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VALYNN TINNELL
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,

No. CR-2014-1193

11 vs.

**RESPONSE TO DEFENSE MOTION
TO PERMIT EXECUTION IMPACT
EVIDENCE**

12 **JUSTIN JAMES RECTOR,**
13 Defendant.

14 COMES NOW, the State of Arizona, by the Mohave County Attorney and through
15 the undersigned deputy, Gregory A. McPhillips, respectfully responds to defendant's
16 present motion. Defendant should be precluded from introducing execution impact
17 evidence, regarding the impact that defendant's execution would have on any third
18 parties during the penalty phase of the trial.

- 19 • **Defendant has provided no disclosure of execution impact evidence to the State**

20 Defendant has not provided disclosure of execution impact evidence to the State.
21 As such, discussion of what undisclosed evidence is admissible is not ripe.

- 22 • **Execution impact evidence, in general**

23 Often defendants seek to present in mitigation the testimony of various friends and
24 family members. These persons should be precluded from testifying regarding the impact
25 that defendant's execution would have on any third parties. A.R.S. § 13-703(G) states
that the trier of fact shall consider as mitigating circumstances any factors "that are



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1 relevant in determining whether to impose a sentence less than death, including any
2 aspect of the defendant's character, propensities or record and any of the circumstances
3 of the offense. . . ." In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the court concluded that
4 "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest
5 kind of capital case, not be precluded from considering, as a mitigating factor, any aspect
6 of a defendant's character or record and any of the circumstances of the offense that the
7 defendant proffers as a basis for a sentence less than death." Execution impact
8 evidence does not fall within these definitions of permissible mitigating factors.

9 The Arizona Supreme Court first touched on this issue in *State v. Williams*, 183
10 Ariz. 368, 904 P.2d 437 (1995). In *Williams*, a judge sentencing capital case, the
11 defendant produced a letter from the victim's sister asking for life imprisonment. The
12 Arizona Supreme Court stated:

13 When a defendant is being sentenced for first degree murder, the
14 sentencing court must consider any aspect of the defendant's
15 character or record and any circumstance of the offense relevant
16 to determining whether a sentence less than death might be
17 appropriate. *State v. McCall*, 139 Ariz. 147, 162, 677 P.2d 920,
18 935 (1983), *cert. denied* 467 U.S. 1220, 104 S.Ct. 2670, 81
L.Ed.2d 375 (1984). [The victim]'s sister based her
recommendation of a life sentence on her family's grief and on a
concern for defendant's family. Her opinion was altogether
unrelated to defendant, to his character, or to the circumstance of
the offense. Thus, we do not find the sister's recommendation to
be a relevant mitigating circumstance.

19 183 Ariz. at 385. The Arizona Supreme Court recently expanded on this decision in *State*
20 *v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006).

21 In *Roque*, the defendant attempted to submit a letter from his own sister as
22 mitigation. The letter discussed the suffering of the defendant's family and asked for a
23 compassionate sentence. The trial court excluded those sections of the letter. The
24 Arizona Supreme Court upheld that decision, noting

25 We have held that a sister's testimony expressing concern for the
defendant's family's well-being is "altogether unrelated to
defendant, to his character, or to the circumstance of the offense"
and is therefore not relevant mitigating evidence.

1 *Roque*, 213 Ariz. at 222, quoting *State v. Williams*, *supra*. The Court went further in not
2 allowing a sentencing recommendation from the defendant's family, stating that "[i]f such
3 recommendations from the victim and victim's family are not relevant, neither are they
4 from defendant's family." *Id.*

5 Courts in other jurisdictions that have addressed this issue have similarly held that
6 execution impact evidence must be excluded entirely or must be limited to evidence that
7 relates to the defendant's character. In *Commonwealth v. Harris*, 572 Pa. 489, 524, 817
8 A.2d 1033, 1054 (2002), the court found that testimony from defendant's family members
9 about how the crime had affected them "had no bearing on appellant's character or record
10 or the circumstances of the offense" and was properly excluded. The court also stated
11 that such "execution impact" or "third party impact" testimony was not relevant under
12 Pennsylvania's capital sentencing statute regarding mitigating circumstances. "In holding
13 that defense third party impact evidence is irrelevant under Pennsylvania's capital
14 sentencing scheme, we join a number of states which have considered this issue and
15 have likewise concluded that third party impact evidence is irrelevant to the defendant's
16 character or record or the circumstances of the crime."

17 In *State v. Loffin*, 146 N.J. 295, 368-369, 680 A.2d 677, 713 (1996), the court
18 stated that "mitigating evidence that focuses on the potential impact on a third party is not
19 relevant to a defendant's character, record, or the circumstances of the offense, and
20 therefore could be properly excluded. Although testimony concerning the potential
21 impact of an execution on a third party may be excluded, a defendant is nevertheless able
22 to provide a wealth of character evidence as revealed by his relationships with his family
23 members." In *State v. Stenson*, 132 Wash.2d 668, 753, 940 P.2d 1239, 1282 (1997), the
24 trial court permitted character and background evidence, including evidence of
25 defendant's relationship with his family, and "only excluded direct statements of how his
execution might affect his family members. The witnesses' proposed testimony, which in
fact was nothing more than their opinions as to the sentence for the Defendant that they

1 thought might be best for the Stenson children, was not relevant to the Defendant's
2 character or background and hence was properly excluded."

3 The Florida Supreme Court also distinguished between testimony regarding family
4 relationships and that which recommends a sentence. "While we agree that Burns' family
5 relationships and the support he provided his family are admissible as nonstatutory
6 mitigation regarding Burns' character, this was not the focus of the proffered
7 testimony. The proffered testimony went to establish that death was not an appropriate
8 penalty because of the impact the execution would have on Burns' family. We find that
9 the trial court did not abuse its discretion in excluding this testimony concerning the
10 sentence Burns should receive." *Burns v. State*, 699 So.2d 646, 654 (Fla. 1997). The
11 court also found no merit in defendant's contention that his family impact testimony was
12 required because the state introduced victim impact testimony. "Victim impact evidence
13 that informs the jury about the specific harm caused by the crime in question is relevant
14 and authorized pursuant to [statute]. The impact the defendant's family will feel as a
15 result of the defendant's execution does not mitigate the harm caused by the crime and
16 thus is not similarly relevant or authorized." *Id.*

17 In *People v. Armstrong*, 183 Ill.2d 130, 155, 700 N.E.2d 960, 971 (1998), the trial
18 court properly excluded testimony from defendant's sister regarding the death penalty's
19 effect on the defendant's family, because the testimony "was wholly tangential to the
20 defendant's character and the nature of his offense." In *Wilcher v. State*, 697 So.2d 1123,
21 1134 (Miss.1997), "the trial court did not err in excluding testimony from Wilcher's family
22 in order to show the impact that the defendant's death would have on their lives. This
23 Court has specifically held that such testimony is not relevant to the defendant's
24 character, record, or the circumstances of the offense and that the exclusion of such
25 evidence is proper." *See also State v. Hardy*, 353 N.C. 122, 133, 540 S.E.2d 334, 343
(2000) (trial court did not err in excluding testimony from defendant's friend as to the
impact defendant's death would have on the friend); *Jackson v. State*, 33 S.W.3d 828

1 (Tex.Crim.App. 2000) (trial court did not abuse its discretion by excluding testimony of
2 family and friends regarding their feelings on the prospect of a death sentence and impact
3 the execution would have on them).

4 In *Williams v. State*, 168 S.W.3d 433 (Mo. 2005), defendant was not allowed to
5 present expert testimony during the penalty phase regarding the psychological impact on
6 his children if he were to be executed. "This Court has previously held that testimony
7 from a murder victim's family as to the appropriate punishment is inadmissible in a capital
8 case. . . . Likewise, this holding would likely extend to exclude testimony from the
9 defendant's family regarding the appropriate punishment. Furthermore, every court,
10 except one, that has considered this issue has determined that testimony regarding the
11 impact the execution would have on family or friends is inadmissible." *Id.* at 445. In
12 *Taylor v. State*, 666 So.2d 36, 53 (Ala.Crim.App. 1994), the court held that "the opinion of
13 the friends or relatives of the defendant that the defendant should not be sentenced to
14 death is not a relevant mitigating circumstance for the jury to consider at the penalty
15 phase of a capital case."

16 California has permitted people with close ties to defendant to testify that they want
17 defendant to live, if that testimony relates to defendant's character. "[W]hat is ultimately
18 relevant is a defendant's background and character — not the distress of his or her
19 family. A defendant may offer evidence that he or she is loved by family members or
20 others, and that these individuals want him or her to live. But this evidence is relevant
21 because it constitutes indirect evidence of the defendant's character. The jury must
22 decide whether the defendant deserves to die, not whether the defendant's family
23 deserves to suffer the pain of having a family member executed." *People v. Ochoa*, 19
24 Cal.4th 353, 456, 966 P.2d 442, 505-506, 79 Cal.Rptr.2d 408, 471-472
25 (1998). "[T]estimony that defendant deserves to live, provided by someone who had a
significant relationship with him, is admissible, not because that opinion is itself important
but because the testimony provides indirect evidence of the defendant's

1 character." *People v. Gregory Calvin Smith*, 30 Cal.4th 581, 631, 68 P.3d 302, 336, 134
2 Cal.Rptr.2d 1, 42 (2003). "From these cases we can distill a general rule: evidence that a
3 family member or friend wants the defendant to live is admissible to the extent it relates to
4 the defendant's character, but not if it merely relates to the impact of the execution on the
5 witness." *People v. Gregory Scott Smith*, 335 Cal.4th 334, 367, 107 P.3d 229, 248, 25
6 Cal.Rptr.3d 554, 577 (2005).

7 In *State v. Stevens*, 319 Or. 573, 879 P.2d 162 (1994), the court decided on
8 statutory grounds that defendant's wife could testify about the impact execution would
9 have on defendant's daughter because the testimony was relevant to character. "While
10 the witness's testimony may not offer any direct evidence about defendant's character or
11 background, it does offer circumstantial evidence. A rational juror could infer from the
12 witness's testimony that she believed that her daughter would be affected adversely by
13 defendant's execution because of something positive about his relationship with his
14 daughter and because of something positive about defendant's character or background.
15 . . . Because the witness's testimony permits an inference that the defendant's execution
16 would affect his daughter negatively because of some mitigating aspect of defendant's
17 character or background, it is relevant. . . ." *Id.* at 584-585, 879 P.2d at 168.

18 The impact or effect of a defendant's execution on the defendant's family members
19 is not mitigating evidence under A.R.S. § 13-703(G) in that this information is not relevant
20 to any aspect of defendant's character, propensities or record or the circumstances of the
21 offense. Therefore, any testimony relating to execution impact should be excluded and
22 these witnesses should not be allowed to offer any opinion regarding the appropriate
23 sentence.
24
25

1 RESPECTFULLY SUBMITTED THIS 28TH DAY OF SEPTEMBER, 2015.

2 MOHAVE COUNTY ATTORNEY
3 MATTHEW J. SMITH

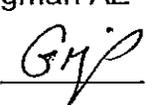
4 By 
5 DEPUTY COUNTY ATTORNEY
6 GREGORY A. MCPHILLIPS

7 A copy of the foregoing
8 sent this same day to:

9 HONORABLE LEE F. JANTZEN
10 SUPERIOR COURT JUDGE

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