IN THE SUPREME COURT OF FLORIDA

CASE NO. 85-074

CHESTER MAXWELL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA QUESTION CERTIFIED

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent, the State of Florida, was the Petitioner in the Fourth District Court of Appeal and the Plaintiff in the Circuit Court, in and for Broward County, Florida. The Petitioner, Chester Maxwell, was the Respondent in the Fourth District Court of Appeal and the Defendant in the trial Court. The parties shall be referred to as "Defendant" and "State" or Petitioner and Respondent throughout this brief.

STATEMENT OF THE CASE AND FACTS

The Defendant, Chester Maxwell, was convicted of first degree murder and robbery on April 23, 1981. On May 12, 1981, he was sentenced to death by electrocution for the murder of Donald Klein. The facts surrounding the Defendant's convictions can be found in Maxwell v. State, 443 So.2d 967 (Fla. 1983), and are as follows:

> The appellant, Chester Maxwell, and his co-defendant, Dale Griffin, were found guilty by a jury and convicted of the murder of Donald Klein. The evidence showed that Mr. Klein was playing golf with three friends at the Palmaire Country Club in Pompano Beach, Broward County, when Maxwell and Griffin approached. Griffin grabbed one golfer and held a knife to his throat while appellant pulled out a revolver. The assailants robbed three of the men of their money, the fourth golfer having nothing of value on his person. From Donald Klein appellant took a gold bracelet, a gold chain and some gold pendants. Appellant also demanded Mr. Klein's gold ring. When Klein protested that his wife had given him the ring, appellant shot him in the chest. He died within minutes. Both the heart and the lungs were severely damaged by the bullet, which was a .22 caliber rifle bullet cut off at the nose so it would fit into the pistol's chamber.
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> One of the victim's golfing companions chose appellant from an identification line-up and at trial testified that he saw appellant shoot Donald Klein.
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> After the shooting appellant and Griffin ran from the area and that night they departed Broward County on a northbound Greyhound bus. Upon learning this, the Pompano Beach police communicated with the Ocala police, who boarded the bus when it stopped at the Ocala bus station. The Ocala police detained the pair and told them to claim their bags. Appellant and Griffin claimed one bag each, accompanied the officers to police headquarters, and consented to have their bags searched. At the time of their detention and questioning, the two suspects had in their possession the gold items taken from Donald Klein. These items were identified by his widow at the trial.
>
> Suspecting that appellant and Griffin had left possessions on the bus when they were detained for questioning, the Pompano

> Beach police sought the assistance of the Tallahassee police. When the bus arrived in Tallahassee, police officers arranged to have all passengers and their luggage removed from the bus. When the bus was emptied, one brown suitcase remained unclaimed. The officers looked inside and found a knife and a .22 caliber pistol. Subsequent examination revealed that the six-chambered pistol contained five .22 caliber rifle bullets with their forward ends cut off.

Id. at 968-969. The Defendant's convictions have been unanimously affirmed by the various courts, both State and Federal, that have reviewed same. Id.; Maxwell v. State, 490 So.2d 927 (Fla. 1986); Maxwell v. Florida, 479 U.S. 972, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986); Maxwell v. State, 603 So.2d 490 (Fla. 1992).

Defendant's sentence of death was reversed by this Court. Id. (R 49-62). His case was remanded to the trial court for resentencing attendant to his conviction for first degree murder (R 49-62). Prior to the scheduled resentencing hearing, the Defendant filed three (3) motions regarding the admissibility of victim impact evidence under § 921.141, Florida Statutes: (1) Motion to Exclude Victim Impact Evidence and/or to Declare Section 921.141(7), Florida Statutes Unlawful and Unconstitutional and/or to Declare Section 921.141, Florida Statutes Unlawful and Unconstitutional (R 227-245); (2) Motion to Limit Presentation and Argument of Victim Impact Evidence to Judge Only (R 246-250); and (3) Motion to Prohibit Application of Chapter 92-81 as an Ex Post Facto Law (R 222-226). The State of Florida, Respondent herein, filed Responses thereto (R 251-260). Attached hereto as an Exhibit is the written proffer by the victim's daughter of what victim impact evidence the State would seek to introduce at the sentencing hearing (Appendix, Exhibit "A").

The trial court held a hearing on the Defendant's motions and entertained arguments

regarding same (R 1-28). On June 7, 1993, the trial court announced that it had decided to declare § 921.141(7), Florida Statutes, unconstitutional (R 39). Thereafter, the trial court entered an order Granting Defendant's Motion to Declare Section 921.141(7) of the Florida Statutes Unconstitutional (R 261-283).

The State of Florida sought certiorari review of the trial court's order in the Florida Fourth District Court of Appeal. The Fourth District granted certiorari and quashed the trial court's order declaring unconstitutional §921.141(7), Florida Statutes. The Fourth District held in pertinent part:

> It is clear that a victim impact statement should not be considered as an aggravating factor in death sentencing. Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed. 2d 822 (1989). The eighth amendment prohibits a jury's considering statements concerning personal qualities of a victim in the sentencing phase of a capital trial, unless the evidence is otherwise relevant.
>
> In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720, reh'g denied, _____U.S. ____, 112 S.Ct. 28, 115 L.Ed. 2d 1110 (1991), the United States Supreme Court recognized that the eighth amendment is not per se violated by victim impact evidence. And in Hodges v. State, 595 So. 2d 929 (Fla.), cert granted and judgment vacated on other grounds, _____ U.S. _____, 113 S.Ct. 33, 121 L. Ed. 2d 6 (1992), our supreme court clarified Payne, recognizing that victim impact evidence is admissible in the sentencing phase except, as set out in the statute, for characterizations and opinions by family members about the crime, the defendant, or the appropriate sentence. Id. at 933.
>
> Here, the trial court was concerned that victim impact evidence is "too prejudicial." However, whether such evidence is too prejudicial is a factor that may be evaluated within the exercise of the court's discretion. Admitting victim impact evidence does not, as claimed, reduce the state's burden in the sentencing phase. Admitting such evidence is relevant in sentencing, as it informs the jury, or court, of the particular harm caused. Victim impact evidence is not an aggravating factor. It is neither aggravating nor mitigating evidence. Rather, it is other evidence, which is not

> required to be weighed against, or offset by, statutory factors.
>
> The trial court also was concerned that the statute infringes on the supreme court's exclusive right to regulate procedure. But, in Booker v. State, 397 So. 2d 910 (Fla.), cert. denied, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed. 2d 261 (1981), the Florida Supreme Court acknowledged that section 921.141, Florida Statutes, is not unconstitutional on that ground.
>
> The trial court also held that the victim impact subsection violates ex post facto principles, because the amendment was adopted after the respondent's crime. However, section 921.141(7) does not purport to affect personal rights as it relates only to the admission of evidence. This is not unlike a change in procedure such as that upheld in Glendening v. State, 536 So. 2d 212 (Fla. 1988), cert. denied, 492 U.S. 907, 109 S. Ct. 3219, 106 L. Ed. 2d 569 (1989). In Glendening, the court held that a hearsay exception should be applied even though it became effective after the offense.
>
> Therefore, we conclude that the trial court departed from the essential requirements of law in ruling that the victim impact evidence statute was unconstitutional.

(Petitioner's Appendix Exhibit B)

On January 18, 1995 the Fourth District denied the Defendant's motion for rehearing but certified, as a question of great public importance, the following:

> Is Section 921.141(7), Florida Statutes, allowing victim impact evidence unconstitutional?

This appeal follows.

SUMMARY OF ARGUMENT

The State maintains the constitutionality of §921.141(7), Florida Statutes. Recent precedents 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. Section 921.141(7), Florida Statutes, is just such a law.

Victim impact evidence is not an aggravating circumstance and is not weighed in reaching a sentence. However, 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 non-statutory aggravating factor and may be properly received.

The State would also argue that subsection (7) is not vague or overbroad, that it does not violate due process, or this Court's exclusive right to regulate practice and procedure. Furthermore, §921.141(7), Florida Statutes is merely evidentiary in nature and as such, it may be properly applied to the case at hand without violating ex post facto principles.

ARGUMENT

THE DISTRICT COURT CORRECTLY FOUND THAT SECTION 921.141(7), FLORIDA STATUTES, WHICH PERMITS THE INTRODUCTION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDING, IS CONSTITUTIONAL.

The State maintains that the Fourth District Court of Appeals correctly found Section 921.141(7), Florida Statutes, constitutional. As this Court is well-aware, the legislative amendment to §921.141, Florida Statutes, is presumed to be constitutional and the legislature is presumed to have intended a constitutional result. Sandlin v. Criminal Justice Standards and 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 herein. Indeed, Florida law as well as public policy require that this Court find Section 921.141(7), Florida Statutes constitutional.

Florida's death penalty statute was originally passed in 1972, and was codified in §921.141, Florida Statutes. Despite various attacks on the statute, the constitutionality of the statute as a whole has been repeatedly upheld by this Court and the United States Supreme Court. See Watson v. State, 19 FLW S564 (Fla. November 3, 1994); Wournos v. State, 644 So. 2d 1000 (Fla. 1993); Spencer v. State, 645 So. 2d 377 (Fla. 1993); Thompson v. State, 619 So. 2d 261 (Fla. 1992); 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 (1976).

As part of §921.141(1), the Legislature set forth the following standard for the admission of evidence in the penalty proceedings:

> 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.

(Emphasis added)

This section has been consistently interpreted by this Court to allow the sentencer, both the jury and the judge, 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). Thus, for example, in Teffeteller, supra, this Court allowed in evidence in a sentencing hearing a crime scene photograph of the victim, although the photograph was not specifically relevant to any of the aggravating circumstances (i.e., under sentence of imprisonment, prior violent felonies, and during the commission of a robbery). This Court stated that "we cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum." Id. 744.

In 1984, the Florida Legislature amended §921.143, Florida Statutes (1984), to allow at a sentencing hearing, or prior to the imposition of sentence upon any defendant who has been convicted of a felony, the victim or next of kin to appear before the sentencing court to provide a statement concerning "the extent of any harm, including social, psychological, or physical

harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced." Victim's rights were further strengthened in Florida, when in 1988, the people amended Article I, Section 16 of the Florida Constitution to include that "(b) 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 stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."

In 1987, the United States Supreme Court in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed. 2d 440 (1987), and again in 1989 in South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed. 2d 876 (1989), held that the Eighth Amendment prohibited a jury from considering and a prosecutor from arguing a victim impact statement or the personal qualities of the victim at the sentencing phase of a capital trial, unless such evidence related directly to the circumstances of the crime. Following the dictates of Booth and Gathers, this Court subsequently held that despite §921.143(2), the Legislature could not permit victim impact evidence "as an aggravating factor in death sentencing." Grossman v. State, 525 So. 2d 833, 843 (Fla. 1988).

In 1991, the United States Supreme Court overruled its prior decisions in Booth and Gathers in Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L.Ed. 2d 720 (1991), and held:

> We thus hold 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.

The Payne Court specifically stated that "the decisions... were wrongly decided and should be, and now are, overruled." Payne, supra at 2611. The Court explained that sentencing a criminal defendant involves factors which relate both to the subjective guilt of the defendant and to the harm caused by his acts:

> '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 death.' Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). See also Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed. 2d 1 (1986). Thus we have, as the Court observed in Booth, required that the capital defendant be treated as a ''uniquely individual human bein{g},'' 482 U.S., at 504, 107 S.Ct., at 2534 (quoting Woodson v. North Carolina, 428 U.S., at 304, 96 S.Ct., at 2991). **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.** The language quoted from Woodson in the Booth opinion was not intended to describe a class of evidence that could not be received, but a class of evidence which must be received. Any doubt on the matter is dispelled by comparing the language in Woodson with the language from Gregg v. Georgia, quoted above, which was handed down the same day as Woodson. **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.'** Mills v. Maryland, 486 U.S., 367, 397, 108 S.Ct. 1860,

> 1876, 100 L.Ed 2d 384 (1988) (REHNQUIST, C.J., dissenting), **or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide.**

(Emphasis added). Id. at 2606, 2607.

The Court ruled that evidence of the specific harm caused by a defendant presented in the form of victim impact evidence, could be admitted by state courts subject, of course, to evidentiary rulings by a state trial court:

> 'Within the constitution limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished.' Blystone v. Pennsylvania, 494 U.S. 299, 309, 110 S.Ct. 1078, _____, 108 L.Ed. 2d 255 (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. **Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the Booth Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.** See Darden v. Wainwright, 477 U.S. 168, 179-183, 106 S.Ct. 2464, 2470-2472, 91 L.Ed. 2d 144 (1986).

(Emphasis added). Id. at 2608.

The Court concluded that juries should hear all relevant evidence, before sentencing a defendant for first degree murder:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. '{T}he State has a legitimate interest in counteracting

> the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' Booth, 482 U.S., at 517, 107 S.Ct. at 2540 (WHITE, J., dissenting) (citation omitted). By turning the victim into a 'faceless stranger at the penalty phase of a capital trial,' Gathers, 490 U.S., at 821, 109 S.Ct. at 2216 (O'CONNOR, J., dissenting), Booth deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

Id. at 2608.

In 1992, the Florida Legislature amended §921.141 as follows:

> (7) 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.

This legislation was prompted by the United States Supreme Court's decision in Payne v. Tennessee and reflects Florida's decision to allow the presentation of victim impact evidence pursuant to Payne. This legislation was originally proposed in Senate Bill 362 which was entitled "an act relating to capital felonies; amending §921.141 and §921.142, Florida Statutes; providing for the admission of victim impact evidence in certain proceedings on the issue of penalty; providing an effective date." Attached hereto in the Appendix as Exhibit "B" is the legislative history and Senate staff analysis of S.362 which cites Payne. As noted previously, it is presumed that the Legislature intended to reach a constitutional result. Sandlin, supra. The State submits that the Legislature's enactment of Chapter 92-81 as codified in §921.141, Florida

Statutes, was a legitimate and constitutional response to the Payne decision.

Although this Court has never expressly ruled upon the constitutionality of Section 921.141(7), Florida Statutes, this Court has recognized the admissibility of victim evidence in light of Payne v. Tennessee. As noted by the Fourth District, this Court in Hodges v. State, 595 So. 2d 929 (Fla. 1992), held that victim impact evidence is admissible in the sentencing phase except, as set out in the statute, for characterizations and opinions by family members about the crime, the defendant or the appropriate sentence. Id. at 933. This Court held:

> 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 876 (1989). Recently, however, the United States Supreme Court held that
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> > 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.
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> 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. Most recently, this Court has held that "brief humanizing remarks do not constitute grounds for reversal," citing Payne for the proposition that in the majority of cases, victim impact evidence serves entirely legitimate purposes. Stein v. State, 632 So. 2d 1361 (Fla. 1994).

The public policy underlying the Payne, decision, the passage of the amendment to § 921.141 allowing for the admission of victim impact, as well as this Court's explicit holding that the admission of victim impact evidence "serves entirely legitimate purposes" is clear: The citizens of Florida have chosen to have the victims of crime or their lawful representations be heard and they should not and cannot be ignored under the United States or Florida Constitutions. See Article 1, Section 16 of the Florida Constitution.

It is also worth noting that other states have considered the admissibility of victim impact evidence post-Payne, and have ruled such evidence admissible. See State v. Gentry, ___ P. 2d ___, 125 Wash. 2d 570, 1995 WL 6435, *21-*31 (1995); State v. Robinson, 451 S.E. 2d 196 (N.C. 1994); State v. Parker, 886 S.W. 2d 908 (Mo. 1994); Livingston v. State, 444 S.E. 2d 748 (Ga. 1994); Lane v. State, 881 P. 2d 1358 (Nev. 1994); Evans v. State, 637 A. 2d 117 (Md. 1994); People v. Sandoval, 841 P. 2d 862 (Cal. 1993); State v. Bernard, 608 So. 2d 966 (Ca. 1992); People v. Mitchell, 604 N.E. 2d 877 (Ill. 1992); Lucas v. Evatt, 416 S.E. 2d 646 (S.C. 1992). The State would urge this Court to do the same.

A. THE FOURTH DISTRICT CORRECTLY HELD THAT THE ADMISSION OF VICTIM IMPACT EVIDENCE AT A CAPITAL SENTENCING PROCEEDING, PURSUANT TO SECTION 921.141(7), FLORIDA STATUTES, IS NOT UNCONSTITUTIONAL SINCE SUCH EVIDENCE DOES NOT CONSTITUTE AN AGGRAVATING FACTOR AND DOES NOT LEAD TO ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

In the opinion below, the Fourth District rejected the Defendant's argument and the trial courts conclusion that the admission of victim impact evidence at a capital sentencing proceeding is "too prejudicial," reduces the State's burden in a sentencing phase and interferes with the weighing process sentencing phase, and otherwise constitutes an aggravating factor. The State maintains the correctness of the Fourth District's decision and urges this Court to uphold the constitutionality of § 921.141(7), Florida Statutes.

Victim impact evidence does not constitute an aggravating factor. The statute is clear that victim impact evidence is not a statutory or non-statutory aggravating factor. However, its admission is contingent upon the prior presentation of evidence concerning an aggravating circumstance. Its relevance is independent of any aggravating circumstance and is an adjunct to the facts of the case as the jury has already heard them. The way in which § 921.141(7) was amended to add subsection (7) clearly establishes that victim impact evidence does not fall under the aggravating circumstances listed in subsection (5) or the mitigating circumstances listed in subsection (6), but rather stands alone as ". . . evidence 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." See § 921.141(7). This evidence is just another method of informing the sentencing authority in a capital case as to the specific harm caused by the crime in question. Payne, supra. As noted in Payne, a sentencing court and jury have always taken into

consideration the harm done by the defendant in imposing sentence, and victim impact evidence is illustrative of the harm caused by the murder. Id. at 2608. Thus, the enactment of subsection (7) is consistent with Payne as it places before the sentencing authority, all of the relevant evidence needed in order to sentence a defendant for the crime of first degree murder. Id.

The fact that victim impact evidence is relevant to a capital sentencing proceeding is evident from the Payne decision itself. A defendant should not be unrestricted in the presentation of mitigation evidence and yet cry foul when the harm caused by his criminal deeds are presented to the jury. Henderson v. State, 463 So.2d 196 (Fla. 1985). It is for this precise reason that this Court in Lockhart v. State, 20 FLW S131 (Fla. March 16, 1995), held that details and photographs relating to a capital defendant's prior violent felony convictions were admissible at a penalty phase. This Court held that such evidence helped to determine if the "ultimate penalty" was called for citing Elledge and Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992). It is worth noting that while a prior violent felony conviction can be proven by the State by the introduction into evidence of a certified copy of conviction, this Court allowed the State to go beyond that and to introduce not just the details of the prior conviction but photographs of the victim. Thus, the graphic harm caused by Lockhart in an unrelated case and his "propensity to commit violent crimes" were held by this Court to be valid considerations at his capital sentencing proceeding. Likewise victim impact evidence is relevant because it places the defendant's crime and the victim's death in its proper context. It is for this same reason that the facts underlying a capital conviction are made known to a jury if a capital resentencing hearing is ordered. Chandler v. State, 514 So.2d 354 (Fla. 1987). These facts assist the

sentencing jury in becoming familiar with the facts of a conviction. Id.; Teffeteller, supra. Indeed, this Court in Teffeteller ruled that a photograph of a victim even though not relevant to prove any 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 added). Id. at 745.

Clearly, this Court has recognized the admissibility of certain evidence at the penalty phase which does not relate to the existence of aggravating or mitigating factors. Id; Chandler, supra. Such evidence does not constitute an aggravating circumstance but, like victim impact evidence, is relevant in and of itself since it places the crime and the victim's death in its proper

context. Such evidence is not weighed but merely considered in rendering an appropriate sentence. In fact, Florida law mandates that in cases of felony murder where the death penalty is sought on 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). Specifically, 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. 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). The jury's finding under Jackson and Tison does not amount to an aggravating circumstance but is something that must be found by a capital jury which is significantly not enumerated under § 921.141, but nonetheless must be considered and found. Thus, contrary to the trial court's order, Florida law as interpreted by this Court allows and in certain circumstances mandates the consideration of evidence and circumstances not listed as aggravation or mitigation under § 921.141.

Of course, the fact that victim impact evidence is not per se inadmissible under Payne does not mean that it is per se admissible under § 921.141(7) Florida Statutes. Indeed, §921.141(1) 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" (emphasis added). See Teffeteller at 745. Victim impact evidence, other than "characterizations and opinions about the crime, the defendant, and the appropriate sentence . . ." may be admissible under § 921.141(1) and § 921.141(7). As noted by the Payne Court,

> In the majority of cases victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. See Darden v. Wainwright, 477 U.S. 168 (1986).

Payne, at 2608. Thus, the Statute does not denigrate judicial discretion regarding the admissibility of evidence. Accordingly, the specific victim impact evidence sought to be introduced in the instant case would have to be evaluated by the trial court to determine its admissibility. To the extent that the proffer attached hereto demonstrates the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death, such should be admissible. As with all victim impact evidence, its admissibility must be made on a case by case basis.

The State would also argue that because victim impact evidence under § 921.141(7) does not constitute an aggravating circumstance but is merely considered in reaching a sentencing recommendation as in the scenarios presented by the Teffeteller and Jackson decisions, it is not weighed. Victim impact evidence, like the facts underlying a conviction which do not relate to aggravating or mitigating circumstances or a non-triggerman's intent is not weighed during sentencing but merely considered. As noted by the Fourth District, victim impact evidence is ". . . other evidence, which is not required to be weighed against or offset by statutory factors." Therefore, the fact that Florida is a weighing State, or that there is no jury instruction regarding how to "weigh" victim impact evidence, does not render § 921.141(7) unconstitutional.[1]

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[1] In response to the Defendant's bold and inaccurate assertion that Tennessee's capital sentencing law is very broad and "sets no such limits" as are required under Florida law, the State would point out that T.C.A. 39-13-204(c)(1982), is substantially identical to the preamble of §921.141, Florida Statutes. Furthermore, Tennessee does list aggravating factors that may

The State likewise maintains that the Fourth District correctly held that the admission of victim impact evidence does not reduce the State's burden in the penalty phase. The admissibility of evidence regarding the existence of an aggravating circumstance is governed by § 921.141(1), and Fla.R.Crim.P. 3.780. Once evidence regarding an aggravating circumstance is "provided" by the State, the State may introduce and argue victim impact evidence, and the jury is instructed pursuant to the Florida Standard Jury Instructions. The instruction tells the trial court to "Give only those aggravating circumstances for which evidence has been presented" and instructs the jury that "Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." Victim impact evidence carries no burden of proof because it is not an aggravating factor. Thus, the State carries no burden of proof in establishing the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Indeed, the Payne Court rejected the notion that the presentation of victim impact evidence creates a "mini-trial" on the victim's character. Id. at 2607. The Payne Court also specifically rejected the argument that the presentation of victim impact evidence leads to the arbitrary and capricious imposition of the death penalty. Payne at 2608.

The State would also point out that the Defendant's argument that § 921.141(7) violates Florida's prohibition against cruel or unusual punishment is likewise flawed. The Defendant has presented no argument in support of his contention but boldly argues that capital defendants enjoy greater protections under the Florida Constitution and that the admission of victim impact

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be relied upon by the State, just as Florida does. Thus, the Payne decision applies with equal force both to Tennessee and Florida capital sentencing proceedings.

evidence violates the prohibition against cruel or unusual punishment citing Tillman v. State, 591 So.2d 167 (Fla. 1991). The State would point out that the admission of victim impact evidence cannot in any way constitute cruel or unusual punishment. Indeed, the people of Florida amended § 921.141 to add subsection (7) after the Florida constitution was revised in 1968 and after the Supreme Court's decision in Payne was announced. In Payne the Supreme Court expressly held that the admission of victim impact evidence did not violate the eighth amendment's bar against cruel and unusual punishment. As it is not cruel and unusual to admit victim impact evidence under the eighth amendment to the United States Constitution, it is not cruel or unusual under the Florida Constitution. The State would also point out that prior to this Court's decision in Grossman v. State 525 So.2d 833 (Fla. 1988), victim impact evidence was admissible under the Florida Constitution. The Grossman decision was issued in response to Booth and Gathers, which were overruled by Payne. The Florida legislature then amended § 921.141 to add subsection (7) in order to be in line with the United States Supreme Court after the Payne decision, just as the Supreme Court of Florida had previously done when it issued the Grossman decision after the Booth and Gathers decisions were meted out by the Supreme Court.

It is thus clear that the admission of victim impact evidence at a capital sentencing proceeding does not constitute cruel or unusual punishment in violation of the Florida Constitution.

As for the Defendant's and trial court's concerns with proportionality, the State would cite to Payne:

> Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendant's whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Booth, supra, 482 U.S., at 506, n. 8, 107 S.Ct., at 2534 n. 8. **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 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.

(Emphasis added). Id. at 2607. Of course, however, 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. The extent to which the victim's death impacts the community will necessarily become a factor to be considered in the Court's proportionality review. The State submits that victim impact evidence can be factored into the question of proportionality, just as is a non-triggerman's culpability or a homicide in a domestic setting.

The State would also point out that victim impact evidence presented by the State can be cross-examined by the Defendant, pursuant to Payne as well as prevailing Florida law. Furthermore, because evidence relating to victim impact may be a "circumstance of the offense," it is entirely conceivable that the defendant would be able to present such evidence himself subject to a trial court's evidentiary ruling on the admissibility of same.

Furthermore, the State would also take issue with the Petitioner's argument that the admission of victim impact evidence has ". . . no rational bearing on any legitimate aim of capital sentencing," that proof of same is highly emotional and inflammatory ". . . subverting the reasoned and objective inquiry which the courts have required to guide and regularize the

choice between death and lesser punishments," that it upsets the balance regarding rebuttal, and that victim impact evidence ". . . invites the jury to impose the death sentence on the basis of race . . . " Indeed, the Supreme Court of the United States considered these arguments in Booth and Gathers and rejected them in Payne. Respondent would also point out that the Payne Court specifically rejected the notion that the admission of victim impact evidence would lead to the comparative valuation of a victim's worth. Id. at 2607. Furthermore, the United States Supreme Court, prior to the Payne decision, rejected the argument that the imposition of the death penalty is race related. McClesky v. Kemp, 481 U.S. 2979 (1987). This Court has applied McClesky to Florida cases. King v. State. 514 So.2d 354 (Fla. 1987).

It is thus clear that the admission of victim impact evidence at a capital sentencing proceeding does not constitute an impermissible aggravating factor and does not lead to the arbitrary and capricious imposition of the death penalty.

B. SECTION 921.141(7), FLORIDA STATUTES IS NOT VAGUE OR OVERBROAD AND DOES NOT VIOLATE DUE PROCESS GUARANTEES

The Defendant claims that § 921.141(7) is unconstitutionally vague as the language it contains has no limitations or definitions as to how victim impact evidence should be considered. The State maintains however that the statute is not vague or overbroad and thus is not unconstitutional.

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 (Fla. 1947). Section 921.141(7),

Florida Statutes, 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 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), 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 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).[2] See, Haggerty v. State, 531 So.2d 364,

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[2] 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

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 ambiguous, notwithstanding Respondents' attempts to thus portray it.

Defendant attacks 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[3] era has tended to obscure the loss resultant from 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

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sentence shall not be permitted as a part of victim impact evidence.

[3] 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).

usage, and notably, Defendant himself does not explain how their meaning could be misconstrued.

The Defendant also contends 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.[4]

Finally, the Defendant asserts that the statute will be improperly applied along lines of race, ethnicity and income level, and that who does or does not receive the death penalty will become dependent 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

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[4] 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.

> 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). Defendant's "vagueness" arguments must be rejected.

C. THE FOURTH DISTRICT CORRECTLY HELD THAT SECTION 921.141(7), FLORIDA STATUTES IS CONSTITUTIONAL AS IT DOES NOT INFRINGE UPON THE EXCLUSIVE RIGHT OF THIS COURT TO REGULATE PRACTICE AND PROCEDURE PURSUANT TO ARTICLE V, SECTION 2, FLORIDA CONSTITUTION.

The State maintains the correctness of the Fourth District's holding that Section 921.141(7), Florida Statutes, does not impermissibly invade the rule-making province of this Court. This Court has already held that Section 921.141, Florida Statutes does not infringe upon this Court's exclusive right to regulate practice and procedure. Booker v. State, 397 So. 2d 910 (Fla. 1987). Thus, the statute is not unconstitutional on this ground.

D. THE FOURTH DISTRICT CORRECTLY HELD THAT THE APPLICATION OF SECTION 921.141(7), FLORIDA STATUTES TO THE DEFENDANT'S RESENTENCING PROCEEDING DOES NOT VIOLATE EX POST FACTO PRINCIPLES.

The State maintains the correctness of the Fourth District's holding that the application of Section 921.141(7), Florida Statutes, to the Defendant's crime does not violate ex post facto principles. Although the amendment to Section 921.141 became effective July 1, 1992, its

application to the Defendant's capital resentencing proceeding does not violate ex post facto principles even though the crime for which the Defendant is to be resentenced occurred in 1980.

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 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 provision "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 the Defendant "of any defense available according to law at the time when the act was committed".

Thus, under Dobbert, the application of this statute to the Defendant 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 offense [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 testified 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 (1989), 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). This addition of the admission of victim impact evidence to a capital sentencing proceeding does not constitute the addition of a statutory aggravating factor. Although the admission of victim impact evidence is contingent upon the prior admission of evidence concerning statutory aggravating circumstances, it is not a statutory aggravating circumstance in its own right. Therefore, because it is not a statutory aggravating factor, the presentation of victim impact evidence at the Respondent's capital resentencing proceeding does not violate ex post facto principles. Miller; Glendening.

CONCLUSION

For the foregoing reasons, Respondent the State of Florida, respectfully requests this Court to answer the certified question in the negative and to rule that §921.141(7), Florida Statutes, is Constitutional.

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carey Haughwout, Tierney and Haughwout, 324 Datura Street, Suite 250, W. Palm Beach, Florida 33401 this 3d day of April, 1995.

Respectfully submitted,

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APPENDIX

Exhibit A -- Written Proffer by the Victim's Daughter, Barbara Klein Caplan

Exhibit B -- Legislative history and Senate staff analysis of S. 362 which cites Payne v. Tennessee, 111 S.Ct. 2597 (1991)

Exhibit A

Written Proffer by the Victim's Daughter, Barbara Klein Caplan