

Baker's Dozen, Part II Advice for the Advocate

Editor's Note: This is a follow-up to a previous column by Alan Ellis. (See 11 (No. 4) CRIM. JUST. 34-36 (Winter 1997).) The first column was titled "Baker's Dozen: Tips for the Experienced Advocate." In this issue, Ellis and his coauthors offer additional, updated practice tips for the advanced practitioner. The original article is available online at the Ellis firm's website at www.alanellis.com.

Acceptance of responsibility

A defendant who confesses upon arrest, provides complete information regarding his offense, and receives a two-level reduction for acceptance of responsibility is entitled to the third level even if he subsequently recants and the government is required to prepare for trial. (*United States v. Corona-Garcia*, 210 F.3d 973, 980-81 (9th Cir. 2000).) If the defendant qualifies for the third level because he provided the government with information regarding his offense in a timely fashion, he cannot be denied the third level because he does not plead guilty in a timely manner. (*Id.*) The third level is to be applied if the defendant satisfies the criteria of either U.S.S.C. § 3E1.1(b)(1) or (b)(2). Thus, defense counsel should consider requesting a three-level reduction for acceptance of responsibility in cases in which the defendant has confessed upon arrest or provided authorities in a timely manner with information concerning his own involvement.

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Criminal history score

Often one criminal history point, more or less, does not alter the Criminal History Category (CHC) into which a defendant falls. It may, nevertheless, be important to object to a presentence investigation report's (PSI) addition of a criminal history point, and then to appeal a district court's denial of that objection—even when the inclusion of the point does not affect the client's CHC. Although normally the addition of a criminal history point that does not affect the sentencing range would be considered "harmless error," that is not always the case. In *United States v. Vargas*, 230 F.3d 328 (7th Cir. 2000), the Seventh Circuit remanded for resentencing based on a seemingly inconsequential criminal history point because the erroneous inclusion of this point "might have affected" the district court's denial of the defendant's motion for downward departure based on the defendant's contention that his criminal history category significantly overrepresented the seriousness of his criminal history. (See U.S.S.G. § 4A1.3 (p.s.))

Downward departure: acceptance of responsibility

A defendant may be eligible for a downward departure for acceptance of responsibility, even if he or she goes to trial and denies guilt, and, therefore, does not qualify for the downward adjustment under section 3E1.1. In *United States v. Gee*, 226 F.3d 885 (7th Cir. 2000), the Seventh Circuit upheld the district court's two-level downward departure on the basis that the defendant demonstrated a "non-heartland" acceptance of responsibility. The defendant demonstrated this acceptance by preindictment offers to the government to determine the legality of his business through a civil declaratory judgment action. The defendant also immediately discontinued his business following the verdict against him. Thus, a defendant who does not qualify for acceptance of responsibility may, nonetheless, receive a downward departure for conduct that exhibits acceptance.

Downward departure: charitable and civic good works

Downward departures for a defendant's charitable and civic good works or public service are discouraged but not forbidden by the U.S. Sentencing

Guidelines. (U.S.S.G. § 5H1.11 (p.s.)) Departures for such works are, therefore, usually denied. A recent Third Circuit case is significant because, in affirming such a departure in a government appeal, the court provides a helpful analytical framework for district courts. In *United States v. Serafini*, 233 F.3d 758 (3d Cir. 2000), the district court departed downward three levels based on the charitable works of the defendant, a state legislator convicted of perjury before a grand jury.

Downward departure: diminished capacity

Several circuits have held that psychological conditions that affect a defendant's volitional control may justify a departure for reduced mental capacity when the diminished capacity was directly responsible for the offense conduct. (See, e.g., *United States v. McBroom*, 124 F.3d 533 (3d Cir. 1997).) Now, the United States Court of Appeals for the Sixth Circuit has taken that theory a step further by affirming a departure for a compulsive gambling disorder that merely motivated the offense conduct. In *United States v. Sadolsky*, 234 F.3d 938 (6th Cir. 2000), the defendant embezzled approximately \$30,000 from his employer to pay off gambling debts. The district court found that the defendant lacked the ability to control his behavior and, therefore, satisfied the requirements for a departure based on diminished capacity. The Sixth Circuit affirmed, noting that the guideline for a diminished capacity departure had been expanded by the amendment effective November 1, 1998. The court also concluded that section 5K2.13 lacks a strict causality requirement, and, therefore, the fact that a defendant was *motivated* to engage in the criminal conduct because of a compulsive disorder constituted a sufficient link to support the departure. The government had argued that the defendant's compulsive gambling did not contribute to his commission of the offense because he did not commit a gambling offense. The Sixth Circuit rejected that argument, ruling that the fact that the defendant's disorder motivated him to embezzle provided a sufficient causal connection. The court noted that under the government's argument, a defendant who suffers from an eating disorder and steals food would be eligible for the departure, while a defendant who steals money to buy food would not. It is also significant that the factual determination that the defendant suffered from a gambling disorder was based solely on lay testimony. Of course, it is generally better practice to use a mental health professional to establish the existence of diminished capacity.

Downward departure: sentencing entrapment

The Sentencing Guidelines recognize one form of sentencing entrapment as a basis for downward departure. Application Note 15 to section 2D1.1 provides that in reverse sting operations, a downward departure may be appropriate when government agents sell drugs to unwary defendants at lower than market prices, thus enticing them to purchase more drugs than they might otherwise buy and raising their offense levels. More broadly speaking, sentencing entrapment occurs whenever a defendant who is predisposed to commit a particular type of illegal activity (thus eliminating entrapment as a defense at trial) is persuaded by government agents to engage in relevant conduct in which he or she would otherwise not have been predisposed to engage, or to an otherwise greater extent, exposing the defendant to harsher punishment. Some circuits have limited sentencing entrapment by implying that only "outrageous" government conduct may justify the departure. (See, e.g., *United States v. Bala*, 2000 WL 1877041 *4 (2d Cir. Dec. 28, 2000) ("We have suggested that . . . sentencing entrapment . . . would likely require a showing of 'outrageous' government conduct"); *United States v. Barth*, 990 F.2d 422, 424 (8th Cir. 1993) ("Sentencing entrapment has been described by this court as 'outrageous official conduct [which] overcomes the will of the individual.'"))

The Eighth Circuit has now made it clear that no such limitation applies to sentencing entrapment departures. In *United States v. Searcy*, 233 F.3d 1096 (8th Cir. 2000), the court held that a defendant need not demonstrate outrageous government conduct to prove sentencing entrapment. All that must be shown is that, but for certain government conduct, a defendant would not have been predisposed to commit certain relevant conduct. Of course, there is not any predetermined checklist of criteria that must be demonstrated before a defendant is eligible for downward departure on this or any other basis not described by the commission in a Chapter 5H or 5K policy statement. The question is not whether a defendant meets the

The appeals court found the defendant lacked the ability to control his behavior.

criteria of being entrapped for sentencing, but whether the facts of the case present a "mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission." (U.S.S.G. § 5K2.0 (p.s.) (quoting 18 U.S.C. § 3553(b)); see *Koon v. United States*, 518 U.S. 81 (1996).)

Drug quantity

In drug cases, the weight of drugs that are "relevant conduct" for sentencing is the most important factor in determining the applicable offense level. When that weight is near the upper limit provided by a particular offense level, a minor miscalculation can mean years in additional imprisonment. In recognition of this, the Ninth Circuit in *United States v. Scheele*, 231 F.3d 492 (9th Cir. 2000), held that in approximating drug quantity, courts must err on the side of caution. The court reversed the district court's estimate of quantity, and specifically ruled that when a district court's estimate falls near the border of a cutoff point under the drug quantity table, the court must consider the margin of error before fixing the amount attributable to the defendant. (*Id.* at 499.) The court held that "If taking the margin of error into account and erring on the side of caution would reduce the defendant's base offense level to the next lowest level, then the court must do so." (*Id.*)

In drug conspiracy cases, particular quantities of drugs are "relevant" to sentencing if they are "reasonably foreseeable" to the defendant and are part of his "jointly undertaken criminal activity." (§ 1B1.3(a)(1)(B).) Although sentencing courts are to determine this quantity by the "preponderance of the evidence" (i.e., the quantity that more likely than not meets these criteria), it is rare for a court of appeals to reverse a sentence based on insufficient factual findings. That is what makes *United States v. Seesing*, 234 F.3d 456 (9th Cir. 2000), so special. In that case, the district court found 4.049 kilograms of methamphetamine "relevant conduct" based solely on the PSI's report that the coconspirators transferred \$70,000 between themselves and that they purchased methamphetamine for \$8,500 a pound. The district court made no finding that the defendant reasonably foresaw all of the transactions related to the \$70,000 transfers; nor did it state whether it was even convinced by the PSI's findings. The court of appeals found that because of this the district court's findings were not supported by the preponderance of the evidence, and remanded for resentencing.

Fraud

In fraud cases, the Sentencing Guidelines offense level is determined in large part by the loss suffered by victims. (See U.S.S.G. § 2F1.1.) Correctly valuing loss is therefore of critical importance. "Loss," however, is not always simply the value of the money or goods taken. When an "intended" loss is greater than the "actual" loss, the application notes explain that the higher figure is to be used. (Appl. Note 8.) In fraudulent loan cases, defendants often obtain loans for which they are not qualified (because of bad credit, for example). Even though these defendants fully intend to repay their loans, intervening circumstances (such as job loss) often prevent them from doing so. When they default, the fraud is discovered, and they are prosecuted. That is what happened in *United States v. Nichols*, 229 F.3d 975 (10th Cir. 2000). In that case, the district court held that the defendant intended to deprive the lender victim of the full value of a home loan, even though the loan was fully secured. The district court found that the defendant intended to defraud the lender of the full value because the defendant had used a false name and Social Security number when he applied for the loan. The court of appeals held this finding of fact to be clearly erroneous, and reversed.

The court of appeals noted that it is possible for someone to intend to defraud a lender of the full value of a loan secured by a movable asset, such as an automobile (which could be hidden from the lender), but found that such intent was less likely when the collateral was a home whose location was never in question. The court also found it significant that although the defendant in that case lied about his name and Social Security number, he provided the lender with an accurate address and phone number and made payments on the loan until he filed for Chapter 13 bankruptcy. The purpose of that bankruptcy was to permit him to pay off his arrearages and resume monthly payments so he could keep his home. Although the prosecution had argued that the defendant intended to sell the house and place it beyond the reach of his creditors, the court rejected this argument, calling it "sheer speculation."

In addition to obtaining a home loan, the defendant also used his false Social Security number to obtain a credit card. Although the defendant gave the victim a \$1,000 security deposit to obtain the card, the district court refused to lower the loss by this amount. The court of appeals held that this was error as well.

Drug and alcohol treatment sentence reduction

In effect, 18 U.S.C. § 3621(e) provides a basis for a reduction in clients' sentences of up to 12 months for successful completion of the Bureau of Prisons' (BOP) 500-hour, comprehensive, residential drug abuse program (RDAP). The possibility of the time reduction under section 3621(e) is an important factor in plea negotiations and sentencing. Charge bargaining can result in a better chance at RDAP eligibility (for example, by ensuring that the defendant is not convicted of a crime, such as a violent felony, that would make him or her ineligible for sentence reduction). Contesting a "gun bump," U.S.S.G. § 2D1.1(b)(1), or the existence of a prior conviction for certain offenses can also increase a defendant's chances of receiving a sentence reduction for participating in RDAP. It's especially important to challenge a gun enhancement now that the Supreme Court has approved the Bureau of Prisons' exercise of discretion to deny early release to defendants with prior convictions for certain offenses as well as to defendants who received an enhancement for possessing a gun. (*Lopez v. Davis*, 121 S. Ct. 714 (2001).)

Judicial recommendations for RDAP and documentation of substance abuse in the presentence report help establish eligibility for treatment. The BOP has recently been requiring that the inmate's substance abuse problem (including alcoholism) be substantiated in the presentence report—even to participate in residential treatment. A clear indication of a substance abuse problem in the presentence report and a sentencing court's recommendation that the defendant participate in residential treatment will help avoid problems of eligibility for early release.

Halfway house in lieu of prison camp

A defendant receiving a short sentence (generally, a year and a day or less), who is otherwise eligible for a minimum security facility, i.e., a federal prison camp, can be designated by the BOP to serve his or her sentence in a community correction center (halfway house) if so recommended by the sentencing judge. This also applies to individuals receiving a split sentence under U.S.S.G. § 5C1.1(d)(2). (Program Statement 7300.08.)

Statutory maximums

When a defendant is convicted by general verdict of a conspiracy to commit offenses with different statutory maximums, courts of appeals have held that it is plain error for a court to impose a

sentence greater than the statutory maximum applicable to the substantive offense that is the least serious object of the conspiracy. (*See, e.g., United States v. Dale*, 178 F.3d 429 (6th Cir. 1999) (where defendant failed to request special verdict, case remanded either for imposition of sentence within lower statutory maximum or retrial, at the government's option).) Courts of appeals review issues not raised below for "plain error."

Defendants suffer in two ways when their trial counsel fail to raise legal issues in the district court. One way is that reversals are more difficult to achieve under the "plain error" standard. The other way is that the relief granted under "plain error" may not be as favorable to defendants. This second principle is illustrated by the recent case of *United States v. Randolph*, 230 F.3d 243 (6th Cir. 2000). *Randolph*, like *Dale*, involved a multiple-object conspiracy. As in *Dale*, the district court failed to give the jury a special verdict form. The difference between the two cases is that defense counsel in *Randolph*, unlike in *Dale*, requested a special verdict form that the district court denied. Under these circumstances, the court of appeals refused to give the government a second "bite at the apple" and remanded with instructions to the district court to impose sentence within the lower statutory maximum.

The Tenth Circuit recently ordered similar relief in an untimely direct appeal that it construed as a motion pursuant to 28 U.S.C. § 2255 to vacate sentence. *United States v. Nicholson*, 231 F.3d 445, 454 (10th Cir. 2000), was a case in which one of the defendants was charged with substantive and conspiracy counts that each involved marijuana and cocaine. Because the verdict did not make clear with which drug the government had met its burden, the court held that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant's sentences on each count could not exceed the five-year statutory maximum applicable to cases involving an unspecified amount of marijuana. The court remanded for resentencing. (For more on *Apprendi*, see Alan Ellis, Peter Goldberger, James Feldman, Jr., & Karen Landau, *Apprehending and Appreciating Apprendi*, 15 (No. 4) CRIM. JUST. 16-22 (Winter 2001).)

AEDPA statute of limitations

The Antiterrorism and Effective Death Penalty Act's (AEDPA) amendment to 28 U.S.C. § 2255 created a one-year statute of limitations for filing motions to vacate sentence. The one-year period

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runs from the latest of several triggering events, the most common of which is “the date on which the judgment of conviction becomes final.” Exactly when that occurs has been the subject of much litigation. Four circuits have held that when a defendant files a direct appeal but does not petition the Supreme Court for a writ of certiorari, the “conviction becomes final” on the last day the defendant could petition for certiorari, whether or not such a petition is actually filed. (See *United States v. Garcia*, 210 F.3d 1058 (9th Cir. 2000); *United States v. Gamble*, 208 F.3d 536 (5th Cir. 2000); *United States v. Burch*, 202 F.3d 1274 (10th Cir. 2000); *Kapral v. United States*, 166 F.3d 565 (3d Cir. 1999).) Other circuits have held that when the defendant fails to petition for cert, the “conviction becomes final” when the court of appeals issues its mandate. (*United States v. Torres*, 211 F.3d 836 (4th Cir. 2000); *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998).) Until the Supreme Court settles this split in the circuits, counsel for defendants in circuits that have not decided this issue should play it safe and file motions to vacate within one year of the date on which the court of appeals decided the direct appeal. Filing by the anniversary

of the date of decision protects clients in the event that the controlling circuit or the Supreme Court eventually takes an even more restrictive view with respect to when a “conviction becomes final.”

2255 motions

To demonstrate ineffective assistance of counsel, defendants must prove not only that their lawyer’s representation fell below an objective standard of reasonableness, but that they were prejudiced by the deficient representation. (*Strickland v. Washington*, 466 U.S. 668 (1984).) Although this standard has always been a difficult one to meet, in 1993 the Seventh Circuit held in *Durrive v. United States*, 4 F.3d 548, that only “significant prejudice” at sentencing could meet that standard. Following *Durrive*, the appeals court held in *United States v. Glover*, 182 F.3d 921 (1999) (table), that a defendant whose sentence was increased by nine to 12 months due to attorney error had suffered no prejudice. The Supreme Court has now rejected that gloss on *Strickland*. In *Glover v. United States*, 121 S. Ct. 696 (2001), a unanimous Court in an opinion by Justice Kennedy held that *any* additional prison time meets the prejudice requirement of *Strickland*. ■