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# AVOIDING PAYNE: AN ANALYSIS OF VICTIM IMPACT EVIDENCE

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On the final day of its 1991 Term, the United States Supreme Court issued its decision in *Payne v. Tennessee*,<sup>1</sup> arming prosecutors seeking the death penalty with a new weapon—victim impact evidence.<sup>2</sup> The immediate damage that *Payne* inflicted on capital defendants was easily understood. States could now permit the admission of victim impact evidence and prosecutorial argument on that subject during the sentencing phase of a capital trial.<sup>3</sup> However, the true horror of *Payne* may lie in the threat to all constitutional liberties posed by the majority's willingness to abandon *stare decisis* and overrule two of the Court's recent decisions, *Booth v. Maryland*<sup>4</sup> and *South Carolina v. Gathers*.<sup>5</sup>

This article first explores the history of the battle over the admissibility of victim impact evidence by examining the *Booth* and

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<sup>1</sup> 111 S. Ct. 2597 (1991).

<sup>2</sup> *Id.* at 2609. The Supreme Court held that in cases where capital punishment is sought "[a] state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* The Court concluded that such evidence should not be treated "differently than other relevant evidence is treated." *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 482 U.S. 496 (1987). In *Booth*, the Supreme Court held that evidence describing the personal characteristics of the victims, the impact of the crimes on the victims' families, and family members' opinions and views of the crimes and the defendant were "irrelevant to the capital sentencing decision, and . . . create[d] a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 502-03. The *Payne* decision overruled the first two parts of the *Booth* holding, but did not decide whether family members' views on the crime and the defendant were considered relevant evidence during the sentencing phase of a capital trial. *Payne*, 111 S. Ct. at 2609.

<sup>5</sup> 490 U.S. 805 (1989). In *Gathers*, the Supreme Court held that prosecutorial comment concerning the personal characteristics of the victim was inadmissible at a capital sentencing trial. *Id.* at 811.

*Gathers* decisions. Second, this article dissects the *Payne* decision to determine whether the Court has left open any avenues of argument that, although not prohibited *per se* by the Eighth Amendment, victim impact evidence should, nonetheless, be prohibited in certain circumstances. Third, this article offers practical suggestions on how defense lawyers may seek to minimize the damage wrought by victim impact statements and perhaps even employ the rationale of *Payne* to benefit their clients. Fourth, this article examines recent legislative efforts in Oklahoma designed to impose the *Payne* ruling on criminal defendants generally, and on capital defendants in particular. To that end, the article summarizes the key provisions of the victims' impact law which took effect in Oklahoma on July 1, 1992.<sup>6</sup> Lastly, this article criticizes the creation in Oklahoma of a new aggravating circumstance in capital murder prosecutions inspired by *Payne*. Oklahoma House Bill 2271,<sup>7</sup> signed into law by Governor Walters on April 14, 1992, furnishes tragic proof that in Oklahoma all victims are not created equal.

## I. UNITED STATES SUPREME COURT DECISIONS ON VICTIM IMPACT EVIDENCE

### A. *Setting Precedent: Booth v. Maryland*

In *Booth v. Maryland*, John Booth was found "guilty of two counts of first-degree murder, two counts of robbery, and conspiracy to commit robbery."<sup>8</sup> Booth and an accomplice had entered the home of an elderly couple and had robbed, gagged, and stabbed them to death with a kitchen knife.<sup>9</sup> Prior to sentencing,

<sup>6</sup> Act of Apr. 30, 1992, ch. 136, 1992 Okla. Sess. Law Serv. 442 (West) (amending OKLA. STAT. tit. 19, §§ 215.33 & 215.39 (1992), OKLA. STAT. tit. 21, § 142.3 (1991), OKLA. STAT. tit. 22, § 991a (1985), OKLA. STAT. tit. 57, §§ 332.2 & 332.8 (1991), and adding OKLA. STAT. tit. 22, §§ 984, 984.1 & 984.2 (1992)).

<sup>7</sup> H.B. 2271, 43d Leg., 2d Reg. Sess., 1991 Okla. Sess. Law Serv. 177 (West) (codified as amended at OKLA. STAT. tit. 21 § 701.10 (1992) [hereinafter HOUSE BILL]). H.B. 2271 is titled "An Act Relating to Crimes and Punishments; Amending 21 O.S. 1991, Section 701.10, Which Relates to the Death Penalty; Authorizing the Introduction of Certain Evidence During the Sentencing Proceeding; and Declaring an Emergency." *Id.* This newly enacted measure effectively expands the list of aggravating circumstances in capital murder cases to include harm and loss suffered by the victim and the victim's family. *Id.*

<sup>8</sup> *Booth*, 482 U.S. at 498.

<sup>9</sup> *Id.* at 497-98. Booth was a neighbor of the victims and knew that they could easily identify him. *Id.* The victims' bodies were discovered by their son two days after the robbery. *Id.*

the State of Maryland's Division of Parole and Probation prepared "a presentence report that described Booth's background, education and employment history, and criminal record."<sup>10</sup> As was required by Maryland statute, the report also contained a victim impact statement ("VIS") which described the effect of the crime on the victim and the victim's family.<sup>11</sup> In the *Booth* case, the VIS was based on interviews with the victims' son, daughter, son-in-law, and granddaughter.<sup>12</sup>

Much of the VIS emphasized the victims' outstanding personal qualities and stressed how deeply the victims would be missed.<sup>13</sup> For example, the victims' son reported that his father was a lifelong hard worker, his mother was "young at heart," and both parents had many devout friends.<sup>14</sup> In addition, the VIS described the emotional and personal problems the family members encountered as a result of the crimes.<sup>15</sup> The victims' son reported that he suffered from depression and lack of sleep.<sup>16</sup> Similarly, the victims' daughter reported that she also suffered from a lack of sleep and had become withdrawn and distrustful.<sup>17</sup> The victims' granddaughter reported that the deaths had ruined her sister's wedding which had taken place a few days after the crimes.<sup>18</sup> Furthermore, she had received counseling for several months, only to quit when she concluded that "no one could help her."<sup>19</sup>

Finally, the VIS set forth the family members' opinions and characterizations of the crimes and of Booth.<sup>20</sup> In this regard, the son stated that his parents had been "butchered like animals."<sup>21</sup> The daughter concluded that she could never forgive the mur-

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; see also MD. ANN. CODE art. 41, § 4-609(c)(2) (1990) (requiring that VIS be included with presentence investigation report in felony cases and misdemeanor cases which cause serious injury).

<sup>12</sup> *Booth v. Maryland*, 482 U.S. 496, 499 (1987). The complete VIS is reprinted in an appendix to the Court's opinion. *Id.* at 509-15.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at n.3.

<sup>15</sup> *Id.* at 499.

<sup>16</sup> *Id.* at 499-500.

<sup>17</sup> *Booth v. Maryland*, 482 U.S. 496, 500 (1987). The daughter also mentioned that she could no longer watch violent movies and that the sight of kitchen knives reminded her of the murders. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

derer and that such a person "could never be rehabilitated."<sup>22</sup> Moreover, the state official who conducted the family interviews concluded the VIS by expressing doubt that the family "will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them."<sup>23</sup>

Booth's trial attorney moved to suppress the VIS on the ground that it was both irrelevant and unduly inflammatory and therefore its use in a capital murder case violated the Eighth Amendment to the United States Constitution.<sup>24</sup> The trial court denied the motion, and the prosecutor agreed to simply read the VIS to the jury, rather than call individual family members to testify.<sup>25</sup> After considering the report and the victim impact evidence contained therein, the jury sentenced Booth to death on one count of murder and to life imprisonment on the second count.<sup>26</sup>

On appeal, five members of the United States Supreme Court concluded that the introduction of a VIS at the sentencing phase of a capital murder trial violated the Eighth Amendment and vacated Booth's death sentence.<sup>27</sup> Writing for the majority, Justice Powell emphasized that "a jury must make an 'individualized determination' whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime.'" <sup>28</sup> According to the Court, the information contained in a VIS could be irrelevant to a capital sentencing decision if it is shown to have no bearing on the defendant's "personal responsibility and moral guilt."<sup>29</sup> Indeed, a VIS focuses on the character and reputation of the *victim* and the effect of the crime on his *family*.<sup>30</sup> Thus, VIS information may "divert the jury's at-

<sup>22</sup> Booth v. Maryland, 482 U.S. 496, 500 (1987).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 500-01; see also U.S. CONST. amend. VIII. The Eighth Amendment mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

<sup>25</sup> Booth, 482 U.S. at 501.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 509.

<sup>28</sup> *Id.* at 502 (quoting Zant v. Stephens, 462 U.S. 862, 879 (1983)).

<sup>29</sup> *Id.* (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)); see Enmund, 458 U.S. at 801. In construing the Eighth Amendment, the Supreme Court stated that "[f]or purposes of imposing the death penalty, [a defendant's] criminal culpability must be limited to his participation in the [crime], and his punishment must be tailored to his personal responsibility and moral guilt." *Id.*

<sup>30</sup> Booth, 482 U.S. at 504. Focusing on the victim and the effect of the crime on the

attention away from the defendant's background and record, and the circumstances of the crime."<sup>31</sup> As a result, a sentencing decision based in part on VIS information may turn on irrelevant factors such as the degree to which the victim's family is willing and able to articulate its grief, or the relative worth of the victim's character.<sup>32</sup> Similarly, family members' opinions and characterizations of the crimes "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."<sup>33</sup>

### B. *Following Precedent: South Carolina v. Gathers*

Two years after *Booth* was decided, the Court reaffirmed its principles in *South Carolina v. Gathers*.<sup>34</sup> During closing arguments at the sentencing phase of Demetrius Gathers's capital murder trial, the prosecutor read to the jury at length from a religious tract that the victim had been carrying and commented on personal qualities he inferred from the victim's possession of the religious tract and a voter registration card.<sup>35</sup> The jury sentenced Gathers to death.<sup>36</sup> Because the prosecutor's remarks "conveyed the suggestion [that Gathers] deserved a death sentence because the victim was a religious man and a registered voter," the South Carolina Supreme Court, relying on *Booth*, reversed Gathers's death sentence and remanded for a new sentencing proceeding.<sup>37</sup>

In another 5-4 decision, the United States Supreme Court affirmed.<sup>38</sup> Although the state had not introduced a VIS, the major-

victim's family may be completely unrelated to the blameworthiness of a defendant. *Id.* Rarely is a defendant motivated to commit a murder based on the effect it will have on the victim or the victim's family. *Id.*

<sup>31</sup> *Id.* at 505. In addition, the introduction of evidence of a victim's good character would entitle the defendant to rebut this evidence in a "mini-trial" on the victim's character. *Id.* at 507.

<sup>32</sup> *Id.* at 505-06. Furthermore, in some cases a victim may not leave behind a family. *Id.*

<sup>33</sup> *Id.* at 508.

<sup>34</sup> 490 U.S. 805 (1989). The victim in *Gathers* was an unemployed, mentally unstable thirty-one year old man who considered himself a preacher and carried bags containing various religious items. *Id.* at 807. The defendant and three friends brutally assaulted the victim one night in a park when the victim refused to speak with them. *Id.* at 806-07. Gathers, in particular, beat the victim with an umbrella, inserted it in his anus, and later returned and stabbed him to death. *Id.* at 807. Gathers was convicted of murder and sentenced to death. *Id.* at 806.

<sup>35</sup> *Id.* at 808-810.

<sup>36</sup> *Id.* at 806.

<sup>37</sup> *Id.* at 810 (quoting *South Carolina v. Gathers*, 295 S.C. 476, 484 (1988)).

<sup>38</sup> *Id.*

ity found that the prosecutor's comments regarding the victim's personal characteristics could result in a death sentence "because of factors about which [Gathers] was unaware and that were irrelevant to the decision to kill."<sup>39</sup> Writing for the majority, Justice Brennan stressed that although the scattering of the victim's personal papers was a relevant circumstance directly related to the crime, "the *content* of the various papers the victim happened to be carrying when he was attacked was purely fortuitous and cannot provide any information relevant to [Gathers's] moral culpability."<sup>40</sup>

Notwithstanding two 5-4 decisions squarely holding that victim impact evidence violated the Eighth Amendment, changes in the Court personnel underscored the precarious position of *Booth* and *Gathers* as enduring precedent. Significantly, the author of the majority opinion in *Booth*, Justice Powell, resigned at the end of the 1987 term and was replaced by Justice Kennedy, who became one of the four dissenters in *Gathers*.<sup>41</sup> Replacing Justice Powell, a moderate, with Justice Kennedy, a conservative, should have tipped the 5-4 balance decisively in favor of the *Booth* dissenters. However, Justice White, himself a *Booth* dissenter, mysteriously joined the majority in *Gathers*, and grumbled in a separate concurrence: "Unless *Booth v. Maryland* . . . is to be overruled, the judgment below must be affirmed."<sup>42</sup> Justice Scalia, writing a separate dissent, picked up on White's invitation and called for *Booth* to be overruled.<sup>43</sup> Similarly, Justice O'Connor's dissent revealed that she, Chief Justice Rehnquist, and Justice Kennedy stood "ready to overrule" *Booth*.<sup>44</sup>

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

<sup>39</sup> *Gathers*, 490 U.S. at 811 (quoting *Booth v. Maryland*, 482 U.S. 496, 505 (1987)).

<sup>40</sup> *Id.* at 812 (emphasis added).

<sup>41</sup> *Id.* (Justice Kennedy joining in Justice O'Connor's dissent).

<sup>42</sup> *Id.* (White, J., concurring).

<sup>43</sup> *Id.* at 823-24 (Scalia, J., dissenting).

<sup>44</sup> *Gathers*, 490 U.S. at 813-14 (O'Connor, J., dissenting).

### C. *Overruling Precedent: Payne v. Tennessee*

Justice White's invitation to overrule *Booth* was finally accepted by the Court in *Payne v. Tennessee*.<sup>46</sup> Significantly, neither Payne, who had sought review, nor the State of Tennessee in its response to Payne's certiorari petition, requested that *Booth* or *Gathers* be reconsidered.<sup>46</sup> Undeterred, six members of the Court *sua sponte* rewrote the application for certiorari and directed the parties to brief and argue whether the decisions should be overruled.<sup>47</sup> Moreover, so that the case could be heard in April during the final session of the Term, the Justices ordered the briefing expedited.<sup>48</sup>

The facts of *Payne* are especially grisly. Payne, who had been injecting cocaine and drinking beer much of the day, entered an apartment occupied by twenty-eight year old Charisse Christopher, her two year old daughter Lacie, and her three year old son Nicholas.<sup>49</sup> When Charisse resisted his sexual advances, Payne viciously stabbed Charisse and Lacie to death.<sup>50</sup> Nicholas, who had been stabbed several times by a butcher's knife which completely penetrated his body from front to back, miraculously survived.<sup>51</sup>

During the sentencing phase, the prosecutor introduced a videotape of the crime scene which captured the carnage in color footage.<sup>52</sup> Additionally, the prosecutor called Charisse's mother Mary Zvolanek, to testify to her grandson Nicholas's reaction to the murders of his mother and sister.<sup>53</sup> According to Mrs. Zvolanek:

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,

<sup>46</sup> 111 S. Ct. 2597 (1991).

<sup>46</sup> 111 S. Ct. 1031, 1031 (Stevens, J., dissenting). In his dissent to the grant of certiorari, Justice Stevens stated that "the Court's decision to expedite the consideration of this case and to ask the parties to address whether we should overrule *Booth v. Maryland* and *South Carolina v. Gathers*, a question presented neither in the petition for certiorari nor in the response, is both unwise and unnecessary." *Id.* (citations omitted).

<sup>47</sup> *Id.* (granting writ of certiorari).

<sup>48</sup> *Id.* (requiring petitioner's brief to be served and filed in four weeks). *But see id.* (Stevens, J., dissenting) (noting that expediting of case was "unwise and unnecessary").

<sup>49</sup> *Payne*, 111 S. Ct. at 2601.

<sup>50</sup> *Id.* at 2601-02.

<sup>51</sup> *Id.* at 2602.

<sup>52</sup> *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990), *aff'd*, 111 S. Ct. 2597 (1991).

<sup>53</sup> *Payne*, 111 S. Ct. at 2603.



Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.<sup>54</sup>

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

But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.<sup>55</sup>

Finally, the prosecutor strongly implied that returning a verdict of death somehow would help Nicholas by stating: "[T]here is something you can do for Nicholas. . . . He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer."<sup>56</sup> Thus, even though Nicholas was too young to testify and presumably had not been asked whether he wanted Payne to be executed, the prosecutor imputed this desire to him.

Writing for the majority, Chief Justice Rehnquist repudiated the Court's earlier decisions which had barred jury consideration of victim impact statements in capital cases.<sup>57</sup> Per Rehnquist, *Booth* and *Gathers* were "decided by the narrowest of margins, over spirited dissents challenging the basic underpinning of those decisions," and "were wrongly decided and should be, and now are, overruled."<sup>58</sup> Rehnquist rejected the premise of *Booth* and *Gathers* which stated that evidence relating to the victim's character or the peculiar circumstances or sufferings of the victim's family does not reflect on the defendant's blameworthiness or moral culpability.<sup>59</sup> To the contrary, the "specific harm" caused by a defendant is an important factor in determining appropriate punishment.<sup>60</sup> Therefore, "if a state chooses to permit the admission of victim-

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2609-11.

<sup>58</sup> *Payne*, 111 S. Ct. at 2610-11.

<sup>59</sup> *Id.* at 2605.

<sup>60</sup> *Id.* at 2608.

impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar."<sup>61</sup>

Systematically, the majority opinion attacked the arguments advanced in support of *Booth* by Justice Powell just four years earlier.<sup>62</sup> For example, the anti-*Booth* majority found that the requirement that a capital defendant be treated as a "uniquely individual human being" did not mandate that the defendant receive that consideration wholly apart from the crime which he committed.<sup>63</sup> Similarly, the fact that it might not be tactically prudent for a capital defendant to rebut victim impact evidence did not necessarily render such evidence inadmissible.<sup>64</sup> Moreover, the majority found that victim impact evidence was not generally offered to encourage juries to discriminate among victims on the basis of their worth to society.<sup>65</sup> Rather, it is offered to show each victim's uniqueness as an individual human being, regardless of how the jury views the loss to society resulting from the victim's death.<sup>66</sup> Because the sentencer must consider "any relevant mitigating evidence that the defendant proffers in support of a sentence less than death,"<sup>67</sup> the State should not be barred from either offering "a glimpse of the life" which a defendant "chose to extinguish"<sup>68</sup> or demonstrating the loss to the victim's family and to society which resulted from the defendant's actions.<sup>69</sup>

## II. AVOIDING PAYNE

### A. Federal Constitutional Challenges

Careful analysis of the Supreme Court's decisions on the admissibility of victim impact evidence reveals three different types of information which prosecutors seek to place before the jury as victim impact evidence. Broadly speaking, information is proffered regarding: (1) the personal qualities and characteristics of the victim; (2) the severe emotional and financial impact of the crimes on

<sup>61</sup> *Id.* at 2609.

<sup>62</sup> *Id.* at 2606-09.

<sup>63</sup> *Payne*, 111 S. Ct. at 2606-07.

<sup>64</sup> *Id.* at 2607.

<sup>65</sup> *Id.* at 2607-08.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2606 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)).

<sup>68</sup> *Payne*, 111 S. Ct. at 2607 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

<sup>69</sup> *Id.*

the victim's family; and (3) family members' opinions which characterize both the defendant and the defendant's crime. Although all three types would be constitutionally inadmissible under *Booth* and *Gathers*, *Payne* only revived the first two.<sup>70</sup> *Payne* did not address the holdings in *Booth* and *Gathers* which forbade family members both from offering characterizations of the crime and the defendant and from offering recommendations as to the proper punishment.<sup>71</sup> Thus, defense attorneys should strenuously argue that this type of evidence remains unconstitutional, even under the current Court's chameleonlike jurisprudence.

Even the first two types of evidence—qualities of the victim and suffering of the victim's family—remain vulnerable to constitutional challenge. If victim impact evidence introduced at the sentencing phase is so unduly prejudicial that it renders the trial fundamentally unfair, then the Due Process Clause of the Fourteenth Amendment may provide relief.<sup>72</sup>

### B. State Law Challenges

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

*Payne* simply holds that the Eighth Amendment to the United States Constitution erects no *per se* barrier to the admission of certain types of victim impact evidence.<sup>73</sup> States remain free, at least as of this writing, to provide more protection for the rights of the accused as a matter of state law than the Supreme Court is willing to mandate as a matter of federal constitutional law. Consequently, state courts should be urged by defense lawyers to hold that, notwithstanding *Payne*, the state's constitution, statutes, and

<sup>70</sup> *Id.* at 2609 (holding that evidence relating to victim's personal characteristics as well as emotional impact on victim's family was not prohibited by Eighth Amendment).

<sup>71</sup> *Id.* at 2611 n.2.

<sup>72</sup> *Id.* at 2608 (citing *Darden v. Wainwright*, 477 U.S. 168, 179-83 (1986)).

<sup>73</sup> *Payne*, 111 S. Ct. at 2609. The Court held that "if the state chooses to permit the admission of the victim impact evidence . . . the Eighth Amendment erects no *per se* barrier." *Id.*

case law mandate the exclusion of victim impact evidence.

For example, Oklahoma case law has long prohibited prosecutors from seeking to elicit sympathy for crime victims.<sup>74</sup> In addition, prosecutors in Oklahoma have been admonished for inviting juries to "be mean"<sup>75</sup> and to send a "message . . . to other would-be criminals. . . ."<sup>76</sup>

### III. LIVING WITH PAYNE

In the event that a defendant's attorney cannot convince the trial court that victim impact evidence would render her client's trial fundamentally unfair or otherwise contravene state constitutional or statutory rules, she must incorporate the VIS into his trial strategy. Even though this is a matter of extreme delicacy, a defense attorney should consider establishing contact with the victim's family. Although the family's initial reaction may be to avoid any contact with defense attorneys, counsel should not automatically assume that all family members want the defendant executed. The funeral director for the victim may be able to identify a family spokesperson who may be approachable, or the director may put the defense attorney in touch with a priest, minister, or rabbi assisting the family during their tragedy. Many family members may have strong religious beliefs which are more evolved than "an eye for an eye,"<sup>77</sup> and thus, may be willing to speak to the defendant's attorney. Indeed, a strong case can be made that revictimization occurs when prosecutors seek to co-opt family members as part of the prosecution team. Even so, if a defense attorney locates a cooperative person willing to testify against a death sentence, she may argue that their testimony is required

<sup>74</sup> See, e.g., *McCarty v. State*, 765 P.2d 1215, 1221 (Okla. Crim. App. 1988) (stating that prosecutor's function is to vindicate right of people and not to tack "as many skins of victims as possible to the wall"); *Stewart v. State*, 757 P.2d 388, 396 (Okla. Crim. App. 1988) (stating that attorney engaged in improper argument to induce jury sympathy for victim); *Jones v. State*, 738 P.2d 525, 529 (Okla. Crim. App. 1987) (stating that court has repeatedly held it improper for prosecutors to invoke jury sympathy for crime victims); *Tobler v. State*, 688 P.2d 350, 353-54 (Okla. Crim. App. 1984) (holding that pleas of jury sympathy for victim was prejudicial); *Sier v. State*, 517 P.2d 803, 805 (Okla. Crim. App. 1973) (instructing jury not to let sympathy enter into their deliberations); *Dupree v. State*, 514 P.2d. 425, 427 (Okla. Crim. App. 1973) (same).

<sup>75</sup> *Sier*, 517 P.2d at 805.

<sup>76</sup> *Id.*

<sup>77</sup> *Payne*, 111 S. Ct. at 2597 ("[A]n eye for an eye, a tooth for a tooth" (citing *Exodus* 21:22-23)).

under *Payne* to rebut the VIS.

In the spring of 1992, Oklahoma executed Olan Randle Robison, who sought to introduce evidence at sentencing that the victim's family members opposed the imposition of the death penalty on him.<sup>78</sup> The trial court denied his request and the United States Court of Appeals for the Tenth Circuit affirmed the decision.<sup>79</sup> In seeking certiorari shortly before his execution, Robison argued that under *Payne*, even-handed justice required that victim impact evidence submitted *by the defendant* be considered.<sup>80</sup> The United States Supreme Court denied certiorari, sending Robison to his death without deciding whether victim impact evidence, clearly a sword in the hands of a prosecutor, might also be used as a shield in the hands of a defense attorney.<sup>81</sup>

Voir dire may present a defense attorney with an opportunity to soften the effect of a VIS. A defense attorney may also lessen the impact of a VIS by asking potential jurors if they think family members could serve as jurors or if they feel that the jury's job in rendering the verdict is to represent the deceased's family. The jurors' responses may also show whether they view their function as doling out vengeance to help in the healing process of the victim's family. Admonishing the jurors that their role is to do justice can be effectively reinforced during closing arguments by reminding them that others, such as God, are better suited to dispense revenge.

Rebutting victim impact evidence requires a thorough investigation of the background and life of the victim. If faced with overwhelming evidence that the deceased had a loving family, a defense attorney should compare the victim's life to her client's life. If the victim's background was filled with love and nurturing encouragement, defense counsel should contrast this with her cli-

<sup>78</sup> *Robison v. Maynard*, 829 F.2d 1501, 1505 (10th Cir. 1987), *cert. denied*, 112 S. Ct. 445 (1991). Robison shot and killed three people at a residence where he believed some valuable gold jewelry belonging to his girlfriend was hidden. *Id.* at 1502-03. He was convicted of three counts of first degree murder. *Id.* at 1502. Robison's attorney wanted the testimony of a victim's relative, who did not seek the death penalty, to be admitted as a mitigating factor for the jury's consideration. *Id.* at 1504. The United States Court of Appeals for the Tenth Circuit affirmed the trial court's exclusion of such evidence. *Id.* at 1505.

<sup>79</sup> *Id.* at 1505 (citing *Booth v. Maryland*, 482 U.S. 496, 502-03 (1987)).

<sup>80</sup> *Robison v. Maynard*, 943 F.2d 1216, 1216-17 (10th Cir.), *cert. denied*, 112 S. Ct. 445 (1991).

<sup>81</sup> *Robison*, 112 S. Ct. at 445.

ent's life as one of abject neglect. For example, it might be useful to show that while the victim was entering college, facing a future filled with promise, the defendant was entering a juvenile detention facility and escaping the physical and emotional abuse of his parents. Where possible, a defense attorney should equate the children of the victim with the children of the defendant.

In rare instances, defense counsel may be able to impugn the character of the victim. To do so, she must locate victims of the victim. Also, if confronted with an especially bloodthirsty family, a defense attorney may seek to gainfully employ evidence which shows bad character of family members. The mere threat of airing the family's dirty laundry may cause the family to withdraw its demand for death. It is often said that people carrying the greatest guilt often scream the loudest for vengeance.

Once the personal characteristics of the victim are placed in issue, defense counsel may argue that the defense is entitled to any evidence in the prosecutor's files regarding the victim's bad character. Therefore, a *Brady* request<sup>82</sup> should be filed, insisting that the defense is entitled to such information because it may have an effect on the sentence to be imposed.

A defense attorney should tactfully inform VIS witnesses that the rights of cross-examination and rebuttal are not affected by the *Payne* decision. In addition, defense counsel should gently, but firmly, insist that it is her duty to try the allegations. During cross-examination, family members should be asked about positive developments since the murder. Questions about how the family is doing and if they are receiving any help coping with the tragedy are appropriate. If someone claims that the murder caused her to seek psychiatric assistance, defense counsel should subpoena the doctor's records and consider calling the doctor as a witness. A defense attorney may also explore the possibility of introducing expert testimony on the issue of whether the execution of her client will help the survivors. Above all, the cross-examination must be soothing and nonconfrontational, while expressing the defendant's remorse through the tone and substance of the questions.

In appropriate cases, defense counsel may consider calling the spouse of the murder victim as a defense witness. This would keep

<sup>82</sup> See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring, as matter of due process, that prosecutor disclose evidence favorable to accused).

the spouse out of the courtroom during the trial, since most witnesses are not permitted to observe a trial in which they are testifying.<sup>83</sup> Otherwise, a defense attorney may consider asking whether the victim was a compassionate and forgiving person to show that the victim would not have wanted a death sentence for the defendant.

Finally, at the close of the sentencing phase, defense counsel should seek an instruction that emotional and financial harm are not aggravating circumstances. Unfortunately, if a defendant lives in a state in which emotional and financial harm *are* considered proper aggravating circumstances, as is now the case in Oklahoma, defense counsel should object to the instruction as unconstitutional and preserve the issue on appeal.

#### IV. INFLECTING *PAYNE* ON OKLAHOMA

Recently, Oklahoma State Senator Brooks Douglass of Oklahoma City, himself a victim of a violent crime,<sup>84</sup> introduced Senate Bill 816, innocuously titled "An Act Relating to Victims' Rights."<sup>85</sup> Regrettably, Governor Walters approved the bill on April 30, 1992.<sup>86</sup> The new law, which became effective on July 1, 1992, allows Oklahoma sentencing, pardon, and parole decisions to consider the victim's character and the impact of the crime on the victim's family.<sup>87</sup>

<sup>83</sup> See OKLA. STAT. tit. 12, § 2615 (1992) (exclusion of witnesses).

<sup>84</sup> See *Ake v. State*, 663 P.2d 1 (Okla. Crim. App. 1983), *rev'd*, 470 U.S. 68 (1985). In late 1979, when Douglass was sixteen years old, Glen Burton Ake and an accomplice murdered Douglass's parents and attempted to rape his twelve-year-old sister. *Id.* at 4. Before fleeing, Ake shot Douglass's sister twice, shot Douglass once, and left both for dead. *Id.* Although Ake was sentenced to death, the United States Supreme Court reversed his sentence because he was denied court-appointed psychiatric assistance at trial. *Ake*, 470 U.S. at 86-87.

<sup>85</sup> S.B. 816, 43d Leg., 2d Reg. Sess., 1992 Okla. Sess. Law Serv. 442 (West).

<sup>86</sup> See Act of Apr. 30, 1992, *supra* note 6; see also Paul English, *Walters Signs Bill Giving Victims Voice*, DAILY OKLAHOMAN, May 1, 1992, at 19. *The Daily Oklahoman* reported that Senate Bill 816 won final passage on April 27, 1992 by a vote of 47-0. *Id.* Governor Walters praised Senate Bill 816 as landmark legislation that will mean "a more equitable system of justice." *Id.*

<sup>87</sup> See OKLA. STAT. tit. 19, § 215.39(B) (1992) (as amended) (any victim impact statement presented to court at sentencing must accompany report to Department of Corrections and Pardon and Parole Board); OKLA. STAT. tit. 22, § 991a(C) (1992) (as amended) (victim impact evidence submitted to court during sentencing of convicted criminal); OKLA. STAT. tit. 57, §§ 332.2 & 332.8 (1992) (as amended) (providing for victim impact testimony at parole hearing and requiring consideration of victim impact statement when making parole recommendations).

Specific provisions deserve mention. First, the very definition of VIS supplied in the bill appears to violate the United States Constitution. According to Section 984 of Oklahoma's Code of Criminal Procedure, as amended, a VIS includes "the victim's opinion of a recommended sentence."<sup>88</sup> Recall that this type of evidence, found unconstitutional in *Booth*, did not receive the Rehnquist Court's seal of approval in *Payne*.<sup>89</sup> Moreover, opinion evidence regarding what sentence a defendant deserves has long been excluded in Oklahoma.<sup>90</sup>

Constitutional infirmities aside, the bill's most remarkable characteristic may be its breadth. Under the new law, a court is required to consider a VIS when sentencing a person convicted of any crime.<sup>91</sup> Pardon and Parole Board members are also required to consider any victim impact statements presented to the court at the time of sentencing.<sup>92</sup> In addition, by legislative fiat, the Oklahoma law makes victims, and in the case of murder victims, their immediate survivors, part of the prosecution team.<sup>93</sup> Consultation between the prosecutor and the victim, or the family of a murder victim, is required before critical decisions are made.<sup>94</sup> Also, prosecutors are now required to inform victims of any delay in the prosecution of a felony case involving a violent crime or sex

<sup>88</sup> OKLA. STAT. tit. 22, § 984 (1992) (as amended). "Victim" is defined as "a person who suffers personal injury or death as a result of criminally injurious conduct." OKLA. STAT. tit. 21, § 142.3(14) (1992) (as amended). The definition of VIS, however, sweeps much more broadly and includes information regarding the impact of the crime on "a victim or member of the immediate family." OKLA. STAT. tit. 22, § 984. Members of the immediate family include spouses, children by birth or adoption, stepchildren, parents, and siblings of the victim. *Id.*

<sup>89</sup> *Payne v. Tennessee*, 111 S. Ct. 2597, 2611 n.2 (1991). The Court's holding did not discuss the constitutionality of admitting into evidence the victim's family's opinions of the defendant and of the appropriate sentence. *Id.*

<sup>90</sup> See, e.g., *Robison v. Maynard*, 829 F.2d 1501, 1504-05 (10th Cir. 1987) (such evidence is irrelevant and interferes with jury's duty of exercising "conscience of the community"), *cert. denied*, 112 S. Ct. 445 (1991).

<sup>91</sup> OKLA. STAT. tit. 22, § 991a(C) (1992) (as amended). The specific provision states that "[w]hen sentencing a person convicted of a crime, the court shall consider any victim impact evidence." *Id.*

<sup>92</sup> OKLA. STAT. tit. 57, § 332.8 (1992) (as amended); see also OKLA. STAT. tit. 57, § 332.2 (1992) (as amended) (allowing victim or victim's representative to testify at parole hearing for at least five minutes).

<sup>93</sup> OKLA. STAT. tit. 22, § 984.1(B) (1992). This new measure provides that "[i]f a presentence investigation report is prepared, the person preparing the report shall consult with the victim or member of the immediate family of the victim if the victim is deceased, incapacitated or incompetent, and include any victim impact statement in the presentence investigation report." *Id.*

<sup>94</sup> *Id.*



offense.<sup>95</sup>

To make matters worse, on April 14, 1992, Governor Walters signed into law Oklahoma House Bill 2271.<sup>96</sup> This law effectively expands the list of aggravating circumstances in capital murder prosecutions to include consideration of the harm and loss suffered by the family of the victim and the nature and extent of the harm and loss suffered by the victim.<sup>97</sup> Consequently, defense counsel in capital cases now have an affirmative duty to explore the background and character of the murder victim. And, in order to vander effective assistance of counsel, capital defense attorneys must investigate the veracity of victim impact evidence.

Tragically, the Oklahoma legislature has now legislatively decreed that, at least in capital murder cases, victims will receive unequal treatment depending upon their relative value to society and the ability of surviving family members to articulate their grief and loss. Capital murder defendants "fortunate" enough to kill someone without any family will escape the draconian state laws permitting victim impact evidence and may thereby escape the death penalty. Similarly, "if a defendant murdered a convenience store clerk in cold blood during the course of an armed robbery, he should be permitted to rebut evidence supporting the new aggravating circumstance by offering evidence unknown to him at the time of the crime about the immoral character of his victim."<sup>98</sup> Sadly, although all persons are created equal as a matter of federal constitutional law, under Oklahoma law, murder victims throughout the state will no longer enjoy the equal protection of the law.

#### CONCLUSION

By permitting the injection of victim impact evidence into capital sentencing determinations, *Payne v. Tennessee* dramatically alters the criteria for deciding which defendants deserve the death penalty. According to *Payne*, jury sentencing must still reflect an

<sup>95</sup> OKLA. STAT. tit. 19, § 215.33(D) (1992) (as amended).

<sup>96</sup> See HOUSE BILL, *supra* note 7 (permitting introduction of victim impact evidence during capital sentencing proceedings).

<sup>97</sup> OKLA. STAT. tit. 21, § 701.10(C) (1992) (as amended). The amended portion states that "the state may introduce evidence about the victim and about the impact of the murder on the family of the victim" as an aggravating circumstance. *Id.*

<sup>98</sup> *Payne*, 111 S. Ct. at 2626 (Stevens, J., dissenting).

individualized determination of whether a defendant should be executed based upon his character and the circumstances of his crime. However, a defendant's blameworthiness or moral culpability may now be assessed by reference to the victim's character or the peculiar circumstances or sufferings of the victim's family. Thus, *Payne* permits the introduction of arbitrary and capricious criteria into capital sentencing determinations. Worse still, the inflammatory nature of victim impact evidence is certain to foreshadow an increase in the number of death sentences by diverting the jury's attention away from the defendant and focusing instead on the character of the murder victim and the palpable suffering of grief-stricken family members.

In a reactionary rush towards retribution, the Oklahoma state legislature has passed victim impact evidence legislation which is at best unwise and at worst unconstitutional. The new laws substantially increase the obligations of defense counsel representing capital clients. In addition to investigating the circumstances of the crime and the background and character of the defendant, defense counsel must expend precious time and effort exploring the character of the victim. Moreover, Oklahoma's victim impact legislation may tempt unscrupulous prosecutors to prey upon reluctant family members by recruiting them to testify in favor of a death sentence. Homicide survivors are extremely vulnerable and susceptible to being manipulated by prosecutors who seek to gain a tactical advantage by exploiting their grief and anger. Special care must be taken to prevent the "revictimization" of surviving family members. The inevitable consequences of inflicting *Payne* on Oklahoma's Code of Criminal Procedure is to skew the state's criminal justice system *in favorem mortis*.

