Inflicting Payne on Oklahoma: the Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases

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INFLECTING PAYNE ON OKLAHOMA: THE USE OF VICTIM IMPACT EVIDENCE DURING THE SENTENCING PHASE OF CAPITAL CASES

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I. Introduction

In recent years, society's disenchantment with the development of enhanced substantive and procedural safeguards for criminal defendants has helped to spawn a victims' rights movement. According to Justice Scalia, "victims' rights" describes "the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society."1 Fueled by politicians,2 the victims' rights movement gained momentum, culminating in congressional passage of the Victim and Witness Protection Act of 1982.3 That statute aimed to "en-

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2. In April 1981, President Reagan issued a proclamation for "Victims' Rights Week."
hance and protect the necessary role of crime victims and witnesses in the
criminal justice process." In particular, the law amended rule 32 of the
Federal Rules of Criminal Procedure by requiring the use of victim impact
statements in federal presentence reports. However, until 1991, victim
impact evidence was excluded from capital cases.

On the final day of its 1991 Term, the United States Supreme Court
issued its decision in Payne v. Tennessee, dramatically departing from
recent precedent and arming prosecutors seeking the death penalty with a
new lethal weapon: victim impact evidence. The immediate damage Payne
inflicts on capital defendants is easily understood. States are now free to
permit the admission of victim impact evidence and prosecutorial argument
on that subject. However, the true horror of Payne may lie in the threat
to all constitutional liberties posed by the majority's willingness to abandon
stare decisis and overrule two of the Court's recent decisions, Booth v.
Maryland and South Carolina v. Gathers.

This article first explores the history of the battle over the admissibility
of victim impact evidence by examining the Booth and Gathers decisions.
Second, in somewhat greater detail, the article dissects Payne to determine
whether the Court left open any avenues of argument that, although not
prohibited per se by the Eighth Amendment, victim impact evidence none-
thless should be prohibited under certain circumstances. Third, the article
offers practical suggestions on how defense lawyers may seek to minimize
the damage wrought by victim impact statements and perhaps even employ
the rationale of Payne to benefit their clients. Fourth, the article surveys
court decisions throughout the country purporting to apply Payne. Fifth,
the article examines recent legislation in Oklahoma designed to inflict
Payne on criminal defendants generally, and on capital defendants in
particular. To that end, the article summarizes the key provisions of a
victim impact law which took effect in Oklahoma on July 1, 1992. Lastly,
the article mourns the creation in Oklahoma of a new aggravating circum-
stance in capital murder prosecutions inspired by Payne. This legislation,
signed into law by Governor Walters on April 13, 1992, furnishes tragic
proof that in Oklahoma all victims are not created equal.

1248, 1248-49 (1982).
6. According to the United States Supreme Court, the "unique circumstance of a capital
sentencing hearing," during which the jury functions to "express the conscience of the
community on the ultimate question of life or death" dictated that victim impact evidence
is not relevant in capital cases. Booth, 482 U.S. at 504.
Stat. § 991a (Supp. 1992)).
Stat. § 701.10 (Supp. 1992)).
II. Booth v. Maryland

In Booth v. Maryland, John Booth and an accomplice entered the home of Irvin and Rose Bronstein, an elderly couple, for the purpose of stealing money to buy heroin. Two days later, the Bronsteins' son discovered his parents' bodies, bound, gagged, and perforated with stab wounds from a kitchen knife. Booth was convicted of two counts of first-degree murder, two counts of robbery, and conspiracy to commit robbery. Prior to the sentencing phase, the Maryland Division of Parole and Probation (DPP) prepared a presentence report which described Booth's background, education and employment history, and criminal record. As required by Maryland statute, the report also contained a victim impact statement (VIS) which described the effect of the crime on the victim and the victim's family. In Booth's case, the VIS was based on interviews with the victims' son, daughter, son-in-law, and granddaughter.

Much of the VIS emphasized the victims' outstanding personal qualities and stressed how deeply the victims would be missed. For example, the victims' son reported that his father was a lifelong hard worker, his mother was young at heart, and both parents had many devout friends.

In addition, the VIS described the emotional and personal problems the family members encountered as a result of the crimes. The victims' son reported that he suffered from depression and lack of sleep and "is fearful for the first time in his life." Similarly, the victims' daughter reported that she suffered from a lack of sleep and had become withdrawn and distrustful. The daughter also stated that she could no longer watch violent movies or look at kitchen knives without being reminded of the

13. Booth, 482 U.S. at 497-98. Booth lived near the Bronsteins and thus was aware that they could identify him. Id. at 498.
14. Id. Booth's accomplice, Willie Reid, received a death sentence as a principal in the first degree to the murder of Mrs. Bronstein. Id. at 498 n.1.
15. Id. at 498.
16. Id. A Maryland statute in effect at the time of the Booth decision set forth the information to be included in the VIS:
(i) Identify the victim of the offense;
(ii) Itemize any economic loss suffered by the victim as a result of the offense;
(iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
(iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
(v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
(vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the trial court requires.
Id. (quoting Md. Ann. Code art. 41, § 4-609(c)(3) (1986)).
17. Id. at 499.
18. Id. at 499 n.3.
19. Id. at 499.
20. Id. at 499-500 (quoting from the trial court record).
21. Id. at 500.
murders. The victims' granddaughter reported that the deaths had ruined her sister's wedding a few days later and that the granddaughter had received counseling for several months, only to quit when she concluded "no one could help her."

Finally, the VIS set forth the family members' opinions and characterizations of the crimes and of Booth. In this regard, the son opined that his parents had been "butchered like animals," while the daughter concluded that she could never forgive the murderer and that "such a person could [n]ever be rehabilitated." Moreover, the state official who conducted the family interviews concluded the VIS by expressing doubt that the family "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."

Booth's trial attorney moved to suppress the VIS on the ground that this information was both irrelevant and unduly inflammatory and that therefore its use in a capital case violated the Eighth Amendment to the United States Constitution. After the trial court denied the motion, defense counsel requested that the prosecutor simply read the VIS to the jury rather than call the family members to testify before the jury. The prosecutor agreed to this arrangement. After considering the presentence report and the victim impact evidence contained therein, the jury sentenced Booth to death on one count of murder and to life imprisonment on the second count.

On direct appeal, Booth argued that the VIS injected an arbitrary factor into the sentencing decision. The Maryland Court of Appeals affirmed Booth's conviction and sentence, holding that the jury's decision to impose the death sentence was not influenced by passion, prejudice, or other arbitrary factors. According to the court of appeals, the VIS in Booth's case was a "relatively straightforward and factual description of the effects of these murders on members of the Bronstein family." Moreover, the
VIS served an important interest because it informed the sentencer of the full measure of harm caused by Booth's crime.\textsuperscript{32} The United States Supreme Court granted certiorari to decide "whether the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence."\textsuperscript{33} Five members of the Court concluded that the introduction of a VIS at the sentencing phase of a capital murder trial violated the Eighth Amendment and vacated Booth's death sentence.\textsuperscript{34} Four justices dissented.\textsuperscript{35}

Essential to Booth's victory in the Supreme Court was the well-established principle that 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."\textsuperscript{36} Sharp disagreement among the majority and dissenting justices centered on whether victim impact evidence "suitably directed" a jury's discretion (as the dissenters believed) or enhanced the risk of "arbitrary and capricious" action (as the majority believed).

Writing for the majority, Justice Powell emphasized that "a jury must make an 'individualized determination' whether the defendant in question should be executed, based on the 'character of the individual and the circumstances of the crime.'"\textsuperscript{37} According to the Court, a state statute requiring consideration of other factors (including information contained in a VIS) must be scrutinized closely to ensure that the evidence has some "bearing on the defendant's 'personal responsibility and moral guilt'"\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{32} Booth, 482 U.S. at 501 (citing Booth v. State, 507 A.2d 1098 (Md. 1986) and Lodowski v. State, 490 A.2d 1228 (Md. 1985), vacated on other grounds, 475 U.S. 1078 (1986)).
\item \textsuperscript{33} Booth, 482 U.S. at 501-02. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. By operation of the Due Process Clause of the Fourteenth Amendment, these prohibitions are made applicable to the states. U.S. Const. amend. XIV, § 1.
\item \textsuperscript{34} Booth, 482 U.S. at 509.
\item \textsuperscript{35} See id. at 515 (White, J., dissenting); id. at 519 (Scalia, J., dissenting).
\item \textsuperscript{36} Id. at 502 (quoting Gregg v. Georgia, 428 U.S. 153, 198 (1976)). The Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), had previously struck down capital sentencing schemes which left to the unfettered discretion of the jury the decision of whether death should be imposed. Id. at 239-40. In reviewing Georgia's revised capital sentencing scheme in Gregg, Justices Stewart, Powell, and Stevens observed that while some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974).
\item As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.
\item Gregg, 428 U.S. at 197-98 (joint opinion of Stewart, Powell and Stevens, JJ.).
\item \textsuperscript{37} Booth, 482 U.S. at 502 (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983)).
\item \textsuperscript{38} Id. (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).
\end{itemize}
and so that a death sentence will not be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." Indeed, the VIS focuses on the character and reputation of the victim and the effect of the crime on his or her family. Thus, VIS information diverts the jury's attention away from the defendant's background and record, and the circumstances of the crime. As a result, a sentencing decision based in part on VIS information may turn on irrelevant factors such as the degree to which the victim's family is willing and able to articulate its grief, or the relative worth of the victim's character. In support of its conclusion that victim impact evidence should be excluded from the sentencing phase of capital cases, the majority scrutinized the VIS submitted in Booth's capital murder trial. For purposes of analysis, the Court identified two types of information which the VIS in Booth's case provided to the jury: (1) descriptions of the personal characteristics of the victims and the emotional impact of the crimes on the family; and (2) family members' opinions and characterizations of the crimes and the defendant. Each type of information is considered separately below.

A. Personal Characteristics of the Victims

As noted above, the VIS in Booth's case reported that Mr. Bronstein was a lifelong hard worker, Mrs. Bronstein was young at heart, and both Bronsteins had many devout friends. In addition, the VIS characterized the Bronsteins as "loving parents and grandparents whose family was most important to them." The VIS also reported that the Bronsteins had been married for fifty-three years, enjoyed a very close relationship, and attended the senior citizens' center. Mrs. Bronstein was reported to have taught herself to play bridge while in her seventies. Family members described the couple as "extremely good people who wouldn't hurt a fly."

As a threshold matter, the majority rejected the position that "defendants whose victims were assets to the community are more deserving of

39. Id. (quoting Zant, 462 U.S. at 885).
40. Id. at 504.
41. Id. at 505.
42. Id.
43. The majority appended the VIS to its opinion. See id. at 509-15 (appendix to the opinion of the Court). In preparing the report, the Maryland DPP official interviewed Mr. and Mrs. Bronstein's son, daughter, son-in-law and granddaughter. Id. at 510.
44. Id. at 502.
45. Although the majority grouped the personal characteristics of the victims and the emotional impact of the crimes on the family together as a single type of information, the analysis will be sharpened by treating these separately. See infra notes 46-73 and accompanying text.
46. Booth, 482 U.S. at 514 (appendix to the opinion of the Court).
47. Id. at 510.
48. Id. at 514.
punishment than those whose victims are perceived to be less worthy.”

According to the majority, the imposition of the death penalty should not turn on “the perception that the victim was a sterling member of the community [as opposed to] someone of questionable character.”

As an additional reason for excluding good-character-of-victim evidence from capital sentencing determinations, the majority noted that “It would be difficult — if not impossible — . . . to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant.”

Although the Sixth Amendment clearly guarantees the accused the right to rebut victim impact evidence, the right to cross-examine the declarants’ VIS information rings hollow given the strategic risks of attacking the victim’s character before the jury. Evidence that the victim was of “dubious moral character, was unpopular, or was ostracized from his family” clearly would be admissible to rebut the VIS good character evidence. Nonetheless, however appealing this “son-of-a-bitch needed killing” defense may be in theory, in practice the prospect of a freshly convicted murderer casting aspersions on his victim would likely alienate the jury.

Thus, implicit in the majority’s analysis seems to be a concern that this good-character-of-victim evidence is both subject to falsification and virtually immune from the crucible of adversary testing. Moreover, the prospect of a “mini-trial” on the victim’s character would likely “distract the sentencing jury from its constitutionally required task — determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime.”

B. Emotional Impact on the Family

In Booth’s case, the VIS component of the presentence report was even more replete with information regarding the emotional impact of the Bronsteins’ murders on family members. The victims’ son reported that he suffered from depression, sleeplessness, and fear. In addition,

[t]he victims’ son states that he can only think of his parents in the context of how he found them that day, and he can feel their fear and horror. It was 4:00 p.m. when he discovered their bodies and this stands out in his mind. He is always aware of when 4:00 p.m. comes each day, even when he is not near a clock. He also wakes up at 4:00 a.m. each morning. . . . He is unable to drive on the streets that pass near his parents’ home.

49. Id. at 506 n.8. According to Justice Powell’s majority opinion, “our system of justice does not tolerate such distinctions.” Id.

50. Id. at 506. In this regard, the majority’s selection of the word “perception” is interesting. Perhaps the Court recognized the almost universal reluctance to defame the dead. For discussion of the related problem of rebutting victim impact evidence, see infra notes 51-52 and accompanying text.

51. Booth, 482 U.S. at 506.

52. Id. at 507.

53. Id.
He also avoids driving past his father's favorite restaurant, the supermarket where his parents shopped, etc. He is constantly reminded of his parents. He sees his father coming out of synagogues, sees his parents' car, and feels very sad whenever he sees old people.\(^{54}\)

Similarly, the emotional trauma suffered by the victims' daughter was chronicled in the VIS.

The victims' daughter and her husband didn't eat dinner for three days following the discovery of Mr. and Mrs. Bronstein's bodies. They cried together every day for four months and she still cries every day. She states that she doesn't sleep through a single night and thinks a part of her died too when her parents were killed. She reports that she doesn't find much joy in anything and her powers of concentration aren't good. She feels as if her brain is on overload. The victims' daughter relates that she had to clean out her parents' house and it took several weeks. She saw the bloody carpet, knowing that her parents had been there, and she felt like getting down on the rug and holding her mother. . . . The victims' daughter reports that she had become noticeably withdrawn and depressed at work and is now making an effort to be more out-going. She notes that she is so emotionally tired because she doesn't sleep at night, that she has a tendency to fall asleep when she attends social events such as dinner parties or the symphony. The victims' daughter states that wherever she goes she sees and hears her parents. This happens every day. She cannot look at kitchen knives without being reminded of the murders and she is never away from it. She states that she can't watch movies with bodies or stab-bings in it. She can't tolerate any reminder of violence. The victims' daughter relates that she used to be very trusting, but is not any longer. When the doorbell rings she tells her husband not to answer it. She is very suspicious of people and was never that way before.\(^{55}\)

The emotional anguish of the victims' granddaughter was described as follows:

The victims' granddaughter states that unless you experience something like this you can't understand how it feels. You are in a state of shock for several months and then a terrible depression sets it. You are so angry and feel such rage. She states that she only dwells on the image of their death when thinking of her grandparents. For a time she would become hysterical whenever she saw dead animals on the road. She is

\(^{54}\) Id. at 512 (appendix to the opinion of the Court).

\(^{55}\) Id. at 512-13.
not able to drive near her grandparents’ house and will never be able to go into their neighborhood again. The victims’ granddaughter also has a tendency to turn on all the lights in her house. She goes into a panic if her husband is late coming home from work. She used to be an avid reader of murder mysteries, but will never be able to read them again. She has to turn off the radio or T.V. when reports of violence come on because they hit too close to home. When she gets a newspaper she reads the comics and throws the rest away. She states that it is the small everyday things that haunt her constantly and always will. She saw a counselor for several months but stopped because she felt that no one could help her.56

Perhaps the most poignant portion of the presentence report recounted the impact of the murders on the upcoming wedding of the victims’ younger granddaughter.57

Since the Jewish religion dictates that birth and marriage are more important than death, the granddaughter’s wedding had to proceed on May 22nd. She had been looking forward to it eagerly, but it was a sad occasion with people crying. The reception, which normally would have lasted for hours, was very brief. The next day, instead of going on her honeymoon, she attended her grandparents’ funerals. . . . The victims’ granddaughter . . . vividly remembers every detail of the days following her grandparents’ death. Perhaps she described the impact of the tragedy most eloquently when she stated that it was a completely devastating and life altering experience.58

Finally, the presentence report described the emotional trauma suffered by the family as a result of delays in bringing Booth and his accomplice to trial.

The victims’ family members note that the trials of the suspects charged with these offenses have been delayed for over a year and the postponements have been very hard on the family emotionally. The victims’ son notes that he keeps seeing news reports about his parents’ murder which show their house and the police removing their bodies. This is a constant reminder to him. The family wants the whole thing to be over with and they would like to see swift and just punishment.59

The State of Maryland argued that the description of the emotional trauma suffered by the family should be considered a “circumstance” of

56. Id. at 513-14.  
57. The Bronsteins’ younger granddaughter was to be married two days after the bodies were discovered.  
58. Booth, 482 U.S. at 511.  
59. Id. at 514.
the crime because it reveals the full extent of the harm caused by Booth.\textsuperscript{60} According to the State, "there is a direct, foreseeable nexus between the murders and the harm to the family."\textsuperscript{61} Thus, jurors should be free to consider these consequences when deciding whether to impose the death penalty.\textsuperscript{62} Moreover, even though "victim impact" was not listed as an aggravating factor in the Maryland statute,\textsuperscript{63} the State argued that such evidence illuminated for the jury the "gravity or aggravating quality" of the offense.\textsuperscript{64}

The majority disagreed. As Justice Powell explained:

While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing. In such a case, it is the function of the sentencing jury to "express the conscience of the community on the ultimate question of life or death." When carrying out this task the jury is required to focus on the defendant as a "uniquely individual human being." The focus of a VIS, however, is not on the defendant, but on the character and reputation of the victim and the effect on his

\textsuperscript{60} Id. at 503.

\textsuperscript{61} Id.

\textsuperscript{62} Id.

\textsuperscript{63} Under the Maryland statute, before a jury was empowered to impose a capital sentence, it was required to find that at least one of the following aggravating circumstances existed:

1. The victim was a law enforcement officer who was murdered while in the performance of his duties.
2. The defendant committed the murder at a time when he was confined in any correctional institution.
3. The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction, or an attempt to kidnap or abduct.
5. The victim was a child abducted in violation of § 2 of this article.
6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.
7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.
8. At the time of the murder the defendant was under sentence of death or imprisonment for life.
9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.
10. The defendant committed the murder while committing or attempting to commit a robbery, arson, or rape, or sexual offense in the first degree.

\textsuperscript{64} Booth, 482 U.S. at 503-04.
family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. 65

Because capital murder defendants frequently do not know their victims, they will have no information about the characteristics of their victims’ families. 66 Also, “defendants rarely select their victims based upon whether the murder will have an effect on anyone other than the person murdered.” 67 Thus, a juror’s reliance on a VIS could result in the imposition of death “because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.” 68 And like “good-character-of-victim” evidence, this evidence could divert the jury’s attention away from its proper focus: the defendant’s background and record, and the circumstances of the crime. 69

The majority observed that the Bronstein family members were articulate and persuasive in expressing their grief and describing the extent of their loss. 70 Nonetheless, the Court concluded that “the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die.” 71

Finally, as was true of “good-character-of-victim evidence,” defendants’ rights to cross-examine the declarants are more apparent than real. Even apart from the strategic problems of impeaching the testimony of grieving family members, VIS evidence is “not easily susceptible to rebuttal.” 72 Rarely will a capital murder defendant fighting for his life be able to show that family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered. 73

C. Opinions and Characterizations of the Crimes and the Defendant

Booth’s presentence report also contained opinions and characterizations of the crimes by several members of the Bronstein family. The Bronsteins’ son stated that his parents were “butchered like animals” and that he “doesn’t think anyone should be able to do something like that and get away with it.” 74 Similarly, the Bronsteins’ daughter could never forgive anyone for killing [her parents] that way. She can’t believe that anybody could do that to someone. The victims’ daughter states that animals wouldn’t do this. [The

65. Id. at 504 (citations omitted).
66. Id.
67. Id.
68. Id. at 505.
69. Id. The Court recognized that in certain cases the defendant will have been aware of some of the information contained in the VIS. Nonetheless, the Court concluded that the nature of the information contained in the VIS created an impermissible risk that the capital sentencing decision will be made in an arbitrary manner. Id.
70. Id.
71. Id.
72. Id. at 506.
73. Id.
74. Id. at 508; see also id. at 512 (appendix to the opinion of the Court).
perpetrators] didn’t have to kill because there was no one to stop them from looting. . . . The murders show the viciousness of the killers’ anger. She doesn’t feel that the people who did this could ever be rehabilitated and she doesn’t want them to be able to do this again or put another family through this.\(^7\)

According to the majority opinion, family members’ opinions and characterizations of the crimes “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.”\(^6\)

**D. The Booth Dissenters**

The four dissenting justices\(^7\) joined in two separate dissents, one authored by Justice White\(^7\) and the other by Justice Scalia.\(^7\) Justice White’s opinion emphasized the need for judicial deference to legislative policymaking decisions. Per Justice White, the judgment of the Maryland legislature that the jury should consider the testimony of the victim’s family in weighing the degree of harm caused and the corresponding degree of punishment “is entitled to particular deference [and] determinations of appropriate sentencing considerations are ‘peculiarly questions of legislative policy.’”\(^8\)

Having chastised the majority for intruding into the legislative function, Justice White considered whether any constitutional barriers prevented the use of victim impact statements in capital sentencing decisions. He found none.\(^9\)

> There is nothing aberrant in a juror’s inclination to hold a murderer accountable not only for his internal disposition in committing the crime but also for the full extent of the harm he caused; many if not most persons would also agree, for example, that someone who drove his car recklessly through a stoplight and unintentionally killed a pedestrian merits significantly more punishment than someone who drove his car recklessly through the same stoplight at a time when no pedestrian was there to be hit.\(^2\)

\(^7\) See id. at 508; see also id. at 513 (appendix to the opinion of the Court).

\(^6\) Id. at 508. The majority did not lack sympathy for the victims. As Justice Powell observed: “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 these feelings.” Id.

\(^7\) Chief Justice Rehnquist, Justice White, Justice O’Connor, and Justice Scalia dissented.

\(^8\) See Booth, 482 U.S. at 515 (White, J., dissenting).

\(^9\) See id. at 519 (Scalia, J., dissenting).

\(^10\) Id. at 515 (White, J., dissenting).

\(^11\) Id. at 515-16. According to Justice White, “I cannot agree that there was anything ‘cruel or unusual’ or otherwise unconstitutional about the legislature’s decision to use victim impact statements in capital sentencing hearings.” Id.

\(^2\) Id. at 516.
Unlike the majority, Justice White found no constitutionally significant distinction between capital and noncapital cases. Because punishment in noncapital cases is frequently enhanced on the basis of the harm caused, regardless of the offender's specific intention to cause such harm, Justice White "fail[ed] to see why the same approach is unconstitutional in death cases." To the contrary, Justice White argued the VIS evidence is particularly appropriate in capital sentencing hearings to "counteract[] the mitigating evidence which the defendant is entitled to put in." Just as mitigating evidence reminds the sentencer that the murderer should be considered as an individual, victim impact evidence reminds the sentencer "so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

Justice White did not share the majority's concern with the practical difficulties of rebutting VIS evidence. He viewed Booth's failure to introduce relevant evidence to rebut the Bronsteins' victim impact evidence as a tactical decision. Because the State of Maryland did not prevent Booth from introducing such evidence, Justice White detected no constitutional problem. Rather, Booth's decision not to rebut was in all likelihood motivated by his realization "that it was not in his best interests to do so."

Justice White was equally unpersuaded by the majority's position that the differing ability of victims' families to articulate their sense of loss resulted in arbitrariness in capital sentencing decisions. He rejected this argument as "a makeweight consideration," noting "there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator."

Curiously, Justice White failed to address squarely the propriety of allowing opinions and characterizations of the crimes by victims. What little he wrote on this type of evidence, however, is worth quoting in full:

To the extent that the Court determines that in this case it was inappropriate to allow the victims' family to express their opinions on, for example, whether petitioner could be rehabilitated,

83. Justice White's conflation of capital and non-capital cases is at odds with longstanding precedent of the Supreme Court. For example, in Woodson v. North Carolina, 428 U.S. 280 (1976), three justices observed the fact that death is a "punishment different from all other sanctions" and that therefore the considerations that inform the sentencing determination may be different from those that might be relevant to other liability or punishment decisions. Id. at 303-04, 305 (plurality opinion of Stewart, Powell, and Stevens, JJ.); see also Booth v. Maryland, 482 U.S. 496, 509 n.12 (1987).
84. Id. at 516-17.
85. Id. at 517 (citing Eddings v. Oklahoma, 455 U.S. 104 (1982)).
86. Id.
87. Id. at 518 n.3.
88. Id. at 518.
89. Id.
90. Id. at 517-18.
91. Id. at 518.
that is obviously not an inherent fault in all victim impact statements and no reason to declare the practice of admitting such statements at capital sentencing hearings *per se* unconstitutional.92

Justice Scalia's dissent purported to first define and then destroy the premise upon which the majority decision was based. In Justice Scalia's view, "the principle upon which the Court's opinion rests — that the imposition of capital punishment is to be determined solely on the basis of moral guilt — does not exist, neither in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court."93 According to Justice Scalia, a person's personal responsibility is very much a function of the amount of harm he or she causes.94 He illustrated his point with an example. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater."95

Justice Scalia's dissent stressed that allowing victim impact evidence during capital sentencing proceedings would provide a more complete picture of a defendant's personal responsibility. However, he identified an additional benefit of admitting this evidence. Justice Scalia explained:

Recent years have seen an outpouring of popular concern for what has come to be known as "victims' rights" — a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced. . . . Perhaps these sentiments do not sufficiently temper justice with mercy, but that is a question to be decided through the democratic processes of a free people, and not by the decrees of this Court. . . .

To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect

92. *Id.* at 518-19.
93. *Id.* at 520 (Scalia, J., dissenting).
94. *Id.* at 519.
95. *Id.*
to prescribe a debate on the appropriateness of the capital penalty with one side muted.96

Thus, Justice Scalia believed that allowing victim impact evidence in capital sentencing proceedings could help rehabilitate the damaged reputation of the criminal justice system.97

III. South Carolina v. Gathers

Within two years of the Booth decision, the Court reaffirmed its principles in South Carolina v. Gathers.98 Demetrius Gathers was convicted of the brutal murder of Richard Haynes, a former mental patient who referred to himself as "Reverend Minister."99 During closing arguments at the sentencing phase of Gathers' capital murder trial, the prosecutor read to the jury at length from a religious tract that Haynes was carrying when he was killed100 and commented on personal qualities he inferred from Haynes' possession of the religious tract and a voter registration card.101

96. Id. at 520.
97. Justice Scalia's opinion does not address the constitutionality of allowing victims to offer opinions and characterizations of the defendants, the crimes, or the appropriate punishment.
99. Id. at 806-07.
100. At the time he was killed, Richard Haynes was carrying a card on which was inscribed "The Game Guy's Prayer." Id. at 807. The prayer, which the prosecutor recited in its entirety to the jury, read:

Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life.
Id. at 808-09.
101. Id. at 808. The prosecutor's closing argument is excerpted below:

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
The jury sentenced Gathers to death. Because the prosecutor's remarks "conveyed the suggestion that [Gathers] deserved a death sentence because the victim was a religious man and a registered voter," the South Carolina Supreme Court, relying on Booth, reversed Gathers' death sentence and remanded for a new sentencing proceeding.

In another 5-4 decision, the United States Supreme Court affirmed. Although the State did not rely on a VIS, the majority found that the prosecutor's comments regarding the victim's personal characteristics could result in a death sentence "because of factors about which [Gathers] was unaware, and that were irrelevant to the decision to kill." Writing for the majority, Justice Brennan stressed that "the content of the various papers the victim happened to be carrying when he was attacked was purely fortuitous and cannot provide any information relevant to [Gathers'] moral culpability."

Notwithstanding two 5-4 decisions squarely holding that victim impact evidence violated the Eighth Amendment, changes in Court personnel underscored the precarious position of Booth and Gathers as enduring precedent. Significantly, the author of the majority opinion in Booth,

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across the bike path, thinking nothing of that....

... 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 about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

... 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 that 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 (quoting from the trial court record).
102. Id. at 806.
103. Id. at 810 (quoting Gathers v. State, 369 S.E.2d 140, 144 (S.C. 1988)).
104. Id.
105. Id. at 811 (quoting Booth v. Maryland, 482 U.S. 496, 505 (1987)). Recall that Booth described two categories of victim impact evidence: (1) the victims' personal characteristics and statements concerning the emotional impact of the crime on the victims' family; and (2) family members' opinions about the crime and the defendant. Booth, 482 U.S. at 502. Only the first part of the first category of victim impact evidence was implicated in Gathers — the victim's personal characteristics. And, unlike Booth, where the victims' family members characterized the victims' personal qualities, Gathers involved a prosecutor's characterization of a victim's personal qualities. Gathers, 490 U.S. at 810-11.
106. Gathers, 490 U.S. at 812.
Justice Powell, resigned at the end of the 1987 term and was replaced by Justice Kennedy, who became one of the four dissenters in *Gathers*. Replacing Powell (a moderate) with Kennedy (a conservative) should have tipped the 5-4 balance decisively in favor of the *Booth* dissenters. However, Justice White, himself a *Booth* dissenter, mysteriously joined the majority in *Gathers*, and grumbled in a separate concurrence: "Unless *Booth v. Maryland* is to be overruled, the judgment below must be affirmed." 107 Justice Scalia, writing a separate dissent, picked up on White's invitation and called for *Booth* to be overruled. 108 Similarly, Justice O'Connor's dissent revealed that she, Chief Justice Rehnquist and Justice Kennedy stood "ready to overrule" *Booth*. 109 In their view, "*Booth* should not be read . . . to preclude prosecutorial comment which gives the sentencer a 'glimpse of the life' a defendant 'chose to extinguish.'" 110 Moreover, "nothing in the Eighth Amendment precludes the prosecutor from conveying to the jury a sense of the unique human being whose life the defendant has taken." 111

Although Justice White's bizarre vote in *Gathers* preserved the rule of *Booth*, ultimately it merely delayed the inevitable. Within two years, Justice Brennan (a liberal) retired, Justice Souter (a conservative) replaced him, and Justice White retreated from his apparent reverence for stare decisis.

**IV. Payne v. Tennessee**

Justice White's invitation to overrule *Booth* was finally accepted by the Court in *Payne v. Tennessee*. 112 Significantly, neither Payne (who had sought review) nor the State of Tennessee (in its response to Payne's petition for certiorari) requested that *Booth* or *Gathers* be reconsidered. Undeterred, six members of the Court *sua sponte* rewrote the application for certiorari and directed the parties to brief and argue whether the decisions should be overruled. 113 Moreover, so that the case could be heard

107. *Id.* (White, J., concurring) (citation omitted).
108. *Id.* at 823-24 (Scalia, J., dissenting). Justice Scalia anticipated the criticism which would flow from the Court's reversal of a recent decision: 
   "It has been argued that we should not overrule so recent a decision, lest our action "appear to be . . . occasioned by nothing more than a change in the Court's personnel," and the rules we announce no more than "the opinions of a small group of men who temporarily occupy high office." I doubt that overruling *Booth* will so shake the citizenry's faith in the Court. Overrulings of precedent rarely occur without a change in the Court's personnel. The only distinctive feature here is that the overruling would follow not long after the recent decision. But that is hardly unprecedented.

*Id.* at 824 (citations omitted).
109. *Id.* at 813-14 (O'Connor, J., dissenting).
110. *Id.* at 816.
111. *Id.* at 817.
113. Payne v. Tennessee, 111 S. Ct. 1031, 1031 (1991). The Court's activism was overshadowed by the Bush administration's politicization of the issue. Attorney General Thorn-
in April during the final session of the Term, the justices ordered the briefing expedited.\textsuperscript{114}

The facts of \textit{Payne} are especially grisly. Payne, who had been injecting cocaine and drinking beer much of the day, entered an apartment occupied by 28-year-old Charisse Christopher, her 2-year old daughter Lacie, and her 3-year-old son Nicholas. When Charisse resisted his sexual advances, Payne viciously stabbed to death Charisse and Lacie. Nicholas, who had been stabbed several times by a butcher's knife which completely penetrated through his body from front to back, miraculously survived.

During the sentencing phase, the prosecutor introduced a videotape of the crime scene which captured the carnage in color footage. Additionally, the prosecutor called Charisse's mother Mary Zvolanek, to testify to her grandson Nicholas' reaction to the murders of his mother and sister. According to Mrs. Zvolanek:

\begin{quote}
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.\textsuperscript{115}
\end{quote}

Arguing for the death penalty during closing argument, the prosecutor commented on the continuing effects of Nicholas' experience:

\begin{quote}
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.\textsuperscript{116}
\end{quote}

Finally, the prosecutor strongly implied that returning a verdict of death somehow would help Nicholas. "[T]here is something you can do for Nicholas. . . . He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer."\textsuperscript{117} Thus, even though Nicholas was too young to testify, and presumably had not been asked whether he wanted Payne to be executed, the prosecutor imputed this desire to him.

Writing for the majority, Chief Justice Rehnquist repudiated the Court's earlier decisions barring jury consideration of victim impact statements in

\textsuperscript{\textsuperscript{114} Id.}
\textsuperscript{\textsuperscript{115} Payne, 111 S. Ct. at 2603 (quoting from the court's appendix).}
\textsuperscript{\textsuperscript{116} Id. (quoting from the court's appendix).}
\textsuperscript{\textsuperscript{117} Id. (quoting from the court's appendix).}
capital cases.\textsuperscript{118} Per Rehnquist, "\textit{Booth} and \textit{Gathers} were decided by the narrowest of margins, over spirited dissents challenging the basic underpinning of those decisions," and "were wrongly decided and should be, and now are, overruled."\textsuperscript{119} Rehnquist rejected the premise of \textit{Booth} and \textit{Gathers}, that evidence relating to the victim's character or the peculiar circumstances or sufferings of the victim's family does not reflect on the defendant's blameworthiness or moral culpability.\textsuperscript{120} To the contrary, the "specific harm" caused by a defendant is an important factor in determining appropriate punishment.\textsuperscript{121} Therefore, "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no \textit{per se} bar."\textsuperscript{122}

The majority opinion systematically attacked the arguments advanced in support of \textit{Booth} by Justice Powell just four years earlier. For example, the anti-\textit{Booth} majority found that the requirement that a capital defendant be treated as a "uniquely individual human being" does not mandate that the defendant is to receive that consideration wholly apart from the crime which he committed.\textsuperscript{123} Similarly, the fact that it might not be tactically prudent for a capital defendant to rebut victim impact evidence does not necessarily render such evidence inadmissible.\textsuperscript{124} Moreover, victim impact evidence is not generally offered to encourage juries to discriminate among victims on the basis of their worth to society. Rather, it is offered to show each victim's uniqueness as an individual human being, regardless of how the jury views the loss to society resulting from the victim's death.\textsuperscript{125} Because the sentencer must consider "any relevant mitigating evidence that the defendant proffers in support of a sentence less than death,"\textsuperscript{126} the State should not be barred from either offering "a glimpse of the life" which a defendant "chose to extinguish" or demonstrating the loss to the victim's family and to society which resulted from the defendant's actions.\textsuperscript{127}

A. The Payne Dissenters

In a stinging dissent joined by Justice Blackmun, Justice Marshall accused the majority of embracing "[p]ower, not reason, [as] the new

\textsuperscript{118} \textit{Id.} at 2611. \textit{Payne} spawned six separate opinions and illustrates the fractious and fragmented nature of the Court's contemporary decisions. Chief Justice Rehnquist's opinion was joined by Justices White, O'Connor, Scalia, Kennedy, and Souter. Justices O'Connor, Scalia, and Souter filed concurring opinions. Justices Marshall and Stevens wrote dissenting opinions.

\textsuperscript{119} \textit{Id.} at 2610-11.

\textsuperscript{120} \textit{Id.} at 2605.

\textsuperscript{121} \textit{Id.} at 2608.

\textsuperscript{122} \textit{Id.} at 2609.

\textsuperscript{123} \textit{Id.} at 2606-07.

\textsuperscript{124} \textit{Id.} at 2607.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.} at 2606 (quoting \textit{Eddings v. Oklahoma}, 455 U.S. 104, 114 (1982)).

\textsuperscript{127} \textit{Id.} at 2607 (quoting \textit{Mills v. Maryland}, 486 U.S. 367, 397 (1988)).
currency of this Court’s decisionmaking.”  As Justice Marshall wryly observed: “Neither the law nor the facts supporting Booth and Gathers underwent any change in the last four years. Only the personnel of this Court did.” According to Justice Marshall, the majority opinion “sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case.”

In more measured tones, Justice Stevens’ dissent discredited the majority’s suggestion that fairness requires that the State be allowed to respond to mitigating evidence offered by the defendant with similar evidence about the victim. Because “[t]he victim is not on trial[,] her character, whether good or bad, cannot . . . constitute either an aggravating or mitigating circumstance.” Thus, Justice Stevens dismissed the majority’s fairness argument as a “classic non sequitur.”

Justice Stevens warned that allowing the sentencer unbridled discretion to consider victim impact evidence — evidence which directly bears “on a matter so grave as the determination of whether a human life should be taken or spared” — would inflate the risk of “wholly arbitrary and capricious action,” which the Court condemned in Gregg v. Georgia. Open-ended reliance on victim impact evidence, moreover, “does not provide a ‘principled way to distinguish [the few cases] in which the death penalty [i]s imposed, from the many cases in which it [i]s not.’

128. Id. at 2619 (Marshall, J., dissenting).
129. Id.
130. Id. According to Justice Marshall, the majority’s approach limits the full protection of the doctrine of stare decisis to “cases involving’ property and contract rights.” Id. at 2623. Justice Marshall warned that under the majority opinion cases decided by a 5-4 vote over spirited dissents are subject to being overruled. Id. Thus, “essentially all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination.” Id. Justice Marshall created an “endangered precedents” list, based upon the majority’s new criteria for overruling Supreme Court decisions. Id. Included among the rights Justice Marshall found to be at risk are: (1) the right under the Double Jeopardy Clause not to be subjected twice to prosecution for the same criminal conduct; (2) the Eighth Amendment right to jury instructions that do not preclude the consideration of nonunanimous mitigating factors in capital sentencing; (3) the Eighth Amendment right not to be executed if insane; (4) the Fourth Amendment right to exclusion of illegally obtained evidence introduced to impeach a defense witness; (5) the Fifth and Sixth Amendment rights of a criminal defendant to provide hypnotically refreshed testimony on his own behalf; and (6) the right to be free of a harmless error analysis applied to the Eighth Amendment right not to be sentenced by a “death qualified” jury. Id. at 2623 & n.2.
131. Id. at 2627 (Stevens, J., dissenting).
132. Id.
133. Id.
134. Id. at 2628.
V. Avoiding Payne

Payne v. Tennessee appears to open the door to the introduction of victim impact evidence during capital sentencing proceedings. However, a careful reading of Payne reveals that the decision does not hold that victim impact evidence must be admitted or that it should be admitted. Payne merely holds that the Eighth Amendment erects no per se bar prohibiting a capital sentencing jury from considering victim impact evidence. Thus, in appropriate circumstances this evidence may still be successfully challenged as contrary to state and federal constitutional guarantees. In addition, state statutes and state case law may provide arguments against its admission.

A. Federal Constitutional Challenges

Careful analysis of the Supreme Court’s decisions in this area reveals three different types of information which prosecutors seek to place before the jury as victim impact evidence. Broadly speaking, information is proffered regarding: (1) the personal qualities and characteristics of the victim; (2) the severe emotional (and perhaps financial) impact of the crimes on the victim’s family members; and (3) family members’ opinions of both the defendant and the defendant’s crime. Although all three types would be constitutionally inadmissible under Booth and Gathers, Payne revived only the first two. Payne did not disturb the holding in Booth which forbade family members from offering characterizations of the crime and the defendant and from offering recommendations as to the proper punishment. Thus, defense attorneys should argue strenuously that this type of evidence remains unconstitutional, even under the current Court’s chameleonic jurisprudence.

Even the first two types of evidence (qualities of the victim and suffering of the victim’s family) remain vulnerable to constitutional challenge. As the Payne Court indicated, if victim impact evidence introduced at the sentencing phase is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment may provide relief. Unfortunately, apart from a bare citation to Darden

137. Payne, 111 S. Ct. at 2612 (O’Connor, J., concurring).
138. Id.
139. Id.
140. See supra notes 39-79 and accompanying text.
141. In the words of Chief Justice Rehnquist:
Our holding today is limited to the holdings of Booth v. Maryland and South Carolina v. Gathers that evidence and argument relating to the victim and the impact of the victim’s death on the victim’s family are inadmissible at a capital sentencing hearing. Booth also held that the admission of a victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

Payne, 111 S. Ct. at 2611 n.2 (citations omitted).
142. Id. at 2608.
v. Wainwright, the Court offers no clues as to the circumstances under which the admission of victim impact evidence would render a trial fundamentally unfair. Moreover, reference to the cited portions of the Darden decision sheds virtually no light on the subject.

In Darden, the defendant argued that the prosecutor's vitriolic closing argument at the guilt-innocence stage of the trial rendered his conviction fundamentally unfair and deprived the sentencing determination of the reliability that the Eighth Amendment requires. At various points during the closing argument, the prosecutor referred to Darden as "an animal" who "shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." The prosecutor also "made several offensive comments reflecting an emotional reaction to the case." Specifically, the prosecutor said:

> I wish [the victim] had had a shotgun in his hand when [Darden] walked in the back door and blown [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun. I wish someone had walked in the back door and blown his head off at that point.

According to the Court, "[t]he relevant question is whether the [challenged conduct] 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Although the Court found the prosecutor's comments to be "improper" and agreed that the closing argument "deserves the condemnation it has received from every court to review it," the Court held that Darden's due process rights had not been violated.

Far from illuminating the circumstances under which the admission of victim impact evidence violates due process, the Payne Court's citation to Darden obfuscates the matter. First, the conduct complained of in Darden consisted of the prosecutor's overzealous closing argument, not the admission of improper victim impact evidence. Second, the objectionable portions of the prosecutor's argument consisted of the prosecutor's characterizations of Darden (an animal) and the prosecutor's opinion as to an appropriate punishment (blow his face off with a shotgun). These same statements, if made by family members, would be inadmissible victim impact evidence under Booth and Payne. Thus, while the Court recognizes that in certain circumstances victim impact evidence may violate due

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144. See Payne, 111 S. Ct. at 2608.
145. Darden, 477 U.S. at 178-79.
146. Id. at 180 nn.11, 12.
147. Id. at 180.
148. Id. at 180 n.12 (citation omitted).
149. Id. at 181 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).
150. Id. at 180.
151. Id. at 179.
152. Id. at 181.
process, the precise contours of a successful challenge remain uncharted.

B. State Law Challenges

Once upon a time, a criminal defendant whose constitutional rights had been violated could confidently seek relief in the United States Supreme Court, regardless of the nature of the criminal charges against her. Once upon a time, a villager suffering a toothache might profitably repair to the local blacksmith to have the offending tooth removed. Today, both would be well advised to seek relief elsewhere.

Bear in mind that 

Payne simply holds that the Eighth Amendment to the United States Constitution erects no per se barrier to the admission of certain types of victim impact evidence. States remain free to provide more protection for the rights of the accused than the Supreme Court is willing to mandate as a matter of federal constitutional law. Consequently, state courts should be urged by defense lawyers to hold that, notwithstanding 

Payne, the state’s constitution, statutes, and case law mandate the exclusion of victim impact evidence.

For example, Oklahoma case law has long prohibited prosecutors from seeking to elicit sympathy for crime victims. In 

McCarty v. State, the Oklahoma Court of Criminal Appeals found that, during the course of a capital trial replete with prosecutorial misconduct, Oklahoma County District Attorney Robert Macy “improperly requested sympathy” for the victims. Macy had urged that “the death penalty is the appropriate punishment that should be done for the right motive, it should be done for love of the victims . . . and his future victims . . . .” Because the court felt “compelled to conclude that the combined effect of the improper prosecutorial comments ‘was so prejudicial as to adversely affect the fundamental fairness and impartiality of the proceedings,’” it reversed McCarty’s death sentence and ordered a new trial.

In addition, prosecutors in Oklahoma have been admonished for inviting juries to “be mean” and to send a “message . . . to other would-be criminals . . . .” 

Sier v. State involved a challenge to a conviction and sentence for sodomy, after former conviction of a felony. During closing arguments, the prosecutor stated:

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155. Id. at 1220-21.
156. Id. at 1221.
157. Id.
158. Id. at 1222.
I would ask that if you feel any sympathy, if you feel any sympathy I would ask that you feel the sympathy for [the victim]. . . .

Another factor, let's look to the message that can be conveyed [by] your actions today. Let’s look to the message that you can convey to other would-be criminals in Tulsa County. This is your opportunity to be mean. This is your opportunity, if you have ever been mean a day in your life, to be mean.161

Sier complained that by allowing the prosecutor to make these improper comments during final argument, the judge permitted the jury to return an excessive sentence.162 The Oklahoma Court of Criminal Appeals agreed. According to the court:

To encourage a jury to be “mean” is to ask a jury to disregard its oath to “well and truly” try a cause and to further disregard the trial court’s instructions to “not let sympathy, sentiment, or prejudice enter” into its deliberations and return a verdict “as the evidence warrants.”163

"[B]ecause of the prejudicial argument of the prosecuting attorney," the court modified Sier’s sentence, reducing his prison term from thirty-five years to twenty years.164

This line of cases remains good law, notwithstanding recently passed victim impact statutes in Oklahoma.165 Indeed, Oklahoma Court of Criminal Appeals decisions which suggest the contours of a due process fundamental fairness argument may provide a valuable check on the admission of victim impact evidence during capital sentencing proceedings. Moreover, even though, as explained below, victim impact evidence is now a fact of life in Oklahoma,166 creative lawyering can help to deprive it of much of its sting. Some suggestions for softening the force of victim impact evidence follow.

VI. Living with Payne

If the trial court refuses to be persuaded that victim impact evidence would render the defendant’s trial fundamentally unfair or otherwise contravene state constitutional or statutory rules, the defense must incorporate the VIS into its trial strategy. Precisely how to defend against victim impact evidence is not susceptible to formulaic prescriptions. Each case must be carefully evaluated to determine which of the following strategies are appropriate.

161. Id. at 805 (quoting from the trial court record).
162. Id. at 804-05. At trial, Sier was convicted and received a 35 year sentence. Id. at 803.
163. Id. at 805.
164. Id.
165. See infra notes 205-11 and accompanying text.
166. See infra notes 205-33 and accompanying text.
Although a matter of extreme delicacy, the defense should consider attempting to establish contact with the victim's family.\footnote{167} The funeral director may be able either to identify an approachable family spokesperson or to establish contact with a priest, minister, or rabbi assisting the family during their tragedy. Although the family’s initial reaction may be to avoid any contact with defense attorneys, one should not automatically assume that all family members will seek to have the client killed. Many family members may have strong religious beliefs which are more evolved than \textit{lex talionis}.\footnote{168}

Initiating contact with the victim’s family may also open a dialogue which leads to a plea bargain. Obviously, a prosecutor is more likely to negotiate a plea bargain if the victim’s family members agree. If a plea cannot be negotiated but there is a cooperative family member willing to testify against a death sentence, the defense attorney should argue that her testimony is required under \textit{Payne} to rebut the VIS.

During the spring of 1992, Oklahoma put to death Olan Randle Robison.\footnote{169} At trial, Robison sought to introduce evidence that family members of a murder victim opposed the imposition of the death penalty on Robison.\footnote{170} The trial court denied his request.\footnote{171} In seeking certiorari

\footnote{167. In the typical case, surviving family members will experience an overwhelming sense of isolation. They are likely to be ignored by the judicial process unless the prosecutor feels that she can gain a tactical advantage by exploiting their grief and anger. (It is a mistake to regard the prosecution and surviving family members as natural allies; indeed, a strong case can be made that revictimization occurs when prosecutors seek to co-opt family members as part of the prosecution team.) If they are expected to testify, family members may find themselves excluded from the courtroom except when they are called to the stand. Personal effects of their loved ones may have been seized as evidence, never to be returned. Defense attorneys who accept capital cases should consider contacting a victim’s support group before approaching survivors. One such organization, Parents of Murdered Children & Other Survivors of Homicide Victims, is headquartered in Cincinnati, Ohio.}

\footnote{168. Expressed in Mosaic law by the formula, "an eye for an eye, a tooth for a tooth," etc., \textit{lex talionis} requires the infliction upon a wrongdoer of the same injury which he has caused another. BLACK’s \textsc{Law Dictionary} 822 (5th ed. 1979).}

\footnote{169. Olan Randle Robison, the third Oklahoma prisoner to be executed since the Supreme Court revived the death penalty in 1976, see \textit{Gregg v. Georgia}, 428 U.S. 153 (1976), was put to death by lethal injection on March 13, 1992. Robison was tried before \textit{Booth} was decided and was executed within a year of the \textit{Payne} decision.}

\footnote{170. \textit{Robison v. Maynard}, 829 F.2d 1501, 1504-05 (10th Cir. 1987).

171. \textit{Id.} at 1504. In requesting federal postconviction relief, Robison argued that the refusal to allow this testimony deprived him of due process. Relying on \textit{Booth}, the United States Court of Appeals for the Tenth Circuit disagreed. \textit{Id.} at 1505. Two reasons led the Tenth Circuit to deny Robison relief on this issue. First, the court found that such evidence would not be relevant:

\begin{quote}
An individual’s personal opinion of how the sentencing jury should acquit its responsibility, even though supported by reasons, relates to neither the character or record of the defendant nor to the circumstances of the offense.

Such testimony, at best, would be a gossamer veil which would blur the jury’s focus on the issue it must decide.
\end{quote}

\textit{Id.} Second, “the obvious consequence of allowing this kind of testimony by the defense would be to permit the State to present witnesses who would testify the [death] penalty should be imposed, thus reducing the trial to a contest of irrelevant opinions.” \textit{Id.} at 1504.
shortly before his execution, Robison argued that under Payne evenhanded justice required that victim impact evidence submitted by the defendant be considered.172 The United States Supreme Court denied certiorari,173 sending Robison to his death without deciding whether victim impact evidence, clearly a sword in the hands of a prosecutor, might also be used as a shield in the hands of a defense attorney.

Voir dire may present the first opportunity to soften the effect of the VIS. Potential jurors should be asked if they think family members could serve as jurors, or better still, if they feel that the jury's job in rendering the verdict is to represent the deceased's family. Their responses may illuminate whether they view the function of the jury as meting out vengeance to help the healing process of the victim's family members. Admonishing the jurors that their role is to do justice can be effectively reinforced during closing arguments by reminding them that others are better suited to dispense revenge: "Vengeance is mine . . . saith the Lord."174

Rebutting victim impact evidence requires a thorough investigation of the background and life of the victim. If faced with overwhelming evidence that the deceased had a loving family, the defense attorney should compare her client's life to the victim's life. If the victim's background was filled with love and nurturing encouragement, the client's life often can be contrasted as one of abject neglect. For example, it might be useful to show that while the victim was entering college, facing a future filled with promise, the client was entering a juvenile detention facility and escaping the physical and emotional abuse of his parents. Where possible, the children of the victim should be equated with the children of the defendant.

In rare instances, it may be possible to impugn the character of the victim. To do so, the defense attorney must locate victims of the victim. Also, if confronted with an especially bloodthirsty family, the defense may be able to show the bad character of family members. The mere threat of airing the family's dirty laundry may cause the family to withdraw its demand for death. Bear in mind that people carrying the greatest guilt may scream the most loudly for vengeance.

Once the personal characteristics of the victim are placed in issue, the defense may argue that it is entitled to any evidence in the prosecutor's files regarding the victim's bad character. It is advisable to file a Brady request175 and to insist that the defense is entitled to the information because it may affect punishment.176

174. Romans 12:19 (King James).
175. See Brady v. Maryland, 373 U.S. 83, 86 (1963) (determining that withholding evidence favorable to an accused violates the accused's due process rights).
176. See Allen v. District Court, 803 P.2d 1164, 1167 (Okla. Crim. App. 1990) (holding that, in order to ensure a trial procedure that will seek justice, the prosecutor must provide certain information to defendant, upon defendant's request, including the following: (1) names and addresses of witnesses and witness statements; (2) statements by the accused or
USE OF VICTIM IMPACT EVIDENCE

VIS witnesses should be tactfully informed that the rights of cross examination and rebuttal survive Payne, and that it remains the defense attorney's duty to try the allegations of victim impact. During cross examination, family members can be examined about positive developments since the murder. The witness can be asked how the family members are coping and if they are receiving any help coping with the tragedy. If a family member claims that the murder caused her to seek psychiatric assistance, the doctor's records should be subpoenaed and the psychiatrist perhaps called as a witness. In addition, it may be possible to introduce expert testimony to the effect that killing the defendant will not help the survivors. Above all, the cross-examination must be soothing and nonconfrontational. The defense attorney should strive to express the client's remorse through the tone and substance of the questions.

Testimony by the victim's spouse is likely to be especially damaging to the defendant. In appropriate cases, the spouse may be placed under subpoena as a defense witness. This tactic should keep the spouse out of the courtroom during the trial. As with other family members, it may be useful to ask the spouse whether the victim was a compassionate and forgiving person.

Finally, at the close of the sentencing phase the defense should seek an instruction that emotional and financial harm are not aggravating circumstances. If the defendant is unfortunate enough to be tried in a state where emotional and financial harm are considered proper aggravating circumstances, the instruction to that effect should be objected to as unconstitutional and the issue preserved for appeal.

As the following incomplete survey of post-Payne decisions demonstrates, many of these strategies have been employed throughout the country, with varying degrees of success.

VII. Survey of Federal Cases Decided Since Payne

Payne's immediate aftermath was to generate a variety of federal and state court decisions which wrestled with victim impact evidence. The following case summaries are representative of post-Payne decisions rendered by federal courts. As demonstrated below, the Supreme Court's

a codefendant; (3) reports or statements of experts; (4) books, papers, documents the prosecutor intends to use at trial; (5) records of prior criminal convictions a defendant, or codefendant; and (6) OSBI or FBI rap sheets on any witness listed by the state or defense).

177. Decisions issued by state courts relying on Payne include McMillian v. State, 594 So. 2d 1253 (Ala. Crim. App. 1991) (VIS which included opinion of victim's parents that defendant deserved death did not render defendant's trial fundamentally unfair); State v. Brewer, 826 P.2d 783 (Ariz.) (admission of VIS not reversible error because presumption is that judge does not consider inadmissible evidence when imposing sentence), cert. denied, 113 S. Ct. 206 (1992); State v. Atwood, 832 P.2d 593 (Ariz.) (VIS may not be given aggravating weight because Arizona's death penalty statute bars the admission of such evidence), cert. denied, 113 S. Ct. 1058 (1992); People v. Howard, 824 P.2d 1315 (Cal.) (upholding closing arguments which stressed defendant's status as an outsider), cert. denied,
recent vacillation on the admissibility of victim impact evidence raises as many questions as it purports to answer.

A. United States Supreme Court

In Dawson v. Delaware,178 the State introduced, during the sentencing phase of his capital murder trial, evidence of David Dawson's membership in the Aryan Brotherhood, a white racist prison gang.179 The Supreme Court held that the introduction of this evidence violated Dawson's First Amendment right to freedom of association where the gang membership had no relevance to issues in the proceeding.180


179. Id. at 1095-96.
180. Id. at 1097. According to Chief Justice Rehnquist's majority opinion, Dawson's membership in the Aryan Brotherhood had no relevance to the sentencing proceeding because, inter alia, the murder victim and the defendant were both white. Id. at 1098.
In a rather curious dissent, Justice Thomas argued that under *Payne* the State was entitled to use Dawson's mere membership in the unsavory gang to rebut good character evidence offered in mitigation.\(^\text{181}\) Because Dawson "chose to introduce evidence of certain good character traits," including his membership in Alcoholics Anonymous, excluding evidence of his membership in the Aryan Brotherhood would deprive the jury of the opportunity to make a fair and balanced determination of the appropriate punishment.\(^\text{182}\)

**B. Fifth Circuit Court of Appeals**

In *Cordova v. Collins*,\(^\text{183}\) the defendant claimed that the admission of a single autopsy photograph of the victim's body "rose to the level of 'victim impact evidence' condemned in *Payne*."\(^\text{184}\) More specifically, the defendant asserted that "the admission of [the] photograph inflamed the jury's sensibilities against him and constituted prejudicial victim impact evidence in violation of the Fifth, Eighth and Fourteenth Amendments."\(^\text{185}\) The United States Court of Appeals for the Fifth Circuit found that *Payne* was inapposite to this claim.\(^\text{186}\) Moreover, because the photograph was admitted "for the purpose of identifying the deceased and also to aid the jury in determining the cause of death," there was "no arguable merit" to the defendant's claim.\(^\text{187}\)

**C. Seventh Circuit Court of Appeals**

A recent decision of the United States Court of Appeals for the Seventh Circuit turned away a Fourteenth Amendment challenge to the use of victim impact evidence as the theme during closing argument.\(^\text{188}\) In *Williams v. Chrans*,\(^\text{189}\) the prosecutor used victim impact evidence as a theme during the sentencing hearing closing argument.\(^\text{190}\) Because the use of the victim impact statement did not render Williams' sentencing hearing "so fundamentally unfair as to deny him due process," the court denied relief.\(^\text{191}\) According to the court, the defense opened the door to such evidence by asking a probation officer to read a favorable paragraph from the VIS.\(^\text{192}\)

181. Id. at 1103 (Thomas, J., dissenting).

182. Id. While agreeing that membership in Alcoholics Anonymous "might suggest a good character," Justice Thomas argued that "membership in the Aryan Brotherhood just as surely suggests a bad one." Id.


184. Id. at 174.

185. Id.

186. Id.

187. Id.


189. 945 F.2d 926 (7th Cir. 1991).

190. Id. at 947.

191. Id.

192. Id. That part of the statement was written by the defendant's counsel and indicated that the defendant "recognized responsibility for his conduct, was cooperative, and thought
Over defense objection, the prosecution asked the probation officer to read another portion of the VIS to the jury. In part, the VIS stated:

The financial losses are not measurable. The victim, Linda Goldstone, was a 29-year-old mother of a 3-year-old son, the wife of a doctor. The impact that this crime had upon her immediate family, not to mention the parents of this woman, cannot be adequately put into words. The grief and sorrow inflicted upon them by this one man's deed is sufficiently aggravated to justify the death penalty. The loss of this woman to society will go unmeasured in time. She was on her way to teach a course in the Lamaze method of childbirth when her — when Williams abducted her. The irony is apparent. A woman and her husband, an obstetrician, devoted to assisting in giving life. A criminal bent upon taking it away.193

Remarkably, even though the VIS concluded with the opinion that death would be the appropriate sentence, the court detected no denial of due process.194 Instead, the court stressed that the VIS was “relatively brief, especially when compared to the overwhelming amount of aggravating evidence admitted.” Although the quantity of victim impact evidence admitted may be relevant to the due process inquiry of whether the sentencing proceeding was so inflammatory as to render the trial unfair, the court missed the point. Under both Booth and Payne, opinion evidence is per se inadmissible because it “serve[s] 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.”196

D. Tenth Circuit Court of Appeals

As discussed above, the United States Court of Appeals for the Tenth Circuit considered the defensive use of victim impact evidence soon after the United States Supreme Court decided Payne.197 In Robison v. Maynard,198 the Tenth Circuit considered whether Payne required reversal of an earlier holding that testimony from a victim’s relative that she did not want the jury to impose the death penalty was improper mitigating evidence and inadmissible at the penalty phase hearing. Adhering to its initial decision, the court read Payne to “not expand the universe of admissible

he could help others if he were allowed to live by showing through example the consequences of his conduct.”199

193. Id. at 946-47.
194. Id. at 947.
195. Id.
196. Booth, 482 U.S. at 508. See supra notes 74-76 and accompanying text.
197. See supra notes 169-73 and accompanying text.
USE OF VICTIM IMPACT EVIDENCE

relevant mitigating evidence” established by earlier decisions of the Court. According to the Tenth Circuit, *Payne* did not extend the range of admissible evidence beyond

that related to the victim and the impact of the victim’s death on the members of the victim’s family. Nothing said by the Court suggests the Court intended to broaden the scope of relevant mitigating evidence to include the opinion of a victim’s family member that the death penalty should not be invoked.

This unscientific survey of post-*Payne* decisions reveals much confusion among federal courts called upon to interpret *Payne* and to resolve claims that victim impact evidence has infused capital trials with fundamental unfairness. One glaring conflict between the circuit courts of appeal is evident from a review of the *Williams* and *Robison* decisions discussed above. Recall that in *Williams* the Seventh Circuit refused to characterize the offensive use of a victim’s opinion regarding an appropriate sentence as a due process violation. Conversely, the Tenth Circuit in *Robison* refused to allow the defensive use of precisely the same type of evidence.

VIII. Inflicting Payne on Oklahoma

In Oklahoma, capital murder trials are conducted in two separate phases. During the guilt phase, the state is required to prove beyond a reasonable doubt that the defendant committed an act which constitutes first degree murder. Defendants become death-eligible only if, during a separate

201. Murder in the first degree is defined in 21 OKLA. STAT. § 701.7 (1991). That statute provides:

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary, first degree arson, unlawful distributing or dispensing of controlled dangerous substances, or trafficking in illegal drugs.

C. A person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing, maiming or using of unreasonable force by said person or who shall willfully cause, procure or permit any of said acts to be done upon the child pursuant to Section 843 of this title.

D. A person commits murder in the first degree when he unlawfully and with malice aforethought solicits another person or persons to cause the death of a human being in furtherance of unlawfully manufacturing,
sentencing hearing, the state proves beyond a reasonable doubt the existence of at least one of eight statutory aggravating circumstances. The eight statutory aggravators are:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

Even if the state proves beyond a reasonable doubt the existence of one of these eight aggravators, a defendant may not be sentenced to death unless the factfinder determines that the relevant mitigating evidence does not outweigh the aggravating evidence.

Recently, Oklahoma State Senator Brooks Douglass of Oklahoma City introduced Senate Bill 816, innocuously titled "An Act Relating to Victim's
USE OF VICTIM IMPACT EVIDENCE

Rights. Regrettably, Governor Walters approved the bill on April 30, 1992. The measure, which became effective on July 1, 1992, puts Oklahoma in the dubious company of other states which allow sentencing, pardon, and parole decisions to turn on the willingness and ability of the victim's family to articulate its grief, or the relative worth of the victim's character.

Specific provisions deserve mention. First, the very definition of VIS supplied in the bill appears to violate the United States Constitution. Section 984 of Oklahoma's Code of Criminal Procedure, as amended, defines "victim impact statement" as "information about the financial, emotional, psychological, and physical effects of a violent crime on a victim or member of the immediate family, and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence." It should be recalled that victims' opinions of an appropriate punishment, found unconstitutional in Booth, did not receive the Rehnquist Court's seal of approval in Payne. Thus, this evidence remains

Before fleeing, Ake shot Douglass' sister twice, shot Douglass once, and left both for dead. See Ake v. State, 663 P.2d 1 (Okla. Crim. App. 1983). Although Ake was sentenced to death, the United States Supreme Court reversed his sentence because he was denied court-appointed psychiatric assistance at trial. See Ake v. Oklahoma, 470 U.S. 68 (1985).

The full name of the measure, as enacted, is: An Act Relating to Victim's Rights; Amending 19 O.S. 1991, Sections 215.33 and 215.39, Which Relate to the Office of District Attorney; Amending 21 O.S. 1991, Section 142.3, Which Relates to Definitions, 22 O.S. 1991, Section 991a, Which Relates to Sentencing Powers of the Court and 57 O.S. 1991, Section 332.2 and 332.8, Which Relate to the Pardon and Parole Board; Modifying Duties of the Victim Witness Coordinator; Requiring Victim Impact Statements to be Provided With Certain Reports; Modifying Language; Increasing Amount for Funeral Expenses; Authorizing the Court to Consider Victim Impact Statement; Requiring the Pardon and Parole Board to Authorize Certain Testimony and to Consider Victim Impact Statement; Defining Terms; Authorizing Presentation of Victim Impact Statement at Sentencing; Providing for Consultation With Victim for Presentence Investigation Report; Authorizing the Court to Prohibit Certain Disclosure of Information; Providing for Codification; Providing an Effective Date; and Declaring An Emergency.


208. 22 Okla. Stat. § 984 (Supp. 1992) (emphasis added). "Victim" is defined in id. § 142.3(14) as "a person who suffers personal injury or death as a result of criminally injurious conduct." The definition of VIS, however, sweeps much more broadly and includes information regarding the impact of the crime on "a victim or member of the immediate family." Id. § 984. Members of the immediate family include spouses, children by birth or adoption, stepchildren, parents, and siblings of the victim. Id.

209. Payne leaves open the question of the constitutionality of admitting into evidence
vulnerable to a due process attack under *Payne*. Moreover, opinion evidence regarding what sentence a defendant deserves has long been excluded in Oklahoma on relevance grounds. As the United States Court of Appeals for the Tenth Circuit observed in a decision rendered after *Booth*, but before *Payne*:

An individual's personal opinion of how the sentencing jury should acquit its responsibility, even though supported by reasons, relates neither to the character or record of the defendant nor to the circumstances of the offense. Such testimony, at best, would be a gossamer veil which would blur the jury's focus on the issue it must decide.

Moreover, allowing any person to opine whether the death penalty should be invoked would interfere with the jury's performance of its duty to exercise the conscience of the community. Because the offense was committed not against the victim but against the community as a whole, in Oklahoma only the community, speaking through the jury, has the right to determine what punishment should be administered.

Similar arguments may be made to exclude victims' characterizations of the defendant, which are often cloaked in the guise of opinions as to sentence.

Constitutional infirmities aside, the legislation's most remarkable characteristic may be its breadth. Under the new law, a court is required to consider a VIS when sentencing a person convicted of any crime. According to section 991a(C), "[w]hen sentencing a person convicted of a crime, the court shall consider any victim impact statement if submitted to the court." This provision appears to commit to the district attorney's the victim's family's opinions of the defendant and of the appropriate sentence. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2611 n.2 (1991).


211. *Robison v. Maynard*, 829 F.2d 1501, 1505 (10th Cir. 1987). As noted above, *Robison* involved a defendant's attempt to use victim impact evidence as a shield against the imposition of a death sentence. See *supra* notes 169-73 and accompanying text. At the sentencing stage of his capital murder trial, Robison unsuccessfully sought to introduce testimony of relatives of the victims who were opposed to sentencing Robison to death. See *Robison*, 829 F.2d at 1504.

212. An earlier version of the statute would have swept even more broadly. Under a discarded version, the district attorney would have been required to consult the victim before making crucial decisions about the case, including amending the charging decision, negotiating pleas or moving to dismiss the charges. See Engrossed S.B. 816, 43d Leg., 2d Sess. (1992) (introduced Feb. 5, 1992). This attempt to make victims (and in the case of murder victims, their immediate survivors) a part of the prosecution team was dropped from the version of the bill which passed. See *Act of Apr. 30, 1992, 1992 Okla. Sess. Laws, ch. 136 (1992).*


214. 22 Okla. STAT. § 991a(C) (Supp. 1992) (emphasis added).
discretion the decision of whether a VIS should be submitted in a particular case. Once submitted, however, the statute is clear. The court must consider the VIS in making its sentencing decision. And, if a presentence investigation report is prepared, the person preparing the report must consult with a member of the deceased's immediate family and include any VIS in the report. However, the plain language of the statute suggests several arguments.

First, section 991a(C) does not mandate that VIS information, if submitted, be made available to the jury. True, section 984.1(A) of title 21 provides: "A victim, or a member of the immediate family of the victim, may present a written victim impact statement or, at the court's option, appear personally at the sentence proceeding and present the statement orally."

However, section 991a(C) only requires that VIS information, if submitted, be considered by the court before imposing sentence. Defense counsel should seek the prosecutor's agreement that the VIS information will be submitted in written form. Arguably, this is the more compassionate approach in that it spares victims the distress of giving voice to their grief. Absent such an agreement, the court should be urged to exercise its discretion to preclude the oral presentation of victim impact evidence. Oral presentations dramatically enhance the risk of unduly influencing jurors and create an environment conducive to emotional outbursts better suited to the Geraldo Rivera Show. At a minimum, courtroom decorum is sacrificed. And, in extreme cases, reversible error may result.

215. 22 Okla. Stat. § 984.1(B) (Supp. 1992). In the event the individual to be consulted cannot be located or refuses to cooperate, the report must include a notation to that effect. Id.

216. Id. § 984.1(A).

217. See id. § 991a(C). After reading an earlier draft of this article, Senator Douglass proposed Senate Bill 451. Among other things, that bill would amend Oklahoma's victim impact legislation to require submission to the jury of all VIS information. See S.B. 451, 44th Leg., 1st Sess. 39 (1993). In addition, the bill would confer on all victims an "absolute right" to personally appear at the sentencing proceeding and present the VIS orally. Id. at 38-39. At the time this article went to press, Senate Bill 451 had passed the Senate and was pending before the House Committee on Criminal Justice.

218. Allowing victim impact statements during non-capital cases can also result in serious breaches of courtroom decorum. For example, during the sentencing phase for convicted serial killer Jeffrey Dahmer, Milwaukee County Court Judge Laurence C. Gram Jr. permitted nine relatives of Dahmer's victims to describe the pain they suffered because Dahmer killed, butchered, and had sex with the corpses of their family members. Many may recall the newspaper photograph of Rita Isbell, sister of a Dahmer victim, being restrained from physically assaulting Dahmer while presenting her victim impact evidence. According to Associated Press news accounts, before she was led away, Ms. Isbell shouted "Satan!" at Dahmer and screamed "Jeffrey, I hate you!" as she lunged toward him, shaking her fist and shouting obscenities. See Dahmer Receives Life Terms; Victims' Relatives Tell of Loss, Dallas Morning News, Feb. 18, 1992, at 3A.

The wisdom of permitting victim impact statements to be made in Dahmer's case is certainly questionable, given the fact that the sentences imposed — 15 life sentences — flowed automatically from the jury's guilty verdict. The only issue before the court was
Whether the victim impact statement is presented orally or in written form, strong arguments counsel against allowing the VIS to affect jury deliberations. Indeed, putting such evidence before the jury substantially increases the risk that sympathy will infect the sentencing decision, rendering it arbitrary and capricious. Conversely, judges are less likely to be unduly influenced by such volatile evidence.  

Second, section 991a(C), when read in conjunction with the definition of victim impact statement contained in section 984, would appear to require the court to consider VIS information submitted by the defendant. The clear language of section 984 imposes no limitation on the source of the information regarding the impact of the crime on a victim or member of the victim's immediate family. Although section 984.1(A) appears to limit the universe of persons who present victim impact statements to "victim[s] or a member of the immediate family of the victim," in rare cases family members opposed to the death penalty may be willing to testify for the defense. And even in those many cases in which sympathetic family members do not exist, the Sixth Amendment right of confrontation guarantees that impeachment evidence be admitted. Consequently, defense counsel in capital cases now have an affirmative duty to explore the background and character of the murder victim. In appropriate cases, evidence may be discoverable showing that a particular victim's immediate family members benefitted financially from the defendant's actions if, for example, they received large sums of money under a life insurance policy.  

Third, section 984.1(C) requires the court to "make available to the parties copies of any victim impact statement." As a matter of fundamental fairness, defense counsel should be entitled to receive copies of any VIS the prosecutor seeks to submit into evidence well before the court rules on its admissibility. This will enable defense counsel to lodge appropriate objections and to carefully investigate the veracity of any factual assertions contained in the statement.  

In order to render effective assistance, defense counsel now have a clear duty to investigate the veracity of victim impact evidence. However, their task may be unconstitutionally hampered by section 984.2 of the new law. That section empowers the court, in certain limited circumstances and upon request of either the district attorney or a victim impact witness, to

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219. See, e.g., State v. Card, 825 P.2d 1081 (Idaho 1991) (statement of victim's family that defendant should be put to death did not interfere with judge's decision to impose the death penalty); State v. Johnson, 594 N.E.2d 253 (III. 1992) (no possible error in allowing victim impact evidence where judge sentenced defendant and made no reference to such evidence).


221. Id. § 984.1(C).
USE OF VICTIM IMPACT EVIDENCE

prevent the disclosure of the "victim's address, telephone number, place of employment, or personal information" other than in a transcript of a court proceeding.\(^{222}\) Before section 984.2's shroud of secrecy descends to make victim impact witnesses unavailable to defense counsel, the court is required to make two determinations: (1) that it is "necessary to protect the victim or immediate family of the victim from harassment or physical harm"; and (2) that the information is immaterial to the defense.\(^{223}\)

Several arguments should be made to overcome this thinly-veiled attempt to interfere with the defense counsel's legitimate investigative function. First, disclosing the victim impact witness information to the defendant's attorney (as opposed to the defendant himself) should in no way increase the risk of harassment or physical injury. Moreover, even though prosecution witnesses are not legally required to cooperate with defense attorneys, defense attorneys are legally obligated to investigate fully the evidence offered against their clients. This duty gives rise to a second argument against the application of section 984.2: information necessary to enable a defense lawyer to discharge his duty to investigate the evidence offered against his client is material per se.

Even for those defendants fortunate enough to confront VIS testimony at trial and escape a death sentence, the VIS will continue to haunt them long after the jury has been discharged and the sentence has been imposed. The new law mandates consideration of a VIS as part of the parole decision. Under title 57, section 332.8 of the Oklahoma Statutes, "no recommendations to the Governor for parole shall be made" unless the Pardon and Parole Board "considers the victim impact statement if presented to the court at the time of sentencing."\(^{224}\) Thus, the new law ensures that a VIS, if submitted, will become part of an inmate's parole file. In addition, the Pardon and Parole Board is required to permit a victim's representative to testify at the parole hearing of the inmate for at least five minutes.\(^{225}\)

To make matters worse, on April 14, 1992, Governor Walters signed into law House Bill 2271, which amended the law regarding capital sentencing proceedings.\(^{226}\) This measure effectively expands the list of aggravating circumstances in capital murder prosecutions to include consideration of the harm and loss suffered by the family of the victim and the nature and extent of the harm and loss suffered by the victim. Specifically, the statute as amended now provides:

\(^{222}\) Id. § 984.2.

\(^{223}\) Id.

\(^{224}\) 57 OKLA. STAT. § 332.8 (Supp. 1992).

\(^{225}\) Id. § 332.2. Of course, nothing in the statute prevents an inmate from presenting evidence of rehabilitation and remorse.

In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in Section 701.7 et seq. of this title. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. In addition, the state may introduce evidence about the victim and about the impact of the murder on the family of the victim.  

Like Senate Bill 816, this law suffers from a lack of clarity. Use of the word "may" in the underscored language suggests that House Bill 2271 also commits to the prosecutor's discretion the decision of whether to introduce victim impact evidence. Although the statute empowers the prosecution to introduce such evidence, the defendant's rights to cross examine witnesses and offer rebuttal evidence remain intact.

Several infirmities in the statute deserve mention. First, the statute by its terms only permits the introduction of victim impact evidence offered by the state. No provision exists for admitting victim impact evidence offered by the defense. As noted above, in rare cases evidence may be available which suggests that family members actually benefitted from the death of a particularly brutal and abusive individual. For example, defendants may seek to introduce evidence that the deceased battered women or abused his children.  

Second, although House Bill 2271 contemplates that victim impact evidence will be offered by the state to show the aggravated nature of the killing, the statute stops short of expressly creating a ninth aggravating circumstance, proof of which would render a defendant death-eligible. With respect to evidence in aggravation offered to establish any of the eight enumerated aggravating circumstances, the statute is clear. The state must disclose this evidence to the defendant prior to trial or it will be ruled inadmissible. However, the statute does not expressly require the state to disclose to the defendant prior to trial victim impact evidence the state plans to introduce. Thus, the state may seek to avoid giving the defendant fair notice of victim impact evidence. This possibility is especially pernicious given the likelihood that victim impact evidence will be used to bolster the state's proof with respect to certain of the enumerated statutory aggravators. The propensity of victim impact evidence to magnify and distort the state's proof of certain aggravators requires that the prosecution provide defense counsel with adequate notice of any VIS to be introduced. For example, can any one doubt that a jury confronted with the overwhelming grief of family members of the deceased will be more inclined to find that "the murder was especially heinous, atrocious, 


228. See supra notes 75-76 and accompanying text.


or cruel"?

Indeed, victims' characterizations of the defendant and the crime and victims' opinions as to appropriate sentence are likely to color the jury's determination of whether the defendant would probably "commit criminal acts of violence that would constitute a continuing threat to society."

With respect to these two statutory aggravators, then, permitting victim impact evidence splashes gasoline on an already raging fire.

Tragically, the Oklahoma legislature has now decreed that, at least in capital murder cases, victims will receive unequal treatment based upon their relative value to society and the ability of surviving family members to articulate their grief and loss. Sentencing for defendants in such cases will be cut loose from any relation to their moral culpability, often with ironic results. Defendants fortunate enough to kill someone without any family will avoid the draconian state laws permitting victim impact evidence and may thereby escape the death penalty. Moreover, if a defendant murdered a convenience store clerk in cold blood during the course of an armed robbery, he will likely be permitted to rebut victim impact evidence by offering evidence unknown to him at the time of the crime about the immoral character of his victim. Sadly, even if all persons are created equal as a matter of federal constitutional law, under Oklahoma law, murder victims throughout the state will no longer enjoy the equal protection of the law.

IX. Conclusion

By permitting the injection of victim impact evidence into capital sentencing determinations, Payne v. Tennessee dramatically alters the criteria for deciding which defendants are deserving of death. According to Payne, jury sentencing must still reflect an individualized determination of whether a defendant should be executed based upon his character and the circumstances of his crime. However, a defendant's blameworthiness or moral culpability may now be assessed by reference to the victim's character or the peculiar circumstances or sufferings of the victim's family. Thus, the introduction of arbitrary and capricious criteria into capital sentencing determinations, condemned in Furman, is resurrected in Payne. Worse still, the inflammatory nature of victim impact evidence is certain to foreshadow an increase in the number of death sentences by diverting the jury's attention away from the defendant and focusing instead on the character of the murder victim and the palpable suffering of grief-stricken family members.

In a reactionary rush towards retribution, the Oklahoma state legislature has passed victim impact evidence legislation which is at best unwise and at worst unconstitutional. The new laws substantially increase the obliga-


232. See id. § 701.11(7).

tions of defense counsel representing capital clients. In addition to investigating the circumstances of the crime and the background and character of the defendant, defense counsel must expend precious time and effort exploring the character of the victim. Moreover, Oklahoma's victim impact legislation may tempt unscrupulous prosecutors to prey upon reluctant family members by recruiting them to testify in favor of a death sentence. Homicide survivors are extremely vulnerable and susceptible to being manipulated by prosecutors who seek to gain a tactical advantage by exploiting their grief and anger. Special care must be taken to prevent the "revictimization" of surviving family members. The inevitable consequence of inflicting Payne on Oklahoma's Code of Criminal Procedure is to skew the state's criminal justice system in favorem mortis.