

Statement Of Reasons Trumps Erroneous Presentence Report

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This is the first in a series of articles on Bureau of Prison information and practice tips for lawyers and their clients. In addition to highlighting successful tips from my own 50 years of practice, I will be interviewing former BOP officials.

Have you ever encountered sentencing judges reluctant to direct the probation officer to make corrections to the final presentence report? The same thing – and sometimes even better – can be accomplished by asking the judge to issue a statement of reasons.

Typically, judges merely check off the boxes and fill in the blanks on the form.

However, recently, I represented a new client inmate post sentencing who received a two-level increase for a gun bump under U.S.S.G. §2B1.1(b)(1) (“If a dangerous weapon (including a firearm) was possessed, increase by two levels.”) This gun bump makes an inmate ineligible for receiving the time off under 18 U.S.C. §3621(e) for successfully completing the Residential Drug Abuse Program. I was able to persuade the sentencing judge to issue a statement of reasons finding that despite the PSR, the inmate was merely a collector. He got the one-year reduction.

The statement of reasons form is prescribed by law — and is properly seen as a tool for correcting errors in the PSR. See 28 U.S.C. §994(w). In particular, the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 192 (2006), amended 28 U.S.C. § 994(w) to require that the reasons for the sentence imposed in every case be “stated on the written statement of reasons form issues by the Judicial Conference and approved by the United States Sentencing Commission.” 28 U.S.C. § 994(w)(1)(B). Thereafter, the Judicial Conference issued and the Sentencing Commission approved Form AE 245B, which was revised in February 2016. Section IB4 of the revised form provides in relevant part:

Additional Comments or Findings “comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions.”

Chapter VI of Publication 107, the U.S. Probation Monograph published by the Administrative Office of the Courts, addresses the use of a criminal judgment’s statement of reasons section to convey pertinent prison-related information to the BOP:



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Statement of Reasons

... The Statement of Reasons, together with the presentence report, is relied upon by staff at the Federal Bureau of Prisons to make inmate classification, designation, and programming decisions. Bureau staff look to the Statement of Reasons for court findings - that differ from the tentative findings in presentence reports - as they relate to controverted guideline applications (e.g., specific offense characteristics or other adjustments) and non-guideline-related (e.g., prior history of sexual misconduct, escapes, violence, immigration status, threats against government officials) issues.

Chapter VI continues, addressing the interplay between how information is provided to the BOP via the PSR and the statement of reasons:

Court-Ordered Corrections

In limited cases, the court may direct that the presentence report be changed. This is to reflect his or her findings on contested issues, particularly if a process has not been adopted by the court to ensure that all findings -- both guideline and non-guideline related-- are routinely transmitted to the Bureau of Prisons using the Statement of Reasons. If the presentence report is changed, the probation officer can hand-write the changes in the original report or revise the sections in the report resolved by the court and label the report "Amended by Order of the Court."

Statement of Reasons

... The Statement of Reasons is now also used by many districts to include findings of disputed issues required by F.R.Crim.P. 32, reasons for departures or sentences outside of the advisory guidelines system, and findings that may not be required for sentencing purposes, but may be very relevant for other post-sentencing purposes. Since the Statement of Reasons is included in the judgment, it is now routinely received by the Federal Bureau of Prisons and Sentencing Commission in those cases in which the judgment is received. Courts are encouraged to adopt procedures to ensure that the Statement of Reasons is used to transmit all findings – both guideline and non-guideline related – to the Bureau of Prisons.

The statement of reasons will be transmitted to the BOP, along with the judgment and the PSR. The bureau rarely sees statements of reasons correcting a PSR, so, when they do, they pay attention. The statement of reasons trumps the PSR in the eyes of the BOP. For example, if the PSR states that your client has "an occasional glass of wine with dinner," it will not make him eligible for the RDAP program. A statement of reasons indicating that he was drinking heavily within 12 months prior to his arrest will make him eligible, all other things being equal.

The BOP reviews the judgment in a criminal case, the PSR and the statement of reasons to ensure any judicial recommendations requiring BOP action are addressed. Program Statement 5322.13. As a matter of fact, the BOP Designation and Sentence Computation Center staff must contact the court if a statement of reasons is not received at the time a requested designation is made. Program Statement 5100.08. The Security Designation Data Section of the Inmate Load and Security Designation Form (BP-337) contains the sentencing, programming recommendations and background information from the judgment, the statement of reasons and the PSR. This information is used to determine an inmate's security level. In determining "Severity of Current Offense," Bureau of Prisons' staff must review the

statement of reasons and ensure the information provided is appropriately used in classifying the inmate.

In short, a statement of reasons carries more weight in the eyes of the Bureau of Prisons than a presentence report if it corrects or qualifies what's in the PSR. It will determine an inmate's security level, RDAP eligibility, programming, and other BOP matters.

If the PSR is not to your liking, ask the judge to issue a statement of reasons and give him or her your proposed language for it.

Alan Ellis, a past president of the National Association of Criminal Defense Lawyers, is a criminal defense lawyer with offices in San Francisco and New York. He practices in the areas of federal sentencing and prison matters, and was awarded a Fulbright Senior Specialist Award by the U.S. State Department in 2007 to conduct lectures in China on American criminal law and its constitutional protections.

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