

**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 IN LIMINE REGARDING REFERENCE TO NON-ENUMERATED
MITIGATING FACTORS**

The Defendant, moves in limine to preclude reference, by counsel, witnesses, or by the court, to mitigating factors not specifically listed in §921.141(7), Sections (a) through (g), as "non-statutory" mitigating factors, and as grounds states as follows:

1. The Defendant is charged with First Degree Capital Murder. The State intends to seek imposition of the death penalty upon conviction of First-Degree murder.
2. It is common for prosecutors, judges, expert witnesses and even defense attorneys to informally refer to mitigating factors that are not among those specifically listed in §921.141(7) as "non-statutory" mitigating factors and to the mitigating circumstances specifically listed in Sections (a) through (g) as "statutory" mitigating factors.
3. Referring to mitigating considerations as "non-statutory" mitigating factors in the presence of the jury unfairly, inaccurately and prejudicially implies that mitigating considerations not expressly listed by statute are inferior to those that are expressly listed. Because the process involves weighing of these factors, that inference is prejudicial.
4. Mitigating considerations not specifically enumerated in the statutes have never

been held to have different weight than those listed by statute. The jury and judge must fairly consider and weigh any aspect of the offense or of the accused's character or record that mitigates the offense. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Section 921.141(7)(h), Florida Statute, requires that the jury and judge consider, "the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty." In that regard, *anything* that the jury may consider as mitigation falls under this broad statutory language is, therefore, a "statutory" mitigating consideration.

5. Whether law provided to the jury comes from statute or case law is not a proper consideration for the jury and it has no bearing on how the law is to be applied. For that reason, the standard jury instructions in criminal cases do not provide citations to their sources for the jury, although some portions derive from statute and some from case law. The term "non-statutory" is not contained in the standard jury instructions. Because it is irrelevant and prejudicial, the term "non-statutory" should not be used in a criminal trial proceeding.

6. Referring to valid mitigating considerations which are not specifically enumerated as "non-statutory" has the effect of undermines the validity and reliability of any subsequent death sentence due to the unfounded and improper inference that statutory factors are to be given more weight than other valid mitigating factors. It is exclusively the responsibility of the penalty phase jury, in the penalty phase of a capital case, to assign to each valid mitigating factor the proper weight, as the jury sees fit.

7. Additionally, prosecutors, courts and defense attorneys refer *out of the presence of the jury* for convenience sake, to the statutory mitigating consideration

created by Section 921.141(7)(h), Florida Statutes, as the "catch-all" mitigating factor. The phrase "catch-all" is likewise demeaning to the factors that fall under the umbrella of this statutory mitigating consideration. For the same reasons as listed above, reference to this mitigating consideration as a "catch-all" by the court, any witness or attorney must not occur in the presence of the jury.

WHEREFORE, the Defendant respectfully requests to preclude reference, by counsel, witnesses, or by the court, to mitigating factors not specifically listed in §921.141(7), Sections (a) through (g), as "non-statutory" mitigating factors.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via electronic submission to the Office of the State Attorney on this 29th day of January, 2026.

Respectfully submitted,

/s/Daniel M. Hernandez
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