DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO Arapahoe County Justice Center 7325 S. Potomac Street Centennial, Colorado 80112	Filed OCT 10 2014 CLERK OF THE COMBINED COURT ARAPAHOE COUNTY, COLORADO
THE PEOPLE OF THE STATE OF COLORADO vs. Defendant(s): **JAMES EAGAN HOLMES**	COURT USE ONLY
Attorney: GEORGE H. BRAUCHLER 18th Judicial District Attorney 6450 S. Revere Pkwy. Centennial, CO 80111 Phone: (720) 874-8500 Atty. Reg. #: 25910	Case Number: **12CR1522** Division: **202**

PEOPLE'S RESPONSE TO DEFENSE "MOTION FOR SPECIFIC INSTRUCTIONS TO WITNESSES AND JURORS REGARDING VICTIM IMPACT EVIDENCE" [D-242]

This pleading is filed by the District Attorney for the 18th Judicial District.

Introduction

1. The defendant has filed Motion D-242, titled "MOTION FOR SPECIFIC INSTRUCTIONS TO WITNESSES AND JURORS REGARDING VICTIM IMPACT EVIDENCE."

2. The defendant cites no authority, from anywhere, standing for the proposition that absent the court providing the defendant-worded warning language to victims and jurors, the defendant will be deprived of any constitutional, statutory, or procedural right. Nor has the defendant cited binding authority holding that a trial court has an obligation to use the defendant's suggested warning terminology during various parts of a trial. Nor has the defendant provided the Court with any authority to support his assertion that the "Court … has an obligation to take [such] precautionary measures . . ."

The Cases Cited by the Defendant do not Support his Position.

3. The defendant cited to *People v. Dahl*, 160 P.3d 301, 304 (Colo. App. 2007) for the proposition that the a court has inherent authority to use all powers reasonably required to protect its ability to function efficiently and to administer justice. *People v. Aleem*, 149 P.3d 765, 774 (Colo.2007). However, in the *Dahl* case, the court also cautioned that "[i]n Colorado, a verdict in

a criminal trial must be unanimous," and "[u]nanimity requires a free and untrammeled deliberative process that expresses the conscientious conviction of each individual juror." *People v. Lewis*, 676 P.2d 682, 686 (Colo.1984). The *Dahl* court stated that a court may not act in a manner that could coerce a verdict by causing a juror to surrender his or her honest convictions as to the weight and effect of the evidence for the mere purpose of returning a verdict. *People v. Dahl*, 160 P.3d at 304 (Colo. App. 2007).

4. The defendant has in essence crafted a limiting instruction in the guise of a "warning." He has done so by parsing out language from various appellate decisions that ignores the complete language of the limiting instructions used in other states. Contrary to the defendant's contention, the defendant's proposed instruction is not mandated by *Payne v. Tennessee*, 501 U.S. 808 (1991). *Payne* never suggested that a limiting instruction such as the one suggested by the defendant was necessary, but the defendant nonetheless cites language from *Payne* giving the inference that *Payne* suggests that limiting instructions should be given. In the defendant's proposed warning, the defendant has taken language from an Oklahoma case, *Cargle v. State*, 909 P.2d 806 (Okla. Crim. App. 1995). The Oklahoma court held that a jury instruction was the proper remedy. *Id.* The complete language of the limiting instruction suggested by the Oklahoma Court of Criminal Appeals is as follows:

> The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. It is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victim is an individual whose death may represent a unique loss to society and the family. This evidence is simply another method of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.
>
> As it relates to the death penalty: Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstance has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances.
>
> As it relates to the other sentencing options: You may consider this victim impact evidence in determining the appropriate punishment as warranted under the law and facts in the case. *Id.*

5. Another part of the defendant's proposed warning language incorporates language from a New Jersey case. In the New Jersey case cited by the defendant, *State v. Muhammad*, 678 A.2d 164, 181 (N.J. 1996), the New Jersey court adopted a hearing procedure that has already been rejected by this Court. In *Muhammad*, the court held a hearing to determine which victim impact evidence would be admissible, and during that hearing gave warnings to the victims. *Id.* This Court has already ruled on what type of victim impact evidence will be admissible and what evidence will not be admissible. Further, the Court has already asked the prosecution to be mindful of the evidence that will be presented and has reminded the prosecution of their responsibilities. The procedures suggested by the defendant are repetitive, cumulative, and burdensome to be carried out for every victim-impact witness in this case. Further, instructing the family members of victims of mass-murder, who have yet to testify and who have done nothing to violate the Court's order, that "the Court will not allow you to testify if you are unable to control your emotions," is problematic for a number of reasons, starting with the fact that it is paternalistic and insulting to the family members of the deceased victims, and implies that that the court believes that these individuals would be unable to control their emotions. Essentially the defendant requests that this court presuppose facts and admonish victims in a manner that would be insulting and unnecessary. This would violate the Victims' Rights Act, which requires that victims are treated with fairness, respect, and dignity. *See* C.R.S. § 24-4.1-302.5.

6. The defendant has also parsed out quotes that fundamentally distort the holdings of *Payne* and *McVeigh*. *See Payne v. Tennessee*, 501 U.S. 808 (1991); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. (Colo.) 1998). Neither *Payne*, nor *McVeigh* suggest that defendant-tendered warnings are necessary to protect a defendant's due process rights:

> *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. *See Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (quotation and emphasis omitted). 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. *Id.* at 1217; *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. (Colo.) 1998).

7. The jurors in this case must decide for themselves what weight to give the evidence in this case, and the jurors will be instructed by the Court to give whatever weight and effect to the evidence that the jurors deem appropriate. That evidence includes victim impact evidence and the weight that the jurors may or may not choose to give that evidence should not be limited by the arbitrary and unprecedented warning language suggested by the defendant. The defendant's request is the equivalent of a limiting instruction regarding victim impact evidence, and there is no legal precedent to suggest that a limiting instruction is proper, in fact, the opposite is the case. According to C.R.S. § 18-1.3-1201, as long as the court deems that victim impact evidence has probative value, and as long as each party is given an opportunity to rebut the evidence, the court may receive the evidence. C.R.S. § 18-1.3-1201 does not suggest that a limiting instruction, or its functional equivalent, the defendant's proposed warning language, is proper. Victim impact

evidence is evidence of aggravation and aggravation is defined to be any circumstance attending to the commission of the crime which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime itself. *Smith v. People*, 75 P. 914 (1904). "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *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)).

Courts have Rejected Similar Limiting Instructions in Capital Cases

8. Colorado courts have rejected similar instructions requested by other defendants in a Colorado capital case. *See People v. Rodriguez*, 794 P.2d 965, 987-988 (1990). In *Rodriguez,* the trial court refused to read the defendant's proposed limiting instruction to the jury at the conclusion of the sentencing phase. The defendant's proposed instruction was as follows:

> At the first part of the trial, I instructed you that you were not to be swayed by sympathy. However, in this part of the trial the law permits you to be influenced by mercy, sentiment and sympathy for Mr. Rodriguez as mitigating circumstances. You must not be influenced by prejudice, bias or public opinion against Mr. Rodriguez. You must not be influenced by sympathy for the victim against Mr. Rodriguez.

People v. Rodriguez, 794 P.2d 965, 987.

9. The *Rodriguez* court held that it was proper for the jury to consider the circumstances of the offense itself. In order to do so, the court held that it was germane for the jury to make the assessment from the viewpoint of the victim herself:

> In the instant case, the jury was required to weigh the aggravating factors found against the mitigating circumstances. Even if the jury concluded that the mitigating factors did not outweigh the aggravating factors, the jury was required to make a factual and moral assessment of whether death was the appropriate punishment for the offense. In making these decisions, we believe that it is proper for the jury to consider the circumstances of the offense itself. In order to do so, it is germane for the jury to make the assessment from the viewpoint of the victim herself." *Id.*
>
> The second part of the requested instruction was: "You must not be influenced by prejudice, bias or public opinion against Mr. Rodriguez." The defendant cites no authority holding that such an instruction must be given at the sentencing phase of a capital trial. *See Young v. People,* 180 Colo. 62, 64, 502 P.2d 81, 82–83 (1972) (defendant cited no authority in support of contention that he was entitled to anti-

sympathy instruction to offset prejudice in sensational homosexual rape case, and court found none)." *People v. Rodriguez*, 794 P.2d 965, 987 (Colo. 1990).

The jury was instructed in the guilt phase not to let prejudice influence their decision. In the absence of any change in circumstances necessitating another admonitory instruction, we conclude that the trial court did not abuse its discretion in refusing the second part of the defendant's requested instruction." *Id.* at 987-88.

. . . [T]he trial court did not err in refusing the third part that instructed the jury not to be influenced against the defendant by sympathy for the victim. While such an instruction was proper during the guilt phase, it would have been improper in the sentencing phase for the reasons expressed in Part II B above. Nor did the refusal of the instruction violate *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, or *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207.

Id. at 988.

10. The United States District Court for the District of Colorado adopted the reasoning of the Colorado Supreme Court and similarly rejected a limiting instruction tendered by that defendant:

I find that Petitioner has failed to cite any clearly established federal law that required such an instruction to be given. In fact, as recognized by the Colorado Supreme Court, it might have been error in the penalty phase for the trial court to instruct the jury not to be influenced against the defendant by sympathy for the victim. *See Rodriguez IV,* 794 P.2d at 973–74, 988. This results because the jury may consider evidence about the victim and the emotional impact of the murder on her family. *Payne,* 501 U.S. at 827, 111 S.Ct. 2597.

Rodriguez v. Zavaras, 42 F.Supp.2d 1059, 1123 (D. Colo. 1999).

In any event, there is simply no constitutional right under Supreme Court law for the jury to be directed to be unsympathetic and ignore the emotional trauma suffered by the victim. (emphasis added) *Id.*

As to the remainder of the instruction, I agree with the Colorado Supreme Court that the portion of the instruction that requested the jury be told that they may be influenced by mercy, sentiment and sympathy in the sentencing phase was adequately given in connection with other instructions. *See Rodriguez IV,* 794 P.2d at 987 (citing Instruction 26 which stated, " '[m]itigating circumstances' are circumstances which do not constitute a justification or excuse for the offense in question, but which *in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability* ") (emphasis added)" *Id.*

11. California courts have also rejected the proposed limiting instructions of capital defendants. In one California case, the jury instruction proposed by the defense and refused by the trial court read:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy."

People v. Carey, 158 P.3d 743, 760-61 (Cal. 2007).

The *Carey* court held:

> **We have in the past rejected the argument that a trial court must instruct the jury not to be influenced by emotion resulting from victim impact evidence.** (emphasis added) *Id.*
>
> Moreover, in *People v. Harris* (2005) 37 Cal.4th 310, 358, 33 Cal.Rptr.3d 509, 118 P.3d 545, we upheld the rejection of a jury instruction identical to the one proposed by defendant here. In *Harris*, the trial court concluded the instruction was confusing because it cautioned the jury against a subjective response to emotional evidence and argument without specifying whether the subjective reaction was that of the victim's family or that of the jurors themselves. (Id. at p. 359, 33 Cal.Rptr.3d 509, 118 P.3d 545.)" *Id.*

12. Another California case, *People v. Zamudio*, 181 P.3d 105, 137-38 (Cal. 2008), also rejected a capital defendant's proposed limiting instruction. At trial, the defendant proposed the following special instruction:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy." The trial court declined to give this instruction.

People v. Zamudio, 181 P.3d 105, 137-38 (Cal. 2008).

> [T]he requested instruction is misleading to the extent it indicates that emotions may play no part in a juror's decision to opt for the death penalty. Although jurors must never be influenced by passion or prejudice, at the penalty phase, they **"may properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, and in so doing [they] may exercise sympathy for the defendant's murder victims and ... their bereaved family members."** *Id.* at 138.
>
> Because the proposed instruction was misleading ..., and because the point was adequately covered by the instructions that the court did give, the trial court acted correctly in refusing to use" the instruction defendant proposed." Id. *Citing* (*People v. Bolden*, 29 Cal.4th at p. 556, 127 Cal.Rptr.2d 802, 58 P.3d 931.).
>
> Moreover, because jurors may, in considering the impact of a defendant's crimes, **"exercise sympathy for the defendant's murder victims and ... their bereaved family members"** (emphasis added) (*Pollock*, 89 P.3d 353, 380 (Cal. 2004)), **the proposed instruction is incorrect in suggesting that a juror's "emotional response" to the evidence may play no part in the decision to vote for the death penalty."** (emphasis added) *Id.*

13. Most recently, in *People v. Montes*, 320 P.3d 729, 788-89 (Cal. 2014), the California Supreme Court upheld its holding in *People v. Zamudio*, 181 P.3d 105, 137-38 (Cal. 2008):

> Defense counsel requested the jury be instructed that "[e]vidence has been introduced for the purpose of showing the specific harm caused by the crime as part of the circumstances of the offense factor. Such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether Mr. Montes should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. The trial court declined to give the proposed instruction, finding it argumentative, duplicative of other instructions, and potentially misleading.

People v. Montes, 320 P.3d 729, 788-89 (Cal. 2014).

> We held in *People v. Zamudio* (2008) 43 Cal.4th 327, 75 Cal.Rptr.3d 289, 181 P.3d 105, that the trial court did not err by refusing to give a proposed instruction substantially similar to the proposed instruction rejected here. The proposed instruction in *Zamudio* contained this additional sentence at the end: " 'On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.' " (*Id.* at p. 368, 75 Cal.Rptr.3d 289, 181 P.3d 105.) The absence of that sentence in defendant's version makes it no less subject to criticism that it was **"misleading to the extent it indicates that emotions may play no part in a juror's decision to opt for the death penalty."** (emphasis added) *Id.* at 789.

Conclusion

14. The People object to a Court Order requiring unprecedented warning language for victims and witnesses and jurors. In a long trial, where evidence will be presented regarding a mass shooting where twelve victims were murdered and seventy more victims were attempted to be murdered and where the evidence will demonstrate that most of the seventy attempted murder victims also suffered horrific and life-altering physical injuries, it is possible that a witness and/or a juror listening to the testimony could unintentionally become emotional despite the very best efforts of the witness or victim or juror to refrain from becoming emotional. If the Court were to grant the motion, the drop of one accidental tear or the utterance of one sniffle would inevitably form the basis of a request for sanctions, or a motion for a mistrial, by virtue of the violation of the Court's Order. The reality is that the individuals who will be testifying are human beings who may show emotion. There is no requirement in the law that the victims refrain from doing so. As this Court eloquently stated in its Order regarding D-168-A, "There is no authority that allows the Court to ignore the law or to make up its own procedural rules when presiding over a capital case. There already are rules and procedures in place addressing capital cases generally and death penalty sentencing hearings specifically. Rule 32.1 (d)(2) and section 18-1.3-1201(3)(b)(11) are prime examples of such rules and procedures." Because of the fact that the defendant has not shown that omission of these "warnings" would violate any of the constitutional provisions he references in his Motion, the People request that the Court deny the motion.

15. The Motion should be denied based on the pleadings only and without an in-court hearing.

GEORGE H. BRAUCHLER, District Attorney

By: _____
Deputy District Attorney
Registration No. 35892

CERTIFICATE OF MAILING

I hereby certify that I have deposited a true and correct copy of the foregoing in the Public Defender's Mailbox located at 6450 S. Revere Pkwy. Centennial, CO 80111, addressed to:

TAMARA BRADY, ESQ.
DANIEL KING, ESQ.
KRISTEN NELSON, ESQ.
OFFICE OF THE PUBLIC DEFENDER

Dated: 10/10/14

By: _____
Certifying Secretary

DISTRICT COURT ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County Justice Center 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO vs. Defendant: **JAMES EAGAN HOLMES**	COURT USE ONLY
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COURT ORDER REGARDING DEFENSE "MOTION FOR SPECIFIC INSTRUCTIONS TO WITNESSES AND JURORS REGARDING VICTIM IMPACT EVIDENCE" [D-242]

THE COURT, being fully advised, and being duly apprised of the relevant facts and law, hereby denies D-242.

Dated this _____ day of _____, 2014

BY THE COURT

_____
District Court Chief Judge Carlos A. Samour, Jr.