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FILED
[Signature]

2015 OCT -7 AM 09:00

VIRLYNN TRINELL
SUPERIOR COURT CLERK

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

8 **IN AND FOR THE COUNTY OF MOHAVE**

9 **STATE OF ARIZONA,**

10 Plaintiff,

11 vs.

12 **JUSTIN JAMES RECTOR**

13 Defendant.

NO: CR 2014 - 01193

DEFENDANT'S MOTION FOR
DISCOVERY OF VICTIM IMPACT
EVIDENCE

(ASSIGNED TO THE HON. LEE JANTZEN)

14 Defendant Justin James Rector, by and through undersigned counsel, moves
15 this court for discovery of (1) all victim impact evidence that may be presented or
16 proffered by the State at trial; and (2) any and all exculpatory evidence or information
17 concerning victim impact that is know to, or in actual or constructive possession of, the
18 State or any agent of the State, for the reasons contained in the Memorandum of Points
19 and Authorities attached hereto and incorporated herein.
20
21
22

23
24 **RESPECTFULLY SUBMITTED This** 7th **day of October, 2015.**

25
26 *[Signature]*
27 **GERALD T. GAVIN**
28 **Co-Counsel for Mr. Rector**

[Signature]
RON GILLES
Co-Counsel for Mr. Rector



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MEMORANDUM OF POINTS AND AUTHORITIES

The Defendant's request is necessary now to help avoid delays of the scheduled trial date. Failure to timely provide this material in the near future will certainly cause delay and complications as trial approaches.

This request for discovery of victim impact evidence specifically includes the names and addresses of all witnesses who may be called to testify concerning victim impact issues, and any and all reports, records, recordings, and notes of any kind describing their statements and utterances relating to the decedent or the offense, however recorded or preserved, whether or not signed or acknowledged by said witnesses.

- > If such statement were oral, Defendant requests to be notified in writing of the contents of such statements.
- > If such statements were tape-recorded and/or video- recorded, Defendant seeks permission to be provided a copy of any such material, or the permission to copy such material, in addition to copy any transcript thereof.
- > Defendant also requests that any notes of any such statements or utterances shall be preserved, and a copy provided to defense counsel.
- > This motion also includes any objects, letters, poems, articles, documents, photographs, video recordings, audio recordings, any other analog or digital recording (i.e. computer discs or other media), or physical evidence of any kind which has been viewed, described or referenced to by any such victim impact witness in the context of victim impact issues, and which has been provided or made available to the prosecution.

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1 > In addition, the Defendant specifically requests the State to provide notice of
2 particular victim impact evidence, testimonial and otherwise, which the State intends or
3 believes it may intend to use at sentencing.

4 This motion for discover for exculpatory evidence concerning victim impact
5 specifically includes any and all evidence or other information concerning victim impact
6 which is known to, or in the actual or constructive possession of, the State or any agent
7 of the State, that may be, in any way or to any extent, exculpatory to Mr. Rector on any
8 issue related to sentencing, including information or evidence concerning the personal
9 characteristics and conduct of the decedent's family, the impact of the crime on the
10 decedent's family, friends or community; and the credibility and/or character of any
11 witness whom the State may rely upon, directly or indirectly, to present testimonial or
12 other evidence concerning victim impact.

13
14 This motion is based on the independent federal and state constitutional
15 guarantees to a fair trial, cross-examination and confrontation of adverse witnesses,
16 due process of law, the right to affirmatively present evidence in one's defense, right to
17 effective assistance of counsel, and the right to a reliable verdict and sentence set forth
18 in the 5th, 6th, 8th and 14th Amendments to the United States Constitution, and Article II,
19 §§ 4, 10, 15, and 24 of the Arizona Constitution.

20 **THE PROSECUTION MUST DISCLOSE ANY AND ALL VICTIM IMPACT**
21 **EVIDENCE IT MAY SEEK TO PRESENT AT TRIAL.**

22 Because of the very real possibility that a penalty jury might be overwhelmed by
23 the emotional nature and prejudicial effect of victim impact evidence, the independent
24 State and Federal constitutional guarantees to a fair trial, cross-examination and
25 confrontation of adverse witnesses, the effective assistance of counsel, due process of
26 law, and a reliable verdict and sentence set forth in the 5th, 6th, 8th, and 14th
27 Amendments to the United States Constitution, and Article II, §§ 4, 10, 15 and 24 of the

1 be held by the court to determine the admissibility of the evidence.” Ledbetter v. State,
2 933 P.2d 880, 894 (1997)(emphasis added). In New Jersey v. Muhammad, 145 N.J.
3 23, 54, 678 A.2d 164, 180 (N.J.1996), the New Jersey Supreme Court expressly held
4 that a trial court should ordinarily conduct an *in limine* hearing in order to determine the
5 admissibility of victim impact evidence, and require a written description of the testimony
6 of each victim impact witness in order to facilitate such determination.

7 Broad notices that do not provide specific detail are insufficient. For example, in
8 United States v. Cooper, 91 F. Supp.2d 90 (D.D.C. 2000), the court held the following
9 description failed to provide the defendant with sufficient notice:

10 “The defendant caused injury, harm, and loss to the friends
11 and family of Emory Allen Evans because of Emory Allen
12 Evans’ personal characteristics as an individual human
13 being and the impact of his death upon those persons. Emory
14 Allen Evans was a beloved member of a family that included
15 a father, mother, a stepfather, a stepmother, and four sisters,
16 who have deeply missed his companionship, love and support
17 since his death. The government will present information
18 concerning the effect of the offense on Emory Allen Evans and
19 his family, which may include oral testimony, a victim impact
20 statement that identifies Emory Allen Evans as the victim of the
21 offense and the extent and scope of the injury and loss suffered
22 by Emory Allen Evans and his family, and any other relevant i
23 nformation.”

24 As these cases illustrate, the State must disclose the specific victim impact
25 evidence it will seek to present at trial, including the details of the particular testimony it
26 expects to elicit from its victim impact witnesses, whether or not such information is
27 currently in written form for otherwise documented.

28 **THE PROSECUTION MUST DISCLOSE ALL EVIDENCE AND OTHER
INFORMATION CONCERNING VICTIM IMPACT WHICH IS FAVORABLE
TO DEFENDANT ON THE CHARACTER OR BACKGROUND OF THE
DECEDENT THE CREDIBILITY OF ITS VICTIM IMPACT WITNESSES, OR
OTHERWISE EXCULPATORY ON ISSUES OF GUILT OR PUNISHMENT**

The United States Supreme Court upheld the admissibility of limited victim
impact evidence in Payne v. Tennessee, 501 U.S. 808, 827 (1991), partially overruling

1 Booth v. Maryland, 482 U.S. 49 (1987). However, the Payne Court also recognized a
2 defendant's constitutional rights to rebut victim impact evidence:

3 " The Booth Court reasoned that victim impact evidence must be
4 excluded because it would be difficult, if not impossible, for the
5 defendant to rebut such evidence without shifting the focus of the
6 sentencing hearing away from the defendant, thus creating a 'mini-
7 trial' on the victim's character. Booth, *supra*, at 506-507. In many
8 cases the evidence relating to the victim is already before the jury
9 at least in part because of its relevance at the guilt phase of the
10 trial. But even as to additional evidence admitted at the sentencing
11 phase, the mere fact that for tactical reasons it might not be prudent
12 for the defense to rebut victim impact evidence makes the case no
13 different than others in which a party is faced with
14 this sort of a dilemma. As we explained in rejecting the contention
15 that expert testimony on future dangerousness should be excluded
16 from capital trials, the rules of evidence generally exist at the federal
17 and state levels anticipate that relevant, unprivileged evidence
18 should be admitted and its weight left to the factfinder, who would
19 have the benefit of cross-examination and contrary evidence by
20 the opposing party. Barefoot v. Estelle, 463 U.S. 880, 898 (1983)."

21 Payne v. Tennessee, 501 U.S. at 823.

22 Thus, where the State presents victim impact evidence, the defense is entitled to
23 present bad character evidence concerning the decedent. The refusal to permit a capital
24 defendant to rebut victim impact evidence by presenting evidence that the decedent
25 was involved in illegal drug activity violates defendant's constitutional rights to
26 confrontation of adverse witnesses. Conover v. State, 933 P.2d 904, 922-923 (Okla. Cr.
27 1997). The Conover court explained that such evidence "was relevant in giving the jury
28 a complete picture of the entire crime and uniqueness of the victim as a human being,
providing a 'quick glimpse of the life' the defendant 'chose to extinguish'." *Id.* at 922.
Therefore, it was reversible error to preclude "cross-examination of the victim's family
into any aspect of the victim's drug involvement," to exclude "rebuttal evidence on the
subject," and to refuse "testimony of a police officer who searched the victim's home at
the time of the homicide and found quantities of illegal drugs and drug paraphernalia."
Id. The Wisconsin Court of Appeals reached a similar conclusion in State v. Spears,
585 N.W.2d 161, 163, (Wis.Ct. of App. 1998), a non-capital case, holding that a

1 defendant must be entitled to attempt to counter the weight of the victim impact
2 evidence by introducing evidence showing that [the murder victim's] relatives may have
3 overstated their loss, or may have misconceived the character of their loved one." See
4 Also Payne v. Tennessee, 501 U.S. at 823 (observing that victim impact witnesses are
5 subject to cross-examination and the presentation of contrary evidence by defendant).

6 Payne and other authorities discussed above make clear that a capital defendant
7 is constitutionally entitled to present evidence rebutting victim impact evidence
8 presented by the prosecution, whether it consists of information concerning the
9 decedent's character, the impact of the decedent's death on his or her survivors, or the
10 credibility of the victim impact testimony. Such rebuttal or cross-examination is relevant
11 Because it might lessen the effect of the prosecution's victim impact evidence or impair
12 the credibility of such evidence, which in turn might dissuade a penalty jury from
13 returning a verdict of death.

14
15 Brady v. Maryland, 373 U.S. 83, 97 (1963), requires the State to disclose to a
16 defendant, even absent a request by the defense, evidence favorable to the accused
17 where such evidence is material to guilt or punishment, and the independent state and
18 federal constitutional guarantees to due process of law require the prosecution to
19 disclose any evidence or information known to the prosecution which might rebut victim
20 impact evidence. The disclosures required under Brady include all information that
21 might potentially impeach the credibility of prosecution witnesses or evidence. See
22 Kyles v. Whitley, 514 U.S. 419, 450-51 (1995); United States v. Bagley, 473 U.S. 667,
23 676, (1985) (holding that "[i]mpeachment evidence, however, as well as exculpatory
24 evidence, falls within the Brady rule.") The State constitutionally required to disclose
25 such information if its known or possessed by *any* State agent, whether or not the
26 prosecutor is personally aware of such information or evidence. Kyles v. Whitley, 514
27 U.S. 450-51.
28

1 The concerns expressed by the United States Supreme Court regarding reliability
2 in capital cases, Woodson v. North Carolina, 428 U.S. 280, 304-305 (1976) (stating that
3 “[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term
4 differs from one of only a year or two” and that consequently “there is a corresponding
5 difference in the need for reliability in the determination that death is the appropriate
6 punishment in a specific case.”), particularly relevant with respect to victim impact
7 evidence. The United States Supreme Court has cautioned that such evidence is
8 uniquely susceptible to violating a defendant’s constitutional rights to a fair trial because
9 it may be “so unduly prejudicial that it renders the trial fundamentally unfair...”, in
10 violation of the federal constitutional guarantee to due process of law. Payne, 501 U.S.
11 at 825.

12
13 For all of these reasons, great care must be taken to insure that the State
14 discloses to the Defendant any and all information or evidence concerning the personal
15 characteristics of the decedent and her family, the impact of the offense on the
16 decedent’s family, friends and community, and the credibility and/or character of any
17 victim impact witnesses because these matters may prove to be material and favorable
18 to the Defendant in rebutting the State’s victim impact evidence. For example, the State
19 must provide the Defendant with all available information concerning life insurance
20 proceeds, inheritance and other financial gain obtained by victim impact witnesses as a
21 result of decedent’s death; the names, addresses and records of any therapists or
22 counselors from whom the decedent’s survivors may have obtained counseling or
23 therapy as a result of the death, and any and all arrests and convictions incurred by any
24 victim impact witness, including any pending criminal cases, probation and/or parole
25 status.
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CONCLUSION

1
2 The independent state and federal constitutional guarantees to a fair trial, cross-
3 examination and confrontation of witnesses, due process of law, the right to affirmatively
4 present evidence in one's defense, right to effective assistance of counsel, and right to
5 a reliable verdict and sentence require the prosecution to provide defendant with pretrial
6 discovery of (1) all victim impact evidence which may be presented or proffered by the
7 prosecution at any stage of trial other proceedings herein, and (2) any and all
8 exculpatory evidence or information concerning victim impact which is known to, or in
9 actual or constructive possession of, the prosecution or any state agent. Defendant
10 respectfully requests that if the Court grants this motion, this court order the State to
11 provide such discovery to Defendant no later than 20 days after the Court issues its
12 decision.
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1 ORIGINAL of the foregoing filed
2 this 7th day of October, 2015 with:

3 Clerk of Court
4 401 E Spring Street
5 Kingman Arizona 86401

6
7 COPY of the forgoing
8 Delivered this 7th day
9 of October, 2015, to:

10 Honorable Lee Jantzen
11 Judge of the Superior Court
12 Mohave County Courthouse
13 2nd floor
14 Kingman Arizona 86401

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16 Assigned Deputy County Attorney
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25 Client Justin James Rector
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27 File

28 BY: 