

United States v. Williams, 109 F.3d 502, 511–12 (8th Cir. 1997) (same). Some circuits have concluded that the last sentence of the note is intended to apply only to sellers. See *United States v. Gomez*, 103 F.3d 249, 252–53 (2d Cir. 1997) (concluding that the last sentence of Note 12 applies only to sellers); *United States v. Perez de Dios*, 237 F.3d 1192 (10th Cir. 2001) (same); *United States v. Brassard*, 212 F.3d 54, 58 (1st Cir. 2000) (same). Others have concluded that the language also applies to buyers in reverse sting operations. See *United States v. Minore*, 40 Fed. Appx. 536, 537 (9th Cir. 2002) (mem.op.) (applying the final sentence of the new Note 12 to a buyer in reverse sting operation); *United States v. Estrada*, 256 F.3d 466, 476 (7th Cir. 2001) (same).

In light of the conflicting interpretations, the Commission requests comment regarding whether it should clarify the interpretation of the last sentence of § 2D1.1, Application Note 12. Specifically, should a buyer in a reverse sting operation be permitted to have excluded from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to purchase, or was not reasonably capable of purchasing? Should the last sentence in Application Note 12 be limited to sellers?

Proposed Amendment 6: Repeal of “Mitigating Role Cap”

Synopsis of Proposed Amendment: This amendment proposes to repeal the current “mitigating role cap” at § 2D1.1(a)(3) and replace it with an alternative approach. The proposed replacement would provide a gradually increasing mitigating role reduction based on drug quantity base offense levels under §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possession of a Listed Chemical; Attempt or Conspiracy), beginning at level [30]. In general, the reduction both is more gradual and less generous than the current approach. Under the current “mitigating role cap” approach, a defendant who qualifies for a minor role adjustment and whose drug quantity would otherwise result in a base offense level of level 34 will only receive a base offense level of level 30 under § 2D1.1(a)(3). This effectively is a four-level reduction. This defendant also receives the two-level adjustment under § 3B1.2 for minor role in the offense, resulting in an offense level of

28 (assuming no other adjustments). Thus, the net reduction for this defendant under the current mitigating role cap approach is six levels. Under the proposed alternative, however, the net reduction would only be [three] [four-] levels (two-level reduction for minor role in the offense and additional [one-][two-] level reduction for having a base offense level of level 34 under § 2D1.1). This alternative approach also maintains the current distinctions among mitigating role defendants under § 3B1.2 (i.e., minor, minimal, or in-between), rather than capping the drug quantity base offense level at level 30 for all qualifying defendants. Effectively, this approach “compresses” the effect of increasing drug quantity above level 30, rather than capping it at that level.

Proposed Amendment:

Section 2D1.1(a)(3) is amended by striking “, except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30”.

Section 3B1.2 is amended to read as follows:

“§ 3B1.2. Mitigating Role

(a) Based on the defendant’s role in the offense, decrease the offense level as follows:

(1) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(2) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between subsections (a)(1) and (a)(2), decrease by 3 levels.

(b) If a downward adjustment under subsection (a) is applied and the defendant’s Chapter Two offense level was determined pursuant to §§ 2D1.1 or 2D1.11, apply an additional reduction according to the following:

Base offense level from § 2D1.1 or § 2D1.11	Additional reduction
(1) level [30]	[1] level
(2) level [32–34]	[1][2] levels
(3) level [36–38]	[1][2][3] levels.”.

Issue for Comment:

The proposed amendment provides an alternative method to the mitigating role cap in § 2D1.1 for minimizing offense level severity for a certain category of drug defendants. Under this alternative approach, should the additional reduction for mitigating role defendants begin at a lower or higher base offense level? Should the reduction be scaled differently in relation to the drug quantity base offense level? Should

certain offenses and/or offenders be disqualified from receiving the additional mitigating role reduction (e.g., defendants convicted under 21 U.S.C. 849, 859, 860, or 861; defendants who used or threatened violence; defendants who possessed or used a weapon; defendants who involved a minor in the offense; or defendants who have a prior felony drug trafficking conviction)? Alternatively, should the Commission simply repeal the current mitigating role cap without providing any alternative method? Are there any other approaches that the Commission should consider, and if so, what are they?

Proposed Amendment 7: Homicide

Synopsis of Proposed Amendment: This amendment proposes a number of changes to the homicide and assault guidelines to address longstanding proportionality concerns and to implement the directive in section 11008(e) of the 21st Century Department of Justice Appropriations Authorization Act (the “Act”), Public Law 107–273.

First, this amendment proposes a number of changes to the homicide guidelines. Generally, the amendment proposes increases in the base offense levels in the guidelines for second degree murder, voluntary manslaughter, and involuntary manslaughter to address proportionality issues among the homicide guidelines and between the homicide guidelines and other offense guidelines in Chapter Two, such as kidnapping and the production of child pornography.

The amendment also proposes to add a special instruction in the involuntary manslaughter guideline (§ 2A1.4), providing that if the offense involved involuntary manslaughter of more than one victim, Chapter Three, Part D (Multiple Counts) should be applied as if the involuntary manslaughter of each victim had been contained in a separate count of conviction. The purpose of the instruction is to ensure incremental punishment for multiple victims. An issue for comment follows regarding whether such an instruction should be added to each of the other homicide guidelines.

The amendment also proposes to eliminate and/or revise existing outdated commentary in some of the homicide guidelines.

Second, this amendment proposes a number of changes to the assault guidelines and the Chapter Three adjustment relating to official victims to address section 11008(e) of the Act. That section directs the Commission as follows: