

ORAL VICTIM IMPACT STATEMENTS IN CAPITAL PUNISHMENT
SENTENCING ARE A *PAYNE*

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INTRODUCTION

For most of American history, the legal system failed to provide crime victims with any rights.¹ Generally, crime was seen as a threat to the entire community, and “the real flesh-and-blood victim was treated like just another piece of evidence, a mere exhibit to be discarded after the trial.”² As cases were adjudicated, the victim’s right to information about the ongoing case, the right to participate in the court process, and the victim’s opinion on the case were not given much consideration.³

To address the injustices and imbalances between the defendant and victims’ interests, crime victims and activists came together — in a highly de-centralized social movement in the early 1970s — around the mission that crime victims should not be used to obtain a conviction and then be quickly discarded with no support.⁴ Rather, the activists’ goal in the movement was to give victims a voice to advocate for their rights in the criminal legal system.⁵ As the social movement gained more support, lawmakers began to enact legislation to provide support to victims, such as crime victim compensation schemes and rape shield provisions.⁶ In 1982, President Ronald Reagan appointed a task force on the victims of crime, recommending various reforms to

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¹ Andrew J. Karmen, *Who’s Against Victims’ Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN’S J.C.R. ECON. DEV. 157, 158 (1992).

² *Id.*; U.S. DEP’T OF JUST., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME (1982) (describing insensitive treatment of rape victims).

³ See Karmen, *supra* note 1 (citing Robert Reiff, THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM’S FORGOTTEN RESPONSIBILITY, 111 (1979) (criminal justice system is “offender-oriented” and produces “social injustice for the victim”)).

⁴ See Karmen, *supra* note 1, at 158–59.

⁵ See generally *id.*

⁶ Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 612–13 (2009).

expand the rights and roles of crime victims within the justice system.⁷ The task force concluded that “[v]ictims, no less than defendants, are entitled to have their views considered” at sentencing and called for legislation requiring victim impact statements.⁸ The Victim and Witness Protection Act of 1982 required all victim impact statements to be included in the pre-sentence report submitted to the sentencing authority.⁹ In addition to giving victims a voice, the Uniform Victims of Crime Act of 1992 gave victims the constitutional right to be present at court proceedings and stay current with their cases.¹⁰ Further, the task force recommended that victim impact statements contain information “concerning all financial, social, physiological, and medical effects [of the crime] on the crime victim.”¹¹ As a result of the Victims’ Rights Movement and the quest to serve crime victims and their families, victim impact statements became a common feature in criminal trials, particularly in capital sentencing proceedings.¹²

The Supreme Court first evaluated the constitutionality of victim impact evidence in *Booth v. Maryland* in 1987.¹³ The Court held that part of a Maryland statute requiring victim impact evidence in capital sentencing proceedings was unconstitutional, as it violated the Eighth Amendment,¹⁴ which prohibits cruel and unusual punishment.¹⁵ During the *Booth* era, the Court ruled that such victim impact statements created an “unacceptable risk that a death sentence would be imposed based on emotionally charged opinions of the victims, rather than a rational judgment based on the circumstances of the crime and individual characteristics of the defendant.”¹⁶

⁷ *Id.* at 613.

⁸ *Id.*

⁹ Judith Platania & Garrett L. Berman, *The Moderating Effect of Judge’s Instructions on Victim Impact Testimony in Capital Cases*, 2(2) ROGER WILLIAMS UNIV. APPLIED PSYCH. IN CRIM. JUST. 85, 85 (2006).

¹⁰ *See id.*

¹¹ Cassell, *supra* note 6, at 613.

¹² Justin D. Flamm., *Due Process On the “Uncharted Seas of Irrelevance”: Limiting the Presence of Victim Impact Evidence at Capital Sentencing After Payne v. Tennessee*, WASH. & LEE L. REV. 295, 296 (1999).

¹³ *See id.* at 302.

¹⁴ *See id.*

¹⁵ U.S. CONST. amend. VIII.

¹⁶ *Victim Families: Victim Impact Evidence*, DEATH PENALTY INFO. CTR. (last visited Oct. 15, 2024), <https://deathpenaltyinfo.org/policy-issues/victims-families/victim-impact-evidence>.

The Court reversed itself in 1991 when revisiting the issue in *Payne v. Tennessee*,¹⁷ holding that the Eighth Amendment does not prohibit individual states from choosing to admit victim impact evidence at the sentencing phase of capital trials.¹⁸ Specifically, the Court stated that evidence concerning a victim's personal characteristics and the repercussions of the victim's death on surviving family members were appropriate means to apprise the fact finder of the harm caused by the defendant's actions.¹⁹ The Court briefly noted that the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, was the proper mechanism of relief in cases where victim impact statements were at issue.²⁰ The Court explained that the defendant may seek "relief under the Due Process Clause" when admission of the evidence is "unfairly prejudicial."²¹

Since *Payne*, nearly all death penalty states have chosen to admit victim impact evidence, including victim impact statements, as many of the constitutional challenges have been inaccurately brought under the guise of the Eighth Amendment.²² Rather than withstand the constitutional pressure of the Eighth Amendment and allow oral victim impact statements, this Comment advances a different interpretive scope for evaluating the constitutionality of oral victim impact statements in capital punishment sentencing under the Fourteenth Amendment Due Process Clause.

This Comment argues that, in capital cases, the defense should challenge the admissibility of oral victim impact statements under the Fourteenth Amendment instead of the Eighth Amendment, while also proposing strategies to circumvent constitutional challenges altogether. Part I of this Comment describes death penalty proceedings and outlines the history of victim impact statements. Part I further discusses the evolution of victim impact statements in capital punishment cases, reviews past constitutional challenges to these statements, and describes the appropriate inquiry for evaluating its constitutionality under the Fourteenth Amendment. Part II of this Comment analyzes the approach taken by several states in interpreting the *Payne* decision and

¹⁷ See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

¹⁸ See Flamm, *supra* note 12, at 304.

¹⁹ See Platania & Berman, *supra* note 9, at 86; see *Payne*, 501 U.S. at 825.

²⁰ Flamm, *supra* note 12, at 304; see *Payne*, 501 U.S. at 825.

²¹ Platania & Berman, *supra* note 9, at 86.

²² See Flamm, *supra* note 12, at 305.

constraining the scope of victim impact statements. Part III explores the advantages and disadvantages of victim impact statements in general, proposes a solution to restrict such statements to written form to alleviate Fourteenth Amendment concerns, and evaluates the constitutionality of oral victim impact statements during sentencing by applying a test similar to Rule 403 of the Federal Rules of Evidence ("Rule 403"). Part III also examines and reconciles the rights of the victim, state, and community with the rights of the defendant, all within the confines of the Fourteenth Amendment and Rule 403 relevancy standard under this new framework.

BACKGROUND

I. THE HISTORY OF VICTIM IMPACT STATEMENTS IN CAPITAL PUNISHMENT TRIALS

During the sentencing phase of a death penalty trial, the prosecution may present various forms of victim impact evidence.²³ Generally, victim impact evidence includes oral or written statements that address "the personal characteristics of the victim, the crime's impact on the victim's life, and the emotional, and financial impact of the victim's death on the family."²⁴ However, the constitutional legitimacy of victim impact evidence has been repeatedly called into question.²⁵ Supporters of victim impact statements feel that participation in court proceedings helps victims reclaim a "sense of dignity" as an "effective mechanism to balance punishment with harm" caused by the crime.²⁶ Opponents of victim impact statements, however, voice concerns that the information surrounding the victim's character, which is included in victim impact statements, may encourage jurors to base sentencing decisions on that information rather than the evidence presented at trial or the circumstances of the crime.²⁷ In balancing the victim's rights in capital sentencing proceedings with the emotional weight of the victim

²³ See *Victim Families: Victim Impact Evidence*, *supra* note 16.

²⁴ See Platania & Berman, *supra* note 9, at 85.

²⁵ *Id.*; see *Booth v. Maryland*, 482 U.S. 496, 501-02 (1987), *overruled by Payne*, 501 U.S. 808; see also *Payne*, 501 U.S. at 827; see also *South Carolina v. Gathers*, 490 U.S. 805, 810, 816 (1989).

²⁶ See Platania & Berman, *supra* note 9, at 85.

²⁷ *Id.*

impact statements, courts have encountered the complex challenge of determining the admissibility of these statements.

A. *Capital Punishment Defined and Capital Proceedings*

Since 1909, the statutory definition of murder has remained practically unaltered.²⁸ Federal courts maintain jurisdiction over homicide cases when a murder occurs on federal property or when other circumstances exist, like when the victim is an elected or appointed government official, which makes the offense a federal crime.²⁹ The United States Code recognizes both murder in the first and second degree, but only first-degree murder carries a possible death sentence.³⁰

Jurisdictions with the death penalty have “bifurcated proceedings, separating capital punishment cases into a guilt and penalty phase.”³¹ First, the jury must evaluate whether the prosecution has proved beyond a reasonable doubt that the defendant is guilty of the crime.³² During the guilt phase, the government offers evidence, including eyewitness testimony or forensic evidence, in an effort to convince the jury that the defendant committed the offense.³³ In response, the defense offers evidence to rebut the prosecution, weaken the prosecution’s case, or help establish the defendant’s innocence through alibi testimony or expert witness testimony, for example.³⁴

If the jury finds the defendant guilty, the trial proceeds to the penalty phase, where the jury considers mitigating and aggravating factors.³⁵ When determining the sentence or “penalty,” the factfinder must determine whether the defendant qualifies for the death penalty by considering a list of aggravating factors defined by the legislature.³⁶ Aggravating factors defined by state legislatures are similar to those

²⁸ Flamm, *supra* note 12, at 306.

²⁹ *Id.* at 306–07.

³⁰ 18 U.S.C. § 1111(b).

³¹ Richa Bijlani, *More Than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. REV. 1499, 1510 (2022).

³² *Id.*

³³ *Stages in a Capital Case*, DEATH PENALTY INFO. CTR. (last visited Sept. 20, 2024), <https://deathpenaltyinfo.org/curriculum/high-school/about-the-death-penalty/stages-in-a-capital-case>.

³⁴ *Id.*

³⁵ See Charles Kenneth Eldred, *Recent Development, The New Federal Death Penalties*, 22 AM. J. CRIM. L. 293, 299 (1994).

³⁶ See Bijlani, *supra* note 31.

in the federal jurisdiction.³⁷ At a minimum, the factfinder must find one aggravating factor beyond a reasonable doubt to make a defendant eligible for a death sentence.³⁸ In an effort to prove the aggravating factor or factors to justify a death sentence, the government may include victim impact statements which identify “the victim of the offense, the extent and scope of the injury and loss suffered by the victim’s family,” as well as, “any other relevant information in the notice of intent that the government will seek the death penalty.”³⁹ Aggravating factors for homicide in the federal jurisdiction include:

Death during the commission of a previous crime; previous conviction of a violent felony involving a firearm; previous conviction of an offense for which a sentence of death or life imprisonment was authorized by statute; previous conviction of other serious offenses which were punishable by more than one year in prison and involved infliction or attempted infliction of serious bodily injury or death; grave risk of death to one or more persons in addition to the victim of the offense; heinous, cruel, or depraved manner of committing the offense; procurement of offense by payment; pecuniary gain; substantial planning and premeditation; conviction of two felony drug offenses; vulnerability of the victim; conviction of serious federal drug offenses; vulnerability of the victim; conviction of serious federal drug offenses; continuing criminal enterprise involved drug sales to minors; homicide of high public officials; and prior conviction of sexual assault or molestation.⁴⁰

A separate sentencing hearing is held once a defendant is found guilty or pleads guilty.⁴¹ The sentencing hearing must be held before the jury who convicted the defendant.⁴² However, if the jury that convicted the defendant is dismissed or if the sentence requires reconsideration, the hearing will occur before a special jury, specifically selected for the sentencing hearing.⁴³ With a motion by the defendant and the government’s approval, the sentencing hearing may be before the judge

³⁷ 18 U.S.C. § 3592; *Aggravating Factors by State*, DEATH PENALTY INFO. CTR. (last visited Oct. 20, 2024), <https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/aggravating-factors-by-state>.

³⁸ See Eldred, *supra* note 35.

³⁹ *Id.*

⁴⁰ *Id.* at 300.

⁴¹ *Id.* at 299.

⁴² See *id.*

⁴³ *Id.*

alone.⁴⁴ At the sentencing hearing, the defendant may present evidence relevant to a mitigating factor and must establish any mitigating factor by preponderance of the evidence.⁴⁵ The government must prove any aggravating factor beyond a reasonable doubt, so long as the government provides notice of the aggravating factor.⁴⁶

The factfinder must consider mitigating evidence presented by the defendant and weigh it against any aggravating factor(s) proffered.⁴⁷ Mitigating factors may include “capacity, duress, minor participation, equally culpable defendants, no prior criminal record, disturbance, victim’s consent, and other factors in the defendant’s background, record, or character that mitigate against the imposition of the death penalty.”⁴⁸

The factfinder must make “special findings identifying any aggravating factor or factors that are found to exist.”⁴⁹ Although these findings are accepted as factual in nature, each jurisdiction and court does not give them equal weight.⁵⁰ A jury must reach a unanimous decision to find an aggravating factor, whereas each juror has the discretion to determine – for themselves – whether a mitigating factor exists and how much weight to give each factor.⁵¹ However, the court is not obligated to instruct the jury that a unanimous decision is not required to identify mitigating factors.⁵² If no aggravating factor is found, the court will impose a sentence other than death. If there are no mitigating factors to present, the jury or judge must consider whether the aggravating factor alone is sufficient “to impose a sentence of death, life without parole, or [an alternative] sentence.”⁵³

In the federal system, the court must sentence the defendant in agreement with the sentencing body if the sentencing body recommends a death sentence.⁵⁴ However, some states allow a judge to override

⁴⁴ Eldred, *supra* note 35, at 299.

⁴⁵ *Id.* at 300.

⁴⁶ *Id.*

⁴⁷ See Bijlani, *supra* note 31, at 1511.

⁴⁸ See Eldred, *supra* note 35, at 300.

⁴⁹ *Id.* at 301.

⁵⁰ See Bijlani, *supra* note 31, at 1511.

⁵¹ See Eldred, *supra* note 35, at 301.

⁵² *People v. Smith*, 30 Cal.4th 581, 593–94 (2003).

⁵³ See Eldred, *supra* note 35, at 301.

⁵⁴ See Flamm, *supra* note 12, at 307.

a jury's death sentence and reduce the sentence to a life term.⁵⁵ In contrast, judicial overrides of a jury's recommendation for a harsher sentence are currently not allowed following a 2016 Supreme Court ruling.⁵⁶ For example, a judge may not override a life sentence in favor of a death sentence. Although judicial overrides of a lesser sentence are not currently permissible, proposed legislation in Florida opens the door for judicial overrides where a judge can change a jury's finding in favor of a death sentence.⁵⁷

The statutory aggravating factors for murder do not include victim impact evidence.⁵⁸ Aggravating factors refer to circumstances surrounding a crime that increase the severity of a crime and the punishment for the offense.⁵⁹ 18 U.S.C. § 3592, which governs the procedures at capital sentencing hearings, establishes aggravating factors to be considered in determining whether a sentence of death is justified, so long as the government provides notice.⁶⁰ Notice is required with aggravating "factors concerning the effect of the offense on the victim and victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family"⁶¹

Section 3593, which mandates a special hearing to assess the justification of a death sentence, in conjunction with Congress's lack of detailed direction on the admissibility of victim impact evidence, grants district courts significant discretion to decide sentence lengths.⁶² The court is responsible for ensuring a sentencing determination is made without passion or undue prejudice, but instead, by the prosecution proving beyond a reasonable doubt that the accused committed the crime and the aggravating factors necessary for a death sentence.⁶³

⁵⁵ Romy Ellebogen, *Florida Bill Would Let Judges Override Juries and Impose Death Penalty*, TAMPA BAY TIMES (Feb. 2, 2023), <https://www.tampabay.com/news/florida-politics/2023/02/02/death-penalty-desantis-capital-punishment-court-judge-jury/> (last visited Sept. 20, 2024).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Flamm, *supra* note 12, at 308.

⁵⁹ *Aggravating Factor*, CORNELL L. SCHOOL (last updated June 2022), https://www.law.cornell.edu/wex/aggravating_factor.

⁶⁰ 18 U.S.C.A. § 3592 (West).

⁶¹ 18 U.S.C.A. § 3593 (West).

⁶² See Flamm, *supra* note 12, at 309–310.

⁶³ *Id.* at 308, 310.

B. *Court Cases and Implicated Constitutional Rights*

In the 1980s and the wake of the Victims' Rights Movement, the Supreme Court evaluated victim impact evidence during the sentencing phase of capital punishment trials.⁶⁴ The United States Department of Justice defines victim impact statements as “statements [that] describe the emotional, physical, and financial impact you and others have suffered as a direct result of the crime.”⁶⁵ Generally, the evidence presented during the sentencing phase is “limited to testimony by victim’s family members describing how the crime has affected their lives.”⁶⁶ Due to constitutional protections, the prosecution cannot present evidence or prosecutorial argument suggesting the victim’s family members prefer the defendant to be sentenced to death.⁶⁷ Since the 1980s, courts have grappled with the constitutionality of victim impact statements.

1. *Booth v. Maryland*

In *Booth v. Maryland*, the prosecution sought the death penalty for Mr. Booth, who robbed and murdered two individuals in the victims’ home.⁶⁸ Mr. Booth was found guilty and opted to have the jury determine his sentence instead of the judge.⁶⁹ In all felony cases, under the Maryland statute in the 1980s, a victim impact statement describing the crime’s influence on the victim and their family was included in the presentence report.⁷⁰ Specifically, the report must

- (i) identify the victim of the offense; (ii) itemize any economic loss suffered by the victim as a result of the offense; (iii) identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence; (iv) describe any change in the victim’s person welfare or familial relationships as a result of the offense; (v) identify any request for psychological services initiated by the victim or the victim’s family as a result of the offense; and (vi) contain

⁶⁴ See *Victim Families: Victim Impact Evidence*, *supra* note 16.

⁶⁵ *Victim Impact Statements*, U.S. DEP’T OF JUST. (last visited Oct. 18, 2024), <https://www.justice.gov/criminal/criminal-vns/victim-impact-statements>.

⁶⁶ *Victim Families: Victim Impact Evidence*, *supra* note 16.

⁶⁷ *Id.*

⁶⁸ See *Booth*, 482 U.S. at 497–98.

⁶⁹ *Id.* at 498.

⁷⁰ *Id.* (citing MD. CODE ANN., § 4-609(c) (West)).

any other information related to the impact of the offense upon the victim or the victim's family that the trial court requires.⁷¹

In *Booth*, the victim impact statements presented at trial were based on interviews with the victim's "son, daughter, son-in-law, and granddaughter," which described the victim's personal qualities, and the "emotional, and personal problems the family members faced as a result of the crimes."⁷²

The defense counsel moved to suppress the victim impact statement on Eighth Amendment grounds, arguing that the information contained in the statement was irrelevant to the crime and inflammatory.⁷³ Ultimately, the Court denied the motion to suppress, and the jury sentenced Mr. Booth to death.⁷⁴

On appeal, the Court reversed, finding that the victim impact evidence presented was not relevant in the "unique circumstances of the capital sentencing hearing."⁷⁵ The Court noted that the victim impact statements, in this case, provided the jury with two types of information: (1) the victim's personal characteristics and the emotional impact the crime had on the family; and (2) "the family members' opinions and characterization of the [defendant and their crimes]."⁷⁶ The Court's main contention with the first type of information was that the focus of a victim impact statement should not be on the defendant but, instead, on the character and reputation of the victim and the crime's effect on the victim's family.⁷⁷

Further, the Court took issue with the fact that victim impact evidence may reveal information about the victim's life not known to the defendant at the time of the offense, which may distract the jury from the relevant factors in deciding an appropriate sentence, namely the defendant's background, the defendant's record, and the circumstances surrounding the crime.⁷⁸ Ultimately, the Court rejected

⁷¹ *Id.* at 498–99.

⁷² *Id.* at 499.

⁷³ *See Booth*, 482 U.S. at 500–01; *see also* *South Carolina v. Gathers*, 490 U.S. 805, 810, 816 (1989) (affirming the reversal of the defendant's death sentencing because the prosecutor's closing argument at the sentencing proceeding violated the Eighth Amendment "by focusing extensively on the personal characteristics of the victim.").

⁷⁴ *See Booth*, 482 U.S. at 501.

⁷⁵ *Id.* at 504.

⁷⁶ *Id.* at 502.

⁷⁷ *Id.* at 504.

⁷⁸ *See Booth*, 482 U.S. at 505.

the state's contention and expressed that the emotional distress of the victim's family and the victim's personal characteristics were not valid sentencing considerations in a capital case.⁷⁹

The second type of information presented to the jury in *Booth* was the "family members' opinions and characterizations of the crimes."⁸⁰ The victim's family used inflammatory language, stating that the victims "were butchered like animals," for example.⁸¹ While the Court recognized the grief and anger of the family caused by the brutal murders, the Court also noted that "any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'"⁸² The Court concluded the emotionally charged nature of victim impact statements could lead the jury to draw illogical conclusions, inconsistent with the rational decision-making required in capital cases.⁸³ After all, capital punishment is a sentence of *death*.⁸⁴ To sentence an individual to death, the jury must be reasoned in its decision-making rather than moved by emotion.⁸⁵ The ultimate conclusion rendered by the Court was that admitting victim impact statements creates an impermissible constitutional risk that the jury may "impose the death penalty arbitrarily and capriciously."⁸⁶

The *Booth* Court echoed concerns stated in previous cases that "the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy."⁸⁷ Furthermore, the Court briefly noted that the Fourteenth Amendment's Due Process Clause provides a mechanism for relief for victim impact statements that are so "unduly prejudicial that it renders the trial fundamentally unfair."⁸⁸ The Court, however, did not elaborate on the Fourteenth Amendment as a mechanism for relief.⁸⁹

⁷⁹ *Id.* at 507.

⁸⁰ *Id.* at 508.

⁸¹ *Id.*

⁸² *Id.* (citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

⁸³ *See id.* at 509.

⁸⁴ *Capital Punishment*, BRITANNICA (last updated Sept. 15, 2024), <https://www.britannica.com/topic/capital-punishment>.

⁸⁵ Platania & Berman, *supra* note 9, at 88.

⁸⁶ *See Booth*, 482 U.S. at 503.

⁸⁷ *Payne*, 501 U.S. at 823.

⁸⁸ *Id.* at 825.

⁸⁹ *Id.*

2. *Montana v. Keith*

In 1988, the Montana Supreme Court in *State of Montana v. Keith* factually distinguished itself from the United States Supreme Court's decision in *Booth*.⁹⁰ In *Keith*, the Montana sentencing procedures – sentencing by a district court judge rather than a jury – did not affect the sentencing remedy.⁹¹ The *Keith* court found no conflict between the state statutes and *Booth* because “*Booth* is factually distinguishable from Montana sentencing procedures and is therefore not controlling.”⁹²

Furthermore, the court noted that *Booth* addresses the particular situation in which a jury is tasked with determining the sentence.⁹³ Upon review of the record, the court found nothing to suggest that the judge was adversely affected by any inflammatory statement.⁹⁴ The court noted that the victim impact statement information presented in *Keith* was not as inflammatory or prejudicial as it only concerned the crime and the impact of the crime on the victim's lives.⁹⁵ Therefore, the court created a carveout to the *Booth* rule and found no Eighth Amendment violation when the sentencing judge referred to victim impact information in the presentence investigation report.⁹⁶ *Keith* exposes the reality that a judge, whose job is to be impartial, may not be as impacted by inflammatory statements while a lay juror might.⁹⁷

3. *Payne v. Tennessee*

In 1991, the Supreme Court overruled *Booth* in *Payne v. Tennessee*.⁹⁸ In *Payne*, Mr. Payne was convicted by a jury for the first-degree murder of a victim and her two-year-old daughter, while the victim's three-year-old son survived.⁹⁹ During the sentencing phase of the trial, the State presented victim impact evidence from the victim's grandmother describing how the victim's three-year-old son had been

⁹⁰ See *State v. Keith*, 754 P.2d 474, 488 (Mont. 1988).

⁹¹ See *id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *Keith*, 754 P.2d at 487.

⁹⁶ *Id.* at 488.

⁹⁷ See *id.*

⁹⁸ *Payne*, 501 U.S. at 830.

⁹⁹ *Id.* at 811–12; see also Platania & Berman, *supra* note 9, at 85.

affected by the murders of his mother and sister, specifically speaking about how he constantly cried for his mother and sister.¹⁰⁰ Also, during the sentencing phase of the trial, Mr. Payne's defense team presented the testimony of his mother, father, a friend, and a clinical psychologist specializing in criminal court evaluation work, each of whom testified to mitigating aspects of Mr. Payne's background.¹⁰¹ The psychologist testified that this crime was generally inconsistent with Mr. Payne's character.¹⁰²

During the closing argument, the prosecutor suggested that justice for the victim's family, particularly for the victim's young son, would be achieved if the jury imposed the death penalty, stating "the brother who mourns for [his sister] every single day and wants to know where his best little playmate is.... These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that the child will carry forever."¹⁰³ On appeal the Court concluded that any violation of Mr. Payne's rights under precedent was "harmless beyond a reasonable doubt."¹⁰⁴ Six justices on the Supreme Court found that if a state chooses to permit the admission of victim impact evidence and prosecutorial argument on the subject, then there is no violation of the Eighth Amendment.¹⁰⁵ In support of this new position, the Court noted that indirect effects of murder, including the grief of the victim's family, are another method of informing the sentencing body about the "specific harm" caused by the homicide.¹⁰⁶ Essentially, the Court noted such testimony is more useful for the jury when evaluating the harm caused by the crime.¹⁰⁷

Dissenting, Justice Marshall, joined by Justice Blackmun, accused the majority of exercising "power, not reason" in its decision making in *Payne*.¹⁰⁸ Specifically, Justice Marshall rebuked the *Payne* majority for overturning *Booth* where there was no change in the laws or facts, only the justices on the bench.¹⁰⁹ Rather, Justice Marshall maintained

¹⁰⁰ See *Payne*, 501 U.S. at 814–15.

¹⁰¹ See *id.* at 814.

¹⁰² See *id.*

¹⁰³ *Id.* at 816.

¹⁰⁴ *Id.* at 817.

¹⁰⁵ See *id.* at 827.

¹⁰⁶ See *Payne*, 501 U.S. at 825.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 844 (Marshall, J., dissenting).

¹⁰⁹ *Id.*

the true inquiry before overruling precedent should be whether the majority satisfied the showing of special justification required, including “subsequent changes or development in the law” that undermines the *Booth* decision’s rationale.¹¹⁰ Justice Marshall found the majority opinion to be a troubling omen that an “extensive upheaval of this Court’s precedents may be in store.”¹¹¹ The dissenters identified the changing makeup of the Court, rather than an evolution in the law, as the motivating factor to overturn *Booth*.¹¹²

In a jarring second dissent in *Payne*, Justice Stevens, joined by Justice Blackmun, claimed the majority “abandon[ed] the rules of relevance that are older than the Nation itself and ventur[ed] into uncharted seas of irrelevance.”¹¹³ Here, Justice Stevens asserted that the evidence presented served no purpose other than “to appeal to the sympathies or emotions of the jurors [which have] never been considered admissible.”¹¹⁴ Additionally, Justice Stevens rejected the Court’s suggestion that because the defendant had a right to introduce mitigating evidence about his character, the State was permitted to respond with similar evidence about the victim.¹¹⁵ Justice Stevens indicated that “the victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance.”¹¹⁶ In other words, the defendant maintained his constitutional rights because he was on trial, and since the victim was not on trial, she had no constitutional rights in the proceeding.

Furthermore, Justice Stevens highlighted the concerns raised in *Booth* by illuminating the risk that a jury may consider facts unforeseeable to the defendant at the time of the crime, rather than rendering a verdict solely based on evidence that informs the jury about the offense.¹¹⁷ Lastly, Justice Stevens expressed concerns that no defined point exists where a fact of victim impact transforms a murder resulting in a life sentence to one resulting in execution.¹¹⁸ In other

¹¹⁰ *Id.* at 848–49; *see also* *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

¹¹¹ *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

¹¹² *See id.*

¹¹³ *See id.* at 858–59 (Stevens, J., dissenting).

¹¹⁴ *Id.* at 856–57.

¹¹⁵ *Id.* at 859.

¹¹⁶ *Id.*

¹¹⁷ *Payne*, 501 U.S. at 860 (Stevens, J., dissenting).

¹¹⁸ *See id.* at 861 (“[T]he quantity and quality of victim impact evidence sufficient to turn a verdict of life in prison into a verdict of death is not defined until after the crime

words, the Court failed to clearly define how victim impact evidence should be used and left, in its place, a vague and malleable standard. Introducing this charged information to a jury may put the defendant's character or morals on trial, rather than objective facts and evidence.

The dissenting justices in *Payne* were concerned that there would be an increase in death penalty verdicts due to a jury's "unguided consideration" of victim impact evidence.¹¹⁹ In the absence of specific guidelines, the Court placed the burden on individual states to decide exactly how to use this victim impact evidence.¹²⁰

The crimes committed in *Payne* and *Booth* were heinous acts against vulnerable victims, and in each case, the victim's family members sought the death penalty.¹²¹ Each victim impact statement delivered conveyed a heightened sense of emotionality, to enhance the possible maximum sentence of death for each defendant.¹²² The *Payne* verdict was significant for the Victims' Rights Movement, affirming that the Eighth Amendment does not prohibit victim impact evidence related to a victim's personal characteristics and the emotional impact the crime had on the victim's family from consideration in capital sentencing proceedings.¹²³

4. Implicated Constitutional Rights

Many of the failed constitutional challenges brought against victim impact statements in capital punishment proceedings were brought under the guise of the Eighth Amendment.¹²⁴ While the Eighth Amendment is not the appropriate mechanism for relief, the Fourteenth Amendment Due Process Clause may provide a basis for the exclusion of these statements if they would render a capital trial fundamentally unfair.¹²⁵ The Fourteenth Amendment provides "No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

has been committed and therefore cannot possibly be applied consistently in different cases.").

¹¹⁹ See Platania & Berman, *supra* note 9, at 87.

¹²⁰ *Id.*

¹²¹ See Platania & Berman, *supra* note 9, at 86.

¹²² *Id.* at 86–87.

¹²³ *Payne*, 501 U.S. at 827.

¹²⁴ See Flamm, *supra* note 12, at 305.

¹²⁵ *Payne*, 501 U.S. at 809.

equal protection of the laws.”¹²⁶ In other words, the government cannot take a person’s life, liberty, or property without following judicial and statutory procedures. Statements that include “good character” comments by the surviving family members and prosecuting attorneys may overshadow the criminal culpability of each defendant and could ultimately infringe on the defendant’s due process rights.¹²⁷ Therefore, victim impact statements that contain an enhanced sense of emotionality and distract from the circumstances of the crime may fail Fourteenth Amendment scrutiny.

5. The Role of the *Matthews* Test and the Federal Rules of Evidence

As the *Payne* Court recognized, the Fourteenth Amendment provides baseline protections that states may not abridge.¹²⁸ Due process concerns are frequently scrutinized under the balancing test established by the Supreme Court in *Matthews v. Eldridge*,¹²⁹ which has been applied mostly to civil cases and administrative procedures.¹³⁰ The *Matthews* Test balances three factors:

- (1) the private interests that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, of additional or substitute procedural safeguards; and (3) the government’s interests, including the fiscal and administrative burdens, that the additional or substitute procedures would entail.¹³¹

While other authors have found many victim impact statements would fail the *Matthews* Test, and thus Fourteenth Amendment scrutiny, the court may apply another due process test to determine the constitutionality of the victim impact statements.¹³² The Court has held that “[d]ue process is flexible and calls for such procedural

¹²⁶ U.S. CONST. amend. XIV, § 1.

¹²⁷ See Platania & Berman, *supra* note 9, at 87.

¹²⁸ Matthew V. Brammer, *Eighth Amendment No Longer Bars Victim Impact Statement Admission in Capital Sentencing Proceedings: Payne v. Tennessee*, 61 U. CIN. L. REV. 261, 287 (1992).

¹²⁹ See *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹³⁰ Mark Stevens, *Victim Impact Statements Considered in Sentencing: Constitutional Concerns*, 2 CAL. CRIM. L. REV. 3, ¶¶ 45–46 (2000), <https://www.bjcl.org/assets/files/2-Cal.-Crim.-L.-Rev.-3.pdf>.

¹³¹ See *Matthews*, 424 U.S. 319, 335 (1976).

¹³² Stevens, *supra* note 130, at ¶ 49.

protections as a particular situation demands.”¹³³ Given the flexibility of due process, other procedural protections may be more appropriate for determining the admissibility of victim impact statements.

Federal courts apply a standard closest to the Federal Rules of Evidence Rule 403 legal relevance standard yet maintain a lower bar.¹³⁴ Under 18 U.S.C. § 3593, the Federal Rules of Evidence do not govern the admissibility of information, yet this section includes two specific provisions analogous to the Federal Rules of Evidence.¹³⁵ The first provision allows information that is relevant to the admissibility of aggravating and mitigating factors.¹³⁶ Section 3593(c) states “information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592.”¹³⁷ The second provision states, “information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.”¹³⁸ The provision in § 3593 is nearly identical to the Rule 403 standard, but it mandates that the lower courts apply a stricter standard for victim impact evidence in capital sentencing proceedings because the threshold for excluding evidence under § 3593 is lower than that under Rule 403.¹³⁹

Due to the unique circumstances in capital sentencing proceedings, the Rule 403 legal relevancy standard should be used as a procedural protection to ensure no due process violations occur.¹⁴⁰ Rule 403 requires the probative value to be *substantially* outweighed by the danger of unfair prejudice, which is a higher standard than § 3593 demands where the risk of unfair prejudice merely *outweighs* the probative value.¹⁴¹ This higher exclusionary bar established by Rule 403 is advantageous for victims because it requires the courts to assess suppressing oral victim impact statements under a more rigorous standard.¹⁴² Rule 403

¹³³ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

¹³⁴ 18 U.S.C.A. § 3593(c) (West).

¹³⁵ *See id.*

¹³⁶ *See Flamm, supra* note 12, at 310–11; 18 U.S.C.A. § 3593(c) (West).

¹³⁷ 18 U.S.C.A. § 3593(c) (West).

¹³⁸ *See Flamm, supra* note 12, at 310–11; 18 U.S.C.A. § 3593(c) (West).

¹³⁹ *See Flamm, supra* note 12, at 311.

¹⁴⁰ Aviva A. Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1492 (2005).

¹⁴¹ FED. R. EVID. 403.

¹⁴² *See Flamm, supra* note 12, at 311.

comports with the Fourteenth Amendment's due process requirement, as Rule 403 requires weighing the rationale both for and against the admissibility of the evidence under a more stringent exclusionary bar.¹⁴³

Because § 3593 provides for the exclusion of evidence "if the danger of unfair prejudice outweighs the probative value," victim impact statements during the guilt phase should not be admitted unless those statements can help prove an aggravating factor, otherwise the statements are more prejudicial than probative.¹⁴⁴ The danger of unfair prejudice resulting from victim impact statements outweighs the low probative value attributed to the statements if other evidence can be presented in the prosecution's case in chief during the guilt phase to prove the aggravating factors.¹⁴⁵ Given the risk that unfair prejudice of oral victim impact statements may outweigh their probative value, particularly when other evidence can adequately establish the aggravating factors, the court should assess these statements under the Rule 403 legal relevancy standard.

C. *Congress's Role in the Victims' Rights Movement*

In the 1990s Congress continued to build upon the *Payne* Court's expansion of victims' rights in capital punishment cases, sometimes at the expense of the defendant. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (hereinafter "the Act") which expanded the list of offenses eligible for the death penalty, intending to reduce violent crime.¹⁴⁶ This Act was beneficial for crime victims and their families as it gave crime victims the right to speak at sentencing and parole hearings.¹⁴⁷

¹⁴³ FED. R. EVID. 403.

¹⁴⁴ See Flamm, *supra* note 12, at 311–12.

¹⁴⁵ *Id.*

¹⁴⁶ See Eldred, *supra* note 35, at 296–98; see generally Violent Crime Control and Law Enforcement Act of 1994 § 10002, 42 U.S.C.A. § 60003.

¹⁴⁷ Violent Crime Control and Law Enforcement Act of 1994 § 230102, 42 U.S.C.A. § 60003. Prior to 1994, federal death penalties would "fall into three categories: crimes involving the physical killing of other persons, crimes involving dangerous activity that results in death, and treason and espionage whether or not any death occurs." See Eldred, *supra* note 35 at 296. In new capital crimes, there are two categories: persons now eligible for the death penalty if they (1) kill another person in various situations; or (2) partake in dangerous activities which result in the death of any person. *Id.* at 296–98. "Dangerous activities" has a broad definition; many states allow persons who participate in a felony where a death occurred to be charged with murder and face the death penalty, even when that individual did not directly kill another. See *DPIC Analysis: Use of*

Congress enacted the Act to support the widespread ideology that the death penalty is a necessary tool against crime.¹⁴⁸ Since the passing of the Act, seventeen death penalty states incorporated in “their state constitutions a statement of victims’ rights that includes a right to offer victim impact evidence before sentencing,” in addition to introducing evidence of aggravating and mitigating factors.¹⁴⁹ Although the expansion of victims’ rights has been significant in the evolution of criminal law, the defendant’s constitutional rights are essential to ensuring a fair and just legal process, and must not be overlooked.

II. STATES ATTEMPT TO RESTRICT VICTIM IMPACT STATEMENTS AFTER *PAYNE*

In the aftermath of *Payne* and the Act, the *Payne* Court left the decision to allow victim impact evidence to the states.¹⁵⁰ Most of the death penalty states have capitalized on the Court’s invitation to make victim impact evidence a significant factor at capital sentencing hearings.¹⁵¹ The Court opened the door to victim impact statements in *Payne*, but did not put forth any guidelines as to how the evidence should be used at capital trials in a nonprejudicial manner.¹⁵²

Some states, such as New Jersey, have placed restrictions on statutes allowing victim impact testimony during trial, for example limiting victim impact testimony to one family member, requiring pre-approval by the trial court in written form, and prohibiting the testimony from including any opinion about the defendant, the crime, or the desired sentence.¹⁵³ Such restrictions allow the victim’s voice to be heard about the crime and its impact on their lives while attempting to eliminate any subjective bias.¹⁵⁴

Other states, however, utilize cautionary instructions from the judge when introducing victim impact evidence during the sentencing phase

the Death Penalty for Killing a Child Victim, DEATH PENALTY INFO. CTR. (last visited Sept. 20, 2024) <https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death>.

¹⁴⁸ See Eldred, *supra* note 35, at 305; see generally Violent Crime Control and Law Enforcement Act of 1994 § 10002, 42 U.S.C.A. § 60003.

¹⁴⁹ Flamm, *supra* note 12, at 297–99; see, e.g., ARIZ. CONST. art. II, § 2.1 (establishing rights of crime victims including right “to be heard at any proceeding involving . . . sentencing”).

¹⁵⁰ See Flamm, *supra* note 12, at 296.

¹⁵¹ *Id.* at 297.

¹⁵² See Platania & Berman, *supra* note 9, at 87.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 88.

of trial.¹⁵⁵ These instructions similarly serve as precautionary measures to help guide the jury and ensure that victim impact evidence does not result in arbitrary, emotion-based sentencing decisions.¹⁵⁶ Although the instructions aim to guide jurors to understand the role of victim impact evidence in sentencing decisions, it is unclear if jurors fully understand the difference between victim impact evidence and aggravating circumstances, or how to objectively apply the instructions.¹⁵⁷ Social science research has illuminated that victim impact evidence that includes information about the victim's suffering and the victim's family influences participant-jurors when sentencing defendants.¹⁵⁸ In fact, jurors may view victim impact evidence as a reflection of the defendant's culpability or view them as emotionally charged statements clouding their judgment to focus on the circumstances of the crime.¹⁵⁹ Numerous states continue to use these jury instructions from the judge, despite research finding jurors lack a general understanding of the function and application of a judge's instruction.¹⁶⁰

ANALYSIS

I. THE ADVANTAGES AND DISADVANTAGES OF VICTIM IMPACT STATEMENTS

Victim impact statements allow the victim of a crime to express in their words what they, their family, or others close to them have experienced as a result of the crime.¹⁶¹ Some scholars argue victim

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Platania & Berman, *supra* note 9, at 88.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 87.

¹⁶⁰ *Id.* at 89 (citing an example of victim impact instruction as follows: "The prosecution has introduced what is known as victim impact evidence. Victim impact evidence is not the same as evidence of a statutory aggravating circumstance. Introduction of victim impact evidence does not relieve the state of its burden to prove beyond a reasonable doubt the existence of a statutory aggravating circumstance. This evidence is simply another method of informing you about the harm caused by the crime in question. To the extent that you find that this evidence reflects on the defendant's culpability, you may consider it, but you may not use it as a substitute for proof beyond a reasonable doubt of the existence of a statutory aggravating circumstance and limit the scope of the evidence presented.").

¹⁶¹ *Victim Impact Statements*, VICTIM NOTIFICATION PROGRAM (last visited Sept. 20, 2024), <https://www.justice.gov/criminal/criminal-vns/victim-impact-statements>.

impact statements assist the judge, or jury, in deciding the sentence that the defendant should receive.¹⁶² Scholarship continues to examine whether victim impact statements contribute positively to the decision making process of the sentencing authority.

Victim impact statements are beneficial mechanisms for victims to describe the emotional, physical, and financial impact the victims and their families have suffered as a direct result of the crime.¹⁶³ After all, the goal of the criminal justice system is to administer justice for those convicted of crimes while also supporting victims. Since a prosecutor represents the state, the only instance where a victim may play a role in the proceeding is during the sentencing portion. The Victims' Rights Movement flourished because of the dissatisfaction with the victim's role in the criminal justice system.¹⁶⁴ Failing to introduce oral victim impact statements could result in a diminished role of victims in judicial proceedings. Research has shown that offering victims a role in the proceeding enhances the legitimacy and acceptance of the outcome.¹⁶⁵ While recognizing victims' experiences enhances the legitimacy of the system, the inclusion of victim impact statements in sentencing proceedings must be carefully weighed against potential concerns associated with their use.

Critics of oral victim impact statements raise additional concerns about using such statements during sentencing hearings. The most notable critique is that such statements divert the jury's attention away from facts that should be examined.¹⁶⁶ An extension of this argument is that oral victim impact statements may lead jurors to consider the victim's character and the harm caused by the defendant – facts jurors should not scrutinize.¹⁶⁷ The emotional content in oral victim impact statements may persuade jurors to give less weight to the facts of the case, which was a concern raised in *Booth*.¹⁶⁸ Scholarship has gone even further to say that testimony by a victim or victim's family may be irrelevant to the circumstances of the crime and so emotionally laden

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See Karmen, *supra* note 1, at 158–59.

¹⁶⁵ See Ana M. Nascimento, et. al., *The Psychological Impact of Restorative Justice Practices on Victims of Crimes—a Systematic Review*, 24(3) TRAUMA, VIOLENCE, & ABUSE 1929, 1930 (2022).

¹⁶⁶ See Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements*, 10 PSYCH., PUB., POL. & L. 492, 500 (2004).

¹⁶⁷ *Id.*

¹⁶⁸ *Booth*, 482 U.S. at 509.

that it is prejudicial.¹⁶⁹ Like any judicial consideration, a judge must evaluate the benefits and drawbacks that oral victim impact statements provide in the criminal legal system.

II. VICTIM IMPACT STATEMENTS ARE A ZERO-SUM GAME IN CAPITAL SENTENCING PROCEEDINGS

Victim impact statements have no real evidentiary value in capital sentencing proceedings. Although there are benefits to victim impact statements, as previously mentioned, the circumstances surrounding capital punishment sentencing are unique. The *Payne* Court justified the admissibility of victim impact evidence by reasoning that just as the defendant has the right to present mitigating evidence during sentencing, the prosecution should similarly be able to present aggravating evidence about the victim.¹⁷⁰ However, victim impact statements differ from aggravating circumstances. While victim impact statements, written or oral, inform the sentencing authority about the harm caused by the accused,¹⁷¹ aggravating factors pertain to the circumstances surrounding a crime.¹⁷² The prosecution presents aggravating evidence throughout the entirety of the guilt phase to justify a harsher sentence, such as prior convictions or especially heinous murders, which many state statutes recognize as aggravating circumstances.¹⁷³ As a result, the harm caused by the accused and the circumstances surrounding the crime can easily become conflated.

In a capital punishment proceeding, the prosecution will likely attempt to prove an especially heinous and depraved murder, so any supporting evidence can come in during the guilt phase by way of testimony or other evidence. This means the prosecution must prove at least one aggravating factor for the defendant to be eligible for a death sentence.¹⁷⁴ Thus, the argument that the prosecution should be able to present aggravating evidence *because* the defendant has the right to present mitigating evidence is circular. The prosecution bears the burden of proof and may be able to use aggravating evidence to prove

¹⁶⁹ See Myers & Greene, *supra* note 166, at 494.

¹⁷⁰ See *Payne*, 501 U.S. at 825.

¹⁷¹ *Victim Impact Statements*, *supra* note 161.

¹⁷² *Aggravating Factor*, *supra* note 59.

¹⁷³ *Aggravating Factors by State*, *supra* note 37; see, e.g., A.R.S. § 13-751(6); Cal. Penal Code § 190.2(14).

¹⁷⁴ See Eldred, *supra* note 35, at 299.

the defendant committed the crime or describe the circumstances surrounding the crime. The prosecution may present testimony that would otherwise be included in the victim impact statement during its case in chief. This also highlights a concern raised in *Booth* where victim impact statements may reveal information not known by the defendant at the time of the crime.¹⁷⁵ Not to mention, as Justice Stevens aptly pointed out in the *Payne* dissent, the defendant has constitutional rights, not the victim.¹⁷⁶ Therefore, giving the prosecution a right, especially when the prosecution bears the burden of proof, and can introduce relevant aggravating evidence in its case in chief, does not comport with the Constitution.

III. BALANCING THE CONSTITUTIONALITY OF VICTIM IMPACT STATEMENTS WITH THE 403 RELEVANCE STANDARD AND DUE PROCESS

Victim impact statements do not serve any evidentiary purpose; rather, they enable victims to articulate the effects of a crime on their families and loved ones. Research, however, about its effect on the factfinder is ongoing. In fact, research that directly examines the effect of oral versus written victim impact statements on sentencing is scarce.¹⁷⁷ While research is scarce, it may be beneficial to err on the side of caution when balancing the constitutionality of victim impact statements in capital punishment sentencing because the jury and judge are dealing with a defendant's freedom and life in these cases. As the Court astutely recognizes in *Payne*, "in the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."¹⁷⁸ The defense can challenge oral victim impact statements under the Fourteenth Amendment, as opposed to failed challenges brought under the Eighth Amendment.¹⁷⁹ A Due Process challenge would allow a court to evaluate the probative and prejudicial value of the statement and determine its admissibility.

¹⁷⁵ See *Booth*, 482 U.S. at 505.

¹⁷⁶ See *Payne*, 501 U.S. at 860 (Stevens, J., dissenting).

¹⁷⁷ See Gena K. Dufour, et. al, *The Relationship Between Victim Impact Statement and Judicial Decision Making: An Archival Analysis of Sentencing Outcomes*, 47 L. & HUM. BEHAVIOR 484, 486 (2023).

¹⁷⁸ *Payne*, 501 U.S. at 825.

¹⁷⁹ See Platania & Berman, *supra* note 9, at 86.

To avoid a Fourteenth Amendment challenge in the first place, courts should limit victim impact statements to written statements, as opposed to oral statements, to avoid undue prejudice. Should jurisdictions allow oral statements, however, defense counsel can challenge the veracity of those statements under the Fourteenth Amendment Due Process Clause. To objectively evaluate the oral statements, courts should adopt a test akin to Rule 403, where the sentencing body must balance the defendant's due process interest, the victim's interest in the case, and the rights of the accused. The admission or exclusion of evidence in the United States court system is governed by the Federal Rules of Evidence.¹⁸⁰ Such a test would prevent prosecutorial misconduct from prejudice in sentencing.¹⁸¹ Rule 403 would provide a more demanding standard to evaluate whether an oral victim impact statement is truly probative, or merely prejudicial to the defendant.¹⁸² Ultimately, the Constitution gives rights to the accused, so gambling with freedom based on extraneous emotionally charged oral statements could result in a due process violation.

The courts should utilize a test akin to the Rule 403 legal relevancy standard to determine the constitutionality of oral victim impact statements prior to using them in capital sentencing proceedings.¹⁸³ Notably, these crimes are brutal and can be emotionally charged, so it is important to evaluate the probative value of the victim's family's statements, as compared to the prejudicial value towards the defendant. Rule 403 requires the probative value to be *substantially* outweighed by the danger of unfair prejudice, which is a higher standard than the § 3595 federal standard demands.¹⁸⁴ This heightened standard will not automatically deem all oral victim impact statements invalid but allows the judge to engage in a balancing exercise about the statement's probative and prejudicial value. Rule 403 comports with the Fourteenth Amendment's Due Process requirement because it requires weighing the rationale both for and against the admissibility of the evidence.

Understandably, victim impact evidence in these cases is largely emotional. The danger of unfair prejudice resulting from victim impact

¹⁸⁰ FED. R. OF EVID., United States Courts, <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-evidence>.

¹⁸¹ See Brammer, *supra* note 128, at 287.

¹⁸² See generally FED. R. EVID. 403.

¹⁸³ Stevens, *supra* note 130, at ¶ 42.

¹⁸⁴ See generally FED. R. EVID. 403.

statements may *substantially* outweigh the low probative value attributed to the statements, particularly since additional evidence can be introduced during the guilt phase to establish the requisite aggravating factors. When evaluating whether oral statements are inflammatory or prejudicial, the application of Rule 403's legal relevance standard may lead to the conclusion that many oral victim impact statements in capital sentencing proceedings would fail to comport with Fourteenth Amendment Due Process requirements.

A. *Victim Impact Statements in Writing and Other Restrictions to Overcome Rule 403 Concerns*

A mechanism to reduce the victim impact statement's prejudicial effect on the listener is to allow written, not oral statements. In some cases, jurors have been so moved by the victim impact statements that jurors passed around a tissue box in the jury box.¹⁸⁵ Victims who are suffering and experiencing emotional distress are more likely to submit a victim impact statement.¹⁸⁶ These oral victim impact statements are likely to be emotionally charged based on the nature and circumstances of the crime in capital sentencing proceedings. In a sample of 534 sentencing rulings, at least one victim impact statement was submitted in *all but one* first-degree murder conviction.¹⁸⁷ This means that these victims are experiencing the most severe emotional distress, and it is unforeseeable how inflammatory their emotions might be. Research has shown on average judges assigned sentences that were more than two years longer in cases including orally delivered victim impact statements compared to cases that had written victim impact statements.¹⁸⁸ Experienced judges are expected to remain impartial and unaffected by these emotionally charged statements; however, due to human nature, they may inadvertently feel and express emotion when carrying out sentencing.

To avoid any seemingly prejudicial nature, the court should consider limiting victim impact statements to written impact statements

¹⁸⁵ See *Arizona v. Gallardo*, 242 P.3d 159, 166 (Cal. 2010) (holding statements about the victim's character and impact of the murder on the family, including playing a 911 call the victim's father made after finding his son murdered were not "so unduly prejudicial" to render the trial unfair).

¹⁸⁶ See *Dufour*, *supra* note 177, at 493.

¹⁸⁷ *Id.* at 492.

¹⁸⁸ See *id.*

submitted as part of the presentence investigation report, as opposed to oral statements read in front of the jury. This approach allows the victim's family the opportunity to submit a written statement to the judge and the defendant, while preventing the potential inflammatory effect an oral statement might have on the jury, as the jury would not hear the victim impact statement. In fact, courts that have considered this avenue have gone so far as to redact content that is prejudicial in victim impact statements.¹⁸⁹ Written statements provide a more formal process, allowing for screening of content to prevent potential prejudice and ensuring the statements focus solely on the harm caused by the crime and its impact on the family. Procedures as such would ensure written statements would overcome any Fourteenth Amendment Due Process concern and follow the constitutionally protected procedures in place.

Further, written impact statements would support restorative justice – the theory of justice that emphasizes repairing the harm caused by criminal behavior – because the defendant and the defense attorney usually see written impact statements.¹⁹⁰ The goal of restorative justice is to encourage offender accountability and meet the needs of the victims to repair the harm from the crime.¹⁹¹ A written victim impact statement that the offender can see will allow the defendant to recognize the impact the defendant's actions had and force accountability of the defendant. Furthermore, the jury would not have access to these statements in the presentence investigation report, thereby eliminating any possibility of bias on their part. Written statements would strike the perfect balance between supporting the victim's wishes and protecting the defendant's constitutional rights.

In addition to written statements, the court could explore restrictions similar to those implemented in New Jersey,¹⁹² which limit the number family members who can provide statements. New Jersey limits victim impact testimony to one family member, requires preapproval by the trial court in written form, and prohibits the testimony from including

¹⁸⁹ *Id.* at 495.

¹⁹⁰ *Victim Impact Statements*, *supra* note 161.

¹⁹¹ *Restorative Justice*, OFF. OF JUVENILE, JUST. & DELINQUENCY PREVENTION MODEL PROGRAMS GUIDE (last updated: Nov. 2010), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/restorative_justice.pdf.

¹⁹² N.J. DIV. OF CRIM. JUST., CRIME VICTIMS' RIGHTS: ATTORNEY GENERAL STANDARDS TO ENSURE THE RIGHTS OF CRIME VICTIMS (1993), <https://www.nj.gov/lps/dcj/agguide/victims.htm>.

any opinion about the defendant, the crime, or the desired sentence.¹⁹³ These standards overcome any Fourteenth Amendment challenge to victim impact statements as they provide restrictions on the content of the victim impact statement. Research has shown that on average, judges impose sentences that are more than four years longer in cases with more than one victim impact statement as opposed to cases with only one victim impact statement.¹⁹⁴ While it is important to hear how the crime impacted the victim's family members, many of the statements will repeat similar ideologies and feelings about the crime. Even supporters of victim impact statements have conceded that juries may "pronounce more severe sentences on defendants, and due process concerns may require that defendants challenge factual information in the statements."¹⁹⁵ Perhaps family members can work together to ensure that the one written statement states all it needs to regarding the crime's impact on the whole family. These restrictions will ensure that written victim impact statements are not unduly prejudicial and do not violate the Fourteenth Amendment Due Process Clause.

B. Difficulty with the Federal Rules of Evidence Relevancy and Balances with Prejudice

Oral victim impact statements challenged under the Fourteenth Amendment provide more of a query for the court to grapple with than written statements do. When an oral victim statement is challenged under the Fourteenth Amendment, the court ought to assess the statement in accordance with the standard established by Rule 403. When evaluating the oral statement, the court should balance the unduly prejudicial value of the statement with the probative value of the statement. In examining the probative value, the judge should consider the rights of the victim, state, and community with the rights of the defendant. While not dispositive, and unique to the information contained in each oral statement, the court will likely find that the unduly prejudicial value of oral victim impact statements outweighs the probative value under the Rule 403 balancing test.

¹⁹³ See Platania & Berman, *supra* note 9, at 87.

¹⁹⁴ See Dufour, *supra* note 177, at 492.

¹⁹⁵ Cassell, *supra* note 6, at 625.

1. The Rights of the Victim, State, and Community

The goal of implementing victim impact statements was to allow the factfinder to take a balanced view of the information presented by both sides in determining an appropriate sentence.¹⁹⁶ As seen in state statutes, such as in California, a judge can often make a final decision contrary to the jury as long as the judge “state[s] on the record the reason for his findings” regarding the aggravating and mitigating circumstances.¹⁹⁷ These statutory provisions provide a procedural safeguard if the judge believes the jury incorrectly found for capital punishment. A defendant is, however, granted the right to a trial by a jury,¹⁹⁸ a vital part of the system of checks and balances in the United States.

In some instances, the role of twelve jurors who reach a unanimous agreement – and could have the victims, state, and community in mind – may be overlooked by an individual judge’s findings.¹⁹⁹ When a judge has the ability to unilaterally change a jury’s finding, it may alter the core values of equality and fairness embedded in the justice system.

Supporters of victim impact statements state two primary goals of providing statements: (1) to provide information detailing the effects of the crime to the sentencer and public, and (2) to provide a source of healing for the victims.²⁰⁰ Victim impact statements are the primary way to include a “victim’s voice” in the criminal justice system.²⁰¹ Supporters of victim impact statements argue that oral victim impact statements are a way for the victim to provide information to the sentencer by narrating the harm caused by the offender.²⁰² In such a

¹⁹⁶ See Cassell, *supra* note 6, at 613.

¹⁹⁷ Cal. Penal Code §190.4(e) (West).

¹⁹⁸ U.S. CONST. amend. XI.

¹⁹⁹ Cal. Penal Code §190.4(e) (West) (In California, even when the trier of fact has returned a unanimous verdict imposing the death penalty, the defendant can make an application for modification of the verdict. The judge, when ruling on the application, may “review the evidence ... and shall make a determination as to whether the jury’s findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.” The judge may not impose the death sentence when a jury recommends life in prison, but a judge may reduce a death verdict if the jury’s findings are contrary to law or evidence presented).

²⁰⁰ Susan A. Bandes, *What Are Victim Impact Statements For?*, 87 BROOK L. REV. 1253, 1259 (2022).

²⁰¹ *Id.* at 1253.

²⁰² Cassell, *supra* note 6, at 620.

case, applying the Rule 403 legal relevancy standard, the judge should evaluate whether the probative value of the oral victim impact statement outweighs its prejudicial effect. If the statement is determined to be more probative than prejudicial, the judge should permit the jury to hear it. In most cases where oral victim impact statements are utilized to provide information about the defendant's crime, the victim is there to testify about the nature and extent of the injuries sustained.²⁰³ The goal of the Victims' Rights Movement was to protect crime victims without denying the constitutional rights of the accused. In capital punishment cases, the crime victim is no longer present to testify or give a statement about the nature and extent of the injuries. Since the victim is deceased, the victim impact statements do not satisfy the second goal of including the "victim's voice" in the system. Instead, the accused's constitutional rights may be violated by prejudicial statements by family members.

Supporters of victim impact statements note that a victim may be able to provide facts that are relevant to sentencing under the sentencing schemes; however, in capital punishment cases the victim is not present to speak, so the relevant facts should be provided by the prosecution.²⁰⁴ Prosecutors present their case in chief, including all evidence to prove an aggravating factor in support of the death penalty.²⁰⁵ Instead, those in support of victim impact statements argue that the "prosecutor can begin to present the other side, but he was not personally affected by the crime or its aftermath and may not be fully aware of the price the victim has paid."²⁰⁶ Since capital punishment cases are so unique, it is difficult to grasp the line victim impact statement tow when examining its constitutionality through a Fourteenth Amendment lens.

While it may be beneficial to hear the victim's side, when there is a deceased victim, it is hard to be fully aware of the effect that hearing inflammatory victim impact statements has on a jury. After all, the defendant – not the victim's family – is on trial. State jurisprudence on this matter has concluded that oral victim impact statements cannot be utilized when the statements are unduly prejudicial; however, it is inconceivable that statements are not prejudicial to the defendant when those statements move the jury to pass tissue boxes around the

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Thomas J. Phalen & Jane L. McClellan, *Speaking for the Dead at Death Sentencing: A Right of Survivorship*, 31 31 Ariz. Att'y 12, 12 (Nov. 1994).

²⁰⁶ Cassell, *supra* note 6, at 613.

jury box.²⁰⁷ In capital cases where the risk of prejudicial, inflammatory victim impact evidence is high, the judge should screen each oral statement under the Rule 403 balancing test before the statement is read out loud. This undertaking, however, may prove inefficient and costly for the justice system. In the spirit of judicial economy, it would be best for the statement to be written rather than read out loud.

As mentioned, supporters believe that victim impact statements provide a source of healing or catharsis for victims, part of a larger movement known as “therapeutic jurisprudence.”²⁰⁸ Some claim that victim impact statements will bring “closure” to victims of a crime.²⁰⁹ However, it remains uncertain whether “closure” truly occurs, especially when extreme violence is at issue.²¹⁰ Research is inconclusive as to whether victim impact statements actually help in the healing process.²¹¹ In fact, the oral victim impact statement regime may inflict secondary trauma on the victim rather than provide a source of healing for some victims and survivors, including those whose wishes do not align with the prosecution’s goals or those whose expectations about the outcomes are not met.²¹² Therefore, more research needs to be done to accurately state whether oral victim impact statements positively contribute to “therapeutic jurisprudence.”

The *Payne* Court claimed that “victim impact evidence is not offered to encourage comparative judgments [between victims] ... It is designed to show instead each victim’s ‘uniqueness as an individual human being,’ whatever the jury might think the loss to the community.”²¹³ There is evidence, however, that oral victim impact statements encourage comparative judgments among murder victims’ families

²⁰⁷ *Gallardo*, 242 P.3d at 166 (The victim impact statement was within the appropriate bounds of victim impact testimony when the victim’s parents did not request a specific sentence for the defendant and spoke of the victim’s character and the impact of the murder upon their family, including the victim’s parents playing the 911 call the victim’s father made after finding his son murdered. Although the jurors were moved by the statements, passing a tissue box around, the court found the statements were not “so unduly prejudicial” to render the trial unfair jury reacting to the call).

²⁰⁸ Cassell, *supra* note 6, at 622.

²⁰⁹ *Id.* at 623.

²¹⁰ *See id.* at 623 n.53 (“No psychological study has ever concluded that the death penalty brings ‘closure’ to anyone except the person who dies . . .”).

²¹¹ *See* Bandes, *supra* note 200, at 1257.

²¹² *Id.*

²¹³ *Id.* at 1261 (quoting *Payne*, 501 U.S. at 823) (internal quotation marks omitted).

based on irrelevant facts, like articulateness and attractiveness.²¹⁴ These facts may prove to be more prejudicial to the defendant than probative because they would distract from the circumstances surrounding the crime.

Victim impact statements do not impact the prosecutor's ability to do their job. The role of the prosecutor is to "represent the people of their jurisdiction" and they "have a duty to seek justice in every case, carefully evaluating the evidence presented and protecting the rights of the accused."²¹⁵ The prosecution can present many different types of evidence, including eyewitness testimony and forensic evidence to prove the aggravating factors.²¹⁶ The aggravating evidence presented focuses on the circumstances surrounding the facts of the crime.²¹⁷ The addition of oral victim impact statements during the sentencing phase fails to illuminate, as Justice Stevens says in his *Payne* dissent, "how a grieving family member's testimony about the uniqueness of the murder victim or the impact of his loss on those who loved him is relevant to determining which defendants should be sentenced to death."²¹⁸ These types of oral statements, which often inform the jury of the financial, physical, and psychological impact of the crime on the victim and the victim's family, do not add to the aggravating circumstances. Instead, oral victim impact statements may encourage comparative judgments and confuse the fact finders, violating the defendant's right to due process. A written statement in a presentence report would avoid any of these concerns entirely.

2. Due Process Challenges to Victim Impact Statements

The defendant has a right to a fair trial. The Constitution protects the rights of the accused. "[T]he Constitution does not protect the defendant's right to commit a crime; it protects the defendant's rights when he is being tried for committing a crime."²¹⁹ Thus, the accused has a right to fair procedures, including a fair sentencing proceeding. Oral victim impact statements are powerful evidence that often overwhelms

²¹⁴ *Id.*

²¹⁵ *What is a DA?*, NAT'L DIST. ATT'Y ASS'N (last visited Sept. 20, 2024), <https://ndaa.org/about/what-does-a-da-do/>.

²¹⁶ *Stages in a Capital Case*, *supra* note 33.

²¹⁷ *Id.*

²¹⁸ *See* Bandes, *supra* note 200, at 1261.

²¹⁹ Stevens, *supra* note 130, at ¶ 13.

judges and juries.²²⁰ Leading scholar, Professor Susan Bandes, who has focused on emotion and the law, has stated that “jurors perceive greater suffering after hearing such statements, and hear the emotional intensity of the statements as “a cry for help or relief” and “anger tends to interfere with the sound judgment – it inhibits detailed information processing, increases tendencies to blame, including misattributions of blame and exacerbates the urge to punish.”²²¹ In other words, Professor Bandes explains that people will want to punish more harshly, and will be less careful about ensuring they are punishing the appropriate offender.²²² Emotionally intense oral victim impact statements may be “so unduly prejudicial that it renders the trial fundamentally unfair” and the due process clause provides a mechanism for relief.²²³ The core purpose of sentencing is to ensure that the punishment fits the crime committed by the defendant, not that the punishment fits how the crime makes the victim’s family members feel.²²⁴ Under the Rule 403 legal relevancy standard, the judge would have to evaluate if the oral statement would provide probative value to the sentencing proceeding, or if the victim’s family members’ feelings would render the trial fundamentally unfair. To receive a fair trial, the jury must remove any emotions surrounding the crime and purely evaluate the circumstances.

Oral victim impact statements create an extra level of passion and prejudice that may shift the focus from the crime committed.²²⁵ Oral victim impact statements can divert the jury’s attention away from the facts that should be scrutinized, including the circumstances of the crime, and instead focus on facts that should not be considered including the victim’s character and the harm experienced.²²⁶ Jurors may be more persuaded by how they feel about the testimony than by the facts of the case.

While each oral victim impact statement is different, the Rule 403 balancing test would allow the judge to evaluate each oral victim

²²⁰ See Cassell, *supra* note 6, at 632.

²²¹ Susan A. Bandes, *Victims, “Closure” and the Sociology of Emotion* 21 (Public L. & Legal Theory, Working Paper No. 208, 2008).

²²² *Id.*

²²³ *Payne*, 501 U.S. at 831 (O’Connor, J., concurring); see also Brain J. Johnson, *The Response to Payne v. Tennessee: Giving the Victim’s Family a Voice in the Capital Sentencing Process*, 30 IND. L. REV. 795 (“Note”) (1997).

²²⁴ See Cassell, *supra* note 6, at 632.

²²⁵ *Id.*

²²⁶ See generally *Booth*, 482 U.S. at 505.

impact statement, rather than make a sweeping generalization about the impact of oral victim impact statements. This test provides an avenue to assess the constitutionality of oral victim impact statements through the Fourteenth Amendment Due Process Clause. Although there will be many oral victim impact statements that do not reach the high bar where the prejudicial value will *substantially* outweigh the probative value, based on the considerations mentioned above, there may be some oral statements that directly violate a defendant's due process rights. Based upon the above considerations, in weighing the probative versus prejudicial value of oral victim impact statements under the Rule 403 standard, the prejudicial value is more likely than not to *substantially* outweigh the probative, which directly violates a defendant's Fourteenth Amendment due process rights.

C. *Discussion of the Payne Dissent*

The dissenters in *Payne* were concerned about the facts and information that the jury might hear from oral victim impact statements. Justice Stevens was concerned that the evidence presented in victim impact statements were meant to appeal to the sympathies of jurors.²²⁷ This echoes the majority opinion in *Booth* that raised concerns about the crime's emotional impact on families.²²⁸ The jury is responsible for finding whether the accused committed the crime based on the evidence presented at trial. Convictions based on sympathies or emotions would be detrimental to the justice system. It could lead to wrongful convictions, which is the difference between life and death in this unique circumstance. Judges tell jurors to set aside their emotions and look at the facts, which may be difficult to do when jurors are hearing an incredibly emotional statement by individuals who brutally lost their family members in a heinous crime. Therefore, before a jury hears the statement, the judge should evaluate whether the prejudicial value of the jury hearing the statement will substantially outweigh the probative value of the statement.

A jury needs to focus most on the defendant's background, record, and the circumstances of the crime, not the family members' opinions. The *Booth* majority supports this idea as justices were concerned about the family members' opinions and characterizations of the defendant

²²⁷ See *Payne*, 501 U.S. at 856 (Stevens, J., dissenting).

²²⁸ See *Booth*, 482 U.S. at 508–09.

and the crime. The *Booth* Court was concerned about how opinions and negative characterization, orally expressed to the jury, would impact the sentencing. A judge may evaluate the contents of the victim impact statement using the Rule 403 legal relevancy standard, and only if a judge decides the opinions of the family, the emotional impact of the crime, and the characterization of the defendant is not substantially prejudicial, can a jury hear the victim impact statement.

To avoid any due process violations, the best place for these statements by a victim's family is in written statements submitted in the presentence investigation report to the judge, defense counsel, and the defendant. Written victim impact statements would eliminate any concern that emotionally charged statements would influence a jury and unduly prejudice the defendant. Ultimately, courts should consider the *Booth* decision, where oral victim impact statements are irrelevant to the blameworthiness of a defendant.²²⁹ Indeed, the jury is tasked with deciding blameworthiness based on proof beyond a reasonable doubt of the aggravating circumstances. The dissenters raise valid concerns because the jury has incredible responsibility and power in capital punishment proceedings, so the court should implore protective measures to reduce any emotionally charged decision-making.

CONCLUSION

Since the 1970s, victim impact statements have been a tool to enhance the voice of victims and their families throughout the criminal justice process. Although it is important to enhance the rights of victims and have their families present at proceedings, statements regarding how a crime impacts the victim's family – physically, emotionally, and financially – may be irrelevant to the circumstances of the crime on trial and may be substantially more prejudicial than probative. After all, the victim and their families are not on trial, the defendant is. This presents a challenging juxtaposition as the wheels of justice turn in the unique circumstances of capital sentencing proceedings.

To combat any concerns of undue prejudice, courts should limit victim impact statements to written statements in the presentence investigation report. This gives the victim's family the ability to voice their grievances to the defendant directly without the jury hearing any potentially inflammatory statements. Written victim impact statements,

²²⁹ See *Booth*, 482 U.S. at 503.

as opposed to oral statements, would eliminate any potential bias, and strike the perfect balance between the Victims' Rights Movement and the defendant's constitutional rights, overcoming any Fourteenth Amendment challenges.

Should the defense wish to challenge the constitutionality of oral victim impact statements, such objections should be based on the Fourteenth Amendment rather than the Eighth Amendment. This is because such statements have the potential to be highly prejudicial or inflammatory, potentially depriving the defendant of their right to life without due process of law. In the event Fourteenth Amendment challenges are presented, the judge ought to assess the content of the oral victim impact statement using a test akin to the Rule 403 legal relevancy standard. This assessment should balance the substantially prejudicial nature compared to the probative value of the statements. In striking the Rule 403 balance, the courts will consider the interests of the victim, community, and defendant. Because oral victim impact statements carry remarkable emotional weight, and the prosecution must establish aggravating circumstances, the judge would most likely find that oral victim impact statements should not be permitted in capital sentencing proceedings, as the potential for prejudice would surpass the probative value. This framework will avoid any due process concerns and safeguard against a prejudicial sentencing process while simultaneously balancing the interests of the victims' families and enhancing efficiency within the criminal justice system.

