Extracting the Impact: Crafting Jury Instructions to Curtail the Influence of Victim Impact Evidence on Death Penalty Sentencing Juries

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INTRODUCTION

Imagine this. You are seated in the jury box of a courtroom, tasked with serving your civic duty in a capital murder trial. At this phase, the defendant has already been found guilty of the crime—all that is left is to determine the appropriate sentence. The prosecutor has sought the death penalty, so there are now two options on the table: death or life imprisonment without the possibility of parole.

To impose the death penalty, the jury must determine that a statutory aggravating factor exists beyond a reasonable doubt, so you take note as the State puts forth evidence that it has met this burden. On the other hand, defense counsel is presenting a host of mitigating circumstances—aspects of the defendant's life that suggest death is too harsh a sentence for the harm done. You watch as witness after witness illustrates the defendant's existence as one full of seemingly every hardship life has to offer. You realize that your task, while incredibly difficult, seems clearly defined at this point under the laws of your state. First, determine whether an aggravating circumstance was present. If so, weigh the aggravating circumstance against the mitigation put forth by the defense. If the aggravators exceed the mitigators you "shall impose a sentence of death."[1]

As you come to terms with the scope of your responsibility, the prosecution comes forth with a new kind of evidence: a victim impact statement. A woman named Martha Farwell, the murder victim's mother, takes the stand.[2] You listen as she testifies about her daughter, Sara, and the impact that she had on her family. You look to your right and left and notice that some jurors have started to cry. Ms. Farwell then plays a video for the jury. You watch as Sara's life unfolds to the tune of soft music and the narration of her mother's voice—home video clips from her early childhood through young adulthood flash on the screen. "One segment shows Sara singing a couple of songs with a school group, including 'You Light Up My Life.' Part of the time she was singing solo."[3] The video continues with clips of Sara "swimming, horseback riding, at school and social functions, and spending time with her family and friends."[4] It ends with a shot of Sara's grave marker, proceeding into a video clip of people riding horseback in Alberta, Canada. You hear Ms. Farwell say that "this was where Sara came from and was the 'kind of heaven' in which she belonged."[5] When the video ends, you notice you've become emotional, too.

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1. Because this hypothetical is inspired by People v. Kelly, 171 P.3d 548 (Cal. 2007), see CAL. PENAL CODE § 190.3 (West 2024).

2. *Kelly*, 171 P.3d at 567–72.

3. *Id.* at 570.

4. *Id.*

5. *Id.*

After this presentation, you feel more daunted by the task before you and uncertain about how to proceed. How do you consider this evidence? The Supreme Court has held that states may allow juries to evaluate it.[6] You are told that you may not consider the impact of the victim's death on her family as an aggravating circumstance, but if not, what purpose does it serve? You know your role is to consider all the evidence put before you, and you have sworn an oath to take that job seriously, but you have no idea how to consider the incredibly heartbreaking, emotive video that you have just seen.

Depending on where you live, the judge may or may not present you with a jury instruction that mentions the victim impact evidence you saw. But one thing is clear: that instruction will not tell you, in concrete terms, what purpose that evidence should be considered *for*. At best, the judge will tell you what that evidence does not prove. Your once clear but difficult task has been muddied. You retire to deliberate knowing that Ms. Farwell's evidence is not aggravating, but you cannot shake the effect that home video had on you. You are human after all.

Given that victim impact evidence (also referred to as "VIE" and "victim impact statements") is highly emotive and an accepted part of the sentencing phase of capital trials, how can defense lawyers craft jury instructions that minimize its effect? In order to answer this question, this Note will (1) provide context on the constitutionality of VIE; (2) outline what the Supreme Court has articulated about the appropriate role of VIE in capital sentencing trials; (3) expose the dangers of VIE to defendants that warrant its limitation through jury instructions; and (4) in light of that information, discuss ways to craft effective jury instructions about VIE. The Note will then highlight the overlap between VIE jury instructions in capital cases and competent legal representation, urging defense lawyers in capital cases to view VIE jury instruction advocacy as a crucial part of their duty to present mitigating circumstances, before offering concluding remarks.

I. BACKGROUND: *BOOTH*, *PAYNE* AND THE VICTIMS' RIGHTS MOVEMENT

In overturning *Booth v. Maryland*[7] in *Payne v. Tennessee*, the Supreme Court found that the Eighth Amendment does not bar states from admitting victim impact evidence.[8] By making this shift, the Court discarded its previous finding that victim impact evidence violated the Eighth Amendment because it is "irrelevant to a capital sentencing decision," and "its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[9]

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6. Payne v. Tennessee, 501 U.S. 808, 827 (1991).
7. Booth v. Maryland, 482 U.S. 496, 509 (1987).
8. Payne v. Tennessee, 501 U.S. 808, 827 (1991).
9. *Booth*, 482 U.S. at 503.

The *Payne* Court recognized the prosecution's "legitimate interest" in countering the humanizing evidence put forth in the defense's mitigation case with similarly humanizing evidence "by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."[10] In doing so, the Court highlighted the potential for unfairness that arises "[b]y turning the victim into a faceless stranger at the penalty phase of a capital trial," because "*Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment."[11]

This complete shift in the constitutionality of victim impact evidence in a span of four years was spurred by a national victim's rights movement, where victims and their families sought influence and empowerment through the criminal justice system. The Women's Movement was a major player in developing a victim's rights movement, as its "leaders saw sexual assault and domestic violence—and the poor response of the criminal justice system—as potent illustrations of a woman's lack of status, power, and influence."[12] At the same time, a "'child advocacy' movement that developed in the 1970s focused on the crimes of child abuse and neglect," as well as a movement to enhance "public awareness about the human and social costs of alcohol and drug abuse."[13] The sentiment persisted into the 1970s and beyond; people were fueled by the idea "that crime was at unacceptably high levels and its victims were neglected."[14] As a result, support and advocacy organizations took shape to "provide better notification and support to victims and witnesses."[15]

These efforts led to a "transformation" beginning with "the passage of new state and federal statutes" which now has reached dozens of state constitutions.[16] In short, the movement is credited with "exponentially enlarging the role of crime victims in the criminal justice process."[17] A key tenet of this movement is the idea that victims have a right to be heard in criminal trials, which the Court solidified in *Payne*.[18]

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10. *Payne*, 501 U.S. at 825.

11. *Id.* (internal quotations and citation omitted).

12. Marlene Young & John Stein, *The History of the Crime Victims' Movement in the United States*, OFF. FOR VICTIMS OF CRIME ORAL HIST. PROJECT (2004), at 2, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/OVC_Archives/ncvrw/2005/pdf/historyofcrime.pdf [https://perma.cc/US9R-BZDL].

13. Alice Koskela, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 163 (1997).

14. Young & Stein, *supra* note 12, at 3.

15. *Id.*

16. Koskela, *supra* note 13, at 158.

17. *Id.*

18. *Id.* at 167–68.

II. HOW TO EVALUATE VICTIM IMPACT EVIDENCE IN CAPITAL SENTENCING TRIALS: WHAT WE KNOW

Under *Payne v. Tennessee*,[19] the controversial six-three majority that directly overturned *Booth*, "if the State chooses to permit the admission of victim impact evidence . . . the Eighth Amendment erects no *per se* bar,"[20] because "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question."[21] Because the defendant "chose to extinguish" a life, "the loss to the victim's family and to society which has resulted from the defendant's homicide" is relevant to the defendant's culpability and blameworthiness.[22] To the majority in *Payne*, this concept aligns with the notion that "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law."[23] Further, any limitations on VIE are lenient: "[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."[24] Thus, absent a finding of "fundamental unfairness" that results from the admission of VIE, juries are generally able to consider it in capital sentencing trials.

Payne establishes that VIE can be introduced at trial to speak to a defendant's culpability.[25] What this means exactly is far from clear; are defendants not culpable for the crimes they commit, regardless of the effects on the victims and their communities? To this point, the Court has provided a guiding principle: "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm."[26] For example, "[i]f 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. His moral guilt in both cases is identical, but his responsibility in the former is greater."[27]

VIE is not the only evidence that may alter a defendant's blameworthiness. Rather, VIE exists within the broader concept that the circumstances of crimes,

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19. Payne v. Tennessee, 501 U.S. 808 (1991).
20. *Id.* at 827.
21. *Id.* at 825.
22. *Id.* at 822.
23. *Id.* at 819.
24. *Id.* at 825; *see, e.g.*, State v. Young, 196 S.W.3d 85, 110 (Tenn. 2006) (finding that improperly admitted victim impact evidence did not render trial fundamentally unfair, even though "testimony was not limited to a brief glimpse of the victim's life, but rather laid the debilitating grief of over one hundred people at Defendant's feet" and "[t]he risk of inflaming a jury's passions with such testimony [was] simply too great to allow its admission.") (internal quotations omitted). *But see, e.g.*, Malone v. State, 168 P.3d 185, 209 (Okla. Crim. App. 2007) (finding that victim impact statement did render trial fundamentally unfair where witness "literally 'beseeches' and 'begs' the jury to sentence [defendant] to death").
25. *Payne,* 501 U.S. at 825.
26. *Id.* at 819.
27. *Id.* (citing Booth v. Maryland, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting)).

and defendants' roles in them, affect their culpability. This means that defendants who played a less prominent role in a crime are deemed less culpable.[28] Similarly, children[29] and intellectually disabled[30] defendants are also categorically less culpable for the crimes they commit. Thus, it appears that—like a defendant's age, intellectual disability, and role in a crime—VIE similarly alters a jury's ability to exact blame on defendants by imposing the death penalty, just in the opposite direction. Where defendants' roles in crimes or intellectual disabilities may render them less culpable, victim impact evidence may do the opposite. All this evidence stands for the principle that individuals should be held responsible for the impacts of their actions; in the VIE context, the more harm a defendant's conduct causes, the more culpable that individual is for the extent of that harm.

III. THE NEED FOR JURY INSTRUCTIONS ON VIE

"Because it seems certain . . . that VIE evidence will continue to be permitted in capital cases, it is important to attempt to regulate or balance the evidence provided by both the victim's and the offender's family."[31] This Note analyzes jury instructions as one way of balancing the effect of victim impact evidence, because "[a] court is required to give . . . any instructions which correctly state the law, are applicable to the facts of the case, and deal with material points, unless the requested instructions are covered by instructions already given."[32] Further, defense counsel has room to influence jury instructions on victim impact evidence, as courts are "not required to give the best possible instruction" and "[w]hether an instruction is applicable and accurately states the law" is within their discretion."[33]

Jury instructions have a heightened importance in capital sentencing trials because "capital jurors are much more at the mercy of their instructions than jurors in other kinds of cases"[34] and the Court has long emphasized the

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28. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding the death penalty excessive and in violation of the Eighth Amendment for a defendant who drove the getaway car in a robbery, and who did not find out an accomplice had murdered the shopkeeper until after the fact).

29. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 572–73 (2005) (holding that the death penalty is unconstitutional for those under 18 at the time of their crime due to their lack of maturity, underdeveloped sense of responsibility, and increased vulnerability to negative influence).

30. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding the death penalty for intellectually disabled defendants unconstitutional because a death sentence could not serve its purpose of deterrence and retribution, which depend on the culpability of the offender).

31. Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129, 156 (2011).

32. Elaine Drodge Koch, *Twenty Tips for Effective Jury Instructions*, 16 NO. 3 PRAC. LITIGATOR 7, 8 (2005).

33. *Id.*

34. James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1161 (1995); *see also* Craig Haney, Lorelei Sontag & Sally Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50(2) J. SOC. ISSUES 149, 161 (1994) (finding that "[t]he overall structure of the death penalty instructions [studied] had a significant impact on the way in which deliberations proceeded").

importance of limiting jury discretion to prevent arbitrary death sentencing decisions that run afoul of the Eighth Amendment.[35] Considering whether to impose the death penalty is "a uniquely personal and deeply moral decision," and juries "depend upon these instructions to tell them how to comprehend the decision before them, to focus them collectively on what is important, guide them as a group about which theories to use, which factors to take into account, and how to reach a consensus."[36] Ultimately, "[t]he decision whether or not to take a life is intensely difficult for a jury, and capital sentencing instructions presumably should aid the jury by providing guidance."[37]

Providing juries with a concrete understanding of the appropriate scope of victim impact evidence is critical to achieving this goal because the emotional nature of this evidence leaves juries susceptible to improperly deciding based on the feelings it evokes. In capital sentencing trials, the admission of VIE "substantially increases" the chance that defendants are given death sentences.[38] Due to the "highly inflammatory" nature of this evidence, "it does tend to focus the attention of the jury on the victim's family and the family's ability to deal with the grief and loss of the murder rather than on the characteristics of the offender and the offense."[39]

In *Payne*,[40] the Court "reasoned that evidence of the impact of the crime on the victim's survivors and the broader community should be allowed in order to offset the advantages that otherwise favor the defendant at the sentencing stage of a capital trial."[41] However, research suggests that these perceived advantages are unfounded, as jurors tend to view the prosecution as the advantaged party relative to the defense.[42] This imbalance may be exacerbated by VIE, as jurors who hear victim impact evidence "tend[] to discount the defendant's assertion that his

35. *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *see also* Furman v. Georgia, 408 U.S. 238, 246–47 (1972) (Douglas, J., concurring) (finding that, in order for a death sentence to comply with the Eighth Amendment, the sentencer's discretion must be adequately limited).

36. Luginbuhl & Howe, *supra* note 34, at 1161.

37. *Id.*

38. *See* Paternoster & Deise, *supra* note 31, at 153 (finding, through a "randomized controlled experiment, using a videotaped copy of an actual capital penalty phase hearing that included VIE, with death-eligible jurors drawn from the jury registration list of a large mid-Atlantic city," that "witnessing VIE substantially increased the chance that the defendant would be given a death sentence").

39. *Id.* at 156.

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

41. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1098 (1995).

42. *Id.* at 1098–1100 (finding that the jury's perceived "adversarial balance between the prosecution and defense suggests that the prosecution suffers no disadvantage," but rather that "[o]ver one-half of the jurors (62.2%) believed that the prosecution had the advantage in preparing the case for trial, in communicating with the jury (62.3%), in commitment to winning the case (51.0%), and in fighting at the guilt phase of the trial (61.6%)").

difficult upbringing was a mitigating factor in [the] crime."[43] These kinds of personal details about a victim do not change the nature of the crime for which a defendant is on trial. But, in some cases, this evidence could change the jury's perception of the crime. For example, defendants may be unaware of the nature of a victim's life when they commit murder. "Allowing the jury to rely on [VIE] therefore could result in imposing the death sentence because of factors . . . that were irrelevant to the decision to kill."[44]

That said, victim impact evidence may illuminate the relationship between the crime and the victim—by discussing the injuries suffered, for example. It may even shed light on the relationship between the defendant and the victim, where the defendant knew the victim or the witness providing VIE. The extent of the victim's injuries and any relationship between the defendant and the victim or the witness both bear on a defendant's culpability; perhaps someone is more blameworthy for killing someone they knew if they used that personal relationship in carrying out the murder. And victim impact evidence may point to blameworthiness by discussing the brutality of the victim's injuries—something the jury surely should consider.

The problem arises however, in asking the jury to compartmentalize this evidence without telling it how to. In instructing the jury to consider VIE about the relationship between the defendant and the victim or witness to weigh culpability, we risk the jury considering the devastating loss the witness has suffered from the victim's death, something that may have no bearing on a defendant's culpability. Similarly, in telling the jury to consider the extent of the victim's injuries as described in the victim impact statement, because brutality of the murder impacts culpability, we risk the jury considering the devastating emotional and psychological effect that seeing those injuries had on the witness describing them.

IV. WHAT SHOULD A VIE JURY INSTRUCTION SAY?

The *Payne* majority has dictated that, where states craft statutes permitting victim impact evidence in death penalty sentencing phases, the Eighth Amendment does not stand in the way of its admissibility to the extent that this evidence sheds light on the defendant's culpability.[45] Victim impact evidence should thus be used to demonstrate the direct harm caused by the defendant rather than inviting

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43. Edith Greene, Heather Koehring & Melinda Quiat, *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28(2) J. APPLIED SOC. PSYCH. 145, 154 (1998) (finding, through a simulated experiment, that victim impact evidence introduced in cases involving "highly respectable" victims increased both juror compassion for survivors and juror perception of seriousness of crime, and decreased the weight given to defendant's upbringing).

44. Booth v. Maryland, 482 U.S. 496, 505 (1987)*; see also Payne*, 501 U.S. at 860–61 (Stevens, J., dissenting) ("[A]spects of the character of the victim unforeseeable to the defendant at the time of his crime are irrelevant [to] the defendant's personal responsibility and moral guilt and therefore cannot justify a death sentence.") (internal quotations and citation omitted).

45. *Payne*, 501 U.S. at 827.

a comparison between the worth of the victim's and defendant's lives. The jury should consider VIE that speaks to the circumstances of the crime rather than the life led by the victim. The defense should emphasize that victim impact evidence can only be used in the jury's weighing process if it allows the jury to exact more blame on the defendant for the crime committed, rather than evoking more sympathy for the victim of that crime.

One way to do this involves focusing the jury's attention on aspects of the evidence that were foreseeable or known to the defendant, as a "degree of knowledge" is required "to make a person legally responsible for the consequences of his or her act or omission."[46] Similarly, another way to focus a jury instruction on what the defendant could be blamed for is to instruct the jury to consider only VIE that speaks to the circumstances of the crime or other relevant facts of the case. Defense attorneys should use these principles to limit the way juries consider VIE through instructions.

This idea does not run afoul of *Payne*. In stating only that the Eighth Amendment does not render VIE *per se* unconstitutional, the *Payne* holding is narrow.[47] In *Payne*, the only time the Supreme Court has found victim impact evidence not automatically barred by the Eighth Amendment, the evidence in question was intertwined with the facts of the case. There, a mother and daughter were brutally killed in their apartment; the son survived despite serious injuries.[48] The victim impact evidence at issue was a brief statement made by the surviving victim's grandmother, stating that the child misses his mom and sister.[49] Notably, the defendant in this case knowingly killed a mother of young children, and tried to kill both her children, too. This evidence differs significantly from more general victim impact evidence that "presents 'factors about which the defendant was unaware, and that were irrelevant to the decision to kill.'"[50]

Nor would this kind of instruction contradict the idea that "[i]f a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death, [but] [i]f the gun unexpectedly misfires, he may not," because although "[h]is moral guilt in both cases is identical . . . his responsibility in the former is greater."[51] What differs there is the intent to kill someone—the blameworthiness for the act of murder. However, unlike evidence suggesting that a gun was intentionally shot rather than misfired, VIE does not necessarily underscore the severity of the crime committed or the intent required to commit it. Thus, for juries to consider VIE in accordance with the principle of blameworthiness outlined in *Payne*, their attention should be focused on what the defendant could have known about the victim or what was related to the facts of the case.

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46. Paul H. Robinson, *Determining the Culpability Requirements of an Offense*, 1 CRIM. L. DEF. § 61 (2024).

47. *Payne*, 501 U.S. at 827.

48. *Id.* at 812–13.

49. *Id.* at 814–15.

50. *Id.* at 818 (quoting Booth v. Maryland, 482 U.S. 496, 504 (1987)).

51. *Id.* at 819 (quoting Booth v. Maryland, 482 U.S. 496, 504 (1987) (Scalia, J., dissenting)).

Despite only a narrow holding from the Supreme Court providing guidance on the admissibility of VIE, state courts have admitted much broader victim impact evidence focusing on a victim's "uniqueness as an individual human being;"[52] the norm is not to hinge culpability on awareness or relevance to the circumstances of the crime. Therefore, in advocating for these kinds of instructions, the defense should focus on the nature of the victim impact evidence in *Payne* itself, while highlighting that certain state courts have narrowed the admissibility of VIE in accordance with this idea. For example, courts have forbidden VIE that focused on a victim's childhood where the victim was killed as an adult.[53]

V. ANALYSIS OF VIE PATTERN JURY INSTRUCTIONS IN DEATH PENALTY STATES

A. STATE BY STATE ANALYSIS

No death penalty state appears to have pattern jury instructions that discuss how a jury should evaluate a defendant's culpability through victim impact evidence. Therefore, advocating for language limiting the consideration of VIE to what a defendant could have known about the victim or what is related to the facts of the case is crucial in each jurisdiction. The pattern (or model) criminal jury instructions in Utah,[54] Texas,[55] Ohio,[56] North Carolina,[57] South Carolina,[58] Arkansas,[59] Alabama,[60] Nevada,[61] South Dakota,[62] Kentucky,[63] Indiana,[64] Kansas,[65] Missouri,[66] and Mississippi[67] do not appear to include any language on how VIE

52. *Id.* at 823 (internal quotations omitted).

53. *See, e.g.*, Salazar v. State, 90 S.W.3d 330, 337 (Tex. Crim. App. 2002) (finding victim impact evidence in the form of a photograph montage inadmissible where "[n]early half of the photographs showed [the victim] as an infant, toddler or small child, but [defendant] murdered an adult").

54. Model Utah Crim. Jury Instr. 2nd ed. (Admin. Off. of the Utah State Cts.) (2013).

55. Tex. Crim. Jury Charges (State Bar of Tex.) (2023).

56. 2 CR Ohio Jury Instr. 503.01 (Anderson Publ'g) (Jan. 2025).

57. N.C. Pattern Crim. Jury Instr. (U.N.C. Sch. of L.) (June 2022).

58. S.C. Requests to Charge–Crim. 3rd ed. (S.C. Bar) (2023).

59. Ark. Model Crim. Jury Instr. (Matthew Bender & Co.) (Dec. 2024) ("If, pursuant to § 16-97-103(2)-(6), evidence of prior convictions or determinations of delinquency, victim impact evidence or statements, character evidence, or aggravating and mitigating circumstance evidence is presented, no instructions or verdict forms permitting specific findings on these determinations appear to be required.").

60. *Penalty Proceedings–Capital Cases*, Ala. Crim. Jury Instr. (Nov. 9, 2007) https://judicial.alabama.gov/docs/library/docs/penalty_phase.pdf [https://perma.cc/AQ5F-TYPG]. Sentencing is technically determined by a judge, but only if at least 10 jurors are exposed to all evidence and vote in favor of the death penalty. *See Alabama*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/alabama [https://perma.cc/43PR-E4U9] (last visited Feb. 23, 2025).

61. Nev. Pattern Crim. Jury Instr. (Nev. Sup. Ct. Statewide Crim. Rules Comm.) (Nov. 2023).

62. S.D. Pattern Jury Instr. Crim. (S.D. State Bar). (Nov. 2022).

63. William S. Cooper & Donald P. Cetrulo, *Ky. Instr. to Juries, Crim.* (Matthew Bender & Co.) (Dec. 2023).

64. Ind. Pattern Crim. Jury Instr. 4th ed. (Matthew Bender & Co.) (Feb. 2024).

65. Kan. Pattern Instr.–Crim. 4th ed. (Kan. Jud. Council) (July 2024).

66. Mo. Approved Instr.–Crim. 4th ed. (Mo. Sup. Ct. Comm. on Proc. in Crim. Cases) (July 2024).

67. Miss. Model Jury Instr.–Crim. (Miss. Jud. Coll.) (2021–2022).

should be considered. Especially in these states, defense counsel should advocate for effective instructions that help curtail the influence of VIE on capital sentencing juries because there is no default to fall back on.

In the remaining death penalty states that allow victim impact evidence and task juries with deciding sentences in capital cases,[68] jury instructions on victim impact evidence discuss when this evidence should be considered, rather than how a jury is to consider it. For one, Louisiana's instructions provide only that the jury "may also consider evidence concerning the impact of [the crime on the victim, and] [the victim's death] on the victim's family [friends and associates]."[69] Oregon's instructions similarly state that the jury must decline to impose a death sentence if

> after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense, and any victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim's family, one or more of you believe that the defendant should not receive a death sentence.[70]

Idaho takes a similar stance, stating only that "[a] victim impact statement is not made under oath and is not subject to cross-examination," yet so long as the statement does not evaluate, characterize, or opine on "the crime, the defendant, or the appropriate sentence," the jury may "otherwise consider victim impact statements in [its] deliberations."[71] California's instructions state simply that "[v]ictim impact evidence has been received in this trial for the purpose of showing, if it does, the financial, emotional, psychological or physical effects of the victim's death on the family and friends of the victim[s]," and tells juries that they "may consider this evidence as part of the circumstances of the crime in determining penalty," but that their "consideration must be limited to a rational inquiry, and must not be simply an emotional response to this evidence."[72] Here, too, defense lawyers must be vigilant in advocating for a more concrete jury instruction on the consideration of VIE.

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68. Twenty-seven states have the death penalty. *See State by State,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/states-landing [https://perma.cc/4RVS-2UT7] (last visited Feb. 23, 2025). Wyoming does not allow victim impact evidence in capital sentencing trials as a matter of state constitutional law. *See, e.g.*, Olsen v. State, 67 P.3d 536, 595 (Wyo. 2003); Harlow v. State, 70 P.3d 179, 193–94 (Wyo. 2003). Montana and Nebraska require jurors to decide on aggravating factors, and leave the sentencing discretion to the judge, who views and considers victim impact evidence, if any, at that stage. *See Montana*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana [https://perma.cc/RJ6K-9ES8] (last visited Feb. 23, 2025); *Nebraska*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska [https://perma.cc/78WV-7WT9] (last visited Feb. 23, 2025).

69. CHENEY C. JOSEPH & P. RAYMOND LAMONICA, 17 LA. CIV. L. TREATISE, Crim. Jury Instr. 3rd ed., § 7:2 (2024).

70. Or. Unif. Crim. Jury Instr. No. 1322 (Or. State Bar) (2020).

71. Idaho Crim. Jury Instr. 1704 (Idaho Sup. Ct.) (2023).

72. Cal. Jury Instr. Crim. 8.85.1 (West Publ'g Co.) (2024).

Florida and Arizona provide slightly more clarity to capital sentencing juries in their pattern instructions, but ultimately fall short in meaningfully curtailing the influence of VIE. While stating that victim impact evidence is not an aggravating factor, Florida allows VIE to be presented after the state has provided any evidence of aggravating factors.[73] Because "victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances,"[74] this evidence can be considered alongside any mitigation put forth by the defense and can meaningfully weaken the defendant's case. Arizona's pattern instruction permits a jury to consider victim impact evidence "to the extent that it rebuts mitigation" and specifies that VIE is not evidence of an aggravating circumstance.[75] This instruction also permits the jury to evaluate victim impact evidence while considering whether mitigating circumstances are present.[76]

Pennsylvania's pattern instruction allows the jury to consider victim impact evidence as tie-breaking evidence after the jury has found at least one aggravating factor and one mitigating circumstance, while highlighting that victim impact statements are not evidence of an aggravating circumstance.[77] It also states that the evidence should be evaluated based on "the culpability of the defendant, not an emotional response to the evidence presented."[78] Here, "[o]nly after that initial decision has been reached on the existence of at least one aggravating circumstance, and if any of the jurors have found at least one mitigating circumstance can the jury consider victim impact testimony within the weighing process."[79]

Oklahoma provides more limitations on the appropriate consideration of victim impact evidence through its pattern jury instruction; these limitations are facilitated by the state's death penalty statute.[80] In Oklahoma, "although a defendant's crime may make him eligible to receive the death penalty, a jury is never obligated to sentence a defendant to death."[81] The pattern instruction in Oklahoma indicates that jurors may only consider victim impact evidence in imposing the death penalty after they have balanced the aggravating and mitigating factors

73. Fla. Standard Crim. Jury Instr. 7.10 (Fla. Bar) (2024).

74. Windom v. State, 656 So.2d 432, 438 (Fla. 1995).

75. STATE BAR OF ARIZ., REVISED ARIZ. JURY INSTR. (CRIM.) 635 (6th ed. 2022) https://www.azbar.org/media/g01ktaqc/raji-criminal-6th-ed-2022.pdf [https://perma.cc/AB9T-4V9T]. Because Arizona's death penalty statute requires aggravation to be proven in an earlier "aggravation phase" and permits VIE to be admitted at the later "penalty phase," VIE will be admitted only after the jury finds an aggravating circumstance beyond a reasonable doubt. *See* Ariz. Rev. Stat. Ann. § 13-751(B)–(C) (2024).

76. *See* State v. Dann, 207 P.3d 604, 622 (Ariz. 2009) ("Arizona law permits victim impact evidence to rebut the defendant's presentation of mitigation evidence.").

77. Pa. Suggested Standard Crim. Jury Instr. 15.2502F (Pa. Bar. Assoc.) (2024) ("[I]f you find at least one aggravating circumstance and at least one mitigating circumstance, you may then consider the victim and family impact evidence when deciding whether aggravating outweigh mitigating circumstances.").

78. *Id.*

79. Com. of Pa. v. Means, 773 A.2d 143, 148 (Pa. 2001); *see* 42 PA. CONS. STAT. ANN. § 9711(c)(2) (West 2024).

80. *See* 21 OKLA. STAT. ANN. § 701.11 (West 2024).

81. Malone v. State, 168 P.3d 185, 214–15 (Okla. Crim. App. 2007).

and find that the aggravating factors outweigh the mitigating factors.[82] Therefore, a jury could theoretically sentence a defendant to death based on the evidence presented to it before considering victim impact evidence.

Oklahoma's instruction further guides its capital sentencing juries by explaining: "[p]roof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged."[83] The instruction also states that "consideration [of victim impact evidence] must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence."[84] In making this statement, the instruction does not tell a jury how to evaluate victim impact evidence to discern a defendant's culpability.

Tennessee's pattern jury instruction conflicts with its state statute. The pattern instruction matches Oklahoma's, permitting the jury to consider VIE only after finding that aggravating factors outweigh mitigating circumstances.[85] However, Tennessee's death penalty statute requires the jury to impose a death sentence after finding that aggravation outweighs mitigation.[86] Because of this conflict, the committee notes to Tennessee's pattern instructions indicate that the "trial judge may wish to remove" the language allowing the jury to consider VIE only after independently finding that aggravating factors outweigh mitigating circumstances.[87] That said, the Tennessee Supreme Court has found harmless error when the contradicting instruction is given because "any contradiction between the statute and the instruction inures to [defendant's] benefit."[88]

B. SYNTHESIS OF FINDINGS

These instructions appear to fall into four different categories: (1) no mention of VIE; (2) high level mention of VIE without specific guidance for how to consider it; (3) instructing the jury to use VIE to rebut mitigation after separately determining that at least one aggravating factor is present; and (4) instructing the jury to consider VIE in deciding whether to impose the death penalty only after determining that aggravating factors outweigh mitigating circumstances.

The first two categories provide little to no help to juries considering VIE; these instructions risk permitting jurors to impose the death penalty in response to compelling victim impact evidence, or worse, to consider victim impact statements as evidence of an aggravating factor. The third category effectively provides the prosecution with two mechanisms for discounting mitigating factors: by

82. Okla. Crim. Jury Instr. 9-45 (Okla. State Cts. Network) (2022).
83. *Id.* (emphasis omitted).
84. *See id.*
85. *See* 7 Tenn. Pattern Jury Instr.–Crim. 7.04(c) (Tenn. State. Cts.) (2024).
86. *See* State v. Reid, 91 S.W.3d 247, 282 (Tenn. 2002) (quoting TENN. CODE ANN. § 39-13-204(g)).
87. *See* 7 Tenn. Pattern Jury Instr.–Crim. 7.04(c) n.3 (Tenn. State. Cts.) (2024).
88. *Reid*, 91 S.W.3d at 283.

providing evidence of aggravating circumstances that are severe enough to outweigh mitigation, and if the case for aggravation is not strong enough to withstand mitigation, by admitting compelling victim impact evidence to sway the jury toward imposing death. The fourth category hamstrings victim impact evidence most effectively in theory, by requiring juries to weigh the aggravating factors against the mitigating circumstances, find that aggravation outweighs the mitigation, and then consider victim impact evidence in deciding whether to impose the death penalty. Here, the jury has an independent basis for imposing the death sentence prior to considering any victim impact evidence. Importantly, this instruction only works where the jurisdiction's death penalty statute does not *mandate* that sentencing juries impose the death penalty after finding that aggravating circumstances outweigh mitigating factors.

What can be gleaned from these pattern jury instructions? At the outset, it is worth noting that pattern (or model) jury instructions are generally samples that do not bind trial judges,[89] but if "[pattern instructions] have been adopted, there is much less latitude in choosing the wording and content"[90] of jury instructions. Still, advocating for strong instructions is crucial, no matter what state the trial is set to occur in. Defense lawyers practicing in states containing little guidance on the consideration of victim impact evidence should look to the jurisdiction's death penalty statute to see whether the jury is required to impose a death sentence after finding that aggravating circumstances outweigh mitigating evidence. If the decision to impose death remains discretionary, as in Oklahoma, the defense should seek an instruction limiting the consideration of VIE until after the jury found aggravating factors to outweigh mitigating circumstances. Of course, the practical effectiveness of this instruction depends on when the jury hears the VIE; if the prosecution presents VIE in its case in chief, the jury will have already heard it before it must weigh aggravation against mitigation.

Further, these instructions must emphasize that victim impact evidence is not an aggravating factor and should state that VIE may only be considered in the event the jury finds the existence of an aggravating factor beyond a reasonable doubt.[91] That said, this instruction may serve little practical purpose, because the

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89. While these model instructions "are not always set in stone, and it may be advantageous to challenge such instructions even where the court requires that those instructions are given," courts may "require parties to use the pattern jury instruction where one applies." *Correcting the Pattern: Pattern Jury Instructions Can Be Challenged*, TROUTMAN PEPPER LOCKE, Oct. 25, 2023, https://www.troutman.com/insights/correcting-the-pattern-pattern-jury-instructions-can-be-challenged.html#_ftnref2 [https://perma.cc/E4EX-AA9X] (citing People v. Simms, 736 N.E.2d 1092, 1133 (Ill. 2000) ("[i]f an appropriate . . . instruction exists, it must be used."); State v. Tisius, 362 S.W.3d 398, 412 (Mo. 2012) ("[I]nstructions are presumed to be valid and, when applicable, must be given.").

90. Koch, *supra* note 32, at 9.

91. Randall Coyne, *Inflicting* Payne *on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 615, 619 (1992) ("[A]t the close of the sentencing phase the defense should seek an instruction that emotional and financial harm are not aggravating circumstances."). Further, "[i]f the defendant is unfortunate enough to be tried in a state where emotional and financial harm *are* considered proper aggravating circumstances, the instruction to that effect should be objected to as unconstitutional and the issue preserved for appeal." *Id*. at 615.

prosecution often proves at least some of the aggravating factors it intends to introduce before the penalty phase of a capital case begins. Therefore, advocating for instructions that limit the jury's focus on victim impact evidence, while pursuing other means of reform to encourage clarity and foster understanding, is critical.

VI. OTHER CONSIDERATIONS FOR CRAFTING EFFECTIVE JURY INSTRUCTIONS

Regardless of whether defense counsel can successfully obtain a jury instruction that limits when and how a jury should evaluate victim impact evidence, other methods of drafting an effective jury instruction on VIE should be considered.

A. WORDING OF JURY INSTRUCTIONS

To this end, jury instruction wording is crucial, particularly because victim impact evidence should be considered for "culpability"[92] but not "emotion," a distinction that may be a difficult concept for jurors to effectively internalize.[93] Even when practicing in a state with sample jury instructions, "instructions should be tailored for the specific case rather than a rote recital of a model instruction."[94] For one, "[t]he names of the parties should be used" because "[t]his personalization of the instructions will make them more understandable" for the jury.[95] Further, common words should be used, and "compound sentences and the use of double negatives"[96] avoided. Finally, "[c]oncrete terms are more easily visualized, which helps jurors remember and comprehend."[97] Because courts often discuss the role of victim impact evidence in abstract terms, explaining that a defendant's culpability can only be fairly evaluated in relation to what the defendant knew when committing the crime is critical to foster understanding and mitigate opportunities for jurors to consider VIE too broadly.

Logical organization is also crucial. "It is better to lead with the most important, put the general before the specific, and present the overall statement or rule before any conditions or exceptions. It is also helpful to provide contextual information, such as 'this instruction has two parts,' and use headings or numbered lists."[98] With VIE, the instruction should start with the general idea that victim impact evidence is used for the purpose of assessing blameworthiness, rather than the emotion it spurs. It should then move to the more specific idea that the jury should focus on what the defendant could reasonably have known about the VIE, or what parts of the VIE speak to the circumstances of the crime.

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

93. *Id.* at 857 (Stevens, J., dissenting) (Victim impact evidence "serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.").

94. Koch, *supra* note 32, at 9.

95. *Id.*

96. *Id.* at 10.

97. Rosalind R. Greene & Jan Mills Spaeth, *Say What You Mean*, 47 FEB. ARIZ. ATT'Y 34, 37 (2011).

98. *Id.* at 36.

"One of the best ways to communicate points clearly is to distinguish the speaker's ideas from those that his listeners might accept if he did not make such distinctions."[99] Crafting a "list of 'negative' sentences deals with real problems that the typical jury is very likely to face."[100] In the victim impact evidence context, an instruction could state that a jury must not impose the death sentence based on the emotional quality of a victim impact statement. The instruction could then provide specific examples of improper consideration of VIE, like sympathy for the witness or the character of the victim.

B. TIMING OF JURY INSTRUCTIONS

Presenting a VIE jury instruction early in the trial will likely help the jury understand its task pertaining to victim impact evidence. For one, "jurors might be more likely to hear instructions they receive early in the case than those they receive later. The setting is still (somewhat) new, they have received only a limited amount of information from the court, and their faculties should be less taxed."[101] An early VIE instruction will also enable the jury to "receive the evidence with a foreknowledge"[102] of the task at hand. Hearing a VIE instruction prior to hearing the evidence will help keep guardrails on the jury's evaluation of that evidence; the jury will be primed about its duty to consider culpability rather than emotion.

Providing VIE jury instructions at earlier stages in the trial can take several forms. Some options include preliminary instructions, instructions given immediately prior to the admission of VIE at trial, and final instructions that are presented before closing argument. Notably, advocating for VIE instructions at any of these stages is often a departure from the norm. "As a general principle, jury instructions are given briefly at the beginning of the trial, as needed during the trial, and extensively at the end of closing arguments."[103] The result? Jurors may not be "fully informed of the law they are to apply until after they have heard all the proof and the lawyers' closing arguments."[104] In watching the trial without knowing the law, a jury is asked to serve as the "'scorekeeper of an athletic contest' who does not know what acts receive points or penalties until after the conclusion of the game."[105]

One way of addressing this issue is to seek a preliminary instruction, which improves juror memory, focuses juror attention, and improves "organization and

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99. Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMPLE L.Q. 1159, 1167 (1986).

100. *Id*. at 1168.

101. Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 89 (2005).

102. Koch, *supra* note 32, at 9.

103. Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 684 (2000).

104. *Id*.

105. *Id*. (quoting Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 160–61 (1996)).

analyzation of evidence."[106] Another helpful tactic involves giving instructions before closing argument that are "then followed by another briefer instruction after closing argument."[107] This repetition is useful "because it may improve juror comprehension and verdict accuracy."[108]

The timing of jury instructions falls squarely within the province of trial judges, who "are accorded broad discretion" in making these decisions.[109] That said, "[o]ne factor" judges use in deciding on timing "is whether counsel requested a particular jury instruction at a particular time."[110] Therefore, defense attorneys should advocate for early instructions on VIE just as they advocate for the content of these instructions.

C. DEPICTION OF JURY INSTRUCTIONS

Jury instructions may also be enhanced through their depiction. Particularly given the evocative character of victim impact evidence and the complexity of the jury's task in evaluating it, providing the jury with a written instruction may prove useful. "Once handed a copy of the instructions, jurors would have multiple opportunities to 'hear' the instructions,"[111] and in the event of confusion relating to the obscure purpose of VIE, they would have a resource to consult.

In a similar vein, using pictures and diagrams in a VIE jury instruction may help build understanding. These illustrations can be particularly helpful when coupled with "negative statements" about how not to consider victim impact evidence. "These 'negative statements' can be represented with illustrations that are crossed out with an 'X' to indicate that these conditions do not constitute"[112] appropriate roles for victim impact evidence. "The visual 'crossing out' . . . can be an effective way of clarifying to the jury the law regarding"[113] victim impact evidence. Consider the proposed instruction limiting consideration of VIE to what the defendant could have reasonably known about the victim or to what is related to the facts of the crime. Any aspects of victim impact evidence that may not fit in this category, and therefore may not bear on culpability, could be visually crossed out.

On a broader level, defense counsel should consider presenting VIE jury instructions in accordance with educational principles.[114] The theory of direct instruction may be helpful in this endeavor. "Direct Instruction counsels that educators should break material into small steps to prevent unnecessary confusion,

106. Phillip Dantes, *Start with Jury Instructions*, 43 DEC. MD. BAR J. 54, 55 (2010).
107. Cohen, *supra* note 103, at 698.
108. *Id.*
109. *Id.* at 685.
110. *Id.*
111. Lillquist, *supra* note 101, at 89.
112. Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 L. & PSYCH. REV. 67, 80 (1998).
113. *Id.*
114. *See, e.g.*, Max Rogers, *Laypeople as Learners: Applying Educational Principles to Improve Juror Comprehension of Instructions*, 115 NW. U. L. REV. 1185, 1187–88 (2021).

structure learning by providing an overview or outline of new material, and give ample opportunities to learners to practice applying new concepts, along with many opportunities for feedback."[115] Direct Instruction has been touted for many reasons: namely, it prevents cognitive overload when processing new material and helps build long term memory relatively quickly, which allows students to "actively use" the information they have acquired.[116] This theory is aptly suited to assist juries, who "[o]f all the parties in a courtroom . . . enter with the hardest job and yet the fewest basic skills with which to undertake it."[117] The VIE context presents a particularly perplexing task for jurors. After all, jurors are effectively told to weigh aggravating factors against mitigating circumstances while also considering victim impact evidence but without confusing VIE for evidence of an aggravating factor. Defense attorneys should seize any opportunity to break that task down, repeat it, and clarify it to jurors.

VII. VIE JURY INSTRUCTIONS AND COMPETENT LEGAL REPRESENTATION

At its core, this Note provides ways for defense lawyers to better represent their clients. It therefore inherently implicates defense counsel's competence under the *Model Rules of Professional Conduct*. Advocating for clear jury instructions that appropriately limit a jury's ability to consider victim impact evidence is a critical part of representing capital defendants. These efforts aid in securing adequate process for vulnerable clients and prevent unfairness in the courtroom; in turn, this advocacy helps defense lawyers satisfy their obligation to engage in competent representation.

Building a case for mitigation is a critical part of a capital defense lawyer's representation strategy and ethical obligations, as "[a]long with preparing to counter the prosecution's case for the death penalty, defense counsel must develop an affirmative case for sparing the defendant's life."[118] "[T]he responsibility for the development and presentation of mitigation evidence must be incorporated into the defense case at all stages of the proceedings . . . in which the jurisdiction may be entitled to seek the death penalty."[119] Further, "[i]nherent in the approach to competent capital defense . . . is the recognition that the mitigation function . . . rests irrevocably with counsel."[120] Yet, vague jury instructions that do not tell a jury how to consider VIE within its constitutional limits threaten to negate the extensive mitigation efforts defense attorneys must pursue. Inadequate instructions weaken the most critical part of capital defense lawyers'

115. *Id*. at 1213–14.

116. *Id*. at 1214.

117. *Id*.

118. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 927 (2003).

119. American Bar Association, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 678 (2008).

120. *Id*. at 677.

obligations to their clients, an aspect of their duties that is vital to carrying out competent representation under Model Rule 1.1.[121]

In light of the clear connection between developing a mitigation strategy and ensuring that strategy is appropriately put before a jury for its consideration, advocating for VIE jury instructions should be seen by defense lawyers as an extension of their Rule 1.1 duty to investigate and argue for mitigating circumstances. The duty to build a mitigation case means little if that mitigation falls flat in the face of emotional victim impact evidence that is not appropriately curtailed. "This Eighth Amendment right to offer mitigating evidence does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will . . . *insist on the consideration* of those compassionate or mitigating factors stemming from the diverse frailties of humankind."[122] To effectively "insist on the consideration"[123] of mitigating circumstances by juries, and to pursue the "means by which the mitigation presentation might be strengthened,"[124] defense lawyers must advocate for jury instructions that limit victim impact evidence.

CONCLUSION

In evaluating victim impact evidence, jurors are tasked with an unnatural responsibility: to watch as bereaved witnesses discuss the life that was lost and the devastating impact this loss has had on their own lives—all without being improperly swayed by this highly emotional evidence. On top of this, juries may be provided with wholly inadequate instructions that fail to articulate how this evidence should be evaluated.

Providing a comprehensive jury instruction about how to consider victim impact evidence is critical. *Payne* sets a low bar for victim impact evidence; the Court's only parameter is that VIE may not render the trial fundamentally unfair.[125] While some state courts have indicated that "what may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial,"[126] that reasoning appears to apply only to the most extreme instances of VIE.[127] Because prosecutors still have great latitude in presenting victim impact evidence, without adequate guidance through instructions,

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121. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018).

122. American Bar Association, *supra* note 118, at 927 (quoting Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1317 (1997)) (internal quotations and citation omitted) (emphasis added).

123. *Id*.

124. *Id*. at 1055.

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

126. Salazar v. State, 90 S.W.3d 330, 337 (2002) (Tex. Crim. App. 2002) (finding a video tape inadmissible as victim impact evidence where the prejudicial value of admitting it outweighed its probative effect).

127. *See, e.g*., Alexander H. Updegrove, *Victim Impact Evidence in Capital Cases: Regulating the Admissibility of Photographs and Videos in the* Payne *Era*, 34 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167, 175–80 (showing that courts regularly exclude "atypical" victim impact evidence in the form of poetry, songs, audio recordings, photographs, and videos).

capital sentencing juries are at risk of being unconstitutionally swayed by this evidence.

Because states' pattern instructions focus on when juries must consider victim impact evidence, rather than how they must consider it, advocating for an instruction that meaningfully guides the jury's process of weighing the evidence is crucial. This Note provides one suggestion, by directing the jury's consideration of VIE to what the defendant could fairly be blamed for through one of two ways: focusing on what parts of the VIE the defendant could have known about when committing the crime or focusing on aspects of the VIE that relate to the facts of the case. In either situation, the jury is truly limited to weighing culpability.

Regardless of the defense's success in substantively limiting VIE through jury instructions, other measures can still meaningfully influence a jury's understanding of its task regarding victim impact evidence. For example, it should be stressed that VIE is not evidence of aggravating circumstances. This point will remind the jury that it must first make an aggravating factor determination separately from any VIE. Further, the wording and timing of these instructions can play pivotal roles in furnishing comprehension; emphasis should be placed on simple, case-specific language in instructions and these instructions should be given early in trials, before the jury hears the victim impact evidence. Finally, defense counsel should consider providing written VIE instructions to jurors, as well as using visuals to describe what the law asks of the jury. To this point, educational principles can provide overarching guidance on how to best foster genuine understanding of the law.

Well-crafted jury instructions make for a fairer criminal process—when the jury knows the task at hand, it is much more capable of delivering a just outcome. This need for clarity is heightened in the context of victim impact evidence in capital sentencing trials, where highly emotional evidence about the harm felt by the victim's family has the potential to damage the careful balancing act that the law requires juries to perform. Victim impact evidence is relevant for assessing the narrow question of a defendant's blameworthiness, yet its evocative character lends itself to having much more influence on juries than *Payne* dictates. Proper jury instructions are paramount to the pursuit of competent and zealous advocacy on behalf of criminal defendant clients and in the fight for just outcomes in criminal trials. Therefore, while this Note has focused on how defense attorneys can help their clients navigate capital sentencing in light of victim impact evidence, this is a pursuit that the broader legal community should embrace. Fair process for those most vulnerable requires it.