UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	Case No. IP06-CR-0139-01-H/F
DERRIK HAGERMAN and	)	
WABASH ENVIRONMENTAL	)	JUDGE HAMILTON
TECHNOLOGIES, LLC	)	
	)	
Defendants.	)	
	)	

SENTENCING MEMORANDUM OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS

INTRODUCTION

The defendants in this case were charged with and convicted of 10 counts of filing false discharge monitoring reports in 2004 with the Indiana Department of Environmental Management, in violation of the Clean Water Act, 33 U.S.C. 1319(c)(4). For this relatively minor regulatory offense, which could have and should have been resolved by more reasonable administrative and civil penalties, the Government seeks a Draconian 78-month prison sentence for Mr. Hagerman, the owner of Wabash Environmental Technologies, LLC, based on its interpretation and application of the advisory U.S. Sentencing Guidelines.

Amicus curiae urges the Court to reject the Government's sentencing recommendation, and for reasons stated herein and those provided by the defendants, impose instead a reasonable sentence of probation. Amicus will not address all the factors that warrant such a sentence; rather, it will focus on the Sentencing Guidelines, particularly Part Q covering

environmental offenses, and demonstrate why those Guidelines are fatally flawed and produce unduly harsh sentences that should be rejected.[1]

I. THE SENTENCING GUIDELINES HAVE IMPERMISSIBLY LIMITED THE DISTRICT COURT'S SENTENCING DISCRETION

The overarching goal of sentencing is to select and impose a just punishment that achieves the principles of deterrence, retribution, and rehabilitation. Congress mandated that sentencing judges, when considering what punishment to impose in a particular case, carefully consider the nature and circumstances of the offense *and* the characteristics of each individual offender, in addition to the other sentencing factors specified in 18 U.S.C. 3553(a), including the "kind of sentences available." 18 U.S.C. 3553(a)(3).

Congress also mandated that the sentence ultimately imposed must be one that "is sufficient, but not greater than necessary" to achieve the purposes of punishment. 18 U.S.C. 3553(a). This so-called parsimony principle forbids a civilized society from inflicting gratuitous and excessive punishments on its citizens.

The Sentencing Reform Act of 1984 (SRA) altered sentencing policy in two major ways. *First*, it abolished the parole system and established a determinate sentencing scheme. No longer would the typical first offender convicted of a non-violent crime be eligible for parole after serving one-third of the sentence imposed by the court, as was the regular pre-Guideline practice. Thus, a Guideline prison sentence of 12 months was essentially equivalent to a substantial pre-Guideline prison sentence of three years.

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[1] Amicus understands that the defendants believe that the evidence at trial was insufficient to sustain the convictions and otherwise intend to appeal their convictions. Amicus does not take any position on those points and only addresses the sentencing issues that this Court will consider at the sentencing hearing scheduled for October 23, 2007.

Second, the SRA created the Sentencing Commission, an agency which devised a set of fairly rigid Guidelines that sentencing courts were required to follow in determining a sentence. 18 U.S.C. § 3553(b). Sentences imposed under the Guidelines often resulted in excessive punishments that fit neither the crime nor the offender, thereby doing great violence to the parsimony principle.

Prior to the Supreme Court's landmark decision in *United States v. Booker*, 543 U.S. 220 (2005), sentencing courts were sometimes forced against their better judgment to "stack" or stretch the sentences for multiple charges against a defendant by making the sentences run consecutively instead of concurrently (as they otherwise would have done in the pre-Guideline era) in order to meet the unduly harsh Guideline sentence.[2] In other cases, the sentences called for in the Guidelines were so severe, including environmental offenses, that they even *exceeded* the statutory maximum sentence permitted for the offense. In those cases, courts were required to lop off the end of the Guideline sentence to make it fit within the statute's maximum term of imprisonment. This Procrustean approach to sentencing fundamentally subverted the principle of making the punishment fit the crime and the offender; instead, the Guidelines effectively forced the crime and offender to fit the punishment.

All of that radically changed, of course, when the Supreme Court ruled in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines violated a defendant's Sixth Amendment rights. As a remedy, the Court deleted the mandatory feature of the Guidelines,

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[2] That is precisely what the Government insists this Court should do in this case. In order to impose the Government's 78-month sentence, this Court would be required to stack at least three counts of filing false reports, each of which carries a maximum prison sentence of two years.

thereby making them "effectively advisory." *Id.* at 245. Henceforth, the Guidelines were to be simply one of seven factors a sentencing court must consider in fashioning a just sentence. Unfortunately, many trial courts and courts of appeals continued to apply the Guidelines as if they were mandatory, affording them a presumption of reasonableness and giving short shrift to the parsimony principle.

In *Rita v. United States*, 127 S.Ct. 2456 (2007), the Supreme Court addressed this issue and concluded a Guideline sentence *may* be regarded (but is not required to be) by a reviewing appellate court to be a presumptively reasonable sentence. The Court reasoned that a Guideline sentence was the result of the decision by the sentencing court and was one that comported with a Guideline sentence promulgated by the Sentencing Commission, *allegedly* based on empirical evidence. *Id.* at 2463.

While the presumption of reasonableness was not mandatory for a reviewing court, the *Rita* Court made clear that the presumption does even not apply to sentencing courts, which need only consider the Guideline sentence as *one* of several sentencing factors: "A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence." *Id.* (emphasis in original). *Rita* posited several scenarios where a sentencing court could justifiably impose a non-Guideline sentence, including the assessment that "the Guidelines sentence itself fails properly to reflect 3553(a) consideration, or perhaps because the case warrants a different sentence regardless [of the Guidelines]." *Id.* In short, sentencing courts have a fairly broad degree of discretion in formulating a proper sentence in a particular case without being cabined by the mechanistic Guidelines. In addition to the reasons provided by the defendants as to why a probation sentence is appropriate,

amicus submits that the Guidelines themselves, particularly Part Q governing environmental offenses, are flawed and do not properly reflect the 3553(a) factors.

II. PART Q OF THE SENTENCING GUIDELINES ARE FLAWED AND GENERATE UNREASONABLE SENTENCES.

To understand why the Part Q of the Sentencing Guidelines for environmental offenses are patently unreasonable and arbitrary, this Court need look no further than the 63-78 month prison sentence for a first offender that the Government claims is called for in this case under the Guidelines. Even assuming that the Government's Guideline calculation was correctly computed, which defendants vigorously dispute, the *maximum* statutory sentence under the Clean Water Act for a first offender who knowingly discharges hazardous substances that may even cause personal injury is only 36-months or three years. 33 U.S.C. 1319(c)(2). The *maximum* sentence for a knowing violation for a second offender is six years. *Id*.

However, as noted, the defendants were *not* charged with the substantive offense of discharging any pollutants; rather, they were charged with and convicted of several reporting violations, namely, making false statements with respect to certain discharge monitoring reports. Under the Clean Water Act, Congress set the maximum punishment for the most egregious violation for a first offender at 24 months or two years; the maximum punishment for a second or subsequent conviction is four years. 33 U.S.C. 1319(c)(4). How can any rational Guideline system call for a sentence that is approximately three *times* greater than the statutory *maximum* set by Congress for a first offender for a minor reporting offense in this case, which could have and should have been addressed by more reasonable and effective administrative and civil remedies and penalties?

To fully appreciate the argument that the Guidelines regularly call for unreasonable and

lengthy prison sentences, it is important to remember that prior to the promulgation of the Sentencing Guidelines in 1987, the normal practice was that 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). As noted, if a defendant were sentenced to prison for the statutory maximum of three years in the pre-Guideline era, that defendant would be eligible for parole, and likely receive it, after serving one year in prison, if not earlier for minor regulatory offenses. Stated otherwise, a good rule of thumb is to multiply a Guideline prison sentence by a factor of three to get an idea of what that same sentence would have been in the pre-Guideline era. Likely candidates for parole included first-time offenders for regulatory offenses, such as the defendant in this case, even assuming such defendants were imprisoned in the first place. Therefore, the already grossly excessive 63-78 month prison sentence the Government claims is called for under the Guidelines in this case is roughly comparable to an absurd pre-Guideline sentence 189-234 months sentence (approximately 15-19 years).

The fatal flaw with Part Q of the Guidelines governing environmental offenses is that the Sentencing Commission ignored Congress' mandate to review past sentencing practices to determine "average sentences imposed in [each] category of cases," and for cases involving sentences of imprisonment, the length of such terms *actually served*" to serve as the "starting point" *before* the Commissioners were allowed to exercise their presumably expert and informed judgment about whether to depart from such past practice, and how far to depart. 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 are any data describing the sentences and fines imposed for violations of the Clean Water Act, the Clean Air Act, and most other environmental laws (perhaps due in part to the paucity of such prosecutions inasmuch as administrative and civil remedies were adequate to punish, deter, and remedy the regulatory violations).

If the Commission had properly done its homework, it would have quickly discovered that pre-Guideline sentences for environmental offenses were fairly uniform but rarely involved incarceration; rather, suspended sentences, probation, fines, remediation, community service, and restitution were the norm. Where incarceration was imposed, the length of the sentences were usually for a few weeks or months, which adequately served the principles of punishment and deterrence. *See generally* U.S. EPA, Office of Enforcement, National Enforcement Investigations Center, Denver SUMMARY OF CRIMINAL PROSECUTIONS RESULTING FROM ENVIRONMENTAL INVESTIGATIONS (May 31, 1991) (summarizing disposition of all environmental criminal cases from fiscal years 1983 to 1991).

An examination of a few representative cases from EPA's SUMMARY makes this clear. For example, in *United States v. ABC Compounding Company, Inc.*, No. 85-484 (N.D. Ga.), a company engaged in the business of mixing and selling chemicals was charged with conspiracy, disposal, and reporting violations under the Resource Conservation and Recovery Act (RCRA). The company was fined $40,000 and the vice-president and part owner, as well as his son, the plant supervisor, each received suspended terms of imprisonment, placed on probation for one year, assessed a $20,000 fine, and ordered to perform community service.

In *United States v. Richard Brown*, No. 86-005 (D. Col.), the defendant, who ordered five drums of toxic waste to be buried, was indicted for disposing of hazardous waste without a permit and for making a false statement to the EPA. The court fined the company $3,500 and placed Mr. Brown in a pretrial diversion program.

In *United States v. Arthur J. Greer*, No. 85-00105 (M.D. Fla.), the proprietor and operator of four hazardous waste handling companies was charged with endangering the lives of employees by ordering them to test for the presence of chemicals such as cyanide, methyl ethyl ketone, xylene, and other chemicals by sniffing samples or lighting them in soft drink cans, rather than by performing required chemical analysis. In addition, he dumped 1,000 gallons of waste and mislabeled the drums as harmless dirt. He was indicted on 33 counts, including six counts of "knowing endangerment" under RCRA. While he was acquitted of the more serious "knowing endangerment" counts, he was sentenced for both RCRA and CERCLA violations to one year and one month imprisonment (and thus eligible for parole after serving one-third of that time, or approximately four months).

In *United States v. Taylor Laboratories, Inc.*, No. CR89-006-R (N.D. Ga.), the company and its owner were charged with storing chemicals in violation of RCRA, some of which were found near a lake. Mr. Taylor, the owner, was sentenced to five years and five days imprisonment, *all* of which was suspended and placed on three-years probation.

Significantly, the Sentencing Commission has never identified in any of its literature what other source documents and data it relied upon in developing the environmental guidelines, or more importantly, if it did use other information, whether it first determined the average pre-Guideline sentence. It is Commission Policy that "when departures [from past

sentencing practice] are substantial, the reasons for departure will be specified." [3] Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, reprinted in Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 50 (1988); *see also* id. at 17 (Guidelines primarily to be based on "typical, or average, actual past practice").

But where are the Commission's reasons to justify the substantial upward departures from pre-Guideline sentencing practices? There are none. The Part Q Guidelines indisputably do not represent the "typical" or "average" pre-guideline sentence, and the Commission is wholly silent as to why there is a sharp departure from past practice."[4] Just as the courts must be vigilant in keeping so-called junk science out of the courtroom, so too should the courts be wary of what amicus submits are junk Guidelines.

Because of these fatal drafting flaws, it should come as no surprise that the

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[3] Congress also directed that the Commission "insure that the guidelines reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j) (emphasis added).

[4] An agency's failure to follow Congressional directives for the promulgation of rules is itself sufficient grounds for invalidating a rule or guideline as a violation of law. *Environmental Defense Fund, Inc. v. EPA*, 898 F.2d 183, 189 (D.C. Cir. 1990) (court "cannot sustain [agency] action merely on the basis of interpretive theories that the agency might have adopted and findings that (perhaps) it might have made.") (emphasis added). *See also United States v. Lee*, 887 F.2d 888, 892 (8th Cir. 1989) (court struck down the applicable guideline and remanded for resentencing because the guideline was "not sufficiently reasonable and violates the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Cf. United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (the guideline calculations have "so run amok that [they] are patently absurd on their face."). *See also* Ronald F. Wright, *Sentences, Bureaucrats, and the Administrative Law, Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 3, 89 (1991) ("sentencing courts should remain receptive to offenders' objections to the procedures employed by the Commission in promulgating guidelines").

Environmental Guidelines are inherently unreasonable and result in wildly disparate and excessive sentences in environmental cases. For an excellent critique of the environmental sentencing guidelines and the Commission's misguided "one-size-fits-all" approach for applying the guidelines to different environmental statutes (which provide for punishments ranging from 6 months to 15 years) see B. Sharp & L. Shen, The (Mis)Application of Sentencing Guidelines To Environmental Crimes, BNA Toxics L. Rpt'r 189 (July 11, 1990). Notably, as this BNA article points out, first offenders for even misdemeanor violations under certain environmental statutes received the statutory *maximum* of one year in prison because the flawed Part Q Guidelines called for prison sentences *greater* than one year. Thus, the statutory *maximum* sentence became, in effect, the mandatory *minimum* for a minor regulatory offense.

In order to avoid the unduly harsh dictates of Sentencing Guidelines for environmental offenses, some courts simply departed from them and imposed reasonable probationary sentences over the strong objection by the Government. For example, in *United States v. Bogas*, 920 F.2d 363 (6th Cir. 1990), a case which the government cites in its recently filed Response To Defendant DERRIK HAGERMAN's Objections To The Presentence Investigative Report at 10, the court of appeals reversed a probationary sentence in a case where a municipal employee buried 100 drums of hazardous materials at the city airport and made false statements to the EPA about it. Finding that the cleanup costs of $100,000 was substantial and thus required a four-level increase under Part Q of the Guidelines, the court reversed the sentence. On remand, the district court nevertheless reinstated her original probationary sentence; the government wisely dropped its second appeal. *See* Exhibit 1

(excerpt of docket sheet).

In another case, a small business and its owner were found guilty of discharging waste water into a stream that contained higher levels of pollutants than were reported on the monitoring reports. In *United States v. Linden Beverage Co.*, Crim. No. 94-122R (W.D. Va), the district court departed from the 33-month prison sentence urged by Government under the then-mandatory Guidelines and instead imposed probation. The conviction was overturned on appeal, and instead of a retrial, the defendants pled guilty to a lesser offense; the court reinstated its probationary sentence. *See* Exhibit 2 (DOJ Press Release, March 17, 1998).

In the case at bar, the "harm" to the environment from the reporting violations appears to be negligible at best. Indeed, the Government felt compelled to file a motion in limine forbidding the defendants from presenting evidence at trial showing the absence of environmental harm. The Government strains mightily in its Response to find any environmental damage when it states:

> The environmental or human health harm in this case is unknown at this time, but it cannot be said that because no harm can be definitely proven, that there was no harm. HAGERMAN cause much anguish and nuisance to persons in the community, both by his aggression toward government regulators and others who questioned his operation of the WET facility and by his environmental releases to the air and water.

U.S. Response at 20.

The Government's position here with respect to the alleged environmental harm and a recalcitrant defendant who they claim (but has not charged or proved) has also obstructed justice, is not unlike the position taken by the government in another overzealous environmental prosecution.

In *Rapanos v. United States*, 126 S. Ct. 2208 (2006), a property owner/developer was

criminally prosecuted for moving sand on his property without a permit which the government alleged was required because the property contained wetlands subject to federal jurisdiction. The Supreme Court ruled in the civil prosecution of Mr. Rapanos that the federal government did not have jurisdiction over his property. *Id*. at 2224. In any event, even if there were federal jurisdiction, the relentless and unnecessary criminal prosecution of Mr. Rapanos was clearly an abuse of prosecutorial discretion. Indeed, the following exchange at Mr. Rapanos's sentencing hearing in the U.S. District Court for the Eastern District of Michigan between Chief Judge Lawrence P. Zatkoff and Assistant U.S. Attorney Jennifer Peregord on March 15, 2005, illustrates the abusive nature of this prosecution:

> **THE COURT**: I'm asking myself and people are asking me, why is the government so determined to send this defendant to prison for moving his sand? Number one -- I think it's a two-prong thing -- number one, this defendant is a very disagreeable person. * * * *
>
> Number two, this person . . . had the audacity and the temerity to insist upon his constitutional rights. * * * *
>
> And this is the kind of person that the Constitution was passed to protect. He is exactly the person who should be protected by the Constitution.
>
> People ask, well, what did this person dump to pollute the waters of the United States? Did he dump oil, radioactive substances, sewage, garbage, herbicides, pesticides, insecticides, fungicides, fertilizer, detergent, lead, iron, copper, mercury, benzene, dioxin, PCB's, PCP's, bacteria, DDT, chlordane, nitrates or cyanide? No. He didn't dump that. He polluted the waters of the United States by moving sand from one area of his property to the other.
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> * * *
>
> I am finding that the average US citizen is incredulous that it can be a crime for which the government demands [a substantial term of] prison for a person to move dirt or sand from one end of their property to the other end of their property and not impact the public in any way whatsoever.

* * *

> **MS. PEREGORD**: Just very briefly, your Honor. It is the government's position that the likeability or lack thereof of the defendant had absolutely nothing to do with this prosecution. *Moreover, sand is more toxic and destructive to wetlands than any of the substances the Court mentioned.*

United States v. Rapanos, No. 03-20023, Sentencing Transcript at 12, 16 (March 15, 2005) (emphasis added).

The Government's astonishing response to the court's valid concerns is remarkable in at least two major respects. First, the DOJ prosecutor, while denying Judge Zatkoff's belief that the prosecution was motivated by the defendant's uncooperative attitude with regulators (unlike the Government's claim here), did *not* refute the Court's belief that another major factor was driving the prosecution, namely, the defendant's insistence on asserting his constitutional rights. Second, the absurd representation to the Court that non-toxic sand "is more toxic and destructive to wetlands" and the environment than deposits of lead, mercury, radioactive wastes, sewage, and other pollutants is truly bizarre, undermines DOJ's credibility, and only serves to further demonstrate how environmental prosecutions are susceptible to prosecutorial overkill and abuse.

But now that the Guidelines are truly advisory after *Booker,* this Court is free to exercise its informed discretion in devising an appropriate punishment for this offense. Amicus submits that the 78-month prison sentence urged by the government for this regulatory offense is absurd on its face.

One of the 3553(a) sentencing factors that courts are required to consider is the "kind of sentences available" 18 U.S.C. 3553(a)(3). In addition to incarceration, for which the

Guidelines are heavily skewed, there are a variety of other sentencing options available to a sentencing judge, such as probation (supervised or unsupervised); home confinement (including electronic monitoring, visitor restrictions, and other conditions deemed appropriate); halfway houses; community service; restitution; forfeiture; and monetary fines; or a sentencing package involving a mixture of all these sanctions.

Regrettably, many of these sentencing options are not provided for under the Guidelines, even though a non-prison sentence in many cases, including this one, comports with the parsimony provision. Violations of any one of the numerous conditions of probation (*e.g.*, drug testing, employment, restitution, community service, and the like) will trigger probation revocation proceedings, and if warranted, incarceration will follow. Unfortunately, errors for imposing excessive prison terms in violation of the parsimony provision cannot be corrected because parole has been abolished.

CONCLUSION

For the foregoing reasons and those provided by the defendants, amicus curiae urges this Court to reject the excessive 78-month prison sentence urged by the Government for this reporting violation both because such a sentence is unreasonable in its own right and because it is derived from faulty Guidelines, which are only advisory. Instead, it would be in the public interest and serve the interests of justice for the Court to impose a sentence of probation for a specified term and/or other alternatives to incarceration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Sentencing Memorandum of the Washington Legal Foundation As Amicus Curiae in Support of Defendants and Exhibits thereo were served on counsel for the parties this 17th day of October, 2007, by overnight delivery to:

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