

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL ZAMUDIO, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

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

Petitioner Samuel Zamudio 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, entered on June 11, 2008.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Samuel Zamudio, and respondent, the People of the State of California.

OPINION BELOW

The California Supreme Court issued an opinion in this case on April 21, 2008, reported as *People v. Zamudio*, 43 Cal.4th 327, 181 P.3d 105 (2008). A copy of that

opinion is attached as Appendix A. The opinion was modified and rehearing was denied on June 11, 2008.

JURISDICTION

The California Supreme Court entered its judgment on June 11, 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 and sentenced to death for the capital murder and robbery of seventy-nine-year-old Elmer Benson and his wife, seventy-four-year-old Gladys Benson. CT 900.¹ At the penalty phase of the trial, in addition to the victim impact testimony presented by four members of the victims' family, two daughters and two grandchildren, the prosecution was permitted to play for the jury a video montage of images of Mr. and Mrs. Benson, which had been prepared for the penalty trial and was narrated by one of their two daughters. RT 3106-3124.

Petitioner's objection to the admission of the victim impact videotape was overruled by the trial court. CT 489-501; RT 3087-3092. Petitioner renewed his objection to the admission of the victim impact videotape on direct appeal to the California Supreme Court. That court found there was no prejudicial error in admission of the videotape. *People v. Zamudio*, 43 Cal.4th at 363-368.

¹ "CT" refers to the Clerk's Transcript of the trial, and "RT" refers to the Reporter's Transcript of the trial.

REASONS FOR GRANTING THE WRIT

The California Supreme Court held that the admission at the penalty phase of petitioner's trial of a fourteen-minute videotape prepared and narrated by one of the victims' two daughters, consisting of a montage of 118 still photographs which depicted the victims' lives from their infancy to the time of their deaths some sixty years later, closing with photographs of their graves was not prejudicial error.² The California

² The victim impact videotape was played for the jury stop-action, photograph by photograph, as Linda Bouffard, one of the Bensons' two daughters, described each of the photographs for the jury. With the exception of the very first photograph, which showed the Bensons a few months before their deaths, the vast majority of the photographs were taken many years before their deaths. For example, there were several photographs of the Bensons as very young children. RT 3106-3107. There were photographs of Mr. Benson when he graduated from high school and as a young man in the navy. RT 3106-3107. There were photographs of Mr. Benson on hunting and fishing trips with both family members and friends. RT 3110, 3115. There were photographs of Mrs. Benson graduating from high school and college. RT 3108. There was a photograph of Mrs. Benson with her first husband, who died in 1950. *Id.* There were photographs of the Bensons when they first met in 1958 and when they got married in 1959. RT 3109. There were photographs of the Bensons taken with their late parents. RT 3106-3107, 3110.

The videotape contained many photographs chronicling the Bensons' interactions with both family members and friends over the years. For example, there were numerous photographs of the Bensons raising their three children, Linda, Micki and Tom. RT 3110-3113. There were photographs of the Bensons attending the weddings, birthdays, graduations and anniversaries of various family members and friends. RT 3113, 3114, 3116, 3118, 3121, 3122. There were photographs of the Bensons with their grandchildren. RT 3119, 3120, 3121. There were photographs of Mrs. Benson with members of her bowling league. RT 3109, 3113.

The videotape also contained photographs showing that both Mr. and Mrs. Benson had been honored for community service, Mr. Benson for his work on the Pat Nixon memorial in Artesia, and Mrs. Benson for her work with the P.T.A. in 1976 and with the American Field Service several years later. RT 3114, 3117, 3119.

The final three photographs on the videotape were of the Bensons' grave markers. RT 3124. The first is of Mrs. Benson's grave marker adorned by a single red rose. The inscription
(continued...)

Supreme Court’s decision that this type of evidence – a pictorial tribute spanning the entire lives of the two victims – 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 strict limitations on the type 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 victim impact 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

² (...continued)

on the marker reads, “Mom, you remain in every hearty laugh, nice surprise and reassuring moment of our lives.” *Id.* The second is of Mr. Benson’s grave marker, which is also adorned by a single red rose. The inscription on his marker reads, “Dad, you found and shared treasures in life where no one else noticed them.” The third and final photograph on the video is of the two grave markers together shown from a distance. On each of the grave markers is an identical vase of flowers. RT 3124.

penalty trial in his case fundamentally unfair and unreliable, and the judgment of the California Supreme Court upholding petitioner's death judgment should be vacated.

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. at 827, 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, said 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.³ 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).

The *Payne* Court recognized the authority of states 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 the Court in *Payne*, a capital case involving the murders of a mother and her two-year-old daughter and the attempted murder of the mother’s three-year-old son, was the testimony of the victim’s mother that her grandson missed his mother and baby sister. Based on that

³ 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).

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 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 the victim’s entire life.

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 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 Court of Appeals in *State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 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 (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, 338.⁴ 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: “[T]he 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

⁴ 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. The court vacated defendant’s sentence, and the case was remanded to the trial court for a new hearing on punishment. *Salazar v. State*, 118 S.W.3d 880, 885 (Tex. Ct. App. 2003).

accomplishments of a unique individual are not necessarily admissible in a criminal trial.”

Id. at 335-36.

Before deciding petitioner’s case, the California Supreme Court had echoed the concern expressed by the court in *Salazar*, 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 “Courts must exercise great caution in permitting the 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 *People v. Kelly*, 42 Cal.4th 763, 171 P.3d 548 (2007), which contains *every one* of the aspects deemed problematic in *Prince*. The “videotaped eulogy” admitted in that case was, as Justice Moreno noted in his concurring and dissenting opinion, “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*.” *People v. Kelly*, 42 Cal.4th at 805 (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 victims’ “uniqueness as . . . individual human being[s].” *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 victims in this case were never valueless fungibles. Several witnesses testified at both the guilt and penalty phases of petitioner’s trial concerning the victims, aspects of their lives and their many positive characteristics. For example, Linda Bouffard, one of the victims’ two daughters, testified at the guilt phase that her father was from Chicago, grew up during the Depression, and worked at a lot of different jobs during his lifetime. Bouffard testified that her mother was born on a farm in South Dakota, went to college, and was a bookkeeper. Bouffard described her parents as generous people who lived a

happy and comfortable life together. RT 1880-1882. Micki Downey, the victims' other daughter, testified at the guilt phase that her parents "knew everyone and loved everyone and liked people and had many, many friends." RT 1996. Both Bouffard and Downey also testified at the penalty phase about their parents. RT 3125-3148. Finally, two of the victims' grandchildren testified at the penalty phase about their grandparents. RT 3149-3158.

Nor was the videotape necessary to demonstrate "the impact of the murder on the victim's family." *Payne* 501 U.S. at 827. In their penalty phase testimony, members of the victims' family testified in some detail how the victims' deaths affected them and their families. RT 3125-3148. For example, in addition to the penalty phase testimony of the victims' two daughters, Bouffard and Downey, concerning how their parents' deaths affected them and their families (RT 3125-3148), the victims' grandson, William Bouffard, testified that after his grandparents were murdered, he became very depressed. He testified that he misses his grandparents, especially during the holidays. RT 3150-3153. Melissa Bouffard, another of the victims' grandchildren, testified that after her grandparents were murdered, she did poorly in school, and no longer trusts anyone. She testified that she is afraid of going into a kitchen at night, because that is where her grandmother was found, and she no longer feels safe walking around her neighborhood at night. RT 3155-3158.

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 – necessarily imbues the final product with all the attributes of a eulogy, compared with the more objective factual testimony envisioned by *Payne*. The excessive emotional impact of such evidence led 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).

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 emotions of the jurors, 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 evocative 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).

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 opinion of 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 admitted in petitioner’s case will, however, eliminate the very real risk that the pathos which 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 a Texas case is reversed after the Court of Criminal Appeals 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 California Supreme Court reads *Payne* to allow the use of videotaped life histories.

Since 2005, the California Supreme Court has ruled on the admissibility of victim impact videotapes in four death penalty cases – *Robinson*, *Prince*, *Kelly* and petitioner’s case – 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* 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.’” *People v. Prince*, 40 Cal.4th at 1288, 156 P.3d at 1092.

This Court should grant certiorari to prohibit state courts from permitting the introduction of victim impact videotapes such as the one admitted at the penalty phase of petitioner’s capital trial which contain extensive irrelevant information about details of the victims’ remote past that serves no purpose other than to inflame the passions of the jury.

CONCLUSION

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

Dated: June 12, 2008

Respectfully submitted,

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