In The

Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

MARK ANTHONY OTT,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Booth v. Maryland*, 482 U.S. 496 (1987), this Court held that the Eighth Amendment erected a *per se* bar against a capital sentencing jury considering two types of victim evidence: (1) "victim impact evidence," which relates to the victim's personal characteristics and the emotional impact of the victim's murder on family members, and (2) the victim's family members' characterizations and opinions about the crime, defendant, and appropriate sentence.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), this Court partially overruled *Booth*, holding that the Eighth Amendment did not bar victim impact evidence or the first type of victim evidence. *Payne* expressly left unanswered whether the Eighth Amendment still bars the second type of victim evidence.

The questions presented are:

1. Should this Court overrule the remaining part of *Booth* holding that the Eighth Amendment erects a *per se* bar against a victim's family members' characterizations and opinions about the crime, defendant, and appropriate sentence?

2. To the extent that any part of *Booth* survives, does it apply to a sentencing proceeding in which death is not option?

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PETITION FOR WRIT OF CERTIORARI

The State of Utah respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

OPINIONS AND ORDERS

The opinion of the Utah Supreme Court is reported at 2010 UT 1, ___ P.3d ___ (App. 1-33). The order of the Utah Supreme Court denying the petition for rehearing under review is unreported (App. 34).

JURISDICTION

The decision of the Utah Supreme Court was entered on January 5, 2010. (App. 1). The State's petition for rehearing was denied on June 11, 2010 (App. 34). The State was granted an enlargement of time until October 12, 2010 to file its petition. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Utah Code Ann. § 76-3-207(2) (West 2004):

(a) In capital sentencing proceedings, evidence may be presented on:

(i) the nature and circumstances of the crime;

(ii) the defendant's character, background, history, and mental and physical condition;

(iii) the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims; and

(iv) any other facts in aggravation or mitigation of the penalty that the court considers relevant to the sentence.

(b) Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules of evidence. The state's attorney and defendant shall be permitted to present argument for or against the sentence of death.

STATEMENT OF THE CASE

1. **Summary of Facts.** At 2:30 a.m., September 1, 2002, Respondent Mark Anthony Ott cut the phone lines to his estranged wife's home. R. 1378:144, 199. Armed with a knife, lighters, and Coleman fuel, he then burst into her home. R. 1374:174-76; R. 1375:148-49, 151-53, 156. Ott went directly to his wife's bedroom where he stabbed her boyfriend, Allen

Lawrence, 23 times. R. 1375:15-19. When Ott's teenaged stepdaughter tried to intervene, he stabbed her in the stomach. R. 1374:85. Ott then doused his wife's bed with gasoline and lit it, a couch, and a loveseat on fire. R. 1375:24-25.

Lawrence, Ott's wife, and her two teenaged daughters and their friend, all managed to escape the burning house. But Lawrence's six-year-old daughter Lacey, who had been momentarily forgotten, died in the fire. R. 1376:99, 103, 105-06, 114.

2. **Trial court proceedings**. Ott was charged with aggravated murder, Utah Code Ann. § 76-5-202 (West 2004), and several other aggravated felonies. R. 1-4, 35-37. In Utah, aggravated murder is punishable by death, life without the possibility of parole, or an indeterminate prison term of 20 years to life, for which parole is available. Utah Code Ann. § 76-3-206 (West 2004). On the day trial was to begin, Ott entered an *Alford* plea to the aggravated murder charge and guilty pleas to attempted aggravated murder and aggravated assault. R. 1122, 1135. In exchange, the State dropped the other charges and agreed not to pursue the death penalty. R. 1135. The parties agreed that a sentencing jury would decide whether Ott should be sentenced to life with or without the possibility of parole. R. 1135.

The sentencing phase lasted five days, three of which were spent on Ott's mitigation case. The jury heard from 27 witnesses, and the evidence and

argument spanned over 1,000 pages of transcript. *See generally* R. 1374, 1375, 1376, 1377, 1378.

Most of the State's presentation included evidence about the horrific circumstances of the charged crimes; Ott's harassing, threatening, and violent conduct leading up to his crimes; and his violent and out-of-control behavior in jail – 114 incidents in all – while he awaited trial. *Id.*

Victim testimony. After testifying regarding the crimes and Ott's conduct leading up to those crimes, the victims present in the house that night also testified regarding the effect the attack had on them, their opinion of Ott's character, their belief that he was incapable of changing, and their fear that if ever released, Ott would harm them again.

Ott's by then ex-wife testified that if Ott were ever released, she believed he would come looking for them and try to harm them again. App. 18-19. She stated that she did not believe he would change, because he was a "control freak." App. 19.

One of Ott's stepdaughters – the one he stabbed – testified that she had been unable to sleep since that night. App. 19. She testified that based on having lived with Ott for some years, she did not believe he was capable of changing. App. 19-20. She testified that she was "terrified" of Ott, even though he remained in prison, and that she would "hate to see how scared [she]'d be if he was actually out." App. 20.

Ott's other stepdaughter – who had also lived some years with Ott and who was in the house that night – testified that she was "very much" afraid of Ott and that if he were ever released, "it doesn't matter how old he's going to be, I think that, you know, he'll finish what he went there to do. I honest to God I [sic] feel that way." App. 20.

Lawrence – who, in addition to his child's death, had suffered on-going harassment and 23 stab wounds at Ott's hands – testified that in imposing sentence, the jury needed "to take what kind of guy this person is into consideration." App. 17. Lawrence stated that Ott's crimes showed what kind of man he was and that he had "used up all his chances":

> He's shown what he truly is, the kind of man he is . . . these types of crimes are committed by certain types of people and he just happens to be one of them. They are psychopathic in nature. They have no respect for other people's rights. No respect for other people's pursuit of happiness. No respect for other people's feelings. They can kill and they don't have any more feeling for killing someone than if they reached up and picked an apple off of a tree. They don't feel it. That's the kind of guy this is. I don't think he'll ever change. I don't think he should ever have the opportunity to again perpetrate his violent nature on any human being anywhere again ever. He doesn't deserve it. He's used up all his chances. He's shown who he is and what he does when he does not get his

> way. He's shown us. He showed his hand. That's what he is. That's is [sic] the defining moment of that man's life. That five minute episode defined him as what he is. That's what Mr. Ott is. That's him.

App. 17. When asked if he believed, based on his personal experience, that Ott would have helped Lacey out of the house if he had known she was there, Lawrence characterized Ott as an unfeeling "terrorist":

> I don't think he would have done a damn thing different. This man is a terrorist. He deals with anarchist cookbooks. He looks at how bombs are built. When he set that house on fire this isn't like building a campfire with a grocery sack. This is a bomb. If I dumped gallons of gasoline on this floor right here and lit it with a match, can you imagine how explosive that would be? It goes up instantly. I've thrown little bits of gas on a campfire to start one. It flares up instantly. Can you imagine that much gasoline in the house? . . . He didn't care. This guy does not care about other people's feelings. He has no empathy for anybody, none. He doesn't have it. It's not inside of his character to have that.

App. 18.

The prosecution also presented the testimony of Lacey's older sister and mother, neither of whom were present the night of the crimes. Lacey's sister testified that the thought of Ott being released "terrifie[d]" her and that she believed Ott "wouldn't

change at all." App. 21. She could not "see how anybody could do what he did." *Id.* She stated that if it had been up to Ott, her "dad would not be here at all . . . But it could have very well been me instead of my little sister, or both of us." *Id.* She wanted the jury to know that Ott "does not care":

> He doesn't care what happened that night. He doesn't care if it was me or my sister or everybody in that house. He burned it down. He didn't help anybody out of it. He didn't try to pick out one person out of five. He wanted just for us, my dad. He was there for whoever and whatever was in that house. I mean, the house could have caught on fire to the next door neighbors. He didn't care who died. He didn't care who got hurt. I know his intention was to kill my dad, but instead he killed my little sister. And I don't think he deserved anything more than what she got. She can't be here today to say what she thinks. I don't think that he deserves any rights. He shouldn't have any rights. He took all of hers away from her, and I don't believe that he should have any.

App. 21-22.

Responding in part to defense counsel's opening statement asking the jury to walk in Ott's shoes (R. 1374:56-57), Lacey's mother testified that she hoped that Ott never got out on parole, because he did not deserve it:

> I think he should have to walk in my shoes. I think you should have to walk in my shoes

> 'cause my last two years have been horrible. You know what? They are not going to get better. I loved my daughter. The love I had for my daughter was so strong. You can't take that away . . . and I hate to say this, but I hope you don't get out on parole because you don't deserve it. My daughter don't get to come back to me right now. I didn't get to finish with my daughter's life. I have to go home tonight without my daughter there, and I have to be alone for the rest of my life. I hope you can think about that for the rest of your life.

App. 22.

The defense did not object to any of the foregoing evidence.

Ott's evidence: In mitigation, Ott put on testimony that he had served his country for years, including a stint in the Gulf War. R. 1377:119-23. Ott's mitigation specialist detailed his military service and the medals he had received for meritorious service. R. 1377:121-23. Ott presented testimony that he suffered physical abuse as a child and post-traumatic stress syndrome and depression upon his return from the Gulf War. R. 1377:123-77; *see also* R. 1376:176-78, 183-84, 186. Ott also presented expert testimony suggesting that he had been suffering from undiagnosed bi-polar disorder and that proper medication had improved his behavior in jail. R. 1378:80-90, 103. Ott also called friends and family members to testify that he was a "good guy" and father and had no real

anger problems until after he married his wife; his violent acts were an anomaly, and not in keeping with his character; his wife and Lawrence shared some of the responsibility for Lacey's death; he did not intend to kill anyone on the night of the crimes; and he should be given a chance at parole. R. 1376:175, 178, 190-91, 203, 206, 207-10, 212, 232-47; R. 1377:14, 18-19, 26-33, 42, 52, 55-58, 72-73, 86, 248.

Ott did not testify at the sentencing hearing, but, as permitted by Utah law, he did make an unsworn statement to the jury. He admitted that he intended to kill Allen Lawrence and that he stabbed his step-daughter when she tried to stop him. R. 1378:134. He told Lacey's mother "and everybody who loved Lacey," that he was "truly sorry for what happened" and that he "mourned" for Lacey "every night." R. 1378:134-35. He said that he could "empathize" with Lacey's mother, particularly because, in the intervening 18 months, he had not been able to see his own children. Ott then told the jury that he hoped that "one day I'll have the opportunity to be put on parole." *Id.*

The jury, on a vote of ten to two, imposed life without the possibility of parole. On appeal, Ott challenged his sentence on several grounds, including the admission of "victim impact evidence." In a single sentence, which cited only *Payne v. Tennessee*, 501 U.S. 808 (1991) for support, Ott asserted that the Eighth Amendment "bans family members' opinions and characterizations of the crime, the defendant, and the appropriate sentence to be imposed." Br. Aplt. at 87. Ott also challenged admission of the evidence

on due process grounds under both the federal and state constitutions. *See id.* at 86-95. Because Ott had not preserved his victim impact evidence claim, he argued that his counsel was constitutionally ineffective for not moving to exclude it.

3. **Utah Supreme Court Decision**. On appeal, the Utah Supreme Court reversed Ott's sentence on the sole ground that the Eighth Amendment *per se* barred both the victims and Lacey's surviving family members from addressing the defendant's character, his chances for rehabilitation, and the appropriate sentence. App. 15-16, 31-32. The court relied on *Booth v. Maryland*, 482 U.S. 496 (1987), "which held the Eighth Amendment barred victim impact evidence." App. 15. The Utah court acknowledged that this Court in *Payne* partially overruled the part of *Booth* that held that the Eighth Amendment did not bar, *per se*, victim impact evidence – i.e., evidence of the victim's personal characteristics and the effect the victim's death had on the family. The Utah court concluded, however, that "to the extent *Payne* overruled *Booth*, *Booth* retained viability for its holding that victim impact evidence that addresses the defendant's character or expresses the victim's opinion of the appropriate sentence at the penalty phase of trial is inadmissible under the Eighth Amendment." App. 15.

The Utah Supreme Court concluded that "large portions of the victim impact evidence . . . featured the victims' opinions of the defendant's character or the appropriate sentence and were therefore clearly

at odds with United States Supreme Court precedent" in *Payne* and *Booth*. App. 16, 23. The court found trial counsel "objectively deficient for failing to object to victim impact evidence that addressed Mr. Ott's character, chances for rehabilitation, and deserved sentence because such victim impact evidence clearly violates the Eighth Amendment when introduced in capital sentencing hearings." App. 32. The court concluded that "but for the admission of the victim impact evidence that addressed Mr. Ott's character and the victims' opinions of the appropriate sentence, Mr. Ott would have received a more favorable sentence." App. 27.

Petition for rehearing. The State timely petitioned for rehearing, pointing out that *Booth*, a case that neither party had relied on, by its plain terms applied only when the death penalty was at issue. The Utah Supreme Court denied the petition without explanation.

REASONS FOR GRANTING THE PETITION

Summary of Reasons

Relying on *Booth v. Maryland*, 482 U.S. 496 (1987), the Utah Supreme Court held that it constitutes cruel and unusual punishment for crime victims and a murder victim's family members to testify in a capital sentencing hearing – whether or not death is an option – regarding their opinions and characterizations of the crime, defendant, and appropriate

sentence. But in *Payne v. Tennessee*, 501 U.S. 808 (1991), this Court expressly left open whether the Eighth Amendment continues to bar this type of victim evidence.

That question – the first question presented for review – has been unanswered by this Court for nearly two decades. This Court should now answer the question by overruling *Booth*'s blanket bar to such evidence. Just as this Court determined in *Payne* that *Booth* wrongly held that victim impact evidence had no relevance to the capital sentencing decision, it should now recognize that victims' characterizations and opinions of the crime, defendant, and appropriate sentence can also, in some circumstances, be relevant to that decision. This is especially true where, as here, all but two of the victims personally witnessed the defendant's crimes and had a personal relationship with him. Their personal observations of the defendant's character and criminal conduct were all relevant to assessing his future dangerousness and whether he was an appropriate candidate for eventual parole. But, as long as *Booth* stands, this relevant evidence is *per se* barred by the Eighth Amendment.

This Court's long silence on the subject of victim evidence has resulted in a clear split of authority on what, if any, part of *Booth* survived *Payne*. The Tenth Circuit Court of Appeals – like most courts – agrees with the court below that, under *Booth,* the Eighth Amendment erects a *per se* bar to victim testimony regarding a capital defendant's character and the appropriate sentence. But a criminal court of last

resort in that circuit – the Oklahoma Court of Criminal Appeals – has reached the opposite conclusion, holding that "in light of the discussion in *Payne*, whatever ban against this evidence there may be does not lie in the Eighth Amendment." *Ledbetter v. State*, 933 P.2d 880, 890 (Okla. Crim. App. 1997). The Oklahoma courts, therefore, have consistently allowed victims in capital cases to recommend the appropriate sentence within the limitations imposed by due process. The Utah Supreme Court's decision has deepened that existing conflict.

Because this Court's opinions in *Booth* and *Payne* are the source and center of this controversy, only this Court can settle the dispute. There is no value in letting the conflict percolate longer than it already has, because courts on both sides of the split have, after expressly considering the alternative, conclusively and repeatedly stated their conflicting opinions. Indeed, the Oklahoma Court of Criminal Appeals has interpreted this Court's denial of past petitions for certiorari presenting the question as implicit approval of its position.

There is also a split of authority among lower courts on the second question presented for review: whether, assuming *Booth*'s Eighth Amendment proscription stands, *Booth* applies in a sentencing proceeding where death is not an option. Despite *Booth*'s clear statements that its holding applies only in the death penalty context, the courts of last resort in three states – Utah in this case and Ohio and Kansas – have concluded that *Booth* applies in non-death

sentencing proceedings. The majority of federal and state courts addressing the issue, however, have reached the opposite conclusion.

The questions presented are a matter of national importance. The constitutions or statutes of at least forty-eight states, including Utah, either explicitly or implicitly grant victims the right to be heard at sentencing hearings. Nearly half of those states allow victims to be heard regarding the crime, defendant's character, and/or the appropriate sentence. The decision below implicates the constitutionality of those provisions.

This Court, and only this Court, can answer these questions with a straightforward clarification: *Payne*'s holding that "the Eighth Amendment erects no *per se* bar," against victim impact evidence extends to victim statements about the crime, defendant's character, and the appropriate sentence. *Payne*, 501 U.S. at 827. "There is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* And any risk that such evidence would be unduly prejudicial may be addressed by applicable evidentiary rules or by the Due Process Clause, in those cases where "a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair." *Id.*

I. This Court Should Answer the Two-Decades-Old Question of Whether the Eighth Amendment Continues to Bar All Victim Opinion on the Crime, Defendant's Character, and Appropriate Sentence.

The controversy in this case centers on the question left open by this Court in *Payne v. Tennessee*, 501 U.S. 808 (1991), when it partially overruled *Booth v. Maryland*, 482 U.S. 496 (1987). In *Booth*, this Court held in a 5-4 decision that the Eighth Amendment erected a *per se* bar to a capital sentencing jury considering two types of victim evidence: (1) "victim impact evidence," which relates to the victim's personal characteristics and the emotional impact of the murder on the victim's family, and (2) a victim's family members' characterizations and opinions about the crime, defendant, and appropriate sentence. *Booth*, 482 U.S. at 502-03. In *South Carolina v. Gathers*, 490 U.S. 805 (1989), this Court extended this bar to prosecutorial argument in a capital sentencing proceeding.

This Court revisited the issue four years later in *Payne*, holding that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 827. In so holding, the Court overruled that part of *Booth* prohibiting victim impact evidence – the first kind of victim evidence at issue there. The Court noted, however, that while the Eighth Amendment did not bar such evidence, the Due Process Clause might, if

in a given case the evidence introduced "is so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 825.

But *Payne* expressly left open the question of whether the Eighth Amendment continued to erect a *per se* bar to the second kind of victim evidence addressed in *Booth*:

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

Payne, 501 U.S. at 830 n.2 (citations omitted). *See also id.* at 833 (O'Connor, J., concurring) ("*Booth* also addressed another kind of victim impact evidence – opinions of the victim's family about the crime, the defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial."). The only reason the question remained open in *Payne* was that it was not at issue there. It is squarely at issue here, however, and, as shown below, will continue to be at issue with

conflicting results among the States, unless this Court intervenes.

A. *Booth*'s blanket bar unnecessarily excludes otherwise relevant victim evidence.

In the two decades since *Payne*, this Court has not addressed the admissibility of victim evidence in either capital or non-capital sentencing proceedings. This Court should now take the opportunity to answer the question it left unresolved in *Payne*.

In erecting a *per se* bar to all victim impact evidence and victim opinion of the crime, defendant's character, and appropriate sentence, *Booth* assumed that such evidence was never relevant in a capital sentencing proceeding. *See Booth*, 482 U.S. at 503-09. In *Payne*, this Court recognized the invalidity of that assumption with respect to victim impact evidence – i.e., evidence of the victim's character and the impact of the victim's murder on family members. *See Payne*, 501 U.S. at 819-27. The *Payne* court explained that "the assessment of harm caused by the defendant as a result of the crime charged" had long been an important relevant consideration in deciding a defendant's punishment, both in death and non-death cases. *Id.* at 819. Victim impact evidence was "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." *Id.* at 825.

Payne recognized that *Booth*'s blanket ban on victim impact evidence prevented the jury "from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Id.* at 826. While "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances," under *Booth*, "the State [was] barred from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." *Payne*, 501 U.S. at 823 (citation omitted). The *Payne* court concluded that the State had "a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Id.* at 825 (internal quotation marks and citation omitted).

Just as *Booth* wrongly imposed a blanket ban on all victim impact evidence, it wrongly banned all victims' opinions of the crime, defendant's character, and appropriate sentence. As this Court recognized in both *Booth* and *Payne*, the decision on whether a defendant should be executed must be an "*individualized* determination . . . based on 'the character of the individual and the circumstances of the crime.'" *Booth*, 482 U.S. at 502 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)) (emphasis in *Zant*). *See also*

Payne, 501 U.S. at 818. Consistent with that authority, Utah, like most states, expressly permits both the State and the defendant to present evidence in capital sentencing hearings on (1) "the nature and circumstances of the crime"; (2) "the defendant's character, background, history, and mental and physical condition"; (3) "the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims"; and (4) "any other facts in aggravation or mitigation of the penalty that the court considers relevant to the sentence." Utah Code Ann. § 76-3-207(2).

Just as Ott did here, capital defendants regularly put on character evidence through family, friends, employers, and experts to portray the defendant as a good, caring, contributing member of society with a likely prospect for rehabilitation. *See, e.g., Payne*, 501 U.S. at 814 (girlfriend testified defendant was "very caring person" and good father to her children and that his crimes were generally inconsistent with his character; psychiatrist testified defendant was "most polite prisoner he had ever met"; parents testified defendant did not drink or abuse drugs, was good painter, good with children, and good son). Indeed, this Court has long held that the Constitution affords capital defendants broad latitude in having the sentencer consider such evidence. *See Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality) (Eighth Amendment requires that sentencer, "in all but the rarest kind of capital case," not be precluded from considering as mitigating factor "any aspect of a

defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"). Capital defendants are also permitted to make their own sentencing recommendations, through testimony or unsworn statements, family members asking for mercy, and argument. *See, e.g., State v. Mundt*, 873 N.E.2d 828, 857 (Ohio 2007) (defendant asked jury in allocution and unsworn statement to spare his life); *State v. Jordan*, ___ S.W.3d ___, 2010 WL 3668513, *20 (Tenn. 2010) (defendant's brother testified he would be devastated if defendant were executed and asked for life without parole sentence); *Jackson v. Epps*, No. 4:03CV461-P, 2010 WL 3853158, *27 (N.D. Miss. Sept. 28, 2010) (counsel asked jury to spare defendant's life). Ott employed all three methods here to ask the jury to impose the most lenient sentence.

As *Payne* recognized, the State must also be permitted to put on adverse evidence of a capital defendant's character to show that execution is the appropriate sentence. *See Payne*, 501 U.S. at 825. Prosecutors do that in a variety of ways, including calling witnesses to detail a defendant's prior conduct to show future dangerousness. *See Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (permissible for sentencer to consider defendant's "past conduct as indicative of his probable future behavior"); *see, e.g., Hawkins v. Wong*, No. Civ. S-96-1155, 2010 WL3516399 (E.D. Cal. Sept. 2, 2010). The prosecution may also call witnesses to opine on a defendant's reputation and character. *See, e.g., Davis v. State*, 315 S.W.3d

908, 915 (Tex. App. 2010) (Texas law permits either party in capital sentencing proceeding to introduce "the prior record of the defendant, his general reputation, his character, an opinion regarding his character"). The prosecution may also call witnesses to detail the circumstances of the charged crimes to show the depravity of a defendant's character. *See Zant*, 462 U.S. at 879.

But while the Constitution places no proscription on the foregoing relevant character evidence generally – indeed, this Court has emphasized its importance – *Booth*'s blanket ban, as read by the Utah Supreme Court, excludes this relevant evidence merely because it happens to come from the defendant's victims.

Arguably, *Booth*'s proscription made some sense as applied to the victim evidence in that case. The surviving members of Booth's victims were not witnesses to the crimes nor were they acquainted with Booth. Thus, they were not in a position to render an opinion on his character or to comment on the circumstances of his crimes. But, unlike the victims' family members in *Booth*, four of the six testifying victims here were eyewitnesses to the charged crimes and had personal knowledge of Ott's volatile and violent character. Three of the six – Ott's wife and two stepdaughters – had lived with him for several years and were intimately familiar with his character. The fourth – Allen Lawrence – having personally endured Ott's harassment and threats for the two months leading up to the crimes, was also familiar with Ott's character. These four witnesses testified to Ott's

on-going aggressive and angry harassment, threats, and abuse and to his horrific acts the night of the murder. Based on their personal interactions with Ott, these witnesses testified that they did not believe he would change. They also testified how Ott's crimes had adversely affected their lives, including making them extremely fearful of what he might do to them if ever released. Granted, Lawrence's characterization of Ott as a remorseless, unfeeling terrorist might arguably be considered inflammatory. But given the admissible evidence the jury had already heard detailing Ott's on-going harassment and horrific crimes, Lawrence's characterization was a fair – and obvious – summation of his own relevant, admissible testimony. Certainly, his characterizations were ones that the prosecution could have legitimately made in argument.

In short, these four witnesses' testimony was directly relevant to Ott's character and, hence, to the sentencing determination. Yet, because these four witnesses were also victims, the Utah Supreme Court read *Booth* as *per se* barring their otherwise relevant and admissible testimony.

Significantly, while the Utah court read *Booth* as prohibiting the victims here from testifying regarding Ott's character and characterizing his crimes against them, the lower court never suggested that Ott's witnesses – who had not personally witnessed the crimes – should have been prohibited from opining on Ott's good qualities, background, and lack of criminal intent. By imposing a blanket ban on this type of

evidence merely because it comes from victims, *Booth* continues to unfairly prevent a capital sentencing jury "from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Payne*, 502 U.S. at 826. That is the very evil this Court sought to avoid in *Payne* when it overruled *Booth*'s blanket proscription on victim impact evidence.

Booth as applied here and by most other courts also wrongly and unfairly prohibits a victim's surviving family members from ever offering an opinion as to the appropriate sentence, either directly or indirectly. Here, Lacey's mother and sister testified that they hoped Ott never got parole. That testimony – intimately tied to how Ott's crimes had affected them – was clearly admissible under *Payne*. Lacey's sister stated that based on the crimes, she feared what Ott might do if ever released. Lacey's mother testified that she hoped Ott never received parole, so that he might know what it was like "to walk in [her] shoes." Given the horrific nature of Ott's crimes and the damage he inflicted on so many, Lacey's family members' suggestion that he was too dangerous to ever be paroled told the jury nothing they would not have already surmised from the evidence before them. Certainly, such a sentencing recommendation does not constitute cruel and unusual punishment.

More importantly, defendants often either directly or indirectly recommend what they think their sentence should be through allocution, family members, and argument. And Ott fully availed himself of

that opportunity. If a defendant and his family members are permitted to offer an opinion on the appropriate sentence, there is no principled basis for barring victims from also recommending an appropriate sentence, particularly where, as here, the victims personally knew the defendant, suffered harm directly at his hands, and legitimately feared for their safety if he were ever released.

B. The Decision Below Has Deepened an Existing Conflict on Whether the Eighth Amendment Continues to Bar Victims From Offering an Opinion on the Defendant's Character and Sentencing.

The Utah Supreme Court's decision has deepened an already existing and irreconcilable conflict among lower courts on the extent, if any, the Eighth Amendment continues to *per se* bar victims from characterizing or offering opinions on the crime, defendant, and appropriate sentence. On the one hand, most courts, as articulated by the Tenth Circuit, have held that "the portion of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid." *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002) (quoting *Payne*, 501 U.S. at 830 n.2). *See also Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) (same). Other courts reaching

the same conclusion include the Eighth Circuit,[1] the Fifth Circuit,[2] and the Fourth Circuit[3] in dictum, and the highest courts of Alabama,[4] Arizona,[5] Maryland,[6] New Jersey,[7] Ohio,[8] Tennessee,[9] Virginia,[10] and Washington,[11] and now Utah.

On the other hand, the Oklahoma Court of Criminal Appeals, that state's criminal court of last resort, has reached the opposite conclusion. *See Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 985 (2003); *Turrentine v. State*, 965 P.2d 955, 980 (Okla. Crim. App.), *cert. denied*, 525 U.S. 1057 (1998); *Ledbetter v. State*, 933 P.2d 880,

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

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

[3] *See Ivey v. Catoe*, 36 Fed. Appx. 718, 725-26 (4th Cir.), *cert. denied,* 123 S.Ct. 420 (2002) (dictum).

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

[5] *See Lynn v. Reinstein*, 68 P.3d 412 (Ariz. 2003).

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

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

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

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

[10] *See Beck v. Commonwealth*, 484 S.E.2d 898, 906 (Va. 1997).

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

890-91 (Okla. Crim. App. 1997); *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997). The Oklahoma court noted that although *Payne* declined to address *Booth* "as it related to characterizations and opinions about the crime, the defendant and the appropriate punishment," it was clear from a reading of both *Booth* and *Payne* that "whatever ban against this evidence there may be does not lie in the Eighth Amendment." *Ledbetter*, 933 P.2d at 890. The Oklahoma court reasoned that "since the Eighth Amendment rationale supporting the ban of the . . . victim impact evidence in *Booth* was overruled in *Payne*, this portion was also overruled, insofar as it had its roots in the Eighth Amendment." *Id.* at 890-91. Accordingly, the Oklahoma Court of Criminal Appeals consistently permits victims in capital cases to recommend the appropriate sentence, albeit with some due process limitations. *See Murphy*, 47 P.3d at 885.

This conflict will not be resolved without this Court's intervention. Indeed, the Tenth Circuit, acknowledging the conflict with the Oklahoma Court of Criminal Appeals, has characterized the latter's position as so contrary to clearly established Supreme Court precedent to warrant habeas review. *See Hooper*, 314 F.3d at 1174 ("Although the OCCA concluded the trial court properly admitted this testimony, we agree with Petitioner that the trial court's decision to admit the testimony is contrary to clearly established Supreme Court precedent. *See* 28 U.S.C. 2254(d)(1)."). For its part, the Oklahoma Court of Criminal Appeals has interpreted this

Court's denial of repeated petitions for certiorari presenting the question as implicit approval of its position, *see Murphy*, 47 P.3d at 885, and rejected any "contention that our interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional." *Id.*

II. The Utah Supreme Court's Decision to Apply *Booth* in a Non-Death Sentencing Proceeding is Directly Contrary to *Booth* and the Clear Majority of Jurisdictions.

Booth, by its express terms, applies only to the "decision to impose the death sentence." *Booth*, 482 U.S. at 508. This Court noted in *Booth* that its "disapproval of victim impact statements at the sentencing phase of a capital case does not mean . . . that this type of information will never be relevant in any context." *Id.* at 507 n.10. Indeed, the Court noted that at least 36 states and Congress had provided for some form of victim participation in the criminal justice system and that its decision in *Booth* should not be read to imply any "opinion as to the use of [victim impact] statements in noncapital cases." *Id.* at 509 n.12.

The crux of the Court's reasoning was based on its holdings over the prior decade regarding what factors a jury might constitutionally consider in deciding whether to impose the death penalty. *See Booth*, 482 U.S. at 502-05 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976); *Zant v. Stephens*, 462 U.S. 862 (1983); *Eddings v. Oklahoma*, 455 U.S. 104 (1982);

Enmund v. Florida, 458 U.S. 782 (1982); *Woodson v. North Carolina*, 428 U.S. 280 (1976)). Thus, this Court explained, its decision was "guided by the fact death is a 'punishment different from all other sanctions,' and that therefore the considerations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations." *Booth*, 482 U.S. at 509 n.12 (citations omitted).

Despite *Booth*'s express limitation of its holding to death penalty cases, the Utah Supreme Court applied *Booth* to a sentencing proceeding in which death was not an option. This was contrary not only to *Booth*, but to the overwhelming authorities that have held that *Booth* does not apply in non-death penalty cases.[12] Petitioner has found only two other courts that have applied *Booth*'s Eighth Amendment analysis to exclude victim evidence in a non-death

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[12] *See, e.g., United States v. Horsfall,* 552 F.3d 1275, 1284 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 2034 (2009); *Hatcher v. Duckworth*, 917 F.2d 1306 (7th Cir. 1990) (unpublished); *United States v. Santana*, 908 F.2d 506, 507 (9th Cir. 1990); *Disotell v. Warden La. Corr. Inst. for Women,* 2010 WL 2483420, *6, (W.D. La. 2010) (slip copy); *Razo v. Blair,* No. 08-1106-PHX-NVW, 2010 WL 1433487, *15 (D. Ariz. Feb. 11, 2010) (slip copy); *Mahan v. Cate,* No. CV08-04699 ABC, 2009 WL 3244911, *2 (C.D. Calif. Oct. 2, 2009) (unreported); *Cooey v. Anderson,* 988 F. Supp. 1066 (N.D. Ohio 1997); *State v. Searcy,* 798 P.2d 914, 919 (Idaho 1990); *People v. Ratzke*, 625 N.E.2d 1004, 1017 (Ill. 1993); *Kills on Top v. State,* 15 P.3d 422, 437 (Mont. 2000); *Randell v. State*, 846 P.2d 278, 280 (Nev. 1993); *State v. Tyler*, 565 S.E.2d 368, 377 n.11 (W. Va. 2002).

case. *See State v. Harwell*, 102 Ohio St. 3d 128, 807 N.E.2d 330 (2004) (in case of juvenile murderer who was not eligible for death penalty, all capital sentencing protections applied, including proscription on victim impact statements); *State v. Gideon*, 257 Kan. 591, 894 P.2d 850 (1995) (in non-death sentencing proceeding, suggesting in dicta that victim's sentencing recommendation would have been improper if presented to a jury).

Thus, the highest courts in Utah, Ohio, and Kansas have mistakenly read *Booth* to reach much farther than it actually does. That reading conflicts not only with *Booth*'s express holding, but also with its core reasoning. This Court should grant certiorari review to correct that growing misapprehension.

III. Both Questions Presented Are of National Importance.

Both questions presented are a matter of national significance. Forty-eight states, including Utah, grant victims the right – by constitution, statute, or both – to make a statement at sentencing.[13] Twenty-three of

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[13] *See* Ala. Const. art. I, § 6.01(a); Ala. Code § 15-23-74; Alaska Const. art. I, § 24; Alaska Stat. § 12.61.010(a)(9); Ariz. Const. art. II, § 2.1(A)(4); Ariz. Rev. Stat. Ann. § 13-4426(A); Ark. Code. Ann. § 16-90-1112(a)(1); Calif. Const. art. I, § 28(b)(8); Calif. Penal Code Ann. § 1191.1; Colo. Const. art. II, § 16a; Colo. Rev. Stat. Ann. § 24-4.1-302.5(d); Conn. Const. art. I, § 8(b)(8); Conn. Gen. Stat. Ann. § 53a-39(d); Del. Code Ann. tit. 11, § 9415; Fla. Const. art. I, § 16(b); Fla. Stat. Ann. § 921.143; Ga. Code

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Ann. § 17-10-1.1; Idaho Const. art. I, § 22(6); Idaho Code Ann. § 19-5306(1); Ill. Const. art. I, § 8.1; 725 Ill. Comp. Stat. 120/4(a); Ind. Const. art. I, § 13(b); Ind. Code Ann. §§ 35-40-5-5 & 35-40-5-6(a); Iowa Code Ann. § 915.21; Kan. Const. art. 15(a); Kan. Stat. Ann. § 22-3424(e); Ky. Rev. Stat. Ann. § 421.520; La. Const. art. 1, § 25; La. Rev. Stat. Ann. § 46:1844; Me. Rev. Stat. Ann. tit. 17-A § 1174; Md. Const. Declaration of Rights, art. 47(b); Md. Code. Ann. § 11-402; Mass. Gen. Laws ch. 279, § 4B; Mich. Const. art. I, § 24(1); Mich. Comp. Laws Ann. § 780.763 to 765; Minn. Stat. Ann. § 611A.038(a)(3); Miss. Const. § 26-A; Miss. Code Ann. § 99-43-31 & -33; Mo. Const. art. I, § 32.1(2); Mo. Rev. Stat. § 557; Mont. Code Ann. § 46-18-115(4)(a); Neb. Const. art. I, § 28(1); Neb. Rev. Stat. § 81-1848; Nev. Const. art. I, § 8(2); Nev. Rev. Stat. § 176.015(3); N.H. Rev. Stat. Ann. § 21-M-k(II)(p) & § 651:4-a; N.J. Const. art. I, § 22; N.J. Stat. Ann. § 2C:44-6(3); N.M. Const. art. 2, § 24(A)(7); N.M. Stat. Ann. § 31-26-4; N.Y. Crim. Proc. Law § 380.50(2)(b); N.C. Const. art. I, § 37; N.C. Gen. Stat. Ann. § 15A-833(a); N.D. Cent. Code Ann. § 12.1-34-02(14); Ohio Const. art. I, § 10a; Ohio Rev. Code Ann. § 2930.13-14; Okla. Const. art. II, § 34(A); Okla. Stat. Ann. tit. 21 § 142A-1; Or. Const. art. I, § 42(1)(a); Or. Rev. Stat. § 137.013 & 163.150(1)(a); 18 Pa. Cons. Stat. Ann. § 11.201(5); R.I. Const. art. I, § 23; R.I. Gen. Laws Ann. § 12-28-3 to -4; S.C. Const. art. I, § 24(A)(5); S.C. Code Ann. § 16-3-1535(B)(6) (2009); S.D. Codified Laws § 24-15A-43(8); Tenn. Const. art. I, § 35(4); Tenn. Code Ann. § 40-38-202 to -203; Texas Const. art. I, § 30(b); Texas Code Crim. Proc. Ann. art. 56.02; Utah Const. art. I, § 28(1)(b); Utah Code Ann. § 77-38-4(1)(b); Vt. Stat. Ann. tit. 13, § 5321(a)(2); Va. Const. art. I, § 8-A; Va. Code Ann. § 19.2-11.01(4)(a) & § 19.2-299-.1; Wash. Const. art. I, § 35; Wash. Rev. Code Ann. § 7.69.030(14); W. Va. Code Ann. § 61-11A-2(b); Wyo. Stat. Ann. § 1-40-203(b)(ix) & (xviii) & § 7-21-102(c). *See also* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 286-87 (2003) ("The constitutions of forty States either explicitly or implicitly grant victims the right to give recommendations at sentencing. Twenty-three of these States grant victims the constitutional right to address the sentencing authority. Seventeen States do not have the right in their constitutions but grant the right by statute.").

those states have statutes expressly granting victims the right to be heard at sentencing proceedings regarding the defendant's character, crime, and/or recommended sentence.[14] Of those states, at least two – Arizona and New Hampshire – expressly permit victims to make such statements in death penalty sentencing proceedings.[15] The enactment of Arizona's provision, however, is conditional and takes place only if on or before June 30, 2013, this Court or the Arizona Supreme Court holds that it is constitutionally permissible for a victim in a capital case to make a sentencing recommendation. *See* Ariz. Rev. Stat. Ann. § 13-701.01.

The Utah Supreme Court has now squarely held that the Eighth Amendment, without exception, bars victims from offering an opinion on the crime, defendant's character, and sentence, even when those opinions are relevant, and even when death is not a sentencing option. That decision – along with those in Ohio and Kansas – casts constitutional doubt on the laws and constitutions of all those States that afford victims the right to participate in non-capital sentencing proceedings. As noted, nearly half the States

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[14] Those States are Alabama, Arizona (conditional enactment), Arkansas, California, Connecticut, Florida, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, and Wyoming.

[15] *See* Ariz. Rev. Stat. Ann. § 13-4426; N.H. Rev. Stat. Ann. § 651:4-a.

allow victims to comment on the crime, defendant's character, and/or recommend a sentence in non-death cases. Applying *Booth* to all sentencing proceedings would be disruptive to the long-standing and widespread practice of allowing victims to address these matters at sentencing.

Because *Booth* and *Payne* are at the center of the controversy, only this Court can answer the questions presented. It should do so by holding that the Eighth Amendment erects no *per se* bar against victim statements about the defendant's character and the appropriate sentence. There is no reason to treat this evidence any differently than other relevant evidence in both capital and non-capital sentencing proceedings. Any risk that such evidence would be unduly prejudicial in a given case may be addressed by applicable evidentiary rules or by the Due Process Clause, should a "witness' testimony . . . so infect[ ] the sentencing proceeding as to render it fundamentally unfair." *Payne*, 501 U.S. at 827.

CONCLUSION

The petition for a writ of certiorari should be granted.

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