

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA)
) Case No. 97-0853-CR-Middlebrooks
 v.)
)
 ATLAS IRON PROCESSORS, INC.,) **MOTION OF THE UNITED STATES**
 et al.,) **AND ACCOMPANYING BRIEF**
) **REQUESTING THAT CLERICAL**
 Defendants.) **ERRORS IN THE DEFENDANTS'**
) **SENTENCING ORDERS**
) **BE CORRECTED**
) **PURSUANT TO FED. R. CRIM. P. 36**

I

INTRODUCTION

Pursuant to Fed. R. Crim. P. 36, the United States moves this Court for an order correcting two clerical mistakes in the Judgement and Committal Orders sentencing the defendants in this criminal case. Rule 36 provides as follows:

Clerical mistakes in judgements, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Fed. R. Crim. P. 36.

There are two clerical errors in the Judgement and Committal Orders sentencing the defendants. The United States waited until it could review the sentencing transcript before bringing this matter to the Court's attention. The sentencing transcript was only recently received. The United States is raising these issues now so that the record can be corrected (and be made clear) before this case is transferred to the Eleventh Circuit.

Below, the United States discusses the clerical errors and provides the support for their being corrected.

II

FACTS AND LEGAL ARGUMENT

The first clerical error concerns the restitution amount to be paid by Sunshine Metal Processing, Inc. (“Sunshine”). On page 3 of Sunshine’s Judgment and Committal Order, the sentencing order correctly provides that the amount of restitution ordered is \$74,009.42. Judgment and Committal Order, Sunshine (Attachment I). See also Sentencing Transcript, p. 201.¹ Page 5 of Sunshine’s sentencing order, however, incorrectly provides that the amount of restitution to be paid is \$7,400,942.00. See Attachment I. The United States respectfully requests that this clerical error be corrected to read “74,009.42.”

The second clerical error concerns the “Date Offense Concluded” section for each of the defendants. The first page of the Judgment and Committal Order for each of the defendants provides that “11/23/1992” is the “Date Offense Concluded.” It appears that the “11/23/1992” date was inadvertently lifted from the Indictment and plugged into the Judgment and Committal Orders. The Indictment charged that the conspiracy lasted “at least until November 23, 1992, the exact dates being unknown to the Grand Jury.” At trial, the United States proved that the price-fixing and market-allocation conspiracy lasted at least through December 31, 1992. In sentencing the defendants, the Court also found that the conspiracy continued at least through December 31, 1992. Accordingly, the United States respectfully requests that these clerical errors be changed so that the “Date Offense Concluded” section for each defendant reads “12/31/1992.”

At the sentencing hearing, the Court held:

I don’t see the basis for any withdrawal at Shula’s meeting [on November 23, 1992]. There was testimony that there was a falling out between the parties and some complaints of cheating, but no one went out and told the market that suddenly this deal we have arrived at

¹ For the Court’s benefit, the United States has provided the entire sentencing transcript, even though only a few pages are cited in this brief. See Attachment III.

between ourselves is no longer in effect and so pricing is going -- we are going to return to aggressive pricing.

At best, they just stepped up their cheating -- but the impact on the market doesn't -- that doesn't seem to me to stop and start that quickly. And so I don't believe there is any evidence a withdrawal. **If anything, again, this - the impact on the market lasted past December 31st.**

Sentencing Transcript, pp. 134-35 (emphasis added).

The duration of the conspiracy is a critical issue and was argued at length at the sentencing hearing. Based on the testimony and the pricing documents admitted at trial, the position of the United States was (and is) that the conspiracy continued at least through December 31, 1992. See, e.g., Sentencing Transcript, pp. 120-25. The defendants argued, on the other hand, that the conspiracy ended on November 23, 1992.

In sentencing the defendants, this Court found that the conspiracy lasted at least through December 31, 1992. Sentencing Transcript, pp. 134-35. The record is clear. The Court found no withdrawal from the conspiracy on November 23, 1992. Id. at 134-35. Moreover, in calculating the volume of commerce attributable to the defendants under U.S.S.G. §2R1.1, the Court included commerce through December 31, 1992. For example, the Court held that the amount of commerce affected by the conspiracy and attributable to Atlas and the Giordano defendants was \$636,153.16. Sentencing Transcript, pp. 173-74. Similarly, the Guideline fines imposed on Sunshine and Weil were based on a volume of commerce figure (\$839,043.80) for the entire conspiratorial period of October 24 through at least December 31, 1992. Also, the Court held that for each individual defendant the applicable Guideline Offense Level was 13, which included a one-level upward adjustment for the volume of commerce affected by the conspiracy and attributable to each of the defendants, and then sentenced them accordingly. See U.S.S.G. §2R1.1(b)(2)(A); Sentencing Transcript p. 174. Of course, these findings only make sense if the conspiracy

continued at least through December 31, 1992.

Accordingly, the United States respectfully requests that the initial page of the Judgement and Committal Order for each of the defendants (Atlas; Sunshine; Anthony J. Giordano, Sr.; Anthony J. Giordano, Jr.; David Giordano and Randolph J. Weil) be changed so that each reads "12/31/1992" under the "Date Offense Concluded" section. The pages to be corrected are provided in Attachment II.

III

CONCLUSION

For the foregoing reasons, pursuant to Fed. R. Crim. P. 36, the United States respectfully requests that this Court correct the clerical errors as discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 29th day of September 1999. In addition, a copy was sent by regular mail to the defendants on this 29th day of September 1999.

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