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Reverse Impact Testimony: A New and Improved Victim Impact Statement

Adrienne N. Barnes*

I. Introduction

A series of Virginia cases and the Code of Virginia permit victims of crime to testify at trial.¹ The Code of Virginia defines who is a victim in Section 19.2-11.01(B).² Virginia courts, however, also allow testimony from non-statutory victims—persons other than those enumerated by the statute.³ The content of this testimony typically involves emotional tales of the devastating loss and inconsolable pain ensuing from the victim's murder.⁴ Victim impact testimony in this form, in effect, begs the jury to impose a death sentence for the defendant as the witnesses describe the terrible loss they and others, including the community, have experienced. There is, however, the possibility that either or both types of victims will take advantage of this right to testify for a purpose other than to encourage the jury to sentence the defendant to death. A jury might interpret this testimony as permission from those most gravely impacted to sentence the defendant to life imprisonment rather than death. A testifying witness of this kind likely intends to bring to the attention of the jury that those most adversely affected by the crime are comfortable with a life sentence and the

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1. VA. CODE ANN. § 19.2-295.3 (Michie 2000) (stating that the victim be permitted to testify, within the bounds of Virginia Code § 19.2-299.1, regarding the impact of the offense upon the victim); see *Beck v. Commonwealth*, 484 S.E.2d 898 (Va. 1997) (holding that non-statutory victim impact testimony is relevant to the jury's sentencing decision in a capital murder case); *Schmitt v. Commonwealth*, 547 S.E.2d 186 (Va. 200[1]) (same); see also *infra* notes 2 and 4.

2. VA. CODE ANN. § 19.2-11.01(B)(iv) (Michie 2000) (defining "victim" in homicide cases as a spouse, parent, sibling or legal guardian of the victim of the homicide).

3. See *supra* note 1.

4. VA. CODE ANN. § 19.2-299.1 (Michie 2000). Section 19.2-299.1 permits a victim to testify as to any economic loss suffered by the victim as a result of the offense, the nature and extent of any physical and psychological injury suffered by the victim as a result of the offense, any change in the victim's personal welfare, lifestyle or familial relationships as a result of the offense, any request for psychological or medical services initiated by the victim or victim's family as a result of the offense, and any other such information related to the impact of the offense upon the victim.
Id.

jury should be comfortable imposing such a sentence. Victim impact statements of this nature can be considered "reverse" victim impact testimony because while the witness intends to influence the jury, the testimony is the "reverse" of encouraging the imposition of the death penalty. This article will address the recent phenomenon of reverse victim impact statements and how they affect the testifying victim, the Commonwealth, and defense counsel.

A. Case Law Permitting Statutory and Non-Statutory Victim Impact Testimony

Prior to 1991, the United States Supreme Court held that the admission of victim impact testimony at the sentencing phase of a capital murder trial violated the Eighth Amendment to the United States Constitution.⁵ The Supreme Court reversed itself in *Payne v. Tennessee*⁶ and held that "victim impact testimony is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, thus, victim impact evidence serves entirely legitimate purposes . . . and is not per se barred by the Eighth Amendment."⁷ As a result of the *Payne* decision, individuals deemed statutory and non-statutory victims have the right to testify at the penalty phase of a Virginia capital murder trial regarding the impact of the victim's murder on their lives.⁸

Victim impact testimony and its content have been the basis of appeal for many defendants.⁹ Defendants typically challenge this testimony as impermissible (either in receipt or use by the court), as irrelevant, and sometimes as unconstitutional. The Supreme Court of Virginia in *Beck v. Commonwealth*¹⁰ considered whether the trial court erred in admitting victim impact evidence from persons other than family members of the victim and "recommendations" concerning the imposition of the death penalty from the victim's friends and family members.¹¹ The defendant also attacked the admission of victim impact testimony on the

5. *Booth v. Maryland*, 482 U.S. 496, 509 (1987) (holding that the introduction of a victim impact statement at the sentencing phase of a capital murder trial violates the Eighth Amendment), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

6. 501 U.S. 808 (1991).

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

8. VA. CODE ANN. § 19.2-264.4(A1) (Michie 2000) (requiring the court to accept victim impact statements subject to the limitations set forth in § 19.2-299.1); *see also* VA. CODE ANN. § 19.2-299.1 (Michie 2000); *see supra* note 4 and accompanying text.

9. *See generally Weeks v. Commonwealth*, 450 S.E.2d 379 (Va. 1994) (rejecting defendant's argument that the trial court erred in admitting "victim impact evidence" because it is not relevant to the jury's sentencing decision in a capital murder case); *Beck v. Commonwealth*, 484 S.E.2d 898, 898 (Va. 1997) (holding that non-statutory victim impact testimony regarding the good character traits of the victim is relevant to the jury's sentencing decision in a capital murder case); *Schmitt v. Commonwealth*, 547 S.E.2d 186, 186 (Va. 200[1]) (same).

10. 484 S.E.2d 898 (Va. 1997).

11. *Beck v. Commonwealth*, 484 S.E.2d 898, 900 (Va. 1997) (holding that non-family victim impact evidence was admissible during sentencing phase and was not overly prejudicial).

ground that admission of testimony from witnesses other than the victim's immediate family members violated the Eighth Amendment.¹² The court held that Beck's constitutional challenge was without merit and that the admissibility of this testimony should be determined according to its relevance.¹³ Basing such a decision on relevance means that the court will determine the admissibility on a case by case basis. To assess admissibility of victim impact testimony under a relevance standard, the court reviewed the materials to be presented to the jury and also analyzed the relationship between the victim and the witness.¹⁴ Factors the court considered when analyzing the relationship of the witness with the victim included: (1) the length of time they knew one another; (2) how often they saw one another; and (3) how they were related.¹⁵ Among the documents reviewed by the court were letters from family members, co-workers and friends of the victim, some of which included the author's opinions regarding how the defendant should be sentenced.¹⁶ The court held that this testimony was beneficial and relevant to the determination of an individualized sentence and decided that the prejudicial effect of such testimony did not outweigh its probative value.¹⁷ Thus, the admission of victim impact testimony does not violate the Eighth Amendment.¹⁸ After *Beck*, it appears that victim impact testimony from the victim's friends and co-workers is given equal weight as the testimony of the victim's family members and will only be disallowed if the court determines the testimony is more prejudicial than helpful.¹⁹ Most importantly, the *Beck* decision, in conjunction with *Weeks v Commonwealth*,²⁰ permits non-statutory victim impact testimony to the extent the testimony addresses only the good character traits of the victim.²¹

Several years later in *Schmitt v Commonwealth*,²² the defendant challenged the holding of *Beck*, alleging that the testimony *Beck* permitted was irrelevant and, consequently, inadmissible.²³ The defendant in *Schmitt* killed a bank security

12. *Id.* at 903-04.

13. *Id.* at 904.

14. *Id.* at 903.

15. *Id.*

16. *Beck*, 484 S.E.2d at 903.

17. *Id.* at 904.

18. *Id.*

19. *Id.* at 900.

20. 450 S.E.2d 379 (Va. 1994).

21. See *Weeks v. Commonwealth*, 450 S.E.2d 379, 379 (Va. 1994); *Beck*, 848 S.E.2d at 904 (permitting non-statutory victim impact testimony regarding the victim's good character traits).

22. 547 S.E.2d 186 (Va. 200[1]).

23. *Schmitt v. Commonwealth*, 547 S.E.2d 186, 192 (Va. 200[1]) (holding that non-statutory victim impact testimony regarding the good character traits of the victim is relevant to the jury's sentencing decision in a capital murder case).

guard during a robbery and received the death penalty.²⁴ During the penalty phase of the trial, the victim's family and friends testified regarding the impact of the murder on their lives.²⁵ The content of this testimony included information such as the victim's service in the United States Army, honors and commendations received during this service, and the relationship he had with his fiancé, children and co-workers.²⁶ The victim's co-workers testified to the victim's thoughtfulness and generosity despite only knowing the victim the few weeks he had been employed at the bank.²⁷ Schmitt challenged this testimony as irrelevant to the jury's sentencing decision but the court found no reason to modify its previously expressed view, and, consequently, rejected Schmitt's argument, holding that all of the testimony was relevant and beneficial to the determination of Schmitt's sentence.²⁸

While Virginia courts have held that the content of victim impact testimony is relevant to the life/death sentencing determination, the relevance is difficult to identify. The testimony cannot bear upon the defendant's propensity to commit additional crimes (future dangerousness); nor can it describe the way in which the instant offense was committed (vileness).²⁹ Moreover, the Virginia cases allow a witness to testify as to the positive character traits of a victim but not the victim's negative character traits.³⁰ The theory is that testimony of positive character traits adequately equips the jury with information necessary to make a sentencing determination. But, because the jury is only made aware of the good things, and never the bad, they are deprived of factors essential to a reliable sentence. The conflict created by the holding in *Lenz v Commonwealth* is one of the reasons reverse victim impact testimony plays such an important role in capital sentencing hearings.³¹ Perhaps the inconsistency inherent in the court's ruling can begin to be cured by allowing reverse impact testimony before the jury.

24. *Id.* at 191.

25. *Id.* at 193.

26. *Id.*

27. *Id.*

28. *Schmitt*, 547 S.E.2d at 194; *see also Weeks v. Commonwealth*, 450 S.E.2d 379, 390 (Va. 1994) (rejecting defendant's argument that the trial court erred in admitting "victim impact evidence" because it is not relevant to the jury's sentencing decision in a capital murder case).

29. *See VA. CODE ANN. § 19.2-264.2* (Michie 2000) (requiring the jury to find, before sentencing the defendant to death, that the defendant poses a future danger to society or that the acts were vile). For additional analysis of this issue, see Matthew L. Engle, *Due Process Limitations on Victim Impact Evidence*, 13 CAP. DEF. J. 55, 63 (2000) (discussing the irrelevance of victim impact evidence to aggravating circumstances in the Virginia capital sentencing scheme).

30. *Lenz v. Commonwealth*, 544 S.E.2d 299, 307 (Va. 2001) (holding that the victim's criminal history was not relevant to, nor had any bearing on the defendant's character, prior record or the circumstances of the defendant's offense); *Remington v. Commonwealth*, 551 S.E.2d 620, 635 (Va. 2001) (same). For a more detailed discussion of these issues, see Mythri A. Jayaraman, Case Note, 14 CAP. DEF. J. 151 (2001) (analyzing *Lenz v. Commonwealth*, 544 S.E.2d 299, 307 (Va. 2001) and *Remington v. Commonwealth*, 551 S.E.2d 620, 635 (Va. 2001)).

31. *Lenz*, 544 S.E.2d at 307.

A witness's testimony essentially asking the jury to spare the defendant's life may not fully inform the jury about the victim's negative character traits, but such testimony does allow the jury to hear from an injured party that has found reason to spare the defendant's life. If victim testimony cannot cure the inconsistency, it can at least dress the wound inflicted by allowing only positive victim character traits to be presented to the jury.

B. Commonwealth v. Thomas

Victim impact testimony took an interesting turn in 2000 in the capital murder trial of Jeffrey Allen Thomas ("Thomas") in Pulaski County, Virginia. Tara Rose Munsey disappeared from the Fairlawn Taco Bell, where she worked, on January 25, 2000.³² A passerby discovered the sixteen-year-old's body several weeks later in a remote part of Pulaski County; she had been sexually assaulted and shot four times—once in the chest and three times in the head.³³ One week after Munsey's disappearance, the police arrested Thomas and eventually charged him with capital murder, rape or attempted rape, and use of a firearm in the commission of a felony³⁴ after his DNA was matched to biological evidence found on Munsey and on items found at the scene.³⁵ Thomas's trial commenced February 26, 2001,³⁶ and on March 9, 2001, after eight days of testimony, the jury convicted him of capital murder, attempted rape and a firearms charge.³⁷ The jury recommended a sentence of three years for the firearms charge, ten years for the attempted rape and death for the murder, based on the brutality involved.³⁸

The prosecution called first during the guilt phase of the trial Katherine ("Kitty") Irwin, the victim's mother, to tell jurors of how she came to realize that something had gone terribly wrong on January 25, 2000.³⁹ The same Kitty Irwin that described the desperate, sinking feeling in her stomach when she found Tara's car at the Taco Bell would soon shock the small community by pleading for the life of her daughter's killer.⁴⁰

32. Rex Bowman, *Trial Begins in Death of Radford Teenager*, RICH. TIMES-DISPATCH, Feb. 27, 2001, at B2.

33. *Id.*

34. Shay Wessol, *Jurors Hear of Munsey's Last Hours Among Friends*, ROANOKE TIMES, Mar. 10, 2001, at A1.

35. Bowman, *supra* note 32.

36. *Id.*

37. Wessol, *supra* note 34.

38. *Id.*

39. Bowman, *supra* note 32.

40. *Id.*

II. *Who is Kitty Irwin?*

When Kitty awoke on the morning of January 25, 2000, she had no idea that she would never again see her daughter alive. She certainly did not know that she would have the opportunity to positively impact one defendant's life and the capital punishment scheme by asking the jury to forgive Thomas as Kitty had forgiven him. It is important to remember, however, that most testifying victims are not permitted to plead for a particular sentence. The law in Virginia is very clear regarding what information may be included in a victim impact statement and does not allow a plea for the jury to impose a life or death sentence.⁴¹ Victim impact statements which contain requests for life or death do, however, apparently reach the jury. Under these circumstances, testifying victims can include a life or death plea in their victim impact statement.

Kitty's testimony serves as an example for those impacted by capital crimes as she empowers other similarly minded persons to follow her lead and advocate life sentences rather than death. If enough victims testify as Kitty did, juries may be more comfortable recommending life sentences and possibly making "death row" a thing of the past. Her unawareness of the importance and impact of her public opposition to the death penalty makes this story fascinating. In a telephone interview, Kitty revealed her views on the death penalty, the influences on these views and how her views changed after her daughter's murder.

A. *Kitty Irwin's Views on the Death Penalty*

Kitty Irwin never gave much consideration about her views on the death penalty, likely because, as is true for most individuals, this issue did not have much impact on Kitty's personal life.⁴² She said she leaned in favor of the death penalty and only became more aware of her feelings after her daughter was murdered.⁴³ Most individuals teetering on the edge of supporting capital punishment would likely be influenced in its favor if a loved one, especially their child, had been murdered and the killer was facing the death penalty. For some reason, Tara's death had the opposite impact on Kitty's views.⁴⁴ As Kitty became more aware of her feelings toward the death penalty, she was faced with the reality that not only had her daughter been murdered but that her daughter's killer could potentially lose his life for the crime.⁴⁵ Her awareness of this reality forced her to examine closely the intended and actual effects of the death penalty as it is imposed.⁴⁶

41. See VA. CODE ANN. § 19.2-299.1 (Michie 2000).

42. Telephone Interview with Kitty Irwin, Mother of murder victim (Oct. 22, 2001).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

Upon serious consideration of her own feelings about the death penalty, Kitty concluded that it is nonsensical to kill a person in order to punish him or her for killing someone else.⁴⁷ She found, and continues to believe, this to be faulty logic.⁴⁸ Kitty had difficulty grasping the concept of this so called punishment and could not understand its purpose.⁴⁹ She does not believe it is helpful to the victim's family if the defendant is sentenced to death because it does not bring the victim back.⁵⁰ "How can the death penalty have any positive repercussions," she asked, "since another family will suffer the same incredible pain that the victim's family experienced."⁵¹ One bad act, according to Kitty, does not mean that the defendant is wholly bad.⁵² The Commonwealth characterizes the defendant as a monster so that the jury can justify a death sentence.⁵³ It hurts Kitty to know that the justice system knowingly inflicts pain on another family.⁵⁴

Kitty understands one of the policy reasons for capital punishment is that the death penalty should serve as a deterrent for future crimes.⁵⁵ She does not believe this to be a valid purpose because the party to be ultimately deterred would be dead and unable to learn from his mistakes.⁵⁶ The rationale behind Kitty's views conveys her criticism of capital punishment in the most simple example: if a child hits another does the parent punish the child by hitting the child or is a more appropriate punishment employed to teach the child why his actions were unacceptable?⁵⁷

Tara's death was not the only influence on Kitty's ultimate position regarding the death penalty.⁵⁸ While employed at a mental health facility, Kitty witnessed mentally ill individuals committing terrible acts and not remembering these actions within five minutes of their occurrence.⁵⁹ She sees similarities between the mentally ill and capital murder defendants in that she believes there is something inherently wrong in the mind of a person who kills another human being; something that is so wrong that, to her, it rises to the level of a mental illness.⁶⁰ Rather than punishing these individuals with the ultimate penalty of their lives, Kitty continues to advocate assisting these individuals, in prison, so

47. Telephone Interview, Irwin, *supra* note 42.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Telephone Interview, Irwin, *supra* note 42.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Telephone Interview, Irwin, *supra* note 42.

58. *Id.*

59. *Id.*

60. *Id.*

that they can become contributing members of society.⁶¹ Despite insufficient expert evidence that Thomas suffered from a mental disorder at the time of the murder, Kitty firmly believes that he suffers from a mental illness; this makes her unsure that he can be held responsible for his behavior.⁶² Kitty is under the impression that Thomas suffers from a sleep disorder, a symptom of schizophrenia, seven cases of which can be traced in Thomas's biological family.⁶³ Kitty wishes that this disorder had been more thoroughly investigated so that Thomas could receive treatment if he does in fact suffer from such a disorder.⁶⁴

B. Kitty's Decision to Oppose a Death Sentence for Tara's Killer

Although the telephone interview with Kitty was brief, it was apparent that she had carefully considered her reasons for opposing the death penalty. One of Kitty's most interesting conclusions regarding the death penalty is that it is just another form of murder.⁶⁵ Twelve individuals are required to judge the acts of another and decide whether that person lives or dies—is this not the same as a premeditated murder as careful thought is given to kill someone?⁶⁶ Kitty considers a death sentence the equivalent of a premeditated murder because the twelve jury members sitting in judgment of a capital defendant give great thought as to whether the defendant will live or die.⁶⁷ The potential for a remorseful defendant to receive a death sentence is even more disturbing to Kitty.⁶⁸ If a defendant conveys remorse and sorrow regarding his actions to a jury, the death penalty can still be imposed.⁶⁹ Defendants may not show remorse if they are eligible for the death penalty because they might feel that they have a greater chance of receiving a life sentence if they refrain from talking.⁷⁰ The fear of dying has the potential to keep defendants from showing emotion and from divulging the complete facts to their attorneys and the victim's family.⁷¹

Related to the problem of permitting twelve individuals to sit in judgment of another is the impact of that duty on the individuals faced with the decision.⁷² Most often, according to Kitty, revenge is the driving force behind a decision to sentence a defendant to death.⁷³ In Kitty's eyes vengeance does not have any

61. *Id.*

62. Telephone Interview, Irwin, *supra* note 42.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Telephone Interview, Irwin, *supra* note 42.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Telephone Interview, Irwin, *supra* note 42.

73. *Id.*

positive impact on the community because death sentences do not promote respect and value for human life.⁷⁴ Kitty firmly believes that defendants sentenced to life in prison can give something back to their communities as they learn from the mistakes that deprived them of their liberty.⁷⁵ For example, if a defendant has minor children, life in prison allows him to work in prison and provide some financial support for his family so that the community does not suffer another loss.⁷⁶ Furthermore, a defendant in this situation can still be a parental figure in the child's life. Kitty also emphasized on several occasions the importance of giving the defendant an opportunity to do something positive with his life.⁷⁷ Finally, Kitty believes that if defendants do not face the possibility of a death sentence, victims' families and friends will have a greater chance for complete closure regarding the circumstances of their loved ones' deaths.⁷⁸ The defendant might be more inclined to speak honestly and candidly about the crime to attorneys and family members if the greatest punishment faced were life in prison without the chance of parole.⁷⁹

III. Impact of Kitty Irwin's Views on Players in the System

Family and friends of a capital murder victim typically seek revenge on the person responsible for the death by recommending a death sentence. Encountering family and friends who speak words of forgiveness rather than vengeance is uncommon. Even the most ardent opponents of the death penalty cannot be sure how those views might change if someone they knew or loved was the victim of a capital crime. It is remarkable that Kitty Irwin arrived at her decision to oppose the death penalty after consulting her conscience rather than solely relying on her emotions. Most statutory victims would not be able to invoke conscience and rationality at a time rife with emotion and would allow emotion to take over and seek revenge on the person responsible for such devastation.⁸⁰ While Kitty's staunch opposition to a death sentence for Thomas was shocking to the community, it was probably most shocking to the judge, the prosecution and defense counsel.⁸¹ All of these individuals had to re-evaluate trial strategy as they were faced with this new and different victim witness.⁸²

74. *Id.*

75. *Id.*

76. *Id.*

77. Telephone Interview, Irwin, *supra* note 42.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Telephone Interview, Irwin, *supra* note 42.

A. Kitty's Perception of the Commonwealth's Reaction

Kitty did not know how her victim impact statement would be received by the Commonwealth.⁸³ Her decision to take advantage of her right to give a victim impact statement did not seem well received by the Commonwealth's Attorney, Mike Fleenor ("Fleenor"), when Kitty informed him of the statement's content.⁸⁴ Kitty's statement had the potential to drive a wedge between the Commonwealth and the family and friends of Tara Munsey as Kitty asserted a position contrary to that of the Commonwealth. To Kitty, this meant seeking defense counsel as an ally to support her testimony because she could provide testimony favorable to Thomas's case.⁸⁵

Kitty believed that the driving force behind the Commonwealth seeking a death sentence was political.⁸⁶ Because Tara's murder outraged the community, it fully supported the Commonwealth's decision to seek the death penalty for Thomas.⁸⁷ Kitty understands that the Commonwealth has a responsibility to the community but she believes that this factor was far too influential in much of the decision making throughout the trial.⁸⁸ She believed that the Commonwealth's apprehension about the victim impact statement was a result of its concern for how it would impact the office professionally, and not because it truly thought that Thomas deserved to die as punishment for his actions.⁸⁹ She based her opinions of the Commonwealth's motives on her own perceptions of events as well as the murmurings that are inevitable in a small community.⁹⁰ Not only had Kitty become aware of the Commonwealth's displeasure with her intended victim impact statement, but she heard the town gossip that the Judge and the elected officials involved—the Commonwealth's Attorney and the sheriff—favored a death sentence because of their status as elected officials.⁹¹ Kitty began thinking that these individuals listened more to the community than to her.⁹² She did not let the feeling of being ignored discourage her; in fact, it encouraged her to press on.

The idea of Thomas being sentenced to death because a public official believed such a sentence would enhance his career had a great impact on Kitty as she realized how inhumane the process is.⁹³ Kitty was particularly appalled that the next local government election determined the appropriate value of life.⁹⁴

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Telephone Interview, Irwin, *supra* note 42.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Telephone Interview, Irwin, *supra* note 42.

93. *Id.*

94. *Id.*

A conversation with the Commonwealth's Attorneys regarding their responsibility in prosecuting Thomas helped form the basis of Kitty's opinion that the Commonwealth's Attorneys exist as purely political entities. The Commonwealth told Kitty that its responsibility was merely to inform the jury of the facts and not to be responsible for the decision that the jury would make.⁹⁵ Of course, Kitty was troubled as she did not understand how a prosecutor could simply absolve himself of all liability for the jury's verdict and hold the jury fully responsible.⁹⁶ It was apparent that Kitty believed the prosecutor should have some accountability for a verdict, regardless of whether it was a life or death sentence, because the Commonwealth dictated the manner in which the trial proceeded.⁹⁷ Perhaps placing all responsibility on the jury enabled the Commonwealth to try the case to the satisfaction of the community and not consider Kitty's concerns about the death penalty. Her concern about the Commonwealth's lack of recognition in its responsibility for the verdict and sentence harkens back to Kitty's initial concern about members of a community being forced to decide whether a defendant lives or dies.⁹⁸

The situation was especially interesting from the perspective of the Commonwealth because Fleenor, the newly elected Attorney for the Commonwealth, had assumed his position only three weeks prior to the discovery of Tara Munsey's body.⁹⁹ The newness of the job likely added to the stress of prosecuting a capital murder and seeking the death penalty against the wishes of the victim's mother. Further, Fleenor had never before encountered a victim witness opposed to the death penalty and prepared to testify against a death sentence for the defendant.¹⁰⁰ Fleenor believed that it was of the utmost importance for the jury to hear all sides, including Kitty's impact statement, so that a fully informed, reliable verdict and sentence would be reached.¹⁰¹ To ensure the reliability of the trial, the Commonwealth believed that not only should the jury be fully informed, but that Kitty should also be fully prepared for what she would hear and see at trial.¹⁰² Kitty met with the Commonwealth several times so that she could review the evidence.¹⁰³ During one of these meetings, she informed Fleenor of her intention to take advantage of her right to make a victim impact statement and

95. *Id.*

96. *Id.*

97. Telephone Interview, Irwin, *supra* note 42.

98. *Id.*

99. Telephone Interview with Mike Fleenor, Franklin County Commonwealth's Attorney (Dec. 3, 2001).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

that her testimony would include her position against sentencing Thomas to death.¹⁰⁴

Despite the potential for Kitty's testimony to influence the jury to sentence Thomas to life, Fleenor thought it best to have Tara's parents present in the courtroom during trial.¹⁰⁵ He successfully argued against the defendant's motion to bar Tara's parents from the proceedings.¹⁰⁶ Fleenor must have believed this particular instance of victim advocacy signaled his continued alliance with all of Tara's family because he did not feel that the difference of opinion regarding the death penalty put the Commonwealth at odds with Kitty.¹⁰⁷ Moreover, Fleenor could have successfully objected to Kitty's plea for Thomas's life because a victim is permitted to make a statement concerning only the impact of the murder on her life.¹⁰⁸ While Kitty's testimony did impact the trial, the Commonwealth did not feel its strategy was affected.¹⁰⁹ Fleenor was unequivocal in his belief that his position was not tempered by Kitty's position and testimony.¹¹⁰ In the prosecution's closing statement Fleenor never asked the jury to sentence the defendant to death because he understood and respected the responsibility of the jury to decide Thomas's fate.¹¹¹ The fact that Fleenor did not object to the content of Kitty's statement lends real credence to his position that the jury is the ultimate decision maker in sentencing.

Jury selection was the key factor in ensuring that the verdict reached was reliable.¹¹² One hundred forty-one potential jurors out of 150 responded to the juror questionnaire mailed and were then questioned in groups of three.¹¹³ Perhaps the rigorous selection method the potential jurors endured impacted the Commonwealth's decision not to appear to the jury as agreeing with Kitty's testimony. Thus, the Commonwealth would appear neutral, truly allowing the jury the sole responsibility of determining sentence. Fleenor said the intense ordeal of questioning which produced the jury led him to have an immense amount of faith in the decision it would reach.¹¹⁴ The jury took its job so seriously that Fleenor did not presume to decide for it; thus, his only choice was to let the jury decide for itself.¹¹⁵ Fleenor viewed himself as a mere messenger—his

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104. Telephone Interview, Irwin, *supra* note 42.
 105. Telephone Interview, Fleenor, *supra* note 99.
 106. *Id.*
 107. *Id.*
 108. See VA. CODE ANN. § 19.2-299.1 (Michie 2000).
 109. Telephone Interview, Fleenor, *supra* note 99.
 110. *Id.*
 111. *Id.*
 112. *Id.*
 113. *Id.*
 114. Telephone Interview, Fleenor, *supra* note 99.
 115. *Id.*

duty was to deliver the facts and the jury was to form its own interpretation.¹¹⁶

Kitty did not share Fleenor's satisfaction with the jury selected because from her perspective, the jury ignored her victim impact statement.¹¹⁷ Despite her plea that Thomas be sentenced to life in prison, the jury handed down a death sentence.¹¹⁸ Fleenor believed that the jury was in fact sympathetic to Kitty's testimony, even though it did not follow her recommendation.¹¹⁹ He even speculated that formal sentencing might have been very different if the jury had been denied access to Kitty's testimony because the Judge said he was comfortable upholding the jury's recommendation of death because the jury had access to Kitty's input.¹²⁰ Kitty was most upset that the jury seemed to ignore her testimony completely, particularly because she believed that this total disregard contributed to the unfairness of the trial.¹²¹

The Commonwealth suspected that Kitty was pleased and satisfied with the guilty verdict but dissatisfied with the death sentence.¹²² Kitty did in fact feel a bittersweet victory. Kitty's public opposition to the death penalty, especially in Thomas's case, did not mean she believed Thomas should go unpunished.¹²³ In fact, Kitty opposed the change of venue that the defense sought because she was afraid that Thomas could go free if the trial was not in Pulaski County.¹²⁴ She

116. *Id.*

117. Telephone Interview, Irwin, *supra* note 42.

118. *Id.*

119. Telephone Interview, Fleenor, *supra* note 99.

120. *Id.*

121. Telephone Interview, Irwin, *supra* note 42.

122. Telephone Interview, Fleenor, *supra* note 99.

123. Telephone Interview, Irwin, *supra* note 42.

124. *Id.* The Supreme Court of Virginia recently vacated the conviction of Jeffrey Thomas and remanded the case for further proceedings. *Thomas v. Commonwealth*, 559 S.E.2d 652 (Va. 2002). The Court based its decision on the fact that the trial court erred in ultimately denying Thomas's motion for change of venue. *Id.* at 661. The defendant offered evidence of a barrage of publicity in print and television media. *Id.* at 659. Ninety-five percent of potential jurors and all of those seated were aware of the publicity and the nature of the case. *Id.* Despite the overwhelming number of potential jurors who were influenced by the publicity, the court would not grant the defendant's motion for a change of venue because it believed that an impartial jury could be seated. *Id.* An individual juror was removed from the venire once the trial court became aware that the potential juror lied about his impartiality and intended to find Thomas guilty and sentence him to death. *Id.* Upon knowledge of this fact, the defense, again, moved for a change of venue, which was once again denied. *Id.* The Supreme Court of Virginia did not hold that the trial court erred in engaging in voir dire proceedings but that the final decision to deny the change of venue motion, based on the trial court's finding that an impartial jury had been seated, was founded upon an improper test. *Id.* at 661. The relevant factor in determining whether a change of venue is required is the ease in which the jury is seated, not whether an impartial jury was actually seated. *Id.* The trial court should have considered the influence of the extensive publicity on the jury pool and on each individual's impartiality. *Id.* A finding of impartiality does not make it reasonably certain that the defendant will get a fair trial. *Id.* Under these circumstances, according to the Supreme Court of Virginia, a change of venue is necessary. *Id.* For a more detailed discussion of this issue, see

was very much in favor of a plea bargain for life in prison without the possibility of parole rather than a trial in which the Commonwealth pursued the death penalty.¹²⁵ Kitty feels even more strongly about the importance of a life plea now that there is a possibility that Thomas's death sentence could be overturned on appeal.¹²⁶ Kitty believes that there is the potential that the trial produced some form of reversible error that would not exist if the Commonwealth's Attorneys had offered Thomas a life plea.¹²⁷ In addition to ensuring that Thomas would pay for his actions, Kitty also believed that offering a life sentence would have saved the community the time of the trial and now the appeal, both of which are very expensive.¹²⁸ Kitty was a bit apprehensive about the possibility of working with the defense because, as the mother of the murder victim, she was supposed to be allied with the Commonwealth, particularly with respect to a victim impact statement.¹²⁹ Because she had strayed from the safety of the Commonwealth after deviating from its plan, Kitty really did not think she would have much, if any, support for her testimony from either side.¹³⁰ Prior to sentencing, Kitty was able to work with the defense team, Mike Barbour ("Barbour") and Brian Scheid.¹³¹ She remembers meeting on a Thursday afternoon, the day before sentencing, with the Commonwealth and the defense to discuss her statement, and being told by the Commonwealth that she would not be permitted to testify.¹³² Rather than discussing why the Commonwealth did not want Kitty to exercise her right to make a victim impact statement, the possibility of offering Thomas life without the possibility of parole consumed the conversation.¹³³ Kitty would have been more than willing to agree to this, however, Fleenor and the Assistant Commonwealth's Attorney decided that it was not fair to put such a burden on Kitty.¹³⁴ Kitty does not believe that fairness or justice had any bearing on this decision because the Commonwealth's Attorney said, as an elected official, he could not allow her to take the decision from the jury.¹³⁵ Kitty's feelings that politics were to blame for the course of the trial and for why

Cynthia M. Bruce, Case Note, 14 CAP. DEF. J. 395 (2002) (analyzing *Thomas v. Commonwealth*, 559 S.E.2d 652 (Va. 2002)).

125. Telephone Interview, Irwin, *supra* note 42.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Telephone Interview, Irwin, *supra* note 42.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Telephone Interview, Irwin, *supra* note 42.

her desires were not afforded proper respect were solidified during this particular meeting.¹³⁶

B. Perceived Reaction of Defense

Thomas's defense team gave Kitty's testimony proper respect during the sentencing phase. After Kitty testified, the defense rested and stated that her testimony left nothing unsaid.¹³⁷ Barbour believed it was necessary to give so much weight to Kitty's testimony because the defense believed that Fleenor had attempted to minimize Kitty's feelings.¹³⁸ Fleenor's attempt to minimize Kitty's testimony was particularly evident when he failed to ask Kitty any questions during her testimony, rather, he simply let her speak and then moved on.¹³⁹ The defense also believed that the Commonwealth's closing did all but plainly ask the jury to ignore the testimony of the victim's mother when Tara's death was referred to as a "crime against the community," inferring that there were victims, other than Kitty, who were adversely affected by the murder.¹⁴⁰

Reverse victim impact testimony was an issue of first impression for the defense team just as it was for the Commonwealth.¹⁴¹ Barbour did not think Kitty's position impacted trial strategy in any way, partly because the defense did not find Kitty to be particularly open about her intended testimony.¹⁴² During two meetings with the defense, Kitty had a friend or family member along with her and was repeatedly cautioned not to talk too much to the defense attorneys.¹⁴³ Barbour thinks that Kitty could have had a more positive impact in the sentencing phase if she had been empowered early on in the process to make her intentions and feelings about the defendant more public.¹⁴⁴ Kitty's caution was likely due to her belief that she would not receive much support from the defense, especially because she sensed that the Commonwealth, who is traditionally the testifying victim's ally, had turned against her.

Barbour cannot be sure of the validity of Kitty's feeling that she was betrayed by the Commonwealth.¹⁴⁵ He sensed that Fleenor was playing "his cards very close to the vest in terms of how strongly he was willing to pursue a death sentence," as well as not being quite so forthcoming with the evidence during

136. *Id.*

137. Telephone Interview, Fleenor, *supra* note 99.

138. Telephone Interview with Mike Barbour, Defense Counsel for Jeffrey Thomas (Nov. 30, 2001).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Telephone Interview, Barbour, *supra* note 138.

144. *Id.*

145. *Id.*

meetings with Tara's parents.¹⁴⁶ Barbour's opinions regarding the Commonwealth's tactics led him to conclude that Kitty believed the Commonwealth gave greater weight to her feelings than it actually did but that the Commonwealth had to go through the motions of supporting Kitty's position to have the benefit of the victim's mother in the courtroom during trial.¹⁴⁷ Barbour defended Fleenor's actions during sentencing because he believed that "the Commonwealth felt its hands were tied once the guilty verdict was handed down."¹⁴⁸ Feeling as if its hands were tied likely made it more difficult for the Commonwealth to give as much consideration to Kitty's feelings as she would have preferred.

Barbour and Kitty had directly opposing views regarding the impact of a change of venue.¹⁴⁹ Kitty, as previously stated, thought there was a greater chance of a not guilty verdict if the trial had taken place elsewhere.¹⁵⁰ Barbour adopted the view that another venue would have warranted less publicity, allowing the jury to give greater weight to Kitty's testimony.¹⁵¹ Both of these opinions, while purely speculative, should definitely be considered in future high profile cases where there is a "defense friendly" victim impact statement.

IV. Other Victims' Stories

Other victims have spoken out against a death sentence for their loved ones' killers and have continued their public opposition of capital punishment through their involvement in anti-death penalty organizations. Each victim's story results from drastically different circumstances, but there is the commonality of forgiveness to each story's ending. In each case, they communicated their feelings of forgiveness and opposition to a death sentence for the defendant in order to encourage a jury to sentence the defendant to life in prison. Just as Kitty Irwin's testimony did not result in a life sentence for Thomas, not all of the other victims were successful in their plight. A life sentence, however, does not necessarily evidence the success of the victim impact statement. The implications for use of reverse victim impact testimony in future trials are shaped with each victim that makes a statement for the defendant's benefit. Three victims especially active in opposing capital punishment tell their stories through the Murder Victims' Families For Reconciliation ("MVFR") organization.

A. Maria Hines

Maria Hines's brother, Jerry Hines, was a Virginia state trooper killed while conducting a routine traffic stop in 1989.¹⁵² The police arrested and charged

146. *Id.*

147. *Id.*

148. Telephone Interview, Barbour, *supra* note 138.

149. *Id.*

150. Telephone Interview, Irwin, *supra* note 42.

151. Telephone Interview, Barbour, *supra* note 138.

152. Maria Hines, *This Started in Tragedy and is Ending in Tragedy*, at <http://www.mvfr.org/>

Dennis Eaton with the murder as well as the murders of three others killed on this same crime spree.¹⁵³ Mr. Eaton received three life sentences for killing the other three individuals and the death penalty for killing Trooper Hines.¹⁵⁴ The death sentence forced Maria Hines to examine her beliefs about the death penalty carefully.¹⁵⁵ Like Kitty Irwin, Maria Hines was continually faced with the fact that putting Mr. Eaton to death would force another family to suffer the same loss the Hines family had.¹⁵⁶ Maria reached what she believed to be the only logical conclusion—killing another human being is wrong even when it is done in the name of justice, and even when that human being was responsible for her brother's murder.¹⁵⁷ A staunch believer in stating beliefs publicly, Maria knew she should go public about her feelings on the death penalty but she agonized over her decision for two years before saying anything.¹⁵⁸ She began attending meetings and working for the Kentucky Coalition to Abolish the Death Penalty so that she could feel she was acting on her beliefs and decide what to do about Dennis Eaton when the time of his execution arrived.¹⁵⁹ Her work with this organization found Maria telling her story at death penalty rallies and to other groups and organizations.¹⁶⁰ Through these speaking engagements Maria realized that she had forgiven Dennis and needed to let him know.¹⁶¹ Maria established a friendship with Dennis Eaton and eventually requested clemency for him but the Governor denied her petition.¹⁶² Maria is grateful for her opportunity to forgive Dennis Eaton and express her condolences to his family at his execution.¹⁶³ She believes that forgiveness is the key to abolishing the death penalty in this country but that there is such a great feeling of vengeance when someone wrongs us that our first instinct is to do the same thing back.¹⁶⁴ Many of Maria's family members were consumed with vengeance towards Dennis Eaton and she knows that they will never experience any closure to the tragedy because vengeance and closure cannot coexist.¹⁶⁵ According to Maria Hines,

homepage.html (last visited Nov. 15, 2001).

153. *Id*

154. *Id*

155. *Id*

156. *Id*

157. Hines, *supra* note 152.

158. *Id*

159. *Id*

160. *Id*

161. *Id*

162. Hines, *supra* note 152.

163. *Id*

164. *Id*

165. *Id*

feelings of vengeance exist because a person harbors anger towards another and the grieving cannot end.¹⁶⁶

Maria Hines did not express her views on the death penalty at Dennis Eaton's trial. She did try to influence the decision post-sentence through her activities in anti-death penalty organizations and her personal relationship with Mr. Eaton. Her story is a perfect example of how a victim can have an impact in the system even when the defendant is sentenced to death.

B. Bud Welch

Bud Welch is probably the proudest father any one could ever meet. His daughter, Julie Marie, was his best friend and the smartest, most beautiful person he knew—they did everything together.¹⁶⁷ Julie Marie Welch worked on the first floor of the Murrah Federal Building in Oklahoma City and was killed in the bombing on Wednesday, April 19, 1995.¹⁶⁸ Bud Welch was filled with the typical emotions one experiences when a loved one is murdered—rage, revenge and hate.¹⁶⁹ When he found out that Julie had died, Bud could not wait for Timothy McVeigh to receive his punishment, preferably the death penalty.¹⁷⁰ As far as Bud was concerned, a trial for McVeigh was unnecessary, a waste of time and he simply should have been killed.¹⁷¹ In fact, Bud Welch states that he would have killed McVeigh himself if there had not been so many precautions taken when the police transported McVeigh.¹⁷² The announcement that the government would seek the death penalty for McVeigh comforted Bud Welch and he believed that the death penalty would be the “big fix” for his pain.¹⁷³

Mr. Welch soon realized that killing McVeigh would not help at all with the loss of Julie and decided to speak out against the death penalty.¹⁷⁴ Remembering Julie's opposition to the death penalty, because she believed it only taught people to hate, empowered Bud to plead for life imprisonment as McVeigh's punishment.¹⁷⁵ He is now an active member of MVFR and speaks at various rallies.¹⁷⁶ After one speech at a church several persons in attendance told Bud that his

166. *Id.*

167. Tom Lowenstein, *Against Execution*, at <http://www.mvfr.org/> (last visited Nov. 15, 2001).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Lowenstein, *supra* note 167.

173. *Id.*

174. *Id.*

175. Terri Powers, *Bud Welch Speaks in Charlottesville*, at <http://www.vadp.org/nlfall99.htm> (last visited Nov. 15, 2001).

176. Lowenstein, *supra* note 167.

story had caused them to rethink their position on the death penalty or that they would never support the death penalty again.¹⁷⁷ While Bud's public opposition did not save Timothy McVeigh from death row, he did impact lives by telling his story.¹⁷⁸

V. Conclusion

A. Importance of Facilitating Relationships with Victim Witnesses that Oppose the Death Penalty

While Kitty's testimony and request to spare Thomas's life did not have the result she desired, and a death sentence was recommended, this should not discourage defense attorneys from facilitating close working relationships with victim's families and friends who oppose the death penalty. If a relationship is cultivated early, there is a greater potential for these individuals to author a victim impact statement that speaks of the value of human life, the need to forgive and the inhumanity of capital punishment. Victims like Kitty Irwin can still impact capital juries because they serve as examples for future victims. Kitty has been contacted by various organizations to speak with other families whose loved one has been murdered by a defendant facing the death penalty.¹⁷⁹ If Kitty's courage in publicly opposing a death sentence for her daughter's killer was contagious there is a distinct possibility that the jury pool would become concentrated with more sympathetic individuals and less vengeful victims.

B. Implication for the Future of Victim Impact Testimony

Victims are permitted to testify only to the factors enumerated in the Virginia Code.¹⁸⁰ This code section does not permit a victim to ask that the jury sentence the defendant to either life or death. A victim impact statement is exactly that—a statement detailing the impact of the murder on the lives of the victim's family and friends. Kitty's statement before the jury was an exception to the general rule that a testifying victim is not allowed to plead for a life or death sentence. The fact that a victim impact statement must be devoid of all requests for sentencing requires that counsel object if the content of a statement violates the statute.¹⁸¹ If the prosecution does not object to the victim impact statement the testifying victim may be permitted to testify before the jury regarding his or her life sentence recommendation.

Even though reverse victim impact testimony is included in the Commonwealth's presentation during the sentencing phase, it can serve as part of the

177. Powers, *supra* note 175.

178. *Id.*

179. Telephone Interview, Irwin, *supra* note 42.

180. See VA. CODE ANN. § 19.2-299.1 (Michie 2000).

181. *Id.*

defendant's case in mitigation. Using reverse victim impact statements is of particular importance in capital cases where the defendant does not wish to put on any mitigation evidence or where there is none available. In situations such as these it is essential to establish a positive rapport with those who will provide victim impact testimony. Regardless of the state of the defense's case in mitigation, a victim willing to provide a victim impact statement favorable to the defense can always be used as a tool in plea negotiations to get the Commonwealth not to seek the death penalty or an outright plea for life without the possibility of parole. Without a positive relationship the testifying victims may be swayed to alter their testimony so that their opposition to the death penalty in general and in the present case is not so apparent.

At some point in the future the impact of hearing stories like Bud's, Maria's and Kitty's will save at least one defendant from the death penalty. They share their stories so that people will be forced to think about their views regarding capital punishment. They would also likely consider their efforts a success if one defendant was sentenced to life in prison because a jury took to heart a testifying victim's forgiveness of the defendant and opposition to the death penalty.