
VAIRA & RILEY, P.C.

THE RELIABLE SOURCE

A NEWSLETTER OF FEDERAL CRIMINAL PRACTICE IN THE
DISTRICT

EASTERN

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The Reliable Source is a service of the firm of Vaira & Riley for the federal criminal practitioners in the Eastern District of Pennsylvania. The newsletter provides a review of current developments and trends in the courts, the United States Attorney's Office, and the federal agencies with a substantial effort devoted to the sentencing process.

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This newsletter is meant as a practical aid to practitioners and is not intended to take the place of legal research.

Sentencing Reports

We intend to provide a monthly report on sentencing developments in the Eastern District, providing decisions by judges on departures and adjustments and positions taken by the United States Attorney's Office. This type of information generally would not be reported. We will obtain such information from personal contacts with practitioners. We will also include discussions of significant reported cases.

Extraordinary Family Ties and Responsibilities

United States v. Sweeting, No. 99-3774 (3rd Cir. May 3, 2000). The Court of Appeals reversed the District Court's 12 level downward departure for extraordinary family ties and responsibilities. The defendant, a single mother of five children, ages 5 to 14, one of whom had been diagnosed with Tourette's Syndrome, pled guilty to distribution and possession of cocaine. The Guidelines provided a sentence in the range of 63 –78 months imprisonment. The district court granted a 12 level departure on the basis of U.S.S.G. §5H1.6. The Court of Appeals vacated the judgment finding that the lower court abused its discretion as the facts did not constitute grounds for a departure based on extraordinary family ties and responsibilities.

The Court of Appeals stated that the fact that a defendant is a single mother of several children and that her incarceration would threaten the family unit is not atypical for convicted felons and was insufficient to take the case outside of the heartland. The court noted that the fact of a sick child might transform a situation into an extraordinary family circumstance; however, the court declined to find such a circumstance. The court stated "nothing about (the son's) care was so unique and burdensome that

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another responsible adult could not provide the necessary supervision and assistance in defendant's absence." The court stated that in reviewing a family situation as a basis for departure, courts should look to the following factors: (1) the necessity of the defendant's personal involvement in the care of a sick family member; (2) whether there are alternative sources of support for the sick person; (3) whether it is demonstrated that the defendant has a pivotal role in the sick person's care; (4) the length of imprisonment mandated –the consideration being whether the sick person would have to face alternative care anyway due to a substantial, albeit reduced, sentence of imprisonment; and (5) the nature of the offense – this is particularly salient when children are involved. This case provides a good review of Third Circuit decisions regarding U.S.S.G. §5H1.6. ❖

Satisfying a Minimum Custody Requirement

Title 18 U.S.C. §3561 permits a sentence of probation, except in the case of a class A or B felony. Thus, if a court departs in a class A or B felony and intends to grant a sentence of probation, the defendant must serve at least a day of incarceration. Some judges have required the defendant to surrender to the U.S. Marshal for a day.

An Eastern District practitioner suggests the following procedure where there is the possibility of a requirement of a one day incarceration.

The practitioner recommends that the client self-surrender to the United States Marshal pre-arraignment for bail processing. The Marshal will release the client for arraignment, although this must be explicitly arranged in advance, usually with Deputy Marshal Bill Thrower who is very accommodating. Following the arraignment, send the Marshal a confirming letter stating that the client self-surrendered for bail processing, was held in custody for the processing, and was released for arraignment. Notify the AUSA of the same and request his/her compliance in seeking this arrangement as credit for satisfaction of the custodial element of the sentence. Request credit for satisfaction of the custodial element of the sentence, and satisfaction of the applicable statute, in your sentencing memorandum.

Renew the request at the sentencing hearing.

The practitioner has found that this approach gives judges the opportunity to avoid imprisoning a client and yet remain faithful to the statute. If you would like more details, please call the Vaira & Riley office and we will put you in touch with the practitioner. ❖

Guilty Plea Precautions

Hammer out all your issues with the AUSA before entering into a guilty plea agreement and explicitly include the issues and resolutions in the plea agreement. If any are in dispute, include language that says the parties agree to disagree on those points. In this way, you know what is in dispute and can avoid getting sandbagged. Vaira & Riley recently worked on a case where the agreed upon Guideline level was written in the guilty plea agreement. The Probation Officer recommended an upward adjustment on his own. The AUSA then argued in support of it even though it was not included in the plea agreement. ❖

Sentences of One Year and One Day or Less Can Be Served in a Halfway House

If a client is anticipating a Guideline assignment of a Level 13 or below, counsel may request that the court direct that the sentence be served in a halfway house. To be eligible to serve time in a halfway house, a defendant's sentence cannot exceed one year and one day, the minimum sentence in the case of a level 13 Guideline range. The Bureau of Prisons has permitted defendants who are sentenced to imprisonment of one year and one day or less to serve their time in a halfway house. Upon receiving an Order of Judgment and Confinement, in which the court recommends confinement in a community custodial facility, the BOP will designate commitment to a halfway house where a defendant is qualified.

To be eligible for commitment to a community confinement facility a defendant must qualify for confinement in a minimum security facility, cannot have committed a violent crime, and the case cannot be a high publicity case. Additional criteria can be found at www.bop.gov. ❖

Required Waivers as Part of Guilty Plea

There is a growing trend in which the United States Attorney's office is insisting upon including the following waivers in guilty plea agreements: waiver of right to pursue any claims presented or that could be presented in pretrial or post-trial motions; waiver of right to appeal any part of the sentence imposed; waiver of right to collaterally attack the judgment of guilty or any part of the sentence imposed by the court, except for a claim based on ineffective assistance of counsel; and waiver of right to receive additional discovery including impeachment evidence (*Brady* material). In some other districts, guilty plea agreements must include a provision that the defendant agrees not to withdraw his plea. To date, this language has not been seen in guilty plea agreements in this district. ❖

SURVEY QUESTION:

From time to time, we will conduct an informal survey of the federal practitioners with regard to an issue that is crucial to federal criminal practice.

5K DEPARTURES

In granting a downward departure, a judge is not bound by the restrictions of the Guidelines, and may depart, as if the Guidelines did not exist. The court of course, has the discretion to evaluate the departure in terms of the original guideline calculations. We surveyed practitioners on the practice of judges once they have agreed to grant a 5K departure. Here are some results:

Judge James McGirr Kelly, Judge Dalzell, Judge Bartle - in departing will do so with some measured reference to the guideline calculation, i. e., a departure of two levels. This means that the defendant's attorney should articulate where he/she would like the judge to go in specific terms of the Guidelines and demonstrate good reasons for it.

Judge Fullam, Judge Padova, Judge Hutton, Judge Giles - will generally not make any references to Guidelines levels in granting a departure. ❖

Perjured Testimony

Welsh & Recker won a new trial for a convicted defendant on the bases of *Brady* violations, newly discovered evidence, and the use of perjured testimony to win the original conviction. Following the decision, the Government dropped all remaining charges against the defendant. Judge Giles's opinion is a good primer on the effect of perjured testimony. See *United States v. McLaughlin*, 2000WL283850. ❖

Problems in the Settlement of Health Care/False Claims Matters

The traditional priority of the resolution of false claims settlements usually concentrates on obtaining a declination of the criminal aspects and then on reaching a civil settlement with the civil division of the United States Attorney's Office. In seeking to resolve a false claim matter with the civil division, there are several parties with whom agreement must be made as part of the settlement process:

- (1) The United States Attorney's Office;
- (2) the relator(s) and his/her attorney (s);
- (3) the Inspector General's Office of the HHS with respect to exclusion from programs; and
- (4) the Pennsylvania Department of Public Welfare (sponsors of the Medicaid program).

In negotiating with the civil division, one cannot presume the United States Attorney's Office has thoroughly resolved issues with the other government entities. From recent experience, the Pennsylvania Department of Health can also extort additional concessions well after the settlement agreement was signed with the federal agencies. Practitioners should insure that all possible parties and government entities whose interests have to be satisfied are included in final settlement. ❖

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