Federal Presentencing and Post Conviction News
FROM THE LAW OFFICES OF ALAN ELLIS

ISSUE 10, WINTER 1995

MORE GOLDEN NUGGETS OF SENTENCING
A Continuing Series of Useful Sentencing Tips

By Alan Ellis

In the September, 1995, issue, we offered some tips on how to get your client the shortest possible sentence to be served at the best possible place. This is a continuation of that article.

1. Remember the safety-valve provisions of the 1994 Crime Bill, 18 U.S.C. §3553(f) and U.S.S.G. § 5C1.2. Under appropriate circumstances, and without the necessity of the government's filing a §5K1.1 motion, a defendant may receive a sentence below the mandatory minimum. Additionally, the new guidelines effective November 1, 1995, contain a provision, U.S.S.G. §2D1.1(b)(4), which provides for a two-level downward adjustment in drug cases if the defendant's offense level is a 26 or higher and if the defendant meets the criteria of 18 U.S.C. §3553(f) and U.S.S.G. §5C1.2.

2. If your client is a cooperating witness, accompany him or her to any debriefings in case there's a dispute as to what your client said.

3. Many clients ask me whether they're entitled to credit for time served while on bail under conditions of home confinement. The answer is no. However, if the court orders your client officially detained and then simply recommends to the U.S. Marshal that he or she be kept under home confinement, this qualifies for official detention. Your client will get credit for time served while under official detention whether the place of confinement is a half-way house, his home or even the Ritz.

4. If you can obtain bail for your client, it's always helpful to have him released on his own recognizance. Bureau of Prisons Program Statement 5100.05 provides for a three-point reduction from a defendant's security score if he or she is released *prior to or during the trial period* without posting bail or incurring any other financial obligation to ensure appearance.

5. Bureau of Prisons regulations provide for a Public Safety Factor for offenders who have a Greatest Severity offense which precludes them from being housed in a Minimum security facility unless the PSF has been waived. Since offenders who have a managerial role (PSI showing an upward adjustment for role in the offense under U.S.S.G. ¶3B1.1) involving drug quantities as low as 10 kilograms of cocaine, 620 kilograms of marijuana, 2 kilograms of heroine and 17 kilograms of methamphetamine are Greatest Severity, counsel should request the sentencing judge to state on the Judgement and Commitment Order that the defendant did not have a "managerial role" in the offense. While the PSI should ordinarily avoid the problem, this extra mention in the J&C underlines the issue and strengthens the argument against application of the Public Safety Factor.

6. Do not downplay your client's alcohol and drug abuse during the PSI interview. The Bureau of Prisons now looks to this section of the PSI to determine whether a client should be placed in a residential drug treatment program, which in turn may qualify him or her for up to a one-year reduction of sentence. On the other hand, do not overplay physical or mental health problems if you don't think that it will gain your client a downward departure. It might very well lead to his or her being designated to Springfield Medical Center, which is something you want to avoid.

Alan Ellis is nationally recognized as an authority in the fields of plea negotiations; sentencing; prison designation, transfers and disciplinary matters; parole; habeas corpus 2241 and 2255 petitions and appeals. Mr. Ellis has successfully represented federal criminal defendants and prisoners throughout the United States for the past 25 years. He is a past president of the National Association of Criminal Defense Lawyers, lectures frequently, and is widely published in the area of presentence and post conviction remedies.

We thought it would be a good idea to start off a new year by continuing our series of sentencing tips. The tips serve as a way for us to share some of the information and insight we gain in working on so many presentencing and post-conviction cases. How the tips can be applied to individual cases is something we are pleased to share with fellow defense counsel (see "How Attorneys Use Our Firm" on the back page).

We also want to call your attention to the news items on page 3. Of particular interest are the Sentencing Commission's revisions to the Drug Table and a retroactive amendment regarding the equivalence of marijuana and marijuana plants.

It's our hope that the information we present in this issue and the ones to follow will make the year a rewarding one for you.

ACCEPTANCE OF RESPONSIBILITY

The Guidelines provide for a two-level downward adjustment for acceptance of responsibility, with an additional level, in cases at or above level 16, for the defendant who either provides timely and complete information to the government concerning his "*own involvement* in the offense" (emphasis added), *or* provides timely notification to the government of his intention to plead guilty. U.S.S.G. §3E1.1. In *United States v. Leonard*, 50 F.3d 1152 (2d Cir. 1995), the Second Circuit reversed the denial of the additional level because the defendant gave truthful information concerning *his own* involvement, even though he misrepresented the involvement of others. In *United States v. Eyler*, 67F.3d 1386, (9th Cir. 1995), the Ninth Circuit held that a defendant may not be deprived of the third level where, prior to trial, he provided complete information concerning counts on which he was eventually convicted, even though he provided no information on counts on which he was acquitted. In *United States v. Ortiz*, 63 F.3d 952 (10th Cir. 1995), the Tenth Circuit reversed and remanded where the district court denied the third level because the defendant had not pled guilty in a timely way, but did not consider whether he had provided timely information about his own involvement in the offense. A defendant is entitled to the third level so long as at least one of these alternative grounds applies.

APPEALS

Although the courts have held that a defendant may waive the right to appeal, most circuits agree that the sentencing court must question the defendant on the record to ensure that the waiver is knowing and voluntary. In *United States v. Stevens*, 66 F.3d 431 (2d Cir. 1995), the Second Circuit remanded for such a determination because, although the defendant's plea agreement stipulated that he waived his right to appeal so long as the sentence imposed was within a particular range (it was), the district court never questioned him to ensure that he had knowingly agreed to the waiver.

DOUBLE JEOPARDY

In general, a person may be prosecuted for state and federal offenses arising from the same conduct without violating the Double Jeopardy Clause. An exception is where one sovereign is acting as the tool of the other. *Bartkus v. Illinois*, 359 U.S. 121 (1959). The Second Circuit recently cited this exception in *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483 (2d Cir. 1995), to remand for more fact-finding where the claimant (who had been convicted in state court based on conduct alleged in the federal forfeiture action) alleged that Double Jeopardy barred the forfeiture because the government had agreed to turn over to the state a large percentage of any forfeited assets.

DOWNWARD DEPARTURES

The background notes to the antitrust guideline, §2R1.1, favors "some confinement," except "in very few cases." *United States v. Milikowsky*, 65 F.3d 4 (2d Cir. 1995), was such a case. The Court affirmed a downward departure based on the district court's finding that if the defendant were incarcerated, even for a short time, his business would fold, causing 150 to 200 innocent employees to lose their jobs.

Congress's mandate to sentencing courts to consider a defendant's need for "medical care, or other correctional treatment" prior to imposing sentence, 18 U.S.C. §3553(a)(2)(D), may occasionally support a downward departure. In *United States v. Williams*, 37 F.3d 82 (2d Cir. 1994), the Court rejected a downward departure based on the defendant's desire to enter a drug treatment program. On appeal following resentencing on remand, 65 F.3d 301 (2d Cir. 1995), the Court approved the same departure based on the district court's finding that imposing a term of imprisonment no greater than five years was the only way to make the defendant eligible for a drug treatment program (thus ensuring that he receive the "treatment" he needed).

A defendant's payment of restitution and failure to profit personally from the offense are ordinarily not grounds for departure in fraud cases. *United States v. Broderson*, 67 F.3d 452 (2d Cir. 1995), reveals an exception to the rule. There, although the vice-president of a NASA contractor did not set out to defraud the agency, that is what he did when he failed to disclose that his ability to negotiate a better interest rate for his company lowered its cost of fulfilling its government contract. Since the fraud resulted in no personal gain to the defendant, and caused no loss to the agency, the Court affirmed the downward departure.

Guideline §5G1.3 establishes the structure for imposing sentence where the defendant is already doing time. Depending on the circumstances, the guideline calls for sentences which are concurrent, consecutive, or some combination of the two. As with any other guideline, however, sentencing courts are free, in appropriate cases, to depart from the general rule. In *United States v. Mihaly*, 67 F.3d 894 (10th Cir. 1995), the Tenth Circuit reversed a sentencing court's refusal to depart based on its erroneous belief that because U.S.S.G. §5G1.3 calls for consecutive sentences it had no authority to depart by imposing a concurrent one. See also *United States v. Marsanico*, 61 F.3d 666 (8th Cir. 1995) (reversing what amounted to an unsupported upward departure in a sentence governed by §5G1.3).

FRAUD

In fraud cases, the guideline offense level is driven by *direct* victim loss. §2F1.1. The Commission has explicitly rejected including consequential losses (such as the interest the victim could have earned on the funds lost) in relevant conduct. U.S.S.G. §2F1.1 Appl. Note 7. The Eleventh Circuit has recently ruled that except in extraordinary cases, consequential losses may also not be used to justify upward departures. *United States v. Thomas*, 62 F.3d 1332 (11th Cir. 1995).

When a victim's loss cannot be adequately measured, the defendant's gain may be used as a way to estimate loss. Where loss *can* be measured, it, and not gain, must be used to calculate the offense level. In *United States v. Dickler*, 64 F.3d 818 (3d Cir. 1995), the defendant defrauded banks by misrepresenting the value of cars he repossessed for them. The district court set the offense level based on the defendant's gain, even though it would have been possible to estimate the value of the cars repossessed, and therefore to estimate the actual loss to the bank. The Third Circuit reversed and remanded for resentencing.

MONEY LAUNDERING

The heart of any count under 18 U.S.C. §1956(a)(1)(B) is the intention to disguise or conceal an illegal source of funds. In *United States v. Dobbs*, 63 F.3d 391 (5th Cir. 1995), money laundering counts were based on the defendant's use of tainted funds drawn on his wife's bank account and his purchase of cashiers checks with tainted funds. The Fifth Circuit reversed, holding that under these facts, there was no

evidence that the defendant did anything to conceal his relationship to the items he purchased.

QUANTITY OF CONTROLLED SUBSTANCE

The government bears the burden of proving by a preponderance of the evidence any fact necessary to increase an offense level. Therefore, in cases involving methamphetamine, once a defendant objects to the application of the higher penalties for *d*-methamphetamine, the government must prove that the substance was *d*-methamphetamine for the harsher penalties to apply. The Circuits are split as to how to treat cases where defense counsel failed to make such an objection. The Tenth Circuit has held that failing to object waives the issue for appeal—although not for purposes of a §2255 motion, where the issue may be raised in the context of ineffective assistance of counsel. *United States v. Denino*, 29 F.3d 572, 580 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1117 (1995). The Third Circuit has held that basing a sentence on the *d*-methamphetamine guideline without evidentiary support is "plain error." *United States v. Bogusz*, 43 F.3d 82, 90 (3d Cir. 1994, *cert. denied*, 115 S.Ct. 1812 (1995). The Eleventh Circuit has now joined the Third Circuit in finding "plain error," and allowing the issue to be raised on appeal even where defense counsel has failed to raise the issue at sentencing. *United States v. Ramsdale*, 61 F.3d 825, 832 (11th Cir. 1995). Note, however, that for offenses committed on or after November 1, 1995, the *d*-methamphetamine *l*-methamphetamine distinction in the guidelines has been repealed.

On a related note, the Ninth Circuit recently held that the government failed to meet its burden of proving *d*-methamphetamine where none of the drug was available for testing. The prosecution attempted to prove that the substance involved was *d*-methamphetamine with testimony that clandestine laboratories almost always produce *d*- or *dl*-methamphetamine, and that *l*-methamphetamine has little or no stimulant effect. The district court accepted this evidence as proof of *d*-methamphetamine. The appeals court reversed, citing a government witness' admission that a clandestine lab might produce *l*-methamphetamine by mistake, and the testimony of other witnesses that there was something unusual about the methamphetamine in question. *United States v. Dudden*, 65 F.3d 1146 (9th Cir. 1995).

NEWS

From the Bureau of Prisons

The BOP will be opening a second male boot camp program in the coming year at Lompoc, California. Currently, only one for males exists in Lewisburg, Pennsylvania, while another for females exists in Bryan, Texas.

From the Parole Commission

In old-law cases, the United States Parole Commission makes parole decisions based, in part, on a combination of an individual's salient factor score (the higher the score, the better) and his or her offense severity rating (the lower the rating, the better). This past August, the Commission made changes in both factors. The Commission revised its salient factor score regulation (28 C.F.R. §2.20) to provide an additional point to prisoners who *commenced* their offense at age 41 or later. 50 Fed.Reg. 40092 (August 7, 1995). While the new regulation is good news for prisoners sentenced under pre-guideline law, it is limited to individuals who were 41 or older when they *commenced* (*i.e.*, began to commit) their offense. The Commission also revised its offense severity rating regulation (28 C.F.R. §2.20) to require that frauds that cause losses between $1 million and $5 million be rated at offense severity Category Six, while frauds causing losses over $5 million be rated at offense severity Category Seven. 60 Fed. Reg. 40270 (August 8, 1995). Prior to the revision, all frauds which caused losses of over $1 million were rated Category Six. This change will make it more difficult for the Commission to parole above the guideline range in cases involving less than $5 million. Finally, the Parole Commission will be awarding Superior Program Achievement, 28 C.F.R. §2.60, of up to one year for inmates who complete a prescribed drug treatment program.

From the Sentencing Commission

At its September meeting, the Commission made retroactive two favorable guideline changes: last year's amendment removing the two top levels from the Drug Table; and this year's amendment which equates one marijuana plant with 100 grams of marijuana in cases involving 50 or more plants. Previously, the guidelines equated one plant with 1 kilogram of marijuana in such cases. Defendants with *base* offense levels 40 or 42 (the amendment does not help defendants with lower base offense levels), or who were sentenced under the old marijuana plant equivalency, may thus apply for a reduction pursuant to 18 U.S.C. §3582(c) and U.S.S.G. §1B1.10. Defendants who think they may benefit from the retroactive application of either guideline may want to seek advice from counsel prior to applying for reduction, since the effect of mandatory minimums and/or plea agreements and/or the *ex post facto* clause of the constitution may make the process more complex than usual. For example, in some cases, an actual resentencing may be had.

The guideline amendments which became effective November 1, 1995, provide a two-level downward adjustment for defendants in drug cases with a total offense level of 26 or more who meet the requirements of the "safety valve" statute—18 U.S.C. §3553(f)—without regard to whether there is a mandatory minimum involved. U.S.S.G.§2D1.1(b)(4). The amendment is not retroactive.

PRACTICE TIPS

Motion for new trial. Under Fed.R.Crim.P. 33, a motion for a new trial based on newly discovered evidence may be filed within two years after final judgment. If an appeal is pending, the rule provides that the court may grant the motion only on remand. In *United States v. Graciani*, 61 F.3d 70 (1st Cir. 1995), the First Circuit held that such motions should be filed with the district court—even when an appeal is pending. The district court may then consider the motion, and either deny it or issue a written statement to the effect that it proposes to grant the motion. If the district court proposes to grant the motion, defense counsel should then move the appeals court to remand. See also *Cronic v. United States*, 466 U.S. 648, 667 n. 42 (1984).

Safety valve. The "safety valve," 18 U.S.C. §3553(f) and U.S.S.G. §5C1.2, allows a sentencing court to impose a sentence below the otherwise applicable mandatory minimum sentence under certain conditions—one of which is that prior to sentencing, the defendant provide the government with all information he has concerning his offense. In cases where the safety valve arguably applies, defense counsel should make sure that their clients provide information to the case agent or the Assistant U.S. Attorney—and not simply to the probation officer preparing the PSI. In *United States v. Rodriguez*, 60 F.3d 193 (5th Cir. 1995), the Fifth Circuit upheld the denial of the safety valve, holding that the defendant's disclosure to the PO did not satisfy the law's requirement.

THE LAW OFFICES OF ALAN ELLIS

A full-service presentencing and post conviction criminal defense firm with offices in the San Francisco and Philadelphia areas, the firm assists counsel and federal criminal defendants in obtaining the lowest possible sentence to be served in the best possible facility and release at the earliest opportunity.

How Attorneys Use Our Firm

Criminal defense lawyers, whose talents and interests lie in trying cases, increasingly consult with us to provide planning and preparation for plea negotiation, sentencing and post conviction remedies, which often entail highly specialized expertise. We can take care of what we do best as sentencing and post conviction specialists, freeing you up to do what you do best as a trial lawyer. From past experience, this works for both *you and your clients*.

Our firm also assists attorneys in Rule 35 motions; prison designation, transfers, and disciplinary matters; parole; habeas corpus 2241 and 2255 petitions; direct appeals from convictions in all circuits; Supreme Court practice; and prisoner transfer treaty work for foreign inmates.

Our firm's attorneys have served as federal law clerks, and half are former law school professors. The firm also has a sentencing specialist who is a licensed clinical social worker with an M.S.S. degree from Bryn Mawr College in the field of psychiatric social work. Rounding out the staff is a federal prison consultant who was formerly a high-level official with the Bureau of Prisons.

For a listing of our references and/or hourly rates, please feel free to contact our California office.

Publisher and Editor: Alan Ellis
Editorial Consultant: Peter Goldberger
Associate Editor: James H. Feldman, Jr.
Contributing Editors: Wally Buer
Anna M. Durbin
W. Manning Evans
Tal Herman
Karen L. Landau
Lianne C. Scherr
Jonathan D. Soglin
Pamela A. Wilk
Associate Publishers: Deborah Bezilla
Samuel Shummon

Federal Presentencing and Post Conviction News is published four times a year by The Law Offices of Alan Ellis. Subscriptions are provided free of charge to interested readers.

Copyright ©1995 The Law Offices of Alan Ellis. All rights reserved.

San Francisco Office
265 Miller Avenue
Mill Valley, CA 94941
(415) 383-3862 • FAX (415) 383-7667

Philadelphia Office
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 658-2255 • FAX (610) 649-8362