

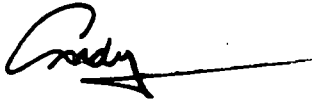
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MEMORANDUM

TO: Phyllis Newton
Staff Director

FROM: Andy Purdy 

RE: Initial Report of the Working Group on Drugs and Role in the Offense

DATE: November 6, 1991

Attached is the initial report of the Working Group on Drugs and Role in the Offense.

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Initial Report to the Commission:
Working Group on Drugs and Role in the Offense

November 6, 1991

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SECTION ONE - STATEMENT OF THE PROBLEM

I. OVERVIEW AND SUMMARY OF FINDINGS

The Drug Working Group has explored the relationship between the drug guidelines and role in the offense provisions, primarily mitigating role reductions (§3B1.2). The principal focus of the group has been to study sentencing practices in this area to determine (1) whether there are definitional or other problems in the guideline language that can be improved by studying current sentencing of lesser role defendants; and (2) whether the importance of drug quantity in determining an offender's base offense level results in inappropriate punishment of "less culpable" offenders.

A. Problems With Definitions

Our preliminary report indicates that the guideline definitions of "minimal" and "minor" roles lack precision and clarity, a situation that contributes to inconsistent application of the mitigating role provisions of §3B1.2. The Commission should consider the Working Group's ongoing monitoring and case review work to determine whether, and in what ways, the definitions may be clarified to increase the likelihood that similarly culpable drug defendants receive similar mitigating role adjustments. In particular, the Commission may want to complete a profile of the "heartland" of courier cases, make a policy decision on how couriers should generally be treated, and determine in what circumstances they should be punished differently from that heartland sanction.

B. Quantity Based Offense Level

At this preliminary stage the data do not lead to any definitive conclusions whether the drug quantity driven system results in inappropriate punishment for certain "less culpable" drug offenders. One issue that has surfaced is whether the present mitigating role adjustments serve to reduce appropriately the "least culpable" defendant's offense level.

As detailed below, the Working Group intends to review further mandatory minimum and non-mandatory minimum case files. The non-mandatory minimum cases will include §2D1.8 cases, drug cases involving pleas to offenses with lower statutory maximums, and departure cases. The Working Group will analyze these cases with attention focused on relevant conduct determinations, mitigating role adjustments, and sentences imposed. These results will be compared with the completed results of the mandatory minimum study case review and the results of further planned case file review. The Working Group also intends to recommend further research strategies that will help inform the Commission's decision on the appropriateness of the current sentencing system for "less culpable" drug defendants.

C. Summary of Findings

The Working Group reviewed both monitoring data drawn from the recent mandatory minimum study, and 450 case files from the populations discussed above. The data indicate general trends in the application of mitigating role adjustments to certain types of offenders and offense characteristics. The data also point to general levels of punishment for "lesser" drug offenders which the Commission may wish to review to determine whether these offenders are inappropriately punished.

1. Mandatory Minimum Study

While data from the mandatory minimum sample provide some insight into the interaction of "actual" role and Chapter Three role adjustments, the conclusions to be reached are limited. First, couriers are much less likely to be United States citizens and are much more likely to be involved in single event drug activity. Second, both Class I offenders ("lesser role" offenders)¹ and Class II offenders ("couriers") are much less likely to have a weapon present during the course of offense conduct. Third, both Class I and Class II offenders are more likely than Class III offenders ("street-level and above" offenders) to receive zero criminal history points. The data do not explain why some defendants who meet the above three criteria receive mitigating role adjustments, and some do not. In order to explore this and other questions, additional case review and analyses is needed.

2. Case File Review

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fact bargaining*

The case file review shows considerable consistency in application of mitigating role adjustments, as well as some inconsistent application -- particularly with respect to the extent to which role reductions are given.

Certain factors appear to correlate well with application of a reduction: limited scope of knowledge of the conspiracy, absence of personal possession of a weapon, no negotiation of the terms of a transaction, limited scope of participation, and Criminal History Category I.

However, these factors do not always correlate perfectly with application of a

¹ Definitions for Class I, Class II, and Class III offenders are provided in Section Two of this Report.

reduction. For example, limited scope of participation resulted in role reductions only half of the time. The same result occurred with respect to possession of a weapon by a coconspirator and possession of a weapon on the premises.

An important finding was that there was no consistent correlation between two-level and four-level mitigating role reductions and specific offender roles and factors. Another interesting finding was that sentences did not always correlate well with the extent of role reductions: sentences for "minor" role offenders occasionally averaged higher than sentences for no-adjustment offenders, and lower than sentences for "minimal" role offenders.

The Working Group also found that prosecutors charged some offenders with statutes carrying lower statutory maximums, perhaps as a way of attaining what they considered a more "appropriate" sentence. Significant numbers of "lesser" role offenders benefit from conviction under statutes with lower statutory maximums, while others do not. Further, some of these "lower maximum" offenders receive additional mitigating role adjustments.

D. Possible Additional Working Group Study

Listed below is a summary of the monitoring data review and case file review that the Working Group intends to carry out before the Final Report.

Additional Review of Mandatory Minimum Study Data: the Working Group intends to continue review of this data to profile more completely specific roles, correlate "factor groups" with offender roles and reductions, and analyze sentencing issues relative to appropriate punishments.

Further Case File Review of Offender Role and Involvement Factors: the Working Group intends to conduct additional case file review to identify the frequency with which offender roles and involvement factors occur in the general drug offender population. This additional review will improve the statistical significance of the review already completed; will give a more complete profile of relevant offenders, including offenders who receive mitigating role adjustments and those who do not; will help to identify the magnitude of sentencing problems with respect to similarly situated "lesser" role defendants; and will illuminate relevant conduct determinations with respect to quantity of drugs with which the defendant was personally involved, quantity attributable to the entire conspiracy and quantity for which the defendant was held accountable.

Particular attention will be given to how specific factors correlate with conduct commonly identified as "more serious." For example, we will examine the correlation between form of compensation and such activities as renting a drug establishment and "courying" drugs. We will also examine the correlation between mode of transportation and "courying" drugs. Finally, we will perform a "factor group" analysis; that is, grouping such factors as acceptance of responsibility, Criminal History Category I, single act of participation, and no weapon involved to determine the overall treatment of defendants possessing all four factors. The Working Group intends to make the raw data computer-accessible for improved analysis.

District-Based Inconsistencies: the Working Group intends to investigate the extent to which role adjustments may be attributed to the practices of particular districts.

II. PROBLEMS WITH DEFINITIONS

Anecdotal and empirical evidence suggest that the mitigating role adjustments in drug offenses are not uniformly applied.² Comments from the field suggest that this inconsistent application occurs for a number of reasons:

A. **Inadequate Definition of Minor, Minimal and Intermediate Role Adjustments under §3B1.2**

Close examination of §3B1.2 reveals how unclear definitions³ may contribute to confusion or inconsistent applications. The definitions of minimal and minor role are either nonexistent or unclear, resulting in inconsistent application of these adjustments.⁴ While

² See, e.g., memorandum from Jim Beck to Peter Hoffman (November 1, 1989) (review of cases in which role adjustments are applied).

³ A significant majority of eighteen Probation Officers from 17 different districts (hereinafter referred to as Probation Officer Working Group) reported that there were difficulties in applying §3B1.2 adjustments in a "few" cases. The remainder reported that there were difficulties in "some" cases. An even greater majority reported that these problems arose in particular types of cases, specifically, multi-defendant drug cases. Two of the group noted that the application difficulties arose when the facts were difficult to ascertain. However, the group was split about evenly on the question of whether the terms "minor" and "minimal" were adequately defined. A majority believed that the present definitions were adequate, a smaller number disagreed believing that the present definitions were inadequate, and two responded that they didn't know. *Source: Summary of Comments of Probation Officer Working Group.*

A probation officer from Brooklyn, New York, stated that the present definitions are adequate and that there are application problems in only a few cases. *Source, Andrea Wilson's Memo re: Probation Officers' Input.* However, in Brooklyn drug couriers are routinely given "minimal" role reductions regardless of drug quantity. See Note 3, *infra*.

⁴ The Baltimore district judges stated that more specific definitions will limit their discretion in assigning specific mitigating role reductions. One judge stated that it is impossible to describe every situation: "No matter how much thought is given to the problem, it cannot be solved by proliferating the specifics."

In general, Baltimore probation officers believe that "minimal" is too narrowly defined and "minor" too broadly defined.

Assistant United States Attorneys in Detroit believe that the examples presently provided are insufficient and confusing. Some would prefer additional examples. They also pointed out that many drug conspiracies are not rigid, organized pyramids analogous to businesses. An individual may be a manager/supervisor in one transaction but not in others. In addition, there should be consideration of those who provide enforcement and control for the enterprise, by threat of violence, but could not be considered a manager or supervisor. *Source: Andrea Wilson's Memo re: Probation Officers' Input.*

Detroit Probation Officers noted that all proposals depend on getting a clearer picture of the overall
(continued...)

this lack of definition gives sentencing judges substantial discretion in individual cases, it also increases the possibility that similar defendants will be treated differently.⁵

The §3B1.2(b) adjustment for minor role lacks examples⁶ and is defined at Application Note 3 as simply "less culpable than most other participants, but whose role could not be described as minimal."⁷ The only guidance for the minimal role adjustment.

⁴(...continued)

hierarchy within drug conspiracies, which is something that should not be taken for granted. They also believe that if a defendant played different roles on different days, he or she should be responsible for the role that carries the highest offense level. The officers did not discuss the question of "full-time" versus "part-time" conspirators within each category. *Source: David Debold's August 14, 1991 Memo, "Drug Working Group Input from Probation Officers in Detroit (August 1991)."*

⁵ Review of the case law will be an imperfect method of determining whether this inconsistent application exists and whether it has resulted in disparity. Questions concerning application of the §3B1.2 adjustments will arise almost exclusively on appeals from defendants who have unsuccessfully argued for such an adjustment in the district court. The government will appeal few cases in which it believes a defendant inappropriately received a §3B1.2 adjustment. Consequently, the case law will reveal only part of the picture.

Some Detroit Assistant Federal Public Defenders report that none of their clients have ever received a mitigating role adjustment. *Source: Andrea Wilson's Memo re: Probation Officers' Input.*

Probation Officers in Detroit report that judges have been stingy with minimal role reductions, which probably reflects the narrow definition. People who fit the "minimal" category are not even prosecuted. These PO's would like to see a broader definition of "minimal role". *Source, David Debold's August 14, 1991 Memo, "Drug Working Group Input from Probation Officers in Detroit (August, 1991)."*

Two Assistant Federal Defenders from St. Louis report that they have never seen a presentence investigation report in the Eastern District of Missouri in which the Probation Officer has applied a §3B1.2 adjustment. *Source: Experience of Assistant Federal Public Defenders James Delworth and Michael Dwyer of the Southern District of Illinois and Eastern District of Missouri.*

A review of some presentence investigation reports from the Eastern District of New York revealed that courts are granting a four level, role in the offense reduction to defendants arrested at John F. Kennedy airport with their intestines full of balloons of heroin, sometimes with a total amount of more than 250 grams. These defendants were believed by the probation officers to be one-time couriers. In St. Louis, a one-time courier would not receive a §3B1.2 reduction, on the ground that one cannot be a minor or minimal participant vis-a-vis oneself. *Source: Experience of Assistant Federal Public Defender Michael Dwyer, Southern District of Illinois and Eastern District of Missouri.*

⁶ Several of the 18 Probation Officers in the Probation Officers Working Group requested additional examples to illustrate the meaning of "minor" and "minimal." *Source: Summary of Comments of Probation Officer Working Group.*

⁷ In determining whether defendants should receive a downward adjustment for their role in the offense, courts have looked beyond a particular defendant's behavior or specific function to consider additional factors generally labeled "culpability," such as: (1) the significance of the defendant or his conduct to the success of the criminal venture; and (2) the defendant's knowledge of the criminal venture's scope or purpose. See, e.g., United
(continued...)

§3B1.2(a), n.2, is that it should "be used infrequently"⁸ and is intended

for example, for someone who played no other role in a very large drug smuggling operation than to off-load part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.

While this note seems to be limited in the case of a courier to a single transaction involving a small amount of drugs, the guideline does not define what constitutes a "small amount of drugs."⁹ In practice, courts do not uniformly limit their use of minimal role adjustments to such narrow circumstances.

Furthermore, the last sentence of §3B1.2 provides a 3-level decrease for cases falling between §3B1.2(a) and (b), but the guideline provides no guidance as to the circumstance(s) which warrant this intermediate adjustment.

Finally, confusion surrounds whether the guidelines permit an offender, who would otherwise qualify for a mitigating role adjustment but for his supervisory role of truly minor

⁷(...continued)

States v. Williams, 890 F.2d 102, 104 (8th Cir. 1989); United States v. Daughtrey, 874 F.2d 213, 216 (4th Cir. 1989).

⁸ Of the eighteen probation officers in the Probation Officer Working Group, a majority said that once it was determined that §3B1.2 applied, it was difficult to determine the extent of the adjustment in a "few" cases. A significant number of the others said that this difficulty arose in "some" cases. *Source: Summary of Comments of Probation Officer Working Group.*

⁹ The Technical Assistance and Training staff has heard many concerns raised by probation officers regarding the current example of "a courier for a single smuggling transaction involving a small amount of drugs." The general opinion seems to be that the language addressing amount is duplicative, because there is already a system in place for measuring drug quantity, i.e., §2D1.1. In addition, many probation officers feel that the example automatically excludes most couriers because they generally don't carry "small amounts."

The Eighth Circuit has held that it is not clearly erroneous for a district court to deny a §3B1.2 adjustment "based solely on the significant amount of drugs." United States v. Garvey, 905 F.2d 1144, 1146 (8th Cir. 1990) (citing United States v. Walker, 885 F.2d 1353, 1354 (8th Cir. 1989) (150 pounds of marijuana); United States v. Gallegos, 868 F.2d 711, 713 (5th Cir. 1989) (100 grams of heroin); United States v. Rojas, 868 F.2d 1409, 1410 (5th Cir. 1989) (497 grams of cocaine)). Yet, in Garvey, the Eighth Circuit affirmed as not clearly erroneous the district court's two level, downward adjustment for a courier carrying 8,130 grams of hashish oil that the courier exchanged for \$37,000. See 905 F.2d at 1145, 1146.

or minimal participants, to receive a downward adjustment.¹⁰

B. Lack of Clarity Regarding what Constitutes Typical Conduct in an Offense not Warranting a Role Adjustment

The guideline is unclear as to what constitutes an "average participant" as used in the background Commentary to §3B1.2.¹¹ Again, this lack of definition may lead to inconsistent applications.

C. Lack of Clarity Regarding When a Mitigating Role Adjustment Is Warranted When the Offense of Conviction Is Significantly Less Serious than His Actual Conduct.

Empirical data suggest that dozens of offenders convicted of Unlawful Use of a Communication Facility (21 U.S.C. § 843(b)) and Simple Possession (21 U.S.C. § 844(a)), also receive mitigating role adjustments. Comments from the field¹² indicate confusion regarding the definition of what may be "ordinarily warranted" or what constitutes conduct "significantly more serious" than the offense of conviction. The concepts may require clarification in the Introductory Commentary, or more prominent placement in the

¹⁰ Probation officers from Baltimore mentioned this problem. They used the example of an off-loader hired to unload a large shipment and who, in turn, hires others to help him. The off-loader has no control or decision-making power, but he is still supervising the people he hired. Many feel the off-loader should still be able to get a mitigating role adjustment.

Assistant Federal Public Defenders in Tampa note that often defendants pass on orders from others, simply acting as a conduit for the information. This passing on of orders from above can be characterized as supervision or management. *Source: Andrea Wilson's Memo re: Probation Officers' Input.*

¹¹ Specifically, the background Commentary states that §3B1.2 "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."

¹² A review of the hotline calls concerning questions about role in the offense, reveals that one of the most frequently asked questions is whether defendants' minimal participation entitles them to a downward adjustment when they have pled to an offense less serious than the offense originally charged. *Source: Andrea Wilson's Memo "Notes on Hotline Calls Concerning Role in the Offense."*

application notes.

D. Uncertainty Whether Certain Generic Types of Offenders or Certain Offender Characteristics do Not Warrant Mitigating Adjustments.

Considerable discussion in the field has centered around whether, as a policy and guideline application matter, certain generic types of offenders -- such as couriers -- or certain offender characteristics -- such as multiple drug related transactions -- either generally warrant or generally disallow certain mitigating role adjustments. Certain categories of defendants -- typically, steerers, couriers, loaders, lookouts -- have been proposed as offenders whose offense level should be determined by methods other than by relying primarily on the calculation of drug quantity.¹³

The difficulties attendant in adequately defining these categories of offenders raise the issue of what criteria should be used to define less culpable drug offenders; e.g., amount of payment, purity of drug, number of times the defendant has committed the offense, level of sophistication of duties, or level of discretion given to defendant.¹⁴ In addition, if more

¹³ Detroit Probation Officers are most receptive to the idea of defining more categories of drug defendants (e.g., lookouts, enforcers, couriers, money-handlers, "significant others" of a more involved conspirator, "true" first offenders, users who sell to support their habit, people oblivious to the type or amount of drug involved, financiers) and offering bigger offense level reductions for certain of these categories. Enforcers would probably get an increase if anything. The PO's point out that knowledge of the full amount involved in the conspiracy is not as important as the amount that the defendant has a stake in. *Source: David Debold's August 14, 1991 Memo, "Drug Working Group Input from Probation Officers in Detroit (August, 1991)."*

A significant majority of the Probation Officer Working Group stated that there are identifiable categories of defendants for whom offense levels should be primarily determined on the basis of something other than drug quantity. Four of eighteen disagreed and would continue to rely primarily on drug quantity to determine offense level. One officer said that he did not know. *Source: Summary of Comments of Probation Officer Working Group.*

¹⁴ Assistant United States Attorneys in Detroit believe that drug purity should not be a factor used to determine role in the offense adjustments. They would look to a defendant's unexplained wealth as an indicator of participation and level of participation.

Assistant Federal Public Defenders in Detroit agree that drug purity is a poor indicator of role because
(continued...)

precise criteria are used to identify less culpable offenders the Commission may have to address the question of the nature or amount of evidence beyond the uncorroborated statement of the defendant required to establish the particular criterion.¹⁵ If, for example, the uncorroborated statement of the defendant is sufficient to establish the criteria, a courier will presumably receive a mitigating role adjustment in all cases. If, on the other hand, the defendant's uncorroborated statement is inadequate, the courier will rarely receive the adjustment.

E. Restrictive Analyses of Breadth of Relevant Conduct in Determining Less Culpable Defendants.

Some courts have restricted the breadth of relevant conduct to the offense of conviction, when determining the offense level of offenders who merit mitigating role

¹⁴(...continued)
minor and minimal defendants have no control over purity. They do not believe that purity is related to a defendant's proximity to the source of the drugs. *Source: Andrea Wilson's Memo re: Probation Officers' Input.*
Two of the PO's in the Probation Officer Working Group noted that drug purity is a poor indicator. *Source: Summary of Comments of Probation Officer Working Group.*

¹⁵ Fred Bennett, the Federal Public Defender in Baltimore, expressed his view that a defendant's uncorroborated testimony should be a sufficient basis for a mitigating role adjustment. "If the government can obtain a conviction on the uncorroborated testimony of an accomplice in a criminal case, surely the uncorroborated statement of a defendant should be sufficient to possibly award lesser offense levels."
Assistant Federal Public Defenders in Detroit echoed this position. In their district, aggravating role adjustments are given even when those who lead, organized, managed, or supervised are not charged or identified. Consequently, they argued that a defendant should be able to receive a mitigating role adjustment even when the others involved are not charged or identified. They believe a defendant's uncorroborated statement should suffice because it is difficult to obtain corroborating evidence. They distrust cooperating defendants' statements because of the high motivation to share the blame and minimize their own roles.
Assistant United States Attorneys in Detroit expressed skepticism about people who claim to have been involved on a single occasion. They believe that there should be a strong presumption that people were involved during the full scope of the conspiracy. *Source: Andrea Wilson's Memo re: Probation Officers' Input.*
Of the eighteen PO's in the Probation Officer Working Group, a significant majority would require more than a defendant's uncorroborated statement to determine a mitigating role adjustment. Most of the PO's in this group would require some corroboration from law enforcement agents, confidential informants, or cooperating defendants. One PO commented that there should not be a presumption in the defendant's favor. *Source: Summary of Comments of Probation Officer Working Group.*

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AUSA's in
Detroit -*

adjustments, while other courts have not. A related question has involved disparate court rulings on whether the offender's conduct should be judged relative to all similarly situated offenders,¹⁶ or relative only to those offenders in his or her conspiracy.

III. QUANTITY BASED OFFENSE LEVEL

A significant problem expressed by the field concerning mitigating role adjustments arises from the fact that offense levels in drug trafficking cases are tied to drug amounts, and that no matter how high that offense level is, a defendant who warrants a mitigating role adjustment can receive no more than a four-level downward adjustment, regardless of how "minimal" his involvement in criminal activity.¹⁷ A number of professionals involved

¹⁶ District judges in Baltimore are concerned about the Fourth Circuit's rule that role in the offense adjustments should be based on a "relevant universe" of similar cases rather than on the particular facts and circumstances of the defendant's actual behavior and relevant conduct. *Source: Andrea Wilson's Memo re: Probation Officers' Input.*

Probation Officers in Detroit were receptive to the idea of judges looking beyond a defendant's role vis-a-vis other members of his conspiracy and paying more attention to his role vis-a-vis the entire universe of drug defendants. They noted that such an approach is more difficult to administer, however. *Source: David Debold's August 14, 1991, Memo, "Drug Working Group Input from Probation Officers in Detroit (August, 1991)."*

¹⁷ Assistant United States Attorneys in Detroit believe that adjustments work well for cases in which there is no ongoing investigation and for which there is no proof of a larger organization. Even though a defendant's role may be hard to define in such a case, the relevant conduct is limited. Role is also hard to define in cases in which there is a long-term investigation with confidential informants and cooperating defendants. In these cases, relevant conduct swamps the minor role in the offense adjustment. These prosecutors support a narrowed definition of relevant conduct and believe that if "foreseeability" is defined realistically (i.e., more narrowly), the problem would disappear.

Assistant Federal Public Defenders in Tampa unanimously support limiting relevant conduct to that which the defendant actually knew about or limiting relevant conduct to the offense of conviction which they would contend is often the same thing. *Source: Andrea Wilson's Memo re: Probation Officers' Input.*

Some judges depart below the four levels for minimal role, notwithstanding the fact that the guidelines apparently have considered and established specific reductions for mitigating role adjustments.

A probation officer from Brooklyn, New York, stated that quantity is a poor determinant in a few cases, particularly for peripheral participants. He does not, however, believe that a change is needed because of the Second Circuit rule allowing departure to a more appropriate level for less-than-minimal participants. *Source: Andrea Wilson's Memo re: Probation Officers' Input.*

Probation Officers in Detroit do not favor an "institutionalized" departure approach. They believe it's
(continued...)

Is this a study of what is a what staff think guideline sentences shall be -

in the sentencing process believe that weight or quantity is a poor gauge of culpability for these lesser involved defendants and, accordingly, believe that these more "peripheral" players are over-punished by the guidelines, particularly where relevant conduct includes a large quantity of drugs and the offender has little direct connection to those drugs.¹⁸

Severity is decided by Congress + Comm - not PO's in Detroit etc.

¹⁷(...continued)

too hard to control the extent of departures, and that the role in the offense problem arises too often in drug cases to rely on this approach. Source: David Debold's August 14, 1991 Memo, "Drug Working Group Input from Probation Officers in Detroit (August, 1991)."

A majority of the PO's in the Probation Officer Working Group would add departure language for situations when a defendant's role is less than what is presently defined as "minimal." A number would not add such language. Two of the PO's who favored this addition would do so only if no other changes were made. Source: Summary of Comments of Probation Officer Working Group.

¹⁸ The Technical Assistance and Training staff is of the opinion that, in general, the perceived "overpunishment" of less culpable defendants in many drug cases is a major concern of probation officers in the field. Members of the training staff conducted three field tests of the organizational guidelines work sheets in August and September of 1991 in Washington, D.C., Chicago, and La Jolla, CA; these site tests were also used as an opportunity to discuss with probation officers issues of particular concern to the Commission in the 1992 amendment cycle. The probation officers at the La Jolla site discussed with Commission staff possible amendments relating to: Acceptance of Responsibility; alternatives, including a reduction for first offenders; Criminal History, including the creation of Categories I and VII and modification of the definitions in Career Offender; and role in the offense adjustments, especially relating to drug cases. The group was then asked to prioritize these possible amendments in order of importance to the field; the thirteen probation officers unanimously agreed that the amendment of greatest concern and importance was one that would address greater role reductions for "less culpable" defendants in drug cases. Although the officers at the other two test sites were not asked this specific question, the majority expressed great interest in such an amendment.

District Judges in Baltimore expressed concern that the guidelines do not permit wives, girlfriends, and first offenders to receive sufficient role in the offense adjustments relative to their culpability. The concept of "reasonably foreseeable quantities" was, to their minds, very broad. They recommended approval of a base offense level cap for less culpable offenders. They prefer a cap that is some percentage (such as two-thirds) of what the base offense level would otherwise be.

Fred Bennett, the Federal Defender in Baltimore, supports an offense level cap, either fixed or proportional to the base offense level otherwise applicable. He believes that role in the offense adjustment should focus on defendants' actual behavior rather than on whether they were essential or material to the criminal venture. If a defendant was easily replaceable, then he or she should receive a mitigating role adjustment.

Baltimore probation officers agree that drug quantity is not probative of culpability for lower people. One PO suggested limiting relevant conduct by determining a defendant's proprietary interest in the drugs. Others suggested a focus on the manner in which the defendant was compensated; a flat fee would indicate a lesser role even if the fee is relatively large. In contrast, people paid a commission, with either drugs or money, have a share in the outcome and can thus be presumed to have a greater role.

Assistant United States Attorneys in Detroit do not support an offense level cap. They comment that peripheral players whose role is less than minimal are probably not guilty. Source: Andrea Wilson's Memo re: Probation Officers' Input.

(continued...)

The Commission may wish to address, as a matter of policy, whether or not the final offense level for defendants qualifying for a mitigating role adjustment should be driven by the amount of drugs involved in the offense. The argument, simply put, is that there comes a point for "lower level" defendants where the amount of drugs attributable to the conspiracy becomes less relevant or irrelevant to their role, and the benefit of mitigating role adjustments becomes less significant. This is the case, for example, where an off-loader or crew member on a vessel importing marihuana plays essentially the same role whether the vessel is carrying 300 or 300,000 kilograms, but whose base offense level varies widely depending upon which of the two quantities applies. On the one hand, if the quantity is 300,000 kilograms, the defendant faces a base offense level of 40, and 292-365 months in jail. On the other hand, if the quantity is 300 kilograms, then the defendant's base offense level is 26 with a range of 63-78 months. For a defendant who stood nothing more or less to gain from working on a vessel that was carrying a larger rather than a smaller amount.

Do we know from DET what the one for the distribution?

¹⁸(...continued)

Probation Officers in Detroit believe that an absolute cap for certain lesser involved conspirators would generate disparity within that class of defendants. A small fish in a big conspiracy may deserve harsher punishment than a small fish in a small conspiracy. They liked the idea of not having to attribute a specific drug amount to each particular defendant and also like the idea of dealing with a percentage of the offense level, depending on the defendant's role/culpability. They would like to see each particular type of role assigned a certain percentage or number of offense levels reduced or increased. *Source, David Debold's August 14, 1991 memo, "Drug Working Group Input from Probation Officers in Detroit (August, 1991).*

A number of the PO's in the Probation Officer Working Group, found the mitigating role adjustments insufficient in some cases, a smaller number found them insufficient in many cases, and several, in a few cases. One PO found the §3B1.2 adjustments to be never insufficient and another found them insufficient in all or most cases. The group identified the problem cases as ones in which defendants are involved on a single occasion or are driven by family pressure or pressure from "significant others," or who by introducing a buyer to a seller become liable for a quantity far beyond their individual capacity.

A large majority would favor an offense level cap. Several would not, and two didn't know. Nearly half would add a new category for peripheral participants whose involvement does not even rise to the status of "minimal." Another half would not add such a category. Half of this group answered that they would not redefine "relevant conduct" for minor or minimal participants, but a number would do so. *Source: Summary of Comments of Probation Officer Working Group.*

the difference in jail time could be as much as 25 years. The mitigating role adjustment for the defendant facing 30 years in prison would be small consolation given the magnitude of the ultimate sentence.¹⁹

SECTION TWO -- MONITORING EMPIRICAL DATA

IV. METHODOLOGY

Monitoring data from two data files were studied in order to gain some insight into application of Chapter Three role-in-the-offense adjustments to drug offenders. The two data files used included an updated 1990 fiscal year file, and the mandatory minimum study sample file.²⁰ The mandatory minimum study sample file was chosen, in particular, because it provides our only source of information regarding a defendant's "actual" role in a drug offense. A defendant's "actual" role is measured by assessing the defendant's role within the entire scope of the drug organization or activity in which he/she was involved. The updated 1990 fiscal year file includes role-in-the-offense information that is not included in the released version of the file. Sentencing and guideline information was available in most of the thirty thousand cases sentenced and identified for fiscal year 1990. However, only those case files that included a "statement of reasons" or "sentencing transcript" that either corroborated or re-calculated the findings in the "pre-sentence report" were included in the

¹⁹ At a level 26 an adjustment for minimal role would bring the guideline range from 63-78 months down to 41-51 months. At a level 40 the same adjustment would bring the range from 292-365 months down to 188-235 months.

²⁰ Fiscal year 1990 began October 1, 1989 and ended September 30, 1990.

analysis that follows. The population was further limited to drug cases involving application of Chapter Two drug guidelines.

The mandatory minimum data file was created from a 12.5 percent random sample of cases sentenced during fiscal year 1990. All cases that involved either a mandatory minimum conviction or behavior believed to comprise elements of a mandatory minimum statute were included in the sample. From this 12.5 percent sample, cases that involved drugs or robberies were selected for further screening. Cases in which mandatory minimum statutes were not triggered, because either drug quantities were not large enough, or firearms were not used in the case of robberies, were excluded from the sample. Relative to the population of all drug offenders, the mandatory minimum sample probably over-represents cases with large drug quantities, and cases in which drug offenders played "more serious" roles. Conversely, minimal and minor defendants are probably under-represented.

Table 1 in Appendix B illustrates the application of Chapter Three role-in-the-offense adjustments for defendants sentenced during the fiscal year and found in either the mandatory minimum sample file or the updated fiscal year file.

Of the defendants from the fiscal year file, the majority received no role adjustment: 16.8 percent received a mitigating role adjustment; 7.3 percent received an aggravating role adjustment; and 76 percent received no adjustment. Likewise, the majority of defendants from the mandatory minimum sample received no adjustment: 13.5 percent received mitigating role adjustments; 16.2 percent received aggravating role adjustments; and 70 percent received no adjustment at all.

As the data indicate, defendants from the mandatory minimum sample were more

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likely to receive aggravating role adjustments than defendants from the 1990 fiscal year file. This is not surprising since the mandatory minimum sample includes defendants more likely to be characterized as "serious drug offenders" deserving of aggravating role adjustments.

Examination of the mandatory minimum sample indicates that defendants in Class I ("lesser role" defendants) were more likely than defendants in Class III ("street-level and above" defendants) to receive mitigating role adjustments. Tables 2 through 7 in Appendix B more fully describe the defendants in these classes: **Class I** defendants include such roles as spouse/mate, enabler, off-loader, and go-between; **Class II** Defendants include both "knowing" and "unknowing" couriers²¹; **Class III** Defendants include street-level dealers, mid-level dealers, distributors, importers, exporters, manufacturers, and financiers. Generally, the Working Group agreed that the offender roles included in Class I were "less serious" than those included in Class III. The tables in Appendix B provide cross-tabulations of these three classes of offender roles by variables that distinguish them.

V. FINDINGS

A. Sex

Approximately 63 percent of the Class I defendants were male; 37 percent were female. Males (75%) were more likely to receive "minimal" mitigating role adjustments than females (25%). Females (55%) were slightly more likely than males (45%) to receive the

²¹ "Unknowing" couriers are characterized as having limited understanding or knowledge of the drug organization in which they participated. "Knowing" couriers, on the other hand, have relatively more knowledge of the structure or hierarchy of the drug organization in which they participated.

"minor" mitigating role adjustment.

Of the Class II defendants identified (hereinafter "couriers"), 79 percent were male and 21 percent were female. Perhaps because of the sheer number differential, males were approximately 60 percent more likely than females to be given "minor" or "minimal" mitigating role adjustments.

Among Class III defendants, over 90 percent were male. See Table 2. Appendix B.

B. Race

40 | 33 | 26

Approximately 40 percent of Class I defendants were white, 33 percent were hispanic, and 26 percent were black. White Class I defendants (75%) were most likely to receive "minimal" mitigating role adjustments, and black Class I defendants (73%) were most likely to receive "minor" mitigating role adjustments.

Of the couriers identified, over 80 percent were minorities: 47 percent were hispanic and 34 percent were black. Black couriers (68%) were more likely to receive "minimal" mitigating role adjustments than hispanic couriers (16%), and hispanic couriers received "minor" mitigating role adjustments most often (hispanic = 58%; black = 23%; white = 19%). See Table 2 in Appendix B. *Control discharge by, OK, etc - otherwise negligent*

Among Class III defendants, hispanics (17%) were less likely than either white defendants (44%) or black defendants (36%) to receive a four-level or three-level mitigating role adjustment. Conversely, hispanic defendants (21%) were also less likely to receive an aggravating role adjustment. White defendants (44%) received the aggravating role adjustments most often. Not surprisingly, Class III defendants (8%) received mitigating role

adjustments less frequently than Class I defendants (37%) and Class II defendants (34%). See Table 3 in Appendix B.

C. Citizenship

The majority of Class I defendants (69%) were United States citizens. Citizenship, however, made virtually no difference in terms of who in Class I received "minimal" role adjustments and who did not. Aliens in this class received the adjustment just as often as United States citizens.

Unlike Class I defendants, couriers were predominantly aliens. This is not surprising since the primary function of couriers is the transportation of drugs, often across country borders. Those couriers who were aliens (74%) were much more likely than United States citizens (26%) to receive the "minimal" role adjustment. Couriers from the United States (75%) received the "minor" mitigating role adjustment most often.

Over 70 percent of Class III defendants were United States citizens. While United States citizens (75%) were much more likely to receive the "minor" role adjustment in this class, both United States citizens and aliens received the "minimal" role adjustment in equal proportions. See Table 4 in Appendix B.

D. Use of a Weapon

In cases involving Class I defendants, firearms were used only 20 percent of the time. Courier cases involved the use of a weapon even less frequently, only 10 percent of the time. While weapons were still absent for the majority of Class III scenarios (64%), they were

obviously used more often in this class than in Class I or Class II.

Defendants in all three classes who received either "minor" or "minimal" mitigating role adjustments did not possess, use or fire a weapon during the course of the offense conduct. What distinguishes defendants receiving two-level reductions from those receiving four-level reductions is that a weapon was found on the premises or in the possession of a co-defendant in close to 25 percent of the "minor role" cases. See Tables 5-A, 5-B, and 5-C in Appendix B.

E. Scope of Participation

While the scope of participation for Class I offenders (40%) and Class III offenders (61%) was most often characterized as "ongoing", couriers (79%) most often participated in just one single act. The difference in scope of participation manifested itself in the frequency with which mitigating role reductions were given to these two groups -- single act couriers (28%) received mitigating role adjustments much more often than Class I (13%) or Class III (5%) "ongoing" offenders. See Table 6 in Appendix B.

F. Criminal History

As Tables 7-A, 7-B, and 7-C illustrate, the majority of Class I and Class II defendants (70%) received zero criminal history points. Class III defendants (49%), on the other hand, had zero criminal history points in less than half the cases. Additionally, defendants from all three classes who had zero criminal history points (88%) received "minimal" mitigating role adjustments most often. The correlation between criminal history points and mitigating

role reductions becomes less distinct, however, with respect to "minor" mitigating role reductions. Here, defendants with a wide range of criminal history points, from zero to "13 and above", received the reduction.

G. Sentencing Data

The 1990 fiscal year data file was also used to complement the information from the mandatory minimum study. Final offense level, guideline range, and district information were cross-tabulated with the Chapter Three role adjustments in order to further assess the application of the adjustment.

As Table 8 in Appendix B illustrates, defendants who received the "minimal" mitigating role adjustment are most likely to have a final offense level of either 22 (11.8%), 24 (10.2%), or 32 (11%). Table 9 in Appendix B provides information similar to that contained in Table 8, except that Table 9 correlates the relationship between Chapter Three role adjustments and guideline range.

H. Districts

Table 10 in Appendix B provides the distribution of Chapter Three role adjustments for each judicial district. As the table indicates, variations exist from district to district in terms of application of the mitigating role adjustment. These variations do not seem to be that large, with the exception of a few districts: the Eastern District of New York accounts for 40 percent of the nation's minimal role reductions; the Western District of Texas accounts for 7.8 percent of the nation's minor role reductions; and, the District of Arizona

*Bump Down
Airport
Case*

accounts for 7.8 percent of the nation's minimal role reductions.

SECTION THREE -- CASE FILE REVIEW

VI. OBJECTIVES

In studying the relationship between the drug-offense guidelines and the role-in-the-offense guidelines, the Working Group focused on two issues: (1) identification of offender and offense characteristics that resulted in application of a §3B1.2 mitigating role reduction, and (2) whether less culpable offenders receive inappropriately severe punishment.

To identify these characteristics and to determine the appropriateness of the punishment, the Working Group reviewed 450 case files of offenders from various offense populations with the following objectives: (1) profile the various roles and factors that typically result in mitigating role adjustments; (2) profile offenders who do not typically receive such reductions, but might otherwise merit some adjustment for a mitigating role played in a drug offense; (3) identify the various subjective factors that might be useful in classifying a defendant as a mitigating role offender; (4) determine whether, to what extent, and (if so) why inconsistency occurs in application of the role guidelines to drug cases; and (5) quantify the levels of punishment received, to provide a basis for the Commission to determine the appropriateness of the punishment of certain drug offenders occurs.

*By whose definition
research can't tell you
that - what is standard - !!!*

VII. METHODOLOGY

A. Developing a Standardized Coding Sheet and Coding Manual

The Working Group's examination of case files followed the general approach taken by the recent mandatory minimum study. A coding sheet (see Appendix C) was developed using the criteria and offense characteristics (e.g., such as scope of participation, particular roles in the offense) identified by the mandatory minimum study as having some relevance to the sentences received by drug offenders.

Additional relevant characteristics were identified following a review of case law. The review uncovered additional offense factors and specific offender roles commonly considered by the courts in determining the culpability of an offender, and the sentence to be imposed.

The resulting comprehensive list of "offender roles" included significant others (girlfriends, spouses, or close relatives of more involved offenders), gopher/workers (persons who perform limited tasks for more involved offenders, and who have limited contact with drugs or decision-making in the conspiracy), off-loaders/loaders (persons who physically load drugs onto vehicles or into storage), crewmembers of transport vehicles, lookouts (persons who provide early warning security function at site of deals), storer/enablers (persons who provide storage facility or other limited assistance, usually only as a favor to a relative or friend), mule/couriers (persons who transport drugs), go-between/broker/steerers (persons who arrange for two parties to conduct a drug transaction), renters for profit (persons who provide structures or equipment for some fee), bodyguard/strongman/debt collector (persons who provide security), professional expertise (persons who provide attorney,

These are not mutually exclusive of role -

Shad's problem - sig other can be major organizer;

accounting, or similar services to conspirators), pilots or ship captains, financiers of front money, growers/manufacturers of drugs, street dealers (persons who sell to users in small quantities), mid-level dealers (persons who sell in large quantities to other dealers), and high-level dealers (key importers, or leaders of drug organizations).

"Offender role" refers to the most serious ascertainable role of the offender. For example, an offender who is the girlfriend of a significant dealer, and who was known to sell drugs herself to users, as well as run errands for the large dealer, would have an "offender role" of a street dealer. The same girlfriend who ran errands, but did not sell drugs on the street would simply be considered a worker/gopher. A girlfriend who took no role in promoting or extending the activities of her dealer boyfriend, but who countenanced the conspiracy and, for example, took only an occasional phone call on his behalf, would be considered a significant other. A list of offender roles, and relevant definitions, is a part of the coding manual (see Appendix C).

A comprehensive list of involvement factors was also developed. "**Involvement Factor**" refers to various characteristics of an offender and the offense that the Working Group has identified (usually as the result of field input) as aggravating or mitigating, and which factors are relatively frequently used by courts to justify or deny mitigating role adjustments. These factors are identified and defined in the coding manual, and include amount and type of compensation, defendant's ownership of drugs, defendant's ownership of an instrumentality (car, house, suitcase) involved in the transaction, the frequency of participation in the conspiracy or offense, the scope of knowledge of the offense and conspiracy, the level of decision-making authority, including whether the offender negotiated

the terms of any transaction, the presence of a weapon, and the quantity and type of drugs involved. A list of involvement factors, and relevant definitions, is a part of the coding manual (see Appendix C).

In addition, relevant sentencing data, including length of imprisonment and criminal history category, were reviewed to provide the basis for the Working Group's initial study of the appropriateness of the punishment.

These offender roles and involvement factors were believed to represent those characteristics that alone or in combination might be considered by courts, probation officers, or prosecutors, as defining less culpable offenders. Further, varying considerations and uses of such roles or factors by courts and probation officers provided the basis for the Working Group's initial study.

A coding manual (see Appendix C) was designed to standardize the approach of coders to collecting the data sought on the coding sheet. Following three test runs by coders and Working Group members on approximately 80 cases, the coding sheet was revised to its present form. When reviewing the 450 case files, a separate coding sheet was completed for each case file by a coder, with the coder identifying offender role, the pertinent involvement factors, and court and probation officer comments regarding role. In addition, monitoring data, particularly sentencing data, available from existing monitoring files, were generated for each case, and attached to that case file's coding sheet.

B. Populations

The Working Group reviewed case files of defendants identified from four primary

populations: (1) cases drawn from the recently completed mandatory minimum study; (2) departure cases where Monitoring identified "role in the offense" as one basis for departure; (3) cases where the defendant was involved in drug trafficking or a drug conspiracy, but was convicted under a statute with a statutory maximum of five years or less; and (4) cases sentenced under §2D1.8 (Renting a Drug Establishment).²²

1. Mandatory Minimum Study Cases

The Working Group reviewed 219 case files pulled from the mandatory minimum study.²³ These cases were identified by specific offender role, and then grouped with lesser role²⁴ or middle role²⁵ offenders, as detailed above. All lesser role and middle role cases were reviewed, where the role category included relatively few offenders, whether or not the sentencing court applied a mitigating role adjustment. Where a lesser role or middle role category included large numbers of offenders, the Working Group reviewed case files for all offenders receiving mitigating role adjustments, and a sample of those not receiving a reduction. In addition, the Working Group reviewed all lesser role offenders receiving

²² Table C-1 in Appendix C summarizes the numbers of case files identified by Monitoring, and the number of case files reviewed to date in each population.

²³ Table C-2 summarizes the breakdown of these cases by role and by mitigating role adjustment received.

²⁴ The term "lesser role offenders," as used in this report, includes offenders such as significant others, workers, off-loaders, lookouts, storer/enablers, money-runners, and mule/couriers, broker/go-between/steerers. The term "lesser role" is not intended to imply that any of the roles are not serious, that any particular conduct is less than serious, or that a mitigating role adjustment should be given to such offenders.

²⁵ The term "middle role offenders" includes crewmembers, renters for profit, and bodyguard/strongmen. The working group originally believed that crewmembers would generally be treated by courts as lesser role offenders. However, case file review of the few crewmember cases shows none of these offenders receiving a mitigating role adjustment.

aggravating role adjustments, and all other offenders²⁶ receiving mitigating role adjustments. The Working Group theorized that these combinations of offenders would provide particularly rich information regarding role adjustments.

2. Drug Role Departure Cases

In addition to reviewing mandatory minimum study cases, the Working Group reviewed all 65 fiscal year 1990 cases that monitoring had identified as involving a departure on the basis of role in the offense. Of these 65 cases, 40 cases were suitable for further study for this report²⁷ -- half of these 40 cases received mitigating role adjustments.²⁸

The Working Group sought to investigate the possibility that in certain instances some drug offenders may receive departures where similar offenders do not. Departures traditionally vary in both the conduct considered sufficient to justify a departure, and the extent of the departure, even where similar conduct justifies the departure.

Relevant information provided by these cases may be limited, since the majority of cases involved multiple justifications, particularly substantial assistance. Accordingly, the true impact of role on the extent of the departure probably cannot be clearly determined.

²⁶ "Other offenders" includes pilots/captains, financiers, grower/manufacturers, street dealers, mid-level dealers, and high-level dealer/importers. As in the case of Class I -- lesser role offenders, no judgments are implied with respect to whether such offenders' conduct was in fact serious, or whether such offenders merit any mitigating role reduction.

²⁷ The cases not studied further included upward departures on the basis of aggravating role, or were otherwise not clearly indicated as involving lesser role offenders.

²⁸ Half of these cases received minor role reductions, half minimal reductions. Under §3B1.2, one might expect the court to give a minimal role reduction before departing on the grounds that the Commission had inadequately considered a particular offender's limited role in an offense. Indeed, it has been argued that the Commission considered no role reduction appropriate beyond four offense levels. This may require clarification by the Commission if a contrary result was intended (see section on options).

3. "Lower Maximum" Cases

The Working Group reviewed all case files for single count offenders receiving mitigating role adjustments who were convicted of offenses with statutory maximums lower than those provided by the drug distribution statutes. These case files included 2 cases convicted of Misprision of a Felony (18 U.S.C. § 4), 9 cases for Conspiracy (18 U.S.C. § 371), 48 cases for Telephone Count (21 U.S.C. § 843(b)), and 15 cases for Simple Possession (21 U.S.C. § 844(a)). In addition, the Working Group began to review a sample of the cases involving these statutes, where the offender did not receive a mitigating role adjustment. All of these lower statutory maximum cases were reviewed to determine a profile of offenders prosecutors might consider worthy of reduced sentences in light of mitigating offender roles or involvement factors.

In addition, the Working Group sought to investigate whether similar offenders, particularly lesser role or less culpable offenders, were treated differently under the guideline, possibly as a result of varying statutory maximums, or guideline treatment (certain guidelines for lesser offenses have a uniform, less punitive base offense level, and do not refer to the §2D1.1 quantity table). In addition, the Working Group also sought to determine the extent to which lower maximums were applied in combination with mitigating role adjustments. The current guideline commentary provides

where the defendant has received mitigation by virtue of being convicted of an offense significantly less serious than his actual criminal conduct, e.g., the defendant is convicted of unlawful possession of a controlled substance but his actual conduct involved drug trafficking, a further reduction in the offense level under §3B1.2 ... ordinarily is not warranted

U.S.S.G. Ch.3, Pt.B, intro. comment.

4. Renting a Drug Establishment Cases

Finally, the Working Group reviewed case files for offenders sentenced under §2D1.8 (Renting a Drug Establishment), including all 22 cases involving mitigating role adjustments, and a 20 percent sample of those not receiving the adjustment (21 case files reviewed of 105 total files). Approximately 40 percent of the offenders were convicted of multiple counts, including, somewhat commonly, drug distribution and conspiracy counts.

C. **Cautionary Notes**

A few cases may have been included in more than one of the populations studied (e.g., departure offenders and mandatory minimum study offenders), as a result of overlapping data bases. In addition, the relatively small size of some populations requires that the resulting findings or trends not be looked on as statistically significant. The Working Group intends to do considerable additional case file review and analysis that should strengthen the reliability of findings resulting from the case file review.

Finally, the reliability of a case file review is directly tied to the breadth and accuracy of information provided in the SOR, PSI, and other court documents. Some of the factors considered relevant by some courts when sentencing drug offenders, are not discussed at all in PSI's supplied to other courts. Role determinations are not always made, or may be based on non-uniform definitions. Most importantly, information provided to the probation officer or court by the defendant or the government may or may not be verifiable for accuracy and objectivity. In these cases, the Working Group attempted to identify the type of information that was corroborated in some way, and the method of corroboration.

Generally, some relatively easily corroborated information regarding the involvement factors of connection with a weapon, decision-making capacity, and negotiation, was available, since such information typically accompanies conduct resulting in an arrest. Information was typically less available to corroborate the defendant or prosecution's assertions regarding such involvement factors as scope of knowledge, scope of participation, and form of compensation.

Couriers were more frequently associated with information that was not easily corroborated by the nature of their conduct -- typically couriers are arrested with the drugs on their person, but no additional information is available regarding a broader conspiracy, or the courier's involvement in that conspiracy.

VIII. CORRELATION OF OFFENDER ROLES AND INVOLVEMENT FACTORS WITH MITIGATING ROLE REDUCTIONS²⁹

A. Particular Offender Roles or Involvement Factors Sometimes Correlate with Receipt of Mitigating Role Adjustments

Particular offender roles or involvement factors, or combinations thereof appeared generally to correlate with the receipt or failure to receive some mitigating role adjustment. Those correlations are summarized below. At the same time, some inconsistency in application was apparent, particularly in the extent of the reduction (i.e., two or four levels) that was applied on the base of particular roles or factors, or combinations of the two.

²⁹ The conclusions that follow are initial only and do not necessarily have statistical significance, and are likely to vary as additional case files are reviewed and as preliminary findings are scrutinized.

1. Mandatory Minimum Offenders

Since the mandatory minimum study screened offenders who lacked the requisite drug quantities to trigger a mandatory minimum charge, all offenders drawn from that study will have been involved with mandatory minimum quantities. Consequently, the impact of varying quantities of drugs on reduction received should be limited, since the offenders all were involved with relatively large quantities of drugs. Similarly, sentences under 60 months in length can not be attributed solely to smaller quantities, but may be dependent on the offense of conviction.

Among **workers**,³⁰ over half of the workers were uncompensated, had single act scope of participation, and two-thirds were not connected with a weapon. Virtually no workers negotiated the terms of the relevant transaction. Workers received mitigating role adjustments in about half of the cases reviewed. No striking factor differences appeared to correlate with either a minor and minimal role reduction.

Offloaders³¹ received no minor role reductions and half received a minimal role reduction. Half of offloaders carried no weapons and half had single act participation. None of the offloaders negotiated the terms of the transaction; a number were involved with conspirators carrying weapons. The only involvement factor that appeared consistently to correlate with a reduction is the single act participation of minimal role offloaders. The

³⁰ Workers were considered to be low-level employees running errands, watering plants, answering phones, and the like. Fifteen workers were identified, nine of whom received a minor role adjustment, and three of whom received a minimal role adjustment.

³¹ Offloaders loaded or unloaded large quantities of drugs onto transport vehicles or into storage facilities. Eight offloaders were identified, with four receiving minimal role reductions, and none receiving minor role reductions.

guideline commentary to §3B1.2(a) (minimal role reduction may be justified where defendant played no role other than to offload part of a single marijuana shipment) likely assists in making the minimal role determination, but may not assist in, or may actually dissuade, making a minor role reduction determination for offloaders. Interestingly, sentences received by minimal role offloaders were considerably higher than sentences for minor role offenders (105 months versus 47 months).

Enablers³² receiving minimal role reductions never had a firearm (compared with minor role or no-adjustment enablers who were more likely to have firearms), but otherwise no distinctions appear to correlate with the size of the role reduction. The longest sentences were given to those with minor role reductions (average 46 months), compared with an 18-month average for those with no reduction, and a 22-month average for those with minimal role reductions. Enablers generally were paid no compensation, had widely varying scopes of participation, rarely negotiated terms of the drug transaction, and in only 25 percent of the cases were connected with weapons.

Couriers³³ consistently had similar involvement factors, regardless of role reduction applied, and were generally similar to couriers appearing in the departure, lower maximum, and renting a drug establishment populations. Only limited differences were apparent. Minimal role courier factors generally compare favorably with the least serious roles with respect to relevant factors identified, and had lesser connection with weapons and more

³² Enablers (persons permitting the use of their home or equipment for drug trafficking, generally for minimal compensation) included twelve offenders, three receiving minimal role reductions and five receiving minor role reductions.

³³ One hundred and ten couriers or mules were studied, with twenty-six receiving minimal role reductions and thirty-two receiving minor role reductions.

limited scope of participation than minor role and no-adjustment couriers. Minor role couriers were more frequently involved with weapons, and were more frequently ongoing participants than no-adjustment couriers. Minimal role couriers received flat fees in every case, were virtually always single act participants, almost never negotiated the terms of their transaction, and rarely were connected with a weapon. Minor role couriers received flat fees 70 percent of the time, were single act participants 67 percent of the time, never negotiated the terms of their transaction, and were not connected with weapons in 80 percent of the cases. No-adjustment couriers received flat fees 60 percent of the time, were single act participants 80 percent of the time, never negotiated the terms of their drug deal, and were not connected with weapons in 90 percent of the cases.³⁴

Go-betweens³⁵ appeared to be slightly more serious than other offenders with respect to their involvement factors. Go-betweens usually received flat fee compensation, but other factors varied considerably: scope of participation was most frequently ongoing, particularly among offenders without mitigating role adjustments, but substantial numbers of offenders were involved in shorter term ventures. Weapons were connected with a go-between in 25 percent of the cases. Go-betweens negotiated the terms of a deal in 40 percent of the cases. Ongoing scope of participation appeared to be somewhat more common among no-adjustment go-betweens, but otherwise no striking factor differences appeared to correlate

³⁴ Summary information for couriers reviewed in mandatory minimum study cases can be found in Tables C-4 through C-6 of Appendix C. Summary information for couriers found in all populations can be found in Table C-3 of Appendix C.

³⁵ Twenty-seven go-betweens (persons who connect two drug parties for a sale, but generally were not believed to have actually supplied, purchased, or delivered the drugs) were identified, with two receiving minimal role reductions and nine receiving minor role reductions.

with the particular application of minor and minimal role reductions to go-betweens. These no-adjustment go-betweens tended to receive lengthier sentences. No-adjustment **street dealers**³⁶ and those receiving reductions appeared to be distinguished by scope of participation and form of compensation (those not receiving adjustments tending to have ongoing participation and percentage of profits compensation). Sentences for no-adjustment dealers were commensurately longer, although this may be connected to the generally more extensive criminal histories of no-adjustment dealers. There appeared to be no substantial distinction between offenders receiving minimal versus minor role adjustments, although minimal role offenders may have had broader scopes of participation. Street dealers received widely varying forms of compensation, but received flat fees in a quarter of cases.³⁷ Scope of participation was evenly spread. A considerable majority negotiated the terms of their own sales. These dealers were connected with a gun in over 25 percent of the cases.

Among **mid-level dealers**,³⁸ those receiving reductions less frequently negotiated their deals, but otherwise appeared similar to those not receiving reductions. Form of compensation was varied, as was scope of participation (although significantly more were ongoing participants, particularly those not receiving mitigating role adjustments), defendants negotiated the terms of their deals in 80 percent of the cases, and weapons were involved

³⁶ Fifteen street-level dealers (persons known to have sold only small, user quantities) were studied, with four receiving minimal role reductions and four receiving minor role reductions.

³⁷ Additional forms of compensation included percentage of profits or drugs (20%), ongoing wages or drugs for personal use (about 15%), or no compensation (15%).

³⁸ Sixteen mid-level dealers (dealers selling large quantities of drugs, that is, more than user quantities) were studied, with one receiving a minimal role adjustment and eight receiving minor role reductions.

in 30 percent of the cases.

2. Offenders Receiving Role Departure Sentences

Offender Roles: **Couriers** and **dealers** were the predominant recipients of the downward departures for role.³⁹ Almost half of the cases reviewed involved couriers -- a fact that is no doubt connected with the "mule role" justification used to narrow the departure population. Only a third of the couriers also received a mitigating role adjustment. Virtually all **lesser role offenders** (e.g., workers, loaders) received the mitigating role reduction in addition to the departure -- a "double" benefit that may be consistent with their lesser roles, and may bring sentences more in line with offenders convicted under statutes with lower statutory maximums. **Mid-level dealers** outnumber **street level dealers** two to one; together the dealers represented one-fourth of all departure recipients. Similar to couriers, about a third of **dealers** received mitigating role adjustments.⁴⁰

Involvement Factors: Few offenders of any role, including dealers, **negotiated** the terms of their transactions. (This was not typical among dealers found in the mandatory minimum study, or in cases with lesser statutory maximums.) Almost half of the offenders were **ongoing participants** (primarily mid-level dealers, some significant others, and some storers), and less than half were **single act participants** (including half of all couriers).

³⁹ As noted below, this apparently anomalous result may correlate with another involvement factor, particularly the fact that such dealers generally did not negotiate the terms of the drug transactions (only 25% did so). Thus, dealers operating with little discretion or decision-making authority may be considered to be little more than ordinary workers, and consequently deserving reduced sentences. In addition, specific district practices may account for some or all of this result -- a situation the working group intends to review further.

⁴⁰ These cases may illustrate situations in which the courts feel offense levels are too high relative to the quantity and type of drugs involved.

Virtually no **weapons** were involved.

Quantity: Well over half of offenders were personally involved with mandatory minimum quantities, including half of **couriers**, most **lesser offenders**, and **all mid-level dealers**. This figure was replicated for offenders receiving mitigating role adjustments. Quantities among departure offenders tended to be considerably higher than other types of offenders, and those receiving mitigating role adjustments more often than not had quantities of drugs sufficient to trigger a mandatory minimum conviction.

Extent of Departure: The extent of the departure varied considerably in cases where role in the offense served as the single justification for the downward departure (as opposed to cases involving multiple justifications): departures ranged from 3 months to 57 months. The average departure for the five such defendants who received a mitigating role adjustment was 18 months (average total offense level 21, average mitigating role adjustment -4). The average departure for the eleven such defendants not receiving a mitigating role adjustment was 13 months (average total offense level 26). The seven non-mitigating adjustment couriers averaged an 11-month reduction in sentence (average total offense level 23), and the five dealer/manufacturer offenders averaged a 20-month reduction in sentence (average total offense level 26).

Summary: Lesser role offenders received two- and four-point reductions equally. By contrast, **street dealers** received minimal role reductions in half of their cases, but received no minor role reduction, while mid-level dealers received only minor role reductions, and no minimal role adjustments. Mid-level dealers receiving departures were given mitigating role adjustments more frequently than those dealers in mandatory minimum

Why did they get mitigation at all?

cases and lower maximum cases, possibly since such dealers negotiated the terms of the transactions relatively rarely.

Consistent with most other types of offenders, virtually no offenders with **weapons**, and no offenders who **negotiated**, received mitigating roles. However, offenders receiving mitigating role adjustments appeared to have more **ongoing participation** in the drug offense than those not receiving mitigating role adjustments.

3. Lower Maximum Offenders

Offender Roles: **Significant others, workers, couriers, and street dealers** made up almost 75 percent of offenders convicted of lesser charges. Workers were the largest single group, followed by couriers and street dealers. A relatively small number of mid-level dealers also received reductions. Among **lesser offenders** (significant others, workers, lookouts), half received minimal role adjustments, and half received minor role. Among **couriers and go-betweens**, almost all received minor role reductions. A relatively large number of **street dealers** received reductions (75% of these received only minor role reductions), in contrast with mandatory minimum case offenders who rarely did so.

Involvement Factors: Very few non-dealer offenders **negotiated** the terms of their transactions, and accordingly very few receiving mitigating role adjustments negotiated terms. The exception was among street dealers, who overwhelmingly negotiated, but who nevertheless also received mitigating role adjustments. **Scope of participation** was mixed, with almost half involved in single act conduct, and a third involved in ongoing conduct.

Weapons were rarely connected with an offense. Otherwise, there appeared to be limited

This exemplifies pd - when there is discretion - 37 it is unevenly applied - but that's just - individualized

correlation between particular involvement factors and particular minor and minimal role adjustments.

Quantity: Only 10 percent of the cases involved mandatory minimum quantities.

Caveat: There may be substantial variations among districts in the granting of reductions to lower maximum offenders. Preliminary data available to the Working Group show that almost 25 percent of telephone count cases receiving mitigating role reductions occurred in one district, and four districts alone accounted for over 40 percent of all such cases. Only one of these four districts has an unusually large number of drug defendants in any given year. On the other hand, thirty districts had at least one such case.

4. Renting a Drug Establishment Offenders

Offender Roles: The roles of offenders sentenced under §2D1.8 most commonly involved **enablers and renters for profit**, but also included **workers and significant others** (who usually received some mitigating role adjustment). **Significant others** uniformly received minimal role adjustments, while **workers** almost uniformly received minor role adjustments.

Relatively substantial numbers of **dealers** (both street and mid-level) and **grower/manufacturers** were also sentenced under this guideline, potentially benefiting from the base offense level which, unlike §2D1.1, is not tied to quantity. About a quarter of these arguably more serious offenders received mitigating role reductions -- suggesting additional, though limited benefits to otherwise serious offenders. However, different applications of minor versus minimal role adjustments appeared in the context of **enablers** (twice as many

✓
used for plus study

received minor role as received minimal). Further, half of **renters for profit** received minimal role reductions, and in two cases **dealers** received minor role reductions.

Involvement Factors: Offenders receiving mitigating role adjustments generally had less serious involvement factors than those without adjustments -- justifying to some degree the more serious sentences imposed on unadjusted offenders. Some inconsistent treatment was apparent, however, with respect to the connection with **weapons** and **ongoing participation**, in that offenders with these factors received mitigating role adjustments relatively frequently, particularly when compared with other, non-§2D1.8 offenders.

Almost half of the offenders **negotiated** the terms of the drug transaction or related transactions, including rental fees, and the like. This might be expected as a result of the large numbers of high-level offenders in the §2D1.8 non-mitigating classes of offenders. By contrast, low-level offenders, typically receiving mitigating role adjustments, did not negotiate terms. Again, the vast majority of offenders had **ongoing scopes of participation** regardless of role or mitigating role reduction received; and a large number of **firearms** were involved, particularly among higher level offenders and enablers, and even where the offender received a mitigating role adjustment.

Quantity: The majority of offenders, whether or not they received mitigating role adjustments, were personally involved with large quantities of drugs, with over 75 percent of cases reviewed involving mandatory minimum quantities.

5. Review of P.O. and Court Comments on Relevant Roles and Factors

The open-ended language found in Application Note 3 to §3B1.2 results in numerous comments in PSI's, Addenda to the PSI, and SOR's that reveal potentially useful factors or roles that the field, at least, believes merit a reduction in offense levels, or merit denying any reduction.

Offender Roles: Only a limited number of role determinations apparently rested solely on the role title of the offender, that is, without considering relevant involvement factors. Such roles included uninvolved **significant others**, or low level workers (phone operator, marijuana waterer, carpenter, translator).

In the case of **couriers**, as a matter of policy, some districts apply minimal role reductions to certain couriers,⁴¹ while other courts refuse to give couriers any mitigating adjustment on the ground that such a role is "pivotal" to the drug organization.

Knowledge of the Scope of the Offense: The most frequently mentioned factor is knowledge of the scope of the offense or conspiracy.⁴² Typically, such knowledge is said to preclude a defendant from receiving a minimal role reduction, but, under appropriate circumstances, usually does not preclude the offender from receiving a minor role reduction.

Scope of Participation: A second common factor is the number of separate occasions on which the defendant engaged in the conduct. Limited participation (one act or multiple acts, but not ongoing participation) typically resulted in a minor role reduction, except in

⁴¹ For example, one-time, foreign-born, internal carrier, heroin mules.

⁴² The distinction between "offense" and "conspiracy" is not usually made by the court or probation officer. Indeed, the term "offense" appears to be most commonly used, but likely the more precise characterization is knowledge of the scope of the entire "conspiracy" and not merely knowledge of the offender's own offense conduct.

the case of certain districts that applied minimal role reductions as a matter of practice to one-time couriers traveling by airplane with heroin carried internally. Different applications arose in some instances in which more than one known instance of involvement with drugs was considered to preclude the offender from receiving any role adjustment, while other courts considered such multiple participation to merely limit the offender to a minor role adjustment, rather than a minimal role reduction.

Decision-Making: Another common factor is whether the offender had decision-making authority in the offense, or made decisions that indicated some level of authority, knowledge, or involvement. This lack of supervising, negotiating, or other decision-making typically merited at least a minor role reduction, where some other factor precluded the offender from receiving a minimal role.

Personal Profit: A fourth common factor is whether the offender personally gained from the offense, or received compensation. Lack of compensation or personal gain may have resulted in a minor or minimal role reduction (particularly the latter when applied to couriers).

Quantity of Drugs: Large amounts of drugs may often preclude an offender from receiving a minimal role reduction or any reduction at all (particularly with couriers).

B. Some Question Remains Whether Offenders with Similar Roles and Factors Receive Mitigating Reductions Disparately

Equally as important as the two items discussed above (which specific offender roles and involvement factors correlate with particular role reductions) is whether offenders with similar roles and factors receive different role reductions. More complete research is

required before final conclusions can be reached on this question -- as outlined in Section One above.

IX. APPROPRIATENESS OF PUNISHMENT

A review of sentencing data provided by Monitoring may assist the Commission in addressing the issue of whether certain drug offenders are appropriately punished relative to their culpability in an offense. Policy judgments with respect to whether these sentences constitute appropriate punishment will be made -- if at all -- by the Commission.

A. Mandatory Minimum Study Offenders

Workers/Gophers: The average sentence for a worker was 47 months. Half of all workers received sentences of less than 42 months, and the rest received between 60 and 120 month sentences. Generally, no-adjustment workers received lower sentences, minimal role offenders received mid-level sentences and minor role offenders received a broad range of sentences. Almost all workers were in Criminal History Category I.

Offloaders: Half of offloaders had Criminal History Category I, with only limited distinctions between offenders receiving role reductions and those who did not. The average sentence was 78 months -- with minimal role offloaders sentenced to an average 105 months (3 at 120 months, and 1 at 60 months) and no-adjustment offloaders sentenced to an average 47 months.

Enablers: Virtually all enablers received sentences under 60 months in length, the average sentence being 30 months. Minor role offenders received lengthier sentences than

minimal role offenders, who in turn were sentenced to prison longer than unadjusted offenders. Virtually all enablers were in Criminal History Category I.

Courier/Mules: Average sentence for mandatory minimum study couriers was generally higher than for other couriers studied, a factor that may be attributed to the relatively large quantities of drugs carried by couriers, and the concomitant mandatory minimums to which they might be subject. Average sentences for all couriers was 51 months, higher than lower maximum couriers (2 months), and departure couriers (32 months). Average sentence for minimal role couriers was 31 months, with 70 percent receiving less than 60-month sentences, and all in Category I. Average sentence for minor role couriers was 71 months, with 40 percent receiving 60-119 month sentences, equal numbers above and below that range, and 70 percent in Category I. Average sentence for no-adjustment couriers was 68 months, with two-thirds of offenders receiving 60-119 month sentences, the bulk of the remainder receiving less than 60-month sentences, and 90 percent in Category I.

Go-Betweens: Sentencing, however, did not necessarily reflect the moderately heightened seriousness of the go-between offender. The average sentence was 47 months, although only half of the offenders received sentences under 60 months in length. Less than 75 percent of go-betweens were in Criminal History Category I. Go-betweens with lengthier terms tended to receive fewer or smaller reductions.

Street-Level Dealer: The average sentence for street dealers was 60 months, with half receiving sentences under 60 months and half over that term. In contrast with other lesser-role offenders who were virtually always in Criminal History Category I, only 60 percent of

street-level dealers were in Criminal History Category I. Sentences for no-adjustment offenders were generally more severe than for those receiving role reductions. Minor role offenders were less likely to be in Category I, but minimal role offenders received more severe sentences.

Mid-Level Dealer: Virtually all such dealers had Criminal History Category I. Average sentence was 68 months, with no-adjustment offenders receiving significantly higher sentences (none under 60 months).

B. Offenders Receiving Departures on the Basis of Role

Sentences were considerably more severe for these offenders than for lower maximum offenders, although both populations of offenders were generally similar with respect to involvement factors. Sentences were generally comparable regardless of whether a mitigating role adjustment was applied. The average term of imprisonment for these offenders was 35 months.

Again, over three-quarters of offenders were in Criminal History Category I, and the same proportion received sentences under 60 months in length. A substantial number of the remaining offenders received sentences between 60 and 120 months -- unlike most other offenders charged with lesser offenses or charged with renting a drug establishment. No significant sentencing variation was detected between offenders receiving mitigating role adjustments and those who did not.

C. Offenders Convicted with Lower Maximums

The average sentence among these offenders was five months, and 80 percent were Category I offenders. With only two exceptions, lower maximum offenders were sentenced under 60 months; 73 of the 79 offenders were sentenced to terms of a year or less.

D. Offenders Sentenced Under §2D1.8 (Renting a Drug Establishment)

Average sentences varied widely between those receiving mitigating role adjustments (7 months) and those not (26 months). The average sentence overall was 15 months, considerably higher than that for offenders with lower maximums, but considerably lower than that for offenders receiving departure sentences. More serious offenders received considerably lengthier sentences. At the same time, 75 percent of offenders were in Criminal History Category I, and 75 percent received sentences under 60 months in length.

E. Court Comments Appeared to be Limited with Respect to Appropriateness of Punishment of Mitigating Offenders

The Working Group discerned few comments in the PSI or SOR that went to the level of punishment applied to mitigating role offenders.⁴³ Explicit comments were not common. Comments by courts sentencing couriers were somewhat more common, and included one comment that it was "ridiculous" for a one-time mule to be held accountable for the entire quantity of drugs on his person when the daily street dealer would typically

⁴³ Of course, in some cases, actions speak louder than words: where the court departed on the basis of mitigating role, after having given a §3B1.2 reduction, some concern with the overpunishment of the offender might be divined. Similarly, where the offender convicted of 21 U.S.C. § 844(a) or 21 U.S.C. § 843(b) receives an additional reduction for mitigating role, we might understand the court to have commented on the level of punishment the offender would otherwise have received.

only be accountable for the small quantity known to be on his person at the time of the sale.

SECTION FOUR -- OPTIONS

While the Working Group has not formulated recommendations, the group has attempted to set out a universe of reasonable options for consideration as the Commission evaluates the appropriateness of the group's plans for further research. If the Commission feels that any of these options do not warrant further consideration or that other options should be explored, feedback to the group would be helpful since it would likely impact on the continued research strategy of the group as articulated in Section One of this report.

X. CLARIFY DEFINITIONS TO INCREASE CONSISTENCY OF APPLICATION

A. Provide Better Definitional and/or Illustrative Guidance as to the Application of the Minor or Minimal Adjustment.

The Drug Working Group's review of monitoring data and case files has identified certain features that are frequently common to offenders who receive mitigating role adjustments. Specifically, there appears to be some correlation between the role performed by the offender, as well as other characteristics,⁴⁴ and whether the offender receives a mitigating role adjustment. The following identify those trends:

⁴⁴ One commentator has suggested culpability may be related to knowledge and low compensation:

[f]actors indicated a limited involvement participant might include: a flat payment for a delivery, rather than a percentage of the profits after the drugs are sold; one way delivery of drugs, with no return delivery of money; receipt of a pre-packed bag; delivery to an individual not previously known to the courier; close supervision by the supplier or distributor; and lack of prior experience in drug distribution.

Young, "Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability," Fed. Sent. Rptr: September/October 1990, pp. 63-66.

1. Correlation Between Offender Characteristics and Reduction for Mitigating Role

a. Offender roles identified as receiving mitigating adjustment --

(1) with some frequency:⁴⁵

- (a) Significant other
- (b) Worker/gopher
- (c) Loader
- (d) Lookout
- (e) Crew member
- (f) Storer/enabler
- (g) Money Runner
- (h) Go-between/steerer
- (i) Bodyguard
- (j) Renter for profit

with a weapon - ready for violence - if you think he's a minimal player?

(2) with little or very little frequency:

- (a) Street level dealer⁴⁶
- (b) Mid-level dealer
- (c) Grower/manufacturer

b. Factors, other than function, identified with persons receiving mitigating adjustments --

(1) with some frequency:

- (a) Criminal History Category I
- (b) Scope of participation - either single or few acts, or, ongoing involvement with other indicia of minor culpability;
- (c) No weapon involved;
- (d) No negotiation of terms of the transaction;
- (e) Limited scope of knowledge of the conspiracy;
- (f) Flat fee payment; and

⁴⁵ For purposes of classification, the group has identified other roles, such as: bodyguard/strongman, street dealer, mid-level dealer, and grower/manufacturer.

⁴⁶ Unless relevant conduct has brought in a substantially greater quantity of drugs than the defendant personally was involved with.

- (g) Relevant conduct bringing in substantial drug quantities beyond that with which defendant was personally involved.
- (2) With little or very little frequency:
- (a) Criminal history category higher than I;
 - (b) Ongoing participation;
 - (c) Defendant personally involved with weapon or force;
 - (d) Defendant negotiated terms of transaction;
 - (e) Relatively expansive knowledge of scope of conspiracy; and
 - (f) Defendant supervised others.

Following additional research, the Commission can study this information and fashion a definition of mitigating role that incorporates those characteristics that the Commission feels warrant a mitigating role adjustment. Such a definition could articulate a general standard for mitigating roles that focuses on the offender role, as opposed to the present standard which is sometimes perceived to gauge the culpability of a majority of the participants in the offense,⁴⁷ with examples of the types of functions (e.g., enabler, loader) that the Commission considers generally to warrant lesser punishment. Adding to the difficulty of providing a more precise definition is the fact that in some drug conspiracies participants perform different functions during different stages of the conspiracy -- for example, on some days, the defendant may have merely permitted drugs to be stored in his apartment; on other days, the offender may have sold drugs for a dealer. The Commission may wish to address this phenomenon in any amended definition.

⁴⁷ For example, in a case involving fifteen defendants who performed clearly peripheral sorts of duties to the drug operation and two defendants who performed more significant tasks, one could argue that the present definition of "minor" role would prevent the conferring of "minor" status on any of those fifteen peripheral participants, since no single one of those individuals was "less culpable than most other participants."

In addition, the Commission could incorporate into this general standard other involvement factors that it considers appropriate; for example, flat fee payment, one time or limited involvement in the drug conspiracy, etc.

2. Couriers

As the empirical research suggests, some courts give couriers a minimal role adjustment, some give a minor role adjustment, and others give no adjustment. The Commission may consider making a policy decision to create a **bright line rule** or **presumption** that couriers either should generally receive a specified mitigating role adjustment or generally receive no adjustment for the quantity of drugs that they are carrying, as opposed to the greater quantity of drugs for which they are held "otherwise accountable" under relevant conduct.⁴⁸

A presumption that couriers should generally receive a minor role adjustment, for example, might be based on a belief that, in the heartland case, the typical courier is involved in a transaction on a one-time basis, for a small amount of compensation. The Commission could permit the Government to rebut this presumption by a showing of factors that the Commission decides disqualify a courier from mitigating role status; e.g., the courier had been involved in multiple such transactions, that the courier had a stake in the profits, etc.

A **presumption** that couriers generally should **not** receive a mitigating role adjustment might be based on a belief that, in the heartland case, the courier possesses some

⁴⁸ This is the Department of Justice's position; see note 6, infra.

*no - Couriers
won't
leave to
its fact
specific*

characteristic that the Commission considers to constitute a disqualifier for mitigating role status.⁴⁹

A **bright line rule** that a courier should not receive a mitigating role adjustment might be based on a notion that, notwithstanding how limited the courier's decision-making authority in the overall drug operation or how limited his compensation, by transporting the drugs he performs a crucial function in the offense charged.⁵⁰

Finally, the Commission may decide that there is **no heartland** for couriers such that the Commission can feel comfortable in creating a presumption favoring either a mitigating role adjustment or no adjustment. That is, for some couriers, the offense may represent an isolated occurrence; for other couriers, while the offense may not have been isolated, the courier nonetheless may have very little decision-making authority in the operation; still other couriers may haul drugs in whose sale they share the profits or have negotiated the terms.

If the Commission decided not to set out a presumption concerning couriers, it might still wish to address two matters that potentially could result in disparity in the manner in which courts treat couriers. First, some courts now appear to conclude that, notwithstanding other indicia of mitigating status, because the courier's role is so significant to the success of the underlying venture, the courier cannot, as a matter of law, be considered to occupy

⁴⁹ The Commission may have to decide what proof the defendant would have to adduce to rebut this presumption, and it may have to address the weight of a defendant's uncorroborated assertions concerning matters required to rebut the presumption.

⁵⁰ This is apparently the basis for the Department of Justice's position. For an analysis comparing the function served by a courier as opposed to that served by an offloader, see the memorandum provided by the USPOs in Miami on this question, in Appendix D.

a mitigating role; that is, these courts apply a bright line rule excluding the courier from a mitigating role adjustment.

If the Commission decides that the latter construction of §3B1.2 is incorrect, it could state clearly that if a courier satisfies whatever criteria the Commission sets out for a mitigating role adjustment, he or she should receive that adjustment.

Having set out the criteria, the Commission might or might not wish to address the level of proof required. The defendant generally has the burden of proof in demonstrating his entitlement to a downward adjustment. Typically, in most courier cases, the only evidence supporting a claim of minor or minimal role status -- that the instant offense was isolated, that the defendant was receiving only small compensation, that the defendant did not know the parties for whom he was making the delivery, that the defendant was not involved in the negotiation of the drug transaction, itself, etc. -- will be the defendant's uncorroborated assertion of those facts.

If the Commission decides that a defendant's uncorroborated assertion is inadequate to meet his or her burden of proof, few couriers will be able to prove their entitlement to the adjustment and the Commission will have failed in its effort to ensure that couriers who meet the requirements for a role adjustment receive that adjustment.

If, on the other hand, the defendant's uncorroborated assertion can carry his or her burden, some disparity among similar offenders could result inasmuch as some courts will always accept the defendant's statement, some courts will never believe the defendant's assertion, and other courts may sometimes credit and sometimes not credit identical descriptions of involvement by different couriers, based on the judge's intuitive feeling about

the defendant's credibility. The Commission's ultimate determination of whether inappropriate punishment of couriers does in fact occur with frequency may help it to determine how to balance the tension between increased judicial flexibility in this area and the potential for some unwarranted disparity.

B. Add Commentary Language about the "Average" or "Typical" Participant Who Warrants Neither an Aggravating nor Mitigating Adjustment for Role in the Offense.

Anecdotal information suggests that some courts feel that in multi-defendant cases, they **must** classify some participants as fulfilling an aggravating role and others as functioning in a mitigating role. New commentary language could seek to discourage this approach by indicating that the "typical" sort of participant, even if ten such typical participants are involved in one offense, should receive neither an aggravating nor mitigating role adjustment. Examples would likely be useful.

*Don't this - just because
anyone A B C D E you want to
give AB minimal doesn't mean
any one needs aggravation -
imbalance!*

C. Address the Interplay Between Participants Who Would Otherwise be Considered to Occupy a Mitigating Role, but for Their Supervision of a Small Number of Other Minimal Participants.

Anecdotal information suggests that some courts refuse to give an otherwise mitigating role participant a downward adjustment because the defendant may have supervised other minimal participants⁵¹ and indeed these courts may give an aggravating adjustment in this situation. The Commission could consider incorporating into its amended definitions the notion of **significant** supervisory control and decision-making authority.

reject!!!

⁵¹ For example, one offloader supervising five other offloaders.

XI. APPROPRIATENESS OF PUNISHMENT

A. Determining the Appropriateness of Punishment.

*it is up to
Congress
to decide*

Reasonable persons may well disagree about what constitutes appropriate punishment or a sufficiently severe sentence for a particular level of criminal involvement. Obviously, it is the Commission, not a working group, that must ultimately make the policy decisions concerning the manner in which to distinguish different levels of participation and the sentencing range that is appropriate for that conduct. Through its empirical review, the Working Group has given, and will continue to give, the Commission information that discloses current sentencing practices in order to assist the Commission in determining whether the drug guidelines do achieve proportionality.

As a general matter, while empirical data can reveal what present sentencing practices are, these data cannot disclose whether those levels are appropriate. Nevertheless, sentencing practices with regard to less culpable defendants may provide some assistance. For example, if a certain level of criminal involvement is frequently the subject of pleas to charges with lower statutory maximums that ultimately lower the applicable sentencing range significantly below that which would be applicable, that may be an indication that the parties agree that the alternative result would be more punitive than necessary. Moreover, if such charging practices are prevalent for a particular type of conduct, their existence may suggest the need to reexamine the guideline that would have been applicable but for the plea agreement. For this reason, the group has looked at cases that suggest a plea bargain to an offense with a lower statutory maximum, such as simple possession (21 U.S.C. § 844(a)) or a telephone count (21 U.S.C. § 843(b)).

Right!

*OR that
parties operate at micro
level & Congress operates at
macro level -*

Further, while Congress has required mandatory minimum sentences for offenses involving certain quantities of drugs, it has not directed that the sentences must increase beyond the mandatory minimum as the quantity increases. It might be useful for the Commission to study the present sentencing practices to determine whether there is category of offender for whom the mandatory minimum sentence should act as a cap, not a floor.

Never - it is not for comm to outsmart Congress!!!

B. If an Inappropriate Level of Punishment is Perceived to Exist for a Certain Category of Offender, What Options Might be Considered?

1. Relevant Conduct

- a. Relevant conduct could be narrowed with respect to less culpable defendants.

Anecdotal information suggests that it is sometimes the broad reach of §1B1.3 (Relevant Conduct) that results in sentences that are sometimes perceived as too harsh for a given offender. For example, the street dealer who is personally involved with only a small quantity of drugs may, depending on the facts revealed by the investigation, become tied to a large conspiracy and held accountable for a correspondingly large quantity of drugs. If the quantity of drugs attributed to the conspiracy is large enough, some may perceive even a four-level reduction for minimal participation to be inadequate.

Accordingly, the Commission could decide, in the case of a defendant who otherwise qualifies for a mitigating role adjustment, the "reach" of relevant conduct would only extend to that quantity of drugs with which the defendant was personally involved or aided and abetted; in other words, eliminate the applicability of the "otherwise accountable" language

from §1B1.3(a)(1) for the less culpable offender.⁵²

Reject!

Attempting to narrow the scope of relevant conduct, even for just the less culpable offender, would present many challenges to the drafter. First, eliminating the applicability of the "otherwise accountable" prong of §1B1.3 to mitigating role offenders, as newly defined by the Commission, would not benefit all offenders whom some perceive to receive excessive sentences as a result of the present reach of §1B1.3.

For instance, with regard to the above example of the street dealer who becomes tied to a large quantity of drugs as a result of being tied in with a large conspiracy, the Commission may decide that, standing alone, being a street dealer is simply not a minor or a minimal type role, in the same way that an offloader, gopher, or enabler might be considered to be a less culpable player. Then, because he cannot be classified as a minor/minimal participant, the street dealer would not receive the benefit of any narrowing of relevant conduct.⁵³

In addition, if the Commission decided to reduce the present sentencing ranges for couriers, merely narrowing the reach of relevant conduct would likely have little effect on the sentences of couriers, whose offense levels are generally set by the quantity of drugs that

⁵² The Justice Department takes the opposite approach; namely, it is their position that a defendant should **only** be eligible for **consideration** for a mitigating role adjustment if relevant conduct brought in criminal conduct (e.g., drugs, fraudulent acts) **beyond** what the defendant did, or aided and abetted. In other words, a courier, for example, should never receive a mitigating role adjustment that would **lower** his offense level **below** that which corresponds to the quantity of drugs with which he or she was involved; he or she could receive such an adjustment only for the quantity of drugs beyond those that the defendant possessed, which additional quantity he would be "otherwise accountable for" through §1B1.3(a)(1).

⁵³ Unless the definition combined the notion that while not entitled to a mitigating role reduction for drugs with which he was directly involved, the street dealer could be considered a minor/minimal participant for the overall conspiracy and, thus, not reached by drugs beyond those with which he was personally involved, requiring the minimal/minor definition to do double duty.

they are carrying, rather than the conspiratorial conduct with which they are involved. since that can rarely be ascertained.

Second, eliminating the applicability of the "otherwise accountable" prong to identified types of participants may have no effect on less culpable offenders whose offense level can be determined only by looking to the conspiratorial conduct with which they were involved. For example, the girlfriend who has had no involvement in drug activities other than to allow her drug dealer boyfriend to use her apartment to conduct his drug operation has "aided and abetted" the entire quantity of drugs for which there is some nexus to her apartment. Thus, even if the "otherwise accountable" prong were not applied to this girlfriend, her offense level could still be high.

If one removed the applicability of both the aiding and abetting and otherwise accountable prong of §1B1.3 to such a participant, there would be no way to calculate her offense level.⁵⁴

Finally, if the Commission can limit the applicability of §1B1.3 to less culpable offenders in a way that makes a substantial difference in their offense levels, the need for a careful and precise definition of such offenders becomes crucial, and the likelihood of vigorous litigation over the applicability of minimal/minor status will be increased.⁵⁵

Specifically, if the guidelines render a mitigating role status as the pivotal factor for purposes of determining whether relevant conduct should be narrowed, the weight placed

⁵⁴ In that case, one would likely have to create an offense level for the conduct, much like present guideline for renters of drug establishments.

⁵⁵ Of course, this consequence will occur with any option that increases the significance of fact-finding regarding the mitigating role adjustment.

on a court's finding regarding that status becomes much heavier. For example, assume that a defendant is arguing that he is a minor participant and thus that his relevant conduct should be narrowed. If the difference resulting from a narrowing of the relevant conduct is ten levels and the role adjustment is two levels, a twelve-level difference would hinge on a guideline that some might argue is barely precise enough to justify a two-level reduction.

- b. Relevant conduct could be narrowed for all participants, whether or not in a mitigating role.

Some have suggested that instead of focusing on a type of offender for whom relevant conduct should be narrowed, the Commission should simply narrow the scope of the guidelines for all offenders by narrowing the usage of the term, "jointly undertaken criminal activity." That is, it is suggested the Commission draft a definition of "jointly undertaken" that would render the street dealer responsible for only those drugs with which the offender dealt, or from which he derived benefit.

This approach to narrowing the guideline would avoid the problem of placing too much weight on a finding regarding mitigating role status, as discussed above. Again, the drafter would face difficulties in crafting a definition that would include very culpable participants who may never touch any drugs and exclude the less culpable participant whose offense level is perceived by some to be too high under §1B1.3.

For example, a definition that held a street dealer responsible for only the drugs he dealt, but not the drugs of other street dealers in the overall conspiracy, might also unintentionally absolve one high-ranking lieutenant in a drug ring of any responsibility for drug quantities with which he was not directly involved. In addition, carried to its logical

extreme, such a definition tends to negate a participant's liability as a conspirator, by holding him responsible for only those quantities for which he is guilty of a **substantive** crime.

Further, that kind of narrowing may understate the street dealer's culpability. That is, tying the street dealer to the Medellin cartel is obviously too much; tying him only to the quantity of drugs that he sold on the particular day of his arrest, however, may be too little.

Nevertheless, although there are numerous conceptual and practical problems involved in any effort to narrow the reach of relevant conduct, the Commission arguably has more flexibility in this endeavor, in terms of the constraints imposed by some mandatory minimum statutes, than in trying to reduce further the sentencing ranges of persons, such as couriers,⁵⁶ who are clearly guilty of **substantive** crimes involving the requisite quantity of drugs.⁵⁷

⁵⁶ One revision that the Commission could consider making would be indicate in commentary that jointly undertaken activity does **not** include the activity of other couriers with whom one may be travelling. That is, if five Mexican couriers, each carrying drugs, walks across the border, each of the five would be responsible only for the drugs that he was carrying, absent evidence that he was supervising the other couriers. Some judges in border states appear to be apportioning the quantity of drugs in this manner, even though the Guidelines, as presently written, would likely disfavor that approach.

⁵⁷ See David Debold Memorandum on Mandatory Minimum Sentences (November 5, 1991). Essentially, the memo notes that while there can be little confusion regarding the applicability of a mandatory minimum sentence on a person such as a courier who is clearly guilty of a **substantive** crime involving the requisite quantity of drugs, there is some ambiguity with regard to the operation of a mandatory minimum statutes with regard the calculation of quantity in **conspiratorial** conduct.

- c. Relevant conduct could be clarified to heighten understanding of its scope so that similar defendants are sanctioned in a similar manner.

The operative language from §1B1.3(a)(1), comment. (n.1), that has caused confusion and misunderstanding is:⁵⁸

In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others **in furtherance of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.** ... Where it is established that the conduct **was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointed undertake,** such conduct is not included in establishing the defendant's offense level under this guideline. (Emphasis added)

It might be useful to further illustrate what is **not** included in relevant conduct as well as what is. For example, if a (non-live in) girlfriend knows her boyfriend has been involved in the sale of ten kilograms of cocaine in the last five months, makes a delivery of one kilogram for him when he falls ill, for which she is paid a sum of money appropriate to that assistance, and knows of his subsequent involvement in the sale of another ten kilograms in the next five months, does her relevant conduct sanction her for one kilogram or for twenty-one kilograms?⁵⁹ While MFAQ #92 would appear to resolve the issue by holding her liable for one kilogram, the guidelines are less than clear on the result.

Among the proposals of the Judicial Conference is one that would clarify relevant conduct (§1B1.3) by amending the guideline and commentary to "clarify that judges have flexibility to individualize the offense level according to the harm for which the defendant

⁵⁸ Most Frequently Asked Question #92 was promulgated to help clarify the confusion; it includes the statement that "Standing alone, the fact that the conduct of others was reasonably foreseeable to the defendant does **not** make the defendant otherwise accountable for that behavior" (emphasis added).

⁵⁹ Assume she did not benefit from or facilitate the distribution of the other 20 kilos.

was personally culpable."⁶⁰ More specifically, the purpose of the Judicial Conference's recommendation is to:

clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were reasonably foreseeable, or of which they were personally aware. It would give judges flexibility to tailor the offense level, especially that part due to the aggregation of amounts of drugs or money, according to the part of the total for which each defendant should be held culpable.⁶¹

The Judicial Conference points out that the commentary language to relevant conduct limits the conduct of co-conspirators that will be attributed to a defendant in question to that which the defendant is aware of or should have foreseen. According to the Judicial Conference, however:

these limitations are often overshadowed by the "common scheme or plan" language found in the text of the guideline itself. Revising the guideline to

⁶⁰ Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines, Appendix A, Recommendation 7, p. 8.

Recommendation 7: "Clarify the relevant conduct Guideline to ensure that offense levels are tailored to individual culpability." Amend §1B1.3 as follows (existing titles and proposed inserts to text are underlined):

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range).

(a) Chapter Two (Offense conduct) and Three (Adjustments).

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be accountable, or counseled, commanded, induced, procured, or willfully caused by the defendant, or in the case of joint criminal activity, reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal plan, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all such acts and omissions and amounts that were part of the same course of conduct or common scheme or plan as the offense of conviction, and of which the defendant was aware or which were reasonably foreseeable to the defendant.

⁶¹ Ibid, p. 9.

clarify that knowledge, foreseeability, and the scope of a defendant's agreement can be used to tailor the offense level, as suggested in Judicial Conference recommendation 7, could help prevent imposing disproportionate punishment on couriers and other minor participants in conspiracies involving large amounts of drugs or money.⁶²

It is not immediately clear to the Working Group how this proposal would "ensure that offense levels are tailored to individual culpability" in any material respect that is different than the current guideline and commentary language.

The 1989 Working Group on Role in the Offense drafted possible additional commentary language for the role guideline⁶³ to clarify the interplay between relevant conduct and possible adjustments for role:

[a]s with all Chapter Three adjustments, the determination of role is made in the context of relevant conduct. Role must, therefore, be determined by assessing a particular defendant's culpability in relation to the acts and omissions within the relevant conduct for which he is accountable. In some cases the relevant conduct will be identical for each defendant, encompassing the same acts and omissions and participants. However, relevant conduct may differ for defendants such that the acts and omissions for which one defendant is accountable will not be the same as those acts and omissions for which another defendant is accountable. Likewise, the number of participants included in the relevant conduct for different defendants may vary. The proper adjustment for role will therefore assess a defendant's culpability relative to those other participants and individuals within the parameters of his own relevant conduct as opposed to attempting to assess relative culpability of co-defendants in the overall criminal enterprise. Thus, when an offense involves more than one individual, 3B1.1 or 3B1.2 (or neither) may apply...."

⁶² Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines, p. 9.

⁶³ But it was not sufficiently developed for timely presentation to the Commission for consideration.

will be source of great disparity

2. Create an Additional Mitigating Role Category for Peripheral Offender with an Adjustment Greater Than Four Levels, or Permit a Departure for Such an Offender.
 - a. Create a "super-minimal" category and give a six-, or more, level reduction for this participant.

The advantage of this option is that it would tend to give judges more discretion to differentiate between less culpable defendants, and to give a greater reduction for those for whom they feel the four levels is insufficient given their less than "minimal" status on the culpability continuum.

Unless such an option was accompanied by a clear definition of "peripheral," and clearer definitions of minor and minimal, however, it likely would create more disparity in application. In addition, some might argue that the creation of a new category reflects a misunderstanding of the current objection to the drug guidelines, as presently created. That is, first, in terms of application, the professed problem with the current guidelines does not lie in there being too few categories, but in the lack of clarity in the definition of these categories.

Second, if the guidelines' primary reliance on the quantity of drugs is perceived to produce, at a certain point, sentences that are too harsh for an offender's level of culpability,⁶⁴ a system that still relied largely on such a determiner, even though it provided for greater mitigation, would be subject to the same criticism.

⁶⁴ Those who would argue that quantity proves too much in determining a sentence might agree that a higher penalty is appropriate for the offender of cocaine from the Queen Mary than it is for the offender of ten pounds of marijuana from a rowboat, but they would argue that the sentence should not be ten times as severe and, accordingly, that at some point, quantity becomes irrelevant.

- b. Clarify ability to depart downward if lesser role warrant a greater reduction than four levels.

This option would have an advantage similar to the "peripheral category," in that it would permit judges, in the rare case of a truly peripheral defendant, to depart. Such departure language might include a recommended number levels for the departure (say, two levels).

The disadvantages of the "peripheral category" are heightened for the "peripheral departure"; that is, there could be wide ranging disparity in the decision to depart and in the level of departure. Further, the categories of participation in drug conspiracies are fairly predictable and it is unlikely that there will be an atypical offender for whom the Commission could not draft an appropriate guideline.

3. For Higher Offense Levels, Increase the Minor/Minimal Role Adjustment Levels.

Under this option, the Commission could determine that at a certain level, the downward adjustment for minor and minimal role would be increased. This option would reduce further the sentence for the offloader who has helped unload the Queen Mary than does the present guideline. It does, however, add another element of complexity to guidelines that are arguably already complex enough and it still could still result in a very large sentence for a minimal participant accountable for conspiratorial conduct involving large quantities of drugs.⁶⁵

⁶⁵ Judge Smalkin (D. Md.) has recommended that the Commission consider creating a tiered structure, ranging from the top leaders of a ring to the most minuscule hangers-on, and give a per cent adjustment depending on one's placement within the tier. For example, a top leader would get 100% of the range; a top
(continued...)

*Absolute violation of Cong intent -
mand min is MAX - absurd*

4. Cap the Offense Level of Mitigating Role Participants: Either at the Level of the Mandatory Minimum Sentence Corresponding to the Drug Amount or at Some Lesser Level.⁶⁶

- a. Where to place the cap?

The Commission could readily cap all mitigating role offenders at the mandatory minimum sentence level. At present, the offense level goes up as drug quantities go up, even beyond the mandatory minimum level. An amendment of the guidelines to make the mandatory minimum sentence a cap, not a floor, for mitigating role participants would ease what are perceived to be harsh sentences for minimal participants swept into wide ranging conspiratorial conduct.

The advantage of this approach is that it would clearly comport with Congressional intent without requiring a greater sentence than Congress has mandated. That is, Congress may require a ten-year sentence for involvement in five kilograms of cocaine; it does not require a higher sentence for higher quantities and thus the Commission could cap the sentence of mitigating role offenders at the mandatory minimum sentence.

The shortcoming of this approach is that, while it will eliminate extremely long sentences for mitigating role participants, it may not provide much relief to certain offenders

⁶⁵(...continued)

lieutenant would get 75% of the range; a minimal participant would get 25% of the range. would. The guidelines are inherently based on a percentage formula already; thus, this approach would arguably duplicate the present working of the guidelines, albeit in a more complex manner. See Appendix D for a copy of the Smalkin proposal, and a possible variation thereon.

⁶⁶ The Legislative Subcommittee of the Federal Public and Community Defenders has submitted to the Commission a suggested amendment to the drug guidelines that uses a cap approach. See Appendix D. The Defenders would cap minimal participants involved in marijuana or "less serious" types of drugs at a level 16; if involved in other controlled substances, the cap would be a level 20. The Defenders would cap a minor participant's offense level at 22 and 26 for "less serious" drugs and other controlled substances, respectively.

Are you CRAZY?

who some in the field believe now receive overly harsh sentences.⁶⁷

The Commission could also consider capping the offense level of mitigating role offenders at a level less than the mandatory minimum range. If the Commission decided to create a cap, it would have to decide to what extent, if any, the existence of mandatory minimum sentencing statutes should affect the Commission's decision in this area.

As Dave Debold notes in his memorandum on this subject, there may be some room to argue that Congress' intent was more ambiguous with regard to the triggering of mandatory minimum statutes for conspiratorial conduct than for substantive violations.⁶⁸ The Commission may consider whether it should or can, within the limitations of drafting, set out conduct for which a cap lower than a mandatory minimum would apply.

For example, a cap might apply to otherwise qualifying mitigating role participants who have not had actual or constructive possession for any period of time of quantities of drugs exceeding the cap or the mandatory minimum statute. Thus, such a cap would cover the gopher, significant other, offloader, etc. It would not apply to the courier, who has actually possessed the requisite quantity of drugs, usually for at least several hours or days, although the latter might still receive a 2 level reduction as a minor participant.

b. How to determine who is entitled to "cap" treatment?

In addition to setting out a definition for the minor/minimal participant who is entitled to "cap" treatment, the Commission could consider adding other qualifiers or

⁶⁷ The Working Group continues its empirical study of the actual sentences imposed on various categories of drug offenders.

disqualifiers for such treatment. Illustrative examples of factors that could be required before the cap limit would be applicable to a given defendant are:

- (1) no gun;
- (2) no drug points/drug priors for drug trafficking kinds of offenses; not simple possession;
- (3) Criminal History I or II; and/or
- (4) acceptance of responsibility.

The advantage of an approach involving qualifiers or disqualifiers is that it would tend to insure that only the defendant worthy of more lenient treatment receives that treatment. Thus, the offender with a prior drug felony conviction, who carries a gun during the offense would not be subject to a cap, if the above qualifiers were chosen. Further, it puts less pressure on the drafter to draft as tight a definition of mitigating role participant, if other factors exist to assure that only the appropriate offenders receive special treatment through a cap or otherwise.

Nevertheless, contingent provisions have been disfavored as a general matter in the guidelines and the Commission will likely proceed cautiously in creating such provisions, since the existence of one of these factors could spell the difference between an offense level at a cap level or one at many levels higher. Indeed, the same principle holds true for giving cap treatment to a mitigating role offender, which is also a contingent provision; the definition for that offender must be carefully drafted in order to insure that large differences in offense levels between similar offenders do not occur as a result of a mushy guideline on which two equally reasonable judges could differ in their interpretation.

APPENDIX A -- Judicial Conference Recommendations

of driving while intoxicated, and the year before that again for assault. These earned him three criminal history points and placed him in Criminal History Category II.

Policy Statement §4A1.3 encourages departures where reliable evidence suggests that the criminal history category does not adequately represent the seriousness of the defendant's past conduct. The Judicial Conference is concerned that in some cases, however, judges may not appreciate that they can depart if there is reliable evidence that the defendant is more dangerous than the typical offender in his criminal history category. Judicial Conference recommendation 6 clarifies that evidence concerning both the degree and the type of risk presented by a defendant should be taken into account when considering whether to depart.


7. **Clarify the relevant conduct Guideline to ensure that offense levels are tailored to individual culpability.**

Defendant was a first offender, indicted as part of a conspiracy on two counts of drug trafficking and one count of use of a firearm during a drug offense. She plead guilty to one trafficking count. Her role was courier. She met with other co-defendants and arranged to pick up a truck and drive it across the border, for which she was to be paid \$5,000. Another co-conspirator met her in New Mexico, where they were both arrested. The co-conspirator was carrying a gun. Though given the reduction for acceptance of responsibility and for playing only a minimal role in the offense, the 2 kg. of cocaine found in the truck and the presence of a gun led to an offense level of 24, with a guideline range of 51-63 months in prison. She claimed that she was told only marijuana was involved and that she knew nothing of the gun. The probation officer, applying the relevant conduct guideline, determined that the full amount of the cocaine in the truck and the adjustment for possessing a gun during the offense applied to the defendant, since it was all part of the "same course of conduct or common scheme or plan as the offense of conviction." Guideline §1B1.3(a)(2).

Some courts have held that quantities of drugs or firearms possessed by co-conspirators should not be attributed to a defendant unless she was aware of them or should have foreseen them. This limitation, as well as one concerning the scope of criminal activity in which a defendant agrees to participate, can be found in the application notes to the relevant conduct guideline. But these limitations are often overshadowed by the "common scheme or plan" language found in the text of the guideline itself. Revising the guideline to clarify that knowledge, foreseeability, and the scope of a defendant's agreement can be used to tailor the offense level, as suggested in Judicial Conference recommendation 7, could help prevent imposing disproportionate punishment on couriers and other minor participants in conspiracies involving large amounts of drugs or money.

A downward departure under this provision is warranted when the criminal history category significantly *over-represents* the *seriousness of the defendant's criminal history*. Examples might include *offenders whose points result from unusually harsh sentencing for misdemeanors or from a string of convictions for relatively minor, victimless crimes such as prostitution.*

(c) In considering a departure under this these provisions the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history of III significantly under-represents the *seriousness or extensiveness* of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category VI criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

 **Recommendation #7: Clarify the Relevant Conduct Guideline to ensure that offense levels are tailored to individual culpability.**

The Judicial Conference proposes that the Sentencing Commission revise the relevant conduct guideline (1B1.3) and accompanying commentary to clarify that judges have flexibility to individualize the offense level according to the harm for which the defendant was personally culpable.

Commentary accompanying the guideline defines the phrase "otherwise be accountable" in (a)(1) as "conduct that the defendant counseled, commanded, induced procured, or willfully caused" and also conduct of others in furtherance of jointly-undertaken criminal activity that was reasonably foreseeable to the defendant, but not if the conduct was "neither within the scope of the defendant's agreement, nor was reasonably foreseeable." The proposed amendment would make these supplemental definitions part of the guideline itself.

Most important, the revisions would clarify that the foreseeability and scope of agreement criteria apply to §1B1.3(a)(2) aggregable offenses. At present, the "common course of conduct or common scheme or plan" standard found in (a)(2) sometimes conflicts with the standards in the application notes, since offenses covered by (a)(2) are often also jointly-undertaken. The illustrations in the commentary suggest that defendants who aid and abet a joint criminal activity are liable for the full amounts of drug or money, notwithstanding claims that they were not aware of and could not reasonably foresee the amounts involved. This suggests that all conduct that is part of a common scheme or plan may be attributed to a defendant, regardless of foreseeability. Application note 2 may be intended to make the "common scheme or plan" standard secondary to the criteria in application note 1, but this is far from clear.

The purpose of Recommendation #7 is to clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were reasonably foreseeable, or of which they were personally aware. It would give judges flexibility to tailor the offense level, especially that part due to the aggregation of amounts of drugs or money, according to the part of the total for which each defendant should be held culpable.

1B1.3. Relevant Conduct (Factors that Determine the Guideline Range).

(a) Chapters Two (Offense conduct) and Three (Adjustments).

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be accountable, or counseled, commanded, induced, procured, or willfully caused by the defendant, or in the case of joint criminal activity, reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal plan, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all such acts and omissions and amounts that were part of the same course of conduct or common scheme or plan as the offense of conviction, *and of which the defendant was aware or which were reasonably foreseeable to the defendant.*

Recommendation #8: Consider modification of the Acceptance of Responsibility Guideline.

The acceptance of responsibility guideline allows for a reduction of two offense levels (or roughly a 25 percent reduction) when a defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." The guideline

APPENDIX B -- Monitoring Supporting Data

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TABLE 1
DISTRIBUTION OF APPLICATION OF CHAPTER THREE ROLE IN THE OFFENSE ADJUSTMENT
(October 1, 1989 through September 30, 1990)
- MONFY90 and Mandatory Minimum Sample -

Chapter Three Role Adjustment	Fiscal Year 1990		Mandatory Minimum Sample		Spouse/Male		Enabler		Counter		Go between		Unloader	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	6,706	100.0	1,026	100.0	13	1.3	7	0.7	170	18.8	28	2.7	14	1.4
-4	401	6.0	48	4.7	2	15.4	1	14.3	27	15.8	1	3.8	4	28.6
-3	55	.80	12	1.2	0	0.0	1	14.3	3	1.8	1	3.8	0	0.0
-2	673	10.0	78	7.8	3	23.1	2	28.6	27	15.8	5	17.9	1	7.1
0	5,086	76.0	722	70.4	6	61.5	3	42.9	107	62.9	21	75.0	8	64.3
+2	279	4.2	80	7.8	0	0.0	0	0.0	5	2.9	0	0.0	0	0.0
+3	100	1.5	30	2.9	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
+4	104	1.6	56	5.5	0	0.0	0	0.0	1	0.6	0	0.0	0	0.0

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TABLE 1
DISTRIBUTION OF APPLICATION OF CHAPTER THREE ROLE IN THE OFFENSE ADJUSTMENT
(October 1, 1989 through September 30, 1990)
- MONFY90 and Mandatory Minimum Sample -

Chapter Three Role Adjustment	Street- Level Distributor		Above Street Level Distributor		Importer/ Exporter		Manufacturer		Financier/ Facilitator	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	208	20.3	431	42.0	78	7.4	84	8.2	15	1.5
-4	3	1.4	8	1.9	2	2.8	0	0.0	0	0.0
-3	3	1.4	2	0.5	0	0.0	1	1.8	1	8.7
-2	11	5.3	20	4.6	2	2.8	4	8.3	3	20.0
0	178	84.6	310	71.9	38	50.0	42	85.8	8	53.3
+2	10	4.8	44	10.2	10	13.2	10	15.6	1	8.7
+3	1	0.5	22	5.1	5	8.8	2	3.1	0	0.0
+4	4	1.9	25	5.8	19	25.0	5	7.8	2	13.3

B-

TABLE 2

SEX OF THE DEFENDANT BY CHAPTER THREE ROLE ADJUSTMENT APLLIED
 (October 1, 1989 through September 30, 1990)
 - Mandatory Minimum Sample -
 Drug Cases Only

SEX OF THE DEFENDANT	CLASS I DEFENDANTS* (Easer Roles) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	69	100.0	8	13.6	2	3.4	11	18.8	38	64.4	0	0.0	0	0.0	0	0.0
Male	37	62.7	6	75.0	1	50.0	5	45.5	25	65.8	0	0.0	0	0.0	0	0.0
Female	22	37.3	2	25.0	1	50.0	6	54.8	13	34.2	0	0.0	0	0.0	0	0.0
SEX OF THE DEFENDANT	CLASS II DEFENDANTS** (Couriers) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	162	100.0	25	15.4	3	1.9	28	18.0	102	63.0	5	3.1	0	0.0	1	0.6
Male	126	79.0	20	80.0	1	33.3	21	80.8	81	78.4	4	80.0	0	0.0	1	100.0
Female	34	21.0	5	20.0	2	66.7	5	19.2	21	20.6	1	20.0	0	0.0	0	0.0
SEX OF THE DEFENDANT	CLASS III DEFENDANTS*** (Street Level and Above) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	750	100.0	12	1.6	7	0.9	38	5.1	535	71.3	73	9.7	28	3.7	55	7.3
Male	677	90.3	12	100.0	5	71.4	34	87.2	477	89.2	65	89.0	29	100.0	55	100.0
Female	73	9.7	0	0.0	2	28.6	5	12.8	58	10.8	8	11.0	0	0.0	0	0.0

TABLE 3

RACE OF THE DEFENDANT BY CHAPTER THREE ROLE ADJUSTMENT APPLIED
 (October 1, 1989 through September 30, 1990)
 - Mandatory Minimum Sample -
 Drug Cases Only

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RACE	CLASS I DEFENDANTS* (Lesser Roles) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	56	100.0	8	13.8	2	3.5	11	19.0	37	63.8	0	0.0	0	0.0	0	0.0
WHITE	28	39.7	6	75.0	1	50.0	3	27.3	13	35.1	0	0.0	0	0.0	0	0.0
BLACK	15	25.9	0	0.0	1	50.0	8	72.7	6	18.2	0	0.0	0	0.0	0	0.0
HISPANIC	18	32.6	1	12.5	0	0.0	0	0.0	18	48.7	0	0.0	0	0.0	0	0.0
OTHER	1	1.72	1	12.5	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
RACE	CLASS II DEFENDANTS** (Couriers) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	161	100.0	25	15.5	3	1.9	26	16.2	101	62.7	5	3.1	0	0.0	1	.6
WHITE	30	18.6	4	16.0	0	0.0	5	19.2	20	19.8	1	20.0	0	0.0	0	0.0
BLACK	55	34.2	17	66.0	1	33.3	6	23.1	27	26.7	3	60.0	0	0.0	0	0.0
HISPANIC	75	46.6	4	16.0	2	66.7	15	57.7	53	52.5	1	20.0	0	0.0	0	0.0
OTHER	1	.6	0	0.0	0	0.0	0	0.0	1	1.0	0	0.0	0	0.0	0	0.0
RACE	CLASS III DEFENDANTS*** (Street Level and Above) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	747	100.0	11	1.5	7	.9	38	5.1	535	71.8	73	9.8	29	3.9	54	7.2
WHITE	262	36.1	5	45.5	3	42.9	11	29.0	205	38.3	39	41.1	17	41.4	26	48.1
BLACK	291	39.0	4	36.4	3	42.9	13	34.2	217	40.6	25	18.1	10	34.5	19	35.2
HISPANIC	156	20.9	2	18.2	1	14.3	13	34.2	106	20.2	16	24.7	6	20.7	6	11.0
OTHER	8	1.1	0	0.0	0	0.0	1	2.6	5	0.0	0	0.0	1	1.5	1	1.1

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TABLE 4

**CITIZENSHIP OF THE DEFENDANT BY CHAPTER THREE ROLE ADJUSTMENT APLIED
(October 1, 1989 through September 30, 1990)
- Mandatory Minimum Sample -
Drug Cases Only**

CITIZENSHIP	CLASS I DEFENDANTS (Lesser Roles) Chapter 3 Role Adjustment															
	TOTAL		4		3		2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	61	100.0	8	13.1	2	3.3	11	18.0	40	65.6	0	0.0	0	0.0	0	0.0
United States Citizen	42	68.9	4	50.0	2	100.0	11	100.0	25	62.5	0	0.0	0	0.0	0	0.0
Non U.S. Citizen	19	31.1	4	50.0	0	0.0	0	0.0	15	37.5	0	0.0	0	0.0	0	0.0
CITIZENSHIP	CLASS II DEFENDANTS (Couriers) Chapter 3 Role Adjustment															
	TOTAL		4		3		2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	185	100.0	7	16.4	3	1.8	25	15.2	104	63.0	5	3.0	0	0.0	1	0.5
United States Citizen	80	48.5	4	25.9	2	66.7	16	64.0	50	48.1	4	80.0	0	0.0	1	100.0
Non U.S. Citizen	85	51.5	20	74.1	1	33.3	9	36.0	54	51.9	1	20.0	0	0.0	0	0.0
CITIZENSHIP	CLASS III DEFENDANTS (Street Level and Above) Chapter 3 Role Adjustment															
	TOTAL		4		3		2		0		2		1		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	773	100.0	12	1.6	7	9	40	5.2	560	72.5	73	9.4	20	2.6	54	7.0
United States Citizen	597	77.2	6	50.0	7	100.0	30	75.0	440	78.0	56	79.5	19	67.9	37	68.5
Non U.S. Citizen	176	22.7	6	50.0	0	0.0	10	25.0	120	21.4	17	20.5	1	3.1	17	29.5

TABLE 5-A
USE OF A WEAPON BY THE DEFENDANT BY CHAPTER THREE ROLE ADJUSTMENT APPLIED
(October 1, 1989 through September 30, 1990)
- Mandatory Minimum Sample -
Drug Cases Only

WEAPON USE	CLASS I DEFENDANTS* (Lesser Roles) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	62	100.0	8	100.0	2	100.0	11	100.0	41	100.0	0	0.0	0	0.0	0	0.0
None	51	82.3	8	100.0	2	100.0	8	72.7	33	80.5	0	0.0	0	0.0	0	0.0
Found on Premises	7	11.3	0	0.0	0	0.0	2	18.2	5	12.2	0	0.0	0	0.0	0	0.0
Readily Available	1	1.6	0	0.0	0	0.0	1	9.1	0	0.0	0	0.0	0	0.0	0	0.0
Carried by Codefendant	2	3.2	0	0.0	0	0.0	0	0.0	2	4.9	0	0.0	0	0.0	0	0.0
Carried by Defendant	1	1.6	0	0.0	0	0.0	0	0.0	1	2.4	0	0.0	0	0.0	0	0.0
Fired	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Otherwise Used	0	0.0	0	0.0	0	0.0	0	0.0	4	9.8	0	0.0	0	0.0	0	0.0

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TABLE 5-B

**USE OF A WEAPON BY THE DEFENDANT BY CHAPTER THREE ROLE ADJUSTMENT APPLIED
(October 1, 1989 through September 30, 1990)
- Mandatory Minimum Sample -
Drug Cases Only**

WEAPON USE	CLASS II DEFENDANTS (Counts) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	166	100.0	27	100.0	3	100.0	25	100.0	107	100.0	5	100.0	0	0.0	1	100.0
None	150	89.3	27	100.0	2	66.7	18	78.0	97	89.7	4	80.0	0	0.0	1	100.0
Found on Premises	1	0.6	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Readily Available	9	5.4	0	0.0	0	0.0	3	12.0	62	57.9	0	0.0	0	0.0	0	0.0
Carried by Codefendant	6	3.6	0	0.0	1	33.3	3	12.0	2	1.8	0	0.0	0	0.0	0	0.0
Carried by Defendant	2	1.2	0	0.0	0	0.0	0	0.0	1	0.9	1	20.0	0	0.0	0	0.0
Fired	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Otherwise Used	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

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TABLE 5-C
USE OF A WEAPON BY THE DEFENDANT BY CHAPTER THREE ROLE ADJUSTMENT APLIED
(October 1, 1989 through September 30, 1990)
- Mandatory Minimum Sample -
Drug Cases Only

WEAPON USE	CLASS III DEFENDANTS*** (Street Level and Above) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	786	100.0	13	100.0	7	100.0	40	100.0	568	100.0	75	100.0	30	100.0	53	100.0
None	502	63.9	10	76.9	4	57.1	30	75.0	364	64.1	44	58.7	16	53.3	34	64.2
Found on Premises	121	15.4	1	7.7	2	28.6	3	7.5	85	15.0	15	20.0		0.0	10	18.9
Readily Available	79	10.1	0	0.0	1	14.3	6	15.0	58	10.4	8	10.7	2	6.7	3	5.7
Carried by Codendant	35	4.5	1	7.7	0	0.0	1	2.5	23	4.1	5	6.7	2	6.7	3	5.7
Carried by Defendant	43	5.5	1	7.7	0	0.0	0	0.0	32	5.6	3	4.0	4	13.3	3	5.7
Fired	3	0.4	0	0.0	0	0.0	0	0.0	3	0.5	0	0.0	0	0.0	0	0.0
Otherwise Used	3	0.4	0	0.0	0	0.0	0	0.0	2	0.4	0	0.0	1	3.3	0	0.0

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TABLE 6
SCOPE OF THE OFFENSE BY CHAPTER THREE ROLE ADJUSTMENT APPLIED
(October 1, 1989 through September 30, 1990)
- Mandatory Minimum Sample -
Drug Cases Only

EVENT SCOPE	CLASS I DEFENDANTS* (Lesser Roles) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	81	100.0	8	13.1	2	3.3	10	18.4	41	87.2	0	0.0	0	0.0	0	0.0
SINGLE EVENT	25	41.0	3	37.5	1	50.0	5	50.0	18	38.0	0	0.0	0	0.0	0	0.0
MULTIPLE EVENT	8	13.1	2	25.0	0	0.0	1	10.0	5	12.2	0	0.0	0	0.0	0	0.0
ONGOING	28	46.0	3	37.5	1	50.0	4	40.0	20	48.8	0	0.0	0	0.0	0	0.0
EVENT SCOPE	CLASS II DEFENDANTS** (Counters) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	187	100.0	27	18.1	3	1.8	28	15.8	105	62.9	5	3.0	0	0.0	1	0.6
SINGLE EVENT	132	79.0	27	100	2	86.7	17	85.3	82	78.1	3	80.0	0	0.0	1	100.0
MULTIPLE EVENT	8	5.4	0	0.0	0	0.0	4	15.4	5	4.8	0	0.0	0	0.0	0	0.0
ONGOING	25	15.0	0	0.0	1	33.3	4	15.4	18	17.1	2	40.0	0	0.0	0	0.0
EVENT SCOPE	CLASS III DEFENDANTS*** (Street Level and Above) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total	790	100.0	13	1.8	8	1.8	40	5.1	573	72.5	74	9.37	30	3.8	54	6.8
SINGLE EVENT	188	23.5	4	30.8	0	0.0	10	25.0	158	27.8	10	13.5	2	6.7	2	3.7
MULTIPLE EVENT	115	14.8	3	23.1	1	18.7	5	12.5	82	18.1	8	10.8	3	10.0	3	5.0
ONGOING	489	61.9	6	48.2	5	83.3	25	62.5	323	56.4	56	75.7	25	83.3	49	67.8

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TABLE 7-A

**CRIMINAL HISTORY POINTS BY CHAPTER THREE ROLE ADJUSTMENT APPLIED
(October 1, 1989 through September 30, 1990)
- Mandatory Minimum Sample -
Drug Cases Only**

CRIMINAL HISTORY POINTS	CLASS I DEFENDANTS (Lesser Roles) Chapter 3 Role Adjustment															
	TOTAL		4		3		2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	82	100.0	8	100.0	2	100.0	11	100.0	41	100.0	0	0.0	0	0.0	0	0.0
0	43	89.4	8	75.0	2	100.0	8	72.7	27	65.9	0	0.0	0	0.0	0	0.0
1	6	9.7	0	0.0	0	0.0	0	0.0	6	14.6	0	0.0	0	0.0	0	0.0
2	3	4.8	1	12.5	0	0.0	0	0.0	2	4.9	0	0.0	0	0.0	0	0.0
3	1	1.8	0	0.0	0	0.0	0	0.0	1	2.4	0	0.0	0	0.0	0	0.0
4	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
5	3	4.8	0	0.0	0	0.0	0	0.0	2	4.9	0	0.0	0	0.0	0	0.0
6	3	4.8	0	0.0	0	0.0	2	18.2	0	0.0	0	0.0	0	0.0	0	0.0
7	2	3.2	0	0.0	0	0.0	0	0.0	1	2.4	0	0.0	0	0.0	0	0.0
8	2	3.2	0	0.0	0	0.0	0	0.0	1	2.4	0	0.0	0	0.0	0	0.0
9	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
10	2	3.2	0	0.0	0	0.0	0	0.0	1	2.4	0	0.0	0	0.0	0	0.0
11	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
12	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
13 and above	1	1.6	0	0.0	0	0.0	1	9.1	0	0.0	0	0.0	0	0.0	0	0.0

TABLE 7-B

CRIMINAL HISTORY POINTS BY CHAPTER THREE ROLE ADJUSTMENT APPLIED
 (October 1, 1989 through September 30, 1990)
 - Mandatory Minimum Sample -
 Drug Cases Only

CRIMINAL HISTORY POINTS	CLASS II DEFENDANTS (County) (Chapter 3 Role Adjustment)															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	188	100.0	27	100.0	3	100.0	27	100.0	105	100.0	5	100.0	0	0.0	1	100.0
0	123	73.2	25	82.6	2	66.7	17	63.0	76	72.4	3	60.0	0	0.0	0	0.0
1	13	7.7	2	7.4	1	33.3	2	7.4	8	7.6	0	0.0	0	0.0	0	0.0
2	8	4.8	0	0.0	0	0.0	3	11.1	5	4.8	0	0.0	0	0.0	0	0.0
3	10	8.0	0	0.0	0	0.0	3	11.1	5	4.8	2	40.0	0	0.0	0	0.0
4	4	2.4	0	0.0	0	0.0	2	7.4	2	1.9	0	0.0	0	0.0	0	0.0
5	4	2.4	0	0.0	0	0.0	0	0.0	4	3.8	0	0.0	0	0.0	0	0.0
6	3	1.8	0	0.0	0	0.0	0	0.0	2	1.9	0	0.0	0	0.0	1	100.0
7	1	0.6	0	0.0	0	0.0	0	0.0	1	1.0	0	0.0	0	0.0	0	0.0
8	1	0.6	0	0.0	0	0.0	0	0.0	1	1.0	0	0.0	0	0.0	0	0.0
9	1	0.6	0	0.0	0	0.0	0	0.0	1	1.0	0	0.0	0	0.0	0	0.0
10	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
11	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
12	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
13 and above	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

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TABLE 7-C

CRIMINAL HISTORY POINTS BY CHAPTER THREE ROLE ADJUSTMENT APPLIED
(October 1, 1989 through September 30, 1990)
- Mandatory Minimum Sample -
Drug Cases Only

CRIMINAL HISTORY POINTS	CLASS III DEFENDANTS (Street Level and Above) Chapter 3 Role Adjustment															
	TOTAL		-4		-3		-2		0		+2		+3		+4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	788	100.0	13	100.0	7	100.0	40	100.0	509	100.0	74	100.0	30	100.0	55	100.0
0	385	48.8	11	84.8	5	71.4	25	62.5	285	56.1	30	40.5	11	36.7	16	29.1
1	80	10.2	0	0.0	1	14.3	4	10.0	56	9.8	11	14.9	3	10.0	5	9.1
2	32	4.1	1	7.7	0	0.0	1	2.5	23	4.0	4	5.4	2	6.7	1	1.8
3	81	7.7	0	0.0	0	0.0	3	7.5	40	7.0	7	9.5	3	10.0	6	14.0
4	48	6.1	0	0.0	0	0.0	3	7.5	32	5.6	6	8.1	4	13.3	1	5.5
5	42	5.3	1	7.7	0	0.0	1	2.5	27	4.8	5	6.8	3	10.0	5	9.1
6	36	4.6	0	0.0	0	0.0	2	5.0	23	4.0	4	5.4	1	3.3	6	10.9
7	18	2.4	0	0.0	0	0.0	0	0.0	14	2.5	1	1.4	2	6.7	2	3.6
8	15	1.9	0	0.0	0	0.0	0	0.0	12	2.1	1	1.4	0	0.0	2	3.6
9	16	2.0	0	0.0	0	0.0	0	0.0	14	2.5	0	0.0	0	0.0	2	3.6
10	14	1.8	0	0.0	0	0.0	0	0.0	11	1.9	1	1.4	1	3.3	1	1.8
11	6	0.8	0	0.0	0	0.0	1	2.5	5	0.9	0	0.0	0	0.0	0	0.0
12	7	0.9	0	0.0	0	0.0	0	0.0	5	0.9	1	1.4	0	0.0	1	1.8
13 and above	27	3.4	0	0.0	0	0.0	0	0.0	22	3.9	3	4.1	1	3.3	1	1.8

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TABLE 8

DEFENDANT'S FINAL OFFENSE LEVEL BY CHAPTER THREE ROLE ADJUSTMENT APPLIED
(October 1, 1989 through September 30, 1990)

FINAL OFFENSE LEVEL	CHAPTER 3 ROLE ADJUSTMENT															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	9,181	100.0	442	100.0	87	100.0	831	100.0	6,908	100.0	492	100.0	193	100.0	298	100.0
1	4	0.0	1	0.2	1	1.5	1	0.1	1	0.0	0	0.0	0	0.0	0	0.0
2	175	1.9	0	0.0	0	0.0	7	0.8	188	2.4	0	0.0	0	0.0	0	0.0
3	1	0.0	0	0.0	0	0.0	0	0.0	1	0.0	0	0.0	0	0.0	0	0.0
4	252	2.7	2	0.5	0	0.0	5	0.6	245	3.6	0	0.0	0	0.0	0	0.0
5	9	0.1	0	0.0	0	0.0	0	0.0	9	0.1	0	0.0	0	0.0	0	0.0
6	150	1.6	29	6.6	0	0.0	1	0.1	120	1.7	0	0.0	0	0.0	0	0.0
7	5	0.1	0	0.0	1	1.5	0	0.0	4	0.1	0	0.0	0	0.0	0	0.0
8	108	1.2	4	0.9	0	0.0	58	7.0	42	0.6	2	0.4	0	0.0	0	0.0
9	13	0.1	0	0.0	0	0.0	2	0.2	11	0.2	0	0.0	0	0.0	0	0.0
10	542	5.9	23	5.2	0	0.0	48	5.8	489	6.8	1	0.2	0	0.0	0	0.0
11	55	0.6	0	0.0	2	3.0	1	0.1	52	0.8	0	0.0	0	0.0	0	0.0
12	493	4.9	18	3.6	0	0.0	37	4.5	380	5.6	8	1.8	0	0.0	1	0.4
13	27	0.3	2	0.5	3	4.5	0	0.0	18	0.3	2	0.4	2	1.0	0	0.0
14	483	5.4	10	2.3	0	0.0	47	5.7	418	6.1	15	3.1	0	0.0	2	0.6
15	24	0.3	0	0.0	1	1.5	1	0.1	19	0.3	1	0.2	2	1.0	0	0.0
16	532	5.8	8	1.8	0	0.0	53	6.4	457	6.8	10	2.0	0	0.0	4	1.5
17	27	0.3	1	0.2	3	4.5	0	0.0	21	0.3	0	0.0	2	1.0	0	0.0
18	412	4.5	17	3.8	0	0.0	23	2.8	355	5.1	16	3.3	0	0.0	1	0.4
19	13	0.1	0	0.0	5	7.5	0	0.0	4	0.1	0	0.0	4	2.1	0	0.0
20	411	4.5	89	22.4	0	0.0	42	5.1	248	3.6	21	4.3	0	0.0	1	1.1

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FINAL OFFENSE LEVEL	CHAPTER 3 ROLE ADJUSTMENT															
	TOTAL		4		3		2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
21	24	0.3	0	0.0	17	25.4	0	0.0	2	0.0	0	0.0	5	2.6	0	0.0
22	438	4.8	80	18.1	0	0.0	86	11.8	238	3.4	18	3.7	0	0.0	2	0.8
23	11	0.1	0	0.0	8	9.0	0	0.0	3	0.0	0	0.0	2	1.0	0	0.0
24	1,082	11.8	28	8.3	0	0.0	85	10.2	831	13.5	15	3.1	0	0.0	3	1.1
25	18	0.2	0	0.0	7	10.5	0	0.0	4	0.1	1	0.2	4	2.1	0	0.0
26	861	9.3	44	10.0	1	1.5	51	8.1	878	9.8	71	14.4	0	0.0	5	1.8
27	20	0.2	0	0.0	5	7.5	1	0.1	3	0.0	0	0.0	11	5.7	0	0.0
28	523	5.7	38	8.1	0	0.0	87	8.1	340	4.8	63	12.8	1	0.5	18	8.0
29	21	0.2	0	0.0	3	4.5	0	0.0	1	0.0	0	0.0	17	8.8	0	0.0
30	582	6.5	26	5.7	1	1.5	71	8.5	443	8.4	38	7.3	1	0.5	15	5.8
31	19	0.2	0	0.0	7	10.5	1	0.1	2	0.0	1	0.2	7	3.8	1	0.4
32	889	7.3	15	3.4	0	0.0	81	11.0	488	7.2	48	10.0	4	2.1	14	5.2
33	28	0.3	0	0.0	2	3.0	1	0.1	1	0.0	0	0.0	22	11.4	0	0.0
34	508	5.5	2	0.5	0	0.0	28	3.5	383	5.7	60	12.2	2	1.0	20	7.5
35	55	0.6	0	0.0	2	3.0	1	0.1	18	0.3	2	0.4	30	15.5	1	0.4
36	263	2.9	1	0.2	0	0.0	4	0.5	186	2.7	43	8.7	2	1.0	27	10.1
37	73	0.8	0	0.0	0	0.0	1	0.1	38	0.5	7	1.4	28	13.5	3	1.1
38	159	1.7	0	0.0	0	0.0	1	0.1	58	0.8	29	5.8	2	1.0	68	25.8
39	23	0.3	0	0.0	0	0.0	1	0.1	1	0.0	0	0.0	20	10.4	1	0.4
40	81	0.7	0	0.0	0	0.0	0	0.0	12	0.2	10	2.0	1	0.5	38	14.2
41	14	0.2	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	13	6.7	1	0.4
42	35	0.4	0	0.0	0	0.0	0	0.0	5	0.1	4	0.8	2	1.0	24	8.0
43	18	0.2	0	0.0	0	0.0	0	0.0	2	0.0	1	0.2	5	2.6	10	3.7

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TABLE 9

GUIDELINE RANGE BY CHAPTER THREE ROLE ADJUSTMENT APPLIED
(October 1, 1989 through September 30, 1990)

GUIDELINE RANGE	CHAPTER 3 ROLE ADJUSTMENT															
	TOTAL		-4		-3		-2		0		2		4		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	9,109	100.0	448	100.0	64	100.0	824	100.0	6,843	100.0	487	100.0	180	100.0	250	100.0
0-6	513	5.6	27	6.1	1	1.6	10	1.2	475	6.9	0	0.0	0	0.0	0	0.0
1-7	26	0.3	1	0.2	1	1.6	0	0.0	23	0.3	0	0.0	0	0.0	0	0.0
2-8	92	1.0	5	1.1	0	0.0	42	5.1	44	0.6	1	0.2	0	0.0	0	0.0
3-9	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
4-10	31	0.3	0	0.0	0	0.0	11	1.3	20	0.3	0	0.0	0	0.0	0	0.0
6-12	407	4.5	20	4.5	0	0.0	38	4.6	349	5.1	0	0.0	0	0.0	0	0.0
8-14	94	1.0	2	0.5	1	1.6	7	0.9	83	1.2	1	0.2	0	0.0	0	0.0
8-15	8	0.1	1	0.2	0	0.0	0	0.0	5	0.1	0	0.0	0	0.0	0	0.0
10-18	336	3.7	13	2.9	1	1.6	36	4.4	280	4.1	6	1.2	0	0.0	0	0.0
12-18	88	1.0	4	0.9	2	3.1	7	0.9	72	1.1	1	0.2	1	0.5	1	0.4
15-21	420	4.6	11	2.5	0	0.0	42	5.1	358	5.2	9	1.9	0	0.0	0	0.0
18-24	79	0.9	0	0.0	0	0.0	7	0.9	67	1.0	3	0.6	2	1.1	0	0.0
21-27	457	5.0	8	1.8	0	0.0	46	5.6	390	5.7	9	1.9	0	0.0	4	1.5
24-30	106	1.2	2	0.5	4	6.3	7	0.9	87	1.3	3	0.6	2	1.1	1	0.4
27-33	389	4.3	15	3.4	0	0.0	23	2.8	336	4.9	14	2.9	1	0.5	0	0.0
30-37	76	0.8	1	0.2	3	4.7	1	0.1	67	1.0	1	0.2	2	1.1	1	0.4
33-41	384	4.3	83	18.6	0	0.0	42	5.1	292	3.7	13	2.7	0	0.0	4	1.5
37-46	91	1.0	11	2.5	16	25.0	4	0.5	50	0.7	5	1.0	5	2.7	0	0.0
41-51	367	4.0	81	18.2	1	1.6	70	8.5	185	2.7	19	3.9	0	0.0	1	0.4
46-57	78	0.9	3	0.7	3	4.7	11	1.3	54	0.8	1	0.2	1	0.5	1	0.4
51-63	823	9.0	29	6.5	1	1.6	81	10.1	685	10.2	13	2.7	0	0.0	0	0.0
57-71	146	1.6	3	0.7	8	12.5	7	0.9	120	1.8	1	0.2	1	0.5	0	0.0

GUIDELINE RANGE	CHAPTER 3 ROLE ADJUSTMENT															
	TOTAL		4		3		2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
63 76	877	7.4	40	9.0	1	1.6	47	5.7	539	7.9	47	5.7	0	0.0	3	1.2
70 87	127	1.4	1	0.2	6	9.4	4	0.5	100	1.5	9	1.9	0	0.0	1	0.4
77 96	52	0.8	1	0.2	0	0.0	4	0.5	45	0.7	2	0.4	0	0.0	0	0.0
78 97	456	5.0	35	7.8	0	0.0	57	6.9	304	4.4	49	10.1	3	1.6	10	1.9
84 105	10	0.1	0	0.0	0	0.0	0	0.0	9	0.1	1	0.2	0	0.0	0	0.0
87-106	73	0.8	1	0.2	2	3.1	4	0.5	41	0.6	7	1.4	17	9.1	1	0.4
82-115	59	0.7	2	0.5	0	0.0	4	0.5	48	0.7	4	0.8	0	0.0	1	0.4
87 121	435	4.8	24	5.4	0	0.0	59	7.2	304	4.4	37	7.6	2	1.1	9	3.5
100-125	12	0.1	0	0.0	0	0.0	0	0.0	10	0.2	2	0.4	0	0.0	0	0.0
108 135	81	0.9	3	0.7	5	7.8	7	0.9	55	0.8	3	0.6	3	1.6	5	1.9
110 137	37	0.4	0	0.0	1	1.6	2	0.2	29	0.4	4	0.8	0	0.0	1	0.4
120-150	12	0.1	2	0.5	0	0.0	0	0.0	9	0.1	1	0.2	0	0.0	0	0.0
121 151	479	5.3	13	2.9	2	3.1	78	9.5	333	4.9	37	7.6	4	2.2	12	4.6
130 162	10	0.1	0	0.0	0	0.0	1	0.1	9	0.1	0	0.0	0	0.0	0	0.0
135-168	126	1.4	2	0.5	2	3.1	13	1.6	87	1.3	10	2.1	10	5.4	2	0.8
140 175	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
151 188	383	4.2	2	0.5	0	0.0	26	3.2	300	4.4	36	7.4	6	3.2	11	5.0
188-210	183	1.8	0	0.0	1	1.6	8	1.0	113	1.7	13	2.7	25	13.4	3	1.2
188 235	234	2.6	0	0.0	1	1.6	5	0.6	189	2.5	37	7.6	7	3.8	15	5.8
210 262	145	1.6	0	0.0	1	1.6	4	0.5	84	1.4	12	2.5	23	12.4	11	4.1
235 293	143	1.6	0	0.0	0	0.0	1	0.1	66	1.0	29	6.0	7	3.8	40	15.4
262 327	108	1.2	0	0.0	0	0.0	2	0.2	82	0.9	12	2.5	14	7.5	16	7.0
292 365	82	1.0	0	0.0	0	0.0	2	0.2	43	0.6	10	2.1	11	5.9	26	10.0
324 405	30	0.3	0	0.0	0	0.0	0	0.0	2	0.0	2	0.4	11	5.9	15	5.8
360 1 de	128	1.4	0	0.0	0	0.0	1	0.1	48	0.7	17	3.5	14	7.5	16	6.5
1 de	17	0.2	0	0.0	0	0.0	1	0.1	2	0.0	1	0.2	1	1.0	0	0.0

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TABLE 10

DISTRICT BY CHAPTER THREE ROLE ADJUSTMENT
(October 1, 1989 through September 30, 1990)

DISTRICT	CHAPTER 3 ROLE ADJUSTMENT															
	TOTAL		4		3		2		0		2		1		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	9,235	100.0	448	100.0	89	100.0	832	100.0	6,940	100.0	493	100.0	189	100.0	264	100.0
D.C. CIRCUIT																
District of Columbia	153	1.7	3	0.7	0	0.0	5	0.6	130	1.9	2	0.4	8	4.2	5	1.9
FIRST CIRCUIT																
Maine	70	0.8	3	0.7	0	0.0	4	0.5	52	0.8	5	1.0	2	1.1	4	1.5
Massachusetts	84	0.7	3	0.7	1	1.5	14	1.7	38	0.6	5	1.0	1	0.5	2	0.8
New Hampshire	27	0.3	0	0.0	0	0.0	4	0.5	20	0.3	1	0.2	0	0.0	2	0.8
Puerto Rico	89	0.8	1	0.2	0	0.0	13	1.6	49	0.7	4	0.8	0	0.0	2	0.8
Rhode Island	16	0.2	1	0.2	0	0.0	0	0.0	12	0.2	3	0.6	0	0.0	0	0.0
SECOND CIRCUIT																
Connecticut	67	0.7	2	0.5	6	6.7	7	0.8	43	0.6	6	1.2	1	0.5	2	0.8
New York																
Eastern	303	3.3	180	40.2	0	0.0	22	2.6	93	1.3	3	0.6	4	2.1	1	0.4
Northern	72	0.8	5	1.1	1	1.5	6	0.7	58	0.8	0	0.0	2	1.1	0	0.0
Southern	175	1.9	6	1.3	3	4.4	20	2.4	123	1.8	15	3.0	4	2.1	1	0.4
Western	64	0.7	2	0.5	0	0.0	7	0.8	53	0.8	2	0.4	0	0.0	0	0.0

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DISTRICT	CHAPTER 3 ROLE ADJUSTMENT															
	TOTAL		4		3		2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Vermont	48	05	2	05	1	15	4	05	34	05	1	02	4	21	2	06
THIRD CIRCUIT																
Delaware	59	08	1	02	0	00	3	04	52	08	0	00	0	00	3	11
New Jersey	145	18	11	25	8	116	15	18	101	15	8	16	2	11	0	00
Pennsylvania																
Eastern	40	04	0	00	0	00	6	07	26	04	2	04	4	21	2	06
Middle	22	02	0	00	0	00	1	01	13	02	3	06	1	05	4	15
Western	49	05	1	02	0	00	3	04	38	06	4	08	0	00	3	11
Virgin Islands	11	01	0	00	0	00	0	00	11	02	0	00	0	00	0	00
FOURTH CIRCUIT																
Maryland	187	20	11	25	0	00	16	19	135	20	18	37	3	16	4	15
North Carolina																
Eastern	77	08	4	09	0	00	4	05	57	08	2	04	4	21	6	21
Middle	171	19	3	07	0	00	19	23	132	19	3	06	7	37	7	27
Western	71	08	3	07	0	00	6	07	57	08	2	04	1	05	2	06
South Carolina	34	04	1	02	1	15	3	04	21	03	2	04	1	05	5	19
Virginia																
Eastern	187	20	0	00	1	15	10	12	155	22	11	22	4	21	6	21
Western	106	12	1	02	0	00	10	12	79	11	6	12	4	21	6	21
West Virginia																
Northern	124	13	1	02	1	15	7	08	105	15	4	08	4	21	2	06
Southern	163	18	5	11	2	29	5	06	137	20	9	18	0	00	5	19

DISTRICT	TOTAL		Number		Percent		Number		Percent		Number		Percent		Number		Percent			
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent		
FIFTH CIRCUIT	Eastern	150	1.6	8	2.0	0	0.0	10	1.2	117	1.7	5	1.0	8	4.7	1	0.1			
	Middle	2	0.0	0	0.0	2	0.2	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0			
	Western	24	0.3	1	0.2	0	0.0	1	0.1	15	0.2	2	0.4	1	0.5	4	1.5			
	Mississippi																			
	Northern	40	0.4	4	0.9	0	0.0	2	0.2	36	0.4	2	0.4	0	0.0	2	0.8			
	Southern	34	0.6	1	0.2	0	0.0	2	0.2	46	0.7	3	0.6	0	0.0	0	0.0			
	Texas																			
	Eastern	20	0.2	1	0.2	0	0.0	1	0.1	16	0.2	0	0.0	2	1.1	0	0.0			
	Northern	110	1.2	0	0.0	0	0.0	5	0.6	86	1.2	13	2.0	0	0.0	0	0.0			
	Southern	424	4.6	6	1.6	1	1.5	21	2.5	170	5.3	13	2.6	5	2.7	0	0.0			
	Western	743	8.1	5	1.1	0	0.0	85	7.8	611	8.8	14	6.9	10	5.3	10	6.8			
	SIXTH CIRCUIT	Kentucky	67	0.8	0	0.0	0	0.0	5	0.6	62	0.9	12	2.4	2	1.1	6	3.1		
		Eastern																		
		Western	48	0.5	2	0.5	0	0.0	2	0.2	36	0.5	2	0.4	2	1.1	5	1.9		
Michigan																				
Eastern		130	1.4	3	0.7	2	2.9	14	1.4	92	1.3	11	2.6	4	2.1	4	1.5			
Western		20	0.2	0	0.0	1	1.5	0	0.0	17	0.2	0	0.0	0	0.0	2	0.8			
Ohio																				
DISTRICT	TOTAL		4		3		2		0		2		3		4					

CHAPTER 1 ROLE ADJUSTMENT

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DISTRICT		CHAPTER 3 ROLE ADJUSTMENT													
TOTAL		4		3		2		0		2		3		4	
Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
105	11	2	05	0	00	12	14	76	11	10	20	2	11	1	11
Tennessee															
70	08	3	07	2	29	8	10	53	08	2	04	0	00	2	08
Eastern															
12	01	3	07	0	00	0	00	7	01	2	04	0	00	0	00
Middle															
142	15	0	00	3	44	6	07	126	18	4	08	1	05	0	00
Western															
SEVENTH CIRCUIT															
Illinois															
67	07	0	00	1	15	8	11	43	08	3	08	3	16	6	30
Central															
81	08	2	05	1	15	5	06	64	09	7	14	1	05	1	04
Northern															
45	05	1	02	2	28	1	01	34	05	2	04	2	11	3	11
Southern															
Indiana															
43	05	5	11	0	00	3	04	33	05	1	02	1	05	0	00
Northern															
32	04	0	00	0	00	1	01	30	04	0	00	0	00	1	04
Southern															
Wisconsin															
4	00	0	00	0	00	0	00	2	00	1	02	0	00	1	01
Eastern															
40	04	2	05	0	00	1	01	32	05	3	06	1	05	1	04
Western															
EIGHTH CIRCUIT															
Arkansas															
97	11	0	00	0	00	10	12	75	11	9	18	2	11	1	04
Eastern															
18	02	0	00	0	00	0	00	5	01	5	10	0	00	0	00
Western															

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DISTRICT	CHAPTER 3 ROLE ADJUSTMENT															
	TOTAL		-4		-3		-2		0		2		3		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Iowa																
Northern	36	0.3	0	0.0	0	0.0	2	0.2	21	0.3	0	0.0	0	0.0	1	0.4
Southern	40	0.4	0	0.0	0	0.0	3	0.4	29	0.4	6	1.2	0	0.0	2	0.6
Minnesota	150	1.8	1	0.2	3	4.4	13	1.6	122	1.8	6	1.2	2	1.1	3	1.1
Missouri																
Eastern	82	0.9	0	0.0	1	1.5	3	0.4	68	1.0	5	1.0	1	0.5	4	1.5
Western	105	1.1	2	0.5	4	5.8	6	0.7	74	1.1	7	1.4	2	1.1	10	3.8
Nebraska	83	0.7	3	0.7	0	0.0	7	0.8	39	0.6	4	0.8	4	2.1	6	2.3
North Dakota	28	0.3	0	0.0	1	1.5	9	1.1	15	0.2	2	0.4	0	0.0	1	0.4
South Dakota	54	0.6	1	0.2	0	0.0	2	0.2	42	0.6	4	0.8	4	2.1	1	0.4
NINTH CIRCUIT																
Alaska	20	0.2	0	0.0	0	0.0	5	0.6	14	0.2	0	0.0	1	0.5	0	0.0
Arizona	302	3.3	33	7.4	0	0.0	53	6.4	194	2.8	20	4.1	2	1.1	0	0.0
California																
Central	56	0.6	0	0.0	0	0.0	10	1.2	42	0.6	1	0.2	0	0.0	1	1.1
Eastern	147	1.6	3	0.7	0	0.0	10	1.2	124	1.8	4	0.8	3	1.6	3	1.1
Northern	30	0.3	2	0.5	3	4.4	2	0.2	20	0.3	2	0.4	0	0.0	1	0.4
Southern	283	3.1	18	4.2	4	5.8	38	4.6	205	3.0	15	3.0	1	0.5	1	0.4
Guam																
Hawaii	64	0.7	2	0.5	1	1.5	3	0.4	52	0.8	3	0.6	2	1.1	1	0.4
Idaho	10	0.1	0	0.0	0	0.0	1	0.1	8	0.1	1	0.2	0	0.0	0	0.0
Montana	19	0.2	0	0.0	0	0.0	1	0.1	16	0.2	2	0.4	0	0.0	0	0.0
Nevada	32	0.4	0	0.0	1	1.5	2	0.2	19	0.3	10	2.0	0	0.0	0	0.0

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DISTRICT	CHAPTER 3 ROLE ADJUSTMENT															
	TOTAL		-4		3		2		0		2		1		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Northern Mariana Islands	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Oregon	153	1.7	3	0.7	1	1.5	21	2.5	115	1.7	9	1.8	0	0.0	4	1.5
Washington																
Eastern	48	0.5	1	0.2	0	0.0	2	0.2	41	0.6	3	0.6	0	0.0	1	0.4
Western	88	1.1	1	0.2	2	2.9	7	0.8	79	1.1	0	1.2	2	1.1	2	0.8
TENTH CIRCUIT																
Colorado	88	1.1	13	2.9	1	1.5	14	1.7	66	1.0	4	0.8	1	0.5	0	0.0
Kansas	73	0.8	1	0.2	0	0.0	6	0.7	56	0.8	7	1.4	1	0.5	2	0.8
New Mexico	244	2.8	4	0.9	0	0.0	45	5.4	185	2.7	8	1.6	1	0.5	1	0.4
Oklahoma																
Eastern	10	0.1	0	0.0	0	0.0	1	0.1	9	0.1	0	0.0	0	0.0	0	0.0
Northern	38	0.4	1	0.2	0	0.0	11	1.3	17	0.2	5	1.0	0	0.0	2	0.8
Western	61	0.7	1	0.2	0	0.0	3	0.4	52	0.8	4	0.8	1	0.5	0	0.0
Utah	38	0.4	2	0.5	0	0.0	0	0.0	32	0.5	4	0.8	0	0.0	0	0.0
Wyoming	51	0.6	2	0.5	1	1.5	6	0.7	38	0.6	2	0.4	1	0.5	1	0.4
ELEVENTH CIRCUIT																
Alabama																
Middle	52	0.6	0	0.0	0	0.0	1	0.1	50	0.7	1	0.2	0	0.0	0	0.0
Northern	78	0.8	2	0.5	1	1.5	4	0.5	70	1.0	0	0.0	0	0.0	1	0.4
Southern	65	0.7	2	0.5	1	1.5	5	0.6	43	0.6	7	1.3	2	1.1	5	1.9

CHAPTER 3 ROLE ADJUSTMENT																
DISTRICT	TOTAL		4		3		2		0		2		1		4	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Florida	43	68	20	45	2	29	48	58	274	40	13	28	18	95	20	70
Middle	385	43	20	45	2	29	48	58	274	40	13	28	18	95	20	70
Northern	42	05	0	00	0	00	3	04	26	04	3	06	0	00	4	10
Southern	608	68	14	31	2	29	43	52	504	73	27	55	0	00	13	49
Georgia																
Middle	82	07	1	02	0	00	6	07	50	07	3	08	0	00	2	08
Northern	182	20	2	13	2	28	21	25	119	17	17	35	11	38	6	23
Southern	68	10	1	02	0	00	12	14	85	09	4	08	2	11	4	15

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SPOUSE/MATE

Mode of Conviction

- Of thirteen defendants identified eleven pled guilty while two went to trial. Neither of the two defendants who exercised their right to trial received a mitigating role adjustment.

Plea Stipulations

- Of eight cases with available information, two defendants stipulated to amount of drug. One defendant received a minimal

[-4] mitigating role adjustment while the other defendant received no role adjustment.

- Of eight cases with available information, one defendant stipulated to offense level, guideline range, or sentence.

- Of eight cases with available information, one defendant stipulated to role in the offense. However, this defendant did not receive a mitigating role adjustment.

- Of eight cases with available information, the government agreed in only one case to make a 5K motion for a reduction in the defendant's sentence. This case also received a minor [-2] role adjustment.

- In half of the eight cases with available information, the defendant agreed to cooperate with the authorities (no formal 5K motion was made by the government). In two of these four cases the defendant received a mitigating role adjustment.

Sentence

- Five of the thirteen defendants were sentenced to no term of imprisonment. In two of the cases the term of imprisonment was a year or less. Five of the defendants were sentenced to a term of imprisonment between 13 and 60 months imprisonment. One defendant was sentenced to between 61 and 120 months imprisonment. Mandatory minimums were imposed in five (1 year, n=1; 5 years, n=3; 10 years, n=1) of the thirteen cases.

ENABLERS (Renters/No Profit)

Mode of Conviction

●Of seven defendants identified six pled guilty while only one went to trial. The defendant who exercised his/her right to trial received a minor [-2] role adjustment.

Plea Stipulations

●Of four cases with available information, one defendant stipulated to amount of drug. The defendant that stipulated to drug amount received no role adjustment.

●Of five cases with available information, one defendant stipulated to offense level, guideline range, or sentence.

●None of the defendants with information available stipulated to role in the offense.

●Of four cases with available information, the government agreed in two cases to make a 5K motion for a reduction in these defendants sentences. The two cases that received a 5K motion additionally received a [-3] and a minor [-2] role adjustment respectively.

●In three of the four cases with available information, the defendant agreed to cooperate with the authorities (no formal 5K motion was made by the government). In two of these three cases the defendant also received a mitigating role adjustment, a [-3] and minor [-2] role adjustment respectively.

Sentence

●None of the seven enablers identified were sentenced to no term of imprisonment. One defendant was sentenced to a year or less in prison. This defendant also received a [-4] minimal role adjustment. Five of the seven defendants were sentenced to between 61 and 120 months imprisonment. One defendant was sentenced between 121 and 180 months imprisonment. Mandatory minimums were imposed in two cases, both mandatory minimums involved a term of 10 years.

COURIERS

Mode of Conviction

●Of 168 defendants identified 137 (81.5%) pled guilty while 31 (18.5%) went to trial. Of the 31 defendants who exercised their right to trial eight (25.8%) received a mitigating role adjustment. However, 48 (35.0%) of those defendants that pled guilty also received a mitigating role adjustment. Interestingly, all 27 defendants that received a minimal role adjustment pled guilty.

Plea Stipulations

●Of 85 cases with available information, 22 (25.9%) defendants stipulated to amount of drug. Two of the 22 defendants stipulated and received a minimal [-4] role adjustment, five of the defendants stipulated and received a minor [-2] role adjustment. However, 14 (63.6%) of the 22 defendants that stipulated to drug amount received no role adjustment.

●Of 90 cases with available information, 36 (40.0%) stipulated to offense level, guideline range, or sentence. Of these 36 defendants, 3 received a minimal role adjustment and 6 received a minor role adjustment. Twenty-five defendants received no adjustment. Two defendants stipulated and received an aggravating role adjustment.

●Of 83 cases with available information, eight defendants stipulated to role in the offense. One half (n=4) of these eight cases also received a mitigating role adjustment.

●Of 84 cases with available information, the government agreed in six cases to make a 5K motion for a reduction in the defendant's sentence. Two of these six cases also received a minor [-2] role adjustment.

●In close to thirty percent (n=25) of the 84 cases with available information, the defendant agreed to cooperate with the authorities (no formal 5K motion was made by the government). In seven of these twenty-five cases the defendant received a mitigating role adjustment. In 17 of these cases the defendants received no role adjustment. And in one case the defendant received an aggravating role adjustment.

Sentence

●In less than four percent (n=6) of the couriers were sentenced to a term of a year or less imprisonment. Over half (51.8%) of the couriers were sentenced to between thirteen and sixty months imprisonment. An additional thirty-five percent of the couriers were sentenced to between 61 and 120 months imprisonment. Finally, two cases received sentences between 181 and 240 months imprisonment. Mandatory minimums were imposed in over seventy percent (5 years, n=83; 10 years, n=38) of the 170 courier cases.

UNLOADERS

Mode of Conviction

●Of the 13 defendants identified 11 pled guilty while two went to trial. Of the two defendants who exercised their right to trial one received a minimal [-4] mitigating role adjustment. The other defendant that went to trial received no role adjustment.

Plea Stipulations

●Of the 9 cases with available information, only one defendant stipulated to amount of drug. This defendant received a minimal [-4] mitigating role adjustment.

●Of 10 cases with available information, four stipulated to offense level, guideline range, or sentence. Of these four defendants, two received a minimal role adjustment and 1 defendant received a minor role adjustment. One defendant received no adjustment.

●Of 10 cases with available information, two defendants stipulated to role in the offense. One defendant received a minimal [-4] role adjustment while the other defendant received a minor [-2] role adjustment.

●Of 10 cases with available information, the government agreed in two cases to make a 5K motion for a reduction in the defendant's sentence. Neither of these two defendants received a role adjustment.

●In three of the 10 cases with available information, the defendant agreed to cooperate with the authorities (no formal 5K motion was made by the government). Of these three one defendant received a mitigating role adjustment.

Sentence

●None of the unloaders identified received a sentence of a year or less. Five of the 14 unloaders received sentences between 13 and 60 months imprisonment. Six of the unloaders received sentences between 61 and 120 months imprisonment. Three unloaders received sentences between 121 and 180 months imprisonment. Mandatory minimums were imposed in over seventy percent (5 years, n=3; 10 years, n=7) of the 14 unloader cases.

GO-BETWEEN (Bring the Parties Together)

Mode of Conviction

●Of the 28 defendants identified 26 (92.9%) pled guilty while two went to trial. Neither of the two defendants who exercised their right to trial received a mitigating role adjustment.

Plea Stipulations

●Of the 18 cases with available information, six (30.8%) defendants stipulated to amount of drug. Two of these six cases additionally received a mitigating role adjustment, a minimal and minor adjustment respectively.

●Of 16 cases with available information, six stipulated to offense level, guideline range, or sentence. Three of the six defendants that stipulated received a mitigating role adjustment. One defendant received a minimal role adjustment while two defendants received a [-3] adjustment.

●Of 17 cases with available information, only one defendant stipulated to role in the offense. This defendant received an additional minimal [-4] mitigating role adjustment.

●Of 17 cases with available information, the government agreed in seven (41.2%) cases to make a 5K motion for a reduction in the defendant's sentence. Over half (57.1%, n=4) of these seven defendants also received a mitigating role adjustment. One defendant received a minimal [-4] role adjustment while two defendants received a minor [-2] role adjustment.

●In nine of the 16 cases with available information, the defendant agreed to cooperate with the authorities (no formal 5K motion was made by the government). Of these nine, four defendants received a mitigating role adjustment. One defendant received a minimal role adjustment while three defendants received a minor role adjustment.

Sentence

●Seven of the go-betweens identified received sentences of a year or less. Thirteen of the defendants received sentences between thirteen and sixty month imprisonment while five defendants received sentences between 61 and 120 months imprisonment. Three cases received sentences between 121 and 180 months imprisonment. Seventy-five percent of the go-betweens identified received prison sentences of more than a year. Mandatory minimums were imposed in over eighty-five percent (1 year, n=2; 5 years, n=13; 10 years, n=9) of the 28 go-between cases.

RECEIVES - SELLS TO USER

Mode of Conviction

●Of the 207 defendants identified 77.8% (n = 161) of them pled guilty while 22.2% (n = 46) went to trial. 39 of the defendants who went to trial received no role in the offense adjustment, six received aggravating roles, and one received a mitigating role. 16 of the defendants who pled guilty received minor or minimal role adjustments.

Plea Stipulations

●Of the 107 cases with information available 31 (29.0%) stipulated to a drug amount. (Two cases that stipulated to drug amount received a -2 Chapter 3 role adjustment).

●Of the 106 cases with information available 40 (37.7%) stipulated to offense level, guideline range, or sentence. Of the forty cases that stipulated only 3 received a mitigating adjustment, 33 cases received no adjustment, and 4 cases stipulated and received an aggravating role adjustment.

●In 10 cases there were stipulations to gun possession.

●Nine out of 106 cases stipulated to role in the offense. Four of these nine cases received a -2 role adjustment while 2 cases received no adjustment and three cases received an aggravating adjustment.

●Thirteen of the 104 defendants identified received an agreement to make a 5K reduction motion at sentencing. None of the thirteen received a mitigating role adjustment. One case received an aggravating (-2) adjustment.

●Over half of the street level defendants agreed to cooperate with authorities (54/51.4%). However only 5 of these defendants received a mitigating role adjustment. Additionally 5 of those who agreed to cooperate received an aggravating role adjustment.

Sentence

●9.6% (n = 20) of the defendants received sentences of a year or less, four of these defendants received no prison sentence. 37.5% (n = 78) defendants received prison sentences between 13 months and 5 years, and 30.2% (n = 63) received sentences between five and ten years. 22.5% (n = 47) of defendants received sentences of 15 years or more. 21.6% (n = 45) of street level dealers were not sentenced under mandatory minimum statutes. 78.3% (n = 163) of these defendants were sentenced under mandatory minimum statutes.

APPENDIX C -- Case File Review Supporting Data

400 Brief Summary of Offense and Factors that Influence Role Determination

401 Specific Role of the Drug Offender (Circle all that apply)

SO -- Girlfriend/Spouse	BG -- Bodyguard/Strongman
GO -- Gopher/Worker/Employee	PR -- Professional Expertise
OF -- Off-loader/Loader	AP -- Aircraft Pilot or Ship Captain
CR -- Crewmember	FF -- Financier
LO -- Lookout	GR -- Grower/Manufacturer
SR -- Storer/Enabler	ST -- Street Dealer/Sells to User
MO -- Money-Runner	MI -- Mid-Level Dealer/Sells to Other Dealers
MU -- Mule (Drug On Person)	HI -- High-Level Dealer/Importer
CO -- Courier (Drug By Vehicle)	OT -- _____
BR -- Broker/Steerer/Go-Between	UN -- Unknown
RE -- Renter (For-Profit)	List type of transportation _____

402 Form of Compensation (Circle all primary forms involved)

NO -- None
FF -- Flat Fee (Fee/In-Kind per Transaction)
DR -- Drugs for Personal Use
ON -- On-going Wages/Salary/Rent/In-Kind
PE -- Percentage of Profits/Drugs
UN -- Unknown

403 Amount of Compensation (Describe: _____)

NO -- None UN -- Unknown

404 Defendant's Ownership of Drugs

N -- No Ownership
P -- Ownership of Portion of Drugs
O -- Ownership of All Drugs
U -- Unknown

405 Defendant Owns or Controls Instrumentality Used in Transaction

O -- Ownership or Control
N -- No Ownership or Control
NA -- No Instrumentality Used
U -- Unknown

406 Scope of Participation (Circle only one)

S -- Single Act
M -- Multiple Acts
O -- Ongoing Involvement
U -- Unknown

407 Scope of Knowledge of Offender's Offense

NK -- No knowledge of scope
PK -- Partial knowledge of scope
FK -- Full knowledge of scope
UN -- Unknown

408 Scope of Knowledge of Broader Conspiracy (If there's evidence of broader conspiracy -- circle only one)

NO -- No evidence of broader conspiracy
NK -- No knowledge of scope
PK -- Partial knowledge of scope
FK -- Full knowledge of scope
UN -- Unknown

LD -- Decision-making capacity for limited part of offense conspiracy
PD -- Decision-making capacity for part of offense conspiracy
FD -- Decision-making capacity for full scope of offense conspiracy
UN -- Unknown

- 410 Defendant Negotiated Terms of Transaction?
Y -- Yes _____ N -- No _____
- 411 Force Involved in the Offense (Circle only one)
NO -- No Force Threatened or Used
TH -- Force Threatened or Used (No Weapon)
WC -- Co-Conspirator Used Brandished, Possessed, Carried Weapon
WN -- Weapon Personally Possessed but Not Connected to Offense
WE -- Weapon Personally Possessed on Premises, Out of Reach, Readily Available
WP -- Weapon Personally Possessed, Carried, Brandished, Threatened, Used
OT -- Other _____
UN -- Unknown
- 412 Total Number of Controlled Substance Offense Priors _____ Points _____
- 413 Current Personal Drug Use
U -- User
N -- Non-User
UN -- Unknown
- 414 Citizenship: U.S. Non-U.S.
- 415 To What Extent Is the Above Information Corroborated?

- 416 Mandatory Minimum Originally Charged: N -- No S -- Same U -- Unknown Y -- Yes _____
- 417 Type of Drugs (Circle only one)
C -- Cocaine (Powder) O -- Other Schedule I, II, or III drugs
R -- Crack/Rock Cocaine N -- Multiple Types of Drugs
M -- Marijuana U -- Unknown
H -- Heroin
- 418 Drug Quantity -- Defendant Personally Involved _____ grams, kilos
- 419 Drug Quantity -- Plea Agreement Stipulation _____ grams, kilos
- 420 Drug Quantity -- Court Assessed _____ grams, kilos
- 421 Drug Quantity -- PSI Assessed (If different from line 420) _____ grams, kilos
- 422 Drug Quantity -- Entire Conspiracy _____ grams, kilos
- 423 Apparent Misapplication of Relevant Conduct Rules (explain) _____
- 424 Apparent Misapplication of Role in the Offense Rules (explain) _____
- 425 Role Recommended by Court Differs from Role Recommended by PSI _____
- 426 Role Stipulated to in Plea Agreement _____
- 427 Quote Relevant Comments _____

- 428 Your Comments _____

10/15/91

CODING MANUAL

DRUG WORKING GROUP STUDY OF ROLE IN THE OFFENSE

Coder Put your initials here.
QC Person Quality Controlling puts initials here.
Case Number Leave this blank.

Offense/Role Characteristics

400 Briefly summarize the conspiracy and the defendant's offense conduct, with particular attention to mitigating or aggravating factors (e.g., use of a firearm or dangerous weapon; quantity with which directly involved, and quantity of entire conspiracy; payment and form of payment; coerced participation in offense).

401 Note the specific roles in the offense played by the offender, as discerned from the offense conduct, admissions of the defendant, etc. Do not rely on whether a Chapter 3 adjustment for role was actually given. Indicate all roles played. Use the following comments as guides:

SO -- "Significant Other" of Offender: spouses, girlfriends, boyfriends, children, parents, and the like where emotional influence or some form of coercion may have been exercised over the defendant. Do not check this if the defendant has any decision-making role in the organization.

GO -- Gopher/Worker/Employee: very limited role (but may be ongoing); limited roles with generally no direct contact with drugs, and may include running errands, answering the telephone, receiving packages, etc. Do not check this if the defendant has any decision-making role in the organization.

OF -- Off-loader/Loader: person who performs little more than the physical labor required to put large quantities of drugs into storage, hiding, or some mode of transportation.

CR -- Crewmember: person who serves as crewmember on vessel or aircraft used to transport large quantities of drugs.

LO -- Lookout: person who provides early warning security functions during meetings, exchanges, off-loading, etc. Usually has minimal contact with the drugs. Less significant security role than bodyguard.

SR -- Storer/Enabler (Not For-Profit): provides structures or equipment for conspiracy use, but usually for no or minimal compensation, often as a "favor." Passive role in conspiracy, usually limited knowledge of nature or scope of conspiracy.

MU -- Mule: person who carries drugs internally or on their person, usually through an airport, or walking across a border. Includes person carrying drugs in baggage, souvenirs, clothing, or otherwise. Likely will not involve unusually large quantities of drugs.

CO -- Courier: person who carries drugs with the assistance of a vehicle or other equipment. May include situations where person otherwise considered crewmember is the only person directing the craft, e.g., a go-fast boat onto which drugs had been loaded from a "mother ship." May involve larger quantities of drugs than a mule. Typically has no verifiable ownership of the drugs.

BR -- Broker/Steerer/Go-Between: arranges for two parties to purchase drugs. Usually has no

ownership of the drugs.

RE -- Renter (For-Profit): provides structures or equipment for conspiracy use for some form of compensation.

BG -- Bodyguard/Strongman/Debt Collector: provide physical and personal security for higher-level dealers, collect debts owed, or punish recalcitrant persons.

PR -- Professional Expertise: provides professional services (e.g., accounting, legal) unlawfully to aid the conspiracy. Typically is not member of the conspiracy organization.

AP -- Aircraft Pilot or Ship Captain: would not include situations where person otherwise considered crewmember is the only person directing the craft, e.g., a go-fast boat onto which drugs had been loaded from a "mother ship." Such a go-fast driver would be considered a courier/driver.

FF -- Financier of Front Money: provides front money for purchase of drugs. May provide money on limited or multiple occasions.

GR -- Grower/Manufacturer: grows or manufactures a controlled substance. Indicate what level dealer defendant is.

ST -- Street Dealer/Sells to User: sells in small quantities directly to the user.

MI -- Mid-Level Dealer: sells in large quantities to other dealers or street-level dealers.

HI -- High-Level Dealer/Importer: sells, manufactures, or grows large quantities of drugs; or leads, directs, or otherwise runs a significant drug conspiracy organization. May also lead, direct, or otherwise run unusually large conspiracy organization that sells, manufactures, or grow drug quantities at the top of the guideline drug quantity chart.

402 Indicate the form in which the compensation was provided.

FF -- Flat Fee differs from Wages/Salary in that a flat fee is specifically tied to individual acts undertaken on behalf of the conspiracy, as opposed to ongoing Wages or Salary.

DR -- Drugs for Personal Use differs from **PE -- Percentage of Profits/Drugs**. Drugs for personal use applies primarily to a drug user who uses the drugs for personal use, or low level participant, with little stake in the actual quantity of drugs involved. A person receiving a portion of the drugs would generally be a higher level player, often a dealer, who deals the drugs received, and who has some stake in the quantity of the drugs involved by sharing in a portion of the drugs. If compensation was made in more than one form, use the more lucrative form (with a flat fee being the least lucrative, percentage being the most lucrative).

403 Indicate the amount of compensation provided to the defendant for his participation in the offense.

404 Indicate whether the defendant owned all or a portion of the drugs.

405 Indicate whether the defendant owned or controlled an instrumentality used in the offense, including a vehicle, residence, or other substantial item. Might, in some cases, include a suitcase or similar object.

406 Indicate the scope of defendant's participation in the offense. Do not assume that more than a single act was involved without at least a preponderance of the evidence indicating so, unless the defendant is personally responsible for an extraordinarily large quantity of drugs.

407. Indicate the scope of defendant's knowledge of the offense in which the defendant is personally involved. Indicators of knowledge of the scope might include quantity of drugs, type of drugs, persons buying or selling the drugs, etc.
408. Indicate whether a broader conspiracy is involved -- a conspiracy beyond the single offense in line 407 -- and indicate the scope of defendant's knowledge of the offense in which the defendant is personally involved. Indicators of knowledge of the scope might include quantity of drugs, type of drugs, persons buying or selling the drugs, etc.
409. Indicate the scope of the defendant's decision-making capacity for the offense or conspiracy. **PD -- Part of the conspiracy** includes defendants with decision-making capacity for a cell or branch of an organization -- that is, they might make decisions for and direct several co-conspirators who have various roles -- the defendant oversees, for example, couriers and bodyguards. **LD -- Capacity for limited part of conspiracy** includes defendants with decision-making capacity for a limited number of co-conspirators with only a single role in the conspiracy -- usually the same role as that of the decision-maker, e.g., a courier supervising two other couriers, all of whom are carrying drugs on the same flight; or an off-loader supervising a small number of other off-loaders.
410. Indicate whether the defendant negotiated any of the terms of the transaction/deal in which s/he was involved. Terms would include price, quantity, etc. Do not include situations where a defendant merely negotiated compensation for conduct not directly connected with drugs (a carpenter building a barn for a marijuana operation, a renter for profit).
411. Indicate the extent to which force was used in the instant real offense conduct. "Weapon" includes any firearm, explosive, destructive device, bomb, knife, or other instrument, but does not include a fist. Indicate only the most severe category involved (with **WU -- Weapon Used/Threatened** being the most severe, and **NO -- No Force Threatened or Used** the least).
- WC -- Weapon Possessed by Co-Conspirator** applies when another member of the conspiracy or offense carried the weapon, but not the defendant, and an articulable 18:924(c) conviction could be entertained.
- WN -- Weapon Possessed but Not Connected** applies when the defendant possesses a weapon but its possession is so unconnected (temporally or spatially) with the drug offense that an articulable 18:924(c) conviction would not be likely.
- WE -- Weapon On Premises/Out of Reach** applies when the weapon is not used, threatened, possessed, or carried, but would otherwise be considered involved during the commission of a crime to the extent that a reasonable 18:924(c) conviction is likely to be sustained (e.g., defendant has the weapon at the same location as the drugs, and the drugs and weapon are only slightly removed from the defendant -- say in another room or in the trunk of a car driven by the defendant).
- WP -- Weapon Possessed/Carried** applies when the weapon is used, brandished, or threatened, or the defendant has the weapon on his/her person or within easy reach, and drugs are also present, on the premises, or slightly removed (e.g., in the car trunk).
412. Indicate the total number of controlled substance offenses, as defined by §4B1.2(2). These involve importing, exporting, trafficking, distribution, sale, delivery, manufacture, PWID, and the like. Do not include possession (without intent to traffick, deliver, etc.).
413. Indicate whether the defendant currently uses any prohibited controlled substances. Rely on the relevant PSI section for this information, or information provided in the offense conduct section.

- 414 Indicate the citizenship of the defendant.
- 415 Indicate the extent to which the factors above are corroborated -- note whether they are corroborated and by whom.
- 416 Indicate whether mandatory minima were originally charged, and list the statute.
- 417 Indicate primary type of drug. Where secondary drugs involve small quantities (sufficient only for personal use), indicate only the primary drug. Where substantially similar quantities of two or more types of drugs are involved, indicate M -- Multiple Types of Drugs. Where other schedule I, II, or III drugs, as listed in the guideline commentary to §2D1.1, are solely involved, indicate O -- Other.
- 418 Indicate the quantity of drugs with which defendant was personally and actually involved. This quantity would include no more than those acts or omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction, that were actually committed by the defendant, or were aided and abetted by the defendant. This equates with the §1B1.3 (Relevant Conduct) standard without §1B1.3's otherwise accountable / reasonably foreseeable standard. This "personal" quantity, then, may be less than the court-determined relevant conduct quantity determined in line 420, 421.
- 419 Indicate the quantity of drugs to which the plea agreement stipulated the defendant was involved.
- 420 Indicate the quantity of drugs with which the court determined the defendant was involved. Use the SOR where possible, and the PSI secondarily.
- 421 If the PSI indicated a different quantity of drugs than the court, indicate the PSI-recommended quantity. Explain on line 428.
- 422 Indicate the quantity of drugs with which the entire conspiracy was involved, regardless of whether the defendant could reasonably foresee the scope of the conspiracy or the entire quantity of drugs. Rely on any evidence in the PSI (e.g., count quantity where the PSI indicates a conspiracy distributed x quantity of drugs a month for the past x months).
- 423 Note whether the relevant conduct rules appear to have been misapplied in some way. Explain the nature of the misapplication here or on line 428. Do not indicate a misapplication unless there is clear evidence of such.
- 424 Note whether the role in the offense rules appear to have been misapplied in some way. Explain the nature of the misapplication here or on line 428.
- 425 Note whether the PSI and SOR determination of the role reduction differs in any way. Explain on line 428.
- 426 Note whether a plea agreement stipulated to any role reduction, or no role reduction.
- 427 Quote relevant comments on the above issues, or other relevant issues, including comments appearing in defendant's objections to the PSI, PSI, SOR, transcript, etc.
- 428 Include any additional comments you might have.

DRUG ROLE CASE REVIEW

PHASE	TYPE	ROLE ADJUSTED	TOTAL CASES	CASES REVIEWED ¹
MANDATORY MINIMUM STUDY	Girlfriend	unadjusted	3	3
		mitigating	5	4
	Offender	unadjusted	9	3
		mitigating	5	4
	Enabler	unadjusted	3	3
		mitigating	4	4
	Go-Between	unadjusted	21	20
		mitigating	3	-
	Others	unadjusted	~25	21
		mitigating	~15	11
	Counser	unadjusted	~100	50
		mitigating	46	46
		aggravating	8	9
	Street-Level	mitigating	17	15
Above-Street	mitigating	29	29	
Miscellaneous	mitigating	11	11	
LESSER OFFENSES	Telephone Court	unadjusted	265	
		mitigating	49	49
	Simple Possession	unadjusted	735	25
		mitigating	15	15
	Conspiracy	unadjusted	70	
		mitigating	16	9
	Accessory	unadjusted	20	20
		mitigating	3	3
	Misdemeanor	unadjusted	20	20
		mitigating	2	2
18:1862	unadjusted	65		
	mitigating	29		
DRUG ESTABLISHMENT GUIDELINE (201.8)	Single Court	unadjusted	65	12
		mitigating	20	20
	Multiple Court	unadjusted	40	9
		mitigating	2	2
DEPARTURE	Role in the Offense	unadjusted	21	21
		mitigating	21	21
TOTAL			1,907	480

¹ The "Number Done" may differ from the "Total Number" of cases available where a case file was not available for review, where a case was classified as "Other" and the role was not considered lesser, or the number reviewed was a selected sample of the total number of case files available.

² Includes 2 financiers, 4 importer/exporters, and 5 manufacturer/growers.

TABLE - DISTRIBUTION OF ROLES
AMONG MANDATORY MINIMUM FILES REVIEWED

ROLE	TOTAL NUMBER	RECEIVED NO ADJUSTMENT	RECEIVED MINOR/MINIMAL	RECEIVED MINOR ADJUSTMENT	RECEIVED MINIMAL ADJUSTMENT
Significant Other	5	3	3	2	
Worker Dooner	5	3	2	3	3
Loader	3	4	4	2	4
Crew Member	2	2	0	0	2
Lookout	5	3	3		2
Storer Enabler	2	4	8	5	3
Money Runner	2			0	
Courier Mule	90	32	58	32	28
Go-Between Steerer	27	18	11	9	2
Renter For Profit	4	0	4	2	2
Bodyguard Strongman	10	5	5	3	2
Street Dealer	15	7	8	4	4
Above Street Level Dealer	18	7	9	8	
Grower Manufacturer	8	1	5	4	
TOTAL	219	88	131	79	52

04105 COURIER PROFILES
CASE FILE REVIEW

SOURCES: Mandatory Minimum Study, All Lower Maximums
Departures for Mule/Role in the Offense

Source of Courier Information	Number of Courier Cases	Furn of Company ¹			Scope of Participation ²			Defendant Negative Terms		Weapons ³		Relevant Issues Accountability					Criminal History Category			Sentence Ranges (in Months)			Distribution of Sentences Imposed
		PF	ON	MO	S	M	O	Yes	No	No	Yes	A ⁴	B ⁵	C ⁶	D ⁷	E ⁸	I	II	III	0-99	100-119	120+	
Mandatory Minimum Study No Adjustment Given	52	33	1	2	42	8	2	0	52	47	5	30	5	7	3	1	40	2	4	12	14	0	4, 5, 18, 21, 23, 27, 28, 31, 38, 44(2), 48(2), 57, 60(1), 63(4), 64, 65, 66, 75, 77, 78, 80, 92, 95, 96, 97, 100, 109, 115, 120(2), 121, 131(1) [Avg. = 68]
Mandatory Minimum Study Minor Rule Applied	32	20	4	3	21	5	6	0	32	25	7	11	12	4	6	0	23	5	4	9	14	9	10(2), 18, 21, 24, 27, 41, 57, 64(8), 65, 78, 84, 97, 100, 110, 120(6), 121, 115, 130 [Avg. = 78]
Mandatory Minimum Study Minimal Rule Applied	26	24	0	0	25	1	0	1	25	24	2	21	4	1	1	0	26	0	0	20	4	2	0, 2, 5, 6, 11, 14, 18, 24(2), 31, 36, 41, 51, 60, 63(2), 114, 120, 121 [Avg. = 38]
Lower Maximums ¹⁰	15	4	0 ¹¹	1	10	2	3	1	14	15	0	0	NA	14	NA	NA	12	NA	NA	15	0	0	11(1), 2, 3, 4, 6, 8, 10 [Avg. = 2]
Departures Mule/Role ¹²	16	7	3	1	9	4	2	1	15	14	2	9	1	1	NA	NA	13	NA	NA	11	5	0	0, 3, 6, 12, 18, 21, 24(2), 27(2), 30, 64(3), 70, 84 [Avg. = 32]
TOTAL ¹³	141	88	8	7	107	20	13	3	136	125	16	77	22	13	24	1	120	7	8	67	38	17	AVERAGE: 31 months

1 Abbreviations: PF - Full Fee; ON - Ongoing (in progress); MO - No Completion
 2 Abbreviations: S - Single Act; M - Multiple Acts; O - Ongoing Involvement
 3 An affirmative response to "Weapons" does not necessarily mean the defendant received a weapon. More specifics on the type of weapon involvement will be brought forth as additional case review is completed regarding their weapon on the premises to personally brandishing a weapon. More specifics on the quantity attributable to the entire company, they were held accountable for that amount.
 4 Category "A" defendants were personally involved with a quantity of drugs smaller than the quantity attributable to the entire company, they were held accountable only for the amount of their personal involvement.
 5 Category "B" defendants were personally involved with a smaller quantity of drugs than that attributable to the entire company, they were held accountable for the entire company amount.
 6 Category "C" defendants were personally involved with a quantity of drugs smaller than that attributable to the entire company, but were held accountable for some lesser amount stipulated to in a plea agreement.
 7 Category "D" defendants were personally involved with a quantity of drugs smaller than that attributable to the entire company, but were held accountable for some lesser amount stipulated to in a plea agreement.
 8 Category "E" defendants were personally involved with a quantity of drugs smaller than that attributable to the entire company, but were held accountable for an amount smaller than that of the entire company.
 9 The presumption for all three mandatory minimum categories is that the defendants possessed the market with quantities of drugs sufficient to trigger mandatory minimum amounts.
 10 Two of the counts in this category involved defendants with mandatory minimum quantities.
 11 Two of the counts remained to lower maximums received drug as company amount and one received a percentage of drugs profit as company amount.
 12 The counts in this category involved the market with quantities of drugs sufficient to trigger mandatory minimum amounts.

Table C-1 COURIER PROFILE
NO ADJUSTMENT APPLIED
SOURCE: MANDATORY MINIMUM FILES REVIEWED

Mode of Transport	No. of Cases	Form of Compensation			Scope of Participation			Defendant Negotiated Terms		Weapons		Relevant Conduct Accountability					Criminal History Category			Sentence Ranges in Months			Real Sentences	
		FF	ON	NO	S	M	O	Yes	No	No	Yes	A ¹	B ²	C ³	D ⁴	E ⁵	I	II	Other	0-99	100-119	120+		
Bus	4	4	0	0	3	1	0	0	4	4	0	4	0	0	0	0	4	0	0	0	4	0	0	60, 71, 97, 115
Train	2	2	0	0	1	1	0	0	2	2	0	1	1	0	0	0	2	0	0	0	0	0	2	121, 151
Auto Border	7	4	0	0	7	0	0	0	7	7	0	7	0	0	0	0	6	1	0	1	4	0	18, 21, 46, 60, 65, 78, 96	
Auto Interstate	2	1	0	0	1	1	0	0	2	1	1	0	2	0	0	0	2	0	0	0	2	0	0	60, 109
Auto Interstate	13	6	1	1	9	3	1	0	15	11	2	7	1	3	1	1	11	0	2	5	7	1	4, 21, 44, 44, 57, 60, 60, 60, 64, 60, 100, 151, 151	
Airport/Airplane	19	15	0	0	17	1	1	0	19	18	1	14	1	3	1	0	17	1	1	3	14	2	28, 38, 48, 60, 60, 60, 60, 60, 60, 60, 60, 63, 63, 63, 64, 95, 120	
Bus	3	1	0	0	2	1	0	0	3	3	0	1	0	1	1	0	2	0	1	1	1	1	1	5, 21, 33, 120
On Foot Border	2	0	0	1	2	0	0	0	2	1	1	2	0	0	0	0	2	0	0	0	2	0	0	75, 92
TOTAL	52	33	1	2	42	8	2	0	52	47	5	30	5	7	3	1	46	2	4	12	34	6		

AVERAGE SENTENCE: - 68 MONTHS

- ¹ Category "A" defendants were personally involved with a quantity of drugs identical to the quantity attributable to the entire conspiracy, they were held accountable for that amount
- ² Category "B" defendants were personally involved with a quantity of drugs smaller than the quantity attributable to the entire conspiracy, they were held accountable only for the amount of their personal involvement
- ³ Category "C" defendants were personally involved with a smaller quantity of drugs than that attributable to the entire conspiracy, but they were held accountable for the entire conspiracy amount
- ⁴ Category "D" defendants were personally involved with a quantity of drugs identical to that of the entire conspiracy, but were held accountable for some lesser amount stipulated to in a plea agreement
- ⁵ Category "E" defendants were personally involved with a quantity of drugs smaller than that attributable to the entire conspiracy, but were held accountable for an amount somewhere between the two

**THIS IS COURIER PROFILE
MINOR ROLE APPLIED
SOURCE: MANDATORY MINIMUM FILES REVIEWED**

Block of Transport	No. of Cases	Form of Compromise		Scope of Partnership	Defendant Regarded Term	Weapons	Retention Conduct	Criminal History			Sentence Range in Months	Total Sentences	
		ON	NO					S	M	C			Yes
Bus	0	0	0	0	0	0	0	0	0	0	0	0	0
Tram	1	0	0	1	0	0	1	0	0	0	0	0	0
Auto Bus	2	2	0	0	0	2	1	0	1	1	1	0	0
Auto	6	3	1	1	0	5	2	4	0	4	1	4	2
Auto Interstate	12	8	0	1	0	12	6	2	1	9	1	10	3
Auto/ Airplane	3	2	1	0	0	3	0	2	0	1	0	0	0
Bus	2	1	1	0	0	2	0	2	0	0	0	0	0
Auto Bus	4	4	0	0	0	4	2	4	4	1	1	10	21
TOTAL	22	20	4	3	0	25	7	11	12	4	0	25	9

AVERAGE SENTENCE - 71 MONTHS

Category "A" defendants were personally involved with a quantity of drugs identical to the quantity attributable to the entire conspiracy; they were held accountable for that amount.

Category "B" defendants were personally involved with a quantity of drugs smaller than the quantity attributable to the entire conspiracy; they were held accountable only for the amount of drugs personally involved in...

Category "C" defendants were personally involved with a smaller quantity of drugs than that attributable to the entire conspiracy; but they were held accountable for the entire conspiracy amount.

Category "D" defendants were personally involved with a quantity of drugs identical to that of the entire conspiracy; but were held accountable for only a portion of that amount.

Block C - COURIER PROFILE
MINIMAL ROLE APPLIED
SOURCE: MANDATORY MINIMUM FILES REVIEWED

Mode of Transport	No. of Cases	Form of Compensation			Scope of Participation			Defendant Negotiated Terms		Weapons		Relevant Conduct Accountability				Criminal History Category			Sentence Ranges in Months			Total Sentences	
		FF	ON	NO	S	M	O	Yes	No	No	Yes	A ¹	B ²	C ³	D ⁴	I	II	Other	0-20	20-119	120+		
Bus	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
Train	1	1	0	0	1	0	0	0	1	1	0	1	0	0	0	1	0	0	0	0	0	1	121
Auto Border	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
Auto Interstate	1	1	0	0	1	0	0	1	0	1	0	0	1	0	0	1	0	0	1	0	0		0
Auto Interstate	3	2	0	0	3	0	0	0	3	1	0	2	1	0	0	3	0	0	1	2	0		24, 63, 114
Airport/Airplane	19	18	0	0	18	1	0	0	19	18	1	18	0	0	0	19	0	0	17	1	1		14, 18, 24, 31, 60, 120, 2, 36, 6, 11, 5, 41
Boat	1	1	0	0	1	0	0	0	1	1	0	0	1	1	1	1	0	0	0	1	0		61
On Foot Border	1	1	0	0	1	0	0	0	1	0	1	0	1	0	0	1	0	0	1	0	0		13
TOTAL	26	24	0*	0	25	1	0	1	25	24	2	21	4	1	1	26	0	0	20	4	2		

AVERAGE SENTENCE = 31 MONTHS

¹ Category "A" defendants were personally involved with a quantity of drugs identical to the quantity attributable to the entire conspiracy, they were held accountable for that amount

² Category "B" defendants were personally involved with a quantity of drugs smaller than the quantity attributable to the entire conspiracy, they were held accountable only for the amount of their personal involvement

³ Category "C" defendants were personally involved with a smaller quantity of drugs than that attributable to the entire conspiracy, but they were held accountable for the entire conspiracy amount

⁴ Category "D" defendants were personally involved with a quantity of drugs identical to that of the entire conspiracy, but were held accountable for some lesser amount (operated a courier service, etc.)

APPENDIX D -- Options

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PROBATION OFFICE

CARLOS JUENKE
CHIEF PROBATION OFFICER

364 U.S. COURTHOUSE
P.O. BOX 012559
MIAMI, FL 33101-2559

March 13, 1990

Mr. Andy Purdy
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Andy:

Pursuant to your request, the following is submitted in reference to the proposed amendment to Chapter 3, Part B. As you are no doubt aware, misapplication of role adjustments (whether intentional or not) has the absolute effect of totalling negating the Guidelines for most controlled substance offenses.

Attached for your review are two charts which illustrate this point. For example, it makes no difference whether or not the offender imports 501 grams or 4,999 grams of cocaine if the court applies the minimal role adjustment to the offense behavior. Both defendants receive terms of 60 months incarceration. The situation is equally true when the 10 year minimum mandatory terms of incarceration are applicable. You may wish to review this second chart which also reflects how the amount of drugs makes little or no impact if role misapplication is utilized.. The second chart is somewhat more detailed in that the criminal history computation is also taken into account. In some instances, there is little difference in whether an offender has a criminal history category of I or IV. In any event, these charts were prepared to demonstrate the crucial nature of this problem. In reference to the proposed amendment, you may wish to consider the following observations:

1. Relevant Conduct
 2. Participant Need Not be Charged
 3. Fraud and Participants
 4. Off-loaders vs. Couriers
 5. Application Note No. 6
1. **Relevant Conduct:** The references to the Relevant Conduct Standard in Paragraphs 1 and 2 on page 78 are extremely helpful. This clarifies the application principle of role and coincides with the application note under 1B1.3 ("because a count may be broadly worded and include the conduct of many

Mr. Andy Purdy
March 13, 1990
Page Two

participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant"). In summary this was very helpful in terms of clarifying role application.

2. **Participant Need Not Be Charged:** This clarification is also very helpful. There is an inclination to presume that a participant must also be a defendant. To point out that a "participant" need not even be charged helps to clarify the principle behind accurate application.
3. **Fraud and Participants:** In Application Note No. 4 on page 80, reference is made to "a fraud that involved only three participants, but used the unknowing services of two or more outsiders". Some additional clarification as to this example or perhaps a different example might be appropriate.
4. **Off-loaders vs. Couriers:** The comparison of "off-loaders" and "couriers" is not valid. You may recall there was a role adjustment under the salient factor scoring system utilized by the U. S. Parole Commission referred to as "peripheral" role. Peripheral role was defined as, "a person hired as a deck hand on a marijuana boat, a person hired to help off-load marijuana, a person with no special skills hired as a courier of drugs on a commercial airline flight, or a person hired as chauffeur in a drug transaction". Inequities and disparity arise when the relevant conduct standard is applied to a similar role adjustment in reference to a suggestion that off-loaders and couriers are somehow similar. In fact, they are not.

Illustration a. on page 1.19 is valid in terms of describing an off-loader's responsibility. An off-loader is usually one of many individuals hired to empty a freighter-type vessel. The off-loader will load his boat (e.g. a small motor boat) with several hundred pounds of marijuana. The freighter generally contains many tons of marijuana. The off-loader would be paid a tiny fraction (\$10,000) of the wholesale value of the entire shipment of marijuana. In this respect, an off-loader should receive a minimal role adjustment for his relevant conduct (e.g. "regardless of the number of bales of marijuana that he actually unloaded, and notwithstanding any claim on his part that he was neither aware of, nor could reasonably foresee, that the boat contained this quantity of marijuana, defendant A is held accountable for the entire one-ton quantity of marijuana on the boat because he aided and abetted the unloading, and hence the importation, of the

entire shipment"). In summary, the off-loader is being held responsible for the same amount of drugs as his multiple co-participants. This, of course, would represent accurate application for a minimal role adjustment. Nevertheless, this is not true of "couriers". Couriers are individuals who are paid a far greater proportional amount of the wholesale value of the controlled substance they are importing. A kilo of refined cocaine in South America may cost in the area of \$2,000. The same kilo of cocaine would cost approximately \$10,000 on the streets of Miami. The cost of cocaine is not the manufacturing but the importation.

Recently, a drug enforcement agent in the Southern District of Florida testified at a sentencing. The agent indicated that "couriers" import on the average of 750 grams of cocaine. They are generally paid between \$1,500 and \$3,000. There is also the cost of having the courier fly to the United States and stay in a hotel where contact is made with the American connection. This can result in an additional \$1,000 in costs. Consequently, to compare the \$10,000 payment to an off-loader involved in millions of dollars of marijuana to the \$3,000 payment to a courier for a \$10,000 kilo of cocaine is simply invalid. Additionally, the off-loader is involved in an offense with many individuals (other off-loaders, deck hands, captain, source of the drugs, recipients of the drugs etc.). The courier, at most, is only involved with two other individuals (the provider of the cocaine in South America and the recipient of the cocaine in Miami). In some cases the provider and the recipient are the same person.

5. Application Note No. 6--page 81-82: As pointed out above, the comparison of off-loaders and couriers is not really valid. Application Note No. 6 provides the following instruction, "For example, if a defendant was a one-time off-loader of one shipment of marijuana (or is a one-time courier, or one-time lookout) and received a small portion of the value of the contraband and meets the qualifications of Application Note 2 above, he could be considered a minimal participant." This determination could be made only for an off-loader, not a courier. Marijuana conspiracies frequently involve multiple transactions. In cases where there are multiple transactions, information generally does exist for purposes of determining who participated in each off-load. "Courier" indictments never involve multiple transactions. The only means to establish whether or not the courier has engaged in this behavior before is the prior criminal record or the passport entries. I did poll some of the officers in the Presentence Unit. Each one that I spoke to indicated that they had never had a case in which a courier had been previously convicted.

Mr. Andy Purdy
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As far as the courier's passport, many defendants have made multiple trips to the United States of short duration (e.g. two days-one week). However, there is never a piece of evidence to suggest that the courier imported drugs on those previous trips to the United States. The general explanation of the defendant is that he is engaged in the business of selling American merchandise in South America. Consequently, the previous entries are for business purposes. To tie the number of transgressions to a role adjustment may or may not be viable for off-loaders. It would seldom, if ever, be accurate for "couriers".

The other difficulty in providing a mitigating role adjustment to couriers is the fact that no verifiable information exists to suggest that the defendant was being supervised by another individual. In fact, the defendant generally was not being supervised by another individual. The individual in South America paid the defendant to deliver drugs to an individual in the United States. The "couriers'" role is the most pivotal role in the offense. Also, the phrase "received a small portion of the value of the contraband" could not happen. The defendant would have been arrested prior to receiving any portion of the value of the contraband.

Another major difficulty arises in terms of the source of the information. Unlike off-loaders, the difficulty lies in the fact that the courier is the only person who knows the true roles of any participants (if they exist at all) unless a controlled delivery is attempted (an infrequent occurrence). If the commission is considering downward role adjustments for these individuals, some commentary language as to the source of the information is absolutely critical. The litigation over role adjustments will only intensify unless some cautionary instructions are made as to the obviously self-serving, and frequently unfounded, statements in these cases.

Obviously, these are major questions as to equity. Perhaps a greater question is to examine the validity of comparing off-loaders to couriers or whether couriers should receive a mitigating role adjustment at all.

In any event, the proposed amendment was helpful. The one area that needs clarification is Application Note 6. I hope that you find some of these comments and observations to be of some value in terms of this new amendment. I have enclosed several other copies for Rusty, Sharon, and Phyllis. It would be greatly appreciated if you could forward those copies to them. Additionally, please feel free to make copies for any other

Mr. Andy Purdy
March 13, 1990
Page Five

commission staff or commissioners that you feel may have some Mr. interest in this matter. As always, please do not hesitate to call upon me in the future if you feel I can be of the slightest assistance to the commission.

Sincerely,



John M. Shevlin, Supervising
U. S. Probation Officer

JMS:mhd

Enclosures

<u>AMOUNT</u>	<u>ACCEPTANCE</u>	<u>ROLE</u>	<u>CRIM.HIS.</u>	<u>MONTHS</u>
500 GRAMS-				
2 KILOS	YES	NONE	I	60-63
"	YES	MINOR	I	60
"	YES	MINIMAL	I	60
2 KILOS-				
3.5 KILOS	YES	NONE	I	63-78
"	YES	MINOR	I	60
"	YES	MINIMAL	I	60
3.5 KILOS-				
5.0 KILOS	YES	NONE	I	78-97
"	YES	MINOR	I	63-78
"	YES	MINIMAL	I	60

120 MONTHS

15-50	KILOS	+	ACC	+	MINIMAL	+	CRIM HIS	I
15-50	"	+	ACC	+	MINIMAL	+	CRIM HIS	II
5-15	"	+	ACC	+	MINIMAL	+	CRIM HIS	II
5-15	"	+	ACC	+	MINIMAL	+	CRIM HIS	I
5-15	"	+	ACC	+	MINIMAL	+	CRIM HIS	II
5-15	"	+	ACC	+	MINIMAL	+	CRIM HIS	III
5-15	"	+	ACC	+	MINIMAL	+	CRIM HIS	IV
5-15	"	+	ACC	+	MINOR	+	CRIM HIS	I
5-15	"	+	ACC	+	MINOR	+	CRIM HIS	II

120-121 MONTHS

50-150	KILOS	+	ACC	+	MINIMAL	+	CRIM HIS	I
15-50	"	+	ACC	+	MINIMAL	+	CRIM HIS	III
15-50	"	+	ACC	+	MINOR	+	CRIM HIS	I
5-15	"	+	ACC	+	MINOR	+	CRIM HIS	III
5-15	"	+	ACC	+	NONE	+	CRIM HIS	I

120-135 MONTHS

50-150	KILOS	+	ACC	+	MINIMAL	+	CRIM HIS	II
15-50	"	+	ACC	+	MINOR	+	CRIM HIS	II
5-15	"	+	ACC	+	NONE	+	CRIM HIS	II

120-137 MONTHS

15-50	KILOS	+	ACC	+	MINIMAL	+	CRIM HIS	IV
5-15	"	+	ACC	+	MINIMAL	+	CRIM HIS	V
5-15	"	+	ACC	+	MINOR	+	CRIM HIS	IV

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

July 17, 1991

CHAMBERS OF
FREDERIC N. SMALKIN
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
301 962 2845
FIS 922 2845

Mr. Donald A. Purdy, Jr.
Chief Deputy General Counsel
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Mr. Purdy:

As you will recall, at the end of our luncheon meeting on Tuesday, July 2, 1991, you expressed some interest in my proposal for a tiered sentencing scheme for drug offenders.

A rough outline of such a scheme follows:

Because drug conspiracies are essentially sui generis (in that they are businesses organized solely for the purpose of conducting criminal activity), and because Congress has determined (and most judges would agree) that the punishment in these cases should have some basic tie-in to the quantity that it was the object of the conspiracy to distribute, it makes sense to replace the 1B1.3 accountability and 3B1.1 role in the offense schemes (which work reasonably well in non-drug cases) with a tiered system of offense levels corresponding to the defendant's role in the business. The leaders/organizers of the organization would have their offense levels calculated on the basis of the full weight of drugs involved. (The entire table could be shifted upward a few levels to take into account displacement of the 3B1.1 factor so that top people wind up where they used to under the old 3B1.1 analysis). Top lieutenants would receive an offense level of, for example, three-fourths that of the top leaders/organizers, while street dealers would receive an offense level two-thirds to one-half that of the top individuals, and couriers, mules, message-takers, and other lesser players would receive a sentence of, for example, one-fourth to one-third the maximum offense level for the quantity of drugs involved in the conspiracy. (These fractions are simply suggestions, but I think they reflect a good estimate of the proportionate criminal responsibility borne by the different categories of players.) This proposal does away, also, with the task of implementing the reasonably foreseeable test in current § 1B1.3 Appl. Note 1, which is practically impossible to do with honest fact-finding, in real life.

Mr. Donald A. Purdy, Jr.
July 17, 1991
Page two

I realize that this is only a very rough sketch of the proposal I have in mind, but it is at least a starting point for discussion. I hope you will find it useful.

Very truly yours,



Frederic N. Smalkin
United States District Judge

FNS/skp

cc Hon. Walter E. Black, Jr.
Hon. Alexander Harvey, II

A VARIATION ON
JUDGE SMALKIN'S PROPOSAL
FOR THE SENTENCING OF DRUG DEFENDANTS

A drug table (like the current one) would still be used, with offense levels based on drug quantities. The offense level would be determined by aggregating the total quantity of drugs involved in the offense. If the defendant was acting alone, the quantity would be determined using current relevant conduct rules. If the defendant was involved in a conspiracy, the quantity would be the entire amount of drugs that was involved in the conspiracy (regardless of defendant's knowledge). A multiplier would be used based on the defendant's role and/or level of culpability. The top level of culpability (similar to the currently defined leader or organizer of a large organization) would have a multiplier of 1.00. A level of culpability similar to the current manager or supervisor level would have a multiplier of 0.75 (as might the solo practitioner level). A street dealer would have a multiplier of between 0.50 and 0.66. Couriers, mules, message takers and other lesser-involved defendants would have a multiplier of between 0.25 and 0.33. The firearms enhancement (two offense levels) would still be added on separately. The guideline could call for it to be included before applying the multiplier, in which case it would not matter whether defendant knew about or foresaw the use of the firearm. On the other hand, if the firearm enhancement was added at the end it would be necessary to show that the defendant knew about or foresaw the firearm.

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF WASHINGTON

January 3, 1991

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I am writing on behalf of the Legislative Subcommittee of the Federal Public and Community Defenders. We are advised that the Sentencing Commission is soliciting recommendations for amendments to the Federal Sentencing Guidelines Manual for consideration during the next amendment cycle. In this letter, we recommend four changes that we believe will better enable the guidelines and policy statements to achieve the purposes of sentencing. The recommendations set forth below address problems that recur frequently under the guidelines and policy statements presently in effect. We urge your favorable consideration of our suggested changes.

I. Minimal and minor participants in drug cases. Because § 2D1.1 is quantity-based, the offense level for a minimal or minor participant is often so high that the adjustments authorized by § 3B1.2 do not adequately reduce the offense level to reflect a defendant's lesser role. Making a minimal or minor participant's offense level dependent upon quantity serves no significant purpose once a drug offense reaches a certain scale. As a former Assistant United States Attorney has noted, "many drug defendants appear to be easily replaceable cogs in the vast drug distribution machinery. These defendants have quite different levels of culpability than the king pins who dominate the drug business." Young, "Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability," 3 Fed. Sent. R. 63 (1990).

We recommend that the Commission address this matter directly by, first, adding the following new paragraphs to § 2D1.1(b):

- (3) If the defendant was a minimal participant in the criminal activity upon which the offense of

conviction is based, and the offense of conviction involved --

- (A) marijuana, hashish, hashish oil, a Schedule I or II Depressant, or a Schedule II, IV, or V substance, reduce by 4 levels, but in no event shall the offense level be greater than level 16; or
 - (B) any other controlled substance, reduce by 4 levels, but in no event shall the offense level be greater than level 20.
- (4) If the defendant was a minor participant in the criminal activity upon which the offense of conviction is based, and the offense of conviction involved --
- (A) marijuana, hashish, hashish oil, a Schedule I or II Depressant, or a Schedule III, IV, or V substance, reduce by 2 levels, but in no event shall the offense level be greater than level 22; or
 - (B) any other controlled substance, reduce by 2 levels, but in no event shall the offense level be greater than level 26.

In addition, we recommend that the following new subsection be added to § 2D1.1:

(c) Special Instructions

- (1) If subsection (b)(3) or (b)(4) applies, do not apply § 3B1.2.

Finally, we recommend that Application Note 2 to the Commentary for § 3B1.2 be changed by eliminating the last phrase in the last sentence. Specifically, deletion of the phrase "involving a small amount of drugs". Input from Federal Public Defenders in the field indicates that that language operates to deprive deserving defendants of the § 3B1.2 adjustment in cases involving large amounts of drugs despite the fact that the defendant's role is minimal or minor. Our suggested change would be in keeping with the rationale that minimal participants in drug transactions frequently have no knowledge of or stake in the amount of drugs involved in a transaction and that, therefore, their sentences should not be determined solely on the basis of the amount of drugs.

II. Acceptance of responsibility. The present adjustment for acceptance of responsibility is inadequate and does not insure a real reduction in sentence (because of the overlapping ranges in offense levels). A greater adjustment for acceptance of responsibility will not only insure a certain, though small, reduction in sentence, but will also reduce pressure to reach plea agreements that hide facts or are otherwise of a kind that the Commission would like to discourage. We recommend that the Commission amend § 3E1.1(a) by striking "2 levels" and inserting "3 levels".

III. Career offenders. The Commission is required by 28 U.S.C. § 994(h) to assure that certain career offenders receive a sentence "at or near the maximum term authorized". The Commission has interpreted the phrase "maximum term authorized" to mean the maximum term prescribed by statute. A recent Eighth Circuit case, however, suggests that such an interpretation may not be correct. See United States v. R.L.C., 915 F.2d 320 (8th Cir. 1990). The case involved an interpretation of the phrase "maximum term that would be authorized if the juvenile had been tried and convicted as an adult" in 18 U.S.C. § 5037(c)(1)(B). The Eighth Circuit rejected the government's argument that the phrase refers to the maximum prescribed by statute for the offense committed, holding instead that the phrase means the maximum term that the juvenile could have received under the guideline had the juvenile been sentenced as an adult.

We recommend that the Commission adopt amendment option one, published by the Commission on March 3, 1989, see 54 Fed. Reg. 9160-62.

IV. Substantial assistance to authorities. The sentencing court is required by 18 U.S.C. § 3553(a) to consider the defendant's "history and characteristics". Section 5K1.1, however, purports to limit the sentencing court's consideration of one aspect of the defendant's history and characteristics -- whether the defendant assisted authorities -- by requiring a motion by the government. While 18 U.S.C. § 3553(e) requires a government motion before the court can impose a sentence below a minimum term required by statute, 28 U.S.C. § 994(n) does not mandate such a requirement when the departure is below the guideline range but not below a statutory minimum. Indeed, as Judge Clark recently pointed out,

there appears to be no logical reason why the prerequisite nature of a government motion under § 3553(e) should be mechanically transposed onto departures from the guidelines authorized pursuant to 28 U.S.C.A. § 994(n). It is far more logical to interpret § 3553(e) as an exception to the general rule set out in § 994(n).

United States v. Chotas, 913 F.2d 897, 903 (11th Cir. 1990)
(Clark, J., specially concurring in part and dissenting in part).

The requirement of a government motion risks unfairness. If there is a dispute between the government and the defendant as to the nature and extent of the defendant's cooperation, the government can foreclose resolution of that dispute by a neutral third party -- the court -- if the government fails to make a § 5K1.1 motion. Section 5K1.1 is a policy statement and therefore not binding upon the sentencing court, but for the most part courts have chosen to follow the Commission's recommendation. They have attempted to ameliorate the chance of unfairness by indicating that a government motion may not be necessary if the prosecutor acts in bad faith. See United States v. LaGuardia, 902 F.2d 1010, 1017 (1st Cir. 1990); United States v. Justice, 877 F.2d 664, 668-69 (8th Cir. 1989); United States v. White, 869 F.2d 822, 828-29 (5th Cir. 1989).

A more direct way to deal with the concern for fairness is simply to recommend a departure if the defendant has assisted authorities. Section 5K1.1 presently speaks of substantial assistance, but if the goal is to encourage defendants to cooperate with authorities, that goal would be better served if § 5K1.1 covered any assistance. The substantiality of the assistance is better accounted for in determining the extent of a departure. After hearing from the government and the defendant, the court can determine whether the defendant did assist authorities and, if so, assess the nature and extent of that assistance. The sentencing court can be expected to give careful consideration to the government's evaluation of the nature and extent of the defendant's assistance. The approach we recommend avoids needless litigation about whether the government is acting in bad faith and will focus the attention of the parties upon the true issues -- did the defendant assist authorities and, if so, how significant was the assistance.

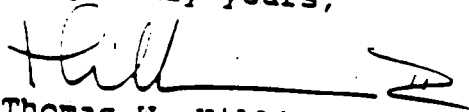
We recommend that the Commission amend the first sentence in § 5K1.1 to read as follows: "The court may depart from the guidelines upon a finding that the defendant has assisted in the investigation or prosecution of another person."

As always, we appreciate the opportunity to provide the Sentencing Commission with our input. As you know, our attorneys represent thousands of individuals in the United States courts each year. We work with the Sentencing Guidelines on a daily

The Honorable William W. Wilkins, Jr.
January 3, 1991
Page 5

basis and we emphatically believe that the recommendations set forth above will improve the guideline system that you have worked so hard to implement. Thank you for your consideration of our recommended changes.

Very truly yours,



Thomas W. Hillier, II
Chair, Legislative Subcommittee
Federal Public Defender, Western District
of Washington

TWH:ifh/wilkltr

cc: Legislative Subcommittee Members

APPENDIX E -- Memoranda on Relevant Case Law

OVERVIEW OF CASE LAW RELATING TO 3B1.2 MITIGATING ROLE IN THE OFFENSE ADJUSTMENTS

Most cases in which the application of 3B1.2 is litigated involve factual disputes about the role the defendant actually played as opposed to technical questions about the guideline terminology and lower courts' rulings on applications of 3B1.2 will not be disturbed unless they are clearly erroneous. 18 U.S.C. 3742(e). Reversals under this standard are extremely rare, even where the appellate court finds fault with the lower court's reasoning. The background commentary to 3B1.2 points out that the application of the adjustment "is heavily dependent upon the facts of the particular case." The vast majority of appeals under this guideline are brought by the defendant who is contesting the denial of an adjustment. A few defendants appeal the imposition of a minor role adjustment in place of a minimal role adjustment; the government rarely appeals. In almost every case, the appellate court has held that the sentencing court was not clearly erroneous and the opinion reveals little about how the guideline is really working. Cases involving purely legal determinations and thus a higher standard of review are the exception.¹

Most courts have ruled that courier status alone does not automatically entitle a defendant to an adjustment.² This seems to be the intent of the sentencing guidelines which do not identify specific role characteristics by which a defendant would be entitled to a reduction. One district court took 3B1.2 to the extreme, holding that there can be no such thing as minor or minimal participants in drug trafficking crimes. The appellate court criticized the ruling since the guideline specifically refers to drug offenses the Sentencing Commission obviously intended to include them. U.S. v. Oliva-Gambini, 909 F.2d 417 (10th Cir. 1990).³

The newest and perhaps most significant development in case law has been the concept of the "relevant universe" of minor and minimal defendants. A drug defendant's role is determined by examining his conduct in relation to drug offenses generally, not just the conspiracy or offense in which he was involved. In U.S. v. Daughtrey, 874 F.2d 213 (4th Cir. 1989) the court held that

Whether Role in the Offense adjustments are warranted is to be determined

¹See, e.g., U.S. v. Gordon, 895 F.2d 932 (4th Cir. 1990). The defendant, who bears the burden of proving that he should be given the adjustment, presented no evidence and the record was silent as to any facts which might shed light on the subject. The district adjusted two levels but the circuit court found no basis and reversed.

²In U.S. v. Buenrostro, 868 F.2d 135 (5th Cir. 1989), the court noted that the Commission could have established courier status as a specific offense characteristic but did not. See also, U.S. v. Garcia, 920 F.2d 153 (2nd Cir. 1990), U.S. v. Osborne, 931 F.2d 1139 (7th Cir. 1991). There are holdings of this sort in virtually all of the circuits.

³Although the reasoning of the lower court was flawed, the defendant was properly denied the adjustment based on his participation in three hand-to-hand deliveries and the result below was affirmed.

not only by comparing the acts of each participant in relation to the relevant conduct for which the participant is held accountable . . . but also by measuring each participant's individual acts and relative culpability against the elements of the offense of conviction. 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. At 216.

The Fifth Circuit has held similarly in U.S. v. Thomas, 932 F.2d 1085 (5th Cir. 1991). The defendant was a go-between who "would pick up cocaine, package it, and give it to others." The court found that Thomas' role

. . . was greater than the minimal participation exercised by the defendants to whom we previously have allowed a downward adjustment. In these cases, while the defendants may have been aware of the extent of the entire conspiracy, they did not take any real part in forwarding them. . . . It is improper for a court to award a minor participation adjustment simply because a defendant does less than the other participants. Rather, the defendant must do enough less so that he at best was peripheral to the advancement of the illicit activity. At 1092.

The case law has not yet developed beyond these rather general terms, and the extent to which a court can rely on its own experience in making these determinations is not yet clear.

The complexity of the adjustment has precluded courts from making purely legal interpretations of the guideline. This complexity stems in part from the vaguely defined terms in the guideline and also from the nature of drug crimes themselves. No two organizations are alike and the structure of even well established drug rings is constantly changing. Regional differences also make it difficult to establish definitions for certain roles or terms.

There are no cases which specifically define the terms "infrequently" or "small amount of drugs" as these terms are used in the commentary. Rather, these phrases become facets of more complicated factual determinations. In Buenrostro, for example, the large amount of heroin contributed to the court's decision not to adjust, but it was not controlling and is not the focus of the opinion. The Eighth Circuit has clearly held that quantity is to be considered in U.S. v. Garvey, 905 F.2d 1144 (8th Cir. 1990). The case involved 8.13 kilos of hash oil and one previous delivery. The defendant carried a large amount of heroin across the country and admitted having made a previous trip. He argued at sentencing that the earlier trip could not be considered and asked for a minimal role. The lower court agreed and did not consider prior conduct, but applied the minor role adjustment because of the weight of the drug. The circuit court held that the commentary to 3B1.2 explicitly refers to other conduct and quantity. The lower court's decision was free from clear error.

Courts have departed below the four level adjustment for minimal role, although these departures are apparently rare. The Second Circuit recently upheld such a departure where defendant Gonzalez drove his more culpable co-defendant to a drug deal but the court was satisfied that Gonzalez was unaware of the nature of the meeting until just seconds before his arrest. (The co-defendant, Alba, told probation officers that he had intentionally kept information about the crime from Gonzalez.) U.S. v. Alba, 933 F.2d 1117 (2nd Cir. 1991). The court departed on four grounds: the defendant's less than minimal participation, his family circumstances, the lack of evidence that he knew the specific quantity of drugs in the deal, and the disparity of sentences among the defendants. The first two grounds were upheld, the remaining two were not. The case was remanded to determine whether the same sentence would have been imposed were it not for the improper grounds for departure. The appellate court notes that departures based on any factor already calculated in the guideline are

permissible if the degree to which it was contemplated was inadequate. . . . [I]f the defendant's conduct . . . is the same as an example listed in the Guidelines Commentary for a mitigating role in the offense-then the sentencing court's discretionary hands are tied, because the Guidelines plainly will have considered this precise sort of conduct in setting the sentencing range. At 1121.

Based on this observation, careful thought should be given to the decision whether to add additional examples to the commentary to 3B1.2. Adding them will decrease the number of scenarios which district courts can claim were not considered, however, it will be practically impossible to consider and demonstrate a meaningful number of illustrations.

A recent money laundering case from the same circuit is also instructive. U.S. v. Restrepo, 1991 WL 100528 (2nd Cir. 1991). The government argued that the fact that role adjustments exist at all means that the commission considered role factors and no departure can be based on them. The amount of money involved created a base offense level which was "extraordinarily magnified." The court analyzed 2S1.1 (Laundering of Monetary Instruments) and found that the commission's justification for increasing base offense levels according to the amount of money laundered is that quantity often infers culpability. The base offense levels for both money laundering and drug offenses are determined by quantity, therefore the court's analysis should apply to both. The court concluded that

. . . where, as here, an offense level has been extraordinarily magnified by a circumstance that bears little relation to the defendant's role in the offense, a downward departure may be warranted on the ground that minimal participation exists to a degree not contemplated by the guidelines. . . . This is simply a recognition that when an aggravating factor is translated to a sliding scale of offense levels, the assumptions underlying that translation cannot fairly reflect every possible case.

In sum, district courts are searching for meaning in the guideline. They cannot determine how to apply 3B1.2 from terms like "small amount of drugs" and "infrequently". We know from a few cases and from other input to the Commission that courts want leeway to make more meaningful reductions for role and that they are concerned that quantity-driven sentencing guidelines do not adequately reflect culpability for the lowest level defendant. Without more direction from the Commission it seems likely that departures like the ones in Alba and Restrepo will be applied more frequently and supported in the circuit courts. The "relevant universe" concept, while too new to fully analyze, may be valuable to those defendants who are able to convince courts of their role but are unable to identify many co-defendants. By comparing that defendant with others similarly situated in a historical analysis of case roles, courts may find that he qualifies for an adjustment without really having much detail about his particular drug organization.

The broad discretion given to sentencing courts discussed earlier has other implications. It is well settled that a defendant seeking a downward adjustment or departure bears the burden of proving by a preponderance of the evidence that he is entitled. At least with regard to 3B1.2, this proof is almost always nothing more than the defendant's version of his involvement. Often, the government has no information to support or refute the defendant's claims and the defendant's own credibility is the determining factor. This is precisely the kind of sentencing consideration which appellate courts will leave exclusively to the district courts, therefore, meaningful review for either party will be hard to secure.

The conduct of the defendants in the cases cited in this study is as follows:

U.S. v. Gordon, 895 F.2d 932 (4th Cir. 1990). The defendant was intercepted at Washington National Airport carrying 249.5 grams of cocaine. He claimed he was guilty of simple possession and denied that he was to deliver the drugs to anyone else. At sentencing he argued for a minimal reduction because he was a courier, while continuing to claim that he acted alone. He was given a minor role reduction. On appeal, that reduction was found to be improper because there was absolutely no evidence upon which to base the downward adjustment.

U.S. v. Buenrostro, 868 F.2d 135 (5th Cir. 1989). The defendant was apprehended crossing the Mexican border with 18 kilograms of heroin (\$3,000,000.00 worth) hidden in his car. He claimed to have only just met the men who recruited him and said he believed it to be marijuana.

U.S. v. Garcia, 920 F.2d 153 (2nd Cir. 1990). The defendant Monsalve, brought relatively pure cocaine from the source to a meeting with co-defendants and handed the package to the undercover officer. The court mentioned purity and the defendant's apparent closeness to the source as factors considered in denying the adjustment.

U.S. v. Osborne, 931 F.2d 1139 (7th Cir. 1991). Defendant Urbano made two trips to Wisconsin with eleven ounces of cocaine, repackaged them, and delivered them to customers on behalf of the organizers of the venture.

U.S. v. Oliva-Gambini, 909 F.2d 417 (10th Cir. 1990). The defendant contacted the undercover agent, accepted the money and handed over the cocaine on more than one occasion. The stipulated facts indicated that he was still "less culpable than the other individuals involved."

U.S. v. Daughtrey, 874 F.2d 213 (4th Cir. 1989). This is not a drug case. The defendant's brother bought counterfeit currency and the two of them passed them over a period of days. The defendant argued that since it had not been his idea, he was less culpable than his brother and therefore entitled to a reduction.

U.S. v. Thomas, 932 F.2d 1085 (5th Cir. 1991). The defendant was a go-between who packaged cocaine and delivered it to others. He was part of an extensive ring included several managers, some of whom branched off into their own distribution rings.

U.S. v. Garvey, 905 F.2d 1144 (8th Cir. 1990). The defendant transported 8,130 grams of hashish oil from Florida to North Dakota. After selling it to a Canadian for \$37,000.00, he was arrested just before flying back to Florida. He claimed to have been hired by another and to have made one previous similar delivery.

U.S. v. Restrepo, 1991 WL 100528 (2nd Cir. 1991). Three defendants were apparently driving counter-surveillance following a van to a warehouse. They also sat in a nearby diner and appeared to be look-outs. Search of the warehouse, other vehicles and private homes resulted in evidence of over \$43,000,000.00 in laundered drug money. By plea agreement, the money was reduced to \$18.3 million. The adjusted base offense levels was 29 and the court departed four more to 25 (57-71 months). The defendants were sentenced to 60 months.

MEMORANDUM

TO: Drug Working Group

FROM: Jennifer Richter

RE: Factors Considered Relevant in Determining Mitigating and Aggravating Roles

DATE: September 19, 1991

The following is a distillation of the factors courts have considered significant in either granting or refusing to grant mitigating role adjustments and aggravating role adjustments. The information was taken from approximately 100 selected case summaries for the years 1990 and 1991.

FACTORS THAT JUSTIFY GRANTING A MITIGATING ROLE

Mitigating role adjustment given when defendant is less culpable than the other members involved in the group conduct. Defendant's "lesser" culpability must be to such a degree that a distinction between him or herself and other group members can be made.

Determination of minor role depends not on the actual role, but on the culpability of a defendant. Culpability depends on such factors as:

- the nature of the defendant's relationship to other participants
- the importance of the defendant's actions to the success of the venture
- the defendant's awareness of the nature and scope of the criminal enterprise

FACTORS THAT DO NOT JUSTIFY GRANTING A MITIGATING ROLE

Courier not entitled to adjustment for mitigating role where courier:

- handled a large quantity of drugs
- had responsibility to deliver and exchange cash for drugs
- had a "personal acquaintance" with the leader of the organization
- knew the quantity of drugs and the destination
- was acquainted with the receiving parties
- drove the car a long distance and could have separated himself from the conspiracy if he so desired
- drove the transporting vehicle alone
- used his own car to transport drugs

The fact that a defendant is a **courier** does not necessarily mean that he is a minor participant. Couriers are indispensable to any drug-dealing network.

Those charged with **telephone counts** do not receive mitigating role reductions if they negotiated the price and quantity of drugs over the phone.

Mule status alone does not indicate defendant was minor participant. For example, a mule who swallowed 40 balloons of heroin in an attempt to smuggle the drugs could be found a principle participant.

Defendant not entitled to a reduction merely because he was less culpable than his co-defendant.

No reduction given for "**minor**" or "**minimal**" participation when defendant:

- was fully apprised of and actively participated in all facets of the drug conspiracy
- was arrested in the company of a major co-conspirator
- was seen or was presumed to be weighing and packaging drugs
- was known to carry a firearm or had access to one
- had drugs and/or paraphernalia on his person at various drug houses
- adapted cars for smuggling
- purchased the goods necessary to smuggling
- had **decision-making** capacity:
 - recruited accomplices
 - planned and carried out preparations for the offense
 - gave signal to co-conspirator to produce the drugs
 - initiated contact with buyers
- engaged in hand-to-hand drug distributions.
- was an intelligent person who realized seriousness of the offense
- vouches for quality of cocaine prior to sale
- received payment for drug transactions

FACTORS THAT JUSTIFY GRANTING AN AGGRAVATING ROLE

Defendant played a larger role in the drug organization than that charged. Role adjustment should be anchored to all the transactions leading to the conviction, not just the last link that resulted in conviction. 4th, 5th, 6th Circuits

Aggravating role adjustment given to defendant who was found to be much more than a "runner" based upon evidence that he discussed with agents methods of laundering drug money using foreign and domestic bank accounts.

Aggravating role adjustment given to defendant who received a larger share of the proceeds from the drug sales than other participants.

Aggravating role adjustment given to defendant who acted as a **manager, supervisor, leader** or **organizer** of his co-conspirators. Factors that indicate leadership role:

had **decision-making** capacity:

- directed others to transport and distribute cocaine and collect drug debt
- initiated transactions
- negotiated prices and handled financial end of drug operation
- approved sale of drugs on credit
- recruited participants to perform various functions and paid them
- acted as spokesperson for the group
- controlled keys to and movement of truck containing cocaine
- had exclusive control over drug plants
- could, but need not, control others
- controlled the business or money in an instrumentality that was essential to the drug enterprise
- used home as drug lab or distribution center
- assured agent that he would corner the amphetamine market
- duped an unwitting friend into driving the getaway car

FACTORS THAT DO NOT JUSTIFY GRANTING AN AGGRAVATING ROLE

Sentence should not be enhanced for relevant aggravating conduct collateral to the defendant's role in the offense of conviction. 5th, 7th, 8th, 10th Circuits

Defendant should not receive an enhancement as a supervisor where the only other person participating in the offense was the buyer.

Enhancement for leadership should not be given:

- where defendant merely owns the trucking business that leased the warehouse in which the cocaine was off loaded
- where co-defendant did not have the necessary intent to commit the offense

APPENDIX F -- Memorandum on Mandatory Minimums

UNITED STATES SENTENCING COMMISSION
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Paul L. Malone, ex officio



MEMORANDUM

TO: DRUG WORKING GROUP

FROM: DAVID DEBOLD

RE: THE IMPACT OF MANDATORY MINIMUM STATUTES ON THE SENTENCING COMMISSION'S DRUG ROLE OPTIONS

DATE: NOVEMBER 5, 1991

The guidelines for drug trafficking offenses are dictated, to a large extent, by the mandatory minimum penalties of 21 U.S.C. § 841. Section 841 contains a five-year mandatory minimum term for "violation[s] . . . involving" certain quantities of cocaine, cocaine base, heroin, PCP, LSD, marihuana or methamphetamine. 21 U.S.C. § 841(b)(1)(B). For violations involving certain larger quantities of these same substances the mandatory minimum sentence is ten years.¹ 21 U.S.C. § 841(b)(1)(A). Furthermore, anyone who attempts or conspires to commit a drug offense is subject to "the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846. In order to maintain proportionality, the Commission set the offense levels in the drug quantity table in such a way that the guideline ranges for drug amounts that trigger mandatory minimum sentences will be at or near the mandatory minimum terms of imprisonment.²

This memo examines what latitude the Commission has to de-emphasize the importance of drug quantity in the sentencing of less culpable drug offenders, in light of the above-mentioned mandatory minimum provisions. It concludes that the courts have not

¹Prior felony drug convictions drive the mandatory minimum terms even higher. *Id.*

²For example, 500 grams of cocaine carries a mandatory minimum term of 60 months. The guideline range for 500 grams of cocaine, with an adjustment only for acceptance of responsibility, and a Criminal History Category of I, is 51 - 63 months.

above-mentioned mandatory minimum provisions. It concludes that the courts have not come to grips with the issue of when a drug quantity mandatory minimum applies to persons convicted of conspiracies. The best indication of how this issue will be resolved is that the courts are beginning to apply the same standards of knowledge, involvement and foreseeability that the guidelines apply in the relevant conduct section. U.S.S.G. §1B1.3. Thus, the Commission may be in a position to shape the law of mandatory minimum drug quantities under the conspiracy statute with its relevant conduct rules.

It is clear that a defendant convicted under section 841 who personally possesses or distributes a "mandatory minimum quantity" of drugs is subject to the mandatory minimum term. What is not clear, and what this memo will focus on, is whether a coconspirator is always subject to the mandatory minimum term where the conspiracy "involved" a mandatory minimum quantity of drugs. If so, the Commission will be restricted in the kinds of changes it can make to the guidelines to lower the sentences of such persons. If, on the other hand, the mandatory minimum provisions apply to coconspirators only under certain circumstances (such as where they knew about or reasonably foresaw the "mandatory minimum quantity"), there will be greater latitude.

Most of the circuits have held that despite the effect of drug quantities on statutory maximums and mandatory minimums under section 841(b)(1), the quantity of drugs involved is not an element of section 841 or 846 offenses. Rather, these subsections are sentence enhancement provisions that come into play at the sentencing stage. As a result, the quantity of drugs involved is not an issue for the jury to decide beyond a reasonable doubt; instead, it is an issue for the judge to decide at the sentencing hearing by a preponderance of the evidence. See United States v. Campuzano, 905 F.2d 677 (2d Cir.), cert. denied, 111 S.Ct. 363 (1990); United States v. Gibbs, 813 F.2d 596 (3d Cir.), cert. denied, 484 U.S. 822 (1987); United States v. Powell, 886 F.2d 81 (4th Cir. 1989), cert. denied, 110 S.Ct. 1144 (1990); United States v. Moreno, 899 F.2d 465 (6th Cir. 1990); United States v. McNeese, 901 F.2d 585 (7th Cir. 1990); United States v. Luster, 896 F.2d 1122 (8th Cir. 1990); but cf. United States v. Alvarez, 735 F.2d 461 (11th Cir. 1984) (interpreting prior provision which only provided an enhancement for large quantities of marijuana); United States v. Pumphrey, 831 F.2d 307 (D.C. Cir. 1987) (dictum); United States v. Crockett, 812 F.2d 626 (10th Cir. 1987) (failure to allege quantity in indictment prevents application of enhancement, even though defendant acknowledged enhancement at plea).

With a substantive drug trafficking offense (e.g., distribution, possession with intent to distribute, or manufacturing), it is fairly easy to determine whether a drug quantity enhancement provision applies. If the evidence shows that in committing the offense of conviction the defendant personally sold, manufactured, or possessed (with intent to distribute) the requisite amount, then the enhancement applies. Conspiracy cases are more troublesome. The conspiracy statute subjects a conspirator to the same penalties as those prescribed for the offense, "the commission of which was the object of the . . . conspiracy." 21 U.S.C. § 846. Drug conspiracies often have no well-defined "object" with respect to the quantity of drugs that will be involved. If the conspiracy is on-going, the quantity will grow

over time. Evidence that the conspirators decided at the outset of a conspiracy how much of what type of drug they would try to distribute is virtually unheard of (due, in no small part, to the fact that conspiracies probably are not run in such a manner).

Complicating matters is the fact that a single conspiracy can be made up of persons who play their own small and separate roles, and know only about some aspects (or some members) of the conspiracy. United States v. Savage, 891 F.2d 145 (7th Cir. 1989) (conspirator need not know every other conspirator to be guilty of a single conspiracy); United States v. Casto, 889 F.2d 562 (5th Cir. 1989) (conspirator need not know all of the details of the scheme or the identities of the other conspirators), cert. denied, 110 S.Ct. 1164 (1990); United States v. Carter, 760 F.2d 1568 (11th Cir. 1985) (same). To convict, the government need only show that the defendant was aware of the central features and the broad scope of the conspiracy, willfully associated himself with it, and knowingly contributed his efforts to its furtherance. United States v. Grier, 866 F.2d 908 (7th Cir. 1989); United States v. Hitow, 889 F.2d 1573 (6th Cir. 1989).

The broad nature of conspiracy liability makes the application of drug quantity enhancements less than straight-forward. Several approaches are possible. At one extreme, the conspiracy penalty provisions could be read to hold every conspirator responsible for any quantity of drugs that a coconspirator distributed, possessed with intent to distribute, or planned to distribute or to possess with intent to distribute, in furtherance of the conspiracy. This inclusive approach could be narrowed by various scienter or participation requirements. The narrowest approach would be to limit drug quantity liability to those who actively participated in the distribution, the possession, or the planning to distribute or possess, the drugs in question. Working from the narrowest approach toward a middle ground, one could add those who knew about the distribution, the possession or the planning to distribute or possess. Still broader would be a rule including those who could have reasonably foreseen the distribution, the possession, or the planning to distribute or possess, the drugs in question.

Subtle variations on these four approaches are possible. For example, "planned" distribution or possession, as referred to above, means that which is discussed (or perhaps even attempted) but which does not come to fruition. A narrower approach could be justified for "planned" distribution or possession than for completed distribution or possession. Also, the "knowing" and "fore-seeable" approaches could be limited to the quantity that the defendant knew about or should have foreseen, or they could be broadened to hold the defendant accountable for any quantity involved if the defendant knew about or should have foreseen the event that involved that quantity. The "knowing" and "foreseeable" approaches could also have special rules for activity that pre-dates the defendant's membership in the conspiracy. Any of the four approaches could be further limited by a requirement that the defendant have a stake in the drugs for which he is held accountable.

There may be good policy reasons for adopting or rejecting each of the possible approaches mentioned in the previous two paragraphs. The issue, however, is which

approach applies to 21 U.S.C. § 846. Unfortunately, no court has directly addressed this issue. The best one can do at this point is try to draw inferences from decisions on related issues. The result in United States v. Jacobo, 934 F.2d 411 (2d Cir. 1991), supports the inference that proof requirements similar to those of the current guidelines apply. In Jacobo, the jury made the finding that the defendants conspired to deliver "5 kilograms or more" of cocaine. The conspirator who negotiated the sale asserted that although he told the informant he would sell 5 kilograms, he did not really intend to sell that much. (He, in fact, only showed up with 2 kilograms.) Another conspirator, who was present when the 2 kilograms were delivered, claimed he wasn't even aware that a quantity of 5 kilograms was mentioned in prior negotiations.

The Second Circuit, noting that drug quantity is not an element of the offense, remanded for the district court to determine the quantities independent of the jury's finding. The broad conspiracy instructions may have led the jury to conclude that the conspiracy was to deliver 5 kilograms, without deciding whether each defendant "had knowledge and intent with respect to the precise quantity of cocaine to be sold." *Id.*, 934 F.2d at 417. The court noted that the guidelines -- unlike the rules for conspiracy liability -- require proof of knowledge and/or intent³ with respect to drug quantities, but it did not discuss whether such proof requirements apply to the mandatory minimum provisions. Two of the defendants, however, received the minimum sentences allowed under the 5 kilogram statutory sentencing enhancement provision. Thus, it may be inferred that intent and knowledge must also be proved to apply that statutory enhancement provision, because, if not, remand for those defendants would have been unnecessary.

Another Second Circuit case suggests a different result, but it is possible to reconcile the two. In United States v. Perrone, 936 F.2d 1403 (2d Cir. 1991), the defendant was convicted of 21 U.S.C. §§ 841(d) (possessing listed chemicals, knowing or intending they would be used to manufacture a controlled substance) and 21 U.S.C. § 846 (conspiracy to manufacture more than 5 kilograms of cocaine). The court reversed the conspiracy conviction, which carried a 10-year mandatory minimum, on the ground that Congress did not intend convictions under section 846 for conduct that is nothing more than a section 841(d) violation. In discussing whether to sentence defendant based on drug quantity (there was no guideline in existence at that time for a violation of section 841(d)), the court noted that "the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy." The court went on to note that to convict of a conspiracy, the government need only prove that the defendant has some knowledge of the conspiracy's aims; he need not know all of the aims. Because the court dismissed the conspiracy count, it did not have to

³The court did not examine the contours of these requirements. Presumably, it did not mean to rule out the possibility that "reasonably foreseeable" conduct in furtherance of the execution of jointly undertaken criminal activity would fit within those contours. See U.S.S.G. §1B1.3, comment. (n.1).

decide whether the "broader scope" of the law of conspiracy applies to the enhanced penalty aspect, as well. As the following discussion indicates, it probably does not.

Conspiracy statutes establish penalties for combining with others for the purpose of violating the law. The agreement, rather than the results of the agreement, is the crime. The mandatory minimum drug quantity provisions provide a possible way to enhance a conspirator's punishment based on criminal conduct of other conspirators in furtherance of the conspiracy. But even before the advent of these mandatory minimums provisions, there was (and still is) a way to punish conspirators for such other crimes. This other way is the Pinkerton doctrine. Pinkerton v. United States, 328 U.S. 640 (1946). Although the contours of this doctrine are described differently by different courts, the general rule is that one may be convicted of a crime committed by one's coconspirator if it is a reasonably foreseeable act done in furtherance of the conspiracy. See, e.g., United States v. Newbern, 731 F.2d 744 (11th Cir. 1984).

The foreseeability element is not always described the same way in these cases, however. Some state that the crime must be reasonably foreseeable as a necessary or natural consequence of the conspiracy. United States v. Gualdado, 794 F.2d 1533 (11th Cir. 1986) (holding that the value of the drugs involved made use of force to protect it foreseeable), cert. denied, 479 U.S. 1101 (1987). Such a rule tends to be more objective and prone to generalizations about factual scenarios that are likely to recur frequently (such as the conclusion, as noted above in Gualdado, that the value of the drugs, in itself, made the use of force to protect the drugs foreseeable). Other circuits even seem to have eliminated the foreseeability requirement where the other criminal conduct was in furtherance of the conspiracy. See, e.g., United States v. Crocker, 788 F.2d 802 (1st Cir. 1986) (in furtherance of the conspiracy or within the conspiracy's reasonably foreseeable scope); cf. United States v. Stanley, 765 F.2d 1224 (5th Cir. 1985) (in furtherance of the conspiracy and within its reasonably foreseeable scope).

One court has fleshed out the rule to require that the act be one of the primary goals of the conspiracy or directly facilitate achievement of one of those goals. If it falls into the latter category (i.e., directly facilitates achievement of a goal of the conspiracy), which the court also characterized as a reasonably foreseeable but originally unintended crime,⁴ this court limits liability to those who played more than a "minor" role in the conspiracy or had actual knowledge of at least some of the circumstances and events leading to such a

⁴The shooting of a person suspected of being an informant might be an example of a crime that directly facilitates the achievement of a goal of the conspiracy and is reasonably foreseeable, even though it was originally unintended. Most crimes that result from things going awry seem to fit this definition, because, first, it would be difficult to show that the coconspirators agreed and intended that they would react in a certain way to every possible problem, and second, such crimes are often committed with little time to reflect even though the possibility that they will be committed is reasonably foreseeable.

crime.⁵ United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985), cert. denied, 474 U.S. 905 (1985).

Pinkerton liability is conceptually distinct from drug quantity liability. Pinkerton applies where the government charges the defendant in a substantive count (in addition to a conspiracy count), and the defendant's liability on that count derives from the fact that a coconspirator committed the substantive offense in furtherance of the conspiracy.⁶ The latter deals with the statutory minimum and maximum for the conspiracy count itself. Both are controlled by congressional intent. The courts may conclude that, absent a clear statement to the contrary, Congress meant to incorporate the Pinkerton rules to drug quantity enhancements. Two courts have moved in that direction (though neither addressed the issue). In United States v. Puma, 937 F.2d 151 (5th Cir. 1991), the court noted the similarity between the Pinkerton rule and the relevant conduct rules of the guidelines. It stated that the fact that a conspirator is convicted of a conspiracy that involved a particular quantity of drugs does not mean that he foresaw that quantity. In United States v. Aichele, 941 F.2d 761 (9th Cir. 1991), the court discussed the guidelines and drug quantity enhancements as if they contained the same proof requirements. It stated that a defendant is responsible for the acts of coconspirators committed in furtherance of the conspiracy. The defendant was held accountable for a quantity of phenylacetic acid because it was reasonably foreseeable that someone in the conspiracy would obtain the acid as a step toward the manufacture of methamphetamine in furtherance of the conspiracy.

There is one aspect of the Pinkerton doctrine that may justify less rigid application of the drug quantity enhancements. Some courts have held that the jury (which applies the doctrine rather than the judge) has the discretion not to convict even if the elements of Pinkerton liability are satisfied. See United States v. Blackmon, 839 F.2d 900, 910 n.12 (2d Cir. 1988). The case law provides no guidance on how or whether a jury should be instructed to exercise that discretion.⁷ Id. If the jury does have such discretion, and if the Pinkerton doctrine and the criteria for sentencing enhancement are meant to be on par with

⁵The court did not define "minor" role in this context.

⁶For example, suppose A, B and C decide that they are going to rob a bank. On the day before the robbery is to occur, and without any involvement by B or C, A steals a car for the getaway. A is caught stealing the car, and evidence of the agreement to rob the bank is uncovered. In addition to a count of conspiracy, B and C could also be charged with theft of the car because it was done in furtherance of the conspiracy.

⁷These courts are not mistakenly referring to the jury's "fact-finding" role when they speak of this "discretion." In the instruction that the court approved of in Blackmon, the jury was told that if they found that all of the requisite elements of the Pinkerton doctrine were satisfied, they "may, but . . . need not, find that defendant guilty of [a substantive count], even though he did not personally participate in the acts constituting the crime or did not have actual knowledge of it." Id., 839 F.2d at 909.

one another, there should be some discretion with the court in applying the sentencing enhancement rules. Because there is no sound reason for discretion in this area to be unguided, the courts of appeals might react by making the foreseeability test more subjective. That is, sentencing judges might be given more deference to conclude that because of the peculiarities of either the defendant or the facts of the case a coconspirator's acts were not foreseeable to that particular defendant.

One of the narrowest possible approaches to applying the mandatory minimum provisions in conspiracy cases would be to apply them only where the conspirators actually agreed that their activity would involve the triggering drug quantity. Proponents of such an approach might point to the language of the conspiracy statute, which states that a person who conspires to commit a drug offense is subject to the same penalties as those applicable to the substantive offense that it was the object of the conspiracy to commit. 21 U.S.C. § 846. This, the argument goes, only permits application of a drug quantity mandatory minimum if the object of the conspiracy was to distribute that quantity. And the object can only be determined by examining the agreement itself. Only if the defendant agreed to be involved with a particular quantity of drugs, or agreed to take part in a particular transaction that turned out to involve a particular quantity of drugs, would he be subject to the mandatory minimum. It is difficult to predict whether this approach will carry the day. The holding in United States v. Hodges, 935 F.2d 766 (6th Cir. 1991) implicitly rejects it. There, the court held that drug amounts distributed in the course of a conspiracy on different dates could be aggregated to reach a mandatory minimum.⁸ Also, this approach would represent a significant departure from traditional coconspirator liability concepts (such as Pinkerton liability for foreseeable activity in furtherance of the conspiracy).

A number of minor related issues may have some bearing on the Commission's work in the drug/role area. One question is how the enhancement is invoked. In order to provide adequate notice, must the quantity of drugs be alleged in the indictment? In those circuits where it is clearly established that drug quantity is not an element of the offense, the most that courts have held on this issue is that inclusion of the drug amount in the indictment is sufficient to satisfy notice requirements. They have not held whether it is necessary to give notice in the indictment. See United States v. Ocampo, 890 F.2d 1363 (7th Cir. 1989); Gibbs, *supra*; United States v. Normandeau, 800 F.2d 953 (9th Cir. 1986); see also United States v. Wood, 834 F.2d 1382 (8th Cir. 1987) (notice issue not raised; observing that defense did not challenge failure to mention quantities in indictment, and finding no error because drug amount is not an element of the offense). Congress has required notice of other enhancement factors to be filed before trial or a guilty plea, 21 U.S.C. § 851 (prior drug convictions), but it has not done the same with drug quantities. Even absent a statutory notice requirement, a defendant is entitled to notice of the charges against him in

⁸Hodges is also an example of a case where the court treated the mandatory minimum drug quantity issue as if it was governed by the same rules as relevant conduct under the guidelines. Id., 935 F.2d at 771-72.

a manner sufficient to enable him to properly plead "in bar of further prosecutions for the same offense." Gibbs, 813 F.2d at 599. This does not seem to dictate notice before trial. Even if it did, notice in a document other than the indictment should suffice now that the courts have held that quantity is not an element of the offense.

Notice before a guilty plea is required, because a defendant must be made aware of what he is subjecting himself to by foregoing a trial. The Federal Rules of Criminal Procedure directly address this. Rule 11(c)(1) requires the court, before accepting a plea of guilty or nolo contendere, to determine that the defendant understands "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term" The required advice regarding minimum and maximum penalties is not limited to "offense" penalties; it also appears to apply to minimum and maximum penalties that result from sentencing enhancement provisions.

A related question is whether the government has exclusive control over whether to invoke the enhanced penalties. If the courts -- in an effort to ensure adequate notice -- require inclusion of quantities in the indictment to invoke the enhancement, then almost certainly the government will control its application. If some other form of notice suffices, especially if it can come after a trial or guilty plea, the courts could hold that they have the power to raise the issue sua sponte.⁹ To date, no court has held as such. The closest was a district court that held, despite the government's claim to the contrary, that the mandatory minimum applied prior to the November, 1988, amendment of section 846. See United States v. Hayes, 703 F.Supp. 1493 (N.D. Ala. 1989), sentence vacated sub nom. United States v. Curry, 902 F.2d 912 (11th Cir. 1990), cert. denied, 111 S.Ct. 973 (1991). The government had recommended a four-year sentence for one defendant as part of a plea agreement, and three others went to trial. The indictment alleged the mandatory minimum amount, but the government agreed with defense counsel that section 846 did not make mandatory minimums applicable to conspiracies until after the 1988 amendment. The court disagreed and applied the mandatory minimum. (The court of appeals ultimately reversed.)

Other cases suggest, without deciding, that the government controls the enhancement. See United States v. Morgan, 835 F.2d 79, 81 (5th Cir. 1987) (quantity is not an element and "need only be proved when the Government seeks an enhanced penalty"; proof at trial not necessary); United States v. Martinez-Zayas, 857 F.2d 122 (3d Cir. 1988) (suggesting that the court has no discretion in applying the enhancement and that Congress has transferred much of the sentencing function of the court to the prosecutor). The prosecutor definitely retains one form of control over the enhancement. If the defendant is only charged with substantive counts, and if no count by itself involves the mandatory minimum drug quantity, the mandatory minimum provisions will not apply. See Hodges, 935 F.2d at 771-72.

⁹If a court decided to apply the enhancement after a guilty plea, the defendant would then need to be given an opportunity to withdraw his plea. See Rule 11(c)(1), supra.