IN THE SUPREME COURT OF FLORIDA

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RICHARD WALLACE RHODES,

Appellant,

vs. Case No. 67,842

STATE OF FLORIDA,

Appellee. :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ISSUE XII

THE PENALTY PHASE OF RICHARD RHODES' TRIAL WAS TAINTED BY EVIDENCE HE WAS UNABLE TO CONFRONT, IMPROPER CROSS-EXAMINATION OF A DEFENSE WITNESS, AND IMPROPER AND INFLAMMATORY ARGUMENT BY THE PROSECUTOR

A. Inadmissible Evidence

Appellee asserts that the taped interview with Jema Adduchio was not inadmissible under Booth v. Maryland, 482 U.S. ____, 107 S.Ct. ___, 96 L.Ed.2d 440 (1987) because the "tape did not focus on the character and reputation of the victim," but instead "focused on the character of the individual defendant and the circumstances of the crime." (Supplemental Brief of Appellee, p.3) However, one of the circumstances of the crime that emerged from the tape was the suffering of the victim. She described how she was "shaken" and beside herself when her attacker fled (R3004-3005), and twice mentioned the panic she felt inside when her assailant threatened to kill her. (R3009) This is precisely the type of evidence disallowed by Booth. The "emotional impact of the crimes on the family" was part of the victim impact statements in Booth that the Court found unacceptable, 96 L.Ed.2d at 448, and Jema Adduchio's account of her emotional state during and after the incident involving Appellant is the same type of evidence.

ISSUE XVI

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE STATE'S USE OF VICTIM IMPACT STATEMENTS PREPARED BY THE AUNT AND MOTHER OF KAREN NIERADKA AT APPELLANT'S SENTENCING HEARING.

At page five of its brief Appellee states that members of Karen Nieradka's family "testified before the judge as to the impact of the victim's death on them." A clarification is in order. Neither Nieradka's aunt, Evia Sage, nor her mother, Eva Jeter, gave "live" testimony at Appellant's sentencing hearing, although Sage was present in the courtroom. (R2949-2051) Instead, the prosecutor read written statements the two women had prepared, which statements, of course, Appellant could not cross-examine.[1]

At page six of its brief Appellee attempts to portray as very narrow the scope of victim impact evidence which the court is required to consider pursuant to section 921.143 of the Florida Statutes because "the statute limits the content of the statements to facts that relate solely to the facts of the case and the extent of any harm resulting from the crime." What counsel fails to point out is that the "harm" to be discussed may include "social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime...." §921.143(2), Fla.Stat. (1985). Thus the statute actually provides for quite a wide range of victim impact evidence to be considered by the court prior to sentencing.[2]

1/ Appellant would also note that the written statements apparently were not under oath, as required by section 921.143(1)(b), Florida Statutes.

2/ Florida's section 921.143 can be compared with the Maryland provision at issue in Booth, which is set forth at 96 L.Ed.2d 446.

Appellee seems to say at pages six through seven of its brief that there is no danger a sentencing judge, as opposed to a sentencing jury, will arbitrarily and capriciously impose a sentence of death, even in part, on the basis of information contained in victim impact statements because the judge will merely follow the law. There are two problems with this conclusion. The first is that judges, like jurors, are human, and cannot realistically be expected to ignore entreaties such as a mother's plea that "justice" be done by putting her daughter's killer in the electric chair. The second is that section 921.143 of the Florida Statutes requires the court to consider victim impact statements at the sentencing hearing, and so a judge would not be "following the law" if he refused to include submissions by the victim's family in his sentencing process.

Appellee claims at pages seven through eight of its brief that there is no evidence the court considered the victim impact statements in making her decision that Richard Rhodes should die, and says that Judge Hansel's oral and written findings show that she "weighed only the appropriate factors." However, as Appellant discussed in Issue XIV of his initial brief, the court's oral and written findings upon which she based Appellant's sentence of death are extremely "barebones." It is difficult, if not impossible, to discern from them exactly what information Judge Hansel did and did not consider in deciding that the ultimate punishment was warranted in this case.

Finally, Appellee attempts to engage in a harmless error analysis, while acknowledging that Booth "does not address the propriety" of doing so. (Supplemental Brief of Appellee, p.8) Perhaps the Supreme Court's failure to conduct a harmless error analysis in Booth is a recognition of the fact that allowing the sentencer in a capital case to consider victim impact evidence of the type discussed herein is so fraught with the potential for prejudice that doing so can never be considered harmless.

CONCLUSION

Appellant, Richard Wallace Rhodes, renews his prayer for the relief requested in his initial supplemental brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida, 33602, by mail on this 2nd day of October, 1987.

Robert F. Moeller
ROBERT F. MOELLER