

LITTLE GEMS, GOLDEN NUGGETS AND OTHER PRACTICE TIPS

PRACTICE TIPS FOR WHITE COLLAR CASES By Alan Ellis

In September of 1995 Federal Presentence and Post Conviction News featured an article entitled "Golden Nuggets of Sentencing - Practice Tips for Successful Sentencing Advocacy." Due to popular demand, we bring you more practice tips as well as favorable new cases on sentencing, prison designation and post-conviction relief particularly as they affect the white collar offender.

SENTENCING

In white collar crime cases, although fraud victims often lose money, the guidelines recognize that in some cases, they do receive something of value for their money. U.S.S.G. §2F1.1, Appl. Note 8(a). This principle can sometimes have dramatic results. See, for example, *United States v. Chaterji*, 46 F.3d 1336 (4th Cir. 1995) (drug customers who purchased non-FDA authorized generic pharmaceuticals suffered no loss because the products they purchased were in fact safe and effective). See also *United States v. Fiorillo*, 186 F.3d 1136 (9th Cir. 1999) (per curiam) (loss does not include price paid by victim for disposal of hazardous waste which defendant properly handled); *United States v. Sublett*, 124 F.3d 693 (5th Cir. 1997) (loss does not include value of counseling provided by qualified counselors); *United States v. Parsons*, 109 F.3d 1002 (4th Cir. 1997) (legitimate expense reimbursement requests not included in loss); *United States v. Maurello*, 76 F.3d 1304 (3d Cir. 1996) (loss in case of disbarred attorney providing legal services does not include fees paid by satisfied clients); *United States v. Barnes*, 125 F.3d 1287 (9th Cir. 1997) (services that were satisfactorily performed should have been subtracted from loss).

Just as there are fraud cases in which victims receive something of value, there are also fraud cases in which defendants have no intent to cause financial loss to anyone. For example, a defendant may lie about his debts to obtain a loan which he fully intends to repay. If the defendant then defaults after repaying a portion of the debt, the loss under U.S.S.G. §2F1.1 is necessarily the loss the victims actually sustain, since there is no intended loss. This is significant, because the guidelines provide that if the loss a defendant intends to inflict is greater than the loss his victims actually sustain, the sentencing court is to consider the intended loss in setting the offense level. U.S.S.G. §2F1.1, Appl. Note 8. If a defendant who intends no loss had pledged assets to secure the debt, then the loss would be reduced by the value of those assets. U.S.S.G. §2F1.1, Appl. Note 8(b). See *United States v. Henderson*, 19 F.3d 917, 927-28 (5th Cir. 1994) (applying this principle); *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991) (same). *United States v. Wells*, 127 F.3d 739 (8th Cir. 1997) (loss reduced by value of future payments to bank on leases assigned as collateral); *United States v. Downs*, 123 F.3d 637 (7th Cir. 1997) (loss reduced by value of assets pledged).

Some departures are unique to fraud cases. The fraud guideline suggests the appropriateness of a downward departure where loss is caused by factors unrelated to the offense. U.S.S.G.

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PUBLISHER'S NOTE

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§2F1.1, Appl. Note 8(b). The application note gives the example of a defendant who understates his debts to obtain a loan to expand his grain export business, and then defaults when the bottom falls out of the market. See e.g., *United States v. Gregorio*, 956 F.2d 341 (1st Cir. 1992) (downward departure appropriate where degree of loss was caused by downturn in economy). The guideline also suggests the appropriateness of a downward departure where the loss determined under subsection (b)(1) may overstate the seriousness of the offense. U.S.S.G. 2F1.1, Appl. Note 11. See e.g., *United States v. Graham*, 146 F.3d 6 (1st Cir. 1998) (loss overstates culpability where lower loss attributed to similarly situated defendants); *United States v. Monaco*, 23 F.3d 793 (3d Cir. 1994) (loss overstates seriousness where defendant had no intent to steal); *United States v. Stuart*, 22 F.3d 76 (3d Cir. 1994) (affirming loss calculation based on face value of stolen bonds, but suggesting appropriateness of departure on remand where defendant received little money for participation in offense, causing loss to overstate seriousness of offense. For a list of other downward departures available in white collar crime cases see *Representing the White Collar Client at Sentencing, Criminal Justice (Winter 2000)*. A copy of this article may be obtained from the Law Offices of Alan Ellis by visiting our website at www.alanellis.com.

PRISON

The BOP criteria for Intensive Confinement Center (boot camp) eligibility has recently changed to severely preclude admission to inmates who, by virtue of their lack of program needs, do not require the intensive specialized program offered at the boot camp and ordinarily are not accepted for ICC placement. Thus, inmates demonstrating a *stable* employment and/or educational or military history will not ordinarily be approved for placement in the ICC, as the program would not benefit such individuals according to the BOP.

Pursuant to 18 U.S.C. §3621(e) the Bureau of Prisons has implemented a Residential Drug Abuse Program (RDAP) that can enable a non-violent inmate to obtain up to a 12 month

reduction in sentence and generally a six month halfway house placement for those who successfully participate in and complete residential drug and/or alcohol treatment. Unless the Presentence Investigation Report reflects that the defendant has a substance abuse or alcohol problem, it will be difficult for an inmate to qualify for the program and sentence reduction.

POST-CONVICTION REMEDIES

A federal defendant whose sentence was enhanced on the basis of a prior state conviction may use 28 U.S.C. §2255 as a vehicle for reopening that sentence if he has succeeded in attacking the prior conviction in state court. *United States v. Walker*, 198 F.3d 811 (11th Cir. 1999) citing seven other Court of Appeals decisions in which it joins. If the one year limitation for the filing of a 2255 motion has expired, one can make the argument that under the savings clause of 2255, a federal prisoner may file a habeas corpus petition pursuant to 28 U.S.C. §2241 to contest the legality of his sentence where the remedy under 2255 is inadequate or ineffective to test the legality of his detention. *Hernandez v. Cambell*, 204 F. 3d 861 (9th Cir. 2000). See also *United States v. Cavallo*, ___F. Supp. 2d, ___. No. Crim 95-59- P-H 2000 U.S. Dist. LEXIS 2157 (D.Me. 2/9/00).

When a 2255 motion is dismissed for technical procedural reasons and the habeas petitioner does not receive an adjudication of his claim, a subsequent petition is not a second or successive motion under the Anti Terrorism and Effective Death Penalty Act (AEDPA) of 1996. In *Re Moore*, 196 F.3d 252 (D.C.Cir. 1999).

A defendant is eligible to have his supervised release or probation terminated early under 18 U.S.C. §3583(e)(1) and 3564 (c). According to a memorandum issued by the Committee on Criminal Law of the Judicial Conference on July 30, 1996, judges are encouraged to consider early termination in appropriate cases because of the rapidly increasing number of persons on supervision and the need to focus scarce supervision resources on those offenders who most need it. Moreover, 18 U.S.C. §3583(e)(2) gives the district court the power to modify any condition of supervised release.

White collar defendants who received a fraud enhancement for sophisticated means for offenses committed between October 31, 1999 and November 1, 2000 may be able to challenge their sentence on the ground that the enhancement was created by a temporary emergency guideline that expired on October 31, 1999. The present versions of U.S.S.G. §2F1.1(b)(5) (sophisticated means) and §3A1.1(b) (large number of vulnerable victims) are the result of amendment 587, an amendment promulgated under a temporary amendment authority that Congress gave the Commission in the Telemarketing Fraud Prevention Act of 1998. The validity of these provisions after October 31, 1999 can be challenged. A person to whom U.S.S.G. §2F1.1(b)(5) or 3A1.1(b) would otherwise apply and who is (1) convicted of an offense

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committed after October 31, 1999 and before November 1, 2000, or (2) sentenced in that period may benefit by a successful challenge.

The Third, Fifth, Ninth and Tenth Circuits have held that the limitation period for filing a 2255 motion under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996 begins to run only after the time for filing a petition for writ of certiorari has expired. On the other hand, the Fourth and Seventh Circuit had concluded that federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin

to run on the date the court issues the mandate in their direct criminal appeal. Compare *Kapral v. United States*, 166 F.3d 565 (3d Cir. 1999); *United States v. Burch*, 202 F.3d 1274 (10th Cir. 2000); *United States v. Garcia*, 210 F.3d 1058, (9th Cir. 2000) (all holding that the one year period begins to run after the time for filing a petition for certiorari has expired) with *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998) (holding that the one year period begins to run when the mandate of the Court of Appeals issues). In a footnote in *Garcia*, the court of appeals noted that it is now the position of the Solicitor General that the limitation period begins to run only after the time for filing a petition for writ of certiorari has expired. *Garcia*, supra at footnote 2.

FAVORABLE NEW CASES

FORFEITURE

Any agency forfeiting an inmate's property must send written notice of the forfeiture proceedings directly to the prisoner at his place of confinement. *United States v. McClory*, 202 F.3d 664(3rd Cir. 2000).

NO HARMLESS ERROR

A guideline miscalculation of two levels is not harmless despite a large downward departure. *United States v. Thayer*, 201 F.3d 214, No. 98-1750 (3d Cir. 1999)

RESTITUTION

An order to pay restitution to fraud victims in a federal criminal proceeding entered prior to the October 1998 amendments to the Bankruptcy Code is dischargeable under bankruptcy under 11 U.S.C. §523 as long as it is payable to the benefit of defrauded victims and not to and for the benefit of any governmental unit. In *Re Rashid*, 210 F.3d 201, (3d Cir., 2000).

ROLE IN THE OFFENSE

In *United States v. Maloof*, 205 F.3d 819, No. 98-21114 (5th Cir. 2000), the court of appeals reversed a four level role enhancement in an anti-trust case. The district court found that two co-conspirators and three company employees satisfied the five participant requirement. However, the appellate court held that finding that the three employees knew what was going on was not a finding that they were criminally responsible.

SUBSTANTIAL ASSISTANCE

In the age of the Sentencing Guidelines it may be ineffective for a lawyer to fail to give his client timely advice concerning the importance of cooperation with the government as a means of reducing the defendant's sentence. *United States v. Hernandez* 98 Cr 961, 2000 U.S. Dist. LEXIS 5721 (S.D.N.Y. 5/3/00)π

NEWS

On April 4 and 5, the newly-appointed Commissioners to the United States Sentencing Commission voted on several proposed amendments to the guidelines including aberrant behavior and post-sentence rehabilitation departures. Unless both houses of Congress reject the proposals, they will go into effect on November 1, 2000.

ABERRANT BEHAVIOR

The Commission addressed the aberrant behavior issue because of a split in the circuits. The Third, Fifth, Seventh and Eleventh Circuits have held that a departure for aberrant behavior is authorized only if the conduct consisted of a single isolated act. The First, Second, Ninth and Tenth Circuits have permitted a departure even if the conduct involved several acts over a period of time.

The Commission has adopted a compromise approach permitting a downward departure for "aberrant behavior," but stating that aberrant behavior means "a single criminal occurrence or single criminal transaction." The Commission said it intends that these phrases will be somewhat broader than a "single act," but will be limited in potential applicability to offenses: (1) committed without significant planning; (2) of limited duration; and (3) that represent a marked deviation by defendant from an otherwise law-abiding life. The departure is not available if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point; or (5) the defendant has a prior federal, state, felony conviction.

In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (1) mental and emotional condition; (2) employment record; (3) record of prior good works; (4) motivation for

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committing the offense; and (5) efforts to mitigate the effect of the offense. Consider delaying your sentencing until November in appropriate cases. Amendment No. 13, 5K2.20 (p.s).

POST-SENTENCE REHABILITATIVE EFFORTS

Also resolving a circuit conflict (all circuits but the Seventh in agreement), the Commission sided with the Seventh Circuit and adopted a new policy statement at 5K2.19, which prohibits post-sentencing rehabilitative efforts as a ground for a downward departure. However, pre-sentence extraordinary rehabilitative efforts as recognized by all circuits will still be a ground for a downward departure. Amendment No. 12.

Depending upon your circuit, you might be wise to have your client sentenced before or after November 1, 2000.

ATTORNEY WANTED: The Law Offices of Alan Ellis has an opening for an associate to work out of its Sausalito, California office. Fax or email inquiries to 415-332-1416 or aelaw1@alanellis.com

Alan Ellis is nationally recognized as an authority in the fields of plea negotiations; sentencing; appeals; prison designation, transfers and disciplinary matters; parole; habeas corpus 2241 and 2255 petitions and international prison transfer treaties. 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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