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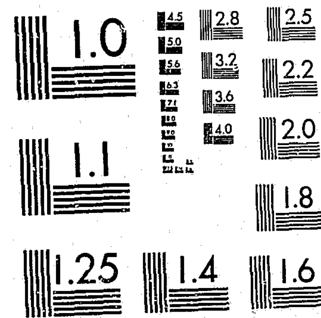

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Random Thoughts on Criminal Sentencing in the United States District Court

By James B. Craven III
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Sentencing, or rather sentencing advocacy, is a lost art. It would perhaps be more accurate to say that it is an art which has yet to be discovered by the majority of the lawyers who represent defendants in criminal cases in the Federal courts. Parenthetically, I should perhaps note now that perhaps some or all of this article may apply to the state courts as well. By way of getting some of my biases out in the open, I am a Federal practitioner and have been since law school, in part because my first job out of law school was as law clerk to Judge Oren Lewis in the Eastern District of Virginia.

The sentencing phase of a criminal case is sorely neglected. More times than I care to remember, I have seen truly great criminal trial lawyers drop the ball altogether at the sentencing stage. This has always frustrated me, in large part because I find the sentencing stage the most interesting and meaningful part of the whole process. And I think defendants as a group agree with me. Perhaps I am also drawn to that aspect of a criminal case out of recognition of my own limitations in other areas. You have to understand here that I am not much good at trying criminal cases. I admire those who know how to do it, and can do it well, but I am just not among them. The trial process itself alternately bores and mystifies me, and I would rather spend my time writing appellate briefs or reading law review articles. The sentencing stage though is another story. I feel I know how to do it and I think I do it fairly well, so consequently I enjoy it.

Think about sentencing for a moment from the defendant's viewpoint. Suppose, as so many are, the defendant we are discussing here has been around. Felony convictions are nothing new. His

record perhaps brings to mind by its length one of the Dead Sea Scrolls. Absent unusual circumstances which do not now occur to me, that fellow could care less about another line on his criminal record. Nor is he concerned about his reputation in the community. For all we know, his reputation in his particular community may be enhanced by another conviction. How then do we reach him? I'll tell you something he cares about as deeply and passionately as he ever cared for anything and that is the question of whether he is going home or going to prison when court lets out at the end of the day.

Why then, if the sentencing stage is the most important part of the case from the client's perspective, does the lawyer traditionally, and typically I fear, give proportionately less time and attention to that stage than to any other? Everyone has seen lawyers, perhaps drained at the end of a trial, just go through the motions, e.g., "He's a good boy, Judge. His mother is right here with him today. He didn't really mean anything by it. He goes to Sunday School every week." Period. Have you ever heard lines like those in the courtroom? Did you wince? You should have.

Shift points of view now and pretend you are the judge. You sit on the bench faced with the unpleasant task of deciding the immediate future and fate of a fellow human being about whom you know precious little. What do you need at such a time? Insipid platitudes from a lawyer who should know better? No, you need help, a lot of it, and right now. You don't like sentencing people. If, as a judge, you ever got to the point where you really enjoyed sentencing people, I would hope you would quit the bench for some other line of work. You have this poor devil standing in front of you and the Congress has given you only minimal guidance on what to do with him. Typically, you can place him on probation at one end of the scale, or you can lock him up for 5 or 10 years at the other end. That's the battleground, or playing field, whichever metaphor you prefer, in which we work. That area is the real crucible for lawyers. That is the area where we can help that judge in his awful task, and our clients in the bargain.

First of all, know the range of sentence alternatives, and know it cold. I don't mean here that you should have some nodding acquaintance with the many sentencing variations possible in your particular case. I mean that you should know every one of them cold, in detail. Be even better informed than the judge and probation officer. They have other cases that day. Presumably you have only one. It doesn't happen often, but I have on occasion had to gently correct the judge and the probation officer. I hasten to add that the reverse is more often the case.

Remember that Federal crimes are statutory offenses. Does the statute call for a minimum sentence in your case? Has the Congress perhaps nonetheless allowed for probation? Is there a minimum special parole term that must be served? Typically there is in narcotics cases, and yet I have seen lawyers learn of it for the first time when they are standing with the client listening to the sentence. To my mind, that is inexcusable. Is a split sentence possible in your case? Do you know what a split sentence is?

If your client is unfortunate enough to have to go to prison, have you given any thought to where he might be sent? The judge has the discretionary authority to recommend a particular place of confinement, but he will likely not even consider doing so unless you ask, and support your request with some plausible reason. Remember though, while we are on this subject, that the judge may only recommend a place of confinement. The final decision there is up to the Executive Branch, specifically the Federal Prison System, an agency within the Department of Justice. There are now 43 institutions in operation around the country, and if you want to learn more about them, a guide is published every 2 years.

The very first step in any Federal criminal case, after the filing of the indictment or the information, is to establish communication with the U.S. probation officer, and they are scattered throughout every district. I should point out now that not all lawyers by any means agree with me here. They choose, for their own reasons and I think largely in distrust of the court structure, to keep their distance from the probation officer until after the trial or plea of guilty. I could not disagree with them more. I think they are wrong and I think the results I have attained for my clients will back me up in that judgment.

Why go to the probation officer before you have to? There are two reasons. One is common sense. Think about it for a minute. Your client may be found guilty by judge or jury, or there may be a plea of guilty. We do not in the Federal courts operate on the citizen warrant system, so there are not a lot of garbage cases brought. I have no current statistics, but the conviction rate in every district in this country is high, well over 90 percent. What I am saying is that the odds on your case going to the sentencing stage are very good, so begin preparing for it at the outset. In the likely event that you reach that stage in the proceedings,

the probation officer will be called upon to help educate the judge about your client's past and present, and will make a recommendation to the judge as to your client's future. For that reason, I stress to my clients the need to get on the good side of the probation officer and stay there.

The other reason I like to get to the probation officer early is rule 32(c) of the Federal Rules of Criminal Procedure. The rule is mandatory. Absent very unusual circumstances, there shall be a presentence investigation and report in every case. The only felony case I can recall in which this requirement was waived was *United States* v. *Agnew* in the District of Maryland, where Judge Walter Hoffman probably felt that everyone knew quite enough about that particular defendant. And, too, that was the very rare case where, with the consent of the Court, the plea bargaining extended to the sentence. Those cases are seldom encountered, so in your case, you can count on a presentence investigation and report being made, and with it, a recommendation from the probation officer to the judge.

Probation officers are overworked and underpaid. Suppose, through your lack of cooperation before trial, the officer has to drop everything and go into high gear to get out a report on your client when the report might just as easily have been put together in a much more leisurely fashion before the trial. Will that officer be otherwise predisposed in your client's favor? How kindly do you feel toward clients who call you the night before a deadline when they have known about it for 3 months?

Are you worried, as some of my noncooperating colleagues are, that what you and your client tell the officer will be broadcast around the courthouse? Don't be. I know of no faster way for a probation officer to get fired. Notice the flat prohibition in rule 32(c)(1) on the dissemination of any such information to anyone, including the judge, without the defendant's written consent, unless and until the defendant has been found guilty, has entered a plea of guilty, or has entered a plea of nolo contendere.

Notice also, in rule 32(c)(2) that the report shall contain any prior criminal record of the defendant and such other information, including characteristics, financial condition, and the circumstances affecting behavior as may be helpful in imposing sentence, in granting probation, or in the defendant's correctional treatment. The language of the rule here is fairly open-ended. Think of it in terms of anything relevant that might help the judge determine your client's future.

Now I said earlier that probation officers are overworked. Why not help them out, particularly when your client may benefit from your assistance? More than once I have written long letters to a probation officer which begin essentially in this way: You don't know it yet, but Joe Smith is going to be indicted next week for something. I represent him and I want to tell you about him. You then go on for maybe six pages and tell that probation officer everything you know about Joe, from his childhood on. Where he went to school and the dates; his entire work history since his very first job, with addresses, dates, names of supervisors; his criminal record, if he has one, with your own editorial comment; his military history, including service number, dates, anything interesting such as wounds or decorations; church affiliation, if any, with the minister's name; current financial status. You should also go into personal and family history, on both an objective and a subjective level. For example, I recall a case not long ago where I had to deal with the fact that the young man's father and sister, with whom he lived, ran what we call in Durham a "liquor house." There was no getting around it. The family home was and is a liquor house. But, I spent some time there talking with both the father and the sister, and I came away persuaded that it is also a home where there was considerable love and support shown to my client.

If you turn over such an informal presentence report and evaluation, you have made that probation officer's job considerably easier. Furthermore, you may have the pleasant experience I have had of seeing some of your own prose reappear on the official report. Another factor inherent in all of this is that I am seldom if ever surprised by anything in the official report. Before 1974, the report was not automatically shown to counsel, either for the defendant or the Government. The judges had the discretionary authority to allow counsel to see the reports, but few did. Since 1974 though, we have been allowed to see them, with very rare exceptions I have never encountered. All of this is covered in rule 32(c)(3). In my judgment, if you do your job beforehand, you will seldom be surprised by its contents. You do have the right to rebut its contents by the way, but I would be selective in that regard. Make sure that the matter is one of consequence, i.e., one crucial to the outcome. I have seen 10 minutes of everyone's time in a bank robbery case taken up with quibbling over whether the defendant has four prior convictions for simple assault or only three, and all of them years before. Who cares?

Make a real concerted effort to formulate a creative sentencing plan for your particular defendant. We need to get away from the old knee-jerk philosophy of a year and a day and the next case please that constitutes so much of the lore of our profession. As lawyers, we should ideally participate in that creative planning, but we cannot do so without that necessary familiarity with sentencing options I mentioned at the outset.

Space does not permit any sort of detailed analysis of sentencing options for every kind of crime and defendant. See a handbook from the Education and Training Series of the Federal Judicial Center entitled *The Sentencing Options of Federal District Judges*. Two excerpts therein cover the most commonly encountered cases, the first entitled *Basic Sentencing Options for Adult Offenders* and the second *Special Sentences for Young Offenders*.

Let me give you a quick and current example of the importance of being in touch with this stuff, in the case of *United States* v. *Hinckley*, now pending in the District of Columbia. John Hinckley, Jr., who is charged with attempted murder of the President and two other men, has been 26 years old for several months now. Why is his birthday important to his case? It isn't anymore, but it was once. His lawyers knew that unless convicted before his 26th birthday, he would be ineligible for the benefits of the Youth Corrections Act. You may recall reading that overtures were made to the Government toward letting Hinckley plead guilty to something before his birthday. It did not work, but you have to applaud the effort. Note that there are hypertechnical distinctions between the benefits afforded to those defendants under age 22 and those under age 26 at the time of conviction. We have not the space to dissect the Youth Corrections Act here. If, however, you handle a criminal case for a young person, you should be able to take the Act apart and put it back together while blindfolded. I forget it and have to relearn it with every case. The Congress also changes it periodically.

Let us move now away from probation office and law library, and return to the courtroom where the grand finale occurs. Do you offer character witnesses at the time of sentencing? I hope not. I think they are boring, a waste of time, and often counterproductive. Once in a great while, too, if provoked enough, the United States attorney will cross-examine them to your client's ruin. Now, of course, there are exceptions to every rule, including this one. If I could get Mother Teresa to come over from India and testify that my client's continued freedom was important to her, I would let her do so. In general though I get more mileage out of pointing out to the court that, unlike my client's codefendants, we are not going to clutter up the court's time with former Sunday school teachers.

The actual sentencing argument is at its best more of a dialogue between lawyer and judge than an argument per se. That is when you really stand up to help the judge decide this common problem that confronts you both. You are not arguing most of the time against, in any sense, either the judge or the United States attorney. Instead you are all struggling together in behalf of your client. I know lawyers who do not agree with my philosophy. They choose to approach the sentencing argument in the traditional adversary approach, us against them as it were. I have seen them do it, and I admire their oratorical ability. At times it can truly be worth the price of admission. When it is all over, they leave the courtroom almost to the sound of applause. It is really very heady wine I imagine. What the casual observer misses, though, is that their clients often stay behind, in the custody of the United States marshal. I enjoy applause too, but I prefer in these cases to walk on down the street with my client after it is all over, even if no one notices.

Be realistic in your sentencing request. You only destroy your credibility if you ask for a $50 fine and 6 months probation in a case of the second offense of armed bank robbery. Don't hesitate to stand up in the appropriate case and say something like this:

> Your Honor, the defendant and I both recognize and understand that there will be an active sentence in this case. I am not going to talk to you about what happened last October or the year before that. Instead I want to speak to the next 40 years, because that is my client's actuarial life expectancy. Where he is going, for how long, under what conditions, and what will he do when he gets out? Those are the questions on our shared agenda today.

And then you go on from there, but I suspect you get the picture.

If your client gets an active sentence, ask the judge to allow him to report on his own directly to the particular institution. This permission is nearly always granted, and the marshal will guide you and your client through the necessary red tape. This procedure allows your client to avoid perhaps 2 weeks in the local county jail and a miserable bus ride of some distance, always the worst part of a Federal sentence. Also, successful voluntary surrender gains an inmate points in the Federal Prison System custody classification.

If your client gets an active sentence, be aware of the possibility of a motion for reduction of

sentence under rule 35(b), Federal Rules of Criminal Procedure. I would not and do not file a rule 35 motion in every case. Save it for those cases in which there is some demonstrable degree of changed circumstances since the original sentence, e.g., a serious illness in the defendant's family, that sort of thing. Also, don't file the motion the next day. Let things cool down a bit and allow enough time so you can tell the judge in the motion that the defendant has already served 95 days, has made a good prison adjustment, and has twice given blood to the Red Cross. About a third of my rule 35 motions are granted, but you have to understand that I am extremely selective about filing them. Remember, too, the 120-day limitation in rule 35(b). In general, the judge has 120 days after the imposition of sentence to change his mind, and that is interpreted in an interesting jurisdictional manner. File the motion on or before the 120th day and you beat the deadline. Contrary to the clear language of the rule, in some circuits it does not mean that the judge must act on your motion within the 120-day period. Judge Sirica let some of the rule 35 motions in the Watergate cases simmer for months before he ruled on them. There may be a sort of "who's going to appeal" attitude in that. I have never researched it. I'll tell you something else about rule 35 too. A defendant is sentenced in open court, perhaps with a full house present. There may be a large number of newspaper reporters, and some TV cameras outside on the sidewalk. The spotlight though is on the bench. By comparison, a rule 35 motion is ruled on quietly, almost always in chambers. The difference is significant and meaningful at times.

Let me close by noting that with the exception of the rule 35 motion, the suggestions in this article are not steps that may occasionally be taken in exceptional cases. They are steps that should always be taken in every criminal case you handle in the United States district court. To do less is in my judgment to deprive your client of the right to the effective assistance of counsel guaranteed him by the sixth amendment. Don't be afraid of such a charge either. Any nut with some time on his hands can file a petition for the Great Writ of habeas corpus, and we all have unpleasant things said about us from time to time. I rationalize it this way. Most lawyers have to argue that they are competent. I have an opinion from the Fourth Circuit that says I am competent.

This is serious business we are about here. These cases are very real, and they involve real people. They are different from the civil case a friend of mine tried in Norfolk many years ago. There the issue was which of two railroads would pay for a highway overpass. Throughout the trial, in which he represented one of the railroads, the nagging question kept coming back to him, "Who cares? What difference does it make?" We don't have to ask that question in these cases.

NOT since the proliferation of indeterminate sentencing laws started about 60 years ago in the United States has there been introduced as striking a change in sentencing legislation and philosophical views as has come on the scene within the last few years.

—SOL RUBIN

END