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

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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QUESTION PRESENTED

Whether the admission at the penalty phase of a capital trial of a twenty-minute video montage consisting of still photographs and video clips depicting the victim's entire life from infancy until her death, as well as film footage in which neither the victim nor her family appears, that is set to music and narrated by her mother, was so inflammatory and unduly prejudicial that it rendered Petitioner's death sentence fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment, and created an unconstitutional risk of arbitrary capital sentencing in violation of the Eighth Amendment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

FEDERAL STATUTES

TABLE OF AUTHORITIES

Pages

FEDERAL STATUTES

TABLE OF AUTHORITIES

Pages

STATE STATUTES

TABLE OF AUTHORITIES

Pages

TEXT AND OTHER AUTHORITIES

No._____

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STATE OF CALIFORNIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Douglas Oliver Kelly respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of California affirming his conviction and sentence of death.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner, Douglas Oliver Kelly, and Respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on December 6, 2007, reported as *People v. Kelly*, 42 Cal.4th 763, 171 P.3d 548 (2007). A copy of that opinion is attached as Appendix A. The opinion was modified and rehearing was denied on February 20, 2008. A copy of the order is attached as Appendix B.

JURISDICTION

The California Supreme Court entered its judgment on February 20, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code section 190.2, subdivision (a) provides:

> The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true[.]

California Penal Code section 190.3 provides in pertinent part:

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole.
>
> . . . .
>
> In determining the penalty, the trier of fact shall take into account any of the following factors, if relevant: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

STATEMENT OF THE CASE

Petitioner was convicted of the capital murder, rape and robbery of nineteen year-old Sara Weir. CT 440, 519.[1] At the penalty phase of the trial, after extensive victim impact testimony by the victim's mother, the prosecution was permitted to play for the jury a twenty-minute video montage of images of Weir, prepared for the trial, set to music and narrated by her mother. RT 2468; People's Exhibit 47. Petitioner was sentenced to death. CT 562.

Petitioner's objection to admission of the videotape was overruled. RT 2427, 2431. This claim was renewed on direct appeal to the California Supreme Court. That court found there was no prejudicial error in admission of the videotape. App. A, 39.

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[1] "CT" refers to the Clerk's Transcript of the trial; "RT" refers to the Reporter's Transcript of the trial.

REASONS FOR GRANTING THE WRIT

The California Supreme Court, over a dissenting and concurring opinion, held that admission at the penalty phase of a capital trial of a twenty-minute videotape prepared and narrated by the nineteen year-old victim's mother, consisting of a montage of dozens of still photographs and video clips depicting the victim's life from infancy to the time of her death, closing with a shot of her grave and stock footage of horsemen riding through the countryside where she was born, described by her mother as "the kind of heaven she seems to belong in" and set to the music of the artist, Enya, was not prejudicial error. The California Supreme Court's decision that this type of evidence – a choreographed video tribute spanning the victim's life – does not exceed the bounds of this Court's decision in *Payne v. Tennessee*, 501 U.S. 808 (1991), marks the outer limit of decisions of courts across the country that have addressed the issue of the admissibility of videotape victim impact evidence, and is in direct conflict with decisions of other jurisdictions. Because of the widespread use of victim impact evidence in state and federal capital trials, and the rapid advent of technology providing access to ever more sophisticated cinematic techniques, this Court should establish meaningful controls on the form of victim impact evidence that can be admitted in capital trials, and make clear that the Eighth Amendment and Due Process Clause of the Fourteenth Amendment preclude admission of evidence such as that presented in this case. Such cinematic evidence, which is designed to play on the jury's emotions, interferes with the jury's

ability to make a moral reasoned judgment about the appropriate penalty, injects an intolerable risk of arbitrariness into the capital-sentencing decision, and renders the penalty trial fundamentally unfair.

The admission of the victim impact videotape at Petitioner's trial rendered the penalty trial fundamentally unfair and unreliable, and the judgment of the California Supreme Court upholding Petitioner's death judgment should be reversed.

I. This Court in Payne Did Not Envision or Sanction the Use of Extensive Videotape Tributes as Victim Impact Evidence

In *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), this Court held that states could permit the admission of victim impact evidence at capital trials without violating the Eighth Amendment. Chief Justice Rehnquist, writing for the Court, argued that *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) should be overruled to correct the imbalance between the defendant, who is permitted to offer mitigating evidence, and the State, which was precluded from offering a "quick glimpse of the life" the defendant took, or "demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." *Payne v. Tennessee*, 501 U.S. at 822 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). In addition, evidence of the "specific harm caused by the defendant," was admissible "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness." 501 U.S. at 825. Such evidence does not run afoul of the Due

Process Clause of the Fourteenth Amendment as long as it is not "so unduly prejudicial that it renders the trial fundamentally unfair." *Id*.

In the seventeen years since *Payne* was decided, this Court has not addressed the issue of victim impact evidence in capital sentencing trials. State and federal legislatures and courts have filled the vacuum created by this protracted silence with statutes and judicial pronouncements allowing the admission of victim impact evidence. Of the thirty-seven states with the death penalty, all have statutes permitting some form of victim impact evidence into their capital sentencing proceedings.[2] Victim impact evidence is admissible in California as a circumstance of the crime under Penal Code section 190.3, subdivision (a). *People v. Edwards*, 54 Cal.3d 787, 835, 819 P.2d 436, 467 (1991).

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[2]ALA. CODE §§13A-5-47, 15-23-72; ARIZ. REV. STAT. ANN. Const. Art. II, § 2.1; ARK. CODE ANN. § 5-4-602(4); CAL. PENAL CODE, § 190.3; COLO. REV. STAT. ANN., § 18-1.3-1201(b); CONN. GEN. STAT. ANN., §§ 53a-46d, 54-220, DEL. CODE ANN., § 4331; FLA. STAT. ANN., §921.143; GA. CODE ANN. § 17-10-1.2; IDAHO CODE § 19-5306; ILL. REV. STAT. 120/3, 120/6; IND. CODE § 35-50-2-9 (e); KAN. STAT. ANN. § 74-7333-38; KY. REV. STAT. ANN. § 421.520; LA. CODE CRIM. PROC. ANN. art. 905.2; MD. CODE ANN., CRIM. LAW §§ 11-401, 11-403; MO. REV. STAT. § 217.762; MONT. CODE ANN. § 302(1)(a)(iii); NEB. REV. STAT. § 29-2261; N.H. REV. STAT. ANN. § 21-M:8-K; N.M. STAT. ANN. § 31-26-4(G); N.C. GEN. STAT § 15-A833; OHIO REV. CODE ANN. §§ 2930.02, 2930.14, 2947.051; 22 OKLA. STAT. ANN. § 984.1; OR. REV. STAT §§ 137.013, 163.150(1)(a); PA. CONS. STAT. ANN. § 9711; S.D. CODIFIED LAWS § 24-15A-43; TENN. CODE ANN. § 39-13-204 (c); TEX. CODE CRIM. PROC. ANN. ART. 37.07 §3 (A); UTAH CODE ANN. § 76-3-207(2)(a)(iii); VA. CODE ANN. §§ 19.2-264, 19.2-299.1; WASH. REV. CODE §§ 10.95.060(3), 10.95.070; WYO. STAT. § 7-21-101-103. The federal statute authorizing victim impact evidence is 18 U.S.C. § 3593 (a).

The *Payne* Court recognized states' authority to admit victim impact evidence as "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." *Payne*, 501 U.S. at 825. The evidence before this Court in *Payne*, a conviction for the murders of a mother and her young daughter, was the testimony of the victims' mother/grandmother about the impact of the murders on her grandson, who was himself a witness to the murder of his mother and sister, and the prosecutor's closing argument expounding on that testimony. Based on that evidence, the broad outlines of victim impact evidence were foreseeable: testimony describing the victim as a valued individual whose loss is keenly felt by those who survive her, and the prosecutor's argument that the victim impact testimony should weigh in favor of a sentence of death. While the scope of victim impact evidence has not been restricted to the facts of *Payne*, nothing in that decision suggests this Court intended to effect as fundamental a change in the substance of evidence at a capital trial as that presented by the orchestrated, eulogy-like videotape in this case.

The terminology used by this Court in *Payne* – "'a *quick glimpse* of the life petitioner chose to extinguish, [citation]' to *remind* the jury that the person whose life was taken was a unique human being," *Payne*, 501 U.S. at 831 (O'Connor, J., concurring) (emphasis added) – suggests limited exposure to this highly potent evidence.

In California, however, the "quick glimpse" of *Payne* has been lengthened to a "chronology" of "all of [the victim's life]." App. A, 39-40.

Justice Souter's statements in *Payne* should now be heeded with regard to victim impact videotapes. He wrote that "[e]vidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." *Payne*, 501 U.S. at 836 (Souter, J., concurring).

The relatively few state and federal courts that have weighed in on the admissibility of video tapes as victim impact evidence have, until the present decision by the California Supreme Court, held the line against tapes like the one in Petitioner's case. In the majority of cases that have addressed the admission of victim impact videotapes, the evidence consisted of either brief clips of home videos or television interviews with the victim. *See, e.g.*, *State v. Gray*, 887 S.W.2d 369, 389 (Sup. Ct. Mo. 1994) (prosecution's presentation at penalty phase of "a video of the [victims'] family Christmas" did not exceed permissible bounds under *Payne*); *Whittlesey v. State*, 665 A.2d 223 (Ct. App. Md. 1995) (ninety-second videotape of victim playing the piano, a skill for which he was nationally recognized, relevant and admissible under *Payne*); *State v. Anthony*, 776 So.2d 376, 393-94 (Sup. Ct. La. 2000) ("brief videotape depicting portions of [victim's] life" admissible as victim impact evidence); *Kills On Top v. State*, 15 P.3d 422, 437 (Sup. Ct. Mont. 2000) (videotape showing victim playing with his

children admissible under *Payne*); *United States v. Wilson*, 493 F.Supp.2d 491, 505 (E.D.N.Y. 2007) (twenty-minute video of television interview with victim, who was a police officer, answering questions about his job, admissible under *Payne*); *Byrd v. Collins*, 209 F.3d 486, 532 (6th Cir. 2000) (admission of video of television interview with victim's daughter, during which victim and wife were present and participated, taken the day before victim's murder, did not violate due process).

Courts confronted with videos more similar to the one in this case, in that they are extended montages of either still photos or home video clips or both, have reached different conclusions about their admissibility. A four-and-one-half-minute video montage of the victim alone and with her young children and other family members, set to music, offered only the "quick glimpse" authorized by *Payne*, according to the Idaho Supreme Court in *State v. Leon*, 132 P.3d 462, 467 (Ct. App. Idaho 2006), while a twenty-seven-minute videotape on the life of the victim, which included 200 still pictures and was accompanied by "evocative contemporary music," was found to exceed the allowable "glimpse" of the victim's life, and was therefore excluded from a federal death penalty trial in *United States v. Sampson*, 335 F.Supp.2d 166, 192-93 (D. Mass 2004).

The court in *Hicks v. State*, 940 S.W.2d 855, 856-57 (Sup. Ct. Ark. 1997), a non-capital case, rejected defendant's due process claim that admission of a silent fourteen-minute videotape of approximately 160 photos of the victim, his family and friends, spanning the victim's life and narrated by his brother, was excessive under *Payne*.

In *Salazar v. State*, 90 S.W.3d 330 (Tex. Crim. App. 2002), the Texas Court of Criminal Appeals found error in the admission of a seventeen-minute video montage of approximately 140 photographs of the victim's life, arranged in chronological order and set to the music of the artist, Enya. *Id*. at 333, 338.[3] The video, which was created by the victim's father, covered the victim's entire life from infancy to young adulthood. The court in *Salazar* observed, "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." *Id.* at 335-36. The videotape in Petitioner's case is nearly identical to that in *Salazar*, even in the music that accompanies both tapes.

Before deciding Petitioner's case, the California Supreme Court had echoed the concern expressed by the *Salazar* Court, citing the videotape in *Salazar* as "[o]ne extreme example of [] a due process infirmity." *People v. Robinson*, 37 Cal.4th 592, 652, 124 P.3d 363, 404 (2005). In *People v. Prince*, 40 Cal.4th 1179, 156 P.3d 1015 (2007), the California Supreme Court continued to express reservations about the use of victim-tribute videotapes, warning that "[c]ourts must exercise great caution in permitting the

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[3] The case was remanded to the court of appeals, which had held that admission of the audio portion of the videotape was harmless error, for an error determination based on both the audio and visual portions of the tape. *Salazar*, 90 S.W.3d at 339. On remand, the court of appeals found admission of the videotape to be prejudicial error, requiring reversal of the defendant's sentence. *Salazar v. State*, 118 S.W.3d 880, 885 (Tex. Ct. App. 2003).

prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim." *Id*. at 1289, 156 P.3d at 1093. The *Prince* court found no prejudice from admission of the videotape in that case because the tape,

> [D]id not constitute an emotional memorial tribute to the victim. There was no music, emotional or otherwise. The tape did not . . . display the victim in her home or with her family, nor were there images of the victim as an infant or young child. The setting was a neutral television studio, where an interviewer politely asked questions concerning the victim's accomplishments on the stage and as a musician and the difficulty she experienced in balancing her many commitments, touching only briefly upon her plan to attend college in the fall and follow the stage as a profession.

Id.

A few months after the decision in *Prince*, when first called upon to apply the criteria it suggested should be used to evaluate victim impact videotape evidence, the California Supreme Court discarded those criteria – and offered no reason for doing so – finding no prejudicial error in admission of the videotape in Petitioner's case, which contains *every one* of the aspects deemed problematic in *Prince*. The "videotaped eulogy" admitted in the present case was, as Justice Moreno noted, "in part strikingly similar to the tape found inadmissible in *Salazar*, and where it differed, was precisely the kind of tape that we warned against admitting in *Prince*." App. A, 5 (Moreno, J., concurring and dissenting).

Admission of the videotape in this case cannot be justified on the ground that without it the jury would have been deprived of information about the victim's

"uniqueness as an individual human being." *Payne*, 501 U.S. at 823. As Justice Souter noted in *Payne*, "Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles." *Id*. at 838 (Souter, J, concurring). The victim in this case was never a valueless, fungible stranger. Her mother, Martha Farwell, who testified at both the guilt and penalty phases, described her daughter as "very friendly, very open," (RT 839); "academically above average" (RT 831); "naive" (RT 839); popular (RT 839); "very pretty" (RT 844). When she was in high school she went on work trips with the youth church group. RT 849. Weir was described by another witness as "very trustworthy," "loving," "warm," "very bright" and loved by all who knew her. RT 1075-77.

Nor was the videotape necessary to demonstrate "the impact of the murder on the victim's family." *Payne* 501 U.S. at 827. In her penalty phase testimony, which covered thirty pages of the trial transcript, Ms. Farwell testified that her family was "absolutely devastated" and "overcome with grief." RT 2443. In the aftermath of her daughter's death, she experienced physical pain, developed facial tics and suffered from nightmares in which her daughter struggled to escape, calling to her. RT 2449. Ms. Farwell described the horrible task of telling her two young sons that their sister had been "killed by a very bad man." RT 2453. And she expressed her own sense of loss: the loss of the future she envisioned for her daughter – going to college, marrying and having children (RT 2459) – and the loss of her daughter's presence in their family's life (RT 2461).

Creating a video tribute such as the one in Petitioner's case – selecting footage of past events with family and friends, marking milestones like birthdays, graduations and holidays, and choosing accompanying music – necessarily imbues the final product with all the attributes of a eulogy, compared with the more objective factual testimony envisioned by *Payne*.[4] The excessive emotional impact of such evidence lead the trial court in the prosecution of Timothy McVeigh to exclude wedding photographs and home videos as victim impact evidence. *United States v. McVeigh*, 153 F.3d 1166, 1221, n. 47 (10th Cir. 1998).

In its most recent decision addressing the admissibility of a victim impact videotape, the California Supreme Court was confronted with another lengthy (fourteen-minute) videotaped montage of photographs of the victims offered at the penalty phase of a capital trial. *People v. Zamudio*, 43 Cal.4th 327, 181 P.3d 105, 75 Cal. Rptr.3d 289 (2008). Relying on its decision in the present case, the California Supreme Court rejected Zamudio's challenge to the victim impact evidence as violative of the Eighth

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[4] The video in this case is narrated by the victim's mother, who identifies each image as it appears, while the music of Enya plays in the background. The California Supreme Court decision emphasized the "unemotional" narration of the tape by the victim's mother (App.A, 39 "narrated calmly and unemotionally by her mother"; "mother's narrative [] was not unduly emotional"). But, while her tone of voice is not overly emotional, *what* she says is heartbreaking in its familiarity with the people and occasions depicted. The simple intonation of the date of a family picnic video becomes chilling when the viewer realizes that it was shot just a couple of months before Weir's death and may have been the last time she was with the family members shown in the video.

and Fourteenth Amendments because the tape was shorter than the tape in *Kelly* (fourteen minutes versus twenty minutes), and because the trial court exercised its discretion by excluding the audio portion of the tape, including music, finding it to be unduly prejudicial and inappropriate. *Id.* at ___, 75 Cal.Rptr. 3d at 325.

The court in *Zamudio* referred approvingly to the videotape as "life histories," (*Zamudio*, at ___, 75 Cal.Rptr. 3d at 325), just as the tape in Petitioner's case was condoned as a life "chronology." App. A, 39. Life histories and life-spanning chronologies venture far beyond anything envisioned by the decision in *Payne* as constitutionally acceptable victim impact evidence, and undeniably exceed the "quick glimpse," sanctioned by this Court.

II. Videotaped Victim Tributes Inject an Unacceptable Risk of Arbitrariness Into Capital Sentencing Proceedings in Violation of the Eighth Amendment

Choreographed video-tributes to victims, drawing upon cinematic techniques designed specifically to play on the audience's emotions, inject unduly inflammatory evidence into what is to be a "reasoned, moral" determination of whether the defendant is to be executed and thus create an unconstitutional risk of arbitrary capital sentencing in violation of the Eighth Amendment. *See California v. Brown*, 479 U.S. 538, 545-46 (1987) (O'Connor, J., concurring) ("*Lockett* [*v. Ohio*, 438 U.S. 586 (1978)] and *Eddings* [*v. Oklahoma*, 455 U.S. 104 (1982)] reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed

at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.")

This Court should reconcile its longstanding recognition that, "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977), with the unavoidable potential of victim impact evidence to generate an emotional response from penalty phase jurors. As Justice O'Connor observed in *Payne*, "I do not doubt that the jurors were moved by this [victim impact] testimony – who would not have been?" *Payne*, 501 U.S. at 832. The Eighth Amendment constraints on the capital sentencer's discretion demand the exclusion of excessive emotional factors. "It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary. [Citations.]" *Saffle v. Parks*, 494 U.S. 484, 493 (1990).

The use of videotape victim tributes makes unavoidable the injection of excessive emotionalism into the capital sentencing process, because the *point* of film is to manipulate the emotions of the viewer. The impact of moving images on the viewer is well documented. *See, e.g.*, ED S. TAN, EMOTIONS AND THE STRUCTURE OF NARRATIVE FILM: FILM AS AN EMOTION MACHINE, Lawrence Erlbaum Associates, 1996; PASSIONATE VIEWS: THINKING ABOUT FILM AND EMOTION (Gregory Smith and Carl

Plantinga eds., Johns Hopkins University Press, 1998). Studies have shown that visual presentations account for the vast majority of the information retained by jurors. David Hennes, Comment, *Manufacturing Evidence for Trial: The Prejudicial Implications of Videotaped Crime Scene Reenactments*, 142 U. PA. L. REV. 2125, 2173 & n. 292 (1994). "A television videotape, much more than other forms of demonstrative visual evidence, leaves a lasting impression on jurors' mental processes, since its vividness dictates that it will be readily available for cognitive recall." *Id*. at 2180; *see also People v. Dabb*, 32 Cal.2d 491, 498, 197 P.2d 1, 5 (1948) (recognizing "the forceful impression made upon the minds of the jurors" by motion pictures).

Videotapes like the one in this case ratchet up the emotional response of the viewer through the use of music. While noting that "the background music by Enya may have added an irrelevant factor to the videotape," (App. A., 42), the California Supreme Court found any possible error was harmless because, "[t]hese days, background music in videotapes is very common; the soft music here would not have had a significant impact on the jury." *Id*. The Court's surmise not only begs the question of the appropriateness of such videotapes at a capital trial, it ignores the reality that the *only* reason to accompany visual images with music is to heighten the emotion experienced by the viewer. In an essay discussing his score for the film "Of Mice and Men," Aaron Copland wrote in 1940, "the score . . . is designed to strengthen and underline the emotional content of the entire picture . . . The quickest way to a person's brain is

through his eye but even in the movies the quickest way to his heart and feelings is still through the ear." Aaron Copland, *The Aims of Music for Films*, N.Y. Times, March 10, 1940, §11 at p. 6. No court would permit musical accompaniment to a victim's courtroom testimony, therefore, the use of music cannot be justified as the background to victim impact evidence in a different medium.

The inclusion of stock footage unrelated to the victim in a video tribute,[5] underscores how far the use of such manufactured evidence takes the capital sentencing process away from the Eighth Amendment's requirement of "rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" (*McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987), cited in *Payne* at 824), and into the realm of theatrical manipulation.

The video in this case was created in 1995, a technological lifetime ago. Today, when even the average computer user can transform images using the "Ken Burns effect,"[6] download virtually any song from iTunes or video from YouTube, the potential content and impact of visual imagery, accompanied by a music soundtrack, is

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[5] In Petitioner's case, the California Supreme Court held that the stock video footage at the end of the tape of horsemen riding across the Canadian countryside "was theatric without imparting any additional relevant material," but any error from its inclusion was harmless. App. A, 42.

[6] The "Ken Burns Effect" is a cinematographic technique that uses zooming and panning motions over still images, adding dynamic impact to an otherwise static presentation. Regina McCombs, *Ken Burns and His "Effect"* (2007) http://www.poynter.org/column.asp?id=101&aid=125153.

unimaginable. Without limits on the use of this technology, capital trials become theatrical venues, and the determination whether a defendant receives a death sentence turns on the skill of a videographer. A capital sentencing process that contains such arbitrary elements is wholly inconsistent with this Court's Eighth Amendment jurisprudence, which requires that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opn. of Stewart, Powell and Stevens, JJ.).

Restricting admission of videotape victim impact evidence will not "deprive[] the State of the full moral force of its evidence," nor will it "prevent the jury from having before it all the information necessary to determine the proper punishment for a first degree murder." *Payne*, 501 U.S. at 825. A limitation on the form of victim impact evidence will neither prevent the jury from taking into account "the loss suffered by a victim's family," nor force the victim to remain "a faceless stranger at the penalty phase of a capital trial." *Payne*, 501 U.S. at 831 (O'Connor, J. concurring). Restricting admission of victim impact videotapes like the one in this case will, however, eliminate the very real risk the pathos that such evidence inspires will subvert the legitimacy of the penalty selection process.

III. The Question Presented by this Case Significantly Affects the Administration of Capital-Sentencing Across the Nation

The efforts of state and federal courts to apply *Payne* to the question of the admissibility of choreographed, videotaped victim impact evidence have produced a range of decisions, some reaching different conclusions on similar facts. Some courts are heeding the words of this Court in *Payne* and controlling the admission of excessive victim impact evidence and preventing the risk of arbitrary sentencing, while others are not. The result of this disparity is that the sentence of a defendant in Texas is reversed after a court there holds that, "[a] 'glimpse' into the victim's life and background is not an invitation to an instant replay," (*Salazar v. State*, 90 S.W.3d at 336), while a defendant in California is sentenced to death because the Supreme Court reads *Payne* to allow the use of life histories.

Since 2005, the California Supreme Court has ruled on the admissibility of a victim impact videotape in four death penalty cases – *Robinson, Prince*, *Kelly* and *Zamudio* – and with each decision has moved farther away from the mandate envisioned by Justice Souter in his concurring opinion in *Payne*: "With the command of due process before us, this Court and the other courts of the state and federal systems will perform the 'duty to search for constitutional error with painstaking care,' an obligation 'never more exacting than it is in a capital case.'" *Payne*, 501 U.S. at 836.

The California court's decisions also reflect the sentiment it expressed in *Prince* and reiterated in Petitioner's case that, "'Case law pertaining to the admissibility of

videotape recordings of victim interviews in capital sentencing hearings provides us with no bright-line rules by which to determine when such evidence may or may not be used.'" App. A, 35, quoting *People v. Prince*, 40 Cal.4th at 1288, 156 P.3d at 1092.

The time has come for this Court to provide the courts across the country with a clear rule prohibiting the admission of victim impact videotapes at a capital penalty trial.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Supreme Court of California should be reversed.

Dated: May 20, 2008

Respectfully submitted,

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