

January 8, 2001

The Honorable Diana E. Murphy
and Commissioners
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Amendment 4, concerning Stipulations
Proposed Amendment 7, concerning Mitigating Role

Dear Judge Murphy and Commissioners:

We write on behalf of Families Against Mandatory Minimums Foundation (FAMM) to comment on two proposed amendments to the Sentencing Guidelines. FAMM is a non-profit, non-partisan organization that conducts research, promotes advocacy, and educates the public about the costs of mandatory minimum sentencing. Cognizant of the need to punish offenders, FAMM works to promote sentencing laws and policies that fit the offense and the offender. The Sentencing Guidelines have the potential to reflect the nuances of culpability and responsibility in a way that mandatory minimums cannot. As a consequence, FAMM is interested in enhancing the Guidelines' ability to promote discretion and proportionality.

Proposed Amendment 4: U.S.S.G. § 1B1.2(a) (Stipulations)

Families Against Mandatory Minimums supports the Commission's proposed amendment to the Commentary accompanying Guideline 1B1.2. The proposed amendment seeks to resolve a circuit conflict by clarifying what constitutes a stipulation for the purposes of determining an offense level based on more serious conduct than that encompassed by the offense of conviction.

While U.S.S.G. § 1B1.2 directs the sentencing court to determine the guideline based on the offense of conviction, it makes an exception for defendants who, in their plea agreements, stipulate to an offense more serious than that for which they were convicted. In that case, § 1B1.2(a) requires the sentencing authority to set the offense guideline based on the more serious stipulated offense.

In light of the potentially severe consequences of stipulating to a more serious offense level, it is important that the parameters defining stipulations be narrowly drawn so as to afford defendants appropriate notice. Some courts have interpreted facts or statements asserted during plea hearings as stipulations permitting the court to address a higher offense level. *United States v. Loos*, 165 F.3d 504, 508 (7th Cir. 1998). The Seventh Circuit in that case found it necessary to

look behind the language of the guideline to determine that U.S.S.G. § 1B1.2(a) “is a grant of authority to the court -- rather than an option for the defendants to use in plea bargaining . . . [I]t is best to read ‘stipulation’ as any step that reflects the defendants’ acknowledgment of their conduct.” *Loos*, 165 F.3d at 507. This approach can result in the transformation of uncounseled statements not contained in the plea agreement but made by defendants in plea colloquies into “stipulations” contained within plea agreements that in turn subject the declarant to increased and unbargained-for consequences.

Other courts have held that such statements cannot be considered part of the agreed-upon plea and thus do not constitute the stipulations contemplated in § 1B1.2(a). *United States v. Nathan*, 188 F.3d 190, 201 (3d Cir. 1999). We agree with the Commission that this is the better view.

The Commission’s proposed resolution of this conflict adopts the Third Circuit’s approach and is consistent with the Guidelines’ language on stipulations and plea agreements. Section 1B1.2 refers to stipulations as statements contained within the four corners of the agreed-upon plea. For example, the exception to the offense level statement in the Guideline applies “in the case of a **plea agreement (written or made orally on the record) containing a stipulation** that specifically establishes a more serious offense . . .” U.S.S.G. § 1B1.2(a) (emphasis added). The commentary advises the sentencing court to assure itself that the plea agreement itself is acceptable in light of the policies set forth in Chapter 6, Part B dealing with plea agreements. U.S.S.G. § 1B1.2, cmt. n. 1. Chapter 6, in turn favors written stipulations of facts “because of the importance of stipulations and the potential complexity of the factors that can affect the determination of sentences . . .” U.S.S.G. § 6B1.4, cmt. An interest in accuracy drives this preference for written stipulations.

That same interest in accuracy appropriately militates against assuming that statements outside the agreed-upon stipulations establish a higher offense level. Plea agreements are a waiver of the constitutional protections afforded defendants and a waiver of the presumption of innocence that protects a defendant until a jury finds beyond a reasonable doubt otherwise. The protections contained in Chapter 6 and in rules that require judges to satisfy themselves about the voluntariness and accuracy of plea agreements reflect the gravity and dangers inherent when a defendant waives such rights.

Statements made at the plea colloquy, the dialogue between sentencing judge and defendant where the judge determines the factual basis for the plea and decides whether or not to accept it, are necessarily made after the plea agreement and attendant stipulations have been arrived at. Statements made during this hearing are thus not contained in the plea agreement (as contemplated by U.S.S.G. § 1B1.2(a)). Nor are they necessarily admissions or other statements of fact agreed to by the defendant and the prosecution as discussed in U.S.S.G. § 6B.

They thus are not part of the plea agreement stipulations contemplated by this guideline and the amendment to the guideline properly clarifies that.

Proposed Amendment 7: U.S.S.G. § 3B1.2 (Mitigating Role)

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

Any defendant is currently entitled to a mitigating role adjustment of anywhere from 2 to 4 levels according to the terms of § 3B1.2 which may be applied when more than one participant is involved in the offense. The proposal would amend the Application Notes to clarify that a "'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. §3B1.1 Application Note 1. It would require that other participants exist and that to qualify for the adjustment, the defendant's role must have demonstrated that he or she was "substantially less culpable than the average participant." Proposed Application Note 3 (C) clarifies that drug couriers "whose role in that offense was limited to transporting or storing drugs and who, based on the defendant's criminal conduct, is accountable under [the Relevant Conduct guidelines] only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving an adjustment under this guideline."

The proposed amendment rejects the position taken in a line of Seventh Circuit cases in which the courts refused to apply § 3B1.2 to single defendant couriers convicted only of amounts personally handled. The Seventh Circuit reasoned that "when a courier is held accountable for only the amounts he carries, he plays a significant rather than a minor role in that offense." *United States v. Burnett*, 66 F.3d 137, 140 (7th Cir. 1995). The court applied that reasoning in *United States v. Isienyi*, finding support in current Application Note 4:

We believe . . . that this Circuit's approach remains a sound one. It is consistent with the Guideline's commentary, which explains that "if a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense."

United States v. Isienyi, 207 F.3d 390, 393 (7th Cir. 2000), quoting U.S.S.G. § 3B1.2, cmt. n. 4.

While FAMM supports the rejection of that position, we note that the contemplated

expansion of current Application Note 4 through proposed Application Note 3(A) may operate to undermine the very relief available to some drug couriers provided in Application Note 3 (C) (providing relief to single defendant drug couriers). At best the proposed Application Note 3(A) and its predecessor, are confusing, as evidenced by the *Isienyi* court's reliance on Application Note 4 to justify precluding such drug couriers from the mitigating role adjustment. The proposed note (and in fact the current note) contemplate a situation where a defendant receives an offense level lower than that warranted by the defendant's actual criminal conduct. Such a defendant, according to the note, should be precluded from receiving a mitigating role adjustment. "Actual criminal conduct," however, should be nothing more or less than relevant conduct, which the court must already take into consideration when establishing offense levels. Judges are currently required to only accept plea agreements that "adequately reflect the seriousness of the actual offense behavior." U.S.S.G. § 6B1.2 (a). Adding to the confusion, proposed Application Note 3(A) describes a situation that does not appear to be available to judges under the Guidelines, that is, of a "defendant who is held accountable for a quantity of drugs less than what the defendant otherwise would have been accountable under § 1B1.3 (Relevant Conduct). . . ." Judges are directed under the guideline treating plea agreements to accept pleas only to the extent that the agreement will not "preclude the conduct underlying such charge from being considered under the provisions of § 1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted." U.S.S.G. § 6B1.2(a). Judges must assess the guideline range that corresponds to the actual conduct, notwithstanding the plea agreement. The commentary explains that "subsection (a) provides that a plea agreement that includes the dismissal of a charge, or a plea agreement not to pursue a potential charge, shall not prevent the conduct underlying that charge from being considered under the provisions of § 1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted." U.S.S.G. § 6B1.2, cmt.

FAMM believes the better course is to avoid *per se* rules against applying adjustments and instead rely on the direction that judges should make fact-based inquiries to determine whether or not a defendant should receive an adjustment for being "substantially less culpable than the average participant." Proposed Application Note 3 (B) reminds the sentencing authority that "the determination whether to apply [a given adjustment] involves a determination that is heavily dependent upon the facts of the particular case." Presumably, if actual conduct precludes an adjustment, an adjustment will not be made.

Therefore, to secure and protect judicial discretion, so important in the consideration of relative role adjustments, FAMM submits that paragraph 2 of proposed Application Note 3 (A) should be removed in its entirety.

We also recommend the deletion of the gratuitous assertion in proposed Application Note 3 (B) that "the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that . . . a role adjustment is warranted." Federal judges

rarely grant downward adjustments based only on a defendant's bare assertion, particularly when they are "weighing the totality of the circumstances." Reading this comment carefully reveals the deeper and unwarranted message that downward adjustments should be somehow less available than upward adjustments. In other words, the guidelines could as readily advise the court that judges ought not to award the government upward adjustments based on the government's bare assertion. Such language does not appear in the guidelines and it ought not to be added here. It sends the wrong message, is confusing, and may act to limit the application of this important and necessary relief.

Issue for Comment 1.

Families Against Mandatory Minimums does not support either alternative proposed in Issue for Comment 1. The first proposed alternative would preclude single defendants whose role is limited to transporting or storing drugs from any mitigating role adjustment. The second would permit a "minor role" adjustment (resulting in a two level change) but not a "minimal role" adjustment (leading to a four level change). As discussed above, such rigid approaches would undermine the purpose of the Guidelines by removing discretion as opposed to guiding it. Furthermore, it would conflict with other Guideline directives, as the United States Court of Appeals for the Third Circuit pointed out:

[W]e note that because the determination of whether a defendant is entitled to a minor role adjustment is highly dependent on the facts of particular cases, *see* U.S. Sentencing Guidelines Manual § 3B1.2, Background Commentary, a mechanical application of the guidelines by which a court always denies minor role adjustments to couriers because they are "essential," regardless of the particular facts or circumstances, would be inconsistent with this guidance.

United States v. Isaza-Zapata, 148 F.3d 236, 238 (3rd Cir. 1998).

Those who are least culpable would, under this regime, completely miss the benefit of the bargain afforded their more culpable compatriots, who, by virtue of their level of knowledge of the acts of other participants, can bargain for departures from the guidelines in exchange for providing "substantial assistance" to authorities. *See* U.S.S.G. § 5K1.1. It is precisely the factors that mark a substantially less culpable defendant -- their lack of knowledge of the scope of and personalities involved in the operation -- that preclude them from consideration for such substantial assistance departures. To write them out of any adjustment creates a system where rewards are available to the most culpable of criminals, but unavailable to the least.

Attempts to split the difference, by denying a greater level adjustment do not find support in guideline policy or current guideline commentary. Current Application Note 1, to be amended as indicated in proposed Application Note 4, defines "minimal participant[s]" as those "plainly

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among the least culpable of those involved in the conduct of a group.” It sets out several considerations for the sentencing court, including the defendant’s lack of knowledge of the enterprise and activities of the other participants. U.S.S.G. § 3B1.2, cmt. 1. “Minor participant[s]” are evaluated relative to the factors defining minimal participants. U.S.S.G. § 3B1.2, cmt. n. 3.

By limiting the adjustment to minor participants, the Guidelines will not permit the sentencing judge to give due effect to his or her fact-based determination that a single defendant courier was plainly among the least culpable of those involved in the conduct. Such drug couriers, while not always among the least culpable defendants, are routinely less culpable than the average participant. No sound reason supports restricting judicial discretion to recognize relative culpability in this fashion.

Issue for Comment 2.

FAMM Foundation would support the application of proposed Application Note 3 (C) to defendants other than drug couriers or other defendants in drug trafficking cases. The principle that underlies the application note (that one’s role is to be judged vis-a-vis the role of the average participant and adjustments taken accordingly) is not dependent on the nature of the offender. There is no cogent reason for not extending the rule to similarly situated defendants (those whose convictions are based solely on their personal involvement) in non-drug based cases, where other participants exist. Such an extension of the proposed Application Note would promote reasonable uniformity in sentencing, consistent with the overall purpose of the guidelines.

Thank you for your consideration of our concerns.

Sincerely,

Mary Price
General Counsel