

No. 07-11073

IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS OLIVER KELLY, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

**REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

MICHAEL J. HERSEK
STATE PUBLIC DEFENDER
FOR THE STATE OF CALIFORNIA

EUGENIE EVANS YOUNG
Senior Deputy State Public Defender
Counsel of Record

221 Main Street, 10th Floor
San Francisco, CA 94105
(415) 904-5600

Counsel for Petitioner
DOUGLAS OLIVER KELLY

No. 07-11073

IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS OLIVER KELLY, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Respondent's attempt to categorize petitioner's claim as merely second-guessing the California Supreme Court's resolution of a fact specific issue, and thus not an appropriate issue for this Court's discretionary review, should be quickly rejected. Opposition at 8-9. Petitioner seeks certiorari in order for this Court to address the California Supreme Court's expansion of *Payne v. Tennessee*, 501 U.S. 808 (1991) beyond its parameters by allowing admission of orchestrated, eulogy-like videotape tributes at the penalty phase of a capital trial. The interpretation of one of its decisions – especially one such as *Payne*, decided 17 years ago – by state and federal courts across the country is indisputably a proper subject of review by this Court.

Respondent asserts certiorari is unwarranted because there is no conflict in the lower court decisions cited by Petitioner. Opposition at 9-10. Citing *United States v. Sampson*, 335 F.Supp.2d 166 (D. Mass. 2004) and *Salazar v. State*, 90 S.W.3d 330 (Tex. Crim. App. 2002), Respondent argues that neither case resolves the issue of admissibility of victim impact videotapes on federal constitutional grounds, but instead relies solely on state or federal statutory grounds. Opposition at 11-12. Respondent ignores the fact that in both cases the court’s analysis was conducted within the framework of *Payne*, even though a statute that requires weighing probative value versus prejudice was also implicated. *Sampson*, 335 F.Supp.2d at 187 (applying *Payne* and due process analysis); *Salazar*, 90 S.W.2d at 336 (same).¹ Indeed, Respondent defends the California Supreme Court decision in the present case, in which that court employed the identical analysis – a probative value versus prejudicial effect weighing under California Evidence Code section 352 – as “correct [sic] properly applied due process standards as reflected in *Payne*.” Opposition at 4.

Instead of addressing Petitioner’s arguments that videotapes like the one in the present case – an orchestrated victim tribute – exceed the bounds of *Payne*, Respondent simply repeats the California Supreme Court’s reasons for finding that admission of the

¹ Contrary to Respondent’s suggestion, *United States v. McVeigh*, 153 F.3d 1166, was not cited by Petitioner as an example of a case in conflict with the present case. Respondent’s Opposition, p. 12. *McVeigh* was cited for the court’s finding that certain items of victim impact evidence – wedding photographs and home videos – should be excluded because of the excessive emotional impact. Petition, p. 13.

videotape in the present case was not prejudicial error. Opposition at 12-16. Tellingly, the victim impact evidence in the cases cited by Respondent in support of the argument that the videotape in this case was not excessively emotional, *United States v. Barnette*, 211 F.3d 803, 818-19 (4th Cir. 2000) and *United States v. McVeigh*, 153 F.3d at 1216-18, 1221-22, was not victim impact videotape evidence.

Respondent argues that Petitioner’s Eighth Amendment claim is too insubstantial to warrant review by this Court because of the long-standing rule permitting juries “unbridled discretion” in the penalty selection phase of a capital trial. Opposition at 18-19. Respondent confuses the “unbridled discretion” of juries viewing properly admitted penalty phase evidence with an unfettered discretion of trial courts to admit all victim impact evidence. Simply because *some* victim impact evidence is admissible – a proposition petitioner does not challenge here – it does not follow that any and all such evidence is admissible, as *Payne* clearly held. If Respondent’s reasoning were adopted, any victim impact evidence a state chose to admit at a penalty phase trial would be insulated from review. This is clearly not the state of the law.

//

//

//

//

//

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: August 15, 2008

Respectfully submitted,

MICHAEL J. HERSEK
STATE PUBLIC DEFENDER
FOR THE STATE OF CALIFORNIA

EUGENIE EVANS YOUNG
Senior Deputy State Public Defender
Counsel of Record

221 Main Street, 10th Floor
San Francisco, CA 94105
(415) 904-5600

Counsel for Petitioner
DOUGLAS OLIVER KELLY