

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY**

STATE OF FLORIDA
Plaintiff,

CASE NO: 23-CF-2935

Vs.

TOMASZ KOSOWSKI,
Defendant.

MOTION TO LIMIT VICTIM IMPACT EVIDENCE

The Defendant, by and through his undersigned counsel, hereby files his motion to limit victim impact testimony and urges the Court to impose the following limits on the testimony: (A) Only one witness may testify. (B) The witness must be an adult. (C) The State must proffer a proposed victim impact statement in writing. (D) The Court must hold a hearing on the admissibility of the evidence prior to its admission. (E) The Court must consider relevant case law, Fla. Stat. 90.403, and any other relevant statutes. (F) The testimony must be limited to the prepared statement. (G) No witness may testify if the witness is unable to control his or her emotions.

As grounds, the Defendant states the following:

1. These are limitations approved by the New Jersey Supreme Court in State v. Muhammad, 678 A. 2d 164, 180 (N.J. 1996).
2. The United States Supreme Court and Florida Supreme Court have held that some types of victim impact evidence are admissible. However, both courts have placed limits on what type of testimony is admissible as victim impact evidence. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 115 L.Ed.2d 720 (1991); Windom v. State, 656 So. 2d 4320 (Fla. 1995). Florida Statute 921.14 (7) also prohibits certain types of victim impact evidence. In Payne, *supra* the majority states:

Our holding today is limited to the holdings Booth v. Maryland, 482

U.S. 496, 107 S.Ct. 2529, 90 L.Ed.2d 440 (1987), and South Carolina v. Gathers, 490 U.S., 805, 109 S. Ct. 2297, 104 L.Ed.2d 876 (1989), 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. Booth also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

111 S.Ct. at 2611 n.2. Thus, Payne explicitly prohibits certain types of victim impact evidence.

Three members of the United States Supreme Court also stated that the Fourteenth Amendment imposed limits on the nature and quantity of victim impact evidence. In addition to the Eighth Amendment per se bar on certain types of victim impact evidence.

Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial.

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." Ante, at 2609. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

Id. at 2612 (Concurring opinion of Justices O'Connor, White, and Kennedy). Additionally, three members of the Court would hold that all victim impact evidence is inadmissible. Id at 2619-2631. Thus, it is clear that every member of the United States Supreme Court agrees that the Eighth Amendment bars certain types of victim impact evidence and at least six members of the Court

that victim impact evidence can be so extensive and or inflammatory as to deny due process.

In Windom, *supra* the Florida Supreme Court also imposed limits on this type of evidence. In Windom, the Court dealt with the admissibility of the following evidence:

Windom attacks the admissibility of testimony by a police officer during the sentencing phase of the trial. The police officer was assigned by her police department to teach an anti-drug program in an elementary school in the community in which the defendant and the three victims of the murders lived and where the murders occurred. Two of the sons of one of the victims were students in the program. The police officer testified concerning her observation about one of these sons following the murder. Her testimony involved a discussion concerning an essay which the child wrote. She quoted the essay from memory: "Some terrible things happened in my family this year because of drugs. if it hadn't been for DARE. I would have killed myself." The police officer also described the effect of the shootings on the other children in the elementary school. She testified that a lot of the children were afraid.

656 So.2d at 434. The Court held that the officer's testimony concerning the impact on the victim's son was admissible. However, the Court held the rest of the testimony to be inadmissible.

Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7). The testimony in which the police officer testified about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death.

Id. Two members of the Florida Supreme Court wrote separately to note the dangers of victim impact evidence.

The use of victim-impact evidence can pose a constitutional problem if misused. I do not believe the courts can or should encourage the use of victim-impact evidence when it in effect may invite jurors to gauge the relative worth of particular victim's lives. All human life deserves dignity and respect; including in the penalty phase of a capital trial. This includes victims of high stature in the

community as well as those in humbler circumstances. It would not be especially difficult for one or the other side in a criminal case to prey on the prejudices some jurors may harbor about particular classes of victims. Subtle appeals to racism, caste-based notions, or similar concerns clearly would undermine the fundamental objective of a criminal trial -- achieving justice. If the effect is either to aggravate the case for one type of victim but mitigate it for another in similar circumstances, then the Constitution is violated. The victim's high stature in the community is not a legal aggravating factor just as a victim's minority status does not lawfully mitigate the crime. In this sense, all human life stands at equal statute before the law. Courts must be vigilant to see that this equality is not undermined.

(Opinion of Justices Kogan and Anstead, concurring in part and dissenting in part). Thus, every member of the Court feels certain types of victim impact evidence are inadmissible. At least two members of the Court feel that this evidence is extremely risky and potentially dangerous. The United States Supreme Court and the Florida Supreme Court have held that victim impact evidence must be strictly limited. The courts also recognize that victim impact is potentially inflammatory and improper.

3. Both Payne and Windom involved the testimony of one witness. *See Payne, supra* at 2603; Windom, *supra* at 434. The witness in Payne only described the impact on the deceased's immediate family. *Id.* at 2603. The Court in Payne described the issue as only concerning testimony regarding the impact on the victim's family. *Id.* at 2603. In Windom, the witness described the effect on the victim's two sons and on the other children in the community. The Florida Supreme Court held the testimony concerning the effect on other children to be improper. The Florida Supreme Court seems to limit victim impact evidence to testimony concerning the impact on the victim's immediate family.

4. Allowing multiple witnesses concerning victim impact raises the precise danger outlined

in the concurring opinion of Justices O'Connor, White, and Kennedy in Payne. *See Payne, supra* at 2611-2613. It raises the danger that this evidence could become unduly inflammatory and thus violate the Due Process Clause of the Fourteenth Amendment. Also, it raises the concerns expressed by Justices Kogan and Anstead in Windom. It would make the lives of prominent members of the community worth more than those of other people. This could lead to one victim's life being worth more than another due to the number of people who come forward to praise the victim. Allowing multiple witnesses concerning victim impact would also allow this evidence to become a feature of the penalty phase and detract the jury from its primary task of weighing aggravation and mitigation.

5. The limits imposed by the New Jersey Supreme Court are a logical and balanced attempt to satisfy the concerns expressed in Payne and Windom.

WHEREFORE, for the foregoing reasons, the Defendant asks this Court to enter an order granting the Defendant's Motion To Limit Victim Impact Evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was emailed to the Office of the State Attorney, this 29th day of January 2026.

Respectfully Submitted,

/s/Daniel M. Hernandez
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