

Sentencing reformers will be listening to DeCoster appeal panel

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February 25, 2016

If those controversial Koch brothers and the conservative Heritage Foundation have their way, sentencing reform may soon require evidence of mens rea — criminal intent — before courts could convict defendants.

Before Congress is likely to act on that reform, however, a three-judge panel in St. Paul, MN, will hear from two top appellate attorneys on a closely related issue: Can a federal trial judge sentence someone to prison time for conviction of a crime where mens rea was not required.

The case involves the father and son defendants Austin (Jack) DeCoster and Peter DeCoster, each sentenced to three months in federal prison for their part in shipping contaminated shell eggs that were linked to a 2010 Salmonella outbreak that sickened an estimated 2,000 people.

Oral arguments are set for March 18 in the DeCosters' appeal to the U.S. Court of Appeals for the Eight Circuit. The DeCosters are contesting their three-month prison sentences, imposed for a federal misdemeanor that did not require the prosecution to prove mens rea.

Once among the nation's largest egg producers, the pair was sentenced after pleading guilty to holding corporate offices when their company allowed the contaminated eggs to enter the marketplace.

The panel of three U.S. District judges hearing oral arguments will be Judges Diana E. Murphy, C. Arien Beam and Raymond W. Gruender. Murphy was named to the U.S. District Court for the District of Minnesota in 1979 by President Jimmy Carter. She was appointed to the Eight Circuit by President Bill Clinton.

Beam's appointments to both the U.S. District and U.S. Court of Appeals were made by President Ronald Reagan. Gruender, a former assistant U.S. Attorney for Missouri, was nominated to serve on the Eight Circuit bench by President George W. Bush.

The appeals panel will hear from former acting U.S. Attorney General Peter D. Kesler for the DeCosters and Jeffrey Eric Sandberg, representing the U.S. Department of Justice's appellate division.

Since it was filed in April 2015, the DeCosters' appeal has attracted a busload of business attorneys as supporters. They've written so-called "Amici briefs" on behalf of the DeCosters' contention that jail time should be out of the question. These DeCoster supports include the National Association of Manufacturers, the libertarian Cato Institute, the Washington Legal Foundation, Chamber of Commerce of the United States, and Pharmaceutical Manufacturers of America.

The DeCosters Iowa egg farms were found to be responsible for a national Salmonella outbreak in 2010 that prompted the largest shell egg recall in U.S. history. More than half a billion eggs were recalled. The father and son, and their company Quality Egg LLC, negotiated a plea agreement in 2015 with the Justice Department.

They paid fines totaling just less than \$7 million along with \$83,008 in restitution and then mounted a vigorous appeal to their three-month sentences, which likely could have been served at a federal facility on a former college campus in Yankton, SD.

Mens rea was originally seen as a deal breaker in the budding sentencing reform movement. Lately, however, some liberals are giving it a second thought.

"For liberals, the right's proposal offers a chance to stroke a blow for justice for ordinary people," liberal Yale Law School professor Gideon Yaffe wrote earlier this month in the *New York Times*. "No one should be convicted of a crime — or even stopped by the police — without evidence of a criminal state of mind."

Yaffe points to a New York state law banning "gravity knives," which open by a flick of the wrist, as example of laws police use to detain thousands of people, mostly minorities where the intent is innocent. Some on the left suggest reviewing all criminal laws on the books, but Yaffee says that would take years.

The fact that the Justice Department is sending one of its top appellate lawyers to St. Paul for the DeCosters' appeal might be an indication that the administration is not yet ready to sign on to the sentencing reform caucus. If, however, the department loses, and jail time is no longer a sentencing option without mens rea, it will be far easier for Congress to sweep it into the judicial dust pan.