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## CRIMINAL PROCEDURE Sentencing and Punishment: Permit Judicial Consideration of Certain Evidence and Testimony in Cases Where the Death Penalty May be Imposed

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## CRIMINAL PROCEDURE

### *Sentencing and Punishment: Permit Judicial Consideration of Certain Evidence and Testimony in Cases in Which the Death Penalty May be Imposed*

**CODE SECTIONS:** O.C.G.A. §§ 17-10-1.1, -1.2 (amended)  
**BILL NUMBER:** HB 486  
**ACT NUMBER:** 570  
**SUMMARY:** The Act amends Georgia law relating to the admissibility of victim impact evidence to include those cases in which life imprisonment or the death penalty may be imposed. The Act provides procedures for the introduction of evidence which demonstrates the emotional impact of the defendant's crime upon the victim, the victim's family, and the community. The evidence may be offered through the testimony of the victim, if living, or by a family member or other witness with personal knowledge of the individual characteristics of the victim and the emotional impact of the crime on the victim's family. The victim impact testimony shall be offered subject to cross-examination and in the presence of the defendant and the jury. The admissibility of such victim impact evidence shall be at the discretion of the court and made in such a manner and degree so as not to inflame or unduly prejudice the jury.

**EFFECTIVE DATE:** July 1, 1993

#### *History*

In 1991, the United States Supreme Court held in *Payne v. Tennessee*<sup>1</sup> that the criminal defendant's rights as guaranteed by the Eighth Amendment of the United States Constitution<sup>2</sup> were not *per se* violated by the introduction of victim impact evidence.<sup>3</sup> *Payne*

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1. 111 S. Ct. 2597 (1991).  
2. U.S. CONST. amend. VIII.  
3. Victim impact evidence is evidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim, the victim's family, and the community. HB 486, as passed, 1993 Ga. Gen. Assem.

overruled *Booth v. Maryland*<sup>4</sup> and *South Carolina v. Gathers*,<sup>5</sup> where the Court held that evidence and prosecutorial argument relating to the victim and the impact of the victim's death were inadmissible at a capital sentencing hearing.<sup>6</sup>

*Payne* did not impose a requirement upon the states to admit victim impact evidence. Rather, the Court concluded only that the Eighth Amendment posed no "per se bar"<sup>7</sup> which would preclude a State's decision to permit victim impact evidence as part of its procedure for penalty determination.<sup>8</sup>

In *Sermons v. State*,<sup>9</sup> the Georgia Supreme Court addressed the effect of the *Payne* decision on criminal procedure in the state. Georgia law at the time of the Supreme Court's ruling in *Payne* permitted the introduction of victim impact evidence in certain cases, but expressly excluded admission in cases in which the death penalty might be imposed.<sup>10</sup> The *Sermons* court noted that although the ruling in *Payne* removed Eighth Amendment barriers, the express language of the state statute continued to preclude the use of victim impact evidence in death penalty cases in Georgia.<sup>11</sup>

#### HB 486

HB 486 was introduced in the 1993 Georgia General Assembly to remove state law barriers to the admission of victim impact evidence in death penalty cases.<sup>12</sup> The bill passed amid a swirl of controversy.<sup>13</sup> The debate largely focused on whether the admission of victim impact evidence would impermissibly shift the jury's focus away from the acts of the defendant and instead direct their sympathy toward the character of the victim and his family. Opponents to the bill envisioned a two tier justice system which depended on the personal qualities of a

4. 482 U.S. 496 (1987).

5. 490 U.S. 805 (1989).

6. 111 S. Ct. at 2611 n.2.

7. *Id.* at 2612 (O'Connor, J., concurring).

8. *Id.* at 2608. Justice Rehnquist, writing for the majority, stated "[t]he States remain free, in capital cases as well as others, to devise new procedures and new remedies to meet felt needs." *Id.*

9. 417 S.E.2d 144 (Ga. 1992).

10. *Id.* The statutes before the court in *Sermons* were O.C.G.A. §§ 17-10-1.1, -1.2 (1992). *Id.*

11. *Id.* at 146 n.2.

12. HB 486, as introduced, 1993 Ga. Gen. Assem.

13. Rep. Thurbert Baker, a sponsor, described the bill as calling upon each member of the General Assembly to make a "gut check." *Lawmakers '93* (WGTV television broadcast, Feb. 24, 1993) (videotape available in Georgia State University College of Law Library). Sen. Mary Margaret Oliver, an opponent of the bill, described it as "blatantly unconstitutional." Telephone Interview with Sen. Mary Margaret Oliver, Senate District No. 42 (Mar. 25, 1993).

victim, or the “deserving and undeserving dead.”<sup>14</sup> Supporters perceived the proposed legislation as a step toward a return of public confidence in the criminal justice system.<sup>15</sup>

The Act expands the scope of admissible victim impact evidence to include cases where life imprisonment or the death penalty may be imposed.<sup>16</sup> The Act further provides procedural protections to guard against misuse of the evidence or undue prejudice to the defendant.<sup>17</sup>

The sponsors of the Act introduced the legislation with the intent of expanding Georgia’s law to the limit permitted by the Supreme Court’s decision in *Payne*.<sup>18</sup> The purpose of the Act is to permit the jury to consider evidence of the crime victim’s good character, in addition to the evidence of the defendant’s good character which may be offered as a mitigating factor.<sup>19</sup> The opportunity for the jury to hear evidence about the victim is intended to “level the playing field.”<sup>20</sup>

The Act provides for the submission of a written victim impact statement which may be used by the prosecution or the court during any stage of the proceedings, including predisposition, plea bargaining, sentencing, or determination of restitution.<sup>21</sup> The Act expands the scope of the previous statute by deleting language that expressly excluded use of a victim impact statement in cases in which life imprisonment or the death penalty might be imposed.<sup>22</sup>

The Act further expands the scope of previous law by providing that victim impact evidence may be heard following a determination of guilt and in conjunction with the statutory procedures for determining the imposition of the death penalty.<sup>23</sup> Prior law expressly excluded oral

14. *Lawmakers '93* (WGTV television broadcast, Feb. 24, 1993) (videotape available in Georgia State University College of Law Library); see also ACLU GEORGIA CIVIL LIBERTIES 3 (Mar. 1993) (available in Georgia State University College of Law Library).

15. *Lawmakers '93* (WGTV television broadcast, Mar. 22, 1993) (videotape available in Georgia State University College of Law Library).

16. O.C.G.A. § 17-10-1.2(a)(1) (Supp. 1993).

17. *Id.* § 17-10-1.2(c) (Supp. 1993).

18. Telephone Interview with Rep. Thurbert E. Baker, House District No. 70 (Apr. 2, 1993) [hereinafter Baker Interview]; Telephone Interview with Rep. Thomas C. Bordeaux, Jr., House District No. 151 (Mar. 25, 1993) [hereinafter Bordeaux Interview]; Telephone Interview with Rep. Roy E. Barnes, House District No. 33 (Mar. 26, 1993) [hereinafter Barnes Interview]. Reps. Baker and Bordeaux were sponsors of the bill. *Id.*

19. Baker Interview, *supra* note 18; Barnes Interview, *supra* note 18.

20. Baker Interview, *supra* note 18.

21. O.C.G.A. § 17-10-1.1(a)(2) (Supp. 1993).

22. 1992 Ga. Laws 2419 (formerly found at O.C.G.A. § 17-10-1.1(a)(1) (Supp. 1992)).

23. O.C.G.A. § 17-10-1.2(a)(1) (Supp. 1993). Georgia’s procedure for the imposition of the death penalty is codified at O.C.G.A. § 17-10-30 (1992). *Id.* § 17-10-30 (1992).

victim impact statements in cases where either life imprisonment or the death penalty were to be imposed.<sup>24</sup>

As passed, the Act provides that a victim impact statement may be made by the victim's family or by another witness who has personal knowledge of the characteristics of the victim and the emotional impact of the crime on the victim, the victim's family, and the community.<sup>25</sup> The bill as originally submitted provided that the testimony might be offered by a "victim or his representative."<sup>26</sup> The term "representative" was changed in the final version of the Act by the House Subcommittee on Constitutional Law to address concerns that the term "representative" might be construed to permit testimony by a special prosecutor hired by the victim's family. The intent of the Act is to permit testimony only by those persons named, specifically a family member of the victim or some other person who can testify from personal knowledge.<sup>27</sup>

The Act enumerates several procedural protections where victim impact evidence is heard in cases where the death penalty may be imposed. Victim impact evidence shall be given in the presence of the defendant and the jury.<sup>28</sup> The testimony of the witness is subject to cross-examination.<sup>29</sup> Further, the Act provides that the admissibility of victim impact evidence shall be in the sole discretion of the judge, and permitted only in a manner and to a degree as not to inflame or unduly prejudice the jury.<sup>30</sup>

The Act adds a separate section which provides that victim impact evidence may be admitted prior to sentencing in all cases other than those in which the death penalty may be imposed.<sup>31</sup> In non-death penalty cases, the evidence may be given by the victim, or, as in death penalty cases, by a family member or other witness with personal knowledge of the impact of the crime on the victim, the victim's family, or the community.<sup>32</sup> This section also provides procedural protections. As in death penalty cases, the evidence shall be allowed subject to the discretion of the court, and is subject to cross-examination.<sup>33</sup> The victim impact evidence in non-death penalty cases shall also be given in the presence of the defendant.<sup>34</sup> However, this section makes no

24. 1985 Ga. Laws 739 (formerly found at O.C.G.A. § 17-10-1.2(a) (1992)).

25. O.C.G.A. § 17-10-1.2(a)(1) (Supp. 1993).

26. HB 486, as introduced, 1993 Ga. Gen. Assem.

27. Bordeaux Interview, *supra* note 18. Rep. Bordeaux was a sponsor of the bill and Chairman of the House Subcommittee on Constitutional Law. *Id.*

28. O.C.G.A. § 17-10-1.2(a)(1) (Supp. 1993).

29. *Id.*

30. *Id.*

31. *Id.* § 17-10-1.2(a)(2) (Supp. 1993).

32. *Id.*

33. *Id.*

34. *Id.*

express provision that the evidence must be given in the presence of the jury.<sup>35</sup> The sponsor of the Act states that this choice of language was not intended to exclude the jury from hearing victim impact evidence in non-death penalty cases.<sup>36</sup>

With minor modifications, the Act retains the language of the former statute regarding the content of the victim impact witness' testimony.<sup>37</sup> The Act limits the introduction of evidence concerning economic loss suffered by the victim or the victim's family to cases where restitution is sought.<sup>38</sup> The most significant change provided by this section of the Act is to permit the introduction of evidence regarding the impact of the crime not only upon the victim, but upon the family of the victim and the community as well.<sup>39</sup>

The Act further amends the previous statute regarding the right of the defendant to rebut victim impact testimony. Previous law provided that the defendant was permitted to rebut a victim's oral statements.<sup>40</sup> The Act replaces the right of the defendant to rebut the victim impact evidence with the defendant's right to cross examine the victim impact witness and rebut evidence, subject to the discretion of the court.<sup>41</sup>

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35. *Id.*

36. Baker Interview, *supra* note 18.

37. O.C.G.A. § 17-10-1.2(b) (Supp. 1993).

38. *Id.* § 17-10-1.2(b)(2) (Supp. 1993).

39. *Id.* § 17-10-1.2(b)(6) (Supp. 1993). Because evidence regarding the impact of the crime upon the victim's community was not before the Court, the *Payne* holding did not reach the admissibility of such evidence. 111 S. Ct. at 2612-13 (O'Connor, J., concurring).

40. 1985 Ga. Laws 739 (formerly found at O.C.G.A. § 17-10-1.2(c) (1992)).

41. O.C.G.A. § 17-10-1.2(c) (Supp. 1993).