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Due Process Limitations on Victim Impact Evidence

Matthew L. Engle

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I. Introduction

There is perhaps no more damaging type of testimony at a sentencing hearing than that of a surviving parent, child, sibling or spouse describing the senses of grief and loss that inevitably result from the sudden and violent loss of a loved one. Victim impact testimony is not only highly emotional and visceral by nature; it is also virtually unimpeachable and irrefutable.[1] Thus, a capital defense attorney who is confronted with victim impact testimony finds herself in a no-win situation. She may choose simply to ignore the testimony and hope that its effect on the fact-finder will not be too prejudicial.[2] Otherwise, she is left with the unpalatable alternative of impugning the decedent's character and attempting to minimize the loss felt by the survivors.

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* J.D. candidate, May 2001, Washington & Lee University School of Law; B.A., Cleveland State University. Thanks to my parents, my sister and especially to my wife, Victoria. Thanks also to Professor Roger D. Groot and all of the members of the Virginia Capital Case Clearinghouse.

1. For example, in 1995 Judge Michael Luttig of the United States Court of Appeals for the Fourth Circuit testified in Texas at the sentencing phase of Napolean Beazley's murder trial. Beazley had been convicted of the murder of Judge Luttig's father, John. In his testimony, Judge Luttig told the Texas court that his father had been "a man of great integrity," the Judge's "hero" and "best friend." Judge Luttig also requested that Beazley be sentenced to death. Laura LaFay, *Prejudice From the Bench?*, ROANOKE TIMES & WORLD NEWS, Nov. 10, 1996, at B-1, *available in* 1996 WL 6060065. Any challenge to this testimony could only offend the fact-finder (Didn't your father really lack integrity, Judge Luttig? Isn't it true that he was not, in fact, your hero?). Similarly, it is difficult to imagine any evidence that could be offered to refute this testimony without seriously alienating the judge or jury and increasing the grief of the survivor.

2. It is, of course, possible and highly desirable for defense attorneys to take steps to minimize the prejudicial effect of victim impact testimony. These worthwhile tactical considerations are outside the scope of this article, which instead focuses upon limiting or excluding this testimony. For suggestions on how to use voir dire and jury instructions to neutralize victim impact testimony, see Michael Ogul, *Dealing with Victim Impact Evidence (Part 2)*, THE CHAMPION, Aug./Sept. 2000, at 42.

Until 1991, the Eighth and Fourteenth Amendments to the United States Constitution prohibited the admission of victim impact testimony at the sentencing phase of a capital murder trial.[3] However, in *Payne v. Tennessee*[4] the United States Supreme Court reversed itself and 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."[5] In its own post-*Payne* jurisprudence, the Supreme Court of Virginia has never seriously treated the admissibility of victim impact testimony. Instead, in a series of decisions notable for their uniform want of analysis, the court has flatly declared that victim impact testimony is admissible because *Payne* makes it so.[6] Furthermore, the Virginia General Assembly has endorsed the admission of victim impact testimony at capital sentencing hearings.[7]

The purpose of this article is to debunk the myth that *Payne* abolished all constitutional barriers to the admission of victim impact testimony. In fact, every Justice in the *Payne* majority recognized a constitutional limit to the use of this type of evidence.[8] Accordingly, this article will suggest that

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3. Booth v. Maryland, 482 U.S. 496, 509 (1987) (holding that the admission of victim impact testimony at the sentencing phase of a capital murder trial violates the Eighth Amendment), *overruled by* Payne v. Tennessee, 501 U.S. 808, 830 (1991). The complete text of the Eighth Amendment states as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The protection against cruel and unusual punishments has been incorporated to the states through the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 675 (1962) (stating that the Eighth Amendment "is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment"); *see also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (stating that "[t]he Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner").

4. 501 U.S. 808 (1991).

5. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

6. *See* Beck v. Commonwealth, 484 S.E.2d 898, 904 (Va. 1997) (holding that the admissibility of victim impact evidence "is limited only by the relevance of such evidence to show the impact of the defendant's actions"); *see also* Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994) (holding that "victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia").

7. *See* VA. CODE ANN. § 19.2-264.4(A1) (Michie 2000). Section 19.2-264.4(A1) provides that in a capital sentencing hearing "the court shall permit the victim, as defined in § 19.2-11.01, upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim." *Id.*

8. *See Payne*, 501 U.S. at 825. Justice Rehnquist wrote for the majority that "[i]n 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 mecha-

defense attorneys should continue to seek to exclude victim impact testimony on the basis of fundamental fairness. The contours of the Virginia capital sentencing scheme will be explored in some detail to bolster the argument that victim impact testimony is not relevant to any of the aggravating or mitigating factors that the jury will consider. The prejudicial effect of this evidence will be emphasized. Perhaps most importantly, this article will closely examine the testimony of which *Payne* approved, and will argue that most victim impact testimony is less relevant and more prejudicial than that of *Payne*. By accentuating these points it may be possible to curtail, if not to prevent, the Commonwealth's use of victim impact testimony in capital sentencing hearings.

II. Payne v. Tennessee

A. The (Actual) Holding

In order to appreciate fully the changes brought about by *Payne*, it is necessary to consider briefly the state of the constitutional law with regard to victim impact evidence immediately prior to that decision. In 1986, the United States Supreme Court granted certiorari on a direct appeal from a Maryland death sentence.[9] John Booth ("Booth") had been convicted of the first-degree murders of Irvin and Rose Bronstein.[10] In accordance with Maryland law, a pre-sentence report containing a victim impact statement was prepared and presented to the jury at the sentencing hearing.[11] The statement, which was read to the jury by the prosecutor, was based upon interviews with the decedents' son, daughter, son-in-law, and granddaughter.[12] The statement recited the decedents' admirable personal qualities and

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nism for relief." *Id.* In addition, Justice O'Connor, writing for three Justices, stated "[w]e do not hold today that victim impact evidence must be admitted, *or even that it should be admitted.* We hold merely that if a State decides to permit consideration of this evidence, the Eighth Amendment erects no per se bar." *Id.* at 831 (O'Connor, J., concurring) (emphasis added) (internal quotation marks omitted). Finally, Justice Souter wrote separately and emphasized "the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal." *Id.* at 836 (Souter, J., concurring).

9. *See* Booth v. Maryland, 479 U.S. 882 (1986) (granting petition for writ of certiorari).

10. Booth v. Maryland, 482 U.S. 496, 498 (1987). The evidence showed that Booth and his co-defendant, Willie Reid, had broken into the Bronsteins' home and stolen money in order to buy heroin. Because Booth knew that the Bronsteins could identify him, the co-defendants bound and gagged the elderly couple and stabbed them to death with a kitchen knife. The Bronsteins' son discovered their bodies two days after the attack. *Id.* at 497-98.

11. *Id.* at 498.

12. *Id.* at 499.

described the emotional and personal problems the family members faced after the crimes.[13] In addition, the statement contained the daughter's assertion that she could never forgive Booth and her opinion that he could never be rehabilitated.[14]

The Court reversed Booth's death sentence and held that the use of the victim impact statement violated his Eighth Amendment right to be free from cruel and unusual punishment.[15] The Court based its holding on two findings. First, the Court found that the evidence violated the Eighth Amendment requirement that a capital sentencing jury focus on the defendant as a "uniquely individual human being."[16] The Court noted that the "focus of a [victim impact statement] . . . is not on the defendant, but on the character and reputation of the victim and the effect on his family."[17] Because these factors are "wholly unrelated" to a defendant's moral blameworthiness, the Court concluded that the evidence would impermissibly divert the jury's attention away from its constitutionally mandated inquiry into the defendant's background and record.[18] Second, the Court found that the evidence violated the Eighth Amendment because it failed to provide a "principled way" for juries to determine whether to impose a sentence of death.[19] Instead, the Court opined that the introduction of this evidence would lead to a disproportionate number of death sentences in cases in which "a family is willing and able to express its grief," which the Court characterized as an "arbitrary" basis for the imposition of the death penalty.[20]

Four years later, the Supreme Court decided to hear *Payne v. Tennessee*. In that case, Pervis Tyrone Payne ("Payne") was convicted of the first-degree murders of twenty-eight-year-old Charisse Christopher ("Christopher") and her two-year-old daughter, Lacie.[21] In addition, Payne was convicted of assaulting Christopher's three-year-old son, Nicholas, with the intent to commit first-degree murder.[22] At the sentencing hearing, the State introduced the testimony of Christopher's mother, Mary Zvolanek, who de-

13. *Id.* at 499-500.

14. *Id.* at 500.

15. *Id.* at 509; *see* U.S. CONST. amend. VIII.

16. *Booth*, 482 U.S. at 504 (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

17. *Id.* at 504.

18. *Id.* at 504-05.

19. *Id.* at 506 (citing Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (plurality opinion)).

20. *Id.* at 505.

21. Payne v. Tennessee, 501 U.S. 808, 811 (1991).

22. *Id.*

scribed how Nicholas had been affected by the murders of his mother and sister.[23] Furthermore, during closing arguments, the prosecutor argued that the jury should impose a death sentence "for Nicholas" and further described the impact that the killings would have on his life.[24] The jury sentenced Payne to death on both of the murder counts.[25] After the Supreme Court of Tennessee affirmed the death sentences, the United States Supreme Court granted certiorari "to reconsider [the] holdings [of] Booth and Gathers that the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family."[26]

The *Payne* majority considered both of the bases upon which *Booth* had invalidated victim impact testimony and rejected each in turn. The Court tacitly conceded that victim impact testimony is not relevant to a defendant's moral blameworthiness, but held that it is relevant on another theory.[27] Victim impact evidence, according to the Court, is "designed to

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23. *Id.* at 814-15. Mary Zvolanek testified as follows:
> [Nicholas] cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.

Id. This was the entirety of the victim impact testimony in *Payne*.

24. *Id.* at 815.

25. *Id.* at 816.

26. *Id.* at 817. In addition to overruling *Booth*, *Payne* overruled *South Carolina v. Gathers*, which had extended the Eighth Amendment prohibition of victim impact evidence to prosecutorial argument regarding the personal qualities of a homicide victim. South Carolina v. Gathers, 490 U.S. 805, 811 (1989) (stating "[w]hile in this case it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the statement is indistinguishable in any relevant respect from that in Booth"), *overruled by Payne*, 501 U.S. at 830. While this article focuses solely on the admissibility of victim impact evidence, it assumes that due process limits prosecutorial argument to precisely the same extent that it limits evidence. *See Payne*, 501 U.S. at 831 (O'Connor, J., concurring) (stating "[i]f in a particular case, a witness' testimony *or a prosecutor's remark* so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment") (emphasis added).

27. *Payne*, 501 U.S. at 819. In fact, the Court (correctly) acknowledged that moral blameworthiness itself is often not a factor of primary relevance to sentencing. In support of this proposition, the Court gave the following example: "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Id.* (quoting *Booth*, 482 U.S. at 519 (Scalia, J., dissenting)). Thus, the Court reasoned that factors other than moral blameworthiness must account for sentence variances. Nonetheless, apparently unpersuaded by its own logic, the Court later announced that it was "now of the view that a State may properly conclude that for the jury to assess meaningfully

portray for the sentencing authority the actual harm caused by a particular crime."[28] Citing the Book of Exodus and a legal treatise on white collar crime, the Court held that the harm caused by a crime is relevant to sentencing "as a prerequisite to criminal sanction" and "as a standard for determining the severity of the sentence that will be meted out."[29] In response to the second holding of *Booth*, that victim impact testimony violates the Eighth Amendment by leading to arbitrary death sentences based upon the surviving family's ability and willingness to express its grief, the Court flatly asserted that

> [a]s a general matter . . . victim impact evidence is not offered to encourage comparative judgments of this kind – for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. 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 resulting from his death might be.[30]

Finally, the Court found that the State has a right to present victim impact testimony in order to "counteract" the mitigating evidence presented by the defendant "by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."[31]

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the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Id.* at 825. Of course, these two positions are completely inconsistent with one another.

28. *Id.* at 821.

29. *Id.* at 820 (quoting STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 56 (1988)); *see also Exodus* 21:23-24 (Revised Standard Version) (stating "[i]f any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot"). The Court mistakenly cited to verses 22-23 of Exodus 21, and misquoted the Lex talionis as "[a]n eye for an eye, a tooth for a tooth." *Payne*, 501 U.S. at 819.

30. *Payne*, 501 U.S. at 823 (internal quotation omitted in original).

31. *Id.* at 825 (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)). If by "counteract" the Court meant "rebut," then it was surely mistaken. Victim impact evidence does not rebut mitigation evidence because it does not bear on the defendant's character, prior record, or the circumstances of the offense. *See* Lockett v. Ohio, 438 U.S. 586, 605 n.12 (1978) (recognizing the "traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense"). However, the dissenting opinion of Justice White in *Booth* indicates that "counteract" has a more abstract meaning. *Booth*, 482 U.S. at 516 (White, J., dissenting) (stating "[m]any if not most jurors . . . will look less favorably on a capital defendant when they appreciate the full extent of the harm he caused, including the harm to the victim's family"). If the constitutional mandate that capital punishment schemes must apply the law "in a manner that avoids the arbitrary

Thus, in its historical context, *Payne* is nothing more than a rejection of the two specific *Booth* holdings that victim impact evidence (1) impermissibly diverts the jury's attention away from the defendant's background, record, and moral blameworthiness and (2) results in arbitrary death sentences based upon the surviving family's ability and willingness to express its grief. In addition, *Payne* stands for the proposition that victim impact testimony is relevant as "another form or method of informing the sentencing authority about the specific harm caused by the crime in question."[32] However, *Payne* does not establish that the specific harm caused by the crime is relevant in any particular capital sentencing scheme,[33] nor does it foreclose the possibility of some constitutional limit on the presentation of victim impact evidence. In fact, the *Payne* Court specifically identified such a limitation.[34]

B. Payne *and Due Process as a Limitation on the Admissibility of Victim Impact Evidence*

In holding that victim impact evidence is not per se violative of the Eighth Amendment to the United States Constitution, the *Payne* majority specifically identified the Due Process Clause of the Fourteenth Amendment as the appropriate mechanism for relief.[35] Furthermore, both of the concurring opinions emphasized this point. Justice O'Connor wrote the following:

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and capricious infliction of the death penalty" means anything, it must mean that juries cannot recommend a death sentence simply because they do not "look favorably" upon the defendant. *See* Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (plurality opinion) (recognizing that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner"); *see also* Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, J.) (stating that a jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"); Furman v. Georgia, 408 U.S. 238, 313 (1972) (opinion of White, J.) (stating that a capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not").

32. *Payne*, 501 U.S. at 825.

33. *Id.* The Court emphasized that evidence of harm has "long [been] considered by sentencing authorities." *Id.* However, the Court did not discuss the Maryland capital sentencing scheme or state any theory of relevance to any aggravating or mitigating circumstance in that scheme.

34. *See infra* Part II(B).

35. *Payne*, 501 U.S. at 825 (stating "[i]n 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"); *see* U.S. CONST. amend. XIV.

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, the Eighth Amendment erects no per se bar. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.[36]

Also, Justice Souter referred to "the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object, and if necessary, appeal."[37] It is clear from these quotations that due process prohibits the introduction of victim impact evidence when the admission of this evidence would render the sentencing proceeding fundamentally unfair.[38]

Justice O'Connor's concurrence also demonstrated that the promise of review under the Due Process Clause was not merely illusory. Her opinion, which was joined by Justices White and Kennedy, contained due process analysis which provides a framework for challenges to victim impact evidence.[39] Two factors were central to Justice O'Connor's conclusion that the evidence admitted in *Payne* did not render the sentencing hearing fundamentally unfair. First, Justice O'Connor emphasized the brevity of the *Payne* testimony.

> The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they did not come home. I do not doubt that the jurors were moved by this testimony - who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime.[40]

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36. *Payne*, 501 U.S. at 831 (O'Connor, J., concurring) (internal quotation marks omitted).

37. *Id.* at 836 (Souter, J., concurring).

38. The Court cited *Darden v. Wainwright* as authority for its holding that due process provides relief for fundamental unfairness. *Id.* at 825 (citing Darden v. Wainwright, 477 U.S. 168, 179-83 (1986)). *Darden* stated that a prosecutor's argument is improper if it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). Thus, the standard for fundamental fairness is perfectly circular; due process prohibits the admission of evidence that would render the trial fundamentally unfair, which is established if the evidence is so unfair that it amounts to a violation of due process.

39. *See Payne*, 501 U.S. at 831-32 (O'Connor, J., concurring).

40. *Id.* (O'Connor, J., concurring); *see supra* note 23 (quoting entire text of the victim impact testimony in *Payne*).

Second, Justice O'Connor emphasized that the jury was already familiar with the impact of the offense upon Nicholas because of testimony that had been presented at the guilt phase of the trial:

> Charisse Christopher was stabbed 41 times with a butcher knife and bled to death; her 2-year-old daughter Lacie was killed by repeated thrusts of that same knife; and 3-year-old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived – only to witness the brutal murders of his mother and baby sister. In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by Mary Zvolanek's testimony deprived petitioner of due process.[41]

Thus, in Justice O'Connor's view, the fact that the victim impact testimony was redundant and cumulative decreased its prejudicial effect.[42] The substance of the victim impact testimony in *Payne* involved the impact of the killings on three-year-old Nicholas.[43] Because Nicholas had been physically present at the commission of the offense, the evidence presented at the guilt phase necessarily involved the impact of the crime upon him. Therefore, the jury's "unavoidable familiarity" with the facts of *Payne* made the victim impact testimony repetitive, lessening the danger of unfair prejudice to the defendant. Based upon these factors, Justice O'Connor concluded that "[*a*]*s to the victim impact evidence that was introduced*, its admission did not violate the Constitution."[44]

III. The Use of Victim Impact Evidence in Virginia Capital Sentencing Hearings

The greatest shortcoming of *Payne* is its failure to state the relevance of victim impact evidence to any particular capital sentencing scheme. While *Payne* did convincingly demonstrate that this type of evidence can be used to demonstrate the actual harm and loss that result from an offense, its analysis was incomplete in that it did not explain how harm or loss is relevant to any of the issues involved in a given capital sentencing system. In fact, a close examination of the Virginia capital sentencing procedure will

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41. *Payne*, 501 U.S. at 832 (O'Connor, J., concurring).

42. *Id.* (O'Connor, J., concurring).

43. *See supra* note 23 (quoting entire text of the victim impact testimony in *Payne*).

44. *Payne*, 501 U.S. at 833 (O'Connor, J., concurring) (emphasis added). Far from being a blanket endorsement for the admission of all victim impact evidence, this conclusion is clearly based upon the limited nature of the victim impact evidence admitted at Payne's sentencing hearing.

illustrate that evidence about the degree of harm or loss caused by the crime is not relevant to the determinations that the jury is required, by statute, to make.[45]

A. The Virginia Capital Sentencing Scheme

Once a defendant has been convicted of capital murder, a sentencing proceeding is held in order to determine whether he should be sentenced to life in prison or to death.[46] Section 19.2-264.2 of the Virginia Code states that:

> [i]n assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.[47]

Thus, before a defendant can be sentenced to death, the jury must find that the Commonwealth has proven either the future dangerousness aggravator or the vileness aggravator beyond a reasonable doubt.[48] It is not, however, mandatory for the jury to impose a death sentence once it has found that an aggravating circumstance has been proven; the jury must also consider the defendant's evidence in mitigation of the offense before making its sentence recommendation.[49]

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45. *See infra* Part III(A).

46. VA. CODE ANN. § 19.2-264.4(A) (Michie 2000); *see* VA. CODE ANN. § 18.2-31 (Michie 2000) (defining the offense of capital murder).

47. VA. CODE ANN. § 19.2-264.2 (Michie 2000).

48. *Id.*; *see also* VA. CODE ANN. § 19.2-264.4(C) (Michie 2000) (stating "[t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt" that one of the aggravating circumstances exist).

49. *See* VA. CODE ANN. § 19.2-264.4(B). The statutory verdict form also makes clear that the jury must consider the defendant's mitigation evidence before making a sentence recommendation:

> The verdict of the jury shall be in writing, and in one of the following forms:
> (1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly

1. Future Dangerousness

Future dangerousness is the less conceptually difficult of the aggravators. It is by definition a prospective inquiry; the jury is directed to look into the future and predict whether the defendant is likely to commit crimes of violence. The express language of section 19.2-264.2 permits the jury to consider "the past criminal record of convictions of the defendant" in making this inquiry.[50] Nonetheless, the Supreme Court of Virginia has held that the jury may consider not only convictions but also prior unadjudicated criminal acts,[51] the circumstances of the offense,[52] and the heinousness of the crime[53] when making the future dangerousness determination.[54] Thus, even

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vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), *and having considered the evidence in mitigation of the offense*, unanimously fix his punishment at death.

Signed ....., foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) *and having considered all of the evidence in aggravation and mitigation of such offense*, fix his punishment at imprisonment for life.

Signed ....., foreman"

VA. CODE ANN. § 19.2-264.4(D) (Michie 2000) (emphases added).

50. § 19.2-264.2.

51. *See* Walker v. Commonwealth, 515 S.E.2d 565, 571 (Va. 1999) (citing Pruett v. Commonwealth, 351 S.E.2d 1, 11-12 (Va. 1986)) (stating that "evidence of violent criminal conduct, whether or not adjudicated, is relevant to the determination of a defendant's future dangerousness because it has a tendency to show that the accused would commit criminal acts of violence in the future").

52. *See* Edmonds v. Commonwealth, 329 S.E.2d 807, 813 (Va. 1985). In so holding, the *Edmonds* court relied on the language of § 19.2-264.4(B) which states that the court should admit "any matter which the court deems relevant to sentence." *Id.* (quoting § 19.2-264.4(B)). However, the court's reliance on § 19.2-264.4(B) was misplaced; that section addresses the admissibility of evidence in *mitigation* of an offense, not evidence in *aggravation* of an offense.

53. *See* Quintana v. Commonwealth, 295 S.E.2d 643, 655 (Va. 1982) (stating "[a]s to the factor that defendant will pose a continuing serious threat to society, we need only refer again to the heinous circumstances surrounding this homicide, committed upon a 72-year-old woman during the course of a robbery").

54. The Supreme Court of Virginia has cited § 19.2-264.4(C) in allowing evidence about the circumstances of the crime to be used to prove future dangerousness. *See Edmonds*, 329 S.E.2d at 813. That section states that

> [t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or

though the Supreme Court of Virginia has been extraordinarily liberal and permissive with regard to the types of evidence it has allowed the Commonwealth to present as proof of future dangerousness, this evidence is limited to the defendant's background and his conduct during the commission of the offense.

2. *Vileness*

Vileness is the more abstract of the two aggravating circumstances. The Commonwealth must prove that the defendant's "conduct in committing the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."[55] The United States Supreme Court has given a qualified endorsement to this aggravator.[56] However, the Court has also recognized that the Constitution limits the use of vileness as an aggravator; in *Godfrey v. Georgia*,[57] the Supreme Court reversed a Georgia death sentence that was imposed pursuant to a jury finding of vileness because the Georgia courts had applied an unconstitutionally broad construction of this aggravator.[58] The Court wrote

> [i]n the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible or inhuman."

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aggravated battery to the victim.

VA. CODE ANN. § 19.2-264.4(C) (Michie 2000). To the extent that this section can be read to permit both the prior history of the defendant and the circumstances of the offense to be used to prove future dangerousness, it is flatly inconsistent with § 19.2-264.2, which permits the consideration of a defendant's history of convictions only to prove future dangerousness and the consideration of the circumstances of the offense only to prove vileness. *See supra* note 47 and accompanying text. In addition, the statutory verdict form codified at § 19.2-264.4(D) supports the argument that only the defendant's criminal history can be used to prove future dangerousness. *See supra* note 49. For further analysis, see Jason J. Solomon, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55, 59-66 (1999).

55. VA. CODE ANN. § 19.2-264.2 (Michie 2000).

56. *See* Gregg v. Georgia, 428 U.S. 153, 200-01 (1976) (opinion of Stewart, J.) (rejecting defendant's claim that an identical Georgia aggravator was "so broad and vague as to leave juries free to act as arbitrarily and capriciously as they wish in deciding whether to impose the death penalty" in violation of the Eighth and Fourteenth Amendments). The Court held that the Georgia aggravator, *as it had been interpreted and applied by the Georgia Supreme Court in that case*, was constitutional. *Id.* (stating that "there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction" of the vileness aggravator as to permit it to be imposed in any murder case).

57. 446 U.S. 420 (1980) (plurality opinion).

58. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion) (stating that "if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty").

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.[59]

Therefore, in order to be constitutionally adequate, the vileness aggravator must be applied in a manner that provides a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."[60] Distinguishing earlier Georgia cases that had applied the vileness aggravator constitutionally, the Court concluded that these opinions

> suggest[ed] that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the [vileness] aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third . . . was that the word, "torture," must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.[61]

Thus, *Godfrey* made clear that the Georgia vileness aggravator was constitutionally permissible only so long as it required proof of torture, depravity of mind, or aggravated battery to the victim. When the finding of vileness was not predicated on one of these underlying facts, the Supreme Court held that the aggravator was unconstitutionally vague.[62]

The Virginia vileness aggravator, like that of Georgia, is limited to cases in which the evidence proves torture, depravity of mind or aggravated battery to the victim.[63] Under *Godfrey*, the Commonwealth is not permitted to ignore the language of section 19.2-264.4(C), which limits the use of the vileness aggravator to cases involving at least one of these sub-elements. Thus, any evidence of vileness that does not address one of these sub-ele-

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59. *Id.*

60. *Id.* at 427 (citing *Gregg*, 428 U.S. at 188 (opinion of Stewart, J.) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring))).

61. *Id.* at 431 (discussing Blake v. State, 236 S.E.2d 637 (Ga. 1977); Harris v. State, 230 S.E.2d 1 (Ga. 1976)).

62. *Id.* at 428.

63. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie 2000). Torture, depravity of mind and aggravated battery to the victim will hereinafter be referred to in the aggregate as the vileness "sub-elements."

ments is prohibited by the Eighth Amendment to the United States Constitution.[64] Accordingly, the Eighth and Fourteenth Amendments to the United States Constitution prohibit the Virginia courts from disregarding the limitations that the General Assembly has placed upon the vileness aggravator. Therefore, evidence can only be relevant to a determination of vileness if it is relevant to one or more of the vileness sub-elements. For this reason, it is essential to understand the types of evidence that have been held to be probative of torture, depravity of mind, and aggravated battery to the victim.

a. Torture

Torture is the least used and consequently the least defined of the vileness sub-elements.[65] However, according to Black's Law Dictionary, torture is the infliction of "intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure."[66] Thus, torture involves proof that the defendant inflicted pain upon the victim during the commission of the capital offense and proof of his motivation for doing so.

One of the only cases in which the Supreme Court of Virginia has discussed the concept of torture is *Fitzgerald v. Commonwealth*.[67] In that case, the defendant raped and sodomized the victim before stabbing and slashing her to death as she begged him to "please just blow [her] brains out and get it over with."[68] In conducting its statutorily-mandated proportional-

64. *See supra* notes 55-62 and accompanying text; *see also Godfrey*, 446 U.S. at 428. Thus, while *Payne* establishes that the Eighth Amendment does not bar the use of victim impact evidence per se, it may bar the use of victim impact testimony to prove vileness. *Payne*, 501 U.S. at 827.

65. *See* Douglas R. Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77, 80 (1999). There are two possible explanations for the dearth of Virginia death sentences predicated upon findings of torture. The first is that no Virginia murder cases have involved torture. The second (and more likely) explanation is that Virginia prosecutors have avoided basing their vileness arguments on the torture sub-element. If prosecutors are in fact avoiding the torture sub-element, this could be because torture involves the goal-directed infliction of pain. In other words, the Commonwealth may have to prove that the defendant inflicted pain upon the victim for a specific purpose. *See infra* note 66 and accompanying text. Alternatively, it may be that Virginia prosecutors find it unnecessary to rely on the torture sub-element because the depravity of mind and aggravated battery sub-elements have been judicially expanded such that practically every conceivable killing now falls within them. *See* Banghart, *supra* at 81.

66. BLACK'S LAW DICTIONARY 1498 (7th ed. 1999).

67. Fitzgerald v. Commonwealth, 292 S.E.2d 798, 802 (Va. 1982) (holding that death penalty was not disproportionate to sentences imposed in similar capital cases).

68. *Id.*

ity review, the court stated that "[t]he systematic torturing of [Fitzgerald's] victim by slashing her with a machete and a knife, followed by comprehensive mutilation, reflected relentless, severe, and protracted physical abuse inflicted with brutality and ferocity of unparalleled atrociousness."[69] Thus, by considering only the defendant's conduct toward the victim during the commission of the offense, the court found that this conduct amounted to torture.[70] In light of *Fitzgerald*, it is not clear whether Virginia requires proof of the defendant's purpose in order to constitute torture or whether it is sufficient to show that the killing involved "physical abuse inflicted with brutality and ferocity of unparalleled atrociousness."[71] However, it is clear that the relevant inquiry is into the actions of the defendant toward the victim during the commission of the offense.

b. Depravity of Mind

Noting that "any act of murder arguably involves a 'depravity of mind' and an 'aggravated battery to the victim,'" the Supreme Court of Virginia has claimed to construe these sub-elements in a manner that prevents them from being "tortured to mean that proof of an intentional killing is all the proof necessary to establish [the vileness] circumstance."[72] Thus, the court has construed depravity of mind to mean "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."[73] Not surprisingly, the court's effort to put a limiting construction on the depravity of mind sub-element has failed. In *Poyner v. Commonwealth*,[74] the court expanded the depravity of mind sub-element to include proof of psychological torture.[75] Furthermore, the Supreme Court of Virginia's jurisprudence regarding the depravity of mind sub-element has been characterized by a relentless and unceasing expansion. It has become common for the Supreme Court of Virginia simply to recite the facts of a case, find depravity of mind, and affirm the death sentence.[76]

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69. *Id.* at 813.

70. *Id.*

71. *Id.*

72. Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978) (holding that Virginia's aggravating circumstances are not unconstitutionally vague).

73. *Id.*

74. . 329 S.E.2d 815 (Va. 1985).

75. Poyner v. Commonwealth, 329 S.E.2d 815, 832 (Va. 1985) (stating that psychological torture "falls squarely within the . . . definition" of depravity of mind).

76. *See, e.g.*, Sheppard v. Commonwealth, 464 S.E.2d 131 (Va. 1995). In that case, the court held that "[e]xecuting two persons in their home and then stripping their bodies of

Nonetheless, in spite of this ongoing expansion, it is clear that the depravity of mind aggravator is based entirely upon the defendant's mental state. Even in those cases in which the Supreme Court of Virginia has summarily affirmed a finding of depravity of mind after reciting the facts of a killing, the gruesome facts have apparently been used only to prove the defendant's "psychical debasement" or "moral turpitude," both of which involve his mental state at the time of the offense.[77]

c. Aggravated Battery to the Victim

Similarly, the Supreme Court of Virginia has attempted, and failed, to limit the aggravated battery sub-element to prevent it from becoming a catch-all aggravating circumstance. In *Smith v. Commonwealth*,[78] the court held that aggravated battery means "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder."[79] However, the Supreme Court of Virginia has interpreted this language to include instances of "overkill," where the defendant, for example, shoots the victim many times in rapid succession, ensuring that death is not prolonged,[80] and has indicated its willingness to find aggravated battery in instances where at least some of the acts constituting the battery did not occur until after the victim was already dead.[81] In spite of this expansion, it is well-established that an aggravated battery can only arise from the defendant's conduct toward the victim during the commission of the offense.

3. Evidence in Mitigation

Before a jury can recommend that a convicted capital murderer be sentenced to death, it is required by law to consider evidence offered by the defendant in mitigation of the offense.[82] Section 19.2-264.4(B) provides that

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jewelry and stealing their personal property manifestly demonstrates a depravity of mind." *Id.* at 139.

77. *See Smith*, 248 S.E.2d at 149.

78. 248 S.E.2d 135 (Va. 1978).

79. Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978) (holding that Virginia's aggravating circumstances are not unconstitutionally vague).

80. *See* Gray v. Commonwealth, 356 S.E.2d 157, 180 (Va. 1987) (finding an aggravated battery where the defendant shot the victim in the head several times in rapid succession).

81. *See* Whitely v. Commonwealth, 286 S.E.2d 162, 169 (Va. 1982) (declining to address defendant's argument that the death penalty cannot be imposed unless aggravated battery is proven by evidence of serious physical abuse before death).

82. VA. CODE ANN. § 19.2-264.4(B) (Michie 2000); *see also supra* note 49 and accompanying text.

> [e]vidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) mental retardation of the defendant.[83]

Thus, all mitigation evidence fits into one of two categories: either it addresses the defendant's background and character or it addresses the circumstances of the offense in a way that decreases the culpability of the defendant.[84] Unquestionably, the Commonwealth has the right to rebut the defendant's mitigation evidence. This rebuttal evidence might demonstrate that the defendant's character and background evidence was untrue, or that it was not sufficient to overcome the aggravating circumstances. In the alternative, this rebuttal evidence might involve the circumstances of the offense that make the defendant more deserving of a death sentence. However, if a defendant's opportunity to present mitigation evidence is limited to these two categories of evidence, then the Commonwealth cannot rebut the defendant's case in mitigation with evidence that does not fit into one of these two categories.[85]

B. Victim Impact Evidence in the Virginia Code

1. The Victim Impact Statutes

Prior to 1998, the Virginia Code contained two important provisions related to the use of victim impact evidence. These provisions permitted the

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83. § 19.2-264.4(B).

84. For this reason, the Supreme Court of Virginia has repeatedly held that evidence about the structure and security of prison life is not admissible *as mitigation evidence* because it does not address the defendant's background or character, or the circumstances of the offense. *See* Walker v. Commonwealth, 515 S.E.2d 565, 574 (Va. 1999); *see also* Cherrix v. Commonwealth, 513 S.E.2d 642, 653 (Va. 1999). For further analysis, see Solomon, *supra* note 54, at 71-73.

85. This fact makes Justice White's assertion in his *Booth* dissent that victim impact evidence is relevant to "counteract" a defendant's mitigation evidence all the more cryptic. *See supra* note 31 and accompanying text.

submission of victim impact statements to the court prior to the imposition of sentence. Section 19.2-264.5 provided that

> [w]hen the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate [sic] the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299 except that, notwithstanding any other provision of law, such reports shall in all cases contain a Victim Impact Statement. Such statement shall contain the same information and be prepared in the same manner as Victim Impact Statements prepared pursuant to § 19.2-299.1. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.[86]

By its terms, section 19.2-264.5 applied only after a sentence of death had been recommended by the jury. The content of the victim impact statement permitted under this section was limited by section 19.2-299.1, which stated that

> [i]f prepared by someone other than the victim, [the statement] shall (i) identify the victim, (ii) itemize any economic loss suffered by the victim as a result of the offense, (iii) identify the nature and extent of any physical or psychological injury suffered by the victim as a result of the offense, (iv) detail any change in the victim's personal welfare, lifestyle or familial relationships as a result of the offense, (v) identify any request for psychological or medical services initiated by the victim or the victim's family as a result of the offense, and (vi) provide such other information as the court may require related to the impact of the offense upon the victim.[87]

Recently, the General Assembly has added several provisions to the Virginia Code in order to facilitate the use of victim impact evidence at capital sentencing hearings. First, the General Assembly has expanded the definition of a "victim" to include a spouse, child, parent, sibling or legal guardian of a murdered individual.[88] Second, the General Assembly added

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86. VA. CODE ANN. § 19.2-264.5 (Michie 1998).

87. VA. CODE ANN. § 19.2-299.1 (Michie 1998).

88. *See* 2000 Va. Acts ch. 272 (adding the siblings of a murdered individual to the list of statutory victims); *see also* VA. CODE ANN. § 19.2-11.01(B) (Michie 2000) (including siblings in the list of statutory victims). *But see infra* Part III(B)(2) for argument that the children and siblings of a homicide victim do not qualify as statutory victims under § 19.2-

subsection A1 to section 19.2-264.4, which governs the capital sentencing proceeding.[89] The new subsection provides that

> [i]n any proceeding conducted pursuant to this section, the court shall permit the victim, as defined in § 19.2-11.01, upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of § 19.2-299.1.[90]

Thus, the Virginia Code expressly contemplates the use of victim impact testimony at two separate stages of a capital trial. Subsection A1 of section 19.2-264.4, added in 1998, permits statutory victims to testify in front of the judge or jury at the capital sentencing hearing. In addition, section 19.2-264.5, which existed prior to 1998, permits the submission of a victim impact statement to the court after a death sentence has been recommended, but prior to the imposition of sentence. In either situation, the scope of such evidence is limited by clauses (i) through (vi) of section 19.2-299.1.[91] The primary difference between the victim impact statement permitted by section 19.2-264.5 and the victim impact testimony permitted by section 19.2-264.4(A1) is that whereas the Supreme Court of Virginia has held that the former was not limited to evidence obtained from the victims identified in section 19.2-11.01,[92] the latter is clearly limited by its own terms to such victims.[93]

11.01.

89. 1998 Va. Acts ch. 485. In addition, the General Assembly added section 19.2-295.3, which permits the admission of victim impact testimony subject to the limitations of §§ 19.2-11.01 and 19.2-299.1 at the sentencing hearing of any felony conviction. *Id.* (enacting § 19.2-295.3).

90. VA. CODE ANN. § 19.2-264.4(A1) (Michie 2000).

91. *Id.*; VA. CODE ANN. § 19.2-264.5 (Michie 2000); *see* § 19.2-299.1.

92. Beck v. Commonwealth, 484 S.E.2d 898, 905 (Va. 1997) (rejecting defendant's claim that "by limiting the definition of 'victim' in the Act to the 'spouse, parent or legal guardian' of the deceased, the legislature implicitly intended to limit the admissibility of victim impact evidence to that provided by such persons").

93. *See* § 19.2-264.4(A1) (stating "the court shall permit the victim, *as defined in § 19.2-11.01* . . . to testify in the presence of the accused") (emphasis added). This article focuses on excluding victim impact evidence from the capital sentencing hearing. Presumably, the consideration of this evidence by the judge prior to the imposition of sentence is less unfair to the defendant because the judge or jury will already have considered the aggravating and mitigating circumstances and concluded that a death sentence is appropriate. For this reason, the subsequent consideration of victim impact testimony will be less prejudicial.

2. *Two Anomalies in the Virginia Code: Why Siblings and Children Are Not Statutory Victims Under Section 19.2-11.01 (B)(iv)*

On April 3, 2000, the Virginia General Assembly amended and reenacted section 19.2-11.01(B)(iv) of the Virginia Code to include the siblings of persons killed by homicide in the list of statutory victims.[94] Six days later, on April 9, 2000, the General Assembly again amended section 19.2-11.01, adding a new subsection giving statutory victims a right of notification "of the filing and disposition of any appeal or habeas corpus proceeding involving their case."[95] In this version of section 19.2-11.01, however, the General Assembly omitted "siblings" from subsection (B)(iv).[96] Thus, the most recent version of section 19.2-11.01 enacted by the General Assembly does not include the siblings of murdered persons as statutory victims.[97] Nonetheless, section 19.2-11.01 as reproduced in the Code of Virginia states that a statutory victim is "a spouse, parent, *sibling* or legal guardian of such a person who . . . was the victim of a homicide."[98] For this reason, section 19.2-11.01 as it appears in the Code of Virginia is inconsistent with the Virginia Acts of Assembly and may be an incorrect statement of law.

The Virginia Code Commission is authorized by law to "arrange for the codification and incorporation into the Code of Virginia all general and permanent statutes enacted" at regular and special sessions of the General Assembly.[99] The Commission is also authorized to make minor corrections to the Code of Virginia when necessary.[100] The Commission is not, however, authorized to alter the statutes enacted by the General Assembly and contained in the Virginia Acts of Assembly in codifying and incorporating the laws of the Commonwealth. Accordingly, the Code of Virginia should yield to the Acts of Assembly when discrepancies exist between the two. In this instance, because section 19.2-11.01(B)(iv) as amended and reenacted by the General Assembly on April 9, 2000, does not include siblings in the list of statutory victims,[101] and because only statutory victims as defined in section 19.2-11.01 are eligible to present victim impact evidence at a capital

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94. 2000 Va. Acts ch. 272.

95. 2000 Va. Acts ch. 827.

96. *Id.*

97. *Id.*

98. VA. CODE ANN. § 19.2-11.01(B)(iv) (Michie 2000) (emphasis added).

99. VA. CODE ANN. § 9-77.9 (Michie 2000).

100. VA. CODE ANN. § 9-77.10 (Michie 2000) (stating "[t]he Commission may correct unmistakable printer's errors, misspellings and other unmistakable errors in the statutes as incorporated into the Code of Virginia").

101. 2000 Va. Acts ch. 827.

sentencing hearing,[102] the siblings of homicide victims should not be permitted to testify at capital sentencing hearings about the impact of the offense upon them.

Regardless of whether one considers the Virginia Acts of Assembly or the Code of Virginia, it is clear that the children of homicide victims are not statutory victims as defined in section 19.2-11.01(B)(iv). In its entirety, subsection (B) states as follows:

> For purposes of this chapter, "*victim*" means (i) a person who has suffered physical, psychological or economic harm as a direct result of the commission of a felony or of [one of eight enumerated offenses], (ii) a spouse or child of such a person, (iii) a parent or legal guardian of such a person who is a minor, or (iv) a spouse, parent, sibling or legal guardian of such a person who is physically or mentally incapacitated or was the victim of a homicide; however, "victim" does not mean a parent, child, spouse, sibling or legal guardian who commits a felony or other enumerated criminal offense against a victim as defined in clause (i) of this subsection.[103]

Thus, a person who is a victim of a felony or other enumerated offense, and that person's spouse and children, qualify as statutory victims under clauses (i) and (ii) of section 19.2-11.01(B). If the victim of the felony or other enumerated offense is a minor, then he, his parents, and his legal guardians are statutory victims under clause (iii) of section 19.2-11.01(B). However, if the victim of the felony or other enumerated offense is physically or mentally incapacitated, *or if he was the victim of a homicide*, then only his spouse, parents, siblings and legal guardians qualify as statutory victims under clause (iv) of section 19.2-11.01(B). For this reason, the Commonwealth is not permitted to call the decedent's children to offer victim impact testimony at the sentencing phase of a capital murder trial.[104]

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102. *See* VA. CODE ANN. § 19.2-264.4(A1) (Michie 2000) (stating "the court shall permit the victim, *as defined in § 19.2-11.01* . . . to testify in the presence of the accused") (emphasis added).

103. § 19.2-11.01(B) (emphasis in original). The most recent version of this statute in the Virginia Acts of Assembly is identical except that it omits the word "sibling" from both clause (iv) and from the final clause of subsection (B) and that the word "victim" is not italicized in the introductory clause. 2000 Va. Acts ch. 827.

104. Treating clauses (ii) through (iv) of § 19.2-11.01(B) as independent clauses is supported by the fact that "parent" is included in clauses (iii) and (iv), but excluded from clause (ii). Clearly, the General Assembly did not intend to include parents as statutory victims unless the offense involved a minor, left the victim incapacitated, or resulted in his death. By the same token, the General Assembly excluded children as statutory victims in all such cases. Additional support for this reading is found in the fact that the General

IV. Argument: Excluding Victim Impact Evidence under the Due Process Clause of the Fourteenth Amendment to the United States Constitution

Due process is now the appropriate mechanism for the exclusion or limitation of victim impact evidence.[105] The Due Process Clause requires the exclusion of victim impact evidence if its admission would render the sentencing hearing fundamentally unfair.[106] Because fundamental fairness can only be determined within the context of a given trial, challenges to the admission of victim impact testimony after *Payne* will necessarily be fact-intensive undertakings. Capital defense attorneys are urged to seek to exclude or limit this evidence through the use of motions in limine and aggressive pre-trial litigation.[107] Part IV of this article seeks to make several general points that should be incorporated into any effort to exclude the Commonwealth's victim impact evidence.

In *Beck v. Commonwealth*,[108] the defendant, Christopher Beck ("Beck") pleaded guilty to the capital murders of Florence Marie Marks, William Miller and David Stuart Kaplan.[109] Because he had entered a guilty plea, Beck was sentenced by the court.[110] Prior to the sentencing hearing, the court received "a large number of letters from family members and friends of the victims which contained statements concerning the impact of Beck's crimes and 'recommendations' concerning the imposition of the death penalty."[111] At the sentencing hearing, the court heard evidence in aggrava-

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Assembly included spouses in both clause (ii) and clause (iv), which would not make sense if they were intended to be read in conjunction with one another, and in the final clause of § 19.2-11.01(B), which expressly excludes all five types of statutory victims if the would-be statutory victim is the perpetrator of the offense.

105. *See supra* Part II(B).

106. Payne v. Tennessee, 501 U.S. 808, 825 (1991); *see also id.* at 831 (O'Connor, J., concurring).

107. The Virginia Capital Case Clearinghouse has drafted motions to exclude victim impact evidence in several capital cases. Please contact the Clearinghouse at Washington and Lee University School of Law for assistance in drafting such a motion in your capital case or to obtain a copy of one of our motions.

108. 484 S.E.2d 898 (Va. 1997).

109. Beck v. Commonwealth, 484 S.E.2d 898, 900 (Va. 1997). In addition, Beck pleaded guilty to statutory burglary, rape, three offenses of robbery and seven firearms offenses. *Id.*

110. *Id.*

111. *Id. Beck* was decided in 1997, one year before the addition of subsection A1 to § 19.2-264.4. Nonetheless, the trial court admitted and considered victim impact testimony at the sentencing hearing. Another example of a court considering victim impact testimony prior to 1998 is *Weeks v. Commonwealth*, in which the court rejected defendant's claim that "the trial court erred in admitting 'victim impact testimony' during the penalty phase of the trial." Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994). These cases seem to indicate that the 1998 amendments were largely nothing more than the codification of existing trial

tion and in mitigation of the offenses, and eventually fixed punishment for each of the three capital murders at death upon findings of future dangerousness and vileness.[112] Beck appealed his death sentences, asserting that the judge should not have heard the victim impact evidence prior to conducting the sentencing hearing.[113]

The Supreme Court of Virginia affirmed the death sentences, rejecting Beck's claim that the court improperly received victim impact statements into evidence prior to and at the sentencing hearing. The court noted that Beck had failed to raise any particularized objection to the admission of any statement or testimony and "stress[ed] that this was a trial without a jury."[114] Under these circumstances, the court held that "the determination that this evidence was relevant and probative of the issue under consideration was clearly within the trial court's discretion."[115] Significantly, the court stated that "[a] judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both."[116]

Accordingly, defense attorneys should use *Beck* to illustrate that although judges are able to separate the admissible from the inadmissible and consider only the former, jurors are not. Therefore, the judge's role as gatekeeper is never more crucial than it is at a capital sentencing hearing in front of a jury. Due process requires trial judges to separate irrelevant or unfairly prejudicial evidence from admissible evidence and ensure that only the latter is submitted to the jury. In addition to *Beck*, defense attorneys should direct trial judges' attention to Justice Souter's concurrence in *Payne*, in which he emphasized "the trial judge's authority and responsibility to control the proceedings consistently with due process."[117] Having emphasized the importance of the judge's role in guaranteeing the defendant a fair trial, defense counsel will wish to move on to the points discussed in the subsequent sections of this article.[118]

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court practice.

112. *Beck*, 484 S.E.2d at 900.

113. *Id.* at 905.

114. *Id.*

115. *Id.* at 906.

116. *Id.* (quoting Eckhart v. Commonwealth, 279 S.E.2d 155, 157 (Va. 1981)).

117. Payne v. Tennessee, 501 U.S. 808, 836 (1991) (Souter, J., concurring).

118. *See infra* Parts IV(A) and IV(B).

A. The Commonwealth's Victim Impact Evidence Will Be Less Relevant Than That Offered in Payne

Defense counsel must first argue that victim impact evidence is not relevant in the context of a Virginia capital sentencing hearing, because it does not address any of the facts that are relevant to the Virginia aggravating or mitigating circumstances. The facts relevant to the future dangerousness aggravator are the past conduct of the defendant and the circumstances of the offense.[119] The facts relevant to the torture sub-element are the defendant's conduct toward the victim during the commission of the offense and (arguably) the defendant's substantive mental state at that time.[120] These are also the facts relevant to the depravity of mind sub-element.[121] Only the defendant's conduct toward the victim during the commission of the offense is relevant to the aggravated battery sub-element.[122] Finally, the only facts relevant to mitigation or rebuttal of mitigation are the character and background of the defendant, and the circumstances of the offense.[123] Therefore, because it does not address the past conduct of the defendant, the circumstances of the offense, the defendant's conduct toward the victim, the defendant's mental state, or the defendant's character or background, victim impact evidence is not relevant to any of the issues of fact presented in the capital sentencing context in Virginia.

Thus far, the Supreme Court of Virginia has refused to accept the rather obvious conclusion that victim impact evidence is rarely, if ever, relevant at a capital sentencing hearing. In *Weeks v. Commonwealth*,[124] the court rejected the defendant's claim that the trial court's admission of this evidence was erroneous.[125] The court held that victim impact testimony "is relevant to punishment in a capital murder prosecution in Virginia."[126] In support of this dubious conclusion, the court stated only that

> under Virginia's modern, bifurcated capital procedure, victim impact evidence is probative, for example, of the depravity of mind component of the vileness predicate, which the jury in this case found as a basis for imposing the death penalty. As the Supreme Court said in Payne, "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should

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119. *See supra* Part III(A)(1).
120. *See supra* Part III(A)(2)(a).
121. *See supra* Part III(A)(2)(b).
122. *See supra* Part III(A)(2)(c).
123. *See supra* Part III(A)(3).
124. 450 S.E.2d 379 (Va. 1994).
125. Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994).
126. *Id.*

> have before it at the sentencing phase evidence of the specific harm caused by the defendant."[127]

This is the only time that the Supreme Court of Virginia has identified a provision of the Virginia Code to which victim impact is relevant. In light of the foregoing analysis, it is abundantly clear that the court was wrong in asserting that victim impact evidence is relevant to depravity of mind. Therefore, defense counsel should continue to argue that victim impact evidence is not relevant in cases involving future dangerousness, torture or aggravated battery. In addition, defense counsel should challenge the faulty holding of *Weeks* by insisting that victim impact evidence is not relevant to depravity of mind because it does not address the conduct of the defendant during the offense or the defendant's mental state at the time of the commission of the offense.

B. The Commonwealth's Victim Impact Evidence Will Be More Unfairly Prejudicial Than That Offered in Payne

After demonstrating that victim impact evidence is not relevant, defense counsel should also argue that its prejudicial effect would be great,

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127. *Id.* at 390 (quoting Payne v. Tennessee, 501 U.S. 808, 825 (1991)). This is a perfect example of how the Supreme Court of Virginia has manipulated *Payne* in order to avoid undertaking its own analysis of the relevance of victim impact evidence in the Virginia capital sentencing procedure. First, the court blithely announces that victim impact evidence is relevant to depravity of mind without explaining how this evidence is relevant. In point of fact, it is not. *See supra* notes 119-23 and accompanying text. Second, the court quotes *Payne* out of context in an extremely manipulative way. In its entirety, the portion of *Payne* quoted by the *Weeks* court is: "We are now of the view that *a State may properly conclude that* for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Payne*, 501 U.S. at 825 (emphasis added). Thus, by truncating the *Payne* quote, the Supreme Court of Virginia made it appear as though the United States Supreme Court had admonished the states that they should put victim impact evidence in front of the jury, when in fact the Court had merely stated that the States are not forbidden from drawing this conclusion. Presumably, Virginia could make the "specific harm caused by the defendant" relevant to capital sentencing by enacting an aggravating circumstance based upon the harm caused by the capital offense. However, Virginia has not done so. Furthermore, any harm-based aggravating circumstance would be subject to Eighth Amendment scrutiny under the vagueness standard established by *Godfrey*. Godfrey v. Georgia, 446 U.S. 420 (1980) (plurality opinion). *See supra* notes 56-62 and accompanying text.

Simply put, until such time as a harm-based aggravator is enacted, victim impact evidence is irrelevant. The General Assembly cannot make victim impact evidence relevant to future dangerousness or vileness simply by legislating its admission any more than the General Assembly can make any other irrelevant fact relevant simply by statutorily authorizing its admission. By definition, irrelevant evidence has no probative value. In addition, this particular type of irrelevant evidence is unfairly prejudicial to the defendant. *See infra* Part IV(B). For this reason, its admission is fundamentally unfair and is prohibited by due process.

and its admission would be fundamentally unfair. In support of this point, counsel should draw two distinctions from the evidence admitted in *Payne*. First, counsel should emphasize the brevity of the evidence admitted in *Payne*. Anything more than the most cursory victim impact statement will be more prejudicial than the single statement in *Payne*.[128] Second, counsel should demonstrate that, unlike that in *Payne*, the Commonwealth's victim impact testimony will not merely replicate evidence that the jury will already have heard in the course of the trial. This will necessarily involve close scrutiny of the available victim impact evidence on a case-by-case basis. In many cases, unlike *Payne*, the statutory victim will not have testified at the guilt phase of the trial because he will not have been a percipient witness to the offense;[129] thus, the jury will not ordinarily be "unavoidably familiar" with the impact of the crime upon the statutory victim.[130] This fact also makes most victim impact evidence more prejudicial than that of which *Payne* approved.

In addition to distinguishing the *Payne* testimony, defense counsel must be prepared to articulate the unfair prejudice that will result from the admission of victim impact evidence at the sentencing hearing. The highly emotional and visceral nature of this type of testimony must be emphasized. Counsel should also mention the likelihood that this evidence will trigger a reaction in the jury that is not logically related to the aggravating and mitigating circumstances of the offense. In addition, defense counsel should assert that the admission of victim impact evidence will confuse the jury by focusing its attention on an irrelevant collateral issue. Furthermore, counsel

128. *See supra* note 40 and accompanying text.

129. Here one must carefully distinguish testimony about the impact of an offense upon a percipient witness from testimony about the occurrence of a prior offense or bad act. For example, in *Johnson v. Commonwealth*, two witnesses testified at a capital sentencing hearing that the defendant had previously raped them. Johnson v. Commonwealth, 529 S.E.2d 769, 776 (Va. 2000) (affirming defendant's death sentence). This was not victim impact testimony; nor could these two witnesses have testified about the impact of these prior rapes upon them. Section 19.2-264.4 requires a sentencing hearing to be held "[u]pon a finding that the defendant is guilty of an offense which may be punishable by death." VA. CODE ANN. § 19.2-264.4 (Michie 2000). Subsection A1 of section 19.2-264.4 states that "[i]n any proceeding conducted pursuant to this section, the court shall permit the victim . . . to testify . . . regarding the impact of *the offense* upon the victim." VA. CODE ANN. § 19.2-264.4(A1) (Michie 2000) (emphasis added). In this context, "the offense" can only refer to the "offense which may be punishable by death," and therefore victim impact evidence is limited to the impact of that offense upon the statutory victims. Accordingly, victims of prior bad acts may be permitted to testify that these acts occurred, but they cannot testify about the impact of these acts upon them. *Id.*; *see also* VA. CODE ANN. § 19.2-295.3 (Michie 2000) (stating that "upon a finding that the defendant is guilty of *a felony*, the court shall permit the victim . . . to testify . . . regarding the impact of *the offense* upon the victim") (emphases added).

130. *See supra* notes 41-44 and accompanying text.

must explain there is a strong risk that the jury will overestimate the persuasive force of this evidence; because they will sympathize with the surviving victims, the jurors will be unable to assess objectively the future dangerousness of the defendant and the vileness of the offense.

V. Kasi v. Commonwealth: *The Supreme Court of Virginia Continues to Treat Due Process Cavalierly*

In *Kasi v. Commonwealth*,[131] the Supreme Court of Virginia affirmed the death sentence of Mir Aimal Kasi ("Kasi").[132] Kasi had been convicted of capital murder for the killings of Frank Darling and Lansing Bennett "as part of the same act or transaction."[133] Both of the slain victims, and several other wounded victims, were agents of the Central Intelligence Agency.[134] On direct appeal, Kasi raised several issues, including a claim that the admission of victim impact evidence at his sentencing hearing was fundamentally unfair.[135] The court's treatment of this claim was so cursory that it will be quoted here in its entirety.

> Next, defendant contends the trial court erred in denying his motion to "preclude" the testimony of Frank Darling's wife in the penalty phase after she had testified during the guilt phase of the trial. Defendant argues, "In this instance," calling for the second time the murder victim's wife to give victim impact testimony violates "the due process standard of fundamental fairness." We do not agree.
>
> Mrs. Darling was a front-seat passenger in the automobile driven by her husband at the time of his murder. She testified during the guilt phase about the events surrounding the shootings. During the penalty phase, she testified only about the substantial impact of her husband's murder upon her life. This is the type of victim impact testimony approved in Payne v. Tennessee, and in Weeks, and the trial court correctly refused to exclude it.[136]

Kasi is yet another example of the Supreme Court of Virginia summarily affirming the use of victim impact testimony without stating any theory of relevance. The court simply cites *Payne* and *Weeks* as if they settle

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131. 508 S.E.2d 57 (Va. 1998).

132. Kasi v. Commonwealth, 508 S.E.2d 57, 68 (Va. 1998).

133. *Id.* at 59. Subsection 7 of the capital murder statute classifies "[t]he willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction" as capital murder. VA. CODE ANN. § 18.2-31(7) (Michie 2000).

134. *Kasi*, 508 S.E.2d at 59.

135. *Id.* at 65.

136. *Id.* (internal citations omitted).

the issue, even though neither case addressed in any meaningful way the relevance of victim impact testimony in the Virginia capital sentencing scheme.[137] Furthermore, *Kasi* does not even mention the prejudicial effect of this evidence. This casual treatment of victim impact evidence simply does not comport with the constitutional mandate of fundamental fairness.[138]

The Supreme Court of Virginia's misuse of *Payne* in both *Kasi* and *Weeks* almost certainly predicts how it will react when confronted with future challenges to victim impact evidence. However, this is not a reason for defense counsel to permit this evidence to be introduced unopposed. As noted by Justice Souter in his *Payne* concurrence, trial judges have a "responsibility to control the proceedings consistently with due process."[139] Thus, the absence of any real threat of reversal from the Supreme Court of Virginia should not be the end of the inquiry; trial judges must still seek to ensure that capital defendants receive trials that are fundamentally fair. Furthermore, because due process claims are always made pursuant to the United States Constitution, appeal to federal courts will always be possible, provided that the issue is litigated throughout the appellate process so as to avoid procedural default.[140] When these challenges are heard by courts that care to uphold fundamental concepts such as relevance and fairness, it will not be enough simply to hide behind *Payne*. These courts will, at minimum, force the Commonwealth to articulate the relevance of victim impact evidence to its capital sentencing scheme and assess the prejudicial effect of the specific testimony offered in a given case.

VI. Conclusion

Payne v. Tennessee represented a radical change in the United States Supreme Court's treatment of victim impact evidence. In that case, the Court abandoned its prior interpretation of the Eighth Amendment, which

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137. *See supra* note 33 and accompanying text; *see also supra* note 127 and accompanying text.

138. *See supra* notes 35-38 and accompanying text. In spite of the analytical deficiencies of *Kasi*, defense counsel should expect the Commonwealth to invoke it in opposition to any effort to limit or exclude victim impact testimony. When this happens, defense counsel can argue that, like *Payne*, *Kasi* involved evidence about the impact of the offense upon a percipient witness. Mrs. Darling witnessed the killing of her husband and testified at the guilt phase of the trial. *Kasi*, 508 S.E.2d at 65. Therefore, the jury was "unavoidably familiar" with the impact of the offense upon her, and the prejudicial effect of her victim impact testimony was diminished. *See supra* notes 41-44 and accompanying text. *Kasi* can be distinguished on this ground.

139. Payne v. Tennessee, 501 U.S. 808, 836 (1991) (Souter, J., concurring).

140. *See* Ashley Flynn, *Procedural Default: A De Facto Exception to Civility?*, 12 CAP. DEF. J. 289, 297-301 (2000) (discussing the myriad objections that must be made at trial in order to preserve the record and avoid procedural default).

had prohibited the admission of victim impact evidence in capital cases. However, contrary to statements of the Supreme Court of Virginia, *Payne* did not eliminate all constitutional barriers to the admission of victim impact evidence. In fact, all six Justices in the *Payne* majority expressly acknowledged a due process limit on victim impact evidence when it renders the sentencing procedure fundamentally unfair. Three of these Justices concluded that the testimony in *Payne* was not fundamentally unfair because of its brevity and because it was merely cumulative of prior testimony.

Virginia capital defense attorneys can seek to exclude or limit victim impact testimony by invoking the Due Process Clause of the Fourteenth Amendment and arguing that its admission would be fundamentally unfair. In support of this argument, defense counsel can illustrate that victim impact evidence is not relevant to any of Virginia's aggravating or mitigating circumstances because it does not address the background or character of the defendant, the circumstances of the offense, the defendant's conduct toward the victim during the commission of the offense, or the defendant's mental state. In addition, defense counsel can demonstrate that the Commonwealth's victim impact evidence in a given case will be more prejudicial than that of *Payne* because it will be quantitatively greater and because it will not be merely cumulative. Finally, defense counsel can argue that victim impact evidence will confuse the issues, mislead the jury, and improperly prey upon the jurors' emotions.

The Supreme Court of Virginia has recognized that trial judges, unlike jurors, are uniquely able to separate admissible evidence from unfairly prejudicial evidence. Thus, it is incumbent upon trial judges to recognize and exclude irrelevant and prejudicial evidence before it is presented to the jury. By demonstrating that the admission of victim impact evidence would be fundamentally unfair, defense attorneys can argue that the United States Constitution requires the exclusion of this evidence, even though the Virginia Code endorses its admission. This type of effective advocacy is likely to result in several benefits for capital defendants. First, a challenge to the admission of victim impact evidence is likely to result in the exclusion of at least some of this evidence at the trial level. Second, it will preserve a constitutional issue for appeal in the federal courts. By choosing to treat victim impact as a due process issue, the Supreme Court has created a constitutional issue that will have to be litigated on a case-by-case basis. Third, the irrelevance of victim impact evidence is a non-frivolous issue that defense counsel can raise in a motion in limine as part of a comprehensive strategy to encourage the Commonwealth to engage in the process of plea bargaining. For all of these reasons, defense attorneys are strongly encouraged to test the due process limits on the admissibility of victim impact evidence.