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IN THE SUPREME COURT OF THE UNITED STATES

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DOUGLAS OLIVER KELLY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
CALIFORNIA SUPREME COURT

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**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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**CAPITAL CASE****QUESTIONS PRESENTED**

Whether the California Supreme Court violated the Eighth and Fourteenth Amendments of the federal Constitution when, upon its review a trial court's evidentiary ruling permitting the admission of a twenty-minute videotape as victim impact evidence, it held that there was "no prejudicial error" resulting from the videotape being shown during the capital trial's penalty selection phase.

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## IN THE SUPREME COURT OF THE UNITED STATES

No. 07-11073

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DOUGLAS OLIVER KELLY,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

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**STATEMENT OF THE CASE**

In early September 1993, petitioner raped, robbed, and murdered nineteen-year Sara Weir, whom he had befriended at a local fitness center. He stabbed her to death with a pair of scissors. The ten-year-old son of petitioner's girlfriend, Michelle T., found Weir's naked and decomposing body stuffed under his bed in the apartment where he had lived with his mother and, for a while, with petitioner. Petitioner also had assaulted Michelle T. in the apartment on night of August 30. Earlier that same day, petitioner had raped another woman, Teri B., whom he had also befriended at the fitness center. When Sara Weir's body was discovered, petitioner was nowhere to be found. He eventually was detained in Texas, in November 1993, as he attempted to reenter the United States from Mexico. He possessed two of Sara Weir's checks, and her car was located in Mexico.



During the guilt phase of petitioner's capital murder trial, in addition to the evidence of the charged crimes committed against Weir and the uncharged August 30 crimes against Michelle T. and Teri B., the prosecution presented evidence that petitioner had raped two other young women, in 1987 and in 1991. (Pet., App. A at 1-10.) The jury convicted petitioner of first degree murder, and found true the "special circumstance" allegations of robbery-murder and rape-murder.

At the subsequent penalty phase, the prosecution presented evidence that petitioner had committed yet another rape, in 1984. Sara Weir's mother, Martha Farwell, testified as the sole victim impact witness. As part of her victim impact testimony, a twenty-minute videotape she had prepared of her daughter's life was played for the jury. (Pet., App. A at 10-11.) The same jury that had rendered the guilt verdict and special-circumstance findings returned a verdict of death. The trial court imposed the death sentence.

On direct appeal, the California Supreme Court affirmed petitioner's conviction and sentence. (Pet., App. A (*People v. Kelly*, 42 Cal. 4th 763, 171 P.3d 548 (2007).) In so doing, the Court rejected petitioner's claim that the victim-impact videotape - a montage of still photographs and video clips of Weir from infancy to shortly before her murder, accompanied by background music and "narrated calmly and unemotionally by her mother" - violated his constitutional rights because it exceeded the general due process standards that this Court

acknowledged in *Payne v. Tennessee*, 501 U.S. 808 (1991), and by the California Supreme Court. (Pet., App. A at 34-42.) Upon reviewing the trial court's evidentiary ruling, the California Supreme Court concluded that there was "no prejudicial error" in permitting the admission of the videotape during the penalty phase. (Pet., App. A at 39.)

#### REASONS THE PETITION SHOULD BE DENIED

Petitioner seeks certiorari because he contends (1) that the California Supreme Court's finding - that the victim impact videotape admitted in the penalty selection phase of his trial did not exceed the bounds of this Court's *Payne* decision - "marks the outside limit" of decisions addressing this issue and it directly conflicts with other jurisdictions, (2) that the admission of the videotape rendered the penalty selection phase of his trial fundamentally unfair and unreliable in violation of the Eighth Amendment, and (3) that this Court should declare a bright-line evidentiary rule precluding the use of victim impact videotape evidence. (Pet. at 4-20.) There is no reason, however, to grant certiorari in this case. Petitioner merely asks this Court to review the California Supreme Court's application of *Payne* to the particular facts of this case; his heavily fact-based claim is inappropriate for this Court's discretionary review. He fails to show the existence of a genuine conflict among the lower courts on the admissibility of victim impact videotape evidence. His assertions that the victim impact videotape

evidence rendered the penalty selection phase of his trial fundamentally unfair and unreliable in violation of the Eighth Amendment, and that this Court should declare a bright-line rule precluding the use of victim impact videotape evidence, are foreclosed by this Court's precedent. In *Payne*, this Court held that the Eighth Amendment does not erect a *per se* bar to victim impact evidence relating to the victim's personal characteristics and the emotional impact on the victim's family. *Payne*, 501 U.S. at 827. The California Supreme Court's decision was correct properly applied due process standards as reflected in *Payne*.

**A. Petitioner Merely Second-guesses The State Courts' Resolution Of His Fact-bound Claim Under A Generalized And Non-controversial "Fundamental Fairness" Standard.**

In *Payne*, this Court held that, if a State chooses to permit the admission of victim impact evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family, the Eighth Amendment erects no *per se* bar. *Id.* at 827; accord *Jones v. United States*, 527 U.S. 373, 395 (1999) (Eighth Amendment allows a capital sentencing jury to consider evidence of victim's personal characteristics and the emotional impact of the murder on the victim's family). In overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*,

490 U.S. 805 (1989),<sup>1/</sup> this Court determined that it had been "wrong" when it had previously stated that this kind of evidence leads to the arbitrary imposition of the death penalty[,] explaining that "[i]n the majority of cases, . . . victim impact evidence serves entirely legitimate purposes." *Id.* at 825.

Instead of establishing rules regulating the admission of victim impact evidence, this Court in *Payne* expressly left to the States the decision of whether to admit victim impact evidence and how to structure its admissibility. *Id.* at 824-27. Observing that "[t]he States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs[,]" this Court concluded that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id.* at 825.

In holding that the decision of whether to admit victim impact evidence and how to structure its admissibility is left to the States, this Court made clear that victim impact evidence is to be treated like all other relevant evidence, and that both extant state and federal evidentiary rules as

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1. *Payne* left intact *Booth's* holding that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Payne*, 501 U.S. at 830 n.2; see *Booth*, 482 U.S. at 508-09; see also *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir.1998).

well as the Due Process Clause of the Fourteenth Amendment already provide plentiful protection against unduly prejudicial victim impact evidence. *Id.* at 823-27. This Court explained that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825 (citing *Darden v. Wainwright*, 477 U.S. 168, 179-83 (1986)).

In other words, nothing in this Court's *Payne* decision suggested that victim impact evidence creates a particular constitutional problem. Rather, as this Court expressly noted, "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." *Payne*, 501 U.S. at 827 (emphasis added); see *id.* at 831 (O'Connor, J., concurring) ("Given that victim impact evidence is potentially relevant, nothing in the Eighth Amendment commands that States treat it differently than other kinds of relevant evidence."). This Court reiterated that "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence *should be admitted* and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." *Id.* at 823 (quoting *Estelle v. Barefoot*, 463 U.S. 880, 898 (1983)) (emphasis added).

California state law is "consistent" with *Payne's* principles. *People v. Lewis and Oliver*, 39 Cal. 4th 970, 1056, 140 P.3d 775 (2006) (quoting *Payne's* language "[t]he federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair[]'"); accord *People v. Zamudio*, 43 Cal.4th 327, 364, 181 P.3d 105 (2008). The California Supreme Court has found victim impact evidence admissible as a "circumstance of the crime" under factor (a) of California Penal Code section 190.3. *People v. Robinson*, 37 Cal. 4th 592, 650, 124 P.3d 363 (2005), and cases cited therein; see *People v. Edwards*, 54 Cal. 3d 787, 833, 819 P.2d 436 (1991) (explaining that the phrase "circumstances of the crime" "does not mean merely the immediate temporal and spatial circumstances of the crime," but "[r]ather . . . extends to '[t]hat which surrounds materially, morally, or logically' the crime"). Under California law, victim impact evidence is admissible "[u]nless it invites a purely irrational response from the jury . . . ." *People v. Lewis and Oliver*, 39 Cal.4th at 1056-57; see also *People v. Pollock*, 32 Cal. 4th 1153, 1180, 89 P.3d 353 (2004) (victim impact evidence is admissible under California law provided it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case"); accord *Zamudio*, 43 Cal.4th at 364.

Here, petitioner contends that the victim impact videotape presented during the penalty selection phase of his

trial was constitutionally impermissible because it exceeded the scope of victim impact evidence "envisioned" by this Court in *Payne*. (Pet. at 14; see Pet. at 5-14.) In making this argument, petitioner points to state and federal cases where the courts, when analyzing victim impact videotape evidence on a case-by-case basis, have arrived at different conclusions regarding admissibility. (Pet. at 5-14.) In essence, petitioner is asking this Court to review the facts of this case to determine whether the California Supreme Court's decision crossed the lines set forth in *Payne*.

This Court, however, rarely grants review "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); see also *Kyles v. Whitely*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting) ("The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally . . . be denied."); *Watt v. Alaska*, 451 U.S. 259, 275 n.1 (1981) (Stevens, J., concurring) ("it is certainly safe to assume that whenever we grant certiorari in a case not deserving plenary review, we increase the likelihood that certiorari will be denied in other, more deserving, cases"). This Court generally does not grant

certiorari when the issue is fact-bound. See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 949 (1995) (refusing to consider fact-bound issue); *Heck v. Humphrey*, 512 U.S. 477, 480 n.2 (1994) ("We did not take this case to review such a fact-bound issue."). Thus, this highly-fact bound case, in which Petitioner seeks review of the California Supreme Court's application of procedures set forth in *Payne*, is not appropriate for this Court's discretionary review. See *Kyles*, 514 U.S. at 456 (Scalia, J., dissenting) ("In a sensible system of criminal justice, a wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety (for example, the requirement that guilt be proved beyond a reasonable doubt) - not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed.").

**B. There Is No Conflict in The Lower Courts That Needs to Be Resolved.**

Certiorari is unwarranted, further, because -- contrary to Petitioner's argument (Pet. at 4, 8-11, 13) -- there is no genuine conflict among the lower courts on the admissibility of victim impact videotape evidence. As petitioner recognizes, many courts have found the introduction of videotapes to be permissible. (Pet. at 8-9, citing *Byrd v. Collins*, 209 F.3d 486, 532 (6th Cir. 2000), *United States v. Wilson*, 493 F. Supp. 2d 491, 505 (E.D.N.Y. 2007), *Hicks v.*



*State*, 940 S.W.2d at 855,856-57 (Ack. 1997), *State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 2006), *State v. Anthony*, 776 So. 2d 376, 393-94 (La. 2000), *Whittlesey v. State*, 665 A.2d 223 (Md. 1995), *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994), and *Kills On Top v. State*, 15 P.3d 422, 437 (Mont. 2000); see generally John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 Cornell L.Rev. 257, 271-72 & n.128 (2003) (collecting cases)).

In two cases that Petitioner cites and relies upon, such evidence was either excluded by the trial court in the first instance on statutory probative-value-versus-undue-prejudice grounds (*United States v. Sampson*, 335 F. Supp. 2d 166, 192-93 (D. Mass. 2004)) or was excluded because it was found to be prejudicial error under state law rules by a state reviewing court (*Salazar v. State*, 90 S.W.3d 330, 332 (Tex. Crim. App. 2002) (*Salazar I*) and *Salazar v. State*, 118 S.W.3d 880 (*Salazar II*) (collectively, "*Salazar*"). (Pet. at 9-10.) Significantly, both of these cases were considered by the California Supreme Court in conducting its review of the trial court's ruling (on state law evidence ground) that the videotape "ha[d] more probative value than any prejudicial effect." (See Pet., App. A at 35-37, 39.)

*Sampson* and *Salazar* do not conflict with the California Supreme Court's application of *Payne* and its observation that

"the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief" for victim impact evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair[.]" See *Payne*, 501 U.S. at 825. In neither *Sampson* nor *Salazar* did the courts did not find that the victim impact videotape evidence violated the federal Constitution. The victim impact evidence in those cases was found impermissible on statutory grounds. *Sampson*, 335 F. Supp. 2d at 187 (applying 18 U.S.C. § 3593(c))<sup>2/</sup>; *Salazar I*, 90 S.W.3d at 332 (applying Tex. R. Evid. 403)<sup>3/</sup>; *Salazar II*, 118 S.W.3d at 882-85 (applying state-law prejudice analysis for non-constitutional error (see Tex. R. App. P. 44.2(b)).) Statutes calling for discretionary weighing of probative value versus prejudice provide protections beyond the Constitution do not merely re-state the Due Process Clause standard. See *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam). Cases applying such statutes, and reaching varying outcomes, do not

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2. 18 U.S.C. § 3593(c) - the portion of the Federal Death Penalty Act addressing proof of mitigating and aggravating factors - provides in pertinent part: "Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."

3. Rule 403 of the Texas Rules of Evidence provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

conflict on any important constitutional question.

Nor does a third case identified by Petitioner - *McVeigh*, 153 F.3d 1166 - establish a conflict among the lower courts or demonstrate that the California Supreme Court's opinion exceeded *Payne*'s bounds. In *McVeigh*, the petitioner challenged the testimony of twenty-seven of the prosecution's thirty-eight victim-impact witnesses, "arguing that their testimony injected a constitutionally intolerable level of emotion into the proceeding and resulted in the imposition of a capital sentence based on passion rather than reason in violation of *Payne* . . . ." *McVeigh*, 153 F.3d at 1216 (footnote omitted). The court of appeals found that none of the victim impact evidence introduced at trial violated *Payne*. *Id.* at 1219-21. It also concluded that the cumulative impact of allowing "such a substantial amount of victim impact evidence" - which was "poignant and emotional" - did not violate the limits set forth in *Payne*. *Id.* at 1221-22. Thus, *McVeigh* does not conflict with the California Supreme Court's decision in the instant case.

**C. The California Supreme Court Decision Was Correct.**

In any event, the California Supreme Court correctly applied *Payne* when it approved the trial court's approach to the admissibility of the victim impact videotape evidence. After watching the videotape, the trial judge overruled the defense's objection to showing the videotape during the penalty selection phase, explaining:

"It's a very compelling tape. I will grant you that. This is a very compelling case. I think if the People wish to present it, I see no objection to it. In doing a [n Evidence Code section] 352 analysis, I think it has more probative value than any prejudicial effect. I think what [the prosecutor] said, what this jury has heard from many other people makes this tape pale."

(Pet., App. A at 34-35 (brackets in *Kelly*).)<sup>4/</sup> In conducting its review of the trial court's decision, the California Supreme Court carefully recounted its earlier consideration of pertinent cases - its own prior decisions, and those of other state and federal courts, involving videotape evidence - to provide a general understanding of permissible victim impact. (Pet., App. A at 35-38 (discussing *People v. Prince*, 40 Cal. 4th 1179, 1288-90, 156 P.3d 1015 (2007), where the Court compared three cases permitting videotape evidence (*Whittlesey*, 665 A.2d 223, *State v. Gray*, 887 S.W.2d 369, and *State v. Allen*, 994 P.2d 728 (N.M. 1999)) with two cases excluding it (*Sampson*, 335 F. Supp. 2d at 191, and *Salazar I*, 90 S.W.3d at 335-38), discussing *Hicks v. State*, 940 S.W.2d at 856-57 where the reviewing court upheld the admission of fourteen-minute videotape with 160 photographs, and discussing

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4. California Evidence Code section 352 provides in pertinent part: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

*People v. Robinson*, 37 Cal. 4th at page 652 where the Court further examined *Salazar I*.)

Guided by those cases, the California Supreme Court concluded that there was "no prejudicial error" in showing that the admission of the videotape during the penalty phase. (Pet., App. A at 39.) It found that: (1) "the trial court watched the videotape and exercised its discretion"; (2) "[t]he videotape supplemented, but did not duplicate, the mother's testimony[,] " who was the sole victim impact witness; (3) "[f]or the most part, the videotape, including the mother's narrative, was not unduly emotional and presented material that was relevant to the penalty determination." (*Id.*) The Court explained that the videotape "humanized Sara Weir, as victim impact evidence is designed to do. It contained a factual chronology of Sara's life, from her infancy to her death in early adulthood, which helped the jury to understand 'the loss to the victim's family and to society which has resulted from the defendant's homicide.'" (*Id.* at 39-40 (quoting *Payne*, 501 U.S. at 822).) "[T]he videotape helped the jury to see that defendant took away the victim's ability to enjoy her favorite activities, to contribute to the unique framework of her family . . . and to fulfill the promise to society that someone with such a stable and loving background can bring." (*Id.* at 40.) It also "illustrated the gravity of the loss by showing Sara's fresh-faced appearance before she died[,] " noting that "[h]er demeanor" - "reserved,

modest, and shy" - "is something words alone could not capture." (*Id.*) The California Supreme Court concluded:

The viewer knew Sara better after viewing the videotape than before, but the tape expressed no outrage over her death, just implied sadness. It contained no clarion call for vengeance. It was longer than some tapes that have been admitted, but we see no bright-line limit to how long a videotape may be.

(*Id.*)

Although the state court observed that the videotape in this case "might have contained irrelevant aspects" - the Enya background music which her mother stated was some of Sara's favorite music, and the concluding video clip showing "people riding horseback" in Canada that Sara's mother described as "the 'kind of heaven' in which Sara [of Canadian Blackfoot Indian descent] belonged" (*id.* 41-42) - it concluded that it "need not decide whether the [trial] court abused its discretion in not ordering the videotape modified to exclude [those two elements] . . . for any error in this respect was not prejudicial." (*Id.* at 799.) The Court explained that "permitting the jury to view and hear those portions along with the rest of the mostly factual and relevant videotape was harmless [beyond a reasonable doubt] in light of the trial as a whole." (*Id.* at 42.)

As this analysis and conclusion demonstrates, the victim impact videotape evidence did not exceed *Payne's* scope

because its admission during the penalty selection phase did not violate petitioner's federal due process rights. See *Romano v. Oklahoma*, 512 U.S. 1, 12-13 (1994) (in determining whether the introduction of certain evidence at the sentencing phase of a capital trial violates the Due Process Clause of the Fourteenth Amendment, the Court must determine, after an "examination of the entire proceedings," whether the evidence "so infected the trial with unfairness as to make the resulting conviction a denial of due process") (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *Darden*, 477 U.S. at 178-81. The California Supreme Court's analysis of this issue closely followed the principles announced in *Payne*, noting that the videotape illustrated Weir's "uniqueness as an individual human being" (*Payne*, 501 U.S. at 823), and the "loss to the victim's family and to society which has resulted from the defendant's homicide[]" (*id.* at 822). The Court explained that the videotape "humanized Sara Weir, as victim impact evidence is designed to do." (Pet., App. A at 39.) And the Court specifically observed in summary that "[t]he viewer knew Sara better after viewing the videotape than before, but the tape expressed no outrage over her death, just implied sadness." (*Id.* at 39-40.)

Petitioner claims that the videotape should have been excluded because it had "all the attributes of a eulogy, compared with the more objective factual testimony envisioned by *Payne*." (Pet. at 13 (footnote omitted).) The California

Supreme Court correctly rejected this characterization, concluding that, "[f]or the most part, the videotape, including the mother's narrative, was not unduly emotional and presented material that was relevant to the penalty determination." (Pet., App. at 39.) Although the Court recognized that the videotape "might have" included two irrelevant features, it concluded that, when balanced against the rest of the videotape and in light of the trial as a whole, they were harmless beyond a reasonable doubt. (*Id.* at 42.) More specifically, the mere presence of some elements that may have been "emotional without being factual" did not violate petitioner's due process rights when considered in light of rest of the videotape and all of the other evidence presented. (*Id.* at 42.) See *Payne*, 501 U.S. at 831-32 (O'Connor, J., concurring) ("I do not doubt that the jurors were moved by this testimony - who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime . . . ."); *United States v. Barnette*, 211 F.3d 803, 818-19 (4th Cir. 2000) (finding that "[e]ven if the victim impact evidence" - consisting of "stories of the victims' childhoods, family experiences, and the trauma of their deaths, and poems reflecting their deep sadness and regret over their losses" - "went beyond the 'quick glimpses of the life' of the victim mentioned in *Payne*," "on the whole it did not contaminate" the penalty phase); *McVeigh*, 153 F.3d at 1216-18, 1221-22 ("poignant and emotional" testimony by



thirty-eight victim-impact witnesses, who testified *inter alia* about their "last contacts" with the victims, the victims' histories (which petitioner characterized as eulogies) and the "pure love and innocence of the children killed," did not result in a verdict based on passion; the jury's sentencing decision was based on a reasoned moral judgment). Because this videotape evidence was properly admitted during the penalty phase of the trial, it did not imbue the penalty phase of the trial with unfairness so as to violate due process, and thus it did not exceed the scope of *Payne*. See *Payne*, 501 U.S. at 825; see also *Estelle v. McGuire*, 502 U.S. 62, 70 (1991) (where relevant evidence was introduced at trial, its introduction did not violate due process under the Fourteenth Amendment). Accordingly, because the California Supreme Court's opinion is consistent with *Payne*, certiorari is not warranted in this case.

**D. Petitioner's Eighth Amendment Claim Is Insubstantial.**

In addition to his Fourteenth Amendment claim, petitioner also asserts that "choreographed video-tributes to victims" - as he characterizes the videotape in the instant case - "inject unduly inflammatory evidence" into the penalty selection determination and thus "create an unconstitutional risk of arbitrary capital sentencing in violation of the Eighth Amendment." (*Id.* at 14; see *id.* at 4-5, 14-18.) But petitioner's argument cannot stand in light of this Court's long-standing rule permitting juries "unbridled discretion"

in the penalty selection phase of a capital trial. *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994) (quoting *Zant v. Stephens*, 462 U.S. 862, 875 (1983)).

Once a capital defendant has been found eligible for the death penalty - which, in California, occurs during the guilt phase when the jury convicts a capital defendant of first degree murder and finds true at least one special circumstance - the constitutional narrowing requirement has been met. *Brown v. Sanders*, 546 U.S. 212, 216, 221 (2006); see *Tuilaepa*, 512 U.S. at 975. At this point, "the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed . . . ." *Tuilaepa*, 512 U.S. at 979-80 (quoting *Zant*, 462 U.S. at 875). In light of this unbridled discretion in the selection phase, this Court has previously decided that victim impact as an aggravating factor does not inject bias or caprice into the sentencing process, explaining:

[E]vidence of . . . victim impact in a particular case is inherently individualized. And such evidence is surely relevant to the selection phase decision, given that the sentencer should consider all of the circumstances of the crime in deciding whether to impose the death penalty.

What is of common importance at the eligibility and selection stages is that "the process is neutral and principled so as to guard against bias or caprice in

the sentencing decision." So long as . . . victim impact factors are used to direct the jury to the individual circumstances of the case, we do not think that principle will be disturbed.

*Jones*, 527 U.S. at 401-02 (original emphasis omitted) (citing *Tuilaepa*, 512 U.S. at 973, 976); accord *United States v. Chanthadara*, 230 F.3d 1237, 1273 (10th Cir. 2000).

As mentioned previously, victim impact evidence in California is admissible as part of the "circumstances of the crime." *People v. Robinson*, 37 Cal. 4th at 650. Thus, petitioner's claim that victim impact videotape evidence renders a capital sentence unconstitutionally arbitrary and unreliable is foreclosed by this Court's cases holding that a capital jury's exercise of unbridled discretion during the penalty selection phase does not violate the Eighth Amendment.

Finally, petitioner's request that this Court to issue a "clear rule prohibiting the admission of victim impact videotapes at a capital penalty trial" (Pet. at 20) is unpersuasive and has been repeatedly rejected. When presented with similar requests in the past, this Court has refused to "fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings." *Romano*, 512 U.S. at 11-12. "The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings." *Id.* at

12 (citing *Payne*, 501 U.S. at 824-25, and *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990)); see *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) ("Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure") (citations omitted). Indeed, in her concurring opinion in *Payne*, Justice O'Connor explained the type of prophylactic exclusionary rule that petitioner now urges upon this Court lacks merit:

The possibility that [victim impact] evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial.

*Payne*, 501 U.S. at 831 (O'Connor, J., concurring); see also *Barefoot*, 463 U.S. at 896-903 (rejecting petitioner's proposition that an entire category of evidence - psychiatrists' testimony regarding future dangerousness - should be barred). This Court has previously rejected requests that it fashion a prophylactic rule of exclusion of categories of evidence under the guise of interpreting the

Eighth Amendment. Petitioner offers no new arguments or authority that would warrant granting certiorari to reconsider that rejection.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: August 6, 2008

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of the State of California

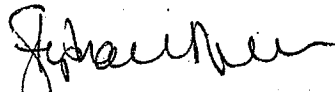
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No. 07-11073

*In the Supreme Court of the United States*

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DOUGLAS OLIVER KELLY, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

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**CERTIFICATE OF COMPLIANCE**

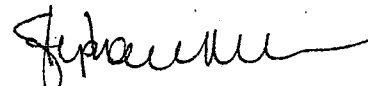
As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 5,718 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 6, 2008

Respectfully submitted,

EDMUND G. BROWN JR.  
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Counsel of Record

Counsel for Respondent

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IN THE  
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***CERTIFICATE OF SERVICE BY MAIL***

I, Stephanie C. Brenan, a member of the Bar of this Court hereby certify that on August 6, 2008, three copies of the **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** in the above-entitled case were mailed, first class postage prepaid, to:

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I further certify that all parties required to be served have been served.

  
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