IN THE SUPREME COURT OF FLORIDA

CURTIS WINDOM,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NUMBER 80,830

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
CHIEF, CAPITAL APPEALS
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

COUNSEL FOR APPELLANT

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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE PROSECUTOR'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO EXCLUDE MINORITIES FROM THE JURY DENIED WINDOM HIS RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State contends that this issue is waived. (AB 8)[1] The State claims that, after it was determined that Ms. Laurence was East Indian, the State offered its reason for striking the prospective juror. The State also states that the defense did not object to Laurence's exclusion nor attack the prosecutor's reason as pretextual. (AB 8) The record simply does not support

[1] Counsel will use the symbol (AB) to refer to the State's Answer Brief with the appropriate page number.

the State's argument.

When the court asked the prosecutor for his reason in striking Ms. Laurence, Mr. Ashton replied:

> Her response to the death penalty questions were less -- a little bit less than neutral. I have a numerical rating system and hers was -- 3 is in the middle and hers was 2.8. I don't believe she is an established minority.

(T256) (Emphasis added). The trial court made a finding that Ms. Laurence was neutral on the issue of the death penalty. (T256) The portion of the record quoted above clearly indicates that the prosecutor, at a loss for a race-neutral reason, instead relied on his belief that East Indians are not an "established minority." (T256) Defense counsel did not object to the prosecutor's reason, because the prosecutor gave no reason. It is clear that, at trial, the State staked all on its opinion that Ms. Laurence was not an established minority. Thus, no race-neutral reason needed to be given. (T256-57) Indeed, the State could articulate a race-neutral reason. Even under the prosecutor's own pretextual "numerical rating system" [which this Court condemned in Kramer v. State, 619 So.2d 274, 276 (Fla. 1993)] Ms. Laurence was almost exactly in the "neutral" class regarding her feelings about the death penalty. (T256) It is therefore clear that the prosecutor did not even attempt to give a race-neutral reason for striking Ms. Laurence.

The State also contends, in the alternative, that the defendant failed to satisfy the initial burden of showing a strong likelihood that the peremptory challenge was solely based

on race or ethnicity. (AB 8-10) As this Court pointed out in State v. Johans, 613 So.2d 1319, 1321 (Fla. 1993), the case law that has developed in this area does not clearly delineate what constitutes a "strong likelihood" that venire members have been challenged solely because of their race. Compare State v. Slappy, 522 So.2d 18 (Fla. 1988) [number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate] with Reynolds v. State, 576 So.2d 1300 (Fla. 1991) [striking one African-American venire member who was sole minority available for jury service created strong likelihood]. In State v. Johans, this Court announced that rather than wait for the law in this area to be clarified on a case-by-case basis, a trial court must conduct a Neil[2] inquiry when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. State v. Johans, 613 So.2d at 1321. Unfortunately, this Court announced that the holding in State v. Johans is prospective only in application. If the controlling factor is the date of a defendant's trial, Curtis Windom is not entitled to the Johans holding.

However, even under the Neil standard, Curtis Windom is entitled to a new trial. The facts of State v. Johans are helpful in the analysis of Windom's case. The Johans prosecutor struck the only African-American venire member initially examined by both parties without any certainty that any African-Americans

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[2] State v. Neil, 457 So.2d 481 (Fla. 1984).

would be seated on the panel, thus creating, at best, doubt as to whether the threshold had been met. State v. Johans, 613 So.2d at 1321. Similarly, Windom's prosecutor exercised its first peremptory challenge to excuse an African-American. (T250-51) This fact is important because the relevant issue in this inquiry is whether any juror has been excused because of his or her race, independent of any other juror. See State v. Slappy, 522 So.2d 18, 21 (Fla. 1988). In Slappy, this Court stated that "*any doubt* as to whether the complaining party has met its initial burden *should be resolved in* [*the complaining*] *parties' favor*." 522 So.2d at 22 (emphasis added).

In State v. Johans, the government argued that since there were other African-Americans in the jury pool, and one African-American was eventually seated on the Johans' jury, no error occurred when the trial court failed to require the State to give a race-neutral reason for the strike. This Court rejected that argument, stating that a race-neutral justification for a peremptory challenge cannot be inferred merely from circumstances such as the composition of the venire or the jurors ultimately seated. State v. Johans, 613 So.2d at 1321.

The first peremptory challenge used by the State in Curtis Windom's trial resulted in the excusal of an African-American. The State's second peremptory challenge was used to excuse Maria Laurence. Although the trial court asked the prosecutor for his reason for striking Laurence, the prosecutor was unable to articulate a race-neutral reason, instead relying on his belief

that Laurence was not part of an established minority. (T256-57) Windom had clearly met his initial burden of establishing a strong likelihood that the peremptory challenge was based solely on race or ethnicity.

On appeal, the State belittles undersigned counsel's classification of "East Indian" as a distinguishable minority. (AB 10) The State attempts to use the fact that no one below was able to successfully guess the ethnic origin of Ms. Laurence in support of its contention that Laurence had no "identifying traits" of a cognizable minority as this Court described in State v. Alen, 616 So.2d 452, 455 (Fla. 1993). Although neither counsel nor the trial court below were able to successfully "guess" Ms. Laurence's ethnic or national origin, they all clearly recognized that Ms. Laurence visibly "stood out" in the venire. If she lacked the "identifying traits" and "physically visible characteristics" this Court described in State v. Alen, the discussion of her ethnicity and nationality would not have occurred. Since the topic was a matter of great debate at trial, Ms. Laurence obviously was separately identifiable from the rest of the jury.

The State concludes that an East Indian designation is certainly a much broader classification than even that of being an American. (AB 12) Perhaps this is so in East India but not where an East Indian is living in America or an American in East India. A person becomes a part of a minority when he leaves his native land to live in another culturally/racially/ethnically

different population. If women[3] are now a recognized "minority" for purposes of application of the Neil doctrine, then East Indians certainly should be also.

[3] Jeb v. Alabama ex rel T.B., April 19, 1994 WL 132232 (U.S.); Laidler v. State, 627 So.2d 1263 (Fla. 4th DCA 1993).

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE IRRELEVANT, PREJUDICIAL EVIDENCE OF A NONSTATUTORY AGGRAVATING FACTOR, SPECIFICALLY THE EFFECT OF THE MURDERS ON THE COMMUNITY'S CHILDREN.

Since the filing of the Initial Brief, the Honorable Rodolfo Sorondo, Jr., Circuit Court Judge of the Eleventh Judicial Circuit in and for Dade County, Florida, has declared Section 921.141(7), Florida Statutes (1993) to be unconstitutional under Article I, Sections 9, 10 and 16 of the Constitution of the State of Florida and under the Eighth and Fourteenth Amendments of the Constitution of the United States. Rather than attempting to paraphrase Judge Sorondo's analysis, Appellant has attached the court's order as an appendix to this Reply Brief. The analysis of the law answers the State's argument set forth in the Answer Brief. See Attached appendix.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT'S DENIAL OF APPELLANT'S ATTEMPT TO CALL SERGEANT FUSCO AS A WITNESS UNCONSTITUTIONALLY DEPRIVED WINDOM OF HIS RIGHT TO PRESENT HIS DEFENSE.

The trial court's ruling essentially prohibited Windom from presenting his defense. Washington v. Texas, 388 U.S. 14 (1967). A trial judge may not frustrate a defendant's legitimate right to present his defense by strict adherence to evidentiary rules. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON THE VAGUE AGGRAVATING CIRCUMSTANCE FOR COLD, CALCULATED AND PREMEDITATED.

The State contends that defense counsel objected only on the grounds that the cold, calculated and premeditated aggravating factor was automatic in cases of premeditated murder. (AB 32) That is not precisely the case. The defense counsel interposed a somewhat rambling objection to the CCP circumstance and jury instruction and concluded:

> You are being sentenced possibly to the electric chair as a result of the fact that you have committed a premeditated murder. So the act itself sends you to the chair when, in fact, I think these aggravating factors were intended to lend some guidance to whether you get a life imprisonment. So I would object to that on those grounds; constitutional grounds, basically.

(R50) (Emphasis added). Although somewhat inartfully articulated, defense counsel did object on the appropriate ground, that is, that aggravating factors should "lend some guidance" to the jury. (R50) The fact that the instruction did not lend any guidance in the jury's attempt to narrow the class of death-eligible first-degree murders caused defense counsel to object on "constitutional grounds, basically." (R50)

Additionally, the first part of defense counsel's lengthy, rambling objection is, in essence, an objection that the jury instruction on the CCP aggravating factor fails to sufficiently

guide the jury in determining if first-degree, premeditated murders are in fact cold, calculated and premeditated without any pretense of moral or legal justification as envisioned by the statute. The aggravating factor and the instruction thereon added nothing to premeditated murder. (R49-50) Since it failed to sufficiently narrow the class of all first-degree, premeditated murders, the factor and the instruction are unconstitutional.

The sufficiency of defense counsel's objection becomes very important in light of the recent decision in Jackson v. State, 19 FLW S215 (April 21, 1994), wherein this Court found that the standard jury instruction (the same one given at Curtis Windom's trial) is unconstitutionally vague. After a decade of repeated rejections of this particular claim, this Court has finally conceded [in light of Espinosa v. Florida, 112 S.Ct. 2926 (1992) and Hodges v. Florida, 113 S.Ct. 33 (1992)] that Florida's standard jury instruction on this circumstance is unconstitutionally vague. Jackson v. State, supra. This Court added that:

> Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. James v. State, 615 So.2d 668, 669 & n.3 (Fla. 1993).

Jackson v. State, at S217. Windom's objection was certainly specific enough to advise the trial court of the difficulty perceived by defense counsel as to the aggravating factor and the

instruction. This issue is therefore clearly preserved.

Even if this Court found Windom's objection to be insufficient, Windom is still entitled to a new trial. Certainly after more than a decade of this Court repeatedly rejecting this particular issue, a trial attorney should have realized that raising the issue was an exercise in futility. The undersigned has been a participant in several charge conferences at capital trials wherein this issue has been raised and discussed. The representative for the State usually goes into a tirade calling the argument frivolous (since it had been repeatedly rejected for many years by this Court) and implying that defense counsel was unethical for even mentioning the issue. Trial judges, prosecutors, and defense lawyers do not understand the necessity of raising a "frivolous" issue to avoid subsequent procedural bar. Many a defense lawyer has relied on the past pronouncements of this Court on this and other issues and concluded that there was no point in raising an objection. Any subsequent "change in the law" certainly <u>should</u> be rectifiable in post-conviction proceedings by the unfortunate client whose lawyer decided not to interpose a "frivolous" objection. If this Court insists on an iron-clad, specific objection in the face of the overwhelming precedent to the contrary from this Court, woe be tide the clients of the lawyers who rely on the precedential value of this Court's opinions.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant requests the following relief:

As to Points I, III and IV through VI, a new trial;

As to Points II, VII, and VIII, vacate the death sentences and remand for a new penalty phase;

As to Points IX through XIII, vacate the death sentences and remand for imposition of life imprisonment on each count.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118 in his basket at the Fifth District Court of Appeal and mailed to Mr. Curtis Windom, #368527 (42-1147-A1), P.O. Box 221, Raiford, FL 32083, this 2nd day of May, 1994.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

CURTIS WINDOM,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER 80,830
	)	
STATE OF FLORIDA,	)	
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Appellee.	)	
	)	

A P P E N D I X

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
CHIEF, CAPITAL APPEALS
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

COUNSEL FOR APPELLANT

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

STATE FLORIDA,

Plaintiff

v.

LEONARDO FRANQUI, ET. AL.

Defendant.
_____/

CRIMINAL DIVISION

CASE NO. 92-2141B

ORDER

THIS CAUSE came on to be heard upon the State's Motion to Admit Victim Impact Evidence at the Penalty Phase. Having read all pleadings submitted herein and having heard the arguments of counsel this court finds as follows:

Florida Law

The Court begins its analysis by noting that all states follow one of three schemes of capital sentencing as concerns the aggravating factors the sentencing authority may consider: the Florida scheme, the Georgia scheme or the Texas scheme. The Texas scheme requires answers to different questions and only if the sentencing authority answers all questions against the defendant can the death penalty be imposed. The Georgia scheme requires the sentencing authority to find at least one aggravating circumstance found in the State's statute before a defendant can be eligible for the death penalty. Once any one statutory circumstance is found however, all relevant evidence in aggravation may be considered. The Florida scheme limits the aggravating circumstances the jury and judge can consider to those found in F.S. 921.141(5). All

three procedures have been approved by the United States Supreme Court. [1]

Until the legislature passed Section (7) of F.S. 921.141 Florida's death penalty statute was extremely clear and unambiguous. Once a jury convicts the accused of murder in the first degree a second "penalty" proceeding is conducted. During this sentencing phase the State must present evidence of the existence of at least one of the aggravating circumstances set forth in 921.141(5), and the defense is free to present evidence of the existence of any mitigating circumstances whatsoever. Although F.S. 921.141(6) sets forth several "statutory" mitigating circumstances the law is clear that in addition to these the defendant is free to present evidence of any factor which "in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed."[2]

The jury must hear the evidence and determine whether sufficient aggravating circumstances exist, as enumerated in 921.141(5), and whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. Based on these consideration the jury must then advise the court whether the defendant should be sentenced to death or life imprisonment.[3] The

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[1] Gregg v. Georgia 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 809 (1976); Proffit v. Florida 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Jurek v. Texas 428 U.S. 262, 96 S.Ct.2950, 49 L.Ed.2d 929 (1976).

[2] Rodgers v. State 511 So.2d 526 (Fla. 1987).

[3] F.S. 921.141(2)

statute makes it clear that the only evidence relevant to the death penalty proceeding is evidence that tends to establish the existence of either an aggravating circumstance or a mitigating circumstance.

Although the nature and number of available mitigating factors is unlimited, the law is clear that the aggravating circumstances are strictly limited to those set forth in 921.141(5). In Elledge v. State 346 So.2d 998, 1003 (Fla. 1977) the Supreme Court of Florida stated:

> "We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death."

The Court added in Miller v. State 373 So.2d 882 (1979) that

> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.[4]

In Pope v. State 441 So.2d 1073 (Fla. 1983) the Supreme Court held that remorse was a non-statutory aggravating circumstance and stated:

> Unfortunately, remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invited the sort of mistake which occurred in the case now before us - inferring lack of remorse from the exercise of constitutional rights. *This sort of mistake may, in an extreme case, raise a question as to whether the defendant has*

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[4]Citing Proffit v. Florida (Supra). See also Furman v. Georgia 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

> *been denied some measure of due process, thus mandating a remand for reconsideration of the sentence.*[5] (Emphasis added).

Finally in Grossman v. State 525 So.2d 833 (Fla. 1988) the Supreme Court of Florida addressed the issue of victim impact directly:

> Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute, Section 921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence.[6]

Although Grossman was decided before Payne (Supra) this statement is consistent with the long line of cases that have held that the State can rely only on the aggravating circumstances set forth in 921.141(5).

If then victim impact evidence is, in fact, a non-statutory aggravating circumstance, it is inadmissible. The State suggests that it is not, rather, the argument goes, "victim impact evidence is a type of evidence about the crime which is used by the jury or the judge in determining how much weight should be given to the statutory aggravating factors which have already been established."[7] By way of example the State argues that if it were seeking to prove

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[5]See also Robinson v. State 520 So.2d 1 (Fla. 1988).

[6]See also Owen v. State 560 So.2d 107 (Fla. 1990); Jackson v. Dugger 547 So.2d 1197 (Fla. 1989).

[7]See State's motion to Admit Victim Impact Evidence at the Penalty Phase at page 4.

the aggravating circumstances that the murder was committed during the commission of a burglary, it could show the jury that the murder occurred while the victim, a young child, was laying asleep in his bed as opposed to the same burglary occurring in a warehouse and the murder victim being a security guard. The State postulates that the jury hearing these cases might give more "weight" to the aggravating circumstance (that the murder was committed during the commission of a Burglary) involving the child than the security guard. This may be true, however the identity of the victim, his age and physical characteristics are matters which inhere in the crime. Thus, if, instead of a child, the victim of the homicide is a quadriplegic, the jury may well be appalled at the callousness of the accused, but the fact that the victim is handicapped is integral to his being. The evidence does not seek to draw comparisons among quadriplegics, it does not seek to distinguish "this" quadriplegic from others, it merely establishes that this victim is a quadriplegic. Likewise, in the State's example, the evidence establishing that the murder victim was a child does not seek to distinguish this child from others. Victim impact evidence however seeks to do just that. Victim impact evidence will seek to distinguish this child from other children. It will suggest, perhaps through the testimony of parents and teachers, that this child was uniquely significant, uniquely intelligent, uniquely loving and loved. Such testimony no longer inheres in the crime but begs for enhanced punishment, it becomes, in fact, an aggravating circumstance intended to inflame the jury to recommend

the imposition of the death penalty. Not only does this type of evidence qualify as a non-statutory aggravating circumstance it also is contrary to the stated goal of having the jury and judge make a cold and dispassionate assessment of the aggravating and mitigating factors.

In the present case the defendants are charged with the first degree murder of a police officer. The State has proffered that it would call one of the victim's police superiors to testify about the type of police officer the victim was. The testimony will undoubtedly praise the victim as an exceptional police officer, this may well be true. However, F.S. 921.141(5)(j) states that an aggravating factor which the jury may consider is that "the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties." The aggravating factor does not address itself to the individual characteristics of the murdered law enforcement officer. Section (J) does not require proof that the law enforcement officer was kind and compassionate or that he has in the past been decorated for valor. It does not require proof that the law enforcement officer was hard working, or effective in police work. It is no less an aggravating factor in cases involving lazy, ill tempered and disliked law enforcement officers. In short, any evidence that goes beyond proving the victim's status as a "law enforcement officer engaged in the performance of his official duties" is superfluous and consequently

irrelevant to prove the permissible aggravating circumstance.[6]

Section 16 of the Constitution of the State of Florida is entitled, "Rights of accused and victims." Paragraph (b) pertains to victims and reads as follows:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard *when relevant*, at all crucial stages of criminal proceedings, *to the extent that these rights do not interfere with the constitutional rights of the accused.* (Emphasis added).

Although the feelings of the victim's next-of-kin in this case are relevant to the sentencing of these defendants on the non-capital crimes charged, they are not relevant, under the sentencing scheme set forth in F.S. 921.141 and descional law interpreting it, to sentencing on the first degree murder charge. Consequently victim impact evidence violates Section 16(b) of Article I of the Florida Constitution.

Even if victim impact evidence is somehow relevant to the capital sentencing criteria it is, in the opinion of this court, violative of the defendant's right to due process of law as guaranteed by Article I, Section 9 of the Constitution of the State of Florida, as it is an impermissible non-statutory aggravating cirumstance.

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[6] I feel compelled to inject a personal note at this point. My characterization of victim impact evidence as "irrelevant" is a purely legal conclusion. To the layperson the word irrelevant is often considered a synonym of the word "insignificant". My conclusion that this type of evidence is irrelevant to the capital sentencing process in Florida should not be confused with a lack of sympathy for the suffering of the next-of-kin of homicide victims. Regardless of my personal feelings however I owe all sides in every law suit an intellectually honest and dispassionate assessment of the legal issues, regardless of the palatability of my conclusions.

FEDERAL LAW

In Payne v. Tennessee _____ U.S. _____, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) the Supreme Court of the United States held that the Eighth Amendment of the United States Constitution establishes no per se bar to the admission of victim impact evidence during the trial of a death penalty proceeding and that States are free to conclude that evidence about the victim and the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. In so holding the Court reversed its decision in Booth v. Maryland 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and South Carolina v. Gathers 490 U.S. 805, 199 S.Ct. 2207, 104 L.Ed.2d 876 (1989) where it had held exactly the opposite.

Payne was decided in June of 1991. The Florida legislature acted immediately and enacted Section (7) of F.S. 921.141 in July of 1992. What the legislature failed to recognize however is that the capital sentencing scheme in the State of Tennessee is different from that in Florida.

In 1992 (one year after Payne) the United States Supreme Court decided Sochor v. United States 112. S.Ct. 2114 (1992). In Sochor the Court stated

> In a weighing state like Florida, there is Eighth Amendment error where the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence.

This court has concluded that Section (7) of F.S. 921.141 is, de facto a non-statutory (thus "invalid") aggravating factor.

Accrodingly this court finds that, as a non-statutory aggravating factor, Section (7) of F.S. 921.141 violates the Eighth and Fourteenth Amendments of the Constitution of the United States.

THE "EX POST FACTO" ISSUE

Article I Section 10 of the Constitution of the State of Florida prohibits the passage of ex post facto laws. F.S. 921.141(7) became law in Florida in July of 1992. The first degree murder charged in the indictment herein was committed in December of 1991. The question presented is whether, as applied to this crime, F.S. 921.141(7) violates Article I Section 10.

Based upon its position that F.S. 921.141(7) is strictly evidentiary in nature and not a statutory aggravating circumstance the State relies on Glendening v. State 536 So.2d 212 (Fla. 1988) to support its contention that the statute is not an ex post facto law. If the court agreed with the State's initial premise, then this position would be meritorious. The Court however has already decided that F.S. 921.141(7) is, de facto, a non-statutory aggravating factor. As such it is not merely procedural and does violate substantial personal rights of the defendants.[9]

Accordingly the Court finds that F.S. 921.141(7), as applied to this case, violates Article I Section 10 of the Constitution of the State of Florida and Article I Section 10 of the Constitution of the United States.

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[9]Dobbert v. Florida 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Miller v. Florida 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); Dugger v. Williams 593 So.2d 180 (Fla. 1991); Weaner v. Graham 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d (1981); Blankenship v. State 521 So.2d 1097 (Fla. 1988).

CONCLUSION

For the reasons stated above this Court finds that F.S. 921.141(7) is unconstitutional under Article I Setions 9, 10 and 16 of the Constitution of the State of Florida and under the Eighth and Fourteenth Amendment of the Constitution of the United States. Consequently the State's motion to Admit Victim Impact Evidence at the Penalty Phase is DENIED.

DONE AND ORDERED this 15 day of March, 1994.

R. Sorondo Jr.

RODOLFO SORONDO, JR.
Circuit Court Judge