The Resurrection of Victim Impact Evidence in Capital Sentencing: Payne v. Tennessee

John W. Cannon

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.utulsa.edu/tlr/vol27/iss3/4

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.
THE RESURRECTION OF VICTIM IMPACT EVIDENCE IN CAPITAL SENTENCING:
PAYNE v. TENNESSEE

I. INTRODUCTION

Evidence admitted in the death sentencing phase of a murder trial may include characteristics of the victim and the effect of the crime upon the victim's family.\(^1\) The United States Supreme Court has adopted this strong departure from precedent\(^2\) in ruling that the Eighth Amendment of the United States Constitution does not raise a per se bar to victim impact statements (VIS) in capital sentencing hearings.\(^3\) In Payne v. Tennessee,\(^4\) the majority determined that victim impact statements do not cause a jury’s subjective and inconsistent application of the death penalty.\(^5\) The majority further determined that history and common practice in criminal trials have consistently allowed fact-finders to consider all relevant evidence relating to the harm in assessing the punishment.\(^6\) Thus, the evidence in a capital sentencing hearing should include VIS.\(^7\) The Payne Court, with this reasoning in a divided decision, shattered the fragility of the two prior United States Supreme Court decisions.\(^8\)

Victim impact evidence allows the jury to see the full extent of harm caused by the victim's death.\(^9\) VIS includes the family's pain caused by the victim's absence, the victim's personal attributes, and the family's opinions of the accused's crime.\(^10\) This evidence is allowed to be heard based on the assumption that an informed jury will more adequately determine whether capital punishment is suitable in the case.\(^11\) Although victim impact statements may display to the jury the true extent of the

\(^3\) Payne, 111 S. Ct. at 2609.
\(^5\) Id. at 2605.
\(^6\) Id.
\(^7\) Id. at 2605-06.
\(^8\) Booth, 482 U.S. at 496; Gathers, 490 U.S. at 805 (holdings in both cases were five to four decisions).
\(^9\) Payne, 111 S. Ct. at 2606.
\(^10\) Booth, 482 U.S. at 502.
\(^11\) Payne, 111 S. Ct. at 2608.
harm caused by the accused, it is unfair inasmuch as the jury will be emotionally swayed when determining what is one of the most solemn decisions society must make—life or death.

II. STATEMENT OF THE CASE

A. Facts

Pervis Payne repeatedly stabbed Charisse Christopher, her two year old daughter, Lacie, and three year old son, Nicholas, after Charisse's refusal of Payne's sexual advances. Both Charisse and Lacie died, but Nicholas survived. Payne was brought to trial and convicted. During the capital sentencing hearing, the prosecution brought forth Nicholas's grandmother who testified about her grandson's distress in missing his mother and sister. The jury sentenced Pervis Payne to death and the Tennessee Supreme Court affirmed the trial court's decision.

B. Issue

At issue in Payne was whether victim impact evidence and accompanying prosecutor's arguments on that point should be barred by the Eighth Amendment.
C. **Holding**

The *Payne* Court held that the prosecution may not be barred under the Eighth Amendment from presenting VIS at the capital sentencing stage of the trial.\(^\text{18}\) The Court's analysis used history, criminal procedure, evidentiary balancing factors, and the Constitution to form a foundation for its holding.\(^\text{19}\)

III. **BACKGROUND**

A. **The Victims of Crimes Movement**

Recently, the main focus in criminal cases has shifted from the rights of the accused to the concern for victims' rights.\(^\text{20}\) Historically, crime was viewed as an injury against the king or state, not the actual victim.\(^\text{21}\) This perspective was reflected by the victim's limited capacity to participate in the criminal process.\(^\text{22}\) Concern for the defendant's rights overshadowed any regard for the victim's rights. Early evidence of this practice in America is shown in the extra protections afforded the defendant in the criminal process under the United States Constitution.\(^\text{23}\)

When a victim reported a crime to the authorities, the police, lawyers, and judges took over, leaving the victim uninformed and uninvolved.\(^\text{24}\) The criminal justice system assumed that "despite this transfer of interest, victims will come forward and cooperate, because although the state brings the case, without the victim's cooperation, there may be no case."\(^\text{25}\) The victim's opinion was rarely requested, and the personal costs incurred by the victim were considered irrelevant.\(^\text{26}\)

---

18. *Id.* at 2609. A State may properly conclude that evidence related to the characteristics of the victim or the effect of the loss of the victim on the family is relevant to the fact-finder's decision concerning the death penalty. *Id.*

19. *Id.* at 2597.


21. Lucy N. Friedman, *The Crime Victim Movement at its First Decade*, 45 PUB. ADMIN. REV. 790 (1990). A majority of victims' rights supporters believes "that a crime inflicts feelings of powerlessness, guilt, and rage on the victim . . . ." *Id.* at 790 (commenting that practical help, counseling, and involvement in the criminal process can solve these feelings in the victim).

22. *Id.*

23. See U.S. CONST. amend. IV, V, VI, VIII, XIV.

24. Deborah P. Kelly, Symposium, *Victims' Perceptions of Criminal Justice*, 11 PEPP. L. REV. 15, 16 (1984) (victims of crimes soon learn the legal fiction that they are not the harmed party). "Victims . . . have no standing in court, no right to counsel, no control over the prosecution of their case, and no voice in its disposition." *Id.* at 16.

25. *Id.* at 15.

26. *Id.* The costs included monetary costs, such as lost pay, transportation, parking, childcare, as well as administrative inconvenience, such as delay, waiting, and postponement. *Id.* at 17. Many studies focused on "administrative run-around" as the primary reason for victim uncooperation.
Although the exact date initiating the victims' movement is unclear, the early 1980s seem to mark the period when the criminal justice system discovered the neglected victims' rights. It is uncertain whether the movement was a result of growing exponential rates of crime or just disillusionment with the criminal process.


However, these studies masked the underlying problem of the victim's lack of understanding of the judicial process and the frustration experienced by the victim over his or her minor role in the justice system. Id. at 16-18. For a more complete discussion on administrative run-around and victim's concerns, see id. at 17-18.

See Carrington and Nicholson, supra note 20, at 4. As crimes increased there were more victims, thus more people thought of themselves as potential victims. Id.
29. William F. McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 AM. CRIM. L. REV. 649 (1976). "Victims and witnesses do not receive even a fraction of the protections and defenses that are accorded an accused. Typically, the interests of the victim and witnesses are subordinated to what are regarded as more important interests." Id. at 662 (footnote omitted). The article also discusses examples of intimidation of a rape victim on the stand during defendant's cross-examination. Id.
30. A portion of President Reagan's proclamation read:
For too long, the victims of crime have been the forgotten persons of our criminal justice system. Rarely do we give victims the help they need or the attention they deserve. Yet the protection of our citizens... is the primary purpose of our penal laws. Thus, each new victim personally represents an instance in which our system has failed to prevent crime. Lack of concern for victims compounds that failure.
The Congress finds and declares that: (1) Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders. (2) All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim... . (5) While the defendant is provided with counsel who can explain both the criminal justice process and the rights of the defendant, the victim or witness has no counterpart and is usually not even notified when the defendant is released on bail, the case is dismissed, a plea to a lesser charge is accepted, or a court date is changed.

Id.
32. Id.
B. *Initial Set Backs to the Victims' Movement*

While the growing movement for victims' rights continued during the 1980s, admissibility of victim impact evidence was stifled by the United States Supreme Court. In *Booth v. Maryland,* the Court reviewed victim impact evidence for the first time. The Court categorized the victim impact evidence that the prosecution admitted at the trial level into two parts. First were the VIS that revealed the deep emotional harm on the victim's family and the attributes of the victim; and second, was the family's opinion of the accused's crimes upon the victim. *Booth* held that both types of information were irrelevant to the death sentencing phase of the trial, and that if admitted the jury may impose the death sentence based on inconsistent, subjective determinations. Notwithstanding *Booth*'s ruling, the victim movement proponents believed that the decision was not a set back because it was limited to capital sentencing cases and not extended to other criminal cases.

Two years after *Booth,* in *South Carolina v. Gathers,* the Supreme Court again prohibited VIS in capital sentencing hearings. The prosecution sought to admit personal characteristics of the victim by reading the evidence to the jury. The Court held that the prosecution engaged in the admission of this kind of evidence was inadmissible.

---

35. 482 U.S. 496. Irvin Bronstein and his wife, Rose, were found by their son robbed and murdered two days after the crime. At the death sentencing hearing the Bronstein’s children made comments to the effect of their parent's personal qualities and the negative mental and physical effects they had experienced since their parent's death. Examples included the statements “fearful for the first time in my life,” “butchered like animals,” and that defendants could “[n]ever be rehabilitated.” *Id.* at 500.
38. *Id.*
39. Philip Carrizosa, *Victim Movement Dealt Heavy Blow By High Court,* L.A. DAILY J., June 16, 1987, at 1. Comments were made by Ed Jagels, the chairman of the Crime Victims California Justice Committee. Although not as concerned with the ruling in *Booth,* if the practice of disallowing VIS was expanded to other trials, the victims' movement would suffer. However, *Booth* expressly limited its ruling to capital sentencing proceedings. The article also focused on the positive attitude of civil rights activists towards the ruling in *Booth.* These groups believed that VIS is prejudicial in capital sentencing hearings when sentencing is based upon “race, social class, and the status of the victim.” *Id.* at 8.
40. 490 U.S. 805 (1989). Mr. Haynes was on a park bench christain witnessing when he was assaulted and killed by Gathers. Mr. Haynes was found with christian pamphlets scattered over his body. The prosecutor read the religious track, victim’s personal prayer, voter registration card, and described the victim’s general characteristics to the jury at the sentencing phase of trial. *Id.*
41. *Id.* at 811.
42. *Id.* at 809. An example of a statement made by the prosecutor in his closing remarks referring to the victim's character was:

Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn’t blessed with fame or fortune. And
in an "improper argument" by reading the victim's personal characteristics at the capital sentencing hearing. Reading this evidence was deemed unfair because the defendant did not foresee these characteristics before committing the murder.

Despite the two previous United States Supreme Court decisions excluding VIS, the Tennessee Supreme Court in State v. Payne, allowed VIS to be admitted as harmless error. Anxious to overrule the decision in Booth, certiorari was granted. Interestingly, the United States Supreme Court instructed the parties to argue the VIS question even though neither party had originally briefed the issue. Consequently, a mere four years after Booth and two years after Gathers, the United States Supreme Court in Payne v. Tennessee overruled the previous holdings and resurrected victim impact evidence as admissible in capital sentencing hearings.

IV. DECISION OF THE CASE

In Payne, the United States Supreme Court faced the task of determining whether victim impact statements are admissible at a capital sentencing hearing under the Eighth Amendment of the Constitution. Included in this determination was the issue of whether the prosecution's statements of VIS before the jury are proper. The Payne Court considered history, past reasoning in Booth and Gathers, and the Eighth and Fourteenth Amendments of the Constitution to resolve the question.

---

43. Id. at 811.
44. Id. The United States Supreme Court stated: There is no evidence whatever that the defendant read anything that was printed on either the tract or the voter card.... The content of the various papers the victim happened to be carrying when he was attacked was purely fortuitous and cannot provide any information relevant to the defendant's moral culpability.
46. Id. at 19.
48. Id.
49. Booth, 482 U.S. at 496.
50. Gathers, 490 U.S. at 805.
52. Id. at 2604. Two categories of VIS were allowed in Payne: harm to the family caused by the death of the victim and information pertaining to the victim's personal attributes. The third category, the victim's family's opinion of the accused, was not offered in Payne.
53. Id. at 2609.
54. Id. at 2605. This law review note does not focus on the second issue of stare decisis in
A. **Axioms That Direct Criminal Sentencing**

A major axiom underlying the rationale for capital punishment is “an eye for an eye, and a tooth for a tooth.” This doctrine continued until the 18th century in the continent of Europe when crimes deserving the death penalty began to slowly diminish. Law makers began measuring the severity of crimes in relation to the victim’s harm.

In the past, when judges had the discretion to determine the sentence, the review of the crimes’ harm played an important factor in exercising this discretion. Payne’s majority emphasized that the seriousness of the harm should be a standard upon which a determination of the type of punishment could be decided. Using historical arguments reflecting the great amount of weight given to the victim’s harm, the Court justified this standard to structure the type of punishment.

The Payne Court recognized today’s practice in American criminal law that allows the court wide discretion to obtain evidence in determining criminal penalties, limited only by the defendant’s constitutional rights. In *United States v. Tucker*, for example, the Court agreed that a judge may conduct an inquiry broad in scope and unlimited as to the kind or source of the information. However, the judge may not base his decision on evidence that was obtained in violation of the defendant’s constitutional rights.

---

55. *Id.* at 2605 (quoting Exodus 21:22-23).

56. *Id.* Chief Justice Rehnquist added, “The sentence for a given offense, rather than being precisely fixed by the legislature, was prescribed in terms of a minimum and a maximum, with the actual sentence to be decided by the judge.” *Id.* See JAMES A. FARRER, CRIMES AND PUNISHMENTS 199-201 (1880).


58. *Id.* (citing STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 56 (1988)).

59. *Id.* at 2606-07.

60. *Id.*

We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging arguments... So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.


62. *Id.* at 446 (citations omitted).

63. *Id.* at 449. Tucker was sentenced the maximum penalty based on the information that he
The rationale for allowing courts such broad discretion is that the more facts before the jury, the better suited the punishment will be for the particular offense. In 1987, the Federal Sentencing Guidelines reflected this broad discretion by extending consideration beyond the crime of the accused to include information relating to the individual guilt of the accused and the harm caused. Thus, because current practice allows broad use of evidence to enable a jury to make more informed decisions, the majority determined VIS should be admitted in the capital sentencing phase of a trial.

B. Refuting the Inadmissibility of Victim Impact Evidence

Two previous United States Supreme Court decisions refused to consider that the victim's harm in a crime plays an important role in fashioning the punishment. The Booth Court held that VIS is not allowed on a "case-by-case" basis, and that this evidence is per se inadmissible unless related directly to the crime. The Gathers Court held that for capital punishment to be imposed, the accused's punishment must be related to the accused's personal accountability and guilt and not to unrelated matters. Both of these decisions indicate that VIS does not convey the accused's "blameworthiness" to the jury. However, the Payne Court determined this reasoning faulty in that two equally culpable defendants may be guilty of unlike crimes only because their conduct results in different degrees of harm. An example of this would be where a defendant in a robbery acts in disregard for life shooting a victim who subsequently lives, versus another defendant under the same circumstances shooting a victim who subsequently dies. The evidence of the

had two prior convictions. However, the convictions were obtained unconstitutionally. In violation of his Sixth Amendment right, Tucker, unrepresented in the prior trials, had never been advised of his right to counsel nor did he intelligently and understandingly waive his right to the assistance of counsel. Id. at 446.

65. Payne, 111 S. Ct. at 2605-06 (citing UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINE MANUAL (1987)).
66. Id. at 2606.
67. Id. at 2605 (referring to Booth, 482 U.S. 496 and Gathers, 490 U.S. 805).
68. Booth, 482 U.S. at 507 n.10.
69. Gathers, 490 U.S. at 810.
70. Payne, 111 S. Ct. at 2605.
71. Id. Chief Justice Rehnquist utilizes Justice Scalia's example: "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." Booth, 482 U.S. at 519 (Scalia, J., dissenting).
72. Payne, 111 S. Ct. at 2605.
victim’s life or death will be admissible to determine if capital punishment is warranted. Thus, courts already use information concerning the victim’s harm to determine the kind of recompense the accused will pay society.

The *Payne* Court reasoned that the State should be able to admit VIS since the defendant is allowed to admit mitigating evidence of his character in the capital sentencing phase of the trial. In the past, the Supreme Court held that the State cannot preclude evidence which mitigates the accused’s culpability to avoid a death sentence. The *Booth* Court added that the defendant’s right to admit mitigating evidence should preclude the State from admitting VIS. However, the *Payne* Court found that prior to *Booth* the Supreme Court had never held the defendant should get special consideration in addition to the mitigating evidence the defendant might introduce. The *Payne* Court wrote that *Booth’s* misinterpretation unfairly prejudiced the State in a capital trial. The fact that no limitations are imposed upon the defendant in what he or she can admit as mitigating evidence is unfair to the State if it is prohibited from introducing VIS. Therefore, allowing VIS into the capital sentencing phase of trial would even the score between the State and the defendant.

*Payne’s* majority refuted *Booth’s* reasoning concerning the argument that VIS was too difficult for the defendant to rebut, and that VIS would

---

73. *Id.*

74. *Id.* at 2607. See *Fed. R. Evid.* 404(a)(1) (allowing character evidence to be admitted by the accused to mitigate guilt).

75. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The defendant’s mitigating evidence included facts of problematic family life, a father’s abuse, and several emotional disturbances which the trial court precluded from consideration. The Supreme Court held that the Eighth and Fourteenth Amendments not stop the fact-finder from considering any mitigating character evidence. *Id.* at 107. See also *Skipper v. South Carolina*, 476 U.S. 1 (1986) (defendant had the right to admit mitigating evidence from two jailers and a visitor).

76. *Booth*, 482 U.S. at 502. See *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Court determined that the defendant should be treated as a “uniquely individual human being.” This focused on the defendant’s right to admit mitigating evidence at the capital sentencing hearing. The *Booth* Court also used this particular statement to include the defendant’s right to preclude the State from admitting VIS. *Booth*, 482 U.S. at 502-03.


78. *Id.*

79. *Id.* (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting). The *Mills* Court precluded the sentencer from considering mitigating factors, relevant circumstance including the defendant’s character or record, and circumstances of the crime that the defendant offered as support for not imposing the death sentence. *Mills*, 486 U.S. at 374.

cause a "mini-trial on the victim's character." The Payne Court dismantled this reasoning in Booth, stating that relevant evidence relating to the victim is already before the jury. Additional evidence admitted at the sentencing hearing may be difficult for the defendant to rebut; however, it is no different than any other burden of rebuttal.

The Payne Court acknowledged the concern brought forth in Booth and Gathers that the jury might more readily sentence a defendant whose murder victim was an outstanding member of the community rather than an indigent victim. Yet the Court in Payne decided that VIS is not designed for the jury to make comparative judgments but to reveal the "uniqueness" of each victim to enable the jury to assess the loss to society. In the facts of Gathers, the victim was not a prominent member of society and even had mental problems, but the jury still viewed him as a "murdered human being" and imposed the death penalty. It follows from the Payne Court's analysis that VIS can be properly employed in the sentencing phase, but only when the jury considers each victim as a human being no matter what the victim's importance in society.

C. Constitutional Basis for Admitting VIS

The constitutional framework allows states to write and enforce criminal laws in their respective jurisdictions; yet where the state dictates the death penalty, the Eighth Amendment mandates upper limitations. The limitations include prohibiting states from restricting the factfinder's determination of relevant evidence that would mitigate the punishment. However, this does not restrict the state from adding any substantive

---

81. Booth, 482 U.S. at 506-07.
82. Payne, 111 S. Ct. at 2607.
83. Id.
84. Id. The majority in Payne refuted Booth's argument that there is an implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Booth, 482 U.S. at 506 n.8. See also Furman v. Georgia, 408 U.S. 238, 242 (1972).
85. Payne, 111 S. Ct. at 2607.
86. Id. The victim had been experiencing some mental problems and had undergone treatment at a mental hospital three times. The victim believed himself to be a preacher and called himself "Reverend Minister." Gathers, 490 U.S. at 805.
87. Payne, 111 S. Ct. at 2607-08.
88. Id. at 2607 (quoting McCleskey v. Kemp, 481 U.S. 279 (1987)). McCleskey was appealing the death sentence as being racially applied under the Eighth and Fourteenth Amendments. The Supreme Court precluded this argument since no legislative intent to discriminate was found. Thus, this case failed in its attempt to remedy an unfair trial under the Fourteenth Amendment. McCleskey, 481 U.S. at 305-06.
VICTIM IMPACT STATEMENTS

considerations not prohibited by the Eighth Amendment. These additional considerations could include the admittance of VIS in capital sentencing hearings on the basis that this type of evidence has been used by the sentencing authority for a long time. Still, in cases where VIS causes prejudicial harm, the defendant has a remedy under the Fourteenth Amendment which deems such trials as "fundamentally unfair." The Payne Court determined that VIS did not cause prejudicial harm since the facts of the crime offered at trial were sufficiently violent to inflame the jurors' passions and account for the imposition of the death sentence.

Based on the historical latitude enjoyed by the states to devise procedures for punishing crimes, the Court concluded that the state may allow the jury to determine the defendant's "moral culpability and blameworthiness" by considering the "specific harm" caused by the defendant. This conclusion is based on the State's interest in convincing the jury that, just as the defendant is a unique individual, the victim is also a unique individual. In addition, the victim's death has caused a loss to the community as well as to the victim's family. Therefore, the State appears to have an additional weapon in order to counter the defendant's use of mitigating evidence during the capital sentencing phase.

D. Emotive Impact of VIS on the Jury in Capital Sentencing

Payne's dissent found two defects in allowing VIS in capital sentencing hearings. First, since the victim's characteristics are not foreseeable to the defendant before the crime, the jury should not be allowed to consider those characteristics for sentencing. Second, the "quality and

89. Payne, 111 S. Ct. at 2608.
90. Id.
91. Id. See also Darden v. Wainwright, 477 U.S. 168 (1986). The defendant appealed concerning improper exclusion of jury member, prosecutor's improper statements, and ineffective assistance of counsel. The Supreme Court found the trial was not "fundamentally unfair" under the Fourteenth Amendment. Id. at 179-89.
92. Payne, 111 S. Ct. at 2612 (O'Connor, J., concurring).
93. Id. at 2608.
94. Id. (citing Booth, 482 U.S. at 517 (White, J., dissenting)).
95. Id.
96. Id. at 2609. Payne's majority concluded that "a State may... permit the prosecutor to... argue to the jury the human cost of the crime of which the defendant stands convicted." Id.
97. Id. at 2628 (Stevens, J., dissenting). These defects are tied to the Eighth Amendment's requirement that the death penalty may not be imposed "arbitrarily or capriciously." Id.
98. Id. (citing Enmund v. Florida, 458 U.S. 782, 801 (1982)). Justice Stevens relied on Tison v. Arizona for the principle that VIS causes capricious jury action since it breaks the "nexus" between the crime charged and the sentence to be imposed. Id. (citing Tison v. Arizona, 481 U.S. 137, 149 (1987)).
quantity" of VIS can be influential in changing a sentence from life imprisonment to capital punishment. Because every victim has varying personal characteristics, this post-crime determination increases the risk of "arbitrary and capricious" results. This concern is greatest not where VIS will make no difference, but where VIS will change life imprisonment to a death sentence. In essence, these defendants may be sentenced to death based on the "whim or caprice" of the jurors.

V. CRITICISMS OF USING VIS FOR CAPITAL SENTENCING

Several problems can be found in the Payne Court's reasoning to admit VIS in the capital sentencing phase of the trial. The problems include: (1) ignoring the distinction between capital and non-capital cases; (2) disregarding the Tennessee Supreme Court's evidentiary rationale for allowing VIS; (3) removing the Eighth Amendment's strict scrutiny requirement in capital cases; and (4) placing the State and the defendant on equal footing in the capital sentencing hearing. These problems reflect the holes in Payne's rationale to admit VIS.

A. Admissibility of VIS in Non-Capital Cases Does Not Justify Admission in Capital Cases

Although courts have broad discretion to determine admissibility questions in non-capital cases, this same discretion should not be extended to sentencing hearings. Courts should treat the death penalty differently from all other punishments. Although judges have liberally allowed the admission of evidence in non-capital cases as well as capital cases, more evidentiary limitations should be imposed upon capital cases. An uninhibited inquiry into evidence has never been practiced in capital sentencing hearings. Because of the extraordinary nature of

99. Id.
100. Id. (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)). Gregg stated where the jury has been given broad consideration of the death sentence, "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189. In the past, the Court has additionally reasoned that "[o]pen-ended reliance by a capital sentencer on [VIS] simply does not provide a 'principled way to distinguish [cases], in which the death penalty [is] imposed, from the many cases in which it [is] not.'" Payne, 111 S. Ct. at 2628 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).
101. Payne, 111 S. Ct. at 2630 (Stevens, J., dissenting).
102. Id.
104. See Gregg, 428 U.S. at 203-04 (reasoning that as long as the evidence admitted in a pre-sentencing hearing is not prejudicial, limitations should not be imposed).
105. See id.
the crimes, it is clear that there is a greater risk of prejudice from allowing VIS in capital sentencing hearings, as opposed to a lesser non-capital case. Most states recognize this risk and allow VIS in non-capital cases only. Thus, Payne’s reasoning fails to recognize that free admission of VIS will cause a greater risk of improper application of the death penalty.

B. Disregarding the Tennessee Supreme Court’s Evidentiary Rationale for Allowing VIS

The Payne Court’s disregard for the Tennessee Supreme Court’s reasoning appears to leave the door wide open for admitting VIS. The Tennessee Supreme Court reached the same conclusion as the United States Supreme Court to admit VIS in a capital case, but the court justified its decision on a different basis concerning evidentiary determinations. Tennessee’s Supreme Court found that the grandmother’s statements as to how much her grandson misses his mother and sister, although irrelevant, “did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty, and was harmless beyond a reasonable doubt.” The Tennessee court also determined that the prosecution’s specific VIS argument to the jury was harmless error.

106. Blow to Victims’ Rights Movement, CHI. DAILY L. BULL., June 15, 1987, at 16. Law enforcement and victims’ rights participants argue that VIS and retribution are “legitimate goal[s] of society.” The consideration of VIS in capital sentencing hearings broadens the state’s interest in protecting the victims of crimes.

107. Booth, 482 U.S. at 509 n.12. Thirty-six states allow the jury to consider evidence of the crime’s emotional and financial impact on the victim. However, some of these states do not allow VIS in crimes punishable by the death sentence.


110. Id. at 19.

111. Id. at 18. The Tennessee Supreme Court also resolved two issues other than VIS: (1) whether sufficient evidence was submitted to support a conviction; and (2) whether it was proper to submit evidence of drug paraphernalia obtained at the time of the arrest. The defendant coming out of the apartment in blood soaked clothes was enough to convey a reasonable inference for the State. In addition, the court determined that the State did not act in bad faith in failing to give notice concerning the admission into evidence of the drug paraphernalia. Id. at 10, 15-16.

112. Id. at 19. The Tennessee Supreme Court determined: [T]he prosecutor’s argument is relevant to this defendant’s personal responsibility and moral guilt. When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his “blameworthiness.” Id.
The Payne Court did not specifically address this evidentiary reasoning of harmless error. The Court’s failure to consider the Tennessee Supreme Court’s reasoning could possibly be interpreted as an endorsement of no evidentiary limitations on VIS in capital sentencing hearings. The Payne Court found no evidentiary error relating to VIS as determined by the Tennessee Supreme Court. Since there appears to be no clear evidentiary hurdle for VIS of the type in Payne, the State will most likely be able to bring in an insurmountable amount of irrelevant evidence in the guise of VIS.

C. Fourteenth Amendment Situated as the Only Limitation and Remedy to VIS

While normal rules of evidence are usually not employed at the sentencing phase of the trial, constitutional requirements are still applicable. Historically, the United States Supreme Court has applied the Eighth and Fourteenth Amendments to the death penalty in order to avoid arbitrary and mandatory sentencing. The Payne Court, however, moves away from the common application in the Eighth Amendment. The concurrence stated that the Eighth Amendment’s “cruel and unusual punishment” provision has no application to VIS in death

113. See generally Payne, 111 S. Ct. at 2612 (O’Connor, J., concurring) (failing to specifically discuss harmless error, the concurrence did contend that the jury was already inflamed by the evidence admitted at trial, and the VIS admitted in the capital sentencing phase made no difference in their determination of death).
114. Id. at 2601-11.
115. See id. at 2611 (O’Connor, J., concurring) (referring to “harmless error” in definition only).
116. Id.
117. See id.
118. 24 C.J.S. Criminal Law § 1494 (1989). A judge is allowed to make a broad inquiry into the facts at the hearing to determine what sentence to impose. Usually, any relevant evidence including hearsay is admissible. This admissible evidence includes evidence that was entered at the guilt phase of the trial or evidence that would have been admissible. In spite of the broad scope of judicial consideration, this evidence must still be relevant and reliable. Id. (emphasis added).
121. Payne, 111 S. Ct. at 2609 (concluding that there is no reason to treat VIS differently from other relevant evidence under the Eighth Amendment). See Robert P. Gritton, Comment, Capital Punishment: New Weapons In the Sentencing Process, 24 GA. L. REV. 423 (1990) (discussing two standards used by the courts to determine if a particular punishment violates the Eighth Amendment: (1) whether the sentence was of a type deemed “cruel and unusual” at the time the Bill of Rights was adopted; or (2) whether the sentence violates evolving standards of decency).
sentencing hearings.\textsuperscript{122} Even though the Court undercut the application of the Eighth Amendment concerning VIS in capital cases, the Court still allowed the Fourteenth Amendment as a means to remedy an unfair trial.\textsuperscript{123} However, the Court never analyzed the boundaries of VIS that would constitute a violation of the Fourteenth Amendment, but only referred to it as a "mechanism for relief."\textsuperscript{124} When applying this reasoning, courts would not review VIS as inappropriate, but would look to whether VIS "so infected the trial with unfairness as to make the resulting conviction a denial of due process."\textsuperscript{125} The concurrence found that because the factual horror of the crime was already observed in trial, the admission of VIS did not change the juror's mind in ruling on the death sentence.\textsuperscript{126} Therefore, this result afforded no due process violation.

In most cases the lack of clarity as to unfairness makes admission of VIS constitutional. Thus, the sentencing would be fair if the jury imposed the death penalty based only on the evidence at trial and not the VIS admitted at the capital sentencing phase.\textsuperscript{127} However, where the jury is unsure in determining the death penalty, VIS should not be introduced to sway them to a determination of death. The demarcation of knowing whether VIS made a difference in the jury's decision appears to be strongly subjective.\textsuperscript{128} Payne's concurrence answers this dilemma by denoting the severity and horror of the crime.\textsuperscript{129} The more severe the crime, the less difference the admission of VIS will make in a capital sentencing hearing.\textsuperscript{130} This reasoning constitutes a weakness in practice for protecting the accused from capricious sentencing because ascertaining the severity of the crime is indeterminate.

The Payne Court did not consider the Fourteenth Amendment's equal protection which protects an individual from conviction on the basis of race or varying circumstances.\textsuperscript{131} The writers of the Fourteenth

\textsuperscript{122} Payne, 111 S. Ct. at 2616 (Souter, J., concurring) (concluding there is nothing "cruel or unusual" about a state legislature codifying VIS into law).
\textsuperscript{123} Id. at 2608.
\textsuperscript{124} Id.
\textsuperscript{125} Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)) The prosecution made an ambiguous remark at the sentencing phase of trial and the judge instructed the jury to disregard the remark. The Supreme Court held no prejudice amounting to denial of due process was shown. Id.
\textsuperscript{126} Payne, 111 S. Ct. at 2612.
\textsuperscript{127} Id. at 2608.
\textsuperscript{128} See id. (O'Connor, J., concurring).
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Jonathan Willmott, Comment, Victim Characteristics and Equal Protection for All: An Alternative Analysis of Booth v. Maryland and South Carolina v. Gathers and a Proposed Standard for
Amendment did not differentiate between people based on life, liberty, and property. It follows that under the Fourteenth Amendment an individual should not be convicted or put to death on the basis of the victim's individual characteristics. As the Fourteenth Amendment promotes equality in protection, so should each victim be considered equally as one life in the sentencing phase. Therefore, admitting the victim's personal characteristics in a capital case alters the balance against the accused's equal protection.

D. The "Powerful State" Should Not Be Allowed to Admit VIS

The contention that the State should be allowed to present VIS in a capital sentencing hearing because the defendant is allowed to admit mitigating evidence to his or her character is not consistent with past constitutional protections afforded the accused over the State. The Constitution has never been delineated to balance the interest between the accused and the State. The Constitution, however, does provide rights to the accused and limitations against the powerful State to prohibit overreaching of the accused's rights. Since the State can rebut in the capital sentencing phase, it is incorrect to conclude that the evidence is not properly balanced without the admission of VIS.

The true evidentiary imbalance is against the defendant in the admission of VIS in a capital case. Admitting the victim's character and personal attributes does nothing but create a mini-trial for the victim. Unfortunately, the defendant cannot effectively rebut VIS pertaining to the family's opinion of the loss of the victim. VIS admissibility only leads into issues that are not relevant to the crime and places the defendant in an unfair, imbalanced predicament. Although the State may have

---

132. Id.
133. Id.
134. Payne, 111 S. Ct. at 2627 (Stevens, J., dissenting). See Fed. R. Evid. 404(a). In rule 404(a), the defendant is favored over the State in that the defendant may introduce character evidence while the State may only rebut.
135. Id.
136. Id. An example of a constitutional limitation upon the State is the requirement of the State to prove the defendant guilty beyond a reasonable doubt. Additionally, under the Federal Rules of Evidence, the State is limited on the admittance of evidence that goes to the accused's propensity to commit a particular crime.
137. Id.
138. Id.
a legitimate interest to counterbalance the defendant's mitigating evidence, this legitimate interest should not extend into VIS beyond the breadth of the defendant's mitigating evidence. 139

VI. ROLE OF VIS AFTER PAYNE

It is very likely that the states will quickly adopt the use of VIS in capital cases reflecting the surge of victims' rights supporters in the United States. Several courts have dealt with the new ruling in Payne. 140 Surprisingly, only one court has applied Payne on its face, deeming VIS constitutional. 141 The Tenth Circuit Court of Appeals in Robison v. Maynard, 142 grappled with the issue of whether the accused should be able to put on more mitigating evidence in the trial's capital sentencing phase since the State gets more leeway in admitting VIS. This court distinguished Payne's holding from any ruling concerning the amount and type of the defendant's mitigating evidence. 143

At the time of Booth in 1987, at least thirty-six states allowed some form of VIS in capital cases. 144 Now that the Supreme Court has resurrected VIS, it most likely will not be difficult for the state courts to resume admission of VIS into the death sentencing phase reflecting the populous' true intent in victims' rights. The Payne Court seemed to adhere to the victims' rights movement pressures. 145 Because the popularity of capital punishment is prevalent in today's violent society, Payne's

139. Booth, 482 U.S. at 517 (White, J., dissenting). Justice White determined that "the State has a legitimate interest in counteracting the mitigating evidence [of] the defendant . . . by reminding the sentencer that just as the [defendant] should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society . . . ." Id. (citation omitted).

140. See, e.g., Arizona v. Lavers, 814 P.2d 333 (Ariz. 1991) (defendant appealing prosecution's death penalty sentence based on the victim's family opinions). Although the VIS evidence in Payne did not include family opinions, the Lavers court still found family opinions in the capital sentencing phase permissible. Id. at 354. See also People v. Mickle, 814 P.2d 290 (Cal. 1991) (defendant arguing testimony of victim's family was inadmissible under the Eighth Amendment's "cruel and unusual punishment" clause). Following the spirit of Payne, the California Supreme Court reviewed a 1978 death penalty law, stating evidence related to the emotional impact of the crime on the victim's family, the families' opinions about the crime, and the victim's personal characteristics are generally inadmissible. While these three categories are not probative of guilt, they reflect the general harm to society as a whole and should be considered. Id. at 324-25.

141. Horton v. Zant, 941 F.2d 1449, 1466 (11th Cir. 1991). The court found that defendant's objection to VIS admitted in the capital sentencing hearing was moot since Payne had overruled Booth which was defendant's foundation for objection. Id.

142. 943 F.2d 1216 (10th Cir. 1991).

143. Id. at 1217.

144. Booth, 482 U.S. at 509 n.12.

145. Payne, 111 S. Ct. at 2630 (Stevens, J., dissenting); see also id. at 2627 n.1. Justice Scalia seemed to rely on public support for victims' rights in writing his concurring opinion.
only solution was to follow the apparent majority of the people and increase the severity of the punishment to stop the escalation in crime.\textsuperscript{146}

Presently, the only way to challenge VIS appears to be under the Fourteenth Amendment's due process, but even this remedy seems weak against the fervor of the victims' movement and the recent decision in \textit{Payne}.\textsuperscript{147} Currently, the "powerful State" may present VIS to counteract the defendant's mitigating evidence on his character at the sentencing phase.\textsuperscript{148} However, the extent to which the state may allow the victim's family to testify or the prosecution to read victim character evidence to the jury seems strongly unbridled.

\section*{VII. Conclusion}

The United States Supreme Court in \textit{Payne v. Tennessee} has stripped away any consideration of the Eighth Amendment's prohibition of VIS. This decision has overruled two previous Supreme Court cases: \textit{Booth v. Maryland} and \textit{South Carolina v. Gathers}. The Court in \textit{Booth} determined that VIS at the sentencing phase of a trial was barred by the Eighth Amendment. The \textit{Gathers} Court interpreted \textit{Booth} as leaving a gap which allows VIS to be admitted only when it is directly associated with the surrounding facts of the crime. In overruling both \textit{Booth} and \textit{Gathers}, \textit{Payne} held that VIS was not per se barred under the Eighth Amendment and should be considered in the capital sentencing hearing.

In essence, the \textit{Payne} Court is providing a greater chance for the State to obtain the death penalty. When VIS is admitted in capital sentencing hearings, a juror is likely to desire retribution more readily than otherwise. A juror may be reluctant to impose the death penalty knowing only that a defendant shot and killed a person. However, when the same juror learns that the victim had three children and was prominent

\textsuperscript{146} \textit{Id.} at 122.

\textsuperscript{147} \textit{See Gritton, supra} note 121, at 445. "While the change in procedure would undoubtedly provide a vehicle for a jury to avenge society, the additional evidence would allow the jury to consider information not relevant to the murderer's decision to kill." \textit{Id.}

\textsuperscript{148} \textit{Id.} at 445. Historically, the United States Supreme Court decisions have precluded defendant's mitigating evidence that does not relate to the circumstances of the offense. Thus: permitting a sentencing jury to hear such irrelevant evidence yields the same effect as imputing that knowledge to the defendant. The jury would then consider that evidence concurrently with any mitigating evidence a defendant could proffer. The admission of that evidence obviously would prejudice juries with information irrelevant to the decision to kill, while diminishing the effectiveness of mitigating evidence.

\textit{Id.}
in the community, the death penalty will loom ever closer for the defendant. Would this juror favor the death penalty if the victim was an indigent versus an affluent member of society? It seems unlikely.

VIS does not aid the fact-finder to more readily determine whether the death penalty is applicable, but merely incites a juror to desire retribution for the harm inflicted on the victim. In addition, since the jury already knows the defendant is guilty, they are more likely to make the defendant pay for the added harm that he or she had not foreseen before killing the victim. The elements of a state's capital punishment statute do not require that the victim be a highly respected individual in the community before imposition of the death penalty. Yet, that end is promoted by the admittance of VIS.

VIS admissibility at capital sentencing hearings is short sighted. VIS appears to give the State extra ammunition to obtain a death penalty verdict; however, this verdict is not an end to itself. The defendant still must advance through the proper appeals before the finality of the death penalty may be employed. Supporters of VIS believe that there will be more justice if more death sentences are given to deserving criminals. However, in order to truly accomplish this end, their focus should be on correcting the slow legal process, prison incapacity, as well as other deficiencies in our criminal system.

*John W. Cannon*