



Role in the Offense Breakout

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Role in the Offense Adjustments

Chapter Three, Part B

Levels

“ §3B1.1 Aggravating Role

+2, +3, or +4

“ §3B1.2 Mitigating Role

-2, -3, or -4



Role in the Offense Adjustments

Chapter Three, Part B

	<u>Levels</u>
” §3B1.3 Abuse of a Position of Trust or Use of a Special Skill	+2
” §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



Role in the Offense Adjustments

Chapter Three, Part B

“§3B1.1 Aggravating Role

- “ If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, **increase by 4 levels**
- “ If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, **increase by 3 levels.**
- “ If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), **increase by 2 levels.**



Role in the Offense Adjustments

Chapter Three, Part B

“§3B1.1 Mitigating Role

- “ If the defendant was a minimal participant in any criminal activity, **decrease by 4 levels.**
- “ If the defendant was a minor participant in any criminal activity, **decrease by 2 levels.**
- “ In cases falling between (a) and (b), **decrease by 3 levels.**





General Principles



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“ Burden to establish §3B1.1 is on the government

- *US v. Al-Rikabi*, 606 F.3d 11 (1st Cir. 2010)
- *US v. Cruz Camacho*, 137 F.3d 1220 (10th Cir. 1998)

“ Burden to establish §3B1.2 is on the defendant

- *US v. Carpenter*, 252 F.3d 230 (2nd Cir. 2001)
- *US v. Brubaker*, 362 F.3d 1068 (8th Cir. 2004)
- *US v. Silva-De Hoyas*, 702 F.3d 843 (5th Cir. 2012)



“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 adjustments not given based solely on the fact of multiple participants



Mitigating Role

§3B1.2 Minor Role App. Note 3(A)

Applicability of Adjustment –

Designed for the defendant who is “substantially less culpable than the average participant – **in the criminal activity.**” (new proposed language)

Previously was not limited to acts of the participant “in the criminal activity.”



Mitigating Role

§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.*

The determination is fact specific



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

“The role determination will be based on a defendant’s relevant conduct, not his/her role in relation to the overall conspiracy



Mitigating Role

§3B1.2, App. Note 3(A)

- “ Provides that certain individuals who perform limited functions in the criminal activity “may receive” a role adjustment
 - “A defendant who is accountable under 1B1.3 (Relevant Conduct) only for the conduct in which the defendant was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline.”
 - “ Previously stated “is not precluded from”



Mitigating Role

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 (8th Cir. 1994)

“ *US v. Fernandez*, 92 F.3d 1121 (11th Cir. 1996)



New Factors for the Court to Consider

§3B1.2, App. Note 3(C) – non-exhaustive list

- i. The degree to which the defendant understood the scope and structure of the criminal activity
- ii. The degree to which the defendant participated in the planning/organization of the activity
- iii. The degree to which the defendant exercised decision-making authority
- iv. The nature and extent of the defendant's participation in the commission of the criminal activity
- v. The degree to which the defendant stood to benefit from the criminal activity



Examples Added

§3B1.2, App. Note 3(C)

- “ Provides example that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment.
- “ Provides that the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative



“What factors do you look for?”

“Are there factors not noted on the previous list?”

“Do you define benefit?”



Mitigating Role

§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 the criminal** 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

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 (1st Cir. 2004)

“ *US v. Teeter*, 257 F.3d 14 (1st Cir. 2001)



Example 1

- “ Multiple defendants operate a tax fraud scheme from inside a correctional institution. They garner the assistance of others on the outside. One of those defendants outside of prison helps by mailing completed tax forms and receiving refunds on debit cards, which are then provided to the incarcerated defendants.
- “ The outside help receive a nominal amount of money for their assistance on relatively few occasions - \$100 per tax return.
- “ Would you give outsiders a minor role reduction? Why or why not? What factors are you looking for?



Example 2

- “ Defendant picks up her friend who then instructs the defendant to drive to a location unknown to the defendant. While there, the defendant’s friend delivers drugs but is arrested after making the delivery. The defendant has done this 6-7 times before. The defendant never knew what quantity of drugs was being delivered or how much money her friend was making. However, her friend usually gave her \$50 as payment for driving him around and making deliveries.
- “ Would you give her a mitigating role reduction? Why or why not? What factors are you looking for?



Mitigating Role

§3B1.2

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



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 **may receive** an adjustment under this guideline.

“ *See* USSG §3B1.2, App. Note 3(A)



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 (8th Cir. 1999)

“Other courts have concluded that couriers may have little culpability in drug trafficking organizations

“ *US v. Rodriguez*, 342 F.3d 296 (3rd Cir. 2003)



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 (7th Cir. 2010)



Example 3

- “ One defendant is stopped at the border with 100 kilograms of marijuana in his vehicle, along with a firearm. Law enforcement also located \$100,000 in cash. Defendant has been previously caught on 6 other occasions for transporting illegal drugs into the country.
- “ He was paid \$600 on each occasion.
- “ Would you give the defendant a minor role reduction? Why or why not? What factors are you looking for?



Example 4

- “ One defendant case – Defendant admitted to transporting 55 kilograms of marijuana concealed in her vehicle as she attempted to cross the border. Also had 2 small children with her. She had never done this before.
- “ She was to be paid small amount of money to deliver the drugs to an unknown person in the U.S.
- “ Would you give the defendant a minor role reduction? Why or why not? What factors are you looking for?



Mitigating Role and the Drug Guideline

“ The base offense level is established by the type and quantity of drugs on the Drug Quantity Table *EXCEPT* if *mitigating* role cap (§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



Example 5

- “ Seven defendant case – One defendant pled guilty to Mail and Wire Fraud. Defendant’s husband was a doctor and she was the billing clerk, billing Medicare for procedures that never occurred. Defendant received nominal amount of money (her salary), and nothing more for her involvement.
- “ Would you give the defendant a minor role reduction? Why or why not? What factors are you looking for?



Example 6

- “ Six defendant case – One defendant (straw buyer) purchased 11 semi-automatic pistols for a member of the conspiracy on three separate dates. She was provided with money to buy the firearms. Defendant was unaware of nature and scope of the conspiracy. She did not recruit any other members to act as a straw buyer. Overall conspiracy involved more than 50 firearms. She was paid \$50 for each firearm she purchased. However, one of the firearms was used in a murder.
- “ Would you give the defendant a minor role reduction? Why or why not? What factors are you looking for?





General Principles - Aggravating Role



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Aggravating Role

§3B1.1

“Based on two factors:

“Defendant acted as organizer, leader, manager, or supervisor

“Number of participants or “otherwise extensive”



Aggravating Role

Organizer/Leader – exercise a significant degree of control and decision-making over the criminal activity

- *US v. Herrera*, 878 F.2d 997 (7th Cir. 1989)
- *US v. Quigley*, 373 F.3d 133 (DC Cir. 2004)
- *US v. Bolden*, 596 F.3d 976 (8th Cir. 2010)
- *US v. Szur*, 289 F.3d 200 (2nd Cir. 2002)



Aggravating Role

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



Aggravating Role

§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



“What factors do you look for?”

“Are there factors not noted on the previous list?”

“Do you define fruits of the crime?”



Aggravating Role

§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 (6th Cir. 1996)

“ *US v. Kamoga*, 177 F.3d 617, 622 (7th Cir. 1999)

“ *US v. Dota*, 33 F.3d 1179 (9th Cir. 1994)



Aggravating Role – Otherwise Extensive

“ Courts primarily look for several factors –

- “ The number of knowing participants
- “ The number of unknowing participants whose activities were led by the defendant with specific criminal intent
- “ The extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme
- “ The width, breadth, scope and complexity and duration of the scheme



Example 7

- “ Seven defendant case – One defendant pled guilty to Mail and Wire Fraud. Defendant was a fortune teller/spiritual advisor who scammed more than 10 victims out of millions. She recruited others to be fortune tellers and also utilized various bank accounts to deposit the money.
- “ Would you give the defendant an aggravating role enhancement? Why or why not? What factors are you looking for?



Example 8

- “ 19 defendant case – All defendants pled guilty to Mail and Wire Fraud in check kiting scheme. Defendant supervised check cashers and also recruited his two minor sons to cash checks. Orchestrated over a period of seven years involving more than \$2.5 million in loss to more than 50 victims. Never cashed checks himself nor did he even handle one. Received a large percentage of each check cashed.
- “ Would you give the defendant an aggravating role enhancement? Why or why not? What factors are you looking for?



Example 9

- “ 11 defendant case – All defendants pled guilty to Mail and Wire Fraud in mortgage fraud scheme. Defendant provided false documents to underwriters (fake W-2, fake IRS returns, fake bank account documents) over a period of several months to secure mortgages for numerous residences. Defendant never lived in the houses, but instead used inflated appraisals to get additional cash at closing.
- “ Would you give the defendant an aggravating role enhancement? Why or why not? What factors are you looking for?



END

