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On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Proposed Amendments to “Mitigating Role,” “Single Sentence Rule,”
and “Jointly Undertaken Criminal Activity”

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My name is Jon Sands and I am the Federal Public Defender in the District of Arizona. I thank the Commission for inviting me to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments on the single sentence rule, jointly undertaken criminal activity, and mitigating role.

I. Mitigating Role

Defenders have long expressed concerns about how the mitigating role guideline leads to unwarranted disparity across and within districts because it lacks clarity and does not provide judges sufficient guidance on who should receive a mitigating role adjustment.¹ We have previously suggested that the Commission clearly delineate which functional roles should generally be considered mitigating roles. Although the Commission has declined to propose any of our past recommendations, we are encouraged by the Commission's decision to examine the problems with the mitigating role guideline. While some of the proposed amendments are a step in the right direction, some are too ambiguous and do not address other significant problems with USSG § 3B1.2, particularly as it applies to drug trafficking and economic crimes.

First, we are concerned that the addition of the language – “in the criminal activity” – to USSG § 3B1.2, comment. (n.3(A), 4, and 5) does not accomplish the Commission's goal of adopting a rule that the relevant point of comparison for determining the “average participant” is the conduct of other participants in the overall criminal scheme. To better capture the approach of the Seventh and Ninth Circuits, the Commission should consider different language, such as “*in the criminal activity, including participants in the broader criminal scheme of which defendant was a part.*” Second, we welcome the Commission's proposal to change the language in §3B1.2, comment. (n.3) to reflect that a defendant may receive a reduction based on the facts set forth in the examples. The commentary would provide more guidance, however, if the language “*is not precluded from consideration*” were replaced with “*should generally receive an adjustment*” rather than “*may receive an adjustment.*” Third, we recommend that the Commission also add language to clarify that a defendant who performs an essential or indispensable role in the activity and a defendant who is responsible for a large quantity of drugs may receive a mitigating role adjustment. Fourth, while adding a non-exhaustive list of factors to §3B1.2, comment. (n.3(C)) may provide courts with additional guidance, the application note could be improved with more guidance or examples of when the minimal role adjustment rather than a minor role adjustment should apply.

¹ See, e.g., Testimony of Henry J. Bemporad, Federal Public Defender for the Western District of Texas, Before the U.S. Sent'g Comm'n, Phoenix, Arizona, 3-7 (Jan. 21, 2010); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 10 (Nov. 20, 2013); Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sent'g Comm'n, at 4 (July 25, 2014).

A. Section 3B1.2 Does Not Provide Judges with Reliable Guidance When Deciding Whether a Person Should Receive a Mitigating Role Adjustment.

Inconsistent application of §3B1.2 has been an ongoing problem.² As far back as 1990, the Commission grappled with whether it should delete the language “any criminal activity” and replace it with “the offense” or whether it should provide a non-exhaustive list of factors relevant to the court’s consideration.³ In 1997 and 2002, the Commission considered resolving a circuit split about how mitigating role comparisons should be done, including whether the defendant should be compared to a hypothetical average participant.⁴ In 2002, it also considered whether to provide “guidance on whether particular drug offenders who perform certain drug trafficking functions (e.g., courier or mule) should – or should not – receive mitigating role adjustments.”⁵ In more recent years, the Commission has acknowledged that courts continue to “disagree” regarding the meaning of the current language of §3B1.2, “sometimes inconsistently appl[y] §3B1.2 to defendants who were couriers and mules,”⁶ and disagree on whether someone who plays a peripheral role qualifies for a four-level minimal-role-adjustment, or only a two-level minor-role-adjustment.⁷ Because the role adjustments still lack 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 decision makers.”⁸

² USSC, *Initial Report of the Working Group on Drugs and Role in the Offense*, App. E (1991) (noting that some courts give reductions to couriers and others do not); USSC, *Report of the Drugs/Role/Harmonization Working Group* 45 (1992) (noting problems with lack of definition for “average participant”), USSC, *Simplification Draft Paper*, Ch. 3 (discussing problems with how the mitigating role guideline is worded, including lack of guidance on meaning of “average participant” and how other parts of the guideline are “confusing and contradictory”).

³ Notices, U.S. Sent’g Comm’n, Sentencing Guidelines, 55 Fed. Reg. 5718-01 (Feb. 16, 1990); Notices, U.S. Sent’g Comm’n, Sentencing Guidelines, 57 Fed. Reg. 90-01 (Jan. 2, 1992); Notices, U.S. Sent’g Comm’n, Sentencing Guidelines, 58 Fed. Reg. 67522-01 (Dec. 21, 1993); Notices, U.S. Sent’g Comm’n, Sentencing Guidelines, 62 Fed. Reg. 152-01 (Jan. 2, 1997); Notices, U.S. Sent’g Comm’n, Sentencing Guidelines, 67 Fed. Reg. 2456-01 (Jan. 17, 2002).

⁴ Notices, U.S. Sent’g Comm’n, Sentencing Guidelines, 62 Fed. Reg. 152-01 (Jan. 2, 1997) Notices, U.S. Sent’g Comm’n, 67 Fed. Reg. 2456-01 (Jan. 17, 2002).

⁵ *Id.*

⁶ USSC, *Aggravating and Mitigating Role Adjustments Primer* 5 (May 2014).

⁷ *Id.* at 13.

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

Because the Commission has never amended §3B1.2 to resolve these ongoing issues, and because appellate courts defer to the decisions of district court judges on application of mitigating role adjustments, §3B1.2 is not applied consistently. Among districts with a large number of drug trafficking cases involving couriers and “mules” who are enlisted to transport drugs so that higher level traffickers do not run the risk of getting caught, application of the mitigating role adjustment varies dramatically. For example, FY 2012-2013 data show that in the Eastern District of New York, 30% of defendants received a mitigating role adjustment, with 21.5% receiving a 4-level minimal role adjustment.⁹ Many of these defendants are couriers and mules who receive adjustments based upon their importation of a large quantity of drugs, and even though no, or few, other participants are identified. In contrast, judges in the Middle District of Florida applied mitigating role adjustments in only 5% of cases. Those judges typically rely on an old Eleventh Circuit decision – *United States v. Rodriguez De Varon*, 175 F.3d 930, 942-43 (11th Cir. 1999) (en banc) – which discourages application of the mitigating role adjustment “when a drug courier’s relevant conduct is limited to her own act of importation” or because the amount of drugs “may be the best indication of the magnitude of the courier’s participation.”¹⁰

Considerable variation also occurs in the southwest border districts even though the cases typically involve couriers who generally know nothing about the inner workings of the larger drug organization and who are usually paid a fixed fee to transport a load of drugs – often not even knowing the quantity or type of drugs they are transporting. Whether these similarly situated defendants receive a mitigating role adjustment depends upon what district they are caught in, the probation officer who prepares the presentence report, and the sentencing judge. Some judges will deny a reduction to virtually all couriers because they are deemed “an indispensable part of drug dealing networks,”¹¹ or because they transported a large quantity of

⁹ USSC, *FY 2012-2013 Monitoring Dataset*.

¹⁰ *United States v. Lormil*, 551 F. App’x 542, 544 (11th Cir 2014) (district court justified in denying minor role reduction for defendant who smuggled 2.5 kilograms of cocaine hidden in suitcase and agents could not contact or locate the alleged leaders).

¹¹ *United States v. Buenrostro*, 868 F.2d 135, 138 (5th Cir. 1989) (defendant who transported 18 kilograms of cocaine across border denied mitigating role adjustment because “couriers are an indispensable part of drug dealing networks”); *United States v. Zuniga*, 585 F. App’x 871, 872 (5th Cir. 2014) (defendant who transported 243 kilograms of marijuana not eligible for role adjustment because her conduct was not “peripheral to the advancement of the illicit activity”); *United States v. Sanchez-Ensaldo*, 583 F. App’x 319, 320 (5th Cir. 2014) (“attempt to import a gross weight of 66.92 kilograms of marijuana provided an indispensable service to the drug-trafficking offense”).

drugs.¹² Other judges typically will give a mitigating role adjustment to couriers no matter the quantity of drugs involved or whether the defendant’s role was somehow “indispensable.”

Recent data show significant differences in rates of mitigating role adjustments for defendants sentenced under §2D1.1 in each of the southwestern border districts. As the table below shows,¹³ only 9% of defendants sentenced in Arizona under §2D1.1 received a mitigating role adjustment. Arizona stands in stark contrast to other border districts. In the Southern District of Texas, 22% of defendants received a mitigating role adjustment compared to the Western District of Texas where the rate was 31% and the Southern District of California and District of New Mexico where 73% of defendants received a mitigating role adjustment. Given that a sizable number of these cases involve couriers, the dramatic differences in rates across districts shows that courts do not consistently apply §3B1.2. The extent of the reduction also varies significantly. In Southern California, only 2% of defendants received a 4-level reduction for minimal role compared to 41% in New Mexico.

**Mitigating Role Adjustments for Defendants Sentenced Under USSG §2D1.1
Selected Districts FY 2010-2013**

		DISTRICT					Total
		Texas-S	Texas-W	Arizona	California-S	New Mexico	
MITROLHI	-4	252 4.2%	398 5.0%	41 0.6%	104 2.0%	893 40.8%	1688 6.0%
	-3	167 2.8%	44 0.6%	25 0.4%	43 0.8%	278 12.7%	557 2.0%
	-2	902 15.1%	2000 25.2%	548 8.1%	3601 70.1%	430 19.6%	7481 26.7%
	-1	1 0.0%	0 0.0%	0 0.0%	5 0.1%	0 0.0%	6 0.0%
	0	4639 77.8%	5479 69.2%	6183 91.0%	1386 27.0%	590 26.9%	18277 65.3%
	Total	5961 100.0%	7921 100.0%	6797 100.0%	5139 100.0%	2191 100.0%	28009 100.0%

Data from across the country also show that drug defendants receive mitigating role adjustments at lower rates than what would be expected. In the 2011 Mandatory Minimum Report, the Commission reported that only 3.1% of drug defendants were actually organizers or

¹² See *Buenrostro*, 868 F.2d at 138; *United States v. Mendoza-Padron*, 497 F. App’x 391, 391 (5th Cir. 2012) (defendant who drove vehicle loaded with 14 kilograms of cocaine across Texas not entitled to minor role adjustment because her role was “coextensive with the conduct for which [she] was held accountable”).

¹³ USSC, *FY2010-2013, Monitoring Dataset*.

leaders and only 19.9% were importers or high-level suppliers.¹⁴ The most common role was courier (23%) and the third most common was street-level dealer (17.2%),¹⁵ which the Commission has recognized is a role “many steps down from high-level suppliers and leaders of drug organizations.”¹⁶ Nearly one half (48.1%) of all defendants fell within the four lowest functional roles: street-level dealer, broker, courier, and mule.¹⁷ In 2009 – the year that the Commission sampled the data for the 2011 report on functional role – only 19.7% of all drug defendants received a mitigating role adjustment.¹⁸ Close to half (46%) of all couriers did not receive a mitigating role adjustment.¹⁹ And 52.1% of mules, 96.5% of street level dealers, and 72.7% of brokers did not receive a mitigating role adjustment.²⁰

Consistent decisions regarding the proper application of §3B1.2 are important for several reasons. First, because the quantity-based drug guidelines fail to properly target serious drug traffickers and instead treat those at lower levels as if they were wholesalers or kingpins, mitigating role adjustments are an important mechanism to ensure that persons who perform functions such as couriers, mules, off-loaders, lookouts, gophers, and other lower-level roles, are not punished at the level Congress intended for “major” or “serious” traffickers.²¹ Second, the mitigating role adjustments are integrally related to other provisions in the guidelines that are designed to mitigate the harsh effects of the Drug Quantity Table. The applicability of the mitigating role caps in §2D1.1(a)(5) and §2D1.11(a), and the mitigating adjustment under §2D1.1(b)(15), depend upon whether the defendant receives an adjustment under §3B1.2 and

¹⁴ USSC, Report to Congress: *Mandatory Minimum Penalties in the Federal Criminal Justice System* App. D, fig. D-2 (2011) (*Mandatory Minimum Report*).

¹⁵ *Id.*

¹⁶ Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences, Hearing before the Committee on the Judiciary, United States Senate, at 5 (Sept. 18, 2013) (Statement of the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n).

¹⁷ *Mandatory Minimum Report*, at App. D, fig. D-2.

¹⁸ USSC, *2009 Sourcebook of Federal Sentencing Statistics* tbl. 40.

¹⁹ *Mandatory Minimum Report*, at App. D, fig. D-4.

²⁰ *Id.*

²¹ The House Judiciary Subcommittee on Crime has provided definitions of major and serious traffickers. “Major traffickers” are the “manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities.” USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 7 (2002). “Serious traffickers” are “the managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities.” *Id.*

whether the adjustment is for being a minor or minimal participant.²² The applicability of the specific offense characteristics for methamphetamine and amphetamine offenses under §2D1.1(b)(5) also turns on whether the defendant receives a §3B1.2 adjustment. This is especially relevant in cases involving couriers who bring methamphetamine across the border. If the defendant receives a mitigating role adjustment, then the 2-level enhancement for importation does not apply. If the defendant does not receive a mitigating role adjustment in a methamphetamine trafficking case, then he or she also gets a 2-level enhancement for importation. Third, because §5K2.0 expressly prohibits departures for mitigating role in the offense,²³ §3B1.2 should provide clear and sound advice.

B. “Average Participant in the Criminal Activity”

The Commission proposes amending §3B1.2, comment. (n.3(A)) to define the term “average participant” by reference to the individuals who actually participated in the criminal activity at issue in the defendant’s case rather than by reference to others who commit similar crimes. It also adds the term “in the criminal activity” to n.4 and n.5. Under the amendment, a person is not eligible to receive a mitigating role adjustment unless he or she is “substantially less culpable than the average participant in the criminal activity.” The Commission relies on case law from the Seventh and Ninth Circuits to support this rule.

We have reservations about whether adding the language “*in the criminal activity*” will accomplish the Commission’s goal of adopting the approach of the Seventh and Ninth Circuits. The term “any criminal activity” appears in §3B1.2 (a) and (b), but it has not been sufficient to clarify which criminal activity should provide the point of comparison. Nor is it clear what “criminal activity” means and whether a difference exists between “the criminal activity” as it would be used in the commentary and “any criminal activity” as it is used in §3B1.2(a) and (b). Does “criminal activity” mean the charged conduct; charged conduct and relevant conduct; the overall conspiracy or criminal scheme of which the defendant is a part, or something else?

We would not want to see this ambiguity make the law revert back to the confusion that existed ten years ago when the Ninth Circuit reversed a refusal to grant minor participant status because the court limited its analysis to the “charged conduct.” *United States v. Yates*, 107 F. App’x 32 (9th Cir. 2004). In another case, the Ninth Circuit reversed a decision to deny a minor participant adjustment when the court compared the defendant’s conduct to those brought to trial

²² Courts have commented how “the combination of a base offense level excessively influenced by the quantity of drugs involved in a transaction and the recently-adopted cap for minor or minimal participants creates a ‘cliff’ effect in which this single factor, which involves the application of a poorly-defined, inevitably somewhat subjective standard in a highly fact-specific way, can lead to dramatic changes in the prescribed sentence.” *United States v. Teyer*, 322 F. Supp. 2d 359, 380 (S.D.N.Y. 2004).

²³ USSG §5K2.0(d)(3) (stating that role “may be taken into account only under . . . §3B1.2”).

rather than all the “relevant actors in the criminal scheme,” including suppliers and distributors who may not be identifiable by name, but whose existence and participation in the overall scheme is proved with sufficient evidence. *United States v. Rojas-Millan*, 234 F.3d 464, 472-73 (9th Cir. 2000).

It is also unclear how the addition of the phrase “in the criminal activity,” affects the Eleventh Circuit’s analysis in *De Varon*, which held, contrary to the Ninth Circuit’s approach in *Rojas-Millan*, that a defendant cannot “prove that she is entitled to a minor role adjustment simply by pointing to some broader criminal scheme in which she was a minor participant but for which she was not held accountable.” *De Varon*, 175 F.3d at 941. Under *De Varon*, a person may be a minor participant in a criminal conspiracy to import drugs, but not be eligible for a mitigating role adjustment because his co-participants are not identifiable or charged and he is only held accountable for the specific drugs seized. See *United States v. Galina-Perez*, 322 F. App’x 743, 743 (11th Cir. 2009) (crew members on drug smuggling boat properly denied mitigating role reduction because they were held accountable only for a large quantity that they smuggled and were not permitted to show that they played a minor role in larger conspiracy). Does the amendment reject *De Varon* because “criminal activity” now includes all the relevant actors in the criminal scheme? If not, then the amendment is not adopting the approach of the Ninth or Seventh Circuits.²⁴

To resolve this issue, the Commission should adopt more specific language that tracks the approach of the Ninth Circuit. Below are ideas on how this could be accomplished. Both proposals are based upon the Ninth Circuit’s decision in *Rojas-Millan*.

- This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant
 - *in the criminal activity, including participants in the broader criminal scheme of which defendant was a part.*
 - *in the criminal activity, including other possible participants who escaped arrest or were tried separately*

²⁴ *United States v. Diaz-Rios*, 706 F.3d 795, 799 (7th Cir. 2013) (in assessing role, courts should look to defendant’s role “in the conspiracy as a whole”).

C. Commentary Examples of Defendants Who “May Receive” A Mitigating Role Adjustment

The second part of the proposed amendment revises the commentary by replacing the phrase “is not precluded from consideration for an adjustment” with the language “may receive an adjustment.”²⁵ In our previous submissions to the Commission, we have suggested that the Commission strike the “is not precluded from consideration” language and replace it with an affirmative statement that defendants in the cited examples “should generally be considered for an adjustment.”²⁶ We continue to encourage the Commission to adopt that suggestion, but generally welcome the change to note 3 because it is a step in the right direction.

When the Commission in 2001 amended note 3 of the §3B1.1 commentary to address situations where a person is accountable only for the conduct in which he was personally involved, it explained:

The amendment does not require that such a defendant receive a reduction under §3B1.2, or suggest that such a defendant can receive a reduction based only on those facts; rather the amendment provides only that such a defendant is not precluded from consideration for such a reduction if the defendant otherwise qualifies for the reduction pursuant to the terms of § 3B1.2.

USSG App. C, Amend. 635 Reason for Amendment (Nov. 1, 2001).

For the Commission to delete the phrase “is not precluded from consideration” and replace it with “may receive” makes clear that a defendant who is accountable only for the conduct in which he or she was personally involved and who performed a limited function is eligible for a reduction. Similarly, it makes clear that a defendant who is held accountable for loss amounts that greatly exceed the defendant’s personal gain or who had limited knowledge of the scope of the scheme is eligible for a reduction. Because these are the kinds of scenarios in which it makes sense for a defendant to receive a mitigating role adjustment, any language that signals the Commission’s intent that such people are eligible for a reduction should provide more guidance to courts.

The Commission should provide even more guidance by stating in its reason for amendment that the change to the commentary in application note 3 is to make clear that a defendant may not be denied a mitigating role adjustment solely because his or her participation

²⁵ §3B1.1 comment. (n.3(A)).

²⁶ Statement of Kathryn N. Nester Before the U.S. Sent’g Comm’n, Washington, D.C., at 14 (March 14, 2012).

was “coextensive with the conduct for which [the defendant] was held accountable.” *United States v. Delgado*, 236 F. App’x 156, 156 (5th Cir. 2007). While the commentary in §3B1.2 already permits a role reduction where the defendant is held “accountable only for the conduct in which the defendant was personally involved,” §3B1.2, comment. (n.3(A)), some courts continue to deny the adjustment for this reason.²⁷ Such decisions undercut the intent behind the commentary.

We also think it important for the Commission to add other examples of defendants in economic crime cases who might be considered for a mitigating role. One solution is to add language to note 3(A), such as:

Similarly, a defendant who received little personal gain relative to the loss amount, and whose participation was limited to such tasks as running errands, making deliveries, and other similar activities, with little or no control over the loss amount, [should generally be considered for] [may receive] an adjustment under this guideline.

The Commission should also encourage mitigating role adjustments for couriers, defendants involved in offloading operations, and defendants who perform simple tasks in economic crime offenses, by amending the commentary to state that

the quantity of drugs and amount of loss involved in the offense is not a dispositive consideration when deciding whether a defendant played a mitigating role in an offense.

D. Non-Exhaustive List of Factors for Courts to Consider in Determining Which Role Adjustment to Apply

Here, too, Defenders welcome the Commission’s attempt to identify factors that may provide more guidance on the distinction between a minor, minimal, and intermediate role adjustment. FY 2012-2013 data show that 5.6% of all individuals sentenced under the guidelines received a 2-level reduction, 1.4% received a 4 level reduction, and only .5% received a 3 level reduction.²⁸ With greater clarity, more of the individuals who receive the 2-level reduction may receive 3- or even 4-level reductions. To further clarify the distinction between the different

²⁷ See *United States v. Bonilla-Ortiz*, 362 F. App’x 63, 65 (11th Cir. 2010) (affirming the denial of a role adjustment because the defendant’s relevant conduct was “identical to his actual conduct”); *United States v. Alfaro-Martinez*, 476 F. App’x 11, 11 (5th Cir. 2012) (defendant denied role adjustment because his “sentence was based entirely on the conduct that he was directly involved in and the quantity of drugs he personally transported”).

²⁸ USSC, *FY 2012-2013 Monitoring Dataset*.

roles, the Commission might consider the language it proposed in 1997 which specified factors to consider in determining who should receive the 4-level reduction for minimal role:

The following is a non-exhaustive list of characteristics typically possessed by a defendant with a minimal role:

(i) Lack of knowledge or understanding of the scope and structure of the offense, and of the identity or role of the other participants in the offense;

(ii) only unsophisticated tasks performed;

(iii) no material decision-making authority in the offense;

(iv) no, or very minimal, supervisory responsibility over the property, finances, or other participants involved in the offense; and

(v) the anticipated or actual total compensation or benefit was small in comparison to the total return typically associated with offenses of the same type and scope.

The commentary should also make clear that peripheral players should generally be considered for a minimal role adjustment. This approach would be consistent with the First Circuit. *See United States v. Santos*, 357 F.3d 136, 142 (1st Cir. 2004) (“defendant must be a plainly peripheral player to justify his classification as a minimal participant”).

Second, as indicated above, we are concerned that the proposed “criminal activity” language is ambiguous. Clarity would be gained by referencing the overall criminal scheme. For example, instead of advising that the court consider “the degree to which the defendant understood the scope and structure of *the criminal activity*,” it could read:

the degree to which the defendant understood the scope and structure of the overall criminal scheme or the activities of others within the scheme.

A similar reference to “overall criminal scheme” could be made in the other two factors listed in the proposed amendment.

Third, we encourage a slight modification to the factor addressing “the degree to which the defendant stood to benefit from the criminal activity.” That factor should make clear that the court should consider a mitigating role adjustment for a person who does not have a proprietary interest in the criminal scheme and is simply being paid to perform certain tasks. One idea is for the third factor to state: “*the degree to which the defendant stood to benefit from the criminal activity, including whether the person was to be paid a flat sum of money or was to receive a percentage of the profits.*”

Lastly, we believe that the commentary could benefit from examples of a defendant whose role can be characterized as minimal or intermediate. Some examples of minimal role could be drawn from the case law. *See, e.g., United States v. Paulino*, 873 F.2d 23 (2d Cir. 1989) (lookout for drug distribution operation played); *United States v. Hernandez*, 375 F. Supp. 2d 1173 (D.N.M. 2004) (defendant was not knowledgeable about the scope and structure of the drug trafficking operation or about others' activities in the operation, and he knew only that he was making purchases of small quantities of drugs to sell in order to support his personal habit); *United States v. Phillips*, 368 F. Supp. 2d 1259 (D.N.M. 2005) (truck driver who was paid \$5000 to deliver marijuana but credibly testified that he did not know what or how much he was hauling).

E. Additional Suggestions for Guidance on Application of the Mitigating Role Adjustment

The Commission requests comment on “[w]hat additional or different guidance should the Commission provide on applying mitigating role adjustments.” We have discussed this issue in many previous submissions and will not repeat them here.²⁹ One area that the Commission should promptly address is how some courts treat minor role as synonymous with “nonessential” or “peripheral to the advancement of the criminal activity.” Far too many courts have ruled that low-level, easily replaceable persons do not qualify for a minor role adjustment because they are an “indispensable” part of the criminal scheme or played a “critical role.” Indeed, the Sixth Circuit has expressly held that “[a] defendant whose participation is indispensable to the carrying out of the plan is not entitled to a role reduction.” *United States v. Latouf*, 132 F.3d 320, 332 (6th Cir. 1997); *United States v. Salgado*, 250 F.3d 438, 458 (6th Cir. 2001) (“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.”). That rule has been followed elsewhere. *See, e.g., United States v. Garcia*, 2006 WL 2601399, *2 (D. Puerto Rico 2006); *United States v. Mazur*, 571 F. App’x 234, 234 (4th Cir. 2014) (“In deciding whether the defendant played a minor role, the critical inquiry is thus not just whether the defendant has done fewer bad acts than his co-defendants, but whether the defendant’s conduct is material or essential to committing the offense.”) (citing *United States v. Pratt*, 239 F.3d 640, 646 (4th Cir. 2001)); *United States v. United States v. Martinez-Larraga*, 517 F.3d 258, 272 (5th Cir. 2008) (“minor participant must be peripheral to the advancement of the criminal activity”).

These cases establish what amounts to a per se rule against application of the mitigating role adjustment for many of our clients. Couriers by definition are a necessary and essential component of the drug trade, just as delivery truck drivers are an essential part of retail trade in

²⁹ *See, e.g.,* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sent’g Comm’n, at 8-9 (July 25, 2014).

furniture, appliances, and mail order items. No one would say, however, that a truck driver, when compared to corporate CEOs, accountants, and even store managers, play anything but a minor role in the retail business. The solution to the problem is for the guidelines to specify that whether the defendant plays a necessary, critical, essential, or indispensable role is not alone sufficient to deny a mitigating role adjustment.³⁰

II. “Single Sentence” Rule

In response to a conflict between the Sixth and Eight Circuits,³¹ the Commission proposes amending the single sentence rule to provide an exception for counting prior convictions that do not receive criminal history points under §4A1.1(a), (b), or (c) so that they may be counted as a prior felony conviction for purposes of certain guideline enhancements – e.g., §4B1.1 (career offender), §2K1.3 (explosives), and §2K2 (firearms).³² Defenders do not support the proposed amendment.

Rather than adopt a rule that calls for enhanced penalties for certain prior felony convictions that are otherwise counted as a single sentence under the criminal history rules and do not receive points under §4A1.1(a), (b), or (c), the Commission should adopt the Eighth Circuit’s longstanding interpretation of the “single sentence” (previously known as “related cases”) rule and let upward departure provisions serve their purpose when the guidelines do not adequately capture the defendant’s prior criminal history.

The Eighth Circuit’s ruling in *King*, 595 F.3d at 852 (8th Cir. 2010), is the more appropriate approach for the following reasons:

³⁰ See *United States v. Isaza-Zapata*, 148 F.3d 236, 239–40 (3d Cir. 1998) (cases discussing centrality or essential nature of courier role “do not stand for the proposition that the minor role adjustment never applies to couriers, or that the court should forego an analysis of the defendant’s relative role”); *United States v. Campbell*, 139 F.3d 820, 822 (11th Cir. 1998) (“[t]he act of transporting drugs, in and of itself, cannot, as a matter of law, preclude a defendant from receiving a downward adjustment based on [defendant’s] role in the offense”); *United States v. Leiskunas*, 656 F.3d 732, 739 (7th Cir. 2011) (“playing a necessary role does not definitely prevent that same role from being minor”).

³¹ *King v. United States*, 595 F.3d 844, 852 (8th Cir. 2010) (when determining whether a prior conviction received criminal history points under §4A1.1(a),(b), or (c) and the single sentence rule, criminal history points should be attributed to the conviction that receives the longest sentence); *United States v. Williams*, 753 F.3d 626, 639 (6th Cir. 2014) (rejecting *King* and concluding that the single sentence rule could not disqualify conviction from being counted as a prior felony conviction under §4B1.2).

³² See USSG §4B1.2(c) (requiring that sentences for at least two of the prior felony convictions counted under the career offender guideline are “counted separately under the provisions of §4A1.1(a), (b), or (c)”); USSG §2K1.3, comment., n.9 (“use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c)”); USSG §2K2.1, comment. (n.10) (same).

- (1) it follows the literal language of the guidelines;
- (2) it is consistent with the Eighth Circuit's earlier approach to the same issue under the "related cases" rule;
- (3) it is easier to apply;
- (4) it gives appropriate deference to the state court's judgment about the seriousness of a prior offense that federal law may broadly characterize as a "felony crime of violence," and
- (5) it is aligned with the need for the sentence to reflect the seriousness of the offense and protect the public from further crimes of the defendant.

To resolve the small ambiguity arising from the failure of the guidelines to determine which conviction, out of a group of multiple convictions counted as a "single sentence," receives the criminal history points under §4A1.1(a), (b), or (c), the Commission has a simple option, easy to apply option: count the conviction that receives the longest period of imprisonment and exclude any other conviction.

A. The *King* Approach Gives Appropriate Deference to the State Court's Assessment of the Relative Seriousness of Multiple Offenses, Limits the Use of Minor Offenses to Enhance Penalties, Simplifies Guideline Application, and Avoids Classifying More Individuals as Career Offenders at a Time When Judges and Prosecutors are Rejecting the Guideline Recommended Sentences with Increasing Frequency.

As a threshold matter, we are puzzled by the Commission's focus on a small conflict between the Sixth and Eighth Circuits that comes up in only a handful of cases and is irrelevant to the sentencing court's ability to impose a sentence that is fully compliant with the guidelines. No other Circuit has addressed the *Williams/King* conflict. And if any district judge sees a problem with either the Sixth or the Eighth Circuit's interpretation of the "single sentence" rule as it applies to convictions that may serve to enhance sentences under the career offender guideline or similar provisions, the court is free to impose a guideline sanctioned departure.

The Third Circuit's decision in *United States v. Santiago*, 387 F. App'x 223, 227 (3d Cir. 2010), demonstrates how easily the analysis can proceed. In *Santiago*, the district court originally found that the defendant's base offense level under §2K2.1 should have been 20 because he had a prior felony conviction for a crime of violence – reckless endangerment. On appeal, the Third Circuit determined that the offense no longer qualified as a crime of violence under *Begay v. United States*, 553 U.S. 137 (2008). The government sought to uphold the sentence on alternative grounds – arguing that a controlled substance offense that had been

counted as a single sentence with an escape crime could be counted as a prior felony offense to enhance the penalty. The Third Circuit rejected the argument, noting the rules governing the interplay between the “single sentence” rule and the use of felony convictions to enhance offense levels, and how the PSR, using those rules, did not assign any criminal history points to the controlled substance offense. The court, therefore, could not use it to enhance the penalty under §2K2.1 because it was permitted to “use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c).” 387 F. App’x at 227. In remanding the case for resentencing, the Third Court noted: “if the District Court determines that the outcome of treating these two sentences as a single sentence underrepresents Santiago’s criminal history, it may decide that an upward sentencing departure is warranted. USSG §4A1.2 cmt. n.3.” *Id.* at 228, n.4.

And given the longstanding problems with how the career offender guideline sweeps too broadly, overstates the risk of recidivism, and does a poor job of capturing the “worst of the worst,”³³ we find it troubling that the Commission would propose an amendment that results in more enhanced penalties for what are typically “penny-ante” crimes that receive the same or a lesser sentence when sentenced with another crime. Because truly violent offenses, like robbery, rarely get a lesser sentence when sentenced with a crime such as theft, the single sentence rule will always count those as a prior felony conviction for a crime of violence. It is the lesser offenses, like fleeing and eluding, which may receive the same or lesser sentence than another charge sentenced at the same time. Those priors would not count under *King*’s interpretation of the single sentence rule and its interplay with the career offender guideline. Good reasons exist for that person not to be automatically thrust into a higher guideline range.

The better option is for the sentencing judge to be able to assess the entirety of the person’s criminal history and decide whether a longer sentence is needed to serve the purposes of sentencing. *Williams* fails to consider that option and the nuances of assessing the seriousness of a defendant’s prior criminal history.

In rejecting *King*, the Sixth Circuit in *Williams* stated that it would be “nonsensical” to permit a defendant to “evade career offender status because he committed more crimes.”³⁴ What the Sixth Circuit chose to ignore, however, is (1) how the state court judge was in the best position to assess the seriousness of crimes that were not separated by an intervening arrest and

³³ As we have previously pointed out, “[t]he current career offender guideline is much broader than Congress required under the Sentencing Reform Act. And the Commission now has more than ample evidence from the *Fifteen Year Review*, the *Booker Report*, the recent *Quick Facts* publication, and beyond, that the guideline should be amended to narrow its scope.” Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sent’g Comm’n, at 7-8 (May 12, 2014).

³⁴ *Williams*, 753 F.3d at 639.

were charged and sentenced together; (2) the minor nature of the so-called “crimes of violence,” and (3) the availability of an upward departure in the event the federal sentencing judge believed that not counting a prior conviction as a felony conviction of either a crime of violence or a controlled substance offense underrepresents the seriousness of the defendant’s criminal history or likelihood of recidivism.³⁵

In *Williams*, three state court convictions were treated as a single sentence under the guidelines. The convictions were for (1) fourth-degree fleeing and eluding, which carried a maximum term of imprisonment of two years;³⁶ (2) possession of less than 25 grams of a controlled substance, which carried a maximum term of four years;³⁷ and (3) resisting a police officer, which carried a maximum term of two years.³⁸ The state judge, who was familiar with the facts of the case, imposed concurrent sentences of 117 days imprisonment, treating each offense equally seriously.³⁹

In federal court, however, the fourth degree fleeing and eluding was treated far more seriously than the other offenses for which the defendant received the exact same sentence. The fourth degree fleeing and eluding escalated into a crime of violence, subjecting Mr. Williams to the career offender guideline, which increased his guideline range from 188-235 months to 360 months to life. In our view, it is “nonsensical” for a crime that the state court did not view any more seriously than other crimes sentenced at the same time, to be singled out and used to double the length of a term of imprisonment in federal court.

It is especially “nonsensical” given how low grade state misdemeanors are considered “crimes of violence” and already receive additional points under §4A1.1(e) if the conviction is otherwise uncounted under §4A1.1(a), (b), or (c) because it was counted as a single sentence.⁴⁰

³⁵ See *United States v. Parker*, 762 F.3d 801, 811 (8th Cir. 2014) (court following *King* appropriately imposed upward departure and variance because defendant’s criminal history was underrepresented); *United States v. Santiago*, 387 F. App’x 223, 227 (3d Cir. 2010) (if treating two sentences as a single sentence underrepresents criminal history, court may depart upward).

³⁶ Mich. Comp. L. § 257.602a(2) (2015).

³⁷ Mich. Comp. L. § 333.7403(2)(a)(v) (2015).

³⁸ Mich. Comp. L. § 750.81d(1).

³⁹ Brief of Appellant at 6, *United States v. Williams*, 2013 WL 1192669 (Mar. 15, 2013).

⁴⁰ Because the criminal history points added under §4A1.1(e) bear no statistical significance to recidivism, the piling on of points serves no deterrent effect. See USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 7, 23 (2005).

Such misdemeanors include fleeing and eluding,⁴¹ resisting arrest,⁴² simple assault,⁴³ and interference with official acts.⁴⁴ Any of these offenses could occur at the same time and be sentenced with another offense, such as motor vehicle theft, shoplifting, or simple drug possession. Under the current guidelines, they would be counted as a single sentence under §4A1.2(a)(2) and, depending upon the sentence length, one to three points would be added to the criminal history score. Another point would be added under §4A1.1(e) for the sentence resulting from the crime of violence. If the court finds that “[c]ounting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public,” the court may depart upward. §4A1.2, comment. n.3.

Rather than let these existing provisions continue to operate as they have been for years, the proposed amendment would dramatically increase the number of persons classified as career offenders, leading to more courts declining to follow the guidelines. The career offender guideline is severely broken, more expansive than the statute requires, and frequently calls for sentences greater than necessary to accomplish the purposes of sentencing.⁴⁵ The rate of within guideline sentences under the career offender guideline has steadily decreased over the last five years from 44% in FY 2008 to 29.6% in FY 2013.⁴⁶ The rate of government sponsored below range sentences for career offenders has steadily increased from 32.8% in FY 2007 to 40.9% in FY 2013. At the same time, the rate of government sponsored below range sentences for reasons other than substantial assistance or participation in an Early Disposition Program more than doubled from 5.7% in FY 2008 to 14.9% in FY 2013. With the rate of below guideline sentences increasing, the average sentence imposed has also decreased. The average guideline minimum has decreased by 7 months from 225 to 218 months over the past five years. During

⁴¹ See generally *United States v. Martinez*, 771 F.3d 672, 667-678, n.5 (9th Cir. 2014) (listing cases finding that vehicle flight under the laws of Pennsylvania, Minnesota, Florida, Virginia, Tennessee, and Kansas are crimes of violence; other states include California, Indiana, Oregon); *United States v. Davis*, 2013 WL 1773672, *3, n.2 (D. Neb. 2013) (Iowa misdemeanor for fleeing and eluding subject to two year penalty).

⁴² *United States v. Weekes*, 611 F.3d 68, 72 (1st Cir. 2010) (Massachusetts misdemeanor resisting arrest; carries sentence up to two and a half years); *United States v. Stinson*, 592 F.3d 460, 466 (3d Cir. 2010) (Pennsylvania second degree misdemeanor of resisting arrest; subject to two year maximum penalty).

⁴³ *United States v. Johnson*, 587 F.3d 203 (3d Cir.2009) (Pennsylvania misdemeanor simple assault).

⁴⁴ *United States v. Malloy*, 614 F.3d 852, 859 (8th Cir. 2010) (Iowa misdemeanor for interference with official acts, which carries a two year maximum penalty).

⁴⁵ See generally Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 Charlotte L. Rev. 39, 51 (2010).

⁴⁶ USSC, *FY2013 Monitoring Dataset*; USSC, *Quick Facts: Career Offenders* (2014).

that same period, the average sentence imposed decreased by 23 months from 183 to 160 months – 42 to 58 months less than the guideline recommended minimum sentence.

Data from the past four years also shows that a sizable number of defendants sentenced under §2K2.1(a)(2) (base offense level 24 “if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or controlled substance offense”) received below guideline sentences. Only 59.2% of defendants received a within range sentence; 7.7% received a government sponsored below range sentences for reasons other than substantial assistance or an Early Disposition Program; and 20.3% received a non-government sponsored below range sentence.

Aside from the likelihood of increasing the number of cases where judges decline to follow the guideline recommended sentences, the proposed amendment would undermine the Commission’s goal of simplifying the guidelines. The criminal history rules are among the most complicated of all the guidelines. In cases where the defendant has more than one prior conviction, the guideline calculation already requires multiple steps:

- (1) Were the offenses separated by an intervening arrest?
 - a. If yes, count separately.
 - b. If no, did the sentences result from offenses contained within the same charging instrument?
 - i. If yes, then count as a single sentence
 - ii. If no, were the sentences imposed on the same day?
 1. If yes, count as a single sentence
 2. If no, count separately
- (2) If the sentences imposed for the prior offenses are counted as a single sentence, apply §4A1.1(a),(b) or (c) to determine the number of points that should be added. In doing that, ask
 - a. Were concurrent sentences imposed for the sentences counted as a single sentence?
 - i. If yes, count the longest term of imprisonment for determining the number of points to add
 - ii. If no, and consecutive sentences were imposed, then use the aggregate sentence of imprisonment in determining the number of points to add

- (3) Did any of the prior sentences counted as a single sentence result from a conviction for a crime of violence?⁴⁷
- a. If yes, add one point under §4A1.1(e) for each prior sentence, up to a total of 3 points.
 - b. If no, add 0 points.
- (4) If counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public, is an upward departure warranted?
- a. If yes, how much of a departure?

Under the proposed amendment, the application of §4A1.2(a)(2) would be even more complicated with additional steps.

- (5) Are you determining “predicate offenses”? (What is a predicate offense? It's not a term defined in the guidelines or used anywhere else in the guidelines. Does the example's reference to a “predicate under the career offender guideline” mean that a “predicate offense” is a “prior felony conviction of either a crime of violence or a controlled substance offense”?)
- a. If yes, then ask: would any one of the convictions counted as a separate sentence independently receive criminal history points under §4A.1(a), (b), or (c)?
 - i. If yes, then proceed to determine if the conviction qualifies as a prior felony conviction for a crime of violence or controlled substance offense under §4B1.2, §2K2.1, or §2K1.3.
 - ii. If no, then return to step 4.

The Commission requests comment on whether the “application issues presented by the *King/Williams* conflict over the ‘single sentence’ rule are also presented by other provisions involved in calculating the criminal history score, and if so, whether and how they should be addressed.” The questions presented in the issues for comment demonstrate how complicated

⁴⁷ As directed by application note 5 to §4A1.1(e), which states: “[i]n a case in which the defendant received *two or more prior sentences as a result of convictions for crimes of violence* that are counted as a single sentence.”

criminal history calculation has become and why the best solution is to follow the approach in *King* rather than seek to micromanage every aspect of the criminal history calculation.⁴⁸

B. The Historical Background to the “Single Sentence” Rule Supports the *King* Approach to Determining Whether a Conviction May be Used to Enhance a Penalty Under §4B1.1, §2K1.3, or §2K2.1.

The history of the “single sentence” rule shows that it was promulgated after substantial consideration and that the Commission was fully aware that there would be crimes of violence that did not receive points under USSG §4A1.1(a), (b), or (c), and thus would not count as a prior felony conviction for purposes of §4B1.1, §2K1.3, or §2K2.1.⁴⁹ The Commission has had ample opportunity to study the interplay of the single sentence rule with the counting of prior felony convictions. The Commission has left it alone and should continue to do so.

The guidelines were initially promulgated with the “related cases” rule, which provided that “related cases are to be treated as one sentence for purposes of the criminal history.” USSG §4A1.2(a)(2) (1987). And much like the current version of the “single sentence” rule,⁵⁰ the rule directed courts assessing criminal history points to “[u]se the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.” *Id.* It considered cases “related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing.” §4A1.2, comment. n. 3 (1987). For purposes of the career offender guideline definition of “two prior felony convictions,” the original guidelines also specified, again much like the current rule,⁵¹ that the sentences for at least two of the felony convictions had to be “counted separately under the provisions of Part A of this Chapter.” USSG §4B1.2(3) (1987).

⁴⁸ We fail to see how the 3-point limitation in §4A1.1(e) presents any issues for counting crimes of violence or controlled substance offenses under the career offender guideline, §2K1.3, or §2K2.1. Those three guidelines require the prior sentences to receive points under §4A1.1 (a), (b), or (c). They do not include §4A1.1(e).

⁴⁹ *See* USSG §4B1.2(c) (requiring that sentences for at least two of the prior felony convictions counted under the career offender guideline are “counted separately under the provisions of §4A1.1(a), (b), or (c)”; §2K1.3, comment. n.9 (“use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c)”; §2K2.1, comment. (n.10) (same).

⁵⁰ The current rule states: “For purposes of applying §4A1.1(a),(b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.” USSG §4A1.2(a)(2).

⁵¹ The current rule advises: “the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c).” §4B1.2(c)(2).

In 1991, the Commission modified the definition of “related cases,”⁵² and added a provision to the criminal history rules that provided for enhanced penalties in cases where a prior conviction for a crime of violence was not counted under the related cases rule.⁵³ This provision was designed to cover scenarios where a person might have a prior conviction for a crime of violence that did not receive points under §4A1.1(a),(b), or (c).⁵⁴ At the same time, it clarified the application of §4B1.2(3) by specifying that for purposes of counting prior felony convictions under the career offender guideline, that the “sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c).”⁵⁵ What the Commission did not change in 1991 was the rule in §2K1.3 or §2K2.1, which specified that for the purposes of determining the number of convictions under §2K1.3(a)(1) and (a)(2) or §2K2.1(a)(1), (a)(2), or (a)(3), “count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).”

This history demonstrates that before the 1991 amendment, the Commission was well aware that convictions for crimes of violence that did not receive points under §4A1.1(a), (b), or (c) would not count as a prior felony conviction under the career offender guideline or receive criminal history points at all. And while it added a provision at §4A1.1(f) (now 4A1.1(e)), to ensure that crimes of violence in related cases received some criminal history points, and kept in place provisions that ensured that crimes of violence even in related cases would count as prior felony convictions for purposes of §2K1.3 and §2K2.1, it chose to limit the crimes of violence that could count as prior felony convictions for the career offender guideline by only permitting use of those crimes that counted under §4A1.1(a), (b), or (c).

In 1992, the Commission considered amending §2K1.3 and §2K2.1 so that the determination of prior convictions for crimes of violence or controlled substance offenses followed the same rules as §4B1.2.⁵⁶ The amendment, however, was not promulgated at that

⁵² USSG App. C, Amend. 382, Reason for Amendment (Nov. 1, 1991) (“amended to provide that ‘cases separated by an intervening arrest for one of the offenses are not treated as related cases’”).

⁵³ USSG App. C, Amend. 382 (Nov. 1, 1991) (inserted §4A1.1(f): “Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.”).

⁵⁴ USSG §4A1.1., comment. n. 6 (1991). *See* USSG App. C, Amend. 382 (Nov. 1, 1991).

⁵⁵ USSG App. C, Amend. 433 (Nov. 1, 1991).

⁵⁶ Sentencing Guidelines for United States Courts, Notice of Proposed Amendments of Sentencing Guidelines, Policy Statements, and Commentary. Request for Comment. Notice of Hearing. 57 Fed. Reg. 62832-01, 62838 (Dec. 31, 1992).

time. In 2001, the Commission revisited the issue of how related cases and prior convictions for crimes of violence or controlled substances should be counted under recidivist sentencing enhancements. By then, the Eleventh Circuit had flagged issues with the interplay of the “related cases” rule and the rules governing whether a defendant had two prior felony convictions of either a crime of violence or controlled substance offense for purposes of applying the career offender guideline.⁵⁷ The Commission, however, did not change how prior convictions in “related cases” should be counted under the career offender guideline. Instead, it amended the commentary in §2K1.3(a)(1) and §2K2.1 so that it used the same approach set forth in the 1991 amendment to the career offender guideline, i.e., “use only those convictions that are counted separately under §4A1.1(a), (b), or (c).”⁵⁸ Once again, the Commission grappled with the question of how crimes of violence in “related cases” should count as prior felony convictions and opted for a rule that limited, rather than expanded, how those convictions should count.

In 2007, the Commission promulgated amendment 709 (a.k.a. “the single sentence rule”), which greatly simplified the method of determining whether multiple prior sentences are counted separately. Over the years, the “related cases” rule caused considerable litigation over whether prior sentences resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing. It was common for prior sentences to be found to be unrelated and thus counted separately.

Litigation also occurred over whether crimes of violence that were not counted under §4A1.1(a), (b), or (c) should nonetheless count as a prior felony conviction under the career offender guideline. In 2000, the Eighth Circuit considered a government appeal from the district court’s decision not to impose a career offender sentence when the convictions treated as “related cases” were receiving and concealing stolen property and burglary. *United States v. Peters*, 215 F.3d 861 (8th Cir. 2000). The Eighth Circuit remanded the case to the district court to use its discretion in deciding which of the convictions should have received the criminal history points under §4A1.1(a), (b), or (c) and whether any counted as a crime of violence for purposes of deciding if the defendant had the requisite number of prior felony convictions under the career

⁵⁷ *United States v. Cornog*, 945 F.2d 1504, 1506 n.3 (11th Cir. 1991).

⁵⁸ USSG App. C, Amend. 630 (Nov 1, 2001). The amendment to §2K1.3(a)(1) provided: “For purposes of applying subsection (a)(1) or (2), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c).” See §4A1.2(a)(2); §4A1.2, comment. (n.3).

The amendment to §2K2.1, comment. (n.15) provided: “For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c).” See §4A1.2(a)(2); §4A1.2, comment. (n.3).

offender guideline. *Id.* In another case, the Eighth Circuit noted a “similar ambiguity” in §2K21.1(a)(2) about whether individual convictions treated as one sentence under the related cases rule receive criminal history points and if a conviction for a crime of violence should count to enhance a sentence. The court applied the rule of lenity and found that the defendant’s offense level should not be based on two prior felony convictions for a crime of violence. *United States v. Ruhaak*, 49 F. App’x 656, 656 (8th Cir. 2002). Also in 2002, another court acknowledged that a “literal reading” of the text of §4B1.2(c) precluded counting defendant’s wanton endangerment conviction as a felony conviction for a crime of violence under the career offender guideline, but rejected the Eighth’s Circuit’s approach in *Peters*. See also *United States v. Clark*, 227 F. Supp. 2d 693, 694 (W.D. Ky. 2002).

After grappling with the confusion over the term “related cases” and “rules relating to multiple prior offenses” and hosting two round-tables in November 2006,⁵⁹ the Commission made multiple amendments to Chapter 4. Chief among them was an amendment that deleted the “related cases” rule and replaced it with the “single sentence” rule. It also made changes to other guideline provisions to conform to the single sentence rule. It kept §4A1.1(f) (now §4A1.1(e)) in place, with some minor wording changes to provide that additional points would be added to the defendant’s criminal history score for crimes of violence that did not receive points under §4A.1(a),(b), or (c) because they were counted as a single sentence. It also added an upward departure in §4A1.1(d) for cases where counting multiple prior sentences as a single sentence may result in underrepresentation of the “the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public.”⁶⁰ But once again, the Commission did not amend the guidelines so that a prior sentence for a crime of violence that was combined with other sentences under the single sentence rule would count as a prior felony conviction under the career offender guideline or §2K1.3 or §2K2.1.

In short, the Commission has had ample opportunity over the years to provide that a conviction for a “crime of violence” or “controlled substance offense” that does not receive points under §4A1.1(a),(b), or (c) because of operation of the “related cases” or “single sentence” rule may nonetheless count as a prior felony conviction under §4B1.1, §2K1.3, or §2K2.1. That it chose not to do so for twenty-eight years is powerful evidence that the Eighth Circuit’s decision in *King* is far more consistent with the Commission’s approach than the Sixth Circuit’s decision in *United States v. Williams*, 753 F.3d 626 (6th Cir. 2014).⁶¹

⁵⁹ USSC, *2007 Annual Report* 10 (2008).

⁶⁰ USSG App. C, Amend. 709 (Nov. 1, 2007).

⁶¹ The historical development of the “single sentence” rule and its interplay with the career offender guideline, §2K2.1, and §2K1.3, is consistent with the interpretation of the guideline that Judge Bye set forth in his opinion in *Donnell v. United States*, 765 F.3d 817, 822-23 (8th Cir. 2014) (Bye, J., concurring

Rather than amending the guideline to dramatically increase sentences for persons who may have been sentenced for a crime of violence or controlled substance offense at the same time they were sentenced for another offense, the Commission should simply follow the Eighth Circuit's interpretation. The Commission should adopt language like that suggested in its first issue for comment.

III. Jointly Undertaken Criminal Activity

The Commission proposes amending §1B1.3(a)(1)(B) to provide more guidance on the requirements for a defendant to be held accountable for jointly undertaken criminal activity. We will preliminarily highlight a few issues here and offer additional analysis in written comments to be submitted by March 18, 2015.

We offer comments on these proposed changes with the caveat that we have significant concerns with the relevant conduct guideline's use of conduct that has neither been charged nor proven beyond a reasonable doubt to calculate the applicable guideline range, and without procedural protections sufficient to ensure accuracy.⁶² Defenders recognize that the Commission's proposed amendment is a small step toward reconsidering how the relevant conduct rules should operate. We are encouraged by the Commission's request for comment on possible policy changes that would require a higher state of mind than "reasonable foreseeability." Just desert and proportionality – the core of the retributive rationale – in sentencing ought to depend on a person's culpability. Culpability is best determined by examining a person's intention – not whether he or she acted negligently. Accordingly, we support Option A, which would require a higher state of mind – specifically intent – rather than "reasonable foreseeability." It is not clear how Option B would change operation of the guideline on "jointly undertaken criminal activity." Does the Commission contemplate keeping the existing guideline and require a conviction for conspiracy or a "Pinkerton conviction" before the relevant conduct guideline can apply or does it expect to replace the existing guideline? If the latter, we fail to see how Option B would be helpful, since *Pinkerton* liability is broader than the existing standard. See *United States v. Getto*, 729 F.3d 221, 234 & n.11 (2d Cir. 2013); *United States v. Davison*, 761 F.3d 683, 686 (7th Cir. 2014).]

in part and dissenting in part) ("the language of §§ 4B1.2(c) and 4A1.2(a)(2) presumes some felonies will not receive points under (a), (b), or (c) of § 4A1.1, and thus will not count toward career offender status. Therefore, if anything is clear from the guidelines, it is that not all felonies count toward career offender status and a potential career offender predicate can in fact be subsumed within a group of convictions which includes a nonpredicate offense which earned the designated criminal history points.").

⁶² For a more detailed summary of the myriad problems with the relevant conduct rules, see *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463 (2001).

The proposed amendment appears to be designed to emphasize the requirement under 1B1.3(a)(1)(B), comment. (n.2) that the court determine the “scope of the criminal activity that the defendant agreed to jointly undertake.” Many courts have failed to apply this requirement even though the application note expressly states the court “must first determine the scope of the criminal activity” and specifies that “jointly undertaken criminal activity is not necessarily the same as the scope of the entire conspiracy.” 1B1.3, comment. (n.2). Outlining the three necessary findings in the guideline rather than just the commentary in §1B1.3 should highlight those requirements, especially given the complexity of the 8 1/2 pages of commentary attempting to explain the relevant conduct rules. The additional commentary in proposed note 3(B) is also helpful because it makes clear that “reasonable foreseeability” is not sufficient by itself to hold the defendant accountable for the conduct of others, but it too may be lost in the lengthy and complex commentary.

Notwithstanding these proposed changes that may better delineate the reach of relevant conduct, we have significant concerns about whether the amendment accomplishes its purpose of simplifying operation of the guideline. First, we are concerned about the continued use of the robbery example in proposed note 3(D) because it undercuts the point that the acts and omissions of others must be “within the scope of the criminal activity that the defendant agreed to jointly undertake.” In the example, *“two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the criminal activity that the defendant agreed to jointly undertake (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).”* To conclude that the assault was within the scope of the criminal activity that the defendant jointly agreed to undertake even though the defendant did not agree to an assault, , and cautioned the first defendant not to hurt anyone appears to be contrary to what is meant by the “scope of the criminal activity.” The take away message from the example is that any act that is reasonably foreseeable is within the “scope of the criminal activity,” thus defeating the purpose of the three-step analysis. Accordingly, the example should be deleted.

Aside from deleting the example, the Commission should consider providing additional guidance on determining the “scope of the agreement.” One option is to move the example at proposed 4(C)(iii) – defendants involved in off-loading marihuana – into the commentary at proposed 3(B).

Second, we are concerned about one of the bracketed additions to proposed note 3. The first bracketed addition states:

[in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities].

This language currently appears in the commentary at note 8, following an example of four defendants who backpacked a quantity of marihuana across the border. Without the example to supply context, the proposed amendment may be more confusing than helpful. Standing alone, the reader is left to guess what circumstances suggest that the nature of the offense “is more appropriately viewed as one jointly undertaken criminal activity” and what circumstances suggest that the nature of the offense is more appropriately viewed “as a number of separate criminal activities.” When combined with the example, however, the context is clear and the difference between the two viewpoints is apparent.

Third, the “Illustrations of Conduct for Which the Defenders is Accountable under Subsections (a)(1)(A) and (B) need to be revisited in light of existing case law⁶³ and the illustrations should more clearly delineate the distinction between “acts and omissions aided or abetted by the defendant” and “jointly undertaken activity.” The example in proposed note 4(A)(i) is captioned: “Acts and omissions aided or abetted by the defendant.” The commentary then sets out an illustration of how the “aiding abetting” subsection of 1B1.3(a)(1) is meant to operate. Before getting to a clear illustration of how the “jointly undertaken” subsection of 1B1.3(a)(1)(B) operates, proposed note 4(B)(i) discusses an example where both subsections apply. The operation of the subsections would be clearer if the illustrations were placed in a logical order: (1) aiding and abetting; (2) jointly undertaken; and (3) both.

The illustrations set forth in proposed note 4(C) could also benefit from subheadings or thesis sentences that highlight the points they are trying to make. Otherwise, the user is overburdened with having to read through multiple scenarios and then determine what principles can be gleaned from them. The Second Circuit’s decision in *United States v. Studley*, 47 F.3d 569, 575 (2d Cir. 1995) identified a list of principles from the illustrations set forth in the application note. These principles could be used to restructure the illustrations.

⁶³ The Supreme Court recently took up the question of aiding and abetting liability as it related to the defendant’s knowledge of the scope of the criminal venture. *Rosemond v. United States*, 134 S.Ct. 1240, 1249 (2014).

- “[A] defendant’s knowledge of another participant’s criminal acts is not enough to hold the defendant responsible for those criminal acts.” *Id.*⁶⁴
- “[A] relevant factor in determining whether activity is jointly undertaken is whether the participants pool their profits and resources, or whether they work independently.”
- “Another relevant factor in determining whether activity is jointly undertaken is whether the defendant assisted in designing and executing the illegal scheme.”
- “[T]he fact that the defendant is aware of the scope of the overall operation is not enough to hold him accountable for the activities of the whole operation. The relevant inquiry is what role the defendant agreed to play in the overall scheme either by an explicit agreement, or implicitly by his conduct.”⁶⁵

We will comment further on this extensive proposal when we submit our comments.

⁶⁴ See also *United States v. Mulder*, 273 F.3d 91, 118 (2d Cir. 2001) (“Mere ‘knowledge of another participant’s criminal acts’ or ‘of the scope of the overall operation’ will not make a defendant criminally responsible for his co-defendant’s acts”).

⁶⁵ Other courts have done the same. See, e.g. *United States v. Bernot*, 2014 WL 1883942 (E.D. Cal. May 12, 2014) (“In circumscribing the scope of the “jointly undertaken criminal activity,” the court may rely on a variety of factors. The Ninth Circuit has approved consideration of comparative profits, as well as “whether [the defendants] ‘worked together,’ ‘relied on one another ...,’ attended the same sales meetings, and ‘depended on the success of the ... operation as a whole for their financial compensation.’ As dictated by the facts, other factors may also include: length and depth of involvement in the conspiracy and representations thereof made to third parties and whether the defendant “helped ‘design or develop’ the scam, ‘worked in any way to further the scheme outside his own sales efforts,’ ‘furthered the objectives of the operation as a whole,’ was paid on a ‘pure commission basis’ as opposed to receiving ‘profits of the overall operation,’ and ‘assisted other representatives with their sales,’ ” (citations omitted); see also *United States v. Campbell*, 279 F.3d 392, 400 (6th Cir. 2002) (adopting Second Circuit’s holding in *Studley*).