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Humphries v. Ozmint No. 03-14, 2005 WL 267962, at *1 (4th Cir. Feb. 4, 2005)

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I. Facts

On December 31, 1993, Shawn Paul Humphries and Eddie Blackwell stole a gun and spent the night driving around and drinking. Early the next morning, the two young men entered the South Carolina convenience store in which Donna Brashier and Dickie Smith were working. Humphries revealed the stolen gun and demanded money from Smith, the owner, who was working behind the store's counter. Smith reached for a weapon under the counter, and Humphries reacted by firing a single shot that struck Smith in the head and killed him. Leaving Blackwell behind, Humphries immediately fled the scene. Blackwell remained in the store, where the police arrested him, and Humphries was apprehended later that day.[1]

A South Carolina jury convicted Humphries of murder, attempted robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy.[2] During the sentencing phase, the State offered the evidence from the guilt phase, additional testimony describing Smith's positive characteristics and community contributions, crime scene photographs, and Humphries's criminal record.[3] The defense sought to establish various mitigating factors, including Humphries's lack of a significant history of violent crime, the abuse the defendant endured throughout his childhood, and his positive personal attributes.[4]

During closing argument, the prosecutor listed four elements for the jury to consider in determining the appropriate punishment: the aggravating evidence, the character of the defendant, mitigating evidence, and the uniqueness of the victim.[5] After discussing the evidence to prove aggravation, the prosecutor related in detail Humphries's troubled past, beginning with his first criminal offense at age thirteen.[6] He further argued that the defense was unable to produce any mitigating evidence and then subsequently turned his attention to

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1. Humphries v. Ozmint, No. 03-14, 2005 WL 267962, at *1–*2 (4th Cir. Feb. 4, 2005) (citing State v. Humphries, 479 S.E.2d 52, 53 (S.C. 1996)).
2. *Id.* at *2.
3. *Id.*
4. *Id.*
5. *Id.* at *4.
6. *Id.*

the character of the victim.[7] In recounting Smith's uniqueness, the prosecutor provided a biographical chronology in which he compared the lives of the victim and defendant in 1984, 1986, 1988, and 1992.[8] Specifically, the prosecutor stated:

> [I]n 1984 [Smith] met Pat, and they fell in love, and they got married. That's the same year Shawn Paul Humphries committed two house break-ins at age 13. In 1986 Dickie makes a pretty drastic move. He decides he's going to quit Kemet and go build houses full-time, and he goes out, and he starts building homes in the community he had grown up in. That's the same year Shawn Paul Humphries is up for his second probation violation and sent down to Columbia. Then in 1988, July the 4th, they have a little baby girl named Ashley. . . . In 1988 Ashley is born. That's the same year Shawn Paul Humphries went to jail for two years. And in the spring of 1992, I believe, Dickie Smith opens the doors to the MaxSaver, building a business down in that community.[9]

The prosecutor concluded by stating that while the defendant was asking the jury for life, "he gave death."[10]

In response, defense counsel reiterated its case for leniency by summarizing the mitigating factors presented during the penalty hearing.[11] The jury recommended the death penalty, and the trial court sentenced Humphries to death.[12] The trial court also overruled the defense's post-trial motion for a new trial, a motion in which Humphries belatedly objected to the State's comparison of Smith and Humphries during closing argument.[13]

On direct appeal, the state supreme court affirmed the convictions and death sentence, and the United States Supreme Court denied certiorari.[14] Thereafter, Humphries applied for postconviction relief, contending, inter alia, that the State violated *Payne v. Tennessee*[15] by comparing the defendant to the victim during its closing argument and that defense counsel's failure to object to this comparison amounted to a denial of effective assistance of counsel.[16] The state habeas court, however, rejected the Humphries's application for postconviction relief,

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7. *Humphries*, 2005 WL 267962, at *4–*5.
8. *Id.*
9. *Id.*
10. *Id.* at *7.
11. *Id.*
12. *Id.* at *6.
13. *Humphries*, 2005 WL 267962, at *7.
14. *Id.*; *see* Humphries v. South Carolina, 520 U.S. 1268, 1268 (1997) (denying certiorari).
15. 501 U.S. 808 (1991).
16. *Humphries*, 2005 WL 267962, at *7–*8; *see* Payne v. Tennessee, 501 U.S. 808, 825 (1991) (cautioning that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief").

and the Supreme Court of South Carolina affirmed.[17] Humphries then sought federal habeas corpus relief.[18] The United States District Court for the District of South Carolina dismissed the petition by granting the State's motion for summary judgment but granted Humphries a certificate of appealability.[19] A divided panel of the United States Court of Appeals for the Fourth Circuit vacated the death sentence and remanded the case with instructions to issue the writ solely for the purpose of resentencing.[20] The State, however, petitioned for rehearing, and the Fourth Circuit voted to rehear the case en banc.[21]

II. Holding

Sitting en banc, the Fourth Circuit rejected the panel's earlier decision to reverse Humphries's death sentence and, instead, affirmed the district court's judgment.[22] Reviewing the state court's decision under the standard set forth in 28 U.S.C. § 2254(d), the Fourth Circuit held that the state court was correct in finding that the prosecution did not violate *Payne* by comparing the victim to the defendant to support its case for the death penalty.[23] Therefore, defense counsel were not ineffective for failing to object to the State's closing argument.[24] Furthermore, the court rejected Humphries's claim that the State's failure to notify the defense of its intention to use victim-impact evidence at sentencing violated his right to due process under the Fourteenth Amendment.[25]

III. Analysis

A. Standard of Review

Because the South Carolina courts adjudicated Humphries's claim on the merits and Humphries exhausted his state court remedies, the Fourth Circuit reviewed the state court's decision under 28 U.S.C. § 2254(d)(1).[26] Under § 2254(d)(1), federal courts may only grant a writ of habeas corpus if the state

17. *Humphries*, 2005 WL 267962, at *7.

18. *Id.*

19. *Id.*; *see* 28 U.S.C. § 2253 (2000) (outlining the procedure for issuing a certificate of appealability; part of AEDPA).

20. *Humphries*, 2005 WL 267962, at *7.

21. *Id.*

22. *Id.* at *20.

23. *Id.* at *16; *see* 28 U.S.C. § 2254(d) (2000) (discussing the standard of review for federal courts reviewing a habeas corpus petition on issues of law and also factual issues that the state courts adjudicated on the merits; part of AEDPA).

24. *Humphries*, 2005 WL 267962, at *16.

25. *Id.* at *19.

26. *Id.* at *8; *see* 28 U.S.C. § 2254(d)(1) (discussing the standard of review for federal courts reviewing a petition for habeas corpus on issues of law that the state courts adjudicated on the merits; part of AEDPA).

court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[27] In *Williams v. Taylor*,[28] the Supreme Court held that

> [A] state court's decision is "contrary to" clearly established federal law, as determined by the Supreme Court . . . "(1) if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent."[29]

Moreover, in distinguishing an unreasonable application of law from an incorrect one, *Williams* held that a state court decision is unreasonable " 'if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.' "[30]

B. Payne *Analysis*

Humphries argued that the prosecutor's closing argument offended the Supreme Court's ruling in *Payne* and that, consequently, defense counsel's failure to object timely to the violation and the resulting prejudice to Humphries amounted to constitutionally ineffective assistance of counsel.[31] In analyzing Humphries's claim, the Fourth Circuit first examined United States Supreme Court precedent regarding victim impact evidence.[32] Contrary to the previous rulings in *Booth v. Maryland*[33] and *South Carolina v. Gathers*,[34] the Supreme Court in *Payne* determined that victim-impact evidence was relevant to the imposition of a death sentence.[35] In overruling its recent precedent, the Supreme Court plainly

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27. 28 U.S.C. § 2254(d)(1).

28. 529 U.S. 362 (2000).

29. *Humphries*, 2005 WL 267962, at *8 (quoting Williams v. Taylor, 529 U.S. 362, 405–06 (2000)).

30. *Id.* (quoting *Williams*, 529 U.S. at 413).

31. *Id.*

32. *Id.*

33. 482 U.S. 496 (1987).

34. 490 U.S. 805 (1989).

35. *Humphries*, 2005 WL 267962, at *9–*10; *see* Booth v. Maryland, 482 U.S. 496, 502–03 (1987) (holding that victim-impact evidence is irrelevant to a determination of whether to impose a death sentence and that its admission risks arbitrary and capricious imposition of the death penalty); South Carolina v. Gathers, 490 U.S. 805, 810–812 (1989) (concluding that both the prosecutor's reading of a religious tract carried by the victim and the prosecutor's description of the victim violated *Booth*).

stated that "if the State chooses to permit the admission of victim-impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar."[36] However, the Fourth Circuit noted that "*Payne* only allows evidence of the victim's personal characteristics and the harm inflicted upon the victim's family and community."[37] Therefore, the Supreme Court did not disturb its precedent forbidding the admission of victim opinion regarding the crime and appropriate sentence.[38] Lastly, the Supreme Court "cautioned that, '[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.' "[39]

Because the Supreme Court gave no specific guidelines for the type of victim-impact evidence that would violate a defendant's due process rights, the Fourth Circuit looked to *Payne*'s citation to *Darden v. Wainwright*.[40] In determining whether a prosecutor's improper comments rendered the subsequent conviction a denial of due process, *Darden* applied the due process standard used in *Donnelly v. DeChristoforo*,[41] in which the Court examined an alleged due process violation by considering the challenged conduct in relation to the proceeding as a whole.[42] Applying both *Darden* and *DeChristoforo*, the Fourth Circuit determined that the analysis of Humphries's due process claim, which was premised on unfair prosecutorial conduct, required the examination of several factors.[43]

Explaining its conclusion that the Supreme Court of South Carolina reasonably applied *Payne* in ruling that the prosecutor's closing argument did not render the sentencing proceeding fundamentally unfair, the Fourth Circuit first noted that the prosecutor's comments did not center on the alleged comparison between the lives of the victim and defendant.[44] Instead, the victim-

36. *Payne*, 501 U.S. at 827.

37. *Humphries*, 2005 WL 267962, at *10.

38. *Id.*

39. *Id.* (quoting *Payne*, 501 U.S. at 825).

40. *Id.*; *see* Darden v. Wainwright, 477 U.S. 168, 181 (1986) (stating that a prosecutor's argument is improper if the comments are so unfair as to make the conviction a denial of due process).

41. 416 U.S. 637 (1974).

42. *Humphries*, 2005 WL 267962, at *11; *see* Donnelly v. DeChristoforo, 416 U.S. 637, 639 (1974) (considering the due process implications of inappropriate prosecutorial remarks in the context of the entire trial).

43. *Humphries*, 2005 WL 267962, at *11. The Fourth Circuit listed such factors as "the nature of the prosecutorial misconduct, the extent of the improper conduct, the issuance of curative instructions from the court, any defense conduct inviting the improper prosecutorial response, and the weight of the evidence." *Id.* (citations omitted).

44. *Id.* at *13. Because the Supreme Court of South Carolina on state habeas determined that *Payne* proscribed victim-to-victim comparisons that were not present in *Humphries*, the court determined whether the solicitor's closing argument rendered the penalty phase of the capital trial

impact evidence played only a supporting role to the prosecution's argument that the defendant deserved death based on the aggravating evidence, the defendant's character, and the lack of mitigating evidence.[45] Furthermore, rather than compare the worth of the lives of the victim and defendant as *Payne* prohibits, the victim-impact evidence presented by the solicitor invited a comparison of the life histories of the two men.[46]

Much like the South Carolina court, the Fourth Circuit noted that the prosecution based its closing argument on facts already established throughout the course of the trial.[47] During the sentencing proceeding, both the prosecution and defense presented, without objection, testimony regarding the lives of the victim and defendant.[48] Therefore, the Fourth Circuit concluded that the state court did not unreasonably apply *Payne*.[49] Regarding the third and fourth reasons for upholding the state court decision, the Fourth Circuit noted that the prosecutor, earlier in the closing argument, had described in great detail the facts of Humphries's life and also that the statements to which Humphries objected only focused the jury's attention on the victim's uniqueness.[50]

As a fifth reason to support its conclusion, the Fourth Circuit posited a harmless error argument.[51] The court emphasized that neither the facts of the case nor the aggravating factor of committing the murder during the commission of an armed robbery were in question.[52] Furthermore, the prosecution countered the mitigating evidence offered by the defendant, and the defense did not contest the victim's uniqueness.[53] Consequently, the court determined that "notwithstanding the solicitor's comparison that Humphries [found] so objectionable, a sentence of death would have resulted."[54]

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fundamentally unfair. *Id.* at *12. The state court concluded that the government's closing argument was based on evidence previously introduced at trial, and therefore, the solicitor's comments were not so unduly prejudicial as to violate the petitioner's due process rights. *Id.* Consequently, Humphries could establish neither that defense counsel was ineffective nor that the alleged ineffectiveness prejudiced the sentencing outcome. *Id.*

45. *Id.* at *13.
46. *Id.*
47. *Id.* at *14.
48. *Id.*
49. *Humphries*, 2005 WL 267962, at *13–*14.
50. *Id.*
51. *Id.* at *15.
52. *Id.*
53. *Id.*
54. *Id.*

Next, the Fourth Circuit highlighted the Supreme Court of South Carolina's decision in *Hall v. Catoe*,[55] another recent state case involving a *Payne* claim.[56] Unlike the facts in *Humphries*, the solicitor in *Hall* specifically compared the worth of the lives of the victim and defendant when asking for the imposition of the death penalty.[57] In distinguishing the two cases, the Supreme Court of South Carolina "reasonably concluded one [of the closing arguments made by the solicitors] was constitutionally proper and the other was not."[58]

Finally, the Fourth Circuit examined the Court's language in *Payne*.[59] *Payne* permits the prosecution to "counteract" a defendant's mitigating evidence by introducing victim-impact evidence regarding the victim's uniqueness and harm to the victim's family and community.[60] Viewed in this light, victim-impact evidence itself invites "a *comparison* between the victim-impact evidence and the defendant's mitigating evidence."[61] The Fourth Circuit concluded that the state court reasonably determined that the prosecutor's life-history comparison and the description of the victim's unique character were within the boundaries of *Payne*.[62]

C. Petitioner's Claim of Lack of Notice

Humphries further argued that the State's failure to notify him of its intent to use victim-impact evidence during the penalty phase violated his constitutional right to a fair trial.[63] Specifically, Humphries contended that South Carolina Code § 16-3-20(B) required the prosecution to notify the defense of the evidence that the Government intended to use at the sentencing proceeding and that the Government's failure to comply with the statute violated his federal constitutional right to due process.[64] In response, the Fourth Circuit proffered multiple

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55. 601 S.E.2d 335 (S.C. 2004).

56. *Humphries*, 2005 WL 267962, at *15; *see* Hall v. Catoe, 601 S.E.2d 335, 341 (S.C. 2004) (distinguishing *Humphries* because the solicitor in the instant case explicitly compared the worth of the victim and defendant's lives, rather than comparing life histories of the two).

57. *Hall*, 601 S.E.2d at 341.

58. *Humphries*, 2005 WL 267962, at *16.

59. *Id.*

60. *Id.* The Supreme Court noted that " 'the State has a legitimate interest in counteracting the mitigating evidence . . . by reminding the sentencer that . . . the victim is an individual whose death represents a unique loss to society and in particular to his family.' " *Payne*, 501 U.S. at 825 (quoting *Booth*, 482 U.S. at 517).

61. *Humphries*, 2005 WL 267962, at *16.

62. *Id.*

63. *Id.* at *19.

64. *Id.*; *see* S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. 2003) (describing the procedures and notification requirements for the sentencing phase of a capital trial).

reasons for rejecting the defendant's contention.[65] Citing *Lewis v. Jeffers*,[66] the court first noted that issues of state law are "not cognizable on federal habeas review."[67] In the alternative, the court adopted the state court's reasoning that because victim-impact evidence is not among the aggravating factors listed in the statute, no notice was required.[68] Finally, even if the statute required the Government to notify the defense of its intent to use the victim-impact evidence, the State satisfied the pretrial obligation.[69] The prosecution informed Humphries of its intent to use the facts of the crime, named the eventual victim-impact witnesses in its witness lists, and notified the defense that it would present victim-impact evidence during the penalty phase.[70] Although conceding that the prosecution could have been more precise, the court determined that section 16-3-20(B) did not require such specificity.[71]

Humphries also contended that the lack of sufficient notice of the victim-impact evidence that the prosecution introduced at the sentencing proceeding denied the petitioner the opportunity to adequately prepare a defense.[72] The Fourth Circuit, however, rejected this claim "for the simple reason that Humphries knew or reasonably should have known that victim-impact evidence would be used by the State during the sentencing phase of the trial."[73] Without statutory support or precedent that explicitly required timely and express notice of an intent to use victim-impact evidence, Humphries possessed "no relevant federal authority to substantiate his claim."[74] Therefore, the state court reasonably interpreted federal law when it concluded that the admission of the victim-impact evidence did not violate Humphries's Fourteenth Amendment rights.[75]

IV. Application in Virginia

A. Victim-Impact Evidence in Virginia

Virginia statutorily permits the introduction of victim-impact evidence in capital trials.[76] Upon motion by the Commonwealth, a victim may "testify in the

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65. *Humphries*, 2005 WL 267962, at *19.

66. 497 U.S. 764 (1990).

67. *Humphries*, 2005 WL 267962, at *19; *see* Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (stating that "federal habeas corpus relief does not lie for errors of state law").

68. *Humphries*, 2005 WL 267962, at *19 (citing *Humphries*, 479 S.E.2d at 55).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Humphries*, 2005 WL 267962, at *19.

75. *Id.*

76. *See* VA. CODE ANN. § 19.2-264.4(A1) (Michie 2004) (allowing the prosecution in capital

presence of the accused regarding the impact of the offense upon the victim," but the victim-impact evidence is limited to the six factors found in Virginia Code section 19.2-299.1.[77] Although these limitations seemingly curtail the breadth of the evidence to which a victim may testify, the final factor permits the introduction of "such other information as the court may require related to the impact of the offense upon the victim."[78] This last provision effectively removes the teeth from the statutory limitation and entrusts the entire matter to the court's discretion.[79]

In *Weeks v. Commonwealth*,[80] the Supreme Court of Virginia interpreted *Payne* to find that victim-impact evidence is relevant during the sentencing phase of a Virginia capital trial.[81] The court concluded that such testimony was "probative . . . of the depravity of mind component of the vileness predicate," which serves as one of the two aggravating factors upon which a jury may impose a death sentence.[82] Consequently, the combination of Virginia Code section 19.2-264.4 and *Weeks* leaves little room for effective objection to the introduction of victim-impact evidence.[83]

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trials to introduce victim-impact evidence subject to specific limitations); VA. CODE ANN. § 19.2-299.1 (Michie 2004) (limiting victim impact evidence to six factors).

77. VA. CODE ANN. § 19.2-264.4(A1); VA. CODE ANN. § 19.2-299.1. The victim may:

> (i) identify the victim, (ii) itemize any economic loss suffered by the victim as a result of the offense, (iii) identify the nature and extent of any physical or psychological injury suffered by the victim as a result of the offense, (iv) detail any change in the victim's personal welfare, lifestyle or familial relationships as a result of the offense, (v) identify any request for psychological or medical services initiated by the victim or the victim's family as a result of the offense, and (vi) provide such other information as the court may require related to the impact of the offense upon the victim.

VA. CODE ANN. § 19.2-299.1. *See* VA. CODE ANN. § 19.2-11.01(B) (Michie 2004) (defining "victim" for purposes of Virginia Code section 19.2-264.4).

78. VA. CODE ANN. § 19.2-299.1.

79. *See id.* (allowing a victim to "provide such other information as the court may require related to the impact of the offense upon the victim").

80. 450 S.E.2d 379 (Va. 1994).

81. *See* Weeks v. Commonwealth, 450 S.E.2d 379, 389 (Va. 1994) (holding that "victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia").

82. *Id.* at 390; *see* VA. CODE ANN. § 19.2-264.2 (Michie 2004) (permitting the imposition of a death sentence upon the finding of future dangerousness or that the commission of the crime was outrageously or wantonly vile).

83. *See* VA. CODE ANN. § 19.2-264.4(A1) (Michie 2004) (allowing the prosecution in capital trials to introduce victim-impact evidence subject to specific limitations); *Weeks*, 450 S.E.2d at 389 (holding that "victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia").

B. *The Limitations of Victim-Impact Evidence Under* Payne

Although the United States Supreme Court concluded that the use of victim-impact testimony in capital trials does not constitute a per se violation of the Eighth Amendment, the prosecution cannot introduce evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair."[84] The Court, however, provided no guidance as to what evidence would constitute undue prejudice.[85] As a result, the Fourth Circuit in *Humphries* applied the analysis of *DeChristoforo* and "consider[ed] the challenged [victim-impact evidence] in relation to the proceeding as a whole."[86]

In *Beck v. Commonwealth*,[87] the Supreme Court of Virginia concluded that the admissibility of victim-impact evidence in a capital sentencing proceeding is contingent upon its relevance.[88] Relevance, however, does not guarantee admissibility.[89] Specifically, "[r]elevant evidence may be excluded only if the prejudicial effect of the evidence outweighs its probative value."[90] Therefore, the fact that victim-impact evidence may be relevant does not necessarily ensure its admissibility.

To weigh the probative value and prejudicial effect of victim-impact evidence, Virginia defense counsel should request in camera review of the testimony. Following the leads of Oklahoma and Tennessee, such procedures would allow the court to control the proliferation of potentially prejudicial evidence without contaminating the jury.[91] In the alternative, counsel should object to

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84. *Payne*, 501 U.S. at 825.

85. *Humphries*, 2005 WL 267962, at *10.

86. *Id.* at *11.

87. 484 S.E.2d 898 (Va. 1997).

88. *See* Beck v. Commonwealth, 484 S.E.2d 898, 904 (Va. 1997) (holding that "the admissibility of victim impact evidence during the sentencing phase of a capital murder trial is limited only by the relevance of such evidence to show the impact of the defendant's actions").

89. *See* Levine v. City of Lynchburg, 159 S.E. 95, 97 (Va. 1931) (stating that "[a]ll facts having rational probative value are admissible unless some specific rule forbids" (citations omitted)).

90. Goins v. Commonwealth, 470 S.E.2d 114, 127 (Va. 1996); *see* Coe v. Commonwealth, 340 S.E.2d 820, 823 (Va. 1986) (stating that "when relevant evidence is offered which may be inflammatory and which may have a tendency to prejudice jurors against the defendant, its relevancy must be weighed against the tendency of the offered evidence to produce passion and prejudice out of proportion to its probative value").

91. *See* Cargle v. State, 909 P.2d 806, 826–28 (Okla. Crim. App. 1995) (concluding that trial courts should hold in camera hearings to determine whether the victim-impact evidence should be excluded from capital sentencing proceedings on the ground that the probative value is substantially outweighed by the danger of undue prejudice); *see also* State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998) (concluding that "[u]pon receiving notification [of the prosecution's intent to introduce victim impact evidence], the trial court must hold a hearing outside the presence of the jury to determine the admissibility of the evidence"). *But see* Welch v. State, 968 P.2d 1231, 1243 (Okla. Crim. App. 1998) (finding harmless error when the trial court failed to conduct in camera review of victim-impact evidence because defense objections at trial provided sufficient protection).

victim-impact evidence admitted at the discretion of the court pursuant to Virginia Code section 19.2-299.1 if it threatens a defendant's rights under the Fourteenth Amendment.[92] Such evidence, however, must significantly affect the defendant's due process rights in light of the entire sentencing proceeding.[93] A reviewing court may consider "the nature of the prosecutorial misconduct, the extent of the improper conduct, the issuance of curative instructions from the court, any defense conduct inviting the improper prosecutorial response, and the weight of the evidence."[94] Therefore, attorneys should object on record to each instance of improper prosecutorial conduct and to the inadequacies of judicial remedial measures. Although such actions may have little effect during the sentencing hearing, the objections will preserve a record of the nature and extent of the abuses for appeal.

C. Notice Requirements of Due Process

Although a due process claim based on the prosecution's alleged failure to comply with state law will never be appropriate for federal habeas review, a jury cannot base the imposition of a death sentence on information that the defense has not had the "opportunity to deny or explain."[95] In *Humphries*, the Fourth Circuit noted that the defense "knew or reasonably should have known that victim-impact evidence would be used by the State during the sentencing phase of the trial."[96] Specifically, the court found that the prosecution notified Humphries of its intent to introduce evidence concerning the commission of the crime, provided the defense with witness lists containing the names of the victim-impact witnesses, and informed the defendant of its intent to introduce the victim-impact evidence during the penalty phase of the trial.[97] Therefore, if the Government fails to provide such minimal notice, *Humphries* suggests that a defendant may have a legitimate due process claim.[98] However, because the court concluded that "no law . . . clearly requires timely, specific, and express notice of

92. *See* VA. CODE ANN. § 19.2-299.1 (Michie 2004) (permitting the introduction of evidence "as the court may require related to the impact of the offense upon the victim"); *Payne*, 501 U.S. at 825 (noting that "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief" if the introduction of victim-impact evidence renders a capital defendant's trial fundamentally unfair).

93. *Humphries*, 2005 WL 267962, at *11.

94. *Id.* (citations omitted).

95. Gardner v. Florida, 430 U.S. 349, 362 (1977); *see Jeffers*, 497 U.S. at 780 (stating that "federal habeas corpus relief does not lie for errors of state law").

96. *Humphries*, 2005 WL 267962, at *19.

97. *Id.*

98. *Id.*

victim-impact evidence," defense counsel must illustrate a substantial lack of notice in order to succeed on federal habeas review.[99]

V. Conclusion

To determine the parameters of acceptable victim-impact evidence under *Payne*, the Fourth Circuit applied the due process analysis of *DeChristoforo* and examined the alleged prosecutorial misconduct in relation to the entire trial.[100] The court concluded that under the circumstances of *Humphries*, a prosecutor's comparison of the life histories of the victim and defendant falls within the bounds of *Payne* and does not render the trial fundamentally unfair.[101] Furthermore, the prosecution need not provide the defense with explicit notification of its intent to present victim-impact evidence to comply with the mandates of the Due Process Clause of the Fourteenth Amendment.[102]

Mark J. Goldsmith

99. *Id.*
100. *Id.* at *11.
101. *Id.* at *16.
102. *Humphries*, 2005 WL 267962, at *19.