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Five to Four over Spirited Dissent: Justification to Overrule - Payne v. Tennessee

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"FIVE TO FOUR OVER SPIRITED DISSENT": JUSTIFICATION TO OVERRULE?

Payne v. Tennessee,
111 S. Ct. 2597 (1991)

Lynn McCreery Shaw

I. INTRODUCTION

Since 1978,[1] at least thirty-six states have adopted legislation requiring victim impact evidence to be presented in criminal trials.[2] The United States Congress has also enacted such a statute called the Victim and Witness Protection Act of 1982.[3] This relatively recent proliferation of legislation has raised the constitutional question of whether such evidence is prohibited in capital sentencing by the Eighth Amendment's proscription of cruel and unusual punishment.[4]

In 1987[5] and again in 1989,[6] the United States Supreme Court held that victim impact statements[7] were a violation of the Eighth Amendment.[8] In June of 1991,[9]

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1. Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPP. L. REV. 23, 51 (1984) [hereinafter Hudson].

2. Hudson, *supra* note 1, at 51.

3. Pub. L. No. 97-291, 96 Stat. 1242 (codified at 18 U.S.C. § 1512 (1988)). The Act states: "The Congress finds and declares that: Without the cooperation of victims and witnesses the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders." *Id.* § 2(a)(1). "This is the single most important and comprehensive piece of federal legislation on behalf of crime victims to ever come out of Congress." Frank Carrington & George Nicholson, *The Victim's Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1, 8 (1984). *See also* FED. R. CRIM. P. 32(c)(2).

4. *Compare* Booth v. Maryland, 482 U.S. 496 (1987) *with* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

5. *Booth*, 482 U.S. at 496.

6. South Carolina v. Gathers, 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

7. Victim impact statements include a description of the emotional trauma suffered by the victim's family and the personal characteristics of the victims, as well as the family members' opinions and characterizations of the crime and the defendant. *Booth*, 482 U.S. at 502-03. Justice Brennan found that the offering of this information by the prosecutor is "indistinguishable in any relevant respect" from a victim or the victim's family offering such information. *Gathers*, 490 U.S. at 811. Under the various statutory schemes, there are basically two models of victim impact statements: "Model #1: The preparation and presentation of a written victim impact statement, to be introduced at the sentencing hearing or plea negotiation . . . . Model #2: The presentation of an oral statement at the sentencing hearing or plea negotiation . . . ." Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 503-04 (1986) [hereinafter McLeod].

8. *Gathers*, 490 U.S. at 811; *Booth*, 482 U.S. at 509.

9. Payne v. Tennessee, 111 S. Ct. 2597 (1991).

however, the Court changed its mind, deciding in *Payne v. Tennessee*[10] that victim impact evidence[11] was admissible during sentencing in a death penalty case.[12]

II. FACTS

On June 27, 1987, twenty-eight year old Charisse Christopher, her two-and-one-half year old daughter, Lacie, and her three-and-one-half year old son, Nicholas, were brutally stabbed at their apartment in Millington, Tennessee, outside of Memphis.[13] Charisse died of forty-one knife thrusts which caused forty-two wounds and forty-two defensive wounds to her arms and hands.[14] Lacie received nine stab wounds to her head, abdomen, back and chest, one of which cut her aorta causing almost immediate death.[15] Nicholas survived several stab wounds, which penetrated completely through his body from front to back but only after seven hours of surgery requiring a massive blood transfusion and two additional operations.[16] The defendant, Pervis Tyrone Payne, was convicted of first degree murder of Charisse and Lacie and of first degree assault of Nicholas with intent to commit murder.[17] Payne received a death sentence for each of the murders and was sentenced to thirty years in prison for the first degree assault.[18]

During the sentencing phase of Payne's trial, the defense presented the testimony of Payne's girlfriend, Bobby Thomas, who lived across the hall from the victims.[19] The defense also presented the testimony of Payne's parents and Dr. John T. Hutson, a psychiatrist who tested Payne three months after the crimes.[20] Ms. Thomas and the defendant's parents testified that Payne was caring, did not abuse alcohol or drugs, worked responsibly as a painter with his father and was good with children.[21] Dr. Hutson stated that based on the tests he had conducted,

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10. *Id.*

11. "The term 'victim impact evidence,' reflecting the type of information contained in [a victim impact statement], encompasses a broad range of factual, opinion, and documentary evidence" the admissibility of which, according to the *Booth* rationale, depends on its characterization as a circumstance of the crime. Charlton T. Howard, III, Note, Booth v. Maryland–*Death Knell for the Victim Impact Statement*, 47 MD. L. REV. 701 n.2 (1988) [hereinafter Howard].

12. *Payne*, 111 S. Ct. at 2609.

13. State v. Payne, 791 S.W.2d 10, 11 (Tenn. 1990).

14. *Id.* at 12.

> The medical examiner testified that the forty-two (42) knife wounds represented forty-one (41) thrusts of the knife, "because there was one perforated wound to her left side that went through her – went through her side. In and out wounds produce two." He said no wound penetrated a very large vessel and the cause of death was bleeding from all of the wounds; there were thirteen (13) wounds "that were very serious and may have by themselves caused death. I can't be sure, but certainly the combination of all the wounds caused death."

Id.

15. *Id.*

16. *Id.*

17. *Id.* at 11.

18. *Id.*

19. *Id.* at 17.

20. *Id.*

21. *Id.*

Payne was "mentally handicapped" but not psychotic or schizophrenic.[22] He also testified that Payne was one of the most polite people he had ever interviewed in jail.[23]

The State responded with the testimony of Charisse's mother, who stated that Nicholas cried for his mother and sister and could not understand what had happened to them.[24] The prosecution's second witness, a detective with the Millington Police Department, identified a videotape he had made of the crime scene, and it was played for the jury over objection.[25]

In her closing argument during sentencing, the prosecutor reminded the jury about the victim's side of the story. She stated that because Nicholas was conscious when the paramedics arrived, he had seen what happened to his mother and sister.[26] She went on to assert that later in life Nicholas would want to know if justice was done and that the jury could give him that answer with its verdict.[27] The prosecution made the alleged impact of the crime on Nicholas more vivid with statements such as "Nicholas' mother [won't be] there to kiss him goodnight," and "[Nicholas] mourns for [Lacie] every single day and wants to know where his best little playmate is."[28]

The Tennessee Supreme Court affirmed the death sentence, holding that the death penalty was neither excessive nor disproportionate to the penalty imposed in similar cases[29] and that the admission of victim impact evidence was harmless error.[30] The United States Supreme Court granted certiorari to reconsider its holdings in *Booth v. Maryland*[31] and *South Carolina v. Gathers*,[32] which prohibited capital sentencing juries from hearing victim impact statements concerning "the personal characteristics of the victim and the emotional impact of the crimes on the victim's family."[33] Affirming the Tennessee Supreme Court's decision,[34] the

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22. *Id.*

> [Dr. Hutson] gave [Payne] the Wechsler Adult Intelligence Scale (WAIS) revised version. [Payne's] scores were Verbal IQ 78, Performance IQ 82 . . . . He testified that the theoretical norm is 100, that actual test results have moved the norm closer to 110; that historically the [mentally handicapped] score was 75 . . . .

Id.

23. *Id.*

24. *Id.* at 17-18.

25. *Id.* at 17.

26. *Id.* at 18.

27. *Id.*

28. *Id.* at 18-19.

29. *Id.* at 21.

30. *Id.* at 19.

31. 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991). The *Booth* Court held that admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence, violated the Eighth Amendment. *Booth*, 482 U.S. at 508-09.

32. 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991). The Court's holding in *Gathers* extended its holding in *Booth* to prosecutorial comment concerning the information in a victim impact statement. *Gathers*, 490 U.S. at 811.

33. *Payne*, 111 S. Ct. at 2604.

34. *Id.* at 2611.

United States Supreme Court overruled its decisions in *Booth* and *Gathers*,[35] holding that the Eighth Amendment does not bar a capital sentencing jury from considering victim impact evidence.[36]

III. Background and History

A. The Cruel and Unusual Punishment Clause and the Death Penalty

Before the consequences of the *Payne* decision can be fully appreciated, it is necessary to examine the arduous journey of the death penalty through United States history. Adopted as part of the United States' English common law heritage, the death penalty was mandatory for all convicted murderers.[37] Then in 1791, the Eighth Amendment[38] became a part of our Constitution,[39] having been adopted verbatim from the English Bill of Rights of 1689.[40] It was eighty years before the Supreme Court was asked to interpret the Cruel and Unusual Punishment Clause.[41] The accepted interpretation of the clause from adoption to the 1909 Supreme Court decision of *Weems v. United States*[42] was that it prohibited certain methods of punishment thought to be barbaric and torturous.[43]

Before *Weems*, popular sentiment led to a revision of the common law rule imposing a mandatory death sentence on all convicted murderers.[44] Pennsylvania took the lead when, in 1794, it statutorily abolished mandatory capital punishment

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35. *Payne*, 111 S. Ct. at 2611 n.2.

36. *Id.* The Court also held that stare decisis did not require the Court to follow prior precedents. *Id.* Discussion of stare decisis is beyond the scope of this article and has been adequately covered in many scholarly works. *See* Herbert C. Kaufman, *A Defense of Stare Decisis*, 10 HASTINGS L.J. 238 (1959); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Peter L. Szanton, *Stare Decisis: A Dissenting View*, 10 HASTINGS L.J. 394 (1959); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990).

37. Woodson v. North Carolina, 428 U.S. 280, 289 (1976) (examining the history of the death penalty). Statistical studies indicate that the death penalty was often commuted. HUGO G. BEDAU, THE DEATH PENALTY IN AMERICA 366 (3d ed. 1982). *See also* Furman v. Georgia, 408 U.S. 238, 299 (1972) (Brennan, J., concurring) (stating that a substantial number of death sentences had been commuted).

38. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

39. *Woodson*, 428 U.S. at 289.

40. Anthony F. Granucci, *'Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) [hereinafter Granucci].

41. Furman v. Georgia, 408 U.S. 238, 264 (1972) (Brennan, J., concurring). *See* Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 479-80 (1867). The plaintiff in *Pervear* was charged with "keeping and maintaining, without a license, a tenement for the illegal sale and illegal keeping of intoxicating liquors," the punishment for which was "fifty dollars and imprisonment at hard labor in the house of correction for three months." *Id.* at 480. The Court held that this was not cruel and unusual punishment. *Id.*

42. 217 U.S. 349 (1910).

43. *See* Gregg v. Georgia, 428 U.S. 153, 170 (1976); *see also* Furman v. Georgia, 408 U.S. 238 (1972) (reviewing the history of the Eighth Amendment) which stated:

> These early cases . . . did not undertake to provide "an exhaustive definition" of "cruel and unusual punishments." Most of them proceeded primarily by "looking backwards for examples by which to fix the meaning of the clause," concluding simply that a punishment would be "cruel and unusual" if it were similar to punishments considered "cruel and unusual" at the time the Bill of Rights was adopted.

Id. at 264 (citations omitted).

44. *See* McGautha v. California, 402 U.S. 183, 198 (1971) (recounting the history of the death penalty).

except for first degree murder which it defined as a willful, deliberate, and premeditated killing.[45] Unfortunately, this measure and similar ones in other states did not remove the problem of jury nullification inherent in the mandatory death penalty, i.e., jurors "'disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict.'"[46] Thus in 1837, Tennessee adopted a statute giving juries sentencing discretion in capital cases, and the federal government adopted such a statute in 1897.[47]

The *Weems* decision expanded the interpretation of the Eighth Amendment to include any instance of disproportionate punishment.[48] Underlying the principle of proportionality was the *lex talionis*, given to Moses by Yahweh, "an eye for an eye, a tooth for a tooth."[49] In modern terms, proportionality means that the punishment must fit the crime, implying that excessive punishments are unconstitutional.[50] However, it was not this expanded view of the Eighth Amendment that called into question the constitutionality of the death penalty. Instead, the belief that discretionary jury sentencing resulted in the arbitrary and capricious imposition of the death penalty caused the constitutional issue to be raised.[51]

"Prior to *Furman v. Georgia*[52] . . . every state that authorized capital punishment had abandoned mandatory death penalties, and instead permitted the jury unguided and unrestrained discretion regarding the imposition of the death penalty in a particular capital case."[53] This change addressed the earlier mentioned problem of jury nullification.[54] Despite juror aversion to the automatic death penalty, the Supreme Court never ruled on the constitutionality of mandatory statutes,[55] and prior to *Furman*, the Court never held that discretionary jury sentencing in capital cases was unconstitutional.[56] In fact, in *McGautha v. California*,[57] decided only one year before *Furman*, the Supreme Court held that discretionary sentencing did not violate the Fourteenth Amendment.[58]

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45. *Id.* (citation omitted). "Except for four states that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." *Id.* at 200 n.11 (citations omitted). "It has been suggested that [the practice of jury sentencing] was a 'reaction to harsh penalties imposed by judges appointed and controlled by the Crown' and a result of 'the early distrust of government power.'" *Id.* at n.10 (citations omitted).

46. Lockett v. Ohio, 438 U.S. 586, 598 (1978) (quoting Woodson v. North Carolina, 428 U.S. 280, 293 (1976)).

47. *McGautha*, 402 U.S. at 200.

48. Weems v. United States, 217 U.S. 349, 366-67 (1910).

49. Granucci, *supra* note 40, at 844 (footnote omitted).

50. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

51. Lockett v. Ohio, 438 U.S. 586, 598-99 (1978).

52. 408 U.S. 238 (1972).

53. *Lockett*, 438 U.S. at 597-98 (citing Woodson v. North Carolina, 428 U.S. 280, 291-92 & n.25 (1976)).

54. *Woodson*, 428 U.S. at 293.

55. *Id.* at 296.

56. *Lockett*, 438 U.S. at 598.

57. 402 U.S. 183 (1971).

58. *Id.* at 207-08.

Furman changed all of this. Decided in 1972, the *Furman* Court held that:

> [D]iscretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment because it was "pregnant with discrimination,"[59] . . . permitted the death penalty to be "wantonly" and "freakishly"[60] imposed, and . . . imposed the death penalty with "great infrequency" [which] afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not . . . ."[61]

Although the Supreme Court had been called on to decide the constitutionality of capital punishment per se, the Court did not definitively resolve the issue.[62] In five separate concurring opinions, Justices Douglas, Stewart and White concluded only that imposing the death penalty under the statutory scheme in this case would violate the Eighth and Fourteenth Amendments,[63] while Justices Brennan and Marshall held that capital punishment was unconstitutional per se.[64] In their dissenting opinions, Chief Justice Burger and Justices Blackmun, Powell and Rehnquist determined that the death penalty was not unconstitutional per se.[65]

In response to the *Furman* decision, many states adopted mandatory death penalties for certain crimes and other states continued to use discretionary sentencing but developed "standards to guide the sentencing decision."[66] The question of the constitutionality of the death penalty was revisited four years after *Furman* in connection with five post-*Furman* death penalty statutes.[67] In the leading case of

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59. Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring).

60. *Id.* at 310 (Stewart, J., concurring).

61. *Id.* at 313 (White, J., concurring) (first alteration in original).

62. Gregg v. Georgia, 428 U.S. 153, 169 & n.15 (1976) (citing *Furman*, 408 U.S. at 306 (Stewart, J., concurring); *Furman*, 408 U.S. at 310 (White, J., concurring)).

63. *Id.* at 169 & n.15. Justice Douglas stated that "these discretionary statutes are unconstitutional in their operation." *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring). Justice Stewart concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310 (Stewart, J., concurring). Justice White could not "avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.* at 313 (White, J., concurring).

The full text of the Eighth Amendment can be found *supra* note 38. Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

64. *Gregg*, 428 U.S. at 169 & n.14. Justice Brennan held that "[w]hen examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual'. . . ." *Furman*, 408 U.S. at 305 (Brennan, J., concurring).

65. *Gregg*, 428 U.S. at 169 & n.13.

66. Lockett v. Ohio, 438 U.S. 586, 600 (1978).

67. *Id.* at 600-01 & n.10.

Gregg v. Georgia[68] and its companion cases, *Jurek v. Texas*,[69] *Proffitt v. Florida*,[70] *Woodson v. North Carolina*,[71] and *Roberts v. Louisiana*,[72] the Supreme Court held that the death penalty was not unconstitutional per se.[73]

> The [plurality] opinion [of *Gregg*] reasoned that, to comply with *Furman*, sentencing procedures should not create "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner." In the view of the three Justices, however, *Furman* did not require that all sentencing discretion be eliminated, but only that it be "directed and limited," so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many in which it is not." The plurality concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit 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," in order to ensure the reliability, under Eighth Amendment standards, of the determination that "death is the appropriate punishment in a specific case."[74]

The plurality opinion of *Gregg* was based on history, legislative enactments and jury decisions regarding the imposition of capital punishment.[75]

In addressing whether or not a particular death penalty statute violates the Eighth and Fourteenth Amendments, the Court in *Lockett v. Ohio*[76] stated that these amendments "require that the sentencer . . . not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a

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68. 428 U.S. 153 (1976).

69. 428 U.S. 262 (1976).

70. 428 U.S. 242 (1976).

71. 428 U.S. 280 (1976).

72. 428 U.S. 325 (1976).

73. Gregg v. Georgia, 428 U.S. 153, 186-87 (1976).

74. Lockett v. Ohio, 438 U.S. 586, 601 (1978) (citations omitted). The plurality in *Gregg*, consisted of Justices Stewart, Powell, and Stevens. The precedential value to lower courts of plurality opinions by the United States Supreme Court can be a very confusing issue. *Marks v. United States* offers some guidance: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting *Gregg*, 428 U.S. at 169 n.15). The Third Circuit provided further insight regarding this issue in *Planned Parenthood v. Casey*: "The binding opinion from a splintered decision [of the United States Supreme Court] is as authoritative for lower courts as a nine-Justice opinion. While the opinion's symbolic and perceived authority, as well as its duration, may be less, that makes no difference for a lower court." Planned Parenthood v. Casey, 947 F.2d 682, 694 (3d Cir. 1991). *See also* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 757 n.7 (1980).

75. *Gregg*, 428 U.S. at 176-82. Justice White, Chief Justice Burger and Justice Rehnquist concurred in the opinion of Justices Stewart, Powell and Stevens which held that the death penalty was not unconstitutional per se and that the statutory system under review did not violate the Constitution. *Gregg*, 428 U.S. at 207 (White, J., concurring); *Gregg*, 428 U.S. at 226 (Burger, J., concurring); *Gregg*, 428 U.S. at 187 (Rehnquist, J., concurring).

76. 438 U.S. 586 (1978).

sentence less than death."[77] Common law principles as codified in Rule 32 of the Federal Rules of Criminal Procedure[78] support the *Lockett* decision.

B. Victims' Rights and the Victim Impact Statement

Throughout the previously discussed death penalty jurisprudence there was no mention of victim impact evidence. However, "[d]emands for . . . legislative reform in the arena of victims' rights have been voiced in more recent years."[79] The federal government and many states have addressed this reform movement:

> In passing the Victim and Witness Protection Act of 1982, Congress amended [Rule 32 of] the Federal Rules of Criminal Procedure to mandate inclusion of a victim impact statement in federal presentence reports. Since 1978, at least thirty-six states have followed the federal government in enacting some variation of VIS [victim impact statement] legislation.[80]

In 1986, Maryland adopted a statute, similar to the federal statute mentioned above, which required the inclusion of a victim impact statement in the presentence report in any felony case.[81] In *Booth v. Maryland*, the Supreme Court considered whether the Maryland statute allowing the sentencing jury in a capital murder trial to hear victim impact evidence violated the Eighth Amendment.[82] The victim impact statements in *Booth* described the severe emotional impact of the brutal murder of the Bronsteins, an elderly couple, on their son, daughter, son-in-law, and granddaughter,[83] as well as the personal characteristics of the victims.[84] It further stated the family members' opinions of the crime and of the perpetrator.[85] The

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77. *Id.* at 604.

78. FED. R. CRIM. P. 32(c).

79. McLeod, *supra* note 7, at 502; *see* Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117 (1984); ABA GUIDELINES FOR TREATMENT OF VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM (1983).

80. McLeod, *supra* note 7, at 507 (footnote omitted). The federal presentence report contains "information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence . . . and such other information as may be required by the court." FED. R. CRIM. P. 32(c)(2). The presentence report is prepared by the probation service of the court but its contents are not disclosed to anyone unless the defendant pleads guilty or nolo contendere or has been found guilty. *Id.* at 32(c)(1). Even then, the report in its entirety may not be disclosed to the defendant and his counsel. Rather, the court may choose to summarize the contents of the report or hold that no finding was made as to the undisclosed information, because it would not be considered during sentencing. FED. R. CRIM. P. 32 advisory committee's notes on 1989 amendments. *See also* Tim A. Thomas, Annotation, *Disclosure to Third Party of Presentence Report Under Rule 32(c), Federal Rules of Criminal Procedure*, 91 A.L.R. FED. 816 (1989) (collecting and discussing federal cases ruling on the permissibility of disclosing presentence report, either in whole or in part, to a third party); Gary D. Spivey, Annotation, *Defendant's Right to Disclosure of Presentence Report*, 40 A.L.R. 3d 681 (1971).

81. Booth v. Maryland, 482 U.S. 496, 498 (1987) (citing MD. ANN. CODE art. 41, § 4-609(c) (1957)), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

82. *Id.* at 497.

83. *Id.* at 499. The son said he suffered from lack of sleep and depression, and the daughter said she also suffered from lack of sleep and had become withdrawn and distrustful. The granddaughter discontinued counseling after several months concluding that "no one could help her." *Id.* at 499-500.

84. *Id.* at 499-500 n.3.

85. *Id.* at 500. The Bronsteins' son stated that his parents were "butchered like animals" and their daughter opined that the murderer could "[n]ever be rehabilitated." *Id.*

Court concluded that the use of victim impact statements during the sentencing phase of a capital murder trial violated the Eighth Amendment because "this information is irrelevant to a capital sentencing decision, and . . . its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[86] As to the emotional impact on surviving family members, the Court reasoned that focusing on such information impermissibly took the sentencer's attention away from the defendant and placed it on the victim and his family,[87] ran the risk of giving undue advantage to victims who better articulate their grief,[88] created the potential for sentencing harshness based on a juror's perception of the worth of the victim,[89] and provided for a potential "mini-trial" on the victim's character.[90]

Two years after deciding *Booth*, the Supreme Court again considered the admissibility of victim impact evidence during capital sentencing.[91] In *South Carolina v. Gathers*, the prosecutor made "extensive comments to the jury regarding the victim's character."[92] Writing for the majority, Justice Brennan stated that although the victim was characterized in *Gathers* by the prosecutor rather than by the victim's family members as in *Booth*, the victim impact statements in both cases were "indistinguishable."[93] While *Booth* "left open the possibility that . . . victim impact statements could be admissible if . . . 'relate[d] directly to the circumstances of the crime,'"[94] the *Gathers* majority held that the victim impact evidence in question did not meet this limitation, and, therefore, its admission violated the principle of proportionality on which the Eighth Amendment is based.[95]

IV. INSTANT CASE

In *Payne v. Tennessee*,[96] the Supreme Court "reconsider[ed] [its] holdings in *Booth v. Maryland* and *South Carolina v. Gathers* . . . that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial."[97] The Tennessee Supreme Court held that the admission of the grandmother's testimony and the State's closing argument during Payne's sentencing were harmless error.[98] The United States Supreme Court granted certiorari and Chief Justice Rehnquist, writing for the five-Justice majority, held that victim impact

86. *Id.* at 502-03.
87. *Id.* at 504.
88. *Id.* at 505.
89. *Id.* at 506.
90. *Id.* at 507.
91. South Carolina v. Gathers, 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).
92. *Gathers*, 490 U.S. at 810.
93. *Id.* at 811.
94. *Id.*
95. *Id.* at 811-12.
96. 111 S. Ct. 2597 (1991).
97. *Id.* at 2601 (citations omitted).
98. State v. Payne, 791 S.W.2d 10, 18 (Tenn. 1990).

evidence is admissible during capital sentencing, thereby eliminating the need for harmless error analysis.[99]

Chief Justice Rehnquist began his opinion with some historical background in support of the general proposition that "the assessment of harm caused by the defendant as a result of the crime charged [is] an important concern of the criminal law . . . in determining the appropriate punishment."[100] The Chief Justice then applied this general proposition to the victim impact statement and asserted that the *Booth* Court misread the statement in *Woodson v. North Carolina* requiring that the capital defendant be treated as a "'uniquely individual human bein[g].'"[101] Instead of intending to describe a class of evidence that could not be received,[102] the Court compared the *Woodson* language with the following language from *Gregg v. Georgia,* decided the same day as *Woodson:*

> "We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument . . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."[103]

Based on this comparison, the majority concluded that the *Woodson* language described a class of evidence which must be heard.[104]

The Court reasoned that if such victim impact evidence was not received, the sentencing trial would be "unfairly weighted" in favor of the defendant since he or she can introduce relevant mitigating evidence while the victim cannot put on relevant aggravating evidence.[105] In so holding, Chief Justice Rehnquist rejected the reasoning in *Booth* that victim impact evidence would create a "'mini-trial' on the victim's character"[106] possibly resulting in a jury basing its punishment decision on the victim's perceived worth to the community.[107] The Chief Justice's rejection was based on two arguments: (1) the jury already heard the victim impact evidence because of its relevance to the guilt phase of the trial, and (2) victim impact evidence is designed to show the victim's "uniqueness" and not to encourage comparative value judgments of a victim's worth.[108]

The majority concluded its opinion by justifying its decision not to follow the *Booth* and *Gathers* precedents: "[*s*]*tare decisis* is not an inexorable command;

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99. *Payne,* 111 S. Ct. at 2609.
100. *Id.* at 2605.
101. *Id.* at 2606-07 (quoting *Woodson,* 428 U.S. 280, 304 (1976)).
102. *Id.* at 2607.
103. *Id.* at 2606 (quoting Gregg v. Georgia, 428 U.S. 153, 203-04 (1976)).
104. *Id.* at 2607.
105. *Id.*
106. *Id.* (quoting Booth v. Maryland, 428 U.S. 496, 506-07 (1987), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991)).
107. *Id.*
108. *Id.*

rather it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"[109] Applying these general principles, the Chief Justice recounted that *Booth* and *Gathers* were five-to-four decisions with spirited dissents, have been questioned by the Court in later decisions, and have not been consistently applied by lower courts.[110] Chief Justice Rehnquist also noted that in the last twenty terms, the Court had overruled thirty-three previous decisions.[111]

In her concurring opinion,[112] Justice O'Connor emphasized that although victim impact evidence may inflame the jury, the Due Process Clause of the Fourteenth Amendment and not *Booth's* "prophylactic, constitutionally based rule that this evidence may never be admitted" offers the proper remedy.[113] Justice O'Connor reiterated that the Court's holding was not that victim impact evidence must be admitted nor that it should be admitted.[114] Rather, the Court held only that if states permit consideration of victim impact evidence, "the Eighth Amendment erects no *per se* bar."[115]

Justice Souter, concurring,[116] stated that "*Booth* sets an unworkable standard of constitutional relevance that threatens . . . to produce . . . arbitrary consequences and uncertainty of application."[117] Justice Souter urged that the *Booth* standard, when taken to its full extent, means that victim impact evidence would have to be excluded at the guilt phase, too.[118] This exclusion of information about circumstances surrounding the crime would leave jurors unable to understand what happened.[119] The only alternative would be to have separate guilt and sentencing trials, which could be a "major imposition on the States."[120]

In his dissenting opinion,[121] Justice Marshall denounced the majority's refusal to follow *Booth* and *Gathers*.[122] Justice Marshall assessed the majority's arguments and concluded that "[t]here [was] nothing new in the majority's discussion of the supposed deficiencies in *Booth* and *Gathers*. Every one of the arguments made by the majority [could] be found in the dissenting opinions filed in those two cases, and . . . each argument was convincingly answered by Justice Powell and Justice Brennan."[123] Justice Marshall thus asserted that "[t]he real question . . . [was]

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109. *Id.* at 2609-10 (citation omitted).
110. *Id.* at 2610-11.
111. *Id.* at 2610 & n.1.
112. *Payne*, 111 S. Ct. at 2611 (O'Connor, J., concurring).
113. *Id.* at 2612.
114. *Id.*
115. *Id.*
116. *Payne*, 111 S. Ct. at 2614 (Souter, J., concurring).
117. *Id.* at 2616.
118. *Id.* at 2617.
119. *Id.*
120. *Id.*
121. *Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting).
122. *Id.* at 2619.
123. *Id.* at 2620.

whether [the] majority ha[d] come forward with the type of extraordinary showing that this Court has historically demanded before overruling one of its precedents."[124] Rather than finding the "special justification" required to overrule precedent, Justice Marshall stated flatly that "[n]either the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did."[125]

Justice Stevens, in his dissent,[126] addressed the majority's unfairness argument.[127] He reminded the majority that although this issue has "strong political appeal . . . [t]he victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance."[128] Justice Stevens stated that, as evidenced by the heavy burden of proof placed on the prosecution and the weighing of the rules of evidence in the defendant's favor, a balance between the State and the defendant was not required.[129]

V. ANALYSIS

The doctrine of stare decisis is central to the reliability and credibility of our judicial system.[130] Hence, overruling precedent prior to *Payne* had supposedly been done only with "special justification."[131] However, Chief Justice Rehnquist, in the majority opinion, reminded us that "[*s*]*tare decisis* is not an inexorable command"[132] and adherence should not be required "when governing decisions are unworkable or are badly reasoned."[133] The Chief Justice gives a paucity of support, if any, for overruling *Booth* and *Gathers*.[134] A majority of the nine Justices is all that is required for a given Supreme Court decision to be the law of the land. Therefore, the fact that *Booth* and *Gathers* were decided five-to-four should not make them more susceptible to being overruled than any other Supreme Court decision. Likewise, the fact that the four dissents were "spirited" should not be dispositive in determining whether or not a precedent should stand.[135] A dissent by its very nature ought to be spirited; otherwise, the dissenter would probably be easy prey for conversion to the majority's view.

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124. *Id.* at 2621.

125. *Id.* at 2619.

126. *Payne*, 111 S. Ct. at 2625 (Stevens, J., dissenting).

127. *Id.* at 2627-28.

128. *Id.* at 2627.

129. *Id.* at 2627-28.

130. *Id.* at 2609.

131. *Payne*, 111 S. Ct. at 2618 (Souter, J., concurring) (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984)). Justice Marshall contended that special justification included "the advent of 'subsequent changes or development in the law' that undermine a decision's rationale, the need 'to bring [a decision] into agreement with experience and with facts newly ascertained,' and a showing that a particular precedent has become a 'detriment to coherence and consistency in the law.'" *Payne*, 111 S. Ct. at 2621-22 (Marshall, J., dissenting) (citations omitted).

132. *Payne*, 111 S. Ct. at 2609.

133. *Id.*

134. *Id.*

135. *See id.* at 2611.

The principal problem with consistent application of *Booth*, "confusion over the precise scope of its holding," was raised and resolved in *South Carolina v. Gathers*.[136] *Gathers* extended the scope of the *Booth* holding to include prosecutorial comment.[137] The Chief Justice further pointed to his dissent in *Mills v. Maryland*[138] to support his contention that *Booth* had defied consistent application.[139] Review of *Mills* confirms Justice Marshall's declaration "[t]hat [the] opinion does not contain a *single word* about any supposed '[in]consistent application' of *Booth* in the lower courts."[140] Rehnquist's reference to *State v. Heurtas*,[141] where the majority and the dissents had differing interpretations of the *Booth* opinions and footnotes, as proof of the "[in]consistent application of *Booth* by the lower courts," is extremely weak.[142] As Justice Marshall aptly pointed out,

> if a division among the members of a single lower court in a single case were sufficient to demonstrate that a particular precedent was a "detriment to coherence and consistency in the law," there would hardly be a decision in the United States Reports that we would not be obliged to reconsider.[143]

The Chief Justice alleged that *Booth* had been inconsistently applied by lower courts, *plural*, not by *a* lower court, and obviously did not support his position.[144]

As a final support for his very easily met standard for disregarding the doctrine of stare decisis, Chief Justice Rehnquist pointed out that the Court has done the very same thing it did in *Payne* thirty-three times during the last twenty Terms.[145] "He did not, however, note that the average age of the overruled precedents in those cases was 40 years, while *Payne* overruled a 2-year-old precedent."[146]

Chief Justice Rehnquist's opinion also gives a less than accurate interpretation of precedent. The Chief Justice asserted that a comparison of language in *Gregg* with the language in *Woodson* supported the majority's position that victim impact evidence must be heard.[147] This comparison takes *Woodson* and *Gregg* out of context. These cases were decided in 1976, six years before the Victim and Witness Protection Act of 1982 was passed and eleven years before the Court addressed the constitutionality of victim impact evidence in *Booth*. It is therefore unlikely that the *Woodson* and *Gregg* Courts had victim impact evidence in mind when those de-

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136. 490 U.S. 805, 811 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991). Justice O'Connor's dissent in *Gathers* cites examples of differing interpretations of the *Booth* holding by lower courts prior to the *Gathers* decision. South Carolina v. Gathers, 490 U.S. 805, 813 (1989) (O'Connor, J., dissenting).

137. *Gathers*, 490 U.S. at 811.

138. 486 U.S. 367, 395 (1988) (Rehnquist, C.J., dissenting).

139. *Payne*, 111 S. Ct. at 2611.

140. *Payne*, 111 S. Ct. at 2622 (Marshall, J., dissenting).

141. 553 N.E.2d 1058 (Ohio 1990).

142. *Payne*, 111 S. Ct. at 2611.

143. *Payne*, 111 S. Ct. at 2622 (Marshall, J., dissenting) (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

144. *See Payne*, 111 S. Ct. at 2611.

145. *Id.* at 2610 & n.1.

146. David O. Stewart, *Four Spirited Dissenters*, A.B.A. J. Sept. 1991, at 40-41.

147. *See supra* notes 101-07 and accompanying text.

cisions were written. Chief Justice Rehnquist also completely ignored a critical part of the language he quoted from *Gregg* limiting the evidence at a presentencing hearing to that which does not prejudice the defendant.[148]

Justice Scalia, dissenting in *Gathers*,[149] made a somewhat appealing argument for overruling precedent while the decision is still fresh error,[150] stating:

> Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. The freshness of error . . . counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it . . . particularly . . . with respect to a decision such as *Booth* . . . purporting to reflect "evolving standards of decency" applicable to capital punishment.[151]

Justice Scalia found support for his position in the following quote from Justice Douglas: "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."[152]

The following arguments were made by Justices White and Scalia in their dissenting opinions in *Booth* and by Justices O'Connor and Scalia in their dissenting opinions in *Gathers:* (1) legislative determinations of appropriate sentencing considerations are "peculiarly questions of legislative policy" entitled to judicial deference;[153] (2) punishment should be proportional not only to the defendant's guilt but also to the harm caused;[154] (3) victim impact statements provide the other side of the defendant's mitigating evidence;[155] (4) the Court should not presume that the sentencing authority relied on the perceived worth of the victim to determine sentencing harshness;[156] (5) the Court's concern with the arbitrariness in sentencing that may result from victims' varying abilities to articulate grief and loss is misplaced as prosecutors and witnesses also vary in their ability to communicate;[157] and (6) victim impact statements are not inherently inflammatory, and the defendant's inability to rebut victim impact evidence is speculative.[158] It is inconceivable

148. *See supra* note 102-04 and accompanying text.

149. South Carolina v. Gathers, 490 U.S. 805, 823 (1989) (Scalia, J., dissenting), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

150. *Gathers*, 490 U.S. at 824.

151. *Id.*

152. *Id.* at 825 (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)).

153. Booth v. Maryland, 482 U.S. 496, 515 (1987) (White, J., dissenting) (quoting Gore v. United States, 357 U.S. 386, 393 (1958)), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

154. *Booth*, 482 U.S. at 515 (White, J., dissenting; *Booth*, 482 U.S. at 520 (Scalia, J., dissenting); *Gathers*, 490 U.S. at 818-19 (O'Connor, J., dissenting).

155. *Booth*, 482 U.S. at 517 (White, J., dissenting); *Booth*, 482 U.S. at 520 (Scalia, J., dissenting).

156. *Booth*, 482 U.S. at 517 (White, J., dissenting); *Booth*, 482 U.S. at 520 (Scalia, J., dissenting).

157. *Booth*, 482 U.S. at 517-18 (White, J., dissenting).

158. *Id.* at 518; *Gathers*, 490 U.S. 822-23 (O'Connor, J., dissenting).

that the integrity of judicial review can be maintained when "fresh error" is nothing more than not having the required number of votes at the appointed time.

Justice Marshall very accurately saw through the majority's rhetoric when he bluntly stated that only the members of the Court had changed since *Booth* and *Gathers* were decided.[159] When *Booth* was decided in 1987, the Supreme Court consisted of Chief Justice Rehnquist and Justices Powell, Blackmun, Brennan, Stevens, Marshall, White, Scalia and O'Connor.[160] The *Booth* majority was made up of Justices Powell, Brennan, Blackmun, Stevens and Marshall.[161]

Between 1987 and the *Gathers* decision in 1989, Justice Powell, a moderate and a member of the *Booth* majority, retired and was replaced by Justice Kennedy, a conservative who joined the dissent[162] in *Gathers*. The only reason *Booth* withstood attack in *Gathers* was because Justice White refused to allow precedent to so easily be disregarded, and, hence, voted with the remainder of the *Booth* majority.[163] In the *Gathers* opinion, Justices O'Connor and Scalia stated in their dissents that, given the opportunity, they would overturn *Booth*.[164] Thus, *Payne* was in the offing.

Between 1989 and the *Payne* decision in 1991, Justice Brennan, a liberal and part of the *Booth* and *Gathers* majorities, retired and was replaced by Justice Souter, a conservative who, writing a separate concurring opinion, voted to overrule *Booth* and *Gathers*.[165] This left only Justices Blackmun, Stevens and Marshall firmly entrenched in opposition to the admissibility of victim impact evidence. Justice White, perceiving greater support for his original stance in *Booth*, again switched sides.

While Justice Marshall's opinion is wholly accurate, it may be considered ironic by some that he should be delivering this message. Thurgood Marshall was appointed to the Supreme Court in 1967 by President Lyndon Johnson.[166] When Justice Marshall announced his retirement from the High Court on June 27, 1991, the same day *Payne* was decided, he and Justice Byron White were the only remaining Warren Court Justices, as well as the only remaining Justices appointed by a Democratic President.[167] Under Chief Justice Earl Warren, "the Court ha[d] been the most divided, if not the most divisive, in American History."[168] The voting record of the Warren Court on cases involving constitutional issues reveals that "a percentage for the non-unanimous/dissenting [vote was] seldom less than 50

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159. Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting).

160. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW, lxxxiii (Richard A. Epstein et al. eds., 2d ed. 1991).

161. *Booth*, 482 U.S. at 497.

162. *See Gathers*, 490 U.S. at 812 (O'Connor, J., dissenting).

163. *Gathers*, 490 U.S. at 812 (White, J., concurring).

164. *Gathers*, 490 U.S. at 814 (O'Connor, J., dissenting); *Gathers*, 490 U.S. at 823-24 (Scalia, J., dissenting).

165. *See* Payne v. Tennessee, 111 S. Ct. 2597, 2614 (1991) (Souter, J., concurring).

166. Bruce A. Green, *"Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term*, 70 N.C. L. REV. 373 (1992) [hereinafter Green].

167. *Id.* at 373.

168. Philip B. Kurland, *Earl Warren, The "Warren Court," and The Warren Myths*, 67 MICH. L. REV. 353, 355 (1968) [hereinafter Kurland].

[percent] and on one or two occasions exceed[ed] 80 [percent]."[169] From 1953 to 1969, the Court shifted dramatically from adherence to the policy of judicial restraint to a position of judicial activism.[170] Out of this activism, the Warren Court became a catalyst for racial equality through its school desegregation and reapportionment decisions, a champion of a much broader First Amendment,[171] and an insurer of fairness in criminal procedure.[172] Justice Marshall thus joined, as its first black Justice, an activist and controversial Supreme Court and wholeheartedly embraced the freedom to disagree as demonstrated by his unwavering position regarding the death penalty despite his colleagues' opinions to the contrary.[173]

One scholar's interpretation of Justice Marshall's words, "'[p]ower, not reason, is the new currency of this Court's decision-making,'" provides some explanation for the apparent inconsistency between Justice Marshall's and Chief Justice Rehnquist's approach to stare decisis.[174] By this statement, Justice Marshall is pointing out that the Court is determining the result it wishes to reach and then finding the legal analysis to support that result.[175] According to Justice Marshall, this method of decision-making is backwards.[176] It is noteworthy that thirteen of the thirty-three overruled decisions Chief Justice Rehnquist cited in the *Payne* opinion were Warren Court decisions.[177] Five of the thirteen were overruled by the Rehnquist Court and the remaining eight by the Burger Court.[178] Some see this as a renaissance of judicial restraint,[179] and the fact that the Court is dominated by conservative, Republican-appointed Justices explains this revival and supports Justice Marshall's "power, not reason" and "personnel change" theories as the impetus behind the *Payne* majority.

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169. William F. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205, 210 (1970) [hereinafter Swindler]; *see also* Kurland, *supra* note 168, at 355 (comparing the voting record of the last five-year period of the Warren Court).

170. Swindler, *supra* note 169, at 231-41. "[T]he doctrine of activism was the obligation of the judiciary to identify the specific rights to be guaranteed within the 'broad and unspecific guarantee.'" *Id.* at 238.

171. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

172. Symposium, *The Warren Court: An Editorial Preface*, 67 MICH. L. REV. 219, 220 (1968).

173. Furman v. Georgia, 408 U.S. 238, 358-59 (1972) (Marshall, J., dissenting) (Justice Brennan was the only Justice to agree with Marshall's opposition to capital punishment). *See also* Lockett v. Ohio, 438 U.S. 586, 619 (1978) (Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting); Woodson v. North Carolina, 428 U.S. 280, 306 (1976) (Marshall, J., dissenting); Roberts v. Louisiana, 428 U.S. 325, 336-37 (1976) (Marshall, J., dissenting).

174. Green, *supra*, note 166, at 375 (quoting Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting). Bruce A. Green, an Associate Professor of law at Fordham University, served as a law clerk to Justice Marshall during the 1982 Term. *Id.* at 373.

175. *Id.* at 375-76.

176. *Id.* at n.11.

177. Payne v. Tennessee, 111 S. Ct. 2597, 2610-11 n.1 (1991).

178. *Id.*

179. Isidore Silver, *The Warren Court Critics: Where are They Now That We Need Them?*, 3 HASTINGS CONST. L.Q. 373, 444-52 (1976).

A relatively small percentage of murderers are sentenced to death.[180] In fact, since the *Furman* decision, the Supreme Court has consistently held that statutes which do not provide "rational criteria that narrow the [sentencer's] judgment as to whether the circumstances of a particular defendant's case meet the threshold [below which the death penalty cannot be imposed]"[181] and which do not provide for consideration of any relevant information offered by the defendant which might cause the sentencer not to return the death penalty[182] violate the Eighth Amendment.[183] Yet, statistical information indicates that juror bias may in fact play a part in capital sentencing decisions.

The Baldus Study researched 2,000 murder cases in Georgia in the 1970's.[184] The research showed that the death penalty was meted out in twenty-two percent of the cases studied where the defendant was black and the victim was white.[185] However, the death sentence was returned in only eight percent of the cases in which both the defendant and the victim were white.[186] Only one percent of the black defendants and three percent of the white defendants who had murdered black victims received the death penalty.[187] It is important to note that the Baldus Study was conducted prior to the use of victim impact evidence in capital sentencing.[188] The bias demonstrated by these statistics, especially the wide chasm between death sentences in black defendant/white victim and black defendant/black victim cases, can only be exacerbated by the introduction of victim impact statements in death penalty cases.

The Supreme Court in *McCleskey v. Kemp* refused to find that McCleskey's death sentence was unconstitutionally based on the Baldus Study statistics, since

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180. SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 3 (1989) [hereinafter GROSS & MAURO]. Between 1976 and 1980, it is estimated that almost 102,000 non-negligent criminal homicides were committed in the United States for which 96,170 arrests were made. *Id.* During this time period, 1,011 death sentences were pronounced, a ratio of approximately 100 homicides for every death sentence. *Id.*

181. McCleskey v. Kemp, 481 U.S. 279, 305 (1987).

182. *Id.* at 306.

183. *See* Enmund v. Florida, 458 U.S. 782 (1982); Eddings v. Oklahoma, 455 U.S. 104 (1982); Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

184. *McCleskey*, 481 U.S. at 286. Professors David C. Baldus, Charles Pulaski and George Wentworth performed a statistical study known as the "Baldus Study" purporting "to show disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 286.

188. Research similar to the Baldus Study, and with similar results, has been conducted in North Carolina, South Carolina, Pennsylvania, Florida, Texas, Ohio, Illinois, Oklahoma, Mississippi, Arkansas and Virginia. *See* GEN. GOV'T DIV., U.S. GEN. ACCOUNTING OFFICE REP. GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (examining all twenty-eight of the post-Furman studies that have investigated the relationship between race and death sentencing); WILLIAM J. BOWERS, EXECUTIONS IN AMERICA (1974) (including research results not only in the United States but also in Canada and several European countries); GROSS & MAURO, *supra* note 180, at 3-10; Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991).

the statistics did not prove that racial considerations influenced his particular sentence.[189] Dissenting, Justice Brennan[190] stated:

> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life . . . .
>
> . . . .
>
> [T]he way we choose those who will die reveals the depth of moral commitment among the living.[191]

McCleskey was decided just six months before *Booth*, and Justice Brennan's words were telling as to the Court's traditional emphasis on the defendant's moral culpability in capital cases. *Payne* thus represents a dramatic shift away from this emphasis, which has been the Court's main concern in death penalty cases at least since the *Furman* decision, if not before, toward a focus on the rights of victims. This shift necessarily raises the issue of the viability of the whole body of death penalty precedents.

In *Zant v. Stephens*,[192] the Supreme Court cited *Arnold v. State*,[193] in which the Georgia Supreme Court held that the statutory aggravating circumstance of "a substantial history of serious assaultive criminal convictions" was unconstitutionally vague because it did not give the "sufficiently clear and objective standards" necessary to control jury discretion in capital sentencing.[194] The *Zant* Court stated that to escape this "void for vagueness" problem, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[195] Although the Court has not classified it as such, it is probable that victim impact evidence would be considered an aggravating circumstance and would arguably, given the results of the Baldus Study and similar research, expand rather than narrow the class of persons eligible for the death penalty. States have enacted varying schemes as to the format of victim impact statements, but most states' victim impact legislation allows the parole department or a similar agency to determine the specific content of the victim impact statement.[196] By allowing the sentencing authority to consider evidence on which neither the state judicial system nor the state legislature has placed any specific guidelines, the *Payne* Court disregards *Zant* as well as the Court's established

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189. McCleskey v. Kemp, 481 U.S. 279, 292-97 (1987).

190. *McCleskey*, 481 U.S. at 320 (Brennan, J., dissenting).

191. *Id.* at 343-44.

192. 462 U.S. 862 (1983).

193. 224 S.E.2d 386 (Ga. 1976).

194. *Zant*, 462 U.S. at 878 n.16 (citing *Arnold*, 224 S.E.2d at 391-92).

195. *Id.* at 877.

196. Howard, *supra* note 11, at 706 n.28 (discussing the various state schemes for using victim impact statements).

proposition that "where the ultimate penalty of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments."[197]

A further hitch in the typical statutory scheme is that a victim impact statement will only be taken if the Court orders a presentence report.[198] One of the objectives of the *Furman* Court was to ensure that there was a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not."[199] These varying legislative schemes, combined with the possibility that a victim impact statement may not be heard, abrogates this objective. It is also interesting to note that while the Supreme Court is now willing to allow a victim's family to testify at sentencing as to what they think the defendant's punishment should be, there is a considerable difference of opinion in both state and lower federal courts concerning the admissibility of *expert* testimony during sentencing "concerning or affecting the appropriate sentence . . . to be meted to a criminal defendant after a conviction."[200] And, while victim impact statements are prepared by the parole department,

> over the last decade many states have diminished or entirely abolished the use of parole boards . . . for determining release dates. As a result, the personal idiosyncracies and shortcomings of parole board members have been eliminated and replaced with objective determinations pursuant to concrete formulae with which the inmate . . . can easily figure out her anticipated date of release.[201]

The basis of the argument for allowing victim impact evidence is that it makes sentencing fair not only for the defendant but also for the victim. However, *Payne* leaves open at least two issues: (1) can the defense essentially assault the character of the victim impact statement proponent, and (2) can the prosecution introduce victim impact evidence if the defendant does not offer evidence of his good character?

VI. CONCLUSION

The death penalty is different from any other punishment in our criminal justice system.[202] Once it has been carried out, there is no appeal and no parole. The sentencing authority, whether a judge or jury, is composed of human beings who

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197. Gregg v. Georgia, 428 U.S. 153, 195-96 n.47 (1976).

198. McLeod, *supra* note 7, at 508-09.

199. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

200. Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (allowing predictions of future nondangerousness based on evidence of good conduct in jail as a mitigating factor during the penalty phase of capital trials); Barefoot v. Estelle, 463 U.S. 880, 905-06 (1983) (verifying admissibility of psychiatric testimony on future dangerousness); Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845 (1990) [hereinafter Radelet & Marquart] (discussing actuarial methods of predicting a capital defendant's dangerousness or nondangerousness and concluding that because neither of these methods could produce accurate predictions, many will be executed to ensure that the one unlikely recidivist will not kill again); Gregory G. Sarno, Annotation, *Admissibility of Expert Testimony as to Appropriate Punishment for Convicted Defendant*, 47 A.L.R. 4th 1069 (1986).

201. Radelet & Marquart, *supra* note 200, at 853 (footnote omitted).

202. The principle that death is different has been called into question, though not completely discarded, by the recent Supreme Court decision in the case of Walton v. Arizona, 497 U.S. 639 (1990).

have all of the gory facts of the crime before it and is, therefore, capable of surmising the grief and agony that the crime has caused the victim and his or her family. The court is a place where the defendant, not the victim is tried, and the cathartic benefits that victim impact statements may give a victim do not help the sentencing authority decide whether the defendant is of the relatively small number of murderers who deserves to die for his or her crime. Defendants should waive their right to a presentence report to avoid the potential for arbitrary sentencing based on the victim impact statement contained therein.