ABA Defending Liberty Pursuing Justice

AMERICAN BAR ASSOCIATION

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June 15, 2001

The Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

I enjoyed visiting with you briefly at the recent PLI conference on corporate compliance programs. As you may know, I serve as Chair of the Corrections and Sentencing Committee of the American Bar Association's Criminal Justice Section. The Committee recently voted to urge that the U.S. Sentencing Commission give high priority in the next amendment cycle to the development of guidance for the issuance of sentence reduction orders under18 U.S. C. § 3582(c)(1)(A), as required by 28 U.S.C. § 994(t).

In 18 U.S.C. § 3582(c)(1)(A), Congress recognized that "extraordinary and compelling" circumstances may warrant a prisoner's early release. Upon motion of the Director of the Bureau of Prisons, the court may reduce a sentence if the reduction is consistent with "applicable policy statements issued by the Sentencing Commission." In 28 U.S.C. § 994(t), Congress directed the Commission to "describe what shall be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." The Commission has not yet responded to this directive.

In an article to be published in a forthcoming issue of the Federal Sentencing Reporter, Commissioner John Steer notes that, without benefit of guidance from the Commission, the Bureau of Prisons has interpreted § 3582(c)(1)(A) narrowly and implemented it cautiously:

> Although the Bureau has no formal criteria, the few motions filed each year have been on behalf of inmates who are terminally ill, with a prognosis of having less than a year to live.

> The Bureau takes into account the nature of the defendant's criminal activity and a proposed written release plan. Before the Director of the Bureau considers whether to file a motion, a request for compassionate release is subject to multiple levels of review; the warden, the regional director, the General Counsel, and then a Bureau medical professional must approve the request.
>
> Because the statute grants absolute discretion to the Director, the decision to file a motion is not subject to review. If a motion is filed, there is no meaningful review of a court's refusal to grant the motion, because, at least at this time, there are no policy statements applicable to modification of a sentence under 18 U.S.C. § 3582(c)(1).

Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

See John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Commutation Power," 13 Fed. Sent. Rptr ___ (2001)(forthcoming).

Commissioner Steer's observations are consistent with the legislative history to this provision. In pertinent part, the accompanying Senate Report states:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 55, *reprinted in* 1984 U.S.C.A.A.N. 2338-39 (emphasis added).

The issue of what constitutes "extraordinary and compelling" grounds for sentence reduction is an important and timely one, in light of (a) the growing number of aged and ill inmates in the federal system, (b) the economic costs of incarceration, and (c) the Congressionally recognized need to respond appropriately to equitable considerations arising after the imposition of sentence. Accordingly, the Committee respectfully urges the Commission to make the

development of standards for the implementation of § 3582(c)(1)(A) a priority matter during the coming year.

Sincerely,

Michael Goldsmith
Chair and Professor of Law

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to evaluate their existing laws, as well as their practices and procedures, relating to the consideration of prisoner requests for reduction or modification of sentence based on extraordinary and compelling circumstances arising after sentencing, to ensure their timely and effective operation.

FURTHER RESOLVED, That the American Bar Association urges these jurisdictions to develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community. Rehabilitation alone shall not be considered an extraordinary and compelling circumstance.

FURTHER RESOLVED, That the American Bar Association urges these jurisdictions to develop and implement procedures to assist prisoners who by reason of mental or physical disability are unable on their own to advocate for, or seek review of adverse decisions on, requests for sentence reduction

REPORT

In the 1980s, rehabilitation of prisoners fell out of favor and "truth in sentencing" movements swept through Congress and state legislatures. The federal Sentencing Reform Act of 1984 and similar state laws abolished parole and required defendants to serve a fixed term in prison, without hope for early release from a parole board based on their good behavior. Release dates under such a sentencing regime are now largely determined at the time of sentencing.

One of the consequences of the movement to determinate sentencing was the restriction or elimination of "safety valve" mechanisms once available to seek mid-term reduction of sentence. In some jurisdictions there is no authority for courts or prison officials to modify a sentence once it has become final, even when unforeseen post-sentence developments made a prisoner's continued incarceration inappropriate or unjust. Other jurisdictions rely upon ad hoc and necessarily arbitrary mechanisms to deal with various compelling situations that may present themselves from time to time. Jurisdictions that do have a sentence reduction authority tend to construe it narrowly, invoking it only in cases of imminent death or total disability.

The absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice. Executive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon.

That the new sentencing regimes make no provision for handling extraordinary post-sentence developments seems less an expression of political will than simple oversight. Determinate sentencing simply swept out all early release mechanisms, without considering the need to address those later-developing circumstances not contemplated at the time of sentencing. As a result, people whose continued confinement no longer makes legal or moral sense may languish for years without a way to draw attention to their situation. There should be a way of examining such cases and, if appropriate, dealing with them equitably and compassionately.

The American Bar Association therefore urges jurisdictions to evaluate their current laws and practices relating to sentence modification and reduction, and to establish or reinvigorate "safety valve" mechanisms to deal with cases involving extraordinary and compelling post-sentence developments that make a prisoner's continued incarceration inappropriate or unjust. The resolution

contemplates that jurisdictions will take a broad view of any existing authority to reduce sentences, that they will enact new laws where necessary, and that they will ensure that these laws are administered in a timely and effective fashion.[1] The measures we advocate are not intended to inaugurate any general across-the-board sentence reduction measures, or substitute for more general sentencing reform.[2] Rather, they are intended to serve the limited function of dealing with truly exceptional cases under existing determinate systems.

The resolution also urges jurisdictions to develop specific criteria by which decision-makers can determine when it will be appropriate to reduce or modify a term of imprisonment. Historically, post-conviction sentence reduction measures have provided a safety valve to deal not only with such circumstances as severe illness or impending death, and physical or mental disability, but also with extreme old age, subsequent changes in applicable law, extraordinary assistance to the government, compelling changes in personal or family circumstances, or some combination of these. They have also proven useful to effect a promised but undelivered consideration for assistance to the government, to correct unjustifiable disparity of sentence among similarly situated co-conspirators, or to cure mistakes in a sentence not discovered in time for the court to correct in the ordinary course.[3]

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[1] These measures are especially timely in light of the increasing pressure on prison budgets posed, in part, by the enormous cost of incarcerating so many people. At the same time, it bears emphasis that our recommendations are not so much about prison economies as they are about the proper working of the justice system.

[2] The "safety valve" authority we recommend may thus be contrasted with the risk review committees recently established by the State of Louisiana to review the cases of, and consider for early release, all non-violent offenders originally sentenced under mandatory minimum sentencing laws that were subsequently relaxed. *See* Ryan S. King and Marc Mauer, *State Sentencing and Corrections Policy in an Era of Fiscal Restraint,* The Sentencing Project, February 2002; Judith Greene and Vincent Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis,* Justice Policy Institute, February 2002. This is not to say that subsequent changes in the law might not be grounds for reduction of an individual prisoner's sentence, particularly if it were combined with other circumstances such as old age or ill health.

[3] *See, e.g., U.S. v. Diaco,* 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced because of unwarranted disparity among codefendants); *U.S. v. Banks,* 428 F. Supp. 1088 (E.D. Mich. 1977)(same).

If a safety valve was considered an essential component of a sentencing scheme prior to the advent of determinate sentencing, today it is even more essential, because rule-based sentencing may preclude or limit a court's ability to take into account at sentencing the potential for extraordinary developments in a particular case. For example, a prisoner sentenced while in the early stages of a serious chronic illness may have no possibility of release if the progress of his disease makes his sentence more onerous than anticipated or intended. Similarly, when a mother must leave behind young children in the care of family members, there may be no way to ensure that intervening events do not leave them effectively orphaned. Particularly where a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem reasonable to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term.

A comprehensive review conducted on behalf of this Committee in 1995 found that only about half the states made formal provision for release of terminally ill prisoners.[4] Moreover, statutes providing for early release of ill and disabled prisoners, including so-called "medical parole" statutes, are seldom used. In 1996, a study of state and federal early release provisions by the U.S. Justice Department's Office of Justice Programs found that only 20 jurisdictions had actually released any prisoners pursuant to these authorities.[5]

In the federal system, the sentencing court has statutory authority to reduce an imposed term of imprisonment, upon motion of the Director of the Bureau of Prisons (BOP), if the court finds that "extraordinary and compelling reasons"

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[4] *See Compassionate Release of Terminally Ill Prisoners,* Draft Report of the ABA Corrections and Sentencing Committee's Compassionate Release Working Group, October 1995. Other states rely upon executive clemency, administrative leave or furlough, and parole. *See Incarceration of the Terminally Ill, Current Practices in the United States,* The Grace Project, Volunteers of America 5 (2001). *See also* Marjorie P. Russell, *"Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners – Is the Cure Worse than the Disease?,"* 3 Widener J. Pub. L. 799, 836 n.10 (1994).

[5] *See* Office of Justice Programs, U.S. Department of Justice, *Update: HIV/AIDS, STDs and TB in Correctional Facilities (1996-1997)* at xiv. A total of 153 prisoners were released in 1996 nationwide for medical reasons. California, with a prison population of some 150,000, grants an average of 28 compassionate releases annually N.N. Dubler, & B. Heyman, *End-of-life care in prisons and jails,* in M. Puisis (ed.), Clinical Practice in Correctional Medicine 355-364 (1998). New York's 1992 Medical Parole Law resulted in a total of 215 releases in the seven years ending in 1998. See J.A. Beck, *Compassionate release from New York state prisons: Why are so few getting out?,* 27 Journal of Law, Medicine, & Ethics, 216-233 (1999).

warrant such a reduction. *See* 18 U.S.C. 3582(c)(1)(A). The legislative history of this statute indicates that Congress intended its authority to be used broadly, if not routinely, to respond to a variety of circumstances that exceed the burdens normally attendant upon incarceration.[6] In practice, however, BOP invokes the statute only in cases of imminent death or severe mental illness or physical incapacitation. In the ten years between 1990 and 2000, only 226 prisoners were released pursuant to this authority.[7]

It seems apparent that, as currently designed, most sentencing systems cannot routinely accommodate the variety of post-conviction developments that may warrant revisiting a sentence after it has become final. That is why the ABA urges jurisdictions to design flexible review mechanisms that will permit sentence reduction in the rare and deserving case.[8] Recognizing that there are many different forms that an effective sentence reduction mechanism might take,

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[6] *See* Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 Fed. Sent Rptr. 188(2001).

[7] *See* Price, *supra* note 6 at 191. Under current BOP practice, requests for reduction of sentence must be approved at an institutional level by the prison warden, and then at a regional level, and finally at the national level by the Director herself. Because BOP does not keep a record of requests for sentence reduction that are not approved at the institutional level, it is impossible to tell what percentage of the total number of requests are subsequently brought to the attention of the court. **The paucity of sentence reduction motions under 18 U.S.C. § 3582(c)(1)(A) may reflect a lack of guidance to BOP, rather than a lack of political will or failure of compassion.** ***See*** **John R. Steer and Paula Biderman,** ***Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences,*** **13 Fed. Sent. Rptr. 154, 157 (2001)("Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section."). Without direction about what situations might warrant revisiting a sentence, corrections officials are reluctant to expand the reach of "extraordinary and compelling reasons" much beyond the clearly identifiable case of imminent death. The United States Sentencing Commission has recently undertaken to develop substantive guidance for a court in considering motions under 18 USC § 3582 (c)(1)(A), including examples of circumstances that are sufficiently "extraordinary and compelling" to warrant reduction, in accordance with 28 U.S.C. § 994(t).**

[8] We do not extend our recommendations to any particular decision-making procedure. However, we note that prison officials have from time to time expressed concern about being placed in a position of deciding which cases are meritorious and which are not, even where a court has the ultimate authority to reduce a sentence. This concern seems particularly well-founded where the grounds advanced by a prisoner for sentence reduction relate to some non-medical circumstance outside the expertise and interest of prison officials. Accordingly, we recommend that jurisdictions consider alternative ways of administering sentence reduction mechanisms that would relieve prison officials of a gatekeeper function that they evidently regard as inappropriate and even compromising. In addition to placing actual authority to reduce a sentence in a court or separate administrative body, consideration should be given to allowing individuals direct access to the decision-making authority.

including a return to the sentencing court, an administrative review procedure, and even executive clemency, the ABA encourage jurisdictions to experiment to find processes that work effectively and efficiently. Whatever form the mechanism takes, it ought to be easily engaged by prisoners and their outside advocates.

Similarly, the grounds for sentence reduction may vary from jurisdiction to jurisdiction. This resolution aims only to return to governments the tools of compassion, not to dictate how they will be used. That said, however, we do not believe that governments should restrict use of a "safety valve" mechanism to cases involving medical or health-related concerns. While specialized medical furlough and geriatric release procedures may provide some guidance for how to administer sentence reduction authority, we hope that jurisdictions will want their criteria to be sufficiently broad and elastic to allow consideration of such non-medical circumstances as old age, changes in the law, heroic acts or extraordinary suffering of a prisoner, unwarranted disparity of sentence, and family-related exigencies.[9]

The resolution specifically states that "rehabilitation alone shall not be considered an extraordinary and compelling circumstance," underscoring the special-purpose nature of the sentence reduction mechanism we are

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[9] The legislative history of the federal sentence reduction statute describes it as a "safety valve" to be used

> in unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 225, 98th Cong., 1st Sess. 37, 55. Regulations published by BOP implementing this authority contemplate that it will be used in non-medical cases. *See* 28 C.F. R. §§ 571.61, 571.62. Regulations implementing an earlier formulation of this sentence reduction authority, 18 U.S.C. § 4205(g), specifically provide that BOP could use the statute "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," such as "if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill." 28 C.F.R. §§ 579.40(a), (b). *See also Turner v. United States Parole Commission*, 810 F. 2d 612, 617 (7th Cir. 1987)(§ 4205(g) regulations "only very loosely identif[y] the classes of cases that the Bureau may review for possible motions," and "reveal the Bureau's retention of the entire discretion granted to it under the statute."). The legislative history of § 3582(c)(1)(A) indicates that its authority was intended to be at least as broad as the authority in § 4205(g), and perhaps broader. *See* S. Rep. No. 225, *supra*. This seems appropriate in light of the limitations placed by the guidelines on a sentencing court's ability to consider a defendant's personal circumstances, and the elimination of parole.

recommending.[10] At the same time, it also indicates that a prisoner's rehabilitation may legitimately be considered in combination with other factors in deciding whether the a prisoner's situation presents "extraordinary and compelling" reasons for sentence reduction.

The ABA also recommends that jurisdictions implement measures to ensure that physically and mentally challenged prisoners have access to assistance, from family members or other advocates, when seeking sentence reductions or appealing adverse decisions. This is particularly important in systems that require prisoners to initiate requests personally or to maintain active advocacy, which are ill-suited for persons nearing death or otherwise too ill or incapacitated to engage the process meaningfully.

This resolution represents a significant extension of existing ABA sentencing policy. The ABA Sentencing Standards authorize reduction of sentences that have otherwise become final in only two circumstances, both of which are time-limited: Standard 18-7.1 contemplates that a court may revisit and reduce a sentence within a specified period of time following its imposition; and, Standard 18-7.2 addresses sentence modification only while a case remains under the jurisdiction of the sentencing court, which the commentary makes clear does not include situations involving confinement. The instant resolution contemplates a sentence reduction authority that by definition is open-ended, permitting mid-course corrections whenever significant post-sentence developments not anticipated by the sentencing court present themselves.

The resolution also expands on the criteria for sentence reduction in existing ABA policy. The resolutions on compassionate release adopted in 1995 and 1996 addressed only terminal illness and physical incapacity as grounds for sentence reduction. In August of 2002 the House adopted a policy encouraging jurisdictions to "adopt and fully implement" mechanisms for the early release of terminally ill and incapacitated inmates, and also to "assess the desirability of applying such mechanisms to elderly or other prisoners in specified circumstances." The instant resolution would encourage jurisdictions to make use of the tools of compassion in a wider variety of circumstances, though it would leave each jurisdiction to decide for itself exactly what circumstances are so "extraordinary and compelling" as to warrant early release.

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[10] This phrase is taken almost verbatim from the statutory provision directing the United States Sentencing Commission to develop policy guidance for sentencing courts in considering motions made by the Director of BOP under 18 U.S.C. § 3582(c)(1)(A). *See* 28 U.S.C. § 994(t).

U.S. Sentencing Commission
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Re: Fed Reg. Notice-Proposed Priorities for amendment cycle May 1, 2004., due by Aug 1, 2003

Issue: Priority Number (12) listed on tentative priorities list (limitation on the base offense level for minor players for narcotics offenses) as compared to the **nonexistent** corollary limitation for defendants convicted of pseudoephedrine crimes for the same offense.

Relevant guidelines: §2D1.1(a)(3) allows a cap of level 30 if a defendant is convicted of a narcotics offense and receives a minor role. §2D1.11, the guideline equivalent for defendants convicted of pseudoephedrine offenses, has no corollary cap of level 30. §2D1.11 (c)(1) cross references §2D1.1 BUT ONLY if the offense involves narcotics and carries a greater penalty.

Discussion: Currently, in *United States vs. Mohammed Salem* (2001 EDCR62 RT in the Central District of California, the defendant was convicted of distributing pseudoephedrine. The government agrees he is eligible for a minor role. However, since the guidelines only have a limitation for narcotics defendants, defendant Salem is facing a base offense of 38. This is unfair and unreasonable. If defendant Salem had been distributing methamphetamine, he would have been eligible for the limitation of 30. There are other defendants like this one currently and more in the future.

Reason to make it a priority: The commission already is tentatively reviewing the limitation of §2D1.1(a)(3) as stated in (12) of its tentative priorities. Therefore, it would be a good use of resources to review the omission and/or non application of the limitation that is currently found in §2D1.1(a)(3). In cases where guideline §2D1.11 applies, there is no such limitation and there should be. Narcotics offenses are far more serious and have life statutory maximums where pseudoephedrine only have a twenty year statutory maximum. In addition, prior to the May 1, 2001 "emergency" increase, pseudoephedrine crimes had a base offense cap of level 30. The base offense was increased without much public comment to 38 at the same time the MDMA guidelines were increased on the drug quantity table from 1 to 35 to 1 to 500.

The commission needs to immediately address this unequal treatment and approve a limitation for listed chemical defendants so the minor players in those cases don't end up with worse sentences than defendants who traffic in narcotics. I would be happy to address the commission in person on these issues.

Sincerely,

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

July 31, 2003

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
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Washington, DC 20002-8002

Attention: Public Affairs-Priorities Comment

Dear Judge Murphy:

I am writing in response to the United States Sentencing Commission's Federal Register Notice published July 1, 2003, requesting public comment on the Commission's proposed priorities for the amendment cycle ending May 1, 2004. For the reasons explained in this letter, the United States Food and Drug Administration, an agency of the Department of Health and Human Services, respectfully requests that the Commission amend its tentative list of priorities to include consideration of amendments to the guidelines that govern violations of the Federal Food, Drug, and Cosmetic Act (FDCA). Following the discussion of our concerns, we also propose specific suggestions on how we believe the guidelines may be amended to address our concerns.

FDA regulates the manufacture and distribution of food, human and animal drugs, medical devices, biologics, and cosmetics. Assuring the purity, integrity, and safety of these products, which account for over 20 percent of every consumer dollar spent in this country, is critical to the well-being of the American people. Most criminal violations of the FDCA are not technical, regulatory offenses. Rather, they are serious criminal acts that pose significant risks of harm to large segments of the public. Defendants in FDCA cases have voluntarily assumed a role in the distribution and manufacture of critical commodities such as food, drugs, biologics, or medical devices. With this role comes the responsibility to act in a manner that is not detrimental to the health and safety of the American public. Courts have observed that the products governed by the FDCA "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." United States v. Dotterweich, 320 U.S. 277, 280 (1943). This is even more the case today than when the Court originally made this observation in 1943.

Recently, FDA has seen a disturbing increase in particularly dangerous criminal violations of the FDCA, including distribution of counterfeit drugs, prescription drug diversion, and mass distribution of prescription drugs without the supervision or intervention of a physician. The distribution of counterfeit drugs, which appear to be genuine product but often contain no active ingredient and sometimes contain harmful ingredients, poses a significant health risk to patients who may be harmed by the very medications that they are taking to treat their diseases. Diverters of prescription drugs operate outside of legitimate distribution channels and obtain drugs from questionable and often illegal sources. These diverters may handle and repackage the drugs

incorrectly, which can result in the dispensing of substandard, ineffective, or harmful drugs to American consumers. When prescription drugs are dispensed without the supervision of a licensed practitioner, consumers may take inappropriate and dangerous medications without proper medical diagnosis. This conduct threatens the safety and integrity of the nation's drug supply and, if left unchecked, could cause not only an erosion in the public's confidence in these vital products but also substantial public harm and even death. In addition, rising concerns about terrorism make close oversight of the food, drug, and biologics supplies especially critical.

The current sentencing guidelines do not treat criminal violations of the FDCA as significant threats to the public health and are ineffectual to deter such conduct. Convictions under the FDCA typically result in little, if any, prison time.[1] As a result, prosecutors are reluctant to take FDA cases, and, even when convictions are obtained, consequences are trivial. The unscrupulous perceive that the potential gains of adulterating and misbranding foods, drugs, and other products outweigh possible punishment, and FDA's ability to protect American consumers is severely hampered. Accordingly, amendment of the guidelines to ensure that criminals who put the public health at risk by violating the FDCA are punished appropriately should be a priority of the Commission.

A Brief Overview of FDCA Offenses and the Existing Sentencing Scheme

The FDCA prohibits a variety of conduct, including the manufacture and distribution of counterfeit drugs; the distribution of drugs (human and veterinary), biologics, and medical devices that are not FDA-approved; and the distribution of misbranded and/or adulterated food, drugs, biologics, and medical devices. See 21 U.S.C. § 331. A violation of any of these prohibited acts is a strict liability misdemeanor punishable by a maximum prison term of one year.[2] 21 U.S.C. § 333(a)(1). If, however, the offense is committed with the intent to defraud or mislead,[3] or is a second conviction under the FDCA, it is a felony with a maximum prison term

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[1] U.S. Sentencing Commission statistics for fiscal year 2001 indicate that only 24.3 percent of Food & Drug offenders received sentences of imprisonment, the lowest percentage of any primary offense category. 2001 Sourcebook of Federal Sentencing Statistics, Table 12. Similarly, in fiscal year 2000, only 23.4 percent of Food & Drug offenders received imprisonment, again the lowest percentage of any primary offense category. 2000 Sourcebook of Federal Sentencing Statistics, Table 12.

[2] See United States v. Dotterweich, 320 U.S. 277, 281 (1943) (misdemeanor liability under the FDCA "dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing"); see also United States v. Park, 421 US 658, 672-73 (1975) (same).

[3] "Intent to defraud or mislead" can be demonstrated by evidence of intent to defraud or mislead consumers, FDA, or some other identifiable government agency. See, e.g., United States v. Andersen, 45 F.3d 217, 220 (7th Cir. 1995) ("a deliberate attempt to mislead the FDA should be considered as clearly a fraud as are attempts to mislead customers or other individuals");

of three years. 21 U.S.C. § 333(a)(2). Certain FDCA offenses that involve diversion of prescription drugs are ten year felonies. 21 U.S.C. § 333(b)(1). In addition, offenses involving the distribution of human growth hormone are punishable by up to five years in prison, 21 U.S.C. § 333(e)(1), or up to ten years if the offenses involve distribution to a person under 18 years of age. 21 U.S.C. § 333(e)(2).

FDCA crimes are governed by two sections of the guidelines, Sections 2B1.1 and 2N2.1. United States Sentencing Commission, Guidelines Manual, App. A (Nov. 2002). Section 2N2.1, entitled "Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product," applies to FDCA violations that do not involve fraud. The base offense level in Section 2N2.1 is 6, and there are no enhancements for specific offense characteristics. Accordingly, most sentences calculated under 2N2.1 are very low. A defendant in Criminal History Category I would have a guideline range of 0-6 months. Section 2N2.1 provides that, if the offense involved fraud, Section 2B1.1 ("Larceny, Embezzlement, and Other Forms of Theft; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States") applies. Section 2B1.1 applies to any fraudulent violation of the FDCA, regardless of whether the victim is a consumer or the government.[4] Like Section 2N2.1, Section 2B1.1 provides for a base offense level of 6.[5] Section 2B1.1, however, includes various enhancements for specific offense characteristics, including incremental increases of the base offense level for crimes involving pecuniary losses that exceed $5,000.

United States v. Arlen, 947 F.2d 139, 143 (5th Cir. 1991) ("intent to defraud or mislead" can be established by showing that "the defendant intentionally violated § 331 with the specific intent to defraud or mislead an identifiable government agency"); United States v. Micheltree, 940 F.2d 1329, 1350-51 (10th Cir. 1991) ("intent to defraud or mislead" can be established by showing that "a defendant consciously sought to mislead drug regulatory authorities such as the FDA or a similar governmental agency"); United States v. Cambra, 933 F.2d 752, 755 (9th Cir. 1991) (intent to defraud or mislead is established by showing that the defendant tried to hide his activities from FDA); United States v. Bradshaw, 840 F.2d 871, 874 (11th Cir. 1988) ("intent to defraud or mislead" can be shown by evidence that the defendant took actions to avoid detection by FDA and state law enforcement authorities).

[4] See United States v. Andersen, 45 F.3d 217 (7th Cir. 1995) (holding that fraud on a regulatory agency was sufficient to invoke Section 2F1.1, the predecessor guideline to 2B1.1); United States v. Arlen, 947 F.2d 139, 146 (5th Cir. 1991) (same). See also United States v. Mitcheltree, 940 F.2d. 1329 (10th Cir. 1991); United States v. Cambra, 933 F.2d 752 (9th Cir. 1991); United States v. Bradshaw, 840 F.2d 871 (11th Cir. 1988).

[5] The Commission has proposed an amendment to the guidelines that would increase the base offense level under Section 2B1.1 to 7 for offenses with statutory maximum terms of imprisonment of 20 years or more. This amendment would not affect FDCA offenses, which have statutory maximum prison sentences of between one and ten years.

Why the Existing Scheme is Inadequate

I. Counterfeiting

In recent years, FDA has seen an increase in counterfeit drug activity and a corresponding increase in counterfeit drug investigations.[6] In fact, the number of counterfeit drug investigations conducted by FDA's Office of Criminal Investigations has quadrupled since 2000. The distribution of counterfeit drugs creates a significant public health risk. Counterfeit drugs, while often visually indistinguishable from genuine product, may contain no active ingredients, be sub- or super-potent, and may even contain bacterial contaminants or other harmful ingredients. Consumers who ingest or inject counterfeit drugs are at risk of therapeutic failures, exacerbation of health problems, and potentially disastrous adverse effects from toxic

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[6] It is unlawful to cause a drug to be counterfeit, to sell or dispense a counterfeit drug, and to hold a counterfeit drug for sale or dispensing. 21 U.S.C. §§ 331(i)(3) and 333(a). A counterfeit drug is defined as:

> a drug which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, or device, or any likeness thereof, of a drug manufacturer, processor, packer, or distributor other than the person or persons who in fact manufactured, processed, packed, or distributed such drug and which thereby falsely purports or is represented to be the product of, or to have been packed or distributed by, such other drug manufacturer, processor, packer, or distributor.

21 U.S.C. § 321(g)(2).

ingredients. The dangers of counterfeiting are magnified by the fact that counterfeiting is most prevalent in expensive drugs, which often are intended for use by vulnerable patients, such as those suffering from cancer and AIDS.
Recent cases investigated by FDA's Office of Criminal Investigations demonstrate the dangers of counterfeiting. An investigation of counterfeit Procrit, an injectable drug used by cancer and AIDS patients, revealed that the counterfeit product contained non-sterile tap water, which could have caused a serious infection in immune-compromised patients. Another investigation involved counterfeit Serostim, a growth hormone used to treat wasting in AIDS patients. The counterfeit product contained no active ingredient.

The statutory maximum penalty for drug counterfeiting offenses committed with intent to defraud or mislead is three years in prison. 21 U.S.C. §§ 331(i) and 333(a)(2). Other violations are misdemeanors with a maximum penalty of one year in prison. 21 U.S.C. § 333(a)(1). Under the current guidelines, if FDA can identify the person who actually manufactured the counterfeit drugs, it is usually possible to obtain a significant sentence under Section 2B1.1, because it is not difficult to show fraud or significant pecuniary loss. This only applies when FDA convicts the actual counterfeiter, which rarely happens because many counterfeit drugs are received from unknown overseas sources.

Because of the difficulties in locating the actual counterfeiters, FDA's ability to prosecute those who facilitate the distribution of counterfeit drugs by turning a blind eye to the source of their drugs is critical to FDA's success in combating the counterfeit drug problem. However, as a practical matter, it is often difficult to prove that criminals who acted as purveyors, rather than manufacturers, of counterfeit drugs knew that the drugs were counterfeit and, therefore, to demonstrate that the offenses involved intent to defraud or mislead. Without proof of fraud, the base offense level for distributing counterfeit drugs in violation of 21 U.S.C. § 331(i)(3) is 6. USSG § 2N2.1. FDA believes that the guidelines should be amended to provide for more significant sentences for those offenders who claim ignorance that the prescription drugs they were distributing are counterfeit but who are, nevertheless, highly culpable because they failed to verify the legitimacy of the drugs under circumstances where the source was highly suspect.[7]

II. Prescription Drug Diversion

In addition to increasing penalties for counterfeiting violations, FDA believes that strengthening the guidelines for offenses involving prescription drug diversion should be a priority. Drug manufacturers typically distribute drugs to primary wholesale distributors (with whom they typically have contractual relationships) who, in turn, sell the drugs to retail

[7] Those who distribute counterfeit drugs but act in good faith and have no reason to believe that the drugs are counterfeit are not subject to criminal penalties under the FDCA. See 21 U.S.C. § 333(c)(5).

pharmacies, hospitals, and health care entities that dispense the drugs to patients. However, a significant and increasing quantity of prescription drugs are handled by smaller, secondary wholesale distributors that generally are not authorized distributors for the manufacturer. Sometimes, these secondary wholesalers obtain their drugs from legitimate sources. For example, a secondary wholesaler can purchase drugs that are being sold at a discounted price because of a short expiration date, to reduce overstocked inventories, or to meet periodic corporate sales targets. Other sources are illegal: the drugs can be stolen; illegally purchased from hospitals, clinics, or charities; purchased on the street from Medicaid patients who choose profit over treatment; obtained from health care practitioners who sell drug samples provided at no cost to them by the manufacturer; or illegally imported from other countries where the drugs are sold at lower cost.

The illegal diversion of prescription drugs threatens the integrity of the nation's drug supply in several ways. Many secondary wholesalers operate outside the legitimate distribution system, do not have a license to engage in wholesale distribution of prescription drugs, and lack the training, facilities, and motivation to store and handle prescription drugs properly. Improper storage and handling of prescription drugs can affect the drug's potency, stability, and even effectiveness. In addition, diverted prescription drugs often are repackaged and relabeled to conceal that the drugs came from an illegal source. Relabeling removes the original expiration date, which can result in the dispensing of expired drugs to consumers. Relabeling also removes the lot number, which is critical to an effective recall if a problem with the drug is discovered. Sometimes drugs are repackaged into containers that bear the wrong drug name or the wrong strength.

In addition to these potential dangers, the very existence of an unregulated wholesale submarket provides a ready path by which counterfeit, adulterated and expired drugs can enter the distribution chain. Unscrupulous wholesalers are more concerned with their profits than the integrity of their suppliers and the purity of the products. Drug counterfeiters can easily find a corrupt purchaser that will turn a blind eye and ask no questions. Terrorists could also exploit the diversion market as a means to introduce tainted or poisoned prescription drugs into the marketplace. Once the drugs enter the secondary wholesale market, they eventually make their way to the shelves of local pharmacies, hospitals, and clinics, and are dispensed to unwitting and often vulnerable patients.

Congress recognized the dangers of prescription drug diversion and the secondary wholesale market when it enacted the Prescription Drug Marketing Act of 1987 ("PDMA") to deter prescription drug diversion.[8] Congress found that the mere existence of the wholesale drug diversion market "prevents effective control over or even routine knowledge of the true sources of prescription drugs in a significant number of cases." H. Rep. No. 100-76 at 2 (1987).

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[8] Pub. L. No.100-293, 102 Stat. 95 (1988), codified as amended at 21 U.S.C. §§ 331(t), 333(b), 353(c)-(e), and 381(d).

Congress concluded that the various forms of prescription drug diversion created an "unacceptable risk that counterfeit, adulterated, misbranded, subpotent, or expired drugs will be sold to American consumers." Id.

The PDMA, as amended by the Prescription Drug Amendments of 1992, places strict controls on the distribution of prescription drugs and prohibits, among other things, the unlicensed wholesale distribution of prescription drugs; the sale, purchase, or trading of prescription drug samples and coupons; and the reimportation by anyone other than the manufacturer of prescription drugs manufactured in the United States. Because of the seriousness of these offenses and the importance of protecting the integrity of the nation's prescription drug supply, Congress provided that these offenses are felonies upon a showing that the violations were done "knowingly" and without necessitating proof that the defendants acted with intent to defraud or mislead, as is required for most other FDCA felonies.[9] And, unlike other FDCA violations hat have a maximum penalty of three years in prison, Congress provided for a maximum prison sentence of ten years for these PDMA offenses [10]

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[9] The PDMA also criminalizes other conduct, such as the distribution of drug samples in violation of 21 U.S.C. § 353(d) and the failure to provide a pedigree prior to the wholesale distribution of drugs in violation of 21 U.S.C. § 353(e)(1)(A). These other PDMA offenses carry the same penalty as traditional FDCA offenses under 21 U.S.C. § 333(a).

[10] The enhanced penalty provisions for certain PDMA offenses are set forth at 21 U.S.C. § 333(b)(1), which provides:

> any person who violates section 331(t) by-
>
> (A) knowingly importing a drug in violation of section 381(d)(1) of this title,
>
> (B) knowingly selling, purchasing, or trading a drug or drug sample or knowingly offering to sell, purchase, or trade a drug or drug sample, in violation of 353(c)(1) of this title,
>
> (C) knowingly selling, purchasing, or trading a coupon, knowingly offering to sell, purchase, or trade such a coupon, or knowingly counterfeiting such a coupon, in violation of section 353(c)(2) of this title, or
>
> (D) knowingly distributing drugs in violation of section 353(e)(2)(A) of this title,
>
> shall be imprisoned for not more than 10 years or fined not more than $250,000, or both.

Despite Congress's express mandate that these PDMA violations be punished more severely than other FDCA violations, the guidelines treat all FDCA violations the same and provide for a base offense level of 6.[11] The higher maximum penalties for these PDMA offenses come into play *only* when there is evidence of fraud *and* significant pecuniary loss under Section 2B1.1(b)(1). In FDA's view, the current guidelines do not carry out the intention of Congress to provide for significant penalties without requiring a showing of fraud.

These guidelines would not be problematic if these PDMA offenses frequently involved both fraud and significant pecuniary loss. However, FDA's experience has shown otherwise. One of the most frequently charged PDMA violations is the distribution by unlicensed wholesalers of prescription drugs in violation of 21 U.S.C. §§ 331(t), 333(b)(1)(D), and 353(e)(2)(A). In many unlicensed wholesale distribution cases, the distribution takes place under circumstances where both parties to the transaction clearly are aware of the illicit nature of the distribution - either because the transaction takes place on the street or because the price of the drugs is so low. Thus, it is often difficult to prove that the seller's failure to obtain a state license amounts to a fraud on the immediate purchaser(s) of the drugs. It is equally difficult to show that the unlicensed transaction amounted to a fraud on the ultimate consumers, because the lack of a state license has no direct effect on consumers. And, unless there is evidence that the defendant took affirmative steps to conceal his conduct from FDA or state licensing authorities, it is difficult to prove a fraud on the government. Even assuming that the government could persuade the sentencing court that the offense involved fraud, it is difficult to quantify the loss involved in unlicensed wholesale drug distribution, because the offense generally does not involve a traceable pecuniary loss to anyone. Nevertheless, the lack of a license should be treated as a serious public health violation because of the dangers created by the distribution of prescription drugs by those without proper credentials.

The lack of stricter guidelines for these PDMA offenses undermines FDA's ability to protect the integrity of the prescription drug distribution system. These PDMA offenses are FDA's primary tool for combating prescription drug diversion and counterfeiting. FDA urges the Commission to amend the guidelines to treat these PDMA offenses as serious offenses warranting prison time. As explained, the very existence of this illegal diversion market creates numerous opportunities for substandard drugs to enter the marketplace and a presents a significant risk to the public

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[11] By way of contrast, other statutes for which Congress prescribed a ten-year statutory maximum prison sentence are treated more strictly by the guidelines. For example, under 18 U.S.C. § 1365(a), it is a crime, punishable by up to ten years in prison, to tamper with a consumer product with reckless disregard for risk of death or bodily injury. The corresponding guideline provides for a base offense level of 25, as compared to a base offense level of 6 for the PDMA offenses. USSG §§ 2N1.1(a) and 2N2.1. Also, violations of 18 U.S.C. § 1505 (obstruction of justice), which have a statutory maximum term of imprisonment of only five years in prison, currently have a base offense level of 12, twice that of PDMA offenses. USSG § 2J1.2(a).

health, regardless of whether the government can prove in a particular case that the diverted drugs were actually counterfeit, adulterated, or misbranded.

III. Other FDCA Violations

In addition to counterfeiting and prescription drug diversion, the FDCA prohibits a wide range of other conduct that affects the public health. For example, FDA investigates the distribution of drugs, biologics, and medical devices that have not been approved by FDA. In the most egregious cases, these offenses involve the sale of unproven, potentially dangerous drugs to seriously ill patients who may forego FDA-approved treatments. Other cases involve the dispensing of prescription drugs without a valid prescription, which presents a health risk to consumers who may not be aware of potentially dangerous drug effects and interactions and may forego diagnosis by a licensed physician.

The current guidelines treat FDCA violations as relatively minor regulatory offenses with a base offense level of 6, with no enhancements for specific offense characteristics in the primary guideline. By contrast, the guidelines provide for a base offense level of 12 for tampering with intent to injure a *business* in violation of 18 U.S.C. § 1365(b). This tampering offense, like most FDCA offenses, has a statutory maximum prison term of three years. In fact, the guidelines treat food and drug offenses on par with odometer fraud, which also has a base offense level of 6 and a cross-reference to 2B1.1.[12] USSG § 2N3.1. FDCA offenses, which involve danger to the public health, should be treated more seriously than odometer fraud, an economic crime, and should have a higher base offense level than 6.[13] The current guidelines, however, treat potential monetary harm more seriously than potential widespread harm to victim's health posed by FDCA crimes.

The problem with the low base offense level is compounded by the lack of enhancements for specific offense characteristics under Section 2N2.1. FDCA cases frequently arise in which prosecutors cannot prove intent to defraud or mislead to establish felony liability. In these cases, the sentence will be governed by Section 2N2.1, and prosecutors are likely to decline the case because the base offense level is 6 and there are no enhancements for specific offense characteristics. Despite the lack of fraud, the conduct addressed in these cases fully warrants

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[12] Odometer fraud also has a statutory maximum sentence of three years in prison. 49 U.S.C. § 32709(b).

[13] Under the guidelines, even offenses involving fish, wildlife, and plants, which also have a base offense level of 6, have several specific offense characteristics that increase the offense level by as much as four levels. USSG § 2Q2.1. Most of the offenses covered by this guideline have lower statutory maximum sentences than FDCA offenses, and it would seem that the American consumers would merit as much protection as endangered species, yet the guidelines appear to treat fish, wildlife, and plant offenses more seriously.

prosecutorial attention and meaningful redress by the courts. FDA-regulated products are vital to society, and consumers expect, even assume, that the products will be safe, pure, and effective. The current guidelines should be amended to provide for stiffer sentences for offenses that, while not involving fraud, involve a cognizable risk to the public health.

In addition, the cross-reference in Section 2N2.1 to Section 2B1.1 is not satisfactory in all cases because the latter section is intended to address economic fraud crimes.[14] The application of Section 2B1.1 is sufficient for crimes where the major offense conduct involves only pecuniary harm. FDCA offenses often cause pecuniary harm, but the major factor in determining the sentencing range should be the degree of risk to the public health involved in the offense, not the pecuniary harm. This is especially true when the defendant has evinced a clear disregard for the welfare of consumers but has caused minimal or no pecuniary harm.

Also, when the offense involves fraud on a government agency, the determination of loss under Section 2B1.1 states that gain should be used as an alternative measure of loss only if there is a loss but the loss "reasonably cannot be determined." USSG § 2B1.1, comment. (n.2). In FDA cases, fraud on a government agency is generally based on the defendant taking affirmative steps to hide his or her conduct from the agency. In such cases, there typically is no pecuniary loss to the government, but there is a risk of harm to the public health. Some courts have departed upward based on the substantial non-monetary harm caused or risked by the offense.[15] See USSG § 2B1.1, comment, (n.15). Although the upward departure may result in an appropriate sentence for the defendant's conduct, there should be a specific enhancement in the guidelines, not just a provision for upward departure, to account for the significant but non-pecuniary risks frequently posed by FDCA offenses.

One final issue warrants mentioning. Under 21 U.S.C. § 333(e), it is unlawful knowingly to distribute, or to possess with intent to distribute, human growth hormone for any use not approved by FDA. The statutory maximum penalty for violating this provision is five years in prison. 21 U.S.C. § 333(e)(1). If, however, the offense involves distribution to a person under age 18, the statutory maximum increases to ten years in prison. The Commission has not yet

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[14] Section 2B1.1 was created to "provide similar treatment for similar offenses for which pecuniary harm is a major factor in determining the offense level and, therefore, decrease unwarranted sentencing disparity that may be caused by undue complexity in the guidelines." USSG App. C, amend 617.

[15] See United States v. Kimball, 291 F.3d 726 (11th Cir. 2002) (defendant was convicted of offenses involving the distribution prescription drugs without a prescription with intent to defraud or mislead government agencies; the district court found no loss to the government and declined to use the defendant's gain as an alternative for loss; the district court departed upward because the guidelines did not adequately account for the non-monetary loss caused by the risk of public harm; the Court of Appeals affirmed).

promulgated a guideline to cover these human growth hormone offenses. See USSG § 2N2.1, comment., (n.4). As a result, United States Attorney's Offices are reluctant to prosecute these offenses, because it is unclear how the offenses will be treated under the guidelines. FDA has noticed an increase in the distribution of human growth hormone for unapproved uses and requests that the Commission promulgate a guideline to address such offenses.

Proposals for A New Sentencing Regime

To account for the variety of FDCA crimes and the different statutory maximum prison sentences for certain PDMA and human growth hormone offenses, FDA believes that the Commission should amend the guidelines for FDCA offenses to provide more flexible, more realistic, and more effective sentencing options. Preliminary suggestions include:

- providing a base offense level of 10 for felony offenses with a three year statutory maximum (those governed by 21 U.S.C. § 333(a)(2));

- providing a base offense level of 12 for PDMA offenses with a ten year statutory maximum (those governed by 21 U.S.C. § 333(b)(1));

- adding specific offense characteristics to Section 2N2.1, including enhancements for offenses that involve reckless or intentional conduct that presents a potential risk to the public health and a specific enhancement, providing for a minimum offense level of 12, for offenses involving the distribution or manufacture of counterfeit drugs;

- revising the enhancement at Section 2B1.1(b)(11) for offenses involving conscious or reckless risk of serious bodily injury to provide that the enhancement applies to defendants who knowingly divert prescription drugs in violation of the PDMA or distribute counterfeit drugs in violation of 21 U.S.C. § 331(i)(3);

- revising Section 2B1.1 to provide an increase in the offense level to a minimum of 12 for FDCA offenses that involve fraud but do not involve significant monetary harm

- revising the application notes to Section 2B1.1 to provide that, for the purposes of calculating loss for offenses involving FDA-regulated products that are adulterated or misbranded within the meaning of the FDCA, loss includes the amount paid for the product, with no credit provided for the purported value of the product;

- promulgating a guideline to address human growth hormone offenses in violation of 21 U.S.C. § 333(e), with a starting offense level of 10, with incremental enhancements based on the amount of human growth hormone involved in the offense, and an additional enhancement for offenses that involve a person under 18 years of age;

- providing enhancements for terrorism-related offenses, including the use of select agents to adulterate FDA-regulated products or the use of proceeds from FDCA offenses to finance terrorist organizations or criminal enterprises.

Conclusion

For the above reasons, the FDA believes that amending the guidelines applicable to FDCA offenses should be a Commission priority for the amendment cycle ending May 1, 2004. At the Commission's request, FDA will provide any necessary assistance and input to help the Commission draft appropriate amendments to strengthen FDA's criminal enforcement and ensure adequate protection of the public health. If you have any questions regarding this matter, please contact Associate Chief Counsel Sarah Hawkins at (301) 827-1130.

Sincerely,

John M. Taylor, III
Associate Commissioner for Regulatory Affairs

cc: Michael Courlander, U.S. Sentencing Commission

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August 1, 2003

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington, D.C. 20002-8002
Attn: Public Affairs-Priorities Comment

Re: Comment on Notice of Proposed Priorities

Dear Commissioners:

The Washington Legal Foundation (WLF) hereby submits these comments, with the attachments, to the U.S. Sentencing Commission in response to the Commission's solicitation of public comment on possible priority policy issues for the amendment cycle ending in May 2004 and possibly for the cycle ending in May 2005. The Commission is also soliciting suggestions from the public on "short- and long-term research issues."

While the Commission has listed 13 categories of issues that the Commission has identified as "tentative priorities," WLF requests for reasons discussed more fully below and in the attached documents that the Commission consider as one of its priorities amending Part Q-Offenses Involving the Environment, particularly §§2Q1.1, 2Q1.2, 2Q1.3 and 2Q2.1. At a minimum, the Commission should conduct a study of these guidelines (and application notes) to see how they have been implemented and/or appoint an advisory committee to conduct a study and make recommendations to the Commission.

Interests of WLF

WLF is a national non-profit public interest law and policy center organized under Section 501(c)(3) of the Internal Revenue Code. WLF is based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in the U.S. Supreme Court, this Court, and other federal courts promoting a limited and accountable government, and opposing overreaching by those administrative agencies and courts which act contrary to intent of Congress as reflected in the substantive statutes.

WLF has also served as counsel in environmental cases, including those involving criminal application of the Clean Water Act. *See, e.g., United States v. Pozsgai,* 897 F.2d 524 (3d Cir. 1990) (27-month prison sentence imposed on first offender for placing topsoil and clean non-hazardous fill on defendant's own property containing marginal wetlands zoned for industrial use). WLF has also appeared as amicus curiae in support of the defendants in

criminal prosecutions under the Clean Water Act arguing that the requisite intent or mens rea for imposing criminal liability was not sufficiently proven. *See, e.g., United States v. Weitzenhoff,* 35 F.3d 1275 (9th Cir. 1994), *cert. denied,* 513 U.S. 1128 (1995); *United States v. Ahmad,* 101 F.3d 386 (5th Cir. 1996); *United States v. Hansen,* 262 F.3d 1217 (11th Cir. 2001), cert. denied, 555 U.S. 1111 (2002).

In addition, WLF's Legal Studies Division has published numerous papers and monographs on these topics. *See, e.g.,* Bartman & Gaynor, *Strict Intent Standard In Environmental Cases Protects Civil Liberties* (WLF Working Paper Series, June 1997); Ellsworth, *Scientific Evidence Under* Daubert: *Utilizing The New Standards At Trial* (WLF Contemporary Legal Note, No. 16, Sept. 1995); Onsdorff & Mesnard, *Criminalizing Environmental Law: Can America Afford Jailing Honest Businessmen?* (WLF Legal Backgrounder, July 10, 1992).

Comments

The application of the Commission's environmental guidelines over the last 16 years have produced what most observers would regard as unjust and excessive prison sentences, and thus, violative of the principles of punishment and the intent of Congress. The primary flaw with the guidelines is that they produce lengthy prison terms even when the environmental harm is minimal and/or the culpability of the defendant is low. Thus, the guidelines do not adequately reflect the actual level of harm to the environment from the offense.

For example, in *United States v. Mills,* 817 F. Supp. 1546 (N.D. Fla 1993), a father and son were each sentenced to 18 months in federal prision for placing some 15 piles of clean building sand on a quarter-acre lot of their own property in order to build a home. Their "crime" was that they did not obtain a permit from the Corps of Engineers due to the questionable finding that the lot contained wetlands. Of course, the presence of the sand was so harmful to the environment that the government was perfecly willing to allow the sand to remain there while the men serve their prison sentence. For first offenders, where the government has more than ample administrative and civil remedies available for this kind of regulatory offense,[1] an 18-month prison sentence meted out to first offenders for what would otherwise be an administrative or civil matter is clearly excessive. Yet, a strict application of the guidelines call for such a sentence. Under §2Q1.3, the base offense level is 6, but the specific offense for discharging a "pollutant" (clean sand) is 4; and if it is done without a permit, §2Q1.3(b)(4) requires another 4 levels, for a total of 14. But the "base offense" in the indictment was discharging sand without a permit, and yet elements of the basic charge were included or double-counted in the additional offense characteristics.

In yet another father and son case, *United States v. Hansen,* 262 F.3d 1217 (11th Cir. 2001), *cert. denied,* 555 U.S. 1111 (2002), the father was sentenced to 108 months in federal

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[1] WLF submits that federal prosecutors are more apt to bring criminal charges for minor regulatory offenses that would otherwise have been handled administratively or civilly, precisely because they know that the Sentencing Commission's flawed guidelines will produce excessive sentences and also force defendants into making unjust plea bargains.

prison and his son 46 months for operating a chemical plant in the course of which a worker was exposed to a chemical that did not result in any injury to the worker. Yet, they were convicted of "knowing endangerment" under the Resource Conservation and Recovery Act (RCRA). Not only was their conviction questionable as a matter of law under the responsible corporate officer doctrine, but the sentence imposed on them and the plant manager was draconian. WLF's amicus brief in the Hansen case is attached hereto which discusses in greater detail the inherent and structural flaws of the environmental guidelines. In addition, a subsequently habeas corpus motion in the Hansen case which was recently filed is also submitted herewith to highlight how the "culpability" issue is not taken into account in these guidelines. Both of those documents are hereby incorporated by reference in these comments.

In a recent Lacey Act prosecution, three seafood importers were sentenced to 97 months in federal prison because approximately 6 percent of the lobster tail shipment from Honduras contained lobster tails that were less than 5.5 inches, which violated a Honduran regulation (not a U.S. law) which the Honduran courts have ruled to have been invalid. *United States v. McNab*, 2003 U.S. App. LEXIS 10708.

Why do these guidelines produce such truly bizarre sentences? As WLF explains more fully in its *Hansen* brief, the answer is that the Sentencing Commission simply did not do its homework before drafting the guidelines. The Commission ignored Congress' mandate that before the Commission was to set guidelines for any category of crime, it was to review past sentencing practices in order to determine "*average sentences* imposed in [each] category of cases" as the "starting point" before the Commissioners were allowed to exercise their independent (and informed) judgment as to whether or not it made any penological sense to depart from such past practice in devising the new guidelines for that category of crimes. 28 U.S.C. § 994(m) (emphasis added). The source material primarily used by the Commission in determining past sentencing practices was a 1,279 page report indexing and categorizing some 40,000 sentences imposed by federal courts from January 1, 1984 to February 28, 1985. Federal Judicial Center, Punishments Imposed on Federal Offenders (1986).

Conspicuously absent from this otherwise comprehensive study covering numerous categories of federal offenses is any data describing the sentences and fines imposed for violations of the Clean Water Act, the Clean Air Act, and the host of most other environmental laws on the books. Perhaps this was due to the paucity of such prosecutions, with administrative and civil remedies found to be more than adequate to punish, deter, and remedy the violations. After all, with respect to malum in se crimes like bank robbery, society cannot bring the robber before an administrative law judge to assess a fine, or file a civil suit for injunction and civil penalties. Criminal prosecution for such crimes is the only method that society has to deal with malum in se crimes. On the other hand, for malum prohibitum offenses, that is, conduct that is prohibited by statute or regulation, society has successfully used a number of remedies available to it short of criminal prosecution. Consequently, because almost any violation that is brought civilly could also be brought criminally, the more appropriate universe of determining what punishments society metes out for environmental offenses should take into account *all* the remedies used, i.e., administrative, civil, and criminal, to get an accurate picture of what the proper punishment should be.

Conclusion

WLF submits that it is long overdue for the Commission to re-examine the environmental guidelines.[2] WLF would be more than willing to assist the Commission and its staff in this endeavor

Respectfully submitted,

Daniel J. Popeo
Chairman and General Counsel

Paul D. Kamenar
Senior Executive Counsel

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[2] WLF notes that the Commission attempted to address some of the double-counting problem at a Commission meeting on April 14, 1992, agenda item #10, but the motion failed by a divided vote of 3-2.

No. 99-11638DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTIAN A. HANSEN, RANDALL W. HANSEN,
AND ALFRED R. TAYLOR,

Appellants.

On Appeal from the United States District Court
for the Southern District of Georgia
Brunswick Division

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS SEEKING REVERSAL

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. The interests of WLF are more fully presented in the accompanying motion for leave to file

this brief.

STATEMENT OF THE ISSUES

Amicus hereby adopts by reference the Statement of the Issues as presented in the various briefs of the appellants. For purposes of this amicus brief, amicus will address the following issues:

1. Whether the District Court erred in denying the defendants' request for a *Daubert* hearing with respect to the government's expert witness, and whether it was error for the witness to testify about matters of law.

2. Whether the sentences must be vacated because they were imposed in violation of law inasmuch as the applicable guidelines were unlawfully promulgated and are otherwise arbitrary, capricious, and unreasonable.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus hereby adopts the Statement of the Case as presented by the appellants in their respective briefs. In brief, the three defendants were convicted of several counts of violating the Clean Water Act (CWA) and the Resource Conservation and

Recovery Act (RCRA), including a "knowing endangerment" count under RCRA, due to exceedances of mercury discharges and related environmental matters occurring at the LCP chemical plant in Brunswick, Georgia. The regulatory offenses occurred at the time the company was in bankruptcy, and while the defendants were doing their best to operate the plant in a safe and environmentally sound manner under the circumstances.

Although no employee was harmed by these violations, and while the discharges of mercury were relatively minor, the trial court applied the Sentencing Guidelines and sentenced the defendants -- all first offenders and solid law-abiding citizens with families to support -- to draconian sentences ranging from four to nine years. Christian Hansen, the founder of the company, was sentenced to 108 months in prison; his son, Randall Hansen -- who dutifully helped his father by putting his own promising career on hold and served briefly as the acting CEO in 1993 after the company was in bankruptcy, and who lived in New Jersey for the most part during the relevant time period in question -- was sentenced to 46 months; and Alfred Taylor, a plant manager who assumed the duties for a limited period of time, was sentenced to 78 months.

SUMMARY OF ARGUMENT

The trial was riddled with reversible errors from beginning to end. While amicus supports all the arguments made by the parties, this brief argues that this Court should reverse the convictions and order a new trial because of the impermissible testimony of the government's so-called "expert," and because the jury instructions concerning mens rea and intent were fatally flawed. Finally, amicus submits that the draconian sentences imposed pursuant to the Sentencing Guidelines for environmental violations must be set aside because those particular guidelines were unlawfully promulgated, patently unreasonable, and fatally flawed.

ARGUMENT

I. IT WAS REVERSIBLE ERROR TO ALLOW THE GOVERNMENT'S "EXPERT" WITNESS TESTIFY AS TO MATTERS OF LAW AND TO PRESENT "JUNK SCIENCE" IN VIOLATION OF *DAUBERT*

WLF supports appellants' well-founded objections to the testimony of government witnesses as to their view of the law and technical matters that were not scientifically demonstrated. R. Hansen Br. at 42 (citing *Montomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990); C. Hansen Br. at 15-22. The interpretation of a criminal statute is

strictly within the province of the court; the self-serving views of the law by the government or their so-called paid "experts" have no place in a criminal trial. As the Supreme Court made clear on this point:

> The law in question, a criminal statute, is not administered by any agency, but by the courts. * * * The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute, but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference [under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984)].

Crandon v. United States, 494 U.S. 152, 177 (1990).

Expert witnesses are generally precluded from testifying at civil trials as to their views of what the law means. *See Reich v. Monfort, Inc.* 144 F.3d 1308, 1328 (10th Cir. 1998) ("Generally, an expert may not state his or her opinion as to legal standards nor may he or she state legal conclusions drawn by applying the law to the facts."). *See also Specht v. Jensen*, 853 F.2d 805, 807-08 (10th Cir. 1988) ("it is axiomatic that the judge is the sole arbiter of the law and its applicability"). Accordingly, it was clear and reversible error for the trial court to rule that the government witness in this case was free to testify about "his impression of what he feels like his view is with respect to this law." R21-8.

This error was particularly egregious and compounded where the government's chief expert witness, Daniel J. Teitelbaum, had been discredited by other courts in prior cases for providing similar "speculative" testimony without a proper scientific basis as required by *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 (1993). The government's attempt to foist this "expert" upon the jury without apprising the trial court of the witness's credibility problems before other courts on similar scientific and worker safety issues constitutes reprehensible and unethical prosecutorial misconduct. The trial court's refusal to grant the defendant's pre-trial request to conduct a *Daubert* hearing was clear and reversible error. *See* C. Hansen Br. at 15-21.

It is bad enough when "junk science" finds it way into civil trials where a defendant's *property* interests are at stake; it is totally unacceptable and should not be tolerated in the least when it is used, as here, in a criminal case to deprive defendants of their *liberty* interests by incarcerating them for periods of four to nine years. Indeed, with respect to Mr. Christian Hansen, who is 73-years old and suffering from rheumatoid arthritis, more than his liberty interests are at stake: his nine-year sentence is effectively a death sentence. In short, the conviction of the defendants on the basis of

the testimony of the government's "expert" witnesses is a manifest injustice which this Court should not tolerate.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY THAT THE PROSECUTION MUST PROVE THAT THE DEFENDANTS POSSESSED THE REQUISITE "KNOWING" MENS REA FOR ALL ELEMENTS OF THE OFFENSES CHARGED

A. The Prosecution Is Required to Prove Mens Rea for Each Element of the Offense

Amicus agrees with the appellants' argument that the trial court erred by not instructing the jury that it must find that the defendants acted knowingly with respect to all elements of the offense, including the existence of a permit. *See* R. Hansen Br. at 32-34 (citing *United States v. Hayes International Corp.*, 786 F.2d 1499 (11th Cir 1986); *U.S. v. BayTank, Inc.*, 934 F.2d 599 (5th Cir. 1991); *United States v. Johnson & Towers, Inc.* 741 F.2d 662, 669 (3d Cir. 1984). *See also United States v. Ellen,* 961 F.2d 462, 466-67 n.2 (4th Cir. 1992) (jury instruction stated that "actual knowledge" is required, not mere "ignorance," and that "the Government must prove that the defendant acted knowingly" as to "all four

elements of the offense," including knowledge of the "absence of a permit"); *United States v. Wilson*, 133 F.3d 251, 263-65 (4th Cir. 1997) (prosecution must prove mens rea as to "each essential element of the substantive offense").

Similarly, amicus agrees with appellants that the trial court's "responsible corporate officer" jury instruction compounded this error by impermissibly diluting or eliminating the mens rea or knowing requirement that Congress inserted in both the CWA and RCRA, and is contrary to the weight of judicial authority. R. Hansen Br. at 34-40, citing *United States v. McDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51 (1st Cir. 1991); C. Hansen Br. at 28-36. See also *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (the Court reversed the conviction of a shop owner who had been found guilty of contributing to the deliquency of a minor for selling her lewd merchandise since he did not personally sell the merchandise, although he controlled the store).

In addition to this compelling judicial authority, there are sound policy reasons why it is important that the prosecution must prove mens rea in this growing and complex field of environmental regulations.

B. The Dilution of the Standard of "Knowing" Violation

Ignores the Complexity of the Law and Threatens Prosecution of Innocent Conduct.

1. ***Environmental Laws and Regulations Are Highly Complex.***

The Supreme Court has stated that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *United States v. Cheek*, 498 U.S. 192, 199-200 (1991). Noting that Congress had set a higher intent standard for proof of violations of tax laws, the Court acknowledged that it as well had accorded "special treatment of criminal tax offenses . . . largely due to the complexity of the tax laws." *Id.* at 200.

Environmental regulations now rival the tax laws in their coverage of individuals and businesses. Regulations under the Clean Water Act, Clean Air Act, and RCRA alone number over 9,000 pages in the Code of Federal Regulations. *See* 40 C.F.R. parts 100-149, 400-503 (Clean Water Act); 40 C.F.R. parts 50-99 (Clean Air Act); 40 C.F.R. Parts 240-299(RCRA). At the same time, environmental laws and regulations are stringent and

complex. EPA Administrator Carol Browner has candidly admitted that the existing regulatory framework is "a complex and unwieldy system of laws and regulations and increasing conflict and gridlock." "New EPA `Common Sense' Approach Cautiously Welcomed By Industries," *Air, Water Pollution Report* at 30 (July 25, 1994). Meanwhile, courts have variously noted a "regulatory hydra" and use of regulatory terms suggestive of "Alice In Wonderland," *United States v. Mills*, 817 F.Supp. 1546, 1548 (N.D. Fla. 1993), *aff'd* 904 F.2d 713 (11th Cir. 1994)[1]

Even a former EPA Assistant Administrator acknowledged that RCRA is a "regulatory cuckooland of definition...[and] is very complex." *United States v. White*, 766 F. Supp. 873, 882 (E.D. Wash. 1991)(quoting comments of Don R. Clay).[2] *See also Inland Steel Co. v. EPA*, 901 F.2d

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[1] The literary reference to *Alice in Wonderland* in *Mills* is particularly apt in this case: the government's "expert" witness, Mr. Tietlebaum, began testifying about the dangers of mercury with references to its role in the genesis of the term "Mad Hatter" in *Alice on Wonderland*. *See* C. Hansen Br. at 20-21.

[2] As a good example, EPA has given an interpretation regarding RCRA requirements in

1419, 1421 (7th Cir. 1990) (describing RCRA as a "statutory cloud cuckoo land"). At the same time, the Clean Water Act extends to many waste materials that are not actually hazardous or are even innocuous, such as clean sand.

2. Dilution of the Intent Standard Fosters Overcriminalization of Enforcement.

The dilution of the "knowing" standard of the kind evident in the present case undoubtedly affects environmental enforcement. Notably, EPA has tried for many years, sometimes together with the Department of Justice, to draw a clear distinction between cases that warrant criminal prosecution and cases that should be handled civilly under EPA's ample civil enforcement authorities. The Agency has been unable to set out a simple, bright-line rule. Instead, it has variously issued guidance to EPA regional offices for screening of cases to identify potential criminal cases, as well as guidance for special treatment of potential criminal cases that present issues of first

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response to a regulated company's inquiry of whether rags contaminated with solvents used in cleanup work are hazardous waste after their use. EPA's answer was that if the solvents are poured onto the surface to be cleaned up, then the contaminated rags used in cleanup become hazardous waste. But if the solvent is first poured onto the rags to be used in cleanup, the rags do *not* become hazardous waste! *See* Letter dated May 20, 1987 from Jacqueline Sales, Chief, EPA Reg. Develop. Branch, to Frank Czigler of S&W Waste, Inc.

impression.[3] EPA's difficulty in clearly and simply distinguishing criminal cases from civil ones has resulted in a lack of predictability about what conduct is criminal. Minor infractions could be, and have been, criminally prosecuted while major knowing violations may be, and have been, handled administratively before the agency, or in civil proceedings.[4]

Moreover, given the lack of a meaningful intent standard in environmental cases, the prosecutor has very substantial leverage to force unwarranted guilty pleas because of the likely imposition of substantial prison sentences under the Sentencing Guidelines for even minor offenses. The published opinions in environmental criminal cases do not reflect the many cases resolved by plea agreements that could have equally well

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[3] For examples of agency attempts to set standards for environmental criminal prosecutions, see D. Carr, ed., *Environmental Criminal Liability: Avoiding and Defending Enforcement Actions* 21-27 (Bureau of National Affairs, 1995).

[4] As a byproduct of the overcriminalization in the environmental area and prosecutors' ready ability to force plea agreements, businesses are reluctant to engage in socially useful environmental audits and self-reporting, fearing arbitrary criminal prosecutions. *See* Keith A. Onsdorff and James M. Mesnard, *Criminalizing Environmental Law: Can America Afford Jailing Honest Businessmen?* (Washington Legal Foundation, Legal Backgrounder, July 10, 1992).

been pursued under civil and administrative enforcement authorities.

But whatever can be said as to the level of mens rea and intent necessary for proving the common or usual violations of CWA and RCRA, Congress made it unmistakably clear that with respect to "knowing endangerment" charges, carrying a maximum penalty of 15 years, the prosecutor must prove beyond a reasonable doubt the defendants' intent or mens rea as to each of the elements listed, particularly that each was aware that their conduct placed another person in imminent danger of death or serious bodily injury due to a RCRA violation, as opposed to some other workplace safety problem that is covered by OSHA regulations. R. Hansen Br. 17-23.

II. THE SENTENCE MUST BE VACATED BECAUSE THE ENVIRONMENTAL SENTENCING GUIDELINES WERE UNLAWFULLY PROMULGATED AND RESULT IN THE IMPOSITION OF PATENTLY UNREASONABLE SENTENCES

While this Court has more than enough reasons to remand this case for a new trial, amicus agrees with the defendants that the district court also erred by not departing downward by failing to find that this case was not a "heartland" violation, and by mistakenly believing that he did not have the discretion to do so. *See* R. Hansen Br. at 43-45; C. Hansen Br. at 38-41; Taylor Br. at 28-30. Amicus submits in the alternative that this Court can, and should, reverse the sentences imposed because, as will be demonstrated, the Environmental Sentencing Guidelines, U.S.S.G. §§ 2Q1.2 and 2Q1.3 were unlawfully promulgated and produce irrational sentences. This Court is mandated by 18 U.S.C. § 3742(f)(1) to set aside a sentence and remand the case for further sentencing proceedings if it "determines that the sentence * * * was imposed in

violation of law or imposed as a result of an incorrect application of the sentencing guidelines* * * ." The unlawful promulgation of the Environmental Guidelines produces sentences that are "imposed in violation of law." Accordingly, the district court should be free to re-sentence the defendants even if a new trial is not ordered by exercising its sentencing discretion as if the convictions were for pre-Guideline environmental offenses or for an offense for which the Commission has yet to promulgate a guideline. *See* R. Hansen Br. at 45, n.31.

As a preliminary matter, there can be no question that this Court has the jurisdiction to determine *de novo* whether a particular sentencing guideline is reasonable in the same way that courts routinely exercise their power to review the reasonableness of any other regulation promulgated by government agencies. In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court of appeals unanimously struck down the applicable guideline in that case, U.S.S.G. § 2J1.6, and remanded the case to the district court for resentencing because the guideline was "not sufficiently reasonable and violates the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the U.S. Sentencing Commission to any other regulatory agency, the standard of review of its regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890, citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

To understand why the Environmental Sentencing Guidelines are patently

unreasonable and arbitrary, this Court need look no further than the sentences that were essentially mandated in this case for the defendants with respect to their convictions under the Clean Water Act. The Probation Office dutifully and mechanically calculated the offense levels as prescribed by U.S.S.G. §2Q1.3 and came up with a total adjusted offense level of 29. Because the defendants had no prior criminal history, the offender category was a level I. Cross-referencing these numbers to the grid on the Sentencing Commission's Sentencing Table yields a shockingly high 87-108 month sentence (approximately 7-9 years) for a first offender! Yet the maximum statutory sentence under the Clean Water Act for the worst water polluter with the worst criminal history not convicted of a "knowing endangerment" charge is only 36-months.[5] How can the statutory maximum effectively constitute a mandatory minimum sentence? How can any rational guideline call for a sentence that is two to three *times* greater than the statutory maximum set by Congress? Even with the minor downward adjustments of 6 levels by the trial court, the resultant score of 23 still translates into a prison sentence of 46-57 months, which is still in excess of the statutory maximum of 36

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[5] The defendants were not charged with "knowing endangerment" under the Clean Water Act; rather, the charges in Counts 2-21 were for simple and relatively minor exceedances of the company's NPDES permit for mercury; such exceedances are not an uncommon occurrence in many companies which are not criminally prosecuted, let alone the officers of the company. Such regulatory violations are usually handled by administrative or civil proceedings.

months. The Court was left with no choice but to impose the statutory maximum of 36 months for each of the Clean Water Act counts. Surely, Congress did not intend that the maximum punishment be imposed in these kind of cases for these kind of first offenders.

These draconian sentences dictated by the guidelines are all the more unreasonable when one considers that it was only in 1987 that Congress reclassified the criminal penalty provisions for CWA violations from a Class A misdemeanor (up to one year imprisonment) to the current maximum term of three years, a Class E felony, the lowest classification for a felony. 18 U.S.C. § 3559. To be sure, the offense scores in this case were substantially raised by an additional 11 points for "substantial likelihood of death or serious bodily injury," but as noted, none of the defendants were charged with such "knowing endangerment" counts under the Clean Water Act, even though the Clean Water Act has an almost identical "knowing endangerment" provision to the RCRA provision. *Compare* 33 U.S.C. § 1319(c)(3) *with* 42 U.S.C. § 6928(e).[6]

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[6] Amicus submits that the addition of the 9 for "substantial likelihood of death or serious bodily injury" under § 2Q1.2(b)(2) (the guideline for hazardous pollutants) and 11 points under § 2Q1.3(b)(2) (the guideline for non-hazardous pollutants) for the Clean Water Act violations was in any event erroneous, since the Application Notes to both of those sections clearly indicate that the increase applies where the general "public health" is seriously endangered which was not demonstrated in this case. Rather, the prosecution focused only the alleged endangerment to the

Even subtracting all of the 11 points added under §2Q1.3(b)(2) for an offense that has a "substantial likelihood of death or serious injury," the normal offense score would be a level 18. This score translates into a sentence of 27-33 months for a first offender, a sentence that is unreasonably close to the statutory maximum for a first offender. While the RCRA violations were computed under U.S.S.G. § 2Q1.2 (the guideline for hazardous pollutants), the resulting offense score under that section was also 29, the identical score as that for the release of *non*hazardous pollutants under §2Q1.3. This equivalence in score for separate categories of pollutants simply does not make any sense.[7]

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employees at the plant. If the government believes that the Clean Water Act seriously endangered the public health, why didn't the government charge the defendants with "knowing endangerment" under CWA? Amicus submits that there simply was no evidence to support such a charge.

[7] The scores are the same for both categories of pollutants because the Commission arbitrarily provided for an increase of *11* levels for a non-hazardous pollutant where there is a "substantial likelihood of death or serious injury," whereas the Commission provided for an increase of only 9 levels for a hazardous pollutant under §2Q1.2(b)(2). The reason the numbers add up to the same total, whether the pollutant is hazardous or not is because the base offense level of the hazardous pollutant under §2Q1.2 is set at 8 which is two points higher than the base offense level for §2Q1.3 which is set at 6. This differential between the offense characteristics

To fully appreciate amicus' argument as to the unreasonableness of these guidelines, it is important to keep in mind the fact that prior to the promulgation of the Sentencing Guidelines in 1987, the normal practice was that those defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed. 18 U.S.C. § 4205(a). Thus, if a defendant were sentenced to prison for the statutory maximum of three years, that defendant would be eligible for parole after serving one year in prison. Likely candidates for parole included first-time offenders for regulatory offenses such as the defendants and offenses in this case.[8] Therefore, the 46-month prison sentence imposed on Randall Hansen is comparable to a pre-guideline sentence of a staggering 132 months, or a 11-year sentence; the 78-month sentence for Mr. Taylor translates to mind-boggling 234-month sentence, or approximately 20 years; and the 108-month sentence imposed on 73-year old Christian Hansen translates into a truly draconian

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for the two different kinds of discharges is backwards: one would think that hazardous pollutant offense levels would be greater than the non-hazardous pollutant, rather than the other way around as it is here. This is yet further evidence of the arbitrariness of the Environmental Guidelines.

[8] Indeed, for those convicted of environmental violations and sentenced to prison, they were eligible for parole after serving 0 to 10 months. 28 C.F.R. Chapter Eleven, Subch. H; 28 C.F.R. § 2.20.

sentence of 324 months or 27 years! Even taking into account only the 36-month sentences imposed under the Clean Water Act for each defendant, that sentence still translates into a 9-year pre-guideline sentence.

All the defendants would have received drastically reduced sentences if instead of the committing these environmental regulatory offenses, they engaged in certain drug activity that Congress deemed deserving of *greater* punishment such as managing a crack house instead of a chemical plant that makes products that are socially useful in our society and improves our standard of living; or illegally using a registration number to manufacture or distribute controlled substances.[9] Indeed, if the defendants had "wilfully" violated safety laws and regulations required under the Occupational Safety and Health Act (OSHA) -- the law which more properly governs the workplace

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[9] *See* U.S.S.G. § 2D1.8(a)(2) (managing or allowing use of premises for drug activity is **capped** by the Sentencing Commission at a level 16 (21-27 months) despite Congress providing in 21 U.S.C. § 857 for up to *20 years* imprisonment, a statutory sentence almost seven *times* greater than the maximum three-year sentence provided under the Clean Water Act, and five years *more* than the 15-year sentence for knowing endangerment); *see also* U.S.S.G. § 2D3.1 (punishment for illegal use of registration number to distribute controlled substances is **capped** at a level 6, which allows for *probation*, despite the statutory maximum sentence of *four* years provided for in 21 U.S.C. § 843857(d), which is one-year greater than the maximum sentence under the Clean Water Act.

safety issue in this case -- and as a result, a worker was actually killed (and not merely threatened with serious injury as was alleged, but not proven, here), the statute, 29 U.S.C. § 666(e), provides a *maximum* of six-months in prison, a misdemeanor. And even when death results, courts have not always imposed prison terms. *See, e.g.*, *United States v. Shear*, 962 F.2d 488 (5th Cir. 1992) (trial court sentenced a supervisor to three years probation, fine, and community service where employee killed in trench not properly shored up per OSHA regulations; conviction overturned because supervisor is not "employer" under the statute).

The arbitrariness of the Environmental Sentencing Guidelines is further evident from an examination of the various offense levels that can be, and often automatically are, added to the base level. The defendants were sentenced under U.S.S.G. § 2Q1.2, the guideline applicable for environmental offenses involving hazardous of toxic substances, as well as §2Q1.3 which is the guideline for non-hazardous substances. For illustration purposes, amicus will focus on § 2Q1.2, although the analysis is the same for §2Q1.3.

The base offense level under § 2Q1.2(a) is an 8. The base offense charged in this case is the discharge (or storing) of a hazardous pollutant without a permit or in violation of a permit. An additional 4 levels are added under § 2Q1.2(b)(1)(B) if the offense "involved a [single] discharge. . . of a hazardous . . . substance" regardless of the amount. If the discharge was continuous, perhaps over a period of a few days, an additional two points for a total of 6 are added to the base level of 8, thus bringing the

offense level to a 14. Yet that conduct -- discharging a pollutant -- was already accounted for in the base offense for which the defendants were charged and convicted. This double-counting would be comparable to a Sentencing Guideline providing for a certain base level for bank robbery, and then adding as an aggravating factor that the object of the robbery was a bank! In addition to the 14 points already accumulated, § 2Q1.2(b)(4) requires adding yet another four levels for not having a permit or discharging in violation of the permit. Again, this is double counting as aggravating conduct what should already be included in the base offense level since the base charge of almost any environmental violation is a discharge of some pollutant in violation of a permit or without a permit. Thus, the score has quickly escalated to a level 18 which translates into a sentence of 27-33 months for a first time offender for a garden variety permit exceedance.

Why do these guidelines produce such truly bizarre sentences? The answer is that the Sentencing Commission simply did not do its homework before drafting the guidelines. The Commission ignored Congress' mandate that before the Commission was to set guidelines for any category of crime, it was to review past sentencing practices in order to determine "*average sentences* imposed in [each] category of cases" as the "starting point" before the Commissioners were allowed to exercise their independent (and informed) judgment as to whether or not it made any penological sense to depart from such past practice in devising the new guidelines for that category of crimes. 28 U.S.C. § 994(m) (emphasis added). The source material primarily used