

PROPOSED AMENDMENT: MITIGATING ROLE

Synopsis of Proposed Amendment: *This amendment proposes to resolve a circuit conflict regarding whether application of §3B1.2 (Mitigating Role) automatically 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. At the July 2000 meeting, the Commission directed the staff to prepare a proposed amendment that represented the majority view, i.e., that of the Third, Eighth, Ninth, and D.C. Circuit Courts of Appeal. Accordingly, this proposed amendment provides an option (Option Two in Application Note 3(A)) that adopts the view that such a drug courier or offloader, in a single defendant case, is not automatically precluded from receiving a mitigating role adjustment. An additional option is presented for commissioner consideration (Option One in Application Note 3(A)) providing a per se rule that such a drug courier or offloader is "substantially less culpable than the average participant" thus warranting a downward adjustment for mitigating role.*

Please note the bracketed text, found in Application Note 4, concerning the intended infrequent application of the minimal role adjustment. This language currently is found in Application Note 2, but is being bracketed for Commissioner consideration of whether such language should be deleted.

In addition to resolving the circuit conflict, the proposed amendment (1) incorporates commentary from the Introduction to the Role in the Offense Part of Chapter Three that there must be more than one participant before application of a mitigating role adjustment may be considered; (2) incorporates the definition of "participant" found in the aggravating role guideline; and (3) 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.

Proposed Amendment:

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

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. [Option 1: For example, a defendant is substantially less culpable than the average participant and warrants a mitigating role adjustment if the defendant is (i) convicted of a drug trafficking offense and the defendant's role is that offense was limited to transporting or storing drugs; and (ii) accountable under §1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored.]

[Option 2: A defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who, based on the defendant's criminal conduct, is accountable under §1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored is not automatically precluded from receiving an adjustment under this guideline.]
 - (B) Fact-based Determination.—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. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.
 - (C) Conviction of 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 level 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 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.

4. 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. [It is intended that the downward adjustment for a minimal participant will be used infrequently.]

~~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.