ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 91,105

JAMES R. HOOTMAN,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On or between February 17 and 18, 1996, eighty-nine year old Deuward Tune was murdered through the infliction of blunt trauma. The record shows that Mr. Tune was a client of respondent/defendant James R. Hootman at Bankers Life. Mr. Tune was convinced in the days preceding his death that Hootman was stealing from him. Mr. Tune made this allegation to numerous friends and to Hootman's home office in Chicago. Hootman arranged for a meeting with Mr. Tune the day before his death. It was postponed, but took place the next day when Mr. Tune was murdered. The victim's dismembered body was discovered on the residential property of Hootman. (Exhibit F, pg. 25) On February 28, 1996, Hootman was indicted for the first degree premeditated murder of Deuward Tune. (Attached, as Exhibit A)

Hootman filed a motion to prohibit application of section 921.141(5)(m), Florida Statutes to his case on March 13, 1997. (Attached, as Exhibit B) The motion was granted per the trial court's order entered on April 25, 1997. (Attached, as Exhibit C)

On May 15, 1997 the state filed a Petition for Writ of Certiorari in the Second District Court of Appeals seeking reversal of the circuit court's order granting Hootman's motion to prohibit application of section 921.141(5)(m), Florida Statutes, Alternatively, the state requested the District Court to certify

this issue to this Court as one of great public importance. On July 25, 1997, the District Court issued a Certification of Order Requiring Immediate Resolution by the Florida Supreme Court.

SUMMARY OF THE ARGUMENT

The court below erred in granting Hootman's motion to prohibit application of section 921.141(5)(m), Florida Statutes and holding the application of the "advanced age"' aggravating factor to Hootman's case would be a violation of the ex ***post facto*** clauses of both the United States and Florida Constitutions. In the case sub *judice*, the trial court held that the application of the aggravating factor of advanced age to Hootman's case would be a violation of the ex ***post*** facto clause. While the possibility that the addition of this single aggravating factor may result in Hootman receiving the death penalty when he might not have otherwise might suggest an ***ex post facto*** violation, an analysis of the relevant case law does not support such a finding.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN GRANTING HOOTMAN'S MOTION TO PROHIBIT APPLICATION OF SECTION 921.141(5)(M), FLORIDA STATUTES AND HOLDING THE APPLICATION OF THE "ADVANCED AGE" AGGRAVATING FACTOR TO HOOTMAN'S CASE WOULD BE A VIOLATION OF THE *EX POST FACTO* CLAUSES OF BOTH THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The court below erred in granting Hootman's motion to prohibit application of section 921.141(5)(m), Florida Statutes and holding the application of the "advanced age" aggravating factor to Hootman's case would be a violation of the expost facto clauses of both the United States and Florida Constitutions. In the case sub *judice*, the trial court held that the application of the aggravating factor of advanced age to Hootman's case would be a violation of the ex ***post*** facto clause. While the possibility that the addition of this single aggravating factor may result in Hootman receiving the death penalty when he might not have otherwise might suggest an ***ex post facto*** violation, an analysis of the relevant case law does not support such a finding.

From the inception of this state's current death penalty law, the United States Supreme Court has held that the retrospective application of a state statute which altered trial-level sentencing procedure did not violate the Federal Constitution's prohibition against state enactment of ***ex post facto*** laws. In Dobbert v.

Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the Court rejected Dobbert's ex post *facto* challenge, although Dobbert was prosecuted under the post Furman statute which was not in effect at the time he committed the murders for which he was convicted.[1]

The Court held that the changes in the law were procedural, and on the whole ameliorative, and that there was no ex post *facto* violation. While noting that 'Article I, § 10, of the United States Constitution prohibits a State from passing any 'ex post facto law,'" the Court held that "(t)he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." Gibson v. Mississippi, 162 U.S. 565, 590, 16 S.Ct. 904, 910, 40 L.Ed. 1075 (1896). "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." The Dobbert Court further noted that in Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), as of the date of the alleged homicide a convicted felon could not have been called as a witness. Subsequent to that date, but prior to the trial of the case, this law was changed; a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him. Even though this change in the law obviously had a

[1]Furman Georgia, 408 U.S. 238 (1971)

detrimental impact upon the defendant, the Court found that the law was not ex post facto because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict.

In the instant case, as in Dobbert, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime. Quoting, Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), the Dobbert Court stated; "The 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 remained unaffected by the subsequent statute."

The United States Supreme Court has recently revisited its ex post *facto* jurisprudence in California Dept. of Corrections v. Morales, 514 U.S. ___, 131 L.Ed.2d 588, 115 S.Ct. 1597 (1995) and held that: 'After Collins *the focus of the expost facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable,"* Morales, 115 S.Ct. at 1608, n 3 (1995)

(emphasis added).[2]

The legislature's amendment to FS 921.141(5) neither altered the definition of the crime of first degree murder nor increased the penalty by which the crime is punishable. First degree murder was punishable by death both before and after the 1996 Amendment. Accordingly, even if Florida's recent legislative change added an additional aggravating factor into the sentencing analysis, thereby producing some ambiguous sort of 'disadvantage' to Mr. Hootman, the ex post *facto* clause would not be violated because it did not increase the penalty by which first degree murder is punishable.[3]

Consistent with this analysis, this Court has repeatedly rejected arguments that the application of newly-enacted or new case law interpretations of aggravating factors to persons who prior thereto had committed their offenses was an ex post facto violation. See, e.g., Combs V. State, 403 So.2d 418, 421 (Fla.)

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[2]In Collins v. Youngblood, 497 U.S. 37, 111 L.Ed.2d 30 (1990), the Supreme Court had overruled two prior precedents which the Court felt had extended ex *post* facto protection unjustifiably to any situation which altered the situation of a party to his disadvantage. The Collins Court had previously determined that a Texas statute which allowed reformation of improper verdicts did not punish as a crime an act previously committed which was innocent when done, did not make more burdensome the punishment for a crime after its commission, did not deprive one charged with crime of any defense according to law at the time when the act was committed was not prohibited by the ex post facto clause.

[3]A review of the facts as set forth at the motion hearing shows the existence of several other aggravating factors including but not limited to; pecuniary gain, CCP, and avoid arrest.

cert. denied, 456 U.S. 984 (1988) (application of the cold, calculated and premeditated aggravating factor); Zeigler v. State, 580 So.2d 127 (Fla.), cert. denied, 502 U.S. 946, 112 S.Ct. 390, 116 L.Ed.2d 340 (1991) (CCP); Sireci v. State, 587 So.2d 450, 454 (Fla.), cert. denied, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987) 1991) (CCP); Foster v. State, 614 So.2d 455, 461, n. 7 (Fla.), cert. denied, 510 U.S. 951 (1993) (CCP); see also Valle v. State, 581 So.2d 40, 47 (Fla.), cert. denied, 502 U.S. 986, 112 S.Ct. 597, 116 L.Ed.2d 621 (1991) (victim was a law enforcement officer engaged in the performance of his official duties); Jackson v. State, 648 So.2d 85 (Fla. 1994); Hitchcock v. State, 578 So.2d 685, 693 (Fla.), vacated on other grounds, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992) (use of "on parole" to support under sentence of imprisonment aggravator).

Recently, in Trotter v. State, 690 So.2d 1234 (Fla. 1996), Petition for Certiorari Filed, (July 2, 1997),[4] this Court again reviewed the ex post facto argument and held:

> Trotter claims that the trial court's use of community control as an aggravating circumstance constitutes an ex post facto violation because his crime and initial sentencing took place before the above

[4]Trotter also implicitly rejects the trial court's concerns regarding a violation of the Florida Constitution. See, Trotter State, Anstead, Justice, dissenting. See, also Jackson v. State, 648 So.2d 85, n 7 (Fla. 1994); Windom v. State, 656 So.2d 432 (Fla.), cert. denied, ___ U.S. ___, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995).

> amendment was enacted. We disagree and find no violation, ***just as we have found no violation in every other case where an*** **aggravating** ***circumstance*** was ***applied*** **retroactively--even** on resentencing. See, e.g., Zeigler v. State, 580 So.2d 127, 130 (Fla.1991) (no ex post facto violation in applying "cold, calculated, and premeditated" aggravating circumstance retroactively on resentencing where Zeigler committed the crime and was originally sentenced before the circumstance was enacted); Hitchcock v. State, 578 So.2d 685, 693 (Fla.1990) (no ex post facto violation in applying "sentence of imprisonment" aggravator retroactively on resentencing where Hitchcock committed the crime and was originally sentenced before this Court held that parole is embraced within the circumstance). See also Jackson v. State, 648 So.2d 85, 92 (Fla.1994) (no ex post facto violation in applying "victim was a law enforcement officer" aggravator retroactively).
>
> Custodial restraint has served in aggravation in Florida since the "sentence of imprisonment" circumstance was created, and enactment of community control simply extended traditional custody to include "custody in the community." See § 948.001, Fla. Stat. (1985). use of community control as an aggravating circumstance thus constitutes **a** refinement in the "sentence of imprisonment" factor, not a substantive change in Florida's death penalty law.
>
> Trotter (emphasis added)

The circuit court, in the instant case, found the Combs-Valle line of cases distinguishable because the new aggravating factors at issue in those cases were not entirely new but a part of what had been the law. It is the state's position that, like the new aggravating factors at issue in the Combs-Valle line of cases, the

addition of age as an aggravating factor is also simply a refinement of the law. Age and vulnerability of the victim has always been relevant and admissible to establish aggravating factors regarding the heinous or premeditated nature of the crime.

For example, in Johnston v. Singletary, 640 So.2d 1102 (Fla.), cert. denied, 513 U.S. 1195, 115 S.Ct. 1262, 131 L.Ed.2d 141 (1994), this Court in considering the harmlessness of an improper instruction, stated:

> The trial court cites to the testimony of a medical examiner to support its finding that the murder was especially heinous, atrocious, or cruel. The medical examiner testified that the victim, an 84-year-old woman who had retired to bed for the evening, **was** strangled and stabbed three times completely though [sic] the neck and twice in the upper chest. The medical examiner's testimony also revealed that it took the helpless victim three to five minutes to die after the knife wound severed the jugular vein. The court also mentioned, correctly, that the victim was in terror and experienced considerable pain during the murderous attack. The heinous, atrocious or cruel aggravating circumstance was properly applied in this instance.
>
> * * *
>
> Even if the issue were not procedurally barred, "we are convinced beyond a reasonable doubt that the erroneous instruction would not have affected the jury's recommendation or the trial court's sentence." The jury would have found Johnston's brutal stabbing and strangulation of the eighty-four-year-old victim, who undoubtedly suffered great terror and pain before she died, heinous, atrocious, or cruel, even with the limiting instruction.

Johnston v. Singletary, 640 So.2d at

1103-1105 (citations omitted). See, also, Bottoson v. State, 674 So.2d 621 (Fla.) cert. denied, U.S. , 117 S.Ct. 393, 136 L.Ed.2d 309 (1996) (murder was especially heinous because of the kidnapping, long confinement and mode of killing of the 74 year old victim); Washington v. State, 653 So.2d 362 (Fla.), cert. denied, U.S. , 116 S.Ct. 387, 133 L.Ed.2d 309 (1994) (jury override upheld where victim was 93-year-old woman found murdered in her bedroom, having been badly beaten, vaginally and anally raped, and she suffered seventeen rib fractures); Trotter v. State, 576 So.2d 691 (Fla. 1990), reversed on other grounds, appeal after remand, 690 So.2d 1234 (Fla. 1996) (murder heinous, atrocious, or cruel where seventy-year-old victim was stabbed at least seven times, one wound resulting in disembowelment); Muehleman v. State, 503 So.2d 310 (Fla.), cert. denied, 108 S.Ct. 39, 484 U.S. 882, 98 L.Ed.2d 170 (1987) (strangled and suffocated ninety-seven year old man).

Finally, the trial court also, found that Hootman would be further disadvantaged because the addition of the age factor would subject him to the admission of victim impact evidence. First, as previously noted, the ex *post facto* clause is not violated simply because a new law produces 'some ambiguous sort of disadvantage,' such as having the jury hear the victim's age. Furthermore, even without the addition of this factor, *victim impact evidence is* **always** *admissible in* a *penalty phase proceeding,* Farina v. State, 680 So.2d 392 (Fla. 1996); Windom v. State, 656 So.2d 432 (Fla.),

cert. denied, U.S. ___, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995); § 921.141 (7) Fla. Stat. (1996), and is commonly admitted in the state's case in chief. Johnson v. State, 660 So.2d 637 (Fla.), cert. denied, ___ U.S. , 116 S.Ct. 1550, 134 L.Ed.2d 653 (1996) (victim seventy-three year old woman); Davis v. State, 648 So.2d 107 (Fla.), cert. denied, ___ U.S. , 116 S.Ct. 94, 133 L.Ed.2d 50 (1995) (victim seventy-three year old woman).

In conclusion, the state maintains that as the addition of this factor in no way increases the penalty by which first degree murder is punishable and that age of the victim was relevant prior to the amendment, there is no violation of the ex ***post facto*** clause of either the Florida or the United States Constitution. Accordingly, the state urges this Court to reverse the ruling of the lower court precluding the state from arguing Mr. Tune's age in aggravation.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests this Honorable Court reverse the circuit court's order granting the motion to prohibit application.

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. Regular Mail to Violet M. Assaid, Assistant Public Defender, and Allyn Giambalvo, Assistant Public Defender, 14250 49th Street North, Clearwater, Florida 34622, this 16 day of September, 1997.

C M Sabella

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 91,105

JAMES R. HOOTMAN,

Respondent.

INDEX TO APPENDIX

INDICTMENT

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR PINELLAS COUNTY

FALL TERM, in the year of our Lord one thousand nine hundred ninety-five

CRC96-02944CFANO-K

STATE OF FLORIDA

vs.

JAMES R. HOOTMAN
SPN 00688245
W/M; DOB: 05/26/33
SSN: [redacted]

INDICTMENT FOR

MURDER IN THE FIRST DEGREE,
Capital Felony

IN THE NAME AND BY THE AUTHORITY FOR THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, impaneled and sworn to inquire and true charge make in and for the body of the County of Pinellas, upon their oath do charge that

JAMES R. HOOTMAN

in the County of Pinellas and State of Florida, on or between the 17th and 18th day of February, in the year of our Lord, one thousand nine hundred ninety-six, in the County and State aforesaid unlawfully and from a premeditated design to effect the death of Deuward Tune, a human being, did inflict blunt trauma upon the said Deuward Tune, thereby causing mortal wounds, of which said mortal wounds, and by the means aforesaid and as a direct result thereof, the said Deuward Tune died; contrary to Chapter 782.04(1)(a), Florida Statutes, and against the peace and dignity of the State of Florida. [L2]

FILED
FEB 28 1996
KARLEEN F. De BLAKER
CLERK CIRCUIT COURT
Deputy Clerk

195

I, Bruce L. Bartlett, **Chief Assistant State Attorney for the Sixth Judicial Circuit of Florida,** have advised the Grand Jury returning the above Indictment, as authorized and required by law.

Bruce L. Bartlett
Assistant State Attorney for the Sixth Judicial Circuit of the State of Florida, Prosecuting **for** said State

Presented in open Court by the Grand Jury and filed this 28th **day of** February, A.D., 1996.

Karleen F. De Blaker
Clerk of the Circuit Court

By Corona L Klimm
Deputy Clerk

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
PINELLAS COUNTY, FLORIDA

The ***State*** of ***Florida***

vs.

JAMES R. **HOOTMAN**

Indictment ***for***

MURDER IN THE FIRST DEGREE

A TRUE BILL.

Ronald K. Wilson
Foreman of the Grand Jury

SO96-037152 I-REH/0227nh17

CIRCUIT COURT PINELLAS COUNTY FLORIDA

Certified a true and correct copy of the original as filed on the 28 day of Feb 19 96
Public Records of Pinellas County, Florida
KARLEEN F. DeBLAKER
Clerk of the Circuit Court, Pinellas County, Florida
By Sharon Hyde

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
CRC9602944CFANO-K

STATE OF FLORIDA

VS.

JAMES R. HOOTMAN
SPN# 00688245

MOTION TO PROHIBIT APPLICATION OF SECTION 921.141(5)(m), FLORIDA STATUTES

The Defendant, James R. Hootman, by and through his undersigned attorney, pursuant to Rule 3.190, Fla..R.Crim.Pro., and the ex post facto clauses of Article I, Section 10 of the Florida Constitution and Article I and Sections- 9 and 10 of the United States Constitution, as well as Article X, Section 9 of the Florida Constitution, moves that this Court enter an Order prohibiting the application of Section 921.141(5)(m) to this case, and as grounds therefor would state as follows:

1. The Defendant is charged with the crime of First Degree Murder and the State has announced its intention to seek the death penalty in the event the Defendant is convicted of this charge.

2. The First Degree Murder which the Defendant is charged is alleged to have taken place on February 17 or 18, 1996.

3. Section 921.141(5)(m), Fla. Stat., enacted in Laws of Florida, Chapter 96-290, became effective on May 30, 1996.

4. Application of Section 921.141(5)(m), Fla. Stat., to the Defendant in this case would make him eligible for the death penalty and permit the introduction of "victim impact" evidence, see Section 921.141(5) and (7). Its application, with or without any other aggravating factors, would make him eligible for the death penalty and thus would increase the penalty by which the crime of First Degree Murder in this case is punishable such that its retrospective application would violate the ex post facto provisions of both the federal and state constitutions.

MEMORANDUM

I.

1. In *Weaver v. Graham*, 450 U.S. 24 (1981), the United States Supreme Court was considering whether or not a statute which reduced a prisoner's eligibility for prison gain time would be unconstitutional if applied retrospectively, that is, to prisoner's sentenced before the enactment of the statute reducing gain time. In determining that such application would be an unconstitutional ex post facto law the Court held at 450 U.S. at 30:

> Two criminal elements must be present for a criminal or penal law to be ex post facto: it must be retrospective.. .and it must disadvantage the offender affected by it.

Application of Section 921.141(5)(m) in this case would clearly meet this test. Not effective until over three months after the crime alleged in the Indictment, its application would obviously be retrospective, Furthermore, its application would make the Defendant eligible for the death penalty, and the admission of "victim impact" evidence under Section 921.141(7), even if it were the only aggravating factor. If applied in combination with other statutory aggravating factors, it would clearly increase the probability that the Defendant would receive the death penalty. Thus, application of Section 921.141(5)(m) would be a substantial disadvantage to the Defendant and would clearly make the punishment more onerous than the law in effect at the time the offense was committed.

2. In *Talavera v. Wainwright*, 468 Fed.2d 1013 (5th Cir. 1972), the court struck down as violative of the ex post facto clause of the United States Constitution, the retrospective application of a (new) rule making it more difficult to obtain a severance of counts joined in an indictment. The court stated at 1015-1016:

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

The new Section, 921.141(5)(m), would obviously prejudice the Defendant and

make it substantially more difficult for him to defend his life if it were used as an additional aggravating factor in any penalty phase hercin.

3. The Florida Supreme Court has stated the test for violation of the ex post facto clause of the Florida Constitution as follows:

> In Florida, a law or its equivalent violates the prohibition against ex post facto law if two conditions are met: (a) it is retrospective in effect; and (b) it diminishes a substantial substantive right the party would enjoy under the law existing at the time of the alleged offense.

Dugger v. William, 593 So.2d 180, 181 (Fla. 1991)

4. The diminution of rights or a disadvantage to the defendant need not be certain or absolute in order for the law to be found an ex post facto one. *See v. Williams*, 397 So.2d 663 (Fla, 1981), the defendant had been sentenced to a term of years in prison and the trial court announced that it was retaining jurisdiction for the first one third of the sentence, The law authorizing such retention of jurisdiction permitted the court to, in effect, "veto" parole for the first one third of his sentence, but was enacted after the commission of the offense for which the [illegible]nt had been convicted.

The Florida Supreme Court found that the decision of the United States Supreme Court in *Weaver v. Graham*, supra, controlled the issue and mandated reversal of the trial court's attempted retention of jurisdiction over the defendant's sentence, adopting the Supreme Court's two-fold test as follows:

> The Supreme Court set forth a two-fold test: (1) does the law attach legal consequences to crimes committed before the law took effect, and (2) does the law effect the prisoners who committed those crimes in a disadvantageous fashion? If the answer to both questions is yes, then the law constitutes an ex post facto law and its void is applied to those prisoners.

See also *Gwong v. Singletary*, infra, at 431 citing *Weaver* for the proposition that "a law need not impair a 'vested right' to violate the ex post facto prohibition, it need only make the punishment more onerous than the law in effect at the time the offense was committed."

Obviously, application to the State's attempt to impose the death penalty on the Defendant of an aggravating factor not enacted until after the commission of the crime alleged,

"attaches legal consequences" to a crime committed before the law took effect. In addition, a new statutory aggravating circumstance, which would increase the probabilities that the Defendant would receive the maximun1 sentence of death, makes the punishment more onerous and thus clearly disadvantages the Defendant in an ex post facto way.

5. In addition to the above general principles concerning cx post facto laws, decisions of the Florida Supreme Court dealing specifically with the ex post facto nature of newly enacted aggravating factors in death penalty cases mandate that Section 921.141(5)(m) would be an unconstitutional ex post facto law if applied to the instant case.

In *Combs v. State*, 403 So.2d 418 (Fla. 1981), the defendant complained that application of Section 921.141(5)(I), the "cold, calculated, and premeditated" aggravating factor, which became effective July 1, 1979, should not be applied to his case because the murder for which he had been convicted occurred before that date. In finding that the ex post facto clauses of the state and federal constitutions did not prohibit application of the "cold, calculated, and premeditated" aggravating factor, the court stated as follows:

> If the legislature had added an entirely new factor as an aggravating circumstance, t h e n retroactive consideration would have violated the prohibition against ex post facto laws as set forth in Weaver v. Graham, 450 US 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981), and in State v. Williams, 397 So.2d 663 (Fla. 1981). However, the addition by the legislature of paragraph (1) to Section 921.141(5), in fact only reiterates in part what is already present in the elements of premeditated murder, with which the prisoner was charged and which the evidence clearly supports. (Emphasis added).

Combs at 421.

Similarly, *in Valle v. State*, 581 So.2d 40 (Fla.1991), in determining whether or not application of Section 921.141(5)(j), the aggravating factor that "the victim was a law cnforccmcnt officer engaged in the performance of his official duties," which had become effective only after the murder in issue, was prohibited as an ex-post-facto law, the court cited *Combs*, supra, stating that:

> We determined (in *Combs*) that the factor (cold, calculated, and premeditated) could be constitutionally applied to a crime committed before the factor was enacted because the statute only reiterated an element already present in the crime of premeditated murder. (Citation omitted).

> Premeditation was not an entirely new factor.
>
> Similarly, in this case the aggravating factor that the victim was a law enforcement officer who was murdered while performing his official duties is not an entirely new factor[1] and Valle was not disadvantaged by its qualification. (Footnote and emphasis added).

6. Thus, the aggravating factors of "cold, calculated and premeditated," Section 921.141(5)(I), and that "the victim was a law enforcement officer engaged in the performance of his official duties," Section 921.141(5)(j), were held not to violate the constitutional provision against application of ex post facto laws only because in one case the statute "only reiterated an element already present in the crime of premeditated murder" and in the other case because it was not "an entirely new factor,"

However, the absolute contrary is true of the entirely new aggravating factor found in Section 921.141(5)(m). This section reads as follows:

> (m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

Neither all or any part of this new aggravating factor is a mere reiteration of any element already present in the crimes of either premeditated or felony murder, *Combs*, nor is it any way encompassed in any of the aggravating factors which were in effect at the time of the murder in this case as was the case in *Valle*. in fact "an entirely new factor, the retroactive consideration and application of which would violate the prohibition against ex aost facto laws." See *Weaver v. Graham*, supra; *Combs v. State*, supra; *Valle v. State*, supra.

7. Two even more recent pronouncements of the Florida Supreme Court make the Defendant's position herein, that application of Section 921.141(5)(m) to this case would violate the ex post facto clauses of both the federal and state constitutions, absolutely clear.

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[1] The court found that it was not an entirely new factor because at the time Valle committed his crime "the aggravating factors of murder to prevent a lawful arrest and murder to hinder the lawful exercise of any governmental function or the enforcement of the laws." Sections 921.141(5)(e), (g), Florida Statutes, had already been established. Furthermore, "[B]y proving the elements of these two factors in this case, the state has essentially proven the elements necessary to prove the murder of a law enforcement officer aggravating factor." *Valle*, supra, at *47*.

In Ellis v. State, 622 So.2d *991 (Ha.* 1993), the court rcvcrscd both the defendant's convictions and death sentences due to various errors during the trial. In a concurring opinion, Justice Kogan stated that he also agreed with the Defendant's argument (in addition to the errors found by the majority) that intervening federal case law (post-*Combs*) had rendered the retroactive application of even the aggravating factors of "cold, calculated and premeditated" unconstitutional. Noting that prior Florida Supreme Court decisions had rejected the Defendant's position, Justice Kogan nevertheless opined in a concurring opinion as follows:

> Although I realize we previously have rejected an ex post facto challenge in this same context (citation omitted), I believe the intervening opinion in *Miller v. Florida*, 482 US 423, 107 S.Ct. 2446, 96 L.Ed 2d 351 (1987), renders our prior analysis highly questionable. Likewise, I cannot reconcile our earlier rulings with the Eleventh Circuit's analysis in *Raske v. Martinez*, 876 F.2d 1496 (11th Cir.), cert. denied, 493 US 993, 110 S.Ct. 453, 107 L.Ed 2d 540 (1989), nor with our opinions in *Waldrup v. Dugger*, 562 So.2d 687 (Fla. 1990), or *Dugger v. Williams*, *593* So.2d 180 (Fla. 1991).
>
> * * *
>
> Thus, on the basis of the ex post facto clauses of the Federal Constitution and Article I. Section 10 of the [illegible] a Constitution, I would remand with instructions that cold, calculated and premeditated is not a possible aggravating factor in this case. I also agree with (the defendant) that the holdings of *Justus* and similar cases cannot be squared with the plain language of Article X. Section 9 of the Florida Constitution.[2] (Footnote added, emphasis original).

Ellis at 1002, concurring opinion.

And in the very recent case of *Gwona v. Singletary*, 21 Fla. L. Weekly S430 (Fla. Oct. 10, 1996) the Florida Supreme-Court again addressed the ex-post-facto issue in the context of a Department of Correction regulation which purported to require all prisoners to serve 85% of their sentences, including those who had been sentenced for crimes which had been committed before the effective date of regulation.

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[2]See Section II, infra.

Citing *Waldrup v. Dugger*, supra, and *Weaver v. Graham*, supra, the court again reiterated that the law violates the ex post facto clause if:

> (1). ..it is retrospective in its effect, and
> (2). . .alters the definition of criminal conduct or increases the penalty by which a crime is punishable. (Emphasis added.)

Gwong at 431.

Applying this test to the D.O.C. rule in question, which in effect denied prisoners gain time to which they had been entitled prior to the effective date of the rule, the court held that the D.O.C. regulation did violate the ex post facto clause of the constitution. The court noted that in *Collins* v. *Youngblood*, 497 US 37, 100 S.Ct. 2715, 111 L.Ed 2d 30 (1990), the Court somewhat altered the definition of ex post facto, stating that a law is ex post facto if it operates retrospectively and alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

In *Gwong*, the Florida Supreme Court also specifically noted that according to *Weaver v. Graham*, 450 US at 30, a statute would violate the ex post facto clause even though the benefit withdrawn (thus making the punishment more onerous) was a "mere expectancy." Furthermore, a law "need not impair a vested right" in order to violate the ex post facto prohibition, it need only make the punishment more onerous than the law in effect at the time the offense was committed. *Weaver*, supra at 30,

II.

8. The application of Section 921.141(5)(m) would also violate Article X, Section 9 of the Florida Constitution. Article X, Section 9 states as follows:

> SECTION 9. **REPEAL O F CRIMINAL STATUTES. -** Repeal gr amendment of a criminal statute shall not effect prosecution or punishment fo1 any crime previously committed. (Emphasis added.)

This section forbids a retroactive application of an amended or repealed statute which affects "prosecution or punishment," *State* v. *Pizzaro*, *383* So.2d 762, 763, (Fla. 4th DCA 1980); *Skinner* v. *State*, 383 So.2d 767, 768 (Fla. 3d DCA 1980). Section 921.141(5)(m), amending Section 921.141(5), effective May 30, 1996, would clearly affect both the prosecution and the punishment in this case. Its application to this case would increase the potential aggravating factors and thus minimize or reduce the effect of any mitigation evidence presented. Application of Section 921.141(5)(m) to the Defendant would violate both the Florida and United States Constitutions.

CONCLUSION

Based upon the above and foregoing authorities, the Defendant asserts that application newly enacted Section 921.141(5)(m) to this case would add an entirely new factor as an aggravating circumstance, a factor not present in the law at the time the crime with which he is charged was committed. Section 921.141(5)(m) would thereby disadvantage him and make the law more onerous than at the time the crime was committed by making him eligible for a death penalty or increasing the probability that he will be sentenced to death, and it would effect both the prosecution and punishment for a crime previously committed. It's application would therefore violate the ex oost facto clauses of both the United States and Florida Constitutions, and the Fourteenth Amendment to the United States Constitution and Article X, Section 9 of the Florida Constitution.

WHEREFORE, the Defendant respectfully prays that this Honorable Court will enter an Order granting this motion and such other and further relief as to the Court seems just and proper.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bernie McCabe, State Attorney, Clearwater, Florida, on this 28th day of February, 1997.

Violet M. Assaid, Attorney at Law
Fla. Bar Number: 792918, For
PUBLIC DEFENDER, SIXTH JUDICIAL CIRCUIT
14250 49th Street North, Suite B100
Clearwater, FL 34622

djb

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

Case Number 9602944 CFANO

STATE OF FLORIDA

vs.

JAMES R. HOOTMAN, 688245
Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO PROHIBIT APPLICATION OF SECTION 921.141(5)(m), FLORIDA STATUTES.

THIS MATTER is before the Court on Defendant's Motion to Prohibit Application of Section 921.141(5)(m), Florida Statutes, filed pursuant to Florida Rule of Criminal Procedure 3.190. After review of the Defendant's Motion, case law submitted by the state and oral argument, this court finds as follows:

Application of Section 921.141(5)(m), Florida Statutes, to the Defendant in this case would make him eligible for the death penally and permit the introduction of "victim impact" evidence, see §21.141(5) and (7), Florida Statutes, Section 921.141(5)(m) allows the jury in a penalty proceeding to consider whether "the victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim." Section 921.141(5)(m) beume effective on May 30, 1996. Ch.96-290, $5, at 1248, Laws of Fla. However, Defendant's First Degree Murder charge is alleged to have occurred on February 17 or 18, 1996. Defendant contends that the application of this section violates the ex post fado clauses of both the United States and Florida Constitutions, U.S. Const.art.1,§§9, 10; Fla. Const.art.l, $10.

The United States Supreme Court in California Dept. Of Corrections v. Morales, 115 S. Ct. 1597, 131 L.Ed 2d 588 (1995), recently set forth the standard used to assess whether a law violates federal prohibitions against ex post facto legislation. The Court in Morales concluded that the ex post facto clause is targeted at laws that "retroactively after the definition of crimes or

increase the punishment for criminal acts." Moreover, The Florida Supreme Court in Dugger v. Williams, 593 So.2d 180,181(Fla.1991), set forth the test for a violation of the ex post facto clause of the Florida Constitution as follows:

> In Florida, a law or its equivalent violates the prohibition against ex post facto law if two conditions are met: (a) it is retrospective in effect; and (b) it diminishes a substantial substantive right the party would enjoy under the law existing at the time of the alleged offense.

Application of §921.141(5)(m) in this case would satisfy both factors set out in the Morales and Dugger definitions of ex Post fact laws. First, Section 921.141(5)(m) was enacted and became effective three months after the crime alleged was committed, thus its application would clearly be retrospective. Second, hearing an additional aggravating circumstance during the penalty phase of a capital case could potentially influence a jury to recommend a death sentence instead of life imprisonment. Moreover, its application alone would make the Defendant eligible for the death penalty and subject to the admission of "victim impact* evidence pursuant to $92 1.141(7), even if it were the only aggravating factor. Florida law requires the existence of at least one aggravating circumstance before the death penalty can be imposed. Therefore, the Defendant in this case could face the death Penalty based upon this one aggravator (§921.141(5)(m)), even though this aggravator did not exist at the time the crime was committed. Consequently, while an application of §921.141(5)(m) would not alter the definition of a crime, it could diminish a substantial substantive right of the defendant by increasing the punishment eventually imposed.

However, a recent Florida Supreme Court decision found no violation in applying an aggravating circumstance retroactively. Trotter v. State, 22 Fla.L.Weekly S 12 (Fla. December 19, 1996). In Trotter the defendant claimed that the trial court's use of community control as an aggravating circumstance constituted an ex post facto violation because his crime and initial sentencing took place before the $921.12 1(5)(a) amendment was enacted. (22 Fla.L.Weedly S12). At the time of Trotter's initial appeal, the capital sentencing statute failed to mention community control specifically, speaking instead of "sentence of imprisonment" broadly. Id. Section 921.121(5)(a) read as follows:

(5) AGGRAVATING CIRCUMSTANCES.--

Aggravating circumstances shall (include) the following:

(a) The capital felony was committed by a person under sentence of imprisonment. §921.121(5)(a), Fla. Stat.(1985).

The legislature, immediately following the Courts decision in Trotter, amended §92 1.12 1(5)(a) to specifically address community control:

(5) AGGRAVATING CIRCUMSTANCES.--

Aggravating circumstances shall (include) the following:

(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.§921.121(5)(a), Fla.Stat.(1991).

The Court in Trotter ultimately held that the use of community control as aggravating circumstance merely constituted a refinement in the "sentence of imprisonment" factor, and not a substantive change in Florida's death penalty law. Id. The Trotter Court cited a number of cases standing for the proposition that there is no ex post facto violation in applying an aggravator retroactively when new or amended aggravating circumstance is either a refinement in the existing factor or reiterates an element already present. See, e.g., Zeigler v. State, 580 So.2d 127, 130(Fla. 1991) (no ex post facto vi&ion in applying "cold, calculated, and premeditated" aggravating circumstance r-actively on resentencing where Zeigler committed the crime and was orfginally sentenced before circumstance was enacted); Hitchcock v. State, 578 So2d 685,693 (Fla. 1990) (no ex post facto violation in applying "sentence of imprisonment" aggravator retroactively on resentencing where Hitchcock committed the crime and was originally sentenced before this Court held that parole is embraced within circumstance); Jackson v. State, 648 So.2d 85, 92(Fla. 1994) (no ex post facto violation in applying "victim was a law enforcement officer" aggravator retroadively).

Moreover, the Supreme Court of Florida, in Combs v. State, 403 So.2d 4 18(Fla. 198 1), held that the prohibition against ex post facto laws is not violated by applying the cold, calculated, and premeditated aggravating factor to a murder committed before the legislature enacted the aggravating factor. The Court determined that the factor could be constitutionally applied to a crime committed before the factor was enacted because the statute only reiterated an element already present in the crime of premeditated murder. Id. At 421. Premeditation was not an entirely new

factor. Therefore, the USC of the cold, calculated, and premeditated aggravating factor in Combs did not violate the ex post facto laws. Id. See also Zeigler v. State, 580 So.2d 127, 130(Fla. 1991).

Similarly, in Valle v. State, 581 So.2d 40 (Fla. 1991), cert denied 502 U.S. 986(1991), the Florida Supreme Court addressed the retroactive application of Section 921.141(5)(j) which permits an aggravating circumstance if "the victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties." The Valle defendant was convicted of murdering a law enforcement officer. While §921.141(5)(j) was enacted after the Valle defendant murdered the officer, two other topically related aggravating factors were in effect at the time of the defendant's offense (subsections (5)(c) and (5)(g). Utilizing the analysis set out in Combs, the Valle Court determined that the "cold, calculated and premeditated* factor was constitutionally applied to a crime committed before the factor was enacted because the statute only repeated an element already present in the crime of premeditated murder. Id. At 47. (citing Combs v. State, 403 So.2d 418, 421). Using a similar analysis, the Valle Court examined the aggravating factors effective at the time of the defendant's offense and concluded that newly enacted subsection (5)(j) merely reiterated the elements contained in subsections (5)(c) and (5)(g). Id. At 47. Accordingly, the law enforcement victim factor, although rdroadively applied, was not an "entirely new" factor. Id. Therefore, the defendant was not disadvantaged by its application.

In all the foregoing cases which find retroactive application constitutional, the aggravating factors did not add anything new to the elements of the offense or to the other applicable aggravating factors. The penalty phase juries were not given additional detrimental information to consider in making its sentencing recommendations. In contrast, the application of newly enacted §921.141(5)(m) creates an entirely new factor. Section 921.141 (S)(m) is neither a refinement in an existing aggravating factor nor a reiteration of an existing element to a crime. Thus, the retroactiveapplication of Section 921.141(5)(m) can not be justified under the holdings of ~~Combs~~ and Valle. Accordingly, the retroactive application of Section 92 1.14 1(5)(m) would violate the prohibition against ex post fado clauses of both the United States and Florida Constitutions. U.S.

Const.art. I, §§9,10; Fla.Const.art.I,§ 10.

Therefore, for all reasons stated haein, it is ORDERED AND ADJUDGED that Defendant's Motion to Prohibit Application of Section 92 1.141(5)(m), Florida Statutes, is hereby GRANTED.

DONE AND OHDEKED, in Clearwater, Pinellas County, Florida this 24 day of April, 1997.

RAYMOND O. GROSS
Circuit Judge

cc: State Attorney's Office
Violet M. Assaid, Assistant Public Defender

CIRCUIT COURT PINELLAS COUNTY FLORIDA

Certified a true and correct copy of the original as filed on the 25 day of APR 19 97
Public Records of Pinellas County, Florida
KARLEEN F. DeBLAKER
Clerk of the Circuit Court, Pinellas County, Florida
By

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

CRC96-02944CFANO-K

STATE OF FLORIDA

V. MURDER IN THE FIRST DEGREE

JAMES R. HOOTMAN
SPN 00688245

NOTICE OF INTENT TO SEEK DEATH PENALTY

Comes now, the State of Florida, by and through the undersigned Assistant State Attorney, pursuant to Rule 3.202 (a), Florida Rule of Criminal Procedure, and files this Notice of Intent to Seek the Death Penalty in the above-styled case.

I HEREBY CERTIFY that a copy of the foregoing Notice of Intent to Seek Death Penalty has been furnished to Robert E. Jagger, Public Defender, Criminal Courts Complex, Clearwatcr, Florida, by personal service, this 15th day of March, 1996.

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

Assistant State Attorney

K-REH/0314SE25

CIRCUIT COURT PINELLAS COUNTY FLORIDA

Certified a true and correct copy of i h: original as filed on the 15a v of MAR 19 96
Public Records of Pinellas County, Florida
KARLEEN F. DeBLAKER
Clerk of tho Circuit Court, Pinellas County, Florida
By

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA.
CRIMINAL JUSTICE DIVISION

STATE OF FLOBIDA

CASE NUMBER: 96-7716

v.

DIVISION: G

CHRISTOPHER OLSEN /

ORDER GRANTING DEFENDANT'S MOTION TO PROHIBIT APPLICATION OF SECTION 921.141(5)(m), FLORIDA STATUTES

THIS MATTER is before the court on Defendant's Motion to Prohibit Application of Section 921.141(5)(m), Florida Statutes, filed pursuant to Florida Rule of Criminal Procedure 3.190. After a review of the Defendant's Motion, case law submitted by the state and oral argument, this court finds that Defendant's Motion must be granted.

Florida Statutes, section 921.141(5)(m) allows the jury in a penalty proceeding to consider whether "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim." Section 921.141(5)(m) became effective on May 30, 1996. Ch. 96-290, § 5, at 1248, Laws of Fla. However, Defendant's First Degree Murder charge is alleged to have occurred between May 18, 1996 and May 20, 1996, prior to the effective date of subsection (5)(m). Defendant asserts that application of this subsection violates the ex post facto clauses of both the United States and Florida Constitutions. U.S. Const. art. I, §§ 9, 10; Fla. Const. art. I, § 10. Defendant requests this court to refrain from instructing

the jury on this aggravating factor should this case proceed to the penalty stage.

The United States Supreme Court has recently set forth the standard used to evaluate whether a law violates federal prohibitions against passing ex post facto legislation. U.S. Const. art. I, §§ 9, 10; California Dent. of Corrections v. Morales, 115 S. Ct. 1597, 131 L. Ed 2d 588 (1995). The Morales Court determined that the ex post facto clause is targeted at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts."

An application of subsection (5) (m) would implicate both factors implicitly encompassed by the Morales definition of ex post facto laws. First, Defendant's First Degree Murder charge allegedly occurred prior to the effective date of subsection (5)(m). Consequently, the court would have to retroactively apply subsection (5) (m) in order to instruct the jury on this aggravating factor. Second, hearing an additional aggravating circumstance during the penalty phase of a capital case could potentially influence a jury to recommend a death sentence instead of life imprisonment. Accordingly, while an application of subsection (5) (m) would not alter the definition of a crime. it could increase the punishment ultimately imposed. Therefore, in Defendant's case, a jury instruction pursuant to (5) (m) would violate ex post facto prohibitions.

The state maintains that this case is akin to previous circumstances in which other aggravating factors (specifically

subsections (5) (a), (5) (i) and (5) (j)) have been retroactively applied. However, in prior cases finding constitutional retroactive application, the aggravating factors did not add anything new to the elements of the offense or to the other applicable aggravating factors. The penalty phase juries were not given additional detrimental information to consider in making its sentencing recommendations. In contrast, subsection (5) (m) creates an entirely new factor. A discussion of applicable case law follows below,

In Combs v. State, 403 So. 2d 418 (Fla. 1981), the state sought retroactive application of section 921.141(5)(i), which provides for an aggravating factor if "[t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." The Florida Supreme Court did not find the law violative of ex post facto clauses because the aggravating circumstance basically "reiterated" the essential elements of First Degree Premeditated Murder. Id. at 421.[1] The Combs Court reasoned that even without this instruction, the jury would have innately considered the "cold, calculated and premeditated" nature of the offense in rendering its recommendation because those elements were already established when it found Defendant guilty of Premeditated Murder. Id.

Combs is distinguishable since subsection (5) (m) does not

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1. See also Ziegler v. State, 580 So, 2d 127, 130 (Fla. 1991); Sireci v. State, 587 So. 2d 450, 455 (Fla. 1991).

merely repeat the essential elements of First Degree Murder. Rather, this subsection allows the jury to give special consideration, beyond what it had already considered at trial, to the victim's "advanced age" in determining whether to recommend life imprisonment or a death sentence. Because subsection (5) (m) could not be classified as a simple repetition of the charged offense, it could not be applied retroactively under the Combs rationale.

In Valle v. State, 581 So. 2d 40 (Fla. 1991), cert denied 502 U.S. 986 (1991), the Florida Supreme Court addressed the retroactive application of section 921.141 (5) (j) which permits an aggravating circumstance if "[t]he victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties." The Valle defendant was convicted of murdering a law enforcement officer. While subsection (5) (j) was enacted after the Valle defendant murdered the officer, two other topically related aggravating factors were in effect at the time of the defendant's offense. One factor, found in subsection (5)(e), applied to capital felonies committed while attempting to avoid custody. The second factor, located in subsection (5)(g), pertained to capital felonies committed to disrupt government functioning. The trial court only instructed on the law enforcement victim factor (subsection (5) (j)) and did not mention the avoiding custody (subsection (5)(e)) or disrupting government (subsection (5) (g)) factors.

To guide its analysis of the ex post facto repercussions of

retroactively applying subsection (5) (j), the Valle Court referred to its prior decision in Combs. In particular, the Valle Court noted that the "cold, calculated and premeditated" factor was constitutionally retroactively applied because it simply repeated the elements of Premeditated Murder. Id. at 47. (citing Combs v. State, 403 So. 2d 418, 421.) Using a similar analysis, the Valle Court examined the aggravating factors effective at the time of the defendant's offense and concluded that the newly enacted subsection (5) (j) merely reiterated the elements contained in subsections (5)(e) and (5) (g). Id. The Valle Court found that when the state established that the victim was a law enforcement officer, killed during his official duties, it had essentially shown the elements contained in the avoiding custody and disrupting government factors. Id. Accordingly, the law enforcement victim factor, although retroactively applied, was not an "entirely new" consideration. Id. Since all the factors were effectively "merged" into one instruction, the Valle court determined that the defendant did not suffer undue prejudice as a result of the subsection (5) (j) jury instruction. Id.[2]

In contrast to Valle, there are no other aggravating factors that are topically related to subsection (5) (m). The most similar is arguably subsection (5)(l) which calls for an

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[2], See also Jackson v. State, 648 So. 2d 85, 91-2 (Fla. 1994) (holding no error to retroactively apply law' enforcement victim factor when it was the only instruction given even though the avoiding arrest and disruption of government factors also applied.)

aggravating circumstance if the victim is under twelve years of age. Of course, both subsection (5) (l) and subsection (5) (m) would not be simultaneously applicable to the same victim and could not be "merged" into one instruction. Therefore, subsection (5) (m) is an "entirely new" aggravating consideration and its retroactive application may not be justified under the holding of the Valle Court.

Most recently, in Trotter v. State, 21 Fla. L. Weekly S12 (Fla. December 19, 1996), the Florida Supreme Court addressed the retroactive application of an amendment to an aggravating factor. At the time the Trotter defendant committed his offense, subsection (5) (a) described an aggravating circumstance if "the capital felony was committed by a person under sentence of imprisonment. " Fla. Stat. § 921.141 (1985). Subsequently, subsection (5) (a) was amended-to specify, "the capital felony was committed by a person under sentence of imprisonment or placed on community control." Fla. stat. § 921.141 (1991). The Trotter penalty phase jury was instructed pursuant to the 1991 version of the subsection. The Trotter Court determined that the community control amendment was just a "refinement" of "sentence of imprisonment" and did not constitute a "substantive change" in the aggravating factor. Id. at S13. Thus, the amendment was constitutionally retroactively applied.

The finding that community control (or other restricted supervision imposed as a result of a felony conviction) is a form of "sentence under imprisonment" is not an entirely new concept.

See Stone v. State, 378 So. 2d 765, 772 (Fla. 1980) (holding that a defendant was "under sentence of imprisonment" even though he was released from custody pursuant to a federal order while further state proceedings were pending); Aldridge v. State, 351 So. 2d 942 (Fla. 1977) (finding that a defendant was "under sentence of imprisonment" even though he was on parole at the time of the offense); State v. Bolvea, 520 So. 2d 562 (Fla. 1988)(determining that a defendant is in "custody under sentence of court " while defendant is on community control or probation for purposes of Florida Rule of Criminal Procedure 3.850.) The amendment to subsection (5) (a) appears to be more aptly regarded as the Florida Legislature's intent to reiterate Prior holdings of the Florida Supreme Court.

The state submits that subsection (5) (m) is a "refinement" of the vulnerability "concept;' of subsection (5) (l). However, there is insufficient authority to support the state's contention. The legislature did not merely amend subsection (5) (l) to include the circumstance where a victim is "vulnerable due to advanced age or disability." Nor did the legislature amend subsection (5) (1) to also include the vulnerability language of subsection (5)(m). Rather, the legislature enacted an entirely new subsection containing the vulnerability language as well as the criterion of the "advanced age, or disability" of the victim or the defendant's "familial or custodial authority" over the victim. Without further guidance from the legislature or the appellate courts, this court cannot allow the retroactive

application of subsection (S)(m) on the basis of the Trotter refinement analysis.

It is therefore ORDERED AND ADJUDGED that Defendant's Motion to Prohibit Application of Section 921.141 (5) (m), Florida Statutes, is hereby GRANTED.

DONE AND ORDERED in chambers, Hillsborough County, Florida this 17 day of February, 1997.

Barbara Fleischer, Circuit Judge

Send Copies to:

Carolyn Dasilva, Esquire
Assistant Public Defender
office of the Public Defender

Nicholas B. Cox, Esquire
Assistant State Attorney
Office of the State Attorney

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA,

Petitioner,

v.

JAMES R. HOOTMAN,

Respondent.

Case No. 97-02118

Order filed July 25, 1997.

Petition for Writ of Certiorari to the Circuit Court for Pinellas County; Raymond 0. Gross, Judge.

Candance M. Sabella, Tampa, for Petitioner.

Bob Dillinger, Public Defender, and Violet M. Assaid, Assistant Public Defender, Clearwater; and James Marion Moorman, Public Defender, Bar-tow, and Allyn Giambalvo, Assistant Public Defender, Clearwater, for Respondent.

Certification of Order Requiring Immediate Resolution by the Florida Supreme Court

LAZZARA, Judge.

The State of Florida invokes our certiorari jurisdiction to review the trial court's order which prohibits the use of the newly created aggravating circumstance of section 921 .141(5)(m), Florida Statutes (Supp. 1996), in seeking the death penalty against the respondent. It also requests that we certify a question of great public importance to the Florida Supreme Court regarding the issue raised in this case Because we conclude that the trial court's order will have a great effect on the proper administration of justice throughout this state, we certify on our own motion that this order requires immediate resolution by the Florida Supreme Court under article V, section 3(b)(5), of the Florida Constitution, and Florida Rule of Appellate Procedure 9.125.'

The State indicted the respondent for first-degree murder, alleging that the crime occurred on or between the 17th and 18th days of February, 1996. It also filed a written notice of its intention to seek the death penalty. One of the aggravating circumstances which the State wants to utilize in its quest for the death penalty is

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[1] Because we are not disposing of this case by a decision, it would be a useless gesture to accept the State's invitation to certify a question of great public importance to the supreme court. See Boler v. State, 678 So. 2d 319, 320 *n.2* (Fla. 1996) (supreme court has no jurisdiction under article V, section 3(b)(4), of the Florida Constitution, to answer a certified question of great public importance where there is no district court "decision" to review), The approach we are taking, however, will hopefully accomplish the same result the State is seeking-a definitive and expeditious answer from the supreme court regarding the propriety of the trial court's order.

based on section 921.141(5)(m), which the legislature enacted into law on May 30, 1996. See Ch. 96-290, § 5, at 890-891, and § 11, at 892, Laws of Fla. In determining whether a death sentence should be imposed, this section now permits consideration of circumstances establishing that "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim." According to the State's Proffer to the trial court, the facts in this case will establish that the victim of the respondent's homicide was eighty-nine years of age, was suffering from immobility requiring the use of a cane or walker, and was visually and hearing impaired.

The respondent in due course filed a motion to prohibit the application of the aggravating circumstance found in section 921.141(5)(m). He argued that because this new circumstance was enacted into law after he allegedly committed his crime, its application to his case would violate the ex post facto provisions of the United States and Florida Constitutions. The trial court rendered a written order granting the respondent's motion in which it agreed with the respondent's ex post facto argument. The State timely filed its petition for writ of certiorari with us seeking a reversal of the order. For the reasons expressed below, we conclude that the order sought to be reviewed raises an issue having a great effect on the proper administration of the death penalty in this state and should more appropriately be decided by the Florida Supreme

Court under the auspices of article V, section 3(b)(5), of the Florida Constitution, and rule 9.125.[2]

The primary basis for our conclusion stems from the supreme court's exclusive jurisdiction under article V, section 3(b)(1), of the Florida Constitution, to "hear appeals from final judgments of trial courts imposing the death penalty." As that court has explained within the context of the doctrine of proportionality review of death penalty cases, "[t]he obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory appellate jurisdiction." Tiliman v. State, 591 So. 2d 167, 169 (Fla. 1991) (emphasis added). We recognize that the order sought to be reviewed is not a final judgment imposing the death penalty and thus does not fall within the exclusive jurisdictional ambit reserved to the Florida Supreme Court. We believe, however, that in the spirit of Tillman with its emphasis on the supreme court's preeminent role in the domain of death-penalty law, it would be judicially beneficial to refer the issue posed in the trial court's order to that court for immediate resolution so

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[2] We note that the respondent relied on a written order rendered by a trial court in a different judicial circuit of this district which also granted a defendant's motion to prohibit the application of section 921.141(5)(m) on the basis of the ex post facto prohibitions contained in the United States and Florida Constitutions. This order is in the record. According to the record, however, the State in that case did not seek review of the order but instead elected to proceed to trial. Thus, the issue of whether section 921.141 (S)(m) can be retroactively applied to a capital felony committed prior to its effective date is not unique to the respondent's case.

that trial courts in this state will have the benefit of a definitively uniform pronouncement regarding the application of section 921.141(5)(m) to cases in which the capital murder was allegedly committed prior to its effective date.

Furthermore, in our judgment, the order in this case is distinguishable from the interlocutory suppression order in State v. Preston, 376 So. 2d 3 (Fla. 1979) (Preston I), which the court declined to review even though the state was seeking the death penalty. In that case, the issue raised in the respondent's motion and decided by the trial court was characterized as routine in the sense that it arose in other types of criminal cases and thus was "not unique to capital cases or to the death sentence itself." Id. at 4. In our case, however, the essence of the issue raised and resolved by the trial court's interlocutory order can be characterized only as peculiarly unique to a capital case and the imposition of the death penalty. Accordingly, we believe that this is another compelling reason why we should afford the supreme court the immediate opportunity to review the trial court's order.

We also find it significant that in the event we decided to quash the trial court's order thus allowing the State to use the aggravating circumstance of section 921.141(5)(m), and that in the event the trial court ultimately imposes the death penalty by relying on this circumstance, our decision would not preclude the respondent under the doctrine of law of the case from raising the ex post facto issue on direct appeal to the Florida Supreme Court. See Preston v. State, 444 So. 2d 939, 942 (Fla. 1984) (Preston II). Thus, we believe that the interests of judicial economy, coupled with the

pressing need for judicial uniformity, furnish additional support for passing this case directly through to the Florida Supreme Court for immediate resolution.

Finally, we are aware of the supreme court's recent revised opinion in State v. Fourth District Court of Appeal, 22 Fla. L. Weekly S424 (Fla. July 10, 1997), in which it clarified its jurisdictional position in the realm of death penalty cases. In doing so, the court held "that in addition to our appellate jurisdiction over sentences of death, we have exclusive jurisdictiori to review **all types of collateral** proceedings in death penalty cases." Id. (emphasis added). It went on to explain, however, citing to Preston I, that "our jurisdiction does not include cases in which the death penalty is sought but not yet imposed." Id.

Clearly, in our case, the death penalty although being sought by the State has not yet been imposed. Nevertheless, we do not believe that this latest pronouncement from the supreme court precludes us from requesting that it invoke its discretionary jurisdiction under article V, section 3(b)(5), of the Florida Constitution, and rule 9.125 to review the trial court's order. Instead, in our view, this recent opinion did nothing more than define the parameters of the exclusive jurisdiction reserved to the supreme court in death penalty cases and was not intended to limit its discretionary authority to accept jurisdiction in a case such as this **one involving a truely** unique issue of death penalty law.

We, therefore, respectfully request that the Florida Supreme Court accept jurisdiction for an immediate resolution of the trial court's order in this case pursuant to

article V, section 3(b)(5), of the Florida Constitution, and Florida Rule of Appellate Procedure 9.125. To that end, no motions for rehearing will be entertained.

DANAHY, A.C.J., and WHATLEY, J., Concur.