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Reflections of a First-Time Expert Witness

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On January 2, 2013, I testified as an expert witness at a sentencing hearing in federal district court. It was my first time being qualified as an expert, and my only time testifying in court in any capacity. A couple of months earlier, I had been contacted by an Assistant Federal Public Defender (AFPD) who asked if I'd be interested in being retained as an expert. She was handling the sentencing of a man convicted of child pornography possession, receipt, and transportation, and had read my work criticizing the development of the Federal Sentencing Guidelines provisions for these offenses.[1] Rather than merely making her usual arguments in a sentencing memorandum, or having an expert submit a report, the AFPD thought that she would have a better chance of making an impression on the sentencing judge with a live expert witness. I was excited about the opportunity to move my academic work into the courtroom, so I happily accepted her offer.

I spent the next two months reviewing the documents that the AFPD sent me periodically, and reacquainting myself with my own research on the flawed history and development of the child pornography Guidelines. In this particular case, the defendant was subject to all of the usual enhancements: a two-level increase for material involving a prepubescent minor; a four-level increase for material that depicted sadistic or masochistic conduct; a two-level increase for the use of a computer; and a five-level increase for the offense involving 600 or more images. This was all run of the mill. The unusual aspect of this case was that, unlike most other defendants, this defendant did not receive an adjustment for acceptance of responsibility. He'd opted to go to trial and maintain his innocence, which precluded him from getting any credit for admitting to what he'd been convicted of doing. Ultimately, the defendant, who had no criminal history, faced a Guideline range of 210 to 262 months. Since the statutory maximum for the most severe offense (receipt of child pornography) was twenty years, the recommended sentence had to be below 240 months. The Government was seeking 210 to 240 months of imprisonment. The sentence recommended by the Probation Office in this case was 210 months of imprisonment—yes, seventeen and a half years. In my first discussion with the AFPD, she was concerned about the possible sentence her client would receive and feared that it would be the recommended 210 months. But she thought trying out live expert testimony couldn't hurt. So, I began thinking about ways to articulate my views on the unreasonableness of the Guidelines' enhancements.

About a month before the hearing, the AFPD sent me a copy of the Government's response to the Defense's sentencing memo. I read the document and realized that there was nothing in it that required adjustment of my notes at all. The Government had taken the position that all of the Presentence Report's (PSR) Guideline enhancements applied to the defendant. That was correct. My view was that, though all of the identified enhancements technically applied to the defendant, the problem was that the enhancements themselves were faulty. I planned to explain to the Court that the enhancements were not tied to any reasoned understanding about the harm or risk of harm created by such offenders—that ultimately the enhancements inflated the Guidelines range without giving any real assurance that the resulting Guidelines sentence would achieve any legitimate sentencing purpose. While the Government was arguing procedure, I would focus on substantive reasonableness.

Eventually, the morning of the hearing arrived. I met with the AFPD for breakfast to review how things would proceed. And then we were off to court. Once in court, after the Government and Defense counsel hammered out a few objections to the PSR, I was called as the first witness. I walked to the witness stand with my folder of notes and was sworn in. Then, the process of qualifying me as an expert began. Up to this point, the Government had filed no objection to my "expertise," so I wasn't sure what to expect. The AFPD went through my relevant background—education, clerkships, teaching experience, and publications. It was painless. And then the Assistant U.S. Attorney (AUSA) began her questioning:

"How many years have you been researching sentencing issues?"

"Six."

"And how many papers have you written specifically about child pornography"

"One full article, but that has led me to be invited to give talks to federal judges and before other professional audiences. I've been the guest editor of an issue of the *Federal Sentencing Reporter* on child pornography possession sentencing ...." I droned on, trying to ensure that my one child pornography article would receive expert status.

I'm paraphrasing, of course, but you get the idea. The questioning proceeded along those lines for just a few more questions and that was it. The AFPD moved for me to be accepted as an expert. The judge asked whether the

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Government had any objection, and the AUSA had none. Phew—I was an expert!

And then the substantive questioning began.

On direct examination, the AFPD walked me through each objectionable Guidelines enhancement that applied to the defendant's case. I carefully answered questions about what my research had led me to believe about the deficiencies in the development of the child pornography Guidelines enhancements and adjustments. I had, of course, shared these views in a number of venues—scholarly publications, Continuing Legal Education classes, symposia, conferences, workshops, and such. However, speaking about these issues in court was a particular pleasure. Just as in my other presentations, I was excited to be talking about issues that were important to me. Testifying in court, though, carried with it the high stakes of a concrete outcome in the life of a real person. From the time that I'd become an academic, I'd hoped that my research would actually affect sentencing law and policy in some way. So it was especially thrilling to think that my research might have an outcome in even one individual case.

The direct examination was lengthy, but it allowed me to express many of my opinions about the relevant Guidelines provisions. The AFPD was thorough and did an excellent job covering every problematic aspect of the sentence her client was facing. None of this was surprising to me. It was the cross-examination that held all of the mystery.

The AUSA came out pretty strong in her first few questions. I'd made a point in my direct testimony that, because of the Guidelines enhancements, non-contact child pornography offenses could sometimes be punished more harshly than certain contact sexual offenses against children. This irrational outcome is due to the haphazard nature in which the child pornography Guidelines developed. Her opening point was that there are also contact sexual offenses against children that are punished more harshly than non-contact child pornography offenses. I remembered that it was not my place to be combative or defensive, so I acknowledged the truth in her statements and we moved on.

From there, though the AUSA brought up tough points, her contentions mostly followed the Government's sentencing memo, focusing on the technical application of the enhancements. This left me a lot of room to explain my position about the unreasonableness of the Guidelines for these offenses, despite their procedural appropriateness to the Guidelines calculation. A few times during the cross-examination, the Defense objected to the AUSA's questions. Oftentimes those objections were sustained because the questions went beyond my expertise. A few times the judge directed me to answer, and I did so within the parameters of my knowledge about the case. When it was all done, I felt pretty comfortable that I'd gotten my views across effectively.

The only part of the experience that left me a bit unsure was after cross-examination when the judge himself began to question me directly. His question was along these lines: "Professor, in your opinion, what should I do in this case?" I was hesitant to advise the judge on what the exact sentence should be, given that my expertise was about Guidelines in general, not about the particularities of this defendant's case. So, my answer explained departures from the Guidelines, but the judge stopped me mid-sentence. "I know about variances and departures, but what do you think I should do in this case?" And then something clicked and I suddenly had a new perspective of my role as an expert witness, and perhaps on the utility of any expert witness at a sentencing hearing.

I had been thinking about my purpose at the hearing as being to inform the judge about my research on the Federal Sentencing Guidelines. And, I suppose that in some instances, educating the bench is the proper and necessary role of an expert. However, especially in the sentencing space, I came to understand that I was also legitimizing the judge's decision to depart from the Sentencing Guidelines. I'd just given a lengthy explanation in open court of everything that was wrong with the Guidelines for all in the audience to hear and for the record to reflect. Now the judge was asking me what he should do, though I had the feeling that he already knew what he could and planned to do in this case. So, after a couple of restatements of the question by the judge, I finally answered in this manner, "Your honor, because your job ultimately is to impose a reasonable sentence, you should feel comfortable departing from the applicable Guidelines range in this case. I've just explained why the Guidelines result in unreasonable sentences in most of these types of cases. And, so, in my opinion, you should take into account all of those deficiencies when you consider what a reasonable sentence would be in this particular case." The judge said thank you, took a recess, and that was that.

My entire testimony took close to an hour and a half. During recess I was ushered out of the courtroom and transported back to my hotel. Before I left, the AFPD promised to update me on the outcome of the hearing when she was done with her work for the day. So, I just waited until I got a call later that evening.

When she called, the AFPD was ecstatic as she explained that the judge imposed the five year mandatory minimum sentence! She was completely shocked and thanked me for my testimony. Of course, I will never know what role, if any, my testimony played in this outcome. I was happy just to be a part of the process. The Defense team had put together a comprehensive sentencing memo and had approached the case with extraordinary consideration. Additionally, the defendant had several medical conditions that would render time in prison difficult, and that I'm sure had a bearing on the judge's decision. The defendant also had an upstanding disaster relief service record, and so there were many reasons to mitigate his punishment. However, as I reflect on the worth of sentencing experts, my experience leaves me with a belief that experts should be used more often, especially in advisory guideline systems like the federal system. Certainly, a sentencing expert can relay

valuable information uncovered through her sentencing research. More importantly, though, a sentencing expert can, perhaps, inspire the court to explore appropriate sentences outside of Guidelines ranges. Consciously or unconsciously, judges may desire support before stepping out on such a journey. I think this is a hugely important function, and counsel in criminal cases should seriously consider this option. I hope that others who conduct sentencing research will have the opportunity to serve in this way as well.

Note

[1] In particular, she'd come across my article, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 Rich. J.L. & Tech. 8 (2010), *available at* http://jolt.richmond.edu/v16i3/article8.pdf.