UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**AE422C (Mohammad, al Baluchi)** **Defense Response to** Government Motion to Conduct Depositions of Certain Witnesses 12 May 2016

1. **Timeliness:** This response is timely filed.

2. **Overview:** The government has not satisfied the requirements of R.M.C. 702, in that it has not provided the addresses of the proposed deponents or demonstrated a likelihood of their unavailability. Victim impact depositions in advance of trial are unduly prejudicial to the defendants, and the military commission has not yet ruled on the permissible scope of victim impact testimony. The military commission should deny the government's motion.

3. **Facts**: On 21 April 2016, the government filed AE422 Motion to Conduct Depositions of Certain Witnesses, identifying ten individuals who lost family members on 11 September 2001 for proposed depositions in open court during the scheduled October hearing. The government described the impact of the proposed testimony and generically cited advanced age and general health concerns as justification.

4. **Argument:**[1]

[1] On 11 April 2016, Mr. al Baluchi responded to a request for conference on this motion by stating his consent if the government complied with RMC 702 and the government consented to the same procedure for victim family members the defense may wish to call. The government declined Mr. al Baluchi's offer. The government's motion does not comply with Rule 702, in that it does not state the addresses of the proposed deponents. *See* AE422 at 11-14. Furthermore, the government has made clear that it opposes participation of witnesses called by the defense in its proposed depositions. *See* AE422A Government Response to Mr. al Baluchi's Motion for Extension of Time to File Response to Government Motion to Conduct Depositions of Certain Witnesses. After review of the AE422 and AE422A, and consulting at length with

Counsel for Mr. al Baluchi and Mr. Mohammad are committed to respect and compassion toward victims of violence, whether committed by the United States or against the United States. As part of this commitment, they, along with other counsel, have obtained victim liaison services from the Convening Authority to provide information and facilitate communication with members of the 9/11 victim community. Members of the defense have met with victim family members of all backgrounds and opinions, have taken part in memorial observances, and visited the 9/11 memorials in New York, Virginia, and Pennsylvania. They take seriously the ethical, legal, and moral responsibility of respect and compassion for victims of violence.

The government's motion is not an act of compassion toward victims, but rather an attempt to elicit victim impact testimony in advance of the trial. Like the Red Queen, the government seeks "Sentence first—verdict afterward."[2] If the government seeks to move toward trial, it should call off its investigations of defense team members,[3] stop destroying evidence favorable to the defense,[4] and revise its strategy of denying, delaying, and degrading the production of discovery.[5] Compliance with the government's legal and ethical duties would do far more to advance the interest in a speedy trial than victim impact depositions.

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some victim family witnesses, Mr. al Baluchi withdraws his conditional consent and opposes the government's proposed pre-trial victim impact statements.

[2] Lewis Carroll, *Alice's Adventures in Wonderland*.

[3] *See* AE292QQ Amended Order; AE416D Docket Order Cancellation.

[4] *See* AE112Q(AAA) Mr. al Baluchi's Motion for Appropriate Relief from Government Demand to Destroy Exculpatory Evidence; AE425(Mohammad) Mr. Mohammad's Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief.

[5] *See, e.g.*, AE112 Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program (filed 27 December 2012).

A. The government has not satisfied the requirements of R.M.C. 702.

As an initial matter, the government has not satisfied the requirements of R.M.C. 702. R.M.C. 702(c)(2)(A) requires a request for deposition to provide the name and address of the requested deponent. The government does not provide the addresses of any of its proposed deponents, either in its motion or in a sealed pleading. The military commission cannot grant the government's motion, as it has not complied with the most basic of rules.

Furthermore, the government has not articulated exceptional circumstances for the depositions. "A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable . . . at trial."[6] The R.M.C. 702 standard is "likely to be unavailable," not absolute unavailability as the government argued in AE350F Government Response to Defense Motion for Deposition of Witness Known as "The Former CIA Interpreter Utilized by Mr. bin al Shibh's Defense Team."[7] On the other hand, "When a deposition is offered against an accused, the Government must establish that the witness is unavailable, both in terms of the hearsay prohibition . . . and in terms of the Confrontation Clause of the Sixth Amendment."[8]

The government has not established a likelihood that its proposed deponents are likely to be unavailable at trial. Its justification is that some potential witnesses are over sixty-five years of age, a consideration that applies to at least four of the defense attorneys. The government has not offered any evidence of any particular reason why these potential witnesses are likely to be unavailable at trial, but rather cites advanced age and "general health concerns."[9]

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[6] *United States v. Lovely*, 73 M.J. 658, 679 (A.F.C.C.A. 2014).
[7] AE350F at 4-6.
[8] *United States v. Vanderwier*, 25 M.J. 263, 265 (C.M.A. 1987).
[9] An objective observer must question the government's commitment to "general health concerns," in that the government seeks to fly older VFMs to Guantanamo—itself a source of specific health concerns—for its litigation benefit.

Given the large numbers of victims of violence on 11 September 2001, the military commission should carefully hold the government to its burden. The government does not explain how it selected these proposed deponents out of the many victim family members over age 65, but it is reasonable to suppose the government found their testimony advantageous to its argument in favor of the death penalty. Although this issue is yet unaddressed, there is probably some number of victim impact witnesses which would exceed the number allowed by the military commission, and the government will be forced to choose. In fact, the government seeks to justify its depositions on the basis that it "must have discretion to choose the pre-sentencing witnesses" it wants.[10] Pre-trial depositions will allow the government to vet the *actual testimony* of victim family members, and choose those testimonies it finds most advantageous.

B. **Pre-sentencing victim impact testimony is unduly prejudicial to the defendants.**

In the 25 years since *Payne v. Tennessee* was decided by the Supreme Court, the decision has been widely criticized by judges and scholars alike for allowing the incursion of highly charged emotion into the capital sentencing process that is nearly impossible to control.[11]

First, the government's proposal to elicit prejudicial victim impact testimony in open court pre-trial cannot be reconciled with the defendants' Eighth and Fourteenth Amendment rights. The Supreme Court has affirmed a "well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases," meaning that the sentencing authority must make an individual sentencing determination based on the character of the

[10] AE422 at 8.
[11] *See, e.g.*, Susan Bandes, "Empathy, Narrative, and Victim Impact Statements," 63 U. Chi. L. Rev. 361, 392-93.

defendant and the circumstances of the crime.[12] "The premise that the State must be on equal footing with the defense (regarding the sentencing phase) defies legal logic and flies in the face of our adversarial system of jurisprudence . . .[t]he victim is not on trial; her character . . . therefore cannot constitute either an aggravating or mitigating circumstance."[13]

Likewise, the due process issues raised by victim impact testimony are so serious that several states have entirely banned the use of such testimony, at least prior to the sentencing phase.[14] However, even if *Payne* were to apply, the government concedes that "relevant victim impact evidence is generally admissible so long as it is not 'so unduly prejudicial that it renders the trial fundamentally unfair.'"[15] Evidence is unfairly prejudicial if it "appeals to the jury's sympathy, arouses its sense of horror, [or] provokes its instinct to punish."[16]

In AE422, the government seeks to depose hand-selected victim family members in open court, during a pre-trial hearing in the most infamous capital case in U.S. history. Arguing that victim impact testimony should be barred from even the sentencing phase, scholars cite the

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[12] *See Stringer v. Black*, 503 U.S. 222, 230 (1992), citing *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 110-112 (1982); *Lockett v. Ohio*, 438 U.S. 586, 601-605 (1978)(plurality opinion); *Roberts v. Louisiana*, 431 U.S. 633, 636-637 (1977); *Gregg v. Georgia*, 428 U.S. 153, 197 (1976)(joint opinion of Stewart, Powell, and Stevens); *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976)(plurality opinion).

[13] Cecil A. Rhodes, "The Victim Impact Statement and Capital Crimes: Trial By Jury and Death By Character," 21 S.U. L. Rev. 1, 40 (1994), citing *Lockett v. Ohio*, 438 U.S. 586 (1978).

[14] *See United States v. McVeigh*, 153 F.3d 1166, 1221 n.47 (10th Cir. 1998) (noting that the district court prohibited the introduction of wedding photographs and home videos prior to the penalty phase of the trial); *see also Lynn v. Reinstein,* 68 P.3d 412, 417 (Ariz. 2003) ("[V]ictims' recommendations to the jury regarding the appropriate sentence a capital defendant should receive are not constitutionally relevant."); *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994) (finding that victim impact evidence was irrelevant to charged aggravating circumstances); *State v. Guzek*, 906 P.2d 272, 283-84 (Or. 1995) (finding that victim impact evidence was not relevant under the statute).

[15] AE422 at 7, citing *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

[16] *See Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) (citing J. Weinstein & M. Berger, Weinstein's Evidence ¶403(03) (1978)); *accord*, *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

procedural and substantive safeguards meant to be in place before and during a trial, stating that "[u]nfair prejudice to a defendant caused, for example, by emotionally charged, highly provocative statements about a crime or the accused in the press or on television is strictly scrutinized to ensure that the jurors selected will remain fair and objective."[17]

As one federal judge stated,

> I cannot help but wonder if *Payne* . . . would have been decided in the same way if the Supreme Court Justices in the majority had ever sat as trial judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony . . . and the juror's sobbing during the victim impact testimony still rings in my ears. This is true even though the federal prosecutors in [the case] used admirable restraint in terms of the scope, amount, and length of victim impact testimony.[18]

The potential for prejudice to the jury is twofold if the depositions are public: (1) the taint of the evidence, some of which may be admitted in a deposition but not ultimately at trial but which may well reach the panel and (2) the panel members might infer that the military judge permitted such an unusual process because the conviction was a foregone conclusion, thus giving

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[17] Jerome Deise and Raymond Paternoster, "More Than A 'Quick Glimpse of the Life': The Relationship Between Victim Impact Evidence and Death Sentencing, 40 Hastings Const. L.Q. 611 (Spring 2013), *available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2246&context=fac_pubs ("Deise and Paternoster").

[18] *United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005) (finding that "as a general matter -- and certainly in this case -- the danger of unfair prejudice arising from hearing 'victim impact' evidence or evidence on other 'non-statutory' aggravating factors before the jury makes its determination on the defendant's "eligibility" for the death penalty, on the basis of the 'gateway' and 'statutory' aggravating factors, substantially outweighs any probative value of such evidence to the determination of the defendant's 'eligibility' for a death sentence.").

the imprimatur of the military judge to the notion that there is no reasonable doubt about guilt. It is hard to imagine a more damaging inference, but it is a reasonable one. If made, it forecloses utterly the possibility of a fair trial.

There is also a growing body of empirical evidence about the unconstitutional effects of victim impact testimony on capital sentencing hearings. A 2013 empirical study conducted by law professors at the University of Maryland found that "[t]he collective thrust of [empirical] findings is that capital jurors are more likely to impose a death sentence . . . if they saw victim impact evidence that was presented by the victim's [family member] to the jury than if they did not. They could . . . attempt to provide some assistance or comfort to the family by imposing a death sentence on the offender." [19] The authors further concluded that

> Victim impact evidence can create unfair prejudice to the accused that would substantially outweigh the probative value for which such evidence is offered, thereby requiring its exclusion. In *Payne*, the Court said "there is no reason to treat such [victim impact] evidence differently than other evidence is treated." We disagree. Regardless of whether "death is different" as a general proposition,

[19] Deise and Paternoster ("Luginbuhl and Burkhead found a substantial effect for VIE: when it was present 51% of the subjects voted for death, but only 20% of the time when it was absent . . . Myers and Arbuthnot found that . . . 67% of those jurors who voted for guilt imposed a death sentence if they watched the VIE, but only 30% imposed a death sentence under the no-VIE condition." In the authors' own empirical study, "while 53.9% of the control group reported that the emotional loss and grief suffered by the victim's family was a very important or important factor in the decision to sentence the defendant, fully 95.8% of those who saw the VIE said that it was an important factor . . . There is a very close relationship between viewing victim impact evidence in this case and reporting that emotional factors were important in deciding the sentence they would have voted for in the case—a consequence of VIE that was feared by the majority in *Booth*/*Gathers* and by the dissenters in *Payne*.")

victim impact evidence in capital cases—as our study suggests—is importantly different.[20]

The "emotional power" and therefore prejudicial value of *pre-trial* victim impact testimony that will inevitably and extensively be covered by the media, cannot but be exponentially heightened regarding the events of September 11, 2001.[21] "The formal presentation of this information by the state can serve no other purpose than to inflame"[22] the public, and thereby taint the proceedings even before trial begins. As *Payne* provides courts "with very little guidance in determining just what victim impact evidence is too emotional or prejudicial to be allowed,"[23] the commission should find that the government's exceptional circumstances are substantially outweighed by the "interests of justice" and due process rights of the defendants.

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[20] *Id.* Precisely because the Military Commissions Act is "modeled" on the Uniform Code of Military Justice, and due to the foregoing concerns, this commission should adopt the limitation imposed by the U.C.M.J. on the use of victim impact testimony for only non-capital cases: "A duly authenticated deposition . . . may be played in evidence before any military court or commission in any case *not capital* . . ." 10 U.S.C. § 849(d).

[21] Breaking News, "Moussaoui Jurors Hear From Families of 9/11 Victims," Apr. 11, 2006, *available at* http://www.breakingnews.ie/world/moussaoui-jurors-hear-from-families-of-911-victims-253546.html ("The judge has urged prosecutors to show restraint, but it has proved difficult to blunt the emotional impact as families of 9/11 victims tell their tales to jurors . . . Some jurors have struggled to maintain composure. One asked for a drink of water toward the end of yesterday's testimony after a day in which his face frequently showed the strain of hearing families' accounts. [The judge] earlier had warned prosecutors not to overplay emotional testimony and reminded them that appellate judges could overturn a death sentence if they believed such testimony was overly prejudicial.").

[22] *Booth v. Maryland*, 482 U.S. 496, 508-509 (1987).

[23] Christine M. Kennedy, *Victim Impact Videos: The New-Wave of Evidence in Capital Sentencing Hearings*, 26 Quinnipiac L. Rev. 1069, 1977 (2008) ["Kennedy"].

C. **The military commission has not yet ruled on the permissible scope of victim impact testimony.**

Prior to any potential testimony being recorded, the commission must carefully delineate the scope of the evidence being sought from the victim family members. *Payne* itself authorizes only a "brief glimpse" into the life of the victim, but provides little other guidance in this matter.[24] The government's position on this is contradictory; although the government concedes that "victim impact witnesses are prohibited from stating characterizations and opinions about the crime, the defendant, and the appropriate sentence,"[25] they also seek to have at least one victim impact witness testify during both the merits and sentencing phases of the trial.[26]

Both courts and commentators have found that,

> To pretend that such evidence is not potentially unfairly prejudicial on issues to which it has little or no probative value is simply not realistic, even if the court were to give a careful limiting instruction. Rather, such potent, emotional evidence is a quintessential example of information likely to cause a jury to make a determination on an unrelated issue on the improper basis of inflamed emotion and bias -- sympathetic or antipathetic, depending on whether one is considering the defendant or the victims' families.[27]

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[24] *Payne* at 822.

[25] AE 422 at 10, citing *Booth* at 830.

[26] AE422 at 11 ("Notably, Mr. [Lee] Hanson is expected to be both a merits and sentencing phase witness for the Prosecution."). Mr. Hanson previously testified during the sentencing trial of Zacarias Moussaoui in 2006, *see* NBC News, "Moussaoui Jurors Hear Painful Testimony," Apr. 10, 2006, *available at* http://www.nbcnews.com/id/12249486/ns/us_news-security/t/moussaoui-jurors-hear-painful-testimony/#.VzQCmcfrjFI.

[27] *Johnson* at 1108. *See also* Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements,* 10 Psychol. Pub. Pol'y & L. 492 (2004)(discussing how victim impact statements are prejudicial to death sentence determinations); Niru Shanker, *Getting a Grip on Payne and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The*

Moreover, even though victim impact evidence may not be offered strictly "to encourage comparative judgments" balancing the lives of the victims with the lives of the defendants, both courts and scholars have confirmed that presenting such emotional and challenging testimony results in exactly that calculus for juries.[28] Without iron-clad restrictions on the scope of testimony by victim family members, their statements in open court will be disseminated by the media and by court observers and will influence the trial as well as the sentence imposed, in a manner directly foreclosed by *Payne*.[29]

For this reason, defense attorneys have a duty to challenge the scope and admissibility of

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Timothy McVeigh Case and Various State Approaches Compared, 26 Hastings Const. L.Q. 711, 740 (1999) ("Thanks in part to poorly articulated parameters in *Payne* . . . victim impact testimony in capital sentencing walks a fine line between allowing particularized attention to the damage caused by the crime on the one hand, and leaving the jury to be inundated with prejudicial outpourings irrelevant to the defendant's guilt on the other."); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 Ariz. L. Rev. 143, 145 (1999) ("The state of the law seven years since *Payne* establishes . . . [that] many of the worst fears imagined in the wake of *Payne* have been realized. Highly prejudicial victim impact evidence is now routinely before capital juries, with precious little in the way of substantive limits, procedural controls, or guidance in how it is to be used in assessing the 'deathworthiness' of defendants."); Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing,* 35 Am. Crim. L. Rev. 93, 101-113 (1997) (arguing that capital juries have a tendency to consider improper factors in sentencing, even in the absence of victim impact statements, so that victim impact statements exaggerate the extent to which improper factors influence capital sentencings).

[28] *See*, *e.g.*, *Humphries v. Ozmint*, 366 F.3d 266, 270 (4th Cir. 2004) ("The problem is that the prosecutor . . . drew repeated comparisons between the value and worth of the victim's life and that of the defendant, an argument which any reasonable observer would have found designed to secure a death sentence from the jury. The way in which the victim led his life was contrasted, at identical points in time, with the way the defendant had led his."); Kennedy at 1077 ("[D]espite Payne's repudiation of comparative judgments . . . [a]n obvious danger is that juries will use this victim impact evidence not only to make comparisons between victims, as prohibited by *Payne*, but to make comparative judgments between the victim and the defendant as well.").

[29] For example, in *United States v. Henderson,* 485 F. Supp. 2d 831, 849-850 (S.D. Ohio 2007), the prosecution and defense agreed that the each victim impact witness would prepare a written statement, which would then be reviewed in camera by the court. Once scrubbed of irrelevant or prejudicial evidence by the court, the witnesses would be allowed to "read their statements verbatim," with the government instructing them "to refrain from reflecting excessive emotion . . . the witnesses' failure to do so might result in the Court's decision to terminate their testimony."

victim impact evidence. The ABA Guidelines[30] require competent capital counsel to develop a pretrial strategy to assess and, where reasonable, contest the admissibility of victim impact evidence. Counsel is also required to consider and reduce the effect of victim impact evidence on the capital sentencer.

> In jurisdictions where victim impact evidence is permitted, counsel, mindful that such evidence is often very persuasive to the sentencer, should ascertain what, if any, victim impact evidence the prosecution intends to introduce at penalty phase, and evaluate all available strategies for contesting the admissibility of such evidence and minimizing its effect on the sentencer.
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> In particular, in light of the instability of the case law, counsel should consider the federal constitutionality of admitting such evidence to be an open field for legal advocacy.[31]

The above quote about "the instability of the case law" in this area is not an artifact of its time. The years since 2003 have seen substantial litigation on victim impact evidence in both

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[30] The American Bar Association's 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines") are not aspirational, but are "guides to determining what is reasonable" performance by defense counsel in capital cases. *See Rompilla v. Beard*, 545 U.S. at 387 & n. 6, 125 S.Ct. at 2466 & n.6 (quoting *Wiggins v. Smith*, 539 U.S. at 524, 123 S.Ct. at 2537; *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065). The Congress of the United States, in the MCA 2009 Conference Report, instructed that the Guidelines be considered.

> The conferees note that section 948k(c)(2) of title 10, United States Code, as amended by section 1802, would require the Secretary of Defense to prescribe regulations for the appointment and performance of defense counsel in capital cases. . . . Accordingly, the conferees strongly encourage the Secretary of Defense to take appropriate steps to ensure the adequacy of representation for detainees, particularly in capital cases. The conferees
> further expect the Secretary, in prescribing regulations under section 948k(c)(2), of title 10, United States Code, to give appropriate consideration to the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003) and other comparable guidelines.

The National Defense Authorization Act for Fiscal Year 2010, Joint Explanatory Statement of the Committee of Conference, Congressional Record, 111-288 pp 862-63; http://www.dtic.mil/congressional_budget/pdfs/FY2010_pdfs/AUTH_CONF_111-288.pdf.

[31] ABA Guidelines, 31 HOFSTRA L. REV. 1067 (2003) (footnotes omitted).

state and federal courts. Ever since the Supreme Court reversed itself in a span of two years to permit limited victim impact evidence, capital jurisdictions have struggled with the boundaries and limitations. The brief summary below is not complete, and can in no way substitute for the thorough briefing of law and process that is required before the military commission can contemplate granting in-advance sentencing testimony such as the prosecution requests.

In *Booth v. Maryland*, the Supreme Court prohibited the evidence of survivors of a homicide victim because it found that such testimony could "serve no other purpose than to inflame the jury and divert it from deciding the case on . . . relevant evidence . . . ." [32] In *South Carolina v. Gathers*,[33] the Court upheld the reversal of a death sentence by the South Carolina Supreme Court that found improper argument "conveyed the suggestion [that the defendant] deserved the death sentence because the victim was a religious man and a registered voter." Two years later, *Payne v. Tennessee*,[34] partially overturned *Booth* and *Gathers*, and the courts below have since been active in drawing the boundaries around what *Payne* permits and what it forbids.

Some questions and testimony that was forbidden under the earlier cases is still inadmissible. "[T]he admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment."[35] The Supreme Court has recognized that victim impact evidence "can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation."[36] The

[32] 482 U.S. 496, 508-09 (1987).
[33] 490 U.S. 809, 810 (1989); *see also State v. Gathers*, 369 S.E.2d 140, 144-45 (S.C. 1988).
[34] 501 U.S. 808 (1991).
[35] *Payne* 501 U.S. at 830 n.2.
[36] *Payne*, 501 U.S. at 836 (1991) (Souter and Kennedy, JJ., concurring). *Accord id.* at 836 noting "trial judge's authority and responsibility" to "guard against the inflammatory risk") (Souter and Kennedy, JJ., concurring).

admissibility of such evidence is hedged about with barriers, and it is the military judge's task to set a clear path, free from inflammatory and unduly prejudicial evidence. In the Oklahoma City bombing case, for example, the court prohibited "non-objective emotional testimony" about such matters as the individual family's mourning process, and refused to admit wedding photos and home videos.[37]

While courts have rarely reversed for improper victim impact evidence (the exception, *United States v. John Wayne Johnson*, discussed below) going forward care must be taken especially not to permit entirely foreseeable error. Concerns have been raised in numerous cases about the prejudicial nature of some victim impact testimony and the scope of its constitutional admissibility as it impacts both the defendant's fair trial rights and Eighth Amendment rights.[38]

A federal district court did reverse a death sentence for Due Process and Eighth Amendment violations occurring during the victim impact evidence by a law enforcement officer's widow. In *United States v. Johnson*,[39] the court granted the defendant's post-trial motion for a new trial of the sentence. The chief error found by the court was an Eighth Amendment violation of *Payne* during the victim impact evidence statement in the testimony of the homicide victim's widow. Her characterization of the defendant as "evil" and "selfish", blaming the homicide for her own subsequent health problems, and the overwhelming appeal to

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[37] *United States v. McVeigh,* 153 F.3d 1166, 1221-22 (10th Cir. 1998). *See also United States v. Fell*, 531 F.3d 197, 239 (2d Cir. 2008) (noting that "victim-impact evidence . . . can sometimes be unduly prejudicial" and "inflammatory").

[38] *See, e.g., United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007 (error to characterize defendant as disrespectful of Navaho culture); *United States v. Bernard*, 299 F.3d 467, 479-480 (5th Cir. 2002) (Court was "troubled" that victim's mother addressed the defendants and "warned them that heaven and hell are real" but no objection by defense and not plain error*); People v. Carrington*, 211 P.2d 617, 658 (Cal. 2009) (witness admonished not to speculate about attenuated effects of the homicide, such as subsequent family deaths or illnesses); *State v. Young*, 196 S.W.3d 85, 101 (Tenn. 2006) (error to permit evidence of victim's friend needing therapy, being suicidal after murder).

[39] 713 F. Supp. 2d 595 (E.D. La.2010).

emotion in her demeanor (sobbing and finally "breaking down entirely") were cited as impermissible victim evidence, compounded by prosecutorial argument that repeated the word "evil". *Id.* at 621. While recognizing that victim impact evidence is inherently emotional, the court found:

>]T]he highly charged emotional content of the victim impact testimony created an atmosphere of overwhelming sympathy for the victim and the victim's family, along with the attendant genuine danger that any other unharnessed appeal to passion, prejudice or sympathy was likely to tip the scales into a Due Process violation of fundamental fairness . . . .[40]

The court in *Johnson* had ordered some prophylactic measures to assess the victim impact testimony in advance, including requiring that written statements be provided in advance. The court, decrying the prosecution's "gamesmanship" further found that the prosecution had failed to produce the full statement in question, and that the discovery violation compounded the constitutional violation. *Id.* at 626-628.

The military commissions should not run the risk of fatal constitutional error by permitting this novel procedure of pre-verdict sentencing depositions in open court, and should deny the government's motion in full. Should the military judge grant depositions, the procedure, scope, and length of the evidence to be taken should be litigated beforehand, including the right of the defendants to conduct their own depositions.

D. <u>Oral Argument</u>: The defense requests oral argument.

E. <u>Attachments:</u>

A. Certificate of Service

[40] *Id*. at 624.

Very respectfully,

//s//
JAMES G. CONNELL, III
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for Mr. al Baluchi

//s//
STERLING R. THOMAS
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Detailed Military Defense Counsel
for Mr. al Baluchi

//s//
DAVID Z. NEVIN
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for Mr. Mohammad

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 12th day of May, 2016, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//
JAMES G. CONNELL, III
Learned Counsel