

THE CONSTITUTIONALITY OF VICTIM IMPACT STATEMENTS: *PAYNE V. TENNESSEE*, 111 S. CT. 2597 (1991)

The sentencing stage of a criminal proceeding gives the sentencing authority an opportunity to evaluate whether a particular penalty is suitable for a convicted defendant.¹ Recently, many state legislatures have allowed sentencing bodies to consider victim impact evidence² before arriving at a decision.³ This evidence permits a sentencing authority to consider a crime's effect on the victim and his or her family.⁴ The admissibility of victim impact evidence at capital sentencing hearings provides a unique challenge to the Supreme Court's construction

1. In a capital punishment proceeding, the sentencing authority decides whether to sentence the defendant to death or otherwise. See generally GEORGE E. DIX & M. MICHAEL SHARLOT, *CRIMINAL LAW: CASES AND MATERIALS* 17-27 (West 3d ed. 1984).

2. The concept of victim impact evidence dates back to 1978 when legislatures reacted to the victim's rights movement. For an explanation of the history of the movement, see generally Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1984) (discussing the rise of the victims' rights movement over the last several decades). Today, this concept refers to three types of information: (1) the personal characteristics of the victim, (2) the emotional impact of the crimes on surviving family members, and (3) the family members' opinions and characterizations of the crimes and of the defendant: Brief for Petitioner at 11, *Payne v. Tennessee*, 111 S. Ct. 2597 (1991) (No. 90-5721) [hereinafter Brief for Petitioner] (discussing the factors held by the Court in *Booth v. Maryland*, 482 U.S. 496, 502-03 (1987), to be irrelevant and constitutionally inadmissible in capital sentencing cases).

3. As of 1990, at least 43 states had provisions in their respective state criminal laws to allow a sentencing authority to consider the impact that a crime had on its victim. The following are examples of legislation: ILL. ANN. STAT. ch. 38, para. 1406 & 1005-4-1(6) (Smith-Hurd 1982 & Supp. 1991); N.Y. CRIM. PROC. LAW § 390.30(3)(b) (McKinney 1983 & Supp. 1991); OHIO REV. CODE ANN. § 2947.05.1 (Anderson 1982); TEX. CRIM. PROC. CODE ANN. §§ 56.02 - 56.03 (West 1979 & Supp. 1991).

4. In *Booth v. Maryland*, 482 U.S. 496 (1987), for example, the victim impact evidence, which the Court held constitutionally inadmissible, included comments by the children and granddaughter of the murder victims about the victims' outstanding personal qualities, emotional problems that surviving family members must face, and physical sufferings in the family. *Id.* at 499-500.

of Eighth Amendment guarantees.⁵ These guarantees must be preserved when citizens face the possibility of society's most severe punishment.⁶ In *Payne v. Tennessee*,⁷ the Court overruled two recent high court decisions⁸ and held that the Eighth Amendment does not prohibit presentation of victim impact evidence to a capital sentencing jury.

In *Payne*, the petitioner was convicted on two counts of first degree murder for killing a woman and her baby daughter, and was sentenced to death for each.⁹ At sentencing, the State presented testimony from the murdered woman's mother who described how the murders af-

5. 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.

6. Great debate centers around what the phrase "cruel and unusual punishment" encompasses. At the simplest level, the debate hinges on whether the sentencing authority should apply the death penalty solely on the basis of the physical act committed, or whether it may apply the more severe penalty due to the physical act's repercussions. See, e.g., Kevin J. McCoy, Comment, *Preserving Integrity in Capital Sentencing: Booth v. Maryland*, 22 CREIGHTON L. REV. 333 (1988) (agreeing with the Court's use of heightened scrutiny in capital cases regarding victim impact evidence). See generally WALTER R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 2.14(f) (2d ed. 1986) (asserting that the prohibition against cruel and unusual punishment includes three aspects: (1) limiting the method of punishment, (2) limiting the amount of punishment prescribed for a given offense, and (3) barring penal sanctions in certain contexts).

The Court has stated that the Eighth Amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (noting that it was cruel and unusual punishment to revoke the United States citizenship of a military deserter). See also *Woodson v. North Carolina*, 428 U.S. 280, 289-93 (1976) (discussing how the meaning of cruel and unusual punishment evolved as society's standards changed: after the Eighth Amendment was adopted in 1791, the states first followed the common-law practice of making the death sentence mandatory for certain offenses, but then jury determinations and legislative enactments reduced the number of capital offenses).

7. 111 S. Ct. 2597 (1991).

8. *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

9. *Tennessee v. Payne*, 791 S.W.2d 10 (Tenn. 1990). Payne was convicted for murdering 28 year-old Charisse Christopher and her 2 year-old daughter Lacie. *Id.* at 11. He was also convicted of assault with intent to commit murder in the first degree upon Charisse's 3 year-old son Nicholas who survived multiple stab wounds. *Id.* at 11-12. The evidence showed that Payne spent the morning and early afternoon of the incident drinking beer and injecting cocaine. 111 S. Ct. at 2601. Later in the afternoon, Charisse resisted Payne's sexual advances in her apartment. Upon resistance, Payne became violent and used a butcher knife to stab the three family members. *Id.* at 2601-02.

fectured her daughter's surviving young son.¹⁰ Additionally, in his closing argument seeking the death penalty, the prosecutor referred to the continuing effects of the crime on the young boy.¹¹ The Tennessee Supreme Court affirmed the conviction holding that the grandmother's testimony was "technically irrelevant," but not fatal to the imposition of the death penalty, and that the closing argument was "harmless beyond a reasonable doubt."¹² The United States Supreme Court granted certiorari¹³ and requested briefs on whether the Court should overrule its holdings in *Booth v. Maryland*¹⁴ and *South Carolina v. Gathers*.¹⁵ The holdings in those cases precluded capital sentencing juries from considering victim impact evidence.¹⁶ The Supreme Court in *Payne* affirmed the decision of the Tennessee Supreme Court and held that the Eighth Amendment does not erect a per se bar to prohibit a capital sentencing authority from considering evidence about the victim's personal characteristics and the crime's emotional impact on the victim's family.¹⁷

10. When the prosecution asked how the young boy was affected by the murders, the victim's mother responded:

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."

111 S. Ct. at 2603.

11. The prosecutor argued for the death penalty and noted the effects of the murder on Nicholas, "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 . . . So he knew what happened to his mother and baby sister." *Id.*

During closing argument, the prosecutor recounted the effects on Nicholas and concluded, "These are the things that go into why it is especially cruel and heinous and atrocious, the burden that that child will carry forever." *Id.*

12. 791 S.W.2d at 16-18.

13. 111 S. Ct. 1031 (1991).

14. *Booth v. Maryland*, 482 U.S. 496 (1987). The Court addressed the constitutionality of victim impact evidence for the first time in *Booth*, invalidating a Maryland statute which required a sentencing jury to consider such evidence. See *infra* notes 48-63 and accompanying text for further discussion of the *Booth* case.

15. *South Carolina v. Gathers*, 490 U.S. 805 (1989). The Court refined its analysis of victim impact evidence when it extended the *Booth* holding to include a prohibition forbidding a prosecutor from commenting to the jury about a victim's personal characteristics. *Id.* at 811. See *infra* notes 64-75 and accompanying text for further discussion of the *Gathers* case.

16. 111 S. Ct. 1031 (1991).

17. The Court, however, limited its holding and did not disrupt the holding in *Booth* which prohibited victim impact evidence concerning a victim's family's charac-

Since the landmark decision of *Furman v. Georgia*,¹⁸ which found the death penalty unconstitutional as applied to three petitioners,¹⁹ the Court has often grappled with the role of the Eighth Amendment in the capital punishment context.²⁰ In his concurrence to the *Furman* per curiam opinion, Justice Brennan noted that the legal community has very little evidence of the framers' intent regarding the Eighth Amendment's prohibition against "cruel and unusual punishment."²¹ Justice White added that a state's use of the death penalty should be discontinued as unconstitutionally cruel and inhumane because it was so infrequently imposed. This infrequent use creates "no meaningful basis" for distinguishing between the few cases when the death penalty is administered from the many cases in which it is not.²² In his dissent in *Furman*, Justice Blackmun anticipated the issue ultimately resolved in *Payne*. In that dissent, he admonished the Court for not incorporating the misery endured by victims and their families into its discussion of capital sentencing.²³ The controversy surrounding victim impact evidence increased in the 1980's,²⁴ and the volatility surrounding the issue is not likely to dissipate in light of the Court's reversal of deci-

terizations and opinions about the crime, the defendant, and the appropriate sentence. *Payne*, 111 S. Ct. at 2611 & n.2. For an explanation of this type of evidence, see *infra* note 56.

18. 408 U.S. 238 (1972).

19. *Furman* dealt with three petitioners who challenged the application of a Georgia death penalty statute. The petitioners were two convicted rapists and a convicted murderer. The Court found the Georgia sentencing scheme unconstitutional under the Eighth and Fourteenth Amendments. *Id.* at 239-40. Justice Douglas reasoned that one of the purposes of the Eighth Amendment is to "require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary." *Id.* at 256 (Douglas, J., concurring).

20. See *infra* notes 29-75 and accompanying text discussing the Court's past treatment of this issue.

21. 408 U.S. at 258 (Brennan, J., concurring). The Court has recently commented that, at a minimum, the Eighth Amendment prohibits punishments considered cruel and unusual at the time that the Bill of Rights was adopted. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (holding that the Eighth Amendment bars the execution of insane prisoners) (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). However, the Court still feels that the remaining boundaries of this ambiguous clause must be found in society's "evolving standards." *Penry*, 492 U.S. at 330-31 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

22. 408 U.S. at 313 (White, J., concurring).

23. *Id.* at 414 (Blackmun, J., dissenting). "[T]he terror that occasioned (the crimes) . . . deserves not to be entirely overlooked." *Id.*

24. See Carrington & Nicholson, *supra* note 2 for a discussion of the rise of the victim's rights movement.

sions only five years old.²⁵

To address the contemporary issues that victim impact evidence presents, the Court looked to its prior Eighth Amendment decisions. Admitting victim impact evidence requires the Court to analyze evidence concerning the victim in addition to the circumstances surrounding the defendant's act. The Court's previous rulings in death penalty cases, however, focus specifically on how state laws treat defendants. In general, the Court extrapolated from two categories of cases to conclude that the Eighth Amendment is not a bar to victim impact evidence. The first category deals with the control that a state must exercise over the sentencer in capital sentencing hearings.²⁶ The second category mandates that the sentencing body accept large amounts of mitigating evidence to individualize the capital defendant.²⁷ The *Payne* Court found that the state could still maintain adequate control over capital sentencing authorities despite the introduction of victim impact evidence. The Court also concluded that the sentencing authority's unique consideration of a capital defendant does not preclude the prosecution's introduction of the harm caused.

The first progeny began after *Furman*,²⁸ when the Court, in *Gregg v. Georgia*,²⁹ examined whether Georgia's capital sentencing statute necessarily ensured objectivity for the capital sentencing body.³⁰ In *Gregg*, a petitioner convicted for the armed robbery and murder of two men

25. In *Payne*, the Court noted that *Booth* and *Gathers* are based on two premises: (1) that the harm caused by a capital defendant to a victim's family does not generally reflect on a defendant's "blameworthiness;" and (2) that the defendant's blameworthiness is the only evidence relevant for a capital sentencing authority. *Payne*, 111 S. Ct. at 2605. The Court rejected these tenets and instead focused on the totality of harm that a crime causes. *Id.* at 2606.

26. For a discussion of these types of cases, see *supra* notes 28-42 and accompanying text.

27. For a discussion of these types of cases, see *supra* notes 43-47 and accompanying text.

28. For a discussion of *Furman v. Georgia*, see *supra* notes 18-25 and accompanying text.

29. 428 U.S. 153 (1976) (plurality opinion).

30. The Georgia death penalty statute read:

Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

.....

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise au-

appealed the jury's imposition of the death penalty.³¹ The petitioner argued that Georgia's capital sentencing statute was applied arbitrarily and was therefore unconstitutional.³² The Court found that the Eighth Amendment is not a per se bar on capital punishment,³³ and held that Georgia's statute did not violate the Eighth Amendment because it properly focused the jury's attention to the particular crime and the defendant.³⁴ The Court also explained that the Georgia legislature had satisfactorily amended the statute to conform with the structures of *Furman* because it provided for appellate review and consistency among death sentences.³⁵

thorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence.

.....
 (c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

Gregg, 428 U.S. at 164 n.9 (citing GA. CODE ANN. § 27-2534.1 (Supp. 1975)).

31. The petitioner, a hitchhiker, shot two men who stopped to give him a ride. 428 U.S. at 158-59. The killings took place so the petitioner could rob the men and steal their car. *Id.* at 159. At the penalty stage, the judge charged the jury to recommend either life imprisonment or the death sentence depending on its consideration of mitigating and aggravating factors. *Id.* at 160-61.

32. *Id.* at 200. The petitioner contested the imposition of the death penalty based on the jury's finding that a murder was committed in the course of another capital felony (armed robbery), and upon the finding that the murder was committed to obtain the victims' automobile and money. *Id.* at 205-06.

33. *Id.* at 187. The *Gregg* Court held that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Id.*

34. *Id.* at 197. The Court determined that Georgia's capital sentencing scheme had been rectified since *Furman*. The Court summarized:

No longer can a Georgia jury do as *Furman's* jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons?

Id.

35. 428 U.S. at 206. The Court noted that the Georgia statute utilized in *Furman* failed to guide juries, allowing them to impose the death penalty in a way that could

In *Eddings v. Oklahoma*,³⁶ the Court dealt with the other major focus in capital appeals as it emphasized the need to ensure that a capital defendant's case is adequately presented to a sentencing body.³⁷ In *Eddings*, a sixteen year-old boy who was raised in a harsh family setting killed a policeman.³⁸ The trial judge sentenced the boy to death because aggravating circumstances outweighed the only mitigating factor

only be called "freakish." *Id.* Now the Court would not stand for any process which lacked uniformity and enabled a jury to act wantonly or capriciously. *Id.* at 204-07. In this case, the safeguards of a bifurcated trial that separated the sentencing and guilt stages, and an automatic review by the Supreme Court of Georgia for the appropriateness of death penalty imposition appeased the Court. *Id.* at 163-66. *See* Proffitt v. Florida, 428 U.S. 242, 259 (1976) (plurality opinion) (explaining that Florida's capital sentencing procedure satisfied the Eighth Amendment because the trial judges had specific guidance from enumerated aggravating and mitigating factors, plus a requirement to put their reasons in writing for a death sentence which ensures effective appellate review). *But see* Godfrey v. Georgia, 446 U.S. 420, 429-34 (1980) (plurality opinion) (explaining that a trial judge cannot simply read sentencing instructions to a jury without explaining their meaning); Gardner v. Florida, 430 U.S. 349 (1977) (stating that the trial judge's rejection of the jury's recommendation of a life sentence in favor of the death penalty based on a confidential defective presentence report, which only the judge reviewed, was constitutionally defective because it was based on a confidential presentence report); Woodson v. North Carolina, 428 U.S. 280 (1976) (explaining that a mandatory death sentencing scheme simply "papers over" the problem of unguided and unbridled jury discretion).

36. 455 U.S. 104 (1982).

37. *Id.* at 112. *See* Enmund v. Florida, 458 U.S. 782 (1982). In *Enmund*, the Florida Supreme Court affirmed a death penalty without evidence that the defendant killed or intended to kill. The defendant had taken part in a robbery in which his co-felons killed an elderly couple. Florida law made Enmund a constructive aider and abettor and hence a principal in first degree murder susceptible to the death penalty. *Id.* at 788. The Court rejected Florida's use of the death penalty because it did not focus on the defendant's individual culpability. *Id.* at 801. *See also* Zant v. Stephens, 462 U.S. 862 (1983) (upholding the jury's selection of the death penalty for a defendant who murdered while an escapee from prison because the sentencing stage gave "individualized" attention to the defendant's character and the circumstances of the crime); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion) (holding that a Florida sentencing authority properly focused on defendant's prior criminal record, duress, role in the crime, and age to determine the strength of mitigating evidence); Williams v. New York, 337 U.S. 241 (1948). In *Williams*, despite a jury recommendation of life imprisonment, the trial judge's imposition of the death penalty was upheld when the judge accessed a presentence investigation of the defendant's background that was unavailable for view in open court. The court stated that the ultimate sentencing authority should possess the greatest quantity of evidence about the defendant, even if some evidence is inadmissible at the guilt stage.

38. *Eddings*, 455 U.S. at 106-07. A police officer pulled over the car that the youth was driving. When the officer approached the car, Eddings shot the officer with a shotgun. *Id.* at 106. The trial court granted the State's motion to allow the boy to stand trial as an adult despite the fact that there was evidence that the defendant's emotional

the judge recognized, the boy's age.³⁹ The trial judge failed to consider, in mitigation, the youth's upbringing and emotional disturbances.⁴⁰ The Court held that it is a violation of the Eighth Amendment for a sentencing authority to refuse to consider any relevant mitigating factors.⁴¹ Justice O'Connor, in concurrence, emphasized that the qualitative difference between death sentences and other punishments is the consideration of the character of the capital defendant and the circumstances of his offense which may render a death sentence unfounded.⁴²

Recently, in *Mills v. Maryland*,⁴³ the Court had the opportunity to consider the adequacy of objective safeguards for the capital sentencing authority and the need to individualize a capital defendant. In *Mills*, a petitioner convicted of first-degree murder⁴⁴ challenged his sentence on the grounds that the jury unconstitutionally imposed a mandatory death sentence and failed to adequately consider mitigating evidence.⁴⁵ The Court reasoned that the jury could have understood the Maryland sentencing statute to mandate the death penalty when the jury unani-

and mental development was much lower than normal for a person of the defendant's age. *Id.*

39. *Id.* at 108-09.

40. *Id.* at 109.

41. *Id.* at 112. The Court referred to a rule requiring that all circumstances and propensities of the offender be taken into account to mitigate any aggravating factors. *Id.* (explaining that the Eighth and Fourteenth Amendments require a sentencing authority to consider any mitigating factor offered to achieve a sentence less than death (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978))).

42. 455 U.S. at 117-19 (O'Connor, J., concurring). The "Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Id.* at 118.

43. 108 S. Ct. 1860 (1988).

44. The petitioner stabbed his cellmate in a Maryland correctional institute. He offered as mitigating factors his youth, mental infirmity, lack of future dangerousness, and the state's failed attempt at meaningful rehabilitation. *Id.* at 1863.

45. *Id.* at 1863-64. According to the petitioner, the court's instructions allowed for capital punishment even if each juror agreed mitigating evidence existed. The petitioner argued that the death penalty would have been imposed even if each juror believed that *some* mitigating circumstance existed. The death penalty would be avoided only upon unanimous agreement on the existence of the *same* mitigating circumstance. *Id.* at 1864. Thus, the instruction would have effectively removed the jury from the sentencing process simply because they could not agree on offered mitigating evidence. See *infra* note 54 and accompanying text citing instances in which a sentencer could not be precluded from considering any aspect of the defendant's character or circumstances of the offense offered in mitigation.

mously found an aggravating circumstance, but when no unanimity existed as to any particular mitigating circumstance.⁴⁶ Therefore, even if some jurors recognized a mitigating circumstance, they could not consider it unless all of the jurors valued that same factor. The Court held that a death sentence cannot be upheld when reasonable jurors may believe that they are to discount mitigating evidence which is not unanimously accepted.⁴⁷ Hence, the Court demonstrated that even detailed guidelines for a sentencing authority will be insufficient when they do not comport with the necessity of incorporating all mitigating evidence into a jury's analysis.

In *Booth v. Maryland*,⁴⁸ the Supreme Court first explored whether the Eighth Amendment⁴⁹ prevented a capital sentencing jury from considering victim impact evidence. After convicting the petitioner on two counts of murder,⁵⁰ the jury heard a presentence report, required by Maryland law, describing the effects that the crime had on the victim's family.⁵¹ After hearing the emotionally charged statements, the

46. *Id.* at 1870. The Court found that the jury instructions on how to mark "yes" and "no" for aggravating and mitigating circumstances were confusing because the jury could only mark "yes" for an *aggravating* circumstance if there was unanimity. Therefore, the jury could have inferred that unanimity was also required to mark "yes" for finding a *mitigating* factor. *Id.* at 1867. Implicit in the Court's holding are the requirements that a sentencing jury must have unambiguous instructions and that the sentencer must consider any circumstances that the defendant offers in mitigation.

47. 108 S. Ct. at 1868. In dissent, Chief Justice Rehnquist did not find fault with the jury instructions and proceeded to discuss an issue that the majority never reached. This question was whether the trial judge improperly allowed into evidence statements about the victim's personal characteristics. *Id.* at 1875 (Rehnquist, C.J., dissenting). The Chief Justice stated his belief that *Booth* should be overruled, and that the investigation report prepared by the victim's brother and sister-in-law in this case would not violate the Eighth Amendment if a sentencing jury would use it for "a quick glimpse of the life petitioner chose to extinguish." *Id.* at 1876 (Rehnquist, C.J., dissenting).

48. 482 U.S. 496 (1987).

49. See *supra* notes 20-42 and accompanying text discussing Eighth Amendment principles.

50. 482 U.S. at 498. John Booth entered his elderly neighbors' home so he could steal money to buy heroin. *Id.* at 497-98. Booth knew that the victims could identify him, so he stabbed them both. *Id.* at 498. The jury found Booth guilty of two counts of first-degree murder, two counts of robbery and conspiracy to commit robbery. *Id.*

51. *Id.* at 498-500. The Maryland victim impact statement law in relevant part, required the report to:

jury sentenced the petitioner to death.⁵² The Supreme Court granted certiorari to determine whether the presentation of victim impact evidence conflicts with the Eighth Amendment.⁵³ The Court found that the information was irrelevant to the capital sentencing decision and creates the risk that the death penalty will be imposed based on constitutionally impermissible grounds.⁵⁴ The Court reiterated the fact that the sentencing authority must focus on the defendants as "uniquely individual human being[s]."⁵⁵ Therefore, the Court held that the use of a victim impact statement in a capital sentencing hearing is tanta-

(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.

482 U.S. at 499 (citing MD. ANN. CODE art. 41 § 4-609(c)(3) (1986)).

52. 482 U.S. at 501. The jury sentenced Booth to death for the murder of Mr. Bronstein and life imprisonment for Mrs. Bronstein's murder.

The victim impact statement used in Booth is located at 482 U.S. at 509-15 (appendix to opinion of the Court). The statement contained descriptions of emotional and personal problems the family faced after the murders, particularly the effects on the victims' son, daughter, and granddaughter. *Id.* For instance, the son noted he is sad when he sees old people, and is aware when it is 4:00 p.m. because that was the time he found his murdered parents. *Id.* at 511-12.

53. 479 U.S. 882 (1986).

54. 482 U.S. at 502-03. The Court decided that a capital sentencing hearing does not require the admission of every possible foreseeable consequence of a crime. *Id.* at 504. The Court believed that although a wide range of foreseeable consequences is "relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing." *Id.* The Court felt that this would ensure that factors unrelated to the defendant's blameworthiness could not cloud the jury's task. *Id.* The Court feared that victim impact statements could promote arbitrary decision-making. *Id.* at 505. Furthermore, the Court was aware of the danger that could result when identical situations arose, but where only one victim left behind a family or only one's family could articulate its sense of loss. *Id.* The Court also found that such evidence shifts the hearing from the defendant to "mini-trial[s]" regarding victim impact and character. *Id.* at 507. This type of evidence does not lend itself to a rebuttal. *Id.* at 506-07.

It is critical to note that victim impact evidence is not excluded in every capital sentencing context. Sometimes information may be admissible because it relates directly to the circumstances of the crime. *Id.* at 507 n.10. *See* FED. R. EVID. 404(a)(2) (peaceable nature of victim may rebut charge that victim was aggressor); 18 U.S.C. §§ 1751, 1111 (1988) (death sentence authorized for assassinating President or Vice President of the United States).

55. 482 U.S. at 504 (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, J.J.)).

mount to "cruel and unusual punishment."⁵⁶

In dissent, Justice White attacked the majority's refusal to defer to a state's determination of which elements constitute the harm in a crime.⁵⁷ According to Justice White, a capital sentencing jury could properly consider the "full extent" of a crime, including harm to the victim's family, instead of only considering the criminal's "internal disposition."⁵⁸ Additionally, Justice White questioned the logic of possibly enhancing punishment with victim impact evidence for noncapital defendants, while forbidding it in capital cases.⁵⁹ Finally, Justice White noted that the state has an interest in counteracting the abundance of mitigating evidence that a defendant may introduce.⁶⁰ Justice White explained that the state should be able to remind the sentencing authority that although the capital defendant needs to be considered an individual, "so too is the victim whose death represents a unique loss to society and in particular to his family."⁶¹

Justice Scalia offered a brief dissent attacking the majority's foundation for improperly citing moral guilt as the sole determinant for capi-

56. 482 U.S. at 502-03. The Court also ruled unconstitutional a less common class of victim impact evidence allowed in the Maryland law. The victim's daughter stated the following to the jury, explaining that she:

[C]ould 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 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.

Id. at 508.

Such evidence was considered to have no purpose other than to inflame the jury. *Id.* at 508-09. See FED. R. EVID. 403 (evidence may be excluded for tending to have prejudicial effects).

57. 482 U.S. at 515 (White, J., dissenting). "[T]he Court should recognize that '[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'" *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

58. 482 U.S. at 516 (White, J., dissenting). Justice White analogized that someone who drives recklessly through a stoplight and kills someone is just as blameworthy as one who also runs the light but does not kill anyone. *Id.* He explained that most people would not have a problem punishing the two people with equal moral guilt unequally. *Id.*

59. *Id.* at 516-17 (White, J., dissenting). *But see McCoy, supra* note 6, at 347 ("[T]his distinction does make sense when one considers the death penalty's irrevocable nature.").

60. 482 U.S. at 517 (White, J., dissenting).

61. *Id.*

tal punishment.⁶² Instead, Justice Scalia suggested that personal responsibility based on the degree of harm that a defendant causes should constitute the critical measure.⁶³

The Court next addressed the constitutionality of victim impact evidence in *South Carolina v. Gathers*.⁶⁴ In *Gathers*, the prosecutor commented about the victim's personal qualities at the defendant's sentencing hearing.⁶⁵ The jury also heard a quotation from a religious passage which the victim was carrying at the time of his murder.⁶⁶ The defendant was unaware of the victim's possession of the passage.⁶⁷ The Court concluded that the prosecutor's statements were of the same nature as those in *Booth* and remanded the case.⁶⁸ *Gathers* therefore extended the Court's holding in *Booth* and precluded a sentencing jury from considering prosecutor's statements about the victim's circumstances that are unknown to the defendant when the crime was committed.⁶⁹

62. *Id.* at 519-20 (Scalia, J., dissenting). Justice Scalia found the Court's opinion in *Tison v. Arizona*, 481 U.S. 137 (1987), dispositive on the proposition that moral guilt is not the only element relevant in capital sentencing. In *Tison* two brothers were executed for the major role they played in their father's escape from prison, during which he killed four people. 481 U.S. at 140-41. The death sentence was unrelated to the brothers' blameworthiness, but rather it followed from their accountability in their major role in the escape. *Id.* at 158. The jury sentenced the brothers based on the extent of the harm committed. *Id.*

63. 482 U.S. at 519-20 (Scalia, J., dissenting).

64. 490 U.S. 805 (1989).

65. *Id.* at 808-10. The defendant and three companions beat a 31 year-old man who referred to himself as "Reverend Minister." *Id.* at 806-07. The victim was sitting on a park bench when he was attacked, and he had religious articles used for preaching in his possession. *Id.* After the attack, the defendant sexually assaulted the victim with an umbrella. *Id.* at 807. The defendant was found guilty of murder and first-degree criminal sexual conduct. *Id.* at 807-08.

66. *Id.* at 808-09. The prosecutor emphasized the religious nature of the victim, and commented on his lack of "fame or fortune." *Id.* at 809. In addition, the prosecutor quoted in its entirety a religious tract in the victim's possession when he was killed. The tract, entitled "The Game Guy's Prayer," used football and boxing metaphors to describe how to act as a good person. *Id.* at 808-09.

67. *Id.* at 811.

68. 490 U.S. at 810. The court did not see a difference in victim impact statements made by a prosecutor rather than the victim's survivors. *Id.* at 810-11.

69. *Id.* at 811. There was no evidence that the attackers read any items the victim possessed, making any claim of their relevance to the circumstances of the crime unsupported. *Id.* The Court considered it "purely fortuitous" that the victim happened to possess items which could emotionally impact a jury. *Id.* at 812. Furthermore, the Court precluded admitting such evidence even when a prosecutor incorporates it into arguments to the sentencing body. *Id.* at 811-12. See, e.g., Eric S. Newman, Note,

Justice O'Connor, in dissent, rejected a rigid view of *Booth* and sided against precluding prosecutorial comment about the victim.⁷⁰ Justice O'Connor explained that the prosecutor has the right to show the jury facts about the victim especially at sentencing when a broader scope of evidence is admissible.⁷¹ Justice O'Connor also argued that because retribution is a goal of the death penalty, the defendant's punishment should be commensurate with the harm.⁷² Thus, Justice O'Connor did not believe that the Eighth Amendment necessitated the portrayal of a victim as a "faceless stranger" at a capital trial.⁷³

Justice Scalia, dissenting, also voiced his rejection of the *Booth* hold-

Eighth Amendment — Prosecutorial Comment Regarding the Victim's Personal Qualities Should Not Be Permitted At The Sentencing Phase Of A Capital Trial, 80 J. CRIM. L. & CRIMINOLOGY 1236, 1251 (1990) (explaining the impropriety of a sentencing jury to decide a defendant's fate by subjectively valuing a prosecutor's arguments concerning the victim's personal qualities).

70. 490 U.S. at 814 (O'Connor, J., dissenting). Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, maintained that *Booth* was incorrectly decided, but declared that the *Gathers* majority could have ruled differently without undoing that precedent. *Id.* at 813-14. In support of this contention, Justice O'Connor pointed to the alternative readings that lower courts had applied to *Booth*. The South Carolina Supreme Court read *Booth* to say that any injection of the victim's personal characteristics at sentencing violates the Eighth Amendment. *South Carolina v. Gathers*, 369 S.E.2d 140, 144 (S.C. 1988). Other jurisdictions, however, did not consider *Booth* to hold that a prosecutor is precluded from arguing about a victim's personal characteristics. See *Daniels v. State*, 528 N.E.2d 775, 782 (Ind. 1988) (distinguishing *Booth* from a situation where prosecutor's remarks referred to information adduced as evidence at trial); *Moon v. State*, 375 S.E.2d 442, 450 (Ga. 1988) (stating that the "mere mention" of facts about the victim, developed at trial, that are not outside the realm of the "circumstances of the crime" will not always be problematic (quoting *Brooks v. Kemp*, 762 F.2d 1383, 1409 (11th Cir. 1985))).

71. 490 U.S. at 816-17 (O'Connor, J., dissenting). In this instance, the jury listened to the defendant's mother, sister, cousin, and sixth grade teacher offer plausible mitigating evidence that the defendant was an affectionate, caring person. *Id.* at 817. Justice O'Connor explained that the prosecutor should have an opportunity to speak about the victim's characteristics because at sentencing "[e]vidence extraneous to the crime itself is deemed relevant." *Id.*

72. *Id.* at 818 (O'Connor, J., dissenting) (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, J.J.)). But see *Newman*, *supra* note 69, at 1249-50 (opposing Justice O'Connor's use of *Tison* for the proposition that punishment should equal the harm caused in all situations, because *Tison* applied the death penalty due to the murders themselves, not whom the victims were).

73. *Gathers*, 490 U.S. at 821 (O'Connor, J., dissenting). Justice O'Connor saw no constitutional infringement when a prosecutor tells the jury that the victim was "an ordinary citizen" who felt that he could sit on a public park bench "without the risk of death." *Id.* at 820.

ing.⁷⁴ He urged the Court not to succumb to the “freshness” of *Booth*, but rather to remove it from the books quickly and minimize its effects on state and federal laws.⁷⁵

*Payne v. Tennessee*⁷⁶ gave the United States Supreme Court the opportunity to reconsider *Booth* and *Gathers*.⁷⁷ The Court overruled *Booth* and *Gathers*⁷⁸ and held that the Eighth Amendment does not erect a per se barrier to the admission of victim impact evidence to a capital sentencing jury.⁷⁹ The Court rejected prior suppositions that victim impact evidence does not reflect the defendant’s blameworthiness, and that only blameworthiness is important in the capital sentencing decision.⁸⁰ The Court instead favored freedom for states to devise methods to be used to inform a sentencing authority about the specific harms resulting from a crime.⁸¹ The Court legitimized the use of victim impact evidence, finding nothing “cruel and unusual” about a family’s testimony or a prosecutor relaying “the human cost of the crime” to the jury.⁸²

74. *Id.* at 823-25 (Scalia, J., dissenting).

75. *Id.* at 824. Justice Scalia argued for promptly overruling *Booth* to preserve society’s standard of focusing on the specific harm when administering criminal punishment. *Id.* at 823. He documented other instances where the Court had overruled prior decisions within relatively short periods of time. *Id.* See, e.g., *Daniels v. Williams*, 474 U.S. 327 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527 (1981) and holding that a state official’s negligent act does not implicate the Due Process Clause).

76. 111 S. Ct. 2597 (1991).

77. Brief for Respondent at 11, *Payne v. Tennessee*, 111 S. Ct. 2597 (1991) (No. 90-5721) [hereinafter Brief for Respondent] (arguing that *Booth* and *Gathers* promulgated rules which improperly prevented juries from punishing defendants for the full extent of the harm caused).

78. The Court did not disrupt that portion of *Booth* which held that evidence of a family’s characterizations and opinions about the defendant and the proper sentence violated the Eighth Amendment. *Payne*, 111 S. Ct. at 2611 n.2. For an example of this type of evidence, see *supra* note 5.

79. 111 S. Ct. at 2609.

80. *Id.* at 2605. The Court proceeded to cite the Federal Sentencing Guidelines of 1987, explaining that the guidelines provide for calibrated sentences based on subjective guilt and the amount of harm caused so as to allow a court flexibility within each crime’s circumstances. *Id.* at 2605-06. The Court, however, did not cite specific examples of the operation of the guidelines.

81. *Id.* at 2607-08. See also Brief for Respondent, *supra* note 77, at 16-17 (arguing that *Booth* and *Gathers* mistakenly take away the state’s authority to choose substantive factors relevant to capital sentencing decisions).

82. 111 S. Ct. at 2609. The Court mentioned that victim impact evidence does not attempt to encourage comparisons from one type of victim to another. *Id.* at 2607. However, the Court’s *ipse dixit* does not respond to the petitioner’s argument that a

The Court determined that victim impact evidence serves a legitimate purpose in criminal justice, and neither promotes jury capriciousness nor limits the sentencing authority's consideration of mitigating evidence.⁸³ A majority of the Court sided with *Booth's* dissent and decided that proper punishment for a murder can only occur when the jury individualizes both the murderer and the victim.⁸⁴ The Court emphasized the fact that, in a capital sentencing hearing, almost no limits are placed on the defendant's introduction of relevant mitigating evidence.⁸⁵ The Court thought it important to offer the jury "a glimpse of the life" that the defendant "chose to extinguish."⁸⁶ The Court explained that victim impact evidence should only be excluded when it infringes upon the Due Process Clause of the Fourteenth Amendment.⁸⁷

Justice Souter's concurrence stems from his understanding of a legal tradition which has never categorically excluded evidence about a crime's effects.⁸⁸ Justice Souter contended that murder has the foreseeable consequences of leaving "survivors" whom the crime will affect.⁸⁹

sentencer will become "society's agent" to "implement social prejudice" based on the victim's appeal to the jury. Brief for Petitioner, *supra* note 2, at 23.

83. 111 S. Ct. at 2606-08. The Court claimed that the *Booth* opinion erred by construing the Court's earlier mandate that a capital defendant be considered a "uniquely individual human being" to mean that a class of evidence (evidence not specific to the defendant or the criminal act) could not be considered at sentencing. *Id.* at 2607 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Rather, the Court said that that language guaranteed consideration of mitigating evidence for a defendant, and that it had no bearing on allowing other evidence for the prosecution. The result of not allowing the introduction of victim impact evidence results in a scale that is "unfairly weighted" towards the defendant in a capital trial. *Id.* The Court explained that allowing prosecutorial use of victim impact evidence to oppose the defendant's use of mitigating factors will make the scales more equally weighted. *Id.*

84. *Id.* at 2608.

85. *Id.*

86. *Id.* (citing *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

87. 111 S. Ct. at 2608. The Court explained that "if evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.*

88. *Id.* at 2614 (Souter, J., concurring). Justice Souter views the harmful impact on the victim's family as a foreseeable consequence of a murder.

89. Justice Souter explained that:

Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death.

Therefore, the defendant need not foresee in detail how his "choice necessarily relates to a whole human being."⁹⁰

Justices Marshall and Stevens dissented in support of the precedent in *Booth*.⁹¹ Justice Marshall adhered to concerns that victim impact evidence allows deviation from the defendant's culpability, and promotes arbitrary jury decisions based on the eloquence of a victim's family.⁹²

Justice Stevens, in dissent, looked beyond *stare decisis* doctrine and viewed *Payne* as a "sharp break" from the Court's understanding of the Eighth Amendment.⁹³ Justice Stevens claimed that the majority is guilty of resting its opinion on political appeal rather than reasoned jurisprudence.⁹⁴ He added that the Constitution grants a defendant special protection from an overly powerful state, and discredited the argument that victim impact evidence is necessary to balance the defendant's introduction of mitigating evidence.⁹⁵ Finally, Justice Stevens emphasized that victim impact evidence should not enter the sentencing decision because it relates to harm recognized after a criminal act. Justice Stevens asserted that the majority illogically analogizes

Id. at 2615 (Souter, J., concurring).

90. *Id.* at 2615-16 (Souter, J., concurring). Justice Souter also saw the continuance of the *Booth* holding as promoting arbitrariness. *Id.* at 2616. He noted that some evidence that is commonly produced at the guilt-phase of a trial technically can be classified as victim impact evidence (that is, what job the victim held and whether the victim has surviving family members). *Id.* at 2616-17. He suggests that to comply with *Booth*, specific facts unknown to the defendant would have to be excluded at trial to ensure that the jury would not later refer to them at sentencing. *Id.* at 2617. This, he feared, would deprive jurors of needed contextual information and reduce their comprehension of the crime. *Id.*

91. 111 S. Ct. at 2619 (Marshall, J., dissenting). Justice Marshall saw the change in the Court's position on victim impact evidence as attributable solely to the additions of Justices Kennedy and Souter. *Id.* Justice Marshall warned that this may indicate the Court's future "defiance" of established principles of constitutional liberties. *Id.*

92. *Id.* at 2620.

93. *Id.* at 2625 (Stevens, J., dissenting). Justice Stevens started with the premise that a capital sentence can only be the product of the jury's consideration of evidence about the "character of the offense and the character of the defendant." *Id.* at 2626.

94. *Id.* at 2627, 2631 (Stevens, J., dissenting). Justice Stevens noted the popularity of a tough stand on crime must not influence the Court to compromise judicial reasoning. *Id.* at 2627.

95. 111 S. Ct. at 2627. As an example of the rules of evidence weighing in the defendant's favor, Justice Stevens pointed to a defendant's ability to introduce evidence of a good reputation to establish a law abiding nature, coupled with the ban on the prosecution to refer to the defendant's character to prove criminal propensities. *Id.* at 2627-28. See also FED. R. EVID. 404(a).

the case for victim impact evidence with instances where the harm dictates the sentence because the harm defines the crime before the act.⁹⁶

The Supreme Court's decision in *Payne* is inconsistent with this country's tenets of criminal law. First, victim impact evidence has no relation to the cornerstones of the American penal system: the criminal act, its relation to the defendant's state of mind, and advance public warning about applicable punishments.⁹⁷ Notwithstanding its elaboration of the totality of harm, Justice Stevens's dissent sufficiently illustrates that victim impact evidence only becomes relevant to a capital sentencing authority when the resulting harm was foreseeable.⁹⁸ Second, the decision functionally establishes a capital sentencing system not based on guidance and consistency.⁹⁹ The "irrevocable nature" of the death penalty warrants a more objective jury analysis than one left to the whim of a prosecutor, appealing to emotions, prejudices, and values.¹⁰⁰ Moreover, the Court's previous desire for states to distinguish between a capital and non-capital murder may become impossible.¹⁰¹

Another realistic concern is that a capital sentencing hearing may now become a prolonged "side-show" concerning victim impact evidence.¹⁰² The jury may easily become distracted, and confuse the real

96. 111 S. Ct. at 2628-29 & n.2. An example of this is the imposition of the death penalty for assassinating the President. See *supra* note 54 and accompanying text. Justice Stevens stated that it is improper for the majority to attempt to make a case for victim impact evidence by showing other instances where criminal punishment looks to the amount of harm caused. *Id.* at 2628. He used Justice White's analogy of two drunk drivers with the same amount of moral guilt facing different sentences only because one killed someone while driving. *Id.* at 2629. See *supra* note 58 for an explanation of the analogy. Justice Stevens explains that the analogy is fully consistent with Eighth Amendment jurisprudence. 111 S. Ct. at 2629. Harm is foreseeable to the actor who drives drunk, and he or she knows in advance that the legislature establishes more severe penalties for that class of harm. *Id.* Conversely, one does not commit victim impact evidence, one commits a murder which arbitrarily may produce an impact on a family. *Id.*

97. See generally LAFAYE & SCOTT, *supra* note 6, at §§ 1.2(b), 3.1.

98. See *supra* notes 93-96 (discussing Justice Stevens's dissent in *Payne*).

99. It seems difficult to overcome the argument that rather than uniformly applying the death penalty, courts allowing victim impact evidence will allow capital sentencing juries to value victims as a way to determine which defendants will die. See generally Newman, *supra* note 69; Brief for Petitioner, *supra* note 2, at 23.

100. See McCoy, *supra* note 6, at 347.

101. See Brief for Petitioner, *supra* note 2, at 26-27.

102. See *Booth*, 482 U.S. at 506-07. The Court in *Booth* noted the difficulty of preventing a shift in the focus from the defendant to the information regarding the

issues when focusing on a family member's testimony. In addition, the Court has no constitutional support for suggesting that a sentencing hearing should be a symmetrical presentation of the State's case and the defendant's mitigating evidence.¹⁰³

The Court's recent personnel changes have resulted in a diminution of the Eighth Amendment's safeguards. By allowing victim impact evidence at a capital sentencing hearing, the Court accedes to the growing victim's rights mobilization,¹⁰⁴ and depreciates the Constitution's charge to forbid "cruel and unusual punishment."¹⁰⁵ The Court has signaled an expansive role for capital punishment. Hopefully, states will conscientiously decide, in light of the Court's recent fluctuation, that the ultimate criminal sentence is misplaced when there remains the possibility that two criminals could commit identical actus rei with only one paying with his life.

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victim. The *Booth* Court was aware of the inherent dangers that could result. *Id.* at 506. The Court alluded to the idea that the defendant would be forced to take the offensive, and in so doing, the trial could appear to the jury as centering on the defendant's ability to discredit the victim's family's testimony. *Id.* at 506-07. Since such testimony is difficult to rebut, the jury may become confused and base the defendant's sentence on his failure to do so. *Id.* at 507.

103. See *supra* note 95 noting the difference in the ability of the defense attorney and the prosecutor to bring up the defendant's character under the Federal Rules of Evidence.

104. For an historical explanation of the victim's rights movement, see generally Carrington & Nicholson, *supra* note 2.

105. See *supra* note 5 for the language of the Eighth Amendment.

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