

Federal Sentencing: The New Frontier of Modern Legal Advocacy

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Over time, the art of legal advocacy has, by and large, been reduced to a formulaic effort to find the “right” case or statute to support a particular legal position. Congress has passed detailed legislation to deal with increasingly narrow contingencies, agencies have made detailed attempts to construct all-encompassing regulatory packages, and courts have continued to apply such laws and regulations to more and more fact patterns each day. As a result, it often appears there is little room for creativity and inventiveness in the law.

Federal sentencing, until recently, served as a glaring example of the escalating predilection for defining an area of the law to the limits of rigidity. Faced with often significantly disparate sentencing in federal courts across the United States, Congress passed the Sentencing Reform Act of 1984, which established the United States Sentencing Commission. The commission’s primary objective was to develop sentencing guidelines for use by district court judges so a standardized methodology would be applied to all convicted defendants. The first guidelines became effective in 1987 and were found to be constitutional by the Supreme Court in 1989. With the implementation of the guidelines, courts were provided with extraordinarily limited discretion, and, consequently, attorneys had little opportunity to effectively advocate for their clients.

However, after two decades of strict adherence to the federal sentencing guidelines, federal district judges have recently been granted significant discretion in determining the appropriate sentences for federal offenders. In light of recent Supreme Court precedent, sentences must meet only an enigmatic “reasonableness” stan-

dard. As a result, 10th Circuit Judge Terrence O’Brien has recently written a single sentence concurring opinion, which provides: “In a series of ceremonial rites the leveling forces of the guidelines, their hearthstone, were sacrificed on the altar of sentencing discretion and appellate courts rendered impotent.”¹ Because the district court “considering what sentence to impose... does not have the benefit of any prior judicial determination regarding the particular circumstances of the offender and the offense,”² the 10th Circuit’s review of the district court’s variance from the advisory guideline range is limited to an examination of the district court’s “application of the 18 U.S.C. §3553(a) factors for substantive reasonableness, utilizing the abuse-of-discretion standard.”³ Thus, in a September 2009 opinion, the 10th Circuit upheld a sentence doubling the highest guideline recommendation – without substantive discussion – since the district court could only abuse its discretion if “it render[ed] a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable.”⁴

A brief example from the Western District of Oklahoma serves to illustrate the issue. The defendant in *U.S. v. Snider*⁵ was an older profes-

sional with no prior criminal history. He had cooperated extensively with the government to obtain convictions against the primary actors in a tax fraud scheme and, as a result, was the subject of a government motion for downward departure. The court, apparently recognizing (although not acknowledging at the time) that incarceration was not appropriate, nonetheless notified the parties of its intent to depart upward from the guidelines – with regard to the amount of restitution. Although the court ultimately decided that the upward departure was not necessary, the case illustrates the discretion a court wields to craft a sentence which rewards the defendant for his cooperation and recognizes that incarceration is not necessary given the age and history of the defendant, the conduct at issue and severity of the offense. Nonetheless, the sentence significantly punishes the defendant and deters others similarly situated from committing such offenses. With the availability of such broad discretion, the attorney must make every effort to advocate on his client's behalf in federal sentencing.

ADVOCACY AND THE PRESENTENCE REPORT

The U.S. Probation Office prepares a presentence report (PSR) on every federal defendant. The PSR is intended to provide the judge with information necessary to impose a fitting sentence and includes discussions of a defendant's personal and family data, physical condition, mental and emotional health, employment record and financial condition, among other issues. Historically, much of this type of background information contained in the PSR had little bearing on the ultimate sentence, while the guideline calculation contained therein was of pre-eminent importance. Now, however, given the court's extraordinary discretion, these sections of the PSR provide the defendant with the first opportunity to put his case for variance before the judge.

As an initial matter, it is necessary to provide the probation officer with accurate and complete information on the defendant's background. The defendant is the foremost source of this information, although the probation officer will generally obtain and check information by interviewing friends and family. In addition, a defendant may comment on or object to the PSR. The defendant's inclusions as well as the probation officer's responses are incorporated into an addendum to the PSR for judicial consideration. Proper advocacy at this stage of

sentencing results in PSR conclusions which can be adopted and expanded rather than contested in the sentencing memorandum.

ADVOCACY THROUGH THE SENTENCING MEMORANDUM

The guidelines are now simply one of many factors that are to be taken into account in arriving at an appropriate sentence under §3553(a).⁶ Generally, issues with the guidelines are addressed in the presentence report prepared by the U.S. Probation Office and any objections thereto made by counsel. Thus, the focus of the sentencing memorandum is on factors other than the guidelines. However, the character and history of the defendant, the nature and seriousness of the charges, and the preferences of the court will all play a role in determining what issues should be raised and where emphasis should be placed. Moreover, the sentencing memorandum should always be predicated on the overarching theme of 18 U.S.C. §3553(a): that "[t]he court shall impose a sentence sufficient, *but not greater than necessary* to comply with the purposes [of sentencing]."⁷ In addition, the court must "recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation."⁸

SENTENCING FACTORS

In determining the minimally sufficient sentence, §3553(a) directs sentencing courts to consider the following factors, among others: 1) the nature and circumstances of the offense and the history and characteristics of the defendant; 2) the kinds of sentences available; 3) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and 4) the need to provide restitution to any victims of the offense. Such factors include:

Age – Under the present regime, "district courts have routinely considered a defendant's age as part of their analysis on the ground that older defendants exhibit markedly lower rates of recidivism compared to younger defendants."⁹ Indeed, even before *Booker*, the 10th Circuit, and other courts, recognized that an older defendant's lack of prior criminal conduct could be a relevant downward departure ground.¹⁰

Education, Vocational Skills and Employment History – A defendant's education, vocational skills and employment history should also be considered by the court. Thus, depend-

ing on the circumstances, one might argue that the professional, such as corporate officer responsible for employing others in the community or the sole medical provider in a small town, is a valuable resource to the community and removal of the individual from the community will have far reaching effects. In addition, there would be a smaller likelihood of recidivism where the defendant has a means by which to earn a paycheck. Or, alternatively, if the professional can no longer perform his or her job as a result of the conviction, he or she will have already suffered a great consequence for the criminal activity. Similarly, if the crime was committed through any special position resulting from the defendant's education or skill and the license is revoked, there is little threat of a repeat offense, as the opportunity no longer exists.

Physical Condition – A defendant's health condition is relevant to the need for confinement, the conditions of confinement, the potential for recidivism and the ability to provide adequate health care (and the associated costs) during any incarceration.¹¹ Particularly, in conjunction with advanced age, the physical condition of the defendant can be a very persuasive and reasonable basis for the imposition of a lower sentence as, under such circumstances, the chance of recidivism greatly decreases while the costs of incarceration would significantly escalate.

Mental and Emotional Condition – The mental and emotional condition of the defendant may be important for a number of reasons. At one extreme, the defendant could be suffering from such acute mental distress that it affects the individual's physical condition and should be treated accordingly. It may also provide a complete or partial justification for the crime committed. In addition, extreme remorse, which could potential exhibit itself as a diagnosed condition (although such a diagnosis is not necessary to make the argument) is itself a grounds for downward departure.¹²

Family Ties and Responsibilities – Courts often find that a defendant's family life is an important ground for imposition of a low sentence. The most obvious cases involve instances where the defendant is the sole or primary caretaker of minors or elderly parents. In such circumstances, incarceration places a significant burden, not only on the defendant but on his or her dependants, as well as the community,

which, in many cases, may be required to fulfill the void while the defendant is jailed.

Civic, Military, Charitable or Public Service Contributions – A strong record of civil, military, charitable or other public service contributions is a legitimate independent basis for downward departure.¹³ Courts are generally much more inclined to give weight to "hands on" activities rather than simple monetary contributions.

Lack of Guidance as a Youth and Similar Circumstances – Where appropriate, the childhood conditions of a defendant, especially a younger defendant, may provide justification for the imposition of a lower sentence.

Cooperation and Exceptional Acceptance of Responsibility – If the defendant is seeking a motion for downward departure from the government based on substantial assistance to a governmental investigation, defense counsel should keep a "diary" reflecting the information, testimony and documents provided by the client and the impact the assistance had on the government's efforts. The 10th Circuit has recognized that a variance was appropriate "for acceptance of responsibility to be so exceptional that it is 'to a degree' not considered by USSG §3E1.1."¹⁴ Thus, even if the government refuses to provide a motion for downward departure based on the defendant's cooperation, the court may still recognize that a departure is merited. With or without a government motion, a well-documented record of the efforts by the defendant will be invaluable in arguing for a variance on such grounds.

Nature of the Offense – To a certain extent, the nature of the offense "is what it is." The court will have at its disposal, for better or worse, the presentencing report and any objections, which will include a discussion of the offense. However, the sentencing memorandum provides an excellent opportunity to attempt to minimize the negative impact of the offense, although great care must be taken to avoid any compromise of the defendant's acceptance of responsibility. Thus, for example, it might be wise to point out that the only "victim" was the government, or that the public funds awarded as a result of a bribe were nonetheless used for their intended purpose resulting in a benefit to the public rather than solely personal gain.

Kinds of Sentences Available – Some statutes provide for minimum and maximum

periods of incarceration. However, many provide language to the effect that a defendant should be fined, imprisoned for not more than a certain period, or both. In such circumstances, the court has discretion to impose a fine and/or incarceration. Consequently, the 10th Circuit has held that this type of statutory language does not require imprisonment but instead allows discretion in sentencing.¹⁵

Need to Provide Restitution to Victims – In the appropriate setting, an argument may be made that, all things considered, it is better for a defendant to be on probation or home detention so he or she can continue to work and generate income that can be used, in part, to pay restitution to the victims of his crime.

SENTENCING OBJECTIVES

Title 18 U.S.C. §3553(a) provides that the court shall impose a sentence sufficient but not greater than necessary to comply with the purposes of sentencing, which are: 1) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense; 2) to afford adequate deterrence to criminal conduct; 3) to protect the public from further crimes of the defendant; and 4) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner.

Just and Proportional Punishment – The concept of just punishment is founded on Old Testament law (an eye for an eye) and has been revisited by political scholars throughout history. Thus, to the extent the sentencing judge has an interest in the philosophical underpinnings, such information is readily available and can often be found within existing case law. For instance, one court, in considering the defendant's sentence, quoted Immanuel Kant: "Juridical punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime."¹⁶ The court continued, "[u]nder a Kantian model, the extent of punishment is required to neatly fit the crime. 'Whoever commits a crime must be punished in accordance with his desert.'¹⁷ Of course, such arguments must be selectively made, as reliance on Kant may simply turn off certain members of the judiciary.

Regardless, the advocate must at some point confront the issue of what punishment is necessary to redress a particular crime. In a truly

retributive society, an appropriate punishment for a typical "white collar" crime would likely involve a financial penalty equal to the amount wrongfully acquired, a result which would be perfectly acceptable under the Sentencing Reform Act (although contrary to the sentencing guidelines). However, the sentencing guidelines attempt, by and large, to equate a period of incarceration to the crime committed. Thus, proportionality between severity of the crime and period of incarceration is a central concept to sentencing jurisprudence.¹⁸ While any crime, particularly a felony, is a serious offense, there is clearly a difference between types of crimes and the means with which they were performed (as evidenced by the guidelines themselves). Similarly, however, one can argue any conviction of a crime, particularly a felony, and the related sentence, whether probation, home detention or incarceration, is a serious consequence.

Adequate Deterrence – The second goal of sentencing, "to afford adequate deterrence to criminal conduct," may also be addressed with more or less philosophical or pragmatic arguments. In many ways, deterrence is a complete contradiction to the first goal of retribution. While Kant believed that only punishment premised on a theory of retribution adequately recognized the individual's dignity, the concept of general deterrence necessarily contemplates the effect of a given punishment on the individual's future conduct as well as the conduct of others in the community. Quoting Plato, the 9th Circuit explained: "The purpose of [punishment] is not to cancel the crime — what is once done can never be made undone — but to bring the criminal and all who witness his punishment in the future to complete renunciation of such criminality."¹⁹

The 10th Circuit has recognized the importance of this consideration when determining an appropriate sentence outside the guidelines range.²⁰ However, the court is left to determine what amount of punishment is required to effectuate the twin goals of individual and general deterrence. Thus, it may be appropriate to argue in a given case that "even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders."²¹ A lesser sentence can also generally provide greater deterrence in cases of first-time defendants.²²

Incapacitation – The next statutory objective is the need "to protect the public from further crimes of the defendant."²³ This utilitarian

approach is again at odds with the retributive theory of punishment, yet each remains a cornerstone of the controlling statutory scheme. “[While] the theory of retribution would impose punishment for its own sake, the utilitarian theories... would use punishment as a means to [a practical] end – the end being community protection by the prevention of crime.”²⁴ There are several factors that can be raised when arguing against the need for incarceration. If the defendant has no prior criminal history, the chance of recidivism is very low – lower in fact, than is reflected in the criminal offense category of the guidelines.²⁵ In fact, the Sentencing Commission has acknowledged that the U.S. Parole Commission’s “Salient Factor Score,” which incorporates first-time offense and age, is a better predictor of recidivism than its own criminal offense category system.²⁶ Other important indicators that a defendant is not a future threat for a repeat offense is if the defendant has a good employment record, is presently employed or attending school, has not and is not abusing drugs, and has a stable home life.²⁷ It may also be useful to remind the court of the significant cost to the public of a defendant’s incarceration, especially when the need to protect the public is low.

Need for Educational or Vocational Training, Medical Care or Other Treatment – A final basis for punishment is rehabilitation, which potentially includes educational or vocational training or appropriate medical or mental health treatment. Such considerations may favor probation or home detention rather than incarceration, particularly where other sentencing objectives do not necessitate lengthy periods of detention. As noted above, the defendant’s health is now a very relevant consideration in fashioning an appropriate sentence. At least one district court has implied the burden is on the government to show it can meet the defendant’s medical needs.²⁸

THE CATCH-ALL PROVISION

While numerous factors are expressly contemplated by statute and incorporated into the guidelines, 18 U.S.C. §3553(b) provides that departure may be warranted if the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different than that described.” Thus, the defendant has no limit on his or her opportunity to

creatively argue for a sentence below the guidelines range.

EVIDENCE TO SUPPORT SENTENCING CONTENTIONS

To apply any sentencing factor or support argument relating to any sentencing objective, the defendant must be able to support his or her factual contentions with some documentary evidence. Perhaps a defendant’s best (but potentially risky) option is to prepare an allocation statement, with or without the assistance of counsel. Paul Antonio Lacy of the Western District of Oklahoma Federal Public Defender’s Office has utilized a questionnaire format wherein the defendant responds to inquiries such as: 1) What are your best accomplishments; 2) What are your best attributes; 3) What have you done that you are most proud of; 4) What are your short/long term goals; 5) Why are you a better person now; 6) How does giving you leniency reflect the seriousness of your offense; 7) How would leniency promote your/others’ respect for the law; 8) What, if anything, would you say to your family; and 9) Why should the judge give you a break.

Additional materials may include affidavits and letters from family, members of the community and charitable organizations, doctors and clergy – in short, people willing to provide the court with support for the contentions set out in the sentencing memorandum. Of course, any statements should be carefully reviewed by counsel prior to presentation to the court. Few judges will be swayed by the defendant’s bookie noting the defendant always paid on time or the defendant’s mother stating their child did nothing wrong. Similarly, newspaper clippings, photographs, Internet articles or any other media which can provide a basis for the variance requested should be collected and evaluated for use as an exhibit to the sentencing memorandum.

CASES FOR DEPARTURE

It is often advantageous to include cases where defendants convicted of similar criminal activities have received sentences below the guidelines range in the sentencing memorandum. Unless the sentence is appealed, which is often not the case where a variance was granted, such examples are not readily available through Westlaw. Instead, one might start with a simple Internet search to find articles or blogs discussing particular cases, which could, in turn, allow the researcher to utilize the PACER

or ECF systems for the appropriate districts to obtain the actual case details. Such a process could be used, for example, in the case of a white collar defendant whose guidelines were significantly increased due to the amount of money involved. After identifying and researching similarly situated individuals, the defendant could provide the court with specific cases where variances were granted.²⁹

CONCLUSION

As expressed by one district court, “[s]entencing is a critical stage of a criminal prosecution. It represents an important moment in the law, a ‘fundamental judgment determining how, where, and why the offender should be dealt with for what may be much or all of his remaining life.’ It is significant not only for the individual before the court, but for his family and friends, the victims of his crime, potential future victims, and society as a whole.”³⁰ Given the stakes involved and the extraordinary discretion afforded to the district court, effective advocacy is at a premium. At the end of the day, the conclusion reached by the sentencing court, based in significant part on the creative efforts of defense counsel, will affect not only the defendant, but also those closest to the defendant and, to some degree, society at large.

1. *United States v. Flanders*, 2009 WL 405846 (10th Cir. Feb. 19, 2009).
 2. *U.S. v. Angel-Guzman*, 506 F.3d 1007, 1015-16 (10th Cir. 2007).
 3. *United States v. Bullcoming*, — F.3d —, 2009 WL 2783012, *6 (10th Cir. Sept. 3, 2009) (also discussing the testimony of a victim regarding the defendant’s acceptance of responsibility as it related to the government’s duty under the plea agreement).
 4. *Id.*
 5. CR-03-159-F, Western District of Oklahoma.
 6. *Kimbrough v. United States*, 128 S.Ct. 558, 570 (2007), *Gall v. United States*, 128 S.Ct. 586 128, 594-97,602 (2007).
 7. As stated by Judge Bright of the 8th Circuit, quoting Jeremy Bentham, *Principles of Penal Law*, 1 The Works of Jeremy Bentham 398 (John Bowring ed., 1962), “Every particle of real punishment that is produced, more than what is necessary, is just so much misery run to waste.” *United States v. Weekly*, 128 F.3d 1198, 1201 (8th Cir. 1997) (dissent).
 8. 18 U.S.C. §3582 (Emphasis added).
 9. *United States v. Green*, 2007 WL 869725 * 2 (S.D. Ohio Mar. 20, 2007) (citing several cases).
 10. See *United States v. Collins*, 122 F.3d 1297, 1307-08 (10th Cir. 1997) (district court properly departed downward based on conclusion that it would overstate the likelihood of recidivism to treat 64-year old man whose prior convictions occurred years ago as a career offender); see also, *United States v. Phillips*, 368 F. Supp.2d 1259, 1260 (D.N.M. 2005); *United States v. Nellum*, 2005 WL 300073 (N.D.Ind. Feb. 3, 2005) (departure where, because of age, likelihood of recidivism very low); *United States v. Ward*, 814 F.Supp. 23 (E.D. Va. 1993) (departure because guidelines fail to consider the length of time, forty-nine years, defendant refrains from committing first crime); *United States v. Hildebrand*, 152 F.3d 756 (8th Cir. 1998) (departure permitted based on age and health condition); *United States v. Dusenberry*, 9 F.3d 110 (6th Cir. 1993) (table) (same); see also *United States v. Tsosie*, 14 F.3d 1438, 1441-42 (10th Cir. 1994) (holding aberrational conduct combined with steady employment and economic support of family warranted downward departure).
 11. See e.g., *United States v. Martin*, 363 F.3d 25 (1st Cir. 2004) (in tax evasion case, health concerns merited downward departure); *U.S. v. Gee*, 226 F.3d 885 (7th Cir. 2000); *United States v. Johnson*, 71 F.3d 539 (6th Cir. 1995); *United States v. Willis*, 322 F.Supp.2d 76 (D. Mass. 2004).

12. *United States v. Fagan*, 162 F.3d 1280, 1284-1285 (10th Cir. 1998); see also, *United States v. Jaroszenko*, 92 F.3d 486 (7th Cir. 1996).
 13. See *U.S. v. Jones*, 158 F.3d 492 (10th Cir. 1998); see also, *United States v. Cooper*, 394 F.3d 172 (3rd Cir. 2005); *U.S. v. Woods*, 159 F.3d 1132 (8th Cir. 1998); *U.S. v. Rioux*, 97 F.3d 648 (2nd Cir. 1996); *United States v. Greene*, 249 F.Supp.2d 262 (S.D.N.Y. 2003); *United States v. Bennett*, 9 F.Supp. 513 (E.D. Pa. 1998).
 14. *United States v. Gaither*, 1 F.3d 1040, 1043 (10th Cir. 1993), citing *United States v. Smith*, 930 F.2d 1450, 1454 (10th Cir.) cert. denied, 502 U.S. 879, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991) *United States v. White*, 893 F.2d 276, 278 (10th Cir.1990).
 15. See *United States v. Elliot*, 971 F.2d 620, 622 (10th Cir. 1992).
 16. *United States v. Blarek*, 7 F.Supp.2d 192, 200-201 (E.D.N.Y. 1998).
 17. *Id.* at 202.
 18. 18 U.S.C. §3553(a)(2)(A).
 19. *United States v. Barker*, 771 F.2d 1362, 1368, n. 12, 13 (9th Cir. 1985) (also quoting Lord Halifax, “[m]en are not hang’d for stealing Horses, but that Horses may not be stolen.”).
 20. See *United States v. Shaw*, 471 F.3d 1136, 1139 (10th Cir. 2006) (sentencing above guideline range to adequately deter).
 21. *United States v. Adelson*, 441 F. Supp.2d 506, 514 (S.D.N.Y. 2006).
 22. See *United States v. Qualls*, 373 F. Supp.2d 873, 877 (E.D.Wis. 2005) (“Generally, a lesser period of imprisonment is required to deter a defendant not previously subject to lengthy incarceration than is necessary to deter a defendant who has already served serious time yet continues to re-offend”).
 23. 18 U.S.C. §3553(a)(2)(C); see also, *Shaw*, 471 F.3d at 1139.
 24. *Blarek*, 7 F.Supp.2d 192, 202 (E.D.N.Y. 1998), quoting Charles E. Torcia, 1 Wharton’s Criminal Law § 1, at 3.
 25. See U.S. Sentencing Commission, A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score (Jan. 4, 2005), available at www.uscc.gov/publicat/RecidivismSalientFactorCom.pdf. Last visited on May 20, 2009.
 26. *Id.*
 27. *Id.*
 28. *United States v. Pineyro*, 372 F.Supp. 2d 133 (D. Mass. 2005).
 29. See e.g., *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.N.Y. 2006) (guideline result of life incarceration with actual sentence imposed of 42 months); *United States v. Garand* (D. Conn. 06-CR-137-CFD) (guideline result of 168-210 months with actual sentence imposed of 12 months and a day); *United States v. Crumpler* (N.D. Ala. 04-CR-502-VEH-JEO) (guideline result of 292-365 months with actual sentence imposed of 96 months); *United States v. McVay*, 447 F.3d 1348 (11th Cir. 2006) (guideline result of 87-109 months with actual sentence imposed of two months, and after appeal, six months).
 30. *Blarek*, 7 F.Supp. at 199 (internal citations omitted).

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