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## **Brace for Impact: The Effects of Victim Impact Evidence and Judicial Instructions on Juror Memory Distortion and Sentencing Decisions in Capital Trials**

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Brace for Impact: The Effects of Victim Impact Evidence and Judicial Instructions on Juror  
Memory Distortion and Sentencing Decisions in Capital Trials

A Thesis Presented in Partial Fulfillment of the Requirements  
for the Masters in Forensic Psychology

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John Jay College of Criminal Justice  
City University of New York

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### **Abstract**

The utilization of visual evidence in the courtroom has increased exponentially in an effort to portray additional information that cannot otherwise be established via forensic evidence and expert testimony. According to Rule 403 of the Federal Rules of Evidence (1984), visual evidence may be permitted in court if the prejudicial value does not significantly outweigh the probative value. The admissibility of visual evidence however, becomes controversial when combined with victim impact statements (VIS) during the penalty phase of capital trials.

Previous research has indicated that jurors are often unable to perceive emotional testimony and subsequently make objective sentencing decisions that are based on reason rather than emotion. Moreover, previous literature has demonstrated that emotionally charged visual evidence can significantly distort jurors' memories of case facts depending on their desire for retribution. Despite these findings, previous literature has not empirically explored the combined effects of emotional testimony and visual evidence on juror memory distortion and sentencing decisions.

The present study examined the combined effects of VIS and photographic evidence on juror memory distortion and sentencing decisions. Participants will be randomly assigned to three conditions and instructed to read identical murder trial transcripts and VIS during the penalty phase of a capital case. Participants were exposed to varying levels of emotionally charged photographs and instructed to subsequently sentence the defendant to either life in prison or to death. Participants' memory recall and emotional states were evaluated. Implications are discussed.

Brace for Impact: The Effect of Victim Impact Evidence on Juror Memory Distortion  
and Sentencing Decisions in Capital Trials

On May 27<sup>th</sup>, 1998 Joseph Lee Ard appeared before the South Carolina Supreme Court for the murder of his pregnant girlfriend, Madalyn Coffey, and their unborn child. According to the autopsy report, Ms. Coffey died from a single gunshot wound to the head, while her unborn (but viable) fetus survived the injury in utero for approximately six to eight minutes before suffocating to death (*State v. Ard*, 1998). The Court determined that the murder of a viable fetus qualified Ard for the death penalty in the state of South Carolina. During the sentencing phase, the solicitor motioned to present two photographs of the unborn child dressed in the clothes that Ms. Coffey had intended for him to wear on his way home from the hospital as aggravating evidence against the character of the defendant—a decision that was left solely to the judge’s discretion on relevance and probative/prejudicial value. Citing previous legislation in *Payne v. Tennessee* (1991), the judge deemed the photographs admissible. Without any judicial instruction on how to properly weigh this emotionally disturbing aggravating evidence, the jury sentenced Ard to death (*State v. Ard*, 1998). Would such an instruction have made any difference? That is what we consider here.

Within the United States legal system, lawyers frequently capitalize on the opportunity to use graphic victim impact evidence such as photographs, videotapes, and victim impact statements (VIS) when attempting to persuade judges and jurors to convict a defendant and/or impose maximum sentences. According to Rule 403 of the Federal Rules of Evidence (Committee on the Judiciary House of Representatives, 2004), judges retain the authority to omit relevant evidence if its probative value significantly outweighs its prejudicial value. Probative

meaning that the visual evidence must serve as additional information that cannot be otherwise established via expert testimony; prejudicial meaning potential bias that may hinder objective legal decision-making (i.e., emotional influence, cognitive processing errors, etc.) and compromise due process and a fair trial under the fourteenth amendment (Bandes & Salerno, 2014; Salerno, 2017). Victim impact evidence is currently introduced in a variety of criminal cases, however, capital juries are presented with this frequently highly prejudicial evidence. Importantly, there have been only futile efforts by the justice system to impose substantive limits, procedural controls, or guidance on how to evaluate such evidence when assessing the “deathworthiness” of a defendant (Douglas, Lyon & Ogloff; 1997; Logan, 1999). As a result of Rule 403, judges are therefore compelled to rely on their own discretion for how emotionally disturbing evidence may affect jurors’ decision-making—often contradicting previous psycholegal research on the effects of emotions and decision-making (Salerno, 2017).

### **Victim Impact Statements**

Historically, crime victims were habitually disregarded by the criminal justice system; that is, until a new wave of legislative reform concerning victims’ rights emerged in the early 1970s (Henderson, 1985; Logan, 1999; Myers & Green, 2004). As a result of this reform, victims’ advocates achieved extensive modifications in state and federal law—giving crime victims the opportunity to testify about the harm that they personally experienced as a consequence of the crime in both non capital and capital cases. These testimonies are termed, victim impact statements (VIS), which are now permitted in nearly every state in the U.S. (contingent on judges’ discretion; Davis & Smith, 1994b; Myers & Green, 2004). In fact, 26 out of the 31 states that enforce the death penalty permit VIS to be administered during the

sentencing phase of the trial (Death Penalty Information Center, 2015; Nuñez et al., 2017).

Victim impact statements are a subsection of victim impact evidence (VIE), which encompasses evidence that may be presented by prosecutors during the sentencing phase of a trial (i.e., VIS, photographic evidence, videographic evidence, etc.). VIS allow the family members of the victim(s) to inform the judge and/or jury on the impact of the crime on their lives. Such statements can include, but is not limited to: identification of the offender; indications of financial losses suffered by the victim(s); lists of physical injuries suffered by the victim including seriousness and permanence; description of changes to the victim's personal welfare or familial relationships; requests of psychological services for the victim or his/her family members; and miscellaneous information related to the impact of the offense on the victim or the victim's family (Myers & Green, 2004).

In 1982, Congress enacted the Victim and Witness Protection Act, which requires the incorporation of VIS with the pre-sentence report that is proposed to the sentencing authority. Additionally, the Uniform Victims of Crime Act (1992) granted victims the constitutional right to attend court proceedings concerning their cases. Along with this legislative reform however, numerous opponents within the legal system have expressed concern—stating that victim impact evidence merely serves to foster the opportunity for jurors to construct their sentencing decisions based on emotion(s) and the victim(s)' character rather than pertinent criminal circumstances/evidence (Platania & Berman, 2006). Furthermore, various legal scholars have vocalized their apprehensiveness towards the lack of uniformity that VIS introduce to sentencing proceedings. Legal experts maintain that victim impact statements do not address the essential needs of crime victims, but rather increase arbitrariness and may result in harsher treatment of

convicted offenders (American Bar Association, 1981; Davis & Smith, 1994). “At best, victim impact testimony provides a momentary opportunity for survivors to give voice to their loss, be heard, and feel less isolated. At worst, victim impact testimony exploits the immense pain suffered by survivors—using the emotional reaction to their circumstances as a lever to produce a death sentence, while leaving them as onlookers in a criminal justice process whose focus is punishing the offender, not meeting the needs of survivors” (Burr, 2003, p. 517).

The landmark Supreme Court decision of *Payne v. Tennessee* (1991) was the first case that allowed the introduction of victim impact evidence in a capital sentence hearing (Platania & Berman, 2006). Pervis Tyrone Payne was convicted by a jury on two counts of first-degree murder for stabbing his girlfriend, Charisse Christopher, and her 2-year-old daughter, Lacie, to death with a butcher knife. In addition, Payne was convicted of one count of assault with intent to commit murder of his girlfriend’s 3-year-old son, Nicholas, who survived his stab wounds. During the sentencing phase of the trial, the jury was shown a videotape of the murder scene that included the slashed and bloody corpses of the victims. Later that same day, Nicholas’ grandmother presented a VIS to the judge and jury:

“He cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister, Lacie. He comes to me many times during the week and asks me, Grandma, do you miss Lacie? And I tell him yes. He says I’m worried about my Lacie.” App. 3  
(*Payne v. Tennessee*, 1991)

During his closing argument, the prosecutor implored the jury to seek the death sentence— as this could be the only true source of retribution and healing for Nicholas:

“But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open...He was able to hold his own intestines in as he was carried to the ambulance. So

he knew what happened to his mother and baby sister. There is nothing you [the jury] can do to ease the pain of any of the families involved in this case...but there is something that you can do for Nicholas. Somewhere down the road. Nicholas is going to grow up, hopefully. He's going to want to know what happened to his baby sister and mother. He is going to want to know what type of justice was done. With your verdict, you will provide the answer.”

(*Payne v. Tennessee*, 1991).

The Court overruled two prior historic cases that strictly prohibited victim impact statements (*Booth v. Maryland*, 1987; *South Carolina v. Gathers*, 1989); stating that the Eighth Amendment does not distinctly prohibit the admission of victim impact evidence if it relates to the victim's character, impact on surviving family members, and legitimately informs sentencers on the harm inflicted by the offender (Platania & Berman, 2006). As a result, Payne was sentenced to death. Justice O'Connor noted that most states have VIS legislation set in place and that its admissibility should be determined on a case-by-case basis (Logan, 1999; Nuñez, Myers, Wilkowski, & Schweitzer, 2017).

As illustrated in *Payne v. Tennessee* (1991) and *State v. Ard* (1998), capital jurors are often burdened with immensely emotional testimonies and/or visual evidence just prior to rendering a decision on whether a defendant should live or die (Nuñez et al., 2017). Under the Sixth Amendment, defendants have the right to appear before an impartial jury of the State—impartial meaning a jury consisting of the defendant's peers (laypersons). Human beings are naturally emotional creatures. Laypersons who are chosen to serve on a jury cannot be expected to control natural feelings of empathy. According to United States common law, sentencing decisions must be rendered on the justification of reason rather than caprice or emotion. The jury ought to focus on case facts and evidence as opposed to the emotions that are

evoked from victim impact testimonies when making a penalty decision. The very nature of victim impact statements however, is to allow pained family members/survivors to express their suffering and agony to jurors who are not in the practice of detaching their emotions from their judgments (Blumenthal, 2001). A paramount concern with the legal relevance of VIS is the capacity for such testimonies to elicit negative emotions (i.e., anger, sadness, disgust, rage, etc.) that will ultimately impede jurors' objective reasoning abilities. Hence, decisions that are born from such emotional experiences lack "reasoned analysis" and are to be therefore considered prejudicial (Logan, 1999; Nuñez et al., 2017).

In the landmark case, *Booth v. Maryland* (1977), the Court affirmed that the conclusions drawn from emotionally-charged victim testimonies would render the jury incapable of making a decision based on reason rather than caprice or emotion, which is unquestionably vital in a capital case (Estrada-Reynolds, Schweitzer, & Nuñez, 1997; Nuñez et al., 2017). The overruling of this decision by *Payne* effectively raised the "per se" bar against such evidence and paved the way for highly prejudicial victim impact evidence to be utilized in subsequent capital cases (Burr, 2003; Logan 1999). Thus, leading to a fundamental question; do victim impact statements serve to aid the probative value of essential case evidence or do they serve to ensure a death sentence by appealing to jurors' emotions?

While few studies have explored the probative value of victim impact statements empirically, the available literature suggests that these emotionally-charged testimonies typically lead jurors to favor the death sentence in capital cases. Previous research has found that mock-jurors are markedly influenced by specific information pertaining to the victim's suffering provided in VIS; thus, death penalty recommendations significantly increase when they are

presented with victim impact evidence (Green, Koehring, & Quiat, 1998). In their study, Green and colleagues (1998) additionally found that participant jurors were more likely to render the death sentence when the VIS alluded that the victim was a highly regarded member in the community. Furthermore, researchers Platania and Moran (1999) found that participant-jurors who were exposed to statements made by the prosecutor outlining the effects of the defendant's actions on the surviving victims/family members (much like the prosecutor in *Payne*) were significantly more likely to render the death penalty versus participants who were not exposed (Platania & Berman, 2006). In summary, victim impact statements that are presented to jurors just prior to rendering a sentence of life or death not only raise the question of legal relevance, but may in fact ensure a sentence of death.

### **Photographic and Videotaped Victim Impact Evidence**

As in cases such as *State v. Ard* (1998) and *Payne v. Tennessee* (1991), juries are often confronted with incredibly disturbing and gruesome photographic evidence to accompany victim impact statements; such as photographs of victims at the scene of the crime, autopsy photos, and even dismembered body parts. (Douglas et al., 1997). For example, in 1989, 28-year-old William Dutton Maddox Jr. was convicted of first-degree murder for repeatedly stabbing a motel owner to death in Cobb County, Georgia. Maddox appeared before a jury where prosecutors presented a graphic videotape taken at the scene of the crime by law enforcement. The colored video displayed the victim lying lifelessly in a corner in a pool of his own blood with his arms, face, chest, and back slashed (Kassin & Garfield, 1991). Similar to VIS, photographic victim impact evidence has been utilized in a wide variety of criminal cases (including capital trials), however there is very little that delineates what is generally admissible. To the prosecution, such evidence

may serve as a crucial element to the collection of case evidence leading towards the defendant's guilt and prison sentence. Alternatively, defense attorneys may view the same photograph as prejudicial and inflammatory, sacrificing the defendant's right to a fair trial (Douglas et al., 1997). Returning to Rule 403 of the Federal Rules of Evidence, judges must not determine "whether gruesome photographs affect verdicts [and sentencing decision], but *how* and *why*" (Salerno, 2017, p. 346).

Can juries separate their emotions and feelings of disgust from their legal decisions? In a criminal case, *Kuntzelman v. Black* (1985), the prosecution aided the testimony of a pathologist who performed the victim's autopsy with particularly gruesome colored photographs of the victim's body at various stages of the autopsy; one photograph of the open chest cavity and internal organs of the victim's body and another of the victim's left lung placed on a table. The jury, who was privy to all of these photographs, found the defendant guilty. Kuntzelman filed a federal habeas corpus arguing that "the photographs were so inflammatory as to influence the jury to find intent where they might not have otherwise done so. Therefore contending that the admission of these photographs into evidence denied him due process and a fair trial under the fourteenth amendment" (*Kuntzelman v. Black*, 1985). In a similar case, a juror was interviewed after finding a defendant guilty after viewing gruesome photographic evidence. The juror stated, "I just kept seeing that woman's body. It was obscene what he did to her" (Kassin & Garfield, 1991, p. 1460). For the purpose of this study, gruesome photographs will be defined as, depictions of victims' injuries that are extremely unpleasant and shocking (Salerno, 2017). Legal scholars and defense lawyers alike are increasingly arguing that the "blood and guts" depicted in

these gruesome photographs (such as in *Kuntzleman*) are only admitted to increase the prosecution's chance at winning (Kassin & Garfield, 1991).

Consistent with victim impact statements, empirical research on the prejudicial nature of photographic victim impact evidence is relatively sparse. One particular study to note, Douglas and colleagues (1997), hypothesized that viewing color autopsy photographs will result in participants rendering a higher guilty rate than viewing no autopsy photographs at all. Additionally, they hypothesized that there would be no differences between participants' reported ability to be fair and impartial jurors, regardless of whether or not they were privy to the autopsy photographs. Their results indicated that participants who were exposed to autopsy photos (both color and black/white) were twice as likely to render a guilty verdict than participants who were not exposed to photographic evidence. Moreover, for each condition, mock-jurors maintained that the photographic evidence should not and did not impact their verdicts (approximately 7.5 out of 10) and that they acted in "a fair and impartial manner in the current mock trials and also could do so in an actual trial" (Douglas et al., 1997, p. 499). Although no attempt was made to diminish juror bias via judicial instructions on photographic evidence, the implications of this study are alarming. If jurors are unable to recognize the extent to which victim impact evidence (i.e., photographic, videotaped, VIS) affects their decision-making, then it would be impractical to expect them to restrain or control the impact of this gruesome/emotionally-laden evidence when instructed to do so by a judge (Douglas et al., 1997).

### **Emotional Evidence in Court**

Emotional reactions to gruesome evidentiary details such as VIS and photographs have been found to impede logical and rational decision-making processes—effectively hindering jurors from delivering a verdict or recommending a sentence based solely on the probative value of victim impact evidence rather than its prejudicial value (Bright & Goodman-Delehunty, 2011). Furthermore, the involvement of gruesome victim impact evidence in a trial has the potential to not only induce sympathy for the victim(s), but to generate outrage at the crime, leading to a propensity to convict the offender. Previous research has established that following exposure to grisly photographs, emotional arousal significantly increases (Bright & Goodman-Delehunty, 2006; Douglas et al., 1997). More specifically, Bright and Goodman-Delehunty (2011) note that “increased emotional arousal is associated with guilty verdicts, and that *anger* [specifically] mediates the influence of gruesome photographs on mock juror decision-making.”

To further examine this conjecture, Bright and Goodman-Delehunty (2011) conducted a 2 (photographic evidence) x 2 (injury severity) x 2 (information processing route instruction) mock-juror study. They hypothesized that participants who were exposed to gruesome evidence would reveal increased levels of anger toward the defendant and sympathy toward the victim in comparison to participants from whom the gruesome evidence was withheld. Participants were assigned to one of four groups; each group received one of four versions of a trial transcript (accompanied by photographic evidence illustrating varying degrees of injury) for a pedestrian filing a negligence suit against the defendant for hitting her with his car. The four trial transcript conditions were: (1) gruesome photographs, moderate injury severity; (2) gruesome photographs,

high injury severity; (3) neutral photographs, moderate injury severity; and (4) neutral photographs, high injury severity. The moderate injury severity condition included information in which the plaintiff reported that she suffered, “serious injuries to legs”; “severe pain”; “frequent headaches”; and was “confined to a wheelchair the majority of the time, but [was] able to walk using [a] walking frame for short distances.” The high injury severity condition listed injuries such as, “paralyzed from the waist down”; “confined to a wheelchair”; “suffered a complete transection of the spinal cord”; “requires assistance with showering, dressing, and grooming”; “experiences constant bad headaches and migraines”; and “has extensive ongoing needs in relation to suitable modified housing, wheelchair, hoists, shower trolley, and medications.” To improve ecological validity, Bright and Goodman-Delehunty (2011) provided judicial instructions (similar to those given in civil jury cases in Australian courts) to all participants before requesting their sentencing decisions. Results indicated that mock-jurors who were exposed to victim impact evidence depicting victims’ severe injuries experienced stronger affective reactions such as anger and punitive desires, however the difference was relatively small and this finding did not reach statistical significance. In addition, when instructed to render a liability verdict, participants were twice as likely to hold the defendant liable when moderate injury details were accompanied by gruesome photographs as opposed to neutral photographs (Bright & Goodman-Delehunty, 2011). A possible limitation of this study is that all participants received judicial instructions on how to properly weigh emotional evidence in a civil case, thereby relinquishing the potential for mock-jurors (in a control group, for example) to express their instinctive anger toward the defendant. Moreover, participants were merely asked whether the defendant should be held liable for the damages inflicted on the plaintiff—implying

monetary punishment. Participants were not required to sentence the defendant to prison time or even to death, which may increase the emotionality of their final decision(s).

Affect-driven information processing is consistent with a number of dual-processing theories of cognition and social judgment. The Cognitive Experiential Self-Theory (CEST; Epstein, 1994) contends that humans process information via two parallel and interactive information processing systems: (1) an experiential system (2) a rational system. The experiential system processes information automatically and rapidly—a “gut-level” information processing system that is more reactive to imagery. Whereas the rational system is inferential and functions according to rules of logic, evidence, and reasoning—and is therefore highly demanding of cognitive resources (Epstein, 1994; Bright & Goodman-Delehunty, 2011). Epstein, Lipson, Holstein & Huh (1992) therefore assert that jurors who process information predominantly in the experiential mode may be more susceptible to making decisions based on affect rather than reason. While it is impossible to investigate jurors’ information processing systems during the voir dire phase of a criminal trial, it is important to understand that some jurors may in fact utilize this type of information processing unknowingly and may consequently be more impressionable by prejudicial evidence.

Similarly, Haidt’s social-intuitionist approach supports the claim that moral judgment may function on a dual-processing system (Haidt, McCauley, & Rozin, 1994). Analogously labeled, “emotional” and “rational”, Haidt argues that although humans are capable of conscious step-by-step moral reasoning, more often than not, people tend to make automatic moral judgments according to immediate/intuitive perception. The repercussions of such impetuous

moral judgments (especially judgments born from anger) in a capital case setting would be—quite literally—lethal.

A tertiary theory in legal decision making is the appraisal theory, which can be reduced to the assertion that ‘an angry juror is a certain juror’ (Tiedens & Linton, 2001). Indeed, anger is often associated with feelings of certainty in comparison to other emotions such as sadness or depression (Tiedens & Linton, 2001). Part of the prejudicial nature of victim impact evidence is its potential to induce feelings of anger. By this logic, when an angry juror feels certain about his/her intuitive moral judgments, they are less inclined to listen to additional aggravating or mitigating evidence and maintain that the information already received is correct and complete (Tiedens & Linton, 2001). Moreover, the juror may be processing additional information heuristically and be more attentive to superficial cues as opposed to logical cues (Estrada et al., 1997). Tiedens and Linton (2001) argue that because the feeling of certainty is an internal cue that one is already correct and accurate in their assumptions/conclusions, it may also indicate that further information processing is unnecessary.

Additionally, anger is associated with lower quality information processing than fear and sadness. Anger tends to lead people to make indiscriminately punitive judgments, which also undermines information processing—producing what legal scholars call, “the prosecutorial mindset” (Lerner, & Tiedens, 2006; Nuñez et al., 2017, p. 865). The prosecutorial mindset occurs because anger carries infusive potential to linger past the triggering events, and thus influence the most basic social judgment and decision-making processes. Lerner, Goldberg and Tetlock (1998) contend that angering jurors (even in an experimental setting) results in a motivation to blame and avenge the defendant for his/her wrongdoing and ensure that they are

appropriately punished, compromising a defendant's right to a fair trial. Indeed, numerous studies have found that angry mock-jurors are significantly more likely to attribute causal responsibility to blame and punish the offender than sad jurors—even to the extent of sentencing the offender to death (e.g., Estrada et al., 1997; Nuñez et al., 2017).

### **Memory Distortion and Emotion Memory**

During the voir dire phase of a capital trial, potential jurors are subjected to “death qualification” questions that determine whether they would be able to objectively consider both mitigating and aggravating evidence during the sentencing phase of the trial. Should they be selected, the jurors who render the “guilty” vs. “not guilty” verdict will in fact be the same jurors who sentence the defendant to either life in prison or to death. Regardless of the length in time between phases, capital jurors are expected to accurately remember details of the case that have been presented to them throughout the entirety of the trial. Considering the physiological effects that emotionally charged images and testimonies can have on attention and decision-making, it is imperative to question whether memory distortion can arise as a result of this. Furthermore if such an effect does exist, we must also inquire as to whether memory distortion can hinder jurors from accurately weighing aggravating and mitigating evidence prior to sentencing a defendant to either life imprisonment or to death.

The malleability of memory and its susceptibility to distortion has been thoroughly examined for several decades (Loftus, 2005). Though the evidence supporting memory distortion is robust, individuals often believe that emotionally charged memories (i.e., traumatic memories) are impervious to distortion given how vividly they remain in our minds. However, previous research has found that all memories—even traumatic memories—are vulnerable to distortion

(Strange & Takarangi, 2012). Distortion here, meaning changes in participants' responses and recollection of events over time. For example, Loftus and Burns (1982) exposed participants to a film portraying a bank robbery. Half of the participants were shown a film where a bank robber shot a little boy in the face while running out of the bank. The other half of the participants were shown the same film until the shooting, which was replaced with security camera footage of the bank manager telling everyone to remain calm. Immediately after viewing the film, memory tests were administered to the participants. Consistent with their hypotheses Loftus and Burns (1982) found that participants who were exposed to the mentally upsetting/stressful version of the film (witnessing the murder of the little boy) demonstrated significantly poorer recall for specific details of the film.

The mechanism explaining memory distortion in highly stressful—and even traumatic—situations (i.e., serving as a juror on a capital case) is likely to be a failure in source monitoring (SM) during the encoding and retrieval of event(s) (Strange & Takarangi, 2015). In brief, the Source Monitoring Framework (SMF) asserts that the foundation of SM is built upon the combination of memory characteristics and judgement processes. The primary characteristics of memory that contribute to this framework are perceptual information (i.e., sound and color), contextual information (i.e., spatial and temporal), semantic detail and affective information (i.e., emotional reactions), and cognitive operations (i.e., records of organization, elaborating, retrieving, and identifying)--all of which are created during the formation of the memory itself. The judgement processes that follow are twofold; the first being a more “automatic” process that relies on heuristics, while the second is more “controlled” and relies on retrieving information systematically (Johnson, Hashtroudi, & Lindsay, 1993). Further research has established that

post-event processing (i.e., discussing the event with others, or learning additional/contrasting information) can affect the familiarity of certain details that were not encoded originally, making them feel real which can lead to source monitoring errors (Segovia, Strange, & Takarangi, 2016).

Strange and Takarangi (2012) investigate the role of memory distortion in the perpetuation of Posttraumatic Stress Disorder (PTSD) symptoms. Specifically, they sought to answer whether individuals in a laboratory setting can perceive an event as being more traumatic than experienced. They instructed participants to watch a short film depicting a fatal car accident; including the scenes prior to the accident, the accident itself, and the aftermath of the accident with the driver who caused the accident being taken to the hospital. Some of the clips that contained critical information about the event were removed from the film. Twenty-four hours after viewing the film, participants were given a surprise memory test where they were shown 18 clips and asked if the clips were in fact part of the original film they saw the day before. Overall, Strange and Takarangi (2012) found that participants were most likely to falsely remember clips that were more traumatic than clips that were less traumatic/emotionally-laden. They suggested that the 24-hour delay allowed participants to ruminate (either intentionally or unintentionally) on the negative material, thus allowing the details to invade their memory and result in source monitoring errors at test (Strange & Takarangi, 2012; Schacter, 2001). Similarly, in the present study, we seek to investigate whether participants who are exposed to disturbingly graphic images while hearing an emotionally laden victim impact testimony will experience source monitoring errors that will ultimately lead to memory distortion.

### **Judicial Instruction**

United States jurisprudence regarding judicial instruction in capital cases has become a focal point of legal fairness and constitutional rights advocates (Haney & Lynch, 1994). Landmark U.S. Supreme Court decisions such as *Simmons v. South Carolina* (1994), *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976) give prominence to the necessity for a procedurally just system that ensures capital juries are adequately equipped to make such decisions regarding a defendant's life. "On the one hand," Haney and Lynch (1994) contend, "appellate courts have insisted that a capital jury's discretion must be guided (so that statutory schemes failing to provide standards or guidelines for use in penalty decision making have been prohibited. On the other hand, these same courts have required capital juries to exercise individualized discretion (so that statutory schemes making one or another outcome in a capital case automatic or mandatory also have been found unconstitutional)" (p. 412). Penalty deliberations (in most states) commence with trial judges providing jurors with a sequence of instructions and factors to consider when making their sentencing decisions (i.e., weighing aggravating and mitigating evidence, emotional evidence, etc.)-- all of which should serve to aid the jury in making such a difficult decision as to whether a life should be taken or spared (Haney & Lynch, 1994; Luginbuhl & Howe, 1994). In comparison with noncapital and civil jurors, capital jurors are "much more at the mercy of their instructions" (Luginbuhl & Howe, 1994, p. 1161) and are reliant on the judge to tell them how to comprehend such material.

Although judicial instructions vary across states, jurisdictions that actively enforce them require that three main concepts regarding aggravating and mitigating factors are clearly described: (1) the domain from which the aggravating and mitigating factors may be selected, (2)

the burden of proof required to prove the existence of aggravating and mitigating factors; and (3) whether or not unanimity is required to establish the existence of aggravating and mitigating factors (Luginbuhl & Howe, 1994). Luginbuhl and Howe (1994) partnered with the Capital Jury Project to investigate the personal experiences of capital jurors and delve into how judicial instructions may aid or complicate their decisions. They found that jurors are often unaware that all evidence introduced to the trial can be considered mitigating evidence so long as the judge determines that the evidence is relevant/admissible (has substantial probative value). The consequences of this misconception can be grave. To exacerbate the issue, capital jurors often believe that they are permitted to consider *any* evidence as aggravating evidence-- effectively expanding the range of factors that can be used to warrant a death sentence over life imprisonment. In the context on victim impact statements, previous research has indicated that VIS are often the source of aggravating evidence that is required for jurors to justify the death sentence (Luginbuhl & Burkhead, 1995). Therefore, our question in the present study is whether participant-jurors will weigh the importance of aggravating and mitigating evidence similarly regardless if they are given general judicial instructions or VIE specific instructions.

### **Study Overview**

The purpose of the present study was to examine the combined effects of textual victim impact statements (VIS), photographic evidence, and judicial instructions on juror memory distortion and sentencing decisions in a capital case. To date, previous literature has yet to thoroughly examine the combined effects of VIS and photographic evidence on sentencing decisions, although both are routinely paired together when presented in court. Furthermore, the

effects of memory distortion and judicial instruction are not well understood in relation to juror sentencing decisions.

Briefly, participant-jurors were randomly assigned to one of three conditions and instructed to read a murder case file in addition to a victim impact statement during the sentencing phase of a capital case. The three conditions of the experiment consisted of a (1) 'Control' group, where participants received only the textual VIS in addition to the trial transcript; a (2) 'Family Photo' group, where participants were provided with a photograph of the victim at the beach with his family (before the crime); and (3) a 'Crime Scene Photo' group, where participants were provided with a gruesome photograph intended for high emotional intensity of the murdered victim at the scene of the crime. Within each condition half of the participants received specific judicial instruction on how to properly weigh the aggravating victim impact evidence, while the other half received more general instruction. Twenty-four hours later, all participants completed a memory recall test and were instructed to sentence the defendant to either life in prison or to death. Additionally, participants' emotional states were evaluated via the Juror Negative Affect Scale (JUNAS) to investigate the relationship between anger level and sentence severity. Participants' affect were recorded prior to viewing trial materials to establish baseline emotions, immediately after viewing all of the victim impact evidence, and just prior to rendering a decision after the memory recall test.

## Method

### Participants

A total of 749 participants were recruited for this study via Amazon's mTurk. We restricted the study to workers within the United States who had a high rate of approval from other researchers. However, 229 participants were excluded from the study due to failed attention checks and failing to return to Day 2 of the study. An additional 117 participants were excluded from the study because they were not "death qualified" (*Wainwright v. Witt*, 1985). Therefore, 403 death qualified, jury-eligible participants from the United States (152 males, 228 females, 2 transgender, and 2 other) between the ages of 18 and 72 years old ( $M_{\text{age}} = 37.73$ ,  $SD = 11.57$ ) completed this study. Of our sample, 79.4% of the participants were white, 9.18% were black, 4.46% were Hispanic, 4.7% were Asian and 1.4% were of other descents. In comparison to previous studies with smaller sample sizes and university student participants, the sample in the present study is a reliable representation of the U.S. population. Approximately 74% of participants had never served on a jury before, 21% had previously served on a jury. All participants were compensated a total of \$5.00 (\$4.00 for day 1, and \$1.00 for day 2).

### Design

Our design conformed to a 3 (victim impact evidence: textual VIS only, VIS with family image, VIS with crime scene image) x 2 (judicial instruction: VIS specific, general) between groups experimental design.

### Materials

**Death qualification questionnaire.** Potential participants answered a three-item death qualification questionnaire to determine if they were eligible to participate in the study. The

questions were consistent with the pre-trial death qualification criteria administered in *Wainwright v. Witt* (1985). There were three close-ended “yes/no” questions. Items included, “Would your attitudes toward the death penalty seriously affect your ability to perform your juror duties?”; “Would you find a defendant ‘not guilty’ in order to avoid the possibility of giving the death sentence?”; and “Would you either always or never give the death penalty?” Individuals who reported no objections to the death penalty when sentencing the defendant were permitted to further participate in the study.

**Juror negative affect scale (JUNAS).** Participants were instructed to complete the Juror Negative Affect Scale (JUNAS; Bright & Goodman-Delehunty, 2006) three times during the study; once prior to viewing the victim impact evidence, once immediately after viewing the VIE and immediately preceding their capital sentence decision submissions, and once prior to answering memory questions on Day 2. The JUNAS combines the Profile of Mood States (POMS; McNair, Lorr, & Droppelman, 1981) and the Positive and Negative Affect Scale (PANAS; Watson, Clark, & Tellegen, 1988) including 30 items and four subscales: fear/anxiety, sadness, anger, and disgust. Participant-jurors were instructed to complete the JUNAS by circling the response that best describes how he/she is feeling at the moment on a 5-point scale Likert scale (1 = *very slightly or not at all*, 5 = *extremely*). Items included emotions such as, “angry, furious, resentful, sad, disgusted, and revolted.” Watson et al. (1988) indicate the internal consistency (Cronbach’s  $\alpha$ ) to be acceptably high for measuring negative affect, ranging between 0.84 and 0.87 ( $\alpha = 0.87$ ).

**Trial transcript.** All participants were presented with a trial transcript outlining the judicial proceedings of the case during the guilt phase. The transcript was derived from a video

from a mock-jury study conducted by Diamond, Casper, Heiert, and Marshall (1996). Originally an hour and 25 minutes in length, the content of the video transcript was reduced to approximately 17 pages including the judge's, prosecution, and defense opening/closing statements, expert testimonies, aggravating/mitigating evidence, and the guilty verdict. Elements of the transcript such as the defendant's and victim's names were adapted to fit the details of our study (see Appendix for full trial summary).

**Victim impact evidence judicial instructions.** From reading the trial transcript evidence summary, all participants were made aware that during the guilt phase of the trial, the defendant was found guilty on all four counts of murder, attempted kidnapping, rape, and armed robbery. Prior to viewing any victim impact evidence, half of the participants within each of the three conditions were randomly selected and given specific VIS judicial instructions by the judge. The judge informed the selected participant-jurors that they would be presented with a testimony given by the victim's wife and that they were to give appropriate consideration to this aggravating evidence before sentencing the defendant. The judicial instructions were provided in textual format for participant-jurors to read before viewing the victim impact evidence and retrieved from a study conducted by Platania and Berman (2006)-- taken verbatim from *Brooks v. State* (1979). The remaining participants were provided with general judicial instructions (see Appendix for full judicial instructions).

**Victim impact statement (VIS).** All participants were provided with a textual victim impact statement created and obtained from a field study of capital trials (Nuñez et al., 2017; Nuñez, Egan-Wright, Kehn, & Myers, 2011). For their study, Nuñez et al., (2011) piloted and analyzed the emotional content within the VIS by a measure of linguistic content (1 = *not at all*

*angry*, 9 = *extremely angry*) and (1 = *not at all sad*, 9 = *extremely sad*). The VIS chosen for the current study was rated by participants as being high in both anger ( $M_{\text{anger}} = 7.73$ ) and sadness ( $M_{\text{sadness}} = 6.82$ ). Consequently, in both linguistic content and individual ratings, the VIS was “highly emotional” (Nuñez et al., 2017, p. 871).

**Photographs.** Participants in the ‘Family Photo’ condition were exposed to a colored photograph alongside the same textual victim impact statement that was provided to all conditions. The photograph for this condition was intended to portray the victim with his family (wife and two young sons) having a pleasant day at the beach. In a pilot study, participants recruited via mTurk rated three separate family photographs on the level of sadness the photographs evoked (upon learning the father had been killed) on a Likert scale (1 = *not at all sad*, 7 = *extremely sad*). The photograph chosen for this study (a family at the beach) evoked significantly higher levels of sadness ( $M = 5.87$ ) in comparison to photographs depicting a family on a camping trip ( $M = 5.59$ ) and a family at the park ( $M = 5.275$ ).

Participants in the ‘Crime Scene Photo’ condition were exposed to a gruesome photograph (in color) alongside the same textual victim impact statement that was provided to all conditions. The photograph for this condition was intended to portray the victim immediately after he had been murdered; the blood covering the victim’s face are clearly visible. The photograph was obtained from the International Affective Picture System where it received uniformly high “traumatic” and “disgusting” ratings (6.98 out of 7.00).

**Attention checks.** To ensure that all participants were paying adequate attention, participants were instructed to answer 3 multiple-choice questions pertaining to general facts about the case. Items included, “How was the victim (Jeff Mason) murdered?”; “Which of Jeff

Mason's (victim) family members provided a testimony describing the effect of losing Jeff?"; and "If you were shown a photo in the court transcript, who was portrayed in the photo you were shown?" Failure to correctly answer all three attention questions resulted in termination of further participation in the study.

**Memory recall task.** All participants were instructed to complete two parts of a memory recall task. The first part of the task was given immediately after participants read the trial transcript--just prior to sentencing the defendant to either life in prison or to death. The second part of the task was given to participants 24 hours after viewing the victim impact evidence. The purpose of this measure was to indicate the participants' levels of memory recall and memory distortion (change over time) immediately after viewing emotionally charged evidence, and after a short delay. The multiple choice questions tested participants' memory of attributes of the murder, defendant, victim/victim's family, and evidence--details which were all included in the trial summary provided. For example, "How much money did Anthony Prentice [the defendant] steal from Jeff Mason [the victim]?"; "What was the defendant's IQ?"; and "How many children did Jeff Mason have?"

### **Level of Agreement**

In addition to testing participant's recall of specific case details, participants were also asked to rate their level of agreement with the guilt verdict, how easy or difficult they found the experience of deciding between life imprisonment and the death sentence, how confident they were that they made the right decision, and how satisfied they were with their final decision. These questions were presented on a Likert scale (1 = *very slightly or not at all*, 5 = *extremely*).

## **Procedure**

Potential participants who expressed interest in participating in this study were instructed to complete an initial death qualification questionnaire via the Qualtrics website. People who reported no objections to the death penalty and indicated that they would be able to reasonably consider both mitigating and aggravating evidence per the judge's instructions when sentencing the defendant were permitted to further participate in the study. Participants were asked to complete a consent form in addition to a demographics form. The informed consent specified that researchers were interested in how mock jurors make sentencing decisions in capital trials. For ethical reasons, participants also were warned that they may be subject to gruesome material in textual and visual form. Participants were then randomly assigned to one of three conditions: Control Group, Family Photo Group, or Crime Scene Photo. Participants in each group were prompted to complete the JUNAS for the purpose of gathering information regarding their initial emotional states.

Participants were instructed to pay close attention to the following materials presented because as of that moment, they would be serving as participant-jurors in a capital murder case. Participants were also told that the defendant in the case had already been found guilty and that the trial was proceeding to the penalty phase, where they (the participant) would be required to sentence the defendant to either life in prison or to death. Participants in the Control group were prompted to read the trial transcript and the subsequent victim impact statement. Participants in Family Photo were prompted to read the trial transcript evidence summary (identical to the control group) and the subsequent VIS; however, participants in this group were also exposed to the "Family" image while reading the VIS. Participants in the Crime Scene Photo group were

prompted to read the trial transcript evidence summary (identical to the control group and experimental group 1) and the subsequent VIS; however, participants in this group were also exposed to the gruesome “Crime Scene” image while reading the VIS. It is important to note however, that prior to viewing any victim impact evidence, half of the participants within each of the three conditions were randomly selected and given VIS specific judicial instructions by the judge. The judge informed the selected participant-jurors that they would be presented with a testimony given by the victim’s mother and that they were to give appropriate consideration to this aggravating evidence before sentencing the defendant.

After viewing all of the materials, the participants were prompted to complete the JUNAS once again. Immediately following their responses, participants were instructed to sentence the defendant to either life imprisonment or death. Participants rated their levels of confidence and ease in regards to their sentencing decision. After completing attention checks, participants completed the first round of memory questions before being instructed to log back into the Qualtrics website in exactly 24 hours to conclude the final portion of the study.

The following day, participants were prompted to fill out the JUNAS scale for the final time and complete the second memory recall task. In addition, participants again rated their levels of confidence in their sentencing decision and were asked to weigh the effects of aggravating and mitigating evidence on their final decisions.

A demographics form asked participants to provide information regarding their age, sex, education level, primary language, and history of jury duty. Participants were thanked, debriefed and awarded a \$5.00 Amazon gift certificate for their participation.

### **Hypotheses and Data Analysis**

Hypothesis 1: We predicted that participant-jurors who were privy to photographic evidence would be more inclined to impose a harsher sentence on the defendant when given the choice between the death penalty and life imprisonment without parole (LIWP). Specifically, we hypothesized that participants in the ‘Family Photo’ group would be more likely to sentence the defendant to death than participants in the ‘Control’ group. Additionally, participants in the ‘Crime Scene Photo’ group would be more likely to sentence the defendant to death than participants in both the ‘Family Photo’ and ‘Control’ groups. To test this hypothesis, a binomial logistic regression was performed.

Hypothesis 2a: We predicted that there would be no significant difference in verdict decisions between participant-jurors who received general judicial instructions and VIE specific judicial instructions. To test this hypothesis, ‘type of judicial instruction’ was included as an independent, interaction variable in the above binomial logistic regression.

Hypothesis 2b: We predicted that there would be no significant difference in the perceived importance of aggravating and mitigating evidence between participant-jurors who received general judicial instructions and VIE specific judicial instructions. To test this hypothesis, two independent-samples t-tests were performed--with one test pertaining to the importance aggravating evidence and the other pertaining to the importance of mitigating evidence.

Hypothesis 3: We predicted that participants who were in the ‘Crime Scene Photo’ and ‘Family Photo’ groups would display higher levels of memory distortion regarding case details presented in the trial transcript than participants in the ‘Control’ group. To test this hypothesis,

five separate Analysis of Variance (ANOVA) analyses were performed--each test pertaining to a different type of memory distortion question.

Hypothesis 4: Lastly, we predicted that participants who reported higher levels of anger immediately following exposure to the victim impact evidence would report higher levels of confidence in their verdict decisions as well. To test this hypothesis, a linear regression was performed to assess the relationship between anger and confidence.

## Results

### Verdict Decisions

Overall, participant-jurors sentenced the defendant to death (59.1%) slightly more than life imprisonment (40.9%). However contrary to our hypotheses, the logistic regression model was not statistically significant,  $\chi^2(5) = 1.522, p = .91$ . The model explained 0.005% (Nagelkerke  $R^2$ ) of the variance in verdict decision and correctly classified 59.0% of cases. Of the two predictor variables, neither was statistically significant (refer to Table 1). The area under the ROC curve was .535, 95% CI [.478 to .593].

**Table 1**

*Logistic Regression Predicting Likelihood of Verdict Decision Based on Photographs and Judicial Instructions*

CI for Ratio	B	SE	Wald	df	p	Odds Ratio	
						Lower	Upper
Control Group				2	.841		
Control v. Family Photo	-.077	.356	.047	1	.829	.460	1.862
Control v. Crime Scene Photo	-.210	.361	.339	1	.560	.399	
General v. Specific Judicial Instructions	.095	.357	.071	1	.790	.546	2.216
Judicial Instructions * Control			.416	2	.812		
General Instructions by Family Photo	-.291	.497	.342	1	.559	.748	1.980
General Instructions by Crime Scene	-.033	.503	.004	1	.947	.967	2.592
Constant	.470	.255	3.399	1	.065	1.600	2.64

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### Importance of Aggravating and Mitigating Evidence (Judicial Instructions)

Consistent with our hypothesis, the importance of aggravating evidence was weighed similarly by jurors who received general instructions ( $M = 4.27$ ,  $SD = 0.889$ ) and jurors who received VIE specific instructions ( $M = 4.22$ ,  $SD = 1.017$ ), 95% CI [-.129, .245],  $t(399.56) = .609$ ,  $p = .543$  (refer to table 2). The assumption of homogeneity of variances was violated as assessed by Levene's test for equality of variances ( $p = .031$ ). There were no outliers in the data.

Additionally, consistent with our hypothesis, the importance of mitigating evidence was weighed similarly by jurors who received general instructions ( $M = 2.510$ ,  $SD = 1.210$ ) and jurors who received VIE specific instructions ( $M = 2.56$ ,  $SD = 1.216$ ), 95% CI [-.292, .183],  $t(401) = -.449$ ,  $p = .765$  (refer to table 2). The Levene's test for equality of variances displayed that the assumption of homogeneity of variances for mitigating evidence was met. There were no outliers in the data.

**Table 2**

*Independent Samples t-test Displays the Importance of Aggravating and Mitigating Evidence on Verdict Decisions*

		Levene's Test for Equality of Variances				t-test for Equality of Means		
		F	Sig.	t	df	Sig.(2-tailed)	Mean Difference	Std. Error Difference
Agg. Strength	General Instructions	4.67	.031	.606	401	.545	.058	.095
	Specific Instructions			.609	399.56	.543	.058	.095
Mitg. Strength	General Instructions	.089	.765	-.449	401	.654	-.054	.121
	Specific Instructions			-.449	399.05	.654	-.054	.121

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### Memory Distortion

Five separate one-way ANOVAs were run to determine whether memory distortion would increase with exposure to varying levels of photographic victim impact evidence. Contrary to our hypothesis, participants recalled case details uniformly correctly across conditions. If memory distortion had been present, participants would have incorrectly recalled details significantly more often during Part 2 of the memory recall task than Part 1. Cronbach's alpha demonstrated that the internal consistency of the memory questions pertaining to the recollection of aggravating evidence ( $\alpha = .462$ ), mitigating evidence ( $\alpha = .247$ ), VIS attributes ( $\alpha = .386$ ), and murder attributes ( $\alpha = -.064$ ) were indeed quite poor. Thus, descriptive statistics pertaining to mean recall accuracy were reported in lieu of typical inferential statistics: aggravating evidence ( $M = 78.3\%$ ); mitigating evidence ( $M = 76.6\%$ ); VIS attributes ( $M = 75.1\%$ ); murder attributes ( $M = 76.3\%$ ) (refer to table 3).

**Table 3**

%	Type of Question	% Correct				Average
		Question 1	Question 2	Question 3	Question 4	
	Memory for Aggravating Evidence	361 (92.3%)	287 (73.4%)	271 (69.3%)		78.3%
	Memory for Mitigating Evidence	371 (94.9%)	242 (61.9%)	355 (90.8%)	232 (59.3%)	76.7%
	Memory for VIS	341 (88.3%)	259 (67.1%)	270 (69.9%)		75.1%
	Memory of Murder Attributes	361 (91.6%)	353 (89.6%)	105 (26.6%)	384 (97.5%)	76.3%

### Anger as a Predictor of Confidence in Verdict Decision

Lastly, we ran a linear regression to establish whether increased levels in anger (reported via the JUNAS) could statistically predict confidence in verdict decisions. Our results were not

statistically significant  $F(1, 401) = 2.901, p = .089$  (refer to table 4). Anger levels accounted for 7% of the explained variability in confidence of verdict decisions with adjusted  $R^2 = 0.05\%$ , a small size effect according to Cohen (1988).

**Table 4**

*Linear Regression Predicting Level of Verdict Confidence Based on Reported Anger Levels*

	B	SE	Beta	t	p	95% CI for Odds Ratio	
						Lower	Upper
Constant	7.453	.100		74.415	.000	7.256	7.650
T2_JUNAS_Anger	.019	.011	.085	1.703	.089	-.003	.041

### Discussion

The overall purpose of this study was to examine the combined effects of victim impact statements and photographic evidence on juror memory distortion and sentencing decisions. Although our results did not reach statistical significance regarding sentencing decisions, the implications from our analyses of judicial instructions may prove useful in further studies and psycholegal literature.

We hypothesized that participant-jurors who were exposed to increasing levels of emotionally-laden photographic evidence would be more inclined to sentence the defendant to death as opposed to life imprisonment without the possibility of parole (LIWP). Specifically, we

predicted that participants who were exposed to a photograph depicting the victim at the scene of the crime would be significantly more likely to sentence the defendant to death than participants who viewed a photograph of the victim with his family prior to the crime or no photo at all. In contrast with our hypothesis and previous research (e.g., Green, Koehring, & Quiat, 1998; Platania & Berman, 2006) we found no significant differences in sentencing decisions. Across conditions, participants uniformly sentenced the defendant to death slightly more than half of the time.

Our second hypothesis was that there would be no significant difference in verdict decisions between participant-jurors who received general judicial instructions and VIE specific judicial instructions. In addition, we also hypothesized that there would be no significant difference in the perceived importance of aggravating and mitigating evidence between participant-jurors who received general judicial instructions and VIE specific judicial instructions. Indeed, our results supported this hypothesis and are consistent with previous research regarding this concept (e.g., Luginbuhl & Howe, 1994; Platania & Berman 2006). However, consistent with Luginbuhl and Howe's (1994) findings, the relevance (or lack thereof) of the VIS did not appear to have an effect on participant-jurors' sentencing decisions in our study, nor did it influence their perceived weight of importance of aggravating and mitigating evidence.

Because we observed virtually no differences between judicial instruction conditions, our findings--in combination with previous literature--suggest a pressing need for judicial instructional improvement in capital cases. During the sentencing phase of a capital trial and following instruction, jurors collectively possess the discretion to determine what is sufficient

mitigating and aggravating evidence in addition to what the appropriate burden of proof should be. In their study, Luginbuhl and Howe's (1994) found that only one third of jurors understood "that a sentence of life is required if the mitigating factors outweigh the aggravating factors" despite being given VIE specific instructions (p. 1180). The capacity for jurors to misinterpret the law at various stages of a trial is immense and equally alarming (Luginbuhl & Howe, 1994). Such arbitrariness of judicial instructions can effectively sentence a defendant to certain death even before the sentence is rendered. In combination with our results, these findings suggest that VIE specific instructions should indeed be implemented in capital cases, however jurors may not be achieving maximum comprehension of the instructions they are presented with. Though we did not measure participants' comprehension of the judicial instructions, perhaps subsequent research studies can dissect the most critical concepts within standard VIE instructions and empirically examine which ideas are most often misunderstood, thus providing legal experts with a focal point for improvement regarding comprehension.

Our third hypothesis was that participants who were in the 'Crime Scene Photo' and 'Family Photo' groups would display higher levels of memory distortion regarding case details presented in the trial transcript than participants in the 'Control' group. We found no evidence to support this hypothesis; indeed, our participants were able to recall details about the case quite accurately overall. Our failure to find an effect may lie in the poor internal consistency of the memory questions that were asked, which will be further discussed in the limitations.

Lastly, we hypothesized that participants who reported higher levels of anger immediately following exposure to the victim impact evidence would report higher levels of confidence in their verdict decisions as well. Our results did not reach statistical significance,

however they are not to be entirely disregarded. We observed a trend that increased levels of anger was predictive of higher levels of confidence to some extent. Recall that researchers Tiedens and Linton (2001) argued that when jurors experience anger, they are more likely to rely on information heuristically, thus causing them to feel more certain/confident about their gut-level decisions. Though participants sentenced the defendant to death and LIWP relatively equally, we can suggest that participants who did experience increased levels in anger felt more confident about their decisions (regardless of the decision itself).

### **Limitations**

First and foremost, it is important to note that victim impact statements are typically given by the victims/survivors themselves, in person. The jury is able to look the victim(s) in the eye as they deliver their harrowing statements of anguish and pain (often with the defendant in the courtroom as well). Because this was our first attempt to investigate this issue, we made the conscious decision to minimize potential confounds by using a textual victim impact statement as opposed to showing a videotaped testimony or constructing a mock jury trial. In doing so, we sought to gain insight about the emotional/cognitive effects that victim impact statements could have on jurors, while allowing for enough emotional variance between imagery and judicial instruction conditions. As detailed in the literature review, the administration of victim impact statements in actual court proceedings consistently elicit acute, negative emotions in jurors. Because we were examining the *combined* effects of VIS and imagery on jurors, we did not want to evoke such strong emotions for all conditions and draw erroneous conclusions regarding where the emotions were stemming from. Unfortunately, our results suggest that using a textual VIS may not have captured the genuine emotionality of such testimonies, which is perhaps why

we did not achieve significance. Thus, we cannot conclude that our manipulations have no effect; they just appear to have no effect when combined with textual statements.

In the same vein, we did not have a control group that was given the trial transcript without a VIS. Having a control group who was not privy to the VIS could have allowed us to establish an emotional baseline, thus yielding more robust implications of jurors' perceptions of VIS as aggravating evidence and whether they led to increased levels of anger. To address these drawbacks in future studies, researchers might benefit from establishing a control group that is not presented with a victim impact statement and photographic evidence in addition to using a videotaped or in-person VIS.

In regards to ecological validity, certain aspects of our study were noticeably different from authentic capital case proceedings. For example, our participants completed the study on the computer and in the comfort of their preferred environments. This limitation in the context of empirical research is not particularly concerning because as previously stated, research has found that varying methodologies (i.e., online vs. mock jury studies) do not yield significantly different results (Bornstein, 1999). However, what *is* concerning is that courts have been rather contemptuous toward implementing modifications based on psycholegal research whose methodologies are not representative of the actual legal process. When conducting jury research, Diamond (1997) suggests creating a study in two stages; "Stage One" should be performed on an easy-access sample (i.e., college students or online sample), while "Stage Two" should be performed on participants who are more representative of an authentic jury. The results are therefore more comparable to one another, while using the foundation of empirical methodologies and applying them to procedures that are more acceptable in court. Using this

model, the present study could be considered “Stage One” of a two-part study.

Similar to in Nuñez et al.’s (2017) limitations, our participants were not asked to decide the defendant’s guilt, nor were they given the opportunity to deliberate with one another and agree on a final sentence. Considering we were primarily focused on the penalty phase of the trial, we wanted to avoid adding substantial amounts of time to the study, however in doing so we may have sacrificed the influence of these factors on our participants’ sentencing decisions. For example, the uniqueness of jury group dynamics can partially be attributed to the requirement of a unanimous decision by a group of twelve strangers. Perhaps more passive individuals would rather have the group decide which verdict/sentence is appropriate in an attempt to avoid conflict. By not allowing our participants to deliberate on a verdict/sentence, we effectively empowered each individual to make the sole decision of sentencing someone to LIWP or death. For the purpose of future VIE advocacy, succeeding studies may benefit from permitting their participants to engage in deliberation and coming to a unanimous decision.

Lastly, the memory test that was given to participants at two times during the study (Day 1 and Day 2) reported extremely low internal consistency. Essentially, our lack of internal consistency means that participants answered our memory recall questions uniformly correctly. Therefore, because participants were able to demonstrate accurate recollection of case details, further analysis into participants’ memory distortion as a result of emotional stimulation would be moot. For example, the memory question items included, “How much money did Anthony Prentice [the defendant] steal from Jeff Mason [the victim]?”; “What was the defendant’s IQ?”; and “How many children did Jeff Mason have?” Overall, participants answered these multiple-choice questions correctly over 75% of the time. The questions that were asked in this

study were not pilot tested and thus the test for recall may not have been difficult enough to lead to implications regarding memory distortion. Perhaps, future studies could use open-ended questions/free-recall to test for memory distortion, as in actual court proceedings, jurors are not presented with alternative options to confirm their recollection of case details. Furthermore, by addressing the above limitation of permitting participants to engage in deliberation prior to rendering a sentence, implications regarding source monitoring errors may come to light. As mentioned in the literature review Segovia, Strange, and Takarangi, (2016) have argued that post-information processing (i.e., the discussion of varying perceptions and opinions during jury deliberation) may indeed lead to memory distortion implications.

### **Future Research**

Considering our limitations and previous research on the admissibility/effects of victim impact evidence in capital cases, subsequent research studies can certainly expand upon our results and implications. Indeed, we must reiterate the importance of court advocacy that is substantiated in empirical research. Future studies should aim to examine the combined effects of VIE systematically (perhaps in a “Stage One” study) while preserving the ecological validity that is of utmost importance to the Court. Elaboration on the tendency for jurors to misinterpret the importance of objectively weighing aggravating and mitigating evidence prior to rendering a death sentence is crucial. Though we did not obtain significant findings regarding the effects of memory distortion on sentencing decisions, previous research surrounding this topic warrants further investigation into whether it does in fact play a role in capital cases.

As previously mentioned, in realistic capital cases, the jury that sentences the defendant during the penalty phase is in fact the same jury that previously finds the defendant guilty or

innocent. In a follow-up study, researchers may consider having mock jurors participate in the guilt phase of the capital trial in addition to the penalty phase. Conducting studies that align more closely with the capital trial jury process (such as a mock jury) may allow for more robust implications regarding memory distortion, the combined effects of varying types of victim impact evidence, and ultimate change in legislature.

In conclusion, research pertaining to the combined effects of varying types of VIE will benefit fields such as cognitive psychology, emotion psychology, and legal scholarship. Hopefully this study in addition to future studies that expand on these issues will ultimately provide critical evidence as jurisdictions consider the role of emotion evidence in sentencing decisions.

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## Appendix A

**Judicial Instruction for Victim Impact Evidence as Presented in the Trial Transcript**

**THE COURT:** I will now instruct you as to the law. Number one, the law that applies to the case is stated in these instructions. And it is your duty to follow all of them. You must not single out certain instructions and disregard others. Neither sympathy nor prejudice should influence you. The evidence you should consider consists only of the testimony of the witnesses. You should consider all the evidence in the light of your own observations and experience in life. Faithful performance by you of your duties as jurors is vital to the administration of justice. The defendant has been found guilty of the offense of murder. According to the law of the state, he will be put to death or imprisoned for life. Only you can determine which. The defendant will be sentenced to death if you find beyond a reasonable doubt that one or more statutory aggravating factors exist, and that no mitigating factor or factors exist sufficient to preclude the death penalty.

Number two, first let me describe the statutory aggravating factors. Before the defendant can be sentenced to death, you must find without a reasonable doubt that the murdered individual was killed in the course of another felony, and

- A) the murdered individual was actually killed by the defendant and not by another party to the crime, or simply as a consequence to the crime and
- B) the defendant killed the murdered individual intentionally or with the knowledge that the acts which cause the death created a strong probability of death or great bodily harm to the murdered individual and
- C) the other felony was one of the following: armed robbery or robbery.

Aggravating factors are those facts or circumstances which provide reasons for imposing the death penalty. Aggravating factors include, but need not be limited to, the required statutory aggravating factors regarding which you're instructed in instruction number two.

Mitigating factors are any facts or circumstances that provide reasons for imposing a sentence less than the death penalty. Mitigating factors may include that

- 1) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution, or
- 2) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act, or

3) the defendant may be rehabilitated or restored to useful citizenship, or

4) any other facts or circumstances that provide reasons for imposing less than the death penalty.

If you determine that there is no mitigating factor or factors sufficient to keep the death sentence from being imposed, check that box on the verdict form which states that there is no mitigating factor or factors sufficient to conclude the imposition of the death sentence on the defendant. If you check this box, the court must sentence the defendant to death. If you determine that there is a mitigating factor or factors sufficient to conclude the imposition of the death sentence, check that box on the verdict form indicating this decision.

Additionally, during the course of this proceeding, you have heard evidence which pertains to the personal characteristics of the victim, and you have heard evidence which pertains to the impact of the victim's death on her family and community. This evidence is referred to as victim impact evidence and is intended to show each victim's uniqueness as a human being and the impact of her loss upon her family. This evidence should be given whatever weight you feel it deserves, in accordance with the law and pursuant to my instructions in determining whether to impose a sentence of life imprisonment

without parole or death. I instruct you, however, that victim impact evidence can never serve as the basis for making a defendant eligible for the death penalty. This evidence is not to be considered by you as an aggravating circumstance - as a reason to impose the death penalty. No matter how emotionally compelling you have found this evidence to be, you are instructed that you may not consider evidence concerning the personal characteristics or impact of the victim's death on her family or community during the weighing of aggravating and mitigating circumstances. When weighing aggravating and mitigating circumstances you may only consider those aggravating circumstances, if any, which you have unanimously found proven beyond a reasonable doubt, and those mitigating circumstances, if any, which you have found proven by preponderance of the evidence. During this process, you may not consider any evidence which pertains to the personal characteristics or the impact of the victim's death on her family or community. If you determine that the mitigating circumstances outweigh the aggravating circumstances, then you will enter a sentence of life imprisonment without parole. It is only in accordance with these instructions that you may consider victim impact evidence in your determination of the appropriate sentence in this case.

Ladies and gentlemen, I now ask you to retire and consider all of the evidence and the instructions which I have read for you, which

govern the law, and please come to a verdict. Thank you.

## Appendix B

### **Victim Impact Statement**

**Q.** Please give your name for the court and explain your relationship to the victim.

**A.** My name is Daphne Mason, Jeff was my husband.

**Q.** Please tell the court how you learned of your husband's murder.

**A.** I was at home watching the kids. We have two little ones—Janie, who is 3 and Max, who is 4. They were in the next room playing with their toys when I got a call from my neighbor Stephanie. She told me to sit down, and then she said that there had been a robbery at the store and someone was shot. I asked her to come over and watch the kids and the next thing I remember is she was at my door. I drove to the store as fast as I could, but then I pulled over to the side of the road when I remembered that I could call him on his cell phone. I knew he wouldn't answer but I just had to try. The phone just rang and rang and went to voicemail. I got back on the road and drove to the store. A policeman came over to the car and I told him my husband worked there. He asked me if my husband was Jeff Mason. That is when I knew my husband was dead.

**Q.** I'm sorry Mrs. Mason, I realize this is hard to talk about. If you can, could you tell the court how losing your husband has impacted you and your family?

**A.** I can't possibly convey, in full detail, how this has impacted my family and me. There is not a day that has gone by since Jeff was murdered that I have not thought about that day or about him in some capacity. It may begin with happy memories, such as the times we spent New Year's Eve together, or our vacations. But, those good memories only lead to memories of the day he was killed. I wonder how he felt as he was attacked and murdered. I imagine his face and the look in his eyes as he took his last breaths. I think about the fear he must have experienced, and the pain, how he suffered, and I am filled with anger and hate for Anthony Prentice. Anthony Prentice took it upon himself to act as my husband's judge, jury, and executioner. Jeff didn't get the chance to have a jury to decide his fate. Instead, Mr. Prentice did it for him. Since Mr. Prentice killed my husband, my entire life has changed. You cannot imagine the hell that he has caused for our entire family. We were just kids when we first met. Jeff has been everything to me practically my whole life. If something good happens in my day I don't have him to share it with. He was just a young man. Taking a person's life

at such a young age is just so unfair. Anthony Prentice didn't have to kill him. Jeff was already beaten and he was not fighting back. Mr. Prentice didn't need to point the gun in his face and blow a hole in his head. What gives him the right to take a person's life like that? Jeff doesn't get to grow old and watch his children grow up and get married. Jeff was robbed of the chance to live and experience his children and family because of that man sitting at the defense table. It makes my blood boil to think that I have been robbed of the most important person in my world because this man sitting at the defense table figured Jeff's life didn't matter. I have suffered from many health problems, including depression and hypertension. I have been on numerous medications. There are no words to tell you of the pain, sorrow, and grief that this man has caused. The holidays are the hardest for us. It was in December when he was killed.

**Q.** Can you share with the Court how the family is impacted by your husband's murder?

**A.** It's frustrating because we can't move forward with our lives. It's—like I—it's just—I don't know. It's just really hard to put—put into words. I wish I could just put you all inside of myself so you could really see what I want to say, 'cause I feel as—so many different emotions. I wish there was just one word that I could use just to tell you how this all—it's all affected us you know. It's still hard. You know, it's been—it's been years, but today, to all of us, that's not a long time. I miss my husband. You know, he didn't do anything wrong to anybody. He was just a victim of a very bad circumstance that really—I don't know. He fell victim to something that really didn't have to have anything to do with him. He was only 31 years old. He didn't hurt anybody. And because of somebody's selfishness, he's gone. Jeff was the best father. Janie was a real daddy's girl. She loved to get up on his lap on the couch and snuggle. They'd watch cartoons together. Max is the spitting image of his father. Every time I look at him I see his dad. Both of these kids have to grow up without their father. The look in their faces when I told them their father was dead is something I cannot forget. I know now nothing I ever do in my life will be as hard as that was. The kids will never be the same. Janie needs all her lights on and still she takes forever to fall asleep. But it's just—just a huge gap. You know, really, like I said, I look at my kids and just know—I know I'm not whole. I know they're not whole. I just—you got to excuse me. It's really caused—it's really hard to put, really, what I feel about the whole situation. I feel angry and empty at the same time. That man robbed those two little children of their father. They don't get to grow up with a father. Max doesn't get to have his father pitch the ball to him. It's such a waste. None of our lives will ever be the same because of this one event. Someday I am going to have to tell them how Jeff died. They don't know he was murdered. How can I tell them that? At what age is it ok to hear that your dad was murdered and how he suffered before he died? I don't want them thinking about the same stuff I think about when I go to bed at night.

Q. Thank you Mrs. Mason.

Appendix C

**Images removed**