# FROM SIMPLE STATEMENTS TO HEARTBREAKING PHOTOGRAPHS AND VIDEOS: AN INTERDISCIPLINARY EXAMINATION OF VICTIM IMPACT EVIDENCE IN CRIMINAL CASES

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## I. *INTRODUCTION*

The robbery victim still had nightmares from the defendant having pointed his gun at her face as he demanded that the victim turn over her purse, her watch, and her diamond engagement ring. She had no choice but to comply. Immediately following the attack, she started having tremors, night sweats, nightmares, and lost the ability to concentrate at work. Counseling did not help; neither did the medication her doctor prescribed for her. Notwithstanding the trauma the robbery victim had experienced, she was determined, if given the opportunity, to help put her attacker in prison. That opportunity came at trial, and she was more than equal to the task. Her testimony was firm and clear. Cross-examination proved fruitless. The jury deliberated for only eighty-five minutes. Her attacker was convicted.

The robbery victim then turned to the second opportunity she was offered—to provide the court and the defendant with a victim impact statement, which the victim could choose to provide live or in writing. To help take back the power that the defendant also robbed her of that day, and to explain to the court as persuasively as possible how much damage he had done to her, she decided upon the former. The victim both intended and expected that her statement would result in a more severe sentence for the defendant than the court would otherwise give.

The above scenario may be hypothetical, albeit almost certainly representative of the feelings of numerous victims every year, but its "victim impact statement" (VIS) is decidedly not. It is today, instead, a universally established part of both the state and federal American criminal judicial systems, and a key part of "victim impact evidence"

(VIE) overall.[1] In its origin, however, it is both quite recent and humble, starting only in 1976, and not with legislation or a court decision but with one man—James Rowland, the Chief Probation Officer in Fresno County, California—and his experiences with victims of crime:[2]

> [M]y career started as a [d]eputy [s]heriff for San Bernardino County and for some reason after a year, I ended up in the detective division and was involved in several cases [involving] . . . domestic violence, rape, murder, [and] child abuse . . . . I was amazed to learn . . . , and I didn't have the term immediately, the impact that crime had on so many people, serious impact. I saw a woman killed by a drunk driver, a head-on collision. The child came through the windshield[,] and as I ran up to the door, she was taking her last breath. And I was very young, fresh out of college and just had a lot of influence on me. And I reflected. I said, "Neither my department nor my four years of college ever dealt with victim issues." And I didn't understand that [because] it was so devastating at times. And the term "impact" was not the original term that I had, but my dad was a builder and he was frequently complaining about environmental impact. And years later I guess I reflected on that and when I was, at that time with being a

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1. Although universal in their adoption, VISs are not universal in application. *See generally* Nat'l Ctr. for Victims of Crime, *Victim Impact Statements*, https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victim-impact-statements (last visited Mar. 21, 2016) (discussing the types of cases in which VISs may be used, the individuals who may give such a statement, the form in which it may be presented, and the defendants' rights to challenge the information contained within the statement).

2. Ellen K. Alexander & Janice Harris Lord, *Impact Statements: A Victim's Right to Speak, A Nation's Responsibility to Listen*, NAT'L CRIM. JUST. REFERENCE SERVICE (July 15, 1994), https://www.ncjrs.gov/ovc_archives/reports/impact/welcome.html. This Article will focus on how VISs and VIE are working in practice; the evolution of these statements, or the victim's rights movement, generally is not within the purview of this Article. For sources on these subjects, see, e.g., Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009); Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215 (2002); Alice Koskela, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157 (1997).

> [d]eputy [s]heriff[,] I said, "[i]f I'm ever in a position to focus more on what crime really does to people[,] . . . I'll do something about it."
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> Years later I ended up as a [p]robation [o]fficer in Fresno[,] and the term "victim impact statement" was born there, going back to my early years as a law enforcement officer and my dad complaining about an environmental impact statement.
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> . . .
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> I met a [judge] when I went to Fresno as chief probation officer, Judge Kenneth Andrene[.] [W]e became very close[,] and he was talking about how the victim is neglected and the justice system is doing nothing for victims. So the victim impact statement discussion came a little earlier, but basically most of the discussion in Fresno was about both victim impact and probation-based victim services to assist them. We were able to hire some staff that worked exclusively with victims. And the victim impact statement was simply . . . two or three paragraphs in the pre-sentence report. That's before the victim actually came to court and could testify. So it was in our pre-sentence report.[3]

From this single pre-sentence report in 1976, VISs and VIE are today authorized, and in many cases constitutionally so, in all fifty states.[4] In federal cases, Federal Rule of Criminal Procedure 32 requires that:

- All pre-sentence reports contain "information that assesses any financial, social, psychological, and medical impact on any victim";[5] and
- "Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard."[6]

Although victim impact statements may be universally authorized, the more important questions are whether and how well they are working in *actual practice*. This Article will analyze two types of evidence to answer these questions regarding victim impact statements: (1) empirical studies from the United States and other countries that use VISs; and (2) the survey performed by the Author, which contains a number of

3. Interview by Melissa Hook with James Rowland, founding member, National Organization for Victim Assistance, Sacramento, Cal. (Feb. 25, 2003), *available at* http://vroh.uakron.edu/transcripts/ Rowland.php.

4. *See* Nat'l Ctr. for Victims of Crime, *supra* note 1.

5. FED. R. CRIM. P. 32(d)(2)(B).

6. FED. R. CRIM. P. 32(i)(4)(B).

suggestions—from judges who preside over court proceedings and trial lawyers who use victim impact statements—that if implemented, would improve the VISs process and enable those who use or defend against VIS to do so more effectively.

VISs—oral or written—are the simplest, most cost-effective (they are free), and easily available types of VIE. For these reasons, they almost certainly are the most often used forms of VIE. Additionally, because they are not "visual" (in the manner of cinematic movies) or "musical" (e.g., scored for maximum emotional impact), they lack characteristics that would easily incite potent emotional reactions capable of creating unfair prejudice to the defendant.

Such oral or written VISs are not the only forms, however. At the other end of the spectrum of VIE lie professionally produced and edited, narrated, and musically scored videos, and types of photographs that by their very nature are *designed* to *incite* potent emotional reactions. Part IV of this Article will analyze selected cases in which courts have attempted to define the limits of VISs and which illustrate the dangers of evidence that are, at least, highly emotionally charged and, at most, inflammatory, carrying with them a *great* potential for subjecting defendants to substantial unfair prejudice. In both Parts I and IV, this Article will analyze how a vacuum created by the United States Supreme Court has left it to lower courts to rein in the use of this particularly potent form of VIE.

Therefore, this Article will analyze how VIE is actually working in its simplest and most common, as well as its most sophisticated and prejudicial, forms. The Author hopes that trial lawyers and judges will benefit from both.

In Part II, this Article will examine empirical evidence of VISs, largely focusing on non-capital cases. VISs in capital cases are fundamentally different because the statements conveying victim information are not directed to the court post-plea or post-conviction. Rather, the statements are directed to jurors in the sentencing phase of the trial. Thus, the operation, as well as the impact of these statements in these two types of cases, is fundamentally different.[7]

7. *Compare* statistical evidence that statements have a lack of effect on sentencing severity in general, *infra* Part II(A), *with* findings that victim impact statements cause a greater likelihood that jurors will recommend the death penalty in capital cases. *See, e.g.*, Jeremy A. Blumenthal, *Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements*, 46 AM. CRIM. L. REV. 107, 116, 119 (2009) (finding that study participants, acting as mock jurors who heard VISs, were more likely to hand the defendant a death penalty sentence than mock jurors who had not heard VISs, whereas mock jurors who heard both VISs and expert testimony on affective forecasting were less likely to give the defendant a death penalty); Jerome Deise & Raymond Paternoster, *More Than*

Capital case jurisprudence on VIE, however, does warrant discussion at this point. One decision in particular from the United States Supreme Court has created a legal vacuum on an issue critical to criminal defendants nationwide in both non-capital *and* capital cases: what will either be permitted or barred in the use of such evidence. For this reason, Part IV will examine both types of cases.

In 1991, in *Payne v. Tennessee*,[8] the Court abandoned its recent decisions in *Booth v. Maryland*[9] and *South Carolina v. Gathers*,[10] and held that the Eighth Amendment and its bar of cruel and unusual punishment would *not* render VIE (there, live testimony) *per se* inadmissible in capital cases.[11] Rather, the Court deferred:

> "Within the constitutional limitations defined by our cases, the [s]tates enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." The [s]tates remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. [VIE] is simply

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*a "Quick Glimpse of the Life": The Relationship Between Victim Impact Evidence and Death Sentencing*, 40 HASTINGS CONST. L.Q. 611, 628 (2013) (examining empirical evidence finding that VISs affect juror emotions and make it more likely jurors will give the defendant a death sentence); Damon Pitt, Comment, *No* Payne*, No Gain?: Revisiting Victim Impact Statements After Twenty Years in Effect*, 16 CHAP. L. REV. 475, 489 (2013) (describing a study where "fifty-one percent of [participants] who heard VIS elected a death sentence, while only twenty percent of those not hearing VIS elected death"). *But see* Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 307–08 (2003) (analyzing a study of over two hundred jurors who sat on capital trials in South Carolina between 1985 and 2001, which revealed no significant connection between victim impact evidence and sentencing results). For the reader who wishes to further explore the use of victim impact statements in capital cases, an excellent starting point is Jean M. Callihan, *Victim Impact Statements in Capital Trials: A Selected Bibliography*, 88 CORNELL L. REV. 569 (2003). Even in non-capital cases, evidence exists that the severity of victim impact evidence causes jurors to increase the sentences they would otherwise impose. *See, e.g.*, Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 435 (2003) (studying mock jurors sentencing in burglary and robbery cases).

8. 501 U.S. 808 (1991). *Payne* resulted in a plethora of literature largely critical of its holding for a variety of reasons, including, but not limited to, urging constitutional, evidentiary, and *stare decisis* grounds. *See, e.g.*, Ranae Bartlett, Case Note, Payne v. Tennessee*: Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 ARK. L. REV. 561, 561 (1992) (stating that "the most disturbing aspect" of the Court's opinion is its "disregard for the role of stare decisis in constitutional law cases"); Catherine Bendor, Recent Development, *Defendants' Wrongs and Victims' Rights:* Payne v. Tennessee*, 111 S. Ct. 2597 (1991)*, 27 HARV. C.R.–C.L. L. REV 219, 220 n.8 (1992) (describing the Court's characterization of stare decisis as a "policy principle rather than a strict command" as a "novel conceptualization of the doctrine of stare decisis"); Joshua D. Greenberg, Comment, *Is* Payne *Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 IND. L.J. 1349, 1349–50 (2000) (arguing that the Court's holding is "constitutionally infirm"); Suzanne Murray, Case Comment, *Constitutional Law—Victim Impact Evidence: Basing Sentencing Decisions on Emotion Rather Than Reason*—Payne v. Tennessee*, 111 S. Ct. 2597 (1991)*, 26 SUFFOLK U. L. REV. 221, 226–27 (1992) (discussing the Court's flawed reasoning regarding stare decisis and the Constitution).

9. 482 U.S. 496 (1987).

10. 490 U.S. 805 (1989).

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

> another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.[12]

Thus, with the same decision, the Court both "uncapped the bottle" containing such evidence, at least in capital cases, and at the same time refused to provide guidance to lower federal or state courts as to how or when it could be used.

Seventeen years later, the Court again had the opportunity, with both *Kelly v. California*[13] and *Zamudio v. California*,[14] to provide this guidance. In addition to the logic of the Court doing so and the judicial efficiency that would result if it did, rulings were *particularly* needed in both cases—for in both, the VIE at issue was *far* more potent than the live testimony presented in *Payne*.[15] Prosecutors had played videos for both penalty phase juries as part of their VIE.[16] Among other highly emotionally powerful portions, these videos showed grave markers of the deceased.[17] The Court's opinion does not adequately reflect, nor could it, the highly emotional impact of the videos themselves.[18] Not unexpectedly, both juries recommended death.[19] Yet, in both cases, the Supreme Court denied certiorari.[20]

Justice John P. Stevens would have granted the petitions.[21] Accordingly, in his statement in response to the denials, he criticized the Court for having failed to address an important need in regard to VIE:

> Given *Payne*'s sharp retreat from prior precedent, it is surprising that neither the opinion of the Court nor any of the concurring opinions made a serious attempt to define or otherwise constrain the category of admissible [VIE]. Instead, the Court merely gestured toward a standard, noting that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." That statement

12. *Id.* at 824–25 (citations omitted) (quoting Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990)).
13. 555 U.S. 1020 (2008) (mem.).
14. *Id.*
15. *Id.* at 1020, 1025.
16. *Id.*
17. *Id.*
18. *Video Resources*, U.S. SUPREME CT. (Nov. 10, 2008), http://www.supremecourtus.gov/opinions/video/kelly_v_california.html.
19. People v. Zamudio, 181 P.3d 105, 114 (Cal. 2008); People v. Kelly, 171 P.3d 548, 552 (Cal. 2008).
20. *Kelly*, 555 U.S. at 1020.
21. *Id.* at 1026.

> represents the beginning and end of the guidance we have given to lower courts considering the admissibility of [VIE] in the first instance.
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> 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 [VIE] 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 [VIE] capital juries are permitted to consider.[22]

Justice Stevens went on to state his concerns as to both the variety of such evidence, including "poems, photographs, hand-crafted items, and—as occurred in these cases—multimedia video presentations,"[23] and its "especially prejudicial" nature:[24]

> Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when [VIE] is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment.[25]

It has been twenty-three years since the Court in *Payne* uncapped what many have since argued is a wellspring of highly prejudicial, constitutionally infirm and irrelevant evidence, all directed toward criminal defendants facing death.[26] Moreover, it has been six years since the Court again failed to take the lead (by denying certiorari in *Kelly* and *Zamudio*) to provide guidance to either the states or lower federal courts as to the use of this critical evidence.[27]

As will be shown in Part IV of this Article, two things are clear. First, Justice Stevens' concerns have proved prescient. Lower courts are faced

22. *Id.* at 1024 (citations omitted).
23. *Id.*
24. *Id.* at 1025.
25. *Id.*
26. *See supra* note 8 (discussing literature critical of *Payne*). To this point, one scholar notes that "[a] flood of critics have alleged that by allowing the admission of victim-impact evidence at capital sentencing, *Payne* permits 'arbitrary and capricious' sentencing in violation of the Eighth Amendment." Greenberg, *supra* note 8, at 1349.
27. *Kelly*, 555 U.S. at 1020.

with the task of having to fill the vacuum in the absence of the Court's guidance. Second, the need for this guidance is significant because each time a court renders a decision of the type analyzed in this Article, the potential for lack of uniformity grows.

Following this introduction, Part II of this Article will review empirical evidence, including studies from Canada, England, and Australia, and will analyze the degree of correlation between perceived benefits and detriments of victim impact statements on the one hand, and the empirical evidence on the other. Part III will present and discuss a detailed and comprehensive survey, performed by the Author in 2013, of judges, prosecutors, and public defenders in the Ninth Judicial Circuit of Florida, as to how VISs are actually working. In Part IV, the Article will examine selected nationwide caselaw at the outer end of the spectrum of VIE, even to the point of it arguably being termed "beyond the pale"—and how courts have coped with such evidence. The Article will conclude in Part V, followed by Appendices I, II, and III, which will detail results of the Ninth Judicial Circuit survey.

## *II. SUGGESTED DETRIMENTS OR BENEFITS OF VICTIM IMPACT STATEMENTS VS. THE EMPIRICAL EVIDENCE—TOO OFTEN, THE EMPEROR HAS NO CLOTHES*

There has been no shortage of commentary either criticizing or touting the use of VISs.[28] However, in analyzing their detriments or benefits as part of the focus in this Article on how such statements are actually working, beliefs and opinions should defer to evidence. Fortunately, a substantial amount of research, empirical in nature, does exist to help determine the validity—or lack thereof—of many of them.

### A. Victim Impact Statements Result in More Severe Sentences

Research suggests that "the overwhelming majority of the victims want their VIS to be used in sentencing, and many of them seek to influence the sentence imposed on the offender via the input."[29] One study has shown that "almost three-quarters of victims who stated they provided VIS material expected the VIS to have an impact on the sentence."[30] It does seem logical to believe that often-emotional victims,

28. *See, e.g.*, *supra* note 8 and all sources cited *infra* in Part II.

29. Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment* and *Enhancement of Justice*, 1999 CRIM. L. REV. 545, 552 (1999).

30. Edna Erez, Leigh Roeger & Michael O'Connell, *Victim Impact Statements in South Australia*, AUSTL. INST. OF CRIMINOLOGY 212, *available at* http://aic.gov.au/media_library/publications/

appearing before the court and describing in painful detail how the defendant's act has hurt them or their families, would correctly expect to influence courts to sentence more severely than the court otherwise would. Moreover, as described at the start of this Article, our hypothetical victim had both this intention and expectation. Though the intention may exist, however, the evidence refutes the likelihood of such expectations coming to pass:

> Research suggests that the concerns expressed by opponents of the VIS concerning possible erosion of adversarial criminal justice principles, rights of defendants and imposition of harsher sentences have not [materialized]. Studies conducted in the USA and in Australia comparing sentencing outcomes of cases with and without VIS, and research in Australia on sentencing trends and comparison of sentence outcomes before and after the VIS reform, suggest that sentence severity has not increased following the passage of VIS legislation. Nor has the VIS affected sentencing patterns or outcomes in the majority of the cases.[31]

And, equally or more surprising:

> In [the] minority of cases in which VIS made a difference, the data revealed that the sentence was as likely to be more lenient as it was to be more severe than initially thought. For example, if the [offense] was perpetrated in an unusually cruel manner, or with disregard to special vulnerability of the victim, then the sentence was likely to be higher. The practitioners likewise provided instances of cases they tried where the VIS led to the imposition of a more lenient sentence than would have been indicated. For example, cases in which the victim's statement disclosed that the victim had made a complete recovery or in circumstances where certain injury had been mistakenly attributed to the crime . . . . In other words, contrary [to suggestions of other authors in this field], it seems that VIS make an important contribution to proportionality rather than to severity of sentencing.[32]

Additional studies also refute the existence of a causal relationship between VISs and more severe sentencing:

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proceedings/27/erez.pdf (last visited Apr. 13, 2016).

31. Erez, *supra* note 29, at 547–48 (footnotes omitted).

32. *Id.* at 548 (footnotes omitted).

- A California study concluded that "[t]he right to allocution at sentencing has had little net effect . . . on sentences in general."[33]
- A New York study concluded that there was "no support for those who argue against [VISs] on the grounds that their use places defendants in jeopardy."[34]
- "A multivariate statistical study of Assault Occasioning Actual Bodily Harm (AOABH) cases was undertaken to examine in closer detail possible effects on sentencing patterns resulting from the introduction of VIS. The multivariate analysis of the factors related to sentences for [such cases] identified as predictors of prison sentences: a previous record of imprisonment, the presence of aggravating factors, an absence of mitigating circumstances[,] and the defendant's age. However, the presence of a VIS in the court file, the [judge's] remarks about the VIS[,] or whether the case was [finalized] before or after the introduction of VIS[,] were not found to be related to sentencing disposition."[35]
- An American study of the effects of victim rights legislation found evidence in two different respects that also refutes any connection between VISs and more severe sentencing.[36] Its survey of prosecutors nationwide, with 378 responding, reported that 57% found that victim rights legislation (including VISs) had "[n]o [i]mpact" on length of sentence; 30% said that sentences were increased "less than 10%"; 11% said they were increased "10 to 20%"; and only 2% said that they were increased "more than 20%."[37] Additionally, the authors examined criminal case files in two counties in Wisconsin and North Carolina both before and after the passage of victim rights legislation in these states—and uncovered no evidence that the change increased sentence lengths.[38]

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33. Cassell, *supra* note 2, at 635.
34. *Id.* (quotations omitted).
35. Erez et al., *supra* note 30, at 215.
36. Robert C. Davis, Nicole J. Henderson & Caitilin Rabbitt, *Effects of State Victim Rights Legislation on Local Criminal Justice Systems*, VERA INST. OF JUST. 11, 29 (2002), *available at* http://www.vera.org/pubs/effects-state-victim-rights-legislation-local-criminal-justice-systems.
37. *Id.* at 11 tbl.6.
38. *Id.* at 29.

In regard to VISs, one author has stated: "The purpose of instituting VIS was to provide victims a voice, not to restructure sentencing priorities. The legislation concerning victim input was not intended to substitute harm for culpability, nor to consider harm as the overriding criterion in sentencing."[39] This seems accurate. No constitutional, statutory, or rules-based authority has been found that *requires* victims' statements, vis-à-vis sentencing, to be, "considered persuasive," "given great weight," or "primary" so as to supersede or outweigh other factors used in sentencing. Instead, and consistent with the "seriousness of the offense"[40] being but one of the factors found in the federal sentencing guidelines, statements are one among many considerations that sentencing judges should take into account. As empirical evidence shows, VISs do not support an undesirable policy that would "consider harm as the overriding criterion in sentencing"[41] because they do not appear to affect sentencing *ab initio*.

### B. Victim Impact Statements Subject Defendants to Unfounded Accusations

This belief has also been tested—and found to be without substance:

> The concern that victims would use the VIS as an opportunity to subject offenders to unfounded accusations has also not [materialized]. In most jurisdictions currently [practicing] VIS, victims do not prepare their own statement[,] but it is filtered or "edited" by the specific agency responsible for the preparation of VIS. Moreover, "retelling" victims' stories often "sterilizes" them to such an extent that judges noted that the VIS was mild compared to what would have been expected in the light of the [offense] involved. VIS therefore turns out to be an understatement rather than an overstatement of the harm sustained in the particular [offense]. The recent pilot project in England confirms that victim statements tend to understate the impact of [offenses], and that the VIS scheme does not encourage exaggeration, inflammatory input or vindictiveness.[42]

39. Erez, *supra* note 29, at 555.
40. 18 U.S.C. § 3553(a)(2)(A) (2012).
41. Erez, *supra* note 29, at 555.
42. *Id.* at 548–49 (footnotes omitted).

### C. Defendants Will Subject Victims Giving Statements to Unpleasant Cross-Examination and Thereby Further Harm or Traumatize Them

As one researcher has noted, "one of the commonly raised arguments against the VIS [is] that because of the likelihood of VIS to affect the sentence, victims will be subjected to unpleasant questioning and challenges to their input."[43] Although this may be a common argument, research involving legal professionals (generally judges, lawyers, and victim advocates) shows there is little, if any, validity to it:[44]

> Concern that defendants would challenge the content of VIS thereby subjecting victims to unpleasant cross-examination on their statements has . . . not [materialized]. Legal professionals have stated that challenges to VIS in court are quite rare. According to these professionals, there are strategic disincentives militating against calling victims to the witness stand and cross-examining them on the content of their statements . . . because of the adverse effects it may have on the sentence. Decision makers who hear and observe victims testifying about the impact of the crime on them may be affected by the testimony and therefore more inclined, according to the legal professionals, to impose a harsher sentence. In this respect, the concern about protecting victims from unnecessary and possibly degrading questioning regarding the content of their VIS (as distinguished from cross-examining victims about their testimony in the trial) seems to be unwarranted.[45]

One 2006 Canadian survey specifically asked judges how often crime victims were cross-examined on their statements.[46] Ninety-seven percent of the ninety-six judges who responded from the three jurisdictions (British Columbia, Alberta, and Manitoba) said "that it never or almost never took place."[47]

Trial lawyers who do not cross-examine victims almost certainly are prudent. Victims giving impact statements as to how they or their families (or both) were hurt fall in the same class of witnesses as grieving parents, widows or widowers, or plaintiffs who have been seriously injured by the defendant. Any competent trial lawyer knows that one cross-examines

43. *Id.* at 549 n.20.

44. *Id.* at 549.

45. *Id.* (footnotes omitted).

46. Julian V. Roberts & Allen Edgar, *Victim Impact Statements at Sentencing: Judicial Experiences and Perceptions*, DEP'T OF JUST. CAN. 33 (Mar. 31, 2006), *available at* http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr06_vic3/rr06_vic3.pdf.

47. *Id.* at 10.

such witnesses only when necessary, and even then, only with the greatest of care.

### D. Victim Impact Statements Have Harmful Effects on Those Who Give Them

One cannot rule out that some victims will be emotionally hurt or impacted by, among other things, going into court (which is stressful for many witnesses and seasoned trial lawyers alike), speaking publicly (when public speaking is renowned as being one of the most common fears), and directly confronting the defendant(s) who hurt them. This does not mean, however, that victims do not benefit from this process. They have been shown to benefit substantially:[48]

> Another argument against the use of [VISs] in sentencing is that it has harmful effects on victims. Some argued that [VISs] subject victims to pressures, and that victims may feel burdened by the responsibility for deciding the penalty.
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> This argument is empirically inaccurate, and does not represent the majority of victims who get involved in criminal justice proceedings. The cumulative knowledge acquired from research in various jurisdictions, in countries with different legal systems, suggests that victims often *benefit* from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering.[49]

One author has summarized a number of research studies, which have shown the following results for victims who engage in the VIS process. All of them either benefit the victims or encourage in their own right:[50]

- "[V]ictims are interested in having a voice."
- "[B]y and large victims do not feel burdened by being heard . . . ."
- Victims do not "feel pressured by knowing that their input has been conveyed to decision makers."
- "[T]he majority of victims of personal crimes wished to participate and provide input, even when they thought their input was ignored or did not affect the outcome of their case."

48. Erez, *supra* note 29, at 551.
49. *Id.* at 550–51 (footnotes omitted).
50. *Id.* at 551.

- "For some, input restores the unequal balance between themselves and the offender, particularly in cases in which the victim did not have an opportunity to testify or be heard because they were resolved by a plea."
- Other victims "wanted 'to communicate the impact of the offense to the offender.'"
- "For the majority of the victims, filling out a VIS was a forum to formally express the crime impact on them, a civil duty they considered important for reaching a just sentence."
- "Providing input for [VISs] also helps victims to cope with the [victimization] and the criminal justice experience. Many victims who filled out [VISs] claimed that they felt relieved or satisfied after providing the information."
- "The recent English pilot project found that for the majority of the victims filing the statement was a worthwhile therapeutic experience, and the cathartic effect of recording the impact of the [offense] had been an end in itself."
- In-depth interviews of rape victims in the United States elicited the following reasons for their participation in the VIS process: "[O]ver half of the victims felt that input will assist with achieving substantive justice, and almost three quarters sought procedural justice"; they "wanted to engage the criminal justice process and . . . assert 'ownership of the conflict' which they felt was misappropriated from them in the name of the state"; "[o]thers wanted to reduce the power imbalance they felt with the defendant, resolve the emotional aspects of the rape, achieve emotional recovery, or achieve formal closure"; and "[m]any victims also wanted to remind judges of the fact that behind the crime is a real person who is a victim."
- "The literature in the growing field of therapeutic jurisprudence provides support to the proposition that having a voice may improve victims' mental condition and welfare. Scholars in this area have discussed [at] length the therapeutic advantages of having a voice, and the harmful effects that feeling silenced and external to the process may have on victims."[51]

51. *Id.* at 551–52 (footnotes omitted).

The empirical evidence on this issue may fairly be described as having settled the matter—victims *benefit* from engaging in the VIS process and by giving statements, and they do so in varying and important ways.

### E. Judges and Legal Professionals Learn a Great Deal About Victimizations from Victim Impact Statements

While the substantial empirical evidence *infra* operates to disprove the perceived detriments of VISs, it may also operate to prove perceived benefits—here, the belief that VISs serve to educate judges and legal professionals:

> Research also confirms that judges are sometimes unaware of victim suffering and injuries resulting from crime, because the information did not find its way into the file, either intentionally . . . or accidentally. . . . In the past, judges and other legal professionals had little opportunity to receive direct detailed input from victims and become acquainted with short and long term effects of various crimes. Research shows that legal professionals who have been exposed to [VISs] have commented on how uninformed they were about the extent, variety and longevity of various [victimizations], and how much they have learned from [VISs] about the impact of crime on victims from properly prepared [VISs].[52]

As to whether judges learn *case-specific* victim details not otherwise available, the authors of the Canadian judges' survey noted that "[i]t has been argued that the information contained in the [VIS] is useful, but redundant in the sense that it will emerge from Crown submissions or evidence adduced at trial."[53] In response, the judges were asked: "How often do [VISs] contain information relevant to sentencing that did not emerge during the trial or in the Crown's sentencing submissions?"[54] The results were equivocal—47% said that VISs "often" or "sometimes" contain useful information not obtainable from these sources, while 53% said "seldom" or "almost never."[55]

52. *Id.* at 553–54 (footnotes omitted).

53. Roberts & Edgar, *supra* note 46, at 13. At the outset, however, such an argument based on the evidence being adduced at trial is highly questionable. How the victim has been affected by the crime is not often an element of a crime—and would therefore render such evidence immaterial, unfairly prejudicial (with little if any probative value) under Federal Rule of Evidence 403, and therefore inadmissible. One exception, however, is where an element of the crime was "great bodily injury" to the victim, for example.

54. *Id.* at 14.

55. *Id.*

Consistent with these findings, the same survey found judges evenly on the question of whether, in general, VISs are useful—50% said they were in "all" or "most" cases, while the other half said they were in "some" or "just a few" cases.[56]

Both survey responses may (happily) be explained by thoroughness in the Crown's sentencing submissions, thereby leaving little relevant sentencing information to be found elsewhere by the court.

Generally, to the extent judges and legal professionals become more educated as to the ways in which victims are affected by crime, the criminal justice system (and society as well) will only benefit. Judges will make more informed sentencing decisions, and, along with lawyers and victim advocates, will help make the victim's journey through the VIS process both smoother and, at least indirectly and possibly directly, a more therapeutic experience.

### F. Suggested Detriments or Benefits Aside—How Do Victim Impact Statements Operate (in Four Important Respects)?

#### 1. *How Often Are Victim Impact Statements Given?*

There is not a significant breadth of research with which to answer this question. However, one study in particular does examine how VISs are given—and it appears to be the most extensive research study performed in the entire VIE arena.

The Witness and Victim Experience Survey (WAVES) was performed from 2007 to 2010 in England and Wales.[57] "WAVES was a national quarterly survey of victims and witnesses [where] [r]espondents were individuals involved in cases which resulted in a criminal charge[,] and which have been closed through . . . verdict or discontinued prosecution."[58] The surveys always asked for responses to the same three questions:[59] (1) whether respondents were offered the opportunity to make a Victim Personal Statement (VPS);[60] (2) if they were so offered, whether they made one; and (3) if they made one, whether they felt their

56. *Id.*

57. Julian V. Roberts & Marie Manikis, *Victim Personal Statements: A Review of Empirical Research*, JUSTICE.GOV.UK 15 (Oct. 2011), https://www.justice.gov.uk/downloads/news/press-releases/victims-com/vps-research.pdf.

58. *Id.* at 15 n.26.

59. *Id.* at 15.

60. *Id.* The authors use the acronyms VIS and VPS interchangeably, although they acknowledge that "VIS more accurately conveys the purpose of the statement[—]to document the *impact* of the crime and not the *personal* views of the victim about the offender or the appropriate sentence to be imposed." *Id.* at 8–9 (emphasis in original).

"views as set out in the Victim Personal Statement were taken into account during the Criminal Justice System."[61] The most significant results were as follows:

- A total of 57,072 responded to the first question, with 42% saying they had been offered an opportunity to make a VPS, 45% saying they had not been, and 13% saying they did not know.[62] Clearly, better efforts were needed to offer these statements to victims.
- Of those who recalled being offered an opportunity to make a VPS (24,108), 55% did make a VPS, 40% did not, and 5% did not know.[63] This appears to be the empirical evidence that best answers the question: How often are statements given? And, the answer is very encouraging—55% is a robust response.
- Of those who made a VPS (13,355), 67% said his or her VPS was taken into account "fully" or "to some extent," only 18% said no, and 15% did not know.[64] This is compelling evidence that in at least one key respect, VPS was fulfilling its main goal of providing victims the opportunity and the satisfaction, with all its attendant benefits,[65] of feeling they were involved in sentencing in a meaningful way.

Such encouraging results are tempered by those from the survey of Canadian judges, who reported that they only saw VISs in 11% of cases.[66] To answer this question, "[j]udges were asked, '*In approximately what percentage of all sentencing hearings was a VIS submitted[?]*.'"[67] However, this question was at the least ambiguous, in that it did not differentiate between written and verbal statements, and at the most implied that only written statements—those that were "submitted"—would generate a "yes" response. As the authors cautioned:

> It seems likely that these statistics underestimate, to an unknown extent, the degree of victim participation in sentencing since VIS is not the only avenue by which victims can provide information to the court. In some locations victims appear to provide the information orally without having submitted a formal statement. As one judge

61. *Id.* at 15 (emphasis omitted).
62. *Id.* at 18 tbl.1.
63. *Id.* at 17, 18 tbl.1.
64. *Id.* at 18 tbl.1.
65. *See supra* text accompanying notes 50–51 (discussing the benefits of victims engaging in the VIS process).
66. Roberts & Edgar, *supra* note 46, at 1.
67. *Id.*

> noted on his or her survey, "I conducted [forty-three] sentencing hearings [and] formal VIS[s] were only received and filed once or twice[,] but *many* victims, especially in circuit locations[,] address the court *directly*."[68]

Finally, on a much smaller scale, albeit without detailing sampling methods or totals, the authors who studied six sites in North Carolina and Wisconsin[69] estimated that between 50% and 90% of victims did not respond to mail invitations to exercise their right to give statements.[70] Additional studies would be welcome to help determine the extent of VIS participation.

#### 2. *In Which Types of Cases Did Judges Feel Victim Impact Statements Were a Particularly Useful Source of Information?*

Seventy-nine percent of the judges in the Canadian survey[71] said there were certain offenses for which a VIS was a "particularly useful source of information."[72] Crimes of violence and sexual offenses were identified most often by judges in all three Canadian jurisdictions that were surveyed.[73] This is consistent with what one would expect, as these crimes cause, more than others, both physical *and* emotional harm to their victims.

#### 3. *How Often Do Judges Refer to the Victim Impact Statement or Its Contents in Their Reasons for Sentence?*

The Canadian survey's authors first explained, "The most important consideration for the victim . . . would appear to be judicial recognition. For this reason we asked judges in the survey how often they referred to the [VIS] or its contents in their reasons for sentencing."[74] If they did so, these judges would be fulfilling one of the goals that research has shown both is important to victims and results in therapeutic benefits for them—

68. *Id.* (emphasis added).

69. Davis et al., *supra* note 36, at 31.

70. *Id.* The authors suggest, based on their own experience, and again without providing any details, that these high percentages were caused by incorrect contact information. *Id.*

71. This survey is referred to several times in this Article because it is both extensive and multi-faceted and thereby lends itself to empirically answering a number of the questions posed herein.

72. Roberts & Edgar, *supra* note 46, at 15.

73. *Id.* No tables or numerical responses could be found that further detail these findings.

74. *Id.* at 18.

"remind[ing] judges of the fact that behind the crime is a real person who is a victim."[75]

These judges did their part in supporting victims in this respect. Thirty-nine percent "almost always" referred to the VIS; 23% "often" did so; 33% sometimes did so; and only 5% "never" or "almost never" did so.[76] One certainly can say that the victims appearing in these cases benefitted from their judges' reference to the VIS. These victims were not the only ones, however.

#### 4. *What Are the Judicial Perceptions of the Purpose of Victim Impact Statements?*

This was the subject of the final question posed to the Canadian judges.[77] The judges were asked to rate the importance of five principal purposes served by VISs as identified in the leading Canadian case regarding the use of the VISs.[78] With "1=not at all important" and "10=very important,"[79] the average results were as follows:

- "Provide the victim with an opportunity to participate in the sentencing process"— 7.9;
- "[P]rovide the offender with an idea of the harm inflicted on the victim"—7.8;
- "Provide court with information about the impact of the crime"—7.4;
- "Provide the victim with an opportunity to communicate a message to the offender"—7.0; and
- "Provide Crown with information about the seriousness of the crime"—4.5.[80]

By ranking the first four purposes the highest in importance, and each high in its own right, these judges were consistent in recognizing benefits to victims as shown by other empirical evidence.[81] Additionally, by ranking the last purpose much lower in importance, the judges were also consistent with other research, albeit in the negative—no other research appears to have determined that victims consider providing

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75. Erez, *supra* note 29, at 552; *see also supra* notes 50–51 and accompanying text (examining the therapeutic benefits of giving victims a voice through VISs).

76. Roberts & Edgar, *supra* note 46, at 18 tbl.22.

77. *Id.* at 25.

78. *Id.* (footnotes omitted).

79. *Id.* at 25 tbl.30 (emphasis omitted).

80. *Id.* (emphasis omitted).

81. *See supra* text accompanying notes 50–51 (listing various benefits to victims found by other empirical evidence).

information to prosecutors "about the seriousness of the crime" [82] to be a benefit.

### G. Conclusion

The empirical evidence examined herein[83] shows that victims are likely to receive substantial therapeutic benefits when they provide impact statements and have their voices heard. Given that this may be considered the primary purpose of a VIS,[84] which is being fulfilled,[85] it is fair to say that this empirical evidence alone is sufficient to indicate that the VISs are operating successfully. Further support for this conclusion is found in the studies that refute perceived detriments of the VIS and greatly support its perceived benefits.[86] Alternatively, in the case where the evidence disputes victims' expectations that their statements will lead to more severe sentencing, this is an encouraging finding. If the evidence were to the contrary, it would mean that VISs were running afoul of their primary purpose—"to provide victims a voice, not to restructure sentencing priorities."[87]

This assessment of successful operation should be qualified for the American judicial system, however, by the fact that the evidence currently does not show the extent to which VISs arebeing used. Besides, no matter the importance of the benefits in providing impact statements, victims cannot receive any benefits if they do not participate. Hopefully, more expansive research will be done that would show excellent VIS participation in the United States consistent with that found in England and Wales,[88] but until then, this qualification seems appropriate.

## *III. THE 2013 NINTH JUDICIAL CIRCUIT SURVEY ON VICTIM IMPACT STATEMENTS*

In 2013, the Author conducted a survey in the Ninth Judicial Circuit in and for Orange and Osceola Counties, Florida to discover how VISs

82. Roberts & Edgar, *supra* note 46, at 25.
83. *See supra* Part II(D) and accompanying notes (discussing various studies that support the assertion that victims do benefit from appearing in court, despite any victim apprehension regarding the judicial process).
84. *See supra* text accompanying note 39 (explaining that the primary purpose of VISs is to give victims a voice).
85. *See supra* text accompanying notes 50–51 (noting the benefits that victims receive from VISs).
86. For a discussion of these studies, see *supra* Part II(A)–(F).
87. Erez, *supra* note 29, at 555; *see supra* text accompanying notes 39–41 (noting that victim harm is only one of several factors to consider in sentencing).
88. *See* Roberts & Manikis, *supra* note 57, at 3 (reviewing empirical research on the impact of VISs in England and Wales).

were actually operating in the hands of judges, prosecutors, and public defenders.[89] Responses were received from thirty judges, twenty-four prosecutors, and three public defenders. The results showed that: (1) VISs were being used with reasonable frequency; (2) they appeared to be operating in a manner reasonably consistent with their purpose;[90] and (3) these courtroom participants could offer thoughtful suggestions regarding the "best practices" of preparing and delivering victim impact statements, including advice on what makes these statements most persuasive. The most material and illustrative findings were as follows:

**THE JUDGES**[91]

- Twelve of the thirty judges had experience with VISs. All allowed them, and none barred them in any specific cases where there was a victim.[92]
- The judges reported that statements were presented in the following ways: orally, without a statement; if in writing, the victim read from it to the court or provided it ahead of time; victims in foreign jurisdictions had the proceeding streamed live over the internet, and were allowed to then interact by mail or phone; read by the prosecutor, a victim advocate, or other representative; and with the assistance of visual aids.[93]
- Defense attorneys rarely presented a VIS. Eight out of twelve said "no" or "never"; two said "rare" or "sometimes"; and two said "yes" or "[y]es, in mitigation on occasion." When used, they were in "[v]iolent crimes, mostly," or usually in domestic violence cases where the "[v]ictim decline[d] prosecution but [the] state proceeded anyway."[94]
- Of twelve judges responding as to what benefits they have observed in the use of VISs, seven focused mainly on those held by victims. Several mentioned that victims were able to address and express their feelings. Four mentioned victims having the benefit of "closure" or "finality." One stated that there are "many [benefits because] . . . having a voice is important to a victim who has no 'standing' to pursue a case and does not often have control on the outcome." Four

89. For the survey's questions and responses, including the textual responses, see *infra* Appendices I, II, and III.

90. *See supra* text accompanying note 39 (explaining that the primary purpose of VISs is to give victims a voice).

91. *See infra* Appendix I (providing the questions and answers from the judges' survey).

92. *Infra* Appendix I, at Questions 1, (a)–(b).

93. *Infra* Appendix I, at Question (c).

94. *Infra* Appendix I, at Questions (d)–(e).

focused on the benefits to themselves, including: "[h]elps to understand the personal impact of the crime and helps me to fashion an appropriate sentence"; "[a]llows judges to see how crimes have affected victims"; and "[t]hey present a more complete picture of the impact of the crime." One noted a benefit for the defendant, saying that "[t]he perpetrators get to see the results of their behavior[—]very helpful in juvenile cases[,] and the principles [of] restorative justice are supported by these impact statements."[95]

If the reader compares these responses to the previously discussed and empirically shown benefits of VISs,[96] he or she will see a significant correlation. To put it another way, these judges understand.

- Regarding negatives of VISs, of eleven judges, two found none; three mentioned matters related to emotion, including statements getting "out of hand if not controlled" and "[h]ostility from the victim or [the] victim's family directed to the defendant." But one who did find negatives of VISs also said that "[e]motional breakdowns have been few and far between," and another said that "[e]motions and anger sometimes [require] more security, but that is not a huge problem." Other negatives mentioned included: witness confusion with a negotiated sentence; statements being "time consuming—but I don't really consider that a negative"; lack of relevancy; and times where the victim's "lack of knowledge of the judicial system leads [him or her] to ask the court for more incarceration on a plea[;] then the court declines to take a negotiated plea between the State and defense. In that case, the victim has now pushed a case to trial that really has a poor chance of a positive outcome."[97]

What is striking here, and also a strong vote of confidence for the use of VISs, is what is *not* found—not one responding judge pointed in a strong way to any negatives in using VISs.

- What has made for more effective statements? The following specifics were offered: appearing live; "[f]acts rather than emotion"; "[p]reparation, a good victim advocate who

95. *Infra* Appendix I, at Question (j).
96. *See supra* Part II(D) (discussing the benefits of the VIS).
97. *Infra* Appendix I, at Question (k). This last comment is confusing, for it is always in the judge's power, regardless of what the victim says or wants, to *not* abandon a negotiated plea or let the case be "pushed . . . to trial." This is especially, but not exclusively, true where the court already knows after negotiating the plea that the case is weak.

understands the process, and generally the educational level of the person making the statement"; "[m]ore descriptive statements, or any statements that are written properly"; "[i]f they write it and try to keep to it"; and "simply speaking from the heart about how the crime has affected them."[98]

- In an expansive "tell us how it is working" question, these judges were asked: "What concerns, if any, have you had regarding the use of such statements as part of the sentencing process?"[99]

Out of eleven responding judges, seven said "none" or "[n]o concerns."[100] Only three expressed specific concerns. None were substantial. Verbatim, they were:

(1) "My concern would be that the sentencing [would] be unduly influenced by the emotionalism of the statement. That is somewhat mitigated by written impact statements, reviewing the facts of the case in advance, and outlining a range of sentencing options [that] I think would be appropriate prior to the hearing. I then move up or down from the middle of that range based on everything presented. Rarely have I gone outside of that range."[101]

This judge does not note that he or she has ever actually "gone outside of that range" *due to* being "unduly influenced by . . . emotionalism."[102] This concern is better categorized as a cautionary note, and not a concern based on negative experience(s).

(2) "I believe they are appropriate and important, however with more and more mandatory minimums, the disparity between the wishes of the victim and the leeway of the court could become a problem."[103]

This judge appears to think it is possible that in the future he or she will not be able to give the more *lenient* sentences that victims want because they will conflict with mandatory minimum sentences. In this, the judge may prove prescient, but at this point this is not a "concern" of what is happening today.

(3) "I do not think the prosecution makes it clear what the purpose is of impact statements. Sometimes victims come in and want to come up with the sentence."[104]

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98. *Infra* Appendix I, at Question l.
99. *Infra* Appendix I, at Question (n).
100. *Infra* Appendix I, at Question (n).
101. *Infra* Appendix I, at Question (n).
102. *Infra* Appendix I, at Question (n).
103. *Infra* Appendix I, at Question (n).
104. *Infra* Appendix I, at Question (n).

And, when that occurs, it is likely that victims will be disappointed.[105] Having victims "sometimes" being disappointed, when the prosecution does not make it clear in advance that it is not the victims' role to determine the sentence, is a concern. One wants as many victims as possible to benefit from the VIS process, not to be disappointed by it. However, this unmet expectation must be rated as relatively minor when one considers that victims are disappointed only "sometimes," and, more importantly, when weighed against the overall benefits for the victims in giving the statement to begin with.

- These judges had specific suggestions for defense attorneys when confronted by VISs, including, affirmatively: "[s]ay nothing[,] . . . [h]ave the defendant apologize to the families[,] . . . [a]cknowledge the pain of the victim while reminding the court that the defendant may also be a victim and is a person with family in the gallery"; "[e]xpress sympathy for the victim's plight and quickly return focus on the better qualities of the defendant"; be "respectful and generally just remind the court sympathy is not to be taken into consideration"; "[know] when to cross[-]examine and when to sit down"; and present testimony from other witnesses.[106]

As to what not to do: do "[n]ot ask questions of victims that would make the situation worse"; do not seek to cross-examine the victim about the statement—one judge noted that he rarely allows victims to be crossed; and, impliedly, do not object to either written or oral statements as hearsay.[107]

Defense attorneys sitting at counsel table hearing these statements, without question, are in a difficult position.[108] Heeding some of these suggestions may make it less so.

- Defense attorneys had suggestions for prosecutors as well, including that prosecutors should "[k]now the facts of their case[,] . . . limit their venom[,] . . . [and stay] [c]ool, calm, [and] collected"; "[m]ake sure they know what the victim is going to say"; "[i]t would be helpful not to have repetitive victim impact statements from the same type of source[—]e.g. friends. They should plan the statements for maximum

105. *See supra* Part II(A) (discussing the impact of VISs on sentences).
106. *Infra* Appendix I, at Question (p).
107. *Infra* Appendix I, at Question (p).
108. *See supra* Part II(C) (explaining that defense attorneys rarely cross-examine victims' impact statements).

use[—]a friend, a family member, a teacher, a religious leader, etc."; "[p]repare the victim to be concise and let [him or her] know the defendant will be close by when the statement is given"; and "the state needs to make the victim [aware] of limitations in sentencing."[109]

The thrust of these suggestions was that more contact and better preparation between prosecutors and victims is needed. Given the caseloads prosecutors carry, this is likely a difficult goal. One judge, in regard to what suggestions he or she had to prosecutors, said: "That's tough[;] . . . they need more funding. They need more victim advocates. They need fewer cases to be able to focus on the victims. But overall they do a great job on the resources they have."[110]

- In the survey, those Ninth Circuit judges responded to two important questions: "How have you used [VISs] in determining sentencing?"[111] and "How much weight do you give them?"[112]

The responses to the first question were mainly both very judicial and very appropriate—e.g., "I have listened to or read the statements [and] then apply them to the facts of the case." But a closer examination of the responses reveals that VISs *did help determine* sentencing with some judges, as three out of ten responding judges answered "yes" without qualification. Five more impliedly said "yes," but qualified their responses—"[t]o increase a possible sentence"; "[i]t has very limited use, but some use"; "[v]aries case by case"; "[o]ne small factor among many"; and "[o]ften the sentencing is already set, but when not, the impact of the victim or family helps me as one of many factors to determine a consequence."[113]

As for the second question, the responses ranged from "[a] lot of weight" (1) to, e.g., "[v]aries in each case" (4) to "[s]ome weight" (4). As one judge thoughtfully explained,

> It all depends[;] . . . sometimes it can carry significant weight depending on what other factors I am considering. Other times it's one of many factors, and sometimes the crime itself presents an appropriate sentence[,] and the impact statement has really no

109. *Infra* Appendix I, at Question (s).
110. *Infra* Appendix I, at Question (s).
111. *Infra* Appendix I, at Question (q).
112. *Infra* Appendix I, at Question (r).
113. *Infra* Appendix I, at Question (q).

> relevance to sentencing; but [its] relevance again goes to the closure for the victim and [him or her] gaining some control in the process.[114]

Pursuant to their self-reports, these judges are not "substitut[ing] harm for culpability, nor . . . consider[ing] harm as the overriding criterion in sentencing."[115] Neither are they excluding VISs from their sentencing considerations. Rather, it appears that they have hit center-mass—they are in "the sweet spot"—with how they are using these statements and how much weight they are giving them. VISs appear to be in good hands with these judges.

- Finally, when asked what "could be done to improve the process of [VISs]," the judges' responses were encouraging. Five out of ten judges said "nothing," "I believe they are fine as-is," or "no opinion." Two said that prosecutors should have earlier and better contact with victims. Each one of them said that victims should have "the full benefits of technology," and that more funding and a deadline for submission of impact statements, which, if not met, will waive the statements, were needed.[116] In sum, there was little the judges felt that could be done to improve the VIS process.

**THE PROSECUTORS**[117]

- A review of the answers from the twenty-four prosecutors responding to the survey indicate that prosecutors have used VIS in a wide spectrum of cases—mainly, but not exclusively, including crimes of violence (felonies and misdemeanors) and even "down to" criminal mischief, or in any crime in which there is a victim. Violent crimes were listed quite often, with sex crimes and domestic violence specifically named by many prosecutors.[118]
- Six out of the twenty-four prosecutors sought to present VISs either 100% of the time or any time there was a victim or one who was willing to participate. Six prosecutors did so from 50% to 80% of the time; five from 20% to 35% of the time;

114. *Infra* Appendix I, at Question (r).

115. Erez, *supra* note 29, at 555; *see supra* text accompanying note 39 (describing the use of VISs as informative to the court and therapeutic to victims).

116. *Infra* Appendix I, at Question (u).

117. *See infra* Appendix II (providing the questions and answers from the prosecutors' survey).

118. *Infra* Appendix II, at Overview, Question 1. Drug cases would not, except in rare instances, be a forum for VISs because there are no "victims."

and seven from 3% to 15% of the time.[119] The median was either 50% or 35%.

- All twenty-four presented VISs through "live testimony," while twenty-two also used written affidavits. Additional presentation formats included: "[o]ral statements from the [prosecutor] to the [court] based on conversations with the victim"; "a child['s] recorded statement on an [iPhone] played in court"; an email; and an unsworn letter.[120]
- Twenty-one of the twenty-four prosecutors said that defense attorneys had not objected to VISs.[121] When there was an objection, it was because the statement was "[n]ot sworn to," was irrelevant, there was "a negotiated plea, or it [was] not the victim [himself or herself] but a family member."[122] Courts almost never sustained defense objections—seven of eleven responding prosecutors said they objected "zero" times or "none"; while others responded "never" (2), "very rarely," or "seldom."[123]
- Prosecutors identified what they believed made VISs "persuasive," which included: victims testifying live (6); victims expressing "emotion" to the court regarding how they have been impacted (8) (although one respondent qualified this with: "When the victim is emotional yet reasonable"); victims telling the court what they would like to see from the case (2); and victims explaining how the crime continues to impact them.[124]
- Prosecutors were also asked about the times when they believed VISs were not persuasive. Responses included: when victims "seemed vengeful"; were "angry or seeming like they just want[ed] to retaliate"; "berate[d] the defendant"; "want[ed] outrageously high sentences"; were "unreasonable or [overreacted]"; were "only asking for money"; had "known the [d]efendant on a personal level"; made statements saying they wanted the defendant to go to jail or prison; talked about irrelevant history; and when "the

119. *Infra* Appendix II, at Question 2.
120. *Infra* Appendix II, at Question 3.
121. *Infra* Appendix II, at Question 4.
122. *Infra* Appendix II, at Question 5.
123. *Infra* Appendix II, at Question 6.
124. *Infra* Appendix II, at Question 8.

judge [had] already made up [his or her] mind" or there was a plea agreement (3).[125]

Two points warrant emphasis here. First, victims who, rather than being emotional—an often-cited reason for why a VIS will be persuasive[126]—are being *too emotional*, thus appearing vengeful or angry, will "turn off" judges. Thus, it appears there is an "emotional threshold" that should not be crossed. Second, the fact that only three out of twenty-four prosecutors believed that their judges had already made up their minds and "tuned out" the victims before them is evidence that their judges remained open-minded. It is, of course, possible that the judges were staying attentive to be courteous to the victims and not because they had not made up their minds, but it seems if this were the case, more than three prosecutors would have formed such an opinion.

- The survey asked prosecutors in what percentage of the cases had there *already* been a sentencing agreement in place at the time the statements were given. The highest category of responses was 75% to 90% of the time (6).[127] The median response, however, was 50%.
- A significant finding is that one-third of the prosecutors (eight out of twenty-four) said they had "known a judge, after agreeing to or determining a sentence, to change his or her mind (and the sentence) AFTER hearing the statement(s)."[128] This is roughly consistent, or at least not inconsistent, with the judges' responses regarding how they have used VISs in determining sentencing.[129]
- Only one-third of the prosecutors (eight out of twenty-four) reported that they had seen defense attorneys present VISs on behalf of their clients.[130] Reasons for doing so included seeking leniency and mitigation of sentence. One respondent noted that defense attorneys present VISs "[w]hen the victim has forgiven the defendant and wants leniency."[131] Logically, one might initially think that defense attorneys would use VISs more often, but logistical hurdles stand in the way. How is defense counsel supposed to learn about

125. *Infra* Appendix II, at Question 9.
126. *Infra* Appendix II, at Question 8.
127. *Infra* Appendix II, at Question 10.
128. *Infra* Appendix II, at Question 11.
129. *See supra* text accompanying notes 111–114 (discussing responses of how judges use VISs in sentencing).
130. *Infra* Appendix II, at Question 13.
131. *Infra* Appendix II, at Question 14.

witnesses who will say the impact on the victim is less than the victim will say it is? And, how often will such witnesses even exist, or be willing to cooperate with defense counsel if they do exist?

- Prosecutors' responses regarding benefits of VISs were highly consistent with responses from the surveyed judges and the empirical evidence.[132] Benefits of VISs to victims included: victims receive closure (8); victims' voices are heard (3); and victims feel "empowered" (2). Noted benefits of VISs to the judges were also quite similar, including: a VIS "[h]elps the judge understand the gravity of the case better," and "[t]he [c]ourt gets to see how personal this crime is to someone[,] and [that it is] not just another case." Similarly, prosecutors noted that VISs had an impact on defendants, as observed: "It is good for the . . . defendant to hear what his or her actions caused." Although one prosecutor responded, "I also think, or perhaps I just hope, that the impact of a victim statement has an effect on the defendant. [I]n only a handful of cases I am confident that it [does]."[133]
- Consistent with the judges' responses, prosecutors reported almost no concerns with the use of statements as part of the sentencing process.[134] Eleven of the twenty responding prosecutors said that they had "none" or "no" concerns regarding the use of VIS as part of sentencing. The specific concerns noted are also fairly described as minor and include: "Sometimes it will be [when] the victim is asking for less punishment [that] I disagree"; "[S]ometimes the victim says irrelevant things"; "Whether [the] victim is going to recommend to the court something less than what I am asking for"; "[The] victim is unreasonable and can tank a plea to [the] bench by asking for max without justification"; and "That it will make the defendant angry and he'll back out of the plea" (this respondent gave no indication as to any frequency with which this occurred).[135] (Again, there was no

132. *Compare infra* Appendix II, at Question 16 (reporting prosecutors' responses as to the benefits of VISs), *with supra* text accompanying note 95 (discussing judges' responses as to the benefits of VISs), and *supra* Part II(D) (discussing the benefits of VISs shown through empirical research).

133. *Infra* Appendix II, at Question 16.

134. *Compare infra* Appendix I, at Question (n) (reporting judges' responses regarding concerns with VISs) and *supra* text accompanying note 99–104 (discussing same), *with infra* Appendix II, at Question 17 (reporting prosecutors' responses regarding concerns with VIS).

135. *Infra* Appendix II, at Question 17.

indication of these concerns actually occurring with any frequency.)

- Prosecutors—when asked "What have you done particularly well in regard to the process of [VISs]?"—offered a number of specific actions that other prosecutors could emulate, both in terms of preparation and delivery, including: "[M]ake sure he/she addresses the court[,] . . . not the defendan[t]"; "Tell them other things other victims have included as a reference"; "Prepare[] the victim and ha[ve] her write out her statement beforehand" (2); "Encourage victims to make [a VIS]" (2); "Mak[e] sure I advocate for the victim if [he or she is] too afraid to speak for [himself or herself]"; "Mak[e] the suggestion that the child audio-record [his or her] statement"; "Logistically [set] cases off for sentencing post the defendant [pleading] to allow for people to come into court and be heard"; and "[I]f it [is] hard for them to do, provid[e] encouragement that they were brave to do it."[136]
- When asked what they have seen "defense counsel do particularly well," five of the seventeen responding prosecutors said "nothing," "none," or "I do not recall." Prosecutors did note several actions, however, including: "work around [the statements]" (although this respondent did not say how that should be done); show respect, including when questioning the victim (3); "argue to the judge, not the victim"; "help the defendant understand [the] purpose [of a VIS]"; keep the defendant "quiet"; "have evidence/testimony to counter-balance [the prosecutor's]"; and "[n]ot cross-examin[e] the victim."[137]

Prosecutors had much less to offer regarding what defendants did particularly well than they did for what they, the prosecutors, did well.[138] This result was expected, however, and is not due to any lack of competence of the defense attorneys. Rather, it is because of the nature

136. *Infra* Appendix II, at Question 19.

137. *Infra* Appendix II, at Question 20. However, see *supra* text accompanying notes 130–131 for a discussion regarding difficulties in defense counsels' ability to discover and present evidence to counter-balance a prosecutor's evidence. The prosecutor responding with "[h]ave evidence/testimony to counter-balance mine" offered no suggestions for defense counsel. *Infra* Appendix II, at Question 20.

138. *Compare infra* Appendix II, at Question 19 (reporting what prosecutors believe they have done well) and *supra* text accompanying note 136 (discussing same), *with infra* Appendix II, at Question 20 (reporting what prosecutors believe defendants did well), and *supra* text accompanying note 137 (discussing same).

of the process and the limits of defense attorneys' ability to discover and then present witnesses or other VISs in court.[139] Defense attorneys have much less to work with.

- The survey examined this significant issue: "In what approximate percentage of the times that such statements were presented by the prosecution, do you feel that they affected sentences by making them longer or tougher?"[140]

Nineteen prosecutors gave percentages. Responses ranged from 0% to 75%, with a median of 25% and a mean of 28.5%.[141] This appears roughly consistent with the tone of the responses given by judges.[142]

This may initially appear to contradict studies that statements do not materially affect sentencing,[143] but this is likely, at best, an indicator that would not seem to empirically contradict them both because the prosecutors' "feelings" may be incorrect and the surveyed judges did not provide percentages.[144]

- Prosecutors next were asked the companion question: "In what approximate percentage of the times that such statements were presented by you, do you feel that they did not affect sentencing in any material way?"[145]

Nineteen provided percentages. Responses ranged from 1% to 100%, with a median of 75% and a mean of 64.7%.[146] This is *highly* consistent with their responses to the previous question—how often do statements increase sentences. The combined medians equal 100%, and the combined means come close at 93.2%. In short, prosecutors reported that statements *either* had no effect on sentences *or* increased them. If the median or mean totals had been in excess of 100%, and to the degree

139. *Supra* text accompanying notes 130–131.

140. *Infra* Appendix II, at Question 21.

141. *Infra* Appendix II, at Question 21. Percentages reported were: 0% (2), 1%, 5%, 10% (2), 15%, 20%, 25% (3), 30%, 40%, 50% (4), 60%, and 75%. Other responses were: "sometimes"; "can't answer"; "low %"; "[i]t's impossible to say because it has no effect on the sentence if there is an agreement[,] and you don't know if it really affects the sentence after trial"; and "[s]mall minority." *Infra* Appendix II, at Question 21.

142. *See infra* Appendix I, at Questions (q)–(r) (reporting surveyed judges' responses regarding VISs' effect on sentencing); *see also supra* text accompanying notes 111–114 (discussing same). The survey did not directly ask the judges the question posed here to prosecutors because of the expectation that judges would feel uncomfortable going on record in a survey, even anonymously, with such information. Rather, this information was elicited more subtly by asking if these judges had used VISs and how much weight they had given such statements. *Infra* Appendix I, at Questions (q)–(r).

143. *See supra* Part II(A), particularly *supra* text accompanying notes 36 and 37 (describing a study that provides evidence that impact statements do not affect sentencing).

144. *Supra* note 142.

145. *Infra* Appendix II, at Question 22.

146. *Infra* Appendix II, at Question 22. Percentages reported were: 1%, 10% (2), 25% (2), 40%, 50% (2), 75% (6), 90% (3), 99%, and 100%. *Id.*

either was, it would have been an indication that these prosecutors' respective percentages were in conflict.[147] They were not.

- The survey asked, "[H]ow much weight do you think judges have given [statements] in determining sentencing?"[148] This was the same question asked of the judges.[149] And, these sets of results, again spanning a scattered range of responses, were highly consistent. They included: "significant weight," "depends on the [type of] case," and "[s]ome weight."[150]

As for the types of cases in which prosecutors believed judges give VIS the most weight, nineteen of the twenty-four prosecutors cited, as may be expected, one or more of crimes of violence generally, domestic violence, or sex crimes.[151] However, these were not the only types of cases.

One respondent said: "A [j]udge wanted to give a burglary [d]efendant the minimum sentence. The [v]ictim appeared and was an [elderly] woman with heart issues. She described how she can't sleep, stay[s] in her house[,] and [cannot] function out of fear [the offender] will come back. The [j]udge realized how much damage this defendant did to her as a person, not just her belongings being taken."[152] Unfortunately, although he or she implied the result of the statement—a more severe sentence—this respondent did not provide further detail.

- When VISs are implicated, prosecutors are even more "in the trenches" than judges, because prosecutors have greater interaction with victims through preparation and pre-sentencing consultations. Therefore, they are uniquely qualified and well-positioned to detail how VISs are actually working, by answering the question: "What problems have you observed in the process of [VISs]?"[153]

Prosecutors' responses were almost laudatory in nature. Seven of the twenty who responded with clarity said "none" or "nothing." Four noted that, at times, the victims' statements might stray from how the victims had been impacted. (Although not stated by the respondents, the court

147. Not accounted for in these percentages are the cases where victim impact statements led to *reduced* sentences. This question was not posed due to the already-substantial length of the survey. Additionally, reduced sentences were expected to be a much less common result of VISs than enhanced sentences, due almost certainly to considerably fewer victims requesting the former.

148. *Infra* Appendix II, at Question 24.

149. *See infra* Appendix I, at Question (r) (asking judges how much weight they give to VISs); *see also supra* text accompanying note 112 (discussing the same question).

150. *Infra* Appendix II, at Question 24.

151. *Infra* Appendix II, at Question 25.

152. *Infra* Appendix II, at Question 26.

153. *Infra* Appendix II, at Question 27.

and prosecutors should be capable of quickly bringing victims or those speaking on their behalf back to the issue at hand.) One said that victims were not sufficiently prepared, while another said that victims' statements were poorly done.[154]

Remaining problems, which at most appeared to be relatively minor or isolated in nature, were the following:

(1) "Victims sometimes feel re-victimized when the sentence is low after presenting a VIS."[155] This would be at least significantly mitigated if prosecutors or victim advocates explained in advance that increasing sentences is not the purpose of VISs.[156]

(2) "Sometimes the victims are scared to present statements."[157] If so, they can present them in writing, through their victim advocate, or through the prosecutor.

(3) "Sometimes the judge doesn't [give] victims enough time to speak or say what they need to in order to feel whole or move forward with their [lives]."[158]

(4) "Not affording [v]ictims the right to make the statement when they are victims of burglaries."[159]

When asked what could be done to improve the process, eight of the eighteen prosecutors said "nothing," "none," "no idea," "not sure," or "no opinion."[160] Remaining specific suggestions included:

(1) "Let the victim share the statement via closed circuit television so that he/she does not have to actually see defendant in court."[161] However, this would eliminate several of the therapeutic benefits of VISs.[162]

(2) "Bring them into the process sooner, have them at plea negotiations."[163]

(3) "Create a form that [allows] the victim to write it out at the beginning of the case and add more information or details to it during the

154. *Infra* Appendix II, at Question 27.
155. *Infra* Appendix II, at Question 27.
156. *See supra* note 39 and accompanying text (stating that the purpose of VISs is to provide victims with a voice).
157. *Infra* Appendix II, at Question 27.
158. *Infra* Appendix II, at Question 27.
159. *Infra* Appendix II, at Question 27.
160. *Infra* Appendix II, at Question 29.
161. *Infra* Appendix II, at Question 29.
162. *See supra* notes 50 and 51 and accompanying text (discussing the therapeutic benefits of VISs).
163. *Infra* Appendix II, at Question 29.

process, if needed."[164] This appears to be a simple, cost-free, and excellent suggestion.

(4) "I don't care for judges asking defense attorneys if they'd like to question the victim. . . . [I]t's the victim's time to be heard[;] . . . not a time to be cross-examined. . . . [I] think it's disrespectful to people who at a time where confrontation rights aren't the issue and the adversarial nature of process shouldn't be at play."[165] Such rights may not be "the issue," but under any concept of due process cross-examination does and should remain "the right" of the defendant. (Interestingly, this respondent acknowledged that "most of the time, defense counsel doesn't ask questions.")[166]

- Finally, some prosecutors had suggestions for how they and defense attorneys could "do better in preparing for, handling, or reacting to [VISs]."[167] Specific ideas included:

(1) "Educate the victims on when these statements are most effective."[168]

(2) "Early involvement of the [victim], multiple drafts of written statements, practice statements with [the prosecutor] (to reduce length/detail)."[169]

(3) "Try to get them as early as possible and use them in negotiating prior to agreeing on a sentence."[170] This seems to be a particularly excellent suggestion from the prosecutors' point of view. Defendants may see what lies at "the end of the road" for them in sentencing, and thereby be motivated to plead out—and do so much earlier in the process.

**THE PUBLIC DEFENDERS**[171]

The results of this survey are limited because the Author only received responses from three public defenders out of approximately 120 public defenders who were included in the survey[172]—a rate of 2.5%. Such few responses, however, by themselves, may be informative.

164. *Infra* Appendix II, at Question 29.
165. *Infra* Appendix II, at Question 29.
166. *Infra* Appendix II, at Question 29.
167. *Infra* Appendix II, at Question 28.
168. *Infra* Appendix II, at Question 28.
169. *Infra* Appendix II, at Question 28.
170. *Infra* Appendix II, at Question 28.
171. *See infra* Appendix III (providing the questions and answers of the public defenders' survey).
172. Email from Melissa Vickers to Mitchell J. Frank, Assoc. Professor of Law, Barry Univ. Sch. of Law, *Question from Prof. Frank re Surveys* (July 26, 2013, 5:04 PM EDT) (on file with Author).

Both the judges' and prosecutors' surveys, especially the latter, show that public defenders, mostly out of necessity[173] and prudence,[174] have little role to play regarding VISs that mainly are used against their clients.[175] Therefore, not surprisingly, one possible explanation for public defenders' lack of response to the Author's survey is that they had little desire to take the time, with heavy caseloads, to comment on a process which they may feel is "stacked against them" and against which they have little ability to defend. However, if this were the case, it would be an indication that they were focusing on how the VIS process operates vis-à-vis their clients—or even themselves—rather than how it operates vis-à-vis the victims of crime. Put another way, public defenders may have forgotten or failed to focus on the fact that the main purpose of VISs is to benefit victims. If true, and had they realized they had an opportunity to give meaningful suggestions and input to help improve the VIS process for these victims, the response rate may have been higher. Prosecutors, who showed no signs of feeling the process was "stacked against them," had a response rate of 16%, between six to seven times that of the public defenders.[176]

Pertinent, albeit limited, findings from the public defenders' survey include the following:

- Prosecutors infrequently tried to present VISs—10% and 25% of the time.[177]
- "Emotion" or "raw emotion," or when the victim explains how the crime is still affecting him or her, makes VISs persuasive.[178]
- When public defenders have presented VISs, they have done so: where "the victim would rather [have the defendant] work to pay restitution than go to [prison]"; in cases of "[s]tatutory rape, or [where] family member victims . . . have forgiven the [defendant]," but prosecution was forced; and "[w]hen the guidelines are so out of skew with logic and

173. *See infra* Appendix II, at Question 13, 14, and 20; *see supra* text accompanying notes 130 and 131 (explaining why most public defenders never present victim impact statements).

174. *See supra* Part II(C) (recognizing public defenders act prudently when they choose not to cross-examine grieving victims).

175. *Infra* Appendix II, at Question 13.

176. The survey was sent to approximately 150 state attorneys. Email from Samantha Garcia to Mitchell J. Frank, Assoc. Professor of Law, Barry Univ. Sch. of Law, *Question from Prof. Frank re Surveys* (July 26, 2013, 11:24 AM EDT) (on file with Author). Twenty-four state attorneys responded, *infra* Appendix II, at Overview, whereas only three public defenders responded out of the 120 who received the survey, *supra* text accompanying note 172.

177. *Infra* Appendix III, at Question 2.

178. *Infra* Appendix III, at Question 8.

the alleged victim [does not want] to completely ruin the [defendant's] life."[179]

- In relating what benefits they have observed in the use of VISs, one respondent stated: "In some cases I would *imagine* it is cathartic to someone who has suffered at the hands of [the defendant] to let [him or her] know the human cost."[180] It seems this public defender may not have been sufficiently focused on victims when he or she responded.
- Concerns of VISs expressed by public defenders included: "Sometimes [a VIS] can turn into an attack on my client as a human being"; "[e]motion can often take over"; and "sometimes logic is overruled by emotion. Sometimes witnesses play up (usually[,] police officers fall in this category)[,] or if the media is [a] part[,] then everyone is making a show rather than trying to get a true restorative[-]style sentence."[181] Public defenders have tried to ameliorate these concerns by objecting to the use of VISs—"so my client at least thinks I am fighting for [him or her]"—and by "[working] hard to take the emotion out of it."[182]
- When asked what they had done "particularly well" in regard to VISs, public defenders responded: "[n]othing"; "[used] them in cases where the victim was forced to prosecute"; and "[h]ard to say."[183]
- Respondents felt VISs helped make sentences longer or tougher from 5%, to 10%, to 75% of the time.[184] In 95%, 90%, and 25% of the time, they felt a VIS did not affect sentencing in any material way.[185]
- Respondents felt judges gave VISs "[v]ery little" weight, "[m]uch weight," or "[p]robably more [weight] than they should."[186]
- Problems with the VIS process included: "[w]hen the victim starts talking about other non-charged crimes [he or she]

179. *Infra* Appendix III, at Question 14.
180. *Infra* Appendix III, at Question 16 (emphasis added).
181. *Infra* Appendix III, at Question 17.
182. *Infra* Appendix III, at Question 18.
183. *Infra* Appendix III, at Question 20.
184. *Infra* Appendix III, at Question 21.
185. *Infra* Appendix III, at Question 22.
186. *Infra* Appendix III, at Question 24.

suspect[s] my client of doing," and "[t]he amount of emotion which clouds rational and reasonable sentences."[187]

- What can "prosecutors and defense attorneys do better in preparing for, handling, or reacting to [VISs]?"[188] To better prepare, respondents suggested: "[a]lways read [VISs] ahead of time before they are presented [in] court"; "[t]alk to people first"; and "[t]alk [to] the victims ahead of time and get them on board with the agreements."[189]
- Finally, they reported that the following "could be done to improve the process of [VISs]": "[t]hey could be limited in scope and duration[—ten] minutes to say how this crime is still [affecting] you today"; "[m]ore stringent rules regarding the scope of testimony and disallowing narration"; and "[i]nstruct judges about how to handle the emotional aspects of the statements but still be able to give rational[,] reasonable sentences."[190]

## *IV. VICTIM IMPACT EVIDENCE IN ITS MOST EMOTIONAL, POTENT, AND PREJUDICIAL FORMS—THE STRUGGLE TO ENSURE FAIRNESS*

As this Part will show, since *Payne*,[191] lower courts, without the Supreme Court's guidance, have been faced with highly emotional VIE. Generally, the Court in *Payne* stated that the overall purpose of VIE was "to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."[192] The Court also revived the right of the state to offer "'a quick glimpse of the life' which a defendant 'chose to extinguish' [and demonstrate] the loss to the victim's family and to society which has resulted from the defendant's homicide."[193]

The purpose of victim impact evidence aside, the Court provided lower courts with no particular tests or requirements, other than the descriptor that the "glimpse of the life" be "brief," to help determine admissibility of such evidence and do so in a reasonably consistent

187. *Infra* Appendix III, at Question 27.
188. *Infra* Appendix III, at Question 28.
189. *Infra* Appendix III, at Question 28.
190. *Infra* Appendix III, at Question 29.
191. *See supra* note 8 and discussion in Part I (discussing literature critical of the holding in *Payne*).
192. Payne v. Tennessee, 501 U.S. 808, 823 (1991) (emphasis in original).
193. *Id.* at 822 (citations omitted) (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

fashion, thereby promoting uniformity.[194] Rather, as Justice Stevens noted, the Court left lower courts with a single statement to guide them.[195] In reality, it was a single sentence.[196]

As the reader will see in the particular cases discussed in this Part, and as may be generally expected in these types of cases, determinations as to admissibility involve weighing the "probative value" of the VIE against the "danger of unfair prejudice" it poses.[197]

### A. Photographs of a Slain Mother's Unborn Child, Who, Although Viable, Died *in Utero* from Lack of Oxygen Minutes After the Mother Did, Dressed in Clothes He Would Have Worn Home from the Hospital After Being Born

In 1998, seven years after the United States Supreme Court rendered its decision in *Payne*, the South Carolina Supreme Court, in *State v. Ard*,[198] a capital case, ruled that two photographs of a slain mother's unborn but viable child were admissible as VIE.[199]

In *Ard*, the child–victim lived only six to eight minutes after his mother was shot, suffocating in the womb from lack of oxygen.[200] The defendant was convicted of murdering the mother and, because the child was viable, the child as well.[201] In the sentencing phase, the State offered two photographs that showed the child dressed in the clothes that his mother wanted him to wear home from the hospital after his birth.[202] The defendant objected that the photographs gave "the impression that it was a born existing person" and the "prejudice from [them] outweighed any potential probative value."[203] The trial court admitted the photographs, notwithstanding the fact that the viability of the child was not at issue during the sentencing phase.[204]

194. *Id.* at 822, 829–30 (citations omitted).

195. *See supra* text accompanying note 22 (referencing the language "unduly prejudicial" used by the Supreme Court).

196. *Payne*, 501 U.S. 808 at 825.

197. If in federal court, see Federal Rule of Evidence 403: although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. If in state court, the court is likely using a statutory version of Federal Rule of Evidence 403 that is identical, or not materially different. *See, e.g.*, N.M. R. EVID. 11-403; TEX. EVID. R. 403.

198. 505 S.E.2d 328 (S.C. 1998).

199. *Id.* at 330–32.

200. *Id.* at 330.

201. *Id.*

202. *Id.* at 331.

203. *Id.* (internal quotations omitted).

204. *Id.* at 331–32.

The South Carolina Supreme Court held that it was within the discretion of the trial court to admit the photographs and affirmed the death sentence.[205] The court gave four specific reasons: (1) "[t]he two photographs were properly admitted to portray the individuality of the unborn child. Since the child was murdered before he was born, there was no other way to vividly present his uniqueness to the jury";[206] (2) "the photographs aided the jury in determining the vulnerability of the infant victim and, therefore, were relevant in assessing the circumstances of the crime and the character of the defendant";[207] (3) the photographs of the child, dressed as he was, "[revealed the mother's] aspirations about the birth of her child and were relevant to the sentence for her murder";[208] and (4) "the photographs support[ed] the statutory aggravating circumstances that two persons were murdered by appellant during one course of conduct and one of the victims was a child under the age of eleven."[209]

It would be difficult to imagine more heartrending, prejudicial, and inflammatory evidence than the not *one* but *two* photographs presented in this case. The sentencing jury *knew* this was an unborn child, wearing the clothes his mother had picked out for him to wear when she brought him home from the hospital, and who had suffocated to death within her womb—after *she* had died.

As to the four reasons for the evidence admission asserted by the court, the first one took "uniqueness" to the extreme. There was no dispute about the facts—the jury had already decided the child was viable. Any manner of obstetric testimony or medical records could have shown the state of the child at the time of his death. The second, third, and fourth reasons could also have easily been accomplished—and without the substantial prejudice that accompanied the photographs—through obstetric testimony of lay witnesses.

The court cited *Payne* for the proposition that "evidence about the victim is relevant to the jury's consideration of the sentence which should be imposed."[210] Yet, although the court discussed the relevancy of these photographs in detail, it never specifically addressed the defendant's objection that the prejudice caused by the photographs outweighed any potential probative value, save only noting that it did not agree, as

205. *Id.* at 332.

206. *Id.*

207. *Id.* The defendant knew he was the father of the child the mother was carrying, and there was testimony that he wished the death of the child. *Id.* at 330.

208. *Id.* at 332.

209. *Id.* (footnote omitted).

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

defendant claimed, that the photographs showed the child lying in a casket.[211]

### B. Photographs Showing a Slain Police Officer's Two Young Sons and Widow Looking Down into the Grave as His Casket Was Lowered, and His Sons Sitting on a Bench by the Gravesite

These photographs were admitted by the trial court in the penalty phase of the capital case *State v. Rose*.[212] On appeal, the Arizona Supreme Court struggled to affirm.

Quoting *Payne*, the court recognized that VIE "is generally admissible at sentencing unless it is 'so unduly prejudicial that it renders the trial fundamentally unfair.'"[213] At trial, defendant objected to admission of the photographs under Arizona Rule of Evidence 403[214] on the basis that their probative value was substantially outweighed by the danger of unfair prejudice.[215] The trial court overruled this objection.[216]

The Arizona Supreme Court found this to be a case of first impression, in that "no Arizona case [had] addressed the admissibility of photographs of the victim's survivors, ostensibly to depict their response to the victim's death and its effect on them."[217] The court then cited two California Supreme Court decisions that allowed admission—in the penalty phase of a capital case—of photographs of the victim's gravesite:

- *People v. Zamudio*, which permitted three photographs of the victims' grave markers;[218] and
- *People v. Kelly*, which permitted a video montage that ended with a close-up of the victim's grave.[219]

The court relied on these decisions in affirming the trial court's admission of the graveside photographs on the basis that the trial court had not abused its discretion in ruling as it did under Rule 403: "After all, the jury was well aware, without the photographs, that the murder caused the two boys to suffer a devastating loss of their father's love, affection, and support for the rest of their lives."[220]

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211. *Id.* at 331 n.3.
212. 297 P.3d 906, 917 (Ariz. 2013).
213. *Id.* at 916 (quoting *Payne*, 501 U.S. at 825).
214. Ariz. R. Evid. 403 is materially indistinguishable from Fed. R. Evid. 403.
215. *Rose*, 297 P.3d at 917–18.
216. *Id.*
217. *Id.* at 917.
218. 181 P.3d 105, 137 (Cal. 2008).
219. 171 P.3d 548, 570 (Cal. 2008).
220. *Rose*, 297 P.3d at 918.

In doing so, the court relied on decisions involving *far less* prejudicial photographs than were involved in the instant case. Consider the difference: photographs of grave markers and the victim's *grave* on the one hand, versus photographs of a slain police officer's two young sons and his widow looking down into the grave as his casket was lowered, and then his sons sitting on a bench, albeit with their backs to the camera, by the gravesite, on the other. The former photographs were only of objects. The latter were not. They added heartbreaking visual evidence of a *personal* dimension. No further discussion should be necessary to impress the point that the court's reliance was factually, and significantly, misplaced.

Most significantly, the court's reliance on *Zamudio* and *Kelly* showed that the Supreme Court's denial of certiorari in both cases[221] had come home to roost. Justice Stevens's great concern that the "especially prejudicial" nature of the VIE in those cases, including video and photographs *merely* of the graves, would invite "a verdict based on sentiment, rather than reasoned judgment"[222] had taken concrete form in Arizona.

And, the Arizona Supreme Court did not by any means heartily affirm the trial court's admission of these photographs, regardless of any abuse of discretion standard: "The trial court, however, would have acted well within its discretion had it excluded those photographs, given their marginal relevance, the danger of unfair prejudice their admission posed, and the extensive, clearly permissible [VIE] already presented."[223] Edward James Rose, the defendant, was sentenced to death in *Rose*.[224] The reader may be asking two questions at this point:

- Who likely would *not* have been sentenced to death by this penalty phase jury, where defendant was charged with murdering a police officer, after the jurors took these photographs into the jury room?
- Would Rose have not been sentenced to death, or his death sentence upheld, if the United States Supreme Court had either accepted certiorari in *Zamudio* and *Kelly* and reversed, or at the very least provided guidance or parameters as to

221. *Supra* notes 13–18 and accompanying text.
222. *Supra* notes 23–25 and accompanying text.
223. *Rose*, 297 P.3d at 918.
224. *Id.* at 909.

what type of "graveside" evidence—*if any*—was permissible?[225]

### C. A Seventeen-Minute Video Tribute to a Slain Police Officer, Including a Photo Montage from Childhood to Adulthood, Poems, and a Television Segment That Covered His Funeral, All Accompanied by a Medley of Music from the Beatles to a Religious Hymn

The defendant in *State v. Hess*[226] was convicted of aggravated manslaughter in the death of her husband, a police officer.[227] The defendant challenged her thirty-year sentence in the New Jersey Supreme Court based on ineffective assistance of counsel in various respects.[228] The most striking instance of ineffective assistance, which drew the focus of the court, was counsel's lack of objection to the "day-in-the-life" video—one of several pieces of VIE introduced by the state at sentencing.[229]

The court first dispelled the idea that judges were completely immune to the effects of prejudicial VIE:

> Undoubtedly, concerns over prejudicial victim-impact statements, including photographs and videos, are less pronounced when a judge rather than a jury is imposing sentence. Nevertheless, judges, no less than jurors, are susceptible to the wide range of human emotions that may be affected by irrelevant and unduly prejudicial materials. We are fully aware that judges, who are the gatekeepers of what is admissible at sentencing, will have viewed materials that they may deem non-probative or unduly prejudicial. We have faith that our judges have the ability to put aside that which is ruled inadmissible. However, both the bar and bench should know the general contours of what falls within the realm of an appropriate video of a victim's life for sentencing purposes.[230]

The video that counsel failed to object to:

- was seventeen minutes long;[231]

225. It is difficult to envision the Court finding the photographs in this case as being *within* any parameters it might have provided for the guidance of lower courts, had it accepted certiorari in these two cases and rendered a decision.
226. 23 A.3d 373 (N.J. 2011).
227. *Id.* at 376.
228. *Id.*
229. *Id.* at 381.
230. *Id.* at 392 (citation omitted).
231. *Id.* at 393.

- was professionally produced;[232]
- contained a montage of approximately sixty photographs of the officer's life from childhood to adulthood, including one of his tombstone;[233]
- contained four separate home-video clips of him graduating from the police academy, coaching a baseball game, and appearing on fishing trips;[234]
- contained a television segment that covered his funeral;[235]
- had three poems displayed over some of the photographs and video clips;[236] and
- was, in its entirety, accompanied by a medley of music: "Here Comes the Sun" by the Beatles, "I'll Be Home for Christmas," two country songs—"I'm From the Country" and "Live, Laugh, Love," one religious hymn— "Here I Am, Lord," and military cadences.[237]

It took the court little time to perform its analysis and render its decision:

> In this case, defense counsel should have objected to the video, and his failure to do so cannot be considered strategic or reasonable. The music and the photographs of the victim's childhood and of his tombstone, and the television segment about his funeral do not project anything meaningful about the victim's life as it related to his family and others at the time of his death. They should have been redacted from the video because they contain little to no probative value, but instead have the great capacity to unduly arouse or inflame emotions. Although we do not believe that the introduction of the video, alone, had the capacity to alter the outcome of the sentence, on remand the video should accord with the prescriptions in this opinion.
>
> We cannot set forth an exhaustive catalogue of what is and is not permissible in a video, other than to say how this video exceeded permissible bounds. We in no way intend to limit the right of family members to present photographs and videos within a reasonable period before the death of the victim, or to express themselves in the

232. *Id.*
233. *Id.*
234. *Id.* at 381.
235. *Id.* at 393.
236. *Id.* at 381.
237. *Id.*

> ways they see fit. For example, we do not suggest that a family member could not read a poem in court.[238]

The *Hess* decision partially filled for New Jersey trial courts the vacuum left by the United States Supreme Court after *Payne*.[239] Notwithstanding that it did not "set forth an exhaustive catalogue," it did start providing specific guidance: poems and reasonably recent photographs and videos of the victim would be admissible; music, photographs of an adult victim's childhood, photographs of his tombstone, and television segments of funerals, would not.

### D. A Professional Quality Video of a Twenty-Year-Old Murder Victim That Was "Entirely Appropriate for a Memorial Service"

In *Salazar v. State*,[240] the Texas Court of Criminal Appeals handed down what can be fairly described as a highly detailed and well-reasoned primer on how courts should analyze video VIE specifically and VIE generally.

In *Salazar*, the defendant was charged with capital murder but was convicted of the lesser-included offense.[241] The jury assessed punishment at thirty-five years in prison and fined the defendant $10,000.[242] An important part of the VIE that was admitted for the jury to consider was a professional quality video regarding Jonathon Bishop, the twenty-year-old deceased.[243] Presenting the court's full, although lengthy, description is warranted to help the reader experience, at least partially, what the jury must have felt when the video was played for them:

> This video is an extraordinarily moving tribute to Jonathon Bishop's life. It consists of approximately 140 still photographs, arranged in a chronological montage. Music accompanies the entire seventeen-minute video and includes such selections as "Storms in Africa" and "River" by Enya, and concludes with Celine Dion singing, "My Heart Will Go On," from the movie *Titanic*.
>
> Almost half of the approximately 140 photographs depict the victim's infancy and early childhood. The pictures show an angelic baby, surrounded by loving parents, grandparents, unidentified relatives,

238. *Id.* at 393–94.
239. *See* Payne v. Tennessee, 501 U.S. 808 (1991) (lacking definitive parameters for VIE).
240. 90 S.W.3d 330 (Tex. Crim. App. 2002).
241. *Id.* at 332.
242. *Id.* at 334.
243. *Id.* at 333.

> and other small children. Later photographs show Jonathon as a toddler, playing the piano, frolicking at the beach with other friends, happily riding on a carousel, laughing in a field of bluebonnets, and cuddling with a puppy. The video also includes numerous annual school pictures showing Jonathon's progression from a cheerful child to an equally cheerful young man. It catalogs his evident and early prowess as a young soccer player and eventually as a football player. There is a picture of him and his date, presumably going to their prom, and more candid shots of the victim and his teen-age buddies. The video includes many family reunion portraits showing Jonathon's entire extended family. Understandably, this professional and polished production portrays Jonathon in a very positive light and *it is entirely appropriate for a memorial service*. The music, too, is appropriately keyed to the various visuals, sometimes soft and soothing, then swelling to a crescendo chorus. In sum, it is a masterful portrait of a baby becoming a young man. It is also extraordinarily emotional.[244]

Defense counsel objected on various grounds, including on the basis that "[the] exhibit is highly prejudicial and outweighs any probative value. . . . After the admission of that exhibit, . . . [there is] absolutely no way this Defendant can get a fair trial, absolutely no way."[245]

The court began its analysis of this VIE by referring to *Payne*:

> As the Supreme Court stated in *Payne v. Tennessee*, such evidence is "designed to show . . . *each* victim's 'uniqueness as an individual human being,'" and is a way to inform "the sentencing authority about the specific harm caused by the crime in question." . . . Defendants are not nameless, faceless ciphers in the courtroom. . . . Every homicide victim is an individual, whose uniqueness the defendant did or should have considered, regardless of whether the murderer actually knew any specific details of the victim's life or characteristics.
>
> On the other hand, the punishment phase of a criminal trial *is not a memorial service for the victim*. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial.[246]

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244. *Id.* at 333–34 (emphasis added).
245. *Id.* at 334.
246. *Id.* at 335–36 (quoting Payne v. Tennessee, 501 U.S. 808, 823–25 (1991)) (first emphasis in original, second emphasis added) (footnotes omitted). The court also noted the distinction between victim character evidence and victim impact evidence. *Id.* at 335.

The court, as evidenced by its use of italics at length, was concerned:

> At the same time, *we caution that victim impact and character evidence may become unfairly prejudicial through sheer volume*. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice under Rule 403. Hence, *we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence*.[247]

> And, it further cautioned:

> As we noted in [*Mosley v. State*],[[248]] there is no legal "bright and easy line" for deciding precisely what evidence is and is not admissible as either victim character or [VIE]. The inability to craft a bright-line rule, therefore, requires heightened judicial supervision and careful selection of such evidence to maximize probative value and minimize the risk of unfair prejudice. Courts must guard against the potential prejudice of "sheer volume," barely relevant evidence, and overly emotional evidence. A "glimpse" into the victim's life and background is not an invitation to an instant replay.[249]

The court then conducted a thoughtful and thorough Rule 403 analysis of the video,[250] including considering the following factors as stated in its prior decision in *Solomon v. State*,[251] as follows in its entirety:[252]

- The probative value of the evidence:

The court assessed the value as "minimal."[253] "Nearly half of the photographs showed Jonathon Bishop as an infant, toddler or small child, but appellant murdered an adult, not a child. He extinguished Jonathon Bishop's future, not his past. The probative value of the vast

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> The former is designed to give the jury "a quick glimpse of the life that the petitioner chose to extinguish, to remind the jury that the person whose life was taken was a unique human being." The latter is designed to remind the jury that murder has foreseeable consequences to the community and the victim's survivors—family members and friends who also suffer harm from murderous conduct.

*Id.* at 335 (footnotes omitted).

247. *Id.* at 336 (footnotes omitted) (quoting Mosley v. State, 983 S.W.2d 249 (Tex. Crim. App. 1998)).

248. 983 S.W.2d 249.

249. *Salazar*, 90 S.W.3d at 336 (footnotes omitted) (quoting *Mosley*, 983 S.W.2d at 262–63).

250. *Id.* at 336–39.

251. 49 S.W.3d 356 (Tex. Crim. App. 2001). In its Rule 403 analysis, the *Salazar* court applied rules that were "simply the normal evidentiary rules that courts apply in any Rule 403 admissibility determination." 90 S.W.3d at 336.

252. Because of the clarity and thoroughness of this analysis, and in the hope that judges and trial lawyers may refer to this as an exemplar, the court's analysis is presented in its entirety.

253. *Salazar*, 90 S.W.3d at 337.

majority of these 'infant-growing-into-youth' photographs is *de minimis*."[254]

- Its potential for unfair prejudice:

> [The] prejudicial effect [of these photographs] is enormous because the implicit suggestion is that appellant murdered this angelic infant; he killed this laughing, light-hearted child; he snuffed out the life of the first-grade soccer player and of the young boy hugging his blond puppy dog. The danger of unconsciously misleading the jury is high. While the probative value of one or two photographs of an adult murder victim's childhood might not be substantially outweighed by the risk of unfair prejudice, what the State accurately characterizes as a "seventeen-minute montage" of the victim's entire life is very prejudicial both because of its "sheer volume," and because of its undue emphasis upon the adult victim's halcyon childhood. Because the probative value of much of the video montage is low and the potential for unfair prejudice high, these two factors weigh against admissibility.[255]

- The time needed to put on the evidence:

> [This] also weighs against admissibility. Here, both parents testified in person and spoke briefly, but eloquently, of their love for Jonathon, his individuality, his childhood and youth, his love of life, and of their personal loss and grief. Mrs. Bishop's testimony was three record pages long, while Mr. Bishop's was two pages. Their testimony was fully admissible. Mrs. Bishop had also testified as the State's first witness during the guilt stage and authenticated a photograph of Jonathon as he looked around the time of his death. This photograph was clearly relevant and admissible. The memorial video, on the other hand, was very lengthy, highly emotional, and barely probative of the victim's life at the time of his death.[256]

- The proponent's need for the evidence:

> The State's need for this evidence was also minimal. Both parents were available to testify and both did so. Their testimony was eloquent and brief. Because Mr. Bishop compiled the photographs for the memorial videotape, the State could have offered a small number of those photographs through him.[257]

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254. *Id.*
255. *Id.*
256. *Id.* at 337–38.
257. *Id.* at 338 (footnotes omitted).

The court concluded its analysis by finding that although in "close cases, courts should favor the admission of relevant evidence[,] [t]his is not a close case";[258] that all of the Rule 403 factors "weigh[ed] against admissibility";[259] and that "[t]he video itself was not admissible and the Enya and Celine Dion background music greatly amplifie[d] the prejudicial effect of the original error."[260]

The court therefore reversed the defendant's sentence and remanded the case to the court of appeals "to apply its harmful error analysis to both the visual and audio portions" of the video, instead of only the former as it had done originally.[261] As may be expected, the court of appeals reviewed its decision based on the higher court's instructions and ultimately determined that it could not "conclude the error had no influence or only a slight influence on the verdict."[262] Accordingly, it in turn reversed and remanded this case to the trial court for a new hearing on punishment.[263]

As the New Jersey Supreme Court did in *Hess*,[264] the Texas Court of Criminal Appeals did here. Both courts contributed to setting parameters for the admissibility of VIE, in these cases videos, where the United States Supreme Court would not.[265] Judges and trial attorneys in these states, and hopefully those in other states as well, can only benefit from their having done so.

### E. A Victim Impact Video Made for a Memorial Service

Whereas the victim impact video in *Salazar* was "entirely *appropriate* for a memorial service,"[266] the video in *United States v. Sampson*[267] was actually *created* for one.[268]

Gary Sampson pleaded guilty to two counts of carjacking resulting in death, and in a sentencing trial under the Federal Death Penalty Act

258. *Id.* (footnotes omitted).
259. *Id.*
260. *Id.* at 339.
261. *Id.*
262. Salazar v. State, 118 S.W.3d 880, 885 (Tex. App. Corpus Christi 2003).
263. *Id.*
264. *See* State v. Hess, 23 A.3d 373, 392–94 (N.J. 2011) (defining parameters for admissibility of VISs); *supra* Part IV(C) (discussing how the court in *Hess* defined parameters for admissibility of VISs).
265. *See supra* notes 8–27 and accompanying text (describing the cases and decisions that helped define the parameters of admissible VIE).
266. 90 S.W.3d at 334 (emphasis added); *supra* discussion in Part IV(D).
267. 335 F. Supp. 2d 166 (D. Mass. 2004).
268. *Id.* at 191.

(FDPA)[269] the jury returned its verdicts requiring the death penalty on both counts.[270] VIE was presented at the trial because:

> [It] may be considered by the jury in federal capital cases, as a non-statutory aggravating factor, if the jury unanimously finds that the prosecution has proven at least one statutory aggravating factor. The FDPA explicitly permits the government to present evidence "concerning the effect of the offense on the victim and the victim's family." Such evidence "may include oral testimony, a [VIS] that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information."[271]

Along with other VIE, the government sought to introduce a memorial video of Jonathan Rizzo, who was a college student and one of the defendant's victims:

> The video, made for a memorial service, was about twenty-seven minutes in length and featured over [two hundred] still photographs of the victim, in roughly chronological order, from the time he was born until the time just before his death. The pictures were set to evocative contemporary music, including that of the Beatles and James Taylor.[272]

Because the "probative value was outweighed by the danger of unfair prejudice, and created a danger of provoking undue sympathy and a verdict based on passion as opposed to reason,"[273] the court excluded the video. In doing so it relied primarily on the holding in *Salazar*, from which it cited at length.[274] In comparing the videos in both cases, the court stated:

> Even longer than the videotape analyzed in *Salazar*, the Rizzo video was close to [thirty] minutes long and featured many pictures of the victim from birth to college, posing with family, friends and religious figures. In addition, it was set to poignant music. Even without the music, admission of the video would have been unfairly prejudicial in light of the fact that the jury heard powerful, poignant testimony about Jonathan Rizzo's full life and the impact of his loss on his family, and

269. 18 U.S.C. §§ 3591–3595 (2012).
270. *Sampson*, 335 F. Supp. 2d at 175.
271. *Id.* at 186 (citations omitted).
272. *Id.* at 191.
273. *Id.*
274. *See id.* at 191–93 (comparing *Sampson* to *Salazar*).

> saw photographs of him in conjunction with this testimony. The video, given its length and the number of photos displayed, would have constituted an extended emotional appeal to the jury and would have provided much more than a "quick glimpse" of the victim's life. Together with the evocative accompanying music, the videotape's images would have inflamed the passion and sympathy of the jury.[275]

Although not explaining its analysis in nearly as great detail as the court did in *Salazar*,[276] the District Court of Massachusetts clearly was applying a Rule 403 analysis.[277] Its decision in this federal case, as well as the extent to which it relied upon and cited from *Salazar*, is further indication that (1) courts have started to curtail the use of these highly prejudicial types of VIE, and (2) the first steps are being taken on the road to uniformity in ruling on such evidence. Both are worthy goals.

## *V. CONCLUSION*

If the primary purpose of a VIS is to "provide victims a voice," and this seems to be an accurate statement,[278] then it is being fulfilled. The empirical evidence strongly shows that victims are being given a voice, along with other benefits. Additionally, perceived detriments of VISs have, with equal strength, been empirically shown to be only that—perceptions. Both results were confirmed by respondents in the Ninth Judicial Survey analyzed herein. For victims of future crime, who will need and deserve the best that any part of the criminal justice system can deliver, this should be excellent news.

The question remains, however, to what extent these victims will be likely to avail themselves of the VIS process—and receive its benefits. Responses from Ninth Judicial Circuit prosecutors suggest that VISs are given in from 35% to 50% of the cases.[279] However, while there is strong evidence of extensive VIS use internationally,[280] there is a dearth of studies specifically targeted to this issue in the United States. Such research is vital to encouraging the use of VISs in the United States.

At the other end of the VIE spectrum lie the videos and photographs, such as those analyzed in Part IV, that both are *designed* to inflame emotions of juries and judges and carry with them such great potential to

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275. *Id.* at 192–93 (footnotes omitted).

276. *See* Salazar v. State, 90 S.W.3d 330, 336–39 (Tex. Crim. App. 2002) (applying Rule 403 analysis to the facts).

277. *See Sampson*, 335 F. Supp. 2d at 178–83 (applying Rule 403 analysis to the facts).

278. Erez, *supra* note 39 at 555.

279. *Supra* notes 118–19 and accompanying text.

280. *Supra* notes 57–65 and accompanying text.

be unfairly prejudicial. Such potential could, in one stroke, have been at least significantly curtailed, and conceivably eliminated, had the Supreme Court offered guidance in *Payne*[281] as to permissible parameters for this evidence or seized later opportunities to do so.[282] It repeatedly declined. Lower courts, as this Article has shown,[283] have been left to the task of providing those parameters. As well as the lower courts may do, uniformity across state and federal jurisdictions will be difficult, if not impossible, to achieve. Although ordinarily such uniformity is neither necessary nor in many instances even desirable, such should not be the case with *this* evidence—which Justice Stevens accurately termed "especially prejudicial."[284] Remembering that this evidence is used in penalty phases of capital cases where death may be the sentence, as well as in other cases where life imprisonment or long prison terms may result, there is no compelling reason why a defendant in one jurisdiction, but not one in another, should be subject to it.

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281. *See* Payne v. Tennessee, 501 U.S. 808, 824–25 (1991) (granting the courts wide latitude in deciding what VIE to admit).

282. *See supra* notes 13–25 and accompanying text (examining how the Supreme Court has given no guidance to the lower courts on the boundaries of permissible VIE).

283. *See supra* Part IV (discussing how lower courts have decided various cases involving VIE).

284. Kelly v. California, 555 U.S. 1020, 1024 (2008).

# APPENDIX I

FLORIDA NINTH JUDICIAL CIRCUIT
JUDGES SURVEY

30 TOTAL SURVEYS RECEIVED

OVERVIEW

Of the thirty judges who responded to the survey, twelve (40%) have presided over criminal jury trials where VIE was introduced.

Of the twelve judges who presided over criminal jury trials where VIE was introduced, only four (33.3%) have seen defense attorneys introduce victim impact statements. However, three (25%) judges stated they would have allowed VIE from the defense, but have never been asked while presiding over a case.

None of the twelve judges who presided over criminal jury trials have ever refused to allow victim impact statements.

Of the twelve judges who presided over criminal jury trials where VIE was introduced, only one (8.3%) required the written victim impact statement to be read out loud.

***Judges' responses are reproduced exactly as they appear on survey response forms.**

| Question 1 | Have you presided over criminal jury trials since victim impact statements have been allowed? |
|---|---|
| 12 out of 30 Respondents (40%) | YES |
| 18 out of 30 Respondents (60) | NO |

| Question a | In what types of cases have you allowed such statements? |
|---|---|
| | All criminal cases: misdemeanors, felonies, juvenile. |
| | Battery, Criminal Mischief |
| | Whenever the state indicates the victim wants to make a statement. |
| | Simple Battery, Sexual Battery, Domestic Violence, Burglary |
| | Felony, Misdemeanor and Juvenile cases. |
| | All criminal cases if the victim wants to be heard at sentencing. |
| | Criminal cases |
| | At sentencing in any case |
| | To the jury, in death penalty cases only. In other types, to me when requested. |
| | Criminal charges with a death, battery, other personal crimes |
| | Prior to any criminal sentence that has a victim |
| | All in which they were offered |

| Question b | In what types of cases have you not, and why not? |
|---|---|
| | I always allow the victims to address the court. |
| | Not asked other than these<br>I always allow it. |

| | |
|---|---|
| | Cases that do not involve a victim, or the victim chooses not to do an impact statement |
| | None |
| | I have allowed them when asked. |
| | I have not declined any cases, the state and defense always agreed or it wasn't an issue |

| Question c | Please describe the mechanics of how victim impact statements have been arranged for and actually presented in court. |
|---|---|
| | The prosecutor advises the Court that there is a victim or a victim's representative who wishes to address the Court. Then, just before sentencing is pronounced, the victim is brought to the leectern to read or make his/her statement. Where victims were in foreign jurisdictions we have streamed the proceeeding "live" via secure internet connection and allowed the victims to interact by email or phone. |
| | The victims were allowed to read directly from the statement. |
| | The state sets it up. For plea agreements, the state will either have the victim present or ask to set off sentencing so they can determine if the victim wants to present a statement. For trials, sentencing is usually set off for some period of time as well. |
| | If it is a plea or a trial, right before sentencing the court will hear the victim's impact statement either read to the court or verbalized by the victim in open court |
| | They have usually been submitted ahead of time directly to me. |

| | |
|---|---|
| | Usually orally by the victim appearing and making a statement. |
| | Either the victim gives the statement live or in some cases an advocate or representative of the victim reads a statement into the record. |
| | Usually the victim makes a statement or the prosecutor reads a statement to the court |
| | Some are read and others are simply statements made by the victim/family. |
| | The victim advocate was present to provide support, the victims all proceeded with verbal statements, some used visual aids that they brought himself |
| | I allow the victim, or victim's representatives, to speak freely in court. Oftentimes, he or she reads off a prepared letter. I have also allowed the victims presence to be waived but a written statement to be read on the record |
| | Written statement, read by either victim or victim advocate |

| Question d | Have defense attorneys attempted to present victim impact statements? |
|---|---|
| | No |
| | No |
| | No - usually only mitigation testimony. |
| | Never |
| | Yes |
| | Sometimes |
| | No |
| | No<br>They have presented mitigation from defendant's family and friends, not victim impact. On rare occasion, a defense attorney will call a victim whose |

| | |
|---|---|
| | testimony is favorable to defendant in mitigation. |
| | No |
| | No |
| | Yes, in mitigation on occasion |

| Question e | In what types of cases? |
|---|---|
| | Never, in my experience. |
| | Same as above |
| | Variable |
| | None |
| | Violent crimes, mostly |
| | None |
| | No |
| | Cases where Victim decline prosecution but state proceeded anyway, usually DV |

| Question f | Have you allowed victim impact statements by the defense? |
|---|---|
| | I would if asked. |
| | No |
| | Yes |
| | No - has never been requested. |
| | No one has ever asked |
| | Yes, when requested. |
| | No |
| | I allow a defendant to present any mitigation or witnesses as to mitigation |
| | Yes. Victim's rights statute does not pick sides |

| Question g | How and in what format have they done so? |
|---|---|
| | Impact statements have been done by written submissions, in person |

| | |
|---|---|
| | statements, family representative spokesperson, via the internet. |
| | Either the victim appears or the defense has a written statement. |
| | Either written statements or live statements from the victim. |
| | Defense or defense witness makes a statement. Clearly this is not an impact statement per se. |
| | Written statement or sworn testimony |

| Question h | Whether presented by the prosecution or the defense, have you allowed such statements to be presented to the court in writing as opposed to live in court? |
|---|---|
| | Yes |
| | Both |
| | Yes |
| | I have done it both way[s]. |
| | Yes |
| | Yes |
| | Yes |
| | Yes |
| | Yes |
| | All victim impact statements I received were all in person, although several victims read from a prepared statement |
| | Yes |
| | Only if read aloud in court |

| Question i | If not, why not? |
|---|---|
| | Not ever asked |
| | Allowed |
| | Must be of record. |

| Question j | What benefits have you observed in the use of victim impact statements? |
|---|---|
| | Psychologically the victim feels better because they got to express their feelings and someone listened to them. Also, the opportunity provides closure. The system and the actual judge appear to be responsive, even if the court cannot grant all of the victims' requests because the law does not allow the requests. The perpetrators get to see the results of their behavior - very helpful in juvenile cases and the principles restorative justice are supported by these impact statements |
| | Allows the victim to have their say in court with a set time period and parameters. |
| | It brings some closure to the victims- particularly in death cases. It allows the victim an opportunity to tell a defendant how their lives have been affected - often in ways the defendant never imagined. |
| | The benefit is really not for anyone other than the victim, and in very serious sexual battery cases the victim feels a sense of finality that really cannot be achieved by simply telling them it is over he took a plea. |
| | Allows judges to see how crimes have affected victims. |
| | Helps to understand the personal impact of the crime and helps me to fashion an appropriate sentence. |
| | It gives the victim an opportunity to address their feelings and thoughts about the matter under consideration and more input from all sides is beneficial to the court when deciding an issue. |
| | Not a lot |

| | |
|---|---|
| | They present a more complete picture of the impact of the crime. |
| | Many . . . having a voice is important to a victim who has no "standing" to pursue a case and does not often have control on the outcome. The statement provides a small sense of closure to the victim or victim's family. Increasingly, the victim impact statement can also help the victim's family portray the victim in a light different/better than media portrayal. |
| | The effect on the defendant being sentenced and it gives a victim their right to be heard |
| | Have not observed any, but then, I am not a psychiatrist. |

| Question k | What negatives have you observed? |
|---|---|
| | Emotional breakdowns have been few and far between. Other that taking court time, I have seen no negatives. The time spent on these statements is necessary and serves a positive societal purpose that places the court in a compassionate role. |
| | If they get off track and just start talking. |
| | They get out of hand if not controlled. They can be exceedingly emotional. |
| | Sometimes victims' lack of knowledge of the judicial system leads them to ask the court for more incarceration on a plea, then the court declines to take a negotiated plea between the State and defense. In that case, the victim has now pushed a case to trial that really has a poor chance of a positive outcome. |
| | None. |
| | Hostility from the victim or victim's family directed to the defendant. |

| | |
|---|---|
| | None so far. |
| | Emotions and anger sometimes requires more security, but that is not a huge problem |
| | On occasions, victims focus on matters that are not relevant under the law. |
| | They can be time consuming, but I don't really consider that a negative |
| | If there is a negotiated sentence sometimes it seems confusing to the victim |

| Question 1 | What has made for more effective statements? |
|---|---|
| | This question pre-supposes that the terms "effective statements" register an identical cognitive response between the person taking the survey and the person writing the question. This questions fails to detail whether "effective" statement is a measure of how the victim feel after the statement is given or whether it "affected" the judge outcome towards a more punitive or lenient result. |
| | If they write it and try to keep to it. |
| | I swear in the person making the statement, which may give them pause about what they say. I also have them stand at the podium facing me, unless they ask to face the defendant, which I do allow. I ensure my deputies are properly positioned to avoid confrontation. I also monitor the time and emotionalism of the speaker, steering them to a safer place if need be. |
| | Just simply speaking from the heart about how the crime has affected them. |
| | More descriptive statements, or any statements that are written properly. |

| | |
|---|---|
| | Oral presentations by the victim in court at sentencing. |
| | It all depends on the case under consideration. Sometimes written statements work best and other times live testimony works best. I've seen both work very effectively. |
| | That the victims are here live |
| | The effectiveness of the statement is dependent upon the facts of the case. |
| | Preparation, a good victim advocate who understands the process, and generally the educational level of the person making the statement |
| | Facts rather than emotion |

| Question m | What approximate percentage of the time has anyone other than the IMMEDIATE victims presented victim impact statements that you have considered in determining sentencing? ("Immediate victims" includes, in cases of death, close family survivors; but otherwise, "immediate victims" does not include those not DIRECTLY subject to the defendants' actions). |
|---|---|
| | I cannot reliably or accurately approximate the percentage requested. |
| | 0% |
| | Very few. This would have to be scheduled - If a sentencing will have a number of statements, I schedule it for an hour, and let each side know they may have 30 minutes. If they want additional statements to be considered, they must be put in writing and sent to me in chambers at least 3 business days in advance, and I review them all. |

| | |
|---|---|
| | On Victim cases about 15-20% of the time has family members given an impact statement. Usually because the victim is too young or scared to do it on their own. |
| | None |
| | None |
| | Less than 5 % |
| | 25% |
| | 20% |
| | None. I consider all the victims I have heard from to be immediate victims. |
| | Zero |

| Question n | What concerns, if any, have you had regarding the use of such statements as part of the sentencing process? |
|---|---|
| | No concerns, if taken in the light they are offered and the judicial officer is not swayed by emotional pleas. |
| | None |
| | My concern would be that the sentencing be unduly influenced by the emotionalism of the statement. That is somewhat mitigated by written impact statements, reviewing the facts of the case in advance, and outlining a range of sentencing options I think would be appropriate prior to the hearing. I then move up or down from the middle of that range based on everything presented. Rarely have I gone outside of that range. |
| | None |
| | None, except in capital cases. |
| | None |
| | None |
| | No concerns. |

| | |
|---|---|
| | I believe they are appropriate and important, however with more and more mandatory minimums, the disparity between the wishes of the victim and the leeway of the court could become a problem. |
| | I do not think the prosecution makes it clear what the purpose is of impact statements. Sometimes victims come in and want to come up with the sentence |
| | No concerns |

| Question o | If you have had concerns, what have you been able to do to ameliorate them? |
|---|---|
| | Follow the agreed plea negotiations. |
| | Explain to Victims the whole process and purpose behind the impact statements. |
| | Use written impact statements in capital cases. |
| | My concerns would be at a level where there is little I feel I can do. |
| | Explain to everyone the purpose of the hearing. |

| Question p | What, if anything, have you observed defense attorneys do to try and ameliorate the effects of such statements? |
|---|---|
| | Not ask questions of victims that would make the situation worse. |
| | Nothing out of the norm. |
| | Say nothing - which at times is appropriate. Have the defendant apologize to the families for his/her actions. Acknowledge the pain of the victim while reminding the court that the defendant may also be a victim, and is a person with family in the gallery. Basically, humanize the defendant. |

| | |
|---|---|
| | They generally state things such as "we understand and appreciate the victim's feelings, which is why we have reached this resolution (plea)" |
| | Presented testimony from other witnesses. |
| | Express sympathy for the victim's plight and quickly return focus on the better qualities of the defendant. |
| | The attorneys are very respectful and generally just remind the court sympathy is not to be taken into consideration. |
| | They sometimes try to cross the victim about the statement-I rarely allow that |
| | Knowing when to cross examine and when to sit down. |
| | Most defense attorneys are respectful, however some will try to minimize the impact |
| | One particular attorney objected based on hearsay to a written impact statement. The same attorney would also object at the live impact statement |
| | Present their own witnesses in mitigation, they have also brought in evidence to impeach victim |

| Question q | How have you used victim impact statements in determining sentencing? |
|---|---|
| | I have listened to or read the statements then apply them to the facts of the case. |
| | Yes |
| | To increase a possible sentence. |
| | Gives me a better understanding of the severity of the offense or lack thereof. |
| | Yes. |
| | It has very limited use, but some use |
| | One small factor among many. |

| | |
|---|---|
| | Often the sentencing is already set, but when not, the impact of the victim or family helps me as one of many factors to determine a consequence. |
| | Yes |
| | varies case by case |

| Question r | How much weight do you give them? |
|---|---|
| | These are case-by-case decisions. It also depends on whether the plea has been negotiated. |
| | Varies in each case. |
| | Some weight. |
| | A lot of weight |
| | Some weight. |
| | That depends on the case before the court. Sometimes it is very important and other times it is not. Its a case by case determination. |
| | Some weight |
| | The statements of victim and defendant and their families is only one small factor in many. |
| | It all depends . . . sometimes it can carry significant weight depending on what other factors I am considering. Other times it's one of many factors, and sometimes the crime itself presents an appropriate sentence and the impact statement has really no relevance to sentencing; but it's relevance again goes to the closure for the victim and their gaining some control in the process. |
| | Some |
| | Varies case by case |

| Question s | What, in your opinion, can prosecutors do better in preparing for, handling, or reacting to victim impact statements? |
|---|---|
| | Know the facts of their case and limit their venom. Cool, calm, collected. |
| | Make sure they know what the victim is going to say. |
| | Do a better job in preparing the victim to present the statement. It is clear that some have no idea what the victim is going to say. It would be helpful not to have repetitive victim impact statements from the same type of source - e.g. friends. They should plan the statements for maximum use - a friend, a family member, a teacher, a religious leader, etc. |
| | Nothing. |
| | Prepare the victim to be concise and to let them know the defendant will be close by when the statement is given. |
| | Speak often with victims and be available to guide victims through the process. |
| | I am not sure |
| | Prosecutors should actually try to have contact with the victim before final disposition. This is something that is not always done. |
| | That's tough . . . they need more funding. They need more victim advocates. They need fewer cases to be able to focus on the victims. But overall they do a great job on the resources they have. |
| | The state needs to be more prepared in letting the court know that a victim has been given notice of the hearing. Also, the state needs to make the victim away of limitations in sentencing |
| | Not my position to say. Judges are supposed to be NEUTRAL |

| Question t | What, in your opinion, can defense attorneys do better in preparing for, handling, or reacting to victim impact statements? |
|---|---|
| | Know the facts of their case and limit their venom. Cool, calm, collected. |
| | Not have them or their clients react to them verbally or physically. |
| | Humanize the defendant, while acknowledging the victim's pain. |
| | Nothing. |
| | No opinion. |
| | I don't know if there is much more they can do than what I have observed them doing so far. |
| | I am not sure about this either |
| | They need to know when to question the witness and when to simply sit down. |
| | Be prepared for them and be cognizant of the victims' fragility at times. |
| | Be respectful. |

| Question u | What, in your opinion, could be done to improve the process of victim impact statements? |
|---|---|
| | Make available to victims the full benefits of technology. |
| | Nothing. |
| | A big procedural issue in my courtroom is that the prosecutor never seems to know if the victim wants to make a victim impact statement. When the state meets with the victim, in preparation for a plea or trial, there should be some type of question asking whether the victim will want to make a statement in the event of a plea before trial. More notice should be given to the JA when setting hearings as |

| |
|---|
| to whether or not there will be live victim impact statements or not. |
| I believe they are fine as is. |
| Nothing |
| Have the prosecutor contact the victim early in the process to get the victim's input regarding the case and possible resolutions and when possible get the victim to write a statement for the prosecutor to read in court. In very serious case involving bodily injury, it would be better for the victim to appear in person and make a statement. |
| See responses above. |
| I don't know |
| No opinion. |
| Funding would be a great start, education for victims and availability of support groups for victims, resources for them, education on a broader scale of the court system that does not come from fictionalized television shows. |
| Require a time frame for submission. If deadline is not met, it is waived . . . . |

# APPENDIX II

FLORIDA NINTH JUDICIAL CIRCUIT STATE ATTORNEYS SURVEY

24 TOTAL SURVEYS RECEIVED

OVERVIEW

Of the twenty-four state attorneys who responded to the survey, all twenty-four (100%) reported using VIE during the sentencing phase of a trial. However, the range of using VIE by case ranged from 3% of cases to 100% of cases.

Of the twenty-four, all (100%) sought to present VIE by live testimony, and twenty-two of the twenty-four (91.7%) sought to present written affidavits. Additionally, state attorneys offered victim impact statements in the forms of conversations with the victim, a child-recorded statement on an iPhone played in court, an email, an unsworn letter to the court, and a written unsworn letter, respectively.

Three of the twenty-four (12.5%) reported that the defense had objected to a victim impact statement presented.

Eight of the twenty-four (33.3%) reported that they knew of a judge who, after agreeing to or determining a sentence, changed his or her mind after hearing a victim impact statement.

Seven of the twenty-four (29.2%) reported that the defense had sought to introduce victim impact statements.

***State attorneys' responses are reproduced exactly as they appear on survey response forms.**

| Question 1 | In what types of cases have you sought to present victim impact statements? |
|---|---|
| | All kinds that have personal victims, (i.e. not drug cases) |
| | All cases where the victim wishes to present one |
| | Felony Battery, Agg Battery, Burglary, Home Invasion Robbery, etc |
| | Theft cases, robbery, battery, violent cases. |
| | Domestic violence cases |
| | Battery, sex cases, burglary |
| | Domestic Violence; DUI Manslaughter |
| | All VT crimes, including Battery, DUI, Thefts, Burglary |
| | Domestic Violence, Robbery, Battery, Sex Crimes and Child abuse |
| | Murder, attempted murder, aggravated battery, robberies, aggravated assault and home burglaries , traffic homicides |
| | Burglaries, batteries, crimes involving violence |
| | any case where there is a victim |
| | Battery, Battery on Law Enforcement Officer, Criminal Mischief, Grand Theft, Exposure of Sexual Organs |
| | Sex crimes, domestic violence, serious felony (attempted murder, aggravated battery, etc.) |
| | All victim cases |
| | Any Victim crime |

| | |
|---|---|
| | I tell all victims they have the right to address the court at sentencing if they desire. |
| | There was a DWLS with death case in which the victim's family submitted them, I also have an animal cruelty case where a bunch of citizen's have submitted letters. |
| | Murder cases and any cases where the victims want to do so. |
| | Domestic violence, sex crimes |
| | Sex crimes, domestic violence, violent crime |
| | Murder, battery, theft, assault, any with victim |
| | Any case with a victim; I deal mostly with sex crimes, armed robberies and homicides |
| | All types - from DUIs with personal injury to aggravated batteries to robberies with firearms |

| Question 2 | In what approximate percentage of overall cases have you sought to present such statements? |
|---|---|
| | 50% |
| | 100% |
| | 35% |
| | 20% |
| | 75% |
| | 30% |
| | 100% if the victim was willing in the DV case. |
| | 10% |
| | 80% |
| | 50% |
| | All of them |
| | All where there is a victim |

| |
|---|
| 3% |
| Any time the victim is willing to give a statement |
| 25% |
| 80% |
| All cases that I can get them. |
| Less than 10%, but most of my cases are traffic violations, rwov, or drug cases so I only have victims in about 25% of my cases |
| 5% |
| 20-30% |
| Less than 10%; victims rarely want to speak. |
| 15% roughly |
| 50% at least |
| 10% |

| Question 3 | In what format(s) have you sought to present them? You can select more than one choice below. |
|---|---|
| Live Testimony | 24 Responses (100%) |
| Written Affidavits | 22 Responses (91.7%) |
| Testimony | 5 Responses (20.8%) |
| Other | 5 Responses (20.8%) (Oral statements from the State Attorney to the judge based on conversations with the victim, a child recorded statement on an IPhone played in court, an email, an unsworn letter to the court, and a written unsworn letter) |

| Question 4 | Has the defense objected to such statements being presented? |
|---|---|
| YES | 3 Responses (12.5%) |
| NO | 21 Responses (87.5%) |

| Question 5 | If so, on what bases? |
|---|---|
| | Relevancy |
| | If there's a negotiated plea, or it's not the victim themselves but a family member. |
| | I allow the defense to review written statements ahead of time and if the State and the Defense can not agree, then the Court makes a ruling. |
| | Not sworn to |
| | Sometimes defense has objected to some of the substance of the victim impact statement. |

| Question 6 | What approximate percentage of the time have courts sustained defense objections, and for what reasons? |
|---|---|
| | 0% |
| | Never |
| | 0 |
| | 1% Because the family member (parent of a juvenile VT) was to present instead of the VT |
| | Zero |
| | None |
| | Seldom |
| | That happened one time and it was properly sustained |
| | 0 |
| | Never have |
| | Very rarely |

| Question 7 | What approximate percentage of the time have courts overruled defense objections, and for what reasons? |
|---|---|
| | Always - its statutory |
| | 0 |

| | |
|---|---|
| | 99% Victim's right's statute |
| | None |
| | 0 |
| | Never have |
| | Very often. I'd imagine that judges don't want to limit a victim on what they wish to express, and the judge, unlike the jury, has the necessary skill to ignore something that the court knows it shouldn't consider. |

| Question 8 | When victim impact statements have been presented, what, in your opinion, has made them persuasive, when you felt they were? |
|---|---|
| | Details, credibility, etc. |
| | The victim explaining what they would like to see from the case. |
| | Words coming from the victim seem to impact the Court moreso than an attorney making arguments- its the live body/person that seems to make the crime and its impact real |
| | That the victim is interested and the court should consider their position. |
| | When there is live testimony from victim |
| | Actual victim present in court |
| | The testimony of the victim personalizes the case and puts a face to the crime rather than a case number. |
| | Victim emotion and sufficient (but not exhausting) detail have motivated courts |
| | Honesty |
| | They are generally persuasive because they are emotional and they cause the judge to actually realize that the crime |

| |
|---|
| affected someone tremendously and the defendant needs to be punished for it. |
| The statements aren't used to impact a plea they are there for the victim to have their say so I don't believe them to be persuasive |
| The impact to their lives of the case itself |
| The sincereness and emotion filled nature of them whether written or live. |
| When the victim really talked about the impact the crime had on them (e.g. created low self-esteem, etc) |
| The most compelling statements are emotional statements about the how the crime effected the victims life. |
| The Court hearing from the Victim what this crime has caused in their life |
| The victim conveying to the court how the crime has impacted them and continues to impact them. |
| Seeing the person who was affected by the defendant's actions. |
| Seeing the person who was affected. |
| Emotion |
| When the victim is emotional yet reasonable |
| When victim calm, rational, and had an articulate reason for what they believed should happen to the defendant |
| Sincere emotion |
| The emotion the victim is able to express to the judge |

| Question 9 | When victim impact statements have been presented, what, in your opinion, has made them not persuasive, when you felt they were not? |
|---|---|
| | When one is angry or seeming like they just want to retaliate or maybe the person giving the statement seems like they have a mental health issue |
| | The victim not asking anything of the court |
| | Sometimes not much substance is actually conveyed, so the impact is little if anything |
| | That they showed indifference to the case. |
| | When the Victim doesn't read them |
| | Lack of feeling of victim |
| | The judges seem to already have a sentence in mind. |
| | Overly emotional, detailed 'belly-aching' statements reek of revenge rather than justice to both court and counsel |
| | When the court's decision on sentencing has been already made or there is an agreed to plea. |
| | Ones lacking in details or personal comments are less effective |
| | When the judge has already made up their mind and kinda of halfway listen to them. |
| | When the victim talked about irrelevant history or other family they felt was to blame. |
| | Statements about I want them to go to jail/prison. |
| | They have not been effective when the Victim has known the Defendant on a personal level |
| | Victim only asking for money. |

| | |
|---|---|
| | When written, a lot of times the spelling and grammar detracts from the impact because you have to figure what the person was trying to say. |
| | I don't present them if they will not be useful, unles the victim insists, which hasn't happened. |
| | I have not seen one that is not persuasive |
| | When the victims are unreasonable or overreacting. |
| | Vindictive statements, wanting outrageously high sentences, not being able to effectively articulate the impact on their life |
| | When victims just berate the defendant |
| | If the victim seemed vengeful and not a sympathetic victim |

| Question 10 | In approximately what percentage of the time, when victim impact statements were given, had the Court, prosecution and defense ALREADY agreed on the sentence to be imposed. |
|---|---|
| | 75% |
| | 50% |
| | 10% |
| | Lower than 50 % |
| | 50% |
| | 45% |
| | 2% |
| | 75% |
| | 90% |
| | 15% |
| | 100% |
| | Very few |
| | 75% |

| | |
|---|---|
| | 25% |
| | 70% |
| | 60% |
| | Not sure. However, in this circumstance victims are always told there is an agreement in place, whether they agree with it or not, but they still have the right to address the court. |
| | 10% |
| | very few |
| | most of the time, probably 80% |
| | 75% |
| | 50% |
| | 40% |
| | more than half |

| Question 11 | Have you ever known a judge, after agreeing to or determining a sentence, to change his or her mind (and the sentence) AFTER hearing the statement(s)? |
|---|---|
| YES | 8 Responses (33.3%) |
| NO | 0 |

| EXPLAN-ATORY ANSWERS TO QUESTION 11 | No, if it is an agreed upon plea no. However, some Judges if it is a plea to the bench do not state the exact terms they would give but would give a range and sometimes after hearing from the victim give the top of the range |
|---|---|
| | If they do, it's only for a particular condition they will not reconsider the whole agreement. |
| | No it's reversible if the Judge does so they don't |
| | No, most of the time there is a cap out there on the sentence, but no formal agreement. |

| | |
|---|---|
| | Not if it was already agreed upon. Unknown if it changed their mind when the sentence was open. |
| | I don't think this has happened, it's more likely the judge would say, I'm considering the range of x, but what I hear from the victim may change that |

| Question 12 | If so, can you please provide some examples of how this occurred, and why you think it did. |
|---|---|
| | I do not recall. |
| | After he heard from the victim |
| | 0% |
| | Maybe when the victim is asking for something the lawyers did not contemplate like community service or substance abuse issues. |
| | It's been so long, I can't give you the specifics |
| | It was employee theft of >$20,000 and the prosecutor was giving a probationary sentence. Victim wanted jail time. Judge rejected probationary sentence. |
| | I can't remember details. |
| | The victim did not approve of the plea offer. after describing how the event affected her daughter, the court would not take the plea agreement |
| | Can't recall a specific example. |
| | Again, I think a judge doesn't want to be in a position to contradict his or herself, so I think they rarely commit to a sentence if they know a victim plans on giving an impact sentence, if the judge thinks the statement may affect the sentence |

| Question 13 | Has the defense ever sought to present victim impact statements to the Court on behalf of a defendant(s)? |
|---|---|
| YES | 8 Responses (33.3%) |
| NO | 16 Responses (66.6%) |

| Question 14 | If so, for what reason(s) could you discern the defense did so? |
|---|---|
| | For mitigation. |
| | They were usually in the form of recantations or minimalizing the offense. |
| | They want leniency |
| | They hoped the judge would be sympathetic if it was a plea to the bench. |
| | Mitigation of sentence, downward departure, etc. |
| | To mitigate the emotional pull of our statements. |
| | When the victim has forgiven the defendant and wants leniency |
| | No |

| Question 15 | Please describe the mechanics of how you have seen victim impact statements arranged for and actually presented in court. |
|---|---|
| | Testimony and written statements read by the prosecutor on behlaf of the victim |
| | Under Florida Statutes the victim can either come to court and present live testimony/sworn, written statement, or just submit the sworn, written statement |
| | Through sworn statements and live testimony |

| |
|---|
| The victim is called to testify at sentencing or the notarized letter is submitted. |
| We meet with the victim beforehand and she reads her statement to the court |
| Call victim personally to prepare statement |
| The victim either speaks freely, reads statement, or submits affidavit. |
| Either written and read by the ASA or live testimony that is controlled by the court |
| I don't quite understand this question |
| We request them during plea negotiations or before a plea to the bench. They submit them to us or sometimes to the PSI writer. We either read them out loud or the V appears and reads them. |
| The court takes the plea and then asks the state for anything else and the State asks the court for the victim to provide their statement |
| Huh? same answer as the top - testimony and written statements |
| Scheduling with the judge on the exact sentencing date. |
| Live victim testimony or prosecutor reading written statement sent by the victim or (one time) had child audio-record their statement because she was too nervous to speak in court |
| Live testimony of the victim, victim reading a pre-written letter, ASA reading vt's letter |
| We have the Victim come in for the sentencing hearing and tell the Court whatever they want about how this crime has impacted their life |

| | |
|---|---|
| | Witnesses called to testify about how the crime has impacted them, what they believe the court should do. |
| | Testimony from defense witnesses (usually right after the trial). |
| | No |
| | Generally prior to sentencing after trial, or after a plea has been accepted and prior to sentencing |
| | The victim is advised of the sentencing and told they can make a statement. If there is a victim advocate, they go over what is acceptable to say. The defendant enters a plea, the victim makes a statement, and then the defendant is sentenced. Sometimes I read a written statement instead if the victim doesn't want to talk. |
| | Usually in the form of a letter to judge |
| | I don't understand this question |
| | Victim and advocate are sitting in courtroom. before def enters plea, I let judge know that victim is present and wishes to make impact statement. Def enters plea. before judge imposes sentence, judge tells state that victim may make statement. after, judge sentences def. |

| Question 16 | What benefits to anyone, if any, have you observed in the use of victim impact statements? |
|---|---|
| | Helps the judge understand the gravity of the case better, sobers the defendant a little, helps the victim find closure. |
| | It is helpful to the victim |
| | it sometimes give the victim closure |

| |
|---|
| Shows to the court that the victim is interested and can tell the judge what their position is. |
| Victims feel empowered |
| Personal satisfaction to the victim |
| It gives the victim closure and they feel part of the process. |
| Victims always feel better about a resolution if they get to tell the court and the defendant what effect the crime had on them. ASAs benefit because VTs feel better and are more accepting of resolutions when the are involved. Courts are put in a tough position of acknowledging VT concerns, but following the law or agreements. |
| It benefits the victim and or their family |
| Victims like them. |
| It helps the victims mostly it bring some type of closure to their cases |
| All parties know what teh impact on victim was |
| It gives the judge an idea of how this has affected the victim and what the sentence will actually do for the victim. |
| It sometimes seems to make the victim feel empowered and gives some amount of closure |
| Victims feel like they at least got a fair shake. |
| It benefits the Victim and the Court. The Victim gets to express their feelings and possibly get closure. The Court gets to see how personal this crime is to someone and not just another case |
| It allows the victim to directly address the court, and through the court the defendant and let the court and defendant know how the crime has impacted them. |

| | |
|---|---|
| | It lets everyone be heard and feel like they are a part of the legal process. |
| | It helps the court understand the dynamics of the crime. It allows the victims to vent. |
| | It is good for the state, the court to understand the impact serious crimes have on victims, and the defendant to hear what his or her actions caused, and it can be good for a victim to confront his or her perpetrator and finally have the upper hand |
| | The victims feel like they were heard |
| | Gives victim sense of being a part of process and that they can stand up to defendant for what he did |
| | It gives closure to most victims |
| | Two benefits - first and foremost for victim to have a chance to be heard, I think can be very powerful for the victim and provide a sense of closure. And to be heard and make the defendant a captive audience to what the victim is saying, I think also is cathartic. I also think, or perhaps I just hope, that the impact of a victim statement has an effect on the defendant. in only a handful of cases I am confident that it has. |

| Question 17 | What concerns, if any, have you had regarding the use of such statements as part of the sentencing process? |
|---|---|
| | Sometimes it will be the victim asking for less punishment when I disagree. |
| | Many times the victims come before the court and present heartfelt, emotional testimony and it does alter the way the judge handles the sentencing |

| | |
|---|---|
| | That sometimes the victim says irrelevant things. |
| | No concerns |
| | None |
| | None. |
| | As an ASA, I fear that family of, friends of or the defendant themselves will retaliate. |
| | No concerns |
| | None |
| | None |
| | None |
| | Retaliation by the defendant |
| | Just when victim wants to bring up irrelevant things |
| | Whether victim is going to recommend to the court something less than what I am asking for. |
| | None. |
| | None |
| | That it will make the defendant angry and he'll back out of the plea. |
| | That victim is unreasonable and can tank a plea to bench by asking for max without justification. |
| | None -- I think it's a valid part of sentencing |
| | None |

| Question 18 | If you have had concerns, what have you been able to do to ameliorate them? |
|---|---|
| | No, the victim has the right to share the impact statement how she truly feels |
| | I try to explain to victims how victim impacts statements work, and that the main purpose is to provide them with closure |
| | Prepared the witness |

| | |
|---|---|
| | No concerns |
| | No |
| | Written statements save the face-to-face, or waiving them altogether |
| | Have the judge instruct the defendant that the impact is not the sole basis of the sentence and is only merely one of many things taken into consideration. |
| | Tried to steer victim back on track |
| | Explain to the victim that while you may think Defendant only deserves probation, and you have the right to tell the court that, the State ultimately brings the charges and it is up to me to recommend a sentence taking into account a number of factors including criminal history, the crime, etc. |
| | Try to advise the victim to be direct, on point, and direct her statement to the judge. |
| | I speak with victims in that regard, tell them how I think they can maximize what the judge will do |

| Question 19 | What have you done particularly well in regard to the process of victim impact statements? |
|---|---|
| | Let the victim say them and make sure he/she addresses the court . . . not the defendant. |
| | I try to allow every victim the opportunity to present some form of statement |
| | Tell them other things other victims have included as a reference. |
| | Prepared the victim and had her write out her statement beforehand |
| | Call victims, met with them and review statements |

| |
|---|
| Yes |
| Getting victims to write the statement early crystalizes their own goals for prosecution and involves them in what can be a frustating process of delays for (from the lay perspective) no reason at all. |
| Encourage victims to make them |
| I always try to be proactive in pushing the Vs to do them. that's half the battle. |
| I always ask my victims before plea if they want to give a statement written or live. |
| Making sure I advocate for the victim if they are too afraid to speak for themselves. |
| Making the suggestion that the child audio-record their statement |
| Live testimony is more beneficial than a statement |
| Informing victims of right to address court if they desire, or do it through me. |
| Logistically setting cases off for sentencing post the defendant pleaing to allow for people to come into court and be heard. |
| Always giving the victim an opportunity to give a victim impact statement |
| Making sure they happen when the victim wants to make one. |
| Have victim write it ahead of time and review it with them |
| Encouraged victims to have their voice heard |
| Victim advocates do the most regarding preparation with the victim of their statement. just being respectful of them and if it was hard for them to do, |

| | |
|---|---|
| | providing encouragement that they were brave to do it |

| Question 20 | What have you seen defense counsel do particularly well in regard to the process of victim impact statements? |
|---|---|
| | Show respect |
| | Work around them |
| | I do not recall |
| | Nothing |
| | Nothing |
| | When defense counsel are allowed to ask questions of a VT, the best do it with respect and then argue to the judge, not the victim |
| | Being kind to victims when the statements are made |
| | Nothing |
| | Help the defendant understand its purpose |
| | Keeping the Defendant quiet |
| | I think it is harder from a defense standpoint. They can present relatives, but victim versus mom of defendant are very different types of statements. |
| | Have evidence/testimony to counter balance mine. |
| | Not cross examining the victim |
| | Act respectful toward the victim |
| | Not ask any follow up questions or push victim button to make that person lose it |
| | Listen respectfully |
| | Nothing |

| Question 21 | In what approximate percentage of the times that such statements were presented by the prosecution, do you feel that they affected sentences by making them longer or tougher? |
|---|---|
| | 40% |
| | 1% |
| | 50% |
| | 20% |
| | Sometimes |
| | 30% |
| | 0% |
| | 15% |
| | 10% |
| | 25% |
| | Half and half |
| | Can’t answer |
| | None |
| | 50% if after trial or plea to the bench |
| | 5% |
| | 60% |
| | 50% |
| | 75% |
| | Low % |
| | It’s impossible to say because it has no effect on the sentence if there is an agreement and you don’t know if it really affects the sentence after trial |
| | 25% |
| | 10% |
| | 25% and this is just a guess |
| | Small minority |

| Question 22 | In what approximate percentage of the times that such statements were presented by you, do you feel that they |
|---|---|

| | did not affect sentencing in any material way? |
|---|---|
| | 75% |
| | 99% |
| | 10% |
| | 75% |
| | 75% |
| | 10% |
| | 100% |
| | 75% |
| | 90% |
| | 25% |
| | 1% |
| | 50% |
| | 90% |
| | 40% |
| | 50% |
| | 25% |
| | Most |
| | Only if there was already a negotiated agreement |
| | 75% |
| | 90% |
| | 75% |
| | Majority |

| Question 23 | Please describe your opinion on how judges have, overall, used victim impact statements in determining sentencing. |
|---|---|
| | It may show how serious the victim is about the case and may help them understand the facts better |
| | It really depends on the type of case, for less serious cases it has little to no impact |

| |
|---|
| I think it depends on the crime charged and how it affects the judge |
| They do weigh them unless there is a stipulated agreement. |
| It's highly important |
| Type of a crime at bar |
| They repeat statements made by the victim in justifying their sentence. |
| Well, if done correctly. The wisest judges include the victim's statement in their ruling, but still give a fair sentence. |
| I don't think they use them very much. The law and/or the plea agreement determines the sentence. |
| Terms of the sentence, restitution, length of the incarceration time or probation time--all these things are factored in when judges hear and read the VI stmts. |
| Unsure |
| Can't answer |
| They just consider them with whatever sentence they have already thought about prior. |
| Gives them a reason to go over the bottom of the guidelines |
| Judges don't seem to take into account the victims input. |
| I believe it helps the Court realize that "real" people were affected by this crime. |
| In most cases, unless the facts and what happened to the victim are very bad (sex cases, crimes of violence with life altering injuries, etc.) judges are looking at a defendant's history and likelihood to reoffend. |
| I think it lets them attach the sentence they want to see to what someone else said. |

| | |
|---|---|
| | This is a dumb question. |
| | Most judges seem genuinely interested in victim impact statements so I believe they use them to determine length of sentences |
| | I don't know. |
| | Very little except to justify what they already planned to do |
| | I hope they use them to fashion a just sentence |

| Question 24 | In your opinion, overall, how much weight do you think judges have given them in determining sentencing? |
|---|---|
| | 40% |
| | Depends on the type of case |
| | I think it depends on the crime and their particular beliefs on the issue |
| | A good amount. |
| | Some weight |
| | Most definite |
| | 0% |
| | Not much. |
| | I think they give them sufficient weight |
| | Not sure how to measure weight. I'd say the judges give them a small to moderate amount of weight. |
| | Unsure |
| | Can't answer |
| | I think they give it moderate to minimal weight. |
| | Depends on the judge |
| | 2% |
| | 50% |
| | 10% |

| | |
|---|---|
| | Some weight, but more as a confirmation of what they were already going to do or considering doing. |
| | 15-25% |
| | Significant weight |
| | Some |
| | Very little unless victim can offer a unique story |
| | 15% |
| | Not very much |

| Question 25 | In what type(s) of cases have judges, in your opinion, given victim impact statements the most weight? |
|---|---|
| | Sex crimes |
| | Very serious, violent cases |
| | Person crimes - batteries, violent crimes |
| | Crimes of violence. |
| | Domestic violence |
| | Personal injury to victims, domestic and sexual assaults |
| | 0% |
| | Theft cases, including burglaries |
| | Battery cases - any kind |
| | Violent personal crimes by strangers: robberies , agg batteries traffic homicides |
| | Probably very violent cases, murders, rape etc. |
| | Can't answer |
| | The more serious cases with fact specific instances of impact on the victim in the judge's opinion. |
| | Sex crimes |
| | DV and Sex cases |
| | Victim crimes such as sex crimes, burglary cases, robbery |

| | |
|---|---|
| | Sex crimes, violent crimes, property cases where the items taken are irreplaceable. |
| | The DWLS with death case. |
| | Where the victims are most sympathetic. |
| | Sex crimes, child abuse, domestic violence, homicide |
| | Domestic violence |
| | Child sex victims |
| | Any violent, personal crime |
| | Violent cases/sex crimes cases with sympathetic victims |

| Question 26 | Can you give any examples of where you feel judges have given victim impact statements the most weight? |
|---|---|
| | A minor victim or a family member |
| | Cases where the victim is present at the time of the offense |
| | Violent crimes |
| | Crimes of violence. |
| | Where there has been a history of abuse |
| | No |
| | When a minor VT testified to how the theft affected her performance at school, I felt the judge used in going above the recommendation. |
| | Not specifically |
| | If the V wants the Def treated lightly or given probation with counselling-- the Judges really seem to weigh those kinds of comments more heavily than the comments where the V says they want the book thrown at the def. or the def. maxed out. |
| | Unsure |
| | No |

| | |
|---|---|
| | One judge heard live testimony from the victim at a violation of probation hearing. She was articulate and told the judge exactly what happened as well as how it made her feel without any questions from the state. |
| | Hearing that the defendant's molestation of a child has fundamentally changed that child's life and view of the world |
| | None |
| | A Judge wanted to give a burglary Defendant the minimum sentence. The Victim appeared and was an older woman with heart issues. She described how she can't sleep, stay in her house and function out of fear they will come back. The Judge realized how much damage this Defendant did to her as a person, not just her belongings being taken |
| | My Judge was trying not to cry in open court while the victim's mom was talking about losing her child. |
| | Cases involving long term abuse as in sex crimes or domestic violence |
| | Sometimes DV victims ask for leniency and the judge has obliged. |
| | No |
| | Not in this space |

| Question 27 | What problems have you observed in the process of victim impact statements? |
|---|---|
| | None |
| | Victims sometimes feel re-victimized when the sentence is low after presenting a victim impact statement |
| | Victims sometimes do not stay on task. |

| |
|---|
| Sometimes the victims are scared to present statements |
| None |
| It can negatively affect the court's view of the "Victim", but that does not usually run counter to considerations of justice. |
| Not affording Victims the right to make the statement when they are victims of burglaries |
| Nothing |
| None that i have seen |
| None |
| Sometimes the judge doesn't victims enough time to speak or say what they need to in order to feel whole or move forward with their life. |
| Getting victims to focus on "impact" rather than everything about the history/crime |
| The Victim sometimes get caught up on a matter and veer from how the crime impacted them |
| Willingness of victim to do a statement or come into court on less serious cases. |
| Timing, sometimes a victim can't come in, so they just send a letter or we talk on the phone and I share what they had to say with the court. |
| Some victims want to vent their anger at the defendant. |
| None |
| Sometimes the victims aren't properly prepared to make one |
| Most are poorly done and of no real value |
| None |

| Question 28 | What, in your opinion, can prosecutors and defense attorneys do better in preparing for, handling, or reacting to victim impact statements? |
|---|---|
| | Not much. Defense may want to let their client know about them |
| | Educate the victims on when these statements are most effective |
| | Have them read their statement. |
| | Just being prepared |
| | Meet and talk to victims and advocates. |
| | Talking to the victim about the purpose of the statement. |
| | Early involvement of the VT, multiple drafts of written statements, practice statements with ASA (to reduce length/detail) |
| | Not really. They do a fine job now. |
| | Nothing |
| | Ensuring they are talking to the victims because it is their right |
| | Nothing |
| | Try to get them as early as possible and use them in negotiating prior to agreeing on a sentence. |
| | Prepare the victim |
| | Try to get more Victims to do live testimony<br>Not much. We can only explain the process and answer questions, it is ultimately up to the victim if they want to give input in the multiple ways possible (in-person, by having me read something, or give something to the judge) |
| | Having a better idea of what is going to happen to the case (or when it will resolve) so that the victim's aren't coming to court 4 times to get the case |

| | |
|---|---|
| | resolved only to not want to come back another time. |
| | Making sure the victim has a real opportunity to be present and be heard |
| | In general, prosecutors can talk to the victim more about making a statement and encourage them to do it. They aren't really encouraged. |
| | Take time to talk with victim and coach them on how to effectively speak |
| | Close the courtroom so people aren't going in and out during a statement |

| Question 29 | What, in your opinion, could be done to improve the process of victim impact statements? |
|---|---|
| | Let the victim share the statement via closed circuit television so that he/she does not have to actually see defendant in court. Especially if they do not want to write a statement. |
| | Bring them into the process sooner, have them at plea negotiations |
| | No opinion |
| | Not sure |
| | Pay more attention to victims needs |
| | Preparing the victim |
| | Not much, because the effectiveness depends on the VT, not the process. As long as the court has heard from the victim (if they so chose) I think the process has worked |
| | Not rush sentencings to clear a docket and afford people the right to make the statements |
| | Nothing |
| | None |
| | Nothing |

| |
|---|
| Create a form that always the victim to write it out at the beginning of the case and add more information or details to it during the process, if needed. |
| More examples to help victim see how to focus the statement |
| Nothing. |
| No idea. |
| Nothing |
| Training of attys and victim advocates in how to write or speak for these statements |
| I don't care for judges asking defense attorneys if they'd like to question the victim. from my perspective it's the victim's time to be heard only as to what the victim wishes to say. not a time to be cross-examined. most of the time, defense counsel doesn't ask questions. the same way i typically don't ask questions of defense witnesses, like family offering mitigation at sentencing. i think it's disrespectful to people who at a time where confrontation rights aren't the issue and the adversarial nature of process shouldn't be at play |

# APPENDIX III

FLORIDA NINTH JUDICIAL CIRCUIT PUBLIC DEFENDERS SURVEY

3 TOTAL SURVEYS RECEIVED

OVERVIEW

Two of the three responding public defenders reported that they objected to the introduction of VIE.

One of the three responding public defenders reported knowing a judge who, after already agreeing to or determining a sentence, changed his or her mind after hearing the victim impact statement.

***Public defenders' responses are reproduced exactly as they appear on survey response forms.**

| Question 1 | In what types of cases has the prosecution sought to present victim impact statements? |
| --- | --- |
| | robbery, burglary, battery, assault, false imprisonment |
| | Theft cases, sex cases, violent cases |
| | Sexual battery |

| Question 2 | In what approximate percentage of overall cases has the prosecution sought to present such statements? |
| --- | --- |
| | 25% |
| | 25% |
| | 10% |

| Question 3 | In what format(s) has the prosecution sought to present them? You can select more than one choice below. |
| --- | --- |
| Live Testimony | 3 of 3 (100%) Responses |

| Written Affidavits | 3 of 3 (100%) Responses |
|---|---|

| Question 4 | Have you objected to such statements being presented? |
|---|---|
| | Yes |
| | Yes |
| | No |

| Question 5 | If so, on what bases? |
|---|---|
| | Relevance |
| | Objected to the content of the statement, not the statement itself |

| Question 6 | In what approximate percentage of the time have courts sustained your objections, and for what reasons? |
|---|---|
| | 0, the courts have consistently said even in negotiated pleas the victim has a right to be heard |
| | 50% legal grounds |
| | N/A |

| Question 7 | In what approximate percentage of the time have courts overruled your objections, and for what reasons? |
|---|---|
| | 100, the courts have consistently said even in negotiated pleas the victim has a right to be heard |
| | 50% relevance |
| | N/A |

| Question 8 | When victim impact statements have been presented, what, in your opinion, has made them persuasive, when you felt they were? |
|---|---|
| | When the victim explains how the crime is still effecting them |
| | Emotion |
| | The raw emotion |

| Question 9 | When victim impact statements have been presented, what, in your opinion, has made them not persuasive, when you felt they were not? |
|---|---|
| | When the victim complains about the character of my client |
| | When they do not related to the facts of the case at hand |
| | When it appears they are trying to do more than just relate the actual injury. |

| Question 10 | In approximately what percentage of the time, when victim impact statements were given, had the Court, prosecution and defense ALREADY agreed on the sentence to be imposed? |
|---|---|
| | 75% |
| | 3% |
| | 95% |

| Question 11 | Have you ever known a judge, after agreeing to or determining a sentence, to change his or her mind (and the sentence) AFTER hearing the statement(s)? |
|---|---|
| | Not personally |
| | No |

| Question 12 | If so, can you please provide some examples of how this occurred, and why you think that it did? |
|---|---|
| | n/a |
| | n/a |

| Question 13 | Have you ever sought to present victim impact statements to the Court on behalf of your clients? |
|---|---|
| Yes | 3 of 3 (100%) Responses |
| No | 0 of 3 (0%) Responses |

| Question 14 | If so, why have you done so? |
| --- | --- |
| | When the victim would rather my client work to pay restitution than go to Department of Corrections |
| | Statutory rape, or family member victims that have forgiven the family member but were forced to prosecute |
| | When the guidelines are so out of skew with logic and the alleged victim is not wanting to completely ruin the client's life. |

| Question 15 | Please describe the mechanics of how you have seen victim impact statements arranged for and actually presented in court. |
| --- | --- |
| | Either the prosecutor reads the letter or calls them to the stand and they read their letter |
| | They walk into court and give a narration |
| | State attorney or I will call them present the information to the court. |

| Question 16 | What benefits to anyone, if any, have you observed in the use of victim impact statements? |
| --- | --- |
| | The victims feel better |
| | Sometimes, they can make the victim look less creditable |
| | In some cases I would imagine it is cathartic to someone who has suffered at the hands of ther person to let them know the human cost. |

| Question 17 | What concerns, if any, have you had regarding the use of such statements as part of the sentencing process? |
| --- | --- |
| | Sometimes they can turn into an attack on my client as a human being |
| | Emotion can often take over |
| | That sometimes logic is overruled by emotion. Sometimes witnesses play up (usually police officers fall in this category) or if the media is part then everyone is making a show rather than trying to get a true restorative style sentence. |

| Question 18 | If you have had concerns, what have you been able to do to ameliorate them? |
| --- | --- |
| | Object so my client at least thinks I am fighting for them |
| | Little to none |
| | Work hard to take the emotion out of it. |

| Question 19 | When objections were made to specific jurors' questions, what were the most common types of objections? |
| --- | --- |
| | Bringing the victims in instead of just reading the letters |
| | Use them when appropriate |
| | When they don't overplay it, have believable witnesses |

| Question 20 | What have you done particularly well in regard to the process of victim impact statements? |
| --- | --- |
| | Nothing |
| | Use them in cases where the victim was forced to prosecute |
| | Hard to say. |

| Question 21 | In what approximate percentage of the times that such statements were presented by the prosecution, do you feel that they affected sentences by making them longer or tougher? |
| --- | --- |
| | 10% |
| | 75% |
| | 5% |

| Question 22 | In what approximate percentage of the times that such statements were presented by the prosecution, do you feel that they did not affect sentencing in any material way? |
| --- | --- |
| | 90% |

| | |
|---|---|
| | 25% |
| | 95% |

| Question 23 | Please describe your opinion on how judges have, overall, used victim impact statements in determining sentencing. |
|---|---|
| | I think judges pretty much have in their mind what their sentence will be before arguments or statements even begin |
| | They use them to give victims a voice and inform them on the proper sentence to be imposed. . . . sometimes it seems as though its used as the Judge's P.R. for re-election |
| | Depends if they are running for office again. |

| Question 24 | In your opinion, overall, how much weight do you think judges have given victim impact statements in determining sentencing? |
|---|---|
| | Very little |
| | Much weight |
| | Probably more than they should. |

| Question 25 | In what type(s) of cases have judges, in your opinion, given victim impact statements the most weight? |
|---|---|
| | Maybe burglary of dwellings or batteries |
| | Sex and violent crimes . . . Burg. Dwelling too |
| | Child sexual battery cases. |

| Question 26 | Can you give any examples of where you feel judges have given victim impact statements the most weight? |
|---|---|
| | no |
| | No. |
| | Again child sexual battery cases where it has been years of abuse. |

| Question 27 | What problems have you observed in the process of victim impact statements? |
| --- | --- |
| | When the victim starts talking about other non-charged crimes they suspect my client of doing |
| | The amount of emotion which clouds rational and reasonable sentences. |

| Question 28 | What, in your opinion, can prosecutors and defense attorneys do better in preparing for, handling, or reacting to victim impact statements? |
| --- | --- |
| | Always read them ahead of time before they are presented to the court |
| | Talk to people first |
| | Talk the victims ahead of time and get them on board with the agreements. |

| Question 29 | What, in your opinion, could be done to improve the process of victim impact statements? |
| --- | --- |
| | They could be limited in scope and duration - 10 minutes to say how this crime is still effecting you today |
| | More stringent rules regarding the scope of testimony and disallowing narration |
| | Instruct judges about how to handle the emotional aspects of the statements but still be able to give rational reasonable sentences. |