The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative

by John L. Carroll*

I. INTRODUCTION

Traditionally, criminal defense lawyers are trained how to marshal evidence on behalf of clients, how to cross-examine witnesses, and how to present brilliant closing arguments. Defense lawyers attend seminars where the greats of the profession regale the audience with tales of hard-fought victories won and dragon-like prosecutors left bloodied on the courtroom field of honor. Rarely, if ever, does one hear stories of defeats—of clients for whom the lawyer pleads guilty or citizens-accused whom a jury has convicted. Even more rarely does one hear stories of the sentencing process in criminal cases—of how defense lawyers can affect the sentences that judges give. The lack of emphasis on the sentencing phase is curious but understandable. No criminal defense lawyer worth his salt wants to talk about sentencing, because he does not want to talk about the losses. No criminal defense lawyer ever became famous by talking about how well he had represented his client at a sentencing proceeding.

The problem with the professional deemphasis of the importance of the sentencing phase is that it overlooks the realities of life. No matter how

---

* Associate Professor of Law, Walter F. George School of Law, Mercer University. Tufts University (B.A., 1965); Cumberland School of Law, Samford University (J.D., 1974 Magna Cum Laude); Harvard Law School (LL.M., 1975). Member, State Bars of Alabama and District of Columbia.

1. In the textual and note material in this Article, whenever 'he' and other masculine pronouns are used, they should, in appropriate circumstances, be considered to mean females as well as males.
skilled the defense lawyer is and no matter how hard he works, the great majority of the cases will end up in a sentencing proceeding either because of a guilty plea or a trial conviction. Yet defense lawyers continue to ignore the sentencing phase with devastating results. As one federal district judge notes:

It has been my experience that the sentencing phase of a criminal case is often the most neglected. All too often even excellent criminal trial lawyers will perform admirably during pretrial preparation and the trial itself, only to neglect the opportunity to present more fully the defendant's position at the time of sentencing.  

In capital cases, however, lawyers are beginning to understand the importance of the sentencing phase. In those cases, lawyers, in a separate hearing, must present evidence to the sentencing authority on whether the death sentence should be imposed. The evidence relates to the circumstances of the offense and, more importantly, to the characteristics of the offender. Often, because of the overwhelming evidence of guilt, the sentencing phase becomes the only meaningful part of a capital-murder trial. As a result, lawyers defending capital cases have been forced to develop specific techniques for representing clients at the sentencing stage. In order to represent a capital defendant successfully, defense counsel must consciously minimize the evidence that the state can present in aggravation of the sentence, but at the same time maximize the evidence that is presented in mitigation of the sentence.

The capital case approach of minimizing aggravation and maximizing mitigation is extremely important in the noncapital case setting as well. Regardless of how the sentencing process is described, it involves a balancing of the aggravation and mitigation elements. In order to be successful in representing noncapital defendants, counsel must follow the lead of


capital-case lawyers. The defense lawyer must minimize the prosecution’s aggravating evidence and at the same time maximize the mitigating evidence. In the words of Bing Crosby, you’ve got to accentuate the positive and eliminate the negative.

II. THE SENTENCING PROCESS

A. Sentencing Reform

Generally, the criminal sentencing process considers one or more of four main objectives: (1) deterrence; (2) punishment; (3) rehabilitation; and (4) incapacitation. State and federal legislators’ response to these objectives has been both varied and confused. The dominant sentencing schemes prior to the early 1970’s were those known as indeterminate sentencing schemes. These schemes gave judges broad ranges within which they could sentence and little or no guidance on how the judges were to exercise their sentencing discretion. In addition, persons sentenced under indeterminate sentencing schemes were generally eligible for parole after serving one-third of their sentences. Thus, even if there was uniformity during the judicial sentencing phase, that uniformity often vanished in the parole process. The indeterminate sentencing schemes have been heavily criticized recently because of the tendency of indeterminate sentencing systems to create longer and more disparate sentences.

Disenchantment with indeterminate sentencing systems has led many states and the federal government to enact sentencing reforms to combat the problems of length and disparity. In theory, the reforms have taken two forms: (1) ‘determinate sentencing’ systems; and (2) ‘sentencing guideline’ systems. In reality, these forms tend to blend together.

8. Even within the broad categories ‘determinate sentencing’ and ‘sentencing guideline,’ the actual mechanisms of sentencing differ greatly, thus making it impossible to assign any precise definitions to those terms. Generally, a ‘determinate sentencing system’ is one in which the judge imposes a sentence of fixed duration within a narrow range. Even in determinate sentencing schemes, the actual time of incarceration may be shortened by the intervention of a parole board. See, e.g., CAL. PENAL CODE § 2931(a) (Deering 1985).

Under a ‘sentencing guideline system,’ the judge is still faced with a limited range of sentencing possibilities. Within those possibilities, however, he has some flexibility about the length of the actual sentence imposed. See Sundberg, Plante & Braziel, Florida’s Initial Experience With Sentencing Guidelines, 11 Fla. St. U.L. Rev. 125 (1983). For critiques of the actual operation of new sentencing systems, see Schunerk, Illinois’ Experience with Indeterminate Sentencing: A Critical Reappraisal; Part 2: Efforts to Impose Substantive
a 'determinate sentencing' scheme, the sentencing judge has little or no discretion. The legislature, in effect, has predetermined sentence. In California, for example, a sentencing judge who seeks to incarcerate a defendant may sentence him to one of three prison terms—a middle term, a lesser term, or a greater term. The middle term is the presumptive sentence. The sentencing judge uses the lesser term when mitigating circumstances are present and uses the greater term when he finds aggravation. The actual time a defendant may serve varies, however, because he is generally eligible for a short parole period and for time off for good behavior.

Under a 'sentencing guideline' system, the judge has a broader range of years within which to sentence than that normally provided in a true 'determinate' system. An analysis of the scheme currently used in Florida offers a good example of the operation of a 'sentencing guideline' system. Under the Florida scheme, the trial judge sentences with reference to a predetermined range of years established by the state Sentencing Commission. The sentencing judge initially determines which range applies by utilizing a scoring system that takes into account the severity of the offense, the prior record of the offender, and the injury to the victim. The judge then utilizes the score with tables that give both a recommended sentence and a range within which the judge may properly sentence. The sentencing judge may reduce the actual time served by any good time awarded to the defendant while in prison, but there is no parole from the sentence itself. The system authorizes judges to sentence outside of the guidelines, but does not favor the practice, and the judges must justify the sentence in writing. Under the 'sentencing guideline' scheme, "Departures from the guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating limits on the exercise of judicial sentencing discretion," 34 De Paul L. Rev. 241 (1985); Kramer & Lubitz, Pennsylvania Sentencing Reform: The Impact of Commission Established Guidelines, 31 Crime & Delinq. 481 (1985).


11. Id. § 2931(a) (Deering 1985).


14. Rule 3.701 creates nine offense categories that attempt to group offenses by type and severity. Category eight, for example, deals with weapons offenses. A defendant who is convicted of a first degree weapons felony receives 70 points. Further points are added for other offenses, prior record, and victim injury. The sentencing guidelines recommend a sentence of eight years for an offender with a score of 134-157 and authorize the judge to impose a sentence of between seven and nine years. See Form 3.988.

ing the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure."

Congress has responded to cries for sentencing reform by totally rewriting federal sentencing laws. In enacting the Comprehensive Crime Control Act of 1984, Congress has replaced the federal indeterminate sentencing scheme with a 'sentencing guideline' system. Under the new federal scheme, the vast discretion in sentencing that federal judges currently possess will be significantly circumscribed. The Act provides that a new federal body, the United States Sentencing Commission, will develop and promulgate a series of sentencing guidelines. In addition, the Act requires federal judges to sentence within those guidelines "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." No parole will be permitted from the sentences imposed under the guideline system, but "the court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment."

B. The Importance of Aggravating and Mitigating Circumstances

The new sentencing schemes rely heavily on concepts of aggravation and mitigation to balance the rigidity of determinate and guideline sentencing. Thus, findings relative to aggravating and mitigating circum-

16. FLA. R CRIM. P. 3.701(11).
20. 18 U.S.C.A. § 3553(b) (West 1985). The new sentencing system becomes effective on or about November 1, 1986. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 235, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 5433, 5453. Since Congress has not yet formulated the guidelines, there is no indication of what may constitute aggravation and mitigation. How Congress defines these circumstances will have a great effect on determining the amount of discretion that the sentencing judge will have. See Survey, supra note 18, at 675 n.3239.
21. 18 U.S.C.A. § 3583 (West 1985). There are limits placed on the length of supervised release that range from three years for serious felonies to one year for minor felonies and misdemeanors.
stances become outcome determinative. The sentence an offender receives will depend, in all likelihood, on how well the defense lawyer can create a case for mitigation and against aggravation.22

The language and content of the mitigating and aggravating circumstances provisions vary extensively from state to state. In Alaska, for example, there are twenty-six statutorily enumerated aggravating circumstances23 and fifteen statutorily enumerated mitigating circumstances.24 Most other states have fewer factors specifically enumerated in their statutes.25 In addition, several jurisdictions allow defense attorneys to offer anything relevant in mitigation of the sentence.26 Regardless of the specifics of the sentencing scheme, all jurisdictions focus on the circumstances of the offense and the characteristics of the offender in considering aggravation and mitigation. Consequently, most jurisdictions permit enhanced punishment when the offender has a prior record27 or when the offense involves cruelty.28 Correspondingly, most states allow for a reduced sentence or a nonincarcerative sentence because of factors such as

---


the offender's age. Some states have broadened the focus of the aggravating or mitigating inquiry, however, by adopting nontraditional aggravating and mitigating circumstances, and other states have created open-ended legislation that leaves the contents of aggravating and mitigating circumstances unspecified. Obviously, under those types of statutes, the courts will permit wide-ranging sentencing arguments.

Regardless of how the legislation defines the content of the mitigating and aggravating circumstances, their existence presents the defense lawyer with an immediate focus for his sentencing presentation. The defense attorney must minimize the amount of aggravating evidence that the prosecution can argue in support of a severe sentence and at the same time maximize the presentation of mitigating evidence. The next section of this Article offers suggestions about how the defense lawyer can accomplish that noble but sometimes elusive goal.

III. MINIMIZING AGGRAVATION

A. The PSI Report

No matter what model the sentencing scheme follows, the presentence investigation report (PSI report) is one of the most important components of the sentencing process. Every state system and the federal sys-

30. In Alaska, for example, a judge may enhance the punishment if he finds that the crime was racially motivated. ALASKA STAT. § 12.55.155(c)(22) (1984). Likewise, an Alaskan judge may reduce a sentence if he finds that the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide emergency necessities for his immediate family. ALASKA STAT. § 12.55.155(d)(11) (1984). An Illinois judge may enhance a sentence if he finds that the offense was committed in a place of worship. ILL. ANN. STAT. ch. 38, § 1005-5-3.2(a)(9) (Smith-Hurd 1985). Likewise, he may impose a reduced or nonincarcерative sentence if he finds that the imprisonment of the offender would entail excessive hardship to his dependents. ILL. ANN. STAT. ch. 38, § 1005-5-3.1(A)(11) (Smith-Hurd 1982).
32. The federal legislation apparently contemplates that the United States Sentencing Commission will provide guidance about the kinds of aggravating and mitigating circumstances that a federal judge may consider. See Survey, supra note 18, at n.3239. Under the Minnesota system, which is generally considered the model 'sentencing guideline system' (see Survey, supra note 18, at n.3136), the Sentencing Commission promulgated a set of aggravating and mitigating circumstances that track the aggravating and mitigating circumstances most commonly found. See MINN. STAT. ANN. § 244, Minnesota Sentencing Guidelines and Commentary, II.(D)(2)(a)(1)-(4), (b)(1)-(5) (West 1985).
33. It goes without saying that sentencing arguments that maximize mitigation and minimize aggravation are important even in jurisdictions with no statutory references to aggravation and mitigation. Statutory references simply provide an immediate focal point for structuring the argument.
tem, either by rule, statute, or custom authorizes the sentencing judge to order that a presentence investigation be conducted and a PSI report be filed to aid the court in determining the sentence.\textsuperscript{34} Usually, either the parole or probation department conducts the investigation.\textsuperscript{35}

It is impossible to overemphasize the importance of the PSI report. The PSI report is "a critical document"\textsuperscript{36} and is the primary source of information about a criminal defendant's background "for all stages of the correctional process"\textsuperscript{37} including, of course, sentencing. In the federal sentencing system, the trial judge usually sentences on the basis of the report and usually follows the probation officer's recommendation.\textsuperscript{38} State trial judges generally do the same.

Most criminal cases are resolved by guilty pleas so that "the PSI is often the only source of information about the defendant and his or her offense that is available to a sentencing judge."\textsuperscript{39} In addition, the presentence report can have collateral consequences long after sentencing. In the federal system, for example, both the Bureau of Prisons and the Parole Commission use the PSI report to determine classification and eligibility for parole.\textsuperscript{40} Thus, a bad PSI report can work a serious hardship on a prisoner. While there has been little or no formal analysis of the use

\begin{itemize}
\item \textsuperscript{34} The situations in which the judge orders a PSI vary from jurisdiction to jurisdiction. In most systems, a PSI is mandatory before felony sentencing. See, e.g., Fed. R. Crim. P. 32(c)(1); Ill. Ann. Stat. ch. 38, § 1005-3-1 (Smith-Hurd 1982); Ind. Code Ann. § 35-38-1-8 (Burns 1985). In the other systems, the trial judge may order a PSI to assist him in sentencing. See, e.g., Fla. R. Crim. P. 3.710; Neb. Rev. Stat. § 29-2261 (1979). The better practice and the practice recommended by the American Bar Association is that a PSI be ordered in every case. See Standards Relating to Sentencing Alternatives and Procedures § 4.1(a)-(c) (1968).
\item \textsuperscript{35} See, e.g., Fed. R. Crim. P. 32(c); Fla. R. Crim. P. 3.710.
\item \textsuperscript{36} Fennell & Hall, Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts, 93 Harv. L. Rev. 1615, 1616 (1980).
\item \textsuperscript{37} Comment, A Proposal to Ensure Accuracy in Presentence Investigation Reports, 91 Yale L.J. 1225, 1225 (1982).
\item \textsuperscript{38} Fennell & Hall, supra note 36, at 1617.
\item \textsuperscript{39} Comment, supra note 37, at 1228.
\item \textsuperscript{40} Fennell & Hall, supra note 36, at 1617 n.13. Under the new federal sentencing scheme previously referenced, the PSI will assume even greater importance. In the words of one commentator:
\begin{quote}
The PSI will be expanded and will include the probation officer's assessment of the classification of the offense and the offender under the new sentencing guidelines.
\end{quote}

\begin{quote}
It will include any aggravating and mitigating circumstances which, in the judgment of the probation officer, might take the case either above or below the potentially applicable guidelines. It will also contain any pertinent policy statements by the Sentencing Commission bearing on the sentencing of the defendant.
\end{quote}

Rezneck, supra note 18, at 790.
\end{itemize}
of the PSI in state systems, common sense compels the conclusion that use of the PSI report in the states is similar to its use in the federal system.\footnote{41}{Commentators have limited their focus to the federal system in analyzing the function and importance of the PSI. The conclusions of the commentators about the importance of the PSI report in both sentencing and postsentencing situations can easily be applied to the state systems.}

In years past, courts often would withhold the PSI report from defense counsel, which created serious due process problems. Now, however, most systems either by custom or by rule permit disclosure of the report to defense counsel prior to sentencing.\footnote{42}{See, e.g., Fed. R. Crim. P. 32(3)(A) (disclosure required at a reasonable time before imposing sentence); Iowa Code Ann. § 901.4 (1985) (disclosure required at least three days before sentencing); Vt. R. Crim. P. 32(c)(D)(3) (disclosure required at least seven days before sentencing).} This practice makes intellectual good sense and is consistent with the recommendation of the American Bar Association.\footnote{43}{The ABA cites notions of fundamental fairness in recommending that “[t]he substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney and others who are acting on his behalf.” Standards Relating to Sentencing Alternatives and Procedures § 4.4(a) (1968).}

B. The Defense Lawyer

How a defense lawyer deals with the PSI process can be outcome determinative for the client. If counsel utilizes the right techniques, he can be ultimately successful in minimizing the aggravating circumstances and information presented in the PSI report. If the defense lawyer does not properly do his job, the sentencing judge uses an aggravated PSI as the basis for imposing the sentence. The PSI report then follows the convicted individual throughout the criminal justice system and adversely affects his chances for parole and for less restrictive custody. The defense lawyer can have a significant impact on the PSI process and its subsequent effect on the client by performing three distinct and important tasks: (1) working with the preparer of the report; (2) working with the victim of the crime; and (3) making timely legal attacks on erroneous information presented to the sentencing authority.

Working with the Preparer of the PSI Report—Treating Probation Officers Like Human Beings

As anyone familiar with the criminal justice system knows, most probation and parole officers are extremely overworked and usually underpaid. Further, the probation and parole personnel are generally under a great
deal of pressure from the court system to prepare large numbers of PSI reports in a short period of time. The more assistance the defense lawyer can provide to the officers in preparing the report on his client, the better the chances of having the personnel prepare a report that is either neutral or favorable.44 Parole and probation employees are human beings with human problems. The more the defense lawyer attempts to understand and minimize the officers' problems in the case, the better the service that the lawyer can render for his client.

The defense lawyer's early contact with the probation officer is absolutely essential because that contact helps the officer do his job better.45 Unfortunately, most criminal defense lawyers view early contact with the probation officer of the PSI report as an admission of defeat. Thus, attorneys delay contacting the probation officer until after the judgment of guilt. This attitude can only hurt a client. When the defense lawyer delays contacting the probation or parole officer, the lawyer puts more pressure on the officer, who will have less time to do his job and will, in all likelihood, be less favorable toward the client because of the additional pressure. The criminal defense lawyer can avoid these problems and their concomitant pressure by early contact.

The information that defense counsel shares with the probation officer will obviously differ from case to case. Generally, the defendant will benefit from having the probation officer talk with the defendant's family. Defense counsel, therefore, can provide important assistance to the probation officer by helping the officer locate family members and by facilitating their interviews.

Cases that will ultimately be tried must be handled differently from cases that will be resolved by a plea. In a case that will be tried, defense counsel obviously cannot allow his client to admit guilt to the probation officer. Most probation officers, however, respect the role of defense counsel and understand that a client cannot talk about the circumstances of an offense until an adjudication of guilt. That limitation should not prevent counsel from providing relevant background information. When defense counsel places principal reliance on a defense PSI report or sentencing memorandum, less contact with the probation officer may be necessary. Even if the lawyer contemplates no use of the court-ordered PSI report, defense counsel should still assist the probation officer in its preparation.46

44. The importance of the parole or probation officer to the sentencing process cannot be overemphasized. A recent study concluded that probation officers play a major role in determining sentencing outcomes. Walsh, The Role of the Probation Officer in the Sentencing Process: Independent Professional or Judicial Hack?, 12 CRIM. JUST. & BEHAV. 289 (1985).

45. Roszowski, supra note 2, at 634; Craven, supra note 2, at 13-14.

46. See McCarthy & Brook, Defense Counsel and the Federal Sentencing Process, 27
In order for a criminal defense lawyer to have success in dealing with parole and probation personnel, he simply must treat them as human beings. If the lawyer understands the functions and pressure of his job and can help minimize those pressures, his assistance to the parole officer will ultimately benefit his client even in the worst cases.

Dealing with the Victim

Until recently, the criminal justice system ignored the concerns of the victims of crime. Victims were excluded from the justice process and alienated by it.47 Victims banded together because of their feelings of alienation and abandonment, formed organizations, and lobbied to make the criminal justice system more responsive to their needs.48 Faced with an active victims' lobby, legislatures and courts began to expand the role that victims play in the criminal justice process.

Nowhere is that role more significant and more expansive than in the sentencing process. As a result of efforts of victims' rights groups throughout the country, virtually every jurisdiction allows a victim to have input in the sentencing process. In many states, the PSI provides the victim's input for the court.49 In other states, the victim may appear at the sentencing hearing or provide the judge with a written statement.50 The new status afforded victims makes meaningful defense contact with

N.Y.L. Sch. L. Rev. 799, 856 (1982); Craven, supra note 2, at 13-14.


48. Thus was born the victim's rights movement. Goldstein, supra note 47, at 516-18.


the victim absolutely essential for successful representation of a client in the sentencing phase.

Obviously, any defense lawyer contact with the victim is an endeavor fraught with peril. One study indicates that pretrial contact between the defense lawyer and the victim tends to make the victim want a stiffer sentence. Another study, however, underscores the advantages of having some sort of peace made between the victim and the offender. Regardless of the potential for damages, the contact is worth making because of the important impact that the victim may have on the sentencing decision. The key to successful contact with the victim is, again, the lawyer's treatment of the victim as a human being. The lawyer must understand the victim's position and feelings and act accordingly.

Contact with the victim can accomplish two important goals. First, contact will help the victim understand that defense lawyers have concern for him as a human being. All too often, the victim sees criminal defense lawyers as persons who are unsympathetic to his plight. It is important for the defense lawyer to overcome this prejudice by simply talking to the victim and letting him know that the defense lawyer cares about what has happened to him. Second, the victim often knows nothing about the defendant's background. Discussions with the victim about the defendant and the mitigating evidence may help to soften the victim's stance. In

51. The defense attorney may not always be the best person to deal with the victim. In situations where a sentencing expert is utilized (see infra text accompanying notes 101-03), the sentencing expert can offer invaluable assistance in dealing with the victim.

52. Hagan, Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process, 73 J. of Crim. L. & Criminology 317 (1982). The author noted that contact between the defense counsel and the victim was associated with an increased tendency for the victim to see the accused as irresponsible and immature and, thus, to want the accused to be punished more severely. The author qualifies his conclusion by remarking: "It may be that in the process of attempting to prove the client's innocence the defense counsel aggravates tensions between victims and accused." Id. at 328. Thus, Hagan's study did not look at the possible effects of the type of defense lawyer-victim contact which is suggested herein.


54. In cases in which the victim is lying about the crime, it will obviously be impossible to be sympathetic to his plight.

55. One recent study indicated that victims who were aware of an offender's background may often oppose incarceration. As the authors noted, prosecutors appear only interested in proclaiming that the harshest punishments are necessary, while using the victims as justification. Yet victims complained of the lack of communication with the prosecution. In fact, several victims interviewed were adamant in their desire to keep the offender out of state prison because they feared it would be a destructive influence. There were even instances where the victims offered to testify on behalf of the offender at a sentencing hearing in order to prevent a prison sentence.
DEFENSE LAWYER’S ROLE

some cases, the defense lawyer cannot talk to the victim either because the victim is dead or injured, or the victim simply refuses to talk to defense counsel. In those circumstances, the lawyer should make some effort to contact the victim’s close family members.

Defense counsel should not overlook the possibility of discussions with corporate victims of crime. Often, judges assume that corporate victims want stiff sentences when in fact they do not. Also, discussions with corporate victims may help defense counsel clearly establish the financial loss that occurred. That loss is sometimes overstated in PSI reports, and, as previously noted, the overstatement can have adverse prison and parole consequences.

There is never anything easy about dealing with the victims of crime if one is a defense lawyer. In some cases, defense counsel will have no success in neutralizing the victim. In other cases, he may be successful. Nonetheless, the benefits of working with the victim far outweigh the risks. No matter how difficult the effort, contact with the victim is important: it can mean a lifetime to the defendant.56

Attacking Erroneous Information

A Brief Look at the Problem. Anyone who has practiced criminal law for even a short time has encountered a PSI report that portrays the client as an archvillain and bases that portrayal on rumor, innuendo, and hearsay. The following examples are indicative of the problem.

The first example concerns the sentencing of a white collar defendant who had pleaded guilty to violations of federal securities law and had testified for six days as a government witness. Part of the PSI report,


56. In a recent study, two social scientists analyzed victims’ statements in PSI reports. Usually, the statements were calls for retribution. The authors found, however, that the calls for retribution were transparent. When sentencing alternatives were described to the victim, the desire for retribution often vanished.

A third factor which we extrapolated concerned the effects of a professional’s providing the victims with information on sentencing options. We had found that victim statements contained in probation pre-sentence reports many times requested retribution, usually in the form of prison. But we also discovered that in the course of gathering these statements, the probation officer offered no choices or alternatives. Usually, there was only a simple question: What do you think should be the “punishment” provided this offender? On the other hand, from our experience in private practice, we found that when provided with additional sentencing options, in all but one case the victims agreed to an alternative sentence . . . . In short, we found that victims were quite willing to move away from a position of retribution if given viable alternatives.

Henderson & Gitchoff, supra note 55, at 230.
which was based entirely on hearsay, read as follows:

Stein has developed a rightly earned reputation among the Securities and Exchange Commission as one of the major manipulators of stocks . . . . He operates under the guise of respectability reinforced by his pervasive and glib personality which makes him formidable opposition. There appears little doubt that Stein is one of the major offenders in this field.97

The second example concerns an even more typical situation. The court found the defendant guilty of simple possession of heroin, and the presentence report portrayed the defendant as a kingpin of a major drug operation. In the second example, the PSI report, again based on hearsay, read:

This officer interviewed Narcotic Agents of the Federal Bureau of Narcotics and Dangerous Drugs who have been investigating Mrs. Wallace's involvement in narcotics since about February of this year. They advised that in their opinion Mrs. Wallace is a very intelligent and clever dealer in heroin. They feel that she has never used the drug but has been the chief supplier to the Western Washington area.98

The defense lawyer obviously cannot leave such erroneous information as displayed in these two examples unchallenged. He must attack it.

Mounting the Attack. The defendant’s right to attack erroneous sentencing information is anchored in the Supreme Court decision in Townsend v. Burke99 and its progeny.100 Those decisions make it clear that the due process clause gives an offender the right to be sentenced only on the basis of accurate information.101 While the due process clause provides a

58. United States v. Weston, 448 F.2d 626, 628 (9th Cir. 1971). Although these two examples are taken from federal cases, a similar if not worse problem exists in state court systems.
60. Most often, the erroneous information comes in the form of hearsay and is related to either the defendant’s status in the world of crime or his place in a drug-smuggling operation. See, e.g., United States v. Borello, 766 F.2d 46, 60 n.23 (2d Cir. 1985) (hearsay allegations that the defendant was associating with organized crime); United States v. Rodriguez, 765 F.2d 1546, 1554 (11th Cir. 1985) (hearsay evidence that the defendant was part of a major narcotics ring and acted as a broker for the drugs). Often, the hearsay is related to uncharged bad acts that the government proffers as a reason for a heavy sentence. See, e.g., United States v. Reme, 738 F.2d 1156, 1166 (11th Cir. 1984) (hearsay testimony that persons
basis for attack for both federal and state defendants, a federal defendant
also may rely on the recently amended provisions of rule 32 of the Fed-
eral Rules of Criminal Procedure. Under rule 32, a defendant has the
right to comment on a presentence report and "in the discretion of the
court, to introduce testimony or other information relating to any alleged
factual inaccuracy contained in it."62 Similarly, some states have adopted
new statutes and rules that specifically entitle defendants to challenge
erroneous sentencing information.63
Defense counsel faced with a PSI report that contains erroneous sen-
tencing information has several choices. There are few hard and fast
rules, however, governing the choices. In addition, the content of the
choices vary from circuit to circuit.64 First, counsel may choose to do
nothing. In some situations, that is the best choice.65 If defense counsel
chooses to do something, however, then various procedures are available.

Prior to that time, federal courts had adopted their own constitutionally mandated set of
procedures for dealing with the problem of erroneous sentencing information. See, e.g.,
United States v. Charmer Indus., 711 F.2d 1164, 1172 (2d Cir. 1982). Those procedures,
adopted as a response to due process challenges to sentencing procedures, are strikingly
similar to the procedures embodied in rule 32. See United States v. Petitto, 767 F.2d 607,
611 (9th Cir. 1985).

1985).

64. The cases cited in this section all will be federal cases. The great majority will be due
process rather than rule 32 cases and, of course, that distinction will be noted. Although not
controlling on the issue, the due process cases will be persuasive on sentencing issues that
arise in state systems.

The law in the federal system is extremely imprecise and the legal standards governing a
defendant's right vary from circuit to circuit. See supra notes 23-33. See generally Giorno,
supra note 61.

65. A full-scale attack on the information may alienate the judge and have an adverse
impact on sentencing. Additionally, a full-scale attack may cause the government to assem-
ble more harmful information. The decision whether or not to attack must be based in sub-
stantial part on the realization that adverse findings in the PSI follow the defendant every-
where and damage his chances for parole. Of course, failure to attack the erroneous
information at sentencing may bar a future effort at obtaining judicial relief. See generally
United States v. Frady, 456 U.S. 152 (1982). See also United States v. Baylin, 696 F.2d 1030,
1035-36 (3d Cir. 1982) (no jurisdictional bar to consideration of erroneous sentencing infor-
mation in a proceeding under 28 U.S.C. § 2255 (1982) even when no objection was lodged
prior to sentencing). Under the new procedures to be implemented in the federal system,
the postsentencing impact of the PSI report will be greatly diminished. Under the new sen-
tencing guideline system, time served will depend, almost totally, on the sentence imposed
by the judge.
Counsel can object and, based on the objection, the court may simply disregard the disputed material. Counsel can object, and the court may then give defense counsel the opportunity to comment on the disputed material without either side presenting any formal evidence. The court may, however, request that the government corroborate the allegedly erroneous information. The judge may also allow comment from the defendant by affidavit or presentation of documents.

As a final alternative, the court can order a Fatico hearing at which both the prosecutor and defendant may offer evidence to support their contentions. The United States Supreme Court has never precisely outlined the parameters of a Fatico hearing. Consequently, the law surrounding the hearing and important elements, such as allocation and quantity of the burden of proof, vary widely among the circuits. In some circuits, the prosecution bears the burden of demonstrating the reliability of the challenged information, and the burden of proof is less than proof beyond a reasonable doubt. In other circuits, the defendant bears the burden of demonstrating unreliability, and the standard of proof is undefined. In all circuits, however, notions of reliability circumscribe the court's decision to rely on or disregard the challenged evidence. Although a sentencing judge has wide discretion in both the kind and source of information he may consider in determining punishment, the

69. United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976).
70. The Fatico hearing takes its name from the decision of Judge Weinstein in United States v. Fatico (Fatico I), 441 F. Supp. 1285 (E.D.N.Y. 1977), rev'd, 579 F.2d 707 (2d Cir. 1978). The term Fatico hearing is the term used to describe the adversarial evidentiary hearing conducted by the court wherein the defendant may attack erroneous sentencing information. See, e.g., United States v. Santarelli, 729 F.2d 1388, 1389 (11th Cir. 1984). A decision of the court not to hold a hearing is reviewable under an abuse-of-discretion standard. See, e.g., United States v. Petitto, 767 F.2d 607 (9th Cir. 1985).
71. See United States v. Napolitano, 761 F.2d 135 (2d Cir. 1985); United States v. Fatico, 603 F.2d 1053, 1057 (2d Cir. 1979); United States v. Weston, 448 F.2d 626, 630 (9th Cir. 1971).
72. United States v. Tooker, 747 F.2d 975, 979-80 (5th Cir. 1984); United States v. Reme, 738 F.2d 1156 (11th Cir. 1984). See generally Comment, supra note 37, at 1523-28.
73. See United States v. Weston, 448 F.2d 626 (9th Cir. 1971). The so-called Weston principle that makes reliability the touchstone of the judge's decision whether or not to consider the challenged evidence has been widely accepted. See United States v. Lemon, 723 F.2d 922, 934 (D.C. Cir. 1983).
information must be reliable beyond some minimal indicia of reliability.\textsuperscript{76} The reliability of rumor and hearsay evidence, which is particularly difficult to challenge, must be ensured "through cross-examination or otherwise, by demanding certain guarantees of reliability."\textsuperscript{76}

While the remedy to be afforded defendants who have been sentenced on the basis of erroneous information is well settled,\textsuperscript{77} the standard to be used in determining whether the relief should be granted is very unsettled. Some circuits utilize a fairly loose standard that requires relief "when the sentencing process created a significant \textit{possibility} that misinformation infected the decision."\textsuperscript{77} Other circuits apply a much stricter two-pronged test. Under the two-pronged test, the court orders a new sentencing hearing only if the defendant can establish: "(1) that the challenged evidence is materially false or unreliable, and (2) that it actually served as the basis for the sentence."\textsuperscript{77}

The 1983 amendment to rule 32 of the Federal Rules of Criminal Procedure has made appellate review of sentencing proceedings easier in federal court. Under the amendment:

If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing . . . \textsuperscript{80}

The procedure mandated by the new rule was the subject of the recent

\textsuperscript{75} United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir. 1982).
\textsuperscript{76} United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978).
\textsuperscript{77} The remedy for the due process or rule 32 violation would be for the appellate court to order a new sentencing hearing. United States v. Reme, 738 F.2d 1156, 1167 (11th Cir. 1984).
\textsuperscript{78} United States v. Bass, 535 F.2d 110, 118 (D.C. Cir. 1976) (emphasis in original); \textit{see also} United States v. Gomer, 764 F.2d 1221, 1223 (7th Cir. 1985) (in order to obtain relief, it is sufficient to show that it was not improbable that the trial judge was influenced by improper factors in imposing sentence); United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976) (where there is a possibility that the sentence was imposed on the basis of false information or false assumptions concerning the defendant, an appeal will lie and the sentence will be vacated); and Scott v. United States, 419 F.2d 264, 266 (D.C. Cir. 1969) (Appellate courts have the duty to "scrutinize the sentencing process to insure that the trial judge has considered the information available with some regard for its reliability.").
\textsuperscript{79} United States v. Reme, 738 F.2d 1156, 1167 (11th Cir. 1984). \textit{See also} United States v. Tooker, 747 F.2d 975, 978 (5th Cir. 1984) ("[D]efendant must show that the information was \textit{materially} inaccurate and that the judge \textit{relied} on that information.")(emphasis added). United States v. Ching, 682 F.2d 799, 801 (9th Cir. 1982) (two-prong test: defendant must show reliance and falsity or unreliability).
\textsuperscript{80} \textit{Fed. R. Crim. P. 32(c)(3)(D).}
Fifth Circuit opinion in *United States v. Velasquez.* During the presentence hearing, Velasquez's counsel objected to the label 'notorious alien smuggler' that had been used in the presentence report to describe Velasquez. The defense attorney argued that the description was false. The district court did not respond to the objection and sentenced the defendant to five years, which was the maximum sentence allowed by law. On appeal, the Fifth Circuit found that the district judge had violated the clear mandate of rule 32(c)(3)(D). The court held that once the defendant carried the rule-imposed burden of objecting to a portion of the presentence report, the district court was required to make findings as prescribed by the rule. The court's failure to do so required a remand for a new sentencing hearing. In reaching its conclusion concerning the requirements of rule 32(c)(3)(D), the Fifth Circuit explicitly rejected the interpretation of the rule by the Ninth Circuit that would allow a new sentencing hearing only if the defendant proved that the sentencing court 'demonstrably' relied on the challenged information when it imposed sentence. Courts in the early decisions exploring the contours of amended rule 32 appear to apply a more relaxed standard for relief than most of the courts that have construed the standard for relief under the due process clause. Appellate courts have granted relief, however, simply because a judge failed to follow the plain language of the rule. As judges begin to understand and follow the rule, there is little likelihood of repeated rule 32 violations. Thus, the due process clause will remain the fundamental ground for challenges to the fairness of sentencing proceedings.

81. 748 F.2d 972 (5th Cir. 1984).
82. *Id.* at 973.
83. *Id.* at 974.
84. *Id.*
85. *Id.* at 974 n.2. The Ninth Circuit test was articulated in a case styled *United States v. Ibarra,* 737 F.2d 825, 827 (9th Cir. 1984). That court later construed its opinion in *Ibarra* as having decided that the district court in *Ibarra* had substantially complied with the provisions of rule 32(c)(3)(D). *See also* United States v. O'Neill, 767 F.2d 780, 787 (11th Cir. 1985) (remand for presentencing when the trial judge failed to make the findings required by rule 32).
86. *See supra* notes 78-79.
87. Compliance with the provisions of rule 32 "will not shield sentences that otherwise violate due process." United States v. Gonzales, 765 F.2d 1393, 1397 (9th Cir. 1985). *See also* United States v. Darby, 744 F.2d 1508, 1532 n.22 (11th Cir. 1984) (rule 32(c)(3)(D) does not purport to state the requirements of due process).
IV. Maximizing Mitigation—Individualizing and Humanizing the Defendant

Success in minimizing the amount of aggravation that the court will consider is only half the battle. Defense counsel must also individualize the defendant and make the court understand the defendant as a human being in order to have an impact on the sentencing process. As one federal judge has described the task:

The lawyer's responsibility is to focus the judge's attention on this particular defendant—that this defendant is salvageable—that it would be in the public's best interest for this defendant to be given the opportunity to redeem himself by a voluntary program of public service, rather than by making mail bags in Atlanta. 88

The task of individualizing and humanizing the defendant is really the task of maximizing the amount of mitigating evidence available and of presenting it to the sentencing judge in a way that will have an impact. To accomplish these goals, the defense lawyer must take two steps: (1) conduct an extensive background investigation; and (2) prepare and present a defense PSI report to the court.

A. The Background Investigation—Uncovering Evidence of Mitigation

Criminal defense lawyers are trained to undertake extensive investigations that focus on the facts of a particular crime. Defense lawyers conduct the investigations to discover evidence to attack the prosecution's case, as well as to provide substantive evidence of the defendant's innocence. The factual trial-type investigation is important, but is usually totally inadequate for sentencing purposes. For sentencing purposes, defense counsel must undertake an extensive background investigation that focuses on the characteristics of the offender and his social history. The background investigation should focus on the client's life, his past behavior, and his motivation for the commission of the crime. The investigation is designed to provide grounds for counsel to humanize and individualize his client in the sentencing process.

The task of conducting an adequate investigation requires counsel to examine a myriad of nontraditional sources not normally associated with a criminal investigation. As one commentator has noted:

In investigating a client's history, counsel should consider school records, juvenile court records, military service records, records of client's employers, union records, social security and welfare department records,

records of a personal or family physician, and records of hospital admissions. Counsel also should talk to clergy, school teachers and social workers who have come in contact with the client's family and to the neighborhood political ward leader. 88

In most cases, particularly those concerning violent crimes, it is important to have mental health professionals examine the client. Often, those examinations will provide the all-important reason for the crime and will make it much easier for the court to understand the defendant as a human being. Only in the rarest cases should defense counsel not include a mental health examination as part of the background investigation.

B. The Defense PSI Report—Presenting Evidence of Mitigation 90

Once the defense counsel gathers the background information, he must present the information to the sentencing authority in a meaningful fashion. Unfortunately, many defense lawyers wait until the sentencing proceeding to present information about the defendant to the court. By then, it is usually too late to have any impact because the judge has already determined the sentence. 91 Indeed, one of the biggest problems with current sentencing practices is that defense lawyers have very little impact on the ultimate sentence. This problem exists not because the system forbids the input but rather because defense lawyers do not utilize the processes available. 92 Despite their failure to do so in the past, defense lawyers can have an impact on the sentence that the defendant receives. The best way to make that impact is by presenting mitigating evidence through a defense PSI. 93

There is, of course, neither a set format for a defense PSI report, 94 nor

90. The term 'defense presentence investigation report' encompasses documents traditionally cited as sentencing memorandums, as well as documents specifically named 'defendant's presentence investigation reports.'
91. Fennell & Hall, supra note 36, at 1669.
92. One set of commentators did an extensive analysis of the sentencing process in federal court. Their study found that the defense's input into the [sentencing] decisionmaking process is minimal, limited primarily to contacts with the probation officer and allocution at the time of sentencing . . . . Defense counsel seldom participate in presentence conferences, and despite the potential importance of sentencing memoranda or parallel presentence reports prepared by defense counsel, an overwhelming majority of judges reported that defense counsel submit such written reports in 10% or less of their cases.
Fennell & Hall, supra note 36, at 1669.
93. See generally Coffee, supra note 7, at 1454-58.
94. For suggestions as to content, see Survey, supra note 18, at 666-70. See also A.
a prescribed set of arguments that the attorney can make. In some cases, the presentation in the PSI report will focus on the hardship of the defendant's life and environmental factors such as child abuse. In others, the emphasis will be on the defendant's crime-free life and his contributions to society. No matter what the arguments, however, the defendant's lawyer must include a section on the defendant's background and history. Most of the mitigating circumstances will appear in this section, and, when appropriate, the section should include a defendant's version of the offense. Given the importance of expressions of remorse in the sentencing process, this section also should include candid remarks on the subject of remorse, and should explain why the defendant committed the criminal act.

Every defense PSI report should also contain a sentencing recommendation section. That section should be the product of thoughtful consideration by counsel after an analysis of all the alternatives. The sentencing plan should be reasonable, fair, and tailored particularly to the circumstances of the case. Defense counsel should not hesitate to recommend a sentencing plan that includes a public service sentence or that couples a short jail term with public service. However, defense recommendation of a totally unrealistic sentence, such as probation for an obviously habitual offender, does not serve the client. This sort of recommendation may instead destroy whatever credibility counsel may have with the court, thereby adversely affecting the defendant. The importance of maintaining credibility cannot be overemphasized and given its importance, counsel should not hesitate to recommend a sentence of incarceration when appropriate. When parole is technically available, but when the client is not likely to be paroled, defense counsel should inform the court of that fact. Often, courts include parole in the sentencing calculus and impose

---


95. Although a judge may not formally consider a defendant's lack of remorse (see, e.g., Thomas v. United States, 368 F.2d 941 (5th Cir. 1966)). It is well known that a defendant's remorse or lack of it is an important sentencing consideration to many judges. See generally Giorno, supra note 61, at 901-06.

96. According to the appropriate ABA guidelines:

The [defense] attorney should familiarize himself with all of the sentencing alternatives that are available for the offense of which the client has been convicted and with community and other facilities which may be of assistance in a plan for meeting the needs of the defendant. Such preparation should also include familiarization with the practical consequences of different sentences, and with the normal patterns of sentences for the offense involved.

STANDARDS ON SENTENCING ALTERNATIVES AND PROCEDURES § 5.3(f)(1) (1968). See also McCarthy & Brook, supra note 46, at 852.


98. See Roszowski, supra note 2, at 635.
harsher sentences, taking into account parole possibilities. In sentencing public officials, for example, courts often assume that the public official with no criminal background will be granted parole at the earliest opportunity. Consequently, the courts often sentence based on a plainly wrong assumption. Thus, a section in the defense PSI report that realistically assesses a client's parole worthiness could save a defendant a significant amount of time in prison.

In sentencing guideline states and, in particular, under the new federal sentencing system, it is extremely important to include a section in the defense PSI report that relates to the sentencing guidelines because those guidelines will determine the sentence. The section should include a defense recommendation of the appropriate guideline range, supported by argument when that computation differs from that of the probation officer. This section also should make specific reference to the mitigating circumstances that justify a sentence below the guidelines.

The importance of the use of a defense PSI cannot be overstated. No matter what the case and no matter what the court, a defense PSI report is the most effective and efficient way of making sentencing arguments. Defense counsel's use of the report may mean years of difference in the sentence a client receives.

The Use of Experts in the Preparation of the Defense PSI Report

No defense PSI can be prepared adequately without the help of expert

99. The United States Parole Commission manual states the following:
   [I]f a public official was convicted of fraud which involved a violation of the public trust and was sentenced to three years imprisonment, his release on parole after one year might satisfy the 'depreciate the seriousness' criterion but the Commission could justify denying release on the grounds that such release would 'promote disrespect for the law.'


100. When the sentencing guideline system becomes effective in federal court, the PSI report provided by federal probation officers will include a section on the guidelines that the government deems appropriate to a particular case. The amended rule reads:
   The report of the presentence investigation shall contain . . . (B) The classification of the offense and of the defendant under the categories established by the Sentencing Commission . . . that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission . . . ; and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under the circumstances.

DEFENSE LAWYER'S ROLE

witnesses. Traditionally, lawyers have used psychologists and psychiatrists in preparing presentence reports when the defendant's mental state is an issue. However, today's cases demand the use of another type of expert—the sentencing expert. Sentencing experts are persons knowledgeable in the components and mechanisms of sentencing systems and who, consequently, can advise counsel about how to make arguments about where his client should be within those systems.

Sentencing experts can assist lawyers in various ways. First, the expert can assist in structuring the background investigation to ensure that it is directed into areas that can be utilized in the defense PSI. Second, the expert can help the family of the client understand the sentencing and correctional process. Third, and most importantly, the sentencing expert can assist in preparing specific portions of the defense PSI. In particular, the sentencing expert can develop a sentencing recommendation that takes into account the client's background, the crime, and the types of programs available in the prison setting.101 The expert's knowledge of the prison system and his knowledge of alternatives to incarceration make the sentencing plans prepared with his input more credible than a bare recommendation of counsel. Sentencing experts also can provide assistance in assessing parole possibilities. Judges often consider parole in sentencing; therefore, an expert's opinion that a defendant is not likely to be paroled may have great weight in the sentencing decision. Last, sentencing experts can assist in constructing the increasingly important arguments about guidelines. As previously noted, this latter function assumes tremendous importance in 1986, when the federal sentencing guideline system becomes effective.102 After that time, the judge's sentence almost always will determine length of incarceration, since parole will be all but eliminated.103

101. See generally Rodgers, Gitchoff & Paur, The Privately Commissioned Pre-Sentence Report: A Multi-disciplinary Approach, 2 CRIM. JUS. 271 (1979). See also McCarthy & Brook, supra note 46, at 853-56. The author has made extensive use of information provided by Ms. Susan James, who is a sentencing expert in Montgomery, Alabama. Her assistance has materially aided clients in several cases.
102. Rezneck, supra note 18, at 791.
103. Sentencing experts also can help influence the court's decision concerning place of incarceration and can assist in making arguments that the defendant should be allowed to surrender at the designated institution rather than have him surrender and be transported. While these may seem like small matters, given the complexity of the sentencing process, they can have a significant impact on the quality of a client's life. See generally McCarthy & Brook, supra note 46, at 859; Craven, supra note 2, at 15.
Like most things in the criminal justice system, the sentencing process is not what it used to be. Consequently, the days when lawyers could adequately represent their clients by appearing on the day of sentence and making an impassioned plea for mercy are gone forever. In today's anti-defendant political and judicial climate, defense lawyers must adapt new techniques for representation of clients at the sentencing phase. This Article has suggested some of those techniques. If defense lawyers take new approaches to sentencing and vigorously represent their client at that stage, some semblance of justice can be restored to the system. If they do not, the lives of many of their clients will be ruined forever by unnecessary and undeserved punishments.