U.S. Department of Justice

Environment and Natural Resources Division

Wildlife and Marine Resources Section
P.O. Box 7369
Ben Franklin Station
Washington, DC 20044-7369

Telephone (202) 305-0210
Facsimile (202) 305-0275

MEMORANDUM

To: Readers of *Federal Wildlife Crimes*

From: John T. Webb, Assistant Chief

Re: Elements of Endangered Species Act Offense Require Proof that Defendant Knew Biological Identity of Animal

In *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998), the Ninth Circuit upheld a jury instruction in an Endangered Species Act prosecution under Section 9 for the illegal "taking" (killing) of a wolf that required the government to prove only that (1) the defendant knowingly shot an animal and (2) the animal was a species protected under the Endangered Species Act (i.e., a gray wolf). The instruction expressly stated, however, that the government was not required to prove the defendant knew the biological identity of the animal at the time he shot it. In approving this instruction, the Ninth Circuit relied in part upon Fifth Circuit decisions in *United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991) and *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990), an Eleventh Circuit decision in *United States v. Grigsby*, 111 F.3d 806 (11th Cir. 1997), and several district court decisions.

In opposition to a *certiorari* petition in *McKittrick* filed November 8, 1998, the Solicitor General informed the Supreme Court that the United States would no longer "request the use of this [mens rea knowledge] instruction, because it does not adequately explicate the meaning of the term 'knowingly' in [Title 16] Section 1540(b)(1)." As the Solicitor General further stated, "In the context of an analogous public welfare misdemeanor offense involving the violation of a regulation, this Court has held that a 'knowing' violation of the regulation occurs if the defendant either knew the essential facts or 'willfully neglected to exercise its duty under the Regulation to inquire into' the relevant facts. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952). . . . In our view, the term "knowingly" in Section 1540(b) has a similar scope." Notice of this position was electronically circulated to each U.S. Attorney's Office and model instructions addressing the SG's concerns have been prepared by the Wildlife and Marine Resources Section.

The Solicitor General made this decision at a time when three Members of the Court had expressed disapproval of the position

taken by the instruction at issue, *see Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 722 (1995)(Scalia, J., dissenting) and when three other recent Court decisions had expressed views difficult to reconcile with the challenged instruction. *See e.g. Staples v. United States*, 511 U.S. 600 (1994); *United States v. Liparota*, 471 U.S. 419, 426 (1985); *United States v. X-citement Video, Inc.*, 513 U.S. 64, 72 (1994). Simply, the Department of Justice position post-*McKittrick* is that prosecutors must prove that the defendant is aware of the facts that constitute the offense, including the identity of the animal, but need not prove that he knew his conduct violated the law.

McKittrick's conviction was not overturned as a consequence, because he also was charged and convicted under the ESA with possessing a wolf unlawfully taken under circumstances where proof of his knowledge of the animal's identity could be made while he possessed it.

Objections about this policy have been raised by the United States Fish and Wildlife Service, Office of Law Enforcement because of the impact on prosecuting grizzly bear poaching cases in Wyoming and in the adjoining districts of Montana and Idaho where hunters now have the ready defense that they mistook the threatened grizzly bear for an unlisted black bear. Furthermore, a number of similar "defenses" are available where listed species have a look alike unlisted counterpart: gray wolves and coyotes; California condors and turkey vultures; whooping cranes and snow geese; to name some of them. Most recently this arose when a hunter in California shot and killed a California condor that he believed was a "buzzard" or turkey vulture.

We have been successful satisfying the knowledge requirement under the ESA where the defendant shoots and kills an unidentified listed animal, but later identifies it correctly when he takes unlawful possession of it after the taking. *See* 16 U.S.C. Section 1538(a)(1)(D) for endangered species and comparable regulations in 50 C.F.R. Part 17 for threatened species. The true "hole" created by the current interpretation of the *mens rea* requirement occurs only when an unidentified animal is killed and left laying. Those perpetrators can and do escape any criminal punishment under the ESA when, for instance, they take an endangered species in violation of 16 U.S.C. Section 1538(a)(1)(B). But assessment of modest "strict liability" ESA civil penalties, prosecution by the state, or both remain viable penalties even here. Absent a legislative fix, there is little hope of restoring the Ninth Circuit's interpretation of the necessary elements found in *McKittrick*.