THE RESPONSE TO *PAYNE V. TENNESSEE*: GIVING THE VICTIM'S FAMILY A VOICE IN THE CAPITAL SENTENCING PROCESS

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INTRODUCTION

In *Payne v. Tennessee*,[1] the Supreme Court reversed its position in *Booth v. Maryland*,[2] by holding that the Eighth Amendment does not erect a per se bar to the introduction of victim impact evidence in a capital sentencing proceeding.[3] This controversial decision has been the subject of volumes of commentary.[4]

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1. 501 U.S. 808 (1991).

2. 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

3. "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." *Payne*, 501 U.S. at 827.

4. *See, e.g.*, Keith L. Belknap, Jr., Recent Developments, 15 HARV. J. L. & PUB. POL'Y 275 (1992); Vivian Berger, Payne *and Suffering—A Personal Reflection and Victim Centered Critique*, 20 FLA. ST. U. L. REV. 21 (1992); David R. Dow, *When Law Bows to Politics: Explaining* Payne v. Tennessee, 26 U.C. DAVIS L. REV. 157 (1992); Markus D. Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 BUFF. L. REV. 85 (1993); Carole Mansur, Payne v. Tennessee*: The Effect of Victim Harm at Capital Sentencing Trials and the Resurgence of Victim Impact Statements*, 27 NEW ENG. L. REV. 713 (1993); Suzanne Murray, *Constitutional Law—Victim Impact Evidence: Basing Sentencing Decisions on Emotion Rather than Reason*—Payne v. Tennessee, 26 SUFFOLK U. L. REV. 221 (1992); R.P. Peerenboom, *Victim Harm, Retribution and Capital Punishment: A Philosophical Critique of* Payne v. Tennessee, 10 PEPP. L. REV. 1621 (1992); Michael Vitiello, Payne v. Tennessee*: A "Stunning Ipse Dixit,"* 8 NOTRE DAME J. L. ETHICS & PUB. POL'Y 165 (1994); Ranae Bartlett, Note, Payne v. Tennessee*: Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 ARK. L. REV. 561 (1992); Michael Q. Berkley, Note, *Constitutional Law—What You Don't Know Can Kill You: The Rehnquist Court's Allowance of Unforeseeable Victim Impact Evidence in the Era of Disposable Precedent*—Payne v. Tennessee, 27 WAKE FOREST L. REV. 741 (1992); Craig E. Gilmore, Note, Payne v. Tennessee*: Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469 (1992); Elizabeth A. Meek, Note, *Victim Impact Evidence and Capital Sentencing: A Casenote on* Payne v. Tennessee, 52 LA. L. REV. 1299 (1992); Michael I. Oberlander, Note, *The* Payne *of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621 (1992); Stephen M. Sargent, Note, Payne v. Tennessee*: The Supreme Court Places its Stamp of Approval on the Use of 'Victim Impact Evidence' During Capital Sentencing Proceedings*, 1992 B.Y.U. L. REV. 841; Victor D. Vital, Casenote, Payne v. Tennessee*: The Use of Victim Impact Evidence at Capital Sentencing Trials*, 19 T. MARSHALL L. REV. 497 (1994); K. Elizabeth Whitehead, Note, *Mourning Becomes Electric:* Payne v. Tennessee*'s Allowance of Victim Impact Statements During Capital Sentencing*

Although much of the commentary has been critical,[5] it is clear, since *Payne* was decided in 1991, that the holding and the rationale underlying the decision has been adopted by an increasing number of state courts.[6] This Note focuses on the evolution of victim impact testimony in Supreme Court jurisprudence, the resulting impact on state court decisions, the legislative response, and it provides a model statute for the introduction of victim impact testimony in a manner which comports with the accused's Eighth and Fourteenth Amendment rights.[7]

I. THE SUPREME FLIP-FLOP ON THE USE OF VICTIM IMPACT DURING CAPITAL SENTENCING

The Supreme Court first addressed the use of victim impact statements in *Booth v. Maryland*.[8] In *Booth*, the Court held by a 5-4 majority that the Eighth Amendment barred consideration of victim impact evidence during a capital sentencing proceeding.[9] The victim impact statement in *Booth* involved two types of information: (1) the personal characteristics of the victims and the emotional impact of the crime on family members, and (2) the family members' opinions and characterizations of the crime and the defendant.[10] Although the Court conceded "the full range of foreseeable consequences of a defendant's actions" might be

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Proceedings, 45 ARK. L. REV. 531 (1992).

5. *See* Vitiello, Berger, Dow, Dubber, Peerenboom, Oberlander, Whitehead, Bartlett, Murray, Berkley, Vital, *supra* note 4.

6. *See* Freeman v. State, 876 P.2d 283, 289 (Okla. Crim. App. 1994) ("[E]vidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim's family is a relevant consideration of Oklahoma capital sentencing juries."). *See also Ex parte* Slaton, 680 So. 2d 909, 928 (Ala. 1996), *cert denied*, 117 S. Ct. 742 (1997); People v. Edwards, 819 P.2d 436, 467 (Cal. 1991); Windom v. State, 656 So. 2d 432, 438 (Fla.), *cert. denied*, 116 S. Ct. 571 (1995); Livingston v. State, 444 S.E.2d 748, 751 (Ga. 1994); State v. Card, 825 P.2d 1081, 1088 (Idaho 1991); People v. Howard, 588 N.E.2d 1044, 1067 (Ill. 1991); Bowling v. Commonwealth, 942 S.W.2d 293, 302 (Ky. 1997); State v. Scales, 655 So. 2d 1326, 1335 (La. 1995), *cert. denied*, 116 S. Ct. 716 (1996); Evans v. State, 637 A.2d 117, 132 (Md. 1994); State v. Fautenberry, 650 N.E.2d 878, 992-93 (Ohio), *cert. denied*, 116 S. Ct. 534 (1995); Homick v. State, 825 P.2d 600, 606 (Nev. 1992) ("The key to criminal sentencing in capital cases is the ability of the sentencer to focus upon and consider both the individual characteristics of the defendant and the nature and impact of the crime he committed. Only then can the sentencer truly weigh the evidence before it and determine a defendant's just deserts."); Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994), *cert. denied*, 116 S. Ct. 100 (1995); State v. Gentry, 888 P.2d 1105, 1136 (Wash.), *cert. denied*, 116 S. Ct. 131 (1995).

7. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The Eighth Amendment is directly applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 667 (1962).

8. 482 U.S. 496 (1987).

9. *Id.* at 509.

10. *Id.* at 502.

relevant in other criminal cases,[11] the Court decided victim impact statements were not relevant in the "unique circumstance of a capital sentencing hearing."[12] Instead, a jury was required to focus on "the defendant as a 'uniquely individual human bein[g].'"[13] The character of the victim and the effect on his family "may be wholly unrelated to the blameworthiness of a particular defendant."[14]

Justice White's dissent emphatically rejected the majority's contention that the harm caused by a defendant's actions was not relevant in a capital sentencing proceeding:

> If anything, I would think that victim impact statements are particularly appropriate evidence in capital sentencing hearings . . . 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.[15]

Echoing this sentiment, Justice Scalia wrote, "It seems to me, however—and I think, to most of mankind—that the amount of harm one causes does bear upon the extent of his 'personal responsibility.'"[16]

Two years later, in *South Carolina v. Gathers*,[17] the Court extended the holding of *Booth* to include the prohibition of prosecutorial comments relating to a victim's individual qualities. The majority concluded it was unconstitutional to allow a jury to impose a death sentence based upon the characteristics of the victim of which the defendant was not aware.[18]

The holdings of *Booth* and *Gathers* were short-lived. By 1991, the membership of the Court had substantially changed. Two members of the *Booth* majority, Justice Powell, the author of the *Booth* opinion,[19] and Justice Brennan were replaced by Justices Kennedy and Souter. *Payne* presented the now more conservative Court an opportunity to overrule *Booth* and *Gathers*.

Payne presented the following facts. Around 3 p.m. on June 27, 1987, after spending the morning and early afternoon injecting cocaine and drinking beer, Pervis Tyrone Payne entered the apartment of Charisse Christopher, who happened to live across the hall from Payne's girlfriend.[20] After Charisse rejected Payne's sexual advances, Payne became violent. A neighbor who lived directly below the apartment called police after hearing a "blood curdling scream" from

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11. *See id.* at 504.
12. *Id.*
13. *Id.* (citing Woodson v. North Carolina, 482 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, & Stevens, JJ.)).
14. *Id.*
15. *Id.* at 517 (White, J., dissenting).
16. *Id.* at 519 (Scalia, J., dissenting).
17. 490 U.S. 805 (1989).
18. *See id.* at 811.
19. *Booth*, 482 U.S. at 496.
20. *See* Payne v. Tennessee, 501 U.S. 808, 811-13 (1991).

Charisse's apartment.[21] The first officer on the scene encountered Payne leaving the building, so covered with blood he appeared to be "sweating blood."[22] Payne struck the officer with a bag, and then fled. When police arrived at Charisse's apartment, they found Charisse and her two children, Nicholas and Lacie, lying on the floor of the kitchen. Blood covered the walls and floor throughout the apartment. Despite several wounds inflicted with a butcher knife which completely penetrated his body, three-year-old Nicholas survived.[23] Charisse and her two-year-old daughter were dead. Charisse had suffered forty-two direct knife wounds and forty-two defensive wounds on her arms, caused by forty-one separate thrusts of a butcher knife. Lacie's body was near her mother's. She sustained stab wounds to the chest, abdomen, back, and head. Payne's baseball cap was snapped on her arm near her elbow.

During the sentencing phase, after Payne had presented witnesses to testify on his behalf, the State presented the testimony of Nicholas's grandmother.[24] When asked how Nicholas had been affected[25] 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.[26]

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

> [Payne's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.[27]

The jury recommended death on each murder count.[28]

On appeal, the Tennessee Supreme Court concluded that any violation of

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21. *See id.* at 812.

22. *See id.*

23. *See id.* at 812-13.

24. *See id.* at 814-15.

25. *Payne* provides a particularly chilling example of where victim impact evidence is indisputably relevant to the defendant's culpability. Payne murdered a mother in front of her children.

26. *Payne*, 501 U.S. at 814-15.

27. *Id.* at 816.

28. *See id.*

Payne's rights was harmless.[29] The Supreme Court granted certiorari to reconsider its holdings in *Booth* and *Gathers*.[30]

The Court, only four years after *Booth* was decided, overruled its holding in that case as it applied to the admission of evidence and argument concerning a victim's individual characteristics and the impact of the defendant's crime upon the victim's family. Chief Justice Rehnquist, writing for the majority, specifically rejected the notion that the impact of a defendant's crime was not relevant to capital sentencing.[31] The opinion began by assessing the traditional functions of criminal sentencing in contemporary society, noting that contrary to the assertions of the majority in *Booth*, an assessment of the harm caused by a defendant has always been an important consideration in determining the appropriate punishment.[32] Rehnquist also stated that although a capital defendant is required to be treated as a unique individual, this does not entitle the defendant to "consideration wholly apart from the crime which he had committed."[33]

In a concurring opinion, Justice Souter addressed the issue of the fairness of allowing a defendant to be sentenced based in part upon consideration of characteristics of the victim of which the defendant was not aware at the time he committed the crime. Murder, Souter noted, has foreseeable consequences:

> The fact 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.[34]

In his final dissenting opinion, Justice Marshall bitterly attacked the willingness of the majority to overrule precedent; "Power, not reason, is the new currency of this Court's decisionmaking."[35] Marshall believed the majority lacked the "special justification" necessary to overrule precedent.[36] It seems clear,

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29. *See id.* at 818.

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

31. *See Payne*, 501 U.S. at 819.

32. *See id.* at 819-22.

33. *Id.* at 822.

34. *Id.* at 838 (Souter, J., concurring).

35. *Id.* at 844 (Marshall, J., dissenting). Marshall apparently applies a "first in time" principle in his reasoning to arrive at this conclusion. When Marshall and Brennan, who were both ideologically opposed to the death penalty, comprised two-fifths of the majority in *Booth*, it was apparently, at least in Marshall's mind, a triumph of "impersonal and reasoned judgment" that carried the day. *Id.* (citing Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970)).

As Justice Scalia noted in his response to Marshall's criticism, "quite to the contrary, what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes." *Id.* at 834 (Scalia, J., concurring).

36. *Id.* at 849 (Marshall, J., dissenting). Again, Marshall's argument fails to adequately

however, given the current composition of the Court, and the wide acceptance of the rationale of *Payne* by courts[37] and legislatures,[38] the Supreme Court is unlikely to depart from its holding anytime in the near future.

II. THE IMMEDIATE EFFECT OF *PAYNE* ON SENTENCING PROCEEDINGS

Despite *Payne's* holding, it did not provide state courts or legislatures with any clear guidelines of its application to existing statutes. As Justice O'Connor stated, "[w]e 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 type of evidence, the Eighth Amendment erects no per se bar."[39] The difficulty in applying *Payne* to then existing death penalty statutes is that no explicit provisions existed providing for the presentation of victim impact evidence at capital sentencing proceedings.

There are currently thirty-eight states which impose the death penalty. As a result of *Furman v. Georgia*,[40] which effectively vacated all death penalty statutes, and *Gregg v. Georgia*,[41] in which the plurality opinion stated that discretion to impose the death penalty must be directed in such a way as to "minimize the risk of wholly arbitrary and capricious action,"[42] all thirty-eight states require the trier in a capital sentencing proceeding to weigh the existence of "aggravating" and "mitigating" circumstances.[43] Although there is some variation among states as

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explain why the Court should adhere to poorly reasoned decisions. Some decisions were so poorly reasoned when they were written, there is no answer as to why the nation is better served by adhering to a decision which once achieved a majority, rather than overruling it and minimizing its impact at the earliest opportunity. *See id.* at 842-43 (Souter, J., concurring) ("In prior cases, when this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent.").

37. *See supra* note 6.

38. *See infra* note 43.

39. *Payne*, 501 U.S. at 831 (internal quotes omitted).

40. 408 U.S. 238 (1972).

41. 428 U.S. 153 (1976).

42. *Id.* at 189 (plurality opinion).

43. Within the 38 statutes, there are variations in the type of evidence admissible. The first category of statutes include a "catch-all" phrase (hereinafter "general"), that provides for a sentencing court to hear all evidence relevant to the crime or sentence. Those 15 states with "general" statutes are: ALA. CODE § 13A-5-45 (1994); CAL. PENAL CODE § 190.3 (West 1988); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1997); KAN. STAT. ANN. § 21-4624(c) (1995); MD. CODE ANN. art. 27, § 413 (1996); MISS. CODE ANN. §§ 99-19-101, 97-3-19 (1994); NEB. REV. STAT. § 29-2521 (1995); NEV. REV. STAT. ANN. § 200.033 (Michie 1997); N.M. STAT. ANN. §§ 31-20A-1, A-5 (Michie 1994); N.C. GEN. STAT. § 15A-2000 (Supp. 1996); TENN. CODE ANN. § 39-13-204 (Supp. 1996); TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1997) (Although the Texas statute can be characterized as a "general" provision, the Texas courts have tied the admissibility of victim impact evidence to its relation to the circumstances of the offense. *See supra* note 59.); VA. CODE ANN. §§ 19.2-264.4, -264.5 (Michie 1995); WASH. REV. CODE ANN. §

to which behaviors qualify as "aggravating circumstances," death penalty statutes are similar in that they delineate specific types of conduct which must be proven before a defendant can be sentenced to die. Typical aggravators for murder include the murder of a police officer or murder during the commission of a robbery or rape.[44]

10.95.060 (West 1990); WYO. STAT. ANN. § 6-2-102 (Michie Supp. 1996).

The second type of death penalty statute are those which make no general provision for the consideration of evidence not relevant to the statutorily enumerated aggravators (hereinafter "limited"). Those eleven states with "limited" statutes are: ARIZ. REV. STAT. § 13-703 (Supp. 1996-1997); DEL. CODE ANN. tit. 11, § 4209 (1995); GA. CODE ANN. § 17-10-30 (Supp. 1996); IDAHO CODE § 19-2515 (1997); 720 ILL. COMP. ANN. STAT. 5/9-1 (West Supp. 1997); IND. CODE § 35-50-2-9 (Supp. 1996); KY. REV. STAT. § 532.025 (Michie Supp. 1996); N.H. REV. STAT. ANN. § 630:5 (1996); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1997); OHIO REV. CODE ANN. § 2929.03 (Anderson 1996); S.C. CODE ANN. § 16-3-20 (Law Co-op Supp. 1996).

Another twelve states have revised their death penalty statutes since *Payne* to provide for consideration of victim impact evidence during capital sentencing proceedings. Those states are: ARK. CODE ANN. § 5-4-602 (Michie Supp. 1995); COLO. REV. STAT. ANN. § 16-11-103 (West Supp. 1996); FLA. STAT. ANN. § 921.141 (West Supp. 1997); LA. CODE CRIM. PROC. ANN. art. 905.2 (West Supp. 1997); MO. ANN. STAT. § 565.030 (Vernon Supp. 1997); MONT. CODE ANN. § 46-18-302 (1995); N.J. STAT. ANN. § 2C:11-3 (West 1995); OKLA. STAT. ANN. tit. 21, § 701.10(c) (West Supp. 1996); OR. REV. STAT. § 163.150 (Supp. 1996); PA. CONS. STAT. ANN. tit. 42, § 9711 (West Supp. 1997-1998); S.D. CODIFIED LAWS ANN. § 23A-27A-2(2) (Supp. 1997); UTAH CODE ANN. § 76-3-207 (Supp. 1996).

44. Indiana's death penalty statute is representative of the type of aggravating circumstances states typically use to determine whether a particular crime is death penalty eligible. The aggravators enumerated are:

(1)The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson;

(B) Burglary;

(C) Child molesting;

(D) Criminal deviate conduct;

(E) Kidnapping;

(F) Rape;

(G) Robbery;

(H) Carjacking;

(I) Criminal gang activity;

(J) Dealing in cocaine or a narcotic drug.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law

Unlike statutory aggravating circumstances, the Supreme Court has held that a defendant has a right to present "any relevant mitigating evidence" that he proffers in support of a sentence less than death.[45] Although the state must show the existence of a specific aggravating circumstance for a jury to sentence a defendant to death, a defendant has an unfettered right to present any type of evidence, however remotely relevant to mitigation of a death sentence, which might tend to make the imposition of the death penalty less likely.[46] This

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enforcement officer, and either:

(A) The victim was acting in the course of duty; or

(B) The murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

(A) under the custody of the department of correction;

(B) under the custody of a county sheriff;

(C) on probation after receiving a sentence for the commission of a felony; or

(D) on parole;

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The defendant burned, mutilated, or tortured the victim while the victim was alive.

(12) The victim of the murder was less than twelve (12) years of age.

(13) The victim was a victim of any of the following offenses for which the defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.

(B) Kidnapping (IC 35-42-3-2).

(C) Criminal confinement (IC 35-42-3-3).

(D) A sex crime under IC 35-42-4.

(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.

(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

(A) into an inhabited dwelling; or

(B) from a vehicle.

IND. CODE § 35-50-2-9(b) (Supp. 1996).

45. Eddings v. Oklahoma, 455 U.S. 104, 114 (1982); *see also* Skipper v. South Carolina, 476 U.S. 1, 4 (1986).

46. For example, Indiana's death penalty statute provides:

The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

imbalance, which existed before *Payne*, led Justice Scalia to comment in *Booth*:

> To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring . . . that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted.[47]

A. The Use Of Victim Impact Testimony With Existing Capital Sentencing Statutes

Although all death penalty statutes are similar in their weighing of aggravators and mitigators, the statutes differ in how victim impact evidence may be treated. These differences may be broken down into three categories: general type statues, limited statutes, and those statutes which specifically provide for victim impact evidence.[48]

1. "General" Statutes.—General statutes usually include a provision that allows a jury to hear evidence on any matter "relevant to sentence"[49] or to "the circumstances of the crime."[50] Courts have interpreted these type of statutes broadly, allowing a sentencing judge or jury to hear victim impact evidence on the theory that the harm caused by the defendant to the victim's family and the unique characteristics of the victim, are relevant to either the sentence or the circumstances of the crime.[51]

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(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) *Any other circumstances appropriate for consideration.*

IND. CODE § 35-50-2-9(c) (Supp. 1996) (emphasis added).

47. Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

48. *See supra* note 43.

49. For example, Maryland's statute allows for evidence to be presented on "Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements." MD. ANN. CODE art. 27, § 413(c)(v) (1996).

50. *See, e.g.*, TENN. CODE ANN. § 39-13-204(c) (Supp. 1996) ("[E]vidence may include, but not be limited to, the nature and circumstances of the crime. . . .").

51. *See, e.g.*, *Ex parte* Slaton, 680 So. 2d 209, 928 (Ala. 1996), *cert. denied*, 117 S. Ct. 742 (1997); People v. Edwards, 819 P.2d 436 (Cal. 1991); Evans v. State, 637 A.2d 117 (Md. 1994); Homick v. State, 825 P.2d 600, 606 (Nev. 1992); Weeks v. Commonwealth, 450 S.E.2d 379 (Va.

The willingness of state courts to accept the reasoning of *Payne* and allow victim impact evidence under the rubric of circumstances of the crime is demonstrated in *People v. Raley*:[52]

> We have recently explained that our decisions holding that victim impact evidence and argument are inappropriate in the penalty trial were largely based on *Booth v. Maryland* and *South Carolina v. Gathers*. Once those authorities no longer bound us, . . .[w]e held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim."[53]

However, the Oregon Court of Appeals in *State v. Metz*[54] rejected this reasoning. Oregon's death penalty statute included a provision describing the penalty phase that stated, "[i]n the proceeding, evidence may be presented as to any matter the court deems relevant to sentence. . . ."[55] Oregon's capital sentencing statute also included a list of four questions which must be answered in the affirmative before a defendant could be sentenced to death.[56] Consequently, the trial court allowed the victim's son and daughter to testify as to the impact of their parents' murder, reasoning that such evidence was relevant to the fourth question, "whether the defendant should receive the death sentence."[57] The appellate court disagreed, reasoning that because victim impact evidence was inadmissible when the statute was written, the legislative intent was for "a specific purpose, *i.e.*, to ensure consideration of *evidence pertaining to mitigation, with particular reference to a defendant's character, background or crime*."[58] "Any other result . . . would permit irrelevant evidence to be interjected into the penalty phase, distorting the capital jury's consideration of the statutorily prescribed questions."[59] Apparently, the Oregon legislature disagreed with this interpretation

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1994), *cert. denied*, 116 S. Ct. 100 (1995); State v. Gentry, 888 P.2d 1105 (Wash.), *cert. denied*, 116 S. Ct. 131 (1995).

52. 830 P.2d 712 (Cal. 1992).

53. *Id.* at 742. Section 190.3 provides:

"In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." CAL. PENAL CODE § 190.3 (West 1988).

54. 887 P.2d 795 (Or. Ct. App. 1994).

55. *Id.* at 800 (quoting OR. REV. STAT. § 163.150(1)(a) (1990)).

56. *See id.* A fifth question permits the trier to weight mitigating circumstances. *See* OR. REV. STAT. § 163.150 (Supp. 1996).

57. *Metz*, 887 P.2d at 800-01.

58. *Id.* at 801.

59. *Id.* at 803. *See also* McDuff v. State, 939 S.W.2d 607, 620 (Tex. Crim. App. 1997) (en banc) (admissibility of victim impact evidence linked to consequences foreseeable to defendant and to defendant's moral culpability); Smith v. State, 919 S.W.2d 96, 102 (Tex. Crim. App.) (en banc), *cert. denied*, 117 S. Ct. 587 (1996) (holding victim impact evidence is inadmissible as a matter of law to the extent it is not directly related to the circumstances of the offense or necessary for

of its intent; less than seven months after the *Metz* decision, the legislature changed the statute to specifically provide for the admissibility of victim impact evidence during a capital sentencing proceeding.[60]

2. *Limited Statutes.*—Limited death penalty statutes present a more difficult question regarding the admissibility of victim impact evidence. These statutes provide no "catch-all" phrase which allows for any relevant evidence to be considered.[61]

However, to suggest that victim impact evidence is inadmissible because a statute does not include a "catch-all" phrase is unwarranted. Most courts in states with limited statutes have accepted the use of victim impact testimony notwithstanding the absence of a statutory provision that provides for the reception of evidence relevant to any factor other than enumerated aggravators.[62] Perhaps they recognize the incongruity of allowing impact statements in sentencing for all other crimes, yet bar the consideration of such testimony when a sentencing jury must make a determination whether to mete out the ultimate punishment. There are, of course, procedural concerns when a statute does not provide guidance for the admission of such testimony. However, there are already procedural safeguards in place which, as with the admission of any other evidence, protect the defendant's rights. A trial judge has the discretion to exclude evidence whose potential prejudicial effect outweighs its probative value, and she can prevent a parade of witnesses.

Some commentators and judges have had difficulty in distinguishing between statutory aggravators and victim impact evidence;[63] however, the two concepts are not identical. *Payne* does not stand for the proposition that a defendant could be sentenced to death based solely upon the testimony of a family member of the victim that the victim was an upstanding citizen, and that his murder has had a devastating impact on his family. Victim impact is not a factor that is "weighed against" mitigating factors; it is merely relevant evidence in considering the appropriate punishment in a particular case. Aggravating circumstances are facts sufficient to elevate a crime to a death-eligible category, while victim impact

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rebuttal); State v. Carter, 888 P.2d 629, 651 (Utah), *cert. denied*, 116 S. Ct. 163 (1995).

60. OR. REV. STAT. § 163.150(1)(a) (Supp. 1996).

61. *See supra* note 43.

62. *See, e.g.*, Livingston v. State, 444 S.E.2d 748, 751 (Ga. 1994); State v. Card, 825 P.2d 1081, 1088 (Idaho 1991); State v. Howard, 588 N.E.2d 1044, 1067 (Ill. 1991) ("[W]e find persuasive the reasons that prompted the United States Supreme Court to overrule Booth . . . Accordingly, we now choose to align ourselves with the Court rule on this subject. Accordingly, we find no error in the presentation of the evidence now challenged by the defendant."); Bowling v. Commonwealth, 942 S.W.2d 293, 302 (Ky. 1997) ("A murder victim can be identified as more than a naked statistic, and statements identifying the victims as individual human beings with personalities and activities does not unduly prejudice the defendant or inflame the jury."); State v. Gumm, 653 N.E.2d 253, 263-65 (Ohio 1995), *cert. denied*, 116 S. Ct. 1275 (1996); State v. Johnson, 410 S.E.2d 547, 555 (S.C. 1991).

63. *See, e.g.*, William J. Bowers, *The Capital Jury Project: Rationale, Design, & Preview of Early Findings*, 70 IND. L.J. 1043, 1044 (1995).

evidence are facts relevant to a determination as to whether a death sentence should be imposed on a death-eligible defendant.[64] As the Oklahoma Court of Criminal Appeals explains:

> Evidence supporting an aggravating circumstance is designed to provide guidance to the jury in determining whether the defendant is eligible for the death penalty; victim impact evidence informs the jury why the victim should have lived. Even if victim impact evidence is present in every case, this does not relieve the prosecution of its burden to prove beyond a reasonable doubt the aggravating circumstance it has alleged. The two kinds of evidence are not similar: that a victim may have been a great person who will be missed by his friends and relatives does not go toward proving . . . [any] aggravating circumstance the prosecution might allege. Because the jury's discretion still is narrowly channeled by the requirement they must find at least one aggravating circumstance beyond a reasonable doubt, the death penalty does not become overbroad, and Appellant's contention this is an Eighth Amendment violation fails.[65]

The inability to draw the distinction between victim impact evidence and aggravating circumstances has led some courts to conclude that victim impact evidence is inadmissible during the sentencing phase unless it specifically relates to the existence of one of the statutorily enumerated aggravating circumstances. For example, in *Bivins v. State,*[66] the Indiana Supreme Court characterized a statement given by the victim's wife describing the impact of the murder on her and her son as a "non-statutory aggravator" which was prohibited by the Indiana Constitution.[67]

A similar result was reached in Arizona regarding the trial court's reception of victim impact evidence. In *State v. Atwood,*[68] the court concluded that "until the legislature says otherwise, . . . the trial court may not give aggravating weight

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64. *See, e.g.*, *Gumm*, 653 N.E.2d at 263 (contrasting evidence relating to the nature and circumstances of the crime with evidence relating to aggravators and mitigators).

65. Cargle v. State, 909 P.2d 806, 828 n.15 (Okla. Crim. App. 1995), *cert. denied,* 117 S. Ct. 100 (1996).

66. 642 N.E.2d 928 (Ind. 1994).

67. *Id.* at 953-57. Chief Justice Shepard stated in his concurring opinion, "I expect that the people of Indiana will be amazed to learn that Justices of their Supreme Court have declared victims constitutionally irrelevant in death penalty cases." *Id.* at 960 (Shepard, C.J., concurring). The *Bivins* court was particularly concerned with the Indiana Constitutional requirement that all penalties be proportionate to the offense. IND. CONST. art. I, § 16. The court stated that article I, section 16 of the Indiana Constitution provides more protection than the Eighth Amendment. *Bivins*, 642 N.E.2d at 955. *Compare* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (Scalia, J.) ("[T]he Eighth Amendment contains no proportionality guarantee."). *See also* Commonwealth v. Fisher, 681 A.2d 130, 146-47 (Pa. 1996) (victim impact testimony not admissible under 42 PA. CONS. STAT. § 9711 as it existed prior to being amended.).

68. 832 P.2d 593 (Ariz. 1992).

to victim impact evidence."[69] However, the court added a twist: "The trial court is free, however, to rebut evidence offered in mitigation with relevant victim impact evidence."[70]

The implication of Arizona's statement that victim impact evidence may be used in rebuttal is not clear. However, it is logical if one accepts Justice Souter's argument; victim impact evidence is admissible and relevant because it is a foreseeable consequence of the defendant's actions.[71] Thus, if a defendant, in mitigation, offers evidence of his good character, the state may use victim impact evidence to rebut this evidence.[72] As Souter noted, the victim impact is an almost inevitable consequence of the defendant's actions.[73] If a defendant is found to have been sane at the time of the crime, then he is considered able to appreciate the foreseeable consequences of his actions. When a defendant acts in a manner with callous disregard to those foreseeable consequences, it calls his or her character into question. The use of victim impact evidence in rebuttal may be a means for courts to reconcile such evidence with a statute written before *Payne* that makes no provision for its admissibility.

Once one discerns the difference between victim impact evidence and aggravators, there is no reason to exclude the admission of evidence which is relevant to the sentencing of a capital defendant. Notwithstanding a decision that victim impact testimony was admitted in error, in practice it usually makes little difference. Even though a perceived error during sentencing may be of constitutional dimensions, the trial court's decision may be upheld if it is found to be harmless beyond a reasonable doubt.[74]

III. THE LEGISLATIVE RESPONSE

As a result of decisions such as *Bivins, Atwood, Metz, Carter and Sermons*,[75]

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69. *Id.* at 673.

70. *Id.*

71. *See supra* text accompanying note 34.

72. *Cf.* State v. Johnson, 410 S.E.2d 547 (S.C. 1991). In *Johnson*, the court determined that a prosecutor's statement that "the [victim's] family could not go see him, they could only see him at the grave" was a proper response to the defendant's sister's testimony that she visited the defendant in the penitentiary for Christmas. *Id.* at 555. Clearly, the court's reasoning is correct. A defendant who seeks to evoke the jury's sympathy in such a manner can hardly complain where the prosecutor reminds the jury that the defendant made it so that the victim's family will never see their loved one again.

73. *See* Payne v. Tennessee, 501 U.S. 808, 838 (1991) (Souter, J., concurring).

74. *See Atwood*, 832 P.2d at 674; Bivins v. State, 642 N.E.2d 928, 957 (Ind. 1994); Sermons v. State, 417 S.E.2d 144, 146 (Ga. 1992); State v. Metz, 887 P.2d 795, 803 (Or. Ct. App. 1994) (The defendant was in fact sentenced to life imprisonment.); State v. Carter, 888 P.2d 629, 653 (Utah 1994), *cert. denied* 116 S. Ct. 163 (1995).

75.

In *Carter*, not only did the Utah Supreme Court hold that victim impact evidence was inadmissible under Utah's capital sentencing scheme, it specifically repudiated the rationale underlying *Payne*:

and the need to provide procedural guidelines for the admission of victim impact testimony, state legislatures have responded by enacting capital sentencing statutes that specifically provide for consideration of victim impact evidence[76] and amendments to state constitutions which essentially create a "victims' bill of rights."[77]

> [W]e find that victim impact evidence simply has no probative force in the sentencing context. Such evidence does not make it more or less likely that a defendant deserves the death penalty. In our society, individuals are of equal value and must be treated that way. We will not tempt sentencing authorities to distinguish among victims—to find in one person's death more or less deserving of retribution merely because he or she was held in higher or lower regard by family or peers. Such a scheme draws lines in our society that we think should not be drawn. The worth of a human life is inestimable, and we do not condemn those who take life more or less harshly because of the perceived value or quality of life taken.

Carter, 888 P.2d at 652.

Apparently the Utah Legislature disagreed. In 1995, less than a year after the case was decided, Utah modified its death penalty statute to specifically provide for victim impact testimony. *See* UTAH CODE ANN. § 76-3-207 (Supp. 1996). The *Carter* court made a fundamental error. Victim impact evidence may "tempt sentencing authorities to distinguish among victims," which, most agree, would generally be improper. (The exceptions to the general rule include the murder of the very young and police officers.) *See Payne*, 501 U.S. at 836 (Souter, J., 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.") However, victim impact evidence may also serve legitimate purposes. Because the consequences of criminal conduct bear on the culpability of the criminal defendant, evidence of those consequences should be relevant in a sentencing proceeding. Moreover, victim impact evidence demonstrates to a jury why society punishes murder so harshly. Murder often causes unbearable heartbreak to survivors in addition to the homicide victim's loss of life.

Victim impact evidence is powerful and it presents the danger of prejudice. However, courts have long dealt with evidence which has these qualities by giving limiting instructions. Uncharged misconduct evidence possesses these same qualities. The possibility of prejudice does not justify a per se bar to that type of evidence. A per se bar is likewise not justified in capital sentencing cases. One may argue that "death is different," *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Scalia, J.), and that therefore capital defendant's need additional protection. However, the reason for rejecting victim impact evidence would be that it creates the possibility of unfair sentences for those *already convicted.* That is certainly less of an injustice than the possibility of *unfair convictions* based partially on the use of uncharged misconduct. Moreover, the state in a capital sentencing case is not required to eliminate all risk of prejudice; it only has to minimize the risk. *See* Tuilaepa v. California, 512 U.S. 967, 973 (1994).

Ultimately, we must trust juries. Trial by jury is a fundamental right and an integral part of our justice system. In capital cases, it is inevitable that powerful and wrenching evidence will be placed before ordinary citizens. Those citizens, ably instructed by the nation's trial judges, can be trusted with this type of evidence and be trusted to make the right decision.

76. *See supra* note 43.

77. Currently at least 13 of the 38 states that possess the death penalty have constitutional

A. Victim Impact Statutes

Currently, twelve states have enacted statutes which specifically allow victim impact evidence during capital sentencing proceedings, including seven in 1995 alone.[78] These statutes help address the problems of sentencing statutes which do not provide for a procedure to permit the introduction of victim impact testimony. They also send an unambiguous message to the state courts that the people of the state, want victim impact testimony to be permitted during capital sentencing proceedings. Further, because a change in the statute allowing for the introduction of victim impact testimony is a procedural change, such laws are not subject to ex post facto prohibitions[79] and can be applied to pre-existing death penalty cases.

All of the statutes which provide for the use of victim impact evidence generally follow the language of *Payne*. Most have modified the statute by simply adding a phrase which indicates that victim impact evidence may be considered, along with evidence concerning aggravating circumstances.[80] Montana's statute, enacted October 1, 1995, is an example of a statute which makes the most basic provision for the admission of victim impact testimony. It provides simply;

> In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime; the defendant's character, background, history, and mental and physical condition; *the harm caused to the victim and the victim's family as a result of the offense*; and any other facts in aggravation or mitigation of the penalty.[81]

Missouri's statute provides a trial court with a little more guidance regarding the admissibility of victim impact evidence:

> Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating

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provisions regarding the rights of victims: ARIZ. CONST. art. II, § 2.1; CONN. CONST. art. I, § 8; FLA. CONST. art. I, § 16; IND. CONST. art. I, § 13(b); MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8(a); WASH. CONST. art. I, § 35. The voters of Montana will consider a victims' rights amendment in 1998. *See* H.R. 234, Reg. Sess. (Mont. 1997).

78. *See supra* note 43.

79. *See* Collins v. Youngblood, 497 U.S. 37, 44-45 (1990); Windom v. State, 656 So. 2d 432, 439 (Fla. 1995); Mitchell v. State, 884 P.2d 1186, 1204 (Okla. Crim. App. 1994).

80. *See* MO. ANN. STAT. § 565.030 (West Supp. 1997); OKLA. STAT. ANN. tit. 21, § 701.10(c) (West Supp. 1997) ("In addition, the state may introduce evidence about the victim and about the impact of the murder on the family of the victim."); S.D. CODIFIED LAWS ANN. § 23A-27A-2 (Supp. 1997); UTAH CODE ANN. § 76-3-207(2)(a)(iii) (Supp. 1996). Utah's capital sentencing proceeding statue interestingly added that the victim must not be compared with others. This may have been in response to the *Carter* court's concerns. *See supra* note 75.

81. MONT. CODE ANN. § 46-18-302 (1995) (emphasis added).

> circumstances . . . may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victims and others. Rebuttal and surrebuttal evidence may be presented.[82]

Missouri's statute provides a trial court with guidelines for the admission of victim impact evidence by describing the type of victim impact evidence which is permissible and by making clear that the admission of such evidence is at the discretion of the court, subject to rules of evidence. Thus, a trial court is free to limit the number of witnesses or testimony if a judge feels that such evidence would be prejudicial to the defendant.

Louisiana's statute adds that "family members . . . after testifying for the state, shall be subject to cross examination."[83] This is important because a defendant must retain the right to cross-examine witnesses against him. Once the state has put the characteristics of the victim and the impact upon the family at issue, the defendant, as with any other evidence, must be allowed to rebut such evidence. This is not to suggest, however, that the defendant may introduce evidence of a victim's bad character or low worth (i.e. that the victim was a drug dealer, or an abusive father) if the state has not put the victim's personal characteristics or family impact at issue.[84] It is precisely this type of comparative worth analysis that *Payne* cautions against.[85]

New Jersey's recently enacted change to its death penalty statute[86] is unique in that it adopts the rationale of the Arizona Supreme Court in *Atwood*. The statute creates a compromise, allowing evidence of the victim's character and the impact of his death on his survivors only after the defendant has put his own character at issue.[87] Thus, a defendant may avoid the powerful impact of the description of the harm caused by his actions by not presenting evidence of his own good character. This would certainly be a difficult choice for a defendant; however, it is a choice that is no different than other difficult choices faced by a defendant during trial.[88]

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82. MO. ANN. STAT. § 565.030.

83. LA. CODE CRIM. PROC. ANN. art. 905.2 (West Supp. 1997).

84. *See* State v. Southerland, 447 S.E.2d 862, 867 (S.C. 1997). (*Payne* did not allow defendant to introduce evidence of the victim's bad character as victim impact evidence.)

85. The Supreme Court stated,

> 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.

Payne, 501 U.S. at 823.

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

87. *Id.* § 2C:11-3(c)(6).

88. In *State v. Muhammad*, 678 A.2d 164, 172 (N.J. 1996), the New Jersey Supreme Court,

New Jersey's capital sentencing statute also makes a distinction between aggravating factors and victim impact evidence.[89] Only after the jury finds that the State has proven the existence of at least one statutory aggravating factor beyond a reasonable doubt is the jury permitted to consider victim and survivor impact evidence.[90]

Florida's capital sentencing statute is the best written statute in terms of describing the type of victim impact that is admissible by parroting the language of *Payne*.[91] It also draws the distinction between aggravators and victim impact evidence by specifying when victim impact is admissible:

> (7) VICTIM IMPACT EVIDENCE -- Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.[92]

Florida's statute has been upheld against challenges that it infringes on the court's right to regulate procedure[93] and that victim impact evidence is an impermissible aggravating factor.[94]

In addition to capital sentencing statutes which allow for the admission of victim impact testimony, many states have statutory provisions which designate members of a victim's family to speak on behalf of a deceased victim.[95] However, these statutes may fail to specify any limits on the number of representatives allowed for a deceased victim and are often interpreted separately from capital sentencing statutes.[96]

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in upholding the constitutionality of the statute, stated, "In the course of a criminal trial, defendants are constantly forced to make many hard choices. Whether they should testify or not is, perhaps, the most difficult choice. Yet no one would claim that the State's right to challenge the defendant's credibility or to introduce his prior record presents a constitutionally prohibited practice."

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

90. *See id.*

91. FLA. STAT. ANN. § 921.141(7) (West 1996).

92. *Id.*

93. *See* Booker v. State, 397 So. 2d 910 (Fla. 1981); State v. Maxwell, 647 So. 2d 871 (Fla. Dist. Ct. App. 1994).

94. *See* Windom v. State, 656 So. 2d 432, 438 (Fla. 1995).

95. *See* DEL. CODE ANN. tit. 11, § 9401(5) (1995) ("Victim" includes the spouse, an adult child, parent or sibling of a deceased victim); 725 ILL. COMP. STAT. ANN. 120/3(a)(3) (West Supp. 1997) ("Crime victim" includes "a single representative who may be the spouse, parent, child or sibling of a person killed as a result of a violent crime."); MISS. CODE ANN. § 99-19-155 (1994) ("'Victim' means . . . an immediate family member of a minor victim or a homicide victim.").

96. *See* State v. Metz, 887 P.2d 795, 802 (Or. Ct. App. 1994). Oregon's omnibus victim

B. Victims' Rights Amendments

Another approach taken by state legislatures to ensure that victims have a voice during the criminal justice process is the passage of constitutional amendments ensuring that victims have certain rights.[97] These amendments are usually referred to as "victims' bill of rights." Currently at least twenty-one of the thirty-eight states that impose the death penalty have or will soon have some type of constitutional provision enumerating certain rights for the victims of crime.[98]

Victims rights amendments often begin with an introductory phrase that victims of crime have a right to be treated with fairness, respect, and dignity, or words to that effect.[99] What effect such a provision would have is unclear. Although such a provision hints that the legislature considers the rights of victims important enough to make a political statement, in terms of creating any legally cognizable rights for victims, the words are vague and open to free-wheeling interpretation.

A second phrase that may be included is that victims have a right to be present at all proceedings in which a defendant has a right to be present (except in exceptional circumstances, such as court ordered sequestration).[100] In fact, such a provision essentially creates no right which was not already recognized.

Some amendments go beyond these generalized statements and create a right for victims (or their representatives) to make a statement during sentencing.[101] For example, Washington's constitution provides that victims have the right;

> [T]o make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased,

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impact statute provided:

> At the time of sentencing, the victim or the victim's next of kin has the right to appear personally or by counsel, and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim, and the need for restitution and compensatory fine.

OR. REV. STAT. § 137.013 (1994).

The Oregon Court of Appeals concluded, "The broad language of ORS 137.013 cannot be reconciled with the more specific requirements of the aggravated murder sentencing statute. . . . Accordingly, the general authorization of ORS 137.013 must give way to the precise limitations of [Oregon's capital sentencing statute.]" *Metz*, 887 P.2d at 802.

97. *See supra* note 77.

98. *See supra* note 77.

99. *See, e.g*, UTAH CONST. art. I, § 28(1)(a) ("To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process"); ARIZ. CONST. art. II, § 2.1(A)1; IND. CONST. art. I, § 13(b); N.M. CONST. art. II, § 24(A)(1); TEX. CONST. art. I, § 30(a)(1).

100. *See* LA. REV. STAT. ANN. § 46:1844(c)(2) (West Supp. 1997).

101. ARIZ CONST. art. 2, § 2.1; MO. CONST. art.1, § 32; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; WASH. CONST. art. 1, § 35.

> incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights.[102]

Clearly, this type of amendment is precise enough to create cognizable rights for victims. But determining the extent of those rights is quite another matter. A defendant is afforded certain rights by the U.S. Constitution,[103] and those rights will trump state-created victims' rights. Similarly, a defendant is usually afforded certain rights by a state's constitution. Therefore, the interests protected by a victims' bill of rights must be reconciled with a defendant's rights. This reconciling of competing interests was precisely the dilemma faced by the Supreme Court of Washington in *State v. Gentry*.[104] In *Gentry*, the court reconsidered its previous holding in light of a subsequently passed victims rights amendment.[105]

The court first addressed the potential tension between the amendment and the due process rights of a capital defendant.[106] The court concluded that the two parts of the constitution could be harmonized:[107]

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102. WASH. CONST. art. 1, § 35.

103. For example, a defendant is guaranteed rights through the Fifth (right against self-incrimination; due process), Sixth (right to a speedy and public trial, impartial jury; to confront witnesses); Eighth (right against excessive bail, excessive fines, and cruel and unusual punishment), and Fourteenth Amendments of the U.S. Constitution which cannot be infringed by a state constitutional amendment.

104. 888 P.2d 1105 (Wash.), *cert. denied*, 116 S. Ct. 131 (1995). Prior to *Gentry*, the Supreme Court of Washington, relying on state constitutional grounds, found that victim impact evidence did not fit within any of the categories of evidence held to be admissible during the sentencing phase of a capital case. State v. Bartholomew, 683 P.2d 1079 (Wash. 1984). Often, state constitutions are construed to give criminal defendants more protection than the analogous federal rights. This construction may or may not be dictated by the plain language of the particular state constitutional provision. It may result from a desire to chart an independent course.

For example, the Indiana Supreme Court has labored mightily to give the Indiana Constitution independent significance. *See, e.g.*, State v. Owings, 622 N.E.2d 948, 950-51 (Ind. 1993). The *Owings* court, in concluding that the Indiana Constitution offers a defendant more protection than its federal counterpart, found it significant that the Indiana Constitution expressly refers to a defendant's right to "meet the witnesses face to face" whereas the Confrontation Clause does not. IND. CONST. art. I, § 13(a). Without evaluating the rule in *Owings*, one wonders how significant that difference really should be because "the Confrontation Clause guarantees the defendant a face to face meeting with witnesses before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016 (1988). A victim's rights amendment may prompt state courts to interpret provisions of state constitutions less expansively in favor of defendant's rights, particularly when the interpretation is not dictated by plain language of those provisions.

105. *Gentry*, 888 P.2d at 1137-38.

106. *See id.* at 1136.

107. The court also used the following standard in its analysis:

> [a] new constitutional provision prevails over prior provisions of the constitution if (1) it specifically repeals them, or (2) it cannot be harmonized with them. Nevertheless it

> Harmony can be achieved in one of two ways: (1) we could hold that the victim's rights amendment does not (and cannot) apply to victim impact evidence in death penalty cases (but such evidence would be admissible in other felony cases); or (2) we can hold that the categories of evidence which are admissible at a death sentencing proceeding can be expanded to include victim impact evidence.
>
> Should we adopt the former conclusion, the irony would be that in cases involving the most heinous crimes of all, the victim's representative would be prohibited from making a victim impact statement while in other murder cases, the victim's representative would be allowed to make such a statement. Furthermore, the victims' rights amendment expressly contemplates the right to use victim impact evidence "[i]n the event the victim is deceased". We conclude that the second construction more clearly gives meaning to all parts of the Washington State Constitution. Although defendants in capital cases have always had substantial due process rights, the victim also now has constitutional rights and these must be harmonized with the defendant's rights.[108]

Gentry suggests that a state court will take seriously a constitutional provision affording rights to victims of crimes provided it specifically enumerates rights which a state court can recognize, and the provision demonstrates on its face that the legislature clearly anticipated the use of victim impact evidence when the victim is murdered.

Although a clearly worded constitutional provision may help ensure that a state court allows the use of victim impact testimony, a particular state court's interpretation of its constitution, may nonetheless render the provision ineffective. A court that gives a victim impact amendment a narrower interpretation might very well reach a different conclusion than the Washington Supreme Court.[109]

> is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions.

Id. at 1138.

108. *Id.*

109. It is possible to add language to state constitutions that limit the ability of state courts to interpret specific provisions of the state constitution. For example, the Florida Constitution was amended in 1982 to read:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communications to be intercepted, and the nature of the evidence obtained. *This right shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court.* Articles or information obtained in violation of this right shall not be admissible in evidence *if such articles or information would be inadmissible under decisions of the United States Supreme Court*

IV. THE SOLUTION

The most effective way to ensure that the relatives of murder victims are given an opportunity to be heard during a capital sentencing proceeding is to combine a narrowly written statute with a constitutional amendment that specifically provides for the right of victims to be heard during sentencing. Combining a statutory provision with a constitutional amendment sends a clear and unambiguous message to state appellate courts. The people of the state, through their elected representatives and through ratification of a constitutional amendment, deem such evidence appropriate and relevant,[110] despite any personal opinions of members of the bench to the contrary. Furthermore, a narrowly written statute helps ensure that the rights of the defendant are protected, and that the sentence received is upheld upon review.

Victim impact evidence is among the most powerful evidence the state can present to a jury for the purpose of sentencing a defendant to death. One of the strongest criticisms of such evidence is its strong emotional impact. The fear is that such emotionally charged evidence will overwhelm any sense of reason during the sentencing process, such that the jury will sentence a defendant based solely upon emotion.

Such an argument carries weight. However, that victim testimony is emotional is not reason enough for its per se exclusion. The emotional reaction is a direct result of the defendant's action; it was wrought by his own hands.[111] It does not lie in the defendant's mouth to complain when emotion is a foreseeable consequence of his actions. Furthermore, juries have demonstrated an ability to consider mitigating factors even in the face of incredibly emotionally charged victim impact evidence in high-profile cases. Nonetheless, due to the strong emotional content of such evidence, limitations should be placed on its admission. As noted in *Payne*, in the event that evidence is introduced that is "so unduly

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construing the 4th Amendment to the United States Constitution.

FLA. CONST. art. I, § 12 (wording added in 1982 emphasized). *See generally* Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166, 175-182 (Bradley D. McGraw ed., 1985). Although amending a state constitution to specifically provide for the admission of victim impact testimony in capital sentencing may be effective, it might also be unnecessarily restrictive in terms of providing rights for crime victims, i.e., because of the doctrine, expressio unius est exclusio alterius.

110. "But more broadly and fundamentally still, [the Eighth Amendment] permits the People to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime." Payne v. Tennessee, 501 U.S. 808, 833 (1991) (Scalia, J., concurring). *Cf.* Bivins v. State, 642 N.E.2d 928, 957 (Ind. 1994) (linking proportionality review under Indiana Constitution to the legislature's determination of what constitutes aggravating circumstances).

111. *See* Jones v. State, 481 S.E.2d 821, 825 (Ga. 1997) ("The passion or emotion shown in this case is not the product of any arbitrary factor but the direct result of [the defendant's] own actions.").

prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."[112]

Death penalty cases are very costly, not only in terms of dollars, but in the emotional toll the lengthy trial and appeal process takes upon victims. Although a sentence of death may be expediently and emotionally gratifying to the prosecutor and the victim, that gratification must be tempered with the realities of the appeals process. If a sentence is overturned, not only is the original expense wasted, but a decision must be made whether to attempt to resentence the defendant to death and to put the victim through another emotional ordeal. Ironically, the evidence that gave the victim a voice could be used to prolong his or her agony.

An effective capital punishment system is not served by temporary victories. The goal of a statute that gives victims a voice should include the goal that the sentence withstand judicial scrutiny. The goal should not be that every capital defendant receives the death sentence, but rather that every death sentence that is imposed be upheld.

A. Victim Impact Statute

To ensure that a defendant's right to due process is maintained, a narrowly drawn statute should make clear that the normal rules of evidence that apply to criminal trials apply to the sentencing proceeding as well. Thus, the introduction of victim impact evidence should never be mandated by the statute. Despite its political appeal, such a provision would make a sentence more susceptible to being overturned on due process grounds. Despite the possibility that a judge with anti-capital punishment leanings might exclude victim impact testimony, the discretion of a judge to exclude prejudicial evidence must be maintained to ensure an appeal-proof sentence.

The statute should also provide that only one victim or representative shall be appointed to speak. From the victim's family point of view, this would certainly be the most unappealing aspect of a victim impact provision in a capital sentencing statute. Inevitably the victim's murder or victimization will have impacted many members of his or her family, and the natural temptation is to bring numerous family members to the stand to drive home the impact of the defendant's crime and to give them their day in court. However, with each witness paraded before the jury, the chances increase that an appellate court will view such evidence as cumulative and prejudicial. The most effective means of removing this temptation is by removing any discretion by the state or trial judge on this point.

Third, the statute should specify exactly what type of evidence is admissible by following the language of *Payne*. It should specify that the evidence is limited to showing the victim's uniqueness as an individual human being and the resulting loss to the community members by the victim's death. The statute should make clear that opinions about the defendant, the appropriate sentence, and the crime are not permitted. Despite the emotional appeal of a victim compelling the jury to,

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112. *Payne*, 501 U.S. at 831 (O'Connor, J., concurring).

"Please give him death," the Court has not overturned the part of *Booth* that says such evidence is inadmissible.[113]

Finally, the statute should make clear that the defendant has a right to cross-examine the witness as with any other witness. This would ensure that the defendant's right to confront witnesses is maintained, despite the potential that cross-examination might elicit testimony that is emotionally painful for the witness. Following are two proposals for a model victim impact statute

1. Model Statute.—

A. The State may appoint a single representative of the deceased victim who may be the parent, spouse, child, or sibling of the victim.
B. Once the State has provided evidence of the existence of one or more aggravating factors as described in [sec. X], the State may introduce, and subsequently argue, victim impact evidence. If the State has appointed a representative pursuant to Sec. A., such representative may testify as to the victim's unique characteristics as a human being and the resulting loss to the community's members caused by the victim's death. The admissibility of victim impact evidence is subject to the rules of evidence governing criminal trials, and the representative, after testifying, shall be subject to cross-examination.
C. If the Jury finds that the State has proven the existence of at least one aggravating factor beyond a reasonable doubt, the jury may consider the victim impact evidence presented pursuant to paragraph B in determining the appropriate sentence.
D. The representative's opinions and characterizations of the crime, the defendant, and the appropriate punishment are not admissible as victim impact evidence.
E. It is the intention of the legislature that the sentencing court be permitted to consider relevant victim impact evidence pursuant to *Payne v. Tennessee*, 501 U.S. 808 (1991).[114]

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113. *Id.* at 830 n.2. *But see* Ledbetter v. State, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997) (citations omitted):

> In *Booth*, the entire discussion dealing with family members' opinions and characterizations of the crimes was covered in two paragraphs, after an extended discussion of the other victim impact evidence, and appeared based upon the same rationale. Based on a review of these cases, *stare decisis* appears to dictate since the Eight Amendment rationale supporting the ban of the other victim impact evidence in *Booth* was overruled in *Payne*, this portion was also overruled, insofar as it had its roots in the Eight Amendment.

114. The publisher's notes for section 5-4-602 of the Arkansas Annotated Code stated, "Acts 1993, No. 1089, § 2 provided: 'It is the express intention of this act to permit the prosecution to introduce victim impact evidence as permitted by the United States Supreme Court in Payne v. Tennessee.'"

Although such a note would not be binding upon a court, it certainly provides an unambiguous statement of legislative intent.

2. *Alternative Model Statute.*—The second model statute offers a comprise solution, for states concerned about the automatic admission of victim impact testimony. Modeled after New Jersey's recently enacted capital sentencing statute, it provides that victim impact testimony is permitted when a defendant puts his own character at issue. Thus, a defendant can avoid the emotional impact by declining, as he or she may during the guilt phase, to put his or her character at issue. Once he or she does, however, the state is allowed to present impact testimony. In this way, it assures that the sentencing process will be balanced, as opposed to a one sided argument against the institution of capital punishment.

> A. The State may appoint a single representative of the deceased victim who may be the parent, spouse, child, or sibling of the victim.
> B. When a defendant puts his character at issue during a sentencing proceeding pursuant to [the statute's section regarding the presentation of mitigation evidence], the State may introduce, and subsequently argue, victim impact evidence. If the State has appointed a representative pursuant to Sec. A, such representative may testify as to the victim's unique characteristics as a human being and the resulting loss to the community's members caused by the victim's death. The admissibility of victim impact evidence is subject to the rules of evidence governing criminal trials, and the representative, after testifying, shall be subject to cross-examination.
> C. The representative's opinions and characterizations of the crime, the defendant, and the appropriate punishment are not admissible as victim impact evidence.
> D. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor pursuant to [Sec. X], the jury may consider the victim and survivor evidence presented by the State in determining the appropriate weight to give mitigating evidence presented pursuant to [Sec. X].

B. Model Constitutional Amendment

For a constitutional amendment to effectively give victims of crime a right to testify during sentencing, this right must be specifically enumerated. Furthermore, to ensure that the relatives of victims have a right to testify, the amendment must show that the drafters intended to extend the rights of victims to members of a deceased victim's family. In so doing, the amendment should make clear that the intention is not to infringe unconstitutionally upon a defendant's rights.

Model Constitutional Amendment

> Victims of crime, including the lawful representative of a minor, incompetent, or victim of homicide, are entitled to the right to be informed of criminal proceedings, and to be present, and heard when relevant, at all crucial stages of criminal proceedings, including all

sentencing and post-conviction proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

V. RECENT DECISIONS REGARDING THE ADMISSIBILITY OF VICTIM IMPACT EVIDENCE

Payne allows states to admit victim impact evidence during the capital sentencing phase, but the decision did not provide states with much guidance with regards to what types of victim impact evidence is admissible, or what procedures a trial court should adopt to ensure that the admission of victim impact evidence does not become so prejudicial as to render the sentencing phase fundamentally unfair. As a result, state courts are now beginning to grapple with these questions.

In *State v. Basile*,[115] the mother and sister of the victim presented victim impact evidence through pictures, letters, and stories, as well as a poem. In addition, the victim's sister concluded her testimony by stating, "And I Pray to God now that justice will be served."[116] The court held that the victim impact evidence was directed at the defendant's moral culpability in causing harm to the victim and her family, and was therefore properly admitted.[117] Interestingly, the *Basile* court also concluded the admissibility of victim impact evidence was not tied to "specific aggravators submitted by the State." Similarly, in *State v. Tucker*,[118] the court upheld the use photographs that showed the victim at different places on vacation, Christmas decorations in the victim's yard, the victim fishing, and the victim holding her Godchild, finding "nothing in these photographs that would have rendered Appellant's trial unfair."[119]

In *Hicks v. State*,[120] the State presented a video tape that was almost fourteen minutes in length, and included approximately 160 photographs of the victim that essentially covered the entire life of the victim.[121] During the presentation of the silent video tape, the victim's brother provided a narrative. The *Hicks* court held that the video tape "merely served as a reminder to the jury that just as Hicks, the murderer, should be considered as an individual, so, too, the State could show that Muldoon's, the victim's, death represents a unique loss . . . [W]e have no hesitation in upholding the trial court's decision admitting the tape and its narration."[122]

Hicks represents the outer limits of what has been accepted as permissible victim impact evidence, and demonstrates the danger associated with the admission of victim impact evidence in the absence of legislative or court guidance. As stated in the concurring opinion:

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115. No. 77123, 1997 WL 304337 (Mo. June 6, 1997) (en banc).
116. *Id.* at *16.
117. *See id.*
118. 478 S.E.2d 260 (S.C. 1996), *cert. denied*, 117 S. Ct. 1561 (1997).
119. *Id.* at 267.
120. 940 S.W.2d 855 (Ark. 1997).
121. *See id.* at 857 (Brown, J., concurring).
122. *Id.*

> I concur in the result because the trial judge had no guidance on this point and did exercise his discretion in curbing part of the presentation. Moreover, I cannot conclude that the presentation of the video tape rendered Hicks' trial *fundamentally unfair.* And that is the standard. I write only to emphasize that this court or the General Assembly should fashion criteria on the introduction of victim-impact evidence to assist the trial court in exercising their discretion. As matters stand today, the guidance in this area is sparse indeed.[123]

The rationale behind allowing victim impact evidence is to allow a jury "a glimpse of the life" the defendant "chose to extinguish,"[124] to create a sentencing proceeding that is balanced, that treats both the defendant and the victim as individual human beings. Allowing the state to present a video taped summary of the victim's life, accompanied by the narrative of a sobbing relative, begins to tip the balance. Although certainly effective in providing the jury with a glimpse of the victim's life, it would be disingenuous to suggest that the use of such evidence has anything other than appealing to the emotions of the jury as its primary objective. By appealing to emotion and using victim impact evidence as a tool to ensure that a defendant is sentenced to death rather as a counterweight to appeals for mercy, the state has interjected an illegitimate element into the sentencing decision, and such a proceeding will almost always be fundamentally unfair and could lead to the arbitrary imposition of the death penalty, rather than a "reasoned moral response"[125] based upon relevant evidence.

In a response to the dearth of guidelines for the admissibility of victim impact evidence, some courts have attempted to describe the purpose of victim impact evidence and delineate procedures for its admissibility. In *Cargle v. State*,[126] the defendant was convicted of two counts of first degree murder for the shooting deaths of Richard and Sharon Paisley. The State presented two victim impact witnesses, Richard's sister, Nancy Davis, and Sharon's mother, Shirley Howell.[127]

Davis testified from a prepared statement which covered twelve pages of transcript. She began with a story from Richard's life at age four, recalled his life and achievements with a series of anecdotes, and described the loss felt by those who knew Richard. Howell testified about Shirley's love of animals, as well as her love for her daughter. The testimony of both witnesses was accompanied by photographs of the victims.[128] By contrast, the defendant presented only his minister, who testified that he used to have a close relationship with defendant, "who came from loving people and who during the past few years "just kind of got apart" from his parents and the church."[129]

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123. *Id.* at 860 (Brown, J., concurring).
124. Payne v. Tennessee, 501 U.S. 808, 822 (1991).
125. *Id.* at 836 (Souter, J., concurring).
126. 909 P.2d 806 (Okla. Crim. App. 1995), *cert. denied,* 117 S. Ct. 100 (1996).
127. *Id.* at 824.
128. *See id.* at 824 nn.12-13.
129. *Id.* at 827.

The court noted that victim impact should be "restricted to those unique characteristics which define the individual who has died, the contemporaneous and prospective circumstances surrounding that death, and how those circumstances have financially, emotionally, psychologically, and physically impacted on the victim's immediate family."[130] In applying these criteria for the admissibility of victim impact evidence to the testimony presented, the court stated,

> [T]here can be no question the testimony was emotionally powerful, and from the standpoint of admissibility of victim impact evidence, much of it irrelevant. For instance, portraying Richard as a cute child at age four in no way provides insight into the contemporaneous and prospective circumstances surrounding his death; nor does it show how the circumstances surrounding his death have financially, emotionally, psychologically, and physically impacted on members of the victim's immediate family. Although Richard may have been unique in that he dressed up as Santa Claus, saved the county thousands of dollars by a personal fundraising effort, was a talented athlete and artist, and was thoughtful and considerate to his family, this goes to only one aspect of the factors enunciated in the statutory definition of victim impact statements. In fact, the entire statement by Ms. Davis goes to the emotional impact of Richard's death. There is no explicit testimony as to the financial, psychological or physical effects of the crime on his family. Taken as a whole, the probative value of Ms. Davis's statement is substantially outweighed by its prejudicial effect . . .
>
> In discussing this, we in no way hold the emotional impact 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.[131]

The court also held that photographs that were admitted were irrelevant, because the photographs "did not demonstrate any 'information about the victim," or show how their deaths are affecting or might affect survivors.[132] Nonetheless, the court found the admission of the victim impact evidence to be harmless beyond

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130. *Id.* at 828.

131. *Id.* at 829-30. *Compare* State v. Rhines, 548 N.W.2d 415, 445-46 (S.D.), *cert. denied,* 117 S. Ct. 522 (1996) (Victim's mother read a one paragraph statement describing the victim's personal characteristics and the emotional impact on the family. "This is precisely the type of evidence permitted by the Court's decision under *Payne*."); Lee v. State, 942 S.W.2d 231 (Ark. 1997) (Victim's sister testified that the victim and her mother spent most of every day together, her parents were on anti-depressants after the incident, the mother was under psychiatric care, and the victim was trying to have another child. The sister also described the painful experience of selecting her sister's wig for her funeral—not so unduly prejudicial as to render trial fundamentally unfair.).

132. *Cargle*, 909 P.2d at 830.

a reasonable doubt.[133]

Cargle is significant because the court attempted to articulate guidelines for a trial court to utilize in determining the admissibility of victim impact evidence: (1) the state should file a Notice of Intent to Produce Victim Impact Testimony, and an in-camera hearing should be held by the trial court as it relates to the statute; (2) The victim impact evidence should not be admitted until the court determines there is evidence of one or more aggravators in the record; (3) Evidence sought to be introduced should be limited to the evidence listed in the Notice to Produce Victim Impact Evidence filed before trial; (4) the trial court may utilize a question-and-answer format as a preferable method of controlling the way victim impact evidence is presented.[134]

The court also promulgated the following jury instruction:

> 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.
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> 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.
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> As it relates to the other sentencing options: You may consider this victim impact evidence in determining the appropriate punishment as

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133. *Id.* at 835.

134. *See id.* at 828. *See also* Ledbetter v. State, 933 P.2d 880, 893 (Okla. Crim. App. 1997) (holding that "the person chosen to prepare a victim impact statement cannot receive aid in the composition from any outside sources, including personnel in the prosecutor's office or statements gleaned from other texts or sources.")

warranted under the law and facts in the case[135]

In *State v. Muhammad*,[136] the Supreme Court of New Jersey addressed a challenge to the capital sentencing statute, which allows the state to introduce victim impact evidence when offered to rebut a defendant's presentation of "catch-all" mitigation evidence.[137] In addition to upholding the constitutionality of the statute under the federal and New Jersey Constitutions,[138] the court held that a certain number of procedures must be followed before victim impact evidence can be admitted into evidence:

> The defendant should be notified prior to the commencement of the penalty phase that the State plans to introduce victim impact evidence if the defendant asserts the catch-all factor. The State shall also provide the defendant with the names of the victim impact witnesses that it plans to call so that defense counsel will have an opportunity to interview the witnesses prior to their testimony. The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness. Further, minors should not be permitted to present victim impact evidence except under circumstances where there are no suitable adult survivors and thus the child is the closest living relative.
>
> Before a family member is allowed to make a victim impact statement, the trial court should ordinarily conduct a . . . hearing, outside the presence of the jury, to make a preliminary determination as to the admissibility of the State's proffered victim impact evidence. The witness's testimony should be reduced to writing to enable the trial court to review the proposed statement to avoid any prejudicial content. The testimony can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests. The testimony can describe generally the impact of the victim's death on his or her immediate family. The testimony should be factual, not emotional, and should be free of inflammatory comments or references.
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> The trial court should weigh each specific point of the proffered

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135. *Cargle*, 909 P.2d at 829-30.
136. 678 A.2d 164 (N.J. 1996).
137. *See id.* at 170-71.
138. *See id.* at 170-76.

> testimony to ensure that its probative value is not substantially outweighed by the risk of undue prejudice or misleading the jury. Determining the relevance of the proffered testimony is particularly important because of the potential for prejudice and improper influence that is inherent in the presentation of victim impact evidence. However, in making that determination, there is a strong presumption that victim impact evidence that demonstrates that the victim was a unique human being is admissible. During the preliminary hearing, the trial court should inform the victim's family that the court will not allow a witness to testify if the person is unable to control his or her emotions. That concern should be alleviated by our requirement that the witness be permitted only to read his or her previously approved testimony. Finally, the court should also take the opportunity to remind the victim's family that the court will not permit any testimony concerning the victim's family members' characterizations and opinions about the defendant, the crime, or the appropriate sentence. Finally, the trial court should inform the prosecutor that any comments about victim impact evidence in his or her summation should be strictly limited to the previously approved testimony of the witness.[139]

Muhammad also made clear the importance of constitutional amendment to ensure that victim impact testimony is admissible:

> At times we have interpreted the State Constitution to afford New Jersey citizens broader protection of certain rights than that afforded by analogous or identical provisions of the Federal Constitution. . . .
>
> . . . .
>
> In the absence of the Victim's Rights Amendment, we might have continued to hold that victim impact evidence should not be admitted during the sentencing phase of a capital case.[140]

CONCLUSION

As courts and legislatures continue to accept the use of victim impact testimony, the challenge that faces courts today should not be whether such evidence should be admitted, but how. Despite criticism, it is readily apparent that a majority of courts accept the rationale of *Payne,* and reject that of *Booth.*

To suggest that the impact of a victim's murder is not relevant to a defendant's sentencing is to marginalize the crime. The very reason we place such a high price on the intentional, unjustified taking of a human life is that murder encompasses much more than the simple extinguishing of a life. Murder does not end there. It is the rending of a person from his family, friends, and community. It deprives an individual of the opportunity to make contributions to civilization a

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139. *Id.* at 180.

140. *Id.* at 173-75.

characteristic that distinguishes the human race from all other forms of life on the planet. It is for this cost that society exacts its highest penalty.[141]

In *Booth,* Powell argued that victim impact evidence is unrelated to the blameworthiness of a particular defendant because, "defendant's rarely select their victims based on whether the murder will have an effect on anyone other that the person murdered."[142]

Rather than being an argument against impact, this argument supports its use. Any defendant charged with the degree of mental competence to be held accountable for his actions is able to appreciate that his actions will bear consequences which extend beyond the person he murders. It is this callous disregard of "whether the murder will have an affect on anyone other the person murdered" that makes the evidence of the impact of this disregard relevant.

The challenge is to construct statutes which provide victims with a voice without creating a vigilante atmosphere in the courtroom. This is best achieved with narrowly written statutes that provide minimal potential for the admission of prejudicial evidence.

As Justice Cardozo noted over sixty years ago; "But justice, though due to the accused, is due 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."[143]

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141. The Supreme Court has stated, "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg v. Georgia, 238 U.S. 153, 184 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.).

142. Booth v. Maryland, 482 U.S. 496, 504 (1987).

143. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).