FROM THE LAW OFFICES OF ALAN ELLIS

Federal Presentence and Post Conviction News

ISSUE 16, SPRING 1999

Only The Good News

LITIGATING SUBSTANTIAL ASSISTANCE MOTIONS

By Alan Ellis

There is a serious misconception that a federal prosecutor has unfettered discretion not to file a substantial assistance motion (*i.e.*, U.S.S.G § 5K1.1, 18 USC § 3553(e), Rule 35(b)) even if a defendant met the requirements of "substantial assistance in the investigation or prosecution of another person who has committed an offense." The first clear indication that there were any limits on prosecutorial discretion came in the case of *Wade v. United States*, 504 U.S. 181 (1992), in which the Supreme Court held that a prosecutor's refusal to file a § 5K1.1 motion "is subject to constitutional limitations that district courts can enforce," and that a defendant would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate government end."

Even before *Wade*, however, circuit courts had stated that, like other matters traditionally left within the prosecutor's discretion, a prosecutor's decision not to depart downward under § 5K1.1 was not without limit. More recently, courts have begun to circumscribe more narrowly a prosecutor's decision not to file a § 5K1.1 motion. In general, to date, the courts have recognized four broad categories of cases where the prosecution's refusal to file a § 5K1.1 motion warrants judicial review: where the refusal by the government constitutes (1) punishment of a defendant for exercising a constitutional right, (2) bad faith by the government in fulfilling its end of a cooperation agreement, (3) non-constitutional impermissible reasons, and (4) the "cutting edge" theory that post-*Koon* a court can *sua sponte* depart downward under § 5K2.0 based on substantial assistance notwithstanding the prosecutor's refusal to so move under § 5K1.1.

Punishing a Defendant for Exercising a Constitutional Right

In *Wade*, the Supreme Court held that a prosecutor's refusal to file a § 5K1.1 motion could not be based on an "unconstitutional motive," providing as examples a refusal based on "the defendant's race or religion." Post-*Wade*, examples of impermissible constitutional motives have expanded to include prosecutorial decisions penalizing a defendant for exercising his Sixth Amendment right to go to trial.

Bad Faith Refusal to File a § 5K1.1 Motion

In general, the government is under no obligation to ever file a substantial assistance motion—or even to listen to what a defendant seeking a sentence reduction has to say. Once, however, the government agrees—either expressly in a written or oral agreement or implicitly by allowing a defendant to cooperate—and a defendant begins to cooperate, he is relying upon the implicit commitment of the government to judge his substantial assistance in an objective and good faith manner. Where a plea agreement includes an obligation by the government to make a substantial assistance motion in exchange for the defendant's cooperation, the prosecutor's decision not to make the motion is judicially reviewable. This is so even if the determination of whether the defendant has rendered "substantial assistance" is expressly left to the discretion of the prosecutor. The prosecutor's discretion is not completely unlimited because there is an implied obligation of good faith and fair dealing in every contract. The scope of the government's discretion, though broad, does not permit it to ignore or renege on contractual commitments to defendants.

(continued on page 4)

PUBLISHER'S NOTE

This issue is devoted to U.S.S.G. § 5K1.1 substantial assistance motions and others. We believe that this will soon be a cutting edge issue in federal sentencing. With mandatory minimums foreclosing many otherwise meaningful downward departures, the number of cooperating witnesses will continue to grow and with it concomitant litigation arising from dissatisfaction with the results.

The lead article on "Litigating Substantial Assistance Motions" is accompanied by favorable—though not necessarily new—court decisions on the subject supporting our positions.

News and Practice Tips deal with this subject as well as other topics of interest.

1999 FEDERAL PRISON GUIDEBOOK

The 1999 Edition of ***Alan Ellis' Federal Prison Guidebook,*** *which has won recognition and praise from judges, defense counsel, prosecutors, probation officers and prison officials, will be available late Spring. The guidebook will contain new and updated information on prison features, e.g. drug treatment programming and services.*

Reserve your discounted copy today by contacting:

The Law Offices of Alan Ellis
P.O. Box 2178
Sausalito, CA 94966.

E-mail AELaw1@aol.com

FAVORABLE SUBSTANTIAL ASSISTANCE CASES

HEARINGS

In *United States v. Mikaelian*, No. 97-50174, 1999 U.S. App. LEXIS, 2337 (9th Cir. Feb. 17, 1999), the Ninth Circuit held that although the government has the discretion to decide whether to file a U.S.S.G. § 5K1.1 motion, "it does not have the last and only word on whether a defendant provided substantial assistance." If a defendant protests that he did indeed cooperate and that the government is acting in bad faith in refusing to file a motion, a factual dispute arises requiring an evidentiary hearing.

The Second Circuit has established its own ground rules for litigating a "bad faith" challenge. To prevail on a claim of breach of a cooperation agreement based on "bad faith," a defendant must first allege that he or she believes the government is acting in bad faith. Such an allegation is necessary to require the prosecutor to explain briefly the government's reasons for refusing to file a § 5K1.1 motion. Inasmuch as the defendant will generally have no knowledge of the prosecution's reasons at this first or pleading step, the defendant has no burden to make any showing of prosecutorial bad faith. Following the government's explanation, however, the second step imposes on the defendant the requirement of making a showing of bad faith sufficient to trigger some form of hearing on that issue. *United States v. Knights*, 968 F.2d 1483 (2ndCir. 1992).

In *United States v. Lezine*, No. 97-2571, 1999 U.S. App. LEXIS 1111, (7th Cir. Jan. 28, 1999), the Seventh Circuit held that when the government seeks to escape an obligation under a plea agreement on the grounds that the defendant has failed to meet some precondition, the defendant is entitled to an evidentiary hearing. In *Lezine*, the plea agreement provided that "assuming the defendant's full and truthful cooperation," the government "shall" move the court to depart downward from the applicable sentencing guideline range for a statutory minimum sentence. The Court of Appeals found that the plea agreement imposed a specific obligation on the government. Since the government made a definitive promise to Lezine, Lezine's due process rights demanded that the court determine whether or not he had failed to meet the precondition of "full and truthful cooperation." *Id.* at 21.

SUA SPONTE DEPARTURES

A district court may, *sua sponte*, without a U.S.S.G. § 5K1.1 motion depart under U.S.S.G. § 5K2.0 based on a defendant's cooperation. *United States v. Solis*, 161 F.3d 281 (5th Cir. 1998). See also, *In Re Sealed case (Sentencing Guidelines "Substantial Assistance")*, 149 F.3d 1198 (D.C. Cir. 1998), *vacated, in part, reh'g, en banc, granted*, 159 F.3d 1362, 1998 U.S. App. LEXIS 29803 (D.C. Cir. 1998) (reh'g en banc held January 27, 1999).

UNCONSTITUTIONAL MOTIVES

The government may not refuse to file a U.S.S.C. § 5K1.1 motion simply because the defendant chose to exercise the constitutional right to trial. *United States v. Khoury*, 62 F.3d 1138 (9th Cir. 1995); *United States v. Paramo*, 998 F.2d 1212 (3rd Cir. 1993); *United States v. Easter*, 981 F.2d 1549 (10th Cir. 1992).

OTHER IMPERMISSIBLE MOTIVES

In *United States v. Anzalone*, 148 F.3d 940 (8th Cir. 1998), the government advised the court that it had received information that defendant Anzalone had used and possessed controlled substances, violating a provision of his plea agreement that he "not commit any additional crimes whatsoever." The government refused to file a U.S.S.G. § 5K1.1 motion because of the defendant's violation of the plea agreement. The district court held that the government's decision was rational. The Eighth Circuit reversed and remanded to the district court for a determination whether the defendant's assistance was substantial, holding that unless a defendant's breach of his cooperation agreement damaged the case in which he was cooperating, the defendant's breach does not justify the government's refusal to make a § 5K1.1 motion.

NOT AFFORDING OPPORTUNITY TO COOPERATE

If a court finds that the government in bad faith has barred a defendant from opportunities to cooperate under circumstances wherein the government agreed to file a U.S.S.G. § 5K1.1 motion upon defendant providing substantial assistance, the court may order the government to file a § 5K1.1 motion even if a defendant did not, as a result, provide substantial assistance. *United States v. Laday*, 56 F.3d 24 (5th Cir. 1995); *United States v. Wilder*, 15 F.3d 1292 (5th Cir. 1994); *United States v. Ringling*, 988 F.2d 504 (4th Cir. 1993).

COOPERATION WITH OTHER AUTHORITIES

A departure for substantial assistance under U.S.S.G § 5K2.0 is permitted where a defendant provides substantial assistance to branches of government other than those that engage in prosecutorial activities. See, e.g., *United States v. Sanchez*, 927 F.2d 1092, 1093 (9th Cir. 1991)(assistance in the prosecution of a civil forfeiture case); *United States v. Khan*, 920 F.2d 1100, 1107 (2nd Cir. 1990)(assistance in rescuing an informant kidnapped by foreign drug dealers); *United States v. Bennett*, 9 F.Supp. 2d 513, 525-26 (E.D.PA.1998)(assistance to bankruptcy trustee); *United States v. Stoffberg*, 782 F.Supp. 17, 19,(E.D.N.Y.1992)(assistance to a congressional committee). In addition, the Second Circuit has held that a district court could consider a departure under § 5K2.0 for a defendant who cooperated with local law enforcement authorities. *United States v. Kaye*, 140 F.3d 86 (2nd Cir. 1998).

PRACTICE TIPS

Substantial Assistance

In order to prove that the government's refusal to file a § 5K1.1 motion is in bad faith, consider:

- Filing a *Brady* motion for anything in the possession of the government favorable to the accused in mitigation of punishment.
- Filing a motion for all records regarding your client's debriefing, to whom the information was disseminated and any results. See *United States v. Mikaelian*, No. 97-50174, 1999 U.S. App. LEXIS 2337, (9th Cir. Feb. 17, 1999).
- Issuing a subpoena to the prosecutor and/or the case agent and extract from them all the ways in which your client's assistance was used.
- Issuing a subpoena for any U.S. Attorney Office internal policies and procedures for making § 5K1.1 motion determinations.
- Issuing a subpoena or writs of habeas corpus ad testificandum to any persons who are on the receiving end of your client's cooperation—these people may be happy to discuss the various ways in which your client has made their lives miserable.

See, Felman, "Defense Strategies for Litigating Substantial Assistance Downward Departures," *The Champion* (July 1994).

If the court refuses to order the government to file a U.S.S.G. § 5K1.1 motion, preserve your issue for appellate review, and seek a downward departure based on "super/extraordinary acceptance of responsibility." Alternatively, urge a downward departure based on "combination of factors"—individual factors which on their own, do not warrant a downward departure—and include "cooperation" that does not rise to the level of substantial assistance. For example, if you have an okay but not great argument for aberrant behavior, post-offense rehabilitation, extraordinary family circumstances, add the "less than substantial assistance cooperation" to the mix and you might get a "combination of factors" departure. U.S.S.G. § 5K2.0, Commentary; "Let Judges Be Judges! Post-Koon Downward Departures: Part 5: Combination of Factors," *Criminal Justice* (Winter 1999). Even if you don't get a downward departure, these mitigating factors can often help in getting a sentence at the low end of the guideline range. This is particularly important when the offense level and/or the Criminal History Score renders high guidelines and/or your client is facing a top end of the guideline sentence.

Safety Valve

Absent a cooperation agreement, statements made by a safety valve eligible defendant at a safety valve debriefing does not necessarily entitle him to guideline immunity under § 1B1.8, which provides that the government will not use self-incriminating information given by a cooperating defendant in determining the applicable guideline range. Thus, the statements can be used to enhance his offense level unless an agreement explicitly provides this protection. *United States v. Cruz*, 156 F.3d 366 (2nd Cir. 1998).

NEWS

From the Bureau of Prisons

Generally, deportable aliens are not eligible for federal prison camp placement. However, a non-U.S. citizen may still be eligible for a federal prison camp if he meets the following criteria: (1) documented and/or independently verified history of stable employment in the U.S. for at least three years immediately prior to incarceration; (2) verified history of domicile in the U.S. for five or more consecutive years; and (3) verified strong family ties (only the immediate family) in the United States. BOP Program Statement 5100.06, Ch. 6. The information must be verified in the Presentence Investigation Report.

The Bureau of Prisons is in the process of revising and updating their Security Designation and Custody Classification Manual (Program Statement 5100.06). The new program statement (5100.07) is to be released by Fall 1999, and is expected to include, among other changes, inmate security level assignments based on a revised classification scoring system. The object of the new program statement is to reclassify offenders in such a way that it results in the even distribution of the federal prison population so as to control overcrowding. Expect more inmates to qualify for federal prison camps.

From the Sentencing Commission

Data on the extent of § 5K1.1 downward departures by district and offense are now available from the U.S. Sentencing Commission.

From the Sixth Circuit

If you are appealing a case in the U.S. Court of Appeals for the Sixth Circuit, make sure you include all the information in the Notice of Appeal set forth in Fed. R. App. P. 3(c). The Sixth Circuit has held that a notice of appeal is "jurisdictionally defective" resulting in dismissal of the appeal if the notice does not designate the name of the court to which the appeal was taken, as required by Rule 3(c). *United States v. Webb*, 157 F.3d 451 (6th Cir. 1998)(per curiam). Although we believe the opinion misconstrues both Rule 3(c) and the Supreme Court precedent regarding proper construction of Rule 3(c) and the required contents of a notice of appeal, it remains to date the law of the Sixth Circuit.

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.

(continued from page 1)

In addition, if a court finds that the government barred a defendant from additional opportunities to cooperate under circumstances wherein the government agreed to file a § 5K1.1 motion upon defendant's providing substantial assistance, the court may order the government to file a substantial assistance motion even if a defendant did not, as a result, provide "substantial assistance."

Impermissible Motives

The government cannot base its decision whether to file a substantial assistance motion on factors other than the substantial assistance provided by the defendant. Unless the defendant breached his cooperation agreement in a way that damaged the case in which he was cooperating, any other breach does not justify the government's refusal to make the motion.

§ 5K2.0 Departure for Substantial Assistance

Courts have found that a departure is permitted under U.S.S.G. § 5K2.0 in the absence of a government motion for substantial assistance under various circumstances. Notwithstanding the absence of a government § 5K1.1 motion, several circuits have already held that a departure for substantial assistance under § 5K2.0 is permitted where a defendant provides substantial assistance to other federal government agencies as well as state and local law enforcement agencies. At least two circuits have recently held that a court can depart downward under § 5K2.0 based on substantial assistance notwithstanding the prosecutor's refusal to so move under § 5K1.1.

Publisher: Alan Ellis
Editor: Samuel Shummon
Contributing Editors:
Wayne Anderson
Anna M. Durbin
James H. Feldman, Jr.
Peter Goldberger
Pamela A. Wilk
Associate Publisher:
Deborah Bezilla

Federal Presentence and Post Conviction News is published four times a year by The Law Offices of Alan Ellis.

San Francisco Office
34 Issaquah Dock, Waldo Point Harbor
P.O. Box 2178
Sausalito, CA 94966
(415) 332-6464 • FAX (415)332-1416
AELaw1@aol.com

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