



COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
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Honorable George P. Kazen
Chair

February 21, 1997

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Committee on Criminal Law of the Judicial Conference submits this response on the amendments and issues published for comment regarding conflicts among the circuits, for the 1997 amendment cycle. The Committee will be sending another written response on other published amendments and issues in early March. While the Committee recommends that the Commission resolve all circuit splits, at a minimum we strongly recommend that the Commission resolve during this amendment cycle those splits listed below as priorities.

The Sentencing Commission should resolve conflicts among the circuits to minimize unwarranted disparity, which is a goal of the Sentencing Reform Act, and also to minimize unnecessary litigation. It is also only logical for the Commission to resolve conflicts on the definition of terms or application of procedures which the Commission itself has created. The Sentencing Commission is statutorily directed to monitor the application of the guidelines and to resolve those conflicts among the circuits which it is capable of resolving. This statutory mandate

February 25, 1997

was reaffirmed by the Supreme Court in United States v. Braxton, 111 S.Ct. 1854 (1991), as a reason why that court would not scrutinize such conflicts as closely as it does in other areas of law.¹

Having been urged to narrow our list of recommendations regarding circuit conflicts, we are submitting a "top ten" list of conflicts which we urge the Commission to resolve. Most of these conflicts relate to Chapter Three or Four guidelines, and therefore affect most sentencings. Furthermore, all involve a fairly easy resolution that does not involve major policy decisions.

In each of the circuit conflicts listed there are several, if not many, circuits yet to resolve the issue. Rather than wait until all circuits attempt to determine what the Commission meant by its terms and procedures, the Commission should take action to resolve the controversy and prevent further litigation. The Commission's resolution of the ten conflicts listed below would avoid litigation in literally hundreds of district courts and numerous appellate courts, which would otherwise need to litigate the issues involved.

The Commission has asked for suggested resolutions to the conflicts. Where the Commission staff has suggested a resolution, we are recommending that the Commission adopt the proposed published resolutions. For the remaining conflicts, we have proposed the resolution which either most closely conforms to the Commission's probable intent, or what is most consistent with the application of the guidelines.

We also believe that resolution of some of the listed conflicts would have additional administrative or policy benefits. For example, clarification regarding the fine for costs would, in addition to resolving a conflict, clear up confusion about the nature of that basis for a fine when offenders are also asked to contribute to the cost of supervision services. The conflict regarding application of retroactive amendments would, in addition to resolving a conflict, avoid sentences being reduced below time served, thereby eliminating the administrative problem regarding the "prison credit" created by such an application. That resolution also clarifies the discretionary nature of such applications and helps defend against unnecessary collateral motions by confirming that the original sentence was not an "illegal" sentence. The suggested resolution to the conflict regarding escape from a federal prison camp would help provide deterrence for escapes from such facilities, where most federal escapes occur.

¹ The Court said, "in charging the Commission 'periodically [to] review and revise' the guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the guidelines conflicting judicial decisions might suggest." 111 S.Ct. 1854, 1858 (citing 28 U.S.C. §994(o)). The Court went on to indicate that because the Commission is charged with this role, the Court would be more "restrained and circumspect" in using its certiorari power to resolve circuit conflicts on sentencing matters. *Id.*

A. Published Amendments Which Resolve Circuit Conflicts:

1. Amendment # 11: Application of retroactive amendments.

We ask the Commission, as a proper exercise of its authority pursuant to 28 U.S.C. §994(u), to adopt published amendment 11, with one suggested addition. This amendment would be very helpful in clearing up several sources of ambiguity regarding the application of retroactive amendments. First, it clarifies that application of such amendments is discretionary with the court. Next, it more closely conforms the policy statement to the statute, by stating that such amendments can only be applied to a term of imprisonment, and not to any other component of the sentence - such as a period of supervised release. This helps to resolve several issues frequently raised and litigated. We suggest an additional phrase be added which would clarify that such amendments are applicable only to a term of imprisonment for the original offense, which would resolve the ambiguity which allowed a recent circuit court to hold that such amendments could be applied to a term of imprisonment for revocation of release.

Finally, and perhaps most importantly, the amendment specifies that courts are only authorized to apply such amendments to reduce a term of imprisonment down to the amount of time already served, and not below that time, thereby avoiding the generation of prison credit, which can create administrative problems for the courts.

2. Amendment # 14: Express threat of death.

We ask the Commission to adopt the published proposed amendment regarding "express threat of death" in §2B3.1 for robbery offenses. The amendment clarifies the operation of the guideline to include inferred threats. This is not only a logical resolution for this issue, but it is also the majority view of the circuits which have already litigated the issue.

3. Amendment # 17: Underlying offense.

We ask the Commission to adopt the published proposed amendment which clarifies how courts should compute the "underlying offense" for certain offenses. The proposed resolution is logical as well as consistent with the application of the guidelines in general, which focus on the conduct for which the defendant was convicted.

4. Amendment #27: Controlled substance offense/career offender.

We ask the Commission to adopt the published proposed amendment regarding the career offender guideline. The proposed amendment resolves a circuit conflict by including in the career offender definition of "controlled substance offense," an offense of possessing a listed chemical with intent to manufacture a controlled substance. This is a logical resolution, consistent with other applications of the guidelines. The amendment also clarifies the guideline regarding "crime of violence," and makes other non-substantive, conforming amendments to the same guideline.

5. Amendment #23: Obstructive Conduct.

We ask that the Commission adopt the published proposed amendment, which resolves a circuit conflict and clarifies and conforms the operation of the obstruction guideline in several significant ways. This is precisely the kind of change that only the Commission can make, and which prevents litigation and confusion.

B. Circuit Conflict Issues Published for Comment in Amendment #28:

6. Item 4 of Amendment 28: Whether a minimum security prison camp is a "similar facility" to a halfway house under §2P1.1(b)(3), in order to qualify for a downward adjustment.

Resolution of this conflict would provide clarity and uniform application of the guideline regarding escape from prison. We recommend a resolution that would provide that a minimum security prison camp is not a "similar facility" for purposes of the §2P1.1(b)(3) downward adjustment, in keeping with the majority position of the circuits. Also, we understand that nearly all federal prison escapes take place from such facilities (and from halfway houses). Preventing a downward adjustment for escapes from prison camps would assist in deterring escapes from such camps.

7. Item 8 of Amendment 28: Whether a sentence to a community confinement center, halfway house or drug treatment center qualifies as "imprisonment" under §4A1.2(e)(1).

This conflict affects the criminal history computation of numerous cases. Its resolution would, therefore, significantly assist uniformity of application and avoid unwarranted disparity. We recommend that the Commission seek a resolution which would be consistent, to the extent possible, with the Bureau of Prisons' treatment of time spent in a halfway house as "prison" credit.² In general, the BOP procedure is that, service of time in a halfway house is not treated as "prison" credit if such time is spent as a condition of supervision, but such time is treated as "prison" credit by the BOP if it is spent as a result of a direct commitment as part of the sentence (either original or upon revocation), or as a result of BOP designation for the last portion of a prison sentence.

8. Item 10 of Amendment 28: Whether a court may impose a fine for costs of supervision or imprisonment under §5E1.2(i) when it has not imposed a punitive fine under §5E1.2(c).

We ask the Commission to eliminate §5E1.2(i) as an "additional" basis for a fine and convert it to a factor under §5E1.2(d) for determining a punitive fine under §5E1.2(c). This would avoid not only the circuit conflict, but would also avoid the potential recurrence of another conflict on the

² The Supreme Court recently upheld the BOP's treatment of such time and resolved a similar circuit split. Reno v. Koray, 115 S.Ct 2021 (1995)

issue.³ Such an additional fine provision is seldom needed, because there are very few defendants who can pay the full punitive fine, much less another, separate fine amount based on costs. When a fine is deemed appropriate, however, some courts prefer to base the amount of fine, at least in part, on the estimated cost of defendant's incarceration. The result, nevertheless, is still one fine and the separate provision in (i), with its "additional" language, serves no useful purpose and only serves to generate confusion and litigation.

9. Item 6 of Amendment 28: **Whether "victim of the offense" under §3A1.1 refers only to a victim of the offense of conviction or also to a victim of the relevant conduct.**

We ask the Commission to clarify that guidelines §§3A1.1, 3A1.2, and 3A1.3 refer to a victim of the relevant conduct of the offense, as defined in §1B1.3. This is the majority view, and is consistent with other Chapter Three adjustments. Resolution now would avoid further litigation in the remaining circuits. Three cases in the opposing circuit have been a potential source of confusion and litigation in courts in the remaining circuits.

10. Item 15 of Amendment 28: **Whether the definition of "non-violent offense" for purposes of §5K2.13 (Diminished Capacity) is consistent with the definition of "crime of violence" under §4B1.2.**

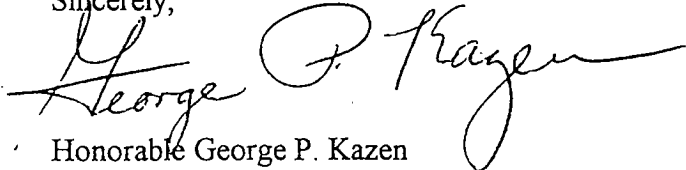
Section 5K2.13 provides for a possible departure if the defendant committed a "nonviolent offense" while suffering from certain mental incapacities. The lack of definition of a "non-violent" offense in §5K2.13, such as exists in the commentary for §5K2.17, has led a minority of the circuits to conclude that perhaps the Commission intended the criteria for "non-violent offense" in §5E2.13 to be different than the criteria for "violent offense" under §4B1.2. Most probably, the Commission intended the definitions in 4B1.2, §5K2.17, and §5K2.13 to be consistent with each other. We recommend that the Commission change the term in §5K2.13 to an "offense other than a violent offense" and/or provide an explanatory commentary note, as it did for §5K2.17.

³There was a circuit conflict on whether there was statutory authority to impose a fine based on costs, which may have been settled, at least as to whether it can be a factor of the punitive fine, with the statutory addition in September 1994, of 18 U.S.C. § 3572(a)(6), allowing costs to be a factor considered in the imposition of the fine. While it is likely that the statutory amendment will also support a separate and additional fine amount too, it has not yet been determined to be so.

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As always, we appreciate the Commission's consideration of our submissions.

Sincerely,

A handwritten signature in cursive script, reading "George P. Kazen". The signature is written in dark ink and is positioned above the printed name and title.

Honorable George P. Kazen
Chairman

cc: Vice Chairman Michael S. Gelacak
Vice Chairman Michael Goldsmith
Commissioner Wayne A. Budd
Honorable Deanell R. Tacha
Mary Frances Harkenrider, ex-officio
Michael Gaines, ex-officio
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John Steer, General Counsel
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Honorable George P. Kazen
Chair

March 6, 1997

Honorable Richard P. Conaboy
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South
Washington, D.C. 20002-8002

Dear Judge Conaboy:

The Committee on Criminal Law of the Judicial Conference submits this response on the amendments and issues published for comment for the 1997 amendment cycle. Our comments are brief, in recognition of the fact that the Commission has decided to not enact substantive amendments beyond some circuit splits or conforming amendments, due to the number of amendments necessary to implement new legislative provisions at this time. The Commission has, nevertheless, indicated its desire to receive comment on pending issues, and it is primarily to that end that we direct most of the following comments. All of the proposed amendments we discuss are, in our view, worthy of continued serious efforts toward passage next year. We also urge the Commission to do whatever might be possible this year, beyond implementing legislation and some circuit splits, to improve the system where it is clear that it should be done.

A. Circuit Conflicts

The Sentencing Commission has a responsibility to resolve conflicts among the circuits, in order to maximize uniformity of guideline application and to minimize disparity and unnecessary litigation. These reasons, in themselves, are sufficient justification for the Commission to resolve circuit conflicts on an ongoing basis, to do what it can to ensure the smooth and uniform application of the guidelines with the least litigation possible.

We ask the Commission to resolve those circuit splits we cited in our February 21, 1997 letter, and to also adopt any other conforming or clarifying amendments it deems useful for the operation of the guidelines, in compliance with its statutory task of monitoring the application of the guidelines and clarifying those conflicts and confusions that arise, where possible. We list below those published circuit conflicts that we ask the Commission to prioritize for resolution this year:

1. Amendment # 11: **Application of retroactive amendments.**
2. Amendment # 14: **Express threat of death.**
3. Amendment # 17: **Underlying offense.**
4. Amendment #27: **Controlled substance offense/career offender.**
5. Amendment #23: **Obstructive conduct.**
6. Item 4 of Amendment 28: **Definition of facility "similar facility" to a halfway house**
7. Item 8 of Amendment 28: **A sentence to a community confinement center as prison**
8. Item 10 of Amendment 28: **The fine for costs of supervision or imprisonment**
9. Item 6 of Amendment 28: **"Victim of the offense" under §3A1.1**
10. Item 15 of Amendment 28: **Definition of "non-violent offense" in §5K2.13**

B. Acceptance of Responsibility

We have urged, and continue to urge, the Commission to reform the acceptance of responsibility guideline by "de-linking" the third point from the first two points, to bring a greater degree of certainty to the first two points when the defendant enters a plea, and to allow the court to exercise its discretion, based on a totality of the circumstances, to award the third point reduction to those defendants who not only enter a plea, but do something in addition, *i.e.*, the "plea-plus" situation.

The published amendment was a step in that direction, but we have come to realize that a simpler version would better serve the system. We have discussed among ourselves and with others, including the judicial advisory group and members of the Commission, to more clearly focus on what should be changed, and to change only that, and no more, of the current guideline. We are very close to completing a proposal that we believe would be well received, but some minor fine-tuning still needs to be done. In light of the shortness of time remaining in this cycle, and in light of the low probability that the Commission will be receptive to this amendment this

year, we have decided not to urge adoption of any amendment at this time. However, we urge the Commission to keep acceptance of responsibility high on the agenda for the next amendment cycle.

C. Fraud Table and Loss Issues

We appreciate the Commission's publication of our proposed fraud table and the commitment of your staff to work with us and others in an effort to reach consensus on a new proposed fraud table. The Department of Justice has joined the Committee in calling for increased fraud levels, and the recent FJC judicial survey indicated this was one area in which the judiciary wants change. We asked the Commission to minimize unnecessary litigation by converting the one-level categories to two-level categories and by eliminating the more than minimal planning adjustment. We also asked, as has the Department, that fraud offenses levels be significantly raised.

We realize that the Commission has said it will not be enacting any amendments this year beyond some conforming ones and some circuit splits. However, because it appears that we are very close to achieving a consensus draft proposal, and because of the importance of this issue to the judiciary, we plan to continue working on the fraud proposal. We hope to be able to submit a revised fraud table with accompanying adjustments very soon, which will address the concerns of both the Committee and the Department. If we are able to do so, we hope that the Commission will give it serious consideration this amendment cycle.

We also believe that the loss issues published for comment merit serious consideration, and we have spent considerable time reviewing them. We regret that the Commission chose not to seriously pursue these issues this year. Several of them merit clarification by the Commission, in order to avoid needless litigation and to enhance uniformity of guideline application. We hope the Commission will solicit comment on these issues again next year, and that it will commit staff resources early to help response groups such as ours work through possible options, to ensure that meaningful options are submitted to the Commission for serious consideration next year.

D. Mitigating Role

We still believe that both aggravating and mitigating role adjustments should be reformed, along the lines of the published mitigating role proposal. We were actively working to fine-tune that proposal, and were close to a significant proposal when we were told the Commission was not prepared to go forward with it this year. A proposal similar to that published on mitigating role has been pending for Commission consideration since the 1995 amendment cycle. Role is a crucially important aspect of every federal sentencing, and one in which maximum flexibility is appropriate and needed for the sentencing court. We ask the Commission to also keep role on the table for serious reform next year.

E. Conforming Amendments

We ask the Commission to adopt the following amendments, which simply conform the guidelines to recent changes in law. These amendments can only bring benefit to the system, and avoid ambiguity:

Amendment #34 on §5K2.0.

Amendment #29 on Probation and Supervised Release

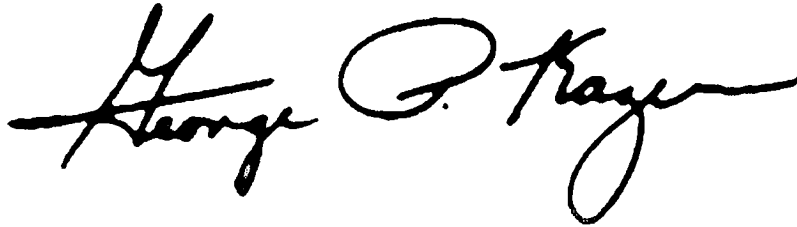
Amendment #30 on Supervised Release

Amendment #31 on Restitution

Amendment #36 on the Presentence Report.

Thank you, as always, for your consideration of our recommendations.

Sincerely,

A handwritten signature in black ink, reading "George P. Trayer". The signature is fluid and cursive, with the first name "George" and last name "Trayer" clearly legible, and "P." as a middle initial.

cc: Vice Chairman Michael S. Gelacak
Vice Chairman Michael Goldsmith
Commissioner Wayne A. Budd
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Mary Frances Harkenrider, ex-officio
Michael Gaines, ex-officio
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