

More Than a “Quick Glimpse of the Life”: The Relationship Between Victim Impact Evidence and Death Sentencing

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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 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.

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1. *Kelly v. California*, 555 U.S. 1020 (2008), *denying cert. to* *People v. Zamudio*, 43 Cal. 4th 327 (2008) and *People v. Kelly*, 42 Cal. 4th 763 (2007).

2. Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517 (2000); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999) (hereinafter *Through the Past Darkly*); Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 FED. SENT’G REP. 5 (2007).

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 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 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. 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.

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

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.supremecourt.gov/media/08/kelly_v_california.wmv.

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 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

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 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 501-07.

10. 501 U.S. 808 (1991).

11. 438 U.S. 586 (1978).

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

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 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 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 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

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.”

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

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 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 its 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 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

U.S. 808 (No. 90-5721) (citing Hillenbrand & Smith, *Victims Rights Legislation: An Assessment of its Impact on Criminal Justice Practitioners and Victims*, 1989 A.B.A. SECT. CRIM. JUST. 71); Brief of Southern Christian Leadership Conference as Amicus Curiae Supporting Petitioner at 10-12, *Payne*, 501 U.S. 808 (No. 90-5721) (citing various studies on racial disparities in the application of the death penalty).

17. *Payne*, 501 U.S. 808, 825 (1991).

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 evidence can be informative, rarely do courts consider valid and reliable empirical 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 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

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 instructions. The seminal case appears to be *People v. Welch*, 20 Cal. 4th 701 (1999). “As we said earlier, [w]e presume that jurors 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 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 introduced 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, 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 formerly 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 in a way that amounted to a presumption in favor of 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).

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 case 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 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. 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

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

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 is likely to have its most prejudicial impact.

As in 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 for which it is offered.²⁴ If either requirement is missing, the offered evidence is

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 case 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 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

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, 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 "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

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. . . . Scientific 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 brings 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 by the danger of unfair prejudice, confusion of the issues or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added).

30. *Id.*

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

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 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 spite 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 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

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 privilege—do not apply to the following: . . . (3) miscellaneous proceedings such as: . . . sentencing . . .”.

34. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

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 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 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 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

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 prejudicial nature of such evidence is assumed.

37. FED. R. EVID. 404(b).

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 trait 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, 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

38. FED. R. EVID. 405.

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 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. Capital sentencing proceedings, by contrast, allow victim 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 be 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 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 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.

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.

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 truthfulness⁴⁸ 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.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 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

46. FED. R. EVID. 611.

47. FED. R. EVID. 613.

48. FED. R. EVID. 608.

49. FED. R. EVID. 609.

50. U.S. CONST. amend. VI.

51. 5 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.

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, 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 to

52. *Id.* at n. 13.

53. FED. R. EVID. 801.

54. FED. R. EVID. 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.

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 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 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

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

60. *Baze v. Rees* 553 U.S. 35, 90 (2008) “. . . It is simply not our place to choose one set of responsible empirical 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 . . .”.

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 evidence is not definitive, however, because many of these studies have neglected to measure subjects' emotional states, 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

61. Jurors in capital cases are extensively *voir dired* to determine if they are eligible to serve. In the *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 penalty. 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 Votes for Death*, 20 AM. J. CRIM. JUST. 1 (1995).

63. *Id.*

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 and was asked before deliberating if they thought the defendant 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 VIE, 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 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

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. 494 (2004).

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).

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 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. 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

66. In this city, jury registration lists are based upon a compilation of information 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.

then asked a series of questions to qualify them as jurors in the particular case at hand.⁶⁷ They 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 some cases alone, in some cases with other subjects. After viewing the videotape, the subjects were asked to complete a written questionnaire. The questionnaire

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 if someone in their immediate family was a police officer or employed by a law enforcement/judicial 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 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 juror 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.

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 took 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 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 general 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 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

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

on a four-point continuum from “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 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 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 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 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 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 ($\chi^2 = 28.27$; $p < .001$; $\gamma = .64$). In fact, death was the modal sentence imposed among those subjects viewing the VIE, but those 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 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 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 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 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, 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

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.

for the victim's family was a very important or important factor in deciding the appropriate sentence and about 57% said 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 *Booth/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 well"/"no help" and 10 implied "coping poorly"/"a great help." First we will examine the relationship between which 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 ($\chi^2 = 39.795$; $p < .001$; $\gamma = .629$). 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 $t = 5.930$ ($p < .001$).

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 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 ($\chi^2 = 27.795$; $p < .001$; $\gamma = .461$). 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 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 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 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 if 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 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

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 Jeffrey Abramson, *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 under the Due Process Clause of the Fourteenth Amendment." 501 U.S. at 831 (O'Connor, J. 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 responsibility 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.

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 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 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

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.

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 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 and not unfairly prejudicial. We further 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

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).

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 "participation"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

80. Margaret Atwood, in her novel *The Handmaid's Tale*, used "Participation" to describe public executions at which spectators 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 does not put his character in issue (Rule 404(a)) and even if he does not testify. However, it becomes immediately apparent that improper character evidence is often admitted in the form of inadmissible hearsay (Rule 803). In addition, the inadmissible hearsay character evidence may also involve improper lay 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 right 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 *per 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 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 for the victim's family." We think that the Court in *Booth* and *Gathers* "got it right," and that VIE 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.

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

The majority opinion in *Payne* argued that victim impact evidence is valuable testimony in informing capital sentencers of the full harm produced by the offender's 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 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 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, 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 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.

82. See Judith Platania & Garrett L. Berman, *The Moderating Effect of Judge's Instructions on Victim Impact Testimony in Capital Cases*, 2 APPLIED PSYCHOL. IN CRIM. JUST. 84 (2006).

Appendix A

The case involved the shooting of a nonuniformed police officer outside 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 aggravating circumstance in the offense is the fact that the suspect was a police officer. In fact, the officer arrested a family member of one of the suspects six months previous to the officer's 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

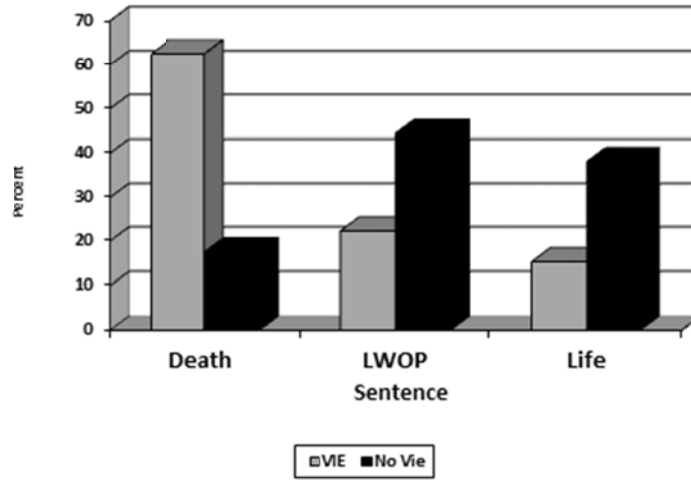


Figure 2: How Well Is Victim's Family Coping With the Murder?

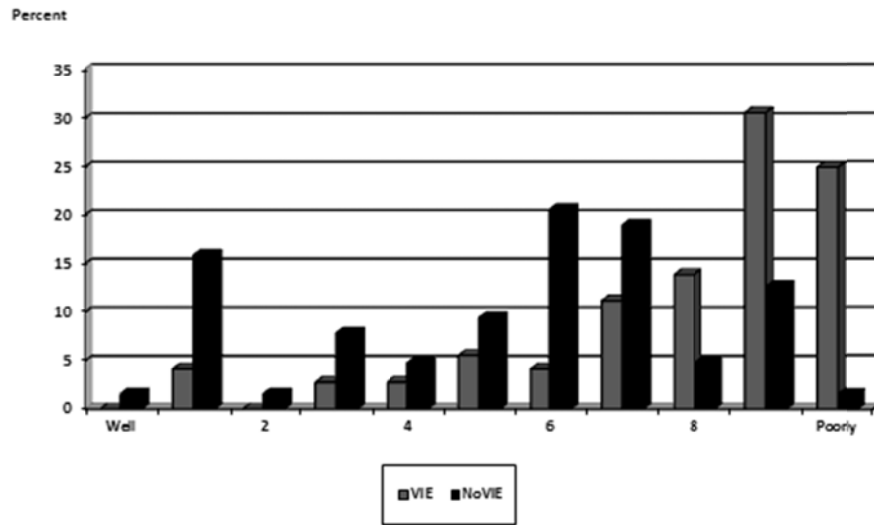


Figure 3: How Much Would A Death Sentence Help the Victim's Family?

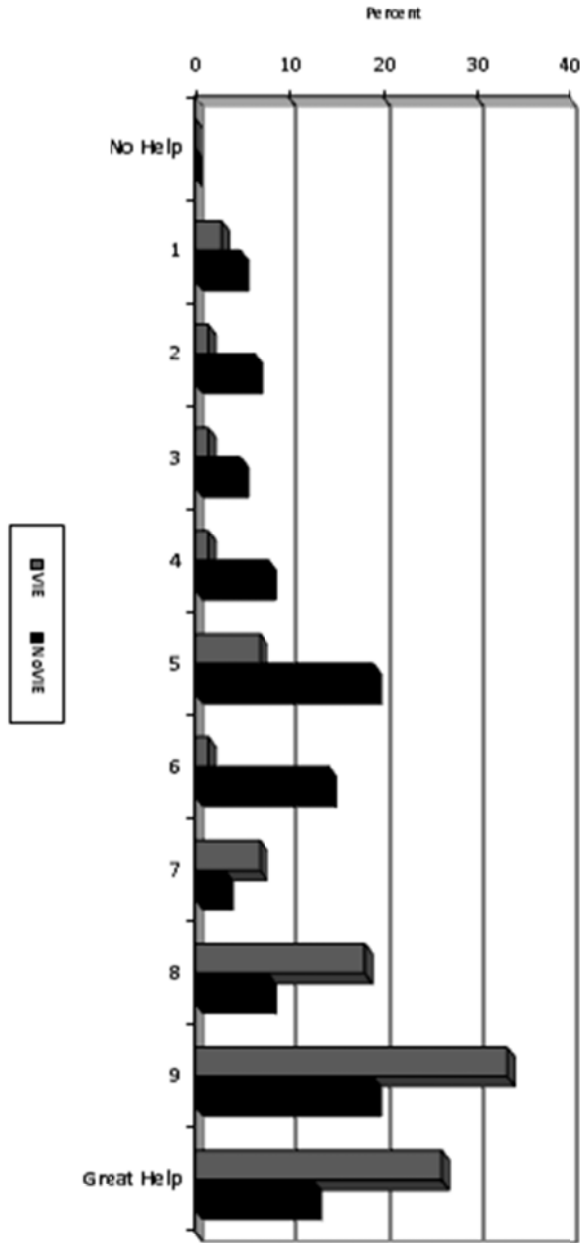


Figure 4: Percent of Subjects in Each Condition Who Reported Feeling ...

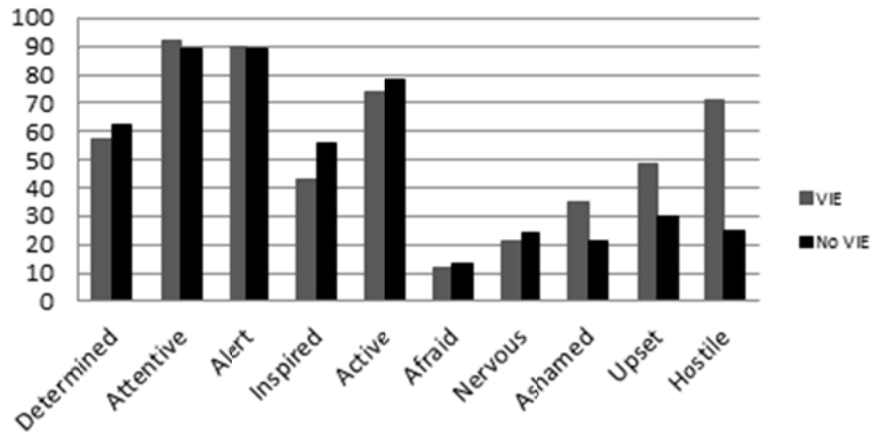


Figure 5: Response to "How well does the following word describe how you feel about the murder of the police officer".

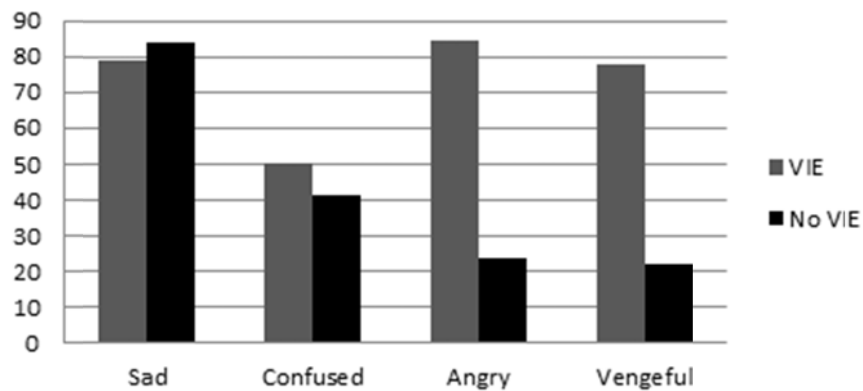


Table 1: Demographic Characteristics of Experimental (VIE) and Control (Non-VIE) Subjects *

	VIE (n=72)	No VIE (n=63)
Marital Status		
Single	42%	39%
Married/Co-habiting	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.

Table 2: Support for the Death Penalty in General and the Police Between Experimental (VIE) and Control (No VIE) Groups

		Strongly Disagree		Disagree		Agree		Strongly Agree		χ^2	γ	N
		VIE	No	VIE	No	VIE	No	VIE	No			
The use of capital punishment under any circumstance is cruel and unusual.		21.1%	20.6%	53.5%	47.6%	14.1%	25.4%	11.3%	6.3%	3.336	-.052	134
Capital punishment should be used for only the worst crimes.		8.6%	11.1%	18.6%	15.9%	41.4%	30.2%	31.4%	42.9%	2.701	-.110	133
The death penalty is morally wrong.		23.9%	17.5%	56.3%	52.4%	9.9%	22.2%	9.9%	7.9%	4.161	-.185	134
If a person takes someone's life, they should be put to death.		4.2%	9.5%	59.2%	49.2%	22.5%	28.6%	14.1%	12.7%	2.529	.001	134
Killing a police officer is worse than killing a regular citizen.		22.2%	31.7%	50.0%	50.8%	19.4%	12.7%	8.3%	4.8%	2.728	.232	135
Police officers should be treated with respect no matter how they treat you.		18.1%	15.9%	48.6%	41.3%	26.4%	33.3%	6.9%	9.5%	1.316	-.140	135
Police officers usually do the right thing.		8.3%	4.8%	23.6%	33.3%	66.7%	58.7%	1.4%	3.2%	2.589	.061	135
Police officers are pillars of the community.		2.8%	1.6%	30.6%	24.2%	51.4%	67.7%	15.3%	6.5%	4.520	-.012	134

*In all comparisons $p > .05$ based on a chi-square test.

Table 3: Relationship Between Viewing Victim Impact Evidence and Factors Related to Sentencing Decision

Importance of:	Very Important		Important		Unimportant		χ^2	γ	N		
	VIE	No	VIE	No	VIE	No					
The offender's role or responsibility for the crime.	67.6%	23.9%	72.6%	17.7%	2.8%	4.8%	5.6%	4.8%	1.121	.093	133
The emotional loss and grief of the victim's family.	61.1%	34.7%	20.6%	33.3%	4.2%	39.7%	0.0%	6.3%	38.062*	.746	135
The financial loss suffered by the victim's family.	31.4%	37.1%	37.7%	32.8%	28.6%	26.2%	2.9%	3.3%	.639	.079	131
Sympathy for the victim's family.	45.1%	39.4%	30.2%	23.8%	9.9%	28.6%	5.6%	17.5%	14.926*	.401	134
Sympathy for the victim.	55.6%	31.9%	33.3%	23.8%	8.3%	31.7%	4.2%	11.1%	16.213*	.460	135

*Significant at least at $p < .05$.