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The Admissibility of Victim Impact Evidence at the Sentencing Phase of a Capital Trial

I. INTRODUCTION

The purpose of this comment is to provide an overview of the decisions which have shaped the United States Supreme Court's position concerning the admissibility of victim impact evidence at the sentencing phase of a capital trial. The recent change in the Court's position will be examined as well as the possible future developments regarding the admissibility of such evidence.

The capital¹ trial is conducted in two stages: the guilt trial, in which the jury rules as to whether the defendant is guilty of the capital offense, precedes the penalty phase, in which the jury or judge, following a guilty verdict, must decide whether the defendant should receive a sentence of life imprisonment or death.² One similarity transcending most jurisdictions' death penalty statutes is that prior to the handing down of a sentence mandating either execution or life imprisonment, a sentencing authority must consider specified "aggravating" and "mitigating" factors relevant to the defendant's crime or character.³

The penalty trial is intended to serve two purposes: (1) to encourage rationality in the sentencing process by requiring the sentencing authority to carefully weigh competing factors prior to sentencing⁴ and (2) to supply the jury with information concerning

1. A capital case or crime is defined as "[o]ne in or for which death penalty may, but need not necessarily, be imposed." *Black's Law Dictionary* 209 (West, 6th ed 1990).

2. Welsh S. White, *The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment* at 73 (The University of Michigan Press, 1991). Prior to the decision of the United States Supreme Court in *Furman v Georgia*, 408 US 238 (1972), most states' capital trials were conducted in one single proceeding in which the jury decided upon both the defendant's guilt as well as his penalty. White, *The Death Penalty in the Nineties* at 73.

3. *Id.* Also common among jurisdictions' penalty proceedings is that the defendant is given a wide opportunity to introduce "mitigating" evidence concerning his character or the circumstances of the crime which is consistent with *Lockett v Ohio*, 438 US 586 (1978). A majority of jurisdictions authorize a sentence of death only if the mitigating circumstances of the crime are outweighed by its aggravating circumstances. White, *The Death Penalty in the Nineties* at 73 (citations omitted).

4. *Id.* at 73-74. It was hoped that this procedure would provide the guidance necessary in order for a sentencing authority to make a discretionary judgment which is not arbi-

the defendant that would likely have been excluded as prejudicial during the guilt trial because it was not materially relevant to the issue of guilt.⁵ Additionally, the issues to be resolved during the penalty trial are quite different from those which are decided during the guilt phase.⁶ With the ultimate goals of the penalty trial being the utilization of all relevant information in order to facilitate the imposition of more accurate death sentences, it was hoped that the jury would be more thoroughly informed about the circumstances of the offense as well as the defendant's personal characteristics.⁷

The notion of individualized sentencing was introduced and explained by the United States Supreme Court in *Woodson v North Carolina*.⁸ The Court in *Woodson* emphasized the qualitative difference between a sentence of death and one of imprisonment.⁹ The Court stated that ". . . in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."¹⁰

Gregg v Georgia,¹¹ decided on the same day as *Woodson*, interpreted *Furman v Georgia*¹² as requiring that the death penalty not

trary or capricious. *Id.* at 73.

5. *Id.* at 74. This was intended to remedy the problem of a sentencing authority not having the relevant information necessary to enable them to make a sentencing decision. *Id.* Because the defendant's guilt was the focus of trials before *Furman*, the evidence admitted which was relevant to the penalty was limited. *Id.*

6. *Id.* at 75. The guilt phase requires the jury to answer questions concerning the conduct of the accused based upon objective determinations concerning the facts which are relevant to the crime. *Id.* In contrast, while the penalty phase does involve some determinations of objective facts, the jury will likely be called upon to render certain value judgments concerning the mitigating circumstances presented by the defendant on his behalf. *Id.* Additionally, recall that the penalty phase requires the jury to weigh certain aggravating and mitigating circumstances. *Id.*

7. *Id.* at 74.

8. *Id.* at 5.

9. *Woodson v North Carolina*, 428 US 280, 305 (1976).

10. *Woodson*, 428 US at 304 (citations omitted). The Court ultimately held a North Carolina Statute which imposed a mandatory sentence of death for certain crimes as violative of both the Eighth and Fourteenth Amendments. *Id.* at 305.

11. 428 US 153 (1976).

12. 408 US 238 (1972). The Court in *Furman* granted certiorari to decide whether the imposition and subsequent carrying out of the death penalty in the cases at issue rose to the level of cruel and unusual punishment thus violating the Eighth and Fourteenth Amendments. *Furman*, 408 US at 239. In the three cases under review, the death penalty was imposed in two of them for rape and in the remaining one for murder. *Id.* The Court ulti-

be imposed utilizing sentencing procedures that allow a “. . .substantial risk that it would be inflicted in an arbitrary and capricious manner.”¹³ In order to meet the requirements of *Furman*, the Court advised that a separate sentencing proceeding be conducted in order to provide the sentencing authority with both the information relevant to sentencing and the guidelines as to how to use such information.¹⁴

II. VICTIM IMPACT EVIDENCE

The sentencing phase of a trial is a vehicle through which the victim of a crime can be permitted to participate in the criminal justice system.¹⁵ Victim participation in the sentencing process can be accomplished in a variety of ways.¹⁶ Use of a victim impact statement is a common way in which a victim can become involved in the sentencing phase of a trial.¹⁷

When determining whether victims should actively participate in the sentencing process, the goals of sentencing and their relationship to victim participation must be considered.¹⁸ The four purposes of sentencing, as announced by Congress, are: retribution, deterrence, incapacitation, and rehabilitation.¹⁹ It has been con-

mately concluded that imposing and carrying out the death penalty in these cases would result in a violation of the Eighth and Fourteenth Amendments. Id at 239-40.

13. *Gregg*, 428 US at 188. The *Gregg* Court viewed *Furman* to require that the discretion which is given to a sentencing authority as to whether to impose the death penalty must be “suitably directed and limited” to result in lessening the risk that the action taken would be arbitrary and capricious. Id at 189. The Court noted the established practice of sentencing which requires consideration of the circumstances of the offense along with the character of the accused. Id (citation omitted).

14. Id at 195.

15. Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L Rev 199 (1988). Such participation is one response to the growing concern in recent years for the rights of crime victims. Comment, 36 UCLA L Rev at 199.

16. Id at 200. Official recognition that victims must be informed of the scheduling of a convicted defendant's sentencing hearing and requiring restitution to compensate victims who experience financial losses are examples of two of the ways in which a victim can take an active role in the sentencing process. Id.

17. Id. A victim impact statement is a statement which describes the impact which a crime has had upon the victim and the victim's family. Id. Four basic types of information are provided to the sentencing authority by a victim impact statement:

the circumstances surrounding the crime and the manner in which the crime was perpetrated, the identity and characteristics of the victim, the effects of the crime on the victim and the victim's family, and the victim or victim's family's opinion of the defendant and of an appropriate sentence.

Id at 203.

18. Id at 211 (citation omitted).

19. Id citing the Sentencing Reform Act of 1984, 18 USC § 3553(a)(2) (Supp IV

tended that each of these goals can be furthered by victim participation; the type of participation, however, is different in each instance.²⁰

There are two models of retribution: state-initiated retribution and victim-initiated retribution.²¹ The state-initiated model, which is based upon the state standing in the place of the victim in prosecuting the offender, is further broken down into two models: moral retribution and social retribution.²² Under the moral model of retribution, which allows society to punish those who break the law on the basis that criminal activity is morally wrong, a victim's moral standing would be subject to study, and thus this model is counterproductive to the goals of victim participation.²³ The social model of retribution, which allows a defendant to be punished in order to restore the social balance which the defendant's crime has upset, is consistent with the theory of victim participation provided that the focus of the victim's testimony is solely upon the harm which he has suffered because of the defendant.²⁴ The model of victim-initiated retribution is characterized by the victim using the criminal justice system provided by the state in order to retaliate against the defendant.²⁵ The goal of victim-initiated retribution is to reestablish the personal balance between the victim and the defendant.²⁶

The goal of deterrence can be furthered as long as victim participation increases the probability of punishment.²⁷ The severity of the sanction and the certainty of the sanction are the two variables

1986).

20. Comment, 36 UCLA L Rev at 219 (cited in note 15).

21. *Id.* at 212-14.

22. *Id.*

23. *Id.* at 212, 219. This model requires a comparison of the goodness of society, which to a certain extent, is represented by the morality of the victim, with the badness of the defendant. *Id.* at 212. Thus, by participating in sentencing, the morality of the victim is subject to question. *Id.* This inquiry into the relative moral standing of the victim may offend the victim's dignity as well as present an obstacle to furthering the goals of the victim at sentencing. *Id.* at 213. It is possible that concentrating on the victim's morality will result in finding fault with the victim and could ultimately lead to imposing a lesser punishment on the defendant than would have resulted if the victim's morality had not been considered. *Id.*

24. *Id.* at 214, 219.

25. *Id.* at 214.

26. *Id.* This type of retaliation would be counterproductive to equality and proportionality in sentencing, which are key concepts upon which determinate sentencing is based. *Id.* The goals of standardized and fair sentences seem to be inconsistent with allowing victim retaliation to serve as the main purpose guiding the sentencing process. *Id.* at 215 n 67.

27. *Id.* at 219.

which impact upon deterring a potential lawbreaker from committing a crime.²⁸

The only way that victim participation can further the goal of incapacitation is if a victim possesses specific knowledge concerning the accused's propensity to commit further crimes.²⁹ If a victim can give information regarding the defendant's lifestyle and past criminal activity, a sentencing authority may be able to utilize such information.³⁰

Finally, the goal of rehabilitating a defendant may also be furthered as long as the defendant would benefit by facing the harm which he caused the victim or if the sentence allows for the victim to participate in its implementation.³¹

Even though it can be argued that each of the goals of sentencing can be furthered by victim participation, there are competing viewpoints as to the propriety of admitting victim impact statements at the sentencing phase of a trial. It has been suggested that such statements would have the tendency to be both inflammatory and prejudicial.³² Additionally, because the statements are often unsubstantiated as well as difficult to rebut, due process concerns are present for the defendant.³³ Contentions that the prosecutor functions adequately to represent the victim at trial also serve as a basis upon which critics of the use of victim impact statements might argue.³⁴ Finally, an argument grounded in equal protection could be made on behalf of the defendant.³⁵ This final argument is

28. *Id.* at 215. It is likely that if victim participation increases the severity of a sanction, it is being increased in an impermissible way. *Id.* However, if victim participation encourages cooperation between the victim and the prosecutor at trial, which in turn could increase the overall efficiency of the trial process and increase the certainty of punishment, the goal of deterrence may be furthered. *Id.* at 216.

29. *Id.* at 219.

30. *Id.* at 216-17. This situation should be contrasted with the case in which the victim does not know the defendant any better than anyone else who can testify as to the criminal characteristics of the defendant. *Id.* at 217.

31. *Id.* at 219. If it is possible that the defendant may feel remorse for what he has done, then some of the best evidence of the harm suffered by the victim would come from the victim impact statement. *Id.* at 218. Additionally, if the victim is to participate in the implementation of the defendant's rehabilitation, then information provided by the victim is important to focus upon the relationship between the victim and the defendant as well as the rehabilitative needs of the defendant. *Id.* at 219.

32. Abraham Abramovsky, *Victim Impact Statements Revisited*, *New York Law Journal* 3 (March 31, 1992). It was reasoned that this would be true because it could be justifiably presumed that a victim or a victim's family would want the maximum sentence allowed by law to be imposed upon a defendant. Abramovsky, *NY L J* at 3.

33. *Id.* (cited in note 32).

34. *Id.*

35. *Id.*

rooted in the notion that all victims are entitled to equal justice and that sentencing should not depend on the position of the victim as determined from a victim impact statement that can easily be manipulated by external factors, but upon the severity of the crime.³⁶

A contrasting viewpoint to the opinion that victim impact statements should not be admitted at the sentencing phase of a trial emphasizes that allowing victims to participate in the criminal justice system through the use of victim impact statements could result in empowering victims.³⁷ Moreover, the criminal justice process may itself benefit by promoting victim cooperation with a prosecutor.³⁸ Additionally, providing judges with more information concerning a case might translate into an improvement of the criminal justice process.³⁹ Furthermore, in response to the argument that the prosecutor is a sufficient representative of the victim at trial, supporters of the use of victim impact statements assert that the prosecution serves as a representative of the people of the state and thus may not necessarily share the same viewpoint about a case as does the victim.⁴⁰ Finally, the concern of equal protection should be to assure that all victims have the right to be heard.⁴¹

36. *Id.* It was contended that the effectiveness of the victim impact statement could be influenced by external factors such as the articulateness of the victim or the victim's family, the financial ability of the victim or the victim's family to hire private counsel to prepare the statement, and the possibility that a deceased may have no one to testify concerning the effects which the crime had upon them. *Id.* This could consequently allow the position of the victim to influence sentencing rather than the severity of the crime. *Id.*

37. Maria Imperial, *A Contrasting View of Victims' Rights*, NY L J at 2 (April 15, 1992). This article was prepared in response to Abraham Abramovsky's article titled "Victim Impact Statements Revisited" (cited in notes 32-36). Imperial, NY L J at 2.

38. *Id.* (cited in note 37).

39. *Id.* It was pointed out that it should not be assumed that a maximum sentence for the defendant would be sought after by the victim or the victim's family. *Id.* In support of this contention, a study was cited (Hagan, 1982) which demonstrated that victims participating in the court process were not as likely to demand severe sentences. *Id.*

40. *Id.*

41. *Id.* The argument concerning the possibility that a victim's articulateness as well as a victim's financial position might result in unequal justice can be likewise applied to defendants. *Id.* A fear that some defendants may be more articulate than others and may be able to retain higher priced defense attorneys could also support a denial of equal rights. *Id.*

Despite the views of the article's author, Imperial cautioned against encouraging victim participation while at the same time not allowing genuine involvement in the criminal justice system. *Id.* The participation must be meaningful in order to be effective. *Id.* A study on the use of victim impact statements conducted in the Bronx Supreme Court (Davis, Henley, Smith 1990) was noted as providing no indications of enhanced feelings of involvement and satisfaction by victims through the use of victim impact statements. *Id.*

III. VICTIM IMPACT STATEMENTS BEFORE *PAYNE v TENNESSEE*

The United States Supreme Court has, in *Payne v Tennessee*,⁴² recently changed its position regarding the admissibility of victim impact evidence in the context of the sentencing phase of a capital trial. What follows is a brief overview of the cases which have shaped the Supreme Court's present stance on the admissibility of such evidence.

A. *Booth v Maryland*⁴³

The issues raised in *Booth v Maryland* evidenced the growing victims' rights movement which had its beginnings in the 1970s.⁴⁴ In *Booth*, the Supreme Court of the United States, for the first time, considered the admissibility of victim impact statements at the sentencing phase of a capital trial.⁴⁵

John Booth had been convicted in a trial by jury of two counts of first-degree murder, two counts of robbery, and conspiracy to commit robbery following the robbery and murder of Irvin and Rose Bronstein.⁴⁶ A presentence report, which included a description of Booth's background, education, and employment history as well as his criminal record, was prepared by the State Division of Parole and Probation.⁴⁷ As part of the presentence report, a victim

42. US , 111 S Ct 2597 (1991).

43. 482 US 496 (1987), overruled by *Payne v Tennessee*, 111 S Ct 2597 (1991).

44. Note, *Death Knell for the Victim Impact Statement?*, 47 Md L Rev 701, 705 (1988).

45. Note, 47 Md L Rev at 705.

46. *Booth*, 482 US at 497-98. Booth and his accomplice Willie Reid entered the couple's West Baltimore home with the likely intent to steal money in order to purchase heroin. Id. Because the couple had the ability to identify Booth, they were bound and gagged and stabbed numerous times with a kitchen knife. Id at 498. The victims' son discovered their bodies two days later. Id. As a principal in the first degree in Mrs. Bronstein's murder, Willie Reid was convicted and sentenced to death. Id at 498 n 1.

Booth chose to have a jury, rather than a judge determine his sentence. Id at 498. The prosecution requested the death penalty. Id.

47. Id. A Maryland statute required that for all felony cases, a presentence report contain a victim impact statement which detailed the effect which the crime had upon the victim and his family. Id citing Md Ann Code art 41, § 4-609(c) (1986). The Code specifically provided that "[i]n any case in which the death penalty is requested . . . a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted . . ." Id at 498 n 2 citing Md Ann Code art 41, § 4-609(d) (1986). The Code stated that the presentence report shall:

(i) Identify the victim of the offense;

(ii) Itemize any economic loss suffered by the victim as a result of the offense;

(iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

impact statement⁴⁸ was prepared utilizing information that was obtained in interviews with the victims' son, daughter, son-in-law, and granddaughter.⁴⁹ For the murder of Mr. Bronstein, Booth was sentenced to death, and for the murder of Mrs. Bronstein, he received a sentence of life imprisonment.⁵⁰

(iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the trial court requires.

Id at 498-99 citing Md Ann Code art 41, § 4-609(c)(3).

48. The information contained in a victim impact statement, a part of the presentence report, is obtained from the victim or the victim's family and can either be read to the jury during the sentencing phase of the trial or testified to in person at the sentencing by the family members. *Booth*, 482 US at 499.

49. Id. Comments in the victim impact statement spoke of the victims' personal qualities and the effects of the crime as felt by the couple's family members. Id. Both the son and daughter stated that they suffered from lack of sleep. Id at 500. In the opinion of the son, his mother and father were "butchered like animals." Id. The daughter was reminded of the murders each time she saw a kitchen knife. Id. The victim impact statement provided, in part, as follows:

[T]he victims' son reports that his parents had been married for fifty-three years and enjoyed a very close relationship, spending each day together. He states that his father had worked hard all his life and had been retired for eight years. He describes his mother as a woman who was young at heart and never seemed like an old lady. She taught herself to play bridge when she was in her seventies. The victims' son relates that his parents were amazing people who attended the senior citizens' center and made many devout friends. (citation omitted)

As described by their family members, the Bronsteins were loving parents and grandparents whose family was most important to them. Their funeral was the largest in the history of the Levinson Funeral Home and the family received over one thousand sympathy cards, some from total strangers. (citation omitted)

Id at 500 n 3.

The victim impact statement concluded with the following statement by an official of the State Division of Parole and Probation:

It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking, painful, and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them.

Id at 500.

50. Id at 501. Booth was found guilty by a jury of first degree murder of Mr. Bronstein, both premeditated and felony, and finding that Booth was a principal in the first degree to that murder, the jury imposed a death sentence. *Booth v State*, 306 Md 172, 507 A2d 1098, 1103 (1986). Booth was also found guilty of first degree murder in the death of Mrs. Bronstein and was sentenced to life imprisonment. *Booth v State*, 507 A2d at 1103. Booth's accomplice, Willie Reid, was found to be the principal in the first degree in the murder of Mrs. Bronstein and was thus sentenced to death. Id at n 1.

Booth's claim that the victim impact statement introduced an arbitrary factor into the

The Supreme Court of the United States granted certiorari to determine whether a capital sentencing jury was prohibited by the Eighth Amendment⁵¹ from considering victim impact evidence.⁵² The Supreme Court reversed the Maryland Court of Appeals and held that the Eighth Amendment does prohibit the consideration of victim impact evidence by a capital sentencing jury.⁵³ The Court concluded that the information contained in the victim impact statement was irrelevant in the capital sentencing decision as its admission created a risk that the death penalty may be applied by the jury in an "arbitrary and capricious" fashion.⁵⁴

The Court first considered the evidence concerning the victims' personal characteristics and the emotional effects which the crime had upon the family.⁵⁵ The Court feared that the admission of such information could result in the jury not focusing upon the defendant's background and record and the circumstances of the crime.⁵⁶ Emphasizing the nature of the information provided by a

sentencing process was rejected by the Maryland Court of Appeals. *Booth*, 482 US at 501. The Court of Appeals reasoned that an important function of the victim impact statement was to enable the sentencer to understand the full extent of the harm caused by the crime. *Id.*

51. The text of the Eighth Amendment is as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Amend VIII.

52. *Booth*, 482 US at 501-02.

53. *Id.* at 502. The court classified the information contained by the victim impact statement in *Booth* into two types: (1) a description of the victims' personal characteristics and the emotional impact upon the victims' family and (2) the family members' opinions and characterizations of both the crimes and the defendant. *Id.*

54. *Id.* at 503. The Court noted that in allowing a jury to impose a death sentence, its discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 502 citing *Gregg v Georgia*, 428 US 153, 189 (1976) (joint opinion of Justices Stewart, Powell, and Stevens); *California v Ramos*, 463 US 992, 999 (1983). While factors other than the circumstances of the crime and the defendant's record and characteristics may be considered by the sentencing authority, it must be assured that such factors are relevant to the defendant's "personal responsibility and moral guilt." *Booth*, 482 US at 502 citing *Enmund v Florida*, 458 US 782, 801 (1982).

55. *Booth*, 482 US at 503. The State contended that it was not "arbitrary" for the sentencing jury to consider such evidence because a "direct, foreseeable" connection existed between the crime and the harm suffered by the family. *Id.* Arguing that the victim impact evidence was a "circumstance" of the crime, the State claimed that the jury's knowledge of the crime's impact upon the family enabled them to better determine the "gravity or aggravating quality" of the offense. *Id.* at 503-04 citing Brief for Respondent at 21.

The Court, however, emphasized that such information would not likely provide a basis for the defendant's decision to kill because it was unlikely that the defendant had any knowledge of such information. *Id.* at 505.

56. *Id.* at 505. The sentencing jury must concentrate on the defendant as a "uniquely individual human bein[g]." *Id.* at 504 citing *Woodson v North Carolina*, 428 US 280, 304 (1976) (plurality opinion of Justices Stewart, Powell, and Stevens). A victim impact state-

victim impact statement, the Court opined that there was a great risk that the decision in a capital sentencing proceeding would be made in an arbitrary manner.⁵⁷ The Court also noted the danger that a defendant would be unable to effectively rebut the victim impact evidence without shifting the focus of sentencing away from the defendant.⁵⁸

The second type of evidence considered by the Court was the opinions of family members and the characterizations of the crimes.⁵⁹ While the Court was sympathetic to the loss suffered by the family, it reasoned that such information could only inflame the jury and cause its attention to be diverted from the relevant evidence concerning both the crime and the defendant, thus resulting in a departure from the reasoned analysis required in capital cases.⁶⁰

B. *South Carolina v Gathers*⁶¹

South Carolina v Gathers reinforced the position taken by the

ment, however, does not concentrate upon the defendant, but upon the victim's character and reputation and the effect which the crime had upon his family—factors that could be completely unrelated to an individual defendant's blameworthiness. *Booth*, 482 US at 504. The Court notes that it is likely that the defendant will not know his victim or particular information concerning the victim's family. *Id.* Additionally, the selection of a victim is probably not based upon the likely effects which a crime will have upon those close to the victim. *Id.*

57. *Id.* at 505. The Court used the articulateness (or lack thereof) of the victim's family as an example. *Id.* In *Booth*, the victims' family members were articulate and persuasive in describing the effects which the murders had upon their lives. *Id.* However, it is possible that a victim will not have a family or that a victim's family, whose loss and grief are similar to that suffered by the family in *Booth*, will be unable to effectively articulate their feelings for the sentencing jury. *Id.* The possibility that the imposition of the death penalty will depend on the articulateness of a victim's family (a factor which is irrelevant to the capital sentencing decision) provides an example of the danger inherent in allowing a jury to consider this type of information. *Id.*

58. *Id.* at 506. In cross-examining the declarants, it is unlikely that the defendant would be able to prove that the family members exaggerated their feelings of loss and grief. *Id.* Additionally, the Court was concerned about allowing possible "mini-trials" on the victim's character which could distract the jury from determining the appropriateness of the death penalty considering the defendant's background and record and the particular circumstances of the crime. *Id.* at 507. The Court ultimately concluded that victim's personal characteristics as well as the emotional impact upon the family of the victim were not permitted to be considered during the sentencing phase of a capital trial. *Id.*

59. *Id.* at 508. The couple's son stated that his parents were "butchered like animals" and that he "doesn't think anyone should be able to do something like that and get away with it." *Id.* The victims' daughter expressed her feelings that those who did this were unable to be rehabilitated. *Id.*

60. *Id.* at 508-09.

61. 490 US 805 (1989), overruled by *Payne v Tennessee*, 111 S Ct 2597 (1991).

Supreme Court in *Booth* regarding the admissibility of victim impact evidence. A jury convicted Demetrius Gathers of murder and first-degree criminal sexual conduct in the death of Richard Haynes.⁶² Gathers was sentenced to death.⁶³ At the sentencing phase, the prosecutor concentrated his comments on the character of the victim, primarily his religious nature, which he deduced from the articles found at the scene of the crime.⁶⁴ The Supreme Court of South Carolina found that the prosecution's comments concerning the victim's character were not necessary to enable the jury to understand the circumstances of the crime and thus reversed Gathers' death sentence and remanded to allow a new sentencing proceeding.⁶⁵ The United States Supreme Court granted certiorari.⁶⁶

The Supreme Court of the United States emphasized that the punishment received by the defendant in a death penalty case must be commensurate with his personal responsibility and moral guilt.⁶⁷ The Court compared the statements made by the prosecution with those contained in the victim impact statement in *Booth*

62. *Gathers*, 490 US at 807-08. While sitting on a park bench, Haynes was approached by Gathers and three other individuals who tried unsuccessfully to initiate conversation with him. Id at 806-07. Gathers and his three companions then beat and assaulted Haynes, and Gathers later returned and stabbed Haynes with a knife. Id at 807. Haynes had no formal religious training, but fashioning himself as a preacher, he called himself "Reverend Minister." Id. It was his practice to carry with him several bags which contained religious articles. Id at 807. A tract titled "The Game Guy's Prayer," which emphasized the importance of being a good sport, was found among several other personal items which were scattered about at the crime scene. Id. The items found at the scene were admitted into evidence at the guilt phase of the trial without objection. Id.

63. Id at 806. At the sentencing phase, all of the articles which were admitted at the guilt phase were readmitted into evidence. Id at 808. While no other evidence was presented by the State at the sentencing phase, it was the prosecution's closing argument that was at issue in this case. Id. The prosecutor first emphasized that Reverend Minister Haynes was a religious person, and then he began to describe the articles which were found strewn about at the crime scene. Id. He even read the contents of the tract "The Game Guy's Prayer" for the jury. Id at 808-09. The prosecutor went on to describe Haynes as someone who "took things as they came along" and that "[h]e was prepared to deal with tragedies that he came across in his life." Id at 809. Noting that Haynes possessed a voter's registration card, the prosecutor then went on to refer to Haynes as someone who believed in his community as well as the United States of America. Id at 809, 810.

64. Id at 808-10.

65. Id at 810 citing *State v Gathers*, 295 SC 476, 369 SE2d 140, 144 (1988). The Supreme Court of South Carolina reasoned that the remarks made by the prosecutor suggested to the jury that the death sentence should be imposed because of the victim's character (ie: that he was a religious man and a registered voter). Id.

66. *Gathers*, 490 US at 810.

67. Id at 810 citing *Enmund v Florida*, 458 US 782, 801 (1982). The Court added that "a criminal sentence must be directly related to the personal culpability of the criminal offender." Id at 810 citing *Tison v Arizona*, 481 US 137, 149 (1987).

and observed that, in substance, the statements made by the prosecution in *Gathers* were indistinguishable from those made in *Booth*.⁶⁸ The Court affirmed the decision of the Supreme Court of South Carolina, reasoning that the statements made by the prosecution could result in a jury imposing the death penalty on the basis of information which was not known by the defendant and not instrumental in the defendant's decision to kill.⁶⁹

IV. *PAYNE V TENNESSEE* AND ITS IMPACT

In *Payne v Tennessee*,⁷⁰ the United States Supreme Court overruled both *Booth v Maryland* and *South Carolina v Gathers*, holding that the Eighth Amendment did not prohibit a state from choosing to allow the admission of victim impact evidence as well as prosecutorial argument concerning the same.⁷¹ A jury had convicted Pervis Tyrone Payne of two counts of first-degree murder and one count of assault with intent to commit murder in the first degree in an incident involving Charisse Christopher, her two-year-old daughter, Lacie, and her three-year-old son, Nicholas.⁷² Payne introduced the testimony of four witnesses during the sentencing

68. *Gathers*, 490 US at 811. The statements in both cases concerned the personal qualities and characteristics of the victim. *Id.* The only distinction was that the statements in *Gathers* were made by the prosecutor, while the statements in *Booth* were made by the victims' survivors. *Id.*

69. *Id.* at 811, 812 relying on *Booth v Maryland*, 482 US at 505. The State argued that the statements were admissible because they bore a direct relationship to the circumstances of the crime. *Id.* at 811. Although the *Booth* Court did not foreclose the possibility that victim impact information could be admitted under the above circumstances, the Court in *Gathers* found that statements made by the prosecutor went too far. *Id.* The Court concluded that the reading from the religious tract as well as the comments about the character of the victim could not be relevant to the circumstances of the crime. *Id.* Under the circumstances, it was unlikely that the defendant was even aware of the contents of materials which *Gathers* was carrying when he was assaulted. *Id.* at 812.

70. U.S. , 111 S Ct 2597 (1991), rehearing denied by *Payne v Tennessee*, US , 112 S Ct 28 (1991).

71. *Payne*, 111 S Ct at 2609, 2611. The Court limited the application of its holding to evidence and argument which deal with the victim and the impact which the crime had upon the victim's family; the Court did not purport to extend its holding to apply to evidence supplied by the family of the victim which contains characterizations and opinions concerning the crime, the defendant, and the appropriate sentences, as no such evidence was presented in this case. *Id.* at 2611 n 2.

72. *Id.* at 2601. Payne received the death penalty for each of the murders and a 30-year prison term for the assault. *Id.* Charisse Christopher, her two-year-old daughter Lacie, and three-year-old son Nicholas were the victims of Payne's actions. *Id.* Charisse and her two children were each stabbed multiple times with a butcher knife. *Id.* at 2602. Even though Nicholas sustained several stab wounds which penetrated his body from front to back, he survived after several hours of surgery and an extensive blood transfusion. *Id.* Charisse and Lacie, however, did not survive. *Id.*

phase of the trial.⁷³ The testimony presented by the State was that of Charisse's mother, Mary Zvolanek, who testified as to the effects that the murders had upon Nicholas.⁷⁴ Although the Supreme Court of Tennessee labeled the testimony of Mrs. Zvolanek as "technically irrelevant," it concluded that it was "harmless beyond a reasonable doubt" because it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty."⁷⁵

To review its holdings in *Booth* and *Gathers* that victim impact evidence providing information about the victim's personal characteristics as well as the effects of the crime upon the victim's family cannot be considered at the sentencing phase of a capital trial, the United States Supreme Court granted certiorari.⁷⁶ The Court

73. Id at 2602. The witnesses on Payne's behalf were his mother and father; Bobbie Thomas; and Dr. John T. Huston, a clinical psychologist who specialized in criminal court evaluation work. Id. These witnesses emphasized Payne's good, moral character and described him as a caring person who was good with children and who had no history of drug or alcohol abuse. Id at 2602-03.

74. Id at 2603. Mrs. Zvolanek explained how Nicholas cried for his mother and sister and did not seem to understand why they were no longer there. Id. The prosecutor also emphasized the long-lasting effects which the crimes would likely have upon Nicholas. Id. The prosecutor speculated that when Nicholas grew up, he would want to know what happened to his mother and his sister, and he would want to know what justice was done. Id. During rebuttal to Payne's closing argument, the prosecutor commented as follows:

[Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.

Id.

75. *Payne*, 111 S Ct at 2604 citing *State v Payne*, 791 SW2d 10, 18 (1990). Emphasizing the importance of the comments made by the prosecution during closing argument in determining Payne's "personal responsibility and moral guilt," the court stated that

[w]hen a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his "blameworthiness."

Id citing *Payne*, 791 SW2d at 19.

76. *Payne*, 111 S Ct at 2604. The Court concluded that two premises formed the foundation for the decisions in *Booth* and *Gathers*: (1) a defendant's "blameworthiness" is not generally determined by evidence which establishes the effects of the crime upon that victim or the victim's family, and (2) the only evidence which is relevant in a capital sentencing decision is that evidence which relates to "blameworthiness." Id at 2605. The Court noted, however, that a determination of the harm caused by the defendant has historically been relevant in establishing the elements of the offense and its punishment. Id.

briefly examined the history of criminal sentencing and concluded that the harm caused by a crime has occupied an important role in the exercise of a sentencing authority's discretion in the imposition of sentences.⁷⁷ The Court concluded that the *Booth* decision resulted in the defendant enjoying an unfair advantage in the sentencing phase of a capital trial.⁷⁸ Acknowledging the possible difficulty in the defendant's being able to rebut such evidence, the Court found this argument from *Booth* unpersuasive.⁷⁹

Noting that a large portion of the responsibility for defining crimes, establishing punishments, and defining procedure rests with the states, the Court reviewed the Eighth Amendment limitations which have been placed upon the process of imposing the death penalty for certain crimes.⁸⁰ The Court viewed victim impact evidence as merely another manner in which the sentencing authority could be informed as to the specific harm caused by the

77. *Id.* at 2606. The Court noted that the Federal Sentencing Guidelines, which became effective in 1987, required the consideration of factors which were relevant both to the defendant's subjective guilt as well as the harm caused by his actions in imposing a sentence. *Id.* at 2605-06. Additionally, the Court remarked that sentencing authorities have always had the freedom to consider a broad spectrum of information. *Id.* at 2606.

78. *Id.* at 2607. While a defendant is largely unlimited in the mitigating evidence which he may introduce, the State is not permitted to introduce evidence which would inform the jury about the victim or the loss suffered by both the victim's family and society. *Id.*

79. *Id.* at 2607. The Court also addressed the concern that victim impact evidence encourages the imposition of the death penalty upon defendants whose victims were seen as assets to the community while the opposite is true for those whose victims are viewed as less important. *Id.* Using the facts of *Gathers* as an example, the Court reasoned that such was not the case, and that victim impact evidence was to be admitted to show that the victim was a unique, individual human being. *Id.* Recall that the victim in *Gathers* was an unemployed, mentally handicapped individual who would likely be perceived by most as someone who did not make significant contributions to society, but the bottom line was that he was murdered. *Id.*

80. *Id.* at 2607-08. In reviewing the limitations, the Court stated that:

[f]irst, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Id. at 2608 citing *McClesky v Kemp*, 481 US 279, 305-06 (1987). Conscious of these limitations, the Court has allowed the states much latitude in choosing the factors which it deems relevant to the determination of a sentence. *Id.* citing *California v Ramos*, 463 US 992, 1001 (1983).

crime.⁸¹ The Court recognized the danger that without evidence concerning the specific harm caused by the defendant, the sentencing authority would not possess all of the information necessary to impose the proper sentence.⁸² Using the instant case as an appropriate example, the Court contrasted the wide variety of mitigating evidence presented by Payne with the evidence presented by the prosecution concerning the impact of the crimes upon the victims' family.⁸³ The Court ultimately concluded that it was within a state's discretion to allow the admission of victim impact evidence as well as prosecutorial argument concerning the same, stating that the Eighth Amendment does not establish a per se bar to its admission.⁸⁴ Additionally, in overruling *Booth* and *Gathers*, the Court rejected Payne's argument based upon stare decisis.⁸⁵

V. CONCLUSION

As a result of the Court's decision in *Payne*, it appears that the victim of a crime or the victim's family will be given a part in the sentencing process equally important as that occupied by the defendant.

The basic tenets of death penalty jurisprudence formed the basis for the Court's earlier decisions. The Court emphasized that the decision to impose the death penalty should not be carried out in an arbitrary or capricious manner and likewise would not allow the consideration of factors which had no relevance to the personal re-

81. *Payne*, 111 S Ct at 2608. Rejecting the notion that allowing the admission of victim impact evidence would result in the arbitrary imposition of the death penalty, it was stated that generally legitimate purposes are served by its admission and that the Due Process Clause of the Fourteenth Amendment guards against its use in an unduly prejudicial fashion. *Id.*

82. *Id.* at 2608. The majority noted that a state interest was present in balancing the defendant's mitigating evidence and reinforcing to the sentencing authority that not only is the defendant to be treated as an individual, but likewise, the victim is a unique individual whose death impacted both his family as well as society. *Id.* at 2608 citing *Booth*, 482 US at 517 (J. White, dissenting).

83. *Payne*, 111 S Ct at 2608-09. Recall that Payne's girlfriend and parents and a clinical psychologist testified as to Payne's good character, that he was good with children, and that he did not abuse drugs or alcohol—information not related to the circumstances of the crimes he committed. *Id.* The only evidence which detailed the impact of Payne's crimes that was admitted during the sentencing phase was the testimony of Nicholas' grandmother that Nicholas missed his mother and sister. *Id.* at 2609. The Court found that allowing the jury to consider the evidence of harm while also considering the defendant's mitigating evidence was not unfair. *Id.*

84. *Id.* at 2609.

85. *Id.* at 2611. The Court reasoned that stare decisis was not a command to be applied mechanically but a principle of policy. *Id.* at 2609-11.

sponsibility and moral guilt of the defendant.⁸⁶ Finding that allowing the admission of victim impact evidence created a great risk that the capital sentencing decision would be made in an arbitrary manner, the Court rejected the admission of such evidence.⁸⁷

While the Court in *Payne* also considered the prohibition against arbitrary and capricious action, it emphasized the importance that the sentencing authority have before it all the necessary information relevant to the sentencing decision which includes information detailing the harm caused by the defendant.⁸⁸ The Court noted that an important function of victim impact evidence was to balance the effects of the virtually unlimited mitigating evidence which the defendant was permitted to introduce in his own behalf.⁸⁹

An additional concern in admitting victim impact evidence is that a sentencing authority may be encouraged to impose harsher punishments upon defendants whose victims were considered as assets to their community than upon defendants whose victims were viewed as being perhaps less important.⁹⁰ The *Payne* Court addressed this concern by emphasizing that the purpose of admitting victim impact evidence is not to promote comparative judgments based upon the perceived worth of the victim but rather to reinforce the notion of "each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."⁹¹

In this author's opinion, the Court's decision in *Payne v Tennessee* represents a beneficial change in the Court's death penalty jurisprudence. While the focus of sentencing is to be upon the defendant's moral guilt and blameworthiness, sentencing must not be a one-sided procedure. Although it is necessary for a sentencing authority to consider fully any mitigating factors presented by the defense, it is equally important that the other side of the issue be presented - namely, that the only reason for which the sentencing process must occur is because the defendant has been found guilty of causing harm to the victim. The harm caused, however, is often much broader than that suffered by the victim alone. The effect which the defendant's actions have upon a victim's family is a

86. *Booth*, 482 US at 503, 504.

87. *Id.* at 503, 509.

88. *Payne*, 111 S Ct at 2608.

89. *Id.*

90. *Id.* at 2607.

91. *Id.*

harm which cannot and should not be ignored.

By allowing the sentencing authority to consider victim impact evidence, the Supreme Court has enabled the sentencer to become well informed with respect to both factions which have an interest in the outcome of the sentencing process. Sentencing must be a balancing process whereby the effect which the defendant's actions have had upon the victim or the victim's family must be factored into the equation. The prohibition against "arbitrary and capricious" imposition of the death penalty is also an added safeguard which transcends the whole sentencing process.

One can only speculate as to what caused this drastic shift in the Supreme Court's position in a relatively short period of time. Two of the justices which formed the majority in *Booth* were not on the Court when *Payne* was decided; in the interim between the Court's decisions in *Booth* and *Payne*, Justices Powell and Brennan were replaced by Justices Kennedy and Souter. Both Justices Kennedy and Souter sided with the majority in *Payne*. Since *Booth* was a 5-4 decision and *Payne* was decided by a 6-3 margin, it is arguable that the change in the Court's personnel may have been a factor contributing to its change in position. Justice White is the only Justice who has not been predictable; while he was part of the *Payne* majority and the dissenters in *Booth*, he was also part of the majority in *South Carolina v Gathers*. The other unpredictable variable is the position which the most recent addition to the Court, Justice Clarence Thomas, will take regarding the issue of the admissibility of victim impact evidence at the sentencing phase of a capital trial. It seems, however, that he will not alone be able to effect another change in this limited facet of the Court's death penalty jurisprudence. Justice Thomas could either add to the *Payne* majority of six or take the place among the dissenters which Justice Marshall left vacant. Thus, it is not likely that *Payne v Tennessee* will be overruled any time in the near future.

Regardless of the reasons for the change in the Court's position, it is apparent that the rights of the victim are no longer secondary in importance to those of the defendant. While a court must be careful not to place the defendant in danger of being subject to arbitrary and capricious action by a sentencing authority, the sentencer now has the freedom to thoughtfully consider the victim and the victim's family and the suffering which they have endured as a result of the defendant's actions. The Supreme Court, in its decision in *Payne*, has taken an important and significant step to recognize the rights of victims in our society. It is a step that may

pave a pathway for future decisions which likewise will place the rights of victims on an equal footing as those of the accused.

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