

OFFENSES (CURRENT GUIDELINES AND OPTIONS A, B, C)—Continued

Of- ense level	Cur- rent guide- lines	Option A	Option B	Option C
30	700 G	1 KG ..	3 KG ..	10 KG.
28	400 G	700 G	1 KG ..	3 KG.
26	100 G	400 G	300 G	1 KG.
24	80 G ..	100 G	100 G	300 G.
22	60 G ..	60 G ..	60 G ..	100 G.
20	40 G ..	40 G ..	40 G ..	40 G.
18	20 G ..	20 G ..	20 G ..	20 G.
16	10 G ..	10 G ..	10 G ..	10 G.
14	5 G	5 G	5 G	5 G.
12	less than 5G.	less than 5G.	less than 5G.	less than 5G.

34. Synopsis of Proposed

Amendment: This proposed amendment would limit the impact of drug quantity in the case of defendants who qualify for a mitigating role adjustment under § 3B1.2 (Mitigating Role). A number of commentators have argued that the current guidelines over-punish low-level defendants when the sentence is driven in large part by the quantity of drugs involved in the offense. These commentators have recommended that, above a certain level, drug quantity should not further increase the offense level for defendants with minor or minimal roles. That is, for example, the difference between 20,000 kilos and 200,000 kilos of marijuana may be relevant to the offense level for the major actors in the offense but not relevant in determining the culpability and offense level for the deckhands or offloaders involved with that quantity. Historically, the U.S. Parole Commission limited the impact of drug quantity for low-level defendants in its parole release guidelines.

Under this proposed amendment, if the defendant qualified for a minor or minimal role, the base offense level from the Drug Quantity Table would not exceed level [28] even if the drug quantity table otherwise would have called for a higher offense level. In addition, the applicable role adjustment from § 3B1.2 (Mitigating Role) will further reduce the offense level by two or four levels.

The bracketing of offense level 28 in the proposed amendment indicates that the Commission requests comment on whether offense level 28 is the appropriate offense level for use in this amendment or whether the offense level should be higher or lower.

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following additional sentence at the end:

“Provided, that if the defendant qualifies for a mitigating role adjustment under § 3B1.2 (Mitigating Role), the base offense level determined under subsection (c) below shall not be greater than level [28].”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended by deleting Note 16 and inserting in lieu thereof:

“16. Subsection (a)(3) provides that if a defendant qualifies for a mitigating role adjustment under § 3B1.2 (Mitigating Role), the base offense level from subsection (c) shall not exceed level [28]. This limitation on the base offense level is in addition to, and not in lieu of, the appropriate adjustment from § 3B1.2 (Mitigating Role).”.

Additional Issue for Comment: The Commission, at the request of the Practitioners’ Advisory Group, requests comment on whether this amendment should set different maximum offense levels from the Drug Quantity Table for defendants with a minor or minimal role depending upon the type of controlled substance. Specifically, should offenses involving heroin, cocaine, cocaine base, PCP, LSD, N-phenyl-N-[1-(2 phenylethyl)-4-piperidinyl] propanamide, marijuana, and methamphetamine have a different maximum offense level from the Drug Quantity Table for lower level defendants (e.g., level 28) than other controlled substance (e.g., level 22)?

35(A). Synopsis of Proposed Amendment: This is a three-part amendment to improve the operation of § 3B1.1 (Aggravating Role). First, this amendment revises § 3B1.1(b) to apply when the defendant managed or supervised at least four other participants. This formulation avoids what appears to be an anomaly in the current guideline in that a defendant who supervises only one participant in an offense with a total of five participants receives a higher offense level than a defendant who is the leader or organizer of an offense involving four participants and manages or supervises all of the participants. This formulation also is more consistent with that of 21 U.S.C. § 848 (Continuing Criminal Enterprise) (which requires the supervision of at least five other participants). Second, this amendment revises § 3B1.1(a) and (b) to delete the term “otherwise extensive,” a term of uncertain meaning that seems to have been intended to deal with certain non-criminally responsible participants (see current Application Note 3). This issue is addressed more directly by revised Application Note 1. Third, this amendment clarifies the interaction of §§ 3B1.1 and 3B1.2 in the case of a

defendant who would qualify for a minor or minimal role but for his/her exercise of supervision over other minor or minimal participants. This interaction has been the subject of inconsistent interpretation and at least one circuit court decision, *United States v. Tsai*, 945 F.2d. 155 (3rd Cir. 1992), has required that §§ 3B1.1 and 3B1.2 be sequentially applied to the same defendant.

Proposed Amendment: Section § 3B1.1 is amended by deleting “follows:” and inserting in lieu thereof “follows (Apply the Greatest):”

Section 3B1.1(a) is amended by deleting “a criminal activity that involved five or more participants or was otherwise extensive” and inserting in lieu thereof “the offense and the offense involved at least four other participants”.

Section 3B1.1(b) is amended by deleting “(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive” and inserting in lieu thereof “of at least four other participants in the offense”.

Section 3B1.1(c) is amended by deleting “in any criminal activity other than described in (a) or (b)” and inserting in lieu thereof “of at least one other participant in the offense”.

The Commentary to § 3B1.1 captioned “Application Notes” is amended in Note 1 by inserting the following additional paragraph at the end:

“In an unusual case, a person may be recruited by a criminally responsible participant for a significant role in the offense (i.e., a role that is typically held by a criminally responsible participant), but the person recruited may not be criminally responsible because the person recruited (1) is unaware that an offense is being committed, (2) has not yet reached the age of criminal responsibility, or (3) has a mental deficiency or condition that negates criminal responsibility. In such a case, an upward departure to the offense level that would have applied had such person been a criminally responsible participant may be warranted. For example, a person hired by a defendant to solicit money for a charitable organization who was unaware that the charitable organization was fraudulent, a person duped by a defendant into driving the getaway car from a bank robbery who was unaware that a robbery was being committed, or a child recruited by a defendant to assist in a theft would meet the criteria for the application of this provision.”.

The Commentary to § 3B1.1 captioned “Application Notes” is amended in