IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NO. 2012-CF-35337-A

STATE OF FLORIDA,

Plaintiff,

vs.

BRANDON LEE BRADLEY

Defendant,

_____/

MOTION TO DECLARE §921.141(7), FLA.STAT., UNCONSTITUTIONAL AND FOR PRETRIAL DETERMINATION OF ADMISSIBILITY OF ALL "VICTIM IMPACT" EVIDENCE UNDER §§90.104(2), 90.105, 90.403,FLA.STAT.

The Defendant, BRANDON LEE BRADLEY, moves this Court to enter its order declaring Section 921.141(7) of the Florida Statutes unconstitutional under Art. I, §§ 2, 9, 16, 17 & 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and, pursuant to Sections 90.104(2), 90.105 and 90.403 of the Florida Statutes, objects to the introduction of victim impact evidence; and otherwise requests a pretrial determination of the admissibility of all "victim impact evidence" that the State seeks to present, as follows:

1. The Defendant has been charged by indictment with First Degree Premeditated Murder of a Law Enforcement Officer With Firearm, and related charges.
2. The State filed notice pursuant to 3.202(a) of the Florida Rules of Criminal Procedure that it intends to seek the death penalty.
3. Section 921.141(7) of the Florida Statutes is unconstitutional and violates the Fifth, Sixth,

Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution for the reasons more specifically set forth in the accompanying memorandum of law.

4. A pretrial evidentiary hearing is required under Sections 90.104, 90.105 and 90.403 of the Florida Statutes because evidence arguably relevant under Section 921.141(7) of the Florida Statutes is nonetheless inadmissible where, as here, the danger of unfair prejudice substantially outweighs its probative value.

5. The Defendant moves this Court to limit whatever victim impact testimony the State intends to introduce at the sentencing phase in the above-captioned matter, by adopting one of the following methods of presentation:

   (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 should hold a hearing on the admissibility of the evidence prior to its admission in light of relevant case law, Section 90.403 of the Florida Statutes, 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.

MEMORANDUM OF LAW

Initially, it is stressed that imposition of the death penalty entails heightened procedural due process requirements because of the severity and finality of the death penalty:

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the

> community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977). See Amendments to Fla.R.Crim.P. & Fla.R.App.P., 875 So.2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); Chamberlain v. State, 881 So.2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different."). Heightened standards of due process are required by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution whenever a state government seeks to impose capital punishment. There is an "acute need for reliable decision making when the death penalty is at issue." Deck v. Missouri, 544 U.S. 622 (2005).

> . . . *Because the death penalty is unique "in both its severity and its finality,"* [Gardner v. Florida, 430 U.S. 349] at 357, 97 S.Ct., at 1204, *we have recognized an acute need for reliability in capital sentencing proceedings.* See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1998) (emphasis added). The Florida Supreme Court agrees that courts have a duty to use procedures that "ensure" reliable imposition of capital punishment. See Arbelaez v. Butterworth, 738 So.2d 326, 326-27 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent *and reliable manner* . . . ") (emphasis added); Deck, *supra*.

At issue here is Section 921.141(7) of the Florida Statutes, which provides the following:

> (7) **Victim impact evidence.** - Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), 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.

In Windom v. State, 656 So.2d 432 (Fla.1992), 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(7)." Windom at 438. The 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 of the United States Constitution. In the abstract and in other specific statutory schemes involving imposition of the death penalty, the introduction of victim impact evidence may not violate the Eighth or Fourteenth Amendments. Payne v. Tennessee, 501 U.S. 808 (1991). In Florida, however, the death penalty is imposed based *solely* on a determination of whether specific statutory aggravating factors are outweighed by mitigating considerations. The sentencer is precluded from using an aggravating consideration not contained in Section 921.141(5) of the Florida Statutes as a basis for imposing capital punishment. See Zack v. State, 911 So.2d 1190, 1208 (Fla. 2005) ("[t]he *only* matters that may be considered in aggravation are those set out in the death penalty statute.").

This type evidence under Florida's statutory scheme is not relevant to determine a defendant's eligibility for capital punishment, nor is it relevant to determine whether a defendant should receive capital punishment after eligibility is determined. Presentation of "victim impact" evidence is not a part of that weighing process at all. See Alston v. State, 723 So.2d 148 (Fla.1998). Rather, the presentation of victim impact evidence is authorized by Section 921.141(7) of the Florida Statutes without any explanation as to how the evidence is to be used

and apparently the legislation was passed solely to accommodate the "right" of the victim provided by article I, Section 16(b) of the Florida Constitution. Significantly, however, by the very language that confers a constitutional right to the victims, the rights of the victims exist only "to the extent that these rights do not interfere with the constitutional rights of the accused." Art. I, §16(b), Florida Constitution. The presentation of such prejudicial evidence to the jury and the sentencer without guidance as to how it is to be used in the sentencing determination renders imposition of the death penalty unreliable, inconsistent, arbitrary and capricious, and a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

The death penalty requires Due Process, consistency and reliability to comport with Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. A statutory capital sentencing scheme must genuinely limit the discretion on imposition of the death penalty by clear and objective standards that are capable of consistent application and meaningful appellate review. Zant v. Stephens, 462 U.S. 862, 877 (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 foster 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 evidence evokes an emotional response. 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, gender, and sexual orientation. Victim impact evidence is not to be weighed as an aggravating factor. Presentation of this type of 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.

In the event this motion is denied and the Court permits the introduction of evidence concerning victim impact under Section 921.141(7) of the Florida Statutes, the Accused respectfully objects and moves under Section 90.403 of the Florida Statute for a determination as to the admissibility of the evidence that is to be presented. A proffer is required so that this Court can determine the propriety and admissibility of the specific evidence sought to be presented based on the standard set forth in Windom, supra. Pursuant to Section 90.104(2) of the Florida Statutes, "In cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means." Except in circumstances not present here, "the court shall determine preliminary questions concerning the . . . admissibility of evidence." Section 90.105(1), Florida Statute. Hearings on the admissibility of evidence shall be conducted out of the presence of the jury. Section 90.105(3), Florida Statute.

Under Section 90.403 of the Florida Statutes, *even if otherwise relevant*, victim impact evidence is *inadmissible* if the danger of unfair prejudice outweighs its probative value. A hearing is thus required to determine the admissibility of this evidence that has long been recognized by various courts as being highly emotional and potentially unfairly prejudicial. In

that regard, unfair prejudice is the type of evidence that logically tends to inflame emotions and which tends to distract jurors or the court from conducting an impartial 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, noting, "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).

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. 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 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).

The determination of the admissibility of victim impact evidence, as with all evidence, is within the sound discretion of a trial court. State v. Maxwell, 647 So.2d 871 (Fla. 4th DCA 1994), affirmed, 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 can a judge make a blanket ruling that all such evidence is admissible. A judge's exposure to improper victim impact evidence is a necessity in order to obtain a ruling on its admissibility. In that regard, a trial court's use of improper victim impact evidence to sentence a defendant to death may be harmless error based on the analysis that can be performed by the appellate court of the trial court's sentencing order. See Walls v. State, 926 So.2d 1156 (Fla. 2006); Card v. State, 803 So.2d 613, 628 (Fla. 2001). If such evidence is improperly presented to the jury, the State will be unable to meet its burden of showing the exposure to such inflammatory and improper evidence did not influence the jury sentencing recommendation due to the absence of specific findings as to the weighing analysis performed by the jury.

An analogous situation occurs with collateral crime evidence that may be 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).

The advantage of requiring an advance ruling on the admissibility of victim impact evidence is that, in the event of an adverse ruling, the State can timely seek discretionary review of the exclusion of its evidence and demonstrate why the court abused its discretion by excluding it. 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). If a pre-trial ruling is not made, the introduction of such evidence cannot be effectively monitored or controlled by the Court.

WHEREFORE, the Accused objects to the introduction of Victim Impact Evidence, asks that Section 921.141(7) of the Florida Statutes 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 of the United States Constitution, and otherwise moves for a hearing to determine the admissibility of all victim impact evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by e-service to the Office of the State Attorney, Brevard County, Florida, this 8 day of November, 2013.

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