

# Federal Presentencing and Post Conviction

# FROM THE LAW OFFICES OF ALAN ELLIS News

ISSUE 11, SPRING 1996

## IT'S NEVER OVER 'TILL IT'S OVER

by Alan Ellis and James H. Feldman, Jr.

Because of the Guidelines concept of "relevant conduct," an individual convicted of a conspiracy and substantive offenses sometimes reaps no benefit from an appellate decision which reverses the substantive conviction, but affirms the conspiracy. E.g., *United States v. Vgeri*, 51 F3d 876 (9th Cir. 1995) (approving a conspiracy sentence based on drugs the defendant was acquitted of possessing when drugs were within scope of conspiracy). Occasionally, however, defense counsel can translate a reversal of a substantive count into a significant reduction of time at resentencing. One of our firm's recent appellate cases illustrates how this can be done.

Our client, a sales manager in a car dealership, was convicted of conspiring and attempting to launder money by telling agents posing as drug dealers how to structure a car sale to avoid government currency reporting requirements. Although our client suggested the agents buy a used car, and then trade that in on a new one, rather than pay cash (thus avoiding the reporting requirement), he did not accept a cash payment or used car in trade, complete paperwork, or prepare a detailed plan. On appeal, the Ninth Circuit reversed the attempt conviction, but affirmed the conspiracy. *United States v. Nelson*, 66 F3d 1036 (9th Cir. 1995). The Court found that our client's "expressed eagerness to consummate the deal and his efforts towards doing so" were evidence of intent, rather than evidence that he took a step "of such substantiality that, unless frustrated, the crime would have occurred." Such a substantial step is necessary to support a conviction for "attempt."

On remand, the Probation Officer initially recommended no change in the guideline calculation. We objected, noting that the reason the Ninth Circuit rejected the attempt conviction entitled our client to a downward adjustment under USSG § 2X1.1(b)(2). We argued that on remand the district court was bound by the Ninth Circuit's rationale.

Guideline 2X1.1(b)(2) provides for a three level downward adjustment in conspiracy cases which are not covered by another specific guideline — "unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary ... for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control." Since not all necessary acts had been completed, and since the Ninth Circuit found that they were not about to be completed but for an intervening act, we argued that the three level adjustment applied. The USPO agreed, and modified the PSI. At resentencing, the district court adopted the modified PSI, and imposed a significantly reduced sentence.

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As we go to press, we anxiously await the Supreme Court's ruling in two key cases:

*U.S. v. Ursery* and *U.S. v. \$409,089.23*, Nos. 95-345 and 95-346 (discussed on page 3) and *Koon v. United States* and *Powell v. United States*, Nos. 94-1664 and 94-8842.

*The Supreme Court decision in Koon and Powell will tell us how much sentencing discretion federal judges have in deviating from the guidelines through departures and what the role of the Court of Appeals should be in reviewing those departures.*

*Both decisions are expected before the Court recesses in June. An analysis of these decisions will headline our July issue.*

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## RECENT FAVORABLE CASE LAW

### ACCEPTANCE OF RESPONSIBILITY

Once a court determines that a defendant is entitled to a two level adjustment for acceptance of responsibility, it must grant a third level decrease if the criteria established in U.S.S.G. § 3E1.1(b) are met. In *United States v. Townsend*, 73 F3d 747 (7th Cir. 1996), the district court had denied the third level adjustment, even though the defendant met its criteria by timely notifying the government of his intention to plead guilty. The district Court reasoned that the defendant was "lucky" to receive the two level adjustment since he had denied relevant conduct which the court found to be true. The Seventh Circuit reversed. While the district court could have denied the two level adjustment based on the defendant's denial, once the two levels were awarded, the court was required to grant the third because the defendant met the "timely notification" criteria of § 3E1.1(b)(2).

### CONCURRENT vs. CONSECUTIVE SENTENCES

When a defendant is serving a sentence for another offense, U.S.S.G. § 5G1.3(c) provides that the sentencing court calculate what the guideline range would be if the defendant were being sentenced for both the instant offense and the offense for which he is already serving a sentence. The sentence the court imposes is therefore consecutive to the other sentence to the extent necessary to achieve the desired result. In *United States v. Brannan*, 74 F3d 448 (3d Cir. 1996), the district court went through this process and imposed a concurrent sentence, but did not believe it had the authority to give credit for the time the defendant had already served. The result was that the defendant's sentence was longer than it would have been had he been sentenced for both offenses at the same time. The Third Circuit held that § 5G1.3(c) gave the district court the power to depart downward to achieve the appropriate sentence and remanded for resentencing.

### CONSPIRACIES/EX POST FACTO

The guidelines in effect on the date of sentencing are applicable, unless they produce a higher sentence than would the guidelines in effect at the time of the commission of the offense. In conspiracy cases, the "commission" date is the last day the conspiracy existed or the date the defendant's participation ended, if earlier. *United States v. Twitty*, 72 F3d 228 (1st Cir. 1995), involved a conspiracy that ended in July 1991. Since the defendant attempted to cover up the conspiracy until December 1991, the district court applied the Guidelines effective November 1, 1991. The First Circuit reversed, reasoning that the defendant's cover-up efforts were not part of the conspiracy, since there was no evidence that the conspirators had agreed to act together to cover-up their crime. The Court remanded for resentencing under the more favorable November 1, 1990 Guidelines.

### DOWNWARD DEPARTURES

Evidence which does not support an entrapment defense may, under certain circumstances, support a downward departure based on "imperfect entrapment." In *United States v. McClelland*, 72 F3d 717 (9th Cir. 1995), the defendant was predisposed, although reluctant, to cause another to travel in interstate commerce to commit murder for hire. The Ninth Circuit held that because of this, the fact that the informant pressured the defendant to go through with the crime, supported the district court's decision to depart downward by six levels.

Although the defendant in *United States v. Caba*, 911 F.Supp. 630 (EDNY 1996), was convicted of money laundering, the district court, citing *United States v. Skinner*, 946 F2d 176, 179 (2d Cir. 1991), found that the specific facts of the case took it out of the "heartland" of money laundering cases, and used the less onerous fraud guidelines as a guide for a downward departure. The crux of the case was that the defendant purchased \$11.7 million worth of foodstamps from unauthorized vendors at a 4-5% discount. He then deposited them into the account of an authorized vendor for whom he held a written power of attorney. Although acknowledging that the defendant's acts brought him within the ambit of the money laundering statute, the court found that the case was outside the "heartland" of money laundering because no illegal drugs were involved, and because the defendant left a complete paper trail (including the use of checks to pay for food stamps) of his involvement.

### FIREARMS

In the wake of *Bailey v. United States*, 116 S. Ct 501 (1995), courts are beginning to flesh out the provision of 18 U.S.C. § 924(c) which punishes the "carrying" of a firearm during and in relation to a drug offense. In *United States v. Hernandez*, — F3d —, 1996 WL 34822 (9th Cir. 1996), the Ninth Circuit held that before a defendant may be convicted of "carrying" a weapon, he "must have transported the firearm in or about his or her person. This means that the firearm must have been immediately available for use by the defendant."

If a defendant possessed a dangerous weapon (including a firearm) during a drug offense, USSG § 2D1.1(b) requires a two level enhancement. Whether the enhancement applies to a defendant in a drug conspiracy case involving a gun depends on the circumstances. In *United States v. Ramos*, 71 F3d 1150 (5th Cir. 1995), the Fifth Circuit upheld the enhancement for a co-conspirator who was present at negotiations to purchase guns for the conspiracy, and in whose home narcotics and guns were found. The Court reversed the enhancement for another co-conspirator who never visited the house where the guns were stored, and who never saw a co-conspirator with a gun. The Court found it insignificant that this co-conspirator was also present at negotiations to purchase guns for the conspiracy since no firearms were actually purchased at that meeting.

### FORFEITURES

When the government files a civil forfeiture action against property where one of the interested persons is in prison, Due Process requires the government to serve the person with notice in prison. In *United States v. \$184,505.01*, 72 F3d 11160 (3d Cir. 1995), although the government knew that an interested person was in prison, it mailed the complaint to his former address. His mother signed for it, and sent it to her son's criminal attorney. Her son never received notice, and therefore filed no claim. The United States obtained a default judgment. When the district court refused to set aside the default, the defendant appealed. The Third Circuit reversed.

### FRAUD/CALCULATION OF LOSS

In fraud cases, the guideline offense level is driven by the amount of loss. How that loss is calculated can therefore make a substantial difference in the sentence imposed. In the *United States v. Maurello*, 76 F3d1304 (3rd Cir. 1996), the defendant, a disbarred lawyer, was convicted of mail fraud by virtue of his unauthorized practice of law. The

sentencing court considered all fees paid to the defendant as losses to the victims since, had the victims known that the defendant had been disbarred, they would have paid him nothing. The Third Circuit rejected that reasoning, as well as the government's alternative argument that licensed attorneys were victims since they lost business because of fraud. Instead, the court ruled that only clients who received unsatisfactory service are victims of the offense. On remand, the Court of Appeals ordered the district court to review the services the defendant provided to dissatisfied clients, to ensure that the clients in fact received unsatisfactory service, and confirm that clients did not claim dissatisfaction in hopes of "procuring a financial windfall."

### RELEVANT CONDUCT

For conduct in conspiracy cases to be "relevant" for sentencing under U.S.S.G. § 1B1.3, it must be "reasonably foreseeable" and in "furtherance of the jointly undertaken criminal activity." Therefore, where there is no evidence that a defendant knew of, or agreed to, conversion of cocaine into crack, the cocaine, rather than crack, guidelines should apply. This is the holding of the Eleventh Circuit in *United States v. Chisholm*, 73 F3d 304 (11th Cir. 1996). In that case, the defendant helped his co-conspirators obtain cocaine, but was not involved in the conversion of the cocaine into crack.

In the Ninth Circuit, when a defendant has been acquitted of an offense, the conduct underlying that offense is not "relevant conduct" for sentencing purposes. In *United States v. Putra*, — F3d —, 1996 WL 89105 (9th Cir. 1996), the defendant was charged with one conspiracy count and two substantive counts involving possession of cocaine with intent to distribute. Although she was convicted of only one substantive count, the district court found by a preponderance of the evidence that the cocaine involved in the acquitted counts was part of the same course of conduct or common scheme or plan as the offense of conviction, and was therefore "relevant conduct" under USSG § 1B1.3. The Court of Appeals reversed, citing its earlier decision in *United States v. Brady*, 928 F.2d 844 (9th Cir. 1991), which hold that to do otherwise would be to allow a defendant to be punished for an offense for which she had been acquitted.

### PRACTICE TIPS

Before the "Safety Valve" legislation authorizes a sentencing court to impose a sentence below an otherwise applicable mandatory minimum, the defendant must meet several qualifications, one of which is to provide the government with all the information he has concerning his offense of conviction. 18 U.S.C. 3553(f). Failure to comply with this provision may result in the court's refusal to apply the "safety valve." For a recent example, see *United States v. Arrington*, 73 F3d 144 (7th Cir. 1996). See also *United States v. Acista-Olivas*, 71 F3d 375 (10th Cir. 1995) (safety valve reversed where defendant refused to reveal identities of other participants in the offense).

### UPWARD DEPARTURES

Rule 11(e)(4) of the Federal Rules of Criminal Procedure requires a sentencing court to give the defendant the opportunity to withdraw a plea when the court intends to reject a plea agreement which involves the dismissal of a count. The Eighth Circuit has held that a sentencing court violated this rule when it accepted such an agreement, but then defeated the Rule's intent by departing upwards based on the dismissed count. In *United States v. Harris*, 70 F3d 1001 (8th Cir.

1995), the government agreed to dismiss one count of the indictment in exchange for a plea to the remaining count and the defendant's cooperation. The reason the government did not require a plea to both counts was because both it and the defendant agreed that the resulting sentence would be too high. The Court reasoned that for it to allow the sentencing court to depart upward based on the dismissed count would destroy the plea bargaining process — a process which is vital to the administration of justice. The Court remanded with instructions to impose a sentence without the upward departure, or to follow the provisions of Rule 11(e)(4).

### NEWS FROM THE BUREAU OF PRISONS

Under the terms of a November 3, 1995 settlement of a class action suit by inmates against the BoP, the BoP will now install in all of its institutions phone systems which will allow inmates to make collect as well as debit card calls. Currently, some institutions require inmates to use only a debit card system. The settlement does not require the BoP to offer collect calling until the new system is in place — a process which may take up to two years. Under the settlement agreement, inmates will also be allowed to submit proposed changes to their official phone lists on any day, up to three times per month. *Washington v. Reno*, E.D.Ky. Civil Nos. 93-217, etc.

On January 2, 1996, the Bureau of Prisons amended its regulation which governs administrative remedies for inmates. The regulation is found at 28 CFR Part 542. The amendment is published in volume 61 of the Federal Register, page 86. Under the amended regulation, inmates now have 20, rather than 15, days from the date of the incident of complaint to file a formal Administrative Remedy Request. The regulation also gives the Bureau more time to respond. The Warden or CCM now has 20, rather than 15, days to respond. The Regional Director still has 30 days to file a response, but the BoP General Counsel now has 40 days, rather than 30. In the event of an emergency, the Warden must respond within 3 calendar days — up from 48 hours under the old rule. No changes have been made to the time within which to file appeals. Inmates still have 20 days from the date the Warden signs the response to appeal to the Regional Director, and 30 days from the date the Regional Director signs the response to appeal to General Counsel. These time limits may be extended when an inmate demonstrates a valid reason for delay — i.e., a situation which prevents the inmate from submitting the appeal within the established time frame.

### NEWS FROM THE SUPREME COURT

The Supreme Court has decided to settle the question of when and if the Constitution's Double Jeopardy Clause bars (1) criminal punishments for a drug or money laundering crime following civil forfeitures based on the same offense, or (2) civil forfeitures based on a drug or money laundering crime following the imposition of criminal punishment for the same offense. *United States v. \$405,089.23*, 33 F3d 1210 (9th Cir. 1994), as amended, 56 F3d 41 (9th Cir. 1995) (involving, inter alia, a forfeiture under 18 U.S.C. 881(a)(6)), cert. granted, 133 L.Ed.2d 707 (Jan. 12, 1996); *United States v. Ursery*, 59 F3d 568, 573 (6th Cir. 1995) (involving, inter alia, a forfeiture under 18 U.S.C. 881(a)(7)), cert. granted, 133 L.Ed.2d 707 (Jan. 12, 1996). The government filed its brief in these cases on February 23, 1996. The briefs of the defendants were filed on March 25, 1996. Following oral argument in April, the Court is expected to issue an opinion prior to its recess at the end of June.

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