# Federal Probation





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# This Issue in Brief

***The Development of a Juvenile Electronic Monitoring Program.***—Author Michael T. Charles reports on a research project concerning the juvenile electronic monitoring program undertaken by the Allen Superior Court Family Relations Division, Fort Wayne, Indiana. Reviewing the planning and implementation phase of the program, the author discusses (1) the preplanning and organization of the program; (2) the importance of administrative support; (3) the politics and managerial issues faced during program development, implementation, and management; and (4) the role and function of surveillance officers.

**Morrissey *Revisited: The Probation and Parole Officer as Hearing Officer.***—Author Paul W. Brown discusses the Federal probation officer's role as hearing officer in the preliminary hearing stage of the parole revocation process. This role was largely created by the landmark Supreme Court case of *Morrissey* v. *Brewer* in which the Court indicated a parole officer could conduct the preliminary hearing of a two-step hearing process possibly leading to a parole revocation and return to prison. How this role was created in *Morrissey* and how it has been carried out by the Federal probation officer are examined.

***Defense Advocacy Under the Federal Sentencing Guidelines.***—This article sets forth the duties and responsibilities of defense counsel in effectively representing clients in all phases of the criminal process under Federal sentencing guidelines. Author Benson B. Weintraub offers practice-oriented tips on arguing for downward departures, avoiding upward departures, and negotiating plea agreements under the guidelines and discusses procedures to employ in connection with the presentence and sentencing stages of a Federal criminal case.

***Federal Bureau of Prisons Programming for Older Inmates.***—The "graying" of our society is creating a change in our prison populations. More sentenced offenders will be older when they enter the institutions, and longer sentences will result in more geriatric inmates "behind the walls." Balancing the needs and costs of geriatric care is a critical issue to be addressed. In this article, authors Peter C. Kratcoski and George A. Pownall discuss various attributes of criminal behavior of older persons and the distribution of older offenders within the Federal Bureau of Prisons. They also discuss the complete health care programming that correctional systems must provide to meet legal mandates already established in case law. According to the authors, significant programming adaptations have taken place in the past several years at the Federal level; more are anticipated in the near future.

***Privatization of Corrections and the Constitutional Rights of Prisoners.***—Many in the legal and corrections community have presumed that "private" correctional facilities will be held to the same constitutional standards as those directly administered by the state itself. Author Harold J. Sullivan

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# Defense Advocacy Under the Federal Sentencing Guidelines

BY BENSON B. WEINTRAUB, ESQ.*

## *Introduction*

IN THE wake of *Mistretta* v. *United States*, 109 S.Ct. 647 (1989), it is evident that the role of defense counsel has changed dramatically. Consequently, it is important for the defense bar to respond to the congressional mandate set forth in the Sentencing Reform Act of 1984 and the Sentencing Act of 1987, as validated by the Supreme Court in *Mistretta*, to best serve the interests of defendants who stand accused of committing Federal offenses.

This article sets forth the duties and responsibilities of defense counsel in effectively representing clients in all phases of the criminal process under the Federal system of guideline sentencing. The salient features of this article include practice-oriented tips on arguing for downward departures, avoiding upward departures, negotiating plea agreements under the guidelines, and procedures to be employed in connection with the presentence and sentencing stages of a Federal criminal case.

## *"Creative" Departures*

### *Background*

The analytical starting point for the discussion of departures from the guidelines is the statutory authorization, 18 U.S.C. § 3553(b) (Supp. 1988), which states, in relevant part:

> (b) **Application of Guidelines in Imposing a Sentence.**—The Court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the Court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the Court shall consider only the Sentencing Guidelines, Policy Statements, and official commentary of the Sentencing Commission . . .

In addition, should the court make an upward or downward departure from the guideline range which is otherwise indicated, "the specific reason for the imposition of a sentence different from that described" shall be stated on the record at the time of sentencing. 18 U.S.C. § 3553(c) (Supp. 1988). Parenthetically, the Sentencing Act of 1987, Pub. L. 100-182, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270, modified the Sentencing Reform Act of 1984 by requiring judges to state their reasons for imposing a particular sentence only where the guideline range itself exceeds 24 months.

Although the highly structured guidelines substantially limit the exercise of judicial discretion, the legislative history nonetheless makes clear that:

> The Sentencing Guidelines system will not remove all the Judge's sentencing discretion. Instead, it will guide the Judge in making [a] decision on the appropriate sentence.

S. Rep. 225, 98th Cong., 1st Sess., 51 (1983). The section-by-section analysis of subsection (b)'s legislative history clarifies that departure authority is available to provide "the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the Guidelines." *Id.* at 78. The Senate report references the rejection of language submitted by Senator Mathias which would have provided extremely broad departure authority. Its rejection of such broad authority was based on the belief that it would create an unworkable "voluntary" guidelines system. *Id.* at 79. The rejection of this broad authority does not, however, indicate acceptance of only narrow departure authority.[1]

As applied in practice, the statutory authorization for *guideline departures is an invitation to counsel for employment of unique and creative arguments in favor of mitigating departures or for the prosecutor to argue in favor of aggravation.* In determining whether the Commission adequately considered a proffered guideline departure "of a kind, or to a degree" not addressed by the Commission, the Com-

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[1]The preceding paragraph was adopted from an article by Samuel J. Buffone, *Departures from the Federal Sentencing Guidelines*, published in "Defense Advocacy Under the New Federal Sentencing Guidelines" (ABA Conference Course Materials, January 21-22, 1988).

mission's non-binding policy statements and commentary are instructive.[2]

*How to Argue for Downward Departure*

To the extent not otherwise covered by official Sentencing Commission pronouncements on mitigators or aggravators, defense counsel is completely free to advance innovative, case-specific grounds for downward departure in appropriate situations.

While case law is rather sparse, some courts have addressed the guidelines' application in the context of departures. In *United States* v. *Pipich*, 688 F.Supp. 191 (D.Md. 1988), 1 *Fed. Sent. R.* 120,[3] defense counsel successfully argued for a departure from the guidelines

> on the ground that an exceptional military service record such as that possessed by the Defendant is a factor that satisfies the departure language of 18 U.S.C. § 3553(b), which provides that a Court may depart from the Guideline sentence otherwise required by Section 3553(a)(4) when it finds that 'there exists an aggravating or mitigating circumstance of a kind, or to a degree, that was not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described.'

*Id.* at 192. The court held, at 192-193: "Therefore, from the lack of any discussion of military service history, the Court determines that the Commission did not at all take into account a Defendant's military record as a factor in formulating the Guidelines, and that is one that could result in a sentence different from the Guidelines." *Id.* (downward departure granted).

In *United States* v. *Zephier*, Case No. CR-88-40014-01 1 *Fed. Sent. R.* 304 (D.S.D. 1988), an assault charge arising from a stabbing incident during a drunken fight (indicating a guideline range of 37-46 months imprisonment) resulted in a *downward departure* of 15 months because of the victim's aggressive conduct toward defendant's brother. The court noted that § 5K2.10 permits departure where the "victim's wrongful conduct contributed significantly to provoking the offense behavior" and where the defendant has no criminal record.

Section 5K2.13 relating to "Diminished Capacity" states that diminished mental capacity *not* resulting from *voluntary* use of drugs or other intoxicants may warrant a lower sentence. *Id.* For the drug addict or alcoholic offender whose disease and chemical dependency substantially motivated the offense conduct, the Commission's rejection of the "Disease Concept" must be challenged. The mainstream of medical literature, and to some extent legal doctrine, indicates that alcoholism and addiction are *not* voluntary; hence, the disease of alcoholism and addiction should not be deemed exempt from the departure ground premised upon "Diminished Capacity." *Cf., U.S. Sentencing Commission Guidelines Manual* at § 5H1.4 ("Physical Condition, Including Drug Dependence and Alcohol Abuse").[4]

Where, as here, the Commission's rules defy any concept of reasonableness and are arbitrary, capricious, or an abuse of discretion, important analogies may be drawn between the rulemaking functions of traditional agencies and those of the Sentencing Commission.

In this context, it is well-settled that alcoholism, or by clinical analogy, addiction, is a "disease." *See, e.g.,* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-III-R") (1987). Alcoholism has been characterized as a "disease" since at least the mid-19th century. *See,* Sir William Osler, M.D., *The Principles and Practice of Medicine*, Birmingham Publishers [The Classics of Medicine Library] 1978 Ed. at 1004 (circa 1850). Moreover, mainstream medical literature presumes that alcoholism and addiction are diseases. *See* U.S. Department of Health and Human Services (National Institute on Alcohol Abuse and Alcoholism), *Alcoholism: An Inherited Disease* (1985). Without depreciating the significance, and perhaps validity of the Commission's perception of alcoholism/addiction and its correlation to crime in a predictively significant manner, *Guidelines Manual* at § 5H1.4, the Commission's rule exempting "voluntary" use of intoxicants is arbitrary, capricious, and an abuse of discretion because an addict/alcoholic's use of such chemicals is clinically "involuntary."

The legally significant point is that the Sentencing Commission, while *technically* not an executive agency, is subject to the Notice and Comment provisions of the Administrative Procedure Act, 28 U.S.C. § 994(x), and the Commission also enjoys other in-

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[2]For a discussion of specific limitations on the applicability of departures, *See U.S. Sentencing Commission Guidelines Manual* at § 5K2.0-.14 relating to "Grounds for Departure," "Death," "Physical Injury," "Extreme Psychological Injury," "Abduction or Unlawful Restraint," "Property Damage or Loss," "Weapons and Dangerous Instrumentalities," "Disruption of Governmental Function," "Extreme Conduct," "Criminal Purpose," "Victim's Conduct," "Lesser Harms," "Coercion and Duress," "Diminished Capacity," and "Public Welfare" (policy statements).

[3]*Federal Sentencing Reporter* is a monthly publication by the Vera Institute of Justice (377 Broadway, New York, New York 10013), and all members of the court family should subscribe to it for current guideline cases and related articles.

[4]This author served as co-counsel in *United States* v. *Michael K. Deaver*, Crim. No. 87-96 (D.D.C.), where the defendant, President Reagan's former deputy chief of staff, was convicted on multiple perjury counts in a non-guideline case. A 2-day presentence evidentiary hearing was held with respect to the correlation between chronic alcoholism, cognitive functions, and the defendant's real offense conduct. Due, in significant measure, to the disease of alcoholism, the defendant's voluntary treatment, and perhaps the correlation between the perjury convictions and the defendant's cognitive functions, a non-custodial sentence of 3 years probation with special conditions was imposed.

dicia of executive agency constitution arguably bringing it within the scope of the "right of review" section of the Administrative Procedure Act, 5 U.S.C. § 706.

Interestingly, in all of the guidelines litigation in the lower courts as well as in *Mistretta*, the United States consistently took the position that notwithstanding the enabling legislation characterizing the location of the Sentencing Commission in the judicial branch, because the Commission displays all of the incidents normally associated with an executive agency, it must be considered an agency within the executive branch. *See* Brief for the United States in *Mistretta* ("The Commission thus performs a type of rulemaking function that has regularly been assigned to administrative agencies exercising the executive power."), *Id.* at 34 (footnote omitted). *See generally* 5 U.S.C. § 706(2)(A) ("The reviewing Court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Yet, the judiciary is generally immune from APA scrutiny. That fact notwithstanding, Justice Blackmun's majority opinion in *Mistretta* underscored the unique, flexible, and practical considerations of the Sentencing Commission.

Defense counsel must, therefore, employ unique and creative arguments to challenge the validity of Commission rules where the rules appear to preclude downward departures on any given set of facts and represents an agency determination that is arbitrary, capricious, or an abuse of discretion. The *Mistretta* Court went to great lengths to distinguish the Commission's rulemaking functions by holding "whatever constitutional problems might arise if the powers of the Commission were vested in a Court, the Commission is not a Court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch. The Commission, on which members of the judiciary may be a minority, is an *independent agency in every relevant sense.*" *Mistretta* v. *United States*, 109 S.Ct. 647 (1989). (emphasis supplied).

*Avoiding Upward Departures*

Sentencing courts may seek to impose upward departures above the indicated guideline range for particularly aggravating offense factors. In such situations, defense counsel must be ever vigilant in challenging the validity of upward departures, create as favorable a record as possible in the district court for purposes of appeal, and challenge such upward departures through direct appeals under 18 U.S.C. § 3742 (Supp. 1988). Hence, the ability to depart is a double-edged sword.

Reported case law regarding departures has generally been in the context of upholding a sentencing judge's upward departure. This presents a myriad of due process considerations.

In *United States* v. *Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988), the defendant pled guilty to superseding information charging one count of using a communication facility in the commission of a drug offense (telephone count). 21 U.S.C. § 843(b) has an extremely low base offense level (12) and is not correlated to the Drug Quantity Table applicable to other narcotics offenses.[5] The Second Circuit upheld the sentencing judge's upward departure based upon the amount of drugs at issue in this case, 20 kilograms of 87 percent pure cocaine. "Based on the clear language . . . the District Court is free to take quantity into account as an aggravating circumstance in sentencing telephone-count offenses even though it is not mentioned in Sentencing Guidelines § 2D1.6, but is a characteristic factor for other drug related offenses." 860 F.2d at 38. However, the court noted "there was no plea agreement with stipulated facts in this case." 860 F.2d at 39.[6] Of little consolation is the court's conclusion that "we do not think that quantity will be an aggravating circumstance in every telephone-count case." 860 F.2d at 39. *See also United States* v. *Guerrero*, 863 F.2d 245 (2d Cir. 1988), 1 *Fed. Sent. R.* 344 (amount of drugs involved in same scheme or plan as offense of conviction is properly calculated into base offense level, or, alternatively, upward departure based on amount of narcotics would be sustained); *United States* v. *Burns*, Crim. No. 88-0302, 1 *Fed. Sent. R.* 331 (D.D.C. 10/14/88) (upward departure warranted on grounds that guidelines do not sufficiently weigh the duration or seriousness of offense conduct).[7]

Similarly, in *United States* v. *Ryan*, 866 F.2d 604, (3d Cir. 1989), the defendant was convicted after trial of simple possession of a controlled substance in violation of 21 U.S.C. § 844(a). He was *acquitted*

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[5]On March 3, 1989, the Sentencing Commission published Notice of Proposed Amendments and Additions to the Guidelines, Policy Statements and Commentary. The proposed amendment to § 2D1.6 will, if adopted, generally correlate the offense conduct with the drug quantity table from § 2D1.1(a)(3).

[6]*See*, § III, *infra*.

[7]*See generally, United States* v. *Nuno-Huizar*, 859 F.2d 85 (9th Cir. 1988), 1 *Fed.Sent.R.* 318; *United States* v. *Riddell*, F.Supp. ——(E.D.Ky. 1988), 1 *Fed.Sent.R.* 198; *United States* v. *King*, 849 F.2d 1259 (9th Cir. 1988), 1 *Fed.Sent.R.* 128.

on the more serious *distribution charge* under 21 U.S.C. § 841(a)(1). The applicable guideline range indicated a sentence of 0-6 months based upon 10.32 grams of "crack" cocaine. However, the judge imposed a sentence of 10 months imprisonment followed by 1 year of supervised release. On appeal, the defendant contended that the judge erred in departing from the indicated guideline range. The upward departure was justified by (1) the amount of drugs in Ryan's possession, *i.e.*, more than 10 grams; (2) the purity of the drugs; and (3) the packaging of the drugs in multiple separate bags, ostensibly indicating an intent to distribute, notwithstanding Ryan's acquittal on the possession with intent to distribute count. The Third Circuit affirmed the conviction and sentence.

This genre of cases is not unlike the "double counting" cases reminiscent of the parole system. Traditional judicial rationalization for upholding double counting claims against the Parole Commission related to the fact that the parole guidelines provided a minimum threshold, for example of drug quantities, in assessing the offense severity level. Where the amount of drugs at issue so substantially exceeded the minimum threshold, reviewing courts have universally upheld double counting.[8] The same problems frequently arise in the RICO context. In *Provenzano* v. *United States Parole Commission*, ___ F.Supp. ___, 1988 Westlaw 130662 (D.Kan. 1988), this author was successful in obtaining a remand to the Parole Commission in habeas proceedings on the double counting issue to determine whether the same reasons were used both to rate the underlying offense conduct and then to use such conduct as a reason for a decision above the indicated guideline range. In most cases, however, double counting claims against the Parole Commission are unsuccessful. However, none of the reported cases under the Federal Sentencing Guidelines thus far appear to have raised the double counting claim in a direct and substantial way. This is yet another example of the creative and innovative legal arguments which counsel must employ in both the trial and appellate courts.

*Developing a Theory of Sentencing*

It is critical for counsel to develop a "theory of sentencing" in much the same way that counsel advances a "theory of the case" at trial. If a case proceeds to trial, the theory of sentencing must be borne in mind so as not to be inconsistent with the theory of the case. Conversely, in plea situations, defense counsel must seek to sensitize both the assistant United States attorney as well as the United States probation officer to grounds for downward departure and perhaps obtain a non-binding stipulation from the Government acknowledging such departure grounds to develop a "theory of sentencing" at the earliest possible opportunity, including the Rule 11 proceeding. The United States probation office, as an adjunct of the court, will advise the sentencing judge through official channels (presentence investigation report and/or perhaps *ex parte* meetings) as to possible grounds for departure (upward or downward). For that reason, counsel must work closely with the probation officer in sensitizing him or her to downward departure grounds not contemplated or adequately considered by the Commission in developing the guidelines. For example, the entire range of "syndrome" evidence may be sufficient to constitute grounds for downward departure, *i.e.*, battered woman syndrome, post-traumatic stress disorder syndrome, etc. It is incumbent upon counsel in guideline sentencing to develop a theory of sentencing with an eye toward establishing downward departures short of cooperation.[9]

In an excellent commentary on the scope of appellate review of a court's refusal to depart above or below the guidelines, Professor David Yellen presents a persuasive argument in favor of such a review process under 18 U.S.C. § 3742. *See*, Yellen, "Appellate Review of Refusals to Depart, 1 *Fed.Sent.R.* 264 (Oct. 1988). Even though the Department of Justice has stated that a sentence "is not appealable by either the Government or the Defendant . . . if one party or the other requested a sentence outside the Guidelines which the Court declined to impose," there is no authority for that proposition. *See, Prosecutors Handbook on Sentencing Guidelines*" 75 (prepared by the U.S. Department of Justice, Nov. 1, 1987). Professor Yellen states that Congress, in implementing certain sentencing appeals under § 3742, did not consciously consider or object to appellate review of refusals to depart.

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[8]Double counting refers to the practice of using the relevant offense conduct (*e.g.*, amount of drugs) to rate the offense severity level in the first instance and then once again to use that same factor in justifying a decision substantially above the guideline range otherwise indicated.

[9]In cases where a defendant has provided substantial assistance to the United States, the court maintains inherent authority to impose a sentence below a mandatory minimum established by statute. 18 U.S.C. § 3553(e). However, courts can only act upon a motion of the Government. Similarly, amended Rule 35(b), F.R.Cr.P. provides for a reduction of sentence—upon the motion of the Government only—within 1 year of the date of sentencing to adequately reward a defendant for cooperation or "changed circumstances," a euphemism for cooperation. *See generally United States Sentencing Commission Guidelines Manual* at § 5K1.1 and commentary thereto. To the extent that a client provides forthright cooperation yet the Government declines to invoke § 3553(e) and/or Rule 35(b) (Supp. 1988), a Petition for Writ of Mandamus may be indicated.

### *Negotiating Effective Plea Agreements Under the Federal Sentencing Guidelines*

No other issue arising under the guidelines has received more scrutiny and attention from the bar than the matter of plea agreements. Each case must be evaluated on an individualized basis to determine the benefits and liabilities of pleading guilty irrespective of issues of proof. The guidelines are intended to reflect the "heartland" concept of "real offense conduct" behind an indictment or information. Therefore, the new sentencing scheme requires a careful examination of the benefits and drawbacks associated with any decision to go to trial or to plead guilty. In that regard, it is, perhaps, obvious that trial attorneys should consult with counsel proficient in the application of sentencing guidelines well *before* any adjudication obtains.

Many attorneys labor under a gross misconception that implementation of a guideline system of sentencing will automatically trigger more trials. While there may be some validity to this reflexive conclusion, careful study of the guidelines, policy statements, and pronouncements by the Department of Justice make it equally evident that there is substantial flexibility and latitude for the negotiation of favorable plea agreements from the defense perspective in certain cases.

One potential benefit of going to trial is that counts upon which the defendant is acquitted will *not* generally be considered in computing the guidelines. Yet, a conviction on a conspiracy count will, by definition, generally encompass the "real offense conduct" of the substantive counts on which the defendant may have been acquitted. *See U.S. Sentencing Commission Guidelines Manual* at § 2X1.1(a) and commentary thereto which states "the base offense level will be the same as that for the object offense which the Defendant solicited, or conspired or attempted to commit . . ." However, if the defendant was convicted of conspiracy or solicitation and *also* for the completed offense, the sentence for the conspiracy or solicitation shall be imposed to run concurrently with the sentence for the object offense, except in cases where it is otherwise provided for by the guidelines or by law. 28 U.S.C. § 994(a)(2).

On the other hand, carefully drafted plea agreements may limit the defendant's exposure through the dismissal of charges or an agreement not to pursue other potential charges. In that sense, an agreement may effectively set a "cap" for the defendant's guidelines or statutory sentence exposure. The Sentencing Commission has promulgated a policy statement governing the use of plea agreements which is set forth below:

> **§ 6B1.2 Standards for Acceptance of Plea Agreements (Policy Statement)**
>
> (a) In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges [Rule 11(e)(1)(A)], the Court may accept the agreement if the Court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing.
>
> (b) In the case of a plea agreement that includes a nonbinding recommendation [Rule 11(e)(1)(B)], the Court may accept the recommendation if the Court is satisfied either that:
>
> (1) The recommended sentence is within the applicable Guideline range; or
>
> (2) The recommended sentence departs from the applicable Guideline range for justifiable reasons.
>
> (c) In the case of a plea agreement that includes a specific sentence [Rule 11(e)(1)(C)], the Court may accept the agreement if the Court is satisfied either that:
>
> (1) The agreed sentence is within the applicable Guideline range; or
>
> (2) The agreed sentence departs from the applicable Guideline range for justifiable reasons.

*Id.*[10] Further, defense counsel is encouraged to incorporate *factual stipulations* into plea agreements to assist the court in perfecting an appropriate record for acceptance of the plea in accordance with § 6B1.4 of the *Guidelines Manual.* That section states that a plea agreement may be accompanied by a written stipulation of facts relevant to sentencing. Except to the extent that a party may be privileged not to disclose certain information, the stipulation shall (1) set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics; (2) not contain misleading facts; and (3) set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate. *Id.*

It is important to pause at this juncture to examine the role of the United States probation officer in assisting the court in its application of the guidelines. Although counsel for the parties may reach a specific plea agreement appearing to comply with § 6B1.2 and include factual stipulations under § 6B1.4, the United States probation office frequently serves as the "spoiler" for a plea agreement which each side otherwise seeks depending upon the U.S. probation officer's knowledge of the case and interpretation of the relevant policy statements issued by the Commission in the context of plea agreements. Moreover, the new presentence investigation (PSI) format con-

[10] *See* Note 6, *supra* for proposed amendments to § 6B1.2.

tains a section relating to the effect of a plea agreement on application of the guidelines.

Therefore, simply because defense counsel and the prosecutor reach a meeting of the minds, unless the U.S. probation officer is persuaded that "the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing," § 6B1.2(a), and that the factual stipulations do not "contain misleading facts," § 6B1.4(a)(2), a substantial risk remains as to whether the sentencing judge, following the advice and recommendation of the U.S. probation officer, will accept the plea subject to the terms negotiated by the parties.[11]

On November 1, 1987, the effective date of the guidelines, the Department of Justice issued the *Prosecutor's Handbook On Sentencing Guidelines And Other Provisions Of The Sentencing Reform Act Of 1984*.[12] This book sets forth guidelines for assistant United States attorneys in entering plea agreements and, with some consolation to the defense bar, acknowledges that:

> the prosecutor is in the best position to assess the strength of the Government's case and enjoys broad discretion in making judgments as to which charges are most likely to result in conviction on the basis of the available evidence. For this reason, the prosecutor entering into a charge bargain may enjoy a degree of latitude that is not present when the plea bargain addresses only sentencing aspects.

*Id.* at 47. The *Prosecutor's Handbook* notes that "subject to [the above] constraints, however, the Department encourages the use of stipulations accompanying plea agreements to the extent practicable." *Id.* at 49. The department's guidelines, however, set forth a bureaucratic procedure for obtaining approval of plea agreements. *Id.* at 49-50.

The *Prosecutor's Handbook* addresses both "charge bargaining" and "sentence bargaining." *Id.* at pp. 41-50. Such plea agreements, however, must be consistent with the standards for acceptance of agreements set forth in the *United States Sentencing Commission Guidelines Manual*. Whether or to what extent this commitment represents a *genuine* policy remains to be tested. These considerations notwithstanding, counsel must always consider the practical aspects of reaching a plea agreement for acceptance by the court, particularly with respect to the role of the U.S. probation officer. Plea agreements under Rule 11, of course, may include binding or non-binding stipulations with respect to (1) departure issues; (2) a sentencing recommendation; (3) a recommendation for a two-point downward adjustment for "acceptance of responsibility," § 3E1.1, and (4) other outcome determinative material facts upon which the guidelines and/or departure will be based.

Suffice to note that the court's acceptance of plea agreements, subject in most cases to the concurrence of the U.S. probation officer, is predicated upon relatively "loose standards," *Prosecutor's Handbook* at 42, and subject to a judicial test which is generally easy to meet, *i.e.*, "for justifiable reasons." §§ 6B1.2(b)-(c). From a practice-oriented perspective, it is advisable to artfully draft plea agreements and factual stipulations incorporated therein largely parallelling the language of the applicable guideline sections and the *Prosecutor's Handbook*.[13]

In effectively negotiating favorable plea agreements from the defense perspective, particularly white collar cases and offenses involving defendants with relatively low culpability, it may be advisable to commence the plea bargaining process while your client is under investigation and before the return of charges. In this way, the plethora of potentially damaging paperwork and investigative agencies' records may not be fully developed or even reach the U.S. probation office, U.S. attorney's office, or the court. As a practical matter, in appropriate situations it may be advisable to enter a guilty plea to information containing a litany of stipulated facts which are not "misleading" and, at that point in the investigation, fairly and adequately represent the overall seriousness of the underlying real offense conduct. A client's interest may be well served by exploring such options where the client knows he or she is under pre-indictment investigation. This may serve, in the long run, to limit a defendant's exposure during the penalty phase of the case.

In conclusion, plea agreements tailored to the facts of the particular case and which are artfully drafted may well serve a client's best interest rather than facing the substantial risks associated with going to trial and being convicted for offense conduct indicating a substantially higher guideline range than that which may be negotiated with the prosecutor, validated by the U.S. probation officer, and accepted by the court. Hopefully, the guidelines will provide

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[11] Although the legislative history states that "some critics expressed the concern that a Sentencing Guidelines system will simply shift discretion from the sentencing Judges to prosecutors," S.Rep. No. 225, 98th Cong., 1st Sess. 63 (1983), in practice, the enormous shift of the exercise of discretion to the U.S. probation officer is perhaps more drastic than the shift of discretion to the prosecutor.

[12] On March 13, 1989, the Department of Justice supplemented the *Prosecutor's Handbook* through the "Thornburgh Memorandum" further defining plea bargaining practices under the guidelines.

[13] The stipulations may include an acknowledgment of the assistant U.S. attorney that a charge is not "readily provable" so as to take the unadjudicated conduct outside the scope of relevant offense behavior. *Id.* at 46-47.

sufficient flexibility so as to avoid a complete breakdown of the plea bargaining process by which almost 90 percent of criminal convictions in United States district courts are obtained.

### *Pretrial, Presentence, and Sentencing Litigation Issues: Substance and Procedure*

*Introduction*

At the outset, one item of consolation is warranted: *Mistretta* is not the begin-all and end-all of sentencing guidelines litigation nor does it impact—in a material and substantial way—upon guideline *application* litigation. *Mistretta* was decided on relatively narrow grounds (separation of powers and excessive delegation), and there are a litany of other statutory and constitutional claims to be asserted in further challenges to the application of the guidelines.

The purpose of this section is to provide counsel with practice-oriented tools forming the sentencing advocate's arsenal for "damage control" under a guidelines system characterized by relative inflexibility and Draconian philosophical underpinnings.

Specifically, this section will provide attorneys with a guide as to the "do's and don'ts" of representation under the Federal system of guideline sentencing.

*Pre-Indictment or Pre-Adjudication Consideration of the Impact of Sentencing Guidelines on Any Sanction to Be Imposed*

Once a client is known to have become a target or subject of a Federal investigation, it is critical for defense counsel to immediately focus upon the possible best and worst case scenarios under the guidelines operating under the assumption that a conviction will be obtained. Frequently, more can be accomplished during pre-indictment plea negotiations than in the post-indictment setting.

*Pretrial Discovery Relevant to Guideline Sentencing*

Although the discovery stage of a criminal case is second nature to most lawyers, it is now important to file a specific *Brady* request seeking information in mitigation of punishment. All too often, attorneys lose sight of the fact that *Brady* v. *Maryland*, 373 U.S. 83 (1963) was actually a sentencing case so that the due process protections established by *Brady* mandate disclosure not only of material exculpatory or impeachment evidence, but evidence in mitigation of punishment for use in the penalty phase of the case.

During the pretrial stage of the case, it is prudent for counsel to begin developing possible grounds for departure below the indicated guideline range should a conviction result, in order to maximize the time necessary for thorough sentencing preparation. Whenever appropriate, professionals from other fields should be consulted. These possible departure grounds should be incorporated into the "theory of the case" if the case proceeds to trial or during plea negotiations.

*Presentence Procedures*

Traditionally, the sentencing court has been vested with broad discretion in determining appropriate procedures for sentencing. The Eleventh Circuit has consistently held that sentencing should not be turned "into a full-scale evidentiary-type hearing." *United States* v. *Stephens*, 699 F.2d 534, 537 (11th Cir. 1983); *United States* v. *Espinosa*, 481 F.2d 553, 556 (5th Cir. 1973). *See also United States* v. *Collins Spencer Catch-The-Bear*, 727 F.2d 759, 762 (8th Cir. 1984).

### *Sentencing Procedures and Motion Practice Under the Federal Sentencing Guidelines*

The United States Sentencing Commission, the Federal Judicial Center, and the Administrative Office of the United States Courts have largely left the development of sentencing procedures to the discretion of each local United States district court.[14] In August 1987, Chief Judge James Lawrence King (S.D.Fla.) appointed the Sentencing Guidelines Administration Committee for the Southern District of Florida, comprised of judges, prosecutors, defense attorneys,[15] and probation officers to study the sentencing guidelines and develop a local rule to govern sentencing procedures. On October 16, 1987, following unanimous endorsement by the judges in the Southern District, Chief Judge King signed Administrative Order 87-50. However, the Committee reconvened the day after *Mistretta* was decided, and the Committee was split as to whether material modifications should be made to AO 87-50. Changes were made and incorporated into Administrative Order 89-08.

*Presentence Investigation Report (PSI) Disclosure*

Under 18 U.S.C. § 3552(d) (Supp. 1988), there is a 10-day minimum period of PSI disclosure mandated by statute. That is, at least 10 days in advance

[14] Interestingly, the Commission, Administrative Office, and Federal Judicial Center have had ongoing disagreements as to which agency should be responsible for training specific components of the court family.

[15] The author serves as a member of this committee.

of the scheduled sentencing proceeding, the PSI must be disclosed to the defendant, defense counsel, and the prosecutor unless the minimum period is waived by the defendant. In light of the additional obligations and duties imposed upon the parties and United States probation office under the Sentencing Reform Act, the Sentencing Guideline Administration Committee in the Southern District of Florida determined that the 10-day disclosure period was inadequate. The full court agreed and adopted a rule requiring the U.S. probation officer to disclose the PSI to the parties at least 25 days in advance of sentencing. Counsel must consult with the United States probation office in each judicial district to determine the time frame for disclosure and to obtain a copy of that district's local rules and procedures.

*Administrative Dispute Resolution With Opposing Counsel and United States Probation Following Disclosure of the PSI*

Local rules and practice in the Southern District of Florida and in most districts throughout the nation provide for administrative resolution of disputed facts material to sentencing through counsel for the parties and the U.S. probation officer. This process is intended to take place as soon as possible after disclosure of the PSI, but in no event later than 10 days prior to sentencing. Following administrative discussion of the disputed sentencing facts or factors, the U.S. probation officer shall, to the extent necessary and practicable, conduct further investigation. Following the conference, the U.S. probation officer will advise the court, through a written notice served contemporaneously upon the parties, as to the resolution of facts disputed by either party, and such notice will be attached to the PSI as an addendum. If such facts or factors are still challenged following "mediation," the U.S. probation officer will advise the court as to the factual findings which will be required to be made by the court at or prior to the imposition of sentence.

Under Administrative Order 89-08 (S.D.Fla.), the "Position of the Parties" pleading must be filed on or before the 50th day following the adjudication of guilt, 10 days before sentencing on the 60th day. *However, the presentence procedure contemplates an administrative resolution process for disputed facts or sentencing factors prior to sentencing.*

Perhaps the most important procedure preparatory to sentencing is the right of the parties to dispute information alleged to be inaccurate in the PSI or Sentencing Memorandum submitted by either party. *See, e.g., Parks* v. *United States*, 832 F.2d 1244, 1246 (11th Cir. 1987) ("Due process protects a Defendant's right not to be sentenced on the basis of false information and invalid premises.") (pre-guidelines case). The "Resolution of Disputed Factors" is addressed in the *Guidelines Manual* at § 6A1.3. The due process right to be sentenced only on the basis of information which is accurate and reliable in every material respect is especially significant under a guidelines system of sentencing. *See* Note, *How Unreliable Factfinding Can Undermine Sentencing Guidelines*, 95 Yale L.J. 1258 (May 1986).

The *Guidelines Manual* establishes a procedure for resolving factual disputes.

> **§ 6A1.3**
> ***Resolution of Disputed Factors.***
>
> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the Court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the Court may consider relevant information without regard to its admissibility under the Rules of Evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.
>
> (b) The Court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

The Sentencing Commission's Commentary on § 6A1.3 is instructive:

> The Court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. *More formality is therefore unavoidable if the sentencing process is to be accurate and fair.* Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the Court must insure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or Affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only way to resolve disputed issues. *See United States* v. *Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing Court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable caselaw.

*Id.* (emphasis supplied). The resolution of disputed factors under § 6A1.3 is subject to further clarification by local rules adopted by each district court. As a practical matter, if a party has exhausted administrative resolution with the United States probation office and the probation officer certifies the unresolved sentencing fact or factors in dispute, it is incumbent upon counsel—consistent with the spirit and commentary of § 6A1.3(b)—to seek a continuance of sentencing, if indicated, so that the aggrieved party will have an adequate opportunity at a rea-

sonable time before imposition of sentence to respond to the court's tentative findings.[16] In many cases, the disputed facts will be outcome determinative with respect to which guideline category applied.

*Burden of Proof and Production at Sentencing*

In guideline and non-guideline cases alike, whenever the defendant disputes and denies the accuracy of information before the court which is relevant to sentencing, it is the Government that must assume the burden of proof. The burden of proof incorporates two distinct ideas: the burden of production and the burden of persuasion. *See, e.g.*, 4 J. Wigmore, *A Treatise On The System Of Evidence In Trials At Common Law* §§ 2485, 2487 (1st ed. 1904). Because the allocation of the burdens of proof and production are closely linked to the issue of what the standard of persuasion should be for the burdened party, it is essential that the court require the prosecution to establish a factual basis for disputed PSI allegations.

The burden of production is a procedural mechanism that determines the order in which the parties must introduce evidence with respect to disputed issues. *See, e.g., McCormick on Evidence* § 336 (2d Ed. Cleary 1972). Traditionally, sentencing proceedings have been committed to the informed, plenary discretion of the sentencing judge,[17] and only recently has the issue arisen as to the operation of the burden of proof at sentencing. The placement of the burden of proof in the context of sentencing is premised upon a defendant's inherent due process right to be sentenced only on the basis of accurate, reliable information consistent with fifth amendment protections.[18]

Consistent with this constitutional foundation, courts and commentators alike have addressed the burden of proof issue in the context of sentencing. Instructive guidance is obtained from the analysis regarding the allocation of the burden of production and persuasion at sentencing which is discussed in Note, *A Hidden Issue Of Sentencing: Burden Of Proof For Disputed Allegations In Presentence Reports*, 66 Georgetown L.J. 1515 (1978). The authors of this article state that "If an assertion in the Presentence Report consists of a naked allegation without supporting facts, a mere denial should be enough to shift to the prosecution the burden of production regarding that allegation." *Id.* at 1529-30 (footnote omitted).

The burden of persuasion becomes relevant only after the parties have discharged their burdens of production and have introduced all available evidence. "For the burden of persuasion to become a factor, the Judge has decided that each party has satisfied its burden of production." *Id.* at 1501.

Recent cases have, after balancing the interests of the parties at sentencing, concluded that the burden of persuasion must be cast upon the prosecution.[19] The logical extension of the analysis leads to a determination as to what standard of evidence shall govern the burden of persuasion.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the court held that the preponderance of evidence standard satisfied the due process clause of the 14th amendment in the context of state sentencing proceedings. *Id.* at 2419-20. The preponderance standard established by *McMillan* and *United States* v. *Lee*, *supra* is not at substantive variance with the standard enunciated by the Eleventh Circuit in *United States* v. *Restrepo*, 832 F.2d 146, 149 (11th Cir. 1987), which states that in view of the defendant's constitutional due process right not to be sentenced on the basis of false or inaccurate information, "We conclude that the Government must advance some satisfactory grounds to support a contested PSI statement, some 'information such as to be persuasive of the validity of the [PSI] charge.'" (citations and footnote omitted).

In *United States* v. *Silverman*, 692 F.Supp. 788, 1 *Fed.Sent.R.* 278 (S.D.Ohio, 1988), a guideline case, the defendant pled guilty to a single count of possession with intent to distribute cocaine pursuant to a plea agreement. As part of the agreement, the government dismissed an Interstate Travel in Aid of Racketeering (ITAR) count, under 18 U.S.C. § 1952. Prior to sentencing, the defendant challenged information contained in the presentence investigation report and argued that a standard of "clear and convincing evidence" was required in determining the offense level. The trial court rejected the defendant's contentions, finding that the rules of evidence governing trials do not apply to sentencing proceedings, even those occurring under the sentencing guidelines. Moreover, in defining relevant conduct for the

[16] For this reason, it is desirable for local rules to incorporate a specific timeframe in advance of sentencing, at which point the judge is required to issue "tentative findings" so as to enable the aggrieved party to adequately prepare for sentencing through the submission of documentary evidence or, in the court's discretion, live testimony.

[17] *See, e.g., Wasman* v. *United States*, 468 U.S. 559, 563 (1984).

[18] *See, Townsend* v. *Burke*, 334 U.S. 736 (1948) and progeny.

[19] The most compelling reason for this procedure relates to the fact that the Government generally has superior knowledge and records as to the facts of the underlying case and is therefore in the best position to illuminate the court as to all relevant facts and circumstances relating to the offense conduct. *See United States* v. *Lee*, 818 F.2d 1052, 1056-57 (2d Cr. 1987). However, when the defendant is in the superior position in the context of claiming a downward departure, it may be appropriate for the court to place the burden on the defendant. Yet, in the context of the facts of a case, allocating the burden of proof and persuasion to the defendant would place the accused in the untenable position of "proving a negative." *See United States* v. *Weston*, 448 F.2d 626, 634 (9th Cir. 1970), *cert. denied*, 404 U.S. 1061 (1972).

purpose of determining the offense level, the court rejected the clear and convincing evidence standard and applied a "preponderance of the evidence test to the factual matters set forth in the presentence report which are used to determine the offense level." *Id.*

The Government's obligation to support its statements in the PSI is triggered by a defendant's clear challenge to specific factual inaccuracies. *United States* v. *Aleman*, 832 F.2d 142 (11th Cir. 1987). Interestingly, however, in the special concurring opinion by Judge Oakes in *United States* v. *Lee*, *supra*, he stated

> I think we may very well want to hold at some future time in some other context that proof by clear and convincing evidence is required as a matter of policy. *See, e.g.*, Note, *A Proposal To Ensure Accuracy In Presentence Investigation Reports*, 91 Yale L.J. 1225, 1245 nn.115-17 (1982). As footnote 117 points out, this is the standard of proof required in analogous situations by the Supreme Court. *See Addington* v. *Texas*, 441 U.S. 418, 433 (1979) (involuntary civil commitment hearing).

The preponderance standard was recently reaffirmed in the guideline case of *United States* v. *Dolan*, 701 F.Supp. 138 (E.D.Tenn. 1988), 1 *Fed. Sent. R.* 334 (1989) where the court held that the burden of persuasion on disputed sentencing facts rested on the prosecution regardless of whether the determination would enhance or reduce the sentence. The court, moreover, held that the preponderance of the evidence standard satisfied due process despite the defendant's contention that the "clear and convincing" standard should apply.

In summary as to this point, practitioners must put the Government to its respective burdens in substantiating the validity of disputed factual assertions relevant to sentencing.

*Perfecting the Sentencing Record for Purposes of Appeal*

Defense counsel must be ever mindful at the sentencing proceeding to duly register specific and clear objections either to the nature of the information relied upon by the court *or* the propriety of the manner in which the guidelines were applied by the district court. *See also*, 18 U.S.C. § 3742 (Supp. 1988). Of course, a defendant may always appeal a departure above the guideline range which is otherwise indicated. It should also be noted that traditional Rule 32 challenges to the factual validity of disputed information relevant to sentencing have not been displaced by the provisions of the *Guidelines Manual* outlining procedures for objecting to facts which are controverted by the defendant. In recent years there has been a virtual plethora of litigation spawned both through direct appeals and Federal habeas corpus proceedings, 28 U.S.C. § 2255, or proceedings under the former provisions of Rule 35(a), F.R.Cr.P., to challenge inaccurate information and sentencing procedures generally.

## *Conclusion*

Based upon the new role of the U.S. probation officer, it is manifestly evident that counsel must maintain an ongoing, respectful, and professional liaison with all members of the United States probation office. *See generally* Weintraub, *The Role of Defense Counsel at Sentencing, Federal Probation* (March 1987). To a certain unspecified degree, under the sentencing guidelines system it is the U.S. probation officer who principally influences the court through the PSI and the guideline calculations submitted to the court notwithstanding the fact that the judge is the final arbiter of sentence.

There are numerous procedures which must be followed by defense counsel under a system of guideline sentencing. Many of these procedural vehicles have substantive characteristics, particularly where disputed facts will be outcome determinative with respect to any sentence imposed under the guidelines.

In order to successfully navigate the relatively uncharted waters of guideline sentencing, it is imperative that defense counsel become completely familiar with the provisions of the *Guidelines Manual* and current case law.