Plea Negotiations in ASD Cases

A. Diversion

Generally, diversion is an alternative to prosecution offered to certain criminal offenders as an opportunity to have charges against them dismissed. In the federal criminal system, diversion is defined in the United States Attorneys' Criminal Resource Manual ("USAM") at Title 9, Section 22.000. Diversion is an optional program, initiated by a United States Attorney, and voluntarily agreed upon by the criminal offender.[1] In exchange for entry into the program, the criminal offender (the "divertee") must agree to waive his rights to a speedy trial and presentment of his case within the statute of limitations.[2] As an initial matter, the divertee must have the advice of counsel before entering any such agreement.

Typically, diversion occurs at the pretrial stage; however, it can occur at any point prior to trial.[4] Offenders are diverted from traditional criminal justice processing and supervised by the U.S. Probation Service.[5] Upon successful completion of the program, participants either will not be charged, or, if they have been charged, will have the charges against them dismissed; those who do not complete the program successfully are returned for prosecution.

A pretrial diversion agreement requires an offender to acknowledge responsibility for his behavior, without necessarily admitting guilt.[7] After entering into the agreement, supervision is tailored to meet the needs of the specific divertee.[8] Some divertees' supervision may include employment and counseling, whereas other supervision can include education, job training, or psychiatric care.[9] In all cases, supervision is not to exceed 18 months, but can be reduced.[10]

In order to take advantage of a diversion program, certification requirements must be met, and the United States Attorney must comply with pretrial diversion guidelines.[11] As stated in Section 9-22.100 (Eligibility Criteria):

> The U.S. Attorney, in his/her discretion, may divert any individual against whom a prosecution case exists and who is not:
>
> > Accused of an offense which, under existing Department guidelines, should be diverted to the State for prosecution;
> >
> > A person with two or more prior felony convictions;
> >
> > A public official or former public official accused of an offense arising out of an alleged violation of a public trust; or
> >
> > Accused of an offense related to national security or foreign affairs.

Since its implementation at the federal level in the Pretrial Services Act of 1982, pretrial diversion has been declining in use.[12] In 1999, 2716 of the 80,154 activated cases in the federal criminal system used a pretrial diversion program.[13] Conversely, nine years later, in 2008, 1426 of the 98,244 activated cases used a pretrial diversion program.[14] More tellingly, one-quarter of the 2008 pretrial diversion cases arose in only three districts (the District of New Jersey, the Eastern District of Virginia, and the Eastern District of Missouri).[15]

Originally, pretrial diversion was a program implemented to help juvenile offenders. It was later adopted in the federal judiciary with the passage of the Pretrial Services Act of 1982.[16] Pretrial diversion "*was meant to be an alternative to prosecution for low-level criminal offenders who had identifiable rehabilitative needs.*"[17] Essentially, the program seeks to prevent criminal offenders from reoffending.18 Section 9-22.010 of the USAM states:

> The major objectives of pretrial diversion are: to prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services; to save prosecutorial and judicial resources for concentration on

major cases; and to provide, where appropriate, a vehicle for restitution to communities and victims of crimes.

B. Diversion in Child Pornography Cases

Federal pretrial diversion is an available option in cases where the divertee is accused of a sexual offense. However, the use of pretrial diversion in these cases is disfavored. USAM § 9-75.410 states that *"[p]re-trial diversion for crimes involving child pornography, child sexual abuse, the sexual exploitation of children and obscenity is generally not favored…however, it may be an appropriate and just disposition in certain cases.*" Notwithstanding § 9-75.410, the ultimate decision whether or not to use pretrial diversion is in the hands of United States Attorneys.

There are not many specific reported instances where a pretrial diversion program has been used, in lieu of prosecution, in cases involving the federal child pornography laws. One reason why this may be the case is that diversion agreements are not matters of public record. In one child pornography case in which pretrial diversion was used, an Ohio criminal defense attorney entered into a pretrial diversion agreement after an investigation ensued regarding the attorney's use of pornographic materials in connection with his representation of accused pornographers.[19] The attorney represented multiple persons charged with violations of federal child pornography laws and statutes.[20] In representing his clients, the attorney "downloaded and manipulated images from the internet of real and identifiable minors and created a series of visual depictions of [those] minors engaged in sexually explicit conduct."[21] In essence, the attorney was compiling the material as court exhibits in cases where he was representing an accused.[22] Rather than prosecuting the attorney, the prosecution allowed him to enter into a pretrial diversion agreement "*which states that his conduct violated 18 U.S.C. § 2252A(a)(5)(B), and wherein he agreed to refrain from engaging in similar conduct for eighteen months.*"[23]

It is important to note that a decision of a United States Attorney not to offer pretrial diversion to an accused is not reviewable by a district court.[24] This makes sense given that the decision to offer diversion involves prosecutorial discretion whether to pursue formal charges.

It is strongly suggested that diversion be considered in some cases as the best option for a defendant on the autism spectrum who is charged with possession of child pornography. The suggestion would be pertinent to an ASD individual who has no prior criminal record and poses a very low or no risk of causing harm to a child. The suggestion is based on the detailed information provided in subsequent chapters that such an ASD person committed the unlawful act without any or at least diminished criminal responsibility related to the neurological deficits of autism.

Footnotes

1. *Id.*; see also USAM § 9-712.
2. *Id*. at § (B)(1).
3. *Id*. at § (B)(2).
4. USAM § 9-22.010; see also USAM § 9-712(A).
5. USAM § 9-22.010.
6. *Id*.
7. USAM § 9-712(F).
8. *Id*. at § (E).
9. *Id*.
10. *Id*. at § (F).
11. See USAM § 9-8.190 (citing USAM § 9-22.000 *et seq*. (Pretrial Diversion)).
12. See Joseph M. Zlatic *et al*., *Pretrial Diversion: The Overlooked Pretrial Services Evidence Based Practice*, 74 Federal Probation 1 (June 2010).
13. *Id*.
14. *Id*.
15. *Id*.

16. See *Id*.
17. *Id*.
18. See USAM § 9-22.010.
19. See *Boland v. Holder*, No. 1:09 CV 1614, 2010 WL 3860996 (N.D. Ohio Sept. 30, 2010).
20. *Id*. at *1.
21. *Id*. (citing Pretrial Diversion Agreement).
22. *Id*. at *1.
23. *Id*. at *2 (citing Pretrial Diversion Agreement).
24. See *United States v. Richardson*, 856 F.2d 655 (4th Cir. 1988).

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Caught in the Web of the Criminal Justice System, pp. 249-253.