IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,373

THE STATE OF FLORIDA,

Petitioner

vs.

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

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INITIAL BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, the STATE OF FLORIDA, was the prosecution in the trial court, and the petitioner before the Third District Court of Appeal, and will be referred to as "Petitioner" or "the State". Respondents, FERNANDO FERNANDEZ, LEONARDO FRANQUI, PABLO SAN MARTIN, and RICARDO GONZALEZ, were the defendants at trial and the respondents in the district court. They will be referred to as "Respondents". The symbol "R." will be used to refer to the record on appeal. The symbol "S.R." will be used to refer to the supplemental record on appeal.[1]

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[1] The State has filed a motion to supplement the record contemporaneously with this brief.

STATEMENT OF THE CASE AND FACTS

Respondents were charged with the first degree murder of a law enforcement officer, North Miami Police Officer Steven Bauer, which occurred on January 3, 1992. (S.R. 1). If Respondents were convicted as charged, the State intended to seek the death penalty. (R. 23). At the penalty phase, the State intended to establish evidentiary support for a number of statutory aggravating circumstances as set forth in section 921.141(5), Florida Statutes (1992). The State also filed a motion, pursuant to § 921.141(7), Fla. Stat. (1992), to introduce victim impact evidence. (R. 23-27).

The Motion to Admit Victim Impact Evidence in the Penalty Phase argued that victim impact evidence was admissible since it is a type of evidence about the crime which is used by the sentencer in determining an appropriate sentence. The State further argued that victim impact evidence was not a nonstatutory aggravating circumstance and that victim impact evidence could not be admitted unless and until an enumerated statutory aggravating circumstance was found to exist. (R. 23-26).

Respondents filed a memorandum of law in opposition to the State's motion. (R. 23-44). Respondents also filed a motion to adopt an order of a Broward County Circuit Court Judge which

declared the statute to be unconstitutional.[2] (R. 45-46). On March 4, 1994, a hearing was held on the State's motion, and at its conclusion the trial court reserved ruling. (R. 80-122, 118).

On March 15, 1994, the trial court entered an order finding § 921.141(7), Fla. Stat. (1992), unconstitutional. The trial court ruled that the admission of victim impact evidence would establish a nonstatutory aggravating circumstance. As such, the court concluded that the statute violated the right to due process of law, conferred by Art. I, § 9, Fla. Const., as well as the Eighth and Fourteenth Amendments of the United States Constitution. The trial court also found the application of the statute to the instant case would violate the ex post facto clauses of both the Florida and United States Constitutions because the statute was enacted after the present crime was committed. (R. 70-79).

On April 13, 1994 the State filed a petition for writ of common law certiorari in the Third District Court of Appeal. (R. 1-21). During the pendency of the certiorari action, on June 2, 1994, the jury returned a verdict finding Respondents guilty as charged. (S.R. 6, 23, 37, 58). The penalty phase proceedings were scheduled to begin on September 19, 1994. (R. 147). A response to the petition was served on July 4, 1994. (R. 149-

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[2] This order was reversed in Maxwell v. State, 19 Fla. L. Weekly D1706 (Fla. 4th DCA August 10, 1994).

186). On July 18, 1994, the district court denied the petition stating:

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

(R. 187).

The State filed a motion for clarification[3] and certification on August 2, 1994. The motion requested that the district court certify the question as one of great public importance. (R. 188-195). On August 11, 1994, the State filed a supplement to its motion for certification, asserting conflict between the Third District's holding and State v. Maxwell, 19 Fla. L. Weekly D1706 (Fla. 4th DCA August 10, 1994). (R. 202-211). On September 7, 1994, the Third District entered an order certifying to the Supreme Court of Florida that its decision was in conflict with Maxwell. (R. 220).

On September 9, 1994, the State filed a notice to invoke discretionary jurisdiction. (R. 221). On September 20, 1994, this court entered an order postponing the decision on jurisdiction and setting a briefing schedule. (R. 222). On September 23, 1994, after a penalty-phase trial in which victim impact evidence was not introduced, a jury recommended that

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[3] The motion for clarification was addressed to an apparent typographical error in the opinion which referred to § 921.143(7), Fla. Stat., rather than § 921.141(7), the section in dispute.

Respondents Fernandez, Gonzalez and Franqui be sentenced to death. (S.R. 6, 23, 58). Respondent San Martin received a life recommendation. (S.R. 37). On October 11, 1994, Judge Rodolfo Sorondo sentenced all four respondents to death. (S.R. 21, 35, 56, 76).

POINT ON APPEAL

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT SECTION 921.141(7), FLA. STAT., THE "VICTIM IMPACT" STATUTE, COULD NOT BE APPLIED TO RESPONDENTS' TRIAL WHERE THE MURDER WAS COMMITTED PRIOR TO THE ENACTMENT OF THE STATUTE WITHOUT VIOLATING *EX POST FACTO* PRINCIPLES, WHERE THE STATUTE IS NOT SUBSTANTIVE IN NATURE?

SUMMARY OF ARGUMENT

The district court declined to vacate the order of the trial court, holding simply that the victim impact statute did not apply to a the sentencing phase of a murder trial where the crime was committed prior to the statute's enactment. The trial court had held that victim impact evidence was irrelevant to capital sentencing proceedings, that the statutory subsection providing for the admission of such evidence created an unconstitutional nonstatutory aggravating circumstance, and that the statute was thus substantive and therefore in any event could not apply to crimes, such as the one herein, which were committed after its enactment. In the decision with which the Third District has certified conflict, the Fourth District found that the statute was evidentiary in nature and was thus constitutional, and further, could be applied retroactively.

The State submits that under controlling federal and state law, the victim impact statute is merely evidentiary in nature and as such, it may be properly applied to the case at hand without violating ex post facto principles.

The State further submits that recent precedent of both this court and the United States Supreme Court clearly hold that victim impact evidence is both relevant to capital sentencing determinations, and that such evidence is constitutionally

permissible, if authorized under state law. The provision at issue here is just such a law.

Finally, although victim impact evidence does not directly prove any aggravating circumstance, it does provide the sentencer with a context in which to place the defendant's crime. It has long been the law of this state that evidence may be admitted for the purpose of placing the crime in context even though it does not directly prove an aggravating factor. Such evidence does not create a nonstatutory aggravating circumstance and may be properly received.

The judgment below should be reversed, and the conflicting decision of the Fourth District should be approved.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT SECTION 921.141(7), FLA. STAT., THE "VICTIM IMPACT" STATUTE, COULD NOT BE APPLIED TO RESPONDENTS' TRIAL WHERE THE MURDER WAS COMMITTED PRIOR TO THE ENACTMENT OF THE STATUTE WITHOUT VIOLATING *EX POST FACTO* PRINCIPLES, WHERE THE STATUTE IS NOT SUBSTANTIVE IN NATURE.

A. INTRODUCTION

Both the trial court and the Third District Court of Appeal held that § 921.141(7), Fla. Stat., the "victim impact" statute, could not be applied to Respondents. The Fourth District held the statute could be applied to similarly situated Chester Maxwell. Maxwell v. State, 19 Fla. L. Weekly D1706 (Fla. 4th DCA August 10, 1994).

The Third District determined that the statute did not apply to Respondents because the crime was committed after its effective date. (R. 187). Although the court did not set forth the basis of its conclusion, its opinion must be viewed as an approval of the trial court's reasoning. Ex post facto principles would prevent retroactive application only if the statute were assumed to be substantive in nature. Further, the district court certified that its opinion conflicted with Maxwell. In Maxwell, the Fourth District rejected the findings of the trial court that the statute established a nonstatutory

aggravating circumstance and that the statute could not be applied retroactively.[4]

The trial court below had concluded: (a) that victim impact evidence was irrelevant to the proof of any permissible aggravating circumstance; (b) that the statute established an impermissible nonstatutory aggravating circumstance and thus violated Respondents' due process rights; and (c) that because the statute established an aggravating circumstance, albeit an impermissible one, it was substantive rather than procedural and thus could not be applied here, where the crime was committed subsequent to its enactment. (R. 70-79).

Although the Third District's ruling was apparently based upon ex post facto grounds, its holding appears also to approve the trial court's other conclusions. The State will therefore first present an analysis of retroactivity, followed by a discussion of the interrelated issues of whether victim impact evidence is relevant and whether the statute establishes an aggravating circumstance.

As a preliminary matter, it should be remembered that when examining the constitutionality of a legislative enactment, the courts must presume that the legislature intended a

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[4] Maxwell also rejected the claim, not explicitly raised below, that § 921.141(7) impermissibly invades the rule-making province of this court. Such contention is without merit. Booker v. State, 397 So. 2d 910 (Fla. 1987).

constitutional result. Sandlin v. Criminal Justice Standards & Training Commission, 531 So. 2d 1344, 1346 (Fla. 1988). Moreover, courts will avoid declaring a statute unconstitutional if such statute can be fairly construed in a constitutional manner. Id. Such a construction is possible here.

B. THE APPLICATION OF § 921.141(7), FLA. STAT., TO RESPONDENTS DOES NOT VIOLATE *EX POST FACTO* PRINCIPLES.

The Third District Court of Appeal declined to grant the State's petition for common law certiorari, finding that § 921.141(7), Fla. Stat., did not apply to Respondent's crime because it was committed before the enactment of the statute. The Fourth District reached a contrary result in Maxwell, finding that the section does not purport to affect personal rights, but only relates to the admission of evidence, citing Glendening v. State, 536 So. 2d 212 (Fla. 1988).[5] Maxwell, at D1706. Although the amendment to § 921.141 became effective July 1, 1992, after Respondents murdered Officer Bauer, its application to Respondents' penalty phase trial would not have violated ex post facto principles. The State would submit that the Fourth District's interpretation should be approved.

In Glendening, this court recognized two formulations for determining whether a law violates ex post facto principles. The first was derived from Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977):

> [A]ny 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

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[5] The trial court below conceded that if it had not found the statute to create an impermissible aggravating factor, it would apply retroactively. (R. 78). The State submits that that underlying conclusion was error, as discussed at length, infra, pp. 17-26.

> any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Dobbert, 432 U.S. at 292; Glendening at 214.

Section 921.141(7), Fla. Stat. provides:

> Victim impact evidence - Once the prosecutor 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.

Nothing in this provison "punishes as a crime an act previously committed, which was innocent when done". The crime at issue is first degree murder; its illegality is unaffected by the amendment. Likewise, nothing in the statute "makes more burdensome the punishment for a crime, after its commission"; the punishment, assuming the existence of one or more aggravating factors enumerated under § 921.141(5) which outweigh mitigating circumstances, was and remains death. Finally, subsection (7) cannot in any respect be construed to deprive Respondents "of any defense available according to law at the time when the act was committed". Thus, under Dobbert, this statute cannot be said to be ex post facto.

The second formulation recognized in Glendening is found in Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987):

> Every 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*.

Miller, 482 U.S. at 429; Glendening, at 214 (emphasis supplied).

In Glendening, the defendant asserted that the retroactive application of the child hearsay statute to his case violated Miller's proscription. This court, however, disagreed. The rule in Miller applies, as the highlighted portion of the quote above suggests, only to those laws which "'change the ingredients of the offence [sic] or the ultimate facts necessary to establish guilt.'" Miller, 482 U.S. at 433 (quoting Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L. Ed. 262 (1884)). On the other hand, changes in the admission of evidence have been held to be procedural. Glendening, at 215.

Thus in Hopt, the law at the time of the murder in question prevented convicted felons from testifying. Prior to trial the disability was abolished, and a convicted felon testfied against Hopt at his trial, resulting in his conviction. The Supreme Court rejected Hopt's ex post facto claim. Likewise in Thompson v. Missouri, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204 (1898),

the Missouri Supreme Court reversed Thompson's murder conviction, because it was based upon certain inadmissible letters. Before retrial the law was changed, and the letters were again admitted against him, resulting in conviction. The U.S. Supreme Court rejected his ex post facto claim. In light of Hopt and Thompson, this court concluded in Glendening that the child hearsay law was also procedural and did not affect substantial personal rights because:

> As in *Hopt*, "[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remain unaffected by" the enactment of section 90.803(23). As in *Thompson*, section 90.803(23) "left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared admissible, and did not disturb the fundamental rule that the state . . . must overcome the presumption of innocence, and establish guilt beyond a reasonable doubt."

Glendening, at 215.

As in Glendening, the statute in question here is procedural and does not affect substantial personal rights. As in Hopt, the degree of proof remains the same. To obtain a sentence of death, the state must still prove that one or more of the aggravating factors found at § 921.141(5) exist, and that they are not outweighed by any mitigating circumstances. As in Thompson, the statute does not disturb or impair the sentencer's right to determine the suffiency or effect of the evidence; indeed victim impact evidence may not even be admitted until the

State has admitted evidence establishing an aggravating circumstance. § 921.141(7). Thus under Miller Respondents' ex post facto claim must be rejected.

Finally the State would submit that, assuming, arguendo, the admission of victim impact evidence could be considered to affect Respondent's substantive rights, any change in the law to that effect ocurred not in 1992, but in 1988, with the adoption of Art. I, § 16(b), Fla. Const., which provides:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right . . . to be heard when relevant, at all crucial states of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Thus § 921.141(7) even assuming some substantive right were affected by the admission of victim impact evidence, the statute would remain a procedural provision which serves only to implement the substantive terms of the Florida Constitution, which were in effect two years before the murder of Officer Bauer. Dobbert; Miller.

The Third District erred in finding that the § 921.141, Fla. Stat., does not apply retroactively. Glendenning; Dobbert; Miller; Maxwell. Its judgment should be reversed, and that of the Fourth District in Maxwell approved.

C. SECTION 921.141(7), FLA. STAT., DOES NOT ESTABLISH AN IMPERMISSIBLE NONSTATUTORY AGGRAVATING CIRCUMSTANCE.

Although not discussed in the Third District's opinion, the trial court's ruling that § 921.141(7) was unconstitutional was premised upon its concerns of relevance and its conclusion that the statute created an additional aggravating circumstance. However, the Fourth District explicitly rejected these contentions in Maxwell. An examination of the statute itself and this court's historical interpretation of Florida's capital sentencing provisions shows that § 921.141(7) does not establish an aggravating circumstance. Not only does the statute merely permit the admission of victim impact evidence during the sentencing proceeding, such evidence is clearly relevant to the sentencing determination. Maxwell, at D1706.

The presentation of a broad range of evidence has been integral to Florida's capital sentencing scheme since its inception:

> In the proceeding, evidence may be presented as to *any matter that the court deems relevant to the nature of the crime* and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the

> Constitution of the United States or the Constitution of the State of Florida.

§ 921.141(1), Fla. Stat. (emphasis supplied).[6]

Section 921.141(1) has long been interpreted by this court to allow the jury to hear evidence "which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence," Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986), or which will allow the sentencer "to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977).

In Payne v. Tennessee, 501 U.S. ___, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), the U.S. Supreme Court reiterated the principles enunciated above that a broad range of evidence may be presented to humanize the defendant in a capital sentencing proceeding:

> "We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than

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[6] Florida's death penalty statute was originally adopted in 1972, and was codified at § 921.141, Fla. Stat. Despite various attacks on the statute, the constitutionality of the statute as a whole has been repeatedly upheld by the Supreme Court of Florida and the United States Supreme Court. See Ragsdale v. State, 609 So. 2d 10 (Fla. 1992); State v. Dixon, 283 So. 2d 1 (Fla. 1973); Proffit v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

> death." Thus we have, as the Court observed in *Booth*, required that the capital defendant be treated as a "'uniquely individual human bein[g].'"

Payne at 115 L. Ed. 2d, at 733 (citations omitted).

The Payne court, however, concluded that its previous holdings in Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987)(admission of victim impact evidence during capital sentencing proceeding violated Eighth Amendment), and South Carolina v. Gathers, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989)(prosecutorial argument on victim impact during capital sentencing proceeding violated Eighth Amendment), "were wrongly decided and should be . . . overruled." Payne, 114 L. Ed. 2d at 739. The Court explained that Booth was a misreading of the Court's precedent:

> But it was never held or even suggested in any of our cases preceding *Booth* that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed. . . . This misreading of precedent in *Booth* has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant' chose to extinguish,' or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide.

Payne, 114 L. Ed. 2d at 733 (citations omitted). The court thus held that victim impact evidence was a relevant and

constitutionally permissible consideration during a capital sentencing proceeding, if a state chooses to authorize the presentation of such evidence. Id., 114 L. Ed. 2d at 736.

Florida has so chosen. Art. I, § 16(b), Fla. Const., provides:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right . . . to be heard when relevant, at all crucial states of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Further, in direct response to Payne,[7] the Florida Legislature amended § 921.141 by adding subsection (7) to specifically provide for the admission of victim impact evidence in capital sentencing proceedings.

Also following Payne, this court rejected a claim that victim impact evidence was improperly admitted during the penalty phase in Hodges v. State, 595 So. 2d 929, 933 (Fla. 1992):

> Hodges also argues that allowing testimony about the victim's prosecuting him for indecent exposure and his attempts to dissuade her from doing so, the victim's sister's breaking down in tears while testifying, and the prosecutor's closing argument violated *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440

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[7] The Senate Staff Analysis for SB 362, which became Ch. 92-81, Laws of Fla., and ultimately § 921.141(7), Fla. Stat., clearly states that the bill was a direct response to Payne. (S.R. 80-81).

(1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989). Recently, however, the United States Supreme Court held that

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about 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. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne v. Tennessee, ___ U.S. ___, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991). In so holding the Court receded from the holdings in *Booth* and *Gathers* that 'evidence and argument relating to the victim and the impact of the victim's death on the victim's are inadmissible at a capital sentencing hearing.' *Id.* at 2611 n. 2. The only part of *Booth* not overruled by *Payne* is "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Id.* The comments and testimony Hodges complains about are not the type of victim impact evidence that the Court did not address, *i.e.*, is still *Booth* error, in *Payne*. Therefore, we find no merit to Hodges' *Booth* claim.

Id. at 939.[8] Likewise in Stein v. State, 632 So. 2d 1361, (Fla. 1994), this court held that "brief humanizing remarks do not

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[8] Section 921.141(7) also excludes the type of evidence which the Payne court continued to hold inadmissible:

> . . . Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

constitute grounds for reversal," citing Payne for the proposition that in the majority of cases, victim impact evidence serves entirely legitimate purposes. Thus it is clear that victim impact evidence is a relevant consideration in a capital sentencing proceeding under both federal and state precedent. Following the above precedent the Fourth District likewise concluded in Maxwell that victim impact evidence is a proper component in capital sentencing decisions.

Nor does the admission of victim impact evidence create an impermissible "nonstatutory" aggravating factor. As pointed out in the trial court's order, this court did conclude in Grossman v. State, 525 So. 2d 833 (Fla. 1988), that victim impact evidence constituted evidence of an impermissible aggravating factor. However, in Grossman this court was following the dictates of Booth.

That victim impact evidence was not considered to establish an impermissible aggravating factor prior to Booth and Grossman is borne out by this court's holding in Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). In Jackson, the court held that Booth required a new sentencing proceeding because the trial court had allowed testimony from the sheriff regarding how the death of the victim, a deputy, had affected the sheriff's department. The Court reversed, despite the fact that the

identical issue had been raised on direct appeal, and rejected.[9] The basis for reversal was that under Witt v. State, 387 So. 2d 922 (Fla. 1980), Booth and Grossman represented a fundamental change in the law of capital sentencing, entitling Jackson to relief. Jackson, at 1198-99. It follows thus that, absent Booth, this court did not consider victim impact evidence to create an impermissible aggravating factor.[10]

It must be kept in mind that victim impact evidence may not be presented nor considered by the jury unless the State has presented evidence of the existence of one or more aggravating factors. §. 921.141(7), Fla. Stat. This limitation clearly indicates that victim impact evidence does not establish a distinct aggravating circumstance, but rather serves to present the crime and any proffered mitigation in context for the jury.

Likewise, other precedent shows that evidence which does not directly establish an aggravating circumstance may be admitted to give the jury a complete understanding of the crime. E.g., King v. State, 514 So. 2d 354 (Fla. 1987)(jury entitled to know underlying facts of conviction on resentencing). Indeed, the Supreme Court of Florida in Teffeteller ruled that a photograph of a victim, even though not relevant to prove any

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9 Jackson v. State, 498 So. 2d 406 (Fla. 1986).

10 The State would also note that the provision rejected in Grossman was a separate statutory section, § 921.143, whereas the provision here, § 921.141(7), is an integral part of the capital sentencing statute.

aggravating or mitigating factor, was nonetheless admissible at the defendant's capital resentencing proceeding:

> We note that this evidence was not used to relitigate the issue of appellant's guilt, *but was used only to familiarize the jury with the underlying facts of the case*. Had this jury also been the same panel that originally determined appellant's guilt, it would have been allowed to see more than simply this one photograph. As we recognized in *Henderson v. State*, 463 So. 2d 196, 200 (Fla.), cert. denied, ___ U.S. ___, 105 S. Ct. 3542, 87 L. Ed. 2d 665 (1985), *"[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments."* Again, *in* Henderson, *we said relevancy is the test of admissibility.* Id. *The essence of appellant's claim here is that the photograph was not relevant to prove any aggravating or mitigating factor and should, therefore, not have been admitted.* The issue, however, is broader than framed by appellant. Section 921.141(1), Florida Statutes (1985), provides in pertinent part that in capital sentencing proceedings, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime." We find that the photograph in question here clearly comes within the purview of the statute. *We hold that it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum.*

(Emphasis supplied). Id., at 745. The evidence in Teffeteller did not constitute an aggravating circumstance but, like victim impact evidence, was relevant in and of itself since it placed the crime and the victim's death in its proper context. The evidence was not independently weighed but merely considered in rendering an appropriate sentence.

As a final example, Florida law mandates that in cases of felony murder where the death penalty is sought to be imposed upon the non-triggerman, the jury must make certain findings before it can recommend a sentence of death. Jackson v. State, 502 So. 2d 409 (Fla. 1986). The jury is instructed that in order to recommend death, it must find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed or that the defendant was a major participant in a felony that resulted in murder and his mental state was one of reckless indifference.[11] The jury's finding under Jackson does not amount to an aggravating circumstance; it is significantly not enumerated under § 921.141(5), but nonetheless must be considered and found. Thus, contrary to the trial court's order, Florida law allows, and in certain circumstances mandates, the consideration of evidence and circumstances not listed as aggravation or mitigation under § 921.141.[12]

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[11] This finding must be made not only in accordance with Florida law, but also in accordance with the Supreme Court's decision in Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

[12] To the extent that the trial court was concerned with proportionality, (R. 74), the State would cite to Payne:

> Payne echoes to concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. As a general matter, however, victim impact evidence is not

Thus the trial court erred in concluding that the victim impact statute creates an improper aggravating factor. The Third District's implicit acceptance of that conclusion was likewise error, and should be reversed. Finally, the State would submit that for the foregoing reasons, the opinion of the Fourth District in Maxwell should be approved.

> offered to encourage comparative judgments of this kind--for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murdered of a reprobate does not. It is designed to show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be. The facts of *Gathers* are an excellent illustration of this: the evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

(Citations omitted). Payne, 115 L. Ed. 2d at 734. Of course, this court will undertake a proportionality review of those cases where victim impact evidence is presented just as it does in cases where victim impact evidence is not presented. Tillman v. State, 591 So. 2d 167 (Fla. 1991).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this court to reverse the judgment of the Third District Court of Appeal below, and to approve the opinion of the Fourth District Court of Appeal in Maxwell.

Respectfully submitted,

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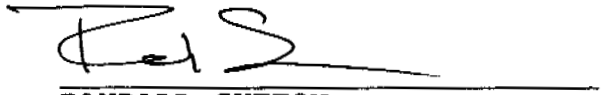
Attorney General



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing INITIAL BRIEF OF PETITIONER ON THE MERITS was mailed to **RONALD GURALNICK, Esq.,** 1928 One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131, **ERIC COHEN, Esq.,** 2550 South Douglas Road, Suite 206, Coral Gables, Florida 33134, **BILL MATTHEWMAN, Esq.,** 9130 South Dadeland Boulevard, Suite 1129, Miami, Florida 33156, **LOUIS CASUSO, Esq.,** 3120 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131, **MARIAN GARCIA, Esq.,** Grove Plaza, 2nd Floor, 2900 S.W. 28th Terrace, Coconut Grove, Florida 33133, **REEMBERTO DIAZ, Esq.,** 1840 West 49th Street, Suite 105, Hialeah Florida 33012, **BRUCE FLEISHER, Esq.,** 4601 Ponce de Leon Boulevard, Suite 310, Miami, Florida 33176, and **BENEDICT P. KUEHNE, Esq.,** Courvoisier Centre, #500, 601 Brickell Key Drive, Miami, Florida 33131 this 17th day of October, 1994.

RANDALL SUTTON
Assistant Attorney General