

## GRID & BEAR IT

By Elliot L. Atkins, Ed.D.

### Preparing For Sentencing In The Federal Courts: Use Of Mental Health Consultation In The Development Of Departure Strategies

The Sentencing Reform Act of 1984, and its resultant sentencing guidelines, represents Congress' attempt to reduce unwarranted sentencing disparities. It was clearly Congress' intention, through the guideline system, for sentencing to be "offense-oriented" rather than "offender-oriented." The only offender characteristic considered in this system is the defendant's criminal history. Other individual attributes of the offender were omitted completely from core calculations within the guideline grid. Congress did, however, intend for certain offender characteristics and certain of their collateral consequences to be taken into consideration in the formulation of a defendant's sentence.<sup>1</sup> In addition, policy statements, commentary and amendments to the guidelines promulgated by the U.S. Sentencing Commission have expanded the definition and scope of these offender characteristics to the point where the concept of an "offender-oriented" sentence can be something more than just an ideal.

The purpose of this article is to make criminal practitioners aware of the role that mental health consultants can play in helping to define and articulate a defendant's personal characteristics and the collateral consequences of those matters for the sentencing process.

Although mental health professionals traditionally have been utilized by defense attorneys in the development of affirmative defenses (*i.e.*, insanity and diminished capacity), more and more often the services of these experts are being secured for a range of interventions spanning the continuum from plea negotiations on the one end to

post-sentencing relief on the other. Between the two lie the following, more frequently utilized provinces of psychological/psychiatric consultation and testimony:

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

#### Departures In General

If the otherwise applicable 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 must focus on whether the sentencing commission adequately considered the kind or degree of circumstances (aggravating or mitigating) present in the case.<sup>2</sup> The commission remains accountable with respect to the quality of the guidelines and has thus assured the courts that they need not follow ill-considered limitations on their discretion. Therefore, district courts are expected to maintain the flexibility to permit individualized sentences when it finds "an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm."<sup>3</sup>

Judges are required to state their reasons for any departure from the guidelines.<sup>4</sup> Mental health testimony can provide the court

with the necessary data to support such a deviation and can provide legitimate grounds for such a departure. The commission itself has acknowledged the relevance of mental health factors as reasons for departure.<sup>5</sup> Mental health professionals and attorneys should, therefore, 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.

The Third Circuit, for example, apparently has complied with this mandate to provide "sufficient flexibility to permit individualized sentences." In decisions evaluating sentencing departures, this appellate court protected and expanded the discretionary power of the district court to grant departures seemingly as a counterpoint to the government's unfettered discretion in the charging process. In *United States v. Higgins*,<sup>6</sup> the court found that in extraordinary situations, a defendant's age, employment record, and family ties and responsibilities can all be reasons for a downward departure. Similarly, in *United States v. Gaskill*,<sup>7</sup> the panel supported a downward departure based upon the disruption imprisonment would cause to the defendant's family due to his wife's unique medical circumstances.

These basic issues also have been addressed by the American Bar Association (ABA) in its Standards for Criminal Justice Sentencing, a set of benchmarks that clearly can be used to reinforce various departure arguments. 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."<sup>8</sup> These standards suggest that, in certain situations, sentencing courts should consider the personal characteristics of offenders, unrelated to culpability for the offense, including physical, mental, social and economic characteristics. Such offender characteristics might also include age, health, handicaps or impairments, psychological well-being, wealth,



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class, past affluence or poverty, current job status, employment history, level of education, standing in the community, family background and current family circumstances.

### Encouraged, Discouraged And Forbidden Departures

Since the guidelines indicate that certain offender characteristics are not "ordinarily" relevant for departure determination purposes,<sup>9</sup> some circuit courts have noted that the use of the modifier "ordinarily" implies that there may be "extraordinary" circumstances where these offender characteristics and situations will be relevant. Extraordinary personal circumstances thus can be accommodated through departures but, because of the statutory mandate and the language in Part H of Chapter Five, such factors must be quantitative in nature. That is, these characteristics and circumstances must be present "to a degree" not ordinarily encountered.

Significantly, a recent amendment to the guidelines 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 purposes "if such characteristic or circumstance is 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."<sup>10</sup> This change also addressed the issue of combining such characteristics and circumstances providing that such a combination may form the basis for such a departure "even though none of the characteristics or circumstances individually distinguishes the case."<sup>11</sup>

In crafting these changes, the commission clearly considered a fairly recent decision from the First Circuit which had differentiated among what it labeled "encouraged, discouraged" and "forbidden" factors in addressing the trial court's freedom to consider offender characteristics at sentencing. Writing for the court in *United States v. Rivera*, [former U.S. Sentencing Commission Commissioner, now U.S. Supreme Court Justice] Steven Breyer attempted to clarify the sentencing court's responsibility when considering whether these factors warrant departure.<sup>12</sup> Then Judge Breyer recognized that the trial courts are likely to have a more difficult time recognizing this responsibility when it comes to those "ordinarily not relevant" or "discouraged" departures as opposed to the other two types.

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.<sup>13</sup>

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."<sup>14</sup> When faced with such matters (*i.e.*, 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.<sup>15</sup>

Confusion when to depart is, again, 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, according to *Rivera*, while discouraging departures for these types of characteristics and consequences, the commission recognized the such matters "could remove a case


from the heartland . . . if they are present in a manner that is unusual or special, rather than 'ordinary.'"<sup>16</sup>

Therefore, except for the "forbidden" factors, it would appear that sentencing courts have some significant 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. Mental health practitioners are particularly well versed to assist the courts in exercising those responsibilities.

### The Development of Departure Strategies '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 practitioner 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

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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."<sup>17</sup>

For instance, as for § 5K2.13 (Diminished Capacity), the Ninth Circuit in *United States v. Cantu*<sup>18</sup> 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."<sup>19</sup> The mental health professional can play a significant role in providing definitions and examples especially in light of the court's conclusion that the goal of § 5K2.13 is "lenity toward defendants whose ability to make reasoned decisions is impaired."<sup>20</sup>

More specifically, since a defendant may be eligible for a departure "no matter what the nature or severity of his underlying condition,"<sup>21</sup> psychiatric and 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, mental health testimony can be used to support a departure under § 2K2.10 *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 significant importance, for instance, where the battered spouse syndrome is implicated. Moreover, psychologists and psychiatrists 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, as regards § 5K2.12 *Coercion and Duress*, mental health 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 psychiatric and psychological support clearly plays an important role in the departure areas discussed above, the significance of the mental health professional can be all the 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 as to how to utilize such consultants/experts.

#### *§ 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 being addressed as having a direct impact upon the defendant's mental capacity (*i.e.*, § 5K2.13). For instance, in *United States v. Garza-Juarez*,<sup>22</sup> 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."<sup>23</sup>

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/psychiatric 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, organizational, attentional deficits) are conditions that may be present in the defendant's life to a degree that makes his/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 itself 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 disorder. 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 mental health practitioner. 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.<sup>24</sup> 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,<sup>25</sup> 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*

As referenced above, the holdings in *Higgins* and *Gaskill*<sup>26</sup> provide examples of mental health professionals affording testimony to support departures based on extraordinary issues under this rubric — 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*,<sup>27</sup> 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 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, §5H1.8 references Chapter Four in addressing the role that unusual circumstances in this regard may play. A review of that chapter brings us to § 4A1.3 *Adequacy of Criminal History Category* where certain criteria are outlined for departures where the otherwise applicable score might either over-represent or under-represent the seriousness of the defendant's prior record and/or the likelihood that the defendant will engage in future criminal conduct.

Obviously, psychological and psychiatric 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. Furthermore, in *United States v. Shoupe*,<sup>28</sup> the appellate court remanded the matter back to consider age and immaturity at the time of the prior conviction, proximity in time of the prior convictions to one another, and the length of time that had elapsed since the first offense in determining whether or not a departure was warranted under this section. Clear-

ly input from a mental health profession can play an important role in such analysis.<sup>29</sup>

#### Conclusion

The mental health practitioner'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 mental health 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 and psychiatrists can augment and compliment the attorney's efforts to negotiate and/or interface with both the prosecutor and the probation officer. Mental health practitioners 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 both mental health and criminal law practitioners 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." Working together, we can maximize the opportunities presented and ultimately do the best for our mutual clients. ■

#### NOTES

1. See 28 U.S.C. §994(d).
2. 18 U.S.C. § 3553(b); U.S.S.G. §5K2.0.
3. U.S.S.G. Ch.I, Part A, Introduction.
4. See 28 U.S.C. §3553(c).
5. U.S.S.G. § 5K2.13.
6. *United States v. Higgins*, 967 F.2d 841 (3rd Cir. 1992).
7. *United States v. Gaskill*, 994 F.2d 82 (3rd Cir. 1993).
8. ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING, 3rd Ed. (1994), *Personal Characteristics of Offenders*, p. 226.
9. See U.S.S.G., *Introductory Commentary* accompanying Part H, Chapter Five.
10. Amendment No. 508, effective November 1, 1994.
11. *Id.*
12. *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993).
13. *Id.* at 949.
14. *Id.* at 948.
15. *Id.*
16. *Id.*
17. U.S.S.G. § 6A1.3 *Resolution of Disputed Factors*.
18. *United States v. Cantu*, 12 F.3rd 1506, 1511 (9th Cir. 1993).
19. *Id.* at 1512.
20. *Id.*
21. *Id.* at 1513, citing *United States v. Lewinson*, 988 F.2d 1005 (9th Cir. 1993).
22. *United States v. Garza-Juarez*, 992 F.2d 896, 913 (9th Cir. 1993).
23. *Id.*
24. *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992).
25. *Id.* at 948.
26. See notes 6 and 7 *infra*.
27. *United States v. Sclamo*, 977 F.2d 970 (1st Cir. 1993). See also, *United States v. Canoy*, 1994 WL573288 (7th Cir. 1994).
28. *United States v. Shoupe*, 988 F.2d 440 (3rd Cir. 1993).
29. See also, *United States v. Brown*, 985 F.2d 478 (9th Cir. 1993); *United States v. Ash*, No. 93 CR 0026 (N.D. Ohio 1993); *United States v. Abraham*, No. 4-92-117 (D. Minn. 1993).

*This edition of the column, the first by a non-lawyer, was adapted from a presentation that Dr. Atkins made to a group of federal practitioners in Philadelphia. Its publication represents our continuing effort to share a broad cross-section of ideas and suggestions for the post-conviction stage of criminal proceedings. Our readers remain our best source for such materials and we eagerly solicit your input for future topics. Anyone wishing to write or to recommend other subject areas please contact:*

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