

# VICTIM IMPACT EVIDENCE IN CAPITAL CASES: REGULATING THE ADMISSIBILITY OF PHOTOGRAPHS AND VIDEOS IN THE *PAYNE* ERA

ALEXANDER H. UPDEGROVE\*

## ABSTRACT

*In Booth v. Maryland, the U.S. Supreme Court prohibited victims' loved ones from presenting victim impact evidence during capital sentencing hearings. Following this, the Court extended Booth's ruling in South Carolina v. Gathers to similarly prevent prosecutors from presenting victim impact evidence at capital trials. Just two years later, however, a change in the Court's composition led to a reversal now permitting states to allow victim impact evidence in capital cases. Since then, the Court has declined to provide further guidance on the admissibility of victim impact evidence despite the introduction of extensive slideshows and videos memorializing victims set to melancholy music. This Article examines state court cases from the fifty states plus cases from federal courts to understand the factors that contribute to the (in)admissibility of victim impact evidence. The Article concludes by proposing model language that states can use to enact legislation regulating the use of photographs and videos as victim impact evidence in capital cases.*

## INTRODUCTION

In *Payne v. Tennessee*, the U.S. Supreme Court overruled two previous decisions to find victim impact evidence admissible in capital trials.<sup>1</sup> This ruling proved controversial at the time for disregarding the doctrine of stare decisis,<sup>2</sup> and has only grown more divisive as technological advancements have

---

\* Alexander H. Updegrave is an Assistant Professor in the Department of Criminal Justice at the University of North Texas. His scholarship focuses on the death penalty, victim services and victimology, race, and immigration issues. This Article is dedicated to Rolando V. del Carmen and Michael S. Vaughn.

1. See *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

2. See *id.* at 844 (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decision[ ]making. Four Terms ago, a five-Justice majority of this Court held that 'victim impact' evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L.Ed.2d 440 (1987). By another 5-4 vote, a majority of this Court rebuffed an attack upon this ruling just two

ushered in new methods for presenting victim impact evidence.<sup>3</sup> Although *Payne* permitted states to provide victims with a voice during sentencing at capital trials, it failed to consider what form that voice should (or should not) take. Similarly, *Payne* provided no guidance for determining when too much victim impact evidence had been presented.<sup>4</sup> Absent instruction from the Court, state courts have generally held that victims can address the court through any format they choose, and demonstrated a reluctance to curb the amount of victim impact evidence presented.<sup>5</sup> The wide latitude *Payne* affords states is problematic because the Supreme Court did not anticipate how far the boundaries of admissible victim impact evidence would expand in the decades following its decision.<sup>6</sup> Despite the troubling implications raised by newer

---

Terms ago. *South Carolina v. Gathers*, 490 U.S. 805, 109 S. Ct. 2207, 104 L.Ed.2d 876 (1989). Nevertheless, having expressly invited respondent to renew the attack, 498 U.S. 1076, 111 S.Ct. 1031, 112 L.Ed.2d 1032 (1991), today's majority overrules *Booth* and *Gathers* and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did."); *see also id.* at 856 (Stevens, J., dissenting) ("Our cases provide no support whatsoever for the majority's conclusion that the prosecutor may introduce evidence that sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.").

3. *See* Erica A. Schroeder, Note, *Sounds of Prejudice: Background Music During Victim Impact Statements*, 58 U. KAN. L. REV. 473, 474 (2010) ("The current trend of advancing technology has made the use of electronic media during VIS a widespread phenomenon. In addition to live testimony from family, more prosecutors today are using technology, such as PowerPoint presentations or *videos*, to visually present the lives of deceased victims. Many of these presentations are set to emotional background music—an irrelevant and highly prejudicial addition to otherwise admissible VIS. Allowing such music during VIS causes prejudicial emotional decisions resulting in a fundamentally unfair sentencing, and courts should no longer allow music during VIS.") (emphasis added); *see also* Alicia N. Harden, Note, *Drawing the Line at Pushing "Play": Barring Video Montages as Victim Impact Evidence at Capital Sentencing Trials*, 99 KY. L.J. 845, 847 (2010) ("Recent technological developments have prompted a new type of victim impact evidence: the victim impact video, or video montage."); Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979, 984 (2010) ("The admission of victim impact videos is concededly a charged issue.").

4. *See* John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 267 (2003) ("[T]he question of how much and what kind of VIE is permissible remains unanswered.").

5. *See id.* at 278 ("*Payne* is not going away. VIE is politically popular, and it is difficult to imagine any state or federal court significantly restricting its admissibility. Furthermore, VIE is largely unregulated.").

6. *See id.* at 271–72 ("In addition to testimony from witnesses, courts have allowed the prosecution to present poems, videotapes, pre-death photographs, and handcrafted items made by the victim.") (footnotes omitted); *see also* Christine M. Kennedy, Note, *Victim Impact Videos: The New-Wave of Evidence in Capital Sentencing Hearings*, 26 QUINNIPIAC L. REV. 1069, 1077 (2008) ("Regarding the forms that victim impact evidence may take, courts have allowed photographs, diaries, letters, and other physical evidence that convey various aspects of the victim's uniqueness.").

formats, such as videos<sup>7</sup> and accompanying music,<sup>8</sup> the Supreme Court has declined opportunities for further clarification.<sup>9</sup>

This Article begins by exploring the Supreme Court's rationale for limiting the use of victim impact evidence in capital trials in *Booth* and *Gathers*. Following this, the *Payne* Court's reasons for reversing its earlier decisions are examined. This Article then briefly reviews state court cases involving the presentation of atypical victim impact evidence, such as poems and recorded phone audio, before honing in on state court cases involving victim impact evidence that contains photographs or videos of victims. Special attention is paid to whether photograph or video presentations included accompanying music. Next, this Article details criticisms leveled by courts and legal scholars against victim impact evidence containing photographs or videos of victims. Finally, this Article concludes by suggesting model language that states can incorporate into their statutes to balance the constitutional right of the defendant to a punishment that is neither cruel nor unusual with victims' right to be heard.<sup>10</sup>

## I. SUPREME COURT CASES ON VICTIM IMPACT STATEMENTS

### A. *Booth v. Maryland* (1987)

In *Booth v. Maryland*,<sup>11</sup> the U.S. Supreme Court concluded that the victim impact statement submitted during the sentencing hearing of the capital trial served dual purposes. The first purpose was to inform the court about the victim's uniqueness and the harm suffered by the victim's loved ones as a result of the crime. The second purpose was to describe how the victim's loved ones felt about the crime itself and the defendant on trial.<sup>12</sup> The Court concluded that neither purpose passed constitutional muster. Specifically, the Court found that the victim impact statement improperly redirected the focus away from the defendant's "blameworthiness" for the crime by introducing evidence of the

---

7. See Kennedy, *supra* note 6, at 1071 ("The obvious emotional appeal of victim impact videos creates new challenges for courts that must determine when the evidence at a capital sentencing hearing is too prejudicial to be heard."); see also Harden, *supra* note 3, at 879 ("Victim impact videos . . . are a 'far cry' from what the *Payne* majority contemplated . . .").

8. See Schroeder, *supra* note 3; see also Kennedy, *supra* note 6, at 1092 ("The accompaniment of a musical soundtrack in some victim impact videos introduces a new element of which some courts have made note.").

9. See *Kelly v. California*, 555 U.S. 1020 (2008); see also Harden, *supra* note 3, at 875 ("Since *Payne*, the Supreme Court has not ruled further on the acceptable scope of victim impact evidence.").

10. See U.S. CONST. amend. VIII.

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

12. See *id.* at 502 ("The VIS in this case provided the jury with two types of information. First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant.").

victim's esteemed status in the community.<sup>13</sup> Additionally, allowing the victim's loved ones to express their opinions about the crime and defendant unnecessarily increases the risk that jurors will return a sentence dictated by emotion rather than facts, thereby becoming a cruel and unusual punishment.<sup>14</sup>

Justice White was joined in his dissent by Chief Justice Rehnquist and Justices O'Connor and Scalia. White's primary dispute with the majority opinion was that he believed prosecutors should be allowed to introduce evidence of the crime's harm in order to nullify any leniency jurors would afford the defendant based on mitigating factors presented by the defense.<sup>15</sup> Thus, White argued that the defendant should be held responsible for the full extent of harm caused by their actions regardless of any mitigating circumstances that might explain how the defendant came to commit that offense (e.g., a history of poor mental health and childhood abuse).<sup>16</sup>

Justice Scalia also dissented and was joined by Chief Justice Rehnquist and Justices White and O'Connor. Scalia argued that charging decisions are not based on how accountable the defendant is for their actions, but rather the intent behind those actions.<sup>17</sup> As a result, a defendant who intended to commit a heinous crime should be held fully responsible for that crime regardless of any circumstances that may have influenced those intentions, such as poor mental health or a lengthy history of childhood neglect and abuse. Scalia also echoed White's dissent by arguing that victim impact evidence is necessary to limit the influence of mitigating evidence on the jury.<sup>18</sup>

---

13. *See id.* at 504.

14. *See id.* at 508 ("One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."); *see also* U.S. CONST. amend. VIII.

15. *See Booth*, 482 U.S. at 517 (White, J., dissenting) ("I would think that victim impact statements are particularly appropriate evidence in capital sentencing hearings: the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in . . .").

16. *See id.* at 518 ("At bottom, the Court's view seems to be that it is somehow unfair to confront a defendant with an account of the loss his deliberate act has caused the victim's family and society.").

17. *See id.* at 519 (Scalia, J., dissenting) ("The Court's opinion does not explain why a defendant's *eligibility* for the death sentence can (*and always does*) turn upon considerations not relevant to his moral guilt. If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.").

18. *See id.* at 520–21 ("To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit both the pros and the cons in the particular case to be heard.").

*B. South Carolina v. Gathers (1989)*

In *South Carolina v. Gathers*, the U.S. Supreme Court extended its *Booth* decision by ruling prosecutors, as well as victims, violate defendants' Eighth Amendment right to a punishment that is neither cruel nor unusual when they emphasize the innocence and esteemed social standing of victims during capital trials.<sup>19</sup> In *Booth*, the Court suggested that victim impact evidence might be relevant to sentence determinations under a narrow set of circumstances.<sup>20</sup> Subsequently, the *Gathers* Court ruled that the mere presence of victims' belongings at the crime scene does not automatically render those belongings relevant as victim impact evidence. Consequently, *Gathers* further narrowed the set of circumstances under which victim impact evidence could be admitted at capital sentencing hearings.<sup>21</sup> Ultimately, *Gathers* reaffirmed that capital sentencing hearings should concentrate on the crime from the defendant's perspective, as assessed by their actions, rather than from the community's perspective, as assessed by the victim's perceived social worth communicated through their possessions and affected loved ones.

Justice O'Connor dissented, and was joined by Chief Justice Rehnquist and Justice Kennedy. O'Connor asserted that the unanticipated consequences of the defendant's actions are just as important when determining the appropriate sentence as understanding the circumstances which may have led to the defendant's criminal actions, such as poor mental health.<sup>22</sup> Additionally, she argued that the uniqueness of the defendant and victim are both relevant to

---

19. See *South Carolina v. Gathers*, 490 U.S. 805, 811 (1989) ("While in this case it was the prosecutor rather than the victim's survivors who characterized the victim's personal qualities, the statement is indistinguishable in any relevant respect from that in *Booth*.").

20. See *Booth*, 482 U.S. at 507 n.10 ("Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime. Facts about the victim and family also may be relevant in a noncapital criminal trial. Moreover, there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant.").

21. See *Gathers*, 490 U.S. at 811 ("The fact that Gathers scattered Haynes' personal papers around his body while going through them looking for something to steal was certainly a relevant circumstance of the crime, and thus a proper subject for comment. But the prosecutor's argument in this case went well beyond that fact: he read to the jury at length from the religious tract the victim was carrying and commented on the personal qualities he inferred from Haynes' possession of the 'Game Guy's Prayer' and the voter registration card. The *content* of these cards, however, cannot possibly have been relevant to the 'circumstances of the crime.' There is no evidence whatever that the defendant read anything that was printed on either the tract or the voter card. Indeed, it is extremely unlikely that he did so.").

22. See *id.* at 818 (O'Connor, J., dissenting) ("That the harm caused by a defendant's actions is relevant to the capital sentencer's moral judgment concerning the appropriate penalty, even if the defendant did not specifically intend that harm, is a principle recognized both in the decisions of this Court and in legislative decisions concerning appropriate levels of punishment.").

sentencing.<sup>23</sup> In a separate dissent, Justice Scalia expressed the opinion that the *Booth* ruling had been incorrectly decided, and that it was better to correct the error quickly so that it would not result in further flawed rulings.<sup>24</sup>

*C. Payne v. Tennessee (1991)*

Two years after *Gathers*, the U.S. Supreme Court reversed its stance on admitting victim impact evidence at capital sentencing hearings in *Payne v. Tennessee*. The majority opined that *Booth* relied on a “misreading of precedent . . . [that] unfairly weighted the scales in a capital trial” toward the defendant.<sup>25</sup> The Court suggested that jurors have already been exposed to the majority of victim impact evidence during the guilt phase, and therefore repeated exposure should not have a biasing effect.<sup>26</sup> Consequently, the Court ruled that states can regulate victim impact evidence as they see fit, and defendants sentenced to death because of bias-inducing victim impact evidence can appeal the decision under the Fourteenth Amendment’s Due Process Clause.<sup>27</sup> In *Payne*, the Court allowed states to admit victim impact evidence at capital trials if they wished, but did not find that the Constitution *requires* states to consider such evidence.

Justice O’Connor issued a concurring opinion and was joined by Justices White and Kennedy. She noted that the majority of states had passed legislation permitting victim impact evidence, and trial judges frequently exercised discretion to prohibit the introduction of biasing material.<sup>28</sup> As a result, trial judges could be trusted to make appropriate decisions concerning the admissibility of victim impact evidence on a case-by-case basis. Additionally, victim impact evidence helps prosecutors establish that the victims “were unique human beings.”<sup>29</sup> Justice Scalia, joined by Justices O’Connor and Kennedy in a concurring opinion, alleged that *Booth* contradicted past Court precedents, and therefore the Court was obligated to disregard *Booth* in order to reaffirm earlier precedents.<sup>30</sup> Justice Kennedy joined Justice Souter in a third concurring opinion. Souter acknowledged the risk that some victim impact

---

23. *See id.* at 820–21 (“Just as *Gathers*’ own background was important to the jury’s assessment of him . . . so information about his equally unique victim was relevant to the jury’s assessment of the harm he had caused and the appropriate penalty.”).

24. *See id.* at 825 (Scalia, J., dissenting) (“*Booth* has not even an arguable basis in the common-law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that present society, through its laws or the actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility. The Court’s opinion in *Booth*, like today’s opinion, did not even try to assert the contrary. We provide far greater reassurance of the rule of law by eliminating than by retaining such a decision.”).

25. *See Payne v. Tennessee*, 501 U.S. 808, 822 (1991).

26. *See id.* at 823.

27. *See id.* at 825.

28. *See id.* at 831 (O’Connor, J., concurring).

29. *Id.* at 832.

30. *See id.* at 835 (Scalia, J., concurring) (“It was, I suggest, *Booth*, and not today’s decision, that compromised the fundamental values underlying the doctrine of *stare decisis*.”).

evidence would cause bias, but did not consider this risk so great as to categorically bar all victim impact evidence from consideration.<sup>31</sup> Moreover, Souter argued that all defendants understand “that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, . . . who will suffer harms and deprivations from the victim’s death.”<sup>32</sup> For this reason, Souter did not consider victim impact evidence to represent the community’s perspective, but rather the defendant’s perspective, as required by *Gathers*. Finally, Justice Souter echoed Scalia’s opinion by observing that it was better to fix *Booth* rather than cling to its flawed interpretations.<sup>33</sup>

Justice Marshall, joined by Justice Blackmun, dissented. Marshall lamented the majority’s disregard for precedents and argued that it had been looking for a way to overturn *Booth* and *Gathers* ever since the Court’s composition had changed.<sup>34</sup> Justice Stevens also dissented and was joined by Justice Blackmun. Stevens reiterated that trials revolve around the defendant, not the victim, and therefore victim impact evidence has no place in capital sentencing hearings.<sup>35</sup> In his most instructive passage, Stevens wrote, “[t]he 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.”<sup>36</sup>

Stevens concluded his dissent by arguing that jurors already recognize that victims are unique individuals, and therefore victim impact evidence only serves to create sentencing disparities based on victims’ standing in the community, with defendants who killed more esteemed victims disproportionately at risk for receiving the death penalty.<sup>37</sup>

---

31. See *id.* at 836 (Souter, J., concurring) (“Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation.”).

32. *Id.* at 838.

33. See *id.* at 843 (“[W]e have chosen not to compound the original error, but to overrule the precedent.”).

34. See *id.* at 844 (Marshall, J., dissenting) (“Power, not reason, is the new currency of this Court’s decisionmaking. . . . [H]aving expressly invited respondent to renew the attack today’s majority overrules *Booth* and *Gathers* and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.”) (citation omitted).

35. See *id.* at 859 (Stevens, J., dissenting) (“The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance.”).

36. *Id.* at 866.

37. See *id.* (“The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others.”).

*D. Kelly v. California (2008)*

Seventeen years after *Payne*, the U.S. Supreme Court declined the opportunity to revisit its earlier decision despite several state courts admitting lengthy videos that contained dozens of photographs of the victims set to music as victim impact evidence.<sup>38</sup> Two Justices expressed a desire to hear the case. In his dissent, Justice Stevens voiced concern over the Court's unwillingness to regulate the admissibility of victim impact evidence.<sup>39</sup> He also questioned the relevance of victim impact evidence that shows adult victims in childhood,<sup>40</sup> and displayed skepticism that photographs and videos of victims set to music were constitutionally permissible.<sup>41</sup> Stevens concluded by noting: "These videos are a far cry from the written victim impact evidence at issue in *Booth* and the brief oral testimony condoned in *Payne*. In their form, length, and scope, they vastly exceed the 'quick glimpse' the Court's majority contemplated when it overruled *Booth* in 1991."<sup>42</sup>

Justice Breyer also dissented, calling attention to the unique problems posed by technological advancements since *Payne*.<sup>43</sup> He ended his dissent by urging the Court to provide clear rules for determining the admissibility of victim impact evidence consistent with twenty-first century technology capabilities.<sup>44</sup>

---

38. See *Kelly v. California*, 555 U.S. 1020 (2008); see also Harden, *supra* note 3, at 879 ("Victim impact videos like the one in *Kelly* are a 'far cry' from what the *Payne* majority contemplated . . .").

39. See *Kelly*, 555 U.S. at 1024 ("Given *Payne*'s sharp retreat from prior precedent, it is surprising that neither the opinion of the Court nor any of the concurring opinions made a serious attempt to define or otherwise constrain the category of admissible victim impact evidence.").

40. See *id.* at 1025 ("The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of crime on the victims' family members.").

41. See *id.* ("[W]hen victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment.").

42. *Id.* at 1025–26.

43. See *id.* at 1026–27 (Breyer, J., dissenting) ("[T]he film's personal, emotional, and artistic attributes themselves create the legal problem. They render the film's purely emotional impact strong, perhaps unusually so. That emotional impact is driven in part by the music, the mother's voiceover, and the use of scenes without victim or family (for example, the film concludes with a clip of wild horses running free). Those aspects of the film tell the jury little or nothing about the [facts of the crime] . . .").

44. See *id.* at 1027 ("I understand the difficulty of drawing a line between what is, and is not, constitutionally admissible in this area. But examples can help elucidate constitutional guidelines. And in my view, the Court should grant certiorari and consider these cases in an effort to do so.").

## II. SUMMARY OF STATE COURT CASES INVOLVING ATYPICAL VICTIM IMPACT EVIDENCE

This section is broken into two parts. The first part briefly reviews state court cases where atypical victim impact evidence other than photographs or videos of victims was presented. The second part concentrates on state court cases where victim impact evidence included photographs or videos of victims.

### A. Court Cases Not Involving Photographs Or Videos

Twelve court cases from ten different states were identified as involving atypical victim impact evidence other than photographs or videos of victims.<sup>45</sup> Courts in Arizona, Arkansas, Connecticut, Missouri, and New Jersey have permitted poems to be admitted as victim impact evidence. A sixth state, Louisiana, considers poems an acceptable form of victim impact evidence, but does not appear to have ever had a case where a poem was submitted for victim impact testimony. Courts in California and Nebraska have ruled that songs or singing can be permissible as victim impact evidence. In *People v. Verdugo*,<sup>46</sup> the trial court allowed the victim's loved ones to play several Mexican songs from a mixtape that the victim had recorded for her father prior to her murder. In *State v. Koch*, the victim's sister "sang two portions of her statement."<sup>47</sup>

**Table 1.** State Court Cases Involving Atypical Victim Impact Evidence

| State/Court Case <sup>48</sup> | Poem?            | Song/Singing? | Audio Recording? | Other? | Allowable? |
|--------------------------------|------------------|---------------|------------------|--------|------------|
| Arizona                        |                  |               |                  |        |            |
| <i>State v. Gallardo</i>       | No               | No            | Yes              | No     | Yes        |
| <i>State v. Rose</i>           | Yes              | No            | Yes              | No     | Yes        |
| Arkansas                       |                  |               |                  |        |            |
| <i>Noel v. State</i>           | Yes              | No            | No               | No     | Yes        |
| California                     |                  |               |                  |        |            |
| <i>People v. Verdugo</i>       | No               | Yes           | No               | No     | Yes        |
| Connecticut                    |                  |               |                  |        |            |
| <i>State v. Couture</i>        | Yes              | No            | No               | No     | Yes        |
| Louisiana                      |                  |               |                  |        |            |
| <i>State v. Jacobs</i>         | Yes <sup>*</sup> | No            | No               | No     | Yes        |
| Missouri                       |                  |               |                  |        |            |

45. See *infra*, Table 1.

46. See *People v. Verdugo*, 236 P.3d 1035, 1063 (Cal. 2010).

47. *State v. Koch*, No. A-15-959, 2016 WL 3083135, at 3 (Neb. Ct. App. May 24, 2016).

48. The cases analyzed are: *State v. Gallardo*, 242 P.3d 159 (Ariz. 2010) (en banc); *State v. Rose*, 297 P.3d 906 (Ariz. 2013); *Noel v. State*, 960 S.W.2d 439 (Ark. 1998); *People v. Verdugo*, 236 P.3d 1035 (Cal. 2010); *State v. Couture*, No. UWYCR0471979, 2014 WL 4357521 (Conn. Super. Ct. June 24, 2014); *State v. Jacobs*, 880 So. 2d 1 (La. 2004) (mem.); *State v. Basile*, 942 S.W.2d 342 (Mo. 1997) (en banc); *State v. Koch*, No. A-15-959, 2016 WL 3083135 (Neb. Ct. App. May 24, 2016); *State v. Koskovich*, 776 A.2d 144 (N.J. 2001); *State v. Hess*, 23 A.3d 373 (N.J. 2011); *State v. White*, 565 S.E.2d 55 (N.C. 2002); *Malone v. State*, 168 P.3d 185 (Okla. Crim. App. 2007).

|                           |     |     |    |               |     |
|---------------------------|-----|-----|----|---------------|-----|
| <i>State v. Basile</i>    | Yes | No  | No | Diary         | Yes |
| Nebraska                  |     |     |    |               |     |
| <i>State v. Koch</i>      | No  | Yes | No | No            | Yes |
| New Jersey                |     |     |    |               |     |
| <i>State v. Koskovich</i> | Yes | No  | No | No            | Yes |
| <i>State v. Hess</i>      | Yes | No  | No | No            | Yes |
| North Carolina            |     |     |    |               |     |
| <i>State v. White</i>     | No  | No  | No | Cookbook      | Yes |
| Oklahoma                  |     |     |    |               |     |
| <i>Malone v. State</i>    | No  | No  | No | Birthday Card | No  |

\*Court noted that poems are permissible victim impact evidence at capital trials, but no poem was submitted during this trial.

Arizona has twice permitted audio recordings as victim impact evidence. In *State v. Gallardo*, the victim's father conveyed the impact the crime had on him by replaying the 911 call where he discovered his son's body.<sup>49</sup> Similarly, in *State v. Rose*, the trial court admitted thirty-five seconds of the victim's fellow police officers honoring him over the radio in the moments immediately following his death.<sup>50</sup> Finally, court cases in Missouri,<sup>51</sup> North Carolina,<sup>52</sup> and Oklahoma<sup>53</sup> have involved a diary, cookbook, and birthday cards, respectively, as victim impact evidence. Oklahoma's Court of Criminal Appeals ultimately ruled that the birthday cards were inadmissible.<sup>54</sup>

#### B. Court Cases Involving Photographs or Videos

Legal scholars have previously noted that state courts consider multiple factors when evaluating the admissibility of victim impact evidence containing photographs or videos of victims.<sup>55</sup> The following court cases are evaluated according to these factors.

49. See *State v. Gallardo*, 242 P.3d 159, 166 (Ariz. 2010) (en banc).

50. See *State v. Rose*, 297 P.3d 906, 918 n.2 (Ariz. 2013) (describing that the message broadcast read, "All units stand by for a broadcast. This is the last call for Officer George Cortez, Jr., number 8232, 834 Henry. 834 Henry is 236290 West Northern. 834 Henry you're now 10-7. Rest in peace. You'll be greatly missed. Goodnight sir. Stations clear for [audio cuts out].").

51. See *State v. Basile*, 942 S.W.2d 342, 358 (Mo. 1997) (en banc).

52. See *State v. White*, 565 S.E.2d 55, 68 (N.C. 2002).

53. See *Malone v. State*, 168 P.3d 185, 209 (Okla. Crim. App. 2007).

54. See *id.* at 210 ("We find that . . . the victim's mother and sister should not have been allowed to read from their cards from the victim.").

55. See *Kennedy*, *supra* note 6, 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."); see also *Harden*, *supra* note 3, at 854 ("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.").

Seventeen state courts plus federal courts have dealt with cases involving photographs of victims as victim impact evidence.<sup>56</sup> The number of photos presented in these cases has ranged from one to more than two hundred. For the thirty court cases where the exact number of photographs was reported, the mean court case had 38 photographs, the median court case had 12.5 photographs, and the mode court case had a single photograph. In ten state court cases, plus a federal court case, victims' loved ones were permitted to present images of an adult victim depicted in childhood. In three state courts—New Jersey, Oklahoma, Texas— and one federal district court, the judges ultimately ruled that the victim impact evidence containing these images was inadmissible. Cases from five states' courts plus one federal court involved victim impact evidence containing images of the victim's funeral or gravestone. New Jersey and a federal court ultimately ruled that the victim impact evidence containing these images was inadmissible.

---

56. See *infra*, Table 2.

**Table 2.** Cases Involving Photo or Video Victim Impact Evidence.

| State/Court Case <sup>57</sup> | # of Photos | Child Photo ?* | Grave Photo? | Runtime (if Video) | Music? | Screened by Court? | Allowable ? |
|--------------------------------|-------------|----------------|--------------|--------------------|--------|--------------------|-------------|
| Arizona                        |             |                |              |                    |        |                    |             |
| <i>State v. Ellison</i>        | >1          | N/A            | No           | -                  | No     | No                 | Yes         |
| <i>State v. Levitski</i>       | 2           | N/A            | N/A          | -                  | Yes    | No                 | Yes         |
| <i>State v. Rose</i>           | 2           | No             | Yes          | -                  | No     | No                 | Yes         |
| <i>State v. Burns</i>          | 110         | N/A            | Yes          | 8 min.             | N/A    | No                 | Yes         |
| Arkansas                       |             |                |              |                    |        |                    |             |
| <i>Hicks v. State</i>          | 160         | Yes            | N/A          | 14 min.            | No     | Yes                | Yes         |
| <i>Burgie v. State</i>         | 1           | No             | No           | -                  | No     | N/A                | Yes         |

57. The cases analyzed are: *State v. Ellison*, 140 P.3d 899 (Ariz. 2006) (en banc); *State v. Levitski*, No. 2 CA-CR 2007-0372-PR, 2008 WL 2623956 (Ariz. Ct. App. June 3, 2008); *State v. Rose*, 297 P.3d 906 (Ariz. 2013); *State v. Burns*, 344 P.3d 303 (Ariz. 2015); *Hicks v. State*, 940 S.W.2d 855 (Ark. 1997); *Burgie v. State*, No. CR 02-90, 2003 WL 367733 (Ark. Feb. 20, 2003); *Tate v. State*, 242 S.W.3d 254 (Ark. 2006); *People v. Edwards*, 819 P.2d 436 (Cal. 1991); *People v. Harris*, 118 P.3d 545 (Cal. 2005); *People v. Robinson*, 124 P.3d 363 (Cal. 2005); *People v. Kelly*, 171 P.3d 548 (Cal. 2007); *People v. Prince*, 156 P.3d 1015 (Cal. 2007); *People v. Zamudio*, 181 P.3d 105 (Cal. 2008); *People v. Dykes*, 209 P.3d 1 (Cal. 2009); *People v. Bramit*, 210 P.3d 1171 (Cal. 2009); *People v. Hamilton*, 200 P.3d 898 (Cal. 2009); *People v. Russell*, 242 P.3d 68 (Cal. 2010); *People v. Verdugo*, 236 P.3d 1035 (Cal. 2010); *People v. Vines*, 251 P.3d 943 (Cal. 2011); *People v. Booker*, 245 P.3d 366 (Cal. 2011); *People v. Garcia*, 258 P.3d 751 (Cal. 2011); *People v. Linton*, 302 P.3d 927 (Cal. 2013); *People v. Montes*, 320 P.3d 729 (Cal. 2014); *People v. Sandoval*, 363 P.3d 41 (Cal. 2015); *People v. Williams*, 355 P.3d 444 (Cal. 2015); *People v. Peoples*, 365 P.3d 230 (Cal. 2016); *People v. Winbush*, 387 P.3d 1187 (Cal. 2017); *Branch v. State*, 685 So. 2d 1250 (Fla. 1996); *Alston v. State*, 723 So. 2d 148 (Fla. 1998); *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000); *Wheeler v. State*, 4 So. 3d 599 (Fla. 2009); *Davis v. State*, 121 So. 3d 462 (Fla. 2013); *Lance v. State*, 560 S.E.2d 663 (Ga. 2002); *Tollette v. State*, 621 S.E.2d 742 (Ga. 2005); *Bryant v. State*, 708 S.E.2d 362 (Ga. 2011); *State v. Leon*, 132 P.3d 462 (Idaho Ct. App. 2006); *State v. Anthony*, 776 So. 2d 376 (La. 2000); *Whittlesey v. State*, 665 A.2d 223 (Md. 1995); *Lopez v. State*, 153 A.3d 780 (Md. Ct. Spec. App. 2017); *State v. Parker*, 886 S.W.2d 908 (Mo. 1994) (en banc); *State v. Gray*, 887 S.W.2d 369 (Mo. 1994) (en banc); *State v. Basile*, 942 S.W.2d 342 (Mo. 1997) (en banc); *State v. Middleton*, 995 S.W.2d 443 (Mo. 1999) (en banc); *State v. Gill*, 167 S.W.3d 184 (Mo. 2005) (en banc); *State v. Driskill*, 459 S.W.3d 412 (Mo. 2015) (en banc); *State v. Galindo*, 774 N.W.2d 190 (Neb. 2009); *Greene v. State*, 931 P.2d 54 (Nev. 1997); *State v. Addison*, 87 A.3d 1 (N.H. 2013); *State v. Hess*, 23 A.3d 373 (N.J. 2011); *State v. Allen*, 994 P.2d 728 (N.M. 1999); *People v. Mooney*, 506 N.Y.S.2d 991 (Genesee Cty. Ct. 1986); *State v. McCullough*, No. 98AP-988, 1999 WL 536647 (Ohio Ct. App. July 27, 1999); *State v. Hartman*, 754 N.E.2d 1150 (Ohio 2001); *Cargle v. State*, 909 P.2d 806 (Okla. Crim. App. 1995); *Al-Mosawi v. State*, 929 P.2d 270 (Okla. Crim. App. 1996); *State v. Tucker*, 478 S.E.2d 260 (S.C. 1996); *State v. Livingston*, 488 S.E.2d 313 (S.C. 1997); *State v. Langley*, 515 S.E.2d 98 (S.C. 1999); *State v. Bixby*, 698 S.E.2d 572 (S.C. 2010); *State v. Berget*, 826 N.W.2d 1 (S.D. 2013); *Salazar v. State*, 90 S.W.3d 330 (Tex. Crim. App. 2002); *State v. Blake*, No. 2007AP2468-CR, 2008 Wisc. App. LEXIS 881 (Wis. Ct. App. Nov. 12, 2008); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998); *United States v. Sampson*, 335 F. Supp. 2d 166 (D. Mass. 2004); *United States v. Wilson*, 493 F. Supp. 2d 491 (E.D. N.Y. 2007).

|                           |     |     |     |                              |     |     |                    |
|---------------------------|-----|-----|-----|------------------------------|-----|-----|--------------------|
| <i>Tate v. State</i>      | 12  | No  | No  | -                            | No  | N/A | Yes                |
| California                |     |     |     |                              |     |     |                    |
| <i>People v. Edwards</i>  | 3   | No  | No  | -                            | No  | N/A | Yes                |
| <i>People v. Harris</i>   | 1   | No  | Yes | -                            | No  | No  | Yes                |
| <i>People v. Robinson</i> | 22  | Yes | No  | -                            | No  | N/A | Yes                |
| <i>People v. Kelly</i>    | >1  | Yes | Yes | 20 min.                      | Yes | Yes | Yes                |
| <i>People v. Prince</i>   | 0   | No  | No  | 25 min.                      | No  | N/A | Yes                |
| <i>People v. Zamudio</i>  | 118 | Yes | Yes | 14 min.                      | Yes | Yes | Yes, but not music |
| <i>People v. Dykes</i>    | 3   | No  | No  | 8 min.                       | No  | Yes | Yes, but not music |
| <i>People v. Bramit</i>   | <20 | Yes | No  | N/A                          | No  | N/A | Yes                |
| <i>People v. Hamilton</i> | >2  | No  | No  | -                            | No  | Yes | Yes                |
| <i>People v. Russell</i>  | 57  | N/A | N/A | -                            | No  | N/A | Yes                |
| <i>People v. Verdugo</i>  | >1  | No  | Yes | -                            | No  | N/A | Yes                |
| <i>People v. Vines</i>    | 0   | No  | No  | 5 min.                       | Yes | Yes | Yes                |
| <i>People v. Booker</i>   | 39  | No  | No  | 4 min.;<br>5 min.;<br>7 min. | No  | Yes | Yes                |
| <i>People v. Garcia</i>   | >1  | No  | No  | 11:45 min.                   | Yes | Yes | Yes                |
| <i>People v. Linton</i>   | 13  | No  | No  | -                            | No  | No  | Yes                |
| <i>People v. Montes</i>   | 115 | No  | Yes | 10:30 min.                   | Yes | Yes | Yes                |
| <i>People v. Sandoval</i> | >1  | Yes | Yes | 6 min.                       | Yes | N/A | Yes, but not music |
| <i>People v. Williams</i> | >1  | No  | No  | N/A                          | Yes | Yes | Yes, but not music |
| <i>People v. Peoples</i>  | >1  | Yes | Yes | -                            | No  | Yes | Yes                |
| <i>People v. Winbush</i>  | 53  | Yes | N/A | 18 min.                      | No  | Yes | Yes                |
| Florida                   |     |     |     |                              |     |     |                    |
| <i>Branch v. State</i>    | 1   | No  | No  | -                            | No  | N/A | Yes                |
| <i>Alston v. State</i>    | 1   | No  | No  | -                            | No  | N/A | Yes                |
| <i>Mansfield v. State</i> | 2   | No  | No  | -                            | No  | N/A | Yes                |
| <i>Wheeler v. State</i>   | 54  | No  | No  | -                            | No  | N/A | Yes                |
| <i>Davis v. State</i>     | >1  | N/A | N/A | -                            | No  | N/A | Yes                |
| Georgia                   |     |     |     |                              |     |     |                    |
| <i>Lance v. State</i>     | >1  | N/A | N/A | -                            | No  | Yes | Yes                |

|                            |     |     |     |                                       |     |     |     |
|----------------------------|-----|-----|-----|---------------------------------------|-----|-----|-----|
| <i>Tollette v. State</i>   | N/A | N/A | N/A | “short”                               | No  | Yes | Yes |
| <i>Bryant v. State</i>     | >1  | Yes | N/A | -                                     | No  | Yes | Yes |
| Idaho                      |     |     |     |                                       |     |     |     |
| <i>State v. Leon</i>       | >1  | No  | Yes | 4:30 min.                             | Yes | Yes | Yes |
| Louisiana                  |     |     |     |                                       |     |     |     |
| <i>State v. Anthony</i>    | N/A | N/A | N/A | “brief”                               | N/A | N/A | Yes |
| Maryland                   |     |     |     |                                       |     |     |     |
| <i>Whittlesey v. State</i> | 0   | No  | No  | 1:30 min.                             | Yes | Yes | Yes |
| <i>Lopez v. State</i>      | 115 | Yes | No  | 6 min.                                | Yes | N/A | Yes |
| Missouri                   |     |     |     |                                       |     |     |     |
| <i>State v. Parker</i>     | 1   | Yes | No  | -                                     | No  | N/A | Yes |
| <i>State v. Gray</i>       | 0   | No  | No  | N/A                                   | No  | N/A | Yes |
| <i>State v. Basile</i>     | >1  | N/A | N/A | -                                     | No  | N/A | Yes |
| <i>State v. Middleton</i>  | 1   | No  | No  | -                                     | No  | N/A | Yes |
| <i>State v. Gill</i>       | 27  | No  | No  | -                                     | No  | N/A | Yes |
| <i>State v. Driskill</i>   | >1  | Yes | No  | -                                     | No  | N/A | Yes |
| Nebraska                   |     |     |     |                                       |     |     |     |
| <i>State v. Galindo</i>    | 0   | N/A | N/A | N/A                                   | N/A | Yes | No  |
| Nevada                     |     |     |     |                                       |     |     |     |
| <i>Greene v. State</i>     | >1  | N/A | N/A | -                                     | N/A | N/A | Yes |
| New Hampshire              |     |     |     |                                       |     |     |     |
| <i>State v. Addison</i>    | 36  | Yes | No  | 0:18 min.;<br>0:34 min.;<br>1:33 min. | No  | Yes | Yes |
| New Jersey                 |     |     |     |                                       |     |     |     |
| <i>State v. Hess</i>       | 60  | Yes | Yes | 17 min.                               | Yes | N/A | No  |
| New Mexico                 |     |     |     |                                       |     |     |     |
| <i>State v. Allen</i>      | 0   | No  | No  | 3 min.                                | No  | Yes | Yes |
| New York                   |     |     |     |                                       |     |     |     |
| <i>People v. Mooney</i>    | 0   | No  | No  | 240 min.                              | No  | N/A | Yes |
| Ohio                       |     |     |     |                                       |     |     |     |
| <i>State v. McCullough</i> | >1  | N/A | N/A | N/A                                   | N/A | N/A | Yes |
| <i>State v. Hartman</i>    | >1  | N/A | N/A | -                                     | No  | N/A | Yes |
| Oklahoma                   |     |     |     |                                       |     |     |     |
| <i>Cargle v. State</i>     | >1  | Yes | No  | -                                     | No  | N/A | No  |
| <i>Al-Mosawi v. State</i>  | 2   | No  | No  | -                                     | No  | N/A | No  |

|                                 |      |     |     |         |     |     |     |
|---------------------------------|------|-----|-----|---------|-----|-----|-----|
| South Carolina                  |      |     |     |         |     |     |     |
| <i>State v. Tucker</i>          | >3   | No  | No  | -       | No  | N/A | Yes |
| <i>State v. Livingston</i>      | 1    | No  | No  | -       | No  | N/A | No  |
| <i>State v. Langley</i>         | 1    | No  | No  | -       | No  | N/A | No  |
| <i>State v. Bixby</i>           | 0    | No  | Yes | 7 min.  | Yes | N/A | Yes |
| South Dakota                    |      |     |     |         |     |     |     |
| <i>State v. Berget</i>          | >1   | N/A | N/A | -       | No  | N/A | Yes |
| Texas                           |      |     |     |         |     |     |     |
| <i>Salazar v. State</i>         | 140  | Yes | No  | 17 min. | Yes | No  | No  |
| Wisconsin                       |      |     |     |         |     |     |     |
| <i>State v. Blake</i>           | >1   | Yes | N/A | N/A     | Yes | N/A | Yes |
| Federal Court Cases             |      |     |     |         |     |     |     |
| <i>United States v. McVeigh</i> | >1   | N/A | N/A | N/A     | N/A | Yes | No  |
| <i>United States v. Sampson</i> | >200 | Yes | Yes | 27 min. | Yes | Yes | No  |
| <i>United States v. Wilson</i>  | 0    | No  | No  | 20 min. | No  | N/A | Yes |

\*Adult victim shown as a child in a photograph presented as victim impact evidence.

Sixteen states' courts plus federal courts encountered cases where videos were presented as victim impact evidence. Nebraska, New Jersey, and Texas ultimately ruled the videos inadmissible. The length of videos presented as victim impact evidence varied greatly, ranging from under a minute all the way up to four hours. For the twenty-seven videos where the exact runtime was reported, the mean runtime was 18.5 minutes, the median runtime was eight minutes, and the mode runtime was eight minutes. Three basic types of videos were presented. The first type involved video slideshows comprised entirely of still photographs of the victim. In *State v. Blake*, for example, the victim's mother presented a PowerPoint slideshow backed by an accompanying soundtrack.<sup>58</sup> The second type strictly involved video clips rather than still photographs. Three poignant examples are relevant here. In *State v. Bixby*, video footage of a police officer's funeral was admitted as victim impact evidence.<sup>59</sup> In *People v. Vines*, the victim was shown engaging in some of his

58. See *State v. Blake*, No. 2007AP2468-CR, 2008 Wisc. App. LEXIS 881, at \*7 (Wis. Ct. App. Nov. 12, 2008) ("Ross's mother asked to be allowed to also show a PowerPoint photo montage of Ross's life accompanied by a recorded musical tribute written and sung by one of Ross's friends.").

59. See *State v. Bixby*, 698 S.E.2d 572, 586 (S.C. 2010) ("The video at issue here contained footage that showed the folding of an American flag over the closed coffin; the playing of 'Taps'

favorite activities.<sup>60</sup> In *People v. Mooney*, the video of an entire restorative justice meeting between the defendant and several victims was introduced as victim impact evidence.<sup>61</sup> Finally, the third type inserted still photographs between sections of recorded video. *State v. Hess* serves as an example of this hybrid type of video victim impact evidence.<sup>62</sup>

Eight states plus federal courts have been confronted with video clips or slideshows accompanied by music. New Jersey, Texas, and some federal courts ultimately ruled those videos inadmissible. In contrast, California routinely admitted the videos, but required all background music to be removed prior to admission.<sup>63</sup> In *People v. Sandoval*, the Supreme Court of California categorically banned victim impact videos from containing accompanying music.<sup>64</sup> The type of music played during victim impact videos has taken several different forms. In *People v. Kelly*, for example, the included music

---

on a trumpet; footage of mourners; and a recording of a fictional 911 call in which Deputy Wilson is given permission to ‘return home,’ a tradition at law enforcement funerals.”).

60. See *People v. Vines*, 251 P.3d 943, 986 (Cal. 2011) (“In the five-minute videotape . . . Ronald Lee is seen singing, dancing, and rapping in three musical numbers with relatives, including his cousin Littell Williams, Jr.; in a fourth number, Lee and several other young people perform before a crowd in a high school auditorium. The videotape is of ‘home movie’ quality, without added music, narration or visual techniques . . . . The videotape depicts Lee at an age only about two years younger than he was at the time of his death at age 20 . . . .”).

61. See *People v. Mooney*, 506 N.Y.S.2d 991, 994 (Genesee Cty. Ct. 1986) (“The victim impact statement includes here a video tape of a victim reconciliation conference conducted on August 17, 1985 approximating four hours in length. Parts one and two consist of a mediated face-to-face confrontation between the defendant and the two immediate victims involved, along with the mother of one victim. Parts three and four consist of an additional confrontation between the same parties, along with other selected representatives of the LeRoy community from law enforcement, the clergy, governmental officials and the citizenry.”).

62. See *State v. Hess*, 23 A.3d 373, 381 (N.J. 2011) (“The video consists of a montage of approximately sixty still photographs of Jimmy’s life from childhood to adulthood, including a photograph of his tombstone. It also consists of four separate home-video clips of Jimmy: his graduation from the police academy, coaching a baseball game, and appearing on fishing trips. The video includes a television segment that covered Jimmy’s funeral.”).

63. See *People v. Zamudio*, 181 P.3d 105, 134 (Cal. 2008) (“The trial court ruled that the picture montage could be played, that the audio portion of the montage—consisting of music and narration—could not be played, and that a family member could describe each photograph in the montage from the witness stand.”); see also *People v. Williams*, 355 P.3d 444, 475 (Cal. 2015) (“The trial court admitted both tapes but directed that the music accompanying the second be muted to avoid evocation of an emotional response.”); *People v. Dykes*, 209 P.3d 1, 48 (Cal. 2009) (“The trial court exercised appropriate caution to avoid introducing irrelevant drama and undue emotion into the penalty determination. The court carefully reviewed the videotape prior to its admission, ordered the audio portion deleted, and vigorously cautioned the prosecutor to ensure that Kristie Clark’s commentary during the playing of the videotape should be unemotional.”).

64. See *People v. Sandoval*, 363 P.3d 41, 76 (Cal. 2015) (“We hold that because background music in victim impact presentations provides no relevant information and is potentially prejudicial, it is never permitted. Music in such presentations is permissible only when it is relevant to the jury’s penalty phase decision.”).

consisted of sad sounding popular music.<sup>65</sup> Similar examples include *Salazar v. State*,<sup>66</sup> *People v. Garcia*,<sup>67</sup> *State v. Leon*,<sup>68</sup> and *United States v. Sampson*.<sup>69</sup> In contrast, *Whittlesey v. State*<sup>70</sup> and *People v. Vines*<sup>71</sup> exemplify a second form, where the victim is shown displaying their musical talent. A third type of music played is sad instrumental music without words. *People v. Montes*,<sup>72</sup> *Lopez v. State*,<sup>73</sup> and *State v. Bixby*<sup>74</sup> all contained music fitting this description. *People v. Sandoval* serves as an example of a fourth type of music characterized by instrumentals intended to evoke images of heroism and sacrifice.<sup>75</sup> In a fifth type of music, *State v. Blake* contained original music composed specifically

---

65. See *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007) (“Throughout much of the video, the music of Enya—with most of the words unrecognizable—plays in the background; the music is generally soft, not stirring.”).

66. See *Salazar v. State*, 90 S.W.3d 330, 333 (Tex. Crim. App. 2002) (“Music accompanies the entire seventeen-minute video and includes such selections as ‘Storms in Africa’ and ‘River’ by Enya, and concludes with Celine Dion singing, ‘My Heart Will Go On,’ from the movie *Titanic*.”).

67. See *People v. Garcia*, 258 P.3d 751, 761 (Cal. 2011) (“[A]t the end of the videotape, a song plays softly in the background for 80 seconds, with lyrics about a ‘hero [who] goes free’ and a ‘villain [who] goes to jail.’”) (second and third alterations in original).

68. See *State v. Leon*, 132 P.3d 462, 464 (Idaho Ct. App. 2006) (“The video portion of the DVD had contemporaneous audio recordings and the portion showing still photographs was arranged in a montage and set to music.”).

69. See *United States v. Sampson*, 335 F. Supp. 2d 166, 191 (D. Mass. 2004) (“The pictures were set to evocative contemporary music, including that of the Beatles and James Taylor.”).

70. See *Whittlesey v. State*, 665 A.2d 223, 250 (Md. 1995) (“The tape showed approximately 90 seconds of Griffin playing the piano, a skill for which he had been nationally recognized.”).

71. See *People v. Vines*, 251 P.3d 943, 985 (Cal. 2011) (the victim impact evidence included “a videotape depicting Ronald Lee singing and dancing, activities at which he was accomplished and in which he took great pleasure.”).

72. See *People v. Montes*, 320 P.3d 729, 787 (Cal. 2014) (“The version of the video previewed by the court and the parties outside the presence of the jury had been 16 to 17 minutes long and had included Walker’s favorite songs, including ‘Fire and Rain’ by James Taylor. Defense counsel objected to the emotional effect of the songs and the religious references in two of them. The trial court found the video images admissible but agreed that the music magnified their emotional impact and caused the videotape to be substantially more prejudicial than probative. The court suggested the prosecutor should restrict himself to ‘Muzak-type’ background if he wanted to use music. The prosecutor subsequently shortened the tape and substituted an instrumental track with no apparent songs or recognizable themes . . . [that consisted of] simple piano music . . .”).

73. See *Lopez v. State*, 153 A.3d 780, 786 (Md. Ct. Spec. App. 2017) (“The video montage, in question, was accompanied by instrumental music, a popular song, and a bell, ringing as it began and then, once again, as it ended.”).

74. See *State v. Bixby*, 698 S.E.2d 572, 586 (S.C. 2010) (The video included “the playing of ‘Taps’ on a trumpet.”).

75. See *People v. Sandoval*, 363 P.3d 41, 75 (Cal. 2015) (the victim impact video was “accompanied by stirring orchestral music.”).

for the purpose of accompanying the victim impact video presented at trial.<sup>76</sup> Finally, the sixth type incorporated several of the other music types into a single video presentation, as demonstrated in *State v. Hess*.<sup>77</sup>

In eight states plus federal courts, trial judges have screened victim impact evidence in at least some cases to determine whether it is admissible before exposing jurors to the material. On some occasions, judges have requested changes to the victim impact evidence before it can be admitted.<sup>78</sup> On other occasions, this screening method has completely barred the victim impact evidence from admission.<sup>79</sup> In *Turner v. State*, Georgia's Supreme Court praised the trial judge for privately viewing the victim impact evidence and ruling on its admissibility before exposing the jury to potentially biasing material.<sup>80</sup>

### III. MOVING FORWARD FROM *PAYNE*

In his concurring opinion in *Decay v. State*, Arkansas Supreme Court Justice Robert Brown noted the lack of guiding principles for determining when to admit or exclude victim impact evidence.<sup>81</sup> As he observed, this lack of guidance is two-fold, since few state statutes address the issue, and courts have been reluctant to take up the task themselves.<sup>82</sup> Absent input from the U.S.

---

76. See *State v. Blake*, No. 2007AP2468-CR, 2008 Wisc. App. LEXIS 881, at \*7 (Wis. Ct. App. Nov. 12, 2008) (the victim impact slideshow was "accompanied by a recorded musical tribute written and sung by one of Ross's friends.").

77. See *State v. Hess*, 23 A.3d 373, 381 (N.J. 2011) ("The entire video is accompanied by a medley of music: a song by the Beatles, 'Here Comes the Sun'; a holiday song, 'I'll be Home for Christmas'; two country songs, 'I'm from the Country' and 'Live, Laugh, Love'; one religious hymn, 'Here I Am Lord'; and military-like cadences.").

78. See *People v. Williams*, 355 P.3d 444, 475 (Cal. 2015); see also *People v. Montes*, 320 P.3d 729, 787 (Cal. 2014).

79. See *State v. Galindo*, 774 N.W.2d 190, 244 (Neb. 2009) ("[T]he record is unclear as to whether Galindo's *Crawford* objection was to all the victims' statements or was instead limited to the State's proposed introduction of a videotape containing victim statements, an action which the trial court disallowed.").

80. *Turner v. State*, 486 S.E.2d 839, 842 (Ga. 1997) ("The procedure used by the state and trial court in this case has much to commend it. It enables the jury to hear the evidence allowable under O.C.G.A. § 17-10-1.2, but also ensures that evidence that might be unduly prejudicial is not admitted. By providing a copy of the statement to the defense and the court before the sentencing phase, the trial court may ensure that the statement does not contain highly inflammatory statements.").

81. See *Decay v. State*, 352 S.W.3d 319, 334 (Ark. 2009) (Brown, J., concurring) ("In my concurring opinion in *Hicks v. State*, 327 Ark. 727, 940 S.W.2d 855 (1997), over ten years ago, I expressed my concern over the lack of guidance for the introduction of victim-impact evidence in Arkansas. I also called on the General Assembly or this court to fashion criteria for the introduction of such evidence. Trial courts still lack concrete guidelines by which to judge the relevance or prejudicial nature of victim-impact testimony. This critical issue needs to be addressed . . .").

82. See *id.*; see also Kennedy, *supra* note 6, at 1076 ("For the most part, states have not promulgated specific rules about what kinds or amounts of evidence are admissible, what is too

Supreme Court,<sup>83</sup> at least one legal scholar has recommended that states exclude all video victim impact evidence.<sup>84</sup> The same scholar concedes, however, that “not every video contains the dramatic and emotional cinematic elements” associated with an unacceptable risk of prejudicing jurors against the defendant.<sup>85</sup> Additionally, other legal scholars have recognized that victim impact evidence is here to stay for the foreseeable future.<sup>86</sup> As a result, states should not seek to categorically ban victim impact videos, but rather create detailed statutes establishing appropriate parameters for their admissibility. Any video that subsequently fails to meet the criteria outlined in those statutes should be ruled inadmissible.

### A. Court and Legal Scholars’ Recommendations

#### 1. Limited Number of Photographs

Several courts have suggested that victim impact evidence can become prejudicial toward the defendant simply through “sheer volume.”<sup>87</sup> These courts echoed the U.S. Supreme Court’s ruling in *Payne* that “[a] State may decide . . . that the jury should see ‘a quick glimpse of the life petitioner chose to extinguish.’”<sup>88</sup> In *Salazar v. State* and *United States v. Sampson*, the number of photographs presented in the victim impact videos factored into their prejudicial nature and subsequent inadmissibility (one hundred forty and two hundred, respectively).<sup>89</sup> Thus, some precedent exists for setting an upper limit

---

much as to be ‘unduly prejudicial,’ or what amount will result in a ‘fundamentally unfair trial.’”) (footnote omitted).

83. See Blume, *supra* note 4; see also Kennedy, *supra* note 6, at 1070 (“The law governing the admissibility of victim impact evidence is generally quite vague.”).

84. See Harden, *supra* note 3, at 848 (“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.”).

85. *Id.* at 875.

86. See Austin, *supra* note 3, at 984 (“[T]he U.S. Supreme Court is not likely to reverse its decisions admitting victim impact evidence in capital cases anytime soon.”).

87. *Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998) (“[W]e caution that victim impact and character evidence may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice under Rule 403. Hence, we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence.”); see also *Hicks v. State*, 940 S.W.2d 855, 860 (Ark. 1997) (Brown, J., concurring) (“I could find no case that has gone as far as the instant case in allowing the sheer number of photographs coupled with the narration by a family member.”).

88. *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) (O’Connor, J., concurring) (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting)).

89. See Emily Holland, Note, *Moving Pictures . . . Maintaining Justice? Clarifying the Right Role for Victim Impact Videos in the Capital Context*, 17 BERKELEY J. CRIM. L. 147, 162 (2012) (“As to the number of images these victim impact videos may contain, one court prohibited

to the number of photographs that victim's loved ones can present of the victim. As previously mentioned, the median number of photographs presented in the thirty court cases where the exact number of photographs presented could be ascertained was 12.5.<sup>90</sup> The mode number of photographs presented was one.<sup>91</sup> Based on these figures, it is recommended for states to limit the total number of photographs that can be presented as victim impact evidence to ten or fewer.

## 2. Limited Runtime for Videos

The *Payne* Court's ruling that states can introduce "a quick glimpse"<sup>92</sup> of murder victims' lives suggests that videos should have an upper limit on runtimes if they are to be admissible. Several courts have agreed. In *People v. Prince*, California's Supreme Court stated, "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 . . ." <sup>93</sup> Similarly, New Jersey barred a victim impact video in *State v. Hess* in part because the video was "overly lengthy."<sup>94</sup> In *United States v. Sampson*, the U.S. District Court of Massachusetts barred admission of a victim impact video "given its length and the number of photos displayed."<sup>95</sup> The Texas Court of Criminal Appeals has urged lower courts "to place appropriate limits upon the amount, kind, and source of victim impact and character evidence."<sup>96</sup> For its part, New Mexico's Supreme Court cited the short runtime of a victim impact video to justify its admissibility.<sup>97</sup> Legal scholars have also argued that a victim impact video's runtime is an important factor to consider when evaluating the video's admissibility.<sup>98</sup> Although New Jersey's Supreme Court has advised courts to avoid measuring video runtimes "with stop-watch precision,"<sup>99</sup> this appears to be the only way to limit videos to "a quick glimpse" of the victim's life.<sup>100</sup> As

---

a video showing two hundred photos, and another court remanded for prejudice a video containing one hundred and forty photos . . ." (footnotes omitted).

90. See *supra*, Table 2.

91. See *supra*, Table 2.

92. *Payne*, 501 U.S. at 830 (O'Connor, J., concurring) (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting)).

93. *People v. Prince*, 156 P.3d 1015, 1093 (Cal. 2007).

94. *State v. Hess*, 23 A.3d 373, 394 (N.J. 2011).

95. *United States v. Sampson*, 335 F. Supp. 2d 166, 192 (D. Mass. 2004).

96. *Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998).

97. See *State v. Allen*, 994 P.2d 728, 751 (N.M. 1999) ("The videotape had been edited so that it lasted only three minutes.").

98. See *Kennedy*, *supra* note 6, at 1076 ("Regarding the amount of [victim impact] evidence, courts have looked at the length of time this evidence takes to be presented . . ."); see also *Holland*, *supra* note 89, at 162 (stating "a video's duration can prove to be a determinative factor" of whether that video is ultimately ruled admissible).

99. *State v. Koskovich*, 776 A.2d 144, 175 (N.J. 2001).

100. *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) (O'Connor, J., concurring) (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting)).

previously mentioned, the median and mode runtime for the twenty-seven videos where the exact runtime could be ascertained was eight minutes. Given that previous legal research has suggested limiting victim impact videos to “three to five minutes,”<sup>101</sup> however, it is recommended that all victim impact videos presented at trial have a maximum collective runtime of five minutes.

### 3. Barring Childhood Depictions of Adult Victims

In *People v. Prince*, California’s Supreme Court noted that victim impact evidence requires increased scrutiny if it “emphasizes the childhood of an adult victim.”<sup>102</sup> Similarly, New Jersey’s Supreme Court observed that “photographs of the victim’s childhood . . . do not project anything meaningful about the victim’s life as it relate[s] to his family and others at the time of his death.”<sup>103</sup> The Texas Court of Criminal Appeals determined that a victim impact presentation was inadmissible partially due to an “undue emphasis [having been placed] upon the adult victim’s halcyon childhood.”<sup>104</sup> Echoing this, Justice Stevens, in his dissent to the U.S. Supreme Court’s denial to hear two cases involving victim impact videos, wrote, “The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of crime on the victims’ family members.”<sup>105</sup>

Several legal scholars have also cautioned against admitting victim impact evidence that depicts adult victims as children.<sup>106</sup> Moreover, in *People v. Vines*, California’s Supreme Court ruled that a victim impact video was admissible partially because the victim was shown “only about two years younger” than he

---

101. Austin, *supra* note 3, at 1014.

102. *People v. Prince*, 156 P.3d 1015, 1093 (Cal. 2007).

103. *State v. Hess*, 23 A.3d 373, 393–94 (N.J. 2011). The court also wrote, “baby photographs of an adult victim . . . do not advance any legitimate objective even against the broad contours of the Victims’ Bill of Rights.” *Id.* at 394.

104. *Salazar v. State*, 90 S.W.3d 330, 337 (Tex. Crim. App. 2002).

105. *Kelly v. California*, 555 U.S. 1020, 1025 (2008).

106. *See Kennedy, supra* note 6, at 1090 (“The probative value of the pictures of the victim as an adult is to show that the victim was a unique individual as allowed by *Payne*. Why then, are the pictures of the victim as a child not also probative to show the uniqueness of the victim—that he did not spring full-grown into life, but had a childhood during which his parents and siblings, friends and relatives, knew and loved him? It seems that the pictures of the victim as a child could logically have more probative value than the court is willing to acknowledge. This, however, would not diminish their elevated prejudicial effect, especially if there are a lot of these types of photographs.”) (footnote omitted); *see also Holland, supra* note 89, at 173 (“Videos that depict the passage of time are also arguably far from the ‘quick glimpse’ *Payne* envisioned. Referred to by some as ‘life histories,’ these are the videos that chart a decedent’s life from infancy to death. They showcase multiple childhood photos of individuals who were adults when they died. Such videos could create a misleading portrait of who the victim was at death, and whom he or she has left behind. They could also run the risk of suggesting certain themes to a jury.”) (footnotes omitted); Austin, *supra* note 3, at 1014 (“Chronologies beginning at birth and ending at death may be germane for young children; they should not be considered probative for teenagers or adults.”).

was when the crime was committed.<sup>107</sup> Similarly, New Jersey's Supreme Court has argued for restricting victim impact presentations to only those photographs or videos taken "within a reasonable period" leading up to the crime's commission.<sup>108</sup> For these reasons, it is recommended that states only admit photographs or videos as victim impact evidence if they show the victim no more than five calendar years before the commission of the crime.

#### 4. Barring Depictions of Funerals and Tombstones

Oklahoma's Court of Criminal Appeals has cautioned that, "[v]ictim impact statements were never intended to be—and should not be allowed to become—eulogies."<sup>109</sup> Similarly, Texas's Court of Criminal Appeals declared that, "the punishment phase of a criminal trial is not a memorial service for the victim."<sup>110</sup> In *State v. Hess*, New Jersey's Supreme Court ruled a victim impact video inadmissible partially because it depicted aspects of the victim's funeral.<sup>111</sup> On the other hand, Maryland's Court of Special Appeals allowed a victim impact video to be admitted because, unlike *Hess*, the photographs in the slideshow did not reference the victim's burial site.<sup>112</sup> Echoing this, California's Supreme Court justified admitting a victim impact video because it "[did] not constitute a memorial, tribute, or eulogy."<sup>113</sup> Finally, at least one legal scholar has also criticized victim impact evidence that showcases the victim's funeral or gravesite.<sup>114</sup> For these reasons, it is recommended that states bar admission of all victim impact evidence depicting a victim's funeral, memorial, gravesite, or tombstone.

---

107. *People v. Vines*, 251 P.3d 943, 986 (Cal. 2011).

108. *Hess*, 23 A.3d at 394 ("We in no way intend to limit the right of family members to present photographs and videos within a reasonable period before the death of the victim . . .").

109. *Malone v. State*, 168 P.3d 185, 210 (Okla. Crim. App. 2007).

110. *Salazar v. State*, 90 S.W.3d 330, 335–36 (Tex. Crim. App. 2002).

111. *See Hess*, 23 A.3d at 393–94 ("[T]he photographs of the victim's . . . tombstone, and the television segment about his funeral do not project anything meaningful about the victim's life as it related to his family and others at the time of his death. They should have been redacted from the video because they contain little to no probative value, but instead have the great capacity to unduly arouse or inflame emotions.")

112. *See Lopez v. State*, 153 A.3d 780, 799 (Md. Ct. Spec. App. 2017) ("[T]he *Hess* video, in contrast to the Lopez video, contained a depiction of the victim's tombstone and a 'television segment about his funeral,' both of which, undoubtedly, had the capacity to inflame rather than to inform") (quoting *Hess*, 23 A.3d. at 394).

113. *People v. Dykes*, 209 P.3d 1, 48 (Cal. 2009).

114. *See Holland*, *supra* note 89, at 168 ("Victim impact videos that contain images that do not feature the victim at all might not comport with *Payne*, either. An example is a video featuring images of a decedent's headstone. A juror who sees that headstone, or even reads its inscription, might respond to this sobering symbol of death with pity or rage, while not gleaning anything about the decedent's individuality. Rather than conveying uniqueness, images like these arguably contribute to the 'faceless[ness]' *Payne* sought to remedy.") (alteration in original) (footnote omitted) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

## 5. Barring Background Music

No aspect of victim impact videos has been criticized more heavily than the use of background music. In California, several victim impact videos were admitted only after removing the accompanying music,<sup>115</sup> prior to California's Supreme Court prohibiting the use of background music altogether.<sup>116</sup> Idaho's Court of Appeals questioned the relevance of background music, but ultimately permitted it in *State v. Leon*.<sup>117</sup> In *United States v. Sampson*, a federal court ruled that a victim impact video was inadmissible partially due to its "evocative accompanying music."<sup>118</sup> The highest courts in New Jersey and Texas have also excluded victim impact videos for their soundtracks.<sup>119</sup> Legal scholars have been vocal in their criticisms of using background music to accompany victim impact evidence as well.<sup>120</sup> Courts and legal scholars agree, however, that videos showing victims exercising their musical talents should be admissible.<sup>121</sup> Based on this, it is recommended that states prohibit the use of accompanying music in victim impact evidence. Victim impact evidence

---

115. See *People v. Zamudio*, 181 P.3d 105 (Cal. 2008).

116. See *People v. Sandoval*, 363 P.3d 41 (Cal. 2015).

117. See *State v. Leon*, 132 P.3d 462 (Idaho Ct. App. 2006) ("Although the musical accompaniment arguably did not constitute a valid exercise of a victim's right to be heard, we do not find it to be unduly inflammatory or manifestly unjust.").

118. *United States v. Sampson*, 335 F. Supp. 2d 166, 192–93 (D. Mass. 2004) ("Together with the evocative accompanying music, the videotape's images would have inflamed the passion and sympathy of the jury.").

119. See *State v. Hess*, 23 A.3d 373, 394 (N.J. 2011) ("An overly lengthy video, baby photographs of an adult victim, and a video scored to religious and pop music do not advance any legitimate objective even against the broad contours of the Victims' Bill of Rights."); see also *Salazar v. State*, 90 S.W.3d 330, 339 (Tex. Crim. App. 2002) ("The video itself was not admissible and the Enya and Celine Dion background music greatly amplifies the prejudicial effect of the original error.").

120. See *Kennedy*, *supra* note 6, at 1101 ("Adding musical soundtracks to victim impact videos only exacerbates the arguably inappropriate influence of emotions on capital sentencing. Music heightens the emotional influence of the visuals generally and introduces more factors that ought to be irrelevant to the sentencing decision."); see also *Schroeder*, *supra* note 3, at 501 ("Evidence must be relevant to be admitted, but music is never relevant: it is always unnecessary and does not advance either of the two goals of VIS. Presenting background music with relevant pictures or videos does not make the music relevant."); *Austin*, *supra* note 3, at 994 ("The choice of music used in victim impact videos is mostly employed to enhance or exaggerate the impact of the video."); *Holland*, *supra* note 89, at 168–69 ("More troubling are the videos that contain professional soundtracks compiled for, and added to, the videos. It is questionable whether a song or series of songs that were not written by or about the victim, or were possibly even known to the victim, are an appropriate way to illustrate the decedent to the jury. They may move the jury to feel emotions prompted by the songs' music, lyrics, or mood, but that is not what *Payne* envisioned.") (footnote omitted).

121. See *Whittlesey v. State*, 665 A.2d 223 (Md. 1995); see also *People v. Vines*, 251 P.3d 943 (Cal. 2011); *Holland*, *supra* note 89, at 168 ("[L]istening to a deceased musician playing an instrument may demonstrate personhood in a way a photo cannot . . .").

consisting of a victim displaying a musical talent, however, should be admissible.

#### 6. Barring Editing Effects

In *People v. Kelly*, California's Supreme Court discouraged the use of "video techniques" to edit pictures or videos presented as victim impact evidence.<sup>122</sup> Two years later, California's Supreme Court again suggested that victim impact evidence should not "contain staged or contrived elements" or "visual techniques designed to generate emotion."<sup>123</sup> In *People v. Garcia*, California's Supreme Court drew attention to an editing effect that made audio of the victim's wedding vow "until death do us part" echo repeatedly.<sup>124</sup> Similarly, the video featured "repeated flashbacks to scenes from [the victims'] wedding."<sup>125</sup> The court ultimately ruled that the video was admissible, but noted the echo effect was "more dramatic than factual."<sup>126</sup> Legal scholars have also expressed concerns that the ability to add slick effects to slideshows and videos will bias juries against the defendant.<sup>127</sup> This concern arises from the fact that "[c]apital sentencing trials are not theatrical productions."<sup>128</sup> It is recommended, therefore, that states require victim impact evidence involving photographs to display static photographs one after the other without special transition effects or other technological modifications. Videos should likewise be devoid of any editing beyond cutting the length down to an appropriately brief runtime.

#### 7. Mandatory Screenings of Victim Impact Evidence

In *State v. Burns*, Arizona's Supreme Court called for trial judges to review all proposed victim impact evidence in order to determine if it was

122. See *People v. Kelly*, 171 P.3d 548, 571 (Cal. 2007) ("Nonfactual dramatization of the evidence in a videotape—in the sense of making a presentation in a dramatic manner—adds irrelevant factors to the videotape. . . . Trial courts must not permit irrelevant background music or video techniques that enhance the emotion of the factual presentation.").

123. *People v. Dykes*, 209 P.3d 1, 48 (Cal. 2009).

124. *People v. Garcia* 258 P.3d 751, 782 (Cal. 2011).

125. *Id.* at 783.

126. *Id.* at 784.

127. See Holland, *supra* note 89, at 176–77 ("[I]nside a video-editing suite, an editor can apply a raft of techniques and special effects to these amateur images that amplify or minimize their action, mood, tone, and emotion, or express a certain aesthetic point of view. Ordering and juxtaposing images, adjusting their speed, applying dramatic lighting shifts and camera zooms, employing music or silence, and even subliminal images are just some of the scores of mechanical and creative devices that can imbue one frame of film with multiple layers of effects. Imperceptibly slowing the pace of a video may coax the audience to linger on elements of a victim's life that may influence the sentencing decision. Tinting the color of a shot could endear a decedent and his or her family to a jury, or heighten feelings of compassion and sadness. Subtle audio touches, such as a few strings of a lullaby or funeral bagpipes, could be applied to a shot to play upon jurors' emotions.") (footnotes omitted).

128. Harden, *supra* note 3, at 877.

admissible.<sup>129</sup> California's Supreme Court similarly urged trial judges to closely scrutinize victim impact evidence for anything that might bias jurors against the defendant.<sup>130</sup> Georgia's Supreme Court explicitly required all trial judges to preview victim impact evidence before it could be admitted in capital trials.<sup>131</sup> Several legal scholars have also called for trial judges to review victim impact evidence prior to admission.<sup>132</sup> As a result, it is recommended that states require trial judges to hold pre-admissibility hearings in order to determine whether victim impact evidence adheres to the appropriate guidelines for admissibility.

---

129. See *State v. Burns*, 344 P.3d 303, 332 (Ariz. 2015) ("The trial court should take an active role in pre-screening the nature and scope of victim impact evidence to ensure it does not 'cross the line.'").

130. See *People v. Prince* 156 P.3d 1015, 1093 (Cal. 2007) ("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.").

131. See *Livingston v. State*, 444 S.E.2d 748, 752 (Ga. 1994) ("To help ensure that victim impact evidence does not result in the arbitrary imposition of the death penalty, we hold that the trial court must hear and rule prior to trial on the admissibility of victim impact evidence sought to be offered. This will, of course, necessitate that the state notify the defendant of victim impact evidence which it intends to offer, and will require the trial court to notify the defendant of the questions, if any, it intends to ask of the state's prospective witnesses at least ten days prior to trial. At the conclusion of the guilt-innocence phase of the trial, the trial court may reconsider any pre-trial decision regarding the admissibility of victim impact evidence.").

132. See *Schroeder*, *supra* note 3, at 499 ("[W]hen it comes to sentencing judgments by juries, it is the courts themselves that could have the greatest impact on reducing emotional judgments by limiting VIS in scope and amount . . . . Courts could additionally take on the responsibility of privately viewing all evidence offered to decide whether admission would prevent a fundamentally fair trial."); see also *Harden*, *supra* note 3, at 863 ("[C]ourts should, at a minimum, very closely analyze [a victim impact] video for emotional effect . . . ."); *Austin*, *supra* note 3, at 1015 ("Courts have greater power to control the level of emotion in victim impact evidence through pre-admissibility hearings than through instantaneous rulings on live testimony. Although a few states require that the prosecution give notice of its intent to introduce victim impact evidence in every case, defense counsel should certainly be given advance notice of and access to victim impact videos or photo slide shows. Defense counsel should be allowed to inquire as to whether the slide show or video was compiled by the victim's survivors or by a professional, and if a professional was involved, who directed or shaped the message.") (footnote omitted); *Holland*, *supra* note 89, at 193 ("Judges should review victim impact videos and decide whether they may be considered at sentencing before they are shown to juries, not during the sentencing proceeding.").

## 8. Jury Instructions on Victim Impact Evidence

Georgia,<sup>133</sup> Oklahoma,<sup>134</sup> New Jersey,<sup>135</sup> and Pennsylvania<sup>136</sup> all recommend that trial judges present the jury with instructions explaining what

---

133. See *Turner v. State*, 486 S.E.2d 839, 842–43 (Ga. 1997) (“[I]n future cases in which victim impact evidence is given in the sentencing phase of a death penalty or life without parole case, the trial court should instruct the jury regarding the purpose of victim impact evidence. For example, the trial court might charge: The prosecution has introduced what is known as victim impact evidence. Victim impact evidence is not the same as evidence of a statutory aggravating circumstance. Introduction of victim impact evidence does not relieve the state of its burden to prove beyond a reasonable doubt the existence of a statutory aggravating circumstance. This evidence is simply another method of informing you about the harm caused by the crime in question. To the extent that you find that this evidence reflects on the defendant’s culpability you may consider it, but you may not use it as a substitute for proof beyond a reasonable doubt of the existence of a statutory aggravating circumstance.”).

134. See *Cargle v. State*, 909 P.2d 806, 828–29 (Okla. Crim. App. 1995) (“To further assist the jury in using victim impact evidence, we hereby promulgate the following instruction, to be used in all future capital murder cases in which victim impact evidence is presented: The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim’s death on the members of the victim’s immediate family. It is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victim is an individual whose death may represent a unique loss to society and the family. This evidence is simply another method of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence. As it relates to the death penalty: Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim’s family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstance has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances. As it relates to the other sentencing options: You may consider this victim impact evidence in determining the appropriate punishment as warranted under the law and facts in the case.”).

135. See *State v. Hightower*, 680 A.2d 649, 661 (N.J. 1996) (“Allowing victim impact information to be placed before the jury without proper limiting instructions has the clear capacity to taint the integrity of the jury’s decision on whether to impose death.”).

136. See *Commonwealth v. Means*, 773 A.2d 143, 158–59 (Pa. 2001) (“The prosecution has introduced what is known as victim impact evidence. Victim impact evidence is not evidence of a statutory aggravating circumstance and it cannot be a reason by itself to impose the death penalty. The introduction of victim impact evidence does not in any way relieve the Commonwealth of its burden to prove beyond a reasonable doubt at least one aggravating circumstance. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt independent from the victim impact evidence, and if one or more jurors has found that one or more mitigating circumstances have been established by a preponderance of the evidence. Victim impact evidence is simply another method of informing you about the nature and

victim impact evidence is and how it should be used. Based on this, it is recommended that states require trial judges to inform juries about the purpose of victim impact evidence using the language adopted by Pennsylvania because it appears the easiest for a layperson to understand.<sup>137</sup>

### *B. A Model State Statute for Victim Impact Evidence*

In the absence of guidance from the U.S. Supreme Court on the issues addressed above, this Article proposes model language that states can use to ensure that the victim impact evidence admitted in capital trials does not unfairly bias jurors against the defendant.<sup>138</sup> The proposed language can also serve as a model for courts to adopt in the event that legislatures fail to act.

**Table 3.** Model Language to Guide States on Aspects of Victim Impact Evidence Left Unaddressed by the U.S. Supreme Court

| Issues to Address   | Recommended Statute Text  |
|---|---|
| (1) Limited Number of Photographs;<br>(2) Limited Runtime of Videos                                     | <i>The total number of photographs presented as victim impact evidence must not exceed ten. This includes photographs presented in a slideshow format or as part of a victim impact video. The total amount of video footage presented as victim impact evidence must not exceed five minutes in runtime, regardless of whether it is a single video or several shorter video clips.</i>  |
| (1) Barring Childhood Depictions of Adult Victims;<br>(2) Barring Depictions of Funerals and Tombstones | <i>All photographs, video, and audio of the victim presented as victim impact evidence must demonstrate the victim as they were five calendar years or less before the commission of the offense(s) being tried at the trial where the victim impact evidence is to be admitted. Depictions of aspects of the victim's funeral, memorial, gravesite, or tombstone are not admissible as victim impact evidence in any format and under any circumstances.</i>   |
| Barring Background Music  | <i>Music is inadmissible as victim impact evidence unless: (1) the music was inadvertently captured when originally recording a video of the victim and cannot be removed without also removing dialogue between the subjects of the video; or (2) the music is being performed by the victim as a display of their musical talent.</i>   |
| Barring Editing Effects   | <i>Photographs presented in a victim impact slideshow should be static, without special transition effects between photographs. Victim impact photographs and videos should not be color-corrected, involve post-recording zooming in or out on the images, or have any type of sound effect added. Victim impact videos should be played at normal speed, without being sped up or slowed down. Victim impact photographs, videos, and audio should be factual and as faithful to their original</i> |

circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. The sentence you impose must be in accordance with the law as I instruct you and not based on sympathy, prejudice, emotion or public opinion and not based solely on victim impact.”).

137. *See id.*

138. *See infra*, Table 3.

|   |   |
|---|---|
|   | <i>conditions as possible, not embellished through editing software to dramatize their presentation.</i>  |
| Mandatory Screening of Victim Impact Evidence Admissibility | <i>Before any victim impact evidence can be admitted into court, the trial judge must hold a private pre-admissibility hearing to determine if the proposed victim impact evidence adheres to the guidelines outlined above.</i>  |
| Jury Instructions on Victim Impact Evidence*                | <p><i>Prior to the introduction of any victim impact evidence in court, the trial judge must instruct jurors that:</i></p> <p><i>“The prosecution has introduced what is known as victim impact evidence. Victim impact evidence is not evidence of a statutory aggravating circumstance and it cannot be a reason by itself to impose the death penalty. The introduction of victim impact evidence does not in any way relieve the prosecution of its burden to prove beyond a reasonable doubt at least one aggravating circumstance. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt independent from the victim impact evidence, and if one or more jurors has found that one or more mitigating circumstances have been established by a preponderance of the evidence. Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. The sentence you impose must be in accordance with the law as I instruct you and not based on sympathy, prejudice, emotion or public opinion and not based solely on victim impact”</i></p> |

\*Adopted from *Commonwealth of Pennsylvania v. Means*.<sup>139</sup>

## CONCLUSION

In the years since *Payne*, the U.S. Supreme Court has neglected to provide further clarification on the types and extent of victim impact evidence that is admissible in capital trials.<sup>140</sup> Absent guidance from the U.S. Supreme Court, state courts have been forced to reach their own conclusions. This approach has resulted in some conflicting rulings across states.<sup>141</sup> Thus, this Article proposed a model statute that states can enact. States seeking to regulate the admissibility of victim impact evidence are recommended to limit the number of photographs to ten and the runtime of videos to five minutes. States should additionally prohibit depictions of adult victims as children, and all imagery of the victim’s funeral and gravesite. Slideshows and videos should not contain background music or include editing effects. Trial judges should hold pre-admissibility hearings to determine whether victim impact evidence is likely to unfairly bias

139. See *Means*, 773 A.2d at 158–59.

140. See Blume, *supra* note 4.

141. For example, Arizona, Arkansas, California, Georgia, Idaho, Louisiana, Maryland, Missouri, New Hampshire, New Mexico, New York, Ohio, South Carolina, Wisconsin, and federal courts have all found victim impact videos admissible on at least one occasion. In contrast, Nebraska, New Jersey, and Texas have excluded victim impact videos.

the jury. Finally, trial judges should issue jury instructions explaining what victim impact evidence is and how it should be used. In conclusion, the rapid growth in technology since *Payne* has hastened the need for the U.S. Supreme Court and state legislatures to identify specific criteria outlining the types of victim impact evidence considered admissible under various circumstances.