

Role in the Offense Breakout

Annual National Seminar on the
Federal Sentencing Guidelines

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Discussion Outline

- Panel Introductions
- Chapter Three Adjustments for Role in the Offense
- Relevant Conduct and Chapter Three Adjustments
- Role in the Offense: Aggravating and Mitigating Roles
- Proposed Guideline Amendments
- New Guideline Amendments

All Star Panel

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

Kealin M. Culbreath, Esq.

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

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

Role in the Offense

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.)

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

General Pointers about Chapter Three Application

- Relevant conduct applies to Chapter Three
- Burden to establish an Aggravating Adjustment is on the government.
- Burden to establish a Mitigating Adjustment is on the defendant

Analysis of Relevant Conduct Acts

- 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

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.)

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

Role in the Offense: Aggravating and Mitigating Roles

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

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

- 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

Aggravating Role

3B1.1

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

Mitigating Role

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.)

3B1.2

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

Mitigating Role and Relevant Conduct

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

- A defendant's reduced relevant conduct in a broad conspiracy may impact the mitigating role decision

Mitigating Role and Relevant Conduct (cont.)

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

- The role determination will be based on a defendant's relevant conduct, not his/her role in relation to the overall conspiracy
- However, even when a defendant's relevant conduct is only for conduct in which he/she was personally involved, a mitigating role is not precluded

Scenario

Drug *Conspiracy* Scenario

- Instant conviction: one count of conspiracy to distribute at least 1000 kg of marijuana from January 1, 2007 to December 31, 2008; vio. 21 USC §§ 846 (to violate § 841(a)) & 841(b)(1)(A); applicable guideline §2D1.1
- Conspiracy involved organizer supplying marijuana on consignment to 30 distributors over a period of two years during which a total of 8,000 kg were distributed
- Defendant was a distributor who was involved in the final four weeks of the conspiracy, and knew of the broader activity, but dealt only with the organizer from whom he received a total of 500 gms.

Drug *Conspiracy* Scenario (cont.)

- What quantity of marijuana is Defendant accountable for under relevant conduct: The 1,000 kg cited in the count of conviction? The 8,000 kg handled by the conspiracy? A different quantity?
- Will the defendant be eligible for a role reduction under §3B1.2?

Mitigating Role and the §2D1.1 Drug Guideline

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 apply²⁵

Role in the Offense: Abuse of Position of Trust

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.)

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

Proposed Guideline Amendments

Submitted to Congress May 1, 2011

Mitigating Role (Currently)

3B1.2

Application Note 3C

The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find based solely on the defendant's bare assertion, that such a role adjustment is warranted.

Mitigating Role (As Proposed)

3B1.2

Application Note 3C

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 (Currently)

3B1.2

Application 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. It is intended that the downward adjustment for a minimal participant will be used infrequently.

Mitigating Role (As Proposed)

3B1.2

Application 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 (Currently)

3B1.2

Application Note 3

(A) Substantially Less Culpable than Average Participant. -

This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average defendant.

Mitigating Role (Currently)

3B1.2

Application Note 3 (cont.)

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, 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.

Mitigating Role (As Proposed)

3B1.2

Application Note 3

Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from consideration for an adjustment under this guideline.

For example, a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, is not precluded from consideration for an adjustment under this guideline.

New Guideline Amendments

New Guideline Amendments

Effective November 1, 2010

- Temporary, emergency amendments pursuant to the Fair Sentencing Act of 2010
- Permanent, regular amendments

Fair Sentencing Act of 2010

Enacted August 3, 2010

FSA 2010 Directives to USSC

- Review and amend the guidelines to address certain aggravating and mitigating factors in drug trafficking cases to account for *offender* conduct
- Emergency amendments to guidelines by November 1, 2010

Emergency Amendments

Effective November 1, 2010

The Commission has not made the emergency amendments “retroactive” (allowing for the reduction of a previously imposed term of imprisonment pursuant to 18 U.S.C. 3582(c)(2) & 1B1.10)

Emergency Guideline Amendments Pursuant to the Fair Sentencing Act of August 3, 2010

- Affects drug guidelines, *including* §2D1.1
 - Changes not limited to “crack” cases
- The November 1, 2010 *Supplement* contains these amended guidelines and must be used in conjunction with the November 1, 2010 *Guidelines Manual*

Mitigating Factors

Minimal Role Defendants

New Maximum Base Offense Level for Minimal Role Defendant

2D1.1(a)(5)

- If, after application of the mitigating role reduction at base offense level (a)(5),
 - the offense level is greater than level 32,
 - AND
 - the defendant receives a 4-level reduction at §3B1.2(a) (“minimal participant”),
- Decrease the base offense level to 32

New Mitigating Factor Decrease

2D1.1(b)(15)

- If the defendant receives the 4-level “minimal participant” reduction in §3B1.2(a)

AND

- The offense involved all of the following three factors, decrease by 2 levels:

New Mitigating Factor Decrease (cont.)

2D1.1(b)(15)(A)

- The defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense

AND

New Mitigating Factor Decrease (cont.)

2D1.1(b)(15)(B)

- The defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances;

AND

New Mitigating Factor Decrease (cont.)

2D1.1(b)(15)(C)

- The defendant had minimal knowledge of the scope and structure of the enterprise

Aggravating Factors

Application Notes on New Aggravating Specific Offense Characteristics

2D1.1(b)

New application notes give guidance regarding the application of new SOCs, including the application of a new SOC and other similar guideline adjustments (addresses possible “double counting”)

New Violence Enhancement

2D1.1(b)(2)

If the *defendant* used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels

New Violence Enhancement (cont.)

2D1.1(b)(2) & App. Note 3(B)

- May be applied in addition to dangerous weapon enhancement at §2D1.1(b)(1)
- However, in a case in which the defendant merely possessed a dangerous weapon but did not use or direct the use of violence, or make a credible threat to use violence, (b)(2) would not apply

New Violence Enhancement and Interaction with §2K2.4

2K2.4, App. Note 4

- If the defendant is convicted of both a drug trafficking offense AND a violation of 18 U.S.C. § 924(c), do not apply §2D1.1(b)(2) (new violence enhancement)
 - Note: the dangerous weapon SOC at §2D1.1(b)(1) is also NOT applied

New Bribery Enhancement

2D1.1(b)(11)

If the *defendant* bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels

New Bribery Enhancement (cont.)

2D1.1(b)(11) & App. Note 27

- Do not apply this SOC if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant
 - Such conduct is covered by §3C1.1 (Obstruction) and, if applicable, §2D1.1(b)(14)(D)

New Premises Enhancement

2D1.1(b)(12)

If the *defendant* maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels

New Premises Enhancement (cont.)

2D1.1(b)(12) & App. Note 28

- Applies to a defendant who knowingly maintains a premises for the purpose of manufacturing or distributing a controlled substance
- “Premises”: “*i.e.*, a building, room or enclosure”

New Premises Enhancement (cont.)

2D1.1(b)(12) & App. Note 28

- Factors to consider regarding “maintained”
 - Whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises
 - The extent to which the defendant controlled access to, or activities at, the premises

New Premises Enhancement (cont.)

2D1.1(b)(12) & App. Note 28

- Manufacture/distribution need not be the sole purpose for maintaining the premises
 - Must be one of the defendant's primary or principal uses for the premises, rather than an incidental or collateral use
 - Factor to consider: the frequency of the use of the premises for lawful purposes vs. manufacturing/distribution of controlled substances purposes

New Aggravating Role Enhancement

2D1.1(b)(14)

Provides a 2-level increase **IF**:

The defendant receives an adjustment under §3B1.1 (Aggravating Role)

AND

The offense involved **one or more** of the following **five factors**:

Factor 1

2D1.1(b)(14)(A)

1. The *defendant* used fear, impulse, friendship, affection to involve another individual in drug activity

AND

The individual received little or no compensation from the drug activity

AND

The individual had minimal knowledge of the scope and structure of the enterprise

Factor 2

2D1.1(b)(14)(B)

2. The *defendant*, knowing that an individual was:
- Less than 18 years old; or 65 years or older
 - Pregnant
 - Unusually vulnerable due to physical or mental condition; or
 - Otherwise particularly susceptible to the criminal conduct

Distributed drugs to that individual or involved that individual in the offense

Factor 2 (cont.)

2D1.1(b)(14)(B) & App. Note 29(A)

- If the defendant distributes to or involves an individual specified in this subsection, that individual is not a “vulnerable victim” for the purposes of §3A1.1(b)

Factor 2 (cont.)

2D1.1(b)(14)(B) & App. Note 29(A)
and 3B1.4, App. Note 2

- If the defendant receives an enhancement under this subsection for involving an individual less than 18 years old in the offense, do not apply §3B1.4 (Using a Minor to Commit a Crime)

Factor 3

2D1.1(b)(14)(C)

3. The *defendant* was directly involved in the importation of a controlled substance

Factor 3 (cont.)

2D1.1(b)(14)(C) & App. Note 29(B)

- Do not apply this subsection if §2D1.1(b)(3) (import/export/pilot) or (b)(5) (import meth) applies

Factor 4

2D1.1(b)(14)(D)

4. The *defendant* engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense

Factor 4 (cont.)

2D1.1(b)(14)(D)
and 3C1.1, App. Note 7

- If the defendant receives an enhancement under this subsection, do not apply §3C1.1 (Obstruction)

Factor 5

2D1.1(b)(14)(E)

5. The *defendant* committed the offense as part of a pattern of criminal conduct engaged in as a livelihood

Factor 5 (cont.)

2D1.1(b)(14)(E)
and 4B1.3, App. Note 1

- “Pattern of criminal conduct”:
 - Criminal acts occurring over a substantial period of time
 - May involve a single course of conduct or independent offenses

Factor 5 (cont.)

2D1.1(b)(14)(E)
and 4B1.3, App. Note 2

- “Engaged in as a livelihood”:
 - Defendant derived income from the pattern of conduct that exceeded 2000 times the then existing hourly minimum wage under federal law in any 12 month period (currently \$14,500)

AND

Factor 5 (cont.)

2D1.1(b)(14)(E)
and 4B1.3, App. Note 2

- The totality of the circumstances shows that the criminal conduct was the defendant's primary occupation during that 12 month period
§4B1.3, App. Note 2

Obstructing or Impeding the Administration of Justice

3C1.1

- Applies when the defendant willfully obstructed or attempted to obstruct the administration of justice in the investigation, prosecution, or sentencing of the instant offense of conviction

AND

- The obstructive conduct related to the defendant's offense of conviction and any relevant conduct; or a closely related offense

Obstructing or Impeding the Administration of Justice (cont.)

3C1.1

- May include obstructive conduct *prior* to the start of the investigation if purposefully calculated and likely to thwart the investigation or prosecution of the offense of conviction

END