THE STORY BEHIND THE ALLOCUTION PLEADING

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After *Booker*, this allocution pleading, in various stages of development has been used countless times by counsel across the country. The questions have been modified over the years at the request of some district judges' suggestions. Counsel are invited to modify the questions and add questions. If you do, please send me a copy so they may be shared. Rumor has it that it has been translated into foreign language, but I have yet to see it.

The allocution pleading has been filed as a stand alone pleading or as a part of a combined sentencing pleading, *i.e.* Sentencing Memorandum, Motion for Downward Departure, Motion for Variance, Allocution, Third Party Submissions and Other Materials. As a stand alone, in order to fit in the Western District of Oklahoma's ECF file naming, it is filed as a Notice - Other (Allocution Statement).

The allocution pleading is created from a set of questions to designed elicit the client's thoughts regarding the predicament they face, personal circumstances, the sentencing process and sentencing factors. The client is given the instructions and the 15 pages of questions at the time counsel believes it is time to start working on mitigation. So, this could be very early in the prosecution. Generally, they are given to the client

during the review of the initial draft of the Presentence Investigation Report. A sample instruction sheet is attached hereto.

The allocution questions and combined answer sheets (also attached hereto) are almost always in the client's handwriting. This is usually because in many cases the client is detained pending sentencing without access to a typewriter or computer.

When the answers are submitted to the court, counsel must decide whether to type out the answers in their entirety, use the handwritten answers in their entirety, type out select portions or edit the handwritten answer. A PDF editor comes in very handy at this juncture.

Handwriting tends to tell more about the individual. Here is an example of handwritten versus typed. The question is: *Why are you a better person now?*

First the typed:

> Because other than this court Im not looking over my showder and I feel real good about myself. As being a good example for all my kids and liveing right and working and being drug free. I just feel alot better obout myself and studying the Bible again that the number one reason I feel real good obout myself and why Im a better person today and will keep trying to get better.

Now, the handwritten:

Becouse other Then This court Im not looking
over my ~~shoulder~~ Showder and I Feel Real good about
My Self as Being a good example For all
My kids by livieing Right and working and
Being drug Free I Just Feel alot Better about
My Self and studying The Bible again
That the number one resaon I Feel real good
about My Self and why Im a
Better person Today and will Keep Trying
to get Better

The handwritten form is more potent. Handwritten statements, even laden with grammatical and spelling errors, serve their function and bring home the fact that the judge is hearing from a real person. They also expose issues of comprehension, communication deficits and literacy.

There may be times a handwritten statement is not practical. For example, one client, while on pre-trial release, was involved in an accident in which he lost a finger and severely damaged other fingers and both hands. It was impracticable to have him write the statement, as his penmanship was illegible.

The client is not told how long each answer should be. Consequently, some answers are a single word and others go on for pages. The average answer is a paragraph or half a page. Again, counsel's familiarity with sentencing judge assists in tailoring the allocution answers. If the sentencing judge enjoys brevity, instruct fetor client to keep it

brief. Counsel's familiarity with the sentencing judge assists in tailoring the allocution statement.

Answering these questions for the sentencing Judge makes the client think about the sentencing process and provides insight that would never be reflected in the Presentence Investigation Report. The answers may enlighten counsel as to other potential mitigation.

In addition to privacy concerns, counsel must make sure the client has not written something that ought not be written; *i.e.* denial of responsibility, inappropriate minimalization, *etcetera.*

Defendants have been receptive to the practice. Very few defendants decline to answer the questionnaire. On several occasions, an attorney is given a completed questionnaire where a client had gotten the questions from another defendant in the detention center.

Lastly, after years of watching a client freeze up and say nothing of substance when the judge asks if they have something to say, the allocution pleading was designed to avoid "the deer in the headlights look."

Below is an allocution statement from the original set of questions. It was submitted by twenty-year-old in a case involving escape from a halfway house. The client would have to return to Bureau of Prisons custody to complete the sentence he would otherwise have served in the halfway house, and his allocution statement seeks leniency

in sentencing on the subsequent escape charge. The answers are reprinted as original written by the client, with no alterations.

1. What are your best accomplishments?

   -Being sober over a year, completing my drug Class in prison

2. What are your best attributes?

   -Carring, People Person, Good work ethics, determination

3. What have you done that you are most proud of?

   -I was Proud of Myself for working on a Job longer then two months. I set a Goal to work my Second Job ever for six months, but it turned out to be nine months.

4. What are your short term goals?

   -To achieve my G.E.D. with in the next year. I would also like to inroll in a small college to take up Business and Realestate Classes. Plus seek help with my drug, and anger Problem as well as my higher Power.

5. What are your long term goals?

   -Having my G.E.D. While working toward a degree in Something major. Plus living a life with Sobriety. Raise me a family and introduce my kids into a life I never had. Also having a relationship with my higher power.

6. Why are you a better person now?

-After being incarcerated for almost 2 year's now I realize what I had taken for granted. Because this is just as hard on my family as it is for me. I guess it took this situation to happen again for me to open my eyes and get myself together before it's to late for me.

7. How does giving you leniency reflect the seriousness of your offense?

-my time is reflective of the seriousness of my offense, leniency reflects your ability to see the person behind the paper.

8. How would leniency promote your respect for the law?

-It would show me that the law system is Capable of seeing all aspects of the crime and the people involved. I was a kid who got out of hand and made the biggest mistakes in my life, but not dangerous or Crimminaly minded. I realize you can get Punished for breaking the law and if shown leniency I will have the up most respect for the law for being able to see I do have something to offer. I can still be successful if giving the change to.

9. What is a just punishment for your offense and why?

-I think by me sitting in this county was a big Punishment. Because I still had 5 months left on my sentence and could have Just got a Violation and sent back to Prison. I don't feel that I should be sentenced to any more time, yes I made

a really big mistake and realize the seriousness of my decision, Plus I don't want to spend the best years of my life behind bars.

10. Will giving you leniency cause other people not to break the law as you did?

-yes, because all my friends, family, and acquaintence see how serious the law is about the rules and the Consequences it can impose on you if given the Opportunity.

11. Why will giving you leniency protect the public from further crimes by you?

-The Sooner I can get out the sooner I can get my life together so that the Public can be shown that they need no protection when it comes to me. I also feel that I can live and act civiliz like your average citizen.

12. Do you need educational or vocational training? How would leniency provide you educational or vocational training?

-yes, I still need to get my G.E.D. and will work on that regardless of what happens or where I'll be incarcerated or in the streets. Because that's something I'm going to accomplish for myself. see lenieacy would help to Provide the option to finish my education, because I would be doing it in the right Place to help me be successful.

13. What, if anything, would you say to your family?

-That Im Sorry for taking even my family for granted and putting myself in this situation again and not finishing it the first go around. I'd tell them that I will

make up for this time I have been away from them and let them know that I'd spend the rest of my life behind bars if it would take away the Pain of ever having to go through this again with me. Plus I promise this will be the last time we have to be apart from each other anymore.

14. Why should the Judge give you a BREAK?

-Because I really didn't have the chance to try and make it in the real world. I was only out for two weeks and came back to jail with a new Escape case. I feel like a loser to the one's who had faith in me and supported me while incarcerated the last time. Their willing to help in anyway they can for me to stop using drugs. Plus I'm willing to Participate in any Program to deal with my substance abuse Problem. I also feel like sending me back to Prison doesn't really help. yes, I know theirs Consequences that I.ve got to face for my mistake I made and Im ready to get it over with. So I can get back out to my family and love one's who need me out their. I have two little brother's who looks up at me as a roll model. I would like to try and help them before it's to late. Because I woulden't wish this type of Punishment on anybody, and if I can help a person from going threw this situation I will. See I look at this as a blessing for me and a second chance to be successful the right way. Because I've only let my mother and family down once again and this is hard on them as it is for me.

I do realize that their going threw this with me. That's another stress I.m putting on my mother for my mess up. It's really a trip because my mother drove me to Prison on Oct. 4, 2004 to turn myself in. Plus she also came and got me from Prison on Dec. 24, 2005 to make sure I made it to the halfway house safe with out an Escape. But I let her down and still haven't been man enough to talk to her and tell her I'm Sorry for the stupid choice I made that day. See, I'm willing to make a chance for the best of me, but most of all my family. I Just Pray and hope that you give me a Break when that time comes. Plus I would like the chance to prove to the law and everyone else I have learn from my mistake, and I do want to be someone in life notjust an inmate to the system. I feel by me only being 20 years old I still have a chance to learn and grow. So no matter what happen's one of my goals are to be successful with in the next 10 years. yes, I can only live and learn from my mistake and I know for a fact not to make this one again. So if you can Mrs. Vicki Miles-LaGrange, would you give me a Break, and another chance to work toward being successful in the world. Thanks.

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For more information regarding the therapeutic jurisprudence implications of the allocution questions and answers, *see,* THERAPEUTIC JURISPRUDENCE AND READINESS FOR REHABILITATION; David B. Wexler, *Florida Coastal Law Review*, Vol. VIII: 111, 2006. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929014

PLEASE ANSWER THE ENCLOSED QUESTIONS AND RETURN TO ME BY _____ __, 2015

Do not include any Social Security or taxpayer-identification numbers; dates of birth; names of minor children; financial account numbers or home addresses or telephone numbers.

WHY?

We are seeking information to benefit you at sentencing. Before your sentencing, we may file a sentencing memorandum, a motion for downward departure, and/or a motion for downward variance. The purpose of such filings is to present information and factors the Court may consider in determining what type and length of sentence is sufficient, but not greater than necessary, to comply with the statutory directives set forth in Title 18, United States Code, § 3553(a).

The primary directive in Section 3553(a) is for sentencing courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." Title 18, United States Code, § 3553(a)(2) states that such purposes are:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining the minimally sufficient sentence, § 3553(a) further directs sentencing courts to consider the following factors:

1) "the nature and circumstances of the offense and the history and characteristics of the defendant" (Title 18, United States Code, § 3553(a)(1);

2) "the kinds of sentences available" (Title 18, United States Code, § 3553(a)(3);

3) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" (Title 18, United States Code, § 3553(a)(6); and

4) "the need to provide restitution to any victims of the offense." (Title 18, United States Code, § 3553(a)(7).

Under Title 18, United States Code, § 3661, "no limitation shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This statutory language certainly overrides the (now-advisory) policy statements in Part H of the sentencing guidelines, which list as "not ordinarily relevant" to sentencing a variety of factors such as the defendant's age, educational and vocational skills, mental and emotional conditions, drug or alcohol dependence, and lack of guidance as a youth.

Rule 32(i)(4) of the Federal Rules of Criminal Procedure permits a defendant the opportunity to speak or present any information to mitigate the sentence. These questions address the sentencing issues described above. Your answers will be presented to the Court for the Court's consideration in determining what type and length of sentence is sufficient, but not greater than necessary, to comply with the statutory directives set forth in Title 18, United States Code, § 3553(a).

Additionally, all letters of support from family, friends and associates that you wish the Judge to read before your sentencing, should be sent to me as soon as possible for inclusion in the sentencing materials.

What are your best accomplishments? What have you done that you are really proud of? What have you done that other people and/or your family are proud of?

What are your best attributes? What are your best characteristics? What are the best things about you as a person?

What are your short term goals? If you go to prison, what are your plans? And if you do not go to prison, what are your immediate plans? What do you want to accomplish first?

What are your long term goals? How do you see yourself in a year or five years or ten or twenty?

Are you a better person now? Why? What are you doing to improve yourself now and in the future?

Breaking any law is serious – some more serious than others. The Judge must consider the seriousness of your offense in determining your sentence. How serious do you consider your offense? How would a sentence less than what is suggested in your Presentence Investigation Report reflect the seriousness of your offense?

Making you respect the law is a factor for the Judge to consider in determining your sentence. Did you respect the law before you were charged with this offense? Do you respect the law now? What type or length of sentence is needed to promote your respect or make you show more respect for the law in the future?

The Judge will consider how the sentence you receive will promote other people's respect for the law. What type or length of sentence is needed to promote or show other people the importance of respecting the law?

What is a just punishment for your offense and why?

You broke the law! The Judge may be concerned that you will break laws in the future. The Judge will consider how the sentence you receive will deter or keep you from committing crimes in the future. The Judge will also consider the need to protect the public from further crimes you may commit. Why should the Judge believe you are not a threat or risk? What type or length of sentence is necessary to deter or keep you from committing crimes in the future and to protect the public?

Do you need educational or vocational training? What type or length of sentence is sufficient but not greater than necessary to provide you with needed educational or vocational training?

Do you need medical care? How would a sentence less than what is suggested in your Presentence Investigation Report provide you with needed medical care in the most effective manner?

How will your sentence affect your family? What, if anything, would you say to your family?

What, if anything, would you say to the victims of your crime?

What makes you or your case any different from defendants like you and cases like yours? Why should the Judge give YOU a break?