

**FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE**

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Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on Proposed Amendments for 2015

Dear Judge Saris:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendments and issues for comment that were published on January 16, 2015. At the public hearing on March 12, 2015, we submitted written testimony on the proposals related to guidelines for hydrocodone, economic crime, inflationary adjustments, mitigating role, the “single sentence” rule, and jointly undertaken activity. Copies of that testimony are attached and incorporated as part of our public comment. Here, we address issues raised at the hearing, and offer additional comment on the Commission’s proposals.

I. Jointly Undertaken Activity

Our written testimony submitted for the March 12, 2015 hearing offers many comments on the Commission’s proposed amendment to USSG §1B1.3(a)(1)(B). Here, we elaborate on why a heightened intent requirement as set forth in Option A would further the purposes of sentencing far better than the reasonable foreseeability standard and why requiring a conviction for conspiracy or at least a conviction for a substantive offense based on *Pinkerton*¹ liability should be a threshold requirement before determining whether a defendant’s sentence should be increased for “jointly undertaken criminal activity.” We also provide further comment on the robbery examples in the existing and proposed commentary.

¹ *Pinkerton v. United States*, 328 U.S. 640 (1946).

A. The Relevant Conduct Guideline Should Require a Higher State of Mind than “Reasonable Foreseeability” Before a Person May be Sentenced on the Basis of Jointly Undertaken Criminal Activity.

“The Commission seeks comment on whether changes should be made for policy reasons to the operation of ‘jointly undertaken criminal activity,’ such as to provide greater limitations on the extent to which a defendant is held accountable at sentencing for the conduct of co-participants that the defendant did not aid, abet, counsel, command, induce, procure, or willfully cause.” Defenders support Option A, which would require a higher state of mind than “reasonable foreseeability.” Such a change would be consistent with evidence regarding crime control purposes, and would much better reflect the seriousness of the offense, the need to promote respect for the law and to provide just punishment. Further, POAG’s concern that requiring a heightened mental state would “provide an incentive for defendants to falsely deny or frivolously contest”² relevant conduct is not only unfounded, but disregards the need for fair adversarial testing to ensure accurate fact-finding.

First, the crime control purpose of enhancing a person’s sentence for the acts and omissions of others that were merely reasonably foreseeable is not supported by empirical evidence. From the standpoint of incapacitation, no research shows that a person who reasonably foresees the act of another is as dangerous as the primary actor.³ From the standpoint of generally deterring group criminal activity – a rationale for holding a person accountable for the acts of others⁴ – sound empirical evidence shows that harsher sanctions have only a marginal deterrent effect on individuals,⁵ and no evidence shows that they deter jointly undertaken activity. “Deterrence theory in general, assumes that criminals are rational actors with full knowledge” of the law.⁶ In the context of group criminal activity, we would have to assume that “criminals know the contours of conspiracy law”⁷ and the harsher sanctions that can be imposed

² Letter from Richard Bohlken, Chair, Probation Officers Advisory Group, to the Honorable Patti B. Saris, Chair, U.S. Sent’g Comm’n, at 3 (Mar. 3, 2015).

³ See generally Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 *Hastings L. J.* 91, 111-112 (1985) (this article discusses accomplice liability but the points discussed apply equally to jointly undertaken activity).

⁴ Mark Noferi, *Towards Attenuation: A “New” Due Process Limit on Pinkerton Conspiracy Liability*, 33 *Am. J. Crim. L.* 91, 102 (2006).

⁵ Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Just.* 199, 201 (2013); Aaron Chafin & Justin McCrary, *Criminal Deterrence: A Review of the Literature* 26 (2014) (“the magnitude of deterrence is not large and is likely to be smaller than the magnitude of deterrence induced by changes in the certainty of capture”), http://eml.berkeley.edu/~jmccrary/chalfin_mccrary2014.pdf.

⁶ Noferi, *supra* note 4, at 103.

for jointly undertaken activity. Evidence shows that few people sufficiently understand criminal law for it to have a deterrent effect,⁸ and even if they do understand the law, the lack of certainty in getting caught and punished undercuts any deterrent effect.⁹ Even assuming rational thought, imposing a lesser sentence on the non-perpetrator of an act in furtherance of jointly undertaken criminal activity would better serve the purpose of deterrence. As one commentator put it: “the system of punishment should convince the rational criminal to serve in a secondary rather than a primary role. If fully successful, such a system would result in willing accomplices, but no perpetrators.”¹⁰

Second, a heightened mental state standard furthers the goal of imposing a sentence that is sufficient but not greater than necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment. 18 U.S.C. § 3553(a)(2)(A). Under the “reasonable foreseeability” standard, a person is held accountable for the acts of others so long as a fictitious “objective person” would have foreseen the conduct. No consideration is given to what the defendant knew or intended. The reasonable foreseeability standard essentially subjects a defendant to harsher punishment for not being smart enough to understand what another person might do. The sentencing purposes of just deserts and proportionality are not served by holding a person accountable for the acts and omissions of others of which he was unaware and did not intend.

The Department suggests that the reasonable foreseeability standard is necessary so that defendants are held responsible “for the consequences of their criminal actions.”¹¹ Only with a showing of intent, or at least knowledge, can there be a causal connection between the defendant’s participation in the jointly undertaken activity and the acts of others. In the absence of a causal connection, the person is not being held responsible for the consequences of his or her

⁷ *Id.*

⁸ Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty v. Severity of Punishment* 2-3 (2010).

⁹ Ronald Pasternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. Crim. L. & Criminology 765, 818 (2010) (discussing how system is unable to exploit rationality and concluding that there is “no real evidence of a deterrent effect for severity”).

¹⁰ Dressler, *supra* note 3, at 112. See also Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 Ohio St. J. Crim. L. 427, 434 & n.38 (2008).

¹¹ Letter from Jonathan Wroblewski, Dir., Office of Policy & Legislation, to the Honorable Patti B. Saris, Chair, U.S. Sent’g Comm’n, at 11 (Mar. 9, 2015) (“*DOJ Comments 2015*”).

own actions, but for the consequences of another's actions.¹² This result is contrary to the principle of just deserts.¹³

Take a case where a confidential informant arranged an undercover buy of drugs from the owner of a shoe store. The defendant – an employee of the store – knew that the owner was selling drugs, but the defendant's only role in the transaction was to count the money. The store owner handed over the drugs to the informant and had a firearm on his person when doing so. Under the reasonable foreseeability standard, many courts would hold the defendant accountable for the firearm as part of jointly undertaken criminal activity.¹⁴ If we want to focus on the real offense, for which the defendant is actually culpable, he should be held accountable only if he actually knew that the owner was carrying the firearm.

Another example is a person with a disability (e.g., intellectual disability or Asperger's syndrome) that limits his or her ability to draw inferences from available facts or read the intentions of others. Under an objective reasonable foreseeability test, such a disability is irrelevant to determining the reach of criminal liability.¹⁵ But it is plainly relevant because "the degree of blameworthiness of an offense" for retributive purposes must be based on "the offender's degree of culpability in committing the crime, in particular, his degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity."¹⁶ Accordingly, sentencing accountability for the acts of others should be based upon a more culpable mental state than reasonable foreseeability.

The Department also attempts to avoid how extraordinarily lax the "reasonable foreseeability" standard is when it claims it has not been described as a "negligence" standard.¹⁷ To the contrary, courts have noted that "[f]oreseeability is the language of negligence law," and

¹² See generally Dressler, *supra* note 3, at 103.

¹³ *Id.* at 103-106.

¹⁴ See *United States v. Castillo-Allen*, 567 F. App'x 738, 742 (11th Cir. 2014); *United States v. Mergerson*, 4 F.3d 337, 350 (5th Cir. 1993) ("Ordinarily, one co-conspirator's use of a firearm will be foreseeable because firearms are 'tools of the trade' in drug conspiracies"). But see *United States v. Lopez*, 384 F.3d 937, 944 (9th Cir. 2004) (government must show that "the defendant knew or should have known based on specific past experiences with the co-conspirator that the co-conspirator possessed a gun and used it during drug deals").

¹⁵ See *United States v. Cottrell*, 333 F. App'x 213, 216 (9th Cir. 2009).

¹⁶ Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (2005).

¹⁷ *DOJ Comments 2015*, at 11.

not a “usual criminal law concept.”¹⁸ Commentators have pointed out that reasonable foreseeability “effectively imposes a negligence standard for a co-conspirator’s crime,” which is inconsistent with our “intuitive sense of justice.”¹⁹

Overall, the problem with the “reasonable foreseeability” standard is that it reflects a “desire to see the fullest sanctions of the criminal law imposed without regard to individual blameworthiness.”²⁰ The solution is to adopt the proposal set forth by the Practitioner’s Advisory Group: replace the “reasonably foreseeable” language in proposed §1B1.3(a)(1)(B)(iii) with “intended by the defendant.”

Lastly, POAG’s concern about defendants falsely denying or frivolously contesting relevant conduct is unfounded and contrary to the adversarial process essential to accurate fact finding. As we have pointed out in the past,²¹ defendants are placed at a severe disadvantage when contesting relevant conduct because they risk losing acceptance of responsibility points. The language in the commentary to USSG §3E1.1, which suggests denial of the adjustment for “frivolously contest[ing] relevant conduct that the judge determines not be true,” places a reduction for acceptance of responsibility in jeopardy every time a relevant conduct objection is overruled. The Commission should encourage, not discourage, fair litigation to ensure that sentences are based on accurate information.

B. Requiring a Conviction for Conspiracy or a Substantive Count Based On *Pinkerton* Liability Would Be an Appropriate Threshold Requirement Before Holding a Defendant Accountable for Jointly Undertaken Activity.

Defenders support Option B of the Commission’s proposal, combined with Option A. The Department opposes this proposal, suggesting that it “is antithetical to the basic theory of the guidelines, which focuses significantly on real conduct and not charging decisions.”²² It also suggests that such a requirement will lead to the filing of more charges.

¹⁸ *United States v. Hansen*, 256 F. Supp. 2d 65, 67 n.3 (D. Mass. 2003). See also *United States v. Batt*, 811 F. Supp. 625, 628 (D. Kan. 1993) (use of “reasonable foreseeability” standard in jury instruction permitted conviction “upon a negligence standard rather than a criminal standard”).

¹⁹ Noferi, *supra* note 4, at 100 (citing Paul Robinson, *Imputed Criminal Liability*, 93 Yale L. J. 609, 646 (1984)).

²⁰ *United States v. Cordoba-Hincapie*, 825 F. Supp. 485 (E.D.N.Y. 1993) (J. Weinstein).

²¹ See, e.g., Statement of Henry Bemporad, Before the U.S. Sent’g Comm’n, Phoenix, Ariz., at 7 (Jan. 1, 2010).

²² *DOJ Comments 2015*, at 11.

The real offense nature of the guidelines does not justify the sweeping contours of the jointly undertaken activity rule. The guidelines were premised on a real offense system to avoid disparity that would result from charging decisions.²³ But the guidelines have not accomplished that goal. Instead, the relevant conduct rules have provided prosecutors with “indecent power.”²⁴ They give prosecutors the twin benefits of (1) increased punishment through inflating guideline ranges on the basis of uncharged, dismissed and acquitted conduct, a lower standard of proof, and otherwise inadmissible evidence; and (2) increased power to coerce guilty pleas, because they can obtain the same sentence even if no charge is filed or conviction obtained.²⁵ All a prosecutor needs to do is provide allegations of uncharged or acquitted conduct to a probation officer to include in the presentence report. Even though the information is nothing more than hearsay, it is enough in some circuits to shift the burden to the defense to disprove.²⁶ And, when a defense attorney challenges such “relevant conduct,” the defendant runs the risk of having the court deny a sentence reduction for acceptance of responsibility even though the defendant pled guilty and accepted responsibility for the charged conduct.²⁷ Thus, although one of the reasons the first Commission adopted the “real offense” system was to “curb the ability of prosecutors to manipulate sentences through their decisions on charging,”²⁸ in practice it has increased the

²³ William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495, 509 (1990).

²⁴ Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L. J. 1420, 1425 (2008).

²⁵ See, e.g., Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 140, 159 (1998); David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 442, 449-50 (1993); Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 550 (1993) (“Implementation of a conviction-offense system [rather than a ‘real offense’ system] places a burden on prosecutors to file and prove, or bargain for, conviction charges that reflect the seriousness of an offenders’ criminal behavior. If, with respect to certain nonconviction crimes, this is an obligation they cannot discharge, then we should have grave doubts that the imposition of punishment is justified.”). The use of acquitted conduct “also allows prosecutors to avoid the restrictions of the Double Jeopardy Clause by essentially giving them a second try at inflicting punishment for the same offense.” Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. Pa. L. Rev. 1599, 1629 (2012).

²⁶ See Thomas W. Hutchison, et al., *Fed. Sent. L. & Prac.* §6A1.3, cmt. 5(e) (2013 ed.) (discussing split in circuits on whether district court may treat allegations in PSR as evidence).

²⁷ See Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2111 (2003); see also Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 Stan. L. Rev. 309, 318-19 (2005).

²⁸ Barkow, *supra* note 25, at 1629. Of course, such concerns are not even theoretically implicated – then or now – with respect to acquitted offenses because an acquitted offense is charged in an indictment and tried to a jury. *Id.* (“But that justification does not account for the Guidelines’ use of acquitted conduct

power of prosecutors to control sentences. The Commission has been aware for quite some time that this “real offense” model transferred power to prosecutors and created unwarranted disparity.²⁹ Accordingly, it should reject the notion that requiring a conviction for conspiracy or *Pinkerton* liability before holding a person responsible for jointly undertaken activity will create more disparity by giving prosecutors the power to decide charges. As it is, prosecutors frequently charge conspiracy, the “darling” of their “nursery.”³⁰

Requiring a conviction would also result in greater procedural fairness in determining the defendant’s sentencing accountability because it would provide the defense with discovery and an opportunity to more fully investigate the veracity of the prosecution’s evidence. Such procedural protections are not available at sentencing. Indeed, some courts read USSG §6A1.3 as permitting the prosecution to carry its burden of proof with undisclosed evidence and unreliable hearsay. A prosecutor may provide probation officers with rank hearsay from undisclosed sources and unreliable witnesses to support guideline calculations. In many circuits, once the prosecutor’s information is incorporated into the presentence report, the burden shifts to the defendant to disprove it.³¹ As the Seventh Circuit put it: “[o]nly when the defendant creates

because, in cases where acquitted conduct is relevant, prosecutors have brought the relevant charges out into the open already.”).

²⁹ See Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 138 (Apr. 2, 1990) (“We have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system.”); United States General Accounting Office: *Central Questions Remain Unanswered* 14-16 (Aug. 1992) (suggesting that the way prosecutors plea-bargain with defendants may adversely impact Black defendants and interfere with the Commission’s mission of eliminating disparity based on race); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 557 (1992) (arguing that circumvention of the guidelines through plea bargaining, while not “necessarily bad,” is “hidden and unsystematic,” suggests “significant divergence from the statutory purpose” of the guidelines, and “occurs in a context that forecloses oversight and obscures accountability”). Later, in 2004, the Commission itself acknowledged that real offense sentencing shifted sentencing power to prosecutors and created hidden and unwarranted disparities. See USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 50, 86, 92 (2004).

³⁰ *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). For the past ten years, conspiracy and attempt under 21 U.S.C. § 846 have been the fourth ranked lead charge for convictions filed in federal court. See Transactional Records Clearinghouse, *Convictions for 2014* (2015) (reporting case information obtained from the Executive Office for United States Attorneys).

³¹ *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (defendant’s “mere objection” to information in a presentence report is insufficient to challenge its accuracy and reliability) (cited in *United States v. Powell*, 650 F.3d 388, 394 (4th Cir. 2011)); *United States v. Mustread*, 42 F.3d 1097, 1101 (7th Cir. 1994) (“Generally, where a court relies on a PSR in sentencing, it is the defendant’s task to show the trial judge that the facts contained in the PSR are inaccurate.”); *United States v. Fuentes*, 411 F. App’x 737,

‘real doubt’ does the burden shift to the government to demonstrate the accuracy of the information.”³² This burden shifting gives prosecutors a significant advantage at sentencing, allowing them to prove aggravating factors and relevant conduct with little or no real evidence, and the source of which may not even be known or disclosed to defense counsel. Other circuits, however, hold the government to its burden when the defendant objects to allegations set forth in a presentence report.³³

This circuit split creates unwarranted disparity. Defendants in circuits where allegations in the presentence report are presumed reliable are deprived of basic procedural protections afforded defendants in other circuits. Defendants in circuits like the Fourth, Fifth, and Seventh are exposed to higher sentences than their counterparts in circuits like the Eighth, Ninth, and Eleventh because the prosecution’s facts are not subject to fair adversarial testing. Requiring a conviction as in Option B would be a small step toward fixing this disparity.

Even if the Commission decides not to require a conviction for conspiracy or a substantive offense based on *Pinkerton* liability before a court may turn to the jointly undertaken activity provision to enhance a sentence, the Commission should advise against the use of acquitted conduct when assessing relevant conduct.³⁴ As widely recognized, this aspect of the

738 (5th Cir. 2011) (defendant bears burden of showing information in presentence report is materially unreliable) (quoting *United States v. Ford*, 558 F.3d 371, 377 (5th Cir. 2009)); *United States v. Carbajal*, 290 F.3d 277, 287 (5th Cir. 2002) (information in the presentence report is “presumed reliable and may be adopted by the district court ‘without further inquiry’ if the defendant fails to demonstrate by competent rebuttal evidence that the information is ‘materially untrue, inaccurate or unreliable’”).

³² *United States v. Meherg*, 714 F.3d 457, 459 (7th Cir. 2013).

³³ See *United States v. Ramos-Colin*, 426 F. App’x 874 (11th Cir. 2011). See also *United States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc) (“by placing the burden on [the defendant] to disprove the factual statements made in the PSR, the district court improperly shifted the burden of proof to [the defendant] and relieved the government of its burden of proof to establish the offense level”); *United States v. Wise*, 976 F.2d 393, 404 (8th Cir. 1992) (en banc) (PSR “is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact”; discussing how court that presumes hearsay in PSR reliable has “turned the general approach to hearsay on its head”); *United States v. Hammer*, 3 F.3d 266, 268 (8th Cir. 1993) (same),

³⁴ See *An Interview with John R. Steer*, 32 *Champion* 40, 42 (2008) (calling for the Commission to exclude acquitted conduct). See also Barkow, *supra* note 25, at 1627 (“Allowing sentencing courts to consider conduct for which the defendant has been acquitted disregards the constitutional role of the jury.”); Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 *Tenn. L. Rev.* 235 (2009) (objecting to the use of acquitted conduct on both constitutional and policy grounds); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 *S. Cal. L. Rev.* 289, 313-14 (1992) (“If Congress’ goals were to eliminate disparity and to have the punishment fit the crime, the modified real-offense system does not serve them well.”).

relevant conduct guideline creates disrespect for law, gives prosecutors a second bite at the apple (contrary to the notion that the relevant conduct rule lessens prosecutorial control over sentencing outcomes), creates unwarranted disparities, and disrespects the jury's function. For example, in one case, the defendant was acquitted of conspiracy but convicted of one count of using a communication facility to cause or facilitate the commission of a transaction involving one pound of marijuana. He was nonetheless sentenced on the basis of 255 grams of cocaine base, which was attributed to the drug conspiracy of which he was acquitted.³⁵ Results like this do not serve the purposes of sentencing and undermine respect for the law.

C. The Commission Should Delete or Amend the Robbery Examples at Proposed Note 3(D) and 4(B)(i) (currently notes 2 and 2(b)(1)).

The Commission requests comment on whether it should provide additional or different examples to better explain the operation of “jointly undertaken criminal activity.” As we noted in our testimony for the Commission’s hearing, we believe that the Commission should delete the robbery example in proposed note 3(D). This example and part of the example in proposed note 4(B)(i) are contrary to the theory and stated operation of “jointly undertaken criminal activity.”

The commentary to §1B1.3 begins by stating that “the focus” under subsection (a)(1) “is on the specific acts and omissions for which the defendant is to be held accountable” in determining the guideline range, “rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.” USSG §1B1.3, comment. (n.1). The commentary has always said that “jointly undertaken criminal activity” is limited to “the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement).” *Id.*, comment. (n.2). The Commission now proposes to make this limitation crystal clear. *See Proposed Note 3(A) & (B).*

Yet, the example at proposed note 3(D) directs courts to sentence a defendant for the conduct of others that was not within the scope of the criminal activity the defendant agreed to jointly undertake. In the example, two defendants agree only to commit a robbery, and then the first defendant assaults and injures a victim in the course of the robbery. The second defendant “[did] not agree[] to the assault,” and in one scenario also “cautioned the first defendant to be careful not to hurt anyone.” The note expressly states that the “criminal activity that the [second] defendant agreed to jointly undertake” was “robbery,” and that he *did not* agree to an assault. Yet, the note asserts, “the assaultive conduct was within the scope of the criminal activity the defendant agreed to jointly undertake (the robbery).”

³⁵ *United States v. McMahan*, 495 F.3d 410, 425 (7th Cir. 2007).

This is a strict liability standard, and is contrary to the principles it purports to apply. The Commission should either delete the example or change it to reach the opposite result.

The example at proposed note 4(B)(i) is a combination of aiding and abetting and jointly undertaken activity. In the portion concerning the latter, the defendant is a getaway driver in an armed bank robbery in which a teller is assaulted and injured. The example asserts without supporting facts or explanation that the assault on the teller was “within the scope . . . of the jointly undertaken activity (the robbery).” Juxtaposed against the absence of facts or explanation regarding the assault on the teller, the example states that the defendant is accountable for the money taken under subsection (a)(1)(B) because “the taking of the money was the specific objective of the jointly undertaken criminal activity.”

Thus, the only basis for accountability under subsection (a)(1)(B) for the assault must be strict liability. We suggest deleting the assault portion of this example, or providing facts that explain why the assault on the teller was or was not an objective of the defendant’s agreement.

II. Mitigating Role

The Defenders’ testimony for the March 12, 2015 hearing offered extensive comments on the Commission’s proposed amendments to the mitigating role guideline. We take this opportunity to respond to some other issues raised at the hearing and in the Department’s testimony.

A. DOJ’s Opposition to Proposed Amendments to the Mitigating Role Guideline is Contrary to its Past Positions.

We were surprised by the Department’s opposition to the Commission’s proposal to amend application note 3(A) pertaining to a defendant who performs “a limited function in concerted criminal activity” and is “accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved.” Last year, Commissioner Ex Officio Wroblewski plainly stated that it was the guidelines intent that such a person should receive a mitigating role adjustment. The Defender witness – Molly Roth – when explaining why the Commission should lower the top of the drug quantity table from level 38 to level 36, discussed her client, 22-year-old Oscar. “He had no convictions and no arrests when he was arrested. He knew he was transporting drugs in his truck but he had no idea the type or quantity.”³⁶ His guideline range was 135 to 168 months.

Commissioner Ex Officio Wroblewski questioned Ms. Roth about the guideline range:

³⁶ USSC, *Transcript of Hearing*, at 86-87 (Mar. 13, 2014) (emphasis added).

But I'm curious because the way the system is supposed to work now, in the case of someone like Oscar, is if you're involved in very, very, very large quantities of drugs, I'm talking about under the Commission's proposal, it would take 90 kilograms of heroin, which is 90 times the amount that would trigger the ten-year mandatory minimum, to get you to level 38.

Bur even someone like Oscar, who's a first-time, non-violent, low-level offender, the way the guidelines are supposed to work is that person is supposed to get a reduction based on the mitigating role cap, a reduction based on mitigating role, a reduction based on the safety-valve, a reduction based on acceptance of responsibility that would drive the sentences far lower than 135 months.

One-hundred and thirty-five months is a Level 30 and criminal history Category I is a Level 33 Category I. I'm not saying that the guidelines work exactly the way the policy is written, but that's the way the policy is written and it's the policy that we are supporting, which is, again, to identify those low-level, non-violent offenders and bring their sentences way down, but staying within the context of the mandatory minimums.

Explain to me why that didn't work for Oscar and why that's not the right approach.³⁷

On the role adjustment issue, Ms. Roth explained: "*The role adjustment was not included in that because he was a single defendant.* And in many parts of the country, that is, indeed, the way the guidelines are applied." *Id.* at 113 (emphasis added).

Commissioner Ex Officio Wroblewski again commented: "*The Commission has tried a number of times to tweak, to make a direction to courts to apply it. If that was applied correctly though, the sentence would drop significantly below that 135.*" *Id.* at 114 (emphasis added).

For the Department to now resist a modest effort on the Commission's part to "make a direction to courts to apply it," is troubling, especially when the Commission's data show that the lower the role, the higher the quantity of drugs involved. For example, in the Commission's 2007 cocaine report, only 19 percent of couriers or mules involved in cocaine powder offenses had drug quantities below the five-year level, while 27 percent had amounts exposing them to five-year minimums (OL 24) and 54 percent had amounts exposing them to ten years or more.³⁸ If low-level couriers and mules like Oscar are not getting the mitigating role adjustment, then

³⁷ *Id.* at 111-13 (emphasis added).

³⁸ USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy*, Fig. 2-12, at 28 (2007).

they are not getting a mitigating role cap, and are being sentenced to prison for unnecessarily long periods of time.

The Department's position in this amendment cycle, that a court should not be encouraged to give a mitigating role adjustment to a person held accountable only for the conduct in which he or she was personally involved, assumes that the only reason for the mitigating role adjustment is to mitigate the effects of relevant conduct. That is not correct. Take for example, a person who works at a stash house as a lookout. She sits outside so that she can alert others in the house if someone unexpected approaches. The drug organization is headed by a distributor who employs 20 people to serve as packagers, runners, and sellers. The defendant's base offense level under §2D1.1 is based on the amount of drugs she constructively possessed at the stash house. Compared to the average participant in the criminal activity, the defendant plainly plays a minimal role and should receive an adjustment under §3B1.2. Under the Department's current position, a court should not be encouraged to give her a mitigating role adjustment.

The Department is apparently unwilling to let go of the argument –correctly rejected decades ago – that the “sole proprietor” who buys drugs from a dealer and resells them should not get a mitigating role. *See United States v. Jackson*, 756 F. Supp. 23, 25 (D.C. Cir. 1991) (giving a 4-level reduction for a homeless drug addict who sold crack for her dealer in an effort to obtain drugs for herself and rejecting government's argument that the existence of a larger network was immaterial to her sentence; concluding that “government's presentation of Ms. Jackson's crime . . . does not preclude the Court from looking beyond the indictment to the actual pattern of criminal conduct in which Ms. Jackson was involved”).

The Department's position also overlooks how participants in other kinds of concerted criminal activity may be accountable under §1B1.3 only for the conduct in which he or she was personally involved, but still perform a limited function that warrants a role adjustment, .e.g., an owner of car used in a bank robbery;³⁹ a person who provides information about the movements of an armored car;⁴⁰ and a defendant who removed items from a building before others set it on fire.⁴¹

And, significantly, the Department offers no solution for the widely disparate practices of district judges, probation officers, and prosecutors in applying the mitigating role adjustment. If the Commission wants to correct for the regional disparity on application of mitigating role adjustments, and reduce the cost of incarceration and prison crowding, it should fix the

³⁹ *United States v. Klinefelter*, 709 F. Supp. 653, 653 (W.D. Pa. 1989) (minimal participant).

⁴⁰ *United States v. Parker*, 903 F.2d 91, 103 (2d Cir. 1990) (minor participant).

⁴¹ *United States v. Haut*, 107 F.3d 213, 217 (3d Cir. 1997) (minimal participant).

mitigating role guideline to make it clear which typical functions in a criminal enterprise generally should receive a role adjustment.⁴² Barring such a change, the least the Commission should do is adopt the proposed amendment.

B. The Commission Should Increase the Range of Mitigating Role Adjustments.

At the hearing, the issue of increasing the reductions for mitigating role was briefly addressed. Specifically, while recommended sentences have been increased over the years on the basis of drug quantity and loss amount, this inflation has not been offset by similar increases in available reductions based on mitigating role. Defenders encourage the Commission to consider amending the guidelines to offset the inflated drug quantity table and loss table by increasing the extent of the reductions available for mitigating role. This could mean keeping the same 2-, 3-, and 4- level reductions, and also providing for additional, more significant reductions. More options would help courts better differentiate among the various actors in concerted criminal activity. Forty-seven percent of judges surveyed in 2010 agreed that the “range of adjustments based on role in the offense should be increased (i.e., allow adjustments for role in the offense greater than 4 levels).”⁴³ Another 28 percent were neutral on the issue and only 25 percent disagreed.⁴⁴ Given that there are more mitigating role adjustments than aggravating adjustments, it is reasonable to infer that judges would like to see a greater range of mitigating role adjustments.⁴⁵

A greater range of mitigating role adjustments would also (1) help offset the narrow range of the safety-valve reduction under §5C1.2 and result in fairer sentences for those who have more than one criminal history point – often for nonviolent offenses – or who have been denied relief under §5C1.2 because of legal possession of a firearm; and (2) ameliorate the over emphasis on loss for individuals who perform low-level functions in economic crimes. Unlike §2D1.1, which has a role cap (albeit it insufficient), and one narrowly defined 2-level reduction for minimal participants who meet specific criteria, §2D1.1(c)(16), the economic crime

⁴² Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 9 (July 25, 2014).

⁴³ USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 9 (2010).

⁴⁴ *Id.*

⁴⁵ USSC, Interactive Sourcebook, *Role Adjustment of Drug Offenders in Each Drug Type FY 2006-2012* (19.3% of cases received a mitigating role adjustment compared to 5.8% that received an aggravating role adjustment). FY 2013 data show that judges gave more non-government sponsored below guideline sentences for drug-trafficking defendants that receive a 4-level minimal participant reduction than in other drug trafficking cases. See USSC, *FY 2013 Monitoring Dataset* (31% non-government sponsored below range sentences for defendants who received reduction for minimal role).

guidelines have no such caps. Thus, people who perform low level functions in economic crimes but who are saddled with high loss amounts obtain little relief.

III. Inflationary Adjustments

Defenders reiterate that the Commission should adjust the monetary values in the Chapter Two offense guidelines to adjust for inflation starting from 1987. The Commission has never revised the monetary values in Chapter Two “specifically to account for inflation.”⁴⁶ And, as Professor Bowman’s testimony at the public hearing in March regarding the amendments to the loss table at §2B1.1 in 2001 made clear, the prior adjustments to the monetary values were not as scientific or systematic as one might hope. To both avoid unwarranted disparity arising from the vagaries of inflation, and serve the goal of proportionality, all monetary values in Chapter two should be adjusted for inflation since 1987.

IV. Economic Crime

A. Sophisticated Means

At the public hearing in March, Commissioner Barkow asked a question about the Defenders’ proposal to limit application of the sophisticated means enhancement to situations where the defendant *willfully caused* the conduct constituting sophisticated means. The question focused specifically on the use of the language: “willfully caused.” The “willfully caused” language is familiar in federal sentencing, and has been part of §1B1.3(a)(1)(A) for over twenty years. *See* USSG App. C, Amed. 439 (Nov. 1, 1992).⁴⁷ We strongly urge the Commission to adopt the language suggested by Defenders, which would limit application of the enhancement to those who are most culpable – those who willfully cause sophisticated conduct – without also sweeping in others who are involved in a sophisticated scheme by mere happenstance.

B. Victim Table – Non-monetary harms

As previously indicated, Defenders oppose including non-monetary harm in the proposed amendment to the victim table, rather than leaving those factors where they currently are, as a basis for a departure. We are very concerned that including these factors in the victim table, without also revisiting the structure of the entire guideline, will increase sentences without any evidence that such increases are appropriate or necessary. Adding non-economic harms into a specific offense characteristic would work like so many of the Commission’s most troubling

⁴⁶ USSC, *Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing*, 80 Fed. Reg. 2570, 2579 (Jan. 16, 2015).

⁴⁷ USSG §1B1.3(a)(1)(A) states: “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or *willfully caused* by the defendant” (emphasis added).

amendments, as yet another incremental add-on, and as a one-way ratchet upward, resulting in recommended sentences that are greater than necessary.

At a minimum, before such an amendment is made, the Commission should field test the proposal. The Commission previously has conducted field tests where it has asked judges and probation officers to apply proposed guidelines to past cases.⁴⁸ By asking judges and probation officers to apply the proposed changes to past cases, the Commission could develop a better understanding of how the changes would impact recommended sentence length and the prison population. This process could also provide information on whether judges agree that the proposed amendments address factors that should be a basis for enhancing the offense level, whether the proposed factors are clear, or overly ambiguous and/or complex, and whether the factors rely on information that is available, or would require extensive investigation and lengthy hearings.

V. Hydrocodone

Defenders reiterate that the Commission should revisit the drug equivalencies for the opiates. A discussion of whether pure single entity oxycodone and hydrocodone have equianalgesic effects or the same abuse liability is premature because it is based on the false assumption that the drug equivalencies for the remaining opioids are proportionate, and that oxycodone is the appropriate drug upon which to anchor the equivalency for other opioids. As set forth in Mr. Coleman's statement, the drug equivalences are not proportionate and significantly strayed off course when the Commission adopted the 1:6700 ratio for oxycodone (actual). And given Mr. Rannazzisi's admission at the public hearing in March that the drug equivalency for heroin is appropriately set, we fail to see how it is acceptable to treat oxycodone and hydrocodone as if they are more potent than heroin when in fact heroin (actual) is at least 1/3 more potent.⁴⁹ The soundest solution is for the Commission to follow the statutory definition of "opiate" set forth in 21 U.S.C. § 802(18) and compare oxycodone, hydrocodone, and any other

⁴⁸ See, e.g., USSC, *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines* (1998) (surveying federal judges and probation officers in a field test of the proposed definition of loss, applying the proposed definition to past cases), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/19981020_Loss_Definition.pdf.

⁴⁹ See Statement of Lex Coleman, Before the U.S. Sent'g Comm'n, Washington, D.C., at n. 24 (Mar. 12, 2015). We also note that other data refute the Department's position that heroin and morphine are equivalent. *DOJ Comments 2015*, at 24. See Robert Kaiko, et al., *Analgesic and Mood Effects of Heroin and Morphine in Cancer Patients with Postoperative Pain*, 304 N. Eng. J. Med. 1501 (1981) (finding that heroin was twice as potent as morphine). In any event, if the Department is correct, then the marijuana equivalency for heroin (1 gm heroin: 1 kg of marihuana) is far too high compared to morphine (1 gm morphine: 500 gm marihuana).

opiate to morphine.⁵⁰ It can then structure the guideline to take into account the lesser abuse liability of the abuse-deterrent and combination products.

In the interim, the Commission should leave hydrocodone combination products and hydrocodone single entity products where they were before the DEA rescheduled them (1 unit of a combination product equals 1 gram of marijuana; 1 gram of hydrocodone equals 500 grams marijuana). As noted by Mr. Rannazzisi, it has taken fifteen years for hydrocodone combination products to be classified as Schedule II. The process took so long because there were legitimate differences of opinion among various stakeholders about the dangers of these products related to other Schedule II opioids. Because the effects of the August 2014 rescheduling on the availability of hydrocodone are still unknown, as is information on the use of the newly approved single entity products, the Commission should take a pragmatic approach and give the rescheduling time to work.

Of the few hydrocodone cases prosecuted in federal court,⁵¹ most involve poor, small volume addicts or sellers who are plainly not “serious” or “major traffickers,” and, heightened penalties for them serves no legitimate purpose of sentencing. The ongoing trends in Appalachia and other parts of the country with similar demographics easily off-set the “pill-mill” stereotype advanced by Mr. Rannazzisi.

And in the unusual “pill mill” prosecutions, the current statutes and guidelines for hydrocodone, oxycodone, and other pain medications yield substantial penalties. For example, an operator of a “pill mill” in Southern Ohio received a 210 month sentence after being held responsible for more than 1900 grams of hydrocodone and 85 grams of oxycodone.⁵² In another case, the operator of a “pill mill” was convicted of 46 counts of violating or conspiring to violate the Controlled Substance Act, including one count of unlawfully dispensing or distributing

⁵⁰ The statute defines “opiate” as “any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability.” 21 U.S.C. § 802(18). Looking at morphine as the point of comparison also would be more consistent with the historical development of opiate controlled substances and the relative pharmacology of such substances. See A Train Education, *Morphine-Like Drugs and Synthetic Derivatives*, https://www.atrainceu.com/course-module/1473368-70_opioids-their-use-and-abuse-module.

⁵¹ In FY 2012-FY 2013, there were 88 Schedule II hydrocodone cases (single entity products) and 73 Schedule II hydrocodone cases (combination products) compared to 1838 oxycodone cases. USSC, *FY2012-2013 Monitoring Dataset*. From FY 2006-FY 2012, there were 32151 oxycodone cases and only 409 hydrocodone cases. USSC, *Interactive Sourcebook*.

⁵² *United States v. Sadler*, 750 F.3d 585, 593 (6th Cir. 2014).

controlled substances and causing death or serious bodily injury. The court sentenced him to the low end of a guideline range of 30 years to life imprisonment.⁵³

Taking an interim step of maintaining the status quo on penalties for hydrocodone so that the Commission can better study the drug equivalencies for opioids and gather better data on the use of the new single entity hydrocodone products will not pose a risk to public safety or undermine the purposes of sentencing. First, decades of high penalties for drug offenses have not deterred drug trafficking, so there is no reason to believe increasing sentences immediately will have a deterrent effect.⁵⁴ Second, the availability of new single-entity hydrocodone product is unlikely to escalate abuse of hydrocodone. Zohydro is on few formularies and prescribers will be more reluctant to prescribe it when they have the option of prescribing Hysingla – an extended-release abuse-resistant product. And Hysingla’s abuse-deterrent properties will make it less appealing to those with serious addictions who “sometimes alter the route of administration (e.g., snorting or injecting) to intensify the effect.”⁵⁵

In addition, it is not as clear as the government would have you believe that hydrocodone use is a gateway to heroin use. While the DEA claims that in its experience “hydrocodone users, oxycodone users, and heroin users share similar characteristics,”⁵⁶ studies of actual abusers reveal otherwise. Those studies, done by Theodore Cicero and colleagues, were submitted to the Commission with our March 13, 2015 letter, which we attach for the Commission’s convenience. Significantly, far fewer opioid users abused hydrocodone than oxycodone, and hydrocodone users were described as more risk adverse.⁵⁷ The Department also omitted critical information from a study it cited in its letter to the Commission. The Department cited the portion of the study that reported “as many as four out of five heroin initiates have previously used non-medical pain relievers.”⁵⁸ It, however, failed to include the next two sentences from the study,

⁵³ *United States v. Joseph*, 709 F.3d 1082, 1105 (11th Cir. 2013).

⁵⁴ See National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 88 (Jeremy Travis et al. eds., 2014) (“Most drug policy analysts agree that . . . imprisoning individual drug dealers seldom reduces the availability of drugs or the number of traffickers.”).

⁵⁵ Pradip K. Muhuri, et al., *CHBSQ Data Review: Associations of Nonmedical Pain Reliever Use and Initiation of Heroin Use in the United States 2* (2013), <http://www.samhsa.gov/data/sites/default/files/DR006/DR006/nonmedical-pain-reliever-use-2013.pdf>.

⁵⁶ *DOJ Comments 2015*, at 22.

⁵⁷ Theodore Cicero, et al., *Multiple Determinants of Specific Modes of Prescription Opioid Diversion*, 41 *J. Drug Issues* 283, 293 (2011) (immediate release oxycodone was the primary opioid of abuse for 58.1% of opioid abusers; extended release oxycodone was the choice for 18.2%; hydrocodone was the primary opioid for only 15.5%)

⁵⁸ *DOJ Comments 2015*, at 23.

which state: “However, the vast majority of NMPR (non-medical pain reliever) users have not progressed to heroin use. Only 3.6 percent of NMPR initiates had initiated heroin use within the 5-year period following first NMPR use.”⁵⁹

Of course, whether the use of hydrocodone or other prescription opioids leads to heroin use or not, our clients who suffer from addiction to opioids need treatment. Prison is not the place to obtain it. Medication- assisted therapy is an evidence-based treatment for individuals addicted to opioids.⁶⁰ Unfortunately, only a few jails and prisons provide it; BOP is not among them. And wasting money on incarcerating those who sell prescription drugs will do nothing to stop the demand for drugs. Limited resources are better spent on treatment than incarceration.

We implore the Commission to act cautiously in resetting the penalties for hydrocodone so that it does not burden poor, unsophisticated, and bottom rung addicts and street-level sellers based on fears about what could happen just because the FDA and DEA have seen fit to reschedule a substance while approving a new formulation – Zohydro – that has no abuse-deterrent properties. The Commission can act to mete out punishment more effectively by proceeding in a more pragmatic manner, based on sound empirical evidence.

VI. Flavored Drugs

Defenders are not aware of a single case in the federal system involving the manufacture of controlled substances in a manner designed to attract use by children. And the rumor that police have seized “strawberry meth” intended to appeal to children is the type of patently false story that made its way onto snopes.com⁶¹ and urbanlegends.com⁶² – both websites that debunk myths.

⁵⁹ *Id.*

⁶⁰ See Hilary Connery, *Medication-Assisted Treatment of Opioid Use Disorder: Review of the Evidence and Future Directions*, 23 *Harvard Rev. of Psychiatry* 63 (2015); Peter Friedmann, et al., *Effect of an Organizational Linkage Intervention on Staff Perceptions of Medication-Assisted Treatment and Referral Intentions in Community Corrections*, 50 *J. of Substance Abuse Treatment* 50 (2014) (noting that medication –assisted treatment for opioid use disorders is underutilized in correctional settings even though it is effective); Cara Tabachnick, *Breaking Good: Vivitrol, A New Drug Given as a Monthly Shot, is Helping Addicts Stay Clean*, *Wash. Post Mag.* (Mar. 13, 2015) (discussing substance abuse treatment program at Washington County Detention Center in Maryland, which uses medication-assisted therapy to treat heroin and prescription opioid abuse), http://www.washingtonpost.com/lifestyle/magazine/his-last-shot-will-a-monthly-jab-of-a-new-drug-keep-this-addict-out-of-jail/2015/03/05/7f054354-7a4c-11e4-84d4-7c896b90abdc_story.html.

⁶¹ <http://www.snopes.com/medical/drugs/candymeth.asp>.

⁶² http://urbanlegends.about.com/library/bl_strawberry_meth.htm.

We believe it is a wasteful and mistaken exercise to craft a solution in search of a problem. Doing so will not deter the feared conduct. As mentioned above, evidence shows that harsher sanctions have only a marginal deterrent effect on individuals and few people sufficiently understand criminal law for it to have a deterrent effect.⁶³ In addition, absent an actual problem of real cases with unfairly low recommended sentencing ranges, the discussion of a solution could well involve unwise detours, such as that proposed by the Department to craft a provision addressing the much broader category of offenses involving “deceptive packaging and labelling of controlled substances.”⁶⁴ This issue for comment and the Department’s proposed response to it, are illustrations of the insidious “factor creep” that plagues the guidelines. Commissioner Ex Officio Wroblewski used the term “factor creep” to describe the phenomenon of adding more and more factors to the guidelines to account for specific harms “ranging from hate motivation, to use of juveniles in the course of certain crimes, to the involvement of gangs, to property damage at veterans’ cemeteries.”⁶⁵ Factor creep adds to the complexity of the guidelines and invites both guideline manipulation and variances from recommended sentences that rise far above fair and just ranges.

We urge the Commission not to add provisions to the guidelines to address these cases sight unseen. Should these offenses materialize, there can be no doubt that they will be appropriately punished. The guidelines generally provide for severe punishment based on the quantity of drugs involved in the offense alone. On top of that, the vulnerable victim adjustment may apply in appropriate cases, providing a 2-level increase were the defendant knew or should have known the victim of the offense was a vulnerable victim, and an *additional* 2-level increase if the offense involved a large number of vulnerable victims. §3A1.1(b). Aggravating role adjustments also apply in appropriate cases, §3B1.1, and when such a role adjustment is warranted, an additional 2-level increase applies when the defendant distributed a controlled substance to an individual the defendant knew to be less than 18-years-old, or otherwise involved the individual in the offense. §2D1.1(b)(15). And should the guidelines alone provide for a sentence the judge determines is not sufficient to meet the purposes of sentencing, the judge may impose a sentence above what is recommended by the guidelines. Watching what federal courts do, should these offenses occur and be prosecuted and sentenced in federal court, will provide invaluable information on the question of whether the current guidelines adequately address such offenses.

⁶³ See pages 2-3 and nn. 5, 8 & 9, *supra*.

⁶⁴ *DOJ Comments 2015*, at 19.

⁶⁵ R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines Psychological and Policy Reasons for Simplification*, 7 *Psych. Pub. Pol’y & L.* 739, 752-53 (2001).

If, despite the many reasons to table this issue until it proves real, the Commission nonetheless decides to amend the guidelines to address the specific factor of manufacturing controlled substances designed to attract use by children, it is imperative that the Commission require evidence the defendant intended the substances to attract use by children. As Defenders have repeatedly emphasized in a variety of contexts during this amendment cycle, individual intent is a critical measure of culpability. A defendant who packaged a controlled substance in a way that it looks like candy to some, but was simply intended to foster brand loyalty with adults⁶⁶ is simply not as culpable as the hypothetical defendant who manufactures controlled substances with the specific intent to attract use by children. The same is true for the individual who colors a controlled substance so it would appeal to adult viewers of the popular television show, *Breaking Bad* (in which the main character manufactures blue methamphetamine).⁶⁷

VII. Technical Amendments

Part A of the technical amendments proposes changes to reflect the editorial reclassification of certain sections in the United States Code. On the limited issue of responding to code reclassification, Defenders have only one specific objection. In Appendix A, the Commission proposes to strike the reference to 2 U.S.C. § 437(d) which has been transferred to 52 U.S.C. § 30109(d). Defenders do not object to striking this old provision. We do, however, object to adding, as the Commission proposes, a reference to the entire section 30109, when only subpart (d) was previously included. The rest of section 30109 deals with administrative procedures. To sweep more broadly is unnecessary and holds the potential for confusion. Appendix A should refer only to subsection 30109(d), just as it did for subsection 437g(d).

⁶⁶ Sean O'Hagan, *Heroin baggies: killer branding*, The Guardian, Oct. 5, 2014, <http://www.theguardian.com/society/2014/oct/05/heroin-baggies-graham-macindoe-photography>.

⁶⁷ Associated Press, *'Breaking Bad'-like blue-tinted meth turns up in New Mexico*, N.Y. Daily News, Jan. 14, 2014, <http://www.nydailynews.com/entertainment/tv-movies/breaking-bad-blue-meth-turns-new-mexico-article-1.1578986>.

Honorable Patti B. Saris

March 18, 2015

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VIII. Conclusion

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

Very truly yours,

/s/ Marjorie Meyers

Marjorie Meyers

Federal Public Defender

Chair, Federal Defender Sentencing

Guidelines Committee

Enclosures

cc (w/encl.): Hon. Charles R. Breyer, Vice Chair
Dabney Friedrich, Commissioner
Rachel E. Barkow, Commissioner
Hon. William H. Pryor, Commissioner
Jonathan J. Wroblewski, Commissioner *Ex Officio*
Isaac Fulwood, Jr., Commissioner *Ex Officio*
Kenneth Cohen, Staff Director
Kathleen Cooper Grilli, General Counsel

ATTACHMENTS

Statement of Jon Sands
Federal Defender for the District of Arizona

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”

March 12, 2015

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 marijuana 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*).

Statement of Michael Caruso

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission

Public Hearing on Economic Crime and Inflationary Adjustments

March 12, 2015

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My name is Michael Caruso and I am the Federal Public Defender in the Southern District of Florida. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding Economic Crime and Inflationary Adjustments.

We have been pleased to work with the Commission over the past few years as it engaged in a multi-year study of economic offenses. But, we are disappointed that at the end of this process, the Commission has concluded that “the fraud guideline may not be fundamentally broken for most forms of fraud.”¹ Our experience and interpretation of the data are to the contrary. Before addressing the specifics of the Commission’s proposed amendments, we first urge the Commission to reconsider its position on the general state of the guideline.

Applying the current guideline requires a tremendous amount of work, and ultimately provides little guidance on what sentence would be sufficient, but not greater than necessary, in any given case. This super-sized guideline, running almost 5 full pages plus an additional 18 pages of commentary, includes complicated rules for calculating loss and the other 18 specific offense characteristics, many of which contain several subparts. It is difficult and time-consuming to apply this guideline, and often requires lengthy sentencing hearings. And, sentences in actual cases demonstrate that courts do not find the guideline particularly helpful in determining a just sentence because the recommended guideline range is rejected more often than accepted.²

While the press focuses on the high profile cases involving large losses motivated by greed, and on the small number of such prosecutions despite corporate acknowledgement of wrongdoing,³ Defenders see a steady stream of government cases against individuals with no

¹ Honorable Patti B. Saris, Chair, U. S. Sentencing Comm’n, Remarks for Public Meeting January 9, 2015, at 2, <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/Remarks.pdf> (*USSC Chair Remarks*).

² USSC *2013 Sourcebook of Federal Sentencing Statistics* tbl. 28 (2013) (*2013 Sourcebook*) (49.5% of sentences under §2B1.1 fell within the recommended guideline range). Preliminary data from FY 2014 suggests the rate of within recommended guideline range sentences continues its steady decline and has dropped to 46%. USSC, *Preliminary Data Report, 4th Quarter Release Preliminary Fiscal Year 2014 Data* (2014) tbl. 5 (*2014 4th Quarter Data Report*).

³ See, e.g., Christopher M. Matthews, *Ex-SAC Trader Gets Nine-Year Term – Judge Penalizes Martoma for Insider Trading; a ‘Darker Side to His Character’*, Wall St. J., Sept. 9, 2014, at C1 (“Mathew

criminal history who played a low-level role in a larger scheme, and who commit this first non-violent offense in an effort to feed and house themselves and their families at basic levels. To be sure, not all of our clients meet these descriptions, but a significant number do, and the guidelines fail to provide courts with adequate guidance on the appropriate sentence for these individuals.

For example, in one recent case, a 55-year old female defendant with high blood pressure and osteoarthritis, faced a recommended guideline range of 108-135 months, far above the 60-month statutory maximum. This recommended sentence is strikingly high for a defendant who the government described as follows: a “mid to low level employee” who “was one of dozens of telemarketers [soliciting investment in movies] . . . most of whom were not charged,” who earned “less than \$45,000 per year” for the four years she worked as a telemarketer, and who for at least part of the time did not understand she was participating in a fraudulent scheme “as evidenced by a \$5,000 investment from defendant’s daughter.”⁴ The government calculated the guidelines at offense level 31 (including a three-point reduction for acceptance of responsibility) in large part due to the 20-point enhancement for loss, which meant a guideline-recommended range of 108-135 months for this defendant in Criminal History Category I. The Court sentenced the defendant to a year and a day, well below the 24 months requested by the government, and significantly below 108 months, the low-end of the recommended guideline range. While there is a good question about why the defendant was not allowed to participate in a post-plea diversion program available in the district, that does not excuse the failure of the guidelines to come anywhere close to providing appropriate guidance on sentences in these cases involving

Martoma, who worked for hedge-fund billionaire Steven A. Cohen, was sentenced to nine years in prison Monday for taking part in what prosecutors said was one of the largest insider-trading schemes ever.”); Trip Gabriel, *Ex-Executive Is Indicted in Disaster at Coal Mine*, N.Y. Times, Nov. 14, 2014, at A12 (“The former chief executive of the company involved in the nation’s worst coal mine disaster in 40 years, in which 29 miner died in West Virginia in 2010, was charged on Thursday with widespread violations of safety rules and deceiving federal inspectors.”); James B. Stewart, *When the Buck Doesn’t Stop*, N.Y. Times, Feb. 20, 2015, at B1 (quoting Professor Brandon L. Garrett, author of *Too Big to Jail: “More often than not, when the largest corporations are prosecuted federally, individuals aren’t charged.”*); Peter J. Henning, *Eric Holder’s Mixed Legacy on White-Collar Crime*, N.Y. Times Blogs (DealBook) (Sept. 29, 2014) (Holder’s “last year as attorney general was marked by multibillion-dollar settlements with banks for their role in fueling the boom in subprime mortgages. They were a long-awaited response to the financial crisis but came after precious few prosecutions of corporate executives.”); Devlin Barrett, *Loretta Lynch to Face Tough Questioning by Lawmakers; Attorney General Nominee Likely to be Asked about Immigration, Surveillance*, Wall St. J. Online (Nov. 9, 2014) (“The [HSBC] settlement, which came with no criminal penalties for any of the individuals involved, was harshly criticized by those who felt Mr. Holder’s Justice Department has failed to punish bank executives for their part in the 2008 financial meltdown.”).

⁴ *United States v. Floyd*, No. 2:11-cr-543, Government’s Objections to the Presentence Report and Recommendation for Participation in CASA (Dkt. No. 530), Government’s Sentencing Position (Dkt. No. 559).

lower-level players whose loss amounts are driven to absurdly high levels based on the conduct of others over whom these lower-level participants have no control.

Another case where the guideline failed involved a 43-year-old woman with no prior criminal conduct who had worked in the family businesses since she was a kid.⁵ Most recently, she had been working as the chief financial officer of a family farm equipment business. While suffering from clinical depression, she became aware that the family business was failing. At the same time, the rest of the family assumed the business was thriving. To ensure that other family members could continue to receive salaries and health insurance until business improved, the defendant worked for a very low salary – \$24,000 to \$26,000 per year – for several years, and even worked a few months without taking any salary at all. But this was not enough, and in desperation, and in her depressive state, she took out loans in the names of clients and family members to cover business expenses. She believed she could pay the money back once the business was back on its feet. Unfortunately, that did not happen. In this case, the defendant agreed to not seek a below-guideline sentence, and stipulated to a loss amount in excess of \$1 million in exchange for the government’s agreement to dismiss a charge under 18 U.S.C. § 1028A which would have required a 24-month sentence consecutive to any other sentence imposed. The government and probation calculated an offense level of 32, with a recommended guideline range in Criminal History Category I of 121-151 months. The court issued a 10-page memorandum opinion addressing defendant’s objections to the offense level calculations, and sustained only the defendant’s objection to the 2-level enhancement at §2B1.1(b)(16)(A). The recommended guideline range for offense level 30 is 97-121 months. The court, on its own, varied downward and imposed a sentence of 73 months, a sentence approximately 25% below the bottom of the recommended range.

The data confirms our experiences that the fraud guideline is broken and fails to provide courts with meaningful guidance. District courts impose sentences outside recommended guideline ranges more often than they do within. This rate of dissatisfaction with the guideline recommended sentences is decidedly not driven by the cases that fall within the upper half of the 16-category loss table. Commission data shows that, for all categories in the bottom-half of the loss table that recommend enhancements based on loss amount, the rate of within-guideline sentences is less than half.⁶ This is important because more than two-thirds of all cases

⁵ Because of the personal nature of some of the facts in this case, we do not identify the name of the defendant.

⁶ USSC, *Economic Crime Public Data Briefing* figs. 4 & 5 (Jan. 9, 2015) (For loss amounts of more than \$5,000 up to and including \$1 million dollars, the loss amounts for which the guidelines recommend an enhancement between 2 to 14 levels, the rate of within guideline sentences was 47.9% in FY 2012), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf (*Economic Crime Briefing*).

sentenced under §2B1.1 fall in those loss categories.⁷ Significantly, the category with the highest rate of within guideline sentences – 84.1% – is where the guidelines recommend no enhancement based on the loss amount.⁸ This highlights one of the biggest problems with the guideline: the overemphasis on loss. When the loss determination starts to play a significant role in the recommended guideline range, courts start rejecting that range as an appropriate sentence. And, when the enhancement for loss becomes large enough that it doubles the lowest base offense level – which happens at the low loss amount of more than \$30,000 – courts begin rejecting the recommended guideline in half the cases.⁹

The Commission has indicated it believes that “sentences on average hew fairly closely to the guidelines for all but the highest dollar values, over \$1 million in loss.”¹⁰ Based on publicly available data, we disagree.¹¹ In FY 2009 - FY 2013, defendants sentenced under §2B1.1 received an average reduction of 60.4% in their sentence in cases where the government filed substantial assistance motions, an average reduction of 59.1% in cases where the government sponsored below-guideline sentences for reasons other than those contained in Chapter Five, and an average reduction of 54.6% in cases with below guideline sentences that were not sponsored by the government.¹² These numbers cannot be fully attributed to the relatively small number of high- loss cases involving loss amounts of \$1 million or more (only 17% of all cases in FY 2012).¹³ In many of the loss categories involving losses of \$1 million or less, courts impose sentences significantly below the recommended guideline range. For example, in FY 2012, in cases where the loss amount fell in the more than \$70,000 category, the average sentence was 19% below the average guideline minimum; where the loss amount fell in the more than \$120,000 category, the average sentence was 21.4% below the average guideline minimum; where the loss amount fell in the more than \$200,000 category, the average sentence

⁷ *Id.* at fig. 4 (There were 5,814 people sentenced based on loss amounts of more than \$5,000 up to and including \$1 million dollars in FY 2012, and 8,503 individuals total under §2B1.1).

⁸ *Id.* at fig. 5.

⁹ *Id.*

¹⁰ *USSC Chair Remarks*, at 2.

¹¹ If the Commission has other data that it has not released to the public that shows sentences hewing closely to the guidelines, Defenders request the Commission make that data available.

¹² USSC, *Quick Facts: Theft, Property Destruction, and Fraud Offenses* (Dec. 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Theft_Property_Destruction_Fraud_FY13.pdf (*Fraud Quick Facts*).

¹³ *Economic Crime Briefing* at fig. 4.

was 24.2% below the average guideline minimum; and where the loss amount fell in the more than \$400,000 level, the average sentence was 22% below the average guideline minimum.¹⁴

And, while sentences of 2, 4 and 6 months below the average guideline minimum may sound like small differences in the world of lengthy federal sentences, for these low-level cases, such reductions are significant because they place the sentence within a lower Zone, which allows for alternatives to incarceration. For example, for the loss category of more than \$30,000, the average guideline minimum is 15 months, and the average sentence is just 2 months lower – 13 months.¹⁵ In Criminal History Category I, the category that applies to most people sentenced under §2B1.1,¹⁶ 15 months is the bottom of the range at offense level 14. A two month reduction would move the defendant to a lower offense level and from Zone D to Zone C, where the guidelines encourage greater use of community supervision, in contrast to Zone D which recommends the entire sentence be spent in prison.¹⁷

Against this backdrop, we believe the Commission's proposed amendments fail to adequately address the core problems that cause the recommended guideline sentences to be higher than necessary for the seriousness of many offenses.¹⁸ The guidelines need to reduce the current overemphasis on loss as a measure of culpability, eliminate intended loss, allow loss amounts to be mitigated by a variety of other factors relevant to culpability, encourage alternatives to incarceration, eliminate the victim table, eliminate the enhancement for sophisticated means, amend §2B1.1(b)(10) to exclude what are largely foreign offenses, cap the cumulative effect of the specific offense characteristics, eliminate floors for non-violent offenses, and also possibly include a safety-valve for fraud cases.¹⁹ If, however, the Commission is unwilling to make these bigger changes, Defenders believe some of the Commission's proposed amendments take steps in the right direction.

¹⁴ *Id.* at fig. 6.

¹⁵ *Id.* at fig. 6.

¹⁶ *Fraud Quick Facts.*

¹⁷ *See* USSG §5C1.1.

¹⁸ *See, e.g.,* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (Nov. 20, 2013) (addressing problems with §2B1.1 and proposing solutions).

¹⁹ *Id.* (providing a more detailed explanation of these changes Defenders believe are necessary to improve the guidelines).

I. Inflationary Adjustments

Defenders enthusiastically support an immediate, and ideally, retroactive, adjustment to the monetary values in the Chapter Two offense guidelines for inflation. It is critical, however, that the Commission properly acknowledge that the guidelines “have never been revised specifically to account for inflation.”²⁰ Accordingly, Defenders oppose the Commission’s proposal to arbitrarily select different starting points for different guidelines (*e.g.* 2001 for §2B1.1 and 1989 for §2B2.1). The starting point should be the same for all – 1987 – because the monetary values in the Chapter Two offense guidelines “have never been revised specifically to account for inflation.”²¹

Adjusting the monetary values in Chapter Two for inflation makes good sense and is consistent with the Commission’s mandate to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.”²² The premise of the Chapter Two monetary values is that they serve as a proxy for offense seriousness. Over time, without adjustment, those monetary values reflect less and less serious offenses due to the effects of inflation. Because \$10,000 is worth less today than it was in 1987, a fraud or burglary involving a loss amount of \$10,000 is less severe today than it was in 1987. By not adjusting for inflation, the Commission has effectively increased the recommended penalties for Chapter Two offenses that are based on monetary values. It is time to fix that. An increase or decrease to the recommended sentence for an offense where monetary values serve as a proxy for offense seriousness should be based on empirical evidence about why such a change is consistent with the purposes of sentencing, not the vagaries of inflation.

While this would be the first time the Commission specifically adjusted the Chapter Two monetary values for inflation, it certainly should not be the last. We recommend the Commission add to the Guidelines a provision that would automatically make inflationary adjustments to the Chapter Two monetary values. If these automatic adjustments do not occur annually, we urge the commission to provide for a downward departure in cases where, had there been an annual inflationary adjustment, it would have resulted in a lower loss enhancement.

In addition, while we support inflationary adjustments to the Chapter Two offense monetary values now and on an automatic and regular basis in the future, we oppose the

²⁰ USSC, *Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing*, 80 Fed. Reg. 2570, 2579 (Jan. 16, 2015) (*2015 Proposed Amendments*).

²¹ *Id.*

²² 28 U.S.C § 994(g).

Commission's proposal to use starting points other than 1987 for the Chapter Two adjustments. First, the guidelines "have never been revised specifically to account for inflation."²³ That alone is reason enough to calculate all of the adjustments from the beginning. Second, the Commission has long worked to achieve proportionality in the guidelines.²⁴ Picking different dates for the starting point of the inflationary adjustment for different Chapter Two offense guidelines is inconsistent with that goal. For example, right now a \$10,000 loss amount triggers a 4-level enhancement under §2B1.1, and a 2-level enhancement under §2B2.1, which starts at a higher base offense level. Under the proposed amendments, those same enhancements will be triggered by two different loss amounts: it will take \$15,000 to trigger §2B1.1's 4-level enhancement, and \$20,000 to trigger §2B2.1's 2-level loss amount. Put a different way: Why would a loss of \$18,000 under the current guidelines be worth +4 under §2B1.1, +2 under §2B2.1, but then, after November 1, 2015, still be worth +4 under §2B1.1 and only +1 under §2B2.1? No reason justifies this difference other than the arbitrary one that the Commission last amended the monetary values in §2B1.1 in 2001, and §2B2.1 in 1989. But when the Commission last amended the monetary values in §2B2.1, it did so in part to "conform the offense levels . . . to the amended loss table at §2B1.1."²⁵ To be sure, after the amendment to §2B2.1 in 1989, the Commission later amended §2B1.1 in 2001 as part of the Economic Crime Package. But that does not mean that in so doing the Commission abandoned its goal of proportionality. It is difficult to imagine why the Commission would abandon that goal now, and even more difficult to see how that goal could be served by picking different starting dates for different Chapter Two offenses when none of them has ever "been revised specifically to account for inflation."²⁶ The best way to ensure that inflation does not arbitrarily increase the severity of sentences for offenses that rely on monetary values, and simultaneously maintain the Commission's goal of proportionality, is to adjust all of the Chapter Two monetary values for inflation since 1987.

Using 1987 as a starting point for the inflationary adjustments also would mildly ameliorate some of the unduly harsh effects of a loss table that from its inception recommended sentences greater than necessary, and that over time has only ratcheted up recommended penalties based on loss amount for reasons unsupported by empirical evidence. When the guidelines were first promulgated, the Commission decided to "abandon the touchstone of prior

²³ *2015 Proposed Amendments*.

²⁴ USSG, ch.1, original intro., pt. 3 ("Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.")

²⁵ USSG App. C, Amend 105, Reason for Amendment (Nov. 1, 1989)

²⁶ *2015 Proposed Amendments*.

past practice” for economic offenses.²⁷ The Commission therefore required some form of confinement for all but the least serious cases, and adopted a fraud guideline requiring no less than 0-6 months and no more than 30-37 months for defendants in Criminal History Category I.²⁸ The Commission explained that “the definite prospect of prison, though the time is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.”²⁹ The evidence, however, shows no difference in deterrent effect between probation and imprisonment.³⁰ It is well-supported and widely-accepted that deterrence is not linked to the severity of the penalty. The greatest deterrent effect is achieved through the certainty of getting caught and punished, not the severity of the punishment.³¹

Since then, the Commission has repeatedly increased the offense levels for loss based on reasons unsupported by empirical evidence. This is true across the entire loss table. For example, in 1987, a loss amount of more than \$10,000 and up to \$20,000 carried an increase of 3 levels, but now carries an increase of 4 levels. A loss amount of more than \$30,000 and up to \$50,000 carried an increase of 4 levels in 1987, but now carries an increase of 6 levels, pushing

²⁷ Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 22-23 (1988).

²⁸ See USSG §2F1.1 (1987).

²⁹ USSG, ch. 1, intro., pt. 4(d) (1987); see also USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 56 (2004) (Commission sought to ensure that white collar offenders faced “short but definite period[s] of confinement”).

³⁰ See David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995); Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007).

³¹ See Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?*, 10 Criminology & Pub. Pol’y 13, 37 (2011) (“The key empirical conclusions of our literature review are that at prevailing levels of certainty and severity, relatively little reliable evidence of variation in the severity of punishment having a substantial deterrent effect is available and that relatively strong evidence indicates that variation in the certainty of punishment has a large deterrent effect, particularly from the vantage point of specific programs that alter the use of police.”), <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2010.00680.x/pdf>. A 2010 review of deterrence research concluded that there is “no real evidence of a deterrent effect for severity.” Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 818 (2010). “[I]n virtually every deterrence study to date, the perceived certainty of punishment was more important than the perceived severity.” *Id.* at 817. A good overview of the criminological research on certainty versus severity is available in an article by Valerie Wright, Ph.D., entitled *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (Nov. 2010), <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>.

even individuals for whom this is their first offense into Zone C. A loss amount of more than \$70,000 and up to \$100,000 has increased from 5 to 8 levels. A loss amount of more than \$120,000 and up to \$200,000 has increased from 6 to 10 levels.³² Every single level increase affects a person's liberty by increasing the guideline recommended sentence, and at these levels, can mean the difference between probation and imprisonment.

Based on this history, even with adjustments for inflation, we believe the monetary values in the Chapter Two offense guidelines – and particularly in §2B1.1 – place far too much emphasis on loss. In response to the Commission's Issue for Comment on whether it should consider other changes to the monetary tables, Defenders repeat their plea that the enhancements for loss amounts be reduced so that they better reflect the seriousness of the offenses.

Turning back to the proposed inflationary adjustments, the Commission has proposed two different methods for adjusting for inflation, both of which use the Consumer Price Index. Option 1 rounds the amounts using a methodology applied when adjusting civil monetary penalties for inflation under section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. §2461 note). Option 2 uses different rounding rules "extrapolated from the methodology used in Option 1." Defenders see no reason to deviate from the well-established practice for civil penalties. This method provides more precision in the lower-middle part of the loss table (more than \$100,000 and under \$1 million), whereas Option 2 provides rounder numbers at the top end of the guideline where there are fewer affected cases.³³ While that may eventually change due to inflation, if the amounts eventually become so large that the rounding method in Option 1 becomes imprecise, it can and should be changed at that time in the future.

Finally, Defenders oppose inflationary adjustments for the fines table in Chapter Five. Here, inflation is doing a good job of shrinking the negative impact that fines can have on reentry, which is positive for the individuals who are reentering society, as well as for public safety. Criminal debt limits a person's ability to "attain housing, employment, and access to credit."³⁴ In addition, "[a]n important consequence of financial burdens is that they increase the

³² The increases are even more extreme in the top half of the loss table.

³³ See USSC, *Prison and Sentencing Impact Assessments for Proposed 2015 Amendments for Inflationary Adjustments to Monetary Tables in the Federal Sentencing Guidelines*, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/2014_2015_Proposed_Impact.pdf.

³⁴ Douglas N. Evans, Research & Evaluation Center, John Jay College of Criminal Justice, *The Debt Penalty, Exposing the Financial Barriers to Offender Reintegration*, at 9 (Aug. 2014).

likelihood of recidivism, particularly when offenders are unable to pay.”³⁵ Any amendment to fines for individuals should work to reduce them.

II. Intended Loss

Defenders continue to believe the intended loss rules can be particularly unfair, increasing loss amounts well beyond the actual loss or culpability of the defendant. The best solution to the problems created by the intended loss rules is to strike intended loss from the guidelines. If the Commission insists it remain, we support the Commission’s proposal in Option 1 to limit intended loss to the pecuniary harm “the defendant purposely sought to inflict.” We do, however, recommend that the Commission change the proposed directions for determining a defendant’s purpose, which currently indicate a defendant’s intent can be inferred from, among other things, “the actions and intentions of other participants, and the natural and probable consequences of those actions.” This language is confusing and could render meaningless the proposed language limiting intended loss to the pecuniary harm the defendant purposely sought to inflict. In addition, if intended loss is to remain in the guideline, we urge the Commission to make additional changes as outlined below.

When calculating a defendant’s intended loss, some courts have held that a defendant is accountable for loss intended by co-participants if the conduct of the co-participants was foreseeable to the defendant.³⁶ For example, in one case, a nurse who was paid \$500 a week for her relatively minor participation in a larger scheme, was held responsible for the entire intended loss of more than \$9 million on the basis that she was responsible for losses from all reasonably foreseeable acts of co-conspirators, even if the losses did not actually occur.³⁷ This approach is both unfair and unduly complex. Holding a defendant accountable for the entire loss “*intended* by co-conspirators so long as the conduct of the entire group was foreseeable to the defendant . . . [is] troublesome insofar as it muddles the distinction between actually occurring harm that was foreseeable to a defendant and harm that did not occur but which was subjectively intended.”³⁸ For intended loss, “proof of subjective intent stands in for actual occurrence of the merely foreseeable.”³⁹

³⁵ *Id.*

³⁶ See, e.g., *United States v. Otuya*, 720 F.3d 183, 191 (4th Cir. 2013); *United States v. Sliman*, 449 F.3d 797,801 (7th Cir. 2006).

³⁷ *United States v. Mateos*, 623 F.3d 1350, 1370-71 (11th Cir. 2010).

³⁸ Roger W. Haines, Jr., Frank O. Bowman, III & Jennifer C. Woll, *Federal Sentencing Guidelines Handbook* 380 (2013-2014 ed.).

³⁹ *Id.* at 368.

Both of the Commission's proposals have the potential to help put a stop to this sweeping interpretation of intended loss by some courts. Option 1, limiting intended loss to the pecuniary harm "the defendant purposely sought to inflict," is superior to Option 2, which would allow courts to also consider the pecuniary harm "that any other participant sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant." Option 1 makes clear that when intended loss is substituted for actual loss, it must be based on the defendant's "subjective intent to cause the loss." This option also advances the Commission's goals of increas[ing] clarity" and "reduc[ing] ambiguity"⁴⁰ by limiting the intended loss inquiry to only the subjective intent of the defendant.

Option 2, on the other hand, while not as bad as the decisions that look to all jointly undertaken activity, still shifts the focus away from where it should be: the subjective intent of the defendant. It calls for increased punishment based on what others intended – that is based on what others were merely thinking. This is fundamentally unfair and will result in recommended guideline sentences that overstate the culpability of the defendant. Option 2 also adds unnecessary complexity to a guideline that is in dire need of simplification. It will be time-consuming and complicated to apply – requiring courts to determine not only the mental state of the defendant, but also the mental state of any other participants for whom the defendant is accountable under §1B1.3(a)(1)(A).

Defenders, however, are concerned that under either Option 1 or Option 2, the proposed amendments would allow an individual's purpose to be determined not only by that individual's actions, but also "by the actions and intentions of other participants and the natural and probable consequences of those actions."⁴¹ This language, at best, will confuse the analysis and result in litigation, and, at worst, undo the work of the earlier language – particularly in Option 1 – limiting intended loss to the pecuniary harm the defendant purposely sought to inflict. It is difficult to understand how the "intentions of other participants" and even the "actions . . . of other participants" that the defendant may not have even known about, are relevant to determining the defendant's subjective intent.

A better approach would be to follow the lead of the Tenth Circuit in *United States v. Manatau*, 647 F.3d 1048, 1056 (10th Cir. 2011), and direct simply:

⁴⁰ *USSC Chair Remarks*, at 2.

⁴¹ This is a concern with both options. Option 2 initially refers to participants for whom the defendant is accountable under §1B1.3(a)(1)(A), but later refers to the "actions and intentions of other participants" without the limitation that the participants be those for whom the defendant is accountable under §1B1.3(a)(1)(A).

*The defendant's purpose may be inferred from all of the available facts.*⁴²

The Tenth Circuit in *Manatau* did not provide any more specificity than that, and the Commission should not either, leaving the inquiry to the discretion of the sentencing court in light of the circumstances of the particular case.

At minimum, the Commission should reject the proposed language directing courts to consider the “intentions of other participants,” and require that the “actions . . . of other participants” be at least known to the defendant. Similarly, the language “natural and probable consequences of those actions,” could lead to confusion over whether this is an inquiry into reasonable foreseeability, or not, and should be omitted. As discussed above, the Commission should draw clear distinctions between reasonable foreseeability and intended loss. There is no need to introduce such complexity and ambiguity here, when the Commission could simply provide the general direction that courts are to consider “the available facts.”

If the Commission persists in keeping intended loss as part of the guidelines, there are additional changes that need to be made. First, an example should be added to Application Note 20(C) that would make clear that a downward departure is warranted if intended loss greatly exceeds actual loss. Second, the arbitrary rule in the commentary setting a floor of \$500 per access device should be eliminated.⁴³ It is inconsistent with looking at the subjective intent of the defendant and works to drive up loss amounts even where no evidence shows the defendant sought to take the full \$500. For offenses involving multiple access devices, the intended loss amounts climb rapidly and often overstate a defendant's culpability.⁴⁴ Third, impossible-to-obtain loss amounts should be excluded from intended loss. Before the 2001 amendments, some courts limited intended loss to that which was possible,⁴⁵ and the guidelines specified that a downward departure may be warranted when, for example, a defendant attempted “to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it.” USSG §2F1.1, comment. (n.11) (1987).⁴⁶ The guideline's current use of impossible-to-

⁴² In *Manatau*, the Tenth Circuit stated the district court is “free . . . to make reasonable inferences about the defendant's mental state from the available facts.” 647 F.3d at 1056.

⁴³ USSG §2B1.1, comment. (n.3(F)(i)).

⁴⁴ See, e.g., *United States v. Levine*, 87 F. App'x 44 (9th Cir. 2004) (calculating total loss of more than \$1 million by multiplying the number of unauthorized credit card numbers in the defendant's possession (2,071) by the \$500 minimum); *United States v. Gilmore*, 431 F. App'x 428 (6th Cir. 2011) (affirming 16-level loss enhancement based on applying the “\$500-per-device rule” to all 2,747 devices).

⁴⁵ See, e.g., *United States v. Watkins*, 994 F.2d 1192, 1196 (9th Cir. 1993) (loss in check kiting scheme was the \$13,100 defendant obtained, not the \$42,600 face amount on the checks).

⁴⁶ This example was included in the original guideline, §2F1.1, comment. (n.11) (1987), and remained until the amendments of 2001, at which point this example was omitted, USSG App. C., Amend. 617

obtain loss amounts to increase the guideline range, rather than mitigate it, does not accurately reflect offender culpability.⁴⁷ If the Commission declines to exclude impossible-to-obtain loss from the definition, Application Note 20(C) should be amended to specify that a downward departure may be warranted in such circumstances. For example, §2F1.1 used to provide that a downward departure may be appropriate where the “defendant attempts to pass a negotiable instrument so obviously fraudulent that no one would seriously consider honoring it.” USSG §2F1.1, comment. (n.11) (2000).

III. Sophisticated Means

Defenders are pleased the Commission is considering amendments to the enhancement for sophisticated means. As the Commission is aware, Defenders have long been troubled by the enhancement for sophisticated means because it is too ambiguous for meaningful application.⁴⁸ Accordingly, Defenders propose eliminating the concept from the guidelines. If, however, the sophisticated means concept is to remain a part of the guidelines, Defenders recommend that the specific offense characteristic be replaced with two departure provisions: an invited upward departure, and a companion downward departure where the lack of sophistication is notable.

(Nov. 1, 2001). No explanation was given for removing this example. At the same time, the Commission amended the guidelines to provide that “intended loss” includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).” The reason given for this new definition was that the “amendment resolves the [circuit] conflict to provide that intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender.... Accordingly, concepts such as ‘economic reality’ or ‘amounts put at risk’ will no longer be considerations in the determination of intended loss.” USSG, App. C, Amend 617 (Nov. 1, 2001).

⁴⁷ See, *e.g.*, *United States v. Corsey*, 723 F.3d 366, 378-79 (2d Cir. 2013) (Underhill, D.J., concurring) (“This was a clumsy, almost comical, conspiracy to defraud a non-existent investor of three billion dollars.... Appellants’ conduct was not dangerous because they had absolutely no hope of success.... This conspiracy to defraud involved no actual loss, no probable loss, and no victim. The scheme was treated as sophisticated, but could be more accurately described as a comedic plot outline for a ‘Three Stooges’ episode. Because the plan was farcical, the use of intended loss as a proxy for seriousness of the crime was wholly arbitrary: the seriousness of this conduct did not turn on the amount of intended loss any more than would the seriousness of a scheme to sell the Brooklyn Bridge turn on whether the sale price was set at three thousand dollars, three million dollars, or three billion dollars. By relying unquestioningly on the amount of the intended loss, the District Court treated this pathetic crime as a multi-billion dollar fraud—that is, one of the most serious frauds in the history of the federal courts.”); *United States v. Zedner*, 401 F.3d 36, 39 & n.1 (2d Cir. 2005) (defendant approached financial institutions to open accounts using a counterfeit \$10 million bond, but institutions “uniformly refused to open an account”; “[s]ome of bonds referred to the United States as the ‘Onited States’ and ‘Thunted States,’ misspelled Philadelphia as ‘Dhtladelphia,’ misspelled Chicago as ‘Cgicago,’ referred to the month August as ‘Augit,’ and ‘Auouit,’ misspelled the word dollar, and claimed to have a duration of ‘forevev.’”).

⁴⁸ See, *e.g.*, Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n, at 7, 13 (Nov. 20, 2013).

Finally, it should not be applied cumulatively when the device-making enhancement at §2B1.1(b)(11) is applied.⁴⁹

While the Commission’s proposed changes to the sophisticated means enhancement do not go as far as Defenders would like, we believe they may – with modifications– move in the right direction. If the enhancement is to remain in the guidelines, Defenders would support narrowing the application of the enhancement to situations where the defendant willfully caused the sophisticated conduct. Currently, some courts apply the enhancement based not on the conduct of the defendant but instead on the sophistication of the general scheme.⁵⁰ Low-level participants in fraudulent schemes who do not willfully cause sophisticated conduct should not have their sentences enhanced simply because someone else in the scheme – often someone over whom the defendant has no control – engaged in conduct that constitutes sophisticated means.

We are concerned that the proposed amendment may not operate to limit application of the enhancement to defendants who willfully caused conduct constituting sophisticated means. The proposed amendment to the guideline provides the enhancement should apply when the defendant “engaged in or caused the conduct constituting sophisticated means.” The proposed amendment to the related commentary also uses the phrase “engaged in or caused” and directs that the enhancement should apply when a defendant “aided [or] abetted . . . such conduct.” We have three concerns with this language. First, the use of the term “caused,” instead of “willfully caused” as used in §1B1.3(a)(1)(A), is troubling because it is a slippery term that has resulted in extensive litigation in a variety of contexts. Including it in this guideline would undermine the Commission’s simplification goals. Second, the phrase “engaged in” is superfluous and confusing. And, third, the “aided” and “abetted” language may lead some courts to apply the enhancement to a defendant who is engaged in low-level conduct such as running errands, but in doing so is aiding or abetting sophisticated conduct by another.

If the Commission is really trying to limit application of this enhancement to defendants who willfully caused the conduct that constitutes sophisticated means, the proposed amendment to the guideline should be changed as follows:

⁴⁹ See, e.g., *United States v. Podio*, 432 F. App’x 308 (5th Cir. 2011) (piling sophisticated means enhancement on top of enhancement for possession or use of device-making equipment); *United States v. Abulyan*, 380 F. App’x 409, 412 (5th Cir. 2010) (same).

⁵⁰ See, e.g., *United States v. Green*, 648 F.3d 569, 572, 576-77 (7th Cir. 2011) (applying sophisticated means enhancement because the whole scheme was sophisticated, even though defendant was only a buyer applying for mortgage loans at the direction of others); *United States v. Cosgrove*, 637 F.3d 646 (6th Cir. 2011) (holding that “a sophisticated means enhancement could be applied to Cosgrove even if his role in the conspiracy did not involve the use of sophisticated means so long as the use of such means was reasonably foreseeable to him”).

(b)(10)(C) the offense otherwise involved sophisticated means and the defendant engaged ~~in or~~ willfully caused the conduct constituting sophisticated means

And the proposed amendment to the commentary should be changed as follows:

In addition, application of subsection (b)(10)(C) requires not only that the offense involve conduct constituting sophisticated means but also that the defendant engaged in or caused such conduct, i.e., the defendant committed such conduct or the defendant aided, abetted, counseled, commanded, induced, procured, or willfully caused such conduct. See §1B1.3(a)(1)(A).

These changes are consistent with the Commission's goal to "increase clarity, reduce ambiguity and better reflect reality."⁵¹

The Commission has also proposed adding language to the commentary specifying that "[c]onduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means." Defenders support the effort to narrow the application of this enhancement. We are hopeful the change will signal that the enhancement should only be applied to a subset of defendants who willfully cause highly sophisticated conduct that is not common in other offenses.

Defenders, however, oppose the proposed addition of language specifying that the enhancement applies to conduct that "displays a significantly greater level of planning or employs significantly more advanced methods in executing or concealing the offense than a typical offense of the same kind." We are concerned that specifically identifying "planning" or "concealing" could expand application of the enhancement. For example, a court might consider how long it took a defendant to plan an offense, rather than focusing on the intricacy of the plan, potentially exposing less intelligent defendants to the enhancement simply because it took them longer than it would take someone of average intelligence to plan an offense. Because of these concerns, we recommend Application Note 9(B) be amended as follows:

Sophisticated Means Enhancement under Subsection (b)(1)(C). – For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means. Conduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means.

⁵¹ USSC Chair Remarks, at 2.

Finally, Defenders request that in addition to making the changes the Commission proposes – in the revised form discussed above– the Commission also make clear that this enhancement should *not* be applied cumulatively with the device-making enhancement at §2B1.1(b)(11).

IV. Victim Table

The current victim table often overstates the seriousness of the offense by double counting the pecuniary harm already captured in the loss table, and by broadly defining victim to include those who suffered no loss but had their means of identification used without authority.⁵² While we think changes should be made, we do not believe the Commission’s proposed amendments adequately address the problems. The Commission’s proposed amendments will unnecessarily increase complexity, and still not provide courts with meaningful guidance regarding the appropriate sentence in any given case. We are not aware of any impact analysis of the proposed amendment, or any efforts to test the proposed changes, but we fear they are likely to result in longer recommended sentences, without any evidence that longer sentences are necessary or appropriate.

Defenders have recommended that the Commission eliminate the victim table. Short of that, the Commission should limit enhancements in §2B1.1(b)(2) to situations where victims suffered substantial financial hardship. We do not support the hybrid method the Commission has proposed, which would enhance sentences based both on the number of victims, as well as victim impact. The better approach is to eliminate the counting of victims and focus exclusively on victim impact, enhancing sentences only where victims suffered substantial financial hardship as a result of the offense. If the hybrid approach is an attempt to address what some see as two different harms, it is important to remember that the harm being measured by merely counting the number of victims is already accounted for in the loss amount.

If, however, the Commission insists on proceeding with the hybrid approach, we support reducing the size of the enhancement under the current victim table, §2B1.1(b)(2), for each tier to 1, 2 and 3. We also believe the tiered approach of Option 2 is better than Option 1, but believe it is critical that the substantial hardship tiers begin small – 1 level to be exact – and increase in 1 level increments to a cumulative cap of 4 for both victim enhancements, §2B1.1(b)(2) and proposed §2B1.1(b)(3). Small enhancements are necessary to ensure that victim impact does not play an outsized role in the culpability determination, and to avoid further lengthening recommended sentences that are already too long. In addition, the new victim enhancement in Option 2 should provide larger steps between the tiers, so that the first 1-level enhancement would not apply until there were, for example, 5 or more victims who suffered substantial

⁵² See USSG §2B1.1, comment. (n.4(E)).

financial harm, and the second enhancement – a 2-level enhancement – would not apply until there were, for example, 25 such victims, and the third enhancement – a 3-level enhancement – would not apply until there were, for example, 100 such victims. This would allow for a meaningful and manageable tiered approach.

Whether the Commission decides to provide enhancements only for victim impact, or instead, to pursue the hybrid approach, Defenders support the Commission’s proposal to strike from the current version of §2B1.1(b)(16) the 4-level enhancement and floor offense level of 24 where an offense “substantially endangered the solvency or financial security of 100 or more victims.” Particularly if the Commission adopts the new proposed victim impact enhancement, the harm addressed in §2B1.1(b)(16) will be accounted for elsewhere in the guideline. And, with 100 or more victims, the loss amount will likely be so high, the loss table alone will lead to a recommended guideline range that is greater than necessary. But this is not the only specific offense characteristic that needs attention. Because the guideline is large and already includes 19 specific offense characteristics with multiple subparts, we urge the Commission to cap the cumulative effect of the numerous enhancements to avoid disproportionate cumulative adjustments.

In addition, under any approach that measures victim impact, specific offense levels should be based solely on “financial” hardship. As mentioned above, Defenders opposed the Commission’s decision in 2009 to expand the definition of victim to include “any individual whose means of identification was used unlawfully or without authority,” even if those individuals suffered no loss and even if they were unaware that their identifying information had been obtained or misused.⁵³ The Commission should not multiply the effect of this expansion by providing for additional enhancements for non-economic harm. These non-economic harms are well addressed in Application Note 20(A)(vi). In addition, these non-economic harms do not appear to be a factor sentencing courts deem particularly important. While we do not know exactly how many times Application Note 20(A)(vi) is relied upon, it is safe to say it is not often. In FY 2013, the rate for *all* upward departures under §2B1.1 (including guideline only as well as guideline with *Booker*) was well under 1%.⁵⁴

Finally, Defenders oppose the Commission’s proposal to include a non-exhaustive list of factors for a court to consider in determining whether the offense resulted in substantial financial hardship to a victim. First, because we oppose including non-financial hardship as a consideration for victim impact, we also oppose the inclusion of factors (F)-(H) and would keep them where they currently are, as a basis for an upward departure in Application Note 20(A)(vi). Second, many of the remaining factors are ambiguous, subjective, and would likely be a topic of

⁵³ USSG §2B1.1, comment. (n.4(E)).

⁵⁴ 2013 Sourcebook tbl. 28 (0.6%); see also 2014 4th Quarter Data Report tbl. 5 (0.4%).

frequent litigation. The determination of whether a victim suffered a substantial financial hardship is necessarily fact intensive, and the relevant factors will vary from case to case depending on the victim's circumstances. Rather than providing meaningful guidance, the list of factors would simply multiply the number of decisions a judge is required to make about whether the offense had a *substantial* effect on various aspects of the victim's economic life. For example the court would be required to determine whether a victim suffered a *substantial* loss from a retirement, education, or other savings or investment fund; made *substantial* changes to his employment, and made *substantial* changes to her living arrangement. This adds unnecessary complexity for courts that are well-equipped to determine the ultimate issue based on all of the evidence presented in any individual case: whether the offense resulted in *substantial* financial hardship. This proposed list of factors would work squarely against the Commission's stated intent to "increase clarity, reduce ambiguity, and better reflect reality."⁵⁵

V. Fraud on the Market

In 2012, the Commission sought comment on what method to use to calculate loss in cases involving fraudulent inflation or deflation in the value of securities or commodities. Defenders urged the Commission to use the market-adjusted model adopted by the Second and Fifth Circuits. *See, e.g., United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007); *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005). Defenders supported this method of calculating loss in these cases because it is the only method that measures the loss actually *caused* by the fraud. Since the loss amount is used in §2B1.1 as a proxy for culpability, price changes that are not attributable to the defendant's conduct should not be included in the loss amount. For this reason, *Rutkoske* and *Olis* applied the loss causation standard of *Dura Pharmaceuticals, Inc., v. Broudo*, 544 U.S. 336 (2005), which limits loss to those proximately caused by the defendant's conduct.⁵⁶ The Commission rejected that approach, and instead, specified a method that is now set forth in the commentary to §2B1.1.⁵⁷ Defenders still believe the market-adjusted method adopted by the Second and Fifth Circuits is the best way to calculate loss in these cases. But, if the Commission persists in rejecting that method, Defenders believe it would be better – as a matter of simplicity and accuracy – to look to gain instead of loss calculated under the complex rules set forth in §2B1.1, comment. (n.3(F)(ix)).

Defenders, however, strongly oppose the Commission's proposal to set floors for the gain enhancement in these cases. There is simply no need to set arbitrary floors. If the sentencing court perceives that the gain and the resulting guideline range understates the seriousness of the

⁵⁵ *USSC Chair Remarks*, at 2.

⁵⁶ *See Rutkoske*, 506 F.3d at 179; *Olis*, 429 F.3d at 546.

⁵⁷ *See* USSG §2B1.1, comment. (n.3(F)(ix)).

offense, the court is free to depart upward under §2B1.1, comment. (n.20(A)).⁵⁸ The Commission's proposal to set the floor no lower than offense level 14, the median offense level for the 7 cases involving conduct of this type in 2012 and 2013, is particularly troublesome and is an example of why sentences have continued to rise for no good reason under the guidelines for years. If 14 is the *median* offense level for all cases over the past two years, it makes no sense to set that as the *floor* for all offenses going forward unless there is evidence that longer sentences are necessary. We have seen no such evidence. Particularly in light of the extremely small number of cases, if the already inflated table at §2B1.1(b)(1) results in a sentence that is too low, departures will be more than adequate to allow courts to impose an appropriate sentence.

⁵⁸ USSG §2B1.1, comment. (n.20(A)) provides: "There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted."

Statement of Lex Coleman
Assistant Federal Defender for the Southern District of West Virginia

On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Proposed Amendments to the Guidelines for Drug Offenses

March 12, 2015

My name is Lex Coleman and I am an Assistant Federal Public Defender for the Southern District of West Virginia. I thank the Commission for inviting me to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendment to the drug equivalency table for hydrocodone.

While we adhere to our position that the drug guidelines place too much emphasis on quantity rather than functional role in the offense, Defenders are encouraged by the Commission's focus on equianalgesic doses because it relies on an empirically based assessment of a particular drug in comparison to other drugs. But we do not think equianalgesic dosing should be the only consideration and we do not support either equivalency proposed – 1 gram of hydrocodone (actual) to 4467/6700 grams of marihuana.

Both of the Commission's proposals are premised on the false assumption that a change in scheduling warrants an increase in penalties and link the hydrocodone equivalency to an arbitrary oxycodone equivalency that was not based on the potency of oxycodone as compared to other opioids,¹ but was established to accomplish a specific sentencing outcome. Rather than respond to the “drug du jour” by arbitrarily increasing penalties and exacerbating existing disparities among various opioids, the better course is for the Commission to reassess its treatment of oxycodone and other opioids and arrive at a standardized methodology in determining drug equivalencies that focuses on specific factors such as potency, purity, toxicity, and abuse liability.

If the Commission nonetheless declines to set a rational penalty structure among the various opiates, the available evidence shows that oxycodone penalties should be reduced and hydrocodone penalties should be set below those for oxycodone. It is noteworthy that the Department of Justice in 2009 also believed that hydrocodone penalties should be lower than those for oxycodone when it advocated for a ratio of one gram of hydrocodone (actual) to 1675 grams of marihuana. The Commission should also be mindful of the long history of opioid abuse in the United States and how persons involved in unlawful opioid distribution are not always “pill mill” profiteers, but individuals who themselves suffer from pain and opioid addiction.

I. The Rescheduling of a Controlled Substance Should Not By Itself Warrant an Increase in Sentence Length.

After years of controversy surrounding the appropriate scheduling of hydrocodone, the Food and Drug Administration recommended that hydrocodone combination products (HCPs) be moved from schedule III to schedule II. HHS concluded that the frequency of use, the diversion of HCPs, and the use of HCPs by individuals without advice from a medical practitioner

¹ The term “opioids” refers to substances that relieve pain and are derived from opium.

warranted rescheduling of the drug. The rescheduling raised the statutory maximum penalty – absent aggravating factors such as bodily injury or death – from ten years to twenty years. 21 U.S.C. § 841(b).

This increase in the statutory maximum penalty does not warrant an increase in the sentencing guidelines for hydrocodone products. First, the Commission should not increase guideline ranges merely because the statutory maximum of a particular offense has been increased. Instead, the Commission should be guided by the purposes of sentencing and the need to avoid unwarranted disparities and unwarranted similarities.

Second, in assessing how a particular guideline amendment comports with the purposes of sentencing and avoids unwarranted disparities and similarities, the Commission should be mindful of “the cumulative effect of all the little decisions that the Commission makes.”² In the context of oxycodone and hydrocodone, those cumulative effects are sizable. In 2003, the Commission increased penalties for many formulations of single-entity oxycodone (OxyContin) by establishing a marijuana equivalency ratio of 1 gram oxycodone (actual) to 6700 grams of marijuana. Before the 2003 amendment, oxycodone had a ratio of 1 gram oxycodone to 500 grams of marijuana – the same as morphine, hydrocodone (schedule II), and methadone. Just six years ago in response to the Ryan Haight On-Line Pharmacy Act, the Commission substantially increased penalties for hydrocodone (schedule III) by raising the offense level cap from 20 to 30. Now, the Commission is contemplating a sizable increase in penalties for hydrocodone by raising the marijuana equivalency and eliminating the offense level cap.

Third, it makes no sense for the Commission to consider increasing penalties for a category of drug offenses given the longstanding criticism of the drug guideline and its emphasis on the quantity of drugs distributed rather than the functional role of the defendant. As the Commission learned with crack cocaine, a piecemeal reaction to the currently trendy drug is not a sound empirical approach to formulating drug policy. This is particularly true in light of the history of incarcerating persons convicted of non-violent drug offenses for long periods of time, even though the evidence shows that harsher punishment has, at best, marginal deterrent effects on crime rates.³ Indeed, the most recent research concludes that “the current exorbitant level of incarceration has reached a point where diminishing returns have rendered the crime reduction effect of incarceration so small, it has become nil.”⁴ Moreover, the Commission need only look

² USSC, *Minutes of the March 19, 2004 Public Meeting*, at 5 (Judge Sessions)

³ 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 (Michael Tonry, ed., 2006). Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Just.* 199, 201 (2013).

⁴ Oliver Roeder, et.al., Brennan Center for Justice, *What Caused the Crime Decline?* 7 (2015), http://www.brennancenter.org/sites/default/files/analysis/Crime_rate_report_web.pdf. See also Ilyana

to how the increased penalties for OxyContin in 2003 and the increased penalties for hydrocodone in 2009 did nothing to deter the abuse or trafficking of prescription opioids. Given the long history of opium abuse in the United States, and the problem of chronic pain and addiction risk, increased criminal penalties are a foolish approach to a public health problem largely created by the aggressive marketing campaigns of pharmaceutical companies.⁵

II. The Drug Equivalency Table Should Be Amended so that the Same Methodology Is Used to Calculate the Equivalency for All Prescription Opioids.

The Commission has proposed using the actual weight of hydrocodone rather than the number of pills or the entire weight of the mixture or substance, particularly since hydrocodone products come in different pill sizes, formulations, and dosages. Defenders agree that using the entire weight of a mixture or substance to determine penalties is an unsound approach.⁶ We also believe that simply counting pills without any consideration for the nature of the dosage or abuse deterrent⁷ properties of certain drugs does not adequately capture the relative seriousness of the offense. Because the current drug equivalency table for opioids sometimes counts pills (hydrocodone when it was a Schedule III), sometimes counts actual weight (oxycodone), and sometimes counts the entire weight of the mixture or substance (e.g., oxymorphone, hydromorphone, morphine), we encourage the Commission to adopt the same methodology to calculate the marijuana equivalency for all prescription opioids. The methodology should at

Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. Public Economics, 2043 (2004) (concluding imprisonment of persons convicted of drug offenses has not been cost effective).

⁵ See Laura Unger, *Lawsuit Seeks to Make Drug Maker Pay for OxyContin Abuse*, USA Today (Dec. 29, 2014) (discussing Kentucky lawsuit against Purdue Pharma for aggressive and deceptive marketing). The rescheduling of hydrocodone from Schedule III to Schedule II may have a greater effect on rates of abuse than increased punishment because it will be more difficult to obtain the drug. Prescriptions can no longer be refilled and the protocols for dispensing the drugs are stricter.

⁶ Last year, our testimony discussed how Congress's decision to base quantity on the "entire weight of any mixture of substance containing a detectable amount of the controlled substance" rather than the purity of the substance inexplicably departed from existing practice and created considerable confusion and disparity. The Commission has generally followed "entire weight" approach, but has periodically departed from it, e.g., when it amended the guideline for LSD and oxycodone. Statement of Molly Roth Before the U.S. Sent'g Comm'n, Washington, D.C., March 13, 2014 (Addendum).

⁷ See Food and Drug Administration, *Guidance for Industry: Abuse-Deterrent Opioids – Evaluation and Labeling* (2013) (identifying six categories of abuse-deterrent formulations, including physical and chemical barriers to prevent crushing; inclusion of an opioid antagonist, which interferes with the euphoria from abuse; and a prodrug, which "lacks opioid activity until transformed in the gastrointestinal track), <http://www.fda.gov/downloads/drugs/guidancecomplianceregulatoryinformation/guidances/ucm334743.pdf>.

least consider the actual weight of the controlled substance, as well as the abuse deterrent properties of certain formulations.

To avoid unwarranted disparity, the Commission should not calculate guideline ranges in hydrocodone cases – or many other controlled substances – using the entire weight of the mixture or substance containing hydrocodone. Hydrocodone comes in many different forms – combination products, single entity products, capsules, tablets, and liquid. Trade names for combination products include Vicodin, Lortab, Lorcet-HD, Hycodan, and Vicorprofen. Two single-entity products have also been approved – Hysingla ER and Zohydro ER. The same amount of the active ingredient can be found in a pill and liquid, but the combination products weigh more because they contain acetaminophen. For example, Vicodin contains 5 mg of hydrocodone and 300 mg acetaminophen; Vicodin ES contains 7.5 mg of hydrocodone and 300 mg acetaminophen; Vicodin HP contains 10 mg of hydrocodone and 300 mg acetaminophen.⁸ Lortab Elixir—an oral solution – contains 7.5 mg of hydrocodone and 500 mg acetaminophen per 15 mL.⁹ In contrast, Zohydro ER – a single entity formulation of hydrocodone contains more hydrocodone, but, as Table 1 shows, the entire weight of the capsule is considerably less than a combination product with the same or a lesser amount of hydrocodone¹⁰:

Table 1

Dosage strength of hydrocodone in Zohydro ER	Weight of the entire Zohydro ER capsule
10mg	104 mg
15mg	132 mg
20 mg	158 mg
30 mg	214 mg
40 mg	279 mg
50 mg	340 mg

⁸ *About Vicodin*, www.vicodin.com.

⁹ RxList, *Lortab Elixir*, <http://www.rxlist.com/lortab-elixir-drug.htm>.

¹⁰ This information was obtained directly from the manufacturer of Zohydro.

The difference is sizable. For example, a Vicodin HP with 10 mg of hydrocodone weighs at least 310 mg per tablet whereas a Zohydro ER with 10 mg hydrocodone weighs 104 mg per capsule. Given these vastly different formulations, counting the entire weight of the mixture or substance leads to unwarranted disparity, especially since Vicodin HP is less likely to be abused than Zohydro ER because it contains acetaminophen.¹¹

This holds true for many other opioids, which come in multiple formulations and contain different quantities of the controlled substances. Table 2 shows some of the other opioid products along with the quantity of controlled substance contained in each. While the table does not reflect the total weight of each mixture and substance, it is obvious that the total weight of certain formulations will vary even though they contain the same amount of an actual substance.¹²

Table 2

Morphine	Avinza 30 mg, 45 mg, 60 mg, 75 mg, 90 mg, 120 mg capsules Kadian 10mg, 20 mg, 40 mg, 50 mg, 60 mg, 70 mg, 80 mg, 100 mg, 130 mg, 150 mg, 200 mg capsules MS Contin 15 mg, 30 mg, 60 mg, 100 mg, 200 mg, tablets
Morphine/naltrexone	Embeda ¹³ 20 mg/08 mg, 30 mg/1.2 mg, 50 mg/2 mg, 60 mg/2.4 mg, 80 mg/3.2 mg, 100 mg/4 mg capsules

¹¹ TJ Cicero, et.al., *Factors Influencing the Selection of Hydrocodone and Oxycodone as Primary Opioids in Substance Abusers Seeking Treatment in the United States*, 154 Pain 2639 (2013).

¹² For example, the capsule shell of an Avina 30 mg (morphine) contains “black ink, gelatin, titanium dioxide, D&C yellow No. 10 (30 mg), FD&C blue No. 2 (45 mg), FD&C green No. 3 (60 mg), FDA iron oxide and FDA yellow iron oxide (75 mg), FD&C red No. 40 (90 mg), FD&C red No. 3 (120 mg), and FD&C blue No. 1 (120 mg).” In contrast, MS Contin 30 mg “contains the following inactive ingredients common to all strengths: cetostearyl alcohol, hydroxyethyl cellulose, hypromellose, magnesium stearate, polyethylene glycol, talc and titanium dioxide.” See generally [www. rx.list.com](http://www.rx.list.com) for a list of ingredients in various drug formulations.

¹³ This product has been voluntarily recalled, but is still approved by the FDA. See FDA, *List of Extended-Release and Long-Acting Opioid Products Required to Have an Opioid REMS*, <http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm251735.htm>.

Oxymorphone	Opana 5 mg, 10 mg tablets Opana ER 5 mg, 7.5 mg, 10 mg, 15 mg, 20 mg, 30 mg, and 40 mg tablets Opana Injection 1mg/mL
Methadone	Methadose Oral Concentrate 10 mg per ml liquid – single dose vial Methadose 5 mg, 10 mg tablets Dolophine 5 mg, 10 mg tablets
Hydromorphone	Dilaudid Injection 1 mg, 2 mg, 4 mg per ml – single dose vial Dilaudid-HP Injection 250 mg – single dose vial Exalgo 8 mg, 12, mg, 16 mg, 23 mg tablets Palladone 12 mg, 16 mg, 24 mg, 32 mg capsules
Codeine	Codeine 15 mg, 30 mg, 60 mg tablets
Codeine/acetaminophen	Tylenol-Codeine 300 mg/30 mg, 300 mg/60 mg tablets

Because these products either come in different sizes and formulations or come in the same size and formulation but contain different amounts of a scheduled opioid, counting the entire weight of the mixture or substance produces unwarranted disparity.¹⁴

The Commission should fix the inconsistent treatment of opioids and the unwarranted disparity it creates, but simply counting the actual weight of the controlled substance does not accomplish that goal. The actual weight of a controlled substance in a product is a poor measure of its analgesic effect, toxicity, or its potential for abuse or misuse. Combination drugs with the same amount of controlled substance do not produce the same effects as a single-entity substance

¹⁴ We also strongly encourage the Commission to restructure the drug quantity and equivalency tables so that quantity is no longer determined based upon the entire weight of the mixture or substance. Advances in science have made it quite feasible to determine the specific quantity and purity of a substance. Forensic labs typically conduct quantitative analysis to “determine the amount, or purity, of the illegal substance,” particularly in federal cases. National Forensic Science Technology Center, *A Simplified Guide to Forensic Drug Chemistry*, at 14, <http://www.crime-scene-investigator.net/SimplifiedGuideDrugChemistry.pdf>. Because the amount, or purity, of the illegal substance, is contained within forensic reports there is no reason, even of administrative convenience, to allow arbitrary differences in formulations to create unwarranted disparity.

because of the synergistic effect of other drugs such as acetaminophen, aspirin, or ibuprofen.¹⁵ Nor do drugs with abuse-deterrent properties have the same abuse potential as those that do not. For example, Zohydro ER is a single-entity hydrocodone product with no features to deter its abuse. In contrast, Hysingla ER – a single-entity hydrocodone product – has abuse deterrent characteristics that make it difficult to crush, break or dissolve. Those properties caused the FDA to approve its labeling as an abuse-deterrent opioid.¹⁶

To account for the abuse potential of various formulations, the Commission has several options: (1) establish a drug equivalency based on actual weight for formulations without abuse deterrent properties and a lesser drug equivalency for products, like Hysingla ER, with abuse deterrent properties; (2) establish a drug equivalency based on actual weight, but then provide for an offense level reduction if the offense involved a drug with abuse deterrent properties or a lesser potential for abuse.

III. The Marihuana Equivalency for Oxycodone Is Not Based on Any Pharmacological Equivalency or Abuse Liability Comparison and Must Be Revised Before the Commission Uses It to Compare Other Opioids.

The Commission's 2003 amendment to the drug equivalency table for oxycodone was not based on an analysis of oxycodone potency or abuse liability as compared to other opiates. Instead, the one gram of oxycodone (actual) to 6700 grams of marihuana ratio was designed to set a specific penalty for OxyContin 10 mg. A brief review of the history of the drug equivalency table for opioids shows how the 2003 amendment strayed off course and was not based upon any consistent methodology for setting drug equivalencies.

When the guidelines were first promulgated, the drug equivalency table listed Schedule I and II substances with "Heroin Like Effects." The original equivalencies treated heroin as two times more potent than morphine, hydrocodone, and oxycodone. Those equivalencies were

¹⁵ See Arnold R. Gammaitoni, et al., *Randomized, Double-Blind, Placebo Controlled 19 Comparison of the Analgesic Efficacy of Oxycodone 10 mg/Acetaminophen 325 mg versus Controlled-Release Oxycodone 20 mg in Postsurgical Pain*, 43 J. of Clinical Pharmacology 296 (2003). In a similar study, a combination of oxycodone 5 mg/ibuprofen 400 mg "provided significantly greater analgesia compared with oxycodone 5 mg/acetaminophen 325 mg, hydrocodone 7.5 mg/acetaminophen 500 mg, and placebo." L.J. Litkowski, et al., *Analgesic Efficacy and Tolerability of Oxycodone 5 mg/ibuprofen 400 mg Compared With those of Oxycodone 5 mg/acetaminophen 325 mg and Hydrocodone 7.5 mg/acetaminophen 500 mg in Patients with Moderate to Severe Postoperative Pain: A Randomized, Double-blind, Placebo-controlled, Single-dose, Parallel-group Study in a Dental Pain Model*, 27 Clin. Ther. 418 (2005).

¹⁶ FDA News Release, *FDA Approves Extended-Release, Single-Entity Hydrocodone Product with Abuse-Deterrent Properties* (Nov. 1, 2014), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm423977.htm>.

generally supported by research literature on the potency of those opioids.¹⁷ Some of the equivalencies were:

- 1 gram morphine .5 gram heroin
- 1 gram methadone .5 gram heroin
- 1 gram hydrocodone .5 gram heroin
- 1 gram oxycodone .5 gram heroin
- 1 gram hydromorphone 2.5 grams heroin
- 1 gram oxymorphone 5 grams heroin
- 1 gram fentanyl 31.25 grams heroin¹⁸

In 1989, the Commission changed the equivalency for fentanyl to 2.5 grams of heroin so that the equivalency for fentanyl conformed to the Drug Quantity Table and statute.¹⁹

In 1991, the Commission sought to simplify application of the drug equivalency table by referencing all the conversions to marihuana rather than heroin.²⁰ Use of the marihuana equivalency made no substantive change to the relationship among the various Schedule I and II Opiates:

- 1 gram morphine 500 grams marihuana
- 1 gram methadone 500 grams marihuana
- 1 gram hydrocodone 500 grams marihuana
- 1 gram oxycodone 500 grams marihuana
- 1 gram heroin 1 kg marihuana

¹⁷ See Claus Reichle, et al., *Comparative Analgesic Potency of Heroin and Morphine in Postoperative Patients*, 136 J. of Pharmacology 43 (1962) (finding that “heroin was approximately two to four times as potent as morphine”). See generally Goodman & Gilman, *Manual of Pharmacology and Therapeutics* (12th ed. 2014).

¹⁸ USSG § 2D1.1 (1987).

¹⁹ USSG, App. C, Amend. 126 (Nov. 1, 1989).

²⁰ USSG App. C, Amend. 396 (Nov. 1, 1991).

- 1 gram hydromorphone 2.5 kg marihuana
- 1 gram oxymorphone 5 kg marihuana
- 1 gram fentanyl 2.5 kg marihuana

The relationship among the various opiates eventually changed when the Commission responded to the growing use of OxyContin – a single entity formulation of oxycodone. After the FDA approved OxyContin, its manufacturer, Purdue Pharmaceuticals, launched an aggressive marketing campaign that resulted in more and more doctors prescribing the drug for musculoskeletal and post-operative pain.²¹ By 2000, reports of abuse and diversion of OxyContin escalated. In 2003, the Commission amended the guidelines for oxycodone as part of an effort to ensure “proportionality” among products that contained only oxycodone and those that contained oxycodone and acetaminophen. But by focusing solely on proportionality among various oxycodone formulations, it ignored the broader question of ensuring “proportionality” between oxycodone and other opiates. Rather than revisit the appropriate equivalency for oxycodone (actual) by comparing its potency or even its relative abuse potential to any other natural, synthetic, or semi-synthetic opiate (e.g. morphine, methadone, heroin, hydromorphone, hydrocodone, oxymorphone), the Commission decided that no penalties for offenses involving OxyContin should be reduced.²² It therefore used the guideline range for the pre-amendment equivalency of the lowest-dose, 10 mg, OxyContin pills to set the new guideline range for oxycodone (actual). That methodology resulted in one gram of oxycodone (actual) being equivalent to 6700 grams of marihuana. In doing so, the Commission substantially raised penalties for all other OxyContin formulations and created unwarranted disparity in sentencing between oxycodone and other opiates by ensuring that oxycodone is sentenced more severely than other opiates with similar or higher potency. It also made it more difficult to fairly compare the various opiates because it based the marihuana equivalency for oxycodone on the amount of the actual substance but used gross weight to compare other opiates – whether prescription opioids or heroin.

Under current marihuana equivalencies, 1 gram of oxycodone (actual) is given an equivalency 13.4 times greater than a mixture or substance containing morphine, methadone, or hydrocodone; 6.7 times greater than a mixture or substance containing heroin; 2.65 times greater

²¹ General Accounting Office, *Prescription Drugs: OxyContin Abuse and Diversion and Efforts to Address the Problem* 4 (2003), <http://www.gao.gov/new.items/d04110.pdf>.

²² USSC, *Notice of Proposed Amendments, Oxycodone* (2003), <http://www.ussc.gov/amendment-process/federal-register-notices/notice-proposed-amendments-sentencing-guidelines-policy-statements-and-commentary-request-public>.

than a mixture or substance containing hydromorphone; and 1.34 times greater than a mixture or substance containing oxycodone – no matter the weight or purity of the controlled substance contained within the carrier medium.²³

The proportionality problems created by these different methodologies of determining the appropriate marijuana equivalency become apparent with comparisons to other opiates. Here, we use heroin and hydromorphone to demonstrate the point. Heroin is more potent than oxycodone,²⁴ but it is punished less severely. Data from the Heroin Domestic Monitor Program shows that the average purity of South American heroin was 31.1 % in 2011.²⁵ Because the amount of *actual* heroin subject to the 1 gram of heroin (total weight of mixture or substance) to 1 kg marijuana equivalency is only about one-third of a gram, one gram of *actual* heroin has a marijuana equivalency of 3000 grams – less than half the 6700 gram equivalency assigned to actual oxycodone.²⁶

The different ways the guidelines treat hydromorphone and oxycodone also demonstrate the proportionality problems with the drug equivalencies for opioids. Even though hydromorphone is 2.6 times more potent than oxycodone, the guidelines treat it as 1.3 times more potent.²⁷

²³ These marijuana equivalency comparisons do not, however, take into account differences in the size of effective or typical dosages, or the amount of dilution typically found in street drugs or in non-oxycodone commercial products.

²⁴ See, e.g., Patient.Co.Uk, *Opioid Analgesics* (5 mg subcutaneous diamorphine (heroin) equivalent to 20 - 30 mg oral oxycodone), <http://www.patient.co.uk/doctor/opioid-analgesics>; The Shrewsbury and Telford Hospital, *Equivalent Dose Ratios for Strong Opioids* (recommending 1.33:1 ratio) <http://www.sath.nhs.uk/>; Health in Wales, *Opiate Conversion Doses* (diamorphine 1/3 more potent), <http://www.wales.nhs.uk/sites3/Documents/814/OpiateConversionDoses%5BFinal%5DNov2010.pdf>.

²⁵ Drug Enforcement Administration, *2011 Heroin Domestic Monitor Program, Drug Intelligence Report* (2013). This means that the amount of *actual* heroin subject to the 1 gram of heroin to 1 kg marijuana equivalency is about one-third of a gram.

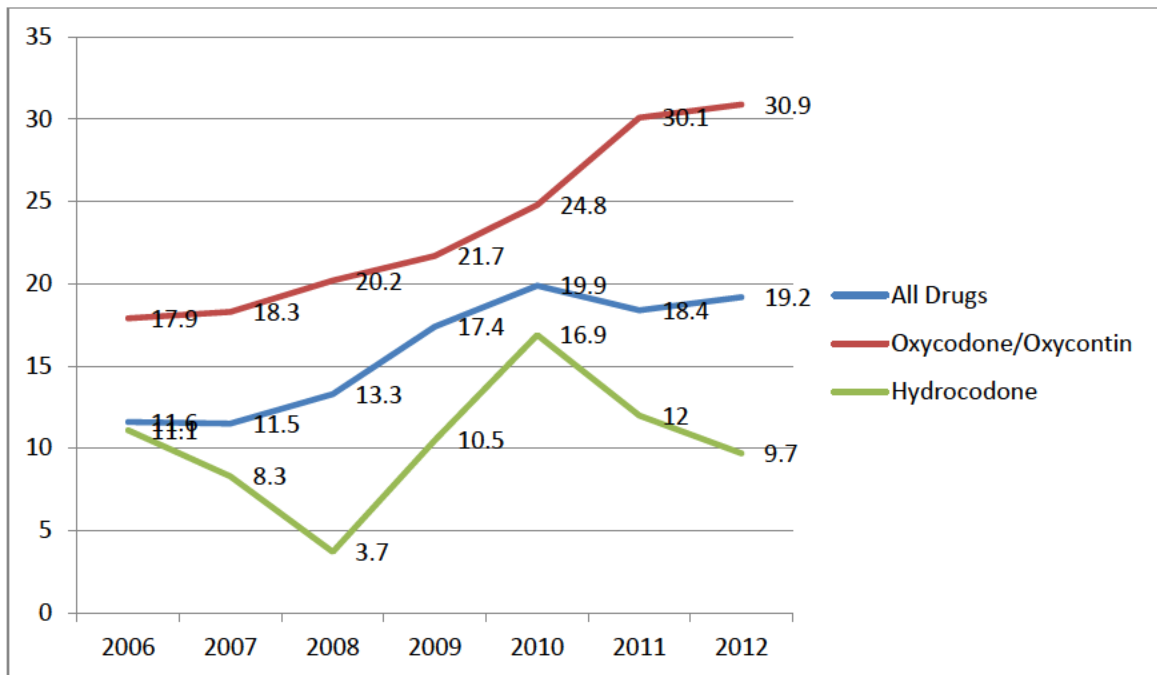
²⁶ Mexican Heroin had an average purity of 16.8%, meaning the amount of actual heroin subject to 1kg of marijuana is about one-sixth of a gram. *Id.* A gram of actual heroin would have a marijuana equivalency of 6000 grams – still less than the equivalency for oxycodone actual.

²⁷ A 4 mg hydromorphone tablet has a gross weight of about 90 mg. See *United States v. Lacour*, 32 F.3d 1157, 1157 (7th Cir. 1994). Using gross weight, ten thousand 4 mg hydromorphone tablets have a marijuana equivalency of 2,250 kg. Hydromorphone 4 mg and oxycodone 10 mg are about equianalgesic, which means that about 10,000 tablets of hydromorphone 4 mg would have the same effect as 26,000 tablets of oxycodone 10mg. The marijuana equivalency for 26,000 10 mg oxycodone tablets is 1,742 kg.

These irrational differences in drug equivalencies among opiates provide powerful evidence that the Commission should not arbitrarily link hydrocodone to the oxycodone equivalency without first undertaking an empirical assessment of the potency, purity, toxicity, pharmacological properties, and abuse liability of the various opiates and arriving at a rational and consistent approach to establishing the appropriate equivalency.

The below guideline sentencing rates for oxycodone also show that the Commission should revisit the oxycodone equivalency because many judges believe that the 1:6700 ratio is too high. In FY 2012, 30.9% of oxycodone/OxyContin cases received a non-government sponsored below range sentence. That is a 13% increase in the rate of below range sentences for oxycodone from FY 2006 to FY 2012 and is significantly above the overall rate of 19.2 % for all non-government sponsored below range sentences. See Table 3.²⁸

Table 3



Setting aside the proportionality issues and the importance of establishing a standard methodology for determining drug equivalencies, the Commission should revisit the 2003 oxycodone guideline because in 2010 OxyContin was reformulated to “be more difficult to manipulate for purposes of misuse or abuse.”²⁹ The tablets are now “difficult to crush, break, or

²⁸ USSC, *FY2006-FY2012 Monitoring Dataset*.

²⁹ FDA News Release, *FDA Approves Abuse-Deterrent Labeling for Reformulated Oxycontin* (April 16, 2013) (discussing FDA approval of the reformulation in 2010 and 2013 updated labeling).

dissolve,” and “forms a viscous hydrogel and cannot be easily prepared for injection.”³⁰ One research study shows that the percentage of individuals using OxyContin as “a primary drug of abuse decreased from 35.6% of respondents before the release of the abuse-deterrent formulation to just 12.8% 21 months later.”³¹ The FDA also recently approved an abuse-deterrent formulation of oxycodone and naloxone (Targiniq ER), which is designed to block the euphoric effects of oxycodone when it is snorted or injected.³²

IV. Hydrocodone Does Not Have the Same Abuse Potential and Trafficking Patterns as Oxycodone.

We believe that the drug equivalency tables should be revised and based more on scientific evidence about factors such as potency, purity, toxicity, and abuse liability, rather than prevalence of use, trafficking patterns, and other factors that can change over time. If, however, the Commission adheres to its past methodology of considering a multitude of factors in constructing the drug equivalency table, then the balance of evidence does not support treating hydrocodone like oxycodone.

To be sure, hydrocodone and oxycodone are both semi-synthetic opioids similar to morphine in producing opiate like effects.³³ But medical professionals do not agree on whether they have the same equianalgesic effects. Two equianalgesic dosing tables show that hydrocodone and morphine are 2/3 less potent than oxycodone;³⁴ and yet another shows that oxycodone is twice as potent.³⁵ We are aware of only one table that treats them the same.³⁶ But even if the equianalgesic doses are the same, other evidence shows that oxycodone is different than hydrocodone and should be treated so under the guidelines.

³⁰ *Id.*

³¹ Sjik Westra, et.al., *Effect of Abuse-Deterrent Formulation of OxyContin*, 367 *New. Eng. J. Med.* 187,188-89 (2012).

³² Susan Jeffrey, *FDA Approves Abuse-Deterrent Oxycodone/Naloxone Combo* (2014), <http://www.medscape.com/viewarticle/828812>.

³³ Drug Enforcement Administration, Office of Diversion Control, *Hydrocodone (Trade Names: Vicodin®, Lortab®, Lorcet-HD®, Hycodan®, and Vicoprofen®)*.

³⁴ Therapeutic Research Center, *Equianalgesic Dosing of Opioids for Pain Management* (2012), <http://stevespharm.com/Therapeutics/Opioid-equiv-chart-PL.pdf>Pharmacisti’s Letter; Globalrph, *Opioid Analgesic Converter*, <http://www.globalrph.com/narcoticonv.htm>.

³⁵ Veterans Affairs/Department of Defense, *Clinical Practice Guideline: Management of Opioid Therapy for Chronic Pain* 132, tbl. E6 (Equianalgesic and conversion doses for patients previously receiving other opioids), http://www.healthquality.va.gov/guidelines/Pain/cot/COT_312_Full-er.pdf.

³⁶ Goodman & Gilman, *Manual of Pharmacology and Therapeutics* (12th ed. 2014).

First, hydrocodone has a lesser abuse liability than oxycodone. An examination of nine studies that compared the likeability and abuse potential of hydrocodone, oxycodone, and morphine found that “[o]ral oxycodone has an elevated abuse liability profile compared to oral morphine and hydrocodone, which have no “clinically significant difference” between them.³⁷ Research also shows that fewer opioid dependent individuals preferred hydrocodone (29.4%) than oxycodone (44.7%) “because the quality of the high was viewed to be much better by 54% of the sample, compared to just 20% in hydrocodone users, who cited acetaminophen as a deterrent to dose escalation to get high and hence, its low euphoric rating.”³⁸ One explanation for the different abuse patterns is that hydrocodone is considered a “prodrug” – an abuse deterrent formulation – that must be “metabolized to an active form after ingestion to procure a pharmacological effect.”³⁹ Oxycodone, in contrast, “is a potent analgesic in its own right and not a prodrug.”⁴⁰ The difference in the way the two drugs are metabolized makes a difference for the potential of abuse because “[d]rug abusers prefer those drugs that give them a large brain concentration in the shortest time.”⁴¹ Of the different formulations of either oxycodone or hydrocodone, extended release and long-acting forms have greater abuse potential than shorter acting forms.⁴² That greater abuse potential led the FDA to subject extended release and long-

³⁷ Rachel Wightman, *Likeability and Abuse Liability of Commonly Prescribed Opioids*, 8 J. Med. Toxicol. 335 (2012). “The abuse liability of a drug characterizes its net positive and negative subjective effects and thus the likelihood of being used for recreational purposes.” *Id.*

³⁸ Theodore Cicero, et al., *Factors Influencing the Selection of Hydrocodone and Oxycodone as Primary Opioids in Substance Abusers Seeking Treatment in the United States*, 154 Pain 2639 (2013). See also Theodore Cicero, et al., *Multiple Determinants of Specific Modes of Prescription Opioid Diversion*, 41 J. Drug Issues 283, 293 (2011) (immediate release oxycodone was the primary opioid of abuse for 58.1% of opioid abusers; extended release oxycodone was the choice for 18.2%; hydrocodone was the primary opioid for only 15.5%).

³⁹ Prescription Painkillers: *History, Pharmacology, and Treatment*. See also E.J. Cone, *The New Science of Abuse-Deterrence Assessment of Pharmaceutical Products: FDA Proposed Guidance and Category I Laboratory Studies* (2014) (noting that FDA considers combination products and prodrugs as an abuse-deterrent formulation), <http://omicsonline.org/open-access/the-new-science-of-abusedeterrence-assessment-of-pharmaceutical-products-fda-proposed-guidance-and-category-laboratory-studies-2153-2435.1000317.pdf>.

⁴⁰ *Id.*

⁴¹ Tammi Schaeffer, *Abuse-Deterrent Formulations, an Evolving Technology Against the Abuse and Misuse of Opioid Analgesics*, 8 J. Med. Toxicol. 400, 400 (2012).

⁴² FDA, *FDA Introduces New Safety Measures for Extended-Release and Long-acting Opioid Medications* (2012), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm310870.htm>

acting opioid analgesics (e.g., Hysingla ER, Zohydro ER, and OxyContin) to a Risk Evaluation and Mitigation Strategy (REMS).⁴³

Second, the risks associated with the two drugs differ. While not controlled for the rate of use, data from the Drug-related Emergency Department Visits for Misuse or Abuse of Drugs shows the number of visits in 2011 for oxycodone (175,229) was nearly double (1.8) the number for hydrocodone (97,183).⁴⁴ The number of visits for oxycodone increased by 220 percent from 2004 to 2011 whereas the number for hydrocodone increased by 96 percent.⁴⁵

Third, oxycodone and hydrocodone have different diversion patterns. Individuals who abuse oxycodone obtain their drugs from different sources than those who abuse hydrocodone. Two studies – one involving users in South Florida and another involving users in treatment centers across the country – showed that hydrocodone users were less likely to obtain their drugs from dealers than those who used oxycodone and more likely to obtain the drugs from legitimate medical sources (as opposed to illegitimate medical sources such as pharmacies and script doctors).⁴⁶ One explanation for this difference is that hydrocodone users are more risk-adverse.⁴⁷

No matter the source of diverted drugs, evidence from forensic drug laboratories shows fewer reports of testing for hydrocodone than oxycodone, while also showing a decreasing number of reports for oxycodone since 2010 and for hydrocodone since 2011.⁴⁸ Table 4.⁴⁹

⁴³ ER/LA Opioid Analgesics REMS Program, *Product's Covered Under the ER/LA Opioid Analgesics REMS Program*, <http://www.er-la-opioidrems.com/IwgUI/rems/products.action>. A REMS is meant to manage the risks associated with certain opioid products.

⁴⁴ SAMHSA, *The Dawn Report: Highlights of the 2011 Drug Abuse Warning Network (DAWN) Findings on Drug-Related Emergency Department Visits*, Table 2 (2013) <http://www.samhsa.gov/data/sites/default/files/DAWN127/DAWN127/sr127-DAWN-highlights.pdf>.

⁴⁵ *Id.* It should be noted that the total number of visits for either oxycodone or hydrocodone were significantly less than visits for cocaine, marijuana, heroin, and other illicit substances. *Id.*

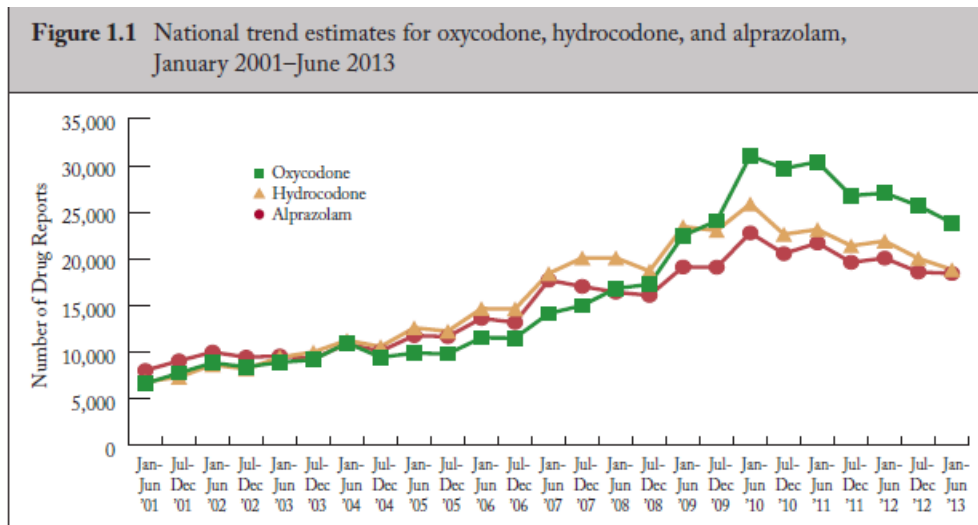
⁴⁶ Cicero, *supra* note 35, at tbl. 4, 291, tbl. 2, 295.

⁴⁷ *Id.*

⁴⁸ DEA, Office of Diversion Control, National Forensic Laboratory Information System, *2013 Midyear Report 6* (2013), <http://www.deadiversion.usdoj.gov/nflis/2013midyear.pdf>.

⁴⁹ *Id.*

Table 4



The Commission’s data also shows fewer offenses involving hydrocodone than oxycodone. Between FY 2006 and 2012, 3660 cases involved either hydrocodone or oxycodone. Only 11% of those involved hydrocodone.⁵⁰

Additional data on those convicted of federal hydrocodone and oxycodone offenses is also instructive. Among all drug types prosecuted in federal court, more women are convicted of offenses involving hydrocodone and oxycodone than any other drug. In FY 2006-2012, nearly a quarter of the individuals prosecuted for either oxycodone or hydrocodone were women (24%). More women were among those convicted of hydrocodone offenses (32.7%) than oxycodone (22.5%). By comparison, women comprised only 12.5% of those convicted of a powder cocaine offense and only 9% of those convicted of heroin. And like many individuals convicted of a drug offense, those convicted of oxycodone and hydrocodone offenses have minimal criminal history (51.4% of those convicted of oxycodone were in CH I and 67% of those convicted of hydrocodone were in CH I). Weapon involvement in these offenses was also small – 12.8% for oxycodone; 9.5% for hydrocodone.⁵¹

Almost half (47%) of the convictions for either drug were in the Fourth and Sixth circuits. More than half (53%) of the hydrocodone cases were concentrated in either the Fourth, Fifth, or Sixth circuits, particularly the Eastern and Western Districts of Texas, Eastern and Western Districts of Kentucky, and Western District of Tennessee – strikingly rural areas.⁵² The

⁵⁰ USSC, *FY2006-FY2012 Monitoring Dataset*.

⁵¹ *Id.*

⁵² *Id.*

prevalence of opioid abuse and diversion in Appalachia and other rural areas has been attributed to a variety of factors: the number of retirees and mine workers with health insurance that invited exploitation; economic depression that made it “tempting for people with legitimate prescriptions to sell them for profit”; and a history of self-medication in areas like Eastern Kentucky, which has high rates of cancer and of residents with chronic pain from mining and timber injuries.⁵³

Our review of cases involving individuals prosecuted for both oxycodone and hydrocodone offenses shows that federal law enforcement efforts are not always targeted toward high-level traffickers, pill mills, or doctors and pharmacists, but sweep in lower level individuals that may share legitimately prescribed drugs with friends and family or engage in small-time dealing to make some money and feed their own addiction.⁵⁴ The case of *United States v. Bell*, 667 F.3d 431 (4th Cir. 2011), provides an example of the government’s overzealous prosecution of a small time dealer. Nancy Bell was a 63-year-old woman, with no prior criminal history, who was convicted of conspiracy to distribute oxycodone that she obtained with a valid prescription over a five year period. She suffered from severe back ailments and occasional breakouts of shingles. Out of the 90 pills she was prescribed each month, she sold a portion to others, including relatives. At her original sentencing, the government claimed that she should be held responsible for every pill that she was prescribed even though some were put to legitimate use for her own pain management. It also sought a sentence at the high end of the guideline range and pressed for an aggravating role adjustment because she directed others, including her daughter, in the sales. The court initially sentenced Ms. Bell to 120 months imprisonment. After the appellate court vacated the sentence because of the manner in which the court used the total amount of oxycodone prescribed to Ms. Bell, she was sentenced to 97 months imprisonment. The court recently reduced her sentence to 63 months pursuant to amendment 782.

In a more recent case, a young man, in criminal history category I, was prosecuted in the Southern District of West Virginia for selling a small quantity of hydrocodone to a confidential informant. The quantity was small enough to yield an offense level of 2. Fortunately, the government eventually agreed to pretrial diversion, but the case is an example of how the lowest level dealers are targets of federal law enforcement officials.⁵⁵ Other low level defendants have

⁵³ Marvin Seppala & Mark Rose, *Prescription Painkillers: History, Pharmacology, and Treatment* (2010).

⁵⁴ Law enforcement authorities and public health officials have acknowledged the “culture of prescription drug sharing” in places like West Virginia. *A West Virginia Summit on Prescription Drug Abuse: Report and Recommendations* (2011), http://www.justice.gov/sites/default/files/usao-sdvw/legacy/2011/08/11/Summit_Report.pdf.

⁵⁵ If penalties for hydrocodone are increased, we fear that there will be even more prosecutions of street level distributors. Law enforcement officers often go after street level distributors in an effort to obtain cooperation about those higher up in the distribution chain. Higher penalties will permit them to leverage

not been so lucky. In the Southern District of West Virginia, prosecutors focus on small cases that may only involve two to eight pills. The volume of small pill cases has produced felony convictions that disqualify poor Appalachian citizens from receiving medical benefits, voting, and possessing firearms. And unlike urban areas, firearm possession in rural areas, where hunting is permitted, helps people feed their families. The benefit to society from these prosecutions is not worth the costs of prosecution or the devastating effect on defendants and their families. For each low level drug distributor that is removed from the street, another steps in to take his or her place.⁵⁶

V. The Commission’s Proposed Amendment and The Minimum Offense Level of 12 That Now Exists for Hydrocodone Will Dramatically Increase Sentences and Likely Lead to Judges Imposing More Below Guideline Sentences.

The Commission’s proposed amendments will cause sentences for hydrocodone to skyrocket. A case in the Western District of Kentucky demonstrates the point. Three individuals were convicted of conspiracy to distribute hydrocodone pills. One defendant worked in a local pharmacy. Over a six month period, she stole between 10,000 to 20,000 hydrocodone pills and sold them to another co-defendant who then sold the pills to a third defendant for eventual sale. For the first two defendants, the offense level was set at 13 (base offense level 16 for 10,000 to 20,000 hydrocodone units with minus 3 for acceptance of responsibility) – a guideline range of 12-18 months. Both received a sentence of two years’ probation. The third defendant received a sentence of 27 months imprisonment.

The guideline ranges would be dramatically higher under either of the Commission’s proposals. For example, if we assume the case involved 10,000 10 mg hydrocodone tablets, the new offense level at a ratio of 1:4467 would equal 446.7 kilograms of marijuana for a base offense level of 26. With 3 points for acceptance of responsibility and a criminal history category I, the guideline range would be 46-57 months imprisonment. If the case involved the lowest dose of hydrocodone – 5 mg – the base offense level would be 24 – 37-46 months imprisonment.

those defendants who can cooperate. Those who have no information to offer will face draconian sanctions. Higher penalties for certain substances also encourage law enforcement authorities to use controlled buys to steer sellers to those drugs in an effort to manipulate the sentence. E. P. Berlin, *Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187, 187 (1993) (“the Guidelines enable prosecutors and law enforcement officials to increase defendants’ prison terms by manipulating investigations and sting operations”).

⁵⁶ Jeremy Travis, et al., National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 146 (2014), <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

Even in cases involving extremely small quantities of hydrocodone, like the one discussed above where the offense level was 2, the guideline recommended sentencing range already has increased significantly. The guidelines now call for a minimum offense level of 12 for Schedule II opiates. USSG §2D1.1, comment. (n.8(D)). The lowest level defendants with just a few pills who plead guilty and receive acceptance of responsibility can no longer receive a guideline recommended sentence of probation unless it also includes a condition of confinement or home detention. USSG §5C1.1(c). Such a result is not only unjust, but unnecessarily costly and a waste of limited resources. Instead of going to prison or spending time in community confinement, these individuals typically need proper medical treatment for their addictions and other health-related problems. We do not understand the rationale for setting a floor that does not fully consider the purposes of sentencing and none is provided in the commentary to §2D1.1 or Appendix C of the Guidelines Manual. In the absence of any justifiable reason for the floor, it should be deleted.

If the Commission were to keep the floor of 12 and raise the marijuana equivalency ratio for hydrocodone as set forth in the proposed amendment, it should expect to see the rate of below guideline sentences increase. Just as judges have declined to impose guideline recommended sentences in many oxycodone cases, see discussion *supra*, they are likely to do so with hydrocodone.

VI. Conclusion

We remain hopeful that the Commission agrees with us that the drug equivalency table for opioids needs to be revisited and that due consideration should be given to potency, purity, toxicity, and abuse liability. The suggestions we make here for revising the drug equivalency table require more study. In the meantime, the Commission needs to temporarily fix the drug equivalency table for hydrocodone because all Schedule III hydrocodone is now Schedule II. The easiest and fairest solution is to delete the reference to hydrocodone under the “Schedule I or II Opiates” and change the “Schedule III Hydrocodone” reference to “Schedule II Hydrocodone.” Such an amendment will maintain the status quo until the Commission can more thoroughly explore needed changes to the drug equivalency table.

Should the Commission, however, choose to ignore the fatal flaws in those drug equivalencies and limit itself to an amendment that bases the marijuana equivalency on the actual amount of hydrocodone, it should not adopt either a 1:4467 or 1:6700 hydrocodone to marijuana ratio. First, the difference between the two ratios would be meaningless in some cases. For example, the offense level for distribution of 10,000 10 mg pills would be 26 under both ratios. Second, the proposed ratios are significantly higher than the gram of hydrocodone (actual) to 1675 grams of marijuana the Commission considered in 2009. The Department of Justice expressly recommended the 1:1675 ratio in 2009, claiming that it would provide “a

minimally acceptable deterrent effect.”⁵⁷ The Department considered recommending a higher ratio of 3350 grams of marihuana for every gram of hydrocodone – still less than the 1:4467 or 1:6700 ratios proposed by the Commission – but rejected it as unnecessary.⁵⁸

For the Commission to adopt a significantly higher ratio than even the Department proposed in 2009 is not justified by the increase in the statutory maximum. For reasons stated above, the statutory maximums should not be a factor in the analysis. If the Commission nonetheless believes that the guideline range should reach the statutory maximum in some cases, it would be easily reached with a ratio lower than 1:4467. For example, a person convicted of trafficking 15,000 Hysingla ER 120 mg tablets would have a base offense level of 32 if the ratio were 1:1675. Aggravating role adjustments and criminal history increases could easily reach the statutory maximum penalty.

⁵⁷ Dep’t of Justice, Letter to the Honorable Ricardo Hinojosa, Acting Chair (March 27, 2009), at 39.

⁵⁸ *Id.*