

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: PERVERS TYRONE PAYNE, Petitioner  
v. STATE OF TENNESSEE

CASE NO: 90-5721

PLACE: Washington, D. C.

DATE: April 24, 1991

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WASHINGTON, D.C. 20543

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   PERVIS TYRONE PAYNE,                   :

4                   Petitioner                   :

5                   v.                   : NO. 90-5721

6   STATE OF TENNESSEE                   :

7   - - - - -X

8                                   Washington, D.C.

9                                   Wednesday, April 24, 1991

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:02 a.m.

13   APPEARANCES:

14   J. BROOKE LATHRAM, ESQ., Memphis, Tennessee; on behalf of  
15   the Petitioner.

16   CHARLES W. BURSON, ESQ., Attorney General of Tennessee,  
17   Nashville, Tennessee; on behalf of the Respondent.

18   DICK THORNBURGH, ESQ., Attorney General, Department of  
19   Justice, Washington, D.C.; on behalf of the United  
20   States, as amicus curiae, supporting the Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 90-5721, Pervis Tyrone Payne  
5 v. Tennessee.

6 Mr. Lathram.

7 ORAL ARGUMENT OF J. BROOKE LATHRAM

8 ON BEHALF OF THE PETITIONER

9 MR. LATHRAM: Mr. Chief Justice, and may it  
10 please the Court:

11 The most prejudicial conduct in which the  
12 prosecution engaged in this case involved what I believe  
13 to be the least controversial part of Booth v. Maryland.  
14 I refer to Booth's condemnation of survivor opinion about  
15 the sentence that a capital defendant should receive.

16 And I refer, in the context of this case, to the  
17 prosecutor's concluding remarks in his closing argument  
18 during the sentencing trial. In the course of that, the  
19 prosecutor, in effect, demanded that the jury impose the  
20 death sentence in order to satisfy the anticipated desire  
21 of young Nicholas Christopher for Payne's execution.

22 It is true, of course, that in this case no  
23 witness actually took the stand and testified that they  
24 wanted Payne executed. But what happened here was much  
25 worse than that, I respectfully submit. And along that



1 line, I think it would be a terrible mistake if we were to  
2 allow the State to avoid the consequences of calling a  
3 witness who would express such opinion by simply allowing  
4 the prosecutor to take the stand and testify for the  
5 witness.

6 In this particular case, the prosecutor, serving  
7 as the surrogate for young Nicholas Christopher, a young  
8 -- youngster for whom this jury undoubtedly had the most  
9 heartfelt and deepest sympathy, serving as the  
10 representative of the State, did three improper things.  
11 He, first of all, demanded Payne's execution because --  
12 for young Nicholas' sake. Secondly, he suggested to the  
13 jury that this was a permissible basis for executing an  
14 offender. And thirdly, he engaged in a form of  
15 psychological intimidation of the worst kind.

16 He strongly --

17 QUESTION: Are you suggesting, Mr. Lathram, that  
18 the jury's feeling of sympathy or perhaps outrage at the  
19 crime and what it's left the victims with is not a  
20 permissible factor at all?

21 MR. LATHRAM: Oh, not at all, Your Honor.  
22 Certainly the jury is going to have the most heartfelt  
23 sympathy for this youngster and should.

24 QUESTION: And outrage, presumably, if the facts  
25 are proven against the defendant.

1 MR. LATHRAM: Certainly, Your Honor, I think  
2 they would definitely have outrage. And at this point,  
3 they had already convicted him. So certainly --

4 QUESTION: They have outrage, but do you say  
5 they may not take that into account in deciding the  
6 penalty?

7 MR. LATHRAM: No, Your Honor, I'm not saying  
8 that at all. I think that they certainly would take that  
9 into account, and are entitled to.

10 What we say is the error here -- it would have  
11 been wrong, for example, Your Honor, for the grandmother  
12 to take the stand and actually testify to the opinion, I  
13 would like to see Pervis Payne executed. By the same  
14 token, we think that the prosecutor cannot get up and  
15 start off his argument to the jury and say at the very  
16 conclusion, there is one thing, however, you can do for  
17 young Nicholas Christopher, and then go on to say that the  
18 little boy when he grows up is going to demand a  
19 particular type of justice. He's going to want to know  
20 what type of justice was done in this case.

21 Just as it would be wrong to call a witness to  
22 the stand and say I think that the defendant should be  
23 executed, by the same token, I respectfully submit, that  
24 it's even worse, under the particular circumstances of  
25 this case, to have the prosecutor testify for the little

1 boy.

2 QUESTION: So suppose a juror said in the jury  
3 room, you know, some day I might meet this young man 5 --  
4 young infant -- 5, 10 years down the road, and I am very  
5 concerned about what kind of justice is done. And I think  
6 we should impose a death penalty. Would that be grounds  
7 for a mistrial, if the juror said that in the jury room?

8 MR. LATHRAM: Your Honor, I don't think so  
9 because I don't think we can impeach the verdict. I don't  
10 think we'd be able to --

11 QUESTION: Well, let's take the hypothetical.  
12 Let's assume that we have this testimony in a State where  
13 you can impeach the verdict. Is that improper conduct for  
14 the juror?

15 MR. LATHRAM: I don't think the jury should  
16 consider it, but I don't think it would raise a problem  
17 for this reason. The juror is thinking on his own.

18 In this case, we have the representative of the  
19 State telling the jury that they may take this into  
20 account and actually execute this man for this  
21 impermissible reason.

22 QUESTION: Well, if jurors can and will and do,  
23 take certain matters of elementary justice into account,  
24 it seems to me proper that prosecutors be able to argue  
25 about it under the supervision of the court, subject to

1 the rebuttal by the defense counsel, and that it is just  
2 only realistic to allow this sort of argument.

3 MR. LATHRAM: Your Honor, I think that we must  
4 presume that the jury is going to follow its instructions.  
5 And there is nothing -- and the jury is told that it is  
6 supposed to apply the collective conscience of the 12 of  
7 them, and they're to base that collective judgment on the  
8 basis of the evidence and on the basis of the law. And --

9 QUESTION: Well, and I submit that a juror could  
10 say I'm concerned about what would happen if I would meet  
11 this young man or members of his family 5, 10 years down  
12 the line. I think that's an appropriate measure of the  
13 kind of justice that we hand out because we have to look  
14 at things in the long term. It seems to me that's  
15 perfectly appropriate.

16 MR. LATHRAM: Your Honor, it -- I would  
17 respectfully disagree, Your Honor. And perhaps I can get  
18 my point across by asking ourselves this rhetorical  
19 question. What if a survivor in a particular case did not  
20 want the defendant executed for religious reasons or  
21 whatever? In that particular case, Your Honor, I don't  
22 think that an otherwise heinous murderer would be  
23 considered to be less blameworthy or less deserving of the  
24 death penalty just because the victim's survivor felt  
25 contrary to the way most survivors would feel.



1 QUESTION: It's funny you should mention that.  
2 I was about to ask you what if the defense in a trial  
3 wants to put on the mother of the victim to testify, you  
4 know, I've suffered more loss than anyone in this case,  
5 and I hope you won't put this poor person to death. I  
6 have forgiven him and I hope you will do the same. Must  
7 that be excluded?

8 MR. LATHRAM: Yes, Your Honor, I think it must  
9 be excluded.

10 QUESTION: Is that right?

11 MR. LATHRAM: I do believe that, Your Honor. I  
12 think the trial court would have to exclude that evidence.  
13 I think that --

14 QUESTION: I thought any mitigating evidence --  
15 this is mitigating evidence offered by the defense.

16 MR. LATHRAM: Your Honor, to me -- I would  
17 respectfully submit that this is an arbitrary variable  
18 that -- I can't imagine anything more arbitrary than to  
19 allow an offender's fate to depend upon the opinion of the  
20 survivor. I think that the mere fortuity that a survivor  
21 wants, for religious or whatever reasons, wants the victim  
22 -- excuse me, the defendant to be spared, injects a  
23 completely arbitrary factor into the sentencing  
24 determination.

25 QUESTION: Well, how about his fate depending on

1 the fact that he had an unhappy childhood?

2 MR. LATHRAM: Your Honor, I think that  
3 certainly, as this Court has held, I certainly think that  
4 that constitutes mitigating evidence, because that is  
5 something that the jury can take into account when it  
6 assesses his character. His character is one of the  
7 things that the jury can assess in determining whether or  
8 not he should live or die.

9 But the mere fortuity that a victim's survivor  
10 feels one way or the other about whether the defendant  
11 should be executed, I respectfully submit -- first, let's  
12 look at it in terms of retribution because retribution is  
13 a valid penological objective. Let's ask ourselves this  
14 question. Let's assume that we have a situation where the  
15 victim's survivor does not want the defendant executed.  
16 Would society's interest in retribution, which after all,  
17 is a punishment for an injury to society as a whole, be  
18 any less diminished? I would think not.

19 I would think that society's interest in  
20 retribution is just as strong, even if one of the  
21 survivors comes in and says, I'm a very religious person  
22 and I don't believe in the death penalty and I don't want  
23 this man being executed.

24 QUESTION: Well, I don't know. You know one of  
25 the purposes of retribution was to prevent people from

1 taking law into their own hands. You go all the way back  
2 an the State's punishment simply substitutes for what used  
3 to be called "weregild," where the person doing the injury  
4 would pay money to the family of the person harmed, and  
5 things of that sort. What the family of the person harmed  
6 thinks about the matter on that theory would be very  
7 important.

8 Certainly one of the purposes is to prevent  
9 people from taking justice into their own hands, saying  
10 the State will avenge you; you need not avenge yourselves.  
11 And if the person comes forward and says, I don't want to  
12 be avenged, is that totally irrelevant?

13 MR. LATHRAM: I think it is, Your Honor, because  
14 again, I think retribution is a punishment for an injury  
15 to society as a whole. And I think that once society  
16 determines that particular conduct is so heinous that it  
17 makes someone death eligible, that the defendant should  
18 not be allowed escape execution simply because of the mere  
19 fortuity that there is a relative out there that some  
20 defense lawyer can find who will come in and say, well,  
21 maybe I don't really want him dead after all.

22 To me, that injects an arbitrary factor into the  
23 whole sentencing process that I think --

24 QUESTION: What was the third thing the  
25 prosecutor did that you object to?

1 MR. LATHRAM: Your Honor, I characterized it as  
2 the worst form of psychological intimidation.

3 QUESTION: Yes.

4 MR. LATHRAM: What he did is he painted a -- of  
5 course he didn't need to paint a sympathetic picture of  
6 this -- little boy because one cannot imagine a more  
7 sympathetic victim --

8 QUESTION: This hasn't got anything to do with  
9 Booth, has it?

10 MR. LATHRAM: Yes, Your Honor, I think it does  
11 for this reason. Booth condemns survivor opinions about  
12 whether or not a defendant should be executed. And while  
13 Booth dealt with a case where the survivors actually came  
14 in and testified, or testified through the VIS statement,  
15 here, I would respectfully submit, that we have something  
16 that is the equivalent of, and indeed much worse than,  
17 such testimony.

18 QUESTION: No. I don't know that the prosecutor  
19 didn't say, I know that this son wants him executed. He  
20 didn't say that.

21 MR. LATHRAM: Your Honor, I think that that's --

22 QUESTION: All he suggested to the jury is take  
23 into consideration the impact that this -- that the  
24 father's death has had and will have on the son.

25 MR. LATHRAM: Your Honor, I would -- if I may



1 respond by --

2 QUESTION: Go ahead.

3 MR. LATHRAM: -- referring to what he said. He  
4 said, this is the very end of his concluding remarks. And  
5 that's significant here because it must be recalled that  
6 the other prosecutor, at the very end of her rebuttal,  
7 picked up the butcher knife and went over and stabbed the  
8 diagram of the little boy, which shows, I respectfully  
9 submit, that the intent here, was to inject as much  
10 prejudice into this sentencing trial as possible.

11 But what he did here is at the very close, he  
12 said, "But there is something you can do  
13 for Nicholas. Somewhere down the road, Nicholas is going  
14 to grow up, hopefully," and then he goes on to say, "He is  
15 going to want to know what type of justice was done." And  
16 he certainly, I respectfully submit, was not suggesting to  
17 the jury that they go back to the jury room and think  
18 seriously about imposing a life sentence.

19 QUESTION: Well, I agree with you that opinion  
20 testimony is a troubling issue. I just think that here  
21 you can interpret this as Nicholas being a surrogate for  
22 the whole community. I have problems with your  
23 interpretation if it. In fact, when you began and said  
24 that this was the worst -- that there was a critical item  
25 of testimony here, I had two or three other candidates

1 that I would have picked out of this record. I have some  
2 difficulty with this argument.

3 MR. LATHRAM: Well, Your Honor, I -- there are  
4 some other things I certainly want to talk about, but --

5 QUESTION: Mr. Lathram, I'm just wondering if  
6 that statement that Nicholas is going to want to know what  
7 type of justice was done, isn't the most natural response  
8 in the world. Do you think that any juror would not know  
9 that a survivor some day is going to wonder what happened  
10 to the perpetrator of the crime?

11 I mean, this isn't telling the jurors something  
12 they don't know. I find it hard to see how that could --  
13 if that is the most prejudicial thing that happened, then  
14 I'm wondering if there was, indeed, any prejudice.

15 MR. LATHRAM: Your Honor, I would like to think  
16 that when a juror brought this up during the course of  
17 deliberations, that the other jurors would say, we're  
18 supposed to decide whether this man lives or dies on the  
19 basis of the evidence in the case and the instructions  
20 given to us from the Court. And --

21 QUESTION: Was there an objection made at the  
22 time that this came in?

23 MR. LATHRAM: No, Your Honor.

24 QUESTION: And yet you want us to rule now, as a  
25 matter of constitutional law, that a new sentencing

1 hearing must be given.

2 MR. LATHRAM: Your Honor, Payne's counsel at --  
3 in the two State proceedings did not object to this.  
4 However --

5 QUESTION: It just seems to me it's exactly the  
6 kind of thing that if there were any question about it,  
7 that if an objection were made at the time, the trial  
8 judge could make some kind of statement to the jury and  
9 tell them to disregard any opinion testimony, if that's  
10 what the State law required.

11 But to come back later and say there's some  
12 constitutional violation strikes me as --

13 MR. LATHRAM: Well, Your Honor --

14 QUESTION: -- strange.

15 MR. LATHRAM: Excuse me, Your Honor. State law  
16 did not require that. State law allowed this to be raised  
17 on appeal, and this Federal issue was, indeed, decided by  
18 the Tennessee Supreme Court. Therefore, I think that what  
19 we have now on the books is a Tennessee decision which  
20 will be precedent for other offenders in Tennessee. So  
21 therefore, I don't think that the failure to object would  
22 prevent this Court from dealing with it. But --

23 QUESTION: Do you think the prosecutor would  
24 have been barred from just saying consider the impact of  
25 this death on the son?

1 MR. LATHRAM: Not at all.

2 QUESTION: You don't think that would be barred  
3 by Booth?

4 MR. LATHRAM: No, sir. I do not think that  
5 would be barred by Booth.

6 QUESTION: But the way you interpret it, you  
7 think Booth does bar it?

8 MR. LATHRAM: I think Booth bars what this  
9 prosecutor did, but doesn't bar the hypothetical statement  
10 that you're --

11 QUESTION: Is a prosecutor forbidden any poetic  
12 license at all in his argument? I mean, certainly,  
13 typically, you are arguing a case to a jury, you're going  
14 to use some analogies and some examples. Are you saying  
15 that he simply may never leave the cold record, even in  
16 his argument?

17 MR. LATHRAM: No, Your Honor, I'm not. What  
18 we're saying here is that this prosecutor told this jury  
19 they could do something that this Court has never even  
20 intimated, much less held could be done. This prosecutor  
21 told the jury that, ladies and gentlemen, you may execute  
22 this man because this little boy someday is going to grow  
23 up and wants you to have executed him. That is in effect  
24 what --

25 QUESTION: But that really is a rather strained



1 construction. He -- it seems to me, if you look at what  
2 we have of the record -- you know, the opinion of the  
3 Supreme Court of Tennessee -- he dealt with the facts.  
4 And in a closing argument, any lawyer is going to get into  
5 a few rhapsodies of sort. That's the way people argue  
6 cases to juries.

7 MR. LATHRAM: Your Honor, I think that the two  
8 key statements here are, first of all he said, "But there  
9 is something you can do for Nicholas." And again -- then  
10 he goes on, now what is that something. Then he goes on  
11 to say how Nicholas is going to grow up and he says, "He's  
12 going to want to know what type of justice was done." He  
13 doesn't say he's going to want to know whether justice was  
14 done, he's going to want to know whether or not you  
15 executed this man.

16 And here's this jury -- imagine, I can't imagine  
17 anything more difficult than being on a jury like this,  
18 and already knowing what has happened to this poor  
19 youngster who saw his mother killed, who saw his sister  
20 killed, who was -- all the medical problems were brought  
21 out in front of the jury. Here's this juror -- jury  
22 thinking, well what, you know, that's a good point. The  
23 representative of the State has now told me that this is a  
24 reason that I may execute someone in the State of  
25 Tennessee.

1 QUESTION: May I ask you a question here, Mr.  
2 Lathram? Do you read the Tennessee Supreme Court opinion  
3 as holding that there was or was not a Booth violation?  
4 It's a little ambiguous to me. It seems to me they may  
5 have said there's no Booth violation here at all.

6 MR. LATHRAM: The Tennessee Supreme Court  
7 opinion is ambiguous, I think, Your Honor.

8 QUESTION: And so if you found no Booth  
9 violation, there -- we really wouldn't have to reach the  
10 question of whether to overrule Booth, would we?

11 MR. LATHRAM: I think what the court held was  
12 that there may have been a Booth violation. In fact, I  
13 think that the court held -- well, the court held that the  
14 grandmother's testimony was technically irrelevant under  
15 Booth.

16 QUESTION: You said was irrelevant. I'm not  
17 sure they said it was a violation of Booth.

18 MR. LATHRAM: It's difficult to tell. It's  
19 within the context of a paragraph --

20 QUESTION: It could have been irrelevant as a  
21 matter of State law, I suppose.

22 MR. LATHRAM: It's possible that that could have  
23 been the case. But then, as far as the argument, Your  
24 Honor, I think what the court said is there may have been  
25 a Booth violation here, but we believe that it was

1 harmless error. I think that's -- again, the opinion is  
2 not really a model of clarity.

3 QUESTION: Mr. Lathram, suppose he hadn't  
4 referred specifically to the child, but had just said, you  
5 know, the citizens of this community, when they see this  
6 verdict come down, they're going to ask whether justice  
7 has been done. They've seen one of their members brutally  
8 murdered, a child orphaned. They're going to want to know  
9 what quality of justice you've meted out on behalf of the  
10 community. And they, you know, they -- they want severe  
11 justice. Is that all right?

12 MR. LATHRAM: I think that would be a perfectly  
13 permissible argument, Your Honor. But I see a marked  
14 distinction between that and --

15 QUESTION: Between that and referring to the  
16 child.

17 MR. LATHRAM: Yes, Your Honor, because what  
18 they're asking -- I can't think of -- again, I know I'm  
19 being somewhat repetitious, but to me, there's nothing  
20 more arbitrary than to allow a person's fate to depend  
21 upon the opinion of a single survivor.

22 QUESTION: Why isn't it arbitrary to have it  
23 depend on the opinion of the community or my perception of  
24 the opinion of the community?

25 MR. LATHRAM: Because I think that when the jury

1 applies its collective judgment, and it serves as the  
2 conscious of the entire community. And I think  
3 prosecutors often tell the jury, you are the conscience of  
4 the community. That gets back to my point on retribution.  
5 Retribution is something for society, not for a particular  
6 individual.

7 QUESTION: But no, I may be a very kindly person  
8 and opposed to capital punishment if it were left up to  
9 me, but I am told by the prosecutor, you -- you're not  
10 sitting to give vent to your own feelings, you are  
11 supposed to express what you think is the moral outrage of  
12 the community. And this community is a hard-hat  
13 community, and we -- you should consider whether they  
14 would want this person executed. Now, that kind  
15 argument's okay, I don't know why that isn't just as  
16 arbitrary, as you put it.

17 MR. LATHRAM: This Court, Your Honor -- and I  
18 think this will respond to it -- this Court has, I think,  
19 in Booth and the majority opinion -- and again, I'm  
20 separating this survivor opinion away from the victim  
21 impact, which I'm going to come to in just a minute -- but  
22 this Court has never intimated, and in fact, all the State  
23 courts' decisions, I believe, and this is, I think,  
24 brought out in the Huertas argument, have indicated that  
25 it's improper for a survivor to express an opinion.



1           And it's -- if I'm not mistaken, and I could be  
2       because I don't know the Huertas record as well as,  
3       perhaps, I should, but I think that went back to Ohio on a  
4       State law determination that the expressions of opinions  
5       like this are impermissible. Now, that's Ohio State Law,  
6       and we're dealing with the Eighth Amendment.

7           QUESTION: I agree. How many States do permit  
8       it to come in? Frankly, I find it extraordinary to have  
9       it admitted. But that's quite separate from the question  
10      of whether it's constitutional if a State wants to do  
11      that. How many States do do it, do you know?

12          MR. LATHRAM: No, Your Honor. I would, and I'm  
13      going to go out on a limb here, but I would venture to say  
14      that no State does. But I don't have anything to back me  
15      up on that. I just can't imagine any State allowing it.  
16      And I do think it rises to an Eighth Amendment violation  
17      because, again, the best way to answer it is to -- is to  
18      focus on the what would happen if the victim's survivor  
19      said, I don't want him killed.

20          To me, the guy is just as heinous and the need  
21      for retribution is just a great, notwithstanding the fact  
22      that a defense lawyer is able to go out and find one  
23      witness who can come in and say, well, gosh, I have some  
24      problems about the death penalty.

25          QUESTION: Do you think this Court would permit

1 the exclusion of testimony that the survivors do not want  
2 him killed?

3 MR. LATHRAM: Absolutely.

4 QUESTION: We've said all mitigating evidence  
5 has to come in.

6 MR. LATHRAM: I think what the Court said, I  
7 respectfully submit, that what the Court said in Lockett  
8 was that all relevant mitigating evidence must come in. I  
9 don't think the Court has ever said that anything a  
10 defense lawyer can dream up as mitigating is allowed to  
11 come into evidence. I think that you have got to --  
12 there's got -- in order for evidence to be relevant, of  
13 course, it must assist the jury in deciding one of the  
14 issues placed before it.

15 And one of the -- the issue here at the  
16 selection stage, is whether or not a defendant deserves to  
17 die. And it seems to me that for the jury to decide this  
18 unbelievably pressing, important, emotional question on  
19 the basis of whether a victim happens to think he should  
20 die or not, injects the kind of arbitrariness into the  
21 decision that this Court has frowned upon since 1972.

22 QUESTION: Well now, counsel, what else in this  
23 case is arguably barred by Booth?

24 MR. LATHRAM: Your Honor, I would like to now  
25 turn to the grandmother's testimony and the arguments

1 based on the grandmother's testimony.

2 We were asked to brief the question of whether  
3 Booth should be overruled, and we've done that. We tried  
4 to answer the questions raised by the dissenting opinions,  
5 and those questions -- those opinions raised very tough  
6 questions. We did the best we could. I think our reply  
7 brief did a better job than our first brief.

8 Let me preface my remarks by saying that I would  
9 never come into this Court and endorse a position that  
10 would invalidate a statute that enhances punishment on the  
11 basis of harm. I believe very strongly, and I know this  
12 Court has said this, that legislatures have very  
13 substantial leeway in our form of Government to make these  
14 kinds of hard choices. And in fact, I think that anything  
15 that encourages more legislative accountability is to be  
16 applauded. And I certainly recognize that this Court does  
17 not sit as legislature to review and correct unwise policy  
18 decisions.

19 My concern with overruling Booth can best be  
20 summarized this way. And what I've tried to do is  
21 reconcile Booth with those punishment enhancement  
22 statutes. And that's what we tried to do in our reply  
23 brief. And I think I can express my concern best by  
24 focusing on two hypotheticals.

25 Let's take the Air Piracy Statute. And let's

1 first take this situation. Hijacking number 1, a death  
2 results. Hijacking number 2, because of a mere fortuity,  
3 there is no death that results. I think Booth would agree  
4 that the statute, because that is the Air Piracy Statute,  
5 is valid. And I certainly would accept that because,  
6 after all, we have a determination by society that the  
7 crime may be aggravated because of the harm, even though  
8 the hijacker didn't intend the harm, and the hijacker  
9 himself was not the one directly responsible for it.

10 Again, that is a valid exercise of retribution  
11 by our national legislature, Congress.

12 Now, let's compare that with this hypothetical.  
13 Let's take, again, two hijackings. And let's assume that  
14 in both a death results. But let's assume that in  
15 hijacking number 1, the victim who dies is a person  
16 beloved by society and leaves behind several aggrieved  
17 survivors. Let's assume that in example number 2, the  
18 victim who dies is, if I may use the word, a reprobate,  
19 who's -- who doesn't leave behind any aggrieved survivors  
20 at all.

21 My concern with overruling Booth is raised by  
22 this question. Is hijacker number 2 really less  
23 blameworthy? Is he really less deserving of death than  
24 hijacker number 1, simply because the victim was a  
25 reprobate who left no aggrieved survivors? Perhaps that's



1 a policy question, and that's the issue, isn't it? That's  
2 what the Court has to decide. Is this something that for  
3 the legislatures to decide, or does this introduce an  
4 arbitrary variable into the sentencing determination?

5 QUESTION: Why isn't --

6 MR. LATHRAM: My big problem --

7 QUESTION: Why isn't it arbitrary whether the  
8 death occurs? I mean hijacker number 1 shoots off a  
9 pistol to scare the people. Unfortunately for him, the  
10 bullet ricochets, and kills someone. Hijacker number 2  
11 does the same thing; the bullet doesn't ricochet and kill  
12 anybody. As far as moral blameworthiness is concerned,  
13 it's exactly the same, isn't it? One has caused more harm  
14 than the other, and we punish him more severely.

15 MR. LATHRAM: It's exactly the same except that  
16 in that situation, Your Honor, society, working through  
17 the Congress, has made a valid, non-arbitrary  
18 classification of death eligibility. We are not trying --  
19 what's wrong with the second example, I respectfully  
20 submit, is that we're letting the decision on whether or  
21 not to impose death depend upon nonspecific variables that  
22 the legislature has not given any definition to and --

23 QUESTION: Well, but wait a minute. You're  
24 letting the jury in both cases decide whether or not to  
25 impose death. You're allowing the jury, in either case,

1 to say, well, in our opinion, he shouldn't get death  
2 anyway.

3 MR. LATHRAM: That's correct, Your Honor.

4 QUESTION: Well, then how can you pretend that  
5 the legislature has set some rigorous penalty that  
6 mathematically follows?

7 MR. LATHRAM: Well, in the first hypothetical,  
8 all the jury is called upon to do is, first, determine  
9 whether a death occurred. Usually that's going to be  
10 stipulated, or that there won't be any dispute about that.  
11 The jury doesn't go along -- doesn't after that then  
12 decide, well, I think death should be imposed because the  
13 victim who was killed in this case happens to be a person  
14 who was well loved by his family members.

15 QUESTION: They can take into account any  
16 mitigating circumstance and decide not to impose death on  
17 the basis of any mitigating circumstance that appeals to  
18 them.

19 MR. LATHRAM: Your Honor, it's inconceivable to  
20 me, and perhaps -- maybe it should be conceivable, but  
21 it's inconceivable to me that a defense lawyer could come  
22 in and say, ladies and gentlemen of the jury, you've got  
23 to consider all mitigating evidence. And one piece of  
24 mitigating evidence that I want to offer is this. The man  
25 that died in this hijacking, even though my client didn't

1 know him at all, was a reprobate who used to cheat on his  
2 income taxes, and who used to cheat on his wife, and was  
3 basically no good, and wasn't loved by any family members.

4 If it's going to be open season where we're  
5 going to allow defense lawyers to do that type of thing,  
6 then I respectfully submit, Your Honor, we're going to be  
7 injecting all kinds of arbitrary variables into the  
8 sentencing process that the Eighth Amendment prohibits.

9 QUESTION: Mr. Lathram, let me make two  
10 suggestions and get your responses to them. The first is  
11 that whether or not the person is a saint or a reprobate,  
12 and whether or not the jury is told about it really isn't  
13 any more -- doesn't inject anything more arbitrary than  
14 the fortuity of death resulting or not resulting, it seems  
15 to me. He performs certain dangerous acts; he realizes  
16 that they may cause death. By the same token, he realizes  
17 that if he performs them, the victim may be a saint. In  
18 each case, it seems to me, that it's fortuitous.

19 The second suggestion is this. Isn't the real  
20 problem with getting into the -- or at least with the  
21 prosecution's taking the affirmative in getting into the  
22 character of the victim, that it implies that society is  
23 valuing victims differently? Isn't the real problem one,  
24 almost one, a kind of maybe a second-tier equality before  
25 the law argument, that society is placing different values

1 on their victims -- on victims?

2 MR. LATHRAM: I think that's correct, Your  
3 Honor, and I think that that is the point that we made in  
4 the first part of our reply brief in this case. I think  
5 that when society, speaking through its legislature, has a  
6 valid governmental interest for making a classification,  
7 whether based on harm or based on victim status, such as  
8 the peace officer. It is not saying that one member of  
9 society is worth more than another. All it's saying is  
10 that we have a legitimate governmental interest in  
11 extending protection to peace officers, or whatever.

12 But when we allow --

13 QUESTION: Is that an Eighth Amendment concern?

14 MR. LATHRAM: Yes, Your Honor, I think it is  
15 because it injects, again, an arbitrary factor that I  
16 think would run afoul of Furman --

17 QUESTION: The valuation itself is an arbitrary  
18 factor because it is insupportable. Is that the argument?

19 MR. LATHRAM: Yes, sir, it's the nonspecificity  
20 of whether or not somebody has led an exemplary life or a  
21 non-exemplary life, or has led a good -- is a good person  
22 or a bad person, or left behind aggrieved survivors or not  
23 aggrieved survivors.

24 QUESTION: Thank you Mr. Lathram.

25 General Burson, we'll hear now from you.



1 ORAL ARGUMENT OF CHARLES W. BURSON

2 ON BEHALF OF THE RESPONDENT

3 MR. BURSON: Mr. Chief Justice, and may it  
4 please the Court:

5 Booth v. Maryland and South Carolina v. Gathers  
6 were wrongly decided in that they were founded on the  
7 flawed propositions that victim impact information may be  
8 unrelated to any legitimate sentencing consideration, that  
9 its inherently emotional appeal will shift the focus of  
10 the sentencer to irrelevant factors, and that in so  
11 shifting the focus of the sentencer, it will result in the  
12 arbitrary imposition of the sentence.

13 It's the State's position that the full extent  
14 of harm done is relevant to the personal responsibility  
15 and moral guilt of the defendant. That some individual  
16 characterization of the victim is necessary to enable the  
17 sentencer to make a decision, a particularized decision,  
18 and a moral decision in the sentencing process.

19 Third, it's relevant to the penological  
20 objective of retribution. Given its probative value, it  
21 can hardly be said that it inherently invites an arbitrary  
22 sentencing decision. Indeed, its inconclusion suggests a  
23 more reliable decision.

24 For these reasons, this information should not  
25 be precluded as an Eighth Amendment proposition on a

1 blanket basis.

2 QUESTION: Mr. Burson, or General Burson,  
3 nothing you've said goes to comments concerning the views  
4 of the victim's family as to what penalty should be  
5 imposed. What you have said all goes to how many children  
6 were left, how much they missed their father, and so  
7 forth.

8 MR. BURSON: Correct.

9 QUESTION: But not to what penalty the father  
10 wants imposed.

11 MR. BURSON: Yes. It's -- first of all --

12 QUESTION: What is the relevance of that?

13 MR. BURSON: -- it's our position that, as has  
14 been discussed, that is not present in this case. But, in  
15 response to your question, we would say that as an Eighth  
16 Amendment proposition, it's relevant to the penological  
17 principle of retribution, as was suggested. This should  
18 come as no great surprise to the jury that the survivors  
19 would feel this way.

20 Now, each State, again, we emphasize as an  
21 Eighth Amendment proposition, we don't think the basis is  
22 there to exclude it. Each State, in making its policy  
23 decisions and weighing whether it should come in or not,  
24 that should be left to them. In Georgia --

25 QUESTION: But General Burson, may I interrupt

1 you at that point because, taking the other side of the  
2 coin, as Justice Scalia asked your adversary earlier, if  
3 we get survivor opinion that the death penalty should not  
4 be imposed and if you decide that's relevant, then it's  
5 relevant mitigating evidence and it must come in under  
6 Lockett. Is that your view?

7 MR. BURSON: No, sir. Under Lockett, there are  
8 restrictions to the mitigating evidence. The mitigating  
9 evidence must relate to the character of the victim, the  
10 record, or the circumstances of the crime. That's our  
11 point.

12 What this -- what evidence seems to have to  
13 comport to is the former line of cases, which narrows the  
14 jury discretion, the Lockett line, which says anything --

15 QUESTION: So, just to make sure I understand,  
16 your point is that it's permissible for the prosecutor to  
17 put this kind of evidence in, but not for the defendant.

18 MR. BURSON: No. I didn't understand that to be  
19 your question. I would suggest that then runs into,  
20 perhaps, a Gardner-type problem, that if the prosecution  
21 opens the door by putting it in, that then the --

22 QUESTION: But it is entirely the election of  
23 the prosecutor whether this kind of evidence can be  
24 received?

25 MR. BURSON: I think that is a decision that

1 would have to make on a State-by-State basis. Our  
2 position is, it is not --

3 QUESTION: But the State could decide, as a  
4 matter of its own law, that we will receive such evidence  
5 from the prosecutor and exclude it from the defendant. A  
6 State could do that, I understand you to say.

7 MR. BURSON: Well, they have to make that  
8 decision within the parameters of due process.

9 QUESTION: Well, I'm assuming that's the  
10 decision they make.

11 MR. BURSON: Well, but they then make --

12 QUESTION: There will be no constitutional  
13 objection to that decision, in your view?

14 MR. BURSON: No, I didn't say that. I said that  
15 as an Eighth Amendment --

16 QUESTION: Well, what would be the  
17 constitutional objection then?

18 MR. BURSON: Due process, Gardner v. Florida,  
19 may well be the objection then.

20 QUESTION: So then you are saying, if a State  
21 adopts a rule that it will receive this evidence from the  
22 prosecutor, due process requires it must also receive it  
23 from the defendant.

24 MR. BURSON: I think that would be a possible --

25 QUESTION: So the defendant then, in such a



1 State, would have the right to put on survivors who will  
2 testify they do not think the death penalty should be  
3 imposed?

4 MR. BURSON: I think that's --

5 QUESTION: That would be your view?

6 MR. BURSON: -- where that takes me, and in  
7 fact, Georgia in the Rowe Mine case, did allow that. In  
8 fact, reverse on the fact that the trial judge didn't let  
9 the defense put it on as mitigating evidence.

10 QUESTION: Mr. Attorney General?

11 MR. BURSON: Yes, sir.

12 QUESTION: What happened to the old-time theory  
13 that the crime was against the State and not the  
14 individual?

15 MR. BURSON: Well, I think at the very heart of  
16 our --

17 QUESTION: It's about gone, hasn't it?

18 MR. BURSON: Yes, sir -- no, sir. I think at  
19 the very heart of our proposition is that we are looking  
20 at societal harm. We are not just talking about to the  
21 harm to the individual. I think the --

22 QUESTION: My other question was the record in  
23 this case shows that the jury was shown pictures of the  
24 dead bodies, the brutal -- blood all over the place, and  
25 everything that could be photographed was shown to the

1 jury, and practically no defense. What in the world did  
2 you need any more evidence for?

3 MR. BURSON: Well, I think the point is, it was  
4 relevant, it was probative, and the trial judge made that  
5 decision.

6 QUESTION: What more did you need?

7 MR. BURSON: Well, I think that --

8 QUESTION: Can you imagine any jury not  
9 convicting?

10 MR. BURSON: I think that they needed a -- at  
11 least a characterization of the victim as a unique human  
12 being, other than just as a corpse. And that's all I  
13 think the -- what was depicted in what you are speaking  
14 of.

15 QUESTION: You mean you needed more than a  
16 bloody body?

17 MR. BURSON: Your Honor, I would respectfully  
18 say that the State was entitled to put on more than a  
19 bloody body, yes, sir.

20 QUESTION: Do you think that --

21 QUESTION: (Inaudible) oh, can't speak for the  
22 State. This is the State of Tennessee. Right?

23 MR. BURSON: With all due respect, I don't think  
24 the child was speaking for the State.

25 QUESTION: Well then, the title says Tennessee

1 v. so-and-so. So-and-so against Tennessee, doesn't it?

2 MR. BURSON: Yes, sir.

3 QUESTION: And it's a Tennessee problem. And  
4 it's not the child's problem.

5 MR. BURSON: The child is a member of the  
6 Tennessee society.

7 QUESTION: Will any other member come in and  
8 talk?

9 MR. BURSON: I think that that would probably be  
10 left up to the trial judge and to the relationship of the  
11 --

12 QUESTION: Come off the street and say, I don't  
13 think this man should go, I think he should be killed.  
14 You can't do that, can you?

15 MR. BURSON: I think that that would be, again,  
16 guided by our concepts of fundamental fairness under the  
17 due process clause.

18 QUESTION: (Inaudible) that what you want to  
19 talk about? Do you really want to talk about fairness?

20 MR. BURSON: Yes, sir.

21 QUESTION: General, I take it you think that  
22 unless Booth is overruled, you are going to lose this  
23 case?

24 MR. BURSON: Well, Your Honor, we --

25 QUESTION: Because you think that this victim

1 impact evidence would not pass muster under Booth.

2 MR. BURSON: The answer is, no, because we think  
3 that if you do not overrule Booth, that this was, as the  
4 supreme court -- supreme court found harmless error beyond  
5 a reasonable doubt.

6 QUESTION: Oh, I see.

7 MR. BURSON: But we do suggest that the  
8 information that came in --

9 QUESTION: But you say -- but you say it was  
10 error under Booth.

11 MR. BURSON: We say that Booth is --

12 QUESTION: Whether harmless or not, it was  
13 error.

14 MR. BURSON: Yes. That Booth is broad enough to  
15 cover this information, with exception of our exception  
16 about the -- about the -- the statements of the  
17 prosecutors about justice being done. But the rest we say  
18 would be covered by the Booth and Gathers principles.

19 At the core of -- and this goes to our point  
20 about the reliability of the decision, it seems that at  
21 the core of the court's focus on personal responsibility  
22 and moral guilt, is the proposition that the ultimate  
23 choice the jury must make between life and death is a  
24 profoundly moral one.

25 That morality is given expression as a



1 constitutional principle through the Eighth Amendment.  
2 Its meaning at any given time must derive from the  
3 prevailing standards of decency in the society. Our  
4 society, through its State and national legislative  
5 bodies, is clear in its message. Decency and morality and  
6 the administration of justice insist on relevant victim  
7 impact information in the sentencing process.

8 QUESTION: General Burson, let me just ask one  
9 other question similar to the other one I asked you about.  
10 Do you also take the position that the defendant should be  
11 able to put in evidence that the victim was an unworthy  
12 person?

13 MR. BURSON: As an Eighth Amendment proposition,  
14 we are not suggesting that that is necessarily prohibited.  
15 Our point is that this is not precluded as an Eighth  
16 Amendment proposition --

17 QUESTION: Oh, I understand.

18 MR. BURSON: -- in that what a state should be  
19 entitled to do is balance its particular legitimate policy  
20 interest against the introduction of this evidence. For  
21 instance, a State may well conclude that to allow a  
22 defendant to put on a negative societal impact evidence  
23 without the State opening it up, that that, in essence,  
24 would invite open season on victims. And that balancing  
25 that interest against the interest of fairness in the

1 trial process, the State may well conclude, no, we are not  
2 going to allow that. They could cure that with an  
3 instruction.

4 QUESTION: But you would say that if the State  
5 puts on evidence about the character of the victim, the  
6 witnesses could be cross-examined to test the credibility  
7 of that testimony?

8 MR. BURSON: Yes.

9 QUESTION: They could do that? But the -- but  
10 it's a one way street on whether -- who can open the door.  
11 The State can open the door with this evidence but the  
12 defendant could not?

13 MR. BURSON: I'm suggesting the State could make  
14 that choice.

15 QUESTION: Right.

16 QUESTION: You were saying, then, really flatly  
17 in disagreement with what your opposing counsel said in  
18 response to a suggestion I made, that it really is  
19 legitimate to value victims differently, depending upon  
20 the circumstances of the lives that they have chosen to  
21 lead.

22 MR. BURSON: What I am suggesting, and I think  
23 it is a significant difference, and yes, I do agree with  
24 counsel. But the point is different. What --

25 QUESTION: I'm sorry. You agree with opposing

1 counsel?

2 MR. BURSON: No, no, no. I disagree because I  
3 don't think what we are asking to be done is evaluation of  
4 the worth and the sanctity of a human life. I think the  
5 clearest example is, if we look, and I kind of hate to use  
6 this example, if we look at the President and we look at a  
7 homeless person, there is no doubt that the sanctity of  
8 their lives is equal and the society values them equally.

9 For the purposes of our proposition, there  
10 further can be no doubt that the taking of the life of the  
11 President creates much greater societal harm than the  
12 taking of the life of the -- of the homeless person.

13 So it is in looking at that societal harm that  
14 we suggest is something that is legitimate for the jury to  
15 consider.

16 QUESTION: Yes. But there, you have a -- your  
17 opponent argues that that's a distinction Congress has  
18 drawn, that you treat the harm to the President  
19 differently from other people. You can have a more  
20 serious penalty. But can you -- would it be permissible  
21 for a statute to say that, a father -- if the victim is  
22 the father of a family of four, the death penalty may be  
23 imposed, but if it was a single parent, it may not be  
24 imposed? Would that be a -- would that be a  
25 constitutional statute?

1 MR. BURSON: Well, are we speaking now as a --  
2 as a statutory aggravating factor, because I think there  
3 is a difference in where we --

4 QUESTION: Right. If you had an aggravating  
5 factor, that if you are the father of a family of four,  
6 that would make you eligible for the death penalty, but if  
7 you're a single parent, you're not -- it would not.

8 MR. BURSON: Oh, if the victim --

9 QUESTION: If the victim --

10 MR. BURSON: -- is a family -- father of a  
11 family of four. I think that that would depend in terms  
12 of defining an aggravator whether that were sufficiently  
13 narrow to define the class and whether that was a  
14 sufficiently principled basis in which to --

15 QUESTION: Unless the question, is there a  
16 principle --

17 MR. BURSON: -- name an aggravator.

18 QUESTION: Is there a principle basis for  
19 drawing that distinction?

20 MR. BURSON: There may well be. I think that  
21 would have to be expressed and looked at in each  
22 individual case. But there may well be a societal  
23 difference in taking the bread winner of four children,  
24 and a State might end up defining that as an aggravating  
25 factor. There is nothing inherent in it that would



1 prohibit it from being.

2 QUESTION: I think you have to say that. I  
3 mean, surely if a jury can -- if you're going to say the  
4 jury can do it, I think you have to say the legislature  
5 can do it.

6 MR. BURSON: I think the principle, Justice  
7 Scalia, would be that if it is too broad so as not to  
8 actually narrow the class, the vagueness of it. But the  
9 example given is not very vague and I would say you have a  
10 fairly limited class of victims there.

11 QUESTION: General Burson, do you think that it  
12 would be permissible for the State to have evidence  
13 introduced to show that the victim went to church every  
14 Sunday and never took a drink? I mean, is that the kind  
15 of evidence that you're arguing should be allowed?

16 MR. BURSON: The type of evidence that we are  
17 arguing for is, as far as -- again, there is the societal  
18 harm evidence, which may be embodied in a particular  
19 characteristic of the victim. But there is another reason  
20 we think it should come in, and that was pointed out by  
21 the Chief --

22 QUESTION: You think that kind of evidence  
23 should come in?

24 MR. BURSON: Well, as --

25 QUESTION: Is that what the State wants to do?

1 MR. BURSON: It depends on how far it goes. It  
2 depends on -- what we are looking for is enough to flesh  
3 out that this was a unique, living human being, as Chief  
4 Justice mentioned in Mills --

5 QUESTION: Is there any limiting principle? Is  
6 there a limiting principle of foreseeability of the harm,  
7 for example?

8 MR. BURSON: We would suggest, no, as far as the  
9 foreseeability. We have suggested that the personal  
10 responsibility of the defendant extends to -- it goes to  
11 the full extent of his harm, and that is very much an  
12 objective factor.

13 We have also suggested, however, that it's --  
14 that is a -- to the extent that moral culpability and that  
15 mental state is insisted on by the court, that moral  
16 culpability as a mental state embraces more than  
17 subjective foreseeability.

18 QUESTION: And the full extent of the harm  
19 includes, in your view, the personal characteristics of  
20 the victim?

21 MR. BURSON: It may. For instance, in this  
22 case, the fact that -- Charisse Christopher was a mother  
23 of two children. That -- the fact -- of two infant  
24 children, the fact that she was a mother and had two  
25 infant children is an individual characteristic that does

1 reflect the additional harm, also, to society.

2 QUESTION: Well, the human characteristics, she  
3 was a nice mother, she always took them to Sunday school.

4 MR. BURSON: I think those human characteristics  
5 are more appropriately viewed as to whether they are  
6 needed to paint a basic picture of this unique human  
7 being. When they go to the point, when they go to the  
8 point of suggesting that her life is worth more in terms  
9 of the sanctity of life than the life of the defendant,  
10 then, we think, you have a problem. That's where the line  
11 should be drawn.

12 QUESTION: Laying aside, for the moment, the  
13 constitutional considerations, just from the standpoint of  
14 your expertise as an attorney general and as a prosecutor,  
15 would you recommend that every State in the Union permit  
16 all of the evidence that was introduced in this record?

17 MR. BURSON: Well, yes, because I think that  
18 this was determined by the trial judge, and we had  
19 arbitrariness review, proportionality review. So --

20 QUESTION: My concern is that prosecutors tend  
21 to go to the very limits of the law. I don't know if you  
22 had the opportunity to read the record in Huertas v. Ohio,  
23 in which the aggrieved mother or grandmother testified as  
24 to the appropriate penalty. And if we overrule Booth v.  
25 Gathers, we are going to have testimony that is of this

1 very, very emotional and potentially prejudicial nature.

2 MR. BURSON: We would suggest, in that regard,  
3 we have our due process principles. We have our appellate  
4 review principles. Fundamental fairness, I think it was  
5 suggested --

6 QUESTION: We have had no case that I recall in  
7 which we have set aside a death verdict for inflammatory  
8 -- inflammatory arguments by the prosecutor. We have come  
9 close to that. We have said that there is a due process  
10 component.

11 MR. BURSON: Well, I think that's just one of  
12 the points. Are we now creating a new standard with  
13 Booth? I don't think this was the intention. Maybe it  
14 was, but in Booth and Gathers, we have created a new  
15 standard at a very low threshold for prosecutorial  
16 argument. I mean, we are before, where the serious  
17 contention is being made that those references to justice  
18 are constitutional error under -- under Booth and Gathers.  
19 And we would suggest that it's up to the States, not --  
20 not as an Eighth Amendment proposition, but the State  
21 should determine the degree to which that comes in and  
22 balance those interests to these substantive factors.

23 QUESTION: Incidentally, just to make the record  
24 clear, I take it you don't defend the stabbing of the  
25 diagram?



1 MR. BURSON: I'm not here to defend that.  
2 That's not an issue we would suggest is before the Court.  
3 When you say the evidence in the case, I'm assuming we're  
4 talking about all the evidence that's relevant --

5 QUESTION: That was the meaning of my question.

6 MR. BURSON: -- to the issues before this case.

7 QUESTION: May I just ask one last question? It  
8 seems to me your standard is whether the evidence would  
9 show that the victim was a unique, living human being. I  
10 think those were your words. That seems to me to assume  
11 that some are unique and others are not.

12 MR. BURSON: Well, I think this goes to -- I  
13 think this -- that is a very serious question, because I  
14 think what Booth and Gather suggest, contrary to what we  
15 have said, that we have to have a particularized decision  
16 on the defendant, what they are suggesting is a generic  
17 victim, an abstract victim, an invisible victim at the  
18 sentencing --

19 QUESTION: No, a victim -- I suggest what the  
20 defendant knows about the victim may properly come into --  
21 into evidence. This is -- we're dealing entirely with  
22 evidence that the defendant did not know about. It was  
23 all unforeseen to the defendant.

24 MR. BURSON: Well, I don't think --

25 QUESTION: That's all Booth covers.

1 MR. BURSON: I don't think in this case, we are.  
2 I think --

3 QUESTION: Well, that may be. Maybe that's why  
4 Booth doesn't apply here.

5 MR. BURSON: Well, I think that Booth does  
6 apply. But, Your Honor, I don't think that's what -- if  
7 it wasn't for -- if it wasn't foreseeable, we're saying,  
8 then we have to deal with a generic victim. And again, I  
9 think I mentioned before, as Chief Justice Rehnquist  
10 pointed out in Mills, that unless we have a basic  
11 character sketch, something to let us know this is a --  
12 not a corpse but a unique, living human being, the -- how  
13 can you make -- how could we make that moral judgment?

14 QUESTION: Does not that -- does not that to  
15 assume that some human beings are not unique?

16 MR. BURSON: No. What it assumes is that our  
17 present standard is a generic victim.

18 QUESTION: Thank you, General Burson.

19 General Thornburgh, we'll hear now from you.

20 ORAL ARGUMENT OF DICK THORNBURGH

21 ON BEHALF OF THE UNITED STATES,

22 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

23 MR. THORNBURGH: Mr. Chief Justice, and may it  
24 please the Court:

25 We urge overruling of Booth v. Maryland and

1 South Carolina v. Gathers.

2 We submit that there is nothing cruel or unusual  
3 about the jury's consideration of victim impact evidence  
4 in the sentencing stage. Booth's contrary view, however  
5 wise or unwise it may be as a matter of social policy, is  
6 simply not required by the Eighth Amendment to the  
7 Constitution.

8 We urge the Court to adopt, instead, a rule  
9 which gives due weight to expressions by the Congress and  
10 the overwhelming majority of State legislatures that  
11 permit consideration of victim impact evidence in all  
12 cases.

13 Victim impacts evidence should be considered in  
14 capital cases to ensure not only that the defendant is  
15 held morally responsible for the victim's death, but to  
16 hold defendant accountable for the full extent of the harm  
17 caused by his or her criminal acts.

18 We echo Justice Blackmun's observation in  
19 Furman, that the misery occasioned to the victims, the  
20 families of the victims, and to the communities where the  
21 offenses took place, are matters which perhaps deserve not  
22 to be entirely overlooked.

23 Consideration of victim impact evidence is an  
24 aid in determining the full accountability of the  
25 murderer, does not risk an arbitrary or capricious result

1 but's indeed rational and reasonable.

2 Victim impact evidence is relevant to  
3 establishing the full range of retribution.

4 QUESTION: Mr. Attorney General, do you take the  
5 view that it's a one-way street or a two-way street? Can  
6 the defendant introduce evidence that the victim was an  
7 unworthy person?

8 MR. THORNBURGH: I think that's a matter that  
9 has to be decided by legislative bodies or in a particular  
10 case by the court.

11 QUESTION: But you would take the view it's  
12 permissible to allow it by -- constitutionally permissible  
13 --

14 MR. THORNBURGH: That's a constitutional matter,  
15 yes.

16 QUESTION: -- to allow it for the prosecutor and  
17 deny it to the defendant.

18 MR. THORNBURGH: As a constitutional matter,  
19 yes.

20 QUESTION: General Thornburgh, what if the State  
21 legislature hasn't enacted anything relating to victim  
22 impact evidence, but the prosecutor wants to introduce  
23 evidence about the character of the deceased? This was a  
24 good church-going person who never told a lie and so forth  
25 and so on.



1 MR. THORNBURGH: Depending upon the delineation  
2 of aggravating and minimizing circumstances, that might  
3 well be admissible within the confines of a legislative  
4 definition. In this case --

5 QUESTION: No, my assumption is it doesn't -- it  
6 doesn't relate directly to anything the legislature has  
7 said.

8 MR. THORNBURGH: I think that our position is  
9 that in order for the jury to hold the defendant fully  
10 accountable for the extent of the harm that's been  
11 inflicted upon the victim, its -- his or her family or  
12 their community, that that kind of evidence is properly  
13 received as a constitutional matter. There is nothing  
14 infirm under the Eighth Amendment about receiving that  
15 information.

16 QUESTION: Well, then why wouldn't evidence as  
17 to the unsavory nature of the victim be relevant as far as  
18 the defendant's case is concerned?

19 MR. THORNBURGH: I'm suggesting that that,  
20 again, is a matter for State law and there is nothing --

21 QUESTION: Well, I'm asking you though, in the  
22 absence of State law, because I suspect in many of these  
23 situations, we don't have a directly relevant State law.  
24 We're going to have prosecutors and defense counsel out  
25 there wondering what to do and how far they can go.

1 MR. THORNBURGH: My own sense --

2 QUESTION: And I'm just wondering what your  
3 theory is.

4 MR. THORNBURGH: My own sense is that the  
5 defense counsel should not be permitted to denigrate the  
6 value of the life that already has found to have been  
7 taken under circumstances justifying death sentence  
8 eligibility. That the characteristics of the life that's  
9 been taken are admissible to give the jury the full  
10 picture of the nature and extent of the harm that's been  
11 caused by the defendant's act so that they can hold that  
12 defendant fully accountable to the full extent of the harm  
13 that's been done to the family and the community and the  
14 like.

15 QUESTION: Well, how about pure opinion  
16 testimony of a survivor as to the penalty?

17 MR. THORNBURGH: Opinion testimony, again, I  
18 don't think, as a constitutional matter, should be barred.  
19 Again, I'm not terribly sure that if I were drafting the  
20 legislation that provided for these kinds of situations,  
21 that that would be at the top of the list. But as a  
22 constitutional matter, I don't see any infirmity in having  
23 that opinion on either side presented.

24 QUESTION: But the full extent -- I mean, once a  
25 man is sentenced to death, what else can you do to him?

1 MR. THORNBURGH: Nothing.

2 QUESTION: So, you don't -- full extent doesn't  
3 help in this case, does it?

4 MR. THORNBURGH: Justice Marshall, what I am  
5 trying to convey is a sense --

6 QUESTION: Well, what I'm trying to convey is  
7 that you -- this case, they showed everything necessary to  
8 bring in a death penalty. And then they added this on.

9 MR. THORNBURGH: We would suggest that in making  
10 the determination as to whether a death penalty eligible  
11 defendant is to, in fact, suffer the death penalty, it's  
12 important for the jury to have the full picture of the  
13 harm that was caused by the act which took the life of the  
14 victim.

15 QUESTION: And anything in addition you can  
16 think of.

17 MR. THORNBURGH: Not anything in addition you  
18 can think of, because a trial judge has and exercises the  
19 opportunity --

20 QUESTION: Well, do you agree with me that there  
21 was enough there without that -- the bloodied pictures, et  
22 cetera?

23 MR. THORNBURGH: I didn't try the case, so I  
24 wouldn't want to make that judgment. But I know a  
25 prosecutor wants to --

1 QUESTION: Well, you have tried other cases,  
2 haven't you?

3 MR. THORNBURGH: Yes, I have.

4 QUESTION: Well, wouldn't you think that was  
5 enough?

6 MR. THORNBURGH: In this case, I think the  
7 prosecutor properly decided to admit the evidence, to  
8 sketch for the jury the full extent of the impact of the  
9 loss, to hold the defendant accountable for that.

10 QUESTION: (Inaudible) overruling Booth? Do you  
11 agree?

12 MR. THORNBURGH: I do not think so.

13 QUESTION: Well, why Booth?

14 MR. THORNBURGH: Because I think Booth goes to  
15 great pains to presume harm from this evidence.

16 QUESTION: But the court didn't. The Tennessee  
17 court didn't.

18 MR. THORNBURGH: The Tennessee court followed  
19 Booth.

20 QUESTION: It didn't say so.

21 MR. THORNBURGH: But found it to be harmless  
22 error, not --

23 QUESTION: It didn't say so.

24 MR. THORNBURGH: It found the admission of this  
25 evidence to be error under Booth but found it to be



1 harmless.

2 QUESTION: That's right. That's right.

3 MR. THORNBURGH: And we're suggesting that its  
4 finding of error is error, and we're urging this court to  
5 overrule it.

6 QUESTION: And we have to go this -- we have to  
7 go this one step further and overrule Booth?

8 MR. THORNBURGH: Yes, we are.

9 There is another factor, I think, that we have  
10 to deal with here, and legitimately. There are concerns  
11 about particular cases where the risks posed by potential  
12 inflammatory or prejudicial evidence may be offered. But  
13 we are suggesting that those can be accommodated by the  
14 kinds of safety valves that exist in the conduct of the  
15 case. Judges are used to making those decisions with  
16 respect to prejudicial evidence, and the appellate review  
17 process, which offers a chance for that judgment to be  
18 clarified.

19 But what we are suggesting is that it is  
20 inappropriate to have a constitutional rule, per se, which  
21 excludes all of the evidence with respect to what the  
22 impact on the victim, the victim's family, and the  
23 victim's community was.

24 We suggest, also, that this per se rule is  
25 really unworkable in practice because some --

1 QUESTION: Mr. Attorney General, do you  
2 understand that per se rule to apply to a matter that the  
3 defendant knew about, or are we only talk about a matter  
4 the defendant could not have reasonably foreseen?

5 MR. THORNBURGH: Clearly, the highest case of  
6 culpability is on matters that the defendant knew about.

7 QUESTION: But you don't understand Booth to  
8 exclude that evidence?

9 MR. THORNBURGH: No.

10 QUESTION: Oh, okay.

11 MR. THORNBURGH: But what we're saying is that  
12 in order to assess the full impact of the act that the  
13 defendant carried out and to hold that defendant fully  
14 accountable, it's necessary to go beyond the ambit of  
15 simply what that defendant knew and to take into account  
16 the actual impact so that the jury has the full picture.

17 QUESTION: General Thornburgh, do you agree with  
18 General Burson that there are really two different sorts  
19 of victim impact evidence and that both can get in? I  
20 mean, one is really an aggravating, you know, he was the  
21 father of 10 children who will miss him, and their lives  
22 will be harder because he's gone, and therefore, society  
23 is harmed. And the other one is, this was a poor  
24 reprobate, never did a lick of work in his life, but you  
25 know, a gentle soul, never harmed anybody -- just to

1 humanize the victim, not to show any greater harm to  
2 society.

3 MR. THORNBURGH: Let me recast that --

4 QUESTION: Would both types be admissible in  
5 your view?

6 MR. THORNBURGH: Let me, if I might Justice  
7 Scalia, recast that dichotomy, because I think there is  
8 entirely too much focus upon the characteristics, per se.  
9 But those characteristics have relevance only insofar as  
10 they reflect the actual harm that was done by the criminal  
11 act for which everyone agrees we must hold this defendant  
12 accountable.

13 It's not the characteristics, themselves but  
14 what has resulted from the death of that individual in a  
15 loss to the victim, the family, and the community. Now, I  
16 think it would be inadmissible, and no one supports the  
17 proposition that in these considerations, the  
18 characteristics, themselves, should govern the  
19 determination. But insofar as they reflect the degree of  
20 the loss that was suffered by the criminal act carried  
21 out, that they are inadmissible -- are admissible.

22 QUESTION: Then you're saying there is a  
23 difference between the two categories that Justice Scalia  
24 described?

25 MR. THORNBURGH: Well, I am suggesting that in

1 both categories, it's not the characteristics of the  
2 victim that govern --

3 QUESTION: But the second category doesn't show  
4 anything about harm. It just shows he was a real nice  
5 guy.

6 MR. THORNBURGH: Well, that could have been --  
7 the loss of that life could have been of great harm to  
8 family, friends, community.

9 QUESTION: No, but just testimony limited to the  
10 fine, moral character of the victim, without any  
11 indication of harm --

12 MR. THORNBURGH: Well, real nice guys are -- the  
13 loss of real nice guys is something of importance to this  
14 community, as to all the communities as well.

15 CHIEF JUSTICE REHNQUIST: Thank you, General  
16 Thornburgh.

17 The case is submitted.

18 (Whereupon, at 11:02 a.m., the case in the  
19 above-entitled matter was submitted.)  
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21  
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## CERTIFICATION

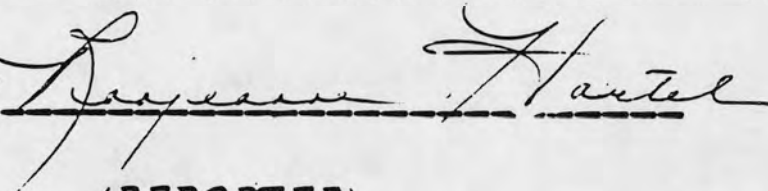
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Pervis Tyrone Payne, Petitioner v. State of Tennessee

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