FEDERAL SENTENCING AND POST-CONVICTION News

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HEALTHCARE IN THE FEDERAL PRISON SYSTEM

By Alan Ellis

There are four levels in the Bureau of Prisons (BOP) medical CARE Level classification system. A provisional care level is assigned by the Designation and Sentence Computation Center (DSCC), based primarily on information contained in the Presentence Investigation Report. After arrival at the designated facility, the provisional care level is reviewed and a non-provisional CARE Level is assigned by BOP clinicians. These assignments depend on the clinical resources an inmate needs and his or her ability to function daily without assistance. Some diagnostic categories such as cancer, diabetes, HIV, and hepatitis may also be used to determine an inmate's care level.

CARE LEVEL 1

- Inmates are generally healthy, but may have limited medical needs that can be easily managed by clinician evaluations every six months.
- Inmates are less than 70 years of age.
- CARE Level 1 designations are made by the DSCC.
- Examples of conditions that qualify for CARE Level 1: mild asthma, diet-controlled diabetes, stable HIV patients not requiring medications.

CARE LEVEL 2

- Inmates are stable outpatients who require at least quarterly clinician evaluations.
- Inmates can be managed through routine, regularly scheduled appointments with clinicians for monitoring, including for mental health issues.
- Enhanced medical resources, such as consultation or evaluation by medical specialists, may be required from time to time, but are not regularly necessary.
- CARE Level 2 designations are made by the DSCC.
- Examples of conditions that qualify for CARE Level 2: medication-controlled diabetes, epilepsy, or emphysema.

CARE LEVEL 3

- Inmates are fragile outpatients who require frequent clinical contacts to prevent hospitalization for catastrophic events.
- Inmates may require some assistance with activities of daily living, such as bathing, dressing, or eating, but do not need daily nursing care.
- Other inmates may be assigned as "companions" to provide the needed assistance.
- Stabilization of medical or mental health conditions may require periodic hospitalization.
- Designation of CARE Level 3 inmates is made by the BOP's Office of Medical Designation and Transportation in Washington, D.C.
- Examples of conditions that qualify for CARE Level 3: cancer in remission less than a year, advanced HIV disease, severe mental illness in remission on medication, severe congestive heart failure, end-stage liver disease.
- BOP CARE Level 3 Facilities include:

  FCI Terminal Island, California
  FCI Ft. Worth, Texas
  FCC Terre Haute, Indiana
  FCC Butner, North Carolina

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FEDERAL SENTENCING GUIDEBOOK

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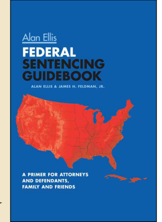

Booker, *Gall*, and *Kimbrough* have radically impacted federal sentencing guidelines. Alan Ellis' updated *Federal Sentencing Guidebook* explains in simple, straight-forward language how the rules have changed and how federal practitioners and their clients can benefit. A must-have primer that will help bridge the gap in client-attorney communications, the *Guidebook* includes detailed advice and practice tips to achieve lower sentences. Every client should have one, so order multiple copies and save: one copy at $19.95 or three or more copies at $14.95 each. For more information and/or to order, click here: **www.alanellis.com**

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CARE LEVEL 4

- Inmates require service available only at a BOP Medical Referral Center (MRC) which provides significantly enhanced medical services and limited in-patient care.
- Inmates may need daily nursing care.
- Functioning may be severely impaired and require 24-hour skilled nursing care or nursing assistance.
- Designation of CARE Level 4 inmates is made by the BOP's Office of Medical Designation and Transportation in Washington, D.C.
- Examples of conditions that qualify for CARE Level 4: cancer on active treatment, dialysis, quadriplegia, stroke or head injury patients, major surgical treatment, high-risk pregnancy.
- The BOP operates six CARE Level 4 MRCs:

  U.S. Medical Center for Federal Prisoners, Springfield, Missouri, provides care primarily for higher security level inmates, and includes a full dialysis unit, as well as an inpatient mental health unit.

  FMC Rochester, Minnesota, is affiliated with the Mayo Clinic for complex medical requirements, and includes an in-patient mental health unit.

  FMC Lexington, Kentucky, generally manages lower security level inmates.

  FMC Devens, Massachusetts, includes a dialysis unit and an inpatient mental health unit, as well as the residential Sex Offender Treatment Program.

  FMC Butner, North Carolina, includes an in-patient mental health unit, and can manage inmates at all security levels. It is the cancer treatment center for the BOP.

  FMC Carswell, Texas, is exclusively for female inmates and is the only FMC available for women. It includes an in-patient mental health unit.

The BOP defines its scope of medical services according to five levels of medical intervention:

Medically Necessary—Acute or Emergent. Medical conditions that are of an immediate, acute or emergent nature, which without care would cause rapid deterioration of the inmate's health, significant irreversible loss of function, or may be life-threatening.

Medically Necessary—Non-Emergent. Medical conditions that are not immediately life-threatening but which without care the inmate could not be maintained without significant risk of:

serious deterioration leading to premature death;

significant reduction of the possibility of repair later without present treatment; or

significant pain or discomfort which impairs the inmate's participation in activities of daily living.

Medically Acceptable—Not always Necessary. Medical conditions that are considered elective procedures, when treatment may improve the inmate's quality of life. Relevant examples in this category include, but are not limited to:

joint replacement;

reconstruction of the anterior cruciate ligament of the knee; and

treatment of non-cancerous skin conditions (e.g. skin tags, lipomas)

Limited Medical Value. Medical conditions in which treatment provides little or no medical value, are not likely to provide substantial long-term gain, or are expressly for the inmate's convenience. Procedures in this category are usually excluded from the scope of services provided to Bureau inmates. Examples in this category include, but are not limited to:

minor conditions that are self-limiting;

cosmetic procedures (e.g. blepharoplasty [cosmetic surgery on the eyelids]); or

removal of non-cancerous skin lesions.

Extraordinary. Medical interventions are deemed extraordinary if they affect the life of another individual, such as organ transplantation, or are considered investigational in nature.

It is the policy of the BOP to provide care that its clinicians determine to be medically necessary. Those medical interventions that fall into the categories of "medically necessary, acute or emergent" or "medically necessary, non-emergent" are those which the agency considers to be medically necessary. However, those that fall into the classification of "medically appropriate but not always necessary" are considered elective and must undergo review by a Utilization Review Committee before approval, and are unlikely to be approved and completed, based on limited medical resources. In addition, pretrial or non-sentenced inmates, and inmates with less than 12 months to serve, are ineligible for health services considered "medically appropriate–not always necessary," "limited medical value," or "extraordinary."

Alan Ellis, Past President of NACDL, specializes in sentencing, prison matters, and post-conviction remedies, with offices in San Francisco, CA, and Philadelphia, PA. He is a co-author of the Federal Prison Guidebook *and the* Federal Sentencing Guidebook *and a contributing editor to* Criminal Justice *magazine for which he writes a quarterly column on federal sentencing. Mr. Ellis has been described as "one of this country's pre-eminent criminal defense lawyers" by* Federal Lawyer *magazine. The United States Court of Appeals for the Ninth Circuit in a published decision has identified him as a "nationally recognized expert in federal criminal sentencing."*

PRACTICE TIP: THE SECOND CHANCE ACT

President Bush recently signed the Second Chance Act which, in some instances, may allow early release for some federal inmates from the federal prison system. We are available to be retained to review individual cases to determine whether we can be of any help in a particular case. After the review, if—and only if—we believe we can be of assistance, will we then go forward in an effort to secure early release.

FAVORABLE NEW CASES

- The fraud guideline includes a 2-level upward adjustment for the unauthorized use of a means of identification to produce or obtain any other means of identification. USSG § 2B1.1(b)(10)(C)(i) (2007 ed.). Although this adjustment is designed for identify theft cases, it applies to all frauds. While the adjustment may seem straightforward, it is anything but. "Means of identification" is defined as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual." 18 U.S.C. § 1028(d)(7). A recent Third Circuit case puts some limits on the adjustment. In that case, a financial advisor was convicted of a mail fraud scheme in which he pocketed money his clients gave him to invest. To hide the crime, he altered investment account addresses so clients would not be notified of transactions that might alert them to the fraud. At sentencing, the court applied the two-level identity theft adjustment. The Third Circuit reversed, reasoning that a name in combination with a different address is not a new means of identification, since it did not give the defendant the ability to steal additional money. It simply made it more difficult for the victims to discover the offense. *United States v. Hawes*, 2008 WL 820023 (3d Cir. March 27, 2008).

- Most, if not all, judges come to sentencing with a tentative sentence in mind. Some even announce the tentative sentence before hearing from either party. The Seventh Circuit has now held that this practice violates Rule 32(i)(4)(A)(ii), which requires a court "[b]efore imposing sentence" to "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." In that case, the district court announced its tentative sentence before inviting the defendant to speak. The defendant took the opportunity to address the court, but prefaced his remarks with "there ain't too much I can say to change your mind." The Seventh Circuit found the Rule 32 violation to be plain error, reversed, and remanded for resentencing. *United States v. Griffin,* 2008 WL 901458 (7th Cir. April 4, 2008).

- The guidelines provide for a 2 or 3-level reduction for acceptance of responsibility. USSG § 3E1.1. While this adjustment is generally not available to defendants convicted after trial, there are exceptions, such as "where a defendant goes to trial to assert and preserve issues that do not related to factual guilt." Appl. Note 2. This is not the only circumstance. In *United States v. Lozano,* 514 F.3d 1130 (10th Cir. 2008), the defendant went to trial on conspiracy and substantive drug counts after the prosecution refused to consider a plea agreement that did not include the conspiracy. After the defendant was convicted on the substantive counts, but acquitted of the conspiracy, she objected to the PSR's recommendation that she be denied credit for acceptance of responsibility. The sentencing court agreed that she had never denied her guilt to the substantive counts, but granted only a one-level reduction. The Court of Appeals reversed, holding that once a court determines that § 3E1.1 applies, the defendant is entitled to at least two-levels. See also *United States v. Gamboa-Cardenas,* 508 F.3d 491 (9th Cir. 2007) (affirming adjustment based on defendant's pre-trial statements where defendant put on a duress defense at trial).

- Motions to vacate sentence ("2255 motions") generally allege Sixth Amendment violations of the right to the effective assistance of counsel. To win, a defendant must show not only that the lawyer was incompetent, but also that there is a reasonable probability that the incompetence affected the outcome of the case. Incompetence and prejudice do not have to be proven when a defendant is actually deprived of counsel. The Sixth Circuit recently reversed the denial of a 2255 motion on this basis. In that case, counsel informed the court that the defendant had fired him and did not want his representation at sentencing. The defendant confirmed this, but did not ask for permission to represent himself. Rather than inquire further, the court gave the defendant the choice of proceeding without counsel or having his fired counsel speak for him. The defendant responded that the attorney could speak, but not represent him. The Court of Appeals reversed. While the district court did not necessarily have to postpone sentencing to allow the defendant the opportunity to retain other counsel, it did have to find out the reason the defendant was dissatisfied with his attorney. *Benitez v. United States,* 2008 WL 942048 (6th Cir., April 9, 2008).

- Although a defendant filing a § 2255 motion must comply with many rules, the one-year statute of limitations is the most important. A late filing can sometimes be excused by "equitable tolling," but the better practice is to file on time – even if the motion does not comply with another rule. Rule 3(b) of the Rules Governing § 2255 Proceedings, as well as Rule 5(e) of the Federal Rules of Civil Procedure, requires the Clerk to file a motion, even if it is not presented in the proper form. The Eleventh Circuit recently relied on this rule to reverse a district court's denial of a § 2255 motion as untimely. The Clerk had refused to file an otherwise timely motion because it was not signed under penalty of perjury. By the time the defendant signed it under penalty of perjury and refiled, the statute of limitations had run. The district court denied the motion on that basis. The Court of Appeals reversed, holding that Rule 3(b) required the Clerk to file the motion the first time. *Michel v. United States,* 2008 WL 634088 (11th Cir. March 11, 2008).

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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.

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