

Before the

**UNITED STATES SENTENCING COMMISSION**

*In re Proposed Amendments to the  
United States Sentencing Guidelines*

**STATEMENT OF DONALD THOMAS BERGERSON**

**In Support of Proposed Amendment Number 50  
(LSD Sentencing)**

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**Donald Thomas Bergerson  
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# UNITED STATES SENTENCING COMMISSION

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## STATEMENT OF DONALD THOMAS BERGERSON

In Support of Proposed Amendment Number 50  
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TO: THIS HONORABLE COMMISSION and INTERESTED  
PARTIES:

I am Donald Thomas Bergerson. I am an attorney in San Francisco, California. I was counsel for one of the litigants in *Chapman v. United States* 500 U.S. \_\_\_, 114 L.Ed.2d 524 (1991), discussed below. This is written testimony in support of proposed amendment 50 to the Sentencing Guidelines. The proposed amendment will ameliorate the impact of language in the statute and the Guidelines which has led to unjust results in *Chapman* and in all other cases involving LSD.

In this statement, I shall outline (1) the background of the issue; (2) criticisms of the current "carrier weight based sentencing" scheme in the Guidelines; and (3) some thoughts about why modification of the Guidelines is a valid interim solution even though Congress has not yet acted to ameliorate the underlying problem.

### I Background

As the Commission is aware, drug offenders are generally sentenced on the basis of the weight of the "mixture or substance containing" the drug. Although some drugs are *also* penalized in

their pure form, this "mixture or substance" language was inserted into each statutory subsection specifying the quantity of drugs which trigger a given penalty.

In *Chapman v. United States*, *supra*, 500 U.S. \_\_\_, the Supreme Court held that absorbant paper containing minute quantities of LSD constitutes a "mixture or substance containing LSD" for sentencing purposes. Most LSD trafficking involves this technique of placing LSD on paper.

*Chapman* reached its result by using a broad "dictionary" definition of the word "mixture." This approach was misleading because LSD does not, in fact, "mix" with blotter paper in any scientific sense. See, Testimony in *U.S.A. vs. Forbes, et. al.*, (NDCA CR-91-0087-VRW (LSD is attracted to the surface of the paper by a process akin to static electricity, but does not "mix" with its fibers). More importantly for purposes of this Commission, the *Chapman* definition of "mixture" appears to vary from the Congressional intent underlying the incorporation of that word into the relevant statute. The House report accompanying the legislation states that the word was used to target dealers who adulterate drugs with 'cut' or 'filler' in order to increase the apparent volume of contraband, and thereby boost their profits<sup>1</sup>. While weighing the 'cut' is an appropriate technique to discourage trafficking in drugs that are sold by weight, LSD is not sold by the weight of the mixture containing it; rather, it is sold by the dose.

The absorbant paper used in LSD trafficking fills a completely different role from that played by the 'cut' in heroin or cocaine dealing. A dose of LSD is an infinitesimally small droplet of stuff, typically weighing a mere fifty *millionths* of a gram. This is too tiny a measure to be handled by either the user or the seller. To be handled, a dose of LSD must be placed onto something considerably larger than the dose, itself. In the 1960s, a variety of materials, (most commonly, tablets or sugar cubes), were used for this purpose; more recently, sheets of gelatin or paper have been employed. The typical LSD consumer is not "fooled" by the size of the tablet or paper into thinking he has bought "more" LSD merely because he has bought a bigger tablet or a heavier piece of paper. No matter how big the carrier may be, the size of the dose of LSD, and its

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1. See, H.R. Rep. 98-845 at pp. 11-12 (1986)

price<sup>2</sup>, is unaffected<sup>3</sup>.

## II The Problem

Weighing paper *does*, however, impact drastically on LSD sentences. Because LSD is so light, *any* carrier is far heavier than the drug. As such, weighing the carrier greatly increases the weight of the "LSD" for sentencing purposes. For example, in one of the cases considered along with *Chapman*, the LSD weighed only six tenths of a gram, while the paper weighed over a hundred grams. This is the difference between a level 22 and a level 36 sentence,--a difference of some twelve and one half years at the lowest end of each respective Guidelines range<sup>4</sup>. [*United States v. Marshall* 908 F.2d 1312 (7 Cir., 1990) *aff'd* sub. nom., *Chapman v. United States*, *supra*, 500 U.S.

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2. According to the National Narcotics Intelligence Consumers Commission, Report 1988: The Supply of Illicit Drugs to the United States 52 (1989), the price of LSD is as little as thirty-five cents per dose. As indicated hereafter, this means that first offender can get five years in prison for \$75.00 worth of LSD if sentenced according to carrier-weight-based sentencing.

3. I recognize that arguing the difference between carrier and 'cut' may "prove too much." Arguably, LSD carriers are more integral to LSD dealing than 'cuts' are in heroin or cocaine trafficking, since the latter drugs could, as a practical matter, still be sold even if in pure form while LSD cannot.

A distinction must be drawn between the importance of the carrier in LSD trafficking and the appropriateness of weighing the carrier in determining the LSD sentence. No doubt, money is also essential to LSD trafficking (and the value of the transaction is a good indication of its size); however, one would not think of weighing the currency involved in a dope deal, lest the kingpin who was paid in thousand dollar bills get a lesser sentence than a similar dealer who accepts payment in twenties. It can be argued that carriers are properly targeted in LSD cases because wiping them out would eliminate the traffic. But this argument can be made with regard to other paraphernalia, e.g. syringes in the heroin trade, which no one would rationally think of weighing in order to determine the quantity of the drug involved in the transaction.

4. The distortion is magnified when other carriers are used. For example, sugar cubes, another LSD carrier, weigh approximately 2 grams apiece; as such, trafficking in a mere five doses of LSD on sugar cubes will trigger the ten year mandatory minimum for trafficking in over ten grams of LSD. 21 USC 841(b)(1)(A)(v) See, Chapman, supra, 114 L.Ed.2d at 533, fn 2.

penalties in parity with each other. For example, the basic anti-drug statute, 21 USC 841(b), imposes a five year minimum sentence for selling a mixture containing 100 grams of heroin or 500 grams of cocaine; according to the relevant authorities<sup>5</sup>, each of these amounts corresponds to something in the neighborhood of 20,000 doses of each respective drug. For LSD, the five year minimum is triggered at 1 gram. Not surprisingly, a gram of *pure* LSD yields 20,000 doses (at 0.00005 grams per dose), putting LSD right in line with heroin and cocaine. However, when paper is factored in, these equivalencies are skewed wildly; Chapman's 1,000 doses weighed 5.7 grams<sup>6</sup>, meaning that Chapman crossed the 1 gram threshold with less than 200 doses; Chapman's punishment was thus one hundred times greater than that which would have been meted out to a trafficker in heroin or cocaine. Nor is Chapman's a unique case; in his dissent, Justice Stevens pointed out that this problem plagues *all* LSD cases. *Chapman*, 500 U.S. at \_\_\_, 114 L.Ed.2d at 543, fn. 10, Stevens, J., dissenting.

Indeed, Chapman's case was 'unusual' only in that he trafficked in extremely *light* paper. This leads to a second troubling paradox in LSD cases; since not all paper weighs the same, bigger dealers sometimes get lesser sentences merely because they use lighter paper. The paper used by trafficker who sold under 500 doses of LSD in *United States v. Rose* 881 F.2d 386 (7 Cir., 1989) weighed .0154 grams per dose. Although Chapman trafficked in over twice the number of doses as did Rose, his anticipated Guidelines sentence (level 28) would have been *less* than that for Rose (level 30), had Rose been sentenced under the Guidelines. In other words, carrier-weight-based sentencing yields a skewed schedule of penalties amongst traffickers in identical amounts of LSD.

A third problem created by the carrier-weight-based sentencing scheme is that the gossamer weight of the LSD, itself, has virtually no impact on the ultimate sentence. As a practical matter, this means that some large dealers in pure LSD are escaping punishment altogether. To supply just one anecdote, just after I did the *Chapman* case, I handled an LSD arrest in San Francisco involving three

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grams of pure LSD. Although this fell within the five year mandatory minimum, it was deemed to be too small for prosecution in the Federal court, so the primary defendant in the case was prosecuted in state Court, where he ended up with only a probationary sentence. This defendant, who trafficked in six times the quantity of LSD that fetched the defendant a twenty year sentence in *Marshall*, was *obviously* a fairly large dealer, since three grams of crystal LSD suggests access to an actual LSD laboratory. Yet, because of carrier-weight-based sentencing, he escaped with only a minor penalty.

Carrier-weight-based sentencing produces all sorts of similarly silly results. For example, if an LSD dealer manages to dispose of his LSD, (either by selling it or destroying it prior to his arrest), he will be sentenced only for the weight of a 'typical' dose of *pure* LSD. (U.S.S.G. 2D1.1, *Commentary* 11) Carrier-weight-based sentencing affords *this* offender a massive "break" for either inserting LSD into the stream of commerce (the very thing the drug laws are supposed to prevent) or for obstructing justice.

Beyond its implications for LSD offenders, carrier-weight-based sentencing threatens to impact adversely on the deployment of enforcement resources in an era of shrinking budgets. The typical LSD dealer, particularly the modest trafficker in hundreds of doses such as Chapman, is a young person from a sheltered background who has temporarily embarked on a period of 'hippie-style' experimentation. Naive and passive, he presents an easy 'mark' for enforcement officers, and carrier-weight-based sentencing inflates the value of the small quantities seized from him. No wonder LSD arrests have increased during the period since *Chapman*; the 'value' of LSD arrests is 'subsidized' by carrier-weight-based sentencing. It is questionable that this reflects the intent of Congress; when the antidrug amendments were debated in 1986, the only reference made to LSD was a statement to the effect that its menace was *diminishing*<sup>7</sup>. At any rate, it is hard to defend the targeting of LSD dealers as a rational enforcement priority.

In short, LSD sentencing is a mess. No one believes that LSD is a more dangerous drug than heroin or cocaine. Yet LSD sentences are roughly a hundred times greater than those assessed for more dangerous drugs, and vary wildly amongst LSD offenders, themselves on the basis of a wholly aleatory factor.

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7. See, 132 Cong. Rec. S14270 (9/30/1986; Sen. Harkin).

### III What This Commission Should Do,--and Why

I realize that however compelling the foregoing arguments may be, this Commission may be hesitant to act. Congress has, after all, thus far not amended the sentencing statute in response to *Chapman*, and a primary purpose of the Guidelines is to implement the statute. For reasons as follow, however, I believe that such concerns are misplaced.

First, nothing in this Commission's charter compels it to amplify Congress' mistake and continue to base punishment to the weight of LSD carriers. While this Commission is not empowered to enact remedial legislation, it can use its Guidelines-shaping power to ameliorate palpable injustices within the bounds of the existing mandatory minimum penalties provided by statute.

Second, by doing nothing, the Commission will in fact countenance a dismantling of sentencing uniformity in LSD cases *anyway*. It is an open secret that only a fraction of LSD sentences are Guidelines-sentences; a large remainder (which may, for all I know, constitute the majority) are mandatory minimum sentences imposed by judges who think carrier-weight-based sentencing to be foolish and Draconian. This perverts and undermines the basic principal of determinate sentencing. One first offender may get twenty years under the Guidelines for 10,000 doses, while another, in front of a different judge, may get a mandatory minimum half as long; I have no question that were the respective defendants to change judges, they would change penalties. I suppose that this happens, to a degree, with many types of crimes. But I suspect that it is a particularly troubling artifact in LSD cases, not only because the sentences in *both* types of cases are disproportionately long, but because sentence-selection is so nakedly tied to the judge's agreement or disagreement with the substantive law,--which *surely* was the one factor we hoped to eliminate with the passage of determinate sentencing.

Third, this Commission is vested with broad duties beyond merely constructing a sentencing table based on mandatory minima. Specifically, this Commission is charged with insuring that penal resources are efficiently allocated. 28 USC 994(c)(1)-(7). I have suggested *ante* that carrier-weight-based sentencing inefficiently focuses scarce enforcement resources on making fairly modest LSD seizures. This Commission is clearly empowered to eliminate such waste.

Finally, action by this Commission in the absence of previous Congressional action would have the salutary impact of *inspiring* such Congressional action. The Supreme Court has recognized that this is an "expert body," [*Mistretta v. United States* 488 U.S. 361, 379

(1989)], endowed with "significant discretion to determine which crimes have been punished ... too severely." *Id.*, at 377. This Commission is chartered with a host of duties ancillary to the exercise of this discretion, including revising inappropriate Guidelines, [28 USC section 994(o)]; recommending changes in statutory penalties, [28 USC section 994(r)]; issuing policy statements aimed at implementing its perception of the intent of Congress in passing criminal legislation, [28 USC section 994(a)]; and assisting the Federal judiciary in meeting its sentencing responsibilities, [28 USC section 995(a)(22)]. In light of these multiple founts of authority, this Commission should not hesitate to declare that LSD is punished disproportionately. If Congress disagrees, it will override the instant amendment to the Guideline. If it *agrees*, however, this Commission can credit itself with goading Congress towards a long overdue reform.

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I cannot close without making a personal comment. The reason I became involved in the *Chapman* case is that it arose out of a Seventh Circuit case involving my wife's brother. *United States v. Marshall, supra*, 908 F.2d 1312.

Stanley Marshall was a National Merit finalist and High School debate star who lost his bearings when his mother died unexpectedly. For years, he lived aimlessly. He tried LSD during this period, and I guess he liked it. Sometime in 1988, he was arrested for a first felony offense of having sold a few thousand dollars worth of LSD over several months.

Stanley was not a kingpin. He sold the LSD because he was homeless and his girlfriend was pregnant. Despite this, he got the sort of sentence traditionally reserved for a dealer like Manuel Noriega.

I was glad that Stanley was sentenced to prison. Prison sobered him and restored his mind. He learned to get up in the morning and eat regularly. He took a job, and he tells me he likes to work. Even so, I felt Stanley was ready to go home after two years; he had recovered sufficiently to get a *real* job and start a family. But he can't go home. He must still serve at least twelve more years of his twenty year sentence.

I need not tell the Commission how sad this is, not only for Stanley, but for the daughter he will never get to raise, and for my wife, and my children who love their uncle with his playful wit and foolish smile. Obviously, I miss him too.

If one of you can think of a reason why Stanley should serve twelve more years, please tell me. But I hope it is more compelling

than that he stored his drugs on a quantity of paper only a little heavier than the pamphlet you are now holding in your hands.

*Respectfully Submitted:*

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