

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20005 & 94-20006

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

VERSUS

GEORGE WOODROW FLANAGAN and SHANNON RAY KIKER,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-93-164-1 & CR-H-93-164-2)

(January 9, 1995)

Before REAVLEY, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

George Woodrow Flanagan ("Flanagan") and Shannon Ray Kiker ("Kiker") were convicted on their pleas of guilty to an indictment charging them with conspiracy to possess with intent to distribute Lysergic Acid Diethylamide ("LSD") and aiding and abetting in the possession of LSD with intent to distribute in violation of 21

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846 and 18 U.S.C. § 2. The offense date was February 25, 1993.

On November 30 1993, the district court sentenced Flanagan to concurrent 36 month sentences, concurrent three-year terms of supervised release and a \$100 special assessment. Kiker was sentenced to concurrent 24 month sentences, concurrent three year terms of supervised release and a \$100 special assessment. The Government appeals the sentences imposed.

The LSD plus the gel capsule in which it was contained weighed 28.1 grams. Based on that quantity, Flanagan's guideline range was initially calculated by the probation department to be 30-37 months, and Kiker's guideline range was calculated to be 24-30 months. Applying U.S.S.G. § 5G1.1, the probation department concluded that the guideline sentence for both defendants was the statutory mandatory minimum or 120 months.

At the sentencing hearing, the district court interpreted the amendment to U.S.S.G. § 2D1.1 addressing the manner of calculation of the weight of LSD to affect the statutory classification of LSD by weight. Over the Government's objection, the district court treated each dose of LSD as equal to 0.4 mg., calculating that the total amount of LSD involved in the charged offense was 400 mg. Based on that amount, the court found that the statutory sentencing range was 0 to 20 years with no mandatory minimum.

DOES THE MANDATORY MINIMUM SENTENCING REQUIREMENT APPLY?

The government argues that the district court misapplied the sentencing guidelines by imposing sentences that were less than the mandatory minimum. The government acknowledges that the 1993

amendment to U.S.S.G. § 2D1.1 directs sentencing courts to use a standard weight for all dosages of LSD regardless of the weight of the carrier in calculating the amount of controlled substances for purposes of the Drug Quantity Table in the Guidelines. However, they contend that the entire weight of the LSD, plus the carrier must be used to calculate the statutory punishment range. That is correct.

In calculating the amount of "mixture or substance" of LSD for the purposes of determining the mandatory minimum sentence under 21 U.S.C. 841(b), the weight of the carrier medium must be included. *Chapman v. United States*, 500 U.S. 453, 460-62, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). The policy statement to 2D1.1(c) provides that the new approach to calculating the amount of LSD does not override the applicability of the *Chapman* "mixture or substance" rule for the purpose of applying any mandatory minimum sentence under § 841. We hold that the amount of LSD must be calculated according to *Chapman*, rather than applying the new guideline method of calculation. *United States v. Pardue*, ___ F.2d ___ (No. 94-30208, 5th Cir., October 17, 1994).

We VACATE the sentences imposed on Flanagan and Kiker, and REMAND for resentencing.