

1/17/01

SUPREME COURT OF LOUISIANA

No. 00-KK-0566

STATE OF LOUISIANA

VERSUS

LESTER GOMEZ

CONSOLIDATED WITH

00-KK-0677

STATE OF LOUISIANA

VERSUS

LESTER GOMEZ

VICTORY, J. (dissenting)

The majority correctly concludes that the legislature, when it adopted and later amended La.C.Cr.P. art. 905.2(A), neither contemplated nor addressed the introduction of victim impact evidence in a capital case where the victim survives the offense. Article 905.2(A) is silent on the subject. That being the case, I believe the resolution of the issue before us is controlled by our existing case law.

In State v. Bernard, 608 So. 2d 966 (La. 1992), we approved the use of victim impact evidence in a capital case at a time when there was no legislative expression of will on the subject. Since there is still no expression of legislative will on the question of using such evidence in a capital case where the victim survives, the same reasoning we applied in Bernard should guide us here. In Bernard, we relied heavily on the decision of the United States Supreme Court in Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991). There, the Court held that the harm resulting from a particular crime is an important concern of the criminal law and that for a jury to assess meaningfully the defendant's moral culpability, it

should have before it evidence of the specific harm caused by the defendant

At the time we decided Bernard, the Code of Criminal Procedure provided, without further detail, that evidence of the circumstances of the event and the character and propensities of the offender could be introduced at the penalty phase. We concluded that, under limiting guidelines, evidence of the impact of the crime on the victim's family could be admitted because it reflects on the offender's character and propensities. Such evidence shows the offender's willingness to commit the crime, even in the face of knowing that there would be likely impact not only on the victim, but on the victim's family as well.

The rationale for introduction of victim impact evidence at the sentencing phase is to assist the jury in determining an appropriate sentence for the defendant. Victim impact evidence is clearly relevant because it sheds light on the character and propensities of the defendant, which is one of the primary factors in determining an appropriate sentence. The fact that the victim of a capital offense survives in no way diminishes the jury's need for relevant evidence to assist it in its critical task of assessing the character and propensities of the defendant so that it can arrive at a just sentence.

In 1998 the Louisiana Constitution was amended to provide in Art. 1, Sec. 25:

[A] victim of crime shall have the right .
. . . to be heard during all critical stages
of . . . postconviction proceedings

In 1999, La. R.S 46:1842(2) was enacted to further make it clear that the victim is entitled to be heard at any judicial proceeding at which there is a disposition of the charged offense or where sentence is imposed. In my view, while the

precise issue of the manner of presenting victim impact evidence in a capital case where the victim survives has not been explicitly addressed by the legislature, the people of this state and the legislature have clearly evidenced their intent that the impact of the crime on the victim should be considered at the sentencing phase of a proceeding. Indeed, in this case the disputed evidence is being offered to show the direct impact on the victims of the crime, who are both still minors. It is not being offered to show the impact on family members. Surely, this evidence is highly relevant to the character and propensities of the offender. Where evidence is offered by family members and professionals to show the direct impact of a crime on minor victims, who may not be able to speak adequately for themselves, there is ample reason to continue to follow our decision in Bernard, as well as the implicit guidance found in our Constitution and in La. R.S. 46:1842(2).

Accordingly, in the absence of any expression of legislative will to the contrary, I respectfully dissent and would allow the disputed evidence to be presented to the jury.