On Mitigation: The Role of “Execution Impact” Evidence

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INTRODUCTION

In Stenson v. Lambert, the Ninth Circuit held that “execution impact” evidence is not relevant to mitigation.\(^1\) Execution impact evidence is “information presented to the sentencing authority from the defendant’s friends and loved ones informing the sentencer of the effect that the defendant’s execution will have on them.”\(^2\) The Stenson court specifically addressed whether courts must allow capital juries to consider execution impact testimony as mitigating evidence during the sentencing phase of a death penalty case. It held that, although mitigating evidence need not relate directly to the charged offense, mitigating evidence must nevertheless be relevant to a defendant’s character, prior record, or the circumstances of the offense, and that the potential impact of a defendant’s execution on a third party is not relevant to those issues.\(^3\)

The Supreme Court holds that the Eighth and Fourteenth Amendments to the United States Constitution require that capital juries “not be precluded from considering, as a 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.”\(^4\) In other words, the Constitution mandates that capital sentencers be allowed to consider during the penalty phase of a capital trial any relevant evidence that tends to mitigate an offender’s moral culpability. Courts have allowed during capital sentencing proceedings, for example, mitigating evidence relating to an offender’s youth,\(^5\) history of emotional or physical abuse,\(^6\) and relative lack of specific intent and

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1. Stenson v. Lambert, 504 F.3d 873, 892 (9th Cir. 2007).
3. Stenson, 504 F.3d at 892.
involvement in the predicate offense. The Supreme Court has even allowed circumstantial character evidence—testimony of jailers asserting that the defendant had made good adjustment while in prison—as mitigating evidence.

The scope of the type of evidence that is admissible in the sentencing phase of a capital trial is much broader than evidence bearing on a defendant’s culpability. In fact, the Supreme Court has found that, although not constitutionally required, states can admit “victim impact” testimony in capital sentencing trials. Victim impact testimony is evidence presented during sentencing that informs the judge or jury of the effect the crime has had on the victim’s family. More specifically, victim impact evidence informs the sentencing authority of the financial, physical, and psychological impact of the crime on the victim and the victim’s family. Today, the vast majority of death penalty states and the federal government allow victim impact testimony in some form.

By contrast, there is no clear consensus on the question of execution impact evidence and in most of the death penalty states this type of evidence is inadmissible. Federal law also does not require admission of execution impact evidence. However, if victim impact evidence is relevant to a jury’s sentencing choice like the Court has determined, then the impact of a convicted person’s execution on his or her family is equally pertinent. Jurisdictions that preclude capital sentencing juries from giving independent mitigating weight to how a convicted person’s execution might impact his loved ones are in violation of the Constitution. Accordingly, juries should be allowed to consider execution impact evidence as mitigating evidence.

7. Lockett, 438 U.S. at 586.
8. Skipper, 476 U.S. at 4-5.
12. Logan, supra note 2, at 20-21 (“At least thirty-two of the thirty-eight death penalty states, and the federal government, now permit [victim impact evidence] in a broad diversity of forms.”).
13. Katzin, supra note 10, at 1193 (“Most states prohibit capital defendants from introducing testimony during the sentencing phase of death penalty cases about the effect that their execution would have on their [loved ones].”).
14. Stenson, 504 F.3d at 892.
The death penalty has been part of the American criminal justice system since the founding of the British colonies.\textsuperscript{15} Since then, anti-death penalty movements have been an important part of United States history.\textsuperscript{16} The various death penalty abolition movements throughout American history have shared a vision that the practice is cruel and unusual under the Constitution.\textsuperscript{17} In the mid-twentieth century, the movement toward abolition likely played a role in setting the stage for the 1972 \textit{Furman v. Georgia}\textsuperscript{18} decision, where the Supreme Court first began regulating state administration of the death penalty.\textsuperscript{19}

In \textit{Furman}, the Court held that the death penalty, as then administered in the United States, was unconstitutional.\textsuperscript{20} The core holding of the concurring justices’ opinions was that the imposition of the death penalty under an arbitrarily administered system in which juries are given unrestricted and unguided sentencing discretion constitutes cruel and unusual punishment in violation of the Eighth Amendment.\textsuperscript{21} In response to \textit{Furman}, many states adopted statutes listing specific aggravating and mitigating factors to adequately guide and channel capital sentencing discretion. For example, in \textit{Proffitt v. Florida}, the Court upheld Florida’s death penalty statute, which provided for a separate evidentiary hearing on aggravating and mitigating circumstances after a defendant was convicted of capital murder and which also directed the trial judge to weigh aggravating and mitigating factors.\textsuperscript{22} Other states responded by enacting mandatory death penalty statutes that required imposing death if a capital jury found that certain conditions were met. The North Carolina and Louisiana legislatures, for example, passed mandatory death penalty statutes shortly after \textit{Furman}, taking all discretion away from the jury.\textsuperscript{23} Altogether, thirty-five states responded immediately after \textit{Furman} by enacting new death penalty statutes, providing either for a mandatory death sentence or carefully guided jury discretion.\textsuperscript{24}

Several years after \textit{Furman}, in \textit{Gregg v. Georgia}, the Court considered the constitutionality of a death penalty statute that provided for a bifurcated trial

\begin{footnotesize}
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\item \textsuperscript{15} NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY 20 (2009).
\item \textsuperscript{16} \textit{Id.} at 20-26.
\item \textsuperscript{17} U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); \textit{see also id.} at 26-26.
\item \textsuperscript{18} Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).
\item \textsuperscript{19} RIVKIND & SHATZ, supra note 15, at 18, 25-26.
\item \textsuperscript{20} Furman, 408 U.S. at 239-40.
\item \textsuperscript{21} \textit{See id.} at 239-374.
\item \textsuperscript{22} Proffitt v. Florida, 428 U.S. 242 (1976).
\item \textsuperscript{24} RIVKIND & SHATZ, supra note 15, at 82.
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with separate guilt and sentencing phases. The statute also provided for factors to guide jurors’ decision-making process with respect to aggravating and mitigating circumstances. There, the Court held that the death penalty, which differs in harshness from all other sanctions, should be reserved for only the most blameworthy and that a proper system for administering the death penalty must include sentencing guidelines for jurors. More specifically, a valid death penalty statute would provide capital juries with sufficient opportunity to consider mitigating evidence. That same day, in Woodson v. North Carolina, the Court held that capital sentencing determinations must be individualized, based on the particularized circumstances of the crime and the defendant, and that mandatory death sentence statutes were unconstitutional.

Through subsequent decisions, the Supreme Court established the scope of admissible evidence in the sentencing phase of capital trials. In 1978, in Lockett v. Ohio, the Court struck down a state statute that prevented the capital sentencing jury from considering as mitigating factors the circumstances of the crime and the character and record of the defendant. There, the defendant was convicted of aggravated murder and aggravated robbery, and during sentencing sought to introduce as mitigating evidence her age, lack of specific intent to cause death, and her minor participation in the crime.

Years later, in Skipper v. South Carolina, the Court held that although circumstantial and not specifically related to the defendant’s culpability for the crime committed, evidence of the defendant’s “good adjustment” during his period of incarceration should have been admitted because a sentencing jury must be allowed to consider any evidence that might provide the basis for a sentence less than death. Together, Lockett and Skipper hold that the Eighth Amendment requires that the sentencing authority be allowed to consider any factor that might justify a punishment less severe than death.

26. Id. at 165-66. Georgia’s death penalty statute specified ten factors that the jury could consider during sentencing.
27. Id. at 195 (“The concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the [sentencer] is given adequate . . . guidance, concerns best met by . . . [providing] for a bifurcated proceeding [where] the [sentencer] is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information.”).
28. Id. at 206.
29. Woodson, 428 U.S. at 280; Roberts, 431 U.S. at 633 (finding that the mandatory death sentence imposed pursuant to a Louisiana statute violated the Eight and Fourteenth Amendments since the statute allowed for no consideration of particularized mitigating factors in deciding whether death should be imposed).
30. Lockett, 438 U.S. at 587.
31. Id. at 597.
32. Skipper, 476 U.S. at 1, 7-8.
33. Lockett, 438 U.S. at 604; Skipper, 476 U.S. at 1, 7-8.
just as states may not preclude the sentencer from considering any mitigating factor during sentencing proceedings, neither may the sentencing jury refuse to consider relevant mitigating evidence proffered by a defendant.\footnote{Eddings, 455 U.S. at 104-05, 114-15 (“The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.”).}

The type of evidence admissible in capital sentencing trials, however, is not limited to that which bears directly on a capital offender’s moral culpability and which might call for a less severe form of punishment. In Payne v. Tennessee, the Court held that although not mandated by the Constitution, states could admit victim impact evidence during capital sentencing proceedings.\footnote{Payne, 501 U.S. at 808.} During the sentencing phase of Payne’s trial, the trial court permitted the state to present testimony regarding the effect of the victim’s murder on her surviving three-year-old child.\footnote{Id. at 814-16.} The Court reasoned that although a defendant’s individual blameworthiness may not be directly reflected in this type of evidence, any relevant factor could be included in considering a sentence less than death and that the harm caused by the defendant is an important factor in determining the appropriate punishment.\footnote{Id. at 825 (“[A] State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.”).}

In addition, the Court explained that victim impact evidence illustrates each victim’s “uniqueness as an individual human being.”\footnote{Id. at 823.}

The Payne Court, however, did not address the “scope, quantity, or kind” of admissible victim impact evidence and left states with broad discretion in determining what victim impact evidence to allow capital sentencing juries to consider. Since Payne, when it comes to victim impact evidence, courts have allowed capital sentencing juries to consider brief oral and written testimony from close family members, friends, neighbors, and co-workers in the form of poems, photographs, hand-crafted items, and even video.\footnote{See, e.g., Kelly v. California, 555 U.S. 1020 (2008) (“In the years since Payne was decided, [the Supreme Court] has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, unduly prejudicial forms.”) (internal quotations omitted).} Unfortunately, evidence about the potential impact of a convicted person’s execution on his or her loved ones has not received similar support.

To date, the Supreme Court has not specifically addressed the admissibility of execution impact evidence and the circuits firmly hold that federal law does not require its admission.\footnote{See, e.g., Stenson, 504 F.3d at 892 (“Stenson cannot point to any federal case requiring admission of “execution impact” testimony because there are no such cases.”) (emphasis added); United States v. Snarr, 704 F.3d 368, 401 (5th Cir. 2013) (acknowledging that the}
that have addressed the admissibility of execution impact evidence have held that such evidence is not relevant to the jury’s decision of whether or not the death penalty should be imposed.\(^\text{42}\) For example, the supreme courts of Washington, New Jersey, California,\(^\text{43}\) Mississippi, and Florida explicitly hold that execution impact evidence is inadmissible.\(^\text{44}\) Although not perfectly delineated, the general consensus is that, unlike mitigation or victim impact testimony, execution impact evidence does not aid in making an individualized assessment of the crucial issue of whether the death penalty is appropriate for the particular defendant on trial. For example, the trial court in \textit{Stenson} held that while there is no constitutional bar to execution impact evidence, such evidence is not relevant to the question the jury has to answer: whether death should be imposed.\(^\text{45}\) Today, only a few states allow capital defendants to introduce execution impact evidence.\(^\text{46}\)

\section*{II. Facts and Procedure: \textit{Stenson v. Lambert}}

In the early hours of March 25, 1993 in Clallam County, Washington, Darold Stenson called 911 from his home to report that both his wife and business partner had been shot to death.\(^\text{47}\) A subsequent investigation revealed that Stenson had committed the murders and he was thereafter arrested and charged with two counts of aggravated first-degree murder.\(^\text{48}\) At trial, the state’s theory of the case was that Stenson killed his wife to collect life insurance proceeds and then killed his business partner to avoid paying a debt Stenson owed him.\(^\text{49}\) A jury found Stenson guilty of both counts of aggravated first-degree murder.\(^\text{50}\)

During the penalty phase, the trial court permitted extensive testimony from Stenson’s family and friends regarding their relationships with him. Stenson also sought to introduce execution impact evidence from loved ones on how his execution would impact them.\(^\text{51}\) The court ruled this testimony inadmissible, finding that it was not relevant to Stenson’s character or background and that it would do no more than simply present the family’s

\footnotesize{\textit{Supreme Court has never included friend or family impact testimony among the categories of mitigating evidence that must be admitted at sentencing).}}

\(^{42}\) Katzin, supra note 10, at 1205.

\(^{43}\) People v. Sanders, 905 P.2d 420, 466 (Cal. 1995).

\(^{44}\) Id. at 1206.

\(^{45}\) State v. Stenson, 940 P.2d 1239, 1282 (Wash. 1994); see also Turner v. State, 573 So.2d 657, 667 (Miss. 1990) (finding that testimony concerning the impact of an execution on a defendant’s family is not relevant to the consideration of whether death should be imposed).


\(^{47}\) \textit{Stenson}, 504 F.3d at 877-78.

\(^{48}\) Id. at 878.

\(^{49}\) Id. at 879.

\(^{50}\) Id. at 880.

\(^{51}\) Id.
opinion as to the appropriate sentence for Stenson. The trial court explained that “the... question whether an individual family member would be devastated by Stenson’s execution was... too much of an appeal to emotion... [and that] the impact upon the family members of the defendant of a sentence of death is self-evident.” Based on the verdicts and insufficient mitigating circumstances to merit leniency, the court sentenced Stenson to death.

In a subsequent appeal to the Supreme Court of Washington, Stenson argued that the exclusion of execution impact evidence violated his right to present mitigating evidence under Lockett. The Washington Supreme Court rejected this argument noting that, although a defendant is entitled to introduce “any aspect of [his] character or record, and any aspect of the offense” as a mitigating factor, execution impact evidence was not relevant mitigating evidence. Stenson then challenged his sentence in the U.S. District Court for the Western District of Washington. Although it ultimately denied Stenson’s petition for post-conviction relief, the federal district court granted a certificate of appealability on Stenson’s Lockett claim. Nevertheless, holding that mitigating evidence must be relevant to the defendant’s character, background, or the circumstances of the offense and that the potential impact of an execution on a third party is not relevant to those issues, the Court of Appeals for the Ninth Circuit affirmed Stenson’s death sentence.

III. CASE ANALYSIS: THE MITIGATING ROLE OF “EXECUTION IMPACT” EVIDENCE

Capital punishment jurisprudence in the United States has come a long way since the pre-Furman days of unrestricted and unguided discretion in capital sentencing proceedings. In Furman and its progeny, the Supreme Court established the need for mitigating evidence during capital sentencing. In response to Furman, many states adopted statutes listing specific aggravating and mitigating factors to guide sentencing discretion and prevent arbitrary and capricious infliction of the death penalty. In Lockett and Eddings, the Court held that under a constitutionally fair and reliable system, the sentencer must

52. Id.
53. Stenson, 940 P.2d at 1279.
54. Stenson, 504 F.3d at 880.
55. Stenson, 940 P.2d at 1279-80.
56. Id. 1281-82.
57. Stenson, 504 F.3d at 880.
58. See 18 U.S.C. § 2253(c)(1)(A) (“Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.”).
59. Stenson, 504 F.3d at 881.
60. Id. at 892.
61. See 408 U.S. at 238; Lockett, 438 U.S. at 604.
62. See, e.g., Gregg, 428 U.S. at 158.
consider and take into account any mitigating evidence relating to the character or record of the capital defendant and the circumstances of the crime.\textsuperscript{63} States, however, retain authority to determine what particular evidence within the broad range described in \textit{Lockett} and \textit{Eddings} is relevant in sentencing.

Beginning with \textit{Payne}, the Court expanded the scope of the type of evidence that is relevant in the capital sentencing phase of a trial.\textsuperscript{64} \textit{Payne} remains law today and victim impact testimony on the actual harm caused by a defendant is at a state’s disposal during capital sentencing.\textsuperscript{65} In fact, states possess and exercise broad discretion in determining what victim impact evidence to allow sentencing juries to consider.\textsuperscript{66} On the other hand, although there is no legitimate basis for treating execution impact evidence differently than other relevant mitigating evidence—or victim impact evidence—most states have specifically excluded direct evidence of how a convicted person’s execution might impact his friends and family members.\textsuperscript{67}

\textbf{A. “Execution Impact” Evidence is “Relevant” Evidence}

Execution impact testimony is relevant mitigating evidence. Supreme Court precedent holds that a capital defendant is entitled to present \textit{any} mitigating evidence that relates to his or her own character and which might serve as a basis for sparing his or her life.\textsuperscript{68} Information that informs the sentencing authority of the potential effect of a defendant’s execution on his or her loved ones sheds light on the defendant’s character and might provide some basis for imposing a sentence less severe than death. For example, in \textit{Stevens}, the Supreme Court of Oregon held that testimony from the defendant’s wife about the potential effect of the defendant’s execution on his daughter was relevant because the rational juror could infer that there were positive aspects about the defendant’s character.\textsuperscript{69} Yet, federal courts and most state courts that have addressed the issue have found that execution impact evidence is not relevant to the consideration of whether death should be imposed because it reveals nothing about a defendant’s character.\textsuperscript{70} Execution impact evidence reflects, at least circumstantially, a defendant’s character and it is therefore relevant mitigating evidence that the sentencer should be allowed to consider.

Just like \textit{Lockett}-type mitigating evidence, execution impact evidence is a method of informing the capital sentencer about a defendant. Testimony from a defendant’s close friends and family members about the potential adverse effect

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    \item \textsuperscript{63} \textit{Lockett}, 438 U.S. at 604; \textit{Eddings}, 455 U.S. at 104-05, 114-15.
    \item \textsuperscript{64} \textit{Payne}, 501 U.S. at 808.
    \item \textsuperscript{65} Logan, \textit{supra} note 2, at 20 (“[Victim impact evidence] has become a staple in the State’s prosecutorial arsenal.”).
    \item \textsuperscript{66} \textit{Kelly}, 555 U.S. at 1020.
    \item \textsuperscript{67} \textit{Katzin}, \textit{supra} note 10, at 1193.
    \item \textsuperscript{68} See \textit{Lockett}, 438 U.S. at 604; accord \textit{Skipper}, 476 U.S. at 4.
    \item \textsuperscript{69} \textit{Stevens}, 879 P.2d at 167-68.
    \item \textsuperscript{70} See, e.g., \textit{Stenson}, 504 F.3d at 892; \textit{Snarr}, 704 F.3d at 401; \textit{Turner}, 573 So.2d at 667.
\end{itemize}
of the defendant’s execution on say, the defendant’s young children, is relevant to the question of whether there is any aspect of the defendant’s character that would justify a less severe sentence. If a capital defendant has family and friends who love him and would miss him after execution, a jury could infer that there are positive aspects about the defendant’s character and that the defendant should not be executed.\(^71\) A capital sentencing jury could also infer that if the defendant did not possess “good character” then people would neither miss him nor present execution impact evidence on his behalf.

The Eighth and Fourteenth Amendments guarantee the right to individualized capital sentencing determinations on the basis of the “character and record of the individual offender.”\(^72\) Execution impact evidence does just that—it allows for individualization. In keeping with the Constitution’s demand for individualization, when a person’s life hangs in the balance, any relevant evidence that may convince the sentencer to spare the person capital punishment should be considered. In fact, the Supreme Court has repeatedly insisted that states permit unconstrained consideration of “all relevant mitigating evidence” proffered by the defense.\(^73\) Character evidence relating to a defendant’s love for and by family and friends is critically important to the sentencing phase. Execution impact evidence is relevant mitigating evidence. Accordingly, capital defendants should have the right to present execution impact evidence during sentencing.

B. “Victim Impact” and “Execution Impact” Evidence Are Comparably Relevant

According to Payne, although a defendant’s true character or individual blameworthiness may not be directly reflected in victim impact evidence, states could allow capital juries to consider any relevant factor when deciding between a life or death sentence.\(^74\) Although Payne does not require the admission of victim impact testimony, the Payne Court held that such evidence is at least circumstantially relevant because evidence of harm to third parties reveals both the victim’s individuality and the extent of the harm the defendant caused society.\(^75\)

\(^71\) See, e.g., Stevens, 879 P.2d at 167-68.
\(^72\) Gregg, 428 U.S. at 304; see also Lockett, 438 U.S. at 605 (emphasizing “[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual”).
\(^73\) See, e.g., Buchanan v. Angelone, 522 U.S. 269, 276 (1998) (“Our consistent concern has been that restriction on the jury’s sentencing determination not preclude the jury from being able to give effect to mitigating evidence.”); Riggins v. Nevada, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) (“[T]he sentencer must attempt to know the heart and mind of the offender and judge his character . . . Assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.”).
\(^74\) Payne, 501 U.S. at 825.
\(^75\) Id.
Similarly but conversely, execution impact evidence reveals both the individual character of the defendant and the collateral harm that the defendant caused society. In fact, testimony by a capital defendant’s relatives may be extremely informative about certain aspects of the defendant’s character. Just like the rational juror could draw a negative character inference about the defendant from victim impact testimony, he could conversely conclude through execution impact evidence that the defendant is a “good person.” And, just like victim impact evidence could illustrate the extent of the harm the defendant caused society, execution impact testimony could show the likely effect that yet another death—the defendant’s—would have on the community. In short, just like the impact on a victim’s family is arguably relevant to capital sentencing determination, the impact on the defendant’s family is comparably relevant. Therefore, to the extent courts admit victim impact evidence because it circumstantially sheds light on a victim’s character and the harm caused, it is inconsistent for courts to exclude execution impact evidence.

C. “Victim Impact” and “Execution Impact” Evidence: One Goal, Two Paths

Although most jurisdictions allow victim impact testimony, the use of this type of evidence in capital sentencing remains a highly controversial issue, as many argue that it “invites prejudice and judgments based on emotion rather than reason.” In their article “The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy,” Myers and Green assert that “the degree of harm inflicted on a victim [and the victim’s relatives] influences the amount of blame attributed to the wrongdoer, [and] as a general rule, the more one harms, the more one is blamed.” Bearing this information in mind, it would contravene common sense to not consider victim impact evidence as enjoying the status of an aggravating factor during capital sentencing.

An aggravating factor is one that assists the sentencer in distinguishing “those who deserve capital punishment from those who do not.” Although capital sentencing aggravators are statutorily defined, they can also be non-statutory. In fact, the Supreme Court has specifically held that the use of relevant non-statutory aggravating factors is appropriate after the jury finds the

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76. See, e.g., State v. Simmons, 944 S.W.2d 165, 187 (Mo. 1997) (en banc) (noting use of mitigating evidence designed to show that defendant’s “death at the hands of the state would injure his family”).
78. Myers and Greene, supra note, 77 at 492, 498 (citing various studies) (“For example, Scroggs (1976) . . . found that participants gave harsher penalties when the victim became pregnant as a result of the rape than when she did not . . . Participants assigned significantly longer sentences in the high-victim-suffering conditions than in the low-victim-suffering conditions.”).
existence of at least one statutory factor that narrows the class of defendants eligible for the death penalty. However, if only a tangential relationship exists between the non-statutory aggravator and the determination of who is more worthy of receiving death, the sentencer should not consider the aggravator in its review. More specifically, a non-statutory aggravating factor is relevant if it is “particularized to the individual defendant.”

Victim impact evidence could be sufficiently relevant to a capital sentencing inquiry regarding who should live and who should die. In fact, in Payne the Court specifically determined that the harm caused by the crime is an important factor in determining the defendant’s sentence. Accordingly, through victim impact evidence, a jury could find specific aspects of a defendant’s crime that justify capital punishment. Consequently, to the extent victim impact evidence can show the capital sentencer that a defendant is a “bad person” and deserving of death, victim impact testimony occupies a non-statutory aggravating role.

Like victim impact testimony, the admissibility of execution impact evidence is also the subject of significant disagreement among the courts. When it comes to execution impact evidence, however, most courts conclude that defendants are not constitutionally entitled to have capital juries consider this type of evidence. These courts hold that execution impact evidence is not relevant to the defendant’s character because it relates to a third party—that is, it relates to someone other than the defendant himself. However, victim impact evidence also relates to a third party, namely the victim’s loved ones. And, just like a jury could draw a negative character inference about a defendant from victim impact testimony, it could analogously conclude through execution impact evidence that the defendant has good character. Thus, execution impact evidence serves a mitigating role during capital sentencing proceedings.

Relevant mitigating evidence is that which “tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” Execution impact evidence could do just that—it can compellingly demonstrate in mitigation the good character traits and human worth of a defendant. Execution impact evidence could show “that the convicted person has the capacity to be of emotional value to others. In that inference, a juror could find an aspect of the defendant’s character or background that justifies a sentence of less than death.” In Skipper, the Court

82. Rivera, 405 F. Supp. 2d. at 668 (emphasis added).
83. Id.
84. Payne, 501 U.S. at 820.
85. Logan, supra note 2, at 33.
86. Id.
88. Stevens, 879 P.2d at 168.
held that evidence of the “defendant’s disposition to make well-behaved and peaceful adjustments to life in prison” was mitigating—even if it did not necessarily relate to the defendant’s moral culpability—because it could convince the sentencing jury that the defendant “would pose no undue danger to other jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment.”

Similarly, to the extent execution impact evidence indicates to the capital sentencing jury that the “defendant [is a good person] and can be of emotional value to others,” it also serves to highlight the continued value the defendant might have for others, even while incarcerated.

Ultimately, third party impact evidence—through victim impact and execution impact testimony alike—circumstantially sheds light on a defendant’s character. As “aggravators” and “mitigators,” respectively, victim impact and execution impact evidence have a similar goal: to afford capital sentencing juries an opportunity to more critically assess the appropriate punishment for defendants. Accordingly, if a victim’s family has a right to present victim impact evidence, then the defendant should have the right to present execution impact evidence as well.

D. Preclusion of “Execution Impact” Evidence Contravenes Defendants’ Constitutional Rights

The Eighth and Fourteenth Amendments require that the capital sentencing authority “not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record . . . that the defendant proffers as a basis for a sentence less than death.” The Supreme Court has specifically “emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.” In other words, states cannot bar “the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.” As explained, execution impact testimony is relevant mitigating evidence that could reasonably warrant a sentence less severe than death. Accordingly, exclusion of execution impact evidence in capital sentencing proceedings violates the Constitution.

Moreover, courts have rejected the argument that admission of victim impact testimony requires reciprocal consideration of execution impact evidence, concluding that the latter does not mitigate the specific harm of the crime or the defendant’s blameworthiness in relation to it.

89. Skipper, 476 U.S. at 5-7.
90. Stevens, 879 P.2d at 167-68 (citing Skipper, 476 U.S. at 5-7).
91. Lockett, 438 U.S. at 604 (emphasis added); accord Skipper, 476 U.S. at 1.
92. Buchanan, 522 U.S. at 275 (emphasis added).
93. McKoy, 494 U.S. at 441 (emphasis added) (citing Skipper, 476 U.S. at 1 and Eddings, 455 U.S. at 104).
94. See, e.g., Stenson, 940 P.2d at 1281 ([W]hile the impact on the victim’s family is arguably relevant to show the specific harm caused by the crime and the blameworthiness of the defendant, the impact on the defendant’s family is not comparably relevant to mitigate the specific
execution impact evidence may not directly reflect a defendant’s individual moral culpability nor show the specific harm he caused, neither does victim impact evidence, and yet most states allow juries to consider victim impact evidence during capital sentencing. Victim impact and execution impact evidence could reasonably have an equally palpable emotional effect on jurors. Accordingly, to the extent courts allow one type of impact evidence and not the other, they fail to give capital sentencers a full opportunity to consider mitigating circumstances, which stands in violation of Lockett’s constitutional mandate.

In sum, it is unconstitutional to preclude execution impact testimony in capital sentencing proceedings, as this is relevant mitigating evidence. If victim impact evidence is relevant, as the Supreme Court and most states have determined, then execution impact evidence is equally pertinent. States that prevent capital sentencers from giving independent mitigating weight to how a convicted person’s execution might impact his friends and family members create a risk that the death penalty will be imposed in spite of factors that call for a less severe penalty. Thus, capital defendants must be permitted to proffer evidence relating to the impact their possible execution would have on their loved ones.

IV. CONCLUSION

The Supreme Court’s capital punishment jurisprudence is complex, governed by the principles and ideas embodied in the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. From the beginning, the Court has somewhat consistently moved in the direction of abolition. Starting in 1972 with Furman, the Court has tried to ensure that the constitutional rights of capital defendants are adequately protected. It was in Furman where the Supreme Court first analyzed the degree of discretion granted to the sentencing authority responsible for determining whether a capital offender is sentenced to death or life imprisonment. Since then, the Court’s focus has been on ensuring that capital punishment be reserved for only the most blameworthy and creating a system for administering the death penalty in a manner that is neither arbitrary nor capricious. To that end, the Court has held that death penalty statutes must provide specific aggravating factors to adequately guide capital sentencing

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harm of the crime or its blameworthiness.”); see also Burns v. State, 699 So.2d 646 (Fla. 1997) (“[W]e do not find merit in this kind of quid pro quo assertion.”).

95. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). This protection is extended to the states through the Fourteenth Amendment.

96. See, e.g., Weems v. United States, 217 U.S. 349 (1910) (prohibiting the infliction of cruel and unusual punishment); Trop v. Dulles, 356 U.S. 86, 100 (1958) (“[The Court in Weems] . . . did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character.”); Furman, 408 U.S. 238.

jurors’ decision-making process. Additionally, the Court holds a proper death penalty statute must not preclude consideration of relevant mitigating factors.

The Supreme Court began examining the scope of admissible sentencing-phase mitigating evidence in 1978 when it held in Lockett that the Eighth Amendment requires that the sentencing authority be allowed to consider any factor that might justify a punishment less severe than death. With its 1991 decision in Payne, however, the Court indicated a willingness to allow the states to fashion their own capital sentencing jurisprudence by giving states the option of allowing victim impact evidence during sentencing. There, the Court reasoned that any relevant factor—not just mitigating evidence—could be included in considering a lesser sentence. Notwithstanding this reasoning, however, evidence about the potential impact of a convicted person’s execution on his or her loved ones has not received similar support, with only a few states today allowing capital defendants to introduce execution impact evidence.

In Stenson, the Washington Supreme Court justified its decision to exclude execution impact testimony by indicating that the trial court had already allowed character and background evidence, including testimony about Stenson’s relationship with his family and friends. However, to the extent Stenson wanted to introduce relevant execution impact evidence on how his execution would impact his three young children and sick father, the court should have allowed it, for the Constitution warrants that when a person’s life hangs in the balance any relevant evidence that may convince the jury to spare the person’s life should be considered.

Execution impact evidence during capital sentencing gives defendants a crucial constitutional protection to which they are entitled: individualized sentencing determination based on particularized circumstances. Just like any other relevant Lockett-type evidence proffered in mitigation, execution impact evidence reflects on a defendant’s character. A capital defendant is constitutionally entitled to present any relevant mitigating evidence in support of a penalty less severe than death. Accordingly, prohibiting execution impact evidence during capital sentencing proceedings violates the Constitution.

98. See, e.g., Gregg, 428 U.S. at 195.
99. Id. at 206.
100. Lockett, 438 U.S. at 604.
101. See Payne, 501 U.S. at 808.
102. Id. at 825.
103. Katzin, supra note 10, at 1193.
104. Stenson, 940 P.2d at 1282.