

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, :
 :
 Appellee, :
 v. :
 :
 :
 :
 Appellant. :

MOTION TO REMAND FOR RE-SENTENCING

THE DEFENDANT in this appeal pleaded guilty in the trial court to one count of knowingly discharging effluents in excess of statutory maximums into waters of the United States, in violation of 33 U.S.C. § 1342 and 33 U.S.C. § 1319(c)(2)(A). At his sentencing hearing on December 20, 2002, the parties and the Court agreed that the Defendant's sentencing guideline range had been correctly calculated in the Defendant's Presentence Report pursuant to USSG § 2Q1.3. At the hearing, the Defendant and the Government requested a 2-level downward departure under Application Note 4 to § 2Q1.3. The Court granted that request, resulting in a criminal history category I and a total offense level of 12, resulting in a sentencing guideline range of 10-16 months. The Court imposed a sentence of 5 months of active imprisonment, with a recommendation that the 5 months active sentence be served in a community treatment center.

Sometime after the sentencing hearing, but before the

Judgment had been signed and filed, the Defendant's undersigned counsel, in consultation with the United States Probation Officer, determined that the 2-level downward departure granted by the sentencing judge had been incorrectly applied. See Defendant's "Motion To Correct Sentence," attached hereto as Exhibit A. If the 2-level downward departure had been applied as the Defendant contended it should have been, the Defendant's offense level would have been level 11 which, in combination with criminal history category I, would have resulted in a range of 8-14 months, not 10-16 months. Therefore, assuming the Court would apply the sentencing guidelines in the same manner, the Court would have arrived at an active term of imprisonment of 4 months, instead of 5 months.¹

The sentencing judge called a supplemental hearing on January 27, 2003, to address this issue. The sentencing judge concluded that, because the Defendant's "Motion To Correct Sentence" had been filed more than seven (7) days after the sentence was announced on December 20, 2002, the sentencing judge no longer had jurisdiction to make any changes in the

¹After the sentencing hearing, the Federal Bureau of Prisons announced that they would no longer honor a recommendation that an active term of imprisonment (in Zone C of the Sentencing Table of the United States Sentencing Guidelines) be served in a community center. Therefore, whatever minimum term of active imprisonment the Court would impose would be actually served as active imprisonment.

Defendant's sentence. The parties agreed with that legal position.

However, the sentencing judge suggested that the Defendant file a Notice of Appeal and request an immediate remand, with the consent of the Government, so that the judge would have jurisdiction to review this issue and make this change in the Defendant's sentence if the judge thought it would be appropriate. The sentencing judge was careful not to express any definite position about whether he would or would not change the Defendant's sentence, since he no longer had jurisdiction over the case. See Transcript of January 27, 2003, hearing, attached hereto as Exhibit B.

Therefore, the Defendant respectfully requests that this Court enter an Order remanding the case for re-sentencing so that the sentencing judge will regain jurisdiction to address the issue presented herein. Defendant's undersigned counsel has conferred with Assistant United States Attorney Harry Hobgood, who has reiterated to counsel the fact that the Government agrees with this request and does not oppose the Motion To Remand For Re-Sentencing. Respectfully submitted, this the ____ day of February, 2003.

WILLIAM C. INGRAM

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing **Motion To Remand For Re-Sentencing** by United States Mail or by hand delivery upon:

Harry Hobgood, AUSA
P. O. Box 1858
Greensboro NC 27402

This the _____ day of February, 2003.

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WILLIAM C. INGRAM
First Assistant Federal Public Defender

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