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EXPERT TESTIMONY AT SENTENCING*

by *G. Thomas Gitchoff, D.Crim.*** and *Daniel Macallair, MPA****

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*This article supersedes *Expert Testimony at Sentencing*, 21 Am. Jur. Proof of Facts 2d 645.

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***Daniel Macallair is the Executive Director of the Center on Juvenile and Criminal Justice and has over 20 years experience as a sentencing and corrections expert using the methods developed by Dr. Gitchoff. Deborah Vargas, a research assistant at the Center on Juvenile and Criminal Justice, provided invaluable assistance in updating Dr. Gitchoff's now classic article.

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Scope

This article explores the history of the growing role of sentencing experts in criminal proceedings. For the past 40 years sentencing experts have assumed a greater presence in criminal sentencing, as sentencing practices have become more punitive and traditional presentence investigations by probation officers have become more cursory. Sentencing experts now perform an important role in all aspects of adult and juvenile sentencing—ranging from death penalty cases to juvenile disposition reports. Much of the original article remains as it is a classic discussion of the issues, but it has been updated as necessary to address a number of additional issues and more recent developments.

Research References

West's Key Number Digest

Criminal Law ¶1156.1; Sentencing and Punishment ¶1 to 146, 650 to 998, 1000 to 1182, 1610 to 1799, 1800 to 2041, 2045 to 2096, 2100 to 2217, 2220 to 2335

Westlaw Databases

Federal Criminal Justice-Federal Sentencing Guidelines (FCJ-FSG)
Federal Sentencing Reporter (FCJ-FSR)
Federal Sentencing Law and Practice (FSLP)
Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues (GUIDESENT)

Law of Sentencing (LAWSENT)

A.L.R. Library

- Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas—Probation, Parole, or Pardon Possibilities, 31 A.L.R.6th 49
- Presentence Withdrawal of Plea of Nolo Contendere or Non Vult Contendere Under State Law—Sentencing and Punishment Issues; Ineffective Assistance of Counsel, 15 A.L.R.6th 173
- Presentence Withdrawal of Plea of Nolo Contendere or Non Vult Contendere Under State Law—Particular Circumstances as Constituting Grounds for Withdrawal, Excluding Issues of Knowledge, Factual Basis, Competency, Evidence, Defenses, Sentencing and Punishment, and Ineffective Assistance of Counsel, 13 A.L.R. 6th 603
- Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings, 22 A.L.R.5th 660
- Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like—post-Gregg cases, 67 A.L.R.4th 942
- Deductibility, as nonbusiness loss under 26 U.S.C.A. sec. 165(c)(2), of restitution payments made pursuant to sentencing order, 112 A.L.R. Fed. 289
- Access to presentence, probation, and parole reports and recommendations under Freedom of Information Act (5 U.S.C.A. sec. 552), 81 A.L.R. Fed. 801
- Requirement, as condition of probation, pursuant to 18 U.S.C.A. sec. 3651, that defendant make restitution to aggrieved parties, 71 A.L.R. Fed. 789
- Application of rule of *Dorszynski v. United States* requiring that sentencing court make express finding of "no benefit" from treatment under Youth Corrections Act (18 U.S.C.A. secs. 5005 et seq.), 54 A.L.R. Fed. 382
- Propriety, as condition of probation granted pursuant to 18 U.S.C.A. sec. 3651, of requiring that probationer refrain from consumption of alcoholic beverages, 37 A.L.R. Fed. 843
- Propriety, as condition of probation granted pursuant to 18 U.S.C.A. sec. 3651 or similar predecessor statute, of requiring defendant to give up profession or occupation, 35 A.L.R. Fed. 631
- Validity, construction, and application of provisions of Federal Youth Corrections Act (18 USC sec. 5010) governing sentencing and rehabilitative treatment of youth offenders, 11 A.L.R. Fed. 499

Legal Encyclopedias

Am. Jur. 2d, Criminal Law §§ 736 to 865

Treatises and Practice Aids

Hutchison, et. al., Federal Sentencing Law and Practice (2006 ed.)

EXPERT TESTIMONY AT SENTENCING

Campbell, Law of Sentencing (2d ed.)

Trial Strategy

Proof of Chemical Dependency and Rehabilitative Efforts as Factor in Sentencing, 51 Am. Jur. Proof of Facts 3d 413
Proof of Qualification for Commitment as a Mentally Disordered Sex Offender, 51 Am. Jur. Proof of Facts 3d 299
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Forms

Am. Jur. Pleading and Practice Forms, Criminal Procedure §§ 359 to 366
Bailey and Fishman, Complete Manual of Criminal Forms §§ 40:1 to 40:24, 92:1 to 92:9.50, 96:1 to 96:7 (3d ed.)

Law Reviews and Other Periodicals

Bailey, Ake v. Oklahoma and an indigent defendant's right to an expert witness: a promise denied or imagined?, 10 Wm. & Mary Bill Rts. J. 401 (Feb. 2002)
Beecher-Monas & Garcia-Rill, Danger at the edge of chaos: predicting violent behavior in a post-Daubert world, 24 Cardozo L. Rev. 1845 (May 2003)
Berger, Reducing Sentencing Disparity: Structured Discretion and Sentencing Judge, 32 Mo B J 414 (1976)
Berman, Assessing federal sentencing after Booker, [United States v. Booker, 125 S. Ct. 738 (2005)], 17(5) Fed.Sent.R. 291 (Jun. 2005)
Bernard, Individualization Versus Uniformity: The Case for Regulation in Criminal Justice, 40 Fed Prob 19 (Dec 1976)
Bibas, White-collar plea bargaining and sentencing after Booker, [United States v. Booker, 125 S. Ct. 738 (2005)], 47 Wm. & Mary L. Rev. 721 (Dec. 2005)
Bissonette, Consulting the federal sentencing guidelines after Booker, 53 UCLA L. Rev. 1497 (Aug. 2006)
Bowman, The failure of the federal sentencing guidelines: a structural analysis, 105 Colum. L. Rev. 1315 (May 2005)
Cakmis, The role of the federal sentencing guidelines in the wake of United States v. Booker and United States v. Fanfan, 56 Mercer L. Rev. 1131 (Summer 2005)
Cassell, Too severe?: a defense of the federal sentencing guidelines (and a critique of federal mandatory minimums), 56 Stan. L. Rev. 1017 (Apr. 2004)

- Chartrand & Forbes-Chilibeck, The sentencing of offenders with fetal alcohol syndrome, 11 *Health L.J.* 35 (Annual 2003)
- Dattilio, Sadoff & Gutheil, Board certification in forensic psychiatry and psychology: separating the chaff from the wheat, 31 *J. Psychiatry & L.* 5 (Spring 2003)
- Dorland & Krauss, The danger of dangerousness in capital sentencing: exacerbating the problem of arbitrary and capricious decision-making, 29 *Law & Psychol. Rev.* 63 (Spring 2005)
- Dressler, The wisdom and morality of present-day criminal sentencing, 38 *Akron L. Rev.* 853 (2005)
- Dubois & Blanchard, Sentencing due process: how courts can use their discretion to make sentencings more accurate and trustworthy, 18 *Fed. Sent. R.* 84 (2005)
- Fabian, Death penalty mitigation and the role of the forensic psychologist, 27 *Law & Psychol. Rev.* 73 (Spring 2003)
- Farris, Sentencing, 18 *Crim. L. Q.* 421 (Aug 1976)
- Fisher, Creative Punishment: A Study of Effective Sentencing Alternatives, 14 *Washburn L J* 57 (1975)
- French, Mental retardation and the death penalty: the clinical and legal legacy, 69 *Fed. Probation* 16 (Jun. 2005)
- Galaway, The Use of Restitution, 23 *Crime & Delin* 57 (Jan 1977)
- Gardina, Compromising liberty: a structural critique of the sentencing guidelines, 38 *U. Mich. J.L. Reform* 345 (Winter 2005)
- Goldsmith, Reconsidering the constitutionality of federal sentencing guidelines after Blakely: a former commissioner's perspective, 2004 *B.Y.U. L. Rev.* 935 (2004)
- Heilbrun, et al., Applying principles of forensic mental health assessment to capital sentencing, 11(1) *Widener L. Rev.* 95 (Sept. 2004)
- Hurwitz, Much ado about sentencing: the influence of Apprendi, Blakely, and Booker in the U.S. Courts of Appeals, 27 *Just. Sys. J.* 81 (Winter 2006)
- Hyllengren, Capital punishment of mentally retarded defendants is cruel and unusual under the Eight Amendment, 37 *Suffolk U. L. Rev.* 239 (2004)
- Jacobson, Use of Restitution in the Criminal Justice Process: *People v. Miller*, 16 *UCLA L. Rev.* 456 (1969)
- Johnson, Justice for all: analyzing Blakely retroactivity and ensuring just sentences in pre-Blakely convictions, 66 *Ohio St. L.J.* 875 (Aug. 2006)
- Kaufman, Sentencing Views of Yet Another Judge, 66 *Geo L. J.* 1247 (June 1978)
- Krauss & Lee, Deliberating on dangerousness and death: jurors' ability to differentiate between expert actuarial and clinical predictions of dangerousness, 26 *Int'l J.L. & Psychiatry* 113 (Mar.-Apr. 2003)
- Kuhn, Victim impact statements in capital sentencing: do 'worthless' defendants pay a higher price?, 32(2) *New Eng. J. on Crim. & Civ. Confinement* 251 (Summer 2006)

EXPERT TESTIMONY AT SENTENCING

- Lambiras, White-collar crime: why the sentencing disparity despite uniform guidelines, 30 *Pepp. L. Rev.* 459 (Apr. 2003)
- Leonard, A new profession for an old need: why a mitigation specialist must be included on the capital punishment team, 31 *Hofstra L. Rev.* 1143 (Summer 2003)
- Loza, Villeneuve, & Loza-Fanous, Predictive validity of the Violence Risk Appraisal Guide: a tool for assessing violent offender's recidivism, 25 *Int'l J.L. & Psychiatry* 85 (Jan.-Feb. 2002)
- Luria, Traditional sentencing factors v. elements of an offense: the questionable viability of *Almendarez-Torres v. United States*, [Almendarez-Torres v. United States, 523 U.S. 224 (1998)], 7 *U. Pa. J. Const. L.* 1229 (Oct. 2005)
- Martin, Cruel and unusual: sentencing in the federal courts, 26 *Pace L. Rev.* 489 (Spring 2006)
- Mattingly, Actually less guilty: the extension of the actual innocence exception to the sentencing phase of non-capital cases, 93 *Ky. L.J.* 531 (Winter 2004)
- McConnell, The Booker mess, [United States v. Booker, 125 S. Ct. 738 (2005)], 83(3) *Denv. U. L. Rev.* 665 (Spring 2006)
- Montgomery, et al., Expert testimony in capital sentencing: juror responses, 33(4) *J. Am. Acad. Psychiatry & L.* 509 (Dec. 2005)
- Morkes, Where are we going, where did we come from: why the Federal Sentencing Guidelines were invalidated and the consequences for state sentencing schemes, 4 *Ave Maria L. Rev.* 249 (Winter 2006)
- Murray, The end of sentencing guidelines and the reemergence of judicial discretion, [Blakely v. Washington, 124 S. Ct. 2531 (2004)], 6(2) *Loy. J. Pub. Int. L.* 217 (Spring 2005)
- Newman, Better Way to Sentence Criminals, 63 *ABA J* 1562 (Nov 1977)
- Odeh, Zeiss, Huss, Cues they use: clinicians' endorsement of risk cues in predictions of dangerousness, 24 *Behavioral Sci. & L.* 147 (Mar. 2006)
- Odom, Jumping on the bandwagon: the United States Supreme Court prohibits the execution of mentally retarded persons in *Atkins v. Virginia*, 31 *Pepp. L. Rev.* 875 (Apr. 2004)
- Orland, From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation, 7 *Hofstra L. Rev.* 29 (1978)
- Orrick, Legal Issues in Structuring Sentencing Discretion, 4 *New England J Prison L* 327 (Spring 1978)
- Partridge, Consequences of Alternative Sentences, 75 *FRD* 371 (Oct 1977)
- Payne, Building the case for life: a mitigation specialist as a necessity and a matter of right, 16 *Cap. Def. J.* 43 (Fall 2003)
- Popko, Throwing the book at sentencing appeals: reasonableness and the Booker decision, 38(2) *Ariz. St. L.J.* 483 (Summer 2006)
- Prejudice and remedies: establishing a comprehensive framework for ineffective assistance length-of-sentence claims, 119 *Harv. L. Rev.* 2143 (2006)

- Price & Kowalski, Ethical obligations under the new approach to sentencing guidelines, 17 *Geo. J. Legal Ethics* 929 (Summer 2004)
- Priester, Structuring sentencing: Apprendi, the offense of conviction, and the limited role of constitutional law, 79 *Ind. L.J.* 863 (Fall 2004)
- Regnier, Barefoot in quicksand: the future of future dangerousness predictions in death penalty sentencing in the world of Daubert and Kumho, 37 *Akron L. Rev.* 469 (2004)
- Ringold, Judge's Personal Perspective on Criminal Sentencing, 51 *Wash. L. Rev.* 631 (July 1976)
- Rubin, The Principle of Least Restrictive Alternative, 21 *Crime & Delin* 331 (1975)
- Schopp, Two-edged swords, dangerousness, and expert testimony in capital sentencing, 30 *Law & Psychol. Rev.* 57 (Spring 2006)
- Shane, Money talks: an indigent defendant's right to an ex parte hearing for expert funding, 17 *Cap. Def. J.* 347 (Jun. 2005)
- Sharp, Simplifying Daubert hearings in indigent defense work through the use of the secret formula: a practical tool for evaluating the admissibility of expert witness opinion testimony, 32 *S.U. L. Rev.* 281 (Spring 2005)
- Skeem, et al., Gender and risk assessment accuracy: underestimating women's violence potential, 29(2) *Law & Hum. Behav.* 173 (Apr. 2005)
- Starr, Diminished capacity departures for compulsive gambling: punishing the pathological or pardoning the common criminal?, 2003 *B.Y.U. L. Rev.* 385 (2003)
- Sturup, Indeterminacy as Individualization, 14 *San Diego L. Rev.* 1039 (July 1977)
- Medicate-to-execute: current trends in death penalty jurisprudence and the perils of dual loyalty, 7 *J Health Care Law Policy* 149 (2004)
- Physicians, medical ethics, and capital punishment, 16 *J Clin Ethics* 160 (2005)
- Predictors of criminal recidivism among male batterers, 10 *Psych., Crime & Law* 413 (2004)
- Reaching a balance between privacy, privilege and planning: a look at barriers to obtaining information for patients with criminal involvement, 75 *Psychiatr Q* 127 (2004)
- Release decision making: Assessing violence risk in mental health, forensic, and correctional settings, 16 *J. Foren. Psychiat. & Psychol.* 774 (2005)
- Report on the impact of United States v. Booker on federal sentencing, 18 *Fed. Sent. R.* 190 (2006)

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KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

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I. BACKGROUND

A. GENERALLY

§ 1 Sentencing experts and the role of defense attorney

The sentencing function performed by judges is the most important of all judicial roles. Sentencing decisions not only affect the life of the defendant, but also can have long term public interest implications. With recent changes in sentencing laws and the general trend towards harsher sentencing, defense attorneys must now assume a more assertive role in representing clients at the sentencing hearing. The need for sentencing experts is now more pronounced as research and in-

formation on sentencing options and correctional programs is often ignored or minimized in a punitive sentencing climate.¹

Despite the trend toward harsher sentencing, the range of sentencing options has never been greater. With changes in technology, judges can now opt to maintain someone at home under house arrest, where they are electronically monitored for 24 hours a day. Nonincarcerative sanctions that have gained greater appeal in recent years include victim-offender reconciliation, day fines, community service, day reporting, victim restitution, and symbolic victim restitution. Other specialized interventions include mental health courts, intensive supervised probation, residential and nonresidential drug treatment, and homeless offender drop in centers.

In response to their increasing role in sentencing hearings, defense attorneys have turned towards the use of sentencing consultants with specialized expertise in the corrections and/or behavioral sciences in an effort to develop sentencing recommendations that are acceptable to the court and address a variety of sentencing goals. Typical sentencing goals include punishment, deterrence, incapacitation, retribution, public safety, and restitution.

Depending on their professional background, a sentencing expert can present a background and/or clinical assessment of the defendant which most attorneys rarely have time to explore and develop. Perhaps the greatest benefit from the standpoint of the defense attorney is the ability to offer a comprehensive profile of their client that exceeds the information contained in the traditional presentencing investigation report (PSI) that is prepared by a probation officer. Probation officers who prepare PSIs are often subject to time and organizational pressures as a result of high caseloads and insufficient resources. Harsher sentencing policies, including determinate and mandatory sentencing, have also resulted in less emphasis on the offender and more emphasis on the offense. Additionally, in many jurisdictions the probation officer, being overburden by high caseloads, does not have the time to do an adequate investiga-

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¹See Clark and Neuhard, "From Day One" Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?, 29 N.Y.U. Rev. L. & Soc. Change 11 (2004).

tion and prepare a useful report.² More often than not, presentence reports are based merely on a perfunctory records check, a few phone calls to victims, witnesses, and a short interview with the defendant. The resulting sentence recommendations often result in unnecessary, perfunctory, and arbitrary incarceration.

The first serious effort to utilize sentencing experts began in 1966 with the Offender Rehabilitation Project of the District of Columbia Public Defender Service.³ Employing a team of social workers, psychiatrists, and psychologists, the project provided defense attorneys with extensive defendant background investigations combined with detailed and well researched sentencing recommendations. The success of this effort was documented and soon became a national model.⁴ In recent years, other jurisdictions have adopted this model, particularly at the juvenile level. For example, the San Francisco Public Defender's Office has been employing social workers to develop alternative dispositions for youth facing commitments to state correctional institutions since 1978. The program was credited with reducing commitments to the California Youth Authority by over half.⁵

This article explains and discusses the role of defense counsel in sentencing planning by enlisting the assistance of sentencing experts. This article is based on Dr. Gitchoff's original 1980 article that is widely considered the most authoritative work on the subject. Working with Dr. Gitchoff, the author has retained some of the text of the original article and updated other portions.

B. CONSIDERATIONS IN REPRESENTING YOUR CLIENT IN SENTENCING

§ 2 Preparation for sentencing

Vital sentencing functions should be performed by defense

²H. Abadinsky, *Probation and Parole: Theory and Practice* (9th ed. 2006).

³For a detailed description of the program see; Medalie, *The Offender Rehabilitation Project: A New Role for Defense Counsel at Pretrial and Sentencing*, 56 Geo LJ 2 (1967).

⁴R. Goldfarb & L. Singer, *After Conviction* 161 (1973); Brazelon, *The Defective Assistance of Counsel*, 42 U Cin L. Rev 1, 41 (1973).

⁵See Macallair (1994) "Disposition Case Advocacy in San Francisco's Juvenile Justice System: A New Approach to Deinstitutionalization" 40 J. Crime & Delinquency 84-95.

counsel *prior* to the retention of a sentencing expert. The goal of defense counsel, as aptly stated by the Presidents' Commission on Law Enforcement and Administration of Justice, should be to:

... ensure that the court and his client are aware of the available sentencing alternatives and that the sentencing decision is based on complete and accurate information. Counsel must familiarize himself with possible dispositions and with the sentencing practices of the court so that he can make an intelligent and helpful presentation.¹

Whether or not an expert is ultimately called upon to assist during the process, preparation for sentencing should begin immediately after the initial defendant interview. The planning process should aim to *humanize* the sentencing decision, namely presenting to the court a picture of "who the client is as a human being."²

§ 3 Preparation for sentencing—Profiling client

The first step in sentencing planning is obtaining all available records on the defendant's history and present status. These documents include criminal history, school, military, and health records, as well as any psychiatric or psychological diagnostic reports. As emphasized by the A.B.A. Advisory Committee on Sentencing and Review, counsel's immediate concern should be the accuracy of the information obtained.¹ The contents of each record should be discussed with the defendant to verify accuracy and to gain a complete understanding of damaging information, which may be presented by the prosecution or contained in the PSI.²

◆ **Comment:** This is particularly important in those

[Section 2]

¹President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 19 (1967).

²See Cooper, *United States versus Unterman: The Role of Counsel at Sentencing*, 13 Crim L. Bull 101, 113 (1977).

[Section 3]

¹Section 5.3 (f)(iii), American Bar Association, Advisory Committee on Sentencing and Review; American Bar Association; Project on Standards for Criminal Justice (1971). Standards Relating to Sentencing Alternatives and Procedures: Approved Draft. New York, NY: Institute of Judicial Administration.

²See Wright, *Federal Practice and Procedure: Criminal* 3d § 524.1.

jurisdictions where disclosure to the defendant of the pre-sentence report is discretionary.³

Only 16 states require full disclosure of the PSI and in other states the general policy is to cleanse the report and then disclose it. This involves the deletion of two kinds of statements (1) confidential comments from private citizens, if known, the offender might endanger the citizen, and (2) clinical statements of evaluations, that if disclosed may be damaging to the offender.⁴ Counsel should understand any jurisdiction specific procedure for preparing a PSI. Particular attention should be given to the format used. This should serve as a checklist and may help prevent any surprises that may result from neglecting to obtain certain records in advance.⁵ Counsel should also seek letters of reference to aid in developing a profile of the defendant. School officials, employers, neighbors, and others should be asked to provide a candid assessment of the defendant and his status in the community. Once this data-gathering process is completed, counsel should have a preliminary understanding of the defendant's problems and needs.

§ 4 Preparation for sentencing—Probing available options

Once counsel has researched the various potential sentencing options for the offense in question, the prosecution should be contacted in an attempt to ascertain the kind of sentencing recommendation the prosecutor considers appropriate. In most cases, counsel should discuss his reflections on the information developed in the profile in an effort to establish a positive rapport for future plea negotiations and the sentencing hearing itself.

The probation officer should also be contacted as soon as one is assigned. The initial contact is to understand the probation officer's attitude toward the case. If the officer shows concern and a willingness to cooperate, counsel should play an important role in forming the officer's sentencing recommenda-

³Judge imposed a death sentence on the basis of evidence in the confidential PSI despite the jury's recommendation of a life sentence. Supreme Court upheld the decision to deny defense access to the report. See *People v. Williams*, 298 N.Y. 863, 84 N.E.2d 446 (1949).

⁴Clear & Cole, *American Corrections* (Wadsworth 4th ed).

⁵Alternative Sentencing Program, Training Manual of the Case Developer (Center on Juvenile and Criminal Justice, June 2001).

tion by providing him with constant feedback on the client, including copies of the referral letters and those records, which show the potential for a constructive program of rehabilitation. If, however, counsel feels the probation officer is negative toward the defendant and is likely to present a poor assessment during sentencing, counsel should probably withhold such information. Providing it to the probation officer under those circumstances will only allow him to develop a greater emphasis on negative factors to counter counsel's efforts.¹

§ 5 Preparation for sentencing—Developing defendant's potential

The defendant's active participation at the earliest possible stage of sentencing planning is crucial. This may be difficult since the defendant may feel that counsel is "giving up" prior to the guilt phase of the process. Counsel should discuss the possible sentencing options and firmly point out the necessity of preparing in advance in order to obtain a favorable sentencing decision for the defendant.¹

An important step is to develop a record of positive activities prior to sentencing, such as a self-initiated rehabilitative effort. This was emphasized early on in by the Offender Rehabilitation Project² as a critical step toward developing a constructive sentencing program. It is also strategically significant since it provides the sentencing judge with some indication of the motivation and potential of the defendant. It should be established, wherever possible, that the individual to be sentenced has a demonstrable record of school work, employment, or a combination of the two that has existed for some period of time. Where the person to be sentenced appears before the judge with only "future plans," the judge is much more apt to give a period of incarceration than where the individual to be sentenced has shown an ability to hold a job or attend school for a sustained period.

[Section 4]

¹Alternative Sentencing Program, Training Manual of the Case Developer (Center on Juvenile and Criminal Justice, June 2001).

[Section 5]

¹Alternative Sentencing Program, Training Manual of the Case Developer (Center on Juvenile and Criminal Justice, June 2001).

²Medalie, *The Offender Rehabilitation Project: A New Role for Defense Counsel at Pretrial and Sentencing*, 56 Geo LJ2 (1967).

In some cases, this may require encouraging the defendant to continue pre-offense activities. If developing a positive program at this stage becomes problematic, counsel should explore with the defendant the retention of a sentencing expert to serve in the capacity of a counselor. Retaining a sentencing expert at this point also provides an opportunity to gather data for sentencing by observing the defendant's behavior in a positive role. Developing a record of positive activities may also prove beneficial during plea negotiations and, in applicable circumstances, may convince the prosecution to divert the defendant out of the criminal justice system entirely.

§ 6 Utilization of expert at sentencing

The need for an adequate profile of the defendant, the nature of the offense, and an understanding of the sentencing options available serves as the basis for the decision to retain a sentencing expert. Functioning as a team, the attorney and the expert can add to the sentencing process a multidisciplinary dimension benefitting both the defendant and the court.

The sentencing expert serves to aid the attorney in both his role as an advocate for the defendant and as an officer of the court whose duty is to ensure that the sentencing decision is based on sufficient and accurate information.¹ In both capacities, the expert prepares for the attorney his own presentence report for submission to the court. Both the report and subsequent testimony provides the court with an evaluation that comprehensively looks at the nature and character of both the offense and the offender. In other than the most notorious cases, such an evaluation places counsel in a position of being able to make a presentation far superior to that of the probation department restrained by insufficient resources and unrealistic case loads.²

The expert's sentence recommendation will provide the court

[Section 6]

¹See Commentary to 5.3, American Bar Association. Advisory Committee on Sentencing and Review; American Bar Association; Project on Standards for Criminal Justice (1971). Standards Relating to Sentencing Alternatives and Procedures: Approved Draft. New York, NY: Institute of Judicial Administration.

²The American Probation & Parole Association. (2007). *Probation and Parole's Growing Caseloads and Workload [Report]*. Lexington, KY: Matthew T. DeMichele; U. S. Controller General, State and County Probation: System in Crisis, General Accounting Office (May 29, 1976).

with options that offer a realistic opportunity to correct the offender. The added knowledge provided to the court can make the difference between incarceration and a community-based program of rehabilitation. The expert's evaluation of the defendant is also of value in cases of incarceration. The effects of institutionalization, the benefits of specific programs available at certain institutions, and even the length of incarceration are central to the expert's evaluation under the appropriate circumstances.

§ 7 Utilization of expert at sentencing—Indigent's right to appointed expert

Although the defendant has the right to present mitigating information at the sentencing hearing, in most jurisdictions access to sentencing experts is often limited to defendant's who can afford to hire them. With the increased use of privately retained sentencing experts, a growing number of public defender offices are employing social workers to conduct presentence investigations and compile sentencing recommendations to ensure that indigent defendants have comparable representation at sentencing hearings. Defense attorneys appointed by the court to represent indigent clients can also petition directly for funds.¹

The use of sentencing experts in indigent cases will continue to grow as the practice gains wider acceptance throughout the nation and public defender offices and private court appointed attorneys fully recognize the potential to enhance client representation. Defense counsel seeking appointment of sentencing experts should utilize sample motions currently used in other jurisdictions where the use of sentencing experts has gained acceptance.

§ 8 Utilization of expert at sentencing—Selecting an expert

There are three basic approaches to the selection of an expert to aid in sentencing. If, after having developed the profile of the defendant, it is clear to counsel that there exists a single overriding behavioral problem connected with the offense, for

[Section 7]

¹Macallair (1994) "Disposition Case Advocacy in San Francisco's Juvenile Justice System: A New Approach to Deinstitutionalization" 40 J. Crime & Delinquency 84-95.

example, if the defendant has a substance abuse history, the best approach is to retain a psychologist, sociologist, or social worker with an expertise in substance abuse treatment.

At the other extreme are those cases that seem inexplicably complex. A defendant may have committed an offense that defies motivational analysis and may have a long, problematic social and/or mental history. In such cases, each issue involved requires analysis by an appropriate specialist. These results are then combined in a team approach.

A balanced approach in the majority of cases calls for counsel to seek out an expert with professional, academic, and clinical experiences emphasizing corrections. The individual preferably should be experienced in the field and, ideally, have authored materials in the corrections field. Community-based alternatives to incarceration play a major role in sentencing planning. It is therefore important that the expert selected has a working knowledge of human services and community corrections programs. A familiarity with the correctional institutions in the relevant jurisdiction would be an added benefit; an understanding of correctional institutions in general is essential.¹

The best resources for locating such an expert are local professional associations and universities and colleges that offer courses in the relevant disciplines, and nonprofit agencies providing services in criminal justice field. The National Legal Aid & Defender Association (NLADA) maintains a professional association of experts: The National Alliance of Sentencing Advocates & Mitigation Specialists (NASAMS).²

§ 9 Expert testimony in death penalty cases

Death penalty cases typically require multiple experts. Among the most important issues to be addressed by a death penalty sentencing expert is the defendant's mental status or capacity, since the defendant's lack of capacity for rational thought can be a mitigating circumstance in the eyes of many jurors. Determining if a defendant is mentally ill or otherwise lacks capacity requires a professional mental health assess-

[Section 8]

¹Schaye & Schaye-Glos, *Mitigation in the Death Belt—Twelve Steps to Saving Lives*, 29 *Champion* (July 2005).

²See NASAMS, at http://www.nlada.org/Defender/Defender_NASAMS/NASAMS_home (last accessed July 25, 2008).

ment by a licensed and recognized professional. Such an assessment must be conducted by experts in psychology and/or psychiatry to determine the defendant's level of mental functioning. Essentially, a diagnosable mental disorder or developmental disability that permanently reduces the person's capacity to exercise reasoned judgment or that causes permanent impairment provides a strong argument against a death sentence.

Experts with a specific understanding of the standards for assessing mental illness and who possess strong professional experience and credentials are essential. The mental health expert in a death penalty case must be able to present complex psychological and/or neurological information to a jury. This is a necessary and unique skill that not all professionals possess. Jury's are comprised of average citizens who are often not familiar with professional diagnosis and jargon and can therefore be quick to dismiss information not easily understood. The expert witness in a death penalty case must be able to convey complex information on the person's mental health or developmental functioning in a compelling and understandable manner.¹

**§ 10 Expert testimony in death penalty cases—
Mitigation expert**

In addition to psychological experts, a defense team in a death penalty case should employ mitigation experts to conduct comprehensive and thorough background investigations into the defendant's life beginning from the day he was born. Compiling a social history of the client includes interviewing any and all available individuals who were related to, or who knew the defendant, and can offer insight on major life events.¹ The mitigation expert must review all relevant documents that detail such things as family dynamics and psychological histories. Documents or personal stories that suggest turbulence and violence are essential for determining the presence

[Section 9]

¹See Schroeder, Guin, Pogue & Brodelon, *Mitigating Circumstances in Death Penalty Decisions: Using evidence-based research to inform social work practice in capital trials*. Social Work Vol. 54 Iss. 4 p 355-654.

[Section 10]

¹See *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

of severe physical or emotional abuse by parents or guardians during the defendant's formative years.

A mitigation expert must have superb investigative skills. Individuals with backgrounds in law enforcement investigation are often ideally suited for this difficult task as it requires tracking people down whom the client has not seen in many years. The individual must be able to make contact and establish trust with people who may be distrustful of the criminal justice system and/or simply do not want to be involved in the defendant's case. Locating and persuading potential witnesses is a critical skill for an effective mitigation expert. The witnesses must be able to corroborate information the expert gathers through other interviews and various documents that provide an explanation as to the root causes of the defendant's behavior. An effective mitigation expert is able to gather and present information on the totality of the defendant's life experiences and how those experiences shaped his behavior and ultimately contributed to the offense.

§ 11 Expert testimony in death penalty cases— Institutional mitigation

Another area of death penalty mitigation results from the growing number of what are now often referred to as "state raised" defendants. State raised defendants are those who spent a large portion of their childhood and adolescence in foster care facilities, juvenile detention centers and youth correctional institutions. State care, whether administered by a child welfare or juvenile justice system often mirrors the worst conditions of the most abusive homes. Youth in state care institutions are typically subject to abusive conditions that tend to promote and exacerbate delinquent and criminal tendencies. Even worse, youths in juvenile correctional institutions are often exposed to a gang ridden racially segregated environment where they are forced to fight to avoid ongoing victimization and exploitation.¹ In these correctional facilities where the strong exploit the weak, youths learn that the world

[Section 11]

¹See California Department of Corrections and Rehabilitation Division of Juvenile Justice; Safety and Welfare Remedial Plan, Implementing Reform in California (July 10, 2006), available at http://www.cdcr.ca.gov/Divisions_Boards/DJJ/docs/SafetyWelfarePlan.pdf (last accessed on June 4, 2008) and *Farrell v Hickman*, Case No. RG 03079344 (order directing DJJ to implement the safety and welfare redial plan).

is a hostile place and that personal needs must be met through aggression and manipulation.

The purpose of institutional mitigation in a death penalty case, like other forms of mitigation, is to provide an explanation as to how the state may have contributed to the defendant's behavior. In addition, abusive institutional conditions suggest a level of state culpability, since the child was in state care during his/her formative years. If the state failed to provide a safe environment designed to promote healthy development, the state could be as culpable as the most abusive parent. Child abuse and exposure to violence is often regarded as a root cause of later violent behavior.² The same is argument is also true of adult correctional institutions. If the state places a person in an environment that promotes violence and exploitation, the state must bear some responsibility for its later impact.

An institutional mitigation expert should have knowledge of correctional institutions and be able to develop a profile of each institutions in which the defendant was held. An institutional profile should examine conditions within each institution.³

§ 12 Expert testimony in death penalty cases— Institutional mitigation—Checklist

GOALS OF INSTITUTIONAL MITIGATION

- Suggest an explanation as to why crime occurred
- Suggest a level of state culpability
- Create a climate of sympathy for defendant

Attorney Tasks and Responsibilities:

Acquire and Review all Background Materials

- Social History
- Mental Health records
- Probation Reports
- School Records
- Child Protective Services Reports
- Institutional History/Performance Evaluation Reports

Construct Institutional Chronology

²Alternative Sentencing Program, Training Manual of the Case Developer (Center on Juvenile and Criminal Justice, June 2001).

³A checklist of the types of information to be gathered by an institutional mitigation specialist is contained in § 12.

- Age of Entry Into Juvenile/Criminal Justice System
- Number of Prior Contacts
- Number of Prior Interventions
- Offense Escalation
- Age at First Institutionalization
- Types of Institutions Committed
- Length of Institutionalization
- Age at Release
- Parole Progress Reports

Interview Client About Institutional Experiences

- Age of Entry
- Disciplinary Practices
- Harassment by Staff
- Ethnic and Racial Hostility Between Wards
- Institutional Gang Involvement
- Noninstitutional Gang Involvement
- Number of Weekly Visits with Mental Health Professional
- Living Arrangements
- Number and Frequency of Visitors
- Relationships with Staff Members
- Relationships with Peers
- Addresses or Locations of Past Institutional Relationships
- Number of Institutional Infractions
- Reasons for Institutional Infractions
- Problems with Education Program

Compile Institution History

- Year Constructed
- Facility Design
- Managing Agency
- Age and Number of Inmates
- Staff to Ward Ratio
- Parole Agent Case Load
- Education and Vocational Program
- Lawsuits Filed Against
- Grand Jury Reports
- Commission Investigation Reports
- Management Audits
- Newspaper Articles

- Internal Memos and Research Reports
- Academic Reports
- Film Documentaries
- Staff Commentaries
- National and State Correctional Association Standards
- Model Programs From Other States

Selecting Witness

- Defendant
- Former Inmate
- Family Members
- Corrections Staff and Institutional Professionals
- Civil Attorneys
- Corrections Experts
- Adolescent Development Expert

§ 13 Sentencing strategy

Effective sentencing experts seek creative sentences that conform to the legal and political culture of a given jurisdiction. Effective sentencing requires recognizing the importance of minimizing correctional confinement while utilizing a range of sanctions and interventions. Sentencing experts should have special expertise in the application of community-based corrections programs. The high recidivism rates of correctional institutions have repeatedly resulted in the A.B.A. Committee on Sentencing Alternatives and Procedures¹ and the National Advisory Committee on Criminal Justice Standards and Goals to recommend the use of alternative sanctions. In 1973, the National Advisory Commission called for the following sentencing criteria:

1. A requirement that the least drastic sentencing alternative be imposed that is consistent with public safety. The court should impose the first of the following alternatives that will reasonably protect the public safety:
 - a. Unconditional release.
 - b. Conditional release.

[Section 13]

¹ABA Standards 2.3 (c), American Bar Association. Advisory Committee on Sentencing and Review; American Bar Association; Project on Standards for Criminal Justice (1971). Standards Relating to Sentencing Alternatives and Procedures: Approved Draft. New York, NY: Institute of Judicial Administration.

- c. Release under supervision in the community.
 - d. Sentence to a halfway house or other residential facility located in the community.
 - e. Sentence of partial confinement with liberty to work or participate in training or education during all but leisure time.
 - f. Total confinement in a correctional facility.
2. A provision against the use of confinement as an appropriate disposition unless affirmative justification is shown on the record . . .²

Central to the idea of the least restrictive alternative is that the sentence reflects a subjective motivational analysis of the offense and the offender, rather than merely the objective severity of the crime committed. Unfortunately, because of changes in sentencing policy over the past 30 years, the overriding sentencing goal in many jurisdictions is now simply punishment. Until Maine and California led the way in the movement towards determinate sentencing in the 1970s, virtually all state sentencing laws were indeterminate. With the continued shift towards determinate sentencing in the 1980s and 1990s, the principle of "least restrictive alternative" is no longer a primary sentencing concern in many jurisdictions. Most sentencing policies adopted over the past 30 years ignored the failure of prisons. In addition, in many states with determinate sentencing statutes, such as California, probation is prohibited in a variety of crimes.³

Among the most rigid determinate sentencing systems devised during the 1980s was guideline sentencing. First introduced in Minnesota and Washington and then later adopted at the Federal level, guideline sentencing was adopted in a number of states. Under guideline sentencing, a defendant's crime and criminal history⁴ are assigned numeric values, which dictate the term of incarceration. As with many rigid sentencing formulas, the system ignores subjective motivational analysis. This trend toward determinate and guideline sentencing, which began the 1970s and continued through the 1990s, not only affected the decision-making process of judges but dictated the nature and content of the probation officer's presentence report. Under guideline sentencing the presen-

²National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Std. 5.2 (1973).

³Cal. Penal Code § 1203(e).

⁴Clear & Cole, American Corrections (Wadsworth 4th ed 1997).

tence investigation focuses primarily on the offense and the offenders criminal history rather than the factors that contributed to the offender's behavior.⁵

As a result of recent Supreme Court decisions,⁶ sentencing guidelines are now voluntary rather than mandatory. However, in preparing for sentencing, both counsel and the sentencing expert in guideline jurisdictions must be aware of how individual jurisdictions and judges adhere to the guidelines. If jurisdictions endeavor to follow the recommended sentencing guidelines, the emphasis must be on circumstances, which place the defendant outside of specific categories or on those factors within the formula, which have a mitigating effect. If, for example, the defendant has committed a prior offense and under that circumstance a set term of incarceration is called for, can it be successfully argued that from a motivational standpoint the offenses are totally unrelated and that a sentence designed to deal with habitual offenders should not be applicable? Another example might involve a formula giving weight to the fact that a victim suffered an injury. The circumstances should be explored in detail by the expert in order to determine to what extent the crime or injury was victim-precipitated.⁷

In dealing with the frustrations of guideline sentencing, both counsel and the expert preparing the evaluation should remember that, in most jurisdictions, *evidence presented at sentencing becomes a part of the permanent record, which follows the defendant throughout any period of incarceration*. The attorney who can provide an accurate and detailed evaluation serves the defendant by having input in the prison classification process and subsequent parole hearings. This may make the difference in the kind of institution the defendant is placed, the type of programs offered, and ultimately the actual time served.

In situations where sentencing options do exist, the court should be presented with a detailed social history of the defendant, a motivational analysis of the offense, and a sentencing

⁵Tonry, *Sentencing Commission and Their Guidelines*, Crime and Justice, Vol. 17 pp. 140-141 (1993).

⁶See *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 6 A.L.R. Fed. 2d 619 (2004).

⁷See *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 6 A.L.R. Fed. 2d 619 (2004) and *U.S. v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

plan prepared by the expert. The sentencing plan should include a method of accountability giving the court the option of keeping informed about the defendant's progress. Normally, this is accomplished by periodic visits to the probation officer and progress reports from any community or professional agencies included in the plan.

The report and subsequent arguments by counsel during the hearing should individualize the sentencing process by creating a logical nexus between the offense, the offender, and the recommended sentence. Although the attributes of each part of the sentencing plan could have their basis in the goals of retribution, rehabilitation, punishment, or other sentencing goals, counsel and the sentencing expert should be in agreement as to an appropriate or acceptable sentence.

§ 14 Alternatives to incarceration

Community-based correctional programs find their authority in the latitude given the courts by probation statutes. The California Judicial Council's Rules of Sentencing, for example, outline the specific criteria a judge should consider when granting probation.

Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant.

(a) Facts relating to the crime

Facts relating to the crime include:

- (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime;
- (2) Whether the defendant was armed with or used a weapon;
- (3) The vulnerability of the victim;
- (4) Whether the defendant inflicted physical or emotional injury;
- (5) The degree of monetary loss to the victim;
- (6) Whether the defendant was an active or a passive participant;
- (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur;
- (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and
- (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

(b) Facts relating to the defendant

Facts relating to the defendant include:

- (1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct;
- (2) Prior performance on probation or parole and present probation or parole status;
- (3) Willingness to comply with the terms of probation;
- (4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors;
- (5) The likely effect of imprisonment on the defendant and his or her dependents;
- (6) The adverse collateral consequences on the defendant's life resulting from the felony conviction;
- (7) Whether the defendant is remorseful; and
- (8) The likelihood that if not imprisoned the defendant will be a danger to others.¹

Existing case law gives judges wide discretion in granting probation, provided the condition is reasonably related to the offense and is a condition the defendant can reasonably complete. For example, in *Beardon v. Georgia*, the Supreme Court determined that probation cannot be revoked when a probationer is not able to pay a fine or restitution. In this case, the court distinguished between inability and unwillingness.² The general rule is a requirement that probation conditions be reasonably related to the rehabilitation of the offender.³

The concept of community-based sentencing through a probationary sentence is not new. A great deal of literature

[Section 14]

¹Cal. Rules of Court, Rule 4.414.

²See *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

³See generally Farabee, D., Knight, K., Garner, B.R., & Calhoun, S., (2007). The Inmate Prerelease Assessment for Reentry Planning. *Criminal Justice and Behavior*. Vol. 34 No. 9, 1188-1197; Fisher, Creative Punishment: A Study of Effective Sentencing Alternatives. 14 *Washburn L J* 57, 75 (1975).

describes and evaluates model programs both in the U.S.⁴ and abroad.⁵ The sentencing expert designing a program for the defendant is advised to become familiar with existing experiences.

§ 15 Alternatives to incarceration—Restitution

Restitution, the payment of money or performance of service to victims or community agencies, has therapeutic as well as political value as a component to the program.¹ It confronts the defendant with a constructive punishment; by allowing the defendant to pay for his wrongful act in such a direct manner (as opposed to symbolically "paying for the crime with time"), it serves to instill a sense of self-worth. Politically, such programs tend to create a sense of "justice" in the eyes of the public and are favored by the courts.

Victim cooperation is obviously essential to this kind of a recommendation. Victims should be contacted by either counsel or a third party expert with training in victim offender reconciliation in an effort to design a specific plan and have the victim indicate his or her cooperation to the court.

If there does not exist a victim, or if the victim refuses to cooperate, "symbolic restitution" programs should be explored. This recommendation involves placing the defendant to work for charitable or otherwise nonprofit agencies. Depending on the agency and the defendant's talents, this is a good method of accomplishing the goals of direct restitution while at the same time improving the defendant's self-esteem.²

§ 16 Alternatives to incarceration—Counseling

Counseling programs include more than the obvious patient-therapist relationship established to deal with behavioral prob-

⁴See generally Seiter, R.P., and Kadela, K.R. 2003. Prisoner reentry: what works, what does not, and what is promising. *Crime and Delinquency* 49(3); Beha et al. Sentencing in Community Service, Law Enforcement Assistance Administration, U.S. Dept. of Justice (1977).

⁵Bergman, Community Service in England—An Alternative to Custodial Sentence, 39 Fed Prob 43 (March 1975).

[Section 15]

¹See generally Galaway, The Use of Restitution, 23 *Crime & Delinquency* 57 (1977).

²Alternative Sentencing Program, Training Manual of the Case Developer (Center on Juvenile and Criminal Justice, June 2001).

lems.¹ The expert who performs an adequate assessment may find, for example, that family therapy might be appropriate. This may be the case in substance abuse, domestic assault, or even sexual assault situations. If counseling is to be included in the recommendation, the defendant should have had at least one visit to the chosen therapist so that he may provide the court with an indication of the benefits to the defendant as well as a professional opinion as to the result of such sessions.

§ 17 Alternatives to incarceration—Continuation of preoffense activities

If the defendant was employed or attending school prior to the immediate offense, the expert should elaborate on the effect of these activities on the defendant's rehabilitation. Perhaps the greatest damage done to any effort at rehabilitation by incarceration is the disruption of a positive "life cycle." The continuation of any such activities should become an integral part of the sentencing recommendation. The emphasis in the recommendation should be the stability in the community and positive goals enhanced.

§ 18 Alternatives to incarceration—Supervision and feedback

Second only to the importance of specificity (the judge should not be faced with a recommendation of good ideas, the details of which will be worked out later) is the need to include supervision and accountability to the court in the recommendation. In many cases, the sentencing judge who accepts a community sentencing recommendation will include the plan in his conditions of probation, thereby leaving the probation department with this test. However, the recommended program submitted by counsel should volunteer to provide supervision. Some plans may be quite complex and be objected to by the probation department as unmanageable or otherwise subject to inadequate supervision. A standard method employed by the author is to require that the defendant report to either counsel or the expert at given intervals. Additionally, periodic checks are made with employers or school officials. This greatly enhances the acceptability by the court of the recommendation.

[Section 16]

¹Wandorf, *Family Therapy: An Innovative Approach in Rehabilitation of Adult Probationers*, 42 Fed Prob 41 (March 1978).

C. PITFALLS TO AVOID AT SENTENCING HEARING

§ 19 Failure to deliver evaluation and expert's credentials in timely fashion

The best and most comprehensive sentencing evaluation can be effectively neutralized, and its impact negated, if the attorney fails to submit proper pleadings or motions in a timely fashion. The defense attorney should submit a copy of the expert's curriculum vitae along with a description of what services the expert would perform.

§ 20 A sentencing advocate's list of tasks

The following two tables list tasks for adult and juvenile sentencing advocacy. They represent sentencing-related work, which would be required in a serious felony case for which a defendant might be incarcerated, if convicted or in juvenile court if the youth might be confined if adjudicated delinquent. The agent who may most capably complete each task is identified. Those tasks identified with investigators or a social worker/case developer must be undertaken by defense counsel when neither an investigator nor a social worker/case developer is available.¹

§ 21 A sentencing advocate's list of tasks—Adult sentences

Trial Stage	Task	Agent			
		Attorney	Investigator	Social Worker/ Case Developer	Psychological or Medical Expert
Arrest	- Interview defendant for background & history	•			
	- Negotiate reduced charges with police or charging prosecutor	•			
Pre-Indictment	- Thorough investigation of defendant's background and history		•	•	

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¹Tables taken from Alternative Sentencing Program, Training Manual of the Case Developer (Center on Juvenile and Criminal Justice, June 2001).

EXPERT TESTIMONY AT SENTENCING

§ 21

Trial Stage	Task	Agent			
		Attorney	Investigator	Social Worker/ Case Developer	Psychological or Medical Expert
	- Negotiate informal disposition, diversion, or reduced charges	•			
Arraignment/ 1 st Bond Hearing	- Thorough investigation of defendant's background - Identification of community resources, placement, or employment for defendant - Bond hearing/ motion to reduce bail	•	•	• •	•
Plea Negotiations (may occur any time before trial)	- Thorough investigation of defendant's background - Identification of community resources, placement, or employment for defendant - Alternative punishments (restitution, community service, work release or periodic imprisonment) - Marshall community support - Negotiations w/prosecutor and Judge	•	•	• • • •	•
Pre-Trial	- Investigation of case/ defense - Investigation of case/ mitigation - Discovery process (Brady sentencing information) - Appearance & presentation of defendant in court/ individualize defendant - Identification & preparation of character witnesses	• • • •	• • •	• •	

Trial Stage	Task	Agent			
		Attorney	Investigator	Social Worker/ Case Developer	Psychological or Medical Expert
	<ul style="list-style-type: none"> - Obtaining employment, treatment or placement for defendant - Medical or psychological evaluation - Preparation of release plan for defendant 			• • •	• •
Bond Reduction Hearing	<ul style="list-style-type: none"> - Presentation of release plan to court 	•		•	
Trial	<ul style="list-style-type: none"> - Presentation of mitigating evidence through cross-exam, case-in-chief - Obtain N/G verdict on most serious charges 	• •			
Presentence Interview	<ul style="list-style-type: none"> - Preparation of defendant for interview - Presentation of release plan to probation dept. - Appearance w/defendant at pre-sentence interview 	• • •		• •	
Preparation for Sentencing	<ul style="list-style-type: none"> - When pre-sentence report is available, review for accuracy; prepare response - When report is not available, prepare defense pre-sentence report - Determine sentencing objectives - Write sentencing plan which proposes appropriate punishment, restitution, placement, employment, counseling, public service, etc., supported by documentation - Identify and prepare witnesses, community support 	• •		• • • •	

Trial Stage	Task	Agent			
		Attorney	Investigator	Social Worker/ Case Developer	Psychological or Medical Expert
	- Prepare defendant for allocution, if any	•			
Sentencing Hearing	- Rebut aggravating or erroneous information	•		•	•
	- Present, describe, and advocate sentence proposed by defense; call witnesses as required	•		•	•
	- Preserve sentencing issues for appeal	•			
Post-Sentencing	- File appeal	•			
	- Parole hearing; submit release report, orders of trial court, or witnesses	•		•	

§ 22 A sentencing advocate's list of tasks—Juvenile sentences

Trial Stage	Task	Agent			
		Attorney	Investigator	Social Worker/ Case Developer	Psychological or Medical Expert
Taken into Custody (Arrest)	- Interview youth for background and history	•			
	- Negotiate reduced charges with police charging prosecutor	•			
Intake	- Thorough investigation of youth's background and history		•	•	
	- Negotiate informal disposition, diversion, or reduced charges	•			
	- Waiver Decision	•	•	•	
Detention Hearing	- Brief investigation of youth's background		•	•	
	- Identification of initial community resources, placement for youth			•	•

Trial Stage	Task	Agent			
		Attorney	Investigator	Social Worker/ Case Developer	Psychological or Medical Expert
	- Prepare/Present release plan for youth	•		•	
Pre-Adjudication	- Thorough investigation of youth's background		•	•	
	- Identification of community resources, placement, or employment for youth			•	•
	- Alternative punishments (restitution, community service, etc.			•	
	- Marshall community support			•	
	- Negotiations w/prosecutor and judge	•		•	
	- Investigation of case/ mitigation /defense	•	•		
	- Appearance and presentation of youth in court/ individualized youth			•	
	- Identification & preparation of character witnesses	•	•	•	
	- Obtaining educational, treatment or placement for youth			•	•
	- Medical or psychological evaluation			•	•
Adjudication Hearing	- Presentation of mitigating evidence	•			
Social History Interview	- Preparation of youth for interview	•			
	- Presentation of release plan to probation department	•		•	
	- Appearance with youth at pre-disposition interview	•		•	

Trial Stage	Task	Agent			
		Attorney	Investigator	Social Worker/ Case Developer	Psychological or Medical Expert
Pre-Disposition	- When pre-disposition report is available, review for accuracy; prepare response	•		•	
	- Determine treatment objectives	•		•	•
	- Write plan which proposes appropriate treatment, punishment, restitution, placement, counseling, community service, etc., supported by documentation			•	•
	- Identify and prepare witnesses, community support			•	
	- Prepare youth for allocution, if any				
Dispositional Hearing	- Rebut aggravating or erroneous information	•		•	•
	- Present, describe, and advocate disposition proposed by defense; call witnesses as required	•		•	•
Post-Disposition	- File Appeal	•		•	

Once the proper motions and orders have been granted by the court, the expert begins his evaluation. The evaluation should be submitted, along with the expert's credentials to the sentencing judge two or three days prior to the date of sentencing. Experience has shown that same-day submission produces irate or hostile judges and prosecutors. It is important for the defense attorney to prepare for the sentencing hearing as thoroughly as he might have during trial. Discussion with the judge in chambers regarding the identity of the expert and his purpose at sentencing is highly recommended. The criminologist or expert witness at sentencing is a unique and frequently unknown party in the proceedings. The attorney's efforts to advise and brief the judge in advance of his plan to

introduce the expert's testimony and evaluation are crucial to a successful hearing.

§ 23 Cross examination and impeachment of defense expert

The ideal sentencing expert should be an experienced professional with established credentials in the field. Most importantly, the expert should ensure that all aspects of the case are properly investigated and any assertions or statements can be supported. A prosecutor's appropriate role is to determine the veracity and credibility of the sentencing experts claims. Therefore, the quality of the work is the most critical element. The sentencing expert must also be aware that public statement and/or written documents that suggest a bias can be used in cross-examination. A sentencing expert should be prepared to address issues, including political affiliations and statement that could be used to impugn objectivity.¹

§ 24 Failure to deliver copies of evaluation to prosecutor and probation officer

This pitfall may appear less crucial than timely delivery to the Court; however, the results may be the same if neglected. Late delivery to the prosecutor (at time of sentencing) may cause allegations of "concealment" or "holding back" relevant information. Additionally, the probation officer may become hostile and defensive if "surprised." In order to avoid these situations, the attorney should submit copies of the evaluation at least one day before sentencing directly to the specific prosecutor and probation officer. When that is not feasible, then proof of delivery receipts should be obtained by the defense attorney and be in his possession during the sentencing hearing.

§ 25 Clarity and conciseness of attorney's presentation

Attorneys must remember that the court has heard sentencing arguments in prolific numbers. Repeating points only alienates the judge and produces boredom. A concise, clear review of the pertinent facts relevant to the defendant's sentence is

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¹Alternative Sentencing Program, Training Manual of the Case Developer (Center on Juvenile and Criminal Justice, June 2001).

sufficient. Additional testimony can be offered by the expert, with the closing remarks completed by the attorney. A well-planned, structured, and supervised program that has been established and verified offers the best hope for the court's acceptance of such an alternative.

§ 26 Incomplete or inaccurate data

This pitfall applies mainly to the expert's evaluation. If the data are incomplete or inaccurate, the prosecutor during cross-examination can vitiate the expert's evaluation and sentencing recommendations. To avoid this situation, the expert must be as thorough as possible and stay in frequent contact with the attorney. There is, of course, no "perfect report." However, given sufficient time, the expert's report should be more comprehensive and analytical than that of the probation officer.

§ 27 Absence of attorney-client consultation

It is vital that the attorney and expert maintain frequent contact. This is recommended from inception of the case to the sentencing hearing. Ideally, the attorney and expert should discuss, review, and critique the expert's evaluation prior to testimony. The attorney should also play the "devil's advocate" in order to give the expert some idea of the type of questioning he will undergo during cross-examination. The five- to 10-minute "quickie" in the courthouse corridor is insufficient, if the attorney hopes to illicit competent, well-thought out responses.

◆ **Note:** If additional time is required by the expert or the attorney, seek a continuance.

II. SAMPLE DOCUMENTS

§ 28 Motion for appointment of criminologist to prepare a criminological case study, and order

[Caption]

MOTION FOR APPOINTMENT OF SENTENCING
CONSULTANT TO
PREPARE A BACKGROUND INVESTIGATION AND
SENTENCING
RECOMMENDATION, AND ORDER

The undersigned, as counsel for the above-named defendant,

moves the Court to appoint *[name of doctor or expert]*, to interview the defendant and prepare a sentencing report to assist the Court and counsel in preparation for sentencing in the above-referenced case. The request is based on the indigency of the defendant, who cannot financially afford to consult with *[name of doctor or expert]* on a private basis.

As a result of consultation with said defendant, with his mother and examining psychiatrist previously appointed by the Court, it is the opinion of the undersigned that a study by a sentencing expert would be beneficial and would be of the utmost importance in the preparation of the defense of the defendant at sentencing, and of assistance to the Court in dealing with the instant case.

Counsel for the defendant is seriously concerned about defendant's mental capacity at the time of the offense as well as the serious consequences facing the defendant as a result of his plea of guilty previously entered in this case.

On *[date of entry of plea of guilty]* the defendant entered a plea of guilty to *[penal code provision(s)]* (first degree armed robbery), and *[penal code provision(s)]* (rape in concert with violence, with the use of a firearm). This 20-year-old defendant could be sentenced to life imprisonment for these offenses.

[Name of doctor or expert] has over 20 years experience in the corrections field. He is uniquely qualified in the area of concern. He has qualified as an expert and has rendered his opinions in case evaluations in state and federal courts on numerous occasions. He has been appointed by the Court in the past in other cases involving complicated facts and serious charges, such as the instant case. His inter-disciplinary capabilities will give the Court a very complete and useful evaluation of the defendant for sentencing purposes.

Based on the foregoing, it is clear that a case evaluation study by *[name of doctor or expert]* is needed to effectively represent the defendant at time of sentencing.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____

[Name and signature]

[Caption]

Good cause appearing, it is hereby ordered that the expendi-

ture of a sum not to exceed \$_____ be authorized for preparation of a sentencing report and evaluation to be prepared by *[name of doctor or expert]* in the above-entitled matter.

IT IS FURTHER ORDERED, that *[name of doctor or expert]* be allowed entry into *[location where inmate is incarcerated]* for purposes of consultation with the *[name of defendant]*.

Dated: _____

[Name and signature of judge]

NOTES TO FORM

The motion and proposed order illustrates one typical type of pleading in which counsel requests the court for appointment of a criminologist to prepare a case study.

§ 29 Private presentence reports

The following samples represent various styles utilized in writing the criminological evaluation (or private presentence report). Reports vary in length and detail depending on the nature, complexity, and time requirements. The first sample report is illustrative of a fairly common case adjudicated in a state court. The second is illustrative of a case where significant community service was performed far in advance of the sentencing hearing. This too, is a state case. The final sample illustrates a federal case, where a modification of sentence motion was granted. Typically, reports range in length from three to 12 pages, depending on complexity, relevance, and particular requirements at sentencing.

Background on offense: The defendant has pleaded guilty to one count of possession of a controlled substance for sale. He has a prior conviction for a similar offense for which he served time in a state prison and successfully completed his parole period.

§ 30 Private presentence reports—Defendant pleaded guilty to one count of possession of a controlled substance

PRESENTENCE REPORT

[Name and address of attorney]

RE: John Doe

Date of birth:

Dear _____:

Pursuant to your request, I saw the defendant, John Doe, on [date] for two hours and on [date] for one hour. I have read the police and probation reports and have talked with his former parole officer, _____, whose telephone number is _____.

BACKGROUND & EMPLOYMENT HISTORY:

The defendant is a 34-year-old [race] male currently employed with _____ as a _____, earning \$_____ per hour. He resides with his former wife, _____, at [address]. Her telephone number is _____. He served four years in the U.S. Navy as was honorably discharged in 1968.

The defendant's background indicates he was born and raised in Fayette, Arkansas. He was instilled with a strong work ethic, having picked cotton from 1954-58 and working at the Greyhound Bus Station in 1959 (summer & after school). He also worked before school began at a grocery store and then as a carpenter's assistant (1962-63); again after school at _____ Radio Station (1969). All of these jobs were in Fayette. In 1964, the defendant joined the Navy and served four years. In San Diego, he attended the skill center manpower program from 1968-69 and was employed as a night manager for _____ Supermarket in Chula Vista. He served in this position from 1969-71 and describes it as the best job he had ever had. Unfortunately, he was terminated in an incident that may have been racially contrived, rather than for just cause. He continued to be employed in several other areas: _____. He was convicted on his prior drug charge and served time in state prison from 1975-1977. Upon release, he has worked for _____, and currently for _____.

He has experienced, in my opinion, considerable personal anguish in his life. His initial involvement in drug possession and sale occurred because of his need to raise \$900 to pay his mother's hospital bills in Fayette. Additionally, while incarcerated, his wife took a lover into his own home and shattered his marriage. Fortunately, there was no violence in this incidence.

IMPRESSION & ANALYSIS:

The defendant possesses a sociable, pleasing appearance and personality. He does not impress me as a "hustler" or con-man or have a truly antisocial personality. In speaking with his parole officer, he, too, had similar views that the defendant was

not the typical type of antisocial personality that so frequently are sent to prison.

The defendant has a stable family history. Though raised in poverty in the South, he worked hard to support himself and his parents. His older brother has been unable to assist due to unemployment. The defendant was honorably discharged from the U.S. Navy and has worked one and two jobs frequently to support himself, his family and his home. His "priors" or "rap sheet" would indicate an active law violator on paper. Most, however, are arrests and not convictions. The defendant's explanation of most of these incidents appear plausible and worthy of further inquiry by the Court.

In the seven years that I have done these evaluations, I have never had a defendant who cried and sincerely did not want to return to the state prison. The defendant recognizes his guilt, does not wish to implicate others (through fear of retaliation), and feels at 34 years of age that he has learned his lesson and wants only to make an honest living. Considering his age (low future probability of any crime commission) and his vigorous work record, he is not likely, in my opinion, to recidivate. By the same token, the Court is always faced with suitable punishments to fit the crime. In this regard, I suggest the following for the Court's consideration:

RECOMMENDATION:

Option I. That execution of sentence be suspended for a period of six months on the condition that the defendant continue his full-time employment; that he maintain weekly contact with the probation officer; that he comply with any other conditions of the Court. (I would be willing to maintain weekly contact on a regular basis—for follow-up purposes and submit a report at the end of the six-month period).

Option II. That the defendant be sent to _____ for a 90-day diagnostic study (this would jeopardize his job), but would serve the dual purpose of obtaining additional data and punishment through the loss of freedom and job.

Option III. That the defendant be sentenced to the County Jail (Honor Camp recommended) for the period of one year and he be permitted to go to work furlough when policy would allow.

The defendant is not a violent offender, nor does he, in my opinion, pose a serious threat to the community. Work is his best prescription for becoming a law-abiding citizen.

If I can be of further assistance, please call.

**§ 31 Private presentence reports—Report of
criminological case evaluation and sentencing
recommendation**

TO WHOM IT MAY CONCERN:

RE: Fred Doe

**Report of Criminological Case Evaluation & Sentencing
Recommendation**

Purpose: The defendant was referred by *[name of attorney]*, for a comprehensive criminological evaluation and sentencing recommendation. The purpose of this evaluation is to provide the Court with an analysis of the defendant's potential for rehabilitation as well as recommending a program by which the rehabilitative process is enhanced.

The following evaluation was compiled over the past eight months from interviews, counseling sessions, official reports, and observations. These include a review of investigative reports, grand jury transcript, a previous probation report, interviews with the defendant's family members, peers, and in excess of 30 hours of counseling and interviews with Mr. Doe in various settings. The purpose of these interviews was to elicit information regarding the personality, veracity, and character of the offender, the nature of his offense, and various aspects and attitudes of offender resocialization.

Offense: Sale of a controlled substance. (Cocaine).

Case Analysis: In my initial sessions with Mr. Doe, I found that he exhibited sincere remorse for his actions. Although this is typical behavior for similar offenders confronted within a relatively short period after their apprehension, in Mr. Doe's case it remained a dominant behavior pattern throughout the eight months of my observations.

Mr. Doe acknowledges his guilt and is now able to fully articulate the motivating factors behind his "immature acts." His actions were in large part due to his acquaintance with the informant and others who have "glorified" drug trafficking. The informant's offer of a "big time" trip to Las Vegas, front row seats to a championship boxing match, and the opportunity to impress some friends led to what was essentially an immature impulse to live the television model of a "big shot." A model that unfortunately is all too often found exploiting minority communities.

Through the support of his family, new peer associations, and counseling sessions, Mr. Doe has been able to realize his actions for what they were and build from them a constructive lifestyle. I have observed that he has terminated all associations with his old acquaintances. This was confirmed by interviews with family members, college professors, and new peer relations developed through new-found community interests.

Additionally, I was able to observe a strong family influence. It is significant to note that this influence is of a totally positive nature. His father, who served 23 years in the Army, and his 11 brothers and sisters (five of whom are college graduates) have provided a supportive environment while at the same time making obvious to him the serious nature of his actions. The embarrassment and anxiety imposed by his arrest and conviction is genuine and has succeeded in providing him with a stronger appreciation of family relations and positive peer associations.

I have found numerous criminological factors of prime significance in the recommendations that follow. In addition to the defendant's successful motivation process described above, the defendant has engaged in a self-rehabilitation effort by participating in what is referred to as "holistic resocialization." This employs all of those factors conducive to restitution and rehabilitation. These are education, employment/financial stability, community service, positive peer associations, and personal goal development and evaluation.

Mr. Doe is presently a junior at *name of university*. His goal is to obtain a degree in counseling. This again confirms the strong influence his family provides, especially his sister, Mary Doe, who is a district counselor for the City Schools. Her educational history makes this goal a realistic one. His present faculty has high regards for his dedication, including *name of professor*, a licensed counseling psychologist, who himself has had counseling sessions with Mr. Doe over the past three months.

As to employment, Mr. Doe has a history as a skilled auto body technician and presently works part-time restoring cars. His employer, *name of employer*, emphasizes that he is a responsible, hard-working employee.

Again, his family has played a major role in furthering his financial stability by providing loans for legal fees and school tuition. (documentation attached).

Mr. Doe's community activities have been extensive, primarily through his efforts with the *Mental Health Association*. He has been instrumental in finishing the Association's recently constructed Mental Health Center by providing 175 hours painting, staining, and laying carpets. After becoming familiar with the functions of the Association, he took it upon himself to translate mental health education materials into Spanish in order to facilitate an outreach program into the Mexican-American community. I find that this exhibits accurately his sincere desire to serve in a counseling role in later life. My purpose in this community service placement was to observe Mr. Doe's seriousness in wanting to do something constructive for the community. His enthusiasm and dedication exceeded my expectations.

Although the behavioral sciences have not advanced to the point where conclusive predictions can be made regarding future behavior, the evaluation above, the nonviolent nature of the crime, the defendant's cooperation with authority figures involved, and his insignificant prior records of criminal conduct, are sufficient in my opinion to reasonably negate the probability of future criminal conduct. This opinion is premised on the continuation of his present supportive environment. It is for this reason that the recommendation does not include institutionalization. Recidivism among those nondangerous offenders incarcerated for drug offenses is significant. I feel it is in society's best interest to provide Mr. Doe with a supportive environment while at the same time insisting upon symbolic restitution which will serve to reinforce his present growth.

Recommendations: I respectfully submit the following for consideration by the Court:

I would recommend a suspended jail sentence (one year) and that Mr. Doe be placed on three years probation through interstate compact with the following conditions:

- A. That he be given a suitable fine.
- B. That he continue his education.
- C. That he continue to remain employed.
- D. That he continue to do community service work for the Mental Health Association at the rate of 10 hours per week for 50 weeks.
- E. That he comply with all other requirements and conditions of the Court.

If I may be of further assistance in follow-up or supervision, please contact me.

**§ 32 Private presentence reports—Report on
modification of sentence**

RE: James Doe
Modification of Sentence
Hearing

Dear Mr. _____:

Pursuant to your request, I have read and reviewed the Brief of Appellant, United States vs. James Doe; the Motion for Reduction of Sentence; 25 character-reference letters and the defendant's statement and autobiography.

I have also talked with *name*, Federal Probation Officer (*location*) and *name*, Federal Probation Officer (*location*). My attempt to interview and obtain a progress report on the defendant, presently incarcerated at the Federal Correctional Institution in *location* was denied by the case manager, *name*, a counselor, *name*, was on vacation and unavailable.

Pending an opportunity to personally interview the counselor and the defendant prior to the hearing on Monday, this criminological case evaluation and sentencing modification recommendation evaluation is based on the above resources and my experience in sentencing matters for the past eight years.

My understanding is that the defendant received two concurrent six-year terms for violations of 21 U.S.C.A. § 849 and 21 U.S.C.A. § 941(a) rendered on September 10, 1976. He remained on bail or appeal bond from the time of his arrest (June 6, 1975) through his appeals until surrendering himself to the U.S. Marshal, shortly after February 23, 1979.

My concern as a criminologist who has assisted federal and state courts in sentencing matters is addressing the purpose of punishment and its effectiveness.

Given the federal guidelines and practices of our federal judiciary nationally, the sentence imposed on the defendant falls within the national average of 49.9 months. The Salient factor score utilized by the U.S. Parole Commission would indicate a 44 to 55 month period of time served prior to parole consideration.

The sad fact is that these numerical estimates do not take into consideration victims, emotions, lives, families, careers, or positive citizenship restoration. For decades, U.S. Crime Commissions, Presidents, Judicial Committees, etc., have at-

tempted to reform our sentencing practices in order to truly restore the offender to the community as quickly as possible. A preponderance of research evidence indicates that long sentences do not rehabilitate the offender. In fact, legal, sociological, and criminological literature stresses the importance of "swift and certain punishment."

In the instant case, the defendant performed in an exemplary fashion for approximately three and one-half years after his arrest. One needs to inquire as to the effectiveness of punishment realized three and one-half years after the offense. Based on the defendant's strong and traditional family background, his employment record, and added maturation, such a lengthy sentence for this particular offender appears excessive. I base this on the facts that he is a nonviolent offender, raised in a prominent, old-world family, where negative behavior was sternly dealt with in a swift and certain fashion. His illegal actions and monetary greed as a younger, immature college graduate along with his association with previously drug-involved peers, have cost him his reputation, his freedom, and the severest embarrassment to a family of prominence, dignity, and respect. In this regard he has been effectively and emotionally punished, as have been his family and friends, the indirect victims of the defendant's offense.

CONSIDERATIONS FOR LAW, JUSTICE AND THE COMMUNITY:

In light of the defendant's background, increased maturity, family stability, education, and employment opportunity, it would appear that he could benefit from a community-volunteer service program without jeopardizing public safety. In this context, he could be placed on parole and continue to be punished, but in a more constructive fashion. Rev. Msgr. *name* of the Catholic Youth Organization has offered to supervise the defendant should the Court elect to modify sentence and place him on parole. This type of community service work by the defendant would benefit a nonprofit, charitable organization and serve to enhance the defendant's self-esteem and yet continue to be constructively punished by performing free labor over a period of time as determined by the Court (for example, 15 hours per week for one or two years). As stated in the Model Sentencing Act (2nd Edition):

The purpose of Penal Codes in sentencing is public protection.
Sentences should not be based upon revenge and retribution . . .
A sentence that allows a defendant to remain in the community

is preferred if it does not substantially compromise public safety—preferred because it entails lower costs to the taxpayer and less disruption to the life of the defendant and his family. The philosophy stated in this section supports non-institutional sentences whenever commitment is not clearly needed for public protection. In my opinion, the defendant is amenable to local treatment and very much wants to reestablish himself in the community by giving of his time and skills to charitable services in need of his labor. Since the defendant and his family have all undergone considerable emotional and mental strain and anguish, it appears that sufficient punishment has been effectuated, as has specific deterrence. From both economic and humanitarian perspectives, it seems incumbent that justice would best be served if the defendant is restored to the community as an asset and responsible citizen. Statistically, community restoration is far more successful than incarceration.

The President's Commission on Law Enforcement and Administration of Justice (1967) states:

. . . The development of a far broader range of alternatives for dealing with offenders . . . based on the belief that while there are some that must be completely segregated from society, there are many instances where segregation does more harm than good. (Cited in FBI Law Enforcement Bulletin, March 1976, "Community Service: A realistic Alternative for Sentencing.")

It would appear that the defendant could readily succeed on parole without jeopardizing the cause and meaning of justice and be given the opportunity to meet his financial, social, civic, and legal obligations. As the U.S. Chamber of Commerce and the American Bar Association have stated:

The goal must always be to develop and restore in the offender the capacity for lawful and productive behavior in the community—a goal for which punishment alone, in our complex, fast-moving society, is clearly an inadequate prescription for success. (Marshalling Citizen Power to Modernize Corrections, p. 19.)

It would appear that neither justice, equity, nor the community would be served by further incarceration of the defendant.

In my opinion, he would successfully complete his parole period and become a true asset to his family and community.

RECOMMENDATION: That the defendant be placed on parole with additional supervision to be performed by Rev. Msgr. *name*. That the defendant perform a minimum of 780 hours of community service work with the Catholic Youth Organization in *location*. That he comply with any additional orders of the Court and probation officer.

If I can be of further assistance, please call.

Sincerely,
[Signature]

**§ 33 A checklist for a privately-commissioned
presentence evaluation and recommendation**

The manner in which it is prepared and the contents of the evaluation submitted by the retained expert will vary according to the complexity and nature of the case. Through experience, the author has found that a number of issues have been repeatedly raised by sentencing judges and prosecutors. The issues, as well as some of the sources used to respond, are presented here to aid counsel in guiding the efforts of the retained expert.

Issues

1. *The present offense:*

- ☐ Was the offense the result of impulse or premeditation? What was the degree and source of provocation, if any?
- ☐ Was the defendant the primary actor? How instrumental were co-defendants in shaping the defendant's conduct?
- ☐ Does the nature and degree of violence involved indicate a future danger to the public?
- ☐ Does the offense(s) indicate a predisposition to future criminal conduct?
- ☐ How, if at all, was the offense victim-precipitated?
- ☐ What emotional or mental factors may have contributed to the defendant's offense? Was it an isolated or situation offense?

2. *The defendant:*

- ☐ Does the defendant exhibit remorse for his actions? If so, how is this manifested?
- ☐ Does the defendant's criminal history predispose him to future criminal conduct?
- ☐ In cases of violence, does the defendant's social, mental, or physical history indicate a tendency for violent behavior?
- ☐ Does any aspect of the defendant's status in the community (lack of employment, training, finan-

cial resources, self-esteem, etc.) indicate future criminal conduct?

3. *The sentencing recommendation:*

- ☐ How will (specific component) benefit the defendant? The community? How will it deter future criminal conduct?
- ☐ How will the defendant be counseled and supervised?
- ☐ Who will verify direct or symbolic restitution? Probation? Expert? Or both?

Data Sources

1. *Interviews:*

- ☐ Defendant
- ☐ Victims, witnesses, co-defendants
- ☐ Police, prosecutor
- ☐ Family members, neighbors, friends

2. *Records:*

- ☐ Arrest
- ☐ Probation report
- ☐ Trial transcript
- ☐ School records
- ☐ Employment records
- ☐ Military records

3. *Observations:*

- ☐ Home visit
- ☐ Diagnostic reports (psychological tests and evaluations)
- ☐ In defendant's milieu, where possible

III. PROOF OF ACCEPTABILITY AND VALUE OF PRIVATE PRESENTENCE EVALUATION

A. ELEMENTS OF PROOF

§ 34 Checklist of facts and circumstances tending to establish acceptability and value of presentence evaluation

The following facts and circumstances, among others, tend to establish the acceptability and value of the private presentence evaluation at the sentencing hearing:

- ☐ Qualifications of experts¹
- ☐ Basis for report and recommendations²
- ☐ General interview procedure³
- ☐ Need and purpose of sentencing alternatives⁴
- ☐ Developing community services resources and follow-up⁵
- ☐ Purpose of criminologist's evaluation⁶
- ☐ Data sources and evaluation⁷
- ☐ Theories of punishment and corrections⁸
- ☐ Significance of rehabilitation and environment⁹
- ☐ Basis for rehabilitation program¹⁰
- ☐ Prediction of dangerousness¹¹
- ☐ Effects of confinement¹²
- ☐ Sentence recommendation¹³

§ 35 Background on proof

The following example represents the "team approach" in the sentencing hearing extracted from a court-martial proceeding. The sentencing experts in this case (criminologist and psychiatrist), worked both independently and collaboratively with the defendant and each other. Prior to sentence testimony, an attorney-expert's conference was held to review the social-behavioral science data compiled by both experts over a several month period. The criminologist's testimony was given first in order to discuss the purpose of his evaluation and clarify historical and current trends in punishment and rehabilitation. The emphasis was on sociological and environmental fac-

[Section 34]

¹ §§ 20, 33.

² §§ 21, 34.

³ §§ 22, 36.

⁴ § 23.

⁵ § 23.

⁶ § 25.

⁷ § 26.

⁸ § 27.

⁹ § 28.

¹⁰ § 29.

¹¹ §§ 30, 38.

¹² § 31.

¹³ §§ 32, 39.

tors and sentence recommendation. The psychiatrist's testimony followed in order to address mental and emotional factors, as well as intent, motivational analysis, and sentencing recommendations. Utilizing this "team approach," the testimony was both thorough and effective; more so, than with only one expert attempting to testify in both the social and behavioral science aspects at sentencing.

◆ **Practice Tip:** It is crucial that prior to testimony, the expert's evaluation and vita be submitted to the court at least two to three days prior to the sentencing hearing. In addition, copies should be given to the prosecutor and probation officer at the same time, or at a minimum, the day before sentencing. Late submission of the evaluation (day of sentencing) usually produces a hostile judge and prosecutor, who may only skim the evaluation. Late submission of the evaluation to the Court and prosecutor affords the prosecution the opportunity on rebuttal to suggest that the defense has been "holding back" and has not had adequate time to study and challenge the expert's evaluation. Ideally, if the expert's evaluation can be completed early enough, the probation officer can be requested to attach it to his own report.

◆ **Caution:** Always have several extra copies of the expert's evaluation in Court, plus proof of earlier delivery to both probation and prosecution officers.

B. TESTIMONY OF SENTENCING EXPERTS

§ 36 Qualifications

[After introduction and identification of witness.]

Q. Would you please tell the court where you live?

A. At *[address]*.

Q. What is your occupation?

A. I am a professor in the criminal justice administration program at San Diego State University, an associate clinical professor of psychiatry at the University of California, and a consulting criminologist in private practice at the Psychiatry and Law Center in San Diego. I am also a licensed marriage, family, and child counselor.

Q. Where is your office located?

A. *[States location of office]*.

Q. Could you describe your educational background?

A. I have a B.A. in biology from Central Methodist College,

Fayette, Mo. and a master's and doctorate in criminology from the University of California, Berkeley. I have also taken post doctorate casework in sexual dysfunction, psychiatry, schizophrenia, and psychodrama technique.

Q. What is your professional background?

A. First, let me define and clarify what is commonly misunderstood. I am not a criminalist, which is a subspecialty of criminology and deals with the laboratory-technical aspects of evidence gathering and analysis (serology, hair particles, fingerprints, etc.). I am not a psychiatrist, nor a psychologist. I am a social scientist, academically and clinically trained to address the various problems of crime, criminality and their causes, treatment, prevention, and control. My training was multidisciplinary, having had coursework in sociology, criminology, law, psychiatry, psychology, and political science. My practical and clinical experience includes having worked as a street gang worker for the juvenile probation department in Richmond, California, having served as a special deputy sheriff in both Contra Costa and Alameda Counties, having been employed under a federal grant to study middle- and upper-class delinquency, and later serving as director of youth services for the city of Pleasant Hill, California. I was hired 10 years ago to develop the criminal justice program at San Diego State University, where I currently teach. I have served as a consultant on a variety of matters to local, state, and federal governments, as well as private nonprofit associations and foundations.

Q. Could you list some of your publications?

A. I have authored two books. The first, which is my dissertation, is entitled, "Kids, Cops & Kilos: A Study of Contemporary Suburban Youth" and the second, co-authored with Dr. Gazell, is entitled, "Youth, Crime and Society." In addition, I have authored over 30 articles and book reviews and have been the subject of two articles by other authors.

Q. Could you describe those two articles?

A. They both deal with what one refers to as my "pioneering efforts" in developing sentencing alternatives. The article is entitled, "Criminologist in Court: Criminologist for the Defense, written by Larry Remer and published in the December 1977 issue of Human Behavior Magazine. The other article by Professor Fred Cohen is entitled, "How and Why to Use Experts at Sentencing: A Comment," in the March-April 1979 issue of Criminal Law Bulletin.

- Q. Do you belong to any professional organizations or associations?
- A. Yes. I am a former executive board member of the American Society of Criminology, a co-founder and president of the Western Society of Criminology, past-president of the San Diego Psychology-Law Society, president of the San Diego Mental Health Association, past chairman of the County Task Force to Study Alternatives to Incarceration, and co-founder of the Pacific Forensic Institute.
- Q. How long have you been in private practice?
- A. Approximately eight years.
- Q. How many cases would you estimate you have had?
- A. Approximately 130.
- Q. Have you ever been appointed by the court?
- A. Yes, in both state and federal jurisdictions.
- Q. Have you testified in other jurisdictions?
- A. Yes. In Alaska, Kentucky, Oakland, Los Angeles, and Nevada.
- Q. Has your opinion been sought by colleagues, as well as the legal profession?
- A. Yes. By psychiatrists, sociologists, social workers, and psychologists.

§ 37 Basis for report and recommendations

- Q. Could you tell the court the basis and purpose of your report?
- A. Yes. The purpose of my report (evaluation) is to assist you and the court in its sentencing function pursuant to Penal Code § 1204. (In states other than California, both by statute and judicial discretion, factors in mitigation and aggravation of the offense are permitted.) The basis of my report stems from six to 12 hours of intensive interviews and evaluation of the defendant. In addition, as I have noted in my written evaluation submitted to the court, I have also spent _____ hours in reviewing the official documents, the attorney's case file, and interviews with significant others (family, friends, employers, victims, etc.). I would also add that another purpose is to explore possible options for sentencing that may be more economical and yet still offer the best opportunity for correcting the offender and protection of the public.

§ 38 General interview procedure

- Q. Could you describe how and where you conduct your interviews?
- A. If the defendant is on bail or O.R., I conduct the initial interview in my office. Thereafter, the type of case, the offender and accessibility of data dictate the times and locations of further interviews and investigations. Frequently, we meet in my office; however, on many occasions home visits or "hangouts" are also utilized. If the defendant is incarcerated, I am limited to conducting my interviews in the particular custodial facility.
- Q. What kind of information do you compile?
- A. Basically the same type that is found in a probation report, that is, the defendant's background, education, employment, family, personality, prior record, psychological or psychiatric history, leisure-time activity, and the like.
- Q. What, then, makes your report different from the probation presentence report?
- A. I have the luxury of time to obtain more accurate and verifiable data that the probation officer seldom has because of his or her large case loads and supervisory pressures. To get to know a defendant and his personality well simply takes time. There are no shortcuts. My case load per month seldom exceeds five or six clients. Therefore, I have the luxury of time and resources to be able to "flesh" him out as a person—to establish trust, rapport, and friendship. In this way, I believe I can give the most accurate analysis of the defendant, his needs, strengths, weaknesses, that I feel are more valid for the court's purpose in determining the most suitable sentence for this particular, individual defendant. If the probation service could also have the luxury of time and smaller case loads, my evaluation would probably not be needed.
- Q. Have you established a record of successes and failures?
- A. Yes. At the request of a judge I submitted to the court the results of my first 55 cases spanning a four-year period. I found that 71 percent had not been rearrested. This was at a time when national recidivism rates are estimated to be between 65 and 85 percent.
- Q. How do you account for such a high success rate?
- A. It is really very simple, trite and old fashioned *caring* and possibly making a little extra effort that extra time

permits. There is nothing that scientific about it. People with problems need and want help. If you are genuine in wanting to help, most will readily open up and accept it. We need to take the time to solve problems, not compound them.

§ 39 Need and purpose of sentencing alternatives

- Q. What is the need and purpose of sentencing alternatives?
- A. The need is clear and gaining more support daily. As incarceration per capita costs continue to rise at exorbitant rates and the costs of per bed construction approaching \$200,000, I feel, as do many authoritative sources, that we must find more economically effective methods to deal with the offender. The trend of seeking alternatives to incarceration has gained considerable momentum in the past several years. Judges have utilized a variety of alternatives historically, such as fines, restitution, split-sentences, and probation. Rarely, however, have the courts systematically, and over time been able to develop well-planned and structured alternatives that offer direct feedback from follow-up services. The purpose of developing sentence alternatives for the court's consideration is again based on economics and carefully planned programs of rehabilitation that offer the best hope of correcting the offender within the community. By seeking independent or private consultants to assist attorneys and the courts in the sentencing function, probation services will also be receiving adjunct assistance through performance of more rigorous and comprehensive investigations and verification of information by the expert. At present, it is estimated that the costs of incarceration are 10 times higher than probation. Therefore, generous use of probation in selected, well-screened cases along with conditions of probation affords the court many realistic and effective alternatives utilizing community services as creative or constructive punishment.
- Q. What do you mean by "creative or constructive punishment"?
- A. It means designing an individualized community service project where the defendant, as a condition of a suspended sentence and placement on probation, would make either direct restitution to victims or "symbolic" restitution in nonvictim crimes. This is not to imply that the well-to-do could "buy their way out," but might also be heavily fined,

given a split-sentence of short-term confinement and community service work with a charitable agency. A variety of combinations can be designed, again depending on the individual offender, the need to protect society, and correction of the offender.

§ 40 Developing community services resources and follow-up

Q. How do you determine which community service suits a particular defendant?

A. I attempt to mutually match the defendant's personality and skills with any number of charitable organizations who are usually enthusiastic to receive much needed "volunteer" help. As an example, someone with a particular skill, such as a plumber, carpenter, or physician, can easily be placed with agencies such as the Salvation Army, Red Cross, Epileptic Society, or mental health associations. In cases of semi-skilled or unskilled laborers, painting, clean-up, and kitchen work is also available. It is important, however, that while these volunteer services are being performed, the agency is supplying supervision and verification of work and that the expert is maintaining weekly contact with the defendant and the supervisor. If counseling or therapy is also a condition of probation, then the expert should also verify attendance and seek frequent progress reports.

Q. What do you mean by follow-up?

A. By follow-up, I mean that it is important to stay in contact with the defendant, even after he completes his required amount of community service work (whether in hours, days, weeks or months). It is also crucial to advise the court and the probation officer of the outcome. Follow-up services appear to have a stabilizing effect on the defendant and affords him a "sympathetic ear" should he encounter later problems of whatever nature (marital, job, etc.). Follow-up also affords the expert the opportunity to learn if the defendant is "making it" or if he has been re-arrested.

Q. In the current case (solicitation and operating a brothel), why are you recommending six months' custody, with a suspended sentence and three years' probation with community service work and a fine?

A. Because the defendant is a first-time, nonviolent offender, age 42, with added mitigating circumstances that incar-

ceration would excessively traumatize the defendant. The defendant was incarcerated as a child in Nazi Germany. When arrested and placed in jail she became hysterical and was additionally terrorized by other inmates. Upon her release on bail, 18 hours later, her conversation was tape-recorded by her perceptive husband. Only the most skeptical and cynical would doubt its authenticity. Her background and psychiatric history verified her earlier childhood experiences. Most had been buried in her memory, but the jail experience revived and rekindled her fears.

Q. What type of community service project do you recommend?

A. I have had the defendant interviewed by the director of our local mental health association and he is willing to supervise her in performing 15 hours of office work for the next three months. As of this date, she has already donated 48 hours of service as verified by the director's letter to the court. In this way, I feel she can be constructively punished in an environment that offers support and stability. There was no direct victim or complainant; therefore, no direct restitution could be offered. The option then is "symbolic restitution" to a charitable community social service agency. She is also seeing me on a weekly basis for counseling and progress reporting. The suspended six-month jail sentence serves as a "threat," although her experience in the jail leads me to believe that she is not likely to recidivate.

§ 41 Purpose of criminologist's evaluation

[After introduction and identification of witness.]

Q. Doctor, have you met the defendant?

A. Yes, I have.

Q. Would you indicate to the members of the court the purpose for your meeting Petty Officer *[name of defendant]* and the nature of any analysis of the case, that you may have done?

A. Yes. At your request, I met with the Petty Officer *[name of defendant]* for the purpose of examining and observing him in an attempt to develop a criminological evaluation. I did meet with him for a total of 5½ hours. And I was very interested in the case itself; I work with similar cases in the civilian realm.

Q. Have you prepared a criminological evaluation, as you

referred to it, in his case?

A. Yes.

§ 42 Data sources and evaluation

Q. In the formulation of that evaluation, could you indicate to the court members what you relied upon outside of your interview with Petty Officer *[name of defendant]*?

A. Yes. The material that I requested from you that you sent me, *[Name of Rerport]* and *[Name of Rerport]*, the Performance Evaluation Reports. I had reviewed all of those, a variety of letters from the Department of the Navy and Antarctic Development Squadron SIC, enlisted evaluations, and numerous other letters. In addition, you sent me, when I requested, that section of the law pertaining to his case in sentencing matters.

Q. Are you referring to the Manual for Court-Martial?

A. Yes, I am, and the Table of Punishments.

Q. Have you ever talked to the victim of this case, Petty Officer *[name of defendant]*?

A. Yes. I spent approximately an hour on the telephone interviewing him. I also spoke with *[name of doctor]*, the psychiatrist, and I also discussed the case with you on several occasions.

§ 43 Theories of punishment and corrections

Q. Before we actually go into the nature of your evaluation, could you indicate to the members of the court, in general, what the theories of society are in sentencing an individual for certain acts he may have committed?

A. We have, for approximately 200 years, since we've had the invention of the penitentiary, seen that as punishment. The penitentiary is an American invention and its purpose was really a very liberal thought of that age. Prior to that, people were being mutilated and brutalized; so the Quakers, a very humanitarian group, thought that something that would be more effective would be to have individual solitary cells where the individual would be placed in confinement and given a Bible and that he could then become penitent, consequently the word "penitentiary," atone for his sins, and reform himself. What they found out in very short order was that instead of just having a criminal, now we also have a criminal who is going insane

because he's locked away in a solitary situation with a Bible and with his food slipped in under the door, and they were quickly going crazy, to use the vernacular. Since that period of time, it has been a never-ending battle to try and reform and do something positive with the penal system. We have not succeeded. Virtually every President and Attorney General of the United States has referred to our penal system in America as being schools for crime, graduate school for crime, colleges for crime, and that they have basically all failed. We've had two Presidential commission reports that have stated the same thing, one under Lyndon Baines Johnson in 1966 and one under Richard Nixon in 1973. We had a violence commission report and a riot commission report which, in essence, alluded to the same fact. There's unanimity when it comes to talking about the failure of prisons. There's very little done about it because it's still a low priority item and the only time we get attention is when they go up in flames or there's a major riot. The rehabilitation ideal, as it has been practiced for approximately the last 40 years in this country, has fallen on hard times, the reason being, mainly, one major study out of New York. Dr. Bob Martinson's study, in effect, concluded, after reviewing several hundred pieces of research on what kind of therapies work in a penal institution, concluded that none of them reduced recidivism.

Q. What do you mean by "recidivism"?

A. A recidivist is one who repeats an offense. Martinson's study was picked up in the political arena and used as a banner to condemn any type of rehabilitative efforts. The fact that they had failed, in my opinion, is that they never had an opportunity to work. It is very difficult to take a person who's been charged with a crime, who is labeled "criminal," put him in a totalitarian dictatorship, because that's what a prison is, and then expect to rehabilitate or to correct him in that environment is really analogous to sending a leper to a leper colony and expecting to cure him. You won't cure him; you isolate him, but the lepers usually don't come back out. With prisoners, 98 percent of them return to the community. They usually return for the worse by virtue of our national recidivism which is estimated to be between 2/3 and 3/4, 66 to 75 percent failure rate, at a time when it's costing us almost \$32,000 per person per year to keep him incarcerated. The penal practice has been referred to as a bankrupt system. Most commissions have urged very strongly that we need to go

to alternatives, and seek other ways of dealing with the offender. That is occurring at a very slow pace but it is developing. I would say that we'll see more of that in the coming years.

§ 44 Significance of rehabilitation and environment

Q. In your opinion, doctor, what is the most important aspect of the sentencing of Petty Officer *[name of defendant]*; is it punishment, or is it rehabilitation?

A. In my professional opinion, I think it should definitely be rehabilitation because I think you have something to work with.

Q. Now would you indicate to the members of the court what your evaluation of the case is, as it relates to Petty Officer *[name of defendant]*?

A. Yes. In the first instance, I found him to be what we refer to as a situational offender. His offense is not unlike that which we find in the civilian community that results in roughly $\frac{1}{4}$ of our police officers being shot or injured severely when they respond to calls, and that is the family disturbance, innocent arguments initially. Others could be a drunken brawl between husband and wife. It can be a family situation where one is cheating on the other. They frequently result in violence, as did the defendant's case. I was impressed that he does have an excellent military demeanor and bearing. I was very impressed with his background and his military record. In speaking with his wife, I was also impressed by the fact that this really lent itself to my experience and theory that this is indeed a family "beef" because she was not the hostile victim. She was really rather forgiving and didn't want anything evil to happen to him. In fact, her direct quotes to me were that "he doesn't need jail"; she has no ill feelings; she just doesn't want to be married to him. She feels he needs help, counseling, and she also thinks that he's an asset to the Navy and should stay in. She is getting her divorce and she is paying for it financially. She seemed to be a very understanding woman, one of great patience and tolerance, but there is a distance from the commission of an act—a distance in time that if any of us are assaulted or injured in a criminal fashion, usually in the period of one or two or three months, we become a little more reflective and calm down, and the emotionalism goes out of it and we become a little more understanding about how this

thing could have happened and we're not nearly as hostile about the offender as we might be. I might also add that when I mention situational offender, I would conclude, I think, by pointing out I do not feel that his offense would ever be repeated. I could not, of course, guarantee that any more than I could about the rest of us in this room, but I think that he has suffered enough remorse, shame, and sadness from what he has done that I don't think he would permit himself to get into that situation. I would agree with his wife. I would like to see him get counseling, not of a psychotherapeutic type, but more of an interpersonal relations type that deals with relating with women and to women, and especially in light of his background and the way he was raised and grew up in a subculture of a type that deals with a woman in one category and which today is the antithesis of his early teachings. I could just as easily use the word education as I could counseling in this context.

§ 45 Basis for rehabilitation program

- Q. What type of education, counseling, or rehabilitative effort do you believe are indicated for him?
- A. Number one, the type of counseling I would recommend could be from a minister. It could also be from his best friend, if he has one here, someone that he can personally relate to and share his problems with without feeling awkward or embarrassed or that he's unique or different, because he's not. We're all in the same boat and I think if he had someone that he could relate to in that context it would be of great benefit to him. Two, if he could find a counselor on base, and I did call Commander [name] who is his commanding officer at the brig, to inquire as to what type of counseling they had there. He mentioned to me that they have basically three counselors for 150 detainees, so there's not too much there in terms of time and specialization that an individual can receive, but I was also impressed that Commander [name] has a marriage, family, and child counseling license and has done this type of interpersonal counseling on the outside. And I would say that he can benefit from a relationship of that type. The federal government funded counseling programs here in San Diego because they found out most persons will pour their hearts out to the bartender and the barber. So they decided to try and give them some actual professional training, albeit superficial in counseling skills and

techniques. But I would like to see the defendant have someone to relate to on an intimate basis. By intimate, I mean a personally intimate basis, not necessarily sexual.

Q. Would his occupation be helpful in rehabilitation?

A. Yes, because the defendant has a great affection for the Navy. The service has been very good to him and I think he's been very good to the service. It's a mutual kind of exchange there and I think he's worthy. I would agree with his wife, I think he should stay in. He's very worthy of staying in and, in effect, making amends for his past offense. He was, in effect, at the wrong place at the wrong time under the wrong circumstances and did a very grievous thing. We cannot excuse that. It's not even within our power to forgive it, but what we need to ask ourselves, is what do we do with this fellow human being who is a part of our community? The old way was that we would banish them, anything from putting them on ships, to ostracizing them, to stigmatizing them, putting them in the blocks, and so forth. I think he still has a long career ahead of him and I'd like to see him succeed in that career. I think he would be an asset to all of us.

§ 46 Prediction of dangerousness

Q. Do you view, in your opinion, Petty Officer *[name of defendant]* as being a threat to any person around him?

A. No more so than the average man.

Q. Why?

A. Well, because I think the nature of his personality, in fact, he's probably more humble and more likely to withdraw from a confrontation than go into one or pick one in a bar or something like that. I think he's the type of personality that would try and steer away from it.

Q. Do you view him as being a further threat to his wife?

A. No, I don't. Especially since they're going to be separated—divorced and, of course, separated by distance. I think at most they might exchange phone calls at Christmas or something like that. In speaking with her, she frankly pointed out that she just didn't want to be married to him anymore, doesn't really want to have anything to do with him, other than exchange a call once in awhile to keep in touch, to say "Hi, how are you" and that type of thing. She wouldn't object to that. And that's my understanding from the defendant too. He has no desire to pursue her or to see

her anymore.

§ 47 Effects of confinement

Q. In your opinion, would lengthy confinement serve any purpose?

A. None whatsoever.

Q. What is the basis for that opinion?

A. Since he was a situational offender and went through an emotional outburst in a family situation, we have two kinds of deterrents, specific and general. Specific deterrence is usually affected immediately after the commission of the crime by the defendant, the offender, unless they are psychopathic or sociopathic, which he is not. And by that I mean that the defendant does have a conscience; he does have feelings; he cares. In fact, he's shown considerable remorse and shame over this offense. Now, general deterrence is virtually nonexistent in these types of offenses of passion and/or where alcohol is involved. You could have the death penalty for these offenses and they would not be reduced one whit from the current activity that's occurring. The reason being that in crimes of passion, people just lose control temporarily and will do something that they are very sorry for. Many of the manslaughter cases in the civilian courts receive probation; they receive little or no custody. In fact, there was a woman who killed her husband and it was such a sad situation the judge offered five years in prison or five years teaching Sunday school in the ghetto and cooking breakfast in the ghetto for the children, and, of course, she took that option. That was a case in Miami, Florida. There are similar cases like that.

Q. Let me try to understand some of what you discussed in terms of your criminological evaluation. First of all, you called what he did a situational offense?

A. Yes.

Q. Now, am I to understand that means that was caused or resulted from a personal situation as opposed to a crime for money or for some other purpose?

A. Yes. The situation, in large part, defines or has great impact on the nature of the offense. In this case, it was the developing history of the distrust, mistrust, and the accusations of cheating by the wife, and the fact that they found themselves in that heated moment in the bathroom. That's what I would call or refer to as a situational offense.

And it's also an offense of passion where there really is no predictability or any ability to prevent it. It's a crime of passion. It's really rare that you can prevent something like that because, as I said, even if you had capital punishment as the ultimate punishment, people would still be doing it.

Q. It's my understanding that most offenses of a violent nature, with the exception of psychopathic offenders, are situational offenders, are they not?

A. That's correct.

Q. Would custody, in your opinion, serve to deter Petty Officer [name of defendant] in any way?

A. It would only isolate him. I don't think it would deter—in the context you use the term “deter.” Of course he would be deterred from doing anything because he's confined. The concern is, what does that mean in terms of his future? Would he come out as a better, wholesome citizen, or would he come out a bitter, hostile man who will be a lot wiser in the ways that we would rather not have him wiser?

Q. Would, in your opinion, confining him deter other individuals from similar acts?

A. Not in this type of offense, as I previously mentioned. If it's a crime of passion, usually you can't do anything about it. I think the most often used story by parents, those of us who have children, talk about how you come that close to picking the kid up and throwing him out the window on some days when you lose your anger. And that fine line between doing it and thinking about it and being able to control yourself, that's it. That is the fine line. Those who do it are charged with child battering, child abuse, or homicide of one type or another and those who control it happen to have that control mechanism at work. We cannot distinguish what makes the difference. It happens in the best families; it happens in the worst families.

Q. What, in your opinion, would be the effect on society if Petty Officer [name of defendant] were discharged?

A. Society, in general, wouldn't even feel it, of course. Few would even know or care. If he went back to his home, depending on how he went back, would it be under the label of a disgraced individual? I think it would be devastating. The fact of the matter is that he does like the Navy his career, and he's done exceedingly well, except for this one blemish. That really says a lot because most of us

in here have probably more blemishes, although maybe not quite as severe as his one.

- Q. In terms of Petty Officer *[name of defendant]* himself, you indicated he might be able to get a job, is there a good prospect, in your opinion, of that occurring should he be discharged with a punitive discharge?
- A. If he could go back to his hometown and find a job there. The job market is very depressed, as we're all aware, and he doesn't have any particular training or skills that have its counterpart on the outside from his military training. I would say he would have difficulty in getting a job. He would have to really prepare and try to get back in school and so forth. If he received a bad discharge, that carries a lot of weight in getting into school and getting jobs. I think sometimes the punishment far exceeds the seriousness of the crime because it stigmatizes the individual and they carry that monkey on their back usually for much longer period a time. It may be 10 years, 15 years, all their lives. I frequently encourage people if they can leave their environment do that and try and start over. Even if it means going to court and changing your name, start yourself a new life.
- Q. How much therapy or counseling do you feel it would take for Petty Officer *[name of defendant]* to get back on the right track and finish out his naval career?
- A. I think possibly, initially, for the first six months, or even a year, that he would see someone, say, on a twice-a-month basis. Again, not in the psychotherapeutic sense, but in an educational realm. And I would hope that the relationship would evolve and establish such a rapport that then the defendant would go there of his own volition because he would see that he was reaping some benefits from it and it would help him adjust to his own lifestyle and in dealing with women.

§ 48 Sentence recommendation

- Q. Your recommendation is that he does not need confinement?
- A. That's correct.
- Q. Because confinement would not rehabilitate or prevent, if it was to happen, recidivism?
- A. That's correct. It would not serve any constructive purpose at all. It would serve traditional notions of vengeance and

punishment, but it wouldn't serve a constructive purpose. He is as deterred now as he would ever be.

- Q. You don't feel that the Navy should discharge him for this offense?
- A. In my opinion, no.
- Q. So what you're telling us, then, is that as a result of this offense, the accused needs counseling?
- A. That's correct. But I can see the awkwardness this type of an offense to just receive, in effect, a slap on the wrist. There should be some kind of combination of a reminder to him as opposed to the punishment. I'm not against punishment. There's constructive punishment and destructive punishment. I'm giving you my evaluation and hoping that you, who best know the law, can come up with the right blending or mixture. I would like to see him stay in the military if he could be put on extra duty. He could still receive counseling. Everything else is done, basically, because we've done it that way for so long. I don't see the purpose of reducing him in rank, as an example. He's better off meeting his responsibilities economically if he could keep his rank and if there was some restitution to be paid. That, along with counseling and his career in the Navy would be my recommendation.

C. TESTIMONY OF PSYCHIATRIST

§ 49 Qualifications

[After introduction and identification of witness.]

- Q. What is your occupation?
- A. I am a psychiatrist.
- Q. How long have you been so employed?
- A. I finished my training in 1971. I've been in private practice of psychiatry here in San Diego for the last four years at *[address]*.
- Q. Would you please indicate to the members of the jury what your educational background is and the degrees that you've obtained?
- A. I received a B.A. in sociology at the University of Notre Dame in 1963. I then spent four years at the University of Colorado medical school and received an M.D. in 1967. I went to the University of Washington in Seattle for a year of internal medicine internship, followed by three years of psychiatric residency in Seattle and also taught in their

police academy. Then I came to San Diego as a staff psychiatrist at the Naval Hospital until 1973. I then went to UCLA for a year of postgraduate study in psychiatry and the law. At that time I taught on the psychiatric staff and also was a consultant to the UCLA law school. I then came to San Diego and I've been in the private practice of psychiatry in San Diego since that time. I'm Board certified in psychiatry and neurology and I'm on the clinical staff of a number of hospitals in town. I'm presently the president-elect of the local psychiatric society. I belong to many organizations which relate to psychiatry and the law.

Q. Could you indicate what some of those organizations might be?

A. The American Academy of Psychiatry, The Psychology-Law Society, The Western Society of Criminology, and the Pacific Forensic Institute.

Q. Do you have any work experience, other than what you've just indicated, in terms of psychiatry or medicine?

A. I've been the consultant to the San Diego State University student health service for the past three years. I've been instrumental in setting up a number of halfway houses and drug rehabilitation programs. I've been very active in teaching courses for the County and State Bar Association. I have presented papers and organized conferences for those groups.

Q. You indicated that you had about two years of Navy experience, what rank were you?

A. I was a lieutenant commander.

Q. Would you indicate, please, to the members of the jury what is involved when you talk about board certification both in psychiatric and neurological areas?

A. Each subspecialty, be it cardiology or neurology or whatever, has a particular set of examinations that one must take in order to be Board certified. What this means is that you've been accepted by your peers as having a certain amount of information or knowledge. In psychiatry and neurology, when I took the exams in 1973, we had to be in practice, for two years and then take a series of examinations. The first is a written examination and upon successful completion of this, an oral examination follows. Upon successful completion of both, then one is Board certified.

Q. Can one practice psychiatry without being Board certified?

- A. Yes.
- Q. Do you have any idea of how many of the practicing psychiatrists, let's say in California or any given location that you may be familiar with, are, in fact, Board certified?
- A. We have 291 physicians in the local psychiatric society and I suspect that there are less than 100 who have their boards.
- Q. So is Board certification a significant status within a psychiatric or other specialty in medicine?
- A. Yes.
- Q. Doctor, do you know Petty Officer *[name of defendant]*?
- A. I do.
- Q. How many times have you seen him prior to today?
- A. I saw him on four occasions.
- Q. At the time that you saw him, did you become familiar with the charges in this case?
- A. I did.

§ 50 Basis for data sources and evaluation

- Q. What was your understanding of the nature of the charges?
- A. He had been charged with a serious assault on his wife.
- Q. Based on your contacts with Petty Officer *[name of defendant]* before today and the nature of the offense and so on, did you form an opinion as to why that particular assault occurred?
- A. I have.
- Q. Would you state your opinion to the jury, please?
- A. Very simply put, it was a series of frustrations that mounted over a period of about two years. He had some ideas that, could be described as suspicious or paranoid, and he reached his breaking point; what I call his stress threshold. Each of us has a level, and when we reach that particular level we may, or may not, engage in behaviors that may, or may not, get us in trouble, but they usually are out of context for our usual sets of behavior. I think that in the relationship with his wife, because of his distress—his paranoia, he reached that point. It was in this particular psychological state that the action occurred.
- Q. In relation to that stress, that paranoia, that suspicion that you referred to, what factors in your workup of this

opinion indicated those things in the defendant?

- A. I had data from two sources. First, I reviewed data from the defendant in the clinical interviews. Then I had the opportunity to review a number of witness statements. I had some look at the other side. It appeared to me that when he came back from Antarctica in February 1977 his wife discovered that he was changing. I don't know exactly what she meant by changing but apparently a series of incidents over the months. There were a number of problems and hassles. He went to Arkansas last December where his wife told him that she was pregnant and he knew that he could not have been the father. He didn't know whether or not she really was pregnant. Upon their return from Arkansas a number of incidents occurred which were very meaningful to the defendant. For example, he was standing in the pool hall observing a situation where a man came up to his wife and grabbed her arm and said something to her that he could not hear. He reported to me, a growing sense of frustration of not being able to talk with his wife, to deal with her, or to make some sense out of their relationship at that time.
- Q. In your opinion, as a psychiatrist, is Petty Officer *[name of defendant]* likely to repeat the conduct that he displayed on the third of January when he assaulted his wife?
- A. I don't believe so.
- Q. Why is that?
- A. When one attempts to predict human behavior one is on thin ice because we cannot predict human behavior 100 percent. What I was impressed with in the defendant's past history was the fact that I could find no evidence or real mental disorganization. I could find no evidence of a serious psychological problem in his background which would lend itself to recurrent violent types of behaviors. In fact, if we go back in this man's history, all the way through his early childhood, his high school career, his naval career, one sees very, very little evidence that this man represents a violent potential or threat.
- Q. Now, am I correct in assuming that the answer you just finished giving relates, not only to the victim, but to others who would be in the same surroundings as Petty Officer *[name of defendant]*?
- A. I think that's correct.

§ 51 Basis for opinion

- Q. Was the incident itself, in your opinion, motivated by this paranoia or was there anything else, such as a criminal bent in his personality, if I can use that expression, that might have produced the assault?
- A. What do you mean by "criminal"?
- Q. Well, in other words, the desire to obtain personal gain, money for example, to obtain any immediate sexual gratification, or anything like that?
- A. No. In my examination of the defendant, I could find none of those.
- Q. Was this, in your opinion, a pretty transitory type of offense?
- A. I think so. I think that the escalation of difficulties and stress led to a very impulsive or spontaneous reaction.

§ 52 General interview procedure

- Q. Doctor, you indicated that you had four interviews with Petty Officer [name of defendant]. When were those interviews and approximately how long of a period of time did you have a chance to interview him?
- A. March 15, 22, 29, and then an update on June 1. I spent a total of about five hours with him. I also had him psychologically tested which included an additional two hours.
- Q. Now, the offense occurred in the very first part of January and your first interview took place later than the middle of March, how would that affect your ability to analyze his motivation?
- A. What I attempted to do in the evaluation was to backtrack and to gather as much data as I could about the incident itself and the time surrounding the incident. Indeed, we did have to backtrack to do that. I was not there at the time. I didn't have a tape recording, for example. I saw it through his eyes and through the witnesses' eyes. What I did do is gather information in as explicit detail as I could and then complement that by taking a past history to find out, in general, what he is like and how he has handled situations, what his successes have been, what some of his failures have been, and then supplement those findings with psychological testing and to get some idea as to what the man is like and what his thinking is like. I try then, with that data, to render an opinion as to what might have

occurred at that particular point in time.

§ 53 Motivational analysis of offense

Q. It is my understanding that most of your understanding of the events of this case came from the accused himself?

A. That's right.

Q. Could you, within reason and briefly, tell the court exactly how the accused explained the incident to you?

A. The day before would be a good starting point. You have to keep in mind that there were a series of incidents that had occurred over the months prior to this which had increased the feelings or the amount of stress and rage that was present in this man. On the day before this incident occurred, he viewed this other man come up and grab his wife's arm. A series of smaller behaviors occurred over the next 24 hours. For example, while driving his car with his wife and friend he was picking up something of their conversation that increased the suspicions that he had about his wife's fidelity. He slept on the couch that night; he got up the next morning and apparently he and his wife were still arguing. This verbal battle escalated to a point when they arrived at a friend's house, ostensibly to pick up the mail. Apparently an altercation occurred there. The fight escalated to the point that the incident occurred in the bathroom of this woman's house. His stress gave way to the impulsive and spontaneous action. If I may explain, each of us has a physical or pain threshold. Some of us can tolerate this much pain [*motioning with hands*] and some of us can tolerate this much pain [*indicating*], but there is a point when the pain gets so intense that we have to yell or scream or go seek help. The same thing happens with stress. Each one of us has a certain stress threshold, a certain point at which we simply cannot tolerate any more stress. That's the stress threshold. Each of us experiences, in our day-to-day living, a certain amount of stress. Driving over here down the freeway caused me stress. It may be unique for me compared to one of you. If we have a tragedy in our family, for example, let's say a parent dies, each of us uniquely goes through a certain amount of stress. What happens is that these little building blocks just simply add up. Most of the time, even though we are very near that stress threshold, we can still function and do fairly well. Then, it takes only one tiny thing that pushes us over that stress threshold. We then do something

that we usually don't do. For example, many times in my practice I find a very minor type of incident ~~breaks the~~ back of the individual, for example, ~~getting a parking ticket~~ or having a window broken. When we reach this stress threshold, our reaction is unique. For example, some people get headaches when they pass this point. Some people get backaches. Some people become profoundly depressed, and some people actually become psychotic at that time. Some people drive their cars too fast. Some people rob liquor stores. Again, each is individual and unique. I think that with the defendant, starting perhaps in 1977 when he came back from his tour of duty, the relationship between he and his wife was different and it was strained. My suspicion is that here was a man who, although able to tolerate certain amounts of stress in his life, had never begun to really confront the type of stress uniquely that she was causing. For example, saying to him, "There is no one else in the world that I'm going out with. I don't have a boyfriend." Well, whether or not that is true, the fact is that the defendant continued to have a lot of suspicions in his own mind about that and I think as he began to confront her he got more and more seriously stressed. The baby coming to stay with them for a while, the difficulties that they had in Arkansas, the fact that she wouldn't cook dinner for him, and the fact that they wound up with no sex life. It was at that point, the last 24 hours, a series of stresses occurred which eventually pushed him beyond his stress threshold so that he reacted in the way that he did, in a violent manner at that particular point in time. How much actual time and thought he put into doing that was not much. I think that one of the things that he was trying to do throughout this entire period was to gain control of the relationship, to put himself back into the spot of being able to do the things that he thinks are important. He was now unsuccessful as a husband. He became more and more frustrated. The stress manifested and built up to his particular stress threshold and he reacted in the way that he did.

- Q. Was that out of context for him, or was he a frustrated man for a considerable period of time?
- A. Going back many years, he was not a frustrated man. This is a man who had many successes. He had been free from significant psychological problems. He had grown up in the South and had a difficult childhood. He was very successful in high school. He finished 64th out of 300 in his

graduating class. He participated in student council activities. He had really not been violent in his past, a few fistfights, but nothing out of the ordinary. Then in his military career, he again was free from mental disorganization and had shown no real violent kinds of tendencies. What had happened here is that a series of frustrations and stresses mounted to the point that he acted or behaved in a way that is really unlike him.

§ 54 Prediction of dangerousness

- Q. You also testified that you don't believe he is likely to repeat this offense. Could you explain that in more detail?
- A. I view this as a relatively isolated experience. Given the right circumstances, the development of stress and frustrations over a period of time, he may react in this manner. What the likelihood is of his getting to that point, I don't know. It is probably minimized if he can learn enough about himself, and about women particularly, that he does not get himself into this increasingly frustrated position. If he can stay out of that, I don't think his potential for violence is very high.
- Q. Do you feel that he's changed, in terms of his stress threshold, resulting from this incident?
- A. I doubt it. I think that the legal proceedings in and of themselves are a growing experience for some people. Individuals get new insights into their behaviors because of the seriousness of what might happen with their life. He does have some sense of remorse. But, basically, the personality is set. You can modify it in bits and pieces and perhaps raise the stress threshold a bit, but not substantially.
- Q. Did you get any insights, in your interviews with him, as to why there was a change in his personality—after he returned from Antarctica?
- A. There were two things. One is the fact that he apparently had been drinking quite heavily during his tour of duty. Secondly, is that his relationship with his wife really did change upon his return. He and his wife simply did not recapture the relationship that they had prior to his departure.
- Q. Is there a generalized problem with Petty Officer [name of defendant] in relating personally with women, or was it simply his wife?

- A. I think he has some trouble with women. To my knowledge he did not have a relationship with a girlfriend or fiancée that lasted for any length of time. We do see some clues from his early life. He was raised by his grandmother; his natural mother wasn't in the picture at that time. One can draw some inferences from that data. I think what happened is that he did find a relationship with his wife. That once was a satisfying relationship. But then upon his return it moved into a power struggle. He felt that he was losing control. He didn't have much control. He was impotent to deal with her. If he were to get into a situation like that with another woman, there likely would be problems.
- Q. If the defendant were removed from the stressful situation, such as his wife, in particular, is that an important factor in your opinion that it is not likely to happen again?
- A. I think so. I think that if he and his wife were to part and do not try to reconcile, that the unique situation that he was in will dissipate and the odds of another violent episode occurring again is markedly diminished.
- Q. In your opinion, doctor, would the defendant be likely to desist from doing it again?
- A. Yes, however, I cannot make a definitive prediction as to his future conduct. As I expressed, he did show remorse and certainly he is cognizant. He is aware of what he has done and he has some feelings about it. I would think that perhaps he would have learned something by the whole legal proceedings because he's in trouble and he knows it.
- Q. Does his state of mind necessarily require, or his state of mind at the time these things happened, require hard facts that, in fact, his wife was not faithful, but rather does the perception of a person in the defendant's position play the most significant role in the state of mind?
- A. I think it's the latter, the perception. Remember the car ride where he was driving with the wife and the friend. He was very keen or attuned to some of the nuances of the conversation, some of the subtleties. He was looking and watching for slips of the tongue, for example, or any kind of comments that he may then relate to his wife's purported infidelity. I think if someone had been able to come up and offer him a signed, sealed statement which guaranteed that she had been faithful to him, that there was no infidelity, he still wouldn't believe it. At that point he still would have maintained some of his suspicions, because he had

lost control. He had really felt impotent as a person with this particular woman. And so, even though he would have been guaranteed that there was no infidelity, I think he would have held on to some of the suspicions.

§ 55 Sentence recommendation

- Q. Based on your psychiatric evaluation of the defendant, do you have an opinion as to his sentence?
- A. I am familiar with the Table of Punishments of the military code and am also aware that the maximum set forth is 20 years at hard labor (attempted murder and maiming). By the same token, similar cases in civilian courts, including family disturbances often lead to manslaughter offenses that sometime receive sentences of probation and/or short periods of custody. These types of isolated, emotional, crimes of passion can seldom be prevented or deterred. They occur in a matter of seconds in a lifestyle that otherwise has been stable and law-abiding. I concur with *[name of doctor]* analysis and evaluation that the defendant's life is the Navy and that his successful pursuit of that career, along with counseling, would offer the best hope of rehabilitation.

