
IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL ZAMUDIO,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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**CAPITAL CASE
QUESTION PRESENTED**

Whether the admission of victim impact evidence, in the form of a videotape played without sound and containing still photographs depicting ordinary events in the lives of the victims, rendered petitioner's capital sentencing trial fundamentally unfair and created a risk of an arbitrary result.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 07-11425

SAMUEL ZAMUDIO,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

STATEMENT OF THE CASE

On February 11, 1996, petitioner entered the home of his elderly neighbors, 79-year-old Elmer Benson and 74-year-old Gladys Benson, and stabbed them to death. Following the guilt phase of his capital jury trial, petitioner was found guilty of two counts of first degree murder and two counts of residential robbery. The jury also found true "special circumstance" allegations that petitioner murdered more than one person and that the murders were committed during the course of a robbery. *People v. Zamudio*, 43 Cal. 4th 327, 333-34 (2008).

At the penalty phase of the trial, the prosecution sought to admit victim impact evidence in the form of a videotape containing still photographs of the Bensons at

various points in their lives. The videotape was made by the Bensons' daughters. There was music accompanying the photographs and a prerecorded narration. The defense objected that the videotape was unduly inflammatory and asked the court to exclude any evidence that was prohibited under the Eighth and Fourteenth Amendments.

The trial court viewed the videotape and listened to the audio portion of the tape. It found that the photographs were relevant but determined that the music and prerecorded narration were unduly prejudicial and inappropriate. It ruled that the videotape could be played to the jury without sound and that a family member could indicate what each scene depicted, cautioning that the family member could offer only "very objective" comments.

The prosecutor played the videotape to the jury without sound. The videotape was fourteen minutes long and contained 118 black-and-white and color photographs of the Bensons by themselves, with family members, and with friends. The photographs depicted Mr. Benson when he was a boy, when he graduated high school, and when he was in the Navy. They also depicted Mrs. Benson when she was a girl, when she graduated high school and college, and when she met her first husband. There were photographs depicting the Bensons on their honeymoon, on vacations, and on fishing and hunting trips. In addition, there were photographs of the Bensons with their

children, grandchildren, and other relatives at birthday parties, weddings, and holidays.

Contrary to petitioner's contention (Pet. at 4), there were no photographs of the Bensons as infants. Further, there were only two photographs of Mr. Benson as a child or young adult and only three photographs of Mrs. Benson as a child or young adult. The videotape concluded with three photographs of the Bensons' grave markers, which had inscriptions on them.^{1/}

One of the Bensons' daughters described the photographs to the jury while the videotape was playing. The defense never objected to any of her testimony describing the photographs. After playing the videotape, the prosecution presented the testimony of family members -- two of the Bensons' daughters and two of their adult grandchildren -- discussing the impact of the Bensons' deaths on the family. After the prosecution's penalty phase evidence, petitioner presented the testimony of his two daughters about their positive communications with him during the two years he was

1. Although the inscriptions in the photographs were readable, they were never read aloud to the jury. The inscription on Mrs. Benson's grave marker read: "Mom, you remain in every hearty laugh, nice surprise and reassuring moment of our lives." The inscription on Mr. Benson's grave marker read: "Dad, you found and shared treasures in life where no one else noticed them."

in jail awaiting trial. At the conclusion of the penalty phase, the jury fixed the penalty at death.

Petitioner pursued his automatic appeal to the California Supreme Court. Among the claims that petitioner raised on appeal was the claim that the admission of the videotaped victim impact evidence violated his Eighth and Fourteenth Amendment rights. In a unanimous decision, the California Supreme Court affirmed petitioner's conviction and death sentence. In doing so, the court rejected petitioner's challenge to the videotaped victim impact evidence. It recognized that the federal Constitution bars victim impact evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. It observed that the trial court viewed the videotape and excluded the audio portion of the tape on the ground that it was unduly prejudicial and inappropriate. It also noted that the trial court directed the person who narrated the videotape from the witness stand to provide only objective comments. The California Supreme Court found that the videotape was relevant to the penalty determination and not unduly emotional. It concluded that the videotape was properly admitted. (Pet. App. A at 44-50.)

REASONS WHY THE WRIT SHOULD BE DENIED**I.**

CERTIORARI IS NOT WARRANTED TO CONSIDER THE CONSTITUTIONAL LIMITS OF VIDEOTAPED VICTIM IMPACT EVIDENCE BECAUSE THE EVIDENCE IN THIS CASE CONSISTED MERELY OF ORDINARY STILL BLACK-AND-WHITE AND COLOR PHOTOGRAPHS PRESENTED WITHOUT SOUND OR OTHER CINEMATIC ATTRIBUTES

Petitioner contends that certiorari is warranted in this case to provide this Court the opportunity to establish strict limitations on the use of videotaped victim impact evidence at capital trials. Petitioner contends that choreographed videotaped tributes to victims that draw upon sophisticated cinematic techniques to play on the emotions of jurors are increasingly common and inject a risk of arbitrariness in the penalty determination, thus rendering a capital trial unfair. (Pet. at 5, 14.)

This case is not an appropriate vehicle to resolve the question regarding the constitutional limits of such videotaped victim impact evidence because the evidence in the instant case lacked sophistication and consisted merely of ordinary still photographs. There was no sound or music accompanying the photographs in this case; nor were there any live video clips. Furthermore, most of the photographs were of average quality and many were black and white. The photographs depicted mostly ordinary events in the lives of

the Bensons, from birthday parties to hunting trips to bowling leagues. The use of videotape to present these photographs was thus not significantly different from the standard practice of projecting still photographs for the jury. There is nothing extraordinary about the presentation of still photographs to a jury.

Contrary to petitioner's contention, the videotaped presentation in this case did not involve elaborate cinematic techniques that were designed to play to the emotions of the jurors. In this respect, the instant case is unlike *Salazar v. State*, 90 S.W.3d 330 (Tex. Crim. App. 2002), a case upon which petitioner relies. (Pet. at 10-11.) In *Salazar*, the Texas Court of Criminal Appeals held that the trial court erred under state law in admitting a victim impact videotape montage at the sentencing phase of a non-capital murder trial. The videotape contained 140 photographs and there was music accompanying the entire video, including such songs as "Storms in Africa" and "River" by Enya and concluding with Celine Dion singing, "My Heart Will Go On," from the movie *Titanic*. The music was "appropriately keyed to the various visuals, sometimes soft and soothing, then swelling to a crescendo chorus." Almost half of the photographs in the video depicted the victim's infancy and early childhood. The court characterized the videotape as a "professional and polished

production," "a masterful portrait of a baby becoming a young man," and "extraordinarily emotional." *Id.* at 333-34.

In contrast to *Salazar*, the videotape in the instant case was played without sound, was not "professional and polished," depicted mostly ordinary events in the lives of the Bensons, and contained no photographs of the Bensons' infancy and very few of their childhood. The mere fact that the videotape ended with photographs of the Bensons' grave sites did not imbue the photographic evidence with cinematic sophistication. Rather, it was a natural and unsurprising way to end the series of photographs in this capital case.

In *People v. Kelly*, 42 Cal. 4th 763, 68 Cal. Rptr. 3d 531 (2007), decided by the California Supreme Court shortly before the instant case, the court discussed the limits of videotaped victim impact evidence:

Nonfactual dramatization of the evidence in a videotape - in the sense of making a presentation in a dramatic manner - adds irrelevant factors to the videotape. The videotape must factually and realistically portray the victim's life and character and not present a "staged and contrived presentation" [Citation.] Trial courts must not permit irrelevant background music or video techniques that enhance the emotion of the factual presentation. Moreover, the videotape,

even when presented factually, must not be unduly emotional. [Citation.]

Id. at 798.

The videotape in the instant case does not test the limits of videotaped victim impact evidence identified by the California Supreme Court in *Kelly* because the videotape consisted of ordinary still photographs that were unaccompanied by music or other video techniques that enhanced the emotion of the presentation. To the extent that petitioner asks this Court to review this case in order to set strict limits on the admissibility of victim impact evidence, review is inappropriate because the victim impact evidence in this case was neither dramatic, staged, nor contrived.

II.

CERTIORARI IS NOT WARRANTED BECAUSE THE QUESTION WHETHER A SERIES OF ORDINARY PHOTOGRAPHS OF THE VICTIMS CONSTITUTED UNDULY PREJUDICIAL VICTIM IMPACT EVIDENCE DOES NOT CONCERN AN IMPORTANT QUESTION OF LAW AND IS A FACT-SPECIFIC QUESTION THAT WILL HAVE LITTLE APPLICATION TO OTHER CASES

Certiorari is not warranted to consider whether the victim impact evidence in this case was proper because the determination whether a series of ordinary photographs of the victims played without sound was unduly prejudicial concerned a routine application of settled law. Moreover, the question whether the evidence in this case was unduly prejudicial is a

fact-specific question that will have little application to other cases.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), 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),^{2/} this Court determined that it had been "wrong" when it 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

2. *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).

to the states the decision 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 824-25.

In holding that the decision 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 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 *Barefoot v. Estelle*, 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 that "[t]he federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair[]'"). 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").

Not only is California law consistent with the due process principles discussed in *Payne*, but the application of those principles in the instant case was routine and proper. The trial court in this case viewed the prosecution's victim impact videotape, determined that the black-and-white and color photographs were relevant, but concluded that the music and narrative comments accompanying the videotape were more prejudicial than probative. Thus, the trial court ordered

that the videotape be played to the jury without sound and that the witness describing the photographs only offer objective comments.

The trial court's ruling was the type of ruling that trial judges make in courtrooms everyday. A judge is often called upon to balance the probative value of evidence against its potential prejudice. See Cal. Evid. Code § 352; Fed. R. Evid. 403; see also *Payne*, 501 U.S. at 831 (O'Connor, concurring) ("Trial courts routinely exclude evidence that is unduly inflammatory"). The fact that the ruling concerned victim impact evidence admitted at the penalty phase of a capital case does not transform the matter into an important question of law. On the contrary, as stated in *Payne*, "[t]here is no reason to treat [victim impact] evidence differently than other relevant evidence is treated." *Id.* at 827.

Moreover, the California Supreme Court's determination that the victim impact evidence in this case was not unduly prejudicial was a routine application of settled law. The California Supreme Court reiterated the settled principle that the federal Constitution bars victim impact evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. (Pet. App. A at 45.) After discussing the precise nature of the victim impact evidence in this case, the

California Supreme Court concluded that the evidence was not unduly emotional or prejudicial. Even if the California Supreme Court's conclusion in this regard was erroneous, which it was not, certiorari would not be warranted. See Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

Furthermore, determining whether the victim impact evidence in this case was properly admitted involves a fact-specific inquiry that will have little relevance to other cases. The question whether victim impact evidence is of such quality that it will have an unduly emotional impact on the jury necessarily concerns an examination of the specific nature of the evidence. Here, for example, the question whether the victim impact evidence was unduly prejudicial requires consideration of the following facts -- that the photographs were unaccompanied by music, that there were few photographs depicting the Bensons in their youth, that there were no photographs depicting the Bensons as infants, that the photographs generally depicted ordinary life events, that many of the photographs were black-and-white, and that the photographs were of average quality in the technological sense. This Court does not grant certiorari "to review

evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Petitioner contends that the California Supreme Court's conclusion regarding the victim impact evidence in this case is in direct conflict with decisions of other jurisdictions. (Pet. at 5.) Petitioner, however, fails to establish that such a conflict exists. Because cases that have found videotaped victim impact evidence to be unduly prejudicial have concerned evidence that is substantially different in nature than the evidence in the instant case, they are not in direct conflict with this case. See, e.g., *Salazar v. State*, 90 S.W.3d 330 (victim impact evidence found to be unduly prejudicial was video containing numerous photographs of victim's infancy and early childhood that was accompanied by dramatic music and was "extraordinary emotional"); *United States v. Sampson*, 335 F. Supp. 2d 166, 191-92 (D. Mass. 2004) (trial court properly excluded memorial video of victim that was close to thirty minutes long, contained over 200 still photographs, and was accompanied by "evocative contemporary music"). Furthermore, even if some jurisdictions have reached contrary conclusions regarding the admissibility of videotaped victim impact evidence, petitioner has not shown that there is a well-developed or recurring national conflict.

Because this case does not present an important question of law, and because further review of this case would likely be limited to its unique facts, certiorari should be denied.

CONCLUSION

For the stated reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Dated: August 14, 2008.

Respectfully submitted,

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