

General Pointers about Chapter Three Application

- Relevant conduct applies to Chapter Three
- “Double counting”
- Burden to establish a mitigating Adjustment is on the defendant
 - *E.g.*, Acceptance and Mitigating Role

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

Chapter Three Application and “Double Counting”

- No issue of “double counting” unless directed by guidelines to NOT double count
 - §1B1.1, App. Note 4(B)
 - However, see case law regarding “impermissible double counting”

Chapter Three Application and “Double Counting” (cont.)

- A number of Chapter Three Adjustments give directions about not double counting, *e.g.*,
 - All Victim Related Adjustments (Chapter Three, Part A), except Terrorism, give directions

Chapter Three Application and “Double Counting” (cont.)

- A number of Chapter Two guidelines give directions to not apply certain Chapter Three Adjustments, *e.g.*,
 - §2B1.1, Fraud, App. Note 14(C), directs that Abuse of Position of Trust not be given if SOC (b)(16) applies for the defendant being a company officer or register broker in a securities offense

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

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 apply¹⁵

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

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

Acceptance of Responsibility

Chapter Three, Part E

- 2-Level Reduction:
If defendant clearly demonstrates affirmative acceptance of responsibility for the offense.
- 1-Level Additional Reduction Possible

Requirements for 1-Level Additional Reduction

§3E1.1(b)

- Only if 2-level reduction applicable
- Must be at least offense level 16
- Government motion required
- Must give timely notification of plea of guilty

Guidelines Consideration of Cooperation

§3E1.1(a)

Defendant usually pleads guilty and admits to count of conviction

§3E1.1(b)

Defendant pleads guilty early
(government motion required)

§5C1.2

Defendant tells government all about offense before sentencing hearing (and meets other four criteria)

§5K1.1

Defendant gives government substantial assistance in the investigation or prosecution of another person
(government motion required)

Guidelines Treatment of Information

	§3E1.1(a)	§5C1.2	§5K1.1
Type/Amount of Information	Admit to court offense of conviction (Do not deny balance)	Provide all information on offense	Truthful and complete information on another person
Usefulness of Information	Not essential	Not essential	Essential
Timeliness of Information	One of many considerations (essential for §3E1.1(b))	Not later than sentencing hearing	One of many considerations
Information Provided to Government	Not necessary	Essential	Essential
Government Motion	Not necessary (essential for §3E1.1(b))	Not necessary	Essential

Acceptance of Responsibility and Multiple Counts

- Acceptance of responsibility is determined only after application of the guidelines for multiple counts has established a single combined adjusted offense level
- Acceptance (the reduction of 2 or 3 offense levels) is based upon consideration of all counts

END