

TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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GAMMA HYDROXYBUTYRIC ACID

- - -

BEFORE THE
UNITED STATES SENTENCING COMMISSION

- - -

March 17, 2004

INTRODUCTION

Members of the Commission–

Good morning. My name is Jodi L. Avergun, and I am the Chief of the Narcotic and Dangerous Drug Section in the Criminal Division at the U.S. Department of Justice. It is a pleasure to join you today to present the views of the Department of Justice on an issue of great importance – the appropriate sentencing guidelines for Gamma Hydroxybutyric Acid, also known as GHB, and its analogues. The Department strongly urges the Commission to significantly increase the sentencing guidelines for offenses involving GHB so that mid-level traffickers receive approximately a five year sentence and high-level traffickers receive approximately a 10 year sentence.

EFFECTS AND ABUSE

GHB is a central nervous system (CNS) depressant that is abused, frequently at rave parties, to produce a euphoric and hallucinogenic high. Known in the youth party scene as G, Liquid X, Liquid Ecstasy, Grievous Bodily Harm, Georgia Home Boy and Easy Lay, GHB has become a serious and

significant drug of abuse. GHB has been associated with date-rape and overdose cases at night clubs and parties. In February 2000, Congress proclaimed it to be “an imminent hazard to the public safety that requires immediate regulatory action under the Controlled Substances Act.”¹

GHB is frequently ingested with alcohol, which compounds its effect. Symptoms of GHB abuse include drowsiness, dizziness, nausea, visual disturbances, unconsciousness, seizures, severe respiratory depression, and coma.²

GHB is easily made in clandestine laboratories by mixing its precursor chemical, gamma butyrolactone (GBL), a common industrial solvent, with sodium hydroxide (lye) in a bowl. GHB is a clear liquid and can be disguised using food coloring and additives.³

The Drug Abuse Warning Network (DAWN) data demonstrate an exponential growth in GHB abuse over the last 10 years, although recent trends suggest that its abuse may have reached a plateau. In 1994, DAWN reported 56 Emergency Department GHB mentions. Four years later, by 1998,

¹See Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999, P.L. 106-172, 114 Stat. 7, Section 2, ¶¶ (1)-(5), February 18, 2000.

²DEA Final Rule, Addition of GHB to Schedule I, 65 Fed. Reg. 13235, 13236 (March 13, 2000).

³Final Rule, 65 Fed. Reg. at 13236.

DAWN GHB Emergency Department mentions had grown to 1,282.⁴ After four more years, by 2002, there were approximately 3,200 Emergency Department GHB mentions.⁵

During the time period when Congress was studying the problem in 1999, DEA had documented over 4,000 overdoses and law enforcement encounters with GHB, and 32 GHB related deaths.⁶ By the time DEA issued its Final Rule placing GHB in Schedule I, DEA had documented over 5,700 overdoses and law enforcement encounters involving GHB, and 65 GHB-related deaths.⁷

HOW HAS THE JUSTICE DEPARTMENT RESPONDED TO GHB?

The Justice Department has responded aggressively to the threat posed by club drugs such as GHB. Operation Webslinger illustrates how GHB and its analogues, GBL and 1,4 BD, pass through several layers of distribution, particularly through the internet, before reaching the ultimate users. During the investigation, distributors and customers were identified in 40 states and seven (7) foreign countries. Law enforcement authorities arrested approximately 27 indicted targets and executed approximately 100 search warrants in the United States and Canada.

⁴ONDCP Drug Policy Information Clearinghouse Fact Sheet, GHB, November 2002, at 2.

⁵In 2000, there were 4,969 Emergency Department GHB mentions, which appears to be the “high water” mark for GHB mentions. The declining numbers after 2000 are probably due to the fact that GHB was placed in Schedule I that year.

⁶See Legislative History of P.L. 106-172, 114 Stat. 7, at 6 (“The DEA has documented over 4,000 overdoses and law enforcement encounters with GHB and 32 GHB-related deaths” since 1990).

⁷See DEA Final Rule – Addition of GHB to Schedule I, 65 Fed. Reg. 13235, 13236 (March 13, 2000).

In Alabama, two mid-level distributors, Chris Perry and Tim Hudson, purchased quart-quantities of BD over the internet and sold it on their website, "G is for Us" as a floor cleaner. They had about 50 customers who purchased BD in ounce and pint quantities.

Another Webslinger target, Brian Mohr of San Jose, CA, also purchased about two (2) gallons per month of BD over the internet. Mohr repackaged the bottles and labeled them as an organic solvent in 32 ounce, 4 ounce and 2 ounce bottles. These are the mid-level traffickers whom we seek to target.

Cassandra Harvey and her son, Joshua, were two of the primary targets of the investigation. They marketed and sold BD under the name "Miracle Organic Solvent" on their website, "Miracle Cleaning Products," even though they knew the product was intended for human consumption. They purchased BD in 55 gallon drums and admitted distributing the equivalent of 10 million dosage units.⁸

In sum, in cases like Webslinger, club drug distributors used the internet to distribute large quantities of BD to their customers. Those customers, in turn, repackaged the drug, at times in diluted form, and then redistributed it. This was a typical pattern with club drugs such as GHB, GBL and BD.

⁸Fifty-five gallon drums are not widely marketed.

Operation Webslinger was well-publicized, and in combination with the placement of GHB in Schedule I in 2000, the result has been that the sale of GHB and its analogues has become much less overt over the internet and 55 gallon drums are not as available or prevalent for distribution.

HOW DID THE ISSUE COME BEFORE THE COMMISSION?

In the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999, Congress directed DEA to issue a final rule placing GHB in Schedule I within 60 days. Congress created an exception with regard to FDA-approved drug formulations containing GHB, which are handled as Schedule III drugs.

With regard to penalties, Congress amended the Controlled Substances Act (CSA) to subject GHB offenders to the same penalties that are applicable to Schedule I and II drugs under 21 U.S.C. § 841(b)(1)(C).⁹ Those penalties include a statutory maximum sentence of 20 years, and if death or serious bodily injury results from the use of such substance, not less than 20 years to life. If the defendant has a prior felony drug conviction, the defendant faces a term of imprisonment of not more than 30 years, and if death or serious bodily injury results, the sentence is life imprisonment.

⁹See Date Rape Prohibition Act, P.L. 106-172, Section 3(b)(1), amending 21 U.S.C. 841(b)(1)(C).

As directed by Congress, DEA issued its Final Rule placing GHB in Schedule I on March 13, 2000.¹⁰ On November 1, 2001, the Commission amended the guidelines to implement P.L. 106-172. In that Amendment (Amendment 623), the Commission eliminated the previous maximum base offense level of 20 in the Drug Quantity Table, §2D1.1 for Schedule I and II depressants, including GHB, and in lieu thereof established the current guideline, which provides for a base offense level of 26 for offenders convicted of trafficking in at least 100,000 units of GHB.¹¹ This corresponds to approximately 13 gallons of GHB.¹²

In April 2003, Congress passed § 608 of the PROTECT Act, P.L. 108-21, which directed the Commission to review the guidelines applicable to offenses involving GHB and to consider amending the guidelines to provide for increased penalties “such that those penalties reflect the seriousness of offenses involving GHB and the need to deter them.”

In response, in December 2003, the Commission requested comments on two proposals to implement the PROTECT Act provision referenced above. In the first option, the Commission

¹⁰Final Rule, 65 Fed. Reg. 13235.

¹¹See § 2D1.1(c)(7).

¹²In liquid form, one unit equals 0.5 grams, see § 2D1.1, note (F), so a level 26 corresponds to 50,000 grams of GHB, and 50,000 grams of GHB equals 50,000 ml or 50 liters, and the Guidelines conversion table states that 1 gallon equals 3.785 liters, so 50 liters equals approximately 13 gallons. Under this formula, one unit of a Schedule I depressant equals 1 gram of marijuana, see § 2D1.1, Drug Equivalency Table, Application Note 10.

proposed establishing a base offense level of 26 for one (1) gallon (3.785 liters) of GHB, and in the second option, the commission proposed establishing a base offense level of 26 at five (5) gallons (18.925 liters) of GHB.¹³

WHY IS GHB SO DANGEROUS THAT IT JUSTIFIES A ONE GALLON QUANTITY FOR A
BASE OFFENSE LEVEL OF 26?

The Department of Justice strongly believes that GHB sentences need to be significantly strengthened. Of the two options presented, we favor Option One (1), because we believe that a defendant who distributes one (1) gallon or more of GHB should receive a base offense level of 26 under the Guidelines.

GHB is a serious drug of abuse with several uniquely troublesome features, which the Department of Justice asks the Commission to recognize through the guidelines. These features include the following:

“Date rape” drug. GHB is a “Date Rape” drug. DEA has labeled GHB as a “Predatory Drug,” because it is used against both males and females to facilitate sexual assaults and other crimes of violence.¹⁴ Indeed, one of the primary reasons that GHB has gained notoriety is because it is one of the

¹³Options 1 and 2 also contemplate establishing a base offense level of 32 (10 years) for 10 gallons and 50 gallons, respectively.

¹⁴See Testimony of Phoenix Field Division SAC Errol Chavez, April 30, 2003, at 2.

most common substances used by sexual predators to commit drug-facilitated sexual assaults.¹⁵ One need only take note of one of GHB's street names – “easy lay” – to see how pernicious this drug is. Unlike other controlled substances which are simply ingested for their depressant or stimulant effects, GHB is used as an offensive weapon by sexual predators to carry out a greater social harm – sexual assault.

A successful prosecution of a GHB distributor, Russell Nestor, in Tampa, FL, vividly illustrates the harm of GHB and the need to strengthen the current guidelines. Nestor purchased multi-gallon quantities of GBL and distributed it in liter and half-liter quantities over a three year period. On the evening of March 16, 2001, Nestor supplied Paul Kniep with GBL, even though Nestor knew that Kniep was an alcoholic. Kniep was found dead the next day in a car outside Nestor's residence with 10 times the lethal limit of GBL in his body.

During a subsequent search of Nestor's house, police found about 10 gallons of GBL in Nestor's van. They also found a videotape of a party at Nestor's residence in January 2001, where Nestor and several males engaged in various sexual acts with a female who was high on GBL.

¹⁵See ONDCP GHB Factsheet, November 2002, at 3 (“According to NDIC, GHB has surpassed Rohypnol as the most common substance used in drug-facilitated sexual assaults”); National Drug Threat Assessment 2003, NDIC, January 2000, at 2 (“Federal, state and local law enforcement agencies in every region of the country report that because of its powerful sedative properties, GHB currently appears to be the substance most commonly used in drug-facilitated sexual assault. When used to facilitate a sexual assault, the drug usually is mixed into the victim's drink”).

Nestor was charged with illegal distribution under § 841 of Title 21 and drug facilitated sexual assault under § 841(b)(7), but the latter charge could not be sustained because the woman voluntarily consumed the GBL. Had the death of Kniep not dictated a mandatory minimum sentence and had Nestor's sentence been decided purely on the quantity of GBL proven at trial, his sentence would not have even risen to a base offense level of 26.

Neither the availability of the alternative charge in 21 U.S.C. § 841(b)(7) in certain cases like this, nor an enhancement for drug-facilitated sexual assault along the lines being considered by the Commission, would address the uniquely pernicious use of the drug at the level of mid- and high-level distributors that are generally the targets of federal prosecution.

How large is the problem of drug-facilitated rape, and how often is GHB the tool of sexual predators? Reliable data are simply not available. Because GHB cannot be traced in blood or urine after about 8-12 hours, even tests conducted the day after the incident are too late. The effects of GHB are such that many victims cannot recall or do not realize what happened. However, we can hazard some idea of the scale. Some estimate that drugs are used in 15-20 percent of sexual assaults.¹⁶

¹⁶See Testimony of former DEA Administrator Asa Hutchinson before the House Judiciary Subcommittee on Crime, October 10, 2002, at 2, citing Gail Abarbanel, Director of the nationally recognized Rape Treatment Center.

It is undisputed from the consensus of field agents and health practitioners that GHB is the controlled substance of choice of sexual predators. DEA has documented 15 sexual assaults involving 30 victims who were under the influence of GHB, and of the 711 drug-positive urinalysis samples submitted from victims of alleged sexual assault, 48 tested positive for GHB.¹⁷ With approximately 95,000 sexual assaults on women each year,¹⁸ it is fair to assume that GHB has been used in thousands of crimes of violence.

Young user profile. GHB is a “club drug” abused primarily by young people. GHB users and sellers tend to be between the ages of 18 and 30.¹⁹ NDIC reports that according to DAWN statistics, individuals in the 18 to 25 year old age bracket account for 58% of all GHB mentions in drug-related emergency department visits.²⁰

Use in combination. GHB is frequently used with other drugs – most often alcohol, but also MDMA and ketamine. In 2000, when the Pinellas-Pasco Medical Examiner’s Office in Florida

¹⁷See ONDCP GHB Factsheet, November 2002, at 3.

¹⁸See Uniform Crime Report, Federal Bureau of Investigation, 2002, Section II, at 24-25, citing estimates from the U.S. Bureau of the Census.

¹⁹Pulse Check: Trends in Drug Abuse, ONDCP, April 2002.

²⁰See GHB and Analog Fast Facts, NDIC Product No. 2003-L0559-009, at 2.

conducted GHB tests on drivers who were suspected of DUI offenses, they detected GHB in approximately 8 percent of the suspected DUI cases that the office examined.²¹

Ease of trafficking and concealment. GHB is easy to manufacture from widely available precursor chemicals, which are sold under the thin disguise of being “cleaning agents,” “organic solvents,” and the like. A drug this easy to make, and whose precursors are this easy to traffic and conceal, should be given special consideration.

More than for any other Schedule I controlled substance, distributors use the Internet to sell GHB and its analogue (and precursors). In Operation Webslinger, for instance, the Department disrupted the equivalent of 25 million dosage units of GHB and its analogues, and the internet greatly facilitated the distribution of such large quantities. We are aware that the Commission is considering a separate enhancement for drug trafficking using the Internet. This will have particular relevance for mid- to high-level GHB traffickers.

High profit margin. Like many other synthetic drugs of abuse, the profit margin for GHB is very high. In a recent case prosecuted by the Eastern District of New York, two defendants, Scott Ansaldi and Rodney Gates, earned \$413,285 in just 10 weeks from selling a diluted GHB-GBL product known as “Verve” over the internet.²²

²¹DIC Information Bulletin: GHB Analogs, August 2002, at 9.

²²U.S. v. Ansaldi, Docket Nos. 03-1259, -0273 (E.D.N.Y.)

Gallon-quantities of the precursor GBL might sell at wholesale over the Internet for about \$200.²³ Although GBL converts to GHB in roughly a one to one (1:1) ratio, through the normal manufacturing process, it must be diluted in at least a five to one (5:1) ratio before it can be consumed. Upon distribution and dilution, capful quantities of 1-5 mls will eventually be sold at retail for between \$5 and \$30, with \$10 being the prevailing rate at rave events. At each stage, the solution may be diluted several times, multiplying the profit margin. Given that the initial gallon of GBL costs only \$200 (undiluted) and produces about 1,000 doses (undiluted) and potentially 4,000-5,000 doses upon dilution, the profit margin is astounding.²⁴

WHAT IS THE JUSTIFICATION FOR THE ONE GALLON QUANTITY YIELDING A BASE OFFENSE LEVEL OF 26?

Mid-level traffickers distribute quantities of GHB (or its analogues) ranging from several ounces to a few gallons, and high level dealers sell multi-gallon quantities of GHB (or its analogues). Mid-level traffickers are the ones who are buying approximately multi-quart quantities of GBL or BD, and manufacturing and/or diluting the drug for further redistribution.

²³See DEA Illegal Drug Price and Purity Report, April 2003, at 16.

²⁴Former DEA Administrator Asa Hutchinson testified before Congress that one 55 gallon drum of GBL potentially yields 240,000 capfuls of GHB. At \$8 per capful, a drug trafficker can make \$1.9 million from one 55 gallon drum of GBL. See Testimony of former DEA Administrator Asa Hutchinson before the House Government Reform Subcommittee on Criminal Justice, September 19, 2002, at 3. This potential yield assumes a dilution ratio of at least 4:1.

We believe that by setting the base offense level at 26 for one (1) gallon quantities of GHB, mid-level traffickers will be sentenced at an appropriate level (approximately 5 years for Criminal History I), and high level traffickers will also receive an appropriate sentence – 10 gallons would yield a base offense level of 32 (121-151 months in Criminal History I).

It may be helpful to set forth in greater detail the Department's rationale for supporting the one (1) gallon option. We know that one (1) gallon of GHB equates to 3,785 milliliters (mls). A "dose" of GHB – usually capfuls – ranges from 1-5 mls. At the high end, with five (5) mls of GHB per capful, one gallon produces 757 doses GHB.²⁵ If there are three (3) mls per dose, then one gallon would produce 1,261 doses. This example assumes that the GHB has not been diluted other than the normal dilution that occurs in the manufacturing process from GBL, but in fact, the GHB often is further diluted on the street.

By way of comparison between GHB and Ecstasy, which is also an illegal, Schedule I "club drug," the current sentencing guidelines provide a level 26 sentence for offenders who illegally distribute at least 800 Ecstasy (MDMA) pills. Accordingly, the one (1) gallon GHB threshold that the Department supports is thoroughly consistent with the existing guideline thresholds for other club drugs such as MDMA.

²⁵3,785 ml GHB/gallon divided by 5 ml of pure GHB/dose = 757 doses.

The Department of Justice believes that a drug trafficker who distributes quantities in a conservative range of 700-1200 doses of a drug as harmful as GHB deserves a base level offense of 26. Such a trafficker should be considered a “mid-level” trafficker and has earned a level 26 base level. Knowing that the 700-1200 doses can be thought of as 700-1200 “date-rape” opportunities, the Department believes that a level 26 base is appropriate.

Furthermore, the Department is aware that under traditional quantity based sentences, terms of imprisonment double as the quantity of contraband associated with an offense increases by a factor of 10. In other words, under Option One, if a one gallon quantity of GHB corresponds to a base offense level of 26, then the Commission will choose 10 gallons of GHB for a base offense level of 32. Similarly, if the Commission chooses Option Two, then a five (5) gallon quantity of GBH would yield a base offense level of 26, and a 50 gallon quantity will yield a base offense level of 32.

The Department believes that traffickers who distribute 10 gallon quantities of GHB are high level offenders. Ten gallons of GHB is capable of producing about 10,000 dosage units. Accordingly, a base offense level of 32 is appropriate. In contrast, under Option Two, traffickers would need to distribute 50 gallons of GHB, which would equate to 50,000 dosage units, before being classified as a high-level trafficker.

CONCLUSION

Make no mistake, GHB poses a danger to our society. A clear liquid that is effortlessly concealed at parties, GHB has increased in popularity, and we need appropriate sentences to deter GHB's use in the future and to reflect adequately the danger that it poses.

Through the PROTECT Act, Congress has asked the Commission to address the threat posed by GHB. The Department of Justice believes that establishing a one (1) gallon quantity for a base offense level of 26 would constitute an important positive step in the right direction.

Thank you for the opportunity to appear before you today. I would be happy to answer any questions you might have.