

# Role in the Offense Breakout

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Annual National Seminar on the  
Federal Sentencing Guidelines

New Orleans, Louisiana  
Thursday, June 14, 2012

# Discussion Outline

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- Panel Introductions
- Chapter Three Adjustments for Role in the Offense
- Relevant Conduct and Chapter Three Adjustments
- Role in the Offense: Aggravating and Mitigating Roles
- Role in the Offense: Position of Trust/Special Skill

# All Star Panel

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Honorable Gustavo A. Gelpi, Jr.

District Judge, San Juan, PR

Honorable Janis Graham Jack

District Judge, Corpus Christi, TX

Amanda LaMotte

U.S. Probation Officer, Athens, GA

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Senior Education & Sentencing Practice Specialist (Moderator)

## SENTENCING TABLE (in months of imprisonment)

### Criminal History Category (Criminal History Points)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	0-6	0-6	0-6	0-6	0-6	0-6
	0-6	0-6	0-6	0-6	0-6	1-7
	0-6	0-6	0-6	0-6	2-8	3-9
	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	0-6	0-6	1-7	4-10	6-12	9-15
	0-6	1-7	2-8	6-12	9-15	12-18
	0-6	2-8	4-10	8-14	12-18	15-21
	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	4-10	6-12	8-14	12-18	18-24	21-27
	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	8-14	10-16	12-18	18-24	24-30	27-33
	10-16	12-18	15-21	21-27	27-33	30-37
	12-18	15-21	18-24	24-30	30-37	33-41
	15-21	18-24	21-27	27-33	33-41	37-46
	18-24	21-27	24-30	30-37	37-46	41-51
	21-27	24-30	27-33	33-41	41-51	46-57
	24-30	27-33	30-37	37-46	46-57	51-63
	27-33	30-37	33-41	41-51	51-63	57-71
	30-37	33-41	37-46	46-57	57-71	63-78
	33-41	37-46	41-51	51-63	63-78	70-87
	37-46	41-51	46-57	57-71	70-87	77-96
	41-51	46-57	51-63	63-78	77-96	84-105
	46-57	51-63	57-71	70-87	84-105	92-115
	51-63	57-71	63-78	77-96	92-115	100-125
	57-71	63-78	70-87	84-105	100-125	110-137
	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	70-87	78-97	87-108	100-125	120-150	130-162
	78-97	87-108	97-121	110-137	130-162	140-175
	87-108	97-121	108-135	121-151	140-175	151-188
	97-121	108-135	121-151	135-168	151-188	168-210
	108-135	121-151	135-168	151-188	168-210	188-235
	121-151	135-168	151-188	168-210	188-235	210-262
	135-168	151-188	168-210	188-235	210-262	235-293
	151-188	168-210	188-235	210-262	235-293	262-327
	168-210	188-235	210-262	235-293	262-327	292-365
	188-235	210-262	235-293	262-327	292-365	324-405
	210-262	235-293	262-327	292-365	324-405	360-life
	235-293	262-327	292-365	324-405	360-life	360-life
	262-327	292-365	324-405	360-life	360-life	360-life
	292-365	324-405	360-life	360-life	360-life	360-life
	324-405	360-life	360-life	360-life	360-life	360-life
	360-life	360-life	360-life	360-life	360-life	360-life
	life	life	life	life	life	life

# Offense Level Calculations

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## Chapter Two Offense Guideline

- Base Offense Level
- Specific Offense Characteristics
- Cross References

## Chapter Three Adjustments

- Victim
- Role
- Obstruction
- Multiple Counts
- Acceptance

# Chapter Three Adjustments for Role in the Offense

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# Role in the Offense

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## Chapter Three, Part B

### Levels

- §3B1.1 Aggravating Role +4,+3, or +2
- §3B1.2 Mitigating Role -4, -3, or -2
- §3B1.3 Abuse of a Position of Trust  
or Use of a Special Skill +2

# Role in the Offense (cont.)

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## Chapter Three, Part B

	<u>Levels</u>
• §3B1.4 Using a Minor To Commit a Crime	+2
• §3B1.5 Use of Body Armor in Drug Trafficking and Crimes of Violence	+2 or +4



# Relevant Conduct and Chapter Three Adjustments

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# General Pointers about Chapter Three Application

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- Relevant conduct applies to Chapter Three
  - *US v. Eastland*, 989 F.2d 760 (5<sup>th</sup> Cir. 1993)
  - *US v. Bjorkman*, 270 F.3d 482 (7<sup>th</sup> Cir. 2001)
- Burden to establish an Aggravating Adjustment is on the government
  - *US v. Al-Rikabi*, 606 F.3d 11 (1<sup>st</sup> Cir. 2010)
  - *US v. Cruz Camacho*, 137 F.3d 1220 (10<sup>th</sup> Cir. 1998)

# General Pointers about Chapter Three Application (cont.)

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- Burden to establish a Mitigating Adjustment is on the defendant
  - *US v. Carpenter*, 252 F.3d 230 (2<sup>nd</sup> Cir. 2001)
  - *US v. Brubaker*, 362 F.3d 1068 (8<sup>th</sup> Cir. 2004)

# Analysis of Relevant Conduct Acts

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- Defendant accountable for acts he/she did in furtherance of the offense of conviction
- Sometimes defendant accountable for certain acts others did in furtherance of the offense of conviction
- For certain offenses defendant accountable for certain acts beyond the offense of conviction

# “Defendant” and Relevant Conduct

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## 1B1.1, App. Note 1(H)

- The term “defendant” limits relevant conduct to acts the defendant committed or is directly responsible for, *i.e.*,
  - §1B1.3(a)(1)(A): acts the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused
  - NOT §1B1.3(a)(1)(B): acts of others with whom the defendant was in a joint undertaking

## “Defendant” and Relevant Conduct (cont.)

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### 1B1.1, App. Note 1(H)

- A number of the Chapter Three Adjustments are limited to acts of the “defendant”, *e.g.*,
  - Reckless Endangerment During Flight, §3C1.2, App. Note 5, is “defendant” specific

# **Role in the Offense: Aggravating and Mitigating Roles**

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# Role in the Offense: Aggravating and Mitigating Roles

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- Multiple “participants” required for a role adjustment
  - Participants have to be criminally responsible, but not necessary to be charged or convicted
  - The defendant is a participant; informants may be participants; undercover officers are not
  - Aggravating role can be based on “otherwise extensive”: the unknowing services of non-participants



## Role in the Offense: Aggravating and Mitigating Roles (cont.)

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- Role adjustments not given based solely on the fact of multiple participants
- Sequence of application requires consideration of aggravating role prior to mitigating role
  - If aggravating role applies, then mitigating role will not

## Role in the Offense: Aggravating and Mitigating Roles (cont.)

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- “The determination of a defendant’s role in an offense is necessarily fact-specific. Appellate courts review such determinations only for clear error. Thus, absent a mistake of law, battles over a defendant’s status and over the scope of the criminal enterprise will almost always be won or lost in the district court.”
  - *US v. Graciani*, 61 F.3d 70 (1<sup>st</sup> Cir. 1995)

# Aggravating Role

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# Aggravating Role

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## 3B1.1

- Based on two factors:
  - Defendant acted as organizer, leader, manager, or supervisor
  - Number of participants or “otherwise extensive”

# Aggravating Role (cont.)

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## 3B1.1

- Burden of persuasion is on the government
- Standard of proof is preponderance of the evidence
- If government meets burden, courts must apply
  - *US v. Jimenez*, 68 F.3d 49 (2<sup>nd</sup> Cir. 1995)

# Aggravating Role (cont.)

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## What's in a Name?

- *Organizer/Leader* – exercise a significant degree of control and decision-making over the criminal activity
  - *US v. Herrera*, 878 F.2d 997 (7<sup>th</sup> Cir. 1989)
  - *US v. Quigley*, 373 F.3d 133 (DC Cir. 2004)
  - *US v. Bolden*, 596 F.3d 976 (8<sup>th</sup> Cir. 2010)
  - *US v. Szur*, 289 F.3d 200 (2<sup>nd</sup> Cir. 2002)

# Aggravating Role (cont.)

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## What's in a Name?

*Manager/Supervisor* – defendant need only have exercised some degree of control over others involved in the commission of the offense or were responsible for organizing others for the purpose of carrying out the crime

- *US v. Fuller*, 897 F.2d 1217 (1<sup>st</sup> Cir. 1990)
- *US v. Hertular*, 562 F.3d 433 (2<sup>nd</sup> Cir. 2009)
- *US v. Chau*, 293 F.3d 96 (3<sup>rd</sup> Cir. 2002)
- *US v. Backas*, 901 F.2d 1528 (10<sup>th</sup> Cir. 1990)
- *US v. Solorio*, 337 F.3d 580 (6<sup>th</sup> Cir. 2003)

# Aggravating Role (cont.)

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## 3B1.1 App. Note 4

- In distinguishing a leadership and organizational role from one of mere management...the court should consider...the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity and the degree of control and authority exercised over others



## Aggravating Role (cont.)

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### Participant Defined

- Courts uniformly count as participants those persons:
  - Who are aware of the criminal objective
  - Who knowingly offered their assistance
  - *US v. Anthony*, 280 F.3d 694, 698 (6<sup>th</sup> Cir. 2002)

## Aggravating Role (cont.)

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### 3B1.2

- When determining whether there are “5 or more participants,” the court may consider all participants and not only those who were subordinate to or supervised by the defendant
  - *US v. Bingham*, 81 F.3d 617, 629 (6<sup>th</sup> Cir. 1996)
  - *US v. Kamoga*, 177 F.3d 617, 622 (7<sup>th</sup> Cir. 1999)
  - *US v. Dota*, 33 F.3d 1179 (9<sup>th</sup> Cir. 1994)

## Aggravating Role (cont.)

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### Otherwise Extensive

- Courts primarily use 2 tests for determination of “otherwise extensive.”
  - *Carrozzella Test*
  - *Totality of the Circumstances*

## Aggravating Role (cont.)

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### *Carrozzella Test*

- A showing that an activity is the functional equivalent of an activity involving 5 or more participants:
  - (1). The number of knowing participants
  - (2). The number of unknowing participants whose activities were led by the defendant with specific criminal intent
  - (3). The extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme

## Aggravating Role (cont.)

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### Carrozella Test followed by:

- *US v. Carrozella*, 105 F.3d 796 (2<sup>nd</sup> Cir. 1997); overruled on other grounds by *US v. Kennedy*, 233 F.3d 157 (2<sup>nd</sup> Cir. 2000)
- *US v. Helbling*, 209 F.3d 226 (3<sup>rd</sup> Cir. 2000)
- *US v. Anthony*, 280 F.3d 694 (6<sup>th</sup> Cir. 2002)
- *US v. Wilson*, 240 F.3d 39 (DC Cir. 2001)

## Aggravating Role (cont.)

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### *Totality of the Circumstances Test*

- Court may look to all of the circumstances of the criminal activity, including...the width, breadth, scope and complexity and duration of the scheme
  - *US v. Laboy*, 357 F.3d 578 (1<sup>st</sup> Cir. 2003)
  - *US v. Yarnell*, 129 F.3d 1127 (10<sup>th</sup> Cir. 1997)

# Mitigating Role

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# Mitigating Role

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## 3B1.2, App. Note 3(C)

The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, *is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case*



# Mitigating Role (cont.)

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## 3B1.2, App. Note 3(A)

- For a defendant who played a part in committing the offense that makes him “substantially less culpable than the *average* participant”
  - Circuits differ as to whether the culpability comparison is based solely on co-participants or also involves a comparison with the “average person” in a hypothetical case

# Mitigating Role (cont.)

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## Average Participant

- Only those persons who actually participated in the criminal activity at issue may be considered “average participants”
  - *US v. DePriest*, 6 F.3d 1201 (7<sup>th</sup> Cir. 1993)
  - *US v. Benitez*, 34 F.3d 1489 (9<sup>th</sup> Cir. 1994)

# Mitigating Role (cont.)

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## Average Participant (cont.)

- Average participants include typical offenders who commit similar crimes
  - *US v. Rahman*, 189 F.3d 88 (2<sup>nd</sup> Cir. 1999)
  - *US v. Santos*, 357 F.3d 136 (1<sup>st</sup> Cir. 2004)

# Mitigating Role (cont.)

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## 3B1.2 Minimal Participant App. Note 4

*Minimal Participant.* Subsection (a) applies to a defendant described in Application Note 3 (A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant

# Mitigating Role (cont.)

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## Minimal Participant

- “To qualify as a minimal participant, a defendant must prove that he is among the least culpable of those involved in the criminal activity...a defendant must be a plainly *peripheral player* to justify his classification as a minimal participant.”
  - *US v. Santos*, 357 F.3d 136 (1<sup>st</sup> Cir. 2004)
  - *US v. Teeter*, 257 F.3d 14 (1<sup>st</sup> Cir. 2001)

# Mitigating Role (cont.)

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## 3B1.2 Minor Role App. Note 5

Defendants who are “less culpable” than most other participants but whose role could not be described as “minimal”

# Mitigating Role (cont.)

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## Minor Participant

- The minor role adjustment only applies if the defendant shows that his “involvement, knowledge, and culpability were materially less than those of other participants” and not merely that “other participants in the scheme...may have been more culpable”
  - *US v. Brown*, 250 F.3d 811 (3<sup>rd</sup> Cir. 2001)

# Mitigating Role (cont.)

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## Minor Participant

- A defendant is not substantially less culpable if he was deeply involved in the offense, even if he was less culpable than the other participants.
  - *US v. Cubillos*, 474 F.3d 1114 (8<sup>th</sup> Cir. 2007)



# Mitigating Role (cont.)

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## The Big Picture

- In evaluating a defendant's role, the sentencing court should consider factors such as the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise
  - *US v. Yu*, 285 F.3d 192 (2<sup>nd</sup> Cir. 2002)

# Mitigating Role and Relevant Conduct

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## 3B1.2, App. Note 3(A)

- A defendant's reduced relevant conduct in a broad conspiracy may impact the mitigating role decision
  - The role determination will be based on a defendant's relevant conduct, not his/her role in relation to the overall conspiracy

# Mitigating Role (cont.)

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## Less Serious Offense 3B1.2 App. Note 3(B)

- A reduction for mitigating role is not ordinarily warranted if the defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct
  - *US v. Lucht*, 18 F.3d 541 (8<sup>th</sup> Cir. 1994)
  - *US v. Fernandez*, 92 F.3d 1121 (11<sup>th</sup> Cir. 1996)

## Mitigating Role (cont.)

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### 3B1.2

- Note that certain offense functions, such as drug courier, may be viewed differently from district to district

# Mitigating Role (cont.)

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## Couriers and Mules

- A defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.
  - *See* USSG §3B1.2, App. Note 3(A)

# Mitigating Role (cont.)

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## Couriers and Mules

- Some courts have concluded that couriers and mules may perform functions that are critical to the drug trafficking activity and thus may be highly culpable participants
  - *US v. Martinez*, 168 F.3d 1043 (8<sup>th</sup> Cir. 1999)

# Mitigating Role (cont.)

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## Couriers and Mules

- Other courts have concluded that couriers may have little culpability in drug trafficking organizations
  - *US v. Rodriguez*, 342 F.3d 296 (3<sup>rd</sup> Cir. 2003)

# Mitigating Role (cont.)

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## Couriers and Mules

- Because the role of a courier or mule may vary, the defendant's culpability will ultimately turn on the facts of the case
  - *US v. Saenz*, 623 F.3d 461 (7<sup>th</sup> Cir. 2010)



# Mitigating Role (cont.)

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## Couriers and Mules

- “In the drug context, examples of some relevant factual considerations include: amount of drugs, fair market value of drugs, amount of money to be paid to the courier, equity interest in the drugs, role in planning the criminal scheme, and role in the distribution.”
  - *US v. Rodriguez De Varon*, 175 F.3d 930 (11<sup>th</sup> Cir. 1999)

# Mitigating Role and the §2D1.1 Drug Guideline

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2D1.1(a)(3) & 3B1.2, App. Note 6

- The base offense level is established by the type and quantity of drugs on the Drug Quantity Table, *except* if mitigating role ( 3B1.2) applies:

<u>BOL</u>	<u>Reduction</u>
32	-2
34 or 36	-3
38	-4

Note: the role reduction at 3B1.2 will also apply<sup>50</sup>

# Role in the Offense: Abuse of Position of Trust

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## 3B1.3

- Applies when the abuse significantly facilitated the commission or concealment of the offense

**Role in the Offense:  
Abuse of Position of Trust (cont.)**

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**3B1.3**

- Applies to both public and private trust characterized by professional or managerial discretion
  - *i.e.*, substantial discretionary judgment that is ordinarily given considerable deference
  - Does not apply in the case of embezzlement or theft by an ordinary bank teller

END