

Public Hearing Testimony

March 22, 1993

I am here today to have my voice heard regarding the proposed amendments of guidelines 2D1.1. The language of your proposed amendments should include the fact that the guidelines, as applied, do not reflect the intent of Congress with regard to illegal street drugs.

Congress specified that the total weight of any mixture or compound shall be used in determining a sentence level. However, the blanket application of this stipulation by the sentencing guidelines has failed to consider the intent of Congress and, therefore, resulted in penalizing inadvertently those not falling under that intent.

It would seem that Congress' intent in using the total weight is, in essence, a form of penalty enhancement for those who profit from the compounding and diluting of an illicit controlled substance with another (usually inert) substance. For example: if 100 grams of cocaine is mixed with another substance to yield a 1000 gram mixture, the final mixture is all sold as cocaine, and thus the original 100 grams yield a profit on 1000 grams.

The sentencing guidelines misapply the above rationale by including legally manufactured pharmaceutical, therapeutic agents. Medicinal pharmaceutical controlled substances are dispensed in dosages with a filler added to facilitate ingestion by the user, since the doses are usually too small to be taken alone. This is the result of a legitimate manufacturing process over which a defendant has no control. The size of the pills or capsules is arbitrary. A pill could have a 1 milligram dose in a 100 or 500 milligram total pill size. Furthermore, the purpose of the compounding is very obviously not the same as with street drugs, to enhance the profits from a given amount of an illegal substance. Therefore, in a case in which pharmaceutical controlled substances are involved, determining a sentence based upon the total weight of the tablets or capsules is illogical and not in keeping with Congress' intent regarding street drugs.

The following examples serve to illustrate the absurdity and injustice of such an application of the total weight rule to pharmaceutical agents.

In 1989, a West Virginia defendant was sentenced for selling 20,000 Tylox tablets. Tylox consists of 500 milligrams of Tylenol and 5 milligrams of Oxycodone, a narcotic. The total weight was 10,100 grams, of which 100 grams was narcotic. His sentence was calculated on the basis of the 100 grams of Oxycodone (which was converted to 50 grams of Heroin), and he received a level 20 baseline sentence. Had he been sentenced as in other cases, his sentence would have been based on converting 10,100 grams of Tylox to 5,050 grams of Heroin, i.e., 10,000 grams of Tylenol would have been converted to 5,000 grams of Heroin, surely a ridiculous proposition.

Another case involves a Maryland man who was also sentenced in 1989 on the basis of 66 tablets of Percodan. Percodan has 5 milligrams of Oxycodone and 550 milligrams of aspirin and filler. His sentencing memorandum erroneously claimed a total Oxycodone weight of (66 x 555 milligrams) 33.3 grams which was converted then to 16.5 grams of Heroin. His sentence was based on this calculation. In fact, the 66 pills had 310 milligrams of narcotic or 1/100 the claimed amount. These calculations and his sentence were never corrected.

Finally, a physician wrote prescriptions for two controlled substances, Hydromorphone and Dolophine (methadone). The Hydromorphone dosage was 4 milligrams and the Dolophine dosage was 10 milligrams. The tablets issued by the pharmacist, from the manufacturer, weighed 90 milligrams for the Hydromorphone, and 250 milligrams for the Dolophine. Sentencing was not based on the total prescription dosages of 175 grams but on the total pill weight multiplied by 2.5 for the Hydromorphone and 0.5 for the Dolophine to convert them to Heroin. The total weight after Heroin conversion was 8059 grams. From 175 grams to 8059 grams! It boggles the mind! There was no Heroin in this case, and the physician had no control over the pill size. The sentence penalized the defendant for something he did not do (manufacture the pill or dilute a narcotic for profit enhancement) and for something that did not exist (Heroin).

My only purpose for being here is to ask that the guidelines reflect the truth. The guidelines should be retroactively (to 1987) amended to correct this inappropriate application of the total weight rule so that individuals are not penalized for legalistic fiction after a process of legislative alchemy.

Thank you