

ARTICLE I, PARAGRAPH 22 — VICTIM’S RIGHTS AMENDMENT — VICTIM IMPACT EVIDENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT AND IS PERMISSIBLE IN A CAPITAL MURDER CASE IN NEW JERSEY — *State of New Jersey v. Muhammad*, 145 N.J. 23, 678 A.2d 164 (1996).

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In our capital cases we have concluded that even when not required by Constitutional compulsion, our common sense of humanity would not permit a jury to sentence a person to death without ever hearing his or her voice spoken in a courtroom. I believe that we may say with equal conviction that a jury should never consider a sentence of death without having known who has died.¹

I. INTRODUCTION

The admissibility of victim-impact evidence² is a controversial issue now gaining widespread attention from courts and legislatures throughout the United States.³ On November 5, 1991, New Jersey voters approved a consti-

¹*State of New Jersey v. Muhammad*, 145 N.J. 23, 61, 678 A.2d 164, 183 (1996) (O’Hern, J., concurring in part, dissenting in part).

²See Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 U.C.L.A. L. REV. 199, 202-03 (1988) for a discussion of various types of victim impact evidence.

³The President’s Task Force on Victims of Crime filed a report in 1982 recommending that the United States Constitution be amended to provide broader protections for victims of crime. PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REP. 114 (1982). The task force explained that victims are “treated as appendages of a system appallingly out of balance. . . . Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.” Richard E. Wegrzyn, *New Jersey Constitutional Amendment for Victims’ Rights: Symbolic Victory?*, 25 RUTGERS L.J. 183, 207 (1993) (quoting PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REP. 114 (1982)); see David Roland, *Progress in the Victim Reform Movement: No Longer the “Forgotten Victim,”* 17 PEPP. L. REV. 35, 36-38 (1989) (“Although victims were expected to cooperate with authorities and to testify as part of the State’s case-in-chief, little attention was paid to the financial, physical, and emotional needs of victims.” *Muhammad*, 145 N.J. at 23-24, 678 A.2d. at 164); Katie Long, Note, *Community Input at Sentencing: Victim’s Right or Victim’s Revenge?*, 75 B.U. L. REV. 187, 189-91 (1995) (“All [victims rights groups] are devoted to increasing the role that victims play in the criminal process.” *Id.*).

tutional amendment expanding the rights of victims.⁴ The amendment sought to provide victims of crime with fair treatment in the justice system by conferring certain rights upon them.⁵ Victims were to be treated with "fairness, compassion, and respect."⁶ This came as a result of a growing trend in the United States of enacting legislation to allow victims to be more involved in the criminal justice system.⁷

Also in 1991, the United States Supreme Court addressed the constitutionality of victim impact evidence in *Payne v. Tennessee*.⁸ The high court ruled that the Eighth Amendment does not bar the admission of such evidence in a capital trial.⁹ In doing so, the Supreme Court overruled its prior holdings in

⁴This constitutional amendment, N.J. CONST. art. I § 22, was approved pursuant to N.J. CONST. art. IX § 4. For additional states with similar amendments, see *Victims Rights Amendments Pass in Five States*, N.Y. TIMES, Nov. 8, 1992, at 29. The Victims Rights Amendment states:

A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, "victim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

N.J. CONST. art. I, ¶ 22.

⁵N.J. CONST. art. I ¶ 22.

⁶*Id.*

⁷See, e.g., Uniform Victims of Crime Act (1992); W. VA. CODE §§ 61-11a-1 to -8 (1991); MASS. GEN. LAWS ANN. Ch. 258B (West Supp. 1991); R.I. GEN LAWS. §§ 12-28-1 to -10 (Supp. 1992); ALASKA STAT. § 12.55.022 (Michie 1990); ARIZ. REV. STAT. ANN. § 12-253(4) (Supp. 1992); CAL. PENAL CODE § 1203(h) (West Supp. 1992); IDAHO CODE §19-5306(1)(b) (Supp. 1991). OHIO REV. CODE ANN.. § 2947.051 (Anderson 1987); TENN. CODE ANN. §§ 40-35-207(8), -209(b) (1990).

⁸501 U.S. 808 (1991).

⁹*Id.*

both *South Carolina v. Gathers*¹⁰ and *Booth v. Maryland*.¹¹ Finally, in 1996, the New Jersey Supreme Court heard *State v. Muhammad*.¹² The court confronted the constitutionality and applicability of victim impact statements in light of the *Payne* decision and the Victim's Rights Amendment.¹³

II. STATEMENT OF THE CASE

On April 1, 1995, Rasheed Muhammad kidnapped eight-year old Jakiyah McClain.¹⁴ Muhammad sexually assaulted and strangled Jakiyah.¹⁵ The Newark Police subsequently apprehended him,¹⁶ and on June 27, 1995, he was indicted¹⁷ for the capital murder of Jakiyah McClain by a grand jury in Essex

¹⁰490 U.S. 805 (1989).

¹¹482 U.S. 496 (1987).

¹²145 N.J. 23, 678 A. 2d 164 (1996). As the *Muhammad* court indicated, several courts have dealt with the victim-impact evidence issue before. See, e.g., *State v. Scales*, 655 So.2d 1326 (La. 1996); *State v. Gonzales*, 892 P.2d 838 (Ariz. 1995); *Nooner v. State*, 907 S.W.2d 677 (Ark. 1995); *Windom v. State*, 656 So.2d 432 (Fla. 1995); *McNelton v. State*, 900 P.2d 934 (Nev. 1995); *State v. Fautenberry*, 650 N.E.2d 878 (Ohio 1995); *State v. Gentry*, 888 P.2d 1105 (Wash. 1995); *Livingston v. State*, 444 S.E.2d 748 (Ga. 1994); *Evans v. State*, 637 A.2d 117 (Md. 1994); *Weeks v. Commonwealth*, 450 S.E.2d 379 (Va. 1994); *Banda v. State*, 890 S.W.2d 42 (Tex.Ct.App. 1994); *State v. Parker*, 886 S.W.2d 908 (Mo. 1994); *Freeman v. State*, 876 P.2d 283 (Okla. Cr. App. 1994); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993); *Lucas v. Evatt*, 416 S.E.2d 646 (S.C. 1992); *People v. Hope*, 589 N.E.2d 503 (Ill. 1992); *People v. Edwards*, 819 P.2d 436 (Cal. 1991); *In re Petition of the State of Delaware*, 597 A.2d 1 (Del. 1991); *State v. Card*, 825 P.2d 1081 (Idaho 1991).

¹³*Muhammad*, 145 N.J. at 30, 678 A.2d at 167.

¹⁴*Id.* Muhammad was living in an abandoned apartment in Newark, with the building superintendent's permission. On April 1, 1995, Jakiyah McClain was talking with a friend, Ah-Tavia Maxey, when Muhammad offered to walk Jakiyah upstairs to the Maxey's apartment. Muhammad took Jakiyah's hand and led her upstairs. Later Ah-Tavia heard screaming and banging. *Id.*

¹⁵*Id.* at 31, 678 A.2d at 168. This was indicated by an autopsy of the victim. *Id.*

¹⁶*Id.* After learning from the building superintendent that Muhammad was living in an abandoned apartment, the Newark police knocked on his door and were allowed to enter by Muhammad. *Id.* They subsequently found Jakiyah, with her underpants around her ankles, under a pile of clothes in a closet. *Id.* Jakiyah's friend Ah-Tavia identified Muhammad as the man who had led Jakiyah away. *Id.*

¹⁷*Id.* Muhammad made a statement to the Police admitting he had kidnapped, sexually assaulted and murdered Jakiyah. *Id.*

County.¹⁸

New Jersey provided notice of four aggravating factors.¹⁹ Muhammad filed a pretrial motion asserting that New Jersey's victim-impact statute was unconstitutional under the federal and state constitutions.²⁰ Muhammad also argued that the *Ex Post Facto* Clauses of the federal and state constitutions were violated by the application of the victim impact statute in this case.²¹ The trial court granted the motion, calling the statute "irremediably defective" and "inconsistent with existing rules of evidence and procedure and the guarantees of due process under the constitutions of this State and of the United States."²²

The state filed a motion for direct certification to the New Jersey Supreme Court.²³ Muhammad filed a motion for leave to cross-appeal the trial court's decision on the *ex post facto* question.²⁴ The court granted both motions.²⁵

The New Jersey Supreme Court held that the victim impact statute was constitutional under both the New Jersey and United States Constitutions.²⁶ In

¹⁸*Id.* Rasheed Muhammad was also indicted on charges of first-degree kidnapping, pursuant to N.J. STAT. ANN. § 2C:13-1b(1) (West 1995); second-degree burglary, pursuant to N.J. STAT. ANN. § 2C:18-2 (West 1995); first-degree aggravated sexual assault of a child, pursuant to N.J. STAT. ANN. § 2C:14-2a(1) (West 1995); and felony murder, pursuant to N.J. STAT. ANN. § 2C:11-3a(3) (West 1995). *Id.* at 31-32, 678 A.2d at 168.

¹⁹*Id.* at 32, 678 A.2d at 168. The four aggravating factors were: 1) that the murder involved torture, aggravated assault or depravity of mind, N.J. STAT. ANN. § 2C:11-3c(4) (c) (West 1995); 2) that the murder was committed to escape detection or apprehension for another offense committed by the defendant N.J. STAT. ANN. § 2C:11-3c(4) (f) (West 1995); 3) that the murder was committed during the course of another felony, N.J. STAT. ANN. § 2C:11-3c(4) (g) (West 1995); and 4) that the victim was less than fourteen years old, N.J. STAT. ANN. § 2C:11-3c(4) (k) (West 1995). *Id.*

²⁰*Id.* Specifically, Muhammad contended that the victim-impact statute violated Article I, ¶ 12 of the New Jersey Constitution and the Eighth Amendment of the United States Constitution (both prohibiting cruel and unusual punishment). *Id.*

²¹*Id.*

²²*Id.*, 678 A.2d at 169 (citing *State v. Muhammad*, No. 2285-95 (N.J. Super. Ct. Law Div. 1995)).

²³*Id.* The New Jersey Supreme Court granted the State's motion for direct certification from the trial court as allowed by N.J. CT. R. 2:12-2. *Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* at 30, 678 A.2d at 169.

doing so, the court relied upon both the United States Supreme Court's 1991 holding in *Payne v. Tennessee*²⁷ that the Eighth Amendment does not bar victim impact evidence, and the Victim's Rights Amendment²⁸ to the New Jersey Constitution.²⁹ The court concluded that the New Jersey Constitution does not provide broader protection for capital defendants in the area of victim impact evidence than the United States Constitution does.³⁰

III. PRIOR HISTORY

A. NEW JERSEY VICTIM'S RIGHTS LEGISLATION

The New Jersey Legislature pioneered efforts to increase the participation of crime victims during the criminal justice procedure.³¹ Starting in 1971 with the creation of the Violent Crimes Compensation Board, which compensated victims of certain violent crimes,³² the New Jersey Legislature later passed the Crime Victim's Bill of Rights which granted specific rights to crime victims and witnesses.³³ In November 1991, New Jersey Voters approved the

²⁷501 U.S. 806 (1991).

²⁸N.J. CONST. art. I, ¶ 22.

²⁹*State of New Jersey v. Muhammad*, 145 N.J. 23, 30, 678 A.2d 164, 167 (1996).

³⁰*Muhammad*, 145 N.J. at 42, 678 A.2d at 174. For New Jersey cases where the courts have held that the state constitution provides broader protection of certain rights than the federal constitution, see *State v. Pierce*, 136 N.J. 184, 208-13, 642 A.2d 947 (1994); *State v. Novembrino*, 105 N.J. 95, 145, 519 A.2d 820 (1987); *State v. Gilmore*, 103 N.J. 508, 522-23, 511 A.2d 1150 (1986); *State v. Hunt*, 91 N.J. 338, 344, 450 A.2d 952 (1982); see also Stewart G. Pollock, *State Constitution as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

³¹See Wegryn, *supra* note 3, at 184-85. New Jersey was a leader in this area, culminating with the passage of the 1991 Victims Rights Amendment. *Id.* at 184.

³²N.J. STAT. ANN. § 52:4B-3. The Board can compensate victims up to \$25,000, limited by certain exceptions including unjust enrichment, N.J. STAT. ANN. § 52:4b-18(a); failure of the victim to cooperate with the requests of law enforcement agencies, N.J. STAT. ANN. § 52:4B-18(a); negligence with a vehicle, N.J. STAT. ANN. § 52:4B-18(d), and occurrence of injury when victim is incarcerated, N.J. STAT. ANN. § 52:4B-18(g).

³³N.J. STAT. ANN. §§ 52:4B-36, 52:4B-37, 52:4B-38. This was amended in 1991 to allow family members of murder victims the chance to file a written statement in the defendant's presentence report. The full text of the statute reads:

Victim's Rights Amendment.³⁴ The victim's rights efforts culminated in 1995, as the victim-impact statute became law in New Jersey.³⁵ The Amendment, effectuated by the victim impact statute, was intended to "afford victims whatever rights could be afforded to them without violating the United States Constitution."³⁶

The Legislature finds and declares that crime victims and witnesses are entitled to the following rights:

(a.) To be treated with dignity and compassion by the criminal justice system; (b.) To be informed about the criminal justice process; (c.) To be free from intimidation; (d.) To have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible; (e.) To make at least one telephone call provided the call is reasonable in both length and location called; (f.) To medical assistance if, in the judgment of the law enforcement agency, medical assistance appears necessary; (g.) To be notified if presence in court is not needed; (h.) To be informed about available remedies, financial assistance and social services; (i.) To be compensated for their loss whenever possible; (j.) To be provided a secure, but not necessarily separate, waiting area during court proceedings; (k.) To be advised of case progress and final disposition; (l.) To the prompt return of property when no longer needed as evidence; (m.) To submit a written statement about the impact of the crime to a representative of the county prosecutor's office which shall be considered prior to the prosecutor's final decision concerning whether formal criminal charges will be filed; and (n.) To make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime. This statement is to be made in addition to the statement permitted for inclusion in the presentence report by N.J.S. 2C:44-6.

N.J. STAT. ANN. §§ 52:4B-36, 52:4B-37, 52:4B-38.

³⁴N.J. CONST. art. I, ¶ 22. Over 1,200,000 New Jersey citizens voted in favor of the amendment, only 223,248 voted against it. *State of New Jersey v. Muhammad*, 145 N.J. 23, 43, 678 A.2d 164, 174 (citing Manual of New Jersey, Two Hundred and Fourth Legislature (First Session) 1992, at 903).

³⁵N.J. STAT. ANN. 2C:11-3c(6). Governor Whitman signed L.1995, L. 123 on June 19, 1995. *Muhammad*, 145 N.J. at 32, 678 A.2d at 169.

³⁶*Muhammad*, 145 N.J. at 44, 678 A.2d at 175. The majority admitted that, were it not for the Victim's Rights Amendment, the *Muhammad* case may have been decided differently. *Id.*

B. PRIOR CASE LAW

1. THE UNITED STATES SUPREME COURT'S TREATMENT OF VICTIM-IMPACT TESTIMONY

The United States Supreme Court addressed the issue of victim impact evidence in *Payne v. Tennessee*.³⁷ In *Payne*, the defendant murdered Charisse Christopher and her two-year-old daughter, Lacie, with a butcher knife.³⁸ Payne also had attacked Charisse's three-year-old son, Nicholas, with the knife, penetrating his entire body with it.³⁹ Despite this front-to-back wound, Nicholas survived.⁴⁰ Payne was apprehended later in the day while wearing bloody clothes.⁴¹ A jury subsequently found Payne guilty of the first-degree murders of Charisse and Lacie, and of first-degree assault with intent to murder upon Nicholas.⁴²

During the sentencing phase, the defense presented witnesses who testified as to Payne's character.⁴³ In response to this testimony, the State of Tennessee

³⁷501 U.S. 808 (1991).

³⁸*Id.* at 812. Payne inflicted 84 cuts to Charisse's arms and hands. *Id.* at 813. Payne had been waiting for his girlfriend who lived across the hall from Charisse and her family. *Id.* at 811. Payne visited this apartment complex earlier in the day, leaving his overnight bag and three cans of malt liquor by his girlfriend's apartment door. *Id.* at 812. Later in the day, after driving around with a friend injecting cocaine, drinking beer, and reading a pornographic magazine, Payne returned to the apartment complex. *Id.* Not finding his girlfriend home, Payne entered the Christophers' apartment and made sexual advances toward Charisse, who resisted. *Id.* Payne responded by attacking Charisse and her two infant children. *Id.*

³⁹*Id.* Nicholas required seven hours of surgery and required 1700 cc's of blood. *Id.*

⁴⁰*Id.*

⁴¹*Id.* at 813. Payne was found hiding in the apartment of an ex-girlfriend. *Id.* At trial, Payne testified he was innocent, and he was covered in blood because he had rushed into the Christopher's apartment when he heard screams. *Id.* at 813-14.

⁴²*Id.* at 808.

⁴³*Id.* at 814. Four witnesses testified: his mother, father, girlfriend, and Dr. John T. Hutson. *Id.* Dr. Hutson testified that Payne was mentally handicapped, but was neither psychotic nor schizophrenic. *Id.* He further testified that Payne was the most polite prisoner he had ever met. *Id.* Payne's girlfriend and parents all testified that Payne was a caring person, and that it was out of character for Payne to have committed the crimes of which he had been found guilty. *Id.*

presented Charisse's mother who testified that Nicholas had been deeply affected by the murders of his mother and sister.⁴⁴ After the State discussed this testimony during its closing argument,⁴⁵ the jury sentenced Payne to death on both murder counts.⁴⁶

The Supreme Court of Tennessee affirmed the decision, rejecting Payne's assertions that his Eighth Amendment rights had been violated by Charisse's mother's testimony.⁴⁷ The Court held that the prosecutor's closing statement and rebuttal were "relevant to [Payne's] personal responsibility and moral

⁴⁴*Id.* The prosecution asked Charisse's mother how Nicholas had been affected by the murders. *Id.* She answered: "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 comes 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 about my Lacie." *Id.* at 814-15.

⁴⁵*Id.* The prosecutor argued for the death penalty during the State's closing argument and rebuttal:

You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives. . . . No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby. . . . [Payne's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.

Id. at 815-16.

⁴⁶*Id.* at 816.

⁴⁷*Id.* The Court held that the grandmother's testimony "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt." *Id.* at 817. (quoting *Payne v. Tennessee*, 791 S.W.2d. 10, 18 (1990)). The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

guilt.”⁴⁸

The United States Supreme Court granted *certiorari* in 1991.⁴⁹ The high court affirmed the Tennessee Supreme Court,⁵⁰ overruling prior decisions in both *Booth v. Maryland*⁵¹ and *South Carolina v. Gathers*.⁵² Writing for the majority, Chief Justice Rehnquist held that the Eighth Amendment of the

⁴⁸*Id.* at 817. The Court further held that “when a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his ‘blameworthiness.’” *Id.* at 18.

⁴⁹*Payne v. Tennessee*, 498 U.S. 1080 (1991).

⁵⁰*Payne v. Tennessee*, 501 U.S. 808 (1991).

⁵¹482 U.S. 496 (1987). In *Booth*, the Court held that victim impact evidence was not allowable, in part because it would be difficult for the defendant to rebut this evidence. *Id.* at 506. In 1983, John Booth had robbed and murdered the Bronsteins, an elderly couple, in their home. *Id.* at 497. Booth and a partner tied the two up and stabbed them in the chest several times. *Id.* at 498. Booth was found guilty by a jury of two counts of first degree murder, two counts of robbery, and conspiracy to commit robbery. *Id.* Maryland statute § 4-609(c)(2)(i) (1986) directed that the presentence report include a victim-impact statement (“VIS”). *Id.* Information for the VIS came from the Bronstein’s son, daughter, son-in-law, and granddaughter and said:

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

Id. at 500.

It further stated “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. *Id.* 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.*

⁵²490 U.S. 805 (1989). The United States Supreme Court ruled that the *stare decisis* doctrine did not require the court to follow prior precedent. *Payne*, 501 U.S. at 827-29. Chief Justice Rehnquist noted that the United States Supreme Court had overruled itself in whole or in part 33 times in the past 20 terms. *Id.* at 828.

United States Constitution does not create a *per se* bar on a state that chooses to allow victim-impact evidence.⁵³ The majority reasoned that victim impact evidence should not be differentiated from other admissible evidence.⁵⁴ In addressing the main contention of the dissent that allowing victim impact evidence will result in the jury finding greater harm based on the social status of the victim, Chief Justice Rehnquist asserted that "victim impact evidence is not offered to encourage comparative judgments of this kind," but rather to show that the victim was a unique human being.⁵⁵

Justice O'Connor, joined by Justices White and Kennedy, wrote a concurring opinion contending that the Constitution does not prevent a state from allowing the jury in a capital case to see "a quick glimpse of the life the petitioner chose to extinguish."⁵⁶ Justice Scalia, joined by Justice O'Connor, and in part by Justice Kennedy, also authored a concurring opinion.⁵⁷ The concurring Justices opined that the Eighth Amendment "permits the People to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime."⁵⁸

The *Payne* decision was met by two forceful dissents from Justices Marshall⁵⁹ and Stevens.⁶⁰ The dissents attacked the majority's reasoning, alleging

⁵³*Payne*, 501 U.S. at 827. The Court, in overruling *Booth* and *Gathers*, reaffirmed Justice Cardozo's holding in *Snyder v. Massachusetts*, 291 U.S. 97 (1934). Justice Cardozo maintained that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder*, 291 U.S. at 122.

⁵⁴*Payne*, 501 U.S. at 827. The majority explained that "[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.*

⁵⁵*Id.* at 823.

⁵⁶*Id.* at 830. (O'Connor, J., concurring). The concurrence maintained that the Court's decision did not hold that victim impact evidence must be admitted, merely that it could without violating the United States Constitution. *Id.*

⁵⁷*Id.* at 833. (Scalia, J., concurring). Justice Scalia attacked Justice Marshall's *stare decisis* argument, quoting an earlier opinion written by Justice Marshall. The *stare decisis* doctrine "is not an imprisonment of reason." *Id.* at 834 (Scalia, J., concurring) (quoting *Guardians Assn. v. Civil Service Comm'n of New York City*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting)).

⁵⁸*Id.* at 833. (Scalia, J., concurring).

⁵⁹ *Id.* at 844. (Marshall, J., dissenting).

that the Court disregarded the doctrine of *stare decisis*.⁶¹ The dissents stressed that “this Court has never departed from precedent without ‘special justification.’”⁶²

Furthermore, Justice Stevens recognized that victim-impact evidence violated the Eighth Amendment in two areas.⁶³ First, the Justice explained that the victim’s characteristics which are not known to the defendant at the time of the murder are not relevant in determining the defendant’s blameworthiness.⁶⁴ Second, Justice Stevens concluded that it is not possible to use victim-impact evidence in a consistent manner.⁶⁵ According to Justice Stevens, the amount and nature of the admissible victim-impact evidence cannot be recognized until after the defendant has committed the crime.⁶⁶

⁶⁰*Id.* at 856. (Stevens, J. dissenting).

⁶¹*Id.* In the majority opinion, Chief Justice Rehnquist explained that “this Court has never felt constrained to follow precedent.” *Id.* at 827 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). The doctrine of *stare decisis* “is a principle of policy and not a mechanical formula of adherence to the latest decision.” *Id.* at 828 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

⁶²*Id.* at 849. (Marshall, J., dissenting) (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). Justice Marshall listed some of these justifications: 1) “[T]he advent of ‘subsequent changes or development in the law’ that undermine a decision’s rationale.” *Id.* (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)); 2) the need “to bring [a decision] into agreement with experience and with facts newly ascertained.” *Id.* (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)); and 3) a showing that a precedent is a “detriment to coherence and consistency in the law.” *Id.* (citing *Patterson*, 491 U.S. at 173). Justice Marshall opined that the majority had failed to show how any of these justifications could be used to overrule *Booth* or *Gathers*. *Id.* The Justice noted that the only thing that had changed since the *Booth* and *Gathers* decisions was the makeup of the Supreme Court. *Id.* at 850. Accordingly, Justice Marshall asserted, “scores of established constitutional liberties are now ripe for reconsideration.” *Id.* at 845. (Marshall, J., dissenting). Justice Stevens further criticized the majority for sidestepping of the *stare decisis* doctrine, alleging that the majority was influenced by political opinion rather than law. *Id.* at 859 (Stevens, J. dissenting).

⁶³*Id.* at 860-61 (Stevens, J., dissenting).

⁶⁴*Id.* See *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *California v. Brown*, 479 U.S. 538, 545 (1987); *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

⁶⁵*Id.* at 861 (Stevens, J., dissenting).

⁶⁶*Id.* See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (“[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”). Justice Stevens further attacked the majority for responding to the “hydraulic pressure” of public opinion. *Payne v. Tennessee*,

2. THE NEW JERSEY SUPREME COURT'S PRIOR TREATMENT OF VICTIM-IMPACT TESTIMONY

The New Jersey Supreme Court addressed the question of victim-impact evidence prior to *Muhammad*.⁶⁷ In *State v. Williams*⁶⁸ the State's high court opined that New Jersey criminal law focuses on the culpability of the defendant and not on the virtue of the victim.⁶⁹ The unanimous court, relying on the Supreme Court decision in *Booth v. Maryland*, held that the introduction of victim-impact statements during the sentencing phase in a capital murder case violates a defendant's Eighth Amendment rights.⁷⁰ Chief Justice Wilentz opined that "defendants may not assert as a defense that the victim was such a worthless human being that the latter's murder was acceptable or at least no loss to the world."⁷¹

501 U.S. 808, 867 (Stevens, J., dissenting) (citing *Northern Securities Co. v. U.S.*, 193 U.S. 197 (1904) (Holmes, J., dissenting)). The Justice further proclaimed the majority's decision "a sad day for a great institution." *Id.*

⁶⁷*See, e.g.*, *State v. Pennington*, 119 N.J. 547, 575 A.2d 816 (1990); *State v. Williams*, 113 N.J. 393, 550 A.2d 1172 (1988).

⁶⁸113 N.J. 393, 550 A.2d 1172 (1988). On December 30, 1982, James Williams murdered twenty-three year old Beverly Mitchell in Trenton, New Jersey, stabbing her thirty-six times and sexually assaulting her. *Id.* at 400, 550 A.2d at 1175. Williams was apprehended after his mother and brother came forward with information about the crime. *Id.* A Mercer County Grand Jury indicted defendant James Williams on several charges including: knowing and purposeful murder by his own conduct, contrary to N.J. STAT. ANN. 2C:11-3a(1) and (2); murder during the course of a robbery, contrary to N.J. STAT. ANN. 2C:11-3a(3); murder during the course of an aggravated sexual assault, contrary to N.J. STAT. ANN. 2C:11-3a(3); and murder during the course of a burglary, contrary to N.J. STAT. ANN. 2C:11-3a(3). *Id.* at 403, 550 A.2d at 1176-1177.

⁶⁹*Id.* at 450, 550 A.2d at 1202 (citing 3 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 528 (12th ed. 1975)). Chief Justice Wilentz, writing for the majority, explained that "[t]he law exists to protect all persons equally," and "our law does not regard a crime committed against a particularly virtuous person as more heinous than one committed against a victim whose moral qualities are perhaps less noteworthy or apparent." *Id.*

⁷⁰*Id.* at 457, 550 A.2d at 1206. Chief Justice Wilentz quoted *Booth* in holding that victim impact statements should not be heard by a sentencing jury: "a jury's discretion to impose the death sentence must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Id.* 550 A.2d at 1203 (citing *Booth v. Maryland*, 482 U.S. 494, 502 (1987)).

⁷¹*Id.*, 550 A.2d at 1202. The Chief Justice stated in *Williams* that the victim's character should not play a role in determining guilt, or during the penalty phase. *Id.* at 451-52, 550 A.2d. at 1203-1204. In such situations where "the victims character has no bearing on the substantive issue of guilt or the penalty to be imposed, the prosecution may not comment on

In 1990, the New Jersey Supreme Court again had occasion to address the victim-impact evidence question in *State v. Pennington*.⁷² Writing for the majority, Justice Pollock held that “the admission of a formal victim impact statement is wrong.”⁷³ As in *Williams*, the court relied on the *Booth* decision in their analysis.⁷⁴ Relying on an analysis similar to *Williams*, Justice Pollock

the evidence in a manner that serves only to highlight the victim’s virtues in order to inflame the jury.” *Id.*, 550 A.2d at 1203.

⁷²119 N.J. 547, 575 A.2d 816 (1990). Pennington, in 1986, shot and killed Arlene Connors in a bar in East Rutherford, NJ. The State prosecutor, in his opening statement in the guilt phase, spoke extensively about the victim:

Arlene Connors is not here. But once she looked, she touched, she spoke, she saw, she breathed, she lived. She even loved. She cannot come into this courtroom in flesh and blood and tell you what happened to her. She will rely, because she has been robbed by him of voice and memory, she will rely on the voices and memories of those who loved her, who will tell you how she was murdered by that cruel man. . . . Let us consider Arlene Connors. At the time of her death, September 2nd, 1986, Arlene Connors was fifty-six years old, robust health, many fruitful years before her. She was a loving wife to her husband Frank. She loved and was loved by eight children for whom and in whom her memory still lives and will always live. She had sixteen grandchildren. She and her husband Frank were in the tavern business and had been for many years. They were just basic ordinary people. They didn’t own a Glitzy [sic] glamorous club. They owned a simple neighborhood bar called Sarges in East Rutherford. It was named after Frank Connors’ rank in the Marine Corps. . . . They made a modest living with the help of their children. Their children worked the bar with them. Their children, who each held down their own full-time separate jobs, helped mom and pop run the bar. As they still do, for Frank Connors alone because this is a living family, and a close, tightly-knit family.

Id. at 567, 575 A.2d at 825-26.

⁷³*Id.* at 569, 575 A.2d at 827. Frank Pennington was found guilty by a jury of capital murder, felony murder, and possession of a firearm with the intent to use it unlawfully. *Id.* at 556, 575 A.2d at 820.

⁷⁴*Id.* at 569, 575 A.2d at 827. The majority also relied on *South Carolina v. Gathers*, 490 U.S. 805 (1989). In *Gathers*, the United States Supreme Court ruled that even if the prosecutor, and not the victim’s family, has made victim-impact statements, reversible error may be found. *Id.* at 811. Defendant Demetrius Gathers was convicted and sentenced to death for first-degree murder and first-degree criminal sexual conduct. *Id.* at 807-08. Gathers had severely beaten and murdered a stranger to him, Richard Haynes, in a park. *Id.* at 806-07. During the trial, the State read from religious material the victim was in possession of when he was murdered. *Id.* at 808-09. The prosecutor made statements about these materials and the defendant in his closing remarks: °

held that some evidence about the victim's character may be admitted, but only if it is directly related to a disputed issue and "if the probative value of such evidence outweighs the risk of undue prejudice or confusion."⁷⁵

IV. NEW JERSEY'S CURRENT TREATMENT OF VICTIM-IMPACT TESTIMONY: *STATE OF NEW JERSEY V. MUHAMMAD*

Writing for the majority, Justice Garibaldi⁷⁶ began the court's analysis by addressing the question of whether New Jersey's victim rights statute violated the Eighth Amendment of the United States Constitution.⁷⁷ In holding that no

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 He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.

Id. at 808-10.

The Supreme Court of South Carolina reversed Gathers' death sentence because the preceding remarks "conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter." *South Carolina v. Gathers*, 369 S.E.2d 140, 144 (1988).

⁷⁵*State v. Pennington*, 119 N.J. 547, 569, 575 A.2d 816, 827 (1990). Justice Pollock quoted Justice Powell's opinion:

One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of those feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.

Id.; 575 A.2d at 827 (citing *Booth v. Maryland*, 482 U.S. 496, 508 (1987)).

⁷⁶*State of New Jersey v. Muhammad*, 145 N.J. 23, 30, 678 A.2d 164, 168 (1996). Justices Garibaldi, Pollock, Coleman, O'Hern, and Chief Justice Wilentz all voted to affirm. *Id.* at 112, 678 A.2d at 209.

⁷⁷*Id.* at 36, 678 A.2d at 171. The Eighth Amendment bars infliction of "cruel and unusual punishments," and dictates "that punishment for crime should be graduated and proportioned to the offense." *Weems v. U.S.*, 217 U.S. 349, 378 (1910).

violation occurred, the majority cited *Payne v. Tennessee* as authority.⁷⁸ In *Payne*, the United States Supreme Court overruled its prior holdings in *Booth v. Maryland*⁷⁹ and *South Carolina v. Gathers*.⁸⁰ The New Jersey Supreme Court emphasized that *Payne* dispelled the practice of allowing a capital defendant to introduce mitigating evidence⁸¹ without permitting the state to use victim impact evidence.⁸² In light of the Victim's Rights Amendment, and the recently enacted victim-impact statute, the court revisited the issue of victim-impact evidence. Unlike the court's previous rulings in *Williams* and *Pennington*, the court in *Muhammad* dealt with the issue of an empowering constitutional amendment.⁸³ By a 5-2 majority, the court upheld the victim impact statute, and therefore, constitutionalized the use of victim-impact evidence in New Jersey courts.⁸⁴

The majority next turned to the protection provided to Muhammad under the New Jersey Constitution as compared to the United States Constitution.⁸⁵ Specifically, Justice Garibaldi applied the test promulgated by Justice Handler in *State v. Hunt*.⁸⁶ The majority concluded that the New Jersey Constitution

⁷⁸*Muhammad*, 145 N.J. at 37, 678 A.2d at 171.

⁷⁹482 U.S. 496 (1987).

⁸⁰490 U.S. 805 (1989).

⁸¹*Muhammad*, 145 N.J. at 40, 678 A.2d at 173. During the sentencing phase in a capital murder case, the defendant may introduce mitigating factors. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Each juror must decide whether mitigating factors are present. *State v. Bey* 112 N.J. 123, 161, 548 A.2d 887 (1988). If they determine that such factors exist, they must decide how much weight is to be afforded each one. *Muhammad*, 145 N.J. at 35, 678 A.2d at 170-71.

⁸²*Muhammad*, 145 N.J. at 38, 678 A.2d at 172 (citing *Payne v. Tennessee*, 501 U.S. 806, 823 (1991)).

⁸³*Id.* at 43, 678 A.2d at 174. See *State v. Pennington*, 119 N.J. 547, 575 A.2d 816 (1990); *State v. Williams*, 113 N.J. 393, 550 A.2d 1172 (1988).

⁸⁴*Id.* at 111, 678 A.2d at 208.

⁸⁵*Muhammad*, 145 N.J. at 40, 678 A.2d at 173. Justice Garibaldi explained, "Whenever a challenge is raised to the constitutionality of a statute, there is a strong presumption that the statute is constitutional." *Id.* at 41, 678 A.2d at 173.

⁸⁶*Id.* The criteria for determining the constitutionality of a statute under the New Jersey Constitution is as follows: 1) textual language, 2) legislative history, 3) preexisting state law, 4) structural differences between the Federal and State Constitutions, 5) matters of particular State interest, 6) state traditions, and 7) public attitudes. *New Jersey v. Hunt*, 91 N.J. 338,

did not prevent family members from making statements about the character of the defendant, or from describing the impact the crime had on the victim's family.⁸⁷ Justice Garibaldi underscored that the state constitution included the Victim's Rights Amendment⁸⁸ while the federal constitution did not.⁸⁹ The majority opined that even if the New Jersey Supreme Court elected not to follow the *Payne* decision, the Victim's Rights Amendment would mandate the greater protections provided to the families of victims.⁹⁰

The majority, however, qualified its holding by providing general guidelines for governing the introduction of victim-impact evidence.⁹¹ Justice Garibaldi emphasized that statements which are inflammatory, prejudicial, or likely to shift the jury's attention from aggravating or mitigating factors should be excluded.⁹² The Justice further asserted that the safeguards built into the

364-67, 450 A.2d 952, 965-66 (1982) (Handler, J., concurring).

⁸⁷*Muhammad*, 145 N.J. at 40, 678 A.2d at 173. In applying the *Hunt* test, the majority noted the differences between the United States Constitution and the New Jersey Constitution. *Id.* at 41-42, 678 A.2d at 173-74. The New Jersey Constitution provides victims with broader rights than does the United States Constitution. *Id.* The majority examined the other factors of the *Hunt* test and concluded that the legislature clearly intended the fair treatment of victims. *Id.* at 42-43, 678 A.2d at 174. The victim's rights statute is intended "to implement the will of the New Jersey electorate with regard to capital prosecution." Senate Judiciary Committee, Statement to Senate Bill No. 1728, at 1 (March 20, 1995). In examining preexisting state law, Justice Garibaldi explained that the New Jersey Supreme Court had touched on victim-impact evidence in prior decisions. *Muhammad*, 145 N.J. at 43, 678 A.2d at 174. The Justice concluded, however, that these prior holdings came before both the United States Supreme Court's holding in *Payne* and the passage of the victim's rights statute. *Id.*

⁸⁸N.J. CONST. Art. I, ¶ 22.

⁸⁹*Muhammad*, 145 N.J. at 41-42, 678 A.2d at 173-74.

⁹⁰*Id.* at 46, 678 A.2d at 175.

⁹¹*Id.* at 47-48, 678 A.2d at 176-177. The court held that the State must notify the defendant of its intent to use victim impact evidence, the prosecutor is limited during the summation to commenting on the approved testimony of the witness, and the testimony must be in writing and evaluated by the court to determine its admissibility. *Id.* at 54-55, 678 A.2d at 179. See *Championing the Rights of Victims*, NEW JERSEY LAW JOURNAL, Sept. 2, 1996, (State Supreme Court Year in Review), at S-76, 77-8 (1996) (other protections include: limitations on the number of witnesses permitted to testify, that the testimony be factual, unemotional and free of inflammatory comments or references, and that opinions not be expressed by a victim about the defendant, his crime or the appropriate sentence).

⁹²*Muhammad*, 145 N.J. at 47, 678 A.2d at 176 (citing *State v. Williams*, 113 N.J. 393, 450-54, 550 A.2d 1172, 1202-04 (1988)).

statute help to insure that victim-impact evidence will not have an adverse effect on the jurors' sentencing decision.⁹³ In addition, the majority opined that the trial court should give limiting instructions to the jurors explaining the use and extent of victim-impact evidence.⁹⁴ Justice Garibaldi conceded, however, that these instructions may not completely insure that victim impact evidence will not be misused.⁹⁵ In addressing this concern, the majority quoted Justice O'Connor's concurrence in *Payne*,⁹⁶ which stated that the possibility of juror misuse of victim impact evidence "does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted."⁹⁷

The majority also held that the *Ex Post Facto* Clauses of the state and federal constitutions⁹⁸ were not violated by the application of victim impact statute.⁹⁹ Justice Garibaldi explained that although the victim-impact statute went into effect on June 19, 1995,¹⁰⁰ two months after the commission of Muhammad's alleged crimes,¹⁰¹ the statute did not change the defendant's substantive

⁹³*Id.* at 52-53, 678 A.2d at 178-79. Justice Garibaldi explained that victim impact evidence will only be applicable if the jury has made a determination pursuant to N.J. STAT. ANN. § 2C:11-3c(5)(h) (West 1995) that at least one aggravating factor has been proven to exist by the State beyond a reasonable doubt. *Id.* The Justice further maintained that once this requirement is met, victim-impact evidence may still only be used by the jury in order to assess how much weight is to be given the catch-all mitigating factor. *Id.* It may not, the majority pointed out, be used as a general aggravating factor. *Id.* (Cf. ARK. CODE ANN. § 5-4-602(4) (Michie 1993)) (permitting the use of victim impact evidence for any purpose).

⁹⁴*Id.* at 52, 678 A.2d at 179.

⁹⁵*Id.*

⁹⁶501 U.S. at 831 (O'Connor, J., concurring).

⁹⁷*Id.*

⁹⁸The *Ex Post Facto* Clause applies to criminal statutes and "give[s] fair warning of their effect and permit[s] individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

⁹⁹*State of New Jersey v. Muhammad*, 145 N.J. 23, 56, 678 A.2d 164, 181 (1996). The majority explained that to violate the *Ex Post Facto* Clause the victim-impact statute must either 1) punish as a crime an act previously committed, which was innocent when done; 2) make more burdensome the punishment for a crime, after its commission; or 3) deprive a defendant of any defense available according to the law at the time when the crime was committed. *Id.* (citing *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)).

¹⁰⁰*Id.* at 32, 678 A.2d at 169.

¹⁰¹*Id.* at 30, 678 A.2d at 169.

rights.¹⁰² Justice Garibaldi noted that it merely altered the extent to which victim impact-evidence could be allowed in the sentencing phase of a capital case. While this may have disadvantaged Muhammad, this fact alone does not render a statute in violation of the *Ex Post Facto* Clause.¹⁰³

In conclusion, Justice Garibaldi observed that the United States Supreme Court had found no constitutional bar to victim impact evidence¹⁰⁴ and that the New Jersey electorate had voted to adopt the Victim's Rights Amendment.¹⁰⁵ Therefore, the Justice concluded, the State will not be prohibited from introducing victim impact evidence in the sentencing phase of the defendant.¹⁰⁶

In a brief concurring opinion, Chief Justice Wilentz expressed a dissatisfaction with both the United States Supreme Court's decision in *Payne v. Tennessee*¹⁰⁷ and the New Jersey Victim's Rights Amendment.¹⁰⁸ While admitting that a Justice's personal views are irrelevant in this decision, the Chief Justice opined that "victim-impact evidence has no place in a rationally conducted sentencing proceeding."¹⁰⁹ Nonetheless, the Chief Justice voted with the majority.

Justice O'Hern authored a concurring and dissenting opinion.¹¹⁰ The Jus-

¹⁰²*Id.* at 57, 678 A.2d at 181 (citing *Nooner v. State*, 907 S.W.2d 677, 689 (1995); *Windom v. State*, 656 So.2d 432, 439 (1995); *State v. Maxwell*, 647 So.2d 871, 872 (1994); *Livingston v. State*, 444 S.E.2d 748, 752 (1994)).

¹⁰³*Id.* at 57, 678 A.2d at 181 (citing *Collins v. Youngblood*, 497 U.S. 37, 50 (1990)).

¹⁰⁴*Id.* at 34, 678 A.2d at 170 (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)).

¹⁰⁵*Id.* at 58, 678 A.2d at 182.

¹⁰⁶*Id.*

¹⁰⁷501 U.S. 808.

¹⁰⁸*State of New Jersey v. Muhammad*, 145 N.J. 23, 59, 678 A.2d 164, 182 (1996) (Wilentz, C.J., concurring). Chief Justice Wilentz explained, "A judge's agreement or disagreement with the opinions of the United States Supreme Court, or with the amendments to the State Constitution approved by the people, and the legislation that follows, are almost always irrelevant: the judge is obligated, regardless of his or her personal views, to obey the law." *Id.*

¹⁰⁹*Id.* at 60, 678 A.2d at 183 (Wilentz, C.J., concurring). Chief Justice Wilentz called victim impact evidence "a throwback, at least potentially, to the days when the death penalty could be imposed arbitrarily, without reason, much like being struck by lightning." *Id.*

¹¹⁰*Id.* (O'Hern, J., concurring in part and dissenting in part).

tice acknowledged that victim-impact evidence should be allowed in every capital case.¹¹¹ Strict limitations, the Justice continued, should be placed upon the extent to which this type of evidence is heard.¹¹² Victim-impact evidence should not be used to show the “worthier status of the victim’s life,” the Justice contended, but should present to the jury the uniqueness of the victim and the victim’s family.¹¹³ Therefore, the Justice explained, the section of the victim impact statute¹¹⁴ that charged the jury to consider victim-impact evidence “in determining the appropriate weight to give mitigating evidence presented”¹¹⁵ pursuant to the catch-all factor should be invalidated.¹¹⁶

Justice O’Hern next addressed the *Payne*¹¹⁷ decision, supporting the proposal to allow only limited victim-impact evidence.¹¹⁸ The Justice pointed out

¹¹¹*Id.* at 65, 678 A.2d at 183 (O’Hern, J., concurring in part and dissenting in part). Justice O’Hern emphasized that sentencing deliberations “should embrace an evidential inquiry ‘broad in scope, largely unlimited either as to the kind of information that may be considered, or the source from which it may come.’” *Id.* at 63, 678 A.2d at 184 (O’Hern, J., concurring in part and dissenting in part) (citing *State v. Davis*, 96 N.J. 611, 619, 477 A.2d 308 (1984) (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972))).

¹¹²*Id.* at 65-68, 678 A.2d at 185-87 (O’Hern, J., concurring in part and dissenting in part).

¹¹³*Id.* at 65, 678 A.2d at 185 (O’Hern, J., concurring in part and dissenting in part). Justice O’Hern discussed the portion of the statute requiring a jury to determine how much weight to afford mitigating evidence, “We treasure every life, whether that of victim or of defendant. Hence, I would hold that the triggering and response mechanisms in the statute are invalid in that they unconstitutionally encumber the right of a capital defendant to present mitigating evidence to a jury.” *Id.* at 62, 678 A.2d at 184 (O’Hern, J., concurring in part and dissenting in part).

¹¹⁴N.J. STAT. ANN. § 2C:11-3c(6) (West 1995).

¹¹⁵*State of New Jersey v. Muhammad*, 145 N.J. 23, 65, 678 A.2d. 164, 185 (1996) (O’Hern, J., concurring in part and dissenting in part). Justice O’Hern opined that without this portion of the statute “juries would understand the valid purpose of such evidence, that is, to gain an understanding of the unique personality of the victim as well as that of the defendant.” *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)).

¹¹⁶*Id.* Justice O’Hern emphasized that the United States Supreme Court has always maintained that victim impact evidence is not to be used to punish one defendant who murdered a devoted parent, and not another who murdered a homeless felon. *Id.* at 68, 678 A.2d at 187 (citing *Payne*, 501 U.S. at 823.)

¹¹⁷501 U.S. 808 (1991).

¹¹⁸*Muhammad*, 145 N.J. at 68-69, 678 A.2d at 186-87 (O’Hern, J., concurring in part and dissenting in part).

that the extent of the victim-impact evidence present in the *Payne* case was a brief statement by the victim's mother that the child of the victim missed his mother and baby sister.¹¹⁹ The Justice concluded that victim-impact evidence should not unconstitutionally create an inference that defendants "whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy."¹²⁰

In a dissenting opinion, Justice Handler¹²¹ attacked the majority by maintaining that a fair administration of the death penalty would not be possible in any instance where victim-impact evidence is applicable.¹²² Justice Handler's dissent envisioned a situation in which the victim-impact statute will discourage a defendant from introducing his own mitigating evidence.¹²³ Furthermore, the Justice continued, the admission of this type of evidence will cloud a juror's ability to impose the death penalty in a fair manner.¹²⁴ Justice Handler agreed that the victim-impact evidence statute was constitutional under the New Jersey Victim's Rights Amendment,¹²⁵ and further admitted that the statute did not violate the United States Constitution.¹²⁶ However, Justice Handler concluded that the victim impact statute was a violation of the New Jersey Constitution.¹²⁷

Justice Handler's analysis began by criticizing the majority's reasoning in upholding the statute.¹²⁸ A shift in the United States Supreme Court, the Justice

¹¹⁹*Id.*

¹²⁰*Id.* at 69, 678 A.2d at 187 (O'Hern, J., concurring in part and dissenting in part) (citing *Payne*, 501 U.S. at 823).

¹²¹*Id.* (Handler, J., dissenting).

¹²²*Id.* Justice Handler explained that "[a] death sentence must be based on a determination of the defendant's deathworthiness in terms of his or her character and the circumstances of the case." *Id.*

¹²³*Id.* at 70, 678 A.2d at 188 (Handler, J., dissenting).

¹²⁴*Id.* Justice Handler explained that victim-impact evidence will have a powerful effect on jurors and will result in invidious discrimination. *Id.*

¹²⁵*Id.* at 73, 678 A.2d at 189 (Handler J., dissenting).

¹²⁶*Id.* at 77, 678 A.2d at 191 (Handler J., dissenting).

¹²⁷*Id.*

¹²⁸*Id.* at 74, 678 A.2d at 190 (Handler, J., dissenting).

contended, does not mandate that a shift occur in the interpretation of the New Jersey Constitution.¹²⁹ Justice Handler contended that the majority failed to recognize that legislative support for the victim impact statute did not mean that it was immune from constitutional review.¹³⁰ The Justice also asserted that the victim impact statute does not strip defendants of their substantive rights.¹³¹ As the Justice explained, the Victims Rights Amendment was erroneously construed by the majority to mean that victims were entitled to “whatever rights [that] could be afforded to them without violating the United States Constitution.”¹³²

Justice Handler further asserted that prior New Jersey law supported the position that victim-impact evidence should not be allowed in the sentencing phase of a capital trial.¹³³ The Justice explained that the punishment of a criminal should focus the jury on the defendant’s blameworthiness,¹³⁴ not on

¹²⁹*Id.* at 78, 678 A.2d at 192 (Handler, J., dissenting). The New Jersey Supreme Court, Justice Handler maintained, “has declined to follow that route before.” *Id.*; see *State v. Moore*, 113 N.J. 239, 550 A.2d 117 (1988) (following *Enmund v. Florida*, 458 U.S. 782 (1982) (requiring homicidal intent as a basis for capital murder)); *State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988); *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

¹³⁰*State of New Jersey v. Muhammad*, 145 N.J. 23, 78, 678 A.2d 164, 192. (1996) (Handler J. dissenting). Justice Handler asserted that because the legislature and the citizens of New Jersey intended the Victim’s Rights Amendment to provide “the right of victims to be present at public judicial proceedings” and not to take away rights of the defendant, the statute as it was written was constitutionally suspect and subject to challenge. *Id.* at 75, 678 A.2d at 190 (Handler, J., dissenting).

¹³¹*Id.* at 74, 678 A.2d at 190 (Handler, J., dissenting). Justice Handler examined the legislative history of the Victims Right’s Amendment in making this determination. *Id.* at 74-78, 678 A.2d at 190-191 (Handler, J., dissenting). The Justice maintained that the Amendment was not meant to limit other constitutional rights. *Id.* “[T]his amendment is not intended in any way to deny or infringe upon the constitutional rights of any person accused of a crime.” *Id.* (quoting Senate Judiciary Committee, Statement to Assembly Committee Substitute for Assembly Concurrent Resolution No. 85 (May 13, 1991)). For further discussion of the Victim’s Right’s Amendment, see Wegryn, *supra* note 3.

¹³²*Muhammad*, 145 N.J. at 74, 678 A.2d at 190 (Handler, J., dissenting).

¹³³*Id.* at 79, 678 A.2d at 192 (Handler J., dissenting); see *State v. Harvey*, 121 N.J. 407, 425, 581 A.2d 483 (1990); *State v. Pennington*, 119 N.J. 547, 566-75, 575 A.2d 816 (1990); *State v. Coyle*, 119 N.J. 194, 231-32, 574 A.2d 951 (1990); *State v. Williams*, 113 N.J. 393, 446-54, 550 A.2d 1172 (1988).

¹³⁴*Muhammad*, 145 N.J. at 83, 678 A.2d at 194 (Handler, J., dissenting).

the victim's worthiness.¹³⁵

Justice Handler also criticized the majority's belief that jurors would be able to sort through the necessary jury instructions.¹³⁶ Justice Handler doubted the ability of a trial court to present clear instructions in a capital sentencing proceeding.¹³⁷ The Justice called such instructions "a maze with no exit" and opined that a juror could not possibly comply with them.¹³⁸ Concerned about the racial implications of the victim-impact statute,¹³⁹ the Justice cautioned that a juror in a capital sentencing case will be required to address the credibility of the victim-impact evidence and "make a moral determination of the gravity of the victim's death."¹⁴⁰ This process, Justice Handler opined, will increase the likelihood of race-based decision making.¹⁴¹

Justice Stein also dissented, characterizing the victim impact statute as a "fundamental threat to the rationality of death-penalty prosecutions in New Jersey."¹⁴² The Justice found fault with jury instructions that require only those jurors who find the existence of mitigating evidence to consider victim-impact evidence.¹⁴³ Justice Stein found this portion of the victim-impact statute¹⁴⁴ "absurd" and attacked the majority for upholding a statute that calls for a jury instruction "with which no jury could conceivably comply."¹⁴⁵ The Justice further found fault with the jury instruction portion of the statute, because it could conceivably create a situation where victim-impact evidence is heard, but would have to be disregarded because none of the jurors found the pres-

¹³⁵*Id.* at 86, 678 A.2d at 196 (Handler, J., dissenting) (emphasis added).

¹³⁶*Id.* at 93, 678 A.2d at 199 (Handler, J., dissenting).

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹*Id.* at 104-105, 678 A.2d at 204-205 (Handler, J., dissenting).

¹⁴⁰*Id.* at 105, 678 A.2d at 205 (Handler, J., dissenting).

¹⁴¹*Id.*; see *Payne v. Tennessee*, 501 U.S. 808, 866 (Stevens, J., dissenting).

¹⁴²*State of New Jersey v. Muhammad*, 145 N.J. 23, 106, 678 A.2d 164, 206 (1996) (Stein, J., dissenting).

¹⁴³*Id.* at 109-110, 678 A.2d at 207-208 (Stein, J., dissenting).

¹⁴⁴N.J. STAT. ANN. § 2C:11-3c(5)(h) (West 1995).

¹⁴⁵*Muhammad*, 145 N.J. at 109, 678 A.2d at 206 (Stein, J., dissenting).

ence of mitigating evidence.¹⁴⁶ Compromising, Justice Stein expressed partial agreement with Justice O'Hern's victim-impact proposal.¹⁴⁷ In particular, the Justice agreed with Justice O'Hern's proposed invalidation of the victim-impact statute.¹⁴⁸ In addition, Justice Stein provided a set of jury instructions¹⁴⁹ that would explain to the jury that no judgment is to be undertaken valuing the defendant's life against the victim's.¹⁵⁰

¹⁴⁶*Id.* at 110-11, 678 A.2d at 207-208. (Stein, J., dissenting). Justice Stein relied on *Lockett v. Ohio*, 438 U.S. 586 (1978), in arguing that a defendant may choose not to introduce catch-all mitigating evidence, fearing that the state will be able to introduce victim impact evidence. *Id.* at 108, 678 A.2d at 206.

¹⁴⁷*Id.* at 110-111, 678 A.2d at 207-208 (Stein, J., dissenting).

¹⁴⁸*Id.*; see *supra* notes 114 -117 and accompanying text.

¹⁴⁹*Id.* at 111, 678 A.2d at 208 (Stein, J., dissenting)

¹⁵⁰*Id.* Justice Stein's proposed jury instruction is as follows:

I have previously instructed you that in order for you to sentence the defendant to death you must find that the state has proved that the aggravating factors that you have determined to exist in this case substantially outweigh the mitigating factors that you have determined to exist in this case, beyond a reasonable doubt. I note that when you engage in that weighing process you will be comparing aggravating factors and mitigating factors that are not directly relevant to each other. For example, the aggravating factor that the homicide was committed in the course of a felony does not readily relate to the mitigating factor based on the defendant's age. Nevertheless, the law requires that you weigh these factors against each other. In doing so, the law in effect requires that that you determine the relative significance of the aggravating and mitigating factors as they apply to your determination about the appropriateness of the ultimate penalty to be imposed on defendant. With respect to the victim impact statements that have been offered into evidence, your function is a similar one. The purpose of those statements is to show you the victim's unique status as a human being and the nature of the harm caused by the defendant's criminal conduct. Just as you should know the unique human being that is the defendant, you should know the unique human being that that was the victim of his crime. The status of the victim is not in any sense to be considered by you as an aggravating factor under the Death Penalty Act. Each murder victim is equally worthy in the eyes of the law and you are not to infer that such evidence signified that defendants whose victims were assets to the community are more deserving of death than defendants whose victims are perceived to be less worthy. Nevertheless, I instruct you that you are permitted to evaluate the evidence concerning the victim's unique status as a human being and the harm caused by the defendant's conduct in deciding how much weight you will attribute to the mitigating factors that you find. Of course, in making that evaluation, you must not attempt to compare the value of the victim's

V. CONCLUSION

The admissibility of victim impact evidence is an important step forward in New Jersey criminal law, and, more importantly for victims and their families.¹⁵¹ This type of evidence should be presented in every capital case.¹⁵² Victim-impact evidence is intended to portray the victim as a unique human being, not to facilitate an analysis of the victim's worthiness.¹⁵³ Therefore, Justice O'Hern's suggestion to invalidate portions of the victim impact statute that instruct juries to weigh victim-impact evidence against mitigating evidence¹⁵⁴ is appropriate.¹⁵⁵ The greatest danger posed by the admission of this evidence in a capital case is that the jury will misinterpret victim-impact evidence and make a determination based on emotion instead of reason.¹⁵⁶ Victim impact evidence is intended to "reinforce the bonds of common humanity that link the jury, the collective conscience of the community, to the administration

life with the value of the defendant's life. You must simply consider the victim impact evidence and then determine whether or to what extent it does or does not affect the weight that you will assign to the mitigating factors that you determine defendant has proved to exist.

Id.

¹⁵¹James O' Brien, president of the Violent Crimes Compensation Board, expressed his satisfaction with the *Muhammad* decision: "After 200 years, finally the victim is going to be allowed to be present in the courtroom during the most serious of all cases, the capital murder case. That is the culmination of a lot of work on the part of a lot of people." Kathy Barret Carter, *Victims' Kin Retain Role in Courtroom*, NEWARK STAR LEDGER, June 29, 1996.

¹⁵²*State of New Jersey v. Muhammad*, 145 N.J. 23, 67, 678 A.2d 164, 186 (1996) (O'Hern, J., concurring in part and dissenting in part).

¹⁵³*See supra* note 70, at 14.

¹⁵⁴N.J. STAT. ANN. § 2C: 11-3c(6).

¹⁵⁵Justice Garibaldi also expressed dissatisfaction with portions of the victims rights statute, but explained that the judiciary "does not have a license 'to rewrite language enacted by the [L]egislature.'" *Muhammad*, 145 N.J. at 40, 678 A.2d at 172 (citing *Chapman v. United States*, 500 U.S. 453, 464 (1991)).

¹⁵⁶Justice Frankfurter discussed this type of danger, stating: "Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective." *Watts v. Indiana*, 338 U.S. 49, 55 (1949).

of the death penalty.”¹⁵⁷

In any instance where the death penalty may be applied, extreme care must be given not to confuse or inflame the jury. Trial judges must bear a portion of the burden to insure that jurors are protected “from illegitimate influences that threaten to taint their verdict.”¹⁵⁸

New Jersey has been near the forefront of the nationwide movement towards greater victim participation. This effort seeks to involve victims in the criminal justice system where they have typically been ignored. They have in effect been, “victimized twice - first by the criminal and then again by those in the system who bend over backward to make sure that the rights of the defendant are protected while the rights and the needs of the victim are callously ignored.”¹⁵⁹

The Victim’s Rights Amendment gives victims and their families a voice while simultaneously providing a jury with relevant information about the harm caused by the crime.¹⁶⁰

¹⁵⁷*Muhammad*, 145 N.J. at 65, 678 A.2d at 185 (O’Hern, J., concurring in part and dissenting in part).

¹⁵⁸*Id.* at 67, 678 A.2d at 186. (O’Hern, J., concurring in part and dissenting in part) (citing *In re Kozlov*, 79 N.J. 232, 398 A.2d 882 (1979)).

¹⁵⁹Senator Heinz, Sponsor of Victim & Witness Protection Act of 1982 § 2 (a)(1), Pub. L. No. 97-291, 96 Stat. 1248 (1982).

¹⁶⁰Essex County First Deputy Assistant Prosecutor John Redden emphasized this, explaining: “It is a victory for jurors in capital cases because this will give them a full picture of the victim.” Kathy Barret Carter, *State Justices to Clarify Victim Impact Statements*, NEWARK STAR LEDGER, Dec. 8, 1995. See also *Payne v. Tennessee*, 501 U.S. 808, 823-825 (1991).

