

Federal Presentence and Post Conviction

News

FROM THE LAW OFFICES OF ALAN ELLIS

ISSUE 14, FALL 1998

Only The Good News

DOWNWARD DEPARTURES

Let Judges Be Judges!

By Alan Ellis

Legislative history of the Sentencing Reform Act of 1984 reflects that it was not Congress' aim in providing for sentencing guidelines to strait-jacket a sentencing court, but rather to guide the judge's discretion, flexibility, and independent judgment. The sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. [S. Rep. No. 225, 98th Cong., 2d Sess. 52 (1984), reprinted at 1994 U.S.C.C.A.N. 3182, 3235].

Prior to *United States v. Koon*, 518 U.S. 81, 135 L.Ed.2d 392, 116 S.Ct. 2035 (1995), many judges, mindful of Congress' goal of eliminating unwarranted disparity in the sentencing of similar offenders for similar offenses, misperceived that the resultant guidelines that had been promulgated to implement this policy had forced them into imposing mechanical sentences in virtually all cases. Unless a downward departure was specifically provided for in the guidelines, it was all too often thought that a sentencing judge had virtually no power to depart.

And then along came *Koon*. *Koon* reminded judges that they could still exercise a sound judicial evaluation of each defendant and each case. *Koon* made it crystal clear that unless a particular factor had been declared "off limits" by the Commission, (e.g. race, sex, national origin, creed, religion, socio-economic status, lack of youthful guidance, drug or alcohol dependence, or economic hardship), the factor may be a ground for a downward departure. In short, the Court may not depart based on a forbidden ground. *Anything else is fair game.*

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***Assisting counsel in
obtaining for their clients
the lowest possible
sentence to be served in
the best possible facility
and release at the earliest
opportunity.***

Plea Negotiations

Sentencing strategy consultation, including objections to PSI and presentation of presentence memoranda

Prison Designation, Transfers and disciplinary Matters

Rule 35 Motions

Parole Representation

2241 and 2255 Petitions

Direct Appeals in all Circuits from Conviction and Sentence

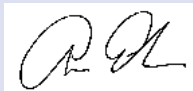
Supreme Court Practice

Prisoner Transfer Treaty Work for Foreign Inmates

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PUBLISHER'S NOTE

After a 20-month hiatus, we are coming to you again "with only the good news." You may notice some changes from our past issues. This and future issues will have a theme centered around a lead article. This issue's theme is downward departures under the Federal Sentencing Guidelines. For additional information on downward departures, see our quarterly column for the American Bar Association's *Criminal Justice* magazine on *Federal Sentencing*. [Alan Ellis, *Let Judges Be Judges! Post-Koon Downward Departure: Part I: Diminished Capacity*, CRIMINAL JUSTICE 55 (Winter 1998); *Part II: Post Offense Rehabilitation*, CRIMINAL JUSTICE 56 (Spring 1998); *Part III: Aberrant Behavior*, CRIMINAL JUSTICE 56 (Summer 1998); *Part IV: Charitable Contributions*, CRIMINAL JUSTICE 56 (Fall 1998).]



According to a review by the highly-regarded Judy Clarke, a Past President of NACDL, writing in the August 1998 issue of *The Champion*, the **Federal Prison Guidebook** by Alan Ellis and Samuel Shummon is "a remarkably handy reference guide to the federal prison system, providing a wide variety of information on each of the over 90 institutions within the federal Bureau of Prisons (BOP)."

You can order the 312-page paperback at the reduced end of year rate of \$19.50 plus shipping from The Law Offices of Alan Ellis, P.O. Box 2178, Sausalito, CA 94965. E-mail AELaw1@aol.com for more information.

CULTURAL ASSIMILATION

A defendant's cultural assimilation is a permissible basis for a downward departure. In *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998), the defendant, who had attended a public school in New York and whose wife and seven children were U.S. citizens, moved for a downward departure based on his 23 years of residency in the United States. The Ninth Circuit held that a person's close connections to this country and wish to remain here with his family could be extraordinary enough to warrant a departure—especially if the defendant was brought to this country as a child and is primarily motivated to be here with his family rather than for financial reasons. A district court has the authority to depart for extraordinary acceptance of responsibility based on the defendant's voluntary relinquishment of a meritorious defense to a forfeiture. In *United States v. Faulks*, 143 F.3d 133 (3rd Cir. 1998), the defendant and the government entered into a plea agreement in which the defendant agreed not to contest the forfeitures and to cooperate with the government, and the government agreed to make a motion for departure under § 5K1.1.

SAFETY VALVE

A defendant may receive a reduction under § 2D1.1 (b)(6) even if he's been denied a reduction under § 3E1.1. Under U.S.S.G. § 2D1.1 (b)(6), defendants with an offense level of 26 or above can qualify for a two-level reduction if they satisfy the requirements of the "safety valve" provision of U.S.S.G. § 5C1.2 (1)-(5). In *United States v. Webb*, 110 F.3d 444 (7th Cir. 1997), defendant was denied an acceptance of responsibility reduction for failing to appear at his plea hearing (defendant turned himself in seven months later), and did not fully admit his criminal conduct until the sentencing hearing. Nonetheless, the district court found that defendant had met the requirements of § 5C1.2 by finally admitting to his conduct, and gave him a two-level reduction under § 2D1.1(b)(6).

The government cannot use allegations that a defendant relapsed into drug use as a basis to refuse to file a motion for departure based on his assistance. In *United States v. Anzalone*, 148 F.3d 940, defendant appealed the district court's denial of his motion directing the government to file a departure motion after having cooperated. In reversing, the Eighth Circuit held that the government's refusal to file the motion was improper because it was completely unrelated to the quality of defendant's cooperation or the information he provided.

SUBSTANTIAL ASSISTANCE

A departure based on substantial assistance to local authorities is not covered by U.S.S.G. § 5K1.1; thus, a court has the authority to depart downward without a motion from the government. In *United States v. Kaye*, 65 F.3d 240 (2d Cir. 1998), the defendant moved the district court to consider a down-

ward departure under § 5K2.0 based on the defendant's substantial assistance to local law enforcement. The district court declined. On reconsideration, the Second Circuit held that § 5K1.1 is so ill-suited to situations in which a defendant may assist local, non-federal law enforcement, that it cannot be said that § 5K1.1 was intended to cover assistance to local law enforcement without some explicit expression of the Sentencing Commission's intent.

A district court may depart downward for substantial assistance without a government motion where the circumstances take the case out of the heartland. In the matter of *In re Sealed Case*, 149 F.3d 1198, the district court denied defendant's departure motion for substantial assistance because the government had not filed a § 5K1.1 motion. The D.C. Circuit held that district courts are authorized under *Koon v. U.S.*, 518 U.S. 81 (1996) to depart from the guidelines based on substantial assistance where the circumstances take the case out of the relevant guideline heartland although the government has not filed a motion. The court concluded that a departure for substantial assistance without a motion from the government is a factor not encompassed by or equivalent to any mentioned, encouraged, or discouraged factors mentioned in U.S.S.G. § 5K1.1.

A district court has the power to review a plea agreement to determine whether the Government has satisfied the terms of the agreement. In *United States v. Isaac*, 141 F.3d 477 (3rd Cir. 1998), defendant and the government entered into a plea agreement requiring defendant's cooperation and permitting the government sole discretion to file a motion for a downward departure. After several meetings between the defendant and the government, the government decided not to file a substantial assistance motion under § 5K1.1. Asserting bad faith and that the plea agreement should be enforced, defendant moved for an order directing the government to file the motion. The district court refused to review the government's unwillingness to file the motion because it found that it had no power to do so. In reversing, the Third Circuit held that the scope of review depends on whether a contractual relationship (plea agreement) exists between the defendant and government; if so, the district court is free to apply contract principles to determine whether it has been satisfied.

WAIVER

In *United States v. Brinton*, 139 F.3d 718, (9th Cir. 1998), the Ninth Circuit held that in departing downward by thirty months primarily based on defendant's incarceration in a state facility for two and one-half months after having been arrested, the district court's departure had not "comport[ed] with the structure and theory of the guidelines as a whole." However, because the government waived the issue by failing to object to the departure, the Court of Appeals did not decide whether the district court abused its discretion.

NEWS

From the Bureau of Prisons

Prisoners who successfully complete the drug treatment program are eligible for up to one year off their sentences. 18 U.S.C. § 3621(e)(2)(B). Most recently, in *Orr v. Hawk*, 1998 U.S.App. Lexis 21895 (6th Cir. 1998), the Sixth Circuit held that the BOP's exclusion of offenders from consideration for early release because of mere possession of a firearm is improper. In *Orr*, defendant was convicted of possession of a firearm by a previously convicted felon in violation of 18 U.S.C. § 922(g). The BOP denied Orr's petition for a one-year reduction under § 3621(e)(2)(B) reasoning that he was precluded from taking advantage of the sentence reduction because his felon-in-possession conviction was a crime of violence within the meaning of 18 U.S.C. § 924(c)(3). Additionally, the BOP pointed to an internal rule—Program Statement 5162.02—which explicitly listed § 922(g) as a crime of violence. In dismissing Orr's petition, the district court held, among other things, that the BOP had not exceeded its statutory authority by excluding those convicted under § 922(g) for consideration for early release. In reversing, the Court of Appeals held that “in view of the absence of statutory support for the BOP's definition of ‘non-violent offense’ (or ‘crime of violence’), as well as body of decisional law construing the term ‘crime of violence’ not to include § 922(g) violations, the BOP could not reasonably refuse to consider those convicted as felons in possession for early release under § 3621(e)(2)(B).”

From the Federal Rules Committee

Effective December 1, 1998, absent contrary action by Congress, the text of Rule 33 (New Trials) will be amended as follows: Rule 33 will be amended to allow defendants to file a motion for new trial based on newly discovered evidence within three years after the verdict or finding of guilty. Presently, under Rule 33, a motion for new trial based on newly discovered evidence must be filed within two years after the verdict or a finding of guilty.

From the U.S. Sentencing Commission

The U.S. Sentencing Commission has issued a study on substantial assistance, finding that the mean departure under 5K1.1 for males was 57% off the low end of the otherwise applicable guidelines range; for females, the mean departure climbs to 66%. See Sentencing Commission Study by Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* at 19, 33 (January 1998).

Effective November 1, 1998, U.S.S.G. 5K2.13 will allow a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity, except under the following three circumstances: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense

indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. The amendment also adds an application note that defines “significantly reduced mental capacity” in accord with the decision in *United States v. McBroom*, 124F.3d 533 (3d Cir. 1997). The *McBroom* court concluded that “significantly reduced mental capacity” included both cognitive impairments (i.e., an inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of “significantly reduced mental capacity.”

PRACTICE TIPS

Downward Departures

According to commentary (N.6) to U.S.S.G. § 5C1.1, a departure from the guidelines may be available in cases where a longer period of community confinement is substituted in place of an equivalent number of months of imprisonment to accomplish a specific treatment purpose. For example, 12 months in an approved residential drug treatment program may be substituted in place of 12 months of imprisonment. Furthermore, whether substitution should be considered will depend on whether the defendant's criminality and the treatment problem to be addressed are related and there is a reasonable likelihood that the problem will be eliminated by successful completion of the treatment program.

Habeas 2255 Motions

The Third Circuit recently held in *Burns v. Morton*, No. 97-5801, 1998 U.S. App. Lexis 14578 (3d Cir. 1998), that a pro se habeas petition is considered “filed” at the moment the state inmate hands the petition to prison authorities for mailing to the district court.

Halfway Houses

A defendant receiving a relatively short sentence (generally a year and a day or less) who is otherwise eligible for a minimum sentence can be designated to serve his or her sentence in a community corrections center (halfway house) if so recommended by the sentencing judge. P.S. § 5100.06. This also applies to individuals receiving a split sentence U.S.S. G. § 5C1.1(d)(2).

Prisoner Treaty Transfers

Mexican nationals who are lawful, permanent, legal residents of the United States are not eligible for transfer to Mexico under the U.S.-Mexican Prisoner Transfer Treaty unless an order of deportation, either in the form of (1) a stipulated administrative or judicial deportation order in connection with a plea agreement or (2) a non-stipulated judicial order of deportation has been entered against them. In cases where a defendant is likely to seek a treaty transfer,

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it is important for counsel to resolve issues relating to the client's immigration status prior to plea and/or sentencing.

The BOP continues to actively encourage non-citizen inmates to apply for transfer to their native countries under existing international treaties, so foreign national inmates can be closer to their families while decreasing the federal government's cost of having to house them.

Safety Valve

The government cannot oppose application of the safety valve based solely on its "belief" that the defendant knows more than she is telling. In *United States v. Miranda-Santiago*, 96 F.3d 517 (1st Cir. 1996), the district court denied application of the safety valve provision after determining that the defendant had failed to "cooperate fully." The defendant had explained the limits of her involvement in the conspiracy as a passive participant, a characterization that was neither objected to nor contradicted by the government. The government did nothing more than simply argue that it did not believe the defendant. In vacating the sentence, the First Circuit held that the district court's "bare conclusion that the defendant had not cooperated fully," absent either specific factual findings or easily recognizable support in the record, is not enough to "thwart [defendant's] effort to avoid imposition of a mandatory minimum sentence."

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 28 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.

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