

Statement of

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United States Sentencing Commission**

Public Hearing on “The Sentencing Reform Act of 1984: 25 Years Later”

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I thank the Commission for inviting me to testify on behalf of the Federal Public and Community Defenders. This is the last of seven regional hearings that the Commission has held on the twenty-fifth anniversary of the Sentencing Reform Act. Defenders have enjoyed the opportunity to testify at each of these hearings, and I endorse the comments of my colleagues on the variety of topics they have previously addressed.¹ I will try not to repeat those comments, but instead to build upon them as they relate to sentencing guideline issues in the southwest border districts, particularly the Western District of Texas.

I have spent my entire 22-year legal career observing the impact of the guidelines in the Western District. My first job after graduating from law school in 1988 was a clerkship with then-U.S. District Judge Edward C. Prado. The guidelines had gone into effect less than a year earlier; both pre-guideline and guideline cases came before the court, and I saw firsthand the enormous impact the guidelines could have on individual sentences. In 1990, when I went to work for the Federal Public Defender’s Office, I was given the task of establishing a separate appellate section, a change in practice made necessary by the substantial increase in the number of appeals that had resulted from the enactment of 18 U.S.C. § 3742. I served as the chief of the appellate section for 18 years; during that time the vast majority of the appeals we handled involved guideline and other sentencing issues. This remains true today, even under the advisory guideline system created by the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005).

With regard to the system *Booker* created, I share the view of my colleagues, and the majority of others who have testified before the Commission in these regional hearings: as a general matter, the advisory guideline system works. It provides a “healthy balance”

1. The Defenders are required to “submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful.” 28 U.S.C. § 994(o).

between the unbridled discretion of pre-guidelines sentencing and the arbitrarily mechanical sentencing practice of the mandatory guideline system.² And it has “greatly improved fairness, honesty and transparency in sentencing.”³ But although the advisory system is working, particular guidelines need significant improvement. After more than two decades, there are still areas of federal practice in which the guidelines do not accomplish the Commission’s mandates: meeting the goals of 18 U.S.C. § 3553(a)(2), achieving certainty and fairness in sentencing, and avoiding unwarranted disparity while maintaining sufficient flexibility to permit individualized sentences.⁴

I will focus my testimony on two guideline issues that have been touched upon in previous Defender testimony, but are of special concern to those involved in the criminal justice system on the southwest border: (1) disparity in guideline application, and (2) the need to balance simplicity and fairness in the guideline sentencing process. These two issues arise in a variety of contexts, but I would like to discuss them as they often arise in two of the most common Western District of Texas offenses: drug importation and felony illegal reentry. I would also like to comment on the need to revise recency, status, and revocation rules to help alleviate unfair treatment of deported aliens who make up a large portion of the defendants in the Western District and along the border in general.

The Western District of Texas

As the Commission’s data shows, the Western District of Texas is the busiest sentencing district in the nation.⁵ Of the sentencings in the district, approximately 85 percent are for drug and immigration offenses.⁶ This is not surprising, since the district shares 800 miles of international boundary with the Republic of Mexico. In fiscal year

2. Written Statement of Jacqueline A. Johnson, Public Hearing Before the U.S. Sentencing Commission, Chicago, Illinois, at 1 (Sept. 10, 2009) (hereinafter Johnson Statement).

3. Written Statement of Nicholas T. Drees, Public Hearing Before the U.S. Sentencing Commission Denver, Colorado, at 1 (Oct. 21, 2009) (hereinafter Drees Statement).

4. 28 U.S.C. § 991(b)(1).

5. See U.S. Sentencing Commission, *Preliminary Quarterly Data Report*, tbl. 2 (Fourth Quarter 2009) (hereinafter USSC FY 2009 Report). The Western District of Texas reported 8,278 cases, more than any other district and more than the total cases reported for 10 of 12 federal circuits. *Id.* By itself, the Western District accounted for more than 10 percent of all the cases reported to the Commission nationwide. Together, the five southwestern border districts accounted for more than 35 percent of the cases in the country. *Id.*

6. U.S. Sentencing Commission, *Statistical Information Packet, Fiscal Year 2008, District of Western Texas*, tbl. 1, at 2 (hereinafter WDTX 2008 Packet).

2009, the three Western District divisions along the border handled 5,885 felony criminal defendants, approximately 71 percent of the district total.⁷

Compared to others, the Western District is a guideline district. Our courts sentence within the guideline range 79.2 percent of the time, the highest percentage of any border district, and the fourth highest in the nation.⁸ The combination of the high guideline-sentence rate and our heavy caseload means that more within-guideline sentences are imposed in the Western District of Texas than in any other district—or any other *circuit*—in the nation. Moreover, the guidelines are typically applied just as they are written, without adjustment for plea-bargaining, cooperation, or “fast-track” disposition. While 98 percent of defendants plead guilty in the Western District, more than 60 percent of them do so without a plea agreement—the highest percentage of any district in the nation.⁹ Accordingly, there are relatively few cases in which the guideline range is the subject of bargaining between the parties. Our clients also tend to receive fewer substantial-assistance departures than elsewhere (6.3 percent, about half the national average), and far fewer fast-track departures (1.7 percent, compared to 9.2 percent nationally and an average 31.7 percent in the other southwestern border districts).¹⁰

Given these circumstances, the Commission’s decisions in drafting commonly applied drug and immigration guidelines take on exceptional importance in the everyday practice of Western District defense attorneys, and in the lives of our clients. The guideline amendments I propose below could benefit hundreds of defendants who are currently receiving unfair, disparate treatment under the guidelines.

Guideline Application Disparity: Drug Couriers

When the Commission promulgated the guidelines, it envisioned a modified “real offense” system in which a number of “important, commonly occurring real offense elements” would be taken into account regardless of the charges brought against the defendant.¹¹ Even when charges did not limit the conduct to be considered, however, the

7. Western District of Texas, *2009 Fiscal Year Statistics*, at 4. These statistics were originally provided to the Commission by U.S. District Judge Kathleen Cardone at the November regional hearing in Austin, Texas.

8. USSC FY 2009 Report, tbl. 2, at 2–6 (showing Western Texas behind only Southern Mississippi, Western Oklahoma, and the Northern Mariana Islands). By comparison, the other southwestern border districts average less than half of sentences imposed within the guideline range. *Id.*

9. *Id.*, tbl. 27.

10. *Id.*, tbl. 1.

11. *See* U.S.S.G. Ch.1, Pt.A(4)(a).

proof would: “the defendant’s actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor’s ability to increase a defendant’s sentence.”¹² But for at least one very common border offense, the available proof does not set the natural limit on the sentence imposed, and an important mitigating real-offense characteristic is inconsistently applied. That offense is drug importation.

In the border divisions of the Western District, the typical drug case involves a courier hired to transport a load of drugs, usually from Mexico into the United States. Such “mules” are usually low-level players that have been recruited into a larger drug organization; they almost never know any of the inner workings of the organizations, or the relationships among its members. Couriers are typically provided with pre-loaded vehicles and paid a per-trip fee that is unrelated to the value of the load they are carrying. They often do not know what drug they are carrying, where it is hidden, where it came from, or where it is ultimately destined for once it is delivered across the border. Couriers typically confess upon arrest, and the vast majority plead guilty to charges of importation or possession with intent to distribute.

One would think that for such a minor, commonplace crime with uncomplicated facts, the guideline application in these cases would be straightforward and relatively uniform. Similar offense levels and guideline ranges would be applied in each case, subject to variation for the type and weight of drugs seized and the defendant’s criminal history. Not so. Sentences in such cases can vary widely, based not on the circumstances of the offense or the history of the defendant, but upon the judge’s (or the probation officer’s) attitude towards common guideline calculations.

As a not-so-hypothetical example, take a defendant who is arrested at the international bridge with 125 pounds (57 KG) of marijuana hidden in a pickup he was given to drive.¹³ He freely admits that he suspected the truck carried a hidden load of contraband, though he did not know what it was or where it was hidden. He tells the agents that, although he has never been arrested before, he has previously driven other vehicles across the border for the same recruiter four times, each time for \$500. The defendant has no actual knowledge whether or not the vehicles were loaded on those occasions, or if so what type or amount of contraband was involved. Due to the limited information the defendant can provide, the arresting agents make no effort to find his recruiter or otherwise corroborate his statement. The defendant is charged with importation of more than 50 KG of marijuana—an offense carrying a statutory sentencing range of 0 to 20 years in prison. He pleads guilty without a plea agreement, and, although he is cooperative, no substantial-assistance motion is filed because of his limited knowledge.

12. *Id.*

13. Marijuana offenses make up more than 70 percent of the drug cases in the Western District. WDTX 2008 Packet, fig. A, at 1.

Depending on the division where the arrest occurs (and sometimes the probation officer or judge to whom the case is assigned), the guideline range for such a defendant could vary by as many as 13 offense levels. In some divisions, before some judges, the defendant's uncorroborated reference to prior trips would be viewed as too speculative a basis upon which to add relevant conduct, and he would be seen as having played a mitigating role in the overall drug-importation scheme. This view would lead to a base offense level of 20 (corresponding to 40 to 60 KG of marijuana), downward adjustments for mitigating role (2 to 4 levels), acceptance of responsibility (3 levels), and safety-valve (2 levels), resulting in an offense level of 11 to 13 and a guideline range (at criminal history category I) of between 8 to 14 months and 12 to 18 months.

In other divisions, or even before other judges in the same division, the guidelines would be viewed very differently. There, the defendant's relevant conduct would be 57 KG multiplied by 5 trips, starting the guideline sentence at base offense level 26 (100 to 400 KG of marijuana).¹⁴ The defendant would receive no adjustment for role in the offense,¹⁵ and if he objected to the relevant conduct calculation, he could risk denial of the safety-valve adjustment and (in a few courts) denial of acceptance of responsibility.¹⁶ These determinations would set his guideline range (at criminal history category I) at 63 to 78 months.

As this example shows, inconsistent guideline calculations in common border drug cases cause significant unwarranted sentencing disparity. On the same facts, a defendant in one court could face a minimum guideline sentence more than 680 percent higher than a defendant in another court. This disparity does not arise from disparate charging decisions or plea-bargaining practices, or from the decision to impose a non-guideline

14. *Cf. United States v. Saucedo-Valverde*, 255 F. App'x 796 (5th Cir. 2007) (per curiam) (seized load multiplied by three); *United States v. Perez*, 183 F. App'x 477, 478–81 (5th Cir. 2006) (per curiam) (same); *cf. United States v. Betancourt*, 422 F.3d 240, 246–48 (5th Cir. 2005) (multiplying estimated distribution amount by 12 recipients, based on defendant's out-of-court statement). Of course, similarly unjustified extrapolation can be based on other information besides an uncorroborated confession. *See, e.g., United States v. White*, 360 F.3d 718, 720 (7th Cir. 2004) (per curiam) (in multiplying witness estimate, "the sentencing court may credit testimony that is totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant") (internal quotation marks and citations omitted).

15. *Cf. Perez*, 183 F. App'x at 481–82; *United States v. Buenrostro*, 868 F.2d 135, 137–38 (5th Cir. 1989). *Cf. Joint Written Testimony of Alan Dubois and Nicole Kaplan, Public Hearing Before the U.S. Sentencing Commission, Atlanta, Georgia at 32 (Feb. 10, 2009) (hereinafter Dubois/Kaplan Testimony) (commenting on denial of mitigating-role adjustments in courier cases).*

16. *See, e.g., United States v. Driver*, 255 F. App'x 918 (5th Cir. 2007).

sentence. Instead, it arises almost entirely from different attitudes of probation officers and judges in applying the guidelines to a common set of facts. This unwarranted disparity is hidden, since both sentences are counted as within the guideline range. It is difficult to address through the appellate process, since deferential standards of review are applied to what are considered highly fact-dependent determinations.¹⁷ And it results in sentences far greater than necessary to achieve the purposes of sentencing. *See* 18 U.S.C. § 3553(a).

The Commission could help address this disparity in guidelines application with simple amendments to the commentary to guidelines §2D1.1, §3B1.2, and §3E1.1.¹⁸ It should tighten the rules for approximating unseized drugs, clarifying that sentencing courts must err on the side of caution when multiplying or otherwise estimating drug amounts,¹⁹ and recommending that determinations not be based on speculative extrapolation from a defendant's uncorroborated confession.²⁰ Current language in the commentary to guideline §2D1.1²¹ and policy statement §6A1.3²² that allows for, or even

17. *See* U.S.S.G. §3E1.1, comment. (n.5) (acceptance-of-responsibility determination “entitled to great deference on review”); *United States v. Jenkins*, 487 F.3d 279, 282 (5th Cir. 2007) (deferential clear-error standard applied to role determination); *Betancourt*, 422 F.3d at 246 (same, drug-amount estimate).

18. Proposed amended language is appended to my testimony.

19. *See, e.g., United States v. Culps*, 300 F.3d 1069, 1076 (9th Cir. 2002); *United States v. Shonubi*, 998 F.2d 84, 89–90 (2d Cir. 1993); *United States v. Sims*, 975 F.2d 1225, 1243 (6th Cir. 1992).

20. *See Shonubi*, 998 F.2d at 90 (rejecting multiple estimate because it was predicated on “speculation . . . surmise and conjecture”).

21. *See* U.S.S.G. §2D1.1, comment (n.12) (requiring courts to approximate the quantity of a controlled substance when “the amount seized does not reflect the scale of the offense”).

22. *See* §6A1.3, p.s., comment. (for guideline determinations, setting the standard of proof as a preponderance of evidence of “sufficient indicia of reliability to support its probable accuracy,” and requiring corroboration only when sentencing information is drawn from “an unidentified informant”); *United States v. Cook*, 550 F.3d 1292, 1296 & n.4 (10th Cir. 2008) (“minimal” indicia of reliability sufficient); *United States v. Houston*, 217 F.3d 1204, 1209 (9th Cir. 2000) (same).

calls for, speculation from minimally reliable information should be amended or deleted.²³

The Commission should also expand the impact of guideline §3B1.2 by removing language in the commentary that unduly restricts its application. The commentary currently invites courts to deny mitigating-role adjustments when the only evidence available on the defendant's role comes from the defendant himself.²⁴ This language is out of place in many bridge cases, where the defendant provides all the information regarding the circumstances of the offense, and the government does no additional investigation after the load is seized. The Commission should also amend the guideline commentary to make clear that paid-by-the-trip couriers with limited knowledge deserve a lesser role, even if they are driving drugs across the border or performing some other "indispensable part" of the offense.²⁵ As Judge Raggi long ago explained, the main importance of couriers in importation cases *is* their minimal role: "They are generally illiterate, impoverished individuals," whose "value to those orchestrating the importation is precisely their expendability."²⁶

In addition to amending the commentary to §2D1.1 and §3B1.2, the Commission should amend the commentary to guideline §3E1.1 to expressly protect defendants whose counsel contest the sufficiency of the evidence offered to prove relevant conduct. While false denials of proven conduct may bear on the defendant's acceptance, current language that suggests denial of the adjustment for "frivolously contest[ing] relevant conduct that the judge determines to be true" can be read to place acceptance in jeopardy every time a

23. See Tr. of Public Hearing Before the U.S. Sentencing Commission, Stanford, California, at 78–79 (May 28, 2009) (Testimony of Judge B. Lynn Winmill) (calling for narrower view of relevant conduct in drug cases); Written Statement of Jason D. Hawkins, Public Hearing Before the U.S. Sentencing Commission, Austin, Texas, at 18 (Nov. 19, 2009) (hereinafter Hawkins Statement) (discussing need to limit drug quantity determinations made possible by §6A1.3); Statement of William P. Gibbens, Public Hearing Before the U.S. Sentencing Commission, Austin, Texas, at 6 (Nov. 19, 2009) (hereinafter Gibbens Statement) (discussing burden of proof under §6A1.3).

24. See U.S.S.G. §3B1.2, comment. (n.3(C)).

25. See *Buenrostro*, 868 F.2d at 138. Cf. Dubois/Kaplan Testimony at 32; Johnson Statement at 28. Language along these lines was included in the commentary before its amendment in 2001. See U.S.S.G. App. C, amend. 635 (Nov. 2001). Proposed language in the Appendix reinserts this language in expanded form.

26. Hon. Reena Raggi, *Local Concerns, Local Insights: Further Reasons for More Flexibility in Guideline Sentencing*, 5 FED. SENT'G REP. 306, 306–07 (1993).

relevant-conduct objection is overruled.²⁷ The Commission should encourage, not discourage, relevant-conduct objections, to ensure sentences are based on accurate information that has been the subject of thorough adversarial testing.²⁸

The safety-valve adjustment presents special problems, problems that often arise in conjunction with the operation of guideline §1B1.8. Section 1B1.8 provides that self-incriminating information disclosed as part of a cooperation agreement will not be used in determining the guideline range. Protection is limited to information that is disclosed as part of a formal agreement under which the government has promised not to use the information.²⁹ By its terms, §1B1.8's valuable protection is unavailing in the common drug-courier scenario. As described above, a cooperative courier defendant typically discloses all the information he has shortly after his arrest. In such cases, §1B1.8 does not apply, because the information became "known to the Government prior to entering the cooperation agreement."³⁰ Thus, §1B1.8 cannot protect even a cooperating defendant from extrapolation based on his uncorroborated, post-arrest confession.

Guideline §5C1.2 further exacerbates this problem. As noted above, a defendant risks denial of the safety-valve adjustment if he disputes extrapolation based on his post-arrest statement.³¹ By contrast, when a defendant delays giving any statement until he obtains a lawyer and can provide information under §1B1.8, not only is he protected from the inflated offense level, he is also not required under §5C1.2 to admit to the extrapolation to obtain safety-valve relief.³²

The disparity among defendants caused by the combined operation of these two guidelines is unjustifiable.³³ It provides an incentive to withhold information from the

27. See U.S.S.G. §3E1.1, comment. (n.1(a)); cf. Hawkins Statement at 19.

28. *Rita v. United States*, 551 U.S. 338, 351 (2007); see also U.S.S.G. §6A1.3, p.s., comment. (parties must be given adequate opportunity to contest relevant facts).

29. U.S.S.G. §1B1.8(a).

30. U.S.S.G. §1B1.8(b)(1).

31. See U.S.S.G. §5C1.2(a)(5) & comment. (n.7).

32. See *id.*, comment. (n.7).

33. In the Fifth Circuit and others, where uncharged drug amounts can be used to set the statutory mandatory minimum, the combined effect of these guidelines can be especially unfair: the defendant receives a mandatory minimum sentence, and is not eligible for safety-valve relief. See, e.g., *United States v. Keith*, 230 F.3d 784, 786–87 (5th Cir. 2000) (per curiam); *United States v. Ramirez*, 43 F. App'x 358, 362–63 (10th Cir. 2002).

arresting agents at the time when the information is likely to be the most valuable. Often, the only useful assistance a courier can provide is to cooperate in an attempted controlled delivery, which typically must occur immediately after arrest. The guidelines should not provide a disincentive to such cooperation.

The Commission can address this problem by amending §1B1.8 to expressly recognize that the parties may agree to exclude information that the defendant provides before entering into formal cooperation. Such an amendment would reward, rather than punish, defendants who voluntarily disclose information soon after their arrest.³⁴ It would preserve prosecution bargaining flexibility, while encouraging the parties to agree that cooperation be rewarded when it occurs before lawyers get involved in the case.

Sometimes, the parties ultimately do not enter into a cooperation agreement in border transportation cases, even when the defendant is cooperative and willing to talk to agents. This sometimes occurs because the courier has such limited information; other times, he resists a formal agreement because he fears for his safety or the safety of his family in Mexico. Guideline §1B1.8 addresses this situation by noting that Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f) restrict the use of information conveyed during plea negotiations.³⁵ Considering that the rules of evidence do not directly apply to sentencing proceedings, *see* FED. R. EVID. 1101(d)(3), the §1B1.8 commentary should be amended to clarify that plea-negotiation statements are protected.

Balancing Fairness and Simplicity of Application: Illegal Reentry

Since the initial promulgation of the guidelines, the Commission has been concerned with finding practical ways “to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process.”³⁶ Reconciling these two aims requires the Commission to establish simple rules of guideline application that are fair in the mine-run case. Despite the Commission’s efforts, however, some guidelines do not achieve these aims. The illegal-reentry guideline, §2L1.2, is one of them. The failure of §2L1.2 to provide easily applicable rules leading to fair sentences is a longstanding problem, the impact of which has grown as the number of sentencings under the guideline has dramatically risen.

34. This point has been repeatedly made by my fellow Defenders. *See, e.g.*, Dubois/Kaplan Testimony at 33; Johnson Statement at 28–29; Drees Statement at 9–10; Written Statement of Alexander Bunin, Public Hearing Before the U.S. Sentencing Commission, New York City, New York at 18–19 (July 9, 2009) (hereinafter Bunin Statement).

35. *See* U.S.S.G. §1B1.8, comment. (n.3).

36. U.S.S.G. Ch.1, Pt.A(4)(a)

Illegal reentry after deportation has become a major focus for federal prosecution in the past 20 years,³⁷ nowhere more so than in the Western District of Texas.³⁸ The facts of these offenses are typically simple and relatively benign—there is rarely any violence or danger to the public associated with the defendant’s reentry. The vast majority of defendants raise no defense and plead guilty. As with the drug courier case described above, one would think the guideline determination would be relatively straightforward, and the resulting punishment relatively mild.

As the Commission well knows, this is not the case. Section 2L1.2 includes multiple upward adjustments based on past convictions. These past convictions can double or triple the defendant’s offense level, even when the previous sentence does not qualify for criminal history points under Chapter Four. The adjustments rely on a confusing litany of difficult-to-apply definitions that can turn on arcane subtleties in decades-old state statutes, or on state record-keeping practices that have nothing to do with the defendant or his offense. The result is that, for illegal reentry, there has been a common refrain from guideline users: §2L1.2 is too complex,³⁹ and the sentences it produces are too high.⁴⁰ The

37. In 1992, there were only 652 defendants sentenced for this offense, accounting for less than 2 percent of the total federal criminal docket. *See* Statement of John R. Steer, Vice-Chair, U.S. Sentencing Commission, Before the Subcommittee on Criminal Justice Oversight, U.S. Senate Judiciary Committee, Exhibit 8 (Oct. 13, 2000). By 2002, the number of cases had increased tenfold, and by 2008 illegal reentry offenses accounted for 13,575 defendants, or more than 18 percent of the total docket. *See* U.S. Sentencing Commission, *2002 Sourcebook of Sentencing Statistics*, tbl. 17, at 40; *id.*, 2008 *Sourcebook of Sentencing Statistics* tbl. 50, at 123 (hereinafter 2008 Sourcebook). Immigration prosecutions jumped by approximately 20 percent in FY 2009 alone. *See* Chief Justice John Roberts, *2009 Year-End Report on the Federal Judiciary* at 4 (Dec. 31, 2009).

38. *See* WDTX 2008 Packet, fig. A., at 1 (showing that immigration cases account for 47.2 percent of the district’s sentencing docket); *id.*, tbl. 1, at 2 (3,403 immigration cases in the Western District). To place these numbers in perspective: In FY 08, there were more immigration cases in the Western District of Texas than there were murder, manslaughter, kidnapping, sexual abuse, assault, robbery, arson, burglary, and racketeering/extortion cases in all the federal courts in the nation, *combined*. *Id.* tbl. 1, at 2.

39. *See, e.g.*, U.S. Sentencing Commission, *Interim Staff Report on Immigration Reform and the Federal Sentencing Guidelines*, at 24 (January 20, 2006) (hereinafter *Interim Staff Report*) (guideline users raise concerns regarding complexity of guideline); Tr. of Public Hearing Before the U.S. Sentencing Comm’n, Stanford, California at 159 (May 27, 2009) (testimony of Chief U.S. Probation Officer Marilyn Grisham) (hereinafter Grisham Testimony) (§2L1.2 determinations are “very time consuming,” and the

Commission could achieve its sentencing purposes with a simpler, less draconian guideline. Such a guideline would be a great help to judges and practitioners in the Western District of Texas and throughout the country.

I make three suggestions for removing unnecessary severity and complexity from §2L1.2: (1) reduce the offense levels associated with the maximum enhancements under the guideline; (2) redefine and narrow those enhancements, using determinations already required elsewhere in the sentencing process; and (3) retain, and expand, guideline commentary to encourage downward departures when the sentence called for does not account for mitigating circumstances present in of a defendant’s reentry offense.⁴¹ Implementing these suggestions would help simplify the sentencing process for probation officers and judges, reduce unnecessarily high guideline sentences, and obviate some of the need for appellate review in these cases.⁴²

I understand that full revision of §2L1.2 is not on the Commission’s priorities list for this cycle, but I urge the Commission to consider amendments to the guideline in the near future, and I hope that the suggestions below will provide a basis for discussion.

1. Reduce the severity of the enhancements. As others have fully explained, the enhancements in guideline §2L1.2 are simply too high. I suggest that, at a minimum, the Commission consider reducing the enhancements in subsections (b)(1)(A) and (B) by four levels each, and the enhancement in subsection (b)(1)(C) by two levels. This would have the effect of equalizing offense levels for illegal-reentry defendants and firearm-

resulting sentences “are just too high”).

40. See e.g., Tr. of Public Hearing Before the U.S. Sentencing Commission, Stanford, California, at 57, 63–65, 114–15 (May 28, 2009) (Testimony of Judge Edward F. Shea). (criticizing length of § 1326 sentences under cost-benefit analysis); Grisham Testimony at 159 (May 27, 2009); Hawkins Statement at 10; Bunin Statement at 15–16; Joint Written Statement of Thomas W. Hillier II and Davina Chen, Public Hearing Before the U.S. Sentencing Commission, Stanford, California, at 27 (May 27, 2009) (hereinafter Hillier/Chen Statement); Written Statement of Raymond Moore, Public Hearing Before the U.S. Sentencing Commission Denver, Colorado, at 32–33 (Oct. 21, 2009) (hereinafter Moore Statement).

41. I have drafted language for an amended guideline that would accomplish these goals, and submitted it to Commission staff for analysis.

42. I note that, in fiscal year 2008, the Western District had the highest number of sentencing appeals of any district in the nation. *2008 Sourcebook*, tbl. 56, at 138. In our office, the vast majority of appeals challenge the application, or the reasonableness, of the illegal-reentry guideline.

possession defendants with similar prior convictions.⁴³ I do not mean to suggest that illegal-reentry defendants should be incarcerated at the same level as armed felons—to the contrary, illegal-reentry defendants are typically deserving of less punishment.⁴⁴ But there is certainly no reason that illegal-reentry defendants should be punished *more* severely.

2. Narrow the maximum §2L1.2 enhancement provisions, using determinations that are already made by the court elsewhere in the sentencing process. Before its amendment in 2001, guideline §2L1.2 provided a 16-level enhancement for any prior aggravated felony conviction. As the Commission recognized, this across-the-board enhancement was both unnecessary and unfair due to the breadth of the definition of aggravated felony.⁴⁵ The Commission sought to respond to this problem by providing graduated sentencing enhancements “depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant.”⁴⁶ In attempting to differentiate among aggravated felonies, however, the Commission made the guideline far more complex. Now, the sentencing court not only has to determine if the defendant has previously been convicted of an aggravated felony so as to increase the statutory maximum under 8 U.S.C. § 1326(b)(2), but it also has to determine whether any of the bases for the guideline enhancement applies, even if § 1326(b)(2) does not. Meanwhile, the 16-level enhancement continues to apply to some offenses that clearly do not deserve it.⁴⁷

43. *Cf.* U.S.S.G. §2K2.1(a)(4)(A) (level 20 for firearm-possession defendant with felony conviction for crime of violence or controlled substance offense), §2K2.1(a)(6) & comment (n.3) (level 14 for defendant whose firearm possession was illegal because of prior felony conviction).

44. *See* Joint Written Testimony of Marjorie A. Meyers and Lucien B. Campbell before U.S. Sentencing Commission, Public Hearing on Proposed Immigration Amendments, San Antonio, Texas, at 7 (Feb. 21, 2006) (hereinafter Meyers/Campbell Testimony).

45. *See* U.S.S.G. App. C, amend. 632 (Nov. 1, 2001).

46. *Id.*

47. *See, e.g.*, Tr. of Public Hearing Before the U.S. Sentencing Commission, Stanford, California, at 54 (testimony of Judge Shea) (even after 2001 amendment, judge still struggled with the undue severity of sentences); *id.* at 116 (testimony of Judge Winmill) (discussing cases where the 16-level enhancement “is just out of whack”); Hawkins Statement at 12–13 (discussing case of Cesar Tlatanchi-Enriquez, who received 16-level increase based on statutory rape conviction for living with underage girlfriend). *Cf. United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321, 1326–27 (D.N.M. 2005) (Vasquez, J.) (holding that although 16-level enhancement applied, defendant’s actual conduct underlying prior conviction was “innocuous” and “relatively trivial”).

Basing enhancements on prior convictions will always result in some complexity and unfairness, because of the vast array of prior convictions possible and the wide variety of state sentencing practices. However, I believe that undue complexity and severity can be removed from §2L1.2 while still achieving the Commission’s salutary goal of distinguishing more serious aggravated felonies from less serious ones. This can be accomplished by using a combination of the aggravated-felony and criminal-history determinations, determinations that are already made during the sentencing process. In every illegal-reentry sentencing, the court must “inevitably” determine if the defendant has a prior conviction for an aggravated felony, so as to select the appropriate statutory penalty.⁴⁸ Similarly, the court will make a criminal-history computation at sentencing in virtually every federal case.⁴⁹ Using these same determinations, the Commission could identify a limited subset of convictions for especially serious aggravated felonies for which the defendant received a substantial sentence. Aggravated felonies that are not as serious, or for which a lesser sentence was imposed, would be subject to lesser penalties.

The Commission has long used both the aggravated-felony definition and Chapter Four criminal history calculations in determining some offense levels under §2L1.2, though only in limited circumstances⁵⁰ Using these determinations more broadly would avoid the unnecessary complexity that arises from multiple determinations based on multiple definitions. Equally important, it would rectify the situation where the guideline recommends a maximum enhancement for an offense that does not meet the “aggravated felony” definition applicable to § 1326(b)(2).⁵¹ Limiting the maximum enhancement to a predetermined subset of aggravated felonies would ensure that the defendants who receive the greatest guideline enhancement are those Congress intended to punish more severely. And using the Chapter Four calculations would have the benefit of eliminating enhancements based on offenses so old that they do not score criminal history points. I agree with others who have previously testified that remote convictions should not be

48. Interim Staff Report at 24. Normally, this determination is made in advance of sentencing, at the time of the defendant’s plea. *See* FED. R. CRIM. P. 11(b)(1)(H) (requiring court to advise defendant of maximum statutory penalty).

49. *See* U.S.S.G. §1B1.1(f).

50. *See* U.S.S.G. §2L1.2(b)(1)(C) and comment. (n.3(A)) (using aggravated-felony definition of § 1101(a)(43)); §2L1.2(b)(1)(A)(ii), (b)(1)(B), and comment. (n.1(B)(vii)) (distinguishing between drug-trafficking felonies based on the sentence imposed, as defined in guideline §4A1.2).

51. *See, e.g.*, Interim Staff Report at 25; Hawkins Statement at 12. Currently, the offenses in this category under the guideline include not only crimes of violence, but also firearms and aiding-and-abetting offenses. *Compare* U.S.S.G. §2L1.2, comment. (nn.1(B)(iii), 1(B)(v), and 5) *with* 8 U.S.C. § 1101(a)(43)(C), (E), (F) and (U).

considered for the maximum enhancement.⁵² It makes no more sense to consider a stale conviction to enhance a sentence for an illegal-reentry defendant than it does for a firearms offender under §2K2.1 or a career drug or violent offender under §4B1.2.⁵³

This proposal would most significantly impact “crime of violence” enhancements under guideline §2L1.2. Currently, the guideline uses a complicated formula that requires the court to determine the generic, contemporary meaning of a host of undefined, enumerated offenses.⁵⁴ The result has been protracted litigation and appeal, with the propriety of a massive enhancement often turning on arcane questions of state law that have little to do with the defendant or his instant offense.⁵⁵ Some such litigation is inevitable as long as the statute and guideline use the complex aggravated-felony definition for enhancement purposes. But there is no reason to add to this complexity in setting rules for determining the appropriate sentence. Instead, the “crime of violence” definition used for the maximum enhancements under §2L1.2 should be limited to a subset of particularly serious aggravated-felony crimes of violence: crimes that have as an element the use, attempted use, or threatened use of physical force against the person of another. This definition is already used in the commentary to §2L1.2,⁵⁶ and it is consistent with (though narrower than) the statutory definition used for the § 1326(b)(2) enhancement. It also tracks the career-offender definition in §4B1.2(a)(1), and the statutory definition of violent felony in the Armed Career Criminal Act.⁵⁷ By using this single definition, confusing references to other offenses or definitions could be eliminated.

52. See, e.g., Hillier/Chen Statement at 28; Hawkins Statement at 13.

53. Cf. U.S.S.G. §4B1.2, comment. (n.3) (Chapter Four criminal history computation rules apply to drug and violent crimes used in career-offender determination); U.S.S.G. §2K2.1, comment. (n.1) (same, firearms offenses). Cf. *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009) (holding that within-guideline §2L1.2 sentence was substantively unreasonable because of age of prior conviction).

54. See, e.g., *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1233 (10th Cir. 2009); *United States v. Aguila-Montes*, 553 F.3d 1229, 1233 (9th Cir. 2009); *United States v. Fierro-Reyna*, 466 F.3d 324, 326–27 (5th Cir. 2006).

55. See, e.g., *Fierro-Reyna*, 466 F.3d at 326–30; *United States v. Cervantes-Blanco*, 504 F.3d 576, 578–87 (5th Cir. 2007).

56. See U.S.S.G. §2L1.2, comment. (n.1(B)(iii) (using this definition, but also adding a list of 12 other specific offenses).

57. See 18 U.S.C. §924(e)(2)(B)(i). The statutory definition is likely to receive controlling interpretation by the Supreme Court in *Johnson v. United States*, No. 08-6925 (argued Oct. 6, 2009).

3. Retain and expand departure grounds under the guideline. Some have argued against amendment of the definition of crime of violence under §2L1.2 for fear that a defendant with a particularly serious prior offense would not receive an appropriate enhancement. But the Commission has already responded to such concerns by including a departure provision for those cases in which the applicable offense level is substantially understated (or overstated).⁵⁸ I believe that this provision should be retained.

As Judge Kathleen Cardone, Judge Michaela Alvarez,⁵⁹ and others⁶⁰ have testified, I also believe that the guideline should take account (by departure or other mechanism) of defendants whose illegal return to the United States is not connected to any other criminal activity, but instead based on a desire to reunite with family or some other benign motive.⁶¹ Encouraged departures could also help account for the fact that, for someone with deep ties to this country, deportation is an especially severe sanction.⁶²

I propose that the Commission consider, at a minimum, adding the following language to the guideline commentary encourage such departures:

*There may be cases in which the defendant's motives for reentering the United States are unconnected to any other criminal activity, or where the defendant's ties to family, employment or community in the United States mitigate the reentry offense or make deportation an especially harsh additional sanction. In such cases, a departure may be warranted.*⁶³

58. See U.S.S.G. §2L1.2, comment. (n.7); App. C. amend. 722 (Nov. 1, 2008).

59. Judge Cardone and Alvarez testified at the Austin hearing. A transcript of their testimony is not yet available on the Commission website.

60. See, e.g., Hawkins Statement at 12.

61. See, e.g., *United States v. Galvez-Barrrios*, 355 F. Supp. 2d 958, 960 (E.D. Wis. 2005) (motive for reentry mitigates seriousness of § 1326 offense, supports below-guideline sentence); see generally 1 Wayne R. LaFare, *Substantive Criminal Law* § 5.3(b) (2d ed. 2003) (“Motives are most relevant when the trial judge sets the defendant’s sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives”)

62. See *Costello v. INS*, 376 U.S. 120, 128 (1964) (“deportation is a drastic measure, at times the equivalent of banishment or exile”) (citations omitted).

63. I understand that the Commission is currently considering an additional departure ground to reflect the fact that, due to their status, illegal-immigrant defendants face harsher conditions and receive fewer benefits in prison. I support such a departure ground, and believe that it should apply both in illegal-reentry and other types of cases.

I note that, when the Department of Justice pushed for the addition of an aggravated-felony enhancement in §2L1.2 in 1991, it suggested that circumstances of these sort could support a downward departure.⁶⁴ Nineteen years later, the suggestion remains a sound one.

The combined effect of these revisions would be to simplify greatly the sentencing process in illegal reentry cases, reducing the guidelines for defendants not deserving of more significant punishment while retaining the flexibility necessary for judges to deal with the individual circumstances of each case. I urge the Commission to consider them.

Double Counting, Recency, and Status: The Problems Caused by “Unsupervised” Release of Deported Aliens

Finally, I want to join my colleagues who have decried the double- and triple-counting that §2L1.2 authorizes.⁶⁵ This is an especially troubling problem in border districts like ours, where there are many prosecutions for illegal reentry against defendants who have no other felony convictions, but who reenter the United States repeatedly due to long residence in and ties to this country. For these defendants, the effect of multiple counting of the prior reentry offense can be especially severe, in part because returning to the United States is typically punished both as a new offense and as a violation of supervised release.

In recent years, prosecution trends in the Western District of Texas have led to the arrest of many illegal-reentry defendants with little or no criminal history but significant ties to the United States. Judges are generally lenient in these cases; defendants often receive time-served sentences of less than 6 months’ imprisonment. They also typically receive one year of “unsupervised release,” a term long used in the Western District of Texas and elsewhere on the border to describe a supervised release term with no supervision and the only condition that the defendant not reenter the United States.⁶⁶ These defendants are deported to Mexico soon after sentencing; lacking community or family ties (or even the ability to speak Spanish), they return to the United States, often to reunite with citizen parents, siblings, spouses and children.

When such a defendant is again prosecuted for illegal reentry, he can have the prior reentry conviction counted as many as *six* times:

- (1) to increase the statutory maximum penalty from 2 to 10 years under 8 U.S.C. § 1326(b)(1);

64. See U.S. Dep’t of Justice, Statement of Joe Brown Before the U.S. Sentencing Commission, at 8 (March 5, 1991).

65. See, e.g., Hawkins Statement at 14. Cf. Interim Staff Report at 28–29 (noting concerns regarding double-counting under §2L1.2).

66. See, e.g., *United States v. Garcia-Garcia*, 939 F.2d 230, 231 (5th Cir. 1991).

- (2) to increase the offense level by four under §2L1.2(b)(1)(D);
- (3) to increase the criminal history score by two points under §4A1.1(b);
- (4) to increase the criminal history score by another two points under §4A1.1(d) because the defendant returned to the United States while on supervised release for his reentry first offense;
- (5) to increase the criminal history score by yet another point under §4A1.1(e) because the defendant returned within two years of his release; and
- (6) to revoke the supervised release term, a revocation for which the guidelines recommend a consecutive imprisonment sentence under policy statement §7B1.3(f).⁶⁷

While it is hard to understand why any of this multiple counting is justified,⁶⁸ I believe the least justifiable increased penalties involve supervised release. “Supervised” release is a misnomer when it comes to deported defendants. They receive no supervision at all—no opportunities for training, education programs, drug or alcohol addiction or psychiatric treatment, or any of the other benefits regularly available to U.S.-citizen releasees as they attempt to re-enter society. Deported defendants are simply dropped on the other side of the border and told not to return—even if, as Judge Cardone and Judge Alvarez noted, they have spent virtually their entire lives in the United States, and their family, friends, and coworkers are all in this country. Given the lack of support, the imposition of supervised release in these cases does nothing but establish a basis for additional punishment.⁶⁹ For these reasons, I would urge the Commission to amend the language of §2L1.2 and §5D1.1 to recommend against automatic imposition of “unsupervised” supervised release on aliens facing deportation.

More generally, the Commission could consider one or more of the following measures to alleviate unnecessary multiple counting in illegal reentry and other cases:

67. *See also* U.S.S.G. §5G1.3, comment. (n.3(C)).

68. “Although it is sound policy to increase a defendant’s sentence based on his prior record, it is questionable whether a sentence should be increased twice on that basis.” *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 963 (E.D. Wis. 2005).

69. The threat of additional punishment is not necessary for its potential deterrent effect. Many other punishment threats already perform this purpose. A defendant who returns to the United States after a prior reentry offense faces an increase in the maximum statutory penalty from 2 to 10 years. He faces a significantly increased offense level under §2L1.2(b)(1), and an increased criminal history score under §4A1.1(b) and (e).

- Eliminate either the recency or status points in §4A1.1(d) and §4A1.1(e), or combine them so that a defendant receives no more than 2 points total under these provisions;
- Make §4A1.1(d), §4A1.1(e), and §4A1.2(k) inapplicable to prior convictions for which the defendant receives an offense-level enhancement under §2L1.2(b) or similar provisions (*see, e.g.*, §2K2.1);
- Amend policy statement §7B1.3(f) and the commentary to guideline §5G1.3(c) to remove the requirement that a consecutive sentences be imposed for a federal offense when the defendant is also subject to a federal revocation sentence;
- Add commentary to guideline §5G1.3 and policy statement §7B1.3(f) to suggest that, when a defendant's offense level or criminal history score is increased because of a pending federal supervised release term, any consecutive revocation sentence be adjusted to account for the increased punishment the defendant will serve on the new offense.

Each of these provisions could help alleviate the unfairness associated with multiple-counting of prior convictions.

In closing, I wish to thank the Commission for its commitment to fairness in sentencing and its continuing work to improve the advisory guideline system. For twenty years, the guidelines have had tremendous importance in sentencing in the Western District of Texas and throughout the country, and they continue to be of tremendous importance in the advisory system. The Commission's efforts to improve the guidelines are greatly appreciated by all of us who work with them every day.

**APPENDIX-- PROPOSED GUIDELINE AMENDMENTS CONCERNING BORDER
COURIER CASES¹**

§1B1.8. Use of Certain Information

- (a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

- (b) The provisions of subsection (a) shall not be applied to restrict the use of information:
 - (1) known to the government prior to entering into the cooperation agreement, with the exception of information previously provided by the defendant;
 - (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);
 - (3) in a prosecution for perjury or giving a false statement;
 - (4) in the event there is a breach of the cooperation agreement by the defendant; or
 - (5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).

Commentary

Application Notes:

- 1. *This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for*

¹These proposed amendments are intended only to address matters mentioned in my testimony; they do not resolve all potential application issues under these guidelines.

example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to depart upward. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); e.g., a court may refuse to depart downward on the basis of such information.

2. *Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The Probation Service generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.*
3. *On occasion the defendant will provide incriminating information to the government ~~during plea negotiation sessions~~ before a cooperation agreement has been reached. **If an agreement is reached, the parties may specify in the agreement that this incriminating information will not be used in determining the applicable guideline range.** In the event no agreement is reached, **the Commission intends that** use of such information in a sentencing proceeding ~~is be~~ restricted **by as in** Rule 11(f) (Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (Inadmissibility of Pleas, Plea Discussions, and Related Statements) of the Rules of Evidence.*
4. *As with the statutory provisions governing use immunity, 18 U.S.C. § 6002, this guideline does not apply to information used against the defendant in a prosecution for perjury, giving a false statement, or in the event the defendant otherwise fails to comply with the cooperation agreement.*
5. *This guideline limits the use of certain incriminating information furnished by a defendant in the context of a defendant-government agreement for the defendant to provide information concerning the unlawful activities of other persons. The guideline operates as a limitation on the use of such incriminating information in determining the applicable guideline range, and not merely as a restriction of the government's presentation of such information (e.g., where the defendant, subsequent to having entered into a cooperation agreement, provides such information to the probation officer preparing the presentence report, the use of such information remains protected by this*

section).

6. *Unless the cooperation agreement relates to the provision of information concerning the unlawful activities of others, this guideline does not apply (i.e., an agreement by the defendant simply to detail the extent of his own unlawful activities, not involving an agreement to provide information concerning the unlawful activity of another person, is not covered by this guideline). **However, the fact that the information the defendant provides about others is not relevant or useful does not preclude application of this guideline.***

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

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Commentary

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Application Notes:

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12. *Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved. **The court should not, however, base its approximation on speculative information, uncorroborated statements, or extrapolation unsupported by the totality of the evidence.***

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more

accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

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§3B1.2. Mitigating Role

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Commentary

Application Notes:

1. Definition.—For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).
2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.
3. Applicability of Adjustment.—
 - (A) ~~**Substantially**~~ Less Culpable than Average Participant.—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.

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to

transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.

If a defendant is less culpable than others involved (for example, those who recruited or directed him, or otherwise played a more significant role), the fact that the defendant's participation was integral to the success of the offense does not preclude an adjustment under this guideline.

- (B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 14 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.
- (C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. ~~As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.~~
4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are **plainly** among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. **It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a marijuana shipment, or in a case where an individual was recruited as a courier to transport drugs. It is intended that the downward adjustment for a minimal participant will be used infrequently.**
5. Minor Participant.— Subsection (b) applies to a defendant described in Application Note

3(A) who is less culpable than most other participants, but whose role could not be described as minimal.

6. *Application of Role Adjustment in Certain Drug Cases.*—*In a case in which the court applied §2D1.1 and the defendant’s base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.*

§3E1.1. Acceptance of Responsibility

* * * *

Commentary

Application Notes:

1. *In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:*
 - (a) *truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, ~~or frivolously contests,~~ relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;*

* * * *