Victim Impact Evidence in Death Penalty Sentencing Proceedings: Advocating for a Higher Relevancy Standard

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Introduction

A California jury convicted Douglas Oliver Kelly of the 1993 murder of 19-year-old Sara Weir.[1] Specifically, the jury convicted Kelly of first-degree murder "under the special circumstances of robbery and rape murder and with personal use of a deadly weapon," which made him eligible for the death penalty.[2] During the guilt phase of the trial, the jury heard testimony regarding Sara, her friendship with the defendant, and the circumstances surrounding her death.[3] Nevertheless, during the penalty phase of the defendant's capital murder trial, the court allowed Sara's adoptive mother to provide additional information about Sara's life, and, in addition to testifying about her daughter, the mother presented a 20-minute video depicting Sara from childhood until the time she was murdered.[4] The video contained soft music playing in the background and footage of Sara singing songs in a school group, including the song "You Light Up My Life."[5] It also demonstrated some of Sara's favorite activities, such as horseback riding and spending time with family and friends.[6] The end of the video showed her grave marker and some video footage of horseback riders in Sara's hometown accompanied by a voiceover

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1 People v. Kelly, 171 P.3d 548, 552-53 (Cal. 2007).

2 *Id.* at 552.

3 *See id.* at 552-53.

4 *Id.* at 553, 570.

5 *Id.* at 570.

6 *Id.*

from her mother saying, "This was where Sara came from and was the 'kind of heaven' in which she belonged."[7]

The trial court found the video to be relevant to the capital sentencing hearing because it illustrated that due to the defendant's actions, Sara could no longer participate in the activities she loved.[8] Also, the video showed "Sara's fresh-faced appearance," portraying her as "reserved, modest, and shy—sometimes shunning the camera."[9] The court reasoned that this video actually corroborated evidence given in the guilt phase, showing that the defendant had "preyed on Sara's naïve and trusting nature."[10] The California Supreme Court conceded that other portions of the video were most likely irrelevant, but their misguided admission was nonetheless "harmless."[11] Therefore, despite the debatable relevance of the video's content, long-standing rules of evidence demanding that unduly prejudicial evidence be kept from the jury, and the special protections afforded in a capital jury trial, the court held that admitting the video did not amount to a serious error.[12]

Without any guidance from the United States Supreme Court regarding the boundaries of admissibility, lower courts across the country have opened their courtrooms to unchecked victim impact evidence (VIE), exposing juries to prejudicial and emotionally charged evidence during the sentencing phase in death penalty cases.[13] In 2008, the Supreme Court denied the petitions for writs of *certiorari* to hear two capital cases where the petitioners objected to the use of certain types of VIE during their sentencing, including the petition of Sara's killer.[14] The courts below found that the VIE was admissible,

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7 People v. Kelly, 171 P.3d 548, 570 (Cal. 2007).

8 *Id.* at 571.

9 *Id.*

10 *Id.*

11 *Id.* at 571-72.

12 *See id.* at 572 ("To the extent [the video] contained aspects that were themselves emotional without being factual . . . we are confident that permitting the jury to view and hear those portions . . . was harmless in light of the trial as a whole.").

13 *See, e.g.*, 18 U.S.C. § 3771(a)(4) (2006) (affording a crime victim "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"); John H. Blume, *Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 267-68 (2003); Niru Shanker, *Getting a Grip on* Payne *and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared*, 26 HASTINGS CONST. L.Q. 711, 713-14 (1999).

14 Kelly v. California, 129 S. Ct. 564, 564 (2008).

notwithstanding their recognition that it did not "shed any light on the character of the offense, the character of the offender, or the defendant's moral culpability."[15]

In his statement concerning the denial of *certiorari*, Justice Stevens called attention to the lack of consistency regarding the admissibility of VIE in the lower courts.[16] He attributed this incoherence to the open-ended decision made by the Court in *Payne v. Tennessee*, which held that VIE was not inadmissible under the Eighth Amendment.[17] In Justice Stevens's own words:

> In the years since *Payne* was decided, this Court has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, "unduly prejudicial" forms. Following *Payne*'s model, lower courts throughout the country have largely failed to place clear limits on the scope, quantity or kind of victim impact evidence capital juries are permitted to consider.[18]

Kelly gave the Supreme Court a chance to establish coherent boundaries or guidelines for the lower courts in admitting or excluding VIE.[19] By denying the petitions for writs of *certiorari*, however, the Court refused to take that chance.[20]

Since the 1970s, victims' rights groups have successfully attained changes in both state and federal law intended to give crime victims a greater role in prosecutions.[21] These efforts culminated in what can be considered the "most prominent and controversial among these measures . . . the advent of 'victim impact evidence' in criminal trials."[22] The strength of the victims' rights movement and modern political pressures make it highly unlikely that legislators will enact laws placing limitations on the type of VIE that may be presented during a

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15 *Id.* at 565.

16 *Id.* at 566-67.

17 *See id.* at 566; *see also* Payne v. Tennessee, 501 U.S. 808, 827 (1991).

18 *Kelly*, 129 S. Ct. at 566.

19 *Id.* at 567.

20 *See* Christine A. Trueblood, Comment, *Victim Impact Statements: A Balance Between Victim and Defendant Rights*, 3 PHOENIX L. REV. 605, 636-37 (2010) (discussing the Supreme Court's decision to deny the petitions for writs of certiorari in *Kelly*). *See generally Kelly*, 129 S. Ct. 564.

21 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, 144 (1999).

22 Logan, *supra* note 21, at 144.

capital sentencing hearing.[23] Therefore, it lies with the Court to "provide the lower courts with long-overdue guidance on the scope of admissible victim impact evidence."[24] Considering the prejudicial effects that such emotionally charged evidence can have on a sympathetic jury, courts should closely monitor VIE and limit it to the evidence that is most relevant to the crime for which the defendant is being sentenced.

This Comment suggests that the Court adopt the Indiana requirements for increased relevancy in capital sentencing proceedings.[25] This standard only admits VIE that is relevant to the specific statutory aggravators found in the case being tried.[26] The criminal justice system would benefit from following the relevancy limitations used in Indiana: litigants would enjoy some certainty regarding the types of admissible VIE, and victim impact witnesses would still be afforded the potential therapeutic benefits of VIE. Furthermore, a higher level of justice would be attainable by increasing the chances that the jury makes a rational sentencing decision according to the relevant facts of the crime, rather than a decision tainted by the emotions exposed by the presented VIE.

Part I of this Comment will discuss Supreme Court precedents regarding the use of VIE in capital trials, focusing on the earlier standards of *Booth v. Maryland*[27] and *Carolina v. Gathers*[28] and culminating with the reversal of those decisions in *Payne v. Tennessee*.[29] Various examples of VIE that have been admitted during capital trials will also be presented to illustrate the permissiveness of current admission standards.[30] Part II will discuss the positive and negative effects of VIE in death penalty sentencing, especially noting the vast increase in types and scope of VIE used after *Payne*.[31] Lastly, Part III

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23 Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 94 (1997) (emphasizing that the political pressure on legislators to appear "tough on crime" makes it unlikely that lawmakers will create any significant limitations on VIE); *contra* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 612-16 (2009) (explaining the rise of the victims' rights movement and its impact on relevant legislation).

24 *Kelly*, 129 S. Ct. at 567.

25 Bivens v. State, 642 N.E.2d 928, 957 (Ind. 1994).

26 *Id.* at 957.

27 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

28 490 U.S. 805 (1989), *overruled by Payne*, 501 U.S. 808.

29 501 U.S. 808 (1991).

30 *Id*.

31 *See infra* Part II.

will discuss the Indiana standard of relevancy and how, by adopting a similar standard, the Court can curtail many of the negative effects of unchecked VIE.[32]

I. BACKGROUND

A. *Supreme Court Treatment of VIE before* Payne

1. *Booth v. Maryland*[33]

The Supreme Court addressed the admissibility of VIE in capital murder trials in the 1987 landmark decision of *Booth v. Maryland*.[34] The defendant had been convicted of brutally murdering an elderly couple while robbing their home in search of drug money.[35] A Maryland statute required that, prior to the sentencing phase of the trial, a state agency must submit a report on both the defendant's background and the crime's impact on the victim.[36] The defendant objected to the admission of the VIE at his sentencing, arguing that the information was irrelevant and unfairly prejudicial.[37] The defendant further argued that because of this testimony's inflammatory nature the Eighth Amendment barred its admission in a capital sentencing hearing.[38] The Supreme Court agreed with the defense and, in a five to four decision, ruled that the admission of VIE during the sentencing phase of death penalty trials constitutes a violation of the Eight Amendment.[39]

The Court explained that a capital jury must base its sentencing decisions "'on reason rather than caprice or emotion,'"[40] and only on evidence that "has some bearing on defendant's 'personal responsibility and moral guilt.'"[41] Otherwise, there is a chance of sentencing capital defendants based on legally irrelevant factors.[42] The VIE

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[32] *See infra* Part III.

[33] 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

[34] *See id.* at 497.

[35] *Id.* at 497-98.

[36] *Id.* at 498 (citing MD. ANN. CODE art. 41, § 4-609(c) (1986)).

[37] *Id.* at 500.

[38] *Id.* at 501.

[39] Booth v. Maryland, 482 U.S. 496, 501-02 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

[40] *Id.* at 508 (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

[41] *Id.* at 502 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

[42] *Id.* (citing Zant v. Stephens, 462 U.S. 862, 885 (1983)).

presented in *Booth* described the personalities of the victims, the repercussions on the victims' family, and the family's description of the crimes and of the defendant.[43] The Court found that admitting such emotional and irrelevant evidence during capital sentencing creates a "constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[44] *Booth* established that VIE, by its nature, is "inconsistent with the reasoned decision making we require in capital cases."[45]

2. *South Carolina v. Gathers*[46]

Gathers, decided by the Supreme Court just two years after the decision in *Booth*, extended *Booth*'s holding to prohibit VIE contained in a prosecutor's comments to the jury during capital murder sentencing.[47] The *Gathers* case involved the murder of a mentally ill man who was killed while sitting on a park bench.[48] The defendant rifled through the victim's belongings in an attempt to rob him after the murder and left the articles spread across the park.[49] Among the articles found at the crime scene were the victim's voter registration card and a prayer.[50] The defendant was convicted of the murder and sentenced to death.[51]

During sentencing the prosecutor spoke at length about the characteristics of the victim, explained that he was a religious man, and read from a prayer that the victim was carrying among his belongings when he was killed.[52] The prosecutor also made inferences about the victim when he said that the victim "believed in this community," his county, and the United States, and that "[h]e was prepared to deal with the tragedies he came across in his life."[53] After finding that these statements and inferences were "unnecessary to an understand-

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[43] *Id.*

[44] *Id.* at 503.

[45] Booth v. Maryland, 482 U.S. 496, 508-09 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

[46] 490 U.S. 805 (1989), *overruled by Payne*, 501 U.S. 808.

[47] *Id.* at 811-12.

[48] *Id.* at 806-07.

[49] *Id.* at 807.

[50] *See id.* at 807, 809.

[51] *Id.* at 806.

[52] South Carolina v. Gathers, 490 U.S. 805, 808-10 (1989), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

[53] *Id.* at 809-10.

ing of the circumstances of the crime," the South Carolina Supreme Court found these comments to be sufficient under *Booth* to overturn the defendant's death sentence.[54]

The United States Supreme Court affirmed and found that this sort of commentary on the victim's personal character is "indistinguishable in any relevant respect from that in *Booth*."[55] The Court highlighted that *Booth* did not preclude the possibility of VIE meeting the threshold for admissibility if it is tied "directly to the circumstances of the crime."[56] In this case, however, the recitation from the prayer book, as well as the commentary about the victim's character and personality, was not relevant to the circumstances of the crime.[57]

B. Payne *and Subsequent VIE Case Law*

1. *Payne v. Tennessee*[58]

The Supreme Court overturned its holdings in *Booth* and *Gathers* in 1991 when it decided that the Eighth Amendment is not a *per se* bar to VIE during sentencing.[59] In *Payne v. Tennessee*, the grandmother and mother of two murder victims talked about the impact of the crime on her other grandchild, Nicholas, who had survived the attack that killed his mother and baby sister.[60] The Tennessee Supreme Court allowed the VIE, holding that although the evidence was "technically irrelevant," it could still be admitted because it did not "create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty . . . ."[61] The Supreme Court affirmed Tennessee's decision to allow the VIE and, by reversing its prior holdings on *per se* inadmissibility of such evidence, held that VIE is admissible and the states may deal with the evidence according to their own practices.[62]

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[54] *Id.* at 810 (quoting State v. Gathers, 369 S.E.2d 140, 144 (S.C. 1988)).

[55] *Id.* at 811.

[56] *Id.* (citing Booth v. Maryland, 482 U.S. 496, 507 n.10 (1987), *overruled by Payne*, 501 U.S. 808 (1991)).

[57] *Id.* at 811-12.

[58] 501 U.S. 808 (1991).

[59] *Id.* at 827-29.

[60] *See id.* at 814-15.

[61] *Id.* at 816-17 (quoting State v. Payne, 791 S.W.2d 10, 18 (Tenn. 1990)).

[62] *Id.* at 816, 824-25, 829.

The *Payne* Court reasoned that VIE is admissible because it is relevant to the harm caused by the crime, which is important to sentencing determinations.[63] In contrast to *Booth*, *Payne* found that VIE does not increase the chance of arbitrary death sentencing.[64] Furthermore, if the VIE presented was prejudicial enough to "render the trial fundamentally unfair," the defendant could seek the protections of the Fourteenth Amendment Due Process Clause.[65] Given the potential relevancy of VIE to the harm caused by the crime, the majority reasoned that a *per se* bar to admissibility is unnecessary and improper.[66]

Two vigorous dissents were written in response to the majority's holding in *Payne*.[67] Justice Marshall suggested that the reversal of the Court's precedent on VIE was the result of a shift in the Court's composition, rather than a change of facts.[68] Justice Stevens focused his dissent on the increased risk of arbitrary death sentencing based on VIE, which he said is inherently irrelevant to the crime for which the defendant is being tried.[69]

2. Prejudicial Uses of VIE Presented at Capital Sentencing Hearings

Since the Supreme Court's decision in *Payne*, lower courts have differed greatly on admissibility decisions regarding various types of VIE during capital sentencing.[70] Without adequate guidance in the admissibility analysis for VIE, state and federal courts have rarely enacted effective limitations to admissibility.[71] For example, in *State v. Conaway*, the prosecutor showed the jury photos of the victims' decomposing bodies when they were discovered a week after the murder and referred to the photos several times during the sentencing

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63 *See id.* at 825.

64 Payne v. Tennessee, 501 U.S. 808, 821, 827 (1991).

65 *Id*. at 831 (O'Connor, J., concurring).

66 *See id.* at 827.

67 *See id.* at 844, 856.

68 *Id.* at 844 (Marshall, J., dissenting).

69 *See id.* at 858-59, 863 (Stevens, J., dissenting).

70 *See*, *e.g.*, LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 126-30 (LexisNexis, 2nd Ed. 2008); *see* Blume, *supra* note 13, at 267-68.

71 Logan, *supra* note 21, at 151 (citing Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 403 (1996) [hereinafter Bandes, *Empathy, Narrative, and Victim Impact Statements*]); *see also* Trueblood, *supra* note 20, at 635 (citing Logan, *supra* note 21, at 169).

proceedings.[72] The North Carolina Supreme Court upheld the admissibility of the photographs, claiming that the condition of the bodies, "including that [the] bodies were left to decompose and to be subjected to the ravages of the elements, [was] relevant to the issues to be determined during the sentencing proceeding."[73] The court also upheld the admissibility of the prosecutor's statements imploring jurors to keep in mind the condition of the bodies when making the sentencing decision, denying the defense's relevancy objections.[74] The court cited *Payne* in support of its claim that the prosecutor's comments and the photographs showed that the victims were "unique individuals whose deaths represented a unique loss to their families."[75]

State v. Ard also demonstrates the extremely permissive standards that have been used for deciding the admissibility of VIE.[76] The VIE at issue in *Ard* was photographs of the murder victim's unborn child, dressed up in baby's clothing.[77] Again, the court cited *Payne* in its decision to admit the photographs.[78] The court also specifically stated that the "trial judge has considerable latitude in ruling on the admissibility of evidence[,] and his ruling will not be disturbed absent a showing of probable prejudice."[79]

Methods of presenting VIE to the jury have grown increasingly prejudicial without significant restraint.[80] In *State v. Basile*, the victim's mother and sister were permitted to read diary entries about the good qualities of the victim as well as a poem about her.[81] Another court allowed a mother to read a poem she had written about her murdered children after she explained that the stress since the crime had led her to abuse drugs and alcohol.[82] Furthermore, many jurisdic-

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72 State v. Conaway, 453 S.E.2d 824, 848, 849 (N.C. 1995); *see also* Logan, *supra* note 21, at 165.

73 *Id.* at 849 (citing State v. Lee, 439 S.E.2d 547, 564 (N.C. 1994)).

74 *Id.*

75 *Id.* (citing Payne v. Tennessee, 501 U.S. 808, 825 (1991)).

76 *See* State v. Ard, 505 S.E.2d 328, 331-32 (S.C. 1998); *see also* Logan, *supra* note 21, at 165.

77 *Id.* at 331.

78 *Id.* at 332.

79 *Id.*

80 Logan, *supra* note 21, at 152-53.

81 State v. Basile, 942 S.W.2d 342, 358 (Mo. 1997) (en banc); *see also* Logan, *supra* note 21, at 153.

82 Noel v. State, 960 S.W.2d 439, 446 (Ark. 1998); *see also* Logan, *supra* note 21, at 153.

tions provide very little limitation on who may present VIE.[83] Although some jurisdictions restrict the number of witnesses, or require a close relationship to the victim, many allow "coworkers, friends, distant family members, and neighbors . . . to testify regarding the impact of the victim's death on them, the victim's family, or the community."[84] These unrestricted admissions of VIE place "highly prejudicial victim impact evidence . . . before capital juries, with precious little in the way of substantive limits . . . ."[85]

II. EVALUATING THE VIRTUES AND DANGERS OF VIE IN CAPITAL SENTENCING

A. *Arguments Against the Use of VIE in Capital Sentencing*

Some commentators have found that using VIE in capital sentencing hearings violates the accused's Equal Protection rights because VIE allows for the imposition of different sentences for the same criminal acts, with the only difference being the victim of the crime.[86] This turns the focus of the sentencing process away from the defendant and allows the jury to impose their sentence based on the victim's "worth."[87] As a result, prosecutors might decide whether or not to pursue the death penalty based on the characteristics of the victim.[88] When capital sentencing decisions are based on the personal characteristics of the victim, rather than on the defendant and the crime committed, the defendant's Equal Protection rights are violated and sentences are decided in an unconstitutionally arbitrary manner.[89]

VIE can also showcase socioeconomic characteristics of victims and their families, which could impact a jury, even though these factors are not relevant to the crime committed.[90] For example, a fam-

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[83] Logan, *supra* note 21, at 153-54 (discussing the permissive rules in Virginia, Arkansas, and Texas regarding who is qualified to present VIE).

[84] Blume, *supra* note 13, at 270-71.

[85] Logan, *supra* note 21, at 145.

[86] Shanker, *supra* note 13, at 732 (noting that VIE often takes focus away from defendant during capital sentencing and instead onto the victim and victim's family).

[87] Phillips, *supra* note 23, at 106-07; Shanker, *supra* note 13, at 733.

[88] Phillips, *supra* note 23, at 113.

[89] *See* Shanker, *supra* note 13, at 732-33.

[90] Phillips, *supra* note 23, at 107-10; s*ee also* Joseph L. Hoffman, *Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty Cases*, 88 CORNELL L. REV. 530, 533 (2003) (discussing how the articulateness and education level of the victim's survivors can improperly impact the sentencing decision).

ily's ability to make an effective presentation to the jury might increase when the presenters come from a higher economic class. Those presenters are more likely to be articulate, well dressed, and highly educated.[91] Wealthier victims are also more able to afford a highly effective means of communication with the jury. For example, professionally designed audio-video presentations are increasingly used to present VIE during capital sentencing.[92] Also, wealthier families are more likely to have audio-video equipment at their disposal, providing them with more potential video footage of the victim to show a jury.[93] Conversely, the family of a poorer victim, who might not be able to afford a video camera or its accessories, might lack the footage needed to make an especially effective VIE presentation.[94] Some wealthier victims can even afford to hire lawyers to deliver their impact statements at capital sentencing.[95] These differences in VIE presentation, arising solely from class differences, can create additional risk of arbitrary sentencing.[96]

Furthermore, in most cases the VIE presented is not relevant to the blameworthiness of the capital defendant.[97] The Supreme Court held in *Booth* that only evidence reflecting the defendant's blameworthiness is admissible in capital sentencing.[98] In fact, the defendant often knows nothing or very little about their victim at the time of the crime.[99]

The *Payne* majority, on the other hand, contends that VIE is relevant by suggesting that the jury should focus on the harm caused as a component of the defendant's blameworthiness.[100] Justice Souter,

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91 Phillips, *supra* note 23, at 107-08; s*ee also* Hoffman, *supra* note 90, at 533.

92 Phillips, *supra* note 23, at 107; *see, e.g.*, People v. Kelly, 171 P.3d 548, 572 (Cal. 2007) (holding videotaped presentation of victim's life is admissible under the standard in California).

93 *See* Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979, 998 (2010) (noting the difference in access to equipment to create a VIE video between middle-class victims and poor or working-class victims).

94 *See id.*

95 Hoffman, *supra* note 90, at 533.

96 Shanker, *supra* note 13, at 733.

97 Hoffman, *supra* note 90, at 533-34.

98 Booth v. Maryland, 482 U.S. 496, 504-05 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

99 *Id.* at 504.

100 *Payne*, 501 U.S. at 825 ("We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.").

concurring in *Payne*, states that even if the defendant did not know the details of the victim's life before the crime, he should have assumed that "the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death."[101] Justice Souter's logic, however, cuts both ways: If the defendant should have known that he was taking the life of a "unique person" and, therefore, does not need to be aware of all the victim's personal characteristics before the charged act, then the it is also unnecessary to provide the details of those personal characteristics to the jury.[102] Prejudicial evidence from VIE should not be admitted to reiterate a point that any juror intuitively knows: A unique individual has been killed.[103]

VIE provides extremely emotional evidence that can be unduly prejudicial, and without Supreme Court-issued boundaries, this prejudicial effect can go largely unchecked and might distract the jury.[104] When a jury is emotionally affected by VIE, they are more likely to lose sight of the evidence that is relevant to the sentencing, such as aggravating and mitigating factors.[105] With such deeply emotional displays playing out in front of them, it is unrealistic to expect the jury to focus on their task of rational decision making.[106] Evidence suggests that jurors already sympathize with victims and their families and do not sympathize with the defendants, which suggests that that VIE is not necessary at all.[107] Put another way, "[the jurors'] difficulty at this juncture is not in imagining the humanity and suffering of the victim

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101 *Id.* at 838 (Souter, J., concurring).

102 Phillips, *supra* note 23, at 114-15; *see also* Hoffman, *supra* note 90, at 533-34.

103 *See Payne*, 501 U.S. at 866 (Stevens, J., dissenting).

104 *See generally* Shanker, *supra* note 13, at 733-35 (noting that, as the law currently stands, it is difficult to place "judicial restraints" on the emotional testimony produced through VIE); Hoffman, *supra* note 90, at 534 (discussing the likelihood that VIE will lead to sentences based on emotions rather than rational deduction); Katie Morgan & Michael J. Zydney Mannheimer, *The Impact of Information Overload on the Capital Jury's Ability to Assess Aggravating and Mitigating Factors*, 17 WM. & MARY BILL RTS. J. 1089, 1131-32 (2009) (noting that the sheer emotions included in VIE can cloud the judgment of the juror with irrelevant information).

105 Morgan & Mannheimer, *supra* note 104, at 1131-32.

106 Joe Frankel, Payne*, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency*, 12 N.Y. CITY L. REV. 87, 120 (2008).

107 *See* Phillips, *supra* note 23, at 115 (citing Bandes, *Empathy, Narrative, and Victim Impact Statements, supra* note 71, at 400) (stating that the jury already has empathy for the victim during the sentencing phase and has already found the defendant guilty of a crime eligible for the death penalty, so additional empathy is not necessary); *see also* David R. Karp & Jarrett B. Warshaw, *Their Day in Court: The Role of Murder Victims' Families in Capital Juror Decision*

and survivors, but in meeting their constitutionally mandated duty to remain open to the defendant's mitigation evidence before determining whether a death sentence is appropriate."[108]

The importance of the capital jury cannot be underestimated. Over the years, the Supreme Court has designed and adopted many different procedural limitations meant to "facilitate the responsible and reliable exercise of sentencing discretion."[109] For example, the Court has held that when a reviewing court finds the jury did not appreciate the seriousness of its role, the possibility of an unwarranted death sentence might be high enough to constitute a violation of the Eighth Amendment.[110] Also, the Supreme Court has taken steps to ensure that the jury, rather than the judge, is the body that finds the existence of aggravating factors in capital trials.[111] With these procedural devices highlighting the jury's centrality to the sentencing decision, there can be no question that the "awesome responsibility of decreeing death"[112] deserves the utmost protection by keeping out prejudicial VIE that might result in sentences based on emotional reactions.[113]

The capital jury is unique, and the Supreme Court has held that it is fundamental to the jury's role to consider aggravating and mitigating circumstances without undue emotion and to make a rational

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Making, 45 CRIM. L. BULL. 4 (2009) (finding empirical results that show jurors to be highly sympathetic toward surviving co-victims).

108 Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489, 501 (2009) [hereinafter Bandes, *Repellent Crimes*] (citing William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1485-86 (1988)).

109 Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) (citing Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion); Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976)).

110 *Caldwell*, 472 U.S. at 333 (finding that when a prosecutor informs a capital jury that their decision to impose the death sentence will be reviewed by the state supreme court, jurors believed that their role in the sentencing process was less important).

111 *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that a statute which permits the trial judge alone to impose a death sentence following a jury's conviction of first degree murder violates the defendant's constitutional rights) (overruling Walton v. Arizona, 497 U.S. 639, 647-49 (1990)).

112 McGautha v. California, 402 U.S. 183, 208 (1971) *rev'd on other grounds sub nom.* Crampton v. Ohio, 408 U.S. 941 (1972).

113 *See, e.g.*, Shanker, *supra* note 13, 734 (citing Katie Long, *Community Input at Sentencing: Victim's Right or Victim's Revenge*, 75 B.U. L. REV. 187, 228 (1995)) (discussing the risk of arbitrary judgments in death penalty cases based on the juror's emotional reactions to VIE).

choice based on the merits of the case before it.[114] Evidence, even if relevant, can be excluded when its unfairly prejudicial value far outweighs its probative value.[115] VIE is often too prejudicial to be exposed to the jury because it draws the jury's focus away from the legally relevant sentencing considerations.[116] Allowing juries to make their decisions based on the emotional impact of VIE opens the door for arbitrary, capricious, and unconstitutional death sentences.[117]

B. *Arguments Favoring the Use of VIE in Capital Sentencing Hearings*

Payne justified the admission of VIE in capital sentencing by claiming that the evidence is relevant to the actual harm caused.[118] Advocates for this view claim that there is a link between the actual harm caused by a particular crime and the appropriate sentence.[119] Justice Scalia supports this claim in his dissent in *Booth*: "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not."[120] Justice Scalia believes this hypothetical supports the inference that a decision to seek higher punishment is related to the harm caused by a defendant's actions.[121] "Seriousness of the offense" is often considered in sentencing,[122] and supporters of VIE argue that "full knowledge of how a particular crime affected a victim and her family" is

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114 *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978).

115 *See, e.g.*, FED. R. EVID. 403.

116 *See, e.g.*, Phillips, *supra* note 23, at 115 (analyzing arguments advocating for VIE and concluding that "these arguments cannot overcome the risk of prejudice posed by admitting victim evidence in the capital sentencing hearing"); *see also* Morgan & Mannheimer, *supra* note 104, at 1132-33 (discussing the low probative value of VIE in comparison with the high costs of presenting such evidence to a capital jury).

117 *Lockett*, 438 U.S. at 604 (stating that the Eighth and Fourteenth Amendments require that a death sentence be subject to higher reliability standards, such as allowing a defendant to produce mitigating evidence for the jury to consider).

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

119 *See id.* at 819; Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 352 (2009) (discussing the view that VIE is more appropriate at criminal sentencing than at parole hearings because the VIE helps highlight the harm caused by the crime when imposing sentences).

120 Booth v. Maryland, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting), *overruled by Payne*, 501 U.S. 808.

121 *Id.* at 520 (Scalia, J., dissenting).

122 *E.g.*, 18 U.S.C. § 3553(a)(2)(A) (2010) (listing "seriousness of the offense" as a factor to be considered during sentencing).

necessary to choose a punishment that is proportional to the offense.[123]

Opponents of VIE, however, point out that in the sentencing phase of a capital case, the harm caused is certainly known to the jury because the defendant has already been found guilty of the crime.[124] The VIE presented to display the "harm caused" is not limited to the facts that the defendant knew prior to the crime committed.[125] Justice Stevens indicates that VIE is "not necessary to apprise the sentencer of any information that was actually foreseeable to the defendant."[126] The presentation of VIE, therefore, results in a situation where the jury is likely to impose an arbitrary sentence of death by "hold[ing] a defendant responsible for a whole array of harms that he could not foresee and for which he is not blameworthy."[127]

Justice Stevens admits that the harm caused should be considered, but its importance should affect the legislative determinations for sentencing regimes, like defining aggravating factors for capital sentencing.[128] Juries should not make these determinations after hearing emotionally charged testimony regarding unforeseeable harms arising from the crime.[129]

Another argument in favor of VIE contends that the evidence produced *is* relevant to the blameworthiness of the defendant, contrary to the assertions of the *Booth* majority.[130] Justice White's dissent in *Booth* presents the example of a driver who recklessly fails to stop at a red light and fatally wounds a pedestrian, noting that this driver would certainly deserve a more severe punishment than a driver who ran the same red light without killing anyone.[131] This example is meant to demonstrate that if "punishment can be enhanced in noncapital cases . . . irrespective of the offender's specific intention to

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123 Elijah Lawrence, *Victim Opinion Statements: Providing Justice for Grieving Families*, 12 J. L. & Fam. Stud. 511, 517-18 (2010) (citing Cassell, *supra* note 23, at 620) (discussing the relevance of VIE in demonstrating the harm caused by the crime and to ensure that the sentence is proportional to the seriousness of the crime).

124 Phillips, *supra* note 23, at 114.

125 Payne v. Tennessee, 501 U.S. 808, 861 (1991) (Stevens, J., dissenting).

126 *Id.* at 865.

127 *Id.* at 864.

128 *Id.* at 861-62.

129 *Id.* at 862.

130 Cassell, *supra* note 23, at 629; *see also* Booth v. Maryland, 482 U.S. 496, 504 (1987), *overruled by Payne*, 501 U.S. 808 (explaining that VIE focuses on characteristics of the victim, which "may be wholly unrelated to the blameworthiness of a particular defendant").

131 *Booth,* 482 U.S. at 516 (White, J., dissenting).

cause such harm [there is no reason] why the same approach is unconstitutional in death cases."[132]

This assertion, however, is contrary to a premise set out by the Supreme Court and followed by other courts for generations: "death is different."[133] The Court has established that state death penalty statutes must be construed in a manner that restrains "wholly arbitrary and capricious action" and ensures that the ultimate sentencing decision is substantially guided and checked.[134] The Court's own rulings require a higher level of care and special statutory construction in death penalty cases.[135] Therefore, simply because certain factors lead to enhanced sentences in noncapital cases, the same factors should not necessarily lead to the imposition of the death penalty.[136] The whole purpose of these safeguards is to avoid arbitrary death sentences.[137] This purpose clashes with admitting VIE that is focused "not on the defendant, but on the character and reputation of the victim and the effect on his family," considerations that may be "wholly unrelated to the blameworthiness of a particular defendant."[138] Because VIE is *not* related to blameworthiness, it needs to be treated differently, especially in the context of a capital hearing.[139]

Justice Scalia takes another approach to the blameworthiness argument: He says that there is simply no textual basis in the Constitution for *Booth*'s sole reliance on the defendant's blameworthiness for sentencing decisions.[140] Therefore, Scalia concludes that "personal

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132 *Id.* at 516-17.

133 Gregg v. Georgia, 428 U.S. 153, 188 (1976) (citing Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (White, J., concurring)). The *Gregg* Court discusses how sentencing procedures must ensure that the death penalty will not be "inflicted in an arbitrary and capricious manner" and that "discretion must be suitably directed and limited" when it is allowed in a sentencing structure. *Id.* at 188-89*; see, e.g.*, Bazo v. Rees, 553 U.S. 35, 84 (2008) (discussing the importance over the years of the principle that "death is different" in making decisions to reduce arbitrary death sentences); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (affirming that the death penalty is a "punishment different from all other sanctions in kind").

134 *Gregg,* 482 U.S at 189.

135 *Id.* at 188-89.

136 *Booth*, 482 U.S. at 509 n.12 (citing Woodson v. North Carolina, 428 U.S. 280, 303-304, 305 (1976)).

137 *Gregg*, 428 U.S. at 198.

138 *Booth*, 482 U.S. at 504.

139 *Id.* (suggesting that VIE might be unrelated to blameworthiness); *see also* Logan, *supra* note 21, at 151-53 (suggesting procedural controls must be adopted to ensure that unduly prejudicial VIE is not admitted).

140 *Booth*, 482 U.S. at 520 (Scalia, J., dissenting); *see also* Frankel, *supra* note 106, at 98-99 (citing *Booth*, 482 U.S. at 519-20 (Scalia, J., dissenting)).

responsibility" (measured by the harm caused) is the key consideration for sentencing purposes, rather than the defendant's blameworthiness.[141] Those who argue against the admission of VIE counter his position by reiterating the potential for arbitrary sentences based on factors presented by a victim's family, rather than on the crime itself.[142]

Some argue that VIE is crucial in the capital sentencing context to counteract the mitigation evidence presented on behalf of the defendant.[143] The defendant's constitutional right to present mitigation evidence on his own behalf was established in *Lockett v. Ohio*.[144] The Court held that death penalty statutes necessarily had to provide sufficiently "individualized consideration of mitigating factors," or else the statutes would violate the capital defendant's Eighth and Fourteenth Amendment rights.[145]

Justice Stevens's dissent in *Payne* noted that the defendant's right to present mitigation evidence does not mean that in the interest of fairness there should be similar mitigating evidence about the victim.[146] Also, even without presenting VIE, the prosecution can rebut any mitigation evidence presented by the defendant and present its own evidence of aggravating factors.[147] Lastly, the American judicial system is founded on affording protections for the accused, not creating an "even-handed balance between the State and the defendant" in criminal proceedings.[148] The Constitution provides special rights to protect the accused, and many rules of evidence are designed to aid the criminal defendant in proving his innocence.[149] Allowing VIE to

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141 *Booth*, 482 U.S. at 519-20 (Scalia, J., dissenting).

142 Frankel, *supra* note 106, at 98-99 (citing *Booth*, 482 U.S. at 516 (White, J., dissenting); *Id.* at 519-520 (Scalia, J., dissenting)).

143 Cassell, *supra* note 23, at 640.

144 438 U.S. 586, 608 (1978). *See generally* Trueblood, *supra* note 20, at 626-27 (discussing the development of mitigation evidence in capital sentencing hearings).

145 *Lockett*, 438 U.S. at 606.

146 Payne v. Tennessee, 501 U.S. 808, 859 (1991) (Stevens, J., dissenting).

147 *Id.* at 860.

148 *Id.*

149 *See, e.g.*, U.S. CONST. amend. V (giving the accused the right to due process of the law, prohibiting double jeopardy, and prohibiting the state from compelling the accused to testify against himself); FED. R. EVID. 404(a) (giving the accused the right to choose whether or not to present evidence of character trait and only allowing the prosecution to present such evidence on rebuttal); *see also Payne*, 501 U.S. at 860 (Stevens, J., dissenting) ("The Constitution grants certain rights to the criminal defendant and imposes special limitations on the State designed to protect the individual from overreaching by the disproportionately powerful State.").

"balance" the capital sentencing proceeding does not create a balance but instead gives a strong advantage to the prosecution, contrary to the protections the judicial system affords a defendant.[150]

Another similar argument supporting VIE insists that presenting VIE allows victims to "heal" and attain "resolution."[151] In the context of VIE, "closure has become an especially popular topic in criminal law, and new participative opportunities have been extended to victims' families, symbolizing a shift in legal focus to more therapeutic ends."[152] Closure has even been invoked as a completely separate justification for the death penalty itself, as well as for VIE.[153] Some commentators have referred to the alleged benefits of presenting VIE as part of a "therapeutic jurisprudence" movement.[154] Supporters of this movement, and of closure as a rationale for VIE, claim that victim participation in sentencing can help the legal system become an "agent[ ] of therapeutic change."[155]

Others argue, however, that the rationale behind the closure aspect of VIE is not sufficient to justify its admission.[156] Although society has accepted closure as a rationale for allowing VIE, the term itself has an ambiguous meaning.[157] Some define closure as "finality,"

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150 *See* Kelly v. California, 129 S. Ct. 564, 567 (2008); Payne v. Tennessee, 501 U.S. 808, 860 (1991) (Stevens, J., dissenting).

151 Trueblood, *supra* note 20, at 625-26 (citing Cassell, *supra* note 23, 621-22; Richard A. Bierschbach, *Allocution and the Purposes of Victim Participation under the CVRA*, 19 FED. SENT'G REP. 44, 164-65 (2006)).

152 Jody Lyneé Madeira, *"Why Rebottle the Genie?": Capitalizing on Closure in Death Penalty Proceedings*, 85 IND. L.J. 1477, 1479 (2010) (citing Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 1-4, 9-26 (2009) [hereinafter Bandes, *Victims, "Closure," and the Sociology of Emotion*]) (discussing the rise of closure as a theme in the criminal justice context, especially in death penalty cases).

153 *Id.* at 1480 (citing Bandes, *Victims, "Closure," and the Sociology of Emotion*, *supra* note 152, at 8; Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance, and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1605 (2000) [hereinafter Bandes, *When Victims Seek Closure*]); *see also* Bandes, *Victims, "Closure," and the Sociology of Emotion, supra* note 152, at 11, 26 (citing *Payne*, 501 U.S. at 832 (O'Connor, J., concurring)) (noting that closure has been used to support the death penalty after empirical evidence discredited the deterrence rationale and discussing the fact that VIE "has been recast as a way for the survivor to move toward healing and closure").

154 Cassell, *supra* note 23, at 622 (defending the use of VIE for closure as part of a larger movement that focuses on the effects of legal processes on victims).

155 *Id.* at 622-23 (citing DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990)).

156 Bandes, *Repellent Crimes, supra* note 108, at 501-02; Trueblood, *supra* note 20, at 626.

157 *See* Bandes, *Victims, "Closure," and the Sociology of Emotion*, *supra* note 152, at 1-2; Trueblood, *supra* note 20, at 626.

"healing" or the "conclusion to a life stage."[158] Others define it as the termination of the judicial proceedings and the end of the constant threatening presence of the convict.[159] Yet despite the lack of definition for the term, courts have increasingly rationalized admitting VIE in the name of closure since the *Payne* decision.[160]

A capital murder trial is not necessarily an ideal setting for a victim to pursue closure because every victim will grieve and react differently, and there is no reason to assume that most victims actually attain closure.[161] In addition to research suggesting that presenting VIE does not necessarily produce closure, there is no practical reason that closure should be a goal in the context of a capital sentencing hearing.[162] Allowing evidence on the basis of closure opens the door for more ambiguity in the capital sentencing process, especially given that there is no accepted definition for the term itself.[163] Some scholars even opine that closure inherently arouses punitive feelings and emotions such as anger, raising concern that these emotions will disrupt the "divide between emotion and reason."[164] The salient fact is that "[o]ur system of criminal justice is not based on the victim's family's vengeance . . . ,"[165] but on rational deliberations meant to preclude arbitrary sentencing, especially during a capital sentencing hearing.[166] As one author notes, "a legal proceeding is not a counsel-

158 Samuel R. Gross & David Matheson, *What They Say at the End: Capital Victims' Families and the Press*, 88 CORNELL L. REV. 486, 491-92 (2003); *see also* Madeira, *supra* note 152, at 1483 (describing various definitions of closure).

159 Madeira, *supra* note 152, at 1483 (citing Gross & Matheson, *supra* note 158, at 490).

160 Bandes, *Victims, "Closure," and the Sociology of Emotion*, *supra* note 152, at 11.

161 *See generally id.* at 13-14 (discussing the misconception that murder survivors all experience the same process and noting that "the trial is a poor vehicle for authentic expression of emotion").

162 Bandes, *Repellent Crimes, supra* note 108, at 502 (finding evidence that VIE does not promote closure and stating that "even if closure is possible, it does not follow that it can or should take place during a capital trial").

163 Bandes, *Repellent Crimes*, *supra* note 108, at 16.

164 Madeira, *supra* note 152, at 1484-85 (citing Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. L. REV. & SOC. CHANGE 215, 238 (2001)).

165 Phillips, *supra* note 23, at 114.

166 Gregg v. Georgia, 428 U.S. 153, 189, 194-95 (1976) (citing McGautha v. California, 402 U.S. 183, 285-86 (1971)) (finding Georgia's capital sentencing statute to be constitutionally sound because it provided the jury with sufficient information and guidance to preclude arbitrary and capricious sentencing).

ing session," and the closure victims seek might be outside what the law can provide.[167]

Lastly, in her concurrence in *Payne*, Justice O'Connor insisted that proper procedural safeguards are in place to restrain the admission of VIE in extreme cases, therefore protecting the Constitutional rights of the defendant.[168] She pointed out that "[t]rial courts routinely exclude evidence that is unduly inflammatory" and that "appellate courts carefully review the record to determine whether the error was prejudicial."[169] She also relied on the defendant's ability to invoke relief under the Due Process Clause if "a witness' testimony or a prosecutor's remark so infects the proceeding as to render it fundamentally unfair . . . ."[170]

The standard Justice O'Connor set for VIE admissibility, however, is so low that it allows almost any type of evidence to be permitted at the trial court level. As evidence of this low bar, very few states have exercised their discretion to reverse a death sentence on the basis of improper VIE.[171] Even assuming the judges were willing to exercise their power to exclude or limit VIE in a situation where permitting admission might violate the defendant's due process rights, such an action has been portrayed unfavorably in the past.[172] Furthermore, the review undertaken at the appellate level is limited to the written record, which prevents the reviewing court from evaluating the prejudicial effect of demeanor evidence, such as crying and facial expressions.[173] This limitation decreases the reviewing court's ability to accurately appraise the prejudicial value of VIE.[174]

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167 Madeira, *supra* note 152, at 1489-90 (citing Bandes, *When Victims Seek Closure*, *supra* note 153, at 1606).

168 Payne v. Tennessee, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring).

169 *Id.*

170 *Id.*

171 Blume, *supra* note 13, 267, 279 (citing Wimberly v. State 759 So. 2d 568, 574 (Ala. Crim. App. 1999); State v. Hightower, 680 A.2d 649, 662 (N.J. 1996); State v. Bernard, 608 So. 2d 966, 973 (La. 1992); Clark v. Commonwealth, 833 S.W.2d 796-97 (Ky. 1991)).

172 Phillips, *supra* note 23, at 101 (citing Andrew Blum, *Impact of Crimes Shakes Sentencing*, NAT'L L.J., June 26, 1995 at A1) (discussing a case where a trial judge denied a request to present VIE because of cumulativeness and the court of appeals responded by "direct[ing] judges to 'respond to the will of the people' and 'accept victim impact testimony wherever possible'").

173 *See* Logan, *supra* note 21, at 183-84 (citing Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1173 (1996)).

174 *See id.* (citing Edwards, *supra* note 173, at 1173).

One author suggests that appellate courts hesitate to review VIE because the rationale behind admission of the evidence during sentencing is often not articulated clearly in the statutes or "victim impact schemes."[175] Without clear direction from the legislation, the discretion is very broadly left to the judges, and appellate courts have been "reluctant to engage with victim impact statement legislation."[176] Such a low bar on VIE cannot be a sufficient check to justify admission of extremely emotional and prejudicial evidence, especially when appellate courts "evince little interest in enforcing *Payne*'s nebulous 'unduly prejudicial' due process proscription."[177]

Appellate courts, therefore, seek to rule on these appeals without reaching the merits of the claim.[178] But without guidance from appellate court decisions, trial courts might struggle to make judgments in future cases, adding to a cycle of uncertainty in VIE admission.[179] If prosecutors know that the VIE they attempt to present will not receive meaningful review, they are incentivized to push the limits and present more prejudicial VIE.[180] Conversely, this cycle can lead defense attorneys to cease making objections to the admission of prejudicial VIE and ultimately can lead to misguided death sentences.[181]

C. *Weighing the Arguments Regarding Admission of VIE*

One reason to preclude VIE arises because most VIE, especially evidence relating to the victim's character, is irrelevant to the crime at issue.[182] Even if one believes the VIE is relevant to the crime charged, a long-standing rule of evidence calls for the exclusion of evidence

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175 Roberts, *supra* note 119, at 353.

176 *Id.*

177 *See* Logan, *supra* note 21, at 181 (citing Payne v. Tennessee, 501 U.S. 808, 825 (1991)).

178 *Id.* at 189 (discussing how appellate courts avoid the merits by using "quantitative assessment . . . focus[ing] instead on whether, absent the purported error, the sentence is justified") (internal citations omitted).

179 *Id.* at 189 (citing Edwards, *supra* note 173, at 1182).

180 *Id.* at 190 (citing ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 23 (1970)).

181 Logan, *supra* note 21, at 189.

182 *See* Trueblood, *supra* note 20, at 629-30 (citing *Payne*, 501 U.S. at 825; FED. R. EVID. 403); *see also* Bryan Myers, Emalee Weidemann & Gregory Pearce, *Psychology Weighs in on the Debate Surrounding Victim Impact Statements and Capital Sentencing: Are Emotional Jurors Really Irrational?*, 19 FED. SENT'G REP. 13, 14 (2006) (citing Booth v. Maryland, 482 U.S. 496, 502 (1987), *overruled by Payne*, 501 U.S. 808) (noting that VIE takes the focus of the jury from relevant factors regarding the crime to irrelevant factors such as the victim's character and "societal worth"); Shanker, *supra* note 13, at 711.

that is relevant but its probative value is substantially outweighed by its unfairly prejudicial nature.[183] The prejudicial value outweighs the probative value of VIE in most cases, especially because the state is given ample opportunity during the guilt phase to present evidence about the crime scene, the victim, and the circumstances of the crime, and is free to reemphasize those facts during sentencing.[184]

The harm caused by a crime may be important during the sentencing decision, but it must be related to the moral guilt and responsibility of the defendant to be admissible at capital sentencing.[185] Typically, a defendant has no prior knowledge of the victim's personality, family situation, and status in the community.[186] Since these traits are not foreseeable, they should not be considered relevant to the defendant's moral culpability.[187] Allowing irrelevant and emotionally charged VIE "distracts the sentencer from the proper focus of sentencing and encourages reliance on emotion and other arbitrary factors," which opens the door for unconstitutional sentencing.[188]

The Eighth Amendment limits the sentencing factors that are permissible for consideration during capital sentencing.[189] The Court has held that arbitrary sentencing must be prevented and has taken steps to ensure that states develop sufficient procedures to prevent arbitrary sentencing.[190] Allowing VIE, however, actually injects the risk of arbitrariness into the process by focusing the jury's attention on irrelevant factors.[191] Allowing the jury to determine a sentence based

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183 *See, e.g.*, FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

184 Morgan & Mannheimer, *supra* note 104, at 1132-33.

185 *Booth*, 482 U.S. at 502 (citing Enmund v. Florida, 458 U.S. 782, 801 (1982)).

186 *See Booth*, 482 U.S. at 504-505 ("As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family.").

187 *See Payne*, 501 U.S. at 861-62 (Stevens, J., dissenting).

188 *Id.* at 864.

189 Frankel, *supra* note 106, at 118.

190 Gregg v. Georgia, 428 U.S. 153, 195 (1976) ("The concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance . . . ."); *see also* Furman v. Georgia, 408 U.S. 238, 255-57 (1972) (Douglas, J., concurring) (finding that a statute which allows for arbitrary death sentences violated the Eighth Amendment).

191 *See Booth*, 482 U.S. at 502-03; Blume, *supra* note 13, at 279; Hoffman, *supra* note 90, at 532 (citing Bandes, *Empathy, Narrative, and Victim Impact Statements*, *supra* note 71, at 405-08); Shanker, *supra* note 13, at 732; *see also* Phillips, *supra* note 23, at 105-07 (noting the existence of

on these irrelevant factors violates the Eighth Amendment and "necessarily prejudices the defendant."[192]

III. PROPOSAL FOR ADOPTION OF INDIANA'S HIGHER STANDARD OF RELEVANCY

A. *Indiana's Statute and Case Law Establishing the Higher Standard*

In *Bivens v. State*, the Indiana Supreme Court held that VIE can only be permitted in capital sentencing if the evidence is relevant to a statutory aggravating or mitigating factor.[193] In *Bivens*, the defendant was convicted of first-degree murder, robbery, confinement, auto theft, and two counts of theft resulting from a two-day crime spree across Indiana.[194] The wife of the murdered man testified about how the murder had affected her life and her son's life.[195] She commented that "her husband 'was always there' for their son" and that she had "lost his companionship and his love, his protection and his care, as well as his friendship . . . ."[196] In ruling against admission of this VIE, the Indiana Supreme Court held that when the death penalty is being considered, "courts must henceforth limit the aggravating circumstances eligible for consideration to those specified in the death penalty statute . . . ."[197] The court reasoned that this "new rule of criminal procedure" provided the requisite level of caution for a death sentence because considering non-statutory aggravating factors increases the risk of disproportionate sentencing in capital cases.[198]

Another example of the Indiana standard of relevancy for VIE can be found in *Lambert v. State*, where the standard was applied to the VIE presented after the defendant was convicted of shooting a police officer.[199] In *Lambert*, the defendant objected to testimony

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arbitrariness through a jury's consideration of socioeconomic factors and relative worth comparisons when making sentencing decisions).

192 *See Payne,* 501 U.S. at 864 (Stevens, J., dissenting).

193 *See* Bivens v. State, 642 N.E.2d 928, 955 (Ind. 1995) (citing IND. CODE ANN. § 35-50-2-9 (West 1992)).

194 *Id.* at 935.

195 *Id.* at 954.

196 *Id.* at 957.

197 *Id.* at 955 (citing IND. CODE ANN. § 35-50-2-9 (West 1992)).

198 *Id.*

199 Lambert v. State, 675 N.E.2d 1060, 1061 (Ind. 1996).

from the victim's wife, brother, and the chief of the police department where the victim worked.[200] The Indiana Supreme Court held that the trial court improperly admitted a majority of the testimony objected to by the defendant, finding the evidence to be irrelevant to the statutory aggravator of killing a police officer in the line of duty.[201] The court also found that given the testimony's length, unedited nature, and how far the testimony went beyond the permissible scope of the evidence, the trial court's admission of such evidence did not constitute harmless error.[202] Therefore, the only testimony from the VIE that would be admissible would be the relevant testimony that spoke to the victim's status as a police officer and explained that he was killed while serving in that capacity.[203]

The relevancy standard used in Indiana should be applied to the admission of VIE in every state that allows such evidence. This standard allows state legislatures to choose which factors are most important when considering a capital sentence. Legislatures would then codify such factors as statutory aggravators. VIE would be admissible during sentencing when the evidence is relevant to the aggravating factors enumerated in the statute. Essentially, states would retain a certain amount of control over the types of VIE that would be admissible in sentencing through the listing of aggravating factors in their statute, and trial judges would not be given unbridled discretion. The standard would also simplify litigation surrounding challenges to VIE admission in capital sentencing hearings. If the Supreme Court adopted this rule as a precedent, it would guide the lower courts with regards to admissibility of VIE and preclude the presentation of the most prejudicial types of VIE, ensuring protection of capital defendants' rights.

B. *Possible Effects of the Higher Relevancy Standard on VIE*

Many of the arguments raised against VIE could be addressed by enacting a relevancy standard like the one the Indiana courts have adopted. For example, one argument mentioned earlier notes that VIE allows for sentencing based upon the victim's worth rather than the actual crime committed, arguably creating Equal Protection viola-

200 *Id.* at 1062.
201 *Id.* at 1064.
202 *See id.* at 1065.
203 *Id.*

tions.[204] These violations occur when arbitrary death sentences are handed down based on the characteristics of the victims, rather than the crime and the defendants themselves.[205] This problem would be nearly eliminated by the higher relevancy standard because the VIE would be limited to the details specific to the statutory aggravator, not to the individual characteristics of the victim. Almost no evidence regarding the victim's "worth," therefore, would be admissible during the sentencing phase. The risk of arbitrary decisions based on the victim rather than the crime and the risk of the Equal Protection violation would be greatly diminished without the inflammatory evidence regarding the personal characteristics of the victims.

The risk of prosecutorial decisions based on the victim's "attractiveness," or likelihood of evoking sympathy in jurors, would also be nearly eliminated.[206] Under the higher standard of relevancy required by the Indiana system, evidence that would make a victim "attractive" to jurors would not be admissible. Evidence painting the picture of a victim who engaged in questionable behavior in the past would also be excluded, unless it directly related to the statutory aggravator, allowing the prosecutorial decisions to be based on the crime rather than the jury's perception of the victim. Greater justice for all victims, not just the ones who lead the most exemplary lives, would be more easily attainable under the higher relevancy standard.

Another criticism of VIE in capital sentencing hearings is that it injects undue emotion into what is supposed to be a rational decision-making process.[207] Presentation of VIE can be an emotional step in the capital trial, which is already an emotional process for the jury. There will be less clouding of the jury's rationality, however, if the witnesses are restrained from uncontrolled testimony and are instead limited to the bounds of the aggravating factors. The majority of the most emotional VIE, meant only to arouse sympathy from the jurors, would be excluded. This standard protects jurors' ability to reason

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[204] *See* Shanker, *supra* note 13, at 732 (citing Booth v. Maryland, 482 U.S. 496, 506 n.8 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991)).

[205] *See id.*; Phillips, *supra* note 23, at 106-07.

[206] *See* Phillips, *supra* note 23, at 113.

[207] Shanker, *supra* note 13, at 734 (citing Bandes, *Empathy, Narrative, and Victim Impact Statements*, *supra* note 71 at 365); *see also* Hoffman, *supra* note 90, at 534 (citing *Booth*, 482 U.S. at 508-09 (1987) (discussing the likelihood that VIE will lead to sentences based on emotions rather than rational deduction)); Morgan & Mannheimer, *supra* note 104, at 1131-33 (noting that the sheer emotions included in the VIE can cloud the judgment of the jury).

properly by filtering out prejudicial VIE and admitting only that VIE tailored to relevant sentencing issues.

Furthermore, the objection has often been raised that VIE has no bearing on the blameworthiness of the defendant.[208] This argument recognizes that the defendant often has no knowledge of the details of the victim's life before the crime and, therefore, should not be held accountable for factors the defendant knew nothing about.[209] When the VIE is limited by the higher relevancy standard, however, it would be directed towards the elements of the crime that make the defendant eligible for the death penalty—the statutory aggravators. These aggravators are designed to focus on the blameworthiness of the defendants.

Enforcing the higher relevancy standard would also maintain many of the positive aspects of VIE. For example, many proponents of the admission of VIE during capital sentencing hearings argue that the evidence reflects the harm caused by the defendant's actions.[210] These proponents feel that evidence regarding the harm caused is very important and necessary to ensure proper sentencing.[211] Even under the increased standard of relevancy required in Indiana, however, much of the harm caused could still be presented to the jury. In limited testimony regarding the aggravating factors, the jury would be reminded that the victim was murdered and that surviving victims cared about them enough to testify. The jury would still be allowed to hear details about the circumstances of the victim's death. Furthermore, the most irrelevant parts of the harm caused—the harms the defendant could not foresee—would mostly be excluded unless they shed light on the statutory aggravating factors.

Victim participation would still be allowed because there would be no *per se* bar to presenting VIE under the Indiana standard. Therefore, if those arguments regarding closure and emotional heal-

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208 *Payne*, 501 U.S. 808, 864 (Stevens, J., dissenting) (noting that VIE allows the jury to base its sentence on "a whole array of harms that [the defendant] could not foresee and for which he is therefore not blameworthy"); *see also* Hoffman, *supra* note 90, at 533-34 (citing *Booth*, 482 U.S. at 594).

209 *Booth,* 482 U.S. at 504-505; Hoffman, *supra* note 90, at 533-34.

210 *See Payne*, 501 U.S. at 825; *see also* Lawrence, *supra* note 123, at 517 (citing Cassell, *supra* note 23, at 620) ("Victim impact statements (and victim opinion statements) provide the sentencer with a more in-depth account of the actual harm done.").

211 Lawrence, *supra* note 123, at 517-18 (discussing the importance of understanding the harm caused by the crime when determining the seriousness of the offense and, thus, choosing a proportionate sentence).

ing for victims of crimes have merit, the victims' families would not be precluded from participation. If a victim's family did not wish to participate, however, the jury would still be able to hear most of the same information from other witnesses. Much of the most prejudicial and extremely emotional evidence presented by family members who testified during VIE would be excluded from the trial. A loved one who is unable or unwilling to testify during sentencing could therefore take comfort in knowing that any evidence they would have been permitted to present can still be admitted through another witness. Furthermore, the victim's family could always address the court after the sentence has been handed down.[212] After the jury has reached its decision, the prejudicial nature of the victim's family's statement could be nullified and the victim would still reap the perceived benefits of testifying.

Lastly, under the Indiana standard the mitigation evidence that the defendant would be allowed to present on his behalf could still be rebutted through presentation of VIE during the sentencing phase. Many commentators argue that presentation of VIE is needed in a sentencing hearing to level the playing field, because the defendant has the ability to present mitigation evidence.[213] The prosecution often uses VIE as a tool to diminish the force of the mitigation evidence presented and refocus the jury on the good characteristics of the victim.[214]

Although the Indiana standard of relevancy for VIE would prevent admission of some common types of VIE used in this context, the prosecution could still have victims' families testify in an effort to rebut the mitigation. The prosecutors would be required to keep their line of questioning limited to the aggravating factors or the circumstances of the crime. In fact, this more streamlined approach might more effectively rebut mitigation because the VIE would be directly

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212 *See* Madeira, *supra* note 152, at 1524-25 (suggesting post-sentence allocution as a method of victim participation).

213 *Payne*, 501 U.S. at 825-26 (explaining that VIE should be allowed to offset the broad range of mitigation evidence which a defendant is allowed to present); *see also*, Cassell, *supra* note 23, at 624 ("Given the structure of contemporary criminal justice systems, fairness requires victim impact statements.").

214 Booth v. Maryland, 482 U.S. 496, 502, 504 (1987), *overruled by Payne*, 501 U.S. 808 (noting that the defendant's prior record and character are supposed to be taken into account during sentencing and stating that VIE focuses instead on the victim's character and reputation); *see also* Trueblood, *supra* note 20, at 616 (describing how VIE shifts the focus from the defendant to the victim).

geared toward the statutory aggravating factors that the jury is required to consider against the mitigating factors when making their sentencing decision.

CONCLUSION

Nothing can reduce the emotional impact of a heinous crime upon the victim's family and friends. The legal ramifications, however, of allowing the presentation of irrelevant and emotionally prejudicial evidence to the jury cannot be ignored. In a death penalty sentencing hearing especially, the jury's ability to make clear and rational decisions is crucially important to a properly functioning criminal justice system. When a defendant's life hangs in the balance, this nation's courts must do everything in their power to provide adequate protection to that defendant's rights.

If the Supreme Court adopted the higher relevancy standard used in capital sentencing hearings in Indiana, the lower courts would receive the guidance they need to draw the line between appropriate and prejudicial VIE. This would minimize the chance of arbitrary death sentencing based on the content of VIE, rather than statutory aggravating and mitigating factors. Nothing under this standard would preclude the families of victims from presenting information about their loved one after sentencing, when there is no chance of prejudicing the jury. Ultimately, ensuring that a sentence is founded on the facts of the crime promotes justice and proportionality. The courts can achieve this objective by using the guidance of the statutory aggravating factors and by refusing to admit irrelevant or unduly prejudicial VIE during capital sentencing hearings.