

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
PROBATION OFFICE

THOMAS J. WEADOCK, JR.
CHIEF PROBATION OFFICER

#34

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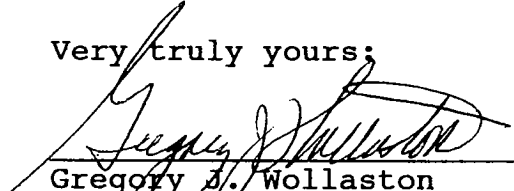
February 24, 1992

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

Dear Sir:

Enclosed please find comments which have been made concerning the proposed amendments to the Guidelines. The packet which was forwarded did not contain pages 12 through 20 and 22 through 33. Additionally, it appears that there should have been additional information after page 40.

Very truly yours;



Gregory J. Wollaston
U.S. Probation Officer

By the Defendant

criminal activity, or was not reasonably foreseeable[^] in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit or implicit (tacit) agreement, including any agreement fairly imputed to the defendant by his conduct and that of other participants in the criminal activity. For example, where a defendant benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneously or subsequent^y to the defendant's joining the criminal activity, such conduct ordinarily may be imputed to be within the scope of the criminal activity the defendant agreed to jointly undertake.

The concept of reasonable foreseeability has no bearing on conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes. The concept of reasonable foreseeability is considered only in relation to the conduct of other participants that is in furtherance of the jointly-undertaken criminal activity."

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 in the fifth (formerly second) paragraph by deleting "'would be otherwise accountable'" and inserting in lieu thereof "is accountable";

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 in example (a) by deleting "boat" wherever it appears and inserting in lieu thereof in each instance "ship"; by deleting "any claim on his part" and inserting in lieu thereof "his claim"; and by inserting the following additional paragraph:

"Because the defendant aided and abetted the unloading of the marihuana shipment, no determination of the reasonable foreseeability of the acts of others in unloading the shipment is required. If it were found that the defendant's actions, in this example, did not constitute aiding or abetting the importation of the entire shipment, the defendant appropriately would still be accountable for the entire one-ton quantity because the facts of the case (nine other off-loaders, marihuana in bales) clearly establish that a one-ton quantity of marihuana was reasonably foreseeable." -

[^] to him,

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 in example (e) in the last sentence by deleting "if" and inserting in lieu thereof "because"; by inserting "(i.e., the importation of the single shipment of marihuana) that" immediately following "criminal activity"; and by deleting "(i.e., the importation of the single shipment of marihuana)".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 by inserting, immediately after example (e), the following additional paragraphs:

"Where the defendant enters an ongoing conspiracy, as in this example, the scope of the specific criminal activity that the defendant agreed to undertake, and thus the defendant's accountability for prior acts of other conspirators, must be determined. One factor that appropriately may be considered in determining the scope of the criminal activity undertaken by the defendant, particularly in a conspiracy that involves repeated conduct (e.g., a series of drug sales over time), is the benefit or expected benefit to the defendant. Where the defendant benefits directly, or expects to benefit directly, from the prior conduct, such conduct ordinarily will be within the scope of the defendant's criminal activity. Where there is no direct benefit, such conduct ordinarily will not be within the scope of the defendant's criminal activity.

f. Defendant J knows about her boyfriend's ongoing drug trafficking activity, but agrees to participate in this activity on only one occasion. Defendant J is held accountable only for the drug quantity involved on that one occasion.

g. Defendant K is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as the defendant sells. The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers, even if all share a common source of supply, because he is not engaged in a jointly-undertaken criminal activity with them. In contrast, Defendant L, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant L's behavior meets the criteria for a jointly-undertaken criminal activity. Therefore, Defendant L is accountable for the quantities of drugs sold by the four other dealers during the course of his agreement with them."

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 by deleting the first sentence.

Reason for Amendment: This amendment clarifies the operation of this guideline. Material is moved from the commentary to the guideline itself and rephrased for greater clarity, the discussion of the scope of this provision in the commentary is expanded, and additional examples are inserted. • The

Illustration of Section 1B1.3 as amended by Proposed Amendment 1

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

conduct under this provision. The conduct of others that was not in furtherance of the jointly-undertaken criminal activity, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit or implicit (tacit) agreement, including any agreement fairly imputed to the defendant by his conduct and that of other participants in the criminal activity. For example, where a defendant benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneous, or subsequent to the defendant's joining the criminal activity, such conduct ordinarily may be imputed to be within the scope of the criminal activity the defendant agreed to jointly undertake.

The concept of reasonable foreseeability has no bearing on conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes. The concept of reasonable foreseeability is considered only in relation to the conduct of other participants that is in furtherance of the jointly-undertaken criminal activity.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant ["would be otherwise accountable"] is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant is Accountable

* * *

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a [boat] ship containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding [any claim on his part] his claim that he was neither aware of, nor could reasonably foresee, that the [boat] ship contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the [boat] ship because he aided and abetted the unloading, and hence the importation, of the entire shipment.

occasion.

g. Defendant K is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as the defendant sells. The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers, even if all share a common source of supply, because he is not engaged in a jointly-undertaken criminal activity with them. In contrast, Defendant L, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant L's behavior meets the criteria for a jointly-undertaken criminal activity. Therefore, Defendant L is accountable for the quantities of drugs sold by the four other dealers during the course of his agreement with them.

2. ["Such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction," as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that were part of the same course of conduct or common scheme or plan as the offense of conviction.]

* * *

(B). Proposed Amendment: The Commentary to §1B1.3 captioned "Application Notes" is amended by inserting the following additional notes:

"8. 'Common scheme or plan' and 'same course of conduct' are two closely-related concepts.

Shane's to highlight (A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other, and linked by common evidence. Factors that appropriately are considered in this determination include common victims, common accomplices, common purpose, and similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), and similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme). Offenses may meet the criteria of a common scheme or plan whether or not they fall within the time frame that

*Common
not
needed*

would also qualify them as part of the same course of conduct.

Should be highlighted

(B) ~~Same~~ course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors appropriate to consider in this determination are the time interval between the offenses and the similarity of the offenses. As §1B1.3(a)(2) applies only to offenses of a character that would be grouped under §3D1.2(d), such offenses will be similar in character (e.g., a series of thefts, a series of thefts and forgeries, or a series of drug sales). As a general -- but not absolute -- standard, offenses that are similar in character and are committed at intervals of 120 days or less appropriately are considered as part of the same course of conduct. Note that in the case of a series of such offenses committed at intervals of 120 days or less (e.g., a series of four thefts each 90 days apart) all the offenses ordinarily would be considered part of the same course of conduct even though the total time from the first to last offense may have exceeded 120 days.

delete a alternative to filing

Due to the nature of tax offenses, a different time interval between offenses is ordinarily appropriate for this determination. For example, a failure to file income tax returns for consecutive years, or the filing of fraudulent ~~income tax returns in consecutive years~~, ordinarily would constitute the same course of conduct because such returns are required only at yearly intervals. The determination of the same course of conduct or common scheme or plan in tax cases is addressed in Application Note 3 of the Commentary to §2T1.1 (Tax Evasion).

Although the term 'same course of conduct' may also be used in connection with dissimilar offenses committed within a short span of time (e.g., a 'spree' in which a defendant assaults a neighbor, steals a car, and unlawfully possesses a controlled substance within a period of several hours appropriately might be considered the same course of conduct), this facet of the term has no applicability to cases under §1B1.3(a)(2) because §1B1.3(a)(2) only applies to offenses of a similar character."

Reason for Amendment: This amendment provides guidance as to the scope of the terms "same course of conduct" and "common scheme or plan."

§1B1.8. Use of Certain Information

(I)	More than \$10,000,000	add 16
(J)	More than \$30,000,000	add 18
(K)	More than \$80,000,000	add 20.

\$2B1.1. Larceny, Embezzlement, and Other Forms of Theft
\$2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery
\$2F1.1. Fraud and Deceit

6. Proposed Amendment: Section 2B1.1(b) is amended by renumbering subdivision (7) as (8), and by inserting the following as subdivision (7):

"(7) If the offense affected a financial institution, increase by 4 levels."

Section 2B4.1(b) is amended by renumbering subdivision (2) as (3), and by inserting the following as subdivision (2):

"(2) If the offense affected a financial institution, increase by 4 levels."

Section 2F1.1 is amended by renumbering subdivision (5) as (6), and by inserting the following as subdivision (5):

"(5) If the offense affected a financial institution, increase by 4 levels."

Reason for Amendment: This amendment would increase the sentences for financial institution fraud, theft, and bribery over the entire range of offense levels, including those at the lower and middle levels, in addition other enhancements already in these guidelines. Under this amendment, embezzlement of \$5,000 from a financial institution, for example, would have an offense level four levels higher than embezzlement of the same amount from an individual or from another type of institution. The purpose of this amendment would be to reflect the increases by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violations of title 18 bank - fraud and embezzlement offenses.

\$2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

7. Issue for Comment: The Commission requests comment regarding the removal or modification of the current limitations on offense levels for the distribution of Schedule III, IV, and V controlled substances, anabolic steroids, and Schedule I and II depressants, so that violations involving large quantities of

2/20/88: For the referenced controlled substances, the Base Offense level should be based on the amount of controlled substance for which the defendant is held accountable. Modification as to the statutes is one way to address the issue.

Classification as to what Commission interprets as affected would be helpful

of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine."

Reason for Amendment: This amendment clarifies a situation in which a defendant is not ordinarily eligible for a reduction under §3B1.2 (Mitigating Role), and moves existing language from the Introductory Commentary of Chapter Three, Part B, to the Commentary in §3B1.2.

(B). Proposed Amendment: The Commentary to §3B1.1 is amended by inserting the following additional note:

"4. When a defendant, who otherwise would merit a mitigating role reduction under §3B1.2 (Mitigating Role), exercised limited supervision over a limited number of participants with equal or lesser roles, do not apply an adjustment from this section. For example, an increase in offense level under this section would not be appropriate for a defendant whose only function was to offload a single large shipment of marijuana, and who supervised other offloaders of that shipment. Instead, consider such circumstances in determining the appropriate reduction under §3B1.2 (Mitigating Role). See also Application Note 4 of the Commentary to §3B1.2 (Mitigating Role)."

The Commentary to §3B1.2 is amended by inserting the following additional note:

"4. When a defendant, who otherwise would merit a mitigating role reduction under §3B1.2 (Mitigating Role), supervises ^{number} of participants with equal or lesser roles, a lesser reduction than otherwise appropriate ordinarily is warranted. For example, in the case of a defendant who would have qualified for a minimal role adjustment but for his supervision of other participants, an adjustment for minor role, rather than minimal role, would be appropriate."

Reason for Amendment: This amendment clarifies that a defendant who otherwise merits a mitigating role, and who supervises a limited number of participants of equal or lesser roles, is not subject to an aggravating role enhancement. Instead, such circumstances may be considered in determining whether a mitigating role reduction is appropriate under §3B1.2.

17(A). Proposed Amendment: The Introductory Commentary to Chapter Three, Part B is amended by deleting the first sentence of the second paragraph and inserting in lieu thereof:

"In the case of a criminal activity involving more than one participant, §3B1.1 or §3B1.2 may apply. When a criminal activity involves only one participant, or only participants of roughly equivalent culpability, neither §3B1.1 nor §3B1.2 will apply."

Section 3B1.1 is amended by deleting "follows:" and inserting in lieu thereof "follows (Apply the greatest):".

Section 3B1.1(a) is amended by deleting "five or more participants, or was otherwise extensive" and by inserting in lieu thereof "at least four other participants".

Section 3B1.1(b) is amended by deleting "(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive" and inserting in lieu thereof "of at least four other participants in a criminal activity".

A Section 3B1.1(c) is amended by deleting "other than described in (a) or (b)" and inserting in lieu thereof "that involved at least one other participant".

The Commentary to §3B1.1 captioned "Application Notes" is amended in Note 1 by deleting the second sentence and inserting in lieu thereof the following additional paragraphs:

"In addition, for the purposes of this guideline, a participant ordinarily includes any person who plays the role of a participant, even if such person is not actually criminally responsible for the offense (e.g., if two persons were recruited to assist in transporting marihuana, they would be deemed participants even if they were undercover law enforcement agents and, thus, not criminally responsible for the offense). However, if an undercover agent were recruited to assist in transporting marihuana and that agent recruited three other undercover agents, only the first undercover agent would be counted as a participant.

what is meant by this
Furthermore, for purposes of this guideline, a participant includes any person recruited to play a *terminology leaves a great deal to interpretation as to what counts as a significant role* *significant role* role in the offense, even though their lack of awareness that an offense was being committed is a bar to their criminal liability (e.g., a person recruited to drive the getaway car from a robbery who is unaware that a robbery is to be committed; or a person expressly hired to collect money for charitable purposes, who is unaware that a fraud is being perpetrated). Persons such as postal employees, messengers, or taxi drivers who are performing their normal duties, and are not otherwise criminally responsible for their conduct, are not included under this paragraph."

The Commentary to §3B1.1 captioned "Application Notes" is amended

A Objections to application of 3B1.1A or 3B1.(B) will be made since the amendment to 3B1.1 has no upper limits. The wording not more than 30 other participants is not clear, the situation.

by deleting Note 2.

Section 3B1.4 is deleted in its entirety.

Reason for Amendment: This amendment clarifies the definition of participant to include the defendant and other persons who are criminally responsible. "Participant" also includes, in most cases, law enforcement officers, and those who are not criminally responsible for their conduct in the offense but who play a role in furthering the offense, even if unwitting. The amendment also deletes §3B1.4, which is untitled, and is inconsistent with the remainder of the guideline format. The substance of the Commentary to §3B1.4 is more appropriately placed in the Introductory Commentary to this Part. *untitled*

Illustration of Chapter Three, Part B, as amended by Proposed Amendment 17(A)

PART B - ROLE IN THE OFFENSE

Introductory Commentary

* * *

[When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply.] In the case of a criminal activity involving more than one participant, §3B1.1 or §3B1.2 may apply. When a criminal activity involves only one participant, or only participants of roughly equivalent culpability, neither §3B1.1 or §3B1.2 will apply. Section 3B1.3 may apply to offenses committed by any number of participants.

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as [follows:] follows (Apply the greatest):

(a) If the defendant was an organizer or leader of a criminal activity that involved [five or more participants or was otherwise extensive] at least four other participants, increase by 4 levels.

(b) If the defendant was a manager or supervisor [(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive] of at least four other participants in a criminal activity, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal [other than described in (a) or (b)] that involved at least one other participant, increase by 2 levels.

participants in a criminal organization may receive increases under §3B1.1 (Aggravating Role) while others receive decreases under §3B1.2 (Mitigating Role) and still other participants receive no adjustment.]

(B). Proposed Amendment to §3B1.1 (Aggravating Role): The Commentary to §3B1.1, captioned "Application Notes," is amended in Note 1 by inserting the following additional sentence as the first sentence:

"This adjustment applies only when the offense is committed by more than one participant."

Reason for Amendment: This amendment clarifies that this adjustment is restricted to cases in which the defendant participates in the commission of the offense with at least one other person who is also criminally responsible for the commission of the offense.

18(A). Proposed Amendment: Section 3B1.2 is amended by deleting "In cases falling between (a) and (b), decrease by 3 levels."

The Commentary to §3B1.2 is deleted in its entirety and the following notes are inserted in lieu thereof:

"1. This section applies only in the case of criminal activity involving more than one participant. "Participant" is defined in Note 1 of the Commentary to §3B1.1.

Should be included
[[2. No mitigating role adjustment under this section shall be applied to a defendant who, in connection with the offense, threatened the use of force, possessed a dangerous weapon, or caused another person to threaten the use of force or possess a dangerous weapon.]]

this is suggested since it appears to be more directed to the events of the instant offense.
3. Subsection (a) (Minimal Role) applies to a defendant who is [[plainly among the least culpable of the participants in the criminal activity]] [[plainly among the least culpable when compared to all other participants who typically participate in the particular type of criminal activity]]. [[It is intended that the downward adjustment for a minimal participant be restricted to a narrow group of defendants whose function in the criminal activity and whose culpability for the offense, relative to that of other participants, indicates that such defendants are plainly among the least culpable.]]

To receive a reduction under subsection (a) (Minimal Role), the defendant [[ordinarily]] shall have:

- (a) only performed unskilled or unsophisticated tasks;
- (b) no proprietary interest in the criminal activity, and

*The determinator
of fees
may be, at
times, impossible
to determine.*

- (c) no [[significant]] decision-making authority in the criminal activity;
- ((d) participated in the criminal activity [[on no more than one occasion]] [[for no more than a short period of time]] ; and
- [[e) no more than limited knowledge of the scope and structure of the criminal activity and of the criminal conduct of the more culpable participants.]]
- [[Frequently, such defendants will have little or no knowledge of the scope and structure of the criminal activity or of the activities of the more culpable participants.]]

*reason
much more
definitive
& leaves little
to interpretation
that is
constitutes
a short period
of time.*

4. In a controlled substance trafficking offense (any offense for which the offense level is determined under §2D1.1) --

*significant leaves to
much to interpretation
if one has power
by authority, the
involvement is
unwarranted.*

*I would suggest
effect rather than
control. I also
can force arguments
in classifying a
person as convicted.*

- (a) "no proprietary interest" excludes (1) any defendant who owned any portion of the controlled substance; and (2) any defendant who financed any aspect of the importation, manufacture, cultivation, transportation, or distribution of the controlled substance;
- (b) "no [[significant]] decision-making authority" excludes (1) any defendant who sold, negotiated the sale of, or determined the terms of a sale of the controlled substance, (2) any defendant who exercised [[significant]] decision-making authority with respect to the importation, manufacture, cultivation, transportation, or distribution of the controlled substance, and (3) any defendant who exercised control of the controlled substance for a significant period of time, such that the defendant [[had the ability to control]] [[was essential to]] the success of the criminal activity. In contrast, "no [[significant]] decision-making authority in the criminal activity" includes any defendant who did not exercise control over the controlled substance for any significant period of time, such that the defendant [[had the ability to control]] [[was essential to]] the success of the criminal activity. For example, a defendant who merely offloaded one ship, or permitted use of a residence in furtherance of the criminal activity did not exercise control over the controlled substance for any significant period of time.

5. Subsection (b) (Minor Role) applies to a defendant who is [[significantly less culpable than a defendant who carried out the same criminal activity without assistance]]

*I would
greatly
less culpable*

when compared to all other participants in the offense.