A Facilitator's Reflections on Restorative Justice Conferencing in Vermont

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I have worked for the Vermont Department of Corrections for over twenty-five years now, starting as a Volunteer Services Coordinator at the Marble Valley Regional Correctional Facility, then becoming a Community Resources Coordinator for both that facility and for the Rutland, Addison, and Bennington county probation and parole offices, and now serving as a Community Corrections Program Supervisor at Rutland probation and parole. Over that time, I have been privileged to both observe and participate in the blossoming of restorative justice practices in Vermont. In total, I have facilitated/coordinated well over fifty such applications in cases ranging from broken windows to broken lives. My focus below will be on the broken lives end of that spectrum and how restorative practices have impacted and, in the future, may impact more sentencing outcomes.

By way of background, my involvement in the restorative justice movement in Vermont has not been limited to the VT DOC, as I have also been able to coordinate/facilitate such practices further "upstream" in community justice centers, court diversion programs, the Department for Children and Families, and in middle and high schools. Within the VT DOC, these processes have been applied pre-charge through the state's attorney's office, pre-sentence as part of the pre-sentence investigation, post-sentence as a condition of probation, pre-release from incarceration, and once, for instance, as part of a governor's pardon investigation over twenty years after the criminal incident occurred.

My first real exposure to restorative justice was a two-day training I attended about twenty years ago offered through VT DOC by the RealJustice organization, now the International Institute for Restorative Practices, out of Bethlehem, Pennsylvania. This training prepared practitioners to facilitate "family group conferences." In fact, this was the first of many such trainings offered over the years in Vermont through VT DOC that have prepared hundreds of individuals to provide this service. Unfortunately, the systems were not in place at the time to take full advantage of this resource. Now, those systems have changed and appear poised for transformation.

Almost simultaneously, in 1995, under the leadership of then-VT DOC Commissioner John Gorczyk, the reparative probation program, firmly grounded in principles of restorative justice, was launched as an alternative to traditional probation in Vermont. This program has been very effective in dealing with minor, non-violent offenses by engaging the offender (and victim(s) if they choose) with a panel of trained community volunteers in a process to address the incident, to reflect on who was affected and how, and to determine what is needed to occur as a result. While originally non-violent offenders were the sole target population for the reparative probation program, this too appears to be changing as restorative justice implementation moves forward in Vermont.

I will discuss below three cases in which the crime happened to be one of severe violence, two with death resulting, and how along the criminal justice continuum the convening of a restorative justice process affected the outcome of the cases. Anywhere along that continuum, there is almost always a relationship between the plea-bargaining process and the sentencing outcome, as the vast majority of cases do not end with a jury determining guilt or

innocence. Sentencing is almost always determined by an admission of guilt and an agreement as to consequences.

It is universally agreed among practitioners that restorative justice at its core needs to be victim-focused and offender-sensitive. With this in mind, it has always felt particularly compelling to me that the more severe the offense, the more consideration should be taken to offer victims and offenders a means by which to address the classic restorative justice questions: What happened? Who was affected and how? What needs to occur now so that, to the extent possible, the harm can be addressed? In fact, at least historically, it has been the less severe offenses that have gotten more attention regarding employing restorative justice processes.

One of the roles of the VT DOC in the criminal justice system is to perform pre-sentence investigations, which include sentencing recommendations, for the court. Typically, an admission of guilt has been made, and there is a plea agreement in place. It is notable in the following case that no admission of guilt had been initially made prior to the ordering of a pre-plea investigation by the court. In this case, a young woman had been charged with Grossly Negligent Operation with Death Resulting, a felony that could result in imprisonment for up to fifteen years and a fine of up to $15,000. At the initial arraignment, she pled not guilty on the advice of her counsel. Also on the advice of counsel, she had not contacted the family of the deceased victim in spite of the fact that she had strongly wanted to do so.

A total of five status conferences were held over a substantial period of time before it became clear that the state and the defense were nowhere near reaching a plea agreement. The parties agreed to, and Judge Theresa DiMauro ordered, a pre-plea investigation to be

completed by the VT DOC. Another status conference was subsequently held at which point a plea agreement was finally made. This would eliminate the possibility of, or need for, a jury trial, which both the prosecution and the defense typically seek to avoid for different reasons. For the state, they could go to trial and lose after expending a great deal of time and effort, and the offender would walk away free. For the defense, they could also go to trial and lose and would typically end up with a harsher sentence than might be bargained for in advance.

While the offender agreed to plead "no contest" to the original charge, there was no agreement as to sentence. The state would recommend a split sentence: four to twelve years with all but one year suspended, the balance being served on probation. In other words, the state was recommending one year in jail with an additional three to eleven years on probation. The state would also recommend special conditions of probation that would include participation at a victim impact panel, loss of driver's license for at least one year, and attendance at a safe-driving re-education course. The defense was free to argue for whatever sentence they believed appropriate. The court ordered a pre-sentence investigation, to augment the pre-plea investigation that was already ordered, to be completed two weeks prior to the sentencing date.

I became personally involved in this case one week prior to the sentencing date. Mike O'Malley, district manager of Rutland probation and parole at the time, knew of my interest and experience in restorative justice conferencing and passed a draft of the pre-sentence investigation by me. One condition that the VT DOC was considering recommending to the court was that the offender participate in a group conference if the family of the deceased victim so desired. I thought it was great that this was being considered at all but recommended

to Mike that holding a conference prior to sentencing would be even more compelling. Doing so would potentially give the surviving victims a substantial role in sentencing, while simultaneously serving both the interests of the state and the defense. It also did not seem appropriate that the defendant be "sentenced" to do a conference as participation in any conferencing process should be voluntary.

Mike sent the following e-mail to the Rutland County state's attorney, the defense attorney, and the VT DOC probation and parole officer who had conducted the investigation:

> After reviewing and staffing a recent PSI on (the offender), it became quite apparent that the adversarial nature of the court system was not in the best interest of justice in this case. The victims are looking for closure for this tragedy. They appear reasonable and rational in their requests for closure and reparation from the offender, given the situation. The offender has taken responsibility for her action, would have probably already expressed her remorse for her poor judgment, agreed to victim's wishes for reparation, and the social/psychological healing would have already begun, had she not followed sound legal advice from her legal counsel, which does not always tack and tie with good social/psychological advice. I would like to suggest the following—the use of Group Conferencing as a pre-sentence option.
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> As part of our recommendation to the Court on this PSI, we have encouraged the Court to consider employing the group conferencing process as a pre-sentencing tool. This is indeed a compelling option in this case, as it appears likely that the defendant and the family of the deceased, along with other appropriate parties, would voluntarily agree to engage in this facilitated process. The goal would be to arrive at an agreement

> of reparation, which would be signed by all participants, which would address what needs to happen now as a result of the harm done. The final sentencing decision of the Court would not in any way be obligated by this agreement, but would certainly be, we would hope, informed and influenced by it. If all parties are agreed, the Department of Corrections could organize and hold such a conference in as little as two to three weeks time.
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> There is no guarantee that a final agreement will be accomplished. However, there are very strong indicators that both parties in this case are excellent candidates to successfully complete this healing process for themselves as well as their community support systems. The ball is now in the hands of the attorneys in this case.

As a result of this e-mail, the defense attorney submitted a request to the court to extend sentencing in order to accommodate a group conference. The Rutland County state's attorney was willing to agree to this request as long as the deceased victim's father agreed. In fact, the father was very open to the possibility but wanted to discuss it with his wife that night. The next morning, we were informed by the state's attorney's office victims' advocate that the father and his family wished to participate in the group conference prior to sentencing. With the assent of the state's attorney and the defense attorney, Judge Theresa DiMauro agreed to extend sentencing for six weeks.

The resulting agreement/understanding that was developed and agreed upon by all participants at the restorative justice conference was:

> We, the undersigned, agree and recommend to the Court that the offender not receive a period of incarceration as a part of her sentence. We do believe that she should not

drive for a total period of two years after sentencing. We also believe that the Court should establish a community service component at sentencing to possibly include public speaking, public service announcements, organizing public support to make improvements to (the State highway) or other appropriate efforts to positively impact the community.

Of course, there are many benefits of restorative justice practices beyond their impact on sentencing in the criminal justice system. The bottom line in this case was that the surviving victims had a huge impact on the resulting "Stipulation to Amend Plea Agreement" that was developed between the parties and then accepted by the judge at the sentencing hearing. While many of the proposed conditions of probation were the same as prior to the stipulation, key elements of the state's position had changed. For instance, the one year of incarceration was now gone, and a community service component had been established as a direct result of the restorative justice conference.

From a systems perspective, the most powerful and effective place along the criminal justice continuum to apply restorative justice practices is prior to sentencing. Post-sentence applications, however, show that the system can support such practices for their innate value as opposed to their impact on sentencing outcomes. The following two cases included conditions of probation arrived at through the plea bargaining process, which led directly to the convening of restorative justice conferences.

In the first of these two cases, five young people were driving in two pick-up trucks from one location to another in a small rural town. They had all been drinking alcohol. One twenty year-old woman died when she fell from the back of one of the pick-ups driven by the offender,

another twenty year-old woman who was then charged, released, and later arraigned on three charges: Negligent Operation, DWI # 1 and DWI # 1 Refusal - Fatal. A plea agreement developed prior to the arraignment between the state's attorney's office and private defense counsel was presented to Judge Patricia Zimmerman. The state agreed to dismiss the second charge (DWI # 1), with consecutive, as opposed to concurrent, sentences of three months—one year for charges #1 and # 3, for a total of six months—two years in jail, all suspended to be served on probation.

A number of the deceased victim's friends and family members attended the arraignment, and at least two spoke. The victim's father said he still had a number of unanswered questions. One of the victim's sisters also voiced concerns about how the victim had died. After hearing the concerns of the victim's family, Judge Zimmerman rejected the plea agreement. "I think there has to be something a lot more creative here," she said, and suggested that the parties come back with an agreement that included a facilitated group conference so that they could all talk about what happened that evening.

I subsequently received a call from the state's attorney's office victims' advocate. Both the state and the defense were in agreement about convening a conference in this case. The initial issue then became whether the conference should occur pre- or post-sentence. Below is an excerpt from an e-mail that I then sent to defense counsel with a copy to the state's attorney and the court:

> Apparently, in speaking to both (the Victim's Advocate) on Friday and you today, the parties most affected by this incident (the offender and her supporters and the family members of the young woman who died) are interested in participating in a group

> conference. The main issue at this point between the State and the Defense appears to be whether the conference should occur pre- or post-sentence. From my perspective as the potential facilitator, this is not a crucial issue so long as the defendant is not being coerced into participating in this process. Two of the basic conditions necessary before any conference is convened are that the defendant admits guilt and that all parties participate voluntarily. As long as those conditions are met, a conference might be held at any point on the criminal justice continuum, from pre-adjudication to pre-release from incarceration.

It was then clearly established that the intent of the court was to convene the conference post-sentence by way of the following response from Judge Zimmerman:

> Thank you for keeping me in the "loop" as you prepare to do your work on this case. I indicated to counsel that the conference could be post-plea as a condition of her probation. I will certainly make myself available if either counsel wish to speak with me about the logistics of a plea conference. However, I prefer to stay "out of the loop" at this point so that counsel may feel free to speak with any interested party w/o running afoul of involving the court in any discussions that could present ethical considerations. Thank you to all for your quick response.

The next issue—what the exact wording of a special condition requiring a conference might be—was dealt with in an e-mail from me to defense counsel and the state's attorney's office. I felt this was an important issue as it might relate to the future use of conferencing as a condition of probation. While it was clear in this case that there were victims interested in participating, this might not always be the case. My main point was that the wording should

make compliance with a condition requiring conferencing moot if there were no victims interested in participating. The final language of this condition read:

> You shall attend and fully participate in … a restorative justice/family group conference with members of (the deceased victim's) family if a member or members of her immediate family … requests that such a conference be convened.

Every indication was that the state's attorney and defense counsel were agreed that a conference would be required as a new condition of probation. On the other hand, it obviously would not be a "done deal" until after sentencing. Over four months had already transpired since the incident/death, and it was apparently the family's desire to have the conference convened sooner rather than later. Thus, I decided to assume a conference would be ordered, determine a date to convene the conference as soon after sentencing as possible and, finally, do the pre-conference preparation prior to the established sentencing date.

Reaching an agreement or understanding at the group conference in this case was definitely influenced by the fact that judgment had already been rendered. The offender had pleaded guilty and was sentenced to six months to two years to serve, all suspended on probation. She was given conditions that included: total abstinence from alcohol; having an alcohol and/or drug screening with treatment if indicated; payment of a $892 fine; two hundred hours of community service; participation in the DUI Victim Impact Program; and participation in a restorative justice/family group conference.

The conference began as a very emotional sharing of individual perspectives but became much more of a discussion about exactly what happened and what the broader issues were as opposed to how the offender could somehow repair or address the harm done. Many

questions were asked and answered. Much of the discussion revolved around how the victim's family and friends received information about the incident from law enforcement authorities and how the rumor mill began to create the impression that there may have been foul play. The offender and her family also expressed frustration about their dealings with "the system."

The agreement/understanding, which was arrived at and signed by all eighteen participants at the end of the two-and-a-half hour conference, is included below:

> We are satisfied with the results of this meeting but do have several areas of concern re: issues. There is a definite and ongoing problem with young people drinking and driving. All participants feel that improvements could definitely be made re: police and victim/community relations, information sharing, etc. Lastly, it is suggested that at least a portion of (the offender's) community service could be fulfilled in prevention efforts to address drinking and driving by young people.

It was notable in this conference that the group gravitated away from offender accountability to broader community issues—specifically, underage drinking and the relationship between law enforcement personnel and affected community members. This may have been due to the fact that this conference was post-sentence, and the offender had already been given a suspended jail sentence with many conditions of probation attached. Participants presumably had no illusions about solving the problem of underage drinking or being able to somehow improve community relationships with law enforcement. They did, however, want their concerns to be voiced for the record.

The final case I will discuss actually did go to jury trial but ultimately, as is often the case after trials have begun, ended for sentencing purposes with a plea agreement. The offender in

this case, an eighteen year-old woman at the time, was the driver of a car that hit and seriously injured the victim and killed her dog. The offender was driving to her friend's house from her mother's home, less than a mile from the crash. It was later revealed that the offender was reading an incoming text message at or around the time of the crash. Once this was determined by law enforcement, she was arrested and charged with Grossly Negligent Operation of a Motor Vehicle with Serious Injury Resulting, a charge that can result in a fifteen-year maximum sentence and a $15,000 fine.

At the beginning of the trial, the defense team argued that the victim was walking in the same direction as traffic on a dark road, with no sidewalk or shoulder, and was wearing all dark clothing. They had hoped to argue that the victim was intoxicated (with a BAC of .99), but this was deemed inadmissible. The state argued that the offender was texting with friends, as established by phone records, and was grossly negligent. They argued that the offender erased her text messages right after the accident (and, by the way, after dialing 911) to cover up the fact that she was a distracted driver.

Halfway through the defense's case, perhaps because the state's evidence was compelling and the defense's case was not materializing as planned, the offender pleaded guilty to two counts—one of Negligent Operation and one of Grossly Negligent Operation with Serious Bodily Injury. The offender was sentenced to thirty days in jail and five months of in-home confinement, a five-year deferred probation sentence (with an underlying six to twelve month sentence to serve if violated) and five hundred hours of community service. At least one hundred hours of the community service needed to "be served speaking to high school students about the dangers of texting while driving." She was also directed to complete the

“Community Reparation Program at the direction of, and full satisfaction of, your probation officer.”

In a final statement to the court, the offender shared with the victim, “I would just like to say I'm really sorry ... I wish I could take all your pain away and I do wish I could take your spot and give you your life back. I never meant for any of this to happen.” Outside of the courtroom, when addressing the media, the victim shared, “If your car is on, turn your cellphone off.”

This is a story/case that is actively unfolding and will be documented elsewhere in the not-too-distant future. Kate Brayton, Director of the Essex Community Justice Center, and I ended up co-facilitating a restorative justice conference that was a direct result of the “reparative condition” noted above. The condition could have been satisfied by an appearance by the offender at a reparative board meeting, which would then have established what more might have been expected from her to address the harm done.

This case had received a great deal of statewide print and broadcast media coverage from the day after the incident occurred, prior to and during the trial, and up until the plea agreement had been signed. Over fourteen months of time had elapsed during this period. Of course, the offender had originally pled not guilty at arraignment on advice of counsel. She wanted to apologize and reach out to the victim and her family, but this was not presented as an option. Meanwhile, the victim’s family and friends were very dissatisfied with the not guilty plea and with the apparent lack or remorse and acceptance of responsibility by the offender. Historically, although this may be changing, reparative board meetings were considered open meetings, and, as such, anyone, including the media, could attend. With this as a backdrop,

both the offender and interested family members of the direct victim preferred the restorative justice conference as the more private of the two options. It is worth noting that, in this case, the direct victim, who again was severely injured, including suffering a traumatic brain injury, chose not to participate. She was very supportive, however, of her family members (sister, brothers, mother, niece, etc.) and friends participating.

The conference was convened more than two years after the incident occurred. There were fifteen participants and the two facilitators/coordinators in attendance. The meeting lasted two-and-a-half hours and was a very transformative circle process. There were clearly many words to be said and many emotions to be expressed. Beyond that, the only real action item to come out of the agreement/understanding is that the offender and the sister of the direct victim agreed to work together to satisfy the required one hundred hours of community service needed to "be served speaking to high school students about the dangers of texting while driving."

We know that restorative justice processes such as conferencing work. The research is now clear that such processes produce significantly better results than more traditional methods in the area of recidivism. In the area of victim satisfaction, however, the difference between traditional and restorative justice approaches is astronomical. The status quo is always very compelling, but the time appears ripe for us to change the way we do business. Such change can only be accomplished by investing the necessary resources and energy required to promote and implement processes such as restorative justice conferencing. If we are able to turn this vision into reality, victims, offenders, their families, their friends and ultimately the entire community will all benefit.

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