



# Multiple Counts

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**2023 National Seminar**

**August 30 & 31, 2023**

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# Lori Baker

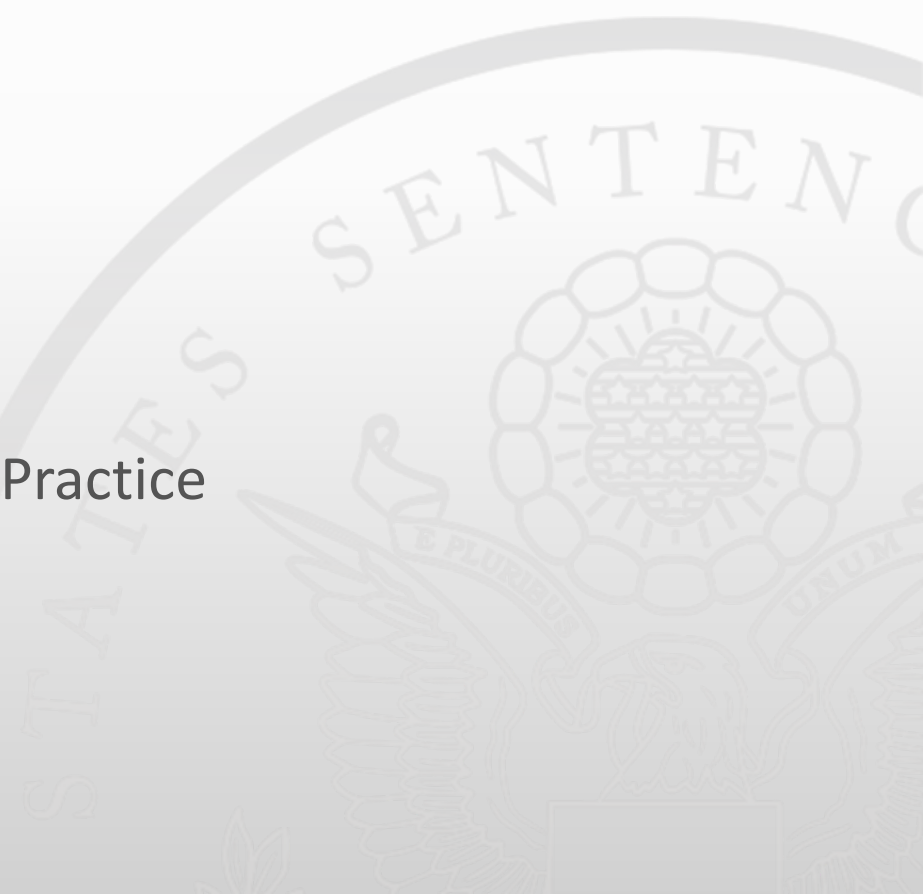
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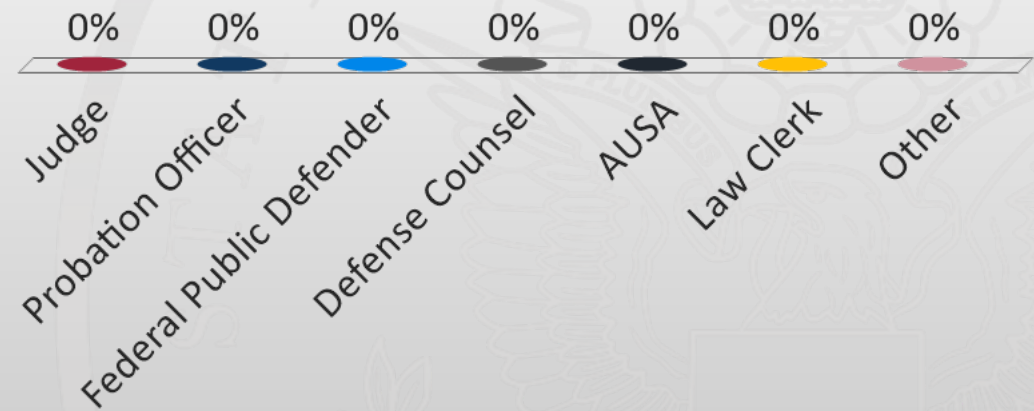
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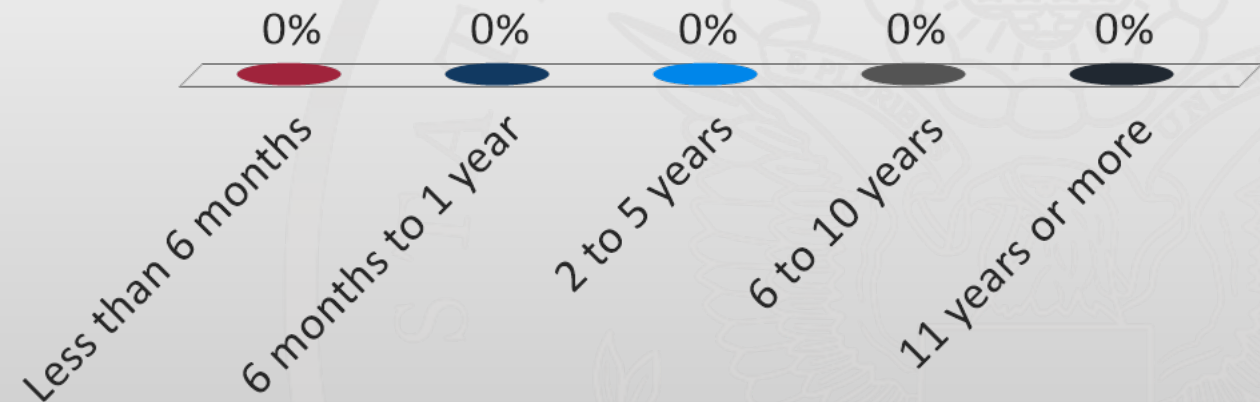
# What is your current position?

- A. Judge
- B. Probation Officer
- C. Federal Public Defender
- D. Defense Counsel
- E. AUSA
- F. Law Clerk
- G. Other



# How long have you been working in the field of federal sentencing?

- A. Less than 6 months
- B. 6 months to 1 year
- C. 2 to 5 years
- D. 6 to 10 years
- E. 11 years or more



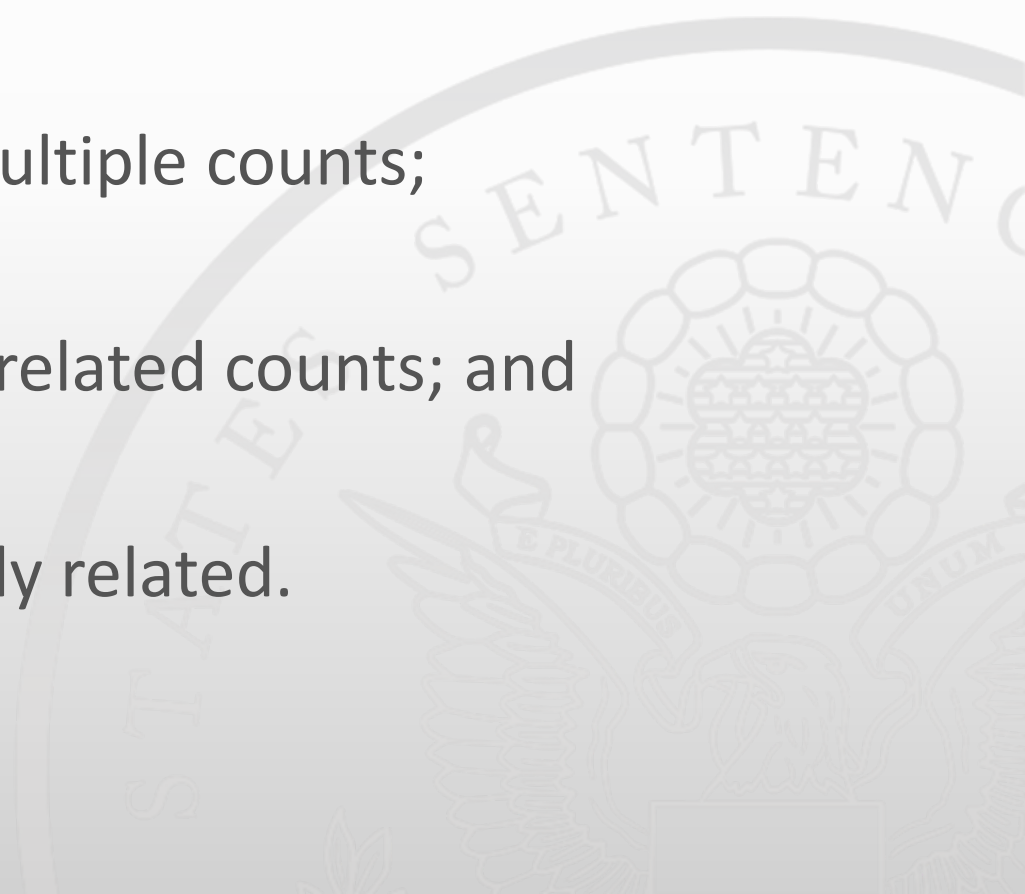
# Learning Objectives

By the end of today's session, your active engagement will empower you to:

**Describe** the rationale for the rules for multiple counts;

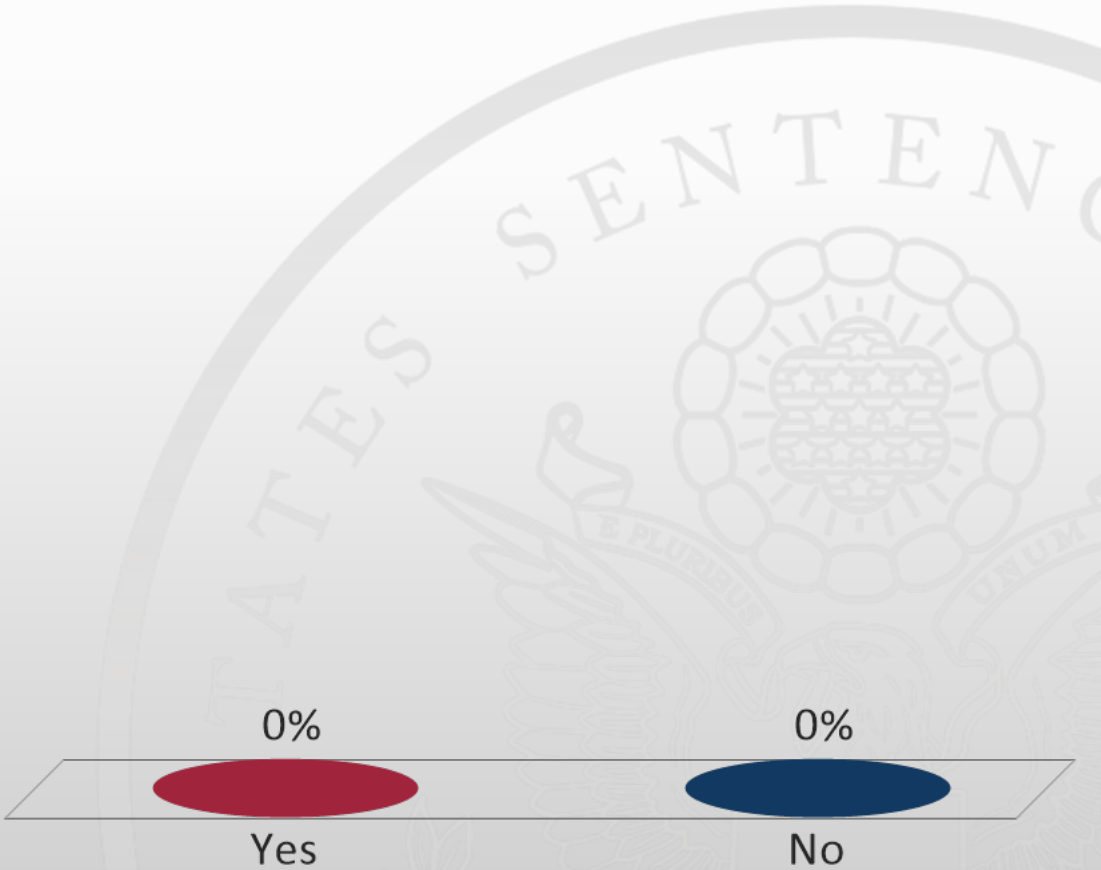
**Utilize** the decision tree to group closely related counts; and

**Assign** units for counts that are not closely related.



# Have you had a case involving multiple counts of conviction?

- A. Yes
- B. No



Will there always be one offense level?

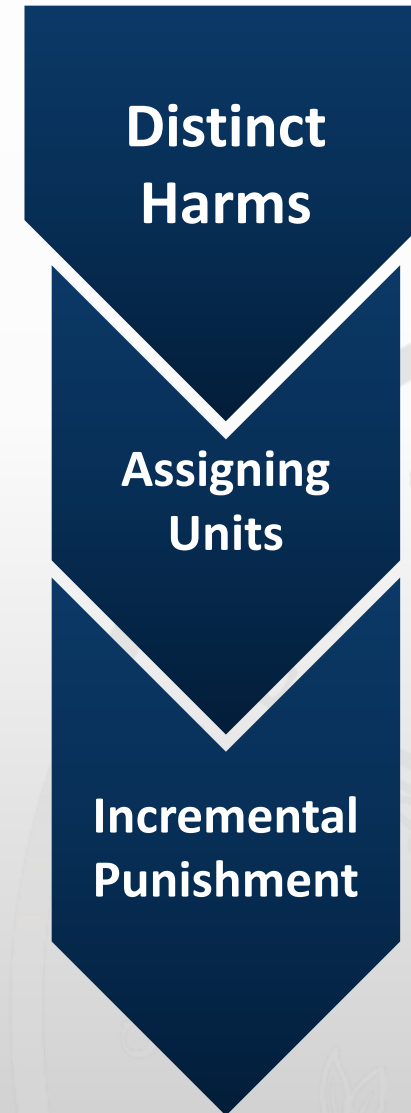
**YES!**

The multiple counts rules are utilized to determine a...

**single offense level.**



# Rationale



# Two Sets of Rules

## 1. “Grouping” (§3D1.2)

- **Closely related counts** are treated as a single, composite harm.
- One offense level represents all counts.



# Two Sets of Rules

## 1. “Grouping” (§3D1.2)

- Closely related counts are treated as a single, composite harm.
- One offense level represents all counts.

## 2. “Assigning Units” (§3D1.4)

- Provides incremental punishment for multiple counts involving separate, distinct harms.
- Adds offense levels for **significant** additional criminal conduct.

# Grouping Closely Related Counts at §3D1.2

Multiple counts involve *substantially the same* harm when:

**RULE** **a** Same Victim, Same Act

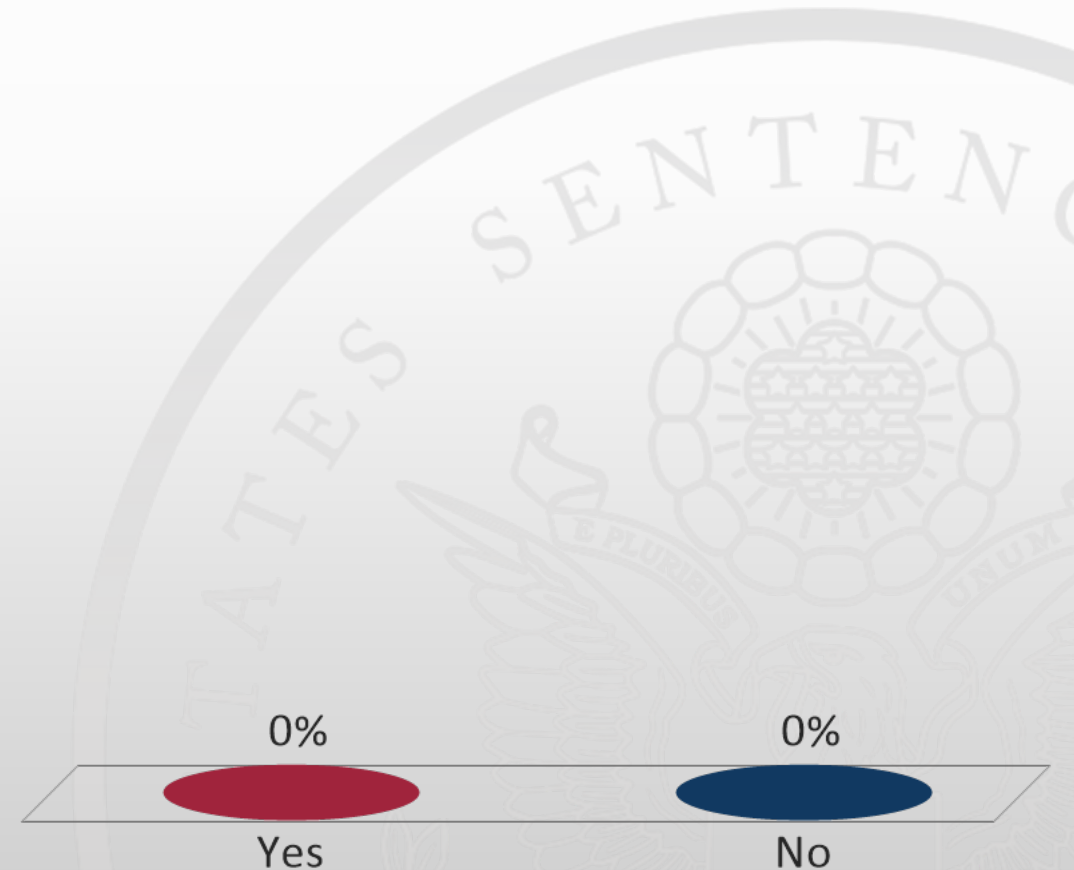
**RULE** **b** Same Victim, Related Acts

**RULE** **c** Conduct Accounted for by SOC/Adjustment

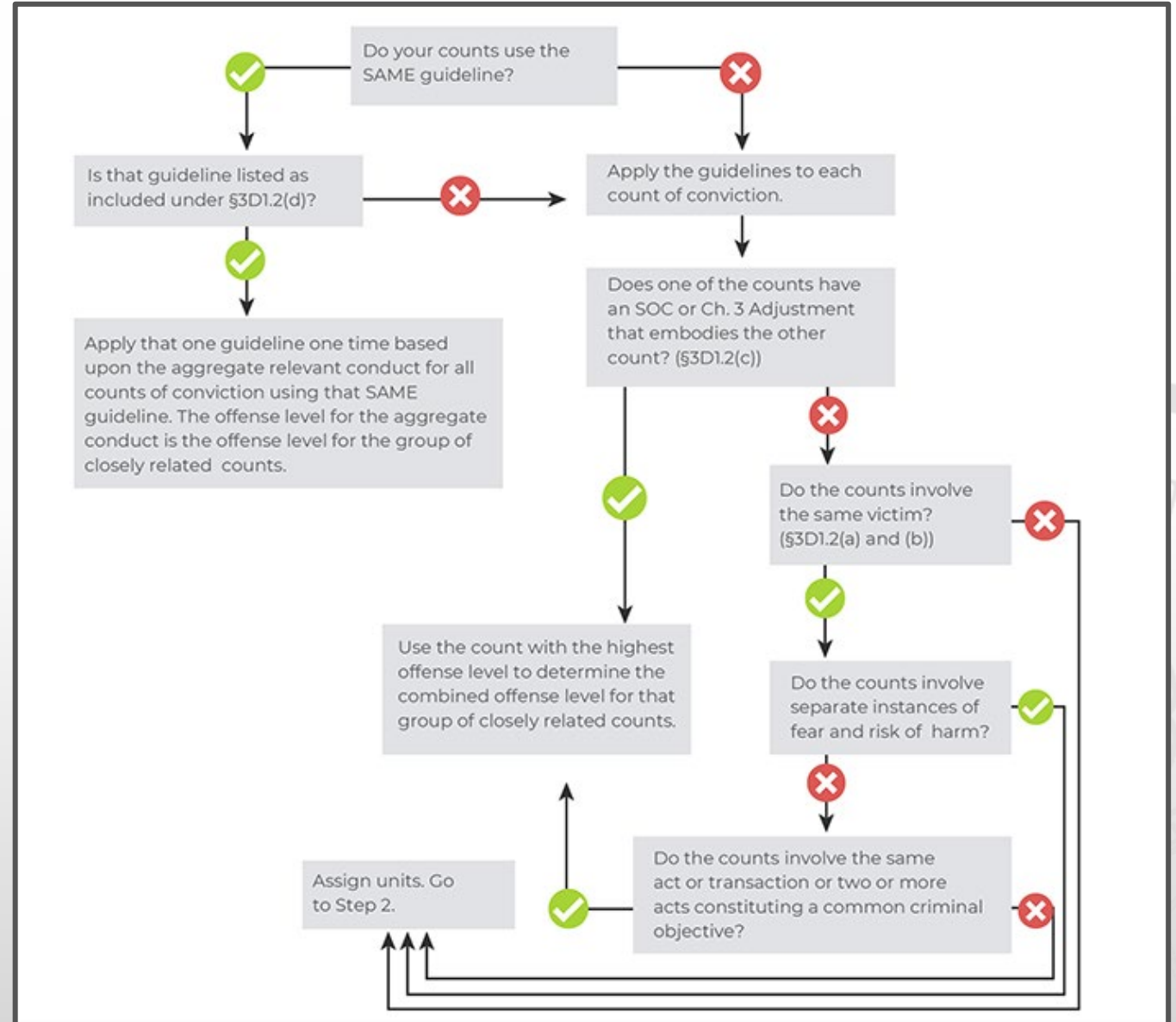
**RULE** **d** Aggregated Harm Guidelines

# Have you used our Decision Tree for Grouping Multiple Counts of Conviction?

- A. Yes
- B. No



# Decision Tree: Grouping Multiple Counts of Conviction



Do your counts use the  
**SAME** guideline?

Is that guideline listed as  
included under §3D1.2(d)?

RULE

d

GROUPING

# Offenses Included at §3D1.2(d)

§3D1.2(d) (p. 367)

Drugs | §2D1.1

Firearms | §2K1.1

Fraud | §2B1.1

Possession, Receipt,  
Distribution of Child  
Pornography | §2G2.2

Tax Offenses | §2T1.1

Money Laundering | §2S1.1

Bribery | §2C1.1

Alien Smuggling | §2L1.1

Counterfeiting | §2B5.3



# Scenario 1

The defendant pled guilty to:

- one count of **felon-in-possession**; and
- one count of **theft from a firearms dealer**

Each count involves two separate firearms, and the applicable guideline for both counts is **§2K2.1**.

Do these offenses group under §3D1.2(d)?

- ✓ A. Yes
- B. No



# Offenses Included at §3D1.2(d)

§3D1.2(d) (p. 367)

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

§2A3.5;

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

§§2C1.1, 2C1.2, 2C1.8;

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

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1,

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

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

Firearms - §2K2.1

Do your counts use the  
**SAME** guideline?

Is that guideline listed as  
included under §3D1.2(d)?

Apply that one guideline one time based upon the  
aggregate relevant conduct for all counts of  
conviction using that SAME guideline.

RULE

d

GROUPING

# Scenario 1A

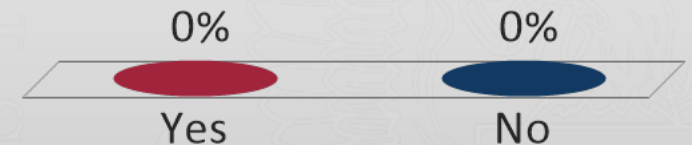
The defendant pled guilty to:

- one count of **felon-in-possession**; and
- one count of **theft from a firearms dealer**

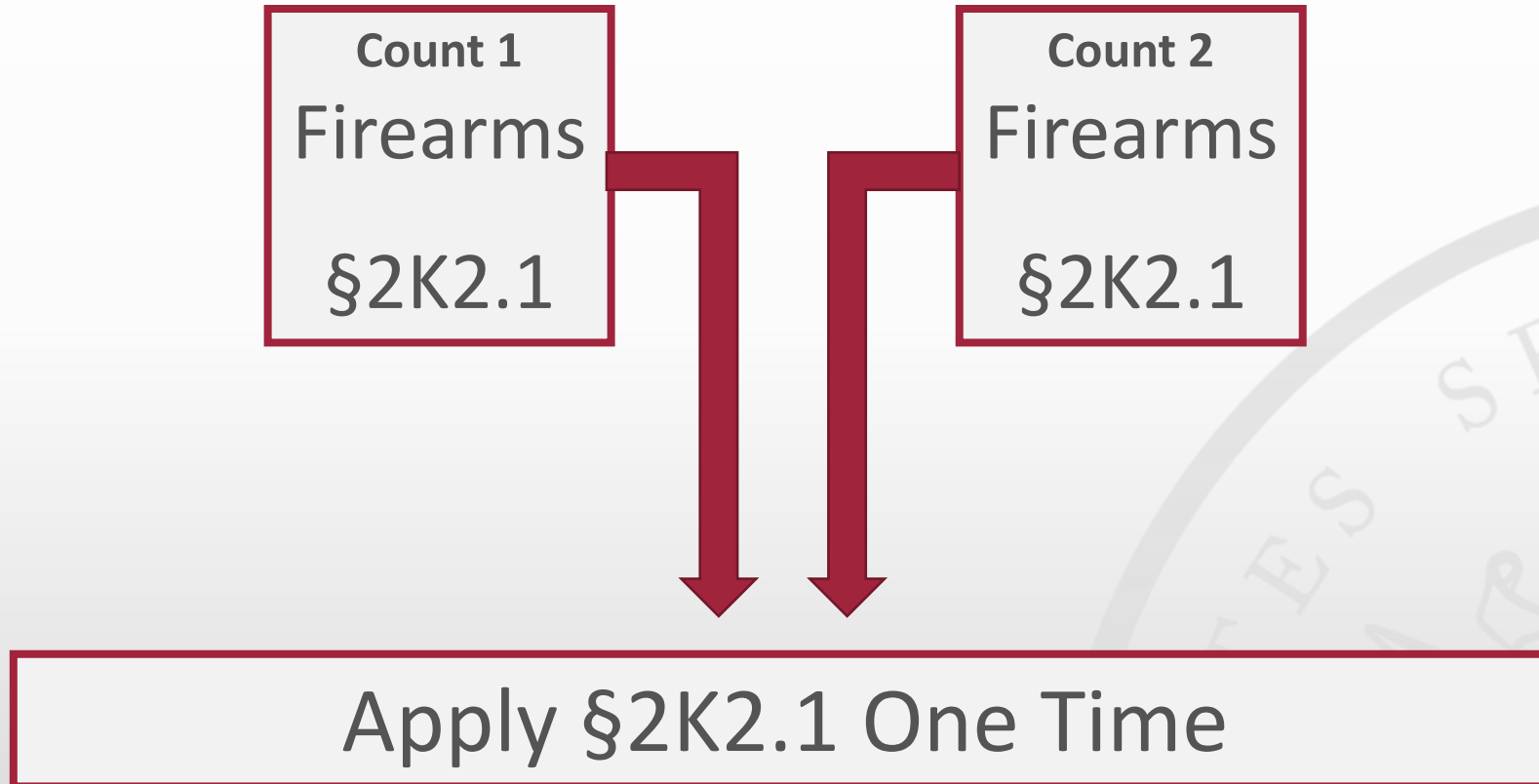
Each count involves two separate firearms, and the applicable guideline for both counts is **§2K2.1**. The guns in count one were not stolen, but the guns in count two were stolen.

**Does the 2-level SOC for a “stolen firearm” apply?**

- ✓ A. Yes
- B. No



# Grouping under “Rule (d)”



# Impact of Grouping under “Rule (d)”

## Counts 1 + 2

### Chapter Two

- §2K2.1(a)(6)(A) = 14
- §2K2.1(b)(1)(A) = +2
- §2K2.1(b)(4)(A) = +2

### Chapter Three

- None

**18**

Adjusted Offense Level

The offense level for the group is the **aggregate quantity** of both offenses.

**§3D1.3(b)**

# Scenario 2

The defendant engaged in an insurance fraud resulting in a loss of \$92,000. When he was arrested at his home, agents found two computers the defendant had stolen from the U.S. Sentencing Commission. The computers were valued at \$2,000 each.

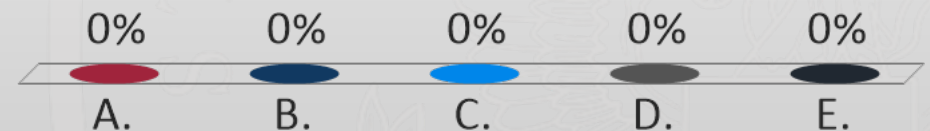
The defendant pled guilty to:

- Count 1: **Wire Fraud**
- Count 2: **Theft**

The applicable guideline for both counts is **§2B1.1**.

These counts . . .

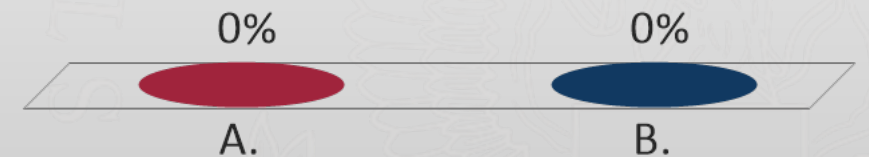
- A. Group under (a)
- B. Group under (b)
- C. Group under (c)
- ✓ D. Group under (d)
- E. Do not group



## Scenario 2A

Which of the following is a true statement?

- A. The loss amount at §2B1.1 is \$92,000 because the insurance fraud and the theft are unrelated, and the insurance loss is greater.
- ✓ B. The loss amount at §2B1.1 is \$96,000 because the offenses group under Rule (d).





## Scenario 3

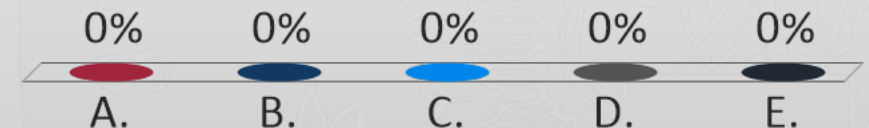
The defendant pled guilty to:

- Count 1: Distribution of fentanyl resulting in the death of **Victim A**
- Count 2: Distribution of fentanyl resulting in the death of **Victim B**

The applicable guideline for both counts is **§2D1.1**.

These counts . . .

- A. Group under (a)
- B. Group under (b)
- C. Group under (c)
- ✓ D. Group under (d)
- E. Do not group



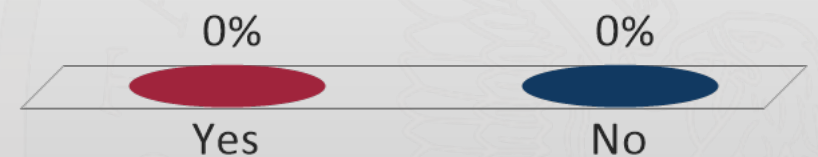
## Scenario 4

The defendant pled guilty to two counts of **production of child pornography (§2G2.1)** based on two separate instances of production.

Do these counts group under §3D1.2(d)?

A. Yes

B. No



Do your counts use the  
**SAME** guideline?

Is that guideline listed as  
included under §3D1.2(d)?

RULE

d

GROUPING

# Offenses **Excluded** at §3D1.2(d)

## §3D1.2(d) (p. 367)

Specifically excluded from the operation of this subsection are:

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

§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§2C1.5;

§§2D2.1, 2D2.2, 2D2.3;

§§2E1.3, 2E1.4, 2E2.1;

§§2G1.1, 2G2.1;

§§2H1.1, 2H2.1, 2H4.1;

§§2L2.2, 2L2.5;

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

§§2P1.1, 2P1.2, 2P1.3;

§2X6.1.

**§2G2.1 - Production**

# Offenses **Excluded** at §3D1.2(d)

## §3D1.2(d) (p. 367)

Production of Child  
Pornography | §2G2.1

Robbery | §2B3.1

Murder | §2A1.1

Kidnapping | §2A4.1

Criminal Sex Abuse | §2A3.1

Assault | §2A2.2

Blackmail | §2B3.3

Extortion | §2B3.2

Burglary | §2B2.1

# Scenario 5

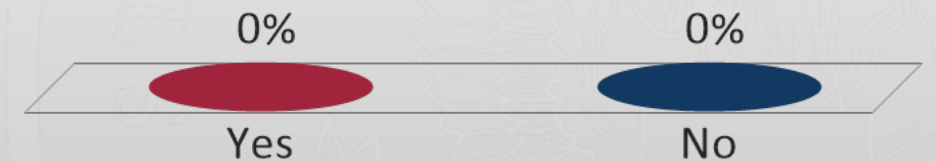
The defendant pled guilty to:

- one count of **felon-in-possession (§2K2.1)**; and
- one count of **distribution of heroin (§2D1.1)**

Do these counts group under §3D1.2(d)?

A. Yes

✓ B. No



# Different Guidelines?



Do Not Group under “Rule (d)”



Apply the guidelines to each count of conviction.



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

## Count 1

Chapter Two

- BOL, SOC, CR

Chapter Three

- Victim, Role, Obstruction

**Adjusted Offense Level**

## Count 2

Chapter Two

- BOL, SOC, CR

Chapter Three

- Victim, Role, Obstruction

**Adjusted Offense Level**

Apply the guidelines to each count of conviction.

Does one of the counts have an SOC or Ch. 3 Adjustment that embodies the other count?



# Scenario 5A

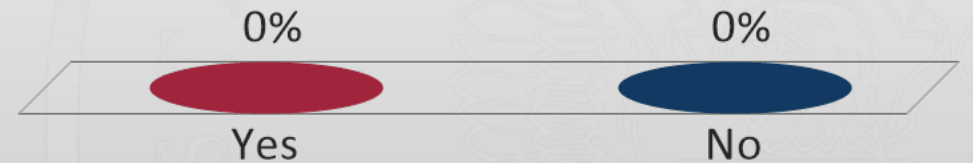
The defendant pled guilty to:

- one count of **felon-in-possession (§2K2.1)**; and
- one count of **distribution of heroin (§2D1.1)**

The firearm and drugs were found “**in close proximity to**” one another.

Do these counts group under §3D1.2(c)?

- ✓ A. Yes
- B. No



# Explanation of Scenario 5A

## Count 1: Firearms

### Chapter Two

- BOL 20
- §2K2.1(b)(6)(B) +4 (for drugs)

**24**

Adjusted Offense Level

## Count 2: Drugs

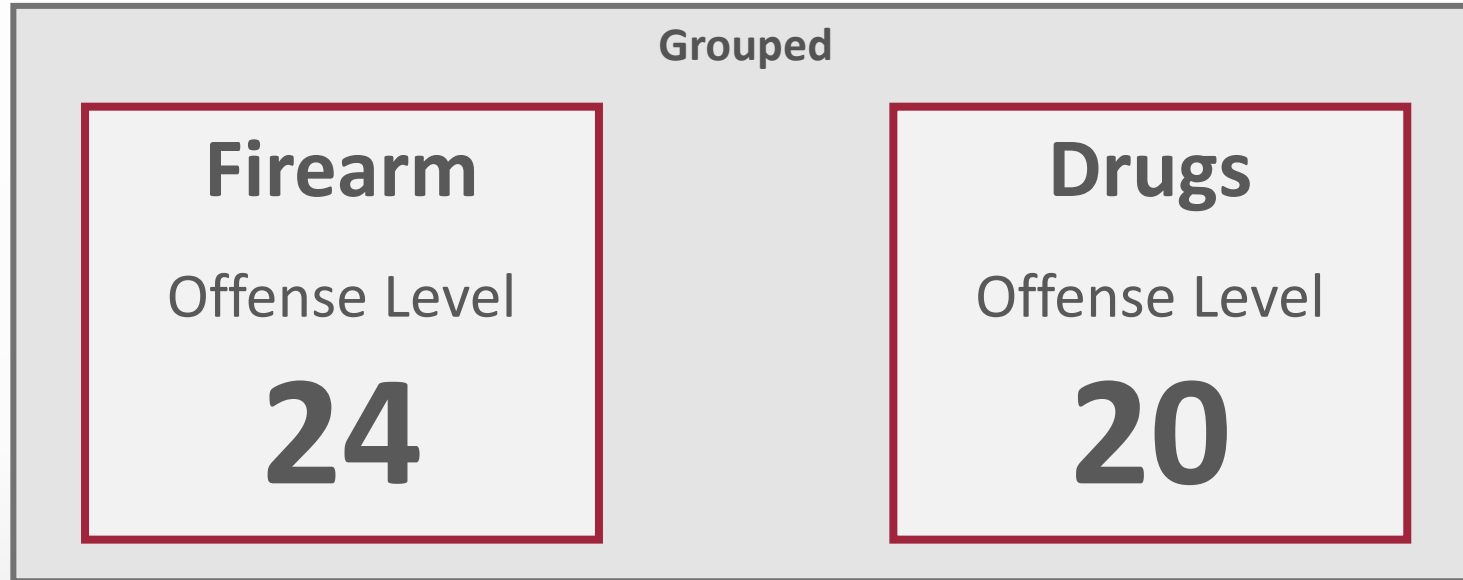
### Chapter Two

- BOL 18
- §2D1.1(b)(1) +2 (for gun)

**20**

Adjusted Offense Level

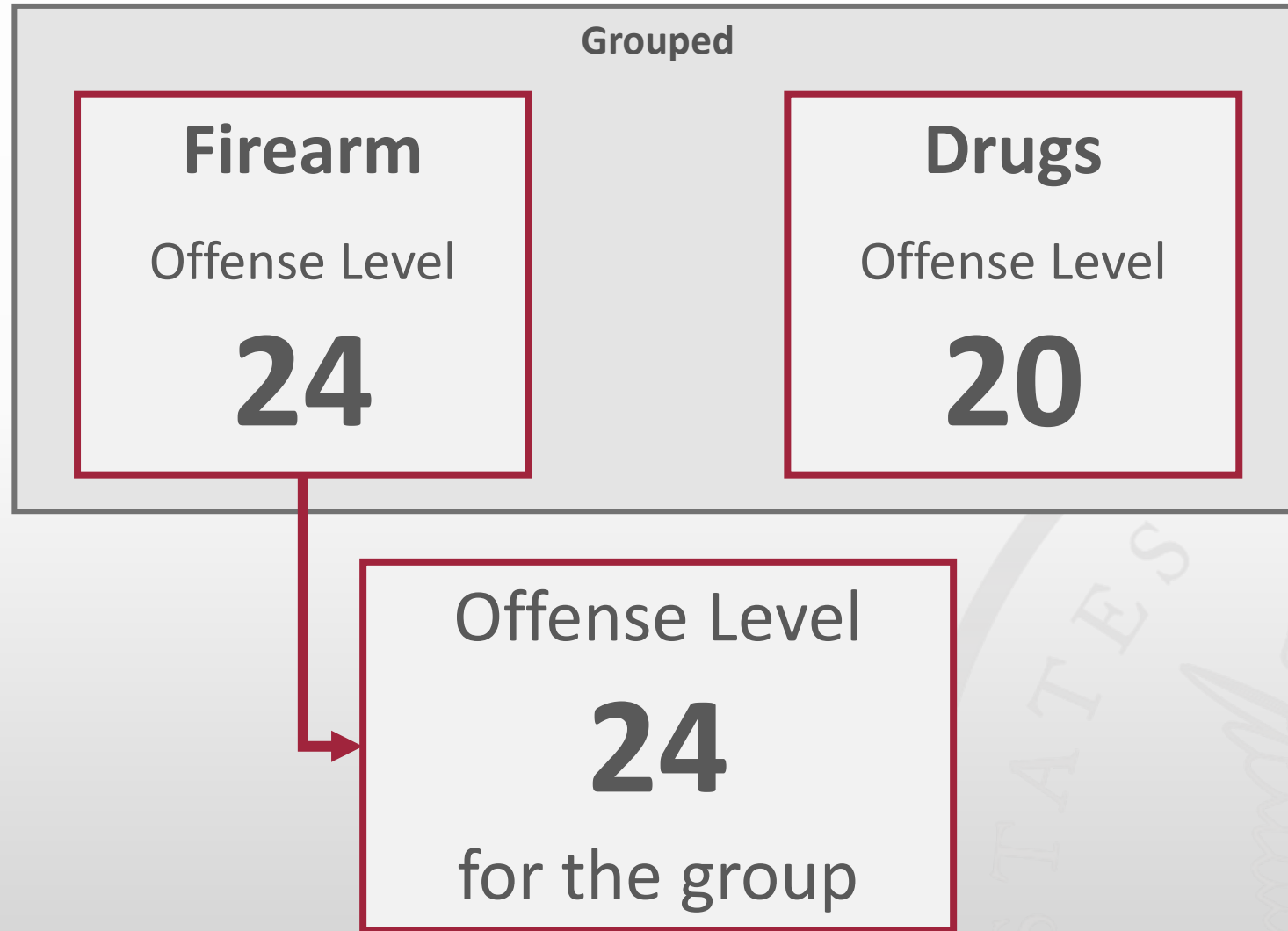
# Impact of Counts Grouping under “Rule (c)”



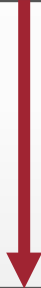
?



# Impact of Counts Grouping under “Rule (c)”



Does one of the counts have an SOC or Ch. 3 Adjustment that embodies the other count?



Do the counts involve the same victim?



# Grouping Closely Related Counts at §3D1.2

Multiple counts involve *substantially the same* harm when:

RULE **a** Same Victim, Same Act

RULE **b** Same Victim, Related Acts

RULE **c** Conduct Accounted for by SOC/Adjustment

RULE **d** Aggregate Harm Guidelines



## Scenario 6

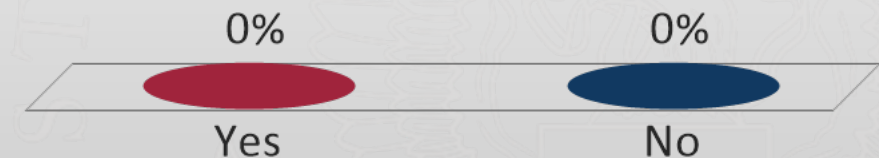
The defendant pled guilty to:

- one count of **illegal reentry (§2L1.2)**; and
- one count of **unlawful possession of a citizenship document (§2L2.2)**

There are no specific offense characteristics or Chapter 3 adjustments in either guideline which embody the other count of conviction.

**Do these counts group under 3D1.2(b)?**

- ✓ A. Yes
- B. No



# Societal Interest

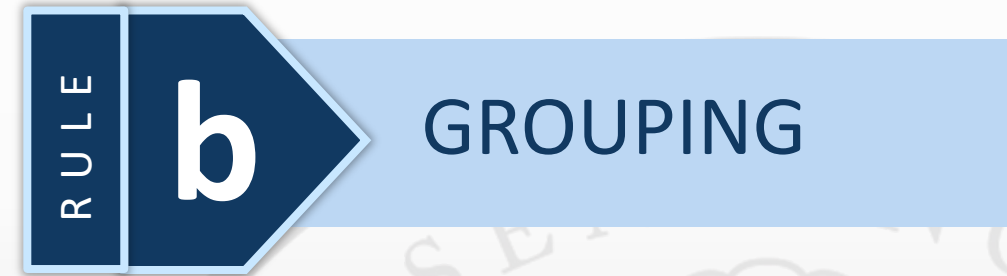
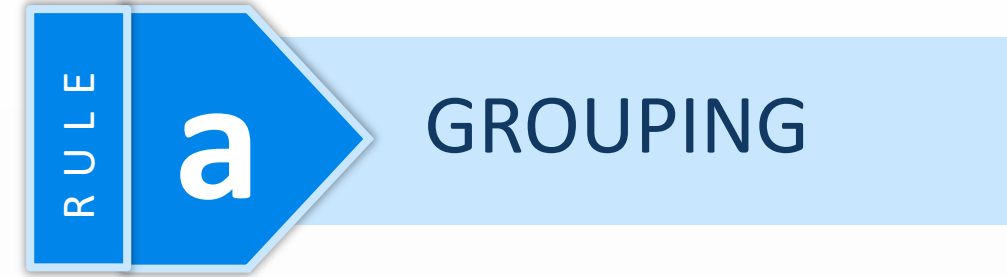
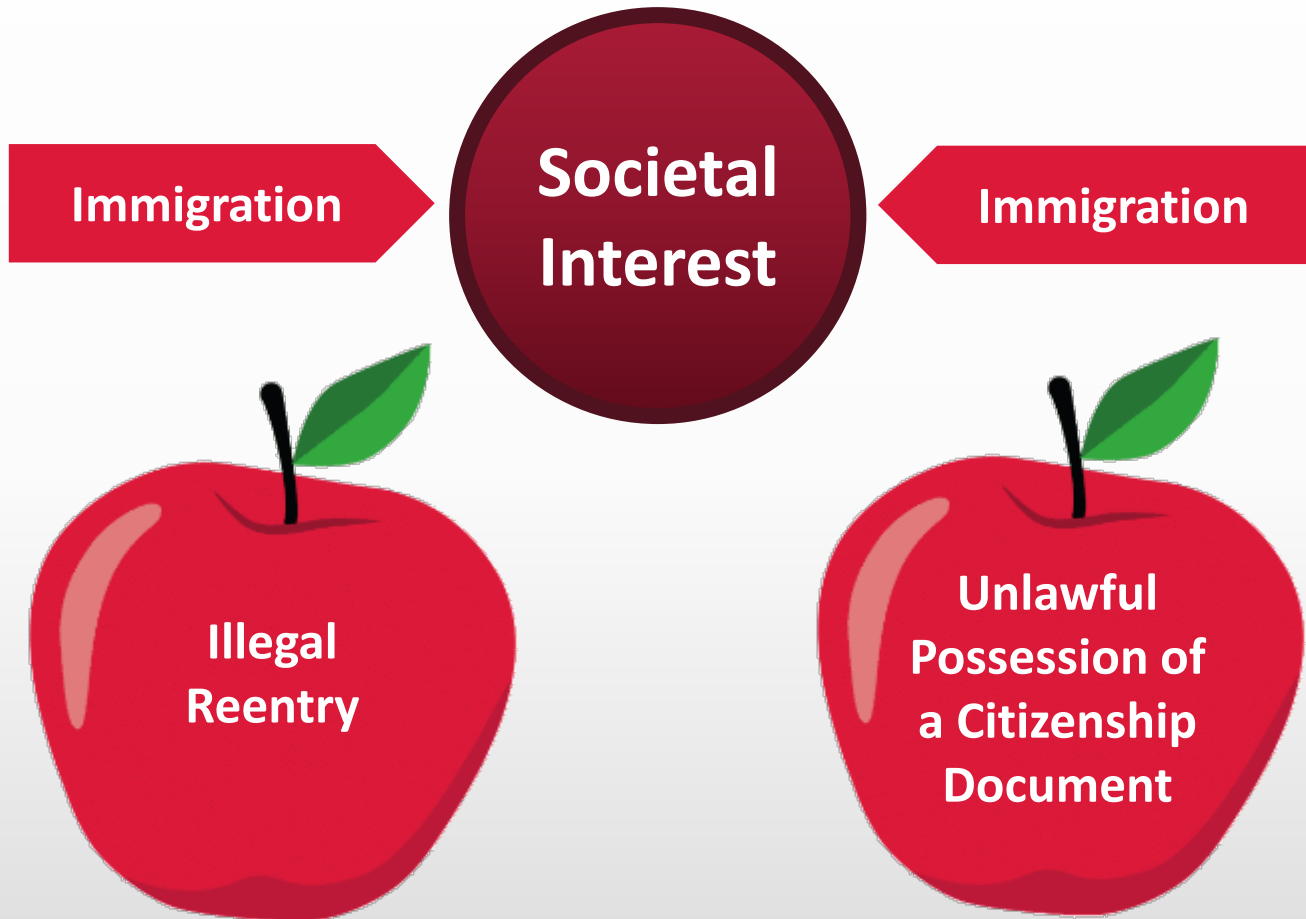
Do the counts involve  
the same victim?



**Societal  
Interest**



# Societal Interest



These counts will group under Rule (a) or (b).

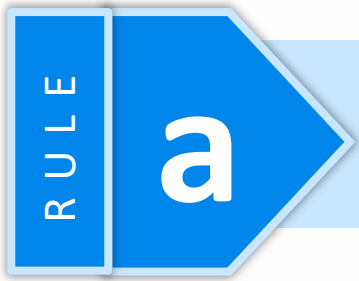
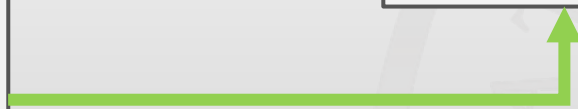
Do the counts involve the same victim?



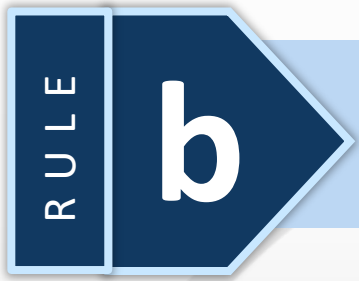
Do the counts involve separate instances of fear and risk of harm?



Do the counts involve the same act or transaction or two or more acts constituting a common criminal objective?

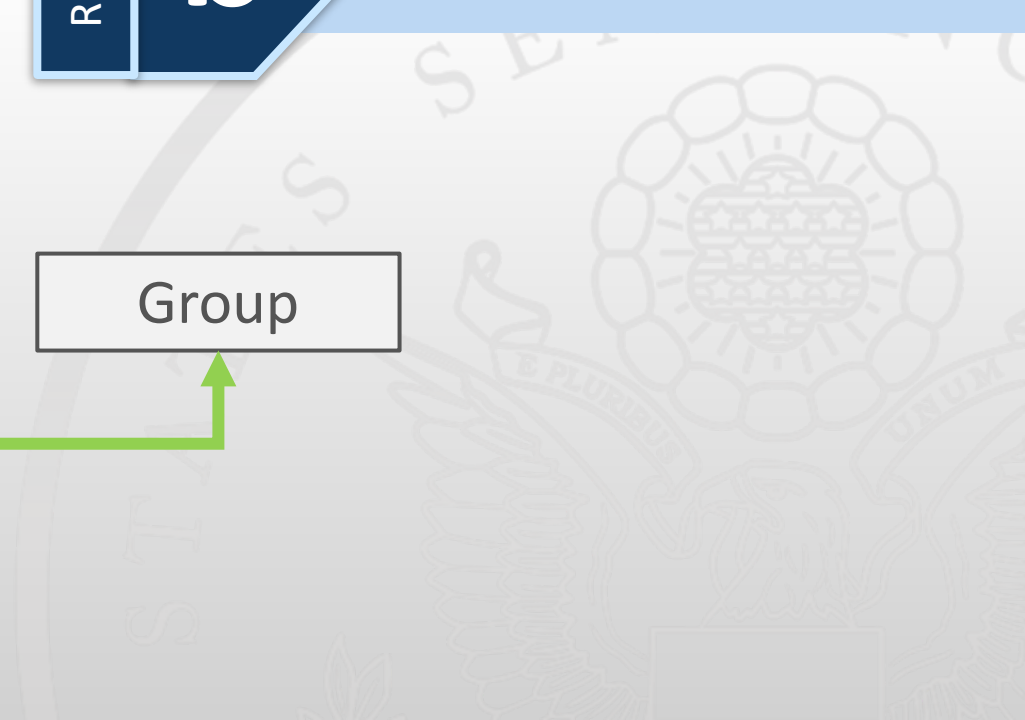


GROUPING



GROUPING

Group



## Scenario 7

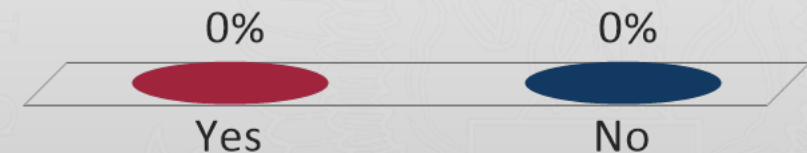
The defendant pled guilty to:

- one count of **illegal reentry (§2L1.2)**; and
- one count of **distribution of heroin (§2D1.1)**

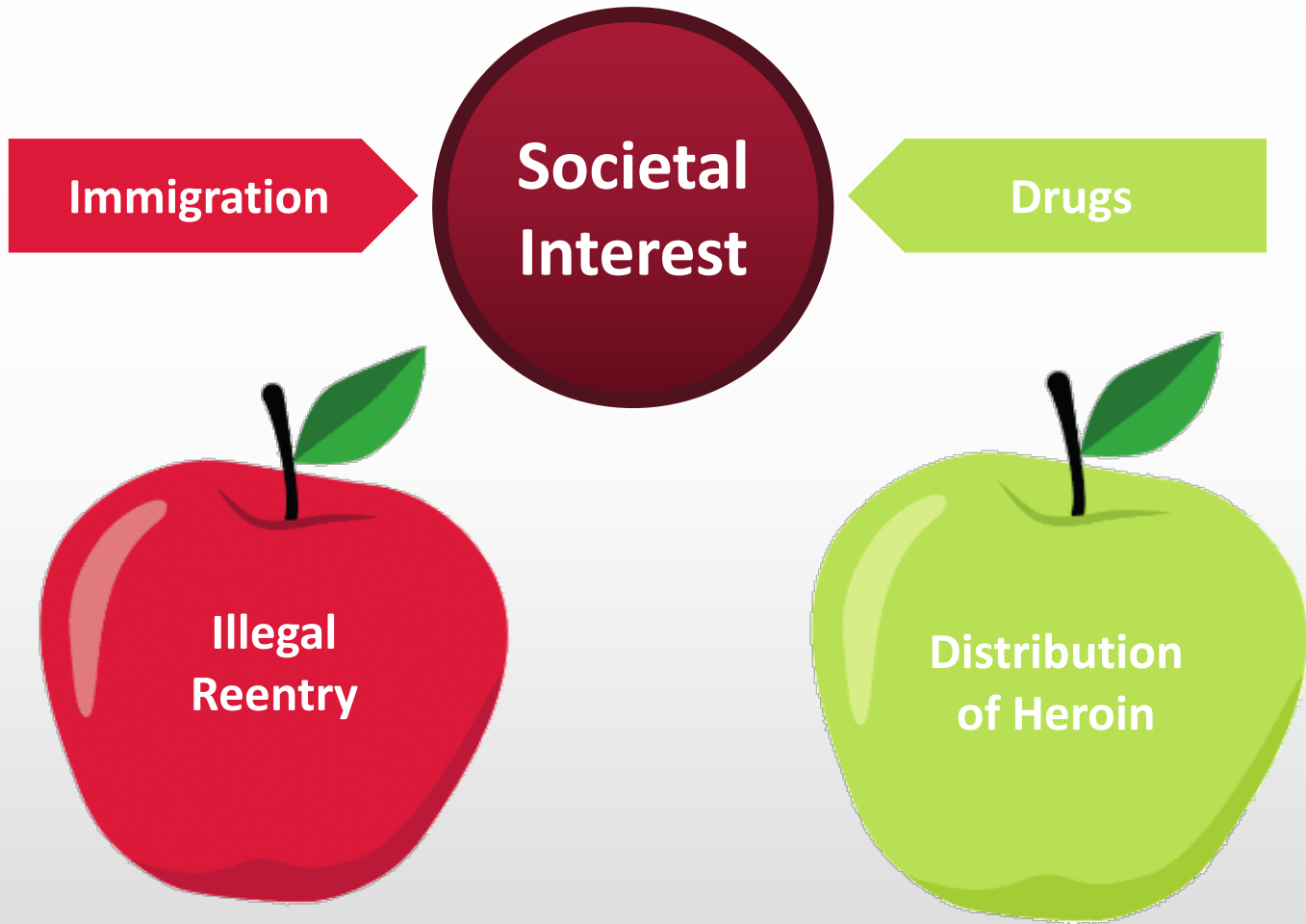
There are no specific offense characteristics or Chapter 3 adjustments in either guideline which embody the other count of conviction.

Do these counts group under 3D1.2(b)?

- A. Yes
- ✓ B. No



# Societal Interest



Different societal interests will not group under Rule (a) or Rule (b).

Do the counts involve  
the same victim?



Assign Units



# Scenario 8

The defendant pled guilty to two counts of **production of child pornography (§2G2.1)**.

The defendant:

- sexually abused the same minor
- on two different days
- filming the abuse on both occasions

**Do these counts group under (a) or (b)?**

- A. Yes, under either (a) or (b)
- B. Yes, only under (a)
- C. Yes, only under (b)
- ✓ D. No, they do not group

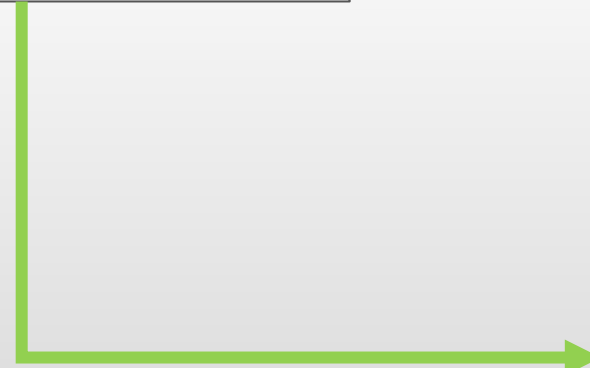




Do the counts involve the same victim?

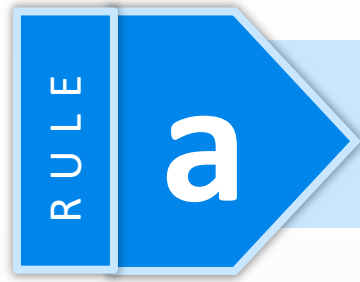


Do the counts involve separate instances of fear and risk of harm?



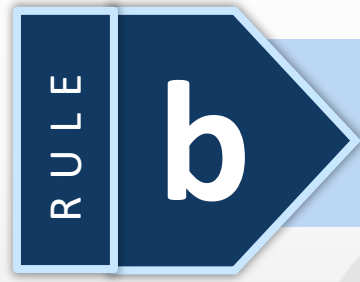
Assign Units

If



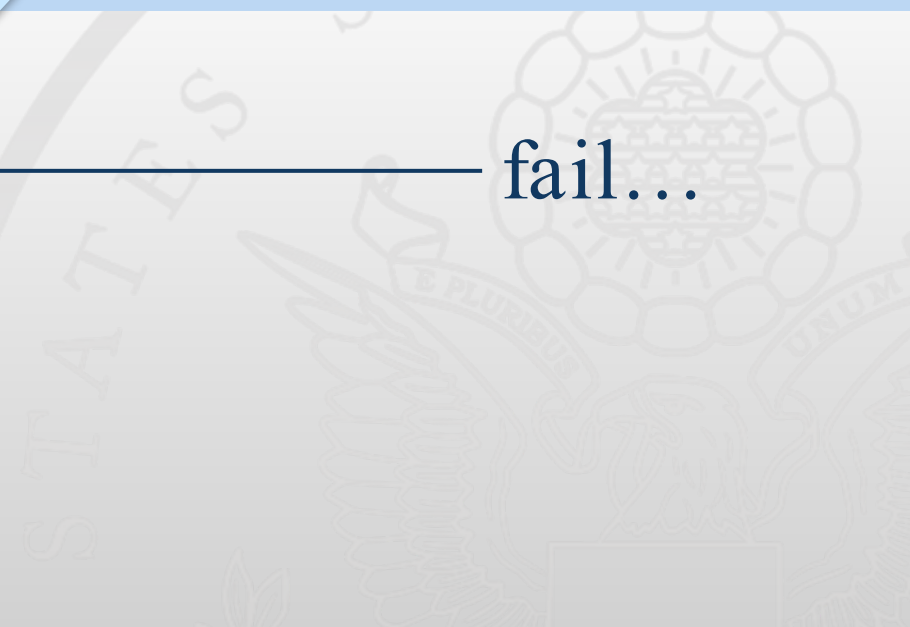
GROUPING

&



GROUPING

fail...



**Do You Still Have Multiple Counts?**

**Keep going!**



# Two Sets of Rules (Reminder)

## 1. “Grouping” (§3D1.2)

- Closely related counts are treated as a single, composite harm.
- One offense level represents all counts.

## 2. “Assigning Units” (§3D1.4)

- Provides incremental punishment for multiple counts involving separate, distinct harms.
- Adds offense levels for **significant** additional criminal conduct.

# Grouping Multiple Counts of Conviction

## Assigning Units

### Grouping Multiple Counts of Conviction

#### Step 2:

#### Assignment of Units (§3D1.4)

If there are two or more counts\* remaining after applying Step 1 to all counts\* use this checklist to determine a single combined offense level.

#### Checklist to Determine a Single Combined Offense Level:

- Identify the count with the highest offense level. If there are two or more counts with the same highest offense level, just select one.
- Compare the count with the highest offense level to the other remaining counts.
- The count with the highest offense level receives one unit.
- Each remaining count that is equally serious or 1 to 4 levels less serious than the count with the highest offense level receives one unit.
- Each remaining count that is 5 to 8 levels less serious than the count with the highest offense level receives one-half unit.
- Any remaining count that is 9 or more levels less serious than the count group with the highest offense level does not receive any units.
- Add up the total amount of units.
- Using the table below, based on the total number of units, add the appropriate number of offense levels to the offense level of the count with the highest offense level.

Total Number of Units	Add to Highest Offense Level
1 ½	+1
2	+2
2 ½ - 3	+3
3 ½ - 5	+4
5+	+5

A reduction for Acceptance of Responsibility (§3E1.1) is determined only after a single combined offense level is established for the multiple counts of conviction. A reduction for Acceptance of Responsibility is based upon consideration of the relevant conduct for all counts.

# Assignment of Units

## If more than one group:

- Assign 1 unit to the group with the highest offense level;
- Assign 1,  $\frac{1}{2}$ , or 0 units to the remaining groups; and
- Increase the offense level of the highest group according to the unit chart.

# Assignment of Units (§3D1.4)

Comparison of Offense Levels	Number of Units to Assign
Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

# Assignment of Units (§3D1.4)

## Production 1

§2G2.1

Offense Level

**36**

**1 unit**

## Production 2

§2G2.1

Offense Level

**34**

**1 unit**

**Total Units**

**2**

# Assignment of Units (§3D1.4)

Total Units

2

Two Additional  
Offense Levels

Number of Units	Increase in Offense Level
1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
more than 5	Add 5 levels



# Additional Offense Levels (§3D1.4)

Total of **2** units = 2 additional offense levels

Highest  
Offense Level

Production 1

§2G2.1

Offense Level

**36**

+2 additional  
offense levels

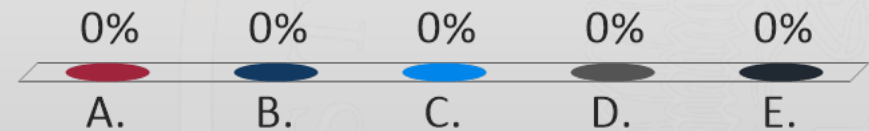
**38**

combined  
offense level

## Scenario 9

The defendant pled guilty to three counts of assault (**§2A2.2**). The defendant got into a fight with his three neighbors at the same time. These counts . . .

- A. Group under (a)
- B. Group under (b)
- C. Group under (c)
- D. Group under (d)
- ✓ E. Do not group



# Scenario 9A

**Assault 1**  
Offense Level  
**22**

**Assault 2**  
Offense Level  
**20**

**Assault 3**  
Offense Level  
**17**

What is the combined offense level under §3D1.4?

- A. 22
- B. 23
- C. 25
- D. 27



# Assignment of Units (§3D1.4)

Comparison of Offense Levels	Number of Units to Assign
Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

# Assignment of Units (§3D1.4)

**Assault 1**  
Offense Level  
**22**

**1 unit**

**Assault 2**  
Offense Level  
**20**

**1 unit**

**Assault 3**  
Offense Level  
**17**

**1/2 unit**

**Total Units:**

**2 1/2**

# Assignment of Units (§3D1.4)

Total Units

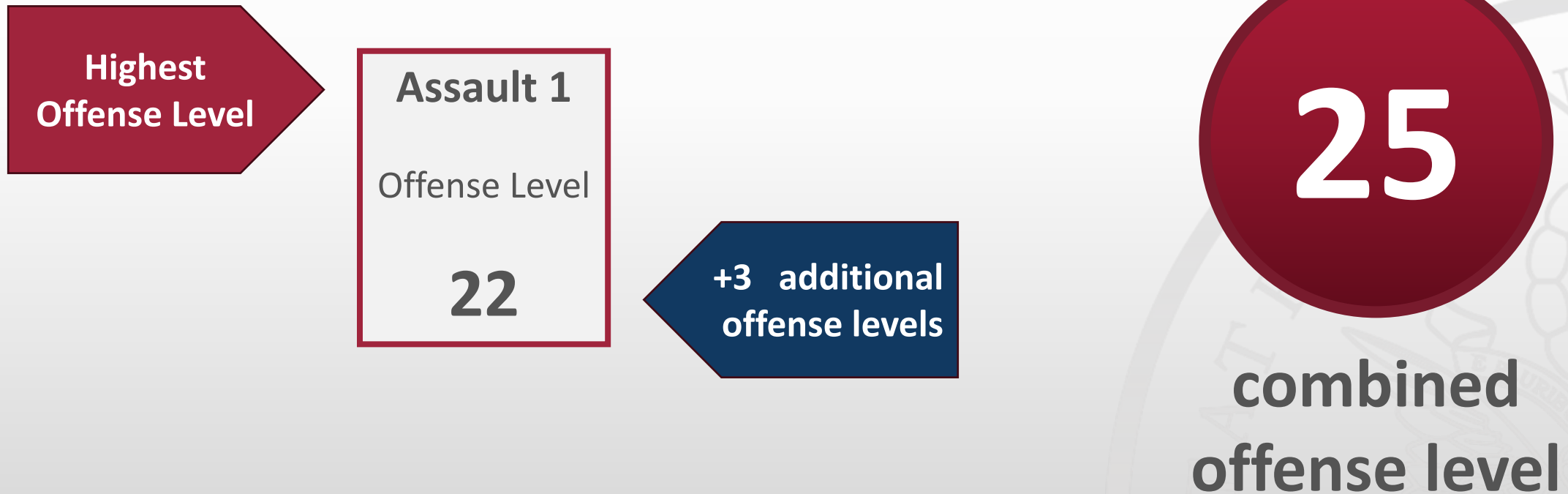
2 1/2

Three Additional  
Offense Levels

Number of Units	Increase in Offense Level
1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
more than 5	Add 5 levels

# Additional Offense Levels (§3D1.4)

Total of **2 1/2** units = 3 additional offense levels



# Scenario 10

The defendant is convicted of 5 counts of bank robbery (**§2B3.1**) and one count of burglary from a residence (**§2B2.1**).

Assume the following guidelines calculation:

Robbery 1	Robbery 2	Robbery 3	Robbery 4	Robbery 5	Burglary
BOL: 20 (b)(1): 2 (b)(2): 2	BOL: 20 (b)(1): 2 (b)(2): 2	BOL: 20 (b)(1): 2 (b)(2): 0	BOL: 20 (b)(1): 2 (b)(2): 5	BOL: 20 (b)(1): 2 (b)(2): 7	BOL: 12 (b)(1): 0 (b)(2): 2
<b>24</b>	<b>24</b>	<b>22</b>	<b>27</b>	<b>29</b>	<b>14</b>



# Scenario 10

<b>Robbery 1</b>	<b>Robbery 2</b>	<b>Robbery 3</b>	<b>Robbery 4</b>	<b>Robbery 5</b>	<b>Burglary</b>
Offense Level	Offense Level	Offense Level	Offense Level	Offense Level	Offense Level
<b>24</b>	<b>24</b>	<b>22</b>	<b>27</b>	<b>29</b>	<b>14</b>

What is the combined offense level under §3D1.4?

- A. 29
- B. 31
- C. 33
- D. 34

# Assignment of Units (§3D1.4)

<b>Robbery 5</b>	<b>Robbery 4</b>	<b>Robbery 1</b>	<b>Robbery 2</b>	<b>Robbery 3</b>	<b>Burglary</b>
Offense Level	Offense Level	Offense Level	Offense Level	Offense Level	Offense Level
<b>29</b>	<b>27</b>	<b>24</b>	<b>24</b>	<b>22</b>	<b>14</b>

# Assignment of Units (§3D1.4)

Comparison of Offense Levels	Number of Units to Assign
Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

# Assignment of Units (§3D1.4)

Robbery 5 Offense Level <b>29</b>	Robbery 4 Offense Level <b>27</b>	Robbery 1 Offense Level <b>24</b>	Robbery 2 Offense Level <b>24</b>	Robbery 3 Offense Level <b>22</b>	Burglary Offense Level <b>14</b>
---	---	---	---	---	--

**1 unit**

**1 unit**

**1/2 unit**

**1/2 unit**

**1/2 unit**

**0 units**

**Total Units:**

**3 1/2**

# Assignment of Units (§3D1.4)

Total Units

3 1/2

Four Additional  
Offense Levels

Number of Units	Increase in Offense Level
1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
more than 5	Add 5 levels

# Additional Offense Levels (§3D1.4)

Total of **3 1/2** units = 4 additional offense levels

Highest  
Offense Level

Robbery 5

BOL: 20  
(b)(1): 2  
(b)(2): 7

29

+ 4 additional  
offense levels

33

combined  
offense level

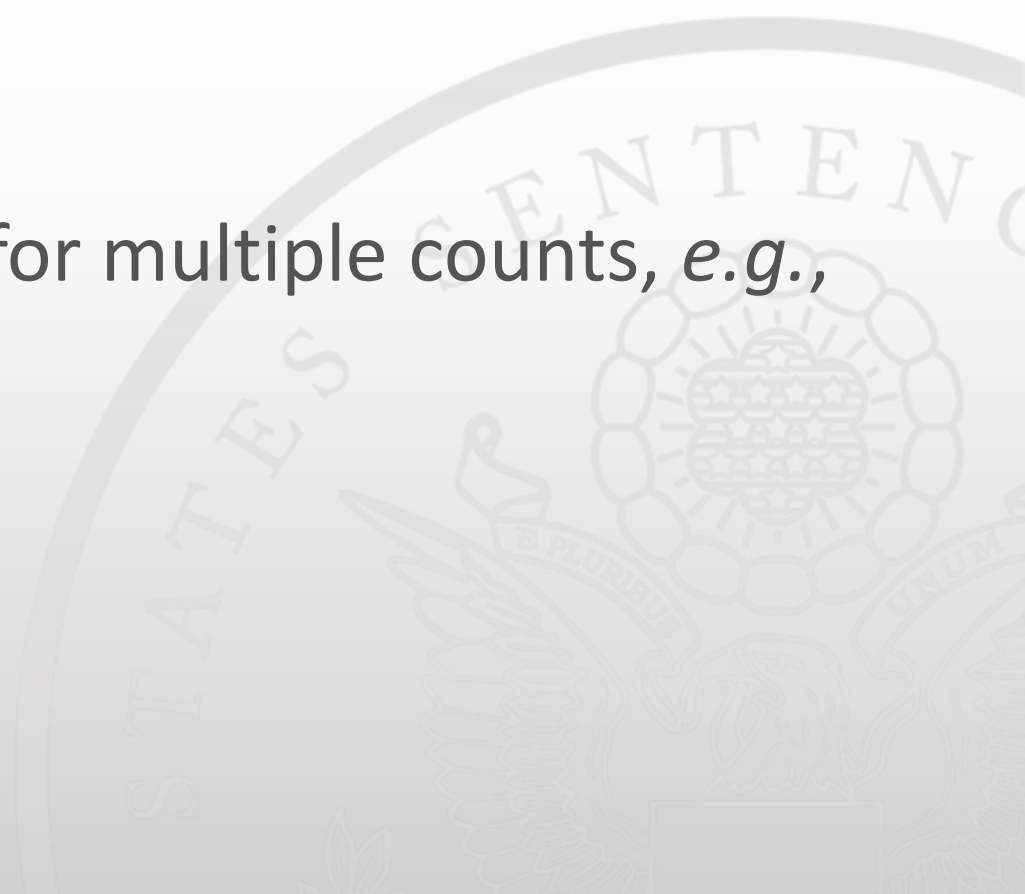
# Summary of Basic Rules

## Grouping is a process of elimination:

1. Start with the grouping rules at §3D1.2.
2. Then, if necessary, move to the assignment of units at §3D1.4.
3. In every multiple counts case, the court **MUST** determine **ONE** offense level representative of all the counts of conviction.

# Special Rules

1. Some statutes are excluded from the rules for multiple counts, *e.g.*, § 924(c), § 1028A.
2. Some Guidelines have specific rules for multiple counts, *e.g.*, §2J1.2, §2S1.1.





# Scenario 11

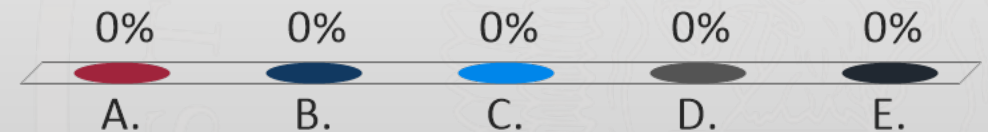
The defendant pled guilty to:

- Count 1: **distribution of methamphetamine (§2D1.1)**
- Count 2: **felon in possession (§2K2.1)**
- Count 3: **money laundering (§2S1.1)**

The money laundering count involves the laundering of drug proceeds.

**These counts . . .**

- A. Group under (a)
- B. Group under (b)
- ✓ C. Group under (c)
- D. Group under (d)
- E. Do not group



# Multiple Counts Scenario

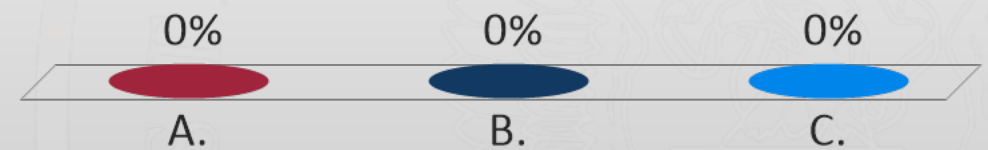


# Scenario 11A

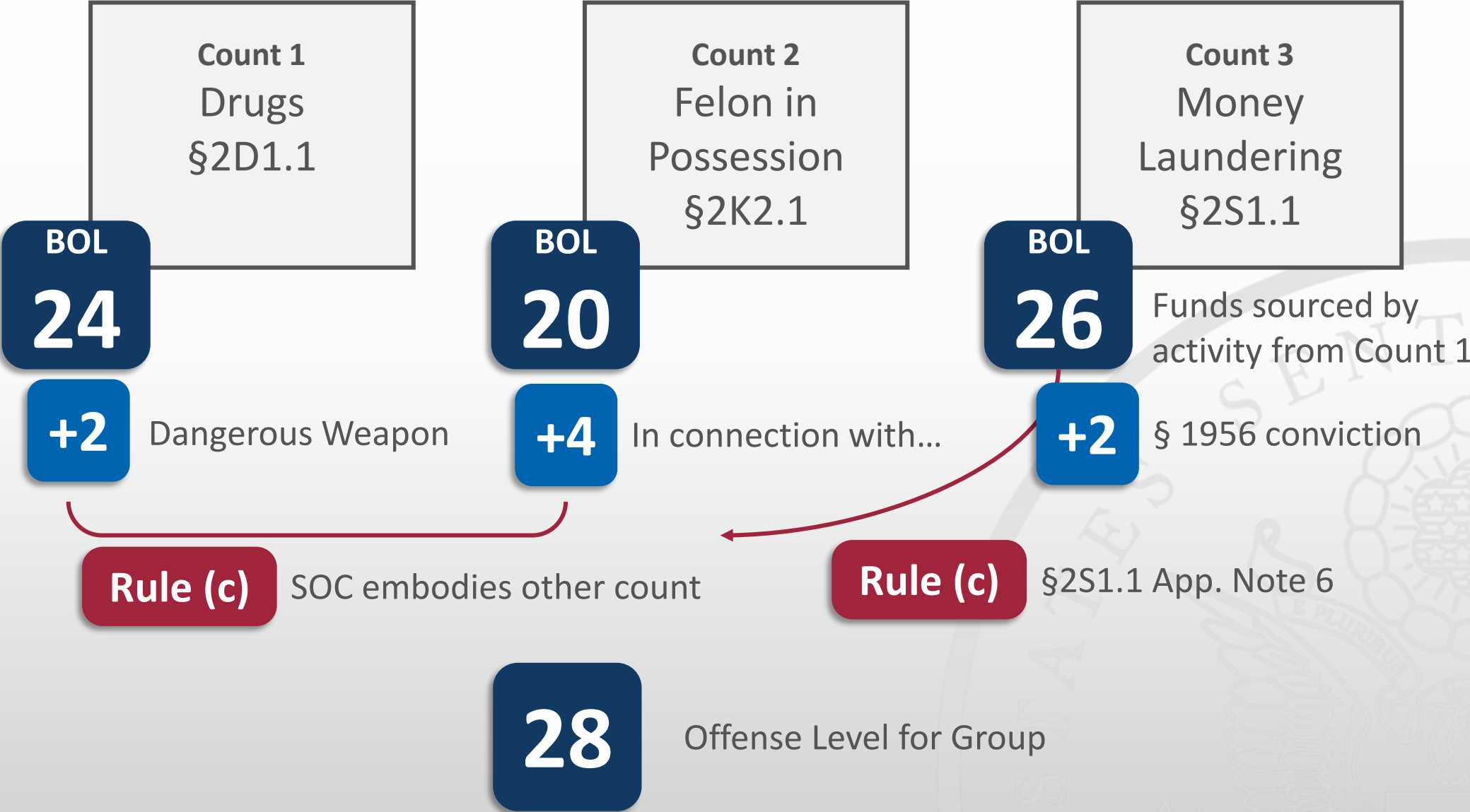
What if the defendant is also convicted of 18 U.S.C. § 924(c)  
(possession of a firearm in furtherance of a drug trafficking offense)

**The § 924(c) count . . .**

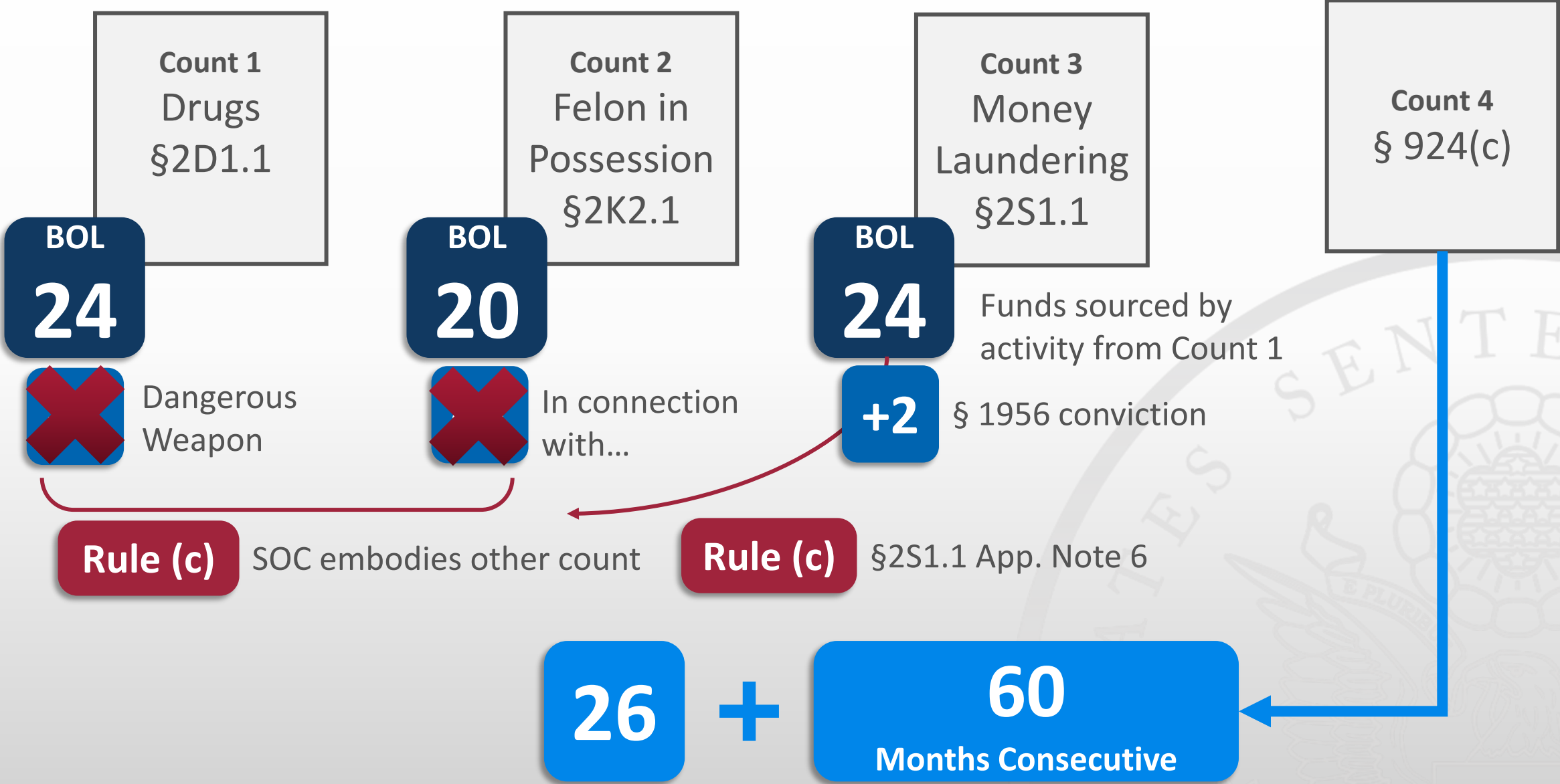
- A. Groups with the other offenses
- B. Prevents the other offenses from grouping with one another
- ✓ C. Does not group with the other offenses and does not prevent the other offenses from grouping with each other



# Multiple Counts Scenario



# Multiple Counts Scenario



# Scenario 12

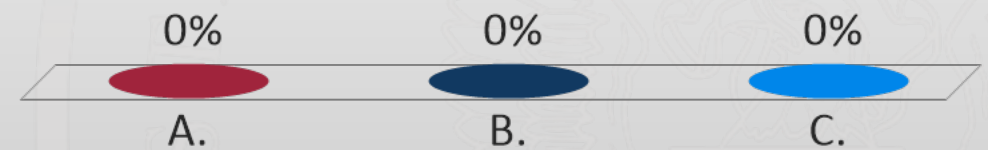
The defendant pled guilty to:

- Count 1: **production of child pornography Victim A (§2G2.1)**
- Count 2: **production of child pornography Victim B (§2G2.1)**
- Count 3: **receipt of child pornography (§2G2.2)**
- Count 4: **possession of child pornography (§2G2.2)**

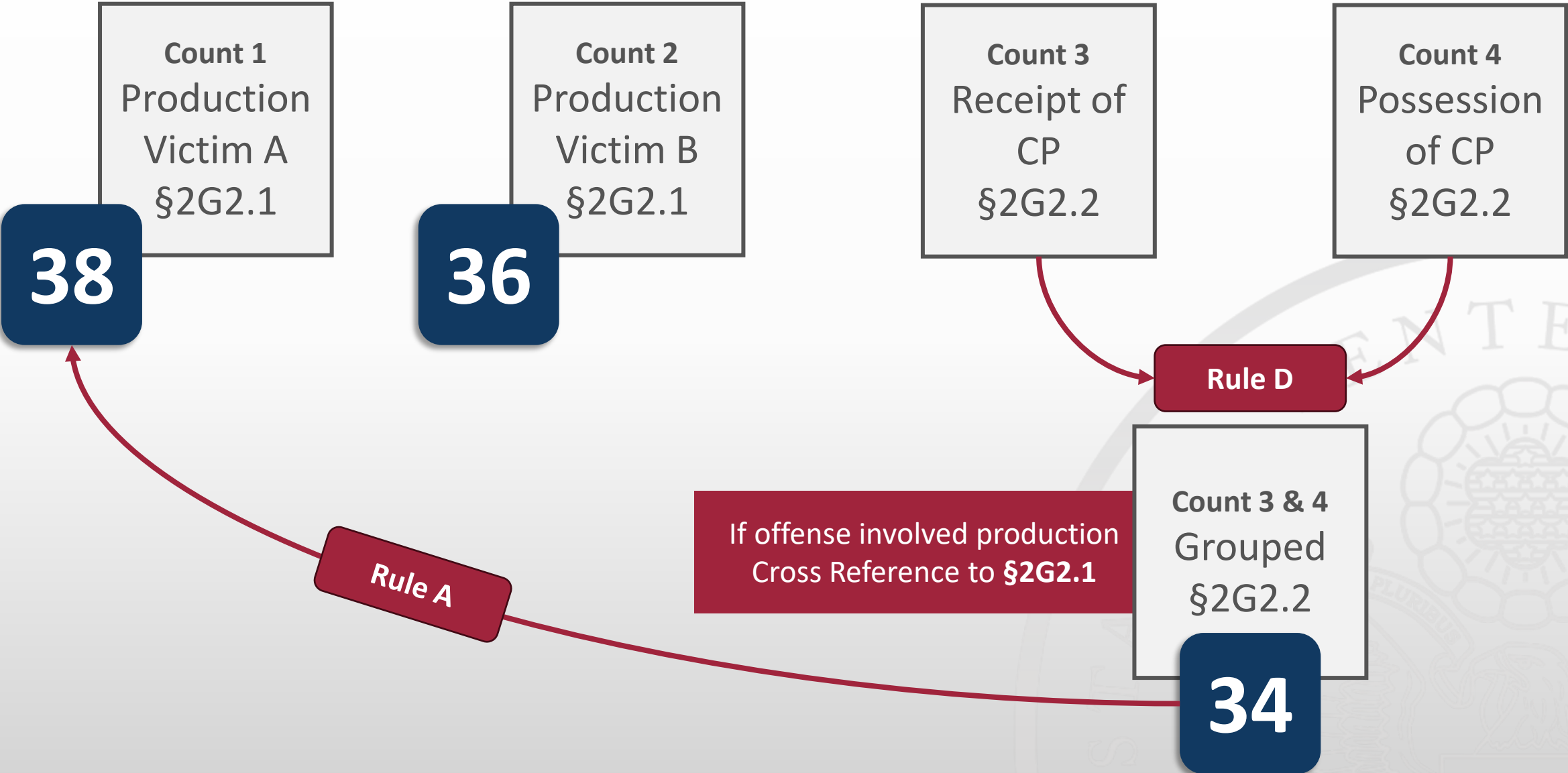
The produced images of Victims A and B are included in the possessed images in Count 4.

**These counts . . .**

- A. Group together
- B. Don't group – units are assigned
- ✓ C. Group together and units are assigned



# Multiple Counts Scenario



# Multiple Counts Scenario

Counts 1, 3 & 4  
Grouped  
§2G2.1

38

1  
Unit

Count 2  
Production  
Victim B  
§2G2.1

36

1  
Unit



40

Final Offense Level

Units must be assigned

## Assignment of Units

Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

## Total Units

## Additional Levels

1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
5+	Add 5 levels



# Grouping Pointers

## Chapter 3, Part D

**Decision Tree**

Use it! Every time!

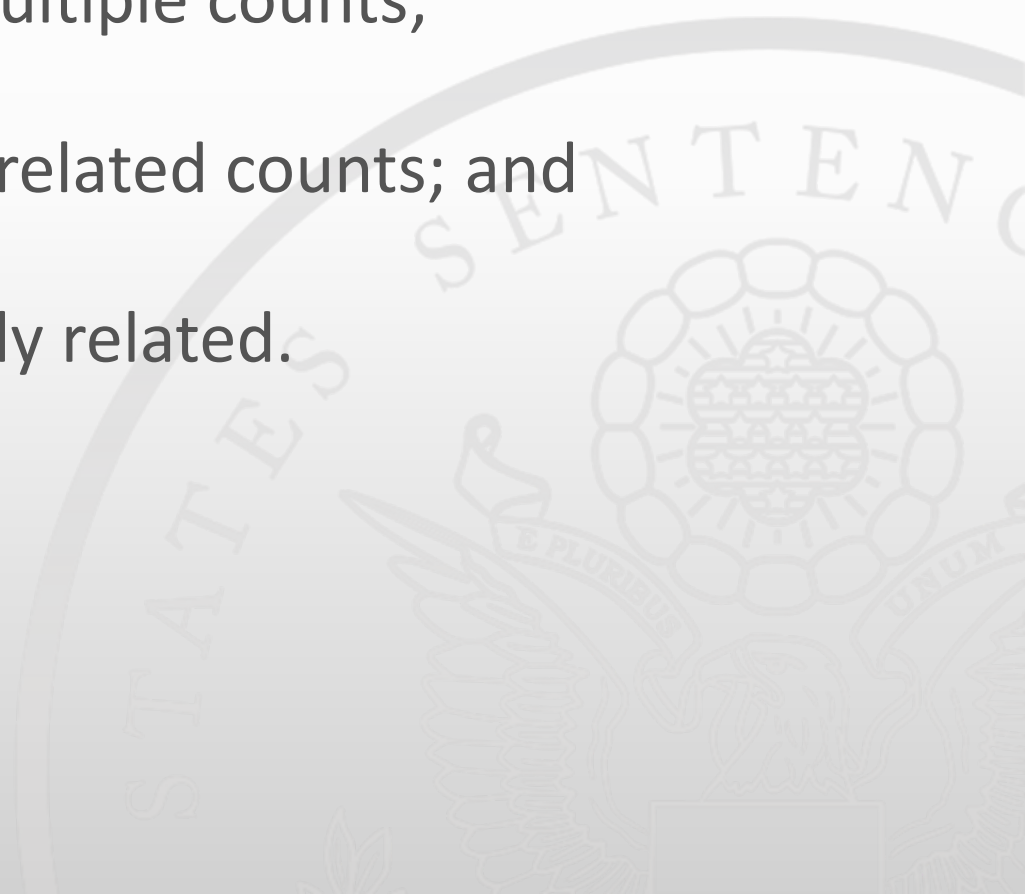
# Learning Outcomes

You should now be able to:

**Describe** the rationale for the rules for multiple counts;

**Utilize** the decision tree to group closely related counts; and

**Assign** units for counts that are not closely related.



# Questions or Comments



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