



Outside Counsel

Emotional Healing During Criminal Sentencing Hearing

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In a recent case in New York federal court, the victim of a multi-million-dollar fraud perpetrated by his long-time and trusted chief financial officer delivered an eloquent and impassioned victim-impact statement to the court. In his own words, the victim spoke first of the harm done to his company due to the embezzlement, then to his wish for the defendant to learn from his mistakes and make a better life for himself. As is standard in criminal cases across the nation, the impact statement gave the victim an opportunity to be heard, and in this specific instance, to voice the pain and struggles he and his company faced due to the defendant's fraud. It also allowed him to express his deep compassion for the defendant—a once trusted employee and family friend. His tone and words conveyed hurt, some understandable anger, but also, and perhaps most unexpectedly, forgiveness.

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The victim's statement was not only moving, but also showed his nature as a man of deep faith and heartfelt humanity towards others, including those who did him harm. "Financial crime may also affect victims emotionally and spiritually. Some victims report that they have lost trust in others or in their own ability to make judgments." Deem, D. et al., *Victims of Financial Crime*, in R.C. Davis, et al. (eds.) *Victims of Crime* (2007), p. 133.

The defendant in this case also made his allocution in an emotional man-

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ner. "[T]he right of a defendant in a criminal case to speak at her or his sentencing hearing before the sentence is pronounced—has been recognized in English common law since 1689 and

has been enshrined in some form in the Federal Rules of Criminal procedure since 1944." Burger-Caplan, J.I., *Time of Desperation: An Examination of Criminal Defendants' Experiences of Allocuting at Sentencing*, Columbia J. of Law and Social Problems, 51:1 (2017), p. 40. The purpose of allocution is to give the defendant a similar opportunity to be heard, to tell their story from their own perspective, and in many cases, allow the defendant to seem more fully human despite their wrongdoing. The defendant's allocution appeared to provoke the spontaneous act of the victim to extend a hand of sympathy to him, which ultimately did affect the sentence imposed.

The essence of the victim's statement echoed in the hallowed courtroom and served to paint the aura of the otherwise cold scene with a sense of warmth. While the judge was in another room making her determination as to an order of restitution and sentencing, the victim approached the defendant, and they embraced. This led to the families of the victim and the defendant to likewise approach each other and offer a hand of renewed friendship and compassion. Where the norm would be for both sides to avoid even simple eye-contact, this case was entirely different. Seasoned attorneys, witnesses and

court employees became witnesses to this unexpected scene of sincere emotional healing as it unfolded. The judge returned a short time later and continued with sentencing, which included the order of restitution and a prison sentence, followed by probation.

It's long been established that the primary purposes of punishment in crime control are (1) deterrence, (2) retribution, (3) rehabilitation, (4) restitution, and (5) incapacitation. Ramsland, K., *The Criminal Mind: A Writer's Guide to Forensic Psychology* (2002) p. 151. Congress has incorporated these basic philosophies into the federal sentencing guidelines as factors to be considered, which is then implemented by both the Sentencing Commission generally and the sentencing judge in each case. 18 USCS §3553(a). In other words, "the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic §3553(a) objectives, the one, at retail, the other at wholesale." *Rita v. United States*, 551 U.S. 338, 348 (2007). But these factors do not address the question raised by the specific case at hand: How should the sentence be impacted, if at all, where a victim does not want the defendant to be unduly punished and/or prosecuted, but is obviously powerless to stop the government, and subsequently the judge, from imposing a just result? Should the victim's goals or desires be more than just one small piece of the equation in sentencing?

While federal courts in New York have weighed the five factors differently, and on a case-by-case basis, to determine whether a departure from the Federal Sentencing Guidelines, either downward or upward, is warranted—the victim's desires are usually not a significant part of the analysis, if it's even considered at all. For example, a substantial downward departure was

granted in *Hawkins* after the defendant showed "extraordinary rehabilitation" over two years despite committing a serious crime against state unemployment compensation funds and coming from a family of crime going back multiple generations. *United States v. Hawkins*, 380 F. Supp. 2d 143 (E.D.N.Y. 2005). Compare this to *Ferranti* where the court granted an upward departure for purposes of deterrence by imposing a hefty fine, costs of imprisonment, and substantial restitution for a "greed driven crime" by the defendant, a wealthy landlord who burned down an occupied building, causing the death of a firefighter, to collect the insurance policy. *United States v. Ferranti*, 928 F. Supp. 206 (E.D.N.Y. 1996). Similarly, the court granted an upward departure in *United States v. Tropiano*, 898 F. Supp. 90, 93 (E.D.N.Y. 1995) primarily for incapacitation because the defendant, though convicted of a benign offense, was involved in (but not charged with) various drug-related activities and the court was "convinced that he will continue with serious criminal conduct when he's out of prison." While one or more of the five philosophies behind crime control play a key role in sentencing, the victim's position and desires have not yet been fully incorporated into the basic framework and, unlike the case before us, judges do not usually consider the victim's opinions at sentencing. Of these three cases, only *Ferranti* discusses the victims' desires, not in the context of sentencing, but to illustrate the differences between the American and the French legal systems in imposing civil and criminal remedies ("The French system has long utilized criminal prosecutions to provide for victim compensation."). *Ferranti*, at 218.

In the end of the case before us, justice was done but the term of

incarceration was almost certainly more lenient given the posture of the victim. The issue of monetary restitution was clearly resolved in favor of the victim, yet the overall sentence served both the interest of society to punish perpetrators of crime while also recognizing the humanity of both victim and victimizer. "Victims of crime usually feel passionately about crime and punishment, and indeed a large proportion of society, whether victims or not, feel the same way." Raine, A., *The Psychopathology of Crime: Criminal Behavior as a Clinical Disorder* (1993) p. 305. Thus, in explaining the rationale behind the sentence imposed, the judge spoke of her own wish for the defendant to turn a page, learn from his mistakes and forge the best life going forward. But she also respected the victim by acknowledging the severity of the crime, imposing an appropriate order of restitution, and recognizing the pain experienced by the victim. It is, perhaps, the overture of acknowledgement of the impact on the victim that served to neutralize some of the victim's pain and ultimately brought the matter peaceably forward for all parties. This case demonstrates the very real value of the victim's desires and position and, in some ways, may even set the stage for potential changes in the prevailing theories behind crime control—that the victim's opinions should be added as one of the factors considered at sentencing, one that is weighed as heavily, if not more heavily, than the existing five philosophies.