

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-12261
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAFAEL GUTIERREZ,

a.k.a. Rafy,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:24-cr-60174-MD-8

Before NEWSOM, BRASHER, and TJOFLAT, Circuit Judges.

PER CURIAM:

Rafael Gutierrez and ten others were charged in Count 1 of a multi-count indictment with conspiring from February to October 23, 2022, in violation of 21 U.S.C. § 846, to possess with intent to distribute 50 or more grams of methamphetamine in violation of 21 U.S.C. § 841(b)(1)(A)(viii). Guterrez was also charged in Counts 4 and 6 with possessing with intent to distribute 50 grams or more of methamphetamine on July 19 and October 13, 2022, in violation of 21 U.S.C. § 841(a)(1). The statutory imprisonment term was ten years to life. Pursuant to a plea agreement, Guterrez pleaded guilty to the Count 1 conspiracy, and the District Court sentenced him to a prison term of 108 months.¹

Guterrez now appeals his sentence. He argues the District Court erred in denying his request for a minor-role participant adjustment of his offense level pursuant to Section 3B1.2 of the Sentencing Guidelines, U.S.S.G. § 3B1.2, and in failing to consider the effect of Amendment 833 of the Guidelines on the application of § 3B1.2.

I. FACTS AND PROCEDURAL HISTORY

In February 2022, law enforcement identified coconspirator Edgar Garcia-Velasquez as a prison inmate selling large quantities of methamphetamine and conducting controlled buys with his associates. Many of the buys involved an undercover law enforcement officer (“UC”). Luis Portillo, a cousin of Gutierrez who had

¹ The Court dismissed Counts 4 and 6 at sentencing as provided in the plea agreement.

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been introduced to the conspiracy by one of Garcia-Velasquez' fellow inmates, brought Gutierrez into the conspiracy. Portillo had access to large amounts of methamphetamine.

In May 2022, Portillo sold one pound of methamphetamine to a UC. In July 2022, Portillo agreed to sell another pound of methamphetamine to the UC. Because Portillo was unavailable to make the delivery, he sent Gutierrez to complete the transaction instead. On July 19, Gutierrez and the UC met at a mall in Broward County. Gutierrez entered the UC's vehicle and delivered a vacuum-sealed bag containing methamphetamine. During the transaction, which was audio and video recorded, Gutierrez and the UC discussed Gutierrez's involvement in drug sales and his relationship with Portillo. After Gutierrez exited the UC's vehicle, a DEA laboratory determined that the methamphetamine had a pure substance weight of approximately 443.1 grams.

In October 2022, Portillo coordinated a buy with the UC for an additional pound of methamphetamine. On October 13, Gutierrez drove Portillo to the delivery site, the mall in Broward County, where Portillo entered the UC's vehicle, delivered the methamphetamine, and received \$2,800. Laboratory analysis revealed that the delivered methamphetamine had a pure substance weight of approximately 427.3 grams. For these two transactions, the probation officer determined that Gutierrez was accountable for 870.4 grams of pure methamphetamine.

Gutierrez objected to the probation officer's description of his involvement in these transactions and therefore in the conspiracy. The probation officer described Gutierrez's objection in her Addendum to the Presentence Report as follows:

The defendant highlighted that the PSR established that he participated in the relevant conduct in this case on only two occasions: July 19, 2022 and October 13, 2022. He explained that on October 13, 2022, his role was to drive a codefendant to the narcotics transaction, and that he did not otherwise participate in the transaction. On July 19, 2022, the defendant delivered the narcotics on behalf of a codefendant who had negotiated and planned the sale, but could not attend the transaction himself, who then "sent" the defendant instead.

The defendant's objection stated there are five factors for the Court to consider when determining whether a reduction at § 3B1.2 would apply, which are outlined in Application Note 3 of that guideline. The defendant opined that he meets all the criteria for a minor role reduction.

The probation officer disagreed with Gutierrez’s objection. Her response quoted Application Notes 3,² 4,³ and 5⁴ and summarized Gutierrez’s involvement in the charged conspiracy:

² The Addendum to the Presentence Report states:

Pursuant to § 3B1.2, comment. [n.3(A)], an adjustment under this section is “for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.” The Court is not required to find, based solely on the defendant’s bare assertion, that such a role adjustment is warranted, but rather, should base such a determination on the facts of the case and the totality of the circumstances, § 3B1.2, comment. [n.3(C)]

³ Application note four states:

Minimal Participant—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in the criminal 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.

U.S.S.G. § 3B1.2, comment. (n.4).

⁴ Application note five states:

Minor Participant—Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.

U.S.S.G. § 3B1.2, comment. (n.5)

Gutierrez was aware of his involvement in the offense by coordinating with Portillo to deliver narcotics in Portillo's place, of which one could assume that he was aware of the amount of drugs he was supposed to deliver; and a few months later, his involvement of knowingly transporting Portillo to commit a drug transaction. For the instant case, the defendant was held accountable for his own actions. Without his participation in the offense, specifically on July 19, 2022, the drug transaction may not have occurred.

The probation officer then restated the two factors set out in our opinion, *U.S. v. Rodriguez De Varon*, 175 F.3d 930, 943 (11th Cir. 1999) (en banc):

[T]he defendant always bears the burden of proving a mitigating role in the offense by a preponderance of the evidence. The Court's ultimate determination of the defendant's role is based on two principles discerned from the guidelines: the defendant's role in the relevant conduct for which he has been held accountable for at sentencing and his role as compared to that of other participants in his relevant conduct.

The probation officer concluded: "[T]his issue is unresolved."

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II. LEGAL STANDARD

“[A] district court’s determination of a defendant’s role in the offense is a finding of fact to be reviewed only for clear error.” *Rodriguez De Varon*, 175 F.3d at 937. We will not overturn the determination unless we are left with a “definite and firm conviction that a mistake” was made. *United States v. Martinez*, 172 F.4th 1306, 1311 (11th Cir. 2026) (quoting *United States v. Cruickshank*, 837 F.3d 1182, 1192 (11th Cir. 2016)). Whether Amendment 833 of the Guidelines is applicable here is a question of law which we review de novo.

III. DISCUSSION

Section 2D1.1 of the Guidelines specified a base offense level of 34 for the Count 1 conspiracy. U.S.S.G. § 2D1.1(a)(5),(c)(3). Section 3B1.2 provided for a two-level reduction of the offense level if the defendant was a “minor participant” in the criminal activity. U.S.S.G. § 3B1.2(b). A minor participant is one “who is less culpable than most other participants, but whose role could not be described as minimal.” U.S.S.G. § 3B1.2 comment. (n.5).

A. Amendment 833 is not Retroactively Applicable

While this case was pending on appeal, Amendment 833 amended U.S.S.G. § 2D1.1 by adding a special instruction regarding the application of the § 3B1.2 mitigating role adjustments to § 2D1.1 cases. *See* U.S.S.G. App. C, amend. 833 (eff. Nov. 1, 2025). As we recently explained in *United States v. Martinez*:

[Amendment 833] inserted new language into U.S.S.G. § 2D1.1(e)(2)(B) expanding the circumstances under which courts should apply the minor-participant reduction under § 3B1.2. The new instruction states that the minor-participant reduction is “generally warranted” for defendants whose primary function is a low-level trafficking role, like a courier, lookout, small-scale distributor.

172 F.4th 1306, 1315 (11th Cir. 2026).

Generally, in reviewing a district court’s application of the Sentencing Guidelines, we apply the version of the Guidelines in effect at the time of the defendant’s sentencing. *Id.* We consider new amendments on appeal only if they are “clarifying” rather than “substantive.” *Id.* In *Martinez*, we held that Amendment 833 is substantive because: (1) it altered the text of the Guidelines rather than merely adding commentary; (2) the amendment commentary reflected that it was a substantive change; (3) the amendment made the role adjustments applicable in drug-trafficking cases even if the offense did not involve other participants and even if the defendant was not substantially less culpable than the average participant in the criminal activity; (4) the Sentencing Commission did not list Amendment 833 as a retroactive amendment; and (5) to the extent that the amendment made the involvement of other participants irrelevant to whether a defendant can receive a role decrease, it abrogated our precedent. *Id.* at 1316.

Because Amendment 833 is substantive, it is not retroactively applicable. Thus we do not consider it in our analysis here.

B. Section 3B1.2 Minor Role Adjustment

Having determined that Amendment 833 does not apply retroactively, the question before us is whether the District Court clearly erred in denying Gutierrez a two-level minor role adjustment under § 3B1.2. In denying the adjustment, the Court relied on the facts its probation officer presented in her presentence report.

Whether a defendant is entitled to 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, comment. (n.3(C)). The commentary includes the following non-exhaustive list of factors to consider:

(i) the degree to which the defendant understood the scope and structure of the criminal activity; (ii) the degree to which the defendant participated in planning or organizing the criminal activity; (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority; (iv) the nature and extent of the defendant’s participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts; and (v) the degree to which the defendant stood to benefit from the criminal activity.

Id.

As the probation officer stated in her Addendum to the Presentence Report, the defendant bears the burden of establishing by a preponderance of the evidence that he qualifies for a minor-role reduction. *Rodriguez De Varon*, 175 F.3d at 943. We have set forth a two-step factual inquiry for district courts to determine a defendant's role: (1) the defendant's role in the relevant conduct for which he has been held accountable at sentencing and (2) his role as compared to that of other participants in his relevant conduct. *Rodriguez De Varon*, 175 F.3d at 940. The comparison is to be made against the conduct the defendant is being held accountable for rather than against the conduct of a larger criminal conspiracy for which the defendant is not being sentenced. *Id.* at 941, 944. In *De Varon*, we identified additional factors to consider for drug couriers, including the "amount of drugs, fair market value of drugs, amount of money to be paid to the courier, equity interest in the drugs, role in planning the criminal scheme, and role in the distribution." *Id.* at 945.

In sentencing Gutierrez, the District Court properly considered those factors:

THE COURT: And as you know, I am taking into consideration the degree to which . . . Mr. Gutierrez understood the scope and structure of just the transactions that he was involved in, the degree to which he participated in those, including in the planning, the degree to which he exercised any decision-making authority or influenced the exercise of decision-making authority, which, I think, [defense counsel], is your greatest point.

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And I don't know that he had any decision-making authority except, you know, that he did show up with the drugs, and he did drive somebody who showed up with the drugs; but, you know, I would agree that the third factor is the weakest.

And the nature and extent of his participation in the criminal activity at issue, which is just these 900-and-some-odd grams, and the degree to which he stood the benefit—I don't know. But why—you know, he did show up a second time.

He's not a stranger to being involved in narcotics transactions from what I can see in his criminal history; so this isn't a doe-eyed person who didn't know what was going on. Now, the facts really are what need to be considered; but, you know, this isn't the—to me, I'm comfortable that this isn't the person that the minor role adjustment was intended to apply to even as a member. So I'm denying the objection. I'm overruling the objection as to minor role.

We find no clear error in the District Court's determination of Gutierrez's role in the charged conspiracy. The Court's judgment is accordingly affirmed.

AFFIRMED.