Sentencing Criminals: The Constitutionality of Victim Impact Statements

Carrie L. Mulholland

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Recommended Citation
Available at: https://scholarship.law.missouri.edu/mlr/vol60/iss3/8
Sentencing Criminals:  
The Constitutionality of Victim Impact Statements  

*State v. Wise*¹  

I. INTRODUCTION  

Most jurisdictions around the country permit juries to consider victim impact statements, statements taken from the family of a victim of violent crime relating to the family’s loss, during the sentencing phase of criminal trials. In 1994, the Missouri Supreme Court followed this trend in *State v. Wise* by approving the use of victim impact statements, and allowing the statements to be presented to the jury at the sentencing stage of a capital punishment trial.²  

In non-capital punishment trials, the victim presents impact statements relating to his economic loss, physical injury and changes in his personal welfare.³ In murder trials, the surviving family members present victim impact statements relating to the effect of the crime on the victim’s family.⁴  

---  

¹. 879 S.W.2d 494 (Mo. 1994).  
². *Id.* at 516.  
³. The Missouri statute which allows certain victim impact statements typifies similar statutes of other states, the District of Columbia and the Federal Rules of Criminal Procedure, and reads as follows:  

A victim impact statement shall:  
(1) Identify the victim of the offense;  
(2) Itemize any economic loss suffered by the victim as a result of the offense;  
(3) Identify any physical injury suffered by the victim as a result of the offense, along with its seriousness and permanence;  
(4) Describe any change in the victim’s personal welfare or familial relationships as a result of the offense;  
(5) Identify any request for psychological services initiated by the victim or the victim’s family as a result of the offense; and  
(6) Contain any other information related to the impact of the offense upon the victim that the court requires.  

MO. REV. STAT. § 217.762 (1994). *See infra* notes 74 and 77 for a comprehensive list of state statutes which permit victim impact statements.  
⁴. *Wise*, 879 S.W.2d at 515.  

The American Bar Association Victims’ Committee defines victim impact statements as follows:
As demonstrated by the United States Supreme Court’s equivocal position, the introduction of family impact evidence at the sentencing stage of a murder trial remains very controversial. Regardingly, in 1991, the Court overruled its precedent that victim impact statements violate the Eighth Amendment’s prohibition against cruel and unusual punishment by holding that victim statements are constitutional in capital punishment cases.5

Despite the constitutionality of the introduction of a victim’s family’s statements, the statements have been severely criticized for: (1) rendering the sentencing of a criminal an arbitrary process; (2) imposing the death penalty based on factors that were unknown to the defendant and irrelevant to the defendant’s decision to kill; and (3) misplacing the jury’s attention on the victim, instead of the defendant, at the sentencing stage of the trial.6 Notwithstanding the controversy, the Missouri Supreme Court upheld the prosecutor’s use of victim impact statements in Wise by relying heavily on the United States Supreme Court’s constitutional approval of impact statements in Payne v. Tennessee.7

Prior to the sentencing of an offender in a serious case, victims or their families should have the opportunity to inform the sentencing body of the crime’s physical, psychological and financial repercussions on the victim or on the victim’s family. Jurisdictions may do this in one or several ways, including: (a) written statement prepared by the victim to be included in the probation department’s presentence report on the offender; (b) written statement prepared by the probation department after consultation with the victim of the victim’s representative; and/or (c) oral statement by the victim’s representative before the sentencing body.


5. Payne v. Tennessee, 501 U.S. 808, 811 (1991) ("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.") (overruling Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989)).


7. Wise, 879 S.W.2d at 515-16 (citing Payne, 501 U.S. at 825, 827).
II. FACTS AND HOLDING

In 1972, Jessie Lee Wise, then eighteen years old, was sentenced to life in prison after he pled guilty to and was convicted of first degree murder.\(^8\) Wise was later released on parole.\(^9\) In 1989, Wise was convicted of first-degree murder, two counts of armed criminal action, stealing, and first-degree robbery.\(^10\) The Circuit Court, St. Louis County, sentenced Wise to death and the Supreme Court of Missouri affirmed.\(^11\)

Wise was a maintenance worker at the condominiums where his victim, Geraldine McDonald, lived.\(^12\) Wise occasionally washed and waxed McDonald's red sports car.\(^13\) On the morning of August 27, 1988, McDonald invited Wise into her condominium to discuss his washing her car.\(^14\) When McDonald refused to pay the price he demanded, Wise killed her and took her money, jewelry, credit cards and BMW.\(^15\)

Wise later confessed to the police that he killed McDonald.\(^16\) After hearing evidence of Wise's confession, and of his fingerprints in McDonald's condominium and on her sports car, the jury convicted Wise of first degree murder.\(^17\) The jury recommended the death penalty.\(^18\)

On appeal, the Missouri Supreme Court affirmed.\(^19\) The court held that when a defendant faces capital punishment, the prosecutor may refer to brief, light and general victim impact statements from the victim's family during sentencing.\(^20\)

---

8. Id. at 501.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id. at 502.
14. Id.
15. Id. at 502, 503, 505.
16. Id. at 502.
17. Id. at 501-02.
18. Id. at 516. The prosecutor never read victim impact statements at trial because the defense objected on the basis of Booth v. Maryland and South Carolina v. Gathers. See State v. Wise, No. 583133 (St. Louis Circuit Court, St. Louis County, Div. 19, March 15, 1989). The Missouri Supreme Court, however, has since used the decision in Wise to uphold the use of victim impact statements in subsequent cases. State v. Parker, 886 S.W.2d 908, 926-27 (Mo. 1994), cert. denied, Parker v. Missouri, 115 S. Ct. 1827 (1995).
19. Id. at 501.
20. Id. at 515-16.
III. LEGAL BACKGROUND

A. The Victims' Rights Movement

The rise of the victims' rights movement started in the 1960's, in conjunction with the women's rights movement's claim that the criminal system mistreated rape victims.\(^21\) One premise behind both movements was that for most crimes, there is at least one innocent victim whose life has been harmed. Supporters of the movements contended that the criminal justice system was entirely unsympathetic to victims by denying them a formal role in the judicial system, exploiting them to prosecute the criminal, and failing to provide rehabilitation or assistance after sentencing of the criminal. Supporters advocated that the law should give victims a more meaningful role in the criminal justice system.\(^22\)

Accordingly, the victims' rights movement sought to accommodate the needs of the victim and to balance the interests of the victim with the rights of the defendant.\(^23\) Supporters have achieved reform in various ways, including the passage of state statutes requiring that the victim be informed of the time and place of criminal proceedings\(^24\) and the award of restitution to victims.\(^25\)

In addition to state legislation, Congress enacted the Uniform Victims of Crime Act of 1992, which provides that the victim has: (1) the right to be present whenever a defendant has the right to be present at a court proceeding under the Confrontation Clause of the United States Constitution; (2) the right to be informed of the date, time and place of the trial; (3) the right to counseling information; and (4) the right to be free from harm and

---


\(^22\) Fahey, *supra* note 4, at 211.


\(^24\) A majority of states have statutes requiring that the victim be provided with information regarding the trial, as well as information on counseling programs and protection from harassment and intimidation. For a list of statutes, *see infra* notes 74 and 77.

\(^25\) *See* Fahey, *supra* note 4, at 211.
harassment.\textsuperscript{26} Furthermore, these rights survive the victim and pass to the victim’s family upon the victim’s death.\textsuperscript{27}

Congress also enacted the Victim and Witness Protection Act of 1982 to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process."\textsuperscript{28} This Act amended the Federal Rules of Criminal Procedure to require the inclusion of victim impact as part of the presentence report submitted to the sentencing authority.\textsuperscript{29}

Victim impact evidence is one of the most controversial means of vindicating victims’ rights.\textsuperscript{30} Victim impact evidence, written statements or oral testimony, allows victims or their families to tell the sentencer of the crime’s impact on their lives.\textsuperscript{31} Advocates of victim impact claim a two-fold purpose for the statements: first, the victim gains a sense of dignity and respect if allowed an active role in the sentencing decision; and second, allowing victim impact will more effectively equate the criminal’s punishment to the full extent of the harm caused.\textsuperscript{32}

\textsuperscript{26} UNIF. VICTIMS OF CRIME ACT §§ 204, 205, 209 (Supp. 1994).

\textsuperscript{27} Id. at § 218. The text of the Act, however, does not mention victim impact statements. Id. at §§ 205-20.


\textsuperscript{29} FED. R. CRIM. P. 32(c)(2)(D). See also the Uniform Rules of Evidence which are more restrictive than the Federal Rules of Criminal Procedure, providing that, "[E]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor [is admissible for the purpose of proving that the victim acted in conformity with his character on a particular occasion]." UNIF. R. EVID. 404(a)(2) (amended 1986) (emphasis added).

\textsuperscript{30} Fahey, supra note 4, at 211; see also Yaroshefsky, supra note 21, at 136 (suggesting alternatives to victim impact statements, which harm the defendant, such as providing the victim an attorney throughout the trial in an attempt to give the victim more dignity).

\textsuperscript{31} Fahey, supra note 4, at 211.

\textsuperscript{32} Id. (citing Richard S. Murphy, Note, The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court, 55 U. CHI. L. REV. 1303, 1304 (1988)).
B. Victim Impact Statements and the Eighth Amendment

Indicative of the United State Supreme Court's indecisiveness, courts and legislatures around the nation have wavered on the issue of the constitutionality of victim impact. In the 1980's, for example, four states restricted the admissibility of victim statements to non-death penalty cases, and California banned victim impact statements in all criminal cases. Currently, after Payne, some states restrict the admissibility of victim statements to cases not involving the death penalty. However, forty-nine states allow victim statements taken from the victim, and most states allow victim statements from a victim's family at the sentencing stage of criminal trials. In the 1987 death penalty case of Booth v. Maryland, the United States Supreme Court first addressed the constitutionality of victim impact statements taken from the family of a victim. Booth was convicted of robbing and murdering an elderly couple and sentenced to death. Before the sentencing stage of the trial, the prosecutor referred to a victim impact

33. See GA. CODE. ANN. § 17-10-1.1 (Harrison 1987); LA. CODE CRIM. PROC. ANN. art. 875(A)-(B) (West 1987); OKLA. STAT. ANN. tit. 22, § 982 (West 1986); S.C. CODE ANN § 16-3-1550(A) (Law. Co-op 1987).

34. Fahey, supra note 4, at 213 n.73 (citing People v. Levitt, 203 Cal. Rptr. 276, 287-88 (Cal. Ct. App. 1984)). See also infra note 63 and accompanying text for other cases holding that victim impact statements were unconstitutional prior to their constitutional approval by the Supreme Court.


36. Idaho statutorily provides for victim impact statements, but not in death penalty cases. See State v. Bivens, 803 P.2d 1025, 1026 (Idaho Ct. App. 1991) (in the absence of the death penalty, the court may consider victim impact statements during sentencing); State v. Wersland, 873 P.2d 144, 146 (Idaho 1994) (impact statements from victim's parents were admissible in a non-death penalty case) (citing IDAHO CODE § 19-5306(1)(b)(3) (Supp. 1994)).

The Alabama and Nevada victim impact statutes do not provide for victim impact statements taken from the victim's family, and presumably would not allow victim impact statements in murder cases. See ALA. R. CRIM. P. 26.3 (1993); NEV. REV. STAT. § 176.145 (Supp. 1993).

Vermont does not have a statute addressing victim impact statements, but a 1993 Vermont Supreme Court case allowed victim impact statements from victims of sexual assault. See State v. Densmore, 624 A.2d 1138, 1142 (Vt. 1993).

Hawaii does not have a statute or any case law addressing the constitutionality of victim impact statements.

37. See infra note 74 for a list of state statutes that provide for victim impact statements from both victims and their families.


39. Id. at 498.
statement taken from an interview with the victims’ son, daughter, son-in-law and granddaughter.

The Court reversed Booth’s death sentence, holding that victim impact statements taken from a victim’s family were contrary to the Eighth Amendment provision that "cruel and unusual punishment [shall not be] inflicted." The Court reasoned that if victim impact statements are allowed, the sentencing body’s focus is improperly placed on the victim, not on the defendant; and, furthermore, the arbitrariness of a sentence would be enhanced by victim impact, thereby constituting an impermissible risk. The Court was "troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy."

Booth was, however, only a five-to-four majority decision. The dissent in Booth focused primarily on the fact that the Maryland legislature decided that the jury should be allowed to hear testimony from the victim’s family regarding the impact of the crime when weighing the degree of harm the defendant caused in determining the degree of punishment to be inflicted on the defendant. The dissent urged that "determinations of appropriate sentencing considerations are, 'peculiarly questions of legislative policy.'"

Due to the Supreme Court’s uncertainty, courts applied Booth in three general ways. Some courts advocated a broad application of Booth and banned victim statements altogether. Other courts attempted to distinguish

40. Id. at 499. The victim impact statements that the prosecutor read to the jury in Booth included statements by the victims’ son that he felt like his parents were "butchered like animals . . . [and he is] . . . fearful for the first time in his life." Id. at 499-500. The victim impact statements also included statements by the victims’ daughter that the murders have made her withdraw and distrustful and that she suffers from sleeplessness. She also stated her opinion that the defendant could not be forgiven and could "never be rehabilitated." Id. at 500. The entirety of the victim impact statements is reprinted in an appendix to the Court’s decision. Id. at 509.

41. Id. at 501-02.

42. U.S. CONST. amend. VIII. The Fourteenth Amendment makes the Eighth Amendment’s "cruel and unusual punishment" prohibition applicable to the states. Robinson v. California, 370 U.S. 660, 666 (1962).

43. Booth, 482 U.S. at 504-05. The Court rejected Maryland’s argument to allow victim impact statements so that the jury can consider the foreseeable, direct consequences of the defendant’s act. Id. at 503-04.

44. Id. at 506 n.8.

45. Id. at 497.

46. Id. at 515 (White, J., dissenting).

47. Id. (White, J., dissenting) (citing Gregg v. Georgia, 428 U.S. 153, 176 (1976); quoting Gore v. United States, 357 U.S. 386, 393 (1958)).

48. Fahey, supra note 4, at 221 n.95 (citing Rushing v. Butler, 868 F.2d 800, 804
Booth on the grounds that a judge heard the victim statements, not a jury.\textsuperscript{49} Finally, some courts attempted to distinguish the content of the victim statements at bar from the content of the victim statements in Booth.\textsuperscript{50}

Despite the Court’s ruling in Booth that victim statements from the family of the victim were unconstitutional, Missouri courts have never relied on Booth to reverse a death penalty case because of an impermissible use of victim statements.\textsuperscript{51} To permit the use of victim statements, Missouri cases have distinguished Booth in two of the above ways: either distinguishing the

\textsuperscript{49} Fahey, supra note 4, at 221 (citing State v. Keith, 754 P.2d 474, 488 (Mont. 1988) (nothing in record indicated that judge relied on victim impact evidence); State v. Sowell, 530 N.E.2d 1294, 1301-02 (Ohio 1988) (discussing presumption in bench trial that judge will consider only relevant evidence), cert. denied, 490 U.S. 1028 (1989)). \textit{See also} State v. McMillin, 783 S.W.2d 82, 96 (Mo. 1990) (noting "[t]he danger of [a victim impact statement] is that it may inflame the jury and divert it from deciding the case on [] relevant evidence . . ." but holding that when a judge, rather than a jury, hears inadmissible evidence such as victim impact statements, the court presumes it was not prejudicial) (quoting Booth v. Maryland, 482 U.S. 496 (1987), cert. denied, 498 U.S. 881 (1991)).

\textsuperscript{50} Fahey, supra note 4, at 222 (citing People v. Ghent, 739 P.2d 1250, 1271 (Cal. 1987) (comments were "brief" and "mild" compared to Booth), cert. denied, 485 U.S. 929 (1988); People v. Jones, 528 N.E.2d 648, 666 (Ill. 1988) (finding comments brief and directly related to the circumstances of the crime), cert. denied, 489 U.S. 1040 (1989)). \textit{See also} State v. Woltering, 810 S.W.2d 584, 587 (Mo. Ct. App. 1991) (holding that statements did not describe the personal characteristics of the victim or the emotional impact on the victim’s family, and were not victim impact statements prohibited by Booth).

\textsuperscript{51} See, e.g., State v. Petary, 781 S.W.2d 534, 541 (Mo. 1989) (finding that where defendant was convicted of first degree murder and sentenced to death, the prosecutor’s references to the victim’s age, pregnant sister, their mental retardation and the victim’s family’s financial problems were not impermissible because they were relevant circumstances of the crime in the guilt and punishment stages of the trial), \textit{vacated on other grounds}, Petary v. Missouri, 494 U.S. 1075 (1990).
content of questionable statements made by prosecutors,\textsuperscript{52} or distinguishing by the fact that a judge was the sentencer, rather than a jury.\textsuperscript{53}

The Supreme Court applied its reasoning in \textit{Booth} that victim impact statements were cruel and unusual punishment in \textit{South Carolina v. Gathers}, also a five-to-four majority opinion.\textsuperscript{54} The defendant in \textit{Gathers}, convicted of murdering and sexually assaulting a mentally impaired man, was sentenced to death.\textsuperscript{55} Unlike the statements presented to the jury about the emotional impact of the murder on the family of the victim in \textit{Booth}, the objectionable evidence in \textit{Gathers} only concerned the character of the victim.\textsuperscript{56}

The victim in \textit{Gathers} considered himself a preacher and was carrying a booklet entitled "The Game Guy's Prayer" when he was murdered.\textsuperscript{57} In commenting on the piety of the victim, the prosecutor read one of the victim's prayers to the jury.\textsuperscript{58} The prosecutor used the prayer, which invoked sports

\textsuperscript{52} Woltering, 810 S.W.2d at 587 (citing \textit{Booth v. Maryland}, 482 U.S. 496 (1987)). The jury convicted Woltering of first degree murder and sentenced him to life in prison without parole. \textit{Id.} at 586. The court held that the statements the prosecutor read from the victim's diary regarding some of her kitchen appliances, sewing materials, the weather, and her buying a car were different from victim impact statements in \textit{Booth} because they did not describe the personal characteristics of the victim or describe the emotional impact on the victim's family. \textit{Id.} at 587.

\textit{See also} \textit{State v. Allison}, 745 S.W.2d 178, 180 (Mo. Ct. App. 1987) (allowing victim to testify about threatening statements the defendant made to her on redirect by the prosecutor in order to rehabilitate her impeached testimony, not to tell the jury the impact of the crime on her; subsequently, the jury convicted Allison of attempted murder and sentenced him to fifteen years in prison); \textit{Petary}, 781 S.W.2d at 541.

\textsuperscript{53} McMillin, 783 S.W.2d at 96 (after lower court judge found the defendant guilty of first degree murder and sentenced him to death, Missouri Supreme Court held that since it was a non-jury trial, the victim impact statements were not prejudicial to the defendant).


\textit{Id.} at 806-08.

\textsuperscript{56} \textit{Id.} at 811.

\textsuperscript{57} \textit{Id.} at 807.

\textsuperscript{58} \textit{Id.} at 809. The prayer that the prosecutor read to the jury read as follows: Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to give me one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me
metaphors and stressed the virtue of humility, to stress the victim's vulnerability.59 The prosecutor also used a voter registration card found on the victim at the murder scene to argue that the victim was an ordinary citizen, who thought he could sit quietly on a park bench without risking death.60

The Court rejected the State's argument that the prosecutor's remarks were distinguishable from victim impact statements because the pages of the booklet were scattered around the crime scene and, therefore, described to the jury the scene of the crime, not the character of the victim.61 The Court instead reaffirmed its precedent that victim-related evidence was unconstitutional in capital punishment cases because "[a]llowing the jury to rely on [victim impact statements] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."62

Federal and state courts faced with the issue of victim statements from family members applied Booth and Gathers to hold family impact statements unconstitutional, and either reversed the defendant's death sentence, and/or remanded the case with directions to impose a life sentence without parole on the defendant.63

to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life.

Id. at 808-09.
59. Id. at 809.
60. Id. at 808.
61. Id. at 811.
62. Id. (quoting Booth v. Maryland, 482 U.S. 496, 505 (1987)).
63. See Hayes v. Lockhart, 881 F.2d 1451 (8th Cir. 1989) (citing Booth and Gathers and holding that victim impact statements from the victim's family were impermissible, reversing defendant's death sentence, and remanding with instructions to impose a life sentence without parole), cert. denied, 493 U.S. 1088 (1990); Pierce v. State, 576 So. 2d 236, 254 (Ala. Crim. App. 1990) (citing Booth and Gathers and remanding the case because victim impact statements by the victim's daughter were impermissible), cert. denied, 576 So. 2d 258 (Ala. 1991).
C. The United States Supreme Court Reverses Its Stance

In 1991, the United States Supreme Court reversed its decisions regarding the constitutionality of victim impact statements. In *Payne v. Tennessee*, the Court overruled both *Booth* and *Gathers* with a six-to-three majority, and concluded that victim impact statements and arguments relating to the impact of the crime on the victim’s family are constitutional during the sentencing of the defendant.55

Payne was convicted of two counts of first-degree murder of a woman and her daughter, and assault with intent to commit murder and attempted murder of the woman’s son.66 The jury sentenced Payne to death.67

At the sentencing stage of the trial, Payne called four witnesses to testify that he was polite, affectionate and caring; the prosecutor called the victim’s mother to testify about the effect of the murder on her grandson.68 In closing argument, the prosecutor argued that, "[Payne’s attorney] wants you to think about a good reputation, people who love the defendant . . . [h]e doesn’t want you to think about the people who love [the victim], her mother and daddy who loved her . . . [t]he brother who mourns for [his sister] every single day and wants to know where his best little playmate is. He doesn’t have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever."69

In *Payne*, the United States Supreme Court upheld the prosecutor’s use of victim impact statements and affirmed the defendant’s death sentence.70 The Court reasoned that the criminal law system has always been concerned with the extent of harm a defendant causes when assessing blameworthiness and sentencing the defendant.71 Accordingly, because victim statements were relevant to the defendant’s responsibility and moral guilt, the Court concluded that victim impact evidence is another factor that the sentencer should be allowed to consider.72

---

65. *Id.* at 825.
66. *Id.* at 814.
67. *Id.* at 816.
68. *Id.* at 814.
69. *Id.* at 816.
70. *Id.* at 830.
71. *Id.* at 819 ("[T]wo equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm.").
72. *Id.* at 808, 826.
D. Current Treatment of Victim Impact Statements

Forty-nine states currently allow the sentencer to consider some form of victim impact statements in non-capital punishment cases.73 Most jurisdictions, including Missouri, the District of Columbia and the federal court system, are closely aligned with the United States Supreme Court decision in Payne and permit victim statements from the victim’s family regarding the impact of the victim’s death on the family.74 Of the states that

73. See infra notes 74-75.

Hawaii does not have a statute or any case law addressing the constitutionality of victim impact statements.
allow victim statements from family members, Idaho requires that the statements are used only in non-death penalty cases.\textsuperscript{75} Other states that allow impact statements from family members impose various other limitations on their use, most typically requiring that: (1) the statements must be general and cannot delve into the victim's character and worth; (2) the statements must be read by the prosecutor, and not in the form of testimony from family members; (3) the statements cannot be unduly prejudicial to the defendant; (4) the statements must adhere to victim impact statement forms; and (5) the statements can be used only when a judge, instead of a jury, is sentencing the defendant.\textsuperscript{76} Only two states do not provide for victim impact statements from family members of victims, and only allow victim impact statements from the victim.\textsuperscript{77}

Prior to Wise, only one Missouri death penalty case followed Payne in permitting victim impact statements.\textsuperscript{78} In this case, however, the prosecutor

\textsuperscript{75} See State v. Bivens, 803 P.2d 1025, 1026 (Idaho Ct. App. 1991) (in the absence of the death penalty, the court may consider victim impact statements during sentencing); State v. Wersland, 873 P.2d 144, 146 (Idaho 1994) (impact statements from victim's parents were admissible in a non-death penalty case) (citing IDAHO CODE § 19-5306(1)(b)(3) (Supp. 1994)).

\textsuperscript{76} Missouri requires that the statements must be general and cannot delve into the victim's character. See Wise, 879 S.W.2d at 516. In Iowa, victim impact statements from family are permissible, but the defendant may not be unduly prejudiced. See State v. Sumpter, 438 N.W.2d 6, 9 (Iowa 1989). The Iowa and Texas statutes regarding victim impact statements also require that victim impact from the victim's family comply with victim impact forms. See IOWA CODE ANN. § 901.3 (West Supp. 1994); TEX. CRIM. PROC. CODE ANN. § 56.03 (West Supp. 1995). Kansas, New Hampshire and Pennsylvania allow victim impact statements from the victim's family only if a judge, and not a jury, is sentencing the defendant. See State v. Hill, 799 P.2d 997, 999 (Kan. 1990); N.H. REV. STAT. ANN. § 651:4-a (Supp. 1993); PA. STAT. ANN. tit. 71, P.S. § 180-9.3 (Supp. 1994).

\textsuperscript{77} The Alabama and Nevada victim impact statutes do not provide for victim impact statements taken from the victim's family. See ALA. R. CRIM. P. 26.3 (1993); NEV. REV. STAT. § 176.145 (Supp. 1993).

Vermont does not have a statute addressing victim impact statements, but a 1993 Vermont Supreme Court case allowed impact statements from victims of sexual assault. See State v. Densmore, 624 A.2d 1138, 1142 (Vt. 1993).

Hawaii does not have a statute or any case law addressing the constitutionality of victim impact statements.

\textsuperscript{78} See State v. Griffin, 848 S.W.2d 464, 471 (Mo. 1993) (citing both Booth and Payne and holding that the victim impact statements regarding the defendant's victims were vague, general and brief, and not impermissible); see also State v. Hunter, 840 S.W.2d 850, 867 (Mo. 1992). In Hunter, a judge convicted the defendant of first degree murder and first degree robbery and sentenced him to death. The prosecutor read the statements of the victim's step sister and half sister to the judge. Id. at 867.
read victim impact statements which made "vague, general and brief" reference to the defendant’s victims, and not to the victims’ families. Missouri courts more commonly circumvented Payne by scrutinizing

n.4. The step sister stated that she hoped that justice would be done. Id. The half sister stated that she didn’t know the victim, but this shouldn’t happen to anyone and she hoped the defendant got the death penalty. Id. Without referring to Payne, the court held that: (1) the victim impact statements were so innocuous that they were unlikely to inflame a person with an ordinary temperament; and (2) the inherent danger in victim impact statements was minimized because the judge, and not the jury, sentenced the defendant. Id. at 867.

The Missouri death penalty provides:

1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Whether a statutory aggravating circumstance or circumstances enumerated in subsection 2 of this section is established by the evidence beyond a reasonable doubt; and

(2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole or release except by act of the governor. In determining the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the statutory aggravating or mitigating circumstances set out in subsections 2 and 3 of this section. If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he considers to be aggravating or mitigating.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions; Mo. Rev. Stat. § 565.032 (1994). The statute continues by listing aggravating circumstances and does not mention victim impact statements. Id.

79. The Missouri Supreme Court tried to distinguish the case from Booth, by noting that Booth only "applies to 'the presence or absence of emotional distress of the victims families, or the victim's personal characteristics,' or 'emotionally charged opinions as to what conclusions the jury should draw from the evidence . . . ."' Griffin, 848 S.W.2d at 471 (quoting Booth, 482 U.S. at 507, 509). The court found that the prosecutor’s references to the defendant’s victims were not commentaries on the victims’ personal characteristics because the references were "vague, general and brief." Id.
testimony purporting to be victim impact, and concluding that it simply did not qualify as victim impact evidence.\textsuperscript{80}

Since its decision in \textit{Wise}, however, the Missouri Supreme Court has reaffirmed its position on victim impact statements and used both \textit{Wise} and \textit{Payne} to uphold the use of victim impact statements in \textit{State v. Parker}.\textsuperscript{81} The jury convicted Parker of first-degree murder and sentenced him to death.\textsuperscript{82} The Missouri Supreme Court upheld the statements of a victim's father regarding how the family had been impacted by the victim's death.\textsuperscript{83} The court reasoned that, "[v]ictim impact evidence illustrates the harm from the murder; there is nothing unfair about permitting the jury to consider that harm, along with defendant's mitigating evidence."\textsuperscript{84}

IV. \textit{INSTANT DECISION}

The decision in \textit{Wise} was the first Missouri case to address the question of whether victim impact statements from the victim's family are constitutional in death penalty cases.\textsuperscript{85} Wise's argument against impact statements from his victim's family was two-fold: first, he asserted that Article I, §21 of the Missouri Constitution creates a per se prohibition against victim impact evidence;\textsuperscript{86} second, he asserted that the victim statements violated his federal constitutional rights to due process and to be free from cruel and unusual punishment.\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{80} See \textit{State v. Shurn}, 866 S.W.2d 447, 470 (Mo. 1992) (holding that evidence of the victim's religious nature was not victim impact, and thus, was permissible); \textit{State v. Ramsey}, 864 S.W.2d 320, 333 (Mo. 1993) (holding that photographs of the victim's dolls and stuffed animals, photographs of the victim's children and photographs and cards from the victim's wallet were not victim impact evidence); see \textit{also} \textit{State v. Whitfield}, 837 S.W.2d 503, 511 (Mo. 1992) (holding that admitting into evidence prosecutor's statements characterizing the victim as a "helpless paraplegic" was not plain error).
\item \textsuperscript{81} 886 S.W.2d 908, 927 (Mo. 1994).
\item \textsuperscript{82} \textit{Id.} at 916.
\item \textsuperscript{83} \textit{Id.} at 927 (father testified as to the tension and concern that the family felt about the trial). The court also upheld the introduction into evidence of a photograph of the victim and her daughter. \textit{Id.}
\item \textsuperscript{84} \textit{Id.} (citing \textit{Payne v. Tennessee}, 501 U.S. 808, 826-28 (1991)) (reasoning that the father's statements were not comments about the jury's verdict, but were evidence of the impact of the crime on the family).
\item \textsuperscript{85} \textit{Wise}, 879 S.W.2d at 515.
\item \textsuperscript{86} \textit{Id.} The Missouri Constitution provides in pertinent part "that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." \textit{MO CONST.}, Art. 1, § 21 (1945).
\item \textsuperscript{87} \textit{Wise}, 879 S.W.2d at 515.
\end{itemize}
The court unanimously rejected both of Wise's arguments and upheld his death sentence. First, the court noted that the Missouri Constitution's limitation on victim impact evidence is analogous to the Eighth Amendment of the United States Constitution, which, according to Payne, does not impose a per se bar against victim impact statements.

The court addressed Wise's second argument regarding cruel and unusual punishment with little analysis, affirming that under both the United States and Missouri constitutions, victim impact evidence may be relevant and admissible at the penalty stage of the trial. The court did, however, recognize that victim impact evidence violates the Eighth Amendment if it is, "so unduly prejudicial that it renders the trial fundamentally unfair[.]" but did not find undue prejudice in this case. The court noted that:

The prosecutor's references to victim impact here were brief, light, and general. The prosecutor did not delve into the victim's personal characteristics or relative worth. No family members testified as to their loss or emotional distress. The statements did not remove reason from the sentencing process, nor did they inject caprice and emotion. The trial court did not abuse its discretion in overruling appellant's objections.

V. COMMENT

Victim impact evidence from a victim's family is a relatively new and controversial concept in criminal law. Regardingly, state statutes restrict victim impact statements in various ways.

Arguably, victim impact statements inject an arbitrary factor in deciding whether to impose the death penalty. Opponents of victim impact

88. Id. at 525.
89. Id. at 515 (citing Payne v. Tennessee, 501 U.S. 808 (1991)).
90. Id. at 515-16 ("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.") (quoting Payne v. Tennessee, 501 U.S. 808 (1991)) (citing State v. Whitfield, 837 S.W.2d 503, 511 (Mo. 1992)).
91. Id. at 516 (citing Payne, 501 U.S. at 825).
92. The prosecutor never actually read victim impact statements, however, because the defense objected on the basis of Booth and Gathers. State v. Wise, No. 583113 (St. Louis Circuit Court, St. Louis County, Div. 19, March 15, 1991).
93. Wise, 879 S.W.2d at 516.
94. See supra notes 75-77 for examples of statutory restrictions on victim impact statements.
95. Alaka, supra note 6, at 582; see also Payne, 501 U.S. at 86 (Stevens, J., dissenting).
statements in capital punishment cases also contend that they impossibly inflame and prejudice the jury.\textsuperscript{96} In addition, the reliability of victim impact statements is suspect because victim impact statements are difficult to verify and impossible for the defendant to rebut.\textsuperscript{97} A defendant’s sentence should solely be based on the severity of the crime and the defendant's record, not on the emotional impact of the victim's family.\textsuperscript{98}

Proponents of victim impact statements contend that the impact of the crime should be a factor in determining a defendant’s sentence. Accordingly, proponents maintain that presentation of victim impact statements during sentencing appropriately allows the sentencer to reflect upon and account for the effect of the defendant’s crime on the victim’s family. Victim impact statements are also important because prosecutors are not as apt as victims to convey the impact of the crime to the sentencer. Although the prosecution uses the victim’s testimony to put on its case, the interests of the prosecution and of the victim are not congruent. The prosecution mainly strives for a conviction. In contrast, a victim, or a victim’s family, seek retribution, and a means of coping and closure. Thus, because victim impact statements are the only method by which to convey the crime’s impact on the victim, or the victim’s family, they are essential in admitting the crime’s impact on the record.\textsuperscript{99} Allowing the victim a voice in the proceeding also creates a sense of fairness. Foremost, victim impact statements vindicate victims’ rights.

Although they are diametrically opposed, both defendants’ and victims’ rights can be safeguarded. If victim impact statements are read after the sentencing stage of the trial, both defendants’ and victims’ rights remain intact. Accordingly, the risk of arbitrary sentencing would be eliminated, and victims would still be a part of the criminal proceeding by having voiced their feelings to the defendant, the court and the public. Victim impact statements should be a part of the defendant’s sentence, not a factor in deciding an appropriate sentence.\textsuperscript{100}

\textsuperscript{96} Fahey, supra note 4, at 220.
\textsuperscript{98} Id.
\textsuperscript{99} Martha Hoffman, Victim Impact Statement, 10 WESTERN ST. UNIV. L. REV. 221, 227 (1983) (victim impact statements help victims regain control over their lives, and allow victims to "get [the] ordeal off [of their] chest[s] and onto the record").
\textsuperscript{100} See, e.g., State v. Rasinski, 464 N.W.2d 517, 525 (Minn. Ct. App. 1991) (court imposed probationary requirement that the defendant: (1) read victim impact statements submitted by the victims’ families; and (2) write a letter of apology to the families).
VI. CONCLUSION

The Supreme Court pronounced that victim impact statements were cruel and unusual punishment in 1987.\textsuperscript{101} The Court affirmed that victim impact statements were cruel and unusual in 1989.\textsuperscript{102} Currently, however, after the Supreme Court reversed its stance in 1991,\textsuperscript{103} almost all states allow the jury to consider victim impact statements during sentencing in capital punishment trials.\textsuperscript{104} Curiously, victim impact statements, once thought to be cruel and unusual punishment, are widely used in our criminal justice system to sentence criminals.

The criminal justice system could better utilize victim impact statements by requiring the defendant to listen to the statements as part of his or her sentence. The system would thereby preserve a place for victim impact in the courtroom, and safeguard against cruel and unusual punishment.

CARRIE L. MULHOLLAND

\begin{itemize}
\item \textsuperscript{101} Booth, 482 U.S. at 509.
\item \textsuperscript{102} Gathers, 490 U.S. at 811.
\item \textsuperscript{103} Payne, 501 U.S. at 830.
\item \textsuperscript{104} See infra note 74 and accompanying text.
\end{itemize}