IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NO. 83-314-1**
	:	
GEORGE MARTORANO	:	

DEFENDANT'S POST-HEARING
MEMORANDUM OF LAW IN SUPPORT OF HIS
MOTION TO CORRECT ILLEGAL SENTENCE AND/OR
FOR RECONSIDERATION AND/OR APPROPRIATE RELIEF

The Defendant, GEORGE MARTORANO, by and through undersigned counsel, respectfully files this post-hearing memorandum of law in support of his "Motion To Correct Illegal Sentence And/Or For Reconsideration And/Or Appropriate Relief" (hereinafter "Motion to Correct") and states as follows:

THE COURT IMPOSED AN ILLEGAL GENERAL SENTENCE

A. The *Ward* Decision

At the oral argument held on Mr. Martorano's Motion to Correct, the prosecutor stated that the Third Circuit's decision in *United States v. Ward*, 626 F.3d 179 (3d Cir. 2010), "was rendered published at the request of Ward because - - for the reason that it allows the defense in subsequent Guidelines cases to argue that if there is a Guidelines procedural error, it can be plain error if you fail to raise it below.

That's the reason it was published." (T.30)[1] However, Appellant Ward's "Consent Motion For Redesignation Of Opinion As Precedential," page 1, filed in the Third Circuit and attached hereto as Exhibit 1, clearly shows that *Ward, supra*, was not published for that purpose.

More specifically, in Appellant Ward's "Consent Motion For Redesignation Of Opinion As Precedential" with which the government fully concurred, Appellant Ward requested that the Third Circuit publish *Ward* in order to make it clear to district court judges that the Third Circuit has "held that federal sentencing law does not permit a 'general sentence' which fails to include a lawful sentence on each count of conviction" and that a general sentence "requires resentencing as a remedy." (Exh. 1 at 1-2). The Third Circuit then granted that request for that purpose. Thus, with the government's approval, the Third Circuit published *Ward* in order to make it clear to district court judges that "federal sentencing law does not permit a general sentence which fails to include the imposition of a lawful sentence on each count of a conviction." (Exh. 1 at 1).[2]

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[1] The transcript of the January 19, 2011 oral argument in this matter is referred to herein as "T." followed by the pertinent page number.

[2] The government should be estopped from making conflicting arguments. *See e.g., United States v. Liquidators of European Federal Credit Bank*, ___ F.3d ___ 2011 WL 9730 (9th Cir. 2011)(holding that judicial estoppel barred the government from making conflicting arguments).

Significantly, *Ward* was published because "general sentences" are prohibited under "federal sentencing law" - - not just under the Federal Sentencing Guidelines. (Exh. 1 at 1). Indeed, the Federal Sentencing Guidelines are not even mentioned in Appellant Ward's "Consent Motion For Redesignation Of Opinion As Precedential." (Exh. 1).

As previously discussed at the oral argument, the *Ward* Court condemned Appellant Ward's general sentence of 25 years on multiple counts, not only because it violated the Sentencing Guidelines, but *also* because "[w]e do not know whether the [District] Court intended to impose a 25 year sentence on each count to run concurrently which would clearly be illegal considering the statutory maximums on certain counts - or whether the [District] Court had some other sentence in mind, and accordingly ... we will remand for resentencing." *Id*. at 184-85. Thus, it was *both* the violation of the Sentencing Guidelines and the fact that the general sentence imposed exceeded the statutory maximum on some of the counts that caused the Third Circuit to vacate Ward's sentence and remand for resentencing.

Notably, in vacating Ward's sentence, the *Ward* Court relied upon and cited to the page in the Eleventh Circuit's decision in *United States v. Moriarty*, 429 F.3d 1012, 1025 (11th Cir. 2005), where the Eleventh Circuit held that an undivided sentence for more than one count that exceeds the maximum sentence on one of the

counts is "per se illegal." In addition, the *Ward* Court explained that, long before the Sentencing Guidelines existed, "in *United States v. Corson*, 449 F.2d 544, 551 (3d Cir. 1971)(*en banc*), "we recognized that we had previously 'expressed a dissatisfaction with general sentences and declared it highly desirable that the trial judge in imposing sentence on an indictment containing more than one count deal separately with each count.'" *Ward*, 626 F.3d at 185 n. 8. (citations omitted). Thus, *Ward* condemns general sentences in all cases - - not just in Sentencing Guidelines cases.

The government argues that *Ward* applies only to Sentencing Guidelines cases by relying upon the *Ward* Court's notation in footnote 8 that three cases (*United States v. Corson*, 449 F.2d 544, 551 (3d Cir. 1971) (*en banc*), *United States v. Xavier*, 2 F.3d 1281, 1292 (3d Cir. 1993) and *Jones v. Hill*, 71 F.2d 932 (3d Cir. 1934)) "did not concern the Sentencing Guidelines ***and*** are inapposite here." *Ward*, 626 F.3d at 185 n. 8. (emphasis added). However, the government's reliance upon this notation to uphold the general sentence imposed upon Mr. Martorano is misplaced. In order to understand this notation in footnote 8, it is first necessary to understand that the three cases cited therein are inapposite *for reasons other than that they are pre-Guidelines cases*. More specifically, in the Third Circuit and other Circuits there has been a subset of "general sentence" cases which are the exception to the rule that

general sentences are prohibited. In this subset of cases, general sentences have been permitted in the special circumstance of a defendant who has been convicted of multiple crimes arising from a single transaction which violate different parts of the same statute.

For example, in *Corson*, *supra*, which is cited in footnote 8 of *Ward*, *supra*, the Third Circuit dealt with a specific situation involving contemporaneous acts of bank robbery under the Federal Bank Robbery Act. The defendant was convicted of (1) entering a bank with intent to commit a felony, (2) robbery of the bank, and (3) bank robbery with a deadly weapon, all based upon a single armed robbery of a bank. The defendant was sentenced to consecutive terms of imprisonment on each count. The *Corson* Court relied upon the Supreme Court's holding in *Prince v. United States*, 352 U.S. 322 (1957), that it was not Congress' intention in establishing a series of greater and lesser offenses under the bank robbery statute to pyramid the penalties therefor and, accordingly, the *Corson* Court held that it was error to sentence Corson to multiple consecutive terms of imprisonment as punishment for a single bank robbery. The *Corson* Court further held that, under the special circumstance of contemporaneous acts of bank robbery, "[t]he only practicable way of implementing *Prince* is to impose a general sentence on all counts for a term not exceeding the

maximum permissible sentence on that count which carries the maximum sentence." 449 F.2d at 551.

For further example, in *United States v. Xavier*, 2 F.3d 1281 1292 (3d Cir. 1993), which is also cited in footnote 8 of *Ward*, *supra*, the Third Circuit again dealt with a defendant who was convicted of multiple crimes arising from a single transaction which violated different parts of the same statute. Defendant Xavier was convicted of, *inter alia*, (1) possession of a firearm during a violent crime and (2) possession of a firearm, both of which violated different parts of the same statute. The District Court imposed consecutive sentences for the two offenses. The *Xavier* Court held that it was not Congress' intention to authorize multiple punishments for these two offenses and that consecutive punishment for these two offenses violated Double Jeopardy. Under this special circumstance, the Third Circuit further held that the district court could "impose a general sentence ... for a term not exceeding the maximum permissible sentence on that count which carries the greatest maximum sentence." 2 F.3d at 1292 (citations omitted).

The Court in *United States v. Scott*, 664 F.2d 264 (11th Cir. 1981), expressly recognized that cases that involve a defendant who has been convicted of multiple crimes arising from a single transaction which violate different parts of the same statute fall within the exception to the rule that general sentences are *per se* illegal.

In *Scott*, the defendant was convicted on two counts of making false statements on bank loan applications which carried a statutory maximum sentence of two years and three counts of mail fraud which carried a statutory maximum sentence of five years. The defendant contended that his general undivided sentence of five years was illegal. The *Scott* Court agreed and explained that a general sentence which exceeds the statutory maximum sentence for any one count is illegal. However, the *Scott* Court noted that there is an exception to that rule of law where a defendant has been convicted of multiple crimes arising from a single transaction which violate different parts of the same statute. As stated by the *Scott* Court:

> The trial court's reliance on United States v. Johnson, 588 F.2d 961 (5th Cir.), cert. denied, 440 U.S. 985, 99 S.Ct. 1800, 60 L.Ed.2d. 248 (1979), to uphold the general sentence is misplaced. Johnson dealt with the specific situation involving a conviction for contemporaneous acts of bank robbery under the Federal Bank Robbery Act. Prior Fifth Circuit cases have held that contemporaneous acts of bank robbery constitute a single transaction, and that therefore a general sentence, while still "bad business," is not impermissible. Id. at 964. See Hall v. United States, 356 F.2d 424, 426 (5th Cir. 1966). Because the Johnson ruling is confined to the special circumstances of contemporaneous acts of bank robbery, it is ***inapposite*** here.

Id. at 265 (emphasis added).

Thus, cases involving the special circumstance of a defendant who has been convicted of multiple crimes arising from a single transaction which violate different parts of the same statute must be viewed as "inapposite" in a case where a court is considering a defendant's claim of an illegal general sentence not involving such crimes. This is why the *Ward* Court stated in footnote 8 that *Corson* and *Xavier* were "inapposite." This also explains why the *Ward* Court further pointed out in footnote 8 that, after *Rutledge v. United States*, 517U.S. 292, 307 (1996), general sentences will no longer cure the types of Double Jeopardy problems at issue in *Corson* and *Xavier*.[3]

The third case which the *Ward* Court described as "inapposite" in footnote 8 was *Jones v. Hill*, 71 F.2d 932 (3d Cir. 1934). *Jones* is a case decided in 1934 where the sentence imposed upon the defendant was not clearly described in the opinion and the Third Circuit remarked that "a general or gross sentence may be imposed under an indictment containing more than one count so long as it does not exceed the aggregate of the punishments which could have been imposed upon the several counts." *Id*. at 932. The *Ward* Court explained in footnote 8 that *Jones* was

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[3] It is important to note that, while at times our two claims - the illegal general sentence and the violation of *Rutledge, supra* - can intersect, they are completely independent of each other. Our claim of an illegal general sentence stands on its own merit. Our claim of a Double Jeopardy/*Rutledge* violation stands on its own merit. Neither claim is necessarily a prerequisite to the other.

"inapposite" because, after *Jones* was decided, the Third Circuit in *United States v. Rose*, 215 F.2d 617, 630 (3d Cir. 1964) and *Corson*, *supra*, disapproved of general sentences. *See Ward*, 626 F.3d at 185 n. 8. Thus, *Xavier*, *Corson* and *Jones* are not "inapposite" because they are pre-Guidelines cases, as the government contends. Rather, the *Ward* Court noted that these cases were "inapposite" because the government offered these cases that are peculiarly distinguishable (and also pre-Guidelines) to support the erroneous government proposition that these cases permit district courts to impose general sentences in any type of case.

Furthermore, as this Court noted at the oral argument in this matter, because the Sentencing Guidelines are advisory after *United States v. Booker*, 543 U.S. 220 (2005), in both the advisory Guidelines regime which existed when Ward was sentenced and the pre-Guidelines regime which existed when Mr. Martorano was sentenced, the sentence to be imposed was within the court's discretion. Therefore, since the general sentence was illegal in *Ward*, there is no reason that it would not also be illegal in this case. Indeed, general sentences have been routinely held to be illegal in cases arising from the pre-Guidelines regime. *See e.g., United States v. Woodard*, 938 F.2d 1255, 1256-58 (11th Cir. 1991)(per curium); *United States v. Scott*, 664 F.2d 264 (11th Cir. 1981); *Benson v. United States*, 332 F.2d 288 (5th Cir. 1964).

B. An Undivided Sentence For More Than One Count Is Illegal If It Exceeds The Maximum Allowable Sentence On One Or More Of The Counts

At the oral argument, the government contended that the Third Circuit permits general sentences as long as they do not exceed the statutory maximum on the count with the highest possible sentence. This is clearly wrong. *See e.g., Ward, supra*. As previously explained, the Third Circuit has only permitted general sentences in the special and rare case of a defendant who has been convicted of multiple crimes arising from a single transaction which violate different parts of the same statute. *See Xavier, supra*; *Corson, supra*. And, the Third Circuit has recognized that, after *Rutledge v. United States*, 517 U.S. 292, 307 (1996), general sentences will not even be permitted in these rare cases to cure this Double Jeopardy problem. *Ward*, 626 F.3d at 185 n. 8.

Indeed, there are a host of cases, including *Ward*, where courts have vacated general sentences that exceeded the statutory maximum on one or more counts *but not all counts*. *See e.g., United States v. Ward*, *supra* (holding that the defendant's general sentence of 25 years was illegal where the defendant was convicted of two counts that carried a statutory maximum sentence of 30 years imprisonment, two counts that carried a statutory maximum of 20 years imprisonment and one count that carried a statutory maximum of five years imprisonment); *United States v. Moriarty*,

429 F.2d 1012 (11th Cir. 2005) (vacating general sentence that exceeded the statutory maximum for one count but not for the other two counts); *United States v. Woodard*, 938 F.2d 1255 (11th Cir. 1991) (vacating general sentence that exceeded the statutory maximum on one of two counts); *United States v. Scott*, 664 F.2d 264 (11th Cir. 1981)(holding that defendant's general sentence of five years was illegal where the defendant was convicted of two counts which carried a statutory maximum of two years imprisonment and three counts which carried a statutory maximum of five years imprisonment); *Walker v. United States*, 342 F.2d 22 (5th Cir. 1965)(vacating defendant's general sentence because it was within the statutory maximum for some counts but in excess of the statutory maximum on one count).

C. Mr. Martorano's Motion To Correct His Illegal General Sentence Is The Proper Legal Vehicle For Correcting His Sentence

For the reasons fully developed in Mr. Martorano's reply memorandum in support of his Motion to Correct, pages 3-5, Mr. Martorano's motion to correct his illegal sentence is the proper legal vehicle for correcting his "general sentence."

Furthermore, a sentence is illegal within the meaning of former Rule 35(a) if any one of the following four circumstances exist: the punishment is in excess of that prescribed by the relevant statute, multiple terms were imposed for the same offense, or the terms of the sentence itself are legally or constitutionally invalid in any other

respect. *Hill v. United States*, 368 U.S. 424, 430 (1962). As previously explained at the oral argument, Mr. Martorano's sentence is illegal in each of these four ways. (T.19).

Significantly, in *Hill*, 368 U.S. at 430 n. 9, the Supreme Court recognized that where, as in the instant case, a sentence can be determined to be illegal by looking at the judgment and sentence order on its face, the sentence is illegal within the meaning of former Rule 35(a), and is not a sentence imposed in an illegal manner. The *Hill* Court further held that the defendant's claim that he was not afforded the right to allocute at his sentencing was a claim that his sentence was imposed in an illegal manner. *See also e.g., United States v. Katzin*, 824 F.2d 234 (3d Cir. 1987)(the issue of whether Federal Rule of Criminal Procedure 32 was complied with in sentencing the defendant was a claim that the sentence was imposed in an illegal manner); *United States v. DeLuca*, 889 F.2d 503 (3d Cir. 1989) (the issue of whether it was improper to resentence the defendant when the defendant was absent at that resentencing was a claim that the sentence was imposed in an illegal manner); *United States v. James*, 70 Fed.Appx. 112 (4th Cir. 2003)(the issue of whether the trial court failed to make the necessary findings for the imposition of a restitution order was a claim that the sentence was imposed in an illegal manner).

It is also important to note that the government has not cited any authority that supports its argument that a general sentence on multiple counts which exceeds the statutory maximum on some of the counts must be challenged as a sentence that was imposed in an illegal manner. This argument is meritless.

D. Former Rule 35 Has Long Been Recognized As An Integral Part Of The Direct Appeal Process

Motions brought under former Federal Rule of Criminal Procedure 35(a) are neither civil motions nor civil collateral attacks on a conviction and sentence. Rather, former Rule 35(a) which authorizes a court "to correct an illegal sentence at any time," imposes no procedural hurdles because a former Rule 35(a) motion is a motion made in the original case as part of the direct appeal of the criminal conviction, rather than a collateral attack on the sentence. *E.g., United States v. Shillingford*, 586 F.2d 372 (5th Cir. 1978); *United States v. Landrum*, 93 F.3d 122, 125 (4th Cir. 1996); *United States v. Little*, 392 F.3d 671, 677 (4th Cir. 2004). Accordingly, the procedural default hurdles that apply to cases filed under 28 U.S.C. §2255, such as compliance with a limitations period, do not apply here. *Landrum, supra*; *Shillingford, supra*; *Little, supra*. For this reason, where a defendant relies upon a new case in support of his former Rule 35(a) motion, the new case must be considered by the court without

the need for any analysis of whether that new case should be retroactive. *Shillingford*, 586 F.2d at 375.

CONCLUSION

The Court in *Ward*, 626 F.3d at 184-85, held that the imposition of an undivided sentence, where multiple counts exist, that exceeds the maximum allowable lawful sentence on one or more of the counts is such an egregious error that it constitutes a "manifest injustice" and rises to the level of plain error. It is simply not required that an undivided sentence exceed the maximum of the greatest count in order to be an illegal general sentence. Rather, it is well-established that an undivided sentence is an illegal sentence where the undivided sentence exceeds the maximum of some counts but not all.

In *United States v. Peeke*, 153 F. 166 (3d Cir. 1907), the Third Circuit condemned an illegal general sentence of five years on multiple counts and stated:

> Should some newly discovered evidence induce the executive to pardon the prisoner on one or more counts, how would it be possible to ascertain to what part of the sentence the pardon applied? To what reduction from the five-year term would be entitled? To state these questions is to answer them.

These same questions can be asked in the instant case and, as in *Peeke*, to ask them is to answer them. Furthermore, while it is clear that the general undivided sentence

imposed upon Mr. Martorano is illegal, it is also important to note that there are other salutary benefits of imposing legal non-general divided sentences, including that (1) there is a community interest and right to know the specific terms and sentences imposed on each count of conviction, and (2) general undivided sentences impose unnecessary burdens on judicial resources and interfere with the orderly administration of justice in both direct and collateral review proceedings. Clearly, the illegal sentence imposed upon Mr. Martorano is plain, prejudicial and a manifest injustice.

Accordingly, for all of the foregoing reasons and those set forth in Mr. Martorano's "Motion to Correct Illegal Sentence And/Or For Reconsideration And/Or Appropriate Relief," Mr. Martorano's Reply Memorandum of Law in support of that motion, and undersigned counsel's oral argument, Mr. Martorano respectfully requests that this Court grant his motion to correct illegal sentence and/or for consideration and/or for appropriate relief, vacate his sentence, and order a resentencing and any such other relief as this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February 2011 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served electronically this day on Andrea G. Foulkes, Assistant U.S. Attorney, 615 Chestnut Street, Philadelphia, PA.

s/ Marcia J. Silvers
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