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The Scope of the Eighth Amendment Does Not Include a Per Se Bar to the Use of Victim Impact Evidence in the Sentencing Phase of a Capital Trial.

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CASENOTES

CRIMINAL LAW—Victim Impact Evidence—The Scope of the Eighth Amendment Does Not Include a *Per Se* Bar to the Use of Victim Impact Evidence in the Sentencing Phase of a Capital Trial.

Payne v. Tennessee, 501 U.S. __, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

In 1988, a Tennessee jury convicted Pervis Payne of two counts of first-degree murder for the killings of Charisse Christopher and her young daughter Lacie.[1] In addition to the murder convictions, the jury found Payne guilty of first-degree assault with intent to murder Charisse's son Nicholas.[2] During the sentencing phase of Payne's capital trial, the State introduced the testimony of Nicholas' grandmother.[3] In response to questions regarding the impact the murders had on Nicholas' life, the grandmother told the sentencing jury that the child missed his mother and sister and cried often as a result of their deaths.[4] In closing arguments, the State also referred to

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1. Payne v. Tennessee, 501 U.S. __, __, 111 S. Ct. 2597, 2601, 115 L. Ed. 2d 720, 726 (1991). Payne, who had been drinking and injecting cocaine, entered the victims' apartment after failing to locate his girlfriend who lived across the hall. *Id.* at __, 111 S. Ct. at 2601, 115 L. Ed. 2d at 726-27. The violence erupted when Charisse resisted Payne's sexual advances. *Id.* at __, 111 S. Ct. at 2601, 115 L. Ed. 2d at 727. When police responded to a neighbor's telephone call, Payne was found to be covered in blood. *Id.* Inside the apartment the walls and floor were also covered in blood. *Id.* at __, 111 S. Ct. at 2602, 115 L. Ed. 2d at 727. Charisse was found to have a total of eighty-four wounds inflicted upon her from the thrusts of a butcher knife. Lacie was also found with multiple stab wounds throughout her body. *Id.*

2. *Id.* at __, 111 S. Ct. at 2601, 115 L. Ed. 2d at 726. Nicholas survived the same type of attack that killed his mother and sister despite having several knife wounds that pierced completely through his body. *Id.* at __, 111 S. Ct. at 2602, 115 L. Ed. 2d at 727.

3. *Id.* at __, 111 S. Ct. at 2603, 115 L. Ed. 2d at 728.

4. *Id.* The pertinent portion of the grandmother's testimony is as follows:

Q. Ms. Zvolanek, how has the murder of Nicholas' mother and his sister affected him?

A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He come to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says I'm worried bout my Lacie.

Nicholas' consciousness during the crime, and thus, his awareness of the murders of his sister and mother.[5] The jury sentenced Payne to death.[6] On appeal, Payne argued that the victim impact statements in the grandmother's testimony and in the State's closing argument violated the Eighth Amendment's proscription against cruel and unusual punishments.[7] The Tennessee Supreme Court affirmed the sentence holding the statements "relevant to his personal responsibility and moral guilt."[8] The United States Supreme Court granted certiorari to determine whether a sentencer should be allowed to consider victim impact evidence when making a death penalty determination.[9] Held—*Affirmed*.[10] The scope of the Eighth Amendment does not include a *per se* bar to the use of victim impact evidence in the sentencing phase of a capital trial.[11]

The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[12] In the capital punishment context, the United States Supreme

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State v. Payne, 791 S.W.2d 10, 17-18 (Tenn. 1990). This type of "victim impact" evidence has previously been held to be a violation of the Eighth Amendment and therefore inadmissible during the sentencing phase of a capital trial. *See* Booth v. Maryland, 482 U.S. 496, 509 (1987) (Eighth Amendment bars use of victim impact statements during penalty portion of capital trial).

5. *Payne*, 501 U.S. at __, 111 S. Ct. at 2603, 115 L. Ed. 2d at 728-29. The prosecutor's comments were as follows:

> But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.

Id. Comments of this nature made by the prosecutor have also been held to be contrary to the Eighth Amendment. *See* South Carolina v. Gathers, 490 U.S. 805, 810-11 (1989) (holding in *Booth* as to Eighth Amendment bar against victim impact statements also applies to comments made by prosecutor during closing argument concerning victim's personal characteristics).

6. *Id.* at __, 111 S. Ct. at 2603, 115 L. Ed. 2d at 729.

7. *Id.* at __, 111 S. Ct. at 2604, 115 L. Ed. 2d at 729. The Supreme Court of Tennessee rejected Payne's Eighth Amendment argument by holding that the grandmother's testimony was "technically irrelevant," and found that the risk of arbitrariness was harmless and not constitutionally unacceptable. *Id.* at __, 111 S. Ct. at 2604, 115 L. Ed. 2d at 730. Additionally, the court held that the prosecutor's comments were related to Payne's personal responsibility and therefore relevant. *Id.*

8. *Id.* at __, 111 S. Ct. at 2603, 115 L. Ed. 2d at 730.

9. *Payne*, 501 U.S. at __, 111 S. Ct. at 2604, 115 L. Ed. 2d at 730.

10. *Id.* at __, 111 S. Ct. at 2611, 115 L. Ed. 2d at 739.

11. *Id.* at __, 111 S. Ct. at 2609, 115 L. Ed. 2d at 736.

12. U.S. CONST. amend. VIII. The English Bill of Rights of 1689 was the predecessor of the ban on cruel and unusual punishments. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 839 (1969). Virginia was the first state to adopt the provision from the English statute and did so in the Virginia Constitution of 1776. *Id.* at 839-40. By 1791, the federal government followed the lead of eight states and the Northwest Ordinance by enacting the "cruel and unusual punish-

Court determined that the death penalty itself does not violate the Eighth Amendment's proscription against cruel and unusual punishments in all circumstances.[13] Due to the severe nature of the death penalty, however, the Court required a minimized risk of arbitrariness in sentencing[14] and a degree of proportionality to the offense prior to imposition of the death penalty.[15]

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ments" language as the Eighth Amendment to the United States Constitution. *Id.* at 840; *see also* Woodson v. North Carolina, 428 U.S. 280, 289-93 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (tracing history of Eighth Amendment to discredit imposition of mandatory sentencing statutes); Gregg v. Georgia, 428 U.S. 153, 169-72 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (reviewing history of Eighth Amendment); Robinson v. California, 370 U.S. 660, 666 (1962) (applying Eighth Amendment prohibitions to states through Fourteenth Amendment Due Process Clause); Dora Nevares-Muniz, *The Eighth Amendment Revisited: A Model of Weighted Punishments*, 75 J. CRIM. L. & CRIMINOLOGY 272, 273 (1984) (tracing history of cruel and unusual punishments prohibition).

13. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (statute which requires finding of aggravating factor while considering mitigating factors and provides for appellate review complies with Eighth Amendment proscription against cruel and unusual punishments); Proffitt v. Florida, 428 U.S. 242, 258-60 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (statute requiring aggravating circumstances to be weighed with mitigating ones and providing for appellate review constitutional); Gregg v. Georgia, 428 U.S. 153, 165-69 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (statute requiring finding of at least one aggravating factor before death penalty imposed and appellate review complies with *Furman* prohibitions). *But see* Peggy C. Davis, *The Death Penalty and the Current State of the Law*, 14 CRIM. L. BULL. 7, 7-8 (1978) (suggesting that Eighth Amendment as articulated by *Gregg* gives little protection against injustice); George E. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 159 (1979) (suggesting that appellate review, although not useless, does not provide meaningful safeguard against unjust infliction of death penalty).

14. *See* California v. Ramos, 463 U.S. 992, 999 (1983) (difference in punishment of death from other sanctions requires that its imposition by state not be arbitrary in its procedure); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (sentence of death may not be imposed by sentencing procedures that produce a significant risk that it will be inflicted arbitrarily and capriciously); Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring) (death penalty unique in its harsh and irreversible nature and may not be arbitrarily inflicted); Lisa G. Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 195 (1986-87) (Eighth Amendment mandates regularity and reliability in imposing death penalty). *But see* RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 140 (1982) (objective of eliminating arbitrariness from death penalty determination may be impossible).

15. *See* Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting) (nexus between punishment and defendant's blameworthiness required to satisfy Eighth Amendment's requirement of proportionality); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (although death penalty extreme sanction, may not be disproportionate to some crimes); Weems v. United States, 217 U.S. 349, 380-82 (1910) (punishment of fifteen years hard labor for falsifying official document held disproportionate to offense committed). *See generally* Lisa G. Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 196-200 (1986-87) (reviewing history and application of proportionality and suggesting that same proportionality standard be employed in both capital and non-capital cases); Dora Nevares-Muniz, *The Eighth Amendment Revisited: A Model of Weighted Punishments*, 75 J. CRIM. L. & CRIMINOLOGY 272, 272 (1984) (proposing that present state sentenc-

In order to fulfill these objectives, the Supreme Court recognized the need for a sentencer to exercise discretion in an informed manner.[16] Therefore, the Court placed certain guidelines on this discretion to ensure a responsible and reliable decision.[17] For example, a sentencing authority must tailor its death penalty determination to the individual defendant and the circumstances of the crime,[18] and consider factors which relate only to the defendant's personal blameworthiness and moral guilt.[19]

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ing statutes fail proportionality requirement because penalty terms disregard severity of offense and punishment).

16. *See* Proffitt v. Florida, 428 U.S. 242, 251-53 (1976) (Eighth Amendment's proscription against arbitrariness satisfied when sentencer's discretion guided by requirement that aggravating and mitigating factors be considered); Spinkellink v. Wainwright, 578 F.2d 582, 608-12 (5th Cir. 1978) (state can impose death penalty so long as complies with appropriate discretion guidelines); People v. Tenneson, 788 P.2d 786, 790-91 (Colo. 1990) (capital sentencing scheme must limit and direct sentencer's discretion so as to minimize chance of arbitrariness and allow sentencer to weigh mitigating factors to comply with Eighth Amendment). *See generally* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 886 (1990) (advocates of unrestricted discretion argue that it is necessary to review needs of offender and risks posed by individual); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1942 (1988) (reviewing history of sentencing discretion and problems associated with its expansion).

17. *See* Eddings v. Oklahoma, 455 U.S. 104, 111 (1982) (standards serving goals of consistency and fairness provided by Supreme Court to guide application of death penalty); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (sentencer must be allowed to consider mitigating factors relating to defendant's character and circumstances of crime); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (higher degree of reliability needed in determination because of difference between death and other punishments); *see also* James S. Liebman & Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the 'Boiler Plate': Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 771-73 (1978) (Court held in *Gregg* and companion cases that state sentencing statutes must include mechanism where jury guided in its determination of death penalty); Rupert V. Barry, Note, Furman *to* Gregg: *The Judicial and Legislative History*, 22 HOW. L.J. 53, 86 (1979) (states responded to *Furman* by enacting sentencing schemes which limited discretion of sentencers).

18. *See* Zant v. Stevens, 462 U.S. 862, 878-79 (1983) (Georgia death penalty statute valid since, *inter alia*, it provides for individualized determination of defendant's character); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (death penalty reversed and case remanded for not allowing for consideration of defendant's character and record in its imposition); Lockett v. Ohio, 438 U.S. 586, 601 (1978) (consideration of defendant's character and record makes death penalty determination more reliable); *see also* Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317, 322 (1981) (U.S. Constitution mandates individualized sentencing decision to obtain reliability); James S. Liebman & Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the 'Boiler Plate': Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 772 (1978) (respect for humanity necessitates review of individualized information and circumstances of offense).

19. *See* Tison v. Arizona, 481 U.S. 137, 149 (1987) (retribution requires that criminal sentence be directly related to defendant's personal blameworthiness); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (offender's background, character, and

To assist the sentencing authority in reviewing the material relevant to a death penalty determination, the Supreme Court has allowed the use of presentence reports.[20] The report, which a probation officer normally prepares, details the defendant's background, education, and prior criminal record.[21] These presentence reports commonly include victim impact evidence.[22]

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offense should be basis for criminal sentence); Enmund v. Florida, 458 U.S. 782, 801 (1982) (death penalty reversed for lack of personal culpability and moral guilt where defendant did not commit murder and had no such intention); Lisa G. Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 207-08 (1986-87) (analysis of *Enmund*'s focus on culpability of particular defendant); Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated*, 66 N.C. L. REV. 283, 312-13 (1988) (mapping the course of culpability requirement in capital punishment in light of *Enmund*, *Tison*, and *Booth*).

20. *See* Booth v. Maryland, 482 U.S. 496, 498-99 (1987) (allowing presentence report to assist jury in making death penalty determination); Gardner v. Florida, 430 U.S. 349, 362 (1977) (holding that presentence report may be considered by judge, but lack of disclosure amounts to denial of defendant's due process); Williams v. New York, 337 U.S. 241, 249-50 (1949) (sentencing judges should not be deprived of information available in presentence reports); *see also* Carol Shockley, *The Federal Presentence Investigation Report: Postsentence Disclosure Under the Freedom of Information Act*, 40 ADMIN. L. REV. 79, 81 (1988) (presentence reports assist sentencer in deciding appropriate penalty). *See generally* Keith A. Findley & Meredith J. Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under* Julian *and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 839-40 (tracing history of presentence reports and problems with inaccuracies).

21. *See* United States Dept. of Justice v. Julian, 486 U.S. 1, 3-4 (1988) (presentence report requires investigation of defendant's background and circumstances of crime); Booth v. Maryland, 482 U.S. 496, 498-99 (1987) (probation officer prepared presentence report describing defendant's criminal record, employment history, and education); Williams v. New York, 337 U.S. 241, 242-43 (1949) (presentence report complied with New York Criminal Code which provided that report include defendant's criminal record, mental evaluation, and any other information which may assist in proper sentencing determination); Keith A. Findley & Meredith J. Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under* Julian *and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 840 (probation officer compiles presentence report to give sentencer complete picture of defendant); Amy K. Posner, Comment, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOK. L. REV. 301, 304-05 (1984) (although prior criminal record and general behavior of defendant may be irrelevant at trial stage, these factors are necessary at sentencing phase to give sentencers adequate information to determine penalty).

22. *See* Booth v. Maryland, 482 U.S. 496, 498-99 (1987) (victim impact statement included within presentence report in compliance with Maryland statute); State v. Huertas, 553 N.E.2d 1058, 1062 (Ohio 1990) (victim impact statement details victim's personal characteristics and emotional pain suffered by victim's family); Lodowski v. State, 490 A.2d 1228, 1263-64 (Md. 1985) (Cole, J., concurring) (victim impact statement included in presentence report under Maryland law); Richard S. Murphy, *The Significance of Victim Harm:* Booth v. Maryland *and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1303-04 (1988) (victim impact statement relates effect crime has had on victim and family). *See generally* Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 202-11 (1988) (describing information generally

As a response to the growing concern that the criminal justice system inequitably ignored victims, Congress passed the Victim and Witness Protection Act of 1982 (the act).[23] One of the declared purposes of the act was "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process."[24] The act amended the Federal Rules of Criminal

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given by victim impact statements); Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 505-11 (1986) (describing contents of victim impact statements, ways of preparing them, and presentation formats).

23. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C. §§ 1512-15, (1988) and 18 U.S.C. §§ 3579-80 (1982)). Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987 (1984) amended §§ 3579-80 and relocated them to 18 U.S.C. §§ 3663-64. The Victim and Witness Protection Act provides restitution for the victim, protection against retaliation and intimidation, a federal "Son of Sam" law which prohibits a felon from profiting from the sale of his story, and a provision for the inclusion of victim impact statements in a presentence report. *See* 18 U.S.C. §§ 1512-15, 3663-64 (1988); *see also* United States v. Wilson, 565 F. Supp. 1416, 1429-30 (S.D.N.Y. 1983) (witness and victim tampering provision of Victim and Witness Protection Act of 1982 not unconstitutional on overbroadness and violation of freedom of speech grounds); United States v. Velasquez, 772 F.2d 1348, 1356-57 (1985) (retaliation provision of act withstands First Amendment attack since not applied to idea or advocacy threats); United States v. Brown, 744 F.2d 905, 910-11 (2d Cir.), *cert. denied*, 469 U.S. 1089 (1984) (ruling that appellant pay restitution to victim upheld despite Seventh Amendment challenge); Susan A. Waddell, Recent Decision, *The Constitutionality of the Victim and Witness Protection Act of 1982*, 35 ALA. L. REV. 529, 551 (1984) (proposing that restitution provisions of the act should be able to withstand constitutional attacks); *see also* Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 393-95 (1989) (explanation of effects and purposes of Victim and Witness Protection Act of 1982 and possible infringement on defendant's constitutional rights); John Heinz, *The Victim and Witness Protection Act of 1982*, 29 PRAC. LAW. 13-8 (1983) (comprehensive overview of the Act by one of its drafters).

24. Victim and Witness Protection Act § 2(b)(1). The other two declared purposes include:

> (2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and
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> (3) to provide a model for legislation for State and local governments.

Victim and Witness Protection Act §§ 2(b)(2) and 2(b)(3); *see also* United States v. King, 762 F.2d 232, 237 (2nd Cir.), *cert. denied* 475 U.S. 1018 (1985) (tampering provision of Act only intended to reach specific means such as intimidation, threat, or physical force); United States v. Satterfield, 743 F.2d 827, 833-36 (11th Cir. 1984), *on remand*, 599 F. Supp. 958 (N.D. Ala. 1985) (purpose of restitution provision is to protect from defendant's threats and harassment, increase victim involvement, and victim restoration to extent possible); United States v. Hernandez, 730 F.2d 895, 899 (2nd Cir. 1984) (Congress' intent of act was to prosecute witness harassment and intimidation under 18 U.S.C. § 1512 and no longer § 1503); Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 393-95 (1989) (discussion on effects of act on sentencing discretion); Lorraine Slavin & David J. Sorin, Project, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 507 (1984) (act first governmental attempt with intention of improving victim treatment); Martha Hoffman, Note, *Victim Impact Statement*, 10 W. ST. L. REV. 221, 222 (1983) (purpose of act to toughen existing protections for

Procedure to require the inclusion of a victim impact statement as a section of the presentence report submitted to the sentencing authority.[25] Similar legislation now exists in the majority of states and the District of Columbia mandating the use of victim impact statements.[26]

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victims and witnesses and require United States Attorney General to develop guidelines and proposals toward this goal).

25. Victim and Witness Protection Act of 1982 § 3, Pub. L. No. 97-291, 96 Stat. 1248; FED. R. CRIM. P. 32(c)(2)(D). As amended, the Federal Rules of Criminal Procedure now provide: "The report of the presentence investigation shall contain . . . (D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed." FED. R. CRIM. P. 32(c)(2)(D); *see* United States v. Santana, 908 F.2d 506, 507 (9th Cir. 1990) (judge's consideration of presentence victim impact information in noncapital case did not violate *Booth* holding against such consideration in capital cases); United States v. Monaco, 852 F.2d 1143, 1149-50 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989) (district judge did not err when he considered the victim impact letters included in presentence report); United States v. Serhant, 740 F.2d 548, 551-53 (7th Cir. 1984) (judge's consideration of victim impact statements not improper since information was noninflammatory and dignified concerning investors who lost money in defendant's mail fraud scheme); *see also* Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 394 (1989) (discussion of revised Federal Rule 32(c)(2)(D)); Martha Hoffman, Note, *Victim Impact Statement*, 10 W. ST. L. REV. 221, 222 (1983) (Rule 32 requires victim impact statement with presentence report).

26. *See* ALASKA STAT. § 12.55.022 (1990); ARIZ. REV. STAT. ANN. §§ 12-253(4) (Supp. 1990), 13-702(D)(9) (1989); ARK. CODE ANN. § 5-65-109 (Supp. 1991); CAL. PENAL CODE § 1191.1 (Deering Supp. 1990); COLO. REV. STAT. § 16-11-102 (Supp. 1991); CONN. GEN. STAT. ANN. §§ 54-91a (West Supp. 1990), 54-91c (Supp. 1991); DEL. CODE ANN. tit. 11, § 4331 (Supp. 1990); D.C. CODE ANN. § 23-103a (1989); FLA. STAT. ANN. § 921.143 (Supp. 1991); GA. CODE ANN. § 17-10-1.1 (Michie 1990); IDAHO CODE § 19-5306(b) (Supp. 1991); ILL. ANN. STAT. ch. 38, para. 1005-3-2(a) (Supp. 1991); IND. CODE ANN. §§ 35-38-1-8 to 1-9 (Supp. 1990); IOWA CODE ANN. § 901.3(5) (Supp. 1991); KAN. STAT. ANN. § 21-4604(2) (1988); KY. REV. STAT. ANN. § 421.520 (Supp. 1990); LA. CODE CRIM. PROC. ANN. art. 875(B) (West Supp. 1991); ME. REV. STAT. ANN. tit. 17-A, § 1257 (West Supp. 1990); MASS. GEN. LAWS ANN. ch. 279, § 4B, ch. 258B, § 3(h) (West Supp. 1991); MINN. STAT. ANN. §§ 611A.037-.038 (West Supp. 1991); MISS. CODE ANN. §§ 99-19-151 to 19-159 (Supp. 1990); MO. ANN. STAT. § 217.762 (Supp. 1991); MONT. CODE ANN. §§ 46-18-112, 46-18-242 (1991); NEB. REV. STAT. § 29-2261 (1989); NEV. REV. STAT. § 176-145(3) (1989); N.H. REV. STAT. ANN. § 651:4-a (1986); N.J. STAT. ANN. § 2C:44-6(b) (Supp. 1991); N.Y. CRIM. PROC. LAW § 390.30(3) (Supp. 1991); OHIO REV. CODE ANN. §§ 2929.12, 2947.051 (Baldwin 1986); OKLA. STAT. ANN. tit. 22, § 982 (West Supp. 1986); OR. REV. STAT. §§ 137.530(2), 144.790(2) (1987); PA. STAT. ANN. tit. 71, § 180-9.3 (Purdon 1990); R.I. GEN. LAWS §§ 12-28-3, -4, -4.1 (Supp. 1990); S.C. CODE ANN. § 16-3-1550 (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. § 23A-27-1.1 (1988); TENN. CODE ANN. §§ 40-35-207 (8), -209(b) (Supp. 1990); TEX. CRIM. PROC. CODE ANN. § 56.03 (Vernon 1990); VT. STAT. ANN. tit. 13, § 7006 (Supp. 1990), tit. 28, § 204(e) (1986); VA. CODE ANN. § 19.2-299.1 (Michie 1990); WASH. REV. CODE ANN. §§ 7.69.020(4), .030 (West Supp. 1990); W. VA. CODE §§ 61-11A-2, -3, -6 (1989); WIS. STAT. ANN. §§ 950.04(2m), .05(1)(dm) (West Supp. 1991); WYO. STAT. § 7-13-303(a)(iv)-(v) (Supp. 1991); Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 200 n.12 (1988); Richard L. Slowin-

In 1987, the United States Supreme Court first addressed the use of victim impact statements in a capital trial in *Booth v. Maryland*.[27] In *Booth*, the jury found the defendant guilty of first-degree murder and robbery.[28] In spite of the defendant's objections, the court allowed the sentencing jury to consider a presentence report compiled in accordance with Maryland law.[29] The report included a victim impact statement based on interviews with the victims' family.[30] The jury sentenced Booth to death.[31]

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ski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U.L. REV. 215, 216 n.10 (1990).

27. Booth v. Maryland, 482 U.S. 496, 497 (1987). *Booth* was a 5-4 decision. Justice Powell wrote the majority opinion in which Justices Brennan, Marshall, Blackmun, and Stevens joined. Justice White filed a dissenting opinion in which Chief Justice Rehnquist and Justices O'Connor and Scalia joined. A separate dissent was filed by Justice Scalia in which Chief Justice Rehnquist, and Justices O'Connor and White joined. *Id*; *see* Payne v. Tennessee, 501 U.S. __, __, 111 S. Ct. 2597, 2626, 115 L. Ed. 2d 720, 757 (1991) (Stevens, J., dissenting) (*Booth* marks first occasion for Court to rule on use of victim impact evidence); South Carolina v. Gathers, 490 U.S. 805, 810 (1989) (*Booth* was first case to address whether victim impact evidence violated principle that sentence must be related to defendant's culpability); *see also* Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 220 (1988) (suggesting that although *Booth* was first capital case to address use of victim impact statements, its narrow holding indicates that it would not be last word). *See generally* Lester K. Syren, Note, Booth v. Maryland: *Whether Victim Impact Statements Are Constitutional in Death Penalty Cases*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 171-72 (1989) (discussing facts of *Booth* and indicating decision was unjust).

28. *Booth*, 482 U.S. at 497-98. John Booth, along with Willie Reid, robbed and murdered Irvin Bronstein, seventy-eight, and his wife Rose, seventy-five, in an apparent attempt to steal money for a heroin purchase. The defendant killed the Bronsteins because he was their neighbor, and he knew that they could identify him. *Id.* at 498. A kitchen knife was used to repeatedly stab them in the chest after they had been bound and gagged. *Id. See generally* Kevin J. McCoy, Note, *Preserving Integrity in Capital Sentencing*, 22 CREIGHTON L. REV. 333, 334-38 (1988) (citing facts of *Booth*).

29. *See* MD. ANN. CODE art. 41, § 4-609(c) (1990) (requiring a victim impact statement to be included in presentence report). As a result of *Booth*, this section is invalid to the extent that consideration of victim impact evidence violates the Eighth Amendment. *Booth*, 482 U.S. at 509; *see also* State v. Huertas, 553 N.E.2d 1058, 1062 (Ohio 1990) (jury allowed to consider presentence report which included victim impact statements given by victim's parents); Lodowski v. State, 490 A.2d 1228, 1263-64 (Md. 1985) (Cole, J., concurring) (victim impact statement included in presentence report under Maryland law); Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 202 (1988) (discussing differing statutes relating to victim impact statements among states). *See generally* Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 504-07 (1986) (arguing for increased victim participation at trial through, *inter alia*, use of victim impact statements).

30. *Booth*, 482 U.S. at 498-500. The report was prepared by the State Division of Parole and Probation (DPP) in compliance with Maryland law. *Id.* at 498. In addition to the victim impact statement, the report included a description of Booth's criminal history, education and employment, and background. *Id.*

The victim interview of the son described how he experiences depression and sleeplessness, feels like his parents were "butchered like animals," and is "fearful for the first time in his

The United States Supreme Court ruled that allowing victim impact evidence in the sentencing portion of a capital trial violated the Eighth Amendment.[32] The Court determined that using such evidence tainted the trial by injecting an arbitrary factor into the sentencing process.[33] Furthermore, the

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life." *Id.* at 499-500. The daughter said that the murders have made her withdrawn and distrustful, and she also suffers from sleeplessness. *Id.* at 500. Her opinion of the defendant was that he could not be forgiven, and people like him could "[n]ever be rehabilitated." *Id.*

The interviewing DPP official concluded the victim impact statement as follows:

> 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.; *see id.* at 509-15 (full text of the victim impact statement); Hough v. State, 560 N.E.2d 511, 514-15 (Ind. 1990) (reciting information in *Booth*'s victim impact statements and distinguishing *Booth* by comparing difference in detail of information in instant case's victim impact statements); Charlton T. Howard, Note, Booth v. Maryland—*Death Knell for the Victim Impact Statement?*, 47 MD. L. REV. 701, 703 n.11 (1988) (reciting text in victim impact statement in *Booth*); Susan A. Jump, Note, Booth v. Maryland: *Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 GA. L. REV. 1191, 1192 n.6 (1987) (reciting pertinent portion of victim impact statements considered in *Booth*). *See generally* Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 202-11 (1988) (discussing various types of information which may be included in victim impact statements).

31. *Booth*, 482 U.S. at 501. Booth received the death penalty for the murder of Mr. Bronstein and life imprisonment for the murder of Mrs. Bronstein. *Id.* *See generally* Regina A. Jones, Note, *Constitutional Law—Cruel and Unusual Punishment—Eighth Amendment Prohibits Introduction of Victim Impact Evidence at Sentencing Phase of Capital Trial*, 19 RUTGERS L.J. 1159, 1160-61 (1988) (reviewing facts of *Booth*).

32. *Booth*, 482 U.S. at 509; *see also* State v. Pennington, 575 A.2d 816, 827 (N.J. 1990) (relying on *Booth* to hold formal victim impact statements inadmissible in capital trials); State v. Huertas, 553 N.E.2d 1058, 1062-63 (Ohio 1990) (citing *Booth* to support appellant's claim that victim impact statements were inadmissible in sentencing phase of capital trial). *See generally*, Paul Boudreaux, Booth v. Maryland *and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177, 196 (1989) (discussing *Booth* holding in relation to society's need for individual vengeance in sentencing criminal defendants). The *Booth* Court also held that opinions of the family members and their characterizations of the crime were inadmissible. *See Booth*, 482 U.S. at 508-09 (victim opinions and characterizations inflame jury and divert focus away from relevant evidence). However, since the admissibility of family members' opinions was not an issue in *Payne*, the focus of this note is on *Booth's* holding concerning the admissibility of evidence relating to the impact the crime had on the victim. *See* Payne v. Tennessee, 501 U.S. __, __ n.2, 111 S. Ct. 2597, 2611 n.2, 115 L. Ed. 2d 720, 739 n.2 (1991). For a discussion of the admissibility of the victim's opinion at trial, see Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 210 (1988) (admission of victim's opinion frustrates goals of equality and proportionality in sentencing).

33. *Booth*, 482 U.S. at 505; *see* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.5, at 216 (2nd ed. 1986) (criminal intent extends only to that which is intended or substantially certain to occur); *see also* Tison v. Arizona, 481 U.S. 137, 149 (1987) (criminal

Court cautioned that allowing the sentencing authority to consider victim impact evidence may shift the focus away from the defendant to the victims' worthiness in the community and their ability to express their grief.[34] The Court, however, did not completely rule out the use of victim impact evidence where it directly relates to the circumstances of the incident.[35] The minority of the Court, however, believed that the sentencer should consider harm to the victims because it substantially relates to the defendant's personal responsibility.[36] Additionally, they reasoned that the law should allow

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sentence must relate to offender's culpability); Lockett v. Ohio, 438 U.S. 586, 624-28 (1978) (opinion of White, J., concurring in part, dissenting in part, and concurring in judgment) (arguing against death penalty inflicted on defendant lacking purpose to cause death); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 911 (1939) (one intends result if acts for purpose of causing result or if realizes that result is substantially certain to occur).

34. *Booth*, 482 U.S. at 505-07; *see* State v. Pennington, 575 A.2d 816, 828 (N.J. 1990) (defendant's culpability depends on offense's elements, not victim's character); State v. Huertas, 553 N.E.2d 1058, 1062-63 (Ohio 1990) (victim impact evidence could distract jury from focusing on accused in determination of whether to impose death penalty [quoting *Booth v. Maryland*, 482 U.S. 496, 507 (1987)]); *see also* Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 395 (1989) (sentencing process needs to focus on defendant and with victim evidence this emphasis improperly shifted to victim); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 991-92 (1985) (injecting victim's testimony during defendant's blameworthiness determination calls into question victim's relative blameworthiness and whether victim "deserved" what he got).

35. *Booth*, 482 U.S. at 507 n.10; *see* South Carolina v. Gathers, 490 U.S. 805, 811-12 (1989) (analyzing whether victim's personal effects could be admitted into evidence as being a circumstance of crime under *Booth*); *see also* Eric S. Newman, Note, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should not be Permitted at the Sentencing Phase of a Capital Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1254-55 (1990) (discussing why evidence relating to circumstances of crime should be admitted during sentencing phase); Richard L. Slowinski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U. L. REV. 215, 235-36 (1990) (discussion of Court's rationale in not allowing victim's personal effects to be admitted as evidence).

36. *Booth*, 482 U.S. at 516-17 (White, J., dissenting). Justice White opined that many, if not most, people would agree that a reckless driver deserves a more harsh penalty if he runs a stoplight and unintentionally kills a pedestrian than one who merely runs a stoplight. *Id.* at 516. The blameworthiness of each offender, however, is the same since both lacked the specific intent to kill. *Id.* Justice Scalia wrote that the majority's premise of basing a capital punishment decision solely on moral guilt is nowhere to be found in the text of the Constitution, the Court's opinions, or history of societal practice. *Id.* at 519-20 (Scalia, J., dissenting); *see* Payne v. Tennessee, 501 U.S. ___, ___ 111 S. Ct. 2597, 2606, 115 L. Ed. 2d 720, 732 (1991) (two significances of harm are (1) as prerequisite to criminal sanction and (2) as standard for determining severity of sentence) (quoting S. WHEELER, ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 56 (1988)); Gregg v. Georgia, 428 U.S. 153, 204 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (noting that it is desirable to provide sentencing jury with as much information as possible); Williams v. New York, 337 U.S. 241, 246 (1949) (demonstrating that sentencing judges allowed wide discretion in making punishment determination). *See generally* Richard S. Murphy, *The Significance of Victim Harm:*

the State to offer victim impact evidence in order to balance the mitigating evidence allowed for the defendant.[37]

In 1989, the United States Supreme Court granted certiorari to hear *South Carolina v. Gathers*.[38] In *Gathers*, the jury found the defendant guilty of murder and first degree sexual conduct, and imposed the death penalty after hearing victim-related information during the sentencing phase of trial.[39] Relying on *Booth*, the Supreme Court of South Carolina reversed the sen-

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Booth v. Maryland *and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1333 (1988) (arguing that *Booth* majority's reliance on culpability rationale unjustified because victim harm should be considered).

37. *Booth*, 482 U.S. at 517 (White, J., dissenting). Justice White stated that the sentencer should be reminded that the victim, as well as the murderer, should be considered as an individual whose death deprives society and the victim's family. *Id.* Justice Scalia buttressed this view by stating that allowing the defendant's mitigating evidence while suppressing the victim's voice creates a debate "with one side muted." *Id.* at 520 (Scalia, J., dissenting). *Compare* California v. Brown, 479 U.S. 538, 541 (1987) (indicating that capital defendant must be permitted to offer any relevant mitigating evidence) *and* Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (concluding that Eighth and Fourteenth Amendments require sentencer to consider mitigating evidence concerning defendant's character, record, and circumstances of offense) *with* South Carolina v. Gathers, 490 U.S. 805, 810-11 (1989) (noting that prosecutor's comments concerning victim's personal characteristics not allowed during sentencing phase of capital trial) *and* Booth v. Maryland, 482 U.S. 496, 509 (1987) (holding that victim impact statements inadmissible at sentencing portion of capital trial). *See* Regina A. Jones, Note, *Constitutional Law—Cruel and Unusual Punishment—Eighth Amendment Prohibits Introduction of Victim Impact Evidence at Sentencing Phase of Capital Murder Trial*, 19 RUTGERS L.J. 1159, 1169 (1988) (arguing that there is a need to cure imbalance in criminal justice system); Lester K. Syren, Note, Booth v. Maryland: *Whether Victim Impact Statements Are Unconstitutional in Death Penalty Cases*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 184-85 (1989) (arguing in favor of balancing mitigating evidence with evidence concerning victim).

38. 490 U.S. at 805, 810. *Gathers* was also a 5-4 decision. *Id.* at 805. Justice Brennan authored the majority opinion in which Justices White, Marshall, Blackmun, and Stevens joined. Justice O'Connor filed a dissent in which Chief Justice Rehnquist and Justice Kennedy joined. Justice Scalia filed a separate dissent. *Id.* at 805. *See generally* Richard L. Slowinski, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U. L. REV. 215, 217-18 (1990) (tracing *Gathers* through lower courts).

39. *Gathers*, 490 U.S. at 806-07. Richard Haynes, the murder victim, was an unemployed 31-year-old. *Id.* at 807. Haynes, who had experienced mental problems, referred to himself as "Reverend Minister" even though he had not been formally trained in religion. *Id.*

Demetrius Gathers, along with three companions, severely beat and kicked Haynes and broke a bottle over his head. Gathers then rammed an umbrella into Haynes' anus. Upon returning to the scene some time later, Gathers stabbed the victim to death with a knife. *Id.* The attackers then rummaged through Gathers' personal belongings in search of something to steal. *Id.* at 807; *see also* Eric S. Newman, Note, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1236-37 (1990) (detailing factual background of *Gathers*); Richard L. Slowinski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U. L. REV. 215, 233-35 (1990) (reviewing facts of *Gathers*).

tence of death and remanded the case for another sentence proceeding.[40]

Gathers differs from *Booth* in the type of victim-related information conveyed to the sentencing jury.[41] In *Booth*, the jury heard evidence derived from interviews with the victims' family,[42] while the jury in *Gathers* heard statements made by the prosecutor concerning the victim's religious beliefs, vulnerability, mental problems, patriotism, and unemployment.[43] The

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40. *Gathers*, 490 U.S. at 810; *see* Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 421 (1989) (personal characteristics as described in *Gathers* unrelated to defendant's culpability and therefore correctly inadmissible).

41. *Compare Booth*, 482 U.S. at 499 (victim impact statements based on interviews with victim's family read to jury) *with Gathers*, 490 U.S. at 808 (victim impact evidence in form of victim's personal characteristics given by prosecutor in closing argument). *See* Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 420 (1989) (discussion of the different forms in which victim impact information can be used); Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 202-11 (1988) (differing forms of victim impact statements).

42. *Booth*, 482 U.S. at 499; *see* Hough v. State, 560 N.E.2d 511, 514-15 (Ind. 1990) (reciting information in *Booth*'s victim impact statements and distinguishing *Booth* by comparing difference in detail of information in instant case's victim impact statements); Charlton T. Howard III, Note, Booth v. Maryland—*Death Knell for the Victim Impact Statement?*, 47 MD. L. REV. 701, 703 n.11 (1988) (reciting text in victim impact statement in *Booth*); Susan A. Jump, Note, Booth v. Maryland: *Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 GA. L. REV. 1191, 1192 n.6 (1987) (reciting pertinent portion of victim impact statements considered in *Booth*). *See generally* Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 202-11 (1988) (discussing various types of information which may be included in victim impact statements).

43. *Gathers*, 490 U.S. at 808. The relevant sections of the prosecutor's closing argument included a reading from a passage called "The Game Guy's Prayer" and comments made about the voter registration card Haynes was carrying. The portion of the closing argument which generated the controversy is as follows:

> We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strewn [sic] them across the bike path, thinking nothing of that.
>
> Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had this [sic] religious items, his beads. He had a plastic angel. Of course, he is with the angels now, but this defendant Demetrius Gathers could care little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.
>
> But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules,

Court, however, did not see any relevance in the distinction and re-affirmed its holding in *Booth* by concluding that victim impact statements, as well as statements made by a prosecutor concerning the victim, violated the Eighth Amendment.[44]

The guidelines enunciated by the Court in *Booth* and *Gathers* created a significant amount of confusion in the lower courts.[45] Some courts made

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to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to it find out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, comlimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life."

Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life. . . .

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

Id. at 808-10. *See* Eric S. Newman, Note, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1238 (1990) (reprinting and discussion of "Game Guy's Prayer").

44. *Gathers*, 490 U.S. at 812. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2604, 115 L. Ed. 2d at 730 (1991) (*Gathers* extended rule in *Booth* to prosecutorial statements concerning victim's characteristics); State v. Huertas, 553 N.E.2d 1058, 1063 (Ohio 1990) (*Gathers* extends *Booth* holding to personal characteristics mentioned by prosecutor); Richard L. Slowinski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U. L. REV. 215, 236 (1990) (evidence inadmissible in *Gathers* since information sufficiently similar to type condemned in *Booth*). *But see* Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 421 (1989) (discussing uncertainty after *Booth* and *Gathers* as to what types of victim impact statements are excluded).

45. *See Gathers*, 490 U.S. at 812-13 (O'Connor, J., dissenting) (discussing confusion in lower courts in applying *Booth*); State v. Huertas, 553 N.E.2d 1058, 1070 (Ohio 1990) (Moyer, C.J., concurring) (urging Supreme Court to give lower courts more direction in applying *Booth* and *Gathers* to victim impact evidence admissibility); *see also* Eric S. Newman, Note, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1242-45 (1990) (reviewing Justice O'Connor's dissent in *Gathers* and her recommendation that

distinctions between cases tried before juries and judges, and others attempted to distinguish between the amount of information provided by victim impact evidence.[46] This confusion, coupled with changes in the Court's personnel, made the decisions ripe for reconsideration.[47]

In the 1991 case of *Payne v. Tennessee,*[48] the United States Supreme Court followed the dissenting opinions in *Booth* and *Gathers* and specifically rejected the trend created by those cases.[49] The Court ruled that the Eighth Amendment does not create a *per se* bar to the use of victim impact statements during a capital trial's sentencing phase.[50] Chief Justice Rehnquist, writing for the majority, stated that the harm caused by a defendant through his crime has been an important consideration in criminal law.[51] In order to determine an offense's elements and its appropriate punishment, judges need to consider this information.[52] Furthermore, the Court noted that a judge

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Booth be read narrowly); Richard L. Slowinski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U. L. REV. 215, 236 (1990) (discussing O'Connor's dissent in *Gathers* relating to confusion in lower courts after *Booth*).

46. *See Gathers*, 490 U.S. at 812-13 (O'Connor, J., dissenting) (discussing confusion *Booth* created for lower courts); Hough v. State, 560 N.E.2d 511, 515 (Ind. 1990) (defendant's Eighth Amendment right not violated by introduction of letters written by victim's family recommending death penalty); State v. Post, 513 N.E.2d 754, 759 (Ohio 1987) (introduction of victim impact evidence not warranting death penalty reversal since case was tried before three-judge panel); *see also* Eric S. Newman, Note, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1242-45 (1990) (reviewing Justice O'Connor's *Gathers* dissent regarding confusion caused by *Booth*); Richard L. Slowinski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U. L. REV. 215, 236 (1990) (discussing Justice O'Connor's dissent in *Gathers* relating to confusion in lower courts after *Booth*).

47. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2619, 115 L. Ed. 2d at 748 (Marshall, J., dissenting) (arguing that only change between *Booth* and *Payne* was Court's composition); State v. Huertas, 553 N.E.2d 1058, 1070 (Ohio 1990) (Moyer, C.J., concurring) (requesting guidance from Court in applying *Booth* and *Gathers*); David O. Stewart, *Four Spirited Dissenters*, A.B.A. J., Sept. 1991, at 40 (discussing Court's desire to resolve victim-evidence issue after *Booth*).

48. 501 U.S. __, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

49. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2611, 115 L. Ed. 2d at 738-39 (*Booth* and *Gathers* wrongly decided and are now overruled).

50. *Id.* at __, 111 S. Ct. at 2609, 115 L. Ed. 2d at 736. The Court did not express an opinion on the admissibility of characterizations and opinions of the victim's family. *Id.* at __ n.2, 111 S. Ct. at 2611 n.2, 115 L. Ed. 2d at 739 n.2. Although the *Booth* Court held that this type of evidence violated the Eighth Amendment, the issue did not arise in *Payne*. *Id.*

51. *Id.* at __, 111 S. Ct. at 2605, 115 L. Ed. 2d at 731.

52. *Id.* at __, 111 S. Ct. at 2605, 115 L. Ed. 2d at 731; *see Booth v. Maryland*, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting) (although moral guilt of two bank robbers who aim their guns at a guard and pull trigger may be identical, responsibility for one who kills is greater than one whose gun misfires); Tison v. Arizona, 481 U.S. 137, 148-49 (1987) (if robbery with

needs to consider, among other factors, the harm that the offense caused when exercising discretion.[53] The Court also reasoned that the holding in *Booth* created an imbalance in capital trials.[54] While a capital defendant may offer relevant mitigating evidence without restriction, the State may not offer evidence on the harm to the victim and society caused by the defendant's actions.[55] The Court determined that the sentencing authority may fairly consider such harm while also considering the defendant's mitigating evidence.[56] Responding to the argument that the defendant's rebuttal of victim impact evidence would create a " 'mini-trial' on the victim's character," the majority reasoned that because of its relevance during the guilt phase of trial, much of the victim evidence has already been offered to the jury.[57] As for the additional evidence introduced during the sentencing phase, the Court stated that the decision faced by the defendant on the prudence of rebutting is no different than other cases encountering this dilemma.[58] The Court recognized that the fact-finder should determine the weight of relevant, unprivileged evidence with the help of cross-examination and the opposing party's contrary evidence.[59]

Additionally, the defendant in *Payne* used the argument that this type of evidence permitted the sentencing authority to determine the sentence based on the perceived worth of the victim.[60] The argument follows that victims who are greater assets to the community prompt the sentencing authority to find the defendant more deserving of punishment.[61] The majority answered this concern by declaring that victim impact statements serve the purpose of showing the victim's "uniqueness as an individual human being," regardless

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reckless disregard for human life results in death of victim, death penalty may be imposed, but death penalty not allowed if victim does not die).

53. *Payne*, 501 U.S. at __, 111 S. Ct. at 2606, 115 L. Ed. 2d at 732.

54. *See Id.* at __, 111 S. Ct. at 2607, 115 L. Ed. 2d at 733. The Court suggested that the majority in *Booth* misread precedent providing that a defendant in a capital trial be treated as a "uniquely individual human being." *See id.* at __, 111 S. Ct. at 2606-07, 115 L. Ed. 2d at 733 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)). The *Payne* majority reasoned that the language from *Woodson* was not intended to be read as describing the evidence which *could not* be admitted, but rather, which evidence *must* be admitted. *Id.* at __, 111 S. Ct. at 2607, 115 L. Ed. 2d at 733 (emphasis in original).

55. *Id.* at __, 111 S. Ct. at 2607, 115 L. Ed. 2d at 733.

56. *Id.* at __, 111 S. Ct. at 2609, 115 L. Ed. 2d at 736.

57. *Payne*, 501 U.S. at __, 111 S. Ct. at 2607, 115 L. Ed. 2d at 734.

58. *Id.*

59. *Id.* (quoting Barefoot v. Estelle, 463 U.S. 880, 898 (1983)).

60. *Id.* This argument was also used by the defendant in *Booth*, but with more success. *See* Booth v. Maryland, 482 U.S. 496, 506 (1987) (no justification for death penalty decision based on perception that victim was "sterling member of community" rather than person with "questionable character").

61. *Payne*, 501 U.S. at __, 111 S. Ct. at 2607, 115 L. Ed. 2d at 734.

of the jury's perception of the community's loss.[62] The majority also responded to the argument that admitting victim impact evidence during a capital trial's sentencing phase leads to an arbitrary application of the death penalty.[63] Answering this argument, the Court reasoned that the use of victim impact statements serve legitimate purposes, and the Due Process Clause provides a method for relief for a trial rendered fundamentally unfair.[64]

The Court justified overruling only three years of established precedent by commenting on how *Booth* and *Gathers* created uncertainty in the law with regard to victim impact evidence.[65] The Court pointed to the narrow margins of those decisions and the inconsistent application by the lower courts as valid reasons for reviewing their holdings.[66]

Justices O'Connor, Scalia, and Souter each wrote a separate concurrence in *Payne*.[67] Justice O'Connor, in her concurrence, stated that because of the potential relevance of victim impact evidence, the states should treat it in the same manner as other types of relevant evidence.[68] Furthermore, Justice O'Connor reasoned that the Eighth Amendment prohibits cruel and unusual practices and punishments according to beliefs held by society.[69] Applying this interpretation of the Eighth Amendment to *Payne*, Justice O'Connor further opined that no consensus of society believes that a victim should not take part in a capital trial's penalty phase.[70] Additionally, Justice O'Connor pointed out that the holding of *Payne* does not require, or even suggest, the admission of victim impact evidence.[71] *Payne* merely permits a state, if it chooses, to consider this evidence without violating the Eighth Amendment.[72]

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62. *Id.* The phrase "uniqueness as a human being" comes from *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Supporting this rationale, the majority gave the facts of *Gathers* as an example. *Payne*, 501 U.S. at __, 111 S. Ct. at 2607, 115 L. Ed. 2d at 734. The victim in that case was unemployed and had mental problems. *Id.*

63. *Payne*, 501 U.S. at __, 111 S. Ct. at 2608, 115 L. Ed. 2d at 735.

64. *Id.* (citing Darden v. Wainwright, 477 U.S. 168, 179-83 (1986)).

65. *Id.* at __, 111 S. Ct. at 2609-11, 115 L. Ed. 2d at 736-39.

66. *Id.* at __, 111 S. Ct. at 2611, 115 L. Ed. 2d at 738.

67. *Payne*, 501 U.S. at __, 111 S. Ct. at 2601, 115 L. Ed. 2d at 726.

68. *Id.* at __, 111 S. Ct. at 2611, 115 L. Ed. 2d at 739 (O'Connor, J., concurring). Justice O'Connor's concurrence was joined by Justices White and Kennedy. *Id.*

69. *Id.* at __, 111 S. Ct. at 2611-12, 115 L. Ed. 2d at 739 (O'Connor, J., concurring) (quoting South Carolina v. Gathers, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting)).

70. *Payne*, 501 U.S. at __, 111 S. Ct. at 2612, 115 L. Ed. 2d at 739 (O'Connor, J., concurring). Supporting this view, Justice O'Connor points out that a majority of states have enacted legislation allowing victim impact evidence to be considered. *Id.*

71. *Id.*

72. *Id.* at __, 111 S. Ct. at 2612, 115 L. Ed. 2d at 739-40. (O'Connor, J., concurring).

Justice Scalia, in his concurrence,[73] supported overruling *Booth* by stating that the decision has no constitutional, historical, or logical foundation.[74] The majority in *Payne*, according to Justice Scalia, correctly disregarded the doctrine of *stare decisis* because of the "plainly inadequate rational support" which plagued both *Booth* and *Gathers*.[75]

In Justice Souter's concurrence,[76] he expressed the view that victim harm deserves consideration since every defendant, if able to establish a criminal responsibility, should know that the foreseeable consequences of murder include the inevitable harm that the decedent's survivors will suffer.[77] Justice Souter also complained about the unworkable standard that *Booth* created.[78] In its full effect, reasoned Justice Souter, *Booth* requires either forbidding the jury from hearing victim impact evidence at the guilt phase of trial or impanelling a new jury to determine the sentence.[79] The first situation deprives the jury of facts it needs to understand the case, and the second alternative creates a significant imposition on the states.[80]

In his dissent to *Payne*, Justice Marshall criticized the majority's disregard for the doctrine of *stare decisis*.[81] Justice Marshall reasoned that the *Booth* and *Gathers* decisions should prevail because their rationale remains persuasive.[82] Furthermore, according to Marshall, the majority did not give the extraordinary showing historically insisted on by the Court before overruling precedent.[83] Additionally, Justice Marshall noted the decisions leading up to *Payne* which recognized the need for an "individualized determination" of the defendant's blameworthiness.[84] This determination furthers the established goal of minimizing the risk of arbitrariness in imposing the death penalty.[85] According to Justice Marshall, the *Payne* decision frustrates this

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73. *Id.* at __, 111 S. Ct. at 2613, 115 L. Ed. 2d at 740-41 (Scalia, J., concurring). Justice Scalia's concurrence was joined by Justices O'Connor and Kennedy as to Part II only. *Id.*

74. *Payne*, 501 U.S. at __, 111 S. Ct. at 2613, 115 L. Ed. 2d at 741 (Scalia, J., concurring).

75. *Id.* at __, 111 S. Ct. at 2613, 115 L. Ed. 2d at 741-42 (Scalia, J., concurring).

76. *Id.* at __, 111 S. Ct. at 2614, 115 L. Ed. 2d at 742 (Souter, J., concurring). Justice Souter's concurrence was joined by Justice Kennedy. *Id.*

77. *Id.* at __, 111 S. Ct. at 2615, 115 L. Ed. 2d at 744 (Souter, J., concurring).

78. *Payne*, 501 U.S. at __, 111 S. Ct. at 2616, 115 L. Ed. 2d at 745 (Souter, J., concurring).

79. *Id.* at __, 111 S. Ct. at 2617, 115 L. Ed. 2d at 746 (Souter, J., concurring).

80. *Id.*

81. *Id.* at __, 111 S. Ct. at 2619, 115 L. Ed. 2d at 748 (Marshall, J., dissenting). Justice Marshall's dissent was joined by Justice Blackmun.

82. *Payne*, 501 U.S. at __, 111 S. Ct. at 2620, 115 L. Ed. 2d at 749 (Marshall, J., dissenting).

83. *Id.* at __, 111 S. Ct. at 2621, 115 L. Ed. 2d at 750-51 (Marshall, J., dissenting).

84. *Id.* at __, 111 S. Ct. at 2619, 115 L. Ed. 2d at 749 (Marshall, J., dissenting).

85. *Id.*

goal in allowing the introduction of victim impact evidence.[86]

Justice Stevens, in his dissent, stated that the *Payne* ruling allows the admission of evidence which does not reflect the character of the offense or offender and therefore lacks relevancy.[87] This, reasoned Justice Stevens, encourages sentencing decisions based on emotion rather than reason.[88] Justice Stevens also attacked the majority's logic relating to the imbalance created when allowing consideration of the defendant's mitigating evidence while suppressing victim impact evidence.[89] That reasoning, according to Justice Stevens, inaccurately depicts sentencing procedures since a state may rebut any mitigating evidence profferred by the defendant.[90] Additionally, the Constitution affords criminal defendants certain protections in order to guard against overreaching by the state's disproportionate power.[91] Justice Stevens further challenged the majority's holding by pointing out that the use of victim impact evidence defies consistent application since its scope is not determined until after the commission of the crime.[92] This inconsistent application leads to a broadening of the sentencer's discretion, and therefore fails to further the goal of minimizing arbitrariness in death penalty decisions.[93]

As a result of *Payne*, the realm of information admissible during the sentencing phase of a capital trial now includes victim impact evidence.[94] Although advocates of victim's rights may see this decision as a victory,[95]

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86. *Payne*, 501 U.S. at __, 111 S. Ct. at 2619-2620, 115 L. Ed. 2d at 749 (Marshall, J., dissenting).

87. *Id.* at __, 111 S. Ct. at 2625-26, 115 L. Ed. 2d at 756 (Stevens, J., dissenting). Justice Steven's dissent was joined by Justice Blackmun. *Id.*

88. *Id.* at __, 111 S. Ct. at 2625, 115 L. Ed. 2d at 756 (Stevens, J., dissenting).

89. *Payne*, 501 U.S. at __, 111 S. Ct. at 2627, 115 L. Ed. 2d at 758 (Stevens, J., dissenting).

90. *Id.*

91. *Id.* An example given by Justice Stevens is the requirement that the state show beyond a reasonable doubt that a defendant is guilty. *Id.*

92. *Id.* at __, 111 S. Ct. at 2628, 115 L. Ed. 2d at 759 (Stevens, J., dissenting).

93. *Payne*, 501 U.S. at __, 111 S. Ct. at 2629, 115 L. Ed. 2d at 761 (Stevens, J., dissenting).

94. *See* Payne v. Tennessee, 501 U.S. __, __, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720, 736 (1991) (Eighth Amendment does not prohibit state from permitting victim impact evidence at capital trial's sentencing phase); People v. Mickle, 284 Cal. Rptr. 511, 545-46 (1991) (Mosk, J., concurring) (*Booth* and *Gathers* overruled by *Payne* to extent that victim characteristics and victim impact inadmissible). *But see* Robison v. Maynard, No. 89-6166, 1991 WL 164737, at *1-*2 (10th Cir. August 29, 1991) (*Payne* holding not intended to include victim's opinion that death penalty should not be invoked); *see also* David O. Stewart, *Four Spirited Dissenters*, A.B.A. J., Sept. 1991, at 40. (*Payne* offers new rule in allowing for admissibility of victim impact evidence relating to victim and impact of death on family).

95. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2631, 115 L. Ed. 2d at 763 (Stevens, J., dissenting) (*Payne* decision will be welcomed among victim rights advocates); Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) (victims' rights proponents have found

the reasoning of the Court and the implications on the criminal justice system indicate that the case was erroneously decided.[96] Specifically, the decision goes against the capital sentencing goals of proportionality and non-arbitrariness.[97]

Traditionally, the consequences intended by a defendant through his actions extend only to those which he desires or which he is substantially certain will result.[98] The consideration of victim impact statements contradict

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criminal trials unjust in disregarding victim); Morris v. Slappy, 461 U.S. 1, 14 (1983) (victim's interests should be taken into account in administration of criminal justice). *See generally* Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117 (1984) (expanding victim's role in criminal proceedings is justifiable in spite of problems and complicated issues); Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for A Change*, 11 PEPP. L. REV. 23 (1984) (favoring increased victim involvement in criminal justice system).

96. *See* People v. *Mickle*, 284 Cal. Rptr. at 546 (Mosk, J., concurring) (victim impact evidence irrelevant in consideration of defendant's personal moral culpability); *see also Payne*, 501 U.S. at __, 111 S. Ct. at 2625, 115 L. Ed. 2d at 756 (Stevens, J., dissenting) (majority's opinion encourages jurors to impose death penalty based on emotion rather than reason); *Booth*, 482 U.S. at 504 (victim impact factors may be completely unrelated to defendant's blameworthiness); Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal*, 27 AM. CRIM. L. REV. 391, 395 (1989) (concern in justice system for accused can be undermined when victim is considered); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 948 (1985) ("discovery" of crime victim substitutes individual for state opposite accused making trial seem more equal).

97. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2628, 115 L. Ed. 2d at 759 (Stevens, J., dissenting) (victim impact evidence contrary to Eighth Amendment's proscription that death penalty not be imposed arbitrarily or capriciously); Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting) (nexus between punishment and defendant's blameworthiness required to satisfy Eighth Amendment's requirement of proportionality); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (sentencer's discretion should be limited so as to minimize risk of arbitrary and capricious action); Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring) (punishment must not be inflicted arbitrarily by the state). The proportionality approach to capital punishment involves consideration of several factors including the nature and seriousness of the crime, punishments imposed in other jurisdictions for the same offense and for more serious offenses, sentences other criminals have received in the same jurisdiction, goals desired in punishing, and the standards of decency which have developed. *Id.*; *see also* Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated*, 66 N.C. L. REV. 283, 311 (1988) (proportion is key to a constitutional application of capital punishment); Dora Nevares-Muniz, *The Eighth Amendment Revisited: A Model of Weighted Punishments*, 75 J. CRIM. L. & CRIMINOLOGY 272, 274-75 (1984) (goals of proportionality and non-arbitrariness have been defined as legitimate goals of capital punishment). *See generally*, Anthony F. Granucci, *'Nor Cruel and Unusual Punishments Inflicted:' The Original Meaning*, 57 CAL. L. REV. 839, 842-44 (1969) (Supreme Court recognized that Eighth Amendment prohibited disproportionate punishments at end of 19th century).

98. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.5, at 216 (2nd ed. 1986); *see Payne*, 501 U.S. at __, 111 S. Ct. at 2628, 115 L. Ed. 2d at 759 (Stevens, J., dissenting) (victim impact evidence calls into question aspects of crime unforeseen by defendant); Tison v. Arizona, 481 U.S. 137, 149 (1987) (criminal sentence must relate to offender's culpa-

this premise by introducing evidence of which, in many cases, the defendant has no knowledge when committing the crime.[99] The Supreme Court, since holding that the death penalty does not violate the Eighth Amendment,[100] has consistently taken measures which seek to minimize the arbitrariness of a death penalty decision.[101] However, in *Payne* the Court seems to disregard

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bility); Lockett v. Ohio, 438 U.S. 586, 624-28 (1978) (opinion of White, J., concurring in part, dissenting in part, and concurring in judgment) (arguing against death penalty inflicted on defendant who lacked purpose to cause death); *see also* Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 911 (1939) (one intends a result if he acts for purpose of causing that result or if he realizes that the result is substantially certain to occur).

99. *Compare Payne*, 501 U.S. at ___, 111 S. Ct. at 2629, 115 L. Ed. 2d at 761 (Stevens, J., dissenting) (victim impact evidence irrelevant since it details harm defendant is unable to foresee) *with id.* at ___, 111 S. Ct. at 2615, 115 L. Ed. 2d at 744 (Souter, J., concurring) (harm to victim's survivors is foreseeable result of murder); *see also* South Carolina v. Gathers, 490 U.S. 805, 811 (1989) (imposing death penalty after allowing jury to rely on evidence of victim's personal characterisitics could be based on factors which defendant was unaware); *Booth*, 482 U.S. at 504 (criminal defendant often knows nothing about victim and rarely selects victim on basis of effect crime will have on victim's family); People v. Levitt, 203 Cal. Rptr. 276, 287-88 (Cal.App. 1984) (culpability depends on factors over which defendant has control); Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal*, 27 AM. CRIM. L. REV. 391, 423-24 (1989) (proposing that to fulfill requirement of foreseeability defendant must satisfy a separate *mens rea* with respect to the effect on the victim). *See generally* Richard S. Murphy, *The Significance of Victim Harm:* Booth v. Maryland *and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1304-05 (1988) (focus on defendant's culpability and foreseeable events cannot be reconciled with consideration of victim harm).

100. *See* Jurek v. Texas, 428 U.S. 262, 268 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (imposition of death penalty is not cruel and unusual and therefore does not violate Eighth Amendment); Proffitt v. Florida, 428 U.S. 242, 247 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (rejecting argument that death penalty violates Eighth and Fourteenth Amendments as cruel and unusual punishment); *Gregg*, 428 U.S. at 207 (opinion of Stewart, Powell, and Stevens, JJ.) (statutory scheme under which death was imposed was not violative of Eighth Amendment). *See generally* RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 5-9 (1982) (Supreme Court "strayed from the abolitionist path" in *Gregg* and thereby revised the Cruel and Unusual Punishments Clause in favor of a supervision of capital punishment); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1741 (1987) (beginning in 1976 Supreme Court began to ease doubts on constitutionality of death penalty by rationalizing and routinizing its application).

101. *See* Proffitt v. Florida, 428 U.S. 242, 258 (1976) (total arbitrariness and capriciousness is eliminated when sentencer is required to review factors favoring or against death penalty); *Gregg*, 428 U.S. at 189 (sentencer's discretion in imposing death penalty must be limited to negate risk of arbitrariness); People v. Tenneson, 788 P.2d 786, 790 (Colo. 1990) (sentencer's discretion must be limited to minimize risk of arbitrary and capricious action); *see also* Lisa G. Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 195 (1986-87) (Eighth Amendment mandates regularity and reliability in imposing death penalty); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1942-44 (1988) (during early 1970's Congress began to take exception to wide discretion allowed for federal sentencing judges and began considering proposals for sentencing reform).

that concern in favor of a concensus of society which supports the rights of victims.[102] Although societal values do factor into Eighth Amendment analysis when determining cruel and unusual punishments, the Court should not bind itself to this concern at the expense of other overriding concerns such as reliability in sentencing.[103] The use of victim impact evidence improperly diverts the sentencer's attention away from the defendant's moral blameworthiness to the victim's character and reputation.[104] This results in an impermissible risk of imposing the death penalty on the basis of "caprice or emotion" and therefore in an arbitrary manner.[105]

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102. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2612, 115 L. Ed. 2d at 739 (O'Connor, J., concurring) (no societal concensus that jury may not consider victim harm); *Gathers*, 490 U.S. at 821 (O'Connor, J., dissenting) (arguing that prosecutor's remarks about victim do not offend society's moral consensus); *Booth*, 482 U.S. at 520 (Scalia, J., dissenting) (popular victim rights movement should be taken into account in deciding whether to admit victim impact evidence); *see also* Symposium, *The Victim's Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1, 12 (1984) (movement is in progress nationally to elevate crime victims to "rightful places"); Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 502 (1986) (legislation in area of victim rights result of increased demands being voiced by victims rights advocates).

103. *See* McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987) (discussing requirement of societal consensus that death penalty be proportionate to offense before it may be imposed); *Gregg*, 428 U.S. at 173 (identifying public attitude as a relevant concern in Eighth Amendment application); Steven Kasten, *Evolutionary Jurisprudence: Prospects and Limitations on the Use of Modern Darwinism Throughout the Legal Process. By John H. Beckstrom*, 88 MICH. L. REV. 1858, 1858 (1990) (pointing out that popular consensus, although suspect as a principled law-making guide, remains durable).

104. *See Payne*, 501 U.S. __, 111 S. Ct. at 2629-30, 115 L. Ed. 2d at 761 (Stevens, J., dissenting) (use of victim impact evidence risks shifting focus away from defendant); *Booth*, 482 U.S. at 505 (victim impact evidence could divert jury's focus away from defendant and circumstances of crime and create 'mini-trial' on character of victim); State v. Pennington, 575 A.2d 816, 828 (N.J. 1990) (defendant's culpability depends on the offense's elements, not on victim's character); State v. Huertas, 553 N.E.2d 1058, 1063 (Ohio 1990) (victim impact evidence could distract jury from focusing on accused in determination of whether to impose death penalty [quoting Booth v. Maryland, 482 U.S. 496, 507 (1987)]); *see also* Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 395 (1989) (sentencing process needs to focus on defendant and with victim evidence this emphasis is improperly shifted to victim); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 991-92 (1985) (injecting victim's testimony during defendant's blameworthiness determination calls into question the victim's relative blameworthiness and whether victim "deserved" what he got).

105. *See Payne*, 501 U.S. __, 111 S. Ct. at 2630-31, 115 L. Ed. 2d at 762 (Stevens, J., dissenting) (proscription against arbitrary application of death penalty must forbid use of victim impact evidence due to its irrelevance to defendant's culpability); *Pennington*, 575 A.2d at 827 (admission of victim impact statements risks a death penalty decision made arbitrarily [quoting Booth v. Maryland, 482 U.S. 496, 505 (1987)]); *see also Booth*, 482 U.S. at 502-03 (use of victim impact evidence creates risk that jury will apply death sentence in arbitrary fashion); Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated*, 66 N.C. L. REV. 283, 314 (1988) (reluctance of Court in

The decision in *Payne* will likely weigh heavily against criminal defendants.[106] Although the majority saw a need to allow the State to balance the defendant's mitigating evidence with evidence of victim impact, this view goes against the demands of the Constitution.[107] In order to ensure that the "disproportionately powerful State" does not disadvantage the criminal defendant, the accused must have certain protective rights.[108]

Justice O'Connor, in her concurrence in *Payne*, correctly assessed the confusion of the lower courts in applying *Booth* to capital sentencing decisions.[109] The problems centered around whether to employ a broad or

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Booth to let victim's character influence jury's decision is understandable in light of its irrelevancy in culpability determination); Richard S. Murphy, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1316 (1988) (use of victim impact statements is arbitrary since degree of victim suffering does not assist in determining defendant's culpability).

106. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2625, 115 L. Ed. 2d at 756 (Marshall, J., dissenting) (*Payne* decision compromises Court's role as protector of powerless); Horton v. Zant, 1991 No. 90-8522, 1991 WL 169211, at *13 (Ga. Sept. 3, 1991) (using *Payne* to reject defendant's claim of arbitrariness); United States v. Berzon, No. 90-2080, 1991 WL 144494, at *12 (Me. Aug. 5, 1991) (using *Payne* to justify a wide and unlimited discretion for judge in considering information for sentencing); *see also* Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 430 (1989) (victim impact evidence weighs against defendant by infringing constitutional rights).

107. *Compare Payne*, 501 U.S. at __, 111 S. Ct. at 2627, 115 L. Ed. 2d at 758 (Stevens, J., dissenting) (criminal defendant is protected by certain rights in Constitution and state is limited from overreaching) *with id.* at __, 111 S. Ct. at 2608, 115 L. Ed. 2d at 735 (not allowing victim impact statements is potentially unfair when defendant is allowed to offer mitigating evidence); *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Eighth and Fourteenth Amendments require that sentencer not be prevented from hearing defendant's mitigating evidence); FED. RULE EVID. 404(a). The prosecution is not permitted to introduce evidence of the defendant's character to show criminal propensities, but the defendant is able to introduce such evidence to show his good character. *Id.*

108. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2627, 115 L. Ed. 2d at 758 (Stevens, J., dissenting) (balance between state and defendant not required); *In Re* Winship, 397 U.S. 358, 368 (1970) (holding that proof beyond a reasonable doubt is a constitutional requirement imposed on States); *see also* Charles Maechling, *Truth In Prosecuting*, A.B.A. J., Jan. 1991, at 59 (protection of defendant's rights justifies the wide range of procedural and constitutional safeguards); Michel Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1769 (1989) (because of unequal distribution of power between accused and state, criminal defendants are given advantage of every reasonable doubt).

109. *See* State v. Post, 513 N.E.2d 754, 759 (Ohio 1987). In *Post* the introduction of victim impact evidence did not warrant death penalty reversal since the case was tried before a three-judge panel as opposed to a jury and there was no evidence that the panel "was influenced by or considered the victim impact evidence" in the sentencing process. *Id.*; *see also* Hough v. State, 560 N.E.2d 511, 515 (Ind. 1990) (defendant's Eighth Amendment right not violated by introduction of letters written by victim's family recommending death penalty); *Huertas*, 553 N.E.2d at 1070 (Moyer, C.J., concurring) (urging Supreme Court to give courts more direction in applying *Booth* and *Gathers* to victim impact evidence admissibility); Eric S.

narrow reading of *Booth*.[110] Although *Payne* should cure this problem, the courts will experience other problems in allowing victim impact evidence during a capital trial's sentencing phase.[111] Perhaps a more practical approach to the problems associated with *Booth* would include a clarification of its implications.[112]

Newman, Note, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1242-45 (1990) (reviewing Justice O'Connor's dissent in *Gathers* and her recommendation that *Booth* be read narrowly); Richard L. Slowinski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U.L. REV. 215, 236-39 (1990) (discussion of Justice O'Connor's dissent in *Gathers* relating to confusion in lower courts after *Booth*).

110. *Compare* South Carolina v. Gathers, 369 S.E.2d 140, 144 (S.C. 1988) (applying broad reading of *Booth* to forbid inclusion of victim's personal characteristics in sentencing phase) *with* Daniels v. State, 528 N.E.2d 775, 782 (Ind. 1988) (interpreting *Booth* narrowly to allow prosecutor's comments on victim's personal characteristics which had been adduced as evidence during trial); *see also* People v. Rich, 755 P.2d 960, 993-94 (Cal. 1988) (*Booth* read narrowly to allow prosecutor's comments at penalty phrase concerning victim's family); Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal*, 27 AM. CRIM. L. REV. 391, 421-22 (1989) (*Booth*'s effect on victim impact statements was not clear since some courts read it narrowly by allowing victim impact evidence when case was tried before judge instead of jury); Eric S. Newman, Note, *Eighth Amendment—Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted at the Sentencing Phase of a Capital Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1242-46 (1990) (Justice O'Connor noted in *Gathers'* dissent the differing interpretations by lower courts on whether to use broad or narrow application of *Booth*); Richard L. Slowinski, Note, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U. L. REV. 215, 236-39 (1990) (discussion of Justice O'Connor's implied support of a narrow reading of *Booth*).

111. *Compare Payne*, 501 U.S. at ___, 111 S. Ct. at 2610-11, 115 L. Ed. 2d at 737-38 (justifying overruling *Booth* and *Gathers* by indicating that it would solve problem of their inconsistent application by lower courts) *with id.* at ___, 111 S. Ct. at 2622, 115 L. Ed. 2d at 752 (Marshall, J., dissenting) (opining that evidence majority gives for inconsistent application in lower courts is insufficient). *See Gathers*, 490 U.S. at 813 (O'Connor, J., dissenting) (offering confusion in lower courts as reason for overruling *Booth*); *Huertas*, 553 N.E.2d at 1070 (Moyer, C.J., concurring) (asking that United States Supreme Court provide opinion with more guidance on use of victim impact statements); *see also Victim Rights Laws Sometimes Bring Frustration, Survey Finds*, 18 CRIM. JUST. NEWSL. (Pace Publications), Dec. 15, 1987, at 3-4 (ABA survey reveals that judges have encountered scheduling difficulties, delays, and an increase in legal challenges by defendants who accuse judges of being overly sympathetic to victims as a result of victim rights laws); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 965-66 (1985) (criminal justice system's focus is on event itself and is not able to cater to needs of victim).

112. *See Payne*, 501 U.S. at ___, 111 S. Ct. at 2622, 115 L. Ed. 2d at 752 (Marshall, J., dissenting) (suggesting that confusion in lower courts was insufficient to overrule precedent); *Huertas*, 553 N.E.2d at 1070 (Moyer, C.J., concurring) (asking Supreme Court for guidance in applying *Booth* and *Gathers*); Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 421 (*Booth* created uncertainty as far as what type of victim impact evidence is prohibited); Phillip A. Talbert, *The Relevance of Victim Impact*

Overruling precedent necessarily creates an uncertain legal system.[113] The relaxation of established law calls into question the strength of other precedents.[114] In a "society governed by the rule of law," the drastic measure of overruling precedent should occur only in situations which present a strong justification.[115]

The majority's opinion in *Payne* marks a significant step backward in the pursuit of a capital sentencing scheme free of arbitrariness. The scope of significant factors in death penalty decisions will now include the victim's ability to express grief persuasively enough to earn the sentencer's sympathy. Prosecutors will take advantage of this new weapon by tailoring their arguments to jurors who are most susceptable to an emotional display by the victims. Sentencers will therefore be exposed to evidence which does not reflect the criminal defendant's culpability and have the ability to consider that evidence in deciding his ultimate fate.

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Statements to the Criminal Sentencing Decision, 36 UCLA L. REV. 199, 228-30 (1988) (discussing the issue *Booth* left unresolved with regard to victim impact statements).

113. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2623, 115 L. Ed. 2d at 753 (message sent by overruling precedent is that all decisions are ripe for reevaluation); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 786-87 (1986) (White, J., dissenting) (arbitrary and unpredictable results follow when law is open to revision on case-by-case basis); Hutto v. Davis, 454 U.S. 370, 375 (1982) (Supreme Court precedent must be followed by lower courts in order for federal judicial system to have structure); *see also* David O. Stewart,, *Four Spirited Dissenters*, A.B.A. J., Sept. 1991, at 40 (neglect to follow precedent disrupts expectations and makes the judicial system uncertain); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1351 (1990) (public confidence in judicial system is undermined when Court neglects to follow precedent).

114. *Compare Payne*, 501 U.S. at __, 111 S. Ct. at 2625, 115 L. Ed. 2d at 756 (Marshall, J., dissenting) (disregard for precedent in *Payne* encourages assault on other precedents) *with id.* at __, 111 S. Ct. at 2609, 115 L. Ed. 2d at 737 (Court is not bound to precedent if decisions are unworkable or based on faulty rationale); *see also* David O. Stewart, *Four Spirited Dissenters*, A.B.A. J., Sept. 1991, at 40 (case reversal makes other precedent's vitality questionable).

115. *See Payne*, 501 U.S. at __, 111 S. Ct. at 2621, 115 L. Ed. 2d at 751 (Marshall, J., dissenting) (Court has never deviated from precedent without "special justification" [quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)]). *Compare* Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 (1983) (adherence to *stare decisis* fundamental to "society governed by law") *with* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (following precedent is not "inexorable command"). *See generally* David O. Stewart, *Four Spirited Dissenters*, A.B.A. J., Sept 1991, at 40-41 (reviewing arguments put forth by Chief Justice Rehnquist and Justice Marshall for and against following doctrine of stare decisis in *Payne*); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1350 (1990) (giving strong justification helps calm fears that decisions are being made based on personal preferences).