

POST-VERDICT PSYCHOLOGICAL CONSULTATION IN THE FEDERAL COURTS

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This article addresses the role that the forensic psychologist can play by serving as either a consultant or an expert witness at a sentencing hearing in federal court. Although the federal sentencing guidelines have created an "offense-oriented" rather than "offender-oriented" system, opportunities for psychological input remain. This article describes three avenues for such consultation and/or testimony, including 1) presenting offender information in an attempt to arrive at a sentence at the lower end of the otherwise applicable guideline range; 2) providing mitigating offender information when the "window" has been opened by the prosecution's moving for a downward departure for substantial assistance; 3) assisting the defense attorney in the development of possible downward departures from the guidelines and providing documentation and testimony in support of such departures.

The interface between psychologists and the criminal justice system is a multifaceted one. Typically, attention is drawn to the psychologist's role in an affirmative defense. As an expert witness in an insanity or diminished capacity defense, the psychologist addresses issues related to the defendant's state of mind at the time of the commission of the offense. At other points along the criminal justice continuum, the psychologist is asked to view the defendant from a much broader perspective. In these cases, the subject of expert testimony would include an understanding of the defendant's personality and functioning prior to and subsequent to his or her commission of the offense. The purpose of this article is to discuss the role psychologists can play in helping to define and articulate the defendant's personal characteristics in the aftermath of a guilty plea or a conviction.

Through its Sentencing Reform Act of 1984, Congress attempted to reduce unwarranted sentencing disparities. It was clearly Congress' intention, through the guideline system, for sentencing in the federal courts to now be "offense-oriented" rather than "offender-oriented." The guideline system established a grid that would ultimately determine the exact punishment for the specific crime committed. The only offender characteristic included in this system is the defendant's criminal history. Other individual attributes of the offender are completely omitted from these core calculations within the guideline grid. At first glance, it would appear that the guideline system would preclude the psychologist from playing any role whatsoever at sentencing. Fortunately, Congress did intend for certain offender characteristics and for certain of their collateral consequences to be taken into consideration in the formulation of the defendant's sentence.

The most frequently utilized provinces of psychological consultation and testimony relative to sentencing fall into the following three categories:

- 1) Presenting offender information in an attempt to arrive at a sentence at the lower end of the otherwise applicable guideline range.
- 2) Providing mitigating offender information when the "window" has been opened by the prosecution's moving for a downward departure for substantial assistance.
- 3) Assisting the defense attorney in the development of possible downward departures from the guidelines and providing documentation and testimony in support of such departures.

This article addresses the role that the psychologist can play in helping the defense attorney cull out appropriate areas for departure and to provide the requisite documentation and expert testimony required in support of such departures.

DEPARTURES

If the guideline raises a question of fairness, or sets a penalty range that seems too low or too high, the court may consider a departure. In such

cases, the court's inquiry should focus upon whether the Sentencing Commission adequately considered the kind or degree of circumstances, aggravating or mitigating, present in this case. District courts are expected to maintain the flexibility to permit individualized sentences, "when a court finds an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm, the court may consider whether a departure is warranted" (1).

Judges are required to state their reasons for any downward departure from the guidelines. Psychological testimony can provide the court with the necessary data to support such a deviation and can provide legitimate grounds for a downward departure. The Sentencing Commission, itself, has acknowledged the relevance of mental health factors as reasons for departure (2). Psychologists and attorneys must realize that data not necessarily relevant to other aspects of the case (i.e., an affirmative defense) can nonetheless be relevant at the sentencing hearing.

These issues have also been addressed by the American Bar Association. The ABA's most recent position includes the following: "In a particular case, a sentencing court may find, from facts established in the sentencing proceeding, that the sentence imposed should differ from the presumptive sentence because of the nature of the offender" (3). These standards suggest sentencing courts take into account the personal characteristics of offenders, unrelated to their culpability for the offenses committed.

ENCOURAGED, DISCOURAGED AND PROHIBITED DEPARTURES

The guidelines state that certain offender characteristics or other circumstances are not ordinarily relevant for departure determination purposes (4). Yet, certain circuits have noted that the use of the modifier "ordinarily" implies that there may be "extraordinary" circumstances where these offender characteristics and situations may be relevant. Extraordinary personal circumstances can be accommodated through departures, but these characteristics and circumstances must be present to a degree not ordinarily encountered.

Significantly, recent amendments to the guidelines have added language to §5K2.0 to provide that an offender characteristic or other circumstance that is "not ordinarily relevant" may nonetheless be relevant for departure determination purposes "if such characteristic or circumstances are present to an unusual degree and distinguishes the case from the heartland cases covered by the guidelines in a way that is important to the statutory purpose of sentencing" (5). This recent amendment also addresses the issue of combining such characteristics and circumstances. The amendment provides that such a combination "may form the basis for such a departure even though none of the individual characteristics or circumstances individually might support such a determination."

The First Circuit differentiated among "encouraged," "discouraged" and "forbidden" factors in addressing the sentencing court's freedom to consider offender characteristics at the time of sentencing. More specifically, there are some nine matters about which the trial court cannot consider departing, even if these factors make a case unusual or atypical. The forbidden departures are: race, sex, national origin, creed, religion, socioeconomic status, lack of guidance as a youth, drug or alcohol abuse, and personal financial difficulties and economic pressure upon a trade or business.

Regarding encouraged departures, a review of Part 5K of the guidelines will identify "a host of considerations that may take a particular case outside the 'heartland' of any individual guideline and, in doing so, may warrant departure" (6). When faced with such matters (for example, diminished capacity, extreme conduct, use of a gun in an immigration offense), the sentencing court should feel more confident to depart because of the encouragement articulated within the particular guideline and/or policy statement, thus assuring that the departure would not be unreasonable.

Confusion as to when to depart is most likely to be encountered where the guidelines and policy statements caution that certain features (i.e., age, education, family ties) are not ordinarily relevant. But even here, while discouraging departures for these types of characteristics and conse-

quences, the commission recognized that such matters could remove a case from the heartland...if they are present in a manner that is unusual or special, rather than ordinary.

Therefore, except for the forbidden factors, it would appear that sentencing courts have the ability to consider, in an unusual case, whether the factors that make it different or atypical are present in a sufficient degree to warrant a departure. The courts clearly retain this freedom to depart whether such departure is encouraged, discouraged or just unconsidered by the guidelines. Psychologists are particularly well versed to assist the courts in exercising those responsibilities.

Encouraged Departures

Obviously, for those characteristics and circumstances where the commission has already noted the potential for departure, the importance of a thorough, scientifically-grounded evaluation and the use of competent expert testimony cannot be understated. In that regard, the psychologist must remember that, while the moving party bears the burden of proving the appropriateness of the departure, the trial court must give the parties an adequate opportunity to present information regarding the supporting facts and "may consider relevant information without regard to its admissibility under the rules of evidence applicable to trial, provided that the information has sufficient indicia of reliability to support its probable accuracy" (7).

For instance, as for §5K2.13 (Diminished Capacity), the Ninth Circuit has noted that the resolution of disputed facts concerning mental impairment requires more than simply a neutral process. According to the panel, "emotional illnesses" and "mental abnormalities" might form the basis for the court's determination of reduced mental capacity and, "to artificially distinguish organic syndromes (mental defects) from emotional disorders is to ignore the increasingly blurry line between them" (8).

More specifically, since a defendant may be eligible for a departure "no matter what the nature or severity of his underlying condition" (9), psychological testimony must be focused upon the degree to which the

defendant suffered from significantly reduced mental capacity—the effect of the impairment on the defendant. And, further, such expertise can be used to then demonstrate the manner and degree to which these underlying conditions impaired the defendant’s ability to make reasoned decisions, and how same may have contributed to the commission of the offense.

Similarly, psychological testimony can be used to support a departure under §5K2.10 (Victim’s Conduct), where the wrongful actions of the victim may have contributed to or provoked the charged offense behavior. Such input might be of importance, for instance, where the battered spouse syndrome is implicated. Moreover, psychologists can provide the court with necessary information to evaluate a requested departure in an assisted suicide context based upon the Lesser Harms concept addressed in §5K2.11.

Finally, under §5K2.12 (Coercion and Duress), psychological testimony can be relevant in documenting and describing the subjective aspect of the circumstances leading up to the offense conduct: the defendant’s perceptions, beliefs and state of mind. While not rising to the level of a complete defense, our expertise can be employed to demonstrate such matters as how the offense conduct would have been less harmful under the circumstances that the defendant believed them to be and/or how the individual was more susceptible to being influenced and motivated to undertake the charged activity.

Discouraged Departures

While psychological support clearly plays an important role in the departure areas discussed above, the psychologist can be even more pivotal in the determination of how exceptional, unusual or extraordinary certain offender characteristics or collateral circumstances might be. The law instructs the district judge considering a departure to ask the basic question “Is this an unusual case?” Evidence and testimony addressing the defendant’s unique characteristics and circumstances can be instrumental in facilitating the judge’s response to that key question. The following brief

discussion of some of the "discouraged" departures should provide insight into the provision of consultation and/or testimony in this area.

§5H1.3 Mental And Emotional Conditions

Unusual, exceptional or extraordinary mental and emotional conditions may be relevant in the determination of a downward departure even when those conditions are not specifically addressed as having a direct impact upon the defendant's mental capacity (i.e., §5K2.13). For instance in *United States v. Garza-Juarez* (10), the Ninth Circuit indicated that, although such matters are "not ordinarily" relevant, "the Commission intended these factors to play a part in some cases, albeit a limited number." While granting the requested downward departure here, the court underscored the need for comprehensive mental health evidence and testimony by noting that "[m]ore detailed findings would have assisted this court in determining whether [the defendant's] mental disorder was extraordinary or existed to a degree not adequately considered by the Sentencing Commission" (10).

Although the defendant's mental and emotional condition more often than not will have an impact on his mental capacity (and, consequently, on the commission of the offense), there are times when such a relationship would be difficult to establish. Psychological evidence regarding the presence of these factors and their role in the defendant's life would, nevertheless, be relevant at the time of sentencing. Depression, anxiety disorders, neuropsychological problems (i.e., memory, organization, attention) are conditions that may be present in the defendant's life to a degree that makes his or her situation unusual, even if those conditions do not have a direct bearing on the actual commission of the offense.

§5H1.4 Physical Condition, Including Drug or Alcohol Dependence Or Abuse

Although substance abuse cannot be used as a basis for a downward departure, the underlying dynamics regarding the defendant's addiction or pattern of substance abuse clearly should remain relevant to the overall

sentencing decision. My own clinical practice provides an example of this nexus.

A significant number of individuals that I have treated because of amphetamine abuse were found, upon further examination, to previously have had undiagnosed hyperactivity or attention deficit disorders. The treatment of choice for these conditions is typically Ritalin, an amphetamine. Not having been in a position to receive such legally prescribed and administered medication, these individuals found out about the "benefits" of this drug through their experimentation with other illicit substances. Unlike some other users, these individuals did not experience the high typically associated with such use. Instead, they felt "normal." They were actually able to slow down, calm down and experience the world as most everyone else does. For these patients, amphetamines became a form of self-medication necessary to function appropriately. Such information clearly can be used to inform the sentencing decision and can be provided to the trial court to explain the whys of certain behaviors.

Additionally, a defendant's efforts at rehabilitation, whether related to drug abuse or other personal circumstances, can be translated for the courts by the psychologist. For example, in *United States v. Maier*, the court held that a defendant's efforts in ending drug addiction can be used to justify a downward departure (11). Finding that "awareness of one's circumstances and the demonstrated willingness to act to achieve rehabilitation" benefited both the individual and society and warranted a different sentencing result, the trial judge credited the defendant's therapist's assessment of her progress toward such rehabilitation and the hazards of interrupting that progress.

§5H1.6 Family Ties And Responsibilities

Psychologists can provide testimony to support departures based on extraordinary issues, not only when addressing the defendant's unique characteristics and circumstances, but also when discussing the effect that imprisonment is likely to have upon either the defendant or his family. Similarly, in *United States v. Sclamo* (7), a departure was upheld where

the psychologist for the defendant's child testified as to the stabilizing force of the defendant in the child's life and the likely deterioration in that condition if the parent were to be incarcerated.

I recently consulted in a matter where a substantial departure (home confinement) was granted because of the defendant's relationship with his older brother who had been severely brain damaged due to an earlier accident. After several years of intensive inpatient rehabilitation, the brother was finally able to reside within the home. Unfortunately, his occasional explosive, physically aggressive outbursts were problematic to the parents and all other caretakers. The defendant was the only individual capable of managing this untoward behavior, and the testimony in that regard documented both that and the likelihood of the brother's re-institutionalization should the defendant be incarcerated.

§5H1.8 Criminal History

While as already noted a defendant's criminal history is one of the only characteristics considered in the guideline grid, the psychologist can address the role that unusual circumstances in this area may play. Certain criteria are outlined for departures where the otherwise applicable score might either overrepresent or underrepresent the seriousness of the defendant's prior record and/or the likelihood that the defendant will engage in future criminal conduct.

Obviously, psychological evidence can be used to provide the court with data and analysis of the defendant's potential for such behavior. Such an evaluation or risk analysis often can provide more, and more reliable, information than a mere reference to the prior record. Although most social scientists recognize the limitations inherent in the prediction of dangerousness or recidivism, historical and psychological data can afford additional layers of relevance upon which a more comprehensive risk assessment can be made.

For example, an offender who has voluntarily enrolled in an intensive rehabilitation/treatment program for a substance abuse problem that was the original precipitant of earlier offenses, would be at a lower risk for re-

offending than a defendant who had maintained the same lifestyle paying little or no attention to the issues underlying his criminality. Clearly, input from a psychologist can play an important role in such analysis.

CONCLUSION

The psychologist's consultative and collaborative relationship with the trial attorney is one that can simplify the development of an effective and appropriate sentencing strategy, particularly in the departure area. The guidelines provide the defendant with an opportunity to present the court with relevant personal information, especially in situations where atypical features are present. The forensic psychological expert is in an excellent position to identify those unusual personal characteristics and problems associated with the defendant, thus providing the attorney with valuable information that can be used to act upon that opportunity.

As a corollary effort, forensic psychologists can augment and complement the attorney's efforts to negotiate and/or interface with both the prosecutor and the probation officer. Psychologists can be used directly and indirectly in providing input for and objections to the presentence report. Remember, the final paragraph in that key document is entitled "factors that may warrant departure." Sensitizing the probation officer to the departure issues that will be implicated and having such matters referenced within this section of the report will be most helpful in setting the stage for an effective downward departure argument at sentencing. Ultimately, it is the impact upon the court that is the primary basis for this professional collaborative relationship.

Remember also that presenting offender-oriented information to the court in this manner may be the only vehicle through which essential data and related arguments can be brought to the court's attention. Whether or not the presentation results in the obtainment of the requested departure, the information provides an indirect benefit as it may serve to neutralize the court's intention to depart in the opposite direction, and it can serve also to reinforce an argument for a low-end-of-the-range determination.

It is only through a comprehensive understanding of the guidelines and a continuing awareness of the emerging case law regarding departures that psychologists can be in a position to best present the mitigating circumstances that have not adequately been taken into consideration by the sentencing commission in formulating the guidelines.

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