

GUIDELINE SCENARIOS – CHAPTER 3 ADJUSTMENTS

For the following scenarios, assume that the defendants were over 18 years old when they committed the offenses, and that they all accepted responsibility for their offenses. Additionally, use the information in Appendix A to answer the questions:

Aggravating Role

Scenario #1

The Court determined there were more than 5 participants in a drug conspiracy that spanned several years. At sentencing, the Court determined that the defendant was a manager of the drug conspiracy, based upon his recruitment of others; however, the court chose not to apply a role enhancement. If the Court determines that a defendant played an aggravating role, can the Court then refuse to provide a role enhancement? Or would the court be permitted to apply only a 2-level enhancement for being an organizer or leader in the criminal activity?

No – if the Court decides that there are 5 or more participants and/or that the defendant was a manager of the drug conspiracy, the court must apply the 3-level for being a manager or supervisor in the criminal activity. See *U.S. v. Jimenez*, 68 F.3d 49 (2d Cir. 1995).

Scenario #2

Defendant grew more than 1,000 kilograms of marijuana in CA. Over the course of several months he hired another defendant to cultivate and harvest the marijuana. At least 2 additional defendants flew the marijuana to Maryland in their own private airplane. Once the marijuana arrived in Maryland, several other defendants distributed the marijuana. Does aggravating role apply?

Yes – +4 at least 5 participants and defendant was a leader or organizer of criminal activity. §3B1.1(a)

Scenario #3

Defendant prepared tax returns. She recruited her 2 sisters to help locate identifying information (names, DOB's, and SSN's) necessary to file fraudulent returns. However, the defendant's 2 sisters were only involved for a short period of time and made very little money. Can the defendant still receive an aggravating role enhancement?

Yes – +2 the defendant was an organizer, leader, manager, or supervisor in any criminal activity. There is no requirement regarding the length of time of co-conspirators' involvement. §3B1.1(c)

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Mitigating Role

Scenario #4

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. Should the defendant on the outside receive a mitigating role reduction?

No, due to the role they played. The defendant was not substantially less culpable, in fact, some may argue she was not only integral but was very aware of the scope of the criminal enterprise and was actively involved in the participation, planning, and organizing of the criminal activity.

Scenario #5

Defendant Davies was convicted of one count Conspiracy to Possess with Intent to Distribute Cocaine and one count Attempt to Possess with Intent to Distribute Cocaine. The conspiracy lasted for approximately 18 months. Defendant Davies's role in the offense did not extend beyond the scope of receiving a delivery of cocaine at the request of a co-defendant and turning the package over to the person who was to pay him. Defendant Davies was only held accountable for the amount of drugs in that one package. There were 28 defendants in the instant case, most of whom were found to be more culpable than the defendant. Are any Chapter 3 Adjustments applicable?

Yes. Mitigating Role (§3B1.2). Defendant Davies would most likely qualify for a reduction for being a minimal participant. However, at the very least he would qualify for a reduction for being a minor participant. In the actual case, the defendant was determined to be a minimal participant.

Scenario #6

Defendants Stevens, Joel, Robins, Tierra, and Marjorie were charged in a 12-count Indictment that included the following counts:

- Count 1 – Conspiracy to Commit Bank Fraud - 18 U.S.C. §§ 1344 and 1349;
- Count 2 – Aiding and Abetting Bank Fraud - 18 U.S.C. §§ 1344 and 2
- Count 3 – Aggravated Identity Theft - 18 U.S.C. § 1028A

Defendants Stevens, Joel, and Robins were named in Counts 1, 2, and 3; Defendant Tierra and Marjorie were named in Counts 2 and 3. They were each convicted on all counts in which they were charged.

This case consists of a criminal enterprise that was engaged in numerous criminal activities involving bank fraud with losses exceeding \$2,000,000. The overall conspiracy to fraudulently obtain money

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included passing fraudulent checks at retail stores and returning the items for cash and also depositing fraudulent checks in bank accounts and withdrawing cash. Checks, identification cards, and identification papers were created fraudulently to facilitate the passing and depositing of fraudulent checks. The conspiracy was based on a need for stolen information that would be used to create fraudulent checks and identification documents, which could then be used to obtain money through various methods of check passing, cashing, and deposits/withdrawals. Stevens and others including Joel were proficient in using check creation software. They began doing so in 2006 and did not stop until their arrest in 2011. Information taken from stolen, legitimate checks was entered into a computer program, which would then print checks on specialized check paper stock.

On January 2, 2011, a burglary of the Edible Arrangements retail store in Shoreview, Minnesota, occurred when Stevens and Joel stole a fire safe. Within the safe was information related to employees of the company, including their applications for employment, which listed their name, address, date of birth, Social Security number, and direct deposit forms authorizing their paychecks to be deposited into their personal bank account. As a result, this paperwork held the account and routing numbers of the victims' bank accounts. This stolen information was used during the conspiracy to create fraudulent checks and driver's licenses, which were used to obtain money fraudulently from banks.

At trial, two victims testified about a home burglary and the theft of a motor vehicle, which were committed in August and September 2011 by Marjorie. Checks and documents stolen during the burglaries were linked to participants in the conspiracy when they were used to make approximately \$24,000 in fraudulent deposits and \$12,000 in fraudulent cash withdrawals.

Robins worked at the Minnesota Board of Psychology. Robins had access to checks that were received through the mail from licensed psychologists to pay their annual licensing fees. Robins originally began copying information from checks, such as names, addresses, and account and routing numbers, to provide to Joel. Joel was connected to others in the conspiracy and recruited Robins to provide this information, which was initially used to create and pass fraudulent checks and obtain credit at Walmart and Sam's Club. Robins also recruited 7 friends and acquaintances to deposit fraudulent and stolen checks at the request of Joel. Joel also provided transportation and direction to the recruited individuals during various check cashing transactions.

Tierra was a bank teller and was recruited by Stevens to provide financial information from victims' accounts, which she had access to in the capacity of her employment. As well as providing financial information, Tierra was sometimes recruited as a specific teller who would accept a fraudulent check without calling management or raising alarms about the authenticity of the check being presented.

Stevens had a contact at a paper shredding company, which contracted with other companies to pick up and destroy their confidential documents en masse. Through this avenue, Stevens could obtain information meant for destruction that could instead be used to make fraudulent checks and identification documents. Stevens had a paid subscription to publicdata.com. He used this website to corroborate information obtained by other means and to obtain valid driver's license numbers that could be used to validate fraudulently created checks. Another website, uniqueIDs.com, was identified by participants as a site where driver's license numbers could be obtained to facilitate the acceptance of fraudulent checks.

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Are there any Chapter 3 Adjustments that are applicable for Defendants Stevens, Joel, Robins, Tierra, and Marjorie?

Stevens was an organizer or leader in the conspiracy and involved in the scheme since 2006. Stevens participated in obtaining stolen information, creating fraudulent checks and identification cards with this information, and dispensing the information to others for use in obtaining cash. Stevens recruited coconspirators, provided transportation, and directed other participants during both the retail fraud and bank fraud schemes, and he received a portion of the fraudulent proceeds they obtained.

Joel was an organizer or leader in the conspiracy. He recruited individuals to provide checks for use in the conspiracy and others to deposit checks and withdraw funds. Joel worked in conjunction with other leaders to create fraudulent identification documents, and he provided transportation and direction to participants directly committing the fraud inside banks. Joel controlled the fraudulent checks and documents used by these participants and kept a percentage of the fraudulent proceeds they obtained.

Robins is considered a manager or supervisor in the criminal activity that involved 5 or more participants. She helped Joel by recruiting at least 7 others. She is considered to have abused a position of trust. She was recruited to provide account and identifying information she accessed in the scope of her employment.

Tierra is an average (or minor) participant in the offense, though she is considered to have abused a position of trust. Tierra stole personal identifying information in the capacity of her employment as a bank teller and provided it to Stevens and Joel who used this information to create fraudulent checks and identification documents, which were used to purchase merchandise that was later returned for cash.

Marjorie was a minor (minimal) participant in the offense. She was recruited to open a bank account and give the checks to others for use in the scheme. Marjorie also deposited a \$9,000 check she knew to be fraudulent with the intent of later withdrawing cash.

Vulnerable Victim

Scenario #7

Defendant Richards was convicted of two counts Wire Fraud, two counts Mail Fraud, and one count Making and Subscribing False Income Tax Returns. The defendant was licensed as a Certified Financial Planner and was also a self-employed tax return preparer. Over the course of several years, Defendant Richards induced a number of clients to invest their retirement funds and other savings into investment vehicles he created, using self-directed Individual Retirement Accounts (IRAs). The defendant selected tax preparation clients who he knew, from their tax information and his interactions with them, were financially unsophisticated, had available retirement funds, and/or had developed a relationship of trust in him. He knew that the majority of the clients were retired, due to age or disability, or were otherwise out of work, and that some were nearing retirement. Defendant Richards also knew that many clients entrusted him with all or a substantial portion of their retirement savings.

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The defendant misled clients to believe that their funds would be placed and were placed in safe, guaranteed-return investments, when, in fact, he intended to divert and did divert the funds to pay personal and business expenses and to invest in highly-leveraged, risky investments for which he had a consistent history, both before and during the scheme, of incurring large losses. During the course of the scheme, Defendant Richards lost almost all of the client money that he placed in his high-risk investments, while continuing to solicit new clients and to lead his current clients to believe that their investments were doing well.

The defendant was initially charged in county court for the same conduct, and he was arrested on the Indictment. While he was in jail, Defendant Richards instructed his wife to hide a laptop computer which he knew had important financial data and would facilitate his return to criminal activity upon his release from custody. The defendant's wife complied with his request, but after significant further investigation the laptop was recovered. Will any Chapter Three adjustments apply?

Yes. Vulnerable Victim [§3A1.1(b)] due to age and inability to produce future earnings. Additionally, Obstruction of Justice [§3C1.1] due to the defendant directing or procuring another person to conceal evidence that is material to an official investigation or judicial proceeding.

Scenario #8

Defendant was convicted of Conspiracy to Defraud the Government and Monetary Transactions in Criminal Derived Property (Money Laundering). The defendant used the identification of numerous victims that included inmates serving a prison sentence, as well elderly victims, all without their knowledge. Over the course of several years, the defendant utilized these victim's personal information to secure more than \$100,000 from the IRS.

Yes, if the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels. Many of the individuals whose means of identification were used without authority were incarcerated. These individuals were targeted for their incarceration, as the defendant knew that they would not be filing their own tax return and would be less likely to recognize the fraud or file a true tax return that would block defendant from filing a second. These victims' incarceration made them "particularly susceptible to the criminal conduct," as described in USSG §3A1.1 comment. (n.2), and a 2-level enhancement is applicable.

However, age alone does not make the elderly victims vulnerable unless there is another factor that makes them unusually vulnerable (dementia, Alzheimer's, etc.).

Scenario #9

Defendant was involved in the sexual exploitation of a minor who was 14 years old. The victim had behavioral problems and would often cut herself and threaten suicide. Would an enhancement be applicable in this case based on the fact that the victim was 14 years old?

No. There must be information showing the defendant targeted the 14-year-old because of some particular susceptibility, other than her age, to the criminal conduct. If the defendant specifically targeted

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the 14-year-old due to her mental health or behavioral problems, then you may have the information you need for the enhancement.

Obstruction of Justice

Scenario #10

Defendant Jackson was convicted of one count Conspiracy to Defraud the Government with Respect to Claims and one count of False, Fictitious or Fraudulent Claims. She initially pled guilty to the offenses, but subsequently filed a motion to withdraw her plea of guilty. At the motion hearing the defendant testified that at the time she entered a plea of guilty, she was aware she was under oath to tell the truth. She then testified that she lied when she entered her plea of guilty and indicated that she only entered the plea of guilty in order to obtain a sentence of probation. Defendant Jackson also testified that she was not guilty of the charges pending against her. The Court denied the defendant's Motion to Withdraw her plea of guilty.

Would an enhancement be applicable in this case where the defendant lied when she entered a plea of guilty?

Yes. Adjustment for Obstruction of Justice. §3C1.1 Application Notes 2 and 4(F) indicate that an adjustment for obstruction of justice applies when the defendant's conduct involved providing materially false/inconsistent information to magistrates and district court judges while under oath.

Scenario #11

Would an enhancement be applicable when a defendant lies about his personal and family background during a PSI interview? For example, the defendant lied about having additional children and being married previously.

No – USSG §3C1.1 App. Note 5(C) – providing incomplete or misleading information; not amounting to a material falsehood, in respect to a presentence investigation.

Scenario #12

Defendant Bradley was convicted of one count Possession with Intent to Distribute Heroin and one count Felon in Possession of a Firearm. After his arrest for the offenses, he began making telephone calls from the jail that included threats to his girlfriend, a witness in the matter. Defendant Bradley was aware of his girlfriend's cooperation with police in this matter, and during one call told her "You act like I ain't gonna get out of here and do something to you over that s**t." In other calls, Defendant Bradley attempted to get his girlfriend to go out and collect his drug profits while he was in jail. In another call he attempted to figure out who he believed set him up in this matter, and discussed killing that person when he got out.

Are there any Chapter 3 Adjustments that are applicable in this case?

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Yes. Adjustment for Obstruction of Justice. §3C1.1 Application Notes 4(A) indicate that an adjustment for obstruction of justice includes, “threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so.”

Scenario #13

Defendants Andrews and Bates were charged in a 12-count Indictment that included the following counts:

- Count 1 – Armed Bank Robbery - 18 USC §§ 2113(a) and (d)
- Counts 2 and 3 – Kidnapping - 18 USC § 1201(a)(1)
- Counts 4 and 5 - Kidnapping of a Minor - 18 USC §§ 1201(a)(1) and 1201(g)
- Count 6 – Possession of Ransom Money - 18 USC § 1202
- Counts 7 through 10 – Hostage Taking - 18 USC § 1203
- Count 11 – Possessing a Firearm in Furtherance of a Crime of Violence - 18 USC § 924(c)(1)(A)(ii)
- Count 12 - Tampering with a Witness, Victim, or an Informant- 18 U.S.C. § 1512

Defendant Andrews was named in Counts 1 through 11; Defendant Bates was named in Counts 1 through 10 and Count 12. They were each convicted on all counts.

Defendant Cross was charged in a separate Indictment with Misprision of a Felony [18 USC § 4] in relation to all of the counts listed above, and Receipt of Ransom Money [18 USC § 1202(a)]. She was convicted of both counts.

The offenses began when Defendants Andrews and Bates began planning to rob the bank where Defendant Andrews had an account. They obtained home addresses of several bank employees by recruiting Defendant Cross, who had access to the law enforcement data system through her employment, to look up this information.

Defendants Andrews and Bates conducted surveillance on the employees and chose the bank manager as the target after learning that he had a wife and two small children. Defendant Bates subsequently broke into the home of the bank manager and hid in a closet until the manager’s wife and children returned to the home. Defendant Bates then exited the closet, pointed a gun at the manager’s wife and children, and informed them that he would kill them if they didn’t cooperate in his robbery plans. Defendant Bates held the manager’s wife and children hostage throughout the afternoon and into the evening. The bank manager eventually came home and he was taken hostage as well.

The family was held hostage through the night. The following morning, defendant Andrews went with the bank manager to the bank and withdrew money while Defendant Bates held the manager’s family hostage. Once the bank manager returned home, Defendant Andrews picked up Defendant Bates and they left the residence.

The following morning, Defendants Andrews and Bates drove to Defendant Cross’s residence, where all three of them counted the money. Defendants Andrews and Bates each took a portion of the money and had Defendant Cross hide the rest in Defendant Cross’s home. Defendants Andrews and Bates obtained some of the hidden money from Defendant Cross approximately one week later. However, Defendants Andrews and Bates were arrested for the offenses a few weeks later. The next day, Defendant Cross

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turned over the majority of the remaining money to the police. However, Defendant Cross did not turn over a portion of the money that was still hidden at Defendant Cross’s residence. The remaining funds were ultimately recovered during a search of Defendant Cross’s home.

Are there any Chapter 3 Adjustments that are applicable for Defendants Andrews, Bates, and Cross?

Yes. Adjustments for Vulnerable Victim and Obstruction of Justice apply to all three defendants. The adjustment for Vulnerable Victim is appropriate because the bank manager and his wife were chosen as targets in the bank robbery since they had young children. The defendants knew that they were, “otherwise particularly susceptible to the criminal conduct” (see §3A1.1, Application Note 2). The adjustment for Obstruction of Justice is appropriate because the defendants engaged in, “threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so” [see §3C1.1, Application Note 4(A)]. **There is also a possible enhancement for the criminal activity being otherwise extensive.

Even though Cross was charged under a different indictment, the relevant conduct analysis would hold her accountable for all acts, committed, aided, abetting, etc. that occurred during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. §1B1.3 (a)(1)(A). She played an integral part in getting the name of the victim in the first place. Andrews and Bates also went to Cross’s residence after the robbery and counted money. Cross also hid money from the robbery after she went to the police.

Acceptance of Responsibility

Scenario #14

Defendant pled guilty to Felon in Possession of a Firearm on June 15, 2016. Prior to his guilty plea, the defendant called a friend and told her she should call detectives and report that the firearm possessed by the defendant in fact belonged to an ex-boyfriend of hers. While incarcerated after his guilty plea, the defendant utilized other inmates’ pin numbers in order to make telephone calls to friends and family. Also, during a cell search, officers located .24 grams of marijuana. Should this defendant receive +2 for obstruction and also lose acceptance of responsibility reduction?

No – often it depends upon when the defendant plead guilty. In addition, the defendant’s conduct with his friend and his attempt to get her to file a false police was that only, an attempt. She did not follow through and a few months later, the defendant pleaded guilty anyway. The defendant had no additional post-plea conduct inconsistent with acceptance of responsibility, but a sentence within the guidelines or at the top of the guidelines could take into account that behavior. The Court reasoned that the defendant’s use of other jail inmates’ pin numbers and .24 grams of marijuana could be and were dealt with by jail officials. Those infractions appeared unrelated to the felon in possession of a firearm charge.

Scenario #15

Defendant pled guilty to Felon in Possession of a Firearm on June 15, 2016. Prior to his guilty plea, the defendant called a friend and told her she should call detectives and report the firearm possessed by the defendant in fact belonged to an ex-boyfriend of hers. The defendant’s girlfriend did as asked and was

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subsequently interviewed by federal agents. However, they soon learned she was lying. While incarcerated after his guilty plea and up until sentencing, the defendant remained law abiding. Can a defendant receive +2 for obstruction and also lose acceptance of responsibility reduction?

In this case, obstruction happened at the beginning of the investigation and defendant later pleaded guilty, so it might be a case that qualifies, although it would be a factual case-by-case determination.

See §3E1.1, App. Note 4, which provides that there may be extraordinary cases in which both adjustments apply.