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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 DECLARE SECTION 921.141(8), FLA. STAT., UNCONSTITUTIONAL AND REQUEST FOR PROFFER OF VICTIM IMPACT TESTIMONY AND PRETRIAL RULING ON WHETHER THE DANGER OF UNFAIR PREJUDICE OF THAT EVIDENCE OUTWEIGHS ITS PROBATIVE VALUE AND/OR OTHERWISE DENIES A FAIR SENTENCING PROCEEDING

The Defendant, by and through the undersigned counsel, objects to the admission of victim impact evidence and moves for Section 921.141(8), Fla. Stat., to be declared unconstitutional under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The Defendant, on the same grounds and pursuant to Section 90.403, Florida Statutes, requests a proffer of all "victim impact evidence" that the State seeks to present and a pre-trial determination as to whether the danger of unfair prejudice presented by that evidence outweighs its probative value, based on the following:

1. The Defendant is charged with First Degree Capital Murder. The State to date, has indicated that it intends to seek imposition of the death penalty upon conviction of First-Degree Murder.
2. The Defendant has been declared indigent.
3. In pertinent part, Section 921.141(8), Florida Statutes, provides as follows:

> **(8) Victim impact evidence** - Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions

about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

4. In Windom v. State, 656 So.2d 432 (Fla.1995), the Florida Supreme Court approved use of victim impact evidence as follows: "Victim impact evidence must be limited to that which is relevant as specified in section 921.141(8)." Windom at 438. The defendant respectfully submits that Windom is wrong and that introduction of evidence and/or argument concerning the impact of the victim's death, even as limited by the holding in Windom, violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In the abstract and in some statutory schemes involving imposition of the death penalty, the introduction of victim impact evidence may not necessarily violate the Eighth or Fourteenth Amendments. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Florida, however, is a state in which the death penalty is imposed based *solely* on a determination of whether specific statutory aggravating factors outweigh the mitigating considerations. Presentation of "victim impact" evidence is not a part of that weighing process. See Alston v. State, 723 So.2d 148 (Fla.1998). The presentation of victim impact evidence is authorized by Section 921.141(8), Fla. Stat. and it is presented without any explanation of how the evidence is to be used by the sentencers. Thus, the interjection of this type of prejudicial evidence, without guidance to the sentencers as to how it is to be used in the sentencing determination, renders imposition of the death penalty unreliable, inconsistent, arbitrary and capricious.
5. To provide Due Process, consistency and the reliability required for imposition of the death penalty under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, a statutory capital sentencing scheme must genuinely limit the discretion of the sentencer by clear and objective standards that are capable of consistent application and meaningful appellate review. Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) ("An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."). Admission of evidence "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death" presents a broad range of vague and prejudicial considerations that fosters inconsistent and discriminatory use of the death penalty. Basing imposition of the death penalty on evidence and argument that is "designed to demonstrate the victim's

uniqueness as an individual human being and the resultant loss to the community's members by the victim's death" denies Due Process, equal protection and it demeans the value of every human life. Such a procedure evokes an emotional response from jurors and the absence of objective criteria explaining how to use the evidence prevents any meaningful appellate review of how the evidence was used by jurors. This procedure encourages consideration of such factors as a victim's race, ethnic origin, religion sex and sexual preference. Victim impact evidence is not to be weighed as an aggravating factor. Presentation of this type evidence is likely to confuse jurors and lead to imposition of the death penalty based on inflamed emotion and unconstitutional considerations rather than calm reflection of specific law and the material facts.

6. In the event this motion is denied and the court permits evidence and argument concerning victim impact under Section 921.141(8), Florida Statutes, to be introduced, the defendant maintains his objections and requests that such evidence be first proffered so that this Court can determine the propriety and admissibility of the evidence that is being sought to be presented based on the standard set forth in Windom, supra. Further, the undersigned asks that evidence and/or testimony be presented to the judge only. If that request is denied, the undersigned asks that all victim impact evidence and testimony be pre-approved by the Court and presented to the jury in a previously-recorded form.

7. The unfair prejudice attending the introduction of this evidence to a jury has long been recognized by various courts. In that regard, unfair prejudice is the type of evidence that would logically tend to inflame emotions and which would tend to distract jurors and the court from conducting an impartial and reasoned sentencing analysis:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

Jones v. State, 569 So.2d 1234, 1239 (Fla.1990). *See* Urbin v. State, 714 So.2d 411, 419 (Fla.1998) (Court has responsibility to monitor practices and control improper influences in imposing death penalty - "Although this legal precept, and indeed the rule of objective, dispassionate law in general may sometimes be hard to abide, the alternative, a court ruled by emotion, is far worse."). Particularly when presiding over a capital trial, judges are cautioned to be "vigilant [in the] exercise of their responsibility to insure a fair trial." Bertolotti v. State, 476 So.2d 130, 134 (Fla.1985).

8. Generally, victim impact testimony presents a broad umbrella of various types of information that

does not pertain to the weighing of statutory aggravating considerations or mitigating considerations:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. Therefore, we find this testimony relevant.

Bonifay v. State, 680 So.2d 413, 419-20 (Fla.1996). An abuse of discretion in presenting this type evidence occurs where the presentation of victim impact evidence is allowed to become a feature of the trial. To date, the use of victim impact evidence has been carefully monitored by trial courts that were vigilant to guard against the possibility of improper emotional influences impacting on the jury's sentencing determination. *See* Alston v. State, 723 So.2d 148 (Fla.1998) (approved where victim's mother testified); Benedith v. State, 717 So.2d 472 (Fla.1998) (approved where victim's sister testified); Davis v. State, 703 So.2d 1055 (Fla.1997) (approved where written statement of victim's mother introduced); Hauser v. State, 701 So.2d 329 (Fla.1997) (approved where victim's mother and grandmother testified); Moore v. State, 701 So.2d 545 (Fla.1997) (approved where victim's daughter testified); Cole v. State, 701 So.2d 845 (Fla.1997) (approved where teacher of victim testified); Burns v. State, 699 So.2d 646, 652-53 (Fla.1997) (approved where victim's father testified in addition to "a fellow officer of the victim who made a brief reference to the victim's wife"); Consalvo v. State, 697 So.2d 805 (Fla.1996) (approved where victim's brother testified); Willacy v. State, 696 So.2d 693 (Fla.1997) (approved where victims

son and two daughters testified); Damren v. State, 696 So.2d 709, 712-713 (Fla.1997) (approved where victim's wife and daughter read prepared statements to the jury); Branch v. State, 685 So.2d 1250, 1253 (Fla.1996) (approved where trial court allowed photograph of victim taken several weeks before she was murdered); Bonifay, 680 So.2d 413, 419-20 (Fla.1996) (approved where victim's wife testified; Windom v. State, 656 So.2d 432, 438 (Fla.1995) (approved where one police officer testified about the impact of three victims' death on their family and on school children).

9. The admissibility of victim impact evidence, as with all evidence, is within the sound discretion of a trial court and should still be subject to relevancy standards. State v. Maxwell, 647 So.2d 871 (Fla. 4th DCA 1994), Aff., 657 So.2d 1157 (Fla.1995). Trial courts should exclude victim impact evidence if it will become a feature to the extent that it denies a fair proceeding. Just as a judge may not, without first hearing the evidence, enter "a blanket order forbidding its admission without regard to the character of the evidence that the State intended to present to the jury," State v. Johnston, 743 So.2d 22 (Fla. 2d DCA 1999), neither should a judge make a blanket ruling that all such evidence is admissible.

10. An analogous situation occurs with collateral crime evidence, which is relevant to prove identity, plan, motive, common scheme, etc. In Williams v. State 110 So.2d 654, 662 (Fla.1959), the Court ruled that, while evidence of unrelated criminal activity may be relevant to prove a defendant's guilt, "we emphasize that the question of the relevancy of this type of evidence should be cautiously scrutinized *before* it is determined to be admissible." (emphasis added). *See also* State v. Johnston, 712 So.2d 1160 (Fla. 2d DCA 1998) ("trial judges must scrupulously examine the probative and prejudicial value of [victim impact] evidence before permitting its introduction."). The danger of William's Rule evidence, as with victim impact evidence, is that it tends to distract jurors from the task at hand and invite a verdict for reasons other than impartial application of the law to the facts. *See* Davis v. State, 276 So.2d 846 (Fla. 2d DCA 1973) (fundamental error to present Williams Rule evidence); Green v. State, 228 So.2d 397 (Fla. 2d DCA 1969) (absence of limiting instruction on proper use of Williams Rule evidence was prejudicial error).

11. The advantage of requiring an advance ruling on the admissibility of victim impact

evidence is that the state has a remedy if it is improperly excluded. See State v. Johnston, 743 So.2d 22 (Fla. 2d DCA 1999); Wike v. State, 698 So.2d 817 (Fla.1997) (state failed to preserve for appeal the trial court's exclusion of, as too prejudicial, the victim impact testimony from the victim's parents). A defendant has no real remedy if it is improperly admitted. If a pre-trial ruling is not made, this evidence cannot be effectively monitored or controlled by the Court

12. A death recommendation from a jury and/or a death sentence imposed by a judge following the foregoing errors specifically enumerated above over timely and specific objection denies Due Process and fundamental fairness guaranteed by article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and International law established by *jus cogens* and binding treaties and agreements, including the International Covenant on Civil and Political Rights, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, and the American Convention on Human Rights. In that regard, the "Supremacy Clause" of the United States Constitution elevates international law found in treaties and agreements to the supreme law of the land, thereby superseding state law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and anything in the constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, art. VI, cl.2. Courts are to enforce international law. U.S. Constitution, art. I, 8, cl.10, and art. III, 2, cl. 1. Multilateral human rights treaties should have greater force than bilateral treaties because they demonstrate international consensus on fundamental human rights:

> Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* applications of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. . . .

U.N. Hum. Rts. Ctte. General Comment 24, U.N. Doc. HRI/GEN/1/Rev.3 &8 (1997). *See* Aloeboetoe *et. al* v. Suriname, Inter-Am. Ct. H.R., Judgment of 10 September 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1994) (holding Dutch-Surinamese slavery treaty violates jus cogens);

Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (European Convention on Human Rights supersedes U.K.-U.S. Extradition Agreement of 1972). See Appendix, Amnesty International, "International Standards on the Death Penalty" (August, 1997). "[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." The Paquete Habana, 175 U.S. 677 (1900).

The existing body of international law requires that any procedure for determining whether a sentence of life or death is to be imposed must provide at the very least the same rights and protections accorded to the initial determination of guilt.

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

International Covenant on Civil and Political Rights, *Article 6*.

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
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> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
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> (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
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> (c) To be tried without undue delay;
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> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess his guilt.

International Covenant on Civil and Political Rights, *Article 14*. The presentation of Victim Impact Evidence fails to comport with minimum requirements of Due Process and otherwise leads to arbitrary imposition of capital punishment.

WHEREFORE, the defendant objects to the use Victim Impact Evidence, asks that Section 921.141(8), Florida Statutes, be declared unconstitutional under art. I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and/or the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and a violation of international treaties, and otherwise seek a pre-trial ruling on the admissibility of such evidence under Section 90.403.

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 28th day of January, 2026.

Respectfully submitted,

/s/Daniel M. Hernandez
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