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## UNDERSTANDING DEFENSE-INITIATED VICTIM OUTREACH AND WHY IT IS ESSENTIAL IN DEFENDING A CAPITAL CLIENT

*Mickell Branham\**

*Richard Burr\*\**

### I. INTRODUCTION: THE NEED FOR COMPASSION TO BE EXPRESSED TO THE FAMILIES OF MURDER VICTIMS BY DEFENSE TEAMS

A murder evokes empathy. Upon first hearing of a murder in our communities, we immediately feel sadness and loss and an outpouring of feeling for the people who loved the victim. We shudder with them. We feel drawn to express sympathy. We cry. Most people feel, shortly thereafter, “Why did someone do this?” “How could he (we usually think, ‘he’)?” “What sort of monster is he?” As people engaged in capital defense work, we think about the murderer as well, but in different terms—how traumatized this person must have been, how unloved, un-nurtured, and impaired, how hurt he must have been. One of us is then appointed to represent this person. We turn all our attention to the tasks of representation—assembling a defense team, interviewing and working with our client, investigating the crime and our client’s life, getting and pouring through discovery, preparing and filing motions,

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putting on hearings, preparing for trial, pursuing pleas, going to trial—and we forget or repress those first feelings we had, of sadness, loss, and empathy.

Those feelings are not forgotten or repressed by others. Police officers and prosecutors are driven by them, jurors re-experience them at trial and make decisions colored by them, and the people who most loved the person killed—the survivors—live them day-in and day-out.

How can we represent our clients effectively, zealously, passionately, and with integrity if we repress the feelings of sadness, loss, and empathy that were first evoked upon hearing of the murder? Are we not failing to address the core of the matter, that thing that drives the very prosecution we seek to defend against? If we could speak to that thing, that palpable heart-rending life-changing wave of emotions left in the wake of murder, would not we be defending our clients more effectively? Of course we would. We cannot defend the person accused of committing a murder without acknowledging and addressing the wrong that our client is accused of. But most of us do not address the wrong directly. We try to raise doubt about our client's involvement, we mitigate his or her culpability, we counter the aggravating circumstances—but we do not speak to the harm done to the victim and his or her survivors. Why not? Because we have been conditioned by the adversary process to think that the survivors of homicide are on the other side, that they have disdain for our clients and for us for defending them, that we appear and even feel disloyal to our clients if we open ourselves to their feelings of sadness and loss. In this way, we forget or repress the empathy we once felt for them, and we ignore that thing that drives prosecutors to seek, and jurors to impose, death for our clients.

The consequences of this are profound both in and out of the courtroom. By failing to speak and act with genuine compassion and empathy for the suffering of surviving family members, defense lawyers diminish the role that humanity and humaneness can play in capital trials and post-conviction proceedings. Capital defense lawyers rely in critical measure on decision-makers to respond with compassion to their clients. Before trials, the defense asks prosecutors to settle cases in part because of the compassion generated by trauma the defendant suffered years ago.<sup>1</sup> If the case goes to trial, the defense asks the jury to reject a death sentence for the same reasons.<sup>2</sup> In post-conviction proceedings, the

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1. See, e.g., James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2108 (2000).

2. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 112-17 (1982) (reversing a death penalty conviction and criticizing the trial judge for not allowing the jury in a death penalty sentencing trial

defense often asks judges to find as ineffective assistance of counsel the failure of trial counsel to investigate and present to the sentencing jury the trauma in a client's life.<sup>3</sup> To show sufficient prejudice, the evidence that trial counsel failed to investigate must generate a feeling of compassion in the post-conviction judge. When the defense team fails to acknowledge and address in meaningful ways the suffering of the victim's family, their evocation of compassion for the defendant is less moving. The compassion that prosecutors, jurors, and judges may genuinely feel for the defendant is tempered by the realization that the defendant, through his own expressions or through the expressions of his representatives, has shown no real feeling for the suffering of the innocent survivors of the murder.

More generally, but just as surely, the failure of the defense team to acknowledge and address in meaningful ways the suffering of the victim's family, or simply to treat the family with kindness and respect, lessens the possibility that the proceedings will end with compassion for their client. Feeling compassion for homicide survivors is natural and instinctive. Like other people, members of the defense team have such feelings. Because they suppress those feelings, however, the defense team does not consider how they can appropriately express such feelings. Accordingly, the defense team does not take steps to engage the survivors—to get to know them, to listen to their stories, and to discern the interests the survivors hope to have met in the judicial proceedings. Because of this, the defense team does not, for example, think about the sentimental value some items of evidence have, such as the victim's watch, ring, or necklace, and thus does not offer to stipulate to a photograph of the item so that the family can have the keepsake back. The defense team does not think to inquire whether the scheduling of pretrial hearings or the trial itself is convenient to the survivors, many of whom have to arrange in advance to travel long distances and be away from work or other commitments. The defense team does not refer to the victim by his or her name in court proceedings and does not insist that everyone else in the process use the victim's name. The defense team does not consider whether the survivors are aware of the matters that will be discussed and presented at a pretrial hearing, such as photographs

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to hear evidence of the defendant's "turbulent family history, of beatings by a harsh father, and of severe emotional disturbance").

3. See *Williams v. Taylor*, 529 U.S. 362, 395, 399 (2000) (overruling a death penalty conviction due to ineffective assistance of counsel and chastising counsel for failing "to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood").

of the victim or the crime scene after the murder, and whether those matters might re-traumatize the survivors. The defense team does not consider the effect that certain motions, such as requiring victim impact testimony to be aired in advance of trial to allow the emotional quality of that testimony to be constrained, will have on survivors who have had no one explain the need for such a preview.

Defense teams which allow themselves to be mindful of the suffering of homicide survivors and to express compassion in these and many other ways do not disserve their clients. To the contrary, their genuine expressions of compassion, made unconditionally and out of kindness, can help ease the suffering of survivors. The aspects of the judicial process that tend to re-traumatize survivors can be ameliorated. The anger that survivors feel toward the defendant can be expressed to members of the defense team, and patient and compassionate listening in such conversations can contribute to the survivors' healing process. The respect that survivors feel from the defense team can make the judicial process less painful.

The insertion of such kindness into the judicial process cannot hurt the defendant. And more often than not, it helps him. When pleas are discussed, survivors who have been treated with kindness by the defense are less likely to be angry at the possibility of a plea, may be able to accept it, and may even be supportive of it. When cases go to trial, the respect that the defense has for and has shown to survivors often allows the defense to help victim impact witnesses tell stories of recovering and regaining a hold on life in the wake of the murder—stories that the witnesses are eager to recount and that do not inherently call for the death of the defendant as a means of helping the survivors. In short, the defense team's expressions of compassion and kindness to the survivors are often reciprocated.

## II. THE PRACTICE OF CAPITAL DEFENSE TEAMS REACHING OUT TO SURVIVORS

A handful of lawyers, investigators, and mitigation specialists in the capital defense community have for many years reached out to the survivors in their cases. Most, however, have not. Within the past ten years, that has begun to change. Beginning with the defense of Timothy McVeigh in the Oklahoma City bombing case,<sup>4</sup> the capital defense

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4. See generally Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity that Has Come from Payne v. Tennessee*, 88 CORNELL L. REV. 517, 528 (2003) (illustrating,

community has begun to develop a systematic practice of reaching out to the survivors in capital cases. Rooted in traditional notions of restorative justice and conflict transformation, defense-initiated victim outreach (“DIVO”)<sup>5</sup> as a method of engaging in dialogue with surviving family members has grown and continues to evolve. One of the primary lessons learned during this evolution has been that the interests of the defense team and the interests of the victims are far from being mutually exclusive. In fact, once dialogue begins, it is hard to believe that this natural flow of human interaction was previously untapped. Victims have questions only the offender can answer. Victims want to be heard not only by the community at large, but specifically by the offender and his or her representatives. The offender is the one the victims want to tell about their pain. Victims need to be heard, and they need to be heard by the offenders and by the capital defense community.

This is true not only when the defendant is, in fact, the offender. This is also true when the defendant is innocent and has a viable claim of actual innocence. In cases of actual innocence, it is imperative that the defense team be in dialogue with the victim’s family. The defense team may be their only hope of learning the truth.<sup>6</sup>

This process ideally begins long before trial. The first step for a capital defense team is to find the appropriate person to reach out to the victim’s family on their behalf. Many offices now have trained victim liaisons on staff. For those that do not, trained and qualified victim liaisons are available nationwide and have been funded at the request of the defense in numerous state and federal jurisdictions.<sup>7</sup> Judges are

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through the context of the prosecution against McVeigh, how “defense-based survivor outreach can benefit both capital offenders and survivors”).

5. In this Article, family members of victims in capital cases are referred to as “survivors.” The phrase “defense-initiated victim outreach” is utilized because many surviving family members consider themselves, and refer to themselves, as victims. *See, e.g.*, Kristin M. Froehlich, *A Survivor’s Journey*, DELAWARE LAW., Winter 2003-04, at 24-25 (discussing the use of the term “victim” as applied to family members of murder victims).

6. Another lesson learned in the evolution of DIVO is that, in many cases, what victims want more than anything else is the truth about what happened, no matter how painful. *See, e.g.*, Interview with Robert C. Shaler, Former Director of the Forensic Biology Dep’t, Office of the Chief Medical Examiner of N.Y., *Talk of the Nation* (NPR radio broadcast Jan. 6, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5132961>.

7. In federal court, victim liaisons have been utilized in numerous capital trials and habeas corpus proceedings, and in many cases have been court-appointed. Victim liaisons have also been widely utilized in state capital proceedings, at both trial and post-conviction proceedings. The *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* and the corresponding commentaries are filled with language that is helpful to a motion for appointment of a victim liaison. Contact with the family of the victim is described as “[a] very difficult but important part of capital plea negotiation.” ABA GUIDELINES FOR THE APPOINTMENT AND

beginning to understand that a victim liaison is a necessary part of the defense function. In one reported case, counsel was found ineffective for not reaching out to the survivors.<sup>8</sup> Retaining victim liaisons and reaching out to survivors is becoming a necessary part of the practice of defending clients in capital cases.

Only someone with appropriate training should be engaged in this sensitive work.<sup>9</sup> Qualified victim liaisons have specialized knowledge about the trauma experienced by survivors when a loved one is murdered and have learned how best to approach and develop a respectful relationship with survivors.<sup>10</sup> They have finely honed listening skills and are taught how to help survivors identify and articulate what they need from the court proceedings focusing on the person charged with the murder.<sup>11</sup> They have the ability to work with defense teams to help respond thoughtfully to queries from survivors and to develop a

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PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.9.1, commentary (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA GUIDELINES are also available online at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>. In connection with plea discussions, counsel “should know and fully explain to the client” both the “concerns” of the survivors and possible “concessions that the client might offer, such as . . . a meeting between [survivors] and the client,” and “a public statement of remorse by the client, or restitution.” *Id.* at Guideline 10.9.1. “[A]pproaches to the victim’s family should be undertaken carefully and with sensitivity” and “[defense counsel] may consider seeking the assistance of . . . a defense-victim liaison . . . in the outreach effort.” *Id.* at Guideline 10.9.1, commentary.

8. See *United States v. Kreutzer*, 59 M.J. 773, 783-84 (Army Ct. Crim. App. 2004).

The defense counsel’s decision not to cross-examine many of the victims who testified, even if counsel had been fully prepared and aware of how the witness would likely respond, could be a reasonable tactic. But as to [the victim’s widow], defense counsel’s failure to even interview her before she testified at trial, in order to determine whether or not they should cross-examine her, was a tragic flaw. [She] is apparently a woman of strong religious faith which gave her a powerful impetus to forgive appellant for his terrible act of killing her kind and loving husband. Regrettably, this evidence of her forgiveness, which she clearly communicated to the prosecution, was not disclosed by the government to the defense counsel. Regardless of the prosecutor’s failing, defense counsel’s failure to interview the principal victim, who would testify against their client about the devastating impact his killing of her husband had on her and their eight children, and to discover her extraordinary feelings of forgiveness and her belief that appellant should not be put to death, rendered their performance grossly ineffective on behalf of their client.

*Id.* (citations omitted).

9. Contact Mickell Branham, [Mickell\\_Branham@fd.org](mailto:Mickell_Branham@fd.org), for information on trainings as well as referrals to qualified victim liaisons.

10. See Kristen F. Grunewald & Priya Nath, *Defense-Based Victim Outreach: Restorative Justice in Capital Cases*, 15 CAP. DEF. J. 315, 337-38, 341-42 (2003).

11. See *id.* at 347; see also Burr, *supra* note 4, at 527-28 (explaining how defense-initiated outreach by a victim liaison helps survivors articulate their feelings and goals in relation to the judicial process).

relationship with the survivors that is comfortable for survivors and guided by the interests and needs of the survivors that the defense is uniquely able to meet.<sup>12</sup>

The victim liaison must not only be appropriately trained. She or he cannot be a member of the defense team. The victim liaison is retained as an expert and has the same relationship as any other expert with the defense team.<sup>13</sup> Unlike investigators, mitigation specialists, and attorneys, who must have undivided loyalty to their clients, victim liaisons must maintain a balance between the interests of the defense team and the concerns and needs of the victims. If members of the defense team try to engage the survivors, they cannot set aside the role and responsibility they have—to save their client's life. Thus, their approach to the survivors would necessarily involve trying to persuade the survivors to support, or at least not object to, a non-death-penalty outcome for their client. A victim liaison cannot have this objective. Her or his objective must be, solely, to engage the survivors wherever they are, wholly on the survivors' terms, and to offer a relationship with the offender, through the defense team, that may satisfy at least some of the survivors' needs and interests. The liaison can have no other agenda. To

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12. The relationship that the victim liaison tries to facilitate between the defense team and the survivors is rooted in the needs and interests of the survivors. The defense team can meet these needs and interests only because of its relationship with the offender. Murder creates an involuntary relationship between the offender and the survivors. See Richard Burr, *Expanding the Horizons of Capital Defense: Why Defense Teams Should Be Concerned About Victims and Survivors*, CHAMPION, Dec. 2006, at 44, 44-47 (discussing the relationship formed between offenders and survivors). See generally Jody Lynce Madeira, *Ties Out of Bloodshed: Collective Memory, Cultural Trauma, and the Prosecution and Execution of Timothy McVeigh* (Ind. Univ. Sch. of Law-Bloomington, Research Paper No. 91, Oct. 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1005271](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005271) (describing the connections fostered between Timothy McVeigh and families of those who died in the 1995 Oklahoma City bombing). In short,

[A murder] puts the killer in the position of having information that the survivors need to know to be able to live without continually imagining what happened, why, and how death came to their loved one. The act of taking another's life also creates an obligation to the survivors. The killer has taken something of irreplaceable value from the survivors, and he is obliged to make up for that somehow—to restore in some way that is meaningful the loss that has been inflicted.

Burr, *supra*, at 45.

Because the defense team stands for the offender in legal proceedings, the defense team shares in this relationship between the survivors and the offender. Thus, when we refer to the interests and needs of the survivors that the defense is uniquely able to meet, we mean those interests and needs that come out of the underlying survivor-offender relationship.

13. The defense retains many experts who are not members of the defense team. Indeed, no testifying expert is a member of the defense team. All experts perform a discrete and limited function to assist the defense in gaining the best outcome for the defendant. The victim liaison is no different in this respect.



reach out to survivors on behalf of the defense team with the purpose of bringing the survivors to the side of the defense in the adversarial process of the judicial proceeding would be as inappropriate and manipulative as a victim advocate, who works for the prosecutor, relating to the survivors for the sole purpose of keeping the family angry and getting them to support the death penalty, rather than supporting the survivors through the judicial process and assisting them in gaining available financial assistance and services. For either the defense or the prosecution to use survivors as a means to their separate ends in a death penalty case is fundamentally disrespectful of survivors, is likely to make their travail through the judicial process worse, and will undoubtedly leave the needs and interests they have—which arise solely out of the involuntary relationship they have with the offender—largely unsatisfied.

The paradox of victim outreach is that by treating victims with respect and sensitivity, by listening to their concerns, meeting their needs, and answering their questions to the extent possible, the defense team has a better chance of getting what it wants than they have by asking the victims for it. By engaging in a process that ultimately humanizes everyone, including the defendant, the judicial process itself becomes more humane. When each party is able to see the other as fellow human being, rather than as enemy, the fullness of humanity, rather than any side's agenda, guides the judicial proceeding. And in these circumstances, anything is possible.

Victim outreach can look dramatically different from case to case. The level of engagement depends entirely on the needs of the victim's family, and often members of the same family have dramatically different concerns and needs. So while there is no formula for victim outreach, and while the process is in no way neat or linear, there are some basic guidelines and parameters that help keep the work in perspective.

#### *A. Information Flow*

Because a victim liaison is not an integral member of the defense team, he or she will not be part of strategy sessions or confidential meetings. Nor should the victim liaison have access to any privileged information. The victim liaison should never be in a position of having information he or she is unable to share with the victim's family. All sources of information relied on by the victim liaison, particularly at the beginning of engagement in a case, should be from public records.

As the relationship with the family develops and questions arise about the judicial process and the defendant, the defense team will have to decide what information to share with the families. The families' need for this information requires the defense team to think more seriously than it otherwise would about whether information can be disclosed. The reflexive response of defense team members to any query for information within their embrace—"I cannot talk about that"—has to be set aside, and the team must carefully consider whether the attorney-client privilege, the attorney-client relationship, the work-product protections, and the defense strategy can nevertheless permit disclosure.<sup>14</sup> Even when the defense team is unable to answer questions or share information, the liaison has the opportunity then to explain to the family, in terms of constitutional principles and ethical obligations, why their questions cannot be answered. Though this kind of response is less satisfying to the survivor, it still respects the survivor and can often be the basis for a discussion about what would have to take place, such as a resolution of the case, for the defense to be able make a fuller disclosure.

Another aspect of information flow is also important. The defense team must make certain that the liaison is kept up-to-date on all case developments, such as motions filed, hearing dates, status conferences, rulings, and the trial schedule, so that the liaison can share important information with the family, and, when appropriate, give the family ample warning that difficult or sensitive issues will be discussed in court or in the press. For scheduling matters, the liaison can also learn if the family has particular difficulty with a scheduled hearing or the trial schedule so that the defense can urge that the family's schedule also be taken into account.

The liaison's tasks do not include "pitching" anything to the victim's family. Note the difference between this and the tasks a mitigation specialist might have in approaching the victim's family. An investigator or a mitigation specialist reaching out to survivors might feel compelled to "explain" their client's disabilities or to persuade the family to support a life sentence.<sup>15</sup> A victim liaison will discuss these

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14. In this respect, too, victim liaisons are like other defense experts. Experts have access to privileged information only within the realm of their expertise. The same is true with the victim liaison. She or he gains access to privileged information only if the defense team decides to make it non-privileged by deciding to provide it to the survivors.

15. See Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1125-34 (2003) (describing the various obligations that investigators, mitigation specialists, and victim liaisons have when working on death penalty cases).

and related issues only when the victim's family expresses interest in them. Questions about punishment or the social history of the defendant are often eventually asked by victims. Only then will the information about these matters be accepted and fully appreciated. Attempts to "pitch" information to the family prematurely by other members of the defense team will usually be met with hostility and skepticism.

### *B. Contact*

Generally, initial contact with the victim's family should be made by letter of introduction from the attorneys, followed by a letter from the victim liaison, fully explaining his or her role. The letter may then be followed up with a telephone call and, eventually, a meeting between the liaison and the family member(s).

Again, note the difference between this approach and an investigative approach. An investigator might show up unannounced at the home of a victim's family. In that way, the investigator has an advantage and power over the family member. Victim outreach, by contrast, serves to empower the victim's family, not to manipulate or overpower them. Victim outreach invites survivors to engage in a relationship if they are drawn to do so. Its power is in tapping into the underlying relationship that already exists between survivors and offender.

Timing of the initial contact is very important. It should not be too soon, and it should not be too late. At the trial level, if at all possible, no contact should be attempted, other than respectful expressions of sympathy and cordial greetings in connection with court proceedings, until at least six months, even one year, after the crime.<sup>16</sup> The capital defense community knows all too well the impact severe trauma has on cognitive functioning. Profound personal grief compounds the limitations on a victim's ability to process information and leaves them extremely vulnerable.<sup>17</sup> On the other hand, the initial contact should not

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16. This general rule assumes that cases will not go to trial until approximately two years after the crime. However, it may have to be disregarded in jurisdictions that deny adequate trial preparation time and push cases to trial faster than this. Even in those cases, it is important to delay initial contact as long as is practicable but not so long that the contact is perceived as a disingenuous attempt at manipulation.

17. In her book, Joan Didion describes her personal experience of grief. JOAN DIDION, *THE YEAR OF MAGICAL THINKING* 167-74 (2005).

I think about people I know who have lost a husband or wife or child. I think particularly about how these people looked when I saw them unexpectedly—on the street, say, or entering a room—during the year or so after the death. What struck me in each instance was how exposed they seemed, how raw.

be so far along in the pretrial period that the outreach is misperceived as a desperate attempt by the defense to win over the survivors' sympathy. Developing a respectful relationship with survivors needs to be initiated at a time when the survivors may be open to it and not so engulfed with the rawness of their loss that they cannot respond meaningfully.

### C. Objective

The objective of a victim liaison in working with surviving family members on behalf of the defense team is simple and straightforward: Learn from them the needs and interests they have that the defense might be able to meet, then meet their needs and answer their questions and concerns. If what the family needs is for the victim liaison to go away, the victim liaison goes away. If the family needs someone to vent their anger toward, the victim liaison listens. If they want to know why the defendant pled not guilty after giving a twenty-page confession, the victim liaison explains the process and why that happened. If they want the defense team to know who their loved one was, the victim liaison makes sure they do. If they want a face-to-face meeting or other form of communication with the defendant, the victim liaison works with the defense team and someone trained in victim-offender mediation toward that goal. The possible needs and questions are varied and, though often common in form, are always different in specific expression. Each time the defense team is able to answer a question or meet a need, something shifts.

At times, surviving family members may not be able to recognize or identify specific needs. Victim liaisons are trained to listen carefully and to help victims discern and articulate their needs and interests.

Because victim outreach work for the defense team must remain victim-centered and be guided solely by the needs and concerns of the victims, it is almost impossible for investigators, mitigation specialists, and attorneys on the case to perform this function. It may seem counterintuitive to some that something that is part of the defense function focuses on the needs of someone other than the defendant. Paradoxically, however, when the defense listens to survivors through the victim liaison and addresses their needs and concerns to the extent they can, without asking anything in return, the dynamics of a case often change. Survivors begin to see numerous ways in which their needs and

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How fragile, I understand now.  
How unstable.

*Id.* at 169.

interests can be met directly by the defense and begin to recognize that more than one outcome can satisfy their interests. In short, by honoring the humanity and dignity of the victim and by modeling compassion to surviving family members, the defense team creates a less hostile environment more conducive to recognizing the humanity of everyone involved in the process, including the defendant.

#### *D. Duration*

The duration of the relationship between the survivors and the victim liaison varies from case to case. If the survivors favor a resolution of the case by plea bargain and the plea bargain is accepted, the case ends. Often in these circumstances, however, a relationship continues between the survivors and the liaison and sometimes includes the defense team and the defendant. If the survivors favor a plea bargain but the case still goes to trial, the relationship between the victim liaison and the survivors continues through trial and the resolution of the case (whenever and however that occurs). If the survivors support and promote the death penalty in a case, but also engage in a relationship with the victim liaison, the liaison continues to work with the family on behalf of the defense team in whatever ways are appropriate. Sometimes survivors' feelings about the process, the case, and the offender remain the same throughout the history of a case, which lasts for years. Sometimes they do not. Maintaining the relationship for as long as survivors want to have the relationship never hurts the defense.

Ideally, one victim liaison would work with the family on behalf of the defense teams through the trial, appeals, and post-conviction proceedings. Once a good relationship has been established with a surviving family, it benefits all parties to extend that working relationship through later stages of the case. Defense teams may change over the course of the case, but when the survivors and the victim liaison have developed a good working relationship, new defense teams are well-served by continuing to work through the victim liaison who has the relationship with the survivors.

#### *E. Appeals and Post-Conviction Proceedings*

In cases where no victim outreach was attempted during the trial, there is still tremendous potential for engaging surviving family members in dialogue during the appellate and post-conviction processes. Often, family members are more receptive to communicating with the defense team when there is greater time and distance from the trial.

Furthermore, families are sometimes uninformed and unassisted when the case reaches its later stages. In those instances, the defense team may be the only source of information or education about what is happening in the case.

In one recent case, a family who had lost their loved ones fifteen years earlier had no idea that an evidentiary hearing was about to take place in federal district court on the federal habeas petition until one of the authors, Mickell Branham, wrote them. No one from the prosecution team had spoken with the family for years. The defense team was able to provide the details, along with the briefs. The family asked Ms. Branham to attend the hearing with them, met the defense team, and showed them pictures of their family. At the close of the hearing, the defense team introduced the victims' family to the judge. The family had been unacknowledged by the prosecution team for most of the hearing.

There may, at times, exist a strained relationship between prosecutors and victims. Where there exists an environment of mistrust or hostility between family members and prosecutors so that family members may have no way of receiving information or understanding about the status of the case or the defendant, contact by a victim liaison is often gratefully welcomed.

#### *F. Multiple Defendant Cases*

In federal court, the death penalty is often sought in multiple defendant cases.<sup>18</sup> Many involve multiple victims as well. In these cases, unless the number of capital-eligible defendants or the number of victims is extraordinarily high, only one victim liaison should be engaged for all defendants. Since the liaison has no access to privileged or confidential information, there is no risk of compromising any defendant's interests. Of course, in working with multiple defense teams, a host of issues can arise for the victim liaison that require parameters to be agreed upon by all defense teams before outreach begins. Having worked on a number of multiple defendant cases, we have established a protocol which covers a wide range of potential complications. Where victim outreach is being considered in a multiple defendant case, we strongly encourage attorneys to discuss with the victim liaison potential

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18. Stephen P. Klein, David A. Freedman & Roger E. Bolus, *A Statistical Analysis of Charging Decisions in Death Eligible Federal Cases: 1995-2000*, in RACE AND THE DECISION TO SEEK THE DEATH PENALTY IN FEDERAL CASES 29, 46, 49 (Stephen P. Klein, Richard A. Berk & Laura J. Hickman eds., 2006), available at [http://www.rand.org/pubs/technical\\_reports/2006/RAND\\_TR389.pdf](http://www.rand.org/pubs/technical_reports/2006/RAND_TR389.pdf).

complications and how the protocol would work under those circumstances.

### III. CONCLUSION: THE LIFE-GIVING FRUITS OF DEFENSE-INITIATED VICTIM OUTREACH

A recent, compelling example of the benefits to everyone of defense-initiated victim outreach arose during a meeting between surviving family members of September 11 and defense team members of Zacarias Moussaoui.<sup>19</sup> Working as a victim liaison in that case, co-author Mickell Branham met with family members one evening along with one of the attorneys from Moussaoui's defense team. The meeting, scheduled for two hours, lasted almost four. As someone they saw as representative of the person that killed their loved ones, Ms. Branham became the target for anger and rage from a number of families. Once that anger was expressed, Ms. Branham and the attorney began to get questions about the process. Once the attorney answered questions about the process, questions then came regarding Moussaoui. Where was he raised? Did he have brothers and sisters? Who was his mother? That progression of dialogue—from expression of tremendous anger and grief, to trying to understand the process, to wondering about who the defendant was—is a natural one which is usually very gradual, transpiring over months or even years. That night, Branham and her colleague witnessed it all within a few hours. At the end of the meeting, some of the same families whose anger was directed at Branham graciously offered her a ride to her hotel and gave her suggestions for nice restaurants nearby. Their anger was not about Branham. It was not about the defense team. It simply needed to be heard by Branham and the attorney.

Then, and only then, were other things possible. Before and during Moussaoui's trial, the victim liaisons were able to meet the needs and address concerns of surviving family members in multiple ways. Their work included meeting with family members and community leaders, answering their questions, helping them to understand the judicial process and, in some cases, assisting family members in being heard. A number of surviving family members wanted to be heard by the trial court during the sentencing phase and testified as defense witnesses, giving testimony that recounted not only their loss and grief but also ways in which they had begun to recover some equilibrium in their lives

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19. See Jerry Markon & Timothy Dwyer, *Moussaoui Gets Some Unusual Help: Some 9/11 Relatives Testify for Defense*, WASH. POST, Apr. 20, 2006, at A10.

and ways in which they found to honor the memory of their lost family members in continuing to live their lives.<sup>20</sup>

The extraordinary thing about defense-initiated victim outreach is that—as in this example from the *Moussaoui* case<sup>21</sup>—it is often transformative; transformative of defense teams and defendants, of prosecutors, of survivors, and of the judicial process. The arc of this transformative process can soar or rise gently, but its direction is toward life. For this reason, DIVO work is mitigating in its most fundamental sense.

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20. Deborah Charles, *Family of 9/11 Victims Testify for Moussaoui Defense*, REUTERS, Apr. 19, 2006; Markon & Dwyer, *supra* note 19.

21. *See* Charles, *supra* note 20.



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