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United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002
Attention: Public Information

TO WHOM IT MAY CONCERN:

In response to the United States Sentencing Commission's request, I submit these comments on the proposed amendments to the Application Notes to United States Sentencing Guidelines § 3B1.2 (Mitigating Role).

If approved, the proposed revision would accomplish the following:

- It would delete Application Note 2, which has led some courts to unduly emphasize drug quantities when considering whether a drug courier is eligible for a mitigating role adjustment.
- It would make clear that the definition of "participant" given in the Application Notes to § 3B1.1 (Aggravating Role) also applies to § 3B1.2 and that more than one participant must be involved in the offense for any role adjustment to be possible.
- It would make clear that the determination of whether a mitigating role adjustment should be made is dependent on the facts of each particular case.
- It would resolve a circuit conflict by making clear that a defendant who only transported or stored drugs and who is accountable under § 1B1.3 (Relevant Conduct) for only the amount of drugs that he or she personally transported or stored is eligible for a mitigating role adjustment.

The Commission has requested comment on two issues in particular. The first is whether one who only transports or stores drugs should be precluded from receiving any mitigating role adjustment or, alternatively, a "minimal role" adjustment. The second is whether the proposed Application Note regarding those who only transport or store drugs should clearly state that its rationale is applicable to offenses other than drug crimes.

The proposed amendments correctly recognize that a mitigating role adjustment should be available to a defendant even though he or she is only charged with importing or distributing the amount of drugs personally handled by that individual. The contrary approach adopted by some courts erroneously equates a defendant's criminal culpability with the amount of drugs he or she handled. District courts must determine each individual defendant's culpability based on all the circumstances surrounding that defendant's involvement in crime and not by applying bright-line axioms across a class of superficially similar cases. Furthermore, the Committee should add an additional Application Note making clear that this holds true for all criminal defendants. I suggest that the most effective, consistent, and principled way to accomplish this would be to pattern this new note after the one that sets forth the factors that courts should consider in deciding whether a defendant is entitled to an aggravating role adjustment. This would foster harmonious application of these two related guidelines sections and promote just sentences for all those involved in any given criminal endeavor.

Drug trafficking is typically undertaken jointly and drugs typically pass through many levels of distribution *en route* from the initial supplier to the ultimate consumer.¹ Yet, all those involved in the illicit trade — kingpins, suppliers, buyers, brokers, look-outs, loaders, unloaders, couriers — can be charged under the same statutes, *i.e.* 21 U.S.C. §§ 841, 952, and sentenced on the basis of only the type and amount of drugs that were involved.² District courts should retain the discretion to reflect in each individual's sentence the obvious disparity in criminal culpability among the gamut of drug traffickers — from kingpin to courier — by adjusting each defendant's offense level based on his or her respective role. However, the Commission should clarify that a drug defendant's culpability may bear little relation to the weight of the drugs that person handled.

The rationale for categorically denying mitigating role adjustments to defendants charged only with possessing or importing the amount of drugs they personally handled is based on a fundamental misconception of the purpose of role adjustments. Some of the courts espousing this view improperly overemphasize the fact that the defendant was only charged with importing or distributing the very amount of drugs that the person actually handled.³ For example, the Seventh Circuit has held that the mitigating role adjustment is available only to defendants who are held responsible for drugs handled by other conspirators and thus "held accountable for the acts of others".⁴ The *en banc* Eleventh Circuit concluded that, because

¹See, *e.g.*, *United States v. Witek*, 61 F.3d 819, 821 (11th Cir. 1995).

²See USSG § 2D1.1.

³See, *e.g.*, *United States v. Isienyi*, 207 F.3d 390, 392 (7th Cir. 2000) (collecting cases); *United States v. Rodriguez de Varon*, 175 F.3d 930, 943 (11th Cir. 1999) (*en banc*).

Application Note 2 suggests that a courier handling a small amount of drugs would ordinarily be entitled to a minimal role adjustment, the amount of drugs is a "material consideration" in determining whether any mitigating role adjustment is indicated.⁵ These courts may be led to equate moral or criminal culpability with the amount of drugs personally handled by an individual because a defendant's base offense level is driven by the amount of drugs involved in the crime. Equating the amount of drugs handled with criminal culpability, however, ignores the fact that while a courier may personally handle many kilograms of drugs and a kingpin may never touch a single gram, the mastermind is more culpable than the pawn. Making drug quantity the exclusive or primary factor behind the base offense level and the mitigating role adjustment also tends to render § 3B1.2 somewhat superfluous.

Other courts have adopted a poorly reasoned "but-for" analysis and concluded that, because couriers are necessary to the importation and distribution of drugs, defendants who are couriers necessarily do not play a minor or minimal role.⁶ The "but-for" approach ignores the fact that many couriers are easily replaced and bring no expertise, skill, talent, or unique contribution to the importation or distribution venture other than to act as a conveyance. It is for these very reasons, presumably, that the mitigating role adjustment exists.

The proposed amendments to the mitigating role guidelines recognize that, while a courier may personally handle many kilograms of drugs and a kingpin may never touch a single gram, the mastermind is more culpable than the pawn. The amendments correctly make explicit the fact that a mitigating role adjustment should be available to a drug defendant who is convicted only of importing or distributing the amount of drugs he or she personally handled. Also, they make clear that "participants" means the same thing under both the aggravating and mitigating role guidelines.

The Commission should additionally make clear that the rationale in proposed Application Note 2(C) applies to non-drug defendants as well. A simple and effective way to accomplish this would be to create an Application Note for the mitigating role guideline that parallels Application Note 4 in the aggravating role guideline. The aggravating role guideline enhances the sentence of a defendant who played a managerial or organizational role in a criminal endeavor.⁷ Application Note 4 to that guideline makes clear that labels such as "kingpin" and "boss" do not

⁴*Id.* at 393.

⁵*See Rodríguez de Varón*, 175 F.3d at 943.

⁶*See, e.g., United States v. Carter*, 971 F.2d 597, 600 (10th Cir. 1992).

⁷*See* USSG § 3B1.1.

control.⁸ Rather, it directs courts to consider the defendant's authority to make decisions, the defendant's ability to recruit others, the defendant's relative share of the profits, and the defendant's degree of control over others.⁹ In short, the aggravating role guideline reflects the reality that, where a crime is carried out by a group of people, a defendant who organizes the group, plans the crime, and takes a relatively large share of the profits is more culpable than others. A corresponding Application Note for § 3B1.2 would reflect society's understanding that an easily replaceable gopher or courier is not as blameworthy or dangerous as other participants. Such a note might read as follows:

In distinguishing a minor role or a minimal role from the role of an average participant, labels such as "courier" or "mule" are not controlling. Factors the court should consider include whether the defendant had any input into planning the criminal activity, whether the defendant had any input into the organization's decisions, whether the defendant had any discretion in his or her own activities or was directed by others, whether and to what extent the defendant had an equity interest in the proceeds, the nature and degree of contacts the defendant had with other participants, and the scope of the defendant's knowledge of other planned or actual crime among other participants. There may, of course, be many or no minor or minimal participants in any given criminal endeavor.

By thus further harmonizing the mitigating role guideline with the aggravating role guideline, the Commission would provide the courts with a coherent and rational basis for rejecting the overemphasis on drug quantities and the "but-for" reasoning in some drug courier cases. The courts that have employed these erroneous mitigating role analyses have failed to realize that their approach is inconsistent with the approach for determining whether an aggravating role adjustment is indicated. There is no justification for this conflict between guidelines that are nothing more than two sides of the same coin.

Judge Easterbrook's opinion in *United States v. Burnett*¹⁰ illustrates how this inconsistency subverts the purpose of the Sentencing Guidelines by imposing too harsh a punishment on some while mitigating the law's deterrent effect on the more serious criminals. Judge Easterbrook recognized that the *Burnett* defendant, who was a drug courier, was "a small cog in the scheme."¹¹ He also noted that "giving chauffeurs the same punishment as bigwigs simultaneously overpunishes the small

⁸See *id.* commentary (n.4).

⁹See *id.*

¹⁰66 F.3d 137 (7th Cir. 1995).

¹¹*Id.* at 140.

fry and reduces the marginal penalty for being a big wig”¹² Judge Easterbrook, however, went on to state that § 3B1.2 “does not ask whether the defendant was minor in relation to the organization, or how easily he could have been replaced; it asks the judge to determine whether he was minor in relation to the crime of which he was convicted and in relation to the conduct for which he has been held accountable.”¹³

Just as the applicability of the aggravating role adjustment is determined by the role the defendant played in the organization that committed the crime, the applicability of the mitigating role adjustment should depend precisely on “whether the defendant was minor in relation to the organization, or how easily he could have been replaced.” This would prevent the harms identified by Judge Easterbrook. Not only does society gain nothing from inflicting an overly harsh punishment on a “chauffeur”, but our desire for justice in sentencing is further damaged by the fact that the “bigwig” receives an only somewhat longer sentence for his much more blameworthy misbehavior.

The Commission’s proposed amendments do much to correct some courts’ misapplication of § 3B1.2. The additional Application Note I propose would set forth a reasoned basis for the amendments already proposed and would therefore contribute to greater uniformity in application of § 3B1.2. This is particularly true in light of the fact that courts have already applied similar criteria in the context of the aggravating role guideline.¹⁴ In the context of drug couriers, the district courts

¹²*Id.*

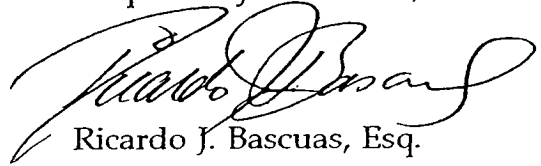
¹³*Id.* (citation omitted).

Burnett is often cited to support an across-the-board bar on mitigating role adjustments for drug couriers. In fact, the Seventh Circuit held in *Burnett* that the district court’s denial of a minor role adjustment was “a reasoned and reasonable judgment, which we therefore will not disturb.” *Id.* at 141. But the court pointed out, “Had the judge decided the other way, we would not have disturbed that decision either. This is what it means to say that a judge has discretion.” *Id.* (citation omitted). Although the opinion states in *dicta* that “[w]hen a courier is held accountable for only the amount he carries, he plays a significant rather than a minor role in that offense,” *Burnett*’s holding emphasizes the district courts’ discretion to consider a role adjustment on the facts of each individual case. *Id.* at 140–41.

¹⁴See e.g., *United States v. Cataldo*, 171 F.3d 1316, 1319–20 (11th Cir. 1999); *United States v. Matthews*, 168 F.3d 1234, 1249 (11th Cir. 1999); *United States v. Brazel*, 102 F.3d 1120, 1132–33, 1162–63 (11th Cir. 1997), *United States v. Delgado*, 56 F.3d 1357, 1371 (11th Cir. 1995); *United States v. Cacho*, 951 F.2d 308, 310 (11th Cir. 1992); *United States v. Jones*, 933 F.2d 1541, 1547 (11th Cir. 1991).

would have a principled basis for distinguishing between a courier who, suffering from economic or other hardship, is paid a relatively small amount by people unknown to him to deliver drugs from one place to another and a savvy drug runner who is taking a share of profits to deliver narcotics so that he can live in high style. More generally, it would provide a consistent rationale for tailoring fair sentences according to the culpability of each participant in any criminal endeavor or conspiracy whether it involves drugs or not. My proposed note would allow courts to reflect in their sentences the much greater harm to society posed by those that orchestrate and conduct criminal activity without ever getting their own hands dirty.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Ricardo J. Bascuas".

Ricardo J. Bascuas, Esq.