FEDERAL SENTENCING AND POST-CONVICTION News

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# Tips on Getting Your Client Into the Best Prison

## and Released at the Earliest Opportunity

*By Alan Ellis*

At sentencing, most defense attorneys rightly focus on guideline objections, departures, and variances. They want to make sure not only that the sentencing guideline range comes out as low as possible, but also that the court is persuaded by any arguments for a sentence below the bottom of that range. While working for the lowest possible sentence is the defense attorney's most important job, defense counsel should not overlook ways to ensure that the client gets into the best possible prison and is released at the earliest opportunity.

Although it is the policy of the Bureau of Prisons (BOP) to place an individual in the least restrictive facility within 500 miles of the inmate's "release residence" for which he or she qualifies, many inmates end up serving their time far from their families and under harsher conditions than necessary. It doesn't have to be that way. There is a lot a defense attorney can do to ensure that his or her clients do their time in the best possible facilities. First, defense attorneys need to understand how the BOP classifies its facilities, and the characteristics of each type of facility. Second, they need to understand how the BOP decides what type of prison is appropriate for a particular defendant. Finally, defense attorneys need to know what to do to increase the chances that their clients will be sent to the prisons they want. The first step in this process is to download the BOP's Security and Classification Manual (Program Statement 5100.008), which lays out the BOP's rules for security classification scoring. It is available in PDF format from the Bureau's website: **www.bop.gov**.

Once a defense attorney understands how the system works, there are four things he or she can do to ensure that a client serves time in the best possible facility. First, counsel should ensure the accuracy of the information on which the Bureau will rely to make its designation decision. Second, counsel should score the client and search for Public Safety Factors (PSFs) to determine the appropriate security level. PSFs (such as "deportable alien") can preclude camp placement for otherwise qualified defendants. Third, counsel should consult with the client to determine which facility at the appropriately-calculated security level the client prefers and then ask the sentencing judge to recommend that facility to the BOP, as well as to provide reasons in support of that recommendation. Counsel should, of course, suggest reasons as part of his or her request. Finally, counsel should, in appropriate cases, request self-surrender.

The most important thing defense counsel can do to ensure designation to the lowest security prison possible is to make sure that any inaccurate information in the Presentence Investigation Report (PSR) is corrected. The BOP relies almost exclusively on the information contained in the PSR to decide where a defendant will do time – as well as to make other important correctional decisions (such as whether a defendant is eligible for the Bureau's Residential Drug Abuse Program – "RDAP")[1]. It is for good reason that the PSR is known as the "bible" by prisoners and BOP staff alike.

If defense counsel objects to inaccurate information at the time of sentencing and the judge sustains those objections, defense counsel must make sure that the PSR is corrected before it is sent to the BOP or, at a minimum, that formal findings are made by the judge pursuant to

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**A NOTE FROM ALAN ELLIS**

The Bureau of Prisons has recently revised and updated its *Security and Classifications Manual* – PS 5100.08. Our lead article will give you tips on getting your client into the best prison and released at the earliest opportunity.

On another note, we are proud to announce that our *Federal Prison Guidebook* is now being published by James Publishing. The next edition should be ready by early next year. The new publisher will let you know how to order it.

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Fed.R.Crim.P. 32(c)(1) and attached to the PSR before it is forwarded to the Bureau. A finding made in the judgment in a criminal case (preferably in the statement of reasons portion) will also suffice.

It is also important for counsel to make sure that the PSR's criminal history score is accurate. The addition of one criminal history point may not change a defendant's Criminal History Category ("CHC"). But it can still be important to object to these seemingly harmless additions. A single point might also affect prison designation, since the BOP now uses criminal history points to calculate an individual's security level[2]. Criminal History Points can affect the type of facility to which the offender may be assigned, even if the judge sentences outside the guideline range.

It is also important for defense counsel to make sure that the PSR adequately documents any drug (illegal as well as prescription) abuse or alcoholism. Many defense lawyers and defendants tend to downplay substance abuse problems, under the mistaken belief that revealing such problems can harm the client. Unless a client's substance abuse problem is adequately documented in the PSR, he or she may not qualify for the Bureau's Residential Drug Abuse Program (RDAP) and will not get the chance to earn up to a one-year reduction in sentence pursuant to 18 U.S.C. § 3621(c)(2), which permits such a reduction for nonviolent inmates who successfully complete a residential drug treatment program in a BOP facility.

Attorneys often try to magnify their client's health problems in hopes of gaining sympathy from the sentencing judge. A focus on mental or physical problems can be warranted if it supports an argument for a lower sentence based either on Guideline Program Statements, such as USSG § 5H1.3 (p.s.) (mental and emotional conditions "not ordinarily relevant") and § 5H1.4 (physical condition "not ordinarily relevant"), or the non-guideline factors 18 U.S.C. § 3553(a) requires a court to "consider." Otherwise, highlighting these problems may have the unintended consequence of the client being designated either to a medical facility rather than a camp, or to a different camp that is not the client's first choice.[3]

This is not to say that medical problems should be minimized. Medical problems should be accurately reported in the PSR. Otherwise, not only may the client not receive appropriate medical treatment and be required to perform physical labor precluded by a medical condition, the client may be designated to a prison that is not equipped to provide the level of care the client needs. It is also important for the PSR to list medications the client has been prescribed.

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*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."*

Initial placement is based classifications that consider both security and medical needs. The BOP makes these classifications based on information in the PSR. Each defendant is assigned a security level based on offense characteristics, sentence, and history, as well as a Level of Care (I, II, III, or IV) based on his or her anticipated medical requirements. The facility nearest the defendant's legal residence, as reflected in the PSR, that meets the security and medical care level requirements and which has bed space available is generally designated for service of sentence.

Finally, it is important to ensure that the PSR lists the correct client address. Since "release residence" is defined by the BOP as the defendant's legal address that's listed on the PSR, the BOP will attempt to house your client near that address. If that address is not only far from family and friends who want to visit your client, but also far from the area to which you client intends to relocate upon release, you should consider requesting that another address be used.

While it is important for defense counsel to make sure the facts in the PSR support the most favorable designation, it is also important for defense counsel to obtain a judicial recommendation supported by reasons. Unfortunately, some judges don't like to recommend particular places of confinement at sentencing, believing that they are not "correctional experts," or because they have become discouraged by letters they get from the BOP advising them that their recommendations cannot be honored in a particular case. In these situations, counsel should point out two things. First, when the BOP fails to honor a judge's recommendation, it is usually because the judge has recommended a facility incompatible with the defendant's security level. Counsel should assure the judge that the defendant qualifies for the facility requested. Second, counsel should remind the court that, although judicial recommendations are only recommendations, that does not mean they are not important. Not only does 18 U.S.C. § 3621(b)(4)(B) specifically contemplate these recommendations, but BOP Program Statement 5100.08 says that the BOP welcomes a sentencing judge's recommendation and will do what it can to accommodate it. Bureau statistics show that in approximately 85% of the cases in which the defendant qualifies for the institution recommended by the judge, the court's recommendation is honored.

Without a recommendation from the judge, prison overcrowding may prevent your client from being designated to the facility he prefers—even if he qualifies for it, and even if it is close to his home. Should there be only one slot open at a prison such as the Federal Prison Camp in Fairton, New Jersey, and there are two defendants who want that placement, the one with the judicial recommendation is more likely to get it. If your judge is reluctant to make recommendations, it may help to get a copy of the Bureau's Program Statement 5100.08 and show the Court the page that deals with judicial recommendations.

Sometimes an unsupported recommendation may not be enough. Before sentencing, draft the language you want the

court to use to make the recommendation. For example, if the reason your client wants a particular facility is because it has the RDAP program, the court's recommendation should say that the Court recommends the facility for that reason. If the Court agrees to include the reasons you have suggested, offer to submit your draft to the judge and the courtroom deputy clerk.

[1] For more information on the RDAP program, *see* Alan Ellis and J. Michael Henderson, "Getting Out Early: BOP Drug Program," *Criminal Justice* (Summer 2005); and Alan Ellis and J. Michael Henderson, "Reducing Recidivism: The Bureau of Prison's Comprehensive Residential Drug Abuse Program," *Champion* (July 2006). Both articles can be found at www.alanellis.com.

[2] *See* Program Statement 5100.08.

[3] Our website contains a link to the BOP's memorandum on level of care. Go to: **http://www.alanellis.com/CM/Publications/BOP-Medical-Classification.pdf**.

# FAVORABLE NEW CASES

***By James H. Feldman, Jr.***

Unfortunately, we did not have room to include all of the favorable new cases we had hoped to report. Those cases may be found on our website, **www.alanellis.com**. Click on the link to the "Publications" page.

● The Sentencing Commission has acknowledged from the beginning that the guidelines do not take into account "the vast range of human conduct potentially relevant to a sentencing decision." USSG § 1A1.1(4)(b) (1987 ed.). That is why, even under the formerly mandatory guideline regime, departures were permitted where there existed a mitigating factor "of a kind or to a degree that was not adequately considered by the Sentencing Commission in formulating the guidelines." USSG § 5K2.0(a); *Koon v. United States,* 518 U.S. 81, 113 (1996). Even so, the guidelines prevented courts from taking certain §3553(a) factors into account in determining a sentence. For example, although USSG § 5K2.13 *encourages* courts to depart when a defendant's diminished mental capacity "contributed substantially to the commission of the offense," it used to prohibit courts from sentencing below the guideline range when the diminished mental capacity was caused by the voluntary use of drugs of other intoxicants. The Ninth Circuit recently held that after *Booker,* that prohibition no longer prevents sentencing courts from considering a variance based on the impact of a defendant's drug addiction. See *United States v. Garcia,* 497 F.3d 964 (9th Cir. 2007), (remanding for resentencing after district court refused to consider drug addiction as a mitigating factor under 18 U.S.C. § 3553(a)(1)).

● Prosecutors, district courts, and sometimes even defense counsel misunderstand *Booker* to require district courts to impose "reasonable" sentences. As the Supreme Court clarified in *Rita v. United States,* 127 S.Ct. 2456 (2007), "reasonableness" is a standard of appellate review, not a consideration of the district court. District courts are to select the sentence which is "sufficient, but not greater than necessary" to meet the goals of sentencing as laid out in 18 U.S.C. § 3553(a)(2). The D.C. Circuit recently applied this principle to reject a government argument that it should review an unreasonableness claim for "plain error," because defense counsel did not object to the reasonableness of the sentence in the district court. *United States v. Bras,* 483 F.3d 103 (D.C. Cir. 2007). The Sixth Circuit recently applied the principle to vacate a sentence and remand for resentencing where the sentencing judge had improperly applied the presumption of reasonableness. The Court held that when a sentencing court applies the presumption, it necessarily failed to consider the § 3553(a) factors. *United States v. Wilms,* 493 F.3d 277 (6th Cir. 2007).

● Prosecutors must not only fulfill the letter of the government's plea agreement promises, they must fulfill the spirit as well. In *United States v. Cachucha*, 484 F.3d 1266 (10th Cir. 2007), the government not only stipulated to guideline range of 10-16 months, but promised to argue for a sentence within that range. At sentencing, however, "the prosecutor made several statements implying that the offense level of 12 was too low." Even though the prosecutor did not explicitly request a higher sentence, the Court of Appeals reversed and remanded for resentencing before a different judge.

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

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.

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