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The Sentencing Reform Act of 1984 and Sentencing Guidelines

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This Issue in Brief

YEARS FROM now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice. The Sentencing Reform Act of 1984 which brought about the sentencing guidelines sent ripples in the pool of the Federal court system that affected all who participate in the sentencing process. Certainly the day-to-day work of judges, both district and appellate, prosecutors, attorneys, probation officers, and correctional personnel has been altered significantly, and the course of careers has changed. This special issue of *Federal Probation* gives a voice to those who have been working in the midst of such historic change.

Federal Probation invited eminent jurists and prominent sentencing experts to prepare articles reflecting their thoughts and perspectives regarding the Sentencing Reform Act and the sentencing guidelines. The first three articles comprise thoughtful, varied perspectives from the bench. The articles that follow are by authors representing other critical roles in sentencing. The articles are organized by profession in the order that each author would typically become involved in the sentencing process.

Ever since the Federal sentencing guidelines went into effect, judges and commentators have criticized the guidelines for placing excessive restrictions on judicial discretion. The Honorable Gerald Bard Tjoflat, chief judge of the U.S. Court of Appeals for the Eleventh Circuit, asserts that critics fail to appreciate the significant discretion that the judge retains. In **"The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel,"** Judge Tjoflat addresses the failure of attorneys to appropriately exploit judicial discretion within the guidelines structure. Advice for attorneys is offered regarding how to develop proper arguments to guide the sentencing judge's discretion in a particular case. Providing substantial background information, the article describes the congressional purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines.

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Defense Practice Under the Bail Reform Acts and the Sentencing Guidelines---A Shifting Focus

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Introduction

With the effectuation of revised bail provisions and the Federal sentencing guidelines arising out of the 1984 Comprehensive Crime Control Act, criminal defense practice has undergone some significant changes commencing with initial consultation and fee arrangements through and including postconviction pursuits. Though some observers have suggested that the new sentencing scheme instituted a mechanistic process and has removed the practitioner's creativity, adversarial engineering and focus on sentencing and release considerations have become essential at a much earlier stage of defense representation. Whereas pretrial and even postconviction release pending appeal was, in most cases, virtually assumed prior to 1987, judicial discretion in affording such release has been significantly restricted after effectuation of the 1984 and 1990 bail revisions.

Prior to the institution of the Federal sentencing guidelines and the 1984 Bail Reform Act, defense practitioners normally perceived criminal representation as involving five somewhat distinct, but interdependent, phases. Preparation was often compartmentalized to deal with each segment sequentially.

The first phase of representation consisted of client consultation, fee arrangement, case evaluation and pretrial release pursuits, if necessary. The level of fee requirements was normally dependent upon a forecast of the extent of advocacy required during pretrial proceedings, whether a plea was appropriate or likely, or whether a trial and sentencing appeared reasonably certain. While assuming that release pending trial and appeal was almost assured in most cases, protracted bail proceedings were normally not factored in as a significant element in fee quotations, except in the case of violent crimes or substantial and complex drug and racketeering cases. Additionally, unless the testimony of forensic experts, criminologists, or investigators was deemed essential to assist the defense in furthering sentencing considerations, sentencing proceedings under Rule 32 of the Federal Rules of Criminal Procedure were not normally perceived as being prospectively complex and/or protracted.

Though the release guidelines of the U.S. Parole Commission could have a significant bearing on sentence execution, and therefore whether a plea should be considered, many lawyers did not expend a great deal of effort analyzing how parole and prison authorities would deal with an offender once he left the court's jurisdiction and defense counsel's active caseload. Motions for discretionary sentence reduction under Rule 35 were contemplated as a separate proceeding or might be undertaken as a part of the overall representation. Thus, pretrial and trial representation were the most significant factors in determining an appropriate fee. With the elimination of parole and discretionary sentence reduction upon a motion by the defendant, sentencing now achieves a finality, short of reversal on appeal, not previously known to the criminal justice system.

The second stage pertained to pretrial practice, i.e., investigation, exploration of plea negotiations, and motions practice. Substantial effort might be expended in attempting to suppress or mitigate the Government's contemplated evidence or, in some instances, to achieve voluntary or involuntary dismissal of charges. The facial merit and zealous pursuit of pretrial motions would frequently be utilized by the defense to attempt to extract a favorable plea disposition from the prosecution. If plea negotiations and motions practice did not lead to an acceptable result, however, the third phase, trial preparation and presentation, would be undertaken.

Prior to the implementation of the sentencing guidelines and detention provisions, defense counsel ordinarily vested the bulk of time and resources in negotiating a plea or preparing a case for trial. Preparation for sentencing proceedings, the fourth phase, was often deferred as an exercise to be addressed only upon attachment of an unfavorable result after the guilt phase had been completed. For offenses committed after November 1, 1987, however, preparation for sentencing and release pending appeal has necessarily compelled counsel to focus upon such proceedings at a much earlier stage of representation.

Though many commentators predicted that, after the 1984 bail and sentencing reforms were instituted, postconviction mini-trials would become commonplace, the extent and complexity of such posttrial proceedings was largely underestimated. Postconviction pursuits have, in many instances, become more

protracted and engaging than the trial itself. Even where a desirable plea has been negotiated, sentencing skirmishes can consume a great deal of the combatants' time and resources. As a result, an evaluation of and preparation for such postconviction endeavors must be undertaken at the earliest possible moment.

With the abolition of parole and defense motions for sentence reconsideration, the fifth phase consists primarily of appeal and habeas pursuits. Incorrect guideline applications and departures by the sentencing judge are additional issues which may be appealed by the aggrieved party. Perfecting sentencing issues for appeal requires informed treatment from the inception of defense preparation.

Case Evaluation and Release Pursuits

Preliminary Assessments

As unpalatable as it might be to one's client, one of the most critical issues to be addressed by counsel under the new release and sentencing schemes is whether the accused is going to cooperate with authorities in prosecuting others, including relatives and close friends. Pursuant to the 1984 Comprehensive Crime Control Act, Congress directed the U.S. Sentencing Commission, and enabled prosecutors and the courts, to accord great weight to a defendant's substantial assistance to authorities in the investigation and prosecution of others who have committed a crime.[1] Such favorable consideration is to be awarded independently of sentence reduction for acceptance of responsibility and may even warrant a sentence below a statutorily mandated minimum.[2]

Particularly in drug cases, because of the Government's ability to recommend a sentence under mandatory minimums, prospective cooperation must be considered at a very early stage and may necessarily temper the zeal of defense pursuits and tactical considerations. As one might expect, prosecutors are more inclined to assign greater weight to a defendant's assistance provided at the early stages of the criminal process and might be more disposed to agree to pretrial release. Since a presumption of dangerousness attaches to most drug charges for detention purposes, and the prospect of acquittal may appear quite remote, prospective cooperation may necessarily drive defense strategy. Additionally, since prosecutors are vested with unilateral authority to apply for and accede to sentencing concessions, defense counsel is obliged to advise the client of the ramifications of aggressive defense posturing versus Government assistance at a very early stage of representation.

Moreover, because such release and sentence concessions may be extended to only a select few in a multidefendant case, defense counsel may feel compelled to beat his colleagues to the prosecutor's door to cut a deal. Thus, overall case evaluation relating to pretrial release, the prospects of acquittal or reduced charges, a comprehensive analysis of applicable sentencing factors, and the likelihood of postconviction detention must all be weighed at the earliest possible moment. Additionally, defense counsel must complete guidelines calculations even before contemplating a visit to the prosecutor's office so that informed discussions of the full range of sentencing factors are possible. Any lesser effort is tantamount to a dereliction of counsel's responsibilities toward assuring complete representation.

As heretofore noted, "substantial assistance" is a consideration separate and distinct from acceptance of responsibility.[3] The benefits arising from each may be quite disparate and must be evaluated individually in mapping out defense strategy. Acceptance of responsibility entitles the defendant to no more than a two-level reduction whereas substantial assistance can result in a substantial downward departure and even a sentence below a statutory mandatory minimum, if applicable. Substantial assistance is, according to the language of the statute and the majority view, dependent upon a motion of the Government, while acceptance of responsibility is not.[4] Nevertheless, the prosecutor's stipulation to a defendant's acceptance of responsibility will certainly make the court's award of the two-level reduction much more likely.

Though the statute clearly seems to premise a reduction for substantial assistance upon a motion from the Government, courts have split as to whether the Government must be the moving party or whether the Government's refusal to file the motion is reviewable.[5] The majority view and a plain reading of the statutory language, however, seem to suggest that a motion by the Government is required. If a clear abuse of discretion or bad faith in the Government's refusal to file a motion can be demonstrated, however, counsel should consider seeking judicial review.[6]

Acceptance of responsibility, on the other hand, may be awarded by the court despite the prosecutor's objection. Early cooperation, an admission of culpability, and restitution or some kind of reparation are the most common factors weighed in determining whether responsibility has been accepted.[7] Though a plea of guilty does not assure the reduction, it is certainly a factor which is weighed.[8] On the other hand, a guilty plea without evidence of sincere contrition will not ordinarily gain the concession.

In order to skirt constitutional challenges, the guidelines provide that a defendant is not to be penalized for asserting the sixth amendment right to trial.[9] If a defendant, however, continues to protest innocence or lack of culpability after a conviction or even after a

plea of guilty, award of the sentence reduction will likely not be forthcoming.[10]

Pretrial Practice—Negotiating Plea Agreements

Unless the prospects of an acquittal are quite substantial, pretrial detention and the prospective application of the sentencing guidelines may propel the defense toward early consideration of a plea disposition. Because of the draconian effects of guideline application in many cases and the prospect of postconviction detention, defense counsel is obliged to seek the prosecution's concession in seeking or foregoing the application of various sentencing factors. Thus, as stated above, counsel must be prepared to discuss the full range of applicable sentencing factors with confidence before meeting with the prosecutor.

The detention and sentencing scheme instituted by the 1984 Act shifted much of the discretion previously vested in the courts to the prosecutors. Though the Sentencing Commission has opined that the guidelines have not made "significant changes" in former plea agreement practices, the institution of pretrial and postconviction detention provisions and the rigidity of the guidelines have, indeed, substantially altered prior practices. Because of the relative inflexibility of the provisions, they actually impel the prosecution and defense to engage in less-than-full disclosure to the probation office and the courts.

Because a defendant may unwittingly disclose information to the probation officer that may not have a direct bearing on "relevant conduct" but could result in sentence enhancement, the defendant must be fully advised of the consequences of imparting information outside certain confines. On the other hand, lack of candor may deprive a defendant of favorable consideration for acceptance of responsibility. This delicate balance must be fully analyzed by counsel with the client.

If defense counsel is engaged before charges are brought, the opportunity to limit the impact of adverse sentencing information may be much greater. The fact that the prosecutor may determine what charges may be filed implicating specified sentencing factors and detention provisions and may reward cooperation by moving for, or agreeing to, sentence concessions has magnified the leverage possessed by the Government. Once charges have been filed, however, the guidelines expressly admonish prosecutors, defense counsel, and judicial officers to disclose and weigh all information which will impact the sentencing decision. Though defense counsel and the prosecutor may agree that certain charges will not be brought or will be dismissed in exchange for a guilty plea, all sentencing factors pertinent to charges not prosecuted are to be brought to the court's attention and may, as a result, warrant the imposition of a sentence commensurate with total offense behavior, even though a number of charges were withheld or were dismissed as a part of a plea bargain.[11] Thus, the statutory maximum for the offense of conviction may stand as the only cap limiting the impact of adverse information. Accordingly, unless the prosecution and the court agree to a downward departure based upon substantial assistance or stipulate to one or more sentencing factors which provide a basis for a lower assessment, count-bargaining may not result in any lighter sentence exposure. The only way of protecting against the court's applying sentencing factors beyond those to which a stipulation has been reached is pursuant to a sentence bargain.[12]

The sentencing judge is compelled by statute to specify in open court the reasons for imposing a particular sentence and, if outside the guidelines range, the specific reason for departing.[13] Counsel must be intimately familiar with all possible bases for adjustment or departure. For example, if a defendant pleads guilty to a fraud-type offense, the base offense level will be six, but if the loss exceeds $2,000 and was reasonably foreseeable, up to 18 levels may be added. Additionally, if the dollar loss does not fully reflect the seriousness of the conduct, an upward departure may be warranted.[14] Thus, while the U.S. Parole Commission was, under the former scheme, regularly criticized for setting release dates based upon purported "real offense" behavior rather than the offense of conviction, the guideline scheme has, in effect, imposed a similar process on sentencing judges while, at the same time, eliminating much of their discretion. Moreover, if a judge elects to set a sentence below the range specified in the guidelines, the Government may appeal.[15]

Aside from substantial assistance, mandatory minimum sentences and detention can be avoided only if the prosecutor agrees to allege a quantity or form of drugs other than that which implicates a statutorily mandated term, or files charges that carry no mandatory terms. Thus, while charge-bargaining can dodge the effects of mandatory sentencing, the guidelines effectively encourage the defense and prosecution to secret offense conduct from probation officers and the sentencing judge which would otherwise compel the court to elevate a sentence to an undesired level. Though guidelines proponents suggest that such charge-bargaining does not undermine the purpose of uniform sentencing, the practices of count and sentence bargaining resulting from the institution of the guidelines demonstrate a real hypocrisy in the announced objectives of the scheme.

Even though the prosecution and defense may stipulate to sentencing factors which justify a lower offense level, the probation officer is charged with the respon-

sibility of conducting an independent investigation.[16] Despite concerted efforts of the respective sides to realize an agreed disposition, the probation department may therefore come up with additional information which implicates sentencing factors compelling the sentencing judge to impose a higher sentence or justifying the reasons for not doing so. This obligation presents a defendant with the Hobson's choice of conceding his full criminal culpability to the probation officer in order to gain the two-level reduction for acceptance of responsibility while, at the same time, risking assessment of a higher offense level because of admissions of greater criminal misconduct.[17] If the greater activity is not within the purview of the crimes charged or stipulated sentencing factors, counsel should admonish the defendant as to the risks of admitting to additional misconduct.

In reality, if the prosecution and defense stipulate to factors justifying a lower sentencing range, a sentence bargain acceptable to the court under Rule 11 (e)(1)(c) is the only vehicle for assuring effectuation of the agreement. Short of reaching such a disposition, the prosecution and defense may attempt to secure a certain level of sentence exposure by stipulating to facts disclosing something-less-than the total offense behavior. If, however, the probation officer and/or the court uncover information implicating a higher offense level, the stipulation may be rejected and the defendant can face the additional threat of losing acceptance of responsibility or being assessed a higher level for obstruction of justice.[18] Thus, though candor by the defendant is to be encouraged, the guidelines may penalize him for being completely forthright.

Though defense counsel may urge the deletion of certain aggravating sentencing factors from the prosecutor's sentencing statement, the prosecutor holds veto authority as to whether such facts will be brought to the court's attention, either directly or through the probation office. The consistency with which prosecutors exercise their discretion, therefore, determines how fair and consistent sentences will be. Thus, under the guideline scheme, a prosecutor's sentencing discretion has been greatly expanded and enhanced while, at the same time, the sentencing judge's has been severely restricted.

Because of the probation officer's duty to independently investigate the applicability of sentencing factors, courts may feel compelled to direct the probation officer to refrain from conducting such an inquiry so that a stipulated and "fair" agreement is not undermined.[19]

Impact of the Trial Evidence

Defense counsel must be cognizant of how the evidence presented at a trial may impact the sentencing factors, the consideration of which is obligatory upon the court should a conviction enter. A defendant's relevant conduct will be largely based upon the evidence entered on the record. Though plea negotiations offer the prospect of insulating the court from adverse sentencing information, the sentencing judge can't ignore trial evidence which may dictate guidelines assessment without justifying the reasons for doing so.

The charge or charges alleged in the indictment will likely determine the base offense level.[20] Though the application of some sentencing factors must be tied to the offense of conviction, many others may attach based upon the evidence in the record even though not directly related to the offense upon which a conviction enters.[21] Thus, prospective guideline application weighs heavily in defense counsel's determination of how to challenge harmful evidence and how he or she may best proffer helpful or mitigating trial evidence. These decisions are driven, in part, by sentencing considerations. For example, even though the defense seeks an acquittal of the charges as its primary objective, the shaping of the record to support or detract from certain sentencing factors must not be neglected during the course of the trial.

If a specific guideline has not been promulgated for a particular statutory violation, or a criminal statute proscribes a variety of conduct that might constitute the subject of various offense guidelines, the court is to determine which guideline section applies based on the nature of the evidence leading to a conviction.[22] Specific offender characteristics provide a broad range of bases for dispute, and the attendant notes and commentary may provide a justification for upward departure. If the Government tailors its evidence to support a request for upward sentence adjustments and departures, and such evidence remains unchallenged, a defendant will likely end up being exposed to a substantially increased sentence. Postconviction attempts to refute or mitigate such evidence may be largely ineffective.

The Government's introduction of evidence during its case-in-chief will likely serve a twofold purpose. Though the primary mission is to establish guilt, such evidence may also provide "aggravators" for sentencing, as well. For example, though evidence of an attempt to alter or subvert evidence may be used to further an inference of guilt or to impeach a witness' or the defendant's credibility, it may also justify an upward sentence adjustment of two levels for willfully obstructing or impeding proceedings.[23] Evidence of the defendant's managerial role in an alleged illegal enterprise may provide evidence of guilt of the charged offense but may, at the same time, also provide a basis

for an upward adjustment for role in the offense.[24]

Accordingly, intimate knowledge of the applicable sentencing factors is critical in attempting to minimize the impact of trial evidence upon the sentencing proceedings. Trial advocacy must also focus upon preparing the record to support defense arguments toward elimination or mitigation of prospective sentencing factors.

Preparation for Sentencing

Though counsel has completed a long and protracted trial, the real battle may just be on the horizon. Preparation for sentencing proceedings may be as consuming and complex as the trial itself, if not more so.

Under the guidelines, a defendant may not waive the preparation of a presentence report. Once the presentence report is completed, it is to be disclosed to the prosecution and defense at least 10 days prior to the date scheduled for sentencing.[25]

When the sentencing guidelines were originally drafted, attorneys for the Government and defense were to file, simultaneously, a written statement of the sentencing factors to be relied on at sentencing after receipt of the presentence report.[26] In guideline revisions, however, local courts were directed to adopt procedures to provide for the timely disclosure of the presentence report and for the narrowing and resolution of disputed issues in advance of the sentencing hearing.[27] Courts throughout the United States have promulgated local rules which outline procedures for filing sentencing statements and identifying disputed sentencing issues.

Where a conviction enters after a trial, the probation officer most likely will not have sat through the proceedings and heard the evidence firsthand. Thus, unless the prosecution and defense reach a full stipulation on the guidelines and sentencing factors likely to be accepted by the court, a presentence statement setting forth the defendant's version of the evidence and an analysis of the applicable sentencing factors should be prepared. If such a statement is not presented prior to the preparation of the presentence report, evidence in mitigation will likely rest upon the defendant's version of the offense incorporated in the probation department's questionnaire or it will have to await the right of allocution at final sentencing. Since the probation officer may proffer preliminary findings of fact in the presentence report, such findings, if unfavorable, may be difficult to overcome at the sentencing hearing.

After the presentence report has been prepared, the defendant may file objections thereto. Defense objections should focus on the applicability of certain sentencing factors and the factual and legal bases supporting the defendant's, or refuting the Government's, position. After such issues are defined, the sentencing hearing must be utilized to present or identify evidence in support of the defendant's asserted positions. Any matters controverted must be resolved by the court if to be considered in sentencing the defendant.[28]

Presentence reports are afforded great weight in appellate review of sentences.[29] Sentencing judges also frequently place substantial emphasis on the factual presentation and guidelines analysis presented by the probation officer.

The probation officer is looked upon, in the sentencing process, "as guidelines expert and preliminary factfinder for the court"[30] Accordingly, how the probation officer evaluates the sentencing information presented by the respective parties may carry great weight in the final sentence actually imposed.

If the sentencing statement of the Government evidences an intent to seek an upwards adjustment or departure, defense counsel should consider filing a request for notice of evidence justifying such action. Some case authority has mandated such disclosure in advance of sentencing so that the defendant may prepare to rebut such evidence.[31] Such a motion may be joined with a request for evidence in mitigation of punishment under *Brady* v. *Maryland*.[32]

Because of the dignity afforded trial evidence, defense counsel must be particularly sensitive to perfecting evidence at trial which will favorably reflect upon the court's application of sentencing factors once the trial has been completed. If, however, the trial record does not satisfactorily further defense arguments in support of favorable sentencing considerations, factual and legal bases must be proffered at the sentence hearing. Should the sentencing judge incorrectly apply the guidelines or depart upwards, counsel must assure that the trial record effectively reflects the legal and factual bases supporting the arguments of improper action.

Release Pending Appeal

If a conviction enters, the marshalling of evidence in support of a favorable application of sentencing factors must immediately commence. If the defendant suffers a conviction after a trial, release pending appeal is a critical concern. Under the Bail Reform Act of 1984, the presumption in favor of postconviction release has been reversed.[33] Under the 1990 amendments, it may be prohibited for certain drug offenses and violent crimes.[34]

Under Rule 46(c), Federal Rules of Criminal Procedure, eligibility for release pending filing of a notice of appeal shall be in accordance with 18 U.S.C. Section 3143. The defendant carries the burden of establishing that he will not flee or pose a danger to any other

person or the community.[35] Under 18 U.S.C. Section 3143 (a), the judicial officer shall detain a convicted offender facing sentencing unless he finds by clear and convincing evidence that the person is not likely to flee, pose a danger to the safety of others, or the applicable sentencing guideline does not provide for a term of imprisonment In the Crime Control Act of 1990, Congress provided for mandatory detention pending sentencing or appeal of a defendant convicted of "crimes of violence" or drug offenses subject to statutory maximums of 10 years or more unless certain conditions are met. Unless the Government recommends no imprisonment and the court finds that the defendant is not dangerous and likely to flee, or that a motion for judgment of acquittal or new trial is likely to be granted, the convicted offender is to be detained. The only exception is where it is "clearly shown that there are exceptional reasons why such person's detention would not be appropriate.[36]

Once sentenced, release considerations for the offender not subject to mandatory detention are controlled by Section 3143(b) Under this provision, in addition to the flight and danger considerations, the court shall order the convicted offender detained unless it finds that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, a sentence that does not include a prison term, or a term of confinement less than that required to complete the appeal process.[37] Accordingly, whether the issues of law or fact raised during the trial and sentencing are deemed "substantial" may control whether the convicted offender is rendered eligible for release pending appeal.

Many circuits have adopted procedural rules for perfecting grounds for release pending appeal. Some circuits may require that such grounds first be presented to the trial court in writing specifying the questions of law or fact which are likely to result in reversal or an order for a new trial.[38] Therefore, if the defendant is likely to receive a term of imprisonment, the sentencing judge, under the terms of statute, must jail the convicted offender unless the findings essential under Section 3143(b) can be rendered. Thus, though a trial judge has already denied defendant's pretrial motions raising what the defense believes to be substantial questions, has rejected evidentiary objections as unmeritorious, and has imposed a term of imprisonment in excess of that necessary to exhaust the appeal process, before release pending appeal may be accomplished, the same judge must deem such issues previously raised as "substantial" enough to pose a likelihood of reversal or an order for a new trial or a reduced term of imprisonment below that necessary to complete the appeal. Many early observers concluded that the trial judge must, therefore, concede the commission of reversible error during pretrial or trial proceedings or error in the imposition of a term of imprisonment beyond that necessary to complete the appeal process. Some courts have noted, however, that the reviewing court must only find the presence of a substantial question that, *if* determined favorably to the defendant on appeal, will likely result in reversal or an order for a new trial.[39] Under the 1990 amendments which apply to certain drug and violent offenders, the judicial officer must find a "substantial likelihood" that a motion for acquittal or new trial will be granted.

Notwithstanding, in order to free one's client from immediate postconviction detention, defense counsel must be prepared to make the required showing in a written motion which must be filed with the trial court immediately upon the imposition of a term of imprisonment. If, as frequently occurs, the trial court should delay ruling on a motion for judgment of acquittal or for a new trial until the sentencing proceeding, and a unitary hearing is held, counsel is faced with the alternative of either seeing the client go to jail until a written motion can be prepared or prognosticating how the court will rule on the posttrial motions raising a number of the "substantial issues" and how it will apply various sentencing factors. The known practices of the sentencing judge may determine how vigorously these issues are addressed.

Though it is not unreasonable for appellate courts to expect that bail issues be presented in writing to the trial court prior to seeking appellate review, defense counsel carries a heavy responsibility in attempting to assure complete and effective treatment of a motion for release pending appeal prior to the forced detention of the defendant.

Conclusion

It is imperative that defense counsel incisively evaluate the prospective application of detention provisions and sentencing factors at the earliest moment of engagement. At the outset, an adversarial posture must be tailored to mitigate or eliminate the prospects of pretrial and postconviction confinement. Completion of guideline worksheets must be accomplished as soon as the array of sentencing factors can be formulated. Only by early preparation may counsel become an effective advocate in attempting to assure full and complete representation.

Though sentencing guidelines practice compels a defense advocate to be creative, it also demands a realistic assessment of the options available to the accused. Though the facts of the case may provide a real prospect of successfully defending at trial, counsel must also begin preparing the case to mitigate against

a harsh sentence and postconviction detention if things don't go as expected.

Much of the evidence educed at trial will impact the sentence to be imposed should an unfortunate result attach. After the trial has concluded, preparation for and presentation of evidence during postconviction proceedings may consume as much, if not more, effort and resources than those expended in readying a case for, and presenting it at, trial.

NOTES

[1]18 U.S.C. 3553(e) and 28 U.S.C. 944(n)

[2]The Commission has recently recommended a further revision to the guidelines by authorizing a departure below the guideline range if a defendant voluntarily discloses to authorities, and accepts responsibility for, the existence of an offense prior to the discovery of such an offense and if its discovery was otherwise unlikely. The guideline does not indicate that the downward departure is dependent upon a motion by the Government. Guideline § 5K2.16 is to become effective November 1, 1991, unless Congress takes disapproving action.

[3]Guidelines, § 5K1.1, Commentary, Application Note 2.

[4]18 U.S.C. § 3553(e); *United States* v. *Fleener*, 900 F.2d 914 (6th Cir. 1990).

[5]Compare e.g. *United States* v. *Ortiz*, 902 F.2d 61 (D.C. Cir. 1990); *United States* v. *Rogers*, 901 F.2d 1131 (D.C. Cir. 1990); *United States* v. *Heurta*, 878 F.2d 89 (2nd Cir. 1989); *United States* v. *Justice*, 877 F.2d 664 (8th Cir. 1990); *United States* v. *Wright*, 873 F.2d 437 (1st Cir. 1989); and *United States* v. *White*, 869 F.2d 292 (5th Cir. 1989).

[6]See e.g. *United States* v. *Rogers*, 901 F.2d 1139 (D.C. Cir. 1990); *United States* v. *Khan*, 920 F.2d 1100, 48 Cr. L. Rptr. 1329-30 (2nd Cir. December 10, 1990).

[7]Guidelines, § 3E1.1, Commentary; *United States* v. *Lucas*, 889 F.2d 697 (6th Cir. 1989).

[8]Guidelines, § 3E1.1(c).

[9]Guidelines, § 3E1.1(b).

[10]See *United States* v. *Blanco*, 888 F.2d 907 (1st Cir. 1989).

[11]Guidelines, § 6B1.4.

[12]Rule 11 (e)(1)(c), Federal Rules of Criminal Procedure.

[13]18 U.S.C. 3553(c).

[14]Guidelines, § 2F1.1, Application Note 9.

[15]18 U.S.C. § 3742(b).

[16]Rule 32(c) (2), Federal Rules of Criminal Procedure; 18 U.S.C. § 3552(a).

[17]See *United States* v. *Rogers*, 899 F.2d 917 (10th Cir. 1990).

[18]Guidelines, § 3C1.1, Application Note 1 (e).

[19]See e.g. Rule 32(c)(1), Federal Rules of Criminal Procedure, wherein the court may find that there is sufficient information in the record to render a sentence determination and directs that a report not be made. Such finding must be entered on the record, however.

[20]Appendix A-Statutory Index, Federal Sentencing Guidelines Manual.

[21]For example, an upward adjustment for managerial role under § 3B1.1 must be tied to the offense of conviction. See e.g. *United States* v. *Williams*, 891 F.2d 921 (D.C. Cir. 1989). On the other hand, a quantity of drugs beyond that charged in the indictment can be assessed against a conspirator if the evidence shows that the defendant knew or should have known about it. *United States* v. *Williams*, 897 F.2d 1034 (10th Cir. 1990).

[22]Application Note 1, § 1B1.2.

[23]Guidelines, § 3C1.1.

[24]See § 3B1.1.

[25]18 U.S.C. § 3552(d).

[26]Guidelines, § 6A1.2(a); 41 Cr. L. Rptr. 3142.

[27] § 6A1.2, Federal Sentencing Guidelines Manual (1990 Edition).

[28]Rule 32 (c)(3)(D), Federal Rules of Criminal Procedure.

[29]See e.g. *United States* v. *Rutter*, 897 F.2d 1558 (10th Cir. 1990); *United States* v. *Fuentes-Moreno*, 894 F.2d 24 (1st Cir. 1990).

[30]Division of Probation, Administrative Office of the United States Courts, *Presentence Investigation Report Under the Sentencing Reform Act of 1984* (September, 1987), note 4 at ii.

[31]*United States* v. *Sands*, 908 F.2d 304, 1990 WL 93947 (8th Cir. July 10, 1990); *United States* v. *Jagmohan*, 909 F.2d 61, 1990 U.S. App. Lexis 11925 (2nd Cir. July 13, 1990).

[32]*Brady* v. *Maryland*, 373 U.S. 83 (1963).

[33]See *United States* v. *Galanis et al., 695 F. Supp. 1565, 1568 (S.D.N.Y, 1988).*

[34]Mandatory Detention for Offenders Convicted of Serious Crimes Act, Sec. 902, S. 3266, 101st Cong., 2nd Sess.; 18 U.S.C. § 3143 (as amended, 1990).

[35]Rule 46(c), Federal Rules of Criminal Procedure.

[36]Note 33.

[37]18 U.S.C. § 3143(b)(1) and (2).

[38]See Rule 9.5.6, Tenth Circuit Rules.

[39]*United States* v. *Affleck*, 765 F.2d 944 (10th Cir. 1985).