GUIDELINE SENTENCING: SELECTED CHAPTER THREE ADJUSTMENTS

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Panel on Chapter Three Adjustments
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SELECTED CHAPTER THREE ADJUSTMENTS

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- Part B – Role in the Offense
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B. This outline focuses on the following selected adjustments:

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II. TERRORISM – §3A1.4

A. **Introduction**

- If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

- In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

B. **General Considerations**

1. Subsection (a) of §3A1.4 increases the offense level if the offense involved, or was intended to promote, a federal crime of terrorism. "Federal crime of terrorism" is defined at 18 U.S.C. § 2332b(g).

2. Under subsection (b) of §3A1.4, if the defendant's criminal history category as determined under Chapter Four (Criminal History and

Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

C. **Upward Departure Provision**

Section 3A1.4 applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to affect the conduct of the government. In such cases, an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.

D. **Specific Examples**

In *United States v. Graham*, 275 F.3d 490, 518 (6th Cir. 2001), addressing an issue of first impression, the Sixth Circuit applied the §3A1.4 adjustment in a domestic terrorism case involving the "North American Militia." The defendant was not convicted of any statutorily determined predicate offenses under the statute defining a federal crime of terrorism. *See* 18 U.S.C. § 2332b(g)(5). However, the court of appeals affirmed the application of the adjustment to the defendant's conviction for conspiracy under 18 U.S.C. § 371 because the indictment alleged that *Graham* conspired to commit offenses against the United States, including conspiring to maliciously damage and destroy by means of an explosive a building, vehicle, or other real or personal property used in interstate commerce in violation of 18 U.S.C. § 844(i), an offense designated as a federal crime of terrorism predicate. Thus, the offense was intended to promote a federal crime of terrorism. In a dissenting opinion, Judge Cohn examined the legislative history of the directives leading to the Chapter Three adjustment, and concludes that the enhancement can only be applied if the defendant is actually convicted of one of the predicate offenses listed at 18 U.S.C. § 2332b(g)(5)(A).

As a matter of first impression, the Second Circuit considered whether application of §3A1.4 constitutes double counting because the guideline increases both the offense level and the criminal history category for a felony involving or intending to promote an act of terrorism. *United States v. Meskini*, 319 F.3d 88 (2d Cir. 2003) (affirming application of terrorism adjustment for defendant who conspired to bomb Los Angeles International Airport during the millennium celebrations in December 1999). The Court held that this is permissible double counting, noting that the language of §3A1.4 "plainly manifests the intent of both Congress and the Sentencing Commission to account for an act of terrorism in calculating both the offense level and the criminal history category." *Id*. at 90.

III. AGGRAVATING ROLE – §3B1.1

A. **Introduction:** Section 3B1.1 provides a range of upward adjustments to increase the offense level based upon the size of a criminal organization (*i.e.*, the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. The size of the upward adjustment is determined as follows:

- a 4-level enhancement if the defendant was an ***organizer*** or ***leader*** of a criminal activity involving five or more participants or was otherwise extensive;

- a 3-level enhancement if the defendant was a ***manager*** or ***supervisor*** (but not an organizer or leader) of a criminal activity involving five or more participants or was otherwise extensive;

- a 2-level enhancement if the defendant was an organizer, leader, manager or supervisor in ***any*** criminal activity not described previously.

B. **Factors:** In distinguishing between a leadership and organizational role from one of mere management and supervision, the court *should* consider the following:

- 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
- Degree of **control and authority** exercised over others (*See* Application Note 4).

If factors are present, upward adjustment is <u>required</u>. *See United States v. Smith*, 49 F.3d 362, 367 (8th Cir. 1995) (district court may not impose a 2-level increase when factual findings support a 4-level enhancement). If factors are absent, no upward adjustment given.

C. **Other Considerations**

1. **Relevant Conduct Used to Determine Role in Offense:** The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct) and not solely on the basis of elements and acts cited in the count of conviction. (*See* Introductory Commentary to Chapter 3, Part B).

2. Defendant need not personally lead or organize all five of the participants; it is sufficient if he leads at least one (Application Note 2).

3. More than one person can qualify as a leader or organizer (Application Note 4).

4. An upward ***departure*** (not an adjustment under §3B1.1) may be warranted in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization (Application Note 2).

D. **"Five or More Participants"**

1. A "participant" is a person who is criminally responsible for the commission of the offense, but **need not have been convicted** (Application Note 1).

2. **"Criminally responsible":** A person who is not criminally responsible for the commission of the offense (*e.g.*, an **undercover law enforcement officer**) is not a participant (Application Note 1).

3. **Defendant** is included as one of the five participants. *United States v. Preakos*, 907 F.2d 7, 10 (1st Cir. 1990); *United States v. Paccione*, 202 F.3d 622, 625 (2d Cir. 2000); *United States v. Colletti*, 984 F.2d 1339, 1346 (3d Cir. 1992); *United States v. Fells*, 920 F.2d 1179, 1182 (4th Cir. 1990); *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990); *United States v. Schweihs*, 971 F.2d 1302, 1318 (7th Cir. 1992); *United States v. Egge*, 223 F.3d 1128, 1134 (9th Cir. 2000)*; United States v. Reid*, 911 F.2d 1456, 1464 (10th Cir. 1990); *United States v. Rodriguez*, 981 F.2d 1199, 1200 (11th Cir. 1993).

4. **Minors** count as participants for aggravating role purposes even if the defendant's sentence is also increased for use of a minor in a drug offense. *United States v. Rivera-Maldonado*, 194 F.3d 224, 234-35 (1st Cir. 1999) (holding that separate enhancements under §§2D1.2(a)(1) and 1B1.1 were not improper double counting).

5. **Corporations** that are essentially the "alter-ego" of the defendant do not count as separate "participants." *United States v. Gross*, 26 F.3d 552, 556 (5th Cir. 1994) (defendant was the sole shareholder, officer, and director of each of the two corporations).

E. **"Leader" or "Organizer":** A defendant must control others to be a **"leader"** under §3B1.1. But one can be an **"organizer"** (although perhaps not a leader) if

he coordinates others so as to facilitate the commission of criminal activity. *United States v. Tejada-Beltran*, 50 F.3d 105, 112-13 (1st Cir. 1995) (even if defendant did not retain control over others, §3B1.1(a) adjustment affirmed because he organized large illegal immigration scheme); *United States v. Schultz,* 14 F.3d 1093, 1099 (6th Cir. 1994) (affirming "organizer" adjustment even though defendant did not directly control others); *United States v. Guyton*, 36 F.3d 655, 662-63 (7th Cir. 1994) (holding that organizing or enlisting others can constitute sufficient control for the upward adjustment).

F. **"Manager" or "Supervisor":** A defendant is a **"supervisor" or "manager"** if he directed, supervised, or exerted control over someone subordinate in the criminal activity. *E.g., United States v. Rodriguez Alvarado,* 985 F.2d 15, 20 (1st Cir. 1993) (managerial enhancement for defendant who seduced a co-conspirator into joining the conspiracy and purchased the paper on which the counterfeit obligations were printed); *United States v. Gaitan-Acevedo,* 148 F.3d 577, 596 (6th Cir. 1998) (defendant was responsible for processing all the marijuana in California and gave one conspirator directions as to where delivery was to be made); *United States v. Lawson,* 947 F.2d 849, 852 (7th Cir. 1991) (defendant had authority to permit others to join conspiracy); *United States v. Garrison,* 168 F.3d 1089, 1096 (8th Cir. 1999) (defendant exercised enough control over at least one other conspirator to warrant a three-level managerial increase).

G. **"Otherwise Extensive"**

1. Even if a defendant's criminal activity does not involve five or more participants, a three or four-level upward adjustment is warranted under §3B1.1(a) or (b) if the criminal activity is "otherwise extensive." However, for any role in the offense adjustment, it appears that at least two participants are required. *See* Chap. 3, Part B, Introductory Comment ("When an offense is committed by more than one participant, §3B1.1 or §3B1.2 . . . may apply"). Defendant can be counted as one of the participants. *See United States v. Dietz*, 950 F.2d 50, 53 (1st Cir. 1991).

2. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive (Application Note 3).

3. **Legal Standards:** The courts have developed two different approaches in determining whether criminal activity is "otherwise extensive."

   a. **Majority View:** Does not determine "otherwise extensive" based solely upon the number of people involved in the criminal activity but looks to the **totality of the circumstances** to determine

whether the activity is the **functional equivalent** of an activity that involves five or more participants. *United States v. Dietz,* 950 F.2d 50, 53 (1st Cir. 1991) (defendant must be involved with at least one other criminally responsible person, then look to the **totality of the circumstances**); *United States v. Mergerson,* 4 F.3d 337, 348 (5th Cir. 1993) (explaining that based on totality of the circumstances, criminal activity was otherwise extensive, even without specific finding that defendant controlled five or more persons); *United States v. Tai,* 41 F.3d 1170, 1174 (7th Cir. 1994) (at the very least, §3B1.1's "otherwise extensive" prong demands a showing that an activity is the **functional equivalent** of an activity that involves fives or more participants); *United States v. Rose,* 20 F.3d 367, 374 (9th Cir. 1994) (discussing whether criminal activity is "otherwise extensive" depends on such factors as (i) the number of knowing participants and unwitting outsiders; (ii) the number of victims; and (iii) the amount of money fraudulently obtained or laundered); *United States v. Yarnell*, 129 F.3d 1127, 1138 (10th Cir. 1997) (extensiveness of a criminal activity is not necessarily a function of the precise number of persons, criminally culpable or otherwise, engaged in the activity, but depends on an examination of the **totality of the circumstances,** including not only the number of participants but also the width, breadth, scope, complexity, and duration of the scheme).

b. **Minority View:** *United States v. Carrozzella,* 105 F.3d 796, 802-805 (2d Cir. 1997) (in determining whether criminal activity is "otherwise extensive," the sentencing court should consider the number of knowing participants, the number of unknowing participants whose activities were organized or led by the defendant with specific criminal intent, and the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme. It should not consider characteristics that might ordinarily be considered evidence of extensive activity elsewhere in the guidelines, *e.g.*, in fraud cases, the amount of loss, the extent of planning and the number of victims); *United States v. Helbling*, 209 F.3d 226 (3d Cir. 2000); *United States v. Anthony*, 280 F.3d 694 (6th Cir. 2002); United *States v. Wilson*, 2001 WL 173302 (D.C. Cir. 2001).

4. **Examples:** *United States v. Rostoff,* 53 F.3d 398, 414 (1st Cir. 1995) (three-year bank fraud involving 140 loans and millions of dollars qualifies as extensive where defendant falsely represented to banks that borrowers were making 10 percent down payments on condos); *United States v. Patasnik*, 89 F.3d 63, 69 (2d Cir. 1996) (two-man fraudulent operation affecting numerous victims over two years qualified as

"otherwise extensive" activity); *United States v. Randy*, 81 F.3d 65, 67 (7th Cir. 1996) (although fewer than five participants, criminal activity was "otherwise extensive" where defendant founded and promoted a scheme to recruit investors in a fraudulent banking scheme and enlisted the help of a nationwide network of more than 60 brokers who sold $16 million worth of certificates to 400 willing investors); *United States v. Mullins*, 992 F.2d 1472, 1479 (9th Cir. 1993) (fraudulent acquisition of frequent flyer miles valued at $1.3 million by three persons was "otherwise extensive"); *United States v. Rodriguez*, 981 F.2d 1199, 1200 (11th Cir. 1993) (drug operation that extended from Colombia to New York and involved 100 kilograms of cocaine found to be "otherwise extensive").

H. Case Law on Aggravating Role

1. The fact that a defendant plays an important or even **essential role** in a criminal enterprise does not necessarily require an aggravating role adjustment. *United States v. Sostre*, 967 F.2d 728, 733 (1st Cir. 1992) (rejecting manager or supervisor role adjustment for drug "steerer" who played an "essential role" in the drug transaction); *United States v. Sherrod*, 964 F.2d 1501, 1505-06 (5th Cir. 1992) (affirming rejection of managerial role for "cook" in methamphetamine conspiracy); *United States v. Vandeberg*, 201 F.3d 805, 811-12 (6th Cir. 2000) ("Merely playing an essential role in the offense is not equivalent to exercising managerial control over other participants and/or assets of the criminal enterprise); *United States v. Parmalee*, 42 F.3d 387, 395 (7th Cir. 1994) (reversing for lack of evidence that pilot controlled or coordinated any of his co-defendants); *United States v. Lopez-Sandoval*, 146 F.3d 712, 716-17 (9th Cir. 1998) (use of "but for" test improper); *United States v. Litchfield*, 959 F.2d 1514, 1523 (10th Cir. 1992) (noting that the enhancement is for "organizers or leaders" not for "important or essential figures").

2. **Drug Cases**

   a. Many cases have held that a defendant is a "**leader"** if he controlled the location of a drug transaction and the quantity, price to be paid, and responsibilities and actions of the other participants. *E.g.*, *United States v. Berrios*, 132 F.3d 834, 839 (1st Cir. 1998) (defendant was organizer or leader because he set prices and determined the location of heroin transactions); *United States v. Ortiz*, 878 F.2d 125, 127 (3d Cir. 1989) (defendant was organizer or leader because he controlled the location, quantity, price and participants in drug transaction).

b. **Drug Quantity to Determine Role:** The quantity of drugs involved is relevant in determining defendant's role, even though that factor also plays a part in determining sentence under §2D1.1. Quantity tends to demonstrate how "close to the source" the defendant's role is in the conspiracy. *United States v. Garvey*, 905 F.2d 1144, 1146 (8th Cir. 1990); *United States v. Ponce*, 51 F.3d 820, 827 (9th Cir. 1995) (defendant oversaw "colossal" quantities of cocaine, approximately 77 tons). The purity of drugs seized is probative for the same reason. *United States v. Iguaran-Palmar*, 926 F.2d 7, 9-11 (1st Cir. 1991).

c. **Drug "Steerers":** A drug "steerer" is someone who "directs buyers to sellers in circumstances in which the sellers attempt to conceal themselves from casual observation." Whether a steerer may qualify for an aggravating role adjustment depends on the specific facts. *See United States v. Graham*, 162 F.3d 1180, 1183-84 (D.C. Cir. 1998) ("the mere act of directing buyers to sellers does not constitute management or supervision"). *Compare United States v. Sostre*, 967 F.2d 728, 733 (1st Cir. 1992) (although defendant brought buyers to sellers and controlled a lookout, he did not control the drugs, was not the principal in the drug transactions, and had to contact the sellers before making representations to buyers), *with United States v. Cochran*, 955 F.2d 1116, 1124-26 (7th Cir. 1992) (defendant who coordinated five defendants in drug transactions, linked supplier with purchaser, attended all planning meetings and drug sales, and allowed his home to be purchase site was an "organizer" under §3B1.1(c)).

3. **Cumulative Application**

Double Counting: Offense level increases based on the application of Chapter Three adjustments and Chapter Two specific offense characteristics that are triggered by the same offense conduct do not constitute impermissible double counting. *See, e.g., United States v. Kneeland*, 148 F.3d 6, 16 (1st Cir. 1998) (finding no improper counting in increases in leadership role and more than minimal planning); *United States v. Rappaport*, 999 F.2d 57, 60-61 (2d Cir. 1993); *United States v. Helbling*, 209 F.3d 226, 247 (3d Cir. 2000); *United States v. Curtis*, 934 F.2d 553, 556-57 (4th Cir. 1991); *United States v. Porretta*, 116 F.3d 296, 301-02 (7th Cir. 1997); *United States v. Willis*, 997 F.2d 407, 418-19 (8th Cir. 1993); *United States v. Kelly*, 993 F.2d 702, 705 (9th Cir. 1993).[1]

[1]In March 2003, the Commission amended §1B1.1 (Application Instructions) to provide an instruction that makes clear that the application instructions are to be applied in the order

IV. MITIGATING ROLE – §3B1.2

A. **Introduction:** Section 3B1.2 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 participant. The size of the downward adjustment is as follows:

- a 4-level reduction if the defendant was a minimal participant in any criminal activity;
- a 2-level reduction if the defendant was a minor participant;
- a 3-level reduction in cases falling between the above two categories.

B. **Fact Based:** The determination whether to apply §3B1.2 (a) or (b) or an intermediate adjustment involves a determination that is heavily dependent upon the facts of the particular case (§3B1.2 Background).

C. **When Mitigating Role Adjustment Not Applicable:** If 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, a reduction for mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense.

For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (offense level 14) is convicted of simple possession of cocaine (offense level 6), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine (Application Note 4).

D. **"Minimal Participant" – §3B1.2(a)**

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presented in the guideline, and to make clear that, absent an instruction to the contrary, multiple specific offense characteristics (or a Chapter Two specific offense characteristic and a Chapter Three adjustment) that are triggered by the same conduct are to be applied cumulatively. During the public meeting in which the Commission voted to promulgate this amendment, effective November 1, 2003, Vice Chair Steer stated that he hoped the amendment would curtail the so-called doctrine of "anti double counting." He noted that the Commission strives to be conscious of the situations where double-counting is not desired and states so explicitly, intending the provisions of the manual to be applied cumulatively and in the order provided, absent an instruction to the contrary. *See* United States Sentencing Commission Public Meeting Minutes (March 26, 2003) *available at* http://www.ussc.gov.

1. It is intended that this downward adjustment for minimal participant be used **infrequently** (Application Note 2).

2. This adjustment is intended to cover defendants who are **plainly among the least culpable** of those involved in the conduct of the group (Application Note 1).

3. **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 (Application Note 1).

4. **Examples:** Minimal participant appropriate for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs (Application Note 2).

E. **"Minor Participant" – §3B1.2(b)**

A minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal (Application Note 3).

F. **Circuit Conflicts**

1. **Culpability Comparisons for Mitigating Role**

a. **Majority Rule:** In determining mitigating role, these courts apply a two-part test: (1) Is the defendant less culpable than most participants in the offense? (2) Is the defendant less culpable than the "average person" in a hypothetical case who commits that type of offense? *United States v. DeMasi*, 40 F.3d 1306, 1323 (1st Cir. 1994); *United States v. Pena*, 33 F.3d 2, 3 (2d Cir. 1994); *United States v. Carpenter*, 252 F.3d 230, 235 (2d Cir. 2001) (Defendant was not entitled to a 3-level mitigating role adjustment based solely on the finding that he was less culpable than his co-conspirator; rather, the court additionally compared the defendant's role to that of the average participant.); *United States v. Jackson*, 55 F.3d 1219, 1225 (6th Cir. 1995) ("Jackson's actions must be compared with those of the average participant in a similar scheme."); *United States v. Caruth*, 930 F.2d 811, 815 (10th Cir. 1991) *cf. United States v. Daughtrey*, 874 F.2d 213, 216 (4th Cir. 1989) (Role in the Offense adjustments are "determined not only by comparing the acts of each participant in relation to the relevant

conduct for which the participant is held accountable, but also by measuring each participant's individual acts and relative culpability against the elements of the offense of conviction."); *United States v. Snoddy*, 139 F.3d 1224, 1228 (8th Cir. 1998) (same).

b. **Minority View:** Does not look at the hypothetical average defendant but asks solely whether the defendant is substantially less culpable than co-participants. *United States v. Washington,* 106 F.3d 983, 1018 (D.C. Cir. 1997) (*per curiam*); *United States v. DePriest*, 6 F.3d 1201, 1214 (7th Cir. 1993); *United States v. Petti*, 973 F.2d 1441, 1447 (9th Cir. 1992).

In 2001, the Commission promulgated amendment 635. Among other things, this amendment incorporated the definition of "participant" from §3B1.1. The definition characterizes a participant as a "person," thereby implicitly rejecting the majority view that a court could compare the defendant with a hypothetical average figure.

2. **Relevant Conduct**

a. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct) and not solely on the basis of elements and acts cited in the count of conviction. (*See* Introductory Commentary to Chapter 3, Part B).

b. Courts have differed on whether, and how much, relevant conduct can be taken into account when a drug courier or "mule" has been charged with only the amount of drugs he or she actually carried and has not been convicted of a conspiracy or other group offense. *Compare United States v. Isienyi*, 207 F.3d 390, 391 (7th Cir. 2000) (defendant who pled guilty to importing heroin NOT eligible for mitigating role when held accountable only for the amount of drugs he personally handled. The mitigating role adjustment appears to contemplate a defendant who, because of his role in a concerted activity, is held accountable for the acts of others; the purpose of the adjustment is therefore not implicated when, as here, the defendant is charged only with importing drugs that he actually carried); with *United States v. Rodriguez de Varon*, 175 F.3d 930, 944 (11th Cir.) (en banc), *cert. denied*, 120 S. Ct. 424 (1999) ("if the defendant can establish that she played a relatively minor role in the conduct for which she has already been held accountable – not a minor role in any larger criminal conspiracy –

the district court may grant a downward adjustment for minor role in the offense.").

This conflict was resolved by the 2001 Amendments to the U.S. Sentencing Guidelines (effective Nov. 1, 2001). The amendment adopted the approach articulated by the Eleventh Circuit in *United States v. Rodriguez De Varon, supra*, that §3B1.2 does not automatically preclude a defendant from being considered for a mitigating role adjustment in a case in which the defendant is held accountable under §1B1.3 solely for the amount of drugs the defendant personally handled. In considering a §3B1.2 adjustment, a court must measure the defendant's role against the relevant conduct for which the defendant is held accountable at sentencing, whether or not other defendants are charged. The substantive impact of this amendment in resolving the circuit conflict is to provide, in the context of a drug courier, for example, that the court is not precluded from considering a §3B1.2 adjustment simply because the defendant's role in the offense was limited to transporting or storing drugs, and the defendant was accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored. The amendment does not require that such a defendant receive a reduction under §3B1.2, or suggest that such a defendant can receive a reduction based only on those facts; rather, the amendment provides only that such a defendant is not precluded from consideration for such a reduction if the defendant otherwise qualifies for the reduction pursuant to the terms of §3B1.2. Although this circuit conflict arose in the context of a drug offense, the amendment resolves it in a manner that makes the rule applicable to all types of offenses.

G. Case Law on Mitigating Role

All circuits addressing the issue have held that drug couriers or "mules" are not ***automatically*** entitled to a §3B1.2 mitigating role adjustment. *See United States v. Lopez-Gil,* 965 F.2d 1124, 1131 (1st Cir. 1992); *United States v. Garcia,* 920 F.2d 153, 155 (2d Cir. 1990); *United States v. White,* 875 F.2d 427, 434 (4th Cir. 1989); *United States v. Buenrosto,* 868 F.2d 135, 138 (5th Cir. 1989); *United States v. Rossy,* 953 F.2d 321, 326 (7th Cir. 1992); *United States v. Williams,* 890 F.2d 102, 104 (8th Cir. 1989); *United States v. Zweber,* 913 F.2d 705, 710 (9th Cir. 1990); *United States v. Calderon-Porras,* 911 F.2d 421, 423-24 (10th Cir. 1990); *United States v. Cacho,* 951 F.2d 308, 309-10 (11th Cir. 1992); *United States v. Caballero,* 936 F.2d 1292, 1299 (D.C. Cir. 1991).

V. ABUSE OF POSITION OF TRUST OR USE OF SPECIAL SKILL – §3B1.3

A. **Introduction**

1. If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by **2** levels.

2. This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime (Background).

3. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more difficult) (Application Note 1).

B. **Definitions**

1. **"Public or private trust":** A position of public or private trust is characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature (Application Note 1).

2. **"Special Skill":** A skill not possessed by members of the general public and usually requiring substantial education, training, or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts (Application Note 3).

   The "special skill" may be **self-taught** and **no formal training or education is necessary**. *E.g., United States v. Noah,* 130 F.3d 490, 499-500 (1st Cir. 1997) (professional tax preparer has skill in preparing and filing electronic tax returns); *United States v. Spencer,* 4 F.3d 115, 120 (2d Cir. 1993) (self-taught chemist convicted of methamphetamine offenses "presents the unusual case where factors other than formal education, training or licensing persuade us that he had special skills in the area of chemistry); *United States v. Urban,* 140 F.3d 229, 235-36 (3d Cir. 1998) (adjustment applies to defendant who used other skills to teach himself to make bombs); *United States v. White,* 270 F.3d 356, 373 (6th Cir. 2001) (held that employee at the county water district's drinking water treatment plant possessed a special skill by using turbidity tests, although tests were regularly performed by unlicensed operators); *United States v. Tolar,* 268 F.3d 530, 533 (7th Cir. 2001) (court determined that defendant's ability to drive an 18-wheel rig was a special skill as he was harder to catch than the

normal drug courier and able to move more per trip.); *United States v. Petersen*, 98 F.3d 502, 506-07 (9th Cir. 1996) (computer skills in fraud case); *United States v. Foster*, 155 F.3d 1329, 1332 (11th Cir. 1998) (counterfeiter with printing skills).

C. **Specific Examples**

1. **Garden Variety Cases:** The adjustment applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination (Application Note 1).

2. **Bank Teller/Hotel Clerk:** Adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by factors applicable to those holding positions of trust (*i.e.*, professional or managerial discretion, substantial discretionary judgment that is ordinarily given considerable deference, or people who ordinarily are subject to significantly less supervision).

3. **Postal Employees:** Because of the special nature of the U.S. mail, an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered U.S. mail (Application Note 1). *But see United States v. Tribble*, 206 F.3d 634, 637 (6th Cir. 2000) (postal window clerk who embezzled $42,000 from Postal Service did not occupy position of trust because no more trust is reposed in a window clerk than an ordinary bank teller or motel clerk).

4. **Imposters:** This adjustment applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not (Application Note 2 and Background). Such persons generally are viewed as more culpable (Background).

   For example, the adjustment applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician (Application Note 2).

   Rationale: In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the

defendant would have had if the position were held legitimately (Application Note 2).

5. **Law Enforcement Officers:** Police officers are generally held to occupy a position of trust and become eligible for the enhancement if they use their position or special knowledge in a way that facilitates or conceals the offense. *E.g., United States v. Rehal,* 940 F.2d 1, 5-6 (1st Cir. 1991) (police officer used his position to conceal the offense); *United States v. Talley,* 194 F.3d 758, 766 (6th Cir. 1999) (police lieutenant participated in informant's criminal activity); *United States v. Sierra,* 188 F.3d 798, 802-03 (7th Cir. 1999) (police officer robbed store under pretense of official seizure); *United States v. Barrett,* 111 F.3d 947, 953-54 (D.C. Cir. 1997) (holding that a county sheriff abused his position of trust when he falsely testified before a grand jury that a friend who had been arrested on weapons charges was a "sworn" deputy sheriff).

6. **Movers:** A truck driver/mover who stole some belongings from the family whose belongings he was supposed to move violated a position of trust because he had "unwatched and exclusive control over the family's belongings for an extended period of time." *United States v. Hill,* 915 F.2d 502, 507 (9th Cir. 1990).

D. **Double Counting**

1. This adjustment may NOT be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. §3B1.3. *See United States v. Harris,* 38 F.3d 95, 99 (2d Cir. 1994) (no double counting to give §3B1.3 adjustment to disbarred attorney who "used lawyering skills instrumental to his [fraud] schemes"– status as attorney was not included in offense level); *United States v. Johnson,* 71 F.3d 539, 544 (6th Cir. 1995) (court should have considered whether doctor used special skill to illegally distribute pharmaceuticals by writing invalid prescriptions because use of special skill is not already taken into account in §2D1.1)

2. **Aggravating Role:** If §3B1.3 adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role). If the adjustment is based solely on the use of a special skill, it may NOT be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

3. **Upward Departures:** A district court may depart upward even if the defendant receives an upward adjustment under §3B1.3. *E.g., United States v. Pitts,* 176 F.3d 239, 245-48 (4th Cir. 1999) (holding that FBI agent who sold confidential information to the Soviet Union abused trust

to such an extent that an upward departure was warranted); *United States v. Barr*, 963 F.2d 641, 651-56 (3d Cir. 1992) (assistant to the U.S. Attorney General who lied about past and present cocaine use to obtain position). *But see United States v. Eagan,* 965 F.2d 887, 892-93 (10th Cir. 1992) (when a §3B1.3 adjustment for use of a special skill is given, a court may not also depart upward because of those same skills).

E. **Circuit Conflict**

Health Care Providers and Insurance Companies: Most courts hold that doctors and health care providers occupy a position of trust with respect to insurance companies and Medicare. *United States v. Ntshona*, 156 F.3d 318, 321 (2d Cir. 1998) (a doctor convicted of using her position to commit Medicare fraud is involved in a fiduciary relationship with her patients and the government and hence is subject to a §3B1.3 upward adjustment); *United States v. Sherman,*160 F.3d 967, 970-71 (3d Cir. 1998) (doctor abused position of trust in defrauding insurance companies); *United States v. Adam*, 70 F.3d 776, 782 (4th Cir. 1995) (physician convicted of welfare fraud "kickback" scheme); *United States v. Dishu*, 130 F.3d 644, 656 (5th Cir. 1997) (psychiatrist convicted of mail fraud for over-billing insurers; adjustment applicable because defendant compromised his patients' trust by over-prescribing morphine as a necessary component to his scheme); *United States v. Vivit,* 214 F.3d 908, 914 (7th Cir. 2000) (doctor abused trust to private insurance companies); *United States v. Rutgard*, 116 F.3d 1270, 1293 (9th Cir. 1997) (ophthalmologist falsely submitted claims to Medicare). *But see United States v. Garrison,* 133 F.3d 831, 839-41 (11th Cir. 1998) (while Medicare may have been the victim in this case, §3B1.3 is not applicable because the defendant (owner/manager of a home health care provider and registered nurse) did not occupy a position of trust relative to Medicare).

VI. USING A MINOR TO COMMIT A CRIME – §3B1.4

A. If the defendant used or attempted to use a person less than 18 years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by **2** levels. §3B1.4.

B. **"Used or attempted to use"** includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting or soliciting (Application Note 1).

C. **Double Counting:** Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor (Application Note 2).

D. **Upward Departure:** If the defendant used or attempted to use more than one person less than 18 years of age, an upward departure may be warranted.

E. **Case Law.** *United States v. Pharis*, 176 F.3d 434, 436 (8th Cir. 1999) (relying on rule of lenity, court held that §3B1.4 adjustment not applicable where child pornographer was tricked into sending pictures to a person he believed was a 13-year-old girl, but was in fact two different adults working for authorities). However, a defendant need not have personal knowledge that a minor is involved in the commission of the offense. In published opinions, three Circuits have held that §3B1.4 does not have a scienter requirement. *See United States v. Thornton*, 306 F.3d 1355, 1358 (3d Cir. 2002); *United States v. Gonzalez*, 262 F.3d 867, 870 (9th Cir. 2001); *United States v. McClain*, 252 F.3d 1279, 1285 (11th Cir. 2001).

VII. OBSTRUCTING/IMPEDING THE ADMINISTRATION OF JUSTICE – §3C1.1

A. **Introduction:** Increase offense level by **2** levels, IF:

- The defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, AND

- The obstructive conduct related to

  (i) the defendant's offense of conviction and any relevant conduct; OR

- (ii) a closely related offense (or a closely related case, such as that of a co-defendant).

(§3C1.1 and Application Note 1).

B. **General Considerations**

1. **"Material"** evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination (Application Note 6).

   In general, evidence, facts, statements or information must be "material" for the obstruction adjustment to apply. Application Notes 4(d), (f), (g), and (h); 5(c).

   But not all forms of obstruction have a separate materiality requirement. *See* Application Notes 4(a)-(c), (e), and (i).

2. **"Willfully"** for purposes of §3C1.1 means the defendant had the "specific intent to obstruct justice, *i.e.*, that the defendant consciously acted with the purpose of obstructing justice." *United States v. Defeo*, 36 F.3d 272, 276

(2d Cir. 1994); *United States v. Carty*, 264 F.3d 191, 195 (2d Cir. 2001) (The fact that the defendant fled to avoid sentencing was equivalent to finding that he acted with specific intent to obstruct justice).

3. **False Testimony or Statements:** In applying §3C1.1 to allegedly false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice (Application Note 2).

4. **Aiding and Abetting:** Defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused (Application Note 9).

C. **Specific Examples**

1. **Witness Intimidation:** Obstruction adjustment applies if defendant threatens, intimidates, or otherwise unlawfully influences a co-defendant, witness or juror, directly or indirectly, or attempts to do so (Application Note 4). *E.g., United States v. Sanchez,* 35 F.3d 673, 680 (2d Cir. 1994) (threat to a "potential" witness justifies an obstruction increase); *United States v. Blair,* 54 F.3d 639, 645 (10th Cir. 1995) (obstruction adjustment given where defendant entered into a "sham" marriage to prevent witness from testifying before grand jury).

2. **Perjury:** Obstruction adjustment applies if defendant commits, suborns, or attempts to suborn perjury (Application Note 4).

   a. Section 3C1.1 is NOT intended to punish a defendant for the exercise of a constitutional right (Application Note 2). *United States v. Dunnigan,* 507 U.S. 87, 92-96 (1993) (obstruction adjustment for perjury can apply if defendant testifies at trial and is convicted; adjustment is not inconsistent with defendant's right to testify).

   b. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt, refusal to provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of §3C1.1 (Application Note 2).

   c. Courts have required a defendant's false testimony to be "material" in order for this adjustment to apply. *United States v. Jones,* 159 F.3d 969, 981 (6th Cir. 1998) (reversing upward adjustment where

defendant's false testimony about racial slurs was not relevant to sentencing); *United States v. Senn*, 129 F.3d 886, 899 (7th Cir. 1997) (reversing upward adjustment because defendant's false testimony about whether he returned or kept marijuana was irrelevant to charge of conspiracy).

3. **False Documents:** Obstruction adjustment applies if defendant produces or attempts to produce a false, altered or counterfeit document or record during an official investigation or judicial proceeding (Application Note 4).

4. **Destroying/Concealing Material Evidence**

   a. Obstruction adjustment applies if defendant destroys or conceals or directs or procures another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempts to do so. *E.g., United States v. Valdez*, 16 F.3d 1324, 1335 (2d Cir. 1994) (upholding obstruction adjustment where defendant was unsuccessful in attempting to disguise his handwriting); *United States v. Ruth*, 65 F.3d 599, 608 (7th Cir. 1995) (upholding obstruction adjustment where defendant repeatedly failed to provide handwriting exemplars, rather than punishing for contempt); *United States v. Ashers*, 968 F.2d 411 413 (4th Cir. 1992) (defendant provided a false voice exemplar to influence an expert witness's testimony).

   b. However, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender (Application Note 4).

5. **Escape**

   a. Obstruction adjustment applies if defendant escapes or attempts to escape **from custody** before trial or sentencing; or willfully fails to appear, as ordered, for a judicial proceeding (Application Note 4(e)).

   b. But avoiding or fleeing **from arrest** does NOT warrant an obstruction adjustment under §3C1.1 (Application Note 5(d)).

c. BUT flight from a law enforcement officer warrants a 2-level adjustment under **§3C1.2** if the defendant "recklessly created a substantial risk of death or serious bodily injury to another person."

d. **Circuit Conflict:** Circuits have disagreed on whether a defendant has attempted to escape from "arrest" or from "custody." *Compare United States v. Draves*, 103 F.3d 1328, 1337-38 (7th Cir. 1997) (deferring to district court's factual finding that defendant's attempt to run away after being arrested and placed in a police car while police went to look for an accomplice was fleeing from "arrest"), *with United States v. Williams*, 152 F.3d 294, 303-04 (4th Cir. 1998) (declined to follow *Draves* when defendant, after being arrested, handcuffed, and placed in a police car, managed to escape while police searched his nearby car); *United States v. McDonald*, 165 F.3d 1032, 1035 (6th Cir. 1999) (declined to follow *Draves* for defendant who had escaped after he had been handcuffed, read his *Miranda* rights, and placed in patrol car).

6. **Materially False Information to Judge/Magistrate Judge:** Obstruction adjustment applies if defendant provides materially false information to a judge or magistrate judge (Application Note 4). *E.g.*, *United States v. Hitt*, 164 F.3d 1370-71 (11th Cir. 1999) (affirming obstruction increase partly because of false statements to magistrate judge regarding eligibility for court appointed counsel).

7. **Materially False Information to Law Enforcement Officer**

a. Obstruction adjustment applies if defendant provides materially false statement to a law enforcement officer that **significantly** obstructed or impeded the official investigation or prosecution of the instant offense (Application Note 4).

b. Making false statements, not under oath, to law enforcement officers do not warrant an obstruction adjustment, unless it significantly obstructed or impeded the official investigation or prosecution of the instant offense (Application Note 5).

c. Providing a false name or identification document at arrest does not warrant an obstruction adjustment, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense (Application Note 5).

8. **Materially False Information to Probation Officer**

a. Obstruction adjustment applies if defendant provides materially false information to a probation officer with respect to a presentence or other investigation for the court (Application Note 4).

b. But providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation does not warrant obstruction adjustment (Application Note 5).

c. Lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release does not warrant obstruction adjustment, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility) (Application Note 5).

9. **Refusal to Testify:** *United States v. Morales*, 977 F.2d 1330, 1331 (9th Cir. 1992) (defendant received upward adjustment under §3C1.1 because he refused to testify at trial of co-conspirator after being granted immunity); *United States v. Williams*, 922 F.2d 737, 739-40 (11th Cir. 1991) ("refusal to testify at a co-conspirator's trial after immunity order had been issued clearly constituted" obstruction, but §3C1.1 cannot be applied because defendant was sentenced for contempt for the same action).

10. **Catchall:** Other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (*e.g.*, 18 U.S.C. §§ 1510, 1511) (Application Note 4).

D. **Double Counting**

1. If the defendant is convicted of an offense covered by Sections

2J1.1 Contempt
2J1.2 Obstruction of Justice
2J1.3 Perjury or Subornation of Perjury; Bribery of Witness
2J1.5 Failure to Appear by Material Witness
2J1.6 Failure to Appear by Defendant
2J1.9 Payment to Witness
2X3.1 Accessory After the Fact
2X4.1 Misprision of Felony

Do NOT apply upward adjustment under §3C1.1 UNLESS a **significant further obstruction** occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (*e.g.*, if the defendant threatened a witness during the course of the prosecution for the obstruction offense) (Application Note 7).

2. **Grouping:** If the defendant is convicted of BOTH

- an obstruction offense (*e.g.*, 18 U.S.C. § 3146 Penalty for Failure to Appear; 18 U.S.C. § 1621 Perjury generally), AND

- an underlying offense (the offense with respect to which the obstructive conduct occurred),

the count for the obstruction offense will be grouped with the count for the underlying offense under USSG §3D1.2(c). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified in §3C1.1, or the offense level for the obstruction offense, whichever is greater. (Application Note 8).

3. **Departures**: Notwithstanding an upward adjustment for obstruction of justice, an upward **departure** might also be appropriate in the case of unusually egregious conduct or multiple acts of obstruction. *E.g., United States v. Venturea*, 146 F.3d 91, 96-98 (2d Cir. 1998) (affirming upward departure based on defendant's "renewed and repeated" obstruction of justice); *United States v. Drew*, 894 F.2d 965, 974 (8th Cir. 1990) (attempted murder of government witness); *United States v. Momeni*, 991 F.2d 493, 496 (9th Cir. 1993) (two-level adjustment did not sufficiently address the seriousness of the perjury).

4. **If obstruction is an element of the offense:** Section 3C1.1 is not applicable if obstruction is an element of the offense. *United States v. Werlinger*, 894 F.2d 1015, 1016-18 (8th Cir. 1990) (concealment is element of embezzlement and may not provide basis for obstruction enhancement).

5. **Contempt:** §3C1.1 not applicable when defendant receives a jail term for contempt for the same conduct. *United States v. Williams*, 922 F.2d 737, 739-40 (11th Cir. 1991).

VIII. ACCEPTANCE OF RESPONSIBILITY – §3E1.1

A. Introduction

1. Decrease the offense level by **2** levels if defendant clearly demonstrates acceptance of responsibility for his offense. §3E1.1(a).

2. Decrease the offense level by **1** ADDITIONAL level if:[2]

   - defendant's offense level prior to applying §3E1.1 is **16** or greater;

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[2]On April 11, 2003, Congress passed the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, or "PROTECT Act." In addition to provisions related to child abduction, the PROTECT Act ("the Act") makes certain changes to the Sentencing Guidelines. Included in these changes is an amendment to §3E1.1 that makes the availability of the third point reduction for acceptance of responsibility dependant upon a motion from the Government. Once the Act becomes law, §3E1.1(b) is amended as follows:

> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Additionally, Application Note 6 is amended to contain the following statement, "*Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Pub. L. No. ___.*"

- defendant clearly demonstrates acceptance of responsibility for his offense (*i.e.*, qualifies for the **2**-level reduction under §3E1.1(a))

- defendant assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

  – timely providing complete information to the government concerning his own involvement in the offense; OR

  – timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources effectively. §3E1.1(b).

B. **Factors:** In determining whether a defendant "clearly demonstrates acceptance of responsibility for his offense," appropriate considerations include, but are not limited to, the following:

- truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under §3E1.1(a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility (Application Note 1(a));

- Voluntary termination or withdrawal from criminal conduct or associations (Application Note 1(b));
  Voluntary payment of restitution prior to adjudication of guilt (Application Note 1(c));

- Voluntary surrender to authorities promptly after commission of the offense (Application Note 1(d));

- Voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense (Application Note 1(e));

- Voluntary resignation from the office or position held during the commission of the crime (Application Note 1(f));

- Post-offense rehabilitative efforts (*e.g.*, counseling or drug treatment)(Application Note 1(g)); and

- The timeliness of the defendant's conduct in manifesting the acceptance of responsibility (Application Note 1(h)).

C. **Timeliness:** The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under §3E1.1(b)(1) and (2) will occur particularly early in the case. For example, to qualify under §3E1.1(b)(2), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently (Application Note 6).

D. **Section 3E1.1(b)(2) is MANDATORY:** Courts have held that once the conditions of §3E1.1(b)(2) have been made, the court MUST give the extra one-level reduction. *See, e.g., United States v. Townsend*, 73 F.3d 747, 755-56 (7th Cir. 1996); *United States v. Rice*, 184 F.3d 740, 742 (8th Cir. 1999); *United States v. McPhee*, 108 F.3d 287, 289-90 (11th Cir. 1997).[3]

The Fifth Circuit has held that the reduction is mandatory even if the defendant later obstructs justice. *United States v. Tello*, 9 F.3d 1119, 1124-28 (5th Cir. 1993) (defendant must be given extra one-level reduction even though he obstructed justice by lying to probation officer because §3E1.1(b)(2) is concerned with government efficiency in only two areas – the prosecution not having to prepare for trial and the court's ability to manage its own docket. It is not concerned with possibly delaying presentence report by lying to probation officer); *accord United States v. Talladino*, 38 F.3d 1255, 1265-66 (1st Cir. 1994) ("The language of subsection (b) is absolute on its face. It simply does not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements are satisfied").

E. **Acceptance of Responsibility AFTER Trial**

1. Section 3E1.1 is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse (Application Note 2).

2. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal

[3]*See supra*, note 2.

conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute for his conduct). In each such instance, however, determination that a defendant has accepted responsibility will be based primarily upon pretrial statements and conduct (Application Note 2).

3. Notwithstanding Application Note 2, courts have regularly denied adjustments under §3E1.1 where defendants raise defenses that did not relate to factual guilt. There are however, some examples of cases where courts have followed Application Note 2: *United States v. Ellis,* 168 F.3d 558, 564 (1st Cir. 1999) (defenses relating to intent may qualify for a §3E1.1 adjustment; remand to district court to clarify its reasons where defendant only went to trial to challenge the intent element of the firearm charge); *United States v. Moore,* 968 F.2d 216, 224 (2d Cir. 1992) (affirming district court's 3E1.1 adjustment notwithstanding that defendant stood trial); *United States v. Rodriguez,* 975 F.2d 999, 1008-09 (3d Cir. 1992) (adjustment available where defendant declines to plead guilty to entire indictment because he contests gun count, on which he is acquitted, and quantity of narcotics involved, on which appellate court affirms his position); *United States v. Fells,* 78 F.3d 168, 172 (5th Cir. 1996) (reversing denial of §3E1.1 adjustment where defendant "freely admitted" all the facts but challenged their legal interpretation); *United States v. McKittrick,* 142 F.3d 1170, 1178 (9th Cir. 1998) (reversing denial of §3E1.1 adjustment where defendant went to trial claiming that he thought the "wolf" he killed was a wild dog); *United States v. Gauvin,* 173 F.3d 798, 806 (10th Cir. 1999) (upholding reduction because defendant only went to trial to challenge his intent to use his car to hurt the officers).

4. **Drug Quantity Contested:** Where the defendant goes to trial only to contest the drug quantity, the courts have had some difficulty determining the question of acceptance of responsibility. The courts have found it significant that drug quantity is a sentencing factor, not an element of the offense to be proven at trial. *United States v. Negron,* 967 F.2d 68, 73 (2d Cir. 1992) (if quantity is not an element of offense, a defendant who admits guilt should not on that account alone be denied the adjustment where he seeks an adjudication of the quantity of narcotics with which he should be personally charged); *United States v. Montes,* 976 F.2d 235, 241 (5th Cir. 1992) (proper to deny adjustment where defendant could have contested drug quantity without standing trial); *United States v. Guerrero-Cortez,* 110 F.3d 647, 654-56 (8th Cir. 1997) (remanded; clear error to deny §3E1.1 adjustment because defendant did not admit conduct until after trial where record showed that defendant had always been willing to plead guilty to offenses involving two kilograms of cocaine – the amount

he was ultimately held responsible for – but government refused to accept guilty plea unless defendant admitted to five kilograms).

5. **Entrapment (Circuit Conflict):** There is a split in the circuits over whether use of an entrapment defense at trial automatically precludes a §3E1.1 adjustment. *Compare United States v. Brace,* 145 F.3d 247, 265 (5th Cir. 1998) (defendant's assertion of entrapment is a denial of factual guilt because it denies subjective predisposition and consequently the required element of *mens rea* . . . Accordingly, it is not one of those rare situations contemplated by the guideline commentary in which a defendant may proceed to trial and still satisfy §3E1.1(a)"), *with United States v. Fleener,* 900 F.2d 914, 918 (6th Cir. 1990) ("such a defense is no less inconsistent with §3E1.1 than a plea of not guilty, which does not raise an absolute bar to a court's consideration); *United States v. Corral-Ibarra,* 25 F.3d 430, 440-41 (7th Cir. 1994) (entrapment defense, pleaded in good faith, may not disqualify defendant from §3E1.1 reduction, but it remains the defendant's task to manifest in some way that he has in fact acknowledged the wrongfulness of his conduct); *United States v. Davis,* 36 F.3d 1424, 1435-36 (9th Cir. 1994) (same); *United States v. Garcia,* 182 F.3d 1165, 1172-74 (10th Cir. 1999) (§ 3E1.1 is not per se unavailable just because defendant goes to trial solely on entrapment defense, but defendant needs to evidence acceptance of responsibility primarily through pre-trial statements and conduct).

F. Guilty Pleas

1. A defendant who enters a guilty plea is not entitled to a §3E1.1 adjustment as a matter of right (Application Note 3).

2. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct), will constitute **significant evidence** of acceptance of responsibility for purposes of §3E1.1(a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility (Application Note 3).

3. **Examples where §3E1.1 adjustment DENIED after guilty plea:** *United States v. Bennett,* 161 F.3d 171, 196-98 (3d Cir. 1998) (defendant lied about offense after pleading guilty and continued to deny his factual guilt and criminal intent in perpetrating the largest charity fraud in history); *United States v. Kamoga,* 177 F.3d 617, 622 (7th Cir. 1999) (defendant never admitted the conduct underlying his guilty plea and likely perjured himself at his detention hearing when he testified to his

lack of knowledge about the crime); *United States v. Wells,* 154 F.3d 412, 413-15 (7th Cir. 1998) (defendant could only account for $30,000 of the $700,000 that he stole, and refused to disclose the location of the remaining money); *United States v. Colbert,* 172 F.3d 594, 597 (8th Cir. 1999) (defendant's later denial of the crime was sufficient to deny the reduction); *United States v. Hernandez,* 160 F.3d 661, 667-68 (11th Cir. 1998) (defendant failed to answer specific questions about how he carried out the fraud).

G. **Constitutional Issues**

1. Section 3E1.1 upheld against a variety of Fifth and Sixth Amendment challenges. *See, e.g., United States v. Paz Uribe,* 891 F.2d 396, 400 (1st Cir. 1989); *United States v. Parker,* 903 F.2d 91, 106 (2d Cir. 1990); *United States v. Cordell,* 924 F.2d 614, 619 (6th Cir. 1991); *United States v. Saunders,* 973 F.2d 1354, 1362-63 (7th Cir. 1992); *United States v. Ross,* 920 F.2d 1530, 1537 (10th Cir. 1990); *United States v. Henry,* 883 F.2d 1010, 1011 (11th Cir. 1989).

2. *Mitchell v. United States,* 119 S. Ct. 1307 (1999) held that:

   - Defendant does NOT waive the privilege against self-incrimination at sentencing simply by pleading guilty;

   - Sentencing judge is barred from drawing adverse inferences from a **defendant's refusal to testify** at sentencing (5-4 vote);

   - Supreme Court expressed "no view" on whether a **defendant's silence** may be considered in determining acceptance of responsibility under the sentencing guidelines.

H. **Obstruction of Justice and Acceptance of Responsibility**

1. Conduct resulting in an upward adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct (Application Note 4).

2. There may, however, be **extraordinary** cases in which adjustments under both §§3C1.1 and 3E1.1 may apply (Application Note 4).

3. **Legal Standard:** *Compare United States v. Hopper,* 27 F.3d 378, 383 (9th Cir. 1994) ("extraordinary" when "defendant, although initially attempting to conceal the crime, eventually accepts responsibility for the crime and abandons all attempts to obstruct justice . . . In other words, as

long as the defendant's acceptance of responsibility is not contradicted by an ongoing attempt to obstruct justice"); *with United States v. Honken*, 184 F.3d 961, 968-69 (8th Cir. 1999) (rejecting *Hopper's* bright line rule; "there is no magic formula for defining an 'extraordinary' case"; district court should have taken into account the "totality of the circumstances," *e.g.*, nature of defendant's obstructive conduct, degree of defendant's acceptance of responsibility, was obstruction an isolated incident early in the investigation or an on-going effort, did defendant voluntarily terminate his obstructive conduct, whether defendant admitted and recanted his obstructive conduct, whether he denied obstruction at sentencing, whether defendant assisted in the investigation of his offense and the offense of others).

I. Circuit Conflict

Additional unrelated criminal conduct: *Compare United States v. Morrison*, 983 F.2d 730, 733-35 (6th Cir. 1993) (additional criminal conduct committed after indictment/information but before sentencing, which is wholly distinct from the crime(s) for which a defendant is being sentenced," may not be used as the basis of denying a §3E1.1 adjustment), *with United States v. O'Neil*, 936 F.2d 599, 600-01 (1st Cir. 1991) (defendant's drug use before sentencing for postal offense; "We can find nothing unlawful about a court's looking to a defendant's later conduct in order to help the court decide whether the defendant is truly sorry for the crimes he is charged with"); *United States v. Ceccarani*, 98 F.3d 126, 130-31 (3d Cir. 1996) (drug use by theft defendant; disagreeing with *Morrison*); *United States v. Watkins*, 911 F.2d 983, 984 (5th Cir. 1990) (fraud defendant's drug use while on release pending sentencing); *United States v. McDonald*, 22 F.3d 139, 144 (7th Cir. 1994) (drug use by counterfeiting defendant; broad language of Note 1(b) indicates that the criminal conduct or associations referred to relate not only to the charged offense, but also to criminal conduct or associations generally); *United States v. Byrd*, 76 F.3d 194, 197 (8th Cir. 1996) (drug use by assault defendant); *United States v. Prince*, 204 F.3d 1021, 1023-24 (11th Cir. 2000) ("guidelines do not prohibit a sentencing court from considering . . . criminal conduct unrelated to the offense of conviction" in making §3E1.1 determination).