USSG § 1B1.10: PUBLIC SAFETY AND POST-SENTENCING CONDUCT[1]

When ruling on a 3582 motion the court must consider the factors set forth in 18 U.S.C. § 3553(a) and the "nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment." The court may also consider the defendant's post-sentencing conduct. USSG § 1B1.10, comment., n. 1(B).

This paper provide some tips on investigating these issues and resources that may help show why a reduction in the term of imprisonment for your client does not pose a serious enough danger to any person or the community for the court to deny relief or not give a full reduction.

I. BOP RECORDS

SENTRY is BOP's online information system, which contains information as far back as 1987. Data is retained permanently. The SENTRY database is not available to defense counsel, but many U.S. Probation officers can access the data.[2] You may wish to consider obtaining from your court a blanket order authorizing Probation to provide you with Sentry and other BOP information so that you can efficiently review cases. In the past, BOP has preferred that the order contain a protective clause, which limits the use of the information to retroactivity proceedings. You may also use the BOP Release of Information Consent (BP-A0192) and Certification of Identity (DOJ-361) to obtain relevant BOP records, including SENTRY records, the Residential Drug Abuse Program Notice (BP-A0761), and Inmate Skills Development Plan (ISDD).[3] If you are reviewing a case for clemency, you may be able to use the Release of Information Consent – Clemency Project 2014.

SENTRY records include the following:

- Identifying information, including SSN, INS, race, height, weight, etc.
- Pending detainers

[1] September 8, 2014. Prepared by Sentencing Resource Counsel for the Federal Public and Community Defenders.

[2] The SENTRY User Manual for U.S. Probation and Pretrial Services contains the most frequently used transaction codes, which will help you communicate with probation officers about the information that should be available and how it can be obtained. The manual is available to Federal Defender offices at http://jnet.ao.dcn/court-services/probation-pretrial-services/inmate-tracking-sentry/sentry-user-manual-0. A short video presentation and powerpoint on "Using BOP Sentry Reports to Evaluate Sentencing Reductions," is available to Federal Defender offices at FJC Online: Intranet Site of the Federal Judicial Center, http://cwn.fjc.dcn/fjconline/home.nsf/pages/979.1.

[3] A list of other BOP forms that may provide relevant information is available on the BOP website. http://www.bop.gov/PublicInfo/execute/forms?todo=query.

- Snapshot of current status in BOP – security level, location, projected release date, progress report due dates (generated every 3 years but can be updated sooner), results of random drug testing, drug education and other programs, financial responsibility
- History of institutional movement – e.g., escape status, drug programming, RDAP eligibility
- Work and unit assignments , including UNICOR, which is reserved for a few well-behaved inmates
- Educational information, including RDAP and vocational training
- Physical and mental health information
- Mail and visiting records
- Disciplinary information
- Status of good time credits , including restoration of credits previously lost

Other BOP forms and documents that will be helpful in investigating your client's adjustment and likelihood of success upon release include:

- Inmate Skills Development Plan, i.e., Program Review – staff rating of inmate in nine areas (academic, vocational,/career, interpersonal, wellness, mental health, cognitive, character, leisure, and daily living)
- Mental Health Records
- Custody Classification Form
- Discipline Hearing Officer reports
- Unit Disciplinary Committee reports
- Progress report – includes program plans, work assignments, educational/vocational programming, counseling programs, mental health of physical problems, financial responsibility
- BP-A0761, which is the RDAP notice on whether an inmate is eligible for RDAP and early release.

Here are some things to keep in mind when reviewing records:

- Even though a record may state that an inmate was supposed to enroll in a specific class or program but failed to do so, it should not reflect unfavorably upon your client. At each team meeting, a goal must be identified and agreed to but the inmate may nonetheless enroll in another program.

- Security classification and custody level are easy ways to determine whether the BOP considers your client a risk. Security levels are minimum, low, medium, high, and administrative. Custody levels, which dictate the degree of staff supervision, are Community, In, Out, Maximum.

- Familiarity with BOP's Prohibited Acts and Disciplinary Scales is critical to assessing the seriousness of prison conduct. Code 300 and 400 series violations are relatively minor and do not entail the loss of good time credits. If an incident appears serious, request the Disciplinary Hearing Officer (DHO) report, which will contain the charge, findings of fact, evidence relied upon, and loss of good time credit. BOP's current program statement on the Inmate Discipline Program, which includes the severity codes, is available on the BOP website. BOP, Program Statement 5270.09 (Aug. 2011), http://www.bop.gov/policy/progstat/5270_009.pdf.

- Custody classification forms list Public Safety Factors, which will help you determine if BOP places your client in a "Disruptive Group" (Aryan Brotherhood, Mexicam Mafia, Texas Syndicate, Black Guerilla Family, or Mexikanemi [Texas Mexican Mafia]). The program statement on Inmate Security Designation and Custody Classification is available on the web. BOP, Program Statement P5100.08 (2006), http://www.bop.gov/policy/progstat/5100_008.pdf.

- A prison disciplinary record should be eyed with skepticism and can be challenged as an inadequate ground to deny or limit a sentence reduction. Such records are hearsay and disciplinary proceedings are conducted without counsel. This may be enough due process in the prison setting, but is inadequate for purposes of a sentencing decision. *See Rita v. United States*, 551 U.S. 338, 351 (2007) ("the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure.") *See* Rules 32(f), (h), (i)(C) and (i)(D); *see also Burns v. United States*, 501 U.S. 129, 136 (1991) (recognizing importance of notice and meaningful opportunity to be heard at sentencing); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (pre-*Gideon*, defendant has a due process right to counsel at sentencing to ensure that he is sentenced on the basis of accurate information).

II. USE FACTS ABOUT YOUR CLIENT'S POST-SENTENCING CONDUCT, FAMILY AND COMMUNITY SUPPORT, AND SOCIAL SCIENCE TO DEBUNK MYTHS AND TO EXPLAIN WHY YOUR CLIENT DOES NOT POSE A RISK IF RELEASED FROM PRISON EARLY

Some judges and prosecutors will latch onto minor non-violent post-sentencing conduct as a reason to deny relief. For example, in one case, the court concluded that the defendant's post-sentencing conduct did not warrant a reduction in sentence. Prison records showed that the defendant had been "found guilty in an administrative hearing for the second time of masturbating in front of a female corrections officer." The court concluded that the conduct shows "disrespect for the law in general and poor impulse control in particular. He continues to be insubordinate and disrespectful toward prison officials and, as things stand now, it appears that he has almost no chance of a successful period of supervised release. The additional incarceration is needed to give him time to accept and adjust to the norms of society and authority." *United States v. Taylor*, 404 F. App'x 62, 70 (7th Cir. 2010).

Among other flaws, this reasoning assumes that prison will help a person adjust to societal norms. No research whatsoever shows that to be the case. In fact, "there is little evidence of a specific deterrent effect arising from the experience of imprisonment compared with the experience of noncustodial sanctions such as probation. Instead, the evidence suggests that reoffending is either unaffected or increased." Daniel Nagin, D*eterrence in the Twenty-First Century*, 42 Crime & Just. 199, 201 (2013).

Here are some other resources that may help you address public safety issues and post-sentencing conduct:

- A disciplinary infraction may be the result of an untreated mental illness, not a sign that the person will present a safety risk if sentenced to a lesser term. National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 223 (Jeremy Travis et al. eds., 2014) (citing numerous studies), http://nap.edu/catalog.php?record_id=18613. At the same time, mental illness alone does not increase a person's risk of recidivism. Arthur Lurigio, *People With Serious Mental Illness in the Criminal Justice System: Causes, Consequences, and Correctives,* 91 Prison J. 66S, 74S (2011).

- "The single best predictor of successful release from prison is whether the former inmate has a family relationship to which he can return. Studies have shown that prisoners who maintain family ties during imprisonment are less likely to violate parole or commit future crimes after their release than prisoners without such ties." Solangel Maldonado, *Recidivism and Parental Engagement,* 40 Family L. Q. 191, 196-97 (2006).

- Marriage plays a protective role in deterrence. Robert Apel et al., *The Impact of Imprisonment on Marriage and Divorce: A Risk Set Matching Approach*, 26 J. Quant. Crim. 269, 289 (2009) ("Considering the (by now) well-established protective role that marriage plays in the criminal career (in the male criminal career, at least), as well as cross-national expansion in the use of incarceration as the predominant form of crime control, an important social concern is the degree to which widespread use of prison may actually backfire by worsening the life chances of offenders returning to the community after they have paid their debt to society.").

- Long prison sentences are not an effective method for reducing recidivism. *See, e.g.*, Francis T. Cullen, Cheryl Lero Johnson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science,* 91 Prison J. 48S, 51S (2011) ("imprisonment does not have special powers in persuading the wayward to go straight"); Valerie Wright, Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty v. Severity of Punishment* 7 (2010) ("when prisoners serve longer sentences they are more likely to become institutionalized, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism"), http://www.sentencingproject.org/ doc/Deterrence%20Briefing%20.pdf; Missouri

Sentencing Advisory Commission, *Probation Works for Nonviolent Offenders*, 1 Smart Sentencing 1 (June 2009) (recidivism rates actually are lower when defendants are sentenced to probation, regardless of whether they have prior felony convictions or prior prison incarcerations), http://www.courts.mo.gov/file.jsp?id=45429; Kimberly Wiebrecht, *Evidence-Based Practices and Criminal Defense: Opportunities, Challenges, and Practical Considerations* 8 (2008) ("treatment interventions are more effective when provided to defendants while they are in the community rather than in an institutional setting"), http://nicic.gov/library/files/023356.pdf.

- Limited halfway house resources should not deter courts from reducing sentences. Release to home confinement with electronic monitoring is as good an option, if not better, as release to a halfway house program. Jody Klein-Saffran, E*lectronic Monitoring vs. Halfway Houses: A Study of Federal Offenders* (1995) (study of persons released from the Federal Bureau of Prisons found that those released to home confinement with electronic monitoring had no greater rearrest rate or employment issues than those who completed a halfway house program and in some respects, fare better than those placed in a halfway house), http://www.fed.bop.gov/resources/research_projects/published_reports/gen_program_eval/orepralternatives.pdf; William Bales, et al., *A Quantitative and Qualitative Assessment of Electronic Monitoring* (May 2010) (Florida study concluding that the use of electronic monitoring significantly reduced the likelihood of failure under community supervision). (https://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf

- Making sure that your client has a sound reentry plan can help convince the court that a sentence reduction will pose no risk to public safety. Several resources can help you focus on appropriate reentry plans for your client.

    - Urban Institute and National Institute of Corrections, *Transition from Jail to Community, OnlineLearning Toolkit*, http://www.urban.org/projects/tjc/Toolkit/.

      This toolkit, particularly modules 6, 7, and 8, provides an overview of how to assess a person's needs as they prepare to reenter society from jail or prison, how to develop a transition plan, and how to locate community resources. It contains screening tools on a number of topics, including "criminal thinking," homelessness, employment, substance abuse, and suicide risk. It also contains a checklist for developing a transitional plan.

    - Women's Prison Association, S*uccess in the Community: A Matrix for Thinking about the Needs of Criminal Justice Involved Women*, http://www.wpaonline.org/pdf/Success_in_the_Community_Matrix.pdf

While geared toward women, this matrix identifies six essential needs that must be met to maximize the chances of successful living in the community. These needs include livelihood, residence, family, health and sobriety, criminal justice compliance, and social/civic connections. The matrix also sets forth goals to accomplish in each area and provides idea on how to accomplish those goals.

III. CATEGORICAL EXCLUSIONS DO NOT SATISFY THE COMMISSION'S INTENT THAT A COURT "MAKE AN INDIVIDUALIZED DETERMINATION IN EACH CASE OF WHETHER A SENTENCE REDUCTION IS APPROPRIATE" AND, IN ANY EVENT, DO NOT IDENTIFY INDIVIDUALS WHO WOULD POSE A THREAT TO PUBLIC SAFETY IF DANGEROUS

DOJ had originally proposed that the Commission deny retroactive relief to people in Criminal History Categories III to VI, or whose sentences were increased for possession or use of a weapon by the defendant or someone else involved in the offense, the use or threat of violence, obstruction of justice, or aggravating role. DOJ eventually backed off this position and supported an approach that would result in courts making "an individualized determination in each case of whether a sentence reduction is appropriate." Notice of Final Action Regarding Amendment to Policy Statement § 1B1.10, 79 Fed. Reg. 44973-01 (Aug. 1, 2014). *See* Press Release, *Statement by Attorney General Holder on Sentencing Commission Vote Approving Retroactivity of Sentence Reductions for Drug Offenses* (July 18, 2014), http://www.justice.gov/opa/pr/2014/July/14-ag-756.html.

Notwithstanding the Department's support for such individualized assessments, some prosecutors may argue that certain guideline factors demonstrate a sufficient risk to deny a reduction or limit the extent of a reduction. Defender comments to the Commission debunk these arguments and show why categorical exclusions sweep in many people who pose no significant risk of danger to the community. Letter from Marjorie A. Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (July 7, 2014). Those comments are available at the Commission's website. http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140711/Defenders_Comment.pdf.