UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
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Appeal No. 03-1246
))))))))))))

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

RAPHAEL S. CLAYTON,

Defendant-Appellant,

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Appeal From the Final Judgment of Conviction
Entered In The United States District Court
For The Eastern District of Wisconsin,
Honorable J. P. Stadtmueller, Presiding

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SEPARATE BRIEF AND APPENDIX OF DEFENDANT-APPELLANT RAPHAEL S. CLAYTON

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel for the appellant, Raphael S. Clayton, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

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(3)(i) N/A

(3)(ii) N/A

Dated: _____ _____
Robert R. Henak

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JURISDICTIONAL STATEMENT

Raphael S. Clayton appeals from the final judgement of conviction and sentence in this criminal case entered by the District Court on January 24, 2003. The District Court had jurisdiction under 28 U.S.C. §3231. The Court of Appeals has jurisdiction to hear this appeal under 18 U.S.C. §3742(a) and 28 U.S.C. §1291.

Clayton filed his notice of appeal and docketing statement with the District Court on January 28, 2003 (R340; R341).[1]

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[1] Throughout this brief, several abbreviations are used pursuant to Fed. R. App. P. 28(e). Documents in the record are identified by the District Court docket sheet number as "R___"; the following ":___" reference denotes the page number of the document. References to documents (continued...)

There are no motions for a new trial or alteration of the judgment, or any other motion which would toll the time in which to appeal pursuant to Fed. R. App. P. 4(b)(3).

There were no prior federal appellate proceedings in this case. This Court consolidated this appeal with those of Mr. Clayton's co-defendants, Stephen L. Mayes, Jaquan T. Clayton, Paul Moore, and Ellis Jordan, in Appeal Nos. 03-1245, 03-1266, 03-1283 and 03-1586.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred and violated Raphael Clayton's right to confrontation by admitting out-of-court statements by unidentified and non-testifying "confidential informants" to the effect that they could and did purchase cocaine from Raphael Clayton.

2. Whether the sentencing court erred in determining Mr. Clayton's guideline range when it imposed a four-level enhancement for role in the offense.

STATEMENT OF THE CASE

On August 20, 2001, the government filed a three-count indictment against Raphael S. Clayton, Paul T. Moore, Jaquan T. Clayton, Steven L. Mayes, Patricia Jordan, Ellis Jordan, Matthew Smith, and Alessandro Haynes, alleging various drug

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[1] (...continued)
which are not docketed or separately paginated (such as those sealed by the District Court following sentencing) are to the document by name. When the document is reproduced in the attached appendix, the applicable appendix page number is also identified as "R.C.App. ___."

offenses. Raphael Clayton was charged in Count 1, alleging a 10-year conspiracy to distribute more than five kilograms of cocaine, and Count 2, alleging possession of a controlled substance with intent to distribute. (R1).

The government subsequently dismissed the charges against Patricial Jordan (R235), and Ellis Jordan and Alessandro Haynes pled guilty to the conspiracy count (R209; R210). After extensive pre-trial proceedings, the remaining five defendants proceeded to a jury trial on May 20, 2002, before the Honorable J. P. Stadtmueller (R271).

On May 30, 2002, the District Court granted the government's motion to dismiss Count 2 against Raphael Clayton (R266).

On June 3, 2002, the jury returned verdicts acquitting Matthew Smith (R279), but convicting the remaining four defendants (R275; R276; R277; R278; R386:1559-63).

Although Raphael Clayton had no prior criminal convictions (PSR:22-23), the author of the presentence report ("PSR") recommended a Guidelines sentencing range of life imprisonment without parole (PSR:29). The PSR attributed more than 150 kgs of cocaine to Clayton, for a base offense level of 38. U.S.S.G. §§2D1.1(a)(3) & (c)(1). The PSR then added two levels for possession of a weapon, U.S.S.G. §2D1.1(b)(1), and four levels for an organizer or leader role, U.S.S.G. §3B1.1(a), for a total offense level of 44. (PSR:21-22).

Mr. Clayton objected to each of these calculations (Raphael Clayton's

Objections to Presentence Report; R406:14-21), but at the final sentencing hearing on January 21, 2003, the District Court sided with the government and the PSR (R407:36-52; R.C.App. 34-50). The Court also rejected Clayton's motion for a downward departure (R407:60-66; R.C.App. 52-58; *see* R320), and imposed the sentence of life imprisonment mandated for offense level 44, along with 5 years supervised release, a $100 special assessment, and a $25,000 fine (R407:72-83; R.C.App. 59-70). The Court entered judgment on January 24, 2003 (R332; R.C.App. 1-6).

Raphael Clayton timely filed his notice of appeal on January 28, 2003 (R340).

STATEMENT OF FACTS

For purposes of this brief, Mr. Clayton adopts the statement of facts set forth in the Joint Brief of Defendant-Appellants filed on October 27, 2003 ("Jt. Brief").

SUMMARY OF ARGUMENT

In addition to the improper admission of evidence of anonymous threats prejudicial to all the trial defendants, and therefore addressed in their joint brief, Raphael Clayton challenges admission of hearsay evidence at the trial and to imposition of the four-level enhancement for "role in the offense" at his sentencing.

The hearsay evidence consisted of out-of-court statements by non-testifying "confidential informants" to the effect that they could obtain cocaine from Raphael Clayton and that the cocaine purchased during three "controlled buys" in fact came

from Mr. Clayton. Such evidence constituted inadmissible hearsay and its admission deprived Clayton of his right to confront the informants. The District Court accordingly erred in overruling his objections on these grounds. Because the at best miniscule legitimate probative value of the evidence was far outweighed by the resulting unfair prejudice to Clayton's defense, depriving him of a fair trial, the failure to exclude the evidence under Fed. R. Evid. 403 was also plain error.

Should the Court nonetheless uphold the conviction, the District Court's imposition of a four-level enhancement for Clayton's role in the offense under U.S.S.G. §3B1.1(a) was clear error. The non-speculative evidence simply did not support that enhancement. Applying the enhancement, Clayton was subject to a mandatory life sentence; without it, he can hope for freedom some day, albeit far in the future.

ARGUMENT

I.

THE TRIAL COURT ERRED, AND DENIED CLAYTON HIS RIGHT TO CONFRONTATION, BY ADMITTING OUT-OF-COURT STATEMENTS OF CONFIDENTIAL INFORMANTS

In an effort to establish the existence of a long-term conspiracy, and to bolster the credibility of its inherently unreliable "cooperating witnesses" by providing a veneer of police evidence purporting to tie Raphael Clayton into that conspiracy, the government introduced evidence that, on a few occasions in the early 1990's, the

police had confidential informants conduct controlled buys of cocaine at the home shared by Clayton, his father (Ellis Jordan), and others. The informants who conducted the controlled buys did not testify. Instead, the government relied solely upon the testimony of the supervising officers regarding the actions of the informants The officers did not personally observe the controlled buys, but were permitted to testify, over objection, regarding the informants' statements. (R371:47-59; R372:93-103; R.C.App. 8-32).

Specifically, Officer Timothy Hanrahan testified concerning his supervision over two controlled buys of cocaine from 2123 North 45th Street in Milwaukee in January, 1991 (R371:47-59; R.C.App. 8-20), and the subsequent execution of a search warrant at the same location (R371:60-62). He also was permitted to testify, over Clayton's hearsay and confrontation objections, that the confidential informant involved in those controlled buys (1) told him beforehand that he could purchase cocaine from a black male named "Raphael" (R371:48; R.C.App. 9), (2) made a phone call to "Raphael" for 1 gram of cocaine on the date of the first controlled buy (R371:50; R.C.App. 11), (3) had arranged to make an additional purchase from "Raphael" prior to the second controlled buy (R371:57; R.C.App. 18), and (4) stated after the second buy that "Raphael" had only charged him $90 (R371:58; R.C.App. 19). The government claimed that the evidence was not offered for its truth (R371:48; R.C.App. 9).

A second officer, Djorje Rankovic, similarly testified concerning a controlled

buy involving a confidential informant at the same address on March 16, 1993, and the subsequent execution of a search warrant there (R372:92-119; R.C.App. 22-32). As with the prior officer, he similarly was allowed to testify, over defense objection, (1) that he "had a confidential informant who had told [him] that he could purchase cocaine from an individual that he knows by the name of Raphael that resides at that residence" (R372:93-94; R.C.App. 22-23), and (2) that, following the controlled buy, the informant told him that he had purchased the cocaine from "Raphael" (R372:101; R.C.App. 30). The government again responded to Clayton's objection by claiming that the evidence was not offered for its truth (R372:93; R.C.App. 22).

While overruling Clayton's objections based on the purportedly limited purpose of the evidence (R371:48; R372:93; R.C.App. 9, 22), the trial court did not instruct the jury that it could use the evidence only for that limited purpose.

Because the out-of-court statements purporting to identify "Raphael" as the source of the cocaine could have no possible relevance other than for their truth, they constituted inadmissible hearsay. The District Court accordingly abused its discretion in overruling Clayton's objections on these grounds. For similar reasons, their admission violated Clayton's constitutional right to confrontation, and the District Court erred in holding otherwise. Also, although not objected to on this ground, the District Court committed plain error in not excluding the out-of-court statements under Fed. R. Evid. 403. The highly prejudicial nature of such evidence far outweighed any minimal legitimate probative value, so its admission denied Clayton

a fair trial.

A. Applicable Legal Standards

1. Hearsay

With limited exclusions not applicable here, *see* Fed. R. Evid. 801(d) (defining "statements which are not hearsay"), "hearsay" is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Hearsay is not admissible unless it falls within a specific legal exception. Fed. R. Evid. 802.

This Court has explained that "[w]e exclude out-of-court statements as hearsay for several reasons." *United States v. Williams*, 133 F.3d 1048, 1051 (7th Cir. 1998):

> First, the declarant, that is the person who made the statement, rather than the intermediary who relates it, was not under oath when he made the statement. Second, the declarant is not present at trial, and his absence deprives the trier-of-fact of the opportunity to assess the declarant's demeanor and credibility. . . . Third, the declarant is not subject to cross-examination. . . . Indeed, in criminal cases, the denial of the defendant's right to challenge the declarant's statements in cross-examination implicates constitutional concerns.

Id. (citations omitted).

2. Confrontation

The Sixth Amendment Confrontation Clause also may be violated by admission of evidence from an unavailable witness.

> When the government seeks to offer a declarant's out of-court statements against the accused, and, as in this case, the declarant is unavailable, courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant to submit to cross examination, the greatest legal engine ever invented for the discovery of truth.

Lilly v. Virginia, 527 U.S. 116, 124 (1999) (plurality opinion) (citation, footnote, and quotation marks omitted). Denying the accused the right to cross-examination is permissible only when the evidence "falls within a firmly rooted hearsay exception" or it contains particularized guarantees of truthfulness such that adversarial testing would be expected to add little to its reliability. *Id.* at 124-25; *see United States v. Centracchio*, 265 F.3d 518, 527-28 (7th Cir. 2001).

3. Federal Rule of Evidence 403

Rule 403 requires District Courts to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Fed. R. Evid. 403. Of course, although "most relevant evidence is, by its very nature, prejudicial, ... that evidence must be unfairly prejudicial to be excluded" under Rule 403. *United States v. Curry*, 79 F.3d 1489, 1496 (7th Cir.1996) (citation omitted). Evidence is unfairly prejudicial "if it will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented." *Id.* (citation omitted).

4. Standards of review

Because Clayton's attorney properly objected to the hearsay nature of the evidence at trial, whether the admission of those statements violated the Rules of Evidence on that ground is reviewed for an abuse of discretion. *See Williams*, 133 F.3d at 1051. A court abuses its discretion if its "decision is based on an erroneous conclusion of law or the record contains no evidence on which the court rationally

could have based its decision or the supposed facts which the court found are clearly erroneous." *Van Stan v. Fancy Colours & Co.*, 125 F.3d 563, 570 (7th Cir. 1997).

Because Clayton also properly objected to that evidence on confrontation grounds, the question of whether admission of the evidence violated his right to confrontation is reviewed *de novo*. *United States v. Hernandez*, 330 F.3d 964, 972 (7th Cir.2003) ("We review evidentiary rulings that impact the Sixth Amendment right to confront witnesses de novo"); *United States v. Castelan*, 219 F.3d 690, 694 (7th Cir.2000).

Finally, because Clayton did not specifically object to the evidence under Rule 403, whether the probative value of the evidence was substantially outweighed by its resulting unfair prejudice is reviewed for plain error. *Williams* 133 F.3d at 1051. Under such review, as explained in *United States v. Olano*, 507 U.S. 725, 733-35 (1993), there must be an error which is plain under current law and that "affect[s] substantial rights." While reversal for plain error is discretionary, "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error ‹seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (citation omitted).

B. The Trial Court Erred By Admitting The Out-of-Court Statements

The government's rationale for admission of the out-of-court statements of the "confidential informants," and the District Court's adoption of that rationale in admitting the evidence, is directly contrary to well-settled law in this Circuit. In

United States v. Williams, 133 F.3d 1048 (7th Cir. 1998), for instance, this Court addressed exactly the same argument asserted by the government here, i.e., that the out-of-court statements of a confidential informant identifying the defendant "was not offered to prove the truth of the matter asserted, but rather to establish the course of the police investigation." *Id.* at 1051. The Court rejected the argument then, and it should do the same now.

Williams concerned a bank robbery. A few days after the robbery, a confidential FBI informant identified Williams and another named individual as potential suspects. The police subsequently used this information to compose a photo spread from which an eye-witness identified Williams as one of the robbers. 133 F.3d at 1049-50. At trial, the FBI agent was permitted to testify that the confidential informant had identified Williams as a suspect in the robbery. *Id.* at 1050.

This Court reversed for reasons equally applicable here. Specifically, the Court concluded that the evidence was inadmissible hearsay, rejecting the government's claim that the evidence was somehow relevant for purposes other than for its truth:

> We agree with Williams that Special Agent Johnson's testimony is inadmissible hearsay. The government's argument that his testimony provides the context for the police investigation and composition of the photo spread for the identification is misplaced. There is absolutely no reason for Special Agent Johnson to testify about the substance of his conversation with the confidential informant and to explicitly identify Williams in court for the government to explain the actions taken by the police in their investigation. Context and background can be established, and are properly established, without the admission of

the confidential informant's hearsay declaration.

Id. at 1051. As the Court explained:

> A police officer or government agent may reconstruct the steps taken in a criminal investigation, may testify about his contact with an informant, and may describe the events leading up to a defendant's arrest, but the officer's testimony must be limited to the fact that he spoke to an informant without disclosing the substance of that conversation. . . . There is a clear distinction between an agent testifying about the fact that he spoke to an informant without disclosing the contents of the conversation and the agent testifying about the specific contents of the conversation--which is inadmissible hearsay.

133 F.3d at 1052 (citations omitted). *See also United States v. Lovelace,* 123 F.3d 650, 652 (7th Cir. 1997).

This rationale applies equally here. Just as there was no legitimate reason to identify Williams in order to explain subsequent police actions, the identity of the particular individual with whom the confidential informants in this case allegedly dealt was wholly unnecessary to any legitimate explanation of the subsequent police investigation. All the jury needed to know to explain the investigation, and all it legitimately could be told absent testimony from the informants themselves subject to cross-examination, was that informants arranged and completed controlled buys from 2123 North 45th Street and that, as a result of those buys, search warrants were executed at that location.

This Court concluded in *Williams* that "[t]estimony recounting the conversation between a government agent and an anonymous informant where the informant

identifies the defendant and the substance of the conversation is offered into evidence constitutes inadmissible hearsay." *Id.* The exact identity of the person allegedly involved in the sales with the informants in this case adds nothing to explain the police conduct with regard to those controlled buys and warrants. Here, as in *Williams*, therefore, the evidence "exceeded the boundaries of merely explaining the development of the police investigation." 133 F.3d at 1052. Here, as in *Williams*, the "specific contents of the conversation . . . [were] inadmissible hearsay." *Id.* Here, as in *Williams*, therefore, the trial court abused its discretion by admitting such evidence. *Id.*

The District Court's error is not limited to a mere abuse of discretion, however. Clayton objected to the out-of-court statements, not just on evidentiary grounds, but on confrontation grounds as well. As inadmissible hearsay, the out-of-court statements purporting to identify Raphael Clayton as the person with whom the confidential informants dealt cannot qualify as falling within "a firmly rooted hearsay exception" as required by *Lilly*, 527 U.S. at 124-25. Nor can such statements be deemed to contain any particularized guarantees of truthfulness. *See, e.g., On Lee v. United States*, 343 U.S. 747, 757 (1952) (use of such informers "may raise serious questions of credibility"); *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993) ("Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison").

Admission of the hearsay statements accordingly was not merely an abuse of discretion; it violated Clayton's right to confrontation as well.

Finally, although Clayton did not object on this ground, the District Court plainly erred by not excluding the evidence under Fed. R. Evid. 403. Once again, this Court's decision in *Williams* is instructive. Here, as there, the defendant objected to an informant's out-of-court identification on hearsay grounds but not under Rule 403. 133 F.3d at 1051. Here, as there, any legitimate probative value of the evidence is far outweighed by the resulting unfair prejudice to Clayton, and admission of the evidence should be deemed plain error. *Id*. at 1052.

As already discussed, the substance of the out-of-court statements purporting to identify Raphael Clayton as a drug dealer had no legitimate probative value in explaining the police investigation. At best, the statements as a whole help explain why the controlled buys were conducted at that particular address. However, the validity of the police action was neither in dispute nor part of the government's burden of proof, and thus of minimal consequence. *E.g.*, *United States v. Mancillas*, 580 F.2d 1301, 1310 (7th Cir. 1978).

The lack of any legitimate or compelling reason to admit the statements was compounded by their potential for prejudice. As this Court explained in *Williams*, "hearsay testimony about an informant's tip containing a specific charge of criminality can be extremely prejudicial because the jury may believe the testimony without any guarantee that it represents the truth." 133 F.3d at 1052, citing *United*

States v. Lovelace, 123 F.3d 650, 654 (7th Cir. 1997). Indeed, this Court recognized that it had long ago made the same point in *Mancillas*, 580 F.2d at 1310:

> To allow testimonial repetition of a declarant's out-of-court charge that the defendant would engage or was engaged in specific criminality would seem to create too great a risk that these dangers [of prejudicial impact] will actualize. That risk cannot be justified simply to set forth the background of the investigation.

(Footnote omitted), quoted in *Williams*, 133 F.3d at 1052.

As explained in *Williams* and *Mancillas*, therefore, whatever miniscule legitimate probative value the substance of the informants' out-of-court statements may have had is far outweighed by these risks of unfair prejudice to Clayton from its admission. 133 F.3d at 1052. Here, as in *Williams*, there is "the strong possibility that the jury made improper use of the evidence . . . as concrete proof" that Clayton was guilty of the charged offense, *id.*, especially given the absence of an instruction limiting the evidence to its purported "non-hearsay" purpose. *See Lovelace*, 123 F.3d at 653 (noting that a proper limiting instruction is "[p]otentially determinative"). Here, as in *Williams*, "[t]his testimony could give rise to an inference in the jurors' minds that because a confidential [government] informant identified [Clayton] as one of the [drug dealers,] then it must be true." *Id.* Unlike the government's "cooperating witnesses," after all, the confidential informants provided their own "corroboration," albeit purely superficial, by successfully completing the controlled buys.

Because the at best miniscule legitimate probative value of the evidence was far outweighed by its resulting unfair prejudice, its admission was clearly erroneous

under current law as set forth in *Williams*. 133 F.3d at 1052.

C. The Error in Admitting the Evidence Was Not Harmless

Because admission of the evidence violated Clayton's right to confrontation, the constitutional standard for harmlessness applies here. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). In order to find an error harmless beyond a reasonable doubt, the Court must determine whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. at 24. "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991).[2] *See also United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1019 (7th Cir.1987) (harmless error inquiry comes down to "whether absent the constitutionally-forbidden evidence, honest and fairminded jurors might very well have brought in not-guilty verdicts." (Citations omitted)).

In assessing a claim of harmlessness, the court must consider the combined effect of all evidentiary errors. *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001). Accordingly, the Court must consider, not merely the prejudicial effect of the

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[2] The Supreme Court disapproved other language in *Yates* on other grounds in *Estelle v. McGuire*, 502 U.S. 62, 73 n.4 (1991).

improperly admitted hearsay, but the combined effect of the hearsay and that of the improper threats evidence addressed in the defendants' Joint Brief. *See* Jt. Brief at 22-38.

As explained in that Joint Brief, the government's case was far from overwhelming, resting as it did almost exclusively on the allegations of "cooperating witnesses" seeking to improve their own positions by claiming the defendants on trial were involved in misconduct similar to their own. Such witnesses have an obvious motive to falsify. *E.g.*, *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993), Jt. Brief at 31-33. The government's case also was saddled with the fact that, although its "cooperating witnesses" claimed Clayton's involvement in more than $13 million worth of cocaine, it had to admit that there was no evidence of unexplained wealth on Clayton's part (R383:1348), and none of his properties were deemed appropriate for forfeiture as "drug proceeds" (R383:1330). The fact that the jury acquitted Matthew Smith, and thus necessarily rejected at least some of the testimony of many of the same "cooperating witnesses" who purported to tie Raphael Clayton to the alleged conspiracy, further demonstrates the weakness of the government's case.

Given the inherent unreliability of the government's "cooperating witnesses" and the absence of any physical evidence of drug dealing by Raphael Clayton, it was important to the government's case that it shore up the allegations of its "cooperating witnesses" with a modicum of more "objective" police corroboration (*see* R405:13-

14, 29-41, 47-58 (government's summation emphasizing alleged corroborating effect of police testimony).

The controlled buys and subsequent search warrants at the home shared by the teenaged Raphael Clayton and his father, Ellis Jordan, were meant to corroborate the "cooperating witnesses'" allegations against Clayton. Yet, they lose a substantial amount of their "punch" absent the hearsay allegations that it was Clayton, rather than his father or someone else, who dealt with the confidential informants. Absent those allegations, the government is left with just a few controlled buys and two successful search warrants at a house shared by the adult Ellis Jordan, his teenaged son, Raphael Clayton, and others, all of which resulted only in charges and convictions against Jordan and none against Clayton (R371:75-76; R372:119-20, 128, 139-41).

Especially when combined with the prejudicial effect of the improper threats evidence, therefore, the government simply cannot meet its burden of proving that the improper hearsay evidence was harmless beyond a reasonable doubt. *Chapman*, *supra*. Indeed, given the likely effect of the confidential informants against Clayton in overcoming the inherent unreliability of its witnesses and other weaknesses in its case, the government cannot even meet its burden of proving harmlessness under the non-constitutional standard. *Olano*, 507 U.S. at 734-35 (for properly-preserved, non-constitutional errors, government must prove that there was no prejudice as result of the error).

Even if Clayton had not otherwise properly objected to the evidence, the same

reasons demonstrate that the trial court's plain error in admitting the unfairly prejudicial evidence in violation of Rule 403 both affected Clayton's substantial rights and undermined the fairness and integrity of these judicial proceedings. *See Williams*, 133 F.3d at 1052 (finding plain error where, as here, there is a strong possibility that the jury used the improper evidence as proof that the defendant committed the crime charged). Once again, the government's case was far from overwhelming, relying in substantial part on whatever corroboration it could derive from independent police investigation. Yet, other than the allegations of its confidential informants that Raphael was the source of the cocaine in the early 1990's (and the results of an automobile stop in 1995 that the state prosecutor even admitted was too flimsy for prosecution of Raphael Clayton (R373:221)), the government was unable to present any independent police evidence corroborating the stories of its "cooperating witnesses" to the effect that Clayton was a drug dealer. Under these circumstances, the hearsay purporting to tie Raphael Clayton to the controlled buys and drugs subsequently found in his father's home easily could have had a substantial effect on the jury's assessment of the cooperating witnesses' stories and thus the verdict against Clayton.

II.

THE DISTRICT COURT ERRED IN IMPOSING A FOUR-LEVEL ENHANCEMENT FOR RAPHAEL CLAYTON'S ROLE IN THE OFFENSE

The District Court adopted the government's claim that Raphael Clayton was a leader or organizer of the conspiracy and therefore enhanced his offense level by four levels under U.S.S.G. §3B1.1(a) (R407:49-51; R.C.App. 47-49). Because the evidence did not in fact support that conclusion, the court erred in enhancing Raphael Clayton's offense level based on this ground.

A. Background

Whether Raphael Clayton was properly subject to an enhancer under U.S.S.G. §3B1.1 was strongly contested at the time of sentencing. Based on the government's version of the offense, the PSR recommended the four-level enhancement (PSR:20, 22). The PSR asserted that Raphael Clayton and Paul Moore "were the original organizers of the conspiracy, and both were responsible for leading the group," and that deals which followed referrals from Raphael Clayton and Paul Moore "were authorized and supervised" by them. (PSR:20). It further asserted that, when deals with other alleged coconspirators took too long, Raphael Clayton and Paul Moore "were notified and would address the problem,"and that once, when Rodney Davis refused to pay alleged coconspirator Steve Mayes for some cocaine in 1996, Raphael Clayton and Paul Moore attempted to mediate the situation and "explained the cocaine in question was ultimately their responsibility." (*Id.; see id.*:22).

The government's sentencing memorandum parroted these allegations, adding assertions that Raphael Clayton and Moore "dictated the price of cocaine," and "direct[ed]" others to transport and store drugs. (R319:9-10).

Raphael Clayton objected to the proposed enhancement on the grounds that the evidence failed to establish that he played any greater role than did any of the other participants. He noted that the defendants were connected primarily through their neighborhood, friendship and family ties, and that there was no evidence of any hierarchy, structure or control which defined their drug dealing activities. Although noting that the scope of the activity presented at trial was extensive, Clayton had little decision-making authority and no control over others. (Raphael Clayton's Objections to Presentence Report at 7-8; R406:20-21).

In overruling Clayton's objections and adopting the role enhancement, the District Court stated that, "from very early on Mr. Paul Moore and Mr. Raphael Clayton were together the driving force, the glue that kept this conspiracy together." The court further stated that, although they "had somewhat withdrawn from the day-to-day activities of this drug distribution conspiracy," they nonetheless "were very much there in the background, very much like a chairman of the board leaving it to the officers of a corporation to take care of the day-to-day activities. But any time there was a problem, any time that something needed attention, they were very much part and parcel." (R407:49-50; R.C.App. 47-48).

The court further asserted that Moore and Raphael Clayton had "achieved the

financial status that comes with being at the titular head of an organization such as this" and that their withdrawal from the activities of the conspiracy did not suggest that they "had left the pulse of the drug conspiracy that is the subject of this prosecution to others." (R407:50; R.C.App. 48). The court concluded:

> And whether it's the recruitment of others to participate, whether it's to ensure the traffic, whether it be drugs or currency, was flowing properly, they were indeed very much part and parcel of the activities that attended the distribution of these pernicious substances.
>
> And I have no difficulty concluding from the evidence that I've reviewed, the evidence that I heard during this two-week trial to conclude that, as I stated moments ago, the probation department got it right in adopting the government's position that both Mr. Raphael Clayton and Paul Moore were organizers of the activities involving at least five participants. And there's no question about the fact that there were many more than five participants here that pursuant to U.S. Sentencing Guidelines 3B1.1(a) a four-level adjustment is appropriate.

(R407:50-51; R.C.App. 48-49).

With the four-level enhancement for role in the offense, the court calculated Raphael Clayton's total offense level at 44, which results in a sentencing guidelines range of mandatory life imprisonment without parole despite Clayton's lack of any prior criminal convictions. U.S.S.G. ch.5, Part A (Sentencing Table). Without the enhancement, the resulting total offense level of 40, when combined with Clayton's criminal history category of I, results in a sentencing range of 292 to 365 months. *Id.*

B. Applicable Legal Standards and Standards of Review

Pursuant to 18 U.S.C. §3742(a), this Court must review a sentence imposed

under the Sentencing Guidelines to determine whether that sentence "was imposed in violation of law" or "was imposed as a result of an incorrect application of the Sentencing Guidelines." The validity of a District Court's sentence turns on whether "it results from a proper application of the Sentencing Guidelines to facts not found to be clearly erroneous." *United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir. 1989) (citations omitted).

The Sentencing Guidelines provide a range of offense level enhancements for defendants found to have played an aggravated role in a joint criminal activity. The defendant's role is assessed in light of all relevant conduct attributed to him and not simply on the basis of the offense of conviction. U.S.S.G. Ch 3, Part B, Introductory Commentary. A sentencing court may increase a defendant's offense level by four levels "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," U.S.S.G. §3B1.1(a), by three levels if the defendant was "a manager or supervisor (but not an organizer or leader)" of such an activity, U.S.S.G. §3B1.1(b), or by two levels if the defendant was an organizer, leader, manager, or supervisor in any less extensive criminal activity, U.S.S.G. §3B1.1(c).

These provisions, as well as others adjusting the defendant's offense level for a mitigating role in the offense, were included in the Guidelines due to concerns about relative responsibility. *See United States v. Vargas*, 16 F.3d 155, 160 (7th Cir. 1994); *United States v. Brown*, 944 F.2d 1377, 1381 (7th Cir. 1991); U.S.S.G. §3B1.1,

Background Note. "[T]hose who play an aggravating role in the offense are to receive sentences that reflect their greater contributions to the illegal scheme." *Brown*, 944 F.2d at 1381.

Many offenses, however, are committed by a single individual or by individuals of roughly equal culpability so that none of them would merit either an enhancement under this provision or a reduction under U.S.S.G. §3B1.2. *United States v. Brick*, 905 F.2d 1092, 1095 (7th Cir. 1990). *See also United States v. Schuh*, 289 F.3d 968, 972 (7th Cir. 2001) ("‹[A] defendant who had no greater role than any other participant cannot receive a §3B1.1 increase'" (quoting *United States v. Mustread*, 42 F.3d 1097, 1103 (7th Cir. 1994)); *United States v. Skinner*, 986 F.2d 1091, 1099 (7th Cir. 1993) (same); *Brown*, 944 F.2d at 1381-82.

Merely because a defendant's role is different, moreover, does not logically make it an aggravating role. "Individuals can play different but integral roles in drug transactions." *Brick*, 905 F.2d at 1095. Nor do mere labels or conclusions assist the assessment. *E.g., United States v. Graham*, 162 F.3d 1180, 1183 (D.C. Cir.1998); U.S.S.G. §3B1.1, App. Note 4.

The key determinant of the applicability of §3B1.1 is control over others. *See Vargas*, 16 F.3d at 160. "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." U.S.S.G. §3B1.1, App. Note 2; *see Schuh*, 289 F.3d at 972. The defendant must have had some "real and direct influence" on other participants

in the criminal activity. *Mustread,* 42 F.3d at 1103; *see United States v. Mankiewicz,* 122 F.3d 399, 405 (7th Cir. 1997).[3]

While control over others is an absolute prerequisite to enhancement under §3B1.1, it is not necessarily enough. *E.g., Mankiewicz,* 122 F.3d at 406 (enhancement inappropriate even though defendant recruited his father to help him); *Brown,* 944 F.2d at 1380 (isolated incident of directing another does not warrant enhancement).

The Guidelines commentary lists a number of factors which help clarify the defendant's role in the offense. These factors are relevant to distinguish a leadership or organizer role from a lesser role of a manager or supervisor. However, this Court also uses those factors to review whether the defendant could have played any aggravated role at all. *E.g., Schuh,* 289 F.3d at 972; *Mustread,* 42 F.3d at 1104. The relevant factors are: 1) the exercise of decision making authority; 2) the nature of participation in the commission of the offense; 3) the recruitment of accomplices; 4) the claimed right to a larger share of the fruits of the crime; 5) the degree of participation in planning or organizing the offense; 6) the nature and scope of the illegal activity; and 7) the degree of control and authority exercised over others. U.S.S.G. §3B1.1, App. Note 4; *Schuh,* 289 F.3d at 972; *Mustread,* 42 F.3d at 1104.

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[3] This Court at one time construed the Guidelines otherwise, holding that control over others was not a prerequisite to an adjustment under §3B1.1. *See United States v. Fones,* 51 F.3d 663, 666 (7th Cir. 1995). This Court recognized in *Fones,* however, that a 1993 amendment to Application Note 2 to §3B1.1 "effectively nullifie[d]" the Court's prior interpretation of the Guideline provision. 51 F.3d at 668-69.

Under the Guidelines, a "role in the offense" determination is a factual one which is reviewed for clear error. *Schuh*, 289 F.3d at 972. However, "whether those facts as determined by the District Court warrant the application of a particular guideline provision is purely a legal question and is reviewed *de novo* by [the appellate] court." *United States v. Garner*, 940 F.2d 172, 174 (6th Cir. 1991) (citations omitted); *see Braxton v. United States*, 500 U.S. 344, 350 (1991); *United States v. Hollis*, 230 F.3d 955, 958 (7th Cir. 2000).

C. The Evidence Did Not Support Enhancement Under U.S.S.G. §3B1.1

Applying the analysis required by this Court's decisions dictates that the facts here do not support an aggravated role enhancement under U.S.S.G. §3B1.1. Those facts demonstrate not that Clayton was a leader or organizer of the drug conspiracy, or even that he had some lesser responsibility as a manager or supervisor. Rather, after excluding the government's speculation and unsupported "spin" on the evidence, applying the factors as dictated by the Sentencing Guidelines and this Court reflects that Raphael Clayton was nothing more nor less than a co-equal participant with his codefendants, filling a different but roughly equivalent role in the criminal conduct.

1. The government's unsupported "spin" and speculation do not support the enhancement

The evidence in this case shows that much of the government's argument which was adopted by the PSR and ultimately the sentencing court, was nothing more

than speculation or unsupported "spin." Determinations under the Sentencing Guidelines, however, "must be based on reliable evidence . . . and not on impermissible speculation." *United States v. Stott*, 245 F.3d 890, 911-12 (7th Cir.), *cert. denied sub nom., Ford v. United States*, 534 U.S. 1070 (2001); *see United States v. Howard*, 80 F.3d 1194, 1202 (7th Cir.1996) ("We must be satisfied, however, that the calculation is based on reliable evidence; speculation and unfounded allegations will not do").

Contrary to the government's conclusory suggestion, there is no evidence that Raphael Clayton and Paul Moore "organized" the conspiracy or "were responsible for leading the group" (R319:9). None of the government's witnesses testified that that was the case, and the evidence does not otherwise support the claim. At the time Raphael Clayton is alleged to have begun selling cocaine, he was but a teenager. It was his father, Ellis Jordan, who possessed the cocaine seized pursuant to the search warrants in the early 1990's and who was convicted on those charges. The evidence reflects that it was Ellis Jordan, if anyone, who was the founding father of the charged conspiracy.

The fact is, however, that the evidence fails to reflect that there were any "organizers" of this conspiracy. None of the state's witnesses testified to how the conspiracy got started. At best, they testified to particular instances over a 10-year period when, they claim, Raphael Clayton or another of the defendants possessed or sold drugs. The record reflects, not the kind of structured organization contemplated

by the government's argument and the District Court's conclusions, but a loose-knit association of equals joined together by friendship, neighborhood, and family ties rather than by hierarchical control systems.

The government points to evidence that, on occasion, someone would call Raphael Clayton for cocaine but someone else would deliver it. The government speculates from this that Clayton must have "directed" others to engage in the risky behavior of delivering the drugs. (R319:9-10). However, nothing in the evidence suggests that the arrangements on any particular delivery, or on deliveries in general, were the results of "direction" by Clayton rather than mutual agreement among co-equal participants. Such evidence accordingly does not establish direction or control. *See Schuh*, 289 F.3d at 973 (mutually beneficial arrangements do not establish control).

According to the evidence, Clayton sometimes delivered the cocaine and sometimes others did so, with no evidence in the record to suggest why one did rather than the other. Just as in a legitimate small business, the fact that one co-equal partner usually takes the customers' orders while another usually makes the deliveries does not rationally support the conclusion that one is "directing" or "controlling" the other. Nor does the fact that one partner delivers on some occasions while the other delivers on other occasions rationally suggest such direction or control. In a drug conspiracy, as in any legitimate association or business, different but co-equal participants can have different functions at different times without making one the

leader or organizer of the others. *Brick*, 905 F.2d at 1095.

Nor is there any evidence supporting the government's assertion that Raphael Clayton "dictated the price of cocaine" for the conspiracy (R319:9). Certainly, the evidence reflects that, if someone came to him to purchase cocaine, he would set the price at which he would sell. However, the other alleged drug dealers did the same, and there is nothing in the evidence rationally supporting the claim that Raphael Clayton set the price at which anyone else would sell cocaine. Counsel can find no instance in the evidence in which an alleged co-conspirator deferred on a cocaine sale until he could get authorization from Raphael Clayton on the price or quantity. Setting one's own price for cocaine does not suggest leadership or control over others.

In *Mustread*, *supra*, for instance, this Court reversed a role enhancement which had been based in part upon the District Court's conclusion that Mustread "exercised total decision making authority over his marijuana purchases:"

> [T]hat Mustread "exercised total decision making authority over his marijuana purchases" cannot, by itself, support the conclusion that Mustread played an aggravated role. One can make decisions for oneself without having authority or influence over others. The trial judge's reasoning does support the conclusion that Mustread committed the crimes of which he was convicted, but it is a significant extension from that to the conclusion that Mustread had an aggravated role relative to other participants. Therefore, we conclude that the grounds given by the trial judge do not adequately support his decision to give Mustread a sentence adjustment.

42 F.3d at 1104. *See also Vargas*, 16 F.3d at 160 (supplying drugs and negotiating

the terms of their sale do not demonstrate that the defendant coordinated or orchestrated the activities of other participants).

The government made much below of the testimony that, as Raphael Clayton was withdrawing from the conspiracy to put more time into his real estate interests in the mid-1990's, he referred customers to others in the alleged conspiracy. The government deemed such referrals to be evidence of control, going so far as to claim that "[t]he deals which followed these referrals were authorized and supervised by Raphael Clayton and Moore." (R319:9).

Once again, however, the government's allegations are based on unsupported "spin" and speculation rather than the evidence. The acts of "referring" or "steering" a potential customer to a known drug dealer or acting as a middleman between buyer and seller do not support a role enhancement. Although filling an important role in the distribution of drugs, *Brick*, 905 F.2d at 1095, those merely directing buyers to sellers do not serve a management or leadership role, *United States v. Graham*, 162 F.3d 1180, 1183-84 (D.C. Cir. 1998) ("steerer" is not a manager or supervisor); *United States v. Sostre*, 967 F.2d 728, 733 (1st Cir. 1992) (same). Nor do those who merely act as middlemen to drug transactions. *Schuh*, 289 F.3d at 973; *United States v. Guyton*, 36 F.3d 655, 662 (7th Cir. 1994); *Brown*, 944 F.2d at 1381-82.

While one who acts as a "steerer" or middleman may qualify for a role enhancement in a given case, the grounds for such an enhancement must be found elsewhere. However, nothing in the evidence beyond the mere fact of the referrals

suggests that Clayton in any way "authorized" or "supervised" the subsequent deals.

Counsel can find no evidence reasonably indicating that Raphael Clayton maintained any level of control over the transactions following the alleged referrals. The best the government could argue below is that, when Raphael Clayton's former customers believed the subsequent transactions were taking too long, they would ask Clayton for help. Nothing, however, suggests that the requested assistance resulted from some organizational control Clayton had over others rather than an ability on his part to mediate disputes between the co-equal friends and/or family members who made up the alleged conspiracy. "Control" suggests an ability to dictate outcomes, while mediation to resolve disputes in a mutually beneficial way suggests just the opposite.

Nor is any level of control rationally shown by the incident in which Raphael Clayton and Paul Moore sought to resolve a dispute after Rodney Davis refused to pay Steven Mayes for a ½ kg of cocaine in April, 1996 (R392:88-95). Once again, attempting to resolve a dispute does not suggest any level of control over others. Contrary to the government's spin, moreover, the purported assertion by Clayton and Moore that the cocaine in question ultimately was their responsibility reflects, not an assertion of control over Mayes, but the type of "fronting" of cocaine which the government and its witnesses claimed was common among the alleged coconspirators. Only by impermissible speculation could that assertion be transmogrified into an assertion of control over Mayes and his transactions. *See*

Guyton, 36 F.3d at 662 (absent evidence of actual control, front arrangement insufficient to establish control of others necessary for role enhancement); *Brown*, 944 F.2d at 1386 (same).

There accordingly is no factual basis in the evidence rationally supporting the government's claim, and the District Court's finding, that Raphael Clayton occupied some organizational or leadership role in the conspiracy. While the government consistently labeled the conspiracy as the "Raphael Clayton organization" or the like, such mere allegation, unsupported "spin,"or speculation is no substitute for proof, even for purposes of sentencing. *E.g.*, *Howard*, 80 F.3d at 1202; *United States v. Ortiz*, 966 F.2d 707, 717 (1st Cir. 1992) (upward adjustment consistent with applicable burden of proof "must be based on more than the trial judge's hunch, no matter how sound his instincts or how sagacious his judgment").

2. The applicable legal standards dictate reversal of the role enhancer

While the specific reasons cited below for imposition of the enhancement thus do not hold water, application of the relevant factors dictated by this Court mandate the same result: the District Court erred.

a. Nature and scope of the illegal activity

. In assessing relative responsibility, the Court first should consider the "nature and scope of the illegal activity" for which Raphael Clayton was held responsible. U.S.S.G. §3B1.1, App. Note 4. In compliance with U.S.S.G. §1B1.3, the District

Court held Clayton responsible for all relevant conduct, and not just those drugs in which he was involved directly (R407:36-47; R.C.App. 34-45). *See United States v. Willis*, 49 F.3d 1271, 1274 (7th Cir.), *cert. denied sub nom, Epison v. United States*, 516 U.S. 846 (1995). Consistent with the Introductory Commentary to U.S.S.G. Ch. 3, Part B, therefore, assessment of Clayton's role must be made on the basis of the entire conspiracy. *See United States v. Damico*, 99 F.3d 1431, 1436-37 (7th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997).

In this context, the nature and scope of the illegal activity mitigates against a role enhancer here. The nature and scope of the illegal activity for which Clayton was held accountable was such that there was no manager or organizer.

The evidence in this case demonstrates, at best, a loose association of independent and roughly co-equal drug-dealers, bound together only by ties of neighborhood, friendship and family. With the possible exception of Steve Mayes' alleged relationship to Chris Moore, there were no "leaders," and there were no supplicants. Each sold to whomever he wanted and whenever he wanted. There was no evidence that any had to look to Raphael Clayton for permission. While Clayton and the dealers cooperated with one another for their mutual benefit, none was answerable to another. *See Mustread*, 42 F.3d at 1105 (no control or enhancement, even though Mustread got Figueroa to buy him a pager: "Figueroa was one of Mustread's independent suppliers and co-conspirators; he was never at Mustread's beck and call. Figueroa's buying Mustread a pager was merely a favor enabling both

to profit more efficiently from their crime").

b. Exercise of decision-making authority and nature of participation in the offense

As already discussed, there is no non-speculative evidence that Raphael Clayton exercised any decision-making authority over the drug trafficking conspiracy or the other drug dealers. *Compare United States v. Talladino*, 38 F.3d 1255, 1261 (1st Cir. 1994) (enhancement proper where defendant made "key strategic decisions" regarding what drugs would be manufactured and when). Indeed, counsel can find no evidence that Clayton dictated even a single decision for the conspiracy as a whole or for another coconspirator.

Clayton's alleged referrals to others in the conspiracy likewise do not support the enhancement. As already discussed, the types of referrals at issue in this case do not reflect control over others and thus do not support a role enhancement. *E.g.*, *Schuh*, 289 F.3d at 973. Nor is it sufficient that Raphael Clayton is alleged to have sold very large quantities of drugs to his alleged coconspirators and others. *E.g.*, *Mustread*, 42 F.3d at 1104 (even position as large scale distributor insufficient for enhancement absent influence or authority over purchaser).

Equally insufficient is the District Court's conclusion that Raphael Clayton was very important to the conspiracy (R407:49; R.C.App. 47 (finding that Clayton and Moore "were together the driving force, the glue that kept this conspiracy together")). The law is clear that being "essential" or "necessary" to a criminal

enterprise does not, without more, qualify one for a §3B1.1 enhancement. *E.g.*, *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1039 (9th Cir. 1997) ("Without a showing that the defendant had control over others, even a defendant with an important role in an offense cannot be deemed a manager" (citation omitted)), *cert. denied*, 522 U.S. 1135 (1998); *United States v. Parmelee*, 42 F.3d 387, 395 (7th Cir. 1994) (enhancement inappropriate even though pilot "certainly was an important player in the smuggling ring" because there was no evidence of control over codefendants), *cert. denied sub nom*, *Sobiecki v. United States*, 516 U.S. 812 (1995); *Sostre*, 967 F.2d at 733 ("steerer," though playing an "essential role" in drug deal, not manager or supervisor).

Because Raphael Clayton's participation in the offense did not involve the exercise of decision-making authority over other participants, this factor thus also mitigates against application of the role enhancement.

c. Recruitment of accomplices

There was no evidence that Raphael Clayton recruited accomplices, and the government made no allegation of such recruitment in the court below.

d. Claimed right to a larger share of criminal proceeds

There was no evidence that Raphael Clayton claimed a right to a larger share of the drug profits. Indeed, although the government's cooperating witnesses claimed that the defendants dealt far more than 300 kgs of cocaine at between $22,000 and $24,000 each (for a total of more than *$13 million dollars*), the government admitted

having no evidence whatsoever of unexplained wealth (R383:1348). The evidence demonstrated that Raphael Clayton in fact was legitimately employed. He purchased distressed inner-city homes for a couple thousand dollars, fixed them up, and then rented them out (*e.g.*, R383:1439-44). None were deemed appropriate for forfeiture as "drug proceeds" (R383:1329-30).

If, as the government contended below, Raphael Clayton was a leader or organizer of a conspiracy involving more than $13 million worth of cocaine so that he received the lion's share of the profits from those sales, the government would be able to find *some* evidence of unexplained wealth. It did not. To speculate, as the District Court did, that he in fact received a greater share of the proceeds thus is clear error (R407:50; R.C.App. 48). *E.g.*, *Ortiz,* 966 F.2d at 717(enhancement must be based on more than the court's "hunch").

e. Greater role in planning or organizing the drug conspiracy

There likewise was no evidence that Clayton had any greater role in planning or organizing the drug trafficking than did his alleged co-conspirators. Again, the government's evidence reflected, not a structured, hierarchical organization, but a loose cooperative of friends and family, sometimes working together for their mutual benefit, and sometimes acting on their own. Assuming the accuracy of the government's witnesses, Raphael Clayton no doubt planned his own drug transactions, but there is no evidence in the record that he planned or organized those of

others.

f. Degree of Control of Authority Over Others

Finally, as already discussed, Raphael Clayton did not exercise any degree of control or authority over others in the drug conspiracy for which he was held liable.

* * *

In the end, applying the role enhancement against Raphael Clayton was unsupported by the record and thus clearly erroneous. Clayton's role in the conspiracy may have been different in some ways from that of his co-conspirators, but that does not make him more culpable than they are. Rather than a hierarchical organization lead by Clayton, the record reflects that all members of this loose, cooperative venture were of roughly equal rank in culpability. The four-level role enhancement against Mr. Clayton accordingly must be reversed.

D. The Error Was Not Harmless

The District Court assessed the four-level role enhancement which, when combined with Raphael Clayton's base offense level of 38 and a two-level increase for possession of a weapon, resulted in a total offense level of 44. As Clayton had no prior criminal convictions, his criminal history category was I. The resulting sentence was mandatory, life without parole, and that is what the District Court imposed (R407:80; R332).

Had the District Court not erred in imposing the role enhancement, Clayton's

total offense level would have been 40 rather than 44. When combined with a criminal history category I, an offense level of 40 results in a guidelines sentencing range of 292 to 365 months. While still a lengthy sentence, anything within that range would have provided Clayton hope for release someday, something he is denied under the current, erroneous sentence. The error thus clearly was not harmless.

CONCLUSION

For these reasons, as well as for those in the Joint Brief, Raphael Clayton respectfully asks that the Court reverse his conviction and grant him a new trial. Should the Court not grant such relief, Clayton asks that the Court vacate the sentence imposed and remand for resentencing.

Dated at Milwaukee, Wisconsin, November 17, 2003.

Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 9,160 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

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Robert R. Henak

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CIRCUIT RULE 30(c) STATEMENT

The items required by Circuit Rules 30(a) & (b) for purposes of Raphael Clayton's individual brief have been bound with that brief.

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Robert R. Henak

CIRCUIT RULE 31 STATEMENT

The materials contained in the appendix are not available in non-scanned PDF format

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Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2003, I caused 15 hard copies of the Separate Brief and Appendix of Defendant-Appellant Raphael S. Clayton to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of that document and one copy of the Brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Government, AUSA Daniel H. Sanders, Eastern District of Wisconsin, 517 East Wisconsin Ave., Milwaukee, WI 53202

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