IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	USCA Dkt. No. 18-0135/AF
Senior Airman (E-4) DARION A. HAMILTON, USAF *Appellant*.	)	Crim. App. No. 39086

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I.

ARE VICTIM IMPACT STATEMENTS ADMITTED PURSUANT TO R.C.M. 1001A EVIDENCE SUBJECT TO THE MILITARY RULES OF EVIDENCE?

II.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING PROSECUTION EXHIBITS 4, 5, AND 6?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally correct.

STATEMENT OF FACTS

Appellant pled guilty to possessing child pornography and distributing it to a public website called Imgur. (JA at 44, 85.) He "possessed 155 images and videos of some children appearing to be as young as two years old, being raped and sodomized . . . forced to perform oral sex on adults . . . [and] put in bondage." (JA at 70, 88.) "[O]f the 155 files on the accused's computer, 116 of those were uploaded to a website trafficked by millions of people every single day." (JA at 70, 87.) The uploaded files were "not password protected, or private in any other way," and they could be accessed simply "through entering search terms on Imgur itself or other search engines." (JA at 85.)

At trial, the military judge admitted several victim impact statements—Prosecution Exhibits 4-6. (JA at 64, 65, 67.) Trial defense counsel objected to the admission of these statements as "[im]proper unsworn statement[s] under rule 1001A," but made no objection to foundation or authenticity. (JA at 64, 65, 67.) As such, the AFCCA found failure to object on these bases "forfeits appellate review absent plain error;" and here, "[t]here was no error plain or otherwise." United States v. Hamilton, 77 M.J. 579, 583 n.4 (A.F. Ct. Crim. App. 2017) (internal citations omitted).

a. Prosecution Exhibit 4

Prosecution Exhibit 4 is a "victim impact statement [sic] written by the victim and her mother . . . in about 2011, when the victim was approximately 14 years old." (JA at 59.) The victim's name is B. (JA at 57.) B was the child depicted in "the Blue Pillow child pornography series." (JA at 57.) "The Blue Pillow is a name given to the child pornography series by the National Center for Missing or Exploited Children." (JA at 57.) "The images that were produced [for this series]. . . occurred from the time [B] was age seven to age 12." (JA at 58.)

During sentencing, Detective KP testified that he recognized images 8, 18, and 30 from Prosecution Exhibit 1[1] "from the Blue Pillow child pornography series." (JA at 57, 88.) He was particularly familiar with Blue Pillow images because "[t]hey were connected to the city of Elk Grove, where [he] work[s]." (JA at 57.) Specifically, "a garbage can that was in the background of one of the pictures" indicated Elk Grove, so "[a] collection of pictures was sent to [Detective KP] to try and find the female victim that was in the pictures" and "after about a month of investigation," Detective KP found B. (JA at 57.)

Ever since then, Detective KP maintains close contact with B and her mother. (JA at 58.) They talk "several times a year. And more recently, [B] has

[1] The attachment of Prosecution Exhibit 1 contains the contraband images of child pornography that Appellant possessed and distributed.

wanted to – now that she's 18 she wanted to get out and tell her story to try and help other children in similar situations." (Id.) Accordingly, they had "begun talking and kind of presenting a case study, [Detective KP] and [B] and [B's] mother." (Id.) Detective KP testified he was "still in contact with [B]" during Appellant's sentencing hearing. (Id.)

Detective KP laid the foundation for, and attested to the authenticity of, Prosecution Exhibit 4. (JA at 60.) Specifically, he explained he was personally "familiar with [B's] desires regarding sentencing cases involving the Blue Pillow series," in that B intended Prosecution Exhibit 4 to "be considered in any case where – or any investigation or prosecution where her images are located." (JA at 58, 60.) Appellant objected that the exhibit was "improper sentencing evidence unless it can be directly attributed to Senior Airman Hamilton" and that Prosecution Exhibit 4 "has a sentence recommendation as it discusses monetary impact."[2] (JA at 60, 64.)

The military judge admitted Prosecution Exhibit 4 stating:

> [T]here is what appears to be a sentence recommendation in the very last paragraph of page three of three, or at least something that could reasonably be interpreted as a sentence recommendation. However, in light of the fact that under the new victim's rights provisions, the victim

[2] The last paragraph of B's mother statement says "I feel strongly that anyone who participated in the possession or transmittal of the photos should share in the financial burden of treating her." (JA at 91.) It also discusses "hitting their pocketbooks" and making them pay "monetarily." (Id.)

> does have fairly broad discretion with regards to the matters that are submitted to the court for its consideration. I am going to overrule the objection but will note that the court is well aware of what is proper and improper under an unsworn statement both from the accused and from the alleged victim, and the court will give that evidence the weight that it deserves under the rules. (JA at 64.)

b. Prosecution Exhibit 5

Prosecution Exhibit 5 is a "video of a keynote address given by [B] at a Crimes against Children Conference in Dallas, Texas, in August of 2015." (JA at 62.) "[I]t was the first conference in which [Detective KP, B, and B's mother] presented, the three of [them], this case study." (JA at 62.)

Detective KP testified that "[B] want[ed] that video as well considered in sentencing proceedings." (JA at 63.) Appellant "objected that it is not a proper unsworn statement under Rule 1001A" because "it appears to be more of a pat on the back to law enforcement and not true victim impact." (JA at 64.)

The military judge "overrule[d] the objection" stating, inter alia:

> [E]vidence of victim impact is fairly broad in terms of what falls under evidence of victim impact, and based on the testimony of the witness as to what is contained within the particular video, I'm going to overrule the objection. I will, however, as with the previous statement regarding the unsworn statements of the individual victim, I will give it the due weight that I believe it deserves under the law. So, therefore, Prosecution Exhibit 5 for identification is admitted as Prosecution Exhibit 5. (JA at 64.)

c. Prosecution Exhibit 6

Prosecution Exhibit 6 has two parts: a victim impact statement from J (a victim of the "Marineland" child pornography series) and an affidavit from Detective DB declaring the intent of J's impact statement. (JA at 93-95.) Specifically, the affidavit—signed five days[3] before Appellant's trial—describes Detective DB's role in discovering the child victims of the "Marineland" series and how "[a]t the time the photographs were taken, [J] was approximately eight (8) but no older than the age of twelve (12)." (JA at 93.)

Further, the affidavit states that Detective DB had "seen and read [J's] statement in the past, prior to testifying in a previous court martial and kn[e]w this is the correct impact statement." (JA at 93.) Finally, Detective DB stated: "I have met this child and know her to be a real child;" and that J "would like [her impact statement] used for trial and sentencing purposes." (JA at 93.)

With regard to Prosecution Exhibit 6, Appellant maintained "the same objection that [he] had to Prosecution Exhibit 4, essentially that it is not a proper victim impact statement due to the date that the letter was signed was prior to the charged timeframe . . . [and] paragraph five[4] contains a similar sentencing

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[3] The affidavit was signed 20 April 2016. (JA at 93.) Appellant's trial began 25 April 2016. (JA at 18.)

[4] Paragraph 5 of this victim impact statements states: "I ask the judge who sentences anyone who is convicted of having or trading my pictures make that person contribute to the costs of a counselor for me. I am told that a good counselor for the problems I have will costs at least $100 every time I see her . . . . I hope that the court will help me by granting restitution from the people who have

recommendation." (JA at 66.)

The military judge overruled the objection finding:

> [W]ith regards to the broad, overarching objection with regards to the victim impact statements in general, as I did with Prosecution Exhibit 4, that these do fall within what is permitted under 1001;[5] therefore, I'm going to overrule the objection -- even despite the fact that it predates the accused's alleged acts, as the case law is fairly clear that is not a limitation. That the mere act of the accused viewing these images is sufficient to bring us within 1001.
>
> With regards to the objection on the basis of an improper sentence recommendation, as again with Prosecution Exhibit 4, the authority or the ability of the victim to submit matters is fairly broad. I again, as with Prosecution Exhibit 4, am aware as the military judge of exactly what is permissible and not permissible within an unsworn statement from a victim. So, I will consider these portions, which are proper from an unsworn perspective, and I will not consider those portions which I determine are not properly within an unsworn. But, I will go ahead and admit the document itself as Prosecution Exhibit 6 for identification, and give those portions the weight which they deserve. (JA at 67.)

Appellant offered a verbal unsworn statement, and a separate written one. (JA at 69.)

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and trade my pictures." (JA at 93.)

[5] The AFCCA found "that both references by the trial judge to 1001 were in fact referring to R.C.M. 1001A because the victim impact statements were unsworn and could not have been admitted under R.C.M. 1001(b)(4)." Hamilton, 77 M.J. at 583 n.5.

SUMMARY OF THE ARGUMENT

1. Unsworn victim statements[6] are not evidence.

An unsworn victim statement is not subject to the Military Rules of Evidence (M.R.E.s) because 1) it is not given under oath, 2) it is a right of allocution governed by its own statutory strictures, and 3) it is modeled after an accused's unsworn statement.

First, R.C.M. 1001A(a) removes the oath requirement establishing that victims are not considered witnesses for purposes of this rule. This non-witness designation strips an unsworn victim statement from its testimonial status, which removes it from the purview of the M.R.E.s.

Second, the victim's right to be heard through an unsworn statement is an independent right of allocution governed by separate rules and case law. The drafters placed unsworn victim statements beyond the reach of the M.R.E.s when they removed judicial discretion—requiring courts to call any victim who chooses to exercise that right. Additionally, the right to be reasonable heard was drawn specifically from the CVRA which makes clear that this is a right of allocution—not a presentation of evidence. Moreover, strictures on the form and substance of

[6] R.C.M. 1001A(c) allows unsworn victim statements to contain two different types of information: matters of "victim impact or matters in mitigation." Accordingly, while the granted issue addresses "victim impact statements" only, the following analysis incorporates all unsworn victim statements (i.e. impact or mitigation) offered pursuant to R.C.M. 1001A.

unsworn victim statements are found in Rule for Courts-Martial (R.C.M.) 1001A itself, not the M.R.E.s. There are internal limits on the content, form, and method of presentation within the rule. If the M.R.E.s governed these statements, they would not have their own separate rules.

Finally, Congress patterned the victim's right to give an unsworn statement after the accused's right to give an unsworn statement. The accused has a right of allocution at sentencing. The M.R.E.s do not govern this right; rather, R.C.M. 1001(c)(2)(C) itself outlines the parameters and scope of an accused's unsworn statement. The victim's right to be reasonably heard is patterned after this right of the accused and should be treated accordingly.

2. Admitting Prosecution Exhibits 4-6 was not plain error on an abuse of discretion; but even if it was, Appellant suffered no prejudice.

Under R.C.M. 1001A(b), B and J qualified as victims and under subsection (e) of that same provision were entitled to provide an unsworn statement. The military judge did not err by admitting Prosecution[7] Exhibits 4-6 because these victims intended their statements to be used in Appellant's case as evidenced by Detective KP's live testimony and Detective DB's sworn affidavit. This conclusion is consistent with federal practice and this Court's holding in United

[7] The United States agrees with the AFCCA that "these types of exhibits [should] be marked as court exhibits" vice Prosecution Exhibits as the victims are called by the court-martial under R.C.M. 1001A. Hamilton, 77 M.J. at 586.

States v. Barker, 77 M.J. 377, 2018 CAAF LEXIS 295, at *14 (C.A.A.F. 21 May 2018). However, even if the military judge erred in admitting these impact statements, Appellant suffered no prejudice because they did not influence the adjudged sentence. The statements did not arm the military judge with new information because he was already presumed to know the themes and harms these victims had suffered. Moreover, it was the egregiousness of Appellant's crimes—which the judge reviewed in Prosecution Exhibit 1—that influenced the sentence, not the content of the impact statements.

ARGUMENT

I.

UNSWORN VICTIM STATEMENTS ADMITTED PURSUANT TO R.C.M. 1001A ARE NOT EVIDENCE SUBJECT TO THE MILITARY RULES OF EVIDENCE.

Standard of Review

"This Court reviews interpretations of R.C.M. provisions *de novo*." United States v. Leahr, 73 M.J. 364, 369 (C.A.A.F. 2014).

Law and Argument

"Victim impact statements are distinctly different from formal courtroom testimony offered during trial in that they are largely unconstrained by either state or federal rules of evidence or other procedural limitations." Colo. v. Holmes,

2013 Colo. Dist. LEXIS 1632, unpub. op. at *114.[8] In the military, an unsworn victim statement is not subject to the M.R.E.s because: 1) it is not given under oath, 2) it is a right of allocution governed by its own statutory strictures, and 3) it is modeled after an accused's unsworn statement.

1. If it is not sworn, it is not evidence.[9]

Tautology notwithstanding, an unsworn statement is not evidence because it is unsworn. A victim "is not considered a witness for purposes of Article 42(b)." R.C.M. 1001A(a).[10] In turn, Article 42(b), UCMJ, provides that "each witness before a court-martial shall be examined on oath." 10 U.S.C. § 842(B). Removing this requirement is pivotal because taking an oath is what changes allocution into testimony. *See* Mil. R. Evid. 603; *see also* Barker, 2018 CAAF LEXIS 295, at *13 ("victim testimony under R.C.M. 1001A does not constitute witness testimony."); *see cf.* United States v. Breese, 11 M.J. 17, 24 (C.M.A. 1981) ("[t]he truth of the matter is that these statements are *not* made under oath and, thus, the 'unsworn statement is not evidence.") (emphasis original); Crawford

[8] *See* Appendix.

[9] While the United States did not advance this particular argument during review by the Air Force Court of Criminal Appeals (AFCCA), after considering the AFCCA's opinion and researching the issue, the United States agrees with AFCCA's conclusion on this point.

[10] Importantly, "an accused making an unsworn statement is not a 'witness'" either. R.C.M. 807(b)(1)(B). For more on the parallels between the unsworn statements of the accused and the victim, see section three below.

v. Washington, 541 U.S. 36, 51 (2004) (quoting 2 N. Webster, An American Dictionary of the English Language (1828) (explaining that witnesses are "those who 'bear testimony,'" and "'[t]estimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"). As such, the relevant question is whether non-testimony, from a non-witness, still constitutes evidence. It does not.

M.R.E. 603 is not just a rule of evidence, it is the gateway through which all witness testimony must pass in order to become evidence. The rule mandates: "[b]efore testifying, a witness must give an oath or affirmation to testify truthfully." Mil. R. Evid. 603. In other words, the designation of testimony is preconditioned on oath or affirmation.[11] It follows that eliminating the oath requirement must also eliminate the testimonial status of the statement. Without an oath, and without testimonial status, allocution is the only thing left.

Importantly, "the right of a victim to be reasonably heard at a sentencing hearing . . . is consistent with the principles of law and federal practice prescribed in 18 U.S.C. § 3771(a)(4)[12] and Federal Rule of Criminal Procedure 32(i)(4)(B), which requires the court to 'address any victim of the crime who is present at sentencing' and 'permit the victim to be reasonably heard.'" Manual for Courts-

[11] As a practical consideration, even hearsay statements—written or oral—must be established or transmitted by someone under oath.
[12] The Crime Victims' Rights Act (CVRA).

Martial, United States (2016 ed.) (MCM), App. 21, at A21–73; *see also* United States v. Barker, 76 M.J. 748, 752-53 (A.F. Ct. Crim. App. 2017) (aff'd on different grounds) ("Article 6b is based on the [CVRA], 18 U.S.C § 3771.").

The provenance of Article 6b, UCMJ matters because federal courts consistently interpret the victim's right to be heard under the CVRA as a right of allocution. Kenna v. United States Dist. Court, 435 F.3d 1011, 1016-17 (9th Cir. 2006) ("The court can't deny the defendant allocution" and after the introduction of the CVRA "victims now have an indefeasible right to speak, similar to that of the defendant."); United States v. Vampire Nation, 451 F.3d 189, 197 n.4 (3d Cir. 2006) ("The right of victims to be heard is guaranteed by the [CVRA]" and "is in the nature of an independent right of allocution at sentencing.") (internal citations omitted); United States v. Grigg, 434 F. App'x 530, 533-34 (6th Cir. 2011) ("It is apparent that a victim has the right to speak at sentencing . . . just as a defendant has the right to allocute in mitigation of sentence."); United States v. Marcello, 370 F. Supp. 2d 745, 750 (N.D. Ill. 2005) (Due to the CVRA, "victims have a right to speak in open court in a manner analogous to the defendant's personal right of allocution at sentencing.") (internal citations omitted)).

Moreover, since the introduction of the CVRA, no federal courts have applied rules of evidence to victim allocution, i.e. unsworn statements.[13] Federal

[13] However, the federal rules of evidence are generally inapplicable at a sentencing

courts' treatment of unsworn victim statements makes consummate sense because, as the First Circuit noted: "[a]ncient in law, allocution is both a rite and a right." United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994). "Part of the rite is a chance for the participants -- the defendant, the prosecution, and now the victim -- to have their say before sentence is imposed." United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349-50 (D. Utah 2005).

This interpretation is consistent with the plain language of Article 6b(a)(4), UCMJ which says victims have "the right to be reasonably *heard*." (emphasis added). Article 6b, UCMJ does not say victims have the right to present evidence,[14] just to be heard. Hamilton, 77 M.J. at 585. What "to be heard" means is axiomatic; it means to be listened to, to be heard out, or as Degenhardt put it, "to have [one's] say." Degenhardt, 405 F. Supp. 2d 1341, 1349 (D. Utah 2005). Any other interpretation would exceed the plain meaning of the text. In fact, "every time that the M.R.E. and the R.C.M. use the term 'to be heard,' it refers to occasions when the parties can provide *argument* through counsel to the military judge on a legal issue, *rather than an occasion when a witness testifies*." LRM v. Kastenberg, 72 M.J. 364, 370 (C.A.A.F. 2013) (emphasis added). Moreover, as

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hearing. Fed. R. Evid. 1101(d)(3)

[14] The word "evidence" is never used in R.C.M. 1001A. However, victims do have a separate right under R.C.M. 1001A(d) to give sworn testimony, which is evidence.

the AFCCA rightly notes "[w]hen R.C.M. 1001A was implemented, R.C.M. 1001 was also modified" to "explicitly distinguish[] between evidence and other matters."[15] Hamilton, 77 M.J. at 583 (emphasis added). Victim statements are among those other matters explicitly contemplated in the changes.

Finally, the very fact that "the rights vindicated by R.C.M. 1001A are personal to the victim in each individual case" demonstrates a process outside the scope of the M.R.E.s. Barker, 2018 CAAF LEXIS 295, at *14. Because the right to make an unsworn statement is independent, it is neither a prosecutorial nor defense function. In other words, victims' rights do not belong to either of the parties. This distinction is important because nowhere in the M.R.E.s does it suggest that a non-party can present evidence, and there is no vehicle to do so.

To put the issue syllogistically: only parties can present evidence; the victim is not a party; therefore, the victim cannot present evidence. In fact, every reference to the presentation of evidence within the M.R.E.s is tethered to one of the parties.[16] Tellingly, there are no references to how a victim might introduce

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[15] The umbrella term "Matter" is used in the predicate paragraph of R.C.M. 1001(a)(1), whereas the specific term "evidence" is used in the subparagraphs to describe the types of matters which the prosecution and defense can present.

[16] For a cursory sampling, *see* Mil. R. Evid. 302(c) ("if the defense offers expert testimony . . . .); Mil. R. Evid. 304(d) (. . . that the prosecution intends to offer against the accused . . . .); Mil. R. Evid. 304(f)(2) ("if the prosecution seeks to offer a statement . . . ."); Mil. R. Evid. 304(f)(3)(A) ("introduction of such testimony by the accused . . . ."); Mil. R. Evid. 311(d)(1) ("the prosecution must disclose . . . evidence derived therefrom, that it intends to offer into evidence

evidence. In short, if the victim's right to give an unsworn statement is truly independent, then it must not be governed by the M.R.E.s because those rules govern parties, and only parties can introduce evidence.

Perhaps this distinction is most clearly pared out in M.R.E. 412. Under this rule, victims "must be afforded a reasonable opportunity to attend and be heard" before evidence about their past sexual history or dispositions can be admitted.[17] Mil. R. Evid. 412(c)(2). Yet, just because victims have an independent right to "be heard" does not mean they can introduce evidence under this rule. In fact, the rule specifically says "*a party* intending to offer evidence" must follow the appropriate procedures. Mil. R. Evid. 412(c)(1) (emphasis added). The rule does not say the victim can do anything but "be heard," which is tantamount to giving

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against the accused"); Mil. R. Evid. 311(d)(3)(B) ("if the prosecution intends to offer evidence . . . ."); Mil. R. Evid. 311(d)(6) ("the defense may present evidence . . . ."); Mil. R. Evid. 321(d)(1) ("the prosecution must disclose" various things "that it intends to offer into evidence."); Mil. R. Evid. 321(d)(3) ("if the prosecution intends to offer such evidence . . . ."); Mil. R. Evid. 321(d)(5) ("prior to the introduction of such testimony by the accused."); Mil. R. Evid. 404(a)(2)(B) ("the accused may offer evidence . . . ."); Mil. R. Evid. 404(a)(2)(A) ("the accused may offer evidence . . . ."); Mil. R. Evid. 404(a)(2) (b)(i) ("the prosecution may . . . offer evidence to rebut it."); Mil. R. Evid. 404(a)(2)(b)(i); Mil. R. Evid. 404(b)(2) ("any such evidence that the prosecution intends to offer at trial . . . ."); Mil. R. Evid. 405(c) ("evidence of this type may be introduced by the defense or prosecution only if . . . ."); Mil. R. Evid. 412 (b)(1)(B) ("evidence of specific instances . . . offered by the accused to prove consent or by the prosecution."); Mil. R. Evid. 413(b) ("if the prosecution intends to offer this evidence . . .); Mil. R. Evid. 414(b) ("if the prosecution intends to offer this evidence . . .);

[17] This right appears to exist independent of Article 6b, UCMJ.

argument.

Thus, the M.R.E.s govern how parties offer evidence. A victim is a "nonparty to the courts-martial." LRM, 72 M.J. at 368; *see also* R.C.M. 103(16). Appellant cites no law, and indeed there is no precedent, for a nonparty to offer evidence[18] under any circumstance.

2. R.C.M. 1001A, not the M.R.E.s, governs unsworn victim statements.

Unsworn victim statements are not evidence subject to the M.R.E.s because Congress created separate rules to govern their admission. *Cf.* United States v. Sowell, 62 M.J. 150, 152 (C.A.A.F. 2005) ("the [accused's] unsworn statement remains a product of R.C.M. 1001(c) and thus remains *defined in scope by the rule's reference,*" i.e. not the M.R.E.s.) (emphasis added).[19] R.C.M. 1001A limits the content,[20] form,[21] notice,[22] and presentation[23] of unsworn victim statements.

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[18] Nonparties can present argument, e.g. M.R.E. 412, but not evidence.
[19] A more detailed comparison between victim unsworn statements and accused's unsworn statement is found in section three of this issue.
[20] R.C.M. 1001A(c) ("the content of statements made under . . . this rule may include victim impact or matters in mitigation."); R.C.M. 1001A(e)(2) Discussion ("A victim's unsworn statement should not exceed what is permitted under R.C.M. 1001A(c) and may not include a recommendation of a specific sentence).
[21] R.C.M. 1001A(e) ("The unsworn statement may be oral, written, or both."); *see also* R.C.M. 1001A(e)(2) Discussion ("If there are numerous victim, the military judge may reasonable limit the form of the statements provided.").
[22] R.C.M. 1001A(e)(1) ("a victim who would like to present an unsworn statement shall provide a copy to the trial counsel, defense counsel, and military judge.); *see also* R.C.M. 1001A(e)(1) Discussion.
[23] R.C.M. 1001A(e)(2) ("the military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement.")

These restrictions would be superfluous if, for example, M.R.E.s 401-414 (pertaining to content), M.R.E.s 603, 801-807 (pertaining to the form, i.e. sworn testimony and hearsay), M.R.E. 611 (pertaining to presentation, i.e. "mode and order of examining witnesses and presenting evidence") were already governing unsworn victim statements.

Moreover, there is an irreconcilable contradiction between R.C.M. 1001A and the M.R.E.s. Specifically, the M.R.E.s provide the military judge with substantial discretion to prevent evidence which he or she believes to pose a risk of: "unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403; *see also* Mil. R. Evid. 611. In other words, if the M.R.E.s were applicable, in some cases the military judge would have the discretion to prevent the victim from "be[ing] called by the court-martial," i.e. deny the victim's right to be heard wholesale, simply because the judge found the information cumulative. R.C.M. 1001A(a). However, Congress removed judicial discretion on this matter saying simply: "[i]f a victim exercises the right to be reasonably heard, the victim *shall be called* by the court-martial." R.C.M. 1001A(a) (emphasis added). Thus, the military judge has little discretion over whether a victim may present an impact statement. So long as the individual qualifies as a victim and the statement relates to impact or mitigation, "the victim shall be called."

Also, if the right to be reasonable heard through an unsworn victim statement was a mere exception to the oath requirement of M.R.E. 603, it would have been written in as an exception. Some Article 6b rights are specifically exempt from particular evidence rules. For example, victims have a right "not to be excluded from any public hearing." Article 6b(a)(3), UCMJ. Because this rule clashed with M.R.E. 615, Congress amended M.R.E. 615 saying: "this rule does not authorize excluding . . . a victim of an offense [from a hearing]. . . unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding." Mil. R. Evid. 615(e). Analogously, if the M.R.E.s were designed to govern the victim's right to be reasonably heard, then it would be written in as an exception to M.R.E. 603's oath requirement—marking a narrow exception to otherwise applicable rules.

Similarly, if the M.R.E.s governed unsworn victim statements, then the opposing party could simply exclude written statements based on hearsay or foundation. In other words, if the M.R.E.s were in play, Congress not only forgot to exempt unsworn victim statements from M.R.E. 603, but also from the M.R.E 800 series and the M.R.E. 900 series. These omissions demonstrate that Congress was not trying to create implied exceptions to the M.R.E.s, but establishing separate rules to govern the admission of unsworn victim statements.

In sum, the M.R.E.s do not govern the victim's right to make an unsworn statement because R.C.M. 1001A has its own internal strictures. If the M.R.E.s were applicable, many of these strictures would be superfluous, while others would be irreconcilable. Moreover, the M.R.E.s contain no exceptions for unsworn victim statements, so the parties could exclude every written victim statement simply by objecting to hearsay or foundation. Thus, unsworn victim statements have their own independent rules outside the scope of the M.R.E.s.

3. A victim's right of allocution is the same as an accused's.

The victim's right to make an unsworn statement is virtually identical[24] to the accused's right of allocution as evidence by the respective statutory language establishing these rights. "A military accused's right of allocution through an unsworn statement prior to sentencing is one of long-standing recognition and is broad in scope." United States v. Jeffery, 48 M.J. 229, 230 (C.A.A.F. 1998). This "unsworn statement remains a product of R.C.M. 1001(c) and thus remains defined in scope by the rule's reference[s]," not the M.R.E.s. Sowell, 62 M.J. at

[24] There are very minor differences, but both create a right of allocution governed by their own respective rules. For example, the internal rules for an accused's unsworn statement encourage judges not to interrupt oral presentation even when it exceeds the scope of a statement, e.g. including "what is properly argument." R.C.M. 1001(c)(2)(C), Discussion. Whereas, "a military judge may stop or interrupt a victim's unsworn statement that includes matters outside the scope of R.C.M. 1001A(c)." R.C.M. 1001A(e)(2), Discussion. This does not undermine the victim's right of allocution, but establishes that the victim actually has a right of allocution governed by its own independent rules.

152. The President provided for this right as follows:

> *The accused* may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, *and may be made by the accused, by counsel, or both*.

R.C.M. 1001(c)(2)(C) (emphasis added).[25] The very next section establishes the same right for victims:

> *The victim* may make an unsworn statement and may not be cross-examined by the trial counsel *or defense counsel* upon it or examined upon it by the court-martial. The prosecution *or defense* may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both.

R.C.M. 1001A(e) (emphasis added). The striking similarity between the language and placement[26] of these rules demonstrates that, like our civilian counterparts, "victims now have an indefeasible right to speak, similar to that of the [accused]." Kenna, 435 F.3d at 1016-17.

As referenced *supra*, the Discussion section of R.C.M. 807(b)(1)(B) provides further evidence that a victim's unsworn statement is to be treated the

[25] Italics are used here to help highlight the de minimis differences between R.C.M. 1001(c)(2)(C) and R.C.M. 1001A(e).

[26] The accused's right to allocution is found in R.C.M. 1001, and the victim's right to allocution is found in R.C.M. 1001A, i.e. it was inserted "between the trial and defense counsel's respective presentencing cases." Barker, 2018 CAAF LEXIS 295, at *1.

same as an accused's unsworn statement. That rule states: "an accused making an unsworn statement is not a 'witness.' *See* R.C.M. 1001(c)(2)(C)." In what can only be interpreted as an effort to endow victims with that same right of allocution, the very next sentence reads: "A victim of an offense which the accused has been found guilty is not a 'witness' when making an unsworn statement during the presentencing phase of a court-martial. *See* R.C.M. 1001A." Id. Importantly, this rule not only treats an accused and a victim as non-witnesses, but it references R.C.M. 1001(c)(2)(C) and R.C.M. 1001A respectively—demonstrating that these truly are independent rights governed by independent rules.

This Court has ruled that an accused's unsworn statement is not evidence. United States v. Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011) (finding the "unsworn statement is not evidence"); Breese, 11 M.J. at 24 (C.M.A. 1981) ("[t]he truth of the matter is that these statements are *not* made under oath and, thus, the unsworn statement is not evidence."); United States v. Provost, 32 M.J. 98, 99 (C.A.A.F. 1991) ("It must be remembered that, if an accused elects to make an unsworn statement, he is not offering evidence.")

In short, there is no reason to treat victim statements differently, because they are patterned after an accused's right to make an unsworn statement. When creating the victim's right to be heard through an unsworn statement, the R.C.M. drafters enlisted the exact same legal foundations which afford an accused the right

of allocution. The mirrored language and coupled placement of these rules signify that the victim's right to give an unsworn statement is virtually identical to its counterpart—the accused's unsworn statement. Accordingly, there is no legal or rational justification to treat unsworn victim statements as evidence subject to the M.R.E.s, when an accused's unsworn statement is not.

II.

THE MILITARY JUDGE DID NOT COMMIT PLAIN ERROR OR ABUSE HIS DISCRETION IN ADMITTING PROSECUTION EXHIBITS 4-6[27] BECAUSE THE VICTIM IMPACT STATEMENTS COMPORTED WITH R.C.M. 1001A, AND EVEN IF THEY HAD NOT, APPELLANT SUFFERED NO MATERIAL PREJUDICE.

Standard of Review

"This Court reviews interpretations of R.C.M. provisions *de novo*." United States v. Leahr, 73 M.J. 364, 369 (C.A.A.F. 2014). However, "[t]his Court reviews 'a military judge's decision to admit evidence for an abuse of discretion.'"

[27] "In this case, the unsworn victim impact statements were marked, offered, and admitted as prosecution exhibits. This was an error." Hamilton, 77 M.J. at 586. The United States agrees with the AFCCA's assessment insomuch as the impact statements were mislabeled. However, the United States maintains that the statements themselves were admissible under R.C.M. 1001A and that "both references by the trial judge to 1001 were in fact referring to R.C.M. 1001A because the victim impact statements were unsworn and could not have been admitted under R.C.M. 1001(b)(4)." Hamilton, 77 M.J. at 584 n.5.

Barker, 2018 CAAF LEXIS 295, at *14 (citing United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002)).

Law and Analysis

The military judge did not commit plain error or abuse his discretion by admitting unsworn statements from B and J because these victims requested that Detectives KP and DB respectively submit their statements to the court. Moreover, even if admission was error, Appellant suffered no material prejudice because the egregiousness of Appellant's crimes determined the sentence, not the victim impact statements—the content of which the military judge was legally presumed to know.

1. The victim impact statements in this case were admissible.

a. Admitting unsworn impact statements generally.

Individuals are considered "victims" under R.C.M. 1001A only if they "suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty." R.C.M. 1001A(b)(1). Such victims have an independent "right to be reasonably heard" in sentencing. R.C.M. 1001A(4); Barker, 2018 CAAF LEXIS 295, at *2.

This right to be reasonably heard includes the opportunity to "make an unsworn statement" which "may not be cross-examined by the trial counsel or defense counsel . . . [or] by the court-martial." R.C.M. 1001A(4)(e); Barker, 2018

CAAF LEXIS 295, at *9. These statements "may be oral or written or both." Id. "The introduction of statements under this rule is prohibited without, at a minimum either the presence *or request* of the victim, R.C.M. 1001A(a), the special victim's counsel, *id*., or the victim's representative, R.C.M. 1001A(d)—(e)." Barker, 2018 CAAF LEXIS 295, at *10 (emphasis added). While "[a]ll of the procedures in R.C.M. 1001A contemplate the actual participation of the victim," Id. at *15, there are circumstances where her or his physical presence is not necessarily required. *E.g.* R.C.M. 1001A(e)(2) ("upon good cause shown, the military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement.").

b. Victim impact statements in the federal circuits.

In federal civilian practice, under the CVRA, victim statements in child pornography cases are admissible so long as they are were "written by children . . . depicted in [the] pornographic images" and intended for trials in which those images were abused. United States v. McElroy, 353 F. App'x 191, 193-94 (11th Cir. 2009) (holding the district court "did not abuse its discretion by considering victim impact statements" because "[t]he government produced evidence at McElroy's sentencing hearing that the victim impact statements had been written by children and the parents of children depicted in pornographic images found on McElroy's computers."); United States v. Burkholder, 590 F.3d 1071, 1073 (9th Cir. 2010) (authorizing the consideration of impact statements during sentencing

where the government demonstrated "that the [impact statements] were authored by children depicted in the images Burkholder possessed," i.e. "the images found on Burkholder's computer matched children known through a database at the National Center for Missing and Exploited Children.");[28] *see also* United States v. Horsfall, 552 F.3d 1275, 1279-80 (11th Cir. 2008) (allowing a law enforcement official to "read brief portions from a few of the victim impact statements that had been submitted to the court," including "a portion of a letter written by the mother of a child pornography victim."); United States v. Clark, 335 F. App'x 181, 182-83 (3d Cir. 2009) (allowing a probation officer to "prepare a Presentencing Report" for the court, which "included victim impact statements representing victims identified in two of the series of images found in Clark's possession.")

In federal courts, child pornography victims need not attend the hearing in order to submit victim impact statements. In United States v. Gray, the appellant "challenge[d] the use of victim impact statements during his sentencing" classifying them as "inadmissible hearsay" and contending they were irrelevant

[28] In that case, the Ninth Circuit found that while the right to be reasonably heard under "the CVRA provides victims the opportunity to communicate directly to the district court; it does not specifically require a district court to append a written statement to a [presentencing report]." Burkholder, 590 F.3d at 1074. Importantly, the Court determined that these "victims chose to exercise their right by submitting written victim impact statements, which . . . were examined and considered by the district court." Id. In other words, when a victim offers an impact statement to be used in future cases, according to the Ninth Circuit that victim has "chose[n] to exercise their right" to be heard in a particular case. Id.

because "the statements were not specific to his case." Gray, 641 F. App'x at 468. In fact, while not explicit in the opinion, there is no indication that these victims were even aware of the appellant's trial.[29] Id. In any event, the Sixth Circuit rejected the appellant's position holding that because "the impact statements [were] submitted by or on behalf of actual victims," those "identified victims had a statutory right to be heard at sentencing under the [CVRA]." Id. Again, federal treatment of this process is important because "Article 6b is based on the [CVRA], 18 U.S.C § 3771." United States v. Barker, 76 M.J. 748, 752-53 (A.F. Ct. Crim. App. 2017) (aff'd on different grounds); *see also* MCM, App. 21, at A21–73.

c. Victim impact statements in the military.

The military takes a more nuanced approach when applying these principles within the framework of R.C.M. 1001A. *See* Barker, 2018 CAAF LEXIS 295, at *10. In the military, impact statements from child pornography victims require, "at a minimum either the presence *or request* of the victim, R.C.M. 1001A(a)." Id. at

[29] The Court speaks about the victims as being "identified" from the images, as if law enforcement or prosecutors simply verified that the victim impact statements were not "generic" but came from the "actual victims identified from the videos that Gray received and possessed." Gray, 641 F. App'x at 468. The probability that these victims were unaware of the trial is further evidenced by the fact that the Court upheld the admission of these statements because they "bear at least the 'sufficient indicia of reliability to support its probable accuracy' as required by the Sentencing Guidelines and due process." Id. (quoting U.S.S.G. § 6A1.3). Had the victims been involved in this specific trial, this holding would likely be unnecessary.

*10 (emphasis added). In other words, it is insufficient to submit impact statements when there is only "some indication of the declarant's intent for the statement to be used in criminal sentencing hearings." Barker, 2018 CAAF LEXIS 295, at *10.

In Barker, "the question [wa]s whether [KF's[30] statements] could be admitted under R.C.M. 1001A, *in their extant form*, without the participation of KF or her advocate." Id. at *11 (emphasis added). With regard to the "extant form" of KF's statements, this Court explained that "[t]rial counsel did not introduce any accompanying affidavits or testimony to establish the origin of these documents, the circumstances of their creation, or where these documents were maintained. Instead, trial counsel merely proffered that they received the documents from the Federal Bureau of Investigation (FBI), and they were redacted already." Id. at *11 (citations omitted). As such, "it [wa]s difficult to know whether or not KF actually wrote the statements" because the only indicia of provenance was "trial counsel's assertion that the FBI provided him with statements from KF." Id. at *4 n.3. Thus, this Court held that admission of victim impact statements under R.C.M. 1001A required, "at a minimum either the presence *or request* of the victim, R.C.M. 1001A(a), the special victim's counsel, *id*., or the victim's representative, R.C.M. 1001A(d)—(e)." Id. at *10 (emphasis added).

[30] KF was the victim in Barker, i.e. the child depicted in the "Vicki series."

Put simply, in Barker, the victim did not request her impact statements to be used in the hearing. Accordingly, this Court "part[ed] ways with the AFCCA . . . given that there was no indication that KF *intended* to 'be heard' at Appellant's sentencing hearing." Id. at *13 (emphasis added). Similar to the circuit holdings in McElroy and Burkholder, the AFCCA admitted the statement "solely because it was possible to glean from the circumstances that the government *acquired* it to permit KF (with whom trial counsel never spoke) to exercise her right to be heard." Id. at *13 (emphasis original). In keeping with R.C.M. 1001A, this Court repudiated the AFCCA's reasoning and found that the minimum threshold requirement for admission is "either the presence *or request* of the victim." Id. at *10.

d. Prosecution Exhibits 4 and 5 were admissible.[31]

B's impact statements were admissible because she exercised her right to be reasonably heard by requesting that Detective KP present her impact statement to the court. (JA at 58, 62.) B's statements are distinguishable from the "extant form" of the victim statements in Barker. Id. at *11. In Barker, "[t]rial counsel did not introduce any accompanying affidavits or testimony to establish the origin of these documents, the circumstances of their creation, or where these documents

[31] Prosecution 4 is B's impact statement and B's mother's letter. (JA at 89-91.) Prosecution Exhibit 5 is a video recording of B's keynote address. (JA at 92.)

were maintained." Id. at *11. Here, trial counsel called Detective KP who was "still in contact with [B]" during Appellant's sentencing hearing and intimately "familiar with [B's] desires regarding sentencing cases involving the Blue Pillow series." (JA at 58.) Detective KP testified that B specifically "requested [her statements] be considered *in any case where – or any investigation or prosecution where her images are located*." (JA at 62) (emphasis added.)

Similarly, B's statements are unlike the Barker victim's because it is not "difficult to know whether or not [B] actually wrote the statements." Barker, 2018 CAAF LEXIS 295, at *4 n.3. Here, it was not difficult to know who wrote Prosecution Exhibit 4 because Detective KP testified "the victim impact statement [wa]s written by the victim and her mother." (JA at 59.) Detective KP knew this because he maintained close contact with B and B's mother. (JA at 58.)

Likewise, B specifically requested Prosecution Exhibit 5—B's keynote address—be "considered in sentencing proceedings." (JA at 63.) Detective KP knew B's intent because they talked "several times a year. And more recently, [B] has wanted to . . . get out and tell her story to try and help other children in similar situations." (JA at 58.) To that end, they produced a video recording of KP telling her story at a "conference in which [they] presented, the three of them, this case study," which became Prosecution Exhibit 5.[32] (JA at 62.) Unlike Barker where

[32] To the extent this Court is concerned about the format of this impact statement,

the statement was admitted "solely because it was possible to glean from the circumstances that the government acquired it to permit [the victim] . . . to exercise her right to be heard;" here, Detective KP's testimony provided plenty of information to ascertain that B intended the video to be used in Appellant's situation. Barker, 2018 CAAF LEXIS 295, at *13. In short, B "intended to 'be heard' at Appellant's sentencing hearing," and simply "request[ed]" KP to facilitate it. Id. at *13.

e. Prosecution Exhibit 6 was admissible.[33]

Similarly, J's victim impact statement was admissible because she exercised her right to be reasonably heard by requesting that Detective DB present her victim impact statement to the court. (JA at 93.) Unlike Barker, there was an "accompanying affidavit[]" in this case. Barker, 2018 CAAF LEXIS 295, at *11.

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i.e. using a video recording, the legislative history of the CVRA lends considerable insight. "[T]he term 'reasonably' is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by other reasonable means." 150 CONG. REC. S10, 911 (daily ed. 9 9 Oct 2004) (statement of Sen. Kyl) (quoted in Degenhardt, 405 F. Supp. 2d at 1346 (D. Utah 2005)). The analysis is no different under R.C.M. 1001A and Article 6b, UCMJ as they were based on the CVRA. The victim has a right to be "reasonably" heard, and video recording is a reasonable alternative to live testimony considering the sheer number of child pornography cases the victims would have to attend.

[33] Prosecution Exhibit 6 was J's impact statement.

Detective DB attested that she had "met [J] and kn[e]w her to be a real child," and that J "would like [her impact statement] used for trial and sentencing purposes." (JA at 93.)

The government did more than offer "some indication of the declarant's intent for the statement to be used in criminal sentencing hearings." Barker, 2018 CAAF LEXIS 295, at *10. Here, the government secured a sworn affidavit from someone with firsthand knowledge, that Prosecution Exhibit 6 was actually being submitted to the court at the "request of the victim." Id. at *10 (emphasis added).

f. B and J were given the opportunity to exercise their rights.

The plain language of R.C.M. 1001A(a) requires that "[i]f the victim exercises the right to be reasonably heard, the victim *shall* be called by the court-martial." (emphasis added). The only viable conclusion is that the victims in this case exercised their right to be reasonably heard. Testimony from law enforcement agents who knew both victims established that those victims desired their impact statements to be presented at any criminal proceedings involving their images. This request includes Appellant's court-martial. Since the victims in this case exercised this right, the court-martial was required to allow their statements to be presented. Furthermore, in accordance with Barker, the victim impact statements in this case were introduced at the "request of the victim[s]." Barker, 2018 CAAF LEXIS 295, at *10.

Trial counsel did not speak directly with the victims in this case, but that is not a specific requirement under R.C.M. 1001A(a). Trial counsel must "ensure the victim is aware of the opportunity to exercise" the right to be reasonably heard. R.C.M. 1001A(a). The plain language of the rule does not indicate that trial counsel must accomplish this by speaking directly to the victim. In this case, trial counsel "ensured" that the victims were aware of their right to be reasonably heard by contacting the detectives involved in each case. These detectives communicated that B and J actually intended to assert that right by presenting their impact statements in any subsequent criminal proceeding—which includes Appellant's hearing.[34] Thus, trial counsel satisfied the notification requirements under R.C.M. 1001A(a).

Moreover, requiring direct contact with the specific victim of a child pornography crime every time her images were involved in a court-martial would become overly burdensome on the victim and would bring up painful memories every time she was contacted. This was likely not the intent of Congress in passing Article 6b, UCMJ nor of the President in promulgating R.C.M. 1001A. *See* Article 6b(a)(8), UCMJ (victims have "the right to be treated with fairness and

[34] This foundational testimony was conspicuously absent in Barker. Id. at *11 ("Trial counsel did not introduce any accompanying affidavits or testimony to establish the origin of these documents, the circumstances of their creation, or where these documents were maintained.").

with respect for the dignity and privacy of the victim of an offense under this chapter."). When a judge is satisfied that the victim has authorized and requested a particular impact statement to be used in any or all subsequent criminal proceedings, that statement should be admissible under R.C.M. 1001A. To require more would thwart Congress's desire to give broad rights to the victim of a sexual offense to be reasonably heard at a military presentencing hearing.

2. Appellant was not prejudiced.

Even if wrongly admitted, Prosecution Exhibits 4-6 did not prejudice Appellant. "[A]n error of law with respect to a sentence can provide a basis for relief only where that error materially prejudices the substantial rights of the accused." United States v. Sanders, 67 M.J. 344, 345 (C.A.A.F. 2009); Article 59(a), UCMJ. The test for this sort of prejudice is whether "the error substantially influenced the adjudged sentence." Sanders, 67 M.J. at 346. Appellant cannot demonstrate this sort of influence.

First, this was a judge alone hearing, and "[a]s the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary." United States v. Bridges, 66 M.J. 246, 248 (C.A.A.F. 2008). "When a fact was already obvious . . . and the evidence in question would not have provided any new ammunition, an error is likely to be harmless." United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007) (quotations omitted); Barker,

2018 CAAF LEXIS 295, at *16-17. Accordingly, the "themes and harms" within B's and J's unsworn victim statements were already "well known to the law, and thus are presumed to have been known by the military judge." Barker, 2018 CAAF LEXIS 295, at 18. In other words, nothing in these victim impact statements "would have provided new ammunition" against Appellant. Harrow, 65 M.J. at 200.

Second, Appellant's sentence stemmed from the egregiousness of his crimes, not the content of Prosecution Exhibits 4-6. Appellant "possessed 155 images and videos of some children appearing to be as young as two years old, being raped and sodomized . . . forced to perform oral sex on adults . . . [and] put in bondage." (JA at 70, 88.) "[O]f the 155 files on the accused's computer, 116 of those were uploaded to a website trafficked by millions of people every single day." (JA at 70, 88.) The uploaded files were "not password protected, or private in any other way," and they could be accessed simply "through entering search term on Imgur itself or other search engines." (JA at 85.) In other words, like Barker, the Government's sentencing case against Appellant was "exceptionally strong, and Appellant's guilt was laid out in vivid deal in the stipulation of fact," which included an attachment of the child pornography itself. Barker, 2018 CAAF LEXIS 295, at *17.

However, the military judge only sentenced Appellant to two years

confinement, over 93 percent less than the maximum 30 years available by law, over 70 percent less than what the trial counsel argued for during sentencing (which was seven years), and 60 percent less than the pretrial agreement confinement cap of five years. *See* MCM pt. IV, para. 68b.e.(1); (s*ee* JA at 53, 70);. Further, though a dishonorable discharge was an available punishment to the military judge and argued for by the trial counsel, the military judge sentenced Appellant to only a bad conduct discharge. (JA at 18.)

Considering the range of punishments available to him, the military judge's lenient sentence demonstrates the product of a reasoned analysis, not the inflated influence of unsworn victim impact statements—the general content of which he was already presumed to know. Simply put, there is no evidence that these statements "substantially influenced the adjudged sentence." Sanders, 67 M.J. at 346. As such, Appellant has not demonstrated error or material prejudice to a substantial right and his claim for relief must be denied, affirming the findings and sentence.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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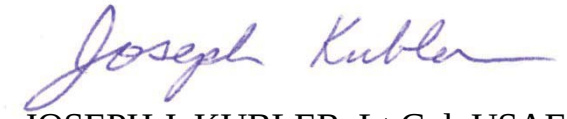

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 July 2018.

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/s/
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Date: 5 July 2018

APPENDIX

Colo. v. Holmes

District Court of Colorado, Arapahoe County

August 30, 2013, Filed

Case No. 12CR1522, Division 26

Reporter
2013 Colo. Dist. LEXIS 1632 *

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, v. JAMES HOLMES, Defendant

Core Terms

victim impact statement, sentencing, victim impact evidence, jurors, emotional, offender, capital sentencing, death sentence, victim impact, restorative, sympathy, cases, prejudicial, unfairly, empathy, death penalty, witnesses, juries, criminal proceeding, benefits, murder, closure, rights, capital case, studies, proceedings, feelings, empirical evidence, accompanying text, penalty phase

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Opinion

MOTION TO EXCLUDE VICTIM IMPACT TESTIMONY FROM ANY PENALTY PHASE HEARING HELD BEFORE THE JURY IN THIS CASE AS UNCONSTITUTIONAL, OR IN THE ALTERNATIVE, TO DECLARE *C.R.S. § 18-1.3-1201(1)(b)* UNCONSTITUTIONAL BECAUSE IT FAILS TO SUFFICIENTLY LIMIT THE SCOPE OF ADMISSIBLE VICTIM IMPACT EVIDENCE [D-166]

CERTIFICATE OF CONFERRAL

The prosecution states that they object, and will file a responsive pleading to this motion.

James Holmes, through counsel, moves this Court for an order excluding victim impact testimony from the jury sentencing phase in the event of a guilty verdict in merits phase of this capital trial because it violates the Sixth, Eighth and Fourteenth Amendments and article II, sections 16, 20 and 25 of the Colorado Constitution, or in the alternative, to declare *C.R.S. § 18-1.3-1201* unconstitutional for the same reasons. In support of this motion, Mr. Holmes states the following:

I. This Court Should Exclude Victim Impact Evidence from the Sentencing Hearing Before the Jury Because it Violates the Sixth, Eighth and Fourteenth Amendments.

a. The Admission of Victim **[*2]** Impact Testimony Creates an Unacceptable Risk that the Capital Sentencing Decision Will be Made in an Arbitrary Manner.

1. Victim impact evidence has a long and controversial history as it relates to capital sentencing proceedings. The United States Supreme Court has held that a jury's discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia, 428 U.S. 153, 189 (1976)*. Moreover, it is axiomatic from the Court's capital jurisprudence that "[w]hat is important at the selection stage [of a capital sentencing trial] is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens, 462 U.S. 862, 879 (1983)*; *see also Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)*; *Lockett v. Ohio, 438 U.S. 586, 605 (1978)*.

2. The Court has further repeatedly reinforced the notion that punishment in a capital case "must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund v. Florida, 458 U.S. 782, 801 (1982)*; *see also Woodson v. North Carolina, 428 U.S. 280, 304 (1976)* (sentencer must focus on "relevant facets of the character and record of the individual offender").

3. Against this backdrop, the United States Supreme Court held in Booth v. Maryland, 482 U.S. 496 (1987), that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence because it is "inconsistent with the reasoned decisionmaking **[*3]** we require in capital cases." Id. at 509. The Court concluded that such information is "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Id. at 502.

4. The *Booth* decision was based on the considerations discussed above, noting that the focus of a victim impact statement is not on the defendant, but on the character and reputation of the victim. Allowing the jury to rely on a victim impact statement could therefore result in imposing the death sentence on the basis of factors about which the defendant was unaware, and which are therefore irrelevant. The Court continued, "This evidence could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime" and could result in the unconstitutionally arbitrary imposition of the death penalty. Id. at 505. Because the character of the victim is unrelated to the blameworthiness of the defendant, victim impact evidence does not "provide a 'principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not.'" Id. at 506 (quoting Godfrey v. Georgia, 44 U.S. 420, 433 (1980) (Stewart, **[*4]** J.)).

5. The Court further expressed concerns that because of its sensitive and emotional nature, victim impact information is virtually unrebuttable, even if the defendant is given the opportunity to do so. *See* id at 507, citing Gardner v. Florida, 430 U.S. 349, 362 (1977). Moreover, in the event that the evidence is rebutted, it could well result in a "mini-trial" on the victim's character, which is not only unappealing, but "could well distract the sentencing jury from its constitutionally required task-determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." *Id.*

6. The Supreme Court again reaffirmed these principles in South Carolina v. Gathers, 490 U.S. 805 (1989). In *Gathers,* the Court once again noted the essential principle in capital cases that "a sentence of death must be related to the moral culpability of the defendant." Id. at 810. It held that a prosecutor who made extensive comments during closing argument about the personal qualities he inferred about the victim violated the Eighth Amendment because such statements were wholly unrelated to the blameworthiness of the defendant and were irrelevant to the circumstances of the crime. Id. at 811.

7. Despite these strong pronouncements, just two years later, after **[*5]** a change in personnel, [1] the Court overruled these cases in large part and held in Payne v. Tennessee, 501 U.S. 808 (1991), that the Eighth Amendment did not erect a *per se* bar prohibiting victim impact testimony in a capital sentencing trial. The Court reasoned that its decision in *Booth* "unfairly weighted the scales in a capital trial," and held that the State may accordingly offer "'a quick glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." Id. at 822.

8. Justice Rehnquist, writing for the majority, reasoned that the State has "a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Id. at 825 (quoting Booth, 482 U.S. at 517 (White, J, dissenting)).

9. The *Payne* court limited its analysis to evidence relating to the victim and the impact of the victim's death on the victim's family. *Payne* explicitly left intact the portion **[*6]** of *Booth* that proscribed a sentencer's consideration of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence. *See* 501 U.S. at 830, n. 2. Additionally, the majority in *Payne* noted that "in the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. at 825.

10. In the 22 years since *Payne* was decided, the opinion has become the subject of widespread criticism amongst legal scholars. Many commentators have echoed the concerns expressed in *Booth* that the admission of victim impact evidence invites comparisons between the worth of the defendant and the worth of the victim, resulting in death sentences that are based on arbitrary and unconstitutional

[1] Justice Brennan retired from the Court in 1990 and was replaced by Justice Souter.

considerations. *See, e.g.*, Laura Walker, *Victim Impact Evidence in Death Penalty Sentencing Proceedings: Advocating for A Higher Relevancy Standard,* 22 Geo. Mason U. Civ. Rts. L.J. 89, 98 (2011) (because victim impact evidence "allows for the imposition of different sentences for the same criminal acts, with the only difference being the victim of the crime," the capital sentencing decision is based on the "personal characteristics of the victim, rather **[*7]** than on the defendant and the crime committed," the defendant's Equal Protection rights are violated "and sentences are decided in an unconstitutionally arbitrary manner").

11. As one commentator noted.

> Payne suggested that VIE should offer only a 'brief glimpse' of the victim. However, most jurisdictions permit extensive evidence regarding the victim's characteristics and the impact of the crime on immediate family members. This type of detailed VIE … can only invite the type of "comparative worth considerations" dismissed by the Payne majority. What else could a capital sentencing jury think when presented with detailed evidence about both the defendant and the victim other than that its role is to decide whether the capital defendant-the person the jury has found guilty of murder—should be permitted to live when the innocent victim and his or her family have suffered so much?

John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases,* 88 Cornell L. Rev. 257, 279 (2003).

12. Others have similarly posited that victim impact statements inevitably allow for the injection of highly-charged emotion into the capital sentencing process that is virtually impossible to mitigate or control, and likewise creates **[*8]** a risk of an element of impermissible arbitrariness into capital sentencing proceedings. *See, e.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statements,* 63 U. Chi. L. Rev. 361, 392-93 (1996) ("Victim impact statements are stories that should not be told, at least not in the context of capital sentencing, because they block the jury's ability to hear the defendant's story. Moreover, they evoke emotions that do not belong in that context. Victim impact statements illustrate the pitfalls of acontextually prioritizing any emotion—no matter how benign the emotion may seem."); Niru Shanker, *Getting A Grip on Payne and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy Mcveigh Case and Various State Approaches Compared,* 26 Hastings Const. L.Q. 711 (1999) ("Though long allowed in civil trials and in non-capital cases, the use of victim impact testimony in capital sentencing poses a particular problem in capital punishment jurisprudence, for the effect of such testimony does not bear on damages or length of prison term, but instead, frequently determines life or death. Thus, the personalized nature of victim impact testimony, and the emotions that are at the crux of such testimony, introduces what borders on an **[*9]** impermissible element of arbitrariness in capital sentencing.").

13. Still others have noted that *Payne* cannot be constitutionally reconciled with the Supreme Court's Eighth Amendment jurisprudence requiring a capital sentencer to make an individual sentencing determination based on the character of the defendant and the circumstances of the crime. *See, e.g.*, Cecil A. Rhodes, *The Victim Impact Statement and Capital Crimes: Trial by Jury and Death by Character,* 21 S.U. L. Rev. 1, 40 (1994) ("The premise that the State must be on equal footing with the defense defies legal logic and flies in the face of our adversarial system of jurisprudence.… The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance.").

14. Notably, the scholarship surrounding *Payne* in the years since the opinion issued has also produced numerous studies that provide solid empirical data supporting the concerns of the majority in *Booth* and *Gathers* and the dissenters in *Payne,* which, at the time, were based solely on anecdotal evidence or intuition. The growing stock of empirical evidence demonstrates that victim impact evidence strongly appeals to-and has the tendency to overwhelm-the **[*10]** emotions of jurors, thereby leading them to sentence defendants to death based on "caprice or emotion" rather than "reason," which is precisely what the Eighth Amendment forbids. *See* Gardner v. Florida, 430 U.S. 249, 258 (1977). [2]

15. Most recently, Jerome Deise and Raymond Paternoster of the University of Maryland conducted an empirical study establishing that jurors are far more

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[2] The other half viewed a videotape in which the victim impact testimony had been edited out. Following their viewing of this video, participants filled out a questionnaire concerning the emotions they were experiencing, and which solicited information about their attitudes towards the defendant, the victim, and the victim's family. *Id. at 632*. At the end of the questionnaire, they were asked what sentence they would have imposed in the case if they had been on the jury.

likely to impose a death sentence if they are exposed to even minimal amounts of victim impact evidence than if they were not. *See* Jerome Deise & Raymond Paternoster, *More Than a "Quick Glimpse of the Life": The Relationship Between Victim Impact Evidence and Death Sentencing, 40 Hastings Const. L.Q. 611 (Spring 2013)*, Attached as Exhibit A. The authors used a random sample of individuals who were randomly selected from a juror registration list used by **[*11]** the criminal court of a large city in a mid-Atlantic state. *Id.* at 630-31. The prospective jurors were screened and "death qualified" to ensure that they were able to consider all sentencing options in a capital case. 135 individuals were ultimately selected to participate in the study. *Id.*

16. The researchers then provided the participants with a three-page description of a real crime that included the facts brought out in the merits phase of the actual trial, and were then told that the defendant had already been convicted of capital murder. *Id.* Jurors were then asked to watch actual penalty phase testimony from that trial on videotape and determine what they thought the appropriate sentence was. *Id.*

17. Half of the jurors were provided with a video that included victim impact evidence. [3] The other half viewed a videotape in which the victim impact testimony had been edited out. Following their viewing of this video, participants filled out a questionnaire concerning the emotions they were experiencing, and which solicited information about their attitudes towards the defendant, the victim, and the victim's family. *Id.* at 632. At the end of the questionnaire, they were asked what sentence they would have **[*12]** imposed in the case if they had been on the jury.

18. Deise and Paternoster found that among those that watched the victim impact evidence, approximately 62 percent voted for death, compared with only 17 percent among the control group. *Id.* at 635. Those who viewed the victim impact evidence were more likely to say that emotional considerations such as empathy and sympathy for the victim and victim's family were important factors in their sentencing decision, and expressed the sentiment that imposing a death sentence was an attempt to provide "assistance or comfort to the family" in a situation where they felt "relatively helpless with respect to what they could do to help." *Id.* at 639.

19. The authors concluded that "victim impact evidence can create unfair prejudice to the accused that would substantially outweigh the probative value for which such evidence is offered, thereby requiring its exclusion." *Id.* at 640.

20. Several commentators and scholars **[*13]** have recognized from experience in other high profile cases involving mass casualties that the constitutional concerns surrounding victim impact evidence is even more likely to be present here. As Susan A. Bandes notes in her recent article, *Victims, "Closure, " and the Sociology of Emotion,* 72-SPG Law & Contemp. Probs. 1 (Spring 2009):

> The mass killing cases highlight difficulties of drawing the line between informational and prejudicial victim impact statements. The distinction borders on the incoherent in the victim impact context generally, given that the value of the information is its ability to evoke pain and make grief salient. The Supreme Court recently declined an opportunity to clarify this distinction.… Justices Breyer and Stevens, in their separate opinions dissenting from the denial of certiorari, each quoted a federal district court judge who said:
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> I cannot help but wonder if Payne would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has **[*14]** now been over four months since I heard this testimony and the juror's sobbing during the victim impact testimony still rings in my ears.
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> In mass killing trials, it is difficult to imagine a metric for determining the point at which the possible prejudicial effect of the emotions evoked by the information outweighs the value of the information. Payne and its progeny assume that victim testimony will not interfere with the jury's constitutional duty to consider the defendant's mitigating evidence before determining whether he deserves to die. But as Judge Matsch learned in McVeigh, it is immensely difficult to regulate the emotional climate of the courtroom in a high-profile, mass killing case. Despite his expressed intention to limit victim impact evidence to "facts rather than

[3] The victim impact evidence presented was "neither as elaborate nor as well produced" as it is in many cases. The sister of the victim, a law enforcement officer, read the victim impact evidence from printed sheets of paper, which lasted no more than twenty minutes. *Id.* at 644.

> emotional impact," he eventually permitted more than three dozen victim impact statements. As one commentator noted, "The 'grieving process' … and the compelling emotional need for witnesses to pay homage to their loved ones and to find some way of sharing their intense pain—rolled over everyone." The effect of the testimony was so powerful that even the judge and the reporters wept.

Id. at 22-23.

21. Likewise, as one of Timothy **[*15]** McVeigh's attorneys wrote in the Cornell Law Review years after the resolution of that case,

> The lesson of McVeigh is that, despite the best intentions of the trial judge to filter out the emotionality of victim impact testimony, emotionality takes over a courtroom and cannot be controlled during such testimony. The truth is that the emotion was so powerful that it overwhelmed all those involved in this case-jurors, counsel, and judge.

Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity That Has Come from Payne v. Tennessee,* 88 Cornell L. Rev. 517, 526 (2003).

22. Another scholar similarly describes the atmosphere created by the victim impact evidence in McVeigh:

> One journalist who witnessed [the impact statement of the mother of a four-year-old decedent] later wrote that "at that moment in that room, it seemed inconceivable that the jury could do anything but sentence [McVeigh] to death.…" and there were even more victim impact statements to come. The statements offered in the McVeigh case were so upsetting and so powerful, in fact, that 'at least one newspaper offered to provide counseling for its reporters covering the case,' and the prosecution eventually had to cut short its presentation because **[*16]** of the effect that it was having on both jurors and spectators. As another journalist noted, "[the prosecution] could see we were all physically and mentally exhausted. Every one of the jurors cried. Reporters found themselves hugging each other for solace, sobbing, saying they couldn't take it anymore."

Tracy Hresko Pearl, *Restoration, Retribution, or Revenge? Time Shifting Victim Impact Statements in American Judicial Process,* FIU Legal Studies Research Paper Series, Research Paper No. 13-15 (August 2013). Attached as Exhibit B.

23. The victim impact evidence in cases involving mass casualties must invariably be limited not only because of the sheer volume, but because of due process concerns, among other reasons. As a result, Bandes notes an additional concern when victim impact evidence is introduced to a capital jury:

> If, on the other hand, victim impact statements are meant to serve as a vehicle for healing and catharsis, the exclusion of any single survivor's testimony becomes problematic for a different reason. Once the ability to make a statement is held out as a gesture of respect for victims and a means toward healing for survivors, the exclusion of any survivor comes to seem **[*17]** a cruel withholding—both of respect for the value of the victim's life, and of the survivor's means of achieving closure.
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> The alternative to letting all survivors testify is to choose among survivors. There is an irony here.… One perhaps unintended consequence of viewing the crime as a harm to individuals rather than to the community as a whole is that it raises the question of which individuals will be given a forum. If only some survivors will be permitted to testify, which victims will get to be remembered, and which survivors will get to be heard? The situation is rife with pitfalls. In McVeigh, the prosecutors excluded several survivors who opposed a death sentence, whereas in Moussaoui, survivors with a range of attitudes toward the death penalty were permitted to testify. Nevertheless, even in the latter case, hundreds of survivors who wanted to testify were precluded from taking the stand.
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> Courts, unsurprisingly, are ill-equipped to make decisions about healing and catharsis and often seem stymied by the complex emotional dynamics survivor testimony engenders in capital cases. Mass killing cases raise unique challenges that cannot be usefully understood without inquiry into the **[*18]** particular emotional dynamics of these trials and how these dynamics affect— and are affected by--the operation and goals of the capital system.

Bandes, 72-SPG Law & Contemp. Probs. at 24-25.

24. In sum, empirical studies that have been conducted in the years following *Payne,* as well as the real-life experience and experiments of trial courts in cases involving a significant number of victims, contradict the Supreme Court's conclusion in that case that it is

possible to prove a "quick glimpse of the life" of the victim without overwhelming the capital sentencing process with emotion. The introduction of this evidence leads to a constitutionally unacceptable risk that a death sentence will be imposed on the basis of arbitrary factors that are unrelated to the rest of the Court's Eighth Amendment jurisprudence.

25. The introduction of victim impact evidence into a capital trial also specifically violates *article II, section 20 of the Colorado Constitution*, which contains "fundamental requirements of certainty and reliability" which exceed those imposed by the federal constitution. *People v. District Court, 834 P.2d 181, 186 (Colo. 1992)* (*quoting People v. Young, 814 P.2d 834, 846 (Colo. 1991)*); *see also People v. Tenneson, 788 P.2d 786, 792 (Colo. 1990)* ("Colorado's death sentencing statute must be construed in light of the strong concern for reliability of any sentence of death."). As explained above, **[*19]** because the injection of this evidence into the sentencing process has a strong tendency to overwhelm jurors and encourage decisionmaking based on factors unrelated to the character of the individual and the circumstances of the crime, it undermines the "certainty and reliability" of the capital proceedings.

26. Additionally, because victim impact evidence injected into a capital sentencing trial has the strong potential to "take over" the sentencing proceeding in a way that overwhelms all other considerations, it deprives a capital defendant of the fundamental rights to life and liberty in a manner that is arbitrary and capricious, and violates the substantive component of the Due Process Clauses of the state and federal constitution. *See, e.g., City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 200, (2003)* (Scalia, J, concurring) (noting that "arbitrary and capricious" government action involving deprivation of "fundamental liberty interests]" can violate the "judicially created substantive component of the Due Process Clause"); *Daniels v. Williams, 474 U.S. 327, 331 (1986)* (discussing that "the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta … was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting *Hurtado v. California, 110 U.S. 516, 527 (1884))*); *Salazar v. Am. Sterilizer Co., 5 P.3d 357, 371 (Colo. App. 2000)* ("Substantive due process requires **[*20]** that legislation be reasonable and not arbitrary or capricious.").

27. Moreover, the introduction of victim impact evidence into a capital sentencing proceeding prior to the jury's deliberations violates a defendant's constitutional right to a fair and impartial jury. "Each individual has a right to a trial by a fair and impartial jury under the *Sixth Amendment to the United States Constitution* and Article II, sections 16 and 23 of the Colorado Constitution." *Domingo-Gomez v. People, 125 P.3d 1043, 1048 (2005)*; *see also Harris v. People, 888 P.2d 259, 264 (Colo.1995)*; *Oaks v. People, 150 Colo. 64, 68, 371 P.2d 443, 446-47 (1962)*. This right includes the right to have an impartial jury decide the accused's guilt or innocence solely on the basis of the evidence properly introduced at trial. *Domingo-Gomez, 125 P.3d at 1048*; *Harris, 888 P.2d at 264*. In *Harris,* the Colorado Supreme Court quoted the following observations from *Oaks, supra:*

> Among the rights guaranteed to the people of this state, none is more sacred than that of trial by jury. Such right comprehends a fair verdict, free from the influence or poison of evidence which should never have been admitted, and the admission of which arouses passions and prejudices which tend to destroy the fairness and impartiality of the jury. This right to a fair and impartial jury is all-inclusive: it embraces every class and type of person. Those for whom we have contempt or even hatred are equally entitled to its benefit. It will be **[*21]** a sad day for our system of government if the time should come when any person, whoever he may be, is deprived of this fundamental safeguard.

Harris, 888 P.2d at 264 (quoting *Oaks, 371 P.2d at 447*) (internal quotations omitted) (emphasis added). Because victim impact evidence strongly encourages jurors to make life-or-death sentencing decisions on the basis of emotion, rather than evidence, it deprives jurors of their impartiality and violates this fundamental constitutional right of criminal defendants.

28. Lastly, because it encourages the indiscriminate application of the death penalty to defendants based on criteria that are unrelated to a defendant's blameworthiness, the introduction of victim impact evidence to a jury at a capital sentencing proceeding violates the Equal Protection principles embodied in the Fourteenth Amendment and *article II, section 25 of the Colorado Constitution. See Furman, 408 U.S. at 249* (Douglas, J, concurring) ("There is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishments. 'A penalty … should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.'"); *see also Shelley v. Kraemer, 334 U.S. 1, 22 (1948)* ("Equal

protection of the laws is not achieved through indiscriminate imposition of inequalities.").

b. Victim Impact Evidence **[*22]** Should be Received by this Court at the Close of the Criminal Proceedings.

29. The host of constitutional issues that are attendant with introducing victim impact evidence during the jury sentencing phase in a capital case of this magnitude should give this Court significant pause.

30. Undersigned counsel's position is that victim impact evidence that is introduced before the jury during the sentencing portion of a capital trial unconstitutionally overwhelms the capital sentencing process with emotion and creates an impermissible risk that the jury will impose the death penalty in an arbitrary and capricious manner in violation of the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and Article II, sections 20 and 25 of the Colorado Constitution. *See, e.g., Zant, 462 U.S. at 879*. Yet they remain mindful of the tremendous and grievous amount of harm and loss experienced by the victims in this case.

31. Counsel respectfully submit that this Court give strong consideration to the suggestion of scholars who propose allowing the introduction of victim impact evidence at the close of the criminal proceedings-after sentence has been decided by the jury, but before its formal imposition by the Court.

32. At least several professors have advocated such a model. In a research paper **[*23]** released this month, Tracy Hresko Pearl, a visiting professor of law at Florida International University College of Law, suggests that courts' treatment of victim impact statements should be informed by the restorative justice movement. She argues that allowing victims a voice in the proceedings in such a different context, "both retains their benefits while minimizing the constitutional deficiencies they introduce into criminal proceedings." *See* Tracy Hresko Pearl, *Restoration, Retribution, or Revenge? Time Shifting Victim Impact Statements in American Judicial Process,* FIU Legal Studies Research Paper Series, Reseasrch Paper No. 13-15 at 18 (August 2013).

33. She notes that in a restorative justice paradigm,

> [V]ictim impact statements are valuable not as tools of prosecutors in establishing the harm perpetrated by defendants, but as opportunities for: (1) victims to express to offenders and the community at large how crimes have affected them, (2) victims to engage with these parties in attempting to find closure and relief, and (3) offenders to understand the impact that their actions have had on others. What is important in this framework, therefore, is not *when* victim impact statements **[*24]** are given, but whether victims have the opportunity to present them at all.

Id.

34. Several others have also endorsed this placement of victim impact evidence as a way to reconcile constitutional concerns with the injection of these statements into the capital sentencing process, and allowing victims the opportunity to participate in the criminal proceedings:

> Although they are diametrically opposed, both defendants' and victims' rights can be safeguarded. If victim impact statements are read after the sentencing stage of the trial, both defendants' and victims' rights remain intact. Accordingly, the risk of arbitrary sentencing would be eliminated, and victims would still be a part of the criminal proceeding by having voiced their feelings to the defendant, the court and the public. Victim impact statements should be a part of the defendant's sentence, not a factor in deciding an appropriate sentence.

Carrie L. Mulholland, *Sentencing Criminals: The Constitutionality of Victim Impact Statements, 60 Mo. L. Rev. 731, 747 (1995)*. *See also* James Alan Fox, [4] Boston Bombing Suspect's Fate: Statements from Victims' Families Should Not Guide Prosecution Strategy or Sentencing Decisions, USA Today, July 9, 2013, available at **[*25]** *http://www.usatoday.com/story/opinion/* 2013/07/09/tsarnaev-boston-bombing-victim-statements-column/2502703/("At the end of the day, or more accurately, the end of the trial, victims and their families should indeed have the opportunity to address the court. This should occur, however, only after the sentence has been determined. In that way, equal treatment for the defendant can be preserved even while victims are given a voice.").

II. Even if this Court Disagrees, the Portion of *C.R.S. § 18-1.3-1201(1)(b)* that Addresses Victim Impact Evidence Violates the Eighth Amendment Because

[4] Lipman Professor of Criminology, Law and Public Policy at Northeastern University.

it Fails to Place Appropriate Limitations on the Admission of this Evidence.

35. Even if the Court disagrees that the Eighth Amendment forbids the introduction of victim impact evidence during the jury sentencing phase of a capital trial, it should declare as unconstitutional the portion of C.R.S. § 18-1.3-1201(1)(b) that addresses victim impact testimony because it is vague and overbroad and fails to provide adequate safeguards to ensure that any victim impact evidence introduced does not render the capital sentencing proceeding arbitrary or fundamentally unfair.

36. C.R.S. § 18-1.3-1201(1)(b) states:

> All admissible evidence presented by either the prosecuting attorney or **[*26]** the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section, *and any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family may be presented.* Any such evidence, *including but not limited to the testimony of members of the victim's immediate family, as defined in section 24-4.1-302(6), C.R.S., which the court deems to have probative value may be received,* as long as each party is given an opportunity to rebut such evidence.

(emphasis added).

37. As explained in Section I, above, *Payne* overruled *Booth* and *Gathers,* but only to the limited extent "that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing." *See* 501 U.S. at 830, n. 2 (noting that *"Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence **[*27]** of the latter sort was presented at the trial in this case.").

38. *Payne* also held that, "In the event that [victim impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne,* 801 U.S. at 825.

39. Thus, under *Payne,* the following principles apply: (1) The Eighth Amendment does not constitute a *per se* exclusion to "evidence and argument relating to the victim and the impact of the victim's death on the victim's family;" but (2) the type and quantity of such evidence is limited by Due Process; and (3) the Eighth Amendment still forbids, under *Booth,* "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence."

40. The Cruel and Unusual Punishments clauses of both constitutions require certainty and reliability in the process by which a death sentence is imposed. People v. Young, 814 P.2d 834, 843 (Colo. 1991). The Due Process clauses likewise require certainty and reliability in the death-sentencing context. *Id. at 842-846*. C.R.S. § 18-1.3-1201 (1)(b) is too broad and unguided to satisfy these constitutional standards.

41. First, the statute allows the admission of "any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family," but fails to define "matters" **[*28]** or "personal characteristics," and fails to provide parameters for what is meant by "the impact on the family." A "matter" is a tremendously broad-and impermissibly vague-term in this context, given that *Payne* countenances only the consideration of the "specific harm" caused by the defendant in order "to assess meaningfully the defendant's moral culpability and blameworthiness." 501 U.S. at 825. Moreover, the broad language of the statute provides no principled manner in which to prevent victim impact evidence from shading into or overlapping with the still forbidden area of characterizations and opinions by members of the victim's family about the crime, the defendant, or the proper sentence.

42. Second, and more importantly, the statute provides no guidelines or mechanisms to screen for any excessive, unduly emotional or inflammatory content or to restrict the manner in which it is presented. In *Payne,* the victim impact evidence was brief. It involved the testimony of just one witness, was a response to just one question, and consisted of a total of six sentences. [5] Nor is there indication that it was delivered with any

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[5] In *Payne,* the two victims' mother/grandmother was asked how her surviving grandson had been affected by the murders of his mother and sister. She responded, "He cries for his mom. He doesn't seem to understand why she doesn't come

undue emotion. As Justice O'Connor noted in her concurrence, "We do not hold **[*29]** today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, the Eighth Amendment erects no *per se* bar." *Id. at 831*. She went on to emphasize that the Due Process Clause provides a mechanism for relief in cases where the victim impact evidence "so infects the sentencing proceeding as to render it fundamentally unfair," and noted that "[t]hat line was not crossed in this case," noting that the case called one witness whose "testimony was brief.... [Su]rely this brief statement did not inflame [the jury's] passions more than did the facts of the crime...." *Id. at 831-32*.

43. Clearly, then, *Payne* does not stand for the proposition that the Constitution will countenance the injection of an unlimited amount of highly emotionally charged victim **[*30]** impact testimony into a capital sentencing proceeding. Yet Colorado's statute fails to provide any mechanism for a court to determine when "that line" is crossed. It therefore fails to comply with the demands of the Eighth and Fourteenth Amendments and their Colorado counterparts. [6]

Request for an Evidentiary Hearing

44. The "heightened standard of reliability" applies to the capital sentencing proceedings in this case. *See, e.g., Spaziano v. Florida, 468 U.S. 447, 456 (1984)*; *Beck v. Alabama, 447 U.S. 625, 637 (1980)* (risk of unreliable conviction "cannot be tolerated" in case where defendant's life is at stake); *Gardner v. Florida, 430 U.S. 349, 357-58 (1977)*; *Woodson v. North Carolina, 428 U.S. 280, 305 (1976)*. *People v. Young, 814 P.2d 834, 846 (Colo. 1991)*; *People v. Rodriguez, 786 P.2d 1079 (Colo. 1989)*.

45. The victim impact evidence that the prosecution undoubtedly will seek to introduce in this case in the event this case proceeds to a capital **[*31]** sentencing hearing is undoubtedly one of the most significant issues that this Court will need to address, and, for the reasons explained above, has the serious potential to impact the reliability of the proceedings.

46. Because of its importance to this case, as well as the necessity of creating a full and complete record for purposes of appeal, as well as his due process right to have an opportunity to be heard and to present evidence to substantiate his claim, *see Ford v. Wainwright, All* U.S. 399, 414 (1986), Mr. Holmes respectfully requests that this Court hold an evidentiary hearing on this motion, in conjunction with [D-167], at which the defense be permitted to present evidence and testimony supporting the empirical research cited above concerning the effects that victim impact testimony has on a capital sentencing jury.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain **[*32]** Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and *Fourteenth Amendments to the United States Constitutions*, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.

ORDER RE: MOTION TO EXCLUDE VICTIM IMPACT TESTIMONY FROM ANY PENALTY PHASE HEARING HELD BEFORE THE JURY IN THIS CASE AS UNCONSTITUTIONAL, OR IN THE ALTERNATIVE, TO DECLARE *C.R.S. § 18-1.3-1201(1)(b)* UNCONSTITUTIONAL BECAUSE IT FAILS TO SUFFICIENTLY LIMIT THE SCOPE OF ADMISSIBLE VICTIM IMPACT EVIDENCE [D-166]

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

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home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie." *501 U.S. at 814-15*.

[6] In the event that this Court does not find this statute unconstitutional for the reasons set forth in this motion, Mr. Holmes has argued in the alternative in motion [D-167] that the Court must nevertheless impose a framework for assessing when "that line" *is* crossed, which include conducting a pre-trial hearing to screen for this content and imposing sufficient restrictions and limitations upon the presentation of this evidence in order to comply with the demands of the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

_____

JUDGE

_____

Dated

I hereby certify that on August 30, 2013, I

__ mailed, via the United States Mail,

__ faxed, or

✓ hand-delivered a true and correct copy of the above and foregoing document to:

/s/ [Signature]

D-166 Exh. A

More Than a "Quick Glimpse of the Life": The Relationship Between Victim Impact Evidence and Death Sentencing by Jerome Deise [*] and Raymond Paternoster and Raymond Paternoster [**]

I. Introduction

In *Kelly* v. *California* and *Zamudio v, California,* the United States Supreme Court refused certiorari in two cases involving the use of victim impact evidence ("VIE") in the penalty phase of a capital trial. [1] In capital cases, victim impact evidence consists of testimony about the victim and the victim's life presented by family members or friends of the murder victim to the sentencing body. The testimony, usually provided by live in-court testimony, consists of information about how valuable the victim's life was, what the victim contributed to their community and family, how much they are loved and will be missed by family members, how difficult life has been in the absence of the victim, and at times a direct or indirect statement as to the penalty the family would **[*34]** like to see imposed on the offender. [2] Essentially, victim impact testimony provides the sentencer with information about the impact that the victim's death had, has, and will continue to have on those left behind in the wake of the killing.

The victim in *Kelly,* Sarah Weir, was nineteen years old. The content of the VIE in her case was familiar, but its delivery took on a new form. As described by Justice Stevens in his dissent from denial of certiorari in the *Kelly* case, the testimony consisted of the following:

> The prosecution played a 20-minute video consisting of a montage of still photographs and video footage documenting Weir's life from her infancy until shortly before she was killed. The video was narrated by the victim's mother with soft music playing in the background, and it showed scenes of her swimming, horseback riding, and attending school and social functions with her family and friends. The video ended with **[*35]** a view of her grave marker and footage of people riding horseback in Alberta, Canada—the "kind of heaven" in which her mother said she belonged. [3]

In *Zamudio,* which involved the killing of a husband and wife, the VIE consisted of testimony from two of the victims' daughters and two grandchildren. In the testimony of one of the daughters, the prosecution played a video, which contained more than one hundred photographs of the victims from their childhood to the present. The pictures revealed the couple raising their children, the husband's service in the military, holiday celebrations, vacations, and family events, among others. The last three photographs showed each of the victim's gravestones, where the inscriptions were clearly readable, and both gravestones from a distance, next to

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[*] Professor of law and Director of the University of Maryland School of Law's Trial Advocacy Program. The authors wish to acknowledge the generous and patient support **[*33]** of our outstanding library research liaison, Nathan Robertson, Director of Information Policy and Management, University of Maryland Francis King Carey School of Law.

[**] Professor in the Department of Criminology and Criminal Justice at the University of Maryland. Ray Paternoster would like to thank the Department of Criminology for providing research hinds to conduct the experiment discussed in this article.

[1] ***Kelly v. California, 555 U.S. 1020 (2008)***, *deriving cert, to People v. Zamudio, 43 Cal 4th 327, 121108)* and *People v Kelly 42 Cal 4th 761 (2007)*

[2] Wayne A, Logan, *Opining on Death Witness Sentence Recommendations in Capital Tritals, 41 B.C.L. REV. 517 (2000)*, Wayne A Logan, *Though the Past Darkly A. Survey of the Uses and Abuses of Victim Impact Evidance in Capital Trials*, 41 ARIZ L. REV, 143 (1999) (hereinafter *Through the Past Darkly);* Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials,* FED. SENT'G REP. 5 (2007)

[3] ***Kelly, 555 U.S. at 1021*** (Stevens, J., dissenting).

vases of flowers. [4] Both Kelly and Zamudio were sentenced to death, and in each case the California Supreme Court upheld the use of the victim impact testimony. [5]The complaint in the *Kelly* and *Zamudio* certiorari petitions was that VIE should not be admissible in a capital case because it unduly appeals to the emotions and sentiments of the jury and presents highly prejudicial testimony. **[*36]** The defendants in the two cases asked the Court to put restrictions on the kinds of testimony that should be allowed as victim impact evidence.

This was not, of course, the first time the Court had the opportunity to rule on VIE. In fact, there is a rather controversial history involving victim impact evidence in capital cases, [6]In *Booth v. Maryland* [7] and again two years later in *South Carolina v. Gathers,* [8] a majority of the Court held that victim impact evidence was not admissible in capital penalty hearings. Among the many problems that the majority identified with VIE was the risk that it would inflame the emotions of penalty phase jurors by focusing their attention on the victim and victim's family. As a result, the jury's sentencing decision would be based not upon a rational and reasoned consideration of the background and characteristics of the offender and the circumstances of the crime, but upon emotional considerations. [9] In spite of the fact that *Booth* and *Gathers* seemed like settled law, the Court, just two years after *Gathers* and **[*37]** with a change in personnel, overruled these cases in *Payne* v. *Tennessee,* [10] deciding that there was no constitutional bar to the states' use of VIE in capital cases. The majority opinion in *Payne* argued that victim impact testimony simply gave the prosecution the opportunity to balance the defendant's extensive right to present mitigating evidence (via *Lockett v. Ohio* [11]) by allowing them to proffer evidence whose only purpose is to humanize the victim and give the jury a *'"quick glimpse of the life'* which [the] defendant 'chose to extinguish.'" [12] As a result of the *Payne* decision, victim impact statements became common in state and federal capital penalty hearings. Subsequent cases such as *Kelly* and *Zamudio* presented the Court with the opportunity to place some restrictions or limitations either on the content or format of victim impact testimony—an opportunity on which it passed. [13]

While VIE is now admissible in both state and federal capital penalty hearings, what seems to have been forgotten is the possible prejudicial effect that such testimony may have on those deciding the sentence. In both *Booth* and *Gathers,* the Court, in deciding that VIE was *per se* impermissible, was clear that this kind of testimony was highly prejudicial because it plays upon the emotions of jurors and runs the risk that the sentence will not. be based upon reason. [14] The *Booth* majority feared that the kind of "evidence" presented in victim impact statements would do little more than **[*39]** arouse feelings of sympathy and empathy for the victim and victim's family, and that the arousal of such strong emotions would lead the jury to help the victim's family in the only way that it could—by voting for a death

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[4] *Zamudio, 43 Cal. 4th at 363*.

[5] ***Kelly, 555 U.S. at 2021*** (Stevens, J, dissenting). The video in *Kelly v. California* may be viewed online at http;//*www.supreniecourt.gov/media/08/kelly_v_california*, wmv.

[6] John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, *88 CORNELL L. REV. 257 (2003)*; Logan, *Through the Past Darkly, supra note 2*.

[7] *482 U.S. 496 (1987)*.

[8] *490 U.S. 805 (1989)*.

[9] The majority opinion in *Booth* gave other reasons why it found VIE *per se* inadmissible: (1) it is an arbitrary factor since some victims would have family members to speak for them, (2) the decision to impose death might easily be swayed by the eloquence or articulateness with which family members were able **[*38]** to express their grief, (3) victim impact evidence would be tactically very difficult for a defendant to rebut, (4) VIE puts the victim and the victim's worth on trial during the penalty phase and not the defendant. *482 U.S. at 501-4*).

[10] *501 U.S. 808 (1991)*.

[11] *438 U.S. 586 (1978)*.

[12] *Payne, 501 U.S. at 822* (emphasis added).

[13] The Court in *Payne* did not provide any guidance as to what would be inadmissible in a victim impact statement except to note that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id. at 825*.

[14] *Earlier, in Gardner v. Florida, 430 U.S. 349, 358 (1977)*, the Court stated that the decision to sentence someone to death must "be, and appear to be, based on reason rather than caprice or emotion."

sentence. The *Payne* Court, however, claimed that only with VIE would it be possible for the sentencer to get a full appreciation of the harm done by the murder and that VIE was not likely to be prejudicial and should, therefore, be treated like any other kind of evidence presented at the sentencing hearing.

Importantly, there was no evidence presented to the Court in *Booth, Gathers, Payne, Kelly,* or *Zamudio* that VIE did not appeal to the emotions of jurors, or that as a result of VIE, a juror's attention would not be diverted from the blameworthiness of the offender to the worthiness of the victim. Nor was there much credible empirical evidence to support Justice Stevens' claim in his dissent in *Payne* that VIE "encourage[d] jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason," [15] Many **[*40]** of the claims both by those on the Court who supported and those who opposed the use of VIE in capital cases were based on anecdotal evidence or intuition rather than solid empirical data. [16]

In this article, we add to the growing stock of empirical evidence about the influence that VIE may have in a capital sentencing hearing. We present the results of an experiment in which respondents, who were selected from the jury **[*41]** pool in a large city, viewed a videotape of an actual penalty phase hearing. Approximately one half of the respondents were randomly assigned to a condition that included viewing the VIE used by the prosecution in the case; the other half viewed the identical videotape where the VIE testimony was edited out. We examine whether witnessing the VIE in the case increased the risk that the defendant would be sentenced to death. We also examine if there is a relationship between VIE and feelings of sympathy and empathy for the victim and victim's family, as well as whether there is a relationship between these emotions and attempts by the jurors to provide comfort to the family in the only way that they could—-by sentencing the defendant to death.

Our article will proceed as follows. First, we consider VIE as evidence and assess it's reliability in capital murder cases. We then show how evidentiary protections provided to an accused before and during the trial to prevent unfair prejudice are lacking in the sentencing phase. We consider whether VIE is unfairly prejudicial and, if so, whether its unfairly prejudicial nature substantially outweighs its probative value. Next, we present our approach **[*42]** to studying VIE with potential jurors who were asked to watch a videotape of an actual penalty phase hearing where either the VIE used in the case was retained (the experimental group) or edited out (the control group). Finally, we offer the results of our study, the problems it identified, and some suggested remedies.

II. Is Victim Impact Evidence Relevant and Reliable?

We consider, initially, the reliability of VIE. In *Payne,* Chief Justice Rehnquist argued that victim impact testimony "is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." [17] The statement assumes what is routinely discussed and accepted by courts—that VIE is relevant evidence. [18] Typically, decisions concerning the admissibility of potential unfairly prejudicial evidence, including victim impact statements, are based on the judges' personal knowledge or beliefs, their experiences, their intuitions about the matter, and sometimes upon questionable "empirical" assertions. [19] While intuitive and anecdotal

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[15] *Payne*, 501. U.S. at 856 (Stevens, J., dissenting).

[16] Although some of the briefs in *Payne* cited empirical evidence, none of the evidence was related to the effect of VIE on jurors or sentencing. Studies cited analyzed the effects of the use of VIE on victims and practitioners. Some studies on racial disparities in sentencing were also cited. *See, e.g.*, Brief of Petitioner at 31-32, *Payne*, 501 U.S. SOS (No 90-5721) (citing Hillenbrand & Smith, *Victims Rights Legislation An Assessment of its Impact on Ciminal Justice Practitioners and Victims.* 1989 A.B.A. SECT CRIM JUST. 71). Brief of Southern Chtistian Leadership Conference as Amicus Curiae. Supporting Petitioner at 10-12, *Payne. 501 U. S. 808* (No 90-5721) (citing various studies, on racial disparties in the application of the death penalty).

[17] *Payne*, 501 U.S. SOS, 825 (1991).

[18] *Barefoot v Estelle, 463 U.S. 880, 898 (1983)*

[19] There are several California cases, for example in which the appellate court commented on defendant's reference on appeal to empirical studies that showed that juries misunderstand jury inductions The seminal case appears to be *People v Welch, 20 Cal 4th 701 (1999)*. As we said earlier, [W]e presume that jurois comprehend and accept the court's directions " *People v. Mickey, 54 Cal. 3d 612, 689 n. 17 (1991)* The presumption that the jurors in this case understood and followed the mitigation instruction supplied to them is not rebutted by empirical assertions To the contrary it is based on research that is not part of the record and has not been subject to cross examination *See Hovey v. Superior Court 28*

evidence can be informative, rarely do courts consider valid and reliable empirical **[*43]** evidence to inform their decisions when instructing jurors at the capital sentencing phase.

Procedural and substantive safeguards provide a variety of protections to an accused before and during trial. In the capital sentencing phase, when these safeguards are most needed because the defendant's life is at stake, they are conspicuously absent. To begin, at the trial stage of **[*45]** a capital murder trial—in contrast to the sentencing phase—unfair prejudice to parties is taken seriously by the court. Unfair prejudice to a defendant caused, for example, by emotionally charged, highly provocative statements about a crime or the accused in the press or on television is strictly scrutinized to ensure that the jurors selected will remain fair and objective. Opinions of potential jurors about the defendant or the crime cannot be unfairly prejudiced by news coverage before any evidence is heard. Safeguards are used to guarantee fundamental fairness and due process to the defendant. When the community of potential jurors has been exposed to unfairly prejudicial media coverage, courts assess whether it is likely they will be able to decide the ease fairly and impartially based upon the evidence presented. When the court determines that an accused cannot receive a fair trial due to unfairly prejudicial pretrial publicity, it can transfer venue of the case to a jurisdiction where the pool of jurors has not been tainted. By contrast, during capital sentencing proceedings, jurors are permitted, indeed they are invited, to hear evidence from the victim impact witnesses that **[*46]** has not been protected by any procedural safeguards— such as those provided during trial by the rules of evidence—and which includes highly emotionally provocative (oral and visual) testimony that is at least as unfairly prejudicial as the pretrial publicity from which they were protected.

Similarly, pretrial rules of discovery reduce “trial by surprise” and require an exchange of information that the parties require for a full and fair hearing. Rarely, however, does counsel receive full disclosure of victim impact testimony during the discovery process.

Jurors, in addition, are questioned during *voir dire* prior to trial in order to identify certain prejudices against or biases in favor of the parties. Jurors may be stricken for cause when their bias or prejudice prevents them from serving impartially. Further, the parties may strike a limited number of jurors by the use of peremptory challenges when the court refuses to excuse for cause. Capital jurors must be willing to impose death if the evidence supports that sentence—that is, only “death-qualified” [20] jurors are eligible to serve. However, even these may be stricken for cause if the court finds them unable to be fair and impartial. **[*47]** Typically, when jurors disclose a potential bias or prejudice during *voir dire,* they are asked whether the fact disclosed would prevent them from rendering a fair and impartial decision. Some jurors, confident in their ability to overcome their acknowledged bias or prejudice, and giving assurances to the court to this effect, may be permitted by the court, to remain on the jury, often requiring counsel to use a peremptory challenge.

Importantly, jurors are not questioned extensively during *voir dire,* nor could they be, about their reactions, biases or potential prejudice to VIE that they have not yet seen or heard. Exposure to VIE before the jurors have determined the merits of the case is precisely the type of potentially unfair prejudicial evidence, like pretrial media coverage, that the court takes pains to keep from jurors. While jurors are likely to hear some evidence during the trial that is also relevant for sentencing purposes, they will not hear all of the VIE until the sentencing phase. The capital sentencing phase provides the opportunity for the full theatrical and emotionally provocative impact of the evidence when it

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Cal. 3d 1 (1980) A number of other California courts use this quote when responding to defendant's attempts to offer empirical evidence on appeal that was not introdued at sentencing Here the court was unwilling to consider empirical evidence that apparently was not introduced at trial and. therefore, subject to challenge by Cross-examination This line of cases demonstrates two things First, judges make assumptions about the jurors understanding and ability to follow the court's instructions Second **[*44]** these assumptions were not rebutted by empirical assertions to the contrary based on research that is not part of the present record and has not been subject to cross examination In one of the studies relied upon by defendant to prove his assertion that jurors do not understand instructions regarding mitigating circumstances and aggravating factors, the authors purported to demonstrate that of 30 people interviewed who had former!) served on juries in capital cases, only 13 showed a reasonably accurate comprehension of the concepts aggravating and mitigating.” while fully one-third of our sample refocused the penalty phase inquiry entirely on the nature of the crime itself+, and did so a way that amounted to a presumption in favor or death”' Craig Haney et al. *Deciding to Take Life Capital Juries, Sentencing Decisions and the Jurisprudence of Death* 50 J.SOC. ISSUES 149, 162, 169 (1994) (italics omitted)

[20] *Witherspoon v. Illinois, 391 U.S. 510 (1968)*.

is likely to have its most prejudicial impact.

As in **[*48]** the pretrial stage, elimination of unfairly prejudicial evidence at trial is fundamental to securing a just result, fairness, and due process for the defendant. In this spirit, rules of evidence are established and construed to "administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." [21] We next briefly consider these rules as they are applied to eliminate or reduce unfair prejudice to the parties during the guilt phase of the capital murder trial; and we consider how they would eliminate or reduce the danger of unfair prejudice in the form of VIE if they were applied during the capital sentencing phase. First, the rules of evidence require that evidence must be relevant to be admissible. Relevant evidence is defined as "if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." [22] Relevance is relational because it requires that evidence is material to a matter of consequence in the case at hand. [23] In addition, it must be probative of the proposition **[*49]** for which it is offered. [24] If either requirement is missing, the offered evidence is not relevant. [25] In *Payne,* the Court found VIE to be relevant to the issue of the harm caused by the defendant, including its effects on the survivors, as well as the offender's culpability and blameworthiness.

Irrelevant evidence is not admissible [26] Furthermore, relevant evidence is not necessarily admissible. To be admissible it must also be reliable. [27] The Federal Rules of Evidence and most state rules of evidence reflect the common law preference for inclusion, rather than exclusion, **[*51]** of evidence to ensure that the truth may be fairly ascertained and proceedings justly determined. [28] Relevant evidence may be excluded when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence; [29] As gatekeepers of the evidence, judges protect the fundamental rights of the accused from evidence that is irrelevant or, if relevant, is so fundamentally unreliable or unfairly prejudicial as to prove worthless to the fact finder. [30] Deference is appropriately given to trial judges making *Rule 403* determinations; however, their decisions to admit or exclude evidence may be reversed when they are

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[21] *FED.R.EVID. 102*.

[22] *FED.R.EVID. 401*.

[23] The term "action" within the meaning of *Rule 401* includes criminal and civil cases. Typically, lawyers attempt to identify the universe of potentially relevant evidence by looking not only to the statutes and case law, but to the pleadings—e.g., the bill of complaint and defenses in a civil ease and the charging document, such as the indictment. the defenses raised, as well as the criminal and civil pattern jury instructions. *Rule 401* has two requirements. To be relevant, evidence must be probative (e.g., have any tendency to make a fact more or less probable than it would be without the evidence), and this probative fact must be material to a claim or defense, (e.g., of consequence in determining the action). The charging document is the critically important document that provides to the defendant the procedural Due Process requirement of notice.

[24] "Relevance is a relational concept and carries meaning only in **[*50]** context.… Relevance requires a 'relation between an item of evidence and a matter properly provable in the case,' and the existence of such a relationship is determined by 'principles evolved by experience or science applied logically to the situation at hand It is sometimes appropriate for counsel to submit additional information to assist the court in making this determination Evidence offered to assist the court in making a relevancy determination, such as scientific studies or treatises is not limited by the rules of evidence other than rules of privilege Scientfic research has disproved many linkages thought to exist and has identified other connections and correlations that are not commonly known Thus in some cases counsel would be wise not to rely solely on the personal knowledge that the judge bangs to the ruling at hand CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, Evidence § 4.2 154-55 n. 10 (3d ed 2003)

[25] *FED.R.EVID. 401*.

[26] *FED. R. EVID. 402*.

[27] *See Precision Piping and Instruments, Inc. v. E.I, du Pont de Nemours & Co., 951 F.2d 613 (4th Cir. 1991)*; *Plastipak Packaging, Inc., v. DePasquale, 75 F. App'x 86 (3d Cir. 2003)*.

[28] *FED. R. EVID. 102*.

[29] *FED. R. EVID. 403* provides that evidence, although relevant, "may be excluded where the probative value of the evidence is *substantially outweighed* ***[*52]*** *by the danger of unfair prejudice, confusion of the issues or misleading the jury*, or by considerations of undue delay, waste of lime, or needless presentation of cumulative evidence." (emphasis

"arbitrary and irrational." [31] Even when it appears that judges' rulings are rationally based upon their knowledge and perception, there remains a substantial danger that they may not understand or appreciate the significance of other evidence that might more accurately inform them and their juries. [32]

While rules of evidence are essential to ensure justice, fairness and due process during trial, historically, they were not applied during sentencing. Moreover, they are not applicable under the Federal Rules of Evidence at sentencing; [33] The Court in *Payne,* providing little guidance as to what evidence might be inadmissible in VIE, offered merely, "in the event that evidence is introduced that is so prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." [34] The results of our study illustrate **[*53]** that when our sample jurors were exposed even to a relatively low dose of VIE, its effect caused substantial bias toward the victim and the victim's family, as well as prejudice against the accused where such bias and prejudice was sufficient to deny due process.

In spile of the fact that the Federal Rules of Evidence do not apply during sentencing, courts routinely make Rule 403 assessments of the victim impact evidence to determine whether the probative value of victim impact evidence is substantially outweighed by the danger of, among other things, unfair prejudice. We urge them to consider empirical evidence such as that produced by our study to assess the danger of VIE evidence in capital sentencing proceedings. Although courts routinely make rulings during the trial without the benefit of empirical evidence, the rules of evidence applicable at trials provide both guidance and limitations regarding the admissibility of various kinds of evidence. Beyond the protections against unfairly prejudicial evidence found in Rule 403, the rules of evidence provide additional guidance **[*54]** to judges and safeguards to the parties.

Consider the topic of character evidence. While the rules of evidence are essential to ensuring justice, fairness and due process at trial, historically, they were not applied during sentencing. By the common law, sentences were fixed and imposed by the court, [35] Currently, however, the rules stipulate that the rules of evidence are inapplicable at sentencing. Therefore, while judges routinely consider unfair prejudice during capital sentencing proceedings they are not obliged to adhere to any of the rules of evidence that we discuss. Other than Rule 402 and possibly Rule 403, which courts seem willing to apply during sentencing, none of the other protections afforded by the other rules of evidence are available to capital defendants during the sentencing phase. The result (which follows) is that evidence inadmissible during the trial is routinely admitted during sentencing. Some examples include things like improper character evidence, improper hearsay, improper lay opinion, inadequate foundations for admitting evidence, etc. In this article we argue that judges should adopt and utilize all of the rules of evidence during the sentencing phase just as they do **[*55]** during the guilt phase of the trial. Indeed, as capital sentencing proceedings become ever more susceptible to the dangers that exist during trial, the rules of evidence applied at sentencing becoming increasingly important and necessary.

Rule 404(a) prohibits the circumstantial use of character evidence of the defendant to show that the defendant acted in conformity with that character or character trait on a particular occasion in question. [36] The danger is that the jury would find the defendant guilty not because of what he did on this occasion, but because of who he is and what he did in the past—his propensity, based on

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added).

[30] *Id.*

[31] *Bhaya v. Westinghouse Electric Corp.. 922 F.2d 184, 187 (3d Cir. 1990)*.

[32] MUELLER & KIRKPATRICK, EVIDENCE (3d ed. 2003) "It is sometimes appropriate for counsel to submit additional information to assist the court in making this (the relevance) determination. Scientific research has disprove many linkages thought to exist and has identified other connections and correlation that are not commonly known. Thus in some cases counsel would be wise not to rely solely on the personal knowledge that the judge brings to the ruling at hand."

[33] *FED. R. EVID. 1101(d)*. "The rules—except for those on previlege—do not apply to the following: … (3) miscellaneous procedings such as sentencing

[34] *Payne v. Tennessee, 50.1 U.S. 808. 825 (1991)*.

[35] "By the common law, the jury determined merely the guilt or innocence of the prisoner, and if their verdict was guilty, their duties were at an end. The court alone determined what the punishment should be.…" *Fields v State. 47 Ala. 603, 606 (1872)*.

[36] The unfairly **[*57]** prejudicial nature of such evidence is assumed.

character, to commit this act too. Evidence of other crimes, wrongs, or acts may be offered for any relevant purpose *other than* to show conformity with that character in the current case. [37] However, *Rule 404(a)* provides three exceptions to the general prohibition against using character evidence to show conformity therewith on a particular occasion. *Rule 404(a)(2)(A)* allows the defendant to introduce **[*56]** pertinent evidence of his or her own character. This is consistent with the defendant's constitutionally protected rights at trial. Of course, when the defendant offers evidence of his good character, the prosecutor may offer evidence to rebut it. In addition, *Rule 404(a)(2)(B)* allows, subject to the limitations of Rule 412 (the Rape Shield Statute), a defendant to offer evidence of an alleged victim's pertinent trait: and if admitted, the prosecutor may offer evidence to rebut and evidence of the defendant's same trait. *Rule 404(a)(2)(C)* provides that in a homicide case, the prosecutor may offer evidence of the alleged victim's trail of peacefulness to *rebut* evidence that the victim was the first aggressor. *Rule 404(a)(3)* provides that evidence of a witness's character may be admitted, as provided in Rules 607, 608, and 609. These rules involve a specific character trait of the witness, namely, the witness's character for truthfulness. Character is proven by testimony as to reputation or in the form of the character witness's opinion and, during cross-examination, by relevant specific instances of conduct to assess the capacity of the witness to form the opinion or reputation evidence of the pertinent character trait. [38]

During trial, then, the prosecution may not offer evidence of the defendant's character unless and until the defendant first offers evidence of his or her character or that of a victim, as provided in *Rule 404*.

Character evidence, when introduced, may only be offered in the manner specified in *Rule 405*. Entitled "Methods of Proving Character," this rule provides three ways of proving character. First, when evidence of a person's character or trait of character is admissible, it may be proved by testimony about the person's reputation—i.e., what is this person's reputation in the relevant community, for example, for peacefulness? Character may also be proved by testimony in the form of opinion—for example, the witness may offer her personal opinion about a relevant character trait of the person. However, on cross-examination of the character witness, the court may allow inquiry into relevant specific instances of the person's conduct that relate to the character trait in question. On cross-examination, the reputation or opinion character witness is examined about the underlying circumstances of her basis of knowledge, or lack thereof, to form an opinion, **[*58]** or the circumstances underlying her ability to testify as to the person's reputation in the community. The cross-examination is designed to test the basis of the witness's opinion or reputation testimony, i.e., to show that the character witness really doesn't know the person well enough to offer an opinion of her character trait or, perhaps, to bring to her attention specific instances of conduct that are inconsistent with the opinion expressed by the witness and which, when made known, may changes the witness's opinion of the person. Importantly, during trial, evidence of specific instances of character may not be offered during direct examination, other than when character is "in issue," or is first offered by the defendants as provided in *Rule 404*.

In those limited instances when "character is in issue," i.e., when a person's character or trait is an essential element of the claim or defense (such as a defense of entrapment, or truth as a defense to a claim of defamation), character may also be proved not just by opinion or reputation, but by relevant specific instances of conduct. But the prosecution would not be allowed to introduce specific instances of conduct to show character or a **[*59]** character trait, even if relevant, during its case in chief.

In the capital sentencing phase, in contrast to the guilt phase, these important safeguards do not apply. Instead, evidence of the good character of the victim is admitted, contrary to *Rule 404*, whether or not the defendant attacks the character of the victim and even if the defendant offers no mitigation evidence. The victim impact evidence in our case study included testimony about the character of the victim to show that he was a generous man, a religious man, a loving and caring parent and family man and that he was proud to be a police officer: "[he] was a person who would do anything for you.… He loved God. He loved being a father. He loved his family and friends, and most of all being a police officer." It included specific instances of conduct to support their opinions about the victim. If evidence of specific instances of the character of a victim were offered by the prosecution during its case in chief, they typically would be excluded by the rules discussed. Such evidence might be admissible by the prosecution for other purposes, such as to show bias or interest.

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[37] *FED. R.EVID. 404(b)*.

[38] *FED.R.EVID. 405*.

Capital sentencing proceedings, by contrast, allow victim **[*60]** impact witnesses to offer evidence of the character of the victim by opinion, reputation, *and* by specific instances of conduct. Moreover, statements of the victim's religious beliefs and that he truly loves God, for example, would not admissible at trial to enhance the witness's credibility.

The danger in admitting such evidence is that jurors might be swayed to find the declarant, and statements about him, more credible simply because of a juror's and victim's shared religious beliefs. Such testimony would violate the rules prohibiting such evidence if improperly offered to enhance or diminish the credibility of the witness during trial. [39] In capital sentencing proceedings, evidence of the deceased victim's belief in God is irrelevant, since his credibility as a witness is not an issue. It is relevant at trial only if the witness were to testify and then it would be excluded by *Rule 610*. In capital sentence proceedings, however, jurors are allowed to consider such evidence, not to enhance the victim's credibility as a witness, but for an even more dangerous, unfair, and impermissible purpose: to show that his belief in God makes him a better person than the defendant.

Another evidentiary **[*61]** protection provided at trial is the requirement that witnesses demonstrate personal knowledge of the matters about which they testify. [40] The rule is designed to improve the *reliability* of evidence by requiring witnesses to testify to their own observations and perceptions. Victim impact witnesses no doubt offer appropriate lay opinion testimony about many facts that are rationally based on their personal observations and perceptions. [41] But lay opinion testimony at trial must also "be helpful to a clear understanding of the witness testimony or the determination of a fact in issue." [42] It has been assumed by courts that victim impact evidence is helpful to jurors in these ways. Our study questions this assumption.

Finally, lay witnesses are not permitted to offer expert opinions; that is, the opinions of lay witnesses may not "be based on scientific, technical, or other specialized knowledge." [43] During the trial phase, the rules of evidence require that opinions concerning such specialized matters as medical and psychological conditions and causation are to be offered only by a qualified expert in the field, [44] Further, the reliability of the expert opinion and the basis of that opinion **[*62]** must be established. [45] Nevertheless, in the sentencing phase, victim impact witnesses often offer opinion evidence that describes physical and psychological symptoms attributed to the crime and the defendant. Undoubtedly, victims' families' tragic experiences produce grave physical, psychological, and emotional effects. Nevertheless, victim impact evidence routinely includes improper and unfairly prejudicial expert opinion in violation of these rules.

Still other safeguards designed to prevent unfair prejudice during the trial phase can be found in the rules of evidence. Significantly, witnesses may be cross-examined about their testimony and may be impeached to show their bias, prejudice, or interest in the outcome of the case, and to show corruption (that the witness has the been paid to lie). [46] Moreover, witnesses may be impeached by use of their prior inconsistent statements or the contradictory evidence of others. [47] In addition, a witness's character for truthfulness [48] may be attacked by opinion, reputation, and, on cross-examination, by specific instances of conduct and by evidence of conviction for certain crimes and other wrongful acts relevant to the credibility of the witness. **[*63]** [49] The opportunity to confront and cross-examine witnesses is a fundamental right of the accused, and this important right is essential to allow a defendant to challenge any witness who testifies against him at any stage of the proceeding. [50]

John Henry Wigmore suggested that cross-examination is the greatest legal engine ever invented for the discovery of truth but cautioned that just as one '"can do

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[39] *FED. R. EVID. 405*; *FED, R. EVID. 610*.

[40] *FED. R. EVID, 602*.

[41] *FED. R. EVID. 701*.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *FED. R. EVID. 702*.

[46] *FED. R. EVID. 611*.

[47] FED.R.EV1D. 613.

[48] *FED. R. EVID. 608*.

[49] *FED. R. EVID. 609*.

[50] ***U.S. CONST, amend, VI***.

anything… with a bayonet-except sit on it';, a lawyer can do anything with cross-examination—if he or she is skillful enough not to impale his own cause upon it." [51] Fearing they might do just that, most defense lawyers wisely opt not to risk impaling their clients who face the death sentence by attempting to impeach or even to cross-examine victim impact witnesses. The dangerous and unfortunate consequence of this is that the truth about what is said about the defendant or the victim, by victim impact witnesses, is likely to remain elusive and almost certainly unchallenged. Stated somewhat differently, the defendant is deprived of the opportunity to face and confront his accusers in any meaningful way. The result is nothing less than a violation of the Due Process Clause of the Fourteenth Amendment envisioned by the **[*64]** Court in *Payne* as the "mechanism" to address evidence that is so unduly prejudicial that it renders the trial fundamentally unfair. [52]

Another evidentiary protection at trial is the rule against hearsay. Hearsay statements are out-of-court statements made by a declarant that are offered in court to prove the truth of the matter asserted, [53] Hearsay testimony, generally, is disfavored because jurors are deprived of the opportunity to observe the demeanor of the declarant while hearing his testimony. In addition, hearsay declarants are not subject to the oath; they are not present in court to declare that they will testify truthfully. [54] Nor are they subject to cross-examination at trial. The rules of evidence exclude hearsay statements offered during trial, unless they are shown to be admissible under at least one of the hearsay exceptions. [55] In the capital sentencing phase, however, hearsay evidence is routinely offered as substantive evidence to prove the truth of what victim impact witness is asserting about the victim, **[*65]** about the effect of the victim's death on the witness and others, and about the defendant. Regardless of whether this evidence would be admissible at trial, no such determination is made at sentencing. The result is that hearsay statements are routinely admitted that are often unfairly prejudicial to a defendant who is powerless to challenge them.

Finally, in addition to those rules discussed, still other rules seek to ensure that an expert opinion is reliable; [56] that evidence is properly authenticated and identified; [57] and that the reliability of a writing, recording, or photograph is established if one intends to prove the contents of it. In capital sentencing proceedings, none of these safeguards apply.

Without the full protection of the rules of evidence, we are left with victim impact evidence that, although deemed relevant, presumably may be excluded only if it can be shown that it is so unfairly prejudicial as to substantially outweigh its probative value. Evidence is unfairly prejudicial only if it has an undue tendency to suggest decisions on an improper basis—commonly, though not always, an emotional basis. [58] It is unfairly prejudicial if it "appeals **[*66]** to the jury's sympathy, arouses its sense of horror, provokes its instinct to punish" or otherwise may cause a jury to base its decision on something other than the established propositions in the case. [59] Does victim impact evidence, then, have an undue tendency to suggest the sentencing decision the jurors should make based on emotions or similar improper basis? Is victim impact evidence merely an appeal to the sympathies of the jurors that arouses their sense of horror? Does it provoke the jurors' instinct to punish? Does it otherwise cause a jury to base its decisions on something other than the evidence?

III. Is Victim Impact Evidence Unfairly Prejudicial? Existing Empirical Evidence

Given the lack of procedural and evidentiary safeguards in the sentencing phase, as discussed *supra,* it becomes even more important to provide jurors with adequate information to ensure fairness in capital

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[51] JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourn ed., rev. ed, 1974). The unfairly prejudicial nature of such evidence is assumed.

[52] Id. at n. 13.

[53] ***FED. R. EVID. 801***.

[54] FED.R. EVID D. 603.

[55] *FED. R. EVID. 803*, *804*, & *807*.

[56] *FED. R. EVID. 702*.

[57] *FED. R. EVID. 901*.

[58] *FED. R. EVID. 403* advisory committee note.

[59] *See* *Carter v. Hewitt, 617 F.2d 961, 972 (3d Cir. 1980)* (citing J, Weinstein & M. Burger, Weinstein's Evidence ¶ 403(03) (1978)); *accord*, *Old Chief v. United States, 519 U.S. 172,180(1997)*.

sentencing proceedings. Empirical evidence is an essential tool needed to inform, more fully and fairly, juror decision making in these proceedings. Jurors will, no doubt, continue to rely **[*67]** upon their intuitions, anecdotal evidence, and their common sense. [60] However, they should also be permitted to consider valid and reliable empirical evidence to inform their decisions. As our study clearly demonstrates, empirical evidence provides additional, essential information about which jurors are likely to be unaware. There is no reason to believe or fear that jurors will not apply their same common sense, intuitions, and life experiences to the empirical evidence presented as they do to other evidence they consider. In the case of VIE testimony, there are empirical studies that have investigated the effect that such testimony has on the process and outcome of capital penalty phase deliberation. Prosecutors are free to present jurors with empirical evidence challenging the validity of findings such as ours. We now consider how jurors might use empirical evidence when deciding whether someone lives or dies. We then move to a discussion of our empirical study of the affect of VIE testimony which we think improves upon these earlier efforts providing more valid information about the consequences of VIE testimony.

The empirical evidence available to date suggests, but does not prove, that victim impact evidence appeals to the emotions of jurors thereby leading them to sentence defendants to death. Many prior studies have found that the risk of a death sentence is higher in the presence of VIE than in its absence. The **[*69]** evidence is not definitive, however, because many of these studies have neglected to measure subjects' emotional stales, have used various types of convenience samples, have asked subjects to read the victim impact evidence rather than witness it as delivered, or have failed to voir dire subjects before the study to ensure that they would have been eligible to serve on a capital jury. [61] Luginbuhl and Burkhead used a sample of university students who were told that the defendant in a depicted crime had been convicted of capital murder and their task was to make a determination as to what sentence he was to receive. [62] The subjects were not voir dired for death qualification prior to their participation in the study. They were then randomly assigned to two groups both of which read identical written summaries of the prosecution and defense arguments for the penalty; but only one group was provided with victim impact evidence. Luginbuhl and Burkhead found, a substantial effect for VIE: when it was present 51 % of the subjects voted for death, but only 20% of the time when it was absent. [63]

Myers and Arbuthnot examined the effect of victim impact evidence within a group of 416 undergraduate psychology students, [64] Subjects were randomly assigned to a jury under one of four conditions: VIE shown and evidence of defendant's guilt was strong, VIE shown and evidence of guilt was weak, no VIE and strong evidence of guilt, no VIE and weak evidence of guilt, Subjects were not death qualified prior to participation. Each juror watched a videotape of a murder trial that lasted sixty minutes **[*71]** and was asked before deliberating if they thought the defendant

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[60] *Baze v. Rees 553 U.S. 35, 90 (2008)* "… It is simply not our place to choose one set of responsible empirical **[*68]** studies over another in interpreting the Constitution. Nor is it our place to demand that state legislatures support their criminal sanctions with foolproof empirical studies, rather than commonsense predictions about human behavior. 'The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts," Were Justice Stevens' current view the constitutional test, even his own preferred criminal sanction—life imprisonment without the possibility of parole—may fail constitutional scrutiny, because it is entirely unclear that enough empirical evidence supports that sanction as compared to alternatives such as life with the possibility of parole.…"

[61] Jurors in capital cases are extensively voir dired to determine if they are eligible to serve. In the **[*70]** voir dire, potential jurors are asked standard questions such as whether or not they knew the victim or know the victim's family, and if they have heard about the crime and have already formed an opinion about it. In capital cases, however, potential jurors are also asked about their views about the death penally. Under the Supreme Court's decision in *Wainwright v. Witt, 469 U.S. 412 (1985)*, potential jurors could be struck if their attitude toward the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas, 448 U.S. 38,45 (1980)*.

[62] James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Vows for Death*, 20 AM. J. CRIM. JUST. 1 (1995).

[63] *Id.*

[64] Brian Myers & Jack Arbuthnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing Judgments of Mock Jurors*, 10 PSYCHOL. PUB. POL'Y & L. 49-1 (2004).

was guilty and what punishment they would impose. Jurors then deliberated in mock juries and were again asked to decide if the defendant was guilty. In juries where the defendant was found guilty, jurors watched a mini-penalty hearing (where VIE was either present or absent) and were asked to determine sentence. Myers and Arbuthnot found that there was no relationship between viewing victim impact evidence and the sentence imposed before deliberations. However, at post-deliberation 67% of those jurors who voted for guilt imposed a death sentence if they watched the VTE, but only 30% imposed a death sentence under the no-VIE condition.

Myers et al.'s subjects came from a convenience sample of 294 adults who were approached in train stations and airports in central California [65] Participants were eligible for jury duty in California (had a driver's license, were at least eighteen years old, and were U.S. citizens) and were death qualified. Subjects were given a **[*72]** three-page written trial summary of the guilt phase of a capital murder case and a more detailed written summary of the penalty phase. In addition to a condition with no victim impact statement, there were four experimental conditions based on the presence of language in the VIE that humanized the victim, dehumanized the defendant, humanized the victim and dehumanized the defendant, or neither humanized the victim nor dehumanized the defendant. After reading the summaries of the guilt and penalty phase of the trial, subjects were asked to render a sentencing judgment of life or death, rate the suffering that relatives of the victim had experienced, and rate the level of compassion they felt for the defendant. There was no relationship found between the reading of VIE evidence and sentencing outcome: 60% of those who saw no VIE recommended the death penalty and 58.5% under the condition where there was a VIE and it dehumanized the defendant. Surprisingly, a death sentence recommendation was least likely where there was a VIE that both humanized the victim and demonized the defendant (34%). Moreover, the dehumanizing language of the VIE had no effect either on the level of compassion **[*73]** that the subjects felt toward the defendant nor on the amount of suffering they felt the victim's family was experiencing.

Although several studies have found that viewing victim impact evidence is related to a higher risk of a death sentence, many of these studies did not use subjects who had been voir dired to determine whether they were eligible to serve on a capital jury; many used university students or other convenience samples, and many studies gave subjects only written summaries of penalty phase testimony and victim impact evidence rather than showing them the evidence as presented in the hearing itself. In the present study we hope to overcome many of these issues as well as provide some explanation as to why victim impact evidence has the effect on jurors that it does.

IV. Methods

A. Sample

Subjects for the study were adults randomly selected from a juror registration list used by the criminal court of a large city in a mid-Atlantic state. The original juror list consisted of approximately 250,000 names. **[*74]** Names were selected from this list at random and selected names were then searched for phone numbers from a variety of online telephone search sites. Numbers that were found were called by members of the research team. [66] After confirming that they were still residents of the city and still eligible to serve as jurors (they had not been convicted of a felony), they were asked if they would be interested in participating in a research project about citizens' attitudes about the death penalty. Of those initially called, about 75% agreed to participate further in the research. These people were then asked a series of questions to qualify them as jurors in the particular case at hand [67] They

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[65] Brian Myers et al., *Victim Impact Statements and Mock Juror Sentencing: The Impact of Dehumanizing Language on a Death Qualified Sample*, 22 AM. J. FORENSIC PSYCHOL. 39 (2004).

[66] In this city, jury registration lists are based upon a compilation of information **[*75]** from voter registration and motor vehicle registration lists and includes the phone numbers that jury commissioners would use in trying to locate jurors to call them for jury service. In addition, the jury commissioner sends out about 5,000 forms by mail to “pre-qualify” jurors and keep they jury registration list up to date. The list was provided by the chief administrative judge of the criminal circuit.

[67] The case that the subjects were to determine sentence in involved the killing of a police officer. The killing had taken place in the jurisdiction some seven years before our research. During the *voir dire*, all potential jurors were asked if they had ever heard of the case and had formed an opinion about it, if they were employees of law enforcement or the judicial system, or it someone in their immediate family was a police officer or employed by a law enforcement/judicial

were also asked questions about the death penalty to determine whether their opinion/feeling about the death penalty would preclude them from being able to follow the law in imposing sentence, or if they would be able to consider all sentencing options. [68] Those who passed this screener were "death qualified" and were given an appointment to appear at the law school for the study. A total of 135 adults were qualified for the study.

B. Procedure

Once subjects arrived at the law school they were directed to the study room and provided with a three-page description of the crime that included the facts brought out in the actual guilt phase of the trial (for a summary of the facts of the case, see Appendix A), They were then told that the defendant in this case had been convicted of capital murder by a jury and that their job was to watch actual penalty phase testimony via video and determine what they thought was the appropriate sentence. Subjects then watched a three and one half hour video of the actual penalty phase of the trial. They were randomly assigned to one of two conditions: (1) the VIE was included in the penalty phase testimony (n=73), or (2) the VIE was edited out (n=62). The videotape of the penalty phase testimony was obtained from the trial court, [69] The subjects watched the videotape of the penalty phase hearing on a large screen, in **[*77]** some cases alone, in some cases with other subjects. After viewing the videotape, the subjects were asked to complete a written questionnaire. The questionnaire first elicited information about various emotions the subjects themselves might be experiencing, then asked questions about their attitudes toward the defendant, victim and victim's family. Finally, at the end of the questionnaire they were asked what sentence they would have imposed in the case if they had been on the jury. The questionnaire look approximately forty-five minutes to complete, and all were completed by each subject in a room alone. There was no group or jury deliberation. Subjects were thanked for their participation, research staff answered any questions subjects had, and subjects then were paid $75 before leaving the law school.

C. Variables

i. Dependent Variable

Our main interest was in the effect that witnessing **[*78]** the victim impact evidence had on the subject's decision in the specific case at hand to vote for either a death sentence, a life sentence without parole, or a life sentence. [70] At the end of the questionnaire, after all other information with the exception of demographic information had been obtained, each subject was asked: "If you were a juror in this case, what would you have voted for as the appropriate punishment for [the defendant's name]?" For purposes of data analysis, sometimes we treated the response options as a dichotomy, "life" and "death," and sometimes we retained the variable with its original three levels.

In addition to how subjects would have voted had they been a juror in the penalty phase of the case, we also inquired about their genera] attitude toward the death penalty; and since the case involved the murder of a police officer we asked respondents about their attitudes toward the police. Subjects were asked if they thought: (1) capital punishment was under any circumstances cruel and **[*79]** inhumane, (2) the death penalty was morally wrong, and (3) if a person takes someone's life, they should be put to death. Finally, subjects were asked to agree or disagree with four statements meant to capture their attitudes toward law enforcement: (1) "Police officers should be treated with respect no matter how they treat you"; (2) "Killing a police officer is worse than killing a regular citizen"; (3) "Police officers usually do the right thing"; and (4) "Police officers are pillars of the community." Response options for all seven questions ranged on a four-point continuum from

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agency. General facts about the case and some indication as to the prosecution's theory and defense strategy are provided in Appendix A.

[68] In asking respondents if they could follow the law in coming to the appropriate sentence in the case we were trying to mimic the prevailing standard set in *Wainwright v. Witt, 469 U.S. 412 (1985)*: "The proper standard **[*76]** for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juior in accordance with his instructions and his oath.'"

[69] The videotape was edited by us in certain places. In order to shorten what we asked subjects to watch for the research project one defense witness was edited out, and all bench conversations between the judge and the lawyers were also edited out since real jurors would not be privy to those conversations.

[70] In this jurisdiction the possible sentence options tor conviction of a capital crime were: death, life in prison without the possibility of parole, and a life with parole sentence.

"strongly disagree" to "strongly agree."

ii. Independent Variable

The key independent variable was the presence in the videotape of the penalty hearing of victim impact evidence. Death qualified subjects were randomly assigned to watch either the control (no VIE) or experimental (VIE) penalty phase video. The testimony given in this victim impact evidence lasted for approximately 15-20 minutes of the approximately three-and-one-half-hour penalty phase hearing. The victim's sister, who provided the VIE, was visibly emotional in giving her testimony and she lost her composure at one point. The victim impact **[*80]** evidence in this case provided the three kinds of information found in the *Booth* case and in many other victim impact statements. First there was evidence with respect to the character of the victim: "[He] was a person who would do anything for you … He loved God. He loved being a father. He loved his family and friends, and most of all being a police officer." Second, there was testimony about the impact of the murder on family members: "[His daughter] misses him so much. She sits in front of his picture and talks to him about what she did in school and she can write her name or she would write him a letter and want Momma to put a stamp on it." Finally, there is a hint as to what the family would like to see as a punishment for the offender: "Nothing can change what he did, but he must face the consequences of his actions. This is why I ask you the jury for a just punishment for an unjustifiable death."

D. Other Variables

We measured many components of the subjects' attitudes toward the victim and victim's family, and asked various questions that captured the reasons behind the subjects' sentencing decision. We measured the extent to which the subjects felt sympathy and empathy for **[*81]** both the victim and victim's family with a scale comprised of the following nine items:

(1) How well does the word "sympathetic" describe how you personally feel about the murder of [the victim's name]?

(2) How well does the word "sympathetic" describe [victim's name]?

(3) How well does the word "sympathetic" describe the [the victim's name] family?

(4) Did you feel sympathy or pity for [police officer's name] family?

(5) Did you imagine being like the victim?

(6) Did you imagine yourself in the victim's situation?

(7) Did you imagine yourself in the situation of the victim's family and/or friends?

(8) Did [the victim's name] family seem very different from your own family?

(9) Did you feel that you knew [victim's name] family personally?

Response options for the first three questions ranged on a four point continuum from "very well" to "not at all," and for the last six items on a four point continuum from "yes, very much" to "no, not at all." A one-factor confirmatory factor analysis of this combined scale indicated that all items had a factor loading of 0.60 or higher on the one factor, which explained 54% of the variance. This factor had an initial eigenvalue of 4.10, while a second factor **[*82]** had an eigenvalue of 1.47. This combined sympathy/empathy scale had a Cronbach's alpha of 0.88.

Based upon the Court's conjecture in both *Booth* (the majority) and *Payne* (the dissenters), we would hypothesize that hearing VIE will increase subjects' feelings of sympathy and empathy for the victim and victim's family. We would also hypothesize that Respondents who have greater sympathy/empathy for the victim and victim's family will be more likely to want to help the family by imposing a death sentence.

In an attempt to understand the salience of different possible reasons for the juror's sentencing decision, we asked "how important" each of the following factors was in their sentencing decision: (1) the offender's role or responsibility for the crime, (2) sympathy for the victim, (3) sympathy for the victim's family, and (4) their feelings about the right punishment. We examined whether those who viewed the victim impact evidence were different from those who did not on these items, which would establish some of the consequences of VIE in terms of attitudes; and we examined whether those who voted to impose death were different on these same items compared with those who voted either **[*83]** for life without parole or a straight life sentence.

Finally, subjects were asked two more questions as possible reasons behind their sentencing decision, and we related responses to these two items to both viewing the VIE and what sentence subjects would have

imposed in the case. Subjects were asked, “How well do you think the victim's family is coping with the murder?” with response options ranging on an eleven-point continuum from “Coping Well” (0) to “Coping Poorly” (10). The second question was, “How much do you think a death sentence for the offender would help the victim's family find closure or help them recover from their loss?” Response options to this question also ranged on an eleven-point scale from “No Help” (0) to “A Great Help” (10). It is expected that those who viewed the VIE would be more likely to think that the victim's family was coping poorly and that a death sentence would help the victim's family recover or reach closure. In addition, it is expected that those who thought that the victim's family was coping poorly and that a death sentence would help them recover or reach closure would be more likely to impose a sentence of death.

V. Results

Table 1 reports some **[*84]** basic demographic information on the experimental (VIE) and control (No VIE) groups. As a confirmation of the random assignment into groups, there are no differences between the two groups in their marital status, race, gender, education, income, or age.

Our first substantive issue is the simple question whether or not watching the victim impact evidence had an effect on the juror's sentencing decision in the case. Figure 1 shows what percentage of the experimental (VIE) and control (No VIE) groups voted for each sentencing option. Among those who watched the victim impact evidence, approximately sixty-two percent voted for death, compared with only seventeen percent among the control group. Potential jurors who watched the VIE were, then, more than three times more likely to impose a death sentence on the offender (£ = 28.27; p∠.001; γ-.64). In fact, death was the modal sentence imposed among those subjects viewing the VIE, but (hose who did not view the victim impact evidence were about equally likely to impose life without parole and a straight life sentence (44.4% vs. 38.1%, respectively). This provides substantial support for the view that one effect of exposure to victim impact **[*85]** evidence is to make the viewer more likely to impose a sentence of death.

The effect of the victim impact evidence in enhancing the probability of a death sentence was not general nor was it based upon an overall favorable attitude toward police officers (the victim in this case was a police officer), but was very specific to this particular case. Table 2 shows quite convincingly that those who viewed VIE were not more generally disposed to death even after viewing it, nor were they more generally disposed to police officers, None of the relationships shown in Table 2 were statistically significant and the measures of gamma are all very weak. While the victim impact evidence moved those who viewed it to impose a sentence of death on the particular offender in the case who caused the victim's death, its effect was very targeted. What follows are results which attempt to determine some of the intervening connections between potential jurors' viewing of the victim impact evidence and their sentencing decision.

First, there was a significant relationship between watching the victim impact testimony and emotional feelings of empathy and sympathy for the victim. The overall mean for all subjects **[*86]** on our nine-item scale of empathy/sympathy for the victim and victim's family was 24.911 (median = 27.00; std. dev. = 6.788; range from 12-35). For those subjects watching the victim impact evidence, however, the mean empathy/sympathy score was 30.486 (std, dev. = 2.600), while the mean for those not viewing the VIE was only 18.540 (std. dev. = 3.809). The independent samples t-test was 20.981, which was highly significant (p ∠.001). Those who saw the VIE, then, were both substantially more likely to feel empathy and sympathy for the victim and the victim's family, and were more likely to state that they would have voted for the death penalty if they had been a juror in the case. Subjects who harbored feelings of empathy/sympathy for the victim and victim's family were also significantly more likely to impose a death sentence than those who felt no such emotions.

Since the independent variable in this relationship (empathy/sympathy scale) is continuous and the dependent variable is binary (vote for death vs. vote for life without parole/straight life) the association is not easy to capture. One way to view this is to compare the mean level of empathy/sympathy for the death and non-death **[*87]** groups and build confidence intervals around each point estimate to see if they overlap. For subjects who voted for a life or life without parole sentence, the mean level of empathy/sympathy was 22.278 and the 95% confidence interval around that point estimate was from 20.783 to 23.774. The mean empathy/sympathy level of those who would have voted for death was 28.625, and the 95% confidence interval was from 27.284 to 29.966. These two confidence intervals do not overlap, suggesting that the mean level of empathy/sympathy is significantly different between

the two groups at p. ∠.05.

A slightly different approach that tells the same story is to estimate the "point biserial correlation coefficient" between the two variables. It is 0.462 (p ∠ .001), indicating that there is a significant positive relationship between feelings of empathy/sympathy and voting for the death penalty in this case. [71] Thus far, two concerns expressed by a majority of the Court in Booth (and ignored by the majority in Payne) are borne out: Victim impact evidence seems to be emotionally arousing, heightening feelings of empathy and sympathy both for the victim and the victim's family, and it increases the chance **[*88]** that the juror will vote for a death sentence.

We now move to examine the important reasons expressed by the subjects for their sentencing decisions and the relationship between these reasons and which group they were in (the experimental group, who saw VIE, or the control group, who did not). Subjects were asked how important the following reasons were in making their sentencing decision: the offender's role or responsibility for the crime, the emotional loss and grief suffered by the victim's family, the financial loss suffered by the victim's family, **[*89]** sympathy for the family of the victim, and sympathy for the victim. Table 3 shows that large proportions of both the experimental and control group (about 90% of each group) thought that the offender's role and responsibility for the murder was either very important or an important factor in their sentencing decision. A much smaller, though roughly equal, proportion of both groups (approximately 70%) thought that the financial loss suffered by the victim's family was either a very important or an important factor in their sentencing decision. What distinguishes the group that saw the victim impact evidence and those that did not is in terms of more emotional factors in their sentencing decision. For example, while 53.9% of the control group reported that the emotional loss and grief suffered by the victim's family was a very important or important factor in the decision to sentence the defendant, fully 95.8% of those who saw the VIE said that it was an important factor. Similarly, of those who did not see the victim impact testimony, about 54% said that sympathy for the victim's family was a very important or important factor in deciding the appropriate sentence and about 57% said **[*90]** that sympathy for the victim was very important or important. Among those who saw the VIE, however, 84.5% reported that sympathy for the victim's family was either very important or important in deciding sentence and 87.5% reported that sympathy for the victim was either very important or important. These differences between the groups are statistically significant and substantively large, There is a very close relationship between viewing victim impact evidence in this case and reporting that emotional factors were important in deciding the sentence they would have voted for in the case—a consequence of VIE that was feared by the majority in *Boothl Gathers* and by the dissenters in *Payne.*

There is one last view of the effect of victim impact evidence in this case that we can offer. All subjects were asked, "How well is the victim's family coping with the murder?" and "How much would a death sentence help the victim's family find closure or help them recover from their loss?" Recall that responses to both questions ranged on an eleven point continuum where 0 implied "coping weU'V'no help" and 10 implied "coping poorly'V'a great help." First we will examine the relationship between which **[*91]** group a respondent belonged to (VIE/NoVIE) and their response to each of these questions.

Figure 2 shows the distribution of the two group's responses to the question how well the murder victim's family was coping. About 55% of those who saw the victim impact testimony reported that the victim's family was not coping well (in categories 9 or 10) while the corresponding percent for those who did not view the VIE was only about 14%, A chi-square test was highly significant and the gamma was strong (χ 2 = 39.795; p. ∠ .001; γ = .629). Viewed differently, the mean response for the item was 7.90 for the experimental group (std. dev.-2.308) while it was 5.35 for those not viewing the VIE (std. dev. = 2.695); and the t-test for the difference between means was = 5.930 (p ∠ .001).

Figure 3 shows the distribution across the eleven responses for the question how much a death sentence would help the victim's family find closure or help them recover from their loss. About 60% of those who saw

[71] We also collapsed the continuous empathy/sympathy variable into various categories (at the median, into thirds, and quartiles) and built contingency tables. In each case there was a significant positive gamma between the empathy/sympathy measure and voting for the death penalty (either as a binary variable or codes as death, life without parole and straight life). Finally, we estimated a bivariate logistic regression model with death penalty vote as the dependent variable and the empathy/sympathy scale as the outcome variable. The logistic regression coefficient for the empathy/sympathy scale was both positive and statistically significant.

the victim impact testimony thought that it would be a great help (in response categories 9 or 10) while only about 30% who did not see the VIE thought that a death sentence would be a great help (x2 = 27.795; **[*92]** p. ∠. 001; γ =,461). Those subjects who saw the victim impact evidence had a mean on this item of 8.93 while those who did not had a mean of only 7.02 (t = 8.617′ p. ∠ .001). Clearly, compared with those who did not. those who saw victim impact evidence were more likely to think that if they were to impose a death sentence on the offender it would provide some measure of comfort for the murder victim's family.

Our final two research questions are these: (1) are subjects who thought that the victim's family is not coping well with the crime more likely to impose a sentence of death than those who thought the family was coping better?; and (2) are subjects who believed that a death sentence would help the victim's family find closure or help them recover more likely to impose a sentence of death? We can answer both of these questions with a simple bivariate logistic regression analysis with the sentencing decision as the binary outcome variable (death/life) and each question as a separate explanatory variable. The logistic regression coefficient for the coping question was b. = .444 (p. ∠ 001) indicating that those subjects who thought that the victim's family were not coping well with **[*93]** the crime were significantly more likely to say that they would have imposed a death sentence than those who thought that the victim's family were coping better. The magnitude of the coefficient is impressive. An increase of one unit on the item corresponds to a 56% increase in the odds of a death sentence, The logistic regression coefficient for the closure question was b. = .633 (p. ∠ 001), indicating that subjects who thought that a death sentence would help the victim's family find closure or help them recover from their loss were significantly more likely to say that they would have voted for a death sentence in the case. Again, the magnitude of this effect is impressive. An increase of one unit on the item reflecting their belief in the family reaching closure with a death sentence increases the odds of a death sentence by 88%.

VI. Findings and Recommendations

The collective thrust of our findings is that capital jurors are more likely to impose a death sentence in this case if they saw victim impact evidence that was presented by the victim's sister to the jury than if they did not. Those who saw the victim impact testimony were also more likely to say that they felt empathy and **[*94]** sympathy for the victim and the victim's family. The jurors in our study who felt such an emotional connection to the victim and family were relatively helpless with respect to what they could do to help. They could, however, attempt to provide some assistance or comfort to the family by imposing a death sentence on the offender. The jurors in our study who saw the victim impact testimony were more likely to say that emotional considerations such as empathy and sympathy for the victim and victim's family were important factors in their sentencing decision. Those who saw the victim impact testimony were also more likely to think that the victim's family was coping poorly with their loss and were more likely to think that a death sentence would give them closure and help them recover. These latter two emotional feelings were also important in increasing the probability that they would impose a sentence of death on the offender.

Our findings suggest that victim impact evidence can create unfair prejudice to the accused that would substantially outweigh the probative value for which such evidence is offered, thereby requiring its exclusion. In Payne, the Court said “there is no reason to **[*95]** treat such [victim impact] evidence differently than other evidence is treated.” [72] We disagree. Regardless of whether “death is different” [73] as a general proposition, victim impact evidence in capital cases—as our study suggests—is importantly different. While many of the concerns about victim impact evidence discussed may apply equally to noncapital cases, they are especially problematic in the context of capital cases. As our study has shown, the principle of fundamental fairness in a capital sentencing proceeding is violated!! the probative value of victim impact evidence is substantially outweighed by the danger that the defendant will be unfairly prejudiced by this evidence. [74] It bears

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[72] *Payne v. Tennessee. 501 U.S. 808 827 (1990)*

[73] *Furman v. Georgia, 408 U.S. 238 (1972)* For an excellent analysis of death-is-different jurisprudence, *see* Jeffery Abramson, **[*96]** *Death is Different Jurisprudence and the Role of the Capital jury*, *2 OHIO ST. J CRIM. L. 117(2004]*

[74] Justice O'Connor in *Payne* stated “We do not hold today that victim impact evidence must be admitted or even that it should be admitted We hold merely that if a State decides to permit consideration of this evidence, the Eighth Amendment erects no bar If in a particular case, a witness testimony or *a* prosecutor's remark so infects the sentencing proceeding as to render it *fundamentally unfair*, the defendant may seek appropriate relief and the Due Process Clause of the Fourteenth Amendment “ *501 U S at 831* (O'Connor, J

repeating that *evidence is unfairly prejudicial only if it has an undue tendency to suggest decisions on an improper basis,* commonly, though not always, an emotional one. [75] It is unfairly prejudicial if it "appeals to the jury's sympathy, arouses its sense of horror, provokes its instinct to punish" or otherwise may cause a jury to *base its decision on something other than the established propositions in the. case.* [76]

Our study produced several significant results that suggest the effects of victim impact evidence can create substantial unfairness to the defendant that would substantially outweigh its probative value sufficient to deny the defendant Due Process, We found that jurors who watched victim impact evidence **[*97]** were more emotionally aroused than those who did not (See Figure 4), Those who viewed the victim impact evidence were slightly more likely to feel "ashamed" than those who did not view it (30% vs. 21%). Jurors who viewed the victim impact evidence were more likely to feel "upset" (49% vs. 30%). We also found that jurors who viewed victim impact evidence were *substantially* more likely to feel hostile (71% vs. 25%). As can be seen in Figure 5, jurors who viewed victim impact evidence were *significantly* more likely to report that they felt "angry" (85% vs. 24%). Furthermore, we found that jurors who viewed victim impact evidence were *significantly* more likely to feel "vengeful" (77% vs. 22%). Subjects who viewed victim impact evidence also demonstrated raised primary emotions—emotions we feel and experience immediately after and in response to some event—and that, more importantly, raised primary emotions provide motivation for action. As we hypothesized, we found that the motivation for action caused by watching victim impact evidence produced an arousal of feelings of *sympathy and empathy* for the victim and the victim's family, VIE also created a *favorable view or disposition* toward **[*98]** the victim and the victim's family and an *undesirable view or disposition* toward the defendant

In addition, we established that watching victim impact evidence aroused feelings of hostility, anger, and vengeance *toward* the offender. Stated differently, we found evidence sufficient to support a finding that the victim impact evidence in our study created *"an undue tendency to suggest decisions on an improper basis commonly, though not necessarily, an emotional one.* [77] This emotionalizing of the capital penalty phase brought on by VIE is to be contrasted with the juror's rational and reasoned consideration of the background and characteristics of the offender and the circumstances of the crime before imposing sentence. While it may be normal human nature for jurors to be moved by the obvious suffering and grieving of the family members of slain loved one—and to use the punishment available to them to strike a corresponding fatal blow to the defendant—Justice Marshall's admonition that the 8th Amendment "is our insulation from our baser selves" is an apt reminder that the courts should not be used for private vengeance. [78]

Does even the very low dose of **[*99]** victim impact evidence that was shown to the jurors in our study suggest unfair prejudice to the offender in that it *appealed to the jury's sympathy, aroused the jurors sense of horror, evoked feeling of anger and even caused them to seek vengeance primarily for the benefit of the victim's family?* Did the victim impact evidence in our study *provoke the jurors' instinct to punish the offender to "help" do something for the victim's family?* Does the evidence from our study suggest other ways in which the jurors' decisions were based on something other than the established propositions in the case? [79] We believe that the answer to these questions is "Yes." Evidence of victim impact should be excluded whether it consists of a single piece of unfairly prejudicial evidence or the cumulative effect of elaborate evidence offered to create unfair prejudice.

Mindful that capital cases are bifurcated, we challenge judges to apply the same safeguards during sentencing as they do during trial, We urge them to broaden the use of the rules of evidence, beyond relevance and *Rule 403* considerations, to ensure that the evidence the jurors hear and consider during sentencing is sufficiently reliable **[*100]** and not unfairly prejudicial. We further

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concurring) (italics added) justice O'Connor specifically identified the Due Process Clause of the 14th Amendment as the appropriate relief. Justice Souter similarly acknowledged that ";the trial judge's authority and responsibilitv to control the proceedings consistently with due process, on which grounds the defendant may object and, if necessary, appeal" *Id. at 836* (Souter J, concurring)

[75] *FED R. EVID. 403* advisory committee note.

[76] *See Carter v. Hewitt. 617 F.2d 961, 972 (3d Cir. 1980); accord. Old Chief v. United States 519 U.S. 172, 180 (1997).*

[77] *FED. R. EVID. 403* advisory committee note.

[78] *Furman, 408 U.S. at 345* (Marshall, J. concurring).

[79] *See Carter v. Hewitt, 617 F.2d 961. 972 (3d Cir. 1980); accord. Old Chief v. United States, 519 U.S. 172,180 (1997).*

urge judges, when assessing the unfairly prejudicial impact of VIE under Rule 403, to consider the results of our study and take adequate steps to instruct jurors of its potential danger. Lastly, we encourage judges to accept empirical evidence such as that produced in our study and offer it for the jury's consideration. Jurors having the daunting task of deciding life or death should be provided with the facts needed to inform their decision. They should be made aware of the dangers of victim impact evidence and how it can improperly influence their decision. Without adequate safeguards provided by the rules of evidence and proper instruction by the court, jurors identify with the victim and, as our study suggests, want to punish the defendant in order to help the victim and the victim's family, We think it important and fair to jurors that they are properly informed of the potential effect VIE might have on their own decisions. If they are not, much to their dismay, they might find themselves instruments of the defendant's "particicution" [80] not by their own hands, but by their uninformed minds. [81]

We acknowledge that ours is but one study. Nevertheless, we are confident in the significance of our findings. We are confident as well in our belief that empirical evidence is needed to inform judges and, more important, the jurors who are called upon, to decide whether the defendant will live or die. The empirical evidence developed in our study is at least as reliable as the intuitions and anecdotal evidence upon which courts typically rely when making Rule 403 determinations. While we do not discount the value of such evidence, we are confident that empirical evidence is more reliable. We urge judges to allow jurors to consider our finding and decide, as with any evidence they consider, what, if any, probative value to give to it.

VII. Conclusion [*104]

The majority opinion in *Payne* argued that victim impact evidence is valuable testimony in informing capital sentencers of the full harm produced by the offenders crime; that it was necessary to balance the evidence given the sentencer, since jurors could and did hear virtually unlimited evidence in mitigation on behalf of the defendant; that it would not likely be overly prejudicial since it would provide only a "quick glimpse of the life" taken by the offender; and if it was prejudicial in particular cases there were available remedies.

In many cases it could be argued that victim impact evidence goes a bit further than simply providing a quick glimpse of the life that the offender extinguished. *In Kelly* and *Zamudio,* the Court was confronted with victim

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[80] Margaret Atwood in her novel *The Handmaids Tide*, used **[*101]** " Particicution' to describe public executions at which spectator were permitted to participate in the execution of a wrongdoer with their own hands

[81] We believe our statistical and evidentiary analyses highlight that VIE presents a very real danger of being unfairly prejudicial to criminal defendants, and that such unfairly prejudicial evidence is fundamentally unfair in violation of the Due Process Clause of the 14th Amendment We infer two possible ways to deal with this danger The first is to apply strictly the same evidentiary safeguards during sentencing that the defendant receives during the pretrial and trial phases If judges were to do that, they would be forced to deal with each of the evidentiary pitfalls that we have identified We would have to say that the greatest potential for substantial unfair prejudice comes in the form of improper character evidence As we discussed in our paper, during capital sentencing the defendant's character is routinely attacked by the prosecution even though the defendant docs not put his character issue (Rule 404(a)) and even if he does not testify However it becomes immediately apparent that improper character evidence is often admitted tn the form of inadmissible hearsay (Rule 803) In addition, the **[*102]** inadmissible hearsay character evidence may also involve improper lav and expert opinion testimony (Rule 703) Further. after all of this unfairly prejudicial VIE evidence is offered, the defendant is virtually powerless to attack it or what rights he does have are pro forma As we discussed, the defendant's 6th Amendment right to cross examine VIE witnesses is an empty light that the defendant dare not exercise The cumulative effect is a very real danger of unfairly prejudicial evidence against the defendant that substantially outweighs whatever probative value that VIE may have such that the defendant is deprived of the fundamental fairness that is guaranteed by the 14th Amendment The second way to deal with this danger and, we urge, the only rational way thing to do, is to recognize that VIE is inherently unfairly prejudicial to the defendant, that it is fundamentally unfair, that it deprives the defendant of Due Process as guaranteed by the 14th Amendment and therefore should be excluded with a *pet se rule* Whether there can ever be a constitutionally acceptable form of VIE is beyond the scope of our paper Whatever VIE should be, it is clear that under current sentencing schemes VIE has far exceeded its status purpose—to **[*103]** provide "a brief glimpse in the life of "We fear that capital defendants will likely continue to be sacrificed on the altar, and in the name, of' victim rights" and/or " closure lot the victim's family We think that the Court in *Booth* and *Gathers* "got it right," and that ME should be prohibited Lastly, we would go further as we believe capital punishment constitutes cruel and unusual punishment in violation of the 8th Amendment and that it should be abolished.

impact evidence that was portrayed through a video display of the offenders' lives and views of the victims' graves, all with accompanying music. The Court could have taken this opportunity to place some limits on either the form or content of victim impact evidence, but it denied hearing in the cases. Perhaps it should have taken this opportunity. In the case involved in this research, the victim impact evidence was neither as elaborate **[*105]** nor as well produced as those in *Kelly* and *Zamudio.* The sister of the victim, a law enforcement officer, read the VIE from printed sheets of paper, which lasted no more than twenty minutes. It had a profound effect, however, in making potential jurors feel empathy and sympathy for the victim and victim's family, and our data are consistent with the conclusion that those who saw the victim impact evidence were more likely to state that these feelings for the victim and victim's family were important considerations in what sentence they would have imposed. We also know that subjects who saw the victim impact evidence were significantly more likely to state that the victim's family was not coping well with the murder and that a death sentence would help them find closure on the issue.

While informative, we do think our study has two important limitations. First, we did not have our subjects deliberate and vote on a verdict. Jury deliberation would have added length to an already demanding experiment for our subjects. It would be important for future research to consider building in deliberation and querying subjects about their sentencing vote both before and after deliberation, Second, **[*106]** it would be important also to build into the experiment manipulations of the victim impact evidence (direct testimony of family members vs. nonfamily members; written versus personally delivered testimony; variations of video testimony by family members, etc.) to see if some types of victim impact evidence are received as more emotional by jurors, and how that would affect their verdict. Finally, it would be important to build into the experiment instructions by the judge to see if even the most emotional and potentially unfairly prejudicial of VIE could be mitigated by judge's instructions. [82]

Our findings point to two important conclusions. First, social science empirical research can be an important tool in informing the law. The majority opinion in both *Booth* and *Gathers* held that VIE would have the unintended effect of making the penalty decision in a capital trial turn on jurors' emotions rather than on their reasoned analysis of the law. The majority opinion in *Payne,* the case that overturned these two previous **[*107]** decisions, was dismissive of those concerns. Neither of these two camps appealed to social scientific evidence to help them understand what essentially was an empirical question, “What is the effect of letting jurors hear victim impact evidence?” The weight of this social science evidence is now impressive.

Second, our findings should raise alarms about the potentially unfairly prejudicial nature of victim impact evidence for the capital defendant. We encourage judges to apply the rules of evidence during the capital sentencing; phase of the trial to ensure that the evidence considered by the jurors when deciding whether one is to live or die is relevant, reliable and not unfairly prejudicial. Even the unexceptional victim impact statement in our study had implications for what type of sentence the defendant received. In the *Booth* decision, Justice Marshall was concerned that the decision to sentence a defendant to death may depend upon both the existence of someone to speak for the victim, and the eloquence of their voice. Our findings in this paper painfully suggest his concern may have substantial merit.

Appendix A

The ease involved the shooting of a nonuniformed police officer outside **[*108]** a bar at approximately 2:00 a.m. one morning. The officer had been in the bar that evening, drinking and socializing with friends. When he left the bar two of the three suspects (the third was waiting in a car) approached the officer and one of them started shooting. The officer was shot nine times, with some entry wounds inflicted when the gun was from six inches to two feet away from the body. The shooter was described by eyewitnesses as wearing a black puffy coat. The two assailants ran from the scene, jumped into the awaiting car and fled. A friend of the officer who was at the bar at the time of the shooting gets the officer's gun and chases the suspects. When the suspects leave their car he fires the weapon at them and the suspects split up. One suspect, the suspect in this case, hides in an outdoor toolshed but is seen by a witness and police officers surround the shed. The suspect surrenders and officers find a 9mm Glock handgun in the shed. Ballistics tests revealed chemical traces of gunpowder on the hand of the suspect and the Glock was the weapon that killed the officer. The only

[82] *See* Judith Platania & Garrett L. Berman, *The Moderating Effect of Judge's Instructions on Victim Impact Testimony in Capital Cases. 1* APPLIED PSYCHOL. IN CRIM. JUST. 84 (2006)

aggravating circumstance in the offense is the fact that the suspect was a police officer. **[*109]** In fact, the officer arrested a family member of one of the suspects six months previous to the officers murder, and this family member was sentenced to the penitentiary. The prosecution claimed that this was a revenge killing, and that the offense is death eligible because the victim was a police officer. The defense claimed that according to state statute the death penalty is a possible punishment only when a law enforcement officer was on duty, which was not the case here, since the officer was not in uniform, not working at the time, but at a bar on his own time. The prosecution argued that city police officers are expected to be on-duty and respond to pleas for assistance at all times. At trial the suspect pleaded innocent to the murder charge, claiming that he only drove the getaway car. Witnesses were presented linking the suspect to the gun, and to being the one who actually fired the shots that killed the police officer.

APPENDIX B

Figure 1: Sentencing Decision Made by Jurors

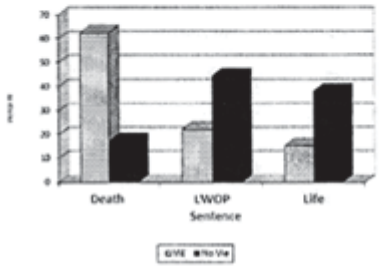


Figure 2: How Well Is Victim's Family Coping With the Murder?

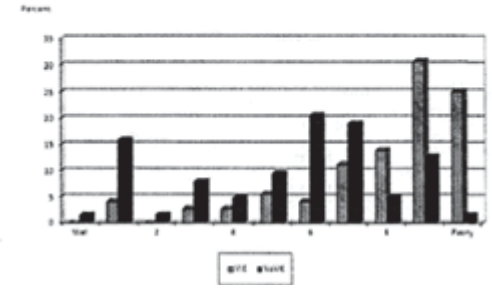


Figure 3: How Much Would A Death Sentence Help the Victim's Family?

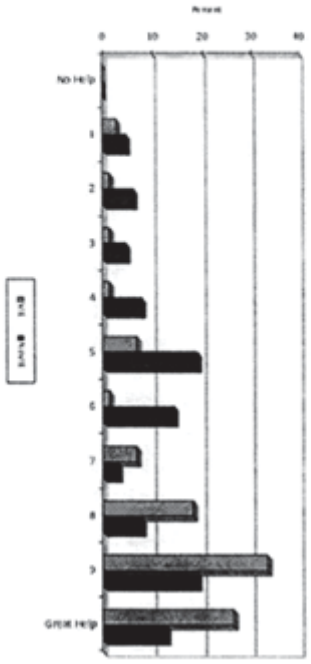


Figure 4: Percent of Subjects in Each Condition Who Reported Feeling ...

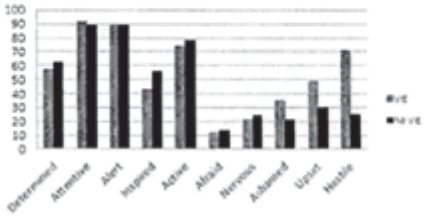
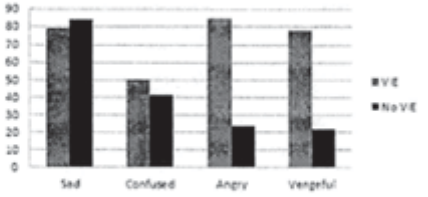


Figure 5: Response to "How well does the following word describe how you feel about the murder of the police officer".



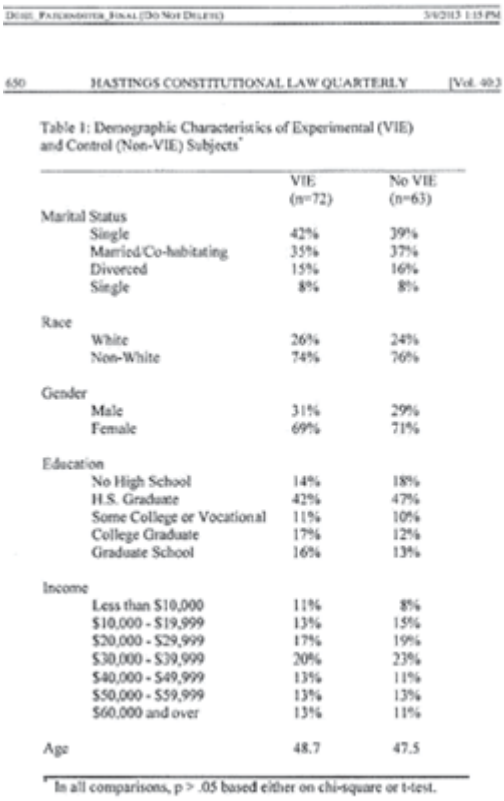


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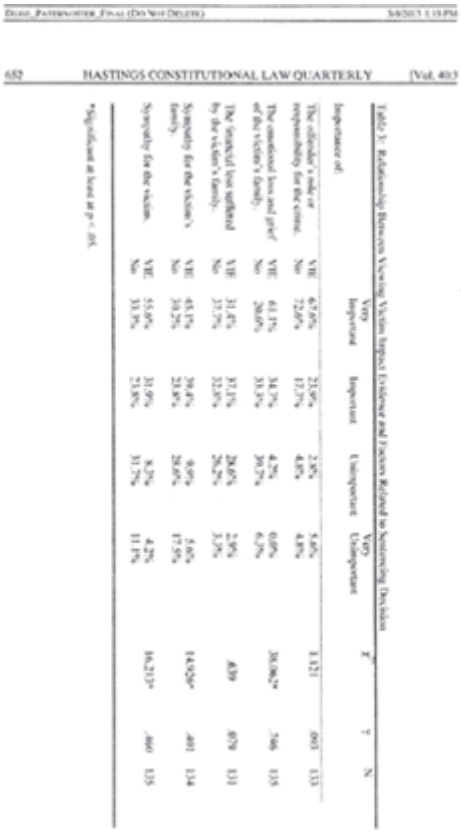
Table 1: Demographic Characteristics of Experimental (VIE) and Control (Non-VIE) Subjects*

	VIE (n=72)	No VIE (n=63)
Marital Status		
Single	42%	39%
Married/Co-habitating	35%	37%
Divorced	15%	16%
Single	8%	8%
Race		
White	26%	24%
Non-White	74%	76%
Gender		
Male	31%	29%
Female	69%	71%
Education		
No High School	14%	18%
H.S. Graduate	42%	47%
Some College or Vocational	11%	10%
College Graduate	17%	12%
Graduate School	16%	13%
Income		
Less than $10,000	11%	8%
$10,000 - $19,999	13%	15%
$20,000 - $29,999	17%	19%
$30,000 - $39,999	20%	23%
$40,000 - $49,999	13%	11%
$50,000 - $59,999	13%	13%
$60,000 and over	13%	11%
Age	48.7	47.5

* In all comparisons, p > .05 based either on chi-square or t-test.



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Spring 2013] VICTIM IMPACT EVIDENCE AND DEATH SENTENCING 651

D-166 Exh. B

Restoration, Retribution, or Revenge? Time Shifting Victim Impact Statements in American Judicial Process

By Tracy Hresko Pearl

FIU Legal Studies Research Paper Series

Research Paper No. 13-15

August 2013

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Courts currently permit victims to offer victim impact statement in criminal proceedings in all 50 states and federal jurisdictions. However, victim impact statements introduce serious constitutional problems into criminal cases by (1) creating inconsistencies in sentencing, (2) injecting bias and prejudice into formal courtroom proceedings, (3) giving judges and prosecutors an opportunity to reject testimony that might sway jurors toward more lenient punishments, and (4) leaving defendants with little opportunity to mitigate their impact on decision-makers. Scholars, therefore, have resoundingly called for the exclusion ***[*111]*** *of victim impact statements from criminal proceedings in the United States. In this article, I take a decidedly different position and argue instead that victim impact statements are, in fact, salvageable. Specifically, I look to lessons from the restorative justice movement and propose a solution that relies on time shifting victim impact statements to the close of criminal proceedings. By removing victim impact statements from trials and sentencing and requiring that they be offered afterwards, their constitutional deficiencies can be virtually eliminated and their numerous benefits preserved.*

As a result of the victories achieved by the Victims' Rights Movement in the 1980s and 90s, virtually every jurisdiction in the United States currently allows victims to offer impact statements during criminal proceedings, usually during sentencing. [1] These statements typically describe the victim's pain and suffering and articulate how the offender or the relevant crime has affected the victim's life. [2] Victims who choose to make impact statements frequently report that the act of offering these statements provides them with a sense of closure, makes them feel valued as individuals, and increases **[*112]** their satisfaction with the criminal justice system. [3]

In spite of these benefits, however, the use of victim impact statements in the American judicial system raises a number of troubling constitutional issues. [4] Indeed, studies have consistently shown that such statements introduce inconsistencies, bias, and prejudice into trials, undermining both the Fifth and Eighth Amendment rights of defendants. [5]As a result, legal scholars who have examined these issues have resoundingly called for the expulsion of victim impact statements from the American criminal justice system. [6]

This article examines whether **[*113]** the use of victim impact statements in American judicial process is salvageable: whether, when, and where such statements might find an appropriate, workable, and constitutional role in our criminal justice system. Part I summarizes the legal history of victim impact statements. Part II explains why, from a retributive justice perspective, victim impact statements are viewed as a useful component of sentencing decisions. Part III discusses the numerous benefits that victim impact statements provide to victims of crime. In Part IV, the numerous constitutional issues with victim impact statements will be identified and analyzed. There, I conclude that these issues are both legitimate and serious enough to warrant the exclusion of victim impact statements from criminal proceedings, at least as they are currently utilized. In Part V, however, I explore whether victim impact statements are salvageable in any way: whether there is a way to preserve their numerous benefits while simultaneously eliminating their constitutional deficiencies. In that section, I turn to the lessons of the restorative justice movement in proposing that “time shifting” victim impact statements-moving them out of **[*114]** formal criminal proceedings and to some time period after both guilt or innocence and sentencing have be determined-may offer the best solution.

I. An Overview of Victim Impact Statements

Victim impact statements are testimonials given by individuals who have been affected by a crime or other traumatic event. [7] They may be offered in either oral or

[1] *See, e.g.,* Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements,* 37 S. CAL. INTERDISC. L.J. 17, 18 (2000); Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy,* 10 PSYCHOL. PUB. POL'Y & L. 492, 492 (2004).

[2] *See, e.g.,* Trey Hill, *Victim Impact Statements: A Modified Perspective,* 29 LAW & PSYCHOL. REV. 211, 212 (2005); Susan Ann Cornille, *Retribution's “Harm “ Component and the Victim Impact Statement: Finding a Workable Model,* 18 DAYTON L. REV. 389, 393-95 (1993).

[3] *See infra* notes 55-90 and accompanying text.

[4] *See* infra notes 93-144 and accompanying text.

[5] *See id.*

[6] *See infra* 145-147 and accompanying text.

[7] *See, e.g.,* Catherine Guastello, *Victim Impact Statements: Institutionalized Revenge,* ***[*115]*** 37 ARIZ. ST. L.J. 1321, 1321 (2005); Hill, *supra* note 2, at 212.

written form, and generally describe the "physical, emotional, psychological, or financial" impacts of such events on the victim or the victim's family. [8] Victim impact statements also usually provide several additional types of information including: (1) the circumstances surrounding the relevant crime or traumatic event, (2) the "identity and characteristics of the victim," and (3) the victim's personal opinion of the person(s) who inflicted the harm on him or her. [9] Victim impact statements are distinctly different from formal courtroom testimony offered during trial in that they are largely unconstrained by either state or federal rules of evidence or other procedural limitations. [10] As one scholar notes in regards to victim impact statements in capital cases:

In the vast majority of jurisdictions, the prosecution enjoys virtual free reign over the method by which impact evidence is conveyed. Indeed, not all jurisdictions require that capital defendants be provided advance notice of the content, form, or extent of impact evidence the prosecution intends to proffer, or otherwise require that impact evidence be subject to advance in-camera judicial review. Videotape presentations, often quite lengthy and sophisticated in form, are also commonly used, and the courts regularly admit photos to convey various aspects of the victim's "uniqueness." Less technological but no less compelling methods have also met with approval, such as in a recent Missouri case where the mother and sister of the victim conveyed their emotional loss by means of pictures, letters, stories, diary entries, and a poem, and another Missouri case where the State used several "handcrafted items" made by the victim. [11]

In the United States, victim impact statements are utilized in both civil and criminal proceedings, though they are significantly more common in the criminal context. [12] In civil cases, victim impact statements may be read or otherwise admitted into the record to assist the judge or jury in determining the amount of damages to award. [13] In criminal cases, victim impact statements are often "presented to jurors, judges, or parole officers" during the sentencing phase of a trial to assist those parties in determining the length of sentence a defendant should receive or, in the case of parole hearings, whether a convicted criminal should be released from prison. [14] Even in murder cases, where the victim of the crime is, by definition, deceased, surviving family members often present victim impact statements describing the life of the victim and the effect of the murder on the victim's family. [15] Because victim impact statements are more common in criminal proceedings, where, as I will discuss, their constitutional deficiencies are more significant, this article will focus on their use in that context.

A. History

The use of victim impact statements in American judicial process was a byproduct of the victims' rights movement that arose in the 1940s and intensified in the 1970s. [16] This movement was fostered by concerns that victims were alienated from and even mistreated by the criminal justice system. [17]

Supporters contended that judicial process in America

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[8] Hill, *supra* note 2, at 212.

[9] Cornille, *supra* note 2, at 393-95.

[10] *See* Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment,* 87 IND. L.J. 1247, 1259 (2012).

[11] Wayne A. Logan, *Through the Past Darkly: A Survey* ***[*116]*** *of the Uses and Abuses of Victim Impact Evidence in Capital Trials,* 41 ARIZ. L. REV. 143, 152-53 (1999) (citations omitted).

[12] *See, e.g.,* Hill, *supra* note 2, at 212; Carrie L. Mulholland, *Sentencing Criminals: The Constitutionality of Victim Impact Statements,* 37 MO. L. REV. 731, 731 (1995); Myers & Greene, *supra* note 1, at 492.

[13] Hill, *supra* note 2, at 212.

[14] *Id.;* Myers & Greene, *supra* note 1, at 492.

[15] Mulholland, *supra* note 12, at 731.

[16] *See* Elizabeth Beck, Brenda Sims Blackwell, Pamela Blume Leonard & Michael Mears, *Inside and Outside the Courtroom: Seeking Sanctuary: Interviews with Family Members of Capital Defendants,* 88 CORNELL L. REV. 382, 387 (2003); Myers & Greene, *supra* note 1 at 493.

[17] *See* Beck, *supra* note 16, at 387; Mulholland, *supra* note 12, at 734. Some scholars have also posited that secondary factors such as "prosecutors' beliefs about the benefits of cooperation from victims in securing convictions, and politicians' desires to portray themselves as tough on criminal and sympathetic toward victims" contributed to the strength and success of the victims' rights movement. Myers ***[*118]*** & Greene, *supra* note 1, at 493.

"was entirely unsympathetic to victims by denying them a formal role in the judicial system, exploiting them to prosecute the criminal, and failing to provide rehabilitation or assistance after sentencing of the criminal." [18] They focused, therefore, on attaining more access to and more rights within the judicial system for victims. [19]

The victims' rights movement attained several major victories in the 1980s during President Ronald Reagan's first term in office. [20] In April 1981, President Reagan launched "National Crime Victims Rights Week," marking "the first time a government entity associated the term 'rights' with crime victims." [21] In 1982, Congress enacted the Victim and Witness Protection Act [22] which gave victims more rights and protections in the criminal justice system. [23] Arguably the biggest victory for the movement, however, was won in 1990 with the Victims Rights and Restitution Act, otherwise known as the "Victim's Bill of Rights." [24] This law gave victims a number of rights including the right to be present at court proceedings and the right to be treated **[*119]** with "compassion, respect and dignity." [25]

Around the same time, states began to pass similar laws guaranteeing rights to victims. [26] It was in these state statutes that the use of victim impact statements during criminal proceedings was officially sanctioned for the first time. [27] Prior to the passing of such legislation, "no evidence regarding the victim (other than details relating to the crime) had been permitted" in trials, because criminal process was viewed solely as an "adversarial process between the defendant and the state." [28]

B. State Use of Victim Impact Statements

Today, "the basic elements of victim impact statements … now play some role in the criminal codes of all fifty states and **[*120]** in federal legislation." [29] The extent and nature of their use, however, varies from state to state. [30] In Iowa, for instance, victim impact statements are only prepared upon the issuance of an order by the trial court. [31] In New Jersey, victims may submit statements on their own, but must exclude information that may be emotionally biased. [32] In comparison, the statute permitting the use of victim impact statements during trial in Nebraska gives victims much more leeway in composing their statements, [33] as does the Delaware statute, which requires a victim's statement to be a part of the presentence report. [34]

At a base level, however, the fundamental elements of victim impact statements remain virtually the same throughout the entire United States. [35] Furthermore, despite these state-to-state variations, victim impact statements are also utilized in largely the same way everywhere: at some point during trial or sentencing to assist judges, juries, or probation officers in determining

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[18] Mulholland, *supra* note 12, at 734.

[19] Hill, *supra* note 2, at 211.

[20] Beck, *supra* note 16, at 388-89.

[21] *Id.*

[22] Victim and Witness Protection Act of 1982, *18 U.S.C. §§ 3663-3664* (formerly codified at 18 U.S.C. §§ 3579-3580 (1988)).

[23] Beth E. Sullivan, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings From Passion and Prejudice, 25 FORDHAM URB. L.J. 601, 612 (1998)*.

[24] *See 42 U.S.C. § 10606(b) (1990)*, repealed by Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004).

[25] *Id. § 10606(b)(1)*, *§ 10606 (b)(5)*.

[26] *See infra notes* 31-40.

[27] *See, e.g.,* Joh, *supra* note 1, at 17, 18; Myers & Greene, *supra* note 1, at 492.

[28] Joh, *supra* note 1, at 21.

[29] Id. at 18.

[30] Sullivan, *supra* note 23, at 614.

[31] *IOWA CODE ANN. § 901.3* (West 2005).

[32] *State v. Muhammad, 678 A.2d 164, 177 (N.J. 1996)*, interpreting *N.J. STAT. § 52:4B-34* (1985).

[33] ***NEB. REV. STAT. § 29-2261*** (1985). Presentence reports must contain "any written statements submitted to the county attorney by a victim." *Id.*

[34] *DEL. CODE. ANN. tit. 11, 4331(d)-(g)* (1987).

[35] Joh, *supra* note 1, at 18.

how the defendant should **[*121]** be punished. [36] These underlying similarities make it possible to draw broad conclusions about the benefits and drawbacks of the use of victim impact statements in American criminal judicial process. [37]

II. Victim Impact Statements in a Retributive System of Justice

Retribution is commonly cited as the current overarching philosophy of the American criminal justice system. [38] This theory of crime and punishment replaced the rehabilitative model of the same that had been popular in the United States during the 1960s and 1970s. [39] Whereas the rehabilitative model emphasized the importance of individualized treatment of offenders in attempting to reduce the likelihood of recidivism, the retributive, or "just desserts," model focuses on the moral imperative of fair punishment. [40] The retributive model of criminal justice has two distinct philosophical underpinnings. [41]

First, the retributive model of criminal justice highlights moral culpability as the justification for punishment. [42] The focus of trials conducted under this model is on determining the extent to which a defendant is blameworthy for the crime with which he or she is charged. [43] Thus, if the trier of a case finds both that (1) an offender's harmful act was "truly of his own volition," and (2) that there are no extenuating circumstances which might warrant relieving the offender of moral responsibility for his act, the retributive model dictates that the offender should be punished. [44]

Second, the retributive model of criminal justice emphasizes that a defendant's punishment must be proportional to the harm that he or she inflicted. [45] In determining a defendant's sentence in a particular case, "a retributivist examines the severity of the crime committed and sets the appropriate punishment in relation to the severity of the crime." [46] This second underpinning of the retributive model works hand in hand with the first: punishment **[*123]** must be proportional to the specific harm caused by the defendant, an assessment of which requires an examination of the defendant's moral responsibility for that act. [47]

A. Use of Victim Impact Statements in a Retributive System of Justice

In a retributive system of criminal justice, "victim impact statements are relevant because they provide the sentencer with an assessment of the harm component" of the defendant's acts. [48] Indeed, because retributivists need to determine the extent of the harm caused by a defendant in order to determine how much punishment he or she should receive, statements by victims discussing how a defendant's actions have impacted their lives can be extremely helpful in making that calculation. [49] As one proponent of victim impact statements notes:

Victim impact statements reveal information about the crime-and particularly about the harm of a crime-which makes them quite relevant to a core purpose of sentencing: ensuring that the punishment fits the crime. Proper punishment cannot be meted out unless **[*124]** judges and juries know the dimensions of the crime and the harm it has caused. Victim impact statements educate them about these salient facts so that they can impose an appropriate sentence. [50]

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[36] *See* Myers & Greene, *supra* note 1, at 492.

[37] *See infra* notes 55-147 and accompanying text.

[38] *See, e.g., Enmund v. Fla., 458 U.S. 782, 801 (1982)*; Cornille, *supra* note 2, at 389; Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals,* 39 BRIT. J. CRIMINOLOGY 216, 217 (1999).

[39] Erez & Rogers, **[*122]** *supra* note 38, at 217.

[40] *See id.;* Guastello, *supra* note 7, at 1329.

[41] *See infra* notes 42-47 and accompanying text.

[42] Guastello, *supra* note 7, at 1336.

[43] Cornille, *supra* note 2, at 400.

[44] *Id.*

[45] Cornille, *supra* note 2, at 400; Guastello, *supra* note 7, at 1332.

[46] Cornille, *supra* note 2, at 400.

[47] *See id.* at 398-400; Guastello, *supra* note 7, at 1331-32.

[48] Cornille, *supra* note 2, at 401.

[49] *Id*. at 389-90.

[50] Paul G. Cassell, *In Defense of Victim Impact Statements, 6 OHIO ST. J. CRIM. L. 611, 632 (2009)*.

Jury instructions often refer to this particular purpose of victim statements. [51] In Oklahoma, for instance, jury instructions inform jurors that "[the victim impact statement] is simply another method of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment." [52] Similarly, in Tennessee, jurors in murder cases are told, "[t]he prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. You may consider this evidence in determining an appropriate punishment." [53] In short, therefore, the use of victim impact statements in a retributive system of justice seems "logical and warranted" in assessing the seriousness of the harm caused by the defendant, and this is their stated purpose in **[*125]** courts throughout the United States. [54]

III. The Benefits of Victim Impact Statements

Proponents of victim impact statements point to the numerous benefits that they provide to victims and to the criminal justice system. [55] Such benefits, they assert, extend beyond assisting judges and juries in assessing the harm caused by defendants. [56] They also include giving victims a greater role in the criminal justice system, providing victims with a sense of closure, enhancing the fairness of trials, and heightening victim satisfaction with the criminal justice system. [57] An examination of each of these touted benefits demonstrates why the use of victim impact statements has broad-based support throughout the United States.

A. A Formal Role for Victims

First, providing victims with an opportunity to offer impact statements gives them a formal **[*126]** role in the criminal justice system. [58] Indeed, as noted above, the traditional adversarial system of justice-such as the one we have in the United States-does not conceive of a role for victims other than possibly providing evidence for the prosecution if called to do so. [59] The prosecutor in such a system only indirectly represents victims' interests; their main responsibility is to represent the interests of the state. [60] This distance between prosecutors and victims has the capacity to make victims feel ignored, "thereby victimizing them twice": once during the commission of the crime and once more during the trial of the offender. [61] Giving victims an opportunity to make a victim impact statement, therefore, gives them a more proactive role in the criminal justice system, reducing the chances that they will feel overlooked or ignored. [62] As one victim, the mother of a murdered woman, remarked, "[Not being allowed to make a victim statement] was the most crushing feeling in the world. It was feeling like a secondhand citizen, like a piece of evidence." [63]

B. Psychological Benefits

Second, many scholars assert that delivering victim impact statements benefits victims psychologically, aiding them in overcoming the effects of the relevant crime in their lives. [64] They note that such statements

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[51] *See infra* notes 52-53 and accompanying text.

[52] *Cargle v. State, 909 P.2d 806, 828-29 (Okla. Grim. App. 1995)*.

[53] *State v. Nesbit, 978 S.W.2d 872, 892 (Tenn. 1998)*.

[54] Erez & Rogers, *supra* note 38, at 217; *see also Nesbit, 978 S.W.2d at 892*; *Cargle, 909 P.2d at 828-29*.

[55] *See, e.g.,* Guastello, *supra* note 7, at 1321; Myers & Greene, *supra* note 1, at 493; Sullivan, *supra* note 23, at 623.

[56] *See, e.g.,* Guastello, *supra* note 7, at 1321; Myers & Greene, *supra* note 1, at 493; Sullivan, *supra* note 23, at 623.

[57] *See infra* notes 58-90 and accompanying text.

[58] *See* Guastello, *supra* note 7, at 1321; Joh, *supra* note 1, at 21.

[59] Joh, *supra* note 1, at 21.

[60] *Id.*

[61] Sullivan, *supra* note 23, at 610.

[62] Guastello, *supra* ***[*127]*** note 7, at 1321.

[63] Joh, *supra* note 1, at 17 (quoting Nightline: Victim Impact Statements (ABC television broadcast, June 10, 1991)).

[64] *See, e.g.,* Bruce A. Arrigo & Christopher R. Williams, *Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing,* 49 CRIME &DELINQ. 603, 618-19 (2003); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements, 63 U. CHI. L. REV. 361, 383-84 (1996)*; Myers & Greene,

introduce a “narrative of authentic pain, individuality, and victimhood” [65] into trials, giving victims “a means of coping, closure, and recovery.” [66] For many scholars, this is one of the most important reasons to permit victims to give such statements during trial. [67]

Moreover, these psychological benefits are seemingly unique to victim impact statements, even where a victim has the opportunity to give formal testimony during trial, as well. Professors **[*128]** Edna Erez and Linda Rogers note that formal trial testimony is of a different nature than a victim impact statement because it involves a “sanitized" retelling of the crime and its aftermath, [68] a retelling constrained by the legal rules of evidence that dictate that such testimony should be relevant, unbiased, and unemotional. [69] Such testimony, they add, is subject to interruption from attorneys' objections, follow-up questions, and clarifications. [70] Accordingly, when giving courtroom testimony, victims may not be able to provide an unhampered, organic narrative of their experience, one with all of the metaphors, symbolism and emotion that naturally occur in human expression. [71] This, in turn, can greatly constrain and interfere with a victim's ability to convey what they wish to convey, flattening their stories and reducing their poignancy and power. [72] Victim impact statements, in this view, recover what is lost during trial testimony, allowing victims to express what they wish to express about their experiences in an uninhibited, unconstrained way. [73]

C. Fairness

Third, permitting victim impact statements during trial or sentencing “creates a sense of fairness” by recognizing the existence or status of victims in an otherwise defendant-focused system. [74] Indeed, victims' rights advocates argue that such statements are “needed to prevent [trials] from being weighted too heavily in the defendant's favor,” [75] and to remind “judges, juries and prosecutors that behind the ‘state’ is real person with an interest in how the case is resolved.” [76] This seems to be a prevailing idea in many states. [77] Jurors in capital cases in Oklahoma, for instance, are instructed that victim impact evidence “is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victim is an individual whose death may represent a unique loss to society and **[*130]** the family.” [78]

This theory seems to be realized in practice. [79] Professors Erez and Rogers interviewed various legal professionals about the effects of victim impact statements. [80] They found that “judges who were less experienced, commented on how much they learned from reading impact statements about victims' reactions, feelings and harm.” [81] One magistrate, for example, stated: “If it was not for the [victim impact statement] I would have thought [the victim] could just take a shower and get the whole thing behind him. The [victim impact statement] makes us, in individual cases, more educated.” [82] Victim impact statements, therefore, “grant victims a new voice in the criminal justice system,” and have the capacity to remind judges and juries that there is an individual other than the defendant

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supra note 1, at 493.

[65] Joh, *supra* note 1, at 22.

[66] Sullivan, *supra* note 23, at 623.

[67] See id. at 611.

[68] Erez & Rogers, *supra* note 38, at 228.

[69] See, e.g., *FED. R. EVID. 104*, *401*, *402*, *403*, *408*; Bandes, *supra* note 64, at 384.

[70] *See* Bandes, *supra* note 64, at 384.

[71] *See id.* at 383-84; Joh, *supra* **[*129]** note 1, at 29. As Professor Bandes notes, “We make sense of the world by ordering it into metaphors, and ultimately into narratives with familiar structures and conventions-plot, beginning and end, major and minor characters, heroes and villains, motives, a moral.” Bandes, *supra* note 64, at 383.

[72] Erez & Rogers, *supra* note 38, at 228.

[73] *See* Joh, *supra* note 1, at 21-23.

[74] Mulholland, *supra* note 12, at 731; *see also* Erez & Rogers, *supra* note 38, at 218.

[75] Hill, *supra* note 2, at 215.

[76] Erez & Rogers, *supra* note 38, at 218.

[77] *Nesbit, 978 S.W.2d at 891*; *Cargle, 909 P.2d at 828*.

[78] *Cargle, 909 P.2d at 828*.

[79] *See infra* notes 80-83 and accompanying text.

[80] Erez & Rogers, *supra* note 38, at 225.

[81] *See id.*

[82] *Id.*

with a stake in the outcome. [83]

D. Increased Satisfaction With the Criminal Justice System

Fourth, strong evidence suggests that victims **[*131]** who are given an opportunity to present impact statements experience greater levels of satisfaction with the criminal justice system than those who are not given such an opportunity. [84] Given the other notable benefits of victim impact statements—providing a more distinct role for victims in the justice system, giving judges and juries a clearer picture of the individuals affected by crime, and affording victims an opportunity to describe their experience and perhaps attain some level of closure—this is not surprising. [85] Indeed, if victims feel like "secondhand citizens" and "pieces of evidence" when they are not given the opportunity to speak freely and openly during criminal proceedings, it makes sense that these feelings would be ameliorated by the chance to offer a victim impact statement. [86]

In short, therefore, victim impact statements offer a wealth of benefits to both victims as well as judges, juries and prosecutors. [87] Such benefits are unique to victim impact statements, as the evidence suggests that victims do not derive the same benefits from giving formal courtroom testimony, which is restrained by the Federal Rules of Evidence, other procedural restrictions, and the strategic needs of prosecutors. [88] At a minimum, therefore, victim impact statements arguably afford victims the dignity and respect that they deserve. [89] At best, they serve an important role in both the recovery process of victims, providing closure and relief by providing a space to speak expressively about their experiences, and in enhancing the understanding of judges and juries of the nature of the crime at issue. [90]

IV. The Problems With Victim Impact Statements

Despite the benefits of victim impact statements, **[*133]** there are a number of major problems associated with their use in a retributive system of justice such as ours. [91] Because such statements are traditionally offered during formal criminal proceedings, there are serious due process, Eighth Amendment, and relevance issues that must be considered before one can draw any broad-based conclusions about their value in American judicial process. [92] The following section will address each of these major problems in turn.

A. Inconsistency

To start, many scholars argue that "irrelevant fortuities such as the social position, articulateness, and race" of victims and their families lead to inconsistencies and arbitrariness in sentencing. [93] They note, for instance, that some victims are better than others at expressing the pain and suffering that they have experienced. [94] These more powerful statements, in turn, have a greater effect on judge and juries, leading to harsher sentences and penalties than might otherwise be imposed in trials with less powerful victim impact statements or no impact

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[83] *Sullivan, supra* note 23, at 623.

[84] *See, e.g.,* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts,* 25 CRIME & JUST. 1, 10 (1999); Myers & Greene, *supra* note 1, at 493; Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls,* 89 MARQ. L. REV. 251, 273-75 (2005).

[85] *See supra* notes 58-86 and accompanying text.

[86] Joh, *supra* note 1, at 17 (quoting Nightline: **[*132]** Victim Impact Statements (ABC television broadcast, June 10, 1991)); *see also* Erez & Rogers, *supra* note 38, at 218.

[87] *See infra* notes 58-86 and accompanying text.

[88] *See* Bandes, *supra* note 64, at 384; Erez & Rogers, *supra* note 38, at 228.

[89] Erez & Rogers, *supra* note 38, at 218.

[90] Sullivan, *supra* note 23, at 623.

[91] *See infra* notes 93-144 and accompanying text.

[92] *See* ***U.S. CONST. amends. V***, ***VIII***; *see also infra* notes 93-144 and accompanying text.

[93] Bandes, *supra* note 64, at 398; *see* also Jeremy Blumenthal, *The Admissibility of Victim Impact Statements at Capital Sentencing: Traditional and Nontraditional Perspectives,* 50 DRAKE L. REV. 67 (2001); Hill, supra note 2, at 217; Christa Obold-Eshleman, *Victims' Rights and the Danger of Domestication of the Restorative Justice Paradigm,* 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 596 (2004).

[94] Guastello, *supra* note 7, at 1331.

statements at all. [95] Justice Powell voiced this concern in *Booth* v. *Maryland,* ***[*134]*** which assessed the constitutionality of victim impact statements in capital cases:

As evidenced by the full text of the [victim impact statement] in this case … the family members were articulate and persuasive in expressing their grief and the extent of their loss. But in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe. The fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information. [96]

Interestingly, largely in response to this particular concern, the Court concluded in *Booth* that the Eighth Amendment concerns raised by victim statements were so severe as to require their **[*135]** exclusion from capital cases. [97] However, the Court reversed itself four years later in *Payne v. Tennessee,* reasoning that the value of victim impact statements in assisting judges and juries determine fair sentences outweighed their constitutional problems. [98] There, Chief Justice Rehnquist, writing for the majority, noted that victim impact statements were an important means of informing the sentencer about the harm inflicted by the defendant on the victim, the assessment of which had "long been an important factor in determining the appropriate punishment." [99]

Studies comparing trials and sentencings with and without victim impact statements demonstrate that concerns about consistency and arbitrariness in sentencing are legitimate. [100] In one study, for instance, participants were asked to read one of four trial summaries which varied in both the severity of the crime and the presence of a victim impact statement. [101] In all four of the summaries "the defendant was tried and convicted of first-degree murder" and the aggravating and mitigating circumstances were noted. [102] The authors found that when a victim statement was present, "51% of study participants voted for the death **[*136]** penalty, whereas only 20% did so when it was absent. The effect was more pronounced for study participants who were neutral toward or moderately in favor of the death penalty than for those who strongly favored it," suggesting that victim impact statements have the strongest effect on the decisionmakers most likely to be undecided on the imposition of a capital sentence. [103] In a similar study, a sample of college students watched videotaped trials that varied in the severity of the crime at issue and the presence or absence of a victim impact statement. [104] Of the students that voted to convict the defendant in the guilt phase of the trial, those who watched trials with victim impact statements were significantly more likely to render death penalty judgments (67%) than those who had not (30%). [105]

Even more striking evidence **[*137]** of the inconsistencies introduced by victim impact statements comes from a 1990 case out of the Florida state court system, *Campbell v. State.* [106] In *Campbell,* the defendant was accused of first-degree murder for killing a reverend and critically injuring his daughter, Sue Zann. [107] During Campbell's first trial, Zann offered a compelling victim impact statement in which she gave tearful, dramatic and "emotionally moving" testimony about what she had suffered through. [108] Largely as a result of such testimony, Campbell was found guilty and

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[95] Myers & Greene, *supra* note 1, at 498; Obold-Eshleman, *supra* note 93, at 596.

[96] *Booth v. Maryland, 482 U.S. 496, 505 (1987)*.

[97] Mat 501-02.

[98] *See Payne v. Tennessee, 501 US. 808, 818-30 (1991)*.

[99] *Id. at 808*.

[100] Myers & Greene, *supra* note 1, at 498.

[101] *Id.* (summarizing James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death,* 20 AM. J. CRIM. JUST. 1, 1-16 (1995)).

[102] *Id.*

[103] *Id.*

[104] Bryan Myers & Jack Arbuthnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing* Judgments of Mock Jurors, 29 J. OFFENDER REHABILITATION 95 (1999).

[105] *Id.*

[106] *See Campbell v. State, 571 So.2d 415 (Fla. 1990)*.

[107] *Id. at 416-18*.

[108] Sullivan, *supra* note 23, at 601 (quoting 48 Hours: My Father's Killer (CBS television broadcast Oct. 2, 1997)).

sentenced to death. [109] Subsequently, however, two courts reversed his death sentence for unrelated reasons. [110] At a third sentencing hearing over ten years later, Zann again took the stand to give a victim impact statement. [111] Over that time period, however, she had changed her opinions about the death penalty and become determined to save Campbell from a capital sentence. During her second impact statement, therefore, and in contrast to her first statement, she kept her testimony "as unsympathetic and undramatic as possible." [112] This time, the jury returned a sentence of life imprisonment, rather than death. [113] Instances such as these leave little doubt that victim **[*138]** impact statements can lead to gross disparities in sentencing.

B. Bias & Prejudice

Second, victim impact statements may introduce bias and prejudice into trials and sentencings. [114] Indeed, because such statements are often graphic and emotional, they have the capacity not only to evoke "sympathy, pity, and compassion for the victim," but also to direct "hatred, racial animus, vindictiveness, [and] undifferentiated vengeance" towards the defendant. [115] Such statements—which often employ terms such as "animal," "savage," and "cold-blooded" [116]-may also make it very difficult for judges and jurors to feel any sort of empathy for the defendant and may direct their attention away from any relevant mitigating circumstances that might persuade them to give a lesser sentence. [117]

The victim impact statements offered during the trial of Oklahoma City bomber Timothy McVeigh, highlight the tendencies of victim impact statements to introduce bias and prejudice into criminal proceedings. [118] A number of victims took the stand during the sentencing phase of the proceedings and offered incredibly poignant and powerful statements about their suffering. [119] Kathleen Treanor, for instance, took the stand and talked about losing her four-year-old daughter, Ashley, in the bombing:

> [She] told about kissing her … daughter Ashley goodbye and never seeing her again. After unspeakable days of waiting, Treanor recovered Ashley's body from the rubble, buried the little girl, and trudged on. Seven months later, someone called from the medical examiner's office. 'He said, "We have recovered a portion of Ashley's hand,'" Treanor testified in a trembling voice that rose as she fought to get through each sentence, '"and we wanted to know if you wanted that buried in the mass grave or if you would like to have it.' And I said, "Of course, I want it. It's a part of her.'" That was about all she could manage. Treanor dissolved, her body **[*140]** racked by sobs, and almost everyone in the courtroom dissolved with her. [120]

One journalist who witnessed Treanor's victim impact statement later wrote that "at that moment in that room, it seemed inconceivable that the jury could do anything but sentence [McVeigh] to death.…" and there were even more victim impact statements to come. [121] The statements offered in the McVeigh case were so upsetting and so powerful, in fact, that "at least one newspaper offered to provide counseling for its reporters covering the case," and the prosecution eventually had to cut short its presentation because of the effect that it was having on both jurors and spectators. [122] As another journalist noted, "[the

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[109] Campbell, 571 So.2d at 417; Sullivan, *supra* note 23, at 601.

[110] *See* Campbell v. State, 679 So.2d 720 (Fla. 1996); Campbell, 571 So.2d at 420.

[111] Sullivan, *supra* note 23, at 601.

[112] *Id.* at 602 (quoting 48 Hours: My Father's Killer (CBS television broadcast Oct. 2, 1997)).

[113] *Id.* at 603.

[114] *See, e.g.,* Hill, *supra* note 2, at 216; Myers & Greene, *supra* note 1, at 493-94; Sullivan, *supra* note 23, at 603-04.

[115] Bandes, *supra* note 64, at 395.

[116] Myers & Greene, **[*139]** *supra* note 1, at 507-08.

[117] Bandes, *supra* note 64, at 377.

[118] *See infra* notes 119-123 and accompanying text.

[119] *See* Eric Pooley, et. al., *Death or Life? McVeigh Could Be The Best Argument For Executions, But His Case Highlights the Problems that Arise When Death Sentences are Churned Out in Huge Numbers,* Time Mag., June 16, 1997, at 31.

[120] *Id.*

[121] *Id.*

[122] Peter Gorner, *Empathy vs.* **[*141]** *Impartiality in the Courtroom; Victims Leave Lasting Impact on the System,* Chi.

prosecution] could see we were all physically and mentally exhausted. Every one of the jurors cried. Reporters found themselves hugging each other for solace, sobbing, saying they couldn't take it any more." [123]

While cases like this one may be unusual in their scope and horror, victim impact statements offered in smaller criminal cases can be just as compelling. [124] In *Payne v. Tennessee,* for instance, the mother and grandmother of two murder victims gave the following statement about the effect of the murders on her grandson:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, "Grandmama, do you miss my Lacie?" And I tell him "yes." He says, "I'm worried about my Lacie." [125]

Admission of "emotionally charged" statements like this one—statements likely to deeply affect a jury and garner both an outpouring of sympathy for the victim and hatred for the defendant — is clearly "inconsistent with the reasoned decision-making we require in capital cases," according to many scholars. [126] These scholars note that the information contained in such statements "may be so emotion-laden in its content that jurors may be persuaded more by how they **[*142]** feel about the testimony than by the facts of the case." [127] This seems particularly true in light of the available evidence about the inconsistencies in sentencing caused by the presence or absence of victim impact statements. [128]

C. Selective Admission

Third, the content of victim impact statements often dictates whether or not prosecutors will offer them and/or judges will **[*143]** admit them. [129] One study has shown, for instance, that "victim impact statements were more likely to be introduced in cases in which the prosecutor felt that there was some advantage to the prosecution in introducing them. Otherwise, legal professionals were likely to discourage victims from submitting an impact statement." This seems to be particularly true in cases where victim impact statements contain narratives about mercy, kindness, or forgiveness towards the defendant. [130] The Tenth Circuit, for example, in *Robison v. Maynard,* affirmed a state court's refusal to permit the family member of a murder victim to offer an impact statement in which she expressed her hope that the jury would *not* sentence the defendant to death. [131] The court reasoned that "the opinion of a relative of a victim is irrelevant to **[*144]** the jury's determination of whether the death penalty should be imposed." [132] This seemingly set up somewhat of a double standard in that circuit, as the Tenth Circuit subsequently upheld the admission of victim impact statements that contained requests that "justice be done" in a capital case. [133]

Trib., June 15, 1997, at 1.

[123] *Id.*

[124] *See infra* notes 125-26 and accompanying text.

[125] *Payne, 501 U.S. at 814-15*.

[126] *Booth, 482 U.S. at 508-09*; Myers & Greene, *supra* note 1, at 493-94.

[127] Myers & Greene, *supra* note 1, at 493-94. The prejudices and biases introduced by victim impact statements can work against *victims,* too. Studies have shown that "variations in the social value of the victim [has] an appreciable impact on… jurors' sentiments… [In one study], [m]ock jurors rated the survivors' suffering as greater when the victim was portrayed as more respectable (e.g., successful, civic minded, a loyal husband and devoted father, a professional photographer) than when the victim was portrayed as less respectable (e.g., a loner and divorced biker). Jurors' perceptions of harm were also influenced by the victim's social standing: the greater that standing, the more harm jurors perceived surviving relatives to have experienced." *Id. at 499-500*.

[128] *See supra* note 93-113 and accompanying text.

[129] *See* Blumenthal, *supra* note 93, at 80; Joh, *supra* note 1, at 28.

[130] Joh, *supra* note 1, at 28. Such statements have been referred to as "reverse" victim testimony because "while the witness intends to influence the jury, the testimony is the 'reverse' of encouraging the imposition of the death penalty." Adrienne N. Barnes, *Reverse Impact Testimony: A New and Improved Victim Impact Statement, 14 CAP. DEF. J. 245, 246 (2002)*

[131] *Robison v. Maynard, 943 F.2d 1216, 1216-17 (10th Cir. 1991)*, *rehearing denied, **502 U.S. 1050 (1992)***.

[132] *Id. at 1217*.

[133] *Turrentine v. Mullin, 390 F.3d 1181, 1200-01 (10th Cir. 2004)*. While, admittedly, at face value, requesting that "justice be done" is not identical to requesting that a jury impose the death penalty, in the context of a capital case, it seems to

The selective admission of victim impact statements in criminal proceedings throughout the United States further points to the unfairness and inconsistencies that such statements can produce. If only certain victims with certain points of view are allowed to make impact statements, such statements are no longer tools for recovery, closure, and balance, but blunt implements whose primary purpose is to inject particular conservative and punitive viewpoints into trials and sentencing, and at the expense of fairness and consistency. [134]

D. Irrefutability

Lastly, victim impact statements are largely irrefutable, which "present[s] a fundamental problem for legal discourse." [135] This is true for two reasons. First, "narratives of pain are resistant to verification, evaluation, and scrutiny" because each individual's experience of pain and suffering is unique. [136] This poses a major issue in criminal proceedings because victims may have various motives or incentives to lie about or exaggerate the extent of the harm that they have suffered—to garner more sympathy for themselves, to increase the likelihood that the defendant will be given a harsh sentence, etc.— and little reason to believe that they will get "caught" in their untruthfulness. [137]

Second, victim impact statements are largely irrefutable because "it is difficult to imagine what legal strategy could effectively counter not only a virtually unchallengeable story of pain but also one implicitly authorized by the state." [138] Indeed, it is tough to conceive of a way for a defense attorney to counter the power of a victim impact statement without seeming callous or unsympathetic. [139] Consider, for example, the following victim **[*146]** impact statement from a father whose little girl, Megan, had been murdered:

> We worry about the impact Megan's death has had on her brother and sister, and pray for their well-being every day … It has been necessary for Jeremy and Jessica to undergo therapy sessions to deal with the loss of their little sister, Megan … Jeremy still has nightmares and has been found screaming in his closet in the middle of the night. He always felt that he was her protector and now feels that he has let her down. [140]

This was a heartbreaking and powerful statement that likely had a strong impact on the jury, which ultimately decided to sentence the defendant to death. [141] There was very little way, however, for the defense to address this statement or mitigate its effect. What could the defendant's attorneys possibly have said in response to this narrative? "We don't believe Megan's family has suffered as extensively as the victim impact statement makes it seem"? "It is unreasonable for Jeremy to believe that he was Megan's protector"? "How do we **[*147]** really know those nightmares are about Megan's death"? "Jeremy and Jessica had preexisting mental problems that predisposed them to need therapy after an event like this"? Such arguments—even if they could be proven— seem cruel and heartless at best, and it seems extremely unlikely that a defense attorney with any degree of skill (or sense of compassion) would attempt to make them.

Thus, victim impact statements present a veritable "catch-22" for defendants and their attorneys: they are admissible during criminal proceedings, and yet they resist formal methods of verification, challenge, and scrutiny. [142] Any defense attorney that dares to attempt to subject the contents of a victim impact statement to such scrutiny, moreover, risks jeopardizing his client's case by appearing insensitive and tactless in the face of the victim's pain and suffering. [143] Such a situation burdens, therefore, a defendant's Fifth Amendment rights to a fair trial, one that must be marked by the presences of impartial decision-makers, unbiased evidence, and the opportunity to confront one's

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facetious to argue that a jury would not understand those words to be a request that the defendant to be sentenced to death.

[134] *See* Erez & Rogers, *supra* note 38, at 219. **[*145]**

[135] Joh, *supra* note 1, at 23.

[136] *Id.*

[137] Erez & Rogers, *supra* note 38, at 227.

[138] Joh, *supra* note 1, at 23-24.

[139] *See id.*

[140] Thomas Zolper, *Megan's Grieving Dad Tells Jury of Loss; Killer Voices Remorse in Appeal for Life,* The Record, June 19, 1997, at Al.

[141] *See id.*

[142] *See* Joh, *supra* note 1, at 23-25.

[143] *See id.* at 23-24.

accusers. [144]

In light of the wealth of serious problems associated with victim impact statements, **[*148]** one is right to question whether they can ever be fairly and constitutionally utilized in our current system of criminal justice. [145] Many have argued quite persuasively that they cannot. [146] The benefits of victim impact statements, however, are also undeniable. [147] As such, it is a useful endeavor to attempt to determine whether there is any way for victim impact statements to be retained in American judicial process in a manner that both benefits victims and protects the rights of defendants. The remaining portions of this article will attempt to do just that: construct a new and more workable framework for the use of victim impact statements in the United States.

V. Finding a Workable Framework for Victim Impact Statements

As discussed above, it seems clear that the rights of defendants are compromised, if not wholly undermined, when victim impact statements are admitted during criminal proceedings. [148] Consequently, if the **[*149]** protection of defendants' constitutional rights is to remain a primary concern of the American criminal justice system, it seems equally clear that the admission of victim impact statements during the formal phases of judicial process should not be permitted. [149] Most scholars end their analysis here, as "[s]upporters and detractors of victim impact statements tend to face off across a bright line that puts the rights of the defendant and those of the victim into competition with one another, with the vindication of the former … conceptualized as a curtailment of the latter, and vice versa." [150] There may be a role, however, for victim impact statements offered in a different context: one removed from trial and sentencing but part of judicial process nonetheless. [151] Here, lessons from the restorative justice movement may be instructive and helpful in conceiving of an alternative time and place for victim impact statements: one that both retains their benefits while minimizing the constitutional deficiencies they introduce into criminal proceedings. [152]

A. An Overview of the Restorative Justice Philosophy

The restorative justice philosophy is an alternative to the retributive philosophy that currently dominates the American system of criminal justice. [153] It is "grounded in values that promote both accountability and healing for all affected by crime." [154] Whereas retributivism focuses on the moral culpability of offenders and stresses the importance of punishment, restorative justice "denounces criminal behavior yet emphasizes the need to treat offenders with respect and to reintegrate them into the larger community in ways that can lead to lawful behavior." [155] Further, restorative justice takes a more "victim-centered" approach to crime, asking "Who has been hurt? What do they need? Whose obligations and responsibilities are these?" [156]

Restorative justice has three primary goals. [157] First, it seeks to provide for the needs of victims and their

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[144] *See* ***U.S. CONST. amend. V***.

[145] *See supra* notes 82-128 and accompanying text.

[146] *See, e.g.,* Guastello, *supra* note 7, at 1340; Joh, *supra* note 1, at 28; Mulholland, *supra* note 12, at 745-48; Myers & Greene, *supra* note 1, at 507-09; Sullivan, *supra* note 23, at 603-04.

[147] *See infra* notes 48-79 and accompanying text.

[148] *See infra* notes 82-128 and accompanying text.

[149] *See, e.g.,* Guastello, *supra* note 7, at 1340; Joh, *supra* note 1, at 28; Mulholland, *supra* note 12, at 745-48; Myers **[*150]** & Greene, *supra* note 1, at 507-09; Sullivan, *supra* note 23, at 603-04.

[150] *See* Sheley, *supra* note 10, at 1248.

[151] *See* Mulholland, *supra* note 12, at 748.

[152] *See, e.g.,* Obold-Eshleman, *supra* note 93, at 572-73; Umbreit, *supra* note 84, at 304.

[153] Obold-Eshleman, *supra* note 93, at 572-73.

[154] Umbreit, *supra* note 84, at 298.

[155] *Id.* at 256.

[156] Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative* ***[*151]*** *Justice,* 53 DRAKE L. REV. 667, 668 (2005).

[157] *See, e.g.,* Beck, *supra* note 16, at 390-91; Obold-Eshleman, *supra* note 93, at 572-73.

families. [158] Second, it seeks to make offenders accountable towards victims. [159] This is a different goal than that sought by the retributive system of justice, which "deals with guilt, punishment, deterrence, incapacitation, and/or rehabilitation of the offender by the state, but not primarily with repairing the harm to victims." [160] Third, restorative justice seeks to establish a system of criminal justice that involves victims, offenders and their communities working together to find closure and mutually agreeable solutions to the problems created by crimes. [161]

B. History and Present Use

The restorative justice philosophy dates back to earlier paradigms of judicial process, "not only in British and American history, but also in numerous indigenous cultures throughout the world." [162] It also has roots in principles of Judeo-Christian religion that emphasize crime not only as a form of harm against a specific individual but against **[*152]** families and communities, as well. [163] As Professor Mark Umbreit acknowledges in an article exploring the historical underpinnings of the philosophy, "[m]any biblical examples are found in both the Old and New Testaments setting forth the responsibility of offenders to directly repair the harm they cause to individuals, harm that has created a breach in the 'Shalom community.'" [164]

Today, restorative justice policies and programs exist in nearly ever state and "range from small and quite marginal programs in many communities to a growing number of state and county justice systems that are undergoing major systematic changes." [165] Successful restorative justice programs have also been implemented elsewhere in the world in countries such as in Canada, Australia, New Zealand, South Africa, South Korea, and Russia. [166]

C. Victim Impact Statements and Restorative Justice

In a restorative justice paradigm, victim impact statements are valuable not as tools of prosecutors in establishing the harm perpetrated by defendants, but as opportunities for: (1) victims to express to offenders and the community at large how crimes have affected them, (2) victims to engage with these **[*153]** parties in attempting find closure and relief, and (3) offenders to understand the impact that their actions have had on others. [167] What is important in this framework, therefore, is not *when* victim impact statements are given, but whether victims have the opportunity to present them at all. [168] In fact, most proponents of a restorative justice approach to crime would arguably be predisposed to argue that such statements should *not* be given at trial or during sentencing. [169] Rather, they would likely oppose their presence in such forums, arguing instead for them to be offered in a less highly charged, less structured environment. [170]

Additionally, in a restorative justice paradigm, it is important that the offender has an opportunity to make a statement in addition to the victim. [171] Restorative justice advocates believe that these opportunities increase the likelihood **[*154]** that victims will hear apologies and expressions of remorse from their offenders, aiding in both the recovery of the victim and the rehabilitation of the offender. [172] Such expressions of remorse are very difficult to attain in traditional criminal justice proceedings, where testimony on the part of offenders is often highly constrained and where

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[158] Beck, *supra* note 16, at 390.

[159] Obold-Eshleman, *supra* note 93, at 572.

[160] *Id.*

[161] *Id. at 572-73*.

[162] Umbreit, *supra* note 84, at 255.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 261

[166] *Id.*

[167] *See* Susan J. Szmania & Daniel E. Mangis, *Finding the Right Time and Place: A Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts, 89 MARQ. L. REV. 335, 337-38 (2005)*; Umbreit, *supra* note 84, at 304.

[168] *See* Szmania, *supra* note 167, at 335-38; Umbreit, *supra* note 83, at 304.

[169] *See* Szmania, *supra* note 167, at 338-41.

[170] *Id.*

[171] *Id.* at 337-38.

[172] *Id.*

apologies can have "damaging legal ramifications." [173]

Professors Susan J. Szmania and Daniel E. Mangis give a poignant example of an offender's statement in an article exploring such expressions in restorative justice contexts. [174] Here, a man convicted of killing a woman while driving under the influence of alcohol remarks:

I get so mad sometimes at the choices I made. I know in my heart that I'd never would have hurt anyone on purpose. God, I'd give anything to change what I did. I'm just sorry. God has brought me through, too. But when I look at y'all, I see so much goodness, and so much (offender pauses), she had so much potential. And I know that no matter how much I play "what-if' I can't change what I did. And I know there's been a lot of good has come out of it. I'm just sorry, [victim's name]. Part of **[*155]** me just wishes that you would just get mad and beat on me and uh. It's just so hard, you know, [sic] [175]

Both victim and offender participants in restorative justice programs where offenders have opportunities to make statements of remorse report high levels of satisfaction with the outcome of such proceedings. [176]

D. Proposals

In light of what we have learned in recent years from studies of restorative justice approaches to criminal justice, and particularly about victims' participation therein, I argue that it is not only possible, but beneficial, to use principles of the restorative justice movement to adapt the ways that victim impact statements are currently utilized in the American justice system. Such adaptations can both (a) preserve the primary benefits of victim impact statements while (b) largely eliminating the constitutional problems associated with their current use. I offer, therefore, the following four proposals:

First, crime victims should always be given an opportunity to offer victim impact statements in open court and in front of the judge, jury, and any public spectators who might be present. The benefits of victim impact statements **[*156]** in helping victims attain a sense of closure, increasing their rates of satisfaction with the criminal justice system, and establishing a sense of fairness in an otherwise defendant-focused system are undeniable and should not be ignored. [177] Offering such statements in a formal courtroom setting, moreover, arguably gives such statements gravitas and allows victims to participate "in the ritual of speaking in court." [178] Professor Mary Margaret Giannini has suggested that participation in this "ritual… dignif[ies] the victim's personal experience" [179] because the ritual is set "apart from the ordinary course of life, lift[ed] … from the realm of every practical affairs … surround[ed] … with an aura of enlarged importance" and set in "a time and space which is, if not quite sacred, at the very least emotionally charged." [180] By allowing victims to speak in such a setting, "his or her experiences … are honored." [181]

> Second, victim impact statements should be offered in open court but only *after* both the trial and sentencing of an offender have been completed. This "time shift" is necessary to ensure that the rights of the defendant are protected. As Professor Carrie Mulholland explains:

Although they are diametrically opposed, both defendants' and victims' rights can be safeguarded. If victim impact statements are read after the sentencing stage of the trial, both defendants' and victims' rights remain intact. Accordingly, the risk of arbitrary sentencing would be eliminated, and victims would still be a part of the criminal proceeding by having voiced their feelings to the defendant, the court and the public. [182]

While some victims' rights advocates might balk at this proposal, arguing that the opportunity to offer victim

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[173] Szmania, *supra* note 167, at 341-42.

[174] *Id.* at 352-53.

[175] *Id.*

[176] *See* Umbreit, *supra* note 84, at 274-75.

[177] *See supra* notes 48-79 and accompanying text. **[*157]**

[178] Mary Margaret Giannini, *Equal Rights for Equal Rites?': Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act,* 26 YALE L. & POL'Y REV. 431, 444 (2008)

[179] Mat 455.

[180] Id. at 450-51 (quoting Mark Cammack, *Evidence Rules and the Ritual Functions of Trials: "Saying Something of Something,"* 25 LOY. L.A. L. REV. 783, 789 (1992)).

[181] *Id.* at 484.

[182] Mulholland, *supra* note 12, at 748.

impact statements is meaningless if victims have no ability to influence either the determination of guilt or innocence or the length of the sentence imposed on the offender, [183] studies have consistently shown that "victims do not usually seek a decisive role in the outcome of their cases." [184] Rather, "[t]he chance to be heard at all is usually the crucial aspect for victims in achieving **[*158]** a sense of satisfaction with the justice system." [185] Indeed, a study conducted by E. Allan Lind found that perceptions of fairness were enhanced in individuals who were given an opportunity to speak *after* a decision had been made and were aware that they had no ability to influence the outcome of the relevant proceedings. [186] Similarly, more recent research "surveying actual victims about their subjective punishment goals identified public recognition of victim status as the most significant" and "confirmed that victims, by and large, are not interested in changing sentencing outcomes." [187] These findings are not surprising in light of what we have learned from the restorative justice movement, which has consistently emphasized the importance of giving "voice" to victims over giving victims the ability to impact on critical judicial decisions. [188]

A second criticism of the time shifting approach that I am proposing might come from retributivists concerned that the removal of victim impact statements from sentencing would deny judges and juries information needed to determine the appropriate amount of punishment to inflict on the defendant. As noted above, retributivists favor the use of victim impact statements in formal criminal proceedings because **[*160]** they believe that such statements "reveal information about the crime-and particularly about the harm of a crime-which makes them quite relevant to a core purpose of sentencing: ensuring that the punishment fits the crime." [189] However, moving victim impact statements to the close of formal criminal proceedings would not preclude prosecutors from offering victim testimony during sentencing and exploring the nature and impact of the relevant crime with victim witnesses. Reframing this testimony as formal courtroom testimony rather than a "victim impact statement," moreover, would likely mean that both procedural and evidentiary restraints would apply, minimizing the likelihood that such testimony could introduce constitutional deficiencies into the proceedings while preserving the benefits they offer to key decision-makers.

Time shifting victim impact statements away from formal criminal proceedings and to a time after all critical decisions have been made thus eliminates the constitutional problems associated with their use during trial and sentencing. [190] Because victims no longer have the ability to influence the outcome of either the guilt or innocence phase **[*161]** of the trial or the length or severity of any resulting sentence through their victim impact statements, there are no legal consequences if such statements introduce bias or prejudice or arouse feelings of hatred or racial animus in listeners. Time shifting victim impact statements also eliminates the potential they have to introduce arbitrariness and inconsistency into sentencing. [191]

Third, offenders should also be given the opportunity to offer statements after the completion of trial and sentencing. Such statements give offenders the chance to offer expressions of remorse, expressions that may go a long way towards giving both victims and offenders

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[183] *See, e.g.,* Cassell, *supra* note 50 at 644 (s"The victims would, no doubt, be quite frustrated at being diverted there-away from the criminal trial court that makes substantive sentencing decisions and, indeed, away from the defendant himself.").

[184] Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice,* 2003 UTAH L. REV. 15, 24 (2003); *see also* Edna Erez, **[*159]** *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings,* 40 CRIM. L. BULLETIN Art. 3 (2004); E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments,* 59 J. PERSONALITY & Soc. PSYCHOL. 952 (1990).

[185] Strang, *supra* note 183, at 24.

[186] Lind, *supra* note 184 at 952.

[187] Erez, *supra* note 184, at 3 (citing U. Orth, *Punishment Goals of Crime Victims,* 27 L. & HUM. BEHAV. 173 (2003)).

[188] *See, e.g.,* Stephan Landsman, *A Chance to Be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund,* 53 DEPAUL L. REV. 393, 409-10 (2003); *See* Szmania, *supra* note 167, at 335-38; Umbreit, *supra* note 83, at 304.

[189] Cassell, *supra* note 50, at 632.

[190] *See supra* notes 48-79 and accompanying text.

[191] *See supra* notes 48-79 and accompanying text.

closure and a sense of peace. [192] This type of "judicially supervised communication between victims and offenders," [193] is viewed by restorative justice proponents as both as "an important aid to victim recovery" and a "linchpin" of any hearing governed by restorative justice principles. [194]

Opponents of this proposal may object on the grounds that remorse or an apology are not guaranteed in an offender's statement as "[s]ome offenders will remain defiant" and "[s]ome [will] suffer from psychopathy, which impairs the capacity to empathize and so feel remorse." [195] Victims, in this view, are at risk of secondary victimization by being exposed to offender statements lacking in empathy, accountability, or apology. [196] These are certainly legitimate concerns. However, restorative justice proponents rightly point out that there are two ways to minimize the likelihood of such secondary victimization. First, victims can be given the option of "witnessing the offender's allocution … but not be required to do so." [197] Second, "proper preparation of the victim" for hearing the offender's statement, "including the possibilities of diverging stories" or of a lack of remorse, "may further preempt secondary victimization." [198]

Fourth, both victim impact and offender statements should not be reviewable on appeal. Letting **[*163]** appellate courts review either type of statement raises precisely the same kinds of constitutional issues that are present when such statements are offered during trial or sentencing by essentially drawing these statements back into the scope of the formal criminal proceedings and counteracting the benefits of time shifting them to a moment without potential legal ramifications. Moreover, if victims or offenders know that their statements might be reviewed on appeal, they might have very reasonable hesitations to express themselves freely and honestly out of fear of the possible consequences. Such inhibition would undermine the value of offering such statements to begin with, as discussed more extensively above. [199]

VI. Conclusion

Though the plight of victims has been historically ignored in the American judicial system, the victims' rights movement that arose in the latter quarter of the twentieth century did much to remedy that situation. The introduction of victim impact statements into trials and sentencings was a particularly notable outcome of this movement. Offering impact statements gives victims a valuable opportunity **[*164]** to express what they have experienced and how a crime has impacted their lives and the lives of family members. It also gives victims a distinct role in judicial process and increases their satisfaction with the criminal justice system. Most importantly, giving victims the opportunity to provide impact statements may promote their recovery and give them an important sense of closure.

The introduction of victim impact statements during formal criminal proceedings, however, raises major constitutional concerns. Strong evidence suggests that the introduction of such testimony causes inconsistencies to arise in sentencing, as the impact statements of certain victims in certain trials may be more powerful and influential than their counterparts in others. Furthermore, the deeply emotional content of such impact statements may introduce an unfair level of bias and prejudice into a trial and be extremely difficult for a defendant to mitigate or negate. Lastly, evidence suggests that prosecutors often only introduce victim impact statements that call for vengeance or justice and refuse to admit those expressing forgiveness or requesting mercy for the defendant. This creates an unfair imbalance **[*165]** that raises serious constitutional issues.

The restorative justice paradigm may offer a workable framework for the inclusion of victim impact statements in American judicial process. By focusing on the importance of victim-offender expression and dialogue,

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[192] *See supra* notes 155-57 and accompanying text.

[193] Erez, *supra* note 184, at 3

[194] C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance* **[*162]** *of Responsibility in Cases of Intimate Partner Violence, 35 HARV. J. L. & GENDER 311, 334 (Summer 2012)*.

[195] Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology Into Criminal Procedure, 114 YALE L.J. 85, 145 (2004)*.

[196] Hopkins, *supra* note 194, at 341.

[197] *Id.*

[198] *Id.*

[199] *See* Bandes, *supra* note 64, at 383; Joh, *supra* note 1, at 29.

this paradigm creates a role for victim impact statements that differs from the role they currently inhabit in the retributive system of justice that exists in this country. It suggests that impact statements made after trial and sentencing may be just as healing and satisfying for victims, and seeks to balance them with statements of remorse from offenders in an effort to attain closure and restoration on the part of the parties and the community at large.

Introducing victim impact statements after trial and sentencing both maintains the fundamental benefits of such statements and virtually eliminates the major constitutional concerns that they raise when introduced in a more formal legal context. Insulating them from appellate review, moreover, further ensures that the rights of defendants are protected and ensures that both victims and offenders can express themselves openly and honestly without fear of any potential legal ramifications. **[*166]**

Therefore, "value can be added to the criminal just system through restorative justice … [which] can fill the voids of injustice in the system." [200] In the case of victim impact statements, employing a restorative justice approach and time shifting their use to after the close of formal criminal proceedings may very well be the best possible way to maintain the benefits of this valuable form of victim testimony while minimizing its associated constitutional problems.

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[200] Reimund, *supra* note 156, at 692.