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Considerations When Advising Victims about Methods for Exercising their Right to Be Heard at Sentencing

A victim's right to be heard at sentencing is "a universally established part of both the state and federal American criminal judicial systems[,]"[1] as evidenced by its enshrinement in statutes and constitutional amendments across the country.[2] As victim voice is increasingly woven into the fabric of criminal sentencing, the ways in which the right may be exercised continue to evolve.[3] Although subject to some variance across jurisdictions, today victims have a variety of options for exercising their right to be heard at sentencing, including: making written, oral or audio-visual victim impact statements (VIS),[4] and filing legal sentencing memoranda.[5] Exercising the right to be heard at sentencing serves at least two purposes: (1) to provide information that can inform the judge or jury regarding imposition of a specific sentence or condition of sentence on the defendant; and (2) to provide restorative/therapeutic value for the victim.[6] Which method(s) of being heard will be best for a specific victim in a particular case will depend on a variety of factors, including the victim's reasons for exercising his/her/their right to be heard.

Personally Delivered Oral Victim Impact Statements[7]

A personally delivered oral victim impact statement may produce at least two outcomes: (1) proportionality in punishment;[8] and (2) victim catharsis.[9] With regard to proportionality, although many opponents of oral victim impact statements decry the process as one that will create excessive sentences fueled by the judge's or jury's emotional reaction to hearing a statement, research has shown this concern to be unfounded. Instead, research reveals that when a victim speaks at sentencing, the result is likely to be a sentence that is proportional to the harm inflicted by defendant's commission of the crime.[10] This outcome may be attributable to the fact that the victim is a unique and critical source of information about the crime's actual harm, and hearing about this harm directly from the victim may make it more accessible to whoever is sentencing the defendant.[11]

For a victim seeking to personally confront the defendant about his/her/their criminal conduct, oral victim impact statements can be beneficial. The personal expression of the harm suffered communicated directly to or in front of the defendant can be a critical tool in healing, and many victims find that after making their statement in court they can move forward from the crime.[12]

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Written Victim Impact Statements[13]

For victims who do not wish to orally address the sentencing authority or defendant, but want their input considered at sentencing, submitting a written statement may be a good option. This option provides victims the opportunity to have their voices heard in the sentencing process with less risk of triggering additional traumatic stress. For this reason and others some victims may prefer this method of being heard. There are, however, some important factors to consider when deciding whether to submit a written impact statement.

First, some jurisdictions require the written VIS to be provided to the defendant, defense counsel and/or the prosecutor in advance of the sentencing hearing, regardless of whether the statement will be read in court.[14] Some victims may wish to modify the content of the statement if they know that the parties will have the opportunity to read it prior to sentencing. Second, unlike a personally delivered oral statement, a victim maintains less control over the statement's content after it has been submitted to the trial court. Whereas victims who give an oral statement are able to modify their statement up until the moment they deliver it, a written statement is harder to modify.[15] Finally, in some jurisdictions the written VIS remains in the offender's file to be used by a custodial agency in any future release hearings.[16] The rationale behind this procedure is to ensure that the releasing authority has victim input when making decisions about defendant's custodial status. This may be a positive outcome if the victim does not wish to speak at such hearings; however, the process does not take into account that release hearings often happen many years after sentencing and that a victim's VIS may no longer reflect the victim's view of the offender or the crime at this later date.

Audiovisual Victim Impact Statements

Because much modern communication is done electronically and with the aid of computers, victims may be most comfortable submitting victim input using technology-assisted forms of communication. Such communication may take the form of a pre-recorded video of the victim delivering a traditional VIS or a memorialization/dramatization of the impact through images and sound.[17] The first type of video may be a practical necessity if the victim is in another location from the sentencing hearing and does not want to, or cannot, travel. This method should cause little controversy and at least one state has statutorily sanctioned the use of this method.[18]

The second type of video—a recording of the crime's impact using images and sound—is often the basis of a defendant's challenge of his/her/their sentence. Court opinions often provide guidance regarding the acceptable form and substance of audio-video statements in any given jurisdiction; reviewing and abiding by the guidance in these cases can help minimize the risk that submitting this form of VIS will be deemed prejudicial to the defendant.[19] Even when a video is found to contain potentially prejudicial content, appellate courts will look to all the factors involved in the sentencing process in determining whether the video impacted the sentence in an

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improper manner and to date these courts most often conclude that any error in admission was harmless.[20]

Filing a Sentencing Memorandum with the Trial Court

If a victim's goal is to advocate for a specific sentence or condition of sentence—including restitution—filing a sentencing memorandum may be advisable.[21] The purpose of sentencing memoranda—like all legal filings—is to persuade the judge with legal argument; it is common practice in many jurisdictions for the State and the defendant to file sentencing memoranda with the trial court advocating their position on the appropriate sentence.[22] The parties may file a sentencing memorandum even where the law does not explicitly authorize them.[23] Similarly, the victim's representative should be able to file a sentencing memorandum even if not explicitly authorized because: (1) it is an exercise of the victim's right to be heard; and (2) trial courts are given considerable discretion to consider all relevant information at sentencing.[24]

Victim representatives should consider filing a legal memorandum in all cases where a victim desires a specific sentence, regardless of whether the prosecutor and the victim diverge on the sentencing recommendation. Such cases may include those in which the prosecutor enters into a plea agreement with the defendant restraining the State from advocating for a particular sentence or requiring the State to seek a reduced sentence. Because the prosecutor does not represent the victim, and the victim is not bound by the plea agreement, the victim may file a memorandum with the court arguing why a certain sentence should be imposed, regardless of the terms of any plea agreement between the State and the defendant.[25] A victim's sentencing memorandum is also useful when there is no plea agreement, but the prosecutor seeks a sentence more lenient or more severe than what the victim thinks is appropriate.[26]

Conclusion

A victim's right to be heard at sentencing serves many purposes and may be exercised in multiple ways. The best methods for any given victim will depend on the victim's goals in being heard. Armed with an understanding of a victim's goals and each method, a victim's advocate or lawyer can help ensure that the victim's voice is successfully woven into the criminal sentencing process.[27]

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[1] Mitchell J. Frank, *From Simple Statements To Heartbreaking Photographs And Videos: An Interdisciplinary Examination Of Victim Impact Evidence In Criminal Cases*, 45 Stetson L. Rev. 203, 203 (2016) ("[VIS] is a universally established part of both the state and federal American criminal judicial systems[.]"); Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 Ohio St. J. Crim. L. 611, 616 (2009) ("[I]t is now virtually universal law that crime victims can deliver a victim impact statement at sentencing.").

[2] *See, e.g.,* Alaska Const. art. I, § 24 ("Crime victims, as defined by law, shall have the following rights as provided by law: … the right to be allowed to be heard, upon request, at sentencing, before or after conviction[.]"); Conn. Const. art. I, § 8(b)(8) ("In all criminal prosecutions, a victim, as the general assembly may define by law, shall have the following rights: …. the right to make a statement to the court at sentencing[.]"); N.M. Const. art. II, § 24(A)(7) (granting victims "the right to make a statement to the court at sentencing and at any post-sentencing hearings for the accused"); Or. Const. art. I, § 42(1)(a) (recognizing the right of victims " to be heard at the . . . sentencing or juvenile court delinquency disposition"); Or. Rev. Stat. Ann. § 137.013 ("At the time of sentencing, the victim or the victim's next of kin has the right to appear personally or by counsel, and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim, and the need for restitution and compensatory fine."); Tenn. Code Ann. § 40-38-103(a)(2) ("All victims of crime shall, upon their request, have the right to:…submit a victim impact statement to the courts and the board of parole and give impact testimony at court sentencing hearings"); Vt. Stat. Ann. tit. 13, § 5321(a)(2) ("The victim of a crime has the following rights in any sentencing proceedings concerning the person convicted of that crime, or in the event a proposed plea agreement filed with the court recommends a deferred sentence, at any change of plea hearing concerning the person charged with committing that crime:…to appear, personally, to express reasonably his or her views concerning the crime, the person convicted, and the need for restitution.").

[3]A California Chief Probation Officer created the first victim impact statement (VIS) in 1976 to give judges an "objective inventory of victims' injuries" and by 1986 forty-eight states permitted VIS in some manner. *See* Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 Stan. L. & Pol'y Rev. 447, 455-62 (2004) (discussing the history of victim impact evidence).

[4] "Victim Impact Statements" and "Victim Impact Evidence" are distinct methods of victim input; the former term references when the victim exercises his/her/their independent right to be heard while the

latter references when a victim is called by the prosecution or defense as a witness during sentencing. This difference is critical as it informs whether and what Rules of Evidence govern the admission of the victim input into court proceedings. Unfortunately, many courts and academic commentators fail to distinguish between these two avenues of victim input, instead using the terms interchangeably. A full discussion of the difference between VIS and VIE is beyond the scope of this Bulletin; when the term "evidence" is used in this Bulletin it is the term used by the author of the cited source.

[5] *See Victim Impact Statements: Top Twelve Practice Tips*, Victim Law Article (Nat'l Crime Victim Law Inst., Portland, Or.), Feb. 2018, at 2, https://law.lclark.edu/live/files/25756-victim-impact-statementstop-twelve-tipspdf. Courts have upheld the use of audiovisual victim impact statements and sentencing memoranda as valid exercises of the victim's right to be heard. *See, e.g., State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 2006) (holding that video and photographic images of the deceased victim may constitute a valid exercise of a victim's right to be heard); *State v. Lindahl*, 56 P.3d 589, 595 (Wash. Ct. App. 2002) (concluding that the trial court did not err in allowing the victim's family's attorney to address the court at the sentencing hearing and to file a sentencing memorandum). *But see*, *Kelly v. California*, 555 U.S. 1020 (2008) (J. Stevens respecting the Court's denial of certiorari of *People v. Kelly*, 171 P.3d 548 (Cal. 2007), on the issue of admissibility of victim impact videos, but stating that "the prosecution's ability to admit such powerful and prejudicial evidence is not boundless").

[6]Jamie Balson, *Therapeutic Jurisprudence: Facilitating Healing in Crime Victims*, 6 Phx. L. Rev. 1017, 1032 (2013) (discussing how for some victims making a VIS is "simply their chance to express—directly to the defendant—how the crime has affected their lives" and is a source of healing); Cassell, *supra* note 1, at 619-624 (discussing the justifications for VIS, including to provide information to the sentencer about the actual harm suffered and to benefit the victim, including therapeutic aspects); *see also generally* Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 No. 5 Crim. Law Bulletin 3 (2004).

[7] Although the initial delivery of an oral victim impact statement is spoken, in most jurisdictions oral statements delivered at sentencing are transcribed and permanently memorialized as part of the sentencing transcript.

[8] *See* Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 Crim. Law R. 545, 548 (1999) (discussing research on sentencing trends and outcomes pre- and post-VIS reform, and concluding that VIS makes "an important contribution to proportionality rather than to severity of sentencing"). Critically, not all victims are heard equally; a victim's race and socioeconomic status are factors that may influence whether an oral VIS will produce a sentence that is proportional to the crime. *See* Kimberly Schweitzer & Narina Nuñez, *Victim Impact Statements: How Victim Social Class Affects Juror Decision Making,* 32 Violence and Victims 521-532 (2017); David R. Karp & Jarrett B. Warshaw, *Their Day in Court: The Role of Murder Victims' Families in Capitol Juror Decision Making*, Chap. 15, 275-295 (July 2006) (finding that jurors viewed African-American families as suffering less about the murder of a family member than white families).

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[9] S. REP. 108-191, 23 (2003) (Committee on the Judiciary reporting favorably on the joint resolution to propose a victims' rights amendment to the United States Constitution; explaining that "[v]ictim statements can also have important cathartic effects" and including quotes from victims on how giving a VIS helped in their healing).

[10] Erez, *supra* note 8, at 548.

[11] Erin Sheley, *Victim Impact Statements and Expressive Punishment in the Age of Social Media*, 52 Wake Forest L. Rev. 157, 158-59 (2017) (explaining that "particular narrative features of VIS work to make a victim's harm accessible to a listener[,]" and that "[u]nmediated victim narratives have therefore always been an important source of information about actual criminal harm").

[12] Megan A. Mullett, *Fulfilling the Promise of Payne: Creating Participatory Opportunities for Survivors in Capital Cases*, 86 Ind. L.J. 1617, 1628 (2011) (noting that personally sharing the effect of the crime at sentencing "has the potential to help survivors move toward closure as a result of 'the sense of catharsis that comes of speaking publicly about one's loss'"); *Cf.*, *Kenna v. U.S. Dist. Court for C.D.Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006) (emphasis added) (upholding the victim's right to speak at sentencing, and noting that "the [law] gives victims the right to confront every defendant who has wronged them; speaking at the co-defendant's sentencing does not vindicate the right of the victims to look *this* defendant in the eye and let him know the suffering his misconduct has caused").

[13] A written VIS is distinct from victim input included in a presentence investigation report (PSR/PSI). Some jurisdictions provide victims a specific right to submit a statement for inclusion in the PSR/PSI. *See e.g.*, Ariz. Rev. Stat. Ann. § 13-4424(A) ("The victim may submit a written impact statement or make an oral impact statement to the probation officer for the officer's use in preparing a presentence report."); Mich. Comp. Laws Ann. § 780.824 ("If a presentence investigation report concerning the defendant is prepared, the victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing the report…A victim's written statement shall, upon the victim's request, be included in the presentence investigation report.") The PSR/PSI is generally written by an officer of the court based upon what the victim submits, rather than written directly by the victim. For this reason and others, affording a victim the right to provide a victim statement for inclusion in the PSR/PSI does not satisfy a victim's broader right to be heard.

[14] *See, e.g.,* Ark. Code Ann. § 16-90-1112(b) ("The court shall give copies of all written victim impact statements to the prosecuting attorney and the defendant."); Miss. Code. Ann. § 99-19-159(1) ("At least forty-eight (48) hours prior to the date of sentencing, the court shall make available copies of the statement to the defendant, defendant's counsel and the prosecuting attorney. These parties shall return all copies of the statement to the court immediately following the imposition of sentence upon the defendant."); Tex. Crim. Proc. Code Ann. § 56.03(e) ("Before sentencing the defendant, the court shall permit the defendant or the defendant's counsel a reasonable time to read the statement, excluding the victim's name, address, and telephone number[.]"). In cases where a court orders the victim to submit a written statement to the defendant or the prosecutor prior to the sentencing hearing, the victim

representative should carefully analyze the law and the victims' right being exercised (i.e., the right to submit a VIS or the right to be heard at sentencing). If requiring pre-submission to a party is negatively impacting how and whether the victim will exercise his/her/their right, the victim representative should consider arguing that it is a violation of the victim's right.

[15] A written VIS can be modified once it is submitted, but it will require successfully moving the court for substitution of statement, and then retrieving copies from all parties if it has been distributed.

[16] *See, e.g.,* Okla. Stat. Ann. tit. 19, § 215.39(B) ("The [Narrative report of offenses for offenders sentenced to incarceration for more than five years] shall be provided to the Department of Corrections and the Pardon and Parole Board, together with the judgment and sentence in the case and any victim impact statements presented to the court in the case."); S.C. Code Ann. § 16-3-1555(B) ("In cases in which the sentence is more than ninety days, the prosecuting agency must forward, as appropriate and within fifteen days, a copy of each victim's impact statement or the name, mailing address, and telephone number of each victim, or both, to the Department of Corrections, the Department of Probation, Parole and Pardon Services, or the Board of Juvenile Parole, the Department of Juvenile Justice, and a diversion program.").

[17] *See, e.g., People v. Booker*, 245 P.3d 366, 405 (Cal. 2011), *cert. denied*, 565 U.S. 964 (2011) (finding that the viewing of three videotapes depicting a series of photographs of the victims engaging in activities, enjoying holidays, and one of what appears to be a school display commemorating one victim being named student of the month at defendant's sentencing hearing did not invite a purely irrational response from the jury and properly humanized the three young victims); *People v. Kelly*, 171 P.3d 548, 570-71 (Cal. 2007), *as modified on denial of reh'g* (Feb. 20, 2008), *cert. denied*, 555 U.S. 1020 (2008) (finding the 20-minute video consisting of a montage of photographs and video clips of the victim swimming, horseback riding, at school and social functions, and spending time with her family and friends, narrated "calmly and unemotionally" by her mother, with music of Enya in the background to be relevant and, because the presentation was not unduly emotional, permissible); *State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 2006) (holding that video and photographic images may constitute a valid exercise of a victim's right to be heard and, in particular, that the DVD presentation in this case was a valid exercise of that right and did not result in manifest injustice); *Lopez v. State*, 181 A.3d 810, 814 (Md. Ct. App. 2018) (holding that the viewing of a six-minute video containing approximately 115 photographs of the mother and son homicide victims, two songs, and the sound of church bells as victim impact at sentencing hearing did not violate the defendant's constitutional rights).

[18] *See* Iowa Code Ann. § 915.21(c),(d) ("A victim may make a video recording of a statement or, if available, may make a statement from a remote location through a video monitor at the sentencing hearing, in the presence of the defendant, and at any hearing regarding reconsideration of sentence. … A victim may make an audio recording of the statement or appear by audio via a speakerphone to make a statement, to be delivered in court in the presence of the defendant, and at any hearing regarding reconsideration of sentence.").

[19] *See, e.g.*, *Kelly*, 171 P.3d at 571 (discussing prior case law and finding that there is no bright-line rule for how long a videotape may be, but that victim impact videos must not contain "nonfactual dramatization of the evidence"; a "staged and contrived presentation"; "irrelevant background music or video techniques that enhance the emotion of the factual presentation"; or be "unduly emotional" even when presented factually); *People v. Dykes*, 209 P.3d 1, 48 (Cal. 2009) (discussing case law on victim impact video and concluding that there is "no bright-line rule pertaining to the admissibility of videotape recordings of the victim at capital sentencing hearings" but "[c]ourts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents"); *State v. Hess*, 23 A.3d 373, 393–94 (N.J. 2011) (stating that it could not set forth an exhaustive catalogue of what is and is not permissible in a video, but that an "overly lengthy video, baby photographs of an adult victim, and a video scored to religious and pop music do not advance any legitimate objective even against the broad contours of the Victims' Bill of Rights"); *Cf. State v. Schierman*, 415 P.3d 106, 167 (Wash. 2018) (discussing case law on victim impact evidence and noting that stylized elements such as still images of victims with captions with phrases like "you are gone, but not forgotten" have been deemed inflammatory and inadmissible).

[20] *See People v. Sandoval*, 363 P.3d 41, 76 (2015) (upholding sentence after finding that the trial court abused its discretion in allowing a six-minute PowerPoint presentation that consisted of still photos introduced into evidence accompanied by stirring orchestral music; concluding that even though the potentially prejudicial music was designed to amplify the emotional impact of the photos and should not be included in VIS, the error did not affect the sentence); *State v. Bixby*, 698 S.E.2d 572, 586 (S.C. 2010) (rejecting defendant's argument that a victim impact video that contained footage of the victim's funeral with the folding of an American flag over the closed coffin, playing of Taps, mourners and a recording of a fictional 911 call in which the victim—a deputy sheriff—is given permission to "return home" was prejudicial).

[21] Sentencing memoranda can be a significant tool to advance a victim's interests and should be in a victim representative's toolkit when advocating for a victim at sentencing. *See* Jacob Grimes, *The Sentencing Memorandum: The Legal and Societal Implications of Its Online Publication*, 36 St. Louis U. Pub. L. Rev. 87, 90 (2017) ("The sentencing memorandum goes beyond calculating criminal categories and following guided sentencing statutes by allowing the parties and judge to tailor sentences based upon highly relevant and individualized information. Specifically, the tool enables the lawyers to summarize the legal, factual, and emotional reasons why the court should impose the requested sentence.").

[22] *See, e.g.,* N.Y. Crim. Proc. Law § 390.40 ("Either the defendant or prosecutor may, at any time prior to the pronouncement of sentence, file with the court a written memorandum setting forth any information he may deem pertinent to the question of sentence. Such memorandum may include information with

respect to any of the matters described in section 390.30 [Scope of pre-sentence investigation and report]. The defendant may annex written statements by others in support of facts alleged in the memorandum.").

[23] *Cf. State v. Collier*, No. 95572 (Ohio Ct. App. June 9, 2011) (finding that Ohio Criminal Rule 32(A) requires courts to afford defense counsel "an opportunity to speak" at sentencing without defining in what manner, and noting that one method is to submit a sentencing memorandum with a detailed argument on defendant's behalf).

[24] *See, e.g., People v. Henderson*, 662 N.E.2d 1287, 1295 (Ill. 1996) ("As a general matter, it is well established that a trial court has discretion to consider virtually all relevant evidence during sentencing."); *State v. Hunnel*, 863 N.W.2d 442, 448 (Neb. 2015) ("The sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. The traditional rules of evidence may be relaxed for this purpose, so that the sentencing authority can receive all information pertinent to the imposition of sentence. Thus, reliance upon hearsay information in a presentence investigation is not inappropriate."); *State v. Lindahl*, 56 P.3d 589, 595 (Wash. Ct. App. 2002) (concluding that the trial court did not err in allowing the family's attorney to address the court at the sentencing hearing and to file a sentencing memorandum).

[25] *See State v. Lampien*, 223 P.3d 750, 760 (Idaho 2009) (finding that the prosecutor did not breach the terms of the plea agreement by permitting victims to make victim statements at the sentencing hearing because the victims were exercising their right to be heard at sentencing and not acting as agents of the State, and therefore were not bound by the terms of the plea agreement); *State v. Shump*, 417 P.3d 274 (Kan. Ct. App. 2018) (finding that "this court has repeatedly held as a general rule that statements made by victims do not violate the State's obligations under a plea agreement").

[26] Another potential benefit of filing a sentencing memorandum is that it helps solidify the victim's standing, including on appeal, on the issue of defendant's sentence as it relates to the victim's right to be heard.

[27] For practice pointers when representing a victim in making a VIS, see *Victim Impact Statements: Top Twelve Practice Tips*, Victim Law Article (Nat'l Crime Victim Law Inst., Portland, Or.), Feb. 2018, https://law.lclark.edu/live/files/25756-victim-impact-statementstop-twelve-tipspdf.

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