

Federal Presentencing and Post Conviction

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FROM THE LAW OFFICES OF ALAN ELLIS
News
Only the Good News

A PLEA FOR A PRE-PLEA PSI

By Alan Ellis

Under the guideline sentencing system, a “knowing, intelligent, and voluntary plea” has been called an “oxymoron.” Shein and Miller, *A Knowing, Intelligent and Voluntary Guilty Plea: The Justice Department’s Latest Oxymoron*. National Association of Criminal Defense Lawyers, *The Champion*, January/ February 1995, p. 11.

Because of upward adjustments, upward departures and relevant conduct, a defendant who pleads guilty seldom understands the ultimate consequences of accepting responsibility for the offenses to which he or she is pleading. Indeed, even in those cases where there are stipulations as to what the guidelines should be, the probation office and the court are not bound by the stipulation unless they are presented under Fed.R.Crim.P. 11(e)(1)(C). In absence of such a binding stipulation, the above factors can make a sentence a lot longer than the defendant anticipated when the plea was entered. Shein and Miller note that:

Unless the defendant is made aware of all the facts both aggravating and mitigating, along with the possible sentencing options awaiting him, before entering the plea, it is impossible to make the determination that the defendant “knowingly” entered the plea.

Id. at 12.

Clearly, the defendant’s primary concern is that the plea agreement result in a sentence that actually fits the charge to which the defendant acknowledged responsibility—not an increased sentence based upon facts which were never discussed in the plea agreement, but that are later submitted at a sentencing hearing based on double and triple hearsay, and subject to a preponderance of the evidence test. In recognition of this problem, the Sentencing Commission commentary to U.S.S.G. § 6B1.2 states:

The Commission encourages the prosecuting attorney prior to the entry of the plea of guilty or *nolo contendere* under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines.

At least two districts in the United States—the Southern District of Alabama, in Mobile, and the District of Arizona, in Phoenix and Tucson—have instituted a procedure for pre-plea PSIs and, in some instances, settlement conferences

before a neutral and detached magistrate unrelated to the case. In this way, a defendant knows what his/her guideline range will be prior to pleading guilty, in some instances whether there will be any departures, and often what sentence the magistrate would impose were he or she the sentencing judge. See *United States v. Pimentel*, 932 F.2d 1029 (2d Cir. 1991) (encouraging use of stipulations for this reason).

Right now pleading guilty even to a plea agreement without binding stipulations is a “crap shoot.” Only when defendants truly understand how much time they are facing will they be accorded due process and justice when they enter their guilty pleas. Moreover, having been so apprised, there will be fewer 2255 motions filed alleging ineffective assistance of counsel who misinform clients concerning how much time they are likely to serve. Courts and U.S. probation officers are therefore urged to contact the two districts mentioned above to find out more about their programs. To be able to better advise their clients, counsel would be wise, in the absence of such a program, to file a motion (hopefully unopposed) that the probation department be required to prepare a pre-plea PSI, at the minimum, and that a conference be scheduled before a magistrate judge to hear objections to the pre-plea PSI and to make a determination as to what the guidelines would be, to recommend any departures, and to state what sentence would be imposed by the magistrate. The courts will benefit from “simplified sentencing” as noted by Chief Judge Charles R. Butler, Jr. of the Southern District of Alabama. More important, what the Sentence Reform Act of 1984 calls for—“truth in sentencing”—will finally be given full meaning.

Many people have asked who receives **Federal Presentencing and Post Conviction News**.

We distribute approximately 7,500 copies:

- 1,000 to all federal district and appellate court judges
- 350 to all chief U.S. probation officers and their staff
- 4,200 to attorneys
- 200 to non-lawyer sentencing specialists
- 1,750 to inmates



Alan Ellis is the editor and publisher of *Federal Presentencing and Post Conviction News*. A former president of NACDL, he and his firm specialize in the pre-sentence and post-conviction representation of federal criminal defendants. Mr. Ellis is often called upon by attorneys and criminal defendants to assist them with sentencing and post conviction remedies. He recently addressed the district and appellate judges of the First Circuit at a workshop on sentencing.

RECENT FAVORABLE CASE LAW

DOWNWARD DEPARTURES

In issue 12 of this newsletter, we reported that in *United States v. Koon*, 518 U.S. —, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996), the Supreme Court gave the green light to downward departures for any reason not prohibited by the guidelines, and hoped that it would embolden district and appeals courts to approve more downward departures. Courts may be getting the message. In *United States v. Jaroszenko*, 92 F.3d 486 (7th Cir. 1996), the Seventh Circuit recently remanded for resentencing to give the district court the opportunity to depart based on the defendant's extraordinary remorse. At the first sentencing, the court had stated that it believed the defendant deserved such a departure, but opined that the law did not permit it. In *United States v. Walters*, 87 F.3d 663 (5th Cir. 1996), the Fifth Circuit affirmed a downward departure in a money laundering case where the defendant received no personal benefit, stating: "Our conclusion that the district court's sentence should not be disturbed is all the more buttressed by the recent Supreme Court case of *Koon v. United States*, which emphasized in the strongest terms that the appellate court rarely should review *de novo* a decision to depart from the Sentencing Guidelines, but instead should ask whether the sentencing court abused its discretion." 87 F.2d at 672 n.10.

FIREARMS

Title 18 Section 924(c)(1) makes it a crime to "use" or "carry" a firearm during and in relation to a drug offense. In *Bailey v. United States*, 516 U.S. —, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), the Supreme Court held that mere possession or storage of a firearm is not sufficient to sustain a conviction under the "use" prong of the statute. While *Bailey* has helped many defendants reverse convictions based on the mere presence of a gun near drugs, it is generally of no use to defendants who have "carried" guns. The one exception is the rare case in which the indictment failed to charge a "carrying" offense. Thus, in *United States v. Garcia*, 86 F.3d 394 (5th Cir. 1996), the Fifth Circuit reversed the 924(c)(1) conviction of a defendant who carried a loaded gun in his waistband during a drug offense—but did not use it.

HABEAS PETITIONS AND 2255 MOTIONS

Although the Antiterrorism and Effective Death Penalty Act of 1996 places a one year time limit on filing 2255 motions and habeas petitions, we have argued that that limitation may not be invoked to preclude claims for which the year had run prior to the effective date of the Act. The year begins to run once direct appeals, including a petition for writ of certiorari to the Supreme Court, have been exhausted. The Second Circuit recently confirmed the validity of our argument, when it reversed the district court's denial of a habeas petition for which the statute of limitation had run prior to the effective date of the Act. *Reyes v. Keane*, 90 F.2d 676 (2d Cir. 1996) (Newman, Ch.J.)

Bailey v. United States, 516 U.S.—, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), overruled the law in many circuits which supported convictions under 18 U.S.C. § 924(c)(1) ("using" or "carrying" a firearm during and in relation to a drug offense) for simply storing a gun near drugs. While *Bailey* is clearly retroactive and applicable in § 2255 motions, a defendant who pled guilty must consider whether challenging the conviction could lead to reinstatement of dismissed counts under a prosecution theory that the motion violates the agreement. In *Rodriguez v. United States*, 933 F.Supp. 279 (S.D.N.Y. 1996), and *United States v. Gaither*, 926 F.Supp. 50 (M.D.Pa. 1996), the courts used contract law principles to conclude that a § 2255 motion does not violate a plea agreement where an unforeseen change in the law renders the conviction unsupported by sufficient evidence. But see *United States v. Viera*, 931 F.Supp. 1224 (M.D.Pa. 1996) (finding a breach of the plea agreement and allowing reinstatement of dismissed counts).

There is also a split in authority over whether a defendant whose § 924(c)(1) sentence is vacated under *Bailey* may be resentenced so as to impose a 2 level enhancement under USSG § 2D1.1(b)(1). Compare *Rodriguez v. United States*, *supra*, 933 F.Supp., at 284, *Dossett v. United States*, 931 F.Supp. 686, 687 (D.S.D. 1996), *Warner v. United States*, 926 F.Supp 1387, 1398 (E.D.Ark. 1996), and *Beal v. United States*, 924 F.Supp. 914, 197 (D.Minn. 1996) (not allowing resentencing on remaining counts), with *Merritt v. United States*, 930 F.Supp. 1109 (E.D.N.C. 1996), and *United States v. Mixon*, 926 F.Supp. 178 (S.D.Ala. 1996) (allowing resentencing).

MANDATORY MINIMUM SENTENCES

The mandatory minimum sentence laws are triggered by the quantity of controlled substance "involved" in the "offense," which means the amount involved in *that count* which is attributable to a defendant. Such laws are subject to prosecutorial manipulation through unfair government pressure which causes a defendant to buy or sell more controlled substance than he would otherwise have been predisposed. This unfair tactic is known as "sentencing entrapment." While the Guidelines suggest that a *downward departure* may be appropriate in such situations, USSG § 2D1.1 (App. Note 15), this does not address the impact of "sentencing entrapment" on mandatory minimums. It is therefore good news that the Ninth has joined the First Circuit by holding that the controlled substance in excess of the amount the defendant was predisposed to purchase or distribute may not be used to trigger a mandatory minimum. *United States v. Castanda*, 94 F.3d 592 (9th Cir. 1996); *United States v. Montoya*, 52 F.3d 245 (1st Cir. 1995).

SAFETY VALVE

The "safety-valve" statute (18 U.S.C. § 3553(f)) and its corresponding Guideline (USSG § 5C1.2) requires courts to impose sentences without regard to an otherwise applicable mandatory minimum for certain first-time offenders. To qualify,

a defendant must meet several criteria, including one that requires him/her to provide the government with truthful information concerning his/her involvement in the offense. The safety-valve helps defendants who have no information which is useful to the government in the prosecution of another person (a criterion for a prosecution motion pursuant to 18 U.S.C. § 3553(e) to impose a sentence below a mandatory minimum). The safety valve can also apply to defendants who maintain their innocence and go to trial—thus helping defendants who do not qualify for the acceptance of responsibility adjustment pursuant to § 3E1.1. Thus, in *United States v. Shrestha*, 86 F3d 935 (9th Cir. 1996), the Ninth Circuit recently affirmed the district court's application of the safety valve to a defendant who provided the government with information concerning his involvement—but then recanted and went to trial.

SUPERVISED RELEASE

The law provides that a term of supervised release begins on the day a person is released from prison. 18 U.S.C. § 3624(e). While application of this provision is normally straightforward, it is less so when a defendant's term of imprisonment is reduced to less than he has already served—due to a retroactive application of an amended guideline or Supreme Court case. In such a case, does supervised release begin upon a defendant's actual release from prison, or from the date he should have been released? The Ninth Circuit recently provided the answer to that question. In *United States v. Blake*, 88 F3d 824 (9th Cir. 1996), the Court held that in such a case, the period of supervised release begins on the date the defendant's prison term should have expired—not on the date he was actually released from prison.

PRACTICE TIPS

B*ad acts evidence.* While Fed.R.Evid. 404(b) prohibits admission of evidence of prior criminal acts to show the character of a defendant, it does allow the evidence for other purposes—such as to prove knowledge or intent. To avoid particularly damaging evidence of prior bad acts (which juries invariably use for the prohibited purpose), defense counsel should consider conceding elements to which there is no defense. In *United States v. Crowder*, 87 F3d 1405 (D.C. Cir. 1996) (en banc), the D.C. Circuit reversed the convictions of defendants in drug trafficking cases who conceded that an individual who possessed drugs in the quantity alleged by the government would have knowledge of the nature of the substances, as well as the intent to distribute. The defendants then based their defense on mistaken identity or denial that they possessed the drugs. Despite their concessions, the district court admitted evidence of prior drug sales. The *en banc* Court reversed because the defendants' concessions removed from the jury's consideration the only issues for which the bad acts evidence was admissible.

P*lea discussions.* Fed.R.Crim.P. 11(e)(6)(D) provides that statements a defendant makes during plea negotiations may not be used against him should the defendant later go to trial. Counsel should be mindful that this rule does not apply to all meetings between a defendant and an assistant U.S. Attorney. Unless the meeting explicitly involves discussions concerning aspects of a potential plea, a defendant's statement could be used against him. The danger posed by a misunderstanding of this rule was recently made abundantly clear by the Eighth Circuit in *United States v. Morgan*, 91 F3d 1193 (8th Cir. 1996). In *Morgan*, the defendant (who was also an attorney) met and cooperated with the FBI and an assistant U.S. Attorney prior to indictment—perhaps in the hopes of earning a § 5K1.1 motion. When the case went to trial, the district court suppressed incriminating statements the defendant made during this meeting—but the Eighth Circuit reversed. The Court found that the plea negotiations rule did not apply since there was no evidence that the defendant and the government ever discussed a possible plea. Counsel should therefore make sure that the proffer letter clearly states that any discussion between the defendant and the government is for the purpose of plea negotiation.

C*rime of violence designation.* Defendants who have committed “crimes of violence” are not eligible for certain programs within the Bureau of Prisons. Counsel should therefore object to any language in a PSI which could cause the BoP to conclude erroneously that a client's offense or related behavior was “violent.” BoP Program Statement (“P.S.”) 5162.02 (4-23-96) lists the offenses and offense characteristics which meet the BoP definition. A related issue is the exclusion under 28 CFR § 550.58 and P.S. 5330.11 (Drug Abuse Programs Manual) of prisoners convicted of violent offenses from the up-to-one-year reduction in sentence for participating in a residential drug/alcohol program. As we went to press, we learned that the Ninth Circuit has held that by focusing on sentencing factors, rather than the nature of the offense of conviction, the BoP regulation excludes more inmates from the program than the statute (18 U.S.C. § 3621(e)) permits. In *Downey v. Crabtree*, —F3d—, 96 C.D.O.S. 7832 (9th Cir. 10-25-96), No. 96-35471, the Court affirmed the district court's reversal (in a § 2241 habeas case) of the BoP determination that a drug offense was a “crime of violence” because the offense level at sentencing was enhanced two levels for the presence of a gun.

NEWS FROM CONGRESS

The Congressional assault on the program authorized by 18 U.S.C. § 3621(e)(2) to reduce sentences by one year for prisoners who participate in residential drug or alcohol treatment programs has ended for now. Thanks to Senators Kennedy and Simon, Congress recently adjourned without passing H.R. 2650, which would have repealed the program.

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.

NEWS FROM CONGRESS

continued from page 3

In the Summer 1996 issue we reported on the one bright light in the otherwise dismal Antiterrorism and Effective Death Penalty Act of 1996—a provision that authorized the Attorney General to deport non-violent offenders from other countries prior to the completion of their sentences. That light has since dimmed considerably, even before it had begun to be implemented. We are sorry to have to report that on September 30, 1996, the President signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (PL 104-208), which takes away from the Attorney General the power to grant early deportation under the new law to aliens convicted of drug offenses, weapons offenses, child pornography offenses, and various offenses related to national defense.

NEWS FROM THE DEPARTMENT OF JUSTICE

To expedite the deportation of criminal aliens, thereby saving government and judicial resources, the Department of Justice has authorized U.S. Attorneys to agree, as part of a negotiated plea, to recommend a one to two level downward departure from the applicable sentencing guideline range to alien defendants who agree to be deported after they have completed serving their sentences. Although the policy has been in effect since April 28, 1995, it has only recently come to light.

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