

IN THE CIRCUIT COURT OF MAYCOMB COUNTY, ALABAMA

STATE OF ALABAMA,

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v.

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Case No. CC-00-0000

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JOE CLIENT.

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**MOTION TO PROHIBIT THE STATE FROM INTRODUCING
VICTIM IMPACT TESTIMONY AND MOTION FOR COURT TO PROPERLY
INSTRUCT THE JURY ON THE ROLE OF VICTIM IMPACT TESTIMONY**

Joe Client respectfully moves this Court to prohibit the State from introducing prejudicial victim impact evidence during the penalty and sentencing phases of his capital trial. In support of this motion, Mr. Client submits the following:

1. Mr. Client has been charged with capital murder and the State is seeking the death penalty.

2. The United States Supreme Court has made clear that the sentencing proceeding of a capital trial must focus on the defendant as a “uniquely individual human being.” Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Prejudicial information about the suffering of the victim’s family or the personal characteristics of the victim have no place at the sentencing hearing, as it would divert the jury’s attention away from the decision about whether to sentence the defendant to death, to the horrible tragedy that has befallen the victim’s family. This is precisely what the United States Supreme Court has condemned: “any decision to impose the death sentence [must] be, and appear to be, based on reason rather than caprice or emotion.” Gardner v. Florida, 430 U.S. 349, 358 (1977). In order to ensure that these standards are met in Mr. Client’s trial, this Court must prohibit the State from introducing illegal or unduly prejudicial victim impact evidence, and properly instruct the jury on how to consider such evidence in determining the appropriate punishment for Mr. Client.

3. First, the United States Supreme Court has made clear that evidence of family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence may not be considered by the sentencer. Payne v. Tennessee, 501 U.S. 808, 830 n.2 (1991); see also Bosse v. Oklahoma, 137 S. Ct. 1 (2016) (victim impact testimony rendering opinions about defendant or his sentence continues to be impermissible after Payne); Wimberly v. State, 759 So. 2d 568, 572 (Ala. Crim. App. 1999) (“Payne did not overrule that portion of Booth that proscribed consideration of the victim's family members’

characterizations or opinions about the defendant, the crime, or their beliefs as to an appropriate punishment”); Ex parte Washington, 106 So. 3d 441, 444 (Ala. 2011) (plain error to admit victim impact testimony that defendant’s crime was “brutal, evil, terrible” and that defendant was “someone without a conscience” who should “pay with [his] life”); Smith v. State, 2017 WL 1033665, at *22-25 (Ala. Crim. App. Mar. 17, 2017) (plain error where victim’s family provided jury with their characterization of defendant, defendant’s crime, and appropriate punishment).

4. As courts have noted, such improper evidence and argument can take a variety of forms including: live testimony to the jury, see Wimberly, 759 So. 2d at 572-74 (although reversed on other grounds, court found that cumulative effect of victim impact testimony constituted plain error where, *inter alia*, victim’s daughter asked jury to return death sentence); live testimony to the judge, see Stallworth v. State, 868 So. 2d 1128, 1176-77 (Ala. Crim. App. 2001) (remand to determine whether trial court considered statement of victim’s family member requesting a death sentence presented at judicial sentencing hearing); information contained in the presentence investigation report, see Pierce v. State, 576 So. 2d 236, 252-54 (Ala. Crim. App. 1990) (remand required where trial court considered victim impact statements contained in presentence report); and information contained in letters written from the family members to the judge, see Taylor v. State, 808 So. 2d 1148, 1167-68 (Ala. Crim. App. 2000) (error where letter from family member recommending death penalty introduced to judge but harmless where no indication that judge considered information in sentencing defendant to death).

5. In this case, the victim’s wife, Vicky Victim, has given several interviews to the media in which she has expressed her belief that Mr. Client is “Satan,” that the death penalty is appropriate for Mr. Client because a sentence of life without parole would likely mean that he would get out of prison as a result of a change in the law, and her hope that the jurors in Mr. Client’s case would put themselves in her family’s position and sentence Mr. Client to death. Such comments are clearly impermissible under both state and federal law, and as such may not be presented – whether orally or written – at Mr. Client’s trial.

6. Second, while the United States Supreme Court has held that the Eighth Amendment erects no *per se* bar to the admission of evidence about the personal characteristics of the victim of a capital offense or the sufferings of the deceased’s survivors, Payne, 501 U.S. at 827, unduly inflammatory victim impact evidence is nonetheless inadmissible under the Due Process Clause of the Fourteenth Amendment. Indeed, “[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.” Id. at 825.

7. Testimony from numerous family members or a lengthy catalogue of events from the victim's childhood would differ considerably from the evidence presented in Payne and would constitute more than the "quick glimpse of the life which [the] defendant chose to extinguish," condoned by the Court. 501 U.S. at 822 (citation omitted). Such evidence serves to inflame the jury's passions rather than inform its decision making, and thus should be prohibited by this court. See, e.g., McGahee v. State, 554 So. 2d 454, 470 (Ala. Crim. App. 1989) (reversal required where State introduced testimony of victim's brother that he had brought gun to crime scene on day of murder in order to use it against defendant, as such testimony was "an attempt to inflame the jury by showing the reaction of a family member of the victim").

8. Nor is the prosecutor in this case permitted to rely upon victim impact evidence to engender the sympathies of the jury in order to obtain a death sentence. See Arthur v. State, 575 So. 2d 1165, 1184 (Ala. Crim. App. 1990) (while reversing capital case on other grounds, court took pains to condemn prosecutor's detailed arguments about loss to family of deceased); Weaver v. State, 318 So. 2d 768 (Ala. Crim. App. 1975) (reversal required where prosecutor created prejudicial atmosphere by, *inter alia*, asking jury to consider family of victim in reaching verdict); Rogers v. State, 157 So. 2d 13, 18 (Ala. 1963) (prosecutorial argument that defendant deprived victim's family of his companionship "certainly calculated to engender unduly the sympathies of the jury on the one hand, or to inflame their minds with prejudice and passion upon the other hand"); Lowman v. State, 91 So. 2d 697, 699 (Ala. Ct. App. 1956) (reversal required where state's references to suffering of family were "highly improper and were calculated to inflame").

9. Additionally, the State should not be permitted to present testimony from anyone other than the victim's immediate family. Alabama's victim impact laws limit the victim impact statement to the "economic, physical, and psychological impact that the criminal offense has had on the victim and the *immediate family* of the victim." Ala. Code § 15-23-73(a) (emphasis added); see also Ala. Code § 15-23-3(3).¹ Testimony from business or community members about the personal characteristics of the victim, undoubtedly heartfelt and compelling, only encourages judgements about the value or status of the victim within the community, a consideration that is entirely irrelevant to the determination of whether Mr. Client should live or die. See Payne, 501 U.S. at 836 (verdict must be based on deliberation

¹Other states have similarly adopted a limited definition of "victim." See State v. Muhammad, 678 A.2d 164, 180 (N.J. 1996) (victim impact limited to family); Cargle v. State, 909 P.2d 806, 828 (Okla. Crim. App. 1995) (victim impact limited to immediate family); see also Del. Code Ann. title 11 § 9401(7) (Rev. 2015) (designating victim as only decedent's spouse, parent, child, stepchild, or sibling).

and not passion, and as such should be imposed as a “reasoned moral response.”) (Souter, J., concurring) (citation omitted).

10. This Court must also ensure that the jury is not unduly influenced by passion or prejudice for the victim, and prohibit the State from seating members of the victim’s family at the prosecutor’s table. See Fuselier v. State, 468 So. 2d 45, 53 (Miss. 1985) (victim’s wife’s presence at prosecutor’s table and open display of emotion error because it could “all too easily lead to a verdict based on vengeance [sic] and sympathy as opposed to reasoned application of rules of law to the facts”).

11. In the event that this Court does allow the prosecution to put on limited victim-impact testimony, it must properly instruct the jury on how to consider such evidence in order ensure the careful, non-arbitrary application of the death penalty. See Smith, 2017 WL 1033665, at *24 (plain error where judge did not provide limiting instruction on victim impact testimony); see also Saffle v. Parks, 494 U.S. 484, 493 (1990) (death sentences may only be given after rational consideration by a sentencing body whose discretion is guided by non-arbitrary standards).

12. The importance of such an instruction has been recognized in several states. For example, in Turner v. State, 486 S.E.2d 839 (Ga. 1997), the Georgia Supreme Court held that “[b]ecause of the importance of the jury’s decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision.” Id. at 842. Recognizing that other states require that the jury be instructed on the purpose of victim impact evidence, the court held that in all cases in which “victim impact evidence is given in the sentencing phase of a death penalty or life without parole case, the trial court should instruct the jury regarding the purpose of [the] victim impact evidence.” Id.; see also State v. Koskovich, 776 A.2d 144, 182 (N.J. 2001) (reversing defendant’s death sentence where court’s improper instruction regarding victim-impact evidence “infringed on the integrity of the penalty phase and impermissibly increased the risk that the death sentence would be arbitrarily imposed”); State v. Nesbit, 978 S.W.2d 872, 892 (Tenn. 1998) (in order to “assist the jury in properly utilizing victim impact evidence” trial courts were required to instruct jury on the proper use of victim impact evidence); Cargle, 909 P.2d at 829 (in all capital trials where victim impact evidence has been introduced, jury is to be instructed on how to use evidence); see also Commonwealth v. Means, 773 A.2d 143, 158 (Pa. 2001) (recognizing “complexity of victim impact testimony within the volatile atmosphere of the penalty phase in a death case,” and accordingly offering prototype jury instruction).

13. As the Alabama Supreme Court has recognized, the sentencing stage of a capital trial is a “due process hearing of the highest magnitude.” Ex parte Stewart, 659 So. 2d 122, 127 (Ala. 1993) (citation omitted). Thus, “[p]roper instructions are absolutely

indispensable if the jury is to effectively perform its role in this crucial proceeding.” Id.

14. It is critical that Mr. Client’s jury be instructed on how to consider victim impact testimony. Without appropriate instructions on how to consider such evidence, the jury will necessarily be required to determine purely on its own how that evidence should be incorporated into its sentencing recommendation. Thus, the jury may determine that the victim impact evidence should be considered as a non-statutory aggravating circumstance or it may simply react to the emotional nature of the evidence presented and arbitrarily sentence Mr. Client to death, in violation of his rights to due process, equal protection, a fair trial and reliable sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law.

For these reasons, Mr. Client respectfully moves this Court to enter an order prohibiting the States from introducing improper victim impact testimony and to properly instruct the jury on how to consider any such evidence that is submitted.

Respectfully submitted,

/s/ Linda Lawyer

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[CERTIFICATE OF SERVICE]

[MOTION UPDATED ON 10/11/17]