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Appeals

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 CONFLICT CERTIFIED

PETITIONER'S INITIAL BRIEF ON MERITS

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I. PRELIMINARY STATEMENT

The Petitioner, CHESTER MAXWELL, is the defendant in the trial court. The Respondent, State of Florida, was the Petitioner in the Fourth District Court of Appeal. The parties shall be referred to as "MAXWELL" and "State" or Petitioner and Respondent throughout this brief.

II. STATEMENT OF THE CASE AND FACTS

The Petitioner, CHESTER MAXWELL, was indicted on October 15, 1980 for first degree murder and three counts of robbery. (R-46-48). He was convicted and sentenced to death on the capital charge. On June 25, 1992, this Court granted a habeas petition, vacating the death sentence, and remanding for a new sentencing hearing. (R-50-58); Maxwell v. State, 603 So.2d 490 (Fla. 1992).

In May, 1993 the Petitioner filed three motions concerning the admissibility of victim impact evidence: Motion to Prohibit Application of Chapter 92-81 as an Ex Post Facto Law (R-222-226); Motion to Exclude Victim Impact Evidence and Argument 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); Motion to Limit Presentation and Argument of Victim Impact Evidence to Judge Only (R-246-250).[1]

The trial court heard argument of counsel on these matters on June 4, 1993. (R-1-36). During the hearing, the court expressed several concerns as to how to constitutionally apply Section 921.141(7), Florida Statutes. Specifically, the court was concerned as to what the jury was supposed to do with victim impact evidence; what the State's burden of proof

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[1] As a result of the trial court's ruling on the constitutionality of Sec. 921.141(7), F.S., this motion was not ruled upon.

was in presenting the evidence; how the court was to instruct the jury to consider this evidence; and how the court was to weigh victim impact evidence in the final sentencing decision. (R-5-6). The court also indicated its concern that the legislature was implying that the death of certain victims, depending on their social status, was more heinous than the death of other citizens. (R-6).

The State argued in the trial court that the jury should be told to give victim impact evidence "what worth it deserves" and that such evidence should be considered, not as an aggravator, but as some other evidence in reaching a decision as to their recommendation to the court. (R-15, 17). The State further argued that the court, in making the final sentencing determination, can use the victim impact for "whatever use you want to make of it." (R-18).

On June 7, 1993 the court announced its intention to hold the victim impact statute unconstitutional. (R-39). Thereafter, the court entered its written Order Declaring Section 921.141(7), Florida Statutes Unconstitutional. (R-261-283). The court concluded that the statute interfered with the jury weighing process rendering it arbitrary and capricious; that the statute lacked guidance to the judge on weighing victim impact evidence relevant to mitigating factors; that it precluded the introduction of mitigating evidence; that it violated the separation of powers doctrine by delegating judicial power reserved to the Supreme Court;

and that the statute violated Art. I, §10 of the Florida Constitution prohibiting the legislature from passing ex post facto laws. (R-281-282).

The State filed a Notice of Appeal. The Fourth District Court of Appeal treated the appeal as a Petition for Writ of Certiorari and on August 10, 1994 the court granted certiorari and quashed the trial court's order declaring unconstitutional the victim impact statute. On January 18, 1995 the court denied the Appellant'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.

III. SUMMARY OF THE ARGUMENT

The trial court correctly ruled that Section 921.141(7), F.S., which permits introduction of victim impact evidence in a capital sentencing proceeding is unconstitutional. The victim impact legislation gives the jury and judge unguided discretion to impose the death penalty in an arbitrary and capricious manner. Victim impact evidence encourages inconsistent, unprincipled and arbitrary application of the death penalty. The statute which permits introduction of such evidence is violative of Article I, Sections 9, 17 and 21 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

The victim impact legislation is vague, overbroad and incapable of a clear and understandable application. The statute lends itself to application in a discriminatory manner, both against victims and defendants. Consequently the statute is also violative of the due process protections of the Florida and United States Constitution.

Furthermore, the ex post facto protections of the United States and Florida Constitutions prohibits application of the victim impact statute to the instant prosecution. Finally, the victim impact statute infringes upon the exclusive right of the Florida Supreme Court to regulate practice and procedure, and is therefore unconstitutional in violation of Art. V, §2 of the Florida Constitution.

IV. ARGUMENT

SECTION 921.141(7), FLORIDA STATUTES, WHICH PERMITS INTRODUCTION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDING IS UNCONSTITUTIONAL

A. SECTION 921.141, F.S., PROVIDING FOR THE ADMISSION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDING IS UNCONSTITUTIONAL AS IT LEAVES JUDGE AND JURY WITH UNGUIDED DISCRETION ALLOWING FOR IMPOSITION OF THE DEATH PENALTY IN AN ARBITRARY AND CAPRICIOUS MANNER.

Effective July 1, 1992, the Florida Legislature enacted Florida Statute 921.141 (7), part of the Florida capital sentencing statute. This section provides:

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

This statute was enacted in response to the United States Supreme Court's opinion in Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), wherein the Court held that the Eighth Amendment does not erect a per se bar prohibiting a capital sentencing jury from considering "victim impact" evidence. To that extent, the decisions in Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987) and South Carolina v. Gathers, 490 U.S. 805, 109 S. Ct.

2207, 104 L. Ed. 2d 876 (1989), were overruled. However, as noted by the trial court, by enacting this statute "The Florida Legislature responded to Payne v. Tennessee, supra, without giving full consideration to the statute's constitutional impact on the Florida capital sentencing procedure set forth in Chapter 921.141, Florida Statutes." (R-280).

The sentencing scheme provided in Florida law is unlike the law reviewed by the Court in Payne in that Florida is a "weighing" state: In other words, the law requires a jury and then a judge to weigh specifically enumerated and defined aggravating circumstances that have been proven beyond a reasonable doubt against mitigating circumstances in determining the appropriate sentence. Section 921.141, Florida Statutes. The law reviewed by the Court in Payne set no such limits. Unlike Florida, Tennessee's capital sentencing law is very broad:

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

T.C.A. 39-13-204 (c) (1982) (emphasis added).[2]

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[2] It is also noteworthy that Tennessee requires a unanimous verdict of the jury to recommend death; Florida requires only a bare majority.

Section 921.141(5), Florida Statutes, specifically limits the prosecution to the aggravating circumstances listed in the statute: "AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limited to the following..." (emphasis added). Accord, Elledge v. State, 346 So.2d 998, 1002-1003 (Fla. 1977); Provence v. State, 337 So.2d 783 (Fla. 1976). The consideration of matters not relevant to aggravating factors renders a death sentence under Florida law violative of the Eighth Amendment. Sochor v. Florida, ____ U.S. ____, 112 S. Ct. 2114, 117 L. Ed. 2d 326 (1992); Stringer v. Black, ____ U.S. ____, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992). In Sochor, the Court explains:

> In a weighing state like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. See Clemons v. Mississippi, 494 U.S. 738, 752, 110 S. Ct. 1441, 1450, 108 L. Ed. 2d 725 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility...of randomness," Stringer v. Black, 508 U.S. _____, 112 S.Ct. 1130, 1139, 117 L. Ed. 2d 367 (1992) by placing a "thumb [on] death's side of the scale," id., at _____, 112 S.Ct. at 1137, thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," id., at _____, 112 S.Ct. at 1139.

Sochor, 112 S.Ct. at 2119.

The Fourth District ruled that victim impact evidence is not an aggravating factor in death sentencing. The court agreed that the jury's consideration of personal

qualities of a victim is prohibited unless otherwise relevant. However, the court ruled that such evidence is relevant, as it informs the jury or the court of the particular harm caused. Although the court recognized that "the particular harm caused" is neither an aggravating or mitigating circumstance, the court found that it is "other evidence, which is not required to be weighed against, or offset by, statutory factors." State v. Maxwell, 19 Fla. L. Weekly D1706 (Fla. 4th DCA August 10, 1994).

With all due respect, the Fourth District opinion is contrary to twenty years of death penalty jurisprudence in this state. A sentencing hearing requires a jury to hear evidence and determine whether sufficient aggravating circumstances exist, as specifically enumerated in Section 921.141(5), F.S., and whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. Based on these considerations, the jury must then advise the court whether the defendant should be sentenced to death or life imprisonment. Section 921.141(2), F.S.. Subsequent case law has made it abundantly clear that the only evidence relevant in a death penalty proceeding is evidence that tends to establish the existence of either an aggravating circumstance or a mitigating circumstance.

In Miller v. State, 373 So.2d 882 (Fla. 1979), the court noted:

> Strict application of the sentencing statute is necessary because the

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

Miller at 885 (citations omitted).

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Supreme Court noted:

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

Elledge at 1003.

Petitioner asserts that the lower court's opinion, finding "other evidence" relevant to the sentencing determination, renders the capital proceeding random and arbitrary as there is no means of guiding and channelling the sentencing authorities discretion with such evidence.

The concern with randomness and arbitrary sentencing procedures, has been the underlying theme of the Supreme Court's death penalty decisions. In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L. Ed. 2d 346 (1972), the Supreme Court held that the death penalty could not be imposed under the sentencing procedures in effect because of the substantial risk that it would be inflicted in an arbitrary and capricious manner as a result of unbridled discretion. Several years later, in reviewing the Florida statute, the Supreme Court upheld the constitutionality of the death penalty finding that the statutory scheme "seeks to assure that the death penalty

will not be imposed in an arbitrary or capricious manner." Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2967, 49 L. Ed. 2d 913 (1976). Rather, "trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." 96 S.Ct. at 2967. Furthermore, the Supreme Court found that the appellate review guaranteed by the Florida sentencing scheme ensured consistency with other sentences imposed and therefore "it is no longer true that there is 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Gregg v. Georgia, 428 U.S. at 188, 96 S.Ct. at 2932, 49 L. Ed. 2d 809 (1976) quoting Furman v. Georgia, 408 U.S. at 313, 92 S.Ct. at 2764 (WHITE, J. concurring.)" Proffitt, 96 S.Ct. at 2967. The Supreme Court held that the Florida Statute thus satisfies the constitutional infirmities identified in Furman. In so holding, the Supreme Court found:

> That legislation [Sec. 921.141, F.S.] provides that after a person is convicted of first degree murder, there shall be an informed, focused, guided, and objective inquiry into the question of whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons and the evidence supporting them, are conscientiously reviewed by a Court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state

> law... [T]his system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed."

96 S.Ct. 2970 (citations omitted) (emphasis added).

In the present case, the trial court reviewed the aforementioned Supreme Court decisions, and found that "the introduction of 'victim impact' evidence will result in the arbitrary and capricious results and the random imposition of the death penalty, which was decried by the United States Supreme Court in Furman v. Georgia, supra." (R-282).

The trial court's concerns were discussed in the hearing on this matter:

THE COURT: Alright. What are we supposed to instruct the jury to do with this information?

In other words, in every instance if we have a person who is a productive member of society and a family person which, believe it or not, many people are.

You may not see it here but most people are. So, we are dealing with a common type of victim who is a family person and a productive member of society and who has loved ones who will miss him or her, children whose life will be saddened. What is the jury supposed to do with this?

In other words, I as a judge, what am I supposed to tell them what to do with this?

PROSECUTOR: You tell them the State has to prove the aggravating circumstances beyond a reasonable doubt but not as an aggravating circumstance, this additional victim impact evidence just as you would consider it.

THE COURT: Consider it how?

PROSECUTOR: To give it what worth it deserves, if any.

(R-15) (emphasis added).

* * *

PROSECUTOR: Well, Your Honor, what you could do is say, ladies and gentlemen, the State has to prove aggravating circumstances.

If they prove aggravating circumstances, you must make a determination if there is, you know, mitigating circumstances, see if the aggravating circumstances outweigh the mitigating circumstances.

If they don't you can tell them in your own instruction they never get up to the victim impact stuff, but once the aggravating circumstances outweigh any mitigating circumstances, they can consider, you know, victim impact not as an aggravator but as some other evidence in reaching a decision as to how they want to make a recommendation to the Court.

(R-17) (emphasis added).

* * *

THE COURT: Alright.

The next step then is assuming then just for the sake of argument, the jury recommends the death penalty. It then falls on me to independently make determinations of whether the State has proven beyond a reasonable doubt the aggravators and whether or not any evidence of mitigators are established.

The question is, based on the case-law that I have seen, what is the judge supposed to do with this now? In other words, I have to make the ultimate decision and I have to hand out a written opinion, contemporaneously with the sentence stating why I am doing this. Where does all this fit in?

PROSECUTOR: Alright.

> You would do the same thing just as if there was no victim impact evidence before you. You would weigh and see if there is any aggravating circumstances to prove beyond a reasonable doubt what the mitigating is (sic) and you make that determination.
>
> If you say, hey, there is one, two, or three aggravating, but it is outweighed by the mitigating, you never have to get up to the victim impact.
>
> You make the same kind of legal determinations and factual determinations as the jury is making and you use the victim impact for whatever use you want to make of it.

(R-18) (emphasis added).

The exchange with the State Attorney highlights the very problem inherent in this statute: that is, where does victim impact evidence factor into the sentencing determination? In the Petition for Writ of Certiorari, the State claimed that victim impact evidence is not to be weighed it is merely to be considered. The Fourth District apparently agreed holding that victim impact evidence is not "required"[3] to be weighed in the consideration of the statutory factors. However, it is the very consideration of factors not inherent in the weighing process that has caused the reversal of several death sentences.

In Burns v. State, 609 So.2d. 600 (Fla. 1992), this Court reversed a death sentence where evidence was introduced concerning the deceased's background and character as a law

[3] It is unclear whether the court is ruling that such evidence could be weighed but is not required to be weighed.

enforcement officer. The Court held that it was harmless error as it related to the guilt phase but found it to be reversible error as it related to the penalty phase. Specifically, this Court held it was not relevant to any material fact in issue. It is particularly noteworthy that Burns was decided after Payne v. Tennessee. Similarly, in Taylor v. State, 583 So.2d 323 (Fla. 1991), the Florida Supreme Court reversed for a new penalty phase due to a prosecutor making an argument designed to invoke sympathy for the deceased. 583 So.2d at 329-330. The Court relied on its prior opinion in Hudson v. State, 522 So.2d 802 (Fla. 1988), in which it held such argument to be improper "because it urged consideration of factors outside the scope of the jury's deliberation." 522 So.2d 809.

In the present case the Fourth District ruled that victim impact evidence was not a non-statutory aggravator. However, this court has previously ruled that such evidence is a non-statutory aggravator and, as such, is an inappropriate consideration in the sentencing determination:

> Florida's death penalty statute, Section 921.141, limits the aggravating circumstances on which a sentence of death maybe imposed to the circumstances listed in the statute. §921.141 (5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. Blair v. State, 406

So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978).

Grossman v. State, 525 So.2d 833 (Fla. 1988) (emphasis added).

The Fourth District cited Hodges v. State, 595 So.2d 929 (Fla. 1992) for the proposition that this Court has approved the use of victim impact evidence. In Hodges, this Court addressed the admissibility of statements made by the victim to others about continuing to prosecute Hodges for an unrelated matter. The Court ruled that the testimony was admissible, despite its hearsay nature because of the relaxed evidentiary rules applicable to a penalty phase. The Court further held that the testimony was not improper victim impact evidence since it did not contain characterizations about the crime, the defendant, or the appropriate sentence. The evidence was relevant to the aggravators found by the trial court: that the murder was committed to disrupt or hinder law enforcement (the prior prosecution) and was committed in a cold, calculated and premeditated manner. Hodges did not present the issue that this Court is faced with in the present case: that is, whether victim impact evidence is relevant and admissible evidence separate and apart from any relevance to aggravators or mitigators.

Hodges, however, stands for the proposition that consideration of matters extraneous to the statutory aggravators is improper. In Hodges, this Court once again chastised the prosecutor for an argument similar to those made

in other cases which urged the jury to compare the quality of the defendant's life in prison to the death of the victim. The Court held the argument was improper because is urged consideration of factors outside of the jury deliberations. Hodges, 595 So.2d at 933-934. See also Jackson v. State, 522 So.2d 802 (Fla. 1988); Taylor v. State, 583 So.2d 323 (Fla. 1991).

Other courts have ruled that victim impact evidence is simply not relevant to the sentencing determination. This is not to say that such evidence is insignificant or to otherwise demean or lessen the terrible suffering of the next-of-kin. Relevance determinations, however, must be made by the courts without passion or prejudice. In Bivins v. State, 642 N.E.2d 928 (Ind. 1994) the court held that although such evidence is not prohibited by the Eighth Amendment, citing Payne, it is only admissible if relevant to an issue properly before the court or jury. The court in Bivins held that given the Indiana statutory scheme of specifying aggravating circumstances, victim impact evidence was improper because it had no relevance to those circumstances. 642 N.E.2d 957. See also State v. Atwood, 832 P.2d 593, 673 (Ariz. 1992) ("The trial court may give aggravating weight only to that evidence which tends to establish the aggravating circumstances specifically enumerated [in the statute], and we do not believe that victim impact evidence has such a tendency.")

The trial court was very concerned about how victim impact evidence is to be used given the statutory sentencing scheme provided for by Florida law:

> What is the burden of proof imposed upon the prosecution by Chapter 92-81? Is it beyond a reasonable doubt; clear and convincing; or preponderance of the evidence? How is the jury supposed to objectively weigh and balance subjective "victim impact" evidence after being given the standard jury instructions on the penalty proceedings in capital cases? How is the trial judge supposed to weigh "victim impact" evidence consistent with the procedures set forth in the weighing process mandated by the Florida and United States Supreme Court? How is the Florida Supreme Court going to factor victim impact evidence into its Eighth Amendment "proportionality" weighing process?

(R-281).

The State's response is that victim impact evidence is not weighed it is merely considered.[4] This begs the questions of how to apply this statute in a constitutional manner:

> "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that

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[4] Apparently there is a disagreement between the circuits on how victim impact evidence factors into the sentencing determination. In State v. Hernandez, et al., (Supreme Court #84,373, currently pending on conflict certification from the Third District Court of Appeal) the State argued that victim impact evidence should be used by the finder of fact to decide what weight to give aggravating circumstances. In the present case the State argued that victim impact evidence is considered only if aggravators outweigh mitigators. (R-17). This discrepancy highlights the problems with applying the statute in a constitutional manner.

> discretion must be suitably directed and limited so as to minimize the risk of wholly and capricious action." 428 U.S. at 189, 96 S.Ct. at 2932 (opinion of STEWART, POWELL, AND STEVENS, JJ).

Godfrey v. Georgia, 446 U.S. 153, 100 S.Ct. 1759, 1764 (1980).

The Florida Constitution requires that victim sympathy evidence and argument be excluded from consideration whether death is an appropriate sentence, and provides broader protection than the United States Constitution for the rights of a capital defendant. The Florida Supreme Court recently found significant the disjunctive wording of Article I, Section 17 of the Florida Constitution, which prohibits "cruel or unusual punishment." Tillman v. State, 591 So.2d 167, 169 (Fla. 1991).[5] The Court in Tillman explicitly held that a punishment is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. The allowance of victim sympathy evidence and argument would violate Article I, Section 17. The existence of this evidence is totally random, depending upon the extent of the deceased's family and friends, and their willingness to testify.

The admission of victim impact evidence and argument would also violate the Due Process Clause of Article I, Section 9 of the Florida Constitution. In Tillman, supra, the Court states that Article I, Section 9 holds "that death is a

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[5] This wording is in contrast to the ban on "cruel and unusual punishment" in the Eighth Amendment of the United State's Constitution.

uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than lesser penalties." Id. at 169. The Florida Supreme Court's opinion in Tillman is clear indication that victim impact evidence violates Article I, Sections 9 and 17 in a capital case, even if it is permitted in other cases.

The admission of victim impact evidence and argument violates Article I, Sections 9 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution for related reasons. First, such evidence introduces into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting a reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakingly achieved in this area. Fourth, the evidence invites the jury to impose the death sentence on the basis of race, class and other clearly impermissible grounds. (See Sec. B, infra).

Victim impact evidence, whether considered a non-statutory aggravating circumstance or merely a factor to "consider" in the sentencing proceeding, encourages

inconsistent, unprincipled, and arbitrary application of the death penalty and therefore is violative of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I Sections 9, 17 and 21 of the Florida Constitution. The trial court properly held this statute to be unconstitutional as applied to the instant sentencing proceeding.

B. SECTION 921.141(7), FLORIDA STATUTES IS VAGUE AND OVERBROAD AND THEREFORE VIOLATIVE OF THE DUE PROCESS GUARANTEE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

The victim impact statute provides that "such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the communities' members by the victim's death." This language contains no definition or limitations. The statute further provides that "characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence." However, it is very unclear what constitutes a characterization or opinion about a crime. The State's proffer letter highlights the difficulty in determining what is opinion and characterization. The letter begins "on September 19, 1980 at 10:30 a.m., a family, friends, and the community lost a very special man..." Is this not opinion testimony about the crime?

A statute, especially a penal statute, must be definite to be valid. Locklin v. Pridgeon, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). The statute at issue here clearly fails under any standard of definiteness required by the United States and Florida Constitutions.

The phrase "loss to the community" contains no definition of community or limits on its membership. This could lead to anyone testifying or even to death sentencing by petition or public opinion poll.[6] The phrase "uniqueness as a human being" places absolutely no limit on this evidence. Who defines uniqueness?

The trial court was particularly concerned about the application of these terms in applying this statute, given the standard jury instruction requiring that a jury not consider sympathy or anger in its determinations:

> THE COURT: Another question is how the case law equates the human brain to nice neat compartments where we make a calculation as to mitigation and we make a calculation as to aggravation, but then we--and we also instruct the jury at the inception that they are not to consider sympathy and they are not to do something because they are angry with something and then

[6] The Florida Constitution provides "Victims of crime or their lawful representative including the next-of-kin of homicide victims, are entitled...to be heard when relevant..., to the extent that these rights do not interfere with the constitutional rights of the accused." Art. I, §16. The victim impact statute broadens these rights to the community at large.

after we instruct them on that say, hey, look, look what this guy has done, look what the effect it's had on his family.

Now, that is based on my experience in life, it is designed to invoke sympathy for the victim and anger against the defendant and the Supreme Court has instructed us not to allow this to happen and the Legislature is now coming in and saying, yes, but we want it to happen....

* * *

THE COURT: But doesn't it result in a--let's say you have a poor person who is in jail and is killed by another inmate.

You are saying that by a victim impact statement that somehow his life doesn't--his loss is not the same as the loss of someone the head of some important company whose kidnapped and he is killed.

(R-20-21).

The Supreme Court has frequently addressed the issue of vagueness of legislatively defined aggravating circumstances. "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)." Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 1957-1859 (1988). Similarly, in Espinosa v. Florida,

505 U.S. ____, 112 S.Ct. 2926, 120 L. Ed. 2d 854 (1992) the Court held "our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor."

Clearly, if victim impact evidence was an aggravating circumstance, its language would render it unconstitutionally vague since it provides a jury and a judge no guidance concerning the meaning of any of its terms or how it is to be applied. The State's argument in the trial court amply demonstrates the vagueness inherent in the application of their statute: "...use the victim impact evidence for whatever use you want to make of it." (R-18). Even if it is not an aggravating circumstance, if it is to be "considered" as the State urges, it must be sufficiently defined in order to adequately channel the sentencing decisions and provide the necessary guidance and direction for the sentencer's consideration.

Perhaps of greatest concern, victim impact evidence as defined in this statute permits and may foster the special danger of racial prejudice infecting a capital sentencing decision. Both the United States Supreme Court and the Florida Supreme Court have recognized the special danger of racial prejudice infecting a capital sentencing decision in a case involving a black defendant and a white deceased. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L. Ed. 2d 27

(1986); Robinson v. State, 520 So.2d 1 (Fla. 1988). Indeed this was the primary concern of Justice Douglas in his opinion finding the death penalty unconstitutional in Furman v. Georgia. In Turner, supra, the Court held that the Sixth and Fourteenth Amendments to the United States Constitution mandates that a black capital defendant accused of killing a white person has a right to voir dire on racial prejudice. In so holding, the Court noted:

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

106 S.Ct. at 1687-1688.

In McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, L. Ed. 2d 262 (1987), a study was cited by Professor David Baldus of death sentences in Georgia showing that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing black victims. A 1980 study of post-Furman death sentences in Florida revealed that black defendants who killed white victims were 8 times more likely to be sentenced to death than black defendants with black victims, and that no white defendant had been sentenced to death for killing a black victim. Adalberto Aguirre, Jr., and David V. Baker, Empirical Research on Racial Discrimination in the Imposition of the Death Penalty, 22 Crim.Just.Abstracts 135, 142 (1990).

Conversely, Michael Radelet reports that since 1608 only 30 of the nearly 16,000 executions that have taken place have involved executions of whites for the murder of African-Americans. Executions of Whites for Crimes Against Blacks: Exceptions to the Rule? 30 Soc.Q. 529, 532 (1989). These statistics support an alarming discrimination already present in death penalty sentencing. The introduction of victim impact evidence can be expected to result in even further discrimination toward defendants and imposition of the death penalty being rendered in an even more arbitrary manner.

Moreover, victim impact evidence leads to discrimination against victims, contrary to the guarantee contained in our constitution of equal protection of the laws. Art. I, §2, Florida Constitution. This court has recognized that the victim's lack of social acceptability is not a proper basis for a jury recommendation of life. See, Bolender v. State, 422 So.2d 833 (Fla. 1982); Coleman v. State, 610 So.2d 1283 (Fla. 1992). Nonetheless, victim impact evidence lends itself to comparing one individual's life against the value of another. Will one victim, depending upon race, social standing, religion, or sexual orientation, be more deserving of a death sentence for his or her killer? Is a murder which does not impact the "community" less heinous than one that does?[7]

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[7] "Recall that the Nazis preyed on people they considered unworthy of life: Jews, Gypsies, homosexuals. The perceived sub-human status of the targets ostensibly justified any manner of

Many reported decisions already reveal examples of attempts to exploit a victim's piety. See e.g., South Carolina v. Gathers, 490 U.S. 805, 109 S. Ct. 2207 (prosecutor recited prayer and argued victim's religiousness); Daniels v. State, 561 N.E.2d 487 (Ind. 1991) (prosecutor mounted life-size photo of victim in full military uniform and stressed that he had been army chaplin); State v. Huertas, 553 N.E.2d 1058 (Ohio 1990) (victim's mother mentioned son's church going habits); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983) (witness testified that deceased was choir member at his church). Certainly the prosecution will not argue explicitly that a murder deserves death because the deceased had money or status or was white or religious. Yet characteristics like the articulateness of survivors frequently correlate closely with wealth and social position, thereby serving as surrogates for parameters nobody deems appropriate. So, too, victim attributes such as being a steady and dependable employee, a

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outrage against them. Transported and later tattooed like cattle, victims were rated against one another in the fashion of animals. Camp commanders directed the younger and healthier captives rightward, to work; the old and weak, leftward, to die. While there is clearly no moral equivalence between genocide and capital punishment as practiced in the United States, the former by its very extremity highlights the need to resist all officially encouraged invidious distinctions founded on a person's class or caste. T o countenance a capital sentencing procedure that allows "'those to discriminate who are of a mind to discriminate,'" as does Payne with respect to victims, is to permit "grading" of humans, which Nazism (if nothing else) should brand as utterly beyond the pale. For the victim's status assumes no greater legitimacy as a basis for the lawful act of sparing or condemning a murderer than for the lawless murder itself." Vivian Berger, Payne and Suffering: A Personal Reflection and a Victim-Centered Critique, 20 Fla. St. L. Rev. 51 (1992).

good provider, a contributor to their church or synagogue, import a certain community status, as well as purely personal traits.

In the event the State is permitted to use victim impact evidence, will it become a defense obligation to exploit or devalue victims in order to minimize such evidence or, in fact, to provide mitigation? In any event, devalued victims will be ignored at a minimum or, worst of all, their defects will be aired in sentencing proceedings. Certainly, if there is a principle of relevance to victim impact evidence that makes a victim's personal, familial, and social worth pertinent evidence in aggravation, worthlessness in these respects becomes pertinent evidence in mitigations.

Victim impact evidence asks a jury to compare the value of a victim's life to the value of other victims' lives and to the value of a defendant's life. The inherent risks that prejudice on racial, religious, social or economic grounds, will infect this decision are unacceptable under the Florida and United States Constitutions. As such, the vagueness of the victim impact evidence renders this statute unconstitutional.

C. SECTION 921.141(7), FLORIDA STATUTES, INFRINGES UPON THE EXCLUSIVE RIGHT OF THE FLORIDA SUPREME COURT TO REGULATE PRACTICE AND PROCEDURE PURSUANT TO ARTICLE V, SECTION 2, FLORIDA CONSTITUTION.

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

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

Haven Federal Savings and Loan Association v. Kirian, 579 So.2d 730 (1991).

The Florida Supreme Court has relied on these principles to invalidate a wide variety of statutes, involving such topics as juvenile speedy trial (RJA v. Foster, 603 So.2d 1167 (Fla. 1992); severance of trials involving counterclaims against foreclosure mortgagee (Haven, supra), waiver of jury trial in capital cases (State v. Garcia, 229 So.2d 236 (Fla. 1969)); and the regulation of voir dire examination (In Re: Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204, 205 (Fla. 1973). The statute at issue here is an attempt to regulate "practice and procedure".

The trial court found that the statute unconstitutionally invades the province of the Supreme Court by providing an "evidentiary presumption that 'victim impact' evidence will be admissible at the penalty phase of a capital case, regardless of its relevance to prove a statutory aggravating circumstance." (R-276). The trial court was also concerned about the statutory permission to the prosecutor to argue in closing argument evidence that has previously been determined to be irrelevant in capital sentencing proceedings. (R-276-277). In Jackson v. State, 522 So.2d 802 (Fla. 1988), the Florida Supreme Court condemned the prosecutor's argument that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced only to life in prison. The trial court considered Jackson and quoted Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985):

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

(R-19) (emphasis in trial court's opinion). The trial court concluded properly:

> The legislature by enacting Chapter 92-81, seeks to amend the above cited portions of the evidence code without first obtaining the approval of the

> Florida supreme Court as is required by Article V of the Florida Constitution. Such action by the Legislature is not constitutionally permissible.

(R-280).

The State argued in the lower court that this statute does not unconstitutionally infringe upon the Supreme Court's exclusive right to regulate practice and procedure by citing Booker v. State, 397 So.2d 910 (Fla. 1987). However, in Booker, the Court merely held that the statutory sentencing scheme does not infringe upon practice and procedure. The victim impact statute, if it is not an aggravating circumstance, is not substantive law. Rather, if the State's argument that it is merely evidence to be "considered" is accepted, than it must be legislatively determined relevant evidence. It is for the Courts to determine relevancy, not the legislature.

Interestingly, the State argued in the lower court in one sentence that it is not a matter of practice and procedure, but argues in response to the ex post facto argument that it is procedural and not substantive. See, Pet. for Cert. pg. 22-23. Clearly, the State cannot have it both ways.

D. THE TRIAL COURT PROPERLY HELD THAT THE APPLICATION OF SECTION 921.141(7), FLORIDA STATUTES, VIOLATES THE EX POST FACTO CLAUSES OF ARTICLE I, SECTION 10 AND ARTICLE X, SECTION 9 OF THE FLORIDA CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 10 OF THE UNITED STATES CONSTITUTION.

The statute in question took effect in 1992. The offense in this cause occurred in 1980. Article I, Sections 9 and 10, of the United States Constitution prohibits Congress from enacting laws that retrospectively apply new punitive measures to conduct already consummated, to the detriment or material disadvantage of the wrongdoer. Through this prohibition, the framers "sought to assure that legislative acts give fair warning to their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29, 109 S. Ct. 960 (1981).

Florida has also adopted an ex post facto prohibition under Article I, Section 10 of the Florida Constitution. This provision states that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed". An ex post facto law, such as the instant one, applies to events occurring before it existed, which results in a disadvantage to the defendant. Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988).

In Miller v. Florida, 482 U.S. 423, 430, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987), the Court held a law is ex post facto if "two critical elements [are] present: First, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must

disadvantage the offender affected by it.'" (quoting Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981)). Both elements are present here. The law took effect since the alleged crime, and adds a powerful reason for imposing death as a punishment which was not permitted to be considered at the time of the offense. The previously well-recognized exclusion of such evidence in a number of cases because of its inflammatory, non-statutorily aggravating nature is stark recognition of the new law's substantial disadvantage. Grossman v. State, 525 So.2d 833 (Fla. 1988) (holding similar victims' rights statute unlawful to apply to capital sentencing); Booth v. Maryland, 107 S.Ct. 2529 (1987) (declaring such evidence violative of the Eighth Amendment), overruled Payne v. Tennessee, 111 S.Ct. 2597 (1991).

In Talavera v. Wainwright, 468 F.2d 1013 (5th Cir. 1972), the Court struck down the retrospective application of a new rule making it harder to obtain a severance as violative of the ex post facto clause of the United States Constitution. The Court stated:

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

Id. at 1015-1016.

The application of the statute at issue here is devastating in its effect on the presentation of the defendant's penalty defense. It shifts the focus of the penalty phase away from the aggravating and mitigating evidence to sympathy for the deceased. It is far more prejudicial to a penalty defense than the application of stricter standards for obtaining a severance is to a guilt phase defense.

The State argues that victim impact evidence does not constitute a statutory aggravating factor and therefore is not violative of ex post facto principles. However, whether it constitutes a statutory aggravating circumstance or not is not determinative of this issue. See Combs v. State, 403 So.2d 418 (Fla. 1981), and Valle v. State, 581 So.2d 40 (Fla. 1991), wherein the Supreme Court permitted the use of later-created aggravators in narrowly tailored circumstances). Furthermore, the Florida Supreme Court has held that a law may be ex post facto even if it is procedural in nature. In Dugger v. Williams, 593 So.2d 180 (Fla. 1991), the Court held that retrospective application of a statute making defendants convicted of capital felonies ineligible for mandatory recommendation for executive clemency violated the ex post facto provision of the Florida Constitution. In so holding, the Court noted:

> [I]t is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters

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

593 So.2d at 181.

At the time of the Defendant's crime, Florida law prohibited the consideration of victim impact evidence as a sentencing consideration. This is clearly a substantial substantive right which is protected by the ex post facto clause of the United States Constitution and the Florida Constitution. In the event the statute is deemed to be purely procedural and therefore not violative of the ex post facto clause, it must then be considered a violation of the separation of powers and the Supreme Court's exclusive jurisdiction to adopt rules for the practice and procedure in all courts.

V. CONCLUSION

The Petitioner submits, based upon the arguments and authorities cited herein, Section 921.141(7), Florida Statutes, is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carolyn McCann, Special Assistant Attorney General, 201 S.E. 6th Street, Fort Lauderdale, FL 33301 this 27th day of February, 1995.

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