

Objection #7—Paragraph 31, Mitigating Role Reduction

Mr. Defendant objects to Paragraph 31 because it does not apply a mitigating role reduction pursuant to U.S.S.G. §3B1.2. He is entitled to a 7-level reduction to his offense level based on the mitigating role he played in this offense.¹

Legal Framework

As this Court knows, the mitigating role guideline was amended, effective November 1, 2015, after a “study found that mitigating role is applied inconsistently *and more sparingly than the Commission intended.*” U.S.S.G., supp. to app. C, amend. 794, at p. 117 (2015). The amendment made several changes to the guideline that are favorable to offenders, thereby making much of the previous case law unhelpful to the Court’s determination of whether Mr. Defendant is deserving of a minimal participant reduction.

Amendment 794 made four principal changes that are relevant to the Court’s analysis in this case. *First*, the amendment clarified that when a court considers whether an offender played a mitigating role—*i.e.* whether the offender was substantially less culpable than the average participant in his criminal activity—the court is to compare the defendant with “only those persons who actually participated in the criminal activity at issue[.]”² In reaching this conclusion, the Commission rejected an earlier approach whereby the court would compare the defendant to a “typical offender,” *i.e.* someone in “the universe of persons participating in similar crimes.”³ Therefore, the Court should identify the actual participants in Mr. Defendant’s criminal activity

¹ Counsel believes Mr. Defendant is entitled to a 3-level mitigating role reduction pursuant to U.S.S.G. § 3B1.2 and an additional 4-level reduction from his base offense level of 38 pursuant to U.S.S.G. § 2D1.1(a)(5). Counsel has attached a chart setting forth the various reductions corresponding to the level of mitigating-role reductions for the Court’s convenience. *See* Exhibit E.

² U.S.S.G., supp. to app. C, amend. 794, at p. 117 (2015).

³ *Id.* (internal quotation marks and citation omitted).

and compare his conduct with the conduct of others involved.

Second, the Commission explained that the defendant's performance of any essential or indispensable role in the activity is *not* determinative of whether he should receive a mitigating role adjustment.⁴ *Third*, the amendment provided the following non-exhaustive list of factors for courts to consider as a framework for deciding whether the adjustment applies: (i) the degree to which the defendant understood the scope and structure of the criminal activity; (ii) the degree to which the defendant participated in planning or organizing the criminal activity; (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority; (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the defendant's acts, amount of responsibility, and level of discretion; and (v) the degree to which the defendant stood to benefit from the criminal activity.⁵

Fourth, the amendment provided "as an example, that a defendant[, like Mr. Defendant,] who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment."⁶

Analysis

Mr. Defendant's criminal activity as set forth in the PSR

The PSR describes Mr. Defendant's criminal conduct as follows. On August 15, 2018, Mr. Defendant sold roughly half a kilogram of heroin to a confidential informant for \$9,500.⁷ Seven days later, on August 22, 2018, law enforcement conducted a traffic stop on a vehicle Mr.

⁴ *Id.* at 118.

⁵ U.S.S.G. § 3B1.2, comment. (n. 3C).

⁶ *See* U.S.S.G., supp. to app. C, amend. 794, at p. 118 (2015).

⁷ PSR ¶ 10.

Defendant was driving and found one kilogram of heroin inside the car.⁸ Mr. Defendant admitted the heroin in the car was his and that he was delivering it to an unknown customer in Grand Prairie.⁹ A subsequent consent search of the room in which Mr. Defendant was staying at the time of the arrest revealed approximately 30 kilograms of methamphetamine, one kilogram of heroin, a .45-caliber pistol, \$43,013 and documents, notebooks and ledgers.¹⁰

Additional Information Provided by Mr. Defendant

Mr. Defendant declined to participate in a proffer meeting with the government at the beginning of this case. His concern for his family's safety—all of whom still reside in Mexico¹¹—outweighed any desire to mitigate his sentence. After spending one year in custody, however, and learning that his family in Mexico have never received any threats related to this case, he decided that the potential benefits of talking outweighed the potential risks.

In September of this year, Counsel reached out to the government regarding Mr. Defendant's change of heart. Agents were not interested in scheduling a meeting, as the case was more than a year old. Accordingly, the information in this section will be supported by an affidavit, attached as Exhibit G to this motion.¹²

Coming to Texas

Mr. Defendant came to Texas in 2017. His cousin, Laura Bustos, was living in Dallas at the time. She told Mr. Defendant that her husband, Aldo—a stone layer—had a lot of work here,

⁸ PSR ¶ 13.

⁹ PSR ¶ 14.

¹⁰ PSR ¶ 16.

¹¹ PSR ¶ 46, 48, & 54. Mr. Defendant's wife, son, parents, and four of his five siblings reside in Michoacán, Mexico. His remaining sister lives in Tijuana, Mexico.

¹² This affidavit is in Spanish, followed by an English translation.

and Mr. Defendant would not have trouble finding work doing the same. Mr. Defendant traveled to Dallas shortly after learning this. His cousin did not have room for him in her apartment, so he moved into an apartment by the Dallas Zoo with an acquaintance from Michoacán Mexico known as “Pelon.”

Upon arriving in Dallas, however, Mr. Defendant learned that Aldo quit his job because his employer was not paying him for all of his work. He found temporary work as a cook at the Dallas Convention Center through a Google search, but it only lasted for a few weeks. After this, he worked with Pelon, painting and remodeling homes. This lasted about five to six months. Around this time, Pelon moved back to Mexico. Mr. Defendant stayed in Pelon’s apartment, and two other men moved in. Mr. Defendant found another job, remodeling homes on a contract basis, but it only lasted four to five months. Eventually, there was not enough work for him to support himself.

The Turning Point

Mr. Defendant remained in touch with Pelon after he moved to Mexico. They had become friends during the time they lived and worked together in Dallas, and Mr. Defendant was responsible for maintaining Pelon’s apartment. After explaining his job difficulty to Pelon—stating that he could not find enough work to pay rent, bills, and send money back to his family in Mexico—Pelon proposed a solution. He introduced Mr. Defendant to a man from Apatzingan, Michoacán named Jorge, who had work installing sheetrock in McKinney. But Jorge wanted to meet Mr. Defendant in person before he began working.

Mr. Defendant first met Jorge at the El Pulpo restaurant in Oak Cliff. Jorge began the meeting by asking about Mr. Defendant’s relationship with Pelon. Mr. Defendant explained that while they were not related by blood, he and Pelon referred to each other as “cousin.” Shortly

thereafter, Jorge said he needed a “chauffer,” or someone who could make deliveries for him. They continued talking, eating and drinking, and Jorge ended the meeting by offering for Mr. Defendant to stay with him for free. Mr. Defendant declined, as he had already paid the month’s rent for Pelon’s apartment.

Mr. Defendant began working at the sheetrock job in McKinney with Jorge, but Jorge quit shortly thereafter. He called Mr. Defendant one day, asking what he was doing. Mr. Defendant stated that he was working, and he informed Jorge that he would be finished around 6PM. Jorge called Mr. Defendant later, asking him to come eat. He picked up Mr. Defendant from his apartment, and after Mr. Defendant entered Jorge’s car, Jorge told him he had to make a delivery on the way to dinner. Mr. Defendant stayed in the car while Jorge exited the car to make his delivery. Then, they went to dinner.

Roughly two weeks later, Jorge asked Mr. Defendant to start working for him by picking up money from one individual and delivering it to someone else or wiring it to Mexico. He paid Mr. Defendant \$50 per \$1,000 transferred.¹³ Jorge provided all of the instructions on where to go, from whom to collect money, and what to do with the money.

After this, Jorge asked Mr. Defendant to deliver drugs for him. Jorge paid Mr. Defendant \$200 for each kilo of drugs he sold. Jorge had moved back to Mexico by this time, so he instructed Mr. Defendant by using Whatsapp. He made it clear to Mr. Defendant that “si no pagas tu, paga tu familia.” (*If you don’t pay, your family pays*). In addition, Jorge told Mr. Defendant that if he screws up, the higher ups in Mexico will punish Jorge. If this happens, Jorge would punish Mr. Defendant.

¹³ Counsel is omitting certain details regarding the time frame of this work and the amount of transactions in which Mr. Defendant engaged. This information could potentially harm Mr. Defendant, as he is offering up this information without the protection of a Proffer Agreement.

Mr. Defendant received most of his drugs from Jorge along with all of his instructions. On one occasion, an unknown Latin male working for Jorge gave Mr. Defendant drugs and money in a Walmart parking lot. Jorge also gave Mr. Defendant a drug ledger and would send photographs via Whatsapp with instructions on what to write in the ledger. At one point, shortly before Mr. Defendant's arrest, Jorge informed Mr. Defendant that someone had been arrested in Dallas and as a result, Mr. Defendant had to dispose of his cell phone. Mr. Defendant complied. Jorge arranged for another individual in Dallas to give Mr. Defendant money to buy a new cell phone. Mr. Defendant had this new phone at the time of his arrest. Officers seized it at the time of the August 22nd traffic stop. According to Mr. Defendant, this phone contained evidence showing that Jorge was instructing him through Whatsapp. When asked whether the government searched this phone, Counsel was informed that there is no phone in evidence.

Controlled Buy on August 15, 2018

Jorge arranged the controlled buy on August 15, 2018. He informed Mr. Defendant that a man was going to call him "por parte del primo," or *on behalf of Primo*. This man reached out to Mr. Defendant through Whatsapp, asking to meet in Fort Worth to sample his heroin. He told Mr. Defendant that Jorge, also known to him as "Viejo," gave him his number. Mr. Defendant met with this man—believed to be the confidential informant—roughly ten days prior to the August 15th controlled buy in Fort Worth to show him his heroin. Being satisfied with the quality of drugs, the man initiated a purchase of half a kilo of heroin, which resulted in the August 15th controlled buy. Jorge informed Mr. Defendant that he would receive \$9,500 from this customer in exchange for the half kilogram of heroin.

Delivery on August 22, 2018

This same customer—again, believed to be the confidential informant—initiated a second

purchase of one kilogram of heroin to be delivered on August 22, 2018. Jorge was overseeing this transaction as well, and Mr. Defendant understood Jorge was in communication with the confidential informant.

Identifying the Participants in the Criminal Activity

Accordingly, the *identifiable* participants in Mr. Defendant's criminal activity are: (1) Mr. Defendant, a field courier; (2) Jorge, Mr. Defendant's boss and source of supply; (3) the unknown "higher ups" in Mexico for whom Jorge was working; (4) the unknown Latin male working for Jorge who was another source of supply for Mr. Defendant; (5) unknown individuals who would give money to Mr. Defendant presumably for drugs they had already purchased; (6) unknown individuals who received money in Dallas from Mr. Defendant per Jorge's instructions; (7) unknown individuals receiving money in Mexico from Mr. Defendant per Jorge's instructions; and (8) an unknown individual who gave Mr. Defendant money from Jorge to buy a cell phone.

Having identified the participants in Mr. Defendant's criminal activity, the Court is next tasked with determining whether Mr. Defendant is substantially less culpable than the average participant in his criminal activity. In making this determination, the Court should analyze the following factors provided by the Sentencing Commission as a framework for its analysis.

(i) The Degree to Which Mr. Defendant Understood the Scope and Structure of the Criminal Activity

The evidence detailed in the PSR, the discovery in this case, and the information provided by Mr. Defendant suggest that Mr. Defendant did not understand the scope and structure of the criminal activity. While he understood that he was supposed to retrieve money from certain individuals and deliver money and drugs to various customers, there is no evidence to suggest any additional institutional knowledge regarding the drug trafficking organization ("DTO"). Mr. Defendant was not aware of the identity of the man who gave him money and drugs in the Walmart

parking lot. He did not know the identity of the man giving him money from Jorge to buy a cellphone. He did not know the identities of the individuals with whom Jorge was working in Mexico. Additionally, there is no evidence to suggest that Mr. Defendant was aware of the identities of the people from whom the money came or those to whom the proceeds would ultimately be delivered. In short, Mr. Defendant's knowledge was limited to his particularized role of field courier.

(ii) The Degree to Which Mr. Defendant Participated in Planning or Organizing the Criminal Activity

The evidence further indicates that Mr. Defendant did not plan out his criminal activity, but instead acted at the behest of Jorge. Jorge told him where to go, what to pick up, what to deliver, how much he would receive for the drugs he delivered, what to write in his drug ledger, when to throw away his phone, and how much money he could keep. Jorge found customers and put them in contact with Mr. Defendant. Mr. Defendant did not find his own customers. He did not decide which drugs to sell or how much to charge. Indeed, he did not meaningfully participate in the planning or organization of this scheme.

(iii) The Degree to Which Mr. Defendant Exercised Decision-Making Authority or Influenced the Exercise of Decision-Making Authority

There is no evidence demonstrating that Mr. Defendant exercised decision-making authority or influenced any decisions in the scheme described in the preceding sections. Mr. Defendant was at the bottom of the hierarchy in the DTO. Importantly, a Department of Justice "Personal History Report" characterizes Mr. Defendant as a mere "Courier."¹⁴

(iv) The Nature and Extent of Mr. Defendant's Participation in the Commission of the Criminal Activity, Including the Responsibility and Discretion He Had in Performing His Acts

¹⁴ See GOV_00000013, *Personal History Report*, attached as Exhibit F.

Mr. Defendant's participation in this DTO was minimal. He did not coordinate the importation of drugs into the United States. He did not hire staff for the DTO nor coordinate the staff's activities. He did not know the identities of the individuals involved in this DTO nor its inner workings. Mr. Defendant, instead, was hired for the specific task of working as Jorge's "delivery guy," *i.e.*, delivering drugs and money, per Jorge's instructions. For this specific task, Mr. Defendant was paid \$50 for each \$1,000 he delivered and \$200 per kilo he sold. Mr. Defendant, therefore, had extremely limited participation in the commission of the overall relevant conduct and little to no discretion in the performance of his acts.

(v) The Degree to Which Mr. Defendant Stood to Benefit from the Criminal Activity

Mr. Defendant did not have a proprietary interest in this criminal activity. Rather, he was "simply being paid to perform certain tasks."¹⁵ His earnings represented a tiny fraction of the market value of the drugs he was assisting in selling. Specifically, he was allowed to keep \$200 per kilo of drug he sold. He sold one kilogram of heroin for approximately \$19,000.¹⁶ Thus, the benefits Mr. Defendant received were minimal.

Other Similarly Situated Defendants Have Received Mitigating Role Reductions in This District

This Court granted a 3-level mitigating role reduction for a similarly situated defendant in *United States v. Delgado*, Cause No. 3:18-CR-507-S. In *Delgado*, the defendant was accountable for approximately thirty kilograms of methamphetamine and collected money pursuant to orders he received from the top. Like Mr. Defendant, Mr. Delgado was a mere courier. In addition, upon

¹⁵ U.S.S.G. § 3B1.3, comment. (n. 3(C)) ("...a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.").

¹⁶ PSR ¶ 18.

information and belief, this Court applied a mitigating role reduction to the defendant in *United States v. Bustos-Torres*, Cause No. 3:18-CR-151-S, because, again, like Mr. Defendant, the defendant was a mere courier. Similarly, Judge Fitzwater did the same for the defendant in *United States v. Bucio-Martinez*, Cause No. 3:15-CR-52-D. In order to avoid unwarranted sentencing disparities, the Court should apply a 3-level mitigating role reduction to Mr. Defendant's offense level, or in the alternative, a 2-level minor role reduction.

Conclusion

As the example listed in the commentary to §3B1.2 outlines, Mr. Defendant is “a defendant who d[id] not have a proprietary interest in the criminal activity and who [wa]s simply being paid to perform certain tasks.” Consequently, he is someone for whom the “mitigating role” reduction was specifically designed. Should the Court sustain this objection, Mr. Defendant would be entitled to a 4-level reduction in his base offense level pursuant to § 2D1.1(a)(5), and an additional 3-level reduction in his total offense level pursuant to § 3B1.2.