

Written Statement of James Skuthan

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On Behalf of the Federal Public and Community Defenders

**Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2011**

Re: Proposed Amendments: Drugs

March 17, 2011

**Testimony of James T. Skuthan
Chief Assistant Federal Public Defender for the Middle District of Florida**

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My name is Jim Skuthan and I am the Chief Assistant Federal Defender in the Middle District of Florida. I work in the Orlando Division. I would like to thank the Commission for holding this hearing and giving me an opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments for drug trafficking offenses.

Let me briefly summarize our major positions here. First, Defenders strongly encourage the Commission to drop the quantity thresholds for all drugs so that the statutory mandatory minimum penalties correspond to base offense levels 24 and 30. The current quantity table serves as a poor proxy for offense seriousness and is not grounded in empirical evidence. A two level decrease would bring the drug guideline a step closer to fulfilling the statutory purposes of sentencing. Second, while retroactivity of the amendments under the Fair Sentencing Act is not yet ripe for comment, we look forward to working with the Commission on how it can provide relief to the many offenders who have been over punished. Third, Defenders support any amendments that reduce excessive offense levels for drug trafficking offenders, but we believe the severity of the drug quantity table should be addressed more directly. As to the “safety-valve,” we have long advocated for its expansion and urge the Commission to make it more widely available and to increase the amount of the reduction. Fourth, we believe that the Commission can make several changes to the commentary governing adjustments for mitigating role, which would encourage courts to apply such adjustments in appropriate cases. It can also make a modest change to the aggravating role guideline so that it does not apply to those defendants who receive an enhancement under USSG §2D1.1(b)(3)(C) (captain, pilot, navigator, flight officer or other operation officer). Lastly, the Commission should implement the directive in the Secure and Responsible Drug Disposal Act of 2010 by simply suggesting to the court that it consider in such cases the applicability of the adjustment under §3B1.3 (Abuse of Position of Trust) rather than by advising its application in all such cases.

I. Repromulgation of the Emergency Amendments under the Fair Sentencing Act and Changes to the Drug Quantity Table.

Defenders welcomed several parts of the emergency amendment, including elimination of the mandatory minimum penalty for simple possession of crack cocaine and increases in the threshold amounts linked to various offense levels in the Drug Quantity Table for crack cocaine.

Several other parts of the amendment were unwelcome but unambiguously directed by Congress. We understand that unambiguous directives bound the Commission to amend the guidelines in the specified manner, and now require it to re-promulgate parts of the emergency amendment without change, regardless of whether the directive represents sound policy, is

consistent with empirical data and national experience, or complies with the purposes of sentencing and other factors that judges must consider at sentencing.¹ We have previously expressed concern that Congressional micro-management of guideline development threatens to widen the gulf between sentences the guidelines recommend and sentences the primary sentencing statute, 18 U.S.C. §3553(a), requires judges to impose.² This gulf undermines confidence in the soundness of the guidelines' recommendations.

Defenders also viewed other parts of the amendment, which were discretionary on the part of the Commission, as unsound. Those views are expressed in our comment on the emergency amendment.³ We appreciate the Commission's invitation with these Issues for Comment to revisit these latter decisions. We believe the Commission should re-promulgate a revised and improved guideline.

A. Recommendations for Changes to the Drug Quantity Table.

The base offense levels (BOLs) for crack offenses should be lowered by two levels throughout the Drug Quantity Table, to restore them to the levels in effect at the time the FSA was enacted. In addition, the Commission should take this unique opportunity to do what it could not do as part of the emergency amendment: lower the BOLs for all drugs to track those for crack and to ensure that mandatory minimum penalties are *within*, rather than *below*, the guideline ranges corresponding to these BOLs for first offenders. Because the aggravating adjustments in the FSA applied to all drug offenders and increased average penalties above what they would have been prior to the Act, an offsetting downward adjustment in the quantity-based BOLs is needed to achieve the FSA's goal of reducing the emphasis on drug quantity and better target the most dangerous and culpable offenders. This change should be made now as part of final integration of the FSA aggravating adjustments into the guidelines. It should not be delayed until a later time when the new aggravating factors, which give independent weight to factors for which drug quantity served as a proxy, have been forgotten or when new aggravating factors are demanded.

¹ See Letter from Jon Sands, Chair of the Federal Defender Guideline Committee, to U.S. Sentencing Commissioners (April 9, 2009) (discussing the role of empirical evidence and congressional directives in guideline development and amendment).

² Statement of Alan Dubois and Nicole Kaplan Before the U.S. Sentencing Comm'n, Atlanta, GA, at 7-15 (February 10, 2009).

³ Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm'n (October 8, 2010). As more fully discussed in our October 2010 submission, we are concerned about the absence of a definition of violence and would prefer that it be defined as "physical force that is intended to cause and capable of causing serious bodily injury to another person." *Id.* at 15. We also believe that the Commission can implement the directive without allowing cumulative application of the adjustments for super-aggravating role, bribery, and maintaining an establishment. *Id.* at 12-14, 21. In addition, the commentary should make clear that an individual is not "otherwise particularly susceptible" under §2D1.1(b)(14)(B) by virtue of his or her economic condition. *Id.* at 23.

Naturally, some of the reasons in favor of revising the amendment in this manner track reasons and evidence in the comment we provided on the emergency amendment. Along with new analyses, we reiterate some previous arguments here for the consideration of the newly appointed Chair and for the convenience of all Commissioners.

1. The current drug guideline does not advance the purposes of sentencing.

We and others have long urged the Commission to review the guidelines linked to mandatory minimums, and the drug guidelines in particular.⁴ Nearly two-thirds (58%) of judges recently surveyed by the Commission believe that the sentencing guidelines should be “delinked” from statutory mandatory minimum sentences. USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 3 (2010).

The current drug guideline generally recommends sentences far greater than necessary to comply with the purposes of sentencing. The Supreme Court has made clear that guideline recommendations may not be presumed to comply with 18 U.S.C. § 3553(a),⁵ and that neither the Commission nor judges are legally bound to conform to unsound Congressional policies underlying mandatory minimum statutes.⁶ Judges may reasonably find that sentences recommended by guidelines or policy statements based on unsound policies fail to conform to § 3553(a), even in typical or mine run cases.⁷ The drug guidelines were based on unsound quantity thresholds and ratios in mandatory minimum statutes rather than on data of past

⁴ See, e.g., Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Before the U.S. Sentencing Comm’n, Washington, D.C. (May 27, 2010); Statement of Julia O’Connell, Federal Public Defender for the Eastern and Northern Districts of Oklahoma, Before the U.S. Sentencing Comm’n, Austin, Tex. (Nov. 19, 2009); Statement of Nicholas T. Drees, Federal Public Defender for the Northern and Southern Districts of Iowa, Before the U.S. Sentencing Comm’n, Denver, Col. (Oct. 21, 2009) (citing numerous problems with drug trafficking guidelines and urging major revision).

Others urging a de-linking of the drug guidelines from the quantity thresholds in the mandatory minimum statutes have included the Judicial Conference of the United States, see Letter from Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Comm’n (Mar. 16, 2007), <http://www.usc.gov/hearings/03/20/07/walton-testimony.pdf>, and numerous witnesses at the Commission’s Regional Hearings. See Transcript of Hearing Before the U.S. Sentencing Comm’n, Atlanta, GA, at 24, (Feb. 10-11, 2009) (Judge Tjoflat); Transcript of Hearing Before the U.S. Sentencing Comm’n, Stanford, Cal., at 6-22 (May 27, 2009) (Judge Walker); Transcript of Hearing Before the U.S. Sentencing Comm’n, Chicago, Ill., at 70-71 (Sept. 9-10, 2009) (Judge Carr and Judge Holderman); Transcript of Hearing Before the U.S. Sentencing Comm’n, New York, NY, at 92, 139-41 (July 9-10, 2009) (Judge Newman).

⁵ *Rita v. United States*, 551 U.S. 338, 351 (2007); *Nelson v. United States*, 129 S. Ct. 890, 892 (2009).

⁶ *Kimbrough v. United States*, 552 U.S. 85, 91, 101-05 (2007); *Spears v. United States*, 129 S. Ct. 890 (2009).

⁷ *Kimbrough*, 552 U.S. at 110; *Pepper v. United States*, 2011 WL 709543, *15 (March 2, 2011).

sentencing practices or other empirical research, and were not developed by the Commission exercising its characteristic institutional role.⁸

The present guideline does not properly “reflect the seriousness of the offense” because it does not reliably categorize offenders according to their culpability as reflected in their functional roles. As the Commission’s research has shown, many low-level offenders receive sentences that Congress intended only for managers or kingpins.⁹ The present guideline requires punishments greater than necessary to “afford adequate deterrence,” 18 U.S.C. § 3553(a), because marginal increases in punishment do not increase any deterrent effects of imprisonment, and many drug crimes, driven by addiction or economic circumstances, are particularly immune to deterrence.¹⁰

The present guideline also does not track the need to “protect the public from further crimes of the defendant.” *Id.* Drug offenders have lower than average rates of recidivism and higher offense levels are not correlated with increased risk of recidivism.¹¹ Moreover, drug offenses, which are driven by user demand, are not prevented by incarceration of any particular drug trafficker, who is readily replaced in the lucrative drug market.¹² Finally, the offense levels

⁸ Ronnie Skotkin, *The Development of the Federal Sentencing Guidelines for Drug Trafficking Offenses*, 26 *Crim. Law Bull.* 50 (1990) (describing Commission’s abandonment of guideline development research upon passage of the Anti-Drug Abuse Act of 1986); USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 47-55 (2004) [hereinafter “*Fifteen Year Review*”].

⁹ See USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007) (showing large numbers of low-level crack and powder cocaine offenders exposed to harsh penalties intended for more serious offenders); *id.* at 28-29 (showing drug quantity not correlated with offender function); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 42-49 (2002) (showing drug mixture quantity fails to closely track important facets of offense seriousness); *Fifteen Year Review*, at 47-55 (discussing evidence of numerous problems in operation of drug trafficking guidelines); Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 *J. Quant. Criminology* 155, 171 (2009) (Drug quantity “is not significantly correlated with role in the offense.”).

¹⁰ See Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Justice: A Review of Research* 28-29 (2006).

¹¹ USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004) (“Offenders sentenced in fiscal year 1992 under fraud, §2F1.1 (16.9%), larceny, §2B1.1 (19.1%), and drug trafficking, §2D1.1 (21.2%) are overall the least likely to recidivate”; “no apparent relationship between the sentencing guideline final offense level and recidivism risk.”); Neil Langan & David Bierie, *Testing the Link Between Drug Quantity and Later Criminal Behavior among Convicted Drug Offenders*, (Nov. 4, 2009) (paper presented at the American Society of Criminology’s annual meeting in Philadelphia), abstract available at http://www.allacademic.com/meta/p372733_index.html.

provided in the Quantity Table, which often result in guideline ranges falling within Zone D of the sentencing table, do not meet “in the most effective manner,” the treatment and training needs of defendants. 18 U.S.C. § 3553(a)(2)(D).¹³

2. The current drug trafficking guideline greatly increased correctional costs without any offsetting benefit.

Changes in drug sentencing policy at the time of guideline implementation were the primary cause of the dramatic growth in the federal prison population at the beginning of the guideline era and led to the severe over-crowding the Bureau of Prisons now faces.¹⁴ The Commission’s choice to create 17 gradations of drug quantity and to extrapolate below, between, and above the two flawed thresholds in the statutes contributed substantially to the tripling of average time served for drug offenses following implementation of the guidelines. The *Fifteen Year Review* reported that 25 percent of the average length for drug sentences in FY 2001 was the result of the Commission’s discretionary choice to link the statutory thresholds to the guidelines in the manner that it did.¹⁵

The dramatic increase in lengthy incarceration of drug traffickers has come at great cost. The budget of the Federal Bureau of Prisons has grown to over \$6 billion a year,¹⁶ with another

¹² USSC, *Cocaine and Federal Sentencing Policy* 68 (1995) (DEA and FBI reported dealers were immediately replaced).

¹³ The Bureau of Prisons has strict eligibility criteria for the residential abuse treatment program. U.S. Dep’t of Justice, Federal Bureau of Prisons, Program Statement 5330.11, ch. 2 (Mar. 16, 2009). And although BOP offers drug education to a greater number of inmates, those programs do not at all meet the needs of offenders with chronic substance abuse disorders. *Drug Treatment for Offenders: Evidence-Based Criminal Justice and Treatment Practices, Testimony before Subcomm. on Commerce, Justice, Science, and Related Agencies of the Senate Committee on Appropriations* (Mar. 10, 2009) (statement of Faye Taxman, Professor, Administration of Justice Department, George Mason University). Research from the National Center on Addiction and Substance Abuse (CASA) shows that only 15.7% of federal prison inmates with substance abuse disorders received professional treatment after admission into the BOP. Nat’l Center on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America’s Prison Population*, at 40, tbl. 5-1 (2010). Community residential treatment programs for offenders who receive probation or who are under supervised release offer better options and access to drug treatment than a lengthy prison sentence.

¹⁴ Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent’g Rep. 26 (1990).

¹⁵ *Fifteen Year Review* at 54. The report notes: “no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline . . . in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.” *Id.* at 49.

\$1.4 billion spent on the Office of the Federal Detention Trustee. State sentencing commissions have analyzed sentencing along with other crime control policies to identify those that maximize the amount of crime control achieved for each taxpayer dollar.¹⁷ The Commission, however, has not undertaken cost-benefit analyses of federal sentencing policies.¹⁸ Outside economic analyses have shown that the dramatic increase in the imprisonment of drug offenders in the United States since the 1980s is unlikely to have been cost-effective.¹⁹

3. Excessive emphasis on drug quantity is the most significant problem with the drug guideline.

Judges and scholars have long cited as the guideline's chief flaw the excessive weight given drug quantity.²⁰ The Commission based the quantity thresholds in the guidelines on

¹⁶ U.S. Dep't of Justice, Budget and Accountability Summary, Federal Prison Systems (BOP), at 142, available at <http://www.justice.gov/jmd/2010summary/pdf/bop-bud-summary.pdf>.

¹⁷ See Brian J. Ostrom *et al.*, Nat'l Ctr. for State Courts, *Offender Risk Assessment in Virginia: A Three-Stage Evaluation* (2002), http://www.vscs.state.va.us/risk_off_rpt.pdf; Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* (2009), <http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf>; Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (2006), <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>. See generally Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 771-90 (2005) (sentencing commissions in North Carolina, Minnesota, and Washington have used data and empirical research to control the prison population, shift the use of prison to more serious offenders, and institute effective alternatives for others).

¹⁸ Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1011 (2001) (noting that “the Commission has yet to address that task [of measuring the guidelines effectiveness] in any way”); Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and Critique of Federal Mandatory Minimums)*, 56 Stan. L. Rev. 1017, 1039 (2004) (reviewing cost-benefit analysis of state systems and noting that “no comprehensive assessment of federal sentences has been performed”).

¹⁹ Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. of Pub. Econ. 2043, 2043 (2004) (“it is unlikely that the dramatic increase in drug imprisonment was cost-effective.”).

²⁰ Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission 2* (1995) (“[T]he Judicial Conference: . . . encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved.”); General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* (1992) (harshness and inflexibility of drug guideline most frequent problem cited by interviewees); Reuter and Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) (reporting recommendations of a RAND corporation working group, which concluded: “The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.”).

quantities contained in the statutes, which were hastily chosen in the heat of partisan debate and based on demonstrably mistaken assumptions. Eric Sterling was Counsel to the U.S. House Judiciary Committee responsible for drug law enforcement at the time the law was enacted. In 2007, he testified:

The Subcommittee’s approach in 1986 was to tie the punishment to the offenders’ role in the marketplace. A certain quantity of drugs was assigned to a category of punishment because the Subcommittee believed that this quantity was easy to specify and prove and ‘is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.’ [H.R. Rep. 99-845, pt. 1, at 11-12 (1986)] However, we made some huge mistakes. First, the quantity triggers that we chose are wrong. They are much too small. They bear no relation to actual quantities distributed by the major and high-level traffickers and serious retail drug trafficking operations, the operations that were intended by the subcommittee to be the focus of the federal effort. The second mistake was including retail drug trafficking in the federal mandatory minimum scheme at all.

Mandatory Minimum Sentencing Laws – The Issues: Hearing Before the Subcomm. on Crime Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong., 1st Sess., at 166, 169-70 (June 26, 2007) (statement of Eric Sterling).²¹

Moreover, unlike the Parole Commission, which based its recommendations on the pure weight of the drugs involved in a crime, the guidelines followed the mandatory minimum penalty statutes in defining the relevant weight as any “mixture or substance containing a detectable amount” of a drug. This added an additional arbitrary element to weight determinations and had the perverse effect of increasing punishments for persons lower in the distribution chain, where dilution of drugs is more common. Determinations of drug quantity are often capricious or estimated from hearsay or other unreliable evidence,²² are easily manipulated by law enforcement agents and confidential informants,²³ and result in a “false precision.”²⁴

²¹ Mr. Sterling described the legislative process as “like an auction house It was this frenzied, panic atmosphere – I’ll see you five years and raise your five years. It was the crassest political poker game.” Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins*, Wash. Post, Nov. 4, 1990, at C1, C2 (quoting Sterling).

²² Estimates of quantities that were not actually seized, that were under negotiation, etc., inevitably are unreliable approximations. The complexity and ambiguity of key concepts such as “relevant conduct” lead to widely different guideline calculations regarding identical facts. Pamela B. Lawrence & Paul J. Hofer, Federal Judicial Center, Research Division, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent’g Rep. 16 (July/August 1997); *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007).

²³ Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich. L. Rev. 2385 (1996); Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187 (1993).

The prison terms mandated for many types of drugs under the penalty statutes were chosen in part based on aggravating factors thought to be associated with those drugs, such as violence (crack), or use by role models such as athletes (anabolic steroids), or marketing to youth (ecstasy). Through the years, however, many aggravating upward offense level adjustments were added to the guideline to reflect these harms, and a variety of other factors, without any reduction in the quantity-based base offense level. The piling on of specific offense characteristics and other adjustments resulted in “factor creep” and double counting.²⁵ Similarly, quantities were chosen in part as markers of different defendants’ aggravated roles in drug distribution schemes, such as sellers of large amounts to retail dealers (wholesalers), or heads of large organizations (kingpins). These defendants, however, are subject to upward adjustments under the aggravating role guidelines, as well as the lengthier base offense levels already chosen to reflect their increased culpability.

The focus on quantity has led to fruitless debates over the proper ratios between various drugs, instead of analysis of what sentences are needed to achieve the statutory purposes of sentencing. The debate over the FSA well illustrates the confusion surrounding the relevance of drug quantity at sentencing and its distortion of rational policy analysis. The abstract numbers and ratios took on different meanings for different persons. We heard political rhetoric that characterized the ratio between powder and crack cocaine as a measure of “how racist” the sentencing law would continue to be. Some Commissioners expressed the view that the quantity ratios had significance in themselves and represented an important aspect of legislative intent, which the Commission should follow even in the absence of a specific directive.²⁶ Others – including the Chairs of the House Committee on the Judiciary and the Sub-Committee on Crime, Terrorism and Homeland Security, and the chief sponsor of the Act in the Senate – concluded that the ratios were mere “shorthand,” and that only the statutory threshold amounts had significance and then only as a rough proxy for the role an offender played in a drug distribution system.²⁷

²⁴ Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent’g Rep. 180 (Feb. 1999).

²⁵ Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 742 (2001) (The guidelines embody “factor creep,” where “more and more adjustments are added” and “it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”).

²⁶ See, e.g., United States Sentencing Commission Public Meeting Minutes, at 5 (October 15, 2010) (remarks of Commissioner Howell reporting conclusion that “provisions of the Act and the congressional statements that surround its passage reflect the sentencing policy judgments of Congress that crack offenses generally should be punished eighteen times more severely than powder cocaine offenses based upon drug quantity”).

²⁷ Letter from the Honorable John Conyers, Chairman, Committee on the Judiciary, and the Honorable Robert C. “Bobby” Scott, Chair, Subcommittee on Crime, Terrorism and Homeland Security, U.S. House of Representatives, to the Honorable William K. Sessions, III, Chair, U.S. Sentencing Comm’n (October 8, 2010); Letter from Richard J. Durbin, U.S. Senator, to the Honorable William K. Sessions, III, Chair,

4. Empirical data and national experience show that the current linkage between drug quantity and base offense levels is unsound for crack offenders and other drug offenders.

The Commission's typical approach of setting the offense levels for offenders involved with statutory threshold amounts at 26 and 32 has been particularly unfortunate. This made the guideline recommendation for most drug offenders *exceed* the mandatory minimum penalties, even for first offenders receiving no aggravating enhancements and involved with quantities at or just above the threshold amounts. Greater drug amounts or criminal history – or other aggravating factors already considered in setting penalties for those amounts – pushed the guideline ranges still further above the statutory requirements. The relatively few mitigating adjustments found in the guidelines could lower ranges for some offenders, but many thousands received penalties far above the statutory requirements because of the Commission's approach. In 2009 alone, due to these discretionary decisions of the Commission, *over half of drug defendants (51.5%, or 12,221 offenders) were sentenced to longer terms of imprisonment than required by statute for the drug quantity for which they were held accountable.*²⁸

Commission reports have described the relevance of drug quantity in several ways, but none show that the current quantity thresholds are sound policy.²⁹ Indeed, the Commission's own research shows that the current quantity thresholds are *unsound*.

The best understanding of how the guideline was meant to track offense seriousness has been described in legislative history and in the Commission's own reports.³⁰ In 1995, the

U.S. Sentencing Comm'n 2-3 (October 8, 2010) (noting text of FSA does not refer to ratios, that some Senators used ratios as mere "shorthand," and that the primary concern of Congress was the threshold amounts under the statute needed to target wholesalers for five-year minimum sentences).

²⁸ Source: USSC FY2009 Monitoring Dataset.

²⁹ *Fifteen Year Review* at 47-52; *see also United States v. Cabrera*, 567 F. Supp. 2d 271, 276, 277 n.5 (D. Mass. 2008) (noting that "the Sentencing Commission has never explained how drug quantity is meant to measure offense seriousness, and significantly, how it correlates with the purposes of sentencing under 18 U.S.C. § 3553(a)," and "apart from the recent adjustment in the crack cocaine guidelines . . . the Commission has never reexamined the drug quantity tables along the lines that the scholarly literature, the empirical data, or [the Commission's own] 1996 Task Force and others, recommended.").

³⁰ Other theories are possible and some legislators may have held different understandings. But evaluation of a guideline must be grounded in some consistent, enduring understanding of how the guideline was meant to operate. If the fact that some legislators may have held different, unspecified, understandings, which might support the current structure, is sufficient to defeat any criticism of a guideline, rational analysis and rule-making are impossible. A consistent understanding is needed to guide analysis, resolve conflicts among competing theories, prevent ad hoc rule making, and consistently define unwarranted disparity. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 83-84 (2003).

Commission described how the congressional record of debates surrounding the Anti-Drug Abuse Act of 1986 appeared to establish three tiers of culpability for “major traffickers” (manufacturers or the heads of organizations), “serious traffickers” (managers of the retail level traffic), and lower-level offenders, for whom prison terms of ten, five, or fewer years would be appropriate, respectively.³¹ This tiered approach was recently reiterated by the chief sponsor of the FSA in the Senate, Senator Richard Durbin, who wrote to the Commission to explain that quantity was intended as a marker for role. He wrote that Congress chose 28 grams for the five-year threshold because a Commission report was taken to reflect the Commission’s determination that this amount is typical of wholesalers, for whom Congress intended five-year minimum sentences.³²

Unfortunately, Congress misread the Commission’s report defining “wholesalers” and overlooked how drug quantity is actually calculated under the current guidelines. The Commission’s 2007 report defines a wholesaler as an offender who “[s]ells more than retail/user level quantities (more than one ounce) *in a single transaction*, or possesses *two ounces or more on a single occasion*.” (emphasis added).³³ The report does not classify as a wholesaler a person who sells user level quantities over a period of time. The guidelines, however, require that the court aggregate drug quantities involved in multiple transactions when they are part of the “same course of conduct or common scheme or plan as the offense of conviction.”³⁴ Hence, a street seller who distributes 1 gram of crack to twenty-eight customers over the course of several weeks is held accountable for 28 grams of crack.

The empirical data in the 2007 report actually shows, as have previous Commission reports and working group findings,³⁵ that the quantity thresholds – even the thresholds for crack

³¹ USSC, *Cocaine and Federal Sentencing Policy* 119-21 (1995) (discussing limited legislative history).

³² Letter from Senator Durbin, *supra* n. 27 (“Congress selected 28 grams as the trigger for five-year mandatory minimums because the Commission and other experts have concluded that less than one ounce is a retail/user quantity, while more than one ounce is the quantity sold by wholesalers). *See e.g.*, USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 18 (2007).

³³ USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 18 (2007).

³⁴ USSG §1B1.3(a)(2) (Relevant Conduct). The Commission has previously considered, but not adopted, guideline amendments that would limit quantity to amounts involved in a “snapshot” of time or a single transaction. *See* Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary. Request for Comment. Notice of Hearing, 60 Fed. Reg. 2430, 2451-52 (Jan. 9, 1995). In some cases, like those involving street-level dealers, such “snapshots” would provide a better indicator of functional role and culpability. In other cases, like those involving couriers, such “snapshots” of quantity would need to be combined with the surrounding circumstances to determine functional role.

³⁵ USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 42-49 (2002) (showing drug mixture quantity fails to closely track role and other important facets of offense seriousness); USSC, *Fifteen Year Review* at 47-55 (discussing evidence of numerous problems in operation of drug trafficking guidelines). The Commission has sponsored several Working Groups and Task Forces that have found

as revised by the FSA – are too low and result in many mid-level and low-level offenders being treated like wholesalers or even kingpins.

In the 2007 report, 20 percent of powder cocaine street level dealers were attributed with amounts qualifying them for five-year mandatory minimums and 12 percent qualified for penalties of 10 years or more.³⁶ The powder cocaine thresholds in effect for these offenders were the same that remain in the Drug Quantity Table today. Findings for other low-level powder cocaine offenders were even more striking. Only 19 percent of couriers or mules had amounts below the five-year level, while 27 percent had amounts exposing them to five-year minimums and 54 percent had amounts exposing them to ten years or more. Among renters, loaders, lookouts, enablers, users, and the other lowest level offenders, only 25 percent were below the five-year threshold, 14 percent were between five and ten years, and *61 percent were attributed with amounts at the ten-year level or higher*. In other words, the current linkage between drug quantity and BOLs assigns these low-level offenders to the wrong severity level more often than the correct one, under Congress's own rationale for quantity-based drug sentencing.³⁷

The report also shows that even the increased quantity thresholds under the FSA and the emergency amendment remain too low to prevent many crack offenders from being subject to penalties more severe than necessary or than Congress intended. For example, 28 percent of street-level dealers, 31 percent of couriers or mules, and 45 percent of loaders, lookouts, users, and other low-level offenders were held accountable for *more than 50 grams*. Even under the emergency amendment, these amounts would subject these offenders to BOLs of at least 26 with guideline ranges for first offenders of at least 63 months – the sentence length intended for wholesalers, not low-level offenders.³⁸ Some of these offenders might earn reductions through

that quantity regularly fails to properly track role and culpability. See USSC, *Initial Report to the Commission: Working Group on Drugs and Role in the Offense* (1991); USSC, *Report of the Drug Working Group Case Review Project* (1992); USSC, *Addendum to the Drug/Role Working Group Report* (1993); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of A Task Force Examining the Drugs-Violence Interrelationship*, 63 Alb. L. Rev. 749, 761 (2000).

³⁶ USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30, Fig. 2-12 (2007).

³⁷ Some of these offenders were exempted from the mandatory penalty by the safety-valve and received downward adjustments for the safety-valve, acceptance of responsibility, or role. But many continued to be sentenced far above the level Congress deemed appropriate. Figure 2-14 in the 2007 cocaine report shows the average length of imprisonment for powder and crack offenders after guideline adjustments, departures, and reductions for cooperation. Unfortunately it is not possible from averages to determine the number or percentage of offenders who receive sentences more severe than Congress intended. The data show, however, that the average sentence imposed on powder cocaine couriers was 60 months (the sentence intended for wholesalers), while the average sentence for renters, loaders, etc. was *93 months*. To obtain these *averages* many offenders were necessarily sentenced far above the levels Congress intended for their roles. These sentences were obtained under the same Drug Quantity Table threshold amounts currently in effect.

³⁸ *Id.* Fig 2-13.

pleading guilty, or cooperating, or the safety-valve. A few might win mitigating adjustments for playing a mitigating role, though that is far from certain, as discussed below in this testimony. But some would also be subject to upward adjustments.

The fact is that the Commission and outside researchers have repeatedly found that drug quantity fails to reliably track offender culpability.³⁹ Nor does it reasonably advance any other principle of proportionate sentencing.⁴⁰ The Drug Quantity Table misallocates punishment instead of tailoring it.

5. The quantity thresholds for crack offenders should be lowered.

In the emergency amendment, the Commission reverted to its problematic approach of exceeding the statutorily required prison terms. We viewed this as particularly unfortunate because it effectively denied some defendants any benefit from passage of the FSA. Pegging the new thresholds – 28 and 280 grams – to BOL 26 and 32 rather than 24 and 30, denied hundreds of offenders any benefit of the legislation intended to redress the unfairness of crack sentencing.⁴¹ For example, offenders with quantities of 28 to 35 grams of crack receive the same guideline range under the emergency amendment that they received prior to the amendment, rendering the threshold changes in the FSA a nullity. Similarly, defendants whose offenses involve between 280 and 499 grams remain at offense level 32 after the emergency amendment,

³⁹ See *supra* note 34; Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminology 155, 171 (2009) (Drug quantity “is not significantly correlated with role in the offense.”).

⁴⁰ The Drug Quantity Table has sometimes been defended as assuring a rough “proportionality” in sentencing. On close inspection, however, this “proportionality” proves illusory. Quantity as currently defined certainly does not achieve proportionality among *all* types of offenses, nor among all *drug* offenses, nor even among offenses involving the same type of drug, which often involve mixtures of dramatically different purity. Office of Nat’l Drug Control Policy, *The Price and Purity of Illicit Drugs* (2004) (showing broad ranges of purity and little relation between purity and total amount), http://www.ncjrs.gov/ondcppubs/publications/pdf/price_purity_tech_rpt.pdf. The linkage assures only that offenses involving larger amounts of a particular mixture or substance containing a detectable amount of drug are punished more severely than smaller amounts of that same mixture or substance. But the current thresholds do not properly track differences among drugs in the typical dosage size, nor variations in the presence of adulterants, nor the harmfulness of various types of drugs. The failure of the current guidelines to account for these differences is especially troublesome in light of availability of empirical data to rank these harms. See, e.g., David Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 *The Lancet* 1047 (Mar. 24, 2007).

⁴¹ We understand from the public record that the Commission’s own estimate was that hundreds of offenders would receive the same sentence. See United States Sentencing Commission Public Meeting Minutes, at 4 (October 15, 2010) (remarks of Commissioner Reuben Castillo) (“100 to 500 individuals are expected to be sentenced from November 1, 2010, when the emergency amendment becomes effective, to November 1, 2011, when the permanent amendment would become effective, who will be unaffected by the proposed amendment because of the decision to set the base offense levels at 26 and 32 to account for the new mandatory minimum gradations.”).

the same as prior to the amendment. Defendants whose offense involved between 840 grams and 1.49 kilograms remain at level 34. Moreover, some of these offenders may qualify for new enhancements directed by the FSA, meaning that for them, the cumulative effect of the FSA was to *increase* sentences above the lengthy prison terms the guidelines recommended at the time of the legislation.

By failing to reduce offense levels for all quantities of crack cocaine while increasing sentences for some offenders, we believe the Commission missed an opportunity to thoroughly redress the long-standing unfairness of crack sentencing. The Commission received correspondence from members of Congress indicating that the intention of the FSA was to address the unfair severity of crack sentencing and that no increase in the BOLs corresponding to the statutory thresholds was expected or needed.⁴² We believe the permanent amendment should address this problem by lowering the BOL levels for crack to the levels in effect at the time the FSA was enacted.

One criticism of the Commission's 2007 amendment was that it did not require that quantity ratios among different drugs be consistent across the entire 17-level quantity table. We believe that matching punishment to culpability, not complying with abstract ratios that appear nowhere in the legislation, is the key to advancing Congress's goals.⁴³ As explained in our Comment to the FSA amendment, we believe the debate over ratios has turned what should be a substantive debate over how best to achieve the purposes of sentencing into a quasi-mathematical and pseudo-scientific exercise. There are no "correct" ratios in light of 18 U.S.C. § 3553(a). Although mathematical anomalies arose when combining different types of drugs under the 2007 amendment, those anomalies were successfully addressed through an application note to the Drug Quantity Table.⁴⁴

The critical point is that substantive justice must take priority over abstract mathematical consistency. The guidelines should be revised to yield recommendations that comport as closely as possible with the principles of 18 U.S.C. § 3553(a).⁴⁵ Punishment should not be dictated by abstract considerations of ratio consistency or ease of calculation of drug equivalencies. As Justice Breyer aptly stated, sentencing is ultimately a "blunderbuss."⁴⁶ Attempts at exactness of

⁴² Letter from Senator Durbin, *supra* note 27.

⁴³ *Id.*

⁴⁴ USSG § 2D1.1 comment. (n.10 (D)).

⁴⁵ It should be noted that some judges have used their discretion under *Booker*, *Kimbrough*, and *Spears* to continue to sentence under a 1:1 ratio instead of the 18:1 ratio established by Congress under its mistaken reading of the Commission's 2007 report, as described above. By lowering the threshold for crack by two levels, the ratio between crack and powder would be much closer to the levels these judges find consistent with 18 U.S.C. § 3553(a).

⁴⁶ Breyer, *Guidelines Revisited*, *supra* note 24.

measurement or consistency in ratios among inherently rough dimensions like drug quantity cannot eliminate this fact.

6. Sound policy and practical considerations compel the reduction of offense levels for all drugs.

The Commission should re-link thresholds in the Drug Quantity Table for all drugs, so that mandatory statutory penalties fall within, rather than below, the guideline ranges associated with base offense levels for first offenders. This would help ameliorate some of the unfortunate effects of the original Commission's decision to extrapolate below, between, and above the statutory levels in the Drug Quantity Table. Aggravating and mitigating factors, including the new adjustments directed by the Act, would receive greater weight in relation to quantity, which is an over-arching purpose of the FSA. Most important, as described above, lowering base offense levels would reduce the number of offenders who perform low-level functions for whom the guidelines recommend sentences that were intended only for wholesalers or kingpins.

The sentence enhancements in the FSA were not limited to crack cocaine offenders but applied to *all* drug offenders. Thus, the Act exacerbated problems with the drug guideline by piling additional enhancements on top of severe and largely arbitrary quantity-based BOLs. The effect is a net increase in average guideline ranges above the already excessive and unnecessarily severe levels prior to the FSA,⁴⁷ without any corresponding decrease in the quantity-based portion of the sentence. Instead of conserving and targeting imprisonment on the most serious and dangerous offenders, the net effect is an unjustified further upward ratcheting of drug trafficking sentences for non-crack offenders.

We believe final revision of the amendment implementing the FSA is a unique opportunity for the Commission to do what it did not, and arguably could not, do as part of the emergency amendment: lower the BOLs for *all* drugs to track those for crack and to ensure that mandatory minimum penalties are *within*, rather than *below*, the guideline ranges corresponding to these BOLs for first offenders. Because the aggravating adjustments in the FSA applied to *all* drug offenders, an offsetting downward adjustment in the quantity-based BOLs is needed to achieve the FSA's goal of reducing the emphasis on drug quantity and better target the most dangerous and culpable offenders. This change should be made now as part of final integration of the FSA aggravating adjustments into the guidelines. It should not be delayed until a later time when either no offsetting aggravators will be available or new ones will be demanded.

⁴⁷ The FSA did include downward adjustments applicable to all drug offenders, such as a cap on base offense levels for minimal participants, §2D1.1(a)(5), and a two-level decrease for certain minimal participants who were motivated by intimate or familial relationship, or by threats or fear, who received no monetary compensation, and had minimal knowledge of the enterprise, §2D1.1(b)(15). These downward adjustments are much narrower in scope than the new aggravating increases. As a result, although empirical analysis from the Commission is not yet available, there seems little doubt that the result of the FSA amendments for non-crack offenders will be an increase in average guideline ranges over what they would have been prior to the amendment.

7. The Commission is not required to link the drug guideline to the quantity thresholds in the statute.

As the Commission has previously explained, statutory mandatory minimums and sentencing guidelines are “policies in conflict.”⁴⁸ It is impossible to rationally integrate the few facts and “tariff” penalties in mandatory minimum statutes into more finely grained guidelines, whether mandatory or advisory. The statutes create “cliff” effects and are a major source of unwarranted disparity in both of its guises: unwarranted uniformity – similar treatment of different offenders – as well as different treatment of similar offenders, depending on the charging whims of the prosecution. The mandatory minimum penalties are set at levels appropriate not for the most *mitigated* offense that can arise under a statute – which is the only way they could avoid injustices – but for relatively serious and aggravated offenses. Mandatory minimums are often enacted in reaction to sensational crimes and result from political competition.⁴⁹ As Justice Breyer concluded in 1999, “statutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. . . [T]heir existence then prevents the Commission from . . . writ[ing] a sentence that makes sense.”⁵⁰

As the Commission said in its 2007 Reason for Amendment to the crack threshold and its report on child pornography, the Commission has a variety of options for accounting for mandatory minimums within the guideline structure.⁵¹ The Commission “may abandon its old methods in favor of what it has deemed a more desirable approach.”⁵² It may set the BOL to include, but not exceed, the mandatory minimum, as it did with crack in 2007. It may set the BOL below the mandatory minimum and rely on Chapter Two and Three adjustments to reach the mandatory minimum in appropriate cases. The Commission may also “select a new (or maintain an existing) base offense level without regard to a newly adopted (or increased) mandatory minimum.”⁵³ Under the latter two approaches, defendants whose guideline

⁴⁸ USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991). “Policies in Conflict” is the title of Chapter 4 of the Report.

⁴⁹ As Justice Rehnquist noted in 1993: “Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’ Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole.” William H. Rehnquist, Luncheon Address (June 18, 1993), in USSC, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286-87 (1993); see also Sterling, *supra* page 7.

⁵⁰ *Guidelines Revisited*, *supra* n. 24.

⁵¹ USSG, App. C, Amend. 706 (Nov. 1, 2007); USSC, *The History of the Child Pornography Guidelines* 44-47 (2009).

⁵² *Neal v. United States*, 516 U.S. 284, 295 (1996) (approving amendment of LSD guideline to use presumptive-weight methodology instead of statute’s “mixture or substance” methodology).

⁵³ USSC, *The History of the Child Pornography Guidelines* 46 (2009).

calculation fails to reach the mandatory minimum receive the mandatory minimum as a guideline sentence through operation of §5G1.1(b).

For many years, the Commission has recognized that tying penalties to the weight of LSD or the number of marijuana plants, regardless of size, would lead to arbitrary variations in punishment unrelated to the seriousness of the offense.⁵⁴ In 2007, in recognition that the statutory thresholds undermined the objectives of the Sentencing Reform Act, the Commission modestly amended the Drug Quantity Table for crack cocaine offenses so that the minimum prison terms required by the statutes fell within, rather than below, the guideline ranges associated the statutory quantities (for first offenders receiving no aggravating enhancements with quantities at or just above the statutory thresholds).⁵⁵ This amendment provided much-needed relief for thousands of crack defendants who were subject to unnecessarily severe penalties. But the fact is, tying the length of prison terms to the quantity of a mixture or substance containing a detectable amount of a drug is arbitrary and excessively severe for *all* kinds of drugs and drug offenders. The Commission should therefore reduce the BOL for all drug offenses by two levels.

8. Lowering offense levels for all drugs would create no significant problems.

A consequence of reducing the base offense level by two is that some defendants who would otherwise qualify for certain downward adjustments may not benefit from them because the mandatory minimum will truncate or trump their guideline range. This trumping and truncating means that some less culpable defenders may be treated the same as ones that are more culpable.⁵⁶ This unwarranted uniformity is an inevitable consequence of mandatory minimums, however. The entire guideline structure should not be ratcheted upward only to partially accommodate the interaction between guideline adjustments and mandatory minimum statutes, particularly when the mandatory minimums are fundamentally incompatible with the guidelines, as described above.

Recent experience has alleviated the concern that drove the original Commission to link the statutory thresholds to the guidelines in the manner that it did. The Commission reported in 1995 that it set the base offense levels for first offenders “slightly higher than the mandatory minimum levels to permit some downward adjustments for defendants who plead guilty or

⁵⁴ Although 21 U.S.C. § 841(a) requires a mandatory minimum of ten years for 1000 marijuana plants, and five years for 100 plants, the base offense levels are set at 26, and 16, significantly lower than what is required to reach the mandatory minimum.

⁵⁵ USSG, App. C, Amend. 706 (Nov. 1, 2007).

⁵⁶ *Fifteen Year Review* at 49 (“[T]rumping’ of the otherwise applicable guideline range creates disparity by treating less culpable offenders the same as more culpable ones . . .”).

otherwise cooperate with authorities.”⁵⁷ In other words, the range was set higher than necessary to ensure that defendants would plead guilty or otherwise cooperate. Even assuming that this was a legitimate reason, the 2007 amendment of the crack guidelines provides an empirical test of this concern, and the data show that the plea rate in crack cocaine offenses did not fall after the amendment.⁵⁸ Moreover, defendants who provide assistance in the prosecution of other persons may still receive sentences below the mandatory minimum by operation of 18 U.S.C. § 3553(e) and Rule 35 of the Federal Rules of Criminal Procedure. We do not believe the guidelines should be designed to recommend sentences greater than necessary to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a) merely to provide room for the partial operation of guideline adjustments intended to induce guilty pleas or reward cooperation. This, in effect, punishes non-cooperation, which is against the Commission’s express policy.⁵⁹

The trumping of guideline ranges by mandatory minimums is an unfortunate consequence of the incompatibility of mandatory minimum statutes and guidelines, but it is also an important reminder of the Congressional role in sentencing. If a statute overrides the judgment of the Commission as to the appropriate sentencing range, responsibility for the policy should be clear. The policy judgment of the political branches should not be cloaked as the work of the Commission, particularly if those judgments fail to meet the standards of § 3553(a).

II. Retroactivity of the Fair Sentencing Act Amendments.

Although the Commission initially requested comment on whether it should make retroactive the permanent amendments implementing the Fair Sentencing Act,⁶⁰ we understand from Commission staff that the Commission will not yet consider the question of retroactivity, and that it will request formal input at a later date. We look forward to providing our views on this important issue at that time. Meanwhile, we have examined the Commission’s analysis on the impact of two proposed options for amending the Drug Quantity Table.⁶¹ As in 2007 regarding the two-level reduction implemented by Amendment 706, we find the current impact analysis to be extremely helpful in formulating our thoughts on retroactivity as it relates to reductions in the Drug Quantity Table. Because the Commission has also asked whether other aspects of the amendment should be made retroactive (i.e., the mitigating changes, the entire proposed amendment including enhancements), we hope the Commission will also provide an

⁵⁷ See USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, ch. 7 (1995).

⁵⁸ See USSC, *Sourcebook of Federal Sentencing Statistics*, tbl. 38 (2009) (93.9% plea rate in crack cases in FY2009; 95.1% in 2008; 93% in 2007; 93.7% in 2006; and 91.8% in 2005).

⁵⁹ See USSG § 5K1.2, p.s. (“A defendant’s refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.”).

⁶⁰ 76 Fed. Reg. 3193, 3195-96 (Jan. 19, 2011).

⁶¹ USSC, *Analysis of the Impact of Amendment to the Statutory Penalties for Crack Cocaine Offenses Made by the Fair Sentencing Act of 2010 and Corresponding Proposed Permanent Guideline Amendment if the Guideline Amendment Were Applied Retroactively* (Jan. 28, 2011).

impact analysis regarding the other proposed permanent changes to § 2D1.1 that can be readily measured, such as the new minimal role cap at § 2D1.1(a)(5).

III. Expansion of the Safety-Valve and Other Downward Adjustment for Defendants Who Do Not Receive Aggravating Adjustments.

The Commission requests comment on three proposals that would make a 2-level downward adjustment available for defendants in drug trafficking cases. One proposal would provide a 2-level downward adjustment in cases where there are no aggravating circumstances involved in the case. Another would expand the safety-valve at §2D1.1(b)(16) to defendants who have more than 1 criminal history point. The third proposal would provide a “similar downward adjustment to drug trafficking defendants who truthfully provide to the Government all information and evidence the defendant has concerning the offense.” It is not clear from the issues for comment whether any of these proposals is meant to be in lieu of changes to the base offense levels in the Drug Quantity Table, or instead whether they are meant to be additional reductions. Nor is it clear whether these proposals are meant to be alternatives to each other.

Defenders support amendments that reduce sentences for defendants convicted of drug offenses and move the guidelines’ recommendations closer toward serving the purposes of sentencing under 18 U.S.C. § 3553(a). We want to make clear that we do not support any of these alternatives as a *substitute* for fixing the Drug Quantity Table and other aspects of the drug guideline. From the standpoints of simplicity and consistency, the guidelines should attempt to properly assess offense seriousness in the first place. To that end, we urge the Commission to begin by reducing the base offense levels for all drugs by two levels, and to take further steps in the near future to delink the drug guidelines from mandatory minimums, to reduce the impact of drug quantity and relevant conduct, and to avoid double counting and multiple upward adjustments for what often amount to the same harms.

A. Two-level downward adjustment for defendants whose cases do not involve aggravating circumstances.

The Commission seeks comment on a proposal to add a two-level downward adjustment in drug trafficking cases for defendants whose guideline calculations do not include aggravating circumstances leading to alternative base offense levels for death or serious bodily injury under §2D1.1(a)(1)-(4), any enhancement under §2D1.1(b), or any Chapter Three upward adjustments.⁶² As discussed above, we do not believe this should be a substitute for a two-level reduction in base offense levels or a more comprehensive fix to the drug guidelines in the near future. It would, however, be a welcome addition at this time to reflect the lesser culpability and lesser need for incapacitation of defendants convicted of drug offenses that do not involve aggravating factors.

⁶² It would be helpful in commenting on this proposal to know the number of defendants who would benefit from it. While the Commission’s dataset is publicly available, we do not have the capacity to conduct the kind of sophisticated mainframe analysis necessary to identify the defendants who would meet the criteria set forth in the proposal.

We encourage the Commission to more finely tune the adjustment so that an offender whose offense level is increased under §2D1.1(b) based on comparatively less serious conduct than others may obtain the benefit of a downward adjustment. Section 2D1.1(b) contains fourteen 2-level upward adjustments ranging from distribution of an anabolic steroid to an athlete, distribution of an anabolic steroid and a masking agent, distribution of a controlled substance through mass-marketing, to possession of a dangerous weapon and use of violence. Not all of these adjustments reflect the same degree of culpability or offense seriousness. The Commission should consider identifying those that are less serious and permitting a 2-level downward adjustment in those cases as well.

B. Expanding the Safety-Valve.

1. Brief history of the safety-valve.

We have long encouraged expansion of the safety-valve. Early in the Clinton administration, Attorney General Janet Reno called for review of mandatory minimum statutes and repeal of some of those statutes applicable to non-violent offenders.⁶³ The concept of a “safety-valve” was soon introduced by the Sentencing Commission and staff of the Judicial Conference. As originally proposed by the Chair of the Commission, the proposed legislation would have amended § 3553 to provide an “override” provision to allow the applicable guideline range or any appropriate downward departures to “trump” the mandatory minimum penalty.⁶⁴ The prospects for repeal of some mandatory minimums soon foundered in the tough-on-crime political environment in Congress, however. And, as the safety-valve legislation worked toward passage, successively more restrictive conditions were placed on its application. The safety-valve ultimately enacted was a far narrower version than the Commission’s original proposal and provided relief from mandatory minimums for a too limited class of drug trafficking defendants.⁶⁵ In the words of Justice Breyer, the safety-valve “is a small, tentative step in the

⁶³ See http://www.ontheissues.org/Governor/Janet_Reno_Crime.htm. Attorney General Reno told the Judicial Conference of the Third Circuit that “we are not going to solve our crime problem by passing minimum mandatories[.]” Don DeBenedictis, *How Long is too Long?*, 79 A.B.A. J. 74, 75 (1993). A product of the Department’s review was the study, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (Feb. 4, 1994), available at http://www.fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf. This study found that 20% of the federal prison population at the time could be classified as low-level drug offenders, and that these low-level offenders had an average sentence imposed of 81 months and were serving an average prison term of over five years, 150% longer than past practice, when many such offenders would have received probation. The study proved instrumental in the creation of the “safety-valve.”

⁶⁴ Paul J. Hofer, *Mandatory Penalty Reform: The Possibilities for Limited Legislative Reform of Mandatory Minimum Penalties*, 6 Fed. Sent’g Rep. 63 (1993) (describing Judge Wilkins’ proposal).

⁶⁵ Pub. L. No. 103-322, § 80001, 108 Stat 1796, 1985 (1994), *codified at* 18 U.S.C. § 3553(f); see 139 Cong. Rec. S14,536 (daily ed. Oct. 27, 1993) (remarks of Senator Kennedy) (describing the bill as “a small but important step in the effort to recapture the goals of sentencing reform”); 140 Cong. Rec.

right direction. A more complete solution would be to abolish mandatory minimums altogether.”⁶⁶

The Commission incorporated the safety-valve into the guidelines, along with its restrictive statutory criteria. Because of a limitation contained in the law, defendants who are otherwise subject to a five-year mandatory minimum receive an offense level not less than 17, corresponding to a minimum guideline range of 24-30 months. USSG §2D1.1(b)(11), §5C1.2. The Commission eventually also reduced by two levels the offense level of any drug defendant who satisfied the statutory criteria, regardless of whether they were subject to mandatory minimums.

These steps have provided some relief for a substantial number of defendants. In FY 2009, of 8,296 defendants who were not subject to a mandatory minimum, 3,332 (40%) received the two-level decrease under the guidelines. Of 15,532 defendants who were subject to a mandatory minimum, 5,447 (35%) benefited from the safety-valve.⁶⁷

2. The safety-valve should be expanded to include more offenders.⁶⁸

Many non-dangerous, low-level offenders still do not qualify for the safety-valve. In FY 2009, 83.2% of all drug trafficking offenses involved no weapon, 51.4% of all drug trafficking offenders had 0-1 criminal history points, another 11.7% had just 2-3 criminal history points, 94.1% had no role adjustment or a mitigating role adjustment, and 93.7% accepted responsibility.⁶⁹ But only 36.9% of defendants convicted of a drug offense received safety-valve relief under the guidelines or from a mandatory minimum.⁷⁰

The Commission’s 2010 survey of judges found that most believe the safety-valve should be expanded to allow additional types of offenders to qualify. Two thirds of judges believe offenders in Criminal History Category II should be eligible, and 69% believe it should be

S14,716 (daily ed. Oct. 7, 1994) (remarks of Senator Kennedy) (recognizing Judge Wilkins for his leadership in producing the Commission’s 1991 report on mandatory minimums and developing a proposal that would later become the safety-valve).

⁶⁶ Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent’g Rep. 180, 1999 WL 730985 (1999).

⁶⁷ USSC, *2009 Sourcebook of Federal Sentencing Statistics*, tbl. 44.

⁶⁸ In addition to expanding the safety-valve under the guideline, the Commission should encourage Congress to expand the statutory safety-valve.

⁶⁹ *Id.*, tbls. 37, 39, 40, 41.

⁷⁰ *Id.*, tbl. 44.

expanded to cover offenders subject to all types of mandatory minimums.⁷¹ Many other commentators have called for changes to the exclusionary criteria. For example, it has been noted that the criteria “do not necessarily distinguish between high-level and low-level drug offenders,” but instead “in many cases they simply serve to make distinctions among the culpabilities of low-level offenders,” “providing lenient sentences for those low-level defendants meeting the safety-valve’s stringent criteria, while subjecting those low-level defendants whose characteristics may be only mildly different (i.e., one criminal history point) to the full mandatory penalties.”⁷²

As a beginning, the safety-valve should be made available to offenders who have more than one criminal history point, preferably all offenders in Criminal History Category III, but at least Criminal History Category II. African-American defendants have a higher risk of arrest and therefore more criminal history points than similarly situated white defendants, and thus are excluded from safety-valve relief when similarly situated white defendants are not.⁷³ And while the number may be small, 260 people were excluded from safety-valve relief in FY 2009 merely because of an offense the Commission classifies as “minor,” presumably traffic offenses.⁷⁴

In *United States v. Feaster*, 259 F.R.D. 44, 51 (E.D.N.Y. 2009), Judge Weinstein provided this analysis of the arbitrariness of the requirement that a defendant have “more than 1 criminal history point” in order to be eligible for safety-valve relief:

The inequity flowing from this obscure – and substantively dubious – guidelines criterion for safety-valve eligibility may, as the Commission’s report states, be infrequent. But it is no less real and no less unfair for the few ill-fated defendants falling into what can only be considered a “pothole on the road to justice.” It also violates the fundamental statutory requirement to consider in sentencing “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553 (a)(6); *see also Booker*, 543 U.S. at 253-54. To take away years of a young man’s life based on bureaucratic rigidity under the banner of “criminal justice” is an intolerable cruelty.

Id. The Commission should fix the injustice resulting from the limitation to one criminal history point.

⁷¹ USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.2 (2010)

⁷² Jane L. Froyd, *Comment: Safety-valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-99 (2000). The requirement of providing truthful information to the government “has no bearing on the defendant’s status as a low-level offender or on traditional factors that have been considered in assessing a defendant’s threat to society.” *Id.* at 1499.

⁷³ USSC *Fifteen Year Review* at 134.

⁷⁴ USSC, *Impact of Prior Minor Offenses on Eligibility for Safety-valve* (2009).

In addition, the Commission should expand the safety-valve to include all drug offenses. Many of our clients are excluded from safety-valve relief because it is limited to defendants convicted under 21 U.S.C. §§ 841, 844, 846, 960 and 963. In some districts where substantial portions of towns and cities fall within protected zones, prosecutors can, and some do, charge violations of 21 U.S.C. § 860 for the purpose of preventing safety-valve relief for low-level offenders with little or no criminal history who would otherwise qualify.⁷⁵ Our clients prosecuted in the Middle District of Florida under the Maritime Drug Law Enforcement statutes, 46 U.S.C. § 70501 – 70508, also do not fall within the express terms of USSG §5C1.2, although their offenses are no different in any relevant way than the specified title 21 offenses. The safety-valve should be expanded to cover all drug offenders.

We also believe that the extent of the reduction available under the safety-valve should be increased. The current two-level reduction is often inadequate to counteract the overpunishment resulting from linking base offense levels to mandatory minimums, drug quantity, relevant conduct, and/or multiple upward adjustments.

3. A downward adjustment for defendants who provide information to the government concerning the offense.

In the same question for comment asking whether the Commission should expand the safety-valve to defendants who have more than 1 criminal history point, the Commission also requests comment on whether it should consider “providing a similar downward adjustment to drug trafficking defendants who truthfully provide to the Government all information and evidence the defendant has concerning the offense.”⁷⁶

The Defenders welcome any effort to reduce excessive penalties for drug traffickers. We are concerned, however, that encouraging defendants to provide information concerning their offenses may expose some defendants to greater penalties than they might otherwise receive and may be subject to abuse. A defendant who provides such information receives no protection against use of the information in determining his sentence. *See* USSG § 5C1.2, n.7 (information disclosed may be considered in determining guideline range unless restricted under § 1B1.8); USSG § 1B1.8, comment. (n.6) (limitation on use of information does not apply to defendant who details the extent of his own unlawful activities). Nor is the defendant protected against use of the information in a state prosecution or subsequent federal prosecution. The lack of such

⁷⁵ In the Northern District of Iowa, prosecutors often include a violation of 21 U.S.C. § 860 among the other charges in an indictment. *See United States v. Koons*, 300 F.3d 985, 993 (8th Cir. 2002); Statement of Nicholas T. Drees Before the U.S. Sent’g Comm’n, Denver, Colo., at 8 (Oct. 21, 2009).

⁷⁶ We are not sure what the question for comment means by “similar downward adjustment” -- similar to the current safety-valve, similar to the expanded downward adjustment for defendants with more than 1 criminal history point, or similar to something else.

protections creates the potential for greater sentencing exposure as well as unwarranted disparity depending on the practices of the particular U.S. Attorney's Office⁷⁷ or the skills of the defense attorney in advising the client.

We would be happy to work with the Commission and its staff to craft amendments that may help alleviate these concerns.

IV. Role Adjustments

The Commission requests comment on “what changes, if any, should be made to USSG §3B1.1 (Aggravating Role) and USSG §3B1.2 (Mitigating Role) as they apply to drug trafficking cases.” We welcome this request for comment because we have long advocated for revisions to the guideline commentary that would remove some of the obstacles to judges granting mitigating role adjustments for individuals who play lesser roles in drug trafficking.

A. The Commentary in the Mitigating Role Adjustment Discourages Its Application.

Because of the Commission's original policy of tying the drug guidelines to the mandatory minimum quantities and focusing on aggregated quantity rather than role, the guidelines recommend substantial periods of imprisonment for low-level, non-violent defendants, as described above. While the mitigating role adjustment at USSG §3B1.2 is meant to ameliorate the harsh effects of quantity-driven guidelines and the relevant conduct rules, the role adjustments are not having their intended effect and should be amended to effectuate Congress's finding that “those who played a minor or minimal role” in drug trafficking should receive a lesser sentence than higher-level offenders.⁷⁸ Too few defendants receive mitigating role adjustments when their conduct is plainly less culpable than that of others.⁷⁹ Without amendment, some courts will continue to underuse the mitigating role adjustment and contribute to unwarranted disparity.

The Application Notes for the aggravating and mitigating role guidelines appear to exacerbate problems, rather than clarify sensible application of these adjustments. As discussed more fully below, the general thrust of the Application Notes under §3B1.2 seems intended to

⁷⁷ We have previously expressed our concerns about the disparate use of USSG §1B1.8. See Statement of Nicholas T. Drees Before the U.S. Sent'g Comm'n, Denver, Colo., at 9-10 (Oct. 21, 2009).

⁷⁸ *2007 Cocaine Report*, at 7 n. 25.

⁷⁹ *2009 Sourcebook*, Table 40 (19.7% of drug offenders received mitigating role adjustment). In the *2007 Cocaine Report*, the Commission reported that in 2005, 53.1% of powder cocaine offenders were low-level offenders (couriers, street-level dealers, renters, loaders, lookouts, users). Yet, that same year, only 20.3% of powder cocaine defendants received a mitigating role adjustment. USSC, *2005 Sourcebook of Federal Sentencing Statistics*, Table 40 (hereinafter *2005 Sourcebook*). For crack offenders, the numbers are even more dismal. While 55.4% were street-level dealers, *2007 Cocaine Report*, at 21, only 6.3% of all crack offenders received a mitigating role adjustment. *2005 Sourcebook*, Table 40.

narrow its application. The narrow language in the Notes to §3B1.2 contrasts strikingly with the expansive Application Notes for aggravating role. For example, Application Note 3(A) for mitigating role requires a defendant to be “substantially less culpable than the average participant.” No parallel requirement applies in the aggravating role guideline commentary. Application Note 4 for aggravating role encourages courts to consider “the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.” The absence of many of these considerations can indicate a defendant’s mitigating role, but Application Note 4 of §3B1.2 mentions only “the defendant’s lack of knowledge or understanding of the scope and structure of the enterprise and the activities of others.” Application Note 4 of §3B1.2 expressly discourages use of the minimal participant adjustment, stating *a priori* that “[i]t is intended that the downward adjustment for a minimal participant will be used infrequently.” The actual data reviewed in the previous section shows that, at least in drug cases, quantity often drives the offense level for low-level offenders so high that it overstates the seriousness of the offense and the defendant’s culpability. Hence, minimal role should apply *frequently*.

Perhaps most striking is the contrast in treatment of others involved in the criminal enterprise, which has created perhaps the greatest inconsistencies in application of mitigating role. Drug manufacture and distribution is an extensive, often international, enterprise. Many drug defendants, however, are hired to play limited, often isolated roles such as couriers, boat hands, or other minor functionaries. While they play the “major” role in that particular, isolated, illegal activity, no one could believe they are major, or even significant, players in the overall criminal enterprise. Yet the commentary to §3B1.2, in contrast to §3B1.1, seems to ignore this very point. In determining whether an organization is “otherwise extensive,” Note 3 of the guideline for aggravating role advises the court to consider “all persons involved during the course of the entire offense.” It then gives as an example of an “extensive” organization, a fraud offense that “used the unknowing services of many outsiders.” Certainly, drug trafficking enterprises are extensive organizations that routinely involve many participants unknown to law enforcement or the defendants charged. Yet the commentary in §3B1.2 places a difficult burden on a defendant who was the only one caught, typically a courier, to establish that the offense involved “multiple participants.”

B. The Commentary for Mitigating Role Should Be Amended to Encourage Use of the Adjustment in Appropriate Cases.

1. Previous efforts at clarification have not succeeded.

When the Commission amended §3B1.2 in 2001, it intended to make the mitigating role adjustment available to a drug courier whose base offense level was determined solely on the quantity personally handled by that defendant. To that end, the Commission adopted the approach articulated by the Eleventh Circuit in *United States v. Rodriguez DeVaron*, 175 F.3d 930 (11th Cir. 1999). According to the Commission’s view of *DeVaron*, a defendant is not automatically precluded from receiving a role adjustment “in a case in which the defendant is

held accountable under §1B1.3 solely for the amount of drugs the defendant personally handled.” USSG App. C, Amend. 635 (Nov. 1, 2001) (Reason for Amendment).⁸⁰

Had the Commission stopped with that clarification, more drug couriers and other low-level participants may have received mitigating role adjustments. The Commission, however, added a number of provisions that diluted the intended effect of the 2001 amendment. It required that the defendant play “a part in committing the offense that makes him *substantially* less culpable than the average participant.” §3B1.2, comment. n. (3) (emphasis added). It added a note discouraging the court from using the defendant’s statement to support the role adjustment. USSG §3B1.2, n. 3(C) (“the court, in weighing the totality of the circumstances, is not required to find based solely on the *defendant’s bare assertion*, that such a role adjustment is warranted”). USSG App. C, amend. 635 (Nov. 1, 2007) (emphasis added).

This latter note is grossly unfair and makes it exceedingly difficult for those offenders who are the only ones caught (*e.g.*, couriers) to prove that there were other participants as required under §3B1.2, comment. (n.2) (Requirement of Multiple Participants), and to then prove they were “less culpable than most other participants,” §3B1.2, comment. (n.5), or “the least culpable of those involved in the conduct of a group.” §3B1.1, comment. (n.4). Judges should not be discouraged from relying upon a defendant’s uncorroborated statements or the surrounding circumstances to find that the offense involved other participants, and to determine the defendant’s culpability in relationship to those participants. Courts are well equipped to determine the credibility of any witness, including a defendant, and are encouraged to base their fact-findings on reliable information. USSG §6A1.3(c). The commentary in application note 3(C) creates an unbalanced bias against the judge exercising his or her ability to do so, and creates a high bar for defendants in cases where the only way to prove that there were other participants is through the defendant’s own statements.⁸¹

The Commission also discouraged use of the mitigating role adjustment for the very defendants it intended to include within the guideline (*i.e.*, those whose role in the offense was limited to such low-level functions as transporting or storing drugs even if the defendant was

⁸⁰ The application of *DeVaron* in the Eleventh Circuit has proven to be quite restrictive. *See, e.g., United States v. Torres-Arreaga*, 358 Fed. Appx. 120, 121 (11th Cir. 2009) (district court did not err in denying courier minor role when “conduct for which he was held accountable at sentencing was the same as his actual conduct”); *United States v. Villegas-Tello*, 319 Fed. Appx. 871, 879 (11th Cir. 2009) (court may only consider participants involved in relevant conduct attributed to defendant); *United States v. Medina-Gutierrez*, 279 Fed. Appx. 919, 921 (11th Cir. 2008) (crew member on vessel properly denied minor role because court only held him “responsible for the amount of the drugs he was personally involved in smuggling,” and activity of others in larger conspiracy was irrelevant because he was not charged with larger conspiracy).

⁸¹ A woman arrested for carrying heroin in her suitcase after arriving on a flight from Africa cannot offer any corroboration other than the reasonable inferences from the surrounding circumstances – she did not grow the poppies, refine them into heroin, package the heroin, decide where to deliver it in the United States, or arrange for payment by the buyer. All the woman may be able to offer is a simple statement: “A man handed me a bag and promised to pay me \$500.”

accountable only for the quantity personally transported or stored) when it stated in its reason for amendment that it did not mean to “suggest that a such a defendant can receive a reduction *based only on those facts*.” USSG App C, Amend. 635. This comment sends a signal to judges that a defendant must show more to obtain a role reduction.

2. Restrictive commentary has resulted in disparate application.

The restrictive commentary in §3B1.2 has contributed to a problem of hidden disparity, which arises from inconsistent application of the guideline. Because the rule lacks clarity, “[s]imilar offenders are likely to receive different sentences not because they are warranted by different facts, but because the same facts are interpreted in different ways by different decisionmakers.”⁸²

Henry Bemporad, the Defender in the Western District of Texas, explained these problems in detail in his testimony at the Phoenix regional hearing.⁸³ In addition to the intradistrict disparity Mr. Bemporad described, regional differences exist in application of §3B1.1. For example, our colleagues report that in the Eastern District of New York and in California, couriers routinely receive role adjustments based on their account of their role in importing drugs, including large quantities, and even though no, or few, other participants are identified. Couriers in the Southern District of Florida may get the same benefit.⁸⁴

In contrast, judges in the Middle District of Florida apply the *DeVaron* decision to preclude couriers from receiving a minor role reduction even though everyone agrees they are mere mules. Those judges typically rule, based on *DeVaron*, that the large quantity of drugs transported precludes the defendant from obtaining a role reduction even when the defendant is unaware of the quantity of drugs involved. The judges also compare the role of each crewmember, find that they are equally culpable, and refuse to apply the role reduction, even if the defendant was hired only to pretend to be a fisherman and had no role in offloading the drugs. The obvious fact that these couriers are nothing but small, easily replaced cogs in a much larger drug trafficking organization is not viewed as mitigating, but as a reason to deny a mitigating role adjustment.⁸⁵

⁸² Barbara Vincent, *Informing a Discussion of Guideline Simplification*, 8 Fed. Sent’g. Rep. 36, 37 (Aug. 1995).

⁸³ Statement of Henry Bemporad Before the U.S. Sentencing Comm’n, Phoenix, Arizona, at 4-7 (Jan. 21, 2010).

⁸⁴ See *United States v. Dorvil*, 784 F. Supp. 849 (S.D. Fla. 1991) (granting minimal role reduction to defendant involved in off-loading 227 kilograms of cocaine).

⁸⁵ The sentencing law is particularly harsh on these defendants because they are subject to mandatory minimum penalties but not eligible for relief under the safety-valve when prosecuted under 46 U.S.C. § 70503.

3. Appellate decisions have unduly restricted application of mitigating role adjustments.

Many appellate courts have a cramped view of what defendants must prove to obtain role adjustments and have set forth stricter standards for application of the role adjustment than the commentary itself. Discussed below are some of the ways that appellate courts have constructed rules that limit application of the mitigating role adjustments.

a. The “critical,” “indispensable,” or “essential” nature of a low-level offender’s role is often used to deny a mitigating role adjustment.

Many appeals courts have ruled that low-level, easily replaceable offenders do not qualify for a minor role adjustment because they are an “indispensable” part of the drug-dealing network, or played a “critical role.” *United States v. Feliz-Ramirez*, 391 Fed. Appx. 17, 19 (2d Cir. 2010) (“couriers are indispensable to the smuggling and delivery of drugs and their proceeds”) (quoting *United State v. Garcia*, 920 F.2d 153, 155 (2d Cir. 1990)); *United States v. Acevedo*, 326 Fed. Appx. 929, 932 (6th Cir. 2009) (“A defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensable or critical to the success of the scheme.”) (quoting *United States v. Salgado*, 250 F.3d 438, 458 (6th Cir. 2001); *United States v. Pruneda*, 518 F.3d 597, 606 (8th Cir. 2008); *United States v. Enny*, 34 Fed. Appx. 527, 529 (9th Cir. 2002) (defendant denied role adjustment because he provided “vital link” in operation); *United States v. Martinez*, 512 F.3d 1268, 1275-76 (10th Cir. 2008) (mitigating role adjustment not applied because defendant who transported two pounds of methamphetamine played critical role in trafficking operation); *United States v. Boyd*, 291 F.3d 1274, 1276-78 (11th Cir. 2002) (mitigating role adjustment not applied because defendant who transported 2,874 grams of cocaine in his luggage from Haiti to Miami played critical role in drug importing operation). The Tenth Circuit has gone so far to say that it is “not productive” to argue that one participant in criminal activity is “more or less culpable” than another. *United States v. Carter*, 971 F.2d 597, 600 (10th Cir. 1992) (upholding denial of role reduction for driver of car who transported 42 pounds of marijuana).

These cases establish what amounts to a per se rule against application of the mitigating role adjustment for couriers. Couriers by definition are a necessary and essential component of the drug trade, just as Federal Express drivers are a necessary part of a legitimate retail trade, or an armored car driver is a necessary part of the banking industry. No one would say, however, that any of those lower-level functionaries, when compared to corporate CEOs, bank presidents, accountants, and even store managers, play anything but minor roles in the retail and banking business.

b. The defendant’s role as a non-peripheral player is used to deny the adjustment for minor role.

The Fifth Circuit has held that for a defendant to qualify for a *minor* role adjustment, it is not enough that he or she was substantially less culpable than the average participant in the offense. Instead, the defendant’s role must also have been “peripheral to the advancement of the illicit activity.” *United States v. Armendariz*, 65 Fed. Appx. 510, 510 (5th Cir. 2003) (unpub.);

United States v. Aquilera-Suarez, 2011 WL 661691, *1 (5th Cir. Feb. 23, 2011) (driver of truck hauling marijuana to Houston denied minor role because he was not “peripheral player”).

By contrast, other circuits apply a “peripheral role” requirement for the *minimal* role downward adjustment of §3B1.2(a). See *United States v. Teeter*, 257 F.3d 14, 30 (1st Cir. 2001) (to qualify as minimal participant, defendant must show she was, at most, a “peripheral player” in the crime); *United States v. Dumont*, 936 F.2d 292, 297 (7th Cir. 1991) (noting that defendant was not “the kind of peripheral figure for which the four-point adjustment is designated”).

No circuit sets forth a clear definition of “peripheral.” Whatever its meaning, “non-peripheral” players in one circuit may obtain a minor role adjustment but not those in another. This split creates unwarranted disparity.

c. If the defendant’s participation was “co-extensive” with the conduct for which the defendant was held accountable, courts often deny a role adjustment.

The Fifth Circuit routinely upholds the district courts’ denial of a mitigating role adjustment when the defendant’s participation was “coextensive with the conduct for which [the defendant] was held accountable.” *United States v. Delgado*, 236 Fed. Appx. 156, 156 (5th Cir. 2007); see also *Martinez*, 512 F.3d at 1276; *United States v. Zuniga*, 387 Fed. Appx. 514, 515 (5th Cir. 2010) (unpub.) (denying adjustment to defendant who did nothing more than pick up person who was carrying marijuana in backpack because his participation was “coextensive with the conduct for which he was held accountable”). That law conflicts with the commentary in §3B1.2, which permits a role reduction even if the defendant is held “accountable only for the conduct in which the defendant was personally involved.” USSG §3B1.1, comment., n. 3(A).⁸⁶

d. The quantity of drugs involved and the distance the courier traveled are often dispositive considerations in denying a role adjustment.

Appellate courts across the country discourage district courts from granting role reductions when the offense involved a large quantity of drugs or the courier traveled a great distance. See, e.g., *Rodriguez De Varon*, 175 F.3d at 943 (amount of drugs involved is material consideration and may be dispositive) (overruling panel decision holding that minor role reduction could not be denied on sole basis of quantity involved); *United States v. Bonilla-Ortiz*, 362 Fed. Appx. 63, 65 (11th Cir. 2010) (denying role reduction to crew member and finding that drug quantity is material consideration in role analysis and may be “dispositive”); *United States v. Carrillo*, 283 Fed. Appx. 307, 307 (5th Cir. 2008) (defendant properly denied role reduction where the defendant, a courier, was paid for services, traveled long distance, suspected he was transporting illegal narcotics, and transported large quantity of cocaine); *United States v. Rossi*,

⁸⁶ The Seventh Circuit, in contrast, took seriously the Commission’s 2001 amendment. See *United States v. Hill*, 563 F.3d 572, 578 (7th Cir.) (discussing 2001 amendment and how it changed circuit law so that defendant’s role not measured solely against conduct for which defendant was personally responsible), *cert. denied*, 130 S. Ct. 623 (2009).

309 Fed. Appx. 12, 13 (7th Cir. 2009) (defendant who transported many kilograms of methamphetamine a long distance not entitled to role reduction).

C. Recommendations for Amendment

The Commission could fix USSG §3B1.2 in several ways:⁸⁷

- Remove from the commentary the language that the defendant must be “*substantially* less culpable than the average participant.” While the commentary seeks to make clear that the adjustment is not precluded for one who transports or stores drugs, it has not had the intended effect.
- Amend the guideline commentary to make clear that paid-by-the trip couriers with limited knowledge are generally eligible for a lesser role, even if their role is an “indispensable” or “integral” part of the offense.
- Amend the guideline commentary to make clear that the amount of drugs involved or distance traveled has little bearing on the defendant’s role.
- Amend application note 2 to state that the court may find that more than one participant was involved in the offense based on the defendant’s statements or the surrounding circumstances.
- Remove from application note 3(C) the following sentence: “As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant’s bare assertion, that such a role adjustment is warranted.”
- Delete the last sentence in application note 4, which states: “It is intended that the downward adjustment for a minimal participant will be used infrequently.” USSG §3B1.2. The Commission proposed to eliminate this language in 2001, but it chose not to do so apparently because of DOJ’s objection that it would invite role reductions for drug couriers. *See* Letter from James K. Robinson, Assistant Attorney General to Chair, U.S.

⁸⁷ We have heard it argued that more and better training of judges and probation officers may increase the use of the mitigating role adjustments. We believe that the case law and practice is too entrenched for training to make much of a difference. In the past, the Commission has promulgated clarifying amendments rather than rely on training to ensure that judges applied the guidelines in the manner in which they were intended. *See, e.g.*, USSG App. C, Amend. 78 (Nov. 1, 1989) (clarifying definition of conduct for which the defendant is “otherwise accountable” under USSG §1B1.3); USSG App. C, Amend. 83 (Nov. 1, 1989) (clarifying that a firearm is a type of dangerous weapon); USSG App. C, Amend. 91 (Nov. 1, 1989) (clarifying guideline commentary regarding use of force or threats); USSG App. C, Amend. 666 (Nov. 1, 2004) (adding application notes and illustrative examples to clarify meaning of “high-level decision-making or sensitive position” under USSG §2C1.1).

Sentencing Comm'n 4-5 (Jan 12, 2001). The language has had the effect of curtailing all role reductions – minimal and minor.⁸⁸

- Add commentary that among the factors the court should consider in deciding whether to apply the adjustment for mitigating role is the absence of the factors set forth in §3B1.1, comment. (n.4), i.e., the absence of decision-making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in the planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.
- Provide for a departure in the commentary to §2D1.1 or §3B1.2, which states that in some cases, the adjustment for mitigating role may not be adequate and the court may give an additional reduction. Close to one-half (46%) of judges surveyed thought that the guidelines should allow for role adjustments greater than four-levels.
- Remove from §5K2.0(d)(3) and §5H1.7 the prohibitions on departures for role in the offense.

D. Prohibit double counting of USSG §2D1.1(b)(2)(C) with §3B1.1.

We encourage the Commission to correct a double-counting issue that results in a disproportionate penalty increase based upon the same conduct. Panels in the Eleventh Circuit have held that a defendant who receives an adjustment under §2D1.1(b)(2)(C) (“defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance”), may also receive an adjustment for aggravating role even though both adjustments are based on the defendant’s status as a leader of a crew. *See, e.g., United States v. Ramirez*, 426 F.3d 1344, 1356 (11th Cir. 2005); *United States v. Rendon*, 354 F.3d 1320, 1332 (11th Cir. 2003); *United States v. Chisholm*, 142 Fed. Appx. 378, 381 (11th Cir. 2005).

One method of fixing the double-counting problem is to add an application note to §3B1.1, which states: “Do not apply any adjustment under this section where the defendant has received an adjustment under USSG §2D1.1(b)(2)(C).”

V. The Secure and Responsible Drug Disposal Act of 2010

Section 4 of the Secure and Responsible Drug Disposal Act of 2010 directs the Commission to “*review and, if appropriate, amend*” the guidelines to ensure that persons

⁸⁸ The “infrequently” language appears in the note discussing the adjustment for minimal role. The Fifth and Ninth Circuits, however, have applied it to all role adjustments under §3B1.2. *See United States v. Mitchell*, 31 F.3d 271, 278 (5th Cir. 1994); *United States v. Hernandez-Franco*, 189 F.3d 1151, 1160 (9th Cir. 1999) (citations omitted); *United States v. Gonzalez-Corona*, 2 Fed. Appx. 858, 858 (9th Cir. 2001) (denying role adjustment to driver of car that contained 60 pounds of marijuana); *United States v. Gomez-Valdes*, 273 Fed. Appx. 663, 665 (9th Cir. 2008).

convicted of a drug offense resulting from the person's authority to receive scheduled substances from ultimate users or long-term care facilities receive "an appropriate penalty increase of *up to 2 offense levels*" greater than the sentence otherwise applicable under Part D of the *Guidelines Manual*. (emphasis supplied).

The Commission proposes to amend Application Note 8 to §2D1.1 to provide that the 2-level adjustment under §3B1.3 for abuse of a position of trust applies in such a case. We believe the Commission's proposal, which would require a 2-level increase in *all* such cases, adopts the most severe reading of the congressional directive, even though the Commission lacks sufficient information about the nature and scope of these cases to determine that such an increase is warranted. Application note 8 of §2D1.1 already calls the court's attention to those defendants who use a special position or skill to facilitate drug trafficking. We think it unwarranted by the directive or any evidence to single out one small category of those individuals, i.e., persons authorized to receive drugs under the Secure and Responsible Drug Disposal Act, and require that the court apply §3B1.3 when in other cases, the application note merely states that §3B1.3 "may apply."

Defenders believe the Commission should implement the directive by amending the second sentence in Application Note 8 to §2D1.1, as follows:

These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, *and persons authorized to receive scheduled substances from an ultimate user or long term care facility, see 21 U.S.C. § 822(g)*, and others whose special skill trade, profession, or position may be used to significantly facilitate commission of a drug offense.

VI. Conclusion

We would be happy to discuss any modifications to the guidelines that would advance the goal of simplicity and fidelity to 18 U.S.C. § 3553(a). Thank you for providing us an opportunity to testify and for considering our comments. As always, we look forward to working with the Commission on these and other issues.