

14-1645

To Be Argued By:
SARAH P. KARWAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-1645

UNITED STATES OF AMERICA,
Appellee,

-vs-

EMMANUEL BLANCO BALBUENA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Janet B. Arterton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on April 29, 2014. Appendix (“A__”) 13. On May 5, 2014, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A13. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

**Statement of Issue
Presented for Review**

Did the district court clearly err in refusing to give the defendant a two-level minor role reduction under U.S.S.G. § 3B1.2(b) where the evidence established that the defendant obtained distribution quantities of heroin on a regular basis from the leader of the drug conspiracy and that the defendant was a trusted member of the conspiracy?

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EMMANUEL BLANCO BALBUENA,
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ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Emmanuel Blanco Balbuena, pleaded guilty to participating in a heroin conspiracy. Balbuena was a close associate of the head of a broad conspiracy whose members obtained significant quantities of heroin from the Dominican Republic and distributed that heroin in and around New London, Connecticut. Balbuena obtained heroin directly from the leader of the conspiracy, which he then he re-distributed

to others. After Balbuena pleaded guilty to participating in the drug conspiracy, the district court sentenced him to 30 months' imprisonment.

On appeal, Balbuena's sole claim is that the district court improperly denied his request for a two-level minor role reduction under the guidelines. This claim is meritless. Balbuena did not meet his burden to show that his participation in the conspiracy was "minor" as compared to others, to warrant the reduction. The district court's judgment should be affirmed.

Statement of the Case

On August 13, 2013, a grand jury sitting in Bridgeport, Connecticut, returned a superseding indictment charging the defendant, Emmanuel Blanco Balbuena, and 31 others with conspiracy to possess with intent to distribute 100 grams or more of heroin, in violation of Title 21, United States Code, Sections 841(b)(1)(B) and 846. A7-8, A68-78.

On January 6, 2014, the defendant pleaded guilty to the lesser-included offense in Count One of the Superseding Indictment, conspiracy to possess with the intent to distribute heroin, in violation of 21 U.S.C. § 841(b)(1)(C), pursuant to a written plea agreement, and a petition to enter plea of guilty. A10-11, A79-102.

On April 23, 2014, the district court (Janet Bond Arterton, J.) sentenced Balbuena to 30 months' imprisonment, to be followed by 36 months' supervised release. A13.

Balbuena is currently serving his term of imprisonment.

A. The offense conduct and guilty plea¹

The case stemmed from a wiretap investigation in the New London, Connecticut area that focused on heroin trafficking by Luis Ariel Capellan Maldonado and his associates, including the defendant. PSR ¶¶ 8-9, 19. Capellan Maldonado obtained kilogram quantities of heroin from Dominican Republic-based sources, which he then distributed to a variety of co-conspirators in the New London area, including the defendant. PSR ¶¶ 9-12, 19.

Capellan Maldonado arranged for the heroin to be brought into this country by human body couriers who swallowed compressed pellets of heroin. *See* PSR ¶¶ 20-21, 23-26. Once the heroin was here, Capellan Maldonado distributed the drug to a trusted group of individuals in New London, who, in turn, distributed it to their own customers. PSR ¶¶ 12-13, 19, 47. Balbuena was one of Capellan Maldonado's customer-

¹ Because the defendant pleaded guilty, the facts are taken from the Pre-Sentence Report ("PSR"), which the district court adopted at sentencing. *See* A106.

distributors. PSR ¶¶ 19, 40. Indeed, the investigation revealed that Balbuena received distribution quantities of heroin from Capellan Maldonado (15 grams to 35 grams), and then redistributed those quantities to others. PSR ¶¶ 40-47.

The investigation identified multiple transactions between Capellan Maldonado and Balbuena, as revealed, primarily, in wiretapped communications between the two. PSR ¶¶ 40-47. In his calls with Capellan Maldonado, Balbuena used coded language (“15 beers,” “20 pesos,” “30 beers,”) to indicate how many grams of heroin he wanted. *See* PSR ¶¶ 41-46. Balbuena also discussed with Capellan Maldonado—again using coded language—whether any cutting agent should be added to the heroin. *See* PSR ¶ 42 (“pour a little something on top.”); PSR ¶ 43 (“Don’t put anything on top of it.”). Capellan Maldonado and Balbuena did not discuss prices in these calls, but they arranged to meet to complete their transactions. PSR ¶¶ 41-46.

Some of the transactions discussed during the phone calls between Capellan Maldonado and Balbuena were corroborated by surveillance. On those occasions, after law enforcement heard about planned transactions, surveillance officers saw Balbuena meet with Capellan Maldonado to conduct the heroin transaction. *See* PSR ¶¶ 44-46. For example, on one occasion, officers saw Balbuena meet with Capellan Maldonado in

New London to pick up “20 pesos,” then followed Balbuena to a parking lot in Montville, Connecticut, where he met his heroin customer, co-defendant Aaron Moore. PSR ¶ 46.

When that same customer was arrested the following month with 24 grams of heroin, Balbuena and Capellan Maldonado discussed the arrest. PSR ¶ 47. Capellan Maldonado directed Balbuena to change his phone number, “[j]ust in case, . . . We never know.” PSR ¶ 47.

Balbuena was arrested on April 3, 2013 at his home. During a search of his home at that time, officers found a handgun in the nightstand next to Balbuena’s bed. PSR ¶ 48.

Based on the foregoing conduct, on January 6, 2014, Balbuena pleaded guilty to conspiracy to possess with the intent to distribute heroin, in violation of 21 U.S.C. § 841(b)(1)(C). A10-11. In the plea agreement, as relevant here, the parties agreed that Balbuena’s base offense level was 26 based on the quantity of heroin involved, and that Balbuena was entitled to reductions in his offense level for acceptance of responsibility and safety-valve relief. A81 (stipulation to offense level and reductions under U.S.S.G. §§ 3E1.1 and 5C1.2). Balbuena reserved his right to argue for a minor-role reduction under U.S.S.G. § 3B1.2(b), and the government reserved its right to oppose that reduction. A82.

B. The sentencing

The PSR determined that Balbuena's advisory guidelines range was 37 to 46 months of imprisonment based upon a total offense level of 21 and a criminal history category of I. PSR ¶¶ 63-66, 98.

Prior to the defendant's sentencing, the defendant filed a motion for a mitigating role reduction in his offense level under U.S.S.G. § 3B1.2, claiming that he played a minor role in the conspiracy. A12. The government opposed the role reduction. A13. An addendum to the PSR was filed which noted the motion, but the PSR was not amended to include any role reduction. *See* PSR Second Add.

On April 23, 2014, the district court (Janet Bond Arterton, J.), held the defendant's sentencing hearing. A103-30. The court confirmed that Balbuena had reviewed the PSR, that he understood it, and that he had an opportunity to make any comments about it that he wished to make. A105-106. The court also confirmed that neither defense counsel nor government counsel had any objections to the factual statements in the PSR. A106. The court then adopted the facts contained in the PSR. A106.

The district court also adopted the guidelines calculation set out in the PSR, concluding that the defendant's total offense level was 21 and that the defendant was a criminal history cate-

gory I. A107, A110-111. The court indicated that it would grant the parties' request for a variance to give effect to the contemplated change to U.S.S.G. § 2D1.1, which would effectively lower the defendant's total offense level to 19, triggering a 30 to 37 month advisory guidelines term of imprisonment. A111-113.

The district court noted the dispute about whether or not Balbuena was entitled to a minor role reduction under the guidelines and invited the parties to make any presentations that they wished to on that issue. A107. Counsel for Balbuena argued that Balbuena's role in the conspiracy was "clearly different" than that of his co-defendants because he used some of the heroin that he purchased and he did not "fall into a role like the main players in this conspiracy." A107. Counsel for the government agreed that Balbuena was not a "leader" of the conspiracy, but explained that Balbuena's "role was very average and very typical of the other members of the conspiracy." A108. Government counsel cited an example of a co-defendant who had previously received a minor-role reduction who sold heroin on only a single occasion, and acted on other occasions as Capellan Maldonado's driver. A108. In contrast, government counsel explained that Balbuena regularly obtained and sold more significant quantities of heroin on par with the "mid-level" players of the conspiracy. A108-109. Counsel also focused on the trust between Bal-

buena and Capellan Maldonado, noting that when Balbuena's customer was arrested, Capellan Maldonado and Balbuena discussed what "they" needed to do to protect themselves from law enforcement. A108-109.

After hearing these arguments, the district court denied Balbuena's motion, explaining as follows:

Having considered your arguments, I note that the Second Circuit has said that a minor role adjustment isn't available merely on showing that a defendant played a lesser role than his co-conspirators. Eligibility for the reduction has to involve a defendant's conduct that must be minor as compared to the average participant in a crime

While it is true that Mr. Balbuena had a smaller, a lesser drug trafficking role in Mr. Capellan's—as Mr. Capellan's customer, but as a person who bought from Capellan heroin and resold it to another, albeit only perhaps one customer, this was a redistribution role, not some ancillary role, supportive of the conspiracy.

I have looked at the case law with respect to minor participants, and I recognize . . . that Mr. Balbuena was not selling—or did not have the customer base that others did, but his conduct was the

same, just a smaller amount of it. I'm going to necessarily conclude that the defendant hasn't met his burden of proof that he's entitled to that role reduction.

A109-110.

With this issue resolved, the district court then heard from defense counsel and government counsel about the section 3553(a) factors. A113-22. The defendant then addressed the court, apologizing for his actions and asking for another chance. A122.

After hearing from all parties, the district court explained the basis for its sentence, noting first that the nature and circumstances of the offense were serious because of the dangerousness and destructiveness of heroin. A122-23. The court explained that heroin dealing "is impacting not just the heroin users who become addicts, but their families, their communities, [and] others against whom they may commit crimes in order to be able to purchase the drugs[.]" A123. The district court recognized that even though Balbuena was not "deeply" involved in Capellan Maldonado's conspiracy, "he was a part of this operation." A123.

The district court also noted that Balbuena had no criminal history and that he was relatively young at 29. A124-25. The court further noted that Balbuena had a good employment history, had no discipline issues while incarcerated, and

had the “support of your family and your fiancé.” A125.

The court then explained that it had to fashion a sentence to take into account the defendant’s characteristics, stating that while the defendant was not a bad person “you certainly have used terrible judgment.” A126. The district court also considered that the sentence had to afford deterrence “both to you, but also others who know what you were up to and look to see what happens when you get caught.” A126. The court stated that the sentence imposed had to “protect the public from furthers crimes, from further trafficking, from any crimes with a gun. These are all the factors that the Court has to balance.” A126.

After considering these factors, along with the recommended guidelines range, the district court imposed a sentence of 30 months of imprisonment, a three-year term of supervised release, and a \$100 special assessment. A127-28.

Summary of Argument

The district court properly concluded that the defendant should not receive a minor-role reduction where the evidence showed that the defendant was a close associate of the head of the conspiracy and regularly re-distributed significant quantities of heroin.

Argument

I. The district court properly declined to apply a minor role reduction.

A. Governing law and standard of review

1. Mitigating role adjustment

Section 3B1.2 of the Sentencing Guidelines provides for a two-level reduction in the defendant's offense level if the defendant was a "minor participant" in the criminal activity. U.S.S.G. § 3B1.2(b). The burden of proof is on the defendant to show that he qualifies for a role adjustment, *see United States v. Ravelo*, 370 F.3d 266, 269 (2d Cir. 2004); he must prove by a preponderance of the evidence that he is entitled to the adjustment, *see United States v. Castano*, 234 F.3d 111, 113 (2d Cir. 2000). *See also United States v. Kerr*, 752 F.3d 206, 223 (2d Cir.) (noting that it is the defendant's burden to show, by a preponderance of the evidence, his entitlement to a role reduction), *cert. denied*, 135 S. Ct. 388 (2014).

The Application Notes provide guidance on applying the minor role reduction. Application Note 3 to § 3B1.2 explains that a mitigating role reduction is warranted "for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant." For a defendant in this category "who is less culpable than most other

participants, but whose role could not be described as minimal,” a two-level reduction under § 3B1.2(b) is appropriate. § 3B1.2, Application Note 5. The Application Notes cite as an example a defendant convicted of a drug offense whose conduct “was limited to transporting or storing drugs.” § 3B1.2, Application Note 3.

This Court has elaborated on the factors important in evaluating whether a defendant is entitled to a mitigating role adjustment: “In evaluating a defendant’s role, we look to factors such as ‘the nature of the defendant’s relationship to other participants, the importance of the defendant’s actions to the success of the venture, and the defendant’s awareness of the nature and scope of the criminal enterprise.’” *United States v. Yu*, 285 F.3d 192, 200 (2d Cir. 2002) (quoting *United States v. Garcia*, 920 F.2d 153, 155 (2d Cir. 1990) (per curiam)). A “minor-role adjustment is not available merely on a showing that the defendant ‘played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant’s conduct must be “minor” . . . as compared to the average participant in such a crime.” *Id.* (quoting *United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1999)).

A district court’s decision on the applicability of a minor-role reduction “is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.” U.S.S.G. § 3B1.2, Applica-

tion Note 3(C); *see also* *Yu*, 285 F.3d at 200 (“[T]his determination is fact-sensitive.”); *Kerr*, 752 F.3d at 223 (“This inquiry [into the applicability of a minor role reduction] is highly fact-intensive . . .”).

2. Standard of review

Generally speaking, this Court reviews a sentence for procedural and substantive reasonableness under an abuse of discretion standard. *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (en banc). With regard to the specific issue of role adjustments, however, “[t]his Circuit has not always been consistent in describing the standard of review.” *United States v. Gotti*, 459 F.3d 296, 349 (2d Cir. 2006) (citing *United States v. Huerta*, 371 F.3d 88, 91 (2d Cir. 2004); *accord* *United States v. Labbe*, 588 F.3d 139, 144 n.2 (2d Cir. 2009); *United States v. Beckford*, 545 Fed. Appx. 12, 15 (2d Cir. 2013). At times, this Court has indicated that whether circumstances constitute “minimal” or “minor” participation in a crime represents a legal question requiring more searching, *de novo* review, *see* *United States v. Carpenter*, 252 F.3d 230, 234 (2d Cir. 2001) (citing *United States v. Gaston*, 68 F.3d 1466, 1468 (2d Cir. 1995) (per curiam)), but on other occasions has concluded that the propriety of role adjustments represents a factual determination requiring review only for clear error, *see* *United States v. Brunshtein*, 344 F.3d 91, 102 (2d Cir. 2003) (citing *United States v. Castano*,

234 F.3d 11, 113 (2d Cir. 2000)), at least in cases where the issue on appeal can be viewed as “primarily factual,” in that the defendant “basically devote[s] [his] argument to disagreeing—by reference to other evidence—with the district court’s determination” *Gotti*, 459 F.3d at 349; *see also United States v. Selioutsky*, 409 F.3d 114, 118-19 (2d Cir. 2005) (stating that this Court will “review issues of law *de novo*, issues of fact under the clearly erroneous standard, [and] mixed questions of law and fact either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual”) (citations omitted).

In recent cases, this Court has emphasized the fact-intensive nature of the inquiry, *see Kerr*, 752 F.3d at 223, and reviewed a district court’s decision for clear error when the application decision was a primarily factual determination. *See, e.g., United States v. Hidalgo*, 519 Fed. Appx. 30, 31-32 (2d Cir. 2013) (noting that Court adopts standard of review appropriate to decision made by district court judge and then finding no clear error in district court’s findings on role enhancement). This Court need not decide, however, which standard is appropriate in this case, because even under the more rigorous of them, the sentence imposed by the district court should be affirmed.

B. Discussion

Here, the undisputed evidence, as set forth in the PSR, clearly demonstrated that Balbuena's conduct was not "minor" as compared to others. Thus, the district court correctly denied the two-level role reduction under U.S.S.G. § 3B1.2.

Balbuena was a trusted, mid-level member of Capellan Maldonado's conspiracy. Balbuena was among a handful of associates of Capellan Maldonado who obtained wholesale quantities of heroin from Capellan Maldonado on a regular basis for re-distribution purposes. PSR ¶ 19. Further, Balbuena and Capellan Maldonado had an established, trusting relationship. Their phone calls were in coded language, and they did not need to discuss price or other details of their transactions but simply the quantity of heroin desired by Balbuena, and, from time to time, the amount of cutting agent Balbuena wanted Capellan Maldonado to add to the heroin. PSR ¶¶ 41-46. Indeed, Balbuena was close enough to Capellan Maldonado that when Balbuena's customer was arrested with 24 grams of heroin, Capellan Maldonado warned Balbuena to change his phone number because, "[w]e never know." PSR ¶ 47. In short, far from being a low-level drug courier or one-time customer, Balbuena was a trusted member of the conspiracy who had direct contact and access to the head of the heroin enterprise. In light of Balbuena's relationship to Capellan Maldonado, and his regular pro-

curement of thousands of dollars of heroin,² Balbuena played an important role in the overall conspiracy. *See Yu*, 285 F.3d at 200 (noting that the defendant’s relationship to others in the conspiracy and the importance of the defendant to the success of the venture are important factors for evaluating propriety of role reduction).

Balbuena correctly notes that Capellan Maldonado’s conspiracy was “broad,” and that others played more significant roles in the conspiracy, such as the suppliers to the conspiracy. Def. Br. 17-18. While it is true that others played more involved roles, it does not necessarily follow that Balbuena played a “minor” role. A “minor-role adjustment is not available merely on a showing that the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant’s conduct must be ‘minor’ . . . as compared to the average participant in such a crime.” *Yu*, 285 F.3d at 200 (internal citations and quotations omitted). Here, for example, oth-

² Balbuena and Capellan Maldonado never discussed prices for their heroin transactions over the telephone; however, from other wiretap calls, the evidence shows that Capellan Maldonado himself paid as much as \$73 per gram for the heroin. *See, e.g.*, PSR ¶ 35. Thus, even if Capellan Maldonado provided the heroin to Balbuena at the same price, Balbuena’s purchases would range from hundreds of dollars (20 grams, \$660) up to thousands of dollars (33 grams, \$2,409).

ers had *less* significant roles than Balbuena, such as those who served as mere couriers for the drugs and cash, *see* PSR ¶¶ 20-22, 39, and Balbuena’s own heroin customer, *see* PSR ¶47. Thus, the district court properly concluded that Balbuena’s conduct was not “minor” as it compared to the average participant in a broad drug conspiracy.

Balbuena argues that the district court mischaracterized his role as a “re-distributor” of heroin instead of simply as a “heroin addict seeking to subsidize his own use[.]” Def. Br. 12, 18. The defendant’s attempt to cast himself as only a low-level heroin user is without evidentiary support. Indeed, the only reference in the record that Balbuena himself ever used heroin appears in a single paragraph in the PSR, where the defendant reported to the Probation Officer that shortly before the instant investigation began, he began experimenting with heroin. PSR ¶ 79. The district court expressed some skepticism of this characterization of the defendant’s history, noting that the defendant’s self-reported account of his addiction “stands in stark contrast to the intransigent addictions that I have seen in the other—in many of the other people who have been involved in this drug conspiracy or who have been members of it.” A124. Moreover, Balbuena’s suggestion that he was using much of the heroin that he obtained from Capellan Maldonado is belied by the evidence, which shows

that Balbuena’s heroin orders were for others, and not for his own use. *See* PSR ¶ 45 (describing an intercepted telephone call where Balbuena ordered 30 grams, and then changed the order to 35 grams because “*he* wants five more instead,” referring to a customer); *see also* PSR ¶ 46 (detailing how Balbuena ordered 20 grams of heroin from Capellan Maldonado and then immediately went and met with his own customer, Aaron Moore, to sell the heroin to him). Finally, this argument makes little sense in light of the fact that Balbuena would direct Capellan Maldonado to add cutting agent to the heroin that he was purchasing (thus weakening its potency), which would be at odds with someone who was buying the heroin primarily for personal use. *See* PSR ¶¶ 41, 42.

Balbuena also argues that this Court’s decisions in *United States v. Yu* and *United States v. Garcia* support his argument for a minor role reduction because the facts in those cases—where this Court upheld the denial of mitigating role adjustments—are different than those in this case. Def. Br. 18-20. In *Yu*, the defendant’s participation in the conspiracy was limited to giving the names and contact numbers of potential heroin purchases to another heroin dealer and for vouching for the dealer to those individuals. 285 F.3d at 194-95. This Court concluded that the defendant was not entitled to a role reduction because he was a “trusted authority”

and he was aware of the nature and scope of the enterprise. *Id.* at 200. In *Garcia*, the defendant delivered cocaine to an undercover officer on a single occasion for \$150. 920 F.2d at 153-54. This Court held that a role reduction was not appropriate because he was “indispensable” to the success of the conspiracy. 920 F.2d at 155.

Balbuena’s attempt to distinguish the *Yu* and *Garcia* cases is misplaced because it ignores the fact that assessing a defendant’s role is “heavily dependent upon the facts of the *particular* case as found by the district court.” *Garcia*, 920 F.2d at 155 (emphasis added); *Yu*, 285 F.3d at 200 (concluding that role determination “is fact-sensitive.”). Here, the district court properly concluded based upon the undisputed facts that Balbuena’s role as a heroin re-distributor was not an “ancillary role” to the conspiracy warranting a role reduction. A110.

Balbuena’s reliance upon *United States v. Osorio*, Nos. 98-1533, 95-1661, 1996 WL 233052 (2d Cir. May 8, 1996), Def. Br. 20-21, does not warrant a different conclusion. In *Osorio*, this Court concluded that the district court’s decision to give the defendant a two-level reduction for his minor role instead of a four-level reduction for his minimal role was not plain error where the defendant agreed at trial to only receiving a two-level reduction. 1996 WL 233052 at *1. Indeed, this Court went on to note that even if the defendant’s role was “merely that of a courier,”

that fact would not necessarily warrant either a minor role or minimal role reduction. *Id.*

In sum, the district court appropriately concluded that Balbuena did not meet his burden of showing his entitlement to a minor role reduction. The undisputed evidence did not show that Balbuena's role in the drug conspiracy was minor as compared to others' roles, and thus the court properly denied his request for a reduction under U.S.S.G. § 3B1.2(b).

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 17, 2015

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Sarah P. Karwan", written in a cursive style.

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Addendum

§ 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.

* * *

Application Notes:

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 1.3 (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 exam-

ple, 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 1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.

Likewise, a defendant who is accountable under § 1B1.3 for a loss amount under § 2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from consideration for an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, 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 actu-

al conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under § 2D2.1 (Unlawful Possession; Attempt or Conspiracy)), 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.

(C) Fact-Based Determination.--The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

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5. Minor 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.