

Potential arguments related to the new mitigating-role rules applicable to drug-trafficking cases

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This document contains legal discussion that can be copied and used in sentencing objections, motions, and memos as needed, related to the new mitigating-role rules applicable to drug-trafficking cases (USSG § 2D1.1(e)(2)), which went into effect November 1, 2025. Highlighted language is either explanatory for users of this document or it indicates where you would need to tailor language for an individual client. Of course, everything should ultimately be tailored for an individual client and case and filing. For instance, this document contains language responding to certain government arguments that are getting made in courier cases. But if your case is not a courier case, or if the government is not raising the arguments that the language responds to, it would not be appropriate to use. In general, please exercise professional discretion.

If you need help applying the new rules to a particular client, feel free to reach out to SRC@fd.org. Also, if you find an error in this document, or have ideas for how to improve it, please let us know!

Potential introductory language regarding the new amendment:

As of November 1, 2025, the mitigating-role adjustment operates differently as applied to individuals convicted of drug-trafficking offenses who served only a low-level trafficking function. Specifically, the amended § 2D1.1 has a new “special instruction” (at (e)(2)) for applying § 3B1.2 role reductions in drug trafficking cases. Under that instruction, role reductions can now be triggered solely by a person’s primary function in the global drug-trafficking market and are not available only to those “substantially less culpable than the average participant” in the same criminal enterprise, as was previously the case. *Accord* U.S. Sent’g Guidelines Manual § 2D1.1(e)(2)(B) (U.S. Sent’g Comm’n 2025) (providing general availability of § 3B1.2 reductions based on a person occupying a low-level drug trafficking function) [hereinafter USSG] *with id.* § 2D1.1(e)(2) (providing that role reductions

are available in single-defendant criminal offenses and regardless of individual's culpability relative to others in the same criminal conduct).

Under § 2D1.1(e)(2), [CLIENT NAME] is entitled to a []-point role reduction. When combined with the amended mitigating role base offense level caps, his total adjusted offense level is [].

Potential affirmative arguments regarding the new rule's broad application:

HEADING 1: Under the new, broadly worded special instruction at § 2D1.1(e)(2), a person's primary function in the global drug trade is sufficient on its own to trigger the § 3B1.2 role reductions.

This Court's assessment of § 2D1.1(e)(2) begins with the text. [INSERT LOCAL CIRCUIT CITATION.] Section 2D1.1(e)(2) is expansive on its face: It instructs courts to apply § 3B1.2 based upon a person's place within the generic drug trafficking hierarchy and not, as § 3B1.2 otherwise provides, based solely on comparing the defendant's conduct to others within his specific criminal scheme. The text of § 2D1.1(e)(2) is expansive in at least five ways:

- First, § 2D1.1(e)(2) affirmatively establishes that a role reduction is now generally warranted for individuals whose functions are among the "low" and "lowest" drug trafficking functions and specifies functions meeting those standards. *See* § 2D1.1(e)(2)(B)(i)–(ii). Prior to this amendment, courts had interpreted § 3B1.2 as not permitting a reduction based solely on function. *See, e.g., United States v. McWaters*, 139 F.4th 727, 729-30 (8th Cir. 2025) ("The fact that [defendant] was a courier . . . , alone, is insufficient to show his entitlement to a reduction."); *United States v. McCombs*, 128 F.4th 911, 915–16 (7th Cir. 2025) ("[D]rug couriers are neither automatically entitled to, nor precluded from, a mitigating role reduction."). Now, function plainly suffices.
- Second, § 2D1.1(e)(2) specifies that its focus is on the person's "primary" function—not necessarily the most-serious function that the person performed. *See* § 2D1.1(e)(2)(B)(i)–(ii).¹

¹ As discussed *infra*, the Commission sought input on whether to use a person's primary function or most serious conduct and opted for the former.

- Third, § 2D1.1(e)(2) provides examples of generally covered functions but clarifies that those examples are not exhaustive. *See* § 2D1.1(e)(2)(B)(i) (providing for reduction for “lowest level . . . functions, *such as*” listed functions); *see also id.* § (e)(2)(B)(ii) (same as to “low-level” functions).
- Fourth, as mentioned above, § 2D1.1(e)(2) eliminates the requirement that any other individual be involved in the instant criminal conduct and that the court consider an individual’s culpability relative to others who are involved in the instant criminal conduct. Prior to this amendment, individuals were regularly denied reductions due to being charged in single-defendant cases. [LOCAL CITE.] This change reflects a key difference between drug trafficking offenses and most other federal offenses. While an individual may commit, for example, bank robbery or fraud completely on their own (making the idea of an “aggravated” or “mitigated” role nonsensical), a person who traffics drugs is necessarily participating in a broader, international, half-trillion-dollar illegal drug market. *Cf. Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that even self-grown marijuana could be subject to federal regulation pursuant to Congressional power to regulate interstate commerce). A person who commits a drug trafficking offense is necessarily part of a trafficking network (likely multiple) that involves other individuals, regardless of whether they are charged or whether the Court can identify them.
- Fifth, § 2D1.1(e)(2)’s text is also expansive on its face because of what it lacks: conduct-based limitations that would be present in a restrictive provision. Notably, under § 2D1.1(e)(2) it does not matter how long a person served a particular function, the number of times the person fulfilled that function, whether the person appeared to be “trusted” by higher-level traffickers, the specific type and weight of substance(s) involved in the offense, what conduct the average person in a given jurisdiction commits, or whether the person has been assessed points for violence or weapons. Any of these may be relevant to sentencing in a particular case, *see* 18 U.S.C. § 3553(a), but regardless, they do not impact application of this offense-level reduction in the advisory Guideline calculation.

To summarize, USSG § 2D1.1(e)(2)’s new text is expansive, instructing courts to apply the mitigating role reduction in far more drug-trafficking cases than § 3B1.2’s generally applicable rules would permit. Given the frequency with which courts

sentence individuals who performed low-level functions,² § 2D1.1(e)(2) could finally get drug-trafficking guideline ranges closer to the lower sentences that courts nationwide actually impose.

HEADING 2: The Sentencing Commission intended § 3B1.2 to be applied liberally in § 2D1.1 cases.

Section 2D1.1(e)(2)’s promulgation history further underscores that role reductions are intended to now be broadly available in § 2D1.1 sentencings. The U.S. Sentencing Commission promulgates amendments pursuant to the Administrative Procedure Act’s “notice and comment” rulemaking requirements. *See* 18 U.S.C. § 994(x) (“The provisions of [the APA] relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines”). As to USSG § 2D1.1(e)(2), the Commission held a roundtable discussion among judges, academics, and practitioners focusing on drug trafficking sentencings;³ released proposed amendments to the public with explanations for the proposals;⁴ solicited public comment on the proposals;⁵ held a hearing with stakeholder witnesses;⁶ and then promulgated final amendments with further

² *See, e.g.,* U.S. Sent’g Comm’n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* 37 (2024) (finding that 48.4% of people sentenced for methamphetamine trafficking offenses in FY2022 acted as street-level dealers, brokers/go-betweens, couriers, renters/storers, employees, or some other low-level function); *see also* U.S. Sent’g Comm’n, *Fentanyl and Fentanyl Analogues: Federal Trends and Trafficking Patterns* 28 (2021) (finding 65.8% of people sentenced in drug cases involving fentanyl and 64.1% of people sentenced in cases involving fentanyl analogues in FY2019 had a role at street dealer or lower, excluding cases where the role could not be determined); U.S. Sent’g Comm’n, Report to Congress: *Mandatory Minimum Penalties for Drug Offenses* 167 (2011) (finding the most common function of their sample of cases from FY2009 was courier at 23.0%).

³ News Release, U.S. Sent’g Comm’n, *U.S. Sentencing Commission Seeks Comment on New Round of Proposed Amendments* (Jan. 24, 2025), <https://www.ussc.gov/about/news/press-releases/january-24-2025> (indicating that proposed drug amendments “further respond to [a] roundtable[] the Commission held last year on . . . drug sentencing.”).

⁴ *See generally* U.S. Sent’g Comm’n, *Sentencing Guidelines for United States Courts*, 90 Fed. Reg. 8968, 8985–92 (proposed Feb. 4, 2025) [hereinafter *Proposed Amendments*].

⁵ *See generally* Public Comments on Proposed Amendments for Supervised Release & Drug Offenses (2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202503/90FR8968_public-comment_R.pdf [hereinafter *Public Comment on Proposed Amendments*].

⁶ *See generally* U.S. Sent’g Comm’n, Transcript of Public Hearing (Mar. 12, 2025), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/2025031213/Transcript-Day1.pdf> [hereinafter *Hearing Transcript*].

explanations.⁷ Throughout this process, the Commission repeatedly indicated its intent to substantially increase the rate at which people sentenced for drug offenses receive § 3B1.2 reductions, including the four-level reduction.

The Commission first proposed what became § 2D1.1(e)(2) in February 2025 as part of a broader package of proposed amendments to the drug-trafficking guideline.⁸ Initially, the Commission proposed a function-based reduction as a new “specific offense characteristic” within § 2D1.1, but it would have operated like what would become § 2D1.1(e)(2).⁹ The Commission explained that its § 2D1.1 proposals, including the proposed function adjustment, were intended “to address concerns that the Drug Quantity Table . . . overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing.”¹⁰ In so stating, the Commission clarified that its proposals were intended to address perhaps the most impactful and oft-criticized error in § 2D1.1.¹¹ Even more directly, the Commission explained that its

⁷ U.S. Sent’g Guidelines Manual app. C (vol. IV) amend. 833 (U.S. Sent’g Comm’n 2025) (codified in U.S. Sent’g Guidelines Manual § 2D1.1(e)(2) (U.S. Sent’g Comm’n 2025)) [hereinafter *Reason for Amendment*].

⁸ *See generally Proposed Amendments*.

⁹ *Id.* 90 Fed. Reg. 8991–92.

¹⁰ *Id.* at 8985–96.

¹¹ *See, e.g.,* Daniel J. Freed & Marc Miller, *Editors’ Observations*, 2 Fed. Sent. Rep. 189, 190 (Vera Inst. Just. 1990) (complaining about judges’ inability to factor individual characteristics into the guideline calculation and, in this context, describing an early case sentenced under the new guidelines in which the judge complained about the lack of distinction between “a drug dealer who preys on society and needs to be imprisoned” and “an addict defendant who is a medical case and a victim of those drug dealers selling miniscule amounts of drugs to support her habit, and thus needs treatment rather than incarceration”); Tr. of Hearing at 77 (Mar. 5, 1991) (testimony of Hon. Mark Wolf on behalf of the Jud’l Conf.’s Comm. on Crim. L. and Prob’n) (“Yes, we believe that the guidelines place excessive reliance on quantity, with inadequate room to consider role in the offense. The result is that low- level drug offenders receive proportionately far more severe punishment than mid- and high - level drug offenders, and the problem is compounded by the reality that the street-level guy or the mule or the lookout usually knows little about the larger operation, and, thus, has no one to roll over on, while the kingpin has all kinds of useful information with which to buy a 5K1.1 departure.”), https://www.uscourts.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/19910305/19910305_Transcript.pdf; Ltr. from Hon. Maryanne Trump Barry, Chair of the Jud’l Conf. Crim. L. Comm., to the U.S. Sent’g Comm., at 2 (Mar. 6, 1995) (in the context of advocating for the Sentencing Commission to simplify role adjustments, noting that the Judicial Conference had “repeatedly urged that sentences in drug cases be driven less by drug quantity”), https://www.uscourts.gov/sites/default/files/pdf/amendment-process/public-comment/199503/199503_PCpt2.pdf (PDF p. 18); Tr. of Public Hearing Before the U.S. Sent’g Comm., New York, New York, at 92–93 (July 9, 2009) (Hon. Newman) (“You are the Sentencing Commission within the judicial branch. What we need from you, even under the era of mandatory minimums, is your best judgment of what the sentence should be for a person who transports a certain amount of heroin or has a certain kingpin role or a certain mule role. We, the country, need[]

proposal was grounded in “commenters hav[ing] raised concerns that the mitigating role adjustment from Chapter 3, Part B . . . is applied inconsistently in drug trafficking cases and does not adequately reflect individuals’ roles in drug trafficking offenses.”¹²

Of further note, in addition to soliciting comment about whether to create a function-focused reduction, the Commission also specifically asked whether that reduction should: 1) be foreclosed for individuals whose offenses included violence; 2) be foreclosed for individuals who possessed firearms; and 3) focus on a person’s “primary” function or, instead, their “most serious” function.¹³ The Commission likewise sought input regarding whether the provision should include an exhaustive list of qualifying functions or mere examples of potentially qualifying functions.¹⁴

After receiving hundreds of pages of public comment and holding a hearing on the proposals, the Commission promulgated § 2D1.1(e)(2). While this represented a different logistical approach to the function reduction—creating the special instruction for applying § 3B1.2 instead of a new specific offense characteristic—essentially every decision that the Commission made from its proposal represented the broadest possible choice: it did not categorically exclude anyone based on offense characteristics; it based the reduction on the defendant’s “primary” (instead of “most serious”) function;¹⁵ and it implemented an amalgamation of the checklist-versus-examples approaches, offering roles that would generally trigger the reduction but also making clear that the listed examples are not exclusive.¹⁶

The Commission’s written explanations for the final amendment further demonstrate the expansive nature of the amendment. The Commission explained in its “Reason for Amendment” that it had “previously amended the Commentary to §3B1.2 to increase its usage” but the earlier amendment “did not result in a sustained increase in application of the mitigating role adjustment in §2D1.1

your judgment [about] what the right sentence should be.”),
https://www.ussc.gov/sites/default/files/Public_Hearing_Transcript_0.pdf.

¹² See *Proposed Amendments*, 90 Fed. Reg. at 8986.

¹³ See *id.* at 8987 (describing various options for which Commission sought comment).

¹⁴ See *id.* (“However, unlike Option 1, Option 2 would not list low-level trafficking functions to which the reduction would necessarily apply. Instead, Option 2 would list functions that may qualify for the reduction as examples.”).

¹⁵ See USSG § 2D1.1(e)(2)(B)(i)–(ii) (basing qualification on person’s “primary function” and making no mention of most serious conduct).

¹⁶ See *id.* (providing that reduction “is generally warranted” if performed a low-level function and prefacing listed examples with “such as”).

cases.”¹⁷ The Commission thus created § 2D1.1(e)(2) to “encourage broader use of § 3B1.2” in drug trafficking cases, by “expand[ing] the circumstances in which an adjustment under §3B1.2 is warranted in §2D1.1 cases.”¹⁸

In both action and explanation, the Commission has made clear that post-amendment, the mitigating role reduction works differently—more specifically, much more expansively—in drug-trafficking cases.

Potential arguments for use only in courier cases:

[HEADING 3 FOR A COURIER CASE]: A person is a courier, entitled to a four-level “lowest-level function” reduction, where the person’s primary function was transporting contraband.

[This section has been removed from this document as of 12/23/25, after SRC created a standalone objection for use in courier cases that contains all of the material that was in this section plus additional useful content. We created the newer document after a couple of courts sided with the government, against the reduction, in a couple of districts, to add additional context in the hope that it would help judges understand that the government’s arguments fall flat. In a courier case, please access that document directly: Box→SRC-Litigation Resources→SRC - Guidelines resources→2025 USSG AMENDMENTS→Mitigating role - 2025 amendment→”Memo- model PSR objection re mitigating role FOR COURIER CASES.pdf.”]

Ideas for “street dealer” cases:

SRC suspects that government arguments in “street dealer” cases will be highly variable and fact-specific. Rather than offering sample language to use in briefing, here are some points that may be useful in particular cases:

- *Because of § 2D1.1(e)(2)(B)(ii)’s reference to small-quantity sales, some prosecutors may attempt to argue that clients cannot get the reduction where the total quantity of drugs sold (all the relevant conduct) will be high. If those arguments are advanced it will be key to explain that*

¹⁷ See Reason for Amendment.

¹⁸ *Id.*

§ 2D1.1(e)(2)(B)(ii) references the size of the distribution to each individual customer and not to the net total sold.

- Prosecutors will likely try to limit § 2D1.1(e)(2)(B)(ii)'s application to people who exactly match the example in the provision (i.e. a person selling user level quantities, infrequently, for no money, with a motivation other than profit). For this provision it will be important to emphasize that the example is not exhaustive; that is, deviations from it still ought to receive the adjustment.*
- Prosecutors may elide the difference between engaging in a function to earn money at all and engaging in it to profit. Put another way, prosecutors may try to argue that a client who made any money off of their sales was primarily pursuing profit. One possible rebuttal to this point will be to emphasize the difference between profit-driven work and work done simply to survive, to make ends meet, to feed an addiction.*
- Prosecutors will likely try to argue that small amounts of money are still too high to count as "little or no compensation." It may be useful to identify for the court the numerous ways in which a client is, almost certainly, not thriving financially. Along with the fact that the client is represented by appointed counsel due to indigency, it may be useful to describe the person's living conditions, access to nutrition and healthcare, access to transportation, average wage at other employment, etc.*
- At bottom, the drug trafficking industry is comparable to any number of other, profit-driven, product-selling, international companies like Amazon or Walmart. As in the drug trafficking industry, those companies serve as retail and distribution networks for products that are themselves produced and transported by the (often-internationally based) manufacturer's networks. A person working as a cashier at Walmart is engaged in a lower-level function than the store managers, district managers, C-suite executives, etc. whether they are working their first shift on a slow day or are working for their twentieth year and handling tens of thousands of dollars of merchandise at the checkout.*