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: **202**

ORDER RESOLVING DEFENDANT'S MOTION FOR SPECIFIC INSTRUCTIONS TO WITNESSES AND JURORS REGARDING VICTIM IMPACT EVIDENCE (D-242)

INTRODUCTION

In Motion D-242, the defendant requests contemporaneous instructions to witnesses and jurors related to the introduction of victim impact testimony at any capital sentencing hearing held in this case. Motion at p. 2. The prosecution asks the Court to deny the motion. Response at p. 8. For the reasons articulated in this Order, the motion is denied without a hearing as meritless.

ANALYSIS

First, the defendant asks the Court to instruct "each witness who is called . . . to give victim impact testimony" as follows:

> The law allows you to provide testimony offering a "quick glimpse" of the life of the victim and to demonstrate the loss to you and your family which has resulted from the defendant's homicide. Your testimony should be factual, not emotional, and should be free of inflammatory comments or references. The Court will not allow you to testify if you are unable to control your emotions.
>
> Additionally, you may not make any comments or statements that could be described as characterizations and opinions about the crime, the defendant, or the appropriate punishment in this case.

Motion at p. 2. Second, the defendant urges the Court to instruct the jury, both "immediately prior to each victim impact witness's testimony" and "at the conclusion of each victim impact witness's testimony," as follows:

> The testimony you are about to hear may include what is called "victim impact evidence." The purpose of victim impact evidence, as with all of the other evidence that is introduced during the sentencing hearing in this case, is to assist the jury in assessing meaningfully the defendant's moral culpability and blameworthiness.
>
> You may only consider evidence pertaining to the victim's personal characteristics and the impact of the crimes on the victim's family that you are about to hear to the extent that you conclude that this evidence is relevant to Mr. Holmes's moral culpability and blameworthiness. If you conclude that this evidence is not relevant to Mr. Holmes's moral culpability and blameworthiness for any reason, you must disregard it.
>
> Your consideration of victim impact evidence must be limited to a rational inquiry into the culpability of Mr. Holmes, not an emotional response to the evidence. In rendering your sentencing verdict in this case, you must not be influenced by any sort of sympathy or sentiment for the victim's family
>
> As I will further explain to you after the close of the evidence, victim impact evidence is not a statutory aggravating circumstance. The introduction of victim impact evidence does not relieve the State of its

burden to prove beyond a reasonable doubt the existence of a statutory aggravating circumstance.

Id. at pp. 2-3.

Neither of these instructions is warranted. Therefore, Motion D-242 fails.

A. Proposed Witness Instruction

The defendant cites no Colorado authority in support of his request for an instruction to victim impact witnesses, and the Court's research revealed none. The defendant's reliance on *State v. Muhammad*, 678 A.2d 164 (N.J. 1996), *see id.* at p. 2 n.2, is misplaced. As the Pennsylvania Supreme Court has recognized, "[w]hile [the] guidelines" set forth by the New Jersey Supreme Court in *Muhammad* "are appropriate under New Jersey's statutory provisions, they are not constitutionally required nor dictated" by the law of other jurisdictions. *Commonwealth v. Rice*, 795 A.2d 340, 353 n.16 (Pa. 2002), *overruled on other grounds*, *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). Like the Pennsylvania Supreme Court, this Court declines to follow New Jersey's law.

The defendant asserts that the Court in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), stated that victim impact evidence is limited to "testimony offering a 'quick glimpse' of the life of the victim" and "demonstrat[ing] the loss to [the witness] and [the witness's] family." Motion at p. 2. However, that is not all the Supreme Court said in *Payne*, and nothing in *Payne*

can be read as requiring, or even recommending, the witness instruction the defendant requests.

Because the language quoted by the defendant does not do justice to the well-reasoned opinion in *Payne*, the Court discusses the decision in some detail. Prior to *Payne*, victim impact evidence was inadmissible, as the Supreme Court had held in *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), "that the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." *Payne*, 501 U.S. at 817, 111 S.Ct. 2597. The Court in *Payne* overruled the holdings in *Booth* and *Gathers*, which it characterized as "unfairly weigh[ing] the scales in a capital trial" by placing "virtually no limits . . . on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" while precluding "the State . . . from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." *Id.* at 822, 111 S.Ct. 2597 (internal citation omitted) (quoting *Mills v. Maryland*, 486 U.S. 367, 397, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) (Rehnquist, C.J., dissenting)). The Court added that victim impact evidence "is designed to show [] ***each*** victim's

uniqueness as an individual human being." *Id.* at 823, 111 S.Ct. 2597 (emphasis in original) (quotation omitted).

Payne declared that victim impact evidence is "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." *Id.* at 825, 111 S.Ct. 2597. The Court observed that it was "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." *Id.* Thus, after *Payne*, "[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." *Id.* at 827, 111 S.Ct. 2597.

Significantly, the Court in *Payne* noted that "[t]here is no reason to treat [victim impact] evidence differently than other relevant evidence is treated." *Id.* Inasmuch as witnesses in this case will not be instructed with respect to any other relevant evidence, there is no basis to instruct them before they provide victim impact testimony.

In any event, the defendant's proposed instruction would provide little, if any, guidance to witnesses regarding what they may and may not testify about. The prosecution's detailed disclosures, *see* Pleading P-83, and the Court's previous

Orders thoroughly addressing the victim impact evidence that may be admitted at trial, *see* Orders D-166, D-167, D-168, D-168a, and P-83-B, are much more useful and render the requested instruction unnecessary and inappropriate.

The defendant's suggested instruction is also inconsistent with Colorado law, which does not bar emotional testimony. To tell witnesses that they will not be allowed to provide victim impact testimony if they cannot do so without showing any emotion would be to impose an unrealistic condition on such testimony, and would result in the improper exclusion of admissible evidence. It would also be insensitive, if not downright offensive. In a case like this one—involving a mass shooting, twelve deceased victims, and numerous severe injuries—it would be the height of insensitivity to tell victim impact witnesses that they may not show any emotion on the witness stand. As the Court noted in Order D-168, "[s]o 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.'" Order D-168 at p. 12 (quoting *United States v. McVeigh*, 153 F.3d 1166, 1221-22 (10th Cir. 1998)).

The prosecuting attorneys working on this case are very experienced. The Court is confident that they will "take all available precautionary measures to ensure that [their] victim impact [witnesses] do[] not overwhelm the jurors with

emotion, thereby causing [the jurors] to forsake their reasoning and to ignore their duty to exercise their reasoned and moral judgment." Order P-83-B at p. 5 n.3. The defendant has a constitutional right to a fair trial in which the jury's decisions are based on the evidence presented, but he is not entitled to an emotionless trial. *See Young v. State*, 752 S.W.2d 137, 145 (Tex. Ct. App. 1988).

The last paragraph of the defendant's tendered witness instruction is equally incongruous with the law. As the Court explained in Order P-83-B, "[w]hile victim impact evidence will only be admissible during [the last part] of any capital sentencing hearing, it is not the only evidence that may be admitted at that stage of the proceedings." Order P-83-B at p. 16.[1] "[A]ll of the aggravating evidence introduced by the prosecution . . . [is] relevant and [is] admissible for consideration by the jury" at that stage of the sentencing hearing. *People v. Dunlap*, 975 P.2d 723, 741 (Colo. 1999) ("*Dunlap I*"). "[T]he proper inquiry demanded for admission of [aggravating circumstance] evidence at [the last part of the sentencing

[1] In Order D-142, the Court ruled that it would bifurcate any capital sentencing hearing into three parts. Order D-142 at pp. 4-5. The jury will be asked to deliberate at the end of each part. *Id.* After part one is completed, if the jury concludes that the prosecution failed to prove beyond a reasonable doubt at least one aggravating factor, it will be directed to impose a life sentence without the possibility of parole. *Id.* Otherwise, the sentencing hearing will proceed to part two. *Id.* at p. 5. Following part two, the jury will be asked to deliberate again to determine whether there are any mitigating factors and, if so, whether those mitigating factors outweigh any aggravating factors that exist. *Id.* If the jury finds that there are mitigating factors that outweigh the aggravating factors, the Court's instructions will direct the jury to impose a sentence of life imprisonment without parole. *Id.* However, if the jury concludes that there are no mitigating factors, or that the mitigating factors that exist do not outweigh the aggravating factors found, the hearing will proceed to part three. *Id.* At the end of part three the jury will be asked to deliberate to determine whether the defendant should be sentenced to death or life imprisonment without parole. *Id.*

hearing] is whether the evidence is relevant to any of the categories listed in [section 18-1.3-1201(1)(b)]," *id.* at 742, which include "the nature of the crime, and the character, background, and history of the defendant." § 18-1.3-1201(1)(b), C.R.S. (2014). The admissibility of evidence at this phase of the proceedings "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." *Dunlap I*, 975 P.2d at 741. Thus, it would be incorrect and confusing to advise victim impact witnesses that they may not testify about the crimes charged. *See e.g., People v. Rodriguez*, 794 P.2d 965, 974 (Colo. 1990) (in a capital sentencing hearing, "it is proper for the jury to consider the circumstances of the offense itself," and therefore, "it is germane for the jury to make the assessment from the viewpoint of the victim herself").

In sum, the Court concludes that the defendant's proposed witness instruction is neither necessary nor appropriate. Accordingly, it is rejected.

B. Proposed Jury Instruction

The defendant's tendered jury instruction is largely based on different portions of the decision in *Cargle v. State*, 909 P.2d 809 (Okla. Crim. App. 1995), *superseded by statute on other grounds, as recognized in Coddington v. State*, 142

P.3d 437, 452 (Okla. Crim. App. 2006).[2] However, Oklahoma case law is not binding on this Court.

Moreover, in *Cargle*, the Court set forth a specific jury instruction "to be used [in Oklahoma] in all future capital murder cases in which victim impact evidence is presented." *Id.* at 828. Yet the defendant's proposed instruction includes only those parts parsed from the *Cargle* instruction that he apparently finds favorable. The defendant substitutes his own language for the rest of the proposed instruction. The *Cargle* instruction, in its entirety, reads 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 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

[2] The defendant also cites *Payne* in support of his proposed jury instruction. Motion at p. 2 n.4. The Court incorporates by reference here the earlier discussion related to *Payne*.

> 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. at 828-29.

The Colorado Supreme Court has made clear that a trial court's use of excerpts from a judicial opinion in a jury instruction is "an unwise practice because opinions and instructions serve very different purposes." *People v. Lane*, 2014 COA 48, ¶ 13, 2014 WL 1647659, at *2 (Colo. App. 2014) (citing *Evans v. People*, 706 P.2d 795, 800 (Colo. 1985), which noted that "statements taken from opinions do not necessarily translate with clarity into jury instructions because opinions and instructions have very different purposes"). The defendant's tendered instruction highlights the Supreme Court's concern.

First, the defendant incorrectly refers to "a statutory aggravating circumstance"—apparently based on the nomenclature used in Oklahoma—thereby conflating a statutory aggravating factor with an aggravating circumstance. Motion at p. 3. This difference is important because, as the defendant is aware, Colorado law ***requires*** the prosecution to establish at least one ***statutory aggravating factor***, *see* § 18-1.3-1201(2)(a)(I), but ***permits*** the prosecution to present evidence of any ***aggravating circumstance***. *See Dunlap I*, 975 P.2d at 739.

Further, whereas the prosecution must prove at least one statutory aggravating factor beyond a reasonable doubt in the first stage of a capital sentencing hearing, "[a]ggravating circumstance evidence is admissible [] only at [the final stage]" of a capital sentencing hearing, *id.* at 740, and there is no burden of proof on the prosecution at that stage of the proceedings, *see Dunlap v. People*, 173 P.3d 1054, 1089 (Colo. 2007) ("*Dunlap III*").

Second, as a form of aggravating circumstance evidence, victim impact testimony may only be admitted in the final stage of a capital sentencing hearing, *see* Order P-83-B at p. 16, and under the procedure adopted by the Court in this case, *see* Order D-142 at pp. 4-5, the proceeding can only reach that stage if the jury has already found that the prosecution proved beyond a reasonable doubt at least one statutory aggravating factor. Therefore, it is unnecessary and confusing to explain to the jury, as the defendant urges, that "[t]he introduction of victim impact evidence does not relieve the State of its burden to prove beyond a reasonable doubt the existence of a statutory aggravating [factor]." Motion at p. 1.

Third, unlike the *Cargle* instruction, the defendant's proposed instruction requires jurors to make a legal determination about the relevance of victim impact testimony and to disregard testimony they conclude is irrelevant. *Id.* The Court—and only the Court—may make this determination. If testimony is allowed, it is because the Court has decided that it is relevant or because there is no objection to

it on relevance grounds. While it is up to the jury to determine what weight, if any, to give to the testimony presented, the jury may not "disregard" as irrelevant any testimony introduced.

Finally, the defendant asks the Court to instruct the jury in a manner that has been expressly disapproved by the Colorado Supreme Court. In *Rodriguez*, the Court found that "it would have been improper in the sentencing phase" for the trial court to have "instructed the jury not to be influenced against the defendant by sympathy for the victim." 794 P.2d at 988 (emphasis omitted). *Accord Rodriguez v. Zavaras*, 42 F. Supp. 2d 1059, 1123 (D. Colo. 1999) ("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;" jurors "may consider evidence about the victim and the emotional impact of the murder on her family") (citation omitted). There is no constitutional right to instruct the jury "to be unsympathetic and ignore the emotional trauma suffered by the victim." *Zavaras*, 42 F. Supp. 2d at 1123.

In short, the defendant's tendered jury instruction is unnecessary and inappropriate.[3] Therefore, the Court declines to use it. The Court is comfortable that the instructions it will use at the end of each stage of any sentencing hearing,

[3] California courts have refused to give limiting jury instructions like the one proposed by the defendant. *See People v. Carey*, 158 P.3d 743, 760-61 (Cal. 2007); *People v. Zamudio*, 181 P.3d 105, 137-38 (Cal. 2008); *People v. Montes*, 320 P.3d 729, 788-89 (Cal. 2014).

along with all the other instructions that will be provided throughout the trial, will adequately guide the jury's deliberations and decisions.

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion D-242 is lacks merit. Accordingly, it is denied without a hearing.

Dated this 15th day of October of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2014, a true and correct copy of the Court's **Order Resolving Defendant's Motion for Specific Instructions to Witnesses and Jurors Regarding Victim Impact Evidence (D-242)** was served upon the following parties of record:

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