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Drawing the Line at Pushing “Play”: Barring Video Montages as Victim Impact Evidence at Capital Sentencing Trials

Alicia N. Harden¹

*Given the current popularity of capital punishment in a crime-ridden society, the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the “victims’ rights” movement, I recognize that today’s decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens. The great tragedy of the decision, however, is the danger that the “hydraulic pressure” of public opinion that Justice Holmes once described,—and that properly influences the deliberations of democratic legislatures—has played a role . . . in [the Court’s] resolution of the constitutional issue involved. Today is a sad day for a great institution.*² —Justice John Paul Stevens

INTRODUCTION: *PEOPLE v. KELLY*³

DURING the penalty phase of Douglas Oliver Kelly’s capital trial for the murder of Sara Weir,⁴ the state introduced a video the victim’s mother, Martha Farwell, created for the trial.⁵ Jurors watched as the video opened with a slide providing Sara’s full name and the years of her life,

¹ JD expected 2011, University of Kentucky; MBA 2007, University of Texas at Dallas; BA 2004, Southern Methodist University. Many thanks to Professor Andrea Dennis for her tireless support and inspiration. Thanks to Professors Richard Underwood and Diane Kraft for their comments and edits on earlier drafts.

² *Payne v. Tennessee*, 501 U.S. 808, 867 (1991) (Stevens, J., dissenting) (citations omitted).

³ *People v. Kelly*, 171 P.3d 548 (Cal. 2007), *cert. denied*, 129 S. Ct. 564 (2008). The companion case to *Kelly* is *People v. Zamudio*, 181 P.3d 105 (Cal. 2008), *cert. denied*, 129 S. Ct. 564 (2008).

⁴ During the guilt phase, the jury found Kelly guilty of first-degree murder based, in part, on the following facts: On September 15, 1993, the body of nineteen-year-old Sara, decomposed and nude, was discovered under the bed of defendant Douglas Oliver Kelly. The State presented evidence that the autopsy revealed Sara died from twenty-nine stab wounds, although the evidence was inconclusive as to whether she had been sexually assaulted. Other physical and testimonial evidence was also introduced implicating Kelly in the murder. *Kelly*, 171 P.3d at 555-56.

⁵ Petition for Writ of Certiorari at 3, *Kelly v. California*, 129 S. Ct. 564 (2008) (No. 07-11073). Other victim impact evidence included testimony from a woman Kelly had raped previously and testimony from the victim’s mother about the impact of Sara’s death on the family. *Kelly*, 171 P.3d at 556-57.

1974-1993.⁶ Slow and melodic music began flowing immediately as Sara's mother intermittently narrated the photos presented.⁷

One picture showed a young Sara as her mother's voice informed the jurors that Sara was sitting up for the first time after having worn a frog-leg splint for months.⁸ Sara was also shown getting dressed for Halloween, a holiday her mother explained was "very exciting" to her, and periodically Sara's mother identified her age with respect to a particular photo.⁹ The video moved chronologically through Sara's life and jurors saw pictures and heard about Sara learning to swim, playing the piano with her grandmother, and spending time with her friends.¹⁰

At one point, Sara's mother identified the soft, slow music as the work of Enya, describing her as one of Sara's favorite artists and the type of music she listened to frequently before her death.¹¹ Throughout the twenty-minute video, the jurors were exposed to important events and special times in Sara's life, including video footage of her riding in a horse competition and singing at school.¹² The video concluded with a picture of Sara's headstone and a video of men on horseback riding in the countryside of southern Alberta, identified on the tape as the land of Sara's people for many generations.¹³ While the jurors watched these last scenes, Sara's mother described the meaning they had to her:

As time goes by, I try very hard not to think of Sara in terms of this terrible crime that we've had to deal with here in the court, but rather think of her in a place like this . . . this is the kind of heaven she seems to belong in.¹⁴

The jury sentenced Kelly to death.¹⁵

In 1991, in *Payne v. Tennessee*, the Supreme Court explicitly approved of the introduction of victim impact evidence¹⁶ in the penalty phases of capital trials.¹⁷ In its 6-3 decision, the Court held that a State might find

6 Videotape: Martha Farwell (1995), <http://www.scotusblog.com/wp-content/uploads/2008/08/kellyvideo.mpg>.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *People v. Kelly*, 171 P.3d 548, 552 (Cal. 2007), *cert. denied*, 129 S. Ct. 564 (2008).

16 Victim impact evidence is not defined by BLACK'S LAW DICTIONARY. A victim impact statement is defined as "[a] statement read into the record during sentencing to inform the judge or jury of the financial, physical, and psychological impact of the crime on the victim and the victim's family." BLACK'S LAW DICTIONARY 1703 (9th ed. 2009).

17 *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("We thus hold that if the State chooses

the evidence “relevant to the jury’s decision as to whether or not the death penalty should be imposed,” and that as a matter of law victim impact evidence should not be treated differently than other types of evidence.¹⁸ The Court’s decision in *Payne*, however, failed to articulate the range of constitutionally permissible forms of victim impact evidence,¹⁹ and scholars describe the standards for admissibility as vague,²⁰ unclear,²¹ and varied.²² As a result of the Court’s lack of direction, lower courts have permitted “wide-ranging evidence” regarding the victim’s family and often do not impose restrictions.²³ Recent technological developments have prompted a new type of victim impact evidence: the victim impact video, or video montage.²⁴ Although there is no legal definition of a victim impact video, scholars have identified common characteristics these videos generally share: a series of photos, often chronological and perhaps interspersed with video, set to music, and displayed on either a courtroom screen or television.²⁵

Challenges to victim impact evidence are grounded in a variety of forms, including evidentiary and constitutional arguments. These challenges have been met with mixed results, especially with respect to the scope and content of video montages.²⁶ Although Kelly appealed his conviction to

to permit the admission of victim impact evidence . . . the Eighth Amendment erects no *per se* bar.”).

18 *Id.* at 827.

19 The Court did note that the evidence should relate to the “emotional impact of the crimes on the victim’s family.” *Id.* at 817.

20 Christine M. Kennedy, Note, *Victim Impact Videos: The New-Wave of Evidence in Capital Sentencing Hearings*, 26 QUINNIPAC L. REV. 1069, 1070 (2008) (“The law governing the admissibility of victim impact evidence is generally quite vague.”).

21 Brian J. Johnson, Note, *The Response to Payne v. Tennessee: Giving the Victim’s Family a Voice in the Capital Sentencing Process*, 30 IND. L. REV. 795, 800 (1997) (“Despite *Payne*’s holding, it did not provide state courts or legislatures with any clear guidelines of its application to existing statutes.”).

22 See Joe Frankel, Comment, *Payne, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency*, 12 N.Y. CITY L. REV. 87, 107-08 (2008) (“What constitutes victim impact evidence varies between jurisdictions because *Payne* does not mandate that states adopt victim impact statutes, nor does it provide guidance to the type of statutes states should adopt.”).

23 John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 270 (2003). The author cites several examples of the extreme content this type of evidence can contain. For instance, with respect to the victim’s family, courts have permitted a victim’s sister to testify that her marriage failed as a result of the murder and relatives have been allowed to testify about miscarriages, heart attacks, and other illnesses. *Id.* at 270-71. Some courts even allow testimony by friends, co-workers, distant relatives, and neighbors concerning the impact of the victim’s death on their life and/or community. *See id.*

24 For the purposes of this Note, the terms will be used interchangeably.

25 See Kennedy, *supra* note 20, at 1078; see also Frankel, *supra* note 22, at 111 (describing “archived” video footage of statements made by the deceased instead of his family).

26 See discussion *infra* Part II.B.

the Supreme Court in 2008, the Court denied certiorari over the dissents of Justices Stevens and Breyer.²⁷ Because a denial of certiorari in and of itself contains no precedential value,²⁸ one cannot read the Court's decision as an approval of the form or content of the video entered against Kelly. As technology improves, these types of issues will appear more frequently, and this Note contends that the Supreme Court should grant certiorari in a victim impact video case not only to provide clarification to lower courts on the forms of appropriate victim impact evidence but also to determine the limits of the content.²⁹ This Note advocates for the adoption of a bright-line rule against video montages as victim impact evidence in capital punishment sentencing trials because victim impact videos result in fundamentally unfair trials, are outside the scope of the Court's holding in *Payne*, and are irrelevant and unduly prejudicial under Federal Rules of Evidence 401 and 403.

Part I of this Note examines the development of victim impact evidence. Specifically, this section provides an overview of *Booth v. Maryland*,³⁰ *South Carolina v. Gathers*,³¹ and *Payne v. Tennessee*.³² Part II briefly discusses the different forms victim impact evidence takes, looking specifically at video montages. This section also provides an overview of caselaw where victim impact videos were admitted or denied and discusses the courts' reasoning behind the decisions in light of factors significant to videos. Part III lays out some of the evidentiary and constitutional challenges against victim impact evidence generally. This section also targets the challenges specifically to video montages. Part IV demonstrates how a bright-line rule barring video montages is the best solution to preventing fundamentally unfair trials and solving the lower courts' inconsistent applications of *Payne*. This Part further argues that a bright-line rule is necessary due to the irrelevant and unduly prejudicial nature of the evidence and the impermissible arbitrariness it introduces into the capital sentencing process.

27 *Kelly v. California*, 129 S. Ct. 564, 564, 567 (2008).

28 *See Maryland v. Balt. Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., dissenting from denial of certiorari) (“[A]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.”).

29 Some states allow for the introduction of victim impact evidence at non-capital trials. These proceedings exceed the scope of this Note and will not be discussed.

30 *Booth v. Maryland*, 482 U.S. 496 (1987).

31 *South Carolina v. Gathers*, 490 U.S. 805 (1989).

32 *Payne v. Tennessee*, 501 U.S. 808 (1991).

I. HISTORICAL DEVELOPMENT OF VICTIM IMPACT EVIDENCE

Historically, victim impact evidence was not admissible evidence at capital sentencing hearings. Within a four-year span, the Supreme Court twice rejected various forms of victim impact evidence before finally recognizing it as constitutionally permissible. The following section details the Supreme Court’s treatment of victim impact evidence.

A. *Booth v. Maryland*

John Booth was sentenced to death after a jury found him guilty of robbing and murdering Irvin and Rose Bronstein.³³ In accordance with a Maryland statute, the presentence report contained victim impact statements describing the effect of the crime on the victim’s family.³⁴ The statements contained within the report were gathered through interviews with family members, and the comments alluded to both personal characteristics of the victims and explanations of how their deaths affected the family members.³⁵ The report concluded that the murders were “a shocking, painful, and devastating memory” that “permeate[d] every aspect” of the surviving family members’ lives.³⁶ Over defense counsel’s objections, the Maryland trial court admitted the victim impact statements as part of the relevant evidence the jury could use in its sentencing decision.³⁷ Booth was

33 *Booth*, 482 U.S. at 497–98, 501.

34 *Id.* at 498. The Maryland state statute required a victim impact statement in all felony cases to contain the following elements:

- (i) Identify the victim of the offense; (ii) Itemize any economic loss suffered by the victim as a result of the offense; (iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence; (iv) Describe any change in the victim’s personal welfare or familial relationships as a result of the offense; (v) Identify any request for psychological services initiated by the victim or the victim’s family as a result of the offense; and (vi) Contain any other information related to the impact of the offense upon the victim or the victim’s family that the trial court requires.

Id. at 498–99 (citation omitted).

35 *Id.* at 499. The victims’ son stated that he “suffer[ed] from lack of sleep and depression, and [wa]s ‘fearful for the first time in his life.’” *Id.* at 500. He also stated that he believed his parents had been “‘butchered like animals.’” *Id.* The victims’ daughter stated that she was no longer able to “watch violent movies or look at kitchen knives without being reminded of the murders.” *Id.* The granddaughter stated that another family member’s wedding had been ruined as a result of the murders and that the family member was unable to go on her honeymoon so she could attend the victims’ funeral. *Id.* at 500.

36 *Id.* at 500.

37 *Id.* at 500–01. However, the prosecution stipulated to simply having the statements read aloud instead of calling the family members to testify live. *Id.* at 501.

sentenced to death for the murder of Mr. Bronstein and life imprisonment for the death of Mrs. Bronstein.³⁸ On automatic appeal, the Maryland Court of Appeals affirmed the convictions and the sentences.³⁹

The Supreme Court granted certiorari to address the question of whether the Eighth Amendment prohibited a capital sentencing jury from considering victim impact evidence. In a 5-4 decision, the Court reversed Booth's capital sentence and remanded to the Maryland Court of Appeals.⁴⁰ Writing for the majority, Justice Powell identified two types of information the victim impact statement encompassed: first, unique character traits of the victims as well as the impact of the crimes on the surviving family members, and second, surviving family members' opinions of the crime.⁴¹ In the eyes of the majority, both types of evidence were "irrelevant" and their admission created "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."⁴²

With respect to the first type of evidence, the character traits of the victims and the murder's emotional impact on family members, Powell reasoned that defendants often do not know their victims and thus will have no specific knowledge of the victim's characteristics.⁴³ Furthermore, most killers do not select their victims based on potential secondary effects on surviving family members.⁴⁴ According to the Court, the jury could wrongfully attribute knowledge of the victim's characteristics as part of the defendant's decision to kill, thus distracting the jury from the "defendant's background and record, and the circumstances of the crime."⁴⁵ The majority also raised the problem of rebuttal. Because of its nature, victim impact evidence itself is not easily rebutted.⁴⁶ Even if the defendant could rebut the victim impact evidence introduced, the evidence the defendant might use as rebuttal evidence concerning the victim's character, popularity, or familial relationships would result in an impermissible "mini-trial" of the victim.⁴⁷

38 *Id.*

39 *Id.*

40 *Id.* at 496, 509.

41 *Id.* at 502.

42 *Id.* at 502-03.

43 *Id.* at 504.

44 *Id.*

45 *Id.* at 505. The Court has held that "a jury must make an '*individualized* determination' whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime.'" *Id.* at 502 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

46 *Id.* at 506-07. ("Presumably the defendant would have the right to cross-examine the declarants, but he rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered.")

47 *Id.* at 507.

The second type of evidence contained within the report, the victim’s family members’ opinions of the crime, was problematic because it only inflamed the jury and diverted its attention from the crime’s relevant evidence and the defendant.⁴⁸ Because capital sentencing decisions require reasoned decision-making, the evidence was inconsistent with the jury’s ability to perform its duties.⁴⁹ Recognizing that death is a unique punishment, the Court concluded that the introduction of the victim impact statements at Booth’s sentencing trial violated the Eighth Amendment.⁵⁰

B. *South Carolina v. Gathers*

Two years after its decision in *Booth*, the Court considered a third type of victim impact evidence: prosecutorial argument on personal characteristics of the victim inferred from the victim’s possessions.⁵¹ *Gathers* was sentenced to death for the murder of Richard Haynes, a stranger he met in the park.⁵² Haynes possessed no formal religious training, but “considered himself a preacher, referring to himself as ‘Reverend Minister.’”⁵³ The religious paraphernalia discovered at the crime scene⁵⁴ was introduced during the guilt phase of the trial without objection and during sentencing the prosecution did not submit new evidence.⁵⁵ During closing arguments at the trial’s sentencing phase, however, the prosecutor spoke extensively about the content of Haynes’ religious items, in particular “‘The Game Guy’s Prayer’” tract.⁵⁶ The prosecutor also commented at length about Haynes’s character, informing his rhetoric solely from the presence of the religious items found on Haynes.⁵⁷

⁴⁸ *Id.* at 508.

⁴⁹ *Id.* at 508-09 (“[A]ny decision to impose the death sentence must ‘be, and appear to be, based on reason rather than caprice or emotion.’” (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (Stevens, J.) (plurality opinion))).

⁵⁰ *Id.* at 509 n.12 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

⁵¹ See *South Carolina v. Gathers*, 490 U.S. 805, 805 (1989).

⁵² *Id.* at 806-07.

⁵³ *Id.* at 807.

⁵⁴ Haynes usually carried several bags with him containing religiously significant articles. This included “two Bibles, rosary beads, plastic statues, olive oil, and religious tracts. Among these items, on the evening of his murder, was a tract entitled ‘The Game Guy’s Prayer,’ . . . extoll[ing] the virtues of the good sport.” *Id.*

⁵⁵ *Id.* at 807-08.

⁵⁶ *Id.* at 808-10.

⁵⁷ *Id.* One notable passage is as follows:

You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went

On appeal, the Supreme Court of South Carolina reversed Gathers's death sentence on grounds that the prosecutor's remarks "'conveyed the suggestion [that Gathers] deserved a death sentence because the victim was a religious man and a registered voter.'"⁵⁸ Writing for a 5-4 majority of the Supreme Court, Justice Brennan affirmed South Carolina's reversal, holding that the prosecutor's argument went beyond the limits of the evidence's relevancy and that the content of the religious items were especially irrelevant given the lack of evidence that the defendant had actually read the materials.⁵⁹ Thus, because the content did not directly relate to the circumstances of the crime, the statements were irrelevant and thus inadmissible.⁶⁰

C. Payne v. Tennessee

The Supreme Court was again presented with the issue of victim impact evidence in *Payne v. Tennessee*, just four years after its decision in *Booth* and only two years after its decision in *Gathers*. Pervis Tyrone Payne was convicted of two counts of first-degree murder for murdering a mother and her daughter and was sentenced to death for both.⁶¹ At the sentencing phase of his trial, the victims' mother/grandmother testified that her surviving grandson did not understand why his mother and sister did not come home and that he cried for both.⁶² The prosecutor also spoke at length in his closing argument about the surviving child's experience, encouraging the jurors to sentence Payne to death to help vindicate the

through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.

Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.

Id. at 809-10.

⁵⁸ *Id.* at 810 (quoting *State v. Gathers*, 369 S.E.2d 140, 144 (S.C. 1988)).

⁵⁹ *Id.* at 805, 811-12. ("The testimony at trial was that Gathers went through Haynes's bags very quickly, 'just throwing [his belongings] everywhere, looking through things,' and that he spent not more than a minute doing so." (citation omitted)).

⁶⁰ *Id.* at 812.

⁶¹ *Payne v. Tennessee*, 501 U.S. 808, 811 (1991). Payne was also convicted of one count of assault with intent to commit murder in the first degree for his attack on the victims' son/brother and received an additional sentence of thirty years in prison for this offense. *Id.*

⁶² *Id.* at 814-15. ("He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.").

loss of his mother and sister.⁶³ In rebuttal to Payne’s closing argument, the prosecutor again directed the jury’s attention to the victims and the “especially cruel, heinous, and atrocious . . . burden” of loss the son would have to carry with him “forever.”⁶⁴

On appeal, the Tennessee Supreme Court affirmed the convictions and the Supreme Court granted certiorari to revisit its holdings in *Booth* and *Gathers* that the Eighth Amendment erects a per se bar to victim impact evidence.⁶⁵ Writing for a 6-3 Court, Chief Justice Rehnquist overruled *Booth* and *Gathers* and held that the Eighth Amendment did not, as a matter of law, prohibit the jury from considering evidence concerning the victim and the impact of the victim’s death on the victim’s family members.⁶⁶ The Court noted that its prior rulings reflected an attitude that the only evidence relevant to a capital sentencing decision is that of the defendant’s “blameworthiness,” and it clarified that an “assessment of [the] harm caused by the defendant” is an important concern for determinations of both guilt and sentencing.⁶⁷ The Court determined that the concern first raised in *Booth* over a “mini-trial” of the victim’s character was somewhat inconsequential because the evidence often comes out during the guilt phase anyway.⁶⁸ Justice Rehnquist also analyzed the purpose of the evidence, finding that it was not introduced to show that one killer deserves the death penalty over another, but to show “each victim’s ‘uniqueness as an individual human being,’ whatever the jury might think the loss to the community resulting from his death might be.”⁶⁹ Finally, the Court noted the “traditional latitude” states have in determining how to punish murderers.⁷⁰

In light of this reasoning, the Court concluded that states could allow juries to consider the harm caused by the defendant in their sentencing decisions.⁷¹ In *Payne*, Rehnquist found the testimony was not related to the

63 *See id.* at 815.

64 *Id.* at 816.

65 *Id.* at 816-17. The Tennessee Supreme Court stated that although the grandmother’s testimony might be “technically irrelevant,” its admission “did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt.” *Id.* (quoting *State v. Payne*, 791 S.W.2d 10, 18 (Tenn. 1990)).

66 *Id.* at 827.

67 *Id.* at 819. Rehnquist noted that the principles underlying sentencing have varied over time, but that discretionary punishments do factor in the degree of harm caused by the defendant. *Id.* at 820 (citing STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 56 (1988)).

68 *Id.* at 823.

69 *Id.*

70 *Id.* at 824 (citing *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990)).

71 *Id.* at 825 (“By turning the victim into a ‘faceless stranger at the penalty phase of a capital trial,’ *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punish-

brutal nature of Payne's crimes, and it only served to illustrate the lasting, harmful effects of the murders.⁷² Although acknowledging the role of stare decisis, the Court nevertheless held that its prior decisions were decided on narrow margins over "spirited dissents," and that the rulings had been questioned by later decisions and "ha[d] defied consistent application by the lower courts."⁷³

II. VIDEO MONTAGES AS VICTIM IMPACT EVIDENCE

A. *Breaking Down the Video*

Although victim impact videos do not have an exact legal definition, basic characteristics stand out as key factors in a court's analysis of the admissibility of a particular video: length, type of photographs, music, and availability of other types of victim impact evidence.⁷⁴ Another (increasingly important) factor is the presence of video feed.⁷⁵

According to *Payne*, the purpose of victim impact evidence is to "offer[] 'a quick glimpse of the life' that a defendant 'chose to extinguish.'"⁷⁶ Although courts frequently rely on this phrase in evaluating the admissibility of particular victim impact evidence, judges are otherwise left to consider Federal Rules of Evidence 401 and 403 and comparable state law to see if a particular piece of evidence is admissible.⁷⁷ The following section seeks to demonstrate how courts examine individual factors in their analyses.

ment for a first-degree murder." (citing *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O'Connor, J., dissenting))).

⁷² *Id.* at 826.

⁷³ *Id.* at 828-30.

⁷⁴ See *Kennedy*, *supra* note 20, at 1087 ("Courts appear to employ a multi-factor balancing test in which each element of the video length, number of photographs, and music, as well as the other available evidence, are each but one factor to be considered in determining admissibility as a whole.").

⁷⁵ See *Kelly v. California*, 129 S. Ct. 564, 567 (2008) (Stevens, J., respecting the denial of certiorari) ("Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when victim impact evidence is enhanced with music, photographs or video footage, the risk of unfair prejudice quickly becomes overwhelming."); see also *People v. Kelly*, 171 P.3d 548, 571-72 (Cal. 2007), *cert. denied*, 129 S. Ct. 564 (2008) (discussing the relevancy of the video feed of Alberta, Canada); *People v. Prince*, 156 P.3d 1015, 1091-94 (Cal. 2007) (discussing the characteristics of a video-taped interview of the victim introduced as victim impact evidence).

⁷⁶ *Payne*, 501 U.S. at 822 (citing *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

⁷⁷ See *Kennedy*, *supra* note 20, at 1081-87.

*B. Breaking Down the Courts' Opinions*⁷⁸

1. *People v. Bramit*.—In *People v. Bramit*, the Supreme Court of California considered three types of victim impact evidence admitted during sentencing: testimony of the victim's family, a videotape, and testimony of victims from an uncharged crime.⁷⁹ The court easily disposed of defendant's appeal on the testimony, finding that in both instances it was relevant and admissible.⁸⁰ The video at issue was an arrangement of less than twenty still photographs of the victim, his family, and his home, most of which the court found to be “snapshots of very poor quality.”⁸¹ Noting the need for caution in admitting videotapes,⁸² especially those of length,⁸³ the court concluded that it had admitted much longer videos, including the twenty-minute video from the trial of *People v. Kelly*,⁸⁴ and that the tape's probative value outweighed any prejudicial impact potentially resulting from the three-minute video.⁸⁵

The court further noted that all of the video's photos had been admitted as evidence during the guilt phase absent defendant's objection. Thus, the court characterized the video as “merely . . . evidence in a different medium, unenhanced by any soundtrack or commentary.”⁸⁶ Citing its own decision in *People v. Kelly*, the court noted that the video served the underlying purpose of victim impact evidence by “‘humaniz[ing]’ the victim.”⁸⁷

2. *People v. Dykes*.—The California Supreme Court again considered the admissibility of a victim video in 2009. In *People v. Dykes*, Dykes appealed his death sentence on seven grounds, one of which was the admissibility of victim impact evidence including testimony of four individuals, still

78 The cases discussed are not the only cases involving victim impact video montages; they are examples merely to demonstrate how the courts have treated the evidence.

79 *People v. Bramit*, 210 P.3d 1171, 1186-88 (Cal. 2009).

80 *Id.* at 1186-87.

81 *Id.* at 1187.

82 *Id.* (citing *People v. Kelly*, 171 P.3d 548, 571 (Cal. 2007), *cert. denied*, 129 S. Ct. 564 (2008)).

83 *Id.* (citing *People v. Prince*, 156 P.3d 1015, 1093 (Cal. 2007), *cert. denied*, 552 U.S. 1106 (2008)).

84 *Id.* (citing *People v. Kelly*, 171 P.3d 548, 570, 572 (Cal. 2007), *cert. denied*, 129 S. Ct. 564 (2008) (admitting a twenty-minute video)); *see also* *People v. Zamudio*, 181 P.3d 105, 137 (Cal. 2008), *cert. denied*, 129 S. Ct. 564 (2008) (allowing the admission of a fourteen-minute video); *People v. Prince*, 156 P.3d 1015, 1091, 1094 (Cal. 2007), *cert. denied*, 552 U.S. 1106 (2008) (allowing the admission of a twenty-five minute video)).

85 *Bramit*, 210 P.3d at 1187.

86 *Id.*

87 *Id.* (citing *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007), *cert. denied*, 129 S. Ct. 564 (2008)).

photographs, and a video.⁸⁸ Dykes claimed that the prejudicial nature of the evidence deprived him of due process, resulting in an arbitrarily determined sentence.⁸⁹ Unsurprisingly, the court found no issues with the admissibility of both the testimony and still photographs, dedicating the weight of its analysis to the video.⁹⁰

The eight-minute video depicted the victim and his family enjoying a trip to Disneyland.⁹¹ Dykes argued that the video was inflammatory and highly prejudicial because it showed a happy young child with his family, thus going beyond *Payne*'s contemplation of a "quick glimpse."⁹² At the outset of its analysis, the court noted the lack of a bright-line rule regarding the admissibility of video montages as victim impact evidence.⁹³ Looking to both *Payne* and its own decision in *People v. Edwards*⁹⁴ for guidance, the court deemed the tape an "awkwardly shot 'home movie'" lacking the elements generally designed to stir up emotions.⁹⁵ The court held that the video was "entirely devoid of drama," only depicting "factual and . . . real events."⁹⁶ Thus, the tape was admissible and did not result in an arbitrary application of the death penalty.

3. *State v. Leon*.—In *State v. Leon*, the defendant challenged the admission of a four-and-one-half-minute video as inadmissible under the Idaho Constitution, claiming that it was not a "statement" and thus outside the scope of the victims' rights as contemplated by the state.⁹⁷ The Idaho Court

88 *People v. Dykes*, 209 P.3d 1, 44-45 (Cal. 2009).

89 *Id.* at 44.

90 *Id.* at 45-47.

91 *Id.* at 47 ("The videotape began with a clip of Lance having climbed up a tree. It then portrayed Lance spending time with family members. The tape included parts of the drive to Southern California and displayed the family interacting in a hotel room. The videotape occasionally focused on Lance, who often is smiling or making amusing gestures to the camera, but it also included footage of other family members.").

92 *Id.*

93 *Id.* at 48.

94 *Id.* ("[T]he prosecution may 'not introduce irrelevant or inflammatory material' that 'diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" (quoting *People v. Edwards*, 819 P.2d 436, 467 (Cal. 1991))).

95 *Dykes*, 209 P.3d at 48 ("The videotape does not constitute a memorial, tribute, or eulogy; it does not contain staged or contrived elements, music, visual techniques designed to generate emotion, or background narration; it does not convey any sense of outrage or call for vengeance or sympathy . . .").

96 *Id.*

97 *State v. Leon*, 132 P.3d 462, 464-65 (Idaho Ct. App. 2006). The Idaho Constitution gives a crime victim the ability "[t]o be heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration or release of the defendant, unless manifest injustice would result." IDAHO CONST. art I, § 22, cl. 6. The IDAHO CODE provides that if the crime is a homicide, the right extends to the victim's family. IDAHO CODE ANN. § 19-5306(3) (2007).

of Appeals determined that a video qualifies as a means to be “heard” and held that videos and photographs in and of themselves were admissible as constitutional victim impact evidence.⁹⁸ The court further stated, however, that some videos or photos could be so inflammatory that “manifest injustice” would result from their admission.⁹⁹

The court upheld the admission of the video, finding that it showed the victim with her family and conveyed personal characteristics of the victim.¹⁰⁰ Furthermore, the video showed, to some extent, the loss suffered by the victim’s surviving children who were too young to testify or offer a statement to be read.¹⁰¹ The court found that the musical track accompanying the video, although not a valid exercise of victims’ rights guaranteed under the Idaho constitution, did not inflame the jury or amount to manifest injustice.¹⁰² The video’s length also did not present an obstacle to admission, meeting *Payne*’s standard of a “quick glimpse of the life petitioner chose to extinguish.”¹⁰³ Consequently, the video was upheld as a valid exercise of the victim’s constitutional rights.¹⁰⁴

4. *United States v. Sampson*.—In *United States v. Sampson*, the defendant was sentenced to death under the Federal Death Penalty Act,¹⁰⁵ which allows for the introduction of victim impact evidence in the form of testimony or a statement identifying the victim and the loss to the victim’s family.¹⁰⁶ The trial court, while cognizant of its responsibility to ensure that admitted evidence is not unduly prejudicial and does not deny due process,¹⁰⁷ admitted the testimony of six witnesses but denied the admission of a video memorial of one of the victims as victim impact evidence.¹⁰⁸

98 *Leon*, 132 P.3d at 466-67.

99 *Id.* at 467.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* (citing *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) (O’Connor, J., concurring)).

104 *Id.*

105 *United States v. Sampson*, 335 F. Supp. 2d 166, 173-74 (D. Mass. 2004).

106 Federal Death Penalty Act, 18 U.S.C. § 3593(c) (2006).

107 *Sampson*, 335 F. Supp. 2d at 187. The court stated:

The first check is the trial court’s statutory responsibility, *see* 18 U.S.C. § 3593(c), to decide if the probative value of a particular piece of evidence is outweighed by the danger of unfair prejudice, in the form of inflaming the jury’s passions

The second check is the responsibility of the court to secure the defendant’s right to due process by viewing the proffered evidence in the context of all other evidence in the case. . . .

Id.

108 *Id.* at 189, 191.

The proposed video was nearly thirty minutes long, was set to “poignant music,” and was comprised of pictures showing the victim “with family, friends and religious figures.”¹⁰⁹ The trial court found that even without the music the video would have surpassed the “quick glimpse” standard from *Payne* and would have inflamed the jury’s passions.¹¹⁰ The court noted that the video, originally created for the victim’s memorial service, was “fitting and lovely for its original, intended purpose” but that it was not constitutionally permissible victim-impact evidence.¹¹¹

5. *Salazar v. State*.—In *Salazar v. State*, the defendant challenged the admission of a seventeen-minute video, consisting of 140 photos, arranged chronologically, and set to the music of Enya and Celine Dion’s “My Heart Will Go On” from the movie *Titanic*.¹¹² Over half of the photos showed the victim as an infant with other family members, and later photos showed the victim as a young athlete with friends and a prom date. Furthermore, the music was “keyed” to the video’s pace and to particular photographs.¹¹³ The trial court did not review the video prior to admitting it and also overruled defendant’s objection to review it prior to admission.¹¹⁴

On appeal, the Texas Court of Criminal Appeals characterized the video as a “masterful portrait of a baby becoming a young man” and “extraordinarily emotional.”¹¹⁵ While recognizing the holding of *Payne*, the court ultimately held that the sentencing phase of a criminal trial is not a substitute for a memorial service and that victim impact evidence “may become unfairly prejudicial through sheer volume.”¹¹⁶ In weighing the factors required for admission, the court found that the video’s probative value was very low as compared to a high risk of unfair prejudice:

Nearly half of the photographs showed Jonathon Bishop as an infant, toddler or small child, but appellant murdered an adult, not a child. He extinguished Jonathon Bishop’s future, not his past. The probative value of the vast majority of these “infant-growing-into-youth” photographs is *de minimis*. However, their prejudicial effect is enormous because the implicit suggestion is that appellant murdered this angelic infant; he killed this laughing, light-hearted child; he snuffed out the life of the first-grade soccer player and of the young boy hugging his blond puppy dog. The danger of unconsciously misleading the jury is high. While the probative value of

¹⁰⁹ *Id.* at 192.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 193 n.12.

¹¹² *Salazar v. State*, 90 S.W.3d 330, 333 (Tex. Crim. App. 2002).

¹¹³ *Id.* at 334.

¹¹⁴ *Id.* at 333.

¹¹⁵ *Id.* at 334.

¹¹⁶ *Id.* at 335-36 (quoting *Mosley v. State*, 983 S.W.2d 249, 262-63 (Tex. Crim. App. 1998)).

one or two photographs of an adult murder victim’s childhood might not be substantially outweighed by the risk of unfair prejudice, what the State accurately characterizes as a “seventeen-minute montage” of the victim’s entire life is very prejudicial both because of its “sheer volume,” and because of its undue emphasis upon the adult victim’s halcyon childhood.¹¹⁷

Although the court found the video inadmissible, it remanded the case because the intermediate appellate court failed to apply the standard of review correctly.¹¹⁸ On remand, the court of appeals found that the video constituted harmful error and vacated defendant’s sentence for a new sentencing hearing.¹¹⁹

C. Overarching Caselaw Conclusions

The previous sections identified relevant factors in the judicial determination of whether a particular video should be admitted as victim impact evidence and provided specific examples of how courts apply those factors to individual cases. From these examples, two general conclusions can be drawn.

First, victim impact videos are usually admitted, and the video format does not present a problem. Courts frequently cite to Justice O’Connor’s concurrence in *Payne* and find that the video is a “quick glimpse” into the life of the victim. Furthermore, the form of the evidence—the video itself, as opposed to oral testimony or still photographs—does not present a per se bar to its admission. Although the video in *Sampson* was ultimately inadmissible, the court noted that several other courts had permitted the admission of victim impact videos.¹²⁰ In *Leon*, the Court found no reason to limit the introduction of video images or photographs as outside of the victim’s state constitutional rights to be heard because of their medium.¹²¹ Thus, although not a form of evidence contemplated by *Payne*, courts do not find victim impact videos inadmissible solely because of their video format.

Second, courts are generally very lenient in what forms the video can take and how far into the life of the victim it can go. As evidenced above, courts are willing to admit home movies and still photographs set to music in a video form. In *Kelly*, a seemingly extreme case, the video admitted was nearly twenty minutes long, set to soft music, and included video

¹¹⁷ *Id.* at 337.

¹¹⁸ *Id.* at 339.

¹¹⁹ *Salazar v. State*, 118 S.W.3d 880, 885 (Tex. App. 2003).

¹²⁰ *United States v. Sampson*, 335 F. Supp. 2d 166, 191-92; *see also* *People v. Prince*, 156 P.3d 1015, 1092 (Cal. 2007), *cert. denied*, 552 U.S. 1106 (2008) (noting the admission of videos in other courts).

¹²¹ *State v. Leon*, 132 P.3d 462, 466-67 (Idaho Ct. App. 2006).

feed and narration by the victim's mother.¹²² Furthermore, several courts have upheld the admission of videos that were not montages, but rather interviews or documentaries of the victim.¹²³ Although courts frequently note the need for caution in permitting videos to serve as victim impact evidence,¹²⁴ videos are rarely deemed inadmissible.

III. CHALLENGING VICTIM IMPACT EVIDENCE

The following section provides a brief overview of challenges commonly made against victim impact evidence. This section provides the arguments behind the basic challenges, tailored specifically to victim impact videos, and seeks to demonstrate why victim impact videos are usually admitted. Because courts fail to give defendants' challenges against these videos sufficient consideration, however, the final section of this Note advocates for the adoption of a bright-line rule.

A. *Due Process*

On appeal, defendants can challenge admitted victim impact evidence as violating their right to due process guaranteed under the Fourteenth Amendment.¹²⁵ In their concurrences in *Payne*, Justices O'Connor and Souter noted the applicability of the Due Process Clause to victim impact evidence. Justice O'Connor focused on the potentially infectious nature of particular testimony or evidence to render the sentencing decision unfair¹²⁶

¹²² See *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007). While a longer video, also set to moving music, was excluded in *Sampson*, it was not created for trial, but for the victim's memorial service. See *Sampson*, 335 F. Supp. 2d at 193 n.12.

¹²³ See *United States v. Wilson*, 493 F. Supp. 2d 491, 505 (E.D.N.Y. 2007) (admitting a twenty-minute video of the victim answering questions about his job as an undercover detective); *People v. Prince*, 156 P.3d 1015, 1091 (Cal. 2007) (admitting a twenty-five minute video interview with the victim).

¹²⁴ See *Prince*, 156 P.3d at 1093 ("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. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents."); see also *Kelly*, 171 P.3d at 571 ("Trial courts must be very cautious about admitting [victim impact] videotape evidence.").

¹²⁵ For a discussion about how due process should be applied, see Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After Payne v. Tennessee*, 45 STAN. L. REV. 1027, 1030-37 (1993) (arguing for a two-prong due process standard to be applied to victim impact evidence cases).

¹²⁶ *Payne v. Tennessee*, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring) ("If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.").

while Justice Souter opined of “the ‘duty to search for constitutional error with painstaking care,’ an obligation ‘never more exacting than it is in a capital case.’”¹²⁷ When appealing, defendants often emphasize the “limited probative value” of the evidence as contrasted with the “highly emotional and often inflammatory evidence.”¹²⁸ Evidence seeking to prove the “unique” characteristics of the victim (e.g., race, religion, class, wealth, education, social status, etc.) can create situations where the jury makes its sentencing decision based on “improper factors.”¹²⁹

Victim impact videos present strong cases for due process challenges. Without specific guidance on the appropriate limits for video montages, courts are forced to make individual decisions regarding the acceptability of a particular video, and these ad hoc determinations lead to inconsistencies as many arguably irrelevant and inflammatory videos are admitted. While the videos might have enough probative value under *Payne* to make them relevant, the videos are often lengthy and set to emotionally charged music and frequently contain photos and video feed that tug at jurors’ heartstrings.¹³⁰ The compelling emotions that these videos evoke can lead to fundamentally unfair sentencing proceedings, resulting in violations of the defendant’s right to due process. Due process challenges, however, are rarely successful. The defendant’s due process challenge failed in *Dykes*, and in *Kelly*, the court determined that any due process “error was harmless beyond a reasonable doubt.”¹³¹ Thus, despite its potential, a due process challenge of a victim impact video montage appears to be a weak argument for a defendant’s appeal because courts ignore the enormous emotionally prejudicial impact these videos present.

¹²⁷ *Payne*, 501 U.S. at 837 (Souter, J., concurring) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)).

¹²⁸ Ellen Kreitzberg, *Capital Cases*, CHAMPION, Jan./Feb. 1998, at 31, 34.

¹²⁹ *Id.* (“[W]hen the jury hears this information they become more likely to base their decision to impose death on improper factors; an emotional response to the family images, a tendency to identify with the similarity between themselves and the victim, or by making a comparative judgment between the victim and the defendant.”).

¹³⁰ See *supra* Part II.B; see also Petition for Writ of Certiorari, *supra* note 5, at 14 (“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.” (citing *California v. Brown*, 479 U.S. 538, 545-46 (1987) (O’Connor, J., concurring))).

¹³¹ *People v. Kelly*, 171 P.3d 548, 572 (Cal. 2007) (citing *People v. Gonzalez*, 135 P.3d 649 (Cal. 2006)), *cert. denied*, 129 S. Ct. 564 (2008).

B. Eighth Amendment

After being sentenced to death, defendants can also challenge the admission of victim impact evidence as resulting in an arbitrary and capricious application of the death penalty. *Payne* did not provide prosecutors with an automatic right to introduce victim impact evidence; instead, the Court ruled that the Eighth Amendment did not draw a per se bar to its admission.¹³² Therefore, the Court left open the possibility for an Eighth Amendment violation.¹³³ Such an appeal is based on how jurors' emotional reactions to the video precluded them from meaningfully considering the individual characteristics of the defendant when deciding his sentence.¹³⁴

In *People v. Prince*, the California Supreme Court stated that if a trial court admits a video montage, it "must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion."¹³⁵ How much emotion is appropriate in the courtroom has received considerable scholarly attention in recent years,¹³⁶ but the standard for victim impact evidence set by the Court in *Payne* controls: a verdict must be based on deliberation, not inflamed passion.¹³⁷ While one scholar has deemed all victim impact evidence inherently emotional,¹³⁸ a video montage is arguably more emotionally charged than oral testimony, written statements, or still photographs. Melodic music, the human interaction displayed in video feed, and voice-over narration accompanying the photographs contribute collectively to the emotional response of jurors. These factors are compounded in lengthier videos and serve only to intensify an "excessively emotional" decision making process.¹³⁹

Recent studies, including mock juror studies and one study looking at actual jury sentencing patterns in California, demonstrate that victim impact statements have "an overall small but consistent effect . . . in increasing the likelihood of death sentences."¹⁴⁰ Thus, even though

¹³² *Payne*, 501 U.S. at 827.

¹³³ Kreitzberg, *supra* note 128, at 35.

¹³⁴ *Id.*

¹³⁵ *People v. Prince*, 156 P.3d 1015, 1093 (Cal. 2007), *cert. denied*, 552 U.S. 1106 (2008).

¹³⁶ See Kennedy, *supra* note 20, at 1094-98 (discussing the rise in scholarship of emotion in the legal setting).

¹³⁷ See *Payne*, 501 U.S. at 836 (Souter, J., concurring).

¹³⁸ See Frankel, *supra* note 22, at 120.

¹³⁹ Kennedy, *supra* note 20, at 1099.

¹⁴⁰ Jeremy A. Blumenthal, *Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements*, 46 AM. CRIM. L. REV. 107, 110 (2009); see also James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 9 (1995) (finding that roughly half of mock jurors presented with victim impact evidence voted to sentence the defendant to death compared to the twenty percent who did not read the victim impact statements and voted for death). *But see* Brooke Butler, *The Role of Death Qualification in Venirepersons' Susceptibility to Victim Impact Statements*, PSYCHOL. CRIM.

jurors may not visibly react in an emotional way, studies show that they are psychologically influenced by victim impact evidence. Presenting this evidence in video form compounds the problem by allowing jurors to relate more intimately to the victim and his or her emotions.¹⁴¹ Furthermore, when musical accompaniment is added, the effect of the visual images is exacerbated; particular songs can arouse emotional memories in jurors to the detriment of their rational decision-making capability.¹⁴² All of this suggests that courts should, at a minimum, very closely analyze the video for emotional effect and, if admitted, monitor jurors' reactions.

Courts routinely reject Eighth Amendment challenges, however. In *Prince*, the court noted that jurors were visibly sad during the viewing of the video, but that their responses were not emotionally heightened as compared to the oral testimony from the victims' families.¹⁴³ Finding a lack of crying or any appearance of jurors being emotionally overwrought, the court denied the defendant's Eighth Amendment challenge.¹⁴⁴ By focusing solely on the absence of outward displays of emotion, courts ignore the significant research indicating that jurors are emotionally impacted by victim impact evidence, thus increasing the likelihood of an Eighth Amendment violation. Despite the demonstrated emotional effect on jurors, a video montage appeal based on juror arbitrariness is unlikely to be successful.

C. *Balancing Federal Rules of Evidence 401 and 403*

For evidence to be admissible, the Federal Rules of Evidence require that proffered evidence be (1) relevant¹⁴⁵ and (2) not present a risk of undue prejudice.¹⁴⁶ Relevance, defined as “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

& L., April 2008, at 133, 140 (finding that victim impact evidence has no significant effect on juror sentencing); Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 341(2003) (arguing a lack of effect of victim impact evidence); Mila Green McGowan & Bryan Myers, *Who is the Victim Anyway? The Effects of Bystander Victim Impact Statements on Mock Juror Sentencing Decisions*, 19 VIOLENCE & VICTIMS 357, 368 (2004) (reporting no effect on sentencing decisions when comparing bystander victim impact statements with “typical” victim impact statements).

141 See Kennedy, *supra* note 20, at 1100-01 (“[T]hey feel as though they are a part of the action with the victim, and thus they share the emotion of the persons on the screen; they feel the happiness from these life experiences and, therefore, sadness for the victim, who has lost forever the chance to experience such things.”).

142 *Id.* at 1101-03.

143 *People v. Prince*, 156 P.3d 1015, 1094 (Cal. 2007), *cert. denied*, 552 U.S. 1106 (2008).

144 *Id.*

145 FED. R. EVID. 401.

146 FED. R. EVID. 403.

evidence," is a very low standard and favors admission of evidence.¹⁴⁷ Admission is not automatic, however, as judges must balance the evidence's probative value against the risk of "unfair prejudice" and exclude the evidence if the relevance is "substantially outweighed by the danger."¹⁴⁸

1. *Relevance*.—Justice Stevens's strong dissent in *Payne* focused significantly on the irrelevancy of victim impact evidence to the capital sentencing decision. Citing prior decisions of the Court that the relevancy of evidence at a capital punishment sentencing must have "some bearing on the defendant's personal responsibility and moral guilt," Stevens argued that if the evidence presented served only to demonstrate a victim's personal characteristics or to show how the crime impacted the victim's family, it was necessarily irrelevant.¹⁴⁹ Thus, if the evidence presents details unforeseeable to the defendant at the time of the crime, it is irrelevant because it fails to show the defendant's culpability for that particular crime.¹⁵⁰

Arguing that the Court lacked precedent for its decision, Stevens opined that victim impact evidence served no purpose but "to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason."¹⁵¹ Accusing the majority of forsaking the rules of evidence and "ventur[ing] into uncharted seas of irrelevance,"¹⁵² Stevens

¹⁴⁷ See FED. R. EVID. 401.

¹⁴⁸ FED. R. EVID. 403.

¹⁴⁹ *Payne v. Tennessee*, 501 U.S. 808, 857 (1991) (Stevens, J., dissenting) (citing *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

¹⁵⁰ *Id.* at 861-62. Justice Stevens wrote:

The majority attempts to justify the admission of victim impact evidence by arguing that "consideration of the harm caused by the crime has been an important factor in the exercise of [sentencing] discretion." This statement is misleading and inaccurate. It is misleading because it is not limited to harm that is foreseeable. It is inaccurate because it fails to differentiate between legislative determinations and judicial sentencing. It is true that an evaluation of the harm caused by different kinds of wrongful conduct is a critical aspect in legislative definitions of offenses and determinations concerning sentencing guidelines. There is a rational correlation between moral culpability and the foreseeable harm caused by criminal conduct. Moreover, in the capital sentencing area, legislative identification of the special aggravating factors that may justify the imposition of the death penalty is entirely appropriate. But the majority cites no authority for the suggestion that unforeseeable and indirect harms to a victim's family are properly considered as aggravating evidence on a case-by-case basis.

Id. (citation omitted).

¹⁵¹ *Id.* at 856.

¹⁵² *Id.* at 859.

foresaw what the empirical data discussed above demonstrates: arbitrary sentences result from otherwise inadmissible and irrelevant evidence.¹⁵³

2. *Unduly Prejudicial*.—None of the videos in the cases detailed above contained any component bearing on the guilt of the individual defendant; they were moving tributes created to show the life of the victim. Thus, when the Court overruled its decisions in *Booth* and *Gathers*, it changed its standard of relevancy in capital sentencing cases and increased the importance of the required balancing test for undue prejudice. Although Justice Stevens argued in dissent that the evidence was irrelevant, thus eliminating the need for balancing the evidence’s probative value against the risk of undue prejudice, the Court’s holding that the evidence was relevant triggered the balancing test.

The Court in *Payne* recognized the potential for the evidence to result in an unfair trial and even conceded that the evidence in *Payne* was potentially unfair.¹⁵⁴ Nevertheless, the Court found that the sentencing party could simultaneously consider the crime’s harm along with the defendant’s mitigating evidence.¹⁵⁵ *Payne*, however, did not contemplate victim impact evidence videos; the evidence before the Court was limited to testimony from family members and arguments from the prosecution.¹⁵⁶ Victim impact videos, because of the characteristics discussed above, present a significantly higher risk of prejudice.¹⁵⁷ They are uninterrupted presentations of evidence frequently accompanied by emotionally charged music and video effects that only serve to create an emotionally charged atmosphere for the jury’s sentencing deliberations. The unique nature of this type of evidence creates a substantial risk of undue prejudice in violation of Rule 403.

3. *Relevance and Prejudice Conclusions*.—Defendants’ relevancy challenges are often losing arguments. In *Prince*, the court considered the relevancy of the evidence in tandem with its potential inflammatory nature and failed to make meaningful findings with regard to relevancy, focusing solely on the “neutral” and “polite” nature of the interview.¹⁵⁸ In *Dykes*, the court

153 *See id.* at 866 (“We should be concerned instead with the cases in which it will make a difference. In those cases, defendants will be sentenced arbitrarily to death on the basis of evidence that would not otherwise be admissible because it is irrelevant to the defendants’ moral culpability. The Constitution’s proscription against the arbitrary imposition of the death penalty must necessarily proscribe the admission of evidence that serves no purpose other than to result in such arbitrary sentences.”).

154 *Id.* at 825 (majority opinion).

155 *Id.* at 826.

156 *See id.*

157 *See supra* Part II.B.

158 *People v. Prince*, 156 P.3d 1015, 1093 (Cal. 2007), *cert. denied*, 552 U.S. 1106 (2008). The court did state that “[i]f not for the circumstances of her subsequent murder,” the video

considered relevancy extensively, eventually finding the video relevant by serving to demonstrate “each victim’s uniqueness as an individual human being” and by allowing the jury insight into the losses suffered by the victim’s family.¹⁵⁹ The court in *Kelly* also considered the relevance of the admitted video and found it highly relevant to the jury’s decision. The video allowed the jury to see the victim’s “fresh-face[] . . . before she died” and provided jurors with an insight into the victim’s demeanor, “something words alone could not capture.”¹⁶⁰ Furthermore, by allowing jurors to observe the victim’s life vis-à-vis the video, jurors knew the victim better than before and thus could have “reasonably . . . and relevantly” concluded that the defendant could have preyed on the victim’s vulnerabilities to commit the crime.¹⁶¹

The rulings in *Prince*, *Dykes*, and *Kelly* go beyond *Payne*’s relevancy rationale as a way to inform the jury about the harm the defendant’s crime caused.¹⁶² By admitting videos detailing the chronology of the victim’s life and the specific nature of the victim’s talents, adventures, and, in some cases, aspirations, courts are permitting jurors to befriend the victim in emotionally charged ways. This type of knowledge does not necessarily translate into juror’s knowledge regarding harm the crime has caused the victim’s family. *Payne* also mandated that victim impact evidence is only meant to capture a brief glimpse of the victim’s uniqueness,¹⁶³ arguably implying that evidence going beyond this standard impermissibly allows the jury to assess the “worthiness of the victim,” not the “blameworthiness of the defendant.”¹⁶⁴ Because courts are willing to uphold the admission of videos like the one in *Kelly* where, on review, parts of the video montage were found to be of questionable relevance,¹⁶⁵ relevancy has been stretched to its extreme and fails to provide defendants with a meaningful method of appeal for the admission of a video montage at capital sentencing.

would have little interest to most outside of the victim’s immediate family. *Id.* While this is arguably a finding of relevance, it fails to specifically identify how the video and its content are particularly relevant to the case especially in light of the court’s characterization of the video.

¹⁵⁹ *People v. Dykes*, 209 P.3d 1, 45-46 (Cal. 2009) (citation omitted) (internal quotation marks omitted).

¹⁶⁰ *People v. Kelly*, 171 P.3d 548, 571 (Cal. 2007).

¹⁶¹ *Id.*

¹⁶² See *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

¹⁶³ See Vesna Jaksic, *Victim Impact Videos Raise Fairness Issue: Defense Lawyers Say Presentations Stir Jurors’ Emotions, Spur Stiffer Penalties; High Court Declines to Hear Issue*, FULTON COUNTY DAILY REPORT, Dec. 29, 2008, available at 2008 WLNR 27108915 (The article quotes senior deputy state public defender Evan Young as stating: “These life chronologies—they really extend from birth to death and are quite extensive. That really goes quite beyond what we believe *Payne* ever envisioned.”); see also *Payne*, 501 U.S. at 823.

¹⁶⁴ Kreitzberg, *supra* note 128, at 32.

¹⁶⁵ *Kelly*, 171 P.3d at 571 (“In some respects, the videotape here might have contained irrelevant aspects.”).

D. Confrontation Clause

The Sixth Amendment allows criminal defendants the right to confront the witnesses against them,¹⁶⁶ and because the capital sentencing phase is an extension of the guilt phase, defendants possess many of the same rights during the sentencing phase, including the right to confront witnesses.¹⁶⁷ By arguing that a video serves as proof of the dreams, desires, and life goals that the victim would have sought to meet through his or her life’s path, a video is being offered for the truth of the matter asserted—this is the embodiment of the victim’s goals. Thus, a video of this type is hearsay.¹⁶⁸ Furthermore, assuming a victim impact video would be considered testimonial under *Crawford v. United States*, it would violate the Confrontation Clause.¹⁶⁹

The defendant in *Prince* argued prior to the video’s admission and on appeal that his Sixth Amendment right to confrontation was violated by the admission of the video against him.¹⁷⁰ The trial court held that the video did not qualify as hearsay because the video merely showed the victim’s demeanor.¹⁷¹ Furthermore, the video was not offered for the truth of the matter asserted because the tape’s content was “secondary”; much of the information revealed in the tape had already been introduced during the guilt phase.¹⁷² On appeal, the California Supreme Court upheld the ruling that the video was non-hearsay because any information contained within was additional to the information introduced through testimony in the guilt phase where the defendant had opportunity for cross-examination.¹⁷³

Although the video in *Prince* was found not to contain extraneous information, videos set to music and containing detailed chronologies of the victim’s life will likely contain information not previously introduced at trial. Thus, the video serves only to inflame the passions of the jury and goes beyond a “brief glimpse” into the victim’s life. A ruling that a victim impact video violates a defendant’s right to confrontation would be consistent with the consensus of the lower courts that the Confrontation Clause does not bar victim impact testimony when it is used only in the capital sentencing decision.¹⁷⁴ Lower courts have only ruled the Confrontation

166 U.S. CONST. amend. VI.

167 *Bullington v. Missouri*, 451 U.S. 430, 446 (1981).

168 Kreitzberg, *supra* note 128, at 59-60. The argument for hearsay is that the relevancy of the video is based on its truth. *Id.* at 60.

169 *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (listing “pretrial statements that declarants would reasonably expect to be used prosecutorially” as an example of testimonial evidence).

170 *People v. Prince*, 156 P.3d 1015, 1091 (Cal. 2007), *cert. denied*, 552 U.S. 1106 (2008).

171 *Id.* at 1094.

172 *Id.*

173 *Id.*

174 *See State v. Johnson*, 284 S.W.3d 561, 584 (Mo. 2009); *United States v. Fields*, 483

Clause inapplicable to victim impact statements and testimony, and they have not directly addressed whether the Clause applies to videos. Unlike oral testimony or a written statement, however, a victim impact video is an artistic creation imbued with emotion and personal touches. There is no effective way to confront the video or its creator.¹⁷⁵

In contrast, the “day-in-the-life” documentaries used in civil cases may be more amenable to cross-examination because the subject of the video is alive. In *Employers Mutual Liability Insurance Co. v. H. C. Mason Associates*, an Alaskan district court admitted a silent, twenty-five minute video of the plaintiff performing daily and other activities.¹⁷⁶ The court overruled the defendant’s hearsay objection, but distinguished between non-hearsay videos and hearsay videos.¹⁷⁷ Finding that the “general conclusion is that motion pictures are not hearsay and are admissible if subject to cross-examination,” the court also found that a “film offered by the plaintiff showing the plaintiff performing tasks to exhibit his disability is like a witness testifying about assertive conduct.”¹⁷⁸ Because the film at issue fell into the latter category, it was ruled hearsay.¹⁷⁹ Nevertheless, the court admitted the video under Federal Rule of Evidence 803(24),¹⁸⁰ the residual or “catchall” exception. The court reasoned that the plaintiff-actor and the verifying witness’s cross-examinations would guarantee truthfulness, and also required that the video be revealed sufficiently in advance of trial to prevent unfair surprise.¹⁸¹ In a capital sentencing hearing, however, the victim cannot testify as to the truthfulness or sincerity of the video montage. There is, essentially, no one to “confront”; this is very different from the living plaintiff in a civil case who is available for cross-examination on the contents of a video. Thus, while the residual clause may save videos in civil cases, it should not be invoked to stretch the limits of criminal evidence.

E. Equal Protection

Victim impact videos create the potential for jurors to draw inappropriate conclusions about the values of the victim’s and the defendant’s life and

F.3d 313, 326 (5th Cir. 2007).

¹⁷⁵ Victim impact videos are distinguishable from the permissible use of one-way closed circuit television testimony. In *Maryland v. Craig*, 497 U.S. 836 (1990), child-abuse victim-witnesses were permitted to testify via one-way circuit television to prevent the trauma of testifying in the courtroom. *Id.* at 841-42. The public policy reasons of preventing trauma to the child do not apply in capital sentencing hearings.

¹⁷⁶ *Emp’rs Mut. Liab. Ins. Co. v. H. C. Mason Assocs.*, 73 F.R.D. 607, 609, 612 (D. Alaska 1977).

¹⁷⁷ *Id.* at 610-11.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 611.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

worth. In *Payne*, the Supreme Court affirmed that victim impact evidence should not permit the jury to engage in comparative worth analysis.¹⁸² Victim impact evidence, however, arguably creates two classes of defendants and victims.¹⁸³ With respect to defendants, the evidence can imply that some defendants kill worthier members of society than other defendants.¹⁸⁴ The evidence can also create victim classes, dividing the line between those victims whose lives were so worthwhile that their death should be avenged by killing the defendant and those victims whose lives were not worthy enough for the death penalty to be imposed.¹⁸⁵ Thus, when elaborate videos like the one in *Kelly* are introduced, jurors will be more inclined to make comparative worth judgments because their attention will be inappropriately focused on the “victim’s race, education, economic status, religion, and ethnicity.”¹⁸⁶ These types of judgments are compounded by the natural human tendency of jurors to relate more closely to and feel more empathy for victims like themselves, potentially resulting in blatant discrimination.¹⁸⁷

In *Leon*, the defendant challenged the video’s admission as a “manifest injustice” under the state statute and therefore inadmissible against him.¹⁸⁸ The defendant argued that a picture of the victim’s children at the gravesite was “particularly damning and prejudicial,” but the court found that smiling, happy children could not have inflamed the jury’s passion beyond rational decision making capabilities.¹⁸⁹ The court’s ruling, however, arguably overlooked a natural tendency of jurors to reflexively think about their own children, grandchildren, and other losses that might lead them to make impermissible value judgments about the defendant killing a woman and leaving her children motherless.

182 *Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (“[V]ictim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hard-working, devoted parent deserves the death penalty, but that the murderer of a reprobate does not.”).

183 Kreitzberg, *supra* note 128, at 35.

184 *Id.*

185 *Id.*

186 *Id.*

187 See Frankel, *supra* note 22, at 119-21; Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 399-402 (1996) (discussing how victim impact evidence can block a juror’s ability to hear the defendant’s story). But see Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 142-43 (Peter Brooks & Paul Gewirtz eds., 1996) (arguing that victim impact evidence statements serve as a vehicle for evidence not otherwise released at trial). For a discussion on the interaction of race and victim impact evidence, see Frankel, *supra* note 22, at 118-22 (arguing that victim impact evidence gives jurors “a tool in which to voice their prejudices”).

188 *State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 2006).

189 *Id.* (internal quotation marks omitted).

The defendant made a comparative worth argument in *Kelly*, contending that the lengthy, emotional video created the potential for jurors to make comparisons between him and the victim.¹⁹⁰ The defendant also argued that the video created an environment for racial prejudices to manifest themselves in the jury's sentencing decision.¹⁹¹ On appeal, the court held that nothing in the record supported either of the defendant's claims.¹⁹² The court's blanket ruling failed to take into account the moving tribute made to "Sarah's people" at the end as the victim's mother described the land where Sarah's ancestors lived. This explicit reference to the victim's Canadian Blackfoot Indian heritage, not otherwise necessarily obvious from the photographs, arguably created the potential for impermissible inferences between the victim and the defendant, an African American.

The financial ability of the victim's family also presents the potential for an equal protection violation because families who can afford to spend more on the video can create better videos that are more creative and more compelling than a simple slide show of photographs. Tom Handley, an assistant public defender in Minnesota, argues that "[better videos] can skew things—a person from a well-to-do family is better able to capture the imagination of the judge because they can put together a video that's inflammatory or very compelling."¹⁹³ The same categories of defendants can be drawn: defendants who have victim impact videos introduced against them may be said to have killed worthier members of society than defendants who do not have videos introduced at trial. Victims whose families are unable to afford videos may be considered less-worthy than those whose families can afford to create a video. One potential danger of this division is that more protections will be provided to the upper-class than to the poor.¹⁹⁴ Another danger is the potential to exacerbate the racial and economic disparities often present in capital cases.¹⁹⁵

F. Short Fallings of Courts to Properly Consider Evidence

Courts repeatedly fail to accurately apply the five challenges discussed above to the unique nature of victim impact evidence videos. They are willing to overlook the inherently emotional nature of these videos and often find that even if one part of the video was admitted in error, it was

¹⁹⁰ *People v. Kelly*, 171 P.3d 548, 572 (Cal. 2007), *cert. denied*, 129 S. Ct. 564 (2008).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Jaksic, *supra* note 163.

¹⁹⁴ Don J. DeBenedictis, *Victim Video: Coming to a Trial Near You?*, FULTON COUNTY DAILY REPORT, Feb. 14, 1997, available at 1997 WLNR 7097078 (The article quotes Stephen B. Bright, a defense attorney, as saying: "It enhances the danger that people from upper-class families will receive greater protection . . . than people in housing projects.").

¹⁹⁵ *Id.*

harmless error, and thus, the defendant was not denied his constitutional right to due process. Courts are also willing to stretch the limits of relevancy and ignore the “brief glimpse” mandate from *Payne*. Even when certain elements like music are deemed irrelevant, they are frequently unwilling to find error. Furthermore, courts are even less likely to seriously entertain confrontation or equal protection arguments.

By failing to meaningfully evaluate defendants’ claims against victim impact videos, courts set a precedent that victim impact videos are generally admissible and ignore the evidence’s unique capacity to emotionally charge the jury and lead to an unconstitutional application of the death penalty. Thus, the “time has come for [the Supreme] Court to provide the courts across the country with a clear rule prohibiting the admission of victim impact videotapes at a capital penalty trial.”¹⁹⁶

IV. DRAWING THE LINE: A BRIGHT-LINE RULE AGAINST VICTIM IMPACT VIDEO MONTAGES

In Kelly’s petition for certiorari, he described the Supreme Court of California’s ruling as marking the “outer limit of decisions” regarding victim impact videos and called upon the Supreme Court to “establish meaningful controls” on the types of permissible victim impact evidence, especially in light of continuing technological advances.¹⁹⁷ Given the unsatisfactory nature of courts’ responses to the various challenges defendants can bring against victim impact videos, a bright-line rule barring the admission of video montages should be adopted. This rule would eliminate the problem of courts admitting overly emotional videos, while respecting the rule of *Payne* and still providing for other forms of permissible victim impact evidence like still photographs, oral testimony, and written statements. This section explores the rationale behind a bright-line rule.

A. *Victim Impact Videos Violate the “Fundamental Fairness” of Due Process*

Payne did not eliminate all constitutional barriers to victim impact evidence.¹⁹⁸ In fact, it recognized the potential for victim impact evidence to create a fundamentally unfair trial and held that the Due Process Clause of the Fourteenth Amendment was the vehicle for relief.¹⁹⁹ Traditionally, fundamental fairness can only be determined *ex post* on the facts of a given case, requiring attorneys to engage in rigorous pre-trial litigation to limit or

¹⁹⁶ Petition for Writ of Certiorari, *supra* note 5, at 20.

¹⁹⁷ *Id.* at 4.

¹⁹⁸ Matthew L. Engle, *Due Process Limitations on Victim Impact Evidence*, 13 *CAP. DEF. J.* 55, 56 (2000).

¹⁹⁹ *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *see also id.* at 831 (O’Connor, J., concurring).

exclude the evidence to prevent the possibility of a due process violation.²⁰⁰ Video montages are inherently different forms of evidence, however, and their unique characteristics justify an *ex ante* rule barring their admission.

1. *The Effect of a Non-traditional Form of Evidence on Cross Examination.*—Courts are split on whether capital defendants have the right to cross-examine adverse witnesses in capital sentencing trials.²⁰¹ When it is available, however, cross-examination has been referred to as the “greatest legal engine ever invented for the discovery of truth.”²⁰² Yet, there is no practical method to cross-examine a video, which begs the question: who should be subjected to the cross-exam? The family members who made or conceptualized the video? The video production company who choose to include specific cinematic effects? The answer is unclear, although the questions demonstrate the fundamental inconsistency of victim impact videos as part of the traditional adversarial system.

As at least one scholar points out, a forceful cross-examination of an impact witness regarding a victim’s flaws is not “the most tactful approach,”²⁰³ and drawing attention to an emotionally compelling video fares no better. Jurors may find a harsh cross-examination of the designers or creators of the moving tributes off-putting. Yet, regardless of tact, a defendant may find it appropriate to question specific cinematic effects and artistic choices. In those jurisdictions where cross-examination is allowed, victim impact videos deny the defendant the ability to exercise their constitutional rights.

2. *The Effect of Cumulative Evidence.*—Federal Rule of Evidence 403 allows a judge to exclude otherwise relevant evidence if the evidence’s probative value is substantially outweighed by “needless presentation of cumulative evidence.”²⁰⁴ Victim impact videos are often little more than visual representations of testimony from the guilt phase of the trial, shown in addition to live victim impact testimony. In *Bramit*, the court noted that many of the twenty still photographs featured in the video montage had already been admitted during the guilt phase of the trial, and thus, the video was simply previously admitted evidence presented “in a different medium.”²⁰⁵ But if the evidence has already been admitted in the guilt

200 Engle, *supra* note 198, at 76.

201 *Compare* Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982) (finding a right to cross-examine during capital sentencing when necessary to ensure the reliability of the witness’s testimony), *with* Bassette v. Thompson, 915 F.2d 932, 939 (4th Cir. 1990) (finding no right to cross-examine in capital sentencing).

202 California v. Green, 399 U.S. 149, 158 (1970) (quotation omitted).

203 Erica A. Schroeder, Comment, *Sounds of Prejudice: Background Music During Victim Impact Statements*, 58 U. KAN. L. REV. 473, 482 (2010).

204 FED. R. EVID. 403.

205 People v. Bramit, 210 P.3d 1171, 1187 (Cal. 2009).

phase, it is irrelevant to the sentencing decision; the jurors already know who the victim was and what the victim looked like and, to some extent, have already humanized him or her.²⁰⁶

In *Kelly*, the victim’s mother testified in both the guilt and penalty phases and provided the jurors with lots of details regarding her daughter’s life and character.²⁰⁷ Although the court in *Kelly* found that the video was not duplicative,²⁰⁸ the court in *Salazar* noted that “[e]ven if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice under Rule 403.”²⁰⁹ If a video only reinforces information already presented, the video is irrelevant and cumulative.

In addition to being cumulative, a victim impact video is an uninterrupted form of evidence that can go on ad nauseum. The video admitted in *Kelly* was twenty minutes long, in addition to extensive testimony from the victim’s mother.²¹⁰ Not only does this compound the cumulative nature of the evidence, but it also serves to enhance the risk of an arbitrary application of a death sentence. Although *Payne* did not assign a length of time to a “brief glimpse,” a twenty-minute, emotionally charged memorializing video should be considered outside the scope of the Court’s contemplation.

3. *Creation and Purpose.*—Although the court in *Salazar* excluded the video on grounds that it constituted a memorial to the victim, the video admitted in *Kelly* was “nearly identical.”²¹¹ The video in *Kelly*, however, was not created for the victim’s memorial service, but for the purposes of litigation.²¹² Given the striking similarities between the videos in length, quality, and music, the purpose of creation should not permit admission. Creating a video with an eye toward litigation does not remove the qualities of the video that make it fundamentally unfair.

Video montages do not serve the traditional purposes of videos in the courtroom: depicting a sequence of events as relayed by a witness, showing how equipment works, the landscape of a particular terrain, or scientific principles, as well as recordation of testimony.²¹³ In criminal trials, videos

206 See *Payne v. Tennessee*, 501 U.S. 808, 838 (1991) (Souter, J., concurring) (“Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles . . .”).

207 Petition for Writ of Certiorari, *supra* note 5, at 12 (“[Mrs. Farwell] described her daughter as ‘very friendly, very open’; ‘academically above average’; ‘naive’; popular; [and] ‘very pretty.’”) (citations omitted).

208 *People v. Kelly*, 171 P.3d 548, 558 (Cal. 2007), *cert. denied*, 129 S. Ct. 564 (2008).

209 *Salazar v. State*, 90 S.W.3d 330, 336 (Tex. Crim. App. 2002).

210 Petition for Writ of Certiorari, *supra* note 5, at 3.

211 *Id.* at 10.

212 *Id.* at 3.

213 See Gregory T. Jones, *Lex, Lies & Videotape*, 18 U. ARK. LITTLE ROCK L.J. 613, 614-15 (1996).

have been used to memorialize confessions and victims' statements, depict crime scenes, and show criminal activity that has previously been captured on film.²¹⁴ Victim impact montages differ even further from day-in-the-life documentaries which are often used to attack a plaintiff's credibility by proving that his claims of physical or mental injury are exaggerated²¹⁵ because they are not live recordings; they are recreations through the lens of a particular individual or party. Video montages do not demonstrate unbiased recreations of a crime scene or relay a recorded confession—they provide information so “emotion-laden in its content that jurors may be persuaded more by how they feel about the [presentation] than by the facts of the case.”²¹⁶ Adoption of a bright-line rule banning video montages is even more supportable because these videos are not analogous to other forms of courtroom videos.

B. Victim Impact Evidence Video Montages are Irrelevant

If evidence at a capital sentencing hearing does not bear on the defendant's “personal responsibility and moral guilt,” it serves no constitutional purpose and is irrelevant.²¹⁷ Although the majority in *Payne* indicated that the harm caused by the defendant is an important factor that the jury should take into account, this holding was politically motivated and not based in legal reasoning.²¹⁸

In discussing the relevancy of victim impact evidence, Justice Stevens's dissent in *Payne* identified two fundamental flaws: the defendant's lack of knowledge of the victim at the time of the crime and the inability of a court to meaningfully evaluate the quantity and quality of the evidence necessary to elicit a jury's death sentence.²¹⁹ Although Justice Souter's statement that “[m]urder has foreseeable consequences” is correct, courts should not view these consequences as “imbue[d] . . . with direct moral relevance”²²⁰ because victim impact videos will overwhelmingly contain elements that were not foreseeable to the defendant at the time of the

214 *Id.* at 630-31.

215 *Id.* at 635.

216 Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCHOL. PUB. POL'Y & L. 492, 493-94 (2004).

217 *Payne v. Tennessee*, 501 U.S. 808, 858 (1991) (Stevens, J., dissenting) (citing *Booth v. Maryland*, 482 U.S. 496, 502 (1987)).

218 *See id.* at 859 (Stevens, J., dissenting) (“Today's majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion.”). Justice Stevens is referring to the victims' rights movement of the 1980s. For discussions of this movement, see Kennedy, *supra* note 20, at 1072-73. *See also* *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting) (describing the political impact of the victims' rights movement); Johnson, *supra* note 21, at 812-14 (discussing victims' rights amendments).

219 *Payne*, 501 U.S. at 860-61 (Stevens, J., dissenting).

220 *Id.* at 838 (Souter, J., concurring).

murder and thus have no bearing on his moral responsibility. Many victim impact videos, even those not created as eulogies, are highly personalized to the victim’s specific tastes and interests.²²¹ The prosecution’s ability to use cinematic evidence enables the prosecution to humanize the victim. This is implicit permission from the court to the jury that the jury, when making its death determination, is permitted to consider unforeseeable characteristics of the victim as foreseeable to the defendant.

Furthermore, members of the Court have stated that when the jury has discretion, especially in a capital case, “that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”²²² By allowing the jury to consider emotionally charged, highly personalized and memorializing videos with unfettered discretion, courts cannot make meaningful reviews of whether the evidence improperly encouraged “reliance on emotion and other arbitrary factors [that] necessarily prejudice[d] the defendant.”²²³

C. What is Acceptable? Removing the Balancing Act

Since *Payne*, the Supreme Court has not ruled further on the acceptable scope of victim impact evidence. While *Payne* was not limited to its facts, it is doubtful the Supreme Court intended *Payne* “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 *Kelly* and other victim impact video cases.²²⁴ *Payne* only contemplated testimony by the victim’s family members and comments regarding the victim by the prosecutor in closing argument; it did not reach the implications of cinematic impact evidence. The video in *Kelly*, considerably longer than others admitted,²²⁵ goes far beyond *Payne*’s “brief glimpse” and provides a detailed chronology of the victim’s life.²²⁶

Although not every video contains the dramatic and emotional cinematic elements as the one admitted in *Kelly*, many do, and this forces courts to continue to make decisions based upon the particular elements of the video. While this may be acceptable for other forms of evidence, a post

221 See Videotape, *supra* note 6 (including the victim’s favorite music, hobbies, holidays, and tributes to her heritage).

222 *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell & Stevens, JJ.).

223 *Payne*, 501 U.S. at 864 (Stevens, J., dissenting).

224 Petition for Writ of Certiorari, *supra* note 5, at 7.

225 Compare *People v. Kelly*, 171 P.3d 548, 557 (Cal. 2007), *cert. denied*, 129 S. Ct. 564 (2008) (admitting a twenty-minute video), and *People v. Prince*, 156 P.3d 1015, 1091 (Cal. 2007), *cert. denied*, 552 U.S. 1106 (2008) (admitting a twenty-five minute video), with *Whittlesey v. State*, 665 A.2d 223, 250-51 (Md. 1995) (admitting a ninety-second video), and *State v. Allen*, 994 P.2d 728, 750-51 (N.M. 1999) (admitting a three-minute videotape).

226 See Petition for Writ of Certiorari, *supra* note 5, at 8.

hoc determination of the impact of a certain video will be an impossible task.²²⁷ Recent scholarship has advocated for a bright-line rule barring musical accompaniment to victim impact videos as the music is “irrelevant and highly prejudicial” and results in prejudiced decision-making and a fundamentally unfair trial.²²⁸ While this argument is well taken,²²⁹ it does not go far enough. Removing the music may remove some of the video’s emotional impact, but the emotional impact factor of individual components is not quantifiable; barring the video altogether ensures rational and even-handed decision-making.

A bright-line rule eliminates the arbitrariness regarding which elements of a video are acceptable and which ones are not. Even if the photos have already been introduced at the guilt phase and are not accompanied by music, the solemnity of a capital sentencing trial can infect even the simplest, most basic of slide shows with undue emotion.

D. Removing the Arbitrariness

Drawing a bright-line rule against victim impact videos would still respect the ruling of *Payne* by permitting other forms of victim impact evidence (oral testimony, written statements, or still photos) to be admitted. The rule would, however, avoid “the injection of excessive emotionalism into the capital sentencing process, because the *point* of film is to manipulate the emotions of the viewer.”²³⁰ Studies have shown that jurors are more likely to recall information if presented in visual format,²³¹ and when injected with emotional elements like music and video feed, jurors are arguably more likely to use the video impermissibly.

Victims’ families can manipulate the video as technology advances, creating powerful images and arousing strong emotions through strategic crescendos of music, artfully timed panoramic scenes, and close-ups of particular photographic elements.²³² By removing the video montage from

²²⁷ Myers & Greene, *supra* note 216, at 511.

²²⁸ Schroeder, *supra* note 203, at 474.

²²⁹ See Petition for Writ of Certiorari, *supra* note 5, at 17 (“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.”).

²³⁰ *Id.* at 15.

²³¹ *Id.* at 15-16; see also David B. Hennes, Comment, *Manufacturing Evidence for Trial: The Prejudicial Implications of Videotaped Crime Scene Reenactments*, 142 U. PA. L. REV. 2125, 2173 n.292 (1994); *id.* at 2180 (“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.”); *People v. Dabb*, 197 P.2d 1, 5 (Cal. 1948) (recognizing “the forceful impression made upon the minds of the jurors” by motion pictures).

²³² This type of image manipulation is frequently referred to as the “Ken Burns Effect.” See Regina McCombs, *Meaning in Motion: Ken Burns and His “Effect,”* POYNTER (June 21, 2007,

the prosecutor’s victim impact arsenal, defendants can be assured that technological advances will not lead to arbitrary applications of the death penalty. Capital sentencing trials are not theatrical productions, and the decision to impose death should not be based upon the skills of a particular videographer.²³³

Following Justice Stevens’s mandate of “reasonable limits,”²³⁴ Professor Regina Austin proposed seven recommendations and conclusions in an effort to define the boundaries of admission.²³⁵ These recommendations include limitations on time,²³⁶ content,²³⁷ music,²³⁸ and persons able to submit victim impact videos as evidence.²³⁹ Austin further proposes that courts rule on the admissibility of a particular video pre-trial and argues that defendants should always receive advance notice of the prosecution’s intent to introduce the video.²⁴⁰ Finally, Austin cautions courts to ensure they understand victim impact videos for what they are: subjective viewpoints about the victim’s life as interpreted by all of those involved in the video’s creation.²⁴¹ While these recommendations may be workable in noncapital cases, the threat of an arbitrary death sentence remains too great to risk a video montage’s admission. “Reasonable limits” in capital sentencing trials should limit the type of evidence to exclude victim impact videos instead of defining the boundaries of the video itself.

12:54 PM), <http://www.poynter.org/column.asp?id=101&aid=125153>.

233 See Petition for Writ of Certiorari, *supra* note 5, at 19.

234 Kelly v. California, 129 S. Ct. 564, 567 (2008) (Stevens, J., respecting the denial of certiorari).

235 Regina Austin, *Documentation, Documentary, and the Law: What Should be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979, 1014–16 (2010).

236 *Id.* at 1014 (“Victim impact videos or photo montages should be short, no longer than three to five minutes. A little bit of video goes a long way.”).

237 *Id.* at 1014–15 (“The content should be probative of the issues pertinent to sentencing in the particular case. It should be directed at: (1) highlighting the victim’s unique qualities . . . as evidenced by specific acts, behavior, or events; and (2) describing the impact of the victim’s death on survivors as evidenced by their history of interaction with the victim. . . . Beyond that, the video should not be misleading, confusing, redundant of other evidence, or unnecessary.”).

238 *Id.* at 1015 (“Music should be allowed only if it has a factual basis in the victim’s tastes, preferences, activities, hobbies, or behavior, or in the relationship between the victim and her or his survivors.”).

239 *Id.* at 1014 (“The categories of persons permitted to submit videos should be limited to individuals closely connected to the victim by blood and affinity.”).

240 *Id.* at 1015.

241 *Id.* at 1016 (“[Video montages] are representations of reality as captured by the family photographer, filmmaker, or videographer; shaped by the editor who chose and arranged the material; and interpreted by the narrator—all of whom are operating under the influence of subjective points of view about the victim’s life, history, and significance.”).

CONCLUSION

In 2008, the Supreme Court denied certiorari in *Kelly* and its companion case, *Zamudio v. California*,²⁴² over the dissents of two Justices.²⁴³ Justice Stevens, respecting the denial of certiorari, described victim impact evidence as “powerful in any form,” but he labeled the videos at issue as “especially prejudicial.”²⁴⁴ Stevens described the videos as “emotionally evocative” and noted that the scenes and memories represented happened long before the crimes were committed and that nothing within the videos explicitly demonstrated the effect of the crimes on the victims’ families.²⁴⁵ Furthermore, the moving portrayals of the victims, enhanced by music, voice-overs, and video footage, were irrelevant to the jury’s sentencing decision and “invited a verdict based on sentiment, rather than reasoned judgment.”²⁴⁶ Stevens compelled the Court to recognize its duty to consider the limits on victim impact evidence that *Payne* failed to provide.²⁴⁷

Justice Breyer argued that the films’ “personal, emotional, and artistic attributes themselves create the legal problem” because those attributes do not serve the defined purposes of victim impact evidence but instead serve only to invite a purely emotional response from the jury.²⁴⁸ In fact, Breyer questioned whether the “minimal probity” of the videos called upon the need for a due process inquiry because of the films’ “disproportionately powerful emotion.”²⁴⁹ Justice Breyer also called upon the Court to grant certiorari, recognizing the need to provide lower courts with examples of constitutional victim impact evidence.²⁵⁰

242 *People v. Zamudio*, 181 P.3d 105 (Cal. 2008), *cert. denied*, 129 S. Ct. 567 (2008).

243 *Kelly v. California*, 129 S. Ct. 564, 564 (2008) (Stevens, J., respecting the denial of certiorari); *Kelly v. California*, 129 S. Ct. 567, 568 (2008) (Breyer, J., respecting the denial of certiorari).

244 *Kelly v. California*, 129 S. Ct. 564, 567 (2008) (Stevens, J., respecting the denial of certiorari). With respect to the power of victim impact evidence, Justice Stevens quoted the following: “As one Federal District Judge put it, ‘I cannot help but wonder if *Payne* . . . would have been decided in the same way if the Supreme Court Justices in the majority had ever sat as trial judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony [in a codefendant’s case] and the juror’s sobbing during the victim impact testimony still rings in my ears. This is true even though the federal prosecutors in [the case] used admirable restraint in terms of the scope, amount, and length of victim impact testimony.’” *Id.* at 567 n.3 (citing *United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005)).

245 *Id.* at 567 (Stevens, J., respecting the denial of certiorari).

246 *Id.*

247 *Id.*

248 *Kelly v. California*, 129 S. Ct. 567, 568 (2008) (Breyer, J., dissenting from the denial of certiorari).

249 *Id.*

250 *Id.*

By denying certiorari in *Kelly* and failing to elucidate guidelines on the scope, content, and medium of constitutionally acceptable victim impact evidence, the United States Supreme Court effectively endorsed the permissive approach taken by lower courts in admitting victim impact video montages. Victim impact videos are irrelevant and their admission leads to arbitrary sentencing decisions based on emotion, not reason. Drawing a bright-line rule is never easy; not every video will embrace the cinematic techniques that play with jurors' heartstrings. Barring admission of video montages per se is the only way to ensure that defendants' sentences are not void of rational decision making. This rule respects the original holding in *Payne* by permitting other types of victim impact evidence to be admitted. Victim impact videos like the one in *Kelly* are a “far cry” from what the *Payne* majority contemplated and have no place in the courtroom.²⁵¹

251 *Kelly v. California*, 129 S. Ct. 546, 567 (Stevens, J., respecting the denial of certiorari).

