

Amendment 7: Circuit Conflict Concerning Certain Drug Defendants and Mitigating Role

U.S. Department of Justice, Criminal Division
James K. Robinson, Assistant Attorney General
Laird C. Kirkpatrick, Commissioner Ex-Officio

DOJ raised two specific objections to the proposed changes to the mitigating role guideline, §3B1.2. First, the proposal deletes Application Note 2 from §3B1.2, which states in part that the minimal role adjustment is intended to be used infrequently. Second, the proposed amendment resolves a circuit conflict in a manner that is inappropriate in most situations — by indicating that a defendant convicted of drug trafficking whose role was limited to transporting or storing drugs and who is accountable only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving a mitigating role adjustment.

Deletion of Application Note 2 is a significant change that goes well beyond resolving the circuit conflict that is the ostensible reason for amending the mitigating role guideline. Deletion of this Note would send a strong signal that the four-level reduction for minimal participation should be applied more frequently.

DOJ stated that the coupling of the deletion of Application Note 2 with the proposed resolution of the circuit conflict is particularly troubling. It is an invitation to grant a role reduction to drug couriers. This, the commentary should be amended to indicate that a role reduction should be precluded in the situation described in the proposed amendment except in rare cases.

Families Against Mandatory Minimums

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FAMM supports proposed Amendment 7 to the extent that it establishes the Commission's position that a single drug courier defendant convicted based on the quantity personally handled may receive the benefit of a mitigating role adjustment available to drug courier defendants tried with others or as part of a conspiracy.

FAMM stated that the proposed amendment rejects the position taken in a line of Seventh Circuit cases in which the courts refused to apply §3B1.2 to single defendant couriers convicted only of amounts personally handled. FAMM supports the rejection of this line of reasoning, but notes that contemplated expansion of current Application Note 4 through proposed Application Note 3(A) may operate to undermine the very relief available to some drug couriers provided in Application Note 3(C). At best, the proposed Application Note 3(A) and its predecessor, are

confusing.

FAMM believes that the better course is to avoid per se rules applying adjustments and instead rely on the direction that judges should make fact-based inquiries to determine whether or not a defendant should receive an adjustment for being "substantially less culpable than the average participant." FAMM proposes that paragraph 2 of proposed Application Note 3(A) be removed in its entirety in order to secure and protect judicial discretion.

FAMM does not support either alternative proposed in Issue for Comment 1. The first proposed alternative would preclude single defendants whose role is limited to transporting or storing drugs from any mitigating role adjustment. The second would permit a "minor" role adjustment but not a "minimal role" adjustment.

Under Issue for Comment 2, FAMM supports the application of proposed Application Note 3(C) to defendants other than drug couriers or other defendants in drug trafficking cases. Such an extension of the proposed Application Note would promote reasonable uniformity in sentencing, consistent with the overall purpose of the guidelines.

Federal Public and Community Defenders

Jon Sands, Assistant Federal Public Defender, District of Arizona

FPCD endorses the goal of proposed Amendment 7 to ensure that a courier held accountable only for drugs personally handled "is not precluded from receiving a mitigating role adjustment." FPCD supports the changes to Application Notes 1 and 3 and their redesignation as Application Notes 4 and 5, and FPCD supports the adoption of new Application Notes 1 and 2. FPCD, however, believes that the proposed Application Note 3 needs revision. Specifically, FPCD recommends that part A of proposed Application Note 3 be revised, part B deleted, and that part C be promulgated as drafted.

For Issue for Comment 1, FPCD believes that a courier should be eligible for a role reduction under §3B1.2 and that a courier can be a minimal participant as well as a minor participant.

For Issue for Comment 2, FPCD believes that proposed Application Note 3(C) addresses a problem that affects a large number of cases and responds to a problem that has occurred with some frequency. FPCD is unaware at this time of similar problems in other guidelines. However, they do not oppose adding language that is more general as long as the drug-courier language remains. Further, the issue that provoked the need for this amendment needs to be addressed specifically.

The New York Council of Defense Lawyers

John R. Wing, President

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NYCDL agrees that the Commission should make clear that a mitigating role adjustment may be applied to a defendant who is convicted of a drug trafficking offense whose role in the offense was limited to transporting or storing drugs even if the defendant is only accountable under §1B1.3 for the quantity of drugs personally transported or stored by the defendant. As to Issue for Comment 2, the NYCDL believes that the adjustments available under §3B1.2 should be available to any defendant who plays a limited role in a large conspiracy, whether it be a drug conspiracy or a conspiracy to commit a financial crime of some sort.

Practitioners' Advisory Group

Co-Chairs Jim Felman & Barry Boss

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The PAG supports passage of this proposed amendment. The PAG, however, believes that a sentence based solely on the defendant's own conduct under §1B1.3(a)(1)(A) may overstate that defendant's relative culpability. Failure to acknowledge such culpability differences exacerbates the drug guidelines' excessive reliance on quantity. Therefore, the PAG urges the Commission to pass this amendment with three minor changes: (1) Delete the paragraph beginning "However, a reduction . . ." in proposed Application Note 3(A) and insert the language from Application Note 4; (2) delete the last sentence of proposed Application Note 3(B) beginning "As with any other factual issue . . ."; and (3) insert the following sentence at the beginning of proposed Application Note 3(C): "The scope of relevant conduct on which an adjustment may be based is not limited to the relevant conduct that is included in the defendant's base offense level."

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Mr. Bascuas stated that the proposed amendments correctly recognize that a mitigating role adjustment should be available to a defendant even though he or she is only charged with importing or distributing the amount of drugs personally handled by that individual. Mr. Bascuas believes that district courts should determine each individual's culpability based on a totality of circumstances, rather than by applying bright-line axioms across a class of

superficially similar cases. He suggests that the Commission design the mitigating role adjustment to resemble the factors that courts should consider in deciding whether a defendant is entitled to an aggravating role adjustment. Furthermore, Mr. Bascuas stated that the Commission should add an additional Application Note making clear that this holds true for all criminal defendants.

In addition to stating that the Commission should make clear that the rationale in proposed Application Note 2(C) also applies to non-drug defendants, Mr. Bascuas suggested language for an additional Application Note.

Additional Comment

U.S. Department of Justice, Criminal Division
James K. Robinson, Assistant Attorney General
Laird C. Kirkpatrick, Commissioner Ex-Officio

The DOJ wrote separately to state that it agrees with the priorities established by the Commission for this amendment cycle and appreciates having had the opportunity to discuss the development of these priorities with the Commission earlier in the amendment cycle.

Chief among the DOJ's concerns are the economic crime amendments; nuclear, biological and chemical weapons; money laundering; the safety valve; statutory directives and other crime legislation; and circuit conflicts. Regarding the economic crime amendments, DOJ believes it is important for the Commission to develop a new loss table that provides increased penalties for offenders at most levels, particularly at the middle and upper ranges. Additionally, DOJ mentions that while the Commission has recently addressed specific types of economic offenses, there are many other offenses that have been largely untouched by the proposed amendments, including health care fraud and procurement fraud. Moreover, the fact that the Internet has created vast opportunities for large-scale fraud deserves the attention of the Commission.

The DOJ discussed the proposal it submitted concerning nuclear, biological and chemical weapons and suggested that the Commission should also raise penalties for importation and exportation offenses involving such weapons.

Money laundering is another area where the DOJ urges the Commission to act expeditiously, urging the Commission to complete its work on this project during this amendment cycle.

Considering ongoing Commission priorities, the DOJ believes that the Commission should further refine criminal history so that those with particularly serious criminal backgrounds are appropriately distinguished from those with less serious backgrounds who may merit more lenient treatment. The DOJ also suggests that the Commission further refine the guideline for acceptance of responsibility. The guideline should contain an incentive for early guilty pleas that permit the government to avoid preparing for trial and the court to allocate its resources efficiently.

The DOJ also urges the Commission to generally take into account a provision of the Sentencing Reform Act of 1984 that provides that one purpose of the Commission is to establish sentencing policies and practices for the Federal criminal justice system, that, among other things, "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process" 28 U.S.C. § 991(b)(1)(C). Additionally, the Commission can also gain knowledge from the experience of state sentencing commissions regarding social science research and should seek information from such commissions more often.

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