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## PAYNE v. TENNESSEE 111 S. Ct. 2597 (1991)

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A recent example of an appropriate lesser-included offense instruction in Virginia is *Moats v. Commonwealth*, 404 S.E.2d 244 (Va. App. 1991). In *Moats*, the appellant held a store clerk at gunpoint, demanded money, and shot and killed the victim. Moats was indicted for capital murder but convicted for first degree murder under an instruction for that lesser-included offense. Moats claimed that the evidence did not support the first degree murder instruction. However, the jury could have found that Moats fired **without** premeditation, perhaps as a fearful response to an action of the store clerk. The court thus correctly found that the instruction on first degree murder (here, felony-murder) was supported by the evidence and properly given. *Id.* While unpremeditated felony murder is not

capital murder in Virginia, evidence in a particular case may suggest it as a lesser-included offense of capital murder.

Attorneys should continue to request lesser-included offense instructions for first degree murder, second degree murder and the underlying felony when the evidence supports such instructions. When appropriate, attorneys should request an instruction requiring a determination on the underlying felony before the jury proceeds to the capital murder charge.

Summary and analysis by:  
G. Douglas Kilday

## PAYNE v. TENNESSEE

111 S. Ct. 2597 (1991)  
United States Supreme Court

### FACTS

Payne was charged and convicted of the first-degree murders of Charisse Christopher and her two-year-old daughter. He was also convicted of the first-degree assault with intent to murder Christopher's son, Nicholas, who was three years old at the time of the crimes and present during the murders of his mother and sister. At the penalty stage of the trial, the State called Nicholas' grandmother to testify as to the effect the murders had had on the surviving child. During closing arguments, the prosecutor also commented on the effects Nicholas had suffered from witnessing the murders as well as the effects of the loss of his mother and sister. The Tennessee Supreme Court affirmed Payne's conviction and sentence, thereby rejecting his argument that the grandmother's and prosecutor's statements violated his eighth amendment rights set forth in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989). See case summary of *South Carolina v. Gathers*, Capital Defense Digest, Vol. 2, No. 1 (1991). The Tennessee Supreme Court held that, although the grandmother's testimony was "technically irrelevant," it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt." 111 S. Ct. 2597, 2604 (1991).

### HOLDING

The Supreme Court overruled both *Booth* and *Gathers*, holding that the eighth amendment does not bar the admission of victim impact evidence during the penalty phase of a capital trial. Although a defendant may offer any mitigating evidence in the sentencing phase, *Woodson v. North Carolina*, 428 U.S. 280, 304, (1976) (holding that capital defendants must be afforded individualized due process), the *Payne* Court reasoned that a defendant is not entitled to "that consideration wholly apart from the crime which he committed." 111 S. Ct. at 2607. *Woodson*, the Court noted, did not hold that a State may not offer evidence pertaining to the life of the victim, the loss to the victim's family and/or the loss to society, *Woodson* merely held that the defense may offer, with virtually no limits, evidence about the defendant's own circumstances. The *Booth* decision, holding that a State may not introduce victim impact evidence, the Court noted, unfairly weighted the process in favor of the defendant.

The Court also held, contrary to *Gathers*, that prosecutors may argue victim impact to the sentencing jury. The Court stated that the decision of whether to allow victim impact evidence is to be left to the individual states.

### ANALYSIS / APPLICATION IN VIRGINIA

*Booth* and *Gathers*, the *Payne* Court reasoned, were based on two premises: that the "blameworthiness" of a defendant is not generally reflected by evidence of harm suffered by a victim of the crime, and that only evidence showing "blameworthiness" is relevant to the decision of whether or not to impose the death penalty. Thus *Booth* held that victim impact statements could only be used as evidence if the statement directly related to the circumstances of the crime or the character of the individual defendant. 482 U.S. at 508. If victim impact statements do not relate directly to the circumstances of the crime or the character of the defendant, they create a risk that capital punishment will be imposed arbitrarily. *Booth*, 482 U.S. at 505. *Gathers* extended the *Booth* rule to prosecutors' penalty phase statements regarding victims.

Yet Justice Rehnquist reasoned that victim impact evidence is "designed to show each victim's 'uniqueness as an individual human being.'" 111 S.Ct. at 2607 (emphasis in original). Victim impact evidence, Rehnquist argued, balances the proceedings by counteracting the mitigating evidence that the defendant is allowed to present at the penalty phase; in fact, Rehnquist argued that victim impact evidence may be "necessary to determine the proper punishment for a first-degree murder." *Id.* at 2608 (emphasis added). Rehnquist noted that the 1987 Federal Sentencing Guidelines use factors that relate to both subjective guilt and the harm caused by the defendant's crime. He also noted today's politically active victims' rights groups.

One theme in Justice Souter's concurring opinion is arguably consistent with *Booth* and *Gathers*: both of those cases required that evidence of aggravating circumstances be relevant to the increased culpability of the defendant. Souter argued first that "murder has foreseeable consequences. When it happens, it is always to distinct individuals, and after it happens other victims are left behind." *Id.* at 2615. The fact that the defendant did not know details of the victim's, or the victim's survivors', lives should not obscure the fact that murder has foreseeable consequences, Souter reasoned.

Souter's second argument was that victim impact-type evidence is heard at the guilt phase of the trial and "will be in the jurors' minds at the sentencing stage." *Id.* at 2617. He failed to mention, however, that the elements of the crime define what evidence is relevant at the guilt phase of a trial. At the penalty phase, other evidence is relevant.

In ruling on what the eighth amendment requires, *Payne*, as a matter of Federal and Constitutional law, now allows victim impact evidence and argument at the penalty stage of a capital trial. The Court left it up to the

states to decide whether victim impact evidence is relevant to the sentencer's decision whether or not to impose the death penalty.

Virginia case and statutory law still prohibit this type of evidence. In *Dingus v. Commonwealth*, 153 Va. 846, 149 S.E. 414 (Va. 1929), the supreme court held that sympathy for the victims of crime "in no way assists in determining either the guilt or innocence of the accused." 149 S.E. at 415. Likewise, Virginia's two statutory aggravating factors —

vileness and future dangerousness — which define relevance of the Commonwealth's evidence at the penalty trial relate only to the personal blameworthiness of the defendant in accord with *Booth* and *Gathers*. Therefore, to date the *Payne* rule is not the law of Virginia.

Summary and analysis by:  
Wendy Freeman Miles

## STAMPER v. MUNCIE

944 F.2d 170 (4th Cir. 1991)  
United States Court of Appeals, Fourth Circuit

### FACTS

In 1978, Charles Sylvester Stamper was tried and convicted on three counts of felony murder and four associated felony counts in Henrico County, Virginia. The appeals process has consistently affirmed Stamper's trial court death sentence.

Stamper was a cook at Shoney's Restaurant where three employees were found shot to death at close range during the course of a robbery from the restaurant safe. A great deal of circumstantial evidence tied Stamper to the scene. A car resembling his was spotted at the time of the murders in the vicinity of the crime; the glass door to the restaurant was broken from the inside, out; glass particles were found on the floor of the defendant's car, 20% of which matched in optical properties the glass of the door; a set of keys of one of the murder victims was found near the home of Stamper's parents; a gun found near the home of Stamper's parents was the same type as that used to kill the victims and the bullets which had been shot from that gun were of the same type as those found in the victims; Stamper paid off a good deal of indebtedness within two days of the crime.

Stamper's case was remanded twice by the Court of Appeals for the Fourth Circuit for failure to exhaust state remedies and a full decade after his trial, he petitioned for a writ of habeas corpus in the U.S. District Court. The petition was denied.

### HOLDING

The Fourth Circuit affirmed the district court's denial of relief. Stamper assigned three general counts of error which were all rejected. The court summarily dismissed as a matter of law Stamper's first assertion that the evidence presented at trial was insufficient to find him guilty beyond a reasonable doubt because of its circumstantial nature. Second, the court found no clear error concerning Stamper's position that he had ineffective assistance of counsel during voir dire. Finally, the court found no error regarding the judge's response to a juror's question posed to the court.

### ANALYSIS / APPLICATION IN VIRGINIA

*Stamper* raised a number of issues and grounds for relief. Some of these the court treated in a summary fashion, did not involve capital penalty law, or revolved around facts peculiar to the case and are unlikely to arise often. These items are not discussed here.

#### A. Circumstantial Evidence Standard

While it is well established that circumstantial evidence may be used as probative and meaningful in a criminal case, the law in

Virginia seems to require that a trier of fact relying on circumstantial evidence **must**, in fact, exclude every other **reasonable** possibility except guilt. This rule was promulgated by the Virginia Supreme Court which held that circumstantial evidence may be used in a criminal case "provided it is of such convincing character as to exclude every **reasonable** hypothesis other than that the accused is guilty." *Dukes v. Commonwealth*, 227 Va. 119, 313 S.E.2d 382 (1984) (emphasis in original). Attesting to this standard, the Virginia Court of Appeals has held that "[w]here the evidence is wholly circumstantial, a conviction can be obtained only if the evidence is consistent with guilt and inconsistent with innocence, and excludes every reasonable hypothesis of innocence." *Beck v. Commonwealth*, 2 Va. App. 170, 342 S.E.2d 642 (1986).

The circuit court, however, may have applied a different standard in *Stamper* than the one handed down in the foregoing cases. The Fourth Circuit held that the prosecution is not constitutionally required to negate every hypothesis except that of guilt. *Jackson v. Virginia*, 443 U.S. 307 (1979). Interestingly, the court cited no Virginia law to substantiate this conclusion. It pointed out that the Tenth Circuit has ruled that "circumstantial evidence need not conclusively exclude every other reasonable hypothesis and it need not negate all possibilities save guilt." *United States v. Gay*, 774 F.2d 368, 373 (10th Cir. 1985). The court also relied upon Fifth Circuit and Seventh Circuit opinions to support its position. Based on those holdings, the circuit court in *Stamper* found that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt because the evidence sufficiently supported such inferences.

Stamper argued that, given the facts in his case, no rational trier of fact could find guilt beyond a reasonable doubt or conclude that he was the trigger man. A *Jackson* analysis may allow a court to make such a finding, but the Virginia rules may not. The Fourth Circuit's dismissal of Stamper's contention based on the United States Supreme Court's decision in *Jackson* and the other circuit courts' holdings may be a misapplication of the law given the Virginia rules promulgated in *Dukes* and *Beck*.

The question is whether a conclusion that a rational trier of fact could find guilt is the complete equivalent of excluding every reasonable hypothesis except guilt. If it is true, under *Jackson*, that federal due process as a general proposition might not require exclusion of every hypothesis of innocence beyond a reasonable doubt as Virginia state cases do require, a separate violation of due process may occur through the arbitrary administration of state created rights. This is the result if the Fourth Circuit failed to apply a Virginia evidentiary standard which is more liberal than that applied by the United States Supreme Court. For a more detailed discussion of this issue, see Konrad, *Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State Created Rights*, Capital Defense Digest,