



The Importance of a Sentencing Theory

By Christopher Wickman



In law school, students are taught to always have a good case theory if they want to win. Success depends on having both a solid legal theory and a solid factual theory to win the hearts of jurors and provide them with the legal footing to decide in favor of your client (and you). Despite this being the common rhetoric in law schools, I see few young attorneys employing a sentencing theory when their client has already “lost”—having been convicted of a crime. For a case in which the sentence your client serves is at the judge’s discretion, a good sentencing theory is as important as a good case theory.

Case theories

One of the questions I’m frequently asked by my nonlawyer friends is whether I’m working on any interesting cases—the

adult version of asking me to tell them a story. From childhood, we all enjoy a good story. Fact finders love a good story as well, and a case theory grounded soundly in the facts and the law is the best story lawyers can tell in the courtroom. Some of the best children’s stories involve a lovable main character that the reader cares about and roots for. In the most exceptional of cases, that lovable main character is your client, whom the jury cares for and wants to win because the law makes doing so the only reasonable choice. As attorneys, we often know the facts are more muddled, and that reasonable minds can sometimes disagree on what would be fair under the law. Lawyers,

FAST FACTS

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Your job when developing your factual theory is to answer the question “Why are you here?” for the judge, the client, and yourself.

as advocates, have a duty to our clients to use our knowledge and experience to advocate the best case theory grounded in the facts and the law. To win at trial, you want and often need the jury to accept your case theory of what the facts show and what the law dictates. That's great, I hear you think to yourself at this point, but what if my criminal defendant client loses and takes a plea or is convicted at trial? Sentencing theory is incredibly important to achieve the best obtainable result. Sometimes, you can pull a win from a loss.

Sentencing theory when you have already lost

The fact that your client is proceeding to sentencing doesn't mean that your client lost. There are cases of injustice where an individual is convicted of a crime when it is not appropriate under the law—and society as a whole loses in these situations. Often, however, an individual convicted of a crime has done something wrong under the law. Trial wins may feel better because you receive vindication for an innocent client, but there are equally important victories for a client who reaches a favorable plea deal or is convicted of lesser charges that are fair and just under the law. In the case of a guilty client, a client may still “win” at sentencing with a good sentencing theory. If a ruling is mandated by a specific penalty (such as life in prison) when heading to sentencing, the goals will be different, but most hearings that young lawyers handle will receive a sentence at the judge's discretion. Sentencing may be your time to win and get a favorable result for your client.

Why sentencing theory matters more now

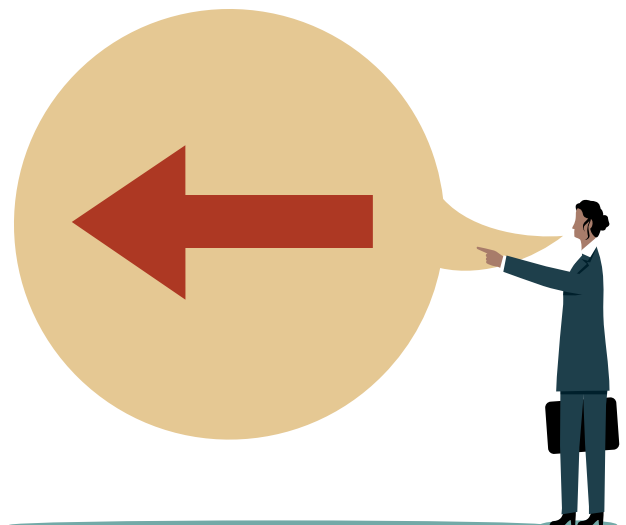
In 2015, the Michigan Supreme Court applied binding United States Supreme Court precedent in finding the Michigan sentencing guidelines unconstitutional.¹ The guidelines were a set

of laws that calculated a range of outcomes for the minimum sentence for an individual based on his or her previous criminal history and the seriousness of the current offense. To deviate from this range, a trial court needed to find substantial and compelling reasons to sentence the defendant above or below the guidelines.

Since the guidelines were found unconstitutional, the Michigan Supreme Court has remedied the unconstitutionality by making the guidelines advisory only—in every case.² While they remain a “highly relevant consideration,” the test of whether a sentence is appropriate is if it is proportionate to the seriousness of the matter.³ Rather than having to cite substantial and compelling reasons to deviate from the guidelines, trial courts have more freedom to sentence above or below the guidelines, resulting in a wider range of options at sentencing. This can work in your client's favor, or work against your client. More than in years past, it's important to present at sentencing a cogent theory representing sound legal and factual theory.

Legal theory

At every sentencing hearing, the presiding judge considers the *Snow* factors,⁴ paraphrased as rehabilitation of the defendant, protection of society, punishment of the defendant, and deterrence of others.⁵ These factors provide the legal theory aspect of your sentencing theory. Every thoughtful sentence that is passed down on an individual convicted of a crime explicitly or silently considers these factors. These factors don't



need to be weighed equally, and it's your job to advocate for a sentence that best addresses your client's situation.

All defendants should be treated differently because all defendants are different. For example, you may have a client who has rehabilitation needs to address and generally poses less danger to society than most defendants before the court. How do you know which factors reflect your individual client's needs? You talk to your client. Every defendant in front of the court is an imperfect person—just like the attorney advocating for him or her. More often than not, your client will have root causes that explain much of the behavior that brought him or her before the court. It's up to you to find the root causes, consider them, and craft a sentence theory to address them that is agreeable with your client.

It's not as simple as asking, "So why did you do this?" Or is it?

Factual theory—Why are you here?

When a defendant comes before the court, many trial judges will try to determine one thing: Why are you here? When considering the *Snow* factors, judges seek to prevent recidivism and harm to society from the defendant in the future. The presentence interview report gives a deep—but incomplete—look at the person standing before the court and a bit of his or her history. It's up to you to present the complete picture of your client and suggest a reasonable sentence so the judge is convinced that the proposed sentence will prevent the client from getting into trouble or harming society again. Your job when developing your factual theory is to answer the question "Why are you here?" for the judge, the client, and yourself.

Many of my clients have good insight into what got them into their current situation—drug or alcohol use, untreated mental health conditions, associating with the wrong people, immaturity, impulsivity, etc. Other clients, however, lack perfect insight into what caused their predicament and seek to blame others for their wrongdoing. You must listen to your client, but you must also ask the right questions to get to the root of the problem. Consider everything in your client's criminal history and life and try to uncover possible root causes. Always discuss your theory regarding the client's problems with your client before sharing it with the court. You could be spot-on or you could be completely off-base. If you plan to include the factual basis underlying your sentencing theory as you properly should, your client must understand and agree with your assessment. It can sometimes be helpful to reach out to the client's family members, friends, and loved ones to get their assessment of the client's situation.

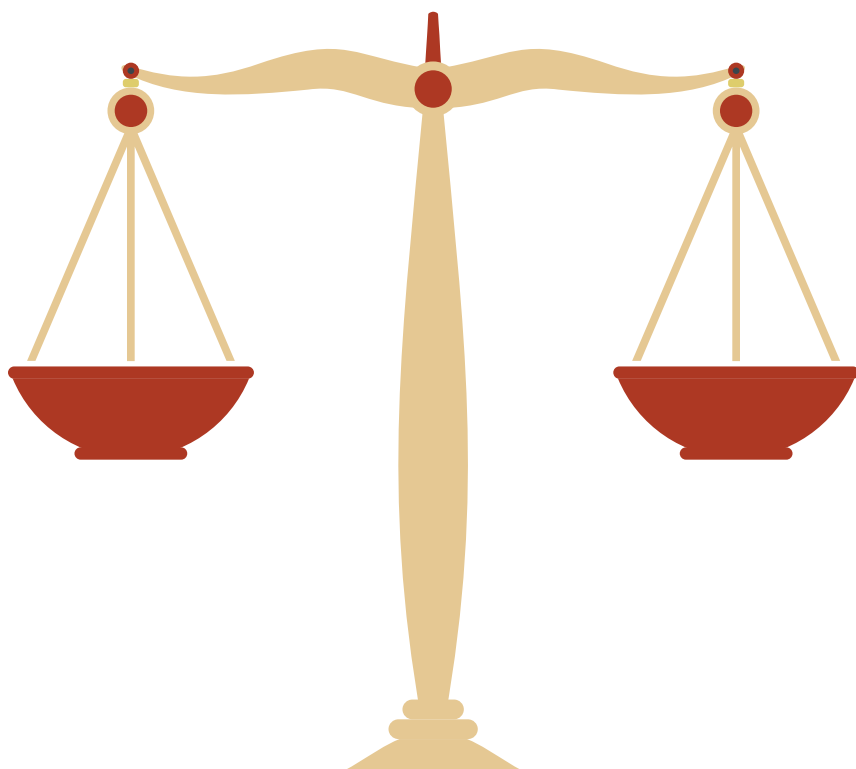
Why the client is there and what you should do

Go into every sentencing with a goal in mind that would be fair and just under the law. Often, your desired sentence will be viewed as lenient compared to the typical sentence, but it doesn't have to be. If it addresses the *Snow* factors, your client's needs, and the issues that got the client into legal trouble, the sentence may be completely adequate. If your client requires services that may not be recommended, such as cognitive behavioral therapy or anger management, talk with your client and get his or her consent to suggest it. The judge may find you more credible in seeking a fair sentence when your recommendation is reasonable and includes requirements beyond the bare minimum to meet those needs. Your job isn't necessarily to get as few obligations as possible in the punishment, but setting up the client to succeed going forward.

Facebook friends and motivational posters tend to say that if you aim for the moon, you often land among the stars. At sentencing, that's not always the case. If you ask for probation and no jail time on every conviction of assault with intent to commit murder without addressing why extraordinary leniency is fair for your individual client, you are likely to fail. Is it ever appropriate to ask for probation for assault with intent to commit murder? You be the judge.

Sentencing theory—an example

Joe and Jane are dating. One day, Joe arrives at Jane's house angry, covered in blood, and holding a gun; he asks Jane to hide him.



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Jane stows him away, but the police eventually find him. Jane may be charged with Joe's crimes as an accessory after the fact because she helped conceal him to prevent his arrest. This could be accessory after the fact to a murder, manslaughter, assault with intent to murder, or other crimes, and Jane would face up to five years in prison.

Let's assume that Jane pleads guilty or is found guilty and has no prior criminal history. If she had been the victim of domestic violence at the hands of Joe and other partners before him and felt coerced to hide Joe, the trial court may consider this in sentencing. There may not be a defense of coercion based on Joe's statements and actions on the day of the crime, but Jane's status as the victim of domestic violence at the hands of Joe and other abusive romantic partners may be considered by the trial court to have affected her decisions. Furthermore, if Jane had cooperated with police when questioned and told the full story of what happened and expressed genuine regret for her decisions, these actions could be considered by the trial court. If after being charged with the case Jane sought domestic violence counseling and worked on her struggles with self-medicating through alcohol or controlled substances brought on by years of abuse and lack of confidence related to abusive domestic partners, these factors could also be considered by the trial court.

"Your Honor, Jane, convicted of accessory after the fact to a murder, is a person standing before the trial court remorseful for her actions. As detailed in my sentencing memorandum submitted to the court, she has long suffered as the victim of domestic violence at the hands of her romantic partners and lacked the strength to say no to Joe on the date in question. She regrets her actions and involvement in what happened and has taken proactive steps to address what led her to this place in life, including attending domestic violence support groups, individual counseling, group therapy, and attending AA and NA meetings to address her previous alcohol and controlled substance use.

"Jane knows she was wrong in her actions and regrets her decisions every day. That said, she has made significant strides since being charged in this case and is rebuilding her life free of abusers, drugs, and alcohol. Although this court

could sentence her to jail or prison for her actions, I would ask that this court sentence her to at least two years of probation so the court may monitor Jane and provide active reinforcement and assistance in rebuilding her life.

"Furthermore, I would ask that she be ordered to continue attending AA, NA, and CA meetings and to continue participating in domestic violence groups and individual therapy as recommended by the probation officer. This will allow her to continue her rehabilitation and avoid further interactions with negative individuals in her life and further involvement with the courts. She will not be a threat to society in the future since she has no prior criminal history, and this sentence will serve as sufficient punishment for her actions and as a sufficient deterrent in this unique set of circumstances. Jane has started to rebuild her life, and incarceration would not only inhibit the gains she has made while on bond in this matter, but would also force her to restart her life once she is released. All she asks is that this honorable court allow her to continue the gains she has made in life and prove that these actions do not define her. Thank you." ■



Christopher Wickman is a criminal defense practitioner based out of Okemos. He has practiced throughout Michigan and handled everything from traffic tickets to capital crimes. He is a member of the SBM Young Lawyers Section Executive Council and the Ingham County Young Lawyers Section Board of Directors, and co-chairperson of the Ingham County Criminal Defense Section.

ENDNOTES

1. *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).
2. *People v Steanhouse*, ___ Mich ___; ___ NW2d ___ (2017).
3. *Id.*
4. *People v Snow*, 386 Mich 586; 194 NW2d 314 (1972).
5. *Id.* at 586, 592.