IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,919

JESUS SCULL,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL ARGUMENT

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SUMMARY OF SUPPLEMENTAL ARGUMENT

The consideration of a victim impact statement by the sentencer in a capital case violates the Eighth Amendment because the information it contains is irrelevant to capital sentencing and because it injects an impermissible risk of arbitrariness into the proceeding. The consideration of such statement without notice to the defendant or his counsel and without the opportunity or ability to rebut it violates the defendant's right to due process of law. Both constitutional violations occurred in this case.

The victim impact statements were contained in the presentence investigation report. Counsel had no notice of the statements, and the defendant would have been unable, even if given the opportunity, to rebut the emotionally laden hearsay statements of the family members. The trial court read the presentence investigation report and expressly referred to the impact of the crime on the family members when it imposed the death penalty. These family members were the same persons with whom the jury foreman had contact. These errors denied defendant Scull his right to a fundamentally fair capital sentencing hearing. Reversal is required.

SUPPLEMENTAL ARGUMENT

THE CONSIDERATION BY THE TRIAL COURT PRIOR TO IMPOSING SENTENCE OF VICTIM IMPACT STATEMENTS CONTAINED IN THE PRESENTENCE INVESTIGATION REPORT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A victim impact statement has been defined as an "objective description of the medical, physical, financial, and emotional injuries inflicted by the offender upon the victim." Lodowski v. State, 490 A.2d 1228 at 1261 (Md. 1985)(Cole, J. concurring).

In Booth v. Maryland, 482 U.S.___, 107 S.Ct.___, 96 L.Ed.2d 440 (1987), the United States Supreme Court held that consideration by the sentencer in a capital case of a victim impact statement (VIS) violates the Eighth Amendment. The VIS in Booth contained information regarding the personal characteristics of the victims, the emotional impact of the crimes on family members, and family members' opinions and characterizations of the crime and the defendant. 96 L.Ed.2d at 448. The majority reasoned that this kind of information is irrelevant to a capital sentencing decision and that a VIS creates an impermissible risk that the capital sentencing decision will be made in an arbitrary and capricious manner. 96 L.Ed.2d at 448-50. The factual setting presented here is different from that of Booth, but the circumstances of this case are as compelling for reversal.

The victim impact statements were contained in the presentence investigation report (PSI) ordered by the trial court

in the exercise of its discretion. (A.1-3).[1] The PSI was prepared by a correctional officer who obtained "very emotional statement[s]" (A.2) from the mother of victim Miriam Mejides and the sister of victim Lourdes Villegas. The statements are unsworn. The correctional officer supplied exclamatory punctuation. (A.2-3).

The mother's statement relates the emotional impact of the crime on her, including her loneliness and sleeplessness, the mother's characterization of the defendant as a monster, and her recommendation that he should receive the death penalty. The sister's statement discusses the emotional and medical impact of the crime on her and her parents, including the sister's bad dreams, the father's heart attack and deterioration, and the mother's high blood pressure and memory loss; it relates the loving and generous nature of the victim and the sister's recommendation of the death penalty. (A.2-3). This is the same kind of information, albeit not as articulate or detailed, which the Court condemned in Booth. 96 L.Ed.2d at 448. This information, which has no bearing on the defendant's character, prior record, or circumstances of the offense, is the antithesis of the objective criteria, focusing on the uniqueness of the defendant as a human being, mandated by the Eighth Amendment in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303-05, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Lockett v. Ohio, 438 U.S. 586, 604 n.12, 98 S.Ct. 2954, 57 L.Ed.2d 973

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1. The symbol "A." refers to the attached appendix.

(1978). The VIS in this case falls within the purview of Booth v. Maryland, and its consideration by the trial court therefore violated the Eighth Amendment.

The due process clause is implicated, as well. Unlike the situation in Booth, and more egregious, neither defendant Scull nor his counsel had notice that victim impact statements would be included in the PSI and considered by the trial court. This was a clear violation of the principles announced in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). In Gardner, the Court held that the defendant was denied due process of law when his death sentence was imposed, at least in part, on the basis of confidential information which he had no opportunity to deny or explain. The due process violation is manifest here.

The record reflects that defense counsel was unaware that the PSI had been completed until the jury retired to consider its advisory sentence. (T.1384). It reflects that the court had read the PSI: the court assessed and described its contents and expressly referred to the defendant's statement professing his innocence (typed on the same pages as the VIS) and to the death penalty recommendation of the Department of Corrections. (T.1384). The court made the PSI a permanent part of the file (T.1384), but there is no indication that the defense was furnished a copy or that the victim impact statements were ever disclosed. The trial court's consideration of the victim impact statements in its determination of sentence also is reflected in the record. The court told defendant Scull," . . . You have no

feeling neither for the consequences of what you have done or the wreckage that you have left behind. The victims and their families, their lives will never be the same because of what you did. . . ." (T.1390). The court then told the spectators that defendant Scull has no feelings and no conscience, and "(a)ccordingly, this Court is satisfied that the aggravating factors rather heavily outweigh the mitigating factors in this case." (T.1390).

It is clear that the trial court considered the victim impact statements contained in the presentence investigation report in its determination of sentence. The state's argument that there is no error if an improper factor does not appear in the sentencing order (Supplemental Argument at 4) is without merit in light of the trial court's affirmative statements in its oral pronouncement of sentence. See, e.g., Simmons v. State, 405 So.2d 310 (Fla. 4th DCA 1981). Moreover, it must be assumed that the trial court considered the entire record, including the PSI, when it imposed the death penalty. See Funchess v. Wainwright, 772 F.2d 683, 693-94 (11th Cir. 1985). Also without merit is the state's contention that the VIS had no effect on the jury's recommendation. See Argument II of defendant Scull's initial and reply briefs. Thus, the family of each victim was able to have an impact, impermissibly, on the trial court and the trial jury. The family members who provided the VIS were the same persons who had unauthorized contact with the jury foreman.

In this case the court imposed the death penalty, at least

in part, on information as to which the defendant had no notice, opportunity, or ability to rebut. The consideration of the statements violated both the spirit of the constitution, Booth v. Maryland; Gardner v. Florida; and the letter of Florida law. §921.141(1), Fla. Stat. (1985) (limiting presentation of evidence in the sentencing hearing to that which is relevant to the nature of the crime and the character of the defendant and providing the defendant a "fair opportunity to rebut any hearsay statements"); §921.143(1), (2), Fla. Stat. (1985) (A.4) (mandating that statements of next of kin be made under oath and directing the prosecution to advise family members that their sworn statements "shall relate solely to the facts of the case and the extent of any [resultant] harm . . .").

This issue involves a new constitutional claim and raises serious questions of law about the validity of defendant Scull's death sentence. This Court must address the merits and reverse. See State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984); State v. Whitfield, 487 So.2d 1045, 1046 & n.2 (Fla. 1986).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 7th day of August, 1987.

BY: Robin H Greene
ROBIN H. GREENE