

The Lowest Sentence, the Best Place, the Earliest Release: Part 2

BY ALAN ELLIS

Approximately 97 percent of all federal criminal defendants plead guilty. Seventy-five percent of those who proceed to trial are convicted. There is, therefore, almost a 99 percent chance that a person charged with a federal crime will ultimately face a judge for purposes of sentencing, and 87.6 percent will be sentenced to prison. Thus, for most offenders, “How much time am I going to do?” and “Where am I going to do it?” are key concerns. In the last issue of *Criminal Justice* (Spring 2015), this column offered tips to help attorneys obtain the lowest possible sentence. This column offers tips to help attorneys have their clients designated to the best possible facility.

1. 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 of Prisons (BOP) 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 “sex offender,” “deportable alien,” or “greatest severity”) can preclude camp placement for otherwise qualified defendants. Third, counsel should consult with the client to determine which facility the client prefers at the appropriately calculated security level and then ask the sentencing judge to recommend that facility to the BOP, as well as to provide reasons in support of that recommendation. Finally, if the defendant is not already in custody, counsel should always request self-surrender.

2. Make sure 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



ALAN ELLIS is a regular columnist for *Criminal Justice* magazine and past president of the NACDL. He practices in the areas of federal sentencing, prison matters, postconviction remedies, and international criminal law, with offices in San Francisco and New York. Contact him at AELaw1@alanellis.com or go to www.alanellis.com. This article is adapted from the *Federal Prison Guidebook* (2015–2017 edition).

make other important correctional decisions, such as whether a defendant is eligible for the BOP’s drug treatment program. 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 Federal Rule of Criminal Procedure 32(c)(1) and attached to the PSR before it is forwarded to the BOP. A finding made in the “Statement of Reasons” (sealed) section of the judgment will also suffice.

3. It is 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 score, but it can negatively impact prison designation. Because the BOP now uses criminal history points to calculate an individual’s security level (see *BOP Program Statement 5100.08: Inmate Security Designation and Custody Classification* (2006), available at <http://tinyurl.com/2aojrjdy>), the points can affect the type of facility to which the offender may be assigned, even if the judge sentences below the guideline range.

4. It is important for defense counsel to make sure that the PSR adequately documents any drug abuse (illegal as well as prescription) or alcohol. 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 BOP’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 an RDAP in a BOP facility.

5. It is important to ensure that the PSR lists the correct client address. Because “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 your client intends to relocate upon release, you should consider requesting that another address be used.

6. Do not “oversell” medical and mental health issues to the probation office. Because the BOP operates on a care level system, inaccurate clinical information may result in an unfavorable placement (e.g., farther from home) in the BOP’s attempt to accommodate issues identified in the PSR. On the other hand, make every effort to substantiate

a client's medical and/or mental health problems, including medication, and have that information reflected in or appended to the PSR. Whatever valid criticism of correctional health care may exist, the BOP cannot be faulted for failing to predict those problems from which a prisoner suffers if the information was not made available to the court, assuming, of course, it was available at that time.

7. After your client is sentenced, make sure you carefully review the judgment. If you requested that the judge recommend a particular facility and you proposed language in support for the court to use, ensure it is in the judgment. Often the clerk prepares the judgment and doesn't get it right. To overcome this, our law office submits a written proposed recommendation to the prosecutor in advance of sentencing and, once we receive the prosecutor's nonobjection, we submit it to the court and the clerk at sentencing noting that the government does not object to the recommendation being placed in the judgment.

8. After sentencing, keep checking the BOP locator (www.bop.gov/inmateloc). Once your client's name appears, it will only be a matter of days until the client is "designated." Upon designation, the US marshal and/or pretrial services is supposed to notify the defendant of his or her designated facility and, if left up to the BOP, the surrender date, place, and time. If you or the client do not receive this notification, it is imperative that you contact

the US marshal or the defendant's pretrial service office. Otherwise, if your client unknowingly fails to surrender on the appointed date, an arrest warrant may very well issue.

9. In scoring for designation and placement, BOP counts detainers. The type of detainer can increase an inmate's security level. BOP treats unresolved charges as a detainer, even when none has been lodged. This results in additional security points and possibly placement at a more secure institution, particularly for individuals who otherwise qualify for minimum-security placement. Accordingly, where a client is sentenced and has a case that may resolve soon thereafter with a sentence to run concurrent with and to be absorbed within the instant sentence or no additional term of imprisonment, counsel should ask the court to (1) hold the judgment in abeyance until after the pending case's disposition and (2) direct US Probation to amend the PSR to reflect the resolution before it sends the report to the bureau. If the court refuses such a request, counsel should obtain a certified copy of the disposition (if state), and forward it to the US Marshall and Designation and Sentence Computation Center (DSCC) of the Bureau of Prisons before the client's designation package is processed. If federal, there is no need to have it certified, as DSCC can confirm on PACER, if the case information and document number are included. ■