

This kind of sequential construct would retain focus on the scope of relevant conduct, provide a sequential easy-to-follow process of application, and possibly avoid unintended results.¹

B. Need for more examples

The example in Note 1(D)(1) involves comparing an offloader to someone "acting alone, imported the same quantity of marijuana". First, it is difficult and artificial to imagine someone acting alone importing 1,000 kilos of marijuana - there would at least be a presumed or anticipated buyer, persons doing the actual importing (piloting, driving, carrying, etc.), as well as contacts in the source country. This scenario is not sufficient explanation to make the concept clear. More examples are needed from drug trafficking, which is the predominant type of case in which these distinctions are difficult to make.

For example, what would be the analysis of apprehending a group of persons, each carrying X amount of drugs, about which the details of the larger organization are unclear? Is each compared to an importer acting alone? Isn't anyone actually carrying drugs carrying them alone (but no one is without a source or client)? What about the middle-broker who buys from people and sells to other people, some of which are known, some not? Do you compare him to a buyer/seller "acting alone"?

The concept introduced in Background commentary (how to perform the analysis of the hypothetical defendant acting alone in an offense too large to be committed by one person) is a difficult one, but potentially a common one in drug-intensive districts. It conceptually appears to belong in Note 1, where the analysis is introduced and explained, rather than in Background Commentary. Moreover, this is one of the kinds of drug cases which need an example to illustrate the concept.

¹ Care must be taken to avoid the possible problem of nearly any defendant who is involved in an offense with others being able to argue persuasively for mitigating role, if the hypothetical analysis is used toward the beginning of the process. This is because the part played by one-of-several defendants is never going to be as broad as that of someone committing the entire offense alone, by definition. For example, a defendant who robs a bank as part of a group (including a driver, look-out, advanced planner, etc.) might be considered eligible for mitigating role if only compared to a small-time robber who does the whole job him/herself. To say the actual robber (who had the assistance of several others) is not eligible because he/she committed the actual crime begs the point, because so does the courier commit the actual crime of possessing with intent, or smuggling. This misuse of the hypothetical defendant-construct should be avoided, which could perhaps be accomplished with examples, and/or with a sequential analysis such as that suggested, where only defendants who survived a series of tests would merit the comparison.

2. The first sentence of the proposed Introductory Commentary states that for role adjustments to apply, "the offense must involve the defendant and at least one other participant, although that other participant need not be apprehended." We believe that this qualification may be confusing, perhaps implying that the participant be subject to arrest or be a fugitive. Instead of this phrase, a reference to the definition of "participant" in Note 1 to §1B1.1, might be more clear. ("participant, as defined at...")

3. It is unclear whether Note 6 concerns the same standard for a firearm adjustment as that in 2D1.1(b)(1) (where a dangerous weapon is "possessed" in a drug offense). Perhaps that could be clarified. If it is a stricter standard, that is the defendant him/herself had to possess or direct the possession, then perhaps either option is alright. On the other hand, if the same standard is implied (which, as it reads now, using the same word "possessed", it probably would be), considering the extremely broad application of the firearm adjustment in drug offenses, we would recommend option #2, which might provide some amelioration where the firearm adjustment has been broadly applied, such as when it is found at a co-defendant's home.

4. This amendment will require case law development to define some of the new concepts, such as "unsophisticated tasks", "substantial part", and "ownership interest". However, the ambiguities may be lessened with some clarifying definitions. For example, does a street seller who buys drugs and resells them in use-quantities have an "ownership interest" in what he/she sells? Does it change if he is advanced the drugs (i.e. on credit), which is common? Is serving as an interpreter during drug negotiations an "unsophisticated task?" Does performing in that role reflect a "substantial part" in negotiating the terms of the same of the drugs? Is the ability to drive an "18 wheeler" to transport drugs an "unsophisticated task?" Does a defendant have an "ownership interest" in drugs he/she is transporting if his/her compensation for his/her services is a portion of the drugs being transported? Or a portion of the profit? These are common sentencing situations, to which the amendment does not adapt easily without further explanation and examples.

5. Finally, if the Commission passes this amendment, we would recommend consideration of further refinement (regarding these ideas or others) over the summer, as well as the development of a specific training module (written, video, etc.) dealing with this guideline to be made available to the field prior to its effective date, which would include several scenarios like those mentioned above, to help familiarize practitioners with the concepts introduced in this very important guideline.