

Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs

Kevin Lerman*

Editors' Note: The following Note discusses proposed changes to federal sentencing guidelines. Additions to the guidelines are noted in bolded text and deletions are noted by the use of the strikethrough function.

Introduction	680
I. Guidelines Application to Low-Level Drug-Trafficking Defendants	684
II. Failure to Achieve Working Mitigating Role and Role Cap Guidelines	686
A. The Contours of the Mitigating Role Guideline Remain Unclear to Judges and Many Others Even After Years of Tinkering Amendments	689
B. The Impact of the 2015 Mitigating Role Amendment	689
III. The Guidelines Should Be Amended to Address the Kingpin-Length Sentences Received by Many Low-Level Couriers and Mules	694
A. Targeting Jurisdictional Obstacles	694
1. Geographic Disparity	695
2. Appellate Court Decisions Perpetuate Role-Reduction Disparities	697
B. Courts, Prosecutors, Probation Officers, and Defense Attorneys Rely on Incomplete Information about Drug-Trafficking Organizations' Actual Structures	700
1. Recent Quantitative Findings Tend to Flatten Out Variation Between Defendants	701
2. The Mitigating Role Guideline Fails at Providing Sufficient Clarity and Detail to Sentencing Courts, Prosecutors, and Probation Officers	703
IV. Recommendations for Reform	705

*J.D., University of California, Irvine School of Law, 2016. I am especially thankful to Professor Kaaryn Gustafson and Kurt David Hermansen for their support and guidance. I would also like to thank Mona Lynch, Dan Hanold, and James Fife for their comments on an earlier draft, as well as the faculty and students who participated in the UC Irvine Socio-Legal Studies Workshop on January 29, 2016.

A. Section 3B1.2 Mitigating Role Should Contain a Functional Role Analysis	705
B. Section 2D1.1(a)(5)'s Role Cap Provision Should Include Average Participants, Not Just Minor and Minimal Participants	706
C. Section 2D1.1(b)(5)'s Increase for Methamphetamine Should Exclude Average Participants, Not Just Minor and Minimal Participants	708
D. The Mitigating Role Guideline or the Aberrant Behavior Guideline Should Be Amended to Distinguish the Two	710
E. The Mitigating Role Guideline Should Be Amended with Unequivocal Language to Disavow Indispensability Determinations	712
Conclusion.....	714

INTRODUCTION

Thirty years ago, the Federal Sentencing Commission produced guidelines for drug-trafficking offenses, which calculated mandatory sentences based on the quantity of drugs a defendant could be held responsible for trafficking.¹ The original plan for the drug guidelines was to set the prescribed sentencing range according to some sort of average based on actual sentences given for similar sets of facts.² But while the original sentencing commission developed the first set of guidelines, Congress passed the Anti-Drug Abuse Act of 1986, which imposed severe mandatory minimum penalties for drug-trafficking offenses.³ For the Guidelines to track the newly established mandatory minimums, the Commission (consistent with 1980s war-on-drugs hysteria)⁴ “incorporated [mandatory minimums] into the

1. This was a result of the 1987 U.S. Sentencing Guidelines, which were promulgated following the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551–742 and 28 U.S.C. §§ 991–98 (1987)).

2. The Commission had collected data from a set of 10,500 federal cases. KATE SMITH & JOSÉ A. CABRANES, FEAR OF JUDGING: *SENTENCING GUIDELINES IN THE FEDERAL COURTS* 59 (1998).

3. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of the U.S.C.). While this act came to highly determinative conclusions about drug offenders' profiles, it was passed without the benefit of any hearings or reports related to the act. See Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 3 n.8 (2015) (citing U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 5–6 (2002)).

4. See, e.g., Dave Zirin, *The Death of Len Bias, My Generation's One-Person Shock Doctrine*, THE NATION: DRUG WAR AND DRUG POLICY (Nov. 18, 2013), <http://www.thenation.com/article/Death-Len-Bias-My-Generations-One-Person-Shock-Doctrine/> [<http://perma.cc/WJW2-9787>] (discussing the widely-held belief that mandatory minimums were triggered by Bias's overdose).

Guidelines at their inception.”⁵ The Commission relied on the assumption that a drug defendant’s culpability was meaningfully linked to the amount of drugs she was found responsible for.⁶ Certain quantities were presumptively indicative of kingpin status, and therefore, presumptively warranted kingpin-length sentences.⁷ Further, the first sentencing table was actually set above the mandatory minimum to enable prosecutors to leverage sentencing reductions in exchange for defendants’ guilty pleas (to get credit for accepting responsibility)⁸ and cooperation.⁹ Thus, the severity of drug sentences came both from the assumed link between quantity and elevated status and from the goal of providing additional time for prosecutors to bargain with to get defendants to quickly plead guilty.

While the sentencing table was pegged to high-level kingpins, kingpins have largely failed to show up for the full incarceration¹⁰ feast.¹¹ Instead, since the Guidelines went into effect, federal prisons have been increasingly populated with

5. STITH & CABRANES, *supra* note 2, at 60; Saris, *supra* note 3, at 5 n.24. The Commission failed to rely on past sentencing practices in any systematic way. While there was a plan to linking sentencing to the survey of past sentencing data, sentences were elevated for many offenses including drug offenses. STITH & CABRANES, *supra* note 2, at 60–61; *see also id.* at 68–69.

6. Notably, whether the offense involves a drug conspiracy, money taken in a bank robbery, or a number of unauthorized immigrants in an unlawful immigration scheme, the “most common specific offense characteristic found in the Sentencing Guidelines is *quantity*.” STITH & CABRANES, *supra* note 2, at 68–69. Yet, the Commission has neither stated nor explained “why these quantifiable differences . . . are *appropriate* measures of the extent of individual culpability, or why they are more significant than other sentencing factors that receive less weight in Guidelines sentencing calculations.” *Id.* at 69.

7. Commentators have noted:

The apparent intent of the [mandatory minimum legislation] was to increase sentences on *major* drug offenders. As Senator Robert Byrd stated: [¶] [A major drug offender] must know that there will be no escape hatch through which he can avoid a term of years in the penitentiary. . . . We divide these major drug dealers into two groups for purposes of fixing what their required jail terms shall be: For the kingpins—the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction, the minimum is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail . . . a minimum of 5 years for the first offense.

Barbara Meierhoefer, *The Severity of Drug Sentences: A Result of Purpose or Chance?*, 12 FED. SENTENCING REP. 34, 34 (1999) (quoting 132 CONG. REC. § 14301 (daily ed. Sept. 30, 1986) (statement of Sen. Byrd)).

8. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2016) [hereinafter U.S.S.G.].

9. Saris, *supra* note 3, at 6; U.S.S.G., *supra* note 8, at § 5K1.1.

10. *See, e.g., Jailhouse Nation: How to Make America’s Penal System Less Punitive and More Effective*, THE ECONOMIST (June 20, 2015), <http://www.economist.com/news/leaders/21654619-how-make-americas-penal-system-less-punitive-and-more-effective-jailhouse-nation> [https://perma.cc/HYQ7-QZAN].

11. The Commission estimates the most culpable drug traffickers, including high-level suppliers and importers, and managers and supervisors account for only 10.9% and 1.1% of drug cases, respectively. U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 167 (2011) [hereinafter MANDATORY MINIMUM REPORT], <http://www.uscc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/reportcongress-mandatory-minimum-penalties-federal-criminal-justice-system> [https://perma.cc/5EK6-PBXV].

kingpins' underlings: couriers,¹² mules,¹³ street-level dealers, and others.¹⁴ This Note presents modest proposals to roll back extremely harsh and inconsistent sentencing practices that remain in effect for drug enterprise underlings.

In many ways, Congress and the Commission were wrong to assume that quantity would be a reliable indicator of culpability. In the years since, the Commission has suggested, “[M]andatory minimum penalties for drug offenses may apply *more broadly* than Congress may have originally intended.”¹⁵ The Attorney General’s office reflected this sentiment through its nationwide policy shift away from alleging mandatory minimum triggering drug quantities against low-level drug-trafficking defendants.¹⁶ But since the quantity-based guidelines are still pegged to the mandatory minimums, the Guidelines fail where drug-quantity-based calculations impose kingpin culpability levels on couriers and mules.

The Guidelines and drug-trafficking statutes have left courts, prosecutors, and probation officers ill equipped to deal with some of the most commonly seen drug trafficking defendants, namely, those who are recruited—and often exploited—to handle the riskiest part of the enterprise: the transportation.

This Note proposes significant fixes to one of the largest “classes” of federal defendants, drug couriers and drug mules.¹⁷ This class has suffered a large proportion of the impact of federal quantity-based guidelines and mandatory minimum sentences. Drug couriers and drug mules who carry drugs in their vehicles or on or in their person make up a substantial portion of federal drug offenders.¹⁸

12. The Commission defines a courier as a person who “[t]ransports or carries drugs using a vehicle or other equipment.” *Id.*

13. A mule is defined as a person who “[t]ransports or carries drugs internally or on his or her person.” *Id.*

14. A street-level dealer is one who “[d]istributes retail quantities (less than one ounce) directly to users.” *Id.* While this Note focuses on mules and couriers, other low-level players, such as street-level dealers and brokers, are included in the ranks of vulnerable drug-trafficking actors facing treacherous sentencing exposure. *See also* Human Rights Watch, *An Offer You Can’t Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013), <https://www.HRW.org/report/2013/12/05/Offer-You-Cant-Refuse/How-US-Federal-Prosecutors-Force-Drug-Defendants-Plead> [<https://perma.cc/C589-CWTC>]. Notably, the Mandatory Minimum Report indicates that “[a]mong those offenders who received relief from the mandatory minimum penalty by providing substantial assistance to the government, the Commission’s analysis shows that offenders who performed high-level functions generally obtained relief for substantial assistance at higher rates than offenders who performed low-level functions.” MANDATORY MINIMUM REPORT, *supra* note 11, at 171.

15. MANDATORY MINIMUM REPORT, *supra* note 11, at 169 (emphasis added).

16. Memorandum from Att’y Gen. Eric Holder to the U.S. Attorneys and Assistant Attorney General for the Criminal Division, (Aug. 12, 2013), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-pon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [<https://perma.cc/LS6H-9AR8>].

17. More than half of drug defendants (fifty-three percent) were placed in Criminal History Category I, signifying that they had minor or no criminal history. “And only 6% of drug-trafficking defendants could be classified as managers or leaders, *i.e.* individuals occupying the highest rungs of a drug enterprise.” *United States v. Leitch*, No. 11-CR-00609 (JG), 2013 WL 753445, at *11 (E.D.N.Y. Feb. 28, 2013) (Gleeson, J.).

18. The Commission estimates couriers alone account for twenty-three percent of drug-trafficking cases. MANDATORY MINIMUM REPORT, *supra* note 11, at 167–68, fig. 8–9.

But according to the Commission's own research and given reputable attacks on the drug war, couriers and mules should not fill federal prisons. Not only is it critical to right the wrongs of quantity-based guidelines to remedy unjust and disparate sentences, but it will also help alleviate woeful overcrowding in federal prison, while also saving scarce resources.¹⁹

Section I of this Note lays the groundwork for analyzing courier and mule sentencing by describing relevant sentencing guidelines and illustrating what is at stake for low-level drug-trafficking defendants if they do not receive reductions for minor or minimal role. Section II illustrates the unsuccessful attempts to achieve working guidelines for couriers and mules. Quantity-based sentencing was based on mistaken Congressional assumptions that lengthy sentences would reach high-level drug traffickers. Commission research places couriers and mules at the lowest levels of drug-trafficking hierarchies. Yet, the Mitigating Role Guideline,²⁰ despite repeated tinkering, lends itself to inconsistent interpretations and ideological shaping that is out of sync with Congress's intent and empirical research. Section II describes the 2015 Amendment and argues that the application will remain troubled.

Section III outlines alternative considerations for future amendments that will target low-level couriers and mules. These include analyzing jurisdictional obstacles, examining application disparity between geographic regions, discussing the failure of appellate decisions to keep pace with guideline amendments, and critiquing assumptions by all actors involved in sentencing drug defendants, including courts, probation officers, and defense attorneys.

Finally, Section IV proposes several solutions to the inconsistent, overly severe regime described in Sections I–III. First, Role Cap, Section 2D1.1(a)(5),²¹ should be extended to average participants in addition to minor and minimal participants. This will lessen the impact for low-level defendants on the cusp of receiving mitigating role adjustments. Second, and similarly, Section 2D1.1(b)(5)'s²² increase for methamphetamine should only apply to defendants receiving aggravating role adjustments. Third, the Mitigating Role Guideline, Section 3B1.2,²³ should be amended to contain a functional role analysis. This will encourage more consistent application of the guideline and will permit meaningful appellate review for role denials. Fourth, the Mitigating Role Guideline and the Aberrant Behavior Guideline²⁴ should be amended to disentangle the two. This will prevent judges from conflating aberrancy and role factors. The two analyses should be expressly separated by probation officers, prosecutors, defense attorneys, and sentencing courts. Finally, the Mitigating Role Guideline should be amended with unequivocal

19. According to the Bureau of Prisons, the average yearly cost per inmate in 2014 was \$30,619.85. Dep't of Justice, Bureau of Prisons, Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 12321, 12523 (Mar. 9, 2015).

20. U.S.S.G., *supra* note 8, at § 3B1.2.

21. *Id.* at § 2D1.1(a)(5).

22. *Id.* at § 2D1.1(b)(5).

23. *Id.* at § 3B1.2.

24. *Id.* at § 5K2.20.

language to overrule “indispensability” jurisprudence. Case law should no longer permit judges to deny mitigating role adjustments on a vague notion of indispensability to a drug-trafficking operation. Doing so is arbitrary and conflates role analysis with basic causation analysis necessary for every conviction.

I. GUIDELINES APPLICATION TO LOW-LEVEL DRUG-TRAFFICKING DEFENDANTS

Even though the Guidelines are technically advisory under *Booker*,²⁵ they remain the starting point for sentencing calculations.²⁶ And districts’ practices of closely following the Guidelines remain deeply institutionalized.²⁷

Courts calculate guideline sentences in drug cases by first calculating a quantity-based “base offense level” under Section 2D1.1.²⁸ If the quantity-based offense level is between thirty-two and thirty-eight, defendants are eligible for an additional reduction under Section 2D1.1(a)(5)’s Role-Cap provision as long as the court grants a mitigating role reduction (described below). The main text of the mitigating role guideline provides:

Section 3B1.2. Mitigating Role:

Based on the defendant’s role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels.²⁹

Courts then apply relevant adjustments to arrive at an “adjusted base offense level” or “total offense level.” The mitigating role adjustment is critical in courier and mule cases because it triggers a cascade effect that greatly decreases the kingpin-quantity-based guidelines sentencing range. If a defendant can show she is “substantially less culpable than the average participant,” then she is eligible for a two-, three-, or four-level reduction from the calculated offense level.³⁰ Since the burden for seeking an adjustment falls on the party seeking it, the burden falls on defendants, making it even more difficult for low-information defendants to prove

25. *United States v. Booker*, 543 U.S. 220, 245 (2005).

26. *See Gall v. United States*, 552 U.S. 38, 49 (2007) (noting that district courts “should begin all sentencing proceedings by correctly calculating the applicable Guidelines range . . . [a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark”) (citation omitted).

27. Mona Lynch & Marisa Omori, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court*, 48 *LAW & SOC. REV.* 411, 419–21 (2014). “As a result, the underlying federal justice institutions are much more massive and entrenched than they were prior to the Guidelines era, making them less pliable.” *Id.* at 441.

28. U.S.S.G., *supra* note 8, at § 2D1.1.

29. *Id.* at § 3B1.2.

30. *Id.* at § 3B1.2 Comment 3(a).

they qualify. If the offense involved the importation of methamphetamine, the mitigating role adjustment then *deactivates* an otherwise applicable two-level increase under Section 2D1.1(b)(5).³¹

Once an offense level is calculated, courts assign criminal history points by calculating a defendant's criminal history.³² The adjusted base offense level and the criminal history category are plotted on a two-dimensional sentencing table with offense levels on the vertical axis and the criminal history level on the horizontal axis.³³ Where the offense level and criminal history intersect, the table lists ranges of months, which amount to "guideline sentences."³⁴

Table 1 demonstrates the offense-level calculations for two identical cases: one in a mitigating-role-granting court, the other in a mitigating-role-denying court. In the example, two defendants plead guilty to importing five kilograms of methamphetamine under 21 U.S.C. §§ 960(a)(1) and (b)(1)(H), which results in a base offense level of thirty-eight under U.S.S.G. Section 2D1.1(c).³⁵ With minor role, the defendant's base offense level is reduced by four points under Section 2D1.1(a)(5)'s role-cap proviso, she receives a two-point minor role adjustment under Section 3B1.2, and is not subject to a two-point increase for methamphetamine under Section 2D1.1(b)(5). After other common sentencing reductions,³⁶ the resulting offense level is twenty-three. In contrast, without a minor role reduction, the other defendant does not receive the Role Cap adjustment and she is penalized under the Methamphetamine Importation Guideline. There is a net difference of eight points between the two. A total offense level of twenty-three results in a sentencing range of 46–57 months; a total offense level of thirty-one yields a range of 108–135 months. Thus, there is a difference of sixty-two months at the low ends and seventy-eight months at the high ends for the exact same conduct. This difference relies on whether a courier carries her burden of showing she is substantially less culpable than the average participant. This is a very difficult task for couriers who often only know their recruiter by an alias.

31. *Id.*

32. *See id.* at ch. 4.

33. *See id.* at 420.

34. *Id.*

35. *See id.* at § 2D1.1(c) (depicting the Drug Quantity Table, which sets offense levels based on the quantity of drugs involved in the offense).

36. *See infra* notes 37–38.

Table 1: Methamphetamine Importation with and Without Role

Minor Role Adjustment		No Role Adjustment	
Base Offense Level (BOL)	38	Base Offense Level (BOL)	38
BOL Role-Cap [§ 2D1.1(a)(5)]	34	BOL Role-Cap [§ 2D1.1(a)(5)]	N/A
Acceptance of Responsibility	-3	Acceptance of Responsibility	-3
Minor Role	-2	Average Role	0
Methamphetamine Importation	N/A	Methamphetamine Importation	+2
Safety Valve ³⁷	-2	Safety Valve	-2
Fast Track ³⁸	-4	Fast Track	-4
Resulting Offense Level	23	Resulting Offense Level	31
Criminal Hist. Category I		Criminal Hist. Category I	
Guideline Range:		Guideline Range:	
46-57 months		108-135 months	

Thus, in this example, a difference of about five years to six-and-a-half years hinges on the mitigating role determination. While judges have discretion to depart or vary from the guideline range, mitigating role causes their departure or variance to begin at a vastly different place, making denial devastating.

II. FAILURE TO ACHIEVE WORKING MITIGATING ROLE AND ROLE CAP GUIDELINES

In 2014, U.S. Sentencing Commission Chair Hon. Patti B. Saris cited couriers and mules—without qualification—as examples of defendants who qualify for mitigating-role adjustments.³⁹ The Sentencing Commission’s research has placed them at the bottom of the drug-trafficking-organization role-culpability hierarchy.⁴⁰ In 2002, the Commission issued a report to the Congress on the structure of cocaine-trafficking organizations and the effect of that empirical data on sentencing for drug offenses.⁴¹ Since then, the Commission has constantly maintained the view

37. See 18 U.S.C. § 3553(f); U.S.S.G., *supra* note 8, at §§ 2D1.1(b)(17), 2D1.11(b)(6), 5C1.2. Section 3553(f)(1)–(5) and Guideline Section 5C1.2 allow some defendants relief from statutory minimum sentences if they have a limited criminal history, did not use violence in the offense, did not harm anyone in the offense, did not have an aggravated role, and underwent a debrief with the government.

38. Fast Track is an early disposition program used in some jurisdictions with the goal of preserving prosecutorial resources in exchange for defendants waiving certain trial rights, accepting responsibility, and pleading guilty. See U.S.S.G., *supra* note 8, at § 5K3.1 (“Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.”).

39. Saris, *supra* note 3, at 6.

40. See, e.g., MANDATORY MINIMUM REPORT, *supra* note 11, at 166–67.

41. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY at 36 (May 2002) [hereinafter COCAINE SENTENCING REPORT], http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf [https://perma.cc/8PET-Q7NY].

that couriers and mules are acting out “less serious functions.”⁴² In one study, the Commission listed couriers and mules as eighth and ninth out of nine categorical roles listed in descending order of culpability.⁴³ Similarly, another study placed couriers and mules at thirteenth and fourteenth in an eighteen-level hierarchy of active participants in drug-distribution conspiracies, which is in the bottom third of participants.⁴⁴

But across the United States, many judges ignore the empirical data, and neither the guidelines, nor the courts of appeal impede them. In the Ninth Circuit, which handles some twenty-one percent of the Country’s drug-trafficking cases,⁴⁵ and the Fifth Circuit, which handles another eighteen percent,⁴⁶ mitigating role is regularly denied by some judges on facts that qualify for maximum role reductions in other parts of the country. For years, couriers and mules had a near-equal chance of getting charged under mandatory minimums as not.⁴⁷ This difference—in a system seeking to reduce disparity between similar offenders—was very alarming. While this radical difference in charging and convictions for the same functional role may have been lessened by Attorney General Eric Holder’s 2013 Memorandum,⁴⁸ getting a defendant “out of the mandatory minimum frying

42. *Id.* at 36–37.

43. MANDATORY MINIMUM REPORT, *supra* note 11, at 166–67, 173, fig. 8-12.

44. COCAINE SENTENCING REPORT, *supra* note 41, at C-3, tbl. C1.

45. In Fiscal Year 2013, the Ninth Circuit had over 21% of the countries’ drug trafficking cases. U.S. SENTENCING COMM’N, 2013 DATAFILE USSCFY13 (Unless otherwise specified, when referring to Commission statistics, specific years refer to the “fiscal years.”). In 2014, the Southern District of California *alone* had 1,494 (seven percent) of the country’s 21,323 drug trafficking cases. *See* U.S. SENTENCING COMM’N, FISCAL YEAR 2014 GUIDELINE SENTENCES, CALIFORNIA, SOUTHERN, http://www.USSC.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/stats_CAS.pdf [<https://perma.cc/H8CZ-FWWT>]; U.S. SENTENCING COMM’N, FISCAL YEAR 2014 GUIDELINE SENTENCES, NAT’L DATA, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/stats_Nat.pdf [<https://perma.cc/ZC7S-3CRB>].

46. In 2013, the Fifth Circuit had over eighteen percent of federal drug trafficking cases. U.S. SENTENCING COMM’N, 2013 DATAFILE USSCFY13.

47. MANDATORY MINIMUM REPORT, *supra* note 11, at 167 (“Only two functions—Courier and Mule—were convicted of an offense carrying a mandatory minimum penalty in less than half of the cases (49.6% and 43.1%, respectively).”).

48. The Attorney General instructed prosecutors to avoid charging mandatory-minimum-activating charges against “certain non-violent low-level drug offenders.” Holder, *supra* note 16, at 1. The Attorney General’s 2013 memorandum was issued following the Supreme Court’s holding in *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013), that “[f]acts that increase the statutory mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.” As such, the Attorney General instructed federal prosecutors not to use charging language that would trigger the mandatory minimums for defendants who (1) could not be shown to have used violence or committed an offense involving minors or death or serious bodily injury; (2) were not organizers, leaders, managers or supervisors; (3) did not have significant ties to drug traffickers; and (4) did not have significant criminal history. Holder, *supra* note 16, at 2.

pan” still only gets her “into the Guidelines fire.”⁴⁹ For couriers and mules, a mitigating role adjustment is the only way to avoid getting burned.

The quantity-based guidelines are problematic for many reasons, and require large overhauls.⁵⁰ Quantity-based guidelines for drug offenses were never linked to the heartland of district court sentences.⁵¹ Drug-trafficking guideline ranges have been criticized for not being based on empirical data, Commission expertise, or the actual culpability of defendants.⁵² As authors Kate Stith and José Cabranes have stated, while the Commission started with the goal of basing the guidelines on past sentences, it ultimately failed to do so in “*any systematic way*.”⁵³ Instead, the Guideline ranges were pegged to mandatory minimum sentences enacted in 1986, two years after the Sentencing Reform Act.⁵⁴

In the right political climate, the low-level defendants discussed here will be better served by a system that takes them out of the quantity-based paradigm altogether.⁵⁵ So will society be better served if we implement evidence-based practices based on empirical data rather than tough-on-crime political stances. For now, the subject guidelines require immediate fixes to ensure existing adjustments are given more broadly and more consistently. Without intervention, some judges, circuit courts, and U.S. Attorneys’ Offices, will perpetuate outmoded protocols that penalize couriers and mules with kingpin calculations. Circuits continue to affirm mitigating role denials even where facts indicate that defendants are situated on the lowest rungs of drug-smuggling hierarchies.⁵⁶

49. Memorandum Explaining a Policy Disagreement with the Drug Trafficking Offense Guideline at 2, *United States v. Diaz*, No. 11-CR-00821-2 (JG), 2013 WL 322243, at *9, *18 (E.D.N.Y. Jan. 28, 2013) (Gleeson, J.) [hereinafter *Diaz Memorandum*].

50. *See, e.g.*, Smarter Sentencing Act, S. 502, 114th Cong. (2015). The SSA had bipartisan support. Among its goals, it aimed to reduce over-criminalization.

51. Before the passage of the ADAA, the guideline ranges were intended to be based an average or heartland of typical sentences. *See* Saris, *supra* note 3, at 5 n.24. But the mandatory minimums made this virtually impossible, so the empirical data collected for this purpose was discarded, and the sentencing table was instead linked to the arbitrarily created mandatory minimums.

52. *Diaz Memorandum*, *supra* note 49, at 2.

53. STITH & CABRANES, *supra* note 2, at 60 (citation omitted).

54. *See* Sentencing Reform Act, *supra* note 1; Anti-Drug Abuse Act, *supra* note 3.

55. *See* Dan Honold, *Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 HARV. J. ON LEGIS. 389, 405–07 (2014). Hanold argues that functional role analysis should be built directly into § 2D1.1(a)(5) so that role is prioritized over quantity-based analysis. He argues that [b]ecause quantity improperly aggregates cases, no amount of offense level tweaking will lead to just results over the long run of quantity-based sentencing. Role-based sentencing, on the other hand, has the potential to achieve just results in many cases, given that the offense levels are properly adjusted to reflect societal attitudes towards a given role.

Id. at 407. Similarly, others have argued for a more limited offense level role cap. *See* Mark Osler, *More Than Numbers: A Proposal for Rational Drug Sentences*, 19 FED. SENTENCING REP. 326, 326–28 (2007).

56. *See* PROBATION OFFICERS ADVISORY GROUP TO THE UNITED STATES SENTENCING COMMISSION, Letter to the Honorable Patti B. Saris, at 4 (Mar. 3, 2015) [hereinafter *Letter to Saris*] (discussing the circuit split in the application of mitigating roles).

A. The Contours of the Mitigating Role Guideline Remain Unclear to Judges and Many Others Even After Years of Tinkering Amendments

In 2010, the Commission surveyed district court judges on their perception of the Mitigating Role Guideline.⁵⁷ A total of 639 judges responded;⁵⁸ 66% agreed that “[t]he distinction between ‘minor’ and ‘minimal’ participant should be explained more clearly.”⁵⁹ Since then, no explanation has been offered, meaning that judges are still unclear on the standard. As the 2015 Mitigating Role Amendment took effect, the U.S. Probation Officers Advisory Group did not understand the purpose of the guideline.⁶⁰ Since judges rely on probation officers to calculate the applicable guidelines for cases, the probation officers’ confusion is likely to be reflected by the sentencing courts.

Recent amendments have tried unsuccessfully to clarify the Mitigating Role Guideline’s purpose and standard.⁶¹ Even with the 2015 Mitigating Role Amendment in place, judges still lack guidance as to whether they can compare hypothetical participants neither party knows about.⁶² The cases cited by the Commission for the Amendment are not the most recent circuit cases.⁶³ The most recent cases appear more permissive of district courts’ engagement in hypothetical role analysis.⁶⁴ Even though federal courts have almost thirty years of experience with the Guidelines, Commission amendments still have a tenuous and unclear relationship with circuit law. The 2015 Mitigating Role Amendment presents no exception, leaving courts of appeal to contemplate the basic effects of the amendment on current jurisprudence on the prior version of the guideline.

B. The Impact of the 2015 Mitigating Role Amendment

On the heels of the Commission’s incremental 2014 “Drugs-Minus-Two” Amendment,⁶⁵ the 2014–2015 amendment cycle produced an amendment to the

57. U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf [<https://perma.cc/2WFT-3VYT>].

58. *Id.* at 3.

59. *Id.* at 14.

60. *See* Letter to Saris, *supra* note 56, at 3.

61. *See id.*

62. *See, e.g.*, Appellant’s Opening Brief at 14, *United States v. Elenes*, 591 F. App’x 562 (2015) (No. 14-50156) (denying minor role in part because the defendant’s role exceeded that of a hypothetical drug-smuggling-compartment welder).

63. *See* U.S.S.G., *supra* note 8, supp. to app. C, amend 794, at 117.

64. *See* Appellant’s Opening Brief at 14, *United States v. Elenes*, 591 F. App’x 562 (2015) (No. 14-50156).

65. The Drugs-Minus-Two Amendment came about following Commission research showing that drug trafficking sentences were overly punitive guidelines. The Amendment gave a slight reduction for nearly all levels of drug defendant involvement. *See* U.S.S.G., *supra* note 8, app. C. Notably, it reduces—with exceptions—a broad range of drug trafficking sentences, but had no particularized impact on which defendants qualify for a mitigating role reduction. *Id.*

Mitigating Role Guideline's application notes.⁶⁶

As amended, Guideline 3B1.2's application notes provide in part:

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 **in the criminal activity**.

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 the ~~concocted~~ criminal activity ~~is not precluded from consideration for~~ **may receive** an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose ~~role~~ **participation** 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~~ **may receive** 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

(C) Fact-Based Determination.— The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;**
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity; and**
- (iii) the degree to which the defendant stood to benefit from the criminal activity.**

4. Minimal Participant.— Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in **the criminal** ~~concocted~~ 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

66. *Id.* at amend. 794.

of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.

5. Minor Participant.— Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants **in the criminal activity**, 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.⁶⁷

While the 2015 Mitigating Role Amendment announced desirable policy preferences, it failed to address principle concerns of Federal and Community Defenders (who spoke on behalf of court-appointed defense attorneys throughout the nation)⁶⁸ and U.S. Probation Officers (whose views are relied on heavily—often followed verbatim—by district courts).⁶⁹ Unfortunately, while the U.S. Probation Department and the Department of Justice participate directly in Commission operations, the Commission has been deprived of direct participation of critical stakeholders, including Federal Defenders.⁷⁰ This imbalanced structure may have played a part in maintaining the Commission's severe, mandatory sentencing structure from the time of the Guidelines' inception until almost twenty years later when the Guidelines were rendered advisory by the Supreme Court's decision in *Booker*.⁷¹ Critical to Defenders' recommendations for the 2015 Amendment was a request that an amendment “clearly delineate which functional roles should generally be considered mitigating roles.”⁷² Such delineation would lessen the amendment's susceptibility to vast differences between how different individuals in the system interpret the meaning of “average” drug traffickers. It would also follow the same structure as aggravating role adjustments, which are based on the defendants' functional roles.

67. U.S.S.G., *supra* note 8, at § 3B1.2.

68. See Public Hearing on Proposed Amendments to “Mitigating Role,” “Single Sentence Rule,” and “Jointly Undertaken Criminal Activity” Before the U.S. Sentencing Comm'n, 1 (Mar. 12, 2015) [hereinafter Mitigating Role Statements] (statement of Jon Sands, Fed. Def. for the Dist. of Ariz. on behalf of the Fed. and Community Def.'s).

69. See Letter to Saris, *supra* note 56.

70. Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PENN. L. REV. 1631, 1642–43 (2012) (explaining that the Commission operates without the transparency imposed on other government agencies, and without any counterweight to ever-present ex-officio Justice Department commentary and ex parte communication). Baron-Evans and Stith also argue that “[w]ithout enforceable constraints, the Commission failed to take into account the views and evidence presented by the judiciary, the defense bar, and others who advised against its proposals,” and that the Commission “promulgated amendments materially different from those originally proposed for comment, to which stakeholders had no opportunity to respond.” *Id.* (quotations omitted).

71. See *id.* at 1646–48; *United States v. Booker*, 543 U.S. 220, 245 (2005).

72. Mitigating Role Statements, *supra* note 68.

While the defense bar's views did not make the final cut of the amendment, the U.S. Probation Officers Advisory Group (POAG), with signatories from all circuits, was equally unsatisfied with the text of the final amendment. POAG indicated the following:

The purpose of the amendment appeared vague. Is the intent of the amendment to expand the analysis of the defendant's conduct? It is unclear when determining if the reduction applies if the analysis should include a comparison of similar/typical offenses or the defendant's role within the charged offense. POAG believes limiting the assessment to the defendant's role in the "criminal activity" rather than his/her activity in the typical crime, does not rectify the disparity across the country in how the mitigating role adjustment is applied, and it may even have the reverse effect by creating more ambiguity. POAG believes the application of the mitigating role adjustment will continue to be applied inconsistently based on the interpretation in each district or circuit. *POAG recommends the Commission look at case law from the circuits that apply the adjustment infrequently to ascertain the barriers that may inhibit application.* This may offer insight and guide the Commission in developing expanded language or formulating examples in the application notes. Much more than a two level reduction hinges on minor role. When considering the mitigating role cap in USSG §2D1.1, there is a potential swing of seven offense levels⁷³ for defendants that are categorically denied mitigating role in one district and given the adjustment in another. POAG agrees §3B1.2 needs to be revised because it is one of the most inconsistently applied sections across the country.⁷⁴

Since judges rely heavily on probation officers to calculate applicable guidelines for a case, probation officers' opinions are a bellwether of judicial understanding.⁷⁵ Probation officers are a powerful force in the sentencing process. Their presentence reports serve as a starting point for offense-level calculation and largely define the "playing field" for formal sentencing discussions.⁷⁶ At sentencing, some judges go so far as to read directly from probation officers' undisclosed sentencing recommendations.⁷⁷ Critically, if probation officers are confused by the guideline, it is likely that confusion will percolate up to the judges who rely on probation officers' reports.

73. The potential swing can be even greater than when minimal role adjustments stand to reduce a base offense level from up to thirty-eight to thirty-two under §§ 2D1.1(a)(5) and/or 2D1.1(b)(5) is "deactivated" by mitigating role for a methamphetamine offense that would otherwise trigger § 2D1.1(b)(5).

74. See Letter to Saris, *supra* note 56, at 3–4 (emphasis added).

75. Baron-Evans & Stith, *supra* note 70, at 1638 n.29, 1692.

76. At the 2015 Annual Sentencing Commission training, Commission Vice Chair Judge Charles Breyer asked during a plenary session for the hundreds of probation officers and judges to raise their hands if they have ex parte presentence meetings, and well over half of the room raised their hands. (Observed by the author).

77. *Id.*

Other advocates and stakeholders downplayed the potential impact of the Amendment. At the 2015 U.S. Sentencing Commission Annual Training Seminar, District of Washington, D.C. Assistant U.S. Attorney, Arvind Lal predicted little change from the 2015 Amendment because he believes courts are largely applying mitigating role reductions as they should be.⁷⁸ District of Puerto Rico Judge, Gustavo Gelpí, in the same panel, noted that First Circuit Court of Appeals precedent gives judges extensive leeway to deny role adjustments—for example, based on the quantity of the drugs.⁷⁹ Indeed, groups with similar values have expressed different expectations about the proposed amendment’s desirability.⁸⁰ This is problematic. All parties to criminal cases must mutually understand the guideline for it to be effective. The guideline is not just critical at the sentencing hearing. Prosecutors and defense attorneys must also understand mitigating role starting from their plea negotiations (to inform their risk calculi regarding trial).

As discussed throughout this Note, the Mitigating Role Guideline is plagued by severe application problems, which the 2015 Amendment fails to adequately address. Unlike the 2014 Drugs-Minus-Two and earlier crack cocaine amendments, the 2015 Mitigating Role Amendment was not buttressed by substantial research outlining the problem the Amendment is aimed at addressing. Rather, the 2015 Amendment—focusing on two circuit rules, which were not the only possible options—reads more like a mere cosmetic adjustment:

The amendment generally adopts the approach of the Seventh and Ninth Circuits, revising the commentary to specify that, when determining mitigating role, the defendant is to be compared with the other participants “in the criminal activity.” Focusing the court’s attention on the individual defendant and the other participants is more consistent with the other provisions of Chapter Three, Part B.⁸¹

Thus, following the Amendment, courts are told to limit their comparisons to a smaller universe of participants in the offense, and are given a sprinkling of additional factors to consider.⁸² But the First Circuit—singled out by the Amendment—has already ignored the Amendment in *United States v. Carela*.⁸³ In

78. U.S. SENTENCING COMM’N, Panel, *Role in the Offense*, Sept. 17, 2015 (observed by the author) (notes on file with the author).

79. *Id.*

80. Federal and Community Defenders expressed “reservations” about whether minor tweaks in guideline language would achieve the amendment’s goal. *See* Mitigating Role Statements, *supra* note 68. Meanwhile, for example, Families Against Mandatory Minimums, professed overall acceptance for the proposal. *See* Families Against Mandatory Minimums, Comment Letter on Proposed Amendment No.5-Mitigating Role to the Sentencing Guidelines at 2–3 (Mar. 18, 2015) <http://www.usc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/FAMM.pdf> [<https://perma.cc/R6YP-VUVN>].

81. U.S.S.G., *supra* note 8, supp. to app. C, amend 794, at 117.

82. *Id.* (noting that the factors include: “(i) the degree to which the defendant understood the scope and structure of the criminal activity; (ii) the degree to which the defendant participated in planning or organizing the criminal activity; and (iii) the degree to which the defendant stood to benefit from the criminal activity.”).

83. *See* 805 F.3d 374 (1st Cir. 2015).

Carela, the First Circuit continued the very test the Commission disavowed in the 2015 Amendment.⁸⁴ Where the Commission expressly clarified the Seventh/Ninth Circuit rule was the correct one, the First Circuit flaunted its incongruent rule days after the Amendment became law.⁸⁵ Yet, even if courts make an effort to follow the Amendment, serious application problems remain unaccounted for and unaddressed.

III. THE GUIDELINES SHOULD BE AMENDED TO ADDRESS THE KINGPIN-LENGTH SENTENCES RECEIVED BY MANY LOW-LEVEL COURIERS AND MULES

In drug cases, the mitigating role adjustment (when granted) ostensibly minimizes the impact of the kingpin-quantity-based guidelines on low-level defendants. But these low-level defendants are still vulnerable to the Guidelines' brutally long sentences. To make matters worse, defendants with the lowest involvement often face harsher consequences than others with greater involvement because—in a system built around cooperation—these pawns of the drug conspiracies have no information to bargain with.⁸⁶ Worse yet, many—lacking experience in the criminal justice system—simply spill their guts at the wrong time.⁸⁷ If a defendant invokes her *Miranda* rights upon arrest, there is a greater chance she will get more credit for information she actually has if it is turned over directly to the prosecutor who handles her case.⁸⁸ Plus, if she lacks knowledge of the drug trafficking organization, a defendant cannot prove she is substantially less culpable than the average participant. Thus, without such proof she will not even get a mitigating role reduction—let alone a reduction for cooperation.

A. Targeting Jurisdictional Obstacles

First, the Commission should amend the mitigating role guideline by directly targeting obstacles in jurisdictions that tend not to apply it.⁸⁹ As discussed above, the same set of facts judged in different federal jurisdictions can result in wildly divergent sentencing outcomes. This results from a variety of factors enabled by an insufficiently clear guideline. Other guidelines are not activated or deactivated until

84. *Id.* at 384 (describing that for a defendant to qualify for a minor role reduction, “he must satisfy a two-pronged test: (1) ‘he must demonstrate that he is less culpable than most of those involved in the offenses of conviction;’ and, (2) ‘he must establish that he is less culpable than most of those who have perpetrated similar crimes.’”).

85. Although the court decided *Carela* on November 4, 2015, *id.* at 374, the Amendment took effect on November 1, 2015. U.S.S.G., *supra* note 8.

86. See MANDATORY MINIMUM REPORT, *supra* note 11, at 171 (“[O]ffenders who performed high-level functions generally obtained relief for substantial assistance at higher rates. The highest rates of relief based on substantial assistance were for Manager (50.0%) and Organizer/Leader (39.1%). The lowest rates of relief based on substantial assistance were for Mule (19.5%), Street-Level Dealer (23.4%), and Courier (27.1%).”).

87. See Human Rights Watch, *supra* note 14, at 73.

88. See *id.* (“The disadvantage low-level drug offenders face compared to those at a higher level is called the ‘cooperation paradox.’”).

89. See Letter to Saris, *supra* note 56, at 3.

mitigating role is granted, so most courier defendants face a treacherous “cliff” at the time of sentencing. While mitigating role reduces the offense level by only two to four points, it has the potential to trigger substantial additional reductions through Role Cap and the Methamphetamine Enhancement.⁹⁰

1. Geographic Disparity

Disparate application of mitigating role adjustments arbitrarily elevates sentences for similarly situated defendants in different geographic regions. Sixteen years ago, a law review comment by former Parole Commission case analyst, Timothy Tobin, illustrated federal courts’ disparate, unpredictable treatment of drug couriers⁹¹ with the anecdote of a “peasant farmer” recruited by a Columbian⁹² drug trafficking organization to bring three kilograms of heroin to the United States on a commercial airline flight. Tobin pointed out the unfairness that would likely result depending on which U.S. city the courier landed in and was caught in. Depending on the district court judge sentencing the courier, and that judge’s interpretation of the mitigating role guideline, the sentence could either be between 151–188 months, between 121–151 months, or between 97–121 months.⁹³

Fast-forward from 1999 to the present, we see a situation in which much tinkering has occurred yet much remains the same, or worse. Couriers or mules are devastatingly worse off in some districts and before some judges—and this depends mainly on where they are arrested, which Assistant U.S. Attorney prosecutes them, and which judge they face at sentencing.⁹⁴ If they arrive in the Middle District of Florida or get the wrong judge in the Southern District of California, even first-time couriers or mules can expect no mitigating role adjustments, and very long sentences.⁹⁵ If they arrive in another district, such as the Eastern District of New

90. See *supra* Table 1.

91. Timothy P. Tobin, Comment, *Drug Couriers: A Call for Action by the U.S. Sentencing Commission*, 7 GEO. MASON L. REV. 1055, 1055 (1999).

92. Notably, throughout the 1980s and 1990s, the principal drug-smuggling corridor shifted from the Colombia-Eastern United States to Northwest Mexico-Southwest United States as the DEA crackdown on Colombian cartels enhanced the market control of Mexican cartels. See HOWARD CAMPBELL, *DRUG WAR ZONE: FRONTLINE DISPATCHES FROM THE STREETS OF EL PASO AND JUÁREZ* 41 (Univ. of Texas Press 2009). Thus, the typical courier was transformed from an airline passenger arriving at an eastern U.S. airport to an automobile driver arriving at a terrestrial port of entry or a pedestrian carrying drugs across the border on their person.

93. Tobin, *supra* note 91, at 1055.

94. See Letter from Marjorie Meyers, Chair, Fed. Def. Sentencing Guidelines Comm., Fed. Pub. Def. for the S.D. Tex., to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n 4 n.4 (July 25, 2014).

95. Compare *United States v. Hurtado*, 760 F.3d 1065, 1069 (9th Cir. 2014) (affirming a forty-six-month sentence and mitigating role denial for 11.64-kilograms-of-cocaine importation by a defendant in Criminal History Category I who drove a truck across the border with the drug hidden in it), with *United States v. Leitch*, No. 11–CR–00609 (JG), 2013 WL 753445, at *4, 14 (E.D.N.Y. Feb. 28, 2013) (accepting deferred prosecution agreement dismissing charges entirely for 13.2-kilograms-of-cocaine importation by defendant in Criminal History Category I who crossed the border on a commercial airline flight with the drug hidden in her luggage).

York, they may receive a two- or four-level mitigating role reduction, along with accompanying reductions under Sections 2D1.1(a)(5) and 2D1.1(b)(5).⁹⁶

Further, if a courier has the luck of being in certain districts, she may even get a non-custodial sentence through a diversion program.⁹⁷ In the 2015 Fiscal Year, in the Eastern District of New York, over ten percent of drug trafficking offenders received a non-custodial sentence.⁹⁸ In contrast, in the District of Puerto Rico, only eight out of 580 (roughly 1.4%) drug trafficking offenders received a non-custodial sentence.⁹⁹ The difference in average drug trafficking sentences across districts is stark. Admittedly, districts may have wide variation as to the drug type and quantity associated with drug offense. However, the fact that the Southern District of California has an average sentence of forty-five months,¹⁰⁰ the Western District of Texas has an average of sixty-three months,¹⁰¹ while Puerto Rico has an average of seventy-eight months¹⁰² is likely significant. Nationally, mitigating role adjustments are deployed minimally. In 2013, just 17.9% of drugs cases benefited from mitigating role adjustments.¹⁰³ In some districts, the adjustment remains woefully underused. In 2014, just 6.5% of District of Puerto Rico cases received a mitigating role reduction.¹⁰⁴ In contrast, in the same year, courts in the Southern District of California granted a mitigating role adjustment in 32.1% of cases.¹⁰⁵

96. See *Leitch*, 2013 WL 753445, at *13–14 n.26 (describing the Attorney-General-authorized early disposition program for “drug courier cases arising out of John F. Kennedy International Airport” in the Eastern District of New York).

97. Notwithstanding the Guidelines’ virtual eradication of non-custodial sentences, in recent years, diversionary programs have sprouted up in districts across the country (including in California, Connecticut, Illinois, South Carolina, and Washington). See *id.* at *3 n.25. Notably, some programs are pre-plea diversion, which means that defendants may completely avoid a conviction if they make progress in rehabilitation.

98. U.S. SENTENCING COMM’N, FISCAL YEAR 2015 GUIDELINE SENTENCES, EASTERN DISTRICT N.Y., http://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/stats_NYE.pdf [<https://perma.cc/RH4M-CZPH>].

99. U.S. SENTENCING COMM’N, FISCAL YEAR 2015 GUIDELINE SENTENCES, P.R., http://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/stats_PR.pdf [<https://perma.cc/SYY5-NJUD>].

100. U.S. SENTENCING COMM’N, FISCAL YEAR 2015 GUIDELINE SENTENCES, CAL., SOUTHERN, http://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/stats_CAS.pdf [<https://perma.cc/GUJ2-NYFC>].

101. U.S. SENTENCING COMM’N, FISCAL YEAR 2014 GUIDELINE SENTENCES, TEX., WESTERN, http://www.USSC.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/stats_TXW.pdf [<https://perma.cc/AZA9-S9RM>].

102. U.S. SENTENCING COMM’N, *supra* note 99.

103. U.S. SENTENCING COMM’N, 2013 ANNUAL REPORT, at A-42, http://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/2013_Annual_Report_Chap5_0.pdf [<https://perma.cc/G56Q-2LVN>].

104. U.S. SENTENCING COMM’N, INTERACTIVE SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, <http://isb.usc.gov/Login> (Select “All Tables and Figures,” then select “Guideline Application” and click on “Offenders Receiving Each Chapter Three Guideline Adjustment.” Display function can be limited to specific circuits or districts.).

105. *Id.* (narrowing display function to Southern District of California).

2. Appellate Court Decisions Perpetuate Role-Reduction Disparities

Drug trafficking offenses are the most common crimes prosecuted in federal courts.¹⁰⁶ The defendants are most commonly apprehended while crossing into the United States along the U.S.-Mexico border in California, Arizona, New Mexico, or Texas.¹⁰⁷ Thus, to the extent that circuit law actually impacts district court decision-making, the critical circuits are the Ninth, which encompasses California and Arizona, the Tenth, which includes New Mexico, and the Fifth, covering Texas.¹⁰⁸ Further, the Eleventh Circuit decisions are significant because that circuit includes Florida,¹⁰⁹ which is also a major entry point for northbound contraband. Finally, the First Circuit, which includes Puerto Rico—and often includes interdictions in international waters¹¹⁰—receives a significant share of mule and courier cases.

Among the problems with case law is that guideline changes liberalizing mitigating role have not percolated into the circuits' express interpretations. While the effect is hard—or even impossible—to measure, fact-based, totality-of-circumstances determinations give great deference to sentencing judges, and sentencing decisions face little pressure on appeal.

For example, regarding couriers and mules, the Ninth and Fifth Circuits still stubbornly rely on case law that predates significant guideline amendments. The Ninth Circuit's pre-2015 mitigating role cases, *Rodriguez-Castro* and *Hurtado*, rely on precedent that preceded and is inconsistent with Amendment 635 (2001), Amendment 640 (2002), Amendment 750 (2011), Amendment 755 (2011), and the Commission's consistent, published research into the structure and operation of drug-trafficking organizations.¹¹¹

The Ninth Circuit's leading mitigating role case, *United States v. Hurtado*,¹¹² lays out a standard that is contrary not only to the text of Section 3B1.2, but also to the last few iterations of amendments¹¹³ aimed at curbing mitigating role denials. While the court in *Hurtado* paid lip service to the guideline's totality-of-the-

106. U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT, FISCAL YEAR 2014, at 40 fig. J, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf (noting that drug trafficking cases made up 31.7% of cases, more than any other category.) [<https://perma.cc/56VP-TYLE>].

107. See U.S. SENATE CAUCUS ON INTERNATIONAL NARCOTICS CONTROL WASHINGTON, D.C. (May 05, 2010) (testimony of Kevin L. Perkins and Anthony P. Placido), <https://archives.fbi.gov/archives/news/testimony/drug-trafficking-violence-in-mexico-implications-for-the-united-states> [<https://perma.cc/R7HN-DWZX>].

108. Louisiana and Mississippi do not share a land border with Mexico, but are positioned to receive drug shipments by sea.

109. It also includes Alabama and Georgia.

110. These cases are frequently brought under the Maritime Drug Law Enforcement Act. See generally 46 U.S.C. §§ 70501-08 (2015).

111. Petition for Rehearing and Suggestion for Rehearing En Banc at 3, *United States v. Hurtado*, 760 F.3d 1065 (9th Cir. 2014) (No. 13-50170).

112. See *Hurtado*, 760 F.3d 1065.

113. See U.S.S.G., *supra* note 8, app. C, amends. 635, 640, 755 (U.S. SENTENCING COMM'N 2014).

circumstances test,¹¹⁴ it disregarded that analysis by stating that any one of three factors alone would have sufficed to deny mitigating role.¹¹⁵

For years, Federal and Community Defenders and other public defense practitioners have cried out for justice in direct appeals, petitions for rehearing en banc, and petitions for certiorari to no avail.¹¹⁶ Essentially, in the Ninth Circuit, even if a defendant transports drugs for the first time with virtually no knowledge of the drug trafficking organization that recruits her, she can be denied a role reduction—and huge role-reduction-dependent decreases—(1) because the amount of contraband she has exceeds a certain quantity (a threshold apparently defined on the spot by the sentencing court without empirical data); (2) because of the amount of money the drug trafficking organization pays her (a threshold apparently also defined by the sentencing court without empirical data); or (3) because she engaged in a mundane preparatory action (e.g., making a trip to the DMV).¹¹⁷ The Ninth Circuit's single-factor analysis in *Hurtado* took hold as a mechanism to summarily dispense with mitigating-role denial appeals.¹¹⁸

As *Hurtado* illustrated in his petition for rehearing,¹¹⁹ the Ninth Circuit's continued citation of cases like *United States v. Lmi*,¹²⁰ or *United States v. Hursh*,¹²¹ perpetuate “an unduly parsimonious attitude to the applicability of the role adjustment to couriers and applies reasoning that is either inconsistent with later amendments or was expressly abjured by the Sentencing Commission after those decisions were filed.”¹²² Even as the 2015 Mitigating Role Amendment was set to take effect, the Ninth Circuit's mitigating-role-denial review was approaching the brevity of haiku writing.¹²³ Yet, the Ninth Circuit acknowledged the 2015 Mitigating Role Amendment in 2016, in *United States v. Quintero-Leyva*, where it held that district courts must consider the factors set out in the 2015 Amendment.¹²⁴ The

114. See U.S.S.G., *supra* note 8, at § 3B1.2 Comment 3(C); see also *United States v. Rodriguez-Castro*, 641 F.3d 1189 (9th Cir. 2011).

115. See *Hurtado*, 760 F.3d at 1069 (“It properly considered the quantity of drugs, the amount paid to *Hurtado*, and the fact that he allowed the truck to be registered in his name. Any of these facts alone may justify denial of a minor role.”) (citing *Rodriguez-Castro*, 641 F.3d at 1193); see also *United States v. Hursh*, 217 F.3d 761, 770 (9th Cir. 2000).

116. See, e.g., *Hurtado*, 760 F.3d 1065.

117. See *id.* at 1069.

118. See, e.g., *United States v. Valle-Mendevill*, 619 F. App'x 660, 661 (9th Cir. 2015) (reciting *Hurtado*'s holding).

119. Petition for Rehearing and Suggestion for Rehearing En Banc, *supra* note 111, at 3.

120. 941 F.2d 844 (9th Cir. 1991).

121. 217 F.3d 761 (9th Cir. 2000).

122. Petition for Rehearing and Suggestion for Rehearing En Banc, *supra* note 111, at 3–4.

123. See *United States v. Gaytan-Salim*, 619 F. App'x 671 (9th Cir. 2015) (affirming district court mitigating role denial in seven short sentences).

124. See *United States v. Quintero-Leyva*, 823 F.3d 519, 523–24 (9th Cir. 2016). The court also reversed two other cases heard on the same day: *United States v. Lopez-Diaz*, 650 F. App'x 359 (9th Cir. 2016) (involving a mule crossing in the pedestrian lane with 220 grams of meth who admitted to crossing on previous occasions and received a fifty-seven-month sentence from Judge Burns), and *United States v. Enriquez*, 650 F. App'x 360 (9th Cir. 2016) (adjusting a ninety-six-month sentence for 10.36 kilos of meth from 2012, and subsequently resentencing several times by Judge Benitez.).

Ninth Circuit recognized some authority of the Sentencing Commission, in requiring courts to consider the 2015 Amendment's factors and applying the Amendment retroactively on direct appeal.¹²⁵ Yet, the Ninth Circuit did not expressly address whether the Amendment superseded (or overruled) the conflicting case law mentioned above.

Indeed, as other courts of appeal slowly take notice of the 2015 Mitigating Role Amendment, its relation decades old case law remains unclear. In the adjacent Fifth Circuit, the cornerstone mitigating role cases are almost thirty years old. The Fifth Circuit still relies on two 1989 cases, *United States v. Gallegos*¹²⁶ and *United States v. Buenrostro*,¹²⁷ to deny mitigating role in courier cases. In *Gallegos*, the court upheld the denial of mitigating role reductions for a pair of defendants convicted of importing just 100 grams of heroin,¹²⁸ and spelled out a standard under which it is virtually impossible to reverse district courts that deny defendants the mitigating role reduction. One of the defendants in *Gallegos* fit the minimal role application note to the letter; he was “recruited as a courier for a single smuggling transaction involving a small amount of drugs.”¹²⁹ In *Buenrostro*, the defendant was convicted after transporting eighteen kilograms of heroin across the border in his car.¹³⁰ Buenrostro argued he was entitled to a minimal role adjustment because drug traffickers led him to believe he was transporting marijuana and he was hired as a one-time courier—consistent with the minimal role application note.¹³¹ The Fifth Circuit upheld the district court's denial of a mitigating role adjustment, reasoning the judge acted within his discretion to deny the adjustment based on the quantity of drugs.¹³²

In late 2016, in *United States v. Castro*, the Fifth Circuit acknowledged the 2015 Mitigating Role Amendment, but continued to rely on *Buenrostro* for the proposition that a person could “be a courier without being substantially less culpable than the average participant.”¹³³ The *Castro* decision appears to permit business as usual in Fifth Circuit. While the Fifth Circuit emphasized that district courts must consider the factors set forth in the 2015 Mitigating Role Amendment, it affirmed the district court's sentence even though the district court failed to expressly address five factors introduced by the amendment.¹³⁴

Similarly, until recently, judges in the Middle District of Florida relied anachronistically on a 1999 Eleventh Circuit case, *United States v. Rodriguez De*

125. See *Quintero-Leyva*, 823 F.3d at 524.

126. See 868 F.2d 711, 712–13 (5th Cir. 1989).

127. See 868 F.2d 135, 138 (5th Cir. 1989).

128. 868 F.2d at 712.

129. *Id.* at 713.

130. 868 F.2d at 136.

131. *Id.* at 137.

132. See *id.* at 138–39.

133. *United States v. Castro*, 843 F.3d 608, 612 (5th Cir. 2016) (quoting *Buenrostro*, 868 F.2d at 138).

134. See *id.* at 613 n.4 (“The court did not err by not expressly weighing Amendment 794's factors.”).

Varon to deny role adjustments.¹³⁵ The *De Varon* decision “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.’”¹³⁶ In September 2016, the Eleventh Circuit reversed and remanded in *United States v. Cruickshank* where the district relied on drug quantity as the “only factor” for denying a role adjustment under *De Varon*.¹³⁷ The Eleventh Circuit, however, still referred to *De Varon* as its leading case,¹³⁸ and called for a future standard that will take into account *De Varon* and the 2015 Mitigating Role Amendment.¹³⁹

Based on appellate courts’ apparent agnosticism regarding past amendments, whether they will credit the 2015 Mitigating Role Amendment remains an open question. Further, it is also an open question whether assistant U.S. attorneys will incorporate the amendment’s guidance into their plea negotiation. A functional, role-based guideline would be much easier for judges, prosecutors, and probation officers to follow and far easier to evaluate on appeal.

B. Courts, Prosecutors, Probation Officers, and Defense Attorneys Rely on Incomplete Information about Drug-Trafficking Organizations’ Actual Structures

Chief among the challenges with establishing sentencing rules for drug couriers and mules is the variation (perceived or speculated about) between different courier roles.¹⁴⁰ The Commission should look to empirical research to provide courts with guidance as to how to interpret evidence regarding courier roles. First, the acknowledged lack of qualitative data on drug-trafficking organizations should caution courts in applying common (mis)perceptions regarding drug-trafficker roles. In fact, the rule of lenity¹⁴¹ should be invoked in role analysis. “The rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a ‘grievous ambiguity or uncertainty in the statute.’”¹⁴² In terms of ambiguity or uncertainty, the Commission’s serial revisions to the Mitigating Role

135. *United States v. Rodriguez De Varon*, 175 F.3d 930, 942–43 (11th Cir. 1999) (en banc).

136. See Mitigating Role Statements, *supra* note 68, at 3 (citing *United States v. Lormil*, 551 F. App’x 542, 544 (11th Cir. 2014) (concluding a Middle District of Florida district court justified denying a mitigating role adjustment for a suitcase carrying courier with 2.5 kilograms of cocaine where law enforcement could not locate the alleged leaders)).

137. 837 F.3d 1182, 1195 (11th Cir. 2016).

138. *Id.* at 1192.

139. *Id.* at 1195.

140. Compare *Hurtado*, 760 F.3d at 1069 (denial of minor role proper based on quantity of drugs, the amount courier was paid or the fact the courier allowed a vehicle to be registered in his name) with *Leitch*, 2013 WL 753445, at *13–14 n.26 (describing the Attorney-General-authorized early disposition program for drug courier cases in the Eastern District of New York, which generally provide for a minimal role adjustment).

141. See, e.g., *Burrage v. United States*, 134 S. Ct. 881, 891 (“Especially in the interpretation of a criminal statute subject to the rule of lenity, . . . [courts] cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant” (citation omitted)).

142. *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998)).

Guideline speak for themselves.¹⁴³ These revisions—combined with dissonant circuit court interpretations—demonstrate the requisite grievous ambiguity and uncertainty in what makes one defendant “substantially less culpable than the average participant.”¹⁴⁴ Thus, where courts and parties are speculating about role, ambiguous determinations should result in findings that favor defendants.

Second, emerging quantitative studies should caution courts from making too much of a single courier’s role characteristics given the relative homogeneity regarding key elements of their conduct.

1. Recent Quantitative Findings Tend to Flatten Out Variation Between Defendants

While the Guidelines require defendants to litigate their mitigating role sentencing claims “from scratch” by laying out the relative roles of people in the drug-trafficking organization that recruits them, federal prosecutors in border districts refer to courier cases in remarkably generic terminology.¹⁴⁵ Recent work by former Assistant United States Attorney Caleb Mason with Social Scientist David Bjerck illustrates the regularity of courier tasks and courier placement in the economic status within drug trafficking organizations.¹⁴⁶ Bjerck and Mason describe their data set as being made up of “every federal border-smuggling case, or ‘border bust’ . . . made at California ports of entry” from late 2006 to 2010.¹⁴⁷

They find that couriers and mules vary in what types of drugs they cross in what quantity, and in their pay.¹⁴⁸ But on average, couriers’ economic positions vis-à-vis the enterprise they work for paint a picture of a uniformly powerless, unskilled labor force.¹⁴⁹

This author disagrees with Bjerck and Mason’s implication that drug-courier work may be a rational way to earn a living, comparable to truck driving.¹⁵⁰ Yet,

143. See U.S.S.G., *supra* note 8, app. C, amends. 635, 640, 755 (U.S. SENTENCING COMM’N 2014).

144. U.S.S.G., *supra* note 8, at § 3B1.2.

145. See David Bjerck & Caleb Mason, *The Market for Mules: Risk and Compensation of Cross-Border Drug Couriers*, 39 INT’L REV. L. & ECON. 58, 59 (2014); see generally Human Rights Watch, *supra* note 14, at 12 (“As one former US Attorney told Human Rights Watch, [¶] [t]he public simply does not realize how many low-level guys are in [federal] prison. . . . We lock up the lowest fruit in drug conspiracies.”).

146. See Bjerck & Mason, *supra* note 145.

147. *Id.* at 60.

148. *Id.* at 61.

149. *Id.* at 59.

150. *Id.* The authors substantially discount non-economic risks taken by couriers and mules. Bjerck and Mason overstate the agency exerted by couriers and mules, arguing that if a mule is successful twice a month, and is able to avoid arrest for a year, she could earn as much as a beginner truck driver. *Id.* They also claim “mules are arguably quite well paid for their courier work, generally being paid one and two thousand dollars for a day’s work.” *Id.* at 70. Simple dollar assessments, however, are problematic. Their conclusions both understate the magnitude of the risk of transporting drugs for a drug trafficking organization, and undervalue the lives of the desperate people who accept the work. In the years covered by Bjerck and Mason’s data sample, a colossal number of deaths were attributed to the drug war. From 2007 to 2012, the Mexican government calculated an astonishing 121,683 drug war deaths. *Más de 121 Mil Muertos, el Saldo de la Narcoguerra de Calderón: Inegi*, [*More than 121-Thousand*

their calculations are valuable in resolving many misconceptions that worry sentencing judges and the appellate judges scrutinizing their decisions.

Courier and mule work is virtually a dead-end path. Bjerck and Mason estimate that around one-in-ten or one-in-twenty drug loads are detected.¹⁵¹ While many people work in dangerous jobs in North America, the danger of a multiyear incarceration term dwarfs other work risks both in certainty and in magnitude. It would seem that couriers would have better chances making a living betting on horses with borrowed money.

Courier work offers a temporary income increase that would be unlikely in most other jobs in the border region. In fact, that is very frequently the reason people are willing to accept drug-trafficking organizations' propositions. Often drug-trafficking organization recruiters—like others offering dangerous and risky employment—deliberately seek out people in dire circumstances to make them an offer they can't refuse.¹⁵² Further, the border region has provided an increasingly vulnerable labor pool in the last couple decades.¹⁵³ The temptation of short-term

Deaths, the Balance of Calderon's Drug War: Inegi] PROCESO (July 30, 2013), <http://www.proceso.com.mx/?p=348816> [<https://perma.cc/9BZK-U2JT>] (showing statistics from Mexico's National Institute of Statistics and Geography). Given the virtual eventuality of being arrested and imprisoned—along with the possibility of being killed—being a drug courier or mule is a tremendously irrational decision, which requires either desperation or some other characteristic rendering the person incapable of making a rational decision. Further, mules who carry drugs directly on, or inside, their person face risk of injury or even death. *See, e.g.*, Steven Morris, *Detecting System Criticized After 'Drug Mule' Death*, THE GUARDIAN (Dec. 10, 2007), <http://www.TheGuardian.com/uk/2007/dec/10/immigrationpolicy.drugsandalcohol> [<https://perma.cc/484J-CGX7>]. Couriers typically come from countries in Latin America and the "global south" that tend to experience the "drug war" in the literal sense. *See* Sonia N. Lawrence & Toni Williams, *Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing*, 56 U. TORONTO L.J. 285, 285–86 (2006).

151. Bjerck & Mason, *supra* note 145, at 71.

152. *See* MARIO PUZO, *THE GODFATHER* 37 (1969).

153. "For drug trafficking [organizations], NAFTA . . . provided both the infrastructure and the [labor] pool to facilitate smuggling, especially during the Fox administration when much of the demand for cheap [labor] was transferred to Chinese sweat shops." PETER WATT & ROBERTO ZEPEDA, *DRUG WAR MEXICO* 161 (1998). Factory "maquila" jobs in Mexican border cities increased fourfold from the 1980s to the 1990s, but following the North American Free Trade Agreement, these *maquilas* began to close, expanding the cartels' labor pool. *See id.* at 159–60. Mexico, a land of intense poverty and extraordinary wealth disparity, tucked under the belly of the United States, presents vast pockets of people vulnerable to drug trafficking enterprises' manipulation. *Id.* at 230 (noting that in Mexico, "the world's richest man, Carlos Slim, acquires on average another million dollars every hour, while the majority live on less than two dollars a day"). In border regions, Mexico's economic plight is particularly salient. *Id.*

financial relief comes at the cost of the extraordinary risk of many years of imprisonment¹⁵⁴ and death by cartel violence.¹⁵⁵

The empirical market analysis possible about courier labor—that cases can be bundled by the thousands and speculated over in economic terms—stands in stark contrast to what happens in sentencing courts. On the one hand, point-A-to-point-B couriers are so standardized that they can be commodified as a uniform labor force (thus rendering rather benign the characteristics and motivations of the individuals involved)¹⁵⁶; on the other hand, the facts of individual cases, when prosecuted and sentenced, represent devastating acts of disqualification from mercy.

For the purposes of sentencing couriers and mules, the most informative aspect of quantitative studies is that they are possible. Overall, such studies demonstrate the “McDonaldization” of drug-trafficking enterprises in the face of the drug war.¹⁵⁷ Thus, in courier and mule cases, a colossal disconnect exists between how the highly structured, multination-drug-trafficking organizations impersonally treat their dispensable underlings and how courts, prosecutors, and probation officers treat them when prosecuting and sentencing them.

2. *The Mitigating Role Guideline Fails at Providing Sufficient Clarity and Detail to Sentencing Courts, Prosecutors, and Probation Officers*

Lacking clear guidance from the Commission, case law, and statutes, judges and advocates problematically and inaccurately characterize drug amounts as indicative of defendants’ roles and their positions in the enterprises that recruit them. Commission guidance—for decades—gave the example of a one-time transaction with a “small amount” of drugs as an offense that would qualify for mitigating role.¹⁵⁸ But no one can agree on what a “small amount” of drugs is. Four

154. Bjerk and Mason calculate expected sentence value based on correlations between courier pay and sentences for those who are arrested and convicted. Bjerk & Mason, *supra* note 145, at 62–67. Smuggling certain drugs pays more than others; and as the drug quantity goes up, the possible sentence goes up and so does the pay. *Id.* The cartels can be seen to operate like a casino: couriers bet years of their freedom—the number of which is now known to social scientists following years of data collection and regression analysis—in exchange for a possible cash payout. Given the complexity of calculating such sentence values and the generalized “labor costs” for couriers and mules, there is virtually no chance that couriers bargain with their handlers as to the amount of risk they will shoulder and what compensation they are willing to expect.

155. *See* PROCESO, *supra* note 150.

156. It is precisely these mundane details, which should be granted the benefit of the rule of lenity under the current mitigating role regime. As described *supra* Section III.B, where offense factors could be reasonably seen as mitigating or aggravating, courts should err toward the interpretation favoring the defendant.

157. *See* GEORGE RITZER, *THE MCDONALDIZATION OF SOCIETY* (2007). Ritzer sees the fast food industry as a paramount example of a modern societal trend to value efficiency, predictability, and calculability above all else. This trend is manifest in multinational drug trafficking enterprises where labor is standardized and compartmentalized. Just as the fast food industry divides labor up into unskilled tasks, so do drug cartels.

158. Prior to Amendment 635 in 2001, U.S.S.G. § 3B1.3 Comment 2, read: “It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate,

years of Southern California border-bust data revealed that drug couriers carried an average of sixty kilograms and a median of thirty.¹⁵⁹ In contrast, circuit court cases miss the mark by affirming mitigating role denial based on quantity for quantities in relatively low ranges.¹⁶⁰

If anything, under Section 3B1.2's comparison to co-participants,¹⁶¹ high quantity may very well cut the other direction. That a drug-trafficking operation is transporting a large quantity of drugs is indicative of an organization that contains high-level drug traffickers with greater culpability. In other words, if an organization is capable of trafficking larger quantities of drugs, it is likely to have more higher culpability participants. Larger drug trafficking enterprises—with greater need to launder their proceeds and establish their place among competing organizations—may be more likely to engage in high-level financial and violent crimes thereby elevating a given enterprise's average participant.

Judges' "assessments" of trust within the criminal enterprise understandably lack nuance. The cases coming before courts all look similar—reflecting patterns of enforcement rather than enterprise structure—and mask the critical dimensions of the enterprise. Drug cartels are run by violence, which is largely facilitated by militarization in Latin American drug-export and drug-transit countries and white-collar crime.¹⁶² Thus, when courts magnify individual case nuances—whether a courier owned the car, or the car was registered in her name, etc.—it distracts from the compelling similarities shared by the “class” of drug couriers.

for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.” U.S.S.G., *supra* note 8, at § 3B1.3 Comment 2 (U.S. SENTENCING COMM’N 2000).

159. Bjerk & Mason, *supra* note 145, at 61. Notably, the data set includes mules crossing the border on foot with presumably much smaller quantities. Subtracting pedestrians, both the mean and median would be significantly higher.

160. See *supra* Section III.A.2; *Cruickshank*, 837 F.3d at 1195 (maintaining drug quantity as a permissible factor—among others—for determining mitigating role eligibility after the 2015 Mitigating Role Amendment).

161. See U.S.S.G., *supra* note 8, § 3B1.2, at 364–66.

162. WATT & ZEPEDA, *supra* note 153, at 232 (noting that in Mexico, “the financial and political structure that allows drug trafficking to flourish has remained all but untouched. . . . [D]rug trafficking in Mexico has been, for a long time, facilitated by official complicity, by white collar crime. . . . [N]arcotrafficking over the last century has been a component part of the state apparatus.”). A more recent example of Mexican state-cartel collusion is the forced disappearance of forty-three students in Guerrero in 2014, which was carried out through coordinated efforts by drug traffickers and law enforcement officers. See generally Francisco Goldman, *Mexico’s Missing Forty-Three: One Year, Many Lies, and a Theory that Might Make Sense*, THE NEW YORKER (Sept. 30, 2015) <https://www.newyorker.com/news/news-desk/mexicos-missing-forty-three-one-year-many-lies-and-a-theory-that-might-make-sense> [https://perma.cc/9R3K-ZWA2]. A larger example is the case of HSBC’s being caught laundering at least \$881 million in drug proceeds, which it received as bulk cash deposits. See generally Press Release, Dep’t of Justice, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), <http://www.justice.gov/opa/pr/HSBC-Holdings-Plc-and-HSBC-Bank-USA-NA-Admit-Anti-Money-Laundering-and-Sanctions-Violations> [https://perma.cc/NRS3-EC5B].

IV. RECOMMENDATIONS FOR REFORM

As described throughout, the Commission has not succeeded in over twenty-five years of tinkering to create a workable mitigating role guideline that achieves the paramount goal of avoiding unwarranted sentencing disparities. Further, the amendments that *have* been made have failed to take hold in most federal circuits.¹⁶³ Thus, in addition to revising the mitigating role guideline, the Commission should act quickly to decouple mitigating-role-dependent guidelines by modifying role-dependent guidelines, role cap and the methamphetamine enhancement (Sections 2D1.1(a)(5) and (b)(5)).¹⁶⁴

A. Section 3B1.2 Mitigating Role Should Contain a Functional Role Analysis

During the comment process for the 2015 Mitigating Role Amendment, Federal and Community Defenders provided several meaningful comments that the Commission did not act upon. First, Defenders critiqued the lukewarm language change from “is not precluded from consideration” to “may receive an adjustment,” noting that desirable language would indicate that defendants “should generally receive an adjustment.”¹⁶⁵ In addition to the obstacles mentioned above, effective Guideline amendment is delayed by a lack of representation on the Commission by the most relevant stakeholders. While federal prosecutors have a permanent seat at the Commission’s table, Federal and Community Defenders, a group uniquely situated as a proper counterbalance, is kept outside formative Commission developments.¹⁶⁶ Their voice is particularly important because Defenders are poised to target sources of injustice that would escape the Commission’s bird’s-eye analysis of sentencing issues, and would be less likely to be perceived by prosecutors and probation department officials.

Unlike previous amendments, adding a provision to allow role-based mitigating role grants for couriers, mules, and even street-level dealers would be far easier to address on appeal and may plausibly percolate up through deferential appellate standards. If “courier” and “mule” have clear definitions under the Guidelines, and the facts support a determination that a defendant is a courier, it is more likely that a circuit court would step in to reverse a district court’s role-reduction denial.

163. See, e.g., *United States v. Hurtado*, 760 F.3d 1065, 1067 (9th Cir. 2014); see also *supra* Section III.A.2. But see *United States v. Quintero-Leyva*, 823 F.3d 519, 524 (9th Cir. 2016).

164. See U.S.S.G., *supra* note 8, § 2D1.1(a)(5) and (b)(5).

165. Mitigating Role Statements, *supra* note 68, at 1.

166. *Id.* As of November 2016, six of seven commissioners were district attorneys, state attorneys general, or assistant U.S. attorneys before becoming commissioners. *About the Commissioners*, UNITED STATES SENTENCING COMM’N, <http://www.ussc.gov/commissioners> [<https://perma.cc/AZ8P-VVT4>] (last visited Nov. 17, 2016).

B. Section 2D1.1(a)(5)'s Role Cap Provision Should Include Average Participants, Not Just Minor and Minimal Participants

While the Mitigating Role Guideline necessarily must leave room for application to myriad other offenses, the role cap provision applies only to drug offenses. Thus, the Role Cap guideline is the ideal place to “clean up” mitigating role application issues and correct for the underuse of mitigating role. Decoupling Role Cap from Mitigating Role will insulate low-level defendants from errors and inconsistencies in how courts apply mitigating role.

The Role Cap provision makes exceptions for base offense levels based on the Drug Quantity Table:

The offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a), decrease to level 32.¹⁶⁷

In effect, the Role Cap provision recalibrates base offense levels for any defendants who can prove that they qualify for mitigating role reductions and have a drug-quantity-based offense level of thirty-two or higher. The last sentence of the provision applies additional reductions for defendants deemed minimal participants whose original offense level is thirty-six or higher. In that case, the guideline instructs courts to reduce the offense level to thirty-two. In other words, it reflects a policy choice that no minimal participant should have an offense level higher than thirty-two.

The Commission implemented Role Cap through Amendment 640 expressly with couriers, mules and other low-level functionaries in mind.¹⁶⁸ Citing couriers and mules as examples of defendants whose actual culpability was not accurately reflected in the amount of drugs they transport, the Commission sought to ratchet down the amount-linked sentencing ranges:

[T]he amendment modifies [§ 2D1.1(a)(5)] to provide a maximum base offense level of level 30 if the defendant receives an adjustment under § 3B1.2 (Mitigating Role). The maximum base offense level somewhat limits the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., “mules” or “couriers” qualify for a mitigating role adjustment). [¶] This part of the amendment responds to concerns that base offense levels derived from the Drug Quantity Table in § 2D1.1 overstate the culpability

167. U.S.S.G., *supra* note 8, § 2D1.1(a)(5), at 150.

168. U.S.S.G., *supra* note 8, app. C, vol. II, amend. 640, reason for amend., at 258 (U.S. SENTENCING COMM’N 2002).

of certain drug offenders who meet the criteria for a mitigating role adjustment under § 3B1.2.¹⁶⁹

The rationale behind Role Cap, that the Drug Quantity Table overstates culpability for certain defendants, remains unquestioned. Indeed, it is supported by the Commission’s consistent, nationwide research on the structure and operation of drug-trafficking organizations.¹⁷⁰ The Drugs-Minus-Two Amendment lends broader support for the proposition that the Drug Quantity Table is indefensibly harsh.¹⁷¹

Yet, by limiting Role Cap application to defendants who can prove they are substantially less culpable than average participants and thus receive a mitigating role adjustment, the guideline presumes a functioning mitigating role guideline. As illustrated throughout this Note, the mitigating role guideline remains problematic, and circuit courts have been largely unresponsive to amendment attempts. Thus, the intent behind Amendment 640 should be decoupled from mitigating role. That is, Section 2D1.1(a)(5) should be amended to ensure its deployment for all “relatively low level trafficking functions, [who] have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., ‘mules’ or ‘couriers’ . . .).”¹⁷² This specific modification will be best accomplished by extending § 2D1.1(a)(5) to all drug-trafficking defendants who do not qualify for an aggravating role as follows:

The offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant **does not** receives an adjustment under ~~§3B1.2~~ **§3B1.1 (Mitigating Aggravating Role)**; and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. . . .¹⁷³

With that simple modification, Section 2D1.1(a)(5) will undoubtedly cap offense levels for defendants in low-level functions with little authority, and lower individual culpability. But the analysis will be liberated from the mitigating role guideline’s vague requirement to compare each defendant with so-called average participants combined with treacherous circuit court jurisprudence supporting mitigating role denial for a number of reasons that fail to reflect defendants’ function, authority or culpability.

The expansion of Role Cap to “average,” not just minor or minimal participants, may be vulnerable to criticism on speculation that some very detrimental drug traffickers will “slip through the cracks” and receive too low a

169. *Id.* at 259.

170. *See supra* Section II.

171. U.S.S.G., *supra* note 8, supp. to app. C, amend. 782, at 64–71 (U.S. SENTENCING COMM’N 2014).

172. U.S.S.G., *supra* note 8, app. C, vol. II, amend. 640, reason for amend., at 259 (U.S. SENTENCING COMM’N 2002).

173. U.S.S.G., *supra* note 8, § 2D1.1(a)(5) (with this Note’s proposed amendments).

sentence.¹⁷⁴ This is unlikely, however, given the availability of other sentencing enhancements including, for example, using firearms,¹⁷⁵ and abusing a position of trust,¹⁷⁶—not to mention, judges’ expansive discretion to sentence above the a properly calculated guideline range under section 3553(a).

As a final note to this Section, this modest modification would effectively breathe the rule of lenity into role determinations in drug cases. At least for Role Caps, defendants in ambiguous situations would be given the benefit of the doubt. Low-level defendants often legitimately lack the requisite knowledge to overcome their burden to prove their roles are minor or minimal. After all, lacking authority in the organization, they lack access to information about other participants. Like fast-food-restaurant employees, couriers and mules have a “street level” view of the organization. Thus, this amendment will serve as a step away from presuming drug defendants should receive sentences fit for kingpins and a step toward requiring the government to first prove elevated status—beginning with proving that a defendant was a manager, a supervisor, or leader within the meaning of Section 3B1.1 in order to negate Role Cap application.

C. Section 2D1.1(b)(5)’s Increase for Methamphetamine Should Exclude Average Participants, Not Just Minor and Minimal Participants

While the methamphetamine transporter remains largely similar to transporters of other drugs, she is treated disproportionately worse by the Guidelines. First, far smaller quantities of methamphetamine trigger higher guideline ranges.¹⁷⁷ Second, a two-level increase applies to methamphetamine importation and to no other drug. Section 2D1.1(b)(5), which provides:

If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.¹⁷⁸

Thus, under Section 2D1.1(b)(5), if a courier or mule defendant has been recruited to transport methamphetamine—and is denied a mitigating role adjustment—her offense is increased by two levels.¹⁷⁹ Section 2D1.1(b)(5) applies

174. See U.S.S.G., *supra* note 8, § 3B1.2, at 364–66.

175. U.S.S.G., *supra* note 8, § 2K2.4, at 269–70.

176. U.S.S.G., *supra* note 8, § 3B1.3, at 367–68.

177. See *infra* text accompanying note 178 (discussing the Comprehensive Methamphetamine Act of 1996).

178. U.S.S.G., *supra* note 8, § 2D1.1(b)(5), at 145. Section 2D1.1(b)(5) was added in 1997 as part of multipart Amendment 555, in response to the “Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104-237, 110 Stat. 3099, including the directives to the Commission in sections 301 and 303 of that Act.” U.S.S.G., *supra* note 8, app. C, vol. I, amend. 555, at 516. Congress directed the Commission in section 301 of the Act to cut each base offense level’s drug quantity in half for methamphetamine (e.g. where three kilograms of methamphetamine triggered a given base offense level, that quantity dropped to 1.5 kilograms for same offense level). *Id.*

179. U.S.S.G., *supra* note 8, § 2D1.1(b)(5), at 151.

to a significant number of cases. Nationally, in 2014, there were 6229 methamphetamine trafficking cases, which accounted for over twenty-nine percent of all drug trafficking cases.¹⁸⁰ Notably, the Commission's justification for adding Section 2D1.1(b)(5) to the guidelines was not justified by any difference in the role of defendants in methamphetamine offenses. Rather, it was based on a generic assertion that evidence indicated "a recent, substantial increase in the importation of methamphetamine and precursor chemicals used to manufacture methamphetamine."¹⁸¹

Methamphetamine has harmfully affected communities throughout the United States.¹⁸² While the public has become increasingly disillusioned about the "war on drugs," as hysteria mounted regarding methamphetamine,¹⁸³ the government deployed the same strategies against methamphetamine trafficking as it has against heroin, cocaine, and marijuana.¹⁸⁴ Nonetheless, there is no evidence that the functional role of a low-level courier or mule is any different for this prohibited drug than for any other. Further, as many practitioners report, the drug trafficking organizations often tell a courier that what she is transporting is marijuana (possibly to assuage any remorse related to involvement with the more harmful drug), or deliberately keep the courier in the dark about what the substance is so they will work for less remuneration.¹⁸⁵

The following simple modification will alleviate the risk of this provision being applied to defendants who are unfairly denied a mitigating role adjustment or who do not have sufficient information to prove they are substantially less culpable than the average participant.

If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is ~~not~~ subject to an adjustment under **§3B1.1 (Aggravating Role)** ~~§3B1.2 (Mitigating Role)~~, increase by 2 levels.¹⁸⁶

The revised guideline will thus apply Section 2D1.1(b)(5) only to those drug traffickers with a demonstrated aggravating role. While an effective mitigating role

180. See U.S. SENTENCING COMM'N, SOURCEBOOK OF FED. SENTENCING STAT., tbl. 33 (2014), <http://www.USSC.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table33.pdf> [<https://perma.cc/Q9ML-PWC9>] [hereinafter FED. SENTENCING STAT.].

181. U.S.S.G., *supra* note 8, app. C, vol. I, amend. 555, reason for amend., at 517.

182. See WILLIAM GARRIOTT, POLICING METHAMPHETAMINE: NARCOPOLITICS IN RURAL AMERICA 4–5, 22–25 (2011).

183. See *America's Most Dangerous Drug*, NEWSWEEK, Aug. 7, 2005, <http://www.Newsweek.com/Americas-Most-Dangerous-Drug-117493> [<https://perma.cc/Y6BY-V4WL>].

184. See GARRIOTT, *supra* note 182, at 34–35.

185. Thus, in order to construct a factual basis in these cases, many pleas read something like, "I knowingly imported a prohibited substance which I admit the government *could prove* is methamphetamine."

186. U.S.S.G., *supra* note 8, § 2D1.1(b)(5) at 151 (with this Note's proposed amendments).

guideline would alleviate the need for this modification, decades of adjustments have justified cynicism about such adjustments taking hold. And even a clear mitigating role guideline would not necessarily fix the problem faced by the most poorly informed couriers and mules who cannot generate sufficient evidence to prove their role is substantially less than average.

While not all of the methamphetamine offenders in 2014 were exposed to the two-level increase,¹⁸⁷ a sizable number of the 4325 cases receiving no role adjustment¹⁸⁸ likely suffered the two-point adjustment. Further, an enormous portion of methamphetamine defendants are couriers, and are thus caught in the limbo discussed throughout this Note.

This Note's proposed modification to Section 2D1.1(b)(5) would prevent similar outcomes in the future, and would present no real negative consequences to enforcement efforts and government interest in punishing drug offenders with elevated roles. As long as the government met its burden of showing aggravating role,¹⁸⁹ Section 2D1.1(b)(5) would still be activated. But borderline mitigating role cases—those likely to get a different outcome depending on the judge adjudicating them—would be spared the plus-two increase. Therefore, the paramount policy objective of avoiding disparities among similarly situated defendants would be served by this revision. Since only 6.1% of methamphetamine trafficking defendants receive an aggravating adjustment,¹⁹⁰ the dangers of misapplication are slight.

*D. The Mitigating Role Guideline or the Aberrant Behavior Guideline
Should Be Amended to Distinguish the Two*

The Mitigating Role Guideline's direction to compare defendants to "average participants" leads to additional application issues, which, in some courts, includes analyzing whether couriers or mules had time to reflect on their involvement (aberrant behavior) and how necessary they are to the overall drug-trafficking enterprise.¹⁹¹

187. The offense must involve "importation" or manufacture using chemicals known to have been "imported unlawfully." *Id.*

188. See FED. SENTENCING STAT., *supra* note 180, tbl. 40, <http://www.USSC.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table40.pdf> [<https://perma.cc/EGZ7-QX53>].

189. Most circuits have held the burden for an adjustment falls on the party seeking it. See, e.g., *United States v. Howard*, 894 F.2d 1085, 1089 (9th Cir. 1990). But see *United States v. Dolan*, 701 F. Supp. 138, 139–40 (E.D. Tenn. 1988) (placing the burden of proof for "acceptance of responsibility" on the government because the court believed that the government would have as much access as had the defendant to the information necessary to establish whether the defendant had accepted responsibility).

190. See FED. SENTENCING STAT., *supra* note 180, tbl. 40.

191. *Hurtado*, 760 F.3d at 1069 ("That [the defendant's] supervisors, organizers, recruiters, and leaders may have above-average culpability—and thus are subject to aggravating role enhancements under U.S.S.G. § 3B1.1—doesn't mean that [the defendant] is 'substantially less culpable than the average participant.'" (emphasis omitted)).

The Commission should clarify that being a repeat courier, or carrying out other mundane tasks, does not preclude a mitigating role adjustment. In other words, a functional role analysis should disentangle the actions of couriers from the requirements for an aberrant behavior departure.¹⁹² The Aberrant Behavior Guideline allows for a downward departure under Section 5K2.20 for qualifying offenses where “the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.”¹⁹³ But some judges’ findings under Section 3B1.2 appear to confuse role with aberrant behavior.¹⁹⁴ The Guidelines should be amended to clarify that a lack of aberrancy should not foreclose mitigating role reductions.

The Aberrant Behavior departure serves a distinct purpose from the mitigating role adjustment, a sort of sorting function for what could be considered a class of offenses with meaningfully underdeveloped intent. The Guidelines should direct attention to the defendant’s functional role and clarify that—barring exceptional circumstances—low-level couriers are not to be disqualified from role reductions based on a lack of aberrancy.

Although preparation and repetition weigh against aberrant behavior departures, couriers’ overall roles in drug trafficking organizations do not meaningfully change. On average, couriers are compensated at a trivial percentage of the value of the drugs they transport.¹⁹⁵ Even if they are compensated incrementally higher for riskier endeavors, couriers’ statures in the enterprises do not change. Trusted drug-trafficking associates do not shoulder the risks of personally transporting drugs across the international border gauntlet of inspectors, detection equipment and drug-sniffing dogs. Nevertheless, some judges have found that couriers and mules had elevated roles because they engaged in low-skilled preparatory activity for drug-smuggling activities. For example, appellate courts have affirmed mitigating-role denials based on defendants making practice runs (crossing the border first without drugs), or registering cars in their names.¹⁹⁶ While the Mitigating Role Guideline has been in effect for decades, courts are still struggling with how to interpret it even for what have become ordinary scenarios for sentencing judges. In February 2016, the Ninth Circuit heard oral argument

192. See U.S.S.G., *supra* note 8, at § 5K2.20(b).

193. *Id.*

194. See, e.g., *Hurtado*, 760 F.3d at 1069 (holding that a defendant’s allowing a car to be registered in his name was a valid ground for denial of a mitigating role adjustment). Allowing the car registration to proceed involves planning and duration, and would therefore disqualify someone from relief based on aberrancy. See U.S.S.G., *supra* note 8, at § 5K2.20(b). See also Appellant’s Opening Brief at 9, *Lopez-Diaz*, 650 F. App’x 359 (No. 14-50050) (9th Cir. 2016) (remanded where district court denied a role reduction for defendant who admitted to importing drugs into the United States by foot).

195. Drug couriers are extremely cheap in relation to the value of the drugs they cross. See Bjerk & Mason, *supra* note 145, at 67–68.

196. *Hurtado*, 760 F.3d at 1067–68.

in three cases, which are exemplars of how two Southern District of California judges have clung to such superficial role tests, *United States v. Lopez-Diaz*, *United States v. Enriquez*, and *United States v. Quintero-Leyva*.¹⁹⁷ As discussed above in Section III.0, the court published an opinion in *Quintero-Leyva* without directly stating whether prior case law remained valid.¹⁹⁸

Even the severest of advice to early Guidelines drafters recommended that first-time drug offenders rarely serve sentences over three years.¹⁹⁹ The Drug Enforcement Agency (DEA), in its 1996 Commentary to the Commission made specific sentencing recommendations based on the type/amount of drugs, the participant's role, and whether it was the offender's first, second, or third drug offense conviction.²⁰⁰ While longer sentences were recommended for drug defendants with prior drug trafficking convictions, substantially lower sentences were recommended for first-time couriers.²⁰¹ Thus, if a courier is instructed by her handler to do a practice run, or if she does courier work on more than one occasion, she should not be proscribed from a mitigating role adjustment.

E. The Mitigating Role Guideline Should Be Amended with Unequivocal Language to Disavow Indispensability Determinations

The 2015 Amendment advises, in lukewarm terms, against denying a mitigating role adjustment based on so-called "indispensability" to a drug-trafficking enterprise.²⁰² The guideline language was changed to state that "certain types of [indispensable] defendants" now "may receive" a mitigating role adjustment.²⁰³ Before the Amendment, defendants were merely "not precluded from consideration for" a mitigating role adjustment.²⁰⁴

The Amendment does not meaningfully address what practitioners have long pointed out are unfair "indispensability justifications"²⁰⁵ upheld by circuit courts and apparently permitted by the Guidelines. In the 2015 amendment cycle, Federal and Community Defenders and others cautioned the Commission to include in its amendment language that would dissuade courts from denying mitigating role

197. *United States v. Lopez-Diaz*, 650 F. App'x 359 (9th Cir. 2016) (describing a mule crossing in the pedestrian lane with 220 grams of methamphetamine, admitted to crossing on previous occasions, and received a fifty-seven-month sentence); *United States v. Enriquez*, 650 F. App'x 360 (9th Cir. 2016) (issuing a 96-month sentence to an automobile courier for 10.36 kilograms of methamphetamine in 2012; the defendant was later issued the same sentence several times after reversal on appeal).

198. *See Quintero-Leyva*, 823 F.3d at 522–24 (remanding with instructions to consider Section 3B1.2's newly listed factors, but not establishing a clear relationship between Ninth Circuit precedent and the 2015 Mitigating Role Amendment).

199. Meierhoefer, *supra* note 7, at 34.

200. *Id.*

201. *Id.*

202. *See U.S.S.G.*, *supra* note 8, at app. C, amend. 794, at 118.

203. *Id.*

204. *Id.*

205. Mitigating Role Statements, *supra* note 68, at 11.

based on the “indispensability” of a defendant’s action.²⁰⁶ In a statement to the Commission, National Association of Criminal Defense Lawyers President, Theodore Simon, wrote:

[T]he commentary should make clear that defendants who have played a lesser role in the offense are entitled to a mitigating role reduction even if the relatively minor role was “indispensable to carrying out the plan.” Arguably, every behavior that is part of criminal conduct could be indispensable to the completion of the conduct, but that does not make every actor equally valuable or equally culpable in the overall scheme. Sands’ analogy of drug couriers to delivery truck drivers is completely apropos. A business establishment may not be able to sell its merchandise if the delivery driver does not transport the goods to the retail store, but truck drivers are easily replaceable and minimally paid in the overall scheme of the business. Couriers who do nothing more than transport from manufacturers to dealers, for little compensation, are less culpable than those who manufacture contraband and those who sell it for large profits.²⁰⁷

This clarification is necessary because—lacking clear Commission guidance—some courts have habitually disqualified defendants from mitigating role adjustments where their functional tasks and responsibilities are insignificant relative to their managers, supervisors, kingpins, and others with special skills or ownership interests in contraband.²⁰⁸ Common sense would suggest that the new “may receive” language will do little to discourage district court evaluations, which are buttressed not only by permissive circuit case law, but also by assumptions about defendants.

As discussed above in Section III.B.1, the concentration of high-density, economically depressed communities on the southwest border is a relatively recent phenomenon. This mass migration co-occurred with the rise of Mexican drug trafficking organization and the shift of the importation zone from the eastern United States to the southwestern United States.²⁰⁹ Thus, drug trafficking organizations found themselves in control of vast trafficking corridors, enabled by Mexican law enforcement and white-collar complicity, and with access to a stable

206. *Id.* (explaining that “[f]ar 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,’” and noting as an example that “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.’”).

207. Letter from Theodore Simon, President, National Association of Criminal Defense Lawyers, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Commission, NACDL Comments on Proposed Amendments for 2015 Cycle at 6 (March 18, 2015), <http://nacdl.org/WorkArea/DownloadAsset.aspx?id=36638&libID=36608>.

208. *See* U.S.S.G., *supra* note 8, at app. C.

209. *See* WATT & ZEPEDA, *supra* note 153, at 159–60.

supply of inexpensive labor.²¹⁰ The laborers suffer the brunt of enforcement efforts as frontline fodder in the drug war.²¹¹

Further, the 2015 Amendment makes indispensability arguments even more tempting for the unwary. If courts are to evaluate a courier's role vis-à-vis immediately related participants, the concept of indispensability is distorted. The courier—usually an unskilled pedestrian or automobile driver—appears far more significant when her actions are placed under the judicial microscope. Others presumably grew or manufactured the drugs, packaged the drugs, financed the operation, and secured safe passage to the border, but without that particular red-handed courier, the drugs would have rotted in a warehouse in Tijuana or Nogales.

While labeling a courier “indispensable” may be correct in a purely philosophical sense, it frustrates practical sentencing purposes. Evaluating indispensability conflates role analysis with causation and permits the most attenuated levels of causation.²¹² Such an evaluation is akin to calling a gas station attendant “indispensable” to the problem of global warming. Causation is dealt with in every criminal case²¹³ and therefore should not be double-counted against relatively low-level defendants at sentencing.

CONCLUSION

Under the current Guidelines, low-level drug couriers and mules remain at extraordinary risk of receiving sentences intended to punish drug kingpins. The reforms proposed in this Note would decouple Role Cap and the Methamphetamine enhancement from mitigating role, and aim to lessen the impact of errors. Amending mitigating role to distinguish it from the aberrant behavior departure analysis and disentangle indispensability analyses will promote more just and consistent outcomes between federal circuits and among judges within jurisdictions. Most importantly, these changes recommended herein will help prevent drug couriers and mules—low-level, and often vulnerable, actors within larger trafficking schemes—from facing overly harsh penalties.

Critically, the proposed changes are relatively simple, easy and effective steps. While the relationship between the advisory Guidelines and case law remains tenuous, these proposals are at the very least a step in the right direction toward the goal of correcting the unduly harsh and unpredictable sentencing regime, which results in unwarranted sentencing disparities.

210. *Id.*

211. *Id.*

212. The traditional understanding of but-for causation is that “[c]onduct is the cause of a result” if “it is an antecedent but for which the result in question would not have occurred.” *Burrage*, 134 S. Ct. at 887–88 (internal quotations omitted).

213. “When a crime requires ‘not merely conduct but also a specified result of conduct,’ a defendant generally may not be convicted unless his conduct is ‘both (1) the actual cause, and (2) the ‘legal’ cause (often called the ‘proximate cause’) of the result.’” *Id.* at 887.