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UNITED STATES OF AMERICA, Appellee,—v.—ALFRED LENOCI, SR., Defendant-Appellant.

Docket No. 03-1481

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2004 U.S. App. LEXIS 15530

April 2, 2004, Argued

July 28, 2004, Decided

PRIOR HISTORY: [*1] Appeal from an order of the United States District Court for the District of Connecticut (Janet Bond Arterton, Judge) convicting the defendant, after a guilty plea, of one count of bribery in violation of *18 U.S.C. § 666(a)(2)* and one count of executing a scheme to deprive another of the intangible right of honest services in violation of *18 U.S.C. §§ 1341* and *1346*. On appeal, the defendant contends that the District Court erred by failing to group his two counts of conviction under § 3D1.2(c) or § 3D1.2(d) of the United States Sentencing Guidelines. We find meritless

the defendant's claim that his counts should have been grouped under § 3D1.2(c). As for the defendant's claim that the District Court erroneously failed to group his convictions under § 3D1.2(d), we decide the issue on the ground of harmless error. We write, however, to describe some of the ambiguities of § 3D1.2(d) that would have made resolution of the defendant's claim difficult had his challenge demonstrated harmful error. We also direct the Clerk of the Court to forward a certified copy of this opinion to the Chairperson and Chief Counsel of the United States Sentencing

[*2] Commission.

DISPOSITION: Affirmed. Stay granted.

LexisNexis(R) Headnotes

COUNSEL: IRA B. GRUDBERG, Jacobs, Grudberg, Belt & Dow, PC, New Haven, Connecticut (Trisha Morris Porto, of counsel), for Defendant-Appellant.

RONALD S. APTER, Assistant United States Attorney for the District of Connecticut, Hartford, Connecticut (Jeffrey A. Meyer, Assistant United States Attorney, of counsel; Kevin J. O'Connor, United States Attorney for the District of Connecticut, on the brief), for Appellee.

JUDGES: Before: JACOBS, STRAUB, and B.D.

PARKER, Circuit Judges.

OPINIONBY: STRAUB

OPINION: STRAUB, *Circuit Judge*:

Defendant-Appellant Alfred Lenoci, Sr., ("Lenoci") appeals from an order of the United States District Court for the District of Connecticut (Janet Bond Arterton, *Judge*) convicting the defendant, after a guilty plea, of one count of bribery in violation of *18 U.S.C. § 666(a)(2)* and one count of executing a scheme to deprive another of the intangible right of honest services in violation of *18 U.S.C. §§ 1341* and *1346*. On appeal, Lenoci contends that the District Court erred by failing to group his two counts of conviction under § 3D1.2(c) or § 3D1.2(d) of the United States Sentencing Guidelines

[*3] Manual ("U.S.S.G."). We find meritless the defendant's claim that his counts should have been grouped under § 3D1.2(c). As for his claim that the District Court erroneously failed to group his convictions under § 3D1.2(d), we decide the issue on the ground of harmless error. We write, however, to describe some of the ambiguities of § 3D1.2(d) that would have made resolution of the defendant's claim difficult had his challenge demonstrated harmful error. We also direct the Clerk of the Court to forward a certified copy of this opinion to the Chairperson and Chief Counsel of the United States Sentencing Commission. n1

n1 Oral argument was heard in this case on April 2, 2004, nearly three months before the Supreme Court decided *Blakely v. Washington*, ___

U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 2004 WL 1402697 (June 24, 2004). While we bring the grouping issues raised in this case to the attention of the United States Sentencing Commission, we recognize that in light of *Blakely*, the Commission may be presented with more pressing matters to which it must attend. In this case, the parties have not raised any *Blakely* issues, nor do we believe that any such issues are immediately apparent. However, out of an abundance of caution, we stay the issuance of the mandate in this case until further direction from the panel. *See, e.g., United States v. Penaranda, 2004 U.S. App. LEXIS 14268, Nos. 03-1055(L), 03-1062(L), 2004 WL 1551369 (2d Cir. July 12, 2004) (in banc)*.

[*4]

BACKGROUND

The facts of this case are largely derived from the defendant's presentence report. According to his presentence report, Lenoci, along with his son and brother, sought to become the preferred real estate developer for certain tracts of land in Bridgeport, Connecticut. One of these was a seventeen-acre parcel of land at the former site of the Father Panik Village low-income housing project. To further his development plans at the site, Lenoci sought the support and approval of Bridgeport's then-mayor, Joseph Ganim. Lenoci agreed to pay for a

variety of construction projects for the mayor's personal residence. In exchange, Ganim used his official position to advance Lenoci's efforts to develop the land; in particular, Ganim wrote a letter in August 1999 to the Bridgeport Housing Authority to support Lenoci's request to enter into a long term lease for the site.

Similarly, in late 1999, Lenoci sought to develop a fifty-acre parcel of land on the Bridgeport waterfront known as Steel Point. To secure the rights for development, Lenoci agreed to pay the mayor's intermediary \$1 for every square foot of commercial space in Bridgeport developed in the future by Lenoci's

[*5] company, including any development at the Steel Point site. At a later meeting, Lenoci also agreed to raise funds for the mayor's anticipated campaign for governor, in return for Ganim's support for the venture at Steel Point.

With respect to the Father Panik Village site, Lenoci also sought state development funds to subsidize the proposed facility. From June 1999 to October 2000, Lenoci provided Mark Trinkley, a senior development manager at the State of Connecticut's Department of Economic and Community Development, with approximately \$35,000 worth of landscaping services, home improvements,

and other personal benefits. These expenditures were made in exchange for Trinkley's recommendation that \$6.5 million in state development funds be directed to Lenoci's company.

On October 19, 2001, Lenoci waived his right to a grand jury indictment and pled guilty to a two-count information arising from his attempts to illegally advance real estate development ventures in Bridgeport. In Count One, the defendant was charged under *18 U.S.C. § 666* with bribing Joseph Ganim. In Count Two, Lenoci was charged under *18 U.S.C. §§ 1341* and *1346* with

[*6] using the United States mails to execute a scheme to deprive the public of the honest services of Mark Trinkley.

Pursuant to a written plea agreement, Lenoci and the government made several stipulations concerning their view as to how Lenoci's sentence should be calculated under the November 2000 sentencing guidelines. The parties agreed that the offense level for Count One should be determined under U.S.S.G. § 2C1.1, entitled "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion under Color of Official Right." Under that guideline, the parties agreed to a base offense level of

10 under § 2C1.1(a), plus an eight-level enhancement under § 2C1.1(b)(2)(B) because "the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position." Thus, the parties calculated an offense level of 18 under Count One.

Similarly, the parties agreed that the offense level for Count Two should be determined under U.S.S.G. § 2C1.7, which applies to "Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions.

[*7] " Under that guideline, the parties agreed to a base offense level of 10 under § 2C1.7(a), plus a four-level enhancement under § 2C1.7(b)(1)(A) based upon the parties' stipulation that the fraud concerning Mark Trinkley was valued at \$35,000. *See also* U.S.S.G. § 2F1.1(b)(1)(E) (2000). Thus, the parties calculated an offense level of 14 under Count Two.

Importantly, however, the plea agreement did not stipulate whether Counts One and Two should be "grouped." The complex grouping provisions in the guidelines describe the calculation of a defendant's offense level in cases, like Lenoci's, which involve

multiple counts of conviction. *See* U.S.S.G. §§ 3D1.1 to 3D1.5. The defendant argued that his two counts involved substantially the same harm and, therefore, should have been grouped under § 3D1.2(c) or § 3D1.2(d). The defendant contends that such a grouping would have led to a combined offense level of 18. With a three-level reduction for acceptance of responsibility, his adjusted offense level would have been 15.

By contrast, the government argued that Lenoci's counts involved distinct transactions and victims, such that grouping was inappropriate. Under the government's

[*8] analysis, if the offenses were not grouped, Lenoci would have a combined offense level of 20, which, subject to the three-level reduction for acceptance of responsibility, would have resulted in an adjusted offense level of 17. The day before sentencing, the defendant was made aware of an alternative argument proposed by the government. The government stated that even if the counts were grouped as Lenoci argues they should be, the court should then apply a two-level upward adjustment under § 2C1.1(b)(1), which states that "[i]f the offense involved more than one bribe or extortion, increase by 2

levels." With such an adjustment, the government argued, Lenoci's adjusted offense level still would have been 17. Thus, under the government's view, Lenoci's offense level would have been the same regardless of the court's resolution of the § 3D1.2(d) grouping issue, so that any error made by the District Court was harmless.

The Probation Office took the view that the offenses should be grouped under § 3D1.2(d) but concurred with the government's alternative calculation, finding that the two-level upward adjustment is appropriate. The defendant took issue with both the Probation Office's

[*9] recommendation and the government's alternative calculation, claiming that the two-level upward adjustment was not consistent with the parties' plea agreement.

At Lenoci's July 22, 2003 sentencing hearing, the District Court declined to group the two counts. The court determined that the two counts did not involve the same aggregate harm:

Count One is driven by the fact of payment to influence an elected official [while] Count Two is driven by the value of the benefits or loss, [such] that you don't have the kind of aggregate value that is a predicate for this

concept of grouping. . . . [A]t the bottom line it is an endeavor to buy the influence of public officials, one is elected, one is not elected, they're two different programs, and the difference of officials, schemes, the official[s] status, seems to me to fall outside what is contemplated to be achieved by the grouping.

Thus, starting with the combined offense level of 20, the court applied a three-level reduction for acceptance of responsibility, producing an adjusted offense level of 17. Having decided not to group the counts, the court did not reach the government's

[*10] alternative argument that a two-level upward adjustment under § 2C1.1(b)(1) would have applied in any event.

The District Court then granted the government's motion for a downward departure under § 5K1.1 based upon Lenoci's cooperation with the government in a large-scale investigation into public corruption in Bridgeport. Had the court not applied the downward departure, Lenoci would have been given a sentence in the range of 24–30 months of incarceration based on his adjusted offense level of 17. However, because of the downward departure, Lenoci's sentence was not rigidly dictated by the court's calculation of Lenoci's adjusted offense level. Rather, having considered Lenoci's adjusted offense level in conjunction with the government's § 5K1.1 motion, the court exercised its discretion to principally sentence Lenoci to a term of imprisonment of 12 months and 1 day on each count, to be served concurrently. n2 Lenoci filed a timely notice of appeal on August 5, 2003. On August 26, 2003, the District Court granted Lenoci's request for continuation of release on bond pending the outcome of

this appeal.

n2 Because the court imposed a sentence that is not dictated by the sentencing guidelines, it is possible that the court would have imposed the same ultimate sentence, regardless of whether the court computed an adjusted offense level of 17 (as the government contends) or 15 (as Lenoci contends). When asked whether or not the court would have imposed the same ultimate sentence, however, the court stated that it would be "inappropriate at this juncture to conclude that a reimposed sentence would definitively remain unchanged." Thus, we cannot and do not avoid addressing Lenoci's appeal because of the court's downward departure. *Cf. United States v. Shuster*, 331 F.3d 294, 296 (2d Cir. 2003) ("[G]uideline disputes that would not have affected the ultimate sentence need not be adjudicated on appeal."), *cert. denied*, 157 L. Ed. 2d 887, 124 S. Ct. 1039 (2004).

[*11]

DISCUSSION

When examining district court determinations as to the sentencing guidelines, we review factual findings for clear error and legal interpretations *de novo*. See *United States v. Gordon*, 291 F.3d 181, 186 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114, 154 L. Ed. 2d 788, 123 S. Ct. 866 (2003); *United States v. Carboni*, 204 F.3d 39, 46 (2d Cir. 2000). When applying the guidelines to the facts of this case, we give "due deference" to the district court. 18 U.S.C. § 3742(e).

The key grouping provision for our purposes is subsection (d) of U.S.S.G. § 3D1.2, entitled "Groups of Closely Related Counts." It provides as follows:

§ 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:

....

(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

[*12] the offense guideline is written to cover such behavior.

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

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

§§ 2C1.1, 2C1.2, 2C1.7, 2C1.8;

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

§§ 2E4.1, 2E5.1;

§§ 2G2.2, 2G2.4;

§ 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.

Specifically excluded from the operation of

this subsection are:

all offenses in Chapter Two,
Part A;

§§ 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.

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)

[*13] used to determine the offense level.

offenses.

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

U.S.S.G. § 3D1.2. n3

n3 We show here the current November 2003 version of the guideline, even though the parties' plea agreement contemplated use of the November 2000 version. The changes to the guideline during this period, however, are not pertinent to Lenoci's

The guideline begins by stating the standard which governs grouping under this section. Namely, "[a]ll counts involving substantially the same harm shall be grouped together" It goes on to explain what this means in subsections (a), (b), (c), and (d). Most important for our purposes, subsection (d) provides certain circumstances where counts are deemed to involve substantially the same harm. It lists several guidelines and, using seemingly mandatory language, provides that offenses covered by those guidelines are "to be grouped." It then goes on to provide

[*14] another list of guidelines which are "[s]pecifically excluded from the operation of this subsection." Afterward, it states that offenses which fall under guidelines that are not listed should be examined on a "case-by-case" basis.

I. THE "TO BE GROUPED" LANGUAGE OF U.S.S.G. § 3D1.2(d)

A critical preliminary issue presented by U.S.S.G. § 3D1.2(d) is the meaning of its seemingly mandatory provision that "[o]ffenses covered by the following guidelines *are to be grouped*." U.S.S.G. § 3D1.2(d)

(emphasis added). The list of offenses under subsection (d) which are "to be grouped" is composed of rows of guideline sections from Chapter 2 of the United States Sentencing Guidelines Manual. Individual guidelines that fall under the same "part" of Chapter 2 all contain the same alphabetical letter, appear on the same line, and are separated from each other by commas. Thus, for example, all of the guidelines in the second row of the "to be grouped" list are from "part C" of Chapter 2, which addresses offenses that involve public officials. Each row is separated from the other rows by semi-colons. Notably for our purposes, §§ 2C1.1 and 2C1.7, the guidelines covering Lenoci's offenses,

[*15] both appear in the second line in the listing of "to be grouped" offenses. Thus, a question is raised as to whether, contrary to the District Court's determination, the guidelines provide that Lenoci's offenses must be grouped.

Unfortunately, the guidelines are not entirely clear as to what is "to be grouped" under § 3D1.2(d). Had we not the benefit of interpretive case law, the provision would suggest at least three possible interpretations. We could:

(1) group all counts that fall under guidelines which appear anywhere in the "to be grouped" list;

(2) group all counts that fall under guidelines that appear on the same line of the list; or

(3) group all counts that fall under a particular guideline in the list (e.g., all counts under § 2C1.1 are to be grouped together).

The first interpretation, namely, that we are to group all offenses in the "to be grouped" list, has been rejected by most courts that have considered the issue and also poses practical difficulties of aggregation. In our Circuit, this approach is likely precluded by our decision in *United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999), cert. denied, 528 U.S. 1162, 145 L. Ed. 2d 1084 (2000).

[*16] *Napoli* addressed whether or not fraud and money laundering counts should have been grouped under § 3D1.2(d). At the time, the applicable guidelines, § 2F1.1 (fraud) and § 2S1.1 (money laundering), both appeared in the § 3D1.2(d) list of offenses which "are to be grouped under this subsection." In a footnote in that case, we stated that we "reject the broad view that money laundering and fraud counts can be grouped under subsection (d) simply because they both appear on its list of counts 'to be grouped.'" *Id. at 9 n.4*. We pointed out that the list of counts "to be grouped" under § 3D1.2(d)

contains offenses, such as drug dealing and fraud, that measure the harm they seek to punish in different ways (e.g., drug quantity versus amount of money). "Because the guidelines for each of these offenses measure harm differently, it would be impossible to use either guideline to determine an offense level based on the 'total' or 'aggregate' harm from both—as is required when counts are grouped under subsection (d)." *Id.* Therefore, we concluded that the appearance of both guidelines on the "to be grouped" list was not conclusive.

Furthermore, this first interpretation

[*17] is contrary to case law in many other circuits where grouping is not automatic simply because each count falls under a guideline in the "to be grouped" list. See *United States v. Williams*, 154 F.3d 655, 657 (6th Cir. 1998), cert. denied, 525 U.S. 1113, 142 L. Ed. 2d 788 (1999); *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993); *United States v. Seligsohn*, 981 F.2d 1418, 1425 (3d Cir. 1992), cert. denied, 513 U.S. 1119, 130 L. Ed. 2d 800 (1995); *United States v. Harper*, 972 F.2d 321, 322 (11th Cir. 1992); *United States v. Johnson*, 971

F.2d 562, 576 (10th Cir. 1992). In addition, in several cases in this Circuit where we eventually concluded that grouping is appropriate for counts that fall under different guidelines, we first engaged in an analysis of whether the offenses were of the same general type and were otherwise suitable for grouping. See *Gordon*, 291 F.3d at 192-93 (2d Cir. 2002); *United States v. Petrillo*, 237 F.3d 119, 124-25 (2d Cir. 2000); *United States v. Fitzgerald*, 232 F.3d 315, 319-20 (2d Cir. 2000).

[*18] If appearance on the list of counts to be grouped was conclusive and grouping automatic, the careful analysis in those cases would have been unnecessary.

Lastly, this interpretation is not supported by Application Note 6 to § 3D1.2. n4 The application note states that "[c]ounts 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." This strongly suggests that the grouping of counts that fall under different guidelines is not automatic merely because the counts are covered by guidelines in

the "to be grouped" list.

n4 *See Stinson v. United States*, 508 U.S. 36, 45, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993) (stating that "the guidelines are the equivalent of legislative rules adopted by federal agencies" and "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted).

[*19]

The second interpretation would automatically group counts that fall under guidelines that appear on the same row of the list. This makes intuitive sense because the offenses under guidelines listed on the same row are generally similar, having been selected for inclusion in the same part of Chapter 2. In addition, the presentation of the list, which separates guidelines on the same row with commas and uses semicolons to set these lines off from the rest, might suggest that this clustering was intentional. Furthermore, guidelines on the same row generally measure harm in the same way, making it

easier to aggregate harm for counts under guidelines on the same line.

At least two circuit courts have been sympathetic to the view that courts should automatically group counts covered by guidelines which appear on the same row of the "to be grouped" list. *See United States v. Zanghi*, 189 F.3d 71, 85 (1st Cir. 1999) (holding that grouping is automatic for counts under guidelines § 2S1.1 and § 2S1.2, and while finding uncertainty in the case law as to "whether it is imperative to group all offenses covered by guidelines listed in paragraph 2 of § 3D1.2(d)," noting that

[*20] such cases do not address grouping as to "offenses covered by guidelines listed *in the same row* of that paragraph" (emphasis in original), *cert. denied*, 528 U.S. 1097, 145 L. Ed. 2d 705 (2000); *United States v. Emerson*, 128 F.3d 557, 564 n.1 (7th Cir. 1997) (stating that "[t]here is some question whether all of the offense sections listed under §3D1.2(d) are to be grouped with each other, or if only those sections listed in the same row are to be grouped together").

On the other hand, there is little in the language of the sentencing guidelines to support an approach under

which grouping is automatic for counts in the same row but not for those on different rows. *Napoli*, at a minimum, provides no support for this line-by-line approach. Although the offenses in *Napoli* involved guidelines listed on different rows, it did not distinguish between offenses under different guidelines on different rows and offenses under different guidelines on the same row. Furthermore, Application Note 6 to § 3D1.2 draws no distinction as to grouping procedures on a line-by-line basis; rather, it seems to group offenses under different guidelines the

[*21] same way regardless of whether or not they are listed on the same line. In addition, § 3D1.2(d) lists certain guidelines that are "[s]pecifically excluded from the operation of this subsection." These listings have the same format as those which are "to be grouped." This suggests that the physical layout of the guidelines on the page is largely just a matter of visual clarity and alphabetical ordering, without legal significance. Given that some rows contain only one guideline, it is particularly difficult to find that the placement of certain guidelines on the same row is meant to signify a particular relationship among those guidelines. In

short, other than the guideline's aesthetic presentation, there is little support in this Circuit for the view that the placement of certain guidelines on the same line has legal significance.

Under a third approach, only offenses covered by the same guideline must be grouped when that common guideline appears in the "to be grouped" list. Thus, the guideline language specifying that "[o]ffenses covered by the following guidelines are to be grouped under this subsection" is read as applying to counts under individual guidelines, but not across

[*22] guidelines. If, for example, both of Lenoci's offenses were covered under § 2C1.1, a "to be grouped" guideline, then, following this interpretation, both offenses would have to be grouped.

This third approach is consistent with Application Note 6 to § 3D1.2, which states that "[c]ounts 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." (emphasis added). By specifying a specific approach to take when different

guidelines on the list are involved, the application note implies that grouping is automatic for counts covered by the same guideline. *See United States v. Buenrostro-Torres*, 24 F.3d 1173, 1175-76 (9th Cir. 1994) ("If the offenses at issue are covered by one of the listed guidelines we do not analyze the facts of the particular case. Here, the offenses in Counts One through Three are covered by § 2F1.1; Congress has determined that such offenses are categorically groupable under § 3D1.2(d)."). Yet, as discussed further in the next section, the view that we must group counts that fall

[*23] under the same "to be grouped" guideline has not met with universal agreement.

The preceding discussion shows that the plain language of the "to be grouped" provision in § 3D1.2(d) is ambiguous. While the application notes and interpretive case law may clarify that language and perhaps foreclose certain interpretations, the range of interpretations available has surely limited the value of the "to be grouped" language, which was likely intended to offer straightforward guidance as to grouping in at least certain instances.

We also note that the three interpretations described

here are not exhaustive, and we raise a question as to whether mandatory grouping, under any of these interpretations, ought to be limited based on whether the relevant offense level calculations primarily involve some measure of harm that *can* be aggregated. For as we discuss in the next section, in considering whether Lenoci's offenses should be grouped, it is not clear how much weight we ought to give to the fact that his harmful conduct cannot easily be aggregated under the guidelines.

II. AGGREGATION OF THE HARM FROM DEFENDANT'S CONDUCT

If the plain meaning of the "to be grouped" language

[*24] failed to resolve the grouping question presented here, we would turn next to the question of whether the counts here ought nevertheless be grouped under the more general provisions of § 3D1.2(d). The government argues, *inter alia*, that grouping is inappropriate here because the offense levels associated with each count are not "determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm." U.S.S.G. § 3D1.2(d). The offense level for Count One was determined by the eight-level upward adjustment triggered by Ganim's status as an elected official. *See* U.S.S.G. § 2C1.1(b)(2)(B).

By contrast, the offense level for Count Two was determined by the monetary amount paid to Trinkley. *See* U.S.S.G. §§ 2C1.7(b)(1)(A), 2F1.1(b)(1)(E) (2000). As the government correctly notes, the harm from these offenses cannot easily be aggregated were they placed into the same group.

The difficulty presented by this challenge is that the relevant guidelines, §§ 2C1.1 and 2C1.7, while not identical, are virtually identical. In fact, had both of Lenoci's counts been deemed to fall under the same guideline, then under any of the three interpretations

[*25] of the "to be grouped" language discussed in the previous section, we would ordinarily have grouped them, despite the difficulties in aggregation noted by the government. If we were compelled by the guidelines to group both of Lenoci's offenses had they fallen under the same guideline, then the government's concern about aggregation is diminished somewhat. Furthermore, one of the purposes of the grouping provisions is to reduce the importance of the charging decision. *See* U.S.S.G., ch. 3 pt. D, intro. cmt. P 4 (stating that the grouping rules serve "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially

identical offense conduct") (quoted in *United States v. Ahmad*, 202 F.3d 588, 591 (2d Cir. 2000)). We should, therefore, be hesitant to find both: (1) that we must group counts that fall under identical "to be grouped" guidelines but (2) that we need not group counts that fall under *virtually* identical "to be grouped" guidelines.

There is, however, some precedent suggesting that grouping is not automatic even for counts which fall under identical "to be grouped" guidelines. The government cites *United States v. McElroy*, 910 F.2d 1016, 1027 (2d Cir. 1990),

[*26] where we held that the District Court did not err when it declined to group counts of paying bribes with counts of receiving bribes, even though they appear to have fallen under the same "to be grouped" guideline. In that case, we did not require grouping because the counts "did not involve either the same property or the same victim." *Id.* Based on *McElroy*, it would seem that grouping is not mandatory even for counts under the same "to be grouped" guideline.

Even if *McElroy* was a case in which we failed to group counts in the same "to be grouped" guideline,

however, we must read it in light of subsequent case law. For example, in *Napoli*, we explicitly disapproved of the same-victim requirement which led the *McElroy* court not to group counts that fell under the same "to be grouped" guideline. *See Napoli, 179 F.3d at 8-9.* Furthermore, in *United States v. Gelzer, 50 F.3d 1133, 1145 (2d Cir. 1995)*, we held that it was clear error not to have grouped two firearms counts, both of which fell under § 2K2.1, a "to be grouped" guideline. In that case, our analysis turned, perhaps exclusively, on the fact that the relevant guideline appeared

[*27] in the "to be grouped" list. The case at bar does not present a proper occasion to resolve these issues, however, because we find, as discussed in Section IV, *infra*, that if the District Court did err as to grouping under § 3D1.2(d), such error was harmless.

III. GROUPING UNDER § 3D1.2(c)

The defendant argues that if his counts are not grouped under § 3D1.2(d), they should be grouped under § 3D1.2(c). Under § 3D1.2(c), counts involve substantially the same harm and should be grouped "[w]hen 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." U.S.S.G. § 3D1.2(c). This provision is intended to prevent "double counting" of "closely related" offense behavior. U.S.S.G. § 3D1.2(c), cmt. n.5. According to *Lenoci*, his conviction under Count Two for honest services mail fraud requires that the public be deprived of the intangible right to the honest services of a public official. Similarly, he notes, the eight-level upward adjustment applied to his bribery offense charged in Count One because it "involved a payment for the purpose of influencing an elected

[*28] official or any official holding a high-level decision-making or sensitive position." U.S.S.G. § 2C1.1(b)(2)(B). Thus, he claims that the offense conduct in both Counts One and Two involves the influencing of public officials.

We find Lenoci's § 3D1.2(c) grouping argument to be without merit. Though both counts of conviction contemplate corruption of a public official, the offense conduct in each count against Lenoci involved different public officials. There was, therefore, no double counting that would justify application of the § 3D1.2(c) grouping provision. *Cf. United States v. Leung*, 360 F.3d 62, 69 (2d Cir. 2004) (finding error where the District Court

failed to group an obstruction of justice count with a passport fraud count that included an obstruction enhancement where the enhancement was "based on the same obstructive behavior").

IV. HARMLESS ERROR

We need not resolve Lenoci's grouping challenge, however, because we find that even if the District Court erroneously failed to group his counts of conviction under § 3D1.2(d), any such error was harmless. *See United States v. Tropiano*, 50 F.3d 157, 162 (2d Cir. 1995) ("[W]e will

[*29] vacate a sentence and remand for resentencing because of a misapplication of the Guidelines only if we determine that the error was not harmless."); *United States v. Thorn*, 317 F.3d 107, 126 (2d Cir.), cert. denied, 538 U.S. 1064, 155 L. Ed. 2d 1119 (2003). Even if the court should have grouped the two counts in this case, Lenoci's offense level would have been the same. See *United States v. Sacco*, 899 F.2d 149, 151 (2d Cir. 1990) (holding that even where the government conceded that the court erroneously failed to group two counts, the error was harmless because "the court's grouping error

made no difference in the sentence"). When Lenoci's counts were not grouped, his combined offense level was calculated by the District Court as 17. Lenoci argues that his offense level would have been 15 if the counts were grouped. We find, however, that even if the counts were grouped, his total offense level would still have been 17; hence, any error was harmless.

Were the two counts combined into one group under § 3D1.2(d), as Lenoci suggests they should have been, the court would have applied § 3D1.3(b). Under that provision, "[w]hen the

[*30] counts involve offenses of the same general type to which different guidelines apply," as the parties agree is the case here, we "apply the offense guideline that produces the highest offense level." We determine the applicability of "specific offense characteristics or adjustments . . . based upon the combined offense behavior taken as a whole." U.S.S.G. § 3D1.3, cmt. n.3.

Under this analysis, Lenoci's offense level under the § 2C1.1 bribery guideline would have been 20. Eight levels would have been added to his base offense level of 10 because the offense involved a payment for the

purpose of influencing an elected official. *See* U.S.S.G. § 2C1.1(b)(2)(B). Importantly, however, we would add an additional two levels because when the conduct is combined into one group, it triggers the applicability of a two-level upward adjustment under § 2C1.1(b)(1). *See* U.S.S.G. § 2C1.1(b)(1) ("If the offense involved more than one bribe or extortion, increase by 2 levels."). Having calculated an offense level of 20 under § 2C1.1, the court would then apply a three-level reduction for acceptance of responsibility, making Lenoci's total offense level 17, the same level arrived at by

[*31] the District Court when the counts were not grouped.

Lenoci does not contest this analysis, as such, but argues instead that the government is precluded by the plea agreement from arguing for the two-level upward adjustment under § 2C1.1(b)(1). The defendant states that, during plea bargaining, both parties were aware that multiple bribes were involved as to both Ganim and Trinkley, such that the government could have sought the upward adjustment regardless of the grouping decision. Yet, the plea agreement made no mention of any two-level upward adjustment despite the parties'

mutual knowledge that several bribes were involved. Furthermore, Lenoci claims that he was not even aware of the government's intention to raise the issue of the two-level enhancement until the day before sentencing. Lenoci argues that the plea agreement must be interpreted according to his reasonable expectation that such an enhancement would not be sought by the government. Thus, under the defendant's analysis, the failure to group the counts was harmful error because, had the court been persuaded by Lenoci's grouping argument, the government would have been precluded from arguing for the multiple bribe

[*32] enhancement. Lenoci concludes that, if he is right as to grouping, the court would have respected the spirit of his plea agreement, yielding a total offense level of 15.
n5

n5 If the court had come to the conclusion that the multiple bribe enhancement should be applied either on its own or at the suggestion of the Probation Office, such a determination would have been correct and would not have violated the plea agreement. The plea agreement specifically states that it is not binding on the court or the

Probation Office and that the defendant does not have the "right to withdraw his guilty plea if his sentence or the Guideline application is other than he anticipated."

"We review interpretations of plea agreements *de novo* and in accordance with principles of contract law." *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002) (citing *United States v. Padilla*, 186 F.3d 136, 139 (2d Cir. 1999)). "A sentence imposed pursuant to a plea agreement must follow the reasonable

[*33] understandings and expectations of the defendant with respect to the bargained-for sentence." *United States v. Palladino*, 347 F.3d 29, 33 (2d Cir. 2003) (internal quotation marks omitted). "Because the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant." *Riera*, 298 F.3d at 133 (internal quotation marks omitted); *Padilla*, 186 F.3d at 140.

We find that the plea agreement did not prevent the government from arguing for a two-level upward

adjustment under § 2C1.1(b)(1). The plea agreement states, "[t]he defendant acknowledges that no other promises, agreements, or conditions have been entered into other than those set forth in this plea agreement, and none will be entered into unless set forth in writing by all the parties." Lenoci cannot cite any provision in the plea agreement which precludes the government from arguing for the two-level upward adjustment, for there is no such provision. The fact that the government did not seek the multiple bribe enhancement in one context does not preclude it from doing so in another, absent some

[*34] agreement on the issue. "[W]here—as here—the Government incorporates into the plea agreement an integration clause expressly disavowing the existence of any understandings other than those set forth in the plea agreement, a defendant may not rely on a purported implicit understanding in order to demonstrate that the Government is in breach." *In re Altro*, 180 F.3d 372, 376 (2d Cir. 1999).

Furthermore, the plea agreement states that "[i]n the event the Probation office or the Court contemplates any sentencing calculations different from those stipulated by the parties, the parties reserve the right to respond

to any inquiries and make appropriate legal arguments regarding the proposed alternate calculations." Although the government was apparently the first party to propose the two-level enhancement for multiple bribes, it did so in response to the recommendation in the presentence report that the counts be grouped. Because the grouping of counts in the plea agreement was not an issue stipulated to by the parties, the government did not violate the plea agreement by presenting an argument in the alternative for a two-level upward adjustment.

Lenoci could anticipate

[*35] that the general issue of grouping would be presented to the District Court because his plea agreement and allocution acknowledge multiple instances of criminal conduct. Indeed, Lenoci does not argue that the government was prohibited from raising *some* grouping argument, only that it could not argue for the multiple bribe enhancement. We find that the argument for the two-level multiple bribe enhancement was an extension of the government's argument concerning the propriety of grouping and the methods by which grouping should or should not be accomplished. Lenoci likely realized and, in any event, should have realized that the government would present a grouping argument, and the multiple

bribe enhancement is simply a part of that argument.

Where, as here, the plea agreement stipulates that there were multiple bribes, it is obvious that the enhancement would have been applicable. Thus, we conclude that, regardless of the District Court's decision as to grouping under § 3D1.2(d), Lenoci's sentence would have been the same. We, therefore, find that if there had been any error as to the § 3D1.2(d) grouping decision, it was harmless.

CONCLUSION

For the reasons stated,

[*36] we hereby AFFIRM the judgment of the District Court and direct the Clerk of the Court to forward a certified copy of this opinion to the Chairperson and Chief Counsel of the United States Sentencing Commission.

Furthermore, in light of *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 2004 WL 1402697 (2004), the mandate in this case shall not issue until further direction from the panel.