

Sentencing

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August 11, 2008

This article describes sentencing proceedings and requests for specific rulings that may ease some difficulties during confinement.

Following the presentence investigation, the next crucial step in the process comes with the sentencing hearing. The offender should consider whether he will make a statement before the judge imposes sentence. This decision, one of great consequence, must not be made in haste.

Offenders ought to appreciate the fact that before judges proceed to the bench, they attend law school and pursue careers as lawyers. Judges, better than most people, understand that attorneys are professional advocates, capable of debating either side of an issue. Indeed, sentencing judges may drift off as attorneys describe their clients as candidates for sainthood; one can be sure that even Charles Manson and other notorious felons had attorneys who argued passionately about their clients' redeeming qualities.

What judges rarely hear is an offender who expresses remorse for breaking laws against society. Yet compelling personal testimony can be much more influential than the most eloquent pleas by counsel. Defendants should realize and assess the powerful impact a formal expression of remorse can have at sentencing.

Sometimes defendants are saddled with judges who seem determined to inflict onerous sentences. Prisoners refer to them as "hanging judges." Regardless of whether a judge has a predisposition toward severity, a sincere statement from the defendant should help. By listening to others, I have heard numerous descriptions of how defendants persuaded their judges into imposing lower sentences.

While I sat in transit once in Atlanta, for example, I was locked in a holding cell with David, a young offender who had been languishing in pretrial detention for several months while

his case crawled through the legal process. He had been charged with crimes related to the distribution of drugs. Making matters worse, David was convicted of violating several prison rules during the time he served in pretrial custody awaiting the outcome of his case. Bureau of Prison officials had charged him with possession of a weapon while he was inside, and on another occasion, officials charged David with stabbing another prisoner.

I met David just after he had pleaded guilty to the original criminal charges. The presentence investigation report was not favorable. After describing the serious disciplinary violations David received while in pretrial detention, the probation officer urged the court to impose an enhanced sentence. The government wanted David to serve a 20-year term, even though the mandatory-minimum sentence could have meant a term of 10 years.

David was slight of build and only 18-years-old. Although he was barely out of adolescence, he was being held in a prison for men, sharing space with murderers, rapists, and other predatory offenders. He felt as though the lawyer representing him did not have an interest in the case, and David did not have support from anyone in the community beyond prison walls. He had been reared in a house where his mother was addicted to heroin and David said that he never knew his biological father. Scores of men came through his mother's life, none of whom were positive role models.

As I counseled David on steps he could take during confinement to prepare for a better life upon release, I could sense the fear he had about the lengthy sentence he felt certain the judge was going to impose. When I asked David what he expected to say to the judge during the sentencing hearing, he said that he would be too nervous to say anything. I offered to help David prepare.

David and I had about three weeks to work together before his sentencing hearing. He told me the story of his life. Instead of being a stigma in his family, crime was the accepted activity to provide subsistence. He never had a chance. We crafted a speech to explain his

background and to describe how those early influences led to his current predicament. The speech was not meant to excuse the choices that David had made, but rather to put them into context and show that he welcomed the opportunity to change.

The speech required ten pages to write. Having quit school during the 10th grade, the speech was the most substantial work David had ever done. Not only did the speech describe his background, but David also described the prison experience, telling how others had attempted to rape him and how he had kept weapons to protect himself and to ward off future attacks. David implored the judge to impose a term that would allow him to serve time in a less volatile environment. He stated how eager he was to educate himself and to develop vocational skills so that he would have more opportunities to function in society upon his release.

After drafting the speech, David rehearsed it over and over to practice his delivery. At first he was nervous, though as I told him why my experience suggested that the speech might give him a second chance at life, David persisted. We worked on committing one sentence at a time to his memory. He kept at it and in time David was delivering entire paragraphs without looking at the page. Once he had the first page down, he felt more confident about the second. Then David had three pages, and four. Within a week David had the entire ten-page speech in his head.

He polished his delivery, devoting several hours each day. By the day of his sentencing hearing David was ready. The effort gave him a sense of confidence, empowered him to face whatever sentence the judge imposed. Rather than leaving his fate in the hands of an attorney that lacked any spirit to defend him, David intended to show the judge that they shared a common humanity and that he was a worthy candidate for compassion.

David's effort paid off. Although he was not able to muster a single source of community support to testify on his behalf, David's delivery moved the court. When he returned to the cell we shared after his court date, he told me that his legs had been quivering as he made his speech

and that he may have confused some of the order. The judge glared at him with severity at first, he said, but as David articulated his story that gaze softened. When David finished speaking, the judge asked some questions. On account of the hundreds of hours David had spent in preparation, he felt prepared to respond.

Apparently the judge liked David's strategy. Before the gavel came down, the judge sentenced David to 10 years, which was the minimum sentence allowable by law. Had the minimum-mandatory law not existed, the judge suggested that he would have imposed a lower term. Further, the judge urged the Bureau of Prisons to designate David to serve his term in a facility with the least amount of volatility possible.

There was no way of knowing what type of sentence David would have received had he not expressed remorse at sentencing. Yet with the prosecutor and the PSI report recommending a 20-year term, and with the defense attorney's apathy, the interest David showed may have been the persuasive factor that moved his judge to leniency.

Although an offender's opportunity to address the court at sentencing may influence the judge's sentence, many offenders choose to remain silent and allow counsel to speak for them. In this prisoner's opinion, such a decision is a mistake, one that characteristically can be measured in a longer prison sentence.

Preparing for Sentencing

During the many years that I have been confined, I've frequently been asked to assist other prisoners who were preparing post-conviction motions. Through those motions, the prisoners hoped the sentencing judge would recognize an injustice and correct it by reducing the offender's sentence. Assisting other prisoners as they prepared their legal motions has given me an opportunity to read transcripts from hundreds of sentencing proceedings. Again and again, I read sentencing transcripts where judges state on the record that they were imposing the lowest

possible sentence as a result of the offender's acceptance of responsibility, citing the statement as evidence of the offender's remorse or contrition.

The U.S. Sentencing Guidelines, which federal judges must follow when sentencing all crimes committed after November 1, 1987, provide a sentencing range for almost every offense. At the low end of the guidelines, sentencing judges have the discretion to impose a monetary fine or probation in lieu of a prison sentence; at the higher end of the guidelines, a judge has the discretion to impose a sentence within a range of many years. There is no question that receiving the lower sentence is in the defendant's best interests, and an offender's statement made at sentencing may sway the judge to impose a sentence at the low end of his sentencing discretion.

Offenders who choose not to address the court at sentencing usually make this decision in an effort to preserve appellate rights. The professors who wrote *Modern Criminal Procedure*, however, do not inspire much hope for relief on appeal. The authors state that, according to that legal treatise, the appellate courts give great deference to the trial court and the decision of the jury. Indeed, fewer than 11 percent of all criminal convictions that resulted from a jury trial are reversed on appeal. Finding relief through post-conviction procedures is even less fruitful, as courts grant relief to fewer than five percent of the post-conviction motions they receive. Incidentally, whereas appeals are considered by a higher court, and decided by a panel of judges who have no previous exposure to the case, post-conviction procedures generally occur before the trial or sentencing judge.

Unfortunately, offenders learn too late that every passing day in the criminal justice system renders an offender's conviction and sentence more immutable. The best time to influence a judge's sentencing decision is before the sentence is imposed, because in nine out of ten cases, offenders never have an opportunity to appear before their sentencing judge again. Accordingly, my experience and observations suggest that offenders should take advantage of every opportunity they have to express remorse for their criminal behavior.

Sentencing Packages

An offender ought to work together with his attorney or a post-conviction specialist in preparing a sentencing package for the judge. The package should contain any type of information the offender has available that might demonstrate the offender's commitment to leading a crime-free, productive life upon release from confinement. The offender might look for opportunities to atone for his criminal actions prior to sentencing, and document those efforts for the sentencing judge. The offender should make every effort to distinguish himself from the scores of felons who present themselves before the bench each week for sentencing, and he can do that by not only expressing remorse, but by providing verification of the efforts he has made to reconcile with his community.

Richard, a friend I made at Lompoc camp, described an elaborate sentencing package he put together. He had been the chief executive officer of a publicly traded company, and he served a nine-month sentence for inappropriately extending his quarter by a few days to meet sales benchmarks. After a prolonged battle with his board of directors, the board ousted Richard from his position and he soon was enmeshed in a skirmish with federal authorities.

After pleading guilty to a violation of securities laws that could have exposed Richard to five years imprisonment, his attorney recommended a team of professionals to help Richard construct elaborate documentation to support Richard's plea for leniency at sentencing.

In the report, a psychiatrist showed that despite his corporate position, Richard suffered from depression and attention deficit disorder. As CEO, Richard bore ultimate responsibility for assuring the public markets that financial records were in order, yet the company's chief financial officer had deceived him with fraudulent reports. The sentencing package helped convince the judge that Richard did not intentionally mislead investors, even though he was negligent for authenticating reports that his CFO had prepared.

Besides providing a plausible narrative of the defendant's version of the crime, Richard's sentencing package highlighted contributions he had made to society. He had spent years mentoring at-risk adolescents. He initiated a job program in his company to encourage productivity and advancement for those on welfare. Richard sponsored an athletic league in the inner city and he volunteered his time as a coach. He had a long history of active community involvement.

The package proved especially helpful, as the judge made clear during Richard's sentencing hearing. While the prosecutor harangued on the reasons that the judge should smack Richard with a lengthy term, the judge gestured to the sentencing package and asked whether the prosecutor had read the report. When she said that she had not, the judge said that he had read every word. He found it compelling, and he went out of his way to highlight some of the comments made through letters in support of Richard. When the judge imposed a term of nine months, the prosecutor jumped from her seat to object. Nevertheless, the sentence stood. The judge then asked Richard whether he would like to remain home with his family for the holidays. When Richard said that he would, the judge ordered that Richard would not have to self-surrender to begin serving his term until four months later.

Richard credits the leniency he received at sentencing to the sentencing package his experts prepared on his behalf.

Character references attesting to an offender's contributions to the community should be included in the sentencing package. It may prove even more beneficial if those witnesses will appear at the sentencing hearing and testify on the offender's good citizenship. Most important, I think, is the offender's written statement to show the sentencing judge that although the offender stands guilty of committing a crime, he is not an enemy of society. Offenders ought to make every effort *before sentencing* to show respect for the law and to substantiate claims of contrition. Once in prison, the options for obtaining sentence reductions vanish.

What Happens at the Sentencing Hearing?

At the sentencing hearing, the offender's attorney, the prosecuting attorney, and the probation officer will take turns arguing their issues regarding the presentence investigation report. The next order of business will concern sentencing, with the prosecutor requesting a specific sentence and the defense attorney providing reasons the sentence should be less than the prosecutor's recommendation. Then, before the judge issues the sentence, the offender will have an opportunity to address the court.

Although each offender must make his own decision, I am convinced the benefits associated with an acceptance of responsibility and an expression of remorse far outweigh the perceived benefits of standing stone-faced before a sentencing judge. Eloquence or flowery prose is not nearly as important as sincerity, and offenders may be certain the sentencing judge is not gullible. In choosing to speak, the best policy is to be truthful and unpretentious

After Sentencing

Once the sentence is imposed, the defendant may ask the judge to rule on collateral matters. Offenders being sentenced to federal prison may ask for clarification on a few issues. One might include a payment schedule for monetary penalties associated with the sentence. Another matter might be for the defendant to request a recommendation for a particular institution. Although such a request may not be binding on the Bureau of Prisons, administrators may respect the judge's wishes. Those whose who have been free on bond may also request permission to self-surrender.

Although no one wants to report to prison, those who have to serve time would find it much less aggravating to self-surrender to the institution. During the time I have served, I've known inmates who have self-surrendered to minimum-security camps, low security prisons, and medium-security prisons. Individuals would have to bear the expense of travel to their designated facility, though that would be a bargain compared to the stress they would endure by traveling in

chains through various jails and holding facilities. If given the opportunity, my experience suggests that inmates who are able should request permission to self-surrender to the prison that administrators have assigned.

Financial Responsibility Plan (FRP)

When judges impose monetary fines or restitution as a part of the sentence, prison administrators will attempt to collect on that debt through the Inmate Financial Responsibility Plan (IFRP). Although administrators say IFRP participation is voluntary, severe punishments are imposed on those who do not have the resources available to make their scheduled payments. Inmates who successfully comply with the IFRP program must maintain sufficient funds in their commissary accounts to meet all regularly scheduled payments.

Administrators compute the payment terms in accordance with the quantity of money that has passed through the inmate's account over the prior six months. All inmates are required to work, and nominal earnings are deposited into the inmate's account each month. When calculating the amount to be collected, administrators include money that an inmate earns as well as any money that family or friends may have sent in to help the inmate meet living expenses inside.

In an effort to avoid the hassles associated with the IFRP program, defendants at the sentencing hearing may request the judge to order that the monetary penalties not become due until after the individual completes his sentence. It is a discretionary decision that the judge has the authority to make. I have known many inmates who succeeded in persuading the judge to issue such an order. Not having to worry about IFRP harassment freed them from significant complications as they served their time.

Specific Institutions

Also, the sentencing judge may heed an offender's request to serve his sentence in a particular institution. Some judges will agree to recommend a facility that is close to the

defendant's home, or one that offers particular programs or services in which the offender wants to participate. Defendants should realize, however, that the prison system is crowded and many factors influence the facility where the offender will serve his time. A sentencing judge's recommendation is helpful, and those responsible for designating prisoners respect a judge's influence. Once one is remanded "to the custody of the Attorney General," however, the judge has surrendered jurisdiction and the decision of where to hold a prisoner, ultimately, is left to the discretion of prison administrators. Chance, rather than logic, often will be the more powerful determinant.