

SUPREME COURT OF LOUISIANA

No. 11-KK-2149

STATE OF LOUISIANA

v.

ERIK TRACZYK

On Writ of Certiorari to the  
Fourth Circuit Court of Appeal

PER CURIAM:\*

In this pending prosecution for first degree murder in violation of La.R.S. 14:30, the state has filed notice, pursuant to State v. Bernard, 608 So.2d 966 (La. 1992) and La.C.Cr.P. art. 905.2, of its intent to introduce victim impact evidence during the trial's penalty phase, if any. The state's notice identifies the prospective witnesses by name and provides their familial relationships to the victim. The notice further details that the state will present evidence at the penalty phase "demonstrating the unique human nature of and the personal characteristics and/or traits of the victim(s), including . . . family history and background, school and educational achievements, career and professional accomplishments and goals, individual relationships with family, friends and associates," and "evidence regarding the emotional, physical and/or economic impact and/or trauma of this crime on the surviving family members."

\*Kimball, C.J. not participating.

As detailed in a Per Curiam issued in response to a request by this Court, the trial judge has found the state's notice inadequate and ordered the prosecution to disclose to the defense written statements detailing the content of the victim impact testimony. The court has clarified that the statements need not be handwritten by the witnesses but must recite "precisely what the witnesses are going to say." The court of appeal found no abuse of discretion by the trial court. State v. Traczyk, 11-1352 (La. App. 4<sup>th</sup> Cir. 9/30/11).

The courts below erred. In Bernard, this Court acknowledged that "some evidence of the murder victim's character and of the impact of the murder on the victim's survivors is admissible as relevant to the circumstances of the offense or to the character and propensities of the offender." Bernard, 608 So.2d at 972. However, we also cautioned that "introduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision." Id. Given these competing concerns, this Court held in Bernard that, "[a]s in the use of other crimes evidence, the defense, upon request, is entitled to notice of the particular victim impact evidence sought to be introduced by the prosecutor and to a pretrial determination of the admissibility of the particular evidence." Bernard, 608 So.2d at 972-73.

However, this Court subsequently held that Bernard's requirement of notice and a pretrial determination of admissibility "does not encompass an evidentiary hearing at which victim impact witnesses are called to testify." State v. Miller, 99-0192, p. 27 (La. 9/6/00), 776 So.2d 396, 412. We relied in part on the Court's

prior writ grant in State v. Bannister, 96-0188 (La. 3/2/96), 670 So.2d 1223, 1224, which set aside a court of appeal order directing the trial court to conduct a hearing at which the state would particularize its victim impact evidence because we found that the requirements of Bernard had been met by the state's notice.<sup>1</sup> Miller, 99-0192, p. 26, n.19, 776 So.2d at 411. Miller thereby clarified that Bernard's requirement of notice with respect to the "particular evidence" the state intends to introduce refers to the "[t]wo broad categories of victim evidence that may be admitted: information revealing the individuality of the victim and information revealing the impact of the crime on the victim's survivors." Miller, 99-0192 at 27, n.20, 776 So.2d at 412 (citing Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)).

In the present case, the state's Bernard notice clearly informs the defense that it must prepare to meet this kind of evidence if trial reaches the penalty phase. The notice also affords the trial court an adequate basis for determining in advance of trial whether the evidence falls into the two broad categories of permissible victim impact testimony and whether some or all of the evidence may nevertheless present an undue and impermissible risk of "descend[ing] into detailed descriptions of the good qualities of the victim, particularized narratives of the sufferings of the survivors, or the opinions held by the survivors with respect to the crime of the murderer." Miller, 99-0192 at 27, n.20, 776 So.2d at 412. The state's notice thereby fully complies with the requirements of Bernard even broadly read. To the extent that the decisions in State v. Gardner, 02-1506 (La. App. 3<sup>rd</sup> Cir. 4/30/03),

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<sup>1</sup> The state's notice in Bannister named the witnesses, provided their familial relationships to the victim, and indicated that the testimony would address: "Identity of the victim and general evidence demonstrating harm to victim's survivors . . . and personal characteristics of the victim."

844 So.2d 1097, and State v. Higgins, 01-0117 (La. App. 5<sup>th</sup> Cir. 3/28/01), 802 So.2d 685, are inconsistent with the views expressed herein, they are expressly disapproved.

Accordingly, the ruling of the trial court on the state's notice filed pursuant to Bernard and La.C.Cr.P. art. 905.2 is hereby reversed.