

REVISED PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING CERTAIN DRUG DEFENDANTS AND MITIGATING ROLE
(Amendment 7 in User Friendly, Volume One)

Synopsis of Proposed Amendment: *This amendment proposes to resolve a circuit conflict regarding whether application of §3B1.2 (Mitigating Role) is precluded (i.e., without the necessity of applying the guideline to the facts) in the case of a single defendant drug courier if the defendant's base offense level is determined solely by the quantity personally handled by the defendant and that quantity constitutes all of the defendant's relevant conduct. Compare e.g., United States v. Isaza-Zapata, 148 F.3d 236, 241 (3d. Cir. 1998) (defendant who pleaded guilty to importing heroin was sentenced based on amounts in his personal possession, but if he can meet the requirements of §3B1.2 he is entitled to the reduction upon appropriate proof) with United States v. Isienyi, 207 F.3d 390 (7th Cir. 2000) (defendant pleaded guilty to one count of importing a specified quantity of heroin; held defendant ineligible for a mitigating role adjustment when his offense level consisted only of amounts he personally handled).*

The proposed amendment adopts the view that such a defendant, in a single defendant case, is not precluded from receiving a mitigating role adjustment.

In addition to resolving the circuit conflict, the proposed amendment (A) incorporates commentary from the Introduction to Chapter Three, Part B (Role in the Offense) that there must be more than one participant before application of a mitigating role adjustment may be considered; (B) incorporates the definition of "participant" found in the aggravating role guideline; (C) deletes commentary language that the minimal role adjustment is intended to be used infrequently; and (D) makes technical amendments to the guideline (such as the addition of headings for, and the reordering of, application notes in the commentary) that are intended to have no substantive impact on the guideline.

To estimate the impact of this proposal, the Commission's Intensive Study Sample (ISS) data was used. The ISS is a five percent random sample of FY1995 cases receiving additional coding. This additional coding included the highest functional role played by drug offenders. To assess the impact of this amendment, at least as it relates to drug defendants, staff identified ISS cases in which a mitigating role reduction was not applied and the the function of the offender is considered low-level (described as either: mule, courier, renter, lookout, or enabler). The rates at which these functions were represented in the ISS sample were then applied to all FY1999 drug cases (by each drug type) in order to estimate the number of cases that may be affected. It is estimated that in FY1999, 5,414 (24.1% of the total of 22,499 drug cases) met these criteria.¹ The average sentence for these 5,414 cases, based upon the 1995 sample, is 72 months. If each of the 5,414 cases received a two-level reduction for mitigating role, the new sentence would be reduced by 20.6 percent to 57 months. There were over 40,000 non-drug

¹*This assumes that the distribution of functions and application of mitigating role to persons with these functions remained the same over time.*

defendants in FY 99 who did not receive a reduction for mitigating role. It is impossible to estimate the impact of this amendment for non-drug cases.

There is insufficient information to extrapolate confidently these findings for a retroactivity analysis. However, in each year between 1995 and 2001, approximately 3,000 to 5,000 potentially eligible cases have been sentenced. Given the relatively lengthy average sentences of drug cases, it is anticipated that a sizeable percentage of the roughly 27,000 cases identified by this estimation method are currently incarcerated and may apply for consideration by the Court.

Proposed Amendment:

§3B1.2. Mitigating Role

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Commentary

Application Notes:

1. Definition.—For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).
2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.
3. Applicability of Adjustment.—
 - (A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.
 - (B) Conviction of Significantly Less Serious Offense.—If a 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 a 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 (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), 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.

14. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.
2. — ~~It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.~~
35. Minor Participant.—~~For purposes of §3B1.2(b), a minor participant means any participant Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.~~
4. — ~~If a 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 a 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 (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), 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.~~

Background. This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.