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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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PETITIONER'S REPLY BRIEF

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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. Respondents' argument regarding jurisdiction is not proper in a case where the district court has certified conflict, and in any event is without merit.

Respondents assert that "this court must first determine whether the merits of the conflict issue should be reached," (A.B. 4),[1] and then proceed to argue that no conflict exists because the Third District did not decide the case on the merits. (A.B. 4-11). This argument is both improper in the present procedural posture, and without merit.

Respondents cite no authority for their contention that this court must determine whether it has jurisdiction in certification cases. The State has located no authority for such a novel proposition. The Florida Constitution and the Florida Rules of Appellate Procedure confer discretionary jurisdiction upon this court over "any decision of a district court of appeal . . . that is certified by it to be in direct conflict with a decision of another district court of appeal." Art. V, § 3(b)(4), Fla. Const.; R. 9.030(b)(A)(vi), Fla. R. App. P. This

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[1] The symbol "A.B. " will be used to refer to Respondents' answer brief; the symbol "I.B." will refer to Petitioner's initial brief. All other references will be as noted in Petitioner's initial brief.

action is before the Court on the Third District's certification that it is "in conflict with State v. Maxwell, Case No. 93-2760 (Fla. 4th DCA August 10, 1994)." (R. 220). This court thus has jurisdiction.[2] Further, not only is Respondents' contention incorrect, it is also an improper subject for a brief on the merits, and should be disregarded. See, R. 9.120(d), Fla. R. App. P. (in cases where conflict certified, "no briefs on jurisdiction shall be filed").

Even were the issue of jurisdiction properly before the court, it is without merit. The holding of the Third District Court of Appeal, that the statute did not apply to Respondents because the crime was committed after its effective date, was clearly a holding on the merits. (R. 187). The issue of the retroactivity of the statute was a central issue argued by the parties before the trial court, (R. 28-32), was one of the bases of the trial court's decision, (R. 78), and was argued before the district court. (R. 19, 174-176). It should be noted that the Respondents' argument to the Third DCA on the availablity of common-law certiorari was much lengthier than that on retroactivity.[3] (R. 153-162). In view of this briefing

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2 Obviously the question of whether the Court will choose to exercise its jurisdiction is one entirely within the Court's prerogative, and the State would urge it to do so. This is, however, a much different question from that argued by Respondents, which questions whether the Court has jurisdiction.

3 The jurisdictional argument presented here appears to be largely identical to that presented below. The State declines to rehash that argument at this juncture. Its views on the matter may be found in its original petition for common-law certiorari. (R. 1-2).

history it strains credulity to conclude that a statement regarding retroactivity was meant to be a holding on the availability of common-law certiorari. That conclusion is further strained by the court's certification of conflict with Maxwell v. State, 19 Fla. L. Weekly D1706 (Fla. 4th DCA August 10, 1994). Presumably the court must have decided something, or there would be no conflict. Maxwell's holding is that the statute in question is constitutional, and may be retroactively applied. It follows that the Third District must have concluded to the contrary. This court has jurisdiction.

B. The application of § 921.141(7), Fla. Stat., to Respondents does not violate *ex post facto* principles.

The State reiterates its views as presented in Section "B" of its initial brief. (I.B. 12-16). The State further submits that the Respondents' argument does not alter the correctness of those views.

Respondents' reliance on Talavera v. Wainwright, 468 F.2d 1013 (5th Cir. 1972), (A.B. 24), is untenable. That case dealt with procedural prejudice and is not on point. Talavera held that the Florida Supreme Court could not, on appeal, apply more onerous standards to the facial sufficiency of a motion to sever than the standards which were in effect at the time the motion was made at trial. Such is clearly not the case here, and Talavera thus sheds no light on the issues presented.

The State would also submit that Respondents' reliance on Valle v. State, 581 So. 2d 40 (Fla. 1991), (A.B. 27), is likewise misplaced. On the contrary, it would submit that Valle supports a finding of constitutionality. As extensively discussed in the initial brief, nothing in § 921.141(7) alters the basic operation of Florida's capital sentencing scheme. Before a defendant may be sentenced to death, the State must prove that one or more of the aggravating factors found at § 921.141(5), Fla. Stat., exists, and that it is not outweighed by any mitigating circumstances. This scheme existed at the time Respondents murdered Officer Bauer, and it exists unchanged now. Thus under Valle, no violation of ex post facto principles occurs.

Finally, the State would also submit that Dugger v. Williams, 593 So. 2d 180 (Fla. 1991), (A.B. 27), is not controlling here. Respondents cite the case solely for the proposition that a simplistic "procedural" versus "substantive" analysis does not suffice for ex post facto issues. Be that as it may, the precedent is quite clear that provisions which are merely evidentiary in nature may be retroactively applied.[4] See, Glendening v. State, 536 So. 2d 212 (Fla. 1988); Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); Hopt v. Utah, 110 U.S. 574, 590, 4 S. Ct. 202, 28 L.

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[4] The evidentiary nature of this statutory provision was extensively discussed in the initial brief. (I.B. 17-26).

Ed. 262 (1884); Thompson v. Missouri, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204 (1898).

C. Section 921.141(7), Fla. Stat., does not establish an impermissible nonstatutory aggravating circumstance.

The State reiterates and relies upon the argument presented in Section "C" of its initial brief. (I.B. 27-26). In opposition thereto, Respondents cite to Burns v. State, 609 So. 2d 600 (Fla. 1992). Burns, however, held that evidence such as the type sought to be admitted below was not constitutionally improper:

> Burns maintains that [testimony regarding the victim's background and character as a law enforcement officer] amounted to improper victim impact evidence under *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989). Recently, however, in *Payne v. Tennessee*, ___ U.S. ___, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), the United States Supreme Court receded from its 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 family are inadmissible at a capital sentencing hearing." *Id.* ___ U.S. ___, n. 2, 111 S. Ct. at 2611 n. 2. . . . We find no merit to Burns' *Booth* claim because the challenged evidence is of the type covered in *Payne*.

Burns, at 605. The Court did go on to hold that although there was no constitutional bar to the admission of the evidence, it was improperly admitted because it was irrelevant. Burns was, however, decided the same year as §921.141(7) was enacted, presumably was tried before its enactment and does not address

the statute at all. As noted in the initial brief, Payne did not mandate victim impact evidence, but merely allowed it as an option, if a state chooses to authorize the presentation of such evidence. Payne, 114 L. Ed. 2d at 736. A case tried before such "authorization," i.e., § 921.1451(7), was in place cannot be read to invalidate the statute, particularly where the same case recognizes that there is no constitutional impediment to victim impact evidence.

Likewise, reliance by Respondents upon Taylor v. State, 583 So. 2d 323 (Fla. 1991), and Jackson v. State, 522 So. 2d 802 (Fla. 1988), is also misplaced. Neither of those cases was predicated upon (or even mentioned) a Booth or Gathers claim.[5] Rather these cases are solely concerned with excessively inflammatory prosecutorial argument, which presumably would still be improper. Virtually any evidence presented at a trial is suceptible to misuse in closing argument. The remedy is not the banning of the evidence. The remedy is appropriate control by the trial court, careful appellate review and the imposition of professional sanctions where appropriate. These mechanisms are already in place.

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5 Jackson was decided well before Payne, and Taylor, on the same day as Payne.

D. Section 921.141(7) is not impermissibly vague.

Respondents also contend that the victim impact statute is vague, and therefore unconstitutional. (A.B. 28-31).

Respondent's argument is premised upon an assumption which the State again submits is invalid: that § 921.141(7) creates an aggravating circumstance.[6] See, A.B. 30. Following from that faulty premise, Respondents then conclude that the statute does not sufficiently define that aggravating circumstance. However, the scant authority upon which Respondents rely does not apply to provisions, such as the current one, which are evidentiary, rather than penal, in nature. The Court in Payne reiterated that, on the contrary, the parameters of what the jury should consider is properly broad based:

> Even in the context of capital sentencing, prior to *Booth* the joint opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*, 428 U.S. 153, 203-204, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), had rejected petitioner's attack on the Georgia statute because of the "wide scope of evidence and argument allowed at presentencing hearings." The joint opinion stated:
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> > "We think the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument . . . So long as the evidence introduced and the arguments made at the presentence hearing do not

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6 The fallacy of that assumption has been thoroughly discussed. See, I.B. 17-26.

> prejudice a defendant, it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Payne, 115 L. Ed. 2d at 732-733. The State would submit that the question of whether the evidence or argument impermissibly prejudices a defendant can be most appropriately addressed in the context the individual trial, under existing evidentiary and conduct-of-argument principles.

Respondents themselves cite cases which illustrate the inapplicability of vagueness analysis to the provision in question. The test of vagueness is whether the crime is defined so poorly as to make the defendant unaware or unable to determine what conduct is proscribed. See, Cuda v. State, 639 So. 2d 22 (Fla. 1994); Locklin v. Pridgeon, 158 Fla. 737, 30 So. 2d 102 (1947). The statute does not advise the defendant what conduct is proscribed for the simple reason that it proscribes no conduct; it merely permits the jury to see the effects of conduct, i.e. first degree murder, that is clearly and unmistakably prohibited.

Likewise, the question presented when considering whether an aggravating circumstance is invalid is whether its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). The attempted application of that

principle to § 921.141(7), Fla. Stat. demonstrates yet again that this provision is not an aggravating circumstance. The existence of "victim impact" simply is not something which is part of the ultimate calculus performed by the sentencer under Florida's capital sentencing scheme. Rather, the sentencer must determine only whether any of the enumerated aggravating factors under § 921.141(5) exist, and if so, whether such factors are outweighed by any mitigating circumstances.

Assuming arguendo that some vagueness analysis can or should be performed, the State would note that the language of the statute which defines what constitutes victim impact evidence is lifted nearly verbatim from Payne:

> [Victim impact evidence] is designed to show *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.

Payne, 115 L. Ed. 2d at 734 (emphasis the Court's).[7] See, Haggerty v. State, 531 So. 2d 364, 365 (Fla. 1st DCA 1988)("The statute defines 'obscene' exactly as it was defined in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). We decline to find the highest court's definition vague."). Furthermore, the language employed is of common usage and not

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[7] Section 921.141(7) defines victim impact evidence as follows:

> 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.

ambiguous, notwithstanding Respondents' attempts to thus portray it.

Respondents attack the phrase "uniqueness as a human being" as being an aphorism which serves only to encourage the weighing of the value of one victim against other "less worthy" victims. Despite its denomination as a vagueness claim, this argument seems rather to question the validity of the statute's purpose. Yet as the Court in Payne noted, the conduct of a capital sentencing trial in the post-Eddings[8] era has tended to obscure the loss resultant from the the victim's death and has

> unfairly weighted the scales in a capital trial; while virtually no limits are placed upon 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, 115 L. Ed. 2d at 733 (citation omitted). The purpose of the statute is thus to remedy an imbalance which the United States Supreme Court, and the Legislature, have determined is unacceptable.

Nor is the phrase "uniqueness as a human being" vague. The terms are of common usage, and notably, Respondents themselves do not explain how their meaning could be misconstrued. Indeed,

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8 Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)(state cannot preclude sentencer from considering "any relevant mitigating evidence" that the defense proffers).

Respondents note that it is "a generally accepted tenet in our society that each and every person is unique." (A.B. 29).

Respondents also contend that "community" is undefinable, because there is no way to define what constitutes the community. However, this term is also of common usage, and is widely employed in statutes.[9]

Respondents also assert that they would be handicapped in trial preparation because of the unknown nature of the evidence introduced pursuant to the statute. (A.B. 30). First, this concern for the admission of evidence again betrays their argument that the statute is not evidentiary in nature. Second, presumably any such evidence would be discoverable under the Rules of Criminal Procedure. Payne also found this argument untenable. Id., 115 L. Ed. 2d at 734.

Finally, Respondents assert that the statute will be improperly applied along lines of race, ethnicity[10] and income

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9 A partial listing of the sections in which the term "community" is employed includes §§ 20.315(1)(e), 39.002(3)(a), 61.30(2)(b), 63.092(2)(g), 90.803(19)(c), 110.505(2), 112.3148(7)(a), 125.38, 125.66(5)(b)2, 159.603(4), 193.461(4)(b), 194.037(1), 212.04(2)(b)6, 216.052(4), 220.183(1)(a), 320.08063(3)(b), 320.64(23), 322.271(2)(a), 331.351, 333.02(1)(a), 341.041(9), 341.302(14), 364.035(1), 365.161(1)(a)1, 366.031(1)(c), 377.711(1), 380.061(1), 381.0101(1), 391.303(2)(f), 393.063(42), 394.479(II)(f), 395.1041(1), 402.27(4)(b), 403.4131(1), 413.401, 440.02(13)(a)6a, 457.109(1)(k), 570.0725(3)(a), 616.001(2), 624.5105(1)(a), 327.6044(1), 633.445(8), 641.18(2), 657.008(4), 766.207(6), 775.21(2)(b)1, 790.22(8), 823.01, 847.001(3)(b), 860.157(2), 872.05(6)(b), 893.02(17)(1), 907.041(1), 916.105(1), 921.0013, & 944.012(1), Fla. Stat.

10 Respondents raise the spector of racial prejudice and offer themselves as examples, four hispanic men convicted of killing a white police officer. They fail to mention however, that hispanics are the majority in Dade County, where they were tried.

level, and that who does or does not receive the death penalty will become depend on the popularity of the victim. This is of course highly speculative, and the Court in Payne thus rejected the argument:

> Payne echoes the 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 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 murderer 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 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.

Payne, 115 L. Ed. 2d at 734. See also, Sochor v. Florida, 504 U.S. ___, 112 S. Ct. 2114, 117 L. Ed. 2d 326, 339-340 (1992)(Court will not consider claims of improper application of death penalty in the abstract). Respondents' "vagueness" arguments must be rejected.

CONCLUSION

For the foregoing reasons, and those set forth in the initial brief, 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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