

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

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January 4, 1990

MEMORANDUM

TO: Phyllis Newton
Staff Director

FROM: ~~Role~~ in the Offense Working Group
Jeffrey W. Lawrence, Group Coordinator
Rusty Burress
Caryl Ricca

INTRODUCTION

In accordance with the 1990 amendment process our group was assigned the task of evaluating Chapter Three, Part B "Role in the Offense" and potential problems in its application. It was our task to determine whether to address any of these problems with an amendment and if so, to draft the amendment.

This report summarizes our study, and is organized as follows: (1) summary of recommendations; (2) examination of past practice, current monitoring, case review and departure; (3) reported decisions in which "role" is specifically addressed by a court in fashioning a sentence,¹ these cases provide information

¹ In many cases, the courts of appeal simply affirm the district court's determination as to a defendant's role in the offense without discussion and simply concluding that the court's
(continued...)

which reflects the application of the guidelines and are helpful to the fashioning of clarifying amendments (18 U.S.C. §994(o)); and (4) review of the preliminary amendment suggested by Peter Hoffman, the technical assistance adviser (a copy of this draft is attached hereto as Exhibit 4). Finally, based upon the examination of these sources, we have drafted the accompanying amendment designated in Appendix A to this memorandum.

I. SUMMARY OF RECOMMENDATIONS

A. Overview

Both pre-guideline and current sentencing practice suggests that where an offense is committed by a group of individuals, sentencing should vary with each particular defendant's role in the conduct. The working group believes that the principal focus for the 1990 amendments of the role guideline should be in clarifying and providing direction in how the adjustments are to be applied. In particular, we have proposed a guideline that:

(1) directs the sentencing judge to
apply the role adjustment in accordance with

¹(...continued)
finding was not "clearly erroneous," see, e.g., United States v. Vasquez, 874 F.2d 250, 252 (5th Cir. 1989) (two-level increase where defendant recruited and directed a co-defendant, was the main participant in negotiations with an undercover officer, and used his apartment as a base of operations, held not clearly erroneous). Because these cases do not provide any additional analysis for the fashioning of an amendment, they have been excluded from the accompanying memorandum.

the relevant conduct of the particular defendant;

(2) we have provided examples in the commentary as to how the guideline should be applied in order to direct judges more effectively as to the intent of the Commission as to who are "organizers, leaders" deserving of an aggravated role, the meaning of "otherwise extensive" and the application of the mitigating role adjustments;

(3) additionally, based upon the Technical Assistance Service information, we have attempted to clarify the application of the "Abuse of Trust" enhancement of §3B1.3.

B. Policy Issues

In our initial plan of November 15, 1989, we indicated that there seemed to be two areas in which the application of role adjustments is particularly disparate: the case in which the defendant is wife/girlfriend of a major narcotics dealer and where a single courier is arrested bringing in large quantities of controlled substances. See Memorandum to Peter Hoffman from Jim Beck, dated November 8, 1989 (cases in which role adjustments are applied), attached here to as Exhibit 1. Some courts have given reductions to these individuals simply on the basis of their status (courier, girlfriend), while others have indicated that a defendant, in order to qualify for a minor or minimal participant reduction, should be required to show both that he is involved with others and is less culpable than they are in connection with the offense.² The Commission may wish to

² In some districts judges routinely reduce sentences of couriers by four levels for minimal role, regardless of the
(continued...)

address, as a policy matter, whether a courier should be eligible for some reduction as a minimal or minor participant regardless of whether he can establish that there are other individuals involved.³ See United States v. Buenrostros, 868 F.2d 135, 138 (5th Cir. 1989).

The group offers the following alternatives: in Commentary, the Commission could define situations in which an individual would be eligible for such a reduction contrasted with an individual who is not. For example, a courier who brings in a large quantity of drugs, and whose passport indicates a number of previous trips into and out of the United States in a short period of time (e.g., a number of months) would not be eligible for such a reduction whereas an individual who was simply arrested for the first time with no other indication that he or she was involved with other shipments, would be eligible for such a reduction. Alternatively, the Commission could expressly state

²(...continued)

amount or other participants; additionally, upon a guilty plea (or even after trial) they are able to get an additional two-level reduction if they accept responsibility within the meaning of §3E1.1. This practice is prevalent in districts with a high volume of courier cases.

³ In the typical case, the courier is unable to provide "substantial assistance" since he is deliberately insulated from the individuals involved in a drug organization. Thus, the availability of a §5K1.1 departure motion is generally unavailable (however, in certain circumstances, i.e., where the courier decides to cooperate early and is able to provide information leading to the arrest of the person to whom the controlled substances were to be delivered, such information may be obtainable).

that the applicability of the role adjustment is dependent upon the establishment of his minor or minimal role by the individual seeking either the reduction based upon the preponderance of the evidence. Thus, a courier who is the only individual arrested would not automatically be eligible for the reduction. A third possibility is to specifically deal with the girlfriend/courier as a specific offense characteristic in the drug guideline §2D1.1 and thereby preclude the application of a role in the offense adjustment. Buenrostros, infra. Should the Commission choose this third option, the definitions as to who and in what circumstances the reduction should be applied would have to be spelled out in the commentary to §2D1.1.

Regardless of the approach taken, it appears that this situation needs to be addressed since it provides an area of great disparity in sentencing.

II. PRE-GUIDELINE PRACTICE, MONITORING AND CURRENT APPLICATION DATA -- ANALYSIS

A. Pre-Guideline Practice

The information provided through Charles Betsey containing the past practice data indicates that there clearly was a distinction based upon the role of an individual defendant in connection with an offense. It is difficult to quantify this since it varied both with the nature of the offense, the degree

to which the individual was a participant in the offense and, the personal situations of individual defendants. Thus, it is difficult to assess the extent to which these factors played a part in the ultimate sentence received. It is clear, however, that under pre-guideline practice, individuals who had a lesser role in the commission of offenses received a sentence reduction and individuals who were leaders in the offenses studied received an increase in their sentences. See, Table I(b), Supplementary Report on the Initial Sentencing Guidelines and Policy Statement, June 18, 1987 (attached hereto as Exhibit 2).

B. Guideline Practice

According to the Monitoring Unit, the 1987 through July 1989 data collection procedures do not permit examination of the application of a role in the offense adjustment in the vast majority of the decided cases. Although the departure studies did provide this information it only picked up this information in cases where the judge cited "role" as a basis for departure. In the past, there has not been a computer module to allow for the coding of the application of role adjustments in other than departure cases. Thus, the instances in which the court reduced the applicable guideline range based upon the defendant's role and then imposed a sentence, would not be reflected. (This is because after the reduction, the court did not "depart" and simply imposed a guideline sentence.) The departure cases,

however, only reflect the aberrant situation, *i.e.*, those instances in which a court has departed from a guideline sentence citing as its reason, the particular defendant's role in the offense.

According to Candace Johnson, there is a current computer module which will capture this information for future cases. Therefore, it is recommended that the examination of role adjustments should be reviewed on a periodic basis. For the present, we have examined those cases which have been culled from the departure study, as well as cases which have been reviewed by the Case Review section of the Monitoring Unit.

An examination of the available cases indicates that sentencing courts are imposing substantially reduced sentences for persons who can be described as being the least culpable in connection with a drug organization: a mule, an offloader, courier, driver, house guard and messenger. Of the cases studied, half were clearly cases arising in border jurisdictions (Arizona, Southern California, Southern Texas). In all but one of the cases, the defendant was convicted of a drug offense, in the one non-drug case (extortion), the judge departed upward apparently on the grounds that the defendants violated an abuse of trust to a degree not considered by the sentencing guidelines. The application of these role adjustments do not appear to depend upon the quantity of drugs involved, the type of drug involved,

nor the number of individuals who are arrested at the time of the offense. Indeed, the adjustments are given to individuals who are the only people involved in the particular crime and who may or may not be the principal in a distribution organization. In all of these cases the judges imposed a substantially reduced sentence based upon the perceived role in the offense, i.e., that the individual defendant was arrested at the border and at the time of his arrest was acting in the capacity of a courier. There does not appear to be any substantial analysis as to relative culpability or the existence of any other participants in the organization.

III. CASE LAW REVIEW--ANALYSIS

A. General

Courts have recognized that "the aim of guidelines §§3B1.1-3B1.4 is to adjust a defendant's offense level, in either direction, to accurately reflect the defendant's culpability in the particular crime. United States v. Hewin, 877 F.2d 3, 4 (5th Cir. 1989). While all of the decisions reviewed dealt with the issue of the application of Chapter Three Part B, the following cases provide judicial determinations of the "role" guideline application, with analysis of the types of considerations which should inform the amendment process.

Perhaps the best overall explanation of the "role" adjustment is (not surprisingly), United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989) (Wilkins, J.). Daughtrey had appealed the district court's refusal to treat him as a minimal or minor participant in a counterfeiting scheme in which he and his brother passed \$20 bills on a number of occasions in different cities. At sentencing Daughtrey contended that he should be treated as a minimal participant because the scheme was his brother's idea, his brother supplied the bills, and Daughtrey did not receive a full share of the illegal proceeds. Daughtrey, 874 F.2d at 215. (The government agreed that a reduction to minor participant was warranted.) Id. The district court rejected both positions and sentenced Daughtrey simply as a participant in the offense. In affirming the court's sentence the Daughtrey court noted that whether the application of the adjustment is warranted

is to be determined not only by comparing the acts of each participant in relation to the relevant conduct for which the participant is held accountable, see Guideline § 1B1.3, but also by measuring each participant's individual acts and relative culpability against the elements of the offense of conviction. [Citations omitted.] The sentencing judge's knowledge of previous cases will likely aid in the final determination of whether, against this objective standard, a defendant's degree of participation in the offense warrants a Role in the Offense adjustment.

Thus, where three individuals participate in the commission of an offense, all three, for purposes of Role in the Offense adjustments, may properly be sentenced as

participants, none of the three receiving an upward or downward offense level adjustment. For example, if three individuals had entered a bank with the intent to commit robbery and one stood guard at the door, another sprayed paint on the camera, and the third gathered the money from a teller's cage, no adjustment for Role in the Offense would be warranted. Even if one of the participants deserved an aggravating adjustment because of other acts he committed, the other participants would not be entitled to minimal or minor Role in the Offense adjustments.

Further, Daughtrey recognizes that in applying this standard, facts may exist which arguably distinguish one participant from another, but the distinguishing factor will not be relevant for sentencing. Id. at 218. For example, in Daughtrey, both defendants participated in a similar fashion in their commission of criminal acts proscribed by the statute. Thus, the fact that Daughtrey's brother came up with the scheme, knew the supplier and received more of the illegal proceeds, was irrelevant in evaluating the defendant's relevant conduct. No role adjustment was applicable.

The Daughtrey analysis provides the paradigmatic case for the application of the role guideline. The proposed amendment is designed to more clearly direct the courts to look to the relevant conduct of the defendant in applying the adjustment. In the introductory commentary we have directed sentencing courts to look both to the relevant conduct of the defendant and the elements of the offense of conviction in determining whether to apply the role adjustment. Only after this determination is made

should the court determine the extent of any Chapter Three adjustments.

B. §3B1.1 Organizer, Leader, Supervisor or Manager of a Criminal Enterprise.

In applying §3B1.1, as with all of Chapter Three, the courts give great deference to the district court's evaluation of the relative positions of persons in concerted offenses. The appellate courts, in reviewing these determinations recognize that the factors listed in Application Note 3 are simply for guidance and are not exclusive in determining whether the enhancement applies. United States v. Ortiz, 878 F.2d 125, 127 (3d Cir. 1989) (Application Note 3 is only intended to suggest various factors to be considered in applying §3B1.1; there need not be evidence of every factor before a defendant is found to be a leader or organizer); United States v. Diaz-Villafane, 874 F.2d 43, 48 (1st Cir. 1989). Thus, in applying §3B1.1 courts have affirmed the increase of two levels where the defendant, a forty year old man and his twenty-two year old wife (illegal alien) were arrested after a search of their luggage revealed 4,988.5 grams of cocaine and \$30,000 in cash. After a guilty plea, Herrera contended that he was simply an unwitting "mule" in the transportation of the cocaine. In applying §3B1.1(c) to Herrera, the district court found that he controlled or directed the behavior of his young wife, was responsible for the movement of

approximately 5,000 of 96% pure cocaine and he was quite aware of the quantity of cocaine being transported.

In affirming the application of this section the Seventh Circuit noted that the determination of whether a defendant was an "organizer" required a court to draw "inferences from a variety of data including the information in the presentence report and the defendants statements and demeanor at the hearing," United States v. Herrera, 878 F.2d 997 (7th Cir. 1989). While the government argued that the quantity and quality of the drugs tended to show his organizer role, the court of appeals, and the district court, ruled in that this particular case, the organizer enhancement was applied because of Herrera's control over, and direction of, his wife. Further, the court observed that even if the large quantity of cocaine implied the involvement of others, that does not indicate what role Herrera played with respect to his wife, or even with respect to those others. Id. at 1001. Indeed, in making its determination, the district court did not rely on the involvement of untold others, id. at 1001-02, but rather applied its evaluation of §3B1.1 to the individuals presently before the court. Finally, the court specifically rejected the contention that the mere existence of a marital relationship, without more, would result in an automatic enhancement as between husband and wife for one spouse over the other. Id. at 1002.

By implication, the Herrera court suggests that the presence or absence of a marital relation will not result in a corresponding reduction for the other spouse. It appears, therefore, that the application of Chapter Three, Part B will depend upon the facts in the particular case and the criminal relationship between the participants. Courts have similarly applied an enhancement for managerial or organizational responsibility under §3B1.1 in situations where the defendant was found to have made the decision regarding the place, quantity and price to be paid for cocaine, directed others involved in the transaction, and recruited at least two of the accomplices. Ortiz, 878 F.2d at 127. In Ortiz, the transaction was a one time four kilogram sale, however, §3B1.1 was applicable even if it were only a single transaction because of the scope and nature of the illegal activity. Id. Accord, United States v. Wagner, 884 F.2d 1090, 1098 (8th Cir. 1989) (two level enhancement for organizer and manager as to both defendants where one defendant supervised the loading of the glassware and chemicals and lived at the site where the equipment for the manufacture of methamphetamine was located and the co-defendant (his brother) ordered and picked up the chemicals necessary to produce the methamphetamine).

In fact, the courts of appeals seem to be particularly sensitive to the fact-bound nature of the application of these enhancements, in one case recognizing that "there need be no

particular formality in the ossature of a narcotics enterprise to justify invocation of §3B1.1. Drug dealers are unlikely to make much use of position descriptions or organizational charts."

United States v. Diaz-Villafane, 874 F.2d 43, 48 (1st Cir. 1989) (evidence presented that defendant was a leader and defendant boasted of "controlling the area" and that other individuals were giving him protection).

Thus, the application of the role adjustment depends upon the managerial conduct of the defendant in relation to other, identifiable individuals involved in the offense. Courts evaluate the defendant's role in relation to his particular relevant conduct in connection with the offense. Both the size and scope of the organized criminal conduct is taken into account in deciding whether, and the extent of a §3B1.1 enhancement is applicable.

The proposed amendment clarifies in Commentary Application Notes 4 & 5, the graduated application of this section and specifically ties the evaluation to the size and scope of the enterprise and the defendant's position in the organization.

C. Application of §3B1.1 where organization is "otherwise extensive."

In United States v. Mejia-Orosco, 867 F.2d 216 (5th Cir. 1989), the court upheld the application of an organizer, leader

or supervisor enhancement pursuant to §3B1.1 in a case in which the defendant was the sole individual in the importation of illegal aliens in violation of 8 U.S.C. §1324(a)(1)(B). In affirming the application, the court reasoned that §3B1.1, contained two distinct elements which could result in an enhancement; *i.e.*, that the defendant's role in the offense could result in an increased offense level if he managed a certain numbers of participants, or, if there were fewer participants managed by the defendant but the organization was "otherwise extensive." The court observed:

The introductory statement to this part [Chapter Three Part B] of the guidelines clearly indicates that there must be more than one participant involved in the criminal activity for this section to apply. However, the guideline makes clear, through its explanation of the term "otherwise extensive," that managerial status may attach by the orchestration of unwitting or duped participants as well as through the leadership of criminally responsible participants. Although the government does not contend that Meija-Orosco controlled a sufficient number of people to make his organization "otherwise extensive" within the meaning of §3B1.1(a) or (b), he might have exercised enough control over unwitting participants to make him a manager within the meaning of §3B1.1(c).

Meija-Orosco, 867 F.2d at 220. The court recognized that the illegal aliens smuggled or transported were not considered participants, however, they affirmed the district court's determination on the grounds that the relatives of the aliens were involved in the crime and thus, either they were

participants or "they were duped into aiding the enterprise in which they were unwitting participants." Id. at 222.

The proposed amendment clarifies in Application Note 4 that this is the proper reading of the term "otherwise extensive." Under §3B1.1 a defendant is subject to increased punishment where his is a manager in an extensive organization--even if that organization has used a number of unwitting individuals to further the criminal conduct. The application notes further clarify that the graduated increases under §3B1.1 are directly tied to the number of individuals involved in the criminal conduct.

D. §3B1.2--Mitigating Role--Application and Analysis.

The application of the "minor" or "minimal" two and four level respective reductions are likewise a factual determination reviewed under the clearly erroneous standard. As noted, the difficult application arises when a single defendant is arrested in connection with a quantity of controlled substances and therefore argues that he is a minor or minimal participant in a greater drug offense. See, e.g., Herrera, supra.

In United States v. Wright, 873 F.2d 437 (1st Cir. 1989) (Breyer, J.), defendant Wright, a member of the ship's crew, entered a guilty plea after security officials on the ship found

approximately 400 grams of cocaine in his locker. The district court rejected Wright's assertion that he was entitled to a downward adjustment concluding that the defendant was not a minimal participant in so far as it was he who possessed the cocaine and on other participant was required to complete the offense. The court further stated that "the person who transports drugs is a necessary link in the introduction of drugs in the United States. The transporter was a business partner fronting for the business at the critical time of importation." Wright, 873 F.2d at 443. The First Circuit, applying the due deference standard, affirmed the decision of the district court finding it not to be "clearly erroneous." Id.

On appeal, defendant made the following argument: drug importing schemes usually involve several persons; that the particular scheme in which he was involved did involve other persons; and that compared to them, he played a minor role in the scheme in that he was merely paid a few hundred dollars for keeping the cocaine in his locker. Wright, 873 F.2d at 443. Other courts have similarly affirmed the denial of the reduction in "courier cases."

In the leading case, United States v. Buenrostro, 868 F.2d 135 (5th Cir. 1989), the defendant was arrested with approximately 18 kilograms of heroin at the border. Defendant argued that he was simply a courier and that therefore his

minimal participant status could be inferred from that fact. Buenrostro, 868 F.2d at 138. In affirming the district court's denial of the §3B1.1 reduction, the court of appeals succinctly summarized the rationale as to why such a reduction was not applicable as a matter of course:

As the district judge in this case clearly recognized, couriers are an indispensable part of drug dealing networks. Without somebody to take the drugs across the border, the drugs will never reach their illicit market. In addition, the mere fact that a defendant was apprehended while acting as a courier does not imply that a defendant is only a courier. The district judge need not accept the defendant's self-serving account of his role in a drug organization. Finally, even if the defendant were purely a courier having no knowledge of the other aspects of the drug dealing operation, the defendant might nonetheless be a highly culpable participant in the operation. A courier who willingly undertakes illegal transit without asking many questions is especially valuable to a criminal organization. When police apprehended a studiously ignorant courier, the organization can rest comfortably, knowing that its other operations remain hidden from the law.

Buenrostro, 868 F.2d at 38. The court went on to observe that the application of §3B1.2 turns on factual culpability and not courier status. Additionally, the court recognized that "if the Sentencing Commission wished to establish a special downward adjustment for all drug couriers, it could easily have done so. It could have included courier status as a specific offense characteristic in §2D1.1, the guideline setting the base offense level for drug traffickers. The Commission could have done so, but it did not." Id. at 138. Accord United States v. Gallegos,

868 F.2d 711 (5th Cir. 1989) (referring to the absence of a special downward adjustment for all drug couriers). In Hewin, supra, the court affirmed the denial of a downward reduction for minimal participation where defendant Hewin was arrested driving 76 pounds of marijuana across the border in Texas. In that case no other participant was mentioned and the court of appeals affirmed the district court's decision.

Finally, courts have refused to grant a reduction for a mitigating role where the individual defendant played a critical role in the drug transaction. In United States v. Colon, the defendant was a "steerer" in that his role was simply to put a buyer of narcotics in touch with a seller. He handled neither the drugs nor the money in the sale and argued that he was thus only minimally involved. In affirming the lack of reduction for mitigating role the Second Circuit held that a steerer played an important role in street-level drug transactions and that without them buyers would either find it difficult to locate sellers or sellers would have to risk exposure to public view. United States v. Colon, 884 F.2d 1550 (2d Cir. 1989). Thus, because they were critical to the drug distribution the reduction under §3B1.2 was not applicable.

The proposed amendment clarifies the application of §3B1.2 and directs the court to look at the defendant's role in light of his relevant conduct in connection with the offense. In

addition, Applicatin Note 2, specifically directs the court that the defendant's conduct must be evaluated against other participants in the offense. Thus, a courier who brings in a quantity of drugs would not be either a minimal or minor participant under the application of relevant conduct.⁴

IV. PRELIMINARY DRAFT BY TECHNICAL STAFF, 10/25/89

Peter B. Hoffman provided the working group with two versions of his proposed revision of Chapter 3 Part B (Role in the Offense). This proposal substantially revises the "role" adjustment, and in the opinion of the working group makes it (1) far more complicated and ambiguous to apply and creates the potential for increasing disparate application rather than making the application of the adjustment more uniform; (2) the revision provides for a restructuring of the various offender characteristics in a manner that seems to be fraught with complications (e.g., §3B1.1(e)). Under this application note the court would not only have to attempt to define the already appropriate level for the offense; and (3) the working group strongly opposes Application Note 5 which suggests that the court use a "hypothetical group of defendants"--this appears to create unlimited potential for abuse and does not further the task

⁴ The proposed amendment is drafted without regard to the potential policy change in the treatment of couriers, supra, Part I.

before the sentencing judge, i.e., fashioning an appropriate sentence for the particular offender.

On the whole, the working group believes that the amendment process for Chapter Three should be much more limited and should clarify the already existing adjustments and their application.

V. PROPOSED AMENDMENT

Exhibit A is the working group's proposed amendment for Chapter Three dealing with the aggravating and mitigating role in the offense. It is intended to clarify the currently existing Role guideline and make its application more uniform.