



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS**

GEORGE P. KAZEN
CHIEF U.S. DISTRICT JUDGE

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United States Sentencing Commission
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 2-500
Washington, D. C. 20544

Re: Proposed Guideline Amendments

I offer the following comments with respect to three of the currently proposed guideline amendments:

Proposed Amendment 18. In my opinion, this proposal is an unnecessarily cumbersome way to address the perceived problem of disproportionate sentences for aggravated felons under Guideline §2L1.2. Preliminarily, it should be remembered that in 1994 Congress doubled the maximum sentence for §1326 offenses to twenty years' confinement and deliberately broadened the definition of an "aggravated felon." Nevertheless, under the current guideline, I cannot recall sentencing any defendant to more than nine years' confinement, and that was one unusual case. Generally, the maximum sentences range from 60-72 months, and those defendants have had rather extensive criminal records. More often, the sentences are in the range of 45-55 months.

In my experience, the ability to find that a defendant's criminal history category is overstated, under Guideline §4A1.3, together with the current Application Note 5 to Guideline §2L1.2, usually have allowed me to appropriately mitigate sentences when necessary.

A relatively modest change to Application Note 5 would allow further flexibility in the occasional harsh case, without completely rewriting the guideline. That Note correctly recognizes that aggravated felonies vary widely across the country. Nevertheless, under sub-part (C), a downward departure is not allowed if "the term of imprisonment imposed" exceeded a year. This language has been interpreted to apply to a suspended sentence. I have seen countless cases involving extremely small quantities of narcotics or very petty assaults or thefts where the

sentence "imposed" was several years, but the defendant was immediately placed on probation and never confined. In my judgment, such sentences should be considered the equivalent of a federal sentence to "probation," so long as the probation has not been revoked. Indeed, prior to the Sentencing Reform Act, one method of placing a federal defendant on probation was to impose a suspended sentence. Note 5 should be modified so that the limitation on departures is controlled by the non-suspended portion of the imposed sentence.

I realize that this approach differs from that proscribed in 8 U.S.C. §1101(a)(48)(B). That provision, however, is one reason why sentences under Guideline §2L1.2 are sometimes disproportionately harsh, and the purpose of Note 5--and of Proposed Amendment 18--is to ameliorate that situation. I respectfully suggest that my proposal would accomplish that goal in a much simpler way.

A further modification to Note 5 would be even more curative. That modification would provide that a departure would be allowed so long as the non-suspended portion of the prior sentence did not exceed two or perhaps three years, instead of only one year as in sub-part (C). To those who might be concerned about allowing judges an unrestrained departure, I first observe that the current Note 5 already allows it. Further, the proposed Option Two would allow unrestrained upward and downward departures. If necessary, however, the departure could be channeled, as in "not more than _____ levels" or "to not lower than level _____." I believe that either or both of these modifications to Note 5 would largely accomplish the goal of proposed Amendment 18.

I stress that a modification of Note 5 to consider only the non-suspended portion of a judgment is not the equivalent of using the criteria of "time served," as contemplated in Option One. The latter interjects a feature which could often be hard to determine and would tend to increase litigation. My proposal would be determined strictly by the sentencing document, as is currently done. If the probation is later revoked and the sentence is implemented, the term again would be determined by the judgment revoking probation.

With respect to Option Two, I oppose a proposed departure for a defendant who supposedly was not advised of the "criminal consequences" of an illegal reentry. The meaning of the term "criminal consequences" is unclear. Does it refer to the fact of being indicted or the potential sentence upon conviction or something more? Whatever it means, it would be almost impossible to verify what a particular defendant was told at his deportation. Moreover, in handling probably over a thousand of these cases, I have never heard anyone claim that he did not know it was illegal to return. The claim, if any, is that he did not realize the sentence would be very high. Incidentally, I have often heard the same claim in narcotics cases. If claimed ignorance as to the possible sentence for violating the law is grounds for departure here, it should be in every case. To my knowledge, ignorance of the law has never been treated that way.

With respect to the text of proposed Amendment 18, I note that there is a proposed definition of the term "controlled substance offense," borrowed in part from Guideline §4B1.2. In the text of Guideline §2L1.2, however, the only place where I see that phrase is at subsection (b)(1)(B), which pertains to convictions of three or more misdemeanor crimes. It would be rare to find a misdemeanor conviction for the type of offenses listed under the tendered definition, which describes such things as manufacturing, distributing, importing and dispensing controlled substances, or possession with those intents. I also note that the current definition of "crime of violence" is deleted, apparently without any new substitute. While again the term "crimes of violence" only appears with respect to misdemeanors, the absence of definition could be problematical. I have recently read the case of United States v. Chapa-Garza, No. 99-51199, decided by the Fifth Circuit Court of Appeals on March 1, 2001. There, the court concluded that a felony DWI conviction was not a crime of violence under 18 U.S.C. §16 (derived from 8 U.S.C. §1101(a)(43), while it would be a crime of violence under Guideline 4B1.2(a)(2). The absence of any definition might lead to similar disputes.

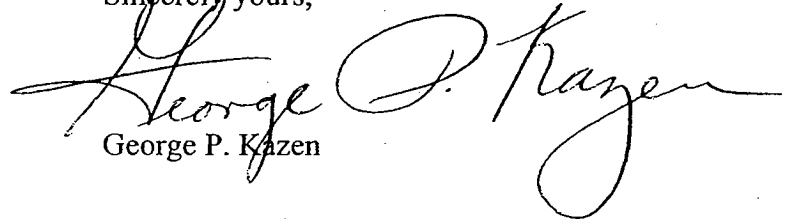
Proposed Amendment 9. This proposal would apparently apply the "safety valve," Guideline §5C1.2, to all drug cases, regardless of the amount. This is presumably based on the perception that current sentences for drug trafficking are too high, a conclusion which is certainly within the prerogative of the Sentencing Commission and the Congress. My primary concern is with subsection (5) of §5C1.2. In the large volume of cases that we handle, there is often a problem of scheduling these "debriefing" hearings between the defense counsel and the prosecutor, and in turn with the particular law enforcement officer assigned to the case. Requested continuances to schedule the conference are not uncommon. After the conference, it is also not uncommon for the parties to disagree on whether the defendant has truthfully provided all information known to him. The judge must make that decision despite not having attended the debriefing session. This then either requires hearing from both sides as to why they disagree or perhaps asking the probation officer to interview the parties and make his own recommendation. This effort is probably worth the result at the higher offense levels. As one descends into the lower levels, the sentencing ranges overlap every two levels and the sentence deferential might be as little as a few months. One questions how diligently subsection (5) would be administered under that circumstance.

Proposed Amendment 7. The stated purpose of this proposal is to provide that a single defendant is not precluded from receiving a mitigating role adjustment. I am not sure that the proposal achieves that result. The new language still provides that there must be more than one "participant" in the offense, and that the adjustment does not apply to a defendant unless the "offense involved other participants." A "participant" is one criminally responsible for the offense but who need not have been convicted. At least at the Mexican border, the vast majority of narcotics cases involve persons handling the transportation leg of the overall narcotics trafficking business. Usually, the defendant is a solo driver transporting narcotics from the Mexican border to somewhere further north, generally at least a few hundred miles but often

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more. Everyone in the system understands that this person is almost never acting alone. Others have cultivated and packaged the substance, and others often have imported it, although sometimes the driver and the importer are the same person. Others are the financiers of the venture and others may have provided the vehicle. Also, someone else will receive the substance at the wholesale level and others will distribute it at the retail level. As often as not, these persons are not definitely identified or arrested by agents. The defendant stands alone before the court, charged with either importing the substance or possessing (*i.e.*, transporting) it with the intent to distribute. He is to be sentenced for his own personal conduct, which he performed alone. Is this is a case where "other participants" are involved under Proposal 7? If so, I suggest that there are few, if any, narcotics cases in which the defendant would not be eligible for consideration as a minor participant. If this is not a case with "other participants," then I think the result in the Seventh Circuit's Isienyi case remains intact, which I believe is the correct result.

Sincerely yours,


George P. Kazen

GPK/gs

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