

THE "NONETHELESS" RIDER IN THE 1994 FSGM

AND A PLEA TO REMOVE IT

The 1994 FSGM contains an amendment that introduces a method for estimating the weight of a sample of LSD on a carrier vehicle. The purpose of the amendment is to reduce the injustice that attends LSD sentencing. This it accomplishes -- or would do if it operated unimpeded. But a rider at the end of the Commentary to the amendment, referred to here as the "nonetheless" rider, warns that the amendment has only limited application and even misinterprets the amendment. The rider is seen to be unnecessary as well as subversive to the intention of the Commission, and a plea is made for its removal.

1. The Commission's first approach to the relief of inequity and disproportionality in LSD sentencing: That such injustice exists has been acknowledged by the Commission in Application Note 18 in Section 2D1.1. The mandate of the Commission is to remedy faulty justice where it is discovered, and this in the person of its Chairman has long set out to do.

The first approach aimed at the elimination of carrier weight as a factor in determining the base offense level where an offense involved LSD on carrier material. Carrier weight exceeds the weight of the LSD it carries by so wide a margin that its inclusion in the determination of a sentence inevitably distorts the administration of justice. The aim of the Commission was to exempt certain LSD offenses from the authority of the mixture-or-substance rule. This proved to be unworkable, but the reason for its lack of success is worth recounting.

The mixture-or-substance rule, one of the two pillars of the Anti-Drug Abuse Act of 1986, requires that the weight of both or all of the ingredients of a mixture or substance containing a detectable amount of certain proscribed drugs, including LSD, decides whether a mandatory minimum sentence is to be imposed. The mixture-or-substance rule left unstated what a mixture is or what a substance is. The meaning of "substance" never figured prominently in court actions subsequent to 1986, but the meaning of "mixture" did. The question was settled in the 1991 Chapman decision, which found that the combination of LSD and blotter paper constitutes a mixture, with the result that the weight of blotter paper carrier material becomes critical to the question of whether a mandatory minimum sentence is triggered.

The Commission's earlier approach foundered on this rock.

Opposition in Congress to the Commission's aim of exempting LSD offenses from the authority of the mixture-or-substance^{rule} resorted to an argument derived from Chapman. A letter from Representative Henry Hyde and other members of the House protested that an exemption in the case of LSD would invite offenders responsible for offenses involving drugs other than LSD to claim the same privilege. Then heroin and cocaine offenders would argue that they too should see their liability to mandatory minimum sentences determined by a weight of pure heroin and pure cocaine. One of the pillars of the 1986 Act would have crumbled, perhaps irreparably.

The letter was dated April 7, 1993. Evidently, by this time the Committee realized it faced an impasse. Unjust sentencing could not be remedied by an appeal to Congress for a resolution of the carrier weight problem directly. Yet the Commission could not fulfill its mandate to alleviate injustice if present sentencing arrangements continued. An alternative approach was needed.

2. The Commission's second approach: The solution the Commission adopted and which Congress allowed to be entered in the 1994 FSGM, consists in an alternative method of estimating the weight of a sample of LSD on carrier material. The Commission's method, which will be referred to here as the 0.4 milligram method, permits a judge to treat each unit of a mixture of LSD and blotter paper as equal to 0.4 milligram for the purposes of the Drug Quantity Table. In practice, the number of units in a sample is counted and the total number is multiplied by the standard figure of 0.4 milligram. The result is entered in the Drug Quantity Table and a base offense level read off. From there a sentence range is determined from the Sentencing Table.

The 0.4 milligram method accords with Chapman. It concedes that an LSD-blotter paper combination is a mixture. Both measures require that the weight of an LSD-blotter paper mixture be recorded as the weight of the entire mixture, not just the weight of one ingredient. Both measures, as a matter of fact, address themselves to LSD-blotter paper mixtures only, Chapman because only the constitution of an LSD-blotter paper combination was examined and declared to fit the definition of a mixture, while the constitution of combinations of LSD and some carrier material other than blotter paper was left unexamined and so not declared to fit the definition of a mixture; the amendment because only blotter paper carrier has been defined in terms of units, and the 0.4 milligram method of estimating weight is useless if a unit of an LSD-carrier vehicle mixture has not been defined. Throughout, there is no point of disagreement between Chapman and the amendment.

Chapman ruled that "the entire mixture or substance is to be weighed," and that "it is the weight of the blotter paper containing LSD, and not the weight of the pure LSD [alone], which determines eligibility for the minimum sentences." Chapman

nowhere uses the expression "entire weight," which is ambiguous, and makes it clear that the court's notion of entirety is that no sector of a mixture consisting of LSD and blotter paper shall be omitted from the count, neither the blotter paper nor the LSD. Chapman nowhere shows an interest in the manner in which the operation of weighing the entire mixture is conducted, however. That the entire mixture is to be weighed is certain. How it is to be weighed is left unstated.

Richard Chapman and his co-petitioners in their case before the Supreme Court did not raise the question of the method of estimating the weight of Chapman's LSD-blotter paper mixture either. The question was simply not germane to the case. The Sentencing Commission, in adopting an alternative method of estimating the weight of such a mixture, therefore, did nothing to contravene the rule of Chapman. So long as the weights of both ingredients of an LSD-blotter paper mixture are taken into account and not the weight of one ingredient only, the 0.4 milligram method is in perfect accord with Chapman.

The method of attributing a standard weight to a unit of a mixture containing LSD is not original and, further, lies within the Commission's sphere of competence. The attribution of a standard weight for administrative purposes is done all the time in the field of drug law. The example which springs to mind is the attribution, by the Commission, of a weight of 100 grams to a marijuana plant when the number of plants in a grow is less than 50. The weight assigned to a single plant is to an extent arbitrary, although the guideline gives a plausible account of it. The assigning of a weight of 0.4 milligram to a unit of a mixture of LSD and blotter paper follows the same principle. It too is arbitrary to an extent, though well defended.

3. The link to mandatory minimum sentencing: The two pillars of the Anti-Drug Abuse Act of 1986 are the mixture-or-substance rule and the provision for mandatory sentences of a minimum of five years and a minimum of ten years. Necessarily, they are linked. The weight obtained in consequence of the calculation performed on the mixture or substance -- mixture only in the case of LSD and blotter paper -- is the weight that either does or does not generate a five or ten year mandatory minimum term. To suggest a metaphor, the mixture-or-substance rule is the fuel that lights the fire of mandatory minimum sentencing. The one supplies the power that drives the other. The question that concerns critics of the Commission is whether its 0.4 milligram method weakens the link between the mixture-or-substance rule and the provision for mandatory minimum sentencing. The contention here is that it does not.

In a strong sense, all drug sentencing is mandatory and minimal. The Drug Quantity Table that translates a given weight of a mixture or substance into an offense level, and the corresponding Sentencing Table that completes the calculation by translating the offense level into a range of months of

imprisonment, together mirror the requirements of the statute. In the statute, two weights, an upper and a lower, the amount stipulated for each drug listed in the Act, are related to the five and ten year mandatory minimum sentences the Act provides for. Together, the Drug Quantity Table and the Sentencing Table mirror this arrangement faithfully, copying the parameters set by Congress on a scale that extends above, below, and between the linkages set by the statute. Each calculation that starts with the weight of a mixture or substance containing a drug such as LSD ends in a range of months from which a sentence is selected. Barring downward departures, each range has a lower edge below which a sentence may not fall. Effectively, every sentence has a mandatory minimum floor.

The Drug Quantity Table and its companion Sentencing Table make up a system that projects and embraces the connections defined in the statute. It may be argued as a consequence that if the principle of assigning weight is acceptable for one part of the system, it is acceptable for every part.

Inasmuch as Chapman ^{is} ~~was~~ silent on the question of the method by which the weight of a mixture or substance is estimated, so also is the statute. There is not an explicit or implicit prohibition of the use of the Commission's instrument for any part of the system of mandatory drug sentencing. Congress, in permitting ~~permitting~~ passage of the 0.4 milligram amendment into law, tacitly recognized this.

Congress is mindful of the need for mandatory sentencing in drug cases. But the Commission's second approach to the relief of injustice in LSD cases does not occasion the same caution as the first. No one has suggested a standardized weighing method for heroin or cocaine mixtures. With the 0.4 milligram method in place for LSD-blitter paper cases generally, it is unreasonable to suggest that the statutory link between mixture-or-substance weight and mandatory minimum sentencing is weakened. Given sufficient weight, a mandatory minimum sentence is triggered with the 0.4 milligram method in place no less effectively than formerly. The mechanism remains intact. A weight that reaches the level stipulated for LSD mixtures triggers the sentence. A weight that does not reach the level does not.

4. The objection: Critics resort to an argument that relies on Section 5G1.1(b) of the guidelines. A statutorily required minimum sentence that exceeds the maximum sentence allowable in a guideline range becomes the guideline sentence, according to this section. In practice, the argument yields a two-stage procedure that determines an offender's sentence. In stage one, the weight of a sample of a mixture LSD and blitter paper is estimated according to the traditional method of gauging weight, namely by checking a pointer-reading on a scale. The weight is examined for its ability to trigger a mandatory five or ten year sentence. Should such a sentence be excited, its place in the ultimate sentence is assured. Next, in stage two of the procedure, the

weight of the sample is re-estimated according to the 0.4 milligram method. This second weight is read into the Drug Quantity Table, and a sentencing range is taken from the Sentencing Table. This is compared with the statutory minimum sentence obtained in stage one, and a determination is made of which is greater: the stage one statutory minimum or the top edge of the guideline range.

Since, invariably, the outcome of the comparison is ~~not~~⁹ that the top of the guideline range in an LSD-blatter paper case is lower than the statutorily required minimum sentence, the statutory sentence, in keeping with Section 5G1.1 is retained. Hence the catch-phrase "statute trumps guideline."

The argument ignores the points outline above: the competence of the Commission to prescribe a method of estimating weight such as the 0.4 milligram method; the silence of Chapman and the statute alike on the question of weight estimation; and the unitary system that joins statutory mandatory minimum sentencing and what is in effect the mandatory minimum sentencing that characterizes all drug sentencing.

The problem with the argument is that it uncritically assumes an equivalence between a method of estimating weight and a category of legal authority. It relegates the 0.4 milligram method to a guideline sentence and reserves the traditional "pointer-reading" method for a statutory sentence. That this assumption lacks a critical foundation seems evident.

The erection of a double standard for estimating the weight of one and the same sample of a mixture containing LSD opposes common sense and rationality. A sense of the rational is restored when the sample is submitted to a single method of estimating weight. As to which method, only the 0.4 milligram method alleviates the injustice commonly attached to LSD sentencing.

If to this it is countered that Section 5G1.1 is an amendment that expressly recognizes instances of a double standard of this sort, it ought not to be forgotten that Section 5 G1.1 is itself an amendment to the guidelines, exerting no greater force than the amendment in Section 2D1.1 that introduced the 0.4 milligram amendment. Section 5G1.1 does not exert the force of statutory law.

5. Consequences of the two-stage procedure: After the March, 1993 hearing of the Commission, a measure was voted in that allowed for retroactive modification of sentences imposed for LSD-blatter paper offenses. (The reader may be reminded that the 0.4 milligram method applies in practice only to LSD cases that involve blatter paper carrier. Retroactive sentence modification therefore applies only to cases of this type.)

The problem that has been raised at hearings of applications

for sentence modification is that a mandatory sentence determined by statute cannot be "trumped" by a sentence in the guideline range, calculated from the 0.4 milligram method.

Not all judges have been persuaded by this argument. The following types of outcome have been reported in cases applying for resentencing:

(A) A sentence is reduced from a position above a statutorily imposed mandatory floor to below that floor. Example: 11.5 years reduced to 56 months. Argument: The sentence is recalculated de novo. A sample of LSD-blitter paper mixture is weighed in the light of the 0.4 milligram method and found not to trigger a mandatory minimum five or ten year sentence.

(B) Sentence reduced to a mandatory ten year floor but not below. Example: 12.7 years reduced to 10 years. Argument: The sentence is recalculated according to the two-stage procedure.

(C) Sentence reduced from above to below a mandatory ten or five year floor due to substantial assistance. This type of outcome requires no further comment.

(D) Sentence not reduced even to a mandatory floor. Example: 78 months retained at 78 months. Argument: The USSC did not intend sentence modifications even to a statutorily imposed mandatory floor. (See below, 6B.)

(E) Sentence reduced where no mandatory element exists. Example: 97 months reduced to 44 months. Argument: Defendant was charged under Section 841(b)(1)(C). (The circumstances, as explained by the defendant, were that the indictment was fortuitous, his case being the first to occur in Delaware, and the prosecutor not being fully informed of the possibilities.)

These cases show the varied outcomes of applications for sentence modification, due to the employment of different arguments. Cases of types (A), (B), and (D) are the subject of appeals. Reports have it that type (B) cases are very common, and that appeals are in progress in at least four, probably more circuits, lodged by the defense in types (B) and (D) and by the prosecution in type (A).

The pattern of current sentencing in new cases, not involving resentencing, is not known to the writer.

6. Effect of the "nonetheless" rider: The rider occupies a peculiar place in the Commentary. It comes at the end of a lucid exposition of the rationale of the 0.4 milligram amendment and appears to have been added as an afterthought. Its purpose remains obscure. The comments it has elicited are:

(A) The "nonetheless" rider is superfluous: Its caution that the Commission's second approach to the difficulty of correcting injustice does not override or trump the "applicability of the concept of 'mixture or substance' for the purpose of applying any mandatory minimum sentence" does not serve a necessary end. The motive behind the Commission's second approach was precisely not to contest the meaning of "mixture or substance" as this was clarified by Chapman, and not to render the mixture-or-substance rule any the less applicable than it was before. Why is this reminder needed?

Besides, nowhere else in the FSGM, as far as can be seen, is a similar caution inserted into an application note to an amendment. Why has this amendment been singled out for such attention?

(B) The rider is subversive of the intention of the Commission: If, as is clear from the commentary, the Commission intended to relieve inequity and disproportionality, the inclusion of a "nonetheless" rider that questions the amendment's effectiveness appears self-defeating. The rider injects doubt as to the amendment's worth. Then opposition to the Commission's intention of a possibly emotional kind that has been contained in the background prior to the reading of this passage is invited to appear in force.

Two anecdotes from the writer's limited experience are relevant, one that concerns a negative outcome for a defendant. Case (D) above was heard by a judge who declined to give a reason for a refusal to modify a 78 month sentence, revealing only that it was the judge's view that the USSC did not seriously intend that LSD sentences should be reduced, even to a mandatory floor. The origin of that impression, it may be assumed, lies at least in part in the "nonetheless" rider and the negative light it casts.

In another case, attended by the writer, the judge conducting a sentencing hearing was inclined to follow the 0.4 milligram method de novo. In the course of questioning, the judge asked why, considering the obvious intention of the Commission, the "nonetheless" disclaimer had been inserted in the manual. No one among those present in court could answer, and for a moment it looked as though the judge's view might waver. It did not, and the defendant was sentenced on the basis of the 0.4 milligram method, but the failure of counsel to respond to the judge's question was awkward.

(C) The "nonetheless" rider is misleading: The reference to Chapman in the rider appears to hinge on the significance in that opinion of the word "entire." The interpretation of the term has been mentioned already. Chapman is clear on the meaning of "entire." Its insistence is that both ingredients of an LSD-blotter paper mixture be weighed, not

one. The Chapman text uses the expression "entire-mixture," not "entire weight." (The expression "entire weight" occurs in the FSGM's asterisked entry at the conclusion of the Drug Quantity Table in 2D1.1, where a more felicitous reading would be "weight of entire mixture") If, as it appears to be, it is insinuating that Chapman calls for an actual or literal weight and not an assigned weight as the quantity that triggers a five or ten year mandatory minimum sentence, the rider does its readers a disservice.

7. Recommendations: There are two:

(A) The "nonetheless" rider should be deleted. It is unnecessary, vague, probably misleading, and inimical to the Commission's intention. Without it, the Commission's intention would be read in a more positive light than it is apt to be at present. Judges would be reassured of the Commission's intention to fulfill its mandate. A healthy impetus to sentencing reform would be felt.

(B) With or without agreement to (A), an amendment should be added to the text of Section 5G1.1. Confusion over the merits of the "trumping" argument would be laid to rest by an amendment that exempted LSD-blotter paper cases from the 5G1.1(b) provision. The effect would be to facilitate modification of an LSD offender's sentence to beneath a mandatory floor. A block to modification of this kind, as in the type of outcome mentioned in 5(B) above, is the principal reason for the frustration of the Commission's aim to promote equity and proportionality in LSD sentencing.

There is no cause to fear that this amendment would threaten the authority of the statute with regard to other kinds of drug sentencing. The effectiveness of the amendment is conditional on the use of a method of estimating weight that assigns a standard weight to a unit of a mixture or substance, and no one has suggested a change in the method of estimating weight in cases involving drugs such as heroin or cocaine.