

In the Supreme Court of the United States

AARON NORMAN DUNN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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**CAPITAL CASE
QUESTION PRESENTED**

Whether the California Supreme Court correctly held that an audio recording of a murder victim singing a song he had written was permissible victim impact evidence in the penalty phase of petitioner's capital trial.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Dunn, No. S184521 (judgment entered July 24, 2025) (this case below)

In re Dunn on Habeas Corpus, No. S291364 (pending)

Sacramento County Superior Court:

People v. Dunn, No. 06F02731 (judgment entered July 7, 2010) (this case below)

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STATEMENT

1. a. In March 2006, petitioner Aaron Norman Dunn went on a drive-by shooting spree in Elk Grove, California. Pet. App. A 1-4. His first victim was Mike Daly, who had just finished celebrating his mother's birthday with other family members at a restaurant. Pet. App. A 4. As Daly sat in his car with his wife and two young children, Dunn sped by and shot him in the face. *Id.* Daly died four days later. *Id.* Dunn then drove down the road, firing at two police officers as they sat in their patrol car. *Id.* Dunn got out of his car and fired at the people in a car stopped behind the patrol car. *Id.* He walked over to another car, pumping his shotgun and preparing to shoot, but the car sped away. *Id.* at 5. Then he ran into a restaurant parking lot where he shot Jon Johnson, who also died. *Id.* at 6. When police officers arrived, Dunn attacked them, leading to a close-quarters shootout, before he was finally shot and subdued. *Id.* at 6-7.

Dunn was convicted of two counts of murder and five counts of attempted murder, with a multiple-murder special circumstance and enhancements for the personal and intentional discharge of a firearm. Pet. App. A 1.

b. In the trial's penalty phase, the prosecution presented evidence of Dunn's prior violent acts, including assaults in jail. Pet. App. A 10-11. There was also victim impact evidence. Jon Johnson's wife testified about the effect of the crime on their children and herself. *Id.* at 13-14; *see also id.* (additional testimony from Johnson's best friend). And one of the police officers whom

Dunn had attacked testified about the crime's traumatic effect on her. *Id.* at 14.

The jury also heard evidence about the crime's effect on Mike Daly's parents, siblings, wife, and children. Pet. App. A 11-13. As relevant here, in the days after the shooting, Daly's siblings travelled from around the country to be by his bedside. *Id.* at 12. Daly's brother testified that on the day of Dunn's death, the brother had spent an hour with Daly playing several songs that were special to them, including an original song that Daly had written and performed entitled *Horizon*. *Id.* The prosecution displayed a photograph of Daly playing guitar and played a five-minute audio recording of Daly singing the song. *Id.* at 87. The trial court denied Dunn's objection to the recording, reasoning that the evidence "relate[d] to the victim's personal characteristics and to the crime's emotional impact on the victim's family." *Id.*

The defense presented mitigation evidence about Dunn's abusive and neglectful childhood, his drug use, and his kindness to his siblings. Pet. App. A 14-16. The defense also presented evidence that at the time of the shooting, Dunn suffered depression and paranoia due to the loss of his job and the breakup of his marriage. *Id.* at 16. Dunn's mother and siblings testified that they loved him and did not want him to receive the death penalty, and that a death sentence would be painful for Dunn's nephews and daughter. *Id.*

The jury sentenced Dunn to death. Pet. App. A 1.

2. The California Supreme Court affirmed the conviction and sentence. Pet. App. A 1-93. As relevant here, Dunn argued that the admission of the audio recording of Daly singing *Horizon* had deprived Dunn of due process and a fair penalty trial because it was duplicative of Dunn’s brother’s testimony and was so emotional as to provoke an irrational response in the jury. *Id.* at 87-88. The court rejected the claim, reasoning that “[t]he song gave jurors insight into what Mike Daly was like, and the recording allowed them to hear from him in his own voice.” *Id.* at 88-89. The song, “written and performed by the victim, offered relevant evidence of his ‘uniqueness as an individual human being.’” *Id.* at 90 (quoting *Payne v. Tennessee*, 501 U.S. 808, 823 (1991)). The recording featured no “later-added dramatic effects that might have injected irrelevant information or distracted the jury from its proper role.” *Id.* at 90. And the lyrics were not “especially evocative or troubling.” *Id.* The court viewed the evidence as similar to that in one of its previous cases: It was “‘moving’ but also ‘probative of [the victim’s] character.’” *Id.* And it was not cumulative of the live testimony, because it allowed the jury to hear “‘directly from the victim himself, contrasted with hearing about him.’” *Id.*

ARGUMENT

1. Dunn argues that his due process rights were violated by the admission of the recording of Daly singing his song. The California Supreme Court’s rejection of that claim was correct under this Court’s precedents.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), this Court held that the Constitution imposes no categorical bar on the introduction of evidence about

the victim or the impact of the defendant's acts on the victim's family and friends in determining the penalty in a capital case. *Id.* at 825-827. The Court reasoned that evidence "about the victim and about the impact of the murder on the victim's family" may be "relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* at 827. The State may also need to "counteract[] the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Id.* at 825. The Court expressly overruled prior decisions that had considered such evidence categorically improper under the Eighth Amendment. *Id.* at 830. Instead, the Court clarified, a State "may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Id.* at 825. Instead of a categorical bar, the constitutional constraint was the Due Process Clause prohibition on evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." *Id.*

The California Supreme Court correctly determined that, under that standard, the recording of Dunn's victim could be admitted. The song, which was "written and performed by [Daly himself]," Pet. App. A 90, was highly relevant evidence of Daly's "uniqueness as an individual human being." *Id.* (quoting *Payne*, 501 U.S. at 823). Dunn was about to present mitigating

evidence, *see* Pet. App. A 14-17, which the prosecution was entitled to “counteract[]” by “reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.” *Id.* at 86 (quoting *Payne*, 501 U.S. at 825). Nor was there anything about the evidence that was “fundamentally unfair” or “unduly prejudicial.” *Payne*, 501 U.S. at 825. In particular, as the California Supreme Court observed, there were no “later-added dramatic effects” that might inject irrelevant information or distract the jury from its proper role. Pet. App. A 90; *see also id.* (song “seem[ed] to describe a person who has moved on after the end of a love affair”).

Dunn alleges that his due process rights were violated because the song was presented “as the last thing jurors would hear in the victim impact presentation,” which “made it particularly dramatic, designed to stir emotions[.]” Pet. 7-8. But powerful evidence is admissible at the penalty phase of a capital trial so long as it is not so unduly prejudicial that it renders the defendant’s trial fundamentally unfair. *Payne*, 501 U.S. at 825.¹ And the recording was not in fact the end of the prosecution’s case in aggravation nor

¹ Petitioner notes that the prosecutor stated in his penalty-phase opening argument that he anticipated that this portion of the trial would be “tearful.” Pet. 8. But such an emotional impact may be anticipated when the jury learns of “victim’s individuality and the effects of his death upon close survivors.” *Payne*, 501 U.S. at 839 (Souter, J., concurring). As recognized in *Payne*, that does not defeat the legitimate use of such evidence so the jury may make a “decision as to whether or not the death penalty should be imposed.” *Id.* at 827 (opinion of the Court).

was the song the last thing the jury heard before making its decision. Instead, following the admission of the song, the prosecution presented evidence of Dunn’s other prior criminal acts. *See* 22 RT 8114-8139; 23 RT 8366-8368.² Then the defense presented extensive mitigation evidence. *See* Pet. App. A 10-16.

2. Dunn incorrectly asserts that the California Supreme Court’s decision in this case conflicts with the Texas Court of Criminal Appeals’ decision in *Salazar v. State*, 90 S.W.3d 330 (Tex. Crim. App. 2002). *See* Pet. 10-11. After the defendant in *Salazar* was convicted of non-capital murder, 90 S.W. 3d at 332 n.2, there was a jury proceeding under Texas law to determine punishment, *see id.* at 333-335. The prosecution introduced a “seventeen-minute” video that the victim’s father had prepared for the victim’s memorial service. *Id.* at 333. The “extraordinarily emotional” video consisted of approximately 140 photos of the victim, set to emotional music that was “keyed to the various visuals, sometimes soft and soothing, then swelling to a crescendo chorus.” *Id.* at 333-334. The Texas Court of Criminal Appeals held that admission of the videorecording violated Rule 403 of the Texas Rules of Evidence. *Id.* at 331. As the court explained, the videorecording’s probative value was low, because the victim was an adult but “nearly half of the photographs showed [him] as an infant, toddler, or small child”—and the risk of unfair prejudice was high, because the images could “unconsciously

² RT refers to the Reporter’s Transcript.

mislead[] the jury” into punishing the defendant for murdering the “angelic infant” or “first-grade soccer player” the images depicted. *Id.* at 337.

Salazar does not conflict with the decision below. As an initial matter, the *Salazar* decision held that admission of the evidence at issue violated Texas’s evidence rules—not any constitutional right. *See Salazar*, 99 S.W. 3d at 338-339. And the facts giving rise to the state-law violation in *Salazar* bear no comparison to Dunn’s case. Dunn’s trial featured a five-minute audio recording of a single song, not a 17-minute video-montage set to swelling music. The recording was of Daly as the adult whom Dunn murdered—it did not depict him as a child. And the recording did not include any “later-added dramatic effects,” or lyrics that were “especially evocative or troubling.” Pet. App. A 90.

3. Finally, Dunn argues that this Court’s review of his case is necessary because the California Supreme Court, as a general matter, exhibits “cavalier acceptance of a wide range of audio and video evidence” during the penalty phase of death penalty trials. Pet. 8. The accusation is unfounded.

The California Supreme Court has warned trial courts to “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.” *People v. Prince*, 40 Cal. 4th 1179, 1289 (2007). That court has not hesitated to hold the admission of victim impact evidence improper when the evidence is “so unduly prejudicial that it renders the trial fundamentally unfair.” *Payne*, 501 U.S. at

825; *see, e.g., People v. Gonzalez*, 12 Cal. 5th 367, 414-416 (2021) (holding it improper for victim impact video to have included testimonials filmed in a cemetery, and improper to use camera technique that progressively zoomed in on speakers); *People v. Sandoval*, 62 Cal. 4th 394, 442 (2015) (“Music in such presentations is permissible only when it is relevant to the jury’s penalty phase decision.”); *see generally Prince*, 40 Cal. 4th at 1289 (“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.”). The audio recording in Dunn’s case was deemed admissible not because the California Supreme Court disregarded its duties under *Payne*, but because the evidence showed the ““unique human being,”” *Payne*, 501 U.S. at 825, whom Dunn killed, as this Court’s precedents permit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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