IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,919

JESUS SCULL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

* *

SUPPLEMENTAL ARGUMENT PURSUANT TO COURT ORDER

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INTRODUCTION

This pleading is being submitted pursuant to an order of this Court. Said order was issued upon appellant's request for an opportunity to address any issues raised by the recent Supreme Court Case of Booth v. Maryland, 41 CrL 3282.

ARGUMENT

THE RECENT CASE OF BOOTH V. MARYLAND HAS NO BEARING ON APPELLANT'S CASE.

John Booth was found guilty of murder. Pursuant to Maryland law, he opted to have the jury determine his sentence. Before that phase of the trial got under way, Parole and Probation officials has prepared a presentence report on Booth. That report contained a "victim impact statement ("VIS") as required by law.

The VIS was detailed. It described the severe emotional trauma suffered by the victims' family and it contained the opinions held by the various family members of the defendant.

The State argued for death, using the VIS in closing:

> Ladies and gentlemen, if they prove the one mitigating circumstance or if they prove two or ten or a hundred or two hundred or a

> thousand, nothing whatsoever about this man, about his background, about his feelings, about his emotions, about his moral capacity, could ever, in any way, outweigh the importance of what he did that day in May last year . . . . If you get to section three and you have to balance it, take this presentence report and read out loud what is entitled the victim impact statement. For ladies and gentlemen that is the ultimate dimension of the crime he has committed. . . . [Emphasis supplied]" See Booth v. State, 507 A.2d 1098, at 1133 (Md. 1986).

Booth objected to the inclusion of the VIS. He was overruled. The Maryland Supreme Court affirmed his convictions. The United States Supreme Court reversed. It held that the VIS, being a mandatory consideration for the jury in a capital case under Maryland law, injected an arbitrary element into the proceedings which violated the Eight Amendment.

Booth is very much different from the case at bar. Behold:

1. Contemporaneous objection.

Appellant, unlike Booth, failed to object to the inclusion of victim impact evidence below. (Tr. 1382) Any "error" has not been preserved for appellate review. Castor v. State, 365 So.2d 701 (Fla. 1978).

2. Judge vs. Jury deliberations

Appellant's sentence was not handed down by the jury, as was the case in Booth. Appellant's jury was never made aware of any victim impact evidence. The presentence report which contained statements by the victims' relatives was strictly confidential. It therefore had no effect on the jury's recommendation, which was 8 to 4 in favor of death (Tr. 1383). The jury was exposed to none of the supposedly inflammatory material condemned in Booth.

The trial court did state that he had ordered the presentence report. However, the court added:

> "**THE COURT:** It [the presentence report] is basically superfluous. You don't normally need a PSI in this kind of case, but I ordered it just in case there is some information. It is very consistent with what Mr. Rappaport said that he really doesn't admit anything, and he doesn't give them much to work with. In fact, they recommend the death penalty as well. But again so the record is clear that this court, while not required to, did in fact order a Presentence Investigation, and I will attach that to the file and make it a permanent part of the file." (Tr. 1382).

Judging from this comment, it is clear that any victim impact evidence perhaps seen by the judge was of no

importance to him. The judge never specifically referred to victim trauma when he discussed the PSI. To argue that victim impact evidence found its way into the sentencing process would therefore be meritless. Importantly, there is no mention of it in the sentencing order itself (R. 294, 295). According to Quince v. State, 414 So.2d 185 (Fla. 1982), if an improper aggravating factor is argued to the trial court, there is no error when that improper factor does not appear in the sentencing order.

> "Appellant argues an improper consideration of nonstatutory aggravating factors when evidence was given concerning likelihood of rehabilitation and lack of remorse. But neither of these factors were considered in aggravation by the judge in his sentencing order and were accorded no weight in the sentencing process." Quince, at 188.

If one compares Booth to Quince it is apparent that the possibility of an Eighth Amendment violation is really only an issue where:

a.) the sentencer is required to consider an improper factor,

b.) the sentencer is a jury more susceptible to impermissible arguments,

c.) the sentencer clearly indicates a reliance upon the improper factor, and

d.) that factor becomes a key part of the sentencing process.

3. Importance of Presentence Reports

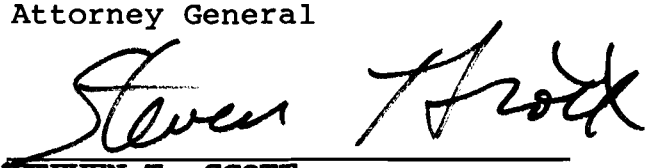
Florida law in this area is fundamentally different from that of Maryland. In this state, no one is required to consider the contents of a presentence report. Rose v. State, 461 So.2d 84 (1984). Maryland, on the other hand, required the judge or jury to consider victim impact as part of the sentencing process. A judge in Florida must be deemed to automatically attach less importance to presentence reports in general. If they serve any purpose, it is undoubtedly that of providing the court with non-statutory mitigating factors. That appears to have been the case here. A reading of the sentencing hearing (Tr. 1381-1390) shows that the trial court was doing his best to find such factors, and that that was his reason in ordering a PSI initially.

CONCLUSION

Any victim impact evidence which found its way into appellant's trial was never a factor in his sentence. The trial judge never mentioned it in his sentencing order. It was not a part of the weighing process. Booth is not germane to our case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **SUPPLEMENTAL ARGUMENT PURSUANT TO COURT ORDER** was furnished by mail to **ROBIN GREENE**, 2655 Le Jeune Road, Suite 1109, Coral Gables, Florida 33134 on this **3rd** day of August, 1987.

STEVEN T. SCOTT
Assistant Attorney General

/dmc