

FEDERAL BUREAU OF PRISONS PRACTICE TIPS

By Alan Ellis

● Some judges don't like to recommend particular places of confinement at sentencing. Here are some of the reasons why:

They believe that because they are not "correctional experts," they are unable to determine where a client should serve his or her sentence.

They often get letters from the Bureau of Prisons (BOP) advising them that their recommendations cannot be honored in a particular case. Generally, the reason a judge gets such a letter is that he or she has recommended a facility incompatible with the defendant's security level.

● A lawyer should only ask a judge to recommend a facility that matches the defendant's security level. In fact, 18 U.S.C. § 3621(a)(4)(B) requires the BOP to consider a judge's recommendation. In compliance with this requirement, BOP Program Statement 5100.07 provides that the BOP welcomes a sentencing judge's recommendation, and will do what it can to accommodate it. BOP statistics show that it honors court recommendations in the overwhelming majority of cases in which the defendant qualifies for the recommended institution.

● Without a recommendation, your client may not wind up in the facility he or she prefers, even if he or she qualifies for it. For instance, prison overcrowding may rule out a facility that is close to home. Should there be only one slot open at a prison and there are two defendants who want that placement, the one with the judicial recommendation is more likely to get it. When both defendants have recommendations, the one whose judge has stated reasons for the recommendation will generally get it. It may help to get a copy of the BOP's Program Statement 5100.07 and 18 U.S.C. § 3621(a)(4)(B) and show the pages that deal with judicial recommendations to the court.

● A-year-and-a-day sentence results in an inmate serving significantly less time—approximately 46 days less than a 12-month sentence, because the 12-month sentence does not provide for good conduct time credit.

● An inmate is not entitled to credit for time served on pre-trial release under home confinement or even in a halfway house as a condition of bond.

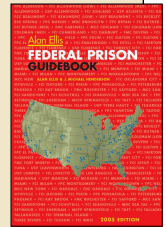
● Certain considerations termed Public Safety Factors by the BOP will preclude camp placement, despite an inmate's being otherwise qualified. The BOP looks to the Presentence Investigation Report to determine the applicability of a particular Public Safety Factor. Examples of Public Safety Factors include: deportable alien, high level/high volume drug trafficking, conviction of sexual offenses (including child pornography), serious telephone abuse (important in white collar cases), and more than ten years remaining to serve on the sentence.

● The BOP can tell you if your client has been designated, but it will not tell you where. If your client has been designated, the U.S. Marshal in the sentencing district can tell you the location, as can Pretrial Services in the district where your client is being supervised. Once you've found out the location, check with that institution to make sure that it has all the necessary paperwork, especially the Presentence Investigation Report (PSI). If your client is a self-surrender, he or she will be put in the special housing unit (SHU) of the adjacent main institution, if there is one, or

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in a local county jail, if there is not, until the institution receives the PSI.

- Many white-collar offenders think that if their sentence is under ten years and they have no prior record, they will automatically go to a federal prison camp. This is not necessary so. There are Public Safety Factors that influence placement, such as Serious Telephone Abuse or Deportable Alien. Management Variables also influence placement, such as language in the PSI that indicates a defendant has off-shore assets and a propensity to travel internationally. Open cases—either state or federal—can also count as a detainer, even though no actual detainer has been filed, and prevent minimum security camp placement. All open cases need to be resolved prior to the time that the Presentence Investigation Report is forwarded to the BOP for designation.
- Medical levels of care can also affect a client’s designation or placement. See “News from the Bureau of Prisons.”
- A growing number of inmates who are in primary state custody when they are sentenced on a federal case are losing substantial credit towards their federal sentences because the BOP narrowly interprets 18 U.S.C. § 3585(b) (which governs credit for prior custody) to prevent “double credit” on concurrent sentences imposed by different jurisdictions. Under BOP policy, any time credited toward a state sentence when the inmate is in primary state custody cannot be credited toward a federal sentence, even if the state sentence resulted from related conduct and even if the judge ordered the sentences to run concurrently. BOP Program Statement 5880.28. The BOP’s interpretation of 18 U.S.C. § 3585(b) sometimes converts a concurrent sentence into a consecutive one, regardless of what the Judgment and Commitment Order provides. There are, however, ways to get around this. For example, U.S.S.G. § 5G1.3(c), as interpreted by the courts, permits a court to impose a lower sentence so that when that sentence is run consecutively to the state sentence, the resulting sentence will amount to a concurrent sentence. Courts may also grant downward departures and variances to achieve the same result. When a judge imposes a concurrent sentence that turns into a de facto consecutive sentence, the problem can sometimes be corrected through a motion to vacate sentence filed pursuant to 28 U.S.C. § 2255 – so long as the motion is filed within the one-year AEDPA statute of limitations.
- The interrelationship between state and federal sentences has always caused problems. For an excellent discussion of state versus federal custody and service of multiple sentences, contact David Beneman, Esquire, Maine CJA Resource Counsel; P. O. Box 465; Portland, ME 04112 (Beneman@maine.rr.com) for his excellent article on the subject.
- Attorney calls: To make an unmonitored call to an attorney, a prisoner must make the request in writing by submitting An Inmate Request to Staff Member. Attorneys may request unmonitored telephone conversations with their clients by making arrangements with the inmate’s unit counselor.
- Non-Legal Mail: Inmates are allowed to receive and send unlimited mail. All incoming mail is opened and some enclou-

tures are not allowed. For more information, see the introduction in *Alan Ellis’ Federal Prison Guidebook, 2005–2006*.

- Legal Mail: Incoming legal mail must clearly be stamped “Special Mail,” and should include the attorney’s name (followed by a comma and the word “attorney”) and address. To be treated as legal mail, the return address should explicitly state that the individual sending the mail is an attorney. It is not enough that the return address lists the name of a law firm or that “Esq.” follows the sender’s name. The sender’s name must be followed by the word “attorney.” Legal mail will be opened in the prisoner’s presence. Outgoing legal mail must be similarly marked to ensure confidentiality.
- BOP’s Residential Drug Abuse Program: You can read all about this comprehensive 500-hour program—which can lead to early release and an extended halfway house or home confinement placement—at our new website, www.alanellis.com and in our new 2005–2006 *Federal Prison Guidebook* in Chapter 13.



For 35 years, The Law Offices of Alan Ellis has worked with federal defendants and inmates, and consulted with many of the nation’s leading criminal defense attorneys, to develop strategies that obtain the lowest possible sentence for clients, to be served at the best facility possible, with the greatest opportunity for early release.

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FAVORABLE NEW CASES BURDEN OF PROOF

By Peter Goldberger and Karen Landau¹

The government bears the burden of proving guidelines enhancements (e.g., loss, drug weight, role, etc.) by at least a clear preponderance of reliable evidence. *United States v. Mezas de Jesus*, 217 F.3d 638, 642-43 (9th Cir. 2000); *United States v. Montano*, 250 F.3d 709, 713 (9th Cir. 2001). The Sentencing Commission itself suggests that a bare preponderance—the greater weight of credible evidence—is good enough. USSG § 6A1.3(a) (p.s.), commentary. As a “policy statement,” this was only advice for the courts, not a binding rule. Now, after *Booker*, the Commission’s “policy statements” are only a factor for courts to “consider.” 18 U.S.C. § 3553(a)(5). In this light, some courts have recently held that they will insist on a more stringent burden of proof, either beyond a reasonable doubt, or at the least, clear and convincing, even where the guidelines are advisory. See *United States v. Malouf*, 377 F.Supp.2d 315(D.Mass. 2005); *United States v. Munoz*, 233 F.3d 1117, 1126-27 (9th Cir. 2000) (the pre-*Booker* case held that clear and convincing evidence is required for relevant conduct that results in an offense level increase of more than four levels); *United States v. Kikumura*, 918 F.2d 1084, 1098-1102 (3d Cir. 1990) (requiring at least clear and convincing evidence for upward departure of five or more levels, based on finding of intent to kill, utilizing a due process balancing test); *Kikumura II*, 947 F.2d 72 (3d Cir. 1991) (declining to address application of reasonable doubt standard because it was not raised on first appeal).

The Tenth Circuit has suggested that a district court may apply a burden of proof of beyond a reasonable doubt or, at least, a level of fact-skepticism beyond a mere preponderance. See *United States v. Dazey*, 403 F.3d 1147, 1178 (10th Cir. 2005); *United States v. Pimental*, 367 F.Supp.2d 143 (D.Mass. 2005) (holding that Fifth Amendment requires application of the beyond a reasonable doubt standard to enhancements because each judicial finding of fact has “quantifiable consequences” on defendant’s sentence); [accord] *United States v. Coleman*, 2005 WL 1226622, *6-7 (S.D. Ohio 2005); *United States v. Kelley*, 355 F.Supp.2d 1031 (D.Neb. 2005); *United States v. Carvajal*, 2005 WL 476125 (S.D.N.Y. 2005); *United States v. Gray*, 362 F.Supp.2d 714 (S.D.W.Va. 2005); *United States v. Harper*, 360 F.Supp.2d 833 (E.D.Tex. 2005).

Judge Bataillon, of the United States District Court for the District of Nebraska, earlier this year issued a memorandum opinion analyzing the impact of the *Apprendi/Booker* line of cases on the question of the applicable burden of proof for findings that increase the defendant’s sentence under the advisory guidelines.

United States v. Huerta-Rodriguez, 355 F.Supp.2d 1019 (D.Neb. 2005). The court held that to comply with due process, it would “require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant’s sentence.” Because the line separating a sentencing enhancement fact from an element of the offense “remains blurred after *Booker*,” the court determined to “err on the side of caution in protecting a criminal defendant’s constitutional rights.” The court wrote:

[T]he court will apply the same standard of proof to the factual showing that would be applied in reviewing the sufficiency of the evidence to support the finding, or in conducting harmless error review on appeal, e.g., whether a reasonable juror could have found the fact beyond a reasonable doubt. [Citations and footnote omitted].

Whatever the constitutional limitations on the advisory sentencing scheme, the court finds that it can never be “reasonable” to base any significant increase in a defendant’s sentence on facts that have not been proved beyond a reasonable doubt.

See *Huerta-Rodriguez*, 355 F.Supp.2d at 20, citing *Ring v. Arizona*, 536 U.S. 584, 592-93 and n. 1 (2000); *Apprendi*, 530 U.S. at 477; and *Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999). In a more recent decision, Judge Bataillon reiterated that the Fifth Amendment required the court to use a standard of proof of beyond a reasonable doubt. *United States v. Okai*, 2005 WL 2042301 (D.Neb. 2005). The court noted that, while the remedial section of the *Booker* decision concluded that there was no Sixth Amendment violation if the guidelines were advisory, that decision did not resolve the question of whether an increased sentence nonetheless violated the Fifth Amendment. 2005 WL 2042301. The court reasoned that because a sentencing court’s discretion remained limited after *Booker*, constitutional safeguards attach to a sentence at “the point at which the sentence exceeds ‘the limits fixed by law.’” (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 566 n. 9 (2000)). Those limits are established by the defendant’s plea or the jury verdict.

On the basis of these precedents, there is a solid foundation for counsel to argue, in appropriate cases where the consequences are serious or the evidence dubious, for the use of a reasonable doubt standard for fact-finding at sentencing or, at least, a standard of clear and convincing evidence.

¹ Mr. Goldberger and Ms. Landau are of counsel to the firm.

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NEWS

FROM THE BUREAU OF PRISONS

By Alan Ellis

Where a client is designated may now depend on his or her health. Although there is no new operations memorandum or even a revised program statement, the Bureau has begun to use a four-level scale that factors an inmate's medical needs into the designation process. Now, an inmate will not only have a security level, but also a medical level. The BOP will consider both levels when it determines where a defendant will serve his or her sentence. Here's the breakdown:

Level 1: Prisoners who are generally healthy.

Level 2: Prisoners who have chronic medical conditions which are under control and can be managed independently with quarterly status reviews. Examples include asthma conditions controlled by prisoner-held inhalers, and high blood pressure/high cholesterol which is controlled through medication.

Level 3: Prisoners who are 'fragile' and either need assistance with daily living activities or require monthly clinical evaluations, such as oncology follow-ups. Examples include brittle diabetics, problematic asthmatics, or people with chronic conditions not well controlled with medication.

Level 4: "In-patient" prisoners who require daily nursing care, or who have intractable chronic conditions. Level 4 covers inmates who qualify for what is currently called "Federal Medical Referral Center Placement."

Level 1 institutions are located approximately one hour or more from community medical centers. Examples of such institutions are FCI Manchester, Kentucky, which is two hours from Lexington; Kentucky, and USP Lee, Virginia; and FCI Yazoo City, Mississippi.

Although Level 2 institutions have no special capabilities beyond those that the health services staff ordinarily provide, they are within about an hour of major regional treatment centers and, therefore, have easier access to medical centers. Examples of Level 2 institutions include FCI Fort Dix and FCI Fairton, both in New Jersey. Most BOP facilities will be classified as Care Level 2 facilities and will function essentially like most BOP facilities function now.

There are two kinds of Level 3 institutions: those like FCI Butner, which are located next to Level 4 institutions (i.e. federal medical centers), and those with greater medical capabilities, such as FCI Fort Worth or FCI Terminal Island. To date, the only identified Level 3 facilities are FCI Butner, FCI Fort Worth, and FCI Terminal Island.

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