

“WHAT ABOUT (ALL) THE VICTIMS?” -- THE ADMISSIBILITY OF
“EXECUTION-IMPACT” EVIDENCE IN CAPITAL SENTENCING HEARINGS

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As the families of murder victims are increasingly allowed to tell their stories in capital sentencing hearings, a question that arises with growing frequency is whether the families of defendants should also be able to tell theirs. Execution impact evidence (EIE) is testimony showing how the defendant’s execution would cause pain and suffering to his loved ones. EIE may be introduced in a variety of ways, including direct testimony of the people directly related to the defendant, and expert testimony from mental health professionals or others to show how the defendant’s execution would detrimentally affect his family and those closest to them. This article will begin with a concise history of victim impact evidence, and then discuss various legal bases for admission of EIE.

A. THE CONSTITUTIONALITY OF VICTIM IMPACT STATEMENTS

In 1991 the United States Supreme Court effected a dramatic change in capital sentencing proceedings by ruling that the Eighth Amendment does not prohibit testimony about the character of the murder victim and the effect of the murder on the victim’s family. *Payne v. Tennessee*, 501 U.S. 808 (1991). This decision permits testimony from family members to be given at the penalty phase of a death penalty trial. *Id.* at 811. Virginia has adopted the Court’s ruling in *Payne* and incorporated it into the state’s death penalty procedure. In *Weeks v. Commonwealth* the court stated

Under Virginia's modern, bifurcated capital procedure, victim impact evidence is probative, for example, of the depravity of mind component of the vileness predicate, which the jury in this case found as a basis for imposing the death penalty. As the Supreme Court said in *Payne*, “for the

jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.” 501 U.S. at 825, 111 S.Ct. at 2608

248 Va. 460, 476 (1994). Virginia also codified *Payne*'s holding in VA. CODE § 192-264.4 (2009):

In any proceeding conducted pursuant to this section, the court shall permit the victim, as defined in § 19.2-11.01, upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim.

VIRGINIA CODE § 19.2-299.1(B) (2009), in turn, provides in pertinent part:

For purposes of this chapter, "victim" means (i) a person who has suffered physical, psychological or economic harm as a direct result of the commission of a felony . . . or (v) a spouse, parent, sibling or legal guardian of such a person who . . . was the victim of a homicide

B. THE DEATH PENALTY'S DETRIMENTAL EFFECT ON THE DEFENDANT'S FAMILY AND FRIENDS

In the years since *Payne*, attention has gradually come to be paid to another group of people who might be seen as victims of both the crime and of the legal process that it triggers: the family members of capital offenders. Elizabeth Beck's analysis of the issue calls attention to the impact the defendant's execution will have on the defendant's family. Specifically, Beck concludes,

The defendant's family [is important] because their loss is personal and has devastating consequences for their entire family system. They [are important] because the siblings and children of offenders grow up with a shared sense of familial dread and in this context face increased risk for mental health problems and involvement in the criminal justice system. They matter because personal involvement with their loved one's capital case invariably results in the loss of confidence in the criminal justice system and the U.S. government, which is unhealthy for a democracy. They matter because some are active members of our communities who have contributions to make to society and find themselves unable to participate when bearing the burden of their loved one's execution.

Beck, Elizabeth et. al., *In the Shadow of Death: Restorative Justice and Death Row Families* 10 (Oxford 2007). But recognizing the emotional and moral importance of execution impact evidence does not answer the evidentiary problem of how to secure its admission. That is the subject of the next section.

C. EXECUTION IMPACT EVIDENCE AS REBUTTAL EVIDENCE TO VICTIM IMPACT EVIDENCE.

Execution Impact Evidence is often offered as “rebuttal” to victim impact evidence, and as a means of counteracting any undue prejudice that might otherwise result from victims’ family members’ testimony. Prosecutors objecting to defense execution-impact testimony can be expected to argue that such evidence does not actually “rebut” victim impact testimony, and should be regarded as irrelevant to any issue that is actually before the sentencing jury. However, it is by no means clear that the concept of rebuttal is so narrow. *Simmons v. South Carolina*, 512 U.S. 154 (1994), provides an example of a case in which the Supreme Court has adopted a broad interpretation of penalty-phase rebuttal as a matter of federal constitutional law. In *Simmons*, the state stressed the defendant’s likely future dangerousness in argument to the jury, but the trial court refused to allow evidence that the defendant, if sentenced to life in prison, would be ineligible for parole thereby negating any future threat to society. 512 U.S. 154 (1994). A defendant’s ineligibility for parole does not directly rebut an individual’s future dangerousness. However, the *Simmons* Court observed that “there may be no greater assurance of a defendant’s future nondangerousness to the public than the fact that he never will be released on parole,” *Id.* at 163-164, and thus held that capital defendants have a federal due process right to rebut dangerousness allegations by informing the jury of their parole ineligibility.

Here, the case for why EIE should be viewed as rebuttal evidence is similar. Victim Impact Evidence was designed to give the jury a clear understanding of the value of the victim's life and the impact that the victim's death had on family and friends. Through this testimony the evidence proffered can suggest that the defendant could only have been a monster to cause such misery and heartbreak. EIE does not directly rebut the victims' survivors testimony about the effect of the murder, but it does tend to rebut the powerfully negative inference that the jury might otherwise draw about the defendant. Testimony from the defendant's family serves to demonstrate the positive characteristics the defendant possesses, as well as his value and importance as a human being and a family member. In this way, it is arguable that victim-impact evidence opens the door to admission of EIE under principles of fundamental fairness. See *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (holding that due process bars the execution of a person "on the basis of information which he had no opportunity to deny or explain."). Victim impact evidence can include testimony from the victim's family concerning the character and uniqueness of the individual whom the defendant murdered. Absent parallel testimony from the defendant's family members about how the execution would affect them, jurors may assume, incorrectly, that the defendant is so inconsequential a person that no one would care or even notice if he were executed.

D. EXECUTION IMPACT EVIDENCE MITIGATES THE "DEPRAVITY OF MIND" SUB-FACTOR OF VILENESS.

One of the aggravating factors found in VA CODE ANN. § 19.2-264.2 (2009), is that the offender's conduct "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."

(*Michie*, 2004) The Virginia Supreme Court has defined the "depravity of mind" sub-

element “to mean a degree of moral turpitude and psychological debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.” *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). EIE can show that a normal, healthy relationship exists between the defendant and his family. This relationship may mitigate the “depravity of mind” manifested by the murder by demonstrating the defendant’s capability to develop and engage in healthy relationships and bonds.

E. EXECUTION IMPACT EVIDENCE AS CIRCUMSTANTIAL EVIDENCE OF THE DEFENDANT’S GOOD CHARACTER

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the Supreme Court held that the Eighth and Fourteenth Amendments “require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of the defendant’s character or record.” Execution Impact Evidence is probative of a defendant’s character because it indirectly conveys the positive effect the defendant had on others around him. Just as prior good acts are relevant as evidence of a defendant’s character, so too is evidence of the adverse impact the execution would have on those who know and care about him. See *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (holding that “a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that by its nature is relevant to the sentencing determination”).

F. CASES DISCUSSING EXECUTION-IMPACT TESTIMONY

The defendant in *Romine v. State* 251 Ga. 208 (1983), was convicted of first degree murder of his parents and armed robbery of his mother. The Supreme Court of Georgia set aside the sentence of death for failure to allow the defendant’s grandfather, Ralph Romine, to give mitigating evidence. *Id.* at 216. Mr. Romine had attended every

day of the trial, but when the sentencing phase arrived he was unable to attend because of illness. Defense counsel requested a continuance stating that Mr. Romine was going to testify that

[H]e did not want his grandson electrocuted . . . [H]e had very strong reservations about it. He tells me that the Lord has dealt with him in that matter and the taking of the life of his grandson will not bring back his son . . . He has expressed a tremendous desire to be able to tell the jury what his wishes are.

Id. The trial court denied the motion for a continuance stating that none of the testimony would be admissible. The Supreme Court of Georgia reversed the death sentence, holding that the trial court had abused its discretion to deny a continuance given Georgia precedent allowing testimony from the defendant's family members. *See Cofield v. State*, 247 Ga. 98 (1981) (stating that a mother's testimony that she did not want her son to be executed was admissible as mitigation in a death penalty case). *Romine* suggests that at least in cases where the victim of the offense is also the defendant's family member, surviving members of the family should be permitted to express their wishes regardless of whether the testimony will be supportive of the prosecution's position.

In *State v. Stevens*, 879 P.2d 162 (Or. 1994) the defense elicited testimony about the impact of the execution upon the defendant's young daughter. The court allowed the testimony, reasoning that while the testimony

may not offer any direct evidence about [the] defendant's character or background, it does offer circumstantial evidence. A rational juror could infer from the witness's testimony that she believed that her daughter would be affected adversely by [the] defendant's execution because of something positive about his relationship with his daughter and because of something positive about [the] defendant's character or background.

Id. at 168.

In *Barnes v. State*, 496 S.E.2d 674 (Ga. 1998) the Supreme Court of Georgia reversed a death sentence because the trial court refused to admit photos of the defendant's daughter and nephew. The defendant offered these photos to "show the jury that a death sentence would impact the children in his life." *Id.* at 687. The court found these photos, as well as a love poem, pertinent to defendant's character for several reasons:

The excluded mitigation evidence was relevant. [Defendant's] love poem to his wife shows that he may be more than just a cold-blooded killer. His childhood photographs shed light on his background because they serve to illustrate that his childhood was happy until it was disrupted by the divorce of his parents. Similarly, the photographs of his child and stepchildren show that he is a father in a way that no amount of testimony could duplicate.

Barnes v. State, 496 S.E.2d 674 at 689.

In *State v. Noel*, 960 S.W.2d 439 (Ark. 1998). the defendant was convicted of three counts of capital murder and one count of attempted capital murder. The Arkansas Supreme Court permitted testimony from the defendant's mother who identified three childhood photos of the defendant "which were offered into evidence and were clearly an effort to emphasize the loss that would be associated with his execution." *Id.* at 446.

In *People v. Cooper*, 53 Cal.3d 771 (1991), a quadruple-murder case, the defendant claimed error because the court refused a defense request to give an instruction that the jury could consider as a mitigating circumstance "[t]he effect of a death verdict on Mr. Cooper's family." *Id.* at 844. The California Supreme Court disagreed and found the instructions sufficient. *Id.* The court stated that:

Although defendant may have a constitutional right to present evidence of the effect of a death verdict on his family, the court allowed him to present *all* the evidence he wanted at the penalty phase. The instructions did not preclude the jury from considering any of the evidence it heard. The court

gave [a] "catch-all" instruction and expressly instructed that the jury "may consider pity, sympathy, or mercy for the defendant."

Id.

F. CONCLUSION

The advent of victim impact evidence after *Payne* has made the sentencing portion of a capital trial all the more emotionally charged and volatile. Evidence of the emotional impact of a death sentence and execution on the defendant's family can help balance out this emotion. It can also show the jurors a human side of the defendant, and help them understand that executing the defendant will affect not only the defendant but many others around him. Fundamental fairness requires admission of such evidence in light of the widespread introduction of victim impact evidence. While there is still little authority bearing on the admissibility of such testimony, the cases summarized here provide some support for its admission.