IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,373

STATE OF FLORIDA,

Petitioner,

v.

FERNANDO FERNANDEZ, LEONARDO FRANQUI, PABLO SAN MARTIN, and RICARDO GONZALEZ,

Respondents.

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA
CONFLICT CERTIFIED

ANSWER BRIEF OF RESPONDENTS ON THE MERITS

BENEDICT P. KUEHNE, ESQ.

SALE & KUEHNE, P.A.
601 Brickell Key Drive
Suite 500
Miami, Florida 33131-2651
Telephone: 305/789-5989
Fax: 305/789-5987
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Florida Constitution

Miscellaneous

STATEMENT OF THE CASE AND FACTS

This proceeding involves the constitutionality of the "victim impact" statute[1/] arising from a penalty proceeding in a murder trial. The trial court concluded the victim impact statute, §921.141(7), Fla.Stat. (1992),[2/] was unconstitutional as applied to the case (R 70-79).

The trial court ruled that the statute was in conflict with Art. I, §§9, 10, & 16 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. The trial court also found that application of the victim impact statute violated the *ex post facto* clause of the Florida and United States Constitutions because the charged murder occurred before the effective date of the victim impact statute.[3/] The state sought common law certiorari review of that order (R 1-21), resulting in the

---

1/ The Florida Legislature enacted §921.141(7), Fla.Stat. (1992), in response to the Supreme Court decision in Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991). The legislative purpose of the "victim impact" statute was to permit the state to "introduce and argue victim impact evidence. This evidence would be designed to show the victim's uniqueness as a person and the loss to the community as a result of his [sic] death." SB 362, Staff Analysis, §I(B). The legislative history and staff analysis to Senate Bill 362, which was enacted as Ch. 92-81, §1, Laws of Florida, are part of the record in this case.

2/ The "victim impact" statute, §921.141(7), provides:

> (7) **Victim impact evidence.** Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

3/ §921.141(7) was enacted effective July 1, 1992, *six months after the charged homicide.*

denial of certiorari review by the Third District Court of Appeal (R 187). The appellate court gave this reason for the denial of certiorari (R 187):

> It appearing that the crimes for which the respondents are to be sentenced occurred prior to the effective date of Section 921.143(7) [sic], Florida Statutes 1992, relief sought herein is denied.

Respondents Fernando Fernandez, Leonardo Franqui, Pablo San Martin, and Ricardo Gonzalez were defendants in criminal trial proceedings previously pending in Dade County Circuit Court. During the pendency of certiorari proceedings, each respondent was convicted of first degree murder (SR 6, 23, 37, 58). Following the penalty phase, each respondent was sentenced to death, without consideration of "victim impact" evidence (SR 21, 35, 56, 76).[4/] The Third District certified its decision as being in conflict with State v. Maxwell, 19 Fla. L. Weekly D1706 (Fla. 4th DCA 1994).[5/]

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHETHER THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DENIED COMMON LAW CERTIORARI IN RULING THE "VICTIM IMPACT" STATUTE COULD NOT BE APPLIED TO A MURDER WHICH OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE WITHOUT OFFENDING CONSTITUTIONAL PRINCIPLES PROHIBITING EX POST FACTO LEGISLATION?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal correctly denied the state's petition for common law certiorari. The lower tribunal's order finding the victim impact statute unconstitutional as applied to this case was correct. Not only did the state fail to show that the trial

---

[4/] Respondent San Martin received a jury recommendation of life (SR 37).

[5/] This court denied respondents' motion to dismiss for mootness in an order entered December 2, 1994.

court's order departed from the essential requirements of the law, but the state also failed to discharge its burden of demonstrating entitlement to certiorari relief. Consequently, the decision of the Third District must be affirmed.

On the merits, the Third District correctly ruled that the victim impact statute could not be applied to conduct which occurred prior to the effective date of the statute. That result was required by the *ex post facto* protections of the United States and Florida Constitutions. Although not ruled on by the Third District, the lower tribunal found several other constitutional infirmities during an exhaustive review of the victim impact statute. The victim impact legislation gives the jury and judge unguided discretion to impose the death penalty in an arbitrary and capricious manner. In addition, the statute is vague, overbroad and incapable of a clear and understandable application. Consequently, it violates the due process guarantees of the Florida and United States Constitutions.

Finally, the victim impact statute infringes upon the exclusive right of the Florida Supreme Court to regulate practice and procedure, and is therefore unconstitutional in violation of Art. V, §2 of the Florida Constitution.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY DENIED COMMON LAW CERTIORARI IN RULING THE "VICTIM IMPACT" STATUTE COULD NOT BE APPLIED TO A MURDER WHICH OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE WITHOUT OFFENDING CONSTITUTIONAL PRINCIPLES PROHIBITING EX POST FACTO LEGISLATION.

The Third District Court of Appeal, like the trial court before it, ruled the "victim impact" statute could not be constitutionally applied to a charged homicide which occurred prior to the effective date of the statute. The trial court ruled squarely on the

merits of the law, finding that applying the "victim impact" statute to respondents' homicide prosecution violated constitutional principles prohibiting *ex post facto* legislation. The Third District did not necessarily reach the merits of the case, concluding instead that the state's petition for writ of common law certiorari should be denied because "the crimes for which the respondents are to be sentenced occurred prior to the effective date of" the statute. The conflict which led to this conflict certification arose because the Fourth District Court of Appeal, in a case raising a similar issue, concluded the "victim impact" statute could be applied to a prosecution involving a murder which preceded the enactment of the statute.

A. Denial Of Certiorari Review Does Not Constitute A Ruling On The Merits Of The Issue Raised.

In reviewing the conflict certified by the Third District, this court must first determine whether the merits of the conflict issue should even be reached. That is because the record in this case does not clearly indicate the Third District actually addressed the constitutional issue raised by the state's petition for common law certiorari. It is more than conceivable the appellate court's ruling was nothing more than a conclusion the state had not discharged its heavy burden of establishing entitlement to common law certiorari. In this respect, respondents disagree with the state's assertion that the appellate "opinion must be viewed as an approval of the trial court's reasoning." (Initial Brief of Petitioner, at 9).

Common law certiorari to review a non-final order in a criminal case is an extraordinary remedy, available only under very limited circumstances. Review of a trial court's ruling while the trial is ongoing ordinarily does not fit within the limited cases for which review by certiorari is available. As pointed out in the 1977 Committee Notes to

Rule 9.130 of the Florida Rules of Appellate Procedure,

> [i]t is extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certiorari. It is anticipated that since the most urgent interlocutory orders are appealable under this rule, there will be very few cases where common law certiorari will provide relief.

Certiorari is an exceptional remedy available only to review those non-final orders that (1) constitute a substantial departure from the essential requirements of law, (2) cause a material injury to a party throughout subsequent proceedings, and (3) cause an injury for which there will be no adequate remedy after final judgment. E.g., State v. Pettis, 520 So. 2d 250 (Fla. 1988); Dairyland Ins. Co. v. McKenzie, 251 So. 2d 887 (Fla. 1st DCA 1971); Gulf Cities Gas Corp. v. Cihak, 201 So. 2d 250 (Fla. 2d DCA 1967). In Combs v. State, 436 So. 2d 93, 96 (Fla. 1983), this court limited application of certiorari to those cases where "there has been a violation of a clearly established principle of law resulting in a miscarriage of justice."

As the following analysis demonstrates, the state in this case failed to satisfy the restrictive standard governing certiorari review.[6/] The state's petition sought review of a trial court order which declared the victim impact statute unconstitutional as applied. The state's primary argument in the certiorari proceeding was that victim impact evidence is not an aggravating circumstance warranting imposition of the death penalty, but that it could nonetheless be used so a jury can better weigh the life or death decision during a penalty phase proceeding. The state's concession that victim impact evidence is not an enumerated aggravating circumstance for purposes of a penalty phase proceeding was itself justification for denial of certiorari review.

Florida precedent has heretofore held that victim impact evidence is **not admissible** in capital sentencing proceedings. E.g., Burns v. State, 609 So. 2d 600 (Fla. 1992); Owen v. State, 560 So. 2d 207 (Fla.), cert. denied, 498 U.S. 855, 111 S. Ct. 152 (1990)(testimony from victim's family on impact of murder could not be used as aggravating factor during death penalty phase); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989)(impact of police officer's death upon his department and community was

---

6/ Respondents urged the Third District to conclude certiorari was not even available because the trial had already commenced and the parties were awaiting completion of the sentencing phase. In Weir v. State, 591 So. 2d 593 (Fla. 1991), this court held that a district court has no certiorari jurisdiction to review an order granting a defendant's motion in limine filed prior to trial but not ruled upon until trial commenced. The court noted that certiorari review was not intended to

> approve the interruption of a trial to allow review of a trial judge's ruling. Allowing such interlocutory petitions could inhibit the orderly trial of cases and could lead to incessant petitions for certiorari. If the State wants a ruling resulting from a pretrial motion reviewed, it must secure an order on that motion prior to trial.

Id. at 594. Based on the Weir rationale, certiorari review was not appropriate.

impermissible victim impact evidence); Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1978); Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354 (1989); Jackson v. State, 498 So. 2d 906 (Fla. 1986). Not a single Florida court has held to the contrary.

Take, for example, the state's citation to Stein v. State, 632 So. 2d 1361 (Fla.), cert. denied, ___ U.S. ___, 115 S. Ct. 111 (1994). The state claims Stein approved the admissibility of victim impact **evidence** in a penalty phase proceeding. That is far from the case, since Stein involved a substantially dissimilar situation arising from a prosecutor's ***argument*** during the penalty phase that the victim was married and had a child. The prosecutor did not comment on the family or community impact of the homicide, but made an argumentative portrayal of undisputed evidence about the victim's marital and parental status.[7] This court, finding the prosecutor's comment did not rise to a level of reversible error, offered this rationale, at 1367:

> Finally, Stein contends that the trial judge erred in denying Stein's request for a mistrial after the prosecutor made certain statements to the jury in his closing argument. Specifically, Stein claims that the prosecutor sought to invoke sympathy for the victims by stating to the jury that victim Saunders was married and the father of a child. We find these brief humanizing remarks do not constitute grounds for reversal and that, if improper, they were harmless beyond a reasonable doubt. DiGuilio. See also Payne v. Tennessee, 111 S. Ct. 2597 (1991)(in the majority of cases, victim impact evidence serves entirely legitimate purposes).

Plainly, that prosecutor's comment did not extend to arguing the subjective impact of the victim's death on the victim's family, which is what the victim impact statute is designed

---

[7] A prosecutor's comments do not constitute evidence. Fla. Std. Jury Instr. (Crim.) §1.02.

to permit. The Stein decision, moreover, did not approve for use by the Florida courts, either expressly or implicitly, the Payne holding that victim impact evidence is admissible.

At the time the Third District considered the state's certiorari petition, this court had never upheld the use of victim impact evidence in a penalty phase proceeding. This court has not yet embraced the Payne rule as abrogating a long line of Florida precedent. The most that could be said is that Stein recognized that a lawyer's comment, not evidence, which correctly describes the victim in a factual manner is not reversible error, especially when the evidence is otherwise overwhelming. Stein v. State. That decision is consistent with precedent existing at the time of the Third District ruling. Seen in that light, the Third District may well have denied certiorari review because the trial court's ruling did not depart from the substantial requirements of law.

The only case relied on by the state as supporting the argument for common law certiorari review is Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991), in which the U.S. Supreme Court held victim impact evidence may not constitute a per se violation of the Eighth Amendment. In so holding, the Supreme Court overruled the per se rule of Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987), and South Carolina v. Gathers, 490 U.S. 805, 199 S. Ct. 2207 (1989), which previously held that evidence and argument relating to the impact of the victim's death on the victim's family violated the Eighth Amendment.

Payne does not establish an absolute rule of law regarding the admissibility of victim impact evidence, and does not come close to giving a constitutional opinion on its use in a Florida capital sentencing proceeding. Indeed, the Payne decision arose in the context of the Tennessee capital punishment scheme, an altogether different statutory

procedure which is not at all similar to Florida's "weighing" statute. In Florida, the penalty phase statute itself and the accompanying procedural protections limit the aggravating circumstances the jury and judge can consider to those found in §921.141(5). The jury and the judge are required to weigh the aggravating circumstances found to exist beyond a reasonable doubt against any statutory and non-statutory mitigating factors when determining if the death penalty is an appropriate punishment. The Tennessee statute, on the other hand, allows the jury to consider all relevant evidence of an aggravating or mitigating nature.

Payne, then, adds nothing to the body of law which governs capital sentencing proceedings in Florida. The Supreme Court acknowledged in Romano v. Oklahoma, ___ U.S. ___, 114 S. Ct. 2004, 2011 (1994), that the "Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings." Consequently, Florida is constitutionally entitled to utilize its own evidentiary rules regarding victim impact evidence. The prevailing Florida rules demonstrate the trial court's order was not only consistent with Florida precedent, but it also did not result in a miscarriage of justice, a required condition precedent to obtaining common law certiorari relief. This miscarriage of justice element is central to the rule of limited availability of the certiorari remedy, as was best expressed by the court in State v. Pettis. There, this court agreed that affording the state an opportunity for interlocutory appeals of pretrial orders is consistent with the fair administration of justice because the state might otherwise be deprived of the right to review orders which could prevent the prosecution of cases. Id. at 253. If the state had no right of review in cases in which a pretrial ruling sounded the death knell for the continued pursuit of the case, the court

noted the following anomalous result:

> The state could only proceed to trial with its ability to present the case significantly impaired. Should the defendant be acquitted, the principles of double jeopardy prevent the state from seeking review; thus, the prejudice resulting from the earlier order would be irreparable.

520 So. 2d at 253.

The concerns addressed in Pettis were not present in this case. At the trial level the state offered no compelling or complete proffer of the evidence it intended to present under the rubric of "victim impact." The state had not shown that a death penalty recommendation could not be obtained without the victim impact evidence. As the case developed, all respondents were sentenced to death without consideration of victim impact evidence. The lower tribunal's exclusion of the unarticulated victim impact evidence could not have significantly impaired the state's ability to proceed against any of the respondents. Plainly, the state was able to introduce all evidence of aggravating circumstances as permitted in §921.141(5), and was able to make legitimate arguments in favor of the death penalty. The exclusion of victim impact evidence which is not an element of the death penalty equation could have had no substantial impact on the penalty phase proceeding.

For these reasons, among others, the Third District concluded that the lower tribunal's ruling did not rise to the level of a "miscarriage of justice. "Because the state's petition for writ of certiorari did not establish the required departure from the essential requirements of law resulting in a miscarriage of justice, see Ward v. State, 636 So. 2d 68 (Fla. 5th DCA 1994) (scope of review on certiorari is narrower than on plenary appeal), the Third District's ruling can be understood to mean the state did not satisfy this

jurisdictional prerequisite.

B. The Victim Impact Statute Is Unconstitutional.

The victim impact statute is unconstitutional in that it gives the jury and judge unguided discretion to impose the death penalty in an arbitrary and capricious manner. That was the conclusion of the trial court in this case. That ruling was consistent with Florida law and constitutional principles, as acknowledged by the Third District's denial of certiorari review.

The Florida Legislature enacted the victim impact statute in response to the United States Supreme Court decision in Payne v. Tennessee. Payne held the Eighth Amendment does not constitute a per se prohibition against the consideration of victim impact evidence in a capital sentencing proceeding, thus overruling the per se rule of Booth v. Maryland and South Carolina v. Gathers. Notwithstanding its intentions, the Florida Legislature's response to the Payne decision is in irreconcilable conflict with the constitutionality of Florida's capital sentencing procedure because the legislature overlooked the fact that Payne dealt with an altogether different sentencing scheme, one in which all relevant aggravating and mitigating evidence is statutorily considered in determining whether the death penalty should be imposed.

Florida's capital sentencing procedure is materially different from the Tennessee procedure reviewed in Payne. The Florida death penalty scheme requires a judge and jury to weigh specifically enumerated aggravating circumstances against enumerated and unenumerated mitigating factors. §921.141(6); Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733 (1988) (defendant is free to present evidence of statutory mitigating circumstances and any other factor which "in fairness or

in totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed"). After considering the aggravating circumstances which have been proven beyond a reasonable doubt and all mitigating circumstances offered by the defense, the Florida procedure requires the jury to advise the sentencing court whether the defendant should be sentenced to death or life imprisonment. §921.141(2). The trial court is the final arbiter of the penalty. §921.141(3).

The Tennessee capital sentencing law is of a very different character in that it allows consideration of all aggravating and mitigating circumstances which pertain to the crime and the defendant:

> In the sentencing proceeding, the evidence may be presented as to any matter that the court deems relevant to the punishment and may include but not be limited to, the nature and circumstances of the crime; the defendant's background history and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated...

T.C.A. §39-13-204(c) (1982) (emphasis added).[8/]

Until the Florida Legislature enacted §921.141(7), the Florida death penalty procedure was clear and unambiguous, and had been found constitutional precisely because it eliminated the possibility of arbitrary and capricious application of the death penalty. Florida precedent holds that during the sentencing phase, consideration of

---

[8/] Tennessee also requires a unanimous jury to recommend death. In contrast, Florida requires only a simple majority.

matters not relevant to the statutorily enumerated aggravating circumstances[9/] results in a death sentence violative of the Eighth Amendment. Sochor v. Florida, ___ U.S. ___, 112 S. Ct. 2114 (1992); Stringer v. Black, 508 U.S. 222, 112 S. Ct. 1130 (1992). The Sochor Court explained, at 2119:

> In a weighing state like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid aggravating circumstance in reaching the ultimate decision to impose a death sentence." See Clemons v. Mississippi, 494 U.S. 738, 752, 110 S. Ct. 1441, 1450 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility...of randomness," Stringer v. Black, 508 U.S. 112 S. Ct. 1130, 1139 (1992), by placing a thumb [on] death's side of the scale", id. at _____, 112 S. Ct. at 1137, thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty." Id. at ____, 112 S. Ct. at 1139.

This court has determined that arbitrary and random decisions in the death penalty process are a substantial evil to be avoided, finding in Miller v. State, 373 So. 2d 882, 885 (Fla. 1979):

> 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. Proffitt v. Florida.

It was this concern with the imposition of the death penalty in an arbitrary and capricious manner as a result of unbridled discretion which first led the United States Supreme Court to declare Florida's sentencing scheme unconstitutional in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972). Subsequent legislative changes to the death penalty

---

9/ §921.141(5): "**Aggravating circumstances.** - Aggravating circumstances shall be limited to the following..." (emphasis added). Elledge v. State, 346 So. 2d 998, 1002-1003 (Fla. 1977) ("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").

procedure which removed arbitrariness led the Court in Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 2967 (1976), to conclude the new scheme was constitutional because it "seeks to assure that the death penalty will not be imposed in a arbitrary or capricious manner." Under the then-new and now-current procedure, "trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." Id. at 253, 96 S. Ct. at 2967. The Court explained its rationale:

> That legislation provides that after a person is convicted of first degree murder, there shall be an *informed, focused, guided and objective inquiry* into the question of whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons and the evidence supporting them are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness and rationality in the even handed operation of the state law...[T]his system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed.

428 U.S. at 259, 96 S. Ct. at 2970 (citations omitted; emphasis added).

The state claims that Florida's death penalty scheme permits "a broad range of evidence" to be considered when making the decision whether to impose the death penalty (Initial Brief of Petitioner, at 17). That assertion is far from the law prevailing in Florida, which mandates strict adherence to the enumerated aggravating factors. Burns v. State. This misunderstanding of our comprehensive capital punishment system is yet another indication that victim impact evidence has no place in Florida's life or death decision making process.

The state asserts that cases such as Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986), stand for the proposition that the jury is entitled to hear any evidence "which will aid it in understanding the facts of the case in order that it may render an appropriate

advisory sentence[.]" (Initial Brief of Petitioner, at 18). That assertion is woefully inaccurate and taken out of context. The issue before the Teffeteller court was whether evidence about the crime was properly introduced during a resentencing hearing before a jury which did not determine the defendant's guilt. Recognizing the importance of having a sentencing phase jury familiar with the facts of the homicide, even if those facts were not essential to the sentencing decision, this court held that a photograph of the victim was properly introduced at sentencing "to familiarize the jury with the underlying facts of the case." Had this same jury handled the guilt phase, they would have seen that evidence and more. Because the photograph was proper trial evidence, the use of admissible evidence during a penalty phase to educate the new jury about the case was entirely permissible. That is all that Teffeteller holds. At no time did this court in Teffeteller even suggest that evidence not admissible to prove the underlying crime could be used to aid the jury in understanding the facts of the crime.

The same is true for the state's citation to Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977), which does not stand for the proposition that any evidence relevant to the defendant's character is admissible in a penalty phase. (Initial Brief of Petitioner, at 18).[10/] The Elledge case involved a murder defendant who had a prior homicide conviction. During the sentencing phase, the trial court allowed the prosecution to introduce the facts of the murder conviction when proving the aggravating factor of prior criminal history. §921.141(5)(b), Fla.Stat. Because the facts of that prior crime were relevant to a statutory aggravating factor, this court concluded it was not error to admit

---

10/ Respondents question what relevance victim impact evidence has on the character of a defendant, since the focus of such evidence is on the decedent's character.

the evidence. The court did not, however, authorize consideration of non-statutory aggravating evidence, as the state seeks to do in the case of victim impact evidence.

As concluded by the trial court in this case and as approved by the appellate court, the alteration of Florida's carefully structured capital sentencing scheme works a constitutional disservice to the principles governing due process and the Eighth Amendment. The addition of a new "weighing" circumstance which is totally subjective and which does not rise to the level of an enumerated aggravating factor leads to the same arbitrary and capricious imposition of the death penalty that had characterized earlier versions of the capital sentencing statute. As the trial court recognized, the use of victim impact evidence is akin to a back door 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 is also contrary to the stated goal of having the jury and judge make a cold and dispassionate assessment of the aggravating and mitigating factors." (R 74-75). Even the state's arguments at the trial court hearing appeared to concede the use of victim impact evidence was totally unbridled and not subject to any firm review, but it suggested this defect could be remedied by "a proper jury instruction" or a proportionality review. (R 115, 117-118).

Utilizing an analogous principle, this court previously recognized, in Burns v. State, 609 So. 2d 600 (Fla. 1992), that the background and character of the deceased as a law enforcement officer is not relevant to any material fact at issue during a penalty phase proceeding. The importance of Burns cannot be underestimated in this case, particularly because it was decided after the Supreme Court's Payne decision. In light of Burns, it

seems this court continues to recognize that strict adherence to the statutory aggravating circumstances is essential in a penalty proceeding.[11/]

Similarly, in Taylor v. State, 583 So. 2d 323, 329-330 (Fla. 1991), this court required a new penalty phase proceeding simply because the prosecutor made an argument designed to invoke sympathy for the deceased victim. That such an argument was improper was evident from the prior decision of Jackson v. State, 522 So. 2d 802, 809 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 183 (1988), which found an analogous argument error "because it urged consideration of factors outside the scope of the jury's deliberation." Even a jury instruction on an invalid aggravating circumstance constitutes an Eighth Amendment violation. Espinosa v. Florida, ___ U.S. ___, 112 S. Ct. 2926 (1992). As these cases illustrate, Florida's capital sentencing scheme works because subjectivity, arbitrariness, and discretion are limited or nonexistent. Any factor which injects even a modicum of randomness into the death penalty equation offends the constitutionality of the statute.

The statutory authority allowing the jury to consider subjective and intangible victim impact evidence runs afoul of the constitutionally mandated requirement of strict adherence to the enumerated factors when justifying a death sentence. As a weighing factor which is not a statutory or non-statutory aggravating factor, the victim impact statute gives unfettered discretion to the jury to consider this circumstance for any imaginable purpose. The statute gives no guidance as to the burden of proof, how a jury is supposed to objectively weigh and balance this subjective evidence, how a court is to analyze the effect of the victim impact evidence, or even the manner in which this

---

[11/] The state does not address the application of Burns in its initial brief.

weighing factor alters the balance of aggravating and mitigating circumstances. This lack of certainty and definiteness runs afoul of the constitutional limitation on discretion in a capital sentencing proceeding.

> [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Godfrey v. Georgia, 446 U.S. 420, 427, 100 S. Ct. 1759, 1764 (1980)(citation omitted).

In the earlier decision of Gregg v. Georgia, 428 U.S. 153, 195 n. 46, 96 S. Ct. 2909 (1976), the Court noted a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." To eliminate that possibility, any valid capital sentencing statute must guide and limit the available discretion by "clear and objective standards," Gregg v. Georgia, 428 U.S. at 198, 96 S. Ct. at 2936, that provide "specific and detailed guidance," Proffitt v. Florida, 428 U.S. at 253, 96 S. Ct. at 2967, and that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303, 96 S. Ct. 2978, 2991 (1976) (Stewart, Powell, and Stevens, JJ.).

As strict as this federal protection is, the Florida Constitution requires that victim sympathy evidence and argument be excluded from consideration of whether death is an appropriate sentence. Our state constitution provides broader protection than the United States Constitution. This court has discussed that additional protection in finding significant the disjunctive wording of Article I, §17 of the Florida Constitution, which

prohibits "cruel or unusual punishment." Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).[12/] Tillman held that a punishment is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. Allowing victim sympathy in the form of "victim impact" evidence crosses that constitutional line by allowing a random, unchanneled process of imposing a penalty based on the character of the victim and the quality of the evidence presented by the victim's family and friends.

Victim impact evidence also violates the due process protections of the Florida Constitution. Art. I, §9, Fla. Const. As Tillman explained, under Art. I, §9, "death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than lesser penalties." Id. at 169. In a capital case, the required level of judicial scrutiny and proportionality review mandate the conclusion that victim impact evidence violates the Florida Constitution because the evidence is nothing more than undecipherable opinions and conclusions not capable of dispassionate application or review.

The trial court recognized the imbalance in a capital sentencing scheme which permits consideration of highly arbitrary and subjective victim impact evidence. The trial court concluded that the victim impact statute essentially puts a price tag on homicide cases, allowing the jury to determine the "worth" of the case by reference to the "value" of the victim. The lower tribunal believed this interplay was troubling:

> 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 judge in determining how much weight should be given to the statutory aggravating factors which

---

[12/] This wording is in contrast to the ban on "cruel and unusual punishment" in the Eighth Amendment to the United States Constitution.

> have already been established." [footnote omitted] By way of example the State argues that if it were seeking to prove 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 kind of evidence qualify as a non-statutory aggravating circumstance it is also contrary to the stated goal of having the jury and judge make cold and dispassionate assessment of the aggravating and mitigating factors.

(R 73-75).

In the present case, the victim is a law enforcement officer. That fact may itself be a statutory aggravating circumstance. §921.141(5)(j). Any other evidence about the victim's character constitutes an impermissible nonstatutory aggravating circumstance. The "victim impact" statute, by its very terms, identifies this evidence as something other

than an enumerated aggravating circumstance, by announcing that victim impact comes into play "[o]nce the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5)..." §921.141(7). Plainly, the legislature intended by its placement of the victim impact subsection that such evidence was not to be considered an enumerated aggravator but was instead a factor which could alter the weighing process in favor of the aggravating circumstances.

This court's decision in Grossman v. State, 525 So. 2d 833 (Fla. 1988), capably establishes victim impact evidence as an unenumerated aggravating factor which has no place in the capital sentencing scheme. There, the court acknowledged that "victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence." Id. at 842. The only valid aggravating factors, the court held, were those enumerated in §921.141(5).

As the trial court noted, "[t]he testimony [sought to be introduced by the state] will undoubtedly praise the victim as an exceptional police officer..." (R 75). Such testimony is neither factually verifiable nor relevant to the enumerated aggravating circumstances. It is opinion evidence that is solely designed to develop sympathy for the victim and outrage for the crime. On this point, the trial court noted:

> The aggravating factor [of a law enforcement victim] 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 "law enforcement officer engaged in the performance of his official duties" is superfluous and consequently irrelevant to prove the

permissible aggravating circumstance. [footnote omitted].

(R 75-76).

If, as the state contends, victim impact evidence is merely a method of giving "the jury a complete understanding of the crime" (Initial Brief of Petitioner, at 23), then it is unnecessary evidence which commands no particular use in a capital sentencing proceeding. Here, the jury was aware of the relevant facts of the case, having considered all evidence which was relevant on the issue of guilt. At sentencing, the jury knew enough about the case, the victim, and respondents to conclude the death penalty was appropriate (except in the case of San Martin). Having reached that conclusion on the basis of admissible evidence and statutorily enumerated aggravating circumstances, adding victim impact to the balance is negligible. Because such evidence is so amorphous and incapable of ready comprehension, however, its use unacceptably compromises the constitutionality of the capital punishment statute.

The Fourth District's Maxwell decision concluded that victim impact evidence is not offensive and that its use does not unfairly alter the balance of aggravating and mitigating circumstances. That court believed that victim impact evidence was neither aggravating nor mitigating evidence, but was instead some undefinable "*other* evidence, which is not required to be weighed against, or offset by, statutory factors." Maxwell. Respondents disagree with that conclusion, and suggest that the Maxwell holding is entirely inconsistent with this court's decisions in Burns, Grossman, and Jackson. If victim impact evidence is not an allowable aggravating or mitigating circumstance, it has no role in the penalty process. The Maxwell decision, then, rests on an unsound and unsupportable foundation. This court should reject the Maxwell holding.

The state also argues that Florida's "victim rights" provision of the Constitution, Art. I, §16(b), Fla.Const., compels a trial court to allow victim impact evidence in a capital sentencing proceeding. That is an unusual, and so far unprecedented, reading of the Florida Constitution. Section 16(b) of the Declaration of Rights creates no substantive amendment to the evidence code, but is instead designed to give victims a limited right to participate in the criminal process. E.g., Sireci v. State, 587 So. 2d 450, 454 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1500 (1992)(wife and son of homicide victim permitted to observe sentencing hearing after completion of their testimony, which did not involve victim impact evidence). The constitutionally mandated participation by a victim does not extend to the presentation of evidence during a penalty phase.

In summary, the victim impact statute is a ploy to enable the jury or judge to impose a death sentence based on the subjective worth of the victim. The statute will cause the arbitrary and capricious application of an utterly vague and unworkable law. The statute promotes a callous disregard for the orderly and defined procedure which has been identified by the courts as the guidepost of Florida's capital sentencing scheme. Because of these infirmities, the statue is unconstitutional as applied to this case and cannot be used to admit subjective evidence of non-statutory aggravating factors.

C. The Lower Tribunal Properly Held That Application Of §921.141(7) Violates *Ex Post Facto* Protections.

The statute in question took effect in July 1992. The offense in this case occurred in January 1992. In Miller v. Florida, 482 U.S. 423, 430 (1987), the Court held a law is *ex post facto* if "two critical elements [are] present: First, the law must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" (quoting Weaver v. Graham, 450 U.S. 24, 101

S. Ct. 960 (1981)). As the trial court found and as the appellate court apparently concluded, both elements are present here.

This law adds a powerful new reason for imposing the death penalty. The previously well-recognized exclusion of victim impact evidence because of its inflammatory, nonstatutorily aggravating nature is a clear and present recognition of the new law's substantial disadvantage to these respondents. Grossman v. State, 525 So. 2d 833 (Fla. 1988) (holding victims' rights unlawful in capital sentencing); Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 (1987)(declaring victim impact evidence violative of the Eighth Amendment). In Talavera v. Wainwright, 468 F.2d 1013 (5th Cir. 1972), the court struck down the retrospective application of a new rule which made obtaining a severance more difficult. The new law violated the *ex post facto* clause of the Constitution. The court stated, at 1015-1016:

> We think it is sufficient to repeat without lengthy citation what is now an axiom of American jurisprudence: The Constitution prohibits a state from retrospectively applying a new or modified law or rule in such a way that a person accused of a criminal offense suffers any significant prejudice in the presentation of his defense.

The application of the victim impact statute to this case will have a devastating impact on the outcome of the penalty proceeding. The victim impact statute shifts the focus of the penalty phase away from the aggravating and mitigating evidence, and instead promotes sympathy for the victim. The statute essentially represents a new definition of the death penalty, allowing even less justification for imposing the ultimate penalty in more cases. The statutory change, additionally, has the direct effect of punishing a particular act more grievously, depending on its victim impact. In this regard, the statutory alteration is identical to the addition of a new aggravating circumstance

which could be weighed in determining the propriety of a death sentence.

The state argues that victim impact evidence does not constitute a statutory aggravating factor and is therefore not violative of *ex post facto* principles. That is an erroneous analysis of the *ex post facto* prohibition. See Combs v. State, 403 So. 2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258 (1982); Valle v. State, 581 So. 2d 40 (Fla.), cert. denied, 112 S. Ct. 597 (1991) (court permitted the use of later-created aggravators in narrowly defined circumstances). The state's principal argument supporting its *ex post facto* position is derived from Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 907, 109 S. Ct. 3219 (1989), the same case upon which the Fourth District's Maxwell decision was based. Glendening ruled that a hearsay exception was applicable to a case even though the evidentiary change became effective after the charged conduct. Far from supporting the state's position, Glendening compels the conclusion the victim impact statute cannot constitutionally be applied to this case.

This court's Glendening decision recognized two different definitions of an *ex post facto* law, 536 So. 2d at 214-215:

> One statement of the characteristics of an *ex post facto* law set forth by the Supreme Court, however, provided that "'any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.'" Dobbert v. Florida, 432 U.S. 282, 292, 97 S. Ct. 2290, 2297 (1977)(quoting Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S. Ct. 68, 69, (1925). Another formulation, reiterated recently in Miller v. Florida, also provides that "1[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender'" violates the prohibition against *ex post facto* laws. 482 U.S. 423, 107 S.

> Ct. 2446, 2450 (197)(quoting Calder v. Bull, 3 U.S. (Dall.) 386, 1 L.Ed. 648 (1798)). No *ex post facto* violation occurs if a change is merely procedural and does not alter "substantial personal rights." Miller, 107 S. Ct. at 2451; Dobbert, 432 U.S. at 293, 97 S. Ct. at 2298.

Using either formulation, the victim impact statute falls within the *ex post facto* prohibition. The legislative change essentially "makes more burdensome the punishment for a crime" since it increases the aggravating factors to be considered when imposing the death penalty. Prior to the statutory amendment, victim impact evidence was flatly prohibited from being used as a death penalty consideration. Burns. After the amendment, the victim impact could, if present with any statutory aggravator, be used to justify the death penalty. Seen in this light, §921.141(5) alters the allowable punishment for actions taken prior to its effective date.

The second formulation of an *ex post facto* law, the Miller v. Florida test, is also satisfied in this case. Because this legislation alters the mix of evidence required to prove entitlement to the death penalty and it expands the universe of situations in which the death penalty is available, the statute thereby makes it easier for the state to obtain a death sentence. Whereas prior to the amendment a jury could only consider the enumerated aggravating circumstances in evaluating whether the mitigating circumstances outweigh the aggravating factors, §921.141(2), that same jury is today able to consider an additional factor, the victim impact evidence. §921.141(5). That change alters the legal rules of evidence and facilitates the state's burden. That is precisely the evil the *ex post facto* clause was intended to avoid.

This court's opinion in Valle v. State, 581 So. 2d 40 (Fla.), cert. denied, ___ U.S. ___, 112 S. Ct. 597 (1991), is instructive on the *ex post facto* issue. In Valle, this court

held that application of §921.141(5)(j)(killing police officer while engaged in the lawful performance of his duties) to an offense occurring prior to the enactment of that factor does not violate the prohibition against *ex post facto* laws. The rationale for that holding was simple: this was not an entirely new factor but was always available by proof of two existing factors - murder to prevent lawful arrest and murder to hinder the lawful exercise of any governmental function or the enforcement of laws. §§921.141(5)(e) & (g), Fla.Stat. (1977). Consequently,

> [b]y proving the elements of these two factors in this case, the state has essentially proven the elements necessary to prove the murder of a law enforcement officer aggravating factor. In any event, [the defendant] is not disadvantaged because the trial judge merged these three factors into one aggravating factor.

Valle, 581 So. 2d at 47 (footnote omitted).

Using Valle as a guidepost, there can be no doubt that victim impact evidence has a different effect in this case. Victim impact was never an allowable consideration under the prior law. No admissible evidence at a sentencing hearing could even approximate let alone equate to victim impact evidence under the former law. The amendment creates an entirely new consideration which disadvantages a defendant. Consequently, its application to crimes occurring before its effective date is prohibited.

This court has ruled, additionally, that a law may be *ex post facto* even if it is procedural in nature. In Dugger v. Williams, 593 So. 2d 180 (Fla. 1991), the court held that retrospective application of a statute making defendants convicted of capital felonies ineligible for a mandatory recommendation for executive clemency violated the *ex post facto* provision of the Florida Constitution. In so holding, the court noted, at 181:

> [I]t is too simplistic to say that an *ex post facto* violation can

> occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect. Where this is so, an *ex post facto* violation also is possible, even though the general rule is that the *ex post facto* provision of the state constitution does not apply to purely procedural matters.

At the time of the charged crime in this case, Florida law prohibited consideration of victim impact evidence as a sentencing consideration. This was then a substantive right protected against prejudicial alteration by the *ex post facto* clauses of the United States Constitution and the Florida Constitution. In the event the statute is deemed to be purely procedural, the law nonetheless has a substantive effect which compromises the *ex post facto* prohibition. The Third District properly declined to allow the prosecution to use victim impact evidence.

D. Section 921.141(7) Is Vague, Overbroad, and Violative Of The Due Process Guarantee Of The Florida And United States Constitutions.

The victim impact statute is too broadly written, providing only that "such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the communities' members by the victim's death." This statutory language contains no definitions or limitations, which is troubling from a constitutional point of view. But that is not all. The statute further provides that "characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence." This proviso is irreconcilable with the preceding sentence, because victim loss is nothing but a personal opinion. The statute fails to give fair notice of what constitutes a characterization or opinion about a crime.

A penal statue must be definite in order to be valid. Cuda v. State, 639 So. 2d 22 (Fla. 1994); Locklin v. Pridgeon, 158 Fla. 737, 30 So. 2d 102 (Fla. 1947). When the

language of a statute is indefinite, the statute is unconstitutional. D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977) The victim impact statue clearly fails under any prevailing standard of definiteness. Consider, for example, the phrase "loss to the community." We could argue and debate the contours of that language and never identify the precise community or the members who comprise a community. Does community mean a municipality or a neighborhood? Is a victim's community determined by membership in the Kiwanas or the local Rotary Club? Is a well known and successful victim considered to have a different community than a homeless or indigent decedent living in the same vicinity? What if two victims, one rich and white and the other poor and hispanic, live in the same city? Can they be treated differently for "victim impact" purposes? Will we have death sentences by public opinion poll or popularity contest?

Consider, too, the phrase "uniqueness as a human being." Is it not a generally accepted tenet in our society that each and every person is unique? What sort of moral or philosophical direction was intended by the legislature's effort to define a person's intrinsic worth? The statutory phrase has neither definition nor limitation. Who or what defines uniqueness? What separates one unique victim from another? Even the sentencing guidelines, in authorizing an upward departure because of the victim's status, do not purport to permit such unbridled discretion in evaluating the moral worth of an individual. Fla. R. Crim. P. 3.990 (Reasons for Departure -- Aggravating Circumstances). How, then, can a death penalty statute pass constitutional muster by using such open ended and vague language.

The constitutional deficiency in the lack of any definition for these and other terms causes a serious dilemma for any defendant facing the death penalty decision. How

does a defendant prepare for the onslaught of subjective opinion evidence? What measure does the defense team utilize to determine if known or unknown factors will be presented at the penalty phase proceeding? Will the application of these suspect terms be left to the jury or judge? Will a jury instruction be used to guide the jury? And what does the victim impact evidence do to the jury instruction that admonishes the jury to eliminate both sympathy and anger from its consideration?

The courts have frequently addressed the issue of vagueness of legislatively defined aggravating circumstances. Claims of vagueness directed at aggravating circumstances in capital punishment statutes characteristically assert the challenged provision fails adequately to inform juries what they must find to impose the death penalty. The resulting open ended discretion results in the same constitutionally invalid statute condemned by Furman v. Georgia. The victim impact statute offers no real guidance for determining the presence or absence of the statutory non-enumerated factor. That is a constitutionally significant omission.

If this court considers that victim impact evidence as an enumerated aggravating circumstance would be unconstitutionally vague because the statute provides no guidance concerning the meaning of its terms or how it is to be applied, its use as a "weighing" factor is no less unconstitutional since it does not direct the fact finders in their use of the evidence. The statute is, quite simply, an open invitation to sell the death penalty based on what positive attributes can be claimed by the victim's representatives. No death penalty procedure can survive that broad and limitless application.

What should be of considerable concern to this court is that victim impact evidence will foster the special danger of racial prejudice infecting a capital sentencing decision.

Both the United States Supreme Court and this court have recognized the danger of racial prejudice or other bias infecting a capital sentencing decision when the case involves a minority defendant and a white victim. Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683 (1986); Robinson v. State, 520 So. 2d 1 (Fla. 1988). This was the primary concern of Justice Douglas in his opinion finding the death penalty unconstitutional in Furman v. Georgia. In Turner, the Supreme Court concluded the Sixth and Fourteenth Amendments to the United States Constitution require that a black defendant accused of killing a white victim be given an opportunity to voir dire the jury on racial prejudice.

> Because of the range of discretion entrusted to the jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected...the risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.

106 S. Ct. at 1687-1688. That concern is a relevant issue here, where four hispanic men were found guilty of murdering a white police officer. Absent severe restrictions on the use of victim impact evidence, the sentencing phase could well have become a plea to rid the world of minority criminals such as these respondents.

Victim impact evidence asks a jury to compare the value of a victim's life with the worth of a defendant's life. The inherent risks that racial prejudice will infect this decision are unacceptable under the Florida and United States Constitutions. For these reasons, the vagueness of the victim impact evidence statute requires a finding the law is unconstitutional.

E. Section 921.141(7) Infringes Upon The Exclusive Right Of The Florida Supreme Court To Regulate Practice And Procedure Pursuant To Art. V, §2, Florida Constitution.

Article V, Section 2 of the Florida Constitution requires the Florida Supreme Court to adopt rules for the practice and procedure in all courts.

> Practice and procedure "encompass the course, form, manner, means, methods, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J. concurring). It is the method of conducting litigation involving rights and corresponding defenses. Skinner v. City of Eustis, 147 Fla. 22, 2 So. 2d 116 (1941).

Haven Federal Savings and Loan Association v. Kirian, 579 So. 2d 730, 732 (1991). These principles have compelled courts to invalidate a wide variety of laws, including such statutes as juvenile speedy trial, RJA v. Foster, 603 So. 2d 1167 (Fla. 1992), severance of trials involving counterclaims against foreclosure mortgages, Haven, waiver of jury trials in capital cases, State v. Garcia, 229 So. 2d 236 (Fla. 1969), and the regulation of voir dire examination. In re Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204, 205 (Fla. 1973).

The statute under consideration in this case attempts to regulate "practice and procedure." In so doing, the statute unconstitutionally invades the province of the supreme court by providing an evidentiary presumption that victim impact evidence will be admissible at the penalty phase of a capital case, regardless of its relevance to a statutory aggravating circumstance. The statutory authorization to argue evidence that has previously been determined to be irrelevant also raises questions which are properly for the Florida Supreme Court. The lack of relevance of the evidence is at odds with the

statutory presumption, as indicated by the court in Jackson v. State, 522 So. 2d 802 (Fla. 1988). There, the supreme court condemned the prosecutor's argument that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced only to life in prison. The decision in Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), is also apropos:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passion of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than a logical analysis of the evidence in light of the applicable law.

The state rejects the contention that this statute unconstitutionally infringes upon the supreme court's exclusive right to regulate practice and procedure by citing Booker v. State, 397 So. 2d 910 (Fla.), cert. denied, 454 U.S. 957, 102 S. Ct. 493 (1981). Booker, however, is not on point. The Booker court merely held that a statutory sentencing scheme does not infringe upon practice and procedure. The victim impact statute is a different matter, since it cannot be substantive law, inasmuch as the state concedes victim impact evidence is not an aggravating circumstance. Rather, as a factor that simply goes into the "weighing" equation, it is for the courts to determine relevance and utility, not the legislature.

CONCLUSION

The appellate court properly concluded that the victim impact statute is not applicable to this case. Additionally, the statute is unconstitutional for the many reasons

set out in this brief. The decision of the Third District should be affirmed.

Respectfully submitted,

SALE & KUEHNE, P.A.

Courvoisier Centre, #500
601 Brickell Key Drive
Miami, Florida 33131-2651
Telephone: 305/789-5989
Fax: 305/789-5987
Counsel for Respondents

By: 
BENEDICT P. KUEHNE
Florida Bar No. 233293

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 21st day of December 1994, to Randall Sutton, Esq., Assistant Attorney General, Office of the Attorney General, 401 N.W. 2d Avenue, Suite N-921, P. O. Box 013241, Miami, Florida 33101; Ronald Guralnick, Esq., One Biscayne Tower, Suite 1928, 2 South Biscayne Blvd., Miami, Florida 33131; Eric Cohen, Esq., 2550 South Dixie Road, Suite 206, Coral Gables, Florida 33134; William D. Matthewman, Esq., 9130 South Dadeland Blvd., Suite 1129, Miami, Florida 33156; Louis Casuso, Esq., 701 Brickell Avenue, Suite 2080, Miami, Florida 33131; Marian Garcia, Esq. Grove Plaza, Second Floor, 2900 S.W. 28th Terrace, Coconut Grove, Florida 33133; Reemberto Diaz, Esq., 1840 West 49th Street, Suite 105, Hialeah, Florida 33012; and to Bruce Fleisher, Esq., 4601 Ponce de Leon Blvd., Suite 310, Miami, Florida 33176.

By: 
BENEDICT P. KUEHNE