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Victim Law Article
Originally Appeared in the 13th Edition of
NCVLI's *Newsletter of Crime Victim Law**
2011

LEGAL PUBLICATIONS PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL

Why Sentencing Recommendations in Victim Allocution are Permissible and Desirable*

Balancing competing interests and equities in deciding a sentence can require a Solomon-like wisdom—and even Solomon heard from both sides. – a victim.[1]

Crime victims are the persons most affected by the underlying crime and they should have an unfettered voice at sentencing. To be unfettered, the victims' right must be the right to be personally heard by the sentencing body before sentence is imposed and it must allow them to speak about their victimization, the harm the crime inflicted, and the appropriate sentence. Although the right of crime victims to deliver a victim impact statement is well-accepted in this country, recognition and acceptance that this right includes the right to deliver a sentencing recommendation—either for mercy or aggravation—is not yet well-accepted due largely to confusion among courts caused by United States Supreme Court precedent. This article provides a brief overview of why sentencing recommendations in victim allocution are permissible and desirable.

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I. Brief History of Victim Input at Sentencing

Commentators have identified at least four purposes underlying a victim's right to be heard at sentencing—regardless of whether it is a capital or noncapital case: 1) providing information to the sentencing body; 2) benefitting and empowering the victim; 3) explaining the crime's harm to the defendant; and 4) improving the perceived fairness of sentencing.[2] In 1982, in part as a response to the recognition of these important purposes, President Reagan's Task Force on Victims of Crime concluded, among other things, that "[v]ictims, no less than defendants, are entitled to have their views considered" at sentencing, and called for legislation requiring victim impact statements and for inclusion of victim input into presentence reports.[3] In the aftermath of this call to action, all states passed legislation guaranteeing victims' rights; of these, thirty-nine explicitly provide victims with a constitutional or statutory right to be heard at sentencing,[4] and others have rights that afford the victim the right to be heard at "critical" proceedings or "when relevant," which necessarily includes the right to be heard at sentencing.[5] Similarly, on the federal level, the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(a)(4), provides a crime victim with "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."

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In 1991, the constitutionality of victim impact statements was upheld by the United States Supreme Court in *Payne v. Tennessee*.[6] The cornerstone of the Court's decision in *Payne* was fairness. Quoting the Tennessee Supreme Court approvingly, the Court said:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.[7]

In light of this, the Court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar."[8] With this decision, the Court overruled its decision from four years earlier in *Booth v. Maryland*.[9]

II. Law Governing Content of Victim Impact Statements

Following *Payne*, debate over the propriety of victim impact statements has largely been resolved such that victim participation at sentencing is generally well-accepted. There are, however, unresolved issues that continue to impinge upon a victim's unfettered right to be heard at sentencing.[10] Among these issues is the scope of permissible content of a victim's statement.

Case law and commentators alike recognize three categories of content in victim impact statements: 1) information relating to the victim and the impact of the crime on the victim and the victim's family; 2) characterizations and opinions about the crime and the defendant; and 3) characterizations and opinions about the appropriate sentence. It is the final category—characterizations and opinions regarding the appropriate sentence—that is most contentious. Although there is consensus among courts nationwide that, with regard to non-capital cases, victims may include information in all three categories in their victim impact statements,[11] courts are split regarding whether sentencing recommendations are permissible in capital cases.

As noted above, the *Payne* Court overruled *Booth*, holding there was no *per se* constitutional bar to victim impact statements. In so ruling, however, it limited the scope of its decision with the following footnote:

> Our holding today is limited to the holdings of *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and *the appropriate sentence* violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.[12]

Unfortunately, this footnote has confused rather than clarified the legal landscape. This is true because the Court's description of the facts in *Booth* are, in fact, misstatements. The Court in *Booth* was not presented with and did not address victims' characterizations about the appropriate sentence.[13] Thus, *Payne* ascribed to *Booth* a category of victim information that was not present in the case. The result of this mischaracterization is that the scope of what *Payne* overruled and what constitutional bars may exist to victim impact statements is far from clear.[14]

Admittedly, most courts that have considered the issue have determined that sentencing recommendations in capital cases—whether the victim requests leniency or the most severe sentence—are prohibited by Supreme Court

jurisprudence.[15] The flaw in the reasoning of these courts' decisions, however, is that they do not critically analyze the assertion that *Booth* considered sentencing recommendations, or that *Payne* left intact a *per se* bar against victim sentencing recommendations. Among the courts that have so ruled are the Courts of Appeals for the Tenth Circuit,[16] the Eighth Circuit,[17] the Fifth Circuit,[18] and the Fourth Circuit[19] in dictum, and the highest courts of Alabama,[20] Maryland,[21] New Jersey,[22] Ohio,[23] Tennessee,[24] Utah,[25] Virginia,[26] and Washington.[27] Although the Arizona Supreme Court did question the assertion that *Booth* erected a *per se* bar against sentencing recommendations, the court ultimately agreed with the other jurisdictions in holding that sentencing recommendations in capital cases are impermissible.[28]

In contrast, the Oklahoma Court of Criminal Appeals, the State's criminal court of last resort, has reached the opposite conclusion. This court has consistently permitted victims to recommend the appropriate sentence in capital cases, without Supreme Court reversal.[29]

III. Addressing Common Objections to Victim Sentencing Recommendations

There are a number of objections to victim impact statements that are made regardless of whether the case is a capital case or not, with the additional objection in capital cases being a vague "death is different" statement. Each objection to a victim speaking at sentencing, including to a victim giving a sentencing recommendation, can be overcome. Detailing all possible objections and the best responses is beyond the scope of this article; however, a few key points should be made.

First, with regard to the general comment that "death is different," although it is true that in a capital case defendant's life is at issue and that is a solemn reality, the saliency of this difference in the context of sentencing recommendations is difficult to determine. As noted earlier in this article, no court has held that the Constitution prohibits victims from opining on the appropriate sentence in non-capital cases.[30] Further, in capital cases in most jurisdictions, defendants enjoy a right of allocution that permits not only the defendant, but also his family, to recommend a sentence to the jury.[31] Consequently, an argument against an injection of emotion into the sentencing determination as grounds for exclusion of victim input only—and in capital cases only—seems unsustainable.

Ultimately, any constitutional rationale for excluding certain types of victim impact information in capital cases would turn on the possibility of prejudice to the jury.[32] But social science research "contradicts the assumption that jurors are readily influenced, much less prejudiced, by participant recommendations."[33] Moreover, the evidentiary rules, under which "courts routinely exclude evidence that is unduly inflammatory," can contain any risk that a victim's sentencing recommendation to a capital jury would be unduly prejudicial.[34] Similarly, the Due Process Clause protects a defendant's rights by controlling the risk of prejudice in cases where "a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair."[35]

IV. Conclusion

As Justice Cardozo said in *Snyder v. Massachusetts*: "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[36] By overwhelmingly passing legislation allowing victims to speak freely at sentencing, states across the country recognized that to keep the balance true, victims—who are most affected by the underlying crime—should, like defendants, have an unfettered voice at sentencing. The Ninth Circuit Court of Appeals, when interpreting the CVRA's right of a victim to be heard at sentencing, has also incorporated this concept of fairness in noting that a victim has an "indefeasible right to speak, similar to that of the defendant . . . ."[37] In light of the fact that Supreme Court jurisprudence does not establish a constitutional bar to the victims' voice including a sentencing recommendation, and to ensure that

the victims' right to be heard fulfills its purposes and is akin to defendant's, and to ensure that the victims' right to be heard fulfills its purposes and is akin to defendant's, victims should be allowed to comment on the appropriate sentence.

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* This text has been adapted by Meg Garvin from NCVLI's amicus curiae brief submitted in support of the State of Utah's petition for certiorari to the United States Supreme Court in the case of *Utah v. Ott*, Case No. 10-490—authored by Professor Paul Cassell, J.D., Alison Wilkinson, J.D., and Meg Garvin—as well as from presentations by NCVLI.

[1] President's Task Force on Victims of Crime, Final Report (1982), *available at* http://www.ovc.gov/publications/presdntstskforcrprt/welcome.html.

[2] *See generally* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 Ohio St. J. Crim. Law 611, 619-25 (2009); *see also* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 Yale L. & Pol'y Rev. 431, 444 (2008). When comparing the historical reasons for defendant allocution with the purposes underlying a victim's right to be heard at sentencing, the purposes are remarkably similar. As Professor Giannini notes, defendants' right of allocution has long been a part of criminal justice, stemming originally from a practice under which defendants were not guaranteed the right to counsel and allocution was the sole means by which they could personally present the court with legal defenses or mitigating evidence. *Id.* at 458-60. In commenting on defendant allocution in *Green v. United States*, the Supreme Court recognized its validity even though defendants now have counsel, stating: "[W]e see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." 365 U.S. 301, 304 (1961).

[3] President's Task Force on Victims of Crime, Final Report (1982), *supra* note 1.

[4] *See, e.g.,* Ala. Const. amend. 557, Ala. Code § 15-23-74; Alaska Const. art. 2, § 24; Ariz. Const. art. 2, § 2.1(A)(4); Cal. Penal Code § 679.02(a)(3); Colo. Const. art. II, § 16a, Colo. Rev. Stat. § 24-4.1-302.5(10(g); Conn. Const. art. 1, § (8)(b)(8); Fla. Const. art. I, § 16, Fla. Stat. § 960.01(1)(k); Idaho Const. art. 1, § 22(6); Ill. Const. art. 1, § 8.1(a)(4); Ind. Code Ann. § 35-40-5-5; Iowa Code § 915.21(1)(b); Kan. Const. art. 15, § 15(a); La. Const. art. I, § 25, La. Rev. Stat. Ann. § 1842(2); Me. Rev. Stat. Ann. tit. 17-A, § 1174(1)(A); Md. Const. Decl. of Rights, art. 7(b), Md. Code Ann., Crim. Proc. § 11-403; Mass. Gen. Laws ch. 258B, § 3(p); Mich. Const. art. I, § 24(1); Minn. Stat. § 611A.038(a); Miss. Const. art. 3, § 26A(1), Miss. Code Ann. § 99-43-33; Mo. Const. art. I, § 32(1)(2); Neb. Const. art. I, § 28(1); Nev. Const. art. 1, § 8(2)(c); N.H. Rev. Stat. Ann. § 21-M:8-k(I)(p); N.J. Stat. Ann. § 52:4B-36(n); N.M. Const. art. II, § 24(A)(7); N.C. Const. art. 1, § 37(1)(b); Ohio Rev. Code § 2930.14(A); Okla. Const. art. II, § 34(A); Pa. Const. Stat. § 11.201(5); R.I. Gen. Laws § 12-28-3(11); S.C. Const. art. I, § 24(A)(5); S.D. Codified Laws § 23A-28C-1(8); Utah Const. art. I, § 28(1)(b), Utah Code Ann. § 77-38-4(1); Vt. Stat Ann. tit. 13, § 5321(a)(2); Va. Const. art. I, § 8-A(3); Wash. Const. art. 2, § 35; Wis. Const. art. I, § 9(m); Wyo. Stat. Ann. § 14-6-502(a)(xvii).

[5] *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 299-305 (2003) (collecting state constitutional and statutory laws that afford victims the rights to "be heard," to "speak," or to "make a statement," either at sentencing, when relevant, or at critical stage proceedings, and arguing that these laws create a right to be heard at sentencing).

[6] 501 U.S. 808 (1991).

[7] *Id.* at 826 (*quoting State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990)).

[8] *Id.* at 822.

[9] 482 U.S. 496 (1987).

[10] Although a thorough examination of most of these issues is beyond the scope of this article, a brief mention is appropriate of the debate surrounding the range of permissible media for conveying victim impact statements?for example, whether victims may use PowerPoint, video, and audio presentations of varying kinds. In 2008, the Supreme Court denied certiorari in two cases that raised questions related to these issues. In one of these cases, Although

a thorough examination of most of these issues is beyond the scope of this article, a brief mention is appropriate of the debate surrounding the range of permissible media for conveying victim impact statements—for example, whether victims may use PowerPoint, video, and audio presentations of varying kinds. In 2008, the Supreme Court denied certiorari in two cases that raised questions related to these issues. In one of these cases, *Kelly v. California*, 129 S.Ct. 564 (2008), two petitioning murderers asked the Court to review the admission of victim impact videos into evidence at the sentencing phase of their trials. Although the full Court denied certiorari, two members—Justices Souter and Stevens—dissented from the denial of certiorari. Justice Stevens explained that he would have granted review because: "In the years since *Payne* was decided, this Court has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, 'unduly prejudicial' forms." *Id.* at 566.

[11] Beloof, *supra* note 5, at 289 n.51 ("Every state ruling on the constitutionality of victim recommendations in noncapital cases has held that trial court judges can hear all three types of impact evidence, including sentencing recommendations that are in the public interest.").

[12] *Payne*, 501 U.S. at 830 n.2 (emphasis added). *See also id.* at 833 (O'Connor, J., concurring) (*"Booth* also addressed another kind of victim impact evidence—opinions of the victim's family about the crime, the defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial.").

[13] As one court has noted: "The victims' statements in *Booth* only indirectly hinted at the punishment the victims were recommending. Indeed the only statements regarding sentencing were that the victims did not 'think anyone should be able to do something like [the murders at issue] and get away with it' and that 'the people who did this could never be rehabilitated.' *Booth*, 482 U.S. at 508. No specific recommendations regarding sentencing were made. Thus the facts in *Booth* make it unclear whether the Court in that case considered the effect of the Eighth Amendment on opinions regarding sentencing." *Lynn v. Reinstein*, 68 P.3d 412, 416 n.4 (Ariz. 2003).

[14] *See* Elijah Lawrence, *Victim Opinion Statements: Providing Justice for Grieving Families*, 12 J.L. & Fam. Studies 511, 522 (2010) ("The split in authority in the lower courts is apparent. This state of confusion is the result of the U.S. Supreme Court's ambiguous holding in *Booth*, followed by its obfuscating opinion in *Payne*. Some courts are construing the Court's ruling in *Payne* to mean the Eighth Amendment creates a per se bar on the admission of victim opinion statements in capital cases."); Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. Rev. 517, 528 (2000) (reviewing authorities and noting that "it is readily apparent that marked uncertainty now persists over the extent, and indeed the continued existence, of the prohibition [against victim sentencing recommendations] ostensibly established in *Booth*").

[15] The federal right to be heard found in the CVRA has yet to be interpreted on this issue, although the legislative history makes clear that Congress intended this right to include the right to give a sentencing recommendation. *See* 150 Cong. Rec. S2468 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("When a victim invokes this right [to be heard] during plea and sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact-the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations."); *see also id.* (statement of Sen. Feinstein) ("The victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused.").

[16] *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002) (quoting *Payne*, 501 U.S. at 830 n.2). *See also Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002).

[17] *See Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000) (dictum).

[18] *See Woods v. Johnson*, 75 F.3d 1017, 1037-38 (5th Cir. 1996) (dictum).

[19] *See Ivey v. Catoe*, 36 Fed. Appx. 718, 725-26 (4th Cir. 2000) *cert. denied*, 537 U.S. 952 (2002) (dictum).

[20] *See Ex parte McWilliams*, 640 So. 2d 1015, 1017 (Ala. 1993).

[21] *See Ware v. State*, 759 A.2d 764, 783-86 (Md.), *cert. denied*, 531 U.S. 1115 (2000).

[22] *See State v. Koskovich*, 776 A.2d 144, 177 (N.J. 2001).

[23] *See State v. Fautenberry*, 650 N.E.2d 878, 882 (Ohio), *cert. denied*, 516 U.S. 996 (1995).

[24] *See State v. Middlebrooks*, 995 S.W.2d 550, 558 (Tenn. 1999).

[25] *See State v. Ott*, 247 P.3d 344 (Utah 2010).

[26] *See Beck v. Commonwealth*, 484 S.E.2d 898, 903-04 (Va. 1997).

[27] *See State v. Pirtle*, 904 P.2d 245, 269 (Wash. 1995), *cert. denied*, 518 U.S. 1026 (1996).

[28] *Lynn v. Reinstein*, 68 P.3d 412, 416 n.4 (Ariz. 2003).

[29] *See Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 985 (2003); *Turrentine v. State*, 965 P.2d 955, 980 (Okla. Crim. App. 1997), *cert. denied*, 525 U.S. 1057 (1998); *Ledbetter v. State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997); *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997).

[30] Beloof, *supra* note 5, at 289 n.51.

[31] In the vast majority of states "courts regularly allow 'pleas for mercy' by defense witnesses. Allocution, when the capital defendant himself addresses the sentencing authority on the question of death, inevitably bears a close similarity as well." Logan, *supra* note 14, at 545-46.

[32] *Id.* at 526 n.60.

[33] *Id.* (citing Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 Cornell L. Rev. 306, 340 (2003)).

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

[35] *Id.*

[36] 291 U.S. 97, 122 (1934).

[37] *Kenna v. U.S. Dist. Court,* 435 F.3d 1011, 1016 (9th Cir. 2006).

Publication of this article was originally supported by Grant No. 2008-DD-BX-K001, awarded by the Office for Victims of Crime (OVC), Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions expressed in this newsletter are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice. OVC is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the National Institute of Justice, and the Office of Juvenile Justice and Delinquency Prevention.

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