FEDERAL SENTENCING AND POST-CONVICTION News

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Bureau of Prisons Revamps Prison Designation Process

By J. Michael Henderson and James H. Feldman, Jr.

In 2005, the Federal Bureau of Prisons began to phase out its Regional Designators—the people who used to decide where inmates were sent. That process is now complete. The Bureau of Prisons now processes initial designations, transfers, and inmate sentence computations from its new Consolidated Designations and Sentence Computation Center in Grand Prairie, Texas. The Consolidated Center performs the following functions for all federal prisons throughout the entire country:

- Initial security level classification scoring. (This used to be done by staff at the Community Corrections Office closest to the sentencing Court.)
- Designations and transfers. (These functions used to be performed at the Bureau's six Regional Offices.)
- Sentence computations. (Each prison used to do this for its own inmates.)

Under this new arrangement, after a court sentences someone to serve a term of confinement, the designation request, along with the federal judgment order and Presentence Report, are sent to the Consolidated Center. Who does the sending can vary from judicial district to judicial district. In many districts, these documents are transmitted to the Bureau electronically. The Bureau anticipates that soon all judicial districts will follow this practice.

Under the new system, once the Consolidated Center receives a designation request and the necessary documentation, it assigns the case to the team that handles cases from that particular U.S. District Court. There are 18 such teams at the Center—each with responsibility for specific federal judicial districts. Teams include records technicians (called Legal Instrument Examiners, or LIEs), Case Management staff, administrative assistants, and operations members. After the team scores the individual for security classification and completes a sentence computation, it enters the case into the Bureau's computer database for designation. It does not actually designate anyone to a particular institution. That task is handled by one of seven Senior Designators. Senior Designators also are responsible for all federal inmate transfers based on disciplinary or supervisory needs. Assistant Designators handle "routine" inmate transfers.

While this new system may be cost-effective for the Bureau, it makes it more difficult for defense counsel to help clients receive particular designations. Under the old system, an attorney could always call the Regional Designator to discuss particular areas of concern. That level of personal attention is not possible under the new system. It is simply not possible to speak with the specific Senior Designator who will be designating the particular client, because designations are randomly divided between the seven Senior Designators. What attorneys can do now, however, is to speak with the person on the team who is responsible for the pertinent judicial district. In our experience, while team members seem to welcome information that should be useful in the designation decision, they are unwilling to discuss the kinds of issues that we used to be able to discuss with Regional Designators.

Under the new system it will also not be as easy for an inmate to resolve sentence computation problems. When prison records offices did the actual sentence computations, an inmate could

continued on p. 2

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Alan Ellis, PUBLISHER
James H. Feldman, Jr., EDITOR

CALIFORNIA
495 Miller Ave.
Mill Valley, CA 94941
Phone: (415) 380-2550
Fax: (415) 380-2555
AELaw1@alanellis.com

PENNSYLVANIA
50 Rittenhouse Place
Ardmore, PA 19003
Phone: (610) 658-2255
Fax: (610) 649-8362
AELaw2@alanellis.com

www.alanellis.com

resolve a calculation error by bringing it to the attention of the records office. Easy fixes will no longer be possible under the new system. Not only do the institutions' records offices no longer compute sentences, they are not even able to go into the Bureau's computer system to make necessary corrections.

Mr. Henderson is a federal prison consultant with the firm and was a Bureau of Prisons official for over 23 years. Mr. Feldman is the editor of Federal Sentencing and Post-Conviction News *and is a senior associate in the firm's Philadelphia office.*

Recent Developments

By James H. Feldman, Jr.

We expect the revolution in sentencing that began in 2000 with *Apprendi v. New Jersey* to continue as the Supreme Court continues to accept cases with important *Booker* issues for review. On November 3, 2006, the Court granted cert in *Claiborne v. United States,* — U.S. —, 127 S.Ct. 551 (2006), and *Rita v. United States,* — U.S. —, 127 S.Ct. 551 (2006), to decide two important questions concerning the meaning of "reasonableness" review under *Booker*: (1) Can a sentence within a correctly-calculated guideline range be presumed to be "reasonable" after *Booker*? If so, can such a presumption justify a guideline sentence, even where the sentencing court has not undertaken an analysis of the other § 3553(a) factors? (2) Must there be "extraordinary circumstances" for a sentence that is substantially below the applicable guideline range to be "reasonable"?

Ever since the Supreme Court excised the section of the Sentencing Reform Act that made the guidelines mandatory,[1] defense counsel have been arguing that even though sentencing courts must still calculate and "consider" the guideline range, that range is but one of several factors a court must "consider" before imposing sentence. While the Courts of Appeals have given lip service to the other factors, early cases placed special emphasis on the guidelines. For example, some courts have held that a sentence within the guidelines is presumptively reasonable.[2] Courts are now beginning to give more weight to the other factors. *United States v. Johnson,* 467 F.3d 559 (6th Cir. 2006) is one such example. In that case, the Sixth Circuit reversed a sentence within the guidelines as unreasonable because the district court did not make it clear on the record that it had actually considered the other factors before imposing sentence. While the Court held that a ritual incantation of the factors is not required, it also held that there must be some indication that the Court actually considered the other factors. Although the defense counsel in that case did not object, the Sixth Circuit held that plain error review was not appropriate, because the sentencing court never gave defense counsel an opportunity to object before imposing sentence. The Court also rejected (over the dissent of Judge Griffin) the government's argument that the error was harmless, noting that the government failed to meet its burden when it failed even to attempt to explain why the error was harmless. See also *United States v. Yopp,* 453 F.3d 770 (6th Cir. 2006) (reversing sentence for violation of supervised release because the district court failed to consider guideline policy statements).

[1] See *United States v. Booker*, 543 U.S. 220 (2005).

[2] See, *e.g., United States v. Green,* 436 F.3d 449 (4th Cir. 2006); *United States v. Alonzo,* 435 F.3d 551 (5th Cir. 2006); *United States v. Williams,* 436 F.3d 706 (6th Cir. 2006); *United States v. Mykytiuk,* 415 F.3d 606 (7th Cir. 2005); *United States v. Lincoln,* 413 F.3d 716 (8th Cir. 2005); *United States v. Kristl,* 437 F.3d 1050 (10th Cir. 2005).

Favorable New Cases

By James H. Feldman, Jr.

● *United States v. Kuchinski,* 469 F.3d 853 (9th Cir. 2006). The guideline offense level in internet child pornography cases depends in part on the number of images saved on the defendant's computer. In this case, the district court held the defendant accountable for thousands of photos saved in his computer's temporary internet files. The Ninth Circuit reversed since there was no evidence that the defendant intentionally saved these images or even knew that they were on his computer.

continued on p. 3

News

FROM THE BUREAU OF PRISONS

By Deborah Bezilla

The B.O.P. has discontinued its use of the term "community corrections center" (CCC) , and has replaced it with "residential re-entry center" (RCC).

The following Bureau of Prisons facilities are now operational and have gone on line since our 2005-06 *Federal Prison Guidebook* was published:

● FCI Williamsburg, Salters, SC, medium security, adjacent minimum security camp

● FCI Bennettsville, Bennettsville, SC, medium security, adjacent minimum security camp

In addition, the following private facilities, which house federal prisoners are now operational:

● CI Moshannon Valley, Philipsburg, PA

● CI NE Ohio Correctional Center, Youngstown, OH

Ms. Bezilla is the administrative assistant in the firm's East Coast office. She has been with the firm for more than 30 years.

● *United States v. Dupre,* 462 F.3d 131 (2d Cir. 2006). The guidelines provide for a two-level increase "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." § 3A1.1(b)(1). The adjustment is applicable where there is something about a victim that makes him less able to protect himself against crime, such as his age or physical or mental condition. This adjustment should not be used simply because a fraud targets people with particular interests. In this case, the Second Circuit reversed the adjustment in a fraud case that targeted evangelical Christians. While there is no doubt that the scheme took advantage of the victims' faith by imbuing its pitch with religious language, the Court held that that was not enough to support the adjustment. The government provided no evidence that evangelical Christians as a class are less able to protect themselves against frauds. Nor did it provide evidence that any individual victim was particularly vulnerable for any other reason.

● *United States v. Huber,* 462 F.3d 945 (8th Cir. 2006). This case involved a farmer's laundering of illegally obtained farm program benefits. The Eighth Circuit upheld against a government challenge the district court's determination that it was impossible to determine the loss to the government, and therefore impossible to use that loss to determine the offense level for the underlying offense. The Court also upheld the district court's finding that the amount of funds laundered overstated the seriousness of the offense, because legitimate funds were commingled with the illegitimate funds, and also because the defendant made a very small profit. Finally, the Court upheld a "departure" based on the defendant's lifetime contributions to his community, which included loaning money to neighbors to help them avoid foreclosures.

● *United States v. Dorcely,* 454 F.3d 366 (D.C. Cir. 2006). Although acquitted conduct may sometimes support an increase in a guideline level, it cannot support an order of restitution. Here, the defendant was charged with conspiring to defraud the government and making a false statement to the FBI, but was convicted only on the false statement charge. The district court imposed restitution pursuant to 18 U.S.C. § 3663A. The Court of Appeals reversed, noting that restitution under § 3663A is proper only for convictions covered by § 3663A(c)(1), namely, crimes of violence, crimes against property (including fraud), and tampering with consumer products. Since lying to the FBI does not fit into any of these categories, the Court of Appeals held that the restitution order was improper. The Court also noted that restitution would have been improper under § 3663 (which *permits* restitution for any Title 18 offense) because no loss was *caused* by the *offense of conviction.*

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PRACTICE TIPS

By Tess Lopez

The defense community needs to change its approach to sentencing. When probation officers receive a case, they are bombarded with information from the government, including graphic photos of child pornography, pictures of bank robbers, automatic weapons, drugs, and victim impact statements detailing how the offender has robbed good ol' granny of her life savings. The victim may add that your client should rot in jail in the worst of conditions. Such information is presented by the government to the P.O. in a nice little package complete with a letter outlining their version of the case, their guideline calculations, and an invitation to meet with the FBI agent or case agent to further "enlighten" the P.O. Defense counsel usually just calls the P.O. to schedule the Presentence interview and mails the probation form completed by your client providing basic background information.

Defense counsel need to change theis approach. The prosecution and probation officer are not going to give the court the information it needs to consider sentences below the guideline range. Defense counsel need to spend sufficient time with clients and their families and friends to be able to identify which 3553 (a) factors may support a sentence outside the guideline range. A defense attorney should obtain this information as early in the process as possible and get it to probation officer soon after he or she receives the case, and certainly prior to the probation interview. This would provide the probation officer with a more balanced view of the case and present a preview of the 3553(a) factors that you have identified for their consideration.

Provide verification of everything. If your client has an alcohol problem that has not been documented by prior arrests, document it, get him evaluated, and have family members or friends comment about it. If your client has significant medical issues, document them and provide the probation officer with a list of medications as well as your client's limitations. Could the client be abusing alcohol to "self-medicate" and relieve an underlying mental health problem? If there is a mental health issue, or if you suspect there might be one, obtain a mental health evaluation. Gather as much information as possible to help the P.O., and ultimately the judge, understand your client and what led to the offense.

Ms. Lopez, a former federal probation officer, is a private mitigation specialist. She regularly consults with the firm. Her remarks are excerpted from Ellis Inside Baseball: Interview with Former Federal Probation Officer, Criminal Justice *(Winter 2007).* **Click here for full interview.**

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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- **Habeas corpus 2255 and 2241 petitions**
- **International prisoner transfer treaty work for foreign inmates and Americans incarcerated abroad**
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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 offices in Hong Kong and Shanghai.

AlanEllis
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www.alanellis.com

FIRM MEMBERS

Alan Ellis
James H. Feldman, Jr.

Anna M. Durbin, OF COUNSEL
Peter Goldberger, OF COUNSEL
Karen Landau, OF COUNSEL
Pamela A. Wilk, OF COUNSEL

Deborah Bezilla, ADMINISTRATIVE ASSISTANT
J. Michael Henderson, FEDERAL PRISON CONSULTANT
Chris Lege, LEGAL ASSISTANT
Saundra Muncy, EXECUTIVE ASSISTANT
Lianne C. Scherr, L.C.S.W., MITIGATION SPECIALIST
Zheng Jie (Hai Lin), CHINA PERSONAL ASSISTANT

THE LAW OFFICES OF
AlanEllis
495 MILLER AVENUE
MILL VALLEY, CA 94941

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