# CAPITAL PUNISHMENT:
# RACE, POVERTY & DISADVANTAGE

Yale University
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## Class Four - Part Two

# VICTIM IMPACT EVIDENCE

**John BOOTH, Petitioner**
**v.**
**MARYLAND**.

Supreme Court of the United States
482 U.S. 496, 107 S.Ct. 2529 (1987)

Powell, J., announced the opinion of the Court. White, J., filed a dissenting opinion in which Rehnquist, C.J., O'Connor, and Scalia, JJ., joined. Scalia, J., filed a dissenting opinion in which with whom Rehnquist, C.J., White and O'Connor, JJ., joined.

**Justice POWELL** delivered the opinion of the Court.

The question presented is whether the Constitution prohibits a jury from considering a "victim impact statement" during the sentencing phase of a capital murder trial.

**I.**

In 1983, Irvin Bronstein, 78, and his wife Rose, 75, were robbed and murdered in their West Baltimore home. The murderers, John Booth and Willie Reid, entered the victims' home for the apparent purpose of stealing money to buy heroin. Booth, a neighbor of the Bronsteins, knew that the elderly couple could identify him. The victims were bound and gagged, and then stabbed repeatedly in the chest with a kitchen knife. The bodies were discovered two days later by the Bronsteins' son.

A jury found Booth guilty of two counts of first-degree murder, two counts of robbery, and conspiracy to commit robbery. The prosecution requested the death penalty, and Booth elected to have his sentence determined by the jury instead of the judge. Before the sentencing phase began, the State Division of Parole and Probation (DPP) compiled a presentence report that described Booth's background, education and employment history, and criminal record. Under a Maryland statute, the presentence report in all felony cases also must include a victim impact statement (VIS), describing the effect of the crime on the victim and his family. Specifically, the report shall:

> (i) Identify the victim of the offense;
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> (ii) Itemize any economic loss suffered by the victim as a result of the offense;
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> (iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
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> (iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
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> (v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
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> (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.

Although the VIS is compiled by the DPP, the information is supplied by the victim or the

victim's family. The VIS may be read to the jury during the sentencing phase, or the family members may be called to testify as to the information.

The VIS in Booth's case was based on interviews with the Bronsteins' son, daughter, son-in-law, and granddaughter. Many of their comments emphasized the victims' outstanding personal qualities, and noted how deeply the Bronsteins would be missed. Other parts of the VIS described the emotional and personal problems the family members have faced as a result of the crimes. The son, for example, said that he suffers from lack of sleep and depression, and is "fearful for the first time in his life." He said that in his opinion, his parents were "butchered like animals." The daughter said she also suffers from lack of sleep, and that since the murders she has become withdrawn and distrustful. She stated that she can no longer watch violent movies or look at kitchen knives without being reminded of the murders. The daughter concluded that she could not forgive the murderer, and that such a person could "[n]ever be rehabilitated." Finally, the granddaughter described how the deaths had ruined the wedding of another close family member that took place a few days after the bodies were discovered. Both the ceremony and the reception were sad affairs, and instead of leaving for her honeymoon, the bride attended the victims' funeral. The VIS also noted that the granddaughter had received counseling for several months after the incident, but eventually had stopped because she concluded that "no one could help her."

* * *

Defense counsel 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 of the Federal Constitution. The Maryland trial court denied the motion * * *. Booth's lawyer then 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.

The jury sentenced Booth to death for the murder of Mr. Bronstein and to life imprisonment for the murder of Mrs. Bronstein. * * *

**II**

* * * Although this Court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion. Specifically, we have said 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." * * * [A] state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's "personal responsibility and moral guilt." To do otherwise would create the risk that a death sentence will be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process."

The VIS in this case provided the jury with two types of information. First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant. For the reasons stated below, we find that this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.

**A**

* * *

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

bein[g]." 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 family. These factors may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered. Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime.

It is true that in certain cases some of the information contained in a VIS will have been known to the defendant before he committed the offense. As we have recognized, a defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability in a constitutionally significant manner. We nevertheless find that because of the nature of the information contained in a VIS, it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner.

As evidenced by the full text of the VIS in this case the family members were articulate and persuasive in expressing their grief and the extent of their loss. But in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe. The fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information. Certainly 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.

Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character.[8] * * *

We also note that it would be difficult – if not impossible – to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant. * * * Moreover, if the state is permitted to introduce evidence of the victim's personal qualities, it cannot be doubted that the defendant also must be given the chance to rebut this evidence. Putting aside the strategic risks of attacking the victim's character before the jury, in appropriate cases the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family. The prospect of a "mini-trial" on the victim's character is more than simply unappealing; it could well 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. We thus reject the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations in a capital case.

**B**

The second type of information presented to the jury in the VIS was the family members' opinions and characterizations of the crimes. * * *

* * *

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. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury

8. We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions.

and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. * * * The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases.

**III**

We conclude that the introduction of a VIS at the sentencing phase of a capital murder trial violates the Eighth Amendment, and therefore the Maryland statute is invalid to the extent it requires consideration of this information. * * *

**Justice WHITE,** with whom THE CHIEF JUSTICE, Justice O'CONNOR, and Justice SCALIA join, dissenting.

* * * Maryland's legislature has decided that the jury should have the testimony of the victim's family in order to assist it in weighing the degree of harm that the defendant has caused and the corresponding degree of punishment that should be inflicted. This judgment is entitled to particular deference; determinations of appropriate sentencing considerations are "'peculiarly questions of legislative policy,'" and the 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,'" 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.

The Court's judgment is based on the premises that the harm that a murderer causes a victim's family does not in general reflect on his blameworthiness, and that only evidence going to blameworthiness is relevant to the capital sentencing decision. Many if not most jurors, however, will look less favorably on a capital defendant when they appreciate the full extent of the harm he caused, including the harm to the victim's family. 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. * * * I would think that victim impact statements are particularly appropriate evidence in capital sentencing hearings: the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.

* * *

The Court's reliance on the alleged arbitrariness that can result from the differing ability of victims' families to articulate their sense of loss is a makeweight consideration: No two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator. * * *

* * *

**Justice SCALIA,** with whom THE CHIEF JUSTICE, Justice WHITE, and Justice O'CONNOR join, dissenting.

* * * It seems to me * * * – and, I think, to most of mankind – that the amount of harm one causes does bear upon the extent of his "personal responsibility." We may take away the license of a driver who goes 60 miles an hour on a residential street; but we will put him in jail for manslaughter if, though his moral guilt is no greater, he is unlucky enough to kill someone during the escapade.

Nor, despite what the Court says today, do we

depart from this principle where capital punishment is concerned. The Court's opinion does not explain why a defendant's *eligibility* for the death sentence can (*and always does*) turn upon considerations not relevant to his moral guilt. 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. * * *

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. * * *

* * *

## *South Carolina v. Gathers* and the Change in the Makeup of the Court

The Court reaffirmed *Booth* in *South Carolina v. Gathers*, 490 U.S. 805 (1989). In an opinion by Justice Brennan, the Court held, 5-4, that the reading of a prayer found in the victim's possessions and arguments about the personal characteristics of the victim by the prosecutor in closing argument violated the Court's holding in *Booth.*

At the time *Gathers* was decided, Justice Powell, the author of the 5-4 opinion in *Booth*, had retired from the Court and been replaced by Anthony Kennedy. Although Justice Byron White was one of the four dissenters in *Booth*, he issued a brief concurring opinion in *Gathers* saying that until *Booth* was overruled, it required reversal of Gathers' sentence.

Justice William Brennan retired from the Court in 1990. His successor, David Souter, was sworn in on October 9, 1990. The following February, the Court, over the dissents of Justices Stevens, Marshall and Blackmun, granted certiorari in the case of *Payne v. Tennessee*, in which the Tennessee Supreme Court has affirmed a death sentence in which victim impact evidence had been received, to consider overruling *Booth* and *Gathers*. The Court ordered expedited briefing and set oral argument for April. Its 6-3 decision was rendered on the final day of the term, June 27, 1991.

**Pervis Tyrone PAYNE**
**v.**
**TENNESSEE.**

Supreme Court of the United States
501 U.S. 808, 111 S.Ct. 2597 (1991)

Rehnquist, C.J., delivered the opinion of the Court. O'Connor, J., filed a concurring opinion in which White and Kennedy, JJ., joined. Scalia, J., filed a concurring opinion in which O'Connor and Kennedy, JJ., joined as to Part II. Souter, J., filed a concurring opinion in which Kennedy, J., joined. Marshall, J., filed a dissenting opinion in which Blackmun, J., joined. Stevens, J., filed a dissenting opinion in which Blackmun, J., joined.

**Chief Justice REHNQUIST** delivered the opinion of the Court.

In this case we reconsider our holdings in *Booth v. Maryland*, and *South Carolina v. Gathers*, that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial.

The petitioner, Pervis Tyrone Payne, was convicted by a jury on two counts of first-degree murder and one count of assault with intent to commit murder in the first degree. He was sentenced to death for each of the murders, and to 30 years in prison for the assault.

The victims of Payne's offenses were 28-year-old Charisse Christopher, her 2-year-old daughter Lacie, and her 3-year-old son Nicholas. The three lived together in an apartment in

Millington, Tennessee, across the hall from Payne's girlfriend, Bobbie Thomas. * * *

* * * Sometime around 3 p.m., Payne [went] to the apartment complex, entered the Christophers' apartment, and began making sexual advances towards Charisse. Charisse resisted and Payne became violent. A neighbor who resided in the apartment directly beneath the Christophers, heard Charisse screaming, "`Get out, get out,' as if she were telling the children to leave." The noise briefly subsided and then began, "'horribly loud.'" The neighbor called the police after she heard a "blood curdling scream" from the Christopher apartment.

* * *

Inside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1700 cc's of blood – 400 to 500 cc's more than his estimated normal blood volume. Charisse and Lacie were dead.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.

Lacie's body was on the kitchen floor near her mother. She had suffered stab wounds to the chest, abdomen, back, and head. The murder weapon, a butcher knife, was found at her feet. Payne's baseball cap was snapped on her arm near her elbow. * * *

* * *

During the sentencing phase of the trial, Payne presented the testimony of four witnesses: his mother and father, Bobbie Thomas, and Dr. John T. Huston, a clinical psychologist specializing in criminal court evaluation work. Bobbie Thomas testified that she met Payne at church, during a time when she was being abused by her husband. She stated that Payne was a very caring person, and that he devoted much time and attention to her three children, who were being affected by her marital difficulties. She said that the children had come to love him very much and would miss him, and that he "behaved just like a father that loved his kids." * * *

Dr. Huston testified that based on Payne's low score on an IQ test, Payne was "mentally handicapped." * * * Payne was the most polite prisoner he had ever met. Payne's parents testified that their son had no prior criminal record and had never been arrested. They also stated that Payne had no history of alcohol or drug abuse, he worked with his father as a painter, he was good with children, and that he was a good son.

The State presented the testimony of Charisse's mother, Mary Zvolanek. When asked how Nicholas had been affected by the murders of his mother and sister, she 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.

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

> 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.

There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.

Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. 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.

In the rebuttal to Payne's closing argument, the prosecutor stated:

You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives.

. . . . .

. . . No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there – there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.

. . . . .

[Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever."

The jury sentenced Payne to death on each of the murder counts.

* * *

*Booth* and *Gathers* were based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family do not in general reflect on the defendant's "blameworthiness," and that only evidence relating to "blameworthiness" is relevant to the capital sentencing decision. However, the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. "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." *Booth*, 482 U.S., at 519 (SCALIA, J., dissenting). The same is true with respect to two defendants, each of whom participates in a robbery, and each of whom acts with reckless disregard for human life; if the robbery in which the first defendant participated results in the death of a victim, he may be subjected to the death penalty, but if the robbery in which the second defendant participates does not result in the death

of a victim, the death penalty may not be imposed. * * *

* * *

* * * While the admission of [victim impact] evidence – designed to portray for the sentencing authority the actual harm caused by a particular crime – is of recent origin, this fact hardly renders it unconstitutional.

* * *

Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind – for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. The facts of Gathers are an excellent illustration of this: the evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States. The state laws respecting crimes, punishments, and criminal procedure are of course subject to the overriding provisions of the United States Constitution. * * *

* * * The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that 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. Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.

* * * "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

* * * [W]e now reject the view * * * that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted. We reaffirm the view expressed by Justice Cardozo: "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. * * * There is no reason to treat such evidence differently than other relevant evidence is treated.

* * *

**Justice O'CONNOR**, with whom Justice WHITE and Justice KENNEDY join, concurring.

In my view, a State may legitimately determine that victim impact evidence is relevant to a capital sentencing proceeding. A State may decide that the jury, before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim's family and community. A State may decide also that the jury should see "a quick glimpse of the life petitioner chose to extinguish," *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (REHNQUIST, C.J., dissenting), to remind the jury that the person whose life was taken was a unique human being.

* * *

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

* * *

**Justice SCALIA**, with whom Justice O'CONNOR and Justice KENNEDY join as to Part II, concurring.

* * * True enough, the Eighth Amendment permits parity between mitigating and aggravating factors. But more broadly and fundamentally still, it permits the People to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime.

* * *

* * * *Booth*'s stunning ipse dixit, that a crime's unanticipated consequences must be deemed "irrelevant" to the sentence, conflicts with a public sense of justice keen enough that it has found voice in a nationwide "victim's rights" movement.

**Justice SOUTER**, with whom Justice KENNEDY joins, concurring.

* * *

Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. * * * But this is just as true when the defendant knew of the specific facts as when he was ignorant of their details, and in each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal. * * *

* * *

* * * While a defendant's anticipation of specific consequences to the victims of his intended act is relevant to sentencing, such detailed foreknowledge does not exhaust the category of morally relevant fact. * * * Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and after it happens other victims are left behind. 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. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or

friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

That foreseeability of the killing's consequences imbues them with direct moral relevance, and evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence of the risk that the defendant originally chose to run despite the kinds of consequences that were obviously foreseeable. * * * Indeed, given a defendant's option to introduce relevant evidence in mitigation, sentencing without such evidence of victim impact may be seen as a significantly imbalanced process.

* * *

* * * I * * * rely as well on my further view that *Booth* sets an unworkable standard of constitutional relevance that threatens, on its own terms, to produce such arbitrary consequences and uncertainty of application as virtually to guarantee a result far diminished from the case's promise of appropriately individualized sentencing for capital defendants. These conclusions will be seen to result from the interaction of three facts. First, although *Booth* was prompted by the introduction of a systematically prepared "victim impact statement" at the sentencing phase of the trial, *Booth*'s restriction of relevant facts to what the defendant knew and considered in deciding to kill applies to any evidence, however derived or presented. Second, details of which the defendant was unaware, about the victim and survivors, will customarily be disclosed by the evidence introduced at the guilt phase of the trial. Third, the jury that determines guilt will usually determine, or make recommendations about, the imposition of capital punishment.

A hypothetical case will illustrate these facts[.] * * * Assume that a minister, unidentified as such and wearing no clerical collar, walks down a street to his church office on a brief errand, while his wife and adolescent daughter wait for him in a parked car. He is robbed and killed by a stranger, and his survivors witness his death. What are the circumstances of the crime that can be considered at the sentencing phase under *Booth*? The defendant did not know his victim was a minister, or that he had a wife and child, let alone that they were watching. Under *Booth*, these facts were irrelevant to his decision to kill, and they should be barred from consideration at sentencing. Yet evidence of them will surely be admitted at the guilt phase of the trial. The widow will testify to what she saw, and in so doing she will not be asked to pretend that she was a mere bystander. She could not succeed at that if she tried. The daughter may well testify too. The jury will not be kept from knowing that the victim was a minister, with a wife and child, on an errand to his church. * * * No one claims that jurors in a capital case should be deprived of such common contextual evidence, even though the defendant knew nothing about the errand, the victim's occupation or his family. And yet, if these facts are not kept from the jury at the guilt stage, they will be in the jurors' minds at the sentencing stage.

* * * If * * * we are to leave the rules of trial evidence alone, *Booth*'s objective will not be attained without requiring a separate sentencing jury to be empaneled [in a case such as the hypothetical]. * * *

* * * Resting a decision about the admission of impact evidence on [whether the survivors testify at the guilt phase] is arbitrary.

* * *

**Justice MARSHALL**, with whom Justice BLACKMUN joins, dissenting.

Power, not reason, is the new currency of this Court's decisionmaking. Four Terms ago, a five-Justice majority of this Court held that "victim impact" evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. By another 5-4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. *South Carolina v. Gathers*. Nevertheless, having expressly invited respondent to renew the attack, today's majority overrules *Booth* and *Gathers* and credits the dissenting views expressed in those cases. 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.

* * *

Carried to its logical conclusion, the majority's debilitated conception of *stare decisis* would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind. * * * [T]he majority invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question.

Indeed, the majority's disposition of this case nicely illustrates the rewards of such a strategy of defiance. The Tennessee Supreme Court did nothing in this case to disguise its contempt for this Court's decisions in *Booth* and *Gathers*. Summing up its reaction to those cases, it concluded: "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or harm imposed, upon the victims." Offering no explanation for how this case could possibly be distinguished from *Booth* and *Gathers* – for obviously, there is none to offer – the court perfunctorily declared that the victim-impact evidence and the prosecutor's argument based on this evidence "did not violate either [of those decisions]." It cannot be clearer that the court simply declined to be bound by this Court's precedents.

Far from condemning this blatant disregard for the rule of law, the majority applauds it. * * * It is hard to imagine a more complete abdication of this Court's historic commitment to defending the supremacy of its own pronouncements on issues of constitutional liberty. * * *

* * *

**Justice STEVENS**, with whom Justice BLACKMUN joins, dissenting.

* * * [E]ven if *Booth* and *Gathers* had not been decided, today's decision would represent a sharp break with past decisions. Our cases provide no support whatsoever for the majority's conclusion that the prosecutor may introduce evidence that sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.

Until today our capital punishment jurisprudence has required that any decision to impose the death penalty be based solely on evidence that tends to inform the jury about the character of the offense and the character of the defendant. Evidence that serves no purpose other than to appeal to the sympathies or emotions of the jurors has never been considered admissible. Thus, if a defendant, who had murdered a convenience store clerk in cold blood in the course of an armed robbery, offered evidence unknown to him at the time of the crime about the immoral character of his victim, all would recognize immediately that the evidence was irrelevant and inadmissible. Evenhanded justice requires that the same constraint be imposed on the advocate of the death penalty.

**I**

In *Williams v. New York*, 337 U.S. 241 (1949), this Court considered the scope of the inquiry that should precede the imposition of a death sentence. Relying on practices that had developed "both before and since the American colonies became a nation," Justice Black described the wide latitude that had been accorded judges in considering the source and type of evidence that is relevant to the sentencing determination. Notably, that opinion refers not only to the relevance of evidence establishing the defendant's guilt, but also to the relevance of "the fullest information possible concerning the defendant's life and characteristics." "Victim impact" evidence, however, was unheard of when *Williams* was decided. The relevant evidence of harm to society consisted of proof that the defendant was guilty of the offense charged in the indictment.

* * *

As the Court acknowledges today, the use of victim impact evidence "is of recent origin." Insofar as the Court's jurisprudence is concerned, this type of evidence made its first appearance in 1987 in *Booth v. Maryland*. * * *

Our decision in *Booth* was entirely consistent with the practices that had been followed "both before and since the American colonies became a nation." * * * The dissenting opinions in *Booth* and in *Gathers* can be searched in vain for any judicial precedent sanctioning the use of evidence unrelated to the character of the offense or the character of the offender in the sentencing process. Today, however, relying on nothing more than those dissenting opinions, the Court abandons rules of relevance that are older than the Nation itself, and ventures into uncharted seas of irrelevance.

**II**

Today's majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion. Because our decision in *Lockett* [*v. Ohio*] recognizes the defendant's right to introduce all mitigating evidence that may inform the jury about his character, the Court suggests that fairness requires that the State be allowed to respond with similar evidence about the *victim*. This argument is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance.

* * *

* * * The Constitution grants certain rights to the criminal defendant and imposes special limitations on the State designed to protect the individual from overreaching by the disproportionately powerful State. Thus, the State must prove a defendant's guilt beyond a reasonable doubt. * * * Even if balance were required or desirable, today's decision, by permitting both the defendant and the State to introduce irrelevant evidence for the sentencer's consideration without any guidance, surely does nothing to enhance parity in the sentencing process.

**III**

Victim impact evidence, as used in this case, has two flaws, both related to the Eighth Amendment's command that the punishment of death may not be meted out arbitrarily or capriciously. First, aspects of the character of the victim unforeseeable to the defendant at the time of his crime are irrelevant to the defendant's "personal responsibility and moral guilt" and therefore cannot justify a death sentence. * * *

Second, the quantity and quality of victim impact evidence sufficient to turn a verdict of life in prison into a verdict of death is not defined until after the crime has been committed and therefore cannot possibly be applied consistently in different cases. * * * Open-ended reliance by a capital sentencer on victim impact evidence simply does not provide a "principled way to distinguish [cases], in which the death penalty [i]s imposed, from the many cases in which it [i]s not."

* * * [A]n evaluation of the harm caused by different kinds of wrongful conduct is a critical aspect in legislative definitions of offenses and

determinations concerning sentencing guidelines. There is a rational correlation between moral culpability and the foreseeable harm caused by criminal conduct. Moreover, in the capital sentencing area, legislative identification of the special aggravating factors that may justify the imposition of the death penalty is entirely appropriate.[9] But the majority cites no authority for the suggestion that unforeseeable and indirect harms to a victim's family are properly considered as aggravating evidence on a case-by-case basis.

* * * [T]he majority today offer[s] only the recent decision in *Tison v. Arizona*, and two legislative examples to support their contention that harm to the victim has traditionally influenced sentencing discretion. *Tison* held that the death penalty may be imposed on a felon who acts with reckless disregard for human life if a death occurs in the course of the felony, even though capital punishment cannot be imposed if no one dies as a result of the crime. The first legislative example is that attempted murder and murder are classified as two different offenses subject to different punishments. The second legislative example is that a person who drives while intoxicated is guilty of vehicular homicide if his actions result in a death but is not guilty of this offense if he has the good fortune to make it home without killing anyone.

These three scenarios, however, are fully consistent with the Eighth Amendment jurisprudence reflected in *Booth* and *Gathers* and do not demonstrate that harm to the victim may be considered by a capital sentencer in the ad hoc and post hoc manner authorized by today's majority. The majority's examples demonstrate only that harm to the victim may justify enhanced punishment if the harm is both foreseeable to the defendant and clearly identified in advance of the crime by the legislature as a class of harm that should in every case result in more severe punishment.

In each scenario, the defendants could reasonably foresee that their acts might result in loss of human life. In addition, in each, the decision that the defendants should be treated differently was made prior to the crime by the legislature, the decision of which is subject to scrutiny for basic rationality. Finally, in each scenario, every defendant who causes the well-defined harm of destroying a human life will be subject to the determination that his conduct should be punished more severely. * * *

* * * Irrelevant victim impact evidence that distracts the sentencer from the proper focus of sentencing and encourages reliance on emotion and other arbitrary factors necessarily prejudices the defendant.

The majority's apparent inability to understand this fact is highlighted by its misunderstanding of Justice Powell's argument in *Booth* that admission of victim impact evidence is undesirable because it risks shifting the focus of the sentencing hearing away from the defendant and the circumstances of the crime and creating a "'mini-trial' on the victim's character." *Booth* found this risk insupportable not, as today's majority suggests, because it creates a "tactical" "dilemma" for the defendant, but because it allows the possibility that the jury will be so distracted by prejudicial and irrelevant considerations that it will base its life-or-death decision on whim or caprice.

**IV**

The majority * * * allows a jury to hold a defendant responsible for a whole array of harms that he could not foresee and for which he is therefore not blameworthy. * * *

* * *

* * * [A]s long as the contours of relevance at

9. Thus, it is entirely consistent with the Eighth Amendment principles underlying *Booth* and *Gathers* to authorize the death sentence for the assassination of the President or Vice President, see 18 U.S.C. §§ 1751, 1111, a Congressman, Cabinet official, Supreme Court Justice, or the head of an executive department, § 351, or the murder of a policeman on active duty. Such statutory provisions give the potential offender notice of the special consequences of his crime and ensure that the legislatively determined punishment will be applied consistently to all defendants.

sentencing hearings have been limited to evidence concerning the character of the offense and the character of the offender, the law has also recognized that evidence that is admissible for a proper purpose may not be excluded because it is inadmissible for other purposes and may indirectly prejudice the jury. * * *

In reaching our decision today, however, we should not be concerned with the cases in which victim impact evidence will not make a difference. We should be concerned instead with the cases in which it will make a difference. In those cases, defendants will be sentenced arbitrarily to death on the basis of evidence that would not otherwise be admissible because it is irrelevant to the defendants' moral culpability. * * *

**V**

* * * The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black.

Given the current popularity of capital punishment in a crime-ridden society, the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the "victims' rights" movement, I recognize that today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens. The great tragedy of the decision, however, is the danger that the "hydraulic pressure" of public opinion that Justice Holmes once described, – and that properly influences the deliberations of democratic legislatures – has played a role not only in the Court's decision to hear this case, and in its decision to reach the constitutional question without pausing to consider affirming on the basis of the Tennessee Supreme Court's rationale [that the error was harmless], but even in its resolution of the constitutional issue involved. Today is a sad day for a great institution.

## .GEORGIA'S VICTIM IMPACT STATUTE

**Ga. Code Ann. § 17-10-1.2. Admissibility of certain evidence subsequent to adjudication of guilt.**

(a)(1) In all cases in which the death penalty may be imposed, subsequent to an adjudication of guilt * * *, the court shall allow evidence from the family of the victim, or such other witness having personal knowledge of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community. Except as provided in paragraph (4) of this subsection, such evidence shall be given in the presence of the defendant and of the jury and shall be subject to cross-examination.

(2) The admissibility of the evidence described in paragraph (1) of this subsection and the number of witnesses other than immediate family who may testify shall be in the sole discretion of the judge and in any event shall be permitted only in such a manner and to such a degree as not to inflame or unduly prejudice the jury. As used in this paragraph, the term "immediate family" means the victim's spouse, child, parent, stepparent, grandparent, grandchild, sibling, stepbrother, stepsister, mother-in-law, father-in-law, sister-in-law, or brother-in-law and the spouses of any such individuals.

* * *

(4) Upon a finding by the court specific to the case and the witness that the witness would not be able to testify in person without showing undue emotion or that testifying in person will cause the witness severe physical or emotional distress or trauma, evidence presented pursuant to this subsection may be in the form of, but not limited to, a written statement or a prerecorded audio or video statement, provided that such witness is

subject to cross-examination and the evidence itself will not be available to the jury during deliberations. Photographs of the victim may be included with any evidence presented pursuant to this subsection.

**LIVINGSTON**
**v.**
**The STATE**

Supreme Court of Georgia.
444 S.E.2d 748 (1994)**.**

**SEARS-COLLINS, Justice.**

* * *

Livingston argues that the trial court erred in denying his motion to prohibit the state from offering victim impact evidence at the sentencing phase of trial * * *

We agree with the United States Supreme Court's assessment in *Payne* that the Eighth Amendment prohibition against cruel and unusual punishment does not erect a *per se* bar to the introduction of all victim impact evidence, and with that Court's determination that victim impact evidence can be admissible. However, we also recognize that under certain circumstances victim impact evidence could render a defendant's trial fundamentally unfair and could lead to the arbitrary imposition of the death penalty.

* * *

[W]e nevertheless uphold the constitutionality of [Georgia's victim impact statute]. We do so because our legislature has employed sufficient safeguards within the statute to ensure that victim impact evidence will not be admitted which reflects on factors which this court has found constitutionally irrelevant to death penalty sentencing, and which could result in the arbitrary and unconstitutional imposition of the death penalty. As precautionary measures, for example, the statute gives a trial court the discretion to exclude victim impact evidence altogether, limits evidence related to the impact of the offense upon the victim's family or community to that which is inquired of by the court, and states that victim impact evidence "shall be permitted only in such a manner and to such a degree as not to inflame or unduly prejudice the jury." Obviously, victim impact evidence relating to constitutionally impermissible factors would "unduly prejudice" a jury. Thus, a trial court would abuse the unusually broad discretion granted by the statute in admitting such evidence. * * *

To help ensure that victim impact evidence does not result in the arbitrary imposition of the death penalty, we hold that the trial court must hear and rule prior to trial on the admissibility of victim impact evidence sought to be offered. This will, of course, necessitate that the state notify the defendant of victim impact evidence which it intends to offer, and will require the trial court to notify the defendant of the questions, if any, it intends to ask of the state's prospective witnesses at least ten days prior to trial. At the conclusion of the guilt-innocence phase of the trial, the trial court may reconsider any pre-trial decision regarding the admissibility of victim impact evidence.

* * *

[Concurring opinions omitted.]

**BENHAM, Presiding Justice**, dissenting.

* * *

I would hold that [the statute] is unconstitutionally overbroad, advancing far beyond the presentation of evidence which enables the jury to see the victim's "uniqueness as an individual human being." Rather than focusing on evidence which would define the victim's personal characteristics while in life, the statute permits evidence of the ripple-effect of the victim's death on both the victim's family and the victim's community. Such evidence is irrelevant to the state's portrayal of the victim as a human being and infuses the sentencing trial with arbitrary factors on which the jury may determine

to impose the death penalty.

Further, admission of victim impact evidence shifts the focus of the sentencing trial from the defendant and the nature of the crime to the value the victim's family and community place on the victim's life. The state "cannot make the existence of . . . an identifiable characteristic of the . . . victim an issue per se and justification for a death sentence." More insidious is the statutory permission given the trial court to invite a detailed narration of the emotional and economic sufferings of the victim's family and members of the victim's community resulting from the victim's death. These inflammatory factors cannot but infect the jury's decision-making process, rendering the sentencing trial fundamentally unfair and denying the due process of law guaranteed in the Georgia Constitution.

On previous occasions I have raised the issue of the equal treatment of all who come before the courts of this state. In considering the jury selection process, I cautioned against the unequal treatment of prospective jurors. In [another case] I warned against creating a system where defendants will engage in character assassination of the victim. I [also] cautioned against the creation of a "'throw-away' class of workers." Here, I caution against the creation of a throw-away class of victims by use of the Victim Impact Statement and the revictimization of the relatives of victims by inquiry into their backgrounds and that of their deceased loved one.

* * * [T]he unchanneled scope of victim impact evidence which is admissible under the statute creates a grave risk that the jury may conclude that it is permissible for its decision to impose the death penalty to be based on such constitutionally impermissible factors as race, religion, class, or wealth.

* * *

In the trial of capital offenses in the past, we have focused on the conduct of the defendant and we have looked to matters of defendant culpability, rather than the background of the victim or the impact on the survivors, in determining what punishment should be meted out. That is not to say that we have had a prohibition against humanizing the victim. That can and should be done, however, without making the victim the focus of the inquiry. The statute upheld by the majority opinion, however, not only makes the victim the focus of the inquiry, but invites the social status of the victim to be the deciding factor in determining whether a defendant should live or die. To suggest that such a statute does not make social status its subject is to ignore reality.

* * *

* * * The value of a rich man's life is just as important to society as that of a poor man. Life gains its value not from one's status but from one's existence and the State should never be in the position of passing on the value of one's life to society in general.

With the Victim Impact Statement statute, we will begin a journey down the treacherous path of determining the relative worth of citizens in seeking the death penalty for the accused. We will force prosecutors to consider matters of race, education, economics, religion and ethnicity of the victims and their survivors in deciding whether to seek imposition of the death penalty on the accused. Not only will due process suffer but the image of justice will be permanently scarred.

* * *

* * * No matter how good and noble the intentions of the legislature in enacting the statute, its attempt to show the uniqueness of the individual victim will inevitably encourage sentencing juries to discriminate among victims and thereby aggravate already festering sores of race, ethnicity and class.

* * *

## OKLAHOMA'S VICTIM IMPACT STATUTE

**Okla. Statutes, Title 21 § 701.10. Sentencing proceeding – Murder in the first degree**

* * *

C. 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.

* * *

**Title 22, Chapter 16 § 984. Definitions**

As used in this act:

1. "Victim impact statements" means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim 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;

2. "Members of the immediate family" means the spouse, a child by birth or adoption, a stepchild, a parent, or a sibling of each victim; and

* * *

## OKLAHOMA VICTIM IMPACT JURY INSTRUCTION

In *Cargle v. State*, 909 P.2d 806 (Okla. Crim. App. 1995), the Oklahoma Court of Criminal Appeals set out the following instruction out and required that it be given at the sentencing phase of capital trials:

The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. It is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victim is an individual whose death may represent a unique loss to society and the family.

This evidence is simply another method of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.

As it relates to the death penalty: Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstance has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances.

As it relates to the other sentencing options: You may consider this victim impact evidence in determining the appropriate punishment as warranted under the law and facts in the case.

**Claudie Delbert CONOVER, Appellant,**
**v.**
**STATE of Oklahoma, Appellee.**

Oklahoma Court of Criminal Appeals
933 P.2d 904 (Oka. Crim. App. 1997).

**LUMPKIN, Judge:**

Appellant Claudie Delbert Conover was tried by jury and convicted of First Degree Murder in the District Court of Ottawa County. The jury found the existence of three aggravating circumstances and recommended the punishment of death. The trial court sentenced accordingly. * * *

Appellant and co-defendant Gary Welch[2] were convicted of the first degree murder of Robert Hardcastle. On August 25, 1994, Appellant visited Larry Davis and his wife, Lynn, in Miami, Oklahoma. Davis lived in a duplex and the victim occupied the opposite half. When Davis admitted Appellant to his home at approximately 5:00 p.m., Davis observed Welch's car parked in front of the duplex. While dinner was being prepared, Davis heard "banging" noises coming from the victim's half of the duplex. Davis commented to his wife and Appellant that he hoped the victim was "winning his wrestling match." Appellant said something to the effect that "someone's getting a spanking over a deal."

Less than five minutes later, the victim ran by Davis' window. As he passed by, the victim was overheard to say "I didn't do it," or "I didn't do anything." When the victim reached Davis' porch, Davis could see he was covered in blood. * * * Appellant went through the door first, pushing the victim away. Davis remained inside the house and closed the door.

The victim ran across the street to a ditch with Appellant and Welch chasing after him. Passersby saw the victim crouched in a fetal position in the ditch with Appellant holding him and punching him and Welch stabbing him. * * * Appellant turned the victim over and repeatedly struck him in the face and upper body while Welch continued to stab and hit him. When a passerby stopped to look at what was going on, Appellant yelled at him to get out of there. * * *

Welch * * * picked up a bottle from the ground, broke it on the street and stabbed and slashed the victim with the broken bottle. Appellant drove over to the scene, Welch jumped in the car and the two men drove off.

* * * A police officer who had been notified of the altercation arrived at the scene. The victim, wearing only a pair of shorts twisted around one ankle, leaned up on one arm and told the officer that Gary Welch had done that to him. The victim told the officer to get Gary Welch. The victim asked for a drink of water several times and then collapsed. The victim died on the scene.

* * * Shortly thereafter, Appellant and Welch were spotted just north of Miami. Upon seeing a marked police car behind them, the men threw a knife out of the passenger window of the car and then pulled over. Appellant exited from the driver's side while Welch occupied the passenger seat. Both men were covered in blood. Appellant also had a few abrasions and contusions about his upper body and face. * * *

* * *

* * * Appellant complains the trial court improperly admitted victim impact evidence which rendered his death sentence unconstitutional. Specifically, Appellant finds error in the following: 1) admission of testimony concerning the victim's family members' characterizations and opinions about the crime, the defendant and the appropriate sentence; 2) admission of victim impact evidence replete with hearsay; 3) the jury's use of victim impact evidence without appropriate instructions; and 4) the trial court's denial of Appellant's cross-examination of the victim's family and prohibition of rebuttal evidence.

2. Welch was tried separately, convicted of First Degree Murder and sentenced to death. He appeals separately.

The State presented the testimony of three witnesses, the victim's mother, father and brother. Each read from a prepared statement detailing the effect of the victim's death on their family.

[*The Court set out the following testimony in a footnote:]*

Ed Hardcastle, the victim's father testified to the following:

> It's very difficult to put into words the loss of a child by a father. I am completely devastated and the complete loss in my life will always be there. I have loving memories of my son as a baby in my arms, as a loving child, his years of growing up into manhood with my hopes and dreams for him, his bringing into my life two beautiful grandsons, the twins. But these, all the memories, will always be overshadowed by the horrible and inhumane way his life was ended.
>
> My wife and I will never be the same because of this tragedy. It is a part of each of us it [sic] has been violently jerked away from us. I speak, in one sense, for my twin grandsons and the loss that they're going to suffer, having to grow up without a father, without knowing him, without sharing his love. I'll never stop thinking of the pain and the stark terror * * * my son must have felt as these two men butchered him. I have never and hope to never see again such cruelty and disregard of human life. Like blood thirsty animals, these men chased my son down and butchered him with a knife, showing no pity, humanity or mercy. They had chances to stop, but they wouldn't. It's not justice that my son lies in a cold grave and these men should live. And I believe that this man should die for what he did.
>
> When asked by the prosecutor his opinion of the recommended sentence, Mr. Hardcastle answered the "death penalty.".

Gayle Hardcastle, the victim's mother stated:

> On July the 17th of 1959, God gave us a precious life, our son, Robert Hardcastle. On August the 25th, 1994, his life was taken from us, from his three year old twin sons, from a family who loved him dearly, taken by a brutal needless murder.
>
> We had no choice. We couldn't say, "good-bye, son; we love you," to touch his hand to let him know we were with him, nothing. We had no choice.
>
> Words cannot explain the pain it has put in our lives, the agony we are enduring. The daily thoughts of the brutal day, the scene where he died, how he died. And not one night since his death have I gone to bed without dreaming of what he must have gone through, seeing his butchered body, knowing that he was crying out for help.
>
> * * *
>
> Needless to say, the pain has never let up. Ten months later we cry and we ache each day. We go to the cemetery to find comfort or closeness, and look at a cold plot of dirt. We go home and pray for God – to God for relief and understanding.
>
> If you have ever tried to explain to three year old babies that their daddy – he is never coming back because he's dead, maybe then you could have a real idea of what pain is. We've had to answer questions like, "why is daddy dead? Why did the mean men hurt daddy? Will daddy come back and take us on a vacation when our piggy bank is full? Is daddy going to be back to Christmas? Can daddy see us from heaven? And does he love us?" The list goes on and on.
>
> We've nursed them through nightmares and know the hurt and pain they are having. These two little boys loved their daddy. But now, because of two murderous animals, they will have to face life without him. * * *
>
> * * *

No human being deserves to die the death he did. It was violent, it was brutal and needless. And two men will be on trial for his murder and there is no doubt that they're the ones who killed him. They planned it. The went to his home in broad daylight. They completed in a very brutal way what they intended to do. And they sit in our courtroom smug, uncaring. They have never showed one sign of remorse. Their wives and girlfriends visit and are allowed to hug them, kiss them, touch them, visit with them weekly in the Court. And we can't even say good-bye.

Sometimes my husband and I can't even communicate because of this murder. A part of our lives is just one big void. It can't be filled or changed or ever replaced. Our hopes and dreams have been shattered forever. And not only has this been a vast emotional trauma for us, it's placed a number of different loads on us that we don't know how we're going to deal with.

And I would beg this Court and this jury to see that justice be done. And justice to us is no less than the death penalty. Both Mr. Welch and Mr. Conover have a very long and vivid history of crime and brutality and, yes, murder for which Mr. Conover only served a few years for, when he shot a young woman just for saying something that he didn't like. Please don't let this happen to another family. We can only put our faith first in God and our courts to find peace in this life.

James Hardcastle, the victim's brother, testified:

* * *

* * * I've always leaned towards the ideology of live and let live, but there has to be a point where we, as a society, have to say enough is enough.

There are people in the world who are parasites that feed on the common decedent [sic] people who work, live and conduct themselves in a decent and responsible manner and who do not deserve to be violated by people that have no sense of right or wrong or just do not care.

In this instance I tend to cry for revenge or vengeance. Sometimes it is hard to tell the difference. In the end I hope and pray that justice will be served. Justice in this case would be for the jury to find the Defendant worthy of the death penalty.

[*End of footnote*.]

* * * Victim impact evidence is constitutionally acceptable so long as it is not "so unduly prejudicial that it renders the trial fundamentally unfair."

* * *

One year after the *Payne* decision, the Oklahoma Legislature specifically provided for the admission of victim impact evidence in sentencing considerations. * * *

The provisions allowing information about the manner in which the crime was perpetrated and the witnesses' opinion of the appropriate sentence do not violate *Payne* and the Eighth Amendment to the United States Constitution.

Finding this type of victim impact evidence generally admissible does not end our analysis. * * * "Although it does not violate the Eighth Amendment, evidence may be introduced 'that is so unduly prejudicial that it renders the trial fundamentally unfair,' thus implicating the Due Process Clause of the Fourteenth Amendment." * * * [T]he Supreme Court in *Payne* seemed to require a balancing to keep the scales of a capital trial from being "unfairly weighted" in favor of one side or the other.

The victim impact evidence in this case did weigh the scales too far in favor of the prosecution. Statements that the victim was "butchered like an animal", that two men "butchered him" have no place in a victim impact

statement. Assuming statements like this are not prohibited under the rules of hearsay,[7] such statements are inflammatory descriptions designed to invoke an emotional response by the jury. Such comments do not fall under the statutory provision permitting statements on the manner in which the crime was perpetrated. These type of statements are emotionally charged personal opinions which are more prejudicial than probative.

Victim impact evidence is to provide a "quick glimpse of the life" which the defendant "chose to extinguish". *Payne,* 501 U.S. at 822. Our statutory language is clear, the evidence in a victim impact statement is to be limited to the "financial, emotional, psychological, and physical effects," or impact, of the crime itself on the victim's survivors; as well as some personal characteristics of the victim. Statements that the defendant acted "like blood thirsty animal[s]", that he was a "parasite", and a "murderous animal" do not shed any light on the victim's life or the impact of the loss of the victim to his family.

* * * The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a "reasoned moral response" to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process.

This is not to say that the emotional aspect of a victim's loss is irrelevant or inadmissible; we simply state that in admitting evidence of emotional impact, especially to the exclusion of the other factors, a trial court runs a much greater risk of having its decision questioned on appeal. Here, several of the statements included in the victim impact evidence were improperly admitted, as the probative value of that evidence was substantially outweighed by its prejudicial effect. * * *

In her prepared statement, Mrs. Hardcastle told of taking care of the victim's twin grandsons, nursing them through nightmares and answering their questions about their father. This evidence is relevant to show the emotional, psychological, and physical impact of the victim's death. This is the type of victim impact evidence contemplated by our state statutes.

Opinion evidence by victim impact witnesses that the defendant deserves death is admissible but will be viewed by this Court with a heightened degree of scrutiny.* * *

There was nothing improper in the opinions given by the three witnesses in this case that the death penalty was the appropriate sentence. * * * However, this type of evidence should be limited to a simple statement of the recommended sentence without amplification. Any statements outside those parameters will be examined in context to determine if its probative value is substantially outweighed by the danger of unfair prejudice. Any statements found more prejudicial than probative will be examined in light of any other errors committed at the trial to determine whether or not their admission was harmless error.

Appellant also complains that the victim impact evidence was replete with hearsay and the witnesses testified to things of which they had no personal knowledge. Specifically, Appellant directs us to a reference made by Mrs. Hardcastle regarding Appellant's prior conviction that "he shot a young woman just for saying something that he didn't like".

The Evidence Code prohibition of hearsay applies in second stage proceedings in capital cases. Unless a hearsay statement falls within one of the recognized exceptions to the hearsay rule, it is not admissible in second stage proceedings. Therefore, victim impact witnesses are to testify only to matters within their own personal knowledge. If Mrs. Hardcastle did not personally know the circumstances surrounding Appellant's prior conviction, it would be improper to allow her statement at trial.

Further, whether or not Mrs. Hardcastle had

7. Such a remark was probably not offered for the truth of the matter asserted, that the victim was in fact butchered, but to show that he died a horrible death. Therefore, it would not constitute hearsay.

any personal knowledge of the circumstances surrounding Appellant's prior conviction, such a statement does not show the financial, emotional, psychological, and physical effects of the victim's death nor is it relevant to the circumstances surrounding the victim's death. The admission of Mrs. Hardcastle's statement about the circumstances surrounding Appellant's prior conviction was error.

* * *

Finally, Appellant finds error in the trial court's refusal to allow cross-examination of the victim's family into any aspect of the victim's drug involvement and to allow any rebuttal evidence on the subject. The record reflects Appellant was given the opportunity to cross-examine the witnesses, except as to the victim's drug involvement. Additionally, Appellant sought to present the testimony of a police officer who searched the victim's home at the time of the homicide and found quantities of illegal drugs and drug paraphernalia.

In a rare glimpse into the legislative history behind the victim impact legislation, the author of the legislation has stated:

> The important issue in sentencing is that the jury be given a clear picture of the entire crime. Information about the victim must be seen as relevant in order to accomplish this task. That the victim is a drug dealer or has a history of causing harm to others is as important for the jury to know as if the victim were a minister. Senator Brooks Douglass, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families: A Response to Professor Coyne,* 46 OKLA. L. REV. 283 (1993).

Based upon the above, the fact that the victim in the present case was involved in illegal drug activity was relevant in giving the jury a complete picture of the entire crime and the uniqueness of the victim as a human being, providing a "quick glimpse of the life" the defendant "chose to extinguish". *Payne,* 501 U.S. at 822. Therefore, such evidence may properly be presented to the jury. Denying the defendant the opportunity to cross-examine on the issue of the victim's illegal drug activities was a denial of his right to confront the witnesses against him.

* * * Upon review of the record, we find the error was not harmless beyond a reasonable doubt. When viewed along with the improperly admitted victim impact evidence discussed above, we cannot say that exclusion of evidence of the victim's involvement with illegal drugs did not affect the reliability of the sentencing proceeding. Accordingly, we must remand the case to the District Court for resentencing.

Chapel, P.J., and Johnson, J., concur. Lane, J, concurred in the results in an opinion in which Vice Presiding Judge Strubhar joined. That opinion is omitted.

### Note – *Willingham v. State*

Later the same year, the Oklahoma Court of Criminal Appeals upheld a death sentence in a case in which the victim impact testimony included testimony of the victim's husband that a "cur" or "stray dog" should not die the way his wife had; and testimony by the victim's daughter characterizing the defendant as a "piece of trash" and continuing:

> I think the only fair punishment for him is he should be confined in a small area, someone three or four times his size should come into that confined area and beat him, cause him pain.
>
> I think he should have to beg for his life. I think he should have to choke on his own blood.
>
> I think he should have to crawl, try to get away from his attacker.
>
> I think he should suffer, suffer, suffer, but you know, even if he's put to death, he won't suffer, you know he will have a painless death. We can't do anything to him that will cause him the kind of pain that has been caused to

our mother and to us . . .

Mom has raised us to be kind and forgiving, but we can't forgive this and we want him killed.

No contemporaneous objection was made by defense counsel to these statements. The Oklahoma Court of Criminal Appeals reviewed them under a plain error standard and upheld their admission. *Willingham v. State*, 947 P.2d 1074 (Okla Cr. App. 1997).

**Ex parte Esaw JACKSON**

Supreme Court of Alabama.
68 So.3d 211(2010).

**WOODALL, Justice.**

Esaw Jackson was convicted of three counts of capital murder for (1) killing Pamela Montgomery by shooting her with a rifle fired from a vehicle; (2) killing Milton Poole III by shooting him with a rifle fired from a vehicle; and (3) killing Montgomery and Poole during one act or pursuant to one scheme or course of conduct. He was also convicted of two counts of attempted murder for shooting Denaris Montgomery and Shaniece Montgomery.

The jury recommended, by a vote of 10-2, that Jackson be sentenced to death [and] * * * the trial court sentenced Jackson to death. * * *

The Court of Criminal Appeals affirmed Jackson's convictions and sentences. Jackson['s court-appointed lawyer] raised only two issues on appeal to the Court of Criminal Appeals[.] * * * The Court of Criminal Appeals rejected his argument "that the penalty of death by lethal injection is cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution." That court also rejected his argument "that charging him with three counts of capital murder was multiplicitous and that his resulting convictions and sentence of death for all three counts violated principles of double jeopardy." * * * Jackson, through new counsel, petitioned this Court for certiorari review of the capital-murder convictions and sentences of death that the Court of Criminal Appeals affirmed.

* * * In his petition for certiorari review, Jackson presents several issues that, according to him, warrant plain-error review. See Rule 39(a)(2)(B), Ala. R.App. P. We granted his petition to consider four of those issues.

* * * "Plain error is 'error so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.' " *Ex parte Walker,* 972 So.2d 737, 742 (Ala.2007). "To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations." Plain-error review "is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Young,* 470 U.S. 1 (1985) (quoting *United States v. Frady,* 456 U.S. 152, 163 n. 14,(1982)). "Although the failure to object will not preclude [plain-error] review, it will weigh against any claim of prejudice." *Sale v. State,* 8 So.3d 330, 345 (Ala.Crim.App.2008).

* * * On February 1, 2006, Pamela Montgomery was operating her automobile; in the vehicle with her were her children, 17-year-old Denaris and 21-year-old Shaniece, as well as 16-year-old Milton Poole III, a family friend. While Pamela was stopped at an intersection, someone fired many rounds from an assault rifle into her vehicle, killing Pamela and Milton and injuring Denaris and Shaniece. Denaris testified that he had seen Jackson drive up beside his mother's car and open fire. Shaniece was not able to identify a shooter. Brandon Carter, a defense witness, testified that he was in Jackson's vehicle at the time of the shooting and that the shots were fired from another vehicle, not by Jackson.

Milton's mother was Loretta Poole. She was acquainted with Jackson, who lived in the same area she lived in. Loretta testified, as stated * * * that, approximately two weeks before the shooting, Jackson had told her that he did not like her and that he was going to make her move from

the area by "hurt[ing][her] so bad" that she "ain't going to have no choice but to move." * * *

During the guilt phase of Jackson's trial, Loretta, on direct examination, gave the following testimony:

* * *

A. [LORETTA:] But I thought he was talking about doing something to "me." I asked still, "What you going to do?" He said, "Never f___ mind what I'm going to do." He said, "Because what I'm going to do," he said, "you know, you ain't going to be able to take it."

Q. Okay.

A. And he don't lie. He didn't lie. *I ain't able to take it.* (witness crying)

Q. Okay.

A. *He killed my child.*

Q. Okay. Hang on. Hang on. Hang on. Just take a minute. Take a minute. Take a minute.

A. Oh, God help me.

Q. Take an easy breath.

A. Help me, Jesus. Help me, God.

Q. Breathe.

A. Help me, Lord Jesus, Jehovah; please help me.

Q. Ma'am – okay?

A. Thank you, Jesus.

Q. Let me ask you a question. You okay? You okay?

A. *I never be okay anymore.*

Q. All right. Well, let me ask you one more question, and I will be done. Okay?

A. Okay.

Q. Okay?

A. Go ahead.

Q. All right. About how long before [Milton] was killed did that conversation take place?

A. Within a week or two, no longer; wasn't quite two weeks.

Q. Okay.

A. It was early one morning. I won't forget it.

Q. Okay.

A. He was riding along the side, and he started coming by the house and stuff, flashing a whole lot of 1's in the windows, and you know, we be out in the yard, and he just come back peeking (sic), doing the peeking things (sic), you know.

Q. Okay.

A. Peeking things. And I paid no attention. I thought he was talking about doing something to me. But then when he said I wasn't going to be able to take it, *I didn't have no idea he was talking about killing my child, until the night he did it,* when my child told me-

[DEFENSE COUNSEL]: We are going to object to this, non-responsive; not been a question asked in fifteen minutes.

[PROSECUTOR]: Hold on.

THE WITNESS: Because it wasn't your child killed. It wasn't your child killed. (witness crying)

THE COURT: Hang on, ma'am. Listen to the question.

THE WITNESS: Oh, *it hurts so bad.*

THE COURT: I know it does. Just hang on just for a second. Just close your eyes and think about Jesus for a second. Just hang on just a second.

[Emphasis added; parenthetical language original.] This emotional, mostly nonresponsive testimony forms the basis for some of Jackson's claims of plain error.

Jackson correctly observes that "Loretta Poole ... was permitted to provide extremely emotional testimony regarding her opinion of [Jackson's] guilt, despite the fact that she had no personal knowledge of the identity of the shooters." Loretta was not at the scene of the shooting; nevertheless, she twice expressed her opinion that Jackson had killed her son. Such testimony from a lay witness was clearly inadmissible. Rule 701, Ala. R. Evid., provides, in pertinent part, that a lay "witness's testimony in the form of opinions or inferences is limited to those opinions and inferences which are ... rationally based on the perception of the witness." "The Advisory Committee's Notes on [this] portion of Rule 701 ... indicate that '[t]his is no more than a restatement of the "firsthand knowledge rule," found in Ala. R. Evid. 602, tailored to opinions. No lay witness may give an opinion based upon facts that the witness did not actually observe.'" *Musgrove Constr., Inc. v. Malley,* 912 So.2d 227, 239-40 (Ala. Civ. App. 2003). * * *

Jackson argues that Loretta's "extraordinarily prejudicial testimony was improper because it went to the *ultimate issue* in this case-whether [he] had shot ... Milton and the others in the car with him." Although the only disputed issue at trial was whether Jackson had fired a weapon into the vehicle occupied by the victims, Loretta's statements were inadmissible, regardless of whether they are properly characterized as going to the ultimate issue to be decided by the jury. Rule 704, Ala. R. Evid., states: "Testimony in the form of an opinion or inference *otherwise admissible* is to be excluded if it embraces an ultimate issue to be decided by the trier of fact." (Emphasis added.) * * * Loretta, who was not present at the crime scene, should not have been allowed to testify that it was Jackson who had killed her son. Under the facts of this case, the significance of the issue embraced within Loretta's opinions is relevant to whether a substantial right of Jackson's has been affected, but not to the admissibility of the opinion.

According to the State, "[t]here cannot be a serious argument that the jury would have perceived [Loretta's] emotional outburst as preempting [its] role as fact finder." However, during his guilt-phase closing argument, the prosecutor sought to benefit from Loretta's inadmissible conclusions. He stated: "Loretta Poole knows that Esaw Jackson did it. I guarantee you she's convinced beyond a reasonable doubt that man killed her son. I guarantee she is convinced beyond a reasonable doubt that Esaw Jackson killed Pam Montgomery." It was, of course, the jury's responsibility to determine whether the State had carried its burden to prove that Jackson had intentionally killed the victims, and Loretta's inadmissible opinion testimony concerning that issue should not have been before the jury as it fulfilled that responsibility. Indeed, "[t]he admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases." *Booth v. Maryland,* 482 U.S. 496, 508-09 (1987), *overruled in nonrelevant part*, *Payne v. Tennessee,* 501 U.S. 808 (1991).

The State argues that any error in admitting Loretta's testimony giving her opinion that Jackson killed her son "was harmless error given the overwhelming evidence of guilt presented at Jackson's trial." However, "the proper inquiry here is not whether evidence of the defendant's guilt is overwhelming but, instead, whether a substantial right of the defendant has or probably has been adversely affected." *Ex parte Lowe,* 514 So.2d 1049, 1050 (Ala.1987). At any rate, the evidence of Jackson's guilt was far short of overwhelming. Indeed, during his closing argument, the prosecutor acknowledged that the "whole case, quite honestly, boils down to

Denaris," the only eyewitness to identify Jackson as the shooter. There was no physical evidence to connect Jackson to the shooting, and the State never found the murder weapon.[3]

* * *

In her testimony, Loretta did more that simply express her opinion as to Jackson's guilt. She also, while crying, described how badly her son's death had affected her: "I ain't able to take it"; "I never be okay anymore"; "it hurts so bad." * * *

* * *

* * * [G]iven the highly emotional nature of Loretta's testimony, as well as the prosecutor's "guarantee [to the jury] that [Loretta was] convinced beyond a reasonable doubt" that Jackson committed the murders, we cannot say that "the record conclusively shows that the admission of the victim impact evidence ... did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant."

[W]e conclude that Loretta's expression of anguish and the inseparable inadmissible opinion and victim-impact testimony thereby communicated to the jury rise to the level of plain error, because the errors reflected by the admission of that testimony affected Jackson's substantial rights and likely had an unfair prejudicial impact on the jury's deliberations. Therefore, the judgment of the Court of Criminal Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

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3. Bullet fragments removed from the bodies of Pamela Montgomery and Milton Poole were determined to have been fired from an AK-47 or a SKS (the semiautomatic version of an AK-47) assault rifle. The State argues that "[t]here was evidence that Jackson was in possession of an assault rifle on the day of the shooting." However, our review of the record finds no support for this statement. * * * [A]s Jackson points out, "the only evidence that anyone ever possessed an assault rifle was testimony that Mr. Jackson's cousin, not Mr. Jackson, had said he bought a 'SK' a couple weeks before the incident, not the same day."

Cobb, C.J., and Lyons, Stuart, Smith, Parker, Murdock, and Shaw, JJ., concur. Bolin, J., concurs in the result.

*Jackson's case illustrates the difference lawyers make in the outcome of cases. He received grossly incompetent representation on his appeal to the Alabama Court of Criminal Appeals. His court-appointed lawyer raised only two frivolous issues and did not recognize and raise the victim impact issue that was the basis for reversal by the Alabama Supreme Court. The Equal Justice Initiative (EJI) of Montgomery represented Jackson in petitioning the Alabama Supreme Court to review the case and filed a comprehensive brief. Had EJI not taken his case and the same lawyers represented him before the Alabama Supreme Court, Jackson's conviction and death sentence would have been upheld and he almost certainly would have been executed. Instead, when Jackson's case returned to Birmingham, the judge ordered an evaluation of Jackson which determined Jackson had an IQ of 56, well below 70, the prime indicator of intellectual disability. On December 31, 2012, the court found "that Jackson is mentally retarded or otherwise intellectually disabled and that U.S. Supreme Court precedent mandates that he cannot be executed."*

## Testimony of Prison Guards and Decision of the Court in *United States v. Battle*

Anthony George Battle was convicted of murdering a correctional officer while a federal prisoner serving a life sentence at the U.S. Penitentiary in Atlanta (USP-A). At the penalty phase of his trial, the prosecution presented the following testimony from correctional officers, which was appended to the decision of the Court of Appeals in *United States v. Battle*, 173 F.3d 1343 (11th Cir. 1999).

### *Officer Schealey*

Q. Officer Schealey . . . did you see an effect on the inmates at USP Atlanta following [Officer Washington's] death?

A. Yes.

Q. And what kind of effect was that?

A. Everybody is walking around smiling now, and if an officer tells an inmate to do something, he would said, "He need to leave me alone, or I'll get a hammer after you." You see people walking around saying, "hammer time, hammer time."

Q. Do you think the murder of Officer Washington would have improved inmate Battle's status within the prison among inmates?

. . . .

A. Yes. Everybody been talking about the incident ever since it happened. So, they talk about the inmate also.

Q. And they would refer to Mr. Battle himself?

A. Yes.

. . . .

Q. How would the effect of the death penalty being rendered as a verdict in this case or as a sentence in this case affect the correctional officers at USP Atlanta and BOP?

A. Well, it would just let us know if the inmate want to assault a staff member or kill a staff member, he know he going to get a death penalty trial.

Q. How would you think it would affect the inmates?

A. It would have them thinking twice before they assault an officer or a staff member.

Q. And in the event that a life sentence were imposed, how do you think that would affect correctional officers?

A. It would have a hard setting on the staff members because we know an inmate doing 99 years, and he know if he kill an officer, what is he going to get? Another 99 years, but what is that to him? And it have an impact on the officers. We got to realize we got to work in this kind of environment, and if an inmate is going to assault us, he's not going to get but just another 99 years plus the 99 he already have.

***Officer Layfield***

Q. If the sentence that the jury renders [in this case] is a life without parole sentence, how do you think that would affect the inmates in the institution?

A. The inmates already have an attitude. Once they receive a lengthy sentence or life imprisonment, that's all that can happen to them. So, I believe the situation would worsen. Without the death penalty, all prisoners, they believe there is nothing else that can happen to them.

Q. Are there a lot of people doing life sentences at USP Atlanta or lengthy sentences that are essentially a life sentence?

A. Yes, Ma'am.

Q. Did you see a change among the inmates after [Officer Washington] was killed?

A. Of course, yes, Ma'am.

Q. What kind of change?

A. When you went to enforce policy, they would be walking around saying things like, "hammer time," or, "Don't forget I got 20 years. I'll be here every day with you." Basically it was threats toward staff members.

. . . .

Q. How do you think rendering a death penalty verdict sentence would impact the institution, the inmates, and the correctional officers?

A. I believe the staff at the penitentiary already act in a very professional manner. I believe the inmates would think several times before they continue with the same attitude that they have.

***Officer Hawkins***

Q. What kind of reaction did you get from [the inmates] in regard to [Officer Washington's] murder?

A. At that particular time I believe I was working in the special housing unit, which is where inmates are housed that have committed infractions against the Bureau of Prisons, and some inmates would like taunt us about him being killed. If they didn't like something we were telling them to do, they would say something like better watch it. I'm going to get that hammer. There were very cruel, ugly things about his death that they would throw back up in our face.

Q. If the jury were to impose the death penalty in this case, do you have an opinion about what impact that would have on ... the operation of USP Atlanta in terms of the staff and the security issues that you have there?

A. I believe that this would send a very clear signal to the inmates and staff members as well that you cannot commit this type of infraction. You cannot kill a staff member and just absolutely nothing be done about it.

Q. Do you have an opinion about what impact the imposition of a life sentence would have on ... the issue of security, and the relationship to the staff, and dealing with the inmates at the institution?

A. If a person is already serving a life sentence, what is giving them another life sentence going to do? You can kill a staff member, and nothing is going to happen except you are going to remain in jail. You are going to do that anyway. Most of the inmates we have housed there are never getting out of there. So, they figure, well, if I kill a staff member and all I have to do is stay in jail, what's to prevent me from doing it again? Nothing.

## *Decision of the Court*

The Court upheld the admission of the testimony. Judge Edmondson, writing for a unanimous panel, explained:

> This testimony, Battle contends, was victim impact testimony introduced in violation of *Booth v. Maryland*, *overruled in part by Payne v. Tennessee*, In addition, Battle says the law of this circuit does not permit "deterrence" evidence and to hold otherwise would open the floodgates: every future capital case would include a trial on whether or not the death penalty deters criminal conduct. Moreover, if this evidence is permissible, Battle argues, the Government deliberately misled him about the nature of the testimony and allowed him no time to find, and to respond with, witnesses of his own.
>
> We cannot say the district court erred here. The guards' victim impact testimony was relevant and permissible. The heart of their testimony was to describe the harm caused at the Atlanta prison by the murder of a correctional officer who was killed just because he was a correctional officer.[6]
>
> These prison guard witnesses are not family members of the slain officer; these are prison officials specifically contemplated and protected by the pertinent statute. Furthermore, their testimony, unlike the victim impact testimony in *Booth*, was neither "inflammatory" nor "emotionally charged." The testimony in question here * * * consisted of short, matter-of-fact descriptions of the effect Officer Washington's murder had and the effect the sentence in this case would have on the prison population and guards at this particular prison (USP-A); no prison official described Battle as a beast who must be killed (as was the case in *Booth*); no official conveyed hatred toward Battle or the viciousness of his crimes (as was the case in *Booth*); in short, no prison official could have

6. Briefly stated, the guards' testimony told the jury that the harm caused by Battle's killing Officer Washington was not simply to take a life, but also to embolden other prisoners, to increase the harassment of guards by prisoners, and to increase the stresses on the prison staff (making them feel less safe) in the peculiar environment of a prison in which many inmates are already serving life sentences or long sentences.

been said to have inflamed the jury.[7]

For Battle's * * * argument * * * that deterrence evidence is inadmissible is misplaced. The evidence in this case was not about deterrence as deterrence is normally discussed in our cases. * * * The evidence in this case was not about the power of the death penalty to deter future crimes in some general or abstract sense. No studies were shown; no data was introduced; no professors spoke. * * *

This case was one where three prison officers briefly discussed a crime committed against a fellow officer (just because he was an officer) and the harmful ripple effects the crime had had on USP-A. Whether or not the death penalty deters murder as a general matter is a legislative judgment: not a question for juries. But, the harmful effects of a murder of a correctional officer (on account of his official capacity) at the specific prison in which he worked is a different and more narrow matter. This kind of specific and particularized testimony about the nature of the actual act being prosecuted and about its consequences for the prison's staff is not barred by the law. If deterrence was touched on in a local context, that circumstance does not alter the substance of the testimony.[8] The testimony was, at root, about harm to the Atlanta prison staff – how the murder of a coworker and the resulting sentence for his killer would affect them – and not much about actually deterring murders in the future.

Moreover, even if the prison-guard testimony here reached the impermissible point (which we think it did not), it was not reversible error. "Admission of [victim impact] evidence will only be deemed unconstitutional if it is so unduly prejudicial that it renders the sentence fundamentally unfair." *Gretzler v. Stewart,* 112 F.3d 992, 1009 (9th Cir.1997). The evidence was not unduly prejudicial in this case because the testimony was a small portion of a week-long sentencing hearing where the Government proved many statutory aggravators.

On the notice question, Battle is right to say that the Government was misleading about the nature of the guards' testimony. The pretrial letter from the prosecutor to Battle's counsel described the three officers as "personal friends of Officer Washington's who may testify at the sentencing hearing regarding what kind of person Officer Washington was."

The first time Battle's counsel heard anything to the contrary was in a conference in the judge's chambers on the first day of the sentencing proceedings. While that is short notice to find and to prepare rebuttal witnesses, the burden was on defense counsel – if he thought he might find and use such witnesses – to move for a continuance. If not at that very moment, then later in court when the nature of the testimony was clear, defense counsel needed to do more than object to the guards' evidence; counsel – if he seriously thought more time would help him – needed to move to delay the proceedings. * * *

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7. By the way, footnote ten in *Booth*, to the extent this portion of *Booth* survived *Payne*, says the Court does not disapprove of all victim impact testimony: "Similar types of information may well be admissible because they relate directly to the circumstances of the crime." Here we might have such information: spotlighting the vulnerability of prison guards, like Officer Washington, to fatal attacks like the one in this case, where the victim was selected simply because he was a guard.

8. Battle's cases are also inapposite because they speak to a different question of whether a defendant's proffered testimony on lack of deterrence constitutes relevant mitigating evidence about a defendant's character or circumstances of the offense which, under *Lockett,* must constitutionally be considered by the trier of fact. Those cases did not decide whether deterrence testimony is altogether impermissible.

## Testimony of J. Michael Luttig in State v. Beazley

Napolean Beazley, an African-American, was convicted 114th Judicial District Court in Tyler, Texas by an all-white jury in 1995 of the 1994 murder of John Luttig, a white businessman and the father of J. Michael Luttig, who was then a judge of the United States Court of Appeals for the Fourth Circuit. The following is the testimony of Judge Luttig at the sentencing phase of the trial.

**Direct examination by the prosecutor**

Q. Mr. Luttig, can you tell this jury where you live.

A. My wife and I live in Vienna, Virginia. It's a suburb of Washington, D.C.

Q. Was that your wife that just testified, Elizabeth Luttig?

A. It was.

Q. Who is Suzanne Luttig Easterling?

A. That's my sister.

Q. Are you the oldest child to John and Bobbie Luttig?

A. Yes.

Q. Do you see Bobbie Luttig seated out here in the courtroom?

A. I do.

Q. And who is she?

A. That's my mother.

Q. You've heard your wife describe the relationship that you had with your father. Can you tell this jury, in your own words, how close you were to your father?

A. There really aren't words for it, but my dad was my hero. My dad still is my hero. I worshiped the ground he walked on, and I still do. As my wife said, we did everything together. My dad was an extraordinary man. He was a man of – of great integrity. He was a man of – of great discipline.

[DEFENSE COUNSEL:] Excuse me, Mr. Luttig. May we approach the bench, your Honor?

THE COURT: Yes, you may.

*(The following proceedings were had at the bench, outside the hearing of the jury:)*

[DEFENSE COUNSEL:] Judge, I don't want to have to be put in a position of objecting, but – in front of the jury, but I've got to. I mean, this is – this has got character evidence, and it's not admissible.

THE COURT: If it is going to his testimony of how this affected him, then he may testify, but I'm not going to let him get carried away with it, all right? In a directed manner as to what is relevant to the special issues.

*(End of bench conference.)*

Q. Can you tell the jury how close you were to your father?

A. As I was saying, he was my best friend throughout life. I suppose that – that we were as close as father and son – as even a father and son can be.

From as long ago as I can remember, there was never a word passed between us that was – that was mean or mean-spirited, although my father was a strict disciplinarian. But he believed in right and wrong, and he tried his best to inculcate that in me, and there was a communication between us.

I understood why he did what he did in terms of discipline, but I also understood at the same time that he did it because he loved me, and I understood that the lessons that he taught me were – were lessons that were in my best interest, and

I took them as such.

As I grew older, the relationship became even closer, despite the fact that – that we moved away from Tyler and indeed moved across the country. He took a – a continuing interest in what I did, in the few achievements I had, in the direction that I was headed in my own life, and we continued to be close, literally up until he day that he was murdered.

Q. Can you tell the jury basically what the effect of this crime has been from the period of time that you were first told that your father died through the – the short period of time after you were notified?

A. Again, it's almost embarrassing to explain to anyone what has occurred and the effect it's had. And that's one of the tragedies itself.

The night I learned that my dad had been killed, it was approximately one o'clock in the morning in Washington, and there was a knock at the door, and – a continued knocking. And, frankly, I was scared. And I called the police – or I asked my wife to call the police, which she did. The knocking continued and then the doorbell continued ringing, just repeatedly, repeatedly.

Finally, I leaned out the second-story window of our house, and I said, "Who is it? Who is down there?" And a friend identified himself. And it was one o'clock in the morning, and this person is banging on the door.

So I went down and – and I was still nervous, even though I recognized the person. And I opened the door and braced myself against the door, because it – it was just so unusual that someone would be at the door at that time of the night.

I opened the door slightly and saw the person, and I asked him, "Do you want me to open the door?" Because I felt as if something was – was wrong. And he said, "Yes." and I did.

And at that point, the person looked down, unable to meet my eyes with his and said, "I never thought I would have to do this in life, and I don't know how to do it better than to just say that your father was just murdered in the driveway of his own home, and your mother just called to tell me and asked me to come over." That's when it began.

And from that day until today, it has been just one of the most horrible experiences that I think anyone should have to go through in life for myself and for my family.

Immediately after that, we called home, and my mother answered, and I said that my friend was there and told me what had happened. She said – she said, "Yes, your dad has been killed. You had better come home."

It was at that point that I really began to believe it, because I had heard it from Mom.

We stayed up all night, of course, and then left for – left for Dallas and then to Tyler the next morning.

When I arrived home here in Tyler with my wife, the house was cordoned off. There were police investigators in the driveway and in the garage. There were ballistics experts in the garage and around the house and in the backyard. There were people trying to re-enact the crime scene and what had occurred.

I was met by television cameras in the front yard. I was asked questions by reporters before I had even seen my mother, all as if we were on the set of a – of a television show or a movie. It was petrifying.

Things were moving so quickly at that point in time, that – that – again, the words can't capture it. But within moments of – certainly within say minutes of arriving home – it was midday – my mother said that what we needed to do was – was go down to – to Joyner Fry to buy some clothes for Dad to be buried in, said we'd need a shirt and a tie that would go with the suit that he had.

It's not just going to buy the clothes that your dad is going to be buried in, it's hearing your mother – hearing your mother ask you if you'll go with her to buy the clothes that your dad is going to be buried in.

At that point, as best I can recall, I had been unable to ask even my mother where my dad had been shot, that is, where on his physical person, because your mind is racing, and you fear the worst. Somewhere within those moments, I did ask one of the officers, I said, "Where was my dad shot?" And he said, "He was shot in the head."

My mother and I went down to Joyner Fry, and we picked out clothes for my dad to be buried in. And then my mom said, "They've called from the funeral home, and we need to go view the body." And I said, "Well, let's go home first."

At home, I either called the funeral home or they called me – I don't recall which – and the funeral home director or the person responsible for my father was someone I had known from high school, and he said to – I asked him in rather oblique terms, but terms that he understood, "Is this something we should do as a family? Should Mother and – and Suzie and my wife come down to the funeral home to view the body?" And he said – he said, "Perhaps not." And I said, "Is it something that – that we can take?" And he said he would have to leave it up to you – to me, but perhaps it would be best if the women didn't come.

So I talked to my mother and my sister and my wife, and I said – I said, "You probably shouldn't go," and they all insisted that they go, which we did. We went down to the funeral home together, and – to view the body. I walked in first and was taken back. That was the first time I had seen my dad since he had been murdered.

Immediately after me came my mother, my sister and wife. My sister cried out in – in the lobby, "That just can't be him. It just cannot be him." But it was. And we stood there and viewed the body and paid what were, in effect, our last respects and then left.

These are the kind of administrative things that attend any death, but obviously as they relate to a murder of this kind, they're all the more traumatic.

In the days that followed, we – we really – we packed up a lifetime. We went through the house where my parents had lived for years. We packed up every item, every memory, every picture. We took from the walls, we took from the desk, we took from the dressers, so that at least momentarily there would be no memory of my father, because none of us thought that we could – could stomach that.

I packed up my dad's clothes. I cleaned out his sock drawer. I packed his ties. I packed his suits, his underwear. Then I packed up my mom's things, with the help of my wife and my sister. And we moved out of the house that had been their home, never stayed there again.

I then went down and I packed up my dad's office, cleaned out the drawers, the pens, the pencils, the paper, the books – all of the memorabilia off the shelves. I packed them away.

During the course of – of packing up my dad's office and in the course of going through what was his safe deposit box, I saw a lot of letters and correspondence from all of us over the years. And as I – as I remarked to others, you know, the interesting, but not surprising fact was that my dad had kept so much of what we had sent him. He kept the letters when we said "thank you." He especially kept the letters when we said "I love you." And he kept all of the – all of the special thank you letters that we sent to him as our dad.

As my wife alluded to, this case was not broken for six weeks. During that time, we lived in absolute terror as a family. It is indescribable. It is indescribable what this family went through for the six weeks before this case was broken.

We had no place to live, so we would stay in friends' houses. And there was not a member of my family that slept even an hour during the night. I would lie awake watching the – for silhouettes

on the sliding glass doors in the bedroom where I stayed for fear that whoever had done this would come back. They would come back to finish off my mother or they would come to finish off the family. And we lived like that for six weeks.

I have never experienced such fear in my entire life. There is not a human being on the face of this earth who should ever, ever have to experience that.

Our family was physically sick for six weeks. After that time period, we were back in Washington with my mother. Eventually the call came from someone at the Federal Bureau of Investigation. He said, "Last night, three people were arrested in connection with your dad's murder." I was shaving at the time, and I started shaking. I knew I had to tell my mother, but I didn't now what the reaction would be.

I went downstairs – this has been six weeks, seven weeks since this has happened. I went down, and my mother was sitting at the breakfast table. And I said, "I guess it's over. They've arrested three people. And I guess the – it's true, as they thought, that this was all done for a car."

My mother collapsed on the floor of the kitchen. It was a writhing kind of pain that I had never seen in my life. And I went down on my knees to comfort her, and she cried. And I said to her, "No matter how bad this is, it would be worse if we had not found them."

I thought my mother was having either a stroke or an attack, but all she was doing was coming to grips for the first time with the fact that this was really done for a car, for a ten-year-old car.

At that point, you begin preparing yourself for the trial. As you know, the trial was – was long in coming, at least for us. During the – the months leading up to the trial, you start to – to experience the loss.

You sit at Thanksgiving dinner, the dinner that your wife has prepared that at all other times would be a feast. You sit there with your mother and your wife and your daughter, and no one says a word, not a single word. There is only one thought in all four of your minds and that is that your dad's not there, and he never will be again.

You make small talk. You pretend like nothing has happened and that there is nothing else on your mind. You tell your wife that the – the meal tastes great when you can hardly even keep it down, and then you get up and you go do the dishes so that they won't see you crying.

Then Christmas comes. It's the first Christmas in your life that you wished would never come, never come, Christmas. But it does.

What do you do? You try to find a gift for your mom that your dad would have bought for your mom, and, of course, you can't.

Christmas Day approached, and your father is buried 100 miles away. What do you do?

Well, you go down to be with him on Christmas so that he won't be alone on his first Christmas. This is after you've designed his gravestone – grave marker. This is after you've driven down and – when the marker was placed, cupping your hands and pulling the dirt up around the marker so it will be perfect, so it will be situated the way it's supposed to be, so it will be perfect in the way that he always wanted things for you. And then you sit there. You sit there for hours. Wait till the sun goes down, and it's cold and you sit there until finally you can't, and you get up and leave. And you say "Merry Christmas."

You go home. The next morning is Christmas. There's no happiness. With a three-year-old daughter, there's no happiness. My mother wouldn't even come into the room Christmas morning. My wife and I had Christmas morning for Morgan and quickly went on with the rest of the day's events.

Then you begin to prepare yourself for the trial – you know, the inevitability of the trial.

Then the day arrives, and the trial begins, and

you – you listen to your mom – you listen to your mom talk about how she crawled on the floor in the filth and the grease of the garage of her own home to keep from being murdered by the people that had just murdered her husband. You listen to her testimony about how the only thing she had on her mind was what it was like to be shot in the back of the head. You listen to – to the pain, and you watch her face. This is your mother.

Then you listen to the – to the autopsy. It has to be done. You hear how one bullet grazed the side of your dad's head, but it left him conscious. You hear how someone comes up in pointblank range then and shoots him through the head, through the brain, through the shoulder and out the arm as he lays in the garage, in the driveway with blood flowing down.

You listen to testimony from the witness that said – who said that the blood sounded like running water.

You listen to testimony from witnesses who say that your dad's eyes were bulging out of his head.

You listen to testimony about how the gun was so close to his hand that it scorched his skin.

And then you listen to testimony about the person who did it, who said before, he wanted to see what it was like or feel what it was like to kill somebody, and that it was a trip to do it.

The – there are no words for it. You know, the idea of this elegant woman, my mother, crawling on the garage floor to keep from being murdered, that's something that you have to live with the rest of your life. And that's something that my mother has to live with rest of her life. She'll never get over that.

Q. Let me ask you, Mr. Luttig: Have you been able to observe your mother as she's gone through the days since the event and after the arrest leading up to the trial and indeed during the few weeks that we've been here in trial?

A. Yes.

I guess my mother and father had what you might call a conventional relationship. My mother depended upon my dad, and my dad took care of my mom. The only thing that – that my dad feared in life was that my mother would be left in the situation that she's in now. I think she's probably done better than even my dad would have expected, but it's not without its costs.

There is a – there is almost a – a false strength to my mom right now, because she's trying to pretend that she can make it. I think she can, but I'm not sure of it. But she's never confronted anything like this in her whole life. As my wife said, my mother literally could not sleep alone in her bed for weeks. She shook and shook and shook night after night.

Now, a year later, if there is any sound in the house, if there is any sound in the hotel room, my mother bolts out of bed.

One night the alarm went off in my house by mistake. I jumped up to run down the stairs. My mother grabbed me and threw me back against the stairs and went first. Never again – never again will this happen.

As I watch her today, as I watch her in the courtroom, I can't begin to experience what she is going through having watched her husband murdered. I have watched her, and it's a woman of impeccable strength. But it turns my stomach.

Q. Judge Luttig, can you tell the jury just a little bit about the effect of this on Suzanne, your sister, as you've been able to observe this?

A. A lot of this is very personal. We don't talk about it much. In fact, a lot of what I've said today we don't talk about and never have. But I think for my sister, my dad was the balance. My dad kept everything in perspective for my sister. She told him everything would be all right, and he stood there to take care of her.

The problem that she mentioned since this occurred, you know, are the result of the elimination of that relationship. My sister, like my

mother, was strong, very strong. But you have to believe me, this is the kind of event that tries people to their fullest, and I don't know – I don't know how my sister will be.

Q. Mr. Luttig, what is the effect of this on you personally as you've sat through this trial and in the months, years to come?

A. I do not know. And I would be less than candid if I said that I did. I think that all of us, even after a period of a year, are still in some shock. I guess for me, the effect is – is – is more indirect – or direct in a more profound way. I'm not sure which.

Like my father, I was the kind of person that loved life, loved people, had a passion for life. People like that, they attack every day. You jump out of bed – you jump out of bed just to go to work, because you enjoy it, you enjoy people, you enjoy life. Part of that is – is that – that you have no fear.

I guess now – I guess I do have fear now. And what this has shown is that this can happen to anybody in the world just like that (snaps fingers), and that changes the way you look at life.

Q. Thank you, Mr. Luttig.

THE COURT: Cross-examination.

[DEFENSE COUNSEL:] No, your Honor. No questions.

*The jury imposed the death penalty. Texas executed Napoleon Beazley, who was 17 at the time of the crime, by lethal injection by on May 28, 2002.*

## Statement of Homer Black in *State v. Simpson*

Ivan Simpson broke into the home of Patricia Ann Nuckles in Atlanta and raped and murdered her on November 21, 2000. Pursuant to a plea agreement, he plead guilty and was sentenced to life imprisonment without the possibility of parole. The following is the statement of Hector Black, made in the Superior Court of Fulton Count, in Atlanta, Georgia, on January 14, 2002, before the judge imposed sentence.

My name is Hector Black. This is my wife, Susie. We first met Patricia Ann Nuckles when she was a thin and neglected child of eight living with her mother and younger sister in vine city. We moved to Vine City in 1965, working in a tutoring program established by the Atlanta Friends meeting [Quakers]. Although Patricia was not our child by any claims of birth, she was our child by the every claim of love .

She lived with us and became a much loved part of our family. She was one year older than the oldest of our three girls. Because my wife is handicapped and mostly confined to a wheelchair, our children all learned to help her with basic chores. Trisha also took her turn - it somehow put her on an equal footing with our other children. I can still hear her scolding her sisters when they tried to avoid helping.

Trish always took her responsibilities seriously. She became our daughter, our children's sister. We watched for 35 years as she grew into a beautiful woman – beautiful in every way. We thought we were helping her, but as can happen when we give, we received far more from her than we gave. She was God's gift to our family.

She was not ashamed of her background. Rather, she used this experience to help others, especially children, in the Emmaus House Program on Hank Aaron Drive, and in the public library in Kirkwood where she worked with children such as she had been. She wanted to make the world a better place. And she did.

November 21,2000 was the darkest day our family has ever experienced. Our lives; mine and the lives of my wife and three daughters were changed forever as we learned piece by piece what had happened to Patricia, our

daughter, our children's beloved sister. Every day we struggled to try to remember the beautiful and loving person she was, and drive out the horrible thoughts and visions of how she died.

Many times it seemed as though the darkness was stronger than we were, that this terrible deed was so burned into our lives that we would never be able to celebrate who Patricia was, how much we loved her and how much she loved us. I thought God had abandoned me.

About three months after Trish was killed I remember looking at the table we had set out with photographs of her from different periods of her life. The one that caught my eye was a picture of her at about nine years of age looking back over her shoulder with such a sweet expression on her face, and I smiled for the first time remembering her as a child. It was the first time I had looked at those photos without a stab of pain.

We were not abandoned. The love of family and friends surrounded us, and God worked through them. I knew that I could not live in this darkness. A friend had given us a book of writings for people who have suffered loss. Among them was the saying, "all the darkness in the world cannot extinguish the light of a single candle." Those words helped us. They are written on her headstone in the little graveyard on our farm where Trish is buried, where my wife and I hope to be buried.

I know that love does not seek revenge. We do not want a life for a life. Love seeks healing, peace and wholeness. Hatred can never overcome hatred. Only love can overcome hatred and violence. Love is that light. It is that candle that cannot be extinguished by all the darkness and hatred in the world.

Judge Goger, that is the reason we are not asking for the death penalty. I know that "forgive us our trespasses as we forgive those who trespass against us." was not meant to be empty words. I don't know if I have forgiven you, Ivan Christopher Simpson, for what you did. All I do know is that I don't hate you, but I hate with all my soul what you did to Patricia.

My wish from my heart for all of us who were so terribly wounded by this murder, including you, Ivan Christopher Simpson, is that God would grant us peace.

## Shooting Victim Tries to Prevent Execution of Man Who Shot Him

Rais Bhuiyan, 37, a former Air Force pilot from Bangladesh, survived after being shot him in the face at close range by Mark Anthony Stroman, 41, a stonecutter from Dallas, who said he shot people he believed were Arabs because he was enraged by the terrorist attacks of Sept. 11, 2001. Stroman killed at least two: Vasudev Patel, an Indian immigrant who was Hindu, and Waqar Hasan, a Muslim born in Pakistan.

Stroman admitted to the shootings and was sentenced to death on April 4, 2002 for the murder of Patel. His execution was later scheduled for July 20, 2011. Despite receiving 38 pellets in his face and being partly blinded in his right eye, Bhuiyan, spent the several months before the execution meeting with officials in Texas to try to persuade them not to execute Stroman. He also created a web site with a petition to spare Stroman.

He explained his reasons in an interview with a reporter from the *New York Times*:

I was raised very well by my parents and teachers. They raised me with good morals and strong faith. They taught me to put yourself in others' shoes. Even if they hurt you, don't take revenge. Forgive them. Move on. It will bring something good to you and them. My Islamic faith teaches me this too. He said he did this as an act of war and a lot of Americans wanted to do it but he had the courage to do it – to shoot Muslims. After it happened I was just simply struggling to survive in this country. I decided that forgiveness was not enough. That what he

did was out of ignorance. I decided I had to do something to save this person's life. That killing someone in Dallas is not an answer for what happened on Sept. 11.

Timothy Williams, *The Hated and the Hater, Both Touched by Crime*, N.Y. TIMES, July 18, 2011. Bhuiyan's website, World Without Hate, is at www.worldwithouthate.org. Texas executed Mark Stroman by lethal injection, as scheduled, on July 20, 2011.

**Douglas Oliver KELLY, Petitioner,**
**v.**
**CALIFORNIA; Samuel Zamudio**
**v.**
**California.**

Supreme Court of the United States
555 U.S. 1020, 129 S.Ct. 564 (2008).

The petitions for writs of certiorari are denied. Justice SOUTER would grant the petition for a writ of certiorari in No. 07-11073.

Statement of **Justice STEVENS** respecting the denial of the petitions for writs of certiorari.

These two capital cases raise questions concerning the admissibility of so-called "victim impact evidence" during the penalty phase of a capital trial. The term is a misnomer in capital cases because the evidence does not describe the impact of the crime on the victim – his or her death is always an element of the offense itself. Rather, it describes the impact of the victim's death on third parties, usually members of the victim's family.

In the first of these cases, petitioner Douglas Kelly was convicted of murdering 19-year-old Sara Weir. The prosecution played a 20-minute video consisting of a montage of still photographs and video footage documenting Weir's life from her infancy until shortly before she was killed. The video was narrated by the victim's mother with soft music playing in the background, and it showed scenes of her swimming, horseback riding, and attending school and social functions with her family and friends. The video ended with a view of her grave marker and footage of people riding horseback in Alberta, Canada – the "'kind of heaven'" in which her mother said she belonged.[1]

In the second case, petitioner Samuel Zamudio was convicted of robbing and murdering Elmer and Gladys Benson. Two of the victims' daughters and two of their grandchildren testified about the effects of the murders on themselves and their families. During one daughter's testimony the prosecution played a video containing 118 photographs of the victims at various stages of their lives, including their childhood and early years of marriage. The photographs showed the couple raising their children, serving in the military, hunting, fishing, vacationing, bowling, celebrating holidays and family events, and attending recognition dinners for Gladys's community service. "The last three photographs in the montage showed, in order, Gladys' grave marker with the inscription readable, Elmer's grave marker with the inscription readable, and both grave markers from a distance, each accompanied by a vase of flowers."

In both cases the California Supreme Court upheld the admissibility of the videos. The court explained that the video admitted during Kelly's sentencing "expressed no outrage" and contained no "clarion call for vengeance," but "just implied sadness." Similarly, the court held that the video shown during Zamudio's penalty phase proceedings was "'not unduly emotional.'" Only one dissenting justice expressed any concern that the evidence had the potential to "imbue the proceedings with 'a legally impermissible level of emotion.'" No member of the court suggested that the evidence shed any light on the character of the offense, the character of the offender, or the defendant's moral culpability.

1. The full video is available online at http://www.supremecourt.gov/opinions/video/kelly_v_california.aspx and in Clerk of Court's case file.

**I**

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Throughout the late 1970's and for much of the following decade, the fact that "death is a different kind of punishment from any other that may be imposed in this country," had justified placing limits on its permissible applications, *see*, *e.g., Godfrey v. Georgia* (plurality opinion), and requiring special procedural protections for the defendant, *see Lockett* [*v. Ohio*], (plurality opinion). Our decision in *Booth* [*v. Maryland*] flowed naturally from the same principle.

Beginning in the late 1980's, however, changes in the Court's capital jurisprudence began to weaken the procedural and substantive safeguards on which we had earlier insisted. In *Tison v. Arizona,* rather than adhere to the rule announced in *Enmund v. Florida,* which prohibited death sentences for defendants who neither killed nor intended to kill a victim, a majority of the Court held that felony murder could qualify as a capital offense. Soon thereafter, the Court rejected a challenge to a death sentence based on evidence that a victim's race enhanced the likelihood that a Georgia jury would impose the death penalty. *McCleskey v. Kemp,* 481 U.S. 279 (1987). As Justice Blackmun presciently observed, the fact that "death is different" was fast becoming a justification for applying "a *lesser* standard of scrutiny" in capital cases. See *id.,* at 347, 348 (dissenting opinion).

Confirming that observation, the Court's 1991 opinion in *Payne v. Tennessee* overruled *Booth* in short order, giving prosecutors a powerful new weapon in capital cases. * * *

Given *Payne*'s sharp retreat from prior precedent, it is surprising that neither the opinion of the Court nor any of the concurring opinions made a serious attempt to define or otherwise constrain the category of admissible victim impact evidence. Instead, the Court merely gestured toward a standard, noting that, "[i]n the event that 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." That statement represents the beginning and end of the guidance we have given to lower courts considering the admissibility of victim impact evidence in the first instance.

**II**

In the years since *Payne* was decided, this Court has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, "unduly prejudicial" forms. Following *Payne*'s model, lower courts throughout the country have largely failed to place clear limits on the scope, quantity, or kind of victim impact evidence capital juries are permitted to consider. *See generally*, Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 Ariz. L.Rev. 143 (1999). Not only have courts allowed capital sentencing juries to hear brief oral or written testimony from close family members regarding victims and the direct impact of their deaths; they have also allowed testimony from friends, neighbors, and co-workers in the form of poems, photographs, hand-crafted items, and – as occurred in these cases – multimedia video presentations. *See* Blume, *Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 Cornell L.Rev. 257, 271-272 (2003) (collecting cases).

Victim impact evidence is powerful in any form.[2] But in each of these cases, the evidence

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2. As one Federal District Judge put it, "I cannot help but wonder if *Payne* . . . would have been decided in the same way if the Supreme Court Justices in the majority had ever sat as trial judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony [in a codefendant's case] and the juror's sobbing during the victim impact testimony still rings in my ears. This is true even though the federal prosecutors in [the case] used admirable restraint in terms of the scope, amount, and length of victim impact testimony." *United States v. Johnson*, 362 F.Supp.2d 1043, 1107 (N.D.Iowa 2005)

was especially prejudicial. Although the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offense. Nor was the evidence particularly probative of the impact of the crimes on the victims' family members: The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of crime on the victims' family members.

Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment.

I remain convinced that the views expressed in my dissent in *Payne* are sound, and that the *per se* rule announced in *Booth* is both wiser and more faithful to the rule of law than the untethered jurisprudence that has emerged over the past two decades. Yet even under the rule announced in *Payne,* the prosecution's ability to admit such powerful and prejudicial evidence is not boundless.

These videos are a far cry from the written victim impact evidence at issue in *Booth* and the brief oral testimony condoned in *Payne*. In their form, length, and scope, they vastly exceed the "quick glimpse" the Court's majority contemplated when it overruled *Booth* in 1991. At the very least, the petitions now before us invite the Court to apply the standard announced in *Payne,* and to provide the lower courts with long-overdue guidance on the scope of admissible victim impact evidence. Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use.