FEDERAL SENTENCING AND POST-CONVICTION News

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PRACTICE TIPS

MAXIMIZING THE BENEFIT FROM YOUR CLIENT'S COOPERATION WITH THE GOVERNMENT

By Alan Ellis

Defendants who cooperate with the government are a much-maligned group. They are the pariahs of the prison system. Some defense attorneys won't represent them. There is even a joke among defense attorneys that asks what the difference is between a "rat" or a "snitch" and a "cooperating individual." The answer? The "rat" or "snitch" is "the other guy's client." The "cooperating individual" is "mine." The reality is that many of our clients are interested in cooperating, because they know that a government motion pursuant to 5K1.1 of the guidelines, 18 U.S.C. § 3553(e), or Fed.R.Crim.P. 35, is one of the surest ways to obtain a lower sentence. It might be because of the near certainty of being convicted in federal court (there is a 97% conviction rate). It might be because, despite the promise of *Booker,* federal sentences continue to be harsh. But for whatever reason, more and more criminal defendants find themselves cooperating with the government in an effort to get lower sentences. Although all criminal defense attorneys know that cooperation can lead to a lower sentence, not all attorneys take advantage of every opportunity to maximize the impact of cooperation.

One often-overlooked way to maximize the benefit from cooperation is to place your client's cooperation in the context of his rehabilitation and remorse. When I am on panels with federal judges at lawyers' conferences, I often engage them in discussions about what leads them to give a defendant a lower sentence. I have learned that, because judges take their duty to protect the public seriously, they are always looking for evidence that a defendant has had a "change of heart," has demonstrated "genuine remorse," and is highly unlikely to re-offend. Even the prosecution is less likely to come down as hard on a defendant it believes has been rehabilitated. One prosecutor put it to me this way. He told me that his office was "willing to go to bat for a fellow who we no longer view as an enemy of the state at war with society, but now view as an ally of law enforcement and a citizen who recognizes his duty to report crime."

The key to tying a client's cooperation to his rehabilitation is to determine whether he really is a changed person who is unlikely to re-offend. Our office utilizes mitigation specialists and mental health professionals to help us explain to the prosecutor, the probation officer and the judge why our client is cooperating. If it turns out that the client does not view cooperating simply as a way to cut his losses, but rather as a way to contribute to a better society and to demonstrate that he has truly cut his ties with his criminal past, we make every effort to bring that to the attention of the prosecution and sentencing judge. Those efforts can include obtaining reports and testimony from mental health professionals, letters to the Court from the client, letters and testimony from people who have witnessed transformations in the client's life, and sometimes even testimony from the government agents with whom the client has cooperated. A truly heart-felt allocution from a remorseful client can be particularly effective. This kind of evidence supports lower sentences, because, as the Supreme Court noted even before the guidelines:

> [T]he criminal defendant, no less than any other ctiizen, is obligated to assist the authorities. ... By declining to cooperate, [the defendant] rejected an obligation of community life that should be recognized before rehabilitation can begin. Moreover, [the defendant's] refusal to cooperate protected his former partners in crime, thereby preserving his ability to resume criminal activities upon

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A NOTE FROM ALAN ELLIS

"Over the past two years, I have been traveling to China to promote human rights. I have been awarded a Fulbright grant to conduct lectures in Shanghai, at Jiaotong University, School of Law, on the constitutional protections afforded criminal defendants in America. In May I hosted Chinese officials and jurists in the United States as part of a reassessment of China's death penalty."

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> release. Few facts available to a sentencing judge are more relevant to the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, [and] the degree to which he does or does not deem himself at war with his society.

Roberts v. United States, 445 U.S. 552, 558 (1980) (internal quotations, bracketed insertions, and citations omitted).

Of course, the only reason some clients cooperate is to get lower sentences. For these clients, it is important to remind the Court that truthful cooperation, whatever the motivation, is still an important indicator of rehabilitation—or at least a step in that direction.

The ideas expressed by the Supreme Court in *Roberts* can be particularly helpful in arguing for a lower sentence in a case in which the prosecution has not filed a departure motion, but has conceded that your client has cooperated fully and to the best of his ability. Even if a client's cooperation does not amount to "substantial assistance," the fact that he has done what he can to make amends with society can be a powerful argument for a lower sentence. This is especially true if there is other evidence of his remorse and rehabilitation.

Defendants who are willing to put their lives and safety, as well as the lives and safety of their families, at risk by providing truthful information to the government, earn whatever reduction in sentence they get. As defense counsel, we are committed to maximizing that reduction.

Alan Ellis has been referred to as a "nationally recognized expert in federal criminal sentencing" by the U.S. Court of Appeals for the Ninth Circuit. Federal Lawyer magazine has described Mr. Ellis as "one [of] this country's pre-eminent criminal defense lawyers."

BOP UPDATE: THE NEW SECURITY DESIGNATION AND CUSTODY CLASSIFICATION MANUAL

By J. Michael Henderson

The Bureau of Prisons (BOP) has changed the way it determines security levels for initial designations as well as for inmates who are already serving their sentences. The changes, which became effective on September 12, 2006, are found in Program Statement 5100.08, *Inmate Security Designation and Custody Classification*. This new program statement replaces the old PS 5100.07, *Security Designation and Custody Classification Manual.*

The new policy does more than simply transfer responsibility for initial classification and designation, as well as inmate transfers, from Regional Offices to the Designation and Sentence Computation Center (DSCC) in Grand Prairie, Texas. The new policy also makes major changes in the scoring system used for initial classification. Those changes include:

The seriousness of prior commitments is no longer judged by the Offense Severity scale. The Bureau now assesses from 0 to 10 points based on the Criminal History Score from the Presentence Report (PSI). In this system, the more points an inmate has, the higher his security level will be. The PSI's Criminal History Score now has a direct impact on the BOP's security level classification.

The new classification system adds a new scoring element for an offender's age at the time of commitment. The BOP believes that age is a factor in predicting adjustment to incarceration and possible misconduct in an institutional setting. Under the new system, younger offenders receive more points. For example, offenders aged 24 years or younger are assessed 8 points, while offenders aged 55 years or older are assessed 0 points.

The new classification system also adds a new scoring item for an offender's level of education. The BOP assesses 0 points if the Presentence Report documents and verifies that the offender has completed at least a high school education, or its equivalent. Otherwise, 2 points are assessed at initial commitment.

There is a new scoring element for drug and alcohol abuse that has gone into effect within the past 5 years. Under it, one point is assessed for such abuse, and 0 points if there has never been any abuse or if abuse was more than 5 years ago.

Offenders no longer receive point reductions for having been released on their own recognizances prior to or during trial. Now, only individuals who are permitted to voluntarily surrender to the Bureau of Prisons receive the 3-point reduction.

The new policy also revises certain Public Safety Factors (PSFs). When the BOP applies a PSF, it has the effect of elevating the scored security level. The new Program Statement changes the criteria for the Violent Behavior PSF. Now, female offenders with a history of two or more convictions for crimes of serious violence within the past 5 years, while still precluded from minimum security placement, can be placed at a low security facility rather than a high security facility. The criteria have also changed for the Deportable Alien PSF. This PSF is now applicable to all offenders who are not United States citizens, unless either U.S. Immigration and Customs Enforcement or the Executive Office for Immigration Review has made a finding not to deport the individual.

The new policy also stipulates that Bureau Designation officials *must* contact the sentencing court if a Statement of Reasons is not included when a request for designation is received.

The impact of these changes is being most acutely felt by younger offenders. Because of the points the BOP now assesses for age, more younger offenders are being designated to higher security facilities. For example, since inmates with 11 or more points are excluded from camps, the 8 points that inmates 24 years old and younger now receive based solely on their age, disqualifies many young offenders who would have previously been camp-eligible.

Mr. Henderson is a federal prison consultant with the firm and was a Bureau of Prisons official for over 23 years.

CASE NOTES

By James H. Feldman, Jr.

Post-*Booker,* extraordinary family circumstances remain good grounds for sentences substantially lower than the advisory guideline range. In *United States v. Husein,* 478 F.3d 318(6th Cir. 2007), the Sixth Circuit affirmed a sentence of one day's imprisonment, plus three years' supervised release, where the advisory guideline range was 37-46 months. The Court of Appeals found that there were sufficient facts to support the district court's finding that the defendant's assistance at home to care for her invalid father was "irreplaceable." The Court held that the fact that there were other potential sources of care did not make the sentence unreasonable.

When the guidelines suggest a sentence near the statutory maximum, the door is opened for defense counsel to argue that mitigating factors warrant a below guideline sentence. After all, sentences near the statutory maximum should be reserved for defendants with no mitigating factors who commit the offense in the most egregious way possible. A recent D.C. Circuit case illustrates the strength of the argument. In *United States v. Watson,* 476 F.3d 1020 (D.C. Cir. 2007), the Court reversed a 108-month guideline sentence where the district court had been under the false belief that the statutory maximum was 20 years, rather than 10. In rejecting the government's argument that the error was harmless, the Court reasoned that had the district court understood that the sentence was near the statutory maximum, it may have decided that mitigating factors warranted a lower one. In reaching this conclusion, the Court noted that the district court had explicitly stated that the 108-month sentence accounted for mitigating factors, since it was "considerably less than the statutorily-available maximum."

In cases involving financial crime, the guidelines are driven by the loss suffered by the victims. Although the sentencing court may "estimate" loss, that estimate must be "reasonable." USSG § 2B1.1, Appl. Note. 3(C). The Eleventh Circuit recently reversed a sentence based on the unreasonableness of a loss estimate. In *United States v. Patrick,* 479 F.3d 760 (11th Cir. 2007) (per curiam), the defendant had conspired with the executive director of a YMCA to embezzle funds from the Y by overbilling the Y for landscaping services, and for billing the Y for work on the executive director's house and gardens. The district court used the Y's tax liability for failing to pay payroll taxes for certain employees to estimate the loss from the scheme. The Eleventh Circuit reversed, noting that the tax loss bore little relationship to the loss caused by the scheme.

Following *Booker*, remorse and post-offense rehabilitation can offer powerful support for sentences substantially below the advisory guideline range. In *United States v. Ngatia,* 477 F.3d 496 (7th Cir. 2007), the Court of Appeals affirmed an 84-month sentence (more than 100 months *below* the bottom of the guideline range) that the district court found was justified by the defendant's shame (as expressed in her letter to the court as well as in a letter from a fellow inmate), her good character (as attested to by friends and relatives) and her rehabilitation efforts (as attested to by certificates of achievement she received while incarcerated).

Where a stock fraud scheme pumps up the stock values by disseminating false information, the loss caused by the scheme is the difference between what the stock sold for and what it would have sold for had there been no fraud. Since the loss is easy to determine where the stock is worthless, courts are sometimes too quick to presume worthlessness. That is what happened in *United States v. Zolp,* 479 F.3d 715 (9th Cir. 2007). Because the case involved the stock of companies which were not entirely sham operations, the Court of Appeals remanded for a resentencing at which the district court would recalculate loss by first determining what the stock value would have been absent the fraud.

It is important to remember that even after *Booker,* if a defendant has objected to a factual allegation in the Presentence Investigation Report (PSI), the burden is on the government to prove it with evidence. If it doesn't, then the court may not rely on the PSI's factual allegation at sentencing. See *United States v. Jenners,* 473 F.3d 894 (8th Cir. 2007).

Mr. Feldman is the editor of Federal Sentencing and Post Conviction News and a senior associate in the firm's Philadelphia office.

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For 39 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.

Areas of concentration include:

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- **Prison designation, transfers and disciplinary matters**
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The firm has a international practice with regional offices in Mill Valley (San Francisco), CA, and Ardmore (Philadelphia), PA. It will soon be opening its first foreign office in Shanghai, PRC.

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