

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

**Re: Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle
Ending May 1, 2018**

Dear Judge Pryor:

This letter offers the comments of the Federal Defender Sentencing Guideline Committee on the Commission's proposed priorities for the 2017-2018 amendment cycle. We appreciate that the Commission has proposed several priorities related to issues Defenders have requested that the Commission consider. We have previously commented on many of the issues raised in the Commission's proposed priorities and incorporate those submissions by reference.¹ In addition, as raised in our annual letter to the Commission (attached in Appendix), we continue to urge the Commission to expand its priorities this year to include other possible amendments to the guidelines, including mitigating role. The remainder of this letter offers a few additional comments on the proposed priorities and requests that the Commission reconsider making amendment 798 (definition of crimes of violence) retroactive and allowing career offenders to benefit from the retroactive application of the crack cocaine and drugs minus-2 amendments.

¹ See, e.g., Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (July 25, 2016) (commenting on proposed priorities for 2017 amendment cycle); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Feb. 20, 2017) (*Meyers Letter Feb. 2017*) (commenting on proposed amendments for 2017); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n (Mar. 10, 2017) (*Meyers Letter Mar. 2017*) (commenting on MDMA/Ecstasy, synthetic cathinones/cannabinoids, THC, and revising how Commission measures drug harms).

I. Proposed Priorities Nos. 1, 3, 4: Potential Statutory Changes and Amendments to the Guidelines

The Commission has proposed continuing work that may result in recommendations to Congress for statutory changes to sentencing law. We are heartened that the Commission continues to support possible legislative reforms that would address unnecessarily harsh and rigid sentences. Given the current political environment, however, we believe that the Commission would be most effective to focus on improvements it is empowered to make without Congressional action.

Specifically, Defenders recommend that the Commission consider changes to the guidelines that would serve the Commission's core statutory purpose.² In addition to the important changes to the guidelines that the Commission is already considering, Defenders encourage the Commission to direct its resources to a few areas it is already authorized to address, including:

- encourage consideration of relevant individual characteristics of the person being sentenced, including his or her strengths and needs, such as a disadvantaged upbringing, lack of youthful guidance, family ties, drug addiction, mental health issues, needs for training, therapy, or other treatment;
- de-emphasize criminal history, particularly since it has a disproportionate impact on racial minorities (e.g., misdemeanors and petty offenses have been used to “manage various disadvantaged populations”³), and scholars have recommended reducing or

² Section 991(b) of Title 28 identifies the purposes of the Sentencing Commission:

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

³ Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, Oxford Handbooks Online 3 (2016). See also Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, XL Fordham Urb. L. J. 101, 147 (2013) (discussing how “a young black male in a poor urban neighborhood out in public at night has a predictable chance of being arrested for and ultimately convicted of a minor urban offense of some kind,

eliminating criminal history rules that have a disparate impact on people of color.⁴ This is especially appropriate and important because the available research shows that “incremental increases in sentence set by the recidivist sentencing premium are unlikely to lead to substantial long-term reductions in crime and recidivism rates”;⁵

- eliminate unnecessary specific offense characteristics that are not directly connected to the acts of the defendant and the offense of conviction (e.g., enhancements based on “jointly undertaken activity” when the defendant was not convicted of conspiracy or dismissed and acquitted conduct and enhancements included in §2D1.1, which were not required by a congressional directive) and increased sentences that were based upon issues du jour (e.g., increase in penalties for hydrocodone offenses, §2D1.1(c), specific offense characteristic for alien smuggling offenses involving unaccompanied minors, §2L1.1(b)(4));
- change the drug quantity table to focus on role in the offense rather than drug type and quantity or at least eliminate the weight of inactive ingredients mixed with certain drugs;⁶

whether he commits any criminal acts or not”); Robert Boruchowitz, et al., Nat’l Assoc. of Crim. Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts* (2009); Alexandra Natapoff, *Why Misdemeanors Aren’t So Minor*, Slate, Apr. 17, 2012 (discussing major consequences of misdemeanors), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html; Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Courts*, 34 *Cardozo L. Rev.* 1751, 1754, 1803-1810 (2013) (discussing incentives for persons charged with misdemeanors to plead guilty so that they can return to their families and jobs rather than remain in jail pending a trial and elevated risk of noncitizens pleading guilty to misdemeanor offenses).

⁴ Richard S. Frase et al., Robina Institute of Criminal Law & Criminal Justice, *Criminal History Enhancements Sourcebook* 2, 26, 105 (2015) (recommending that sentencing commissions “examine the racial impact of all components of that system’s criminal history score; discussing how criminal history enhancements “have a strong disparate impact on racial and ethnic minorities, and undercut the goal of making sentence severity proportional to offense severity” and how “high degrees of criminal history enhancement magnitude will add substantially to the problem of racial disproportionality in prison populations”).

⁵ Lila Kaemian, *Assessing the Impact of a Recidivist Sentencing Premium on Crime and Recidivism Rates in Previous Convictions at Sentencing*, Ch. 10, 244 (Julian Roberts & Andreas von Hirsch, eds. 2010) (quoted in Richard S. Frase et al., Robina Institute of Criminal Law & Criminal Justice, *Criminal History Enhancements Sourcebook* 107 (2015)).

⁶ See Addendum to Statement of Molly Roth Before the U.S. Sentencing Comm’n, Washington, D.C., at 507 (Mar. 13, 2014).

- change the mens rea for jointly undertaken activity to require actual knowledge rather than reasonable foreseeability.

In addition, Defenders continue to encourage the Commission to amend the career offender guideline to focus on individuals who have previously been convicted of crimes of violence and federal drug trafficking offenses.⁷ The Commission should do so by adhering to the specific directive in 28 U.S.C. § 994(h) and thus eliminate state drug offenses from the definition of “controlled substance offense.” Section 994(h) directs the Commission to “assure that the guidelines specify a sentence of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and

(1) has been convicted of a felony that is

(A) a crime violence; or

(B) an offense described in section 401 of the Controlled Substance Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substance Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

Even though § 994(h)(2), which defines the predicate offenses calling for an increased sentence, specifies the exact same offenses as in § 994(h)(1), which defines the offense of conviction that triggers an enhanced sentence, the Commission chose a different interpretation for prior convictions, requiring application of the career offender guideline based on prior *state* drug offenses. While the Commission may have had discretion to make that choice, it also has discretion to revisit that choice.

⁷ See, e.g., Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, Washington, D.C., at 3-6 (June 15, 2015); Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, Washington, D.C., at 31-33 (July 23, 2012).

Counting state drug offenses, even though they are not the type of offenses Congress intended to trigger a sentence at or near the maximum term authorized,⁸ greatly increases sentencing disparity. As the Commission acknowledged thirteen years ago in its Fifteen Year report, the use of prior drug trafficking convictions to define career offenders has a significant impact on Black defendants.⁹ That impact has not declined. In FY 2016, although Black people constituted 20% of individuals sentenced under the guidelines,¹⁰ they were nearly sixty percent of persons classified as career offenders.¹¹ And prior state drug offenses, which frequently serve as a predicate career offender conviction, have the highest rate of disparities that are not explained by the rate of criminal offending or other factors.¹² Rather than perpetuate that disparity, the Commission should amend the guideline to limit predicate drug convictions to those specified by Congress in 28 USC § 994(h)(2)(B).

Counting state drug offenses on par with violent offenses is also inconsistent with the Commission's findings on recidivism. The Commission found that persons who committed a violent instant offense or prior offenses "generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future."¹³ In light of those findings, persons with prior state drug offenses do not warrant the sizable increase in sentence under the career offender guideline.

⁸ If Congress had intended state drug offenses to count, it knew how to say so, see 18 U.S.C. § 924(e)(2)(A)(ii), but it did not.

⁹ USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133-34 (2004) (in 2000, "Black offenders constituted just 25 percent of the offenders sentenced under the guidelines," but were "58 percent of the offenders subject to the severe penalties required by the career offender guideline").

¹⁰ USSC, *2016 Sourcebook of Federal Sentencing Statistics*, tbl. 4.

¹¹ USSC, *Quick Facts: Career Offenders* (June 2017).

¹² See Ashley Nellis, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 9-10 (2016) (discussing studies finding high rates of disparities for drug arrests and that disparities for drug crimes are "especially severe . . . despite the evidence that whites and blacks use drugs at roughly the same rate"). See also NAACP, *Criminal Justice Fact Sheet* (2017) ("African Americans and whites use drugs at similar rates, but the imprisonment rate of African Americans for drug charges is almost 6 times that of whites."), <http://www.naacp.org/criminal-justice-fact-sheet>; Samuel Gross, et al., National Registry of Exonerations, *Race and Wrongful Convictions* 16 (2017) ("The number of African American drug dealers on the street could conceivably be proportional to their number in prison, but it is highly unlikely since most users get drugs from members of their own race.").

¹³ USSC, *Report to the Congress: Career Offender Sentencing Enhancements* 26 (Aug. 2016).

If the Commission declines to follow the specific directive in § 994(h) and believes that state drug offenses should be counted as predicates for the career offender guideline, it should at least amend the guideline to count only “serious drug offenses” as defined in 18 U.S.C. § 924(e)(2)(A)(ii) (requiring a maximum term of imprisonment of ten years or more). In our experience, the vast majority of people subject to the career offender guideline based on prior drug convictions were previously convicted of state, not federal, drug offenses. Thus, eliminating state offenses from the definition of “controlled substance offense” would largely eliminate the unwarranted disparities noted above.

II. Proposed Priority No. 2: Continued Study of Offenses Involving MDMA/Ecstasy/THC, and Synthetic Cathinones and Cannabinoids

Defenders are pleased that the Commission plans to continue its examination of MDMA/Ecstasy and to also study tetrahydrocannabinol (THC), particularly in light of current research that shows the guideline-specified ratios for those drugs are too high. In addition, Defenders support the Commission’s proposed priority to study “possible approaches to simplify the determination of the most closely related substance under Application Note 6 of the Commentary to §2D1.1. As it undertakes its study, we encourage the Commission to set ratios for synthetic cannabinoids and cathinones and to treat pure synthetics differently than mixtures.

A. MDMA and THC

As discussed in our March 2017 letter to the Commission, and as will be discussed in our August 2017 comments, scientific research shows that the current 1:500 MDMA-to-marihuana ratio seriously overstates the harms associated with MDMA.¹⁴ And, as Judge Middlebrooks found, the 1:167 ratio used to convert THC into marihuana has no scientific basis so it needs to be revised.¹⁵

B. Direct Harms

Defenders have long advocated that the most fair and just approach to guideline-recommended sentences for drug trafficking offenses is role-based.¹⁶ If, however, the Commission remains committed to recommending sentences based on drug type and quantity, we urge the Commission to adopt a uniform harms-based theory on the relation of drug type and weight to

¹⁴ *Meyers Letter Mar. 2017*, at 23-27.

¹⁵ *Id.* at 32 (discussing opinion in *United States v. Hossain*, 2016 WL 70583, at *5-6 (S.D. Fla. Jan. 5, 2016)).

¹⁶ Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 4 (Mar. 21, 2011); Addendum to Roth Statement, *supra* note 6, at 2-3 (discussing that use of drug quantity as a proxy for role in the offense has not fulfilled the congressional objective of targeting major drug traffickers).

the statutory purposes of sentencing. Specifically, as outlined in more detail previously, Defenders suggest the Commission look to the direct harms caused by the amount of drugs trafficked by individual defendants.¹⁷ In contrast to the mix of congressional directives, statutory quantity thresholds, and ad hoc analyses that have informed current guideline recommended drug trafficking penalties, a direct harms approach can and should rely on empirical evidence such as public health and medical information, dosage amounts, research and data.

In measuring drug harms, we strongly encourage the Commission to not rely on anecdotal information or subjective impressions, such as some of the testimony presented at the April 2017 hearing.¹⁸ Commission experience with reports of “crack babies,” the neurotoxicity of MDMA, “meth mouth,” and other drugs described at one time as the worst drug ever,¹⁹ should result in healthy skepticism about impressions based on sensationalized news reports, or on the extreme cases – often involving multi-drug use or pre-existing health problems – that appear in emergency rooms or coroners’ reports.

C. Application Note 6

Defenders applaud the Commission for proposing to study the guidance it offers regarding closely related substances. Specifically, Defenders urge the Commission to amend Application Note 6 to focus on medical and public health harms, such as addiction potential, toxicology (both neurotoxicity and other organ damage), overdose risk, and other measures of direct harms (*e.g.*,

¹⁷ *Meyers Letter Mar. 2017*, at 6-7, 18-19.

¹⁸ *See, e.g.*, Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 156 (Apr. 18, 2017) (*Transcript April Hearing*) (testimony of Osvaldo Tianga describing users of “flakka” - a synthetic cathinone - as “zombies” who run “around naked, acting very psychotic, paranoid”). *See also* Statement of Captain Osvaldo Tianga Before the U.S. Sentencing Comm’n, Washington, D.C., at 1 (Apr. 18, 2017).

A scholar who receives funding from the National Institute of Drug Abuse, however, has noted how “[s]tories of horrific crimes resulting from drug use have been propagated by the media for over a century,” and discusses how the adverse effects of flakka have been exaggerated. Joseph Palamar, *Flakka is a Dangerous Drug, But It Doesn’t Turn You into a Zombie*, *The Conversation* (Nov. 28, 2016), <https://theconversation.com/flakka-is-a-dangerous-drug-but-it-doesnt-turn-you-into-a-zombie-69533>. *See also* Natashia Swalve and Ruth DeFoster, *Framing the Danger of Designer Drugs: Mass Media, Bath Salts, and the “Miami Zombie Attack,”* 43 *Contemporary Drug Problems* 103 (2016) (research finding that “media coverage of the Miami Zombie Attack framed a novel drug in incomplete and problematic terms” and “dramatically underrepresented the role of mental health in the attack and led to inadequately informed health legislation”).

¹⁹ *See, e.g.*, USSC, *2002 Report to the Congress: Federal Cocaine Sentencing Policy* 21-22 (May 2002) (noting that researchers found that the effects of crack cocaine were not as “devastating as originally believed”).

potency) rather than factors such as “chemical structure” or “central nervous system” effects.²⁰ The Commission amended Application Note 6 in 2004 after becoming “aware that courts employ a variety of means to determine the applicable guideline range for defendants charged with offenses involving controlled substances not specifically referenced in §2D1.1, resulting in disparate sentences.”²¹ The purpose of the amendment was “to provide a more uniform mechanism for determining sentences in cases involving analogues or controlled substances not specifically referenced” in §2D1.1. The wide disparity in cases involving synthetic cathinones and cannabinoids shows, however, that the 2004 amendment did not accomplish its purpose.²² Defenders believe that guidance based on harms provides sufficient flexibility to address a wide-variety of substances, while also promoting uniformity in application.

D. Set Ratios for Synthetic Cathinones/Cannabinoids and Account for Mixtures

In addition to amending Application Note 6, the Commission should simplify the guidelines, promote proportionality, and eliminate the need to litigate the marijuana equivalency for synthetic cathinones and cannabinoids by specifying a ratio supported by well-established empirical evidence as suggested by Dr. Gregory Dudley.²³

Moreover, as Dr. Dudley testified, these new specified ratios should not treat a mixture of a synthetic drug the same as its pure form.²⁴ Dr. Dudley explained that powder cannabinoids—the form in which the drug is typically imported—are more akin to pure THC, while cannabinoids sprayed onto herbs or other inert matter are more akin to marijuana.²⁵ With cannabinoids mixed with herbs, the active ingredient is only a small portion—typically one to two percent—of the total weight. Notwithstanding that evidence, some courts are finding that THC is the most analogous drug to synthetic cannabinoids, and are then using the marijuana equivalency for pure THC for the total weight of the sprayed “spice” product. Such an approach can result in treating one dose of sprayed “spice” as equivalent to 1000 to 2000 doses of marijuana.²⁶ This is an alarming result that undermines the effort to treat drugs not referenced in the guidelines the same as the most closely related substance listed in the guidelines.

²⁰ *Meyers Letter Mar. 2017*, at 19-20.

²¹ USSC, App. C, Amend. 667, Reason for Amendment (Nov 1, 2004).

²² *Meyers Letter Mar. 2017*, at 15-18, n. 57.

²³ Statement of Gregory B. Dudley, Ph.D., Before the U.S. Sentencing Comm’n, Washington, D.C., at 4-5 (Apr. 18, 2017).

²⁴ *Transcript April Hearing*, at 215-220.

²⁵ *Id.*

²⁶ *Meyers Letter Mar. 2017*, at 13.

During the April hearing, the Commission heard testimony that uneven application of synthetic cannabinoids to inert substances was typical of the “spice” manufacturing process, and that the potency, and even the chemical composition, of “spice” products varies among brands, batches, and even within the same bag. As reflected in a question by Commissioner Reeves at the hearing,²⁷ this lack of uniformity undoubtedly creates uncertainty and risks for consumers, who may be unable to determine the precise substances and dosages they are consuming.

While these considerations raise dilemmas and dangers for drug consumers, on balance, they do not justify treating pure and diluted forms of a drug the same under the guidelines, nor, certainly, treating diluted forms more severely than pure forms. For most drugs, pure forms are associated with a greater risk of addiction, and a greater likelihood of overdose and death. The current guidelines distinguish between pure (or actual) forms of several drugs, such as methamphetamine, marijuana, and PCP, and treat the pure form much more severely.

Current guideline commentary recognizes that the purity of a drug “may be probative of the defendant’s role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution . . . possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs.”²⁸ For this reason, guideline commentary indicates that pure forms, not diluted forms, may warrant more severe sentences. Evidence before the Commission affirms this pattern for synthetic drugs, which are often imported in pure forms by the top-level domestic distributors.²⁹

E. Deterrence

Finally, as the Commission undertakes its study of MDMA, THC, and synthetic cathinones and cannabinoids, it should keep in mind the well-established research that increasing penalties does not provide an additional deterrent effect.³⁰ We raise this here because we recognize and are

²⁷ *Transcript April Hearing*, at 217.

²⁸ USSG §2D1.1, comment. (n.27(C)).

²⁹ *Transcript April Hearing*, at 134 (Shontal Linder, Ph.D.).

³⁰ See e.g., National Institute of Justice, *Five Things About Deterrence* (Sept. 2014) (“certainty of being caught is a vastly more powerful deterrent than the punishment”), <https://nij.gov/five-things/pages/deterrence.aspx>; Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Just.* 199, 201 (2013) (“[T]here is little evidence that increases in the length of already long prison sentence yield general deterrent effects that are sufficiently large to justify their social and economic costs.”); Gary Kleck & J.C. Barnes, *Deterrence and Macro-Level Perceptions of Punishment Risks: Is There a “Collective Wisdom”?*, 59 *Crime & Delinq.* 1006, 1031-33 (2013); Brennan Center for Justice, *What Caused the Crime Decline?* 26 (Feb. 2015) (“The National Academy of Sciences (NAS) concluded that ‘insufficient evidence exists to justify predicating policy choices on the general assumption that harsher punishments yield measurable deterrent effects.’”).

sympathetic to the desire to “do something” to address the production and trafficking of synthetic drugs that harm lives. For example, a question was raised during the April hearing before the Commission about adding an “aggravating factor” for synthetic drugs.³¹ The research, however, makes clear that increasing recommended sentences for synthetic drugs is unlikely to advance the goal of reducing production, trafficking, and harmful use of synthetic drugs. Instead, it carries with it the direct and indirect costs from more prison time for non-violent offenses without providing any likely progress toward the desired outcome.

III. Proposed Priority No. 5: Continuation of Recidivism Study Including Consideration of Guideline Amendments for “First Offenders” and Possible Recommendations to Reduce Costs of Incarceration and Overcapacity of Prisons and to Promote Effectiveness of Reentry Programs

A. “First Offenders”

Defenders are pleased that the Commission proposes to continue its consideration of possible guideline amendments for “first offenders,” including not only lower ranges, but also increased availability of alternatives to incarceration. Defenders provided extensive comment on this issue in response to proposed amendments last year, and we encourage the Commission to review that letter.³²

Critical to any guideline amendments for “first offenders” is a definition of “first offender.” Defenders believe the term should include not only individuals with zero criminal history points and no prior contact with the criminal justice system, but individuals who have zero criminal history points and prior convictions that are never counted in computing criminal history points under Chapter Four: misdemeanor and petty offenses listed in §4A1.2(c); foreign convictions, §4A1.2(h); tribal convictions, §4A1.2(i); expunged convictions, §4A1.2(j); certain military convictions, §4A1.2(g).³³

The available evidence from the Commission’s recidivism research in 2004 and 2017 shows that public safety is not undermined by including within the definition of “first offender” individuals with zero criminal history points who also have convictions excluded from counting under §4A1.2 (c). The Commission’s March 2017 data analysis found that persons with zero criminal history points and no prior contact with the criminal justice system had lower rearrest rates than

³¹ *Transcript April Hearing*, at 144.

³² *Meyers Letter Feb. 2017*, at 2-18.

³³ If the Commission excludes other categories of offenses in the future, such as offenses committed prior to age 18, those also should not preclude a person from “first offender” status under the guidelines.

those with zero points and some prior contact.³⁴ But the Commission did not distinguish between individuals with zero criminal history points and a prior conviction for a minor offense that never counts in the criminal history score and those with zero criminal history points and a prior conviction that did not receive points due to the age of the conviction. Thus, the Commission's 2004 data still has an important role to play and shows that individuals who had convictions under §4A1.2(c) only had a reconviction recidivism rate of 2.9%, which was substantially similar to the 2.5% rate for individuals with no prior convictions.³⁵ Moreover, in the 2017 analysis, the Commission "did not find substantial differences between" persons with zero criminal history points who did or did not have prior contact with the criminal justice system.³⁶ The most common post-offense release for both groups was a public order offense.³⁷

B. Reduce Costs of Incarceration and Overcapacity of Prisons

The Commission's proposal to develop recommendations for using information from its recidivism study to "reduce costs of incarceration and overcapacity of prisons" is critically important. Recent research from state practices shows a "weak relationship between incarceration and crime reduction, and highlights proven strategies for improving public safety that are more effective and less expensive than incarceration."³⁸ Among the practices that policymakers can adopt to reduce crime without the use of incarceration is to "[i]ncrease the availability and use of alternative-to-incarceration programs."³⁹

IV. Proposed Priority No. 6: Implementation of the Bipartisan Budget Act of 2015⁴⁰

If the Commission proceeds with this priority, it will be the third time the Commission has considered the Bipartisan Budget Act of 2015 since it was signed into law on November 2, 2015.⁴¹ As previously noted, Defenders have no objection to the Commission's earlier proposal

³⁴ USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* 9 (Mar. 2017).

³⁵ USSC, *Recidivism and the "First Offender": A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate* 14, n.27 & 28 (2004).

³⁶ *The Past Predicts the Future*, *supra* note 34, at 9.

³⁷ *Id.* at 8.

³⁸ Vera Institute of Justice, *Overview of The Prison Paradox: More Incarceration Will Not Make Us Safer* (July 2017), <https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer>.

³⁹ *Id.* at 3.

⁴⁰ 82 Fed. Reg. 28381 (June 21, 2017).

⁴¹ The Commission first addressed this Act in its proposed amendments for 2016, by proposing simply amending Appendix A to reference §2X1.1 in addition to §2B1.1. 81 Fed. Reg. 2295, 2299. The Commission did not propose adding a new specific offense characteristic or any other changes to

to amend Appendix A to reference the three statutory provisions amended by the Bipartisan Budget Act not only to §2B1.1, but also to §2X1.1.⁴² No other changes, however, are necessary.⁴³ The current guidelines at §2B1.1, §3B1.3, and §3B1.1 are more than adequate to guide courts toward severe sanctions for a broad range of offenses, including those addressed in the Bipartisan Budget Act.⁴⁴ No evidence supports the need for amending the guidelines to address changes made by the Bipartisan Budget Act of 2015. In the past decade, no one has even been convicted of violating 42 U.S.C. § 1011.⁴⁵ In addition, neither the government nor sentencing courts have indicated that the guidelines are too low in cases prosecuted under 42 U.S.C. §§ 408 or 1383a. In the last three years almost 60% of the 703 defendants sentenced for a conviction under 42U.S.C. § 408 received sentences within the guideline recommended range, with only 1.6% of defendants sentenced above the guideline recommended range.⁴⁶ Similarly, of the 96 defendants convicted under 42 U.S.C. § 1383a(a) and sentenced under §2B1.1 in the last three years, 39.6% received sentences within the guideline recommended range and 2.2% received a sentence above the guideline recommended range.⁴⁷ Absent compelling evidence of the need to specifically address the changes to these statutes made by this Act, it seems particularly unwise to further complicate the already unduly lengthy and complex guideline at §2B1.1.⁴⁸

V. Proposed Priority No. 7: Study of Findings and Recommendations by the Commission's Tribal Issues Advisory Group⁴⁹

The Commission proposes studying the findings and recommendations contained in the May 2016 Report issued by the Commission's Tribal Issues Advisory Group, specifically including (a) revising the way in which tribal court convictions are addressed in Chapter Four of the

Chapters Two or Three of the guidelines manual. *Id.* Following comment by members of Congress, the Justice Department and the Inspector General of the Social Security Administration, the Commission deferred action on the Act. *See* Remarks for Public Meeting, Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n, Washington, D.C., Apr. 15, 2016.

⁴² *See Meyers Letter Feb. 2017*, at 44.

⁴³ *Id.* at 44-47.

⁴⁴ The Bipartisan Budget Act amended three statutes addressing fraudulent claims under certain Social Security programs, 42 U.S.C. §§ 408, 1011, & 1383a.

⁴⁵ USSC, *FY 2007-2016 Monitoring Dataset*.

⁴⁶ USSC, *FY 2014-2016 Monitoring Dataset*.

⁴⁷ *Id.*

⁴⁸ *See Meyers Letter Feb. 2017*, at 45.

⁴⁹ 82 Fed. Reg. 28381 (June 21, 2017).

guidelines, and (b) providing a definition of “court protection order” that would apply throughout the guidelines.

Tribal convictions. Defenders continue to have concerns about the practices in sentencing Native defendants in federal court, and remain adamantly opposed to counting tribal convictions in the criminal history calculation under §4A1.2.⁵⁰ Defenders, however, support TIAG’s recommendation, and the Commission’s 2017 proposed amendment, to add a non-exhaustive list of factors that courts may consider when deciding “whether or to what extent, an upward departure based on a tribal court conviction is appropriate.”⁵¹

Court Protection Orders. Defenders support, as recommended by TIAG and proposed by the Commission, amending the guidelines to define “court protection order” to mean “‘protection order’ as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).”⁵² Consistent with the TIAG’s recommendation, however, Defenders urge the Commission not to make any additional changes to the guidelines regarding protection orders at this time, and without first collecting and studying data “[g]iven the absence of reliable data and the real potential for disparate impact on Indian defendants.”⁵³

Young People. Defenders also encourage the Commission to expand the proposed priority regarding the TIAG report, and consider amendments responsive to the TIAG’s recommendation that the guidelines make changes to better address young people who are prosecuted in federal court.⁵⁴ Federal jurisdiction over Indian young people presents important issues and is too frequently overlooked.⁵⁵ We urge the Commission to consider following the recommendations of TIAG to both amend §5H1.1 (Age), and add a departure to Chapter 5, Part K “concerning juvenile and youthful offenders.”⁵⁶

⁵⁰ *Meyers Letter Feb. 2017*, at 19-20. TIAG also recommended that “tribal convictions not be counted under U.S.S.G. §4A1.2.” USSC, *Report of the Tribal Issues Advisory Group (TIAG Report)*, at 12 (May 16, 2016).

⁵¹ 81 Fed. Reg. 92003, 92009 (Dec. 19, 2016); *TIAG Report*, at 12-13.

⁵² 81 Fed. Reg. 92003, 92010 (Dec. 19, 2016); *TIAG Report*, at 14.

⁵³ *TIAG Report*, at 15.

⁵⁴ *TIAG Report*, at 33-34.

⁵⁵ *See Meyers Letter Feb. 2017*, at 19, n.67.

⁵⁶ *TIAG Report*, at 33-34.

VI. Proposed Priority No. 8: Examination of Criminal History Guidelines⁵⁷

We are pleased the Commission remains interested in examining some of the criminal history rules that regularly lead to unjust, and unnecessarily lengthy and expensive sentences for some of our clients.

A. Single Sentence Rule for Multiple Convictions Resulting from the Same Criminal Conduct

1. Prior Federal and State Convictions Resulting from the Same Criminal Conduct

Defenders support the Commission’s proposed priority to study how the guidelines account for prior federal and state convictions resulting from the same criminal conduct under §4A1.2(a)(2). The issue warrants attention, as the current rule can lead to significant increases in a defendant’s criminal history category—even elevating a defendant to career offender status—without good reason. *See United States v. Marcoccia*, No. 16-2781, 2017 WL 1399690 (3d Cir. Apr. 19, 2017). In *Marcoccia*, the defendant had two prior felony convictions: one a state conviction for possession of methamphetamine and the other a federal conviction for conspiracy to possess with intent to distribute in excess of 50 grams of methamphetamine.⁵⁸ The state and federal charges were contained in separate charging documents, and Mr. Marcoccia was sentenced for the two convictions on different days.⁵⁹ As a result, the “unambiguous text of the guidelines,” deemed these two separate prior felonies, and Mr. Marcoccia a “career offender.”⁶⁰ The career offender enhancement “increased dramatically” the guideline recommended range from 27-33 months to 151-188 months.⁶¹

Concurring in the *Marcoccia* judgment, Judge Krause wrote separately “to highlight the concerns raised by the application of §4A1.2(a)(2) in this situation” where “state and federal sentences are counted separately when they result from convictions charged in separate indictments and sentenced on separate days—even when those convictions are based on the very same conduct that happened to be charged by separate sovereigns.”⁶² Judge Krause (a) noted that the history of the guideline indicates this application “may not have been specifically intended by

⁵⁷ 82 Fed. Reg. 28381 (June 21, 2017).

⁵⁸ *Marcoccia*, 2017 WL 1399690, at *1.

⁵⁹ *Id.*

⁶⁰ *Id.* at *2.

⁶¹ *Id.* at *1 & n.3.

⁶² *Id.* at *5 (Krause, J., concurring).

the Sentencing Commission,” and (b) provided three reasons the Commission should consider how §4A1.2(a)(2) applies in these circumstances.⁶³

Unintended Application. As Judge Krause explained, before Amendment 709, effective November 1, 2007, prior “state and federal sentences arising from the same criminal conduct” would “have been counted as a single sentence because they would have been deemed ‘related’ sentences.”⁶⁴ Responding to concerns that the “related” analysis was “too complex” and caused “a significant amount of litigation,” the Commission “amended the Guidelines to eliminate the ‘related’ sentencing provision.”⁶⁵ In this effort to “simplify” the guideline, Judge Krause observes the Commission “may have swept within its ambit certain sentences that the Commission did not specifically consider, and on reflection, would not treat as separate sentences.”⁶⁶

Reasons to Amend the Guideline. First, Judge Krause notes that counting federal and state convictions resulting from the same criminal conduct as separate sentences for criminal history purposes conflicts with both Congressional mandate and Commission policy regarding unwarranted disparity, reasonable uniformity and proportionality.⁶⁷ Second, Judge Krause reasons that the current rule is not consistent with the career offender enhancement directive, and “allows the draconian effect of §4B1.1 to reach even two-time offenders, in effect, redefining career offender status.”⁶⁸ Third, Judge Krause explains that “treating these sentences as separate also has implications for the reality and the appearance of fundamental fairness in sentencing.”⁶⁹ Due Process “concerns are triggered where the serendipity of two sovereigns charging and sentencing the same conduct on different days results in the mandatory application of the career offender enhancement under the Guidelines, which then serve as the ‘benchmark’ and ‘framework’ for sentencing.”⁷⁰

⁶³ *Id.* at *5-*7.

⁶⁴ *Id.* at 5. The guidelines then defined “related” cases as those with no intervening arrest that “resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.” §4A1.2, comment. (n.3) (2006).

⁶⁵ *Marcoccia*, 2017 WL 1399690, at *5 (Krause, J., concurring) (quoting USSG App. C, Amend. 709 (Nov. 1, 2007)).

⁶⁶ *Id.* at 6.

⁶⁷ *Id.* at 6 (noting the remedial limitations of departures and variances, particularly when the career offender enhancement is at issue).

⁶⁸ *Id.* at 7.

⁶⁹ *Id.*

⁷⁰ *Id.*

2. Multiple Convictions from Different State Jurisdictions for the Same Criminal Conduct

We ask the Commission to consider expanding the priority to include all scenarios where multiple jurisdictions obtain convictions for the same conduct, not just when the multiple convictions arise from federal and state convictions. Our preliminary inquiry to Defenders about problems with federal and state convictions for the same criminal conduct not only confirmed that the problem addressed in *Marcoccia* has arisen in other cases, but also revealed a related problem of multiple convictions from different courts within the same state for the same criminal conduct. For example, Defendants with Texas priors are subject to additional criminal history points because felonies and misdemeanors, for the same criminal conduct, are usually charged in different charging instruments, assigned to different courts and sentenced on different dates.⁷¹ Under Texas law, state district courts have original jurisdiction over felony offenses and, with only two narrow exceptions, they have no jurisdiction over misdemeanors.⁷² Misdemeanors fall under the original jurisdiction of the state county courts and the justices of the peace.⁷³ As a consequence, felony and misdemeanor offenses in Texas arising from the same arrest for the same criminal conduct are usually charged in different charging instruments, assigned to different courts, and as a consequence, sentenced on different dates.

By contrast, in neighboring Oklahoma, state district courts have original jurisdiction over felonies and misdemeanors.⁷⁴ Accordingly, felony and misdemeanor offenses in Oklahoma that stem from the same arrest are usually charged in the same charging instrument and assigned to one district court. With this unified approach, where the charges are adjudicated in one court, when they result in convictions, the sentences are almost always imposed on the same day by the Oklahoma district court.

Under the current rules of §4A1.2(a)(2), defendants from Texas and Oklahoma may have very different criminal history scores, not because their prior convictions are any different, but because of the way misdemeanors and felonies are charged and processed under state law. As with the federal and state convictions for the same criminal conduct addressed in *Marcoccia*, it seems this application of §4A1.2(a)(2) is an unintended consequence of the amendment in 2007, and the same reasons exist for the Commission to remedy the problem.

⁷¹ In one Defender case, for example, the defendant had previously been arrested and charged in separate courts in Texas for resisting arrest (misdemeanor) and assault on public servant (felony) for the same conduct. He received 1 criminal history point for each conviction.

⁷² Tex. Crim. Proc. Code Ann. art. 4.05.

⁷³ Tex. Crim. Proc. Code Ann. arts. 4.07, 4.11.

⁷⁴ Okla. Const. art. VII, §7.

B. Convictions for Offenses Committed Prior to Age 18

Defenders support the Commission’s proposed priority to study the treatment of convictions for offenses committed prior to age 18. As Defenders previously have explained in more detail, we urge the Commission to exclude all prior offenses committed before the age of 18 from the criminal history calculation, career offender guideline, and other guideline recommended enhancements.⁷⁵ A primary reason for excluding such offenses comes from the science of brain development: young people are less culpable than their adult counterparts because their brains have not yet fully developed.⁷⁶ As the Commission recognized in its recent report, *Youthful Offenders in the Federal System*, “researchers agree that the prefrontal cortex is not complete by the age of 18” and “that development continues into the 20s.”⁷⁷ Under the current criminal history rules, however, prior offenses committed by people when they were under 18, and thus less culpable than their adult counterparts, are treated on par with prior offenses committed by adults.⁷⁸

At a minimum, the Commission should, as proposed last year, exclude prior juvenile adjudications from the criminal history calculation.⁷⁹ The reasons for this are numerous. In addition to reduced culpability due to incomplete brain development, other reasons juvenile adjudications should be excluded from the criminal history calculation include: (a) juvenile adjudications are less reliable than adult criminal convictions; (b) the length of a juvenile “sentence” is a poor proxy for the seriousness of the offense, and not comparable to the length of sentence imposed for an adult conviction; and (c) excluding prior juvenile adjudications may ameliorate the disparate impact of the criminal history rules on racial minorities.⁸⁰

Even better than excluding juvenile adjudications from the criminal history calculation, however, would be excluding all offenses committed prior to age 18, regardless of whether they resulted in adjudications in juvenile court, or convictions in adult court. In addition to addressing the concerns discussed above, excluding all offenses committed before the age of 18 avoids the unwarranted disparity generated by relying on state policies and practices—that vary

⁷⁵ *Meyers Letter Feb. 2017*, at 20-34.

⁷⁶ *Meyers Letter Feb. 2017*, at 21-22.

⁷⁷ USSC, *Youthful Offenders in the Federal System*, at 7 (May 2017).

⁷⁸ The guidelines currently provide different decay rules for some—but not all—juvenile adjudications. See §4A1.2(d) & (e). These different decay periods are important, but do not adequately address the differences between offenses committed prior to age 18, and those committed by adults.

⁷⁹ 81 Fed. Reg. 92003, 92011 (Dec. 19, 2016); *Meyers Letter Feb. 2017*, at 21-29.

⁸⁰ *Meyers Letter Feb. 2017*, at 22-29.

tremendously, and shift regularly—regarding the adult criminal prosecutions of young people for offenses committed before age 18.⁸¹

C. Revocation Sentences

Defenders also support the Commission’s proposed priority to study the treatment of revocation sentences under §4A1.2(k). Defenders encourage the Commission to adopt the amendment proposed last year, which would simplify the criminal history rules by amending §4A1.2(k) to provide that revocations of probation, parole, supervised release, special parole, or mandatory release are not counted for purposes of counting criminal history points and do not affect the applicable time period for counting prior sentences.⁸² As addressed in more detail in a prior submission, the current rule is unnecessarily complicated and can have a devastating and unjust impact of defendants in a number of different ways, including (a) deeming defendants “career offenders” on the basis of old convictions that would not have otherwise counted; (b) rendering defendants ineligible for safety valve relief; and (c) elevating the criminal history category based on very old convictions.⁸³ In addition, many good reasons support excluding revocation sentences from the criminal history calculation, including: (a) revocations are not necessarily criminal in nature and are often for technical violations; (b) because length of sentence imposed is used as a proxy for the seriousness of the offense, aggregating revocations with the original sentence artificially inflates the severity of a prior conviction; (c) counting revocation sentences in the criminal history score exacerbates unwarranted disparity because revocation practices and rates vary widely between jurisdictions; and (d) excluding revocation sentences may ameliorate the disproportionate impact of the criminal history rules on racial minorities.⁸⁴

D. Time Served

Defenders support the Commission’s proposed priority to study a possible amendment of §4A1.3 to account for instances in which the time actually served was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score. Defenders prefer that the Commission adopt time-served as the rule for measuring criminal history. Until that happens, Defenders encourage the Commission to adopt, as proposed last year, an amendment to §4A1.3 to provide explicit guidance in the commentary that a downward departure from a defendant’s criminal history category may be warranted in a case in which the period of

⁸¹ *Meyers Letter Feb. 2017*, at 29-34.

⁸² 81 Fed. Reg. 92003, 92012 (Dec. 19, 2016); *Meyers Letter Feb. 2017*, at 37-42.

⁸³ *Meyers Letter Feb. 2017*, at 37-39.

⁸⁴ *Meyers Letter Feb. 2017*, at 39-41.

imprisonment actually served by the defendant – “time served” – was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.⁸⁵

E. Under a “Criminal Justice Sentence”

Defenders encourage the Commission to expand the scope of its proposed priority regarding the criminal history rules to also include the study of the rule at §4A1.1(d) and Application Note 4, that assigns an additional two points if the defendant is under “any criminal justice sentence” at the time defendant committed the instant offense. In our experience, the rule sweeps too broadly, unnecessarily and unjustly increasing the criminal history score in a variety of scenarios. For example, we regularly see situations where our clients, following state convictions are deported while on supervision, only to have a violation warrant issued for failure to report. Under this scenario the client’s term of supervision may have expired, but because the violation warrant is outstanding the client is assigned an additional two points.⁸⁶ We also regularly see these two points applied to our clients’ criminal history score where the term of supervision for a state offense is due to end before the date of the instant federal offense, but just before the term of supervision expires, a violation warrant is issued for failure to pay a fee. While the guidelines specifically exclude from the two point rule someone who is under a sentence to pay a fine,⁸⁷ the violation warrant for failure to pay a fee, even after the time of supervision has expired, can unnecessarily and unjustly elevate our clients criminal history category and recommended guideline range.

VII. Proposed Priority No. 9: Continuation of Study of Alternatives to Incarceration and Consolidating Zones B and C

Defenders agree that studying alternatives to incarceration is an important priority. We recommend that the Commission amend the guidelines to encourage alternatives to incarceration for many groups beyond Zones B and C. Available data shows that the rise in imprisonment for federal drug offenses has resulted in high costs and low returns.⁸⁸ And the emphasis on drug

⁸⁵ 81 Fed. Reg. 92003, 92013 (Dec. 19, 2016); *Meyers Letter Feb. 2017*, at 42-44.

⁸⁶ The guidelines define “criminal justice sentence” to include: “A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.” §4A1.1, comment. (n.4); *See also* §4A1.2(m) (same).

⁸⁷ §4A1.1, comment. (n.4) (“a sentence to pay a fine, by itself, would not be included”).

⁸⁸ Letter from Adam Gelb, Director, *Public Safety Performance Project of The Pew Charitable Trusts, to the Honorable Chris Christie, President’s Commission on Combating Drug Addiction and the Opioid Crisis*, at 2 (June 19, 2017), <http://www.pewtrusts.org/~media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf>. *See also* The PEW Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return* (2015),

quantity has resulted in long prison sentences for persons at the lower-levels of drug trafficking.⁸⁹ Lessons can be learned from state sentencing reform efforts, which have found that “lengthy prison sentences for drug offenders have shown a poor return on taxpayer investment,” while “alternatives such as drug courts and stronger community supervision have proven more effective.”⁹⁰ In fact, “[a] systematic review of drug courts in 30 states concluded that a combination of comprehensive services and individualized care is an effective way to treat offenders with serious addictions.”⁹¹

The testimony presented at the Commission’s hearing in April 2017 also shows the need for the Commission to amend the guidelines to encourage alternatives to incarceration for a wider range of individuals than those who would fall within an expansion of Zones B and C. Both Ms. Price and Dr. Taxman’s testimony explained why the Commission should support drug court programs and other alternatives that provide treatment in a therapeutic community rather than a prison setting.⁹²

And other research confirms that “Drug Courts have been shown to have the greatest effects for high-risk participants who were relatively younger, had more prior felony convictions, were diagnosed with antisocial personality disorder, or had previously failed in less intensive dispositions. In one meta-analysis, the effect size for Drug Court was determined to be twice the magnitude for high-risk participants than for low-risk participants.”⁹³

The Conviction and Sentence Alternatives Program (CASA) in the Central District of California is a model program that the Commission should support. As Judge Gee suggested, and Judge Sorokin agreed, at the Commission’s hearing, “the guidelines should include language that

http://www.pewtrusts.org/~media/assets/2015/08/federal_drug_sentencing_laws_bring_high_cost_low_return.pdf.

⁸⁹ Gelb Letter, *supra* note 88, at 2-3.

⁹⁰ *Id.* at 10.

⁹¹ *Id.*

⁹² *Transcript April Hearing*, at 22-26, 32-33, 41 (Vanessa Price; Faye Taxman, Ph.D.).

⁹³ National Ass’n of Drug Court Professionals, *Research Update on Adult Drug Courts* 3 (2010) (citations omitted), http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Court%20-%20NADCP_1.pdf. See also Douglas Marlowe, Chief of Science, Law and Policy, National Drug Court Institute, *Drug Court Practitioner Fact Sheet: Targeting the Right Participants for Adult Drug Courts* 8 (2012) (“Evidence suggests that drug courts can potentially double their effectiveness and cost-effectiveness by focusing their efforts on this high-risk/high-need target population.”), http://www.ndci.org/sites/default/files/nadcp/Targeting_Part_I.pdf.

recognizes programs like [CASA].”⁹⁴ Defenders agree with Judge Gee’s proposal that §5B1.1 be amended to make clear that a probationary sentence may be imposed for offenses falling within Zones C and D “pursuant to a court-authorized diversion program that provides intensive supervision.”⁹⁵

Defenders also have several other recommendations to encourage alternatives of incarceration:

- Expand Zone B by 2 levels to an 18-24 month range rather than simply consolidate Zones B and C. Such an expansion would increase the number of individuals likely to benefit from Zone B Sentencing Options, while also protecting public safety.
- Delete §5C1.1, comment. (n.7), which discourages the use of substitutes for imprisonment for those in criminal history category III or above even if the individual falls within Zone B.
- Amend §5C1.1 (Imposition of a Term of Imprisonment) to create a rebuttable “presumption” of an alternative sentence, excluding from this presumption only those individuals whose offense of conviction resulted in serious bodily injury as defined in §1B1.1, comment. (n.1(L)).

VIII. Proposed Priority No. 11 – Miscellaneous Guideline Application Issues, including Acceptance of Responsibility

We are pleased that the Commission plans to reconsider the rule on acceptance of responsibility and are hopeful the Commission will make changes so that persons who contest relevant conduct are not penalized with loss of acceptance points. The Defenders’ February 2017 comments recommended specific changes to §3E1.1, which would remove all references to relevant conduct and focus only on the offense of conviction.⁹⁶ We also explained the problems that arise from the adjustment for acceptance of responsibility turning on the court’s assessment of whether the challenge is “frivolous” or “non-frivolous,” particularly given the due process implications and the chilling effect such an assessment has on a lawyer’s ethical responsibilities.⁹⁷

A recent Seventh Circuit case demonstrates how the current version of §3E1.1 puts defense counsel between a rock and a hard place in deciding how to challenge relevant conduct. Ayiko Paulette pled guilty and was sentenced to 300 months in prison for conspiracy to commit drug

⁹⁴ *Transcript April Hearing*, at 62, 88.

⁹⁵ *Id.* at 62.

⁹⁶ *Meyers Letter Feb. 2017*, at 48-58.

⁹⁷ *Id.* at 54-57.

trafficking. The defense objected to the counting of certain drug transactions because they were outside the scope of the conspiracy, but conceded that the objection was “general in nature, [and] meant to preserve this record for appellate purposes.”⁹⁸ “He was clearly trying to walk a fine line: he did not want to risk losing credit for acceptance of responsibility under U.S.S.G. § 3E1.1 by challenging relevant conduct too vigorously.”⁹⁹ The district court overruled the objection based upon allegations in the indictment. On appeal, the court acknowledged that “[d]rug type and quantity” and the “alleged beginning and ending dates of a charged conspiracy” were not elements of the offense.¹⁰⁰ The court, however, rejected the defense argument that the district court did not adequately explain why certain drug deals “were relevant to the charged conspiracy” because defense counsel did not “support his position with evidence or even legal analysis” or “challenge the accuracy of the drug quantity assigned by the probation officer.”¹⁰¹ If, however, defense counsel had mounted such a factual or legal challenge that the court rejected, under the current interpretation of §3E1.1, the defendant likely would have been deprived of a reduction in sentence for acceptance of responsibility.¹⁰²

IX. Other Proposed Priorities

The Commission requests comment “on any other issues that interested persons believe the Commission should address during the amendment cycle ending May 1, 2018.” We have incorporated some of those ideas in the discussion above. In addition, Defenders’ annual letter to the Commission, which is attached, sets forth other issues we would like the Commission to address, including amending the mitigating role guideline to ensure that it is applied consistently and more often. Finally, Defenders here recommend that the Commission make retroactive the

⁹⁸ *United States v. Paulette*, 858 F.3d 1055, 1058 (7th Cir. 2017).

⁹⁹ *Id.* at 1061.

¹⁰⁰ *Id.* at 1059.

¹⁰¹ *Id.* at 1061.

¹⁰² *See, e.g., United States v. Cedano-Rojas*, 999 F.2d 1175, 1882 (7th Cir. 1993) (“if a defendant denies the [relevant] conduct and the court determines it to be true, the defendant cannot then claim that he has accepted responsibility for his actions”); *United States v. Berthiaume*, 233 F.3d 1000, 1004 (7th Cir. 2000) (upholding district court’s decision that defendant “frivolously” contested drug quantity calculation because court rejected the challenge to the reliability of the government’s witnesses); *United States v. Jones*, 539 F.3d 895, 897-98 (8th Cir. 2008) (defendant’s unsuccessful challenge to credibility of cooperating witness was sufficient to deny acceptance of responsibility adjustment even though appellate court acknowledged that the witness was “not a strong witness” and his “testimony as to drug transactions amounts and frequency was confusing and often internally inconsistent”).

new definition of crime of violence and repeal the limitation on retroactivity of the drug amendments for career offenders.¹⁰³

A. Retroactivity of New Definition of Crime of Violence

The Commission undertook a substantial analysis to redefine the term “crime of violence” in §4B1.2 with the intent that it “focus on the most dangerous repeat offenders.”¹⁰⁴ The Commission, however, opted not to make this new definition retroactive even though many people sentenced under the old definition are still in prison, and would no longer be considered “dangerous repeat offenders.”¹⁰⁵

The Commission’s lack of sufficient data and inability to determine which definition of a crime of violence may have been used to enhance a sentence or assess whether a predicate offense may count under the new definition, should not serve as a bar to retroactivity. While the Commission has often relied on its ability to identify those affected by an amendment in assessing whether it should be retroactive, no statute compels such analysis.

Neither the Commission, courts, nor probation officers need to shoulder the burden of identifying individuals eligible for retroactive relief of a guideline amendment. Federal Defenders in many districts already have reviewed old cases that may have benefited if the Supreme Court had decided that the residual clause in §4B1.2 was unconstitutionally vague.¹⁰⁶ Those individuals form a portion of those potentially eligible for relief if the Commission opts to make the new crime of violence definition retroactive.

The Commission also should not be concerned about possible litigation over whether a particular offense falls categorically within the definition of an enumerated offense. Many of those issues have already been resolved through litigation under the current sentencing regime. That there

¹⁰³ USSG App. C, Amend. 706 (Nov. 1, 2007), Amend 782 (Nov. 1, 2014).

¹⁰⁴ USSG App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016).

¹⁰⁵ *Id.* See USSC, Chief Judge Patti B. Saris, U.S. Sentencing Comm’n, Remarks for Public Meeting 4 (Jan. 8, 2016) (discussing that Commission staff did not have sufficient information to “identify cases in which the residual clause alone qualified an offender for the career offender provision”).

¹⁰⁶ For example, in one district, the Defender office filed post-*Johnson* career offender claims and have identified 28 clients who clearly would not fall within the career offender guideline under the new definition of crimes of violence because their prior convictions were for offenses such as burglary, larceny from the person, simple assault, involuntary manslaughter, and fleeing to elude. Numerous other Defender offices had filed petitions under 28 U.S.C. § 2255, which were dismissed after the Supreme Court determined that the residual clause in the career offender guideline was not void for vagueness. *Beckles v. United States*, 137 S. Ct. 886 (2017). In those cases, the nature of the predicate offense falling under the residual clause is plainly available and Defenders can identify whether the offense now falls within the enumerated offenses in §4B1.2(a)(2).

may be a few remaining open issues to litigate in the future should not preclude a person serving a lengthy prison sentence from having a court review the prior conviction and determine if a lesser sentence is appropriate.

B. Retroactivity of Crack Cocaine and Drugs Minus 2 Amendments for Career Offenders

In addition to making retroactive the crime of violence amendment, Defenders request that the Commission modify §1B1.10(a)(2)(B), and §1B1.10, comment. (n.1) to make persons to whom the career offender guideline applied eligible for a sentence reduction based on amendments 706 and 782, even if they received a departure or variance. The Honorable John J. McConnell, Jr. requested that the Commission consider such a change for the 2017 amendment cycle.¹⁰⁷ The Commission's Career Offender report shows that many of the individuals who met the criteria for the career offender guideline were sentenced to terms of imprisonment that would have applied under the drug guidelines.¹⁰⁸ Consistent with those findings, the Commission should rescind the "legal fiction that anyone who could have been sentenced as a career offender, was so sentenced, and is therefore ineligible for a sentence reduction."¹⁰⁹

Lastly, the case of a Defender client in the District of Massachusetts demonstrates how the changes we recommend here are sorely needed. In 2006, Miguel Almenas, convicted of distributing crack cocaine, was determined to be a career offender based upon state convictions for resisting arrest and possession of cocaine with intent to distribute. His guideline range was 262-327 months. He received a sentence of 192 months – 43 months below the guideline range.¹¹⁰ Because he fell within the career offender guideline at the time of his original sentencing, even though he would not fall within the current definition of career offender, he was deemed ineligible for a sentence reduction based upon amendments 706 and 782. If he were charged today, his guideline range would be 57-71 months. He is now 56-years-old and, absent Commission intervention to allow a sentence reduction, faces another almost two years in prison.

¹⁰⁷ Letter from the Honorable John J. McConnell, Jr., U.S. District Judge, Rhode Island, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (Nov. 3, 2015).

¹⁰⁸ USSC, *Report to the Congress: Career Offender Sentencing Enhancements*, at 3 (Aug. 2016).

¹⁰⁹ Judge McConnell Letter, *supra* note 107, at 1.

¹¹⁰ *United States v. Almenas*, 553 F.3d 27, 30 (1st Cir. 2009).

Honorable William H. Pryor

July 31, 2017

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X. Conclusion

As always, we appreciate the opportunity to submit comments on the Commission's proposed priorities. We look forward to continuing to work with the Commission on matters related to federal sentencing policy.

Very truly yours,

/s/ Marjorie Meyers

Marjorie Meyers

Federal Public Defender

Chair, Federal Defender Sentencing

Guidelines Committee

Enclosures

cc (w/encl.): Rachel E. Barkow, Commissioner
Hon. Charles R. Breyer, Commissioner
Hon. Danny C. Reeves, Commissioner
J. Patricia Wilson Smoot, Commissioner *Ex Officio*
Zachary Bolitho, Commissioner *Ex Officio*
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Appendix

**FEDERAL DEFENDER
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May 30, 2017

Honorable William H. Pryor, Jr.
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002-8002

Re: Proposed Priorities for 2017-2018 Amendment Cycle

Dear Judge Pryor:

Pursuant to 28 U.S.C. § 994(o), this letter identifies the priorities that Defenders believe the Commission should address in the upcoming amendment cycle.

Last year, the Commission proposed several important amendments to the guidelines in areas including first offenders/alternatives to incarceration, tribal issues, youthful offenders, criminal history issues, and acceptance of responsibility. We were pleased to hear from the Commission that the “data analysis, legal research, and public comment” on these proposed amendments during the past year “should provide [the Commission] a sound basis for considering guideline amendments as early as possible during the next amendment cycle.”¹ We encourage the Commission to include these issues in its priorities during the upcoming amendment cycle. And as the Commission moves forward with its multi-year study of synthetic cannabinoids, cathinones, and MDMA/Ecstasy, Defenders continue to believe that the Commission should adopt a consistent harms and dosage-based approach to determining the appropriate guidelines for these substances and for future analogs and synthetics that will inevitably enter the drug market. In addition, we urge the Commission to address other improvements to the guidelines that Defenders have suggested in recent years.²

¹ USSC, Remarks of Circuit Judge William H. Pryor, Jr., Acting Chair of U.S. Sentencing Comm’n, Public Hearing on Alternatives to Incarceration & Synthetic Drugs, at 2 (April 18, 2017).

² Rather than repeat the issues here, we refer the Commission to previous letters. *See* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm’n, at 58-59 (Feb. 20, 2017) (suggestions include modifying the enhancements under §2A3.5(b)(1) (for committing a sex offense while in failure to register status), and eliminating the

Mitigating Role

Defenders also encourage the Commission to further study how the mitigating role adjustment is applied and to amend it to ensure it is doing the work the Commission intended when it amended the guideline in 2015. In our experience, the amendment has not remedied the two primary concerns the Commission sought to address in 2015: “mitigating role is applied inconsistently and more sparingly than the Commission intended.”³

Following an earlier study, the Commission explained the reason for the 2015 amendment to §3B1.2:

Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended. In drug cases, the Commission’s study confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions (and that rates of application vary widely from district to district). For example, application of mitigating role varies along the southwest border, with a low of 14.3 percent of couriers and mules receiving the mitigating role adjustment in one district compared to a high of 97.2 percent in another. Moreover, among drug defendants who do receive mitigating role, there are differences from district to district in application rates of the 2-, 3-, and 4-level adjustments. In economic crime cases, the study found that the adjustment was often applied in a limited fashion. For example, the study found that courts often deny mitigating role to otherwise eligible defendants if the defendant was considered “integral” to the successful commission of the offense.⁴

computer enhancement at §2G1.3(b)(3)); Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm’n, at 2-11, 32 (Mar. 10, 2017) (suggestions include revisiting the manner in which the guidelines measure drug harms, and changing the ratios for MDMA and THC); Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n (May 26, 2016) (suggestions include narrowing the career offender guideline, modifying the reasonably foreseeable standards and heightening the mens rea requirement for jointly undertaken activity, widening the range of mitigating role adjustments, lowering the mitigating role cap in §2D1.1 and establishing a mitigating role cap in §2B1.1, deleting or modifying Ch. 5, Pt H (Specific Offender Characteristics), making the changes to the definitions of crimes of violence and the immigration guideline retroactive, and allowing persons sentenced under the career offender guideline to be eligible for relief under §1B1.2). *See also* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n (June 15, 2015); Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n (May 12, 2014).

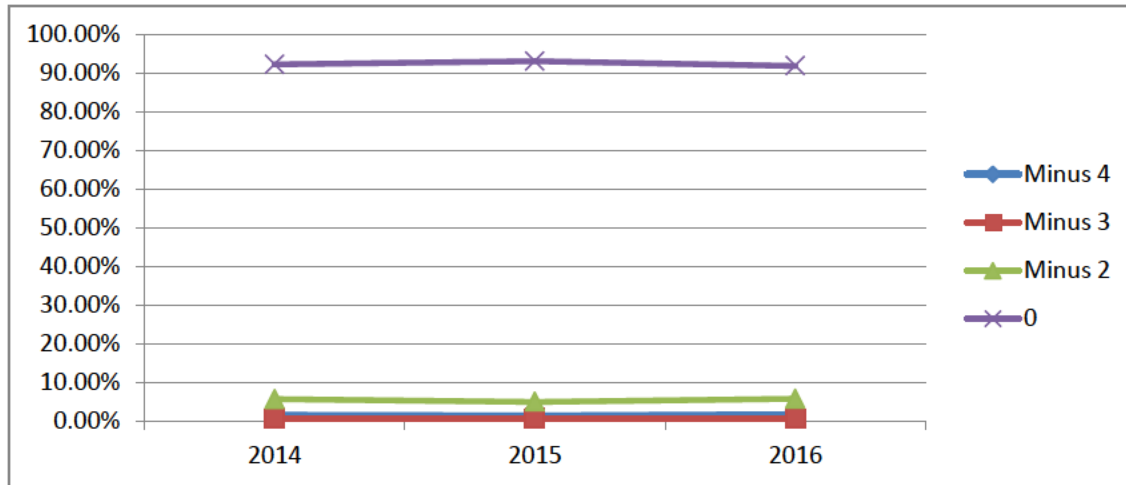
³ USSG, App. C, Reason for Amendment 794 (Nov. 1, 2015).

⁴ *Id.*

The 2015 amendment to §3B1.2, however, has not achieved its objective of more frequent and consistent application of the mitigating role adjustment. It is still infrequently and inconsistently applied, and some courts continue to interpret the guideline to preclude a minor or minimal role adjustment for virtually all couriers and mules.

As Table I shows, the frequency of application of §3B1.2 has not increased since before the amendment.⁵

Table I – Defendants Receiving Mitigating Role Adjustment FYs 2014-2016



In addition, data from FY2016 demonstrates the inconsistent application of the mitigating role adjustment and raises significant concerns that warrant the Commission undertaking another study of §3B1.2.⁶ Table II shows that application of the mitigating role adjustment in drug trafficking cases continues to vary along the southwest border districts where many of the people prosecuted served as drug couriers or mules.

⁵ USSC, FY 2014 – FY 2016 Monitoring Dataset

⁶ USSC, FY 2016 Monitoring Dataset

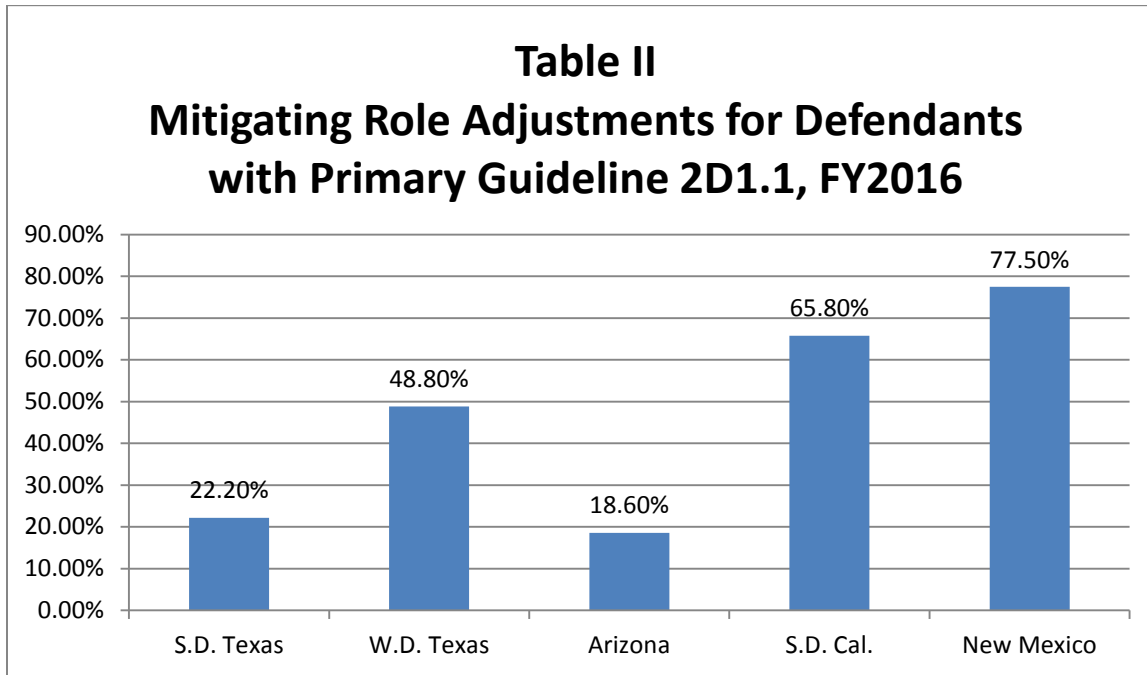
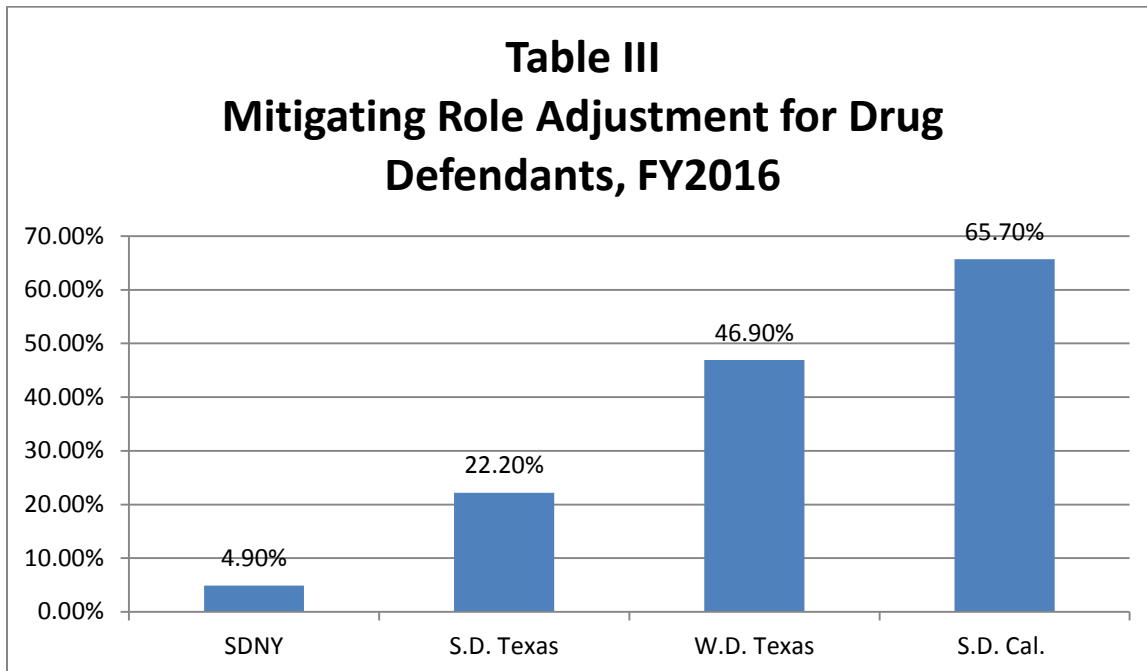


Table III also shows a significant difference in application of the mitigating role adjustment in the four districts with the largest number of drug trafficking cases in FY2016.⁷



⁷ Includes defendants whose primary guidelines were §2D1.1, §2D1.2, §2D1.5, §2D1.6, and §2D1.8.

While Defenders do not have access to the data to show how many individuals sentenced for drug trafficking were couriers and mules, our experience is that application of the role adjustment continues to vary along the southwest border, with few couriers and mules receiving the adjustment in Arizona and the Southern District of Texas compared to a much greater number receiving the adjustment in other districts. Couriers and mules who bring drugs into the United States in the McAllen Division often receive an adjustment for mitigating role whereas persons engaged in similar criminal activity in other divisions, such as Brownsville, do not. In a recent Brownsville case, a backpacker who was paid \$250 for transporting marijuana with other individuals was denied the role adjustment. The government objected to the adjustment “based on the fact that he was bringing narcotics in the United States.”⁸ The court denied the adjustment, finding “that his role was a critical function in bringing the drugs in the United States.”⁹ For a prosecutor to object and a court to deny a role adjustment because a backpacker plays a “critical function” in bringing drugs into the United States is contrary to the Commission’s view that “[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative.”¹⁰ Appellate review alone has not adequately or consistently corrected the problem.¹¹ In fact, the Fifth Circuit appears to limit the reduction to a defendant who is only held accountable for the drugs that he personally transported.¹² It is

⁸ Transcript of Sentencing at 3-4, *United States v. Chanes-Hernandez*, No. 1:15-CR-00730 (S.D. Texas, Brownsville, Jan. 25, 2016). See also Transcript of Sentencing at 3-4, *United States v. Juan Carlos Castillo-Garza*, No. B-16-1009 (S.D. Texas, Brownsville, March 21, 2017) (prosecutor objected to mitigating role adjustment for a courier on the basis that “[h]e was essential to the operation of the drug trafficking organization”; court denied the role adjustment because the Fifth Circuit has said to get an adjustment “you must be peripheral to the advancement of the illicit activity” and “he was dead center of the peripheral – activity”).

⁹ *Chanes-Hernandez*, at 4.

¹⁰ USSG §3B1.2, comment. (n.3(C)).

¹¹ See *United States v. Chanes-Hernandez*, 671 Fed. Appx. 266 (5th Cir. 2016) (rejecting defense argument that court gave controlling weight to a single factor (critical role of bringing drugs into the United States) in denying the role adjustment: “We do not view the district court’s brief statement as encompassing all of its findings and conclusions and excluding all others. The district court was not required to state on the record how it weighed each of the many considerations set forth in § 3B1.2.”). See also *United States v. Torres-Hernandez*, 843 F.3d 203, 209 (5th Cir. 2016) (district court expressly stated that “getting the drugs into the United States is a critical role and is not a minor role by any means,” yet the appellate court found the district court weighed the other factors even though it did not mention those factors on the record). But see *United States v. Gutierrez*, 671 Fed. Appx. 649 (9th Cir. 2016) (sentence vacated and remanded “[b]ecause it appears that the district court denied the minor role adjustment based on Gutierrez’s essential role in the offense and did not consider all of the now-relevant factors”); *United States v. Francisco Javier Sanchez-Villarreal*, 2017 WL 2240297 (5th Cir. 2017) (sentence vacated and remanded because “court’s explanation at sentencing for its denial of the mitigating-role reduction strongly suggests that the court made outcome determinative its finding that Sanchez-Villarreal’s role was ‘critical.’”).

¹² See *Torres-Hernandez*, 843 F.3d at 208 (citing U.S.S.G. § 3B1.2, cmt. n.3(A) to deny role reduction for defendant held accountable for relevant conduct).

incumbent on the Commission to amend the guideline to offer more concrete guidance on application of §3B1.2.¹³

The current version of §3B1.2 also continues to place an unfair burden on the defendant of proving the mitigating role adjustment in cases that obviously involve multiple participants, but only the defendant or persons playing a similar role are identifiable. At least one court has opined that in courier cases, the facts necessary to assess the five factors listed in the commentary to §3B1.2 are not going to be available:

In the typical courier case, none of those five factors are ever going to be established one way or the other in the typical courier case. Because there is nobody else that is going to come in and is going to be able to testify one way or the other about whether or not the defendant, for example, had any greater knowledge of the structure of the organization, whether or not the defendant had any proprietary interest.

Transcript of Sentencing on Remand at 14, *United States v. Sacramento Diaz*, No. 14-CR-0271 (S.D. Cal. Nov. 15, 2016).¹⁴

Any requirement that a defendant who performs a low-level function produce evidence about other participants in a drug trafficking scheme also ignores the obvious facts about how drug trafficking operates. The Commission has acknowledged that drug trafficking involves many different functions of decreasing culpability from the highest level including an importer or high-level supplier, to the lowest level including a renter, loader, or lookout.¹⁵ And even though all drug trafficking must have the highest level participants, those individuals are typically not known and not arrested with the lower-level participants. Rather than taking judicial notice of the various functions in drug trafficking, some courts compare a low-level defendant, such as a courier/mule to other couriers/mules that may have been involved. Consequently, some courts refuse to find that the person's role was minor or minimal. Such a result undercuts the purpose of

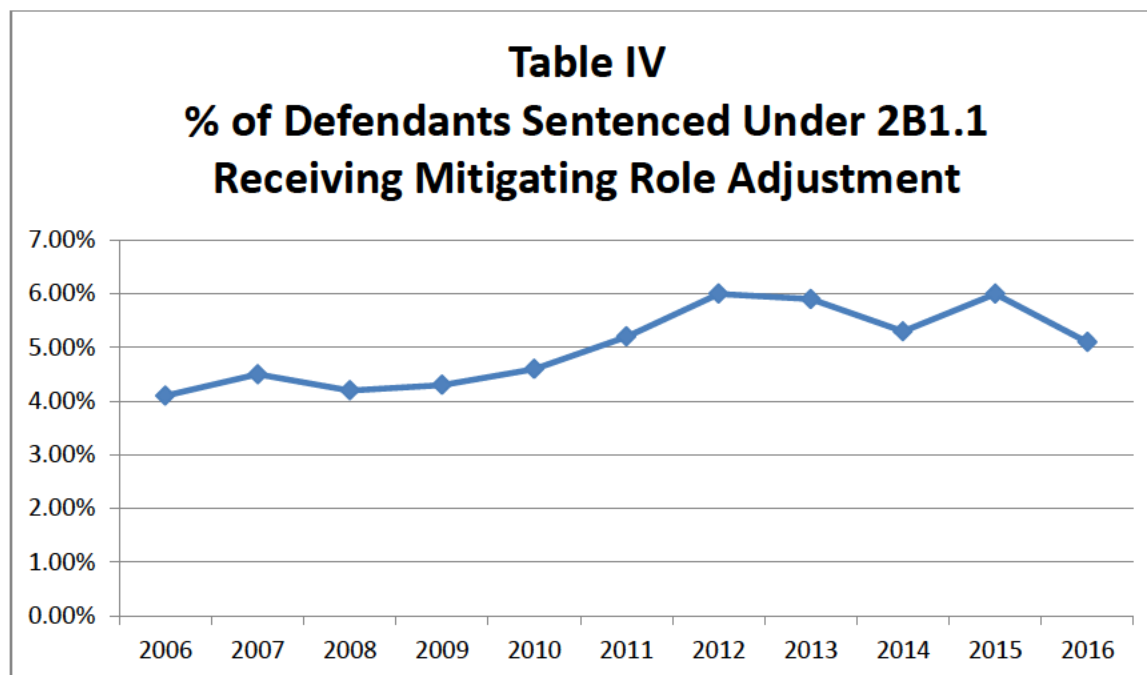
¹³ If the Commission does not step in to provide additional clarification, it is inviting inconsistent application in light of judicial interpretation that districts courts have almost unfettered discretion on whether to apply a mitigating role adjustment. *See, e.g., United States v. Monestime*, 2017 WL 383362, *6 (3d Cir. 2017) (“[t]he district courts are allowed broad discretion in applying this section, and their rulings are left largely undisturbed by the courts of appeal.” (citing *United States v. Self*, 681 F.3d 190, 201 (3d Cir. 2012) (quoting *United States v. Isaza-Zapata*, 148 F.3d 236, 238 (3d Cir. 1998)); *United States v. Jimenez*, 2017 WL 1476890, *3 (5th Cir. 2017) (“[T]he district court's determination that Campos was not a minor participant and thus not entitled to an adjustment is plausible based on the record, even if a contrary conclusion would have been plausible as well.”); *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016) (“A district court ... may grant a minor role reduction even if some of the factors weigh against doing so, and it may deny a minor role reduction even if some of the factors weigh in favor of granting a reduction.”)).

¹⁴ *See also United States v. Castro*, 843 F.3d 608, 615-16 (5th Cir. 2016) (Graves, J. dissenting).

¹⁵ USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 17-18 (2007).

the Commission adopting an amendment that discourages the court from considering the “defendant’s culpability relative to both his co-participants and to the typical offender.”¹⁶

The infrequent and inconsistent applications of §3B1.2 are not limited to cases involving drug offenses. The 2015 amendment has not increased the rate of application in cases involving economic offenses, either, even though, in our experience, many individuals sentenced under §2B1.1 play low-level functions in the criminal activity. Table IV shows how application of the role adjustment in FY2016 §2B1.1 cases was the lowest it has been over the past six years.



Because of these remaining problems with sparing and inconsistent application of §3B1.2, Defenders urge the Commission to clearly identify which typical functions in a criminal enterprise generally should receive a role adjustment.¹⁷ Or, at the very least adopt the changes we recommended in 2015, which would better define “average participant” and “criminal activity,” make clear that certain persons should generally receive an adjustment rather than “may receive an adjustment,” and provide courts with more guidance on when the minimal role and minor role adjustments should apply.¹⁸

¹⁶ USSG, App. C, Reason for Amendment 794 (Nov.1, 2015).

¹⁷ Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 9 (July 25, 2014).

¹⁸ Statement of Jon Sands Before the U.S. Sentencing Comm’n, Washington, D.C., at 1-12 (Mar. 12, 2015).

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Defenders also encourage the Commission to consider increasing the range of mitigating role adjustments. As discussed in previous comments,¹⁹ such a change would offset the inflated drug quantity and loss tables, help courts better differentiate among the various actors in concerted criminal activity, help offset the narrow range of the safety-valve reduction under §5C1.2, and ameliorate the over emphasis on loss for individuals who perform low-level functions in economic crimes.²⁰

Conclusion

We encourage the Commission to focus this year's amendment cycle on promulgating amendments that are in keeping with the latest research on what works in corrections (e.g., alternatives to incarceration), that better capture culpability (e.g., youthful offenders, role in the offense) and that are aimed at establishing clear and fair guidelines (e.g., relevant conduct, acceptance of responsibility, drug quantity table, career offenders). We look forward to continuing to work with the Commission on these and other matters related to sentencing policy this year.

Very truly yours,
/s/ Marjorie Meyers
Marjorie Meyers
Federal Public Defender
Chair, Federal Defender Sentencing
Guidelines Committee

cc : Rachel E. Barkow, Commissioner
Hon. Charles R. Breyer, Commissioner
Hon. Danny C. Reeves, Commissioner
J. Patricia Wilson Smoot, Commissioner *Ex Officio*

¹⁹ Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 13 (Mar. 18, 2015).

²⁰ The Commission has previously indicated an interest in ensuring factors other than loss amount play a role in the guideline recommendations for economic offenses. *See* USSG App. C, Reason for Amend. 792 (Nov. 1, 2015) (explaining that changes to §2B1.1, "in combination with related provisions to the mitigating role guideline at §3B1.2 (Mitigating Role), reflects the Commission's overall goal of focusing the economic crime guideline more on qualitative harms to victims and individual offender culpability").

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