

EMPHASIZING VICTIMS' RIGHTS AT THE SENTENCING PHASE OF CRIMINALS

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In *Cianos v. State*, [FN1] the Court of Appeals addressed the right of a victim to speak to the judge or jury prior to the sentencing of a criminal defendant. [FN2] The court held that victims and their families may not appeal a defendant's sentence when oral impact statements are *723 not heard or considered in sentencing a defendant. [FN3] Despite this ruling, however, the court, in strongly worded dicta, instructed trial judges to give appropriate consideration to the impact that a crime has upon a victim in determining the appropriate sentence given to a criminal defendant. [FN4] The court explained: "An important step towards accomplishing [the task of considering the crime's impact] is to accept victim impact testimony wherever possible." [FN5] In reaching this conclusion, the court traced Maryland's past legislation and constitutional amendments regarding victim rights. [FN6] These measures were enacted in response to the concerns of victims who often feel neglected by the criminal justice system. [FN7] The *Cianos* dicta follows the recent legal trend throughout the United States toward emphasizing victims' rights. The court, however, correctly refused to allow the recognition of victims' rights to take precedence over the public interest in the administration of justice. This Note will review the legal background of written and oral victim impact statements, and outline some of the practical difficulties that allowing oral testimony will present for trial courts, attorneys, victims, and victims' families.

1. The Case.--On January 6, 1994, Sean Patrick Hall entered a guilty plea to two counts of manslaughter by automobile and one count of driving while intoxicated (DWI) after being charged with the deaths of Jerome Robert Barrett and James Nicholas Cianos III. [FN8] The court scheduled Hall's sentencing and ordered a presentence investigation. [FN9] At sentencing, the State requested that the court hear an oral address by Evelyn Barrett, [FN10] the widow of Jerome Barrett, and by Robin Cianos, the mother of James Cianos III. [FN11] The two had previously submitted written, victim impact statements for the court's consideration. [FN12] The trial court ruled that there was nothing Ms. Barrett and Ms. Cianos could say that had not already been expressed in their written statements and, therefore, that it would not be beneficial to *724 take the additional court time to hear oral testimony. [FN13] The trial court permitted the State and Hall's attorney to argue as to sentencing, and allowed Hall's girlfriend to speak on his behalf. [FN14] Afterwards, the court imposed Hall's sentence. [FN15] Ms. Cianos and Ms. Barrett filed an application for leave to appeal to the Court of Special Appeals. [FN16] They argued that the trial court abused its discretion by not allowing them to testify at the sentencing proceeding. [FN17] Ms. Cianos and Ms. Barrett argued that the Court of Special Appeals was compelled to vacate Hall's sentence and to remand the case to the trial court for resentencing. [FN18] However, the Court of Special Appeals denied their application because it determined that the issues raised by the application were moot. [FN19] The Court of Appeals granted certiorari [FN20] to address the rights of a victim to speak to the judge or jury prior to the sentencing of a criminal defendant, as provided in Article 27, section 643D. [FN21]

*725 2. Legal Background.--

a. The Rise of Victim Impact Statements.--In recent years, there has been a growing concern that the criminal justice system devotes an inordinate amount of its time and resources to protecting the rights of criminal defendants while the victims' rights are ignored. [FN22] In response to this concern, Congress and many state legislatures began enacting measures to strengthen the role of the victim as a party to be officially recognized in criminal proceedings. [FN23] One method of victim involvement has been the courts' use of victim impact statements in sentencing criminal defendants. [FN24] Generally, a victim impact statement, written or oral, describes the physical, emotional, and psychological effect the crime had on the victim and the victim's family. [FN25] *726 Such a statement is used solely during the sentencing phase of a criminal proceeding. [FN26] On the federal level, Congress passed the Victim and Witness Protection Act of 1982, which amended the Federal Rules of Criminal Procedure to require the inclusion of a victim impact statement as a part of a presentence report submitted to the sentencing authority. [FN27] Although many states have enacted similar statutes, the admissibility of victim impact statements remains a controversial issue.

b. The Supreme Court's Treatment of Victim Impact Statements.--The Supreme Court first addressed the admissibility of victim impact statements in *Booth v. Maryland*. [FN28] The Booth Court, in a five-to-four decision, held unconstitutional the use of victim impact statements in capital sentencing proceedings. [FN29] In so holding, the Supreme Court concluded that the Maryland statute, Article 41, section 4-609(c), was invalid to the extent that it required consideration of victim impact statements. [FN30] The Court determined that introducing victim impact statements could render the sentencing jury's death penalty decision impermissibly arbitrary and capricious by shifting the focus away from the defendant and onto the victim and the victim's family. [FN31] The *727 Court emphasized that the jury must focus on the defendant and his personal characteristics as a unique human being prior to imposing a sentence of death. Two years later, the Supreme Court extended *Booth* in *South Carolina v. Gathers*, [FN32] to hold that a prosecutor cannot include a victim impact statement in his closing argument to a jury in a death penalty case. [FN33] Neither *Booth* nor *Gathers* expressed an opinion as to the use of victim impact statements in noncapital cases. [FN34] In *Payne v. Tennessee*, [FN35] the Supreme Court overruled both *Booth* and *Gathers*. [FN36] The Court held that the Eighth Amendment "erects no per se bar" [FN37] prohibiting a capital sentencing jury from considering victim impact evidence relating to the victim's personal characteristics and to the emotional impact of the murder on the victim's family. [FN38] In addition, the *Payne* Court determined that a prosecutor is not precluded *728 from arguing such evidence at a capital sentencing hearing. [FN39] After *Payne*, individual states are left to decide whether to include victim impact evidence in assessing the defendant's culpability in a capital sentencing case. [FN40]

c. Victim Impact Statements: The Development of Maryland Law.--

(i) Statutory Developments.--Maryland has followed the national trend by enacting laws designed to increase meaningful victim involvement in criminal proceedings. [FN41] The Maryland General Assembly designed a sentencing scheme that required presentence

investigation reports to include written victim impact statements in two situations: (1) felonies where the defendant caused physical, psychological, or economic injury to the victim, and (2) misdemeanors where the defendant caused serious physical injury or death. [\[FN42\]](#) A year later, Maryland required that a victim impact statement be prepared in capital cases. [\[FN43\]](#) As a result of these laws, Maryland courts have considered written victim impact statements in determining the appropriate sentence for defendants. [\[FN44\]](#) Maryland has also expanded the rights of victims beyond written victim impact statements to include oral victim testimony. [\[FN45\]](#) In 1986, the General Assembly passed Article 27, section *729 643D, which allows a victim or representative of a victim to address the sentencing judge or jury at the request of the state's attorney and in the discretion of the sentencing judge. [\[FN46\]](#) Similarly, Article 27, section 761 provided guidelines for treatment of and assistance to crime victims and witnesses. [\[FN47\]](#) The Maryland legislature has continued to enact other victims' rights measures. One provision allows the victim of violent crime to file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider a right secured to that victim by Article 27, section 620(b) or section 643D, or [Article 41, section 4-609 of the Maryland Code](#). [\[FN48\]](#) In addition, by enacting Article 47 of the Maryland Declaration of Rights, Maryland has recently joined the handful of states that have already adopted constitutional amendments on victims' rights. This provision includes "the right, in a case arising in the circuit court, the right, *730 upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding." [\[FN49\]](#)

(ii) Judicial Developments.--Prior to the Supreme Court's decision in Booth declaring victim impact statements in capital cases unconstitutional, [\[FN50\]](#) the Court of Appeals allowed victim impact evidence even in death penalty cases. [\[FN51\]](#) In complying with the holdings of Booth and Gathers, [\[FN52\]](#) the Court of Appeals did not allow victim impact statements to be introduced at capital sentencing until after Payne. [\[FN53\]](#) After the Payne decision, however, the Court of Appeals, in Evans v. State, [\[FN54\]](#) reaffirmed its pre-Booth position that victim impact evidence may be considered even in capital proceedings. [\[FN55\]](#) As a result, the court has continued to view victim impact evidence as "relevant and probative." [\[FN56\]](#)

Although the Supreme Court has remained silent on the issue, Maryland has addressed the use of victim impact statements in noncapital cases. The Court of Appeals has accorded the noncapital sentencing judge "virtually boundless discretion" in conducting the sentencing proceeding. [\[FN57\]](#)

*731 The court has determined that the Maryland legislature set forth only the minimum standard for factors that a sentencing judge must consider when using victim impact evidence. [\[FN58\]](#) Thus, in Reid v. State, [\[FN59\]](#) the Court of Appeals held that the trial judge did not err in considering a written victim impact statement prepared by the victim and forwarded directly to the court, even though a victim impact statement had already been submitted by the Division of Parole and Probation as part of its presentence investigation. [\[FN60\]](#) Similarly, the Court of Special Appeals, in Ingoglia v. State, [\[FN61\]](#) noted that the legislature in enacting [Article 41, section 4-609](#) did not purport "to limit the victim's role to the single Victim Impact Statement of the presentence investigation." [\[FN62\]](#) There, the court determined that the sentencing court did not abuse its discretion in receiving into evidence the sentencing recommendation of the

assault victim's mother. [\[FN63\]](#) It reasoned that the trial court indicated that it would exercise its discretion in imposing the sentence "independently regardless of what anybody thinks including [the victim's mother], the State, [[[defense counsel] or the defendant." [\[FN64\]](#) As in Reid, the court in Ingolia did not mention the recommendation of the victim's family when it imposed sentence. [\[FN65\]](#)

3. The Court's Reasoning.--In Cianos, the Court of Appeals held that crime victims and their representatives were precluded from challenging *732 a final criminal judgment. [\[FN66\]](#) The court first addressed Cianos and Barrett's contention that the trial court abused its discretion by not allowing them to testify at the sentencing proceeding. [\[FN67\]](#) The court found that even if it accepted that Cianos and Barrett were denied their right to address the sentencing court as to the impact of the defendant's crimes upon them, the appeal would still be moot. [\[FN68\]](#) To support this finding, the court pointed to [sections 12-301 and 12-302 of the Courts and Judicial Proceedings Article](#), which allow only a party to appeal from a final judgment. [\[FN69\]](#) [Section 12-303.1 of the Courts and Judicial Proceedings Article](#) expressly acknowledges that a victim is not a party in a criminal proceeding. [\[FN70\]](#) Furthermore, even if Cianos and Barrett had applied for leave to appeal prior to the final judgment, such action would not have stayed the criminal proceedings against the defendant. [\[FN71\]](#) An appeal by a victim or the victim's representatives is collateral and may not interrupt a criminal case, and such an appeal cannot result in reversal of judgment and reopening of the case. [\[FN72\]](#) Thus, the court concluded the petitioners were not entitled to appeal the final judgment of Hall's conviction and sentence. [\[FN73\]](#)

The court next addressed Cianos and Barrett's assertion that the absence of a provision expressly precluding a victim from challenging a final criminal judgment implies the right to do so. [\[FN74\]](#) The court again pointed to the plain language of the relevant statutes, [sections 12-301, 12-302, and 12-303.1](#), to refute their argument. [\[FN75\]](#) Moreover, the court reasoned that the legislative history demonstrated the legislature's unwillingness to institute a provision that would invalidate a defendant's sentence simply because victim testimony was not taken into account at the sentencing proceeding. [\[FN76\]](#) The major practical *733 problem of such a provision would be "the possibility of placing the defendant in jeopardy a second time during the sentencing hearing." [\[FN77\]](#) Staff of the House Judiciary Committee concluded that the bill "would be acceptable, however, if [the] lines [invalidating the sentence] were deleted. The statute would have no teeth after such a deletion but it would provide the personal input toward which the statute is aimed." [\[FN78\]](#) Thus, the Cianos court determined that [section 12-303.1](#) does not allow a victim, as a nonparty, to appeal from a final judgment. [\[FN79\]](#) After concluding that Cianos and Barrett's application for leave to appeal was properly denied, the court addressed the rights of a victim to speak to the judge or jury prior to the sentencing of a criminal defendant. In dicta, the court detailed the seven Maryland legislative acts concerning victims' rights [\[FN80\]](#) to demonstrate that the "mandate of the people is clear" in increasingly recognizing victims' rights. [\[FN81\]](#) The court stated definitively that "trial judges must give appropriate consideration to the impact of crime upon the victims. An important step towards accomplishing that task is to accept victim impact testimony wherever possible." [\[FN82\]](#) In an attempt to provide future guidance, the court explained that sentencing judges should not request that victims waive their rights to address the court as to the impact of the crimes upon them. [\[FN83\]](#)

4. Analysis.--

a. Balancing the Administration of Justice and Victims' Rights.--In *Cianos*, the Court of Appeals held that victims and their family members were precluded from challenging the final judgment of conviction and sentence of a defendant. [FN84] With respect to its holding, *734 *Cianos* presented a relatively straightforward case and was thus decided according to the plain meaning of the relevant statutory text. [FN85] The limitation against challenging the final judgment by nonparties is appropriate for reasons of judicial administration. It would be a miscarriage of justice if a defendant's sentence were invalidated simply because the victim was not permitted to give oral testimony.

Aside from the specific outcome and holding in *Cianos*, the court seized the opportunity to clarify victims' rights. The court responded to *Cianos* and Barrett's request that the court give guidance for future cases in the event it found their appeal moot. [FN86] One of the reasons for the lack of appellate case law on victims' rights provisions is that the State, having obtained the defendant's conviction, has not appealed victims' rights issues in criminal cases. [FN87] As discussed below, the Court of Appeals's laudable attempt to emphasize a victim's right to address a sentencing court raises as many questions as it purports to answer.

b. The Future Impact of the Court's Dicta.--It is unclear how great an impact the dicta expressed in *Cianos* will have on Maryland courts in the future. As defined by the Court of Special Appeals, dictum is "any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication." [FN88] Of course, lower courts may simply ignore the court's words of guidance in *Cianos*, [FN89] or they may choose to interpret them broadly or narrowly.

*735 A narrow reading of the opinion suggests a case-by-case approach, in which future sentencing courts will use their statutorily broad discretion [FN90] to determine when victims' oral testimony should be permitted, and if permitted, what type of victim impact testimony to allow, by whom, and how much. [FN91] Such a discretionary approach would enable the sentencing court to balance fairness to a defendant with the rights of a victim.

A broader reading of *Cianos* suggests that oral victim impact testimony will be heard, in addition to the requisite written victim statements, in all criminal cases where victims wish to testify. There are potential difficulties with such a broad interpretation. Victims may, for example, speak at length, recounting in an emotional manner exactly what they stated in their written victim impact statements. If significant resources have already been devoted to the presentence investigation compiling victim impact statements that are complete or nearly complete, it is difficult to justify testimony at the sentencing hearing. Judicial economy may be hampered further by the probable increase in the time needed for sentencing proceedings. The amount of time and resources wasted in litigating this "mini-trial" could be extraordinary. Not only would additional time be needed for testimony, but the defense would need to be given the right to cross-examine, as provided in section 643D. [FN92] It would be "difficult if not impossible" to provide the defense a fair opportunity to contradict the *736 information being offered by the State. [FN93] The result illustrated by the above examples suggests that the court failed to consider the

practical problems of allowing victim impact testimony.

Although it stressed that trial judges should not deny victims their right to provide victim impact testimony, the Court of Appeals did not discuss what types of victim impact testimony it was interested in promoting and what types, if any, it wished to discourage. Because *Cianos* was not a capital case, it was not the best possible case to use as a vehicle for discussing oral victim impact testimony. *Cianos* offers no specific guidance for cases where victims offer opinions about appropriate sentences for criminal defendants. Because Maryland permits the death penalty, a sentence suggested by a victim's family member presents a continuing problem. An emotional appeal for a harsh sentence could improperly influence the decision to impose a death sentence.

The court's dicta also may be read as a judicial message to the General Assembly. The Court of Appeals has informed the legislature that it interprets Article 27, section 643D expansively, limiting the broad discretion trial courts historically have been afforded.

[\[FN94\]](#) If the General Assembly disagrees with the court's reading of section 643D, the General Assembly is invited to amend the statute or to clarify its legislative intent. If the legislature feels strongly that oral testimony is unfairly prejudicial or a waste of judicial resources, it may choose to follow the path taken by those states that have, in the past, limited victims to providing written statements. [\[FN95\]](#)

While victims' rights groups may celebrate the *Cianos* dicta, the court's strong words of guidance unfortunately may prove to be difficult to administer and to enforce. The court's recognition of the right of victims to testify may become an empty promise. Indeed, there remains no appropriate remedy for denial of victims' rights. Currently, there is no possibility for resentencing the defendant and little chance of staying a sentencing proceeding. In *Cianos*, for example, the case was not remanded for resentencing even when the court recognized that the victims' rights were denied outright. This case *737 illustrates that there is no real remedy for noncompliance by judges. [\[FN96\]](#) The only victory the victims' families received was a token one: not having to pay the court costs. [\[FN97\]](#)

5. Conclusion.--Although *Cianos* was not a difficult decision with respect to its holding--proving consistent with Maryland's statutory language and legislative history--its discussion framed in dicta is significant. The court laudably emphasized the rights of victims and their representatives to give oral victim impact testimony at the sentencing phase of criminal proceedings. The court, however, failed to deal with possible problems, both substantive and procedural, that are likely to arise in future sentencing proceedings. Practitioners and sentencing judges will continue to have the formidable task of determining the limits of oral victim impact statements. This task will be particularly difficult in death penalty cases and cases in which victims wish to testify not only as to the effects of the crimes upon them, but also as to their opinion of the defendant and of the appropriate sentence.

[\[FN1\]](#). [338 Md. 406, 659 A.2d 291 \(1995\)](#).

[\[FN2\]](#). [Id. at 407, 659 A.2d at 292](#).

[\[FN3\]](#). [Id. at 412, 659 A.2d at 294](#).

[\[FN4\]. Id. at 413, 659 A.2d at 295.](#)

[\[FN5\]. Id.](#)

[\[FN6\]. See infra note 80 and accompanying text.](#)

[\[FN7\]. Cianos, 338 Md. at 412-13, 659 A.2d at 294-95.](#)

[\[FN8\]. Id. at 407-08, 659 A.2d at 292.](#)

[\[FN9\]. Id. at 408, 659 A.2d at 292.](#)

[\[FN10\]. Ms. Barrett also sustained serious bodily injuries in the accident. Id. at 408 n.1, 659 A.2d at 292 n.1.](#)

[\[FN11\]. Id. at 408, 659 A.2d at 292.](#)

[\[FN12\]. Id.](#)

[\[FN13\]. Id.](#)

[\[FN14\]. Id. Hall's girlfriend had also previously submitted a written statement for the court's review. Id. at 408 n.2, 659 A.2d at 292 n.2.](#)

[\[FN15\]. Id. at 408-09, 659 A.2d at 292.](#) Hall received concurrent 5-year sentences, with all but 14 months suspended, on each of the manslaughter counts. Id. In addition, Hall received 4 years probation, 160 hours of community service, and assessment of costs. [Id. at 409 n.3, 659 A.2d at 292 n.3.](#) On the DWI count, Hall received one year to be served concurrent with the manslaughter sentences and a \$1000 fine. [Id. at 409, 659 A.2d at 292.](#) Hall was also ordered to attend Alcoholics Anonymous meetings and to participate in 10 victim impact panel sessions. [Id. at 409 n.4, 659 A.2d at 292 n.4.](#)

[\[FN16\]. Id. at 409, 659 A.2d at 292-93.](#) The only avenue of appeal from a guilty plea before a circuit court is by application for leave to appeal to the Court of Special Appeals. [Id. at 407, 659 A.2d at 292;](#) see also [M d. Code Ann., Cts. & Jud. Proc. ss 12-202,-302 \(1995\);](#) see infra note 20.

[\[FN17\]. Cianos, 338 Md. at 409, 659 A.2d at 293.](#)

[\[FN18\]. Id.](#)

[\[FN19\]. Id.](#)

[\[FN20\]. Id. at 407, 659 A.2d at 292.](#) Under [sections 12-202](#) and [12- 302 of the Courts and Judicial Proceedings Article](#), an order by the Court of Special Appeals granting or denying an application for leave to appeal is not reviewable by the Court of Appeals by

way of certiorari. The Court of Appeals, however, may grant certiorari when the intermediate appellate court makes a decision on an application for leave to appeal based on an alleged denial of victims' rights. See [M d. Code Ann., Cts. & Jud. Proc. ss 12-202,-302 \(1995\)](#).

[FN21]. Article 27, s 643D(a), addressing oral impact testimony, provides in pertinent part:

In every case resulting in serious physical injury or death, the victim or a member of the victim's immediate family, or if the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the required information, the personal representative, guardian, or committee, or other family member may, at the request of the State's Attorney and in the discretion of the sentencing judge, address the sentencing judge or jury under oath or affirmation before the imposition of sentence.

[Md. Ann. Code art. 27, s 643D\(a\) \(1992\)](#).

[FN22]. Charlton T. Howard III, Note, [Booth v. Maryland--Death Knell for the Victim Impact Statement?](#), 47 M d. L. Rev. 701, 705 (1987). In 1982, President Ronald Reagan endorsed the Final Report of the President's Task Force on Victims of Crime. This report called for over 100 victim-oriented reforms aimed at state and federal legislatures and the judiciary. In particular, the report stressed that every victim should be allowed to give some form of input during the sentencing of a criminal defendant. See P resident's Task Force on Victims of Crime, Final Report 77 (1982) [hereinafter President's Task Force]. The Task Force also recommended a federal constitutional amendment that would be appended to the Sixth Amendment to recognize victims' rights. Id. at 114-15. Currently, the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." [U.S. Const. amend. VI](#). The proposed modification reads, "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." President's Task Force, supra, at 114-15.

[FN23]. As noted by the Court in [Booth v. Maryland](#), 482 U.S. 496 (1987), overruled in part by [Payne v. Tennessee](#), 501 U.S. 808 (1991), at least 36 states now permit the use of some form of victim impact evidence in sentencing proceedings. [Id. at 509 n.12](#).

[FN24]. In addition, the pressure for reform has centered on several other general areas, including protection for victims and witnesses of crime, victim compensation, and restitution programs, victim assistance programs, and increasing victim input in the decision-making processes of the criminal justice system. [Patrick M. Fahey, Note, Payne v. Tennessee: An Eye for an Eye and Then Some](#), 25 Conn. L. Rev. 205, 207 (1992).

[FN25]. See [M d. Ann. Code art. 41, s 4-609\(c\) \(1993\)](#). A victim impact statement shall:

- (i) Identify the victim of the offense;
- (ii) Itemize any economic loss suffered by the victim as a result of the offense;
- (iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

- (iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
- (v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
- (vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

Id.

Generally, four basic types of information have been provided to the sentencing authority by a victim impact statement: (1) the circumstances surrounding the crime and the manner in which the crime was perpetrated; (2) the identity and characteristics of the victim; (3) the effects of the crime on the victim and the victim's family; and (4) the victim or victim's family's opinion of the defendant and of an appropriate sentence.

Phillip A. Talbert, Comment, [The Relevance of Victim Impact Statements to the Criminal Sentencing Decision](#), 36 *UCLA L. R. ev.* 199, 203 (1988).

[FN26]. Common policy justifications for victim impact statements include giving victims more control of their recently shattered lives, satisfying victims' demands for retribution, and making criminal proceedings more fair by addressing victims' needs and not just treating them as witnesses. Micheal A. Johnson, Note, [The Application of Victim Impact Statements in Capital Cases in the Aftermath of Booth v. Maryland: An Impact No More?](#), 13 *T. M arshall L. Rev.* 109, 113-15 (1988).

[FN27]. See [F ed. R. Crim. P. 32\(b\)\(4\)\(D\)](#) (previously codified as [Fed. R. Crim. P. 32\(c\)\(2\)\(C\)](#)), which states in pertinent part: "[The presentence report must contain] verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed." Id.

[FN28]. [482 U.S. 496 \(1987\)](#), overruled in part by [Payne v. Tennessee, 501 U.S. 808 \(1991\)](#).

[FN29]. [Id. at 502-03](#). In the dissent's view, the full extent of the harm caused by a defendant is germane to deciding an appropriate punishment. [Id. at 515-21](#) (White, Rehnquist, O'Connor, Scalia, JJ., dissenting).

[FN30]. [Id. at 502-03](#).

[FN31]. The underlying constitutional claim raised in these capital sentencing cases is the Eighth Amendment proscription of cruel and unusual punishment. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." [U.S. C onst. amend. VIII](#); see [Robinson v. California, 370 U.S. 660, 666 \(1962\)](#) (applying the prohibitions of the Eighth Amendment to the states through the Due Process Clause of the Fourteenth Amendment). Commencing with [Furman v. Georgia, 408 U.S. 238 \(1972\)](#), the Court has required state death penalty schemes to conform to the dictates of the Eighth Amendment's prohibition against cruel and unusual punishment. Thus, a state may no longer inflict the death

penalty in an arbitrary manner. Sentencing must "be, and appear to be, based on reason rather than caprice or emotion." [Gardner v. Florida, 430 U.S. 349, 358 \(1977\)](#).

[FN32]. [490 U.S. 805 \(1989\)](#), overruled in part by [Payne v. Tennessee, 501 U.S. 808 \(1991\)](#).

[FN33]. [Id. at 810](#). In *Gathers*, the Court determined that the prosecutor's reading into the sentencing record a religious tract that the murder victim was carrying, and comments about the victim's personal qualities inferred from the victim's possession of a religious tract and voter registration card were grounds for reversal of a sentence of death. [Id. at 810-12](#).

[FN34]. [Booth, 482 U.S. at 509 n.12](#). The *Booth* Court recognized that sentencing considerations may be different in a noncapital context and therefore was careful to note that its holding was "guided by the fact that death is a 'punishment different from all other sanctions.'" *Id.* (quoting [Woodson v. North Carolina, 428 U.S. 280, 303-05 \(1976\)](#) (plurality opinion of Stewart, J.)).

[FN35]. [501 U.S. 808 \(1990\)](#). For a general discussion of *Payne v. Tennessee*, see [Christine D. Marton, Comment, The Admissibility of Victim Impact Evidence at the Sentencing Phase of a Capital Trial, 31 D uq. L. Rev. 801, 816 \(1993\)](#) (expressing opinion that the Court's decision in *Payne* represents a beneficial change in the Court's death penalty jurisprudence). But see [Michael I. Oberlander, Note, The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings, 45 Vand. L. Rev. 1621, 1649-57 \(1992\)](#) (discussing why victim impact evidence at capital sentencing plays no role in any of the legitimate theories for punishment).

[FN36]. [Payne, 501 U.S. at 830](#).

[FN37]. [Id. at 827](#).

[FN38]. [Id. at 831](#). "We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, 'the Eighth Amendment erects no per se bar.'" *Id.* (O'Connor, J., concurring).

The Court in *Payne* considered only the first type of victim impact evidence presented in *Booth*--the personal characteristics of the victims and the emotional impact of the murder on the survivors. *Id.* The Court did not consider the second type of victim impact evidence, which relates to a victim's or family member's characterizations of a defendant or opinion about an appropriate sentence. Thus, it is unclear if it remains unconstitutional to present this second type of impact evidence in a capital case.

[FN39]. [Id. at 827](#). The *Payne* Court explained that victim impact statements reflect "each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Id.* at 823.

[FN40]. *Id.* at 824-25. If, in a particular case, a witness's testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may still seek appropriate relief under the Due Process Clause of the Fourteenth Amendment. *Id.* at 825.

[FN41]. In fact, Maryland was the first state to use a victim impact statement. See S. R. ep. No. 532, 97th Cong., 2d Sess. 10, 11 (1982), reprinted in 1982 U.S.C.C.A.N. 2515, 2517-18 (noting that "[t]he victim impact statement was first used in Federal Courts for the District of Maryland in May, 1979, as a way of providing the sentencing judge with information on the victim that might not otherwise be brought to his attention").

[FN42]. [M d. Ann. Code art. 41, s 4-609\(c\)\(2\) \(1993\)](#).

[FN43]. *Id.* [s 4-609\(d\)](#).

[FN44]. See [Tibbs v. State, 72 Md. App. 239, 259, 528 A.2d 510, 519](#) (holding that a sentencing judge in a noncapital case could consider the impact that a crime had upon the victims), cert. denied, [311 Md. 286, 533 A.2d 1308 \(1987\)](#); [Hurley v. State, 60 Md. App. 539, 564-65, 483 A.2d 1298, 1311 \(1984\)](#) (finding that a trial court may properly consider the impact a crime had upon its victims before passing on the defendant's sentence), cert. denied, [302 Md. 409, 488 A.2d 500 \(1985\)](#).

[FN45]. See [M d. Ann. Code art. 27, s 643D \(1992\)](#) (for pertinent text, see *infra* note 46 and accompanying text); see also [Lodowski v. State, 302 Md. 691, 743-44, 490 A.2d 1228, 1254-55 \(1985\)](#) (declaring, in dicta, that a victim may make oral as well as written statements, even though oral statements are not specifically permitted in the statute), vacated on other grounds, [475 U.S. 1078 \(1986\)](#). Similarly, other states have extended victims' rights to include oral victim impact testimony. See e.g., [C onn. Gen. Stat. Ann. s 54-91a\(c\)](#) (West 1990); N.J. S tat. Ann. s 52:4B-36m-n (West 1995); [R.I. G en. Laws s 12-28-4 \(1994\)](#); [V T. S tat. Ann. tit. 13, s 7006 \(1995\)](#). By legislative amendment, New York has recently joined those states permitting the victim to testify in person at the sentencing hearing. [N.Y. Crim. Proc. Law s 380.50 \(McKinney 1994\)](#). For case law prior to the New York amendments, see [People v. McCarthy, 519 N.Y.S.2d 118, 119 \(N.Y. County Ct. 1987\)](#) (limiting crime victim to written statement submitted to sentencing judge, as oral presentation could "becloud the judicial atmosphere"). In *McCarthy*, the court recognized that the New York legislature contemplated the victim impact statement only as a written document to the mandated presentence report. "The charged atmosphere at sentencing is fraught with the opportunity for someone bent on mischief or with interest in other civil or criminal matters to attempt to intimidate the Court, provoke the defendant or generally disrupt the sentencing proceeding." *Id.*

[FN46]. [Article 27, s 643D](#) provides in pertinent part:

In every case resulting in serious physical injury or death, the victim or a member of the victim's immediate family, or if the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the required information, the personal representative, guardian, or committee, or other family member may, at the request of the

State's Attorney and in the discretion of the sentencing judge, address the sentencing judge or jury under oath or affirmation before the imposition of sentence.
[M d. Ann. Code art. 27, s 643D \(1992\)](#).

[FN47]. [Article 27, s 761](#) provides in pertinent part:

(12) A crime victim or witness should: ...

On request of the State's Attorney to and in the discretion of the judge, be permitted to address the judge or jury or have a victim impact statement read by the judge or jury at sentencing before the imposition of the sentence or at any hearing to consider altering the sentence.

Id. [s 761\(12\)](#).

[FN48]. See [M d. Code Ann., Cts. & Jud. Proc. s 12-303.1 \(1995\)](#); see also infra notes 70-83 and accompanying text.

[FN49]. See [M d. Const. Decl. of Rts. art. 47](#). For similar constitutional amendments enacted by other states that have granted crime victims the right to be present and to be heard in criminal proceedings, see [F la. Const. art. 1, s 16\(b\)](#); [T ex. Const. art. 1, s 30](#); [W ash. Const. art. 1, s 35](#). Other constitutional provisions have granted crime victims a right to restitution. See [C al. Const. art. 1, s 28\(b\)](#); [M ich. Const. art. 1, s 24](#); [R.I. Const. art. 1, s 23](#).

[FN50]. See supra notes 28-31 and accompanying text.

[FN51]. See, e.g., [Booth v. State, 306 Md. 172, 507 A.2d 1098](#), cert. granted in part, [479 U.S. 882 \(1986\)](#), vacated in part, [482 U.S. 496 \(1987\)](#); [Lodowski v. State, 302 Md. 691, 749, 490 A.2d 1228, 1257-58 \(1985\)](#) (concluding that the victim impact statement imparts to the sentencer important information concerning the full measure of harm caused by the defendant), vacated on other grounds, [475 U.S. 1078 \(1986\)](#).

[FN52]. See supra notes 28-34 and accompanying text.

[FN53]. See supra notes 35-40 and accompanying text; see also, e.g., [Harris v. State, 312 Md. 225, 235-36, 539 A.2d 637, 642 \(1988\)](#) (vacating a death sentence because victim impact statements presenting the victim's family members' opinions and characterizations of the crime injected an impermissible arbitrary component into the sentencing proceeding); [Hunt v. State, 312 Md. 494, 540 A.2d 1125 \(1988\)](#). In light of Booth, the Hunt court vacated a death sentence and a new sentencing hearing was held on capital conviction because a victim impact statement was improperly admitted in evidence at the sentencing hearing. [Id. at 497, 540 A.2d at 1126](#).

[FN54]. [333 Md. 660, 637 A.2d 117](#), cert. denied, [115 S. Ct. 109 \(1994\)](#).

[FN55]. [Id. at 687-88, 637 A.2d at 130-31](#).

[FN56]. [Id.](#)

[FN57]. [Logan v. State](#), 289 Md. 460, 480, 425 A.2d 632, 642 (1981); see also [Smith v. State](#), 308 Md. 162, 166, 517 A.2d 1081, 1083 (1986) (according judges broad discretion in conducting sentencing proceedings); [Johnson v. State](#), 274 Md. 536, 542, 336 A.2d 113, 116 (1975) ("[I]t is our belief that the sentencing judge will have difficulty determining the proper sentence ... if he is forced to bridle himself with mental blinders and thus enter the process of imposing sentence with impaired vision.").

[FN58]. [Reid v. State](#), 302 Md. 811, 820-23, 490 A.2d 1289, 1294-95 (1985). In *Reid*, the court explored the legislative history of Article 41, s 124(c) (now codified at [Md. Ann. Code art. 41, s 4-609](#)). Senator Garrity, the sponsor of the measure, stressed the purpose behind the proposed legislation. In a hearing before the State Senate Judicial Proceedings Committee on January 19, 1982, he stated: "[This bill] provides the mechanism to place at the judge's disposal all the facts regarding impact of the crime on the victim." [Reid](#), 302 Md. at 816, 490 A.2d at 1292.

[FN59]. [Reid](#), 302 Md. at 816, 490 A.2d at 1292.

[FN60]. [Id.](#) at 812-13, 490 A.2d at 1290.

[FN61]. [102 Md. App. 659](#), 651 A.2d 409 (1995).

[FN62]. [Id.](#) at 670, 651 A.2d at 414 (quoting [Reid](#), 302 Md. at 819, 490 A.2d at 1293).

[FN63]. *Id.* The Maryland court found the words of the Court of Appeals of Wisconsin instructive in determining whether a victim's sentencing recommendation can be received into evidence. In [State v. Johnson](#), 463 N.W.2d 352 (Wis. Ct. App. 1990), the Wisconsin Court of Appeals stated:

[T]rial courts are not rubber stamps. They do not blindly accept or adopt sentencing recommendations from any particular source.... We believe that consideration of the comments--even the "wishes"--of a victim is within the sentencing court's prerogatives. Courts are entitled--even encouraged--to consider the rights and interests of the public in imposing a sentence in a particular case. [Id.](#) at 355-56.

[FN64]. [Ingoglia](#), 102 Md. App. at 670, 651 A.2d at 414.

[FN65]. *Id.*

[FN66]. [Cianos](#), 338 Md. at 412, 659 A.2d at 294.

[FN67]. [Id.](#) at 409, 659 A.2d at 293.

[FN68]. [Id.](#) at 410, 659 A.2d at 293.

[FN69]. *Id.*

[FN70]. [Id. at 410-11, 659 A.2d at 293.](#)

[FN71]. [Id. at 411, 659 A.2d at 293.](#) An application for leave to appeal filed by a victim may not result in a stay of other proceedings in the criminal case unless all the parties to the case consent. See [M d. Code Ann., Cts. & Jud. Proc. s 12-303.1 \(1995\)](#).

[FN72]. [Cianos, 338 Md. at 411, 659 A.2d at 293-94.](#)

[FN73]. [Id.](#)

[FN74]. [Id., 659 A.2d at 294.](#)

[FN75]. [Id.](#) Ordinarily, where there is no ambiguity in the language of a statute, there is no need to look elsewhere to ascertain the intent of the legislature. [Id.](#) Nevertheless, the court in [Cianos](#) examined the legislative history of the relevant statutes. [Id.](#)

[FN76]. [Id. at 411-12, 659 A.2d at 294.](#) [Senate Bill 132 \(1983\)](#) provided for victim testimony in addition to the written victim impact statement and stated that a defendant's sentence would be invalidated absent this testimony. The Senate amended S.B. 132 to permit, rather than to mandate, this testimony and to strike the provisions invalidating the defendant's sentence. This amended bill was passed and codified as Article 41, s 124(d) (now codified as [Md. Ann. Code art. 41, s 4-609](#)).

[FN77]. [Cianos, 338 Md. at 411-12, 659 A.2d at 294](#) (citing [Lodowski v. State, 302 Md. 691, 747, 490 A.2d 1228, 1256-57 \(1985\)](#)).

[FN78]. [Id.](#) (alterations in original).

[FN79]. [Id. at 410-11, 659 A.2d at 293.](#)

[FN80]. The seven legislative acts are as follows: (1) [s 12-303.1 of the Courts and Judicial Proceedings Article](#); (2) [Article 27, s 640\(b\)\(7\)](#); (3) [Article 27, s 620](#); (4) [Article 27, s 643D](#); (5) [Article 27, s 761](#); (6) [Article 41, s 4-609\(c\)](#); (7) [Article 47](#) of Maryland's Declaration of Rights. For a detailed discussion of each act, see *supra* notes 21, 25, 42-49, 70-71, 75-79 and accompanying text.

[FN81]. [Cianos, 338 Md. at 413, 659 A.2d at 295.](#)

[FN82]. [Id.](#)

[FN83]. [Id.](#) The court concluded that because the petitioners were arguably denied their rights guaranteed by [Article 27, s 643D\(a\)](#), they did not have to pay court costs. [Cianos, 338 Md. at 413, 659 A.2d at 295.](#)

[FN84]. [Cianos, 338 Md. at 412, 659 A.2d at 294.](#)

[FN85]. See supra notes 66-79 and accompanying text.

[FN86]. Petitioners' Brief at 15-16, [Cianos v. State, 338 Md. 406, 659 A.2d 291 \(1995\)](#) (No. 107).

[FN87]. See id.

[FN88]. [Stover v. Stover, 60 Md. App. 470, 476, 483 A.2d 783, 786 \(1984\)](#) (citing Black's Law Dictionary, 409 (5th ed. 1979)); see also [Welker v. Strosnider, 22 Md. App. 401, 409, 323 A.2d 626, 631 \(1974\)](#) (stating that "[p]eripheral [sic] recitals [in appellate court opinions] are not precedent at the common law"). For a discussion of the role of dictum in legal analysis, see generally [Charles W. Collier, Precedent and Legal Authority: A Critical History, 1988 Wis. L. Rev. 771](#); Kent Greenawalt, [Reflections on Holding and Dictum, 39 J. Legal Educ. 431 \(1989\)](#); Note, Dictum Revisited, 4 Stan. L. Rev. 509 (1951-52).

[FN89]. But see [Evans v. State, 333 Md. 660, 687, 637 A.2d 117, 131](#) (noting that there have been many times that the court has adopted and relied on the dicta articulated in [Lodowski v. State, 302 Md. 691, 490 A.2d 1228 \(1985\)](#)), cert. denied, [115 S. Ct. 109 \(1994\)](#); [Murray v. Comptroller of Treasury, 241 Md. 383, 395, 216 A.2d 897, 904](#) ("Occasionally a dictum, when it strikes a note resonant with accepted legal principle, becomes as important as the actual decision."), cert. denied, [385 U.S. 816 \(1966\)](#). Furthermore, in Greenawalt, supra note 88, at 434, the author states: The precise weight of earlier authority may rest to some extent on whether the point covered was argued by counsel and carefully considered by the court. Discussion that is evidently dictum because of the way a case is finally resolved can have somewhat more power if it reflects extensive argument by counsel and careful judicial consideration. Id.

[FN90]. See [Md. Ann. Code art. 27, s 643D \(1992\)](#).

[FN91]. See supra note 25 and accompanying text (discussing the various types of information that could be provided to the sentencing authority by a victim impact statement).

[FN92]. See [Md. Ann. Code art. 27, s 643D\(b\)\(1\)](#) (providing that if the victim or the victim's representative is permitted to address the judge or jury, the defendant may cross-examine the victim or the victim's representative); see also [Gardner v. Florida, 430 U.S. 349, 362 \(1977\)](#) (concluding that due process requires a defendant be given an opportunity to rebut a presentence report); cf. [Miller v. State, 67 Md. App. 666, 509 A.2d 135](#), cert. denied, [307 Md. 260 \(1986\)](#). In Miller, the victim of second degree rape, second degree sexual offense, perverted practice, assault with intent to rape, and battery, provided oral impact testimony to the judge in his chambers, even though she had already provided a written victim impact statement as part of the presentence investigation. [Id. at 670-71, 509 A.2d at 137](#). On appeal, the defendant argued that he was improperly sentenced after the judge privately questioned the victim about the impact of the offenses

and of her thoughts as to sentencing. [Id. at 672, 509 A.2d at 138](#). The Court of Special Appeals remanded the case for resentencing because it held that the sentencing court should not have taken further statement from the victim in chambers, without giving the defendant the opportunity to hear and refute that statement. *Id.* "Statements by a victim to a judge should ordinarily be made in the presence of the defendant." [Id. at 675, 509 A.2d at 139](#).

[FN93]. See Howard, *supra* note 22, at 720 ("Tactically, it is hard to imagine when cross-examining the victim's family would not be counterproductive, evoking antipathy towards the defendant or counsel. Indeed, such measures may be futile. Rarely can it be shown that grieving family members have exaggerated emotional trauma, depression, fear or anxiety.").

[FN94]. See *supra* notes 57, 82-83 and accompanying text.

[FN95]. See *supra* note 45 and accompanying text.

[FN96]. The Senate Bill 264 review letter of May 17, 1993, addressed to the governor by the attorney general, concluded that while practical problems would render appellate review rare, "the bill serves a legitimate purpose and has legal effect" because "the existence of the remedy may, in itself, act as a check on judges who might otherwise give short shrift to victims rights." Respondent's Brief at 12, [Cianos v. State, 338 Md. 406, 659 A.2d 291 \(1995\)](#) (No. 107) (quoting Senate Bill 264 review letter).

[FN97]. See *supra* note 83.

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