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Eighth Amendment--Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial

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EIGHTH AMENDMENT—PROSECUTORIAL COMMENT REGARDING THE VICTIM'S PERSONAL QUALITIES SHOULD NOT BE PERMITTED AT THE SENTENCING PHASE OF A CAPITAL TRIAL

South Carolina v. Gathers, 109 S. Ct. 2207 (1989).

I. INTRODUCTION

In *South Carolina v. Gathers*,[1] the United States Supreme Court held that the eighth amendment[2] prohibits prosecutorial commentary concerning the victim's personal qualities at the sentencing phase of a capital case.[3] This Note explores the *Gathers* opinions and concludes that the Court correctly held that the prosecutor's comments concerning the victim's personal qualities could not have been relevant to the "circumstances of the crime" and should have been barred from the sentencing proceeding.[4] This Note further considers the weaknesses of the dissenters' arguments and concludes that the dissenters' arguments are largely unfounded and represent superficial arguments for the admissibility of commentary or evidence regarding the victim's personal qualities at the sentencing phase of a capital trial.

II. FACTUAL BACKGROUND

On a Saturday evening in September of 1986, Demetrius Gathers and three companions approached a park bench where Richard Haynes, a stranger to them, sat.[5] After Haynes refused to converse with Gathers, Gathers and two of his companions brutally beat him.[6] As Haynes lay unconscious on the ground, Gathers and the other

1 109 S. Ct. 2207 (1989).
2 For text of the eighth amendment, *see infra* note 42.
3 *Gathers*, 109 S. Ct. at 2210-11.
4 *Id.*
5 *Id.* at 2208.
6 *Id.*

assailants rummaged through Haynes' belongings, apparently looking for something worth stealing.[7] The perpetrators scattered on the ground the contents of Haynes' wallet and bags which Haynes was carrying with him on that night, as he usually did.[8] These bags contained several articles of religious significance, including two Bibles, rosary beads, plastic statues, olive oil, and religious tracts.[9] Of particular significance were a religious tract entitled the "Game Guy's Prayer"[10] and Haynes' voter registration card.

Before leaving the scene, Gathers beat Haynes with an umbrella and then forced the umbrella up Haynes' anus.[11] Gathers returned to the park sometime later and stabbed Haynes to death with a knife.[12]

The victim, Richard Haynes, was in his early thirties and unemployed.[13] For about two years prior to his death, Richard Haynes had been experiencing some mental problems, which necessitated his checking into a mental hospital on three occasions.[14] Haynes considered himself a "Reverend Minister," even though he had no formal religious training, and he would discuss his religious views with anyone who would listen.[15]

III. Prior Proceedings

Demetrius Gathers was tried in the Court of General Sessions for Charleston County, South Carolina.[16] The jury found Gathers guilty of murder and first-degree criminal sexual assault.[17] During the guilt phase, the objects found scattered around Haynes' body[18] were, for the most part without objection,[19] admitted into evidence during the testimony of Charleston police officer Anthony Hazel.[20] However, there was no mention during the guilt phase of the con-

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7 *Id.* at 2209.

8 *Id.* at 2210.

9 *Id.* at 2209.

10 *Id.* The "Game Guy's Prayer" is a religious tract which relied on football and boxing metaphors, and extolled the virtues of the "good sport." *Id.* For the full text of this prayer, *see infra* note 25.

11 *Gathers*, 109 S. Ct. at 2208.

12 *Id.*

13 *Id.* at 2208.

14 *Id.*

15 *Id.* at 2208-09.

16 *Id.* at 2209.

17 *Id.*

18 These objects included the religious tract and Haynes' voter registration card. *Id.* at 2209.

19 *Id.* at 2209.

20 *Id.* at 2209 n.**.

tents of the papers found scattered around Haynes' body, including the religious tract and the voter registration card.[21]

At the sentencing phase of the trial, all of the testimony and exhibits were re-admitted into evidence.[22] The state presented no additional evidence at the sentencing phase.[23] The source of the present controversy arises from the prosecutor's closing argument at the sentencing proceeding.[24] During his closing argument, the prosecutor focused on the victim's personal qualities. Pointing out that the religious tract was previously admitted into evidence, the prosecutor proceeded to read the prayer entitled the "Game Guy's Prayer," which was written on the tract.[25] After reading the prayer, the prosecutor commented on Mr. Haynes' personal qualities, making inferences from the victim's possessions.[26] The prosecutor suggested that, "Reverend Minister Haynes . . . was a very small person. He had his mental problems. Unable to keep a regular job. And wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life."[27]

The prosecutor then directed attention to the voter registration card that Mr. Haynes carried on the night Gathers brutally beat and stabbed him. The prosecutor commented on Mr. Haynes' personal

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21 *Id.*

22 *Id.* at 2209.

23 *Id.*

24 *Id.*

25 The prosecutor read the prayer in its entirety:

> Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life. *Id.* at 2209-10.

26 *Id.* at 2209.

27 *Id.* at 2210.

qualities which he had inferred from Mr. Haynes' possession of the card:

> You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card. Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.[28]

The Supreme Court of South Carolina held that the prosecutor's "extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime," and concluded that the remarks made by the prosecutor during the closing argument at the sentencing phase " 'conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter.' "[29] The South Carolina Supreme Court, relying on the United States Supreme Court's decision in *Booth v. Maryland*,[30] reversed Gathers' death sentence and remanded for a new sentencing proceeding.[31]

IV. SUPREME COURT OPINIONS

A. MAJORITY OPINION

Writing for the majority,[32] Justice Brennan noted two recognized principles which the Court has consistently adhered to in capital cases: " '[f]or purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his responsibility and moral guilt,' "[33] and, " '[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.' "[34] Adhering to these principles, and

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[28] *Id.*

[29] *Id.* (quoting South Carolina v. Gathers, 295 S.C. 476, 484, 369 S.E.2d 140, 144 (1988)).

[30] 482 U.S. 496 (1987). For a discussion of *Booth*, *see infra* note 35.

[31] *Gathers*, 109 S. Ct. at 2210.

[32] Justice Brennan delivered the opinion of the Court, in which Justices White, Marshall, Blackmun, and Stevens joined. Justice White, in a brief concurrence, stated that unless *Booth* (*see infra* note 35) was overruled, the defendant's death sentence had to be reversed and the judgment below affirmed. *Gathers*, 109 S. Ct. at 2211. Justice White had dissented in *Booth*, 482 U.S. at 515-19.

[33] *Gathers*, 109 S. Ct. at 2210 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

[34] *Id.* (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

relying on the holding two terms previous in *Booth*,[35] the *Gathers* Court concluded that the contents of the papers[36] and the prosecutor's related comments regarding Haynes' personal qualities cannot be relevant to the "circumstances of the crime."[37]

Justice Brennan explained that in *Booth*, the Court addressed the issue of whether the use of victim impact statements (VISs)[38] in capital sentencing proceedings violates the principle that a death sentence "must be related to the moral culpability of the defendant."[39] Justice Brennan noted that the *Booth* Court[40] held that statements regarding the personal qualities of the victims introduce facts that might be " 'wholly unrelated to the blameworthiness of a particular defendant.' "[41] The *Booth* court deemed such information irrelevant to a capital sentencing decision and held that its admission violates the eighth amendment[42] because it creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.[43]

Justice Brennan explained that the statements in *Booth*[44] included descriptions of the victims' personal charcteristics, the emotional impact of the crime on the victims' family, and the family

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35 482 U.S. at 496. In *Booth*, the petitioner, having been found guilty of two counts of first-degree murder, was sentenced to death after the jury considered a presentence report which was compiled by the Maryland Division of Parole and Probation. *Id.* at 498. Under a Maryland statute, this report must include a victim impact statement, hereinafter, VIS, which describes the effect of the crime on the victim and the victim's family. MD. CODE ANN. art. 27, § 413(b) (1982). *Id.* The VIS may be read to the jury during the sentencing phase, or the family members may be called to testify as to the information contained in the VIS. *Id.*

The VIS in *Booth* provided the jury with two types of information. First, it described, based on interviews with family members, the personal qualities of the victims and the emotional impact of the murders on the family. *Id.* at 499-500. Second, the report set forth the family members' opinions and characterizations of the murders and the defendant. *Id.*

36 Particularly, the religious tract entitled the "Game Guy's Prayer" and Haynes' voter registration card.

37 *Gathers*, 109 S. Ct. at 2211.

38 *See supra* note 35.

39 *Gathers*, 109 S. Ct. at 2210.

40 *Booth*, 482 U.S at 496. Justice Powell delivered the opinion of the Court, in which Justices Brennan, Marshall, Blackmun, and Stevens joined. Justice White filed a dissenting opinion, in which Chief Justice Rehnquist and Justices O'Connor and Scalia joined. Justice Scalia also filed a separate dissent, in which Chief Justice Rehnquist and Justices White and O'Connor joined.

41 *Gathers*, 109 S. Ct. at 2210 (quoting *Booth*, 482 U.S. at 504).

42 The eighth amendment provides: "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

43 *Booth*, 482 U.S. at 503.

44 *See supra* note 35.

members' opinions of the crime and their characterization of the defendant.[45] The Court noted that the statements at issue in the present case regarding the personal qualities of Mr. Haynes are essentially the same as the information included in the VIS in *Booth*, which the Court held to be unconstitutional just two terms ago. Justice Brennan argued that although the prosecutor, rather than the victim's family, commented on Mr. Haynes' personal qualities in the present case, "the statement[s] [are] indistinguishable in any relevant respect from [those] in *Booth*."[46] Justice Brennan further contended that, as in *Booth*, " '[allowing] the jury to rely on [this information] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.' "[47]

Justice Brennan acknowledged that the *Booth* opinion did not foreclose the possibility that the type of information contained in the VISs would be admissible if such statements " 'relate[d] directly to the circumstances of the crime.' "[48] The State of South Carolina asserted that the prosecutor's comments were tied to the "circumstances of the crime."[49] The State also argued that the fact the defendant scattered the personal possessions of the victim around on the ground was " 'relevant to the circumstances of the crime or reveal certain personal characteristics of the defendant,' "[50] and "should be the subject of permissible comment under the Eighth Amendment."[51]

The Court agreed with South Carolina's assertion that the fact that Gathers scattered around Mr. Haynes' personal belongings, apparently looking for something of value to steal, was relevant to the "circumstances of the crime" and, therefore, an admissible subject for comment.[52] However, the Court contended that the prosecutor's comments went "well beyond that fact."[53] The Court concluded that the contents of these personal papers "cannot possibly be relevant to the 'circumstances of the crime.' "[54] Justice Brennan argued that the record did not show that Gathers read anything

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45 *Gathers*, 109 S. Ct. at 2210.

46 *Id.*

47 *Id.* at 2210-11 (quoting *Booth*, 482 U.S. at 505).

48 *Id.* at 2211 (quoting *Booth*, 482 U.S. at 507 n.10).

49 *Id.*

50 *Id.* at 2211 (quoting Brief for Petitioner at 28, South Carolina v. Gathers, 109 S. Ct. 2207 (No. 88-305)).

51 Brief for Petitioner at 50, South Carolina v. Gathers, 109 S. Ct. 2207 (1989) (No. 88-305).

52 *Gathers*, 109 S. Ct. at 2211.

53 *Id. See supra* notes 25-28.

54 *Gathers*, 109 S. Ct. at 2211.

printed on the prayer card or the voter registration card.[55] Referring to the evidence presented at trial that Gathers went through Mr. Haynes' possessions quickly, throwing his belongings everywhere, Justice Brennan reasoned that Gathers probably did not read any of Mr. Haynes' papers.[56] Furthermore, Justice Brennan noted that the crime took place at night, in a wooded area,[57] and the assailants did not possess flashlights.[58] Justice Brennan concluded:

> Under these circumstances, the content of the various papers the victim happened to be carrying when he was attacked was purely fortuitous, and cannot provide any information relevant to the defendant's moral culpability. Notwithstanding that the papers had been admitted into evidence for another purpose,[59] their content cannot be said to relate directly to the "circumstances of the crime."[60]

B. JUSTICE O'CONNOR'S DISSENTING OPINION

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy,[61] dissented from the *Gathers* holding, and argued that although *Booth* was wrongly decided and should be overruled, the Court could reach a proper disposition without overruling the recently decided precedent.[62] Justice O'Connor framed the issue in *Gathers* as whether to adopt a broad or a narrow reading of *Booth*. She stated that a broad reading would establish a rigid eighth amendment rule which eliminates virtually all consideration of the victim at the sentencing phase. Alternatively, Justice O'Connor noted that a narrower reading of *Booth* would allow the sentencing jury to consider information regarding the victim and the extent of the harm caused by the defendant, in the determination of the appropriate punishment.[63]

Justice O'Connor noted the considerable confusion regarding the scope of the holding in *Booth*.[64] She pointed out that some courts, like the Supreme Court of South Carolina in the present case, have broadly interpreted *Booth* for the proposition that evidence regarding the victim's characteristics during the sentencing phase, violates the eighth amendment, while other courts have inter-

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55 *Id.*

56 *Id.* (citing app. at 27).

57 *Id.* (citing app. at 17; Record at 621-622, 926-927, *Gathers* (No. 88-305)).

58 *Id.* (citing Record at 622-623, *Gathers* (No. 88-305)).

59 *See supra* notes 22-23 and accompanying text.

60 *Gathers*, 109 S. Ct. at 2211.

61 Justice Scalia also dissented in a separate dissenting opinion. *See infra* notes 86-100 and accompanying text.

62 *Gathers*, 109 S. Ct. at 2212 (O'Connor, J., dissenting).

63 *Id.* (O'Connor, J., dissenting).

64 *Id.* (O'Connor, J., dissenting).

preted *Booth* as not prohibiting prosecutorial argument concerning the victim's personal qualities at the sentencing phase.[65]

Justice O'Connor rejected a rigid eighth amendment rule which would prohibit a sentencing jury from hearing argument or considering evidence concerning the victim's personal qualities and characteristics.[66] Justice O'Connor opined that nothing in the eighth amendment prohibits the prosecutor from conveying to the sentencing jury "a sense of the unique human being whose life the defendant has taken."[67] Justice O'Connor further argued that *Booth* should not be read "to preclude prosecutorial comment which gives the sentencer a 'glimpse of the life' a defendant 'chose to extinguish.' "[68] Justice O'Connor continued, " '[T]he fact that there is a victim and facts about the victim properly developed during the course of the trial, are not so far out of the realm of 'circumstances of the crime' that mere mention will always be problematic.' "[69]

The dissent further contended that the present case illustrates the "one-sided nature of the moral judgment" that results from the Court's broad reading of *Booth*.[70] Justice O'Connor emphasized that the Court has consistently required a sentencing jury to consider a wide range of information concerning the defendant, including background and character traits of the defendant, not merely the

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65 *Id.* (O'Connor, J., dissenting). Justice O'Connor cited the following cases in support of this observation: Daniels v. State, 528 N.E.2d 775, 782 (Ind. 1988) (The prosecutor's reference to personal facts concerning the victim and his family during argument at the sentencing phase of a felony-murder trial was not improper because such comments were based upon evidence in the trial.); Moon v. State, 258 Ga. 748, 756, 375 S.E.2d 442, 450 (1988) (The Court, relying on Brooks v. Kemp, 762 F.2d 1383, 1409 (11th Cir. 1985) (*see infra* note 69 and accompanying text), held there to be no violation of *Booth* either in the introduction of the evidence or in the state's arguments.); People v. Rich, 45 Cal. 3d 1036, 1089-90, 755 P.2d 960, 993-94, 248 Cal. Rptr. 510, 543-44 (1988) (The Court, in a prosecution for murders and sexual offenses that resulted in death sentences, held that the prosecutor's comments during the penalty phase closing argument, that when the jury thought about Christmas time, which was approaching, to think of these families because these victims are gone forever, did not amount to error under *Booth*.); People v. Ghent, 43 Cal. 3d 739, 771-72, 739 P.2d 1250, 1271, 239 Cal. Rptr. 82, 103 (1987) (The prosecutor's brief and mild remarks concerning the impact of the rape and murder on the victim's family merely noted the obvious loss resulting from the murder: "Unlike *Booth*, where the jury was given lengthy and specific details regarding the actual impact on the victim's family, here the prejudicial effect of the prosecutor's comments was undoubtedly minimal or nonexistent.").

66 *Gathers*, 109 S. Ct. at 2212 (O'Connor, J., dissenting).

67 *Id.* at 2213-14 (O'Connor, J., dissenting).

68 *Id.* (O'Connor, J., dissenting) (quoting Mills v. Maryland, 486 U.S. 367, (1988) (Rehnquist, C.J., dissenting)).

69 *Id.* (O'Connor, J., dissenting) (quoting Brooks v. Kemp, 762 F.2d 1383, 1409 (11th Cir. 1985) (en banc), *vacated on other grounds*, 478 U.S. 1016 (1986), *judgment reinstated*, 809 F.2d 700 (11th Cir.) (en banc), *cert. denied*, 483 U.S. 1010 (1987)).

70 *Gathers*, 109 S. Ct. at 2214 (O'Connor, J., dissenting).

"circumstances of the crime."[71] This information is not directly relevant to the "circumstances of the crime," Justice O'Connor argued, but it is relevant to the jury's assessment of both the defendant as a person and his moral blameworthiness.[72]

Just as evidence concerning the defendant is relevant to the jury's sentencing determination, Justice O'Connor asserted that "one of the factors that has long entered into society's conception of proper punishment is the harm caused by the defendant's actions."[73] Justice O'Connor stated that retribution is a penological goal of the death penalty, and quoted *Tison v. Arizona*,[74] in which the Court explained that " 'the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.' "[75] Justice O'Connor further argued that one essential factor which is relevant to the jury's determination of the defendant's culpability is the extent of the harm caused.[76]

Justice O'Connor relied on *Tison*[77] to illustrate her contention that the resulting harm caused by the defendant is directly relevant to the capital sentencer's moral judgment in determining an appropriate sentence. The harm Gathers caused was the taking of Mr. Haynes' life, and, therefore, the prosecutor's comments describing the personal qualities of Mr. Haynes were admissible because the comments served to assist the jury in their appreciation of the harm which resulted from Gathers' actions.[78] Justice O'Connor further supported her argument by referring to the fact that society pun-

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71 *Id.* (O'Connor, J., dissenting). Justice O'Connor cited the following cases in support of this statement: Lockett v. Ohio, 438 U.S. 586 (1978) (The Court concluded that "in all but the rarest kind of capital case, [the sentencer should] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); Eddings v. Oklahoma, 455 U.S. 104 (1982) (In *Eddings*, a 16 year old was convicted of first-degree murder for killing a police officer and sentenced to death. The Court held that the death sentence must be vacated because the trial judge refused to consider mitigating evidence presented by the defendant. This evidence concerned the defendant's violent background and turbulant upbringing.).

72 *Gathers*, 109 S. Ct. at 2214 (O'Connor, J., dissenting).

73 *Id.* (O'Connor, J., dissenting).

74 481 U.S. 137 (1987). In *Tison*, two brothers were convicted of first-degree murder, armed robbery, kidnapping, and theft of a motor vehicle and sentenced to death. The Court held that the eighth amendment does not preclude imposing the death penalty on defendants who participated in their father's prison breakout and other related felonies that resulted in four murders, even though the defendants did not intend to kill the victims or inflict the fatal wounds.

75 *Gathers*, 109 S. Ct. at 2214 (O'Connor, J., dissenting) (quoting *Tison*, 481 U.S. at 149).

76 *Id.* (O'Connor, J., dissenting).

77 For an explanation of *Tison*, *see supra* note 74.

78 *Gathers*, 109 S. Ct. at 2214-15 (O'Connor, J., dissenting).

ishes reckless driving differently from vehicular homicide, where the distinction rests only upon the ultimate harm caused and not upon any difference in the defendant's mental state.[79] In the death penalty context, Justice O'Connor pointed out that no state authorizes the imposition of the death penalty for attempted murder, yet the defendant who has attempted to kill has the same mental state as a murderer.[80] The only distinction, Justice O'Connor argued, is the harm that results from the defendant's actions, which is deemed sufficient to support a difference in punishment.[81]

Justice O'Connor concluded that nothing in the eighth amendment precludes a community from considering its loss when imposing a sentence, nor does anything in the eighth amendment preclude commentary concerning the victim's personal qualities at the sentencing phase of a capital trial.[82] Justice O'Connor further argued that "a rigid Eighth Amendment rule which excludes all such considerations is not supported by history or societal consensus, and it withholds information from the sentencer which a State may clearly deem relevant to the moral judgment of the capital sentencer."[83] Rather, she asserted, the eighth amendment serves as a shield against practices and punishments which are " 'cruel and unusual.' "[84] Justice O'Connor deduced that the prosecutor's remarks in the present case did not offend any aspect of the eighth amendment.[85]

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79 *Id.* at 2215 (O'Connor, J., dissenting).

80 *Id.* (O'Connor, J., dissenting).

81 *Id.* (O'Connor, J., dissenting). The difference in punishment is between a sentence of years and a sentence of death.

82 *Id.* at 2216. (O'Connor, J., dissenting).

83 *Id.* (O'Connor, J., dissenting).

84 *Id.* (O'Connor, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). For text of the eighth amendment *see supra* note 42.

85 *Gathers*, 109 S. Ct. at 2216 (O'Connor, J., dissenting).

Justice O'Connor then attacked Gathers' other arguments which the defense asserted as alternate grounds for affirming the judgment below. First, the defense argued that the prosecutor " 'engaged in manipulation of the evidence and outright fabrication,' " in his characterization of the victim's personal qualities based on inferences from Mr. Haynes' possession of the "Game Guy's Prayer" and voter registration card. *Id.* (O'Connor, J., dissenting) (quoting Brief for Respondent at 22, South Carolina v. Gathers, 109 S. Ct. 2207 (1989) (No. 88-305)). Justice O'Connor explained that because the prayer was already in evidence without objection and could have been read by the jury even if the prosecutor did not mention it in his closing argument, the prosecutor's reading of the prayer may constitute harmless error and did not render the resulting sentence a denial of due process. *Id.* (O'Connor, J., dissenting).

Second, Justice O'Connor refuted Gathers' argument that the defense did not have an opportunity to rebut the prosecutor's favorable statements concerning the victim's personal characteristics. *Id.* (O'Connor, J., dissenting). Justice O'Connor responded to this by noting that the defense pointed to no evidence introduced at the sentencing phase that the defendant was precluded from rebutting. *Id.* (O'Connor, J., dissenting).

C. JUSTICE SCALIA'S DISSENTING OPINION

Justice Scalia also dissented from the *Gathers* holding, arguing that "the present case squarely calls into question the validity of *Booth*"[86] and asserted that *Booth* should be overruled.[87] Justice Scalia reiterated that he was among the four dissenters in *Booth*[88] who believed that the decision in *Booth* "imposed a restriction upon state and federal criminal procedures that had no basis in the Constitution."[89]

Justice Scalia argued that *Booth* does perceptible harm and should, therefore, be overruled. Justice Scalia contended that his position is strengthened by "subsequent writings"[90] that describe the negative consequences of a rule which effectively states that the specific harm inflicted upon society by a murderer may not be taken into account by the sentencing jury when deciding whether to sentence the defendant to death.[91]

After arguing that *Booth* should be overruled, Justice Scalia proceeded to address the Court's concern that it should not overrule such a recent decision.[92] Justice Scalia argued that overruling *Booth*

Justice O'Connor further argued that just as the prosecutor could comment upon evidence about the victim already in the record, so could counsel for the defense. *Id.* (O'Connor, J., dissenting). However, like the defendant's other due process claim, in which Gathers asserted that the prosecutor's closing argument wrongly "invited" the jury to impose the death sentence on the basis of the victim's religion and political affiliation, Justice O'Connor concluded that the issue would be best addressed by the Supreme Court of South Carolina on remand. *Id.* (O'Connor, J., dissenting).

86 482 U.S. 496 (1987). *See supra* note 35 for an explanation of *Booth*.

87 *Gathers*, 109 S. Ct. at 2217 (1989) (Scalia, J., dissenting).

88 In addition to Justice Scalia, Justices White, O'Connor and Chief Justice Rehnquist also dissented in *Booth*.

89 *Gathers*, 109 S. Ct. at 2217 (Scalia, J., dissenting).

90 Justice Scalia cited Justice O'Connor's dissent in the present case and Chief Justice Rehnquist's dissent in Mills v. Maryland, 108 S. Ct. 1860 (1988), as examples of "subsequent writings" which point out the negative impact of the rule articulated by the Court in *Booth*.

In *Mills*, the Court held that in a capital case, the sentencer may not be precluded from considering any mitigating factor or relevant circumstance, including the defendant's character or record, that the defense offers as a basis for a sentence less than death.

In his dissent in *Mills*, Chief Justice Rehnquist argued that "since virtually no limits are placed on the mitigating evidence a capital defendant may introduce concerning his own history and circumstances," the state should not be "precluded from demonstrating the loss to the victim's family, and to society as a whole, through the defendant's homicide." *Mills*, 108 S. Ct. at 1876 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist further argued that "the Court's decision in *Booth* prevents the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Id.* (Rehnquist, C.J., dissenting).

91 *Gathers*, 109 S. Ct. at 2217 (Scalia, J., dissenting).

92 *Booth* was decided in June of 1987. Justice Scalia acknowledged that there is a concern that the Court should not overrule such a recent decision "lest our actions 'appear to be occasioned by nothing more than a change in the Court's personnel,' " *Gath-*

will not "shake the citizenry's faith in the Court."[93] He continued by pointing out that overrulings of precedent rarely occur without a change in the Court's personnel.[94] "The only distinctive feature here," Justice Scalia continued, "is that the overruling would follow not long after the original decision,"[95] and Justice Scalia cited several cases in which the Court overruled a case which it had recently decided.[96]

Justice Scalia further argued that because the error of the *Booth* decision is "fresh," society has not yet adjusted to its existence and the surrounding law has not yet been premised upon the validity of the decision in *Booth*. Therefore, the opportunity to correct the *Booth* decision should be "seized at once, before state and federal laws and practices have adjusted to embody it."[97] Once society has adopted such an erroneous decision, Justice Scalia argued, it will be more difficult to correct it.[98] Justice Scalia then stated that he would consider it a violation of his oath to adhere to what he considers "a plainly unjustified intrusion upon the democratic process in order that the Court might save face."[99]

Justice Scalia concluded his dissent by reiterating his contention that *Booth* should be overruled:

> *Booth* has not even an arguable basis in the common law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that present society, through its laws or the actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility. The Court's opinion in *Booth*, like today's opinion, did not even try to assert the contrary. We provide far greater reassurance of the rule of law by eliminating rather than retaining such a decision.[100]

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ers, 109 S. Ct. at 2217 (quoting Brief for Barbara Babcock as Amici Curiae at 29-30, South Carolina v. Gathers, 109 S. Ct. 2207 (1989) (No. 88-305) (quoting Florida Dep't. of Health & Rehab. Servs. v. Florida Nursing Home Ass'n., 450 U.S. 147, 154 (1981) (Stevens, J., concurring)), and the rules announced by the Court no more than "the opinions of a small group of men who temporarily occupy high office." *Id.* (Scalia, J., dissenting).

93 *Gathers*, 109 S. Ct. at 2217 (Scalia, J., dissenting).

94 *Id.* (Scalia, J., dissenting).

95 *Id.* (Scalia, J., dissenting).

96 *Id.* at 2217-18 (Scalia, J., dissenting). Justice Scalia cited the following cases is support of this contention: Daniels v. Williams, 474 U.S. 327, 330-31 (1986) (*overruling* Parratt v. Taylor, 451 U.S. 527 (1981)); United States v. Scott, 437 U.S. 82, 86-87 (1978)(*overruling* United States v. Jenkins, 420 U.S. 358 (1975)); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (*overruling* Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586 (1940)).

97 *Gathers*, 109 S. Ct. at 2218 (Scalia, J., dissenting).

98 *Id.* (Scalia, J., dissenting).

99 *Id.* (Scalia, J., dissenting).

100 *Id.* (Scalia, J., dissenting).

V. Discussion And Analysis

The imposition of the death penalty in the present case would probably not have been attacked on grounds that the sentence violated the eighth amendment had the prosecutor refrained from commenting on Mr. Haynes' personal qualities in his closing argument. In fact, Demetrius Gathers may deserve the death penalty for his heinous actions on the night of September 13, 1986. However, as the majority in this case held, the prosecutor's comments concerning Mr. Haynes' personal qualities were unnecessary to an understanding of the "circumstances of the crime," and wholly unrelated to the defendant's moral culpability.[101] The majority recognized that the fact that Mr. Haynes was a religious man and a registered voter was purely fortuitous and provided no information relevant to Gathers' decision to kill.[102]

Allowing the jury to consider commentary regarding the victim's personal qualities, whether communicated by the prosecutor or the victim's family members,[103] may result in the arbitrary and capricious imposition of the death penalty. Therefore, presentation of such evidence violates the eighth amendment.[104] Permitting the sentencer to consider comments concerning the victim's personal qualities effectively places the victim on trial, not the defendant. Whether the defendant is sentenced to death would depend not on the defendant's moral culpability or blameworthiness, but on the sentencer's perception and value judgment of the personal qualities of the victim.

Although the majority in *Gathers* reached the proper disposition, Justice Brennan, writing for the majority, elected not to write a substantial opinion. Instead, he essentially relied on the arguments and reasoning employed by the majority in *Booth* two terms ago.[105]

This Note critically analyzes the dissenters' arguments and assertions,[106] and concludes that these arguments and contentions are largely unfounded, representing superficial arguments for the ad-

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101 *Id.* at 2211.

102 *Id.*

103 *See, e.g.*, Booth v. Maryland, 482 U.S. 496 (1987).

104 For text of the eighth amendment, *see supra* note 42.

105 The substance of these arguments will be discussed *infra*, and have been discussed *supra*.

106 Justice Scalia wrote a separate dissenting opinion. However, the central arguments made by Justice Scalia are essentially the same as those articulated by Justice O'Connor in her dissent, with the exception that Justice Scalia firmly believes that *Gathers* "sqarely calls the validity of *Booth* into question," *Gathers*, 109 S. Ct. at 2217 (Scalia, J., dissenting), and, therefore, *Booth* must be overruled in order to reach a proper disposition in the present case. *See infra* notes 125-32 and accompanying text.

missibility of commentary concerning the victim's personal qualities at the sentencing phase of a capital trial.

The rationale behind the dissenters' position may not be that such evidence or commentary is relevant to the defendant's moral culpability and relates to the "circumstances of the crime," and is therefore information which should be considered by the sentencing jury in determining the proper punishment;[107] but instead, perhaps the dissenters are motivated by an underlying desire to see an increased use of the death penalty in capital cases, which would likely result if the sentencer were permitted to consider emotionally charged statements about the victim's personal qualities.[108]

A. THE DISSENT'S DISTORTION

It is necessary for the sentencing jury to consider the extent of the harm caused by the defendant's actions. However, the harm caused in the case of a murder is the death of an innocent human being, not the death of a religious person or a registered voter. The dissenters distorted the contention that the sentencing jury should be required to consider the extent of the harm caused as an essential factor in determining the defendant's culpability.[109] Contrary to the dissenters' opinions, whether the victim is religious or atheist, rich or poor, black or white, a registered voter or opposed to democracy should not bear on the sentencing determination.

The sentence must relate to the defendant's actions and blameworthiness, and a purely fortuitous factor, such as whether the victim was a registered voter, has no place in the determination of a proper sentence for a defendant. If it were otherwise, the sentencer would be passing judgment on the victim by determining the defendant's sentence based on the victim's attributes. Justice O'Connor erroneously cited *Tison*[110] in support of the contention that the harm caused by the defendant's actions is relevant to the sentencer's judgment concerning a proper punishment.[111] Referring to *Tison*, Justice O'Connor noted that "[w]hat was critical to the defendants' eligibility for the death penalty . . . was the harm they helped bring about: the death of four innocent human beings."[112]

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107 As Justice O'Connor contended in her dissenting opinion. *Gathers*, 109 S. Ct. at 2211-17 (O'Connor, J., dissenting).

108 This hypothesis in no way expressly or impliedly asserts what the author's personal opinion is regarding the death penalty.

109 *Gathers*, 109 S. Ct. 2207 (O'Connor and Scalia, JJ., dissenting).

110 481 U.S. 137 (1987). *See supra* note 74 and accompanying text.

111 *Gathers*, 109 S. Ct. at 2214 (O'Connor, J., dissenting).

112 *Id.* at 2215 (O'Connor, J., dissenting).

Although it is true that the defendants in *Tison* were eligible for the death penalty because of the harm they helped to bring about, the victims' personal qualities were irrelevant to the defendants' eligibility for the death penalty. The *Tison* defendants' eligibility for the death penalty was based on the fact that they killed four people; it did not matter "who" the four victims were. The victims could have been any four unfortunate people who happened to cross paths with the defendants during the prison breakout of the defendants' father. *Tison*, therefore, is not in any way supportive of the dissenters' assertion that the eighth amendment does not preclude the sentencing jury from considering commentary concerning the personal qualities of the victim(s) at the penalty phase of a capital trial.

In an attempt to support further her contorted line of reasoning that the harm caused by the defendant is relevant to the capital sentencer's moral judgment in determining an appropriate sentence, Justice O'Connor analogized societies' punishment of reckless driving. She noted that society punishes reckless driving differently from vehicular homicide, where the distinction rests only upon the ultimate harm caused. The defendant's mental state is not determinative.[113] Justice O'Connor also found an analogy to atempted murder. She noted that no state authorizes the imposition of the death penalty for attempted murder, yet the defendant who has attempted to kill has the same mental state as one who has succeeded. The only distinction, Justice O'Connor correctly argued, is the harm resulting.[114]

These examples do support the established proposition that the resulting harm caused by the defendant, in terms of whether the victim lives or dies, is relevant to the sentencing decision. However, these examples do not support the dissenters' position that the personal qualities of the victim are relevant to the sentencing decision and, therefore, are the subject of admissible comment at the sentencing phase of a capital trial.

B. THE CREATION OF A CONSTITUTIONALLY UNACCEPTABLE RISK

If, as the dissenters advocate, commentary concerning the victim's personal qualities is permitted at the sentencing phase of a capital trial, a constitutionally unacceptable risk is created that the jury may impose the death penalty in an arbitrary and capricious

113 *Id.* at 2215 (O'Connor, J., dissenting).

114 *Id.* (O'Connor, J., dissenting).

manner.[115] Permitting the sentencing jury to consider such irrelevant information would result in the sentencers deciding the fate of a particular defendant based on their subjective value judgments concerning the victim's personal qualities as communicated to them by the prosecutor, or by the victim's family, as in *Booth*.[116]

Allowing the jury to consider such information implies that defendants whose victims were valued in the community are more deserving of the death penalty than those whose victims are perceived to be less valued.[117] As the *Booth* Court articulated, "[o]f course our system of justice does not tolerate such distinctions."[118] The Court in *Booth* further noted that "[t]his type of information does not provide a 'principled way to distinguish [cases] in which the death penalty was imposed, from the cases in which it was not.' "[119]

In the present case, Gathers did not know Mr. Haynes prior to the murder[120] and, therefore, had no knowledge of Mr. Haynes' personal qualities. Permitting the jury to consider the prosecutor's comments regarding Mr. Haynes' personal qualities would result in imposing the death penalty based on factors about which Gathers was totally unaware; therefore, the factors were irrelevant to his decision to kill.[121] "This evidence could thus divert the jury's atten-

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115 The Court in *Booth*, 482 U.S. at 503, also noted this intolerable result of permitting the sentencing jury to consider information regarding the victim's personal qualities at the sentencing phase of a capital trial.

116 *Booth*, 482 U.S. at 499. For the a discussion of *Booth*, see *supra* note 35.

117 In his dissent in the present case, Justice Scalia asked, "Would the fact that the victim was a dutiful husband and father be a personal characteristic or an indication of injury to others?" *Gathers*, 109 S. Ct. at 2217 (Scalia, J., dissenting). The response to this question would be, "Does it really matter?"; whether the victim was a "dutiful husband and father" is not relevant to the sentencing jury's decision. This information is irrelevant to the defendant's decision to kill. What if the victim had no surviving family? Does a murderer who "selects" this individual not deserve the same penalty as he would receive if he murdered a "dutiful husband and father." Justice Scalia's quote illustrates the element of arbitrariness which would pervade the sentencing procedure in capital cases if such information were admissible at the penalty phase of a capital trial.

118 *Booth*, 482 U.S. at 506 n.8.

119 *Id.* (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).

120 *Gathers*, 109 S. Ct. at 2208.

121 The Court in *Booth* advanced substantially similar reasoning. *Booth*, 482 U.S. at 505. The *Booth* Court also quoted a 1984 state court decision which is relevant to this discussion:

> We think it obvious that a defendant's level of culpability depends not on fortuitous circumstances such as the composition of his victim's family, but on circumstances over which he has control. A defendant may choose, or decline, to premeditate, to act callously, to attack a vulnerable victim, to commit a crime while on probation, or to amass a record of offenses. . . . In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement is relevant to damages in a civil action, but it has no relationship to the proper purposes of sentencing in a criminal case.

tion away from the defendant's background and record, and the circumstances of the crime,"[122] which should be determinative of the sentencing decision. This shifting of the focus of the trial away from the defendant and onto the victim is impermissible at a proceeding where the question to be decided by the Court is whether the defendant is to receive the ultimate sentence—death—or imprisonment. The defendant is on trial, not the victim.

Another source of arbitrariness will be injected into the capital sentencing decision if, as the dissenters advocate, the sentencing jury is permitted to consider information pertaining to the victim's personal qualities. This arbitrariness involves the risk that the capital sentencing decision will be influenced by the degree to which an individual prosecutor is able to appeal to the emotions of the sentencing jury through his/her commentary about the victim's personal qualities. The persuasiveness of the prosecutor in communicating to the sentencer the admirable qualities of the victim, or the horrible grief and the sense of loss the victim's family is experiencing, is irrelevant to the decision whether a defendant, who may in fact deserve the death penalty, should live or die. Arbitrariness results if sentencing decisions vary from case to case based on the persuasiveness of the prosecutor's comments concerning the victim's personal qualities.

The Court in *Booth* similarly argued that, although the victims' family members were articulate and quite persuasive in expressing their grief and sense of loss, there are other cases in which the family members were not as articulate in describing their feelings, even though their sense of loss is equally severe.[123] The *Booth* court correctly observed that "the fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing sentencing juries to consider this information."[124] The *Gathers* dissent inexplicably and disturbingly failed to acknowledge the *Booth* Court's perceptive admonition.

C. THE DECISION IN *BOOTH* CONTROLS THE *GATHERS* CASE

Justice O'Connor erroneously argued that the Court could reach a proper disposition in the present case without overruling *Booth*. Justice O'Connor asserted that the central holding in *Booth*—that statements about the harm to the victim's family are inadmissi-

Booth, 482 U.S. at 504 n.7 (quoting People v. Levitt, 156 Cal. App. 3d 500, 516-17, 203 Cal. Rptr. 276, 287-88 (1984)).

122 *Id.* at 505.

123 *Id.*

124 *Id.*

ble at a capital sentencing proceeding—does not control the *Gathers* case because at issue in the present case are solely the prosecutor's comments concerning the victim.[125]

However, *Booth* is not limited to statements about the harm to a victim's family. The VIS at issue in *Booth* included characterizations by the victims' family of the victims' outstanding personal qualities and the family members' opinions about the crime and the defendant, as well as statements concerning the emotional and personal problems the family members have faced as a result of the murders.[126]

The statements at issue in the present case concern the personal qualities of the victim; therefore, the VIS in *Booth* contained information indistinguishable from the information presented by the prosecutor in *Gathers*. The only distinction, aside from the word choice, is the source of the commentary. In *Gathers*, the prosecutor delivered the controversial statements,[127] while in *Booth* it was the victims' survivors who characterized the victims' personal qualities.[128] This distinction, however, is irrelevant. Presentation of such information at the sentencing phase of a capital trial, by either the prosecutor or the victim's family members, creates a constitutionally unacceptable risk that the sentencing jury may impose the death penalty in an arbitrary manner.

Unlike the dissenters who joined Justice O'Connor's dissenting opinion, Justice Scalia, writing a separate dissenting opinion in *Gathers*,[129] correctly recognized that the present case "squarely calls into question the validity of *Booth*."[130] Likewise, Justice White, in his brief concurrence in *Gathers*, recognized that unless *Booth* is to be overruled, the judgment of the Supreme Court of South Carolina must be affirmed.[131] Justice White, who dissented in *Booth*, apparently conceded that since the Court's holding two terms ago in *Booth*, presentation of evidence or commentary concerning the victim's personal qualities is not permissible at the sentencing phase of a capital trial.[132]

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125 *Gathers*, 109 S. Ct. at 2212 (O'Connor, J., dissenting).

126 *Booth*, 482 U.S. at 499-500.

127 *Gathers*, 109 S. Ct. at 2210.

128 *Booth*, 482 U.S. at 499.

129 *Gathers*, 109 S. Ct. at 2217-18 (Scalia, J., dissenting).

130 *Id.* at 2217 (Scalia, J., dissenting).

131 *Id.* at 2211 (White, J., concurring).

132 *Booth*, 482 U.S. at 515-19 (White, J., dissenting).

D. INTRODUCTION OF EVIDENCE ABOUT THE VICTIM'S PERSONAL QUALITIES SHOULD NOT BE PRECLUDED FROM EVERY CAPITAL SENTENCING PROCEEDING

The holding in the present case does not, and should not, preclude the introduction of evidence or commentary concerning the victim's personal qualities in every capital sentencing proceeding.[133] There are instances where evidence concerning the victim's personal qualities should be admissible at the sentencing phase of a capital trial. In situations where the personal characteristics of the victim were relevant to the defendant's decision to kill or relate directly to the "circumstances of the crime," the introduction of such information should be admissible.

Facts about the victim's personal qualities are relevant in situations where "who" or "what" the victim was provided the impetus for the defendant to kill; in these situations the defendant was aware of the victim's personal qualities and these characteristics were directly relevant to the defendant's decision to kill.[134] Moreover, as the majority in *Booth* noted, "there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant."[135] However, in situations such as the present case, where the victim's personal qualities neither were known by the defendant, and, therefore, not relevant to the decision to kill, nor related directly to the "circumstances of the crime," the introduction of evidence about the victim's personal characteristics should not be admissible at the sentencing phase of the capital trial because of the risk that the jury may make the capital sentencing decision in an arbitrary manner.

VI. CONCLUSION

In *Gathers*, the Supreme Court held that the eighth amendment prohibits prosecutorial commentary concerning the victim's personal qualities at the sentencing phase of a capital trial.[136] The Court correctly reasoned that allowing the sentencing jury to con-

133 The majority in *Booth*, 482 U.S. at 507 n.10, and the majority in *Gathers*, 109 S. Ct. at 2211, recognized that the holding in each case does not mean that this type of information will never be relevant in any context.

134 Examples of such situations include racially motivated murders, cases in which religious differences result in a murder, or when the victim's beliefs are not in accord with those of the murderer and these differences are the principal reason for the murder.

135 *Booth*, 482 U.S. at 507 n.10. *See, e.g.*, FED. R. EVID. 404(a)(2) (prosecution may show peaceable nature of victim to rebut charge that victim was aggressor).

136 *Gathers*, 109 S. Ct. at 2210-11 (1989).

sider commentary regarding the victim's personal qualities may result in the arbitrary and capricious imposition of the death penalty.[137] The Court relied on the arguments and reasoning employed by the majority in *Booth*, decided two terms earlier, for the conclusion that the contents of Mr. Haynes' papers and the prosecutor's related comments concerning the victim's personal qualities which he extrapolated from the victim's possessions, cannot be relevant to the circumstances of the crime.[138] Furthermore, the majority appropriately noted the fortuity and irrelevance of the victim's religious character and status as a registered voter to the defendant's moral culpability and blameworthiness.

The dissenters in *Gathers* argued[139] that the victim's personal qualities should be the subject of permissible comment at the sentencing phase of a capital trial because such information indicates the extent of the resulting harm caused by the defendant's actions, which is an essential factor to the sentencing jury's determination of both the defendant's culpabiltiy and a proper sentence.

However, the dissenters support their position with distorted and unfounded arguments which may lead one to believe that the rationale behind their position is not that such commentary or evidence is relevant to the defendant's moral culpability and relates to the "circumstances of the crime," but, perhaps may reflect an underlying desire to see an increase in the frequency of imposing the death penalty in capital cases. This increase would most likely result if the sentencer were permitted to consider emotionally charged statements concerning the victim's personal qualities. We cannot begin to draw lines with regard to appropriate punishment in capital cases based on subjective determinations of the worth of the victim.

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137 *Id.* The *Gathers* Court relied on the decision in *Booth*. *See supra* note 35 for an explanation of *Booth*.

138 *Gathers*, 109 S. Ct. at 2211.

139 The dissenters also argued that *Booth* should be overruled, although Justice O'Connor argued that overruling the recently decided precedent was not necessary to reach the proper disposition in the present case. *Id.* at 2212.