendant is convicted of a drug conspiracy involving five participants in which he organized and directed the criminal activity. He also used his skill as a pilot to bring the drugs into the country. The adjustment for organizer would result in a 4 level increase under §3B1.1(a). As a result, there would be no additional offense level increase for use of a special skill under §3B1.3.*

- (3) This adjustment can be applied, in principle, even if a mitigating role adjustment has been made. As a result, the net effect of the reduction for mitigating role and the increase for abuse or skill may have no impact on the total sentence.

** Example: A defendant is convicted of bank robbery in which she had a minor role, i.e., providing a wiring diagram of the bank surveillance cameras to her boyfriend who subsequently committed the robbery. The defendant abused a position of trust because she worked in the security department of the bank and was one of the few employees to whom such information was made available. She could receive a 2 level reduction under §3B1.2(b) and a 2 level increase under §3B1.3. The net result would be no change in the offense level.*

f. No adjustment for role (§3B1.4) may be appropriate when:

- (1) there is a single participant in criminal activity (charged or uncharged) in which no abuse of trust or use of special skill occurred;
- (2) the participants in a criminal activity are co-equals of roughly equal culpability and no abuse of trust or use of a special skill occurred;
- (3) the participant's role is otherwise neither aggravating or mitigating.

3. Obstruction - Chapter Three, Part C

Show §3C1.1 - Overhead #13

- a. Enhancement given for impeding or obstructing the investigation or prosecution of the instant offense. Includes activities related to judicial proceedings, such as an investigation by the probation officer, testimony before a grand jury, at trial, or sentencing.
- b. Court must decide whether the defendant's were (1) part of the offense behavior or (2) an attempt to willfully interfere with the disposition of criminal charges. Enhancement only applies to the latter.

** Example: A defendant involved in the interstate transportation of stolen automobiles may have destroyed documents that showed the true ownership of the vehicles. If this was done routinely in the course of the offense, it would not merit an enhancement under this section for obstruction. However, if after being interviewed by the FBI in an investigation related to the stolen cars, the defendant began destroying documents about which the FBI had inquired, the obstruction adjustment would apply.*

- c. False testimony in proceedings or falsehoods furnished to the probation officer must have been material.

** Example: If, in the course of a presentence investigation, the defendant claimed his work history was more stable than it actually was, such a falsehood might not be viewed as material. If, however, the defendant gave false information about his employment that would indicate financial inability to pay restitution or a fine, the falsehood would be material.*

- d. Obstruction adjustment not used on a count of conviction for obstruction or similar offenses, unless significant further activity occurs to impede or obstruct the investigation or prosecution of the first "obstruction" offense. (See Application Note 2, §2J1.3)

** Example: The defendant is convicted of having bribed a witness in violation of 18 USC § 201. Guideline application is made at §2J1.8, and the Chapter Three adjustment for obstruction (§3C1.1) would not be applied to this count because this behavior has been taken into consideration by the offense level calculation.*

**Complete Worksheet A of Test Case A by entering
adjusted offense level - Overhead #14**

4. Multiple Counts - Chapter Three, Part D

For a detailed treatment of this issue, see Sentencing Commission Trainer's Manual, Multiple Counts.

5. Acceptance of Responsibility - Chapter Three, Part E

Show §3E1.1 - Overhead #15

- a. Two level reduction based on clear demonstration and affirmative acceptance of personal responsibility for the defendant's criminal conduct.
- b. A guilty plea:
- does not entitle, as a matter of right, the acceptance reduction
 - is not required for awarding acceptance

- c. A defendant's going to trial:
 - is a constitutional right
 - does not automatically preclude reduction for acceptance
- d. An individual cooperating with authorities in the investigation of others may warrant acceptance, but not automatically.

** Example: A defendant pleads guilty to possession with intent to distribute cocaine. He provides substantial assistance to authorities that leads to the arrest and conviction of two major drug dealers. During the presentence investigation, the defendant shows no remorse, minimizes his guilt, and otherwise gives no affirmative indication of contrition. Therefore, while the defendant may warrant a departure for substantial assistance, the 2 level reduction for acceptance may not apply.*

- e. When the obstruction enhancement is given, a reduction for acceptance of responsibility is unlikely, but not precluded in all cases (§3E1.1, Application Note 4).

** Example: Defendant destroys material evidence upon initial inquiry by authorities, but later comes forward, is truthful, provides full information, pays restitution, and pleads guilty. In this case, the acceptance adjustment may be warranted even though the obstruction adjustment had been given.*

- f. The court must determine if the acceptance of responsibility adjustment is appropriate. Proper considerations include (but are not limited to) the criteria listed in §3E1.1, Application Note 1.

Note: The offense level as determined by the application of Chapters Two and Three can be overridden by guidelines for Career Offender and Criminal Livelihood (Chapter Four, Part B).

Show Worksheet D, filling in adjusted offense level from Worksheet A of Test Case A, then acceptance of responsibility to arrive at offense level total - Overhead #16

IV. CRIMINAL HISTORY CATEGORY - Chapter Four

Show sentencing table - Overhead #17

Establishes horizontal axis on sentencing table

A. Criminal History Points

1. Establishes criminal history category

Exception: when career offender guideline overrides (Chapter Four, Part B)

2. Points determined by:

- a. Sentences received in the past;
- b. Status at the time of the instant offense (criminal justice control);
- c. Recency of release from imprisonment at time of the instant offense.

3. Proper assignment of points is affected by various definitions, instructions, time restrictions, and limitations.

B. Assignment of Points

To assign points for prior sentences, divide criminal history into offenses that were committed after the defendant's 18th birthday and offenses committed before the defendant's 18th birthday.

1. Offenses committed after the defendant's 18th birthday:

Note: No distinction is made whether the sentence was imposed as an adult or juvenile sentence.

- a. 3 points for sentence of over one year and one month imprisonment imposed within -- or resulted in incarceration during -- the fifteen years previous to the instant offense;

** Example: The instant offense of conviction is for drug distribution that occurred on 11/29/88. On 11/5/81 the defendant had been sentenced to three years imprisonment for burglary that was committed after his 18th birthday. Three points are assigned.*

- b. 2 points for each prior sentence of between sixty days and one year and one month imprisonment imposed within ten years of the instant offense;

** Example: On 2/11/86 the same defendant received a sentence of ninety days imprisonment for grand larceny committed after his 18th birthday. Two points are assigned.*

- c. 1 point for any other sentence, including probation, fine, suspended sentence, or sentence less than sixty days imprisonment, imposed within ten years of the instant offense.

Note: maximum of 4 points may be added for offenses of this nature.

** Example: On 9/13/86 for a larceny committed after his 18th birthday, the same defendant received a sentence to a three year probationary term. He receives 1 point for this sentence.*

2. Offenses committed before the defendant's 18th birthday:

Note: A distinction between sentences imposed as an adult or juvenile is important only for sentences of more than one year and one month.

- a. 3 points for sentence of more than one year and one month imprisonment imposed within - or resulted in incarceration during - the fifteen years previous to the instant offense if the defendant was sentenced as an adult;

** Example: On 1/4/82 the seventeen-year-old defendant was convicted of armed robbery and sentenced as an adult to five years imprisonment. Three points are assigned.*

- b. 2 points for an adult sentence of between sixty days and one year and one month imposed within - or resulted in incarceration during - the five years previous to the instant offense;

2 points for any juvenile sentence of at least 60 days imprisonment imposed within - or resulted in incarceration during - the five years previous to the instant offense.

** Example: On 12/31/85 the defendant was convicted of minor assault for which he received a ninety day term of incarceration. Two points are assigned.*

- c. 1 point for any other sentence, including probation, fine, suspended sentence or sentence less than sixty days imprisonment imposed within five years of the instant offense.

Note: maximum of 4 points may be added for offenses of this nature.

** Example: The sixteen-year-old defendant was sentenced to a three year probationary term. He receives 1 point for this sentence.*

3. In determining length of prior sentence, it is the sentence imposed and not the time actually served that is the determinate factor.

** Example: On a three year custody sentence imposed for burglary committed after the defendant's eighteenth birthday, the defendant served eleven months and was paroled. Because points are assigned on the sentence pronounced not the actual time served, the sentence receives 3 points. However, if a three year sentence is imposed and all but eleven months is suspended, the points are assigned based on the eleven months not suspended and 2 points are assigned.*

C. Applicable Time Frames

1. Prior sentences must fall within specified time frames in order to be counted in the criminal history category.
2. Time frames encompass the period from the date of commencement of the instant offense forward to the sentencing date (applicable in all cases) and extend backward for a prescribed (but varying) period of time.
 - a. For offenses committed prior to the 18th birthday, the time frame encompasses the period from the instant offense forward to the sentencing date and extends backward five years.

Exception: If the defendant is sentenced as an adult to a term of incarceration of more than one year and one month, the time frame is increased to extend backward fifteen years.

- b. For offenses committed after the 18th birthday, the time frame extends backward fifteen years for sentences of more than one year and one month.
 - c. For offenses committed after the 18th birthday, the time frame extends backward ten years for sentences of less than one year and one month.

** Example: In the instant offense, the defendant stole a treasury check from the mail on 11/27/87. On 8/8/88 he was convicted of this offense and a presentence report was ordered with sentencing scheduled for 12/22/88. On 9/22/88 the defendant was arrested by local authorities for retail theft, convicted, and sentenced on 11/3/88 to ninety days imprisonment. This retail theft conviction would result in 2 points because the sentence was imposed before the defendant was sentenced for the instant offense.*

D. Important Definitional Considerations

1. Related cases (§4A1.2(a)(2) and Application Note 3)

Definition: occurred on a single occasion, were part of a single common scheme or plan, or were consolidated for trial or sentencing.

Related sentences are treated as one sentence. Consecutive sentences are added together. With concurrent sentences, the longest sentence is used.

** Example: The defendant was arrested on different dates and charged with independent offenses of burglary and aggravated assault. However, the cases were consolidated for plea and sentencing. He was sentenced to one year imprisonment for the burglary and a concurrent sentence of six months on the aggravated assault. Because the sentences are concurrent, the court looks to the longer sentence and treats them as a one year sentence. Two points are assigned.*

If the defendant had been sentenced to consecutive terms of imprisonment, the sentences would be added together and 3 points assigned.

2. Revocations are handled by treating the sentence imposed upon revocation and the sentences originally imposed as one (§4A1.2(k)(1)). Add any term of imprisonment originally imposed with any term of imprisonment upon revocation and treat the total as one prior sentence. The date the sentence was imposed is still considered to be the date of the original offense.

** Example: The defendant received a sentence of two years probation. Several months later the defendant was found in violation of probation and was sentenced to twelve months imprisonment. A total of 2 points is added, because the sentence imposed at revocation (twelve months) is added to the original term of imprisonment (in this case zero months of incarceration).*

** Example: If the same defendant had received an original sentence of probation with ninety days imprisonment and, upon revocation of probation, a sentence of one year imprisonment, these would be added together and treated as one sentence of one year and three months. Three criminal history points would be assigned.*

** Example: A defendant was placed on probation eleven years prior to the instant offense. This sentence receives no criminal history points under §4A1.1 because the defendant was sentenced prior to the applicable time period.*

If the same defendant's probation was revoked and, as a result, he received a sentence of more than one year and one month, the revocation sentence would be added to the original sentence. If the resulting incarceration extended into the fifteen year period prior to the instant offense, 3 points would be applied pursuant to §4A1.1(a). (Note: Sentences are included under §4A1.1(a) if they extend into the applicable time period.)

If the same defendant received a sentence of less than one year and one month for the subsequent revocation, no criminal history points would be given. Even though the revocation sentence would be added to the original sentence, the date of the original sentence would still be prior to the applicable time period needed to receive points under §4A1.1(b) or (c). (Note: Sentences are included under §4A1.1(b) and (c) based on the date of sentence. Whether the incarceration extended into the applicable time period is not a consideration.)

3. **Handling of certain prior convictions (§4A1.2(c) Sentences Counted and Excluded, (f) Diversionary Dispositions, (g) Military Sentences, (h) Foreign Sentences, (i) Tribal Court Sentences, and (j) Expunged Convictions):**

A thorough review of §4A1.2 is required for proper application.

E. Status

Applies to defendant under any type of sentence (criminal justice control) such as probation, parole, imprisonment, escape, etc., at the time of the instant offense (§4A1.1(d), Application Note 4).

1. Two points added if under criminal justice control.

** Example: A defendant is convicted of bank robbery (the instant offense). At the time of the robbery the defendant was on escape status, having escaped from a state institution while serving a prior sentence that is countable and would have received either 1, 2 or 3 criminal history points. Result: 2 points are assigned for status.*

2. Status applies if the defendant was under criminal justice control at any time during any relevant conduct of the instant offense.

** Example: A defendant is convicted of conspiracy to distribute cocaine. The conspiracy took place over a three year period. When the conspiracy began, the defendant was on probation for theft; however, his probation term expired six months later. In this case, 2 points would be added because the defendant was under status during the relevant conduct of the instant offense.*

3. To assign points under status, points must have been assigned under §4A1.1(a), (b) or (c) for the prior sentence that resulted in the status.

** Example: A defendant has a prior sentence of straight probation for a theft conviction in state court that was imposed more than ten years before the instant offense. At the time of the instant offense, the defendant was still on probation. In the calculation of prior sentences, no criminal history points would be added under §4A1.1 because the sentence was imposed more than ten years earlier. Therefore, 2 points would not be added under status (§4A1.1(d)).*

Exception: In a case where the maximum of 4 points has already been given for sentences under §4A1.1(c), there may be additional sentences that were not counted because of the 4 point maximum. If the defendant is under status from one of these prior sentences, §4A1.1(d) would still apply.

** Example: A defendant has five prior sentences, all imposed within ten years of the instant offense. These five prior sentences consisted of either a fine, probation, or less than 60 days imprisonment. At the time of the instant offense the defendant was on probation for the latest of these five prior sentences. While each of these prior sentences would otherwise qualify for the addition of 1 criminal history point, a maximum total of 4 points can be added for 1 point sentences. Because the prior sentence that has resulted in the status would have otherwise been counted as a prior sentence except for the 4 point maximum, the status counts.*

F. Recency

Refers to a defendant committing any part of the instant offense within two years of release from imprisonment on a sentence of at least 60 days (§4A1.1(e), Application Note 5).

1. Two points are generally added for "recency." However, if the defendant was under any criminal justice sentence and received 2 points for status under §4A1.1(d), only 1 point is given for recency.

** Example: A defendant was convicted and sentenced to 120 days for driving under the influence of an intoxicant. He was released sixteen months prior to the commencement of the relevant conduct in the instant offense and was not under criminal justice control (status). Two points would be added for recency under §4A1.1(e).*

2. Recency applies if release was within two years of any of the relevant conduct of the instant offense.

** Example: A defendant pleads to a single count of mail fraud. However, under relevant conduct (§1B1.3(a)(2)) the first act that was part of the fraud scheme occurred four years before the date cited in the count of conviction. One year prior to the first act in this mail fraud scheme, the defendant had been released from imprisonment on a two year sentence for burglary (a prior sentence counted under §4A1.1(a)). Two points would be added under §4A1.1(e), "recency," because part of the instant offense (relevant conduct) occurred within two years of release on the burglary sentence.*

3. To be counted, the custody from which the defendant was released must have resulted from a sentence of 60 days or more of imprisonment, i.e., a sentence counted under §4A1.1(a) or (b) for which 3 or 2 criminal history points were assigned.

** Example: A defendant had a prior sentence of three years probation with a special condition of 45 days imprisonment. He was released from the imprisonment within two years of the instant offense and was still on probation at the time of the instant offense. For the prior sentence, 1 point would be assigned under §4A1.1(c). Two points would be assigned for status (on probation) under §4A1.1(d). However, no points would be assigned for recency under §4A1.1(e) because the imprisonment was for a sentence of less than 60 days and not counted under §4A1.1(a) or (b).*

4. Recency applies, and point(s) are assigned even if the defendant committed the instant offense while still in custody (§4A1.1, Application Note 5).

** Example: Two defendants are sentenced to five year terms of imprisonment. One is paroled for good behavior, but commits the instant offense within two years of release while still on parole. One point for recency would be assigned. The second defendant is not paroled, but commits another crime while in custody. One point for recency would be awarded. (Both defendants would be given 2 points for status.)*

Using Test Case A, show Worksheet C. Work criminal history and determine criminal history category - Overhead #18

V. CAREER OFFENDER AND CRIMINAL LIVELIHOOD Chapter Four, Part B

A. Career Offender - §§4B1.1, 4B1.2

Show §§4B1.1 and 4B1.2 - Overhead #19

1. Guidelines are in response to directives in the Sentencing Reform Act (28 USC § 994 (h)) stating that defendants meeting certain criteria shall be sentenced at or near the maximum term authorized.
2. Criteria to apply career offender status:
 - a. Defendant must be at least age 18 at time of instant offense;
 - b. Instant offense is a felony conviction for a crime of violence or controlled substance offense;
 - c. Two prior felony convictions for crimes of violence or controlled substance offenses, or one of each, prior to the instant offense; instant offense cannot be part of the same offense conduct as either of the two priors, nor can the two priors have been part of the same offense conduct.

3. Requires consultation of a table based on maximum statutory penalty of the count of conviction.
 - a. Assign offense level designated by the table only if greater than the offense level computed through Chapters Two and Three;
 - b. In the case of multiple counts where more than one count qualifies for career offender status, use the count with the highest maximum statutory penalty;
 - c. No further adjustments are made to the offense level after the career offender determination is made. (i.e., even if the adjustment for acceptance of responsibility had been warranted in the regular offense level calculations, it would not reduce the offense level determined by application of the career offender table). See §1B1.1 for order of guideline application.

** Example: A defendant pleads guilty to possession with intent to distribute cocaine and use of a communication facility to distribute cocaine. The first carries a maximum sentence of 20 years and the second a maximum term of four years. Both are felony drug offenses and the defendant was over 18 when they occurred. He has two prior felony convictions for armed robbery and burglary of a residence, each of which meets the criteria for crime of violence and each of which is considered a prior sentence under the guidelines in Chapter Four, Part A. He would thus be classified a career offender. Because both counts qualify under this section, possession with intent to distribute cocaine would be used to establish the offense level because it has the higher statutory maximum. If the offense level from the table is higher than that computed through regular guideline application for all counts of conviction, it would become the offense level used in determining the guideline sentencing range.*

** Example: A defendant pleads guilty to two counts of tax evasion and one count of use of a dangerous weapon to assault an IRS agent. The defendant is at least 18 years old and has two prior convictions for drug-related felony offenses that are separately countable in the computation of points for prior criminal sentences. The defendant would be classified as a career offender because one of the instant counts of conviction (assault) qualifies under this section. The career offender offense level would be established by the statutory maximum for the assault charge. If greater than the offense level determined through regular guideline application for all counts of conviction, the career offender offense level would be used to determine the guideline sentencing range.*

4. Criminal history category automatically becomes VI regardless of category determined by regular application of other Chapter Four guidelines.

** Example: A defendant has pleaded guilty to conspiracy to distribute cocaine, a felony with a maximum penalty of 20 years. He was convicted of voluntary manslaughter 12 years prior to the instant offense, received eight years imprisonment (3 points), and was paroled after four years. Three years later he*

was convicted of voluntary manslaughter and received four years (3 points). He was paroled after two years and was on parole at the time of the instant offense (2 points). His release occurred less than two years before the instant offense (1 point). Thus, his total criminal history points are 9, which places him in Criminal History Category IV. However, because he qualifies as a career offender, the criminal history category automatically becomes VI.

5. **Definition of crime of violence - §4B1.2(1)**

Show §4B1.2 - Overhead #20

- a. Based on 18 USC § 16;
- b. Must be the offense of conviction;
- c. Guideline states that offense must have violence as an element; lists several offenses that meet the criteria (e.g., murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, robbery; §4B1.2, Application Note 1);
- d. The court must determine if the offense meets the definition of a "crime of violence."

6. **Definition of controlled substance offense - §4B1.2(2)**

- a. Must be the offense of conviction;
- b. An offense identified in 21 USC §§ 841, 845(b), 856, 952(a), 955, 955(a), 959, and similar offenses
- c. Includes any federal or state offense that is substantially similar to statutes listed in §4B1.2(2). These offenses include manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense a controlled substance or a counterfeit substance. The definition also includes aiding and abetting and conspiring or attempting to commit such offenses (§4B1.2 and Application Note 2).
- d. Convictions for simple possession are not considered even if the real offense behavior was distribution.

B. **Criminal Livelihood - §4B1.3**

Show §4B1.3 - Overhead #21

- 1. Guideline 4B1.3 responds to Sentencing Reform Act (28 USC § 994(i)(2)) directives by ensuring that defendants who commit an offense as part of a pattern of criminal conduct from which a substantial portion of income is

derived shall be sentenced to a substantial term of imprisonment. The intent is to raise an applicable defendant's offense level to a "substantial term" if one is regular application of the guidelines does not produce such results.

2. If this guideline is applicable:

- a. Compute offense level according to regular procedure;
- b. If the offense level has not reached level 13, and the defendant was not awarded a 2 level reduction for acceptance of responsibility, assign level 13;
- c. If in regular application the defendant was awarded a 2 level reduction for acceptance of responsibility, and the offense level has not reached level 11, assign level 11. This is to allow for acceptance even when criminal livelihood is applicable.

** Example: A defendant is convicted of dealing in firearms without a license. Over an 18-month period he sold 250 firearms, receiving an average of \$100 per firearm. He was employed as a bartender during this period and earned \$12,000. He did not affirmatively demonstrate acceptance of responsibility. The offense level through regular computations is determined to be 12, with no reduction for acceptance of responsibility. If Criminal Livelihood is determined to be applicable, the offense level would be increased to 13.*

** Example: A defendant is convicted of bank embezzlement that occurred over a one-year period and involved a loss of \$15,000. The offense level through regular computation is determined to be 10, with a 2 level reduction for acceptance of responsibility, bringing the offense level to 8. If Criminal Livelihood is determined to be applicable, however, the offense level would be increased to 11.*

** Example: A defendant is convicted of receiving stolen money orders. The offense involved a loss of \$10,000 over an eight-month period. Selling the money orders was the defendant's only source of income. He admitted his involvement in the offense. The offense level through regular computations is determined to be 14, with a 2 level reduction for acceptance of responsibility, bringing the offense level to 12. Even if criminal livelihood is determined to be applicable, no increase would result because the offense level is at least 11.*

- d. The criminal livelihood guideline has no effect on the criminal history category as determined through regular application.

VI. RESULTING GUIDELINE RANGE - Chapter Five, Part A

The sentencing table provides the sentencing range.

A. Procedure

Range established by:

1. Offense level (vertical axis) determined by use of Chapters Two and Three, unless overridden by Career Offender/Criminal Livelihood in Chapter Four, Part B; and
2. Criminal history category (horizontal axis) in Chapter Four, Part A, unless overridden by Career Offender guideline in Chapter Four, Part B.

B. Structure

1. Ranges expressed in months of imprisonment;
2. Top of guideline range cannot exceed the bottom of the range by more than 25 percent or six months, whichever is greater (28 USC § 994(b)(2));
3. Ranges overlap moving down the table (increases in offense levels) and overlap moving across the table (increases in criminal history category).

C. Nature of Sentences Under the Guidelines

1. Sentencing ranges expressed in real time (18 USC § 3621(a)). Defendant serves the actual term imposed. Good conduct time permits a maximum reduction of 54 days per year on sentences of more than one year. Good time reductions are not available on a life sentence (18 USC § 3624(b)).
2. With abolition of parole, there is now a form of post-release supervision called supervised release that can be imposed by the court at the time of sentencing (18 USC § 3583).

D. Sentencing Options (excluding fines)

1. **Imprisonment** - option in every guideline range, even when non-incarcerative sentencing options are available for the particular guideline range (§5C2.1).

All guideline sentences are subject to statutory limitations (i.e., statutory maximum and minimum sentences (§5G1.1)).

2. **Probation - now a sentence (18 USC § 3561)**

a. **Statutory considerations:**

- (1) probation not available for Class A or B felony (18 USC § 3561(a)(1));

(For classifications, see 18 USC § 3559.)

Note: The statutory maximum for a Class B felony is increased as of November 18, 1988, to 25 years or more for offenses occurring on or after that date.)

- (2) not available if statute precludes probation (18 USC § 3561(a)(2));
- (3) not available if defendant is sentenced at the same time to a term of imprisonment (18 USC § 3561(a)(3));
- (4) maximum term of probation by statute is five years (except for infractions) with minimum term of one year for a felony (18 USC § 3561(b)).

Show shaded sentencing table, sentencing options, pointing out areas where probation is available - Overhead #22

b. **Availability of probation under the guidelines:**

- (1) available if minimum of the guideline range is zero.
- (2) available if minimum of the guideline range is at least one month but no greater than six months. In such cases, at least the minimum guideline range must be satisfied by intermittent confinement (e.g., nights, weekends in jail) or community confinement (e.g., residency in a halfway house, community treatment center, residential alcohol/drug treatment center). Refer to §5B1.1(a)(2).

c. **Terms of probation (§5B1.2)**

- (1) between one and five years if offense level is 6 or greater;
- (2) not more than three years if the offense level is 5 or less.

d. Conditions of probation (§5B1.3)

(1) statutorily required (18 USC § 3563):

- (a) defendant shall not commit another federal, state or local crime during the term of probation;
- (b) if imposed for a felony, the court shall impose at least one of the following: a fine, order of restitution, or community service;
- (c) defendant shall not possess illegal controlled substance.

Note: 18 USC § 3563(a) has been amended by the Omnibus Anti-Drug Abuse Act of November 18, 1988, adding the statutory prohibition of possession of a controlled substance.

(2) recommended conditions in guidelines (§5B1.4, Policy Statement).

3. New "split sentence" (or Intermediate Sentencing Option) (§§5C2.1(c)(3) and 5C2.1(d)(2))

- a. Available if guideline range has minimum of at least one month; minimum can be no greater than ten months;
- b. This option is not probation, but a sentence of imprisonment followed by supervised release with conditions of community confinement;
- c. Requires term of imprisonment that is at least one-half the minimum of the guideline range;
- d. Term of supervised release must be ordered with the condition that at least the remainder of the minimum of the guideline range be fulfilled in community confinement (e.g., residency in a halfway house, community treatment center, residential alcohol/drug facility, etc.).

** Example of new split sentence: A defendant has a guideline range of 8 - 14 months imprisonment. The new split sentence is available if the minimum of the guideline range (8 months) is at least one but not more than ten. The defendant could be committed to the custody of the Bureau of Prisons for four months (at least half of the 8-month minimum) with a two-year term of supervised release to follow that contains a condition of residence in a halfway house for a period of four months (at least the balance of the 8-month minimum).*

(For additional examples, see §5C2.1, Application Notes 3 and 4.)

4. **Supervised Release** - a term of post-release supervision to follow imprisonment

a. Statutory considerations:

- (1) created by Sentencing Reform Act (18 USC § 3583) along with guideline sentencing and abolition of parole;
- (2) ordered by the court at sentencing; this is an add-on, analogous to the old special parole terms;
- (3) may be imposed with any sentence of imprisonment for felonies and Class A misdemeanors.
 - (a) length of term determined by classification of offense (i.e., A or B felony, C or D felony, E felony or Class A misdemeanor) 18 USC § 3583(b).

Note: This provision has been amended by the Sentencing Act of 1987 and the Omnibus Anti-Drug Abuse Act of 1988.

- (b) certain drug offenses require mandatory minimum terms of supervised release.

b. Guideline directives (§5D3.1)

- (1) availability (§5D3.1)
 - (a) required on any term of imprisonment of over one year;
 - (b) may be ordered to follow any other term of imprisonment.
- (2) length of term (§5D3.2)
 - (a) based on the classification of the offense (i.e., 3-5 years for a Class A or B felony; 2-3 years for a Class C or D felony; 1 year for Class E felony or Class A misdemeanor)
 - (b) Exception: If the offense has, by statute, a mandatory minimum term of supervised release, the guideline term is to be between 3 - 5 years unless the mandatory minimum is greater.

- (3) condition(s) of supervised release (§5D3.3)
 - (a) statutorily required condition that no law be violated;
 - (b) statutorily required condition that no illegal controlled substance be possessed (18 USC § 3583(d));
 - (c) recommended conditions in the guidelines (§5D3.3).

5. **Restitution - §5E4.1**

a. Statutory considerations:

must be ordered if conviction is for a title 18 statute or certain title 49 statutes (in accordance with 18 USC § 3663(d)).

Note: This has recently been clarified by the Congress in the Omnibus Anti-Drug Abuse Act of 1988.

b. Guideline directives:

- (1) to be ordered in accordance with 18 USC §3663(d) or may be ordered as a condition of probation or supervised release in any other case;
- (2) when a defendant is ordered to pay restitution as well as a fine, any money paid shall first be applied to the restitution (§5E4.1(b));
- (3) regarding the amount of restitution required and other related issues, the guidelines defer to 18 USC § 3664(a). (See §5E4.1, Background). The guidelines do not address issues of restitution determined by case law (e.g., consideration of restitution for dismissed counts).

E. **Fines - §5E4.2**

- 1. Guidelines require that a fine be paid in every case except where the defendant establishes an inability to pay or payment of a fine would place an undue burden on the defendant's dependents (§5E4.2(a),(f)).
- 2. Fine range is established within statutory limitations, just as guideline sentencing range of imprisonment is within limitations set by statute for the offense.

Show Worksheet D, section 11 on fines.
Point out minimum and maximum columns - Overhead #23

3. A fine may be the sole sanction if the guidelines do not require a term of imprisonment (§5E4.2, Application Note 1), although the amount of the fine must be sufficient to ensure that the sanction is punitive (§5E4.2(e)).
4. Purposes of the fine range (differs for minimum and maximum):
 - a. Purpose of the minimum:
 - (1) at the very least, defendant will not have financially profited from criminal activity;
 - (2) in many instances the minimum provides some level of punishment and deterrence.
 - b. Purpose of the maximum: to provide the court with sufficient flexibility to impose a more severe financial punishment when deemed appropriate.
5. Factors utilized in establishing the fine range
 - a. Fine table (§5E4.2(c)(3)) provides a minimum and maximum fine range. The table is based on the offense level utilized in establishing the guideline range of imprisonment.
 - b. Minimum of the fine range:
 - (1) established by the greater of the minimum of the fine table or the amount of pecuniary gain to the defendant (less restitution) (§5E4.2(c)(1)).

** Example: Assuming no restitution is applicable, if the offense level computed for the offense is 16, the minimum fine established by the guideline fine table is \$5,000. If the defendant's pecuniary gain from the offense is less than \$5,000, the minimum of the fine range will be \$5,000. If, however, the defendant's pecuniary gain in this offense is \$10,000, the minimum of the fine range will be \$10,000. Thus, at the very least, the defendant will not have personally profited from the criminal activity.*

**Point out calculations of Test Case A as they
would appear on Worksheet D, item 11 - Overhead #24**

- (2) restitution paid or ordered by the court will reduce the amount of pecuniary gain, because payment of restitution will reduce the amount of financial profit to the defendant.

** Example: Even though the defendant's pecuniary gain would have been \$10,000, any restitution paid by the defendant prior to sentencing, or ordered at sentencing by the court, reduces the pecuniary gain. Thus, if the defendant had paid or was ordered to pay \$3,000 restitution, the \$10,000 pecuniary gain is reduced to \$7,000. Because \$7,000 is greater than the fine table minimum of \$5,000, the minimum of the fine range would be \$7,000. However, if the defendant had paid or was ordered to pay \$8,000 in restitution, then the \$10,000 pecuniary amount is reduced to \$2,000, which is less than the fine table amount of \$5,000. The greater of the two amounts is the amount to be used -- in this case \$5,000 from the fine table.*

- (3) regardless of the restitution ordered or paid, the minimum of the fine range will be at least the fine table minimum.

** Example: If a defendant had pecuniary gain of \$10,000, but was ordered to pay full restitution, thereby reducing the pecuniary gain to zero, the fine table minimum (\$5,000 in this case) would be the fine range minimum. As the \$10,000 restitution would have negated the pecuniary gain, the \$5,000 fine ordered would therefore be punitive.*

- (4) in computing the fine range minimum in advance of sentencing, only the amount of restitution made prior to the hearing is subtracted from the pecuniary gain. There is no certainty as to whether or how much restitution will be ordered by the court. If at the hearing the court orders restitution, the amount ordered would be deducted from any pecuniary gain to the defendant. This may result in a recalculation of the minimum of the fine range.

c. Maximum of the fine range:

- (1) factors considered
 - (a) if a count of conviction has a statutory maximum in excess of \$250,000 (e.g., certain drug statutes); or
 - (b) if the statute violated carries a fine for each day of violation (e.g., certain environmental statutes);

then the statutory maximum penalty is the fine maximum penalty. When there are multiple counts each carrying a maximum fine in excess of \$250,000, the guideline fine maximum is the total of these fine amounts. In any case, there is no need for additional computation of the maximum of the guideline fine range (§5E4.2(c)(4) and Application Note 5).

** Example: A defendant is convicted of 21 USC § 841(a)(1), an offense that carries a maximum statutory penalty of \$1 million. Because the statutory fine maximum is greater than \$250,000, the \$1 million would be the fine range maximum.*

- (c) otherwise, the maximum fine range is the greatest of three factors:
 - (i) maximum fine as established by use of the fine table;
 - (ii) three times the gross pecuniary gain to all participants in the offense;
 - (iii) twice the pecuniary loss caused by the offense.
- (2) the gain factor considered in establishing the maximum of the fine range is different from the gain factor considered in establishing the minimum.
 - (a) the gain of all participants in the offense is considered as opposed to merely the gain of the individual defendant.

** Example: In a bank robbery in which four participants stole a total of \$20,000, the defendant's share was \$5,000. Twenty thousand dollars is used as the gain factor in establishing the fine range maximum.*

- (b) because gross pecuniary gain is considered, no reduction is given for restitution paid or ordered, or for losses that were subsequently recovered.

** Example: If a defendant robs a bank of \$10,000 but drops the money while fleeing the scene, no pecuniary gain is realized. However, the gross pecuniary gain would be \$10,000.*

- (c) a multiplier of three is applied to gross pecuniary gain.

** Example: A defendant sells stolen property for gross pecuniary gain of \$30,000. The gain factor used in determination of the maximum fine amount would be three times the gain, or \$90,000.*

** Example of differences in the consideration of gain between minimum and maximum guideline fine determinations: A defendant is one of four participants in a land fraud scheme that defrauded individuals of \$40,000. The defendant's share is \$5,000. He subsequently pays restitution of \$4,000. No further restitution is ordered. The gain factor considered for the defendant in establishing the minimum of the fine range is pecuniary gain to the defendant of \$1,000 (\$5,000 minus the \$4,000 in restitution). The gain factor used in the*

determination of the maximum of the fine range is three times the gross pecuniary gain of all the participants, or \$120,000 (3 x \$40,000).

6. Factors considered in determining where within the fine range the fine is to be set (§5E4.2(d)(1-7)):
 - a. purposes of sentencing
 - b. ability to make payment and burden on defendant's dependents
 - c. restitution obligations
 - d. collateral consequences
 - e. prior similar fines
 - f. any other pertinent equitable considerations
7. The fine, taken together with other sanctions imposed, must be punitive (§5E4.2(e)).
8. Even when the defendant establishes an inability to pay or when a fine imposes an undue burden on dependents, the total combined sanction must be punitive even if it requires imposition of alternative sanctions (§5E4.2(f)).
9. When the defendant cannot pay a fine in a lump sum, the guidelines direct that a payment schedule of generally not more than twelve months should be established by the court. If the defendant is sentenced to probation or supervised release, the payment schedule should be made a condition of supervision (§5E4.2(g)).
10. An additional fine amount sufficient to pay the costs to the government of any imprisonment, probation, or supervised release is to be imposed after the fine range and point within the range have been determined.
 - a. If the defendant demonstrates either an inability to pay or that payment will cause an undue burden on dependents, the court may order the defendant to pay a lesser amount or nothing (§5E4.2(i)).
 - b. For guidance in determining the cost of imprisonment and supervision, the Federal Bureau of Prisons and the Administrative Office of the U.S. Courts have provided average monthly cost figures. As of March 1, 1989, the costs are:

\$1221/month for imprisonment
\$920/month for community confinement
\$83.33/month for probation or supervised release
 - c. Calculation of these costs is not possible until the court determines the length of imprisonment and supervision.
 - d. Once the costs of imprisonment and supervision have been determined, the additional fine amount is added to the fine amount from the fine range.

Note: It is not a departure if the total fine amount determined from the guideline fine range and the costs of imprisonment and supervision exceed the maximum of the guideline fine range. In any case, the total fine amount may not exceed the statutory maximum.

** Example: The court sentences a defendant to eight months imprisonment and two years of supervised release. The fine range was calculated to be \$1,000 - \$10,000, the court determines that the point within the fine range to be ordered is \$4,000. An additional fine amount must then be imposed for costs of imprisonment and supervision; in this case eight months imprisonment x \$1,221 + twenty-four months of supervised released x \$83.33 = \$9,768 + \$1,999.92 = \$11,767.92. When combined with the \$4,000 fine amount from the fine range, the total fine amount to be imposed is \$15,767.92. (Note that it is greater than the maximum of the fine range (\$10,000) but it is less than the statutory maximum penalty (in this case \$250,000)).*

VII. DEPARTURES

A. Statutory Considerations

1. Departures are permissible for an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described (18 USC § 3553(b)).
2. The court's determination as to whether a circumstance was adequately considered shall be made only upon consideration of the guidelines, policy statements, and official commentary of the Sentencing Commission (18 USC § 3553(b)).
3. Upward departures are appealable by the defendant (18 USC § 3742(a)(3)(A)); downward departures are appealable by the government (18 USC § 3742(b)(3)(A)).
4. In review of an appeal based on a departure, the court shall determine if the sentence is "unreasonable," giving consideration to the statutorily directed factors considered in imposing a sentence (18 USC § 3553(a)) and the reasons the district court has given for the departure (18 USC § 3742(d)(3)).

B. Guideline Considerations

1. Information to be used in imposing sentence (selecting a point within the guideline range or departing from the guidelines, §1B1.4) - reflects the Congressional intent of 18 USC § 3661.
 - a. A court is not precluded from considering information that the guidelines do not take into account.

- b. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines.
 - c. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. (See, e.g., Chapter Five, Part H.)
- 2. "Heartland" approach of guidelines (Chapter One, Part A(4)(b) Departures (Policy Statement)):
 - a. General Commission policy statement that atypical factors may warrant departure
 - (1) when a factor has not been considered by the guidelines
 - (2) when the applicable guidelines, specific offense characteristics, and adjustments take a factor into consideration, departure is warranted only if the factor is present to a degree substantially in excess of that ordinarily involved in the offense of conviction (§5K2.0).
 - b. The applicable guideline sentencing range usually provides the court with sufficient flexibility to take circumstances into consideration without departure.

3. Departure Factors

- a. Suggested factors are found in commentary and policy statements. They may contain suggestions that a departure should occur (or should not occur) if certain factors exist. Sometimes they suggest whether the departure should be upward or downward and the degree of departure.
 - (1) the guideline commentary may suggest a departure for specified reasons.

** Example: Application Note 1 of the guideline for first degree murder (§2A1.1) states that a downward departure may be warranted if the defendant did not cause the death intentionally or knowingly.*

** Example: Application Note 11 of the fraud guideline (§2F1.1) states that "in a few instances, the total dollar loss that results from the offense may overstate its seriousness.... In such instances, a downward departure may be warranted."*

** Example: The commentary to the guideline for convictions for counts related to unexpired sentences (§5G1.3) states that "departure would be warranted when independent prosecutions produce anomalous results that circumvent or defeat the intent of the guidelines."*

- (2) policy statements, most notably in Chapters Four and Five, suggest when a departure may be appropriate or inappropriate.
 - (a) Chapter Five, Part K (Departures), Substantial Assistance to Authorities (§5K1.1) - addresses departures for substantial assistance to the government in the investigation and prosecution of another person who has committed an offense. The policy statement requires the government to make a motion for this departure. Statutorily, such a motion allows the court to depart even below a mandatory minimum term of imprisonment (18 USC § 3553(e) and 28 USC § 994(n)).
 - (b) Chapter Five, Part K (Departures), General Provisions (§§5K2.0 - 5K2.14) - identifies factors the Commission has not fully taken into account in formulating the guidelines. The presence or extent of these or other factors not taken into consideration by the guidelines may warrant a departure (§5K2.0).

** Example: Policy statement 5K2.6 states that if a weapon or dangerous instrumentality was used or possessed in the commission of an offense, the court may increase the sentence above the authorized guideline range if the enhancement was not already taken into account in a specific guideline. In discussing the extent of the increase, the policy statement directs that the discharge of a firearm might warrant a substantial increase in sentence.*

- (c) Chapter Five, Part H (Specific Offender Characteristics) (§§5H1.1 - 5H1.10) - addresses characteristics of the offender and the extent to which the Commission has determined their relevance for sentencing.

Note: Read the policy statements carefully for guidance as to where to sentence within the range or whether a departure is warranted.

** Example: Policy statement 5H1.1 states that age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. However, age may be a reason to go below the guidelines when the offender is elderly and infirm and where an alternative form of punishment might be equally efficient and less costly than incarceration.*

(d) Chapter Four, Part A (Criminal History), Adequacy of Criminal History Category (Policy Statement) (§4A1.3)

- (i) court may consider imposing a sentence departing from an otherwise applicable guideline range if:
 - criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct; or
 - the likelihood exists that the defendant will commit other crimes.
- (ii) This policy statement also provides:
 - several possible indicators of inadequate representation of past criminal activity;
 - suggestions as to when the criminal history category may be under- or overrepresented.

** Example: When the court determines that the criminal history category under- or overrepresents the seriousness of the defendant's criminal history, or the likelihood exists that the defendant will commit further crimes, the court is instructed by §4A1.3 to look to the guideline range for a defendant with a higher or lower criminal history category. That range should guide the degree of departure.*

Note: The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. A departure below the lower limit of the guideline range for Category I criminal history on the basis of the adequacy of criminal history is not appropriate.

- b. Factors may exist that, while not specifically listed by the Commission, warrant departure. The Commission believes that such cases will be highly unusual (Chapter One, Part A, 4(b) Departures).

4. Amount of Departure

- a. Statutory limitations, i.e., maximum and minimum penalties, restrict the amount of departure.

Upon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart below

a statutorily required minimum sentence (18 USC § 3533(e) and 28 USC § 994(n)).

- b. The amount of a departure may be structured by departing a suggested amount, by interpolation, or by analogy.

- (1) suggested amounts of departure are found in commentary and policy statements.

** Example: In a case of transportation for purposes of prostitution, Application Note 1 to §2G1.1 recommends a downward departure of 8 levels if the defendant did not commit the offense for profit and the offense did not involve physical force or coercion.*

** Example: The Chapter Three adjustment for official victim (§3A1.2, Application Note 2) directs the court to consider an upward departure of at least 3 levels if the official victim is the President or Vice President.*

** Example: The application note to the guideline for first degree murder (§2A1.1) states that if a departure is warranted because the defendant did not cause the death intentionally or knowingly, such departure is not envisioned below the guideline range for second degree murder or below the guideline range for the underlying offense in the absence of death.*

- (2) interpolation: selecting the midpoint between two adjacent numerical guideline values.

** Example: The guideline for robbery (§2B3.1) has specific offense characteristics for injury that call for increases in the offense level based on the degree of injury (i.e., 2 levels for bodily injury; 4 for serious bodily injury; and 6 for permanent or life-threatening bodily injury). If the court determines that the degree of injury falls between bodily injury and serious bodily injury and therefore warrants an offense level increase falling between the adjacent numerical possibilities, the 3 offense level increase would represent a departure.*

- (3) structured departure by analogy: suggested by commentary or policy statements, but most often will be an unguided attempt to provide some rational structure to the departure.

** Example: Two individuals are injured during the commission of a robbery. The robbery guideline (§2B3.1), however, contemplates injury to only one victim (§5K2.0). If the court determines that a departure is warranted, it might consider what the effect would be of an offense level increase reflecting the second injury (e.g., if the second injury were determined to be "bodily injury," the effect of 2 additional offense levels). Alternatively, the court could consider what the guideline range would have been if the defendant had been convicted of a count of assault and the multiple count rules had applied.*

** Example: In a case in which the defendant had a prior foreign conviction for which a ten year prison term had been given, no criminal history points would be assigned for that sentence because the criminal history guidelines do not count foreign sentences (§4A1.2(h)). Should the court determine that there is reliable information regarding this prior conviction and that the defendant was afforded adequate due process considerations, the court might determine that a departure is appropriate based on the inadequacy of the defendant's criminal history category. The court may wish to see what effect additional criminal history points (3 in this case) would have on the defendant's criminal history category, and in turn the effect on the sentencing range. A departure to the range that would have resulted would represent a structured departure.*

- (4) Unstructured departures: departures of an amount not based on a specific guideline suggestion, an interpolation, or an attempt to structure by analogy. This might occur when the court finds that some factor relevant to sentencing has been considered in application of the guidelines, but the degree to which it occurred is so much greater than what is ordinarily involved in the offense.

VII. IMPOSING SENTENCE

A. Imprisonment

1. Sentencing on a single count of conviction

- a. The sentence imposed shall be the sentence determined by the applicable guideline range (§5G1.1(c)).

** Example: A defendant is convicted of a single count charging an offense with a maximum statutory penalty of five years (60 months). The guideline range is calculated to be 15 - 21 months. The guideline sentence of imprisonment would be selected from the 15 - 21 month range.*

- b. Statutory limitations

- (1) if application of the guidelines results in a guideline range above the statutory maximum, the statutory maximum shall be the guideline sentence (§5G1.1(a)).

** Example: A defendant is convicted of a single count with a statutory maximum of four years (48 months). The guideline range is computed to be 51 - 63 months. As the calculated guideline range is greater than the statutory maximum, the guideline sentence becomes 48 months.*

** Example: A defendant is convicted of a single count with a statutory maximum of four years (48 months). The guideline range is computed to be 41 - 51 months. As the maximum of the computed guideline range is greater*

than the statutory maximum, the statutory maximum prevails. The guideline sentence in this instance would be between 41 - 48 months.

- (2) if the applicable guideline range is below the minimum statutory requirement, the mandatory minimum shall be the guideline sentence (§5G1.1(b)).

** Example: A defendant is convicted of an offense that carries a minimum mandatory sentence of five years (60 months). The guideline range is computed to be 33 - 41 months. Because the computed guideline range is less than the mandatory minimum, the guideline sentence becomes 60 months.*

** Example: In a single count case with a mandatory minimum of five years (60 months) the guideline range is computed to be 51 - 63 months. The minimum of the calculated guideline range is less than the mandatory minimum, so the mandatory minimum prevails. The guideline sentence in this instance would be between 60 - 63 months.*

2. Sentencing on multiple counts of conviction

- a. Counts of conviction that carry a mandatory consecutive sentence are not computed using the multiple count rules of Chapter Three, Part D; rather they are to be determined and sentenced independently (§5G1.2(a)).

** Example: A defendant is convicted of bank robbery (18 USC § 2113(a) and (d)) and use of a dangerous weapon in the commission of a violent offense - second conviction (18 USC § 924(c)). The weapons charge carries a mandatory consecutive ten year sentence. The applicable guideline range is determined for the bank robbery, excluding the specific offense characteristic for a weapon, with the weapons offense to run consecutively. Therefore, if the guideline range for the robbery is 41 - 51 months, the defendant would receive a sentence for the robbery selected from the applicable range (e.g., 51 months) and 120 months for the 924(c) violation imposed to run consecutively. The defendant's total sentence would be 171 months.*

- b. Application of the multiple count rules (Chapter Three, Part D) produces an offense level that is representative of all counts of conviction. The applicable guideline range that results is therefore representative of all counts and provides for the total punishment (§5G1.2(b)).

Note: The multiple count rules are to be applied not only to multiple counts resulting from a single indictment, but also to multiple counts resulting from separate indictments. This includes cases handled under Rule 20 of the Federal Rules of Criminal Procedure.

c. Achieving the total punishment

(1) statutory considerations:

- (a) statutory maximum penalty - In achieving the total punishment for multiple counts, the imposition of a sentence on a given count cannot exceed the maximum statutory penalty for that count.
- (b) statutory mandatory minimum - In achieving the total punishment for multiple counts, the sentence imposed on a given count cannot be less than the mandatory minimum penalty for that count.

Exception: Substantial Assistance to Authorities, §5K1.1 (18 USC § 3553(e)).

- (2) If the total punishment for multiple counts can be reached through the count carrying the highest maximum statutory penalty, the total punishment is achieved by use of that count. The same sentence, within statutory limitations, is imposed concurrently on all remaining counts.

** Example: A defendant is convicted of three counts carrying statutory maximum penalties of one year, four years, and 20 years. The guideline range for the multiple counts is 70 - 87 months and the desired sentence from within the range is 77 months. A sentence of 77 months is imposed on the count carrying the highest statutory maximum (the 20-year count). The same sentence (77 months) would be imposed to run concurrently on the remaining counts, except that the statutory maximum of those counts is less than 77 months; therefore, sentences of 12 months concurrent and 48 months concurrent would be ordered.*

- (3) If the total punishment for multiple counts cannot be reached solely by use of the count with the highest maximum statutory penalty because its maximum statutory penalty is less than the desired total punishment, then the sentence imposed on one or more of the remaining counts is to run consecutively, but only to the extent necessary to achieve the total sentence. All remaining counts will run concurrently. The sentence imposed for those remaining counts will be the maximum statutory penalty for each count.

** Example: A defendant is convicted of four counts carrying statutory maximum penalties of five years, four years, two years, and one year respectively. The guideline range for the multiple counts is 78 - 97 months and the desired sentence from within this range is 80 months. Sentences may be imposed as follows: A sentence of 60 months on the count carrying the highest maximum statutory penalty, a five year maximum; a sentence of 20*

months consecutively on the count carrying a two year maximum (thereby reaching, but not surpassing, the desired total punishment of 80 months); and concurrent sentences of four years and one year on the remaining two counts.

B. Supervised Release

1. Statutory considerations:

- a. The statutory maximum length of supervised release is determined by the classification of the offense (18 USC § 3583(b)) or by the particular statute for the offense (21 USC § 963).
- b. A term of supervised release runs concurrently with any other term of supervised release and with any federal, state, or local term of probation, supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of supervised release (18 USC § 3624(e)).

2. Guideline directives:

- a. Based upon statutory maximums (18 USC § 3583(b)), the guidelines require various terms of supervised release (§5D3.2).

Note: If a count of conviction has a statutorily required term of supervised release, the guideline term is to be three to five years or the mandatory term, whichever is greater.

** Example: A defendant is convicted of distribution of heroin (21 USC § 841(b)(1)(a) - second conviction), an offense that carries a mandatory minimum term of supervised release of ten years. Because this exceeds the three to five year term that would otherwise be called for by the guidelines (§5D3.2(a)), the guideline term of supervised release is ten years.*

** Example: A defendant is convicted of 21 USC § 841(b)(1)(D), an offense that carries a mandatory minimum term of two years supervised release. The guideline term is to be selected from a range of three to five years.*

b. In cases of multiple counts:

- (1) the term of supervised release must fall within the guideline range of supervised release as determined by the count carrying the highest statutory maximum.

** Example: A defendant is convicted of a Class A felony (guideline range of supervised release: three to five years); a Class C felony (guideline range of two to three years); and a Class A misdemeanor (guideline term of one year). The guideline term to be imposed is determined by the count carrying the highest statutory maximum, in this case the Class A felony.*

- (2) the guidelines do not require imposition of a term of supervised release on each count, nor do they specify the count on which to impose the sentence. The guideline only require that a sentence within the range must be imposed on one count. The court may impose multiple sentences as long as the total sentence falls within the guideline range.

Note: Multiple terms of supervised release must run concurrently (18 USC § 3624(e)).)

C. Fines

1. Statutory limitations:

- a. Statutory changes affect the maximum fine that can be imposed (e.g., the Fine Improvement Act of 1987);
- b. If calculation of a guideline fine amount exceeds the statutory maximum, the statutory maximum prevails.

2. Guideline directives:

- a. The total guideline fine consists of the fine amount determined by computing a fine range under §5E4.2(c) and the additional fine amount for costs of imprisonment and supervision under §5E4.2(i). The total fine is imposed as one fine amount (i.e., the total of the two specified fine amounts).

** Example: A fine of \$2,000 is determined appropriate from the computed fine range of \$1,000 to \$10,000. An additional fine amount of \$4,561.92 is determined for the costs of imprisonment and supervision. The total fine is therefore \$6,561.92.*

- b. The addition of costs of imprisonment and supervision to the fine amount determined from the fine range may result in the total guideline fine amount exceeding the fine range maximum determined under §5E4.2(c).

** Example: A fine of \$8,000 is determined appropriate from the computed fine range of \$1,000 to \$10,000. An additional fine amount of \$4,561.92 is determined for the costs of imprisonment and supervision. The total guideline fine is therefore \$12,561.92. While this amount exceeds the maximum of the applicable fine range, under §5E4.2(c) it is not a departure.*

- c. If the court determines that the defendant has an inability to pay or that payment of the fine would pose an undue burden on the defendant's dependents, the total fine may be waived or payment of less than the minimum of the applicable fine range may be ordered.

Reduction or waiver of a fine based on inability to pay does not constitute a departure.

** Example: In a case with a computed fine range of \$1,000 to \$10,000 and cost of imprisonment and supervision of \$4,561.92, the court determines that the defendant is only able to pay a total fine of \$500 and therefore orders that amount. While this amount is less than the minimum of the applicable fine range, it is not a departure if a finding of "inability to pay" or "burden on the dependents" has been made.*

- d. In cases with multiple counts, there is no guideline direction as to how the total fine amount is to be ordered.

D. Unexpired Sentences - §5G1.3

1. A sentence of imprisonment is to run consecutively to any unexpired sentence of imprisonment, unless the instant offense(s) arose from the same transactions or occurrences as those that resulted in the unexpired sentence. A departure would be warranted when independent prosecutions produce anomalous results (Commentary to §5G1.3).

** Example: A defendant is serving a four-year state sentence for auto theft at the time of sentencing in federal court for drug distribution. Because the instant offense did not arise from the same transactions or occurrences as that of the unexpired sentence, the instant offense should run consecutively.*

2. When the instant offense (or one or more multiple offenses) for which the defendant is being sentenced arose from the same transactions or occurrences as the defendant's unexpired sentence, the instant federal sentence is to run concurrently with the sentence being served unless statutorily prohibited.

** Example: A defendant is serving a four-year state sentence for auto theft at the time of sentencing in federal court for interstate transportation of a stolen motor vehicle. The instant charge arose out of the same transactions or occurrences as the auto theft (the auto that was stolen being the auto the defendant transported interstate). The instant sentence would therefore run concurrently to the sentence being served.*

3. In making a determination as to whether the instant federal offenses(s) arose from the same transaction or occurrences as the sentence(s) being served, it may be helpful to consider the relevant conduct of the instant offense(s) and the conduct addressed in guideline application.
4. When independent prosecutions produce anomalous results that circumvent or defeat the intent of the guidelines, a departure would be warranted (§5G1.3). In structuring a reasonable departure, the court should consider the range that would have been determined if the charges had not been prosecuted independently.

E. Statement of Reasons

1. Statutory Considerations:

- a. At the time of sentencing, the court shall state the reasons for imposing a particular sentence (18 USC § 3553(c));
- b. If the upper end of the applicable guideline range exceeds the lower end by 24 months, the court shall state reasons for selecting a particular point within the range (18 USC § 3553(c));
- c. If the court departs from the applicable guidelines as to kind and range of sentence, term of supervised release, or fine, the court shall state the specific reason(s) for the departure (18 USC 3553(c)).

SENTENCING TABLE

Criminal History Category

Offense Level	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 - 1	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6
2	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6	1 - 7
3	0 - 3	0 - 4	0 - 5	0 - 6	2 - 8	3 - 9
4	0 - 4	0 - 5	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 5	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	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

§1B1.2. Applicable Guidelines

- (a) The court shall apply the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense. Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses.
- (b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).

<u>Statute</u>	<u>Guideline</u>
18 U.S.C. § 1962	2E1.1
18 U.S.C. § 1963	2E1.1
18 U.S.C. § 2071	2B1.1, 2B1.3
18 U.S.C. § 2073	2F1.1
18 U.S.C. § 2111	2B3.1
18 U.S.C. § 2112	2B3.1
18 U.S.C. § 2113(a)	2B1.1, 2B2.2, 2B3.1, 2B3.2
18 U.S.C. § 2113(b)	2B1.1
18 U.S.C. § 2113(c)	2B1.1, 2B1.2
18 U.S.C. § 2113(d)	2B3.1
18 U.S.C. § 2113(e)	2A1.1, 2B3.1
18 U.S.C. § 2114	2B3.1
18 U.S.C. § 2115	2B2.2
18 U.S.C. § 2116	2A2.2, 2A2.3, 2B2.2, 2B3.1
18 U.S.C. § 2117	2B2.2
18 U.S.C. § 2118(a)	2B3.1
18 U.S.C. § 2118(b)	2B2.2
18 U.S.C. § 2118(c)(1)	2A2.1, 2A2.2, 2B3.1
18 U.S.C. § 2118(c)(2)	2A1.1
18 U.S.C. § 2153	2M2.1
18 U.S.C. § 2154	2M2.2
18 U.S.C. § 2155	2M2.3
18 U.S.C. § 2156	2M2.4
18 U.S.C. § 2199	2B1.1, 2B2.3
18 U.S.C. § 2231	2A2.2, 2A2.3
18 U.S.C. § 2241	2A3.1
18 U.S.C. § 2242	2A3.1
18 U.S.C. § 2243(a)	2A3.2
18 U.S.C. § 2243(b)	2A3.3
18 U.S.C. § 2244	2A3.4
18 U.S.C. § 2251	2G2.1
18 U.S.C. § 2252	2G2.2

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

The conduct that is relevant to determining the applicable guideline range includes that set forth below.

- (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
- (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
 - (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
 - (3) all harm or risk of harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk that was the object of such acts or omissions;
 - (4) the defendant's state of mind, intent, motive and purpose in committing the offense; and
 - (5) any other information specified in the applicable guideline.
- (b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four.

§3D1.2

- (d) Counts are grouped together if the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are specifically included under this subsection:

§§2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B5.2, 2B5.3, 2B5.4, 2B6.1;
 §§2D1.1, 2D1.2, 2D1.3, 2D1.5;
 §§2E4.1, 2E5.1, 2E5.2, 2E5.4, 2E5.6;
 §§2F1.1, 2F1.2;
 §2N3.1;
 §2R1.1;
 §§2S1.1, 2S1.2, 2S1.3;
 §§2T1.1, 2T1.2, 2T1.3, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1, 2T3.2.

Specifically excluded from the operation of this subsection are:

all offenses in Part A;
 §§2B2.1, 2B2.2, 2B2.3; 2B3.1, 2B3.2, 2B3.3;
 §§2C1.1, 2C1.5;
 §§2D2.1, 2D2.2, 2D2.3;
 §§2E1.3, 2E1.4, 2E1.5, 2E2.1;
 §§2G1.1, 2G1.2, 2G2.1, 2G3.2;
 §§2H1.1, 2H1.2, 2H1.3, 2H1.4, 2H2.1, 2H4.1;
 §§2L1.1, 2L2.1, 2L2.2, 2L2.3, 2L2.4, 2L2.5;
 §§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.6, 2M3.7, 2M3.8, 2M3.9;
 §§2P1.1, 2P1.2, 2P1.3, 2P1.4.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

Commentary

Background: This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3557. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).

§2B2.2. Burglary of Other Structures

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
 - (1) If the offense involved more than minimal planning, increase by 2 levels.
 - (2) If the loss exceeded \$2,500, increase by the corresponding number of levels from the table in §2B2.1.
 - (3) If obtaining a firearm, destructive device, or controlled substance was an object of the offense, increase by 1 level.
 - (4) If a firearm or other dangerous weapon was possessed, increase by 2 levels.

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant _____ District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) _____ U.S. Code Title, Subtitle, Section & Subsection _____

1. **Offense Level** (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

<u>Guideline Number</u>	<u>Description</u>	<u>Level</u>
_____	_____	_____ (base)
_____	_____	_____
_____	_____	_____
_____	_____	_____

Notes: _____

Sum

2. **Victim-Related Adjustments** (See Chapter Three, Part A)

§§ _____

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. **Role in the Offense Adjustment** (See Chapter Three, Part B)

§§ _____

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. **Obstruction Adjustment** (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

5. **Adjusted Offense Level**

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

§3A1.1. Vulnerable Victim

If the defendant knew or should have known that the victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was particularly susceptible to the criminal conduct, increase by 2 levels.

§3A1.2. Official Victim

If the victim was any law-enforcement or corrections officer, any other official as defined in 18 U.S.C. § 1114, or a member of the immediate family thereof, and the crime was motivated by such status, increase by 3 levels.

§3A1.3. Restraint of Victim

If the victim of a crime was physically restrained in the course of the offense, increase by 2 levels.

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

§3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed in addition to that provided for in §3B1.1, nor may it be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

Commentary

Application Notes:

1. *The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller.*
2. *"Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.*

Background: *This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. Such persons generally are viewed as more culpable.*

§3C1.1. Willfully Obstructing or Impeding Proceedings

If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level from Chapter Two by 2 levels.

Commentary

This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in respect to the instant offense.

Application Notes:

1. *The following conduct, while not exclusive, may provide a basis for applying this adjustment:*
 - (a) *destroying or concealing material evidence, or attempting to do so;*
 - (b) *directing or procuring another person to destroy or conceal material evidence, or attempting to do so;*
 - (c) *testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding;*
 - (d) *threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly;*
 - (e) *furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court.*
2. *In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant.*

WORKSHEET A (OFFENSE LEVEL)

Overhead #14

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant _____ District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____ - _____ - _____

Count Number(s) _____ U.S. Code Title, Subtitle, Section & Subsection _____ - _____ - _____
_____ - _____ - _____

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
_____	_____	_____ (base)
_____	_____	_____
_____	_____	_____
_____	_____	_____

Notes: _____

Sum

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

§3E1.1. Acceptance of Responsibility

- (a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.
- (b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.
- (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

Commentary

Application Notes:

1. In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:
 - (a) voluntary termination or withdrawal from criminal conduct or associations;
 - (b) voluntary payment of restitution prior to adjudication of guilt;
 - (c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;
 - (d) voluntary surrender to authorities promptly after commission of the offense;
 - (e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
 - (f) voluntary resignation from the office or position held during the commission of the offense; and
 - (g) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

WORKSHEET D (GUIDELINE WORKSHEET)

Overhead #16

Defendant _____

District _____

Docket Number _____

1. **Adjusted Offense Level (From Worksheet A or B)**

If Worksheet B is required, enter the result from Worksheet B, Line 9. Otherwise, enter the result from Worksheet A, Line 5.

2. **Acceptance of Responsibility (See Chapter Three, Part E)**

If applicable, enter "2." If not applicable, enter "0."

3. **Offense Level Total (Line 1 less Line 2)**4. **Criminal History Category (From Worksheet C)**

Enter the result from Worksheet C, Line 7.

5. **Career Offender/Criminal Livelihood (See Chapter Four, Part B)**a. **Offense Level Total**

If the career offender provision (§4B1.1) or the criminal livelihood provision (§4B1.3) results in a higher offense level total than Line 3, enter the offense level total. Otherwise, enter "N/A."

b. **Criminal History Category**

If the career offender provision (§4B1.1) results in a higher criminal history category than Line 4, enter "VI" for the criminal history category. Otherwise, enter "N/A."

6. **Guideline Range from Sentencing Table**

Enter the applicable guideline range from Chapter Five, Part A.

 months7. **Probation**a. **Imposition of a Sentence of Probation (Check the line applicable)**

- ____ 1. Probation is not authorized by the guidelines (if the minimum of the guideline term is greater than six months). (If checked, go to item 8)
- ____ 2. Probation is authorized by the guidelines (if the minimum of the guideline range is zero months) (§5B1.1(a)(1)).
- ____ 3. Probation is authorized by the guidelines (if the minimum of the guideline range is one to six months), provided the court imposes a condition or combination of conditions requiring intermittent confinement or community confinement satisfying the minimum of the guideline range (§5B1.1(a)(2)).

A. Length of a Term of Probation (See §5B1.2)If probation is authorized, the guideline for the length of such term of probation is:
(Check the line applicable)

- ____ 1. At least one year, but not more than five years (if the offense level total is 6 or more)
- ____ 2. No more than three years (if the offense level total is 5 or less)

SENTENCING TABLE

Criminal History Category

Offense Level	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 - 1	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6
2	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6	1 - 7
3	0 - 3	0 - 4	0 - 5	0 - 6	2 - 8	3 - 9
4	0 - 4	0 - 5	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 5	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	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

WORKSHEET C (CRIMINAL HISTORY)

Defendant _____ Docket Number _____

Date Defendant Commenced Participation in Instant Offense _____

1. **3 POINTS** for each prior **ADULT** sentence of imprisonment exceeding **ONE YEAR** and **ONE MONTH** imposed within **15 YEARS** of the instant offense **OR** resulting in incarceration during any part of that **15-YEAR** period. (See §§4A1.1(a) and 4A1.2)
2. **2 POINTS** for each prior sentence of imprisonment of at least **60 DAYS** resulting from an offense committed **SUBSEQUENT** to the defendant's 18th birthday not counted under §4A1.1(a) imposed within **10 YEARS** of the instant offense; and

2 POINTS for each prior sentence of imprisonment of at least **60 DAYS** resulting from an offense committed **PRIOR** to the defendant's 18th birthday not counted under §4A1.1(a) from which the defendant was released from confinement within **5 YEARS** of the instant offense. (See §§4A1.1(b) and 4A1.2)
3. **1 POINT** for each prior sentence resulting from an offense committed **SUBSEQUENT** to the defendant's 18th birthday not included under §4A1.1(a) or §4A1.1(b) imposed within **10 YEARS** of the instant offense; and

1 POINT for each prior sentence resulting from an offense committed **PRIOR** to the defendant's 18th birthday not included under §4A1.1(a) or §4A1.1(b) imposed within **5 YEARS** of the instant offense. (See §§4A1.1(c) and 4A1.2)

Note: a maximum of **4 POINTS** may be imposed for the items in 3.

Date of Imposition	Sentence Status*	Offense	Sentence	Release Date **	Criminal History Pts.
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

* Sentence status, juvenile (J) or adult (A), required on sentence, if offense committed prior to age 18.

** A release date is required in only three instances:

1. When a sentence covered under §4A1.1(a) was imposed more than 15 years prior to the commencement of the instant offense but release from incarceration occurred within such 15-year period;
2. When a sentence counted under §4A1.1(b) was imposed for an offense committed prior to age 18 and more than 5 years prior to the commencement of the instant offense, but release from incarceration occurred within such 5-year period; and
3. When a sentence is counted under §4A1.1(c) because the defendant was released from custody within 2 years of the instant offense or was still in custody at the time of the instant offense.

Total Criminal History Points for §§4A1.1(a), 4A1.1(b), and 4A1.1(c) (Items 1, 2, 3)

4. **2 POINTS** if the defendant committed the instant offense while under any criminal justice sentence (for example, probation, parole, supervised release, imprisonment, work release, escape status). Enter **0 POINTS** in any other case. (See §§4A1.1(d) and 4A1.2) List the type of control and identify the sentence from which control resulted.

5. **2 POINTS** if the defendant committed the instant offense less than 2 YEARS after release from imprisonment on a sentence counted under §4A1.1(a) or (b). However, enter only **1 POINT** for this item if 2 points were added under §4A1.1(d). In any other case, enter **0 POINTS**. (See §§4A1.1(e) and 4A1.2) List the date of release and identify the sentence from which release resulted.

6. **Total Criminal History Points (Sum of Items 1-5)**

7. **Criminal History Category (Enter here and on Worksheet D, Line 4)**

<u>Total Points</u>	<u>Criminal History Category</u>
0 - 1	I
2 - 3	II
4 - 6	III
7 - 9	IV
10 - 12	V
13 or more	VI

§4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

§4B1.2. Definitions

- (1) The term "crime of violence" as used in this provision is defined under 18 U.S.C. § 16.
- (2) The term "controlled substance offense" as used in this provision means an offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955a, 959; and similar offenses.
- (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of Part A of this Chapter. The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.

§4B1.2. Definitions

- (1) The term "crime of violence" as used in this provision is defined under 18 U.S.C. § 16.
- (2) The term "controlled substance offense" as used in this provision means an offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955a, 959; and similar offenses.
- (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of Part A of this Chapter. The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.

*Commentary*Application Notes:

1. "Crime of violence" is defined in 18 U.S.C. § 16 to mean an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense. The Commission interprets this as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision. Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.

§4B1.3. Criminal Livelihood.

If the defendant committed an offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income, his offense level shall be not less than 13, unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than 11.

Commentary

Application Note:

1. *"Pattern of criminal conduct" means planned criminal acts occurring over a substantial period of time. Such acts may involve a single course of conduct or independent offenses. This guideline is not intended to apply to minor offenses.*

Background: Section 4B1.3 implements 28 U.S.C. § 994(i)(2), which directs the Commission to ensure that the guidelines specify a "substantial term of imprisonment" for a defendant who committed an offense as part of a pattern of criminal conduct from which he derived a substantial proportion of his income.

SENTENCING TABLE

Criminal History Category

Offense Level	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 - 1	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6
2	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6	1 - 7
3	0 - 3	0 - 4	0 - 5	0 - 6	2 - 8	3 - 9
4	0 - 4	0 - 5	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 5	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	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

B. **Conditions of Probation** (See §5B1.3) A defendant serving any term of probation shall not commit a federal, state, or local crime. See 18 U.S.C. § 3563(a)(1). In addition to standard conditions (1-13), list any applicable special conditions:

8. **Sentences under §5C2.1(c)(3) and (d)(2)** (Check the line applicable)

- ____ 1. The provisions of §5C2.1(c)(3) and (d)(2) are not applicable (if the minimum of the guideline range is zero or is greater than ten months). (If checked, go to item 9.)
- ____ 2. A sentence under §5C2.1(c)(3) or (d)(2) is authorized by the guidelines. The court may impose a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement for imprisonment, provided that at least one-half of the minimum guideline range, but no less than one month, is satisfied by imprisonment.

9. **Supervised Release**

a. **Imposition and Length of a Term of Supervised Release** (See §§5D3.1, 5D3.2)

If a term of imprisonment of more than one year is imposed, the guidelines require a term of supervised release.

If a term of imprisonment of one year or less is imposed, the guidelines authorize but do not require a term of supervised release.

List the guideline and the length of any term of supervised release:

[3-5 years for Class A or B felony (offenses with maximum term of imprisonment of 20 years or more);

2-3 years for Class C or D felony (offenses with maximum term of imprisonment of less than 20 years but 5 years or more);

1 year for Class E felony or misdemeanor (offenses with maximum terms of imprisonment of less than 5 years but 5 days or more);

For statutorily required minimum terms of supervised release, refer to §5D3.2(a).]

b. **Conditions of Supervised Release** (See §5D3.3) A defendant serving any term of supervised release shall not commit a federal, state, or local crime. See 18 U.S.C. § 3583(d). In addition to standard conditions (1-13), list any applicable special conditions:

10. **Restitution** (See §5E4.1)

If an order of restitution is applicable, enter the amount. Otherwise, enter "N/A."

11. **Fines**

a. **Fines for Individual Defendants** (See §5E4.2)

	<u>Minimum</u>	<u>Maximum</u>
(1) Statutory Maximum of any single count in excess of \$250,000		\$ _____
(2) Fine Table:	\$ _____	\$ _____
(3) Personal Gain to Defendant less Restitution:	\$ _____	
(4) Gain to All Participants		(\$ _____ x 3) \$ _____
Loss to Victim		(\$ _____ x 2) \$ _____

Guideline Range for Fines:
(determined by the greater minimum and greatest maximum above)

Minimum: \$ _____

Maximum: \$ _____

- b. **Cost of imprisonment** \$ _____ **Cost of probation, supervised release** \$ _____
(See §5E4.2(i)). **Cost of community confinement** \$ _____

B. Conditions of Probation (See §5B1.3) A defendant serving any term of probation shall not commit a federal, state, or local crime. See 18 U.S.C. § 3563(a)(1). In addition to standard conditions (1-13), list any applicable special conditions:

8. Sentences under §5C2.1(c)(3) and (d)(2) (Check the line applicable)

- ____ 1. The provisions of §5C2.1(c)(3) and (d)(2) are not applicable (if the minimum of the guideline range is zero or is greater than ten months). (If checked, go to item 9.)
- ____ 2. A sentence under §5C2.1(c)(3) or (d)(2) is authorized by the guidelines. The court may impose a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement for imprisonment, provided that at least one-half of the minimum guideline range, but no less than one month, is satisfied by imprisonment.

9. Supervised Release

a. Imposition and Length of a Term of Supervised Release (See §§5D3.1, 5D3.2)

If a term of imprisonment of more than one year is imposed, the guidelines require a term of supervised release.

If a term of imprisonment of one year or less is imposed, the guidelines authorize but do not require a term of supervised release.

List the guideline and the length of any term of supervised release:

[3-5 years for Class A or B felony (offenses with maximum term of imprisonment of 20 years or more);
2-3 years for Class C or D felony (offenses with maximum term of imprisonment of less than 20 years but 5 years or more);
1 year for Class E felony or misdemeanor (offenses with maximum terms of imprisonment of less than 5 years but 5 days or more);
For statutorily required minimum terms of supervised release, refer to §5D3.2(a).]

b. Conditions of Supervised Release (See §5D3.3) A defendant serving any term of supervised release shall not commit a federal, state, or local crime. See 18 U.S.C. § 3583(d). In addition to standard conditions (1-13), list any applicable special conditions:

10. Restitution (See §5E4.1)

If an order of restitution is applicable, enter the amount. Otherwise, enter "N/A."

11. Fines

a. Fines for Individual Defendants (See §5E4.2)

	<u>Minimum</u>	<u>Maximum</u>
(1) Statutory Maximum of any single count in excess of \$250,000		\$ _____
(2) Fine Table:	\$ _____	\$ _____
(3) Personal Gain to Defendant less Restitution:	\$ _____	
(4) Gain to All Participants		(\$ _____ x 3) \$ _____
Loss to Victim		(\$ _____ x 2) \$ _____

Guideline Range for Fines:
(determined by the greater minimum and greatest maximum above)

Minimum: \$ _____

Maximum: \$ _____

- b. Cost of imprisonment** \$ _____ **Cost of probation, supervised release** \$ _____
(See §5E4.2(i)). **Cost of community confinement** \$ _____

GUIDELINES APPLICATION QUIZ FOR BEGINNERS

TRUE OR FALSE

Chapter One and Appendix A

1. If a plea agreement contains a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline most applicable to the offense of conviction.
2. Unless otherwise expressly indicated, a reference to another guideline or an instruction to apply another guideline refers only to the base offense level; all other applicable adjustments for specific offense characteristics should not be applied.
3. The sentencing guidelines apply to all misdemeanor convictions.
4. The guidelines do not apply if the statute of conviction is not listed in the Statutory Index.

Specific Offense Characteristics and Chapter Three Adjustments

5. The defendant was convicted of armed bank robbery (18 USC § 2113(d)) and use of a firearm during the commission of a felony (18 USC § 924(c)). In calculating the robbery guideline the specific offense characteristic for a firearm would not be applied.
6. If the defendant is indicted for possession with intent to distribute marihuana (21 USC § 841) but is only convicted of simple possession of marihuana (21 USC § 844), the total amount of drugs may be used to determine the base offense level.
7. The defendant is considered the organizer of a major drug operation involving five other defendants. Under the adjustment for aggravating role (§3B1.1), he would receive a three level enhancement.
8. The defendant is a private pilot who flew in a ton of marihuana. Assuming he had neither an aggravating nor mitigating role in the criminal activity, he should not be given a role adjustment for special skill (§3B1.3).
9. The defendant was convicted of kidnapping (18 USC § 115(b)(2)) and in the course of the crime he held the victim captive for a total of 10 days. Because restraint is incorporated in the base offense level, the victim related adjustment under restraint of victim (§3A1.3) should not be applied.

10. If the conviction is for robbery of a financial institution (18 USC § 2113(a)) and the loss is less than \$10,000, there will always be at least a one level enhancement as a specific offense characteristic under the robbery guideline (§2B3.1).

Criminal History

11. The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, including conduct that is related to the instant offense.
12. Adult diversionary dispositions may be counted for purposes of criminal history if they involve an admission of guilt or a judicial determination of guilt in open court.
13. Criminal history points are based on the sentence pronounced, not the length of time actually served.
14. The time limits that apply in calculating criminal history points also apply to career offender determinations.
15. The defendant meets the qualifications of §4B1.1, career offender. The offense level was calculated to be 30 on the felony drug conviction with a maximum statutory penalty of 25 years. The defendant's criminal history category was calculated to be category IV. Therefore the guideline range would be 135-168 months.

Imposition of Sentence

16. The guideline range for a defendant with an offense level of 26 and a criminal history category of IV is 92-115 months.
17. The guideline range for a defendant with an offense level of 7 and a criminal history category of III is 4-10 months.
18. Under the guidelines, a defendant with a total offense level of 5 can be placed on no more than three years probation.
19. A defendant with a guideline range of 8-14 months is eligible for probation under the guidelines.
20. Under the guidelines, the maximum term of supervised release for a defendant convicted of a Class C felony is two years.
21. If a guideline range is higher than the statutory maximum penalty of imprisonment, a sentence from the guideline range should be imposed.

Fines

22. Under the guidelines, the court shall impose a fine in all cases except if the defendant establishes that he does not have the ability to pay or that imposition of the fine would place an undue burden on the defendant's dependents.
23. With an offense level of 20, a defendant's guideline fine range from the fine table is \$10,000 - \$100,000.
24. With an offense level of 10 and a criminal history category of IV, the guideline fine range from the fine table is \$1,000 - \$10,000.
25. The court orders the defendant to make restitution in the amount of \$5,000 and also imposes a \$4,000 fine. The defendant is given 30 days to pay the restitution and the fine. Two days after sentencing he makes a partial payment of \$ 3,800. This first payment must be applied toward the total amount of the fine.

ANSWERS TO GUIDELINES QUIZ FOR BEGINNERS

Chapter One and Appendix A

1. **False** Where a stipulation as part of a plea of guilty specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline most applicable to the stipulated offense. See §1B1.2 and Application Note 1.
2. **False** A reference to another guideline, or an instruction to apply another guideline, refers to the entire guideline, unless it is otherwise expressed. See §1B1.5, interpretation of references to other offense guidelines.
3. **False** The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. See §1B1.9 and Application Note 2.
4. **False** If the offense is a felony or Class A misdemeanor for which no guideline has been expressly promulgated, the guidelines instruct that the most analogous offense guideline be applied. If an analogous guideline does not exist, the provisions of 18 USC § 3553(b) shall control. See §2X5.1 and the introduction to Appendix A.

Specific Offense Characteristics and Chapter Three Adjustments

5. **True** Counts that dictate a consecutive sentence are excepted from application of the multiple count rules (e.g., 18 USC § 924(c)). Therefore to avoid double counting, the enhancement for weapon use is to be disregarded. See §3D1.2, Application Note 1 and §2K2.4, Application Note 2.
6. **False** The guideline for unlawful possession, §2D2.1, does not include the total amount of drugs in the base offense level or as a specific offense characteristic.
7. **False** The defendant should receive a 4 level enhancement for being the organizer of a criminal activity involving five or more participants. See §3B1.1(a).
8. **False** The enhancement would be appropriate. See §3B1.3, abuse of position of trust or use of special skill and Application Note 2.
9. **True** See §3A1.3, restraint of victim and Application Note 2.

10. **True** The loss for a financial institution or post office should be treated as at least a \$5,000 loss. See §2B3.1(b)(1).

Criminal History

11. **False** Prior sentence means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. See §4A1.2 and Application Note 1.
12. **True** A diversionary disposition resulting from a finding or admission of guilt is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered. However, diversions in juvenile court are not to be counted. See §4A1.2(f).
13. **True** For purposes of applying §4A1.1(a), (b), or (c) criminal history points are based on the sentence imposed not the length of time actually served. See §4A1.2, Application Note 2.
14. **True** See §4B1.2, Application Note 4.
15. **False** According to the career offender table, an offense that carries a statutory maximum of 25 years or more should be increased to an offense level of 34 unless the offense level computed through regular guideline application is greater. Also, a career offender's criminal history category in every case is a Category VI. The guideline range should be 262-327 months. See §4B1.1.

Imposition of Sentence

16. **True** Refer to the sentencing table, Chapter 5, Part A.
17. **True** Refer to the sentencing table, Chapter 5, Part A.
18. **True** When probation is imposed, the term shall be no more than three years if the offense level is less than 6. See §5B1.2(a)(2), term of probation.
19. **False** A sentence of probation is not authorized where the minimum term of imprisonment specified in the guideline range is more than six months. In this case §5C2.1(d) would apply. See §5B1.1, imposition of a term of probation, Application Note 2 and refer to §5C2.1(d) for the appropriate sentencing option.
20. **False** The length of supervised release for a Class C felony is at least two years but not more than three years. See §5D3.2(b)(2).

21. **False** If application of the guidelines results in a sentence above the maximum authorized by statute for the offense of conviction, the statutory maximum shall be the guideline sentence. See §5G1.1, sentencing on a single count of conviction.

Fines

22. **True** The court shall impose a fine in all cases unless the defendant establishes an inability to pay a fine or that imposition of a fine would unduly burden the defendant's dependents. See §5E4.2(a),(f).
23. **False** According to the fine table the range is \$7,500-\$75,000. See §5E4.2(c)(3).
24. **False** The fine table is based only on the offense level. The fine guideline range for an offense level of 10 is \$2,000-\$20,000. See §5E4.2(e)(3).
25. **False** Any money paid by the defendant shall first be applied to satisfy the order of restitution. See §5E4.1(b).

ADVANCED GUIDELINES APPLICATION QUIZ

TRUE OR FALSE

General Questions

1. A plea agreement contains several stipulations as to the amount of drugs, role in the offense, etc. The court is required to accept the stipulations as binding.
2. The defendant is convicted of (21 USC § 844) simple possession of cocaine, but stipulates in the plea agreement that he had in fact distributed one kilogram of cocaine. Therefore, the distribution guideline §2D1.1 should be applied but the sentence imposed may not exceed the statutory maximum for simple possession.
3. According to 18 USC § 3553(c), judges must always state their reasons for imposing a particular sentence.

Specific Offense Characteristics and Chapter Three Adjustments

4. The defendant was convicted of selling fraudulent securities by telephone and mail to numerous clients contacted randomly across the country. Of the 100 identifiable victims, three of these individuals were senile, and one was terminally ill and bedridden. Therefore, the three victims meet the definition of vulnerable victims §3A1.1 and the offense level should be increased by 2 levels.
5. Defendant A has been convicted of embezzlement of \$5,000,000 from a financial institution. He was the comptroller and his codefendant was the assistant vice president. To accomplish the crime, many administrative personnel unknowingly assisted in the crime. However, because there were only two individuals who were criminally responsible, there can be no increase for aggravating role, §3B1.1.
6. A defendant is convicted of conspiracy to distribute two kilograms of cocaine. As part of the same scheme and prior to his arrest he negotiated with undercover agents to distribute two additional kilograms the following month. Because the defendant negotiated a specific amount, a total of four kilograms will be used (the negotiated amount of drugs plus the amount distributed) to determine the base offense level.
7. The defendant pleaded to distribution of marihuana (21 USC § 841). Two related dismissed counts included distribution within 1000 feet of a school (21 USC §845a). You are required to double these drug amounts before adding them to the total amount of drugs.
8. When using the drug table, the weight of the packaging material is added to determine the total drug amount for purposes of §2D1.1.

9. Use of a toy gun during the commission of a bank robbery does not merit the firearm enhancement under the guideline for robbery, §2B3.1.
10. The defendant is convicted of manufacturing methamphetamine (21 USC § 841). Because the defendant destroyed the methamphetamine lab and the total amount of drugs is unknown, §2D1.1 does not apply. Therefore the court must use the guideline for unlawful possession, §2D2.1, and depart upward.

Criminal History

11. The defendant has two prior felony convictions. The defendant was sentenced to both convictions at the same sentencing hearing and received two years custody for the first conviction and 90 days custody for the second conviction to run concurrently. The defendant should receive a total of five criminal history points for the convictions.
12. The defendant has a prior felony drug conviction (21 USC § 841). He also has a prior conviction for simple possession (21 USC § 844). Because the instant offense is armed bank robbery (18 USC § 2113(d)), the defendant should be considered a career offender under §4B1.1.
13. The defendant has a prior state court conviction for an auto theft that he committed when he was 20 years old. He was sentenced as a youthful offender to 16 months and released after serving 13 months. The conviction was later set aside. The instant offense occurred two years later. The prior conviction would not be counted for purposes of criminal history points.
14. If a defendant commits an offense after committing the instant offense, but is sentenced for that offense prior to sentencing on the instant offense, criminal history points may be applied if the sentence imposed was for conduct other than conduct that was part of the instant offense.
15. A prior sentence of unsupervised probation may not be considered in determining criminal history points.
16. A defendant convicted of distribution of cocaine (21 USC § 841) has two prior convictions for armed bank robbery. The first robbery sentence was imposed ten years ago. The second offense, although committed after the instant drug offense, was recently sentenced. Because the defendant committed the second bank robbery subsequent to the instant drug offense, the criteria for career offender are not met.

Imposition of Sentence

17. Straight probation (probation without conditions of confinement) is available if the minimum of the guideline range is not more than six months.
18. If the guideline range is 12-18 months, the guidelines require that the minimum term be satisfied by a sentence of imprisonment without any of the incarceration alternatives such as intermittent confinement or community confinement.
19. The defendant is convicted of distribution of 25 kilograms of cocaine (21 USC § 841) a Class A felony. Because he has a prior drug distribution conviction, the statute requires a term of supervised release of at least 10 years. The court must depart from the guideline range of 3-5 years of supervised release for a Class A felony and impose a 10 year term of supervised release.
20. If the guideline range is 46-57 months and one of the counts carries a mandatory minimum sentence of five years, the statutory minimum shall be the guideline sentence.

Fines

21. If the court determines the defendant does not have the ability to pay a fine or payment of a fine causes undue hardship on dependents, it may waive or reduce the fine without departing from the guidelines.
22. The range from the fine table is determined to be \$5,000 to \$50,000. Once the fine amount within the range is selected by the court, the additional fine amount to cover the costs of imprisonment and supervision cannot result in the total fine amount exceeding this fine range maximum.
23. The defendant's offense level is determined to be 27. The guideline fine table maximum is \$125,000 for this offense level. Although the maximum statutory fine for the offense of conviction is \$4,000,000, the maximum guideline fine range is \$125,000.
24. A fine may be the sole sanction if the guidelines do not require a term of imprisonment.
25. If the court determines that the defendant willfully misrepresented all or even part of his income or assets, it may consider an increase in the offense level and resulting sentence in accordance with the Chapter Three obstruction adjustment (§3C1.1).
26. The costs to the government of imprisonment, probation, and supervised release are not subject to the defendant's ability to pay as described in §5E4.2(f).

ANSWERS TO ADVANCED QUIZ

General Questions

1. **False** According to the policy statement on stipulations, §6B1.4(d), "the court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing."
2. **True** If the plea agreement contains a stipulation to a more serious offense, the court shall apply the guideline that is most applicable to the stipulated offense. The sentence however may not exceed the statutory maximum of the offense of conviction. See §1B1.2(a), applicable guidelines, and §5G1.1(a), sentencing on a single count of conviction.
3. **True** According to (18 USC § 3553(c)) located in Appendix B, "The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence..."

Specific Offense Characteristics and Chapter Three Adjustments

4. **False** In this case, the defendant did not know and should not have been expected to know the victims were senile or terminally ill. See §3A1.1, Application Note 1.
5. **False** Both defendants could receive an aggravating role increase of 3 or 4 levels depending on the facts of the case. In determining if the scheme was "otherwise extensive" all persons involved during the course of the entire offense are to be considered. For example "a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive." See §3B1.1, Application Notes 2 and 3. Also consider §3B1.3, abuse of trust.
6. **True** If the offense involved negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. See §2D1.1, Application Note 11 and §2D1.4, Application Note 1.
7. **False** To use multiple drug amounts, there must be a conviction for 21 USC §§ 845, 845a or 845b, statutes that specifically pertain to distributing to juveniles, pregnant women or within 1000 feet of a school or college for which the applicable guideline is §2D1.2 or §2D1.3. Note: The drug amounts from these dismissed counts would be added in, but they would not be doubled.

8. **False** The footnote to the drug quantity table in §2D1.1 designated by a single asterisk states that "the total weight of the controlled substance" is to be used in determining the guideline offense level. While the entire amount of the mixture or compound containing the controlled substance would be considered, the packaging materials would not. With respect to blotter paper or sugar cubes on which LSD or some other controlled substance has been absorbed, the Commission has not addressed the issue and the court may have to make a determination.
9. **True** A toy gun does not meet the requirements of the definitions of firearm and dangerous weapon as described in Application Notes 1(d) and 1(e) under §1B1.1 (§1B1.1, Application Note 1(d) and (e)). No enhancement under §2B3.1(b)(2) should be applied for sentencing purposes even in a jurisdiction in which case law supports a conviction for armed bank robbery by a defendant using a toy gun.
10. **False** The conviction under 21 USC § 841 would utilize §2D1.1 of the guidelines. If the amount of controlled substance cannot be determined, the sentencing judge may estimate the amount based on the size or capability of the methamphetamine lab. See §2D1.1, Application Note 11 and §2D1.4, Application Note 1.

Criminal History

11. **False** Because the cases were consolidated for sentencing they are considered related cases and should be treated as one sentence for purposes of criminal history. If concurrent sentences were imposed the longest sentence is used. In this case the total number of criminal history points is 3. See §4A1.2 (a)(2) and Application Note 3.
12. **False** Simple possession does not meet the definition for a "controlled substance offense" in the career offender guideline. See §4B1.2(2) and Application Note 2.
13. **False** Convictions that are set aside are to be counted. Sentences that are expunged are not to be counted. See §4A1.2, Application Note 10 and §4A1.2(j).
14. **True** "Prior sentence" means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. See §4A1.1(a) and Application Note 1.

15. **False** A term of probation is considered a prior sentence if it meets the criteria under §§4A1.1(c) and 4A1.2. Whether or not the defendant was being supervised during a probation sentence is not a consideration. See §4A1.2(a)
16. **True** To meet the career offender guideline criteria, the two prior felony convictions of a crime of violence or a controlled substance offense must have been sustained prior to the defendant committing the instant offense. See §4B1.2(3)(A).

Imposition of Sentence

17. **False** Straight probation is authorized if the minimum term of imprisonment is zero months (§5B1.1(a)(1)). If the minimum is at least one month but not more than six months, the court is required to impose a condition or combination of conditions requiring intermittent confinement or community confinement as provided in §5C2.1(c)(2), imposition of a term of imprisonment (§5B1.1(a)(2)).
18. **True** If the minimum term of imprisonment in the guideline range is more than ten months, the guidelines require that the minimum term be satisfied by a sentence of imprisonment. See §5C2.1(f) and Application Note 8.
19. **False** A departure is not necessary. If a defendant is convicted under a statute that requires a term of supervised release, the term shall be at least three years but not more than five years, or the minimum period required by statute, whichever is greater. See §5D3.2(a).
20. **True** See §5G1.1(b).

Fines

21. **True** See §5E4.2(f).
22. **False** See §5E4.2(c). The additional fine amount for costs of imprisonment or supervision is to be added to the fine amount chosen from within the fine table. For example, if the maximum of the range is \$50,000 and the court decides to fine the defendant \$50,000, the costs of imprisonment or supervision would be added to that amount. This would not be considered a departure from the guidelines fine range. See §5E4.2(i).

23. **False** Limiting the maximum fine under the guidelines does not apply if the defendant is convicted under a statute authorizing a maximum fine greater than \$250,000. See §5E4.2(c)(4).
24. **True** As long as the fine is punitive, a fine may be the sole sanction. See §5E4.2(e) and Application Note 1.
25. **True** If the defendant willfully fails to disclose income or assets, the court may increase the offense level by applying the enhancement for obstruction, §3C1.1. See §5E4.2, Application Note 6.
26. **False** The costs to the government are subject to the defendant's ability to pay. See §5E4.2(i) and Application Note 7.

TEST CASE A

[please complete Worksheets A, C, and D]

Single Count Exercise

Richard Alpha is the manager of the First National Bank of Smallville, Idaho, and has served in that capacity for the last five years. In November of 1988 the bank moved to new quarters in Le Shoppes, Smallville's first indoor shopping mall.

During the first few weeks of operation in their new office, the assistant branch manager experienced difficulty opening the bank's computerized vault. The vault, equipped with a time lock, was programmed to open only at 7:30 a.m. Vaults, Unlimited, the firm that installed the giant safe, informed bank officials that the only way they would be able to open the vault for repairs was by using sophisticated electronic equipment that "fooled" the vault into thinking it was 7:30 a.m. The repairs commenced and Mr. Alpha studied the technician's operation of the equipment with great interest.

Late the evening of December 19, 1988, Mr. Alpha broke into the offices of Vaults, Unlimited, and stole the sophisticated electronic equipment valued at \$17,000 after threatening the night watchman with a pistol. He then proceeded to the First National Bank and used his keys to enter the building. Mr. Alpha broke into the vault with the help of the hi-tech equipment and stole \$240,000. He fled Smallville for Puerto Rico, leaving the vault door ajar and the burgled equipment in the safe.

On December 23, three days after arriving in Puerto Rico, Mr. Alpha was arrested and charged with assault and battery stemming from an incident in which he shot an individual at a local bar. While Puerto Rican officials were investigating Mr. Alpha for the assault, he broke down and confessed to the criminal activity in Smallville. He turned over \$205,000 in cash to the local authorities, explaining that he lost \$35,000 gambling at the blackjack tables. On February 2, 1989, Mr. Alpha subsequently received a two year sentence after pleading guilty in Puerto Rican commonwealth court to assault with a deadly weapon.

Mr. Alpha voluntarily waived extradition and was returned to Smallville on a writ where state authorities had charged him with burglary in connection with the break-in at Vaults, Unlimited. He pleaded guilty on March 25, 1989, and received a three year state sentence, imposed to run consecutively to the two year sentence from Puerto Rico.

Mr. Alpha was then borrowed on a writ for federal prosecution on a charge of bank burglary. (18 U.S.C. § 2113(a); 20 years and/or \$250,000; Class C felony) He pleaded guilty after making a full statement to law enforcement officials.

Investigation by the probation officer has confirmed criminal history resulting from offenses committed after Mr. Alpha's 18th birthday. In all cases the defendant was represented by counsel.

1/11/84 *State Court, Cincinnati, Ohio*

- * *Assault - 2 years suspended upon 2 years probation*
- * *Resisting Arrest - \$1,000 fine or 90 days consecutive*
- * *Assaulting a Police Officer - dismissed pursuant to a plea agreement*

The charges stemmed from a domestic dispute on 9/10/83 in which Mr. Alpha assaulted his wife. The defendant scuffled with officers when police arrived at the scene.

3/22/87 *State Court, Smallville, Idaho*

- * *Driving while intoxicated - Adjudication withheld upon a plea of guilty; court imposed sentence of two years unsupervised probation.*

Probation was in effect at the time of the instant federal offense.

2/2/89 *Commonwealth Court, Puerto Rico*

- * *Assault with a deadly weapon - 2 years custody*

3/25/89 *State Court, Smallville, Idaho*

- * *Burglary - 3 years to run consecutively to the Puerto Rican sentence*

Mr. Alpha is 47 years old, has no dependents, owns a house in Smallville valued at \$75,000 (\$50,000 mortgage outstanding), and has savings of \$8,000. He has no other assets or debts.

Please calculate a sentencing range, fine range, supervision requirements, and any other elements needed to sentence Mr. Alpha under the guidelines.

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant ALPHA, RICHARD District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) _____ U.S. Code Title, Subtitle, Section & Subsection 18 - 2113 (a)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2B2.2(a)</u>	<u>BURGLARY OF A BANK</u>	<u>12</u> (base)
<u>2B2.2(b)(1)</u>	<u>PLANNING</u>	<u>2</u>
<u>2B2.2(b)(2)</u>	<u>* 257,000 LOSS (2B2.1(b)(2)(E) FROM)</u>	<u>4</u>
<u>2B2.2(b)(4)</u>	<u>POSSESSION OF A FIREARM</u>	<u>2</u>

Notes: _____

Sum 20

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ 3B1.3 2

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

22

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☒

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET C (CRIMINAL HISTORY)

Defendant ALPHA, RICHARD

Docket Number _____

Date Defendant Commenced Participation in Instant Offense 12/19/88

1. **3 POINTS** for each prior **ADULT** sentence of imprisonment exceeding **ONE YEAR** and **ONE MONTH** imposed within **15 YEARS** of the instant offense **OR** resulting in incarceration during any part of that **15-YEAR** period. (See §§4A1.1(a) and 4A1.2)
2. **2 POINTS** for each prior sentence of imprisonment of at least **60 DAYS** resulting from an offense committed **SUBSEQUENT** to the defendant's 18th birthday not counted under §4A1.1(a) imposed within **10 YEARS** of the instant offense; and
2 POINTS for each prior sentence of imprisonment of at least **60 DAYS** resulting from an offense committed **PRIOR** to the defendant's 18th birthday not counted under §4A1.1(a) from which the defendant was released from confinement within **5 YEARS** of the instant offense. (See §§4A1.1(b) and 4A1.2)
3. **1 POINT** for each prior sentence resulting from an offense committed **SUBSEQUENT** to the defendant's 18th birthday not included under §4A1.1(a) or §4A1.1(b) imposed within **10 YEARS** of the instant offense; and
1 POINT for each prior sentence resulting from an offense committed **PRIOR** to the defendant's 18th birthday not included under §4A1.1(a) or §4A1.1(b) imposed within **5 YEARS** of the instant offense. (See §§4A1.1(c) and 4A1.2)

Note: a maximum of 4 POINTS may be imposed for the items in 3.

Date of Imposition	Sentence Status*	Offense	Sentence	Release Date **	Criminal History Pts.
1/11/84		ASSAULT	2 YRS. SUSPENDED, 2 YRS. PROBATION		1
" "		RESISTING ARREST	\$1,000 OR 90 DAYS CONSECUTIVE		
" "		ASSAULTING AN OFFICER	DISMISSED		
3/22/87		DWI	2 YRS. UNSUPERVISED PROBATION		1
2/2/89		ASSAULT W/ DEADLY WEAPON	2 YRS. CUSTODY		3
3/25/89		BURGLARY	3 YRS. CONSECUTIVE TO SENTENCE OF 2/2/89		0 (4A1.2 (a)(1))

* Sentence status, juvenile (J) or adult (A), required on sentences if offense committed prior to age 18.

- ** A release date is required in only three instances:
1. When a sentence covered under §4A1.1(a) was imposed more than 15 years prior to the commencement of the instant offense but release from incarceration occurred within such 15-year period;
 2. When a sentence counted under §4A1.1(b) was imposed for an offense committed prior to age 18 and more than 5 years prior to the commencement of the instant offense, but release from incarceration occurred within such 5-year period; and
 3. When a sentence is counted under §4A1.1(c) because the defendant was released from custody within 2 years of the instant offense or was still in custody at the time of the instant offense.

Total Criminal History Points for §§4A1.1(a), 4A1.1(b), and 4A1.1(c) (Items 1, 2, 3)

5

4. **2 POINTS** if the defendant committed the instant offense while under any criminal justice sentence (for example, probation, parole, supervised release, imprisonment, work release, escape status). Enter **0 POINTS** in any other case. (See §§4A1.1(d) and 4A1.2) List the type of control and identify the sentence from which control resulted.

UNDER PROBATION IMPUSED 3/22/87

2

5. **2 POINTS** if the defendant committed the instant offense less than 2 YEARS after release from imprisonment on a sentence counted under §4A1.1(a) or (b). However, enter only 1 POINT for this item if 2 points were added under §4A1.1(d). In any other case, enter **0 POINTS**. (See §§4A1.1(e) and 4A1.2) List the date of release and identify the sentence from which release resulted.

0

6. **Total Criminal History Points** (Sum of Items 1-5)

7

7. **Criminal History Category** (Enter here and on Worksheet D, Line 4)

IV

<u>Total Points</u>	<u>Criminal History Category</u>
0 - 1	I
2 - 3	II
4 - 6	III
7 - 9	IV
10 - 12	V
13 or more	VI

WORKSHEET D (GUIDELINE WORKSHEET)

Defendant ALPHA, RICHARD

District _____

Docket Number _____

1. Adjusted Offense Level (From Worksheet A or B)

If Worksheet B is required, enter the result from Worksheet B, Line 9. Otherwise, enter the result from Worksheet A, Line 5.

22

2. Acceptance of Responsibility (See Chapter Three, Part E)

If applicable, enter "2." If not applicable, enter "0."

- 2

3. Offense Level Total (Line 1 less Line 2)

20

4. Criminal History Category (From Worksheet C)

Enter the result from Worksheet C, Line 7.

IV

5. Career Offender/Criminal Livelihood (See Chapter Four, Part B)

a. Offense Level Total

If the career offender provision (§4B1.1) or the criminal livelihood provision (§4B1.3) results in a higher offense level total than Line 3, enter the offense level total. Otherwise, enter "N/A."

N/A

b. Criminal History Category

If the career offender provision (§4B1.1) results in a higher criminal history category than Line 4, enter "VI" for the criminal history category. Otherwise, enter "N/A."

N/A

6. Guideline Range from Sentencing Table

Enter the applicable guideline range from Chapter Five, Part A.

51-63
months

7. Probation

a. Imposition of a Sentence of Probation (Check the line applicable)

- ☒ 1. Probation is not authorized by the guidelines (if the minimum of the guideline term is greater than six months). (If checked, go to item 8)
- ☐ 2. Probation is authorized by the guidelines (if the minimum of the guideline range is zero months) (§5B1.1(a)(1)).
- ☐ 3. Probation is authorized by the guidelines (if the minimum of the guideline range is one to six months), provided the court imposes a condition or combination of conditions requiring intermittent confinement or community confinement satisfying the minimum of the guideline range (§5B1.1(a)(2)).

A. Length of a Term of Probation (See §5B1.2)

If probation is authorized, the guideline for the length of such term of probation is:
(Check the line applicable)

- ☐ 1. At least one year, but not more than five years (if the offense level total is 6 or more)
- ☐ 2. No more than three years (if the offense level total is 5 or less)

B. **Conditions of Probation** (See §5B1.3) A defendant serving any term of probation shall not commit a federal, state, or local crime. See 18 U.S.C. § 3563(a)(1). In addition to standard conditions (1-13), list any applicable special conditions:

8. **Sentences under §5C2.1(c)(3) and (d)(2)** (Check the line applicable)

- ☒ 1. The provisions of §5C2.1(c)(3) and (d)(2) are not applicable (if the minimum of the guideline range is zero or is greater than ten months). (If checked, go to item 9.)
- ☐ 2. A sentence under §5C2.1(c)(3) or (d)(2) is authorized by the guidelines. The court may impose a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement for imprisonment, provided that at least one-half of the minimum guideline range, but no less than one month, is satisfied by imprisonment.

9. **Supervised Release**

a. **Imposition and Length of a Term of Supervised Release** (See §§5D3.1, 5D3.2)

If a term of imprisonment of more than one year is imposed, the guidelines require a term of supervised release.

If a term of imprisonment of one year or less is imposed, the guidelines authorize but do not require a term of supervised release.

List the guideline and the length of any term of supervised release: 2-3 yrs.

[3-5 years for Class A or B felony (offenses with maximum term of imprisonment of 20 years or more); 2-3

2-3 years for Class C or D felony (offenses with maximum term of imprisonment of less than 20 years but 5 years or more);

1 year for Class E felony or misdemeanor (offenses with maximum terms of imprisonment of less than 5 years but 5 days or more);

For statutorily required minimum terms of supervised release, refer to §5D3.2(a).]

MORE THAN 6 MONTHS

b. **Conditions of Supervised Release** (See §5D3.3) A defendant serving any term of supervised release shall not commit a federal, state, or local crime. See 18 U.S.C. § 3583(d). In addition to standard conditions (1-13), list any applicable special conditions:

5B1.4 (B) 14, 15, 16, 17, 18

10. **Restitution** (See §5E4.1)

If an order of restitution is applicable, enter the amount. Otherwise, enter "N/A."

\$ 35,000

11. **Fines**

a. **Fines for Individual Defendants** (See §5E4.2)

	Minimum	Maximum
(1) Statutory Maximum of any single count in excess of \$250,000		\$ <u>—</u>
(2) Fine Table:	\$ <u>7,500</u>	\$ <u>75,000</u>
(3) Personal Gain to Defendant less Restitution:	\$ <u>35,000</u>	
(4) Gain to All Participants		(\$ <u>257,000</u> x 3) \$ <u>771,000</u>
Loss to Victim		(\$ <u>257,000</u> x 2) \$ <u>514,000</u>

Guideline Range for Fines:
(determined by the greater minimum and greatest maximum above)

Minimum: \$ 35,000

Maximum: \$ 771,000

b. **Cost of imprisonment** (See §5E4.2(i)).

\$ 1221/mo

Cost of probation, supervised release

\$ 83.33/mo

Cost of community confinement

\$ 920/mo

12. Special Assessments (Sec §5E4.3)

Enter the amount of any special assessment required for each count of conviction.

[§25, if the defendant is an individual convicted of a misdemeanor;
\$50, if the defendant is an individual convicted of a felony;
\$100, if the defendant is an organization convicted of a misdemeanor; and
\$200, if the defendant is an organization convicted of a felony.

\$ 50.00

13. Additional Applicable Guidelines, Policy Statements, Statutory Provisions, and Aggravating and Mitigating Factors

List any additional applicable guidelines, policy statements, and statutory provisions. Also list any applicable aggravating and mitigating factors that may warrant a sentence at a particular point within the applicable guideline range or outside the applicable guideline range. Attach additional sheets as required.

§ 5G1.3 - IF INDEPENDENT PROSECUTIONS
CREATE ANOMALOUS RESULTS, A DEPARTURE
MAY BE CONSIDERED. IF THE TWO BURGLARIES
HAD BEEN COMBINED UNDER ONE GUIDELINE
SENTENCE, THE RANGE WOULD BE 57-71 MONTHS.
IN ORDER TO OBTAIN THE INTENDED RANGE,
THE COURT COULD DEPART UPWARD, RUNNING
THE SENTENCE CONCURRENT TO THE STATE
CHARGE, OR DEPART DOWNWARD AND RUN
THE SENTENCE CONSECUTIVELY.

THE INSTANT SENTENCE SHOULD RUN
CONSECUTIVELY TO THE UNEXPIRED SENTENCE
OF 2/2/89.

Completed by _____

Date _____

[If a plea agreement is accepted by the Court, attach a copy to the worksheet.]

MULTIPLE COUNTS

Table of Contents

- I. Goal
- II. Introduction
 - A. Four Grouping Rules
 - B. Reasons for Determining a Single Offense Level
- III. Components of Determining a Single Offense Level
 - A. Grouping Counts
 - B. Process to Reach a Single Offense Level
- IV. Grouping Rules
 - A. Basic Rules §3D1.2(a), (b), (c), and (d)
 - B. Rules (a) and (b)
 - C. Rules (c) and (d)
 - D. Mandatory Consecutive Sentences
- V. Practical Approach to Grouping
 - A. Exclusion of Mandatory Consecutive Sentences
 - B. Grouping under §3D1.2(d) (Rule (d))
 - C. Grouping under §3D1.2(b)(1) and (b)(2)
 - D. All Remaining Counts
 - E. Grouping under §3D1.2(a) and (b) (Rules (a) and (b))
 - F. Grouping under §3D1.2(c) (Rule (c))
 - G. Separate Count Group

VI. Reaching the Combined Adjusted Offense Level

- A. Count Group Offense Level
- B. Assigning Units
- C. Total Units
- D. Conversion Table
- E. Offense Level Increase
- F. Acceptance of Responsibility

VII. Advanced Multiple Counts Considerations

- A. "Pseudo" Counts
- B. Complete and Incomplete Acts
- C. Exception to Grouping First under Rule (d)
- D. Double Counting
- E. Conflicting Grouping Rules

Supplementary Materials:

CHECKLIST

UNITS EXERCISE

CASE SCENARIOS FOR DISCUSSION

MULTIPLE COUNTS LECTURE

I. Goal of Multiple Counts Section (Chapter Three, Part D)

To develop a single offense level that encompasses the counts of conviction and represents the seriousness of these counts.

II. Introduction: Determining a Single Offense Level

Show §3D1.2 - Overhead #1

A. The guidelines provide four basic rules for grouping multiple counts of conviction (§3D1.2(a), (b), (c), and (d) -- referred to as Rules (a), (b), (c), and (d)).

1. Rule (a) -- Counts are grouped when they involve the same victim and the same act or transaction (§3D1.2(a)).
2. Rule (b) -- Counts are grouped when they 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 (§3D1.2(b)).
3. Rule (c) -- Counts are grouped 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 count (§3D1.2(c)).
4. Rule (d) -- Counts are grouped if the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior (§3D1.2(d)).

Show Reasons - Overhead #2

B. Reasons for Determining a Single Offense Level (Chapter Three, Part D, Introductory Commentary)

1. To prevent multiple punishments for substantially the same conduct (i.e., avoid "double counting");

** Example: If a defendant embezzled money by falsifying a banking form, the defendant could be convicted of one count of embezzlement and one count of falsifying a banking form. However, each count involved substantially the same conduct. Additional punishment of the defendant solely because there were two counts of conviction would result in double punishment for the same conduct.*

2. To provide incremental increases in punishment for significant additional criminal conduct;

The guidelines attempt to replicate pre-guideline sentencing practices of incrementally increasing punishment for significant additional criminal conduct. In the past, a defendant convicted of multiple counts of significant criminal conduct (e.g., three counts of bank robbery) would receive a sentence of imprisonment intended to punish the defendant for the significant criminal conduct embodied in the first count. For the second count of significant criminal conduct, the court would impose some increase in punishment over the first count, but generally not as great a punishment as the first count; rather, the increase in punishment was incremental. Likewise, punishment for the third count would not be as great as either the first or second counts. For each additional count of significant criminal conduct, the amount of additional punishment would continue to decline.

3. To limit the significance of prosecutorial charging patterns.

Had the guidelines been constructed so as to automatically provide for additional punishment whenever there were multiple counts of conviction, significant variation in guideline sentences would result based solely on the manner in which a prosecutor charged for criminal behavior. Absent some constraints on the impact of multiple counts, a bank embezzler charged in a separate count for every distinct act of embezzlement otherwise would receive a harsher sentence under the guidelines than one who committed the same acts but was prosecuted in a single criminal count.

III. Two Major Components for Determining a Single Offense Level for Multiple Counts

A. "Grouping counts" (§3D1.2(a-d))

1. When any of the four "grouping" rules directs that individual counts be "grouped," the individual counts become part of a "count group."
2. For some offenses, the offense level for the "count group" is determined by the individual count in the group with the highest offense level. The offense level of the highest individual count becomes the offense level for that entire "count group" (§3D1.3).

For other offenses the offense level is determined by aggregating amounts or quantities for all appropriate counts.

Note: Using the offense level of the highest count or aggregating amounts for all counts to represent the entire count group is essentially the same as giving concurrent sentences for each of those counts.

Show Overhead #3

** Example: Suppose the grouping rules result in four counts of conviction being grouped into a single "count group." Count One has an offense level of 12; Count Two, an offense level of 15; Count Four, an offense level of 10; and Count Five, an offense level of 10. The highest offense level of the individual counts in the "count group" is offense level 15 for Count Two. That offense level becomes the offense level for the entire "count group."*

3. If any of the grouping rules results in a count being grouped with one already part of a group, the count becomes a part of that count group.

Show Overhead #4

** Example: One grouping rule results in the grouping of Counts One and Four into a single count group. Another rule results in the grouping of Count Three with Count Four; therefore, Count Three enters the count group with Counts One and Four. The highest offense level for all the counts in the group becomes the offense level for the entire group.*

4. If a count is not grouped with any other counts, the individual count is considered a "count group." In such a case, the offense level of that count is the offense level for the group.

Show Overhead #5

** Example: A defendant is convicted of six counts. The grouping rules result in four of the individual counts being grouped together, with the two remaining counts not being grouped with any other count. Each of these two ungrouped counts becomes a separate count group.*

5. The grouping rules may result in:
 - a. grouping all counts into a single count group;
 - b. grouping counts into various count groups; or
 - c. no grouping of counts, leaving individual counts as separate count groups.
6. Each count group that results from the grouping process is behavior representing "significant criminal conduct."
7. Grouped counts treated as though they constitute a single offense for purposes of the guideline calculation (Chapter Three, Part D, Introductory Commentary).

B. Process to Reach a Single Offense Level

1. When all individual counts are grouped into a single count group, the offense level for that count group represents the seriousness of the entire criminal conduct.
2. When application of the grouping rules results in more than one count group, the combined seriousness of the groups is established through a process described in §3D1.4.

Show Worksheet B - Overhead #6

- a. Using the count group with the highest offense level as a benchmark, relative seriousness of the other count groups is determined by assigning "units."
- b. Based on the total number of units, a table indicates the increase to be applied to the offense level of the count group with the highest offense level. This adjustment represents an incremental increase in punishment.

IV. Grouping Rules (§3D1.2)

- A. The four basic rules for grouping (Rules (a), (b), (c), and (d)) are described at §3D1.2(a), (b), (c), and (d).**

- B. Rules (a) and (b) require that counts have the same victim and that they be closely interrelated (Chapter Three, Part D, Introductory Commentary).**

Show §3D1.2(a) - Overhead #7

1. Rule (a) -- Counts are grouped when they involve the same victim and the same act or transaction (§3D1.2(a)).

a. The counts must involve the same victim. If counts involve different victims, do not group under Rule (a).

- (1) The "victim" is the person who is directly and most seriously affected by the offense (§3D1.2, Application Note 2). The term "victim" is not intended to include indirect or secondary victims.
- (2) For counts involving no readily identifiable victim (including so-called "victimless" crimes), the victim is the societal interest that has been invaded.

** Example: A defendant is convicted of simple possession of cocaine and simple possession of heroin, both of which occurred on the same occasion. The societal harm resulting from simple possession is the same for both counts, i.e., society's interest in reducing the use of illicit drugs.*

- (3) In general, the guidelines do not treat the "United States" or the "government" as the victim for purposes of grouping. Rather, the victim is the societal interest invaded.

** Example: While it might be argued that the government is the victim of a falsification of a passport and a tax violation, the narrower societal interests are protection of our system of immigration and enforcement of our system of taxation.*

- (4) Ambiguities regarding the victim are to be resolved by a determination of whether the counts involve "substantially the same harm" (§3D1.2, Application Note 2).

** Example: A defendant is convicted of one count of simple possession of cocaine and one count of driving while impaired. While the societal interest may be different for these two offenses, substantially the same harm results (i.e., harm caused to society while driving under the influence of drugs). Therefore, the offenses are treated as having the same victim.*

b. To be grouped under Rule (a), counts must represent essentially:

(1) A single injury to the same victim; or

** Example: A defendant was convicted of embezzling money from a bank and making a fraudulent entry on a banking form. The offense involved a single injury (the embezzlement) to the same victim (the bank). Therefore, the count charging embezzlement and the count charging fraudulent entry would be grouped under Rule (a).*

(2) A single criminal episode or transaction involving the same victim.

** Example: A defendant kidnapped a woman and assaulted her in the course of the kidnapping. Both offenses occurred during the same criminal episode and involved the same victim. The kidnapping count and assault count would therefore be grouped under Rule (a).*

**For additional examples of grouping under Rule (a),
see exercises #4 and #5 under Tab C**

Show §3D1.2(b) - Overhead #8

3. Rule (b) -- Counts are grouped when they 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 (§3D1.2(b)).

** Example: A defendant is convicted of two counts of obstructing an election by paying two persons to cast unlawful votes in the same election. The counts are grouped because they have substantially the same victim (the societal interest in integrity of the election process) and they constitute two or more acts that are connected by a common criminal objective.*

a. The counts must involve the same victim. If counts involve different victims, do not group under Rule (b).

** Example: A defendant is convicted of a count of interstate transportation of a stolen motor vehicle and a count of altering a vehicle identification number. The charges resulted from the defendant's theft of a car that he transported interstate and subsequent alteration of the vehicle identification number. The counts have the same victim (the owner of the stolen car) and are connected by a common criminal objective (possession of the automobile). They would therefore be grouped under Rule (b).*

- b. To be grouped under Rule (b), the counts must be connected by a single criminal objective or constituting part of a common scheme or plan. This rule attempts to group counts that represent essentially one composite harm to a single victim (§3D1.2, Application Note 4).

** Example: Should a defendant rob the same bank on two or more occasions, the same victim (the bank) would be involved in each count. However, each robbery represents a discrete offense, having its own separate objective and distinct harms. Therefore, these counts are not generally grouped under Rule (b).*

- c. In addition to the examples provided above, the guidelines identify three specific examples of grouping under Rule (b) at §3D1.2(b)(1), (2), and (3) (referred to as Rule (b)(1), Rule (b)(2), and Rule (b)(3), respectively).

- (1) These aspects of Rule (b) are in response to legislative directives in the Sentencing Reform Act (28 USC § 994(l)(2), 18 USC § 3584(a), and 28 USC § 994(u)).

Note: The following rules are not inclusive of Rule (b). It is important to remember that these rules are a subset of the general rule that requires grouping 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.

- (2) Rule (b)(1) -- Counts are grouped when there is a count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation (§3D1.2(b)(1)).

Show grouping under Rule (b)(1) - Overhead #9

** Example: A defendant conspired with a co-defendant to rob a bank and subsequently did so, escaping with \$5,000. The defendant was convicted of one count of conspiracy to commit bank robbery (18 USC § 371) and one count of bank robbery (18 USC § 2113(a)). The bank robbery constituted the sole object of the conspiracy count. One count group results as the robbery was the sole object of the conspiracy to commit bank robbery. The acts constitute a common criminal objective and represent essentially one composite harm (taking the bank's money by threat or force) to the same victim (the bank).*

- (3) Rule (b)(2) -- Counts are grouped when there is a count charging an attempt to commit an offense and a count charging the commission of the offense (§3D1.2(b)(2)).

How grouping under Rule (b)(2) - Overhead #10

** Example: The defendant attempted and completed the importation of 200 kilograms of marihuana. He was convicted of one count of attempting to import 200 kilograms of marihuana (21 USC § 963) and one count of importation of marihuana (21 USC § 952). One count group results inasmuch as an attempt to commit an offense and the actual commission have the same victim (society's interest in eliminating illicit drugs) and different acts that constitute a common criminal objective (attempting to bring drugs into the country and actually completing the intended act).*

- (4) Rule (b)(3) -- Counts are grouped when there is a count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition (§3D1.2(b)(3)).

Show grouping under Rule (b)(3) - Overhead #11

** Example: The defendant submitted falsified invoices for \$8,000 to Housing and Urban Development, claiming that repairs had been made to HUD-owned properties when in fact the repairs had not been made. He was convicted of one count of false statements (18 USC § 1001) and one count of false claims to HUD (18 USC § 287). The two counts would form one count group inasmuch as Count Two charges a specific prohibition that is encompassed in the general prohibition charged in Count One. Each count involves the same victim (HUD) and two or more acts that are part of a single course of conduct connected by a single criminal objective (fraud resulting in financial gain to the defendant).*

4. Occasionally there is difficulty in determining whether Rule (a) or Rule (b) applies due to difficulty in the determination of whether counts represent the same act or transaction (Rule (a)) or two or more acts that are part of a common scheme or plan (Rule (b)). They are to be grouped if either rule applies. The results of grouping under either Rule (a) or (b) are the same.

** Example: A defendant is convicted of two counts, one for forgery of a check and one for uttering the same check. The counts involve the same victim (the individual or business who cashed the check) and the same harm (the negotiation of the check). However, there may be debate over whether forgery and uttering*

are the same act, or whether they constitute two acts that are part of a common scheme. The effect of grouping under either Rule (a) or (b) is identical and therefore presents no practical problem.

**For additional examples of grouping under Rule (b),
see exercises #5 and #6 under Tab C**

- C. For grouping Rules (c) and (d), the counts need not have the same victim.

Show §3D1.2(c) - Overhead #12

1. Rule (c) -- Counts are grouped 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 count (§3D1.2(c)).

Show §2B3.1 - Overhead #13

** Example (Specific Offense Characteristic): The defendant, a convicted felon, pleaded to bank robbery (18 USC § 2113(a)(d)) and a firearms violation (18 USC § 922(g)). In the course of the bank robbery, the defendant brandished a firearm before fleeing with \$7,500. The two counts are grouped because the behavior cited in one count, possession of a firearm, is taken into consideration by application of the robbery guideline (by way of a specific offense characteristic) and results in an enhancement under that guideline. Failure to group would result in the defendant being punished twice for essentially the same offense behavior.*

Show Worksheets A, Counts One and Two - Overheads #14 and #15

** Example (Adjustment): The defendant is convicted of one count of selling five grams of heroin to an undercover DEA agent (21 USC § 841(a)(1)). A second count of conviction involves the defendant offering the agent a \$6,000 bribe not to arrest him for the sale of the heroin (18 USC § 201(b)(1)). In applying the guidelines to Count One, a 2 level adjustment for obstruction (§3C1.1) would be appropriate. Because this adjustment is punishing for the same harm encompassed in Count Two, grouping is appropriate to avoid double counting.*

2. Rule (c) requires that counts be "closely interrelated" (§3D1.2(c), Application Note 5).

** Example: A defendant is convicted of one count of drug distribution and one count of attempted bribery. The bribery involved an attempt to bribe a housing inspector to approve a substandard apartment complex. The bribery had no relationship to the drug offense and vice versa. Neither the bribery nor the drug guideline includes a specific offense characteristic or adjustment reflective of the other behavior. Therefore, the two counts would not be grouped under Rule (c).*

**For additional examples of grouping under Rule (c),
see exercises #1, #5, #7, and #8 under Tab C**

Show §3D1.2(d) - Overhead #16

3. Rule (d) -- Counts are grouped if the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm; or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior (§3D1.2(d)).

a. The offenses addressed by this guideline are those in which the essence of the harm can be determined by a measure of an amount or quantity of some fungible item, such as money or drugs, or if the offense behavior is ongoing or continuous. By adding up the money or drugs, the seriousness of the offense can be adequately addressed in one guideline calculation, even if the behaviors are not related (i.e., not part of the same course of conduct or common scheme or plan).

- (1) The specific offense guidelines in Chapter Two that are grouped under Rule (d) are listed in the rule itself (§3D1.2(d)).

** Example: Guideline 3D1.2(d) specifically includes §2B1.1 (theft, larceny, embezzlement), §2F1.1 (fraud), §2D1.1 (drug distribution), §2S1.1 (money laundering), §2T1.1 (tax violations), etc.*

- (2) Rule (d) contains a listing of Chapter Two guidelines that are specifically excluded from grouping under this rule. These guidelines have been specifically excluded from grouping under Rule (d) because the primary harm considered in the guidelines is not measured on the aggregate.

** Example: Robbery (§2B3.1) is on the excluded list under §3D1.2(d). While monetary loss is a consideration under the robbery guideline, it is not necessarily the most significant factor considered in applying this guideline. Risk of injury as evidenced by enhancements for weapon use and injury play a significant role in determining the harm resulting from a robbery. The factors representing risk of injury cannot be aggregated.*

The fact that counts of conviction are exempt from grouping under Rule (d) does not mean the counts cannot be grouped under another grouping rule, i.e., Rules (a), (b), or (c) (§3D1.2(d)).

** Example: The guidelines for robbery (§2B3.1) and bribery (§2C1.1) are among those listed under Rule (d) as excluded from grouping under this rule. However, in a two count indictment in which the defendant is convicted of robbery and attempting to bribe an officer not to testify in the robbery case, the counts would be grouped under Rule (c) rather than Rule (d). The obstruction adjustment (§3C1.1) would enhance the robbery guideline and would therefore take the behavior cited in the bribery count into consideration.*

- (3) There may be offenses for which the Chapter Two offense guidelines would address the behavior primarily on the aggregate amount, or by its ongoing nature, but are not specifically listed in the rule (§3D1.2(d) and Application Note 6). Such offenses could nonetheless be grouped under Rule (d) depending on the circumstances of the specific case involved.

** Example: A defendant is convicted of one count of arson (18 USC § 32) and two counts of property destruction (18 USC § 1361), with one of the property destruction counts involving completely different property than that charged in the arson count.*

For convictions under 18 USC § 32, the statutory index lists §2K1.4 as the appropriate guideline. This guideline (§2K1.4) is one that is not listed under §3D1.2(d) as either included or excluded from the grouping rules of §3D1.2(d) because there will be cases in which application of Rule (d) is appropriate and others in which it is not. Generally, §2K1.4 is not to be grouped on an aggregate under Rule (d). However, the cross reference under §2K1.4 (§2K1.4(c)(2)) provides the means for guideline application based on an aggregate amount. Under that cross reference, a guideline (§2B1.3) listed as included under §3D1.2(d) is available for guideline application if the resulting offense level is higher than that calculated under §2K1.4.

If in applying the arson guideline (§2K1.4), the resulting adjusted offense level is higher than the adjusted offense level from use of the cross reference (the cross reference refers to §2B1.3, Property Damage or Destruction, and is based

primarily on an aggregate amount), the offense level for this count would be derived from §2K1.4 and the counts would not be grouped under Rule (d). However, if the cross reference is invoked, Rule (d) would apply and the entire dollar amount would be added together to determine the appropriate offense level.

- (4) Because the offense level for these counts is determined on an aggregate under Rule (d), a single offense level is determined by adding together amounts or quantities from the various counts.

Show grouping under Rule (d) - Overhead #17

** Example: A defendant is convicted of three counts of embezzlement (18 USC § 656). Count One resulted in a \$5,000 loss, Count Two in a \$10,000 loss, and Count Three in a \$20,000 loss. The guideline for each of these counts bases its offense level primarily on the total dollar loss. In this case the same guideline (§2B1.1) applies to each. Because harm is based on an aggregate and §2B1.1 is one of the guidelines listed as applicable under §3D1.2(d), the counts are grouped under Rule (d). The embezzlement guideline (§2B1.1) would be applied using the aggregate loss of \$35,000.*

- (5) When counts are grouped under Rule (d), the guideline is applied based on the relevant conduct of all counts grouped under this rule. In determining the base offense level, specific offense characteristics, and adjustments, all fungible items are aggregated. If a specific offense characteristic or adjustment is applicable to the relevant conduct of any of the counts, it may be considered applicable to the aggregate offense level (Chapter Three, Part D, Introductory Commentary, and §3D1.3, Application Note 3).

** Example: A defendant is convicted of 50 counts of fraud. In five of those counts, a vulnerable victim was targeted. Because fraud (§2F1.1) is based primarily on the aggregate loss involved and is one of the guidelines listed as applicable under §3D1.2(d), the 50 counts are grouped under Rule (d). In applying the Chapter Three adjustments, vulnerable victim would apply because in looking at the criminal conduct as a whole at least part of that conduct involved the targeting of vulnerable victims.*

- (6) In establishing the aggregate under Rule (d), there may be counts in which the quantity of fungible items (e.g., money and drugs) related to one count are the same quantity of fungible items related to another count. In those instances the aggregate

should be determined by the actual amount of fungible items (i.e., the underlying concept of grouping Rules (a) or (b) regarding the same victim and substantially the same harm may result in the merging of these quantities).

** Example: A defendant is convicted of four counts of mail fraud and four counts of false statements, the false statements being those made in the mail frauds. The guideline for both mail fraud and false statements is §2F1.1, one listed under §3D1.2(d) as groupable on the aggregate. All counts are grouped under Rule (d). In establishing the loss, the mail frauds involved \$5,000 as did the false statements. However, these are the same monies being considered and therefore the total loss is \$5,000, not \$10,000. (The merging of the monies had the effect of grouping each mail fraud count with its respective false statements count under Rule (a) or Rule (b).)*

** Example: A defendant is convicted of three counts: importation of five kilograms of cocaine, possession with intent to distribute five kilograms of cocaine, and distribution of five kilograms of cocaine. Each count uses offense guideline 2D1.1, one listed under §3D1.2(d) as groupable under Rule (d). The total amount of the drug is used in determining the aggregate. If the amount and substance cited in each count is the same five kilograms, only five kilograms is used in applying the guidelines. (The merging of drug amounts had the effect of grouping each count under Rule (b).)*

- b. Under Rule (d) it is not necessary for counts to have the same victim or be interrelated. If the guidelines for counts of conviction are of a type listed under Rule (d), they are grouped (§3D1.2(d) and Application Note 6).

** Example: In a case with two unrelated counts of fraud involving different victims, it is sufficient for grouping under Rule (d) that the guidelines for the counts of convictions are based on a quantity and are of a type listed as applicable under §3D1.2(d).*

- c. If offenses utilize different Chapter Two guidelines, counts can be grouped under Rule (d) as long as the applicable Chapter Two guidelines are of the type listed under §3D1.2(d), and provided they are the same general type of offense (e.g., offenses resulting in monetary loss) (§3D1.2(d) and Application Note 6, §3D1.3 and Application Note 3).

- (1) Offenses utilizing guidelines of a type listed under §3D1.2(d) that are not of the same general offense type (e.g., counts involving drug distribution and property loss) would not be grouped under Rule (d) because amounts of money and drugs cannot be aggregated.

- (2) When different Chapter Two guidelines are applicable under Rule (d), apply each to determine which guideline results in the higher offense level. The higher offense level becomes the offense level for the count group (§3D1.3, Application Note 3).

** Example: A defendant is convicted of one count of theft and one count of fraud. The counts are grouped under Rule (d). Because theft and fraud utilize different offense guidelines, each guideline would be applied to determine which results in the higher offense level. In applying each guideline, use the aggregate loss for the theft and fraud and any specific offense characteristics and adjustments applicable based on relevant conduct of all counts in the count group.*

- D. Counts for offenses carrying mandatory consecutive sentences are not to be used in application of the multiple counts rules. They are not to be grouped with other counts, nor are they to be treated as separate count groups in the determination of incremental increases in punishment (§3D1.2 and Application Note 1, §5G1.2(a) and Commentary).

** Example: A defendant is convicted of one count of distribution of cocaine (21 USC § 841(a)(1)) and one count of use of a firearm in drug trafficking (18 USC § 924(c)). Because 924(c) carries a mandatory five year consecutive sentence, the guidelines for grouping are not applied to this count.*

The guidelines for the drug distribution (§2D1.1) contain a specific offense characteristic for the possession of a firearm. However, because the defendant will be sanctioned for the firearm under the mandatory five year consecutive term, the specific offense characteristic under the drug guideline is ignored in order to prevent double counting for the firearm.

Note: The checklist (p. 24) summarizes Sections V and VI

Show checklist - Overhead #18

V. Practical Approach to Grouping Rules

- A. Determine if any of the counts result in a statutorily mandated consecutive sentence. These counts are excluded from application under the multiple count rules (§3D1.2, Application Note 1).

- B. Determine if any of the counts of conviction are based primarily on quantity, are offense guidelines of a type listed as applicable under §3D1.2(d), and are the same general offense type so as to permit the aggregation of fungible items such as amounts of money, drugs, and so forth.**

Show Worksheets A and B (§3D1.2(d))- Overheads #19 and #20

1. Worksheet Requirements: A single Worksheet A is required for the calculation of the offense level applicable to counts groupable under Rule (d). However, if counts are not of the same general offense type, separate Worksheets A are required for each general type (e.g., one Worksheet A for multiple counts involving monetary loss and one Worksheet A for multiple counts involving drug amounts).
2. When offenses are groupable under Rule (d) and are of the same general type but utilize different guidelines (e.g., fraud and theft), computations are made on separate Worksheets A to determine which guideline results in the higher offense level.
3. For situations in which it may not be appropriate to group under Rule (d) first, see Sentencing Commission Trainer's Manual, Multiple Counts, Part VII, Section B.

- C. Determine if there are any counts charging conspiracy, solicitation, or attempt and a substantive count that is the sole object of the conspiracy, solicitation or attempt. Group these under Rule (b)(1) or Rule (b)(2).**

1. For conspiracy, solicitation, or attempt, the guidelines are applied to the substantive count only because the offense level for the substantive count will always be equal to or exceed the offense level for the conspiracy, solicitation, or attempt count. Generally, grouping under Rule (b) requires taking the count with the highest offense level, which for these cases will always be the substantive count (§3D1.3, Application Note 2).
2. Worksheet Requirements: Only one Worksheet A is required when a substantive count is the sole object of the conspiracy, solicitation, or attempt.

Show Worksheets A and B (§3D1.2(b)(1)) - Overheads #21 and #22

** Example: A defendant is convicted of one count of conspiracy to import five kilograms of cocaine and one count of importation of the same five kilograms.*

In this case, the guidelines are applied to the substantive count only. Because the conspiracy count and the substantive count are grouped under Rule (b)(1) and the substantive count will result in the higher offense level, a single Worksheet A indicating that it represents both the substantive count and the conspiracy count is completed.

Note: Be careful when aggregating the drug amounts to ensure that the same amount of drugs is not double counted, i.e., while there was conspiracy to import five kilograms and the actual importation of five kilograms, the amount of drugs cited is the same five kilograms, not ten kilograms.

** Example: A defendant is convicted of one count of conspiracy to rob a bank and one count charging the substantive offense of robbery of the bank, the sole object of the conspiracy count. A single Worksheet A is required to apply the guidelines to the substantive count. The offense level determined will be that for the count group consisting of the conspiracy and substantive counts.*

- a. If the substantive count that is the sole object of the conspiracy, solicitation, or attempt has been grouped under Rule (d), there is no requirement for an additional Worksheet A. The Worksheet A completed for the counts grouped under Rule (d) includes the substantive count.

** Example: A defendant was convicted of five counts of theft, one count of conspiracy to commit fraud, and one count of fraud (the sole object of the conspiracy). The theft and fraud counts are grouped under Rule (d) using a single Worksheet A. The conspiracy count and the substantive count are grouped under Rule (b)(1). Because the guidelines have already been applied to the substantive count when it was grouped under Rule (d), it is only necessary to list on the top of that Worksheet A the fact that the conspiracy count is now included in that group of counts.*

D. Apply the guidelines to all remaining counts of conviction.

1. Worksheet Requirements: A separate Worksheet A must be completed for each remaining count of conviction.

Note: It is important to always fill out a separate Worksheet A for each remaining count even if it is clear that grouping will occur. It is not uncommon to find that what appears to be a less important or less serious count will have a higher offense level.

- E. Determine if any of the remaining counts have the same victim or societal interest. If remaining counts have the same victim, determine if the counts represent a single transaction or episode or whether they represent two or more transactions connected by a common criminal objective or part of a common scheme or plan. If so, group the counts under Rule (a) or Rule (b), respectively.**

In making this determination consider all counts of conviction, including those already grouped under other grouping rules (Rules (d), (b)(1), and (b)(2)).

- F. Determine if the application of the guidelines for any remaining counts (including those grouped under Rules (d), (b), and (a)) takes into consideration the behavior cited in any other count. If so, group under Rule (c).**

** Example: A defendant is convicted of four counts of drug distribution and one count of felon in possession of a firearm. Counts One through Four (the drug counts) are grouped under Rule (d) using a single Worksheet A. Neither Rule (b)(1) (conspiracy or solicitation) nor Rule (b)(2) (attempt) apply. The guidelines are applied to Count Five (the firearms count) using a Worksheet A. The guideline for the drug counts provides a specific offense characteristic dealing with possession of a firearm. As a result, the firearms count (Count Five) is grouped with the drug counts (Counts One through Four) under Rule (c).*

- G. Any counts that are not grouped at this stage of the analysis will remain in a separate count group.**

VI. Process of Reaching the Combined Adjusted Offense Level

- A. Determine the offense level for each count group (§3D1.3).**

1. For some offenses the offense level for the "count group" is determined by the individual count in the group with the highest offense level. The offense level of the highest individual count becomes the offense level for that entire "count group" (§3D1.3).
2. For other offenses the offense level is determined by aggregating amounts or quantities for all counts and basing the offense level on that total.

B. Assign units to the various count groups.

1. The count group with the highest offense level is assigned one unit and serves as the benchmark from which the relative seriousness of the offense levels of the remaining count groups is determined (§3D1.4(a)).
2. Assign one unit for each count group that has an offense level equal to the count group with the highest offense level (the benchmark count group) or one to four levels less than the benchmark count group (§3D1.4(a)).
3. Assign one-half unit to any count group whose offense level is five to eight levels less than the offense level of the count group with the highest offense level (§3D1.4(b)).
4. Assign no units to each count group whose offense level is nine or more levels less than the offense level of the benchmark count group (§3D1.4(c)).

C. Add all units (§3D1.4, Application Note 2). Round up to the next largest whole number except when the total number of units is 1 1/2 (§3D1.4(d)).

D. A conversion table directs the increase in the offense level based upon the total number of units (§3D1.4).

Show conversion table - Overhead #23

1. The offense level increase represents incremental increases in punishment.
2. The conversion table from number of units to increase in offense level is as follows:

Number of Units

Increase in Offense Level

1	none
1 1/2	add 1 level
2	add 2 levels
3	add 3 levels
4 or 5	add 4 levels
More than 5	add 5 levels

E. The offense level increase is added to the count group with the highest offense level (§3D1.4, Application Note 2), resulting in a combined adjusted offense level.

1. The combined adjusted offense level determined through this process represents all counts of conviction in a multi-count case.
2. **Worksheet Requirements:** A Worksheet B is used to determine the combined adjusted offense level. Even in instances in which multiple counts are grouped on a single Worksheet A (e.g., multiple counts grouped under Rule (d) or a conspiracy and a substantive count both grouped under Rule (b)(1)), a Worksheet B should be completed to ensure accuracy.

F. Using the combined adjusted offense level, a determination is made regarding the two offense level reduction for Acceptance of Responsibility (§3E1.1). (See Sentencing Commission Trainer's Manual, General Application.)

VII. Advanced Considerations Involving Multiple Count Rules

Note: This section considers advanced, complex issues related to multiple counts. It should be used only after participants have a general understanding of multiple counts. The material might work well for advanced training sessions.

A. Multiple offenses may be charged in a single general conspiracy count involving more than one type of specific underlying behavior (Chapter Three, Part D, Introductory Commentary and §3D1.2, Application Note 9). When applying guidelines to conspiracy counts charging multiple objects:

1. Treat multiple underlying offenses as if each was a separate count of conspiracy (i.e., a "pseudo count") to commit a substantive offense.
2. Apply the multiple count rules to the conspiracy "pseudo counts" and any other counts of conviction.

** Example: A defendant is convicted of one count charging conspiracy to rob banks A, B, and C. Treat the conspiracy count as if it were three counts, each charging conspiracy to rob one of the banks. Fill out a separate Worksheet A for each of the three "pseudo robbery counts." Application of the grouping rules to the "pseudo counts" will result in three separate count groups.*

** Example: A defendant is convicted of one count charging conspiracy to rob banks A, B, and C and three substantive counts charging the robbery of banks A, B, and C. For application purposes the counts are treated as six counts:*

three "pseudo counts" and three substantive counts. In grouping, Rule (b)(1) would result in each "pseudo count" of conspiracy being grouped with the substantive count of the robbery that was the sole object of the "pseudo count" (§3D1.2(b)(1)). The grouping results in three count groups.

** Example: A defendant is convicted of one count of conspiracy to distribute drugs. The count cites numerous underlying offenses as well as multiple substantive counts of drug distribution. Because all counts, including the "pseudo" conspiracy counts, are groupable based on the aggregate (Rule (d)), the quantities of drugs are added. One Worksheet A is used and all counts are included in one group on Worksheet B.*

Show Worksheets A and B "pseudo counts" - Overheads #24 and #25

3. Worksheet Requirements: Worksheets A are required for each "pseudo count" according to the worksheet instructions for grouping rules. For example, if "pseudo counts" and other counts are grouped under Rule (d), a single Worksheet A is required. If there is a "pseudo" conspiracy count and a substantive count that is the sole object of the conspiracy, a single Worksheet A is used for both counts. Guideline application is required only for the substantive count. A Worksheet B is required to determine the combined adjusted offense level of the "pseudo counts" and any actual counts.

B. Complete and incomplete acts groupable under Rule (d) that involve conspiracies, attempts, or solicitations (§2X1.1, Application Note 1 and §2B1.1, Application Note 2).

1. If counts of conviction involve only completed acts, the guideline applicable to the underlying offense is applied (with no reduction).
2. If counts of conviction involve only incomplete acts, the guideline for the object offense is applied along with a 3 level reduction pursuant to §2X1.1. (The reduction is not applied if the defendant completed all acts believed necessary for successful completion of the offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some event beyond the defendant's control (§2X1.1 and Background).)
3. For counts of conviction involving both complete and incomplete offenses, the guideline for the object offense is applied based upon the completed acts and the acts that were about to be completed except for some interruption beyond the defendant's control (i.e., apply the guidelines using the loss that occurred or was about to occur). No reduction is awarded. The guideline is reapplied

using the loss total from the completed acts as well as intended losses from the incomplete acts. This offense level is then reduced by three levels. The greater of the two offense levels is used.

Show Worksheets A and B - Overheads #26, #27, #28

** Example: A defendant is convicted of a conspiracy to commit theft involving five completed thefts and five planned thefts. He is also convicted of the five substantive thefts. The guideline applicable to the theft offenses is §2B1.1; the guideline applicable to the conspiracy is §2X1.1. (Because there is no specific guideline for conspiracy to commit theft, the guideline for conspiracy is used and it in turn references the guideline for the object offense of theft. The applicable guideline is listed under Rule (d) as being based on an aggregate and therefore groupable under Rule (d)).*

The aggregation of loss for the completed acts is \$10,000; the incomplete acts would have resulted in a \$20,000 loss. Two guideline computations are required. The first computes the guidelines using the \$10,000 loss. The second computes the guidelines using the \$30,000 loss but decreases the adjusted offense level by 3 levels. The higher of the two offense levels determined is used.

C. Situations in which it may not be appropriate to group under Rule (d) first.

1. Certain counts groupable under Rule (d) should not be aggregated with other counts groupable under Rule (d) even when they are offenses of the same general type. This occurs when one or more counts groupable under Rule (d) involve the same victim and substantially the same harm as another count of conviction that is not groupable under Rule (d). Grouping under Rule (d) instead of Rule (a), (b), or (c) may result in double counting.

Show Overhead #29

** Example: A defendant is convicted of a count of burglary (an offense not groupable under Rule (d)) and multiple counts of theft. One of the theft counts involves the same victim and same transaction as the burglary count and is therefore groupable under Rule (a). While the burglary guideline (§2B2.1) is one specifically excluded from grouping under Rule (d), the multiple counts of theft utilize a guideline based on an aggregate and are of a type listed as groupable under Rule (d). However, if all the theft counts are aggregated under Rule (d), it would not be possible to group the specific theft count with its corresponding burglary count under Rule (a). Therefore, the count that is to be grouped with*

the burglary should be calculated separately from the theft counts that will not be grouped with the burglary. The remaining counts of theft would be aggregated and grouped under Rule (d).

Had there been more than one theft count for grouping with the burglary count, first aggregate and group under Rule (d) prior to grouping with the burglary under Rule (a).

2. **Worksheet Requirements:** A Worksheet A is required for the counts to be grouped under Rule (a) or (b). Another Worksheet A is used to calculate the aggregate of the remaining counts that are groupable under Rule (d). Other Worksheets A are required per the standard worksheet requirements. A Worksheet B is necessary to show the grouping of the various counts. Remember: Once counts groupable under Rule (d) are grouped with counts under Rule (a) or (b), the higher offense level of the counts in the group is the offense level for that count group.

D. Aggregation of amounts in application of Rule (d) requires caution to avoid double counting the same quantity or loss.

1. For some cases involving aggregation under Rule (d), the amounts are technically grouped under Rule (a) or (b) first. This situation arises when adding the monetary loss or drug amounts together would result in double counting.

** Example: A defendant is convicted of three counts of mail fraud and two counts of false statements made in the course of the mail frauds. These offenses are groupable under Rule (d) because the applicable guideline, §2F1.1, is listed under Rule (d) as one of the type appropriate for such grouping. The dollar loss related to the fraud is \$5,000; the loss related to the false statements is also \$5,000. If the \$5,000 loss from the mail fraud is a different loss from that of the false statements, all counts would be grouped under Rule (d) with the dollar amounts added together, resulting in a \$10,000 loss.*

However, if the loss from the mail fraud is the same loss as that of the false statements, the total loss is \$5,000. Technically, the two losses are first grouped under Rule (a) or (b) before grouping on the aggregate under Rule (d).

2. **Worksheet Requirements:** If the dollar loss for the fraud and false statements is the same, one Worksheet A is required. Technically, the dollar amounts merge and reflect grouping under Rule (a) or (b). However, when counts are groupable under Rule (d) and the quantities or amounts involve either the same monies or the same drugs, one Worksheet A is required. A Worksheet B is completed to show the grouping of the mail fraud and false statements

counts under Rule (a) or (b) and Rule (d) that results in a single combined offense level.

3. It is sometimes unclear whether the dollar loss from the various counts involves the same money. In such cases special attention must be given to the intended result of grouping under Rule (a) or Rule (b).

Show Overhead #30

** Example: A defendant is convicted of one count of interstate transportation of a stolen motor vehicle, one count of disposing of a stolen motor vehicle that traveled interstate, and three counts of mail fraud. The guidelines for these offenses (§2F1.1 for the mail fraud and §2B6.1 for the motor vehicle violations) are listed as groupable under Rule (d). The loss resulting from the fraud involved \$5,000 to each of three separate victims. The amount of loss related to the interstate transportation was \$15,000, the same loss attributable to the disposal of the stolen vehicle. A determination must first be made as to whether the \$15,000 in the two motor vehicle offenses represents the same monetary loss.*

The analysis involves a determination of whether the victim of these losses was the same (in this case the individual whose automobile was stolen would be the victim) and whether the monetary loss resulted from a single transaction or two or more acts that were part of the same course of conduct or common scheme or plan. In this case the two separate acts of transporting and disposing resulted in the one composite harm, the loss of the \$15,000 automobile. These considerations result in a loss of \$15,000. This \$15,000 loss is then aggregated with the loss from the three fraud counts, resulting in a \$30,000 total loss.

E. Conflicting rules may make guideline grouping decisions difficult.

1. For some unique count patterns, instructions in the guidelines may appear to conflict or not provide adequate guidance for dealing with a grouping decision. In such cases, the court must consider the appropriate rules and the intent of grouping in order to make a proper determination.

** Example: The defendant is convicted of one count of drug distribution (21 USC § 841), one count of illegal possession of a firearm (18 USC § 922(g)), and one count of possession of a firearm during the commission of an offense (18 USC § 924(c)). Both firearm counts involve the same firearm used in the drug distribution.*

2. Certain situations pose double counting dilemmas for which there is no ready solution within the guidelines.

** Example: The enhancement for possession of the gun under §2D1.1 (drug distribution) in the preceding example would not be applied because punishment is provided through the mandatory consecutive sentence of § 924(c). This grouping rule, as noted in §2K2.4, Application Note 2, was created to avoid double counting.*

However, without the 924(c) count, the 922(g) count would have been grouped with the drug distribution under §3D1.2(c) because of the enhancement in the distribution guideline -- again, to avoid double counting. Because the gun enhancement was not applied under §2D1.1 (due to § 924(c)), it appears that the grouping of the 922(g) count and the drug count would not be possible under the guidelines.

3. The primary objective is to avoid double counting, a principle repeated throughout the guidelines. To avoid double counting, the court should make a determination as to the most appropriate way to eliminate any conflicts.

** Example: Despite the apparent contradiction in the preceding example, the court could consider grouping the 922(g) count with the 924(c), thus eliminating the gun from consideration under the grouping rules; or with the drug count because the behavior in § 922(g) is taken into account through a specific offense characteristic (Rule (c)). Application of §2K2.4 (guideline for 18 USC § 924(c)) eliminates the specific offense characteristic under the drug count, thus removing the 922(g) (that was grouped under that characteristic) from consideration.*

CHECKLIST FOR MULTIPLE COUNT GROUPING

For analysis of multiple count grouping, it may be useful to proceed in the following order:

- A. Exclude counts for which the statute mandates imposition of a consecutive sentence. See §3D1.2, Application Note 1.
- B. Group all appropriate counts according to Rule (d) (§3D1.2(d)). Complete only one Worksheet A for offenses of the same general type. Add the enhancements based on the total dollar/property loss or total drug amount.

Exception: In rare cases where grouping is possible under Rule (d) it may be more appropriate to group under Rule (a) or (b) first. This occurs when one or more counts groupable under Rule (d) involves the same victim and substantially the same harm as another count of conviction that is not groupable under Rule (d). A distinction need only be made if grouping under different rules would produce different results.

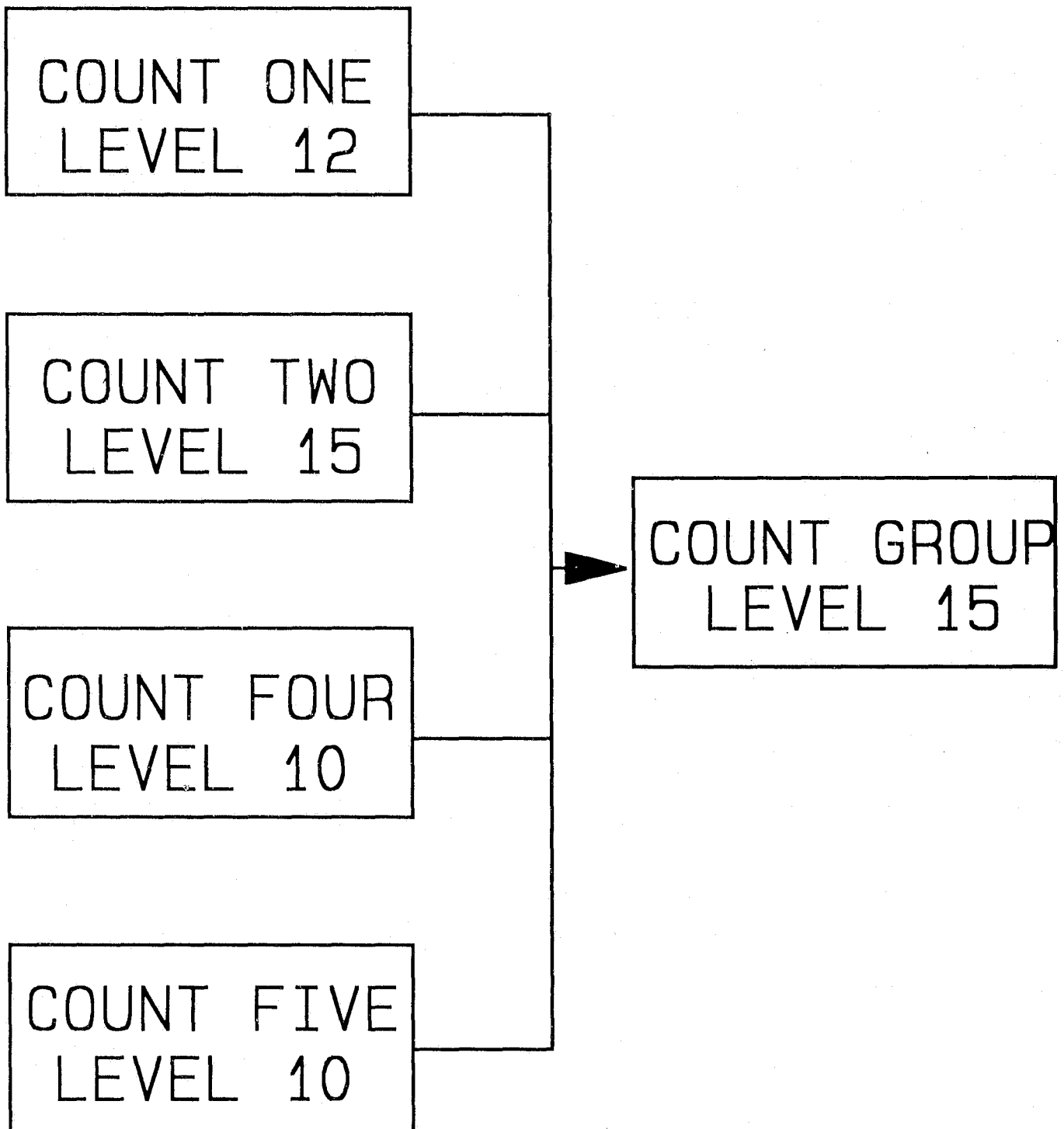
- C. Group all counts involving a conspiracy, solicitation, or attempt and a substantive count that was the sole object of the conspiracy, solicitation, or attempt according to Rule (b) (§3D1.2(b)(1) and (b)(2)). Complete only one Worksheet A using the offense level from the substantive count.
- D. Complete a separate Worksheet A for all remaining counts.
- E. Group counts in which the victim is the same and substantially the same harm results.
 - 1. Group counts in which the victim is the same and the criminal conduct represents a single transaction or episode according to Rule (a) (§3D1.2(a)).
 - 2. Group counts in which the victim is the same and the criminal conduct represents two or more transactions connected by a common criminal objective or is part of a common scheme or plan according to Rule (b) (§3D1.2(b)).
- F. Group counts in which the guideline for one count takes into consideration behavior cited in another count according to Rule (c) (§3D1.2(c)).
- G. Complete a Worksheet B to reach a combined adjusted offense level.

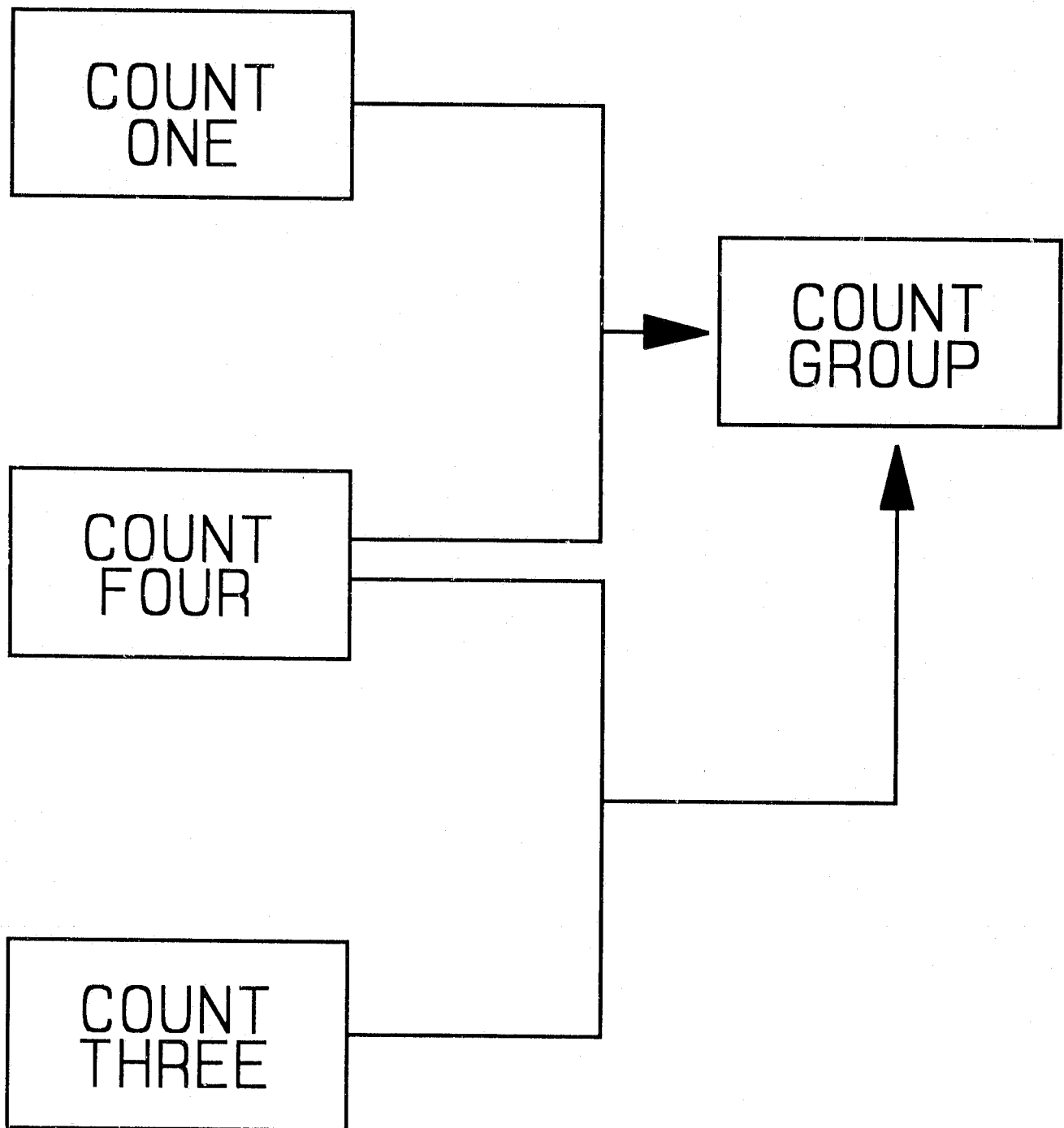
§3D1.2

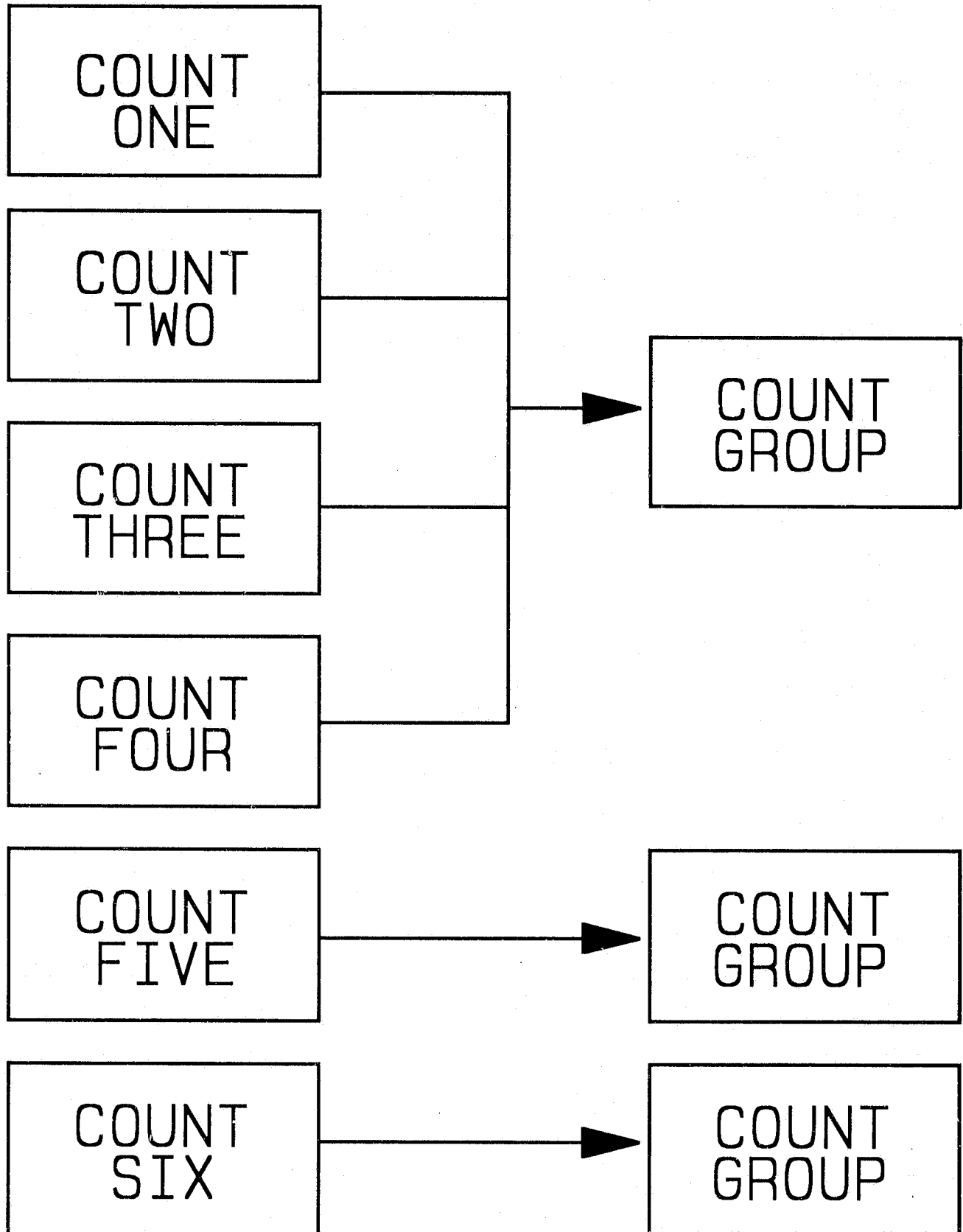
- (a) When counts involve the same victim and the same act or transaction.
- (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan, including, but not limited to:
 - (1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. § 994(l)(2).
 - (2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. § 3584(a).
 - (3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. § 994(u).
- (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.
- (d) Counts are grouped together if the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Reasons for Determining a Single Offense Level

- 1. To prevent multiple punishments for substantially the same conduct (i.e., avoid "double counting");**
- 2. To provide incremental increases in punishment for significant additional criminal conduct;**
- 3. To limit the significance of prosecutorial charging patterns.**







WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant _____

Docket Number _____

Notes explaining grouping decision: _____

Incremental punishment through units and
offense level increase.Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2151 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): 5101/2 (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

_____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

_____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

_____ (units)

6. Total Units

1 1/2 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
1 1/2 units - add 1 level
2 units - add 2 levels

3 units - add 3 levels
4 or 5 units - add 4 levels
More than 5 - add 5 levels

1

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

15

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

16

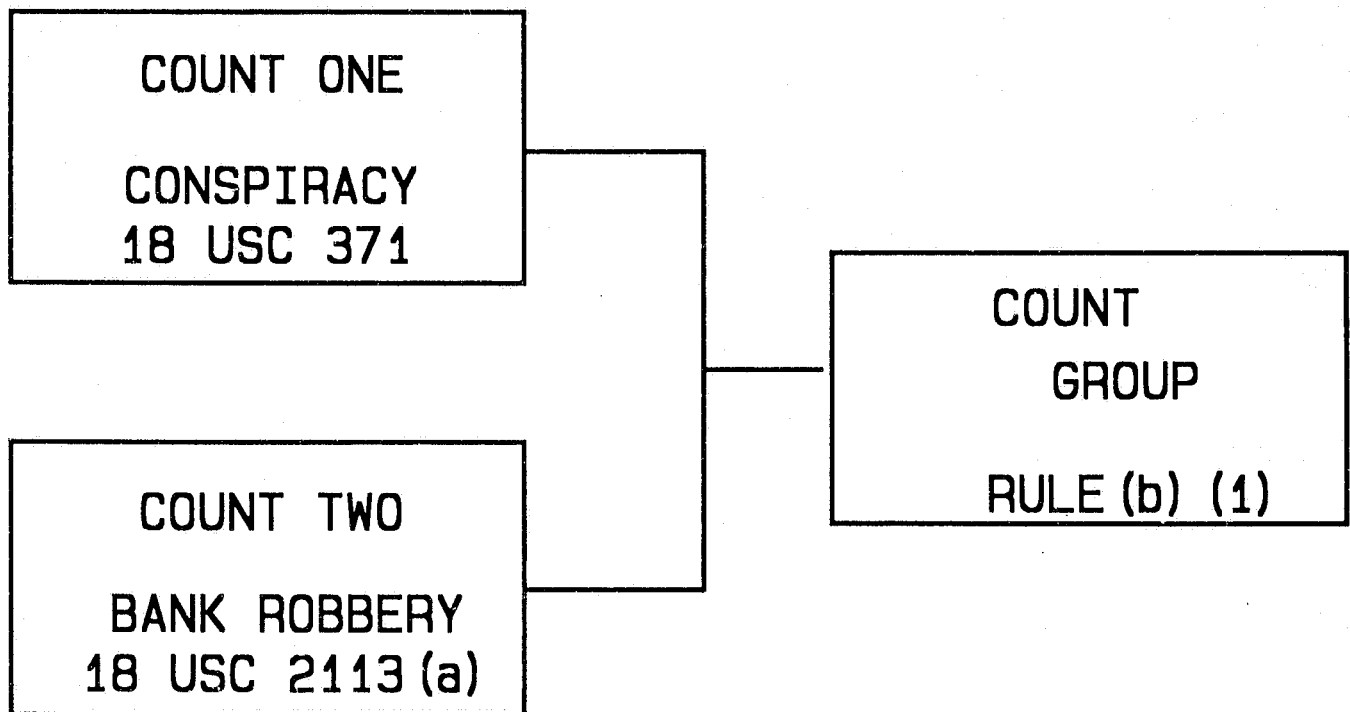
§3D1.2(a)

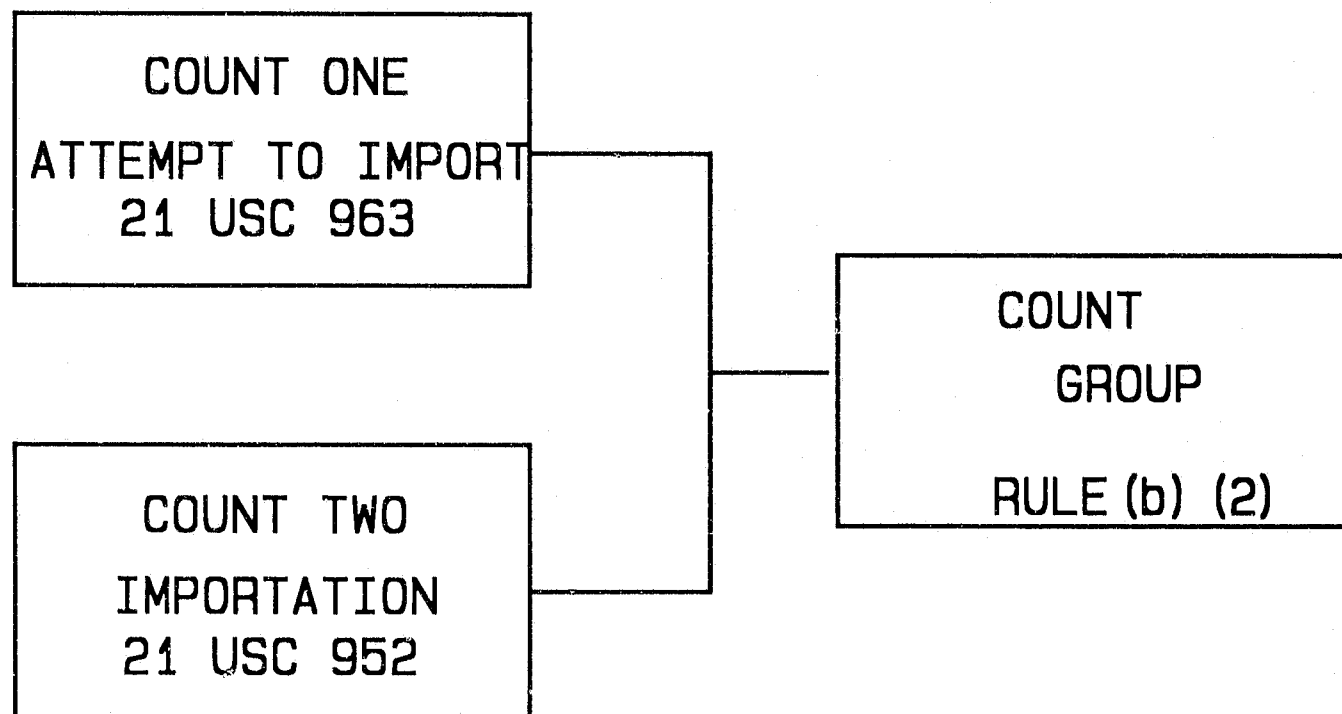
When counts involve the same victim and the same act or transaction.

§3D1.2(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, including, but not limited to:

- (1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. § 994(l)(2).**
- (2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. § 3584(a).**
- (3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. § 994(u).**





COUNT ONE
FALSE STATEMENTS
18 USC 1001

COUNT TWO
FALSE CLAIMS
18 USC 287

COUNT
GROUP
RULE (b) (3)



§3D1.2(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.

§2B3.1.**Robbery**

(a) Base Offense Level: 18

(b) Specific Offense Characteristics

(1) If the loss exceeded \$2,500, increase the offense level as follows:

	<u>Loss</u>	<u>Increase in Level</u>
(A)	\$2,500 or less	no increase
(B)	\$2,501 - \$10,000	add 1
(C)	\$10,001 - \$50,000	add 2
(D)	\$50,001 - \$250,000	add 3
(E)	\$250,001 - \$1,000,000	add 4
(F)	\$1,000,001 - \$5,000,000	add 5
(G)	more than \$5,000,000	add 6

Treat the loss for a financial institution or post office as at least \$5,000.

(2) (A) If a firearm was discharged increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels.

(3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A)	Bodily Injury	add 2
(B)	Serious Bodily Injury	add 4
(C)	Permanent or Life-Threatening Bodily Injury	add 6

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

(4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

(5) If obtaining a firearm, destructive device, or controlled substance was the object of the offense, increase by 1 level.

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant _____ District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____
Count Number(s) 1 U.S. Code Title, Subtitle, Section & Subsection 21 - 841 - (a)(1)

1. **Offense Level (See Chapter Two)**

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
§2D1.1(a)(3)	Selling heroin*	14 (base)

Notes: * 5 grams

Sum 14

2. **Victim-Related Adjustments (See Chapter Three, Part A)**

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. **Role in the Offense Adjustment (See Chapter Three, Part B)**

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. **Obstruction Adjustment (See Chapter Three, Part C)**

If applicable, enter "2." If not applicable, enter "0."

2

5. **Adjusted Offense Level**

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

16

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant _____ District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 2

U.S. Code Title, Subtitle,
Section & Subsection

18 - 201 - (b)(1)

1. **Offense Level (See Chapter Two)**

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>§2C1.1(a)</u>	<u>Offering bribe</u>	<u>10</u> (base)
_____	_____	_____
_____	_____	_____
_____	_____	_____

Notes: _____

Sum

10

2. **Victim-Related Adjustments (See Chapter Three, Part A)**

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. **Role in the Offense Adjustment (See Chapter Three, Part B)**

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. **Obstruction Adjustment (See Chapter Three, Part C)**

If applicable, enter "2." If not applicable, enter "0."

0

5. **Adjusted Offense Level**

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

10

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

§3D1.2(d) Counts are grouped together if the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are specifically included under this subsection:

§§2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B5.2, 2B5.3, 2B5.4, 2B6.1;
§§2D1.1, 2D1.2, 2D1.3, 2D1.5;
§§2E4.1, 2E5.1, 2E5.2, 2E5.4, 2E5.6;
§§2F1.1, 2F1.2;
§2N3.1;
§2R1.1;
§§2S1.1, 2S1.2, 2S1.3;
§§2T1.1, 2T1.2, 2T1.3, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1, 2T3.2.

Specifically excluded from the operation of this subsection are:

all offenses in Part A;
§§2B2.1, 2B2.2, 2B2.3; 2B3.1, 2B3.2, 2B3.3;
§§2C1.1, 2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E1.5, 2E2.1;
§§2G1.1, 2G1.2, 2G2.1, 2G3.2;
§§2H1.1, 2H1.2, 2H1.3, 2H1.4, 2H2.1, 2H4.1;
§§2L1.1, 2L2.1, 2L2.2, 2L2.3, 2L2.4, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.6, 2M3.7, 2M3.8, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3, 2P1.4.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

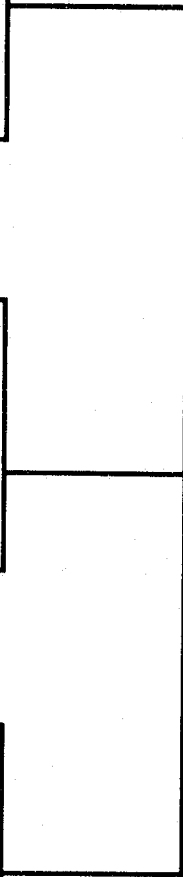
Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

COUNT ONE
EMBEZZLEMENT
18 USC 656
\$5,000

COUNT TWO
EMBEZZLEMENT
18 USC 656
\$10,000

COUNT THREE
EMBEZZLEMENT
18 USC 656
\$20,000

COUNT GROUP
\$35,000
RULE (d)



CHECKLIST FOR MULTIPLE COUNT GROUPING

For analysis of multiple count grouping, it may be useful to proceed in the following order:

- A. Exclude counts for which the statute mandates imposition of a consecutive sentence. See §3D1.2, Application Note 1.
- B. Group all appropriate counts according to Rule (d) (§3D1.2(d)). Complete only one Worksheet A for offenses of the same general type. Add the enhancements based on the total dollar/property loss or total drug amount.

Exception: In rare cases where grouping is possible under Rule (d) it may be more appropriate to group under Rule (a) or (b) first. This occurs when one or more counts groupable under Rule (d) involves the same victim and substantially the same harm as another count of conviction that is not groupable under Rule (d). A distinction need only be made if grouping under different rules would produce different results.

- C. Group all counts involving a conspiracy, solicitation, or attempt and a substantive count that was the sole object of the conspiracy, solicitation, or attempt according to Rule (b) (§3D1.2(b)(1) and (b)(2)). Complete only one Worksheet A using the offense level from the substantive count.
- D. Complete a separate Worksheet A for all remaining counts.
- E. Group counts in which the victim is the same and substantially the same harm results.
 - 1. Group counts in which the victim is the same and the criminal conduct represents a single transaction or episode according to Rule (a) (§3D1.2(a)).
 - 2. Group counts in which the victim is the same and the criminal conduct represents two or more transactions connected by a common criminal objective or is part of a common scheme or plan according to Rule (b) (§3D1.2(b)).
- F. Group counts in which the guideline for one count takes into consideration behavior cited in another count according to Rule (c) (§3D1.2(c)).
- G. Complete a Worksheet B to reach a combined adjusted offense level.

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant _____ District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1, 2, 3 U.S. Code Title, Subtitle, Section & Subsection 21 - 841 - (a)(1)

1. **Offense Level (See Chapter Two)**

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>§2D1.1(a)(3)</u>	<u>Distribution of cocaine*</u>	<u>28</u> (base)
_____	_____	_____
_____	_____	_____

Notes: * 500 gm. + 1 Kg. + 500 gm = 2 Kg.

Sum

28

2. **Victim-Related Adjustments (See Chapter Three, Part A)**

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. **Role in the Offense Adjustment (See Chapter Three, Part B)**

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. **Obstruction Adjustment (See Chapter Three, Part C)**

If applicable, enter "2." If not applicable, enter "0."

0

5. **Adjusted Offense Level**

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

28

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant _____ Docket Number _____

Notes explaining grouping decision: Counts 1-3 are grouped under Rule (d) using the aggregate quantity of cocaine.Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2, 3**28**1 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

____ (units)

6. Total Units

1 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

0

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

28

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

28

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant _____ District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1, 2

U.S. Code Title, Subtitle,
Section & Subsection

18 - 371
18 - 2113(a)

1. **Offense Level** (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>§2X1.1(a)</u>	<u>Conspiracy to rob bank</u>	<u>18</u> (base)
<u>§2X3.1(a)</u>	<u>Rpb bank</u>	
<u>(b)(1)</u>	<u>Financial institution</u>	<u>1</u>

Notes: _____

Sum

19

2. **Victim-Related Adjustments** (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. **Role in the Offense Adjustment** (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. **Obstruction Adjustment** (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. **Adjusted Offense Level**

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

19

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant _____ Docket Number _____

Notes explaining grouping decision: Counts 1 and 2 are grouped under Rule (b)(1); conspiracy and sole objectInstructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2191 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

_____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

_____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

_____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

_____ (units)

6. Total Units

1 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

0

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

19

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

19

§3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

Number of Units	Increase in Offense Level
1	none
1 1/2	add 1 level
2	add 2 levels
3	add 3 levels
4 or 5	add 4 levels
More than 5	add 5 levels

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant _____ District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) Pseudo 1 U.S. Code Title, Subtitle, Section & Subsection 18 - 371

(Complete identical Worksheets A for Pseudo Counts 2 and 3)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
§2X1.1(a)	Conspiracy to Rob Bank A	18 (base)
§2B3.1(a)	Rob Bank A	
(b)(1)	Financial institution	1
§2X1.1(b)(2)	Incomplete conspiracy	-3

Notes: _____

Sum

16

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

16

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant _____

Docket Number _____

Notes explaining grouping decision: _____

Pseudo counts 1-3 are not groupable under Rules (a), (b), (c), or (d)

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s):

Pseudo 1

16

1 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s):

Pseudo 2

16

1 (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s):

Pseudo 3

16

1 (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s):

(units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s):

(units)

6. Total Units

3 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

3

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

16

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

19

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant _____ District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1, 2-6

U.S. Code Title, Subtitle,
Section & Subsection

18 - 371 -
18 - 655 -

1. **Offense Level** (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>§2X1.1(a)</u>	<u>Conspiracy to Commit Theft</u>	<u>4</u> (base)
<u>§2B1.1(a)</u>	<u>Theft by Bank Examiner</u>	
<u>(b)(1)(F)</u>	<u>Loss - \$10,000</u>	<u>5</u>
<u>(b)(3)</u>	<u>Planning</u>	<u>2</u>

Notes: _____

Sum

11

2. **Victim-Related Adjustments** (See Chapter Three, Part A)

\$\$ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. **Role in the Offense Adjustment** (See Chapter Three, Part B)

\$\$ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. **Obstruction Adjustment** (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. **Adjusted Offense Level**

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

11

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant _____ District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1, 2-6 U.S. Code Title, Subtitle, Section & Subsection 18 - 371 - 18 - 655

1. **Offense Level** (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
§2X1.1(a)	Conspiracy to Commit Theft	4 (base)
§2B1.1(a)	Theft by Bank Examiner	
(b)(1)(G)	Loss - \$30,000	6
(b)(3)	Planning	2
Notes: §2X1.1(b)(2)	Incomplete acts	-3

Sum

9

2. **Victim-Related Adjustments** (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. **Role in the Offense Adjustment** (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. **Obstruction Adjustment** (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. **Adjusted Offense Level**

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

9

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant _____

Docket Number _____

Notes explaining grouping decision: _____

Group counts 2-6 under Rule (d);
 Group Count 1 with Counts 2-6 under
 Rule (b)(1)

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2-6

11

1 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

--

_____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

--

_____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

--

_____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

--

_____ (units)

6. Total Units

1 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

0

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

11

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

11

COUNT ONE: BURGLARY OF A POST OFFICE
18 USC 2115

COUNT TWO: THEFT OF U.S. MAIL
18 USC 1708

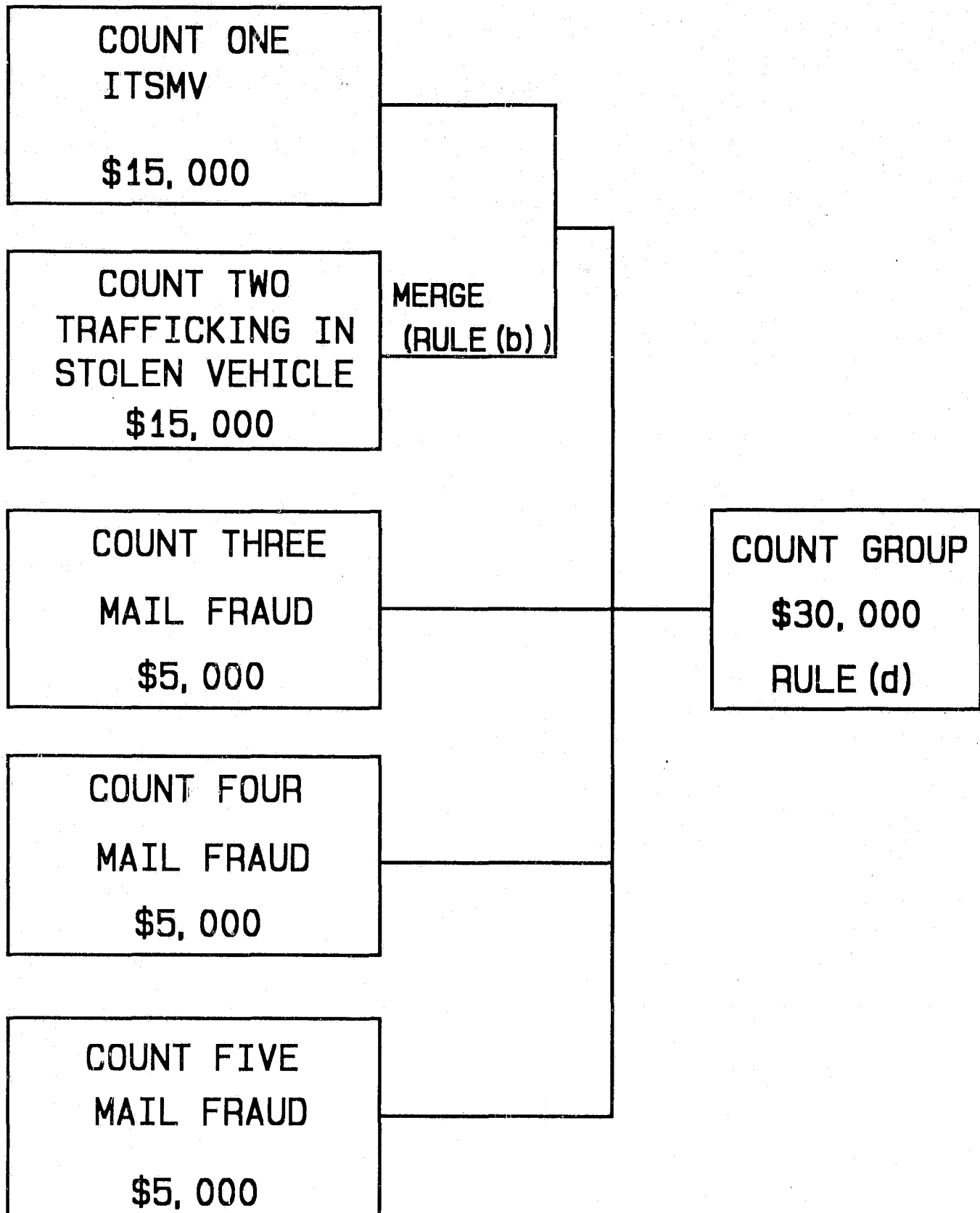
COUNT THREE: THEFT OF U.S. MAIL
18 USC 1708

COUNT FOUR: THEFT OF U.S. MAIL
18 USC 1708

COUNT FIVE: THEFT OF U.S. MAIL
18 USC 1708

3D1.2 (a)

3D1.2 (d)



WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant _____

Docket Number _____

Notes explaining grouping decision: _____

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): _____

_____ (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

_____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

_____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

_____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

_____ (units)

6. Total Units

_____ (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #1 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1 U.S. Code Title, Subtitle, Section & Subsection 18 - 2113 (a)(d)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2B3.1 (a)</u>	<u>Armed Robbery Credit Union</u>	<u>18</u> (base)
<u>(b)(1)(B)</u>	<u>Loss \$ 7,000</u>	<u>1</u>
<u>(b)(2)(B)</u>	<u>Firearm used to assault</u>	<u>4</u>
<u>(b)(3)(B)</u>	<u>Serious Bodily Injury *</u>	<u>4</u>

Notes: * Auditor received hospital care, 35 stitches

Sum 27

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

27

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #1 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 2 U.S. Code Title, Subtitle, Section & Subsection 18 - 1 1 1 - _____

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2A2.2(a)</u>	<u>Aggravated Assault</u>	<u>15</u> (base)
<u>(b)(1)</u>	<u>More than minimal planning</u>	<u>2</u>
<u>(b)(2)(B)</u>	<u>Use of firearm</u>	<u>4</u>
<u>(b)(3)(B)</u>	<u>Serious Bodily Injury*</u>	<u>4</u>

Notes: *Auditor received hospital care, 35 stitches

Sum

25

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

25

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)Defendant Exercise #1

Docket Number _____

Notes explaining grouping decision: Count 2 is grouped with Count 1 under §3D1.2(c), as serious bodily injury in Count 2 is a specific offense characteristic of Robbery (Count 1).

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2

27

1 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

____ (units)

6. Total Units

1 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

0

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

27

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

27

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #2 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1

U.S. Code Title, Subtitle, Section & Subsection 18 - 2113 (a)(d)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2B3.1(a)</u>	<u>Robbery</u>	<u>18</u> (base)
<u>(b)(1)(B)</u>	<u>loss \$6,700</u>	<u>1</u>
_____	_____	_____
_____	_____	_____

Notes: _____

Sum

19

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

19

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #3 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1, 2, 3 U.S. Code Title, Subtitle, Section & Subsection 21 - 841 - _____

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2D1.1(a)(3)</u>	<u>Trafficking in a Controlled Substance</u>	<u>26*</u> (base)
_____	_____	_____
_____	_____	_____
_____	_____	_____

Notes: * From the Equivalency Table: 250 gm cocaine = 50 gm heroin;
100 gm cocaine = 20 gm heroin; 50 gm + 20 gm + 50 gm = 120 gms heroin

Sum 26

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

26

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant Exercise #3

Docket Number _____

Notes explaining grouping decision: Counts 1, 2, and 3 are grouped on the aggregate under §3D1.2(d)Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2, 3261 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

____ (units)

6. Total Units

1 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

0

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

26

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

26

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #4 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1 U.S. Code Title, Subtitle, Section & Subsection 18 - 113 - (a)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2A2.1(a)</u>	<u>Assault with Intent to Commit Murder</u>	<u>20</u> (base)
<u>(b)(2)(B)</u>	<u>Dangerous Weapon used</u>	<u>4</u>
<u>(b)(3)(C)</u>	<u>Serious Bodily Injury *</u>	<u>4</u>

Notes: * Hospitalization and extensive surgery

Sum

28

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

28

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #4 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 2 U.S. Code Title, Subtitle, Section & Subsection 18 - 113 - (c)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2A2.2(a)</u>	<u>Aggravated Assault</u>	<u>15</u> (base)
<u>(b)(2)(B)</u>	<u>Dangerous Weapon</u>	<u>4</u>
<u>(b)(3)(B)</u>	<u>Serious Bodily Injury *</u>	<u>4</u>

Notes: * Hospitalization and extensive surgery

Sum

23

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

23

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)Defendant Exercise #4

Docket Number _____

Notes explaining grouping decision: Counts 1 and 2 are grouped under
§ 3D1.2(a) - same act, same victim. (See Application Note 3 of
§ 3D1.2.)

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2**28**1 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

____ (units)

6. Total Units

1 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

0

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

28

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

28

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #5 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1, 2 U.S. Code Title, Subtitle, Section & Subsection 21 - 841 - (a)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2D1.1(a)(3)</u>	<u>Distribution of Cocaine *</u>	<u>26</u> (base)
<u>(b)(1)</u>	<u>Possession of firearm during offense</u>	<u>2</u>
_____	_____	_____
_____	_____	_____

Notes: * 500 gm + 1 kg = 1.5 kg

Sum

28

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ 3D1.2(b)
minor participant

-2

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

26

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #5 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 3 U.S. Code Title, Subtitle, Section & Subsection 21 - 843 - (b)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2D1.6(a)</u>	<u>Use of Communication Facility in Drug Offense</u>	<u>12</u> (base)
_____	_____	_____
_____	_____	_____
_____	_____	_____

Notes: _____

Sum 12

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

12

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #5 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 4 U.S. Code Title, Subtitle, Section & Subsection 21 - 843 - (b)

1. **Offense Level (See Chapter Two)**

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2D1.6(a)</u>	<u>Use of Communication Facility</u>	<u>12</u> (base)
	<u>in Drug Offense</u>	

Notes: _____

Sum 12

2. **Victim-Related Adjustments (See Chapter Three, Part A)**

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. **Role in the Offense Adjustment (See Chapter Three, Part B)**

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. **Obstruction Adjustment (See Chapter Three, Part C)**

If applicable, enter "2." If not applicable, enter "0."

0

5. **Adjusted Offense Level**

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

12

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #5 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 5 U.S. Code Title, Subtitle, Section & Subsection 18 - 922 (g)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2K2.1(a)</u>	<u>Possession of Firearm</u>	<u>9</u> (base)
	<u>OR</u>	
<u>2D1.1(a)</u>	<u>Distribution 1.5 kg Cocaine</u>	<u>26</u>
<u>(b)(1)</u>	<u>Possess Firearm</u>	<u>2</u>
		<u>28</u>

Notes: _____

Sum

28

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ 3D1.2(b)

minor participant

-2

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

26

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)Defendant Exercise #5

Docket Number _____

Notes explaining grouping decision: Counts 1 and 2 are grouped under §3D1.2(d).Counts 3 and 4 are grouped with Counts 1 and 2 under §3D1.2(b)- same victim, 2 or more transactions. Count 5 is grouped with the other counts (1, 2, 3, 4) under §3D1.2(c), specific offense characteristic.Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2, 3, 4, 5261 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

____ (units)

6. Total Units

1 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

0

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

26

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

26

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #6 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1, 2-3, 4-7, 9-14 U.S. Code Title, Subtitle, Section & Subsection 18 - 371
18 - 2314
18 1341
18 1343

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2X1.1(a)</u>	<u>Conspiracy</u>	<u>6</u> (base)
<u>2F1.1(a)</u>	<u>Mail, Wire, Securities Fraud</u>	
<u>(b)(1)(H)</u>	<u>\$ 383,250*</u>	<u>7</u>
<u>(b)(2)(B)</u>	<u>More than one victim</u>	<u>2</u>

Notes: * 10 counts @ 35,325 + 20,000
+ 10,000 = 383,250

Sum

15

2. Victim-Related Adjustments (See Chapter Three, Part A)

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

§§ 3A1.1

2

3. Role in the Offense Adjustment (See Chapter Three, Part B)

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

§§ 3B1.1(a)

4

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

21

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)Defendant Exercise #6

Docket Number _____

Notes explaining grouping decision: All counts (except the conspiracy) are of the same general type and are groupable under §3D1.2(d). The dollar loss from all counts is aggregated. The conspiracy count is grouped with the substantive counts under Rule (b).

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2-3, 4, 6, 7, 9-14, 5

21

1 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

_____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

_____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

_____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

_____ (units)

6. Total Units

1 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

0

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

21

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

21

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #7 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1 U.S. Code Title, Subtitle, Section & Subsection 18 - 2113 (a)(d)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2B3.1(a)</u>	<u>Armed Robbery Credit Union</u>	<u>18</u> (base)
<u>(b)(1)(B)</u>	<u>Loss \$ 7,000</u>	<u>1</u>
<u>(b)(2)(B)</u>	<u>Firearm used to assault</u>	<u>4</u>
<u>(b)(3)(B)</u>	<u>Serious Bodily Injury *</u>	<u>4</u>

Notes: * Auditor received hospital care, 35 stitches

Sum

27

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

27

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #7 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 2 U.S. Code Title, Subtitle, Section & Subsection 18 - 1 - 1 - 1 - _____

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2A2.2(a)</u>	<u>Aggravated Assault</u>	<u>15</u> (base)
<u>(b)(1)</u>	<u>More than minimal planning</u>	<u>2</u>
<u>(b)(2)(B)</u>	<u>Use of firearm</u>	<u>4</u>
<u>(b)(3)(B)</u>	<u>Serious Bodily Injury*</u>	<u>4</u>

Notes: *Auditor received hospital care, 35 stitches

Sum

25

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

25

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #7 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 3 U.S. Code Title, Subtitle, Section & Subsection 18 - 1 - 111 - _____

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2A2.2(a)</u>	<u>Aggravated Assault</u>	<u>15</u> (base)
<u>(b)(1)</u>	<u>More than minimal planning</u>	<u>2</u>
<u>(b)(2)(c)</u>	<u>Firearm brandished</u>	<u>3</u>
<u>(b)(3)(A)</u>	<u>Bodily injury (bruises)</u>	<u>2</u>

Notes: _____

Sum

22

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

22

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant Exercise #7

Docket Number _____

Notes explaining grouping decision: Count 2 is grouped with Count 1 under §3D1.2(c), as the specific offense characteristic for serious bodily injury in robbery reflects the criminal conduct in Count 2. Count 3 is not grouped.

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1, 2271 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): 3221/2 (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

_____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

_____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

_____ (units)

6. Total Units

1 1/2 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
1 1/2 units - add 1 level
2 units - add 2 levels

3 units - add 3 levels
4 or 5 units - add 4 levels
More than 5 - add 5 levels

1

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

27

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

28

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #8 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1-3 U.S. Code Title, Subtitle, Section & Subsection 21 - 841 - (a)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

<u>Guideline Number</u>	<u>Description</u>	<u>Level</u>
<u>2D1.1(a)(3)</u>	<u>Distribution of Heroin *</u>	<u>16</u> (base)
<u>(b)(1)</u>	<u>Possession of Firearm</u>	<u>2</u>
_____	_____	_____
_____	_____	_____

Notes: * 13 grams

Sum

18

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

18

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #8 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 4 U.S. Code Title, Subtitle, Section & Subsection 21 - 844

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
2D2.1(a)(3)	Possession of Marijuana	4 (base)

Notes: _____

Sum

4

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

4

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #8 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 5 U.S. Code Title, Subtitle, Section & Subsection 18 - 9 22 - 9

1. **Offense Level (See Chapter Two)**

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2K2.1(a)</u>	<u>Possession of a Firearm</u>	<u>9</u> (base)
	<u>OR</u>	
<u>2D1.1(a)</u>	<u>Distribute 13grams heroin</u>	<u>16</u>
Notes: <u>(b)(1) firearm</u>		<u>2</u>
		<u>18</u>

Sum

18

2. **Victim-Related Adjustments (See Chapter Three, Part A)**

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. **Role in the Offense Adjustment (See Chapter Three, Part B)**

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. **Obstruction Adjustment (See Chapter Three, Part C)**

If applicable, enter "2." If not applicable, enter "0."

0

5. **Adjusted Offense Level**

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

18

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #8 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 6 U.S. Code Title, Subtitle, Section & Subsection 26 - 7201 - _____

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2T1.1(a)</u>	<u>Tax Evasion*</u>	<u>9</u> (base)
<u>(b)(1)(A)</u>	<u>From Criminal Activity</u>	<u>2**</u>

Notes: * Tax loss was \$12,000
** Requires a floor of level 12

Sum 12

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

12

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant Exercise #8

Docket Number _____

Notes explaining grouping decision: Counts 1-3 are grouped under §3D1.2(d);
Count 5 is grouped with Counts 1-3 under §3D1.2(c);
Count 4 and Count 6 are not grouped.

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1-3, 5181 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): 440 (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): 6121/2 (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

_____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

_____ (units)

6. Total Units

1 1/2 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
 1 1/2 units - add 1 level
 2 units - add 2 levels

3 units - add 3 levels
 4 or 5 units - add 4 levels
 More than 5 - add 5 levels

1

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

18

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

19

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise # 9 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1-5 U.S. Code Title, Subtitle, Section & Subsection 18 - 1001 - 18 - 641 -

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level	
<u>2F1.1(a)</u>	<u>Fraud</u>	<u>6</u>	(base)
<u>(b)(1)(F)</u>	<u>Loss \$70,000*</u>	<u>5</u>	
_____	_____	_____	
_____	_____	_____	

Notes: \$15,000 + \$5,000 + \$20,000 + \$15,000 + \$15,000 = \$70,000

Sum

11

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ 3D1.3

2

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

13

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

☐

* If the defendant has no criminal history, enter criminal history category "I" here and

☐

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Exercise #9 District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1-5 U.S. Code Title, Subtitle, Section & Subsection 18 - 6 4 1 -
18 - 1 0 0 1 -

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level	
<u>2B1.1(a)</u>	<u>Theft</u>	<u>4</u>	(base)
<u>(b)(1)(H)</u>	<u>Loss \$70,000*</u>	<u>7</u>	
_____	_____	_____	
_____	_____	_____	

Notes: *\$15,000 + \$5,000 + \$20,000 + \$15,000 + \$15,000

Sum

11

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____

0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ 1B1.3

2

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

13

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant Exercise #9

Docket Number _____

Notes explaining grouping decision: Using Rule(d) add dollar loss because they are counts of conviction of the same general type. Calculations from the fraud and theft guide lines represent the same offense level

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 1-5

13

1 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): _____

_____ (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): _____

_____ (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____

_____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____

_____ (units)

6. Total Units

_____ (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

1 unit - no increase
1 1/2 units - add 1 level
2 units - add 2 levels

3 units - add 3 levels
4 or 5 units - add 4 levels
More than 5 - add 5 levels

0

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

13

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

13

MULTIPLE CHOICE QUIZ ON GROUPING

Instructions

The following scenarios require a grouping decision. Using the format illustrated in the example below, select the most appropriate grouping guideline for each problem and enter the corresponding letter as your answer.

See Guidelines Manual at §3D1.2 for reference

Select (write appropriate letter in answer blank):

a = §3D1.2(a)

b = §3D1.2(b)

c = §3D1.2(c)

d = §3D1.2(d)

n = counts do not involve substantially the same harm and should not be grouped.

Example: The defendant possessed marihuana and amphetamines on the same occasion and is convicted of two counts of simple possession of controlled substances.

Answer: a

Explanation: Because the counts involve the same victim (the same societal interest) and the same act, use §3D1.2(a) to group the counts.

Questions

1. The defendant is convicted of five counts of embezzling money from five different clients (§2B1.1). ____
2. The defendant is convicted of one count of unlawfully possessing a firearm (§2K2.1) and one count of making a false statement in connection with acquisition of this firearm (§2F1.1). ____
3. The defendant is convicted of one count of embezzlement (§2B1.1) and one count of making a false entry to conceal the same embezzlement (§2F1.1). ____
4. The defendant is convicted of two counts of assault with a dangerous weapon for

attacking two individuals (§2A2.2). _____

5. The defendant is convicted of one count of fraud (§2F1.1) and one count of obstruction of justice for attempting to cover up that fraud (§2J1.2). _____
6. The defendant is convicted of four counts: (1) interstate transportation of a stolen motor vehicle valued at \$6,000 (§2B1.1 or §2B1.2); (2) forgery of a \$3,000 check (§2B5.2); (3) forgery of a \$2,000 check (§2B5.2); and (4) theft of a \$7,000 check (§2B1.1). _____
7. The defendant is convicted of three counts of bank robbery (§2B3.1) for robbing three different banks. _____
8. The defendant is convicted of three counts of unlawful possession of a firearm (§2K2.1). All counts arise out of a single incident involving three different weapons. _____
9. The defendant is convicted of one count of mishandling environmental pollutants (§2Q1.3) and one count of record keeping violations in connection with the mishandled pollutants (§2Q1.3). _____
10. The defendant is convicted of one count of drug distribution (§2D1.1) and one count of forgery in an unrelated case (§2B5.2). _____

ANSWERS TO MULTIPLE CHOICE QUIZ ON GROUPING

1. **d** Embezzlement is an offense for which the offense level is determined primarily on the amount of money involved (an offense based on the aggregate), and the guideline for embezzlement (§2B1.1) is listed under §3D1.2(d) as one included for grouping under Rule (d).
2. **b** The victim is the same (the same societal interest) and both charges that represent one composite harm. Both acts constitute part of a common scheme, in this case, possession of the weapon.
3. **a,b, or d** The victim (the bank) is the same for both charges, and similarly, both charges represent one composite harm. To assist in determining whether Rule (a) or (b) applies, ask the following question: did the defendant do anything to accomplish this embezzlement other than make this one false entry?

Reminder: Rules (a) and (b) are so closely related that it is often difficult to point to one grouping rule over the other as the "correct" solution. This does not create problems in correct guideline application because either rule results in the same grouping decision, and consequently the same offense level.

Because both counts of conviction are of a type listed under §3D1.2(d), they are groupable under Rule (d) as well.

4. **n** These counts do not involve the same victim and therefore cannot be grouped under Rule (a) or (b). The conduct embodied in one count is not treated as a specific offense characteristic of or adjustment to the other count, making grouping under Rule (c) incorrect. The guideline for assault (§2A2.2) is expressly prohibited from grouping under Rule (d). Therefore, the counts cannot be grouped. By not grouping these counts the defendant will probably receive incremental punishment for the additional harm. If not, it may provide reason for sentencing at the upper end of sentencing range.
5. **c** The offense level for the fraud count is increased by the Chapter Three obstruction adjustment (§3C1.1) to reflect the obstruction of justice behavior. Rule (c) requires grouping when one count embodies conduct that is treated as a specific offense characteristic or adjustment to another count.
6. **d** All four counts are groupable under Rule (d) because their offense levels are based on the aggregate and their guidelines are identified as groupable under §3D1.2(d). It does not matter that different guidelines are involved. Use the guideline based on the aggregate that produces the highest offense level.

7. **n** The counts do not involve the same victim (eliminating grouping under Rules (a) and (b)), do not embody conduct taken into consideration in other counts (eliminating grouping under Rule (c)), and are expressly prohibited from grouping under Rule (d). Therefore, the counts cannot be grouped.
8. **a** The counts involve the same societal interest (protecting society from unlawful use of firearms) and represent the same act or transaction.
9. **b** The record keeping violations are a specific violation of a general prohibition (§3D1.2(b)(3)). The victim is the same (the same societal interest), substantially the same harm results, and the counts are part of a common scheme or plan.
10. **n** While the guidelines for both offenses (§2D1.1 for the drug violation and §2B5.2 for the forgery) are primarily based on an aggregate and are listed as groupable under §3D1.2(d), they are not the same general offense type (one involves drug amounts and the other involves monetary loss) and cannot be grouped under Rule (d). They are otherwise unrelated and represent separate harms that cannot be grouped. Incremental punishment is therefore appropriate.

QUIZ ON MULTIPLE COUNTS

Questions are generally in order of complexity

TRUE OR FALSE

1. A defendant has been convicted of two counts of bribery (18 USC § 201, guideline 2C1.1). The first involved a bribe of \$5,000 to a housing inspector, the second a bribe of \$6,000 to a housing commissioner. For purposes of grouping, complete one Worksheet A and total the dollar loss from both counts grouped under Rule (d).
2. A separate Worksheet A is required for each count of multiple counts except: (1) where the offense level for a group of counts is based primarily on aggregate value or quantity and the counts are groupable under §3D1.2(d); or (2) where there is a conspiracy, solicitation, or attempt count and a substantive count that was the sole object of the conspiracy, solicitation, or attempt (3D1.2(b)(1) and (b)(2)).
3. When determining the combined adjusted offense level (multiple count guideline 3D1.4), if the total number of units equals 7, the offense level is increased by 7.
4. A defendant's convictions for burglary (§2B2.1) and theft (§2B1.1) involving a break-in at the same residence would be grouped under Rule (d) with the monies added together to determine the adjusted offense level.
5. If a defendant is convicted of armed bank robbery (18 USC § 2113(d), guideline 2B3.1), and use of a firearm during commission of a crime of violence (18 USC § 924(c), guideline 2K2.4), sentencing for the firearms conviction may be served concurrently with that for the robbery.
6. The defendant pleaded guilty to conspiracy to commit bank robbery (18 USC § 371 - - Count One), bank robbery (18 USC § 2113(a) -- Count Two), and interstate transportation of a stolen automobile (18 USC § 2312 -- Count Three) used in the commission of the robbery. The defendant had planned to steal the car after the robbery, but decided at the last moment to steal it the day before the robbery. Therefore, only Counts One and Two are grouped together.
7. The defendant is convicted of a count of use of a communication facility in committing a drug offense (§2D1.6) and a count of perjury (§2J1.3) that was related to the drug offense. If the obstruction adjustment (§3C1.1) is applied for the drug count, the two counts can be grouped under Rule (c).
8. The defendant is convicted of two counts of possession of a firearm by a convicted felon (18 USC § 922(g), guideline 2K2.1) resulting from firearm possession on two separate occasions. The counts should not be grouped unless both possessions were connected by a common criminal objective.

ANSWERS TO MULTIPLE COUNTS QUIZ

1. **False** See §3D1.2(d). Bribery, §2C1.1, is specifically excluded from grouping under Rule (d). No aggregation of money is possible.
2. **True** In cases involving attempt, solicitation, or conspiracy to commit the completed offense, a formal determination for each count may not be necessary when it is clear that one count in the count group cannot have a higher offense level than another (§3D1.3, Application Note 2). In such cases a separate Worksheet A is not required. If counts are grouped under Rule (d), one Worksheet A may be completed using the aggregate amount.
3. **False** See §3D1.4, Determining the Combined Offense Level. If the total number of units is more than 5, the offense level is increased by 5. An increase of 5 levels is the maximum permitted under this guideline.
4. **False** See §3D1.2(d). Burglary of a Residence, §2B2.1, is specifically excluded from grouping under Rule (d), so no aggregation is possible. The counts would be grouped under Rule (b) because they involve the same victim and two acts that are part of the same course of conduct with a single criminal objective. The higher offense level of the two counts would be the offense level for the count group. Because both counts involve the same money, the amounts would not be added.
5. **False** A conviction for 18 USC § 924(c) requires a mandatory five year consecutive sentence. See §2K2.4, Application Note 1. Guideline 3D1.2 and Application Note 1 exclude mandatory consecutive punishments from multiple count application.
6. **False** Counts One and Two are grouped under §3D1.2(b)(1) (count charging a conspiracy and a substantive offense that was the sole object of the conspiracy). The relevant conduct (§1B1.3(a)(1)) of the robbery allows consideration of acts in preparation of the robbery (e.g., the theft of the automobile), and the robbery guideline (§2B3.1(b)(1)) contains a specific offense characteristic -- loss -- that allows consideration of the loss of the automobile. Because the specific offense characteristic from the robbery has picked up the conduct cited in the theft count, Count Three is grouped with Counts One and Two, using Rule (c) (§3D1.2(c)).
7. **True** See §3D1.2(c). The conduct cited in the obstruction serves as an adjustment to the drug count. The two counts are therefore grouped under Rule (c).

8. **True**

The counts are not grouped under Rule (a) (§3D1.2(a)) because they involve different transactions. To consider grouping under Rule (b) (§3D1.2(b)), the counts would have to be part of the same course of conduct or common scheme or plan with a common criminal objective.

UNITS EXERCISE

Illustrates Determination of a Combined Adjusted Offense Level

(See Worksheets A and B following this exercise)

Hand out the following:

1. Completed Worksheets A for Counts One, Two, Three; and
2. Blank Worksheet B.

The Instructor should:

1. Emphasize §3D1.4 as the guideline used to combine all count groups into a single adjusted offense level so that the court can impose one sentence that reflects all counts of conviction.
2. Read/review case facts.

CASE FACTS: The defendant is convicted of three counts of bank robbery. In the first two robberies he pointed a gun at the tellers and escaped with \$5,000 and \$7,500 respectively. In the third robbery he escaped with \$15,000 and struck a witness with his gun while leaving the bank, causing bodily injury.

3. Briefly review completed Worksheets A.
4. Show blank Worksheet B on the overhead and walk students through the application process, filling it in as you go. Ask the students to complete their Worksheets B at the same time.

Show Worksheet B - Overhead #31

5. Take questions.

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Units Example District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 1 U.S. Code Title, Subtitle, Section & Subsection 18 - 2113 - (u)(d)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2B3.1(a)</u>	<u>Robbery</u>	<u>18</u> (base)
<u>(b)(1)(B)</u>	<u>Loss \$5,000</u>	<u>1</u>
<u>(b)(2)(C)</u>	<u>Weapon brandished</u>	<u>3</u>

Notes: _____

Sum 22

2. Victim-Related Adjustments (See Chapter Three, Part A)

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

§§ _____ 0

3. Role in the Offense Adjustment (See Chapter Three, Part B)

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

§§ _____ 0

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

22

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Units Example District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 2 U.S. Code Title, Subtitle, Section & Subsection 18 - 2113 (a)(d)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2B3.1(a)</u>	<u>Robbery</u>	<u>18</u> (base)
<u>(b)(1)(B)</u>	<u>Loss \$7,500</u>	<u>1</u>
<u>(b)(2)(c)</u>	<u>Weapon brandished</u>	<u>3</u>
_____	_____	_____

Notes: _____

Sum 22

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

22

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET A (OFFENSE LEVEL)

COMPLETE A SEPARATE WORKSHEET A for each count of conviction or stipulated offense before applying the multiple count rule in §3D1.3. *Exceptions: Only a single Worksheet A is to be completed (1) where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)); (2) where there is a conspiracy count and a substantive count that was the sole object of the conspiracy. (see §3D1.2(b)).*

Defendant Units Example District/Office _____
(last name, first name, middle initial)

Docket Number (Year-Sequence-Defendant No.) _____

Count Number(s) 3 U.S. Code Title, Subtitle, Section & Subsection 18 - 2113 - (a)(d)

1. Offense Level (See Chapter Two)

Enter the sum of the base offense level and any specific offense characteristics from Chapter Two. Explain the basis for this determination and cite each applicable guideline section below:

Guideline Number	Description	Level
<u>2B3.1(a)</u>	<u>Robbery</u>	<u>18</u> (base)
<u>(b)(1)(C)</u>	<u>Loss \$15,000</u>	<u>2</u>
<u>(b)(2)(B)</u>	<u>Weapon used to hit victim</u>	<u>4</u>
<u>(b)(3)(A)</u>	<u>Bodily injury</u>	<u>2</u>

Notes: _____

Sum 26

2. Victim-Related Adjustments (See Chapter Three, Part A)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

3. Role in the Offense Adjustment (See Chapter Three, Part B)

§§ _____ 0

Enter the specific section and adjustment applicable. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

4. Obstruction Adjustment (See Chapter Three, Part C)

If applicable, enter "2." If not applicable, enter "0."

0

5. Adjusted Offense Level

Enter the sum of lines 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Line 1.

26

* If the defendant is convicted of a single count, check the box. Note also that Worksheet B need not be completed.

* If the defendant has no criminal history, enter criminal history category "I" here and

WORKSHEET B (MULTIPLE COUNTS OR STIPULATION TO ADDITIONAL OFFENSES)

Defendant Units Example

Docket Number _____

Notes explaining grouping decision: Each count of robbery is treated as a separate count group. Robbery is specifically excluded from grouping under §3D1.2(d). Neither can these three be grouped under §3D1.2(a) or (b) because they involve different victims, different acts.

Instructions for Items 1-5.

If the offense level for the Group is based primarily on aggregate value or quantity, or is the offense level for a count charging conspiracy and a substantive offense that was the sole object of the conspiracy, enter the adjusted offense level from Worksheet A. Otherwise, enter the adjusted offense level from Worksheet A for the count in the Group having the highest adjusted offense level (See §3D1.3). List the count number(s) from Worksheet A for each of the counts in the Group.

In determining the number of units to be assigned, count:

- * One unit for the Count Group with the highest offense level;
- * One unit for each additional Group equally serious or 1 to 4 levels less serious;
- * One-half (1/2) unit for each Group 5 to 8 levels less serious;
- * No increase in units for each Group 9 or more levels less serious.

1. Adjusted Offense Level for the First Group of Closely Related Counts

Count number(s): 3 26 1 (units)

2. Adjusted Offense Level for the Second Group of Closely Related Counts

Count number(s): 2 22 1 (units)

3. Adjusted Offense Level for the Third Group of Closely Related Counts

Count number(s): 1 22 1 (units)

4. Adjusted Offense Level for the Fourth Group of Closely Related Counts

Count number(s): _____ _____ (units)

5. Adjusted Offense Level for the Fifth Group of Closely Related Counts

Count number(s): _____ _____ (units)

6. Total Units

3 (total units)

7. Increase in Offense Level Based on Total Units (see §3D1.4)

- | | |
|---------------------------|-----------------------------|
| 1 unit - no increase | 3 units - add 3 levels |
| 1 1/2 units - add 1 level | 4 or 5 units - add 4 levels |
| 2 units - add 2 levels | More than 5 - add 5 levels |

3

[except when the total number of Units is 1 1/2, round up to the largest whole number]

8. Highest of the Adjusted Offense Levels From Lines 1-5 Above.

26

9. Combined Adjusted Offense Level (see §3D1.4)

Enter the sum of Lines 7 and 8 here and on Worksheet D, Line 1.

29

PURPOSE OF BREAKOUT GROUPS

Focus of Group leaders:

1. Establish that participants are clear on grouping rules, including when not to group.

This is not the chief purpose of the session, but rather a starting point from which to proceed. (It is assumed that most participants will be at least somewhat familiar with grouping and multiple counts. Proceed on that assumption.)

2. Provide practice working through the case examples with the checklist to guide analysis.

By completing the examples as a group, participants can assume the role of instructor at home and repeat the process.

3. Familiarize participants with material available in packets and provide suggestions on how to use it when they train.

USE OF LECTURE MATERIALS

I. GOAL OF GROUPING:

To establish a single offense level that encompasses all the counts of conviction and represents the seriousness of these counts.

II. DISCUSS MULTIPLE COUNT RULES - brief review

A. Rule (a) - §3D1.2

1. Participants turn to page in packet. Read rule. Ask participants for an example or two that would illustrate grouping under rule (a).
2. Note: The Supplementary Illustrations on Multiple Counts provide additional examples.

B. Rules (b), (c), and (d) - Follow same procedure for rule (a).

III. GROUP DISCUSSION OF CASE SCENARIOS

- A. Discuss checklist for grouping determination and have participants turn to the checklist under Tab A, page 24.
- B. Point out that an expanded explanation of the checklist material is included in the Multiple Counts Lecture (see Tab A, Part V).

Note: Flip once or twice between checklist and expanded explanation to show relationship.

- C. Work through as many of the case examples as time permits, completing Worksheets A and B. (Allow time for discussion of Worksheet B.) Pass out case scenario and blank worksheets for each example.
 1. Point out the additional examples located in the packet (Tab C).
 2. See discussion of grouping process that follows each example. These discussions may be used to help trainers explain and guide grouping decisions.
 3. Conclude with a discussion of units when counts cannot be grouped. Work through Units Example (Tab C). Pass out completed Worksheets A and blank Worksheet B.

IV. ADDITIONAL TEACHING MATERIALS

Locate and discuss use of the following materials that have not been mentioned in previous discussions:

- Case Scenarios that might be used to generate discussion, Tab C;
- Quiz on grouping rules with explanation;

Note: Leader may wish to suggest that participants actually take a portion of this or the next quiz, depending on time available. The quizzes may be used by the trainer to isolate and clarify points not understood or to generate further discussion.

- Quiz on multiple counts with explanation;
- Advanced considerations, Tab A, Part VII.

CASE SCENARIOS FOR BREAKOUT GROUPS

Note to Instructor: The sample cases are designed to test the knowledge of the participants on basic guideline application skills in general and application of the multiple count rules from Chapter Three, Part D in particular.

These exercises may be utilized in several ways:

1. Completed prior to attending the training;
2. As homework during training after the guideline application lecture has been presented; or
3. During the training session individually or in small groups.

Regardless of when they are done, they should be reviewed and discussed by the instructor and class.

INDEX FOR CASE PROBLEMS

Exercise #1 -- grouping under §3D1.2(c)

Exercise #2 -- counts not grouped

Exercise #3 -- grouping under §3D1.2(d)

Exercise #4 -- grouping under §3D1.2(a)

Exercise #5 -- grouping under §3D1.2(a) or (b), (c), and (d)

Exercise #6 -- grouping under §3D1.2(b) and (d)

Exercise #7 -- grouping under §3D1.2(c) and one count not grouped

Exercise #8 -- grouping under §3D1.2(c) and (d)

Exercise #9 -- grouping under §3D1.2(d), including a Rule 20 example

Exercise #10 -- how grouping attempts to reduce the effect of prosecutorial charging practices

Exercise #1

Count One: Armed Robbery of a Credit Union
 18 USC § 2113(a)(d), Class B Felony
 25 years/\$250,000

Count Two: Aggravated Assault
 18 USC § 111, Class C Felony
 10 years/\$250,000

The defendant was found guilty of the Counts One and Two for offenses that occurred on February 4, 1989. The defendant, armed with a loaded handgun, robbed the Federal Credit Union. After entering the credit union, the defendant ordered the tellers to stand against the wall and began to rifle their cash drawers. The defendant encountered an auditor from the National Credit Union in a back room and ordered him to stand against the wall with the tellers. The auditor apparently did not move fast enough, which prompted the defendant to pistol-whip him. The auditor sustained serious lacerations and bruises to his face that required 35 stitches. The defendant escaped from the credit union with \$7,000.

NOTE TO INSTRUCTOR: Exercise #7 in this section is a more complicated example using this basic scenario.

Analysis - Exercise #1

Determining the grouping

Using the checklist as a guide, ask the following questions:

- A. Are there any mandatory consecutive terms required for any of the counts?
 - 1. No.
- B. Are there any counts grouped under Rule (d)?
 - 1. No.
- C. Do any counts involve conspiracy, solicitation, or attempt?
 - 1. No.
- D. Complete a Worksheet A for all remaining counts.
 - 1. Count One: Armed robbery includes specific offense characteristics for loss, firearm, and serious bodily injury.
 - 2. Count Two: Aggravated assault includes the enhancement for the auditor with serious bodily injury (same auditor as in Count One).
- E. Do any counts involve the same victim and substantially the same harm?
 - 1. No.
- F. Are there any counts in which the guideline for one count takes into consideration behavior cited in another count (grouping under Rule (c))?
 - 1. The serious bodily injury in the robbery count reflects the assaultive behavior in Count Two and is therefore grouped under Rule (c).
 - 2. The offense level for the count with the higher offense level is the offense level for the count group. (Count One offense level is higher, level 27.)
- G. Complete a Worksheet B.

Show completed Worksheets A and B - Overheads #32-#34

Exercise #2

- Count One: Armed Bank Robbery
18 USC § 2113(a)(d), Class B felony
25 years/\$250,000
- Count Two: Carrying a Firearm During a Crime of Violence
18 USC § 924(c)
Mandatory consecutive 5 year prison sentence

The defendant was found guilty of the aforementioned counts.

On January 29, 1988, the defendant, brandishing a sawed-off shotgun, entered the First National Bank and ordered all of the tellers to stand against the wall. The defendant gave the bank manager a bag and ordered her to empty the contents of the tellers' drawers into the bag. The defendant did not point the shotgun at anyone in the bank and escaped with \$6,700. The dye pack in the bag exploded, causing the defendant to leave the money in the parking lot. Additionally, the police recovered the defendant's ski mask and loaded 12-gauge shotgun in the bushes a short distance from the bank.

Analysis - Exercise #2

Determining the grouping

Using the checklist as a guide, ask the following questions:

- A. Are there mandatory consecutive terms required for any of the counts?
 - 1. Yes, § 924(c). This count is not subject to multiple count grouping rules.
 - 2. Do any counts remain after eliminating the consecutive count?
 - a. Yes. However, with the consecutive count eliminated, this becomes essentially a single count case under the guidelines.
- B. Not applicable.
- C. Not applicable.
- D. Complete a Worksheet A on the single count remaining.
- E. Not applicable.
- F. Not applicable.
- G. A Worksheet B is not required in this exercise.

Show completed Worksheet A - Overhead #35

Exercise #3

- Count One: Distribution of Cocaine
 21 USC § 841(a)
 Class C Felony (amended November 18, 1988)
 20 years/\$1,000,000 fine
- Count Two: Distribution of Cocaine
 21 USC § 841(a)
 Class C Felony (amended November 18, 1988)
 20 years/\$1,000,000 fine
- Count Three: Distribution of Heroin
 21 USC § 841(a)
 Class C Felony (amended November 18, 1988)
 20 years/\$1,000,000 fine

The defendant pleaded guilty to three counts of distribution of a controlled substance, each in violation of 21 USC § 841. Specifically, he was convicted of making three sales to an undercover DEA agent. The first on February 12, 1989 was for 250 grams of cocaine; the second on February 27, 1989 was for 100 grams of cocaine; and the third on March 7, 1989 was for 50 grams of heroin.

The defendant was arrested immediately after the third sale. He subsequently gave a statement admitting his guilt.

NOTE TO INSTRUCTOR: Exercise #8 is a more complicated example using this basic scenario.

Analysis - Exercise #3

Determining the grouping

Using the checklist as a guide, ask the following questions:

- A. Are there mandatory consecutive terms required for any of the counts?
 - 1. No.
- B. Are any of the counts groupable under Rule (d)?
 - 1. Yes.
 - 2. Determine the applicable guidelines, in this case §2D1.1.
 - 3. The drug guideline (§2D1.1) is included under §3D1.2(d) as groupable under Rule (d).
 - 4. Convert the amount of cocaine in the two cocaine counts into heroin equivalencies using the drug equivalency table (Count One, 250 grams cocaine = 50 grams heroin; Count Two, 100 grams cocaine = 20 grams heroin). Add the amount of drugs from each count (50 + 20 + 50) to reach a total equivalent amount of heroin, 120 grams. Locate the base offense level on the drug quantity table (Level 26).
 - 5. Complete a Worksheet A on these counts.
 - 6. How many counts remain after grouping Rule (d)?
 - a. None
- C. Not applicable.
- D. Not applicable.
- E. Not applicable.
- F. Not applicable.
- G. Complete a Worksheet B.

Show completed Worksheets A and B - Overheads #36 and #37

Exercise #4

- Count One: Assault with Intent to Commit Murder
 18 USC § 113(a), Class C Felony (amended November 18, 1988)
 20 years/\$250,000
- Count Two: Assault with a Dangerous Weapon
 18 USC § 113(c), Class D Felony
 5 years/\$250,000

The defendant was convicted on March 5, 1989, of assault with intent to commit murder and assault with a dangerous weapon. Both counts arose out of the defendant's February 5, 1989 attack of his former girlfriend with a baseball bat. The defendant beat her severely, causing her hospitalization and extensive surgery for facial reconstruction. The defendant admits beating the victim. However, he claims that he was provoked to do so by her plans to leave him. He stated that his assaultive behavior was warranted in light of his extreme anger and frustration over her rejection.

Analysis - Exercise #4

Determining the grouping

Using the checklist as a guide, ask the following questions:

- A. Are there mandatory consecutive terms required for any of the counts?
 - 1. No.
- B. Are any of the counts groupable under Rule (d)?
 - 1. No. All offenses in Chapter Two, Part A, of the guidelines are excluded from grouping under this rule (§3D1.2(d)).
- C. Do any counts involve conspiracy, solicitation, or attempt?
 - 1. No.
- D. Complete a separate Worksheet A for all remaining counts.
- E. Do any counts involve the same victim and substantially the same harm?
 - 1. Yes. The victim (girlfriend) was the same for both counts and the criminal conduct represents a single episode.
 - 2. Group Counts One and Two under Rule (a).
 - 3. Are there any remaining counts?
 - a. No.
- F. Not applicable.
- G. Complete a Worksheet B based on the grouping provided.

Show completed Worksheets A and B - Overheads #38-#40

Exercise #5

- Count One: Possession with Intent to Distribute 500 grams of Cocaine
21 USC § 841(a), Class B Felony
5 - 40 years/\$2,000,000 fine
- Count Two: Possession with Intent to Distribute 1 kilogram of Cocaine
21 USC § 841(a), Class B Felony
5 - 40 years/\$2,000,000 fine
- Counts Three and Four: Use of a Telephone to Facilitate a Drug Offense
21 USC § 843(b), Class E Felony
4 years/\$250,000 fine
- Count Five: Possession of a Firearm
18 USC § 922(g), Class D Felony
5 years/\$250,000 fine

The defendant transported 500 grams of cocaine from Miami to Cincinnati on December 18 and one kilogram of cocaine on January 15. He was hired by another individual to deliver the "packages" and was to receive \$500 for each delivery. When he arrived in Cincinnati on December 18, he telephoned Miami for instructions on where to deliver the package. Before delivering the January 15 package he called the individual who was to receive it in order to arrange delivery. Upon arrest immediately following the delivery, officers found the defendant to be in possession of a firearm.

Investigation disclosed that the defendant was one of a number of couriers making deliveries for a Miami drug dealer who was leader of an extensive cocaine distribution organization. The two deliveries cited appear to be the only ones made by the defendant. None of the couriers knew of the others.

Variation #1:

The defendant entered into a plea agreement to plead guilty to the two telephone counts in exchange for dismissal of the remaining counts. How is the single offense level for the two counts determined?

Analysis - Exercise #5

Determining the grouping

Using the checklist as a guide, ask the following questions:

- A. Are there any mandatory consecutive terms required for any of the counts?
 - 1. No.
- B. Are there any counts grouped under Rule (d)?
 - 1. Yes. The applicable guideline is drug distribution (§2D1.1), a guideline specifically listed under §3D1.2(d) as an offense for which the total amount of drugs is aggregated.
 - 2. Add the drugs from Count One (500 grams) to those in Count Two (1 kilogram), reaching a total of 1.5 kilograms. Locate the base offense level on the drug quantity table (Level 26).
 - 3. Complete a Worksheet A for these counts.
 - 4. Guideline 2D1.1 provides for a 2 level enhancement for possession of a firearm during the commission of the drug distribution offense.
- C. Do any counts involve conspiracy, solicitation, or attempt?
 - 1. No.
- D. Complete a Worksheet A for all remaining counts.
 - 1. Counts Three and Four: Use of a communication facility (telephone count) has a base offense level (12) and no specific offense characteristics.
 - 2. Count Five: Possession of a firearm by a prohibited person (§2K2.1) has a cross reference to apply the guideline for the offense committed when using the firearm if the resulting offense level is higher. The offense level for the drug distribution guideline is higher than that for possession of the firearm.
- E. Do any counts involve the same victim and substantially the same harm?
 - 1. Yes. Counts Three and Four have essentially the same victim (societal interest) as the drug distribution behavior in Counts One and Two.

2. The criminal conduct for Counts One through Four represents two or more acts or transactions connected by a common criminal objective or are part of a common scheme or plan.
 3. Counts Three and Four (telephone counts) are therefore grouped with Counts One and Two (drug distribution counts) under Rule (b).
- F. Are there any counts in which the guideline for one count takes into consideration behavior cited in another count?
1. Yes. Count Five is grouped with Counts One and Two under Rule (c). The firearm enhancement for the drug offense is the criminal conduct reflected in Count Five.
 2. Do any counts remain after grouping after Rule (c)?
 - a. No.
- G. Complete a Worksheet B to reach a combined adjusted offense level.

Show completed Worksheets A and B - Overheads #41 - # 45

Variation #1: If the defendant pleaded guilty to the two telephone counts, the single offense level for the two counts would be determined by grouping them under Rule (b). On Worksheet B, enter the higher of the two offense levels in the group. In this case they are equal.

Exercise #6

Count One:	Conspiracy to Violate 18 USC §§ 2314, 1341, and 1343 18 USC § 371, Class D Felony 5 years/\$250,000
Counts Two & Three:	Interstate Transportation of Fraudulently Obtained Securities 18 USC §§ 2314, Class C Felony 10 years/\$250,000
Counts Four, Six, Seven, Nine - Fourteen:	Mail Fraud 18 USC §§ 1341, Class D Felony 5 years/\$250,000
Count Five:	Wire Fraud 18 USC §§ 1343, Class D Felony 5 years/\$250,000

This case involved a large scale fraudulent loan brokerage scheme operated throughout the Midwest by the defendant and a co-defendant over a three year period ending March 1, 1989. The defendant and co-defendant targeted bankrupt farmers facing foreclosure and offered to obtain loans for these farmers contingent upon the farmers paying them an advance fee equal to a percentage based on the value of the expected loan. At least eight other individuals (as yet unindicted) worked for the defendant as salesmen. All had knowledge of the scheme.

The defendant or one of the salesmen would approach a farmer known to be in financial difficulty and offer to obtain a loan for him through alleged contacts in the banking industry. After receiving an advance fee paid by the farmer to cover "paperwork and overhead," the defendant or his representative would fail to produce the loan and would abscond with the money.

Count One of this indictment pertains to the numerous meetings between the defendant and his co-defendant wherein plans to defraud certain farmers were discussed. Counts Two and Three pertain to the defendant and co-defendant transporting two personal checks in the amount of \$10,000 from a farmer in Illinois and \$20,000 from a farmer in Ohio. Counts Four, Six, Seven, and Nine through Fourteen and Count Five pertain to the defendant using the mail and a wire transfer to receive advance money of \$35,325 from each of the victims.

Analysis - Exercise #6

Determining the grouping

Using the checklist as a guide, ask the following questions:

- A. Are there mandatory consecutive terms required for any of the counts?
 - 1. No.
- B. Are any of the counts groupable under Rule (d)?
 - 1. Determine the applicable guidelines. In this case, §§2X1.1 and 2F1.1 are applicable.
 - 2. The fraud guideline (§2F1.1) is included under §3D1.2(d) as groupable under Rule (d).
 - 3. Add the appropriate dollar loss from the fraud counts, reaching a combined total of \$383,250 (10,000 + 20,000 + (10 X 35,325)). Find the appropriate enhancement based on the total amount.
 - 4. Complete a Worksheet A on these counts.
 - 5. How many counts remain after grouping under Rule (d)?
 - a. One.
- C. Do any counts involve conspiracy, solicitation, or attempt?
 - 1. Yes. Group the conspiracy with the substantive count that is the object of the conspiracy (Rule (b)).
 - 2. Include this count as part of prior Worksheet A.
 - 3. How many counts remain after grouping under Rule (b)?
 - a. None.
- D. Not applicable.
- E. Not applicable.
- F. Not applicable.
- G. Complete a Worksheet B based on the grouping provided.

Show completed Worksheets A and B - Overheads #46 and #47

Exercise #7

Count One: Armed Robbery of a Credit Union
 18 USC § 2113(a)(d), Class B Felony
 25 years/\$250,000

Counts Two and Three: Aggravated Assault
 18 USC § 111, Class C Felony
 10 years/\$250,000

The defendant was found guilty of the above three counts. On February 4, 1989, the defendant, armed with a loaded handgun, robbed the Federal Credit Union. During the offense, the defendant ordered the tellers to stand against the wall and began to rifle their cash drawers. Encountering two auditors in a back room of the Credit Union, the defendant ordered them to stand against the wall with the tellers. When they apparently did not move fast enough, the defendant pistol whipped one of the auditors and struck the other in the face with his free hand. The pistol-whipped auditor sustained serious lacerations and bruises that required 35 stitches. The other auditor suffered bruises around her mouth. The defendant escaped from the credit union with \$7,000.

Analysis - Exercise #7

Determining the grouping

Using the checklist as a guide, ask the following questions:

A. Are there any mandatory consecutive terms required for any of the counts?

1. No.

Note: If the use of a dangerous weapon in relation to a crime of violence (18 USC § 924(c)) had been a count of conviction, the answer would have been "yes." See §3D1.1, procedure for determining offense level on multiple counts, Application Note 1. (In such case, that count would not be grouped.)

B. Are there any counts grouped under Rule (d)?

1. No.

C. Do any counts involve conspiracy, solicitation, or attempt?

1. No.

D. Complete a Worksheet A for all remaining counts.

1. Count One: Armed robbery includes specific offense characteristics for loss, firearm, and serious bodily injury. One auditor received hospital care and stitches.

2. Count Two: Aggravated assault includes an enhancement for the auditor (in Count One) with serious bodily injury.

3. Count Three: Aggravated assault includes enhancement for the second auditor with bodily injury (bruises).

E. Do any counts involve the same victim and substantially the same harm?

1. No.

F. Are there any counts in which the guideline for one count takes into consideration behavior cited in another count?

1. Yes. Count Two is grouped with Count One under Rule (c) because the specific offense characteristic for serious bodily injury under the robbery count is the assaultive behavior in Count Two.

2. Are there any remaining counts after grouping under Rule (c)?
- a. No.

G. Complete a Worksheet B based on the grouping provided.

Show completed Worksheets A and B - Overheads #48 - #51

Exercise #8

- Counts One - Three: Distribution of Heroin
21 USC § 841(a), Class C Felony (amended
November 18, 1988)
20 years/\$1,000,000
- Count Four: Possession of Marihuana
21 USC § 844, Class A Misdemeanor
1 year/\$250,000
- Count Five: Possession of a Firearm by a Convicted Felon
18 USC § 922(g), Class D Felony
5 years/\$250,000
- Count Six: Income Tax Evasion
26 USC § 7201, Class D Felony
5 years/\$250,000

On September 20, 1988, October 3, 1988, and November 1, 1988, the defendant sold four grams, six grams, and three grams of heroin, respectively, to an undercover DEA agent. He was arrested immediately after the third sale and found to be in possession of a .25 caliber handgun and a small quantity of marihuana.

Subsequent investigation disclosed that the defendant had filed a 1986 income tax return in which he failed to report income derived from drug selling activities that resulted in a tax loss of \$12,000.

Analysis - Exercise #8

Determining the grouping

Using the checklist as a guide, ask the following questions:

- A. Are there mandatory consecutive terms required for any of the counts?
 - 1. No.
- B. Are any of the counts groupable under Rule (d)?
 - 1. Yes. Guideline 2D1.1 applies to Counts One - Three and is listed under §3D1.2(d) as groupable under Rule (d).
 - 2. Aggregate the drugs from the group counts. Total amount equals 13 grams of heroin.
 - 3. How many counts remain after grouping under Rule (d)?
 - a. Three
- C. Do any counts involve conspiracy, solicitation, or attempt?
 - 1. No.
- D. Complete a Worksheet A for all remaining counts.
 - 1. Count Four: possession of marijuana.
 - 2. Count Five: possession of a firearm includes the cross reference to the underlying offense.
 - 3. Count Six: tax evasion includes enhancement for tax loss from criminal activity.
- E. Do any counts involve the same victim and substantially the same harm?
 - 1. No.
- F. Are there any counts in which the guideline for one count takes into consideration behavior cited in another count?
 - 1. Yes. Count Five is grouped with Counts One - Three under Rule (c) because possession of a firearm is a specific offense characteristic in the drug distribution guideline, §2D1.1.

2. Although Count Six has a specific offense characteristic enhancement for failing to report income from criminal activity (and that criminal activity involves drug selling), the tax return was filed prior to the behavior captured in the drug counts and thus reflects separate criminal activity. Count Six would remain a separate count group.

G. Complete a Worksheet B based on the grouping provided.

Show completed Worksheets A and B - Overhead #52 - #56

Exercise #9

Counts One and Two:

Theft of U.S. Property
18 USC § 641, Class C Felony
10 years/\$250,000

Counts Three - Five:

Submission of False Documents
18 USC § 1001, Class D Felony
5 years/\$250,000

The defendant, a doctor at a local hospital in Atlanta was convicted of three counts of Medicare fraud and two counts of theft of federal property.

During the months of January, February, and March 1989, the defendant submitted three falsified vouchers for payment to Medicare: January's voucher included statements totaling \$20,000; February and March vouchers totaled \$30,000, distributed evenly between the two months.

After learning that he was being investigated for this Medicare fraud, the defendant flew to Washington, D.C., and met with an old college friend who was an official with the Department of Health and Human Services. The defendant admitted his guilt, but explained that he had been having severe financial problems as a result of a bitter divorce.

While in Washington, the defendant visited the National Gallery of Art where he stole two prints, one valued at \$15,000 and the other at \$5,000.

Federal prosecutors in Atlanta indicted the defendant for three counts of Medicare fraud, in violation of 18 USC § 1001; federal prosecutors in Washington, D.C., indicted him for two counts of theft in violation of 18 USC § 641. Defendant pleaded guilty to the three counts in Atlanta and, pursuant to Fed.R.Crim.P. 20, also pleaded guilty at the same proceeding to the two counts of theft stemming from the Washington, D.C. robbery.

Analysis - Exercise #9

Determining the grouping

Using the checklist as a guide, ask the following questions:

- A. Are there mandatory consecutive terms required for any of the counts?
 - 1. No.
- B. Are any of the counts groupable under Rule (d)?
 - 1. Determine the applicable guidelines. In this case, §§2B1.1 and 2F1.1.
 - 2. The theft guidelines (§2B1.1) and the fraud guidelines (§2F1.1) are included under §3D1.2(d) as groupable under Rule (d) and both are of the same general offense type (involving monetary loss).
 - 3. Dollar loss from all theft and fraud counts are added together ($\$15,000 + \$5,000 + \$20,000 + \$15,000 + \$15,000 = \$70,000$).
 - 4. Complete Worksheets A. Using the \$70,000 figure, both the theft and fraud guidelines would be applied and the one resulting in the higher offense level would be the offense level for the count group.
 - 5. How many counts remain after grouping under Rule (d)?
 - a. None
- C. Not applicable.
- D. Not applicable.
- E. Not applicable.
- F. Not applicable.
- G. Complete a Worksheet B based on the grouping provided.

Show completed Worksheets A and B - Overhead #57 - #59

Exercise #10

Illustration shows how grouping attempts to reduce the effect of prosecutorial charging practices

- Count One: Armed Robbery of a Credit Union
 18 USC § 2113(a)(d), Class B Felony
 25 years/\$250,000
- Count Two: Aggravated Assault
 18 USC § 111, Class E Felony
 3 years/\$250,000
- Count Three: Destruction of Government Property
 18 USC § 1361, Class C Felony
 10 years/\$250,000
- Count Four: Possession of a Firearm by a Convicted Felon
 18 USC § 922(g), Class D Felony
 5 years/\$250,000

The defendant was charged with the above offenses that occurred on March 4, 1989. The defendant, armed with a loaded handgun, robbed a federal credit union on a military base. During the offense, the defendant ordered the tellers to stand against the wall while he rifled their cash drawers. Encountering an auditor in the back room of the credit union, the defendant ordered him to stand against the wall with the tellers. When the auditor apparently did not move fast enough, the defendant fired a bullet, grazing the auditor's arm, causing a serious laceration that required 35 stitches.

As a teller attempted to move toward the window of the credit union to signal a military police vehicle, the defendant fired in the teller's direction to avert the teller from the window. Upon fleeing the credit union with \$6,000, the defendant fired at a military police vehicle, causing \$1,500 worth of damage.

Exercise #10

Different results depending upon the counts of conviction

1. The defendant pleads to Count One, armed robbery. Guideline 2B3.1 applies with a base offense level of 18. The base is increased by 1 level for the loss (includes the \$6,000 cash taken and the \$1,500 damage to the police vehicle), 5 levels for firearm discharge, and 2 levels for bodily injury. The offense level is 26.
2. The defendant pleads guilty to the armed robbery (Count One) and to the firearm count (Count Four). The offense level for the robbery count is 26. The offense level for the firearm count is also 26 because of the cross reference to the underlying offense within the firearm guideline (§2K2.1). The firearm is a specific offense characteristic in the robbery guideline, so the counts are grouped under Rule (c). Pursuant to §3D1.3, the combined adjusted offense level is 26.
3. The defendant pleads guilty to the armed robbery (Count One) and to the assault (Count Two). The offense level for the robbery is 26. The offense level for the assault is 22, resulting from a base offense level of 15, a 5 level increase for firearm discharge, and a 2 level increase for bodily injury. The assault is a specific offense characteristic in the robbery count, so the counts are grouped under Rule (c). Pursuant to §3D1.3, the combined adjusted offense level is 26.
4. The defendant pleads guilty to the armed robbery (Count One) and to the destruction of property (Count Three). The offense level for the robbery is 26. The offense level for the destruction of property is 6, resulting from a base offense level of 4 with a 2 level increase for the property damage (the \$1,500 damage to the police vehicle). The destruction of property (property damage dollar value) is used as a specific offense characteristic in the robbery guideline; therefore, the counts are grouped under Rule (c) with the higher offense level becoming the offense level for the count group. The combined adjusted offense level is 26.
5. The defendant pleads guilty to the firearm count (Count Four) and to the assault (Count Two). The offense level for the firearm count is 26. The offense level for the assault is 22 (as shown above). The firearm is a specific offense characteristic in the assault guideline, so the counts are grouped under Rule (c). The higher offense level becomes the offense level for the count group (§3D1.3). The combined adjusted offense level is 26.

Case Scenarios Helpful to Generate Discussion:

Note: Answers can only be determined after a review of the appropriate Chapter Two guideline.

- A. The defendant attacks the victim with a knife and is convicted of one count of assault with intent to commit murder and one count of assault with a dangerous weapon. How are these grouped?

Explanation: Both counts represent the same harm and can be grouped under Rule (a) of §3D1.2 -- same victim, same act. Complete a Worksheet A on each count, then use the higher offense level when combining the groups on Worksheet B.

- B. The defendant is convicted of ten counts of mail fraud each involving a \$1,000 loss (§2F1.1). How is this offense calculated under the guidelines?

Explanation: Fraud is one of those offenses in which harm is measured by aggregating (adding up) amounts. See the lists of offenses specifically included under §3D1.2(d). The ten counts representing a total loss of \$10,000 would be grouped under Rule (d) of §3D1.2. Only one Worksheet A is required.

- C. A defendant is convicted of one count of bank robbery (§2B3.1) and one count of cocaine distribution (§2D1.1) for offenses occurring on different dates. The defendant is sentenced on both counts at the same time. How is the appropriate offense level calculated?

Explanation: The counts cannot be grouped under Rule (d) because robbery is on the list of offenses specifically excluded under §3D1.2(d). Because the counts are not related and represent separate harms, grouping Rules (a), (b), and (c) would not apply. Complete a separate Worksheet A for each count. On Worksheet B, assign units for each group and add units as instructed to arrive at one offense level for the two counts.

- D. The defendant is convicted of one count of possession with intent to distribute drugs (§2D1.1) and one count of possession of a weapon by a felon (§2K2.1) (18 USC § 922(g)). Both offenses occurred during the same incident. How are these counts grouped?

Explanation: Because the guideline for the drug violation contains a specific offense characteristic for possession of a firearm, the counts are grouped under Rule (c) of §3D1.2 (one count includes conduct treated as a specific offense characteristic or adjustment to the guideline for another count). Complete a separate Worksheet A for each count and use the higher offense level as the offense level for the group.

Note: If the weapon charge is 18 USC § 924(c), the count is exempt from grouping due to the mandatory consecutive five year penalty by statute.

**Refer to Supplementary Illustrations at Tab C
for additional scenarios**

SUPPLEMENTARY ILLUSTRATIONS
CHAPTER THREE, PART D (MULTIPLE COUNTS)

I. GROUPING OF COUNTS (§3D1.2)

The intent of §3D1.2 is to group together "[a]ll counts involving substantially the same harm." The subsections of §3D1.2 should be interpreted consistently with the overall intent of the section, and these illustrations attempt to do so. The following examples discuss grouping of counts under the subsections of §3D1.2, and illustrate some of the issues involved. Examples in which grouping is not appropriate are included.

A. Counts that Involve the Same Victim (or Societal Interest) and the Same Act or Transaction.

The examples below illustrate and discuss whether counts should be grouped together under §3D1.2(a). These examples supplement Application Note 3 of the Commentary to §3D1.2.

Subsections (a) and (b) of §3D1.2 are similar. In some instances exactly which subsection applies may be unclear, or both may apply. The specific subsection upon which grouping is based is unimportant because the result is the same either way.

Example A.1. The defendant is convicted of one count of assault with intent to commit murder (18 U.S.C. § 113(a)) and one count of assault with a dangerous weapon (18 U.S.C. § 113(c)) for attacking one victim on a single occasion.

The counts are grouped together under §3D1.2(a) because they involve the same victim and the same act or transaction.

Example A.2. The defendant is convicted of two counts of simple possession of controlled substances for possessing marijuana and amphetamines on the same occasion.

The counts are grouped together under § 3D1.2(a) because they involve the same "victim" (the same societal interest) and the same act or transaction.

Example A.3. The defendant is convicted of one count of operating a common carrier under the influence of drugs and one count of unlawful (simple) possession of drugs arising out of the same incident.

The counts are grouped together into a single group because the counts involve substantially the same societal interest and the same act or transaction.

Example A.4. The defendant is convicted of one count of assault and one count of unlawful possession of drugs occurring during the same incident.

The counts are not grouped together. Assault is not a "victimless" crime; moreover, assault is not the specific societal interest against which the laws prohibiting drug possession is designed to protect.

Example A.5. The defendant is convicted of two counts of postal burglary for burglarizing the same post office on two different occasions.

Although the counts involve the same victim, they are not grouped together under §3D1.2(a) because they are not part of the same act or transaction.

Example A.6. The defendant is convicted of three counts of unlawful possession of a firearm. All counts arise out of a single incident in which the defendant possessed three different weapons.

The counts are grouped together into a single group because they involve the same societal interest and the same act or transaction.

Example A.7. The defendant is convicted of two counts of unlawfully possessing a firearm. The counts involve different occasions.

The counts are not grouped together under §3D1.2(a) because they involve different transactions. However, see the discussion of Example B.11.

Example A.8. The defendant is convicted of one count of embezzling from a bank and one count of making a false book entry. The false book entry was made in connection with the embezzlement.

The two counts represent substantially the same harm and therefore should be grouped together under §3D1.2. Assuming the false entry to be part of the same act or transaction as the embezzlement, the two counts would be grouped together under §3D1.2(a). Even if §3D1.2(a) does not apply, however, the counts necessarily would be grouped together under §3D1.2(b), because they involve the same victim and are connected by a common criminal objective and constitute part of a single criminal scheme.

Example A.9. The defendant is convicted of one count of tax evasion, one count of tax fraud, and one count of making a false statement in a tax return. The tax fraud consisted of filing a return containing the false statement in order to evade the same taxes covered by the tax evasion count.

The tax fraud and the false statement counts are grouped together under §3D1.2(a) because they involve a single act or transaction and same societal interest. The tax evasion count, however, could involve several acts, *i.e.*, more than just filing the false return. Even if the tax evasion count cannot be grouped with the other two counts under §3D1.2(a), however, it must be grouped with the other counts under §3D1.2(b), because the acts are connected by a common criminal objective and constitute part of a single criminal scheme.

Example A.10. The defendant is convicted of one count of perjury and one count of being an accessory after the fact to a felony. The substance of the accessory count is committing perjury in the trial of the felon.

The counts are grouped together under §3D1.2(a) because they involve the same act or transaction and same societal interest.

Example A.11. The defendant is convicted of two counts of assault with a dangerous weapon for attacking two individuals in a single incident.

The counts are not grouped together because they involve different victims.

B. Grouping of Counts that 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 (§3D1.2(b)).

The examples below illustrate and discuss whether counts should be grouped together under §3D1.2(b). These examples supplement Application Note 4 of the Commentary to §3D1.2. See also Examples A.8 and A.9, above.

Subsections (b)(1) - (b)(3) are special cases; the rule in §3D1.2(b) is much more general. In addition, subsections (a) and (b) of §3D1.2 are similar. In some instances exactly which subsection applies may be unclear, or more than one may apply. The specific subsection upon which grouping is based is unimportant because it does not affect the result.

Example B.1. The defendant is convicted of one count of conspiracy to counterfeit U.S. currency and one count of attempting to counterfeit U.S. currency. Both counts relate to the same counterfeiting plan.

The counts are grouped together into a single group under §3D1.2(b)(1) because they involve a conspiracy to commit an offense and commission of the same object offense. They would also qualify for grouping under §3D1.2(a), if the conspiracy and the completed offense constituted a single act or transaction.

Example B.2. The defendant is convicted of one count of theft of mail and one count of forgery for stealing and attempting to cash a social security check.

The counts are grouped together under §3D1.2(b) because they involve the same victim (regardless of whether the victim is considered the government or the intended recipient of the check) and constitute acts connected by a common criminal objective.

Example B.3. The defendant is convicted of one count of embezzlement and two counts of wire fraud, all in furtherance of a single fraudulent scheme involving one victim.

The counts are grouped together under §3D1.2(b) because they involve the same victim and two or more acts or transactions constituting part of a common scheme or plan. They also would be grouped together under §3D1.2(d) because they involve the same general type of offense and the guidelines for those offenses are based primarily on quantity, i.e., dollar loss.

Example B.4. The defendant is convicted of one count of mishandling environmental pollutants and one count of recordkeeping violations in connection with the mishandled pollutants.

The counts are grouped together under §3D1.2(b) because they involve the same victim and two or more acts or transactions connected by a common objective or constituting part of a common scheme or plan.

Example B.5. The defendant is convicted of two counts of obstructing an election for paying two persons to cast unlawful votes in a single election.

The counts are grouped together under §3D1.2(b) because they involve substantially the same societal interest, *i.e.*, the integrity of the specific election, and two or more acts or transactions connected by a common objective or constituting part of a single scheme or plan.

Example B.6. The defendant is convicted of three counts of interception of communications (wiretapping). The offenses were committed on different days but were all for the purpose of gaining information regarding a competitor's business plans.

The counts are grouped together under §3D1.2(b) because they involve the same victim and two or more acts or transactions connected by a common objective or constituting part of a single scheme or plan. If, however, the counts involved different victims, they would not be grouped together; §3D1.2(b) applies only if the offenses involve the same victim.

Example B.7. The defendant is convicted of one count of manufacturing an eavesdropping device and two counts of advertising an eavesdropping device.

The counts are grouped together under §3D1.2(b) because they involve the same societal interest and two or more acts connected by a common objective or constituting part of a single scheme or plan, *i.e.*, selling an eavesdropping device.

Example B.8. The defendant is convicted of three counts of transmission of wagering information arising out of a single course of conduct.

The counts are grouped together under §3D1.2(b) because they involve the same societal interest and multiple acts connected by a common objective or a single scheme or plan.

Example B.9. The defendant is convicted of two counts of trespassing for trespassing at the same government facility on different occasions.

The counts are not grouped together under §3D1.2(b) because, even though the same victim was involved, the counts are not considered part of a single course of conduct. Each trespassing offense causes a distinct harm (disruption of governmental operations).

Example B.10. The defendant is convicted of one count of unlawfully possessing a firearm (18 U.S.C. § 922(g)) and one count of making a false statement in connection with the acquisition of the firearm (18 U.S.C. § 922(a)(6)).

The counts are grouped together under §3D1.2(b) because the counts involve the same societal interest and are parts of a single scheme or plan, i.e., obtaining the weapon.

Example B.11. The defendant is convicted of two counts of unlawfully transporting the same firearm on different occasions.

Whether or not the counts should be grouped together depends upon the specific facts of the case. If the defendant continually possessed the same weapon over a period of time for hunting, grouping would be appropriate under §3D1.2(b) because there would be a single course of conduct with a single objective (mere possession or legitimate use) invading only a single societal interest. On the other hand, if the defendant used the firearm to commit a robbery on each occasion, there would be two different courses of conduct with different criminal objectives and victims, so that grouping would be inappropriate.

C. Conduct that is Treated as a Specific Offense Characteristic in, or Other Adjustment to, the Guideline Applicable to Another of the Counts.

The examples below illustrate and discuss the application of §3D1.2(c). These examples supplement Application Note 5 of the Commentary to §3D1.2.

Subsection (c) covers many cases that are also covered by subsection (a) or (b) of §3D1.2. The specific subsection upon which grouping is based is unimportant because the result is the same either way.

Example C.1. The defendant is convicted of one count of burglary and one count of unlawful (simple) possession of drugs. The offense involved the burglary of a pharmacy in which a quantity of drugs was taken.

The counts are grouped together under §3D1.2(c) because obtaining a controlled substance is included as a specific offense characteristic of the burglary guideline.

Example C.2. The defendant is convicted of one count of fraud, and one count of obstruction of justice for attempting to cover up that fraud.

The counts are grouped together under §3D1.2(c) because the obstruction of justice is treated as an adjustment to the fraud offense under §3C1.1 (Obstruction), i.e., pursuant to §3C1.1, the offense level applicable to the fraud count will be increased because of the obstruction.

Example C.3. The defendant is convicted of one count of fraud and one count of bribery of a public official to facilitate that fraud.

The counts are not grouped together. Although the fraud guideline is indirectly referenced by the bribery guideline (see §§2C1.1(c)(1), 2X3.1), it is not a specific offense characteristic in, or other adjustment to, the bribery guideline. Furthermore, a private fraud offense and a governmental corruption offense involve substantially different harms.

Example C.4. The defendant is convicted of one count of burglary of a residence and one count of unlawfully possessing a firearm (18 U.S.C. § 922(g)) during the course of the burglary.

The counts are grouped together because weapon possession is a specific offense characteristic in the guideline for residential burglary (§2B2.1). Note, however, that if the defendant had been convicted of using a firearm in relation to a crime of violence (18 U.S.C. § 924(c)), that count would not be grouped with the others, because by law the sentence for a conviction under §924(c) is consecutive to the sentence for the underlying offense. See §3D1.2 and Application Note 1 of the Commentary thereto. See also Examples F.1 and F.2, below.

Example C.5. The defendant is convicted of one count of robbery and two counts of assault for the robbery of a post office in which two postal employees were assaulted. One of the employees was injured seriously.

The robbery guideline (§2B3.1) considers only one assault. Consequently, the count of robbery and the count of assault causing serious bodily injury (the more serious of the two assault counts) are grouped together. The second assault count forms a separate group. See Application Note 8 of the Commentary to §3D1.2.

Example C.6. The defendant is convicted of one count of theft and one count of income tax evasion for evading taxes on the income obtained from the theft.

Proper grouping depends on the specific facts. The tax evasion guideline contains a specific offense characteristic, §2T1.1(b)(1), that increases the offense level if the defendant failed to report income exceeding \$10,000 per year from criminal activity, or if the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income. If either of these characteristics applies, the counts are grouped together under §3D1.2(c); otherwise, they are not.

D. Counts that Involve the Same General Type of Offense where the Guidelines for That Type of Offense Determine the Offense Level Primarily on the Basis of the Total Amount of Harm or Loss, the Quantity of a Substance Involved, or Some Other Measure of Aggregate Harm.

The following examples illustrate and discuss the grouping of counts pursuant to §3D1.2(d). These examples supplement the illustrations in Application Note 6 of the Commentary to §3D1.2.

The list of offenses in subsection (d) may be confusing because the parentheticals sometimes lists specific guidelines in a Part of Chapter Two that are grouped under this rule. At other times, however, the parentheticals list guidelines that are excluded. In addition, the offense guidelines may cover continuing conduct under some fact patterns but not others. Consequently, §3D1.2(d) must be read carefully, and the offense guideline should be consulted to make sure that grouping under subsection (d) is in fact appropriate.

Example D.1. The defendant is convicted of five counts of embezzling money from different clients.

The five counts are grouped together under §3D1.2(d), and the quantities are added. The guideline for embezzlement (§2B1.1) depends primarily upon quantity and is among those listed in §3D1.2(d).

Example D.2. The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each from a different victim.

The five counts are grouped together pursuant to §3D1.2(d), and the dollar amounts are added.

Example D.3. The defendant is convicted of three counts of dealing in unlicensed firearms. The transactions are unrelated.

The three counts are grouped together pursuant to §3D1.2(d). Dealing in firearms is a continuing activity that normally involves several acts. The applicable guideline (§2K2.3) is among those expressly included in §3D1.2(d).

Example D.4. The defendant is convicted of one count of selling heroin, one count of selling LSD, and one count of selling marijuana, each offense occurring on a separate day.

The three counts are grouped together under §3D1.2(d). The Commentary to §2D1.1 provides equivalencies for combining (adding) quantities of different drugs to determine a single combined offense level.

Example D.5. The defendant is convicted of three counts of bid rigging (15 U.S.C. § 1). The counts relate to independent agreements to fix prices.

The three counts are grouped together pursuant to §3D1.2(d), and the respective volumes of commerce are added. The applicable guideline (§2R1.1) depends primarily on the volume of commerce, and is among those listed in §3D1.2(d).

Example D.6. The defendant is convicted of two counts of engaging in a pattern of unlawful employment of aliens.

The two counts are grouped together pursuant to §3D1.2(d). The applicable guideline (§2L1.3) is for an offense that necessarily involves continuing behavior, and is listed in §3D1.2(d).

Example D.7. The defendant is convicted on the following four counts: (1) interstate transportation of a stolen motor vehicle valued at \$6,000; (2) forgery of a \$3,000 check; (3) forgery of a \$2,000 check; and (4) theft of a \$7,000 check.

For purposes of §3D1.2(d), fraud and theft are treated as offenses of the same kind and, therefore, all counts are grouped together. The offense level is determined by the aggregate harm, in this case \$18,000. Offense levels are determined under both the fraud guideline and the theft guideline using the aggregate value; whichever guideline produces the higher offense level is used. If the offense level is the same under each guideline, either may be used.

Example D.8. The defendant is convicted of three counts of bank robbery for robbing three different banks.

The counts are not grouped together and the amounts of money taken are not added. Robbery is one of the offenses specifically excepted from the operation of §3D1.2(d).

Example D.9. The defendant is convicted of one count of drug distribution and one count of an unrelated forgery.

The offenses are not grouped together. Even though the offense levels for both offenses are determined primarily on the total amount of harm or loss, the offenses are not of the same general type. Drug quantities cannot be aggregated with dollar amounts.

Example D.10. The defendant is convicted of one count of possession of cocaine with intent to distribute and one count of possession of cocaine. The offenses occurred on different occasions.

None of the rules provides for grouping these counts unless the court determines that the drugs from the possession count were held for sale. Although the guideline for distribution of cocaine (§2D1.1) depends primarily on quantity, that for simple possession (§2D2.1) does not. Consequently, §3D1.2(d) does not apply. In some cases, this could result in a combined offense level that is higher than that which would attain if the defendant were convicted of two counts of possession with intent to distribute. This would be illogical and not in keeping with the intent of the multiple-count guidelines, especially since possession is a lesser included offense of possession with intent to distribute. Cf. §3D1.2(b)(3) (lesser included offense is grouped with the more serious). In those situations, this unintended result could provide grounds for departure.

E. Conspiracy and RICO Offenses.

The following examples illustrate the treatment of complex conspiracy and RICO counts. See Example B.1, above, for another example involving a conspiracy.

Example E.1. *The defendant is convicted of one count of conspiracy for conspiring to embezzle bank funds and to distribute cocaine.*

This case is treated as if it were comprised of two conspiracy counts: one for conspiracy to embezzle and the other for conspiracy to distribute cocaine. The rules for determining the combined offense level when multiple counts are involved are then applied. See Paragraph 6 of the Introductory Commentary to Chapter Three, Part D and Application Note 9 of the Commentary to §3D1.2. None of the grouping rules of §3D1.2 provides for grouping the resulting "counts" together.

Example E.2. *The defendant is convicted of one count of conspiracy for conspiring to embezzle bank funds and to steal government property.*

This case is treated as if it were comprised of two conspiracy counts: one for conspiracy to embezzle and the other for conspiracy to commit theft. See Example E.1. The resulting "counts" are grouped together pursuant to §3D1.2(d).

Example E.3. *The defendant is convicted of one count of bribery for bribing public official A to vote in favor of a project and one count of conspiracy for conspiring to bribe public officials A and B to vote in favor of that project.*

The case is treated as if it were comprised of 3 counts: (1) bribery of official A, (2) conspiracy to bribe official A, and (3) conspiracy to bribe official B. The ordinary grouping rules are then applied. "Counts" (1) and (2) are grouped together pursuant to §3D1.2(b). None of the grouping rules of §3D1.2 provides for grouping count (3) with either of the other counts. Corrupting different officials involves substantially different harms (*i.e.*, the public interest in the integrity of each official is distinct). Bribery of a public official (§2C1.1) is expressly exempted from §3D1.2(d).

Example E.4. The defendant is convicted of one count of racketeering (18 U.S.C. § 1962(a)) arising out of the theft of two interstate shipments and one embezzlement.

The offense is treated as if the defendant had been convicted of three counts: two counts of theft and one count of embezzlement. The resulting "counts" are subject to the ordinary grouping rules. Here, they are grouped together pursuant to §3D1.2(d), and the offense level is determined by §3D1.3(b). However, if the result is below level 19, the offense level is 19. See §2E1.1(a)(1).

F. Statutorily-Mandated Consecutive Sentences.

The following examples illustrate the treatment of cases that include a count having a statutorily-mandated consecutive sentence. See also Example C.4, above.

Example F.1. The defendant is convicted of one count of distribution of heroin and one count of using a firearm in connection with a drug trafficking crime (18 U.S.C. § 924(c)) arising out of the same facts.

By statute, the sentence imposed for violation of 18 U.S.C. § 924(c) must be consecutive to that imposed for the underlying offense. In such a case, the counts are not grouped together and the provisions in §3D1.4 for determining a combined offense level do not apply. See §3D1.2 and Application Note 1 of the Commentary to that section. The offense level and sentence for the distribution offense are determined as if the firearm were not present. Accordingly, specific offense characteristic (b)(1) of §2D1.1 is ignored. The defendant is sentenced to five years' imprisonment on the firearm count (ten years if a machine gun or silencer was involved), to run consecutively to that for heroin distribution; these terms are doubled if the defendant previously was convicted under §924(c).

Example F.2. The defendant is convicted of one count of attempted robbery and one count of using armor-piercing ammunition in connection with the robbery attempt (18 U.S.C. § 929(a)). A teller sustains permanent bodily injury during the robbery attempt.

The counts are not grouped together. The use of the weapon is ignored in determining the offense level for the attempted robbery. (Note that the permanent bodily injury therefore results in a 6-level increase that is not affected by the 9-level cap in §2B3.1(b)(3) for simultaneous weapon use

and injury.) The attempted robbery count is sentenced independently. The defendant is sentenced to five years' imprisonment on the ammunition count, to run consecutively.

Example F.3. The defendant is charged with one count of the sale of heroin. While on pretrial release for the heroin charge, the defendant is arrested for bank robbery. The defendant is convicted of the heroin charge and then convicted of the robbery charge.

Under §5G1.4, the sentence on the robbery count is consecutive to that on the heroin count. In addition, under 18 U.S.C. § 3147, there is a sentence enhancement that runs consecutively to the other sentences.

II. DETERMINING THE COMBINED OFFENSE LEVEL (§§3D1.3, 3D1.4)

The following examples illustrate the operation of §§3D1.3 and 3D1.4. They supplement those following the Commentary to §3D1.5.

Example A. The defendant is convicted of three counts of theft involving three automobiles stolen on different days. The value of the automobiles stolen totaled \$28,000.

The counts are grouped into a single group and the theft guideline is applied using the aggregate value. The base offense level is 4. There is an enhancement of 6 levels based on the value of the property. In addition, there should be a 2-level enhancement for more than minimal planning unless it is clear that each of the thefts was purely opportune. See §2B1.1(b)(4) and Application Note 1(f) of the Commentary to §1B1.1. The combined offense level is 12. See §3D1.3.

Example B. The defendant is convicted of one count of mail theft and one count of unlawful possession of heroin. The theft count involved the unplanned theft of a motor vehicle valued at \$6,200 (offense level 8). The unlawful possession count arose out of a small quantity of heroin being found on the defendant's person at the time of the arrest.

The offenses are not grouped together because the mail theft has a definite victim whereas the heroin possession does not and invades a societal interest that is substantially different from the prevention of theft. The group with the highest offense level counts for one Unit; the other group has an identical offense level, and so also counts for one Unit. The total of two Units results in a

2-level increase to the offense level (level 8) for the more serious count. The combined offense level is 10. See §3D1.4.

Example C. The defendant is convicted by plea of one count of robbery. As part of an explicit plea agreement, the defendant stipulates that he committed three additional robberies. Each was an unarmed robbery of a bank in which less than \$20,000 was taken.

Under §1B1.2, the offense level in this case is determined as if the defendant had been convicted of four counts of robbery. The ordinary multiple-count rules apply to the four "counts." The "counts" are not grouped together. The offense level for each robbery "count" is 19. (The base offense level is 18. For a financial institution, the loss is always treated as at least \$5,000, so that there is a one-level increase. See §2B3.1.) Each group counts for one Unit. The total of four Units results in a 4-level increase, so the combined offense level is 23. (See §3D1.4.)

Example D. The defendant is convicted of one count of distributing 100 grams of heroin and one count of distributing 20 kilograms of marijuana, the offenses occurring on different occasions. When arrested for selling the marijuana, the defendant had a loaded pistol in his possession.

The counts are grouped together under §3D1.2(d). Rules for determining a heroin-equivalency for the marijuana are found in the Commentary to §2D1.1. Twenty kilograms of marijuana are the equivalent of twenty grams of heroin, making the total drug quantity 120 grams of heroin. The base offense level for distribution of 120 grams of heroin is 26. There is a 2-level increase for weapon possession under §2D1.1(b)(1). See Application Note 3 of the Commentary thereto. The combined offense level is therefore 28.

GUIDELINE SELECTION AND RELEVANT CONDUCT

Table of Contents

- I. Guideline Selection and Relevant Conduct**
- II. Fundamentals of Guideline Application**
 - A. Chapter One, Part A
 - B. Chapter One, Part B
 - C. Guidelines 1B1.2 and 1B1.3
- III. Real Offense vs. Charge Offense Sentencing**
 - A. Count of Conviction and Actual Conduct
 - B. Middle Ground Approach
- IV. Determining the Correct Guideline**
 - A. Guideline Selection Based on Offense of Conviction
 - B. Stipulation to More Serious Offense
- V. Relevant Conduct**
 - A. Shift in Focus to Real Offense Behavior
 - B. Relevant Conduct in Relation to All Offenses (§1B1.3(a)(1))
 - C. Relevant Conduct Expanded (§1B1.3(a)(2))
 - D. Remaining Sections of Relevant Conduct (§1B1.3(a)(3),(4),(5))
 - E. Relevant Conduct and Chapter Four (§1B1.3(b))
- VI. Relationship of Relevant Conduct to Grouping of Counts**
 - A. Grouping under §3D1.2(d) Provides Basis for Expanded Relevant Conduct (§1B1.3(a)(2))
 - B. Relevant Conduct of Each Count Considered

GUIDELINE SELECTION AND RELEVANT CONDUCT LECTURE

I. Introduction: Guideline Selection and Relevant Conduct

- A. Correct application of the sentencing guidelines requires a thorough understanding of the concept of relevant conduct. "Relevant conduct," as used throughout the Guidelines Manual, operates as a gatekeeper and defines the parameters of information that should be considered in calculating a guideline sentence.
- B. Individual guidelines may restrict the use of relevant conduct in determining a sentencing range. However, relevant conduct or other information not considered in determining the range may be used in choosing a point within the range or whether a departure is appropriate.

II. Chapter One: Fundamentals of Guideline Application

- A. Part A of Chapter One provides a detailed narrative overview of the Commission's approach to guideline sentencing.
- B. Part B of Chapter One provides guidelines and commentary fundamental to proper application, including:
 - the steps in application;
 - selection of the correct guideline;
 - information that can be used in application and sentencing;
 - structure and significance of the guidelines and commentary; and
 - definitions used throughout the guidelines.
- C. Two guidelines from Chapter One, Part B, are of particular importance when determining the correct guideline and the appropriate sentencing range.

**Participants should review §§1B1.2 and 1B1.3
in their Guidelines Manual as each point is addressed.**

Show §1B1.2 - Overhead #1

- 1. Guideline 1B1.2 states the information used to determine the correct offense guideline.

Show §1B1.3 - Overhead #2

2. Guideline 1B1.3 states the information used to determine the guideline range once the appropriate offense guideline has been selected. This is referred to as **Relevant Conduct**.

Note: Guideline 1B1.4 details selection of a point within the guideline range or whether a departure from the guidelines is warranted. It is not considered when choosing the correct guideline or in determining the correct guideline range. Guideline 1B1.8 discusses the use of incriminating information provided to the government by immunized defendants. For a more detailed treatment of this issue, see Sentencing Commission Trainer's Manual, Guideline Application.

III. Real Offense vs. Charge Offense Sentencing

- A. In developing the guidelines, the Commission addressed the question of whether guideline ranges should be determined based on the defendant's actual conduct (independent of the count or counts of conviction) or on the counts of conviction.

Thorough study of the Commission's discussion of this issue, pages 1.5-1.6 of the Guidelines Manual, is suggested.

- B. The Commission ultimately determined that a middle ground would be the most practical solution to this fundamental issue.
 1. Selection of the correct guideline is determined by the **offense of conviction** (§1B1.2(a)).
 2. The **actual offense behavior**, as defined by the **relevant conduct** for the offense of conviction, is considered in determining the correct guideline range (§1B1.2(b)).

IV. Determining the Correct Guideline (§1B1.2)

- A. Correct selection of a guideline in almost all instances results from the **offense of conviction** (i.e., the offense cited in the count of conviction). See discussion at §1B1.1(a) and §1B1.2(a).

Illustrate determination of an appropriate guideline - Overhead #3

1. **The court shall apply the offense guideline most applicable to the offense(s) of conviction.** The Statutory Index (Appendix A) provides a reference for the majority of commonly prosecuted federal criminal statutes to assist in the determination of the most appropriate guideline.

** Example: If the defendant is convicted of 18 USC § 2113(b) (bank larceny), the statutory index references §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). This is the guideline most applicable to the offense of conviction, even if the actual behavior involves a robbery.*

2. **In some cases, more than one type of behavior is addressed in a single statute (e.g., stealing or receiving).** As a result, the statutory index may list multiple guidelines for that statute. When multiple guidelines are referenced, select the one most appropriate for conduct cited in the count of conviction.

** Example: Title 18 USC § 1708 reads "Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail,...;or Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter..." The statutory index references §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), §2B1.2 (Receiving Stolen Property), and §2F1.1 (Fraud and Deceit). Because several types of criminal acts are covered by the statute, consider the language in the indictment when determining the appropriate guideline. If a defendant is convicted of 18 USC § 1708, theft of mail, the most appropriate guideline would be §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).*

** Example: A defendant is convicted of 18 USC § 666 in an indictment citing theft of property by an Indian agent. The actual criminal conduct, however, indicates that a bribe occurred. Although the indictment in this case charges theft, the statute allows for conviction of theft, embezzlement, fraud and bribery. The statutory index references four guidelines (§§2B1.1, 2C1.1, 2C1.2, 2F1.1). The language of the indictment guides the determination of the appropriate guideline within the structure of §1B1.2(a), regardless of the underlying real offense conduct. Therefore, the appropriate guideline in this case would be for theft, §2B1.1.*

3. **If no guideline is referenced in the statutory index for a particular statute, see §2X5.1.** For felonies and Class A misdemeanors that are not listed in the statutory index, the most analogous guideline is to be applied.

- a. The most analogous guideline is the guideline most appropriate for the offense of conviction described in the indictment or information, taking into account the nature of the offense of conviction, its characteristics, and relative seriousness in comparison to the nature of offense(s), characteristics, and relative seriousness of conduct in offense(s) expressly covered by the guideline.

- (1) To determine whether a sufficiently analogous guideline exists, look first for guidelines applicable to offenses similar in nature to the offense of conviction. Compare the offense characteristics of potentially analogous guidelines to the characteristics of the offense of conviction.
- (2) To the extent necessary, consult the statutes (listed in the statutory provisions of the commentary or in the statutory index) covered by possibly analogous guidelines and compare the conduct described in those statutory provisions to that cited in the offense of conviction.
- (3) Ultimately, the court must decide which guideline is most analogous.

- b. If no sufficiently analogous guideline can be found, the court shall impose an appropriate sentence, taking into account the purposes of sentencing as set forth in 18 USC § 3553(a)(2), having "due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offense and offenders" (18 USC § 3553(b)).

B. There is one limited exception to this general rule. If a stipulation, as part of a negotiated plea agreement establishes facts that prove a more serious offense or offenses than the offense of conviction, apply the guideline most applicable to the more serious offense or offenses established. Regardless of a stipulation, the sentence is limited by the statutory maximum of all offense(s) of conviction.

Reference §1B1.2(a)

** Example: A defendant enters a plea of guilty to one count of use of a communication facility in committing a drug offense (21 USC § 843(b)). The weight of the drug does not enter into the calculation of the guideline range because neither the base offense level nor any specific offense characteristic under §2D1.6 considers the weight of the drugs involved (Use of Communication Facility in Committing Drug Offense: base offense level 12).*

However, if as part of the plea agreement the government and defense stipulate that the actual offense conduct involved possession with intent to distribute cocaine, the appropriate guideline is §2D1.1. This guideline considers the weight of the cocaine in determining the offense level. Because in this case the count of conviction is use of a communication facility (carrying a four-year statutory maximum penalty), the defendant could not be sentenced to more than four

years, regardless of the guideline range that may have resulted from applying §2D1.1, a guideline that considers the weight of drugs (See §5G1.1(a)).

V. **Relevant Conduct** (§1B1.3)

A. After selection of the appropriate guideline, guideline application shifts focus to the "real offense" behavior. The guideline range is determined by considering the actual offense behavior independent of the charges or language of the indictment.

1. This permits the relative seriousness of the real offense to be considered through appropriate use of the base offense level, specific offense characteristics, or Chapter Three adjustments.

** Example: A defendant who possesses a gun in the commission of a drug offense will generally receive a higher offense level than another defendant who commits an identical drug offense but does not possess a gun. This is true whether or not the defendant is specifically charged with the gun offense.*

2. This real offense aspect of the guidelines attempts to reduce disparity created by different charging patterns or language in the indictment.

** Example: Two defendants charged in separate drug indictments but involved in schemes with identical amounts of drugs will generally receive the same enhancement for drug quantity regardless of the amount listed in the indictment.*

Note: Because relevant conduct is central to most decisions made in determining the guideline range, close review of both the guideline language and the commentary is essential. Relevant conduct applies to all decisions made in Chapters Two and Three, and certain factors enumerated in Chapter Four.

B. Guideline 1B1.3(a)(1) defines relevant conduct as it relates to all offenses, greatly expanding the range of behavior to be considered from that of a strict offense of conviction system.

Overlay Overhead #4 on #3.

This overhead states the guideline and depicts how it expands on considerations used in §1B1.2.

It is helpful to READ THROUGH THE GUIDELINE with the participants.

1. Guideline 1B1.3 permits consideration of the **ACTUAL CONDUCT** of the defendant in relation to the offense of conviction. This consideration is not limited by any specific conduct charged in the indictment.

** Example: There is evidence that the weight of the heroin mixture confiscated was 150 grams. However, the indictment states "less than 100 grams." Consider the actual amount that can be shown in applying the drug guideline.*

2. **Guideline 1B1.3(a)(1) establishes the parameters of the real offense behavior that may be considered for an offense of conviction, including:**

a. All acts and omissions

(1) committed by the defendant,

(2) aided and abetted by the defendant, or

** Example: The resident manager of an apartment building on a federal reservation provides individuals with pass keys to apartments for the purpose of stealing electronic equipment. In application of the guidelines, the manager would receive all applicable enhancements under the burglary guideline (§2B2.1).*

(3) for which the defendant would be otherwise accountable.

** Example: Two defendants commit a robbery in which one defendant carried a gun unbeknownst to the co-defendant. When applying §2B3.1, the co-defendant would also receive an enhancement for presence of a firearm because the presence of that firearm was known or was reasonably foreseeable to the defendant.*

b. Such acts and omissions may have occurred

(1) during the commission of the offense of conviction,

** Example: An inmate escapes from a maximum security correctional facility. In the process of escaping, the inmate attacks a guard who attempts to apprehend him. When applying the escape guidelines, the inmate receives an adjustment for use of force because it occurred during the commission of the offense.*

(2) in preparation for that offense,

** Example: In calculating the offense level for a bank robbery, the value of a car stolen in preparation for the offense would be included when calculating loss.*

(3) in the course of attempting to avoid detection or responsibility for that offense, or

** Example: In a bank robbery in which the defendant commandeers a car and driver in an attempt to flee from authorities, the value of the car taken and the abduction may be considered for purposes of guideline calculation.*

(4) that otherwise were in furtherance of that offense.

** Example: In the preceding bank robbery, the defendant shoots the driver of the car after the defendant has made his escape. Injuries resulting from the shooting should be used to enhance the bank robbery offense level.*

Additional examples of §1B1.3(a)(1) for discussion purposes:

** Example: During a bank robbery, the defendant bound and raped a teller, causing serious bodily injury. In applying §2B3.1, is the injury to the teller considered applying the specific offense characteristic for "injury to victim"?*

The robbery guideline (§2B3.1) requires an enhancement if "any victim sustained bodily injury." Two sections of relevant conduct apply. Guideline §1B1.3(a)(1) allows consideration of all acts and omissions "that occurred during the commission of the offense of conviction." Guideline 1B1.3(a)(3) allows consideration of all harms that resulted from such acts. Therefore, the injury to the teller is considered.

** Example: A defendant purchased the ingredients, materials, and equipment necessary to manufacture methamphetamine. He constructed a laboratory and had just begun the manufacturing process when he was arrested (and later convicted) for drug manufacturing. Upon conviction, should the size of the lab and the amount of drugs that could have been produced be considered in determining the appropriate offense level?*

Yes. The drug manufacturing guideline (§2D1.1, Application Note 11) instructs that when "the amount seized does not reflect the scale of the offense, see Application Note 2 of Commentary to §2D1.4." According to §2D1.4, if no drugs are seized, the sentencing judge shall approximate the quantity of the controlled substance, and in making such determination may consider "the size and capability of any laboratory involved."

Relevant conduct (§1B1.3(a)(1)) allows the consideration of all acts and omissions that occurred "in preparation for that offense" in determining the offense level. As a result, the purchase and possession of ingredients, materials and equipment may be used to approximate the quantity of drugs that the laboratory was capable of producing.

** Example: A defendant is convicted of two counts of money laundering (18 USC § 1956(a)(1)(A)). The defendant is a tax attorney and investment broker who assisted drug dealers in the laundering of illegally obtained funds. After being interviewed by agents, but prior to his arrest, the defendant arranged for the transfer of his and other defendant's assets to a foreign bank as a means to further hide their activities. Should the defendant receive the 2 level enhancement for willfully obstructing or impeding proceedings (§3C1.1)?*

The obstruction adjustment (§3C1.1) instructs that a 2 level enhancement should be given if the defendant willfully impeded or attempted to impede the administration of justice during the investigation of the instant offense. According to relevant conduct (§1B1.3(a)(1)), which also applies to Chapter Three adjustments, all acts committed "in the course of attempting to avoid detection or responsibility for that offense," may be considered.

** Example: A defendant is convicted of bank robbery (18 USC § 2113(a)). During the getaway involving a high speed chase, the defendant ran the car he was driving into a traffic pole, causing \$5,000 damage to the pole. Is the \$5,000 added into the "loss" when applying §2B3.1(b)(1)?*

According to §2B1.1, Application Note 2 (referenced by §2B3.1), "loss" means the value of the property "taken, damaged, or destroyed." Relevant conduct (§1B1.3(a)(1)) indicates that all acts committed "in the course of attempting to avoid detection or responsibility for that offense" should be considered. In addition, §1B1.3(a)(3) instructs that all harm resulting from such acts should be included. The car was stolen and ultimately damaged in an attempt to avoid detection or responsibility for the bank robbery and should therefore be considered.

- C. **Guideline 1B1.3(a)(2) defines the expansion of relevant conduct for certain types of offenses in which the information that can be considered in making Chapter Two and Three determinations is even broader. That is, §1B1.3(a)(2) goes beyond §1B1.3(a)(1) to acts that are part of the same course of conduct or common scheme or plan.**

**Overlay Overhead #5 above #3 and #4.
This overhead states §1B1.3(a)(2), depicting how it
expands the information considered**

It is helpful to READ THROUGH THE GUIDELINE with the participants.

1. Offenses referenced in §1B1.3(a)(2) are of a type for which the Chapter Two guidelines depend substantially on quantity or aggregate amount of harm.
2. In general, §1B1.3(a)(2) offenses include most drug offenses, theft, fraud, tax violations, and certain other property crimes. Offenses that are not encompassed by this rule include robbery, assault, and homicide.
 - a. The guidelines generally distinguish between offenses that deal with repetitive or ongoing behavior and those more oriented toward single episodes of criminal behavior (e.g., assault, bank robbery). Even if two offenses of the "single episode" variety can be shown to be part of the same course of conduct or common scheme or plan (e.g., burglarizing two adjoining apartments), the guidelines treat each offense independently and do not allow the inclusion of information from one offense in determining the level for another offense.
 - b. Offenses not encompassed by §1B1.3(a)(2) are not precluded from consideration under §1B1.3(a)(1).

** Example: During an attempted residential burglary, a defendant struck a child causing serious bodily injury. The child's mother, attempting to intervene, was threatened by a co-defendant who pointed a gun at her. The defendants were originally charged with two counts of aggravated assault and one count burglary. The first defendant pleaded guilty to one count of aggravated assault against the child.*

While aggravated assault is not groupable under §3D1.2(d) (and thus the expanded relevant conduct under §1B1.3(a)(2) would not apply), §1B1.3(a)(1) does apply. Because the mother was threatened with a gun "during the commission of the offense of conviction" and "in furtherance" of that offense, the enhancement for threatened use of a gun should be given.

Show Overhead #6

3. Guideline 3D1.2(d) provides a list of offense guidelines calculated largely on the basis of total amount of harm or loss for which §1B1.3(a)(2) is applicable. Guideline 3D1.2(d) also provides a list of offense guidelines excluded from consideration. The status of guidelines not identified in §3D1.2(d) must be determined based upon the facts of each particular case and the applicable guideline.

It may be helpful to have participants examine the list in §3D1.2 to examine the list. If this information is presented in conjunction with the basic presentation, the participants will not yet have been exposed to the rules for grouping. A general explanation can be provided, indicating that it will be addressed in more depth later.

4. For offenses meeting the §3D1.2(d) criteria, relevant conduct authorizes examination of a wider range of conduct than that allowed in §1B1.3(a)(1), including all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. In considering the meaning of the phrases "part of the same course of conduct" and "common scheme or plan," the commentary to §1B1.3 suggests that the language was derived generally from Rule 8(a) of the Federal Rules of Criminal Procedure.

- a. Acts and omissions that were part of the same course of conduct would encompass criminal conduct based on the same act or transaction or on two or more related acts or transactions as described in Rule 8(a). These phrases describe the situation in which a defendant, pursuing a single criminal objective, engages in more than one criminal transaction and violates several distinct statutory prohibitions, i.e., situations where there is a direct relationship between the offenses committed.

** Example: A defense contractor denied a contract breaks into a federal office and in a fit of rage steals his and other bidders' plans. In the course of his actions he throws a chair across the room, destroying a computer. Although he is charged with theft of property, the destroyed property is considered in assessing loss.*

- b. Acts and omissions that were part of a common scheme or plan may also be considered relevant conduct for such offenses. A determination as to whether a common scheme or plan existed involves consideration of such factors as the interval of time between the offenses, common or ongoing behavior, the presence or absence of common accomplices, victims, or modus operandi, and any direct evidence of a conspiracy.

** Example: An offender, known to be involved in ongoing drug activity, provides drugs on a weekly basis to a small group of street distributors. However, when arrested the defendant is charged with only a single count of distribution relating to the amount of drugs distributed to an undercover agent at the time of arrest. The drugs that the defendant is known to have distributed to the street distributors is considered "part of a common scheme or plan" and would be used to calculate the offense level.*

Additional examples of §1B1.3(a)(2) for discussion purposes:

** Example: The defendant, an apartment building manager, pleaded guilty to one count of theft of mail. The offense involved theft of a \$1,500 U.S. Treasury check from a tenant's mailbox. Reliable information exists that the defendant stole six other treasury checks with a total value of \$5,500 from six separate tenants in the same building. Is the loss from the other thefts included in determining the offense level for the single count of theft?*

The theft guideline (§2B1.1) requires the determination of total amount of loss. Because §2B1.1 is an offense type that may be aggregated under §3D1.2(d), relevant conduct at §1B1.3(a)(2) is applicable. Subsection (a)(2) specifies that "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" are to be included in determining the offense level. Therefore, if the criteria of §1B1.3(a)(2) are met, the monies from all dismissed counts should be included in calculating the total amount of loss.

** Example: The defendant is convicted of distributing 300 grams of cocaine to an undercover agent. Prior to arrest, the defendant negotiated delivery of a kilogram of cocaine to the agent. The indictment alleged that the defendant was responsible for delivery of ten kilograms of cocaine from Miami to Chicago over a five month period. Should the defendant be held accountable for all drugs distributed and negotiated that were part of this ongoing drug operation?*

The drug distribution guideline (§2D1.1) is listed under §3D1.2(d) as a guideline that aggregates amounts or quantities. Guideline 1B1.3(a)(2) requires that "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" are to be considered in determining the offense level. Although the defendant was convicted of distributing only 300 grams of cocaine, the negotiated kilogram and the delivery of ten kilograms (if part of a common scheme or plan as the offense of conviction) should be included in determining the base offense level.

***Note:** According to §2D1.4, Application Note 1, "the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount."*

** Example: A drug addict robs three banks on the same block in Manhattan, one after the other. He pleads guilty to one bank robbery. Are the monies from the other two bank robberies used to determine the offense level of the single bank robbery count?*

No. Robbery (§2B3.1) is not an offense type that is groupable under §3D1.2(d). As a result, §1B1.3(a)(2) is not applicable and the acts involved in a "common scheme or plan" are not relevant. In addition, the monies from the other two

bank robberies do not meet the relevant conduct criteria for §1B1.3(a)(1) because the dismissed acts were not committed "in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense."

Show Overhead #7

D. Three additional rules in §1B1.3(a) further expand and in many ways overlap those already discussed, including:

1. **All harm or risk of harm** that resulted from the acts or omissions specified in §1B1.3(a)(1) or (a)(2), if the harm or risk was caused intentionally, recklessly, or by criminal negligence; all harm or risk that was the object of such acts or omissions (§1B1.3(a)(3));

** Example: The injury to a bank teller during the commission of a bank robbery; the injury to a guard at the bank sustained during a bank robbery; and the injury to a pedestrian run over as the bank robber attempts to flee would all be considered as injury under the robbery guideline (§2B3.1).*

** Example: The risk of serious bodily injury from setting fire to an office building after regular business hours would be considered under the arson guideline (§2K1.4).*

2. **The defendant's state of mind, intent, motive and purpose in committing the offense** (§1B1.3(a)(4));

** Example: For a defendant convicted of illegal possession of a firearm, §2K2.2 considers, among other things, whether "the offender obtained or possessed the firearm solely for sport or recreation." Application of this specific offense characteristic would require consideration of the defendant's intent or motive for possession of the gun.*

3. **Any other information specified in the applicable guideline** (§1B1.3(a)(5)).

** Example: For a defendant convicted of bribery in connection with an employee pension plan (§2E5.1), a specific offense characteristic calls for an offense level increase if the defendant was a fiduciary of the plan.*

** Example: Guideline 3B1.3 takes into account any special skill or position of trust of the defendant that facilitated the offense.*

- E. Relevant conduct includes any information relevant to determination of the factors enumerated in Chapter Four (§1B1.3(b)).

** Example: In determining criminal history points, the applicable time period begins with the date of the defendant's commencement of the instant offense.*

** Example: The guideline for criminal livelihood (§4B1.3) directs that an offense level of at least 11 apply if the defendant committed the instant offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income.*

VI. Relationship of Relevant Conduct to the Grouping of Counts

Relevant conduct (§1B1.3) applies to all counts of conviction, regardless of subsequent grouping.

- A. For offenses of a type that require grouping of multiple counts under §3D1.2(d), relevant conduct expands the parameters to include all such acts and omissions that are part of the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2)).
- B. When multiple counts are grouped under Rule (d), the relevant conduct of each count in the count group is taken into consideration.

1. There is no requirement that counts grouped under Rule (d) be related. Where the individual counts grouped under Rule (d) are not all part of the same course of conduct or common scheme or plan, relevant conduct for the individual counts would be different (i.e., the number of counts charged or the dismissal of counts might affect the offense level).

** Example: A defendant is convicted of one count of theft and one count of fraud not part of the same course of conduct or common scheme or plan. The theft count involved a \$20,000 loss; the fraud count involved a \$50,000 loss. Because theft and fraud are the same general offense type, a conviction of both results in guideline application on an aggregate (\$70,000). Using the \$70,000 figure, both the theft and fraud guidelines would be applied and the one resulting in the higher offense level would be the offense level for the count group.*

However, because the theft and fraud were not part of the same course of conduct or common scheme or plan, a conviction on the theft count alone would have resulted in guideline application based on \$20,000 loss and any other relevant conduct for the theft. A conviction on the fraud count alone would have resulted in guideline application based on \$50,000 loss and any other relevant conduct for the fraud.

See Exercise #9 at Tab C for illustration.

2. In general for counts grouped under Rule (d), each count represents conduct that was part of the same course of conduct or common scheme or plan. In such cases, the relevant conduct of a given count and the relevant conduct of all counts will result in the same offense level (i.e., the number of counts charged or the dismissal of counts will not generally affect the offense level).

** Example: A defendant is convicted of four counts of embezzlement from a bank. Each count charges \$1,000 embezzlement for a total of \$4,000 taken in the embezzlement scheme. Because relevant conduct (§1B1.3(a)(2)) states that all acts or omissions that were part of the same course of conduct or common scheme or plan are to be considered in application of the guideline to a given count, the amount from the total scheme, \$4,000, would apply regardless of whether there were one or four counts of conviction. The relevant conduct of any or all of the four counts is \$4,000.*

Refer to breakout group discussion materials, Tab C, for small group discussion.

§1B1.2. Applicable Guidelines

- (a) The court shall apply the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense. Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses.

- (b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

The conduct that is relevant to determining the applicable guideline range includes that set forth below.

- (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
- (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
 - (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
 - (3) all harm or risk of harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk that was the object of such acts or omissions;
 - (4) the defendant's state of mind, intent, motive and purpose in committing the offense; and
 - (5) any other information specified in the applicable guideline.
- (b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four.

**INFORMATION TO BE CONSIDERED
IN DETERMINING THE GUIDELINE RANGE**

§1B1.2

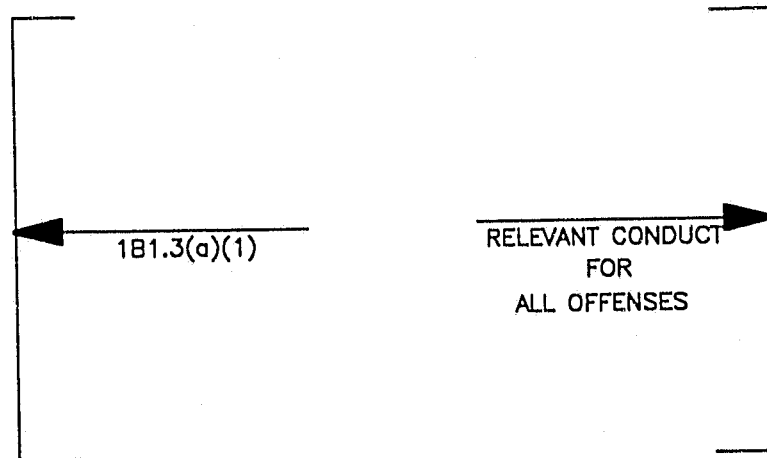
- (a) The court shall apply the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense. Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses.

OFFENSE

OF

CONVICTION

1B1.2



§1B1.3(a)

- (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;



- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

§3D1.2

- (d) Counts are grouped together if the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are specifically included under this subsection:

§§2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B5.2, 2B5.3, 2B5.4, 2B6.1;
§§2D1.1, 2D1.2, 2D1.3, 2D1.5;
§§2E4.1, 2E5.1, 2E5.2, 2E5.4, 2E5.6;
§§2F1.1, 2F1.2;
§2N3.1;
§2R1.1;
§§2S1.1, 2S1.2, 2S1.3;
§§2T1.1, 2T1.2, 2T1.3, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1, 2T3.2.

Specifically excluded from the operation of this subsection are:

all offenses in Part A;
§§2B2.1, 2B2.2, 2B2.3; 2B3.1, 2B3.2, 2B3.3;
§§2C1.1, 2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E1.5, 2E2.1;
§§2G1.1, 2G1.2, 2G2.1, 2G3.2;
§§2H1.1, 2H1.2, 2H1.3, 2H1.4, 2H2.1, 2H4.1;
§§2L1.1, 2L2.1, 2L2.2, 2L2.3, 2L2.4, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.6, 2M3.7, 2M3.8, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3, 2P1.4.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

The conduct that is relevant to determining the applicable guideline range includes that set forth below.

- (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
- (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
 - (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
 - (3) all harm or risk of harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk that was the object of such acts or omissions;
 - (4) the defendant's state of mind, intent, motive and purpose in committing the offense; and
 - (5) any other information specified in the applicable guideline.
- (b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four.

QUIZ FOR RELEVANT CONDUCT PACKET

TRUE OR FALSE

1. A defendant sells one kilogram of cocaine. He is charged and pleads guilty to one count of misdemeanor possession of cocaine (21 USC § 844(a)). The weight of the cocaine affects the determination of the appropriate guideline sentencing range.
2. The same defendant enters a plea of guilty to misdemeanor possession of cocaine. However, via a plea agreement, the government and defense stipulate that the more serious offense of possession with intent to distribute cocaine actually occurred. The weight of the cocaine should, therefore, be taken into account in establishing the defendant's offense level.
3. The offense of conviction involves a two year conspiracy in which ten defendants stole and forged multiple social security checks totaling \$25,000. The defendant became active in the conspiracy during the last three months of the offense in which he stole a total of \$2,000 in checks. Although unaware of the scope of the entire operation, he was convicted of the overall conspiracy involving \$25,000. The defendant is held accountable for the entire \$25,000 in calculating a guideline sentence.
4. The lead defendant in a major drug conspiracy is named in an 11 count indictment. Count One charges conspiracy with ten overt acts, each overt act involving the sale of one kilogram of cocaine. The other ten counts reflect each of the overt acts named in the conspiracy. The defendant enters a plea of guilty to Count Six of the indictment in exchange for dismissal of the remaining counts, even though there is evidence of his involvement in the other nine overt acts. In determining the appropriate base offense level, all 10 kilograms of cocaine should be considered.
5. During the course of an arrest for a drug sale, a defendant assaults an individual who has identified himself as a Drug Enforcement Administration (DEA) agent. The defendant is convicted of a one count indictment charging possession with intent to distribute a controlled substance. The defendant should not receive an adjustment for official victim (§3A1.2) because the count of conviction only involves drug distribution.
6. The wife of a defendant offers a \$10,000 bribe to a probation officer to have the probation officer misapply the guidelines and recommend probation in a criminal case against her husband. Prior to offering the bribe, she learned that she was suffering from a fatal illness. In response to this health condition, she offered the bribe in order to have her husband placed on probation; thus, able to remain at home with her. Because the health condition is not an element with the bribery guideline, consideration should not be given to this issue.

7. The defendant was named in separate indictments for two counts of conspiring to possess and distribute cocaine and marihuana. He pleaded guilty to one conspiracy count involving activity that occurred between the months of February and June, 1988. The second conspiracy count (a separate indictment) was dismissed. This conspiracy occurred during the months of June and July, 1988. Because evidence exists that the conspiracies involve the same course of conduct and common scheme or plan, they should be treated as relevant conduct under §1B1.3(a)(2), and the drug amounts from the two conspiracies should be added.
8. The defendant was indicted on one count of possession and transportation of a firearm and one count of possession and transportation of a silencer. Both counts involved the same weapon. Although the defendant pleaded guilty only to the first count, the enhancement for silencer is applicable.
9. Upon fleeing the scene of a bank robbery in a getaway car, the Defendant collided with a police car and an officer was seriously injured. Because this conduct occurred after the actual offense of conviction (bank robbery), neither the injury to the officer nor the damage to the police vehicle may be considered when determining the offense level for robbery, §2B3.1.

ANSWERS TO QUIZ FOR RELEVANT CONDUCT PACKET

1. **False** When a defendant is convicted of misdemeanor possession, the appropriate guideline for application purposes is §2D2.1. Drug weight is not considered within the structure of that guideline.
2. **True** When a stipulation specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline appropriate to the stipulated offense. Keep in mind, however, that the sentence is subject to statutory maximum limitations established by the offense of conviction. In this case, the appropriate guideline for the stipulated offense is §2D1.1, a guideline that takes into account the weight of the cocaine.
3. **False** The entire \$25,000 loss would not necessarily be taken into account. Any amount that did not involve "acts and omissions committed or aided and abetted by the defendant" or that was shown not to be "reasonably foreseeable" by the defendant (§1B1.3(a)(1)) would not be included.
4. **True** Although the defendant entered a plea of guilty to only one count involving only one kilogram of cocaine, the offense conduct involved "acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" (§1B1.3(a)(2)). Therefore, all drugs that were part of the common scheme or plan (10 kilograms in this case) should be considered in determining the base offense level.
5. **False** Generally, false. The court must make a decision as to whether or not the assault was part of the relevant conduct of the offense of conviction; in this case, whether the assault was committed "in the course of attempting to avoid detection or responsibility" for the possession with intent to distribute charge. From the facts presented, it appears that the assault occurred within the relevant conduct of the drug conviction and was motivated by the agent's status. Had the defendant been convicted of assault, an adjustment for official victim would apply there as well.
6. **False** While health condition is not an element of the bribery guideline, there are instances where certain factors may be considered either for departure or for determining where within the guideline range a person should be sentenced. However, the guidelines suggest that "physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall" (§5H1.4).

7. **True** The offense level should be calculated based on all relevant conduct. Relevant conduct at §1B1.3(a)(2) instructs that "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" shall be considered in determining the offense level.
8. **True** In determining the offense level, relevant conduct at §1B1.3(a)(1) allows consideration of all acts committed by the defendant that occurred during the commission of the offense of conviction.
9. **False** Relevant conduct §1B1.3(a)(1) includes all acts and omissions committed by the defendant that occurred during the commission of the offense of conviction or in the course of attempting to avoid detection for that offense. Because the defendant hit the officer's vehicle while attempting to avoid apprehension, this conduct should be considered relevant in determining the offense level for robbery. In addition, §1B1.3(a)(3) instructs that all harm resulting from such acts should also be considered.

TRAINER OUTLINE - - RELEVANT CONDUCT BREAKOUT GROUP

1. Discuss breakout group objectives

- * To teach participants the proper process and analysis regarding relevant conduct;
- * To ensure correct guideline application regarding relevant conduct.

2. Discuss relevant conduct. Use overlay overheads to present the concept of "expanding parameters," if desired (Overheads #3-#5 in Tab A, Relevant Conduct Lecture).

3. Discussion of Scenarios

A. General format for analysis

- (1) Identify from Chapter Two the appropriate guideline for the OFFENSE OF CONVICTION.

NOTE: This is the starting point for relevant conduct. Participants should think in terms of actual offense conduct relevant to the OFFENSE OF CONVICTION.

- (2) Read through the guideline to see offense characteristics that determine what relevant acts or behavior are utilized in reaching the offense level.
- (3) Turn to the relevant conduct guideline (§1B1.3) to identify what components of the real offense behavior can be considered.
- (4) Repeat steps 2 and 3 for Chapter Three adjustments.

B. Discussion - Bank Robbery Scenario

- (1) Refer as needed to annotated exercises provided to trainer. (Participants will not have this material until after the analysis.)
- (2) Raise each question in sequence on the exercise sheet. The items fall in order of specific offense characteristics, followed by Chapter Three adjustments.

- (3) Use the prompts suggested, but only to the extent necessary to elicit correct answers and citations. Participants will understand and retain whatever they achieve on their own better than information "spoon fed" to them.
- (4) Students should locate and cite the appropriate authority in the guidelines for each point.

C. Discussion - Burglary Scenario

Repeat the process used for the Bank Robbery Scenario (B above, Steps 1 through 4). Refer to the questions and annotated discussion provided.

D. Discussion - Drug Scenario

Repeat the process used for the Bank Robbery Scenario (B above, Steps 1 through 4). Refer to the questions and annotated discussion provided.

NOTE TO TRAINERS AND STUDENTS

The scenarios, questions, and answers presented as part of the Relevant Conduct Breakout Group packet have been developed to facilitate group discussion on this complex issue.

It is important to keep in mind here and throughout the training materials that guideline application decisions are subject to the court's interpretation of the guidelines based on the facts of each individual case.

Answers have been provided in the following exercises to questions that, in practice, will be left to the court to decide. In many instances, disagreements may arise as to correct application in light of the facts of individual cases. In these materials the Commission's Training Staff has taken positions on specific issues in an effort to generate informative discussion. The information provided should not be considered the correct answer.

As stated in the introduction to the Trainer's Manual, all training materials do not necessarily represent an official position of the Commission, should not be considered definitive, and are not binding upon the Commission, the court, or the parties to any case.

RELEVANT CONDUCT EXERCISE

BANK ROBBERY SCENARIO:

Defendants A, B, and C rob a bank. Defendant A, the getaway driver and lookout, is unarmed and waits outside the bank during the robbery. The getaway car, stolen by Defendant B for use in the robbery, is valued at \$10,000. Defendants B and C are armed and during the course of the robbery they tie up the tellers. No shots are fired, but firearms are brandished. Defendant C strikes a teller in the head with his pistol, inflicting a minor wound that requires five stitches.

A police officer on routine patrol in the area attempts to stop Defendants B and C as they exit the bank. The officer is shot in the leg by Defendant B as the defendants escape with \$2,000. After abandoning the getaway car, the defendants divided the loot and separated. All three defendants are later apprehended.

Defendants A, B, and C are each charged with conspiracy to commit bank robbery and a substantive count of bank robbery. Defendant A pleads to the conspiracy count.

QUESTIONS:

Which of the following ADJUSTMENTS will be factored into Defendant A's offense level? (See the robbery guideline, §2B3.1):

1. Should the \$2,000 stolen from the bank be included as loss in applying §2B3.1(b)(1)?
 - Why or why not? (Which guideline provides the authority)
2. Should the \$10,000 value of the stolen car be included as loss in applying §2B3.1(b)(1)?
 - Why or why not?
3. Should the firearm be included under §2B3.1(b)(2)?
 - Why or why not?
4. Is an adjustment given to Defendant A for any or all of the injuries to victims under §2B3.1(b)(3)?
 - Why or why not?

5. Is an adjustment given to Defendant A for physical restraint under §2B3.1(b)(4)(B)?
 - Why or why not?
6. Would Defendant A also receive an adjustment for physical restraint under §3A1.3, Victim Related Adjustments?
 - Why or why not?

Variation #1

During the robbery an alert teller activates the silent alarm, notifying the police. Defendant A hears the squad car sirens and immediately leaves the scene without his two codefendants. Defendants B and C also hear the sirens upon exiting the bank and steal a nearby car by forcing out the owner. In their attempt to escape, they strike a child, causing permanent paralysis of her legs.

Should the offense level for Defendant A include a 6 level increase for "permanent or life-threatening bodily injury" under §2B3.1(b)(3)(C)?

- Why or why not?

RELEVANT CONDUCT EXERCISE - - ANNOTATED

BANK ROBBERY SCENARIO:

Defendants A, B, and C rob a bank. Defendant A, the getaway driver and lookout, is unarmed and waits outside the bank during the robbery. The getaway car, stolen by Defendant B for use in the robbery, is valued at \$10,000. Defendants B and C are armed and during the course of the robbery they tie up the tellers. No shots are fired, but firearms are brandished. Defendant C strikes a teller in the head with his pistol, inflicting a minor wound that requires five stitches.

A police officer on routine patrol in the area attempts to stop Defendants B and C as they exit the bank. The officer is shot in the leg by Defendant B as the defendants escape with \$2,000. After abandoning the getaway car, the defendants divided the loot and separated. All three defendants are later apprehended.

Defendants A, B, and C are each charged with conspiracy to commit bank robbery and a substantive count of bank robbery. Defendant A pleads to the conspiracy count.

QUESTIONS:

Which of the following ADJUSTMENTS will be factored into Defendant A's offense level (See the robbery guideline, §2B3.1):

- (1) **QUESTION:** Should the \$2,000 stolen from the bank be included as loss in applying §2B3.1(b)(1)?

ANSWER: Yes.

EXPLANATION:

Prompt 1: Determine what is considered "loss" as used in the robbery guideline (§2B3.1).

Guideline Citation:

§2B3.1, Application Note 3 references §2B1.1 for a discussion of "loss." According to §2B1.1, Application Note 2, "loss means the value of the property taken, damaged, or destroyed."

Prompt 2: What in the guidelines gives the authority to take the loss into account?

Guideline Citation:

According to §1B1.3 (a)(1), relevant conduct includes "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction."

Prompt 3: What in the guidelines gives the authority to take the money into account even though the defendant did not actually take it, but only drove the car?

Guideline Citation:

According to §1B1.3, Application Note 1, "if the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant."

(2) **QUESTION:** Should the \$10,000 value of the stolen car be included as loss in applying §2B3.1(b)(1)?

ANSWER: Yes.

EXPLANATION:

Prompt 1: Again, what is considered "loss" in applying this guideline adjustment? (2B3.1(b)(1))

Guideline Citation:

*§2B3.1, Application Note 3 references you to §2B1.1 for a discussion of "loss." According to §2B1.1, Application Note 2, "loss means the value of the property **taken**, damaged, or destroyed."*

Prompt 2: What in the guidelines gives the authority to take the value of the stolen car into account?

Guideline Citation:

*According to §1B1.3(a)(1), relevant conduct includes "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred... **in preparation for that offense.**"*

Prompt 3: What in the guidelines gives the authority to take the value of the stolen car into account even though the defendant did not steal the car?

Guideline Citation:

According to §1B1.3, Application Note 1, "if the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant."

(3) **QUESTION:** Should the firearm be included under §2B3.1(b)(2)?

ANSWER: Yes.

EXPLANATION:

Prompt 1: What is the definition of a firearm?

Guideline Citation:

§2B3.1, Application Note 1 references you to §1B1.1, Application Note 1(e), "firearm means any weapon which is designed to or may readily be converted to expel any projectile by an action of an explosive."

Prompt 2: What level increase should be applied?

Guideline Citation:

§2B3.1(b)(2)(A) indicates that if a firearm was discharged, increase by 5 levels.

Prompt 3: What in the guidelines gives the authority to take the firearm information into account?

Guideline Citation:

According to §1B1.3(a)(1), relevant conduct includes "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred in attempting to avoid detection or responsibility for the offense."

Prompt 4: Does Defendant A, unarmed in the getaway car, receive the increase for the weapon? By what authority in the guidelines?

Guideline Citation:

According to §1B1.3, Application Note 1, "[i]f the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant."

(4) **QUESTION:** Is an adjustment given to Defendant A for any or all of the injuries to victims?

ANSWER: Yes. An adjustment would be made based on the greatest degree of injury sustained by a victim.

EXPLANATION:

Prompt 1: In applying §2B3.1(b)(3), what is considered "bodily injury"?

Guideline Citation:

§1B1.1 Application Note 1 (b) defines "bodily injury" as "any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought."

Prompt 2: How is the "bodily injury" adjustment determined when there is more than one victim injured?

Guideline Citation:

§1B1.1 Application Note 4 states that "within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the injury is to be used... the adjustments for different degrees of bodily injury... are not added together."

Note: See Policy Statement §5K2.0, Grounds for Departure. The last two sentences of paragraph two indicate that the robbery guideline does not deal with injury to more than one person.

Prompt 3: What in the guidelines gives the authority to take the injury into account?"

Guideline Citation:

According to §1B1.3(a)(1), relevant conduct includes "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction."

Prompt 4: What in the guidelines gives the authority to hold the defendant accountable for injuries that he did not personally cause?

Guideline Citation:

According to §1B1.3, Application Note 1, "[i]f the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant."

(5) **QUESTION:** Is Defendant A given an adjustment for physical restraint under §2B3.1(b)(4)?

ANSWER: Yes.

EXPLANATION:

Prompt 1: What constitutes being "physically restrained"?

Guideline Citation:

§1B3.1, Application Note 1 references §1B1.1. According to §1B1.1, Application 1(i), "physically restrained means the forcible restraint of the victim such as by being tied, bound, or locked up."

Prompt 2: What in the guidelines gives the authority to take the physical restraint into account?

Guideline Citation:

According to §1B1.3(a)(1), relevant conduct includes "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction."

Prompt 3: What in the guidelines gives the authority to hold Defendant A accountable for the actions of his codefendants who tied up the tellers?

Guideline Citation:

According to §1B1.3, Application Note 1, "[i]f the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant."

CHAPTER THREE ADJUSTMENTS

- (6) **QUESTION:** Would Defendant A also receive an adjustment for physical restraint under Chapter Three, Part A (Victim Related Adjustments)?

ANSWER: No.

EXPLANATION:

Prompt 1: What about double counting if you applied this adjustment?

Guideline Citation:

According to §3A1.3 Application Note 2, this adjustment applies to any offense in which the victim was physically restrained in the course of the offense, except where such restraint is... listed as a specific offense characteristic."

VARIATION #1

During the actual robbery an alert teller activates the silent alarm, notifying the police. Defendant A hears the squad car sirens and immediately leaves the scene without his two codefendants. When Defendants B and C flee the bank they also hear the squad cars. They jump into a nearby car, tossing out the owner. In their attempt to escape, they hit a child, causing permanent paralysis of her legs.

- (1) **QUESTION:** Should the offense level for Defendant A include a 6 level increase for "permanent or life-threatening bodily injury" under §2B3.1(b)(3)(C)?

ANSWER: A more difficult question to answer.

EXPLANATION:

Prompt 1: What is considered permanent injury?

Guideline Citation:

According to §1B1.1, Application Note 1(h), "permanent... injury means... loss or substantial impairment of the function of a bodily member... that is likely to be permanent."

Prompt 2: What in the guidelines gives the authority to consider applying the most severe bodily injury adjustment when it did not occur during the commission of the offense?

Guideline Citation:

According to §1B1.3(a)(1), relevant conduct includes "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred... in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense."

Prompt 3: What in the guidelines gives the authority to consider conduct on the part of codefendants when the defendant might not have planned that a child would be paralyzed as a result of his codefendants' actions?

Guideline Citation:

According to §1B1.3, Application Note 1, "if the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant." The court would have to determine if the activities of Defendants B and C, after A had stranded them, were reasonably foreseeable by Defendant A.

BURGLARY SCENARIO:

Defendants A and B plan to break into and rob an Air Force commissary late one night. Defendant A, a security guard employed at the air base has access to specific security information and floor plans of the commissary.

While attempting to disconnect an alarm on the commissary's vault, the defendants encounter a night watchman. As the watchman approaches the defendants, he observes a pocket knife in Defendant B's hand. The two defendants overpower the guard and lock him in a nearby closet while they proceed to break into the vault and steal \$3,000.

QUESTIONS:

Which of the following ADJUSTMENTS will be factored into the offense levels for both Defendants A and B? (See §2B2.2, Burglary of Other Structures)

1. Should both defendants receive the enhancement for "more than minimal planning" in applying §2B2.2(b)(1)?
 - Why or why not? (Which guideline provides the authority?)
2. Should both defendants receive the enhancement for possession of a dangerous weapon in applying §2B2.2(b)(4)?
 - Why or why not?
3. Should both defendants receive an enhancement for restraint of victim in applying the Chapter Three adjustment §3A1.3?
 - Why or why not?
4. Should Defendant A receive an enhancement for abuse of trust in applying §3B1.3?
 - Why or why not?

BURGLARY SCENARIO:

Defendants A and B plan to break into and rob an Air Force commissary late one night. Defendant A, a security guard employed at the air base has access to specific security information and floor plans of the commissary.

While attempting to disconnect an alarm on the commissary's vault, the defendants encounter a night watchman. As the watchman approaches the defendants, he observes a pocket knife in Defendant B's hand. The two defendants overpower the guard and lock him in a nearby closet while they proceed to break into the vault and steal \$3,000.

QUESTIONS:

Which of the following ADJUSTMENTS will be factored into the offense levels for Defendants A and B? (See §2B2.2, Burglary of Other Structures)

- (1) **QUESTION:** Should both defendants receive the enhancement for "more than minimal planning" in applying §2B2.2(b)(1)?

ANSWER: Yes.

EXPLANATION:

Prompt 1: In applying §2B2.2(b)(1), what is considered "more than minimal planning" in determining the appropriate guideline adjustment?

Guideline Citation:

§2B2.2, Application Note 1 references §1B1.1 for a definition of "more than minimal planning." According to §1B1.1(f) "more than minimal planning means more planning than is typical for commission of the offense in a simple form. It lists the following example, "... obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning."

Prompt 2: What in the guidelines gives the authority to take "more than minimal planning" into account?

Guideline Citation:

According to §1B1.3(a)(1), it includes "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred "... in preparation for that offense."

Prompt 3: What in the guidelines gives the authority to apply the enhancement for Defendant B even though he did not devise the plan to access the building and did not have the knowledge to deactivate the alarm system?

Guideline Citation:

§1B1.3, Application Note 1, includes conduct "for which the defendant is otherwise accountable."

(2) **QUESTION:** Should both defendants receive the enhancement for possession of a dangerous weapon in applying §2B2.2(b)(4)?

ANSWER: Yes.

EXPLANATION:

Prompt 1: In applying §2B2.2(b)(4), what is considered a "dangerous weapon" in determining the appropriate guideline adjustment?

Guideline Citation:

§2B2.2, Application Note 1 references §1B1.1 (Application Instructions). According to §1B1.1, Application Note 1(d), "dangerous weapon means an instrument capable of inflicting death or serious bodily injury."

Prompt 2: What in the guidelines gives the authority to take the weapon information into account?"

Guideline Citation:

According to §1B1.3(a)(1), "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred **during the commission of the offense of conviction.**"

Prompt 3: What in the guidelines gives the authority to hold Defendant A accountable for the weapon enhancement if Defendant B actually possessed the knife?

Guideline Citation:

According to §1B1.3, Application Note 1, "conduct for which the defendant is otherwise accountable" and "conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant."

CHAPTER THREE ADJUSTMENTS

- (3) **QUESTION:** Should both defendants receive an enhancement for restraint of victim in applying the Chapter Three adjustment, §3A1.3?

ANSWER: Yes.

EXPLANATION:

Prompt 1: In applying §3A1.3, what is the definition of "physically restrained"?

Guideline Citation:

§3A1.3, Application Note 1 references §1B1.1 (Application Instructions) for a definition of "physically restrained". According to §1B1.1 Application Note 1(i), "physically restrained means the forcible restraint of the victim such as by being tied, bound, or locked up."

Prompt 2: What in the guidelines gives the authority to consider Chapter Three adjustments with respect to relevant conduct?"

Guideline Citation:

According to §1B1.3, the conduct that is relevant to determining the applicable guideline range includes Chapter Three adjustments. It shall be determined on the basis of "all acts and omissions committed or aided and abetted by the defendant,... that occurred during the commission of the offense of conviction... or that otherwise were in furtherance of that offense."

- (4) **QUESTION:** Should Defendant A receive an enhancement for abuse of trust in applying §3B1.3?

ANSWER: A more difficult question to answer.

EXPLANATION:

Prompt 1: In applying §3B1.3, what criteria must be met for the abuse of trust adjustment to apply?

Guideline Citation:

§3B1.3 Application Note 1, states that "the position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons."

DRUG SCENARIO:

During a one year period, Defendant X sells cocaine at various times to Defendants B, C, and D. Defendant B was sold one kilogram; C - two kilograms; and D - three kilograms. During the same period, Defendants B, C, and D each separately distributed the cocaine through unindicted individuals who served as "runners." All defendants were indicted of conspiracy to distribute six kilograms of cocaine.

Defendant B pleaded guilty to distribution of one kilogram of cocaine and Defendants X, C, and D were convicted of conspiracy to distribute six kilograms of cocaine.

QUESTIONS:

What quantities of drugs should be used to determine the offense levels of the defendants?

- (1) **QUESTION:** What quantity of drugs should be used to determine the offense level of Defendant X?

ANSWER: Six kilograms

EXPLANATION:

Prompt 1: Which Chapter Two guidelines and commentary are relevant?

Guideline Citation:

§2D1.4(a) indicates that a conviction for conspiracy should receive the same offense level as the object of the conspiracy, in this case, an offense involving drug distribution. Therefore, §2D1.1 is used to determine the offense level. The base offense level for this guideline is based on quantity of drugs.

As referenced in §2D1.1, Application Note 6, "[w]here there are multiple transactions... the quantities of drugs are to be added."

Prompt 2: What in the guidelines gives the authority to consider all the drugs against Defendant X?

Guideline Citation:

According to §1B1.3(a)(1), the conduct that is relevant to determining the applicable range includes "all acts and omissions committed or aided and abetted by the defendant,... that occurred during the commission of the offense of conviction..."

(2) **QUESTION:** What quantity of drugs should be used to determine the offense level of Defendant D?

ANSWER: Three kilograms

EXPLANATION:

Prompt 1: Which Chapter Two guidelines and commentary are relevant?

Guideline Citation:

§2D1.4 indicates that a conviction for conspiracy should receive the same offense level as the object of the conspiracy, in this case an offense involving drugs. Therefore, §2D1.1 is used to determine the offense level. The base offense level for this guideline is based on quantity of drugs.

§2D1.1, Application Note 6, instructs "where there are multiple transactions..., the quantities of drugs are to be added."

Prompt 2: What in the guidelines gives the authority to include the three kilograms bought and sold by Defendant D?

According to §1B1.3(a)(1), conduct relevant to determine the applicable guideline range includes, "all acts and omissions committed or aided and abetted by the defendant,... that occurred during the commission of the offense of conviction."

Prompt 3: Can you include drugs distributed by the other codefendants in calculating the guidelines for Defendant D?

Guideline Citation:

According to §1B1.3(a)(1), conduct relevant to determine the applicable guideline range includes, "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction."

According to §1B1.3, Application Note 1, among conduct that the defendant can be considered "otherwise accountable" is conduct that he "counseled, commanded, induced, procured, or willfully caused. If the conviction is for conspiracy, it includes conduct... that was known to or was reasonably foreseeable by the defendant."

In this scenario there is no evidence to suggest that Defendant D knew that Defendants B and C were involved in distributions, or that Defendant X was distributing to any other individuals. Therefore, the cocaine that was distributed by Defendant X to Defendants B and C would not have been reasonably foreseeable by Defendant D.

- (3) **QUESTION:** What quantity of drugs should be used to determine the offense level for Defendant B?

ANSWER: One kilogram

EXPLANATION:

Prompt 1: Which Chapter Two guidelines and commentary are relevant?

Guideline Citation:

According to §2D1.1(a)(3), the base offense level is the level specified in the drug quantity table.

Prompt 2: What in the guidelines gives the authority to include the one kilogram bought and sold by Defendant B?

Guideline Citation:

According to §1B1.3(a)(1), relevant conduct includes all acts "committed or aided and abetted by the defendant... that occurred during the commission of the offense of conviction."

Prompt 3: Can you include drugs not distributed by Defendant B?

Guideline Citations:

§2D1.1, Application Note 11, indicates that types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level and refers to §1B1.3(a)(2) (Relevant Conduct).

According to §1B1.3(a)(2), "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction", may be considered in determining the offense level.

According to §1B1.3 Application Note 2, such acts and omissions, "refers to acts... aided and abetted by the defendant, or for which the defendant would be otherwise accountable."

In this case there is no evidence that the defendant "counseled, commanded, induced, procured or willfully caused" the conduct of others, or was in any other way "otherwise accountable."

Prompt 4: Does it matter that Defendant B was not convicted of all substantive acts of the conspiracy?

Guideline Citations:

According to §2D1.1 Application Note 11, "types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct)."

§1B1.3(a)(2), "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction," may be considered in determining the offense level.

According to §1B1.3 Application Note 2, such acts and omissions "refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable."

A conviction for conspiracy is not necessary to include conduct of others. However, there is no evidence to suggest that Defendant B counseled, commanded, induced, procured, or in any way was otherwise accountable for the activities of Defendants C or D.

VARIATION #2

Defendant X sells cocaine to Defendants B, C, and D under an agreement that their runners distribute the drugs at specified areas of the city. In the planning and discussions of the operation, Defendant X makes the final decisions.

Defendants B, C, and D occasionally use cocaine together and have informally agreed not to sell drugs to each others customers.

- (1) **QUESTION:** What quantity of cocaine should be used to determine the offense level of Defendant D?

ANSWER: Six kilograms

EXPLANATION:

Prompt 1: Which Chapter Two guidelines and commentary are relevant?

Guideline Citation:

According to §2D1.4, the base offense level shall be the same as if the object of the conspiracy or attempt had been completed. In this case §2D1.1 should be used and the base offense level is the level specified in the drug quantity table.

Prompt 2: What in the guidelines gives the authority to include the three kilograms bought and sold by Defendant D?

Guideline Citation:

According to §1B1.3(a)(1), "all acts and omissions committed or aided and abetted by the defendant... that occurred during the commission of the offense of conviction."

Prompt 3: Can you include drugs distributed by the other codefendants in calculating the guidelines for Defendant D?

Guideline Citation:

According to §1B1.3(a)(2), "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" may be considered in determining the offense level.

According to §1B1.3 Application Note 2, "[s]uch acts and omissions... refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable."

In this case Defendant D may be considered to have aided and abetted or to be otherwise accountable for the activities of the other codefendants because of the agreement not to sell drugs to each others customers.

According to §1B1.3, Application Note 1, "if the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant."

The conspiratorial nature of the agreement allows the consideration of the acts of other participants.

- (2) **QUESTION:** What quantity of drugs should be used to determine the offense level for Defendant B?

ANSWER: Six kilograms

EXPLANATION:

Prompt 1: Which Chapter Two guidelines and commentary are relevant?

Guideline Citations:

According to §2D1.1(a)(3), the base offense level is the level specified in the drug quantity table.

According to §2D1.1, Application Note 11, "types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level."

Prompt 2: What in the guidelines gives the authority to include the one kilogram bought and sold by Defendant B?

Guideline Citations:

According to §1B1.3(a)(1), it includes "all acts and omissions committed or aided and abetted by the defendant... that occurred during the commission of the offense of conviction."

Prompt 3: Can you include drugs distributed by the other codefendants in calculating the guidelines for Defendant B even though he was not convicted of the whole conspiracy?

Guideline Citations:

According to §1B1.3(a)(2), "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or

plan as the offense of conviction" may be considered in determining the base offense level.

According to §1B1.3, Application Note 2, "[s]uch acts and omissions... refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable."

The defendant may be considered to have aided and abetted, or to be otherwise accountable for the activity of the other codefendants because of the agreement not to sell drugs to each others customers.

According to §1B1.3, Application Note 1, "it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant."

The conspiratorial nature of the agreement allows the consideration of conduct of others.

According to §1B1.3, Background Commentary, "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."

According to §1B1.3, Background Commentary, "... in a drug distribution case, quantities and types not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction."

VARIATION #3

On one occasion Defendant D was accompanied by his live-in girlfriend when he made a purchase (250 grams) from Defendant X. Defendant D made arrangements to sell the 250 grams to one of his runners. On the day of the sale he became ill and asked his girlfriend to make the transaction. The person who purchased the cocaine was an undercover agent. After the transaction the girlfriend was arrested and was indicted of one count of conspiracy to distribute six kilograms and one count of distribution of 250 grams. She subsequently pleaded guilty to the distribution count. Investigation determined that on two other occasions she had delivered a total of 200 grams to her boyfriend's runners.

- (1) **QUESTION:** What quantity of cocaine should be used to determine the girlfriend's offense level?

ANSWER: The 250 grams in the count of conviction and the 200 grams she distributed on two occasions to her boyfriend's runners.

EXPLANATION:

Prompt 1: Which Chapter Two guidelines and commentary are relevant?

Guideline Citation:

According to §2D1.1(a)(3), the base offense level is the level specified in the drug quantity table.

As referenced in §2D1.1, Application Note 6, "[w]here there are multiple transactions... the quantities of drugs are to be added."

§2D1.1, Application Note 11, states that "[t]ypes and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2)."

Prompt 2: What in the guidelines gives the authority to include the 250 grams that she distributed?

Guideline Citation:

According to §1B1.3(a)(1), the conduct that is relevant to determining the sentencing range includes "all acts and omissions committed or aided and abetted by the defendant,... that occurred during the commission of the offense of conviction."

Prompt 3: What in the guidelines gives the authority to include the 200 grams she distributed on the other occasions not included in the count of conviction?

Guideline Citation:

According to §1B1.3(a)(2), "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction," can be considered in application of the guidelines.

According to §2D1.1, Application Note 11, "... drugs not specified in the count of conviction may be considered in determining the offense level."

According to §1B1.3, Background Commentary, "... in a drug distribution case, quantities and types not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction."

ROLE IN THE OFFENSE

- (1) **QUESTION:** Using the facts through Variation #3, what role in the offense adjustment, if any, should be made to the offense level of Defendant X?

ANSWER: 4 level enhancement for organizer, leader

EXPLANATION:

Prompt 1: What factors should be considered in making this assessment?

Guideline Citation:

According to §3B1.1(a), "if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels."

Application Note 1 states "[a] 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted."

According to §3B1.1, Application Note 3, "in distinguishing a leadership and organizational role from one of mere management or supervision... factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others."

Prompt 2: What is the scope of the conspiracy that can be taken into account when making this assessment?

Guideline Citation:

According to §1B1.3(a), relevant conduct is applicable to the adjustments in Chapter Three.

Guideline §1B1.3(a)(1) provides that "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction"... are relevant to the determination of the applicable guideline range.

- (2) **QUESTION:** What role in the offense adjustment, if any, should be made to the offense level of Defendant D?

ANSWER: 3 level enhancement for manager

EXPLANATION:

Prompt 1: What factors should be considered in making this assessment?

Guideline Citation:

According to §3B1.1(b), "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels."

Guideline §3B1.1, Application Note 1, states "[a] 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted."

Participants in this offense have included Defendants X, B, C, D, the girlfriend, and unindicted runners.

Application Note 2 of §3B1.1, indicates "[i]n assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered."

Prompt 2: What is the scope of the conspiracy that can be taken into account when making this assessment?

Guideline Citation:

According to §1B1.3(a), relevant conduct is applicable to the adjustments in Chapter Three.

Guideline §1B1.3(a)(1) provides that "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction" ... are relevant to the determination of the applicable guideline range.

- (3) **QUESTION:** What role in the offense adjustment, if any, should be made to the offense level of the girlfriend?

ANSWER: 2 level reduction for minor participant

EXPLANATION:

Prompt 1: What factors should be considered in making this assessment?

Guideline Citation:

According to §3B1.2(b), "[i]f the defendant was a minor participant in any criminal activity, decrease by 2 levels." Application Note 3 states that "a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." ("Minimal participant" is described in Application Notes 1 and 2.)

Prompt 2: What is the scope of the conspiracy that can be taken into account when making this assessment?

Guideline Citation:

Guideline §1B1.3(a)(1) provides that "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction"... are relevant to the determination of the applicable guideline range.

According to §1B1.3, Application Note 1, among the types of behavior for which the defendant is "otherwise accountable" are "counseled, commanded, induced, procured, or willfully caused. If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant."

§1B1.3(a)(2) directs that "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" is relevant to the determination of the guideline range.

Prompt 3: Can behavior not included in the count of conviction be taken into account in determining role in the offense?

Guideline Citation:

§1B1.3 directs that in all cases "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense" are relevant to the determination of the applicable guideline range (§1B1.3(a)(1)).

§1B1.2(a)(2) expands what is "considerable" to include: "all such acts and omissions that were **part of the same course of conduct or common scheme or plan as the offense of conviction.**"

According to §1B1.3, Background Commentary, "[c]onduct that is **not formally charged or is not an element of the offense of conviction** may enter into the determination of the applicable guideline sentencing range."

According to §1B1.3, Background Commentary, "... in a drug distribution case, quantities and types **not specified in the count of conviction** are to be included in determining the offense level **if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction.**"