Using Numbers to Attack the Sentencing Guidelines

Introduction
Defense lawyers practicing in federal court are always on the watch for effective tools. Those tools seem, at times, to be somewhat limited — lengthy government investigations and “cooperating witnesses” result in fewer trials; plea agreements extracted from defendants who have little or nothing to offer the government but who face large increases in sentencing guidelines if they exercise their trial rights result in limited appellate issues; if one is lucky enough to preserve an issue for appeal, there are a paltry number of helpful appellate decisions. When it seems like little else will come to their aid, attorneys fall back on sympathy, begging and “good relations” as their primary tools. Sometimes, all three fail to result in any leniency.

Sentencing data and data from other sources are tools which can help bolster an argument at the begging phase; they can also persuade the court to depart or to apply a favorable adjustment (or avoid an onerous one) at sentencing. Recently, a departure argument based on diminished capacity bolstered by what the prosecution called “pop psychology speculation” was analyzed by the Court (and denied) largely on the basis of an informal statistical analysis. One professional article submitted had concluded that approximately 8 to 15 million Americans suffered from Attention Deficit Disorder (ADD), that up to at least 63.5 million Americans were addicted to various substances.1 Other data suggested a correlation between the ADD diagnoses and criminal behavior and incarceration.1 The Court reasoned that, if that were true, then thousands of individuals must be incarcerated with this disorder and many courts would have faced the departure argument in the past. Since no appellate decision supported the argument, the departure was denied (in spite of the defense argument that a review of reported cases merely indicated that no such cases were appealed).

Anticipating such arguments — particularly when raised by the court sua sponte — is tricky. But using statistics in arguments can be vital to overcome a court’s view that the attorney is simply relying on those traditional tools of begging and seeking leniency without any “facts.” Faced with a Sentencing Guidelines system that attempts to reduce human behavior to its numerical equivalents, arming oneself with numbers to refute conclusions, inferences and misconceptions can actually help. Data can help persuade the prosecution to offer a move favorable plea agreement, and it can help persuade the court to apply the Sentencing Guidelines in the way that is least hurtful to a client.

What Can Data Be Used For?
Plea Agreements. Prosecutors sometimes try to extract agreements based on arguments without support. For example, many defendants sign plea agreements containing a limited waiver of appeal provision. Such provisions have uniformly been upheld by Courts of Appeal, despite the fact that the Department of Justice originally intended that such waivers were only to be considered, “in the appropriate case.” Prosecutors seized on this avenue to avoid unwanted appeals, arguing that “frivolous” appeals zapped their resources. Data proved that argument to be specious — for example, in the District of Vermont in Fiscal Year 2001 (10/1/00–9/30/01), only one sentencing appeal was listed in the Sentencing Commission’s table of “Types of Appeal in Each Circuit and District.” In Fiscal Year 2000, Vermont had 7 appeals filed — 4 concerned only sentencing issues, 1 related to conviction and sentencing and 2 appealed conviction only. Armed with those statistics, it seems it should be relatively easy to convince the powers-that-be (if not the AUSA assigned to the case), that a waiver of appeal is an onerous and unjustified provision to force on a defendant in a district where one case out of the 111 reported in a year was appealed!

Prosecutors also try to extract agreements to sentence “floors” in plea agreements simply based on their feelings about the case. Information on similarly situated defendants, and the sentences they received, can help persuade a prosecutor to lower the floor (and to perhaps lower the ceiling as well). Faced with a plea agreement in a drug case (42% of all federal cases nationally are drug cases, with a similar percentage in Vermont), a Vermont defense attorney might point out that, in 2001, the United States Sentencing Commission reported that, in the 43 drug trafficking convictions reported that year, 27 defendants were sentenced to
prison and the mean sentence was 66 months (the median was 42 months). Only 9 defendants received sentences in excess of 60 months, 6 were between 37–60 months, 2 were in the 25–36 month range and 6 were in the 13–24 month range. Four received sentences less than 12 months. Sixteen people received probationary sentences (6 with confinement attached). Although attorneys often argue their clients’ circumstances or offenses fall outside the heartland of cases thus justifying departure, these statistics could help an attorney argue that his or her client is within the heartland profile, and should not be lumped in with the 1/3 of all drug defendants who received sentences in excess of 5 years. Similarly, this kind of information can help persuade a prosecutor not to force an agreement to a Guideline enhancement.

Guideline Adjustments. The Sentencing Commission retains statistics regarding the application of various adjustments and criminal history issues. One can determine how many people received Chapter 3 adjustments, including acceptance of responsibility reductions in each offense category; how many people were sentenced as career offenders in each offense category; types of drugs, citizenship of drug offenders or immigration offenders, weapons adjustments. When a court hears that in 99.5% of all cases sentenced in 2001, no adjustment for “vulnerable victim” was applied (§3A1.1), or that in 94% of all cases sentenced in that year, no aggravating role adjustment was applied under §3B1.1, it can help your argument that your client’s case is not so far out of the ordinary that those adjustments should apply. (Of course, it is somewhat disheartening to learn that a mitigating role adjustment under §3B1.2 was applied in less than 15% of all cases that year.)

Departures. In Vermont, attorneys practice in a district with a 50% departure rate — approximately 25% for substantial assistance, 23% for other downward departures and a mere .9% for upward departures. The critical issue in a downward departure argument, of course, is whether the circumstances of the offense, or of the defendant, fall within the “heartland” case envisioned by the Sentencing Commission when it drafted the Guideline. Data regarding similar cases can help the court to make that determination.

In fraud prosecutions, less than 18% of all defendants have less than a high school education. If your client is one of them, you might argue that he or she falls outside the contemplated profile of the fraud offense, either because he or she used unsophisticated means or perhaps was vulnerable to influence. Burglars, on the other hand, are more likely to have less than a high school education and so, a well-educated burglar might have a motive other than economic deprivation for you to pursue. Finding a way to distinguish a defendant from the “heartland offender” can cause a judge to consider departure. In United States v. Flucker, the defense argued that the defendant’s low IQ and limited education rendered him vulnerable to following in his father’s footsteps, his father having been a drug dealer. Combined with his extraordinary physical attributes (“’7” 3” height), this educational deprivation left the defendant with few occupational opportunities. While USSG §5H1.2 states that educational and vocational skills are not “ordinarily relevant” in determining a sentence, the particular limitations and lack of skills of that defendant were outside the norm. Because the court agreed that those limitations had affected the defendant’s course of conduct and contributed to his commission of the offenses, it permitted the departure.

Sometimes both judges and prosecutors will try to structure a sentence to “help” the defendant. Statistics from the Bureau of Prisons can help you avoid these well-intentioned but misguided attempts to assist your client, particularly in the area of drug rehabilitation. The Bureau of Prisons 500-Hour Drug Awareness Program is thought to be a successful and worthwhile venture, and it is for many people. However, sometimes judges will set sentencing levels based on misconception. For example, the Bureau of Prisons routinely — though informally — suggests that a minimum 36 month sentence is appropriate in order for a defendant to enter and complete this program. Untrue. Inmates are sent to the program based on their release date; if an inmate has a longer sentence, he or she will be bumped to a later entry into the program, which takes about 8 months to complete. Judges will often assume that inmates will easily gain the one-year reduction in their custodial sentence that can be gained by successful completion of the program. Not true. The average inmate achieves a reduction of 6 months after completion of the program. And it is easy to fail — inmates are penalized for late arrivals and other minor infractions which can result in their expulsion from the program. And, of course, if there is any indication in their Presentence Report that a weapon was related to their offense, or that they have a violent history, they will not be eligible for the reduction at all. Extensive information is available on the Bureau of Prisons website (www.bop.gov) and individuals at the programs themselves can answer general questions, though not specific questions about a particular inmate. A review of the Bureau of Prisons statistics can help you overcome the misconceptions which underlie certain sentences.

Negative data about institutions is often hidden. The Bureau of Prisons website will not help you locate information on sexual abuse in prison, litigation about prison conditions, or suicide rates. To bolster an argument that your client is particularly susceptible to abuse in prison, or that he or she may present an unusual risk of suicide, you will have to search through websites for human rights organizations, or articles on state prisons. But finding out that the highest suicide rate in Canada is for aging adult males can persuade a
judge to depart when the defendant is a 60 year old individual charged with a child pornography offense.\textsuperscript{13}

Where the Sentencing Commission has not been able to achieve a just result (crack cocaine v. powder cocaine sentences are the prime example), their publications can be used in a “totality of the circumstances” argument. For example, it is useful to compare the guideline sentence set forth in a presentence report with the sentence which would be imposed if certain changes occurred. Although the court would not depart simply because a crack cocaine offender would receive a significantly lower sentence under the Commission’s proposal, it might help a defense attorney to show the arbitrariness of these numbers by setting out the proposed sentence to the court, arguing that but for timing and the political make-up of Congress, the client would receive a significantly reduced sentence.

**The Protect Act**

While the full impact of The PROTECT Act\textsuperscript{13} on sentencing is as yet unclear, defense attorneys and some judges are concerned about its impact on fair sentencing practices.\textsuperscript{14} Among other things, the PROTECT Act amended 28 U.S.C. §994 by requiring more detailed data on each sentence imposed by a judge to be submitted to the Sentencing Commission, varied the standard of review of downward departures and eliminated departures altogether in some limited areas. The Commission must report to Congress annually on the departures granted, and Congress can request supporting documentation provided by the Courts to the Commission.\textsuperscript{15} With increased scrutiny of judicial departure decisions by Congress, supporting a defense request with data can protect a judge’s individual decision to depart. Balking against the “numbers game” won’t help. But the addition of statistical comparisons — data which confirm a defendant’s position outside the heartland of offenders — can.

The PROTECT Act does limit the availability of departures in certain child abduction and sex offense cases, and judges must now describe with specificity the reasons for any departure. But nothing in the Act limits the information a defense or prosecuting attorney can present to the Court. Indeed, the Act only fortifies the argument that data presentation can be critical to protecting a departure on appeal. Since the PROTECT Act does alter the standard of review — now de novo for downward departures, although retaining abuse of discretion for upward departure — a downward departure easily reviewable because of the presentation of supporting data is much more likely to survive appeal.\textsuperscript{16} And courts continue to depart, both upward and downward from the Guidelines.\textsuperscript{17}

**Obtaining Data**

The challenge of obtaining data for use in sentencing arguments has been assisted by the Internet. Many organizations now routinely publish annual statistics — like the United States Sentencing Commission — that are rich with data that can help persuade a court that a defendant or an offense is or is not typical. Because the Sentencing Guidelines assign numerical equivalents to various aspects of behavior, fighting the numbers with other numbers is essential.

But be forewarned: most agencies are not forthcoming with negative information about their performance. Practitioners have to take the information given and extrapolate from it — when the Bureau of Prisons reports on how many graduates of the drug program recidivate, it is left to the practitioner to figure out on own his or her how well the program is faring. Trudging through the regulations is difficult and time-consuming.

The best information on federal sentencing practice and prosecution is the Sentencing Commission’s Annual Report and Sourcebook on Federal Sentencing Statistics. Each year the book sets forth information about each district that is useful in countering government (and court) arguments. The Sentencing Commission itself can help (and they maintain a hotline for that purpose), but staff cannot provide information regarding a specific case. For example, you can request that they provide information regarding a certain Guideline adjustment, or about the racial make-up of a certain class of offenders. Or you might want to know how many offenders convicted of fraud are under 30 (they can run such things fairly easily). You cannot get an opinion from them regarding your particular case and whether an adjustment is appropriate or a challenge might lie. Their database consists of information on every reported case from each judicial district — the Commission receives the judgment and commitment order and presentence report for every case sentenced. (Of course, their information is only as good as the information provided by the court. There are various disclaimers about the statistics at the front of the Sourcebook).

Information is entered into their data base on each offender, the Guideline utilized, the substance in a drug case, the application of any Guideline adjustments and departure information. Thinking about how your case may differ from the typical offender may give you some ideas about information you might request from the Commission to try to distinguish your case statistically, as well as emotionally. As a practitioner, you must think like the Guidelines — what aspects of your client’s history or personality are unique, what makes this offense conduct unusual. If the Commission has not published statistics on the percentage of burglaries committed by non-citizens, for example, you can request that they do if you believe you can use that information for a departure argument.

Both the Internet and agency publications can be helpful to the federal practitioner. All federal practitioners should receive the Annual Report and Sourcebook...
of Federal Sentencing Statistics from the Sentencing Commission (202-502-4500). Most of the statistics are also available via the Commission website (www.ussc.gov), but the book seems to make the presentation easier to understand. Most other agencies offer similar publications which can be obtained either by calling the agency directly or via the website.

Indeed, the Internet has become an increasingly valuable research and investigative tool. The following are particularly helpful websites:

www.bop.gov. The Bureau of Prisons website is difficult to maneuver. It contains seemingly endless recitations of regulations but helps you find inmates or figure out how to file a FOIA request. It does describe the various programs offered and does have an interesting 3-year study report on the drug program issued in September of 2000.

www.jflax.com. Jeff Flax is the national systems administrator for the federal defenders. His website links to just about every other site you might need.

www.fd.org. This is the new website of the Training Branch of the Defender Services Division. These are the people who put on the national CJA training seminars, and their website contains many publications you can download. While most are not statistical, they do contain information on prosecutions as well as general caselaw and statutory information.

http://jnet.ao.dcn. The JNET is a judicial branch network run by the Administrative Office of the U.S. Courts in Washington, D.C. Most of the information is about the actual function of the court system — budget issues, memoranda regarding fiscal and personnel issues. But you can get some information and transcripts of proceedings here.

www.usdoj.gov. The Department of Justice website is huge. It contains everything from the U.S. Attorney’s Manual and the FBI Uniform Crime Report, to the Attorney General’s Annual Report and “strategic goals” — and an appendix of acronyms. It links to the National Criminal Justice Reference website and the National Institute of Corrections website, both of which can contain useful information. There are numerous publications available on topics as varied as the Americans with Disabilities Act and Native American issues.

www.ojp.usdoj.gov/bjs. The Bureau of Justice Statistics site is full of interesting information. Crime and victim characteristics, firearms, offenders, probation and parole, criminal history records, the FBI Uniform Crime Reporter and FedStats — all can be accessed via the BJS site. Trying to get information directly from the Pretrial Services and Probation Office generally requires a FOIA request.

Conclusion

While defense attorneys usually find it distasteful to deal with the reduction of human behavior to numerical components under the Sentencing Guidelines, it is critical to fight numbers with numbers. Thinking in that way takes some adjustment — attorneys are used to presenting clients as total human beings, not merely in comparison to others or as aberrations from statistical norms. But the Guidelines demand more than a soft presentation — hard data can persuade and may be the only real tool for defense attorneys arguing against the rote application of the Guidelines against their clients. Particularly since the passage of the PROTECT Act, it can make the difference in persuading a judge to depart and in protecting that departure on appeal.

Notes

1. See ADD: Alcoholism and Other Addictions, by Wendy Richardson, M.A., L.M.F.C.C., web citation www.addult.org/adc.html. The arguments were made in United States v. Melendez, No. 2:02-Cr-13 (D. VT. 2002).
3. See Department of Justice Memorandum to all United States Attorneys, October 4, 1995, by then-Acting Assistant Attorney General John C. Kenney. (The use of waiver provisions was encouraged “in appropriate cases” with an eye toward reducing the burden of appellate and collateral litigation.)
4. Table 55, United States Sentencing Commission, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS.
5. Table 55, United States Sentencing Commission, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS.
6. United States Sentencing Commission, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS.
7. United States Sentencing Commission, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS.
8. United States Sentencing Commission, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS. It is interesting to note that in the 2001 book, the Vermont page is opposite the statistics for Utah where 91% of all defendants were sentenced within the guideline range, less than 1% received substantial assistance departures, 8.6% received other downward departures. Thus, it is critical to know your district, and craft your arguments to appeal to the sensibilities of your court. While the Sentencing Guidelines were enacted to eliminate unwarranted disparity in sentencing, the reality is that each district has its own peculiarities and arguments that succeed in one will not necessarily succeed in all.
9. United States Sentencing Commission, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS.
14. See, e.g., United States v. Kenneth Mellert, No. CR 03-0043 MHF (N.D. CA 7/30/03). Chief Judge Marilyn Patel is critical of the dictates of the PROTECT Act and of the process by which it was created. She writes, “It appears that much of Congress’ effort is prompted and advised by the Department of Justice or persons within that Department without the benefit of the accumulated wisdom of the Sentencing Commission or the Judiciary. The thrust of the
legislation is to remove more and more of the determination and discretion in sentencing from an independent judiciary and the Commission and vest it in the Department of Justice, which, of course, is a partisan in our system of justice. . . . [T]he wisdom of the years and breadth of experience accumulated by judges and the Sentencing Commission in adjudicating criminal cases and sentencing defendants is shucked for the inexperience of young prosecutors and the equally young think-tank policy makers in the legislative and executive branches.” Judge Patel departed in the case, in part because of a “cost/benefit analysis of placing defendant in an actual prison type facility rather than a community corrections facility. . . .”

One concern regarding the privacy of Presentence Reports has yet to be addressed. Until now, Presentence Reports could not be divulged without court order. Recent Bureau of Prisons regulations have even prohibited inmates from retaining copies of their own reports. This regulation was enacted to attempt to reduce threats and abuse in prison resulting from inmates demanding other inmates’ reports to see if they were “snitches.”

See United States v. VanLeer, 270 F.Supp.2d 1318 (D.Utah 2003) for one court’s discussion of what was then called “the Feeney Amendment” and the impact on day-to-day practice. (“It is . . . critically important that defense counsel understand the narrow parameters of the Feeney Amendment and continue to file motions for downward departure where appropriate. . . . This new practice (reducing findings on departure to writing with specificity) requires the court, prosecutors, and defense counsel, to think about how departure findings can best be reduced to writing expeditiously.”

See, e.g., United States v. Thurston, 338 F.3d 50 (1st Cir. 2003) (reverses downward departure based on extraordinary good works and sentencing disparity), United States v. Carter, 2003 WL 21760511, No. 02-5001 (4th Cir. 7/21/03)(affirming upward departure under USSG §2F1.1, comment. (n. 11(a)) for substantial non-monetary harm in securities case), United States v. Camejo, 333 F.3d 669 (6th Cir. 2003) (affirming upward departure for underrepresented criminal history, but remanding for consideration of downward departure based on time spent in immigration custody).