CERTIFICATE OF ATTENDANCE

Nuts & Bolts Series: 2025 Criminal Seminar

Presented By:
THE FEDERAL BAR ASSOCIATION, WILLIAM D. BROWNING TUCSON CHAPTER

Thursday, May 14, 2025
11:30 am - 2:00 PM
District Court of Arizona (Tucson) - Jury Assembly Room

Panel A: Best Practices for Working with the U.S. Probation Office (60 min.)

Panelists:

- Wendy Cotner, Supervisor, U.S. Probation Office; and
- Allison Watson, Officer, U.S. Probation Office

Panel B: Persuasive Sentencing Memoranda and Advocacy (60 min.)

Panelists:

- Hon. John C. Hinderaker, U.S. District Court Judge;
- Jay Marble, Assistant Federal Public Defender;
- Jessica Turk, CJA Resource Counsel, District of Arizona; and
- Robert Fellrath, Assistant United States Attorney

The State Bar of Arizona does not approve or accredit CLE activities for the Mandatory Continuing Legal Education requirement. This activity may qualify for up to **2.0 hour(s)** toward your annual CLE requirement for the State Bar of Arizona, including 0 hour(s) of professional responsibility. Introductory remarks, breaks, lunch, etc. are not included in the computation of credit.

By signing below, I certify that I attended the CLE described above and am entitled to claim one or two hours of Continuing Legal Education credit.

______________________________ ______________

Attendee's Signature Date

Please circle one: Student Instructor

THE STATE BAR OF ARIZONA DOES NOT MAINTAIN CLE RECORDS FOR ATTORNEYS -- KEEP THIS IN YOUR CLE FILE. DO NOT SEND THIS CERTIFICATE TO THE STATE BAR OF ARIZONA UNLESS YOU ARE AUDITED.

Agenda

11:30 AM - 11:40 AM
Opening Remarks (10 minutes)
Speaker: Hon. Jennifer G. Zipps, Chief Judge, District of Arizona
Welcome attendees and introduction of panelists

11:40 AM - 12:40 PM
Panel A: Best Practices for Working with the U.S. Probation Office (60 min.)
Moderator: Caroline Allen, Assistant United States Attorney

- Panelists:
  - Wendy Cotner, Supervisor, U.S. Probation Office; and
  - Allison Watson, Officer, U.S. Probation Office
- Discussion topics:
  - Overview: key components of the PSR, timeline for PSR preparation, the use of risk assessments (e.g., COMPAS, STATIC-99) in the PSR process, considerations regarding individuals with mental health issues, substance abuse problems, and developmental disabilities
  - Challenging the PSR: common errors in the PSR and how to spot them, common mistakes in raising objections, the inclusion of victim impact statements in the PSR
  - Recent/upcoming changes: updates to how certain offenses are categorized, proposed 2025 amendments to the Sentencing Guidelines

12:40 PM - 1:00 PM
Break (20 minutes)
Lunch and refreshments available

1:00 PM - 2:00 PM
Panel B: Persuasive Sentencing Memoranda and Advocacy (60 min.)
Moderator: Michael Perez-Lizano, Assistant United States Attorney

- Panelists:
  - Hon. John C. Hinderaker, U.S. District Court Judge;
  - Jay Marble, Assistant Federal Public Defender;
  - Jessica Turk, CJA Resource Counsel, District of Arizona; and
  - Robert Fellrath, Assistant United States Attorney
- Discussion topics:
  - Purpose and structure of persuasive sentencing memoranda: core components and effective organization; presenting mitigating and aggravating factors, selecting relevant and/or distinguishing adverse precedent, integrating victim impact statements, analyzing successful sentencing memoranda
  - Tone and style of courtroom advocacy: balancing advocacy with professionalism, addressing the judge’s concerns, responding to unfavorable facts or evidence
  - Ethical considerations in sentencing advocacy: balancing the use of sensitive client information, navigating conflicts between client interests and ethical obligations, when to incorporate expert opinions (e.g., psychological evaluations, addiction assessments, vocational experts)

BIOGRAPHIES

HON. JOHN C. HINDERAKER

District Judge John C. Hinderaker received a Bachelor of Arts with honors in business economics from the University of California, Santa Barbara in 1991. He graduated *magna cum laude* from the University of Arizona James E. College of Law in 1996 where he was on the Arizona Law Review and Order of the Coif. In 1996, Judge Hinderaker clerked for United States District Judge John M. Roll and from 1996 to 1997 he clerked for United States Magistrate Judge Raymond T. Terlizzi. Judge Hinderaker joined Lewis and Roca in 1998 and was elected partner in 2006. At Lewis and Roca Judge Hinderaker practiced civil litigation focusing on real estate, land use, eminent domain, commercial and construction matters.

In 2018, Governor Doug Ducey appointed Judge Hinderaker to the Arizona Superior Court in Pima County. Judge Hinderaker sat on both the family and criminal law benches during his tenure on the Superior Court. President Donald J. Trump nominated Judge Hinderaker to the United States District Court for the District of Arizona on December 2, 2019. He received his commission on September 23, 2020.

JESSICA TURK

Jessica Turk has served as CJA Resource Counsel since June of 2024. Prior to her present position, Jessica practiced criminal indigent defense for 16 years. For the majority of those 16 years, she managed a solo law practice that focused solely on case appointments made through the Criminal Justice Act. Aside from CJA work, Jessica also has been employed as a public defender at the Hawaii Federal Defender Office, Pascua Yaqui Tribe, and Gila River Indian Community. Jessica's commitment to indigent defense comes from her deeply held belief in the principles that serve as the foundation of the Sixth Amendment. Jessica has also served as a Ninth Circuit Lawyer Representative since 2022. Aside from law, Jessica is an avid basketball mom who loves to get outside and travel.

JAY MARBLE

Jay Marble has been a Federal Public Defender since 2006 and a supervisor since 2021. He also worked at the Pima County Public Defender's Office for 4 ½ years before making the transition to Federal Court.

ROBERT FELLRATH

Rob Fellrath went to undergrad and law school at the University of Notre Dame. He began his legal career as an active duty Judge Advocate in the Army, where he served for seven years as a trial counsel and defense counsel. He then joined the Federal Public Defender's Office in Vermont, where he worked for about a year and a half before he joined the U.S. Attorney's Office in Arizona in September 2008. He has been with the U.S. Attorney's Office from 2008 – 2018 and 2019 – present. He spent a little less than a year serving as an Immigration Judge in Los Angeles during that break. He has served as a supervisor at the USAO from 2012 – 2018 and 2022 – 2025. Rob also continued his career in the Army Reserve, where he served as a defense counsel, team chief, and military judge.

ALLISON WATSON

I've been in Tucson over 30 years. I graduated from the University of Arizona with a bachelor's degree in public administration. As a new graduate with no work history, I searched for a job and landed myself in prison. I worked as a corrections officer at a maximum-security facility in Tucson for approximately 3 years. One day, an inmate told me I would have made a good probation officer, and so I applied that night to Pima County Juvenile Probation. I worked at Pima County Juvenile Court as a probation officer from 2016 until 2020 and managed a juvenile sex offender caseload for the last two years. In 2020, I became a Presentence Probation Officer Assistant at U.S. District Court of Arizona and was promoted to Probation Officer the following year. I have three beautiful children who are my world, and I enjoy the work I do.

WENDY COTNER

I'm originally from Jacksonville, FL. I obtained my bachelor's in psychology from the University of North Florida, and have an M.A. in criminal justice from ASU. I began my career as a probation officer with Maricopa County Adult Probation and became a federal probation officer in Tucson in July 2003. I transferred to the Northern District of Florida and worked in the Gainesville office (Go Gators 😊) for one year circa 2010. It's a small office and I was the sole presentence writer. I transferred back to Tucson in 2011. I was promoted to sentencing guidelines specialist in 2015 and supervisory USPO in 2017. I worked part-time for roughly five years of my career to take care of my three boys, who are now 25, 19, and almost 15.

Presentence Investigation: The Basics

Allison Watson, U.S. Probation Officer
Wendy Cotner, Supervisory U.S. Probation Officer

Deadlines

- Officers typically have 30 days to complete the presentence investigation
- Rule 32(e)(2) requires the presentence report be given to the defendant, the defendant's attorney, and counsel for the government at least 35 days before sentencing (unless the defendant waives time)
- Juvenile PSR:

Under18 U.S.C. § 5037(a) the disposition hearing must occur within 20 court days of the hearing establishing delinquency.

Given the limited amount of time available to complete the investigation, disclosure to the Court and parties at least three days prior to the disposition hearing (no Draft PSR)

Investigation Process

- Enroll in ECF notifications within two business days of assignment
- Contact defense counsel within two business and ***attempt*** to schedule presentence interview
- Send presentence paperwork to defendant, conduct interview
- The investigation:
  - Collect collateral resources from other courts, districts, law enforcement agencies, research caselaw if necessary, etc. (criminal history)
  - Request case specific documents (DCS, military records)
  - Contact victim advocate/send out victim paperwork
  - Verify: education, work history, medical history (review available evaluations), contact collateral
  - Review disclosure and reach out to AUSA or case agent if needed
- Submit report to a supervisor for review, make edits as necessary

Possible Delays – PSR considerations

- Defense/defendant/officer availability, defendant cooperation
- CCA cancellations
- Technical issues
- Safety Valve eligibility
- Not receiving signed release forms from defendant
- Criminal history records not received or insufficient records received
- Follow up investigation needed

FJC core competency for experienced probation officers:
Confidence in Decision Making

Makes individualized recommendations based on law, judiciary policy, and principles supported by research.

Clearly articulates relevant reasons for recommendations that are grounded in law, policy, research, and individual characteristics.

Maintains reasoned position in spite of pressure from competing stakeholders

Distinguishes factual information from speculation and opinion

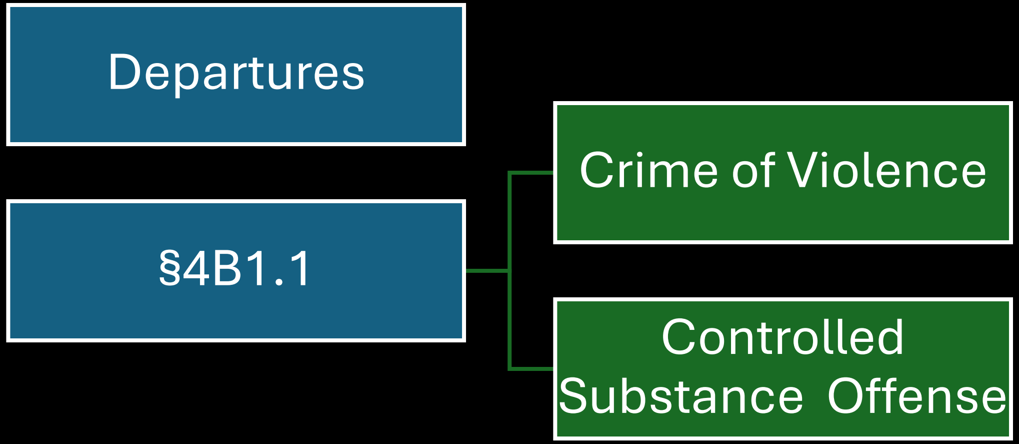
Additional Considerations and Tools

- Mental health/cognitive/substance use issues
- Risk assessments
  - Correctional Offender Management Profile for Alternative Sanctions – COMPAS:
    - Particularly accurate in identifying high-risk offenders
    - Stronger predictive accuracy for males rather than females
  - STATIC-99
    - Baseline assessment to predict sexual recidivism
- Judiciary Sentencing Information (JSIN) tool

Sentencing Guideline Amendments

- USSG §1B1.3
  - Acquitted conduct removed from the scope of relevant conduct in 2024

Proposed 2025 Sentencing Guideline Amendments



The *Booker* Three-Step Process

- After the Supreme Court's decision in Booker, just as before it, a sentencing court must correctly calculate a defendant's guideline range and then consider whether there is any basis set forth in the Guidelines Manual to "depart" from the range. However, the practical effect of Booker was to add a third step in the sentencing process—namely, the court's decision whether, after considering all of the factors in 18 U.S.C. § 3553(a), a sentence outside of the applicable guideline range should be imposed as a "variance."

This *Booker* “three-step process” requires “respectful consideration” of the Guidelines Manual in all three steps:

1) in initially calculating the sentencing range;

(2) in considering policy statements or commentary in the Guidelines Manual about departures from the guideline range; and

(3) in considering all of the§ 3553(a) factors (which include the guidelines, commentary, and any relevant policy statements in the Guidelines Manual) in deciding what sentence to impose, whether within the applicable range, or whether as a departure or as a variance (or as both).

Return to The Two-step Process

- 1) Calculate the sentencing range
- 2) Consider all of the 18 U.S.C. § 3553(a) factors (which include the guidelines, commentary, and any relevant policy statements in the Guidelines Manual) in deciding what sentence to impose, whether within the applicable range, or whether as a variance.

Comments?
Questions?

PERSUASIVE SENTENCING MEMORANDA AND ADVOCACY

Defense Perspective

But first, a few comments on the PSI process:

- Get to know your client well in advance of the PSI
- Prepare your client
- Use the PSI prep packet
- Think about possible conditions of probation or SR as well as BOP issues
- Anticipate possible objections
- Why a mitigation psychological evaluation might be helpful prior to the PSI in some cases (request specifics)
- Use of other experts
- Gather certain other documents ahead of the PSI

Before you begin writing, consider:

Know your audience—what kind of sentencing memo best suits your assigned DJ

Identifying key aggravating and mitigating factors

For mitigators, reference USSG to help brainstorm and organize (USSG § 4A1.3-overstatement of criminal history; App. Note. 21 to USSG § 2B1.1-overstatement of loss; 5G1.3: Credit for state prison for relevant conduct; 5H1.1 Age; 5H1.3 Mental/ Emotional Health; 5H1.4: Physical Condition; 5H1.11: Military Service; 5K2.13: Diminished Capacity)

Gathering support letters and other materials first

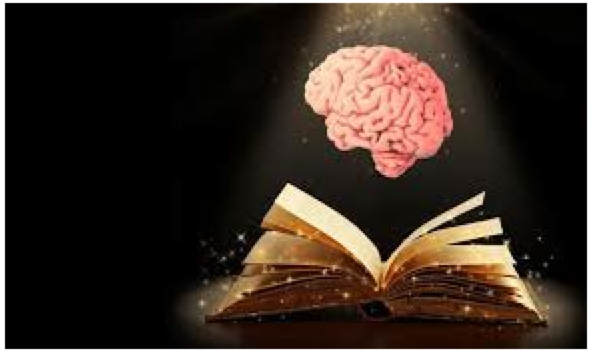
Work with your client as they prepare a letter—sentencing materials should compliment each other

Crafting a release plan with your client and possibly an expert

Capture and Hold Attention

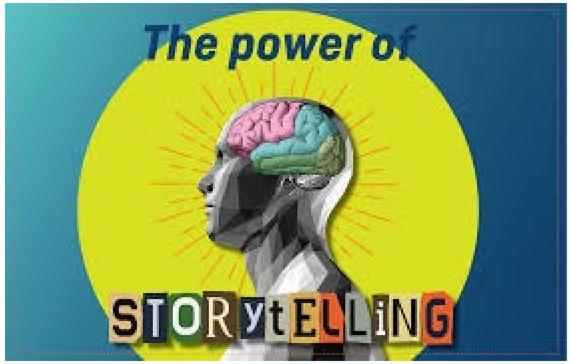
Less Copy and Paste

More Storytelling



The Legal Framework

- Should I cite general sentencing case law in my sentencing memorandum?
  - Opinion: it's not necessary in most cases. Instead, start with your best mitigation evidence and tell your client's story.
  - Some cases may require citation to the U.S. Sentencing Guidelines or case law.
    - Examples: imperfect duress under §5K2.12, other Specific Offender Characteristics under §5H of the Guidelines, and downward departures or variances under Chapters 3 and 4 of the Guidelines.
  - Focus on your client's individual circumstances and mitigation. Try to connect the mitigation with 18 U.S.C. §3553(a) factors.
- To seal or not to seal? How to seal.



Humans use stories to understand and construct reality.

Scientific studies show that:

1. Humans recall facts longer if they are part of a larger narrative

2. Stories boost the production of both cortisol (encouraging attentiveness) and oxytocin (encouraging connection)

Often, our client's stories are told through the 18 U.S.C. § 3553(a) factors. Doing so reminds the Court that your client did not commit his/her offense in a vacuum, but as an event in the context of his/her life.

Pepper v. United States, 562 U.S. 476, 488 (2011) ("Permitting sentencing courts to consider the widest possible breadth of information about a defendant ensures that the punishment will suit not merely the offense but the individual defendant").

Telling a story is not simply regurgitating information in the PSR.

Your absence has gone through me
Like thread through a needle.
Everything I do is stitched with its color.
-- W.S. Merwin

Photos of Sebastian hanging on a wall in the Salinas family home.

In an effort to truly escape, Mr. Salinas unsuccessfully attempted to end his own life by putting a gun to his head. The gun jammed—twice. He continued to live, but only as a ghost, never truly present. Heroin, Mr. Salinas found, numbed and distracted him from the weighty and constant grief that ravaged him. He used whenever he could. Everyday. He became addicted. Mr. Salinas' sister tried everything she could to bring her brother back, but he was so incredibly lost, and she was terrified at the certainty of his imminent death.

C. Overstated Criminal History

Mr. *** is not requesting a formal departure in breach of his plea agreement. He is, however, asking the Court to find that the same rationale used to support such departures apply in equal force as a § 3553(a) factor. Under USSG § 4A1.3(b)(1), "if reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted."

In this case, it is evident that Mr. ***'s past criminal convictions are symptoms of his substance abuse. Such convictions include a 2009 misdemeanor DUI as well as 5 misdemeanors for marijuana possession or marijuana paraphernalia. Mr. *** accrued his first felony for a street level drug sale to an undercover officer. The drug sale was propelled by Mr. ***'s own addiction. His second felony came about approximately five years later when officers found Mr. *** slumped over and unconscious in a parked vehicle with heroin nearby. Mr. *** is ashamed of his record. He is also acutely aware of the way that his past has negatively affected his current opportunities.

Mr. ***'s prior convictions, however, are all non-violent offenses, none of which involve weapons of any kind. They are the vestiges of a life that Mr. *** has worked extremely hard at changing. Two of the ten points that place Mr. *** in a category V were the result of Mr. ***'s placement on probation with Pima County Adult Probation. Mr. *** does not dispute that he was on probation at the time of the instant offense. What he does point out though is that his probation officer agreed to dismiss the pending petition to revoke and recall the warrant for Mr. ***'s arrest in order to help persuade the magistrate judge in this case to release him to residential treatment.

Mr. ***'s past convictions do not reflect the criminal history of a defendant who ordinarily would fall within category V. Mr. *** has addressed and continues to address the substance abuse and mental health issues that were at the root of his criminality. A mechanical application of the Guidelines in this case significantly exaggerates the significance of Mr. ***'s criminal history. Additionally, so long as Mr. *** continues on the path that he is now forging for himself, it is extremely unlikely that the crimes that mark his past will be repeated.

Addressing Offense Conduct

Culpability

- Lesser/Mitigating Role
- Drug Addiction→ Treatment
- Nature of the Conduct (distinguish using USSG offense specific characteristics to help)

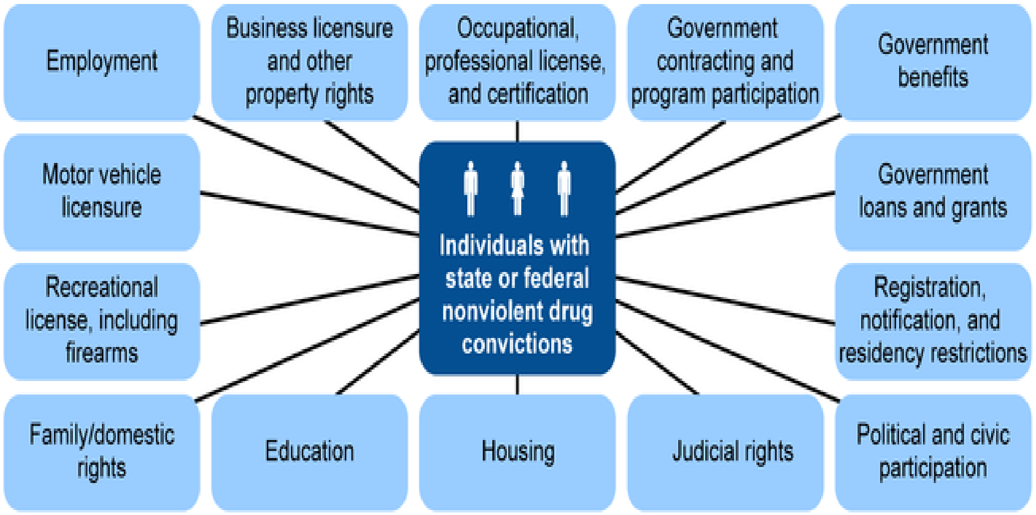
Rehabilitation and Remorse

- Actions that propelled the case forward
- Employment/Volunteering
- Housing
- Sobriety
- Family support/Need to support family
- Disassociating from criminal networks/lifestyle
- Cooperation or attempted cooperation
- Quote client's letter
- Changes those close to the client have witnessed (quote)

What GAO Found

Collateral consequences are the penalties and disadvantages that can be imposed upon an individual with a criminal conviction, in addition to those directly associated with a sentence (such as a fine, prison, or community service). GAO's review of the American Bar Association's (ABA) National Inventory of the Collateral Consequences of Conviction (NICCC) found that, in federal laws and regulations, there are 641 collateral consequences that can be triggered by nonviolent drug convictions (NVDC). For example, individuals with NVDC may be ineligible for certain professional licenses and federal housing assistance. The NICCC data that GAO reviewed indicate that these 641 collateral consequences can limit many aspects of an individual's life, such as employment, business licenses, education, and government benefits. In addition, GAO also found that the NICCC identified that 497 (78 percent) of the 641 collateral consequences can potentially last a lifetime.

Aspects of an Individual's Life That Can Be Affected by Federal Collateral Consequences for Nonviolent Drug Convictions, as Identified by the NICCC



Source: GAO analysis of the American Bar Association's National Inventory of the Collateral Consequences of Conviction (NICCC). | GAO-17-691

Collateral Consequences

https://www.gao.gov/products/gao-17-691

Nonviolent Drug Convictions: Stakeholders' Views on Potential Actions to Address Collateral Consequences

GAO-17-691 Published: Sep 07, 2017. Publicly Released: Sep 07, 2017

Preparing for the Sentencing Hearing

Best practice: Submit your sentencing memo 10 days before the Sentencing hearing. Include any important mitigation documents as attachments to your sentencing memo.

Provide the Probation Department with any letters or mitigation documents 10 days before sentencing

Prepare your client for the sentencing hearing by reviewing the materials and explaining the process

Review the most important points to discuss with the Judge

If you have filed objections to the PSR, have a verbal statement ready for the hearing. Make sure it is clear and concise. Be prepared to discuss caselaw as well.

Sentencing Oral Advocacy

Prepare what you will say in advance – don't read your sentencing memo

Tell your client's story. Highlight the client's mitigation and unique circumstances.

Address troubling criminal history if you think it is best to take the "sting" out of it.

> Example: a client has several alcohol-related offenses, but the client has been sober for an extended period of time.

Do NOT repeat the same point over and over. Instead, be clear, concise, and present all of your client's mitigation.

Allocution