HUMANIZING THE CLIENT AND THE CAUSE: EFFECTIVE SENTENCING, MANAGING THE MEDIA, ENGAGING THE COMMUNITY

Moderator:

- Leo Beletsky, Professor of Law and Health Sciences and Faculty Director, Health in Justice Action Lab, Northeastern University School of Law

Panelists:

- Carrie Allman, Homicide Chief, Montgomery County (PA) Office of the Public Defender
- Devin Reaves, Executive Director, Pennsylvania Harm Reduction Coalition
- Joshua Vaughn, Staff Reporter, The Appeal

Sentencing

I. Defense Attorney Responsibilities

A. ABA Criminal Justice Standards for the Defense Function

1. Client Interview, 4-3.3

B. Sentencing, 4-8.3

II. Client Relations, Testimony and Allocution

A. Remorse: expressions of remorse can be extremely powerful when done correctly and extremely off putting when they are done poorly.

B. Specificity over generalizations.

1. According to judges, generalized apologies do not carry as much persuasive weight as ones that are specific.
2. To develop a more specific statement for allocution help the client to identify and describe:
    a. Why they are sorry;
    b. What specific harms they have caused;
    c. What specific reasons they have for being remorseful;
    d. What specific steps they are taking or will take to remedy the situation.

C. Preparation:

1. Preparing a client to provide allocution or sentencing testimony cannot wait until the day before the sentencing hearing.
2. Regardless of whether the case may be moving towards trial or towards a plea, being preparing the client for testifying and allocution from the start of representation.
3. Preparation, especially at the early stages does NOT have to mean preparing to admit to criminal conduct or even discussions in the context of a plea.
4. Developing good court communication skills can assist the client in preparing to testify at a suppression hearing, to testify at trial, and/or to present evidence at sentencing. Working with clients to develop good communication skills can also enhance the overall attorney-client relationship. The attorney can help develop these skills by modeling good communication skills whenever speaking with the client.
5. Communication skills include:
    a. Listening to one another in asking and answering questions;
    b. Developing depth to descriptions of people and events;

c. Learning to express feelings;

d. Learning to provide substance and explanation (i.e. being able to articulate "why" not just "what"); and

e. Awareness of and improvement of non-verbal communication such as posture, facial expressions, eye contact, and body language.

D. Theme and Message: the content, theme, and message of the attorney's arguments should complement client's allocution/testimony. Attorneys and clients should spend time discussing the client's goals for sentencing and develop arguments and present evidence which supports that message. Inconsistent messaging between the attorney and client can dilute the value of both messages, where complimentary and consistent messaging can amplify both.

Ex: If the client testifies they need to get/be home because of an immediate need to care for their children or support an elderly parent; but the attorney argues the client should be released to a 6 month residential drug program 3 hours away, the court may find neither persuasive because they appear to be inconsistent.

E. Articles on Mitigation and Allocution

1. Bennett, Mark, Heartstrings or Heartburn: A Federal Judge's Musings on Defendant's Right and Rite of Allocution, *The Champion*, March 2011

2. Bennett and Robbins, Last Words: A survey and analysis of federal judges views on allocution in sentencing, 65:3 Ala. L. Rev. 735 (2014)

3. Boren, James, and Lang, Allyson, Using Lessons from the Capital Arena for Sentencing Advocacy in All Cases, *The Champion,* July 2018

4. Ellis, Alan, Views from the Bench on Sentencing Representation, Parts 1 through 5, Law 360 (March 2016)

5. Thomas, Kimberly A., Beyond Mitigation: Towards a Theory of Allocution, 75 Fordham L. Rev. 2641 (2007)

III. Victim Outreach: In appropriate cases, outreach to the victim can be highly effective.

A. Research from the Alliance for Safety and Justice shows 60% of crime victims prefer criminal justice approaches that prioritize rehabilitation over punishment.

B. Crime victims as a whole strongly prefer investments in crime prevention and treatment to more spending on prisons and jails, with 85% of those surveyed preferring more investments in education than in building more prisons and nearly 90% preferring investments in employment over investments in prisons.

C. Articles and Resources on Victim Outreach

1. Defense-Initiated Victim Outreach (Divo): A Guide For Creating Defense-Based Victim Outreach Services, Manual For Defense, The Institute for Restorative Justice and Restorative Dialogue, University of Texas at Austin, 2011.

2. Victim Outreach: An Ethical and Strategic Tool for the Defense. Frogge and Cruz, The Champion, April 2014, p. 34
3. Crime Survivors Speak: A National Survey of Victims Views on Safety and Justice

IV. ADDITIONAL MATERIALS

A. Evidence-Based Strategies for Preventing Opioid Overdose: What's Working in the United States: An introduction for public heath, law enforcement, local organizations, and others striving to serve their community, Jennifer J. Carroll, PhD, MPH; Traci C. Green, PhD, MSc; and Rita K. Noonan, PhD, CDC, 2018

B. The Opioid Crisis Is Blurring the Legal Lines Between Victim and Perpetrator, Daniel Denvir, Slate, January 15, 2018

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0005776-2016,

HAROLD BURTON,
Defendant

POST SENTENCE MOTION

AND NOW COMES the Defendant, HAROLD BURTON, by his attorney from the Law Office of the Public Defender of Montgomery County; Carrie L. Allman, Homicide Chief/Trial Counsel, and respectfully submits this Post Sentence Motion of which the following is a statement:

1. Mr. Burton was charged at the above-captioned as follows: Count 1 - Drug Delivery Resulting in Death; Count 2 - Recklessly Endangering Another person; Count 3 - Criminal Use of a Communication Facility; Count 4 - Possession with Intent to Deliver (Heroin); and Count 5 - Possession (Heroin).

2. These charges are connected to the January 29, 2016 overdose death of Ms. Renee Winslow.

3. Mr. Burton was not charged until June of 2016.[1]

4. Numerous pretrial motions were filed and litigated and a Jury Trial commenced on

[1] Attorney Douglas Breidenbach Jr. represented Mr. Burton from the time he was charged until January 19, 2017 when he withdrew, and the Office of the Public Defender was appointed.

July 9, 2018.

5. After numerous hours of deliberation, the Jury returned the following verdict:

Count 1 – Drug Delivery Resulting in Death - Guilty

Count 2 – Recklessly Endangering Another Person – Not Guilty

Count 3 – Criminal Use of a Communication facility – Guilty

Count 4 – Possession with Intent to Deliver – Guilty

6. On October 30, 2018, Mr. Burton appeared for sentencing.

7. The Court had ordered a PSI and it was reviewed by both parties.

8. Additionally, both parties agreed that Count 4 would merge with Count 1 for sentencing purposes. As such, a sentence could only be imposed at Counts 1 and 3.

9. Mr. Burton's prior record score listed him as an RFEL; as such, the following guidelines applied:

Count 1 – Drug Delivery Resulting in Death – OGS – 13; PRS-RFEL

Guidelines: 108-126 months (9-10 and ½ years) +/- 12 months

Count 3 – Criminal Use of a Communication facility – OGS -5; PRS –RFEL

Guidelines: 24-36 months (2-3 years) +/- 3 months

10. The Defense requested a sentence that considered Mr. Burton's mitigating factors, including his traumatic childhood, and his expressions of regret and requested a sentence of 8-16 years at Count 1 and a concurrent sentence at Count 3.

11. The Commonwealth requested a sentence at the top of the standard range at each Count, and requested they run consecutive.

12. The Court imposed the following sentence:

Count 1 – 10 and ½ to 28 years

Count 3 – 2 and ½ to 7 years (consecutive to Count 1)

13. As such, Mr. Burton's aggregate sentence is 13-35 years of incarceration.

14. This timely post sentence motion follows:

The verdict rendered was contrary to the weight of the evidence, as such a new trial should be awarded

The jury erred in returning its verdict because "the evidence presented was so contrary to the verdict rendered that it shock's one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Commonwealth v. Smith*, 861 A.2d 892, 895 (Pa. Super. 2004). The Commonwealth's evidence was of such low quality, tenuous, vague and uncertain as to make the verdict of guilty pure conjecture; and, therefore, shocks of the conscience of the Court. A finding of guilt under the circumstances of this case should shock the conscience of the Court. The verdict was contrary to the weight of the evidence and a new trial should be awarded. Some factors demonstrating that the verdict was against the weight of evidence are as follows:

a. Not a single witness saw a drug exchange between Harold Burton and Renee Winslow.

b. The texts and brief visit were consistent with what Mr. Burton explained, in his own words, to his girlfriend in a jail call; namely that Ms. Winslow was badgering him for

drugs and he went to tell her to stop.

c. Mr. Burton was not arrested in possession of any drugs, nor is there any evidence that he ever had drugs on him.

d. The texts show 12 messages, with 8 of them being sent from Ms. Winslow seeking drugs and asking where Mr. Burton is, and why he never keeps his promises.

e. The theory that Ms. Winslow as the "buyer" is setting the price on the drugs is inconsistent with common sense drug dealing as the dealer would seek to maximize his profit, not allow a buyer to set terms and conditions.

f. Ms. Winslow was experiencing a substance use disorder and could have received the drugs from others, particularly where her place of work employed those with previous convictions, where the apartment complex she lived in had numerous people engaging in drug activity mere doors down, and where she had a history of drug addiction and use and would reasonably know where to find drugs.

g. The evidence presented was weighted in favor of the cause of death not being a fentanyl overdoes, but rather the result of Ms. Winslow's other prescription drugs.

For all of the foregoing reasons of fact and law, Mr. Burton requests a new trial as the verdict rendered by the jury is contrary to the weight of the evidence presented.

The Sentence imposed is manifestly excessive, unreasonable, and an abuse of discretion

The sentence imposed is manifestly excessive, unreasonable and an abuse of discretion where the Court failed to consider the rehabilitative needs of the defendant, the nature and characteristics of the defendant, failed to give careful consideration to all relevant factors and imposed a sentence that is inconsistent with the norms underlying the sentencing code.

Despite being a "standard" range sentence, the sentences imposed both start at the top of the standard range, the maximum is more than twice the minimum at each count, and each count was made to run consecutive. However, even a standard range sentence can be an abuse of discretion as the guidelines are only advisory, a court must consider a variety of factors in sentencing and is not bound by the guidelines. "Guidelines have no binding effect, create no presumption in sentencing, and do not predominate over other sentencing factors-they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence." *Commonwealth v. Walls,* 592 Pa. 557, 570, 926 A.2d 957, 964 - 965 (Pa. 2007).

In the instant matter, a sentence of 13-35 years does not reflect a careful consideration of all factors. The Sentencing Code requires that a sentence be consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. 42 Pa. C.S. §9721(b). The sentence imposed by the Court fails to follow those standards. The sentence focuses solely on the seriousness of the offense and the

Court's personal feelings about the matter and how offensive the Court found the actions of Mr. Burton.

Furthermore, the Court focused solely on the seriousness of the offense at the expense of considering other pertinent factors. The sentence imposed was manifestly excessive, unreasonable, and abuse of discretion where the Court did not consider the particular circumstances of the case or the nature and characteristics of the defendant. Specifically, the Court did not consider all of the mitigating factors such as: the defendant's traumatic history of having a drug-addicted mother, an absent father, and a step-father who was murdered; the defendant's own addiction issues as the defendant had an addiction to alcohol, marijuana, and percocets. As such, the sentence imposed fails to consider not only the rehabilitative needs of Mr. Burton, but also his personal nature and characteristics and therefore is an abuse of discretion.

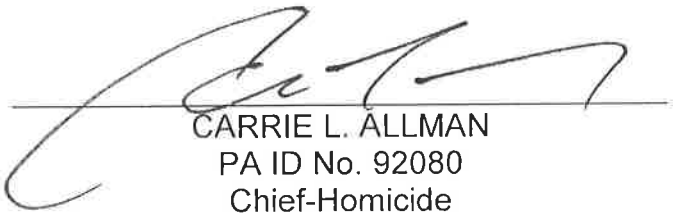
The Superior Court has noted that it may vacate an appellant's sentence if the trial court abused its discretion by imposing a sentence that is manifestly unreasonable or where the sentencing court fails to give "careful consideration to all relevant factors in sentencing [appellant]." *Commonwealth v. Parlante*, 823 A.2d 927, 930 (Pa. Super. 2003) (citing *Commonwealth v. Sierra*, 752 A.2d 910, 913 (Pa. Super. 2000)). Additionally, it has been noted that an abuse of discretion occurs when a sentence is clearly unreasonable or manifestly excessive under the circumstances of the case," *Commonwealth v. Duffy*, 491 A.2d 230, 233 n.3 (Pa.Super. 1985), or when the sentence "commits an error of law." *Commonwealth v. Townsend*, 443 A.2d 1139, 1140 (Pa. 1982). Notably, an error of law occurs whenever a sentence "overlook[s] pertinent facts" or "disregard[s] the force of

evidence." *Townsend,* 443 A.2d at 1140.

In the instant matter, the Court focused on the seriousness of the offense to the exclusion of other factors, and imposed a sentence based on the idea that dealers should "know" what their product is, which is wholly inconsistent with the testimony of the Detectives offered at trial, and based on the Court's distaste for this particular crime. The Court punished Mr. Burton for factors already taken into account in the guidelines – namely the seriousness of the offense and Mr. Burton's prior record. The Court failed to consider the mitigating evidence in fashioning a sentence and therefore imposed a sentence that is excessive and not in keeping with the norms underlying the sentencing code.

For all of the foregoing reasons of fact and law, the sentence imposed is an abuse of discretion and should be modified.

Respectfully Submitted,



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VERIFICATION

Carrie Allman verifies that the statements made in motion are true and correct to the best of her knowledge, information, and belief, and understands that false statements herein are made subject to the penalties of 18 Pa.C.S. Section 4904 relating to unsworn falsification to authorities.

Carrie Allman, Esquire
Homicide Chief
Office of the Public Defender

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0005776-2016,

HAROLD BURTON,
Defendant

CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania Courts that require filing confidential information and documents differently than non-confidential information and documents.

CARRIE L. ALLMAN
Attorney for Defendant
PA ID 92080

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0005776-2016,

HAROLD BURTON,
Defendant

PROOF OF SERVICE

I, Carrie L. Allman, of the Montgomery County Public Defender's Office, certify that a true and correct copy of this Motion has been served upon the following counsel of record,

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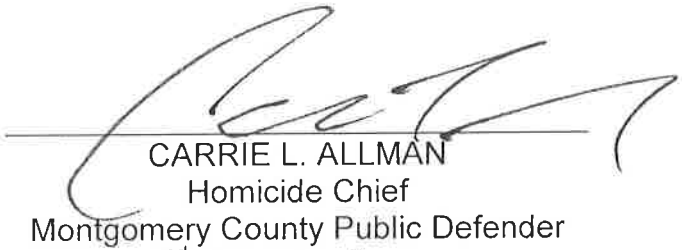

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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0005776-2016,

HAROLD BURTON,
Defendant

ORDER OF COURT GRANTING A NEW TRIAL AS THE VERDICT RENDERED IS CONTRARY TO THE WEIGHT OF THE EVIDENCE PRESENTED

AND NOW, to wit, this _____ day of _____ 2018, upon consideration of the foregoing Petition, it is hereby ORDERED, ADJUDGED, and DECREED, that the Petition is GRANTED such that:

The conviction is vacated, a new trial is awarded, and the new trial will be scheduled within 120 days.

BY THE COURT:

_____

THE HONORABLE STEVEN O'NEILL

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0005776-2016,

HAROLD BURTON,
Defendant

ORDER OF COURT GRANTING SENTENCING RELIEF

AND NOW, to wit, this _____ day of _____ 2018, upon consideration of the foregoing Petition, it is hereby ORDERED, ADJUDGED, and DECREED, that the Petition is GRANTED such that:

The sentence imposed on October 30 , 2018 is vacated and a new sentencing hearing will occur on _____, 2018.

BY THE COURT:

_____

THE HONORABLE STEVEN O'NEILL

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Using Lessons from the Capital Arena for Sentencing Advocacy in All Cases

Defense lawyers in noncapital cases can learn from the strategies developed during several decades of capital representation. They can incorporate those strategies into sentencing advocacy for clients charged with drug offenses, burglary, noncapital murder, or any other crime.

Humanizing the Client

In 1976 when *Gregg*[1] reinstated the death penalty, a whole new world was created for the capital defense community. There were to be two phases of a trial, the guilt phase and the penalty phase. No one had any idea what should be done in a penalty phase, and it took decades for the capital defense community to develop and refine skills for that portion of the case. The only issue at that point of the case was to determine whether the appropriate sentence was life in prison or death for the defendant, who had been convicted unanimously by a jury of 12 people, all of whom had already said they believed in and would impose the death penalty under appropriate circumstances.

"Winning" was redefined in death cases. A win was a conviction of first degree murder with a sentence of life which, in almost any other world, would be a soul-crushing defeat.

Many dedicated capital defenders struggled with how to convince jurors to give life sentences to clients who had just been convicted of committing the most horrible acts: killing children, perhaps raping them first; raping and murdering adults; killing police officers; and killing multiple people at the same time.

Many lawyers believed the penalty phase was hopeless and despaired for lack of anything to do. As a result, they even more aggressively defended the guilt phase and, ironically, cemented the death penalty as inevitable.

Veteran lawyers who tried dozens of murder cases had no training, no experience, and no plan for the penalty phase. However, even in Louisiana, the state that incarcerates more people per capita than any other state or nation, the aggressive training and preparation for penalty phase work has resulted in a stunning turnaround: in the last 10 years, one person has been executed (he volunteered) and 11 have been removed from death row, some of them exonerated as innocent. But the real story is the failure to put more people on death row. It is now rare that prosecutors seek the death penalty in murder cases, and it is *not* rare that juries return verdicts of life. The reason for that is the vision and foresight of people like Scharlette Holdman, who developed the concept of mitigation. Holdman was fond of saying that while she was proud of the work she did in teaching lawyers how to mitigate

BY JAMES E. BOREN AND ALYSON LANG

a person's bad acts, she wished she had called the field "humanity" rather than mitigation. Why? When it is all distilled down to a very small point, that is what the penalty phase in a capital case is all about — humanizing the client and convincing a jury that despite the bad things she has done, life in prison is a sufficient punishment in her case.

Eighth Amendment law — developed in capital cases — establishes that the trend the jurisprudence supports is that to be constitutional a capital scheme must first reduce the pool of crimes eligible for the death sentence by carefully defining and narrowing the offense. Even more important, sentencing must take into account the individual offender and determine that of all the people who are convicted of first degree murder, only the "worst of the worst" should receive the death penalty.

The decision to kill a fellow human is not easy and never has been, even in times of war. In the criminal justice system, 12 people sit around a table and decide whether they will kill the defendant (another human), and that conversation can occur only if the state has succeeded in dehumanizing the client. It is easier to kill someone from afar with gas, a bomb, or a rifle than it is to kill someone up close. But it is not hard to kill people labeled subhuman predators who are monsters, thugs, and not deserving of life — like murderers, drug dealers, and sex offenders.

Over time, advocates in the capital defense arena have figured out which things do not work. Arguing that the death penalty is wrong and immoral does not work, just like arguing that child pornography or distribution of drugs should not be a crime. A trial strategy that "shoots everything that moves" does not work because it obscures the points the defense is attempting to make for reasonable doubt or to temper the punishment or degree of culpability.

How Did the Client End Up Here?

Defenders who successfully put on a mitigation case do it in the same way that people attack or endorse scientific evidence. Blood type, blood spatter, DNA, hair, crime lab efficiency, false confessions, and faulty eyewitness identification are successfully attacked or advocated by careful preparation. The defense must understand the science and simplify it for judges (to get expert funding) or jurors (so they can understand the concept and apply it).

Mitigation is telling the story of the client's life so the sentencer can understand how he wound up where he is. The defense attorney cannot tell the client's story until she understands it, which she cannot do until she has taken an adequate social history that goes back at least three generations. This is not the theory: "David was molested as a child so pity him and let him live." Although that was at one time the state of the art, now it has been refined: "David was molested as a child and here is what happens when kids are abused." Ted Cruz, as the solicitor general in Texas, filed an amicus brief in the U.S. Supreme Court that argued Mr. Kennedy should be executed for the rape (without death) of a child. Along with the attorney generals of numerous states, Ted Cruz argued: child rape causes people to become criminals, creates suffering with PTSD, causes people to look at child pornography, and thus causes people to develop numerous serious mental health issues that can result in violence. Because of the serious consequences of child rape, the argument continued, child rapists should be executed. Their argument was not successful. But they recognized, inherently, the long-lasting damage caused by mental, physical, or emotional trauma.

Prosecutors will effectively argue that many people suffer abuse during childhood, but they do not become killers. An expert witness, however, can talk about the effects of childhood trauma or maltreatment that includes physical, sexual, and emotional abuse. Some trauma is considered so severe that it is comparable to that of military combat. Victims of child sexual abuse suffer adverse consequences in their physical, emotional, social, and cognitive development. They are more likely to experience adverse outcomes throughout their lifespan. Victims of child abuse experience nearly twice the number of serious physical and mental health problems as children who were not abused. Adverse outcomes of childhood sexual abuse include high-risk health behaviors such as higher number of lifetime sexual partners, younger age at first voluntary intercourse, teen pregnancy, alcohol and substance abuse, and behavioral problems including delinquency, aggression, adult criminality, and abusive or violent behavior.

As for the impact on society, child abuse is similarly drastic. Child sexual abuse has been correlated with an increased prevalence of health problems, which in turn have been correlated with increased utilization of public and private resources. Child sexual abuse also plays a major role in shaping the future sex criminal and "sexual revictimization" of the victim.

Prosecutors who handle capital cases go to seminars to learn how to attack mitigation evidence. They know it is effective. That they worry about and fear effective mitigation evidence is reason enough for defense attorneys to contemplate putting that arrow in their quiver for all cases.

Mitigating Factors

The American Bar Association guidelines on capital defense at 10.11 present a summary of factors considered to be mitigating that are either listed in state statutes addressing the penalty phase of capital cases or that fall under the "any other mitigating factor" concept.

The following are among the many mitigating factors:

- Abuse and/or neglect of the client during childhood.
- Mental impairment disorders or limitations of any nature. It need not rise to the level of incompetency or insanity and it does not necessarily require a battle over the proper diagnosis of the problem. If the client suffers from some pathology that interferes with his mental functioning, that is something that a jury or judge can take into account.
- Personal characteristics such as youth, old age, religious commitment, work history, or good character. This, unfortunately, is the only thing many lawyers investigate — maybe because it is easy.
- Efforts at self-improvement or to overcome problems, even if those efforts were unsuccessful. For example, drugs and alcohol, which many people consider to be "excuses," are often successfully urged as mitigating factors, particularly if family members helped or enabled the person to continue the destructive effects of substance abuse.
- The client's love of family, spouse, or others. This touches the heart of some but must be distinguished from the utterly unsuccessful "putting me in jail hurts my family" argument.
- Love that others have for the client. In capital cases and in cases involving homicide and physical injury to the victims, this helps counter the "victim impact" testimony that the state introduces. Reverse victim impact.
- Service in the military, post-traumatic stress syndrome, emotional scars from military service, and drug addic-

tion from military service. How do defense attorneys find out about these things? They look.

- Addiction to drugs or alcohol, if presented so that the jury understands how the client is susceptible to addiction and how the client became addicted. Examples include resorting to alcohol after a particularly traumatic loss or using drugs to self-medicate for various reasons.

- Cooperation with authorities such as the client turning himself in or confessing to the crime. If the client waived his rights and confessed, it can be used to his advantage to say he showed remorse by cooperating, realizing his mistakes, and accepting responsibility. It is not snitching, but could be.

- Lesser culpability of the client than others involved in the same offense. This requires knowledge of co-defendants' cases, history, and involvement.

- Remorse. Most studies indicate the single most important factor that juries take into consideration in determining life or death is whether the defendant expresses remorse. Some mental health disorders preclude a person from sharing his emotions and if that is the case, it is worth addressing at the sentencing stage, during guilt, or voir dire. Remorse when guilt is contested, however, is tougher; this is a problem a bifurcated trial complicates.

- Good adjustment in prison and the capacity for rehabilitation. Jail records and interviews with custodians if the person is detained pretrial can result in rich stories supporting any of the issues listed above.

- Needless suffering of the client's family. In one case, a juror voted for life and spared the client's life because his daughter was suicidal. The juror felt that if her father had been sentenced to death, it would also cause his daughter to commit suicide. This is tricky evidence to admit, but possible.

Intellectual Disability

Mental retardation, now called "intellectual disability" in most statutory schemes, illustrates the transformation of what could be a "bad fact" into a "good fact." The problem with people who are intellectually disabled is that they make bad choices and are considered dangerous or "scary" for that reason. After advocates understood that intellectual disability is a condition with predictable symptoms and consequences, it allowed them to argue that a person who is unable to make cognitive decisions should not be punished at the same level of culpability as a person who is not afflicted with that disability.

Insanity

Most states have extremely tight definitions and extremely difficult burdens to prove insanity. The inability to "distinguish right from wrong" is not a definition used by any mental health professional to describe insanity, and thus it is a defense that is rarely used. When used, it is rarely successful. Many "lesser" mental health defenses, however, constitute mitigating factors. For example, Louisiana considers the following factors (among others) to be mitigating circumstances: (1) the offense was committed while the offender was under the influence of extreme mental or emotional disturbance; (2) the offense was committed while the offender was under the influence of another person; (3) at the time of the offense, the capacity of the offender to conform his conduct to the law was impaired due to mental defect or intoxication; and (4) the youth of the offender at the time of the offense.[2] An advocate can use these factors to develop an argument like this:

> In cases in which the life sentence or death sentence is litigated, courts have been forced to identify what constitutes legal grounds for mitigation and legal grounds for aggravation. If we consider these factors in the most serious of crimes, why should we not consider them in all crimes? Put another way, if it mitigates a jury in a decision not to impose death, why should it not mitigate a decision as to whether to impose five years or 50 years in a drug case?

Fetal Alcohol Spectrum Disorders

Prosecutors have long argued that people who have anti-social personality disorder, or are a sociopath, have an "aggravating factor" that should increase the amount of punishment received. It impacts future dangerousness, and is a bad fact. Recent research discovered that fetal alcohol spectrum disorders (FASD) can explain a lot of actions that appear to be anti-social personality. For a client with FASD, the favorable fact is that it is a disease that a person is born with and thus it is not the client's fault. FASD can result when a mother drinks alcohol during the first three months of pregnancy. Defense counsel does not have to blame the mother because many do not know they are pregnant for the first three months. Whether the mom was a good person or a bad person is irrelevant: the point is that a child was born with serious predictable disabilities. FASD appears to have the same symptoms as anti-social personality disorder. Attorneys who attend a seminar on FASD will find their sentencing advocacy expanded and improved.

A first step is to try to obtain a history of the mother's use of alcohol at the time the child was in the womb. An interview with a mom who denies drinking is the beginning, not the end, of the investigation. In addition, do not assume the amount of alcohol the mother says she drank was too small to damage the client.

Examining a client's school records may reveal diagnoses of anti-social personality disorder or attention deficit disorder. Speech and language handicaps and learning disabilities are also symptoms of fetal alcohol syndrome. Behavioral problems such as oppositional defiant disorder, conduct disorder, and reactive attachment disorder are also indicators of FASD. In addition, defense counsel should try to obtain the mother's medical records. Moreover, if defense counsel finds prenatal records and postnatal care records that indicate failure to thrive, it means that more digging should be done.

In order to corroborate a client's impairment as organic rather than behavioral, which is significant to most prosecutors, judges and juries, it is important to acquire anecdotal evidence from the client's early years. From birth records, one can look at the child's weight, height, and head circumference. Many people with FASD do not have physical or cognitive disabilities, but they still have serious brain-based neuro-behavioral disabilities. Incredibly important information can be unearthed by (1) obtaining educational records, especially at the lower grades; (2) looking at attendance; (3) determining if the person was socially passed; and (4) interviewing school teachers and the school psychologist.

Juvenile records are a fertile field of investigation. The problem of a client demonstrating a lack of remorse can easily be a symptom of FASD because the client does not understand the cause and effect and implication of his actions. This helps judges, juries, and prosecutors understand a client's inability to

express remorse. Angel, a young girl charged with multiple murders by arson, was saved by discovery of a note she wrote to God when she was seven years old. In her note, Angel prayed that she would die because she could not stand to go on living while everyone hated her.

Similarly, a client's desire to please can cause him to smile at people in the courtroom and appear unconcerned with the proceedings, and this behavior may be misinterpreted by the uneducated observer. FASD and a low IQ are completely different, although they can coexist in a person. From defense counsel's perspective, a favorable aspect of FASD is that it can be "seen" and it is not simply a lack of willpower.

Because prosecutors know mitigation evidence is effective, they attend seminars to learn how to attack it.

Telling a court or a prosecutor that the client was "depressed" at the time of his crime is generally not effective. However, understanding basic psychology can result in a better disposition of the case. Situational depression ("My dog died and I lost my job.") is not like clinical depression, which has associated features of delusions and an impairment of cognitive functioning. As an example, Eeyore of Winnie the Pooh fame, after receiving a check for one hundred thousand dollars, despaired on the side of the street about depositing it for fear he would be run over by a truck or that the bank would be closed or that he would forget his identification card.

Individuals suffering from diagnosable mental diseases may not qualify for the not guilty by reason of insanity defense. In capital cases mental health issues that do not rise to the level of an insanity defense are nevertheless mitigating. Jurors are told that if they cannot accept it, they cannot serve on the jury. Why not try to educate a judge or jury on the diagnosis, symptoms, and ability to be rehabilitated?

Guilt Phase and Penalty Phase

Capital defenders have learned that lawyers must simultaneously develop defenses for the guilt phase and the penalty phase. In noncapital cases, the usual approach is to focus all efforts on establishing a defense to the crime or a reason a responsive verdict is appropriate. "We'll cross the sentencing bridge when and if we get to it," is the way some defenders think. It is hard to talk sentencing strategy to a client before trial without appearing weak or pessimistic and without injuring the attorney-client relationship. In capital cases, however, defense attorneys learned that if they are not careful to coordinate the guilt phase and the penalty phase, they may close many doors of mitigation and sentencing advocacy. One way to think of it is that there should be one phrase for both phases of trial — guilt and punishment.

Obviously, this requires that the defense attorney prepare for sentencing at the same time he is preparing his opening statement telling jurors that they should believe his client's alibi or claim of self-defense. What capital defenders do is front-end load their mitigation by tying in the mental health difficulties of the client with an explanation of, for example, why the client confessed or why the client ran away and hid. The presumption of guilt by escape is a state of mind issue. Because of a mental health disorder, the person may panic or confess to crimes not committed when facing any kind of stress, or the person may appear without remorse and "flat" in court.

Psychiatrist Elizabeth Kubler-Ross, author of "On Death and Dying," studied grief and how mental health professionals and doctors could help patients and families of patients struggling with terminal diagnoses. She determined that grief went through several stages:

- Shock — the initial paralysis at hearing the bad news.
- Denial — trying to avoid the inevitable.
- Anger — A frustrated outpouring of bottled-up emotions.
- Bargaining — seeking in vain for a way out.
- Depression — final realization of the inevitable.
- Testing stage — where one seeks realistic solutions.
- Acceptance — finding the way forward.

These stages are what victims of crimes, prosecutors, judges, and jurors go through. Recognizing the stage helps in negotiations with the prosecutor. If decisions concerning punishment are made in the anger stage, clients are in trouble.

ABA Guideline 11.8.6 sets out topics counsel should consider presenting:[3]

- Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma, and developmental delays).
- Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof.
- Military services (including length and type of service, conduct, and special training).
- Employment and training history (including skills and performance, and barriers to employability).
- Family and social history (including physical, sexual, or emotional abuse, neighborhood surroundings and peer influence) and other cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services).
- Rehabilitative potential.
- Record of prior offenses (adult and juvenile), especially when there is no record, a short record, or a record of nonviolent offenses.
- Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing.

Which witnesses and evidence should counsel consider presenting at sentencing? ABA Sentencing Guideline 11.8.3(F) discusses penalty phase witnesses:[4]

- Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would

be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor.

- Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor.

- Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself.

- Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

The U.S. Supreme Court — in *Wiggins v. Smith*[5] and *Rompilla v. Beard*[6] — relied on the 1989 ABA Guidelines to determine that failure to do a thorough investigation into mitigating factors constituted ineffective assistance of counsel.

Sources of suggested mitigation work may be found at ABA Capital Defense Guidelines 11.8.6 as well as the 2008 *Hofstra Law Review* symposium issue on the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases.[7]

Re-entry Potential

Mitigation in capital cases is important, but the reality is that there are many more noncapital offenders being sentenced without any mitigation efforts used. Many of the same mitigation factors listed in the American Bar Association guidelines on capital defense at 10.11 are also relevant in noncapital cases. While the process has begun to incorporate mitigation in noncapital cases, the practice has not become widespread. If mitigation were used in all noncapital cases, offenders would be more humanized and hopefully prison time overall would be reduced.

The one obvious hurdle is the huge time and financial burden this requirement would put on already strained defense lawyers, but one must hope for a better system overall. Who is going to pay for a thorough investigation into mitigation factors? Some of the most fun litigation for appointed counsel is to ask for money for experts and to put on a hearing to say why the defense needs it. The defense teaches the court some law and makes everyone understand why PTSD or FASD is relevant to the case. Some courts choose to give defense attorneys what they want (a deal) instead of giving them money. If fighting about funding accomplishes nothing else, it allows the defense attorney to educate the judge and prosecutor about the *concept* of mitigation.

A distinguishing factor in noncapital mitigation is the additional focus on the offender's rehabilitation and re-entry potential. In death penalty cases, the only focus is on explaining why the defendant should not die. In noncapital cases, however, the offender is more likely someday to be released and return to society. This requires more focus on researching skills and development and resources for the offender that will facilitate a smooth re-entry.

A notable and rising example of noncapital mitigation is the mitigation of those juvenile offenders sentenced to mandatory life without parole for crimes committed prior to age 18. These individuals can be resentenced and potentially released. The mitigation of such youthful offenders must focus on not only re-entry capabilities but also on the person's success and adaptation to life in prison. The mitigation materials should include a list of accomplishments (religious, skill or social-based) and job success while incarcerated, combined with a solid re-entry and employment plan upon release. The difficulty in this type of mitigation is the ability to gather preincarceration information. In cases in which the juvenile was 16 years old at the time of the offense and has since served 30 or 40 years in prison, information such as family, educational, and medical history preincarceration may be difficult to find or nonexistent.[8]

Conclusion

It would be great if, one day soon, law school capital punishment courses become history courses. The most serious punishment, sooner or later, will be life or virtual life.

A lawyer should never say he or she cannot find any mitigation for a person. If the lawyer cannot find the humanity in the client, it is because the lawyer is not trying hard enough. Defense attorneys must present the theory of mitigation to the prosecutor. Sometimes that results in a better plea and allows discussions about the purpose of sentencing which, in addition to retribution and incapacitation, includes rehabilitation and deterrence. What do defense attorneys have to lose?

If mitigation is constitutionally required for the most serious punishment, why should the defense save that effort only for people facing death?

Notes

1. *Gregg v. Georgia*, 96 S. Ct. 2909 (1976).
2. La. Code Crim. Proc. Ann. art. 905.5.
3. https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/1989-guidelines/1989-guideline-11-8-6.html.
4. https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/1989-guidelines/1989-guideline-11-8-3.html.
5. *Wiggins v. Smith*, 539 U.S. 510 (2003).
6. *Rompilla v. Beard*, 545 U.S. 374 (2005).
7. https://scholarlycommons.law.hofstra.edu/hlr/vol36/iss3.
8. For further information on noncapital mitigation, see Miriam Gohara, *A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 Am. J. Crim. L. 41 (2014); Dana Cook, Lauren Fine & Joanna Visser Adjoian, *Miller, Montgomery, and Mitigation: Incorporating Life History Investigations and Re-entry Planning into Effective Representation for 'Juvenile Lifers,'* The Champion, April 2017, at 44; James Tibensky, *Interviewing for Noncapital Mitigation*, The Champion, June 2014, at 30.

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Heartstrings or Heartburn: A Federal Judge's Musings On Defendants' Right and Rite of Allocution

BY MARK W. BENNETT

Sentencing is, for me, and I believe most of my colleagues, the most daunting task we perform as federal district court judges. Depriving individuals of their liberty is never easy nor should it be.[1] Thinking about the appropriate sentence often leads to sleepless nights and stirring internal struggle and debate. I have sentenced two defendants to death, many more than that to probation, dozens to life, and have handed down every possible sentence in between.[2] I have heard more than 2500 sentencing allocutions. As a practicing lawyer for 16 years before that, I was a proud member of the C.J.A. panel from the week after passing the Iowa bar in 1975 until taking the oath of office as a federal judge. During that time, I had the great privilege of standing next to many defendants in federal court when they allocuted. Sometimes I felt proud; sometimes I nearly fainted. Never in my wildest imagination did I think allocutions were as important as I have found them to be on this side of the bench.

Allocutions Are Not Meaningless

Some of the allocutions I have heard have pulled at my heartstrings and even brought me to tears, while others have given me heartburn and elevated my already too high blood pressure. On rare occasions, all have happened in the same allocution. For me, a defendant's right of allocution is one of the most deeply personal, dramatic, and important moments in federal district court proceedings. As my wonderful mentor, colleague, and friend, Judge Brock Hornby of the federal district court in Maine, recently wrote:

> Federal judges sentence offenders face-to-face. It is a profoundly human exercise that cannot be captured in a mere transcript or sentencing statistics. Judicial sentencing vividly showcases governmental power and, sometimes, on the part of other participants, repentance, recalcitrance, compassion, sorrow, occasionally forgiveness. In today's world of vanishing trials, it is one of the few places where federal judges regularly interact publicly with citizens.[3]

Because U.S. magistrate judges in our district take guilty pleas, and many defendants who go to trial wisely do not testify, the allocution often is my first, only, and last direct contact with a defendant. I find them immensely important. More often than not, they help shape the sentences I impose — for better or worse. In many cases, I find the allocution more significant in crafting a sentence that is "sufficient but not greater than necessary"[4] than anything the defense lawyers are able to do or argue. I disagree with claims by academics in law review articles that changes in criminal procedure have rendered the historic

rite of allocution meaningless.[5] In my courtroom, allocution is always factored into the crucible of intense scrutiny that I give the § 3553(a) factors when imposing a sentence.

As the U.S. Supreme Court noted in *Green v. United States*,[6] "As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." Even a cursory browsing of the history of this long-standing right/rite reveals its purpose to be tempering punishment with mercy and reflecting that sentencing should, as recognized in the more modern parlance of the 18 U.S.C. § 3553(a) factors, be individually tailored through the use of judicial discretion to reflect the individual circumstances of each crime and each defendant. Unfortunately, while it has been around for centuries, "allocution practice" is the most underdeveloped and least sharpened arrow in the defense lawyers' quiver. That's what prompted me to write this article.

The Rules of Allocution

The first rule of allocution: Discuss allocution early and often with your client and explore the pros and cons of waiving this precious right/rite. After advising a defendant in lay terms about the right of allocution, I am shocked how often the defendant turns to defense counsel, often an experienced assistant federal public defender or C.J.A. counsel, and asks, "Should I say something?" It seems like the very notion of an allocution has caught the defendant and counsel completely by surprise. It strikes me that at this stage it is a little too late to decide if the defendant should give an allocution and what should be said. The ritual usually continues with counsel turning to me and asking, "May I have a moment to discuss this with my client?" The answer is always the same: "Yes." I can't help wondering how counsel has overlooked the allocution, as I say to myself: *You have got to be kidding me! Where have you been the last 90 days? You are a walking violation of the Sixth Amendment. You have appeared before me dozens of times — don't you have a clue how important your client's allocution can be to me? I have frequently commented on the record why the allocution has motivated me to reduce the defendant's sentence.*

The second rule of allocution: Have some idea what your client is going to say. I recently listened to an almost six-hour allocution spanning two days in a complex white collar fraud case following a guilty plea to 21 various fraud counts and an adverse jury verdict on three tax counts. The defendant's allocution as to why he was innocent of *all* counts lasted longer than the plea, the defendant's evidence at trial, and the jury deliberations — combined! I speculate that most of my colleagues do not reward a defendant at sentencing for protestations of innocence in allocution, let alone six hours' worth. I know I did not. Another poor allocution came from a defendant who, after a lengthy trial, told me what a terrible and unfair judge I was. *Hmmm ... Who do you think the trial judge on your § 2255 petition is going to be?*

The third rule of allocution: Avoid the clichés that federal trial court judges hear over and over again. These allocutions fall into three distinct categories: (1) the overly apologetic, (2) the narcissistic, and (3) the "I have seen the light."

Here is an example of an overly apologetic allocution: "I want to apologize to everyone, on this planet and on all others in the Milky Way and beyond," or its sister variation: "I want to apologize to you, your Honor, the prosecutor, my lawyer, the court security officers, your law clerk, and your auto mechanic."[7] *That's nice — everybody but the actual victims of your crime.* Stale and rote allocutions of the narcissistic variety include: "I really want to see my son graduate from high school." *Did you think about that when you were committing your crime?* "I really want to walk my daughter down the aisle." "If you give me probation, you have my personal guarantee I will never come back to your court." My personal favorite of the "I have seen the light" variety is this one: "If you give me probation, I will talk to high school students about drugs." *Would those be the same students you hooked on methamphetamine?* Its sister cliché goes like this: "If you show me some leniency, I will become a drug counselor when I get out." *Do you have a clue how often I have heard that one?*

The fourth rule of allocution: A really bad allocution can earn you a longer sentence, sometimes, with an upward variance, a *much* longer sentence! I have a long tradition of asking questions of defendants during their allocutions (after a proper Fifth Amendment warning). I frequently ask defendants about the history of violence that is included in the PSR report. I recall one such sentencing when I addressed the defendant: "I note in paragraph 45 of the PSR report that you knocked your then live-in girlfriend off the front porch and broke her jaw in seven places and her leg in three places. Why would you do that to her?" He responded: "She deserved it." I countered: "Excuse me, I don't think I heard your answer." His follow-up: "I said she deserved it." *I don't know what you could have said that would have helped you, but this really, really hurt you!* He received an extra 10 months per word.

The fifth rule of allocution: There are times a defendant should never allocute. When a defendant's allocution can only lengthen the sentence, I often send a not-so-subtle message to defense counsel and the defendant that silence is golden. The difference between good lawyers and great lawyers is often the judgment of knowing when not to say something. For example, after receiving the government's recommendation of a sentence at the mandatory minimum, I usually turn to defense counsel and ask: "Would you like to talk me out of a sentence at the mandatory minimum?" There is one and only one answer: "No thank you, your Honor." All too often, a defense lawyer cannot resist the urge to wax eloquent and, on occasion, has actually talked me into a higher sentence. The same is true for the defendant.[8] If I have indicated that I will impose the minimum sentence I can — this is not the time for the defendant to try to earn an Oscar. *In terms of risk/reward, there simply is no possible benefit to saying something because you are on a one-way elevator — it only goes up!*

Allocutions That Work

Having identified the major gaffes defense counsel and defendants have committed before me, a discussion of what works might be more useful. My basic principles of allocution include: (1) a sincere demeanor; (2) a discussion of what "taking full responsibility" actually means to the defendant; (3) an acknowledgment that there are victims (e.g., even when the PSR indicates "no identifiable victim," as it does in most drug cases); (4) an understanding of how the crime affected the victims; (5) an expression of genuine remorse; (6) a plan to use prison or probation time in a productive manner; (7) a discussion of why the defendant wants to change his or her criminal behavior; and, perhaps most importantly, (8) information that

helps humanize the defendant and the defendant's role in the crime.

Sincerity — or lack of it — is usually easy to spot. I don't worry too much about being conned. If I did, I would likely not assign much weight to allocutions in my sentencing deliberations. However, I like to give defendants the benefit of the doubt on sincerity. It is worth it to me to be conned on a rare occasion to be sure that truly sincere defendants are not lumped in with the insincere ones. Perhaps I am fooling myself, but I think that faking sincerity is no easy task.[9] While it is not impossible to gauge, sincerity is harder to sense when a defendant is reading verbatim from a script, often speaking too fast and not making eye contact. I think defendants should be encouraged to speak from their hearts rather than from their written statement whenever possible. And it is not just a matter of eloquence or sophistication. I have heard extraordinarily sincere allocutions from folks who could not read or write and infuriatingly insincere nonsense from sophisticated, highly educated white collar defendants.

I often bristle during allocution when a defendant claims to "take full responsibility" for the crime, but has absolutely no response when asked what that means. Defendants can mouth the buzzwords, but are clueless as to what the words actually mean to them as an individual. I will often then ask, "Well, the statutory maximum sentence is life. Are you taking full responsibility for that sentence?" Good answers require a thoughtful response that few defendants are capable of coming up with spontaneously. Thoughtful responses tend to separate the con artists from the very sincere defendants, who have given their criminal conduct and their desire to change a lot of thought — even in unsophisticated ways.

Genuine recognition of the impact of the crime on the victims and remorse are very important to me. As I indicated above, a defendant who apologizes to everyone, both imaginable and unimaginable, and in the long litany briefly mentions any "victims" or "the community" without any explanation, strikes me as insincere. A more impressive allocution details how the defendant's criminal conduct actually affected the victims.

Genuine remorse is essential to my consideration of a downward variance. It is hard to fake anguish. One can sense it. As most of our mothers told us when

we were young: "It's not what you say but how you say it" that's often more important. In an impressive work on the role of remorse and apology in the criminal justice system, Professors Bibas and Bierschbach note that "criminal procedure neglects the power of remorse and apology."[10] I don't. As these professors note: "When offenders express genuine remorse … the effects can be profound."[11]

Many moving allocutions reflect that the defendant has thought about what specific changes are needed and wanted to make a real difference. Defendants must be realistic to influence me. Defendants should not make any claims that after serving the 20-year mandatory minimum, they aspire to succeed me on the bench or become an astronaut. However, a true desire to learn a specific trade and a request to go to a specific Bureau of Prisons institution that offers that trade can sometimes be very helpful. It at least shows that the defendant and counsel took the time to explore some possibilities. I have a book (a must-have for defense lawyers) that describes each of the 115 Bureau of Prison facilities and can quickly test the accuracy of these requests or discuss with the defendant a more suitable facility.[12] An armed career criminal with 27 scored criminal history points and a guideline range of 360 months to life in prison should not request a prison camp to learn horticulture and do community gardening work outside the prison gates.

I often find very impressive defendants who explain why they want to change their criminal behavior and explain specifically and realistically how they intend to do that in prison and beyond. These defendants express in their allocutions both a deep desire to change and at least the thoughtful beginnings of a rudimentary plan to do so. Again, to be effective, allocutions need to be reality-based and not "pie in the sky."

Finally, allocutions give defendants a critically important opportunity to humanize themselves in my eyes. An article by Professor Kimberly Thomas, *Beyond Mitigation: Towards a Theory of Allocution*,[13] should be required reading for every criminal defense lawyer. The last line of her article is worth noting here: "Allocution stories based on the theory of humanization give defendants a point in the process to be heard and give life to a historic practice."[14] Thus, factors that mitigate and help explain a defendant's criminal conduct and lifestyle choices are critically important. They demonstrate a defendant's insight into prior conduct and can be seen as a meaningful step towards rehabilitation and redemption.

Allocutions are important to me not because I believe in tempering justice with mercy. In my view, true justice must often include mercy — not be tempered by it. Attorneys have an unfailing obligation to help their clients decide whether or not to allocute, and if they do, provide guidance on what to say. I beg you not to give this most intimate, personal, dramatic, and often very effective moment the short shrift I did when I stood years ago in your shoes next to defendants.

Notes

1. Early in my second year as a judge I had a discussion about sentencing with a mentor judge before whom I had practiced extensively. I told him of the extraordinary difficulty and emotional toll I was encountering in sentencing. He said, "Don't worry, Mark, it will get much easier." Out of respect, I did not respond, but I said to myself, *if it gets easy to deprive someone of their liberty please shoot me*. I have not been shot, and it hasn't gotten any easier.

2. One might think the Northern District of Iowa is a sleepy little district in terms of criminal sentencings. It is not. For example, in 2008, it was in its traditional place of fifth in the nation of the 94 districts in terms of criminal defendants sentenced per judge, at 271; the national average was just 91. ADMINISTRATIVE OFFICE, UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS — 2008, U.S. DISTRICT COURT — JUDICIAL CASELOAD PROFILE (2009), http://jnet.ao.dcn/cgi-bin/cmsd2008.pl.

3. D. Brock Hornby, *Speaking in Sentences*, 14 GREEN BAG 2d 141, 141 (2011).

4. 18 U.S.C. § 3553(a).

5. *See, e.g.*, Jonathan Scofield Marshall, *Lights, Camera, Allocution: Contemporary Relevance or Director's Dream?*, 62 TUL. L. REV. 207, 212 (1987) ("Modern criminal procedure has rendered allocution virtually obsolete."). It is not just academics who have questioned the importance of allocutions. Marvin E. Frankel, who was then a U.S. district court judge for the Southern District of New York and one of the pioneers of the sentencing guidelines movement for federal courts, observed, "Speaking … of the usual case, defendant's turn in the spotlight is fleeting and inconsequential." MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 38 (1973).

6. 365 U.S. 301, 304 (1961).

7. Of course there are exceptions to this rule. As Judge Brock Hornby pointed out in an email to me critiquing this piece: "But I have had moving allocutions from illegal aliens, apologizing to the people of this country, expressing their love for this country, their dream since childhood of living here, and their regret that because of their actions they cannot return." Email from Hon. D. Brock Hornby, U.S. District Court Judge for the District of Maine, to Mark W. Bennett (Feb. 2, 2011, 3:17 EST) (on file with the author).

8. Judge Brock Hornby also pointed out in "mildly disagreeing" with my fifth rule, that an allocution "can have an important role in the sentencing ritual, in its impact on victims, on the defendant's family and on the community if reported." *Id.* I agree, but I believe the risk outweighs the benefit unless very, very carefully done.

9. Or is it? Perhaps all of us overestimate our ability to gauge sincerity. *See* CHRISTOPHER CHABRIS & DANIEL SIMONS, THE INVISIBLE GORILLA AND OTHER WAYS OUR INTUITIONS DECEIVE US 80-115 (2010) (chapter entitled *What Smart Chess Players and Stupid Criminals Have in Common*).

10. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology Into Criminal Procedure*, 114 YALE L.J. 85, 89 (2004).

11. *Id.* at 115.

12. ALLEN ELLIS & MICHAEL HENDERSON, FEDERAL PRISON GUIDEBOOK (2010-2012 Edition).

13. 75 FORDHAM L. REV. 2641 (2007).

14. *Id.* at 2683.

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