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Litigating with Victim Impact Testimony: The Serendipity That Has Come from Payne v. Tennessee

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LITIGATING WITH VICTIM IMPACT TESTIMONY: THE SERENDIPITY THAT HAS COME FROM *PAYNE V. TENNESSEE*

Richard Burr†

INTRODUCTION

Victim impact testimony is lethal for capital defendants and often illusory for the witnesses who provide it. Although such testimony invariably serves the prosecution's goal of procuring a death sentence, the opportunity to testify does not address most of the needs of the survivors of murder[1] that could be met by the criminal justice process. 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.

In the wake of *Payne v. Tennessee*,[2] it is virtually impossible for defense counsel to exclude or limit victim impact testimony. If it is admitted, its emotional power will frequently produce a death sentence. Its introduction over defense objection, no matter how emotionally charged it may be and likely to result in a death sentence "based on . . . caprice or emotion" rather than reason,[3] will almost never provide the basis for a successful argument on appeal.

These realities have pushed capital defense lawyers in new directions. We have come to realize that we must overcome our instinct that survivors are unreachable and inherently joined to the prosecution. Instead, we must reach out to survivors with genuine compassion. We must learn from survivors which of their needs can be met within the criminal justice process and do what we can, consistent with representing the interests of our clients, to ensure that those needs

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1 I use the term "survivors" or "survivors of murder" to refer to the family members and loved ones of murder victims.

2 501 U.S. 808 (1991).

3 Gardner v. Florida, 430 U.S. 349, 358 (1977).

are met. We must champion not only compassion for our clients, but also a greater compassion for survivors. In short, we must work for the respectful inclusion of survivors in the criminal justice process and not be complicit in their exploitation and virtual exclusion.

I
LITIGATING TO EXCLUDE OR CONSTRAIN VICTIM IMPACT TESTIMONY

Due to the magnitude of the harm inflicted by the bombing of the Alfred P. Murrah Building in Oklahoma City,[4] the trial of Timothy McVeigh presented questions about victim impact testimony that no court had ever before addressed. Moreover, the trial judge in the case, Chief Judge Richard P. Matsch of the U.S. District Court for the District of Colorado, tried mightily to be even-handed and to assure due process for McVeigh.[5] As such, it is a useful case to illustrate the adversarial process's virtual inability to filter out inflammatory emotion from victim impact testimony.

Before the penalty phase of the trial began, McVeigh filed several motions in limine to exclude all victim impact evidence, asserting that *Payne* was decided erroneously, and that the admission of victim impact testimony in his case would inevitably lead to a violation of the Eighth Amendment and his right to a fair trial.[6] In the alternative, he requested that the court limit the admission of victim impact evidence and employ certain procedural safeguards to minimize the risk that the sentencing decision in his case would be the product of emotion rather than reason.[7]

McVeigh's arguments to constrain victim impact testimony were based on the view that the Supreme Court in *Payne* did not intend to abandon the longstanding Eighth Amendment principle that "'any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'"[8] He found support in *Payne* because even though the Court held that "the Eighth Amendment

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4 The April 19, 1995 bombing killed 168 people and severely injured hundreds more. Jo Thomas, *McVeigh Guilty on All Counts in the Oklahoma City Bombing; Jury to Weigh Death Penalty*, N.Y. TIMES, June 3, 1997, at A1.

5 This is not to say that Judge Matsch or any judge does otherwise in different cases. However, because Judge Matsch, counsel for McVeigh, and the government collectively viewed the magnitude of the offense as a test of the criminal justice system's ability to provide due process, all parties paid more attention to this constitutional requirement than they might have in an ordinary case.

6 *See* Motion for New Trial, United States v. McVeigh, 958 F. Supp. 512 (D. Colo. 1997) (No. 96-CR-68), *available at* 1997 WL 403417, at *83 (addressing McVeigh's motions in limine).

7 *Id.*

8 Payne v. Tennessee, 501 U.S. 808, 849 (1991) (Marshall, J., dissenting) (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

erects no *per se* bar"[9] to the admission of victim impact testimony, it also noted that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."[10] In his concurrence, Justice Souter reiterated this safeguard: "[T]here is a traditional guard against the inflammatory risk [of victim impact testimony], in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal."[11] On this basis, McVeigh argued that the *Payne* Court sought to strike a balance between the introduction of victim impact evidence and the defendant's Eighth Amendment rights, requiring trial courts to restrict the presentation of victim impact evidence appropriately so that the emotion inherently associated with such evidence did not overwhelm the jury's responsibility to make a reliable, individualized sentencing determination based on a full and fair consideration of the mitigating and other aggravating circumstances.

Because the *Payne* Court gave no guidance on how to strike this balance, and because there was at that time no federal court precedent concerning victim impact evidence in federal capital trials, McVeigh urged Judge Matsch to draw upon the state courts' experience under the *Payne* decision.[12] Pointing to the cautionary principles and procedures developed in *State v. Muhammad*,[13] *Cargle v. State*,[14] and *State v. Bernard*,[15] McVeigh urged Judge Matsch to take steps to minimize the risk that the emotion inherent in victim impact testimony would overwhelm the jury's ability to reach a sentencing decision based on reason.[16]

Judge Matsch adopted the cautionary principles articulated in those cases. Outlining what he considered to be the parameters of admissible victim impact testimony in an in-chambers conference on May 30, 1997,[17] Judge Matsch explained that victim impact evidence must conform with the following:

> [It must] be as objective as possible and it has got to be the consequences of the crime. And I don't believe that it can have as much

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9 *Id.* at 827.

10 *Id.* at 825 (citing Darden v. Wainwright, 477 U.S. 168, 179–83 (1986)).

11 *Id.* at 836 (Souter, J., concurring).

12 *See* Motion for New Trial, United States v. McVeigh, 958 F. Supp. 512 (D. Colo. 1997) (No. 96-CR-68), *available at* 1997 WL 403417, at *91 (addressing McVeigh's motions in limine).

13 678 A.2d 164, 175–81 (N.J. 1996).

14 909 P.2d 806, 830 (Okla. Crim. App. 1995).

15 608 So. 2d 966, 972–73 (La. 1992).

16 *See* Motion for New Trial, *McVeigh*, 958 F. Supp. 512, *available at* 1997 WL 403417, at *91.

17 *See id.*

> emotional impact as some of the things that are being discussed here.
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> . . . .
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> [I]t can include the loss of a—people to an agency and can include the loss of a family member, what has happened, the empty chair, but not the emotional aspect of that, the grieving process, the mourning process. I don't think that's part of it. That's where I'm talking about objective, as opposed to subjective. The facts, rather than the emotional impact.[18]

Later, in the course of ruling on defense objections to specific aspects of victim impact evidence, the court acknowledged the inherent difficulties of defining the parameters of admissibility for such evidence, as well as the need to guard against the dangers of an emotion-driven sentencing determination:

> *Payne vs. Tennessee* involved . . . cautions given by every justice who wrote; and almost every justice wrote in that case. And there simply is no clear guidance as to where the line between appropriate, particularly victim-impact testimony ends and an appeal to passion, the human reactions, emotive reactions of revenge, rage, empathy—all of those things—begins.
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> So I know that these rulings are not going to be consistent with the views of many; but nonetheless, we have to guard this hearing to ensure that the ultimate result and the jury's decision be one made as truly a moral response to appropriate information, rather than an emotional response.[19]

Attempting to follow these principles, Judge Matsch granted some of McVeigh's requests to exclude certain kinds of information, but denied others. However, Judge Matsch flatly refused to employ the procedural safeguards requested.[20]

Thereafter, the government presented penalty phase victim impact testimony by twenty-seven family members of persons who were killed, three persons who were themselves injured, six persons involved in rescue and medical assistance efforts, and three others—a worker from the day care center in the Murrah Building, an epidemiologist, and a member of the state medical examiner's office.

What is manifest from reading the trial record is that the district court's efforts to restrict and control the presentation of emotionally overwhelming evidence failed. Nearly every victim impact witness

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18 *Id.*

19 *Id., available at* 1997 WL 403417, at *91–92.

20 *See id., available at* 1997 WL 403417, at *83. McVeigh urged the court to adopt procedures similar to those utilized at that time by Louisiana, New Jersey, and Oklahoma, in which a pretrial hearing was held to listen to and determine the admissibility of every victim impact witness's testimony. *See* State v. Bernard, 608 So. 2d 966, 972–73; State v. Muhammad, 678 A.2d 164, 180–81 (N.J. 1996); Cargle v. State, 909 P.2d 806, 828–29 (Okla. Crim. App. 1995).

strayed beyond the limits established by the district court. Not only was "the empty chair"[21] acknowledged, but also the effects of the empty chair, in riveting, emotional, poignant, heart-wrenching detail, were allowed to flood the courtroom. The "grieving process, the mourning process," which the court expressly prohibited—and the compelling emotional need for witnesses to pay homage to their loved ones and to find some way of sharing their intense pain—rolled over everyone.

II

VICTIM IMPACT TESTIMONY IN *UNITED STATES V. MCVEIGH*

Various witnesses provided accounts of their reactions, or those of other family members, to the realization that their loved one had been killed in the bombing. One witness described being at the Drug Enforcement Agency (DEA) command center when her son came to this realization:

> They had set up an area in the bar of the hotel, and we went in there and they had the TVs on. And Patrick started screaming. He was really upset, and he was upsetting the other people, because he said: "I don't want my dad to be dead. I don't want my dad to be dead." And so he was seeing all the pictures on TV.
> So they took us up to a room so the other people wouldn't be so upset. And we got in there and he was crying. And he said, "Mom, let's say a prayer," so I said okay. He got down and he said, "God, I don't want my father to be dead; but if he is, that's okay because I know he's with you. But take care of my mom and me and my sister." And then he kind of calmed down after that, but we couldn't watch TV.[22]

Children as victims and as suffering survivors represented a major portion of the government's victim impact evidence. As such, young children or adolescents figured prominently in the testimony of sixteen of the twenty-seven family members who testified. The father of a child who was not quite eight years old at the time his mother died in the bombing recounted an incident that occurred while he and his son were receiving counseling. The father had asked the counselor to talk with his son, Clint, because Clint had been avoiding him:

> And she took him into a room and they talked. And she came back and she said: "Clint has never seen you cry. He's never seen you scared. He thinks the people that have done this are after you and him." And it never dawned on me—you know, I mean that they weren't after me or him directly; and this very professional lady gets

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21 *See supra* note 18 and accompanying text.

22 Trial Transcript, United States v. McVeigh, 958 F. Supp. 512 (D. Colo. 1997) (No. 96-CR-68), *available at* 1997 WL 296395.

> a tear in her eye and says that—told me that you and your [wife] have started him a savings account. He's got $180 in there and that he wants to pay me that money if I'll help you.[23]

Another witness, a police officer who was involved in the rescue effort, recounted that a little girl from the Murrah Building day care center, who was not there on April 19, approached him and his dog, hugged the dog, and said, "Mr. Police Dog, will you find my friends?"[24]

Some of the most emotionally wrenching testimony was provided when witnesses were asked about the impact of the deaths of family members on their children, grandchildren, nieces, and nephews. The overwhelming emotional quality of this testimony speaks for itself, as illustrated by the few examples provided below. One mother recounted her twenty-year-old son coming to her at three o'clock one morning:

> [H]e was crying very hard. And he said: "I want my dad back. I want him to see me graduate from college. I want him to meet my wife and be at my wedding. I want him to see my first child." He's getting married next month, and there will be a rose where his father should be.[25]

Another witness, who lost her husband, noted an especially poignant detail concerning her grandson: "He would ask Bev [his mother] when they were traveling, like to the day care and so forth—he would ask Bev to run a red light so they could crash and die and he could go be with papa."[26] For the three teenage children of another mother who testified, the trauma of their father's death had eaten away at every aspect of their lives. Regarding the oldest, she stated:

> [She] graduated from high school last year, and her dad wasn't there. She was also elected to the . . . homecoming court. And your dad is supposed to walk you out on the football field at homecoming, and I just remember her walking out on the field teary. All these other girls were all smiling and happy, and she was teary.[27]

Regarding her middle child, the mother stated:

> [She] has had the hardest time. She was like her daddy's little girl. She—she told me that she has learned to hate, which is a horrible thing to hear coming from your 16-year-old baby. . . . She wrote a paper for school. The topic was a day that changed her life. . . . [A]t the end of the paper, she said that "I never knew such a dark, horrible place existed until I had to go there; and I'm clawing my way out as best I can."[28]

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23 *Id.*, *available at* 1997 WL 298226.
24 *Id.*
25 *Id.*, *available at* 1997 WL 292341.
26 *Id.*, *available at* 1997 WL 292798.
27 *Id.*
28 *Id.*

As to her youngest child, she testified:

> [He] went through puberty that summer, which is so hard—to kids anyway. He started to get a little beard. And I said, "Honey, you've got to shave, that you're looking messy." And I just remember . . . he slammed the wall with his fist and he said, "Who is going to teach me how to shave it?"[29]

The father of Clint, the young boy mentioned above,[30] recalled that for Clint's eighth birthday he had a big birthday party, and:

> [A]fter everybody left, Clint climbed up on my lap and started crying. And he asked me—he said, "Do you think my mom loved me?" And I said, "Well, your mom loves you more than anything in the world." And he said, "Why isn't she here?" And I told him—I said, "Hey, if your mom had the choice, she would be here. She wouldn't miss this for the world."[31]

At the conclusion of his testimony, the Court permitted Clint's father to read a statement from his son:

> "I miss my mom. We used to go for walks. She would read to me. We would go to Wal-Mart. Sometimes at school maybe a kid will bring something up"—and he was talking about show and tell—"something new that he got and someone would ask him or her where they got it. And they usually say, 'My mom got it,' and that makes me sad.
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> "After the bomb, everyone went to my aunt's house, and my grandma took me to the zoo, my cousin and I to the zoo. While we were at the zoo, I bought my mom a ring. I bought it for whenever they found her.
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> "Sometimes at school around the holidays, I will still make my mom Mother Days and valentines like the other kids."[32]

Equally as moving was the testimony about the impact of the deaths on the witnesses themselves. Nearly every witness identified a photograph of their loved one, which often included other family members, and which often was taken on a special or lighthearted occasion. Identifying this photograph often brought tears and deep-seated emotion as the witness described the impact of the death of a child, a spouse, a parent, a brother, or a sister. One witness, fighting through tears and a choking voice, testified:

> I feel like I died, too, on April 19. I feel like my heart looks like that building. It has a huge hole and that can never be mended. . . . There is nothing in my life that is the same. I no longer do the same work. The only thing that is the same is the house that I live

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29 *Id.*

30 *See supra* note 23 and accompanying text.

31 Trial Transcript, *McVeigh*, 958 F. Supp. 512, *available at* 1997 WL 298226.

32 *Id.*

> in, and now it's a house that's not a home, so it really isn't the same. . . . My father wants his daughter back. He wants me to be the way I was before.[33]

A mother who lost her fourteen-month-old daughter spoke of feelings universal to all parents, when she testified:

> I think that my fears of her dying when she was first born being confirmed was the very worst thing for me. When we drove home that night, the highway overlooked the Murrah Building; and by that time, it was very dark and it was raining and it was cold. And I truly, truly believed that my daughter was alive. You know, you don't ever think—you don't ever think that your own child is dead.
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> And at this point, I thought that maybe she was in fact still in the building. And I think my biggest fear at that point was that she set there in this building and she'd been there for 12 hours, she was in a dirty diaper, she didn't have a bottle, she didn't have me to hold her, and she was afraid. And I could picture her just saying "Momma," and I felt so guilty leaving this place.
>
> And I think in the end, by the time they finally told us that they found her body, it had been seven days, and I was just so incredibly thankful that they found her at all; and I felt lucky that I got to hold her wrapped in a beautiful receiving blanket made by my friend, Joyce. And that's the last thing that I held.[34]

A husband who lost his wife, who had been a military recruiter, testified that he took several personal items "[e]verywhere I go":

> I have my wife's coffee cup that the children bought for her that says "No. 1 Mommy." Inside of that is our marriage license, two rings, and a death certificate. Sitting across the top of the table—or across the TV is the cap that they were able to salvage that was her headgear while in uniform.[35]

Another witness gave extremely moving testimony concerning the many ways in which she and her husband had been affected by the loss of their adult daughter. This included the pain they felt upon learning that their daughter's former husband was dating someone else; how her husband, who did not like house dogs, loved and kept their daughter's dog in the house; her discomfort at continuing to exercise at the facility where her daughter used to teach an exercise class; her determination to accelerate the process of giving to her surviving children the land that, before the bombing, she had intended to leave for them at her death; her funny and touching dreams of her daughter; and her need to retire because of not "roll[ing] with the

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33 *Id.*, *available at* 1997 WL 292341.

34 *Id.*, *available at* 1997 WL 295646.

35 *Id.*, *available at* 1997 WL 296395.

changes" any more.[36] At the close of her testimony, she summed up what so many parents feel in these circumstances:

> It's so hard for me because Karen was my youngest child. She was only 32. She had not had a chance to have her babies or have her life, and I—I'm 61 years old. And I'm her mother, and I just should have gone before she did. And I—it's hard for me, because I've had everything and she didn't have a chance. . . .
> [I]t's hard for me to think about a future anymore. And I think about my future and my family's future, and I—it's just like—it's like a—like a star with one of the points gone. And it's going to always be that way.[37]

On appeal to the United States Court of Appeals for the Tenth Circuit, McVeigh argued that these and many similar instances of victim impact testimony interjected a constitutionally intolerable level of emotion into his sentencing proceeding and created the risk that his sentence was the product of emotion, not reason.[38] The Tenth Circuit agreed that the evidence was "poignant and emotional,"[39] but never substantively confronted the argument made by McVeigh that the evidence was so highly emotional that it overwhelmed the jury's reasoning capacity. The closest the court came to addressing the issue meaningfully was the following:

> [A]t the conclusion of those rulings [on McVeigh's motions in limine], the district court stated that it would allow "objective" evidence describing the "fact" of "the loss of . . . people to an agency and . . . the loss of a family member . . . the empty chair, but not the emotional aspect of that, the grieving process, the mourning process." The government followed this instruction, and we have found few instances where the type of non-objective emotional testimony described by the district court was admitted.[40]

This conclusion makes one wonder whether the court was reading the same record from which the preceding examples were taken. That record contained myriad instances in which witnesses described in highly emotional terms events that could have been described in far less or even unemotional terms.

One reason the Tenth Circuit failed to confront this issue was that it held that trial counsel failed to object properly to many of the instances of testimony that appellate counsel later alleged to be inappropriately emotional.[41] Trial counsel for McVeigh, fearing aliena-

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36 *Id.*

37 *Id.*

38 Brief of Appellant at 206–23, United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) (No. 97-1287).

39 United States v. McVeigh, 153 F.3d 1166, 1221 (10th Cir. 1998).

40 *Id.* at 1221–22.

41 *Id.* at 1217–18.

tion of the jury if they objected to each witness, had approached the bench early in the prosecution's penalty-phase case and had asked to be allowed a continuing objection. However, that objection was to testimony that went "'beyond the impact on the lives of the witnesses,'"[42] but was not addressed to the emotionality of the testimony. The Tenth Circuit purported to review the unobjected-to testimony for plain error, but because it saw no improper emotionality in the testimony, it necessarily found no plain error.

The lesson of *McVeigh* is that, despite the best intentions of the trial judge to filter out the emotionality of victim impact testimony, emotionality takes over a courtroom and cannot be controlled during such testimony. Perhaps defense counsel could have done a better job of objecting, but nearly every witness violated the court's well-articulated principle, and defense counsel could not, without the risk of significantly alienating the jury, have objected to all of the objectionable testimony. The truth is that the emotion was so powerful that it overwhelmed all those involved in this case—jurors, counsel, and judge. Concrete boundaries and limits to testimony should have been set in a pretrial evidentiary hearing in which all the witnesses testified and their testimony was either excluded or constrained by judicial direction. Such a hearing would have allowed defense counsel to object without the fear of disaffecting the jury. However, the trial court refused to conduct such a hearing. As a result, emotionality thereafter took over the courtroom, and the Tenth Circuit blessed the whole process. Although some of the Tenth Circuit's tolerance for the emotionality of the testimony can be understood as its resistance to giving McVeigh a new trial or sentencing proceeding—what we as his counsel characterized as the "McVeigh exception" to the law—some tolerance undoubtedly was attributable to the dynamic of victim impact testimony. Whatever testimony is admitted will be seen as in compliance with *Payne*, no matter how emotional.

III

REACHING OUT TO VICTIMS AND EMBRACING THEIR NEEDS

The effort to constrain the outpouring of emotion in victim impact testimony can distort defense counsel's view of the individuals providing the testimony. Rather than seeing them as completely innocent and profoundly hurt, defense counsel are inclined to see them in an adversarial light—as impassioned and embittered adjuncts to the prosecution team. In reality, the only way prosecutors can assist survivors within the context of the criminal justice process is to provide

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42 *Id.* at 1218 (referring to trial court's framing of the basis for defense counsel's continuing objection).

them with a forum for the expression of their suffering. However, whereas prosecutors cannot begin to meet other, often more compelling needs of survivors, defense counsel often can.

During criminal prosecutions, for example, survivors often have a need for information: Why was my loved one murdered? What did my loved one experience in the course of being killed? What did he or she say and do before death came? What is going to happen in the prosecution? How long will it take? What are the steps that must be taken before the prosecution is over? What is going on in the prosecution at any particular moment?

Survivors also have a need for someone—the right person—to be held accountable for their loved one's death. It is usually of no satisfaction to them if there is doubt about whether the right person is being prosecuted for the murder. Rather, the individual being held accountable for the crime must be the person who actually committed the crime.

Furthermore, survivors also have a need to get through the prosecution with as little re-traumatization as possible. Every court proceeding creates the risk that survivors will relive the experience of learning of their loved one's murder and re-experience, empathetically, the murder itself. This problem is often at its worst during the trial, where the details of the murder are revealed publicly. If a death sentence is imposed, every post-conviction proceeding and development poses the risk of further traumatization. Indeed, because post-conviction proceedings usually span a number of years, the cycle of continuing re-traumatization may also extend for many years.

The defendant and the defense team are often in the best position to respond to these needs. As Tammy Krause, who for the past five years has been pioneering defense-team-based outreach to survivors, states, "The organic relationship is between the defense and the victim, not between the prosecution and the victim. The prosecutors are, at best, very interested observers, who can do little to meet the survivor's needs within the criminal justice system without the interest and cooperation of the defense."[43]

To assist defense teams in capital cases in reaching out to survivors, Krause and Dr. Howard Zehr have developed a process of defense-based survivor outreach founded on the principles of restorative justice.[44] This process asks the following questions: (1) Who was hurt? (2) What are their specific needs? and (3) Who is obligated to meet

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43 Richard Burr & Tammy Krause, Address at the Bryan R. Shechmeister Death Penalty College, Santa Clara University School of Law (Aug. 14, 2002) (on file with author).

44 For a general discussion of and introduction to restorative justice, see HOWARD ZEHR, CHANGING LENSES 177–214 (1990).

their needs?[45] Rather than simply trying, convicting, and punishing the defendant, this framework expands the focus of the criminal prosecution to address the judicial needs of survivors, to allow for cooperation between the defense and the prosecution that may benefit survivors, and to include expressions of offender accountability.[46]

The defense-based outreach to survivors that comes from this framework asks two basic questions of survivors: (1) What is most important to you? and (2) What are your needs within the judicial process? From these modest inquiries can arise a range of potential benefits for survivors. For example, survivors may:

- gain formal introduction to defense team members, thereby overcoming the first and in many ways most formidable barrier produced by the adversarial process;
- receive timely information about upcoming hearings and dates;
- learn about the judicial process and the possible roles survivors can play;
- get answers to at least some of their questions about the case and the crime;
- gain opportunities to talk with others about the victim in a variety of settings;
- identify and articulate their judicial needs;
- decide which track—trial or guilty plea—best serves their interests;
- meet with defense attorneys and, in appropriate situations, the offender;
- encourage plea agreements that take their interests and needs into account.

The possibilities that present themselves as a result of defense-based survivor outreach can benefit both capital offenders and survivors. For example, in a recent plea agreement in a highly publicized federal death penalty case, *United States v. Stayner*, the family of the murder victim wanted to avoid trial, believing that it would be too traumatic.[47] In addition, the family wanted to avoid the inevitable years of appeal and post-conviction review that would follow if the offender were sentenced to death. The defendant, Cary Stayner, was

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45 Burr & Krause, *supra* note 43.

46 *See id.*

47 *See* Kevin Fagan, *Plea Bargain in Slaying of Yosemite Naturalist*, S.F. CHRON., Sept. 13, 2000, at A3. Stayner was charged with two separate killings near California's Yosemite National Park. *Id.* He pleaded guilty to the 1999 murder of a Yosemite nature guide, and thus avoided the death penalty. *Id.* In August of 2002, however, a jury found Stayner guilty of the 1999 murder of three tourists outside the park, and in October the jury recommended a death sentence. *See* Stacy Finz & Alan Gathright, *Jury Recommends Death for Three Yosemite Murders*, S.F. CHRON., Oct. 10, 2002, at A1, 2002 WL 4032489. Stayner was sentenced to death on December 12, 2002. Stacy Finz, *The Case of a Lifetime*, S.F. CHRON., Dec. 15, 2002, at A1, 2002 WL 4038188.

willing to plead guilty in exchange for a sentence of life without the possibility of release.[48] The survivors also had other needs, including a desire that Stayner stop making public statements or giving interviews about the case, that Stayner be cut off from the possibility of any personal financial gain from selling the film or literary rights to the story of his case, and that, should they choose, they would have the opportunity to meet Stayner with a third-party facilitator present.[49] The plea agreement incorporated all these elements.

CONCLUSION

The ultimate value of defense-based survivor outreach was elegantly reflected in a *Los Angeles Times* article that appeared on December 1, 2000, the day after Stayner was sentenced:[50]

> In a gripping courtroom apology, a weeping Cary Stayner turned to face the family, friends and fiance of Joie Armstrong on Thursday to seek their forgiveness for killing the Yosemite naturalist.
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> "I wish I could take it back, but I can't. I wish I could tell you why I did such a thing, but I don't even know myself," Stayner said, locking eyes with his victim's mother, Lesli Armstrong, who held his gaze through her own tears until he was done.
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> "I'm so sorry," he went on, haltingly. "I wish there was a reason. But there isn't. It's senseless."[51]

The victim's mother, Lesli Armstrong, stated:

> "He's devastated. I'm devastated. We're all devastated. I ached for him, I ached for me. I ached for everything. I wish we could all take it back and make it all different."
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> . . . .
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> She said she accepts Stayner's apology and will save room in her heart to forgive him some day for taking away Joie . . . .[52]

When *Payne* was decided, no one could have foreseen that it could lead to such a result. Death can so easily be *Payne*'s fruit, but there is also the possibility that life, freed of anger, hatred and vengeance, can be its harvest. This is the serendipity of *Payne*.

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48 Plea Agreement at 13–14, United States v. Stayner, No. 99-5217 (E.D. Cal. Sept. 13, 2000).

49 *Id.* at 5–8.

50 Christine Hanley, *At His Sentencing, Yosemite Killer Apologizes to Family*, L.A. TIMES, Dec. 1, 2001, at A3.

51 *Id.*

52 *Id.*