INSIDE THE MINDS

Navigating Post-Conviction Appeals

Leading Lawyers on Attempting to Obtain Post-Conviction Relief and Managing Client Expectations

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Federal Criminal Appeals and Post-Conviction Relief: Getting the Most Out of Limited Opportunities for Relief

James H. Feldman Jr.

Sole Practitioner

Law Office of James H. Feldman Jr.

ASPATORE

Introduction

As Justice Anthony Kennedy remarked a few years ago in *Lafler v. Cooper,*[1] "criminal justice today is for the most part a system of pleas, not a system of trials." That statement is especially true with respect to federal criminal cases, 97 percent of which end in guilty pleas.[2] Of the remaining 3 percent that go to trial, 82.3 percent end in convictions. *Id.* For the twelve-month period ending June 30, 2014, out of 81,836 people prosecuted by the federal government, only 428 were acquitted after trial. *Id.* That works out to a conviction rate of 99.5 percent. Virtually every federal criminal defendant will one day face a sentencing judge. Sentencings and appeals, therefore, are of critical importance in almost all federal criminal cases; that is where I have focused my practice for more than twenty-five years.

In a normal case, a defendant's first opportunity to challenge a conviction comes after sentencing. In federal cases, mandatory minimum laws and the sentencing guidelines work together to make many of those sentences unjustly long. Because of the daunting odds, damage control is the defense attorney's primary job in the federal system. While it is usually not possible for someone to avoid a conviction, good lawyering can have a significant positive impact on the lives of our clients. Sometimes, pleas can be negotiated that avoid mandatory minimum sentences or keep the maximum sentences within tolerable limits. Interesting the government in the client's cooperation is probably the most reliable way of ensuring a favorable sentence.

Once a defendant has pled or been found guilty, the criminal defense attorney can make the greatest difference in the client's life during the sentencing hearing. While the odds of winning an acquittal in a federal criminal case are long, it is often possible to contest guideline upward adjustments and to persuade a court to impose a lower sentence than the range recommended by the sentencing guidelines. While I can be of the

[1] *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

[2] This figure disregards the approximately 8 percent of federal cases that are voluntarily dismissed by the government for various reasons, such as a defendant's decision to plead guilty to an Information. *See* UNITED STATES COURTS, U.S. DISTRICT COURTS-CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND OFFENSE, DURING THE 12-MONTH PERIOD ENDING JUNE 30, 2014 (2014), http://goo.gl/RVhcjy (statistics compiled by the Administrative Office of the US Courts).

most benefit to a client if I am brought in to assist with sentencing, most of my clients unfortunately find me only after they have received an unfairly long sentence or have been convicted after trial and sentenced to even longer terms of imprisonment. At that point, my focus becomes appeals and other post-conviction relief.

Because our criminal justice system at some point seems to value finality over justice, it has set up roadblocks that make it often difficult and sometimes impossible for our clients to obtain relief—even when they have what would otherwise seem to be good issues. The options for relief in the federal system are few, and the traps for the unwary many. This chapter is designed to help the new attorney or occasional federal practitioner give their clients the best opportunity for new trials or sentence reductions. It reviews the options for post-conviction relief available to federal criminal defendants, some of the roadblocks that make it difficult to exercise those options, and some ways we, as attorneys, can help our clients obtain the relief to which they are entitled or may be eligible.

Rule 33 Motion for a New Trial

If a defendant has been convicted after trial, the first opportunity to challenge the conviction comes fast. Rule 33 of the Federal Rules of Criminal Procedure[3] gives a defendant only fourteen days following the verdict or finding of guilty to move for a new trial for any reason other than newly discovered evidence. The court can, and usually will, give a defendant more time if a timely motion for extension is filed. A defendant has three years following the verdict or finding of guilty to file a motion for new trial based on newly discovered evidence.

In my experience, clients who are convicted after trial are often unhappy with their attorneys—even if the attorney worked hard and did everything possible for the client. Often, that displeasure comes from the client's perception (real or imagined) that the attorney failed to interview or call witnesses or investigate possible defenses suggested by the client or otherwise provided ineffective assistance.[4] When a client voices complaints of this nature within the period during which a motion for a new trial could

[3] FED. R. CRIM. P. 33.
[4] *See infra,* note 14, for a brief discussion of ineffective assistance claims.

be filed, the attorney should let the client know such issues could be raised in a motion for a new trial and advise the client to seek new counsel for that purpose. If the client foregoes the opportunity to litigate ineffective assistance claims in a motion for a new trial, the client will not have another chance to do so until after sentencing and direct appeal.

While such issues are normally raised after appeal in a motion pursuant to 28 United States Code, Section 2255,[5] there are several reasons it makes sense for the client to raise them prior to sentencing—if possible. Many times, it is impossible to raise these issues in a motion for a new trial because the client may not even be aware of the attorney's errors. But when a client actively complains about what the attorney has failed to do, it is to the client's advantage to litigate the issues sooner rather than later.

After sentencing and appeal, it may be difficult or impossible to find witnesses, and once they are found, the witnesses' memories may have faded. Litigating the issues prior to sentencing also ensures the court will hear and decide them expeditiously, since courts must give criminal cases top priority. Although a Section 2255 motion is filed in a criminal case, it is treated as a civil matter for many purposes and can thus languish, sometimes for years, without judicial action. Another advantage of raising such issues in a Rule 33 motion is that if the motion is denied, it can be appealed as part of the direct appeal. A defendant needs a certificate of appealability (COA) before the defendant can appeal a district court's denial of a 2255 motion.

A motion for a new trial based on newly discovered evidence must be filed within three years of verdict. This kind of motion must be based on evidence that was unknown or unavailable at the time of trial; the defendant must have been diligent in attempting to uncover it; the newly discovered evidence must be material; and it must be such that its emergence probably will result in an acquittal upon retrial. Evidence that merely impeaches the credibility of government witnesses cannot support a motion for a new trial based on newly discovered evidence, but could support a motion for new trial filed within the fourteen-day period as extended by the court.

[5] 28 U.S.C. § 2255.

Direct Appeals

A direct appeal is the defendant's opportunity to raise legal issues that are supported by the record in the district court.[6] In federal cases, the direct appeal is initiated by filing a notice of appeal with the district court within fourteen days after the judgment of conviction and sentence is entered on the court's docket.[7] Often judgment is entered on the day of sentencing, but sometimes it can take several days or a week or more after sentencing before the judgment is entered on the docket. Upon a showing of excusable neglect, it is possible to obtain an additional thirty days to file a notice of appeal.[8]

Sometimes defendants want to forego their direct appeals so they can immediately pursue Section 2255 motions. In my opinion, it does not make sense for a defendant to forego direct appeal unless the defendant has waived that right in a plea agreement, or unless no non-frivolous issue could be raised on direct appeal. Although the chances of success in any particular appeal may be small,[9] there is usually no good reason to abandon a small—but real—chance to obtain relief.

The chance of success in a criminal case rarely exceeds fifty-fifty in the best of circumstances. In the rare case where error is obvious, the government will often concede and agree to a remand. Where an error or its impact is debatable, the effort an attorney puts into the appeal can have an impact on the chances of success. While I tell my clients that they may have only a small chance of obtaining relief on direct appeal, I also tell them that there is a 100 percent chance that they will obtain no relief if they do not appeal.

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[6] Because direct appeals are based solely on the record in the district court, no additional evidence can be submitted. There is therefore no need for any further investigation. The other forms of post-conviction relief discussed in this chapter are generally motions or petitions filed in the district court that must be supported by evidence. The nature of the evidence needed to support such motions or petitions will differ, depending on the issues raised. In those situations, it will sometimes be necessary to enlist the services of investigators or experts to meet the defendant's burden of proof.

[7] FED. R. APP. P. 4(b)(1)(A).

[8] FED. R. APP. P. 4(b)(4).

[9] During the twelve-month period ending June 30, 2014, the courts of appeals reversed convictions or sentences only 6.4 percent of the time. *See* UNITED STATES COURTS, U.S. COURTS OF APPEALS-DECISIONS IN CASES TERMINATED ON THE MERITS, CIRCUIT AND NATURE OF PROCEEDING, DURING THE 12-MONTH PERIOD ENDING JUNE 30, 2014 (2014), *available at* http://goo.gl/OX27BP.

Criminal defendants have so few ways to challenge their convictions that it makes no sense to give up any real chance, however small. In the realm of federal criminal defense, there are generally *only* small chances. What is important for the client to understand is that while the chances of success are generally small, they are real. Even though only 6.4 percent of criminal defendants won their appeals in the twelve-month period ending June 30, 2014, that figure translates to more than 500 defendants obtaining relief on appeal that year.

Money should, of course, never be an issue with respect to a direct appeal in a criminal case. If your client cannot afford an attorney for direct appeal, the court will appoint one. Normally, courts appoint the attorney who represented the defendant in the district court.

The first level of direct appeal is to the United States Court of Appeals for the circuit that covers the particular district court. If you lose the direct appeal, you have ninety days to petition the Supreme Court for *certiorari*.[10] The chances of the Supreme Court granting *certiorari* are small. Out of the approximately 10,000 petitions for writ of *certiorari* the Supreme Court receives each year, the court grants and hears oral arguments in about seventy-five to eighty cases.[11] Out of the seventy-nine cases in which the Supreme Court granted *certiorari* and heard oral argument in the October 2014 term, fourteen involved criminal appeals and *habeas* petitions or other collateral attacks.[12]

If you have a "cert-worthy" issue in your case, and your client can afford it (or you are appointed under the Criminal Justice Act), you owe it to your client to raise it. In preparing your *certiorari* petition, check to see whether the court has already granted *certiorari* with respect to an issue that could be raised in your case. That is a virtual guarantee that *certiorari* will be granted once the other case is decided and then remanded to the court of appeals to apply the new ruling. It is also a good idea to identify any issues pending for

[10] SUP. CT. R. 13.1. For good cause, a justice may extend that time for up to an additional sixty days, as long as the request is made at least ten days before the petition is due. SUP. CT. R. 13.5.

[11] *Frequently Asked Question*, SUPREME COURT, http://goo.gl/oENTQe (last updated Mar. 17, 2015).

[12] SUPREME COURT OF THE UNITED STATES, GRANTED AND NOTED LIST CASES FOR ARGUMENT IN OCTOBER TERM 2014 (2015), *available at* http://goo.gl/gxJvoq.

certiorari in criminal cases. If you can raise an issue that seems to be coming frequently before the court, it could also increase your chances.

Section 2255 Motions

If a defendant loses the direct appeal, the next post-conviction tool at his disposal is the Section 2255 motion.[13] Although many people think of the Section 2255 motion as a kind of appeal, it is actually a motion filed in the criminal case in district court. The same judge who sentenced the defendant decides the 2255 motion.

Section 2255 motions differ from direct appeals in a couple of important ways. First, issues that could have been raised in a direct appeal cannot be raised in a 2255 motion—another reason not to abandon the direct appeal. Unlike in a direct appeal, a defendant can introduce new evidence to support the issues raised in the 2255 motion. Additionally, a defendant cannot file a Section 2255 unless he or she is in custody. The term "custody" means more than imprisonment; it can also include other restrictions on freedom, such as probation or supervised release. However, if a defendant has already served his or her imprisonment, supervised release, or probation, the defendant cannot file a 2255 motion. Also, a Section 2255 motion can be used to attack only the custodial part of a sentence—it cannot be used to challenge fines or forfeitures. Finally, it can be used to challenge only constitutional, jurisdictional, or other fundamental errors. Generally, Section 2255 motions are used to raise claims of ineffective assistance of counsel.[14]

When it was first enacted, no statute of limitations applied to 28 United States Code, Section 2255, and the only limit to the number of 2255

[13] *See* 28 U.S.C. § 2255.

[14] Establishing an ineffective assistance claim can be difficult. Counsel for the defendant must not only establish that prior counsel's representation "fell below an objective standard of reasonableness," but also that it prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Where the ineffectiveness is based on an attorney's failure to investigate, it is necessary to carry out the investigation prior counsel failed to conduct to determine whether the defendant was prejudiced by that failure. Clients may have the information necessary to conduct the investigation; sometimes the services of an investigator or expert are required. For example, if prior counsel should have had tape recordings examined for tampering, it will be necessary to retain an expert to conduct that examination.

motions a defendant could file were principles of equity, such as "abuse of the writ." That changed in 1996, when the Antiterrorism and Effective Death Penalty Act (AEDPA)[15] became law. A one-year statute of limitations now applies to Section 2255 motions. The year begins on the day the judgment of conviction becomes final, which is either the day the Supreme Court decides the case against the defendant or denies *certiorari* or the last day on which the defendant could have appealed further, but did not.[16] To make it even more complicated, three other events can trigger a new one-year statute of limitations, the first of which is when the government has unconstitutionally or illegally impeded the defendant's ability to file a 2255 motion. The year starts on the day any such impediment is removed. I have never seen a case in which that provision applied.

The second triggering event occurs on the date on which the Supreme Court initially recognizes a new right that has been made retroactively applicable on collateral review. Of course, that new right must have been violated in the defendant's case before this new triggering event could be helpful to someone. This is also a rare event, but does occasionally happen.

In 1995, when the Supreme Court construed 18 United States Code, Section 924(c)—the law that makes it a crime to use or carry a firearm during and in relation to a drug trafficking offense or a crime of violence—it initially recognized a new right that was retroactively applicable on collateral review. Prior to that, courts of appeals had interpreted the word "use" to include situations in which guns were stored in proximity to illegal drugs, where they could be accessed easily to defend them. In *Bailey v. United States*[17], the Supreme Court overruled those cases and provided a much narrower definition of the term "use." As a result, some defendants were able to have their illegal convictions vacated.[18]

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[15] Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[16] *Clay v. United States*, 537 U.S. 522, 530 (2003).
[17] *Bailey v. United States*, 516 U.S. 137 (1995).
[18] In 1998, following *Bailey*, Congress amended the law to criminalize possessing a firearm during and in furtherance of a drug offense or crime of violence. This became known as the "*Bailey* Fix Act." *Abbott v. United States*, 582 U.S. 8, 25 (2010).

A more recent example is *Skilling v. United States,*[19] in which the Supreme Court construed 18 United States Code, Section 1346, which, together with other fraud statutes, such as 18 United States Code, Section 1341 (mail fraud), makes it a crime to defraud someone of the intangible right of honest services. After that case, some convictions for honest services fraud became open to challenge, since they were not based on kickbacks or bribery. Since the Supreme Court's construction of a federal statute is always retroactive, such cases can trigger one-year statute of limitations for defendants affected by them.

The fourth and final triggering event occurs on the date on which a defendant discovers facts that support the defendant's claim, as long as those facts could not have been discovered earlier through the exercise of due diligence.

In general, it is best to file a Section 2255 motion within one year of the judgment of conviction becoming final. The exception to this rule occurs when no non-frivolous issues can be raised. While attorneys are, of course, precluded from filing frivolous claims, *pro se* prisoners' filings are rife with them. By the time a defendant exhausts his direct appeals, the defendant and the defendant's family cannot afford to hire attorneys to research, prepare, and litigate Section 2255 motions. This leads to the vast majority of Section 2255 motions being filed *pro se*.

There are, however, ways to make access to an attorney affordable to more defendants and to increase their chances of obtaining relief from zero to small. Some defendants and their families who cannot afford to hire counsel to investigate and litigate a Section 2255 motion *can* afford to hire an attorney to review their cases for non-frivolous issues. I have found this to be an important way to help clients who cannot afford to hire an attorney to litigate their motions. If I find a non-frivolous issue, I draft a Section 2255 motion for the client to file *pro se*.

When I do this, I always include a paragraph at the end of the motion that discloses the fact that the defendant received my assistance in drafting the motion. Such limited-scope engagements are entirely proper and ethical as

[19] 561 U.S. 358 (2010).

long as the attorney's assistance is disclosed in the motion.[20] Another advantage of this approach is that if the court determines a hearing is required on the motion, it will appoint counsel to represent the defendant.[21] The court must also appoint counsel for a defendant who moves for discovery, if the court determines counsel is necessary for effective discovery.[22]

If I do not find a non-frivolous issue, I advise my client not to file a 2255 motion. Not only will a frivolous motion fail to provide any relief to the *pro se* defendant, but it may also preclude the defendant from filing at a later date if, in the future, the defendant discovers new facts that support a motion or if the Supreme Court recognizes a new right that is made retroactively applicable to cases on collateral review.

Before a defendant can file a second Section 2255 motion, the defendant must obtain permission from a panel of the court of appeals. An appellate panel may grant such permission on only two grounds:

1. Newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
2. A new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.[23]

Even if the Supreme Court construes a federal criminal statute in a way that calls into question the validity of a defendant's conviction, or even makes it clear the defendant is not guilty, Section 2255's "gatekeeping" provision precludes the defendant from Section 2255 relief. A second Section 2255 motion is not permitted under this circumstance, since the Supreme Court does not establish any new rule of constitutional law when it construes a federal statute. In some situations, a defendant may be able to obtain relief through a petition filed pursuant to 28 United States Code, Section 2241.

[20] *See* Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and the Philadelphia Bar Association Professional Guidance Committee, Joint Formal Opinion 2011-100 (Representing Clients in Limited Scope Engagements).
[21] *See* FED. R. APP. P. 8(c).
[22] *Id.* 6(a).
[23] 28 U.S.C. § 2255(h).

After filing a Section 2255 motion, the process tends to go smoothly—at least at first. Shortly after the motion is filed, the court will normally order the government to file a response by a certain date. After the defendant files a reply, some courts either quickly set a hearing date or rule on the motion (if no hearing is necessary), while other courts seem to relegate Section 2255 motions to the back-burner, leaving them languishing for years. Unfortunately, there seems to be no good way to require a court to deal with a case more expeditiously. I have had occasional success with a motion to expedite—when there is a good reason for such a motion, such as my client's advanced age. On a couple of occasions, I have resorted to drafting *mandamus* petitions for filing in the court of appeals. I sent a copy of each draft to the court in question as a courtesy and let the judge know I would be filing it on a particular date (usually a month or two in the future). This approach has always resulted in the court's taking action—just not the action I had hoped for.

If the district court denies a Section 2255 motion, there is no appeal of right. Before you can appeal, you must obtain a COA, either from the district court or from a judge of the court of appeals.[24] The standard for receiving a COA is not high: you "must make a substantial showing of the denial of a constitutional right."[25] A "substantial showing" "includes [a] showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[26] For clients whose families cannot afford to pay me to handle an appeal, I charge a small fee to prepare and file the application for COA and move for appointment of counsel if the court grants the motion.

Other Possibilities for Post-Conviction Relief

When a person in prison has lost a Section 2255 motion, he or she may look for an attorney to file a 28 United States Code, Section 2241 petition, otherwise known as a "petition for writ of *habeas corpus*." Such petitions must be filed in the judicial district in which the person is held in custody. The warden is named as the respondent. *Habeas* petitions are tempting

[24] 28 U.S.C. § 2253(c).
[25] *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).
[26] *Id.* (quoting from *Barefoot v. Estelle,* 463 U.S. 894 (1983)).

because they are not subject to the restrictions that have been imposed on 2255 motions. For example, there is no time limit for filing a *habeas* petition. Although inmates who have already lost Section 2255 motions sometimes file *pro se habeas* petitions, most such petitions are dismissed because 28 United States Code, Section 2255(e) prohibits a court from entertaining a *habeas* petition if the person could have filed a 2255 motion but did not, or if the person has already been denied Section 2255 relief. The only exception to the latter prohibition occurs when a Section 2255 motion "is inadequate or ineffective to test the legality of detention." Unfortunately, there are few such situations. The fact that a defendant missed the deadline for filing a Section 2255 motion or does not meet the criteria for filing a second Section 2255 motion does not render the Section 2255 motion "inadequate or ineffective to test the legality of detention."[27]

There are only a few situations in which a Section 2255 motion is inadequate or ineffective, one of which occurs when the Section 2255 gatekeeping rule on second successive motions prevents a factually innocent person from obtaining relief. This occurred after *Bailey* made it clear that some defendants convicted of using a firearm during and in relation to a drug offense or crime of violence, in violation of 18 United States Code, Section 924(c), were actually innocent of that offense, but were precluded from filing a second Section 2255 motion because the ruling in *Bailey* did not satisfy either of the two criteria for granting that permission.[28] While *habeas* petitions generally cannot be used to challenge a defendant's federal conviction, they are properly used by federal prisoners to challenge the loss of good time credits by the Bureau of Prisons (BOP) or other BOP determinations concerning when they will be released from custody.

Petition for Writ of Error *Coram Nobis*

Clients who are no longer in custody can petition for Writs of Error *Coram Nobis* to challenge the validity of their convictions when they suffer collateral consequences from unconstitutional or otherwise fundamentally erroneous convictions. Petitions in the nature of the ancient Writ of Error *Coram Nobis* are authorized by the All Writs Act.[29]

[27] *See, e.g., Cradle v. Miner*, 290 F.3d 536, 539 (3d Cir. 2002).
[28] *See In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997).
[29] 28 U.S.C. § 1651. *See United States v. Morgan*, 346 U.S. 502 (1954).

I have filed such petitions on several occasions in attempts to help non-citizens challenge their removal from the United States based on old and arguably improper convictions.

Motion Pursuant to the Federal Rules of Criminal Procedure, Rule 35(b)

Federal criminal clients can sometimes earn reductions in the sentences they are already serving by assisting in the government's investigation or prosecution of crimes committed by others. Rule 35(b) motions must be filed within a year after sentencing—although there are several exceptions to that rule. Generally, if a prosecutor is interested in the defendant's cooperation, he or she will be able to fit the cooperation within one of the exceptions.

Although only a prosecutor may file a Rule 35(b) motion, criminal defense attorneys can assist their clients by acting as intermediaries with prosecutors. If a client has information he or she is willing to share concerning crimes committed by others, I have found it well worth the time it takes to approach the client's prosecutor to see whether the prosecutor is interested in the information and is willing to consider a Rule 35(b) motion if the cooperation qualifies as "substantial." If the information involves a crime in another jurisdiction, I generally call the prosecutor in that jurisdiction to find out whether he or she is interested in the information and is willing to urge the client's prosecutor to file a Rule 35 motion if the cooperation becomes substantial. I also call the client's prosecutor to make sure he or she would be open to considering a Rule 35 motion if the cooperation in the other jurisdiction is substantial.

There is no hard and fast rule as to what constitutes substantial assistance. Generally, whenever a defendant testifies before a grand jury or at trial, the cooperation is substantial. Cooperation that results in a guilty plea can also be substantial. In my experience, there is generally no way of knowing in advance whether a prosecutor will be interested in a client's cooperation following sentencing, which means it is always worth at least making a phone call to find out. If the prosecutor is interested in the defendant's cooperation and is willing to file a Rule 35(b) motion should that cooperation turn out be substantial, I will send the prosecutor an e-mail that summarizes my understanding of the circumstances under which he or

she will file a Rule 35(b) motion and asks him or her to confirm that my understanding is correct.

While assistance must be substantial before it can earn a Rule 35(b) motion, the assistance need not be provided by the client. Friends or family members who have firsthand information concerning crimes committed by others can cooperate on behalf of the client, with any substantial assistance inuring to the client's benefit. Not all prosecutors accept third-party cooperation. Because third-party cooperators face some risks when they cooperate for the benefit of a family member or friend, I urge them to seek their own counsel before agreeing to cooperate.

Occasionally, a family member of a client finds an online service that, for a large fee, promises to provide someone to cooperate on anyone's behalf. I have also had clients approach me after meeting someone in a detention center who claims to know someone on the outside who will cooperate for a fee. I am always wary of these situations. While I do not see anything necessarily illegal about such arrangements, I always tell clients that the prosecutor must be informed about it from the start. The one time I broached such a possibility with a prosecutor, she was not interested. She did not want to be part of what she viewed as a wealthy prisoner's purchasing a sentence reduction.

18 United States Code, Section 3582(c)(2) Motion to Reduce Sentence

Occasionally, the Sentencing Commission amends a guideline to reduce an offense level for a particular type of crime and makes that amendment retroactively applicable. When that happens, 18 United States Code, Section 3582(c)(2) opens the door to a potential sentence reduction if the amended guideline results in a lower guideline range. The court is authorized to reduce a defendant's sentence to the bottom of the guideline range that results when the amended guideline is applied to the case and all other guideline application decisions remain the same.[30] This means that if the sentencing court imposed a sentence below the bottom of the then-applicable range, it is possible the amended guideline range still will not be lower than the sentence imposed. In that situation, the amended guideline may not support a reduced sentence.

[30] U.S. SENTENCING GUIDELINES MANUAL § 1B1.10.

The one exception occurs when the court imposed a below-guideline sentence because of a government motion to depart pursuant to the United States Sentencing Guidelines (USSG), Section 5K1.1 or 18 United States Code, Section 3553(e) or to reduce sentence pursuant to Rule 35(b) based on the defendant's substantial assistance to the government. In those situations, the court is authorized to reduce the sentence to a point that is comparably less than the bottom of the newly calculated guideline range.

While retroactively applicable amendments are relatively rare (there have been only thirty in the past thirty-two years), I am hopeful there will be some significant retroactive amendments during the next few years as Congress and the Sentencing Commission become more aware of the huge burden unnecessarily long sentences impose on individuals and society as a whole. The Sentencing Commission's decision last year to reduce the guidelines in almost all drug cases by two levels and to make the amendment retroactive was an important step in the right direction. But it did nothing to address the unnecessarily long sentences being served because of mandatory minimum laws that require judges to impose such sentences based solely on factors such as drug quantity.

Today, more than half of all federal prisoners were convicted of an offense carrying a mandatory minimum sentence.[31] It has become clear mandatory minimum sentences are not in the public interest. Not only do most federal judges oppose them, but last year the chair of the Sentencing Commission, Judge Patti Saris, also urged Congress to:

1. Reduce the current statutory mandatory minimum penalties for drug trafficking;
2. Make retroactive the provisions of the Fair Sentencing Act of 2010, which increased the quantity of cocaine base ("crack" cocaine) necessary to trigger a mandatory minimum sentence; and
3. Consider expending the so-called safety valve to allow courts to impose sentences below mandatory minimum penalties for non-violent, low-level drug offenders with slightly greater criminal histories than are currently permitted.[32]

[31] *See* http://goo.gl/Rcwa5m.
[32] *See* TESTIMONY OF CHIEF JUDGE PATTI B. SARIS, CHAIR, UNITED STATES SENTENCING COMMISSION FOR THE HEARING ON "AGENCY PERSPECTIVES" BEFORE THE OVER-

With respect to financial crimes, such as fraud and tax offenses, the commission is considering incorporating an inflationary factor into those guidelines that would automatically increase the cut-off points for losses that increase the guideline range.[33] If such an amendment were adopted and made retroactively applicable, it could result in significant sentence reductions in white-collar cases, since the fraud and tax guidelines are still based on the value of the dollar in 2001 without any adjustment for inflation.[34]

18 United States Code Section 3582(c)(1)(A): Motion for Compassionate Release

Title 18 United States Code Section 3582(c)(1)(A) gives the director of the Bureau of Prisons the authority to move the court to reduce a defendant's sentence for "extraordinary and compelling reasons," or where the defendant is over seventy years old, has already served thirty years, and is no longer a danger to the safety of any person or to the community. In the past, the BOP rarely exercised its discretion under the "extraordinary and compelling reasons" provision of this law—reserving it mostly for inmates suffering from terminal conditions who were near death. In 2013, however, the BOP amended the criteria for considering such requests, thus opening this option to more inmates. The BOP will now consider compassionate release for inmates who meet the following criteria:

- Age sixty-five and older
- Suffer from chronic or serious medical conditions related to the aging process
- Experiencing deteriorating mental or physical health that substantially diminishes their ability to function in a correctional facility
- Conventional treatment promises no substantial improvement to their mental or physical condition.
- Have served at least 50 percent of their sentence[35]

CRIMINALIZATION TASK FORCE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES HOUSE OF REPRESENTATIVES (2014), *available at* http://goo.gl/FO777n.

[33] *See* PRISON AND SENTENCING IMPACT ASSESSMENTS FOR PROPOSED 2015 AMENDMENTS FOR INFLATIONARY ADJUSTMENTS TO MONETARY TABLES IN THE FEDERAL SENTENCING GUIDELINES (2014), *available at* http://go.usa.gov/3qNcV.

[34] *Id.*

[35] BOP Policy Statement 5050.49 (This and other policy statements are available on the BOP's website, www.bop.gov).

The BOP will also consider making a motion for compassionate release for "Inmates age 65 or older who have served the greater of 10 years or 75% of the term of imprisonment to which the inmate was sentenced."[36] The BOP Policy statement explains how to request compassionate release.

The Presidential Pardon

Article II, Section 2 of the Constitution gives the president virtually unlimited power to pardon or commute the sentence of anyone convicted of offenses against the United States.[37] The only limitation provided in the Constitution concerns cases of impeachment. Although the president's power to pardon or commute sentences is almost unlimited, the Office of the Pardon Attorney—the Department of Justice (DOJ) office that advises the president concerning pardons and commutations—has established eligibility rules and a procedure for applying for presidential clemency.[38] Those rules, as well as the application form that must be used to apply for presidential clemency, are available online.

Under those rules, a defendant cannot petition for a pardon until five years after his or her release from prison.[39] If no prison term was imposed, the person must wait five years after conviction.[40] Pardon applications should also not be submitted while the person is on parole, probation, or supervised release.[41] Other than in exceptional circumstances, applications for commutation of sentence should not be submitted until all other forms of relief have been exhausted.[42] In other words, presidential clemency is an individual's last chance to reduce his or her sentence or be relieved from the collateral consequences of a federal conviction.

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[36] *Id.*

[37] A sentence "commutation" reduces an individual's sentence, but does not alter the fact that the person has been convicted of a crime or affect the collateral consequences of that conviction. A "pardon" is an act of presidential forgiveness. It does not render an individual "innocent" of an offense, but it does remove any collateral consequences of the conviction.

[38] *Rules Governing Petitions for Executive Clemency*, US DEP'T OF JUSTICE, http://www.justice.gov/pardon/rules-governing-petitions-executive-clemency (last updated Jan 13, 2015).

[39] *Id.* § 1.2

[40] *Id.*

[41] *Id.*

[42] *Id.* § 1.3.

In recent years, presidents have used their clemency power sparingly.[43] On the more hopeful side, in 2014, the DOJ announced a new initiative that could result in sentence commutations for many inmates. Under this initiative, the DOJ will give priority to inmates who meet the following criteria:

1. They are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today;
2. They are non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels;
3. They have served at least ten years of their prison sentence;
4. They do not have a significant criminal history;
5. They have demonstrated good conduct in prison; and
6. They have no history of violence prior to or during their current term of imprisonment.[44]

Attorneys interested in participating in the clemency initiative should send inquiries to clemencyproject@clemencyproject2014.org.

Conclusion

Going forward, I am hopeful that Congress will take action necessary to correct the excesses of the years in which being "tough on crime" meant longer and longer sentences. This seems entirely possible as more and more people of every political stripe conclude that mandatory minimum sentences do not protect society and are not worth the price we pay, either financially or in human suffering.

Barring changes in the law that would allow for the correction of unjust sentences on a large scale, the traditional tools of criminal defense will remain to protect the rights of our clients and hopefully to make a difference in their lives:

[43] In FY 2014, for example, President Obama granted thirteen pardons and commuted nine sentences, but denied 154 pardon applications and 1,226 commutation applications. That year, people submitted 273 applications for pardon and 6,561 commutation applications. At the beginning of that year, there were 754 pardon petitions pending and 2,785 commutation petitions pending. *Clemency Statistics*, US DEP'T OF JUSTICE, http://www.justice.gov/pardon/clemency-statistics (Mar. 19, 2015).

[44] *New Clemency Initiative*, US DEP'T OF JUSTICE, http://www.justice.gov/pardon/new-clemency-initiative (last updated Jan. 12, 2015).

- Rule 33 provides defendants with the opportunity to ask for a new trial for any reason within fourteen days of verdict or within three years based on newly discovered evidence.
- Direct appeals are used to challenge errors that are supported by the record.
- The motion pursuant to Title 28 United States Code Section 2255 is available for defendants still in custody to present new evidence in support of a new trial or sentencing based on constitutional or other fundamental errors, such as the denial of the Sixth Amendment right to the effective assistance of counsel.
- The petition for writ of error *coram nobis* provides similar relief to defendants no longer in custody.
- Rule 35(b) provides an opportunity for some clients to reduce their sentences by cooperating with the government.
- When the Sentencing Commission reduces a guideline offense level and makes that reduction retroactive, 18 United States Code Section 3582(c)(2), gives courts the power to reduce sentences.
- Section 3582(c)(1)(A), gives some older inmates who have served much of their sentence the potential for compassionate release.
- Finally, the president has the power to pardon or commute the sentence of anyone convicted of a federal offense.

Key Takeaways

- Once a defendant has pled or been found guilty, you can make the greatest difference in the client's life during the sentencing hearing. Contest guideline upward adjustments, and try to persuade the court to impose a lower sentence than the range recommended by the sentencing guidelines.
- When a defendant believes he was convicted after trial because his attorney failed to investigate or call critical witnesses, he should ask his attorney to move for additional time to file a Rule 33 motion and then seek new (or additional) counsel to explore the possibility of a Rule 33 motion. Sometimes a Rule 33 motion for a new trial can provide a client his or her first and best opportunity to raise ineffective assistance of counsel claims.

- Advise your clients not to forego their direct appeals so they can immediately pursue Section 2255 motions. Although the chances of success in any particular appeal may be small, there is usually no good reason to abandon a small (but real) chance to obtain relief.
- If your client cannot afford to hire you to research, prepare, and litigate a Section 2255 motion, offer instead to review the case for non-frivolous issues. If you find one, draft a Section 2255 motion for the client to file *pro se,* with a paragraph disclosing your assistance in drafting the motion.
- When a Section 2255 seems to have stalled in the district court, consider whether there are grounds for a motion to expedite.
- Consider filing a motion in the nature of a writ of error *coram nobis* for clients who are no longer in custody but who suffer collateral consequences from unconstitutional or otherwise fundamentally erroneous convictions.
- Cooperating with the government can sometimes earn a Rule 35(b) motion for sentence reduction based on substantial assistance. Be wary of individuals or websites offering fee-based cooperation.
- Older clients who have served substantial portions of their sentences may qualify for compassionate release pursuant to Section 3582(c)(1)(A).
- Non-violent, low-level offenders with good prison records and no significant criminal history who have already served ten years in prison and whose sentences are longer than would have been imposed today may qualify for a presidential commutation.

James H. Feldman Jr., sole practitioner in the Law Office of James H. Feldman Jr., has practiced federal post-conviction criminal defense full-time since 1989, first as a senior associate in the Law Offices of Alan Ellis and later as a sole practitioner. During that time, he has handled numerous sentencings, appeals, and 2255 motions in federal courts throughout the United States. Mr. Feldman is co-author of the Federal Sentencing Guidebook *and the* Federal Post-Conviction Guidebook*, and was editor of the Ellis firm's* Federal Presentence and Post-Conviction News. *He has authored numerous articles on federal sentencing and post-conviction remedies, including* Litigating in a Post-Booker World, Representing the White Collar Client in a Post-Booker World*, and A 2255 and 2241 Primer. In addition to his own practice, Mr.*

Feldman is of counsel to the Law Office of Peter Goldberger and the Law Offices of Alan Ellis. He works out of his Ardmore, Pennsylvania, office.

After earning his law degree in 1976 from the University of Cincinnati College of Law, Mr. Feldman engaged in the solo practice of law in Cincinnati until 1982, when he moved to Philadelphia to serve as staff attorney for the Central Committee for Conscientious Objectors (CCCO). Because of his work with CCCO, Mr. Feldman is one of a handful of attorneys in the United States experienced in litigating habeas *petitions on behalf of members of the United States armed forces after they have been denied discharge as conscientious objectors.*

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