

Federal Presentencing and Post Conviction

ISSUE 12, SUMMER 1996

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

DEPORTATIONS OF NON-VIOLENT OFFENDERS PRIOR TO COMPLETION OF SENTENCES OF IMPRISONMENT

by Alan Ellis

The 1996 Antiterrorism and Effective Death Penalty Act contains one bright light in an otherwise dismal collection of negative changes in federal criminal law. It authorizes the deportation of non-violent offenders *prior* to completion of their sentences of imprisonment. The Act, signed into law by the President on April 24, 1996, amends 8 U.S.C. § 1252(h) to read as follows:

(1) *Except as provided in paragraph (2) an alien sentenced to imprisonment may not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, supervised release, probation or possibility of rearrest or further confinement in respect of the same offense cannot be a ground for deferral of deportation.*

(2) *The Attorney General is authorized to deport an alien in accordance with applicable procedures under this Act prior to the completion of the sentence of imprisonment—*

- a) *in the case of an alien in the custody of the Attorney General if the Attorney General determines that (i) the alien is confined pursuant to a final conviction for a non-violent offense (other than alien smuggling), and (ii) such deportation of the alien is appropriate and in the best interest of the United States*
(Emphasis added)

This means that a federal criminal defendant who is not a U.S. citizen and who is serving a sentence of imprisonment may be deported prior to the completion of his or her sentence if (1) he or she is confined for a non-violent offense, and (2) deportation is appropriate and in the best interest of the United States. The law presents many unanswered questions. For example, it is unclear what this law means by "non-violent offense." While no regulations or procedures, either formal or informal, have yet been issued to implement this law, we are closely monitoring developments as they occur, and will report on them in upcoming issues of this newsletter.

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, appeals, transfer treaty work for foreign inmates and early deportation of aliens. Mr. Ellis has successfully represented federal criminal defendants and inmates throughout the United States for the past 25 years. He is 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 all struggle to keep up with the latest decisions in federal criminal law. The purpose of this newsletter is to provide you with recent favorable decisions, news, etc., hence, our motto is "only the good news."

Indeed, between Presentencing and Post Conviction News and its Supplement, we publish almost 200 "good news" items a year. "Bad news" are camouflaged as "Practice Tips" so you can hopefully avoid any pitfalls. The recent Supreme Court decision in U.S. v. Ursery and U.S. v. \$405k certainly does not qualify as good news, but if you look at footnote 3, there is a glimmer of hope in the opinion.

Finally, please note that effective August 1, we are moving our San Francisco office to 34 Issaquah Dock, Waldo Point Harbor, Sausalito, CA 94965, telephone 415-332-6464, telefax 415-332-1416.



RECENT FAVORABLE CASE LAW

BREACH OF PLEA AGREEMENT

When the government breaches a plea agreement, the defendant is entitled either to be resentenced or to withdraw his or her plea. In *United States v. Taylor*, 77 F.3d 368 (11th Cir. 1996), the defendant claimed that the government breached its agreement to recommend a 10-year sentence when, in its response to the defendant's objections to the PSI, it stated that it was prepared to prove the facts necessary to establish the 188-235 month range recommended by the probation department. The Eleventh Circuit agreed, reversed the defendant's conviction and 12 year sentence, and allowed him to withdraw his plea. The Court reasoned that although the government recommended a 10 year sentence as required by the agreement, the prosecution nevertheless violated the agreement when it took a position that was "flatly inconsistent" with the agreed-to recommendation. The Court characterized the prosecution's recommendation as mere "lip service" to the agreement.

CONDITIONS OF PROBATION

A court may not impose an occupational restriction as a condition of probation under 18 U.S.C. § 3563(b)(6) unless it reasonably believes that without such a condition a defendant will continue to engage in unlawful conduct for which he has already been convicted. (This provision is also adopted by reference as an allowable special condition of supervised release. *Id.* § 3583(d).) In *United States v. Doe*, 79 F.3d 1309 (2d Cir. 1996), the Second Circuit struck down a restriction which required a convicted accountant to notify his tax preparation clients of his conviction. The Court held that the condition was not reasonably necessary to protect the public, even though the defendant was convicted of aiding and abetting the preparation and filing of false income tax returns.

FRAUD

In 1988, in an attempt to overrule the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987) (holding that federal fraud statutes do not protect "the intangible right of the citizenry to good government"), Congress enacted 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive *another* of the intangible right of honest service." Splitting with the Eleventh and Fourth Circuits (which have held that the statute functions to overrule *McNally*), the Fifth Circuit recently reversed a conviction which relied on this statute. The Court held that the statute did not overrule *McNally* because the statute's use of the word "another" does not clearly demonstrate Congressional intent to protect the constituencies of state and local government officials from dishonest public servants. *United States v. Brumley*, 79 F.3d 1430 (5th Cir. 1996).

In fraud cases, the offense level is controlled in large part by victim loss. USSG § 2F1.1. The Eleventh Circuit recently reversed the sentence of a defendant convicted of fraud growing out of a "Ponzi" or "pyramid" scheme, where the district court

had included in victim loss, money paid by victims who ultimately either broke even or made money from the scheme. *United States v. Orton*, 73 F.3d 331 (11th Cir. 1996).

GUILTY PLEAS

Before a district court accepts a defendant's guilty plea, it must hold a plea hearing pursuant to Fed.R.Crim.P. 11. That rule requires the court to accept or reject plea agreements under which the prosecution will dismiss other charges, or in which the defense and prosecution agree to a particular sentence (agreements pursuant to Rule 11(e)(1)(A) and (C)). The rule nevertheless permits a court to defer that decision until after it has had an opportunity to consider the presentence investigation report. (Deferring acceptance is recommended in USSG § 6B1.1(c) (p.s.)) In *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996), the Ninth Circuit held that when a court exercises its option to defer its decision on the plea agreement, the defendant is entitled to withdraw his plea for any reason or no reason at all, so long as he files his motion to withdraw the plea before the court has accepted the plea agreement.

HABEAS PETITIONS AND 2255 MOTIONS

An erroneous jury instruction supports federal habeas relief only if the petitioner can show that the error had a "substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619 (1993), or unless it leaves the District Court judge "in grave doubt as to the harmlessness of the error." *O'Neal v. McAninch*, 513 U.S. —, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). On direct appeal, a court's instruction that omits an element of the offense is reversible error unless the jury necessarily found the missing element — a much easier burden for the defense to meet. *Carella v. California*, 491 U.S. 263 (1989) (Scalia, J., concurring). The Ninth Circuit, sitting in banc, recently held in a habeas appeal that when a defendant meets this latter appellate standard, he necessarily meets the former habeas one. In *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996) (in banc), the Court reasoned that this is so because when a district court is unable to determine whether a jury *necessarily* found a missing element, it is *necessarily* "in grave doubt as to the harmlessness of the error."

OBSTRUCTION OF JUSTICE

The general rule is that a sentencing court may not apply the two level obstruction of justice enhancement simply because a defendant exercises a Constitutional right. The exception that often swallows that rule is that the court may nevertheless impose the enhancement if it finds that a defendant who testified in his own defense committed perjury. USSG § 3C1.1 (Appl. Note 1). The Tenth Circuit recently placed some limits on the use of this exception when it held that before the obstruction of justice enhancement may be based on perjury, the sentencing court must find by a preponderance of the evidence all requisite factual predicates for perjury. In *United States v. Medina-Estrada*, 81 F.3d 981 (10th Cir. 1996), the Court reversed an obstruction of justice enhancement on this basis when it found that although the

sentencing court properly identified the defendant's perjurious statements, it failed to find the required elements of perjury — that the defendant, while testifying under oath, knowingly and willfully gave false testimony concerning a material matter.

QUANTITY OF CONTROLLED SUBSTANCE

In 1993, the Sentencing Commission amended USSG § 2D1.1 (the guideline for offenses involving illegal drugs) to provide that “cocaine base” means “crack,” a “form of cocaine base.” Recently, in *United States v. James*, 78 F3d 851 (3d Cir. 1996), the Third Circuit held that this amended guideline requires the government to prove by a preponderance of the evidence at sentencing not merely that the substance in question is “cocaine base,” but specifically that it is “crack,” as well, before the harsher guideline offense levels for “cocaine base” apply. [Readers should note that the crack/base distinction does not exist under the clauses of 21 U.S.C. § 841(b), which establish mandatory minimum terms in “cocaine base” cases.]

ROLE IN OFFENSE

The government must prove by a preponderance of the evidence that a defendant exercised control over at least one other participant before the sentencing court may impose a 2 level enhancement for role in the offense pursuant to USSG § 3B1.1(c). In *United States v. Frankhauser*, 80 F3d 641 (1st Cir. 1996), the First Circuit recently reversed a two level organizer or supervisor enhancement which the district court imposed based solely on the criminal experience and age of the defendant, contrasted with the youth and inexperience of the other participant in the offense. The Court reversed the enhancement because there was no evidence that the defendant actually exercised control over the other participant. In *United States v. Jobe*, 77 F3d 1461 (5th Cir. 1996), the Fifth Circuit reversed a role in the offense enhancement imposed on a bank director who was involved in an extensive check kiting scheme against his own banks. The Fifth Circuit found no evidence that the defendant managed or supervised other participants.

SUFFICIENCY OF EVIDENCE AT SENTENCING

The Government bears the burden of proving, by a preponderance of the evidence, factors which enhance a sentence. In *United States v. Torres*, 81 F3d 900 (9th Cir. 1996), the Ninth Circuit reversed a 6 level upward adjustment pursuant to USSG § 2L2.1(b)(2)(C) for trafficking in 100 or more immigration documents, because the government had failed to meet that burden. Although the defendants had objected to the enhancement at sentencing, the government failed to meet its burden of proving the facts necessary to sustain the enhancement, when it failed to produce any of the documents. Significantly, the Court also cited sentencing disparity as a second basis for reversal of the enhancement — the government had conceded in a co-defendant's case that the scheme had involved fewer than 100 documents. The Court stated, “While it is true that disparity may exist in sentencing co-conspirators, that disparity cannot be

justified where the factual findings are inconsistent on the same record.”

PRACTICE TIPS

The “safety valve” statute, 18 U.S.C. § 3553(f), authorizes courts to sentence defendants below mandatory minimums where certain criteria are met, including the requirement that prior to sentencing, the defendant provide the government with everything he or she knows about the offense. This requirement applies even in cases where the government either has not asked the defendant for any information, or where the defendant can provide the government with no new information. Defense counsel should help clients comply with this requirement by setting up debriefing sessions with Assistant U.S. Attorneys. Two recent cases illustrate the need for such assistance. In *United States v. Ivester*, 75 F3d 182 (4th Cir. 1996), the District Court refused to apply the safety valve where the defendant never provided information to the government because he was never asked. The Fourth Circuit affirmed. In *United States v. Montanez*, 82 F3d 520 (1st Cir. 1996), the First Circuit recently held that a defendant's eight-page letter to the government concerning the offense did not comply with the safety valve statute because it left out critical information, such as the defendant's source of illegal drugs. Although the Court held that a letter may meet the statute's requirement if it is complete, a debriefing session is more likely to ensure that the client provides all information desired by the government.

Defense counsel negotiating plea agreements should be aware that after the Supreme Court's decision in *Melendez v. United States*, — U.S. —, 1996 WL 327175 (June 17, 1996), a government motion pursuant to USSG § 5K1.1 (p.s.), to depart downward from the otherwise applicable guideline range, will no longer authorize a sentencing court to depart below an otherwise mandatory minimum. The Court's decision reverses contrary helpful precedents in the Second, Fifth, Seventh, and Ninth Circuits. Counsel should therefore attempt to include in any cooperation agreement a prosecution commitment to move not only to authorize the court to depart from the guidelines pursuant to USSG § 5K1.1, but also to impose a sentence below any otherwise applicable mandatory minimum pursuant to 18 U.S.C. § 3553(e). No “specific language ... or [even] an express reference to § 3553(e) is necessarily required before a court may depart below the statutory minimum....But the Government must in some way indicate its desire or consent that the court depart below the statutory minimum before the court may do so.” *Melendez*, n. 5.

NEWS FROM THE SUPREME COURT

The Supreme Court has confirmed what defense counsel have long argued — district courts are free to depart downward from the otherwise applicable guideline range for

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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 THE SUPREME COURT

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any factor which makes a case unusual. In *Koon v. United States*, — U.S. —, 1996 WL 315800 (June 13, 1996) — the federal prosecution of the police involved in the infamous Rodney King beating in Los Angeles — the Court held that any unusual factor is fair game, so long as the Sentencing Commission has not expressly placed it out of bounds, as it has with the factors listed in USSG § 5H1.10 (p.s.) (race, sex, national origin, creed, religion, and socio-economic status) or § 5H1.12 (p.s.) (lack of youthful guidance). In that case, the sentencing court had granted substantial downward departures, all of which were reversed on appeal to the Ninth Circuit. The Supreme Court decision in turn reversed the court of appeals.

This decision should inspire counsel and encourage sentencing judges to show much more creativity and imagination in fashioning downward departures. It should also restrain the appellate courts from too closely scrutinizing those departures and from substituting their judgment for that of the sentencing judge. The decision should not be understood to have similarly liberated judges to impose more upward departures, because of 18 U.S.C. § 3553(a), which guarantees that sentences must be “sufficient but not greater than necessary to comply with the purposes” of sentencing set forth in § 3553(a)(2).

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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 ©1996 The Law Offices of Alan Ellis. All rights reserved.

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