

Federal Presentencing and Post Conviction

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

DEPORTATION AND THE CRIMINAL DEFENDANT; A New Role for Federal Judges

By Tova Indritz

Over 25% of the prisoners in federal custody are not U.S. citizens. Most of them face a second punishment after they have served their prison sentences—removal from the United States. Removal, the new name for deportation, can be a harsh penalty, especially for those who have lived in the U.S. for many years, whose family-members are U.S. citizens, who fear political persecution in their native land, or who have little knowledge of the language or culture of their country of birth. Removal can ban a person from returning to the United States for up to 20 years. Removal to certain countries may even be tantamount to a death sentence.

The Immigration and Nationality Corrections Act of 1994 permits federal judges to act, in effect, as immigration judges, by authorizing them to consider the deportation of aliens at sentencing—but only if the INS and the U.S. Attorney first consent to the court's assumption of jurisdiction over the deportation proceedings. Since sentencing is a critical phase in a criminal case, whenever courts exercise this power, the law has the (possibly unintended) effect of creating for the first time a right to counsel (and effective assistance of counsel) at immigration removal proceedings.

Thus, a federal judge can balance both the immigration and conviction consequences at the time of sentencing. For example, a sentencing judge might grant cancellation of removal (formerly called "relief from deportation") for a qualified long-time lawful permanent resident, as a way to mitigate a harsh sentence of imprisonment. On the other hand, a court might order deportation, but then depart downward based on the harsh consequences of deportation. In certain cases, this procedure may provide a more sympathetic ear for a request for relief from deportation.

Since the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 extended the authority for judicial deportation to cover all deportable aliens, a federal judge could presumably order deportation on some ground less serious than the conviction of an aggravated felony or a crime of moral turpitude, such as the fact that the alien is in the U.S. illegally. The Act also extended the same authority to U.S. Magistrate Judges when they are the sentencing judges.

Depending on the nature of the conviction and the

immigration status of the defendant and of his/her family, a defendant may be eligible to apply for various forms of relief, including cancellation of removal. Since the judge must notify the alien of the relief available to him, this is an opportunity for the defense to marshal the equitable arguments for discretionary relief from deportation. It behooves the defense lawyer to understand the immigration consequences of both the client's immigration status and of the conviction, or else to consult an immigration attorney who does.

If a judge determines that an alien has established a *prima facie* case for eligibility for relief from deportation, the INS must provide the court with a recommendation and report on its view of the application for relief.

Where there is no defense to deportation, it may be to the defendant's advantage simply to agree to deportation. That will avoid the alien's being transferred to serve extra weeks of incarceration in an INS detention facility to await a deportation hearing after completing his/her sentence. Stipulating to deportability could also help a defendant obtain a better plea agreement, and a downward departure for the concession of deportability. See News from the Department of Justice in Issue 13 for more information on DOJ policy.

Having deportation hearings at sentencing thus offers certain potential benefits to defendants. Clearly deportable aliens may be able to receive lower sentences in exchange for agreeing to deportation. People with strong ties to this country who have not been convicted of aggravated felonies may be able to receive longer sentences in exchange for judicial determinations of cancellation of removal, battered spouse relief, or other immigration relief. In certain situations (such as when a defendant is cooperating), prosecutors may even agree to judicial orders granting relief from deportation. Some AUSAs may also agree to a plea and sentence package with a finding of relief from deportation based on mitigating circumstances; as with any plea agreement, the final decision would be left to the court.

Tova Indritz, who is "Of Counsel" to our firm, has written our lead article on the new powers of federal judges to act in the same capacity as immigration judges when sentencing alien defendants. With the consent of INS and the U.S. Attorney, a federal judge can determine whether an alien should be deported or, conversely, entitled to relief from deportation. Defense Lawyers need to understand the immigration consequences of criminal convictions to avoid providing ineffective assistance of counsel.



Tova Indritz is a criminal defense attorney in private practice in Albuquerque, New Mexico. She is a member of the boards of directors of the National Association of Criminal Defense Attorneys and the New Mexico Criminal Defense Lawyers Association. In 1993 she was awarded the Charles Driscoll Outstanding Lawyer of the Year award by the NMCDLA. She is a member of the ABA Coordinating Committee on Immigration, where she represents the ABA's Criminal Justice Section. She speaks widely on the immigration consequences of criminal convictions. She was formerly the Federal Public Defender for the District of New Mexico, and is now of counsel to the Law Offices of Alan Ellis.

RECENT FAVORABLE CASE LAW

ACCEPTANCE OF RESPONSIBILITY

Defendants who demonstrate acceptance of responsibility (“AOR”) for their offenses are entitled to a two or three level reduction in offense level. USSG § 3E1.1. A sentencing court may deny the reduction to a defendant who does not “truthfully admit[] the conduct compromising offense(s) of conviction” or who “falsely den[ies] any additional relevant conduct for which the defendant is accountable.” § 3E1.1 appl. note 1(a). The Eleventh Circuit recently held that a defendant may safely raise *legal objections* to counting conduct as “relevant” under § 1B1.3. In *United States v. Smith*, 101 F.3d 98 (11th Cir. 1996), the court of appeals reversed the sentencing court’s denial of the AOR reduction where the defendant admitted all the necessary facts of his check kiting scheme. The sentencing court had denied the reduction because defense counsel had raised a legal (as opposed to factual) objection to the PSI’s recommended loss figure.

Although truthfully admitting involvement in relevant conduct is one factor a sentencing court may consider in determining whether a defendant has accepted responsibility, it is not the only one. See USSG § 3E1.1, appl. note 1 (partial listing of factors). Thus, in *United States v. Ruggiero*, 100 F.3d 284 (2d Cir. 1996), the court of appeals affirmed the district court’s granting the two-level decrease, despite the defendant’s false denial of his involvement in relevant conduct, because the district court’s decision was not “without foundation.” The district court’s decision acknowledged the false statements, but nevertheless found that the defendant had accepted responsibility based on evidence of his remorse, his guilty plea, and his confession on the stand. See also *United States v. Kraig*, 99 F.3d 1361 (6th Cir. 1996) (affirming acceptance adjustment based on defendant’s allocution prior to imposition of sentence, where defendant who had gone to trial requested adjustment for first time during sentencing hearing).

CALCULATING THE SENTENCE

In Issue 7 of this newsletter, our lead article discussed one common error in applying the guidelines—the application of adjustments to an overall case, rather than the correct method of applying adjustments to individual counts prior to grouping. Another common error that can add points involves the erroneous refusal to group counts. When counts are grouped under USSG § 3D1.2(a)-(c), the offense level for the group is determined by the count with the highest offense level. § 3D1.3(a). When there is more than one group, the final offense level, determined under § 3D1.4, may be higher than the offense level for the most serious count. It is therefore good news that the Ninth Circuit has split with the Fifth and Eleventh Circuits in holding that a money laundering count should have been grouped with a drug conspiracy count since both crimes were “connected by a common criminal objective,” and because both offenses involved the same “societal interests.” *United States v. Lopez*, 104 F.3d 1149 (9th Cir. 1997).

DOUBLE COUNTING

The Guidelines generally permit the same factor to be counted more than once under different sections that apply to the case, unless doing so would violate a specific guideline provision or some general application rule. USSG § 3B1.1, appl. note 4. Nevertheless, courts occasionally find impermissible “double counting.” In *United States v. Triplett*, 104 F.3d 1074 (8th Cir. 1996), for example, the Court held that a two-level upward adjustment pursuant to USSG § 2B3.1(b)(2)(F) (“if an express threat of death was made” in robbery count) was impermissible double counting in violation of § 2K2.4, comment., backgr., when the conduct supporting the enhancement (using a gun during a robbery) already supported a five-year consecutive sentence pursuant to 18 U.S.C. § 924(c).

DOWNWARD DEPARTURES

We continue to see positive fallout from *Koon v. United States*, 518 U.S. —, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996), the case in which the Supreme Court gave the green light to downward departures for any reason not prohibited by the guidelines. The latest bases for downward departures include job loss to innocent employees, *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996), and community service. *Crouse v. United States*, — U.S. —, 136 L.Ed.2d 3 (Oct. 7, 1996) (vacating the 6th Circuit’s decision at 78 F.3d 1097 and remanding for further consideration in light of *Koon*).

POSITIONS OF TRUST

The guidelines provide for a 2 level enhancement when a defendant “abused a position of public or private trust ... in a manner that significantly facilitated the commission or concealment of the offense.” § 3B1.3. By “position of trust,” the Guidelines refer to situations in which the defendant has a fiduciary duty to another. Thus, in *United States v. Jolly*, 102 F.3d 46 (2d Cir. 1996), the Second Circuit reversed the enhancement where the defendant enticed people to invest in a Ponzi scheme. The Court held that the relationship between the defendant and the victims was an arms length borrower/lender relationship, and not fiduciary in nature.

SENTENCING ENTRAPMENT

When government agents entice an unpredisposed individual to commit a crime, entrapment provides a complete defense. When a predisposed individual commits a crime, but faces a higher sentence when government agents artificially manipulate a sting, “sentencing entrapment” can support a downward departure (see USSG § 2D1.1, appl. note 15) or negate an otherwise applicable mandatory minimum. Last issue we reported that the Ninth Circuit had held a mandatory minimum inapplicable when low prices offered by government agents persuade a defendant to purchase the triggering drug quantity. *United States v. Castaneda*, 94 F.3d 592 (9th Cir. 1996). Recently, the court of appeals applied the same principle

to § 924(c)(1) offenses. Under 18 U.S.C. § 924(c)(1), defendants face mandatory five-year consecutive sentences for using or carrying firearms during and in relation to drug offenses or crimes of violence. When the firearm is a machine gun, the mandatory consecutive sentence is increased to 30-years. In *United States v. Ramirez-Rangel*, 103 F.3d 1501 (9th Cir. 1997), the Court ruled that where agents supplied machine guns in exchange for methamphetamine, the possibility of sentencing entrapment required that the prosecution prove at sentencing that the defendant knew that the guns were “machine guns” before the 30-year mandatory minimum applied.

SUFFICIENCY OF EVIDENCE AT SENTENCING

A sentencing court may “accept the presentence report as its findings of fact,” Fed.R.Crim.P. 32(b)(6)(D), and then determine the guideline offense level based on those findings — but only if the PSI’s findings are adequate. *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996), illustrates the point. In this tax evasion case, the district court adopted the PSI, which made tax-loss findings without first determining how much of the tax the defendants “evaded or attempted to evade.” USSG § 2T1.1(a) (1987 ed.). Because the jury had been instructed that they could return a guilty verdict if they found the defendants had evaded a “substantial” amount of taxes, the verdict alone was not sufficient to support a finding that the defendants had evaded or attempted to evade all the taxes they owed but did not pay. The First Circuit remanded for resentencing.

UPWARD DEPARTURES

When a defendant’s counts of conviction form more than one “group” (as determined by § 3D1.2), the offense level is increased based on the number of “units” USSG § 3D1.4 assigns to each group. While the guideline provides for a five-level increase for more than five units, the background commentary notes that a “departure would be warranted in the unusual case were the additional offenses resulted in a total of *significantly* more than 5 units.” (emphasis added). The Sixth Circuit recently reversed a two level upward departure in a seven bank robbery case involving seven “units.” While the Court refused to state how many units could constitute “significantly more than 5,” it held that seven did not. *United States v. Valentine*, 100 F.3d 1209 (6th Cir. 1996).

UPDATES

In Issue 11, we reported on *United States v. Caba*, 911 F.Supp. 631 (E.D.N.Y. 1996), a conspiracy to commit food stamp fraud and money laundering case, in which the district court followed and expanded on *United States v. Skinner*, 946 F.2d 176, 179-80 (2d Cir. 1991), to grant a downward departure from the offense level determined by the otherwise applicable money laundering guideline. The Court used the

fraud guideline to guide the departure, since it found that the offense was more akin to regulatory fraud than money laundering. On November 29, 1996, the Second Circuit affirmed in an unpublished opinion which endorses that reasoning. It can be found on WestLaw at 1996 WL 685764.

In Issue 12, we reported on *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996), in which the Ninth Circuit held that when a court exercises its option to defer its decision on a plea agreement, the defendant is entitled to withdraw his plea for any reason or no reason at all, so long as he files the motion to withdraw the plea before the court has accepted the plea agreement. The question will now be decided by the Supreme Court. On January 17, 1997, the Court granted the government’s petition for writ of certiorari. 1997 WL 16029, 65 USLW 3499, 65 USLW 3505. Good luck to our colleague, Jonathan Soglin, who represents Mr. Hyde!

PRACTICE TIPS

Plea agreements: Proffer agreements which prevent the government from using revealed information against a defendant may not provide enough protection for a defendant who later enters into a plea agreement which fails to include a similar provision. In *United States v. Fagge*, 101 F.3d 232 (2d Cir. 1996), the Court held that the plea agreement, which did not include such a provision, superseded the proffer agreement, which did. The Court thus found that the government had not breached the proffer agreement when the prosecutor, in response to a question by the sentencing court, used information he had learned in a proffer session to explain why the government had not stipulated to a minimal role reduction.

Corrections to PSI: Federal Rule of Criminal Procedure 32(c)(1) requires that the sentencing court’s rulings on objections to the PSI “must be appended to any copy of the presentence report made available to the Bureau of Prisons.” Since the Bureau of Prisons may not correctly apprehend the significance of a court’s rulings, better practice is for defense counsel to ask the court to have the probation officer revise the PSI to incorporate the court’s rulings—especially when those rulings could affect the BoP’s custody classification. In *United States v. Smith*, 101 F.3d 202 (1st Cir. 1996), although the First Circuit recognized that the BoP had incorrectly counted against the defendant previously vacated state convictions which the sentencing court refused to consider, it found no error, since the district court’s appending a copy of the sentencing transcript to the PSI satisfied the rule. The Court recommended the defendant pursue administrative remedies within the BoP. (If unsuccessful, the prisoner could then presumably obtain court review on habeas corpus under 28 U.S.C. § 2241.)

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.

PRACTICE TIPS

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Agreement to move for departure. Attorneys should take special care to impress on clients with cooperation agreements the need to be completely honest and forthcoming with the government from the start. The importance of such advice was recently brought home when the Second Circuit recently reversed a downward departure which the district court had granted over the government's objections. Contrary to the district court, the Second Circuit found that the government's refusal to move for departure did not breach the plea agreement, despite the defendant's cooperation, because the defendant had lied to investigators about his own involvement. Although the defendant corrected his misstatements moments after he made them (after consulting with counsel), the Court held that because the initial lies opened the defendant up to impeachment, they rendered his cooperation less useful, and thus justified the government's refusal to move for departure. *United States v. Brechner*, 99 F.3d 96 (2d Cir. 1996).

Publisher and Editor: Alan Ellis
Associate Editor: James H. Feldman, Jr.
Editorial Consultant: Peter Goldberger
Contributing Editor: Tova Indritz
Associate Publishers: Deborah Bezilla
Samuel Shummon

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San Francisco Office

34 Issaquah Dock
Waldo Point Harbor
Sausalito, CA 94965
(415) 332-6464 • FAX (415) 332-1416
E-mail: AELaw1@aol.com

Philadelphia Office

50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 658-2255 • FAX (610) 649-8362
E-mail: AELaw2@aol.com