REDACTED

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**
ORDER REGARDING DEFENDANT'S MOTION FOR A PRE-TRIAL EVIDENTIARY HEARING TO LITIGATE ISSUES SURROUNDING THE ADMISSIBILITY OF ANY PROFFERED VICTIM IMPACT EVIDENCE (D-168)	

INTRODUCTION

In Motion D-168, the defendant asks the Court "to hold an evidentiary hearing to address the numerous attendant evidentiary and constitutional issues surrounding victim impact evidence in this case." Motion at p. 1. The People oppose the motion. *See generally* Response. For the reasons articulated in this Order, the motion is denied. However, if the Court concludes that the People's final Crim. P. 32.1(d)(2) disclosures are not sufficiently specific to allow it to

assess the relevance of the proposed victim impact evidence, it may decide a hearing is necessary on this motion. *See* Order D-167.[1]

ANALYSIS

A. Colorado's Capital Sentencing Scheme

Colorado's capital sentencing scheme consists of four stages. In the first stage, the jury must determine whether the prosecution has proven the existence of at least one statutorily specified aggravator beyond a reasonable doubt. § 18-1.3-1201(2)(a)(I), C.R.S. (2013); *People v. Dunlap*, 975 P.2d 723, 736 (Colo. 1999) ("*Dunlap I*"). In the second stage, the jury must decide whether any mitigating factors exist. § 18-1.3-1201(2)(a)(II); *Dunlap I*, 975 P.2d at 736. In the third stage, based on the mitigating evidence presented, the jury must assess whether "mitigating factors exist which outweigh any aggravating factor or factors found to exist." § 18-1.3-1201(2)(a)(II); *Dunlap I*, 975 P.2d at 736. If the jury finds that mitigating factors do not outweigh the statutorily specified aggravators, the jury moves to the fourth and final stage to determine whether the defendant should be sentenced to death or life imprisonment without the possibility of parole. § 18-1.3-1201(2)(a)(III); *Dunlap I*, 975 P.2d at 736. Only if the jury finds beyond a

[1] As relevant here, Rule 32.1(d)(2) requires the People to disclose "the subject matter" of the testimony of any capital sentencing hearing witness. In Order D-167, the Court gives the People until Jun 19 to supplement the disclosures in their Notice P-40.

reasonable doubt that mitigation does not outweigh aggravation is the defendant "eligible to receive the death penalty." *Dunlap I*, 975 P.2d at 736.

B. The Eighth Amendment Does Not Bar the Admission of Victim Impact Evidence at a Capital Sentencing Hearing

The Eighth Amendment, which is applicable to the States through the Fourteenth Amendment, states, in pertinent part, that "cruel and unusual punishment" shall not be inflicted. U.S. Const. amend. VIII. The Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins v. Virginia*, 536 U.S. 304, 311 n.7, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

There are "special limitations" imposed upon the death penalty by the Eighth Amendment. *Payne v. Tennessee*, 501 U.S. 808, 824, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). "First, there is a required threshold below which the death penalty cannot be imposed." *Id.* (quotation omitted). Thus, "the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *Id.* (quotation omitted). "Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty." *Id.* (quotation omitted). "Beyond these limitations . . . the [Supreme] Court has deferred to the State's choice of substantive factors relevant to the penalty

determination." *Id.* (quoting *California v. Ramos*, 463 U.S. 992, 1001, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)).

In *Payne*, the Supreme Court overruled in part *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), and held that the Eighth Amendment does not bar a state from allowing victim impact evidence in a capital sentencing hearing. *Id.* at 825, 111 S.Ct. 2597. "[V]ictim impact evidence . . . . is designed to show . . . each victim's 'uniqueness as an individual human being.'" *Id.* at 823, 111 S.Ct. 2597 (emphasis omitted). Such evidence allows the jury to consider "the human cost of the crime of which the defendant stands convicted." *Id.* at 827, 111 S.Ct. 2597. The introduction of victim impact evidence affords the prosecution an opportunity to provide "a quick glimpse of the life [the defendant] chose to extinguish" in order to demonstrate the value of the loss to the community. *Id.* at 822, 111 S.Ct. 2597 (quotation omitted).

The Court in *Payne* observed that "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id.* at 825, 111 S.Ct. 2597. The Court reasoned as follows:

> We are now of the view that 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. The State has a legitimate interest in counteracting 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. By turning the victim into a faceless stranger at the penalty phase of a capital trial, *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

Id. (quotations omitted).

Payne reaffirmed the view expressed by Justice Cardozo in 1934: "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Id.* at 827, 111 S.Ct. 2597 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S.Ct. 330, 78 L.Ed. 674 (1934)). Accordingly, the Court held "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." *Id.* As the Court observed, "[t]here is no reason to treat [victim impact evidence] differently than other relevant evidence." *Id.*

Relying on *Payne*, the Colorado Supreme Court ruled in *Dunlap I* that "[e]vidence regarding the impact of a capital murder on the victim's family members is relevant in the penalty phase of the defendant's trial." 975 P.2d at 744. Since "the general admissibility of victim impact evidence from the family

members of homicide victims is now well-established in the context of the capital murder sentencing phase, [the Court] decline[d] to address in detail Dunlap's contention that the impact of such evidence in his trial was unduly . . . prejudicial." *Id.* at 744 n.14 (citing *Payne*, 501 U.S. at 825, 111 S.Ct. 2597).

However, the introduction of victim impact evidence is not unrestrained. *Payne* did not overrule the prohibition against the admission of "information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence." 501 U.S. at 835 n.1, 111 S.Ct. 2597 (Souter, J., concurring); *see also id.* at 830 n.2, 111 S.Ct. 2597 ("Our holding today is limited to the holdings of [*Booth* and *Gathers*], that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing").

Under section 18-1.3-1201(1)(b), C.R.S. (2013), only if the Court deems victim impact evidence to have probative value, and only if the Court determines it is admissible, may it be introduced at any capital sentencing hearing. As the Court acknowledged in *Dunlap I*, the admissibility of evidence at phase four of any capital sentencing hearing—the stage during which victim impact evidence may be introduced—"is constrained only by familiar evidentiary principles concerning the relevance of the evidence and the potential for that evidence to inflame the passion

or prejudice of the jury." 975 P.2d at 741.[2] The Court may not allow victim impact evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 744 n.14 (quoting *Payne*, 501 U.S. at 825, 111 S.Ct. 2597).

The Tenth Circuit Court of Appeals may have best summarized the parameters on the admissibility of victim impact evidence in the case involving the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City:

> *Payne* allows the introduction of victim impact testimony to aid the jury in making a reasoned moral response when imposing sentence upon a defendant convicted of a capital offense. First, the sentence must be the result of a reasoned decision. The evidence must not be so unduly prejudicial that its admission allows emotion to overwhelm reason. Second, the sentence must be based on moral considerations. Because the consequences of the crime are an important ingredient in the moral equation, the government can present testimony demonstrating the harm caused by the defendant's actions. Third, the sentence must reflect the jury's judgment. The jury must balance all of the relevant mitigating and aggravating factors in determining an appropriate sentence.

United States v. McVeigh, 153 F.3d 1166, 1217 (10th Cir. 1998) (quotation omitted), *disapproved on other grounds*, *Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999). Thus, while "[i]n the majority of cases, . . . victim impact evidence serves

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[2] Rule 402 of the Colorado Rules of Evidence defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. "All relevant evidence is admissible." CRE 402. Nonetheless, the Court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." CRE 403.

entirely legitimate purposes," *Payne* 501 U.S. at 825, 111 S.Ct. 2597, the introduction of such evidence is not without limitations.

C. The Defendant's Request

Given the restrictions on the introduction of victim impact evidence, the defendant requests a hearing during which: (1) "the prosecution [would] be required to provide the Court with a specific written proffer of every victim impact statement it wishes to introduce at a possible [capital] sentencing hearing in this case;" and (2) the Court, "at a minimum," would be required to "determine the relevance of each and every proffered victim impact statement, and conduct an analysis of whether that evidence is more prejudicial than probative." Motion at p. 4. The defendant cites no authority in support of his request, and the Court's research uncovered none. Because the defendant's request is neither supported by law nor advisable under the circumstances, it is denied.

The Court acknowledges that admissibility determinations surrounding victim impact evidence at a capital sentencing hearing are challenging. As the district court in *United States v. McVeigh* recognized, victim impact evidence "is the most problematic[]" sentencing hearing evidence "and may present the greatest difficulty in determining the nature and scope of the 'information' to be considered." 944 F. Supp. 1478, 1491 (D. Colo. 1996). However, without a legal basis, the Court is uncomfortable requiring the prosecution to present detailed

proffers at a hearing with respect to all victim impact witnesses so that their anticipated testimony may be analyzed. The Court is optimistic that the People's final Rule 32.1(d)(2) disclosures will be sufficiently specific to allow it to assess, without proffers or a hearing, what victim impact evidence is relevant and what victim impact evidence lacks probative value or is otherwise facially improper. *See* Order D-167 at p. 15 (giving the People until June 19, 2014, to supplement their Notice P-40 disclosures concerning the subject matters of the testimony to be provided by any sentencing hearing witnesses).

The defendant's reliance on Order D-73, which granted the defendant's request for pretrial notice of the prosecution's *res gestae* evidence—even though no statutory law or case law required it—is misplaced. Reply at p. 3. First, that Order did not require a pretrial hearing. *See generally* Order D-73. Second, just as Order D-73 resulted in a more detailed notice of the prosecution's *res gestae* evidence, the Court anticipates that Order D-167 will result in a more specific notice of the prosecution's victim impact evidence. Third, unlike the admissibility of *res gestae* evidence, the admissibility of victim impact evidence will hinge in part on the evidence presented by the defendant. In *Payne*, the Court explained that one of the purposes of allowing victim impact evidence is that "the State has a legitimate interest in counteracting the mitigating evidence" presented by the defendant. 501 U.S. at 825, 111 S.Ct. 2597 (quotation omitted); *see also United*

States v. Snarr, 704 F.3d 368, 400 (5th Cir. 2013) ("the purpose of permitting victim impact evidence is to counteract a defendant's mitigating evidence and fully explain to the sentencing authority the harm caused by the defendant's crime") (citation omitted). As the Court observed in *Payne*, "there is nothing unfair about allowing the jury to bear in mind [the specific] harm [caused by the defendant] at the same time it considers the mitigating evidence introduced by the defendant." 501 U.S. at 826, 111 S.Ct. 2597 (emphasis omitted). The Court cannot attempt to assess in a vacuum the admissibility of the prosecution's victim impact evidence under CRE 403 without first knowing what, if any, mitigation evidence the prosecution may be entitled to counteract. Nor can the Court determine what, if any, proposed victim impact evidence may be excluded as cumulative without considering the defendant's mitigation evidence.

The defendant's request for a hearing is also based on his desire "to present empirical evidence from social scientists . . . regarding the demonstrated effect of victim impact evidence on jurors in a capital sentencing proceeding." Motion at p. 4 (relying on a law review article, authored by two law professors, that has not been cited in a single published decision). According to the defendant, the Court cannot conduct the required Rule 403 analysis "without the benefit of this research," *id.*, and without considering the "criticism that has been generated by the *Payne* decision," Reply at p. 4. The Court disagrees.

The Court is bound by the decision in *Payne*, as well as the decision in *Dunlap I*, which adopted *Payne*. That some scholars may disagree with *Payne* is of no consequence—it continues to be binding law in the United States and Colorado.

Furthermore, trial courts, including this Court, are routinely called upon to analyze the admissibility of evidence under Rule 403. They do so guided by the plain meaning of the language in the rule, as well as appellate decisions interpreting and applying the rule. Even in the most difficult cases, trial courts manage to resolve complex Rule 403 evidentiary issues without assistance from outside sources.

Here, the Court does not need to hear from law professors in order to understand "the possible prejudice" victim impact evidence may have. Reply at p. 4 n.3. In any case, whether the challenged evidence is possibly prejudicial is inconsequential. Rule 403 directs the Court to admit relevant evidence unless "its probative value is substantially outweighed by the danger of unfair prejudice." CRE 403. "All effective evidence is prejudicial in the sense of being damaging or detrimental to the party against whom it is offered." *Dunlap I*, 975 P.2d at 742 (quotation omitted). Thus, relevant evidence is often prejudicial, but is nevertheless admissible. By contrast, *unfairly* prejudicial evidence, even if relevant, is inadmissible because it has "an undue tendency to suggest a decision

on an improper basis, commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror." *Id.* (quotation omitted).

In analyzing the prosecution's proposed victim impact evidence under CRE 403, the Court must be mindful of the purposes behind its admission, as well as the context in which it is being introduced. Under *Payne*, victim impact evidence may be admitted at a capital sentencing hearing "in order to allow the jury to understand the consequences of the crime committed." *McVeigh*, 153 F.3d at 1221. So long as the victim impact testimony neither causes the jury to impose a sentence based on passion rather than reason, nor interferes with the requirement that the jury's decision be based on a reasoned, moral judgment, it will not be excluded simply because it is "poignant and emotional." *Id.* at 1221-22. Furthermore, a substantial amount of victim impact testimony may be appropriate to allow the prosecution to establish the magnitude of the crime. As the Court explained in *McVeigh*:

> The magnitude of the crime cannot be ignored. It would be fundamentally unfair to shield a defendant from testimony describing the full effects of his deeds simply because he committed such an outrageous crime. The sheer number of actual victims and the horrific things done to them necessarily allows for the introduction of a greater amount of victim impact testimony in order for the government to show the "harm" caused by the crime.

Id. at 1221.

The trial court in *McVeigh* allowed thirty-eight witnesses to provide victim impact testimony. *Id.* at 1216. On appeal, the Court noted that, "[a]lthough

significant in number, these witnesses comprised an extremely small percentage of the number of potential witnesses the government might have called to testify about the 168 victims who died in the blast and the impact of the explosion on the numerous injured victims." *Id.*[3]

In light of the nature of the large-scale shooting involved in this case, the Court is likely to draw guidance from *McVeigh* in deciding what victim impact evidence is admissible. Therefore, to the extent it is practicable, it may behoove the prosecution to include in its final Rule 32.1(d)(2) disclosures citations to *McVeigh* or other authority addressing the admissibility of specific types of victim impact evidence it wishes to introduce.

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion D-168 lacks merit. Accordingly, it is denied without a hearing. If the People supplement

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[3] The victim impact evidence admitted in *McVeigh* consisted of: testimony about witnesses' last contacts with deceased family members; testimony describing witnesses' often agonizing efforts to find out what happened to their loved ones; testimony regarding the impact upon learning of someone's death, including witnesses' reactions upon learning of a relative's death and upon seeing pictures of the remains of the crime scene on television; testimony related to the professional and personal histories of victims; testimony regarding the innocence and unconditional love manifested by children; and discussions of the impact of the blast on the families of the victims. *Id.* at 1219-21. Relying on *McVeigh*, in *Dunlap I*, the Colorado Supreme Court found that, "[i]n the context of a quadruple homicide," the trial court judge did not abuse his discretion in admitting victim impact evidence related to: (1) "the condition of each of the four victims in the hour following the shootings;" (2) the decision by a victim's parents to keep their daughter on life support to allow other family members "to say goodbye;" and (3) the decision by the parents of another victim to donate his organs. 975 P.2d at 744 n.14 (citing *McVeigh*, 153 F.3d at 1221).

Notice P-40, the Court will determine whether to stand by this ruling or amend it. The Court reiterates that the more specific the People's final Rule 32.1(d)(2) disclosures are, the lower the likelihood it will need to hold a hearing or require offers of proof.

Dated this 23rd day of May of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2014, a true and correct copy of the Court's **Order Regarding Defendant's Motion for a Pre-Trial Evidentiary Hearing to Litigate Issues Surrounding the Admissibility of Any Proffered Victim Impact Evidence (D-168)** was served upon the following parties of record:

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