

057-94

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April 13, 1994

Honorable William W. Wilkins, Jr.
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Wilkins:

On behalf of the Subcommittee on Criminal Law and Sentencing of the Judicial Conference Criminal Law Committee, I thank the Commission for providing us the opportunity to comment on this year's proposed amendments at the meeting on March 25, 1994. At that meeting, the Commission invited the Subcommittee's response on further drafts of certain proposed amendments. The Commission sent us new drafts of several amendments, along with staff analysis of those drafts. We appreciate this further opportunity to respond.

As you are probably aware, this specific response is that of the Subcommittee and it does not constitute a formal, direct response by the entire Criminal Law Committee, which itself meets only in December and June, and therefore has not deliberated on these latest amendment drafts. Nevertheless, our Subcommittee has a mandate to review and comment on guideline proposals.

We are aware of concern by some whether the Commission should pass any amendments this year, given questions raised about the status of the Commission membership. It would be inappropriate for us to express a legal opinion on these questions. Nevertheless, we urge the Commission to go forward on those amendments which are sound and which would improve the fairness and efficiency of the system. A blanket refusal to adopt any amendment due to questions about the Commission's status would, it seems, be tantamount to a concession that Chairman Wilkins and Commissioner Nagel are not legal members of the Commission. Moreover, even in the unlikely event that the current Commission is later found to have exceeded its authority, the result would not be appreciably worse than were the Commission simply to do nothing.

I. Substitute Amendment 14 (5K2.0 - Departures)

This amendment is responsive to the Judicial Conference's proposal that language be included to endorse a departure based on a unique combination of circumstances, under appropriate conditions. Accordingly, we strongly support it.

We request that the Commission consider one change to the substitute amendment: that the second sentence of the proposed commentary be changed from "The Commission does not foreclose the possibility of an extraordinary case that...", to "The Commission acknowledges the possibility of an extraordinary case that...." We believe that this more affirmative language better states the spirit of the Subcommittee's proposal. Otherwise, we endorse and urge the Commission's adoption of this amendment, which we believe is a much needed recognition of legitimate departure in extraordinary cases, and which has been supported in essence by the Judicial Conference for several years.

II. Substitute Amendment 19 (1B1.10 - Retroactive Amendments)

The Subcommittee has urged the Commission to adopt a procedure for § 1B1.10 which applies only the retroactive amendments(s), rather than the entire current manual of guidelines, for all the reasons given in our position paper and orally on March 25. We therefore appreciate and strongly endorse substitute amendment 19, as the Commission has drafted it.

We had proposed (in an Exhibit to our position paper) some commentary to ensure the understanding that only the retroactive amendment(s) should be used. In lieu of any of those forms of commentary, this draft utilizes one sentence at the end of proposed Note 2, which we believe is crucial and key to a clear understanding and uniform application of the intended procedure: "All other guideline application decisions remain unaffected." We believe that, as long as this sentence is retained, this draft accomplishes what the Subcommittee proposed, and we urge that the Commission pass it.

III Substitute Amendment 10 (Role)

We applaud the Commission's effort to give more guidance to the meaning of the terms "minor" and "minimal", which are among the most often-considered adjustments in the guidelines. This revised, comprehensive rewriting of the section on role in general, and on mitigating role specifically, is more detailed than our Subcommittee has had time to properly digest. Considering the complexity of the proposed amendment, and the novelty of its analytical construct, we urge you to

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"field test" this proposal before making a final decision. On an expedited basis, this testing could perhaps be accomplished during the summer months. Enclosed herewith as Exhibit A are some technical suggestions and observations which we offer for your consideration. In sum, we strongly support the goal of this amendment but believe that it is not ready for adoption in its present form.

IV. Substitute Amendment 8 (D) (Commissioner Nagel's Proposal)

This proposal is much too sweeping to be digested at this time. While we do not oppose it, neither are we prepared to endorse it. Preliminarily, we note a potential issue of whether it comports with statutory authorization, and we note that it may not be as beneficial to defendants on the low end as it might be. For defendants who currently would be at a level lower than 19, the amendment actually appears to be harsher. Moreover, it cannot be an effective substitute for the role amendment, because it only addresses drug offenses, whereas courts must address role considerations in all cases.

We also believe it tactically prudent to await the fate of the mandatory minimum "safety valve" in the Congress before considering such a profound revision of the entire drug sentencing scheme.

V. Amendment 8(A) (Drug chart)

We support the Commission's suggestion that the drug chart be topped off at level 38, as a reasonable way to put a cap on how high amount, alone, can drive a base offense level.

As we discussed in our meeting, however, we have serious qualms about lowering the entire drug chart by two levels. Whether we like it or not, we cannot avoid the reality of the mandatory minimums and how they affect disposition of actual cases. A system in which a defendant has absolutely nothing to lose by going to trial, and conversely, nothing whatever to gain from entering a plea of guilty, is not only unfair but very unwise. This would be the result if the defendant's guideline level calls for a sentence significantly less than the mandatory minimum.

Sincerely yours,

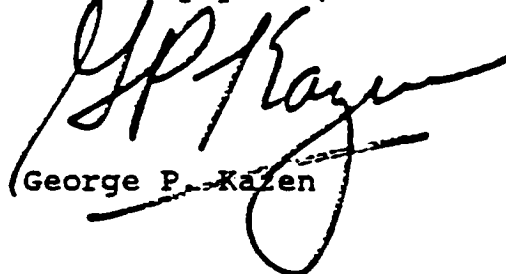

(George P. Kazen)

EXHIBIT A

April 13 Judicial Subcommittee Letter to the Commission Notes Regarding Substitute Amendment 10

1. Perhaps the most significant feature of the proposed amendment is the generation of a common standard of analysis for determining mitigating role (i.e., that the defendant be "substantially less culpable than a person who committed the same offense without the involvement of any other participant."). This analysis is new, and difficult to apply without thorough understanding. This could be accomplished by a more sequential presentation of the analysis, and the addition of several more examples from common cases (particularly drug offenses).

A. Organization of the analysis

Perhaps a step-by-step construct for the proposed analysis could be used, such as:

- (1) The fact that relevant conduct defines the scope of role consideration should be the first point (moved up from proposed Note 1(D)), in order to set the outer boundaries of the analysis.
- (2) Then, it should be made clear that the defendant should be compared to other participants within that scope.
- (3) Then, any disqualifiers for mitigating role should be stated. The proposed amendment states these as qualifying characteristics at Notes 2 and 4 (e.g. characteristics ordinarily associated with mitigating role, such as "the defendant had no material decision-making authority..."). It might be easier to understand if they were stated as disqualifiers (e.g. the defendant would not qualify if: "the defendant had material decision-making authority..."). At any rate, to qualify for mitigating role, a defendant must meet (or not meet) all or most of these, as the amendment sets out in Note 1(A) and (B).
- (4) Then, any defendant who passes the disqualifier test should be compared to the list of what might be called "general descriptors" of mitigating role (as currently set out in the amendment at Note 1(E)).
- (5) If, and only if, a defendant is still "in the running" after the disqualifier- and general descriptor- tests, the hypothetical-defendant analysis (as explained in Note 1 and at points elsewhere) would be applied. That is, if such a defendant were then found to be substantially less culpable than a person who committed the same offense alone, he/she should receive a mitigating role adjustment.

2. The first sentence of the proposed Introductory Commentary states that for role adjustments to apply, "the offense must involve the defendant and at least one other participant, although that other participant need not be apprehended." We believe that this qualification may be confusing, perhaps implying that the participant be subject to arrest or be a fugitive. Instead of this phrase, a reference to the definition of "participant" in Note 1 to §1B1.1, might be more clear. ("participant, as defined at...")
3. It is unclear whether Note 6 concerns the same standard for a firearm adjustment as that in 2D1.1(b)(1) (where a dangerous weapon is "possessed" in a drug offense). Perhaps that could be clarified. If it is a stricter standard, that is the defendant him/herself had to possess or direct the possession, then perhaps either option is alright. On the other hand, if the same standard is implied (which, as it reads now, using the same word "possessed", it probably would be), considering the extremely broad application of the firearm adjustment in drug offenses, we would recommend option #2, which might provide some amelioration where the firearm adjustment has been broadly applied, such as when it is found at a co-defendant's home.
4. This amendment will require case law development to define some of the new concepts, such as "unsophisticated tasks", "substantial part", and "ownership interest". However, the ambiguities may be lessened with some clarifying definitions. For example, does a street seller who buys drugs and resells them in use-quantities have an "ownership interest" in what he/she sells? Does it change if he is advanced the drugs (i.e. on credit), which is common? Is serving as an interpreter during drug negotiations an "unsophisticated task?" Does performing in that role reflect a "substantial part" in negotiating the terms of the sale of the drugs? Is the ability to drive an "18 wheeler" to transport drugs an "unsophisticated task?" Does a defendant have an "ownership interest" in drugs he/she is transporting if his/her compensation for his/her services is a portion of the drugs being transported? Or a portion of the profit? These are common sentencing situations, to which the amendment does not adapt easily without further explanation and examples.
5. Finally, if the Commission passes this amendment, we would recommend consideration of further refinement (regarding these ideas or others) over the summer, as well as the development of a specific training module (written, video, etc.) dealing with this guideline to be made available to the field prior to its effective date, which would include several scenarios like those mentioned above, to help familiarize practitioners with the concepts introduced in this very important guideline.