

## APPENDIX A

*United States v. Eric Daniel Doyle,*  
CA 18-30118, Dkt. 18, “Order Granting Motion to Dismiss”

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MAR 14 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC DANIEL DOYLE,

Defendant-Appellant.

No. 18-30118

D.C. No. 9:15-cr-00032-DWM-1  
District of Montana,  
Missoula

ORDER

Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 16) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable). Contrary to appellant's contentions, his agreement to waive his right to appeal "any aspect of the sentence" unambiguously encompasses the claims he now seeks to raise, *see United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998), and his sentence is not illegal.

**DISMISSED.**

APPENDIX B

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## APPENDIX C

USSG Chapter 3, Part D  
USSG Chapter 5, Part G

## **PART D – MULTIPLE COUNTS**

### **Introductory Commentary**

This Part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The single, “combined” offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

The rules in this Part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional offenses increases.

Some offenses that may be charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range. For example, embezzling money from a bank and falsifying the related records, although legally distinct offenses, represent essentially the same type of wrongful conduct with the same ultimate harm, so that it would be more appropriate to treat them as a single offense for purposes of sentencing. Other offenses, such as an assault causing bodily injury to a teller during a bank robbery, are so closely related to the more serious offense that it would be appropriate to treat them as part of the more serious offense, leaving the sentence enhancement to result from application of a specific offense characteristic.

In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this Part provides rules for grouping offenses together. Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.

Some offense guidelines, such as those for theft, fraud and drug offenses, contain provisions that deal with repetitive or ongoing behavior. Other guidelines, such as those for assault and robbery, are oriented more toward single episodes of criminal behavior. Accordingly, different rules are required for dealing with multiple-count convictions involving these two different general classes of offenses. More complex cases involving different types of offenses may require application of one rule to some of the counts and another rule to other counts.

Some offenses, *e.g.*, racketeering and conspiracy, may be “composite” in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this Part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses.

Essentially, the rules in this Part can be summarized as follows: (1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (*e.g.*, theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct (*e.g.*, many environmental offenses), add the numerical quantities and apply the pertinent offense guideline, including any specific

offense characteristics for the conduct taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the most serious offense in that group. (3) As to other offenses (e.g., independent instances of assault or robbery), start with the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.

*Historical Note*

Effective November 1, 1987. Amended effective November 1, 1989 (amendment 121); November 1, 2007 (amendment 707).

## §3D1.1. Procedure for Determining Offense Level on Multiple Counts

- (a) When a defendant has been convicted of more than one count, the court shall:
  - (1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts (“Groups”) by applying the rules specified in §3D1.2.
  - (2) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.
  - (3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.
- (b) Exclude from the application of §§3D1.2–3D1.5 the following:
  - (1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).
  - (2) Any count of conviction under 18 U.S.C. § 1028A. *See* Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.

### Commentary

#### Application Notes:

1. **In General.**—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

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2. Subsection (b)(1) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.*, 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b)(1) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. *See* §5G1.2(a).

Unless specifically instructed, subsection (b)(1) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (*i.e.*, the statute does not otherwise require a term of imprisonment to be imposed). *See, e.g.*, 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.

**Background:** This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter 3, Part E (Acceptance of Responsibility) and Chapter 4, Part B (Career Offenders and Criminal Livelihood) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentence) discusses how to determine the sentence from the (combined) offense level; §5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentence) to the “offense level” should be treated as referring to the combined offense level after all subsequent adjustments have been made.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 348); November 1, 1998 (amendment 579); November 1, 2000 (amendment 598); November 1, 2005 (amendments 677 and 680); November 1, 2007 (amendment 707).
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### §3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(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.
- (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) When 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 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;  
§2K.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.

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.

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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.

### Commentary

#### Application Notes:

1. Subsections (a)–(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment are excepted from application of the multiple count rules. *See* §3D1.1(b)(1); *id.*, comment. (n.1).
2. The term “**victim**” is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the “victim” for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, *i.e.*, to identify and group “counts involving substantially the same harm.”
3. Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.

When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).

**Examples:** (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. (5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be

grouped together. *But:* (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts *are not* to be grouped together.

4. Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).

**Examples:** (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole. The counts are to be grouped together. (4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting. *But:* (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts *are not* to be grouped together.

5. Subsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents “double counting” of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).

Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For

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example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

A cross reference to another offense guideline does not constitute “a specific offense characteristic . . . or other adjustment” within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; *see* §3D1.3(b). The “same general type” of offense is to be construed broadly.

**Examples:** (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (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. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. *But:* (9) The defendant is convicted of three counts of bank robbery. The counts are not to be grouped together, nor are the amounts of money involved to be added.

7. A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.
8. A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. *See* §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. **Example:** The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

**Background:** Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts (“Group”). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of “victimless” crimes) are grouped together only as provided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this Part and resolving ambiguities, the court should look to the underlying policy of this Part as stated in the Introductory Commentary.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 45); November 1, 1989 (amendments 121, 253–256, and 303); November 1, 1990 (amendments 309, 348, and 349); November 1, 1991 (amendment 417); November 1, 1992 (amendment 458); November 1, 1993 (amendment 496); November 1, 1995 (amendment 534); November 1, 1996 (amendment 538); November 1, 1998 (amendment 579); November 1, 2001 (amendments 615, 617, and 634); November 1, 2002 (amendment 638); January 25, 2003 (amendment 648); November 1, 2003 (amendment 656); November 1, 2004 (amendment 664); November 1, 2005 (amendments 679 and 680); November 1, 2007 (amendment 701).
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## §3D1.3

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### §3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

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Determine the offense level applicable to each of the Groups as follows:

- (a) In the case of counts grouped together pursuant to §3D1.2(a)–(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group.
- (b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.

#### Commentary

##### Application Notes:

1. The “**offense level**” for a count refers to the offense level from Chapter Two after all adjustments from Parts A, B, and C of Chapter Three.
2. When counts are grouped pursuant to §3D1.2(a)–(c), the highest offense level of the counts in the group is used. Ordinarily, it is necessary to determine the offense level for each of the counts in a Group in order to ensure that the highest is correctly identified. Sometimes, it will be clear that one count in the Group cannot have a higher offense level than another, as with a count for an attempt or conspiracy to commit the completed offense. The formal determination of the offense level for such a count may be unnecessary.
3. When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines, use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome.
4. Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under §3D1.2. The aggravated assault will increase the guideline range for the rape. The robbery, however, will not. This is because the offense guideline for rape (§2A3.1) includes the most common aggravating factors, including injury, that data showed to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However,

an exceptionally large property loss in the course of the rape would provide grounds for an upward departure. *See* §5K2.5 (Property Damage or Loss).

**Background:** This section provides rules for determining the offense level associated with each Group of Closely Related Counts. Summary examples of the application of these rules are provided at the end of the Commentary to this Part.

*Historical Note*

Effective November 1, 1987. Amended effective November 1, 1989 (amendments 257 and 303); November 1, 2001 (amendment 617); November 1, 2004 (amendment 674).

## §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
2 1/2 – 3	add 3 levels
3 1/2 – 5	add 4 levels
More than 5	add 5 levels.

In determining the number of Units for purposes of this section:

- Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.
- Count as one-half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.
- Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

### Commentary

#### Application Notes:

- Application of the rules in §§3D1.2 and 3D1.3 may produce a single Group of Closely Related Counts. In such cases, the combined offense level is the level corresponding to the Group determined in accordance with §3D1.3.

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2. The procedure for calculating the combined offense level when there is more than one Group of Closely Related Counts is as follows: First, identify the offense level applicable to the most serious Group; assign it one Unit. Next, determine the number of Units that the remaining Groups represent. Finally, increase the offense level for the most serious Group by the number of levels indicated in the table corresponding to the total number of Units.

**Background:** When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this Part could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.

*Historical Note*

Effective November 1, 1987. Amended effective November 1, 1990 (amendment 350).

### §3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

#### Commentary

This section refers the court to Chapter Five (Determining the Sentence) in order to determine the total punishment to be imposed based upon the combined offense level. The combined offense level is subject to adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, Part B (Career Offenders and Criminal Livelihood).

<i>Historical Note</i>	Effective November 1, 1987.
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### **Concluding Commentary to Part D of Chapter Three**

#### **Illustrations of the Operation of the Multiple-Count Rules**

The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step-by-step approach is recommended until the user is thoroughly familiar with the guidelines.

1. Defendant A was convicted of four counts, each charging robbery of a different bank. Each would represent a distinct Group. §3D1.2. In each of the first three robberies, the offense level was 22 (20 plus a 2-level increase because a financial institution was robbed) (§2B3.1(b)). In the fourth robbery \$21,000 was taken and a firearm was displayed; the offense level was therefore 28. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half unit for purposes of §3D1.4. Altogether there are 2 1/2 Units, and the offense level for the most serious (28) is therefore increased by 3 levels under the table. The combined offense level is 31.
2. Defendant B was convicted of four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of 75 grams of heroin; (4) offering a DEA agent \$20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to marihuana equivalents (using the Drug Equivalency Tables in the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)). The first count translates into 46 kilograms of marihuana; the second count translates into 30 kilograms of marihuana; and the third count translates into 75 kilograms of marihuana. The total is 151 kilograms of marihuana. Under §2D1.1, the combined offense level for the drug offenses is 24. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 26 under §3C1.1 (Obstructing or Impeding the Administration of Justice). Because the conduct constituting the bribery offense is accounted for by §3C1.1, it becomes part of the same Group as the drug offenses pursuant to §3D1.2(c). The combined offense level is 26 pursuant to §3D1.3(a), because the offense level for bribery (20) is less than the offense level for the drug offenses (26).
3. Defendant C was convicted of four counts arising out of a scheme pursuant to which the defendant received kickbacks from subcontractors. The counts were as follows: (1) The defendant received \$1,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received \$1,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received \$1,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received \$1,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by §2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is \$4,000, which results in an offense level of 9 under either §2B1.1 (assuming the application of the "sophisticated means" enhancement in §2B1.1(b)(10)) or §2B4.1. Since these two guidelines produce identical offense levels, the combined offense level is 9.

## §3D1.5

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 303); November 1, 1990 (amendment 350); November 1, 1991 (amendment 417); November 1, 1995 (amendment 534); November 1, 2001 (amendment 617); November 1, 2009 (amendment 737); November 1, 2011 (amendment 760); November 1, 2014 (amendment 782); November 1, 2015 (amendment 796).
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## **PART G – IMPLEMENTING THE TOTAL SENTENCE OF IMPRISONMENT**

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### **§5G1.1. Sentencing on a Single Count of Conviction**

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- (a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.
- (b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.
- (c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence—
  - (1) is not greater than the statutorily authorized maximum sentence, and
  - (2) is not less than any statutorily required minimum sentence.

#### **Commentary**

This section describes how the statutorily authorized maximum sentence, or a statutorily required minimum sentence, may affect the determination of a sentence under the guidelines. For example, if the applicable guideline range is 51–63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under subsection (a) is 48 months; a sentence of less than 48 months would be a guideline departure. If the applicable guideline range is 41–51 months and there is a statutorily required minimum sentence of 60 months, the sentence required by the guidelines under subsection (b) is 60 months; a sentence of more than 60 months would be a guideline departure. If the applicable guideline range is 51–63 months and the maximum sentence authorized by statute for the offense of conviction is 60 months, the guideline range is restricted to 51–60 months under subsection (c).

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 286).
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### **§5G1.2. Sentencing on Multiple Counts of Conviction**

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- (a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

- (b) For all counts not covered by subsection (a), the court shall determine the total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law.
- (c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.
- (d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.
- (e) In a case in which subsection (c) of §4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.

#### Commentary

##### **Application Notes:**

1. **In General.**—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences (“total punishment”) is determined by the court after determining the adjusted combined offense level and the Criminal History Category and determining the defendant’s guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).

Note that the defendant’s guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. *See* Note 3, below.

Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

This section applies to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

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Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.

### 2. **Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—**

(A) **In General.**—Subsection (a) applies if a statute (i) specifies a term of imprisonment to be imposed; and (ii) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.,* 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment) and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subdivision (B), the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. *See, e.g.,* the Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. *See, e.g.,* Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

(B) **Multiple Convictions Under 18 U.S.C. § 1028A.**—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S.C. § 1028A(b)(4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section “concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission . . .”.

In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

- (i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).
- (ii) Whether the underlying offenses are groupable under §3D1.2 (Groups of Closely Related Counts). Generally, multiple counts of 18 U.S.C. § 1028A

should run concurrently with one another in cases in which the underlying offenses are groupable under §3D1.2.

- (iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.
- (C) **Imposition of Supervised Release.**—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. *See* 18 U.S.C. § 3624(e).

3. **Application of Subsection (b).**—

- (A) **In General.**—Subsection (b) provides that, for all counts not covered by subsection (a), the court shall determine the total punishment (*i.e.*, the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law (such as where a statutorily required minimum sentence or a statutorily authorized maximum sentence otherwise requires).
- (B) **Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum.**—The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1, but also in a multiple-count case.

In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. *See* §5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. *See* §5G1.1(c)(2) and accompanying Commentary.

However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. *See* §5G1.1(a).

- (C) **Examples.**—The following examples illustrate how subsection (b) applies, and how the restrictions in subparagraph (B) operate, when a statutorily required minimum sentence is involved.

Defendant A and Defendant B are each convicted of the same four counts. Counts 1, 3, and 4 have statutory maximums of 10 years, 20 years, and 2 years, respectively. Count 2 has a statutory maximum of 30 years and a mandatory minimum of 10 years.

For Defendant A, the court determines that the final offense level is 19 and the defendant is in Criminal History Category I, which yields a guideline range on the Sentencing Table of 30 to 37 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant A's guideline sentence is 120 months. *See* subparagraph (B), above. After considering that guideline sentence, the court determines

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that the appropriate “total punishment” to be imposed on Defendant A is 120 months. Therefore, subsection (b) requires that the total punishment of 120 months be imposed on each of Counts 1, 2, and 3. The sentence imposed on Count 4 is limited to 24 months, because a statutory maximum of 2 years applies to that particular count.

For Defendant B, in contrast, the court determines that the final offense level is 30 and the defendant is in Criminal History Category II, which yields a guideline range on the Sentencing Table of 108 to 135 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant B’s guideline range is restricted to 120 to 135 months. See subparagraph (B), above. After considering that restricted guideline range, the court determines that the appropriate “total punishment” to be imposed on Defendant B is 130 months. Therefore, subsection (b) requires that the total punishment of 130 months be imposed on each of Counts 2 and 3. The sentences imposed on Counts 1 and 4 are limited to 120 months (10 years) and 24 months (2 years), respectively, because of the applicable statutory maximums.

(D) **Special Rule on Resentencing.**—In a case in which (i) the defendant’s guideline range on the Sentencing Table was affected or restricted by a statutorily required minimum sentence (as described in subparagraph (B)), (ii) the court is resentencing the defendant, and (iii) the statutorily required minimum sentence no longer applies, the defendant’s guideline range for purposes of the remaining counts shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.

### 4. Career Offenders Covered under Subsection (e).—

(A) **Imposing Sentence.**—The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) shall, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. Subsection (e) requires that the total punishment determined under §4B1.1(c) be apportioned among all the counts of conviction. In most cases this can be achieved by imposing the statutory minimum term of imprisonment on the 18 U.S.C. § 924(c) or § 929(a) count, subtracting that minimum term of imprisonment from the total punishment determined under §4B1.1(c), and then imposing the balance of the total punishment on the other counts of conviction. In some cases covered by subsection (e), a consecutive term of imprisonment longer than the minimum required by 18 U.S.C. § 924(c) or § 929(a) will be necessary in order both to achieve the total punishment determined by the court and to comply with the applicable statutory requirements.

(B) **Examples.**—The following examples illustrate the application of subsection (e) in a multiple count situation:

(i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 300 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 60 months on the 18 U.S.C. § 924(c) count, subtracts that 60 months from the total punishment of 300 months and imposes the remainder of 240 months on the 21 U.S.C. § 841 count. As required by statute, the sentence on the 18 U.S.C. § 924(c) count is imposed to run consecutively.

- (ii) The defendant is convicted of one count of 18 U.S.C. § 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 240 months on the 21 U.S.C. § 841 count and a sentence of 87 months on the 18 U.S.C. § 924(c) count to run consecutively to the sentence on the 21 U.S.C. § 841 count.
- (iii) The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. § 113(a)(3) (10 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460–485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 100 months on the 18 U.S.C. § 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.

**Historical Note**

Effective November 1, 1987. Amended effective November 1, 1989 (amendments 287 and 288); November 1, 1994 (amendment 507); November 1, 1998 (amendment 579); November 1, 2000 (amendment 598); November 1, 2002 (amendment 642); November 1, 2004 (amendment 674); November 1, 2005 (amendments 677 and 680); November 1, 2010 (amendment 747); November 1, 2012 (amendments 767 and 770).

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**§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment**

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- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:
  - (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
  - (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

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- (c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.
- (d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

### Commentary

#### Application Notes:

1. **Consecutive Sentence – Subsection (a) Cases.** Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.
2. **Application of Subsection (b).—**
  - (A) **In General.**—Subsection (b) applies in cases in which all of the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (d).
  - (B) **Inapplicability of Subsection (b).**—Subsection (b) does not apply in cases in which the prior offense was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is a prior conviction for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).
  - (C) **Imposition of Sentence.**—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.
  - (D) **Example.**—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 90 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 25 grams of cocaine, an offense for which the defendant has been convicted

and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12–18 months (Chapter Two offense level of level 16 for sale of 115 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. **Application of Subsection (c).**—Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.
4. **Application of Subsection (d).**—
  - (A) **In General.**—Under subsection (d), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:
    - (i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));
    - (ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;
    - (iii) the time served on the undischarged sentence and the time likely to be served before release;
    - (iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and
    - (v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.
  - (B) **Partially Concurrent Sentence.**—In some cases under subsection (d), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.
  - (C) **Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.**—Subsection (d) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the

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time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) **Complex Situations.**—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (d) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) **Downward Departure.**—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(d), rather than as a credit for time served.

5. **Downward Departure Provision.**—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. *See* §5K2.23 (Discharged Terms of Imprisonment).

**Background:** Federal courts generally “have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.” *See Setser v. United States*, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser*, 132 S. Ct. at 1468. Exercise of that discretion, however, is predicated on the court’s consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 289); November 1, 1991 (amendment 385); November 1, 1992 (amendment 465); November 1, 1993 (amendment 494); November 1, 1995 (amendment 535); November 1, 2002 (amendment 645); November 1, 2003 (amendment 660); November 1, 2010 (amendment 747); November 1, 2013 (amendment 776); November 1, 2014 (amendments 782, 787, and 789); November 1, 2016 (amendment 802).
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