

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Gerald T. Gavin
State Bar #013842
Ron Gilleo
State Bar # 016928
3880 Stockton Hill Road STE 103-450
Kingman Arizona 86409
Email: geraldgavinlaw@gmail.com
(928) 530-0948 / (480) 233 -6038
Attorneys for Justin James Rector

FILED
BY: J
2015 APR 22 PM 2: 25
MOLLYN TUNNELL
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

STATE OF ARIZONA,

Plaintiff,

NO: CR 2014-01193

vs.

**DEFENSE MOTION TO PRECLUDE
OVERLY EMOTIONAL TESTIMONY**

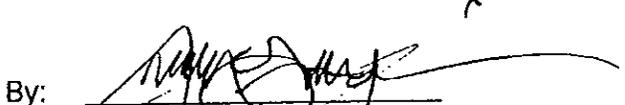
JUSTIN JAMES RECTOR

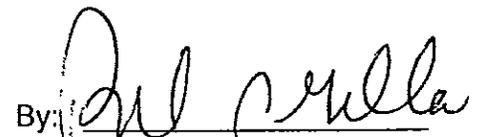
Defendant.

(ASSIGNED TO THE HON. LEE JANTZEN)

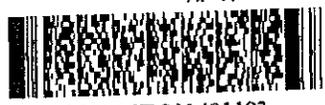
Defendant Justin James Rector, by and through undersigned counsel, hereby moves this Court for an order the State, through both its assigned Deputy County Attorney and Victim Witness Advocate(s), to admonish all alleged victims against overly emotional display in Court, as explained in the Memorandum of Points and Authorities attached hereto and incorporated herein.

RESPECTFULLY SUBMITTED this 22nd day of April, 2015.

By: 
GERALD T. GAVIN
Co-Counsel for the Defendant

By: 
RON GILLES
Co-Counsel for Defendant

The Law Office of Gerald T. Gavin
3880 Stockton Hill Road Suite 103-450
Kingman Arizona 86409
((928) 530-0948 480) 233-6038
geraldgavinlaw@gmail.com



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

The defense is concerned that while the assigned prosecutor in this case will be mindful of the restrictions on emotional displays in the courtroom, lay witnesses and victims may not understand the limits in courtroom. The State cannot argue evidence not presented or interject emotionalism into a trial, but by failing to control their witnesses, the alleged victim's representatives, the alleged victim's family and friends, it is doing exactly that. In Viereck v. United States, 318 U.S. 236, 247-48, 63 S.Ct. 561, 87 L.Ed. 734 (1943), the defendant's right to a fair trial was prejudiced by reference to irrelevant facts, the only purpose of which was to inflame the passion of the jury. In a case analogous to the instant case, the prosecutor made comments during closing argument about his visit to the crime scene where seasoned officers were openly sobbing and about his conversations with the defendant's parents outside the courtroom. The jury witnessing family and friends showing emotion while seated in the courtroom and facing the jury would have the same effect. In this situation, the State would not have to make the argument...but the jury could the intended emotional connection on their own. Not only can the State not argue evidence not admitted at trial, the jury cannot consider evidence not presented at trial. In Arizona, the rule is "[t]he jury may consider only matter that has been received in evidence and any breach of this principle should not be condoned if there is the slightest possibility that harm could have resulted." State v. Turrentine, 122 Ariz. 39, 41, 592 P.2d 1315 (1979), citing State v. Cruz, 121 Ariz. 283, 589 P.2d 1315 (1978).

In the present case, while the prosecutor may not make a blatant verbal argument, the alleged victims representatives, friends and family are quite capable of imparting this extraneous emotional argument through their course of actions during the trial, including: gasps, loud sobbing, loud exhaling, shaking of hands and heads,

1 grunts, groans and the like. One source of great emotion arises when the alleged
2 victims family vents its obvious grief in the courtroom. See, e.g., Fuselier v. State, 468
3 So.2d 45 (Miss 1985) (reversing where the trial court allowed the victim's daughter to sit
4 within the rail). While it is understandable the victims, their representatives, and friends
5 come to support the prosecution, it is equally clear, while their emotions are human,
6 they are irrelevant to the factual issues in dispute. Arizona Rules of Evidence 401, 402.
7 If, as is legally evident, such opinions cannot be expressed from the witness stand, they
8 cannot be presented by extraneous actions in the courtroom.

9 Formerly in Arizona, in capital cases, (before the Ring decision deciding juries,
10 not judges, should decide sentences) it was assumed that a judge could overlook
11 irrelevant and unconstitutional alleged victim impact evidence. See State v. Bocharski,
12 346 U.S. Ariz. Adv. Rep. 27, 22 P.3d 43, 55-56 (2001); State v. Beaty, 158 Ariz. 232,
13 244, 762 P.2d 519, 531 (1988).

14 However, there is no corresponding assumption a jury can do the same thing.
15 Bocharski, 22 P.3d at 49. Jurors can only decide cases on evidence produced at trial.
16 Turrentine, supra; Cruz, supra. By showing emotion while others are testifying, they are
17 injecting alleged victim impact evidence into the proceeding. This evidence is clearly
18 inadmissible in the guilt or aggravation phase of a trial as it has no relevance. Arizona
19 Rules of Evidence 401, 402.

20 Since this is the real world and cases are not tried in a vacuum, at times the jury
21 is confronted with evidence not presented at trial. See State v. Adamson, 136 Ariz. 250,
22 665 P.2d 972 (1983) (man yelled to jury "He's guilty"); State v. Miller, 178 Ariz. 555, 875
23 P.2d 1994 (excused alternate left note on of remaining juror stating "He's Guilty" or "My
24 vote is Guilty"); State v. Holden, 88 Ariz. 43, 353 P.2d 705 (1960) (juror reading to other
25 jurors portions of book on California Jury Instructions); State v. Poland, 132 Ariz. 269,
26 645 P.2d 784 (1982) (juror looked up information in Phoenix telephone directory).
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORIGINAL of the foregoing filed
this 22nd day of April, 2015 with:

Clerk of Court
401 E Spring Street
Kingman Arizona 86401

COPY of the forgoing
Delivered this 22nd day
Of April, 2015, to:

Honorable Lee Jantzen
Judge of the Superior Court
Mohave County Courthouse
2nd floor
Kingman Arizona 86401

Greg McPhillips
Assigned Deputy County Attorney
PO Box 7000
Kingman Arizona 86401

Ron Gilleo
Mohave County Legal Defender
Co-Counsel for Justin James Rector
313 Pine Street
PO Box 7000
Kingman Arizona 86401

Client Justin James Rector
Mohave County Jail

File

BY: 