

Defense-Initiated Victim Outreach in Virginia Capital Cases: An Introduction

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Murder is darker than death, and so is the road to surviving and healing Murder breaks all the sacred rules, knows no fairness, and can never be compensated for or undone. It provokes fear and rage and tempts us to battle it on its terms instead of our own. Murder drives even the most loving and compassionate people to the edge of that fine line that separates our respect for life from our violent potentials. The aftermath of murder takes us straight through hell The aftermath of murder is nothing less than a full-blown emotional and spiritual struggle.¹

Those who have lost a loved one to any kind of tragedy can describe the moment when life changed forever. Often, nothing after that point ever seems the way it did before. Grief counselors and psychologists describe this phenomenon as "the new normal."² The idea is that loss can change us so profoundly that we will never be as we were. All we can do is learn to cope in a new and unwelcome reality—the new normal.

When grief is precipitated not by accident or disease but by murder, victim-survivors are left not only to deal with the untimely loss of a loved one, but also with the emotional consequences of criminal victimization. Unfortunately, the criminal justice system is poorly equipped to meet the needs of victim survivors. Thus, defense-initiated victim outreach (DIVO) was designed to serve three primary purposes: 1) to provide survivors with an additional means to access information and services; 2) to reduce the pain inflicted on survivors by the criminal justice process, 3) to provide a means by which defense counsel can convey respect and compassion to survivors.³

¹ CARRIE FREITAG, AFTERMATH: IN THE WAKE OF MURDER 1-2 (2003).

² See, e.g., CAROLYN AMBLER WALTER & JUDITH L.M. MCCOYD, GRIEF AND LOSS ACROSS THE LIFESPAN: A BIOPSYCHOSOCIAL PERSPECTIVE 12 (2009) (explaining that a "new normal" is established as part of the grief process).

³ The Institute for Restorative Justice and Restorative Dialogue, DEFENSE-INITIATED VICTIM OUTREACH (DIVO): A GUIDE FOR CREATING DEFENSE-BASED VICTIM

The Basics of DIVO

DIVO was created based on notions of restorative justice. It is a process intended to open a line of communication between victim survivors and the defense team. This is done through an independent, trained victim liaison. The victim liaison is not a member of the defense team. He or she is not covered by attorney-client privilege and does not have access to confidential information about the defense. The role of the victim liaison is to determine what victim survivors need that that the defense team may be able to provide: "His or her objective must be, solely, to engage the survivor . . . 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."⁴

By opening a channel of communication between the defense team and survivors, DIVO seeks to reduce the tension and anger inherent in an adversarial system. Simply, "by treating victims with respect and sensitivity, 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."⁵

SERVICES 6, *available at*
<http://www.utexas.edu/ssw/dl/faculty/armour/dl/Master%20Manual%208.26.10.pdf>
[hereinafter, DIVO GUIDE].

⁴ Mickell Branham & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why it is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019, 1025 (2008).

⁵ *Id.* at 1026.

The Need for DIVO

The worst part of the whole thing was that they wouldn't give me her bicycle. I had to go down to the prosecutor's office and the receptionist said it was Sidney's [her murderer's] bicycle. I screamed, 'Give me that bicycle. It's my sister's bicycle. He stole it from her.' . . . Mom doesn't want to ever see it again. But I feel Leslie would have wanted me to ride it.⁶

On top of immeasurable grief, survivors report a wide range of intangible losses resulting from the crime that caused their loved one's death: feelings of fear, anger, guilt, shame, isolation, betrayal, and a diminished sense of personal security are common.⁷

Although the depth and range of emotions experienced by victim survivors are extreme, these reactions are not unexpected. Crime victims frequently struggle with irrational fear and other symptoms stemming from the impact criminal victimization has on one's view of the world. These symptoms result in part from loss of what psychologists call the "just world perspective."

Even without realizing it, most of us have deeply-ingrained beliefs about the way the world works. Though we may intellectually realize that life is not fair, the world is dangerous, and bad things happen to good people, we nonetheless conduct our daily lives under the assumption that the world is a basically fair and orderly place. Violent crime shatters a victim's just world perspective by disrupting three fundamental assumptions: 1) bad things won't happen to me; 2) the world is orderly and meaningful, and 3) I hold a positive view of myself and my actions.⁸ Following a violent crime, victims must grapple with and attempt to re-establish these basic beliefs.

⁶ J.L. BARKAS, VICTIMS IX–XII (1978).

⁷ E.g., Marilyn Peterson Armour, *When a Family Member is Murdered*, in FAMILY STRESSORS: INTERVENTIONS FOR STRESS AND TRAUMA 31–33 (DONALD ROY CATHRELL,

⁸ *Id.* at 15.

Victim survivors, then, are struggling with two levels of terrible loss: loss of a loved one, and loss as a victim of a crime. The combination can be devastating. Marsha Kimble describes the all-consuming nature of emotions she experienced following her daughter's death in the Oklahoma City bombing: "For many months after the bombing, I could barely put one foot in front of the other. . . . I was bombarded by emotions, principally earth-shattering grief."⁹

A family member's murder is a loss unlike any other. Survivors experience a complicated type of grief characterized by a wide range of crippling emotions. Some fear for their personal safety and the safety of their remaining family members. They may feel extreme guilt, dwelling on what they could have done to prevent the crime from occurring. These feelings are not always rational, but can nonetheless be a natural reaction to the trauma they have suffered. Similarly, survivors report feeling anger and frustration at the amount of time and resources poured into protecting the rights of the person who took away their family member. They may view the resources available to the defense as further evidence that there is something wrong with the world—all the rules have been broken, nothing can be counted on. They may even perceive that, in an adversarial battle, society has taken the "side" of the defendant over that of their family member. It is tempting to dismiss these feelings as political sentiments, but that is not always the case. Instead, these reactions are often the result of the severe trauma that the family has suffered, unrelated to political affiliations or personal beliefs about the Constitution and civil rights.

⁹ Marsha Kimble, *My Journey and the Riddle*, in *WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 127–138, 130 (JAMES R. ACKER & DAVID R. KAPP, EDS. 2006).

Many survivors look to the criminal justice system to "set things straight" in a world that suddenly seems upside down and off-kilter. Survivors expect that courts will affirm the wrongness of the crime, emphasize the horror of what happened, and re-establish a sense of balance and order in the world. Unfortunately, the criminal justice system is poorly equipped to meet the needs of victims and survivors. The adversarial nature of court proceedings results in an "us vs. them" attitude—an attitude that can lead parties to view the prosecution as "representing" victims and survivors, and defense counsel as "opposing" the prosecution and, by association, the victims. In Virginia, this attitude is bolstered by Virginia Code Section 19.2-11.01, which states that victims should be given "the opportunity to be heard by law-enforcement agencies, attorneys for the Commonwealth, corrections agencies and the judiciary."¹⁰ Defense counsel are conspicuously absent from the statute, supporting the assumption that the prosecution is fully responsible for representing victims and survivors while defense counsel are necessarily in an adversarial relationship with survivors. This, of course, is not reality. The interests represented by the prosecution are those of "the state" or "the government"—not necessarily the victims. Consequently, victim survivors have reported feeling as though they are an unwelcome third party to criminal justice proceedings. Author J.L. Barkas describes her family's experience in the aftermath of her brother's murder:

Seth was a victim, but my family and I learned that the violation committed by the criminal is only the first victimization. There are others, almost as devastating, perpetrated by society and the criminal justice system.

If I spoke about my brother's murder, people recoiled. They didn't empathize, they didn't sympathize, they didn't get angry. They said,

¹⁰ Code of Virginia § 19.2-11.01.

"Well, why was he walking down that street? What time of night was it?" They acted as if Seth had done something wrong, as if I were now doing something wrong to mourn him, to be angry, to be devastated. . . .

My family was also victimized because of our ignorance of the criminal justice system. Certain basic legal actions, such as obtaining crime compensation for Seth's widow, become crises. I naively thought the state would be as concerned about Seth's murder as I was, and I wondered whether the police would ask for my assistance in the capture and trial of the criminals. But they never called. . . . I called the district attorney's office. . . . I wasn't even treated civilly. I wasn't given any information or any help, and that baffled me.¹¹

DIVO was created in recognition of the unavoidable link that exists between a capital defendant and the victim's family. In some cases, the defense is in a position to provide assistance or comfort to survivors in ways that others cannot. The family may have questions that only the defendant can answer. They may have specific wishes regarding the trial process—for example, scheduling conflicts or concerns about how the defense team will acknowledge them at the courthouse. They may wish to know information about defense strategy. In one case, the victim's family was distraught after a suggestion from the prosecutor that the defense would present evidence of the victim's past drug use at trial.¹² The DIVO liaison brought the question to defense counsel, and learned that counsel knew about the victim's troubled past but had already decided not to bring it up at trial because it had taken place years before the murder and was completely unrelated to the crime. This information was extremely comforting to the victim's parents, who were able to stop worrying about that detail and attend the trial without constant fear that the details of a difficult time in their daughter's past would be made

¹¹ J.L. BARKAS, VICTIMS IX–XII (1978).

¹² The Institute for Restorative Justice and Restorative Dialogue, DEFENSE-INITIATED VICTIM OUTREACH (DIVO): A GUIDE FOR CREATING DEFENSE-BASED VICTIM SERVICES 6, *available at* <http://www.utexas.edu/ssw/dl/faculty/armour/dl/Master%20Manual%208.26.10.pdf> [hereinafter, DIVO GUIDE].

public. In other cases, the victim's family may wish to have an item of sentimental value returned—for example, a piece of jewelry or watch that the victim was wearing when he or she died.¹³ If the defense is willing to stipulate to a photograph of that item at trial (and can do so without any impact on their case), it may be possible to arrange for the item to be returned to the family.

DIVO reflects the need for basic kindness and decency in the criminal justice process. For survivors, DIVO is always voluntary. The purpose is to determine whether survivors have any needs that the defense might be able to fill.¹⁴ In some cases, there might not be anything. The question might even be met by a slammed door. The point, however, is to open a channel of communication. If, at a later point, there is something that the defense may be able to provide, the survivors know the door is open and have a point of contact to communicate with the defense team.

Why DIVO is Important to the Defense

At first glance, the idea of DIVO may appear contrary to traditional views of criminal defense. Defense attorneys are conditioned to view survivors as members of "the other team."¹⁵ It is tempting to avoid survivors, or ignore them altogether. However, prevailing professional norms make clear that contacting survivors is a necessary part of zealous advocacy in a capital case.¹⁶

¹³ Branham & Burr, *supra* note 4, at 1021 (using a family's desire to have a sentimental item returned as an example of how a DIVO liaison might be able to help).

¹⁴ DIVO GUIDE, *supra* note 12, at 16.

¹⁵ Branham & Burr, *supra* note 4, at 1020.

¹⁶ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/deathpenaltyguidelines2003.authcheckdam.pdf>.

Mickell Branham, the National Victim Outreach Coordinator for the Capital Resource Counsel Project (based in the Nashville, Tennessee Federal Defender Office), and attorney Richard Burr explain why addressing the needs of survivors is essential to a complete capital defense:

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? . . . We cannot defend the person accused of committing a murder without acknowledging and addressing the wrong that our client is accused of.¹⁷

As Branham goes on to conclude, "the failure of the defense team to acknowledge and address in a meaningful way the suffering of the victims family, or simply to treat the family with kindness and respect, lessens the possibility that the proceedings will end with compassion for their client."¹⁸

Because the victim liaison does not have any inside information about the defendant or defense strategy, there is no risk that he or she would inadvertently reveal privileged or secret information. By necessity, the liaison's answer to any question from survivors is: "Let me see if I can find out." He or she then takes the survivors' request to the defense team who determines whether it can be met.

When a request is made through the victim liaison, defense counsel must consider how much, if anything, can be turned over to the survivors. This step requires defense counsel to set aside the inclination to refuse all requests and truly consider whether the attorney-client relationship and defense strategy would nonetheless permit disclosure.¹⁹

¹⁷ Branham & Burr, *supra* note 4, at 1020.

¹⁸ *Id.*

¹⁹ *Id.* at 1027.

In many cases, disclosure may not appear to provide a tangible benefit for the defense, but would not cost anything either. Branham and Burr explain:

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 . . . 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.²⁰

Of course, there will be cases in which DIVO is not successful or does not appear to have a tangible benefit for the defendant. Much like a mitigation investigation, however, it is impossible to anticipate in advance what benefit DIVO might bring in a given case.

DIVO in Virginia

Although it has been used extensively in other states, DIVO is still a relatively new practice in Virginia. Unless a defendant has a private source of funding, counsel must seek to have a victim liaison appointed and paid for by the court—not always an easy task. Recent changes to Virginia law make it possible to request appointment ex parte, and will hopefully increase the likelihood of having a specialist appointed. Still, there are barriers to successful appointment.

In one recent Virginia case, defense counsel introduced the testimony of Pamela Blume Leonard, Executive Director of the Council of Restorative Justice at Georgia State University, in support of a request for appointment of a liaison. Ms. Leonard provided the court with an overview of DIVO, explaining that a DIVO liaison's role is to communicate with survivors and learn about any unmet needs that might be met by the

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Id.

defense—not to take the defense agenda to the survivors. (A transcript is available [here](#).) After Ms. Leonard’s testimony, defense counsel emphasized that DIVO is meant to be a tool for survivors, not for defense. Based on this argument, the court concluded that it would be inappropriate to appoint a DIVO specialist because "all of the evidence I’ve heard is that [DIVO] does not benefit the Defense . . . It is being marketed as something solely to benefit the victim." The court appeared to accept the Commonwealth’s argument that the defense was "trying to ride two horses at once"²¹ by arguing that a DIVO specialist should be appointed as a tool for the defense, but then going on to claim that DIVO is intended solely for the benefit of victims. The court concluded that Virginia statutorily provides for victim outreach by the Commonwealth, and that therefore appointment of a DIVO was not necessary. This argument is one that counsel will likely have to confront and overcome in seeking to have a victim liaison appointed. In spite of the difficulty in convincing a court that DIVO is necessary, DIVO liaisons have been appointed in both federal and state cases in Virginia.

For example, in 2008, Jermaine Lamonte Montgomery was charged with capital murder in the stabbing death of a Chinese restaurant deliveryman. After hearing testimony from Mickell Branham about the nature of DIVO and the role of victim liaisons, the Circuit Court for Spotsylvania County appointed two DIVO experts in the case. (A transcript of Mickell Branham’s testimony is available [here](#).) This marked one of the first times that a DIVO expert was appointed in Virginia. The facts of Montgomery were unusual in that the victim’s family largely resided in China. One of the victim liaisons traveled to China, met with the family, and learned that they were

²¹ Commonwealth v. Lawlor transcript, p. 64 ll 14–15.

opposed to the death penalty. What the family wanted most was not to see Mr. Montgomery die, but to have the opportunity to properly bury their family member's body. In July of 2009, the cases against Mr. Montgomery ended in a life plea.

DIVO has also been used in federal court in Virginia. When Zacharias Moussaoui was tried, Mickell Branham served as a victim liaison to surviving family members of September 11 victims.²² The effort was so successful in the Moussaoui case that ultimately several family members of victims testified for the defense at sentencing.²³ Marilyn Rosenthal, whose son Josh died in the World Trade Center, asserted her belief that "something good has to come out of what happened."²⁴ Another victim survivor explained to the jury that her family did not want to "get caught up in a whirlpool of sadness and anger."²⁵

There are additional stories of DIVO success in Virginia. The sensitive nature of the information and respect for privacy of the parties involved make it impossible to adequately describe all such examples here. An attorney with additional questions about the possibility of using DIVO should contact Mickell Branham, the National Victim Outreach Coordinator for the Capital Resource Counsel Project in the Nashville, Tennessee Federal Defender Office. Ms. Branham can provide advice tailored to your specific case.

²² Branham & Burr, *supra* note 4, at 1032.

²³ See, e.g., USA TODAY, *Victims' Family Members Testify for Defense in Moussaoui Case*, Apr. 19, 2006, http://www.usatoday.com/news/nation/2006-04-19-moussaoui_x.htm (last visited Apr. 27, 2011).

²⁴ *Id.*

²⁵ *Id.*

Implementing DIVO

The first step in implementing DIVO is have a DIVO liaison appointed. A certified DIVO liaison will have specific training in the best approach to take in contacting victims. Additionally, as noted above, Mickell Branham is available to provide case-specific advice. As a general matter, however, there are certain basic principles of DIVO that should be followed in every case.

1. Initial Contact

The timing of the first contact with the victim's family is critical. If at all possible, contact should not be attempted for at least six months to a year after the crime.²⁶ Be careful not to initiate contact too close to dates that may have significance in the family—anniversaries of the crime or the victim's funeral, birthdays, Mother's Day, Christmas, and other family holidays should be avoided. As Mickell Branham and Richard Burr explain, "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."²⁷ It is also important, on the other hand, that the initial contact is not delayed so long that is "is misperceived as a desperate attempt by the defense to win over the survivors' sympathy."²⁸ The exact timing will vary form case to case, but it crucial to consider carefully when the right time will be for this important step.

²⁶ See *id.* at 1028–29 (describing the DIVO process).

²⁷ *Id.*

²⁸ *Id.*

The first contact with the victims family generally should be in the form of an introductory letter from the defense attorneys.²⁹ The next contact should be a letter from the victim liaison explaining his or her role. This letter may then be followed up by a telephone call or meeting if the family desires. This process is, by design, different from the normal investigatory techniques most defense counsel are accustomed to. Unlike fact investigation, the purpose of DIVO is not to seek information or find witnesses, but to open a line of effective communication in a way that is sensitive to the needs of both sides.

2. Role of the Liaison

Crucially, the victim liaison must be trained in DIVO and independent of the defense team. An attorney, paralegal, or anyone else who would have access to confidential information or who personally knows the defendant cannot serve in this role. Direct contact between an attorney and a victim survivor is not DIVO, and it is very important that it is not described as such.

Initially, all of the information the victim liaison knows about the case should come from public records. This eliminates the risk that the liaison will inadvertently be given information that is privileged or confidential.

As Branham and Burr explain, the role of victim liaison is 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 on was, the victim liaison makes sure they

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Id.

do. . . . Each time the defense team is able to answer a question or meet a need, something shifts.³⁰

The duration of the DIVO process will vary depending on the case and the needs of the individual family. There is nothing to be lost by maintaining the relationship for as long as survivors are willing, keeping open the possibility that there could be unexpected benefits for both victims and the defense.

Conclusion

Reaching out to the victim's family is a necessary part of providing an adequate defense in a capital case. DIVO is intended to make the step more sensitive to the needs of victims and, hopefully, more effective for the defense. Defense counsel cannot ask a jury to have compassion on their client if they themselves do not show compassion for the family of the victim.³¹

In some cases, DIVO has had tangible benefits and has even directly resulted in a life plea. In other cases, the results have been less clear. In the same way that it is impossible to anticipate the results of a fact or mitigation investigation, the potential benefits of DIVO in a given case will not be apparent until after it has been implemented. DIVO should therefore be attempted in every capital case.

³⁰ *Id.* at 1029.

³¹ Branham & Burr, *supra* note 4, at 1027.