

(J-92-1999)
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 54 E.D. Appeal Docket 1997
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Philadelphia County at
	:	No. 91 January Term 1997, dated October
v.	:	14, 1997, declaring 42 Pa.C.S. §
	:	9711(a)(2) and (c)(2) unconstitutional.
	:	
ALFRED MEANS,	:	
	:	
Appellee	:	ARGUED: October 18, 1999
	:	

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: June 25, 2001

I agree with the trial court that the statutory provisions governing victim impact evidence in the penalty phase of capital cases, 42 Pa.C.S. § 9711(a)(2) & (c)(2), are unconstitutional. While I do not dispute the fact that victim impact evidence may be relevant in sentencing a capital defendant, I take issue with the circumstances and procedures under which Commonwealth juries are allowed to consider such evidence. Contrary to the majority, I believe that the Commonwealth's statutory sentencing scheme in capital cases, as amended to permit the admission of victim impact evidence, violates the Fourteenth Amendment to the United States Constitution. Accordingly, I must respectfully dissent.

In Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court held that the Eighth Amendment to the United States Constitution erects no *per se* bar to the

admission of victim impact evidence in the penalty phase of a capital case. The Court explained that the prosecution has a legitimate interest in counteracting the mitigating evidence that a defendant presents, and that there is nothing unfair about allowing the jury to consider the harm caused by the defendant at the same time that it considers the defendant's mitigating evidence. Id. at 825. However, the Payne Court also recognized that victim impact evidence might be so unduly prejudicial so as to render the trial fundamentally unfair, thereby violating the Due Process Clause of the Fourteenth Amendment. Id. at 825. Thus, instead of establishing bright-line rules regulating the admission of victim impact evidence, the Payne Court expressly left to the states the decision of whether to admit victim impact evidence and how to structure its admissibility. Id. at 826.

Following Payne, the Pennsylvania General Assembly amended our state's death penalty statute to permit, virtually without qualification, the admission of victim impact testimony at capital penalty hearings. See 42 Pa.C.S. § 9711(a)(2), (c)(2). The statute first allows the Commonwealth to present victim impact evidence for any purpose "the court deems relevant and admissible." Id. § 9711(a)(2). Then, without any guidance, the statute instructs the jury that "it shall consider" victim impact evidence if it finds at least one aggravating circumstance and at least one mitigating circumstance. Id. § 9711(c)(2). Unlike the majority, I believe that the admission of victim impact evidence in such an unguided fashion, to be used by the jury without any direction whatsoever in balancing aggravating and mitigating factors, violates the fundamental fairness required by the Due Process Clause of the Fourteenth Amendment.

In contrast to the statutory amendments enacted by the General Assembly and endorsed by the majority, I would allow victim impact evidence only where it is relevant to rebut defense evidence introduced as a catch-all mitigating circumstance.¹ Restricting victim impact evidence in this manner is, in the first instance, consistent with this Court's prior case law on such evidence. In Commonwealth v. Fisher, 681 A.2d 130, 146 (Pa. 1996), this Court concluded that the admission of evidence at the penalty phase of capital trials should be limited to that which is specifically relevant to an enumerated aggravating or mitigating circumstance.² Thus, if a defendant chooses to introduce evidence relating to one of the mitigating factors in 42 Pa.C.S. § 9711(e), based on Fisher, the Commonwealth is then allowed to present evidence that is relevant to rebutting the defendant's specific mitigating evidence. Applying this reasoning to the instant case, it makes sense to restrict the Commonwealth's use of victim impact evidence to those instances where a defendant has introduced evidence under the catch-all mitigating provision.³

Moreover, in Fisher, we found that the jury's unguided use of victim impact evidence in the death penalty weighing process was unconstitutional. 681 A.2d at 146-48. The trial

¹ In my view, victim impact evidence is not even relevant in a capital sentencing proceeding unless the defendant has introduced evidence pursuant to the catch-all mitigating provision, 42 Pa.C.S. § 9711(e)(8). Under § 9711(e)(8), a defendant may present "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."

² Although Fisher involved a death penalty case decided before 42 Pa.C.S. § 9711 was amended to permit victim impact evidence, the reasoning of Fisher is directly applicable here.

³ In his concurring opinion, Justice Saylor recognizes that the majority's decision conflicts with Fisher, stating that the majority "abandon[s] the prevailing interpretation concerning the general operation of the Pennsylvania death penalty statute" as expressed in Fisher.

court in Fisher told the jury to consider the victim impact evidence in deciding whether to impose a life sentence or the death penalty.⁴ When the jury asked the court if the victim impact evidence should be considered as an aggravating factor, the court told the jury to consider the evidence “mentally.” Id. at 148. On appeal, we found that the trial court’s “clarifying” instruction did not alleviate the jury’s confusion. Id. As a result, we concluded that the jury may have considered the testimony as an aggravating circumstance which “interjected an arbitrary and impermissible factor into the sentencing decision of the jury.” Id. The language and focus of 42 Pa.C.S. § 9711(c)(2), which the majority concludes is constitutional, is essentially the same as the jury instructions we found to be offensive in Fisher. Under Section 9711(c)(2), the jury is instructed to consider the victim impact evidence in weighing the aggravating and mitigating factors, but is given no indication of how to properly incorporate the evidence into its deliberation. With so little direction on how the victim impact evidence is to be applied, the jury’s discretion is, in effect, left totally unchecked. The amended statute thereby injects the very kind of arbitrary and

⁴ The trial court in Fisher instructed the jury as follows:

Members of the jury, you have now heard testimony from the victim’s mother, []. In order that you may assess meaningfully the Defendant’s moral culpability and blameworthiness, this evidence of the specific harm caused by the Defendant should be considered by you during the penalty phase of this trial. The Commonwealth is permitted to and has a legitimate interest in counteracting the Defendant’s mitigating evidence

681 A.2d at 148.

impermissible factor into the jury's sentencing decision that this Court prohibited in Fisher.
See Fisher, 681 A.2d at 148.⁵

I also believe that by upholding the legislative scheme at issue in the instant case, the majority minimizes the importance of Furman v. Georgia, 408 U.S. 238 (1972), and its progeny. In Furman, the United States Supreme Court held that where discretion is afforded a jury on a matter so grave as the determination of whether or not a defendant should be executed, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Id. at 309-310 (Stewart, J., concurring).⁶ Prior to the amendment incorporating the admission of victim impact evidence, the United States Supreme Court found that Pennsylvania's death penalty statute was constitutional precisely because of the restricted and guided process for weighing aggravating and mitigating factors that the statute employed. See Blystone v. Pennsylvania, 494 U.S. 299, 303 (1990)(holding statute constitutional because it properly accommodated the concerns

⁵ The majority also ignores Commonwealth v. McNeil, 679 A.2d 1253 (Pa. 1996), where this Court rejected the standardless weighing of victim impact testimony in death penalty deliberations. In McNeil, we vacated a death sentence where victim impact testimony was presented at the penalty hearing. Although McNeil was also a pre-amendment case, our concern was an inability to determine how the jury considered the victim impact evidence in weighing the aggravating and mitigating circumstances. Id. at 1259. We recognized that the jury may have improperly relied on the victim impact testimony to tip the judicial balance in favor of the death penalty. Id.

⁶ See Maynard v. Cartwright, 486 U.S. 356, 362 (1988)(channeling and limiting the jury's discretion in imposing a death sentence is a fundamental constitutional requirement); California v. Ramos, 463 U.S. 992, 999 (1983)(capital sentencing procedures must constrain and guide the jury's discretion to ensure that the death penalty is not meted out arbitrarily and capriciously); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (states must channel the jury's discretion by clear and objective standards that provide specific and detailed guidance and that facilitate meaningful, rational appellate review of the jury's decision to impose a death sentence); Gregg v. Georgia, 428 U.S. 153, 195 (1976)(dictating the type and extent of discretion the jury must and must not have).

of Furman and allowed the jury to consider all mitigating evidence). By not providing proper guidance for the consideration of victim impact evidence, the statute renders the process unconstitutionally arbitrary and disrupts the careful weighing process required in capital cases under the federal constitution. See Penry v. Lynaugh, 492 U.S. 302, 326 (1989)(unbridled discretion in capital sentencing is unacceptable).

In contrast to Pennsylvania, New Jersey has instituted procedures governing the admission and use of victim impact evidence that, in my opinion, properly channel a jury's discretion in capital sentencing proceedings. Under the New Jersey death penalty statute, the jury is allowed to consider victim impact evidence only if the prosecution has proven at least one statutory aggravating factor beyond a reasonable doubt, and at least one of the jurors finds evidence of the defendant's character or record pursuant to the catch-all mitigating circumstance. N.J.S.A. 2C:11-3c(5)(h). Even if those requirements are met, the jury can only use victim impact statements for determining how much weight to afford the catch-all mitigating circumstance. Id. at 2C:11-3c(6). To further help ensure fundamental fairness in capital sentencing proceedings, the New Jersey Supreme Court has also adopted a series of rules governing the admission of victim impact evidence. See State v. Muhammad, 678 A.2d 164, 179-81 (N.J. 1996). Unlike the Pennsylvania statute, the New Jersey statute does not allow a jury to use victim impact evidence as a general aggravating factor or as a means of weighing the worth of the defendant against the worth of the victim. Instead, the only permissible use for victim impact evidence is to assist the jury in determining the appropriate weight to give the catch-all mitigating circumstance. Id. at 179.

To correct the constitutional infirmity of Pennsylvania's current statutory scheme, I would, pursuant to this Court's rule-making power, establish a set of procedural safeguards to ensure that the death penalty is meted out with proper guidance and is not imposed in an arbitrary or capricious manner. See *Barclay v. Florida*, 463 U.S. 939, 960 (1983)(Stevens, J., concurring in judgment)(capital cases require procedural protections to ensure that the death penalty will be imposed in a consistent and rational manner). Borrowing heavily from the New Jersey scheme, I would adopt the following rules for the use of victim impact testimony at capital trials in this Commonwealth:

- 1) The Commonwealth must notify a defendant, prior to trial, of its intent to introduce victim impact testimony in the penalty phase.
- 2) The Commonwealth may introduce victim impact testimony if, and only if, the defendant presents evidence pursuant to the catch-all mitigating provision, 42 Pa.C.S. § 9711(e)(8).
- 3) Absent special circumstances, only one witness should testify on behalf of the victim's family in order to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness.
- 4) The Commonwealth must provide the defendant with the name of the victim impact witness that it plans to call so that defense counsel will have an opportunity to interview the witness prior to his or her testimony.
- 5) Minors should not be allowed to present victim impact evidence, unless there are no adult survivors and the child is therefore the closest living relative.
- 6) The victim impact statement must be reduced to writing for the trial court and opposing counsel to review in advance, thereby reducing the potential for prejudicial content.
- 7) The trial court should hear the proffered testimony outside the presence of the jury to make a preliminary determination as to the admissibility of the victim impact evidence, and to determine if the victim impact witness can present the statement to the jury without an overly emotional display. The witness will be permitted only to read his or her previously approved testimony.

- 8) The statement must be limited to a general factual profile of the victim, including information regarding the victim's family, employment, education and interests. The testimony can describe generally the impact of the victim's death on his or her immediate family. The testimony should be factual, not emotional, and free of inflammatory comments or references. The trial court should take the opportunity to remind the victim's family that the court will not permit any testimony concerning the family's characterizations and opinions about the defendant, the crime, or the appropriate sentence. Because of the inherent difficulty of placing any meaningful constraints on its nature and scope, testimony regarding the effect of the victim's death on any "community," however defined, should not be permitted.
- 9) Any comments about victim impact evidence in closing argument are strictly limited to the previously approved testimony of the witness.
- 10) Although specific language is not mandated, the trial court must give jury instructions consistent with the above rules in order to ensure the fundamental fairness of a capital sentencing procedure. At a minimum, the trial court must instruct the jury that: a) the Commonwealth must prove an aggravating circumstance beyond a reasonable doubt to all jurors in order for the jury to consider the aggravating circumstance; b) the jury may consider victim impact evidence only if the defendant presents evidence pursuant to the catch-all mitigating provision; and c) victim impact evidence may only be used to determine how much weight should be accorded to the catch-all mitigating circumstance, and not to support aggravating circumstances or justify a death sentence.

These safeguards, which are missing from the Pennsylvania statute, would prevent a jury from using victim impact evidence in an arbitrary and capricious manner when deciding whether the death penalty is an appropriate sentence. In my view, when the choice is between life and death, the failure to have such procedural safeguards is incompatible with the command of the Fourteenth Amendment requiring fundamental fairness in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 605 (1978)(plurality

opinion)(the risk that the death penalty will be imposed despite factors which may call for a less severe penalty is unacceptable and incompatible with the Fourteenth Amendment).⁷

Adopting these procedural protections would limit the admissibility of victim impact evidence to those instances where it is relevant to rebutting evidence that a defendant proffers under the catch-all mitigating provision and restrict the jury's use of such evidence to determining how much weight to afford the catch-all mitigating circumstance. Rather than completely removing the trial court's sound discretion in admitting relevant victim impact evidence, these rules simply define the parameters in which victim impact evidence may be introduced and considered by juries. Trial courts would still maintain the authority

⁷ These procedural safeguards are especially important because the voters of this Commonwealth have not yet approved a victim's rights amendment to specifically mandate that victim impact evidence should be admitted in capital cases. In the last twenty years, thirty-two states have amended their constitutions to include victim's rights amendments. See ALA. CONST. amend. 557 (1994); ALASKA CONST. art. I § 24 (1994); ARIZ. CONST. art. II, § 2.1 (1990); CAL. CONST. art. I, § 28 (1982); COLO. CONST. art. II, § 16a (1992); Conn. CONST. art. I, § 8(b) (1996); FLA. CONST. art. I, § 16 (1988); IDAHO CONST. art. I, § 22 (1994); ILL. CONST. art. I, § 8.1 (1992); IND. CONST. art. I, § 13(b) (1996); KAN. CONST. art. XV, § 15 (1992); LA. CONST. art. I, § 25 (1998); MD. CONST. DECL. OF RIGHTS art. 47 (1994); MICH. CONST. art. I, § 24 (1988); MISS. CONST. art. 3 § 26A (1998); MO. CONST. art. I, § 32 (1992); NEB. CONST. art. I, § 28 (1996); NEV. CONST. art. I, § 8(2) (1996); N.J. CONST. art. I, ¶ 22 (1991); N.M. CONST. art. II, § 24 (1991); N.C. CONST. art. I, § 37 (1996); OHIO CONST. art. I, § 10(a) (1994); OKLA. CONST. art. II, § 34 (1996); OR. CONST. art. I, § 42 (1999); R.I. CONST. art. I, § 23 (1986); S.C. CONST. art. I, § 24 (1996); TENN. CONST. art. I, § 35 (1998); TEX. CONST. art. I, § 30 (1989); UTAH CONST. art. I, § 28 (1994); VA. CONST. art. I, § 8(A) (1996); WASH. CONST. art. I, § 35 (1989); WIS. CONST. art. I, § 9(m) (1993).

The New Jersey Supreme Court effectively explained the significance of a victim's rights amendment when it stated that the legislative authority to enact New Jersey's victim impact statute is traced directly to the Victim's Rights Amendment. Muhammad, 678 A.2d at 174. The court further explained that:

In the absence of the Victim's Rights Amendment, we might have continued to hold that victim impact evidence should not be admitted during the sentencing phase of a capital case. However, the electorate, by passing the Victim's Rights Amendment, which is intended to afford victims whatever rights could be afforded to them without violating the United States Constitution, and the Legislature, by enacting [the victim impact statute] in order to effectuate that amendment, have mandated that victim impact evidence be admitted.

Id.

and discretion to admit, or not admit, relevant victim impact evidence, provided the defendant has opened the door to such evidence by presenting mitigating evidence under the catch-all provision. In addition, by ensuring that Commonwealth juries are appropriately instructed, we can further alleviate problems with weighing victim impact evidence and facilitate proper appellate review of a jury's decision to impose the death penalty. Restricting a jury's consideration of victim impact evidence in this manner balances the scales of justice during sentencing, allowing the jury to decide the proper punishment based only on evidence that is relevant and in such a way that its discretion is properly channeled.