

[COURT]

STATE OF [XXX],

Plaintiff,

vs.

[DEFENDANT'S NAME],

Defendant,

[VICTIM'S NAME/PSEUD],¹

Crime Victim.

) Case No.: [XXX]

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**CRIME VICTIM'S MOTION
REQUESTING AN ORDER²
PERMITTING VICTIM TO BE
PRESENT THROUGHOUT ALL
PUBLIC³ PROCEEDINGS RELATED
TO THE CRIMINAL OFFENSE.**

Crime Victim, [VICTIM], by and through undersigned counsel, pursuant to Tex. Const. art. I, § 30 (e) and Tex. Crim. Proc. Code Ann. art. 56.01 (3), hereby asserts [his/her] right to be present and requests that this court order that the Victim be permitted to be present in the

¹ **NOTE TO PRACTITIONER:** If using a pseudonym for the crime victim for the first time insert this footnote; if not using pseudonym, or court has already received brief addressing victim's pseudonym, omit this footnote: All references herein to the crime victim shall refer to "[Jane Doe]" / "[John Doe]" to protect [his/her] privacy in accordance with [his/her] federal constitutional rights. See *Whalen v. Roe*, 429 US 589, 599-600 (1977) (recognizing that the United States Constitution provides a right to personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"). [State] courts have long acknowledged and respected the privacy of victims by using pseudonyms or initials in court opinions. See, e.g., [insert caselaw with pseudonyms].

² **NOTE TO PRACTITIONER:** This sample motion is styled for when a crime victim proactively files to assert his or her right. If a crime victim is faced with a motion to exclude by one of the parties, additional arguments may need to be made. Such arguments could include:

- 1) The crime victim is exempt from exclusion under jurisdiction's sequestration rule;
- 2) The moving party has failed to offer proof to justify the victim's exclusion; and
- 3) The moving party had (or will have) an adequate opportunity to cross-examine the victim regarding his/her testimony.

³ **NOTE TO PRACTITIONER:** If jurisdiction does not limit right to be present to "public" proceedings, delete "public" throughout the pleading.

1 courtroom throughout all public proceedings related to the offense, even though the Victim may
2 be called as a witness during the trial.

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4 RESPECTFULLY submitted this ____ day of _____.

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6 BY _____
7 Attorney for Crime Victim

8
9 **STATEMENT OF FACTS**

10 *[Insert all relevant facts, including whether the defendant, the prosecution, or the court
11 has made any objections to the victim being present.]*

12 **ARGUMENT**

13 **I. THE VICTIM HAS STANDING TO ASSERT AND SEEK ENFORCEMENT OF
14 [HIS/HER] CONSTITUTIONAL⁴ AND STATUTORY RIGHT TO BE PRESENT.**

15 The Texas Constitution guarantees crime victims numerous enforceable rights. *See* Tex.
16 Const, Art I, § (a)(1)-(2), (b)(1)-(5). Texas law expressly provides that “[a] victim or guardian or
17 legal representative of a victim has standing to enforce the rights enumerated in [the Victims’
18 Bill of Rights.]” Tex. Const. art. I, § 30 (e).

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20 **[VICTIM]** is a crime victim as defined by the Texas statute. A “victim” is “a person who
21 is the victim of the offense of sexual assault, kidnapping, aggravated robbery, trafficking of
22 persons, or injury to a child, elderly individual, or disabled individual or who has suffered
23 personal injury or death as a result of the criminal conduct of another.” Tex. Crim. Proc. Code
24 Ann. art. 56.01 (3). *[Insert information demonstrating how the constitutional and/or statutory*

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26 ⁴ **NOTE TO PRACTITIONER:** While many jurisdictions afford an affirmative right for victims to be present in
27 their constitution, if your jurisdiction does not afford such a right, delete references to state constitutional rights to
28 be present throughout the pleading.

1 *definition of “victim” is met in this case.*] [VICTIM] properly appears before this Court seeking
2 enforcement of [his/her] rights.

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4 **II. THE VICTIM HAS A CONSTITUTIONAL AND STATUTORY RIGHT TO BE
PRESENT AT ALL PUBLIC COURT PROCEEDINGS.**

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6 The Victim has a constitutional “right to be present at all public court proceedings related
7 to the offense, unless the victim is to testify and the court determines that the victim’s testimony
8 would be materially affected if the victim hears other testimony at the trial.” Tex. Const. art. 1,
9 § 30(b)(2). The victim also has a statutory right to be present at such proceedings. *See* Tex.
10 Code Crim. Proc. art. 56.02(b) (guaranteeing crime victims the right “to be present at all public
11 court proceedings related to the offense subject to the approval of the judge in the case.”). These
12 rights outweigh the defendant’s rule-based right to request the sequestration of witnesses.⁵

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15 **A. The Victim will not materially alter testimony if the victim remains in the
courtroom and hears testimony of other witnesses.**⁶

16 The Victim has a right to be present at all public proceedings unless the court
17 “determines that the victim’s testimony would be materially affected if the victim hears other
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19 ⁵ Under Rule 614 of the Texas Rules of Evidence, a criminal defendant has the right to request the court to “order
20 witnesses excluded so they cannot hear the testimony of other witnesses, and it may make the order of its own
21 motion.” Tex. R. Evid. 614. The Rule sets forth four exemptions, one of which expressly applies to crime victims.
22 The Rule 614 provides that it “does not authorize exclusion of: . . . the victim in a criminal case, unless the victim is
23 to testify and the court determines that the victim’s testimony would be materially affected if the victim hears other
24 testimony at the trial.” Tex. R. Evid. 614(4). The legislature codified this exemption in Texas Code of Criminal
25 Procedure Article 36.03(a). As a victim of the defendant’s criminal offense, the Victim falls under the exemption in
26 Rule 614(4). *See* Tex. Code Crim. Proc. art. 36.03(d)(2) (defining, for the purposes of the sequestration the term
27 “victim” to mean “a victim of any criminal offense.”)

28 ⁶ **NOTE TO PRACTITIONER:** This section is dependent on the phrasing of a jurisdiction’s right to be present
statute. Some jurisdictions afford an unqualified right to be present such that this section is unnecessary. *See, e.g.,*
Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1(A); Colo. Const. art. II, § 16a; Idaho Const. art. I, § 22; La.
Const. art. I, § 25; Mich. Const. art. I, § 24; Miss. Const. § 26A; Mont. Code Ann. § 46-24-106(1) (2003); Nev.
Const. art. I, § 8(2); N.M. Const. art. II, § 24; Okla. Const. art. II, § 34(A); Or. Const. art. I, § 42; S.C. Const. art. I,
§ 24; Tenn. Const. art. I, § 35; Utah Const. art. I, § 28(1). In other jurisdictions, qualifications on the right make this
section or similar sections necessary.

1 testimony at the trial.” Tex. Const. art. 1, § 30(b)(2). The mere possibility of the victim’s
2 testimony being influenced by other witnesses is insufficient to meet the high evidentiary
3 standard of “materially affected.”⁷

4 In this case, the Victim will testify about [*insert a general description of what the victim*
5 *will be testifying about*]. This testimony will not be “materially affected” by listening to the
6 testimony of other witnesses. [*Insert fact-based arguments to support this argument, such as:*

8 (1) *the Victim has previously testified at [insert title of previous hearing, interview, etc];*

9 (2) *the Victim’s testimony will be based on her personal observations about the impact*
10 *that the crime has had on her;*

11 (3) *the Victim’s testimony is not central to an understanding of the facts underlying the*
12 *offense*⁸;

14 (4) *the Victim is testifying to discrete factual events;*

15 (5) *the Victim’s testimony will be confirmed by other evidence; and*

16 (6) *the Victim will testify first or only after witnesses whose testimony bears on different*
17 *matters*⁹.]

19 _____
20 ⁷ See *Tam Tran v. State*, No. 06-10-00124-CR, 2011 Tex. App. LEXIS 1050, *8-9 (Tex. Ct. App. Feb. 9, 2011)
21 (unpublished opinion) (rejecting defendant’s argument that the victim’s father’s victim-impact statement should
22 have been stricken from the record based on the father’s violation of Rule 614 where neither defendant’s brief nor
the record demonstrated that testimony from the witnesses during the guilty/innocence phase influenced the father’s
statement).

23 ⁸ See *Minor v. State*, 91 S.W.3d 824, 830 (Tex. Ct. App. 2002) (holding that a court does not abuse its discretion
24 in allowing the testimony of a witness where “the witness has no connection with either the State’s or the
25 defendant’s case-in-chief and was not likely to be called as a witness because of a lack of personal knowledge
26 regarding the offense”); *Thain v. State*, No. 01-02-00584-CR, 2003 WL 21404170, *5 (Tex. Ct. App. June 19, 2003)
(unpublished opinion) (holding that the presence of a murder victim’s father throughout trial did not materially
affect his testimony to defendant’s prejudice where testimony related to fact that had already been confirmed by
other evidence).

27 ⁹ See *Minor*, 91 S.W.3d at 830 (finding that trial court did not abuse its discretion in allowing the victim’s sister
28 to testify that the victim was left-handed even though the victim’s sister was in court during the testimony of other
witnesses).

1 Therefore, the court lacks authority to exclude the Victim from the courtroom. *Wilson v.*
2 *State*, 179 S.W.3d 240, 248 (Tex. Ct. App. 2005); *Scott v. State*, No. 14-07-01048-CR, 2008 Tex.
3 App. LEXIS 9142, *20-21 (Tex. Ct. App. Dec. 4, 2008) (unpublished opinion).

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5 **III. THE VICTIM'S PRESENCE AT ALL PUBLIC COURT PROCEEDINGS WILL**
6 **NOT INTERFERE WITH THE DEFENDANT'S CONSTITUTIONAL RIGHTS.**

7 A criminal defendant does not have a constitutional right to exclude witnesses from the
8 courtroom. See *United States v. Edwards*, 526 F.3d 747, 758 (11th Cir. 2008); *Larson v.*
9 *Palmateer*, 515 F.3d 1057, 1065 (10th Cir. 2008); *Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir.
10 1988); *Mathis v. Wainright*, 351 F.2d 489, 489 (5th Cir. 1965). Similarly, a criminal defendant
11 does not have a constitutional right to exclude spectators from a public court proceeding. See
12 *Willis v. Kemp*, 838 F.2d 1510, 1523 (11th Cir. 1988) (finding that the court did not err in
13 refusing to remove the victim's young son from the courtroom, and noting that defendant "cites
14 no authority for the proposition that due process requires that in a capital sentencing proceeding,
15 the defendant has a constitutional right to have removed from the courtroom spectators whose
16 presence may remind the jury of the victim"); *Burgess v. State*, 723 So.2d 742, 757 (Ala. Crim.
17 App. 1997) ("[N]o rule of law authorizes a court to exclude spectators or others from the
18 courtroom during a public trial, except for misconduct, and . . . the decision is left to the
19 discretion of the trial court.").

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22 On the other hand, as noted above, crime victims in Texas — including victim-witnesses
23 like the Victim in this case — have a state constitutional right to be present at all public court
24 proceedings. have a state constitutional right to be present at all public court proceedings. Tex.
25 Const. art. 1, § 30(b)(2); see also *Willis*, 838 F.2d at 1523 ("A criminal proceeding is a public
26 hearing; all citizens, including the victim's family, have a right to attend."). A defendant's rule-
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1 based right to exclude any witnesses must yield to this constitutional guarantee. *See Williams*,
2 960 A.2d at 815 (rejecting defendant’s argument that the trial court erred in allowing the victim
3 to remain in the courtroom after testifying, despite a sequestration order, where “defendant had
4 no constitutional right to exclude [the victim] from the courtroom while [the victim] had a
5 constitutional right to remain after concluding his testimony”).

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7 In addition, courts across the country agree that the mere presence of the victim in the
8 courtroom does not violate a defendant’s right to a fair trial. *See, e.g., Burgess*, 723 So.2d at 757
9 (“Without question, a criminal defendant has a right to a fair trial by impartial jurors. However,
10 the right to a fair trial in no way requires that victims or their surviving family members be
11 barred from the courtroom for the entire trial.”); *State v. Fulminante*, 975 P.2d 75, 92 (Ariz.
12 1999) (agreeing with other states’ interpretations of the victim’s right to be present, and finding
13 defendant’s due process rights were not violated by the victim’s presence in the courtroom);
14 *Stephens*, 720 S.W.2d at 303 (finding that defendant did not demonstrate “how the presence of
15 the victim was so fundamentally or inherently unfair as to deprive him of a fair trial”); *State v.*
16 *Gertsch*, 49 P.3d 392, 400 (Idaho 2002) (noting that defendant pointed to no controlling
17 authority for the proposition that the victims’ presence affected his due process rights); *Williams*,
18 960 A.2d at 815 (rejecting defendant’s argument that the victim’s presence in the courtroom after
19 the victim testified violated defendant’s right to a fair trial where defendant had not pointed to
20 any federal constitutional right to trump the victim’s state constitutional right to be present);
21 *Beltran-Felix*, 922 P.2d at 34 (rejecting defendant’s argument that the lower court violated his
22 fair trial rights by allowing the victim, who was present during the testimony of other state
23 witnesses, to testify where, *inter alia*, there was no suggestion that critical elements of the case
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1 turned on the victim’s testimony or that the victim revised her testimony, except in one
2 “insignificant” instance, to conform with that of other witnesses).¹⁰

3 **IV. PUBLIC POLICY SUPPORTS THE VICTIMS PRESENCE AT ALL COURT**
4 **PROCEEDINGS.**

5 The legal protections that Texas affords crime victims related to their presence in the
6 courtroom are consistent with the policy rationales supporting crime victim presence at all public
7 court proceedings. Crime victims — as the people harmed by the crime — have the most
8 compelling interest in the successful prosecution of the case. As the President’s Task Force on
9 Victims of Crime observed:
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11 The crime is often one of the most significant events in the lives of
12 victims and their families. They, no less than the defendant, have a
13 legitimate interest in the fair adjudication of the case, and should
14 therefore, as an exception to the general rule providing for the
15 exclusion of witnesses, be permitted to be present for the entire
16 trial.

17 President’s Task Force on Victims of Crime: Final Report 80 (1982),
18 <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/welcome.html>. Indeed, as one
19 Texas court noted, the right to be present under the Texas Crime Victims’ Bill of Rights “was
20 created to preclude dispositions of criminal cases in a manner which does not adequately
21 consider the impact of crime upon the individual victim — dispositions theoretically carried
22 out in open court but in reality unattended by even the general public, much less the specific
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24 ¹⁰ Only one reported case, *Martinez v. State*, 664 So.2d 1034 (Fla. Dist. Ct. App. 1995), found that the defendant’s
25 fair trial rights outweighed a victim’s constitutional right to be present. *Martinez*, 664 So.2d at 1036; see Douglas E.
26 Beloof & Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9
27 Lewis & Clark L. Rev. 481, 531 (2005) (discussing *Martinez* as the “single decision in this country that finds a
28 constitutional violation from a victim in the courtroom,” and noting that it is “a decision that is singularly
unpersuasive); see also *id.* at 533, n.308 (discussing two reported cases finding non-constitutional violations from
victims attending trial). Since *Martinez*, other Florida courts have found that the defendant’s fair trial rights are not
violated by the victim’s presence. See *Beasley v. State*, 774 So.2d 649, 669 (Fla. 2000) (finding the victim’s
presence in the courtroom prior to testifying did not violate defendant’s fair trial right); *Cain v. State*, 758 So.2d
1257, 1258 (Fla. Dist. Ct. App. 2000) (same).

1 victim.” *Jimenez*, 787 S.W.2d at 523-24.^{11, 12}

2 Additionally, “the right to attend the trial may be critical in allowing the victim to recover
3 from the psychological damage of a crime. It seems reasonable to assume a victim’s attendance
4 at a trial may ‘facilitate healing of the debilitating psychological wounds suffered by a crime
5 victim.’” Douglas E. Beloof & Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial:
6 The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 536 (2005) (quoting Ken
7 Eikenberry, *Victims of Crime/Victims of Justice*, 34 Wayne L. Rev. 29, 41 (1987)). Not only
8 does attendance aid recovery, but it also prevents the “secondary harm” that may result if a
9 victim is excluded from trial. *Id.* (quoting Dean G. Kilpatrick & Randy K. Otto, *Constitutionally
10 Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on
11 Psychological Functioning*, 34 Wayne L. Rev. 7, 18-19 (1987)) (“[V]ictims’ perceptions about
12 the equity of their treatment and that of the defendants affects their crime-related psychological
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16 ¹¹ This court went on to note that “[t]he right to ‘presence’ designed to counteract that systemic insensitivity does
17 not necessitate the physical presence of the victim/witness in the courtroom during other testimony (and certain
18 legal argument) in such a manner that subsequent evidence may be tainted to the detriment of the jury’s deliberation
19 and verdict.” *Jimenez*, 787 S.W.2d at 524. The court concluded that, despite a statutory right to be present a
20 suppression hearing, the trial court committed a clear abuse of discretion when it exempted the victim from
21 exclusion under Rule 614 (then numbered Rule 613). *Id.* Importantly, this case was decided before Rule 614 and
22 Article 36.03 included an express exemptions from exclusion for victims. *See also Kehoe v. State*, No. 05-
23 90-01155-CR, 1992 WL 141156 (Tex. Ct. App. June 24, 1992) (concluding, prior to the addition of the victim
24 exemption to Rule 614, that the right to be present under Article 56.02(b) does not preempt the Rule’s exclusion
25 requirements).

26 ¹² Like Texas, most jurisdictions across the country expressly protect victims’ right to attend trial by constitution
27 or statute. *See* Beloof & Cassell, 9 Lewis & Clark L. Rev. 481, 504 (2005) (noting that “approximately seventeen
28 states give victims unqualified rights to attend trial and approximately twenty-five states and the District of
Columbia give victims qualified rights to attend trial”). Courts interpreting these provisions have held that there are
sound policy reasons for permitting victims to attend trial. For instance, in *State v. Williams*, 960 A.2d 805 (N.J.
Super 2008), the court found that New Jersey’s Victims’ Rights Amendment dictated that victims be permitted to
attend trial. *Williams*, 960 A.2d at 813-15. In reaching this conclusion, the court cited testimony given before the
Assembly Judiciary, Law and Public Safety Committee, that “those who have had their lives forever maimed and
changed by violent acts are not only part of the public but also have a special standing to be present and to observe
the system at work.” *Id.* at 814 (quoting testimony of General Robert Del Tufo before the Assembly Judiciary, Law
and Public Safety Committee); *see also People v. Holbrook*, No. 232527, 2002 WL 31953823, *4 (Mich. Ct. App.
Dec. 13, 2002) (unpublished opinion) (“[A] crime victim has an important interest in participating fully in the trial
of the defendant.”).

1 trauma Failure to . . . offer the right of [criminal justice] participation should result in
2 increased feelings of inequity on the part of victims, with a corresponding increase in crime-
3 related psychological harm.”).

4 Texas’s victims’ rights laws were designed to prevent such secondary harms. This is
5 clear from the Texas House Research Organization’s bill analysis of the state’s constitutional
6 victims’ rights amendment. The summary of the position of the bill’s supporters contained in the
7 analysis states: “The rights listed in the proposed amendment may seem basic to those unfamiliar
8 with the system — the right to be present at court hearings involving the offense, for instance —
9 but in reality these rights are not guaranteed under the present system. Victims are now
10 sometimes victimized twice — once by the criminal and again by the criminal justice system.”
11 *State ex rel. Hilbig v. McDonald*, 839 S.W.2d 854, 858 (Tex. Ct. App. 1992) (quoting House
12 Research Organization, Bill Analysis, H.J.R. 19, 71st Leg. Reg. Sess. (1989)).

13 The Victim in this case has strong interests in being present at all public court
14 proceedings. [*Insert facts to demonstrate that the Victim’s interests weigh in favor of presence,*
15 *such as: (1) the Victim’s interests in seeing justice done; (2) the Victim’s psychological and*
16 *emotional interests in being present.*]

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20 **CONCLUSION**

21 For the foregoing reasons, the Victim respectfully asks this Court to grant the Victim’s
22 Motion for an Order Permitting the Victim to Attend All Public Court Proceedings Related to the
23 Criminal Offense.
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26 Dated this ____ day of _____, 20__

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Attorney Name
Bar #
Attorney for Victim [VICTIM]