

**[J-74-2000]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 271 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence of
	:	Death Imposed by the Court of Common
v.	:	Pleas of Lancaster County dated March
	:	17, 1999, at No. 672 C.A. 1997
	:	
	:	
FRANCIS BAUER HARRIS,	:	
	:	ARGUED: May 2, 2000
Appellant	:	
	:	

**CONCURRING AND DISSENTING OPINION**

**MR. CHIEF JUSTICE ZAPPALA**

**DECIDED: November 20, 2002**

The majority holds that, while *victim* impact evidence is admissible in a capital sentencing hearing, evidence regarding the impact the crime had on the *defendant's* family is precluded. If one assumes that victim impact evidence is relevant to the jury's determination of whether the defendant should be executed for his offense, the logical extension of such a view is that evidence of the impact the defendant's execution would have on the defendant's family is equally pertinent and admissible evidence. Both types of evidence tend to establish the harm resulting from the loss of human life that has arisen from the criminal acts committed by the defendant. Will not the defendant's family be impacted and suffer a loss when the final sentence of death is imposed? Evidence of such impact is no less relevant than the victim impact evidence presented here by the Commonwealth.

My difficulty in this case stems from my unceasing disagreement with the controlling precedent of this Court holding that victim impact evidence is relevant and admissible. As I noted in my dissenting opinion in Commonwealth v. Means, 773 A.2d 143 (Pa. 2001) (Zappala, J., dissenting), and Commonwealth v. Rice, 795 A.2d 340 (Pa. 2002) (Zappala, J., concurring and dissenting), the introduction of victim impact evidence unconstitutionally channels the jury's deliberations toward examining the life and attributes of the victim, rather than the criminal culpability of the defendant. I fully accept, however, the precedential value of this Court's decision in Means and believe that the natural extension of such a holding results in the admissibility of the evidence the defendant here sought to present.

The majority in the instant case holds that "execution impact" or "third party impact" testimony is inadmissible because "[t]his type of evidence does not fall within any of the seven specific mitigating circumstances outlined in 42 Pa.C.S. § 9711(e). Nor does it fall within the 'catchall' mitigating circumstance outlined in § 9711(e)(8), which encompasses, '[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense.'" Majority opinion at 27. I agree that "third party impact" evidence does not fall within the first seven specific statutory mitigating circumstances. I also agree that such evidence does not fall within the catchall mitigating circumstance, 42 Pa.C.S. § 9711(e)(8), as it does not go to the defendant's character, his record or the circumstances of the offense. This does not resolve the inquiry, however, as our holding in Means was based on the very proposition that evidence in a capital sentencing hearing is not necessarily limited to the enumerated mitigating and aggravating circumstances.

In Means, the defendant argued that because victim impact evidence was not related to an aggravating or mitigating factor set forth in the sentencing statute, it could not be presented to a jury during a penalty phase proceeding. This Court rejected this

proposition on the ground that "Pennsylvania's sentencing scheme does not limit the evidence admissible in the penalty phase to only the information necessary to establish aggravating and mitigating circumstances." Id. at 153. Quoting Commonwealth v. Abu-Jamal, 555 A.2d 846, 858 (Pa. 1989), the Court in Means stated:

We do not read the statute as limiting the scope of the sentencing hearing to this extent. The legislature has directed that "[I]n the sentencing hearing, evidence may be presented *as to any matter that the court deems relevant* and admissible on the question of the sentence to be imposed *and shall include matters relating to any of the aggravating or mitigating circumstances* specified in subsections (d) and (e)." 42 Pa.C.S. § 9711(a)(2).

Commonwealth v. Means, 773 A.2d at 152 (emphasis supplied).

Thus, the majority's finding that "third party impact" evidence does not fall within any enumerated mitigating circumstance is of no significance. The issue becomes simply whether evidence of the impact of the crime on the defendant's family is relevant to the imposition of sentence. I must admit that my finding of relevancy in "third party impact" evidence is tied solely to the relevance the Court found in victim impact evidence. Once a value is permitted to be placed on the life of the victim, should not the defendant's family be permitted to testify that the defendant's human existence is likewise worthy of value in the eyes of the jury?

Accordingly, because our Court has opened the door to allow the jury to hear evidence regarding the impact of the victim's death, the door should not now close when the defendant attempts to offer evidence as to the impact the execution will have on his benefactors. Due to this disparity in treatment, I would reverse the sentence of death and remand for a new penalty hearing during which the defendant may present "third party impact" evidence.