

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-5020

TITLE JOHN BOOTH, Petitioner V. MARYLAND

PLACE Washington, D. C.

DATE March 24, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN BOOTH, :

Petitioner, :

v. : No. 86-5020

MARYLAND :

- - - - - x

Washington, D. C.

Tuesday, March 24, 1987

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:58 p.m.

APPEARANCES:

GEORGE E. BURNS, JR., ESQ., Baltimore, Maryland,
on behalf of the petitioner.

CHARLES O. MONK, II, ESQ., Deputy Attorney General of
Maryland, on behalf of the respondent.

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You may proceed whenever you're ready, Mr. Burns.

MR. BURNS: Mr. Chief Justice, and may it please the Court:

This Court has repeatedly -- most recently in this term in California versus Brown -- said there are two relevant considerations in a capital sentencing.

The second thing are the circumstances of the crime. The circumstances of the crime, of course, in a normal way are also not involved. There's no contention that the victims who testified were at the crime scene, were involved with the crime, but that the crime was instituted against them as opposed to the actual victims.

The State, however, argues that this is still

1 part of the circumstances of the crime. The argument
2 really comes down to no more than saying, "If I cast a
3 pebble into the ocean, the ripples just go on forever."

4 The problem with that, I think, is not only
5 has it never been used as a basis for criminal
6 sentencing, it's probably not even a good basis for tort
7 law.

8 The implications are simply staggering,
9 because I think it's fair to say that each and every one
10 of us is offended by violent crime. That being the
11 case, there's no reason every citizen who is offended by
12 this shouldn't come in and express that view.

13 Indeed, we might have an 800 number linked up
14 to the courtroom. People could call in.

15 More specifically, lawyers and judges who are
16 involved in these cases are certainly offended by the
17 facts that they have to deal with, the crime that they
18 have to deal with.

19 It would seem that it would be fair to call
20 them in as also --

21 QUESTION: What exactly was introduced in
22 evidence here, Mr. Burns?

23 MR. BURNS: Here we have the testimony of, or
24 the statements of the immediate family; that is, the
25 mother -- excuse me, son, daughter of the victims -- the

1 actual victims.

2 I use the victims in two words -- two ways.
3 "Victims" obviously meaning the murder victims, victims
4 as included in this case included those people, family
5 members, who obviously were upset by the crime, as
6 anyone would be, but were not present in any way at the
7 crime, and at whom the crime was not actually aimed at.

8 So that was what we had in this case. That is
9 the complaint.

10 The State, in short --

11 QUESTION: You'd allow it to be introduced, I
12 presume, if as one of the aggravating circumstances, it
13 was shown that the victim was tortured to death in front
14 of his wife or something like that, wouldn't you?

15 MR. BURNS: I think there are circumstances --

16 QUESTION: Then the fact that the wife was so
17 much aggrieved by it you think would be relevant?

18 MR. BURNS: Well, I think it would be relevant
19 in a slightly different way, Justice Scalia. In that
20 circumstances it is a crime. The crime does become more
21 horrible, if it were not just the wife, if it were just
22 a citizen that had to stand here and watch this.

23 I do think that is aggravating that you put
24 someone through that. So I think it is an aggravating
25 circumstance of the crime, as opposed to someone who is

1 not present at the crime.

2 So I agree -- My answer is: yes, but perhaps
3 for a slightly different reason than you suggest.

4 QUESTION: I don't understand why in principle
5 you say simply the fact that the crime does more harm is
6 not a valid aggravating factor.

7 Let's assume that I'm pulling a bank robbery
8 and I aim at a guard intending to kill him. If I happen
9 to kill him, I'm liable for much graver punishment than
10 if my aim is bad and he's only wounded; correct?

11 MR. BURNS: I'm not sure, Your Honor, because
12 in one case you have murder and in one attempted murder,
13 except if there is the aggravating factor of capital
14 crime. You have in Maryland at least life in each case.

15 QUESTION: Well, I think you certainly would
16 not deny that a State can have different punishments,
17 and considerably different, for a murder that goes awry,
18 and one that is actually committed.

19 MR. BURNS: I agree, Your Honor.

20 QUESTION: Although the evil of the person who
21 pulls the trigger, the blackness of his soul, is exactly
22 the same; right? He's just as bad a person.

23 MR. BURNS: I agree, Your Honor.

24 QUESTION: So somehow the harm that is
25 inflicted upon society is a perfectly valid factor.

1 Now, why does it just have to be the harm upon the
2 victim?

3 MR. BURNS: If that's true, Your Honor, we
4 eliminate reasons for foreseeability, because I think in
5 Your Honor's hypothetical, we do have the foreseeability
6 problem.

7 If I point a gun in a bank and shoot it, I
8 surely am aware that anyone there may be injured. I am
9 not likely to be aware that the victim that gets hit,
10 for example, has a loving family and children as opposed
11 to a victim who may be hated by everyone.

12 That's very unlikely that I'm going to be
13 aware of that.

14 And I would agree, Justice Scalia, if we have
15 a case, for example, of someone saying, "I'm very fond
16 of Mr. Smith. I've liked Mr. Smith for ten years, but I
17 hate his family. I'm going to get even with his family
18 by killing Mr. Smith."

19 Well, in that case I would agree that the
20 circumstance of the crime is precisely that. But the
21 ordinary situation is, there certainly may be all these
22 ripple effects, but it really has nothing to do with the
23 blackness of the soul of the defendant, because the
24 defendant isn't aware, and in most instances, to put it
25 bluntly, is indifferent to all these things.

1 QUESTION: But why is the blackness of the
2 soul of the defendant, as you and Justice Scalia have
3 been saying, the only thing that the State may produce
4 evidence about?

5 Certainly our cases have given the broadest
6 latitude to the defendant, to show anything in the
7 defendant's background that may make the jury have a
8 feel for and be sympathetic to him.

9 Why can't the State at the same time be
10 entitled to make the victim human and make the family
11 human, to get across to the jury just what the impact of
12 this act was?

13 MR. BURNS: Well, Chief Justice, I think one
14 clear thing is presumably the defendant's background is
15 relevant, why he's here.

16 The victim --

17 QUESTION: This Court has said it was relevant.

18 MR. BURNS: Yes, in the past.

19 QUESTION: And presumably this Court could say
20 the victims were relevant.

21 MR. BURNS: This Court could --

22 QUESTION: So the question is: What reason
23 supporting one doesn't support the other?

24 MR. BURNS: I think one question is: Does it
25 have an effect on why this individual committed this

1 particular crime?

2 Certainly defendant's background does. Does
3 it have any effect on the crime, for example, if one
4 sees two people that both look like they're from Skid
5 Row, shoots one.

6 It turns out he's a Skid Row person, and no
7 one much cares.

8 He shoots another person, and it turns out
9 this person was actually a renowned surgeon, and he
10 happened to be dressed that way. And, indeed, probably
11 a thousand lives will be lost because he'll be unable to
12 be the surgeon in those cases.

13 But again --

14 QUESTION: Mr. Burns, do you suppose that it's
15 possible for a State to make it an aggravating
16 circumstance to murder someone who is a policeman?

17 MR. BURNS: I think it is, Justice O'Connor,
18 if I may add one thing.

19 I think it would have to be that you would
20 have reason to know it is a policeman as opposed to not.

21 QUESTION: Well, maybe; maybe not.

22 Do you think the State can make it an
23 aggravating circumstance to murder the parent of minor
24 children?

25 MR. BURNS: I think if the State tied it to a

1 knowledge and specific purpose for doing that.

2 QUESTION: Well, maybe; maybe not. That's the
3 issue.

4 Does the defendant's knowledge of that have to
5 be a component, or is it possible to take into
6 consideration the scope of harm to society?

7 MR. BURNS: That's the question, Your Honor.
8 But I think the difficulty is if we open this and
9 prevent scope of society arguments is, again, we're not
10 really focusing on culpability of the defendant.

11 It's hard for the defendant to be -- judge his
12 culpability in light of what not only he does not know
13 in many cases, but could not conceivably know.

14 So that we have -- and I think this goes to
15 the arbitrary factor. We have two defendants who have
16 both acted in a horrible way, society would agree.

17 One, purely by fortuitous circumstances, has
18 caused all these additional harms, not because he's
19 worse or better than the other defendant, but simply by
20 chance.

21 I think it's difficult to see how that cannot
22 have an arbitrary result, because we're not looking at
23 what this criminal did, what he deliberately caused to
24 be done, but merely fortuitous circumstances of again
25 the ripple effect for society.

1 QUESTION: Is that any more arbitrary than
2 Justice Scalia's example of the attempted murderer who
3 aims for the forehead, misses and gets ten years, as
4 opposed to the man who hits and is executed?

5 MR. BURNS: I don't think that is arbitrary at
6 all, Your Honor, again because when I point the gun at
7 someone, I surely must know -- I mean, I think it's the
8 basis of the criminal law --

9 QUESTION: When you know you're going to
10 miss? I mean, the hypothesis is you intend to hit him
11 square in the forehead, and in one case you miss.

12 MR. BURNS: Precisely, Judge Scalia.

13 I may have benefited from that. My point is:
14 The defendant who hits the victim and is punished
15 greater can hardly complain because someone else missed
16 him.

17 In that circumstances, both of them knew, or
18 should have known, the consequences. I surely know, if
19 I point a gun at someone and I intend to kill them, that
20 I may well do that.

21 If I don't, I may have been lucky. But it has
22 nothing to do with fortuitous circumstances in the sense
23 that I don't have control of.

24 QUESTION: I could say if you do, you're
25 unlucky. I mean, you know, --

1 MR. BURNS: Maybe very unlucky.

2 QUESTION: -- which direction you want to look
3 at it from. But the point is: It seems to me you're
4 talking about culpability as though the only elements
5 that go into culpability are how wicked is your intent,
6 number one, and perhaps, perhaps -- Well, I guess
7 that's it. How wicked is your intent?

8 It seems to me that another quite independent
9 element of culpability is simply how great is the harm
10 you did. How great is the harm that you did?

11 MR. BURNS: The difficulty, Justice Scalia, is
12 that I think we're going to have to simply change what
13 we've said about criminal law for at least the last 200
14 years.

15 Culpability has been the hallmark of criminal
16 law, unlike tort law, because again we're punishing
17 people for their bad acts, what they consciously are
18 doing, not what other circumstances may, quite beyond
19 their acts, cause.

20 If you're trying to use this -- and I suppose
21 deterrence is a factor in all of criminal law -- if
22 you're trying to deter someone, you may deter someone by
23 saying, "If this happens, if you do this and you kill
24 someone, we're going to punish you in this way."

25 It's hard to deter someone by simply saying,

1 "Well, if after the fact we decide that there may have
2 been ripple effects, that this person had a caring
3 family as opposed to an uncaring family" --

4 QUESTION: It's not deterrence; it's not
5 deterrence. It's expression of society's outrage and
6 revulsion.

7 MR. BURNS: Well, Your Honor, the question of
8 outrage --

9 QUESTION: Call it vindication, if you like.

10 MR. BURNS: Pardon? I'm sorry.

11 QUESTION: Call it vindication, if you like.

12 MR. BURNS: Well, I think that -- if I may --
13 leads us to a second problem. The State has attempted
14 to link that up by saying: It goes to retribution.

15 And certainly there are opinions by Justices
16 of this Court talking about retribution in capital
17 punishment.

18 However, those opinions are dealing with the
19 question of whether there should be capital punishment
20 or not, not the procedures to carry out retribution.

21 And I think the point is significant. For
22 example, if the State is right, and all I have to show
23 is that this procedure is consistent with retribution,
24 then it's obvious that defendant should be tortured
25 during sentencing.

1 It's difficult to think of anything that could
2 better serve retribution. Or if one doesn't like that,
3 one could at least bound, gag and chain him during it.
4 Again, it serves as retribution.

5 The point is: Retribution has a legitimate
6 basis, if one accepts it, in deciding whether or not we
7 apply the ultimate punishment, but it doesn't help at
8 all to say, "Is the procedure fair," because it would
9 seem to me that the less fair the procedure, the greater
10 retribution.

11 If one uses that argument, it militates in
12 favor of having the most unfair procedure. And I think
13 this may be an example. If not the most unfair
14 procedure, certainly an unfair one in this particular
15 case.

16 QUESTION: Mr. Burns, aren't there a number of
17 States with capital punishment laws that look to, as an
18 aggravating circumstance, the extent to which other
19 people might have been endangered by the conduct?

20 MR. BURNS: I think, Justice O'Connor -- the
21 ones I'm familiar with -- are ones where you're talking
22 about -- and Maryland has that, too, of killing more
23 than one person.

24 But, once again, the defendant certainly
25 knows--

1 QUESTION: No. I think there are a number
2 that look to the extent to which other people were
3 endangered, not killed.

4 MR. BURNS: Again, I can't say that I'm
5 completely familiar with every other statute, other than
6 Maryland's, but I believe those are again to be tied --

7 For example, if you put a bomb in this
8 building, surely one knows that the chances of killing
9 more than one person are very, very great.

10 And again I think that is easy to tie to
11 foreseeability, as opposed to the situation where no one
12 can possibly foresee.

13 So I'm learning my answer, because I'm not
14 terribly familiar with all these statutes, but I think
15 you can distinguish them in that way.

16 A word perhaps should be said about, in
17 passing, the state's use of authority. The State, not
18 unreasonably, has combed the country for those cases
19 which best support its position --

20 QUESTION: Let me come back just a minute and
21 say that -- or inquire whether you think it is generally
22 foreseeable when you murder someone that it's very
23 likely you will leave a number of family members
24 distraught and devastated, that that's the likelihood,
25 really?

1 MR. BURNS: That may be reasonably likelihood,
2 resonable likelihood that someone may be.

3 But again you don't know how extreme, and
4 there are going to be extremes.

5 QUESTION: Well, but just if you limit it to
6 that kind of reasonable concern, do you think that's
7 inherently improper, viewed in the light of the other
8 aggravating circumstances that States have adopted?

9 MR. BURNS: I don't think so, Justice
10 O'Connor. And I think there are several perhaps
11 additional problems with this, because not only are we
12 talking about leaving these victims, we're also talking
13 about a very personalized thing.

14 For example, let's suppose that there are two
15 murders. And in one case -- They both have loving
16 families.

17 But some people, their grief just as intense,
18 would prefer not to participate, would prefer not to be
19 involved in this. They want certainly justice, but they
20 also want to not be involved.

21 So they're not going to have much in the
22 victim impact statement. They may say, "No, we're not
23 going to be involved."

24 The other case, the people may -- Their grief
25 may take the opposite view. But once again here, not

1 only do we have fortuitous circumstances in where there
2 are family members, but it turns on the specific
3 reaction of the family members, rather than the actual
4 victim or the defendant.

5 QUESTION: Well, Mr. Burns, hasn't tort law
6 for a long time distinguished between intentional torts
7 and negligent torts in this respect, that with respect
8 to intentional torts, you take the consequences as you
9 find them, and you're responsible for even fairly
10 unforeseeable consequences.

11 It's just in the negligence areas that the
12 foreseeability question comes in.

13 MR. BURNS: I certainly agree, Mr. Chief
14 Justice, there's a difference.

15 QUESTION: So that an intentional killer is
16 really not in a position as applying traditional tort
17 laws to complain that he killed someone who had a far
18 more bereaved family than the next person.

19 MR. BURNS: Mr. Chief Justice, I certainly
20 agree with you that the family could successfully sue
21 the killer. I have no difficulty with that whatsoever.
22 I think in our brief we make clear, one of the early
23 divisions between tort law and criminal law was just
24 that, is to take the victim as you find the situation.
25 And the idea, obviously, of tort law is to put people,

1 make people whole to the extent you can. Obviously,
2 realistically in this case, you can't; but to the extent
3 that you can.

4 And so I'm certainly not suggesting that you
5 couldn't sue in tort, but --

6 QUESTION: But you're insisting that there's a
7 foreseeable -- a principle of foreseeability here that
8 should somehow limit your client's criminal liability.

9 MR. BURNS: Yes, Your Honor.

10 QUESTION: I'm suggesting that that -- that
11 there's a very good analogy from tort law that suggests
12 that isn't the case.

13 QUESTION: Well, I suggest, Your Honor, that
14 that obviously this Court can do as it will, but I think
15 to do that, we're going to have to substitute tort law
16 for criminal law.

17 Criminal law has never been built on that
18 basis.

19 And I think the reason Mr. Chief Justice has
20 to draw all the the analogy from tort law is precisely
21 that. It's not criminal law.

22 QUESTION: You think -- you think that you
23 can't be convicted of the crime of killing a federal
24 officer unless you knew he was federal officer?

25 MR. BURNS: Well --

1 QUESTION: Right?

2 MR. BURNS: -- as always --

3 QUESTION: You don't take the victim the way
4 you find him? You look down and you say, "My God, I've
5 killed a federal officer."

6 MR. BURNS: I would say if you reasonably --

7 QUESTION: I'll tell you -- well, I don't
8 think reasonably. You have no idea whether he's your
9 Federal Officer or not when you -- when you kill him.
10 And if you've killed a federal officer, I think you take
11 your victim the way you find him.

12 MR. BURNS: I'm just -- I'm not familiar with
13 the case. I don't know if Your Honor has one in mind.

14 I think, for example, let's -- the situation
15 -- I don't -- this is not a Federal case. It was a
16 Maryland case where you have someone posing as a drug
17 dealer. And I think in that situation, it's very
18 difficult to argue is, when someone is being killed in a
19 drug transaction because he's posing as a drug -- drug
20 dealer, that you're actually killing a federal officer
21 because it doesn't serve that purpose of --

22 QUESTION: And if you rob a bank and you don't
23 know that it's a Federal bank, you're -- you're not
24 prosecutable under the laws governing the robbery of a
25 Federal bank?

1 MR. BURNS: I think it's reasonableness -- is
2 if everyone realizes that banks, most banks perhaps,
3 many banks, are Federal banks, is if someone is
4 deliberately posing as a drug dealer, I don't think one
5 can reasonably say, "I must, therefore, assume" --

6 QUESTION: Everybody realizes -- everybody
7 realizes people have relatives whom they leave behind.

8 MR. BURNS: They realize that.

9 QUESTION: And all that this Statute permits
10 is those relatives to come in and demonstrate the harm
11 that this individual has done, just as -- just as he's
12 entitled to put on exculpatory testimony, his mother
13 coming on and saying, you know, "It was my fault," or
14 whatever.

15 MR. BURNS: The difficulty is --

16 QUESTION: These are just the realities of
17 things.

18 MR. BURNS: Presumably his mother -- it may
19 been her fault. I don't know that it is. That may have
20 some bearing on what he did.

21 What he did was certainly not because and not
22 intended, in the normal situation, to these other
23 individuals.

24 And it's very difficult, Justice Scalia, --

25 QUESTION: Then you're getting back to your

1 assumption that the only proper basis for setting a
2 level of punishment is the nature of his soul.

3 And what I'm saying is, it isn't. It's also
4 the amount of harm that he's caused.

5 MR. BURNS: I think, Your Honor, Justice
6 Scalia, in part I agree with you. But I think it's
7 foreseeable harm, not unforeseeable harm. I think
8 that's the only difference I have with you --

9 QUESTION: Can we just back up for minute?

10 Did you say that the man doesn't know that --
11 that everybody knows that all the banks are Federal
12 banks?

13 MR. BURNS: I'm saying -- I said, Justice
14 Marshall, --

15 QUESTION: Are you from Maryland? I mean, are
16 you from Maryland and you say that?

17 MR. BURNS: Now, Justice, we've changed that
18 in Maryland.

19 QUESTION: Mr. Burns, I thought the question
20 before us in this case was admissibility of the Victim
21 Impact Statements.

22 MR. BURNS: Yes, Justice Powell.

23 QUESTION: We haven't talked very much about
24 that, have we?

25 MR. BURNS: Well, I think this all is the

1 question of admissibility comes down to, whether it
2 serves one of these purposes.

3 QUESTION: Well, let me ask you this.

4 Was the Victim Impact Statement by the son
5 and, I guess, daughter and maybe children,
6 grandchildren--

7 MR. BURNS: That's correct, Justice Powell.

8 QUESTION: -- introduced in evidence at the
9 sentencing hearing?

10 MR. BURNS: Yes, Justice Powell.

11 QUESTION: Were you permitted to cross-examine?

12 MR. BURNS: By agreement of all the parties,
13 the preferred -- the options given the Defense in this
14 case were, you can have live or statements.

15 By agreements, they thought it was less
16 prejudicial than you had the statements.

17 So the answer is, they didn't cross-examine
18 him. But I can't honestly say, obviously, that's
19 because of the procedure. It was because the procedure
20 that the parties agreed that it would be less
21 prejudicial than for statements.

22 QUESTION: Under Maryland law, you would have
23 had the opportunity to cross-examine?

24 QUESTION: If they had testified, I think you
25 certainly would have, yes, Justice Powell.

1 QUESTION: What's the difference between
2 filing written statements and testifying? Could you
3 file any --

4 MR. BURNS: I don't understand, Justice Powell.

5 QUESTION: -- any conflicting -- conflicting
6 statements?

7 MR. BURNS: I'm afraid I don't understand your
8 question.

9 QUESTION: You don't understand the question?
10 On page 59 of the Appendix, there is a Victim
11 Impact Statement of Mr. and Mrs. -- what is it?
12 Bronstein?

13 MR. BURNS: Yes, Justice.

14 QUESTION: And you say that was filed at the
15 sentencing hearing. And you did not cross-examine Mr.
16 and Mrs. Bronstein?

17 MR. BURNS: No. They were not there, no.

18 QUESTION: But couldn't you have -- couldn't
19 you have insisted they be there so you could
20 cross-examine them.

21 MR. BURNS: I think that's true. They -- I
22 think they could have. As I pointed out, Justice
23 Powell, in this case, all the parties -- well,
24 obviously, defense didn't want any Victim Impact
25 Statement.

1 The response was, "Well, is -- would you
2 prefer us to have live victims or the Statement?"

3 And I think defense counsel made that choice.

4 Obviously, if they would have come, I see no
5 reason why they could not be cross-examined in that
6 circumstance.

7 I reserve my time for rebuttal.

8 CHIEF JUSTICE REHNQUSIT: Thank you, Mr. Burns.

9 We'll hear now from you Mr. Monk.

10 ORAL ARGUMENT OF CHARLES O. MONK, II, ESQ.,

11 ON BEHALF OF THE RESPONDENT

12 MR. MONK: Mr. Chief Justice, and may it
13 please the Court:

14 The issue in this case is whether victim
15 impact evidence can be introduced at the sentencing
16 phase of a capital case consistent with the Eighth
17 Amendment.

18 We believe that it can under Maryland's
19 carefully devised capital sentencing process.

20 The Maryland General Assembly has chosen to
21 include victim impact evidence in the death penalty
22 process.

23 In doing so, however, Maryland has not
24 undermined the substantial safeguards of its process
25 that guide the discretion of the sentencer and insure

1 that the death penalty is not imposed in an arbitrary or
2 capricious manner.

3 In fact, I suggest that Maryland's bifurcated
4 death penalty procedure contains many more procedural
5 safeguards than other sentencing procedures already
6 approved by this Court.

7 Maryland has ten limited circumstances where
8 the death penalty may be appropriate.

9 With the exception of a person that contracts
10 for murder, only a principal in the first degree, that
11 is, one that actually commits the murder or kills the
12 victim, is subject to capital punishment in Maryland.

13 The aggravated murderers, where the death
14 penalty can be imposed, include such things as victim --
15 as the victim was a law enforcement officer. And let me
16 stop here, Justice Scalia.

17 In Maryland, the defendant would not have to
18 know that the victim was a law enforcement officer. It
19 would be sufficient that the -- that the victim was a
20 law enforcement officer on duty to constitute an
21 aggravated circumstance under the Maryland Statute.

22 Another -- another example of the aggravated
23 circumstances required by the Maryland Statute is that
24 the victim was taken or attempted to be taken in the
25 course of a kidnapping or abduction.

1 In this case, the aggravating circumstance is
2 that the defendant committed the murder while committing
3 robbery.

4 Under Maryland's death penalty law, if no
5 aggravating circumstance is found, then life
6 imprisonment is the sentence.

7 However, if one or more aggravating
8 circumstances are found to exist and the standard is
9 beyond a reasonable doubt, then we shift to mitigating
10 circumstances for consideration.

11 In addition to Stat. 7, statutorily defined
12 mitigating circumstances, Maryland also permits the
13 defendant wide discretion to present other facts in
14 mitigation.

15 Mitigating circumstances under the Maryland
16 procedure must only be proved by a preponderance of the
17 evidence.

18 A single mitigating circumstance is sufficient
19 under the Maryland procedure to outweigh whatever
20 aggravating circumstances are found and indicate that
21 life sentence is appropriate.

22 In this case, the jury found and noted on the
23 verdict sheet under the open-ended-other-facts category
24 that the defendant's family environment, child neglect,
25 and lack of strong father image were mitigating factors.

1 I think this is important because it indicates
2 that the jury was, in fact, listening to the evidence
3 and understanding what the defendant was presenting.

4 QUESTION: Mr. Monk, I think the question I
5 have I'd like you to address, frankly, is that the
6 Maryland sentencing scheme, as you've been describing it
7 and as the record discloses, is very specific.

8 In fact, the jury is actually given a form --

9 MR. MONK: That's correct, Your Honor.

10 QUESTION: -- and it lists the aggravating
11 circumstances, and the jury is told to check off on the
12 form what ones it finds. And the form includes space to
13 put the mitigating circumstances. And they're asked to
14 say what they are.

15 And then they're told that if they find that
16 the aggravating circumstances outweigh the mitigating,
17 they are to return the sentence of death.

18 MR. MONK: That's correct.

19 QUESTION: Now, the use of the Victim Impact
20 Statement is not described on the form for sentencing.
21 It's doesn't fit into this very precise procedural
22 scheme at all.

23 And it appears to me that the Victim Impact
24 Law was, perhaps, passed later and is kind of an add-on,
25 and that the form has never been adjusted to reflect how

1 the jury is to use it.

2 And, indeed, in this case it was just the
3 subject of argument by the Prosecutor, I suppose, after
4 the Statement had been admitted.

5 And I'm concerned about what you see about the
6 kind of guidance that would meet Federal constitutional
7 standards in a death-sentencing scheme is required for
8 the use of victim impact statements.

9 MR. MONK: Justice O'Connor, I would agree
10 with you that there is no place on the form for the jury
11 directly to consider victim impact evidence.

12 But I disagree with you that is not clearly a
13 part of the process.

14 The Maryland Court of Appeals in this case, I
15 think, addressed exactly your concern when it said the
16 victim impact evidence reflects the gravity or
17 aggravating circumstances of the crime.

18 There's no place on the form, I might say, for
19 a description of the heinous nature of the crime, the
20 fact that the Bronsteins were bound and gagged and
21 stabbed numerous times. There's no place on the form
22 for the jury to look at that evidence either.

23 QUESTION: Well, I think if I'd been a juror,
24 I might have been quite confused about what use to make
25 of the Victim Impact Statement in a scheme like

1 Maryland's that has been made so specific.

2 And that's why I'm asking you for help.

3 MR. MONK: Well, I suggest to you, Justice
4 O'Connor, that the process, what the jury was supposed
5 to do in this case and I think was Maryland's process
6 calls for, is that once the jury finds the threshold of
7 an aggravated murder, that it was committed in the case
8 in connection with a robbery, then they take into
9 consideration the circumstances of the crime, the victim
10 impact, the defendant's criminal record, in considering
11 the aggravating quality of the crime, and then weigh
12 that against the mitigating circumstances presented by
13 the defendant.

14 It's -- it's not there on the form, but it is
15 part of the process.

16 QUESTION: Nowhere are they told to do that
17 though.

18 MR. MONK: Well, I think there could be an
19 instruction if there was not a request for such an
20 instruction in this case.

21 There was an instruction, however that say --
22 that said that you weigh -- that gave -- the suggestions
23 to the jury about what an aggravating circumstance meant
24 and what a mitigating circumstance meant.

25 And I think that that kind of instruction is

1 sufficient for the jury to understand the process that
2 it's undertaking.

3 QUESTION: May I ask this question?

4 Under the Maryland Statute -- I'm sure it's
5 here somewhere, but I haven't been able to lay my hands
6 on it -- is the effect of the murder on the victim's
7 family a statutory aggravating factor?

8 MR. MONK: It is not, Justice Powell.

9 QUESTION: It is in getting to the case in any
10 event?

11 MR. MONK: Pardon me.

12 QUESTION: I say --

13 MR. MONK: How does it come in?

14 QUESTION: There's a separate statute in
15 Maryland that says this is admissible in a capital case?

16 MR. MONK: That's right.

17 The Statute -- the General Assembly has
18 defined what evidence is admissible in a capital case.
19 And among that list is a pre-sentence report including
20 the Victim Impact Statement.

21 And that's how it comes into the process.

22 The pre-sentence report details the criminal
23 history of the defendant and some relevant information
24 about his background.

25 QUESTION: My understanding is that although

1 counsel for the defendant in this case objected to the
2 introduction of this Victim Impact Statement, counsel
3 did not choose to cross-examine the parties who signed
4 these testimonials as to the effect of the murder on
5 them.

6 MR. MONK: That's correct.

7 And, in fact, the Statement, as the Petitioner
8 has indicated in argument, came in as a joint exhibit of
9 the --

10 QUESTION: Would he have had the right to
11 cross-examine those people? Could you --

12 MR. MONK: Would have --

13 QUESTION: Could you have introduced a
14 statement if he had objected and said, "If you bring
15 them up here, I'm going to cross-examine them?"

16 MR. MONK: I think he could have, and I think
17 the Court would have been required to give him the
18 opportunity to rebut the evidence.

19 Under Maryland's scheme, it's clear --

20 QUESTION: To cross-examine them?

21 MR. MONK: Yes.

22 QUESTION: Can you give me a case on that?

23 MR. MONK: Well, I think the Statute, itself,
24 reflects it, Justice Marshall.

25 The Statute says --

1 QUESTION: Does the Statute say, "An impact
2 statement" is admissible?

3 MR. MONK: Yes, it does.

4 But the Statute also indicates --

5 QUESTION: It says, impact statement?

6 MR. MONK: It says, including a victim impact
7 statement, in the description of the pre-sentence report.

8 QUESTION: (Inaudibles.)

9 MR. MONK: It's in the Statute, I believe.

10 QUESTION: That's okay. I can find it.

11 MR. MONK: Also the -- I think if the Court
12 would look at the Maryland Court of Appeals earlier
13 decision in Lodowski where the Court of Appeals took the
14 opportunity to construe this Statute is further guidance
15 in that case.

16 QUESTION: General Monk, can I ask you a
17 question?

18 In your response to Justice O'Connor proper,
19 you described the Statement, "It reflects the aggravated
20 nature of the crime," or something like that.

21 MR. MONK: That's correct.

22 QUESTION: Do you think it would be
23 permissible for the State Statute to provide that if a
24 victim leaves surviving two or three children, that
25 shall be considered an aggravating circumstance, a

1 statutory aggravating circumstance justifying the death
2 penalty might not otherwise be justified?

3 MR. MONK: Well, I think in the same vein that
4 I think it's permissible that we decide that the
5 commission of -- or murder of a police officer in the
6 course of his duties: If the General Assembly were to
7 decide that, I think it's possible that that could be
8 considered a statutory aggravating circumstance.

9 I don't think that's --

10 QUESTION: And you think it would be
11 constitutional to do that is what I am asking.

12 MR. MONK: I think they could do so
13 constitutionally.

14 I don't think that is what they have done here.

15 QUESTION: No, I understand. Although one
16 could argue that the effect of it is pretty much the
17 same because it -- I suppose it could -- this bit of
18 evidence could make the difference between the jury
19 finding a man -- imposing the death sentence and not
20 doing so. That must be the very purpose of it.

21 QUESTION: Indeed. I don't understand what
22 you've done here if -- why it is -- why it should not be
23 excluded as totally irrelevant evidence unless it is an
24 aggravating circumstance.

25 What does it bear upon unless it bears upon

1 aggravation?

2 MR. MONK: Justice Scalia, indeed, that's what
3 the Maryland Court of Appeals said.

4 They said this evidence reflects the gravity
5 of the crime and the aggravating quality of the crime --

6 QUESTION: So it is an aggravating
7 circumstance established by a separate statute. It is
8 just not listed in the other Statute that lists all the
9 aggravating circumstances?

10 MR. MONK: That's right.

11 But in a sense, we're playing a bit of a word
12 game here because aggravating circumstances within the
13 meaning of the Maryland Statutes are thresholds which
14 have to be crossed before you become death eligible.

15 And it's -- it is not that. And that's
16 important to understand.

17 QUESTION: But I suppose it could be made that
18 under your view of the case?

19 MR. MONK: Well, to the extent that the
20 Maryland General Assembly could decide that a police
21 officer killed in the performance of duty constitutes an
22 aggravating circumstance, --

23 QUESTION: Well, I understand. So your answer
24 is yes?

25 MR. MONK: -- I think they could decide that,

1 yes.

2 QUESTION: Do I understand that the Maryland
3 Statute authorizes imposing the death penalty just
4 because the jury hears and believes the statements of
5 victim -- of relatives?

6 MR. MONK: That's correct.

7 QUESTION: You have to find a statutory
8 aggravating circumstance?

9 MR. MONK: That's exactly right. You have to
10 be a principal in the first degree and find a statutory
11 aggravating circumstance. Then you consider --

12 QUESTION: And so there's no -- there's no
13 separate aggravating circumstance for victim impact --
14 of impact on victims?

15 MR. MONK: That is exactly correct, Justice
16 White.

17 QUESTION: No, but as I understand it, you
18 think there could be. There would be no constitutional
19 objection to that because the argument would be
20 precisely the same?

21 MR. MONK: Well, I don't know that the
22 argument would be precisely the same. But I -- but I
23 don't think --(Inaudibles.)

24 QUESTION: Well, if it can make the
25 difference, and I think you've accepted that it could,

1 between having a death sentence imposed in one case and
2 not in another case, which was identical except for the
3 absence of an impact statement, I don't know why that
4 isn't the classic example of an aggravating circumstance.

5 MR. MONK: Well, under the Maryland scheme,
6 and I think under the Eighth Amendment jurisprudence of
7 this Court, the State should and is required to limit
8 and define those cases -- (Inaudibles.)

9 QUESTION: Well, this is one classic --
10 (Inaudibles.) -- the only victims who had children which
11 would limit it but as compared to victims who did not
12 have children.

13 MR. MONK: I would agree that they could do
14 so, and the General Assembly could do so.

15 Whether this Court would find that as it has
16 with respect to rape that that's -- that that's cruel
17 and unusual punishment, I can't say.

18 But I think as a logical matter, they could do
19 so and create that threshold, aggravating circumstance,
20 as opposed to how the evidence came in in this case
21 which is -- goes to the aggravating --

22 QUESTION: Right.

23 MR. MONK: -- quality or nature of the crime.

24 QUESTION: I think you must make that argument
25 in order to sustain the Statute.

1 MR. MONK: I would like to say a few more
2 words about the Maryland statutory scheme itself because
3 I think once the Court understands the scheme and
4 understands the safeguards built into the scheme, they
5 will understand why the introduction of this evidence
6 was not arbitrary or create an arbitrary or capricious
7 result.

8 Under the Maryland law, whenever the death
9 penalty is imposed, the decision is subject to immediate
10 review and direct review by the Maryland Court of
11 Appeals.

12 In addition, the trial Judge must submit a
13 report to the Court of Appeals detailing information
14 about the defendant, the conduct of the trial, and a
15 recommendation by the trial Judge as to whether
16 imposition of the sentence of death is justified.

17 Now let me say, the defendant has a choice in
18 Maryland.

19 He can choose the jury or he can choose the
20 trial judge at the sentencing phase of the process.

21 And the jury's decision is binding if he
22 chooses the jury.

23 In reviewing the case, the Court of Appeals is
24 specifically required under Maryland Statute to
25 determine whether the sentence of death was imposed

1 under the influence of passion, prejudice, or any other
2 arbitrary factor.

3 In this case, the Court of Appeals concluded
4 that the introduction of the victim impact evidence did
5 not present an arbitrary factor.

6 As a final consideration, the Court of Appeals
7 undertakes a proportionality review to determine whether
8 the sentence is excessive or disproportionate to the
9 penalty imposed in a similar case, considering both the
10 crime and the defendant.

11 It is, I suggest to you, in the face of this
12 carefully devised statutory scheme, that Petitioner
13 would have this Court rule that victim impact evidence
14 cannot be introduced consistent with the Eighth
15 Amendment.

16 We submit to do so would be improper extension
17 of the Eighth Amendment jurisprudence of this Court.

18 It has long been recognized that retribution
19 is a valid rationale for the death penalty.

20 In non-capital cases, it is typical in
21 assessing a punishment to be imposed to consider the
22 impact of the crime upon the victim.

23 As Justice Marshall noted earlier, Maryland
24 just suffered through a savings and loan crisis. When
25 we came to the point of sentencing the criminals

1 involved in the savings and loan crisis, certainly the
2 impact of their crimes on the State of Maryland was a
3 relevant consideration and was appropriately taken into
4 consideration by the Court.

5 And I don't think it offended the Eighth
6 Amendment in any way, shape, or form to do so.

7 Indeed, we recognize in our system of legal
8 process, to paraphrase the words of Justice Stewart in
9 Gregg, that channeling the instinct for retribution
10 through the administration of criminal justice is
11 essential in an ordered society that asks its citizens
12 to rely upon legal processes rather than self-help to
13 vindicate their wrongs.

14 Consequently, it is entirely consistent with
15 this long-recognized precept of criminal justice that
16 Maryland provide the sentencer in capital cases with a
17 victim impact information that can be used in
18 considering what retribution should be exacted as a
19 consequence of the defendant's conduct.

20 Significantly the Maryland Court of Appeals in
21 this case held that there is a reasonable nexus between
22 the impact of the crime upon the victim's family and the
23 facts and circumstances surrounding the crime,
24 especially as I said before, as to the gravity or
25 aggravating quality of the offense.

1 Thus, the Maryland Court appropriately gives
2 deference to the Maryland statutory scheme and holds
3 that victim impact evidence is admissible simply as
4 another circumstance of the crime.

5 It is not, and let me emphasize this, indeed
6 it cannot be, under the Maryland law, a call for the
7 death penalty.

8 This is not private vengeance.

9 Instead, it simply provides additional
10 probative information that the sentencer can use in
11 weighing the aggravating nature of the crime against
12 whatever mitigating circumstances it has found.

13 The introduction of this victim impact
14 evidence is not as Petitioner suggests "wholly
15 arbitrary."

16 Under the Maryland statutory scheme, it must
17 be admitted in every case whether it is traumatic or
18 inconsequential.

19 In this regard, it is no more arbitrary than
20 the crime itself. Justice Rehnquist --

21 QUESTION: Before you, the blue brief, the
22 last pages of the blue brief --

23 MR. MONK: Yes, I do.

24 QUESTION: Is -- down there in Roman numeral
25 -- Roman numeral five and six, are those the -- is that

1 the only -- are those the only mentions of the family
2 members?

3 MR. MONK: That's correct.

4 QUESTION: And in six, it says -- in five, it
5 says the statement must contain any request for
6 psychological services by the victim's family.

7 MR. MONK: That's correct.

8 QUESTION: And in six, it says any other
9 information about the victim's family that the court
10 requires.

11 MR. MONK: That's correct.

12 QUESTION: Was there some requirement by the
13 Court in this case?

14 MR. MONK: The Court requested a pre-sentence
15 report. And the probation officer then interviewed the
16 family of the victim and reported --

17 QUESTION: Well, I know, but this seems to
18 indicate that the Judge has to require information about
19 the impact on the victim's family.

20 MR. MONK: In this case the Court did not
21 specifically request information about the victim's
22 family.

23 He did request a pre-sentence report. And, as
24 part of that pre-sentence report, the probation officer
25 conducted an interview of the family and prepared the

1 victim impact statements that were admitted in evidence
2 as a --

3 QUESTION: Does the judge ever instruct with
4 respect to a victim impact statement, what its relevance
5 is, or how it should be used?

6 MR. MONK: The judge could instruct.

7 QUESTION: Does he ever?

8 MR. MONK: He was not requested to do so in
9 this case.

10 QUESTION: Does he ever?

11 MR. MONK: Well, I can't speak across all of
12 Maryland's cases. But I certainly think it's
13 appropriate to do so. And I think I --

14 QUESTION: But you don't recall any instance
15 where the judge did comment on it?

16 MR. MONK: I have not -- I do not know of such
17 an instance.

18 QUESTION: But you know -- you know what a
19 prosecutor says about it, doesn't he -- don't you?

20 MR. MONK: The prosecutor in this case read
21 the Victim Impact Statements.

22 QUESTION: And so then argued from what?

23 MR. MONK: He argued from it that there --
24 that this was a serious crime, and it caused harm to the
25 defendant's family -- the victim's family.

1 QUESTION: And, therefore, it helped to
2 illuminate what aggravating circumstance?

3 MR. MONK: Well, in this case the aggravating
4 circumstance was that the crime was committed while
5 committing a robbery. It helped illuminate the fact
6 that the crime was particularly heinous and that it
7 caused severe harm.

8 And that was weighed against the mitigating
9 circumstances proffered by the defendant.

10 QUESTION: What aggravating circumstance did
11 the jury find in this case?

12 MR. MONK: Number ten that the -- on the
13 Maryland statutory scheme, that the crime was committed
14 while committing robbery.

15 QUESTION: Is that the only one?

16 MR. MONK: That's correct.

17 QUESTION: Now how did a victim impact
18 statement, how could that have illuminated that?

19 MR. MONK: Well --

20 QUESTION: It may have -- did they ask for --
21 for the especially heinous, aggravating --

22 MR. MONK: No.

23 QUESTION: -- circumstance?

24 MR. MONK: You see that -- under the Maryland
25 scheme, there is no direction that you look for

1 especially heinous or anything of that nature as there
2 is in other State statutes.

3 Under the Maryland scheme, what happens is
4 that once you have met the threshold that the crime was
5 committed while committing a -- murder was committed
6 while committing a robbery, then the aggravating nature
7 of the crime, itself, the criminal history of the
8 defendant and the impact upon the victim's family --

9 QUESTION: I see.

10 MR. MONK: -- comes into evidence and is used
11 as a weight on that side to compare to the mitigating
12 circumstances presented by the defendant.

13 QUESTION: General Monk, allow me to
14 interrupt. Can I ask one other thing?

15 About this aggravating circumstance, killing a
16 police officer -- and the Statute doesn't require that
17 the defendant know that he was a police officer --

18 MR. MONK: That's correct.

19 QUESTION: -- has the Appellate Court in
20 Maryland construed that Statute and held that that is a
21 correct instruction?

22 MR. MONK: Yes.

23 QUESTION: It has?

24 MR. MONK: Yes.

25 Let me just say which -- that takes me to my

1 next point which is foreseeability.

2 I think foreseeability is an important -- an
3 important question here.

4 And I agree with Justice Rehnquist that I
5 think there is a distinction on the defendant's
6 direction -- direct acts -- on his knowing act is what's
7 at issue.

8 It is quite clear that the defendant knows, I
9 believe, or should have known, when he takes another
10 person's life, that the family of the victim will suffer
11 greatly as a consequence of his conduct even if he
12 doesn't know who the family is. He knows that the
13 person -- it's reasonable to assume that he knows the
14 person has a family, and they're going to suffer as a
15 result of his wanton act.

16 QUESTION: Yes, but General Monk, doesn't the
17 jury also know that? If that's so -- common knowledge,
18 why do you need the victim impact statement?

19 MR. MONK: Well, Justice Stevens, I think that
20 goes back to my earlier point that I -- and I think it's
21 a legislative judgment that Maryland has made that
22 there's a role to play for victim impact evidence when
23 we get to that final stage, after we have determined
24 that this is an aggravated murder, and we have met all
25 the other prerequisites of principal in the first degree

1 and so forth, when we get to the weighing of the moral
2 judgment, the Maryland General Assembly has said, Why
3 can't we have a limited introduction of the impact of
4 the crime upon the victim? Personalize -- personalize
5 the facts from the victim's side when the jury makes
6 that moral judgment of weighing --

7 QUESTION: And makes it more likely that it
8 will impose the death sentence?

9 MR. MONK: Well, I don't think that you can
10 necessarily come to that conclusion.

11 You know, on the other side of the fence --

12 QUESTION: Don't you go too far when you say
13 that the jury knows that he has a family?

14 The jury knows that he may have a family.
15 That's all the jury knows. This shows that, in fact, he
16 does have a family.

17 MR. MONK: He does have a family.

18 QUESTION: Just as the jury knows that he may
19 have had a deprived childhood.

20 But the exculpatory evidence that can come in
21 shows that he, in fact, did have a deprived childhood.

22 MR. MONK: That is correct, Justice Scalia.

23 QUESTION: (Inaudibles) -- impact statement
24 that would help the criminal?

25 MR. MONK: Well, I can imagine the victim

1 impact statement that would not, in any way, indicate or
2 add to the aggravating quality of the crime.

3 For instance, suppose the victim didn't have a
4 family at all, the victim impact statement would
5 indicate that. A family --

6 QUESTION: Do you think that would help?

7 MR. MONK: Well, I don't think it would add to
8 the heinous nature of the crime.

9 QUESTION: My question was, help.

10 MR. MONK: Well, obviously, he committed this
11 murder. Nothing is going to help him --

12 QUESTION: Nothing would help --

13 MR. MONK: -- from the victim's side of the
14 equation.

15 Nor, I guess, in Maryland's judgment, should
16 it.

17 What Maryland has done here is found a role,
18 and we think an appropriate role, consistent with the
19 Eighth Amendment for the victims in the criminal justice
20 system.

21 QUESTION: Mr. Monk, what is the relevance of
22 the recommendation of the surviving family members as to
23 the proper punishment to be imposed?

24 MR. MONK: Under Maryland's procedure, they
25 are explicitly not permitted to make any demand for

1 death penalty or what -- any recommendation whatsoever.

2 QUESTION: Wasnt' there something in the
3 Victim Impact Statement here that really incorporated
4 their recommendations?

5 MR. MONK: Well, I think there were two
6 comments that are --

7 QUESTION: Right.

8 MR. MONK: --pointed out by Petitioner in
9 Amici.

10 One comment is something to the effect that
11 they were seeking swift justice. I certainly don't
12 think that necessarily implicates the death penalty.

13 And the other comment was that the defendant
14 not be permitted to commit this type of crime again.

15 And I suggest to you that life imprisonment
16 accomplishes that end.

17 Now, I'm not saying that --

18 QUESTION: You don't -- you don't stand here
19 and try to justify introducing before the jury the
20 recommendation of family members on the penalty?

21 MR. MONK: I do not. Indeed, it cannot be
22 under the Maryland Statute. It's specifically excluded
23 by the Maryland Statute.

24 QUESTION: And so what would you do to the
25 extent they're included? Should they be removed --

1 MR. MONK: They should be redacted --

2 QUESTION: -- from the statement? Redacted --

3 MR. MONK: The trial court should redact any
4 such statements?

5 QUESTION: And arguably, a couple of these
6 should have been redacted?

7 MR. MONK: Well, I think reasonable minds
8 could differ on whether they could or they couldn't.
9 The trial Judge didn't think so. The Maryland Court of
10 Appeals also decided that they -- that they were not
11 necessary to do so.

12 I'm not going to say that anybody looking at
13 this automatically would say, "Gee, I -- maybe this goes
14 too far."

15 I think the question before this Court is not
16 whether a few of these statements are beyond what they
17 should have been under the Maryland Statute or not, but
18 whether this evidence comes in at all under the Eighth
19 Amendment.

20 And I think Maryland has found a way to
21 include it within the process without making the process
22 arbitrary or capricious.

23 QUESTION: Mr. Monk, while we're talking about
24 Maryland practice, could the substance of this statement
25 have been introduced in the trial itself?

1 MR. MONK: No, it could not as far as I can
2 see, Justice Powell.

3 I was speaking about the foreseeability of
4 this, and let me just finally make my points on that.

5 Indeed, if you -- if we accept the premise
6 that the defendant knows or should have known that
7 there's a family to be harmed when he commits the
8 murder, then as the sentencer judges his moral capacity,
9 it is called upon to recognize whether he felt any
10 concern or remorse for the harm caused to the victim and
11 the victim's family.

12 In this case, the evidence showed the
13 defendant was particularly callous to the grave harm he
14 caused others when he described to his cohorts that they
15 should pay no mind to the brutally murdered bodies of
16 Mr. and Mrs. Bronstein when they returned to the house
17 to ransack and steal more property.

18 He, obviously, was totally unconcerned that
19 the Bronstein family would suffer greatly from his
20 brutal acts.

21 He was simply concerned about taking their
22 property without getting caught.

23 Nevertheless, I suggest to you that it was or
24 should have been completely foreseeable to Booth,
25 especially considering he lived two houses down the

1 street, that the family would suffer greatly as a direct
2 result of his conduct.

3 Consequently, it is not at all unfair to
4 require that the sentencer consider victim impact
5 evidence in making a moral judgment regarding Booth's
6 crimes.

7 One other point that I want to respond to that
8 the Petitioner has made is the emotional impact of this
9 evidence.

10 Petitioner claims that victim impact evidence
11 is so emotionally charged as to introduce an arbitrary
12 factor that will disrupt the exercise of the guided
13 discretion of the sentencer.

14 Victim impact evidence may well be emotional.

15 However, by itself, this should not be a
16 problem of constitutional dimension.

17 First, the trial court can instruct the jury
18 upon the use of victim impact evidence, although as I
19 have said here, he was not requested to do so.

20 Secondly --

21 QUESTION: You made include it in -- in your
22 consideration of -- of how serious a crime this was?
23 The more serious it is, the more what?

24 MR. MONK: Well, that's essentially -- I think
25 that's essentially correct.

1 The Maryland Court of Appeals said something
2 to the effect that the sentencer may consider the impact
3 of the offense upon the victim or the victim's family as
4 it relates to the gravity or aggravating quality of the
5 crime.

6 And I think that's appropriate. That's what
7 it comes in -- that's the place in the process that it
8 comes in.

9 It just like a description of the crime,
10 itself.

11 If this case were sent back, --

12 QUESTION: Well, when the prosecutor is asking
13 for the death penalty and as he's trying to get it, he
14 uses this because he thinks it will help him attain that
15 goal; doesn't he?

16 MR. MONK: It comes in in every case, whether
17 the prosecutor wants it in or not.

18 And so that's another reason why I don't think
19 it's arbitrary.

20 It is -- whatever it is, it is the
21 circumstances of the crime that is -- and the
22 consequences of the crime that is before the sentencer
23 when they're weighing and making the moral judgment
24 they're called upon to make.

25 QUESTION: That the probation officer, does he

1 prepare the --

2 MR. MONK: The probation officer does, yes,
3 Justice.

4 QUESTION: And if he finds out that the
5 children of the victim think that it was good riddance,
6 he puts that in the report, too?

7 MR. MONK: Well, he puts in whatever --

8 QUESTION: Does he?

9 MR. MONK: -- whatever he finds. He puts in
10 whatever he finds. And the defendant is given the
11 opportunity to challenge whatever evidence comes in
12 --(Inaudibles.)

13 QUESTION: (Inaudibles.) Well, wait a minute.
14 Or at least relieved when somebody is out of the way?

15 (Inaudibles.)

16 MR. MONK: Is it up to the --

17 QUESTION: Obviously, it is. I mean, if the
18 probation officer, if the guy said, "I think this is a
19 dirty (Inaudibles) and he's a this and all and all, but
20 I'm a man of God, and I believe that I could not but
21 recommend it." Could he leave the rest of it off?

22 MR. MONK: He can't -- he can't recommend a
23 sentence.

24 He could --

25 QUESTION: Well, could he leave out some good

1 things? Of course, he could.

2 MR. MONK: Of course, he could. But let me
3 say this. Under the Maryland process, Justice Marshall,
4 the defendant is entitled to rebut whatever evidence
5 that comes in. And so if there's any doubt that the
6 facts have not come out fairly in the victim impact
7 statement, he has the opportunity to present
8 countervailing evidence.

9 But he does have the opportunity to
10 cross-examine if he suggests to the Court --

11 QUESTION: To the officer?

12 MR. MONK: Well, I -- the evidence doesn't
13 have to come in to the probation officer. I mean, the
14 victim -- at the sentencing phase on a capital case,
15 there is some evidence that comes in as hearsay.

16 QUESTION: My question was limited to the
17 probation officer. He has nothing that he can do about
18 the probation officer, absolutely nothing.

19 MR. MONK: Well, I assume that he could call
20 the probation officer and ask him how he prepared the
21 report. There's nothing in the process--

22 QUESTION: Can you give me a case on that?

23 MR. MONK: Well, the Statute, itself, permits
24 him to rebut, and I -- it seems to me that he can do
25 whatever is reasonable to rebut under the Maryland --

1 QUESTION: But have you ever heard of it?

2 MR. MONK: I have not seen --

3 QUESTION: Have you ever heard of it in
4 Maryland?

5 MR. MONK: To my knowledge, I have never seen
6 a case where he's called.

7 QUESTION: I'm sure.

8 MR. MONK: But that doesn't -- that's not to
9 say that it couldn't be done.

10 QUESTION: General Monk, I assume that the
11 same thing is true of all of the -- of all of the
12 aggravating factors that the State doesn't have to
13 introduce everyone of them if it doesn't want to.

14 MR. MONK: That is correct.

15 QUESTION: There's no obligation on the State
16 to come forward with an aggravating factor though it may
17 exist.

18 MR. MONK: The State needs only to demonstrate
19 beyond a resonable doubt that one of the aggravating
20 circumstances exist.

21 Thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Monk.

23 Mr. Burns, you have ten minutes remaining.

24 ORAL ARGUMENT OF GEORGE E. BURNS, JR., ESQ.,

25 ON BEHALF OF THE PETITIONER - REBUTTAL

1 MR. BURNS: Mr. Chief Justice, may it please
2 the Court:

3 Initially, one technical problem: The State,
4 very confidently, has said the Maryland Statute doesn't
5 matter whether you know it's a police officer or not.

6 The Court of Appeals has disagreed with that.
7 in a case cited by the State and in the briefs -- I
8 won't give you the cite -- the Court of Appeals did
9 think it mattered

10 So I don't think that it supports the State's
11 position whatsoever.

12 Also, --

13 QUESTION: (Inaudibles.) -- is it a defense?

14 MR. BURNS: Yes, Your Honor. In the sense
15 that the Court of Appeals --

16 QUESTION: You cannot be convicted for killing
17 an officer unless you knew he was an officer?

18 MR. BURNS: Unless you knew reasonably--
19 (Inaudibles.)

20 QUESTION: That's what the holding was?

21 MR. BURNS: Yes, Your Honor.

22 QUESTION: What is -- (Inaudibles.)

23 MR. BURNS: Lodowski versus State just cites
24 in the State's brief -- it's 302 Md. 691.

25 So that has been decided in a contrary way.

1 I think it was intriguing that the State took
2 the position that, to Justice Stevens' question, that
3 you could have an aggravating factor that a defendant
4 had children, three children presumably.

5 Well, if that's true, I think you can go a
6 step farther. And under this theory is, for example, we
7 could say, it's an aggravating factor if you have four,
8 not if you have two. Or perhaps, if we thought it was a
9 good idea that people didn't have children and wanted to
10 control our population, presumably the State could under
11 those circumstances say, then it's only an aggravating
12 factor if there are no children.

13 In short, I think what the State's done is
14 point out the completely arbitrary nature of these
15 things that have really nothing to do with the crime
16 itself.

17 QUESTION: (Inaudibles.) -- aggravating
18 factor. Why is that more -- (Inaudibles.)

19 MR. BURNS: Well, Your Honor, I think all the
20 other aggravating factors are things that are focusing
21 on precisely what the defendant did.

22 QUESTION: If you assume that the only thing
23 relevant is how evil is the defendant.

24 MR. BURNS: How evil --

25 QUESTION: How much harm has the defendant

1 done?

2 MR. BURNS: One, and two, whether what he did
3 was foreseeable. I don't suggest that it's only evil --

4 QUESTION: If you assume it's -- it's those
5 two only, and not, I think --

6 MR. BURNS: I think that's true, Justice
7 Scalia. And I think, absent that, we simply have no way
8 to introduce anything but the most arbitrary standard.

9 And we're not, again, focusing on --
10 particularly pointing out those particularly bad
11 individuals that we want to execute, we're going to
12 pinpoint those individuals who may, through -- the fault
13 obviously is theirs to the crime -- but in terms of all
14 these other circumstances, it really has nothing to do
15 with what they were thinking or what they knew.

16 And, indeed, it may turn out --

17 QUESTION: You may think that the difference
18 between murder and attempted murder is arbitrary; I
19 don't. And I don't think your law states that.

20 MR. BURNS: Justice Scalia, I disagree.

21 I've never suggested that was arbitrary.

22 On the contrary, I think it's --

23 QUESTION: A distinction you've drawn between
24 them.

25 MR. BURNS: I think it's fairly easy when you

1 look at the situation. It's very difficult for me to be
2 in the situation of trying to murder someone and not
3 realize either it's going to be attempt or murder.

4 I have complete control over that. I don't
5 see how I can possibly argue that that's arbitrary.

6 QUESTION: When you kill someone, you know
7 he's either going to have a family or he's not going to
8 have a family.

9 MR. BURNS: I have no control over whether he
10 does.

11 As the State pointed out, the defendant in
12 this case, probably in any case, is unconcerned. That
13 may be callous, but it also doesn't show evil heart in
14 that, I want to punish this person's children; I want to
15 make his family -- it may be that I would introduce
16 evidence that maybe the defendant would say to someone,
17 "I committed this crime; perhaps, I shouldn't have, but
18 I really hope that he had no family and no children.

19 QUESTION: But the intent of the two
20 defendants is exactly the same; they both intended to
21 kill the person.

22 MR. BURNS: That's true.

23 QUESTION: And the only reason you punish one
24 more than the other is not because he knew more or he
25 intended more, but simply because he did more harm.

1 That's the only reason.

2 MR. BURNS: As I pointed out, Justice Scalia,
3 if we accept that, if we accept that, then I think it
4 becomes reasonable to weigh is, who is this victim in
5 the community? Was he the surgeon that's going to save
6 a thousand lives? Or was he the drug dealer who,
7 perhaps, was going to eliminate lives? Are we going to
8 have a system that's going to turn on: Some lives are
9 worth giving more protection to than others, because
10 that's really what it comes down to.

11 It isn't that the defendant's chooses to kill
12 the surgeon as opposed to the drug dealer. It happens
13 that way.

14 And the question is: Is the society -- are
15 we, as a society, prepared at this point to say, "Well,
16 some victims, we really don't care that much about, so
17 we wouldn't consider capital punishment. There are
18 other victims that we care a great deal about because
19 they had nice families," as opposed to the person, for
20 example, who is a very unpleasant person and has
21 impatient heirs.

22 Presumably in the logic of the thing, the
23 probation officer should come in and say, "This is
24 favorable. You should never give death to this person
25 because he was a terrible person; his heirs are happy;

1 the impact is good."

2 QUESTION: That's not comparable. That's not
3 at all comparable with what's going on here. We're --
4 we're not saying, is it a nice family, or is it a bad
5 family.

6 It's just how much has the family been harmed?

7 MR. BURNS: But Justice Scalia, --

8 QUESTION: (Inaudibles.) -- who they are.

9 It's not --

10 MR. BURNS: The difficulty is how can you get
11 away with that --

12 QUESTION: -- saying some families are worth a
13 lot and other families are worth nothing. That's not
14 what's going on.

15 MR. BURNS: How can you get away from that
16 is: If I have a family that's loving, caring,
17 articulate, and upset as opposed to: Do I have a family
18 that doesn't care very much for me, doesn't even mildly
19 like me.

20 It comes down to --

21 QUESTION: Mr. Burns, may I suggest that you
22 and Justice Scalia are not communicating because he's
23 talking about non-death cases. And your argument, as I
24 understand it is the difference between life and death:
25 It can't be based on a factor that has nothing to do

1 with the blackness of the man's soul.

2 MR. BURNS: You're right, Justice Stevens, if
3 that's the case. I'm sorry -- (Inaudibles.)

4 QUESTION: But his examples are all non-death
5 cases.

6 MR. BURNS: -- I have disagreement on that
7 issue.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Burns.
10 The case is submitted.

11 (Whereupon, at 2:54 p.m., the case in the
12 above-entitled matter was submitted.)

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CERTIFICATION

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86-5020 - JOHN BOOTH, Petitioner V. MARYLAND

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BY Paul A. Richardson

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