

04-0276-cr

To be Argued By:
ALINA P. REYNOLDS

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 04-0276-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

FRANK ESTRADA, EDWARD ESTRADA, ISAIAS SOLER,
GLORIA VARGAS, DANIEL HERREDIA, FELIPE SANTANA,
(For continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND GOVERNMENT APPENDIX
FOR THE UNITED STATES OF AMERICA

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BENITO ROSARIO, NELSON CARRASQUILLO, CHARLES
DEJESUS AND EDDIE LAWHORN,

Defendants,

MICHAEL HILLIARD,

Defendant-Appellant.

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Jurisdiction	vi
Statement of Issues	vii
Preliminary Statement	1
Statement of the Case	2
Statement of Facts	3
Summary of Argument	14
Argument	14
I. The District Court Did Not Clearly Err in Calculating Hilliard's Drug Quantity	14
A. Relevant Facts	14
B. Governing Law and Standard of Review	16
C. Discussion	17

II. The District Court Did Not Clearly Err or Abuse Its Discretion When It Increased Hilliard’s Sentencing Offense Level under U.S.S.G. § 3B1.1(a) for His Leadership Role . . .	23
A. Relevant Facts	23
B. Governing Law and Standard of Review	24
C. Discussion	28
Conclusion	31

TABLE OF AUTHORITIES

CASES

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Buford v. United States</i> , 532 U.S. 59 (2001)	27, 28
<i>Ellerby v. United States</i> , 187 F.3d 257 (2d Cir. 1998)	25
<i>United States v. Ahmad</i> , 202 F.3d 588 (2d Cir. 2000)	27
<i>United States v. Blount</i> , 291 F.3d 201 (2d Cir. 2002), <i>cert. denied</i> , 537 U.S. 1141 (2003)	<i>passim</i>
<i>United States v. Carmona</i> , 873 F.2d 569 (2d Cir. 1989)	17
<i>United States v. Deutsch</i> , 987 F.2d 878 (2d Cir. 1993)	27, 28
<i>United States v. Eyman</i> , 313 F.3d 741 (2d Cir. 2002) <i>cert. denied</i> , 538 U.S. 1021 (2003)	26
<i>United States v. Fitzgerald</i> , 232 F.3d 315 (2d Cir. 2000)	27

<i>United States v. Greenfield</i> , 44 F.3d 1141 (2d Cir. 1995)	26
<i>United States v. Huerta</i> , 371 F.3d 88 (2d Cir. 2004)	<i>passim</i>
<i>United States v. Leonard</i> , 37 F.3d 32 (2d Cir. 1994)	25
<i>United States v. Loeb</i> , 45 F.3d 719 (2d Cir. 1995)	27
<i>United States v. McLean</i> , 287 F.3d 127 (2d Cir. 2002)	17
<i>United States v. Molina</i> , 356 F.3d 269 (2d Cir. 2004)	26
<i>United States v. Palmer</i> , 68 F.3d 52 (2d Cir. 1995)	27
<i>United States v. Shonubi</i> , 103 F.3d 1085 (2d Cir. 1997)	21
<i>United States v. Studley</i> , 47 F.3d 569 (2d Cir. 1995)	27, 28
<i>United States v. Szur</i> , 289 F.3d 200 (2d Cir. 2002)	25, 27
<i>United States v. Tracy</i> , 12 F.3d 1186 (2d Cir. 1993)	17

United States v. Zagari,
111 F.3d 307 (2d Cir. 1997) 27

STATUTES

18 U.S.C. § 3231 vi
18 U.S.C. § 3742 vi
21 U.S.C. § 846 2
28 U.S.C. § 1291 vi

GUIDELINES

U.S.S.G. § 2D1.1 13, 16
U.S.S.G. § 3B1.1 *passim*

STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over these criminal proceedings under 18 U.S.C. § 3231. The defendant-appellant was convicted by way of a guilty plea. The defendant was sentenced on December 15, 2003, and he filed a timely Notice of Appeal on December 22, 2003. This Court has appellate jurisdiction over the district court's entry of final judgment under 28 U.S.C. § 1291 and over the defendant's sentencing challenges under 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES

- I. Did the district court clearly err in calculating a drug quantity attributable to Hilliard by conservatively estimating and adopting findings that were based on credible trial testimony and interviews of cooperating witnesses?

- II. Did the district court clearly err or abuse its discretion when it increased Hilliard's sentencing offense level under U.S.S.G. § 3B1.1(a) for his leadership role?

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BRIEF FOR THE UNITED STATES OF AMERICA

PRELIMINARY STATEMENT

Defendant Hilliard pleaded guilty to conspiring to possess with intent to distribute in excess of 1000 grams

of heroin in connection with his participation in the Estrada narcotics trafficking enterprise, which was responsible for the distribution of wholesale quantities of heroin and crack cocaine primarily in Bridgeport, Connecticut. He was sentenced primarily to 330 months in prison. After a sentencing hearing, the trial judge credited the statements of a number of cooperating witnesses who had outlined the defendant's role in the enterprise, including his management of heroin packaging sessions. The defendant now appeals his sentence, challenging the district court's factual findings that 30 kilograms of heroin were attributable to him, as well as its finding that he was a manager of the drug enterprise. Because these challenges are meritless, this Court should affirm the defendant's sentence.

STATEMENT OF THE CASE

On June 19, 2000, a federal grand jury in Connecticut returned a Third Superseding Indictment against numerous defendants involved in drug trafficking activity primarily in and around Bridgeport, Connecticut, including the defendant-appellant Michael Hilliard. Count Twelve charged him with conspiring to possess with intent to distribute 1000 grams or more of heroin, in violation of 21 U.S.C. § 846. Count Thirteen charged the defendant with conspiring to possess with intent to distribute 50 grams or more of cocaine base ("crack"), in violation of 21 U.S.C. § 846. *See* Joint Appendix ("JA"), JA 52-54.

The district court presided over two and a half days of evidence in a trial in January 2002 that resulted in guilty pleas, as well as two, month-long trials in November

2001, and March 2002. The defendant entered a guilty plea to Count Twelve of the Indictment after jury selection and before the beginning of the March 2002 trial.

On December 15, 2003, the district court sentenced the defendant to a term of 330 months of imprisonment, to be followed by a term of five years of supervised release. On December 19, 2003, the defendant filed a timely notice of appeal. JA 364.

The defendant is presently serving his federal term of imprisonment.

STATEMENT OF FACTS

The district court presided over two and a half days of evidence in a trial that ended in guilty pleas in addition to two, month-long trials of co-defendants in this case. Hilliard pleaded guilty to conspiring to possess with intent to distribute in excess of 1000 grams of heroin just prior to the commencement of evidence in the March 2002 trial. To date, the district court has sentenced seventeen of Hilliard's co-defendants. On December 15, 2003, the district court sentenced Hilliard and relied extensively on the trial records and FBI reports of interviews of cooperating witnesses. The following statement of facts is drawn from the trials held in November 2001, January 2002, and March 2002, as well as reports of interview.¹

¹ A brief Government's Appendix ("GA") consisting of the relevant two pages of cooperating witness Frank Estrada's FBI 302 report of interview is attached hereto.

Frank Estrada, a.k.a. “The Terminator,” and his criminal associates began running a violent drug trafficking organization within the city of Bridgeport, Connecticut in the late 1980’s. Beginning in 1995 and upon his release from state prison, Estrada expanded his narcotics trafficking organization and distributed large, wholesale quantities of heroin and cocaine base throughout Bridgeport, New Haven, and Meriden, Connecticut for street-level distribution. Defendant Hilliard grew up in the P.T. Barnum housing project in Bridgeport, which became one of the Estrada organization’s main retail outlets for heroin and cocaine base.

The government presented extensive evidence at the various trials to establish the nature, extent and roles played by the members of the drug trafficking conspiracies charged in Counts Twelve and Thirteen of the Third Superseding Indictment. The evidence principally included the testimony of cooperating witnesses as well as law enforcement officers who conducted surveillance, forensic testing, and search and seizure activities in connection with the case.

Testimony of Frank Estrada

In January 2002, Frank Estrada pleaded guilty to fourteen federal charges and entered into a cooperation agreement with the government. Tr. 03/15/02 at 174-177. His testimony detailed how his organization worked, who the members were, and the type and quantities of narcotics distributed. Specifically, Estrada testified that in the early stages of establishing his organization, his “main thing

was selling heroin,” but that he merged his organization with Hector Gonzalez’s crack cocaine organization in order to maximize profits. Tr. 03/15/02 at 77-78.

Estrada explained that heroin packaging sessions were regularly conducted in order to prepare the heroin for street-level distribution. Tr. 03/14/02 at 266. Estrada explained that he employed trusted associates to organize and run the sessions. He testified that whoever was running the session was responsible for getting the workers to the session location and implementing the session rules, which included keeping all the workers at the location and not letting anyone use the phone. Tr. 03/14/02 at 269. Estrada explained that he gave a budget to the session leader and it was the leader’s responsibility to pay the session workers. Tr. 03/14/02 at 269. Estrada testified that “Mizzy” (Hilliard) was responsible for getting the workers to the session locations. Tr. 03/14/02 at 268.

According to Estrada, he and Hilliard grew up together in P.T. Barnum. He stated that in the 1980’s, Hilliard sold powder cocaine for him and that Hilliard became a member of the “Terminators.” Estrada indicated that after Hilliard was released from prison, he worked for a short time as a basketball coach, but in 1996 began working for the Estrada organization. Hilliard began doing hand-to-hand sales and collecting money from the other street-level dealers. GA at 1.

In 1997, Estrada put Hilliard in charge of the heroin packaging sessions. Estrada explained that he wanted someone he could trust in charge of the sessions. GA at 1.

Estrada gave Hilliard a budget of \$2,500 for each session. The budget was to be used to pay the session workers and to buy the packaging materials. Hilliard was paid a percentage of the profits from the sale of the narcotics. Estrada brought the narcotics to the session location and then left Hilliard in charge. GA at 1. Estrada indicated that Hilliard was also responsible for distributing the packaged narcotics to the street distribution lieutenants and that he collected narcotics proceeds from the lieutenants. GA at 2.

Testimony of William Rodriguez, a.k.a William Gomez

William Rodriguez testified that he joined the Estrada organization in 1996, and that he was one of Frank Estrada's first supervisors. According to Rodriguez, Hilliard joined the organization early on and became a trusted member who participated in heroin packaging sessions along with other members of the organization. Tr. 03/07/02 at 40. Rodriguez explained that beginning in the later part of 1996 through early 1997, the heroin packaging sessions took place approximately twice a month and that Hilliard was a regular participant. Tr. 03/07/02 at 93-95. Rodriguez further testified that in 1996, defendant Hilliard also participated in cooking and preparing crack cocaine for street level distribution. Tr. 3/6/02 at 267-269; 3/7/02 at 131-133.

Rodriguez explained that Hilliard was one of the individuals involved in the activities of the organization in the early days, when Frank Estrada sought to establish himself and his organization in the P.T. Barnum housing

project. Rodriguez testified that when the Estrada organization was just getting started, it could not compete with established and better brands like Lally Rodriguez's "5-0" brand. One of the methods members of the Estrada organization used to drive Lally out of the P.T. Barnum housing project was to steal Lally's stash of narcotics and to replace Lally's heroin with Estrada's lower quality heroin. Rodriguez testified that sessions were held in order to replace the good heroin with the bad heroin and that defendant Hilliard participated as a "bagger" at those sessions. Tr. 1/8/02 at 207-210.

Rodriguez explained that in early 1997 he was arrested by the Bridgeport Police, and that he cooperated with the police by providing the location of the stash apartment located at 80 Granfield Avenue. Tr. 03/07/02 at 96. Former Bridgeport Police Detective Richard DeRiso testified that based upon the information provided by Rodriguez, he obtained a state search warrant for the location where on March 7, 1997, the police seized, among other things, a kilogram of crack cocaine, firearms and narcotics packaging materials. Tr. 03/04/02 at 151-152, 156-172.

Testimony of Amelia Pererra

Amelia Pererra was introduced to Frank Estrada by a former boyfriend. She explained that in early 1997, when her boyfriend was released from prison, he rejoined the Estrada organization, and he began participating in heroin packaging sessions. Tr. 03/07/02 at 207, 209, 215. Her boyfriend was killed in May 1997. Shortly thereafter, she began participating in heroin packaging sessions. Tr.

03/07/02 at 216, 224. She explained that Frank Estrada picked her up and drove her to the first session that she attended, where she observed Estrada place a firearm on the table where the heroin was piled.

In the summer of 1997, Pererra began attending the heroin packaging sessions about once a week. Tr. 03/07/02 at 231. She identified Hilliard as one of the participants at the sessions she attended. Tr. 03/07/02 at 227. Approximately one month after her first session, members of the organization began using the apartment where she lived with her sister in Bridgeport to package narcotics. Perrera explained that the sessions would begin once Hilliard, "Eso" (Isaias Soler) and Ricardo Rosario arrived at her apartment with the heroin packaging materials. She indicated that Hilliard and Soler brought a duffel bag with grinders, spoons, bags and other packaging materials to her apartment. 03/07/02 at 234-235.

Pererra attended heroin packaging sessions at various locations in Bridgeport. She attended sessions at Ricardo Rosario's apartment in the P.T. Barnum housing project and at Felix DeJesus' girlfriend's apartment located on Alice Street in Bridgeport. Tr. 03/07/02 at 236. She explained that Hilliard was present at the session she attended at the apartment on Alice Street. Tr. 03/07/02 at 241.

Testimony of Viviana Jimenez

Viviana Jimenez grew up in the P.T. Barnum housing project with her family, including her sister Glenda Jimenez. Tr. 03/08/02 at 173, 179. In the winter of 1998,

she began selling heroin for the Estrada organization in P.T. Barnum, and was supplied by her cousin, Isaias Soler (a.k.a. "Eso"), one of Estrada's high-ranking lieutenants. Tr. 03/08/02 at 188-189.

Though her main job in the organization was as a street-level distributor, Jimenez participated in two heroin packaging sessions in early 1998. Tr. 03/08/02 at 189. Jimenez explained that one day "Mizzy" (Hilliard) and "Dino" (Felix DeJesus) picked her up and drove her and the other session workers to a house in Bridgeport. Tr. 11/27/01 at 165. Upon entering the house, she noticed that there were piles of heroin on a table and packaging materials already set up. Tr. 03/08/02 at 192-193. Jimenez testified that Isaias Soler was grinding the heroin, Ricardo Rosario was "spooning" the heroin into the small baggies, and she and the other workers were tasked with taping and counting the baggies. Tr. 03/08/02 at 194-195. She testified that Hilliard was carrying a firearm and sat in the room watching over the workers. Tr. 11/27/01 at 168; Tr. 03/08/02 at 197. Jimenez testified that the session lasted almost two days, and they packaged 120 "bricks" (each brick consists of 100 individual small bags) of heroin. Tr. 03/08/02 at 197-199.

Jimenez indicated that approximately three weeks later she participated in another session. Tr. 03/08/02 at 200. She explained that it was very similar to the first session she attended. She was driven to the session location by Hilliard and DeJesus, and when they arrived at the location, everything was all set up. Tr. 03/08/02 at 202.

Jimenez testified that Hilliard was one of the individuals who supervised the sessions and explained the session rules to her and the other workers. Tr. 11/27/01 at 170-171; Tr. 03/08/02 at 197. None of the workers were permitted to use the telephone, smoke, talk or leave the session location until the job was completed. Tr. 11/27/01 at 171; Tr. 03/08/02 at 196-98.

Jimenez explained that at one point during the second session someone unexpectedly knocked on the door. Not knowing who it was, Hilliard, DeJesus and Soler rushed the door with their guns drawn. Hilliard instructed the workers to duck because he was going to shoot if they discovered a stranger was at the door. Ultimately, they discovered it was Frank Estrada who had come to the session location to make sure everything was going as planned. Tr. 11/27/01 at 171-172.

Testimony of Glenda Jimenez

Glenda Jimenez grew up in the P.T. Barnum housing project with her sister, Viviana Jimenez, and the rest of her family. In 1997, when she was seventeen years old, she began selling narcotics in P.T. Barnum for her cousin Isaias Soler, who was one of Estrada's street distribution lieutenants. Tr. 03/08/02 at 45.

Around September 1997, she began attending heroin packaging sessions. Tr. 03/08/02 at 55. She explained that the first session she attended was on Atlantic Street in Bridgeport at Mel's (Amelia Pererra's) residence. She testified that her cousin Soler drove her to the location and that when she walked into the location she saw piles of

heroin on the table. Tr. 03/08/02 at 59. When she arrived, Estrada, Hilliard, Ricardo Rosario, Amelia Pererra and others were already at the location. Tr. 03/08/02 at 60.

Approximately one month later, Jimenez participated in another session with Hilliard on Atlantic Street. Tr. 03/08/02 at 64. Jimenez explained that Hilliard helped “spoon” the heroin into small baggies. Tr. 03/07/02 at 67. Jimenez participated in one other session and then stopped attending because Estrada failed to pay her. Tr. 03/07/02 at 69.

Testimony of Nelson Carrasquillo

In January 1999, Nelson Carrasquillo became involved with Frank Estrada’s sister, and several months later they began living together in an apartment in Bridgeport. Tr. 03/20/02 at 95,100. Carrasquillo first became aware of the heroin packaging sessions in May 1999 when he walked in on a session taking place at the apartment he shared with Carmen Estrada. Tr. 03/20/02 at 103,105. He identified Hilliard as one of the people participating in the session. Tr. 03/20/02 at 105. Heroin packaging sessions took place at Carrasquillo’s apartment in Bridgeport throughout the summer of 1999. According to Carrasquillo, Hilliard was a regular member of the heroin packaging sessions. Tr. 03/20/02 at 127-128. Hilliard was spooning the heroin into the individual baggies, and sometimes taping the bags. Tr. 03/20/02 at 129. Carrasquillo testified that at least one kilogram of heroin was packaged at each session and sessions were held on a weekly basis. Tr. 03/20/02 at 127, 130.

Carrasquillo explained that heroin packaging sessions also took place in the late summer through the fall of 1999, and that Hilliard was a regular participant. Tr. 03/20/02 at 135. He testified that at those sessions Carmen Estrada kept her 9 millimeter firearm on the table with the heroin. Tr. 03/20/02 at 136. A kilogram of heroin was packaged at each of those sessions. Tr. 03/20/02 at 140.

The heroin packaging sessions continued to take place on a weekly and sometimes twice-weekly basis between December of 1999 through March of 2000. Many of the same people, including Hilliard, participated in those sessions. Tr. 03/20/02 at 157.

Law Enforcement Testimony

Former Bridgeport Police Detective Richard DeRiso testified that based upon information provided by William Rodriguez after his arrest, the detective obtained a state search warrant for the organization's stash location at 80 Granfield Avenue, Bridgeport. Tr. 03/04/02 at 151-152. On March 7, 1997, the officers executed the search warrant and seized large amounts of narcotics, drug packaging materials and paraphernalia, all of which was introduced as evidence at trial. The following items were seized from the stash location: coffee grinders with residue, a digital scale, a particle mask, tape, baggies, stamps and pads, boxes of empty glassine folds, ziplock baggies, over a kilogram of crack cocaine, a quantity of heroin, and two firearms with ammunition. Tr. 01/08/02 at 151; Tr. 03/04/02 at 156-172.

Sentencing

Defendant Michael Hilliard’s Guidelines were calculated in the Pre-Sentence Report (“PSR,” reproduced in the Government’s Sealed Appendix), which the district court adopted as its findings, as follows.

Drug Quantity (30 kilograms or more of Heroin) (§ 2D1.1(c)(1))	+38
Use of Firearm in Connection with Offense (§ 2D1.1(b)(1))	+2
Leadership Role (§ 3B1.1(b))	<u>+3</u>
Adjusted Offense Level	43

Michael Hilliard PSR, ¶¶ 26-31.

The district court declined to award the defendant a two-level upward adjustment for his use of a minor in connection with the offense. JA 301-302. The district court granted the defendant a three-level downward adjustment for acceptance of responsibility and this resulted in a Total Adjusted Offense Level of 40 and Criminal History Category VI with a corresponding imprisonment range of 360 months to life. JA 305, 310. Further, based upon a combination of the tragic circumstances of the defendant’s life, and the defendant’s efforts at pre-arrest rehabilitation, the district court departed from the Guidelines by 30 months pursuant to Guidelines Section 5K2.0, and imposed a 330-month term of imprisonment. JA 356.

SUMMARY OF ARGUMENT

I. The district court did not clearly err in calculating the drug quantity attributable to Hilliard. Contrary to Hilliard's claim that the district court's findings were speculative, the district court in fact relied upon the credible trial testimony and reports of interview of cooperating witnesses and conservatively found a quantity of 30 kilograms or more of heroin.

II. The district court did not clearly err or abuse its discretion when it increased Hilliard's sentencing offense level under U.S.S.G. § 3B1.1(a) for his leadership role in the conspiracy. The court properly relied on evidence that Hilliard supervised and managed workers at heroin packaging sessions.

ARGUMENT

I. THE DISTRICT COURT DID NOT CLEARLY ERR IN CALCULATING HILLIARD'S DRUG QUANTITY

A. RELEVANT FACTS

With respect to the issue of quantity, the recommendation of the PSR was a guidelines base offense level 38, based upon the attribution of 30 kilograms or more of heroin to the defendant. PSR ¶ 26. The PSR detailed the heroin packaging sessions indicating that the typical session "would last 8 to 14 hours and would normally end with a plastic lawn leaf sized garbage bag full of packaged heroin." PSR ¶ 8. The PSR estimated

that “900 grams of heroin was packaged during each session, though it is likely that each session involved a kilogram.” PSR ¶ 9.

The district court adopted the findings of the PSR. JA 304. In addition, the court relied upon the record testimony of cooperating witnesses and found that:

there is more than sufficient record evidence that Mr. Hilliard’s personal involvement here with the bagging sessions exceeds 30 kilograms of heroin and, in the alternative, that the scope of his agreement here which was to participate in the bagging and to supervise the bagging of heroin essentially from the Spring of ‘99 through -- excuse me, Spring of ‘97 through the Fall of ‘99 not consistently but over much of that period of time includes well in excess of 100 kilograms of heroin and that it was reasonably foreseeable to him as part of that agreement.

JA 278-279.

In sharp contrast to Hilliard’s claim that his involvement in the heroin conspiracy was limited to nine or ten heroin packaging sessions and that he was responsible for no more than 8 kilograms of heroin, the district court observed, “. . . . we’re talking about lots and lots of these sessions [t]his was a gigantic, prolific drug conspiracy.” JA266-267. Even employing the most conservative estimates, the district court found the quantity of heroin attributable to the defendant was well over 30 kilograms of heroin:

I previously found, as you noted, on average it was between 700 and 800 grams at one of these sessions, but if you look at the numbers here, the numbers overwhelm the situation. I mean if you take 160 sessions between Spring of '97 and Fall of '99, he only has to be at a quarter of those and the evidence is sufficient to suggest that he was at most, if not all of those and you've got Frank Estrada saying he's in charge of sessions, he's running the sessions for a period of time and, yes, there is evidence that he was in and out of the conspiracy. So let's say reduce to half the times, we're only talking about 80 sessions at the point, and we're only talking about, you know, some 60 kilograms of heroin.

JA 275.

Ultimately, the district court held, “. . . this was the single largest heroin conspiracy in Bridgeport history and it produced scores of kilograms every year . . . and in my view it's not a close question that Mr. Hilliard is to be charged with 30 kilograms of heroin.” JA 279.

B. Governing Law and Standard of Review

The Drug Quantity Table of Section 2D1.1 of the Sentencing Guidelines prescribes the manner in which base offense levels are calculated for federal narcotics trafficking offenses. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table). If the quantity of narcotics seized during an investigation does not reflect the sales occurring or agreed to during an offense, the Sentencing Guidelines

require a district court to estimate the amount of drugs involved in the offense. *See United States v. Blount*, 291 F.3d 201, 215 (2d Cir. 2002) *cert. denied*, 537 U.S. 1141 (2003); *United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002). In making such an estimate, the district court has “broad discretion to consider all relevant information,” and “given the wide latitude of the district court to make credibility determinations, the court is not restricted to accepting the low end of a quantity range estimated by a witness.” *Blount*, 291 F.3d at 215 (citations omitted). The district court need only make drug quantity findings by a preponderance of evidence, and its drug quantity determinations are subject to review only for clear error. *See United States v. Richards*, 302 F.3d 58, 68 (2d Cir. 2002); *McLean*, 287 F.3d at 133.

It is well-settled that a sentencing court may rely upon all of the facts known to the court about the offense of conviction including facts which it learns through proceedings involving other defendants. *See United States v. Tracy*, 12 F.3d 1186, 1203 (2d Cir. 1993) (citing *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989) (sentencing court is entitled to rely on any type of information known to it including testimony from a trial in which the person to be sentenced was neither a defendant nor represented by counsel)).

C. Discussion

The district court did not commit clear error in its drug quantity findings. The court reasonably relied on the trial testimony and the reports of interview of cooperating witnesses it found to be credible in conservatively

estimating that a quantity of 30 kilograms or more of heroin was attributable to Hilliard.

Hilliard contends that the district court's quantity findings were "not supported by specific evidence in the record" and were based "on unfounded assumptions and erroneous speculation." Def.Br. at 16. In fact, the district court relied upon specific testimony and reports of interview of cooperating witnesses who were former leaders and members of the Estrada organization. The cooperating witnesses provided detailed testimony and information regarding Hilliard's participation and supervision of heroin packaging sessions that served as the basis for the district court's findings and amply support those findings.

For example, both Frank Estrada and William Rodriguez described Hilliard's long-time and frequent participation in heroin packaging sessions. Tr. 3/6/02 at 267-269; 3/7/02 at 131-133; GA at 1. Rodriguez testified that as early in the conspiracy as 1996 and 1997, heroin packaging sessions were held approximately twice a month and that Hilliard was a regular participant. Tr. 03/07/02 at 93-95. In 1997, Estrada put Hilliard in charge of the heroin packaging sessions. GA at 1. Indeed, the district court specifically found "Frank Estrada's testimony to be credible in this case ." The court noted, "I found him to be credible and he's very specific in his 302 about dates and how he wanted someone trusted to oversee the bag-up sessions" JA 288-289.² Clearly, the court

² Defendant's claim that "the jury completely
(continued...)

relied upon specific evidence in the record in determining quantity.

In addition, the court relied on the testimony of session workers, such as Viviana Jimenez, who confirmed that in 1997 and 1998, Hilliard was in charge of sessions at which “piles of heroin” were packaged sometimes into as many as 120 “bricks” (each brick consists of 100 individual small bags). JA 289; Tr. 11/27/01 at 170-171; Tr. 03/08/02 at 197-199.

The court also relied on Nelson Carrasquillo’s testimony that Hilliard was a regular participant in heroin packaging sessions held between May 1999 and March 2000. Tr. 03/20/02 at 127-128, 157. Carrasquillo testified that the sessions were held on a weekly basis, and sometimes a twice-weekly basis, and that at least one kilogram of heroin was packaged at each session. His testimony established that Hilliard’s participation at the

² (...continued)

disregarded Estrada’s statement at trial” is wholly unfounded. Def.Br. at 25. Estrada testified at a trial against members of his own organization, and as one of over a dozen cooperating witnesses at two trials involving a rival organization. One of the trials involving the rival organization resulted in a hung jury on all counts as to all defendants. Neither the parties nor the court are privy to the jury’s deliberations, it is therefore impossible to say what credibility findings the jury made with regard to Estrada’s testimony.

heroin packaging sessions continued into 1999, and, along with the testimony of the other cooperating witnesses, was clearly a sufficient basis for the court to attribute 30 kilograms or more of heroin to Hilliard. Tr. 03/20/02 at 127, 130, 157.

As the district court noted, the evidence establishing quantity was “very strong evidence.” JA 274. Relying upon Estrada and the other cooperating witnesses, the district court found, “what we have here I think is very strong evidence that Mr. Hilliard’s participation, his personal involvement dramatically exceeds the 30-kilogram limit. And certainly if you look at the scope of his agreement in this conspiracy and what was reasonably foreseeable to him, then we get into gigantic quantities” JA 276.

Hilliard further contends that the witnesses lacked credibility because they failed to specify the dates of the heroin packaging sessions, specific sessions Hilliard participated in, and failed to label him as a supervisor. JA 272-274, Def.Br. at 20-21. In response, the district court observed, “[h]ere what we have is overwhelming evidence of quantity in a general sense and overwhelming evidence of participation in the general sense.” JA 274. Noting that it would be unreasonable to expect witnesses to provide specific dates and the specific quantities attributable to Hilliard, the district court instead properly relied upon the witness testimony to estimate the quantity of heroin attributable to the defendant and found that:

between the Spring of ‘97 and the Fall of ‘99, if sessions were held on average once a week, and the

evidence seemed to suggest that sometimes they were held twice a month and sometimes they were held twice a week, so if we take an average of once a week, we're looking at approximately 160 weeks as the period of time when Estrada was indicating Mr. Hilliard is overseeing sessions. And if he attended a quarter of the sessions during that period of time, then we're in excess of 30 kilograms from his own participation and that's just the period of '97 to '99, not counting the record evidence concerning 1996.

JA 266.

Moreover, Hilliard's reliance on *United States v. Shonubi*, 103 F.3d 1085, 1088-90 (2d Cir. 1997) is misplaced, and his claim that the "court had no basis for associating him with a greater number of sessions" is wholly without merit. Def.Br. at 17. In *Shonubi*, this Court held that "evidence that points specifically to a drug quantity for which the defendant is responsible" would be the type of "specific evidence" a sentencing court could rely upon to make relevant-conduct quantity findings. *Shonubi*, 103 F.3d at 1089-90. In *Shonubi*, the Court also instructed sentencing courts to use caution when estimating drug quantities. *Id.* at 1092.

Here, unlike in *Shonubi*, the "specific evidence" of quantity directly attributable, or reasonably foreseeable, to the defendant, was overwhelming. Based upon that evidence, the district court found that the Estrada organization was "run like a business where almost like clockwork, on average about once a week there was a

session.” JA 274-275. Between the Spring of 1997 and the Fall of 1999, when Hilliard was in charge of the sessions, the district court calculated that approximately 160 sessions took place, but attributed only half of those sessions to Hilliard. JA 33.

The district court was equally conservative in estimating the quantity of heroin packaged at each session. Although the PSR found that between 900 grams and a kilogram of heroin was packaged at each session, the district court noted that there was some testimony establishing that half a kilogram of heroin was packaged and other testimony that a kilogram of heroin was packaged. The court found that “on average it was between 700 and 800 grams at one of these sessions, but that if you look at the numbers here, the numbers overwhelm the situation.” JA 275. As the court noted, “[s]o let’s say reduce to half the times, we’re only talking about 80 sessions at that point, and we’re only talking about, you know, some 60 kilograms of heroin.” JA 275. Thus, even based upon the district court’s conservative estimate of both the quantity of heroin packaged at each session and the number of sessions attended by the defendant, the defendant is responsible for well over 30 kilograms of heroin.

Hilliard has failed to show any clear error by the district court. Instead, the record demonstrates that the district court adhered to the specific and credible testimony of cooperating witnesses in conservatively calculating the quantity of heroin attributable to Hilliard. *See Blount*, 291 F.3d at 215 (noting sentencing court’s “wide latitude” to make credibility determinations).

II. The District Court Did Not Clearly Err or Abuse Its Discretion When It Increased Hilliard's Sentencing Offense Level under U.S.S.G. § 3B1.1(a) for His Leadership Role

A. Relevant Facts

Hilliard further challenges the district court's increase of his sentence for his leadership role. Def.Br. at 22-26. As recommended in the PSR, the district court increased the defendant's base offense level by three levels pursuant to U.S.S.G. § 3B1.1(b), based upon his role as a manager or supervisor at the heroin packaging sessions. JA 289.

In support of its attribution of a role adjustment, the district court credited Frank Estrada and found that:

he (referring to Estrada) gave Mr. Hilliard a budget for each session, for the workers, yet Mr. Hilliard got a percentage of the money made from the sale of the bagged-up narcotics, which suggests a supervisory role, that Hilliard usually organized the session, that Estrada would come and bring the drugs and leave Hilliard in charge and that Hilliard brought the drugs to lieutenants for distribution after they bagged up. These are all strong indications to me that Mr. Hilliard's role at these sessions was one of a supervisor. That role was confirmed by Viviana Jimenez's testimony that – this was November 27, 2001 at 168 – that Mr. Hilliard was essentially watching the sessions with

a gun, that he was I think he was in effect not functioning as a worker at the sessions but, rather, was there to oversee others

JA 289.

B. Governing Law and Standard of Review

Guidelines Section 3B1.1 provides that:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive, 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, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

“To qualify for an adjustment under § 3B1.1, the defendant must have exercised some control over others involved in the commission of the offense or he must have been responsible for organizing others for the purpose of

carrying out the crime. . . . It is irrelevant that [the defendant] may have undertaken these supervisory activities at someone else's behest; what is dispositive is that he took a management role in the criminal scheme." *United States v. Leonard*, 37 F.3d 32, 38 (2d Cir. 1994) (internal citations and quotation marks omitted).

"A defendant may properly be considered a manager or supervisor if he 'exercise[d] some degree of control over others involved in the commission of the offense. . . or play[ed] a significant role in the decision to recruit or to supervise lower-level participants.'" *Blount*, 291 F.3d at 217 (quoting *Ellerby v. United States*, 187 F.3d 257, 259 (2d Cir. 1998) (internal quotation marks omitted)); *see also United States v. Szur*, 289 F.3d 200 (2d Cir. 2002) (affirming two-level managerial role adjustment where defendant gave instructions to money laundering co-defendants about how transactions were to be done).

Section 3B1.1 of the Guidelines directs a sentencing court to increase a defendant's base offense level by three points if he was a "manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." *See* U.S.S.G. § 3B1.1(b). The application notes define a "participant" as "a person who is criminally responsible for the commission of the offense." U.S.S.G. § 3B1.1, app. note 1. The Application notes to the Guidelines direct the courts to base their decisions regarding role enhancements on factors such as

the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1 app. note 4. A defendant's direct and immediate control over other participants is also an important factor in determining whether the defendant had a managerial or supervisory role. *See United States v. Greenfield*, 44 F.3d 1141, 1146 (2d Cir. 1995).

When considering whether or not to apply a sentencing enhancement for role in the offense, the district court must make specific findings of fact. *See United States v. Molina*, 356 F.3d 269, 275 (2d Cir. 2004). The district court "satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report." *Id.* at 275-276 (citing *United States v. Eyman*, 313 F.3d 741, 745 (2d Cir. 2002), *cert. denied*, 538 U.S. 1021 (2003)).

The Court of Appeals may overturn a sentencing court's factual findings as to the defendant's role in the offense only if there has been clear error. *See United States v. Huerta*, 371 F.3d 88, 91 (2d Cir. 2004). Though 18 U.S.C. § 3742(e) prescribes that "due deference" must be accorded to the sentencing judge's application of the guidelines to the facts, this Court's decisions have variously stated that a district court's ultimate conclusion

that a defendant deserves a role enhancement is reviewed for clear error or *de novo*. See *Huerta*, 371 F.3d at 91.³

³ In several cases, this Court has suggested in dicta that *de novo* review applies to a district court's application of the Sentencing Guidelines. See *United States v. Szur*, 289 F.3d 200, 215 (2d Cir. 2002); *United States v. Fitzgerald*, 232 F.3d 315, 318 (2d Cir. 2000). The government respectfully submits that *Szur* and *Fitzgerald* do not correctly state the law, because they overlook 18 U.S.C. § 3742(e) that expressly commands deferential review of a district court's application of the Sentencing Guidelines, a point emphasized in *Buford v. United States*, 532 U.S. 59 (2001) (district court's application of career offender guideline subject to deferential review, not *de novo* review).

A genealogy of the dicta from *Szur* and *Fitzgerald* discloses its origin in a misreading of this Court's decision in *United States v. Deutsch*, 987 F.2d 878, 884 (2d Cir. 1993), in which this Court correctly stated that “[w]e give due deference to the district court's application of the Guidelines to the facts.” Specifically, *Szur* cites *United States v. Ahmad*, 202 F.3d 588, 590 (2d Cir. 2000). In turn, *Ahmad* and *Fitzgerald* both cite *United States v. Zagari*, 111 F.3d 307, 323 (2d Cir. 1997), which in turn cites *United States v. Palmer*, 68 F.3d 52, 54 (2d Cir. 1995), which in turn cites both *United States v. Loeb*, 45 F.3d 719, 722 (2d Cir. 1995), and *United States v. Studley*, 47 F.3d 569, 573 (2d Cir. 1995). The *Loeb* case, however, incorrectly interprets *Deutsch*, which, as discussed above, stands for the contrary proposition of deferential review to
(continued...)

Here, as was the case in *Huerta*, the Court need not resolve this inconsistency due to the overwhelming evidence of the defendant's supervisory role in the offense. *Huerta*, 371 F.3d at 91 (not reaching inconsistency in precedents because same result would be reached irrespective of standard of review).

C. Discussion

The district court did not err by enhancing Hilliard's sentence by three levels for his managerial role. The evidence available to the sentencing court established beyond doubt that Hilliard was a manager and supervisor in the criminal organization. He regularly organized and supervised heroin packaging sessions and carried firearms

³ (...continued)

a district court's application of the Sentencing Guidelines. Meanwhile, the *Studley* case cites *United States v. Mucciante*, 21 F.3d 1228, 1237 (2d Cir. 1994), a case that holds only that a district court's legal interpretation of the Guidelines is reviewed *de novo* and its related findings of fact for clear error, without addressing the standard of review for a district court's application of the Sentencing Guidelines. See 21 F.3d at 1237. *Studley* also cites *United States v. Stanley*, 12 F.3d 17, 20 (2d Cir. 1993), which in turn cites only *Deutsch*, the initial case that stands for a rule of deferential review. In light of the Supreme Court's decision in *Buford*, however, a district court's application of the Sentencing Guidelines to established facts should be subject to review only for abuse of discretion.

at the sessions. He was also responsible for distributing the narcotics to street-level lieutenants and for collecting the narcotics trafficking proceeds which he passed back up to Frank Estrada with whom, he was closely associated.

The district court's findings regarding role were specific and wholly supported by the evidence in the case. The district court adopted the findings of the PSR, and made even more specific findings when it credited the information and testimony provided by cooperating witnesses Frank Estrada and Viviana Jimenez. JA 289, 304. The court found that Estrada trusted Hilliard and put him in charge of the sessions. Hilliard had a budget for each session, organized the sessions, possessed firearms at the sessions and oversaw the workers there. As the district court noted, "[t]hese are all strong indications to me that Mr. Hilliard's role at these sessions was one of a supervisor." JA 289.

Hilliard does not contest that he was armed at the sessions. He contends that he was acting merely as a "security guard protecting the sessions from outside intruders," but that he had "no supervisory powers over the number of workers at sessions, the quantity of drugs, the amount placed in each bag, or the money." Def.Br. at 23. However, as the district court noted:

[I]t was, it was assets to guard, it was drugs to guard, and so if he's left in charge of guarding the drugs, making sure that the workers don't steal it, making sure that the workers don't mess it up, making sure that no one finds them, making sure that the bagged-up drugs get distributed to the

lieutenants so they can be sold on the street, who else is in charge of that operation? I mean Frank Estrada comes, he drops off the raw heroin and he's put in his 302 that he left Mr. Hilliard in charge. And there is testimony in the record that's consistent with that; he was watching them, that he was telling them what the rules were, that . . . he was the only one permitted to leave to get food, that he rushed the door when there was a knock. Those all sound to me like the activities of someone who is in charge on the scene and, in other words, to distinguish what you're saying, it's not like he followed Frank Estrada around and made sure that nobody messed with Frank Estrada. He's making sure that Frank Estrada's drugs are being properly handled.

JA 281-282.

Hilliard has done nothing to show that the district court's findings about the nature and extent of his activities were clearly erroneous and therefore the district court's role in the offense enhancement should be affirmed.

CONCLUSION

For the foregoing reasons, the sentence of the district court should be affirmed.

Dated: August 27, 2004

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,145 words, exclusive of the Table of Contents, Table of Authorities, and this Certification.

Alina Reynolds

ALINA P. REYNOLDS
ASSISTANT U.S. ATTORNEY

GOVERNMENT APPENDIX

Redacted: US vs Jones, et al; US vs Burden, et alContinuation of FD-302 of Frank Estrada, On 01/07/2002, Page 65through 9/30/02 (see page 1-3 for all dates)**Estrada's Relationship with Michael Hillard**

Estrada knew Michael Hillard, aka Mizzy, from the 1980's when they grew up together in the P.T. Barnum Housing Complex. In approximately 1987 Hillard sold powder cocaine with Estrada in the complex. Estrada considered Hillard to be one of the Terminators. Hillard's brother, Reggie Hillard, was murdered in the late 1980's. Reggie Hillard sold in the complex, but not with Estrada. After Hillard's brother's murder, Hillard stopped dealing narcotics because of pressure from his mother. Despite no longer selling with Estrada, Hillard continued to stash narcotics and weapons for Estrada.

Hillard eventually was arrested and went to prison. Hillard was in prison with Estrada in the early 1990's. While in prison Hillard was stabbed by the Latin Kings for being a member of the Terminators. After being stabbed, Hillard became a member of the Nation gang.

Hillard was released from prison after Estrada was released in September, 1995. When Hillard was released he worked as a volunteer coaching basketball. In the Summer of 1996 Hillard started working for Estrada in the P.T. Barnum Housing Complex. Hillard handed out packets of narcotics (both heroin and cocaine base) and collected money from the street sellers. Hillard did this for a few months but stopped because he and Hector Gonzalez did not get along.

In the Spring of 1997, after the March 7, 1997, search warrant at 80 Grandfield Avenue, Hillard got involved with Estrada, this time participating in bag up sessions. Estrada wanted someone he trusted to oversee the bag up sessions. Estrada wanted to distance from being constantly at the sessions. Estrada gave Hillard a budget of approximately \$2,500 for each session. Out of the money Hillard was to pay the session workers and buy the bagging materials (tape, stamps, boxes of bags, etc.). Estrada paid Hillard a percentage of the money made on the sale of the bagged up narcotics. There was no set percentage agreement between Estrada and Hillard.

Hillard usually organized the session, and Estrada brought the heroin to the session location. Estrada came and went from the session leaving Hillard in charge. Estrada told Hillard the session workers needed to be rotated every few months because

ADD.1

Redacted: US vs Jones, et al; US vs Burden, et alContinuation of FD-302 of Frank Estrada, On 01/07/2002, Page 66
through 9/30/02 (see page 1-3 for all dates)

they could get addicted to the fumes from the sessions. Many of the session workers had heroin habits and liked performing sessions. After the sessions were complete, Hillard brought the bagged up work to the lieutenants and advised Estrada accordingly. Hillard also collected money for the lieutenants after they sold the narcotics.

Estrada recalled a time when he owed Hillard for a number of sessions he supervised and had yet to pay him. At the same time Hillard had crashed Estrada's Chevrolet Impala and agreed to pay Estrada for the damage. Estrada reached an agreement with Hillard where he signed over to Hillard a Chevrolet Impala SS Supersport. Estrada purchased the car in new condition for \$25,000 cash from an American Airlines pilot. Estrada only had the car for a short period of time before he signed it over to Hillard.

Hillard often came and went from the Estrada organization. There were times Hillard did not work for Estrada and attempted to "make a go of it with a legitimate job." However, Hillard always came back to Estrada when the legitimate employment did not work out, or when Hillard needed money to supplement his legitimate employment.

When Hillard was arrested in December, 2000, by the federal authorities he had not been working for Estrada for approximately one year. However, Hillard did work for Estrada as a bouncer in Estrada's club. In that capacity, Hillard occasionally collected money from lieutenants who came to the club to pay Estrada.

Estrada's Relationship with Ricardo Rosario

Estrada met Ricardo Rosario, aka Q, after Estrada was released from prison in September, 1995. When William Gomez, aka William Rodriguez, aka Billy The Kid, started working for Estrada, Gomez started dating Idaila Rosario, aka Bollie. Idaila Rosario was the sister of Benito Rosario, and Ricardo Rosario. Through Gomez, Idaila, and Benito, Ricardo Rosario started working in the Estrada organization.

Some of Estrada's sessions were conducted at the Rosario's apartment in the P.T. Barnum housing Complex and Idaila, Benito, and Ricardo Rosario participated in those sessions. Estrada and Gomez also stashed narcotics and weapons in Rosario's

ADD2

ADDENDUM OF STATUTES

**Title 21, United States Code, Sections 841(a)(1) and
(b)(1)(A) [Relevant Portions]**

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

.....

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in

accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible

for parole during the term of imprisonment imposed therein.

....

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G. § 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy [Relevant Portions] (2001)

(a) Base Offense Level (Apply the greatest):

- (1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death

or serious bodily injury resulted from the use of the substance; or

- (3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

.....

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
-------------------------------------	--------------------------

- | | |
|---|----------|
| (1) 30 KG or more of Heroin
(or the equivalent amount of other
Schedule I or II Opiates); | Level 38 |
|---|----------|

.....

U.S.S.G. § 3B1.1. Aggravating Role (2001)

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, 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, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. A “participant” is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).