

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: OHIO, Petitioner V. EDIBERTO HUERTAS

CASE NO: 89-1944

PLACE: Washington, D.C.

DATE: January 16, 1991

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SUPREME COURT, U.S.
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OHIO :

4 Petitioner :

5 v. : No. 89-1944

6 EDIBERTO HUERTAS :

7 - - - - - X

8 Washington, D.C.

9 Wednesday, January 16, 1991

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:59 a.m.

13 APPEARANCES:

14 JONATHAN E. ROSENBAUM, ESQ., Chief Assistant Prosecuting
15 Attorney of Lorain County, Elyria, Ohio; on behalf of
16 the Petitioner.

17 JOANN BOUR-STOKES, ESQ., Columbus, Ohio; on behalf of the
18 Respondent.

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1 PROCEEDINGS

2 (10:59 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 89-1944, Ohio v. Ediberto Huertas.

5 The spectators are admonished the Court remains
6 in session. There will be no talking in the courtroom.

7 Mr. Rosenbaum, you may proceed whenever you are
8 ready.

9 ORAL ARGUMENT OF JONATHAN E. ROSENBAUM

10 ON BEHALF OF THE PETITIONER

11 MR. ROSENBAUM: Mr. Chief Justice, and may it
12 please the Court:

13 This case today is about fair and evenhanded
14 justice for the accuser. I have three points I would like
15 to briefly make at the beginning of my argument. Firstly,
16 I submit there is no independent State ground upon which
17 the lower court decision was predicated. It is obvious
18 from a reading of the opinion that the sole authority
19 relied upon by the Ohio Supreme Court was this Court's
20 holdings in Booth and Gathers.

21 Secondly, the evidence --

22 QUESTION: May I just interrupt you? I hate to
23 do this, but you say from reading the opinion. I remember
24 Justice Stewart used to lecture me periodically about the
25 importance of the syllabus in Ohio law. Now, what does

1 the syllabus say the holding is?

2 MR. ROSENBAUM: The syllabus in this case is
3 taken directly from the text of the opinion from Section
4 1(e), and it says expressions of opinion by a witness as
5 to the appropriateness of a particular sentence in a
6 capital case violate the defendant's constitutional right
7 to have the sentencing decision made by the jury and
8 judge. And they argue to the court that the key word
9 there is constitutional right. And the only authority,
10 indeed the only constitutional authority cited and relied
11 upon by the Ohio Supreme Court, is Booth and Gathers. And
12 in fact, the very next sentence --

13 QUESTION: But do those cases, do Booth or
14 Gathers deal with the issue discussed in the syllabus?

15 MR. ROSENBAUM: Absolutely. They deal with the
16 constitutional ramifications which the Ohio Supreme Court
17 felt to comply -- to take out the opinion evidence in this
18 case as well as the evidence of harm caused to the victims
19 in general. And I submit that the very next line of the
20 opinion from that same section says, after reviewing the
21 arguments presented we find no grounds on which to
22 distinguish Booth and Gathers, and we are thus compelled
23 to follow those cases and vacate the sentence of death.

24 QUESTION: Let me just be sure -- are you now
25 reading from the syllabus or the opinion?

1 MR. ROSENBAUM: I am reading from the very next
2 line that came from the opinion -- the syllabus. The
3 syllabus was lifted word for word from section 1(e) of the
4 opinion --

5 QUESTION: Yes, but the references to the cases
6 that you just made is not in the syllabus, is it?

7 MR. ROSENBAUM: That's correct. It's in the
8 very next line. But the reference --

9 QUESTION: Next line of the opinion?

10 MR. ROSENBAUM: The very next line of the
11 opinion, that is correct. But the reference to the
12 constitutional right is in the syllabus, and that's what
13 we're talking about today, not opinion evidence, but the
14 constitutional ramifications that took out the opinion
15 evidence in this case and also persuaded the Ohio Supreme
16 Court through, I believe, a misinterpretation of Gathers,
17 to say that it is not relevant to a person's moral guilt
18 when he knowingly causes trauma on known victims prior to
19 the time he made his decision of guilt.

20 QUESTION: Counsel, on this point, as I recall
21 the opinion of the Ohio Supreme Court, it cited no State
22 authority in support of its holding on this -- that you
23 have just quoted from the syllabus.

24 MR. ROSENBAUM: Mr. Justice Kennedy, it cited no
25 other authority other than Booth and Gathers. There was

1 no State statutory law, no State evidentiary rulings, and
2 no State case law.

3 QUESTION: Well, Mr. Rosenbaum, did either Booth
4 or Gathers involve testimony of the witness as to what the
5 penalty should be in the case?

6 MR. ROSENBAUM: The -- Booth had -- did not
7 involve testimony --

8 QUESTION: I thought it was quite different, a
9 different kind of evidence in those cases.

10 MR. ROSENBAUM: In the Bronsteins' statement in
11 the victim impact statement that was this Court's basis,
12 or was construed to be inappropriate by this Court, they
13 make reference to, although they did not express the
14 desire to impose the ultimate penalty, they said that the
15 person was not subject to rehabilitation, that justice
16 should be swift, and they clearly implied what their
17 thinking was, although they did not come out and say that.

18 QUESTION: It seemed to me that the Ohio
19 syllabus here was focusing on a somewhat different point,
20 to wit, the recommendation of the penalty and nothing
21 more.

22 MR. ROSENBAUM: I think the syllabus clearly
23 points out that what is important here is the
24 constitutional right, and I think the constitutional
25 rights involved, and whether there is a prohibition based

1 upon those rights. I think that the opinion evidence is a
2 very small part of this case, and it -- a reading of the
3 entire opinion, although I concede that in Ohio the
4 syllabus is the case law -- illustrates this.

5 This Court held in Caldwell v. Mississippi that
6 it will not assume that a State court --

7 QUESTION: Counsel, can you tell me -- can you
8 make an inference as to why in preparing the syllabus,
9 whoever prepares it, the court focused on just the opinion
10 as to the ultimate issue, as opposed to the other kinds of
11 Booth-Gathers evidence that really was introduced into
12 this trial? What --

13 MR. ROSENBAUM: I cannot make --

14 QUESTION: Can we speculate on why that might
15 be?

16 MR. ROSENBAUM: I am reluctant to speculate, but
17 I can respond to your question by saying in Chief Justice
18 Moyer's concurring opinion he made it very clear that this
19 ruling came from their concerns about Booth and Gathers,
20 and that they asked -- that he felt this was a very
21 confusing case, and he asked for this Court to review it
22 and revisit it. And I think that gives us some insight to
23 tell you that this case is more -- is about far more than
24 opinion testimony. And a reading of the entire case shows
25 that as well.

1 This Court held --

2 QUESTION: As a matter of State law in Ohio is
3 opinion evidence on the penalty in a criminal case
4 admissible as a matter of Ohio law?

5 MR. ROSENBAUM: I -- this is a point that has
6 been raised by the respondent, and they cite the case of
7 State v. White. And I submit to you that the flaw in
8 their argument is this.

9 QUESTION: Well, you can just answer the
10 question.

11 MR. ROSENBAUM: I will, thank you. The answer
12 is it does in the guilt phase, and that is what White
13 deals with. White was a 1968 case, and it was written,
14 obviously, way before Ohio's bifurcated capital death
15 penalty scheme.

16 QUESTION: In determining whether a defendant is
17 guilty or innocent in a criminal case in Ohio, lay witness
18 opinion as to the penalty is considered relevant?

19 MR. ROSENBAUM: Is not considered relevant.

20 QUESTION: Not considered relevant.

21 MR. ROSENBAUM: It is not considered relevant,
22 and that -- in the guilt phase. White deals with the
23 guilt phase, and the purpose of bifurcating a capital
24 scheme is obviously there are types of law or types of
25 evidence that will not be appropriate and will be

1 prejudicial --

2 QUESTION: Are there Ohio cases holding that lay
3 witness opinion evidence is relevant in the penalty phase
4 of a capital case?

5 MR. ROSENBAUM: No.

6 QUESTION: Thank you.

7 MR. ROSENBAUM: There are not.

8 QUESTION: Mr. Rosenbaum, when the Supreme Court
9 of Ohio decided this case and said that the testimony of
10 the lay witness was not admissible, did it rely on any
11 Ohio cases to say that or did it rely on the United States
12 Constitution?

13 MR. ROSENBAUM: It relied solely upon this
14 Court's interpretations of the Eighth Amendment based on
15 Booth and Gathers. And I argue to this Court, because of
16 that and this Court's holding in Caldwell v. Mississippi,
17 that this Court should not assume that a State court
18 decision rests on adequate independent State grounds when
19 the State court decision fairly appears to rest primarily
20 on Federal law or even to be interwoven with Federal law.
21 In this case the Ohio Supreme Court expressly relied
22 primarily on Booth and Gathers to reach its decision,
23 which is encapsulated in the syllabus. I argue to you --

24 QUESTION: I think one can read the discussion
25 on page 21 of the cert. petition as indicating they

1 thought that Booth and Gathers were so far different that
2 even the dissenting justices' opinions in Booth and
3 Gathers would not have applied to this case. That's what
4 I read them as saying in so many words.

5 MR. ROSENBAUM: You read the majority of the
6 Ohio opinion as saying that?

7 QUESTION: Yes, at page 21.

8 MR. ROSENBAUM: I -- I think that this Court has
9 wrongfully applied Booth and Gathers on page 21. I mean,
10 of the -- the Ohio Supreme Court has wrongfully applied
11 this Court's holding in Gathers on that page in this case.

12 QUESTION: But, as I say, they're talking about
13 the position of the dissenters in Booth and Gathers in
14 there.

15 MR. ROSENBAUM: Correct.

16 QUESTION: But we could perfectly well affirm
17 without doing anything one way or the other to Booth and
18 Gathers, couldn't we?

19 MR. ROSENBAUM: You could affirm the Ohio
20 Supreme Court decision?

21 QUESTION: Yes.

22 MR. ROSENBAUM: Absolutely. And you could also
23 reverse the Ohio Supreme Court decision --

24 QUESTION: Could we reverse without --

25 MR. ROSENBAUM: -- without affecting Booth or

1 Gathers. And I argue to you that this is because the Ohio
2 Supreme Court has misinterpreted this Court's holding in
3 Gathers when it ruled that it is no more heinous to commit
4 a crime when you know that you are going to leave
5 traumatized victims, that you are aware of, either at the
6 time you made your decision to kill or prior to making
7 that decision to kill. So this Court could leave Gathers
8 intact and reverse the Ohio Supreme Court and reinstate
9 the death penalty.

10 I would like to argue today that Booth is a
11 departure from this Court's traditional jurisprudence
12 which is -- made in capital litigation cases, which made
13 an attempt to channel the discretion of the jury and
14 evidence that it is to get. And to arrive at this it has
15 sacrificed evidence that is relevant and necessary, and
16 that is victim impact evidence because, as this Court held
17 in Booth, it may create an impermissible risk of the death
18 penalty being arbitrarily imposed.

19 I argue to you that this presupposes that jurors
20 cannot ever be channeled or deal with victim impact
21 testimony in a rational way, nor can trial -- nor can
22 trial courts regulate victim impact testimony.

23 QUESTION: Do you think that if Booth and
24 Gathers were overruled we might expect that the kind of
25 testimony that was in this transcript would be fairly

1 typical in death penalty sentencing proceedings in which
2 the father of the victim recommends the death penalty?

3 MR. ROSENBAUM: No. And I'm going -- I'm asking
4 this Court to overrule Booth and Gathers and permit only
5 objective, factual, easily rebuttable, readily
6 anticipatable victim impact testimony.

7 The opinion evidence in this case --

8 QUESTION: So you think that some of the
9 testimony here went beyond --

10 MR. ROSENBAUM: Oh, absolutely.

11 QUESTION: -- what's appropriate?

12 MR. ROSENBAUM: The opinion evidence in this
13 case came in over the objection of the State of Ohio. The
14 defense asked the defendant's mother, in a question that
15 presupposed the answer, or implied it, didn't you already
16 tell myself and the probation officer that you don't want
17 the death penalty imposed? She dodged that question by
18 saying I leave it up to the courts and jury. He then
19 pinned her down, over the State's objection, to say well,
20 can't you forgive, as a Christian? And she said I can.

21 QUESTION: Well, what about the father's
22 testimony? The State introduced that.

23 MR. ROSENBAUM: The State -- absolutely. The
24 State then, faced with the implication in a predominantly
25 Christian community that this woman, the mother of the

1 deceased, is able to forgive this man for killing her son,
2 over my objection, which I think is irrelevant and
3 inappropriate, tried to counter and neutralize that, and I
4 called the father and asked him the same question. And I
5 submit to you that this dichotomy and this unfairness is
6 the result of the regime of Booth and illustrates the
7 handicap that has been placed upon the prosecution.

8 QUESTION: Well, I don't, I don't see why the
9 same thing wouldn't have occurred if Booth and Gathers
10 were somehow off the books.

11 MR. ROSENBAUM: Well, that's -- it's possible.
12 That's correct.

13 QUESTION: But you -- but you indicate that it's
14 inappropriate.

15 MR. ROSENBAUM: I think it is inappropriate. It
16 came in over my objection, and I am asking this Court, if
17 it doesn't see fit to overrule Booth, to modify it and
18 provide that both sides can bring in objective and limited
19 victim impact testimony so that there will be an equal
20 balance between the State and the defense.

21 And I argue to you that the result of this
22 prohibition that came through the regime of Booth is that
23 the penalty phase is now the mitigation phase. We solely
24 focus upon the defendant. Personal responsibility is no
25 longer a function of the harm caused.

1 If that is the case, just retribution can no
2 longer be a legitimate concern in our capital sentencing
3 scheme. And I say that to you because if a jury is not
4 aware of the actual and complete harm caused through the
5 admission of objective victim impact testimony on both
6 sides, it cannot express the community's outrage,
7 conscience, or contemporary values over a capital case.

8 QUESTION: Well, I'm not sure how, if you
9 thought the mother's testimony was appropriate -- was
10 inappropriate, that the trial was made all that much
11 better by introducing further inappropriate testimony by
12 the father on the same subject.

13 MR. ROSENBAUM: In looking back on that case, or
14 that decision, I don't know if I would have made it. But
15 I was in the middle of a trial, faced with the devastating
16 impact of testimony, prior to the Booth decision, that a
17 woman has now forgiven the murderer of her son, as a
18 Christian, when I have a predominantly if not entirely
19 Christian jury.

20 Now the State sought to neutralize that, and
21 maybe in hindsight that wasn't the best thing to do. But
22 I think a modification or reversal of Booth will actually
23 prohibit this in the future, because the penalty phase
24 will be the penalty phase and not the mitigation phase,
25 when the defendant can offer anything that he so desires

1 and the State cannot rebut that.

2 QUESTION: Was this case tried in Elyria?

3 MR. ROSENBAUM: Yes, it was.

4 QUESTION: (Inaudible) suggest we should affirm?

5 MR. ROSENBAUM: I am making three ultimate --

6 QUESTION: Even if we do to Booth what you want
7 us to do, this sort of evidence wouldn't get in.

8 MR. ROSENBAUM: This -- I argue to you that the
9 evidence in this -- the opinion evidence in this case,
10 when the State went on to neutralize what the defendant
11 did, is either harmless error or an invited error, and
12 this case is not about this.

13 QUESTION: It's a rather strange argument to say
14 that the existence of Booth and Gathers invites testimony
15 of this sort. I just can't follow that.

16 MR. ROSENBAUM: The existence of Booth and
17 Gathers has created a one-sided regime, and this case
18 illustrates that. And in an effort to let the -- or
19 offenders, prove their mitigation, they can put in
20 anything they want and the State cannot. An example of
21 that is this case. The defendant calls his entire family
22 to the stand, or enough of it to testify about the rest of
23 the family, and they testify about their mutual love
24 relationship and the benefits that the respondent has
25 caused them. What they are saying is his death will

1 impact upon our lives. But the State cannot counter that
2 by putting on the actual impact of the murder that the
3 respondent caused.

4 And this one-sided thing, I think, goes back to
5 the point that we have taken retribution out of the term
6 "professional responsibility." This Court has
7 acknowledged, and the entire history of capital
8 jurisprudence in this country acknowledges that
9 communities should express the public outrage, concern,
10 and contemporary values, and that retribution is a valid
11 and constitutional consideration in a capital sentencing.

12 QUESTION: But all you're really asking, as I
13 understand it, is that we adopt a rule, a kind of opening-
14 the-door rule, so that if the -- whatever kind of evidence
15 on mitigation the defense puts in, you should be allowed
16 to counter with like evidence. Isn't that all you're
17 saying?

18 MR. ROSENBAUM: I am asking first and foremost
19 for you to overrule Booth and put the balance back in
20 this, to make the penalty phase --

21 QUESTION: But all we have to do to get what you
22 want in this case is a kind of opening-the-door rule,
23 isn't it?

24 MR. ROSENBAUM: You could modify Booth, or even
25 to get what I really need, I guess, in this case is you

1 could just rule that the Ohio Supreme Court has
2 misinterpreted Gathers, and because the respondent knew of
3 the trauma he was going to cause prior to his decision to
4 kill, that was relevant to his moral guilt, much less
5 personal responsibility, which is the other issue I am
6 arguing, and therefore the Ohio Supreme Court erred.

7 QUESTION: But that doesn't reach the opinion on
8 the ultimate issue, testimony by the father.

9 MR. ROSENBAUM: Well, I think it does, because
10 that -- that opinion is based upon the constitutional
11 restraints that the Ohio Supreme Court felt it was
12 operating under as a result of Booth and Gathers. This
13 opinion is far broader --

14 QUESTION: I don't understand. I -- is what
15 you're saying that, without Booth and Gathers, the Ohio
16 Supreme Court could have found it, what, harmless error or
17 invited error, but because of Booth and Gathers it was
18 precluded from doing that?

19 MR. ROSENBAUM: Exactly.

20 QUESTION: Is that the point?

21 MR. ROSENBAUM: Exactly. That's how they
22 interpreted that.

23 I want to follow up on my point that as a result
24 of juries' not being able to express the community's
25 conscience, contemporary values, and outrage, that our

1 system of justice -- the public may lose faith in our
2 system of justice because the public will be aware of the
3 actual harm caused, but because of Booth the sentencing
4 jury will not be, and if they are they can't use it. As a
5 result of that, punishment will not fit the crime. The
6 jury cannot express the community's outrage because the
7 jury does not know what the community knows. And we have
8 taken harm out of the personal responsibility equation.

9 I also argue to this Court that the Eighth
10 Amendment applies to all criminal cases, yet only in
11 capital cases does it preclude victim impact testimony.
12 This is not required by the text of the Constitution. Our
13 history is rich in examples where offenders have been
14 punished for the harm they caused, whether they intended
15 it or not. The Fiola case dealing with Federal officers,
16 Roberts v. Louisiana, and presidential assassination
17 statutes -- there is a Federal one which authorizes the
18 death penalty as well as aggravating circumstances for
19 that type of killing. These are inconsistent with Booth
20 and produce anomalous results.

21 And despite this history, Booth precludes jurors
22 from knowing the actual harm caused, and it does so at a
23 time when modern thought requires that victims be included
24 in our system of justice so that they can be addressed and
25 redressed, not excluded.

1 I argue to you that the per se exclusion of
2 Booth is over broad, and that the harm that it seeks to
3 cause, that risk can be dealt with by the traditional
4 methods normally associated with our everyday trials in
5 our criminal justice system. These safeguards include
6 discretion of the trial judge, the bifurcated nature of
7 our capital penalty litigation scheme, and mandatory
8 review at all levels.

9 I am asking you to overrule Booth and permit the
10 inclusion of reliable and objective victim impact evidence
11 on both sides.

12 QUESTION: Mr. Rosenbaum, what do we know now
13 that we didn't know when we decided Booth that would
14 justify us in overruling it?

15 MR. ROSENBAUM: I think what we know now is that
16 Booth has created confusion, that Booth has taken the
17 retribution aspect out of capital sentencing, and that it
18 -- basically, it is wrong. And the lower courts and the
19 State courts are having a hard time applying it. There
20 are anomalous results, there are inconsistent results
21 based upon the statutes and specifications. If you
22 consider assassination of the President, am I precluded
23 now from offering evidence that the victim of this crime
24 is the President of the United States? Booth is
25 inconsistent with that, and I know that you have argued

1 that in your dissenting opinions in both Booth and -- and
2 Gathers.

3 I am asking you to overrule Booth and include
4 objective victim impact evidence, not opinion. If this
5 Court will not do that, I am asking you to modify it so
6 the State is on an even keel, so that the State can put on
7 testimony concerning the actual impact felt and caused by
8 the murder, as opposed to the potential impact that is
9 going to fall to the defendant's family if he is executed.

10 And if this Court does not see fit to do that, I
11 then, as my final argument, ask you to overrule State v.
12 Huertas and reinstate the death penalty because the known
13 harm caused to a victim and his family that you are aware
14 of prior to your decision to kill is relevant to your
15 moral guilt and says something about your blameworthiness,
16 and thus should be considered.

17 QUESTION: Mr. -- you go ahead.

18 QUESTION: What protections would there be
19 besides your -- your concession that opinion evidence of
20 relatives should not be allowed in as to what the penalty
21 ought to be? Don't you think it's rather unfair to the
22 defendant to put on a weeping widow or, you know, a
23 bereaved mother, tears streaming down her face in front of
24 the jury? What protections are there against that sort of
25 --

1 MR. ROSENBAUM: That -- the protections are
2 twofold, or they are, one, these are the things that our
3 trial courts deal with in everyday life. You know, there
4 is little difference if I put the widow -- or the grieving
5 mother as it was in this case, on the stand in the guilt
6 phase because she actually witnessed the threats that this
7 man made that exemplify or demonstrate his prior
8 calculation and design.

9 These are things that we have to deal with on an
10 everyday basis: prejudicial evidence and weighing the
11 probative value of that evidence. We have consistently
12 called upon our trial courts to make the proper judgments
13 in these manners in every case, in every way except Booth.
14 For some reason we have decided that the systems that we
15 have -- the history of our country has built into the
16 criminal justice system are no longer adequate to deal
17 with grief. And the grief of a mother or the grief of a
18 widow is something that every juror realizes.

19 QUESTION: Is Booth and Gathers -- are Booth and
20 Gathers then just a shorthand way for us to ensure that no
21 inflammatory testimony is being introduced at the trial?
22 Is that what Booth and Gathers are really directed to?

23 MR. ROSENBAUM: I think Booth -- that is -- I
24 have no quarrel with your statement except other than
25 shorthand. I think it is, it is longhand and it is too

1 long. And that this -- these are -- this is evidence that
2 is needed by the State to prove certain elements of the
3 case that are relevant to retribution so that the jury can
4 actually speak to the community's conscience, outrage, and
5 contemporary values in the imposition --

6 QUESTION: It's an overly inclusive and overly
7 constrictive rule?

8 MR. ROSENBAUM: That is exactly my point. It is
9 over broad. The safeguards which we have trusted in every
10 other area of criminal justice -- our criminal justice
11 system -- with regarding prejudicial versus probative
12 value of any piece of evidence, whether it be victim
13 testimony, whether it be the photographs of a murder
14 victim at the scene. These safeguards have always served
15 us well, but this Court, because it was afraid that there
16 may be an impermissible risk of an arbitrarily imposed
17 death penalty, I think has overreacted and has handicapped
18 the State.

19 QUESTION: May I ask you this, Mr. Rosenbaum,
20 about the need to overrule Booth because of the harm it
21 has done in excluding this victim impact evidence? The
22 Ohio Supreme Court on page 13 points out that in State
23 against Post, which was also a 1987 case, they noted that
24 the admission of victim impact evidence at capital trials
25 was not expressly permitted by the Ohio statute. I drew

1 the inference, perhaps erroneously, and this is why I
2 wanted to ask you as an Ohio lawyer, that prior to Post
3 and prior to Booth there probably were not any Ohio cases
4 approving the use of victim impact evidence in capital
5 trials?

6 MR. ROSENBAUM: That's correct.

7 QUESTION: So that really all Booth did, as far
8 as Ohio law was concerned, was maintain the status quo?

9 MR. ROSENBAUM: No, I disagree.

10 QUESTION: Well, how -- in what respect did it
11 change it?

12 MR. ROSENBAUM: Because the legislature has
13 refused to specifically include, make it mandatory that
14 victim impact evidence --

15 QUESTION: Right.

16 MR. ROSENBAUM: -- be included. The legislative
17 history, as documented by the -- refiled by the National
18 Association of Criminal Defense Lawyers, documents that
19 the legislature refused to make it mandatory inclusion.
20 That is a vast --

21 QUESTION: And I gather there are no Ohio cases
22 permitting it either?

23 MR. ROSENBAUM: There is no Ohio case -- well,
24 with the exception of -- the issue really has not been
25 addressed. And the reason is, and as Booth says --

1 QUESTION: That's my very point.

2 QUESTION: -- and it quotes Ohio Revised Code
3 section 2929.03(d)(1), which says it does not expressly
4 authorize it, but there has, the legislature has refused
5 to speak, and it has not been excluded in any way. And as
6 a result of the Booth regime it is not going to come in in
7 Ohio.

8 QUESTION: Did the legislature refuse to speak
9 pre-Booth or post-Booth? When, when was that?

10 MR. ROSENBAUM: It was pre-Booth.

11 QUESTION: Given the fact that there is an Ohio
12 legislation authorizing victim impact statements in these
13 cases, what stated legislative criterion for imposition of
14 the death penalty would this -- would the evidence be
15 addressed to if it were admissible as you want it to be?

16 MR. ROSENBAUM: Well, first of all, the Ohio
17 statutory scheme as it exists does not make -- does not
18 make it mandatory that it be included. I don't know if
19 you understood that. The victim impact legislation in
20 Ohio clearly makes it mandatory in all other areas but
21 capital litigation. And so the legislature has not spoken
22 in any way, and I don't think that the legislature can
23 speak now in light of the Ohio Supreme Court's
24 constitutional ruling based on Booth and Gathers.
25 However, I think what should be included is, as I have

1 been arguing, is that victims should be free to come to
2 court and express objective thoughts about their losses.
3 Not that I love you, I miss you, that kind of stuff, but
4 truly objective thoughts that can be anticipated and
5 rebutted.

6 And I would like to reserve the balance of my
7 time.

8 QUESTION: May I just ask you further question?
9 Is there any extant Ohio legislation right now to which
10 this kind of evidence would properly be addressed?

11 MR. ROSENBAUM: The only statute that may apply
12 to this type of situation is Ohio Revised Code section
13 2929.03(d)(1), which makes it discretionary. In other
14 words, if the defendant requests a presentence report and
15 that presentence report, if requested, must go to the
16 jury, traditionally presentence reports in Ohio include
17 victim impact-type testimony.

18 QUESTION: Is there, is there a statute defining
19 aggravating circumstances?

20 MR. ROSENBAUM: Yes.

21 QUESTION: And do -- are there categories within
22 that statute to which the testimony you want to come in
23 would properly be addressed --

24 MR. ROSENBAUM: No.

25 QUESTION: -- if -- under the present law?

1 MR. ROSENBAUM: There are categories that
2 pertain to like the killing of a peace officer,
3 presidential assassination, Governor assassination, but
4 nothing else.

5 Thank you.

6 QUESTION: Very well, Mr. Rosenbaum.

7 Ms. Bour-Stokes, we'll hear from you.

8 ORAL ARGUMENT OF JOANN BOUR-STOKES

9 ON BEHALF OF THE RESPONDENT

10 MS. BOUR-STOKES: Mr. Chief Justice, and may it
11 please the Court:

12 I would like to begin by stating this morning
13 that the Ohio Supreme Court did base its holding on the
14 improper opinion testimony of the father in this case, and
15 it seems that my opponent this morning has conceded that
16 there was error in allowing the father's testimony.

17 To support my position I would first like to
18 start by the proposition of Ohio law that what is stated
19 in the syllabus is the law of the case, and any
20 conclusions in the opinion that are not carried forward
21 into the syllabus do not constitute the law of the case.
22 So if one looks at the syllabus in this case, it only
23 concerns the father's testimony.

24 QUESTION: That's a very strange rule. I don't
25 think it's replicated anywhere else, is it?

1 MS. BOUR-STOKES: I don't think so, Your Honor.
2 It is a very unique rule to Ohio, and the way the Ohio
3 Supreme Court interprets its own opinions.

4 QUESTION: As Justice Stevens said, Justice
5 Stewart used to lecture us about Ohio syllabi.

6 MS. BOUR-STOKES: And it's very important in
7 this case.

8 I would like to also respond to --

9 QUESTION: Well, you have to -- you have to --
10 the word "constitutional" is in the syllabus, isn't it?

11 MS. BOUR-STOKES: Yes, Your Honor, and I would
12 like to respond to the fact that the constitutional right
13 referred to in the syllabus cannot be a Federal
14 constitutional right, first because it talks about the
15 constitutional right to a jury and judge decision. This
16 Court has recognized in Spaziano v. Florida that there is
17 no Federal constitutional right to a jury decision in
18 capital case. And the Ohio Supreme Court had recognized
19 that long before this case.

20 QUESTION: You're saying the syllabus couldn't
21 be wrong?

22 MS. BOUR-STOKES: I'm -- no, no, I don't believe
23 a syllabus is wrong. It comports entirely with --

24 QUESTION: Well, but it could be wrong. I mean,
25 the mere fact that, that if it referred to a Federal

1 constitutional right it was in error, I mean, we reverse
2 State supreme courts now and then. Not only their
3 syllabus but their entire opinion may be wrong. It --
4 it's thinkable, at least, isn't it?

5 MS. BOUR-STOKES: I think what the Ohio Supreme
6 Court decided in this case is entirely correct, that the
7 opinion testimony was improper in this case.

8 QUESTION: Well, if you're looking around for
9 some evidence of what they meant by constitutional right,
10 I suppose it's not against the Ohio rules to look at their
11 opinion, is it?

12 MS. BOUR-STOKES: No -- it's not, Your Honor.
13 And if you look at the opinion --

14 QUESTION: Well, look at it. They never -- they
15 don't -- they've never cited any, any constitutional case
16 from Ohio.

17 MS. BOUR-STOKES: That is correct, Your Honor.

18 QUESTION: The only constitutional law they
19 discuss is Federal.

20 MS. BOUR-STOKES: And what the court did was, in
21 --

22 QUESTION: Isn't that right?

23 MS. BOUR-STOKES: It did -- yes, correct, Your
24 Honor. And it discussed Booth and Gathers in the context
25 of Mrs. Harris' testimony, and her improper testimony.

1 QUESTION: But Ms. -- may I interrupt you, Ms.
2 Bour-Stokes?

3 MS. BOUR-STOKES: Um-hum.

4 QUESTION: Do they discuss any Federal
5 constitutional decision discussing the constitutional
6 right to having the sentencing decision made by the jury?

7 MS. BOUR-STOKES: No, Your Honor. The only
8 Federal Constitution decisions they cite are Booth and
9 Gathers. And the principles from Booth and Gathers cannot
10 be --

11 QUESTION: Which have nothing to do with that
12 constitutional right.

13 MS. BOUR-STOKES: Right. The constitutional
14 rights from Booth and Gathers cannot be the constitutional
15 rights that control the Ohio Supreme Court opinion in this
16 case, because those were the Eighth Amendment principles
17 this Court enunciated in Booth and Gathers about the
18 distortion of evidence and the emotional impact of the
19 crime on the family.

20 QUESTION: Well, is there an Ohio constitutional
21 provision that gives -- that requires that the sentencing
22 decision be made by the judge and the jury?

23 MS. BOUR-STOKES: There is no specific
24 provision, Your Honor. What the Ohio Supreme Court did
25 early on in its jurisprudence was recognize that there is

1 a constitutional right to a jury trial in Ohio in a State
2 case, under the Sixth --

3 QUESTION: Under the Ohio constitution?

4 MS. BOUR-STOKES: Yes, Your Honor. Under the
5 specific provision that you're entitled to an impartial
6 trial by jury. And the --

7 QUESTION: Now wait, is this an Ohio
8 constitutional provision?

9 MS. BOUR-STOKES: Yes, Your Honor, it is an Ohio
10 constitutional provision. What the Ohio Supreme Court
11 also did was recognize there is also a constitutional
12 right to be tried by a jury in a capital case in Ohio.
13 And those two provisions combined are what controls in
14 this case.

15 QUESTION: And what are -- do you cite those
16 decisions in your brief?

17 MS. BOUR-STOKES: I cited State v. Jenkins, Your
18 Honor, which is the important case, and it is cited in my
19 brief in a footnote, and is in the table of authorities.

20 QUESTION: And just to be clear, that rests on
21 Ohio constitutional law?

22 MS. BOUR-STOKES: What it -- it interprets an
23 Ohio statutory provision about the right to jury trial.
24 And I infer from that decision that the Ohio Supreme Court
25 felt that there was a State constitutional right to a jury

1 trial. And --

2 QUESTION: Well, do they -- do they cite the
3 State constitution?

4 MS. BOUR-STOKES: No, Your Honor, but what
5 happens then later on is the Ohio Supreme Court recognizes
6 that there is no Federal constitutional right to a jury
7 trial, in a case called State v. Rogers, and since that
8 time the Ohio Supreme Court has consistently recognized
9 that there is a constitutional right to a jury trial in
10 Ohio.

11 QUESTION: Ms. Bour-Stokes, did the Supreme
12 Court of Ohio in its opinion in this case cite State
13 against Jenkins?

14 MS. BOUR-STOKES: It could have cited State
15 against Jenkins --

16 QUESTION: Did it -- I said did it cite?

17 MS. BOUR-STOKES: Oh, no, I'm sorry, Your Honor.
18 It did not cite State v. Jenkins. The only Ohio
19 principles that the court cited was, early in its
20 discussion, it cited State v. Post dealing with the victim
21 impact evidence.

22 QUESTION: Let me ask you one more question, if
23 I may. In a case decided some years ago by this Court,
24 Perkins v. Bengay Consolidated Mining Co., written by
25 Justice Burton who was another Ohioan, of course, and

1 interested in the Ohio syllabus rule. I think he says
2 that the opinion of the supreme court may be consulted if
3 there is doubt about what the syllabus means. Is that
4 still an Ohio rule?

5 MS. BOUR-STOKES: Yes, it is, Your Honor. And
6 what's important to support my argument today is if you
7 look at the way the Ohio Supreme Court opinion was
8 structured in this case, it set forth clearly what the
9 Court was going to address. The first four arguments
10 dealt with Mrs. Harris' testimony, and then the court went
11 on to state that the father's opinion testimony in this
12 case went beyond anything considered by this Court in
13 Booth and Gathers. So the Court was drawing a distinction
14 between what this Court set out in Booth and Gathers and
15 the fact that the father's opinion testimony in this case
16 was improper.

17 QUESTION: But the point is simply whether -- it
18 isn't whether it goes beyond what was approved in Booth
19 and Gathers. It certainly does, in the view of the Ohio
20 Supreme Court. But let me ask you this. The syllabus is
21 taken verbatim from a sentence in the opinion.

22 MS. BOUR-STOKES: Yes, it is, Your Honor.

23 QUESTION: And that sentence is followed by the
24 following, as if in explanation of why they had said that.
25 "We -- after reviewing the arguments presented, we find no

1 grounds on which to distinguish Booth and Gathers, and we
2 are thus compelled to follow those cases, vacate the
3 sentence of death, and remand for imposition of a life
4 sentence in accord with Penix, supra." We are compelled
5 by Booth and Gathers to decide this case the way we
6 decided is what they're saying. Now, doesn't that explain
7 what the syllabus means?

8 MS. BOUR-STOKES: No, it does not, Your --

9 QUESTION: When it refers to a constitutional
10 determination?

11 MS. BOUR-STOKES: No, it does not, Your Honor,
12 first of all because, as I have explained, the
13 constitutional principles from Booth and Gathers do not
14 concern the constitutional right to have your capital
15 sentencing decision made by a jury or by a judge.

16 Second of --

17 QUESTION: I may agree with that. But did the
18 Ohio Supreme Court agree with it? That may just be a
19 basis for reversing them. The point is not whether it's
20 true, but what the Ohio Supreme Court thought it was
21 saying.

22 MS. BOUR-STOKES: Second, if there is a
23 conclusion in the opinion that is not carried forward to
24 the syllabus in Ohio, that does not constitute the law of
25 the case, and that's the Ohio Supreme Court's reading of

1 its own structure of its opinions. Third, this --

2 QUESTION: What was the second? I'm sorry.

3 MS. BOUR-STOKES: If there is a conclusion in
4 the text of the opinion that is not carried forth into the
5 syllabus, it does not constitute the law of the case.

6 QUESTION: Well, I don't read that as a separate
7 conclusion. I read that as an explanation of the prior
8 sentence. "We are thus compelled to follow those cases."

9 MS. BOUR-STOKES: I read as a very -- I
10 disagree, Your Honor. I read as a very separate
11 conclusion because the court is referring to all of the
12 arguments advanced in this case dealing with Mr. and Mrs.
13 Harris' testimony, and this concluding paragraph comes at
14 the conclusion of all of those sections. And the
15 reference to Booth and Gathers specifically refers to
16 their analysis of Mrs. Harris' testimony.

17 I would also like to point out that the Ohio
18 Supreme Court has concluded as a matter of State law that
19 the father's opinion testimony in this case was not
20 relevant to any of the decisions the jury had to make in
21 this case. It provided no factual information, and it
22 impeded on the jury's decision in this case to determine
23 what the appropriate sentence was.

24 QUESTION: Well, it may have been irrelevant in
25 the abstract under some criterion, but if Booth and

1 Gathers didn't necessarily keep it out, and if it was in
2 fact addressed to testimony of a like character from the
3 other side, the Ohio Supreme Court might very well have
4 allowed it either on an open door theory or as harmless
5 evidence, had it not believed that Booth and Gathers
6 required a different result. Isn't that true?

7 MS. BOUR-STOKES: No, Your Honor. First of all
8 I would like to dispel the notion that this was in any way
9 invited error by defense counsel. The chronology of
10 events is very important. The father's --

11 QUESTION: Well, let me -- before you do that,
12 let me just go back to my question on one point. If that
13 is the way the Ohio Supreme Court had interpreted the
14 record, but for its belief that Booth and Gathers required
15 this result, the Ohio Supreme Court might have come out
16 the other way. Isn't that true?

17 MS. BOUR-STOKES: No, Your Honor. I think if
18 this --

19 QUESTION: You mean on no conceivable
20 understanding of the facts could Ohio have come out the
21 other way if they had not believed that Booth and Gathers
22 required this result?

23 MS. BOUR-STOKES: No, Your Honor, I think the
24 Ohio Supreme Court's analysis was very distinct from that,
25 and even if this --

1 QUESTION: You certainly don't give up ground.

2 (Laughter.)

3 MS. BOUR-STOKES: And even if this Court were to
4 overrule Booth and Gathers, the result in this case would
5 not change. The father's opinion testimony is still
6 improper under Ohio law.

7 And I would like to go on to address the invited
8 error doctrine raised by --

9 QUESTION: Ms. Bour-Stokes, you say the father's
10 opinion testimony is improper under Ohio law. In its
11 opinion in this case, did the Supreme Court of Ohio cite
12 an Ohio case for that proposition?

13 MS. BOUR-STOKES: No, it did not, Your Honor.
14 It did not cite an Ohio case.

15 QUESTION: Isn't that rather strange?

16 MS. BOUR-STOKES: I wouldn't say it's strange.
17 It's unique in this case that the Ohio Supreme Court did
18 not cite --

19 QUESTION: Well, if it's unique, surely that's a
20 fortiori strange, isn't it?

21 (Laughter.)

22 MS. BOUR-STOKES: I will be willing to admit
23 that it could be very strange in this case, Your Honor,
24 that they did not cite an Ohio Supreme Court opinion. But
25 that does not necessary lead to the conclusion then that

1 the decision was not based upon State law grounds, because
2 before the decision in this case was rendered the Ohio
3 Supreme Court had already found that opinion testimony in
4 the ultimate issue that's not helpful to the trier of fact
5 is not admissible in a case, and this -- and this decision
6 comports with that ruling.

7 In addressing the invited error doctrine, the
8 father's testimony was before the jury in this case, or
9 was admitted before the parents ever took the stand. The
10 presentence investigation report was admitted into
11 evidence at the State's request before Mr. and Mrs. Harris
12 took the stand. Contained within the presentence
13 investigation report was a victim impact statement. In
14 that victim impact statement the father flatly stated that
15 Mr. Huertas should receive the death penalty for the crime
16 in this case.

17 QUESTION: Is that what the Ohio Supreme Court
18 was referring to? That statement? I didn't get from its
19 opinion that that's what it was addressing. I thought it
20 was addressing his -- his live testimony.

21 MS. BOUR-STOKES: The Ohio Supreme Court did
22 address the live testimony, Your Honor.

23 QUESTION: Yeah. So what is -- what does the
24 other have to do with it?

25 MS. BOUR-STOKES: My argument this morning is

1 that in no way was the question posed to Mrs. Harris
2 somehow invited error by defense counsel, because the
3 error occurred before Mrs. Harris ever took the stand in
4 this case.

5 QUESTION: Not the error the supreme court was
6 relying upon to reverse this case. The error that the
7 Ohio Supreme Court was relying upon was the error of
8 introducing live the testimony of the father.

9 MS. BOUR-STOKES: That's --

10 QUESTION: It didn't even address the other one.

11 MS. BOUR-STOKES: That's correct, Your Honor.
12 My argument this morning is not addressed to the Ohio
13 Supreme Court opinion, but to the argument raised by the
14 State of Ohio that somehow this was invited error.

15 QUESTION: But we're, we're addressing the Ohio
16 Supreme Court opinion, and the question is whether it was
17 -- whether the error the Ohio Supreme Court opinion found
18 was invited.

19 MS. BOUR-STOKES: And -- no, it could not have
20 been invited, Your Honor, because of the fact that the
21 presentence investigation report was admitted, and the
22 fact that the Ohio Supreme Court --

23 QUESTION: Wait, wait. Why does that make it
24 uninvited? You put the mother on the stand, that doesn't
25 in -- what if -- what if counsel had sought to cross-

1 examine, the mother? Could the -- could counsel have done
2 that? The mother says yes, I can, as a Christian I can
3 forgive him. Could counsel for the State come in and say
4 now, now think about it. I mean, you know you're supposed
5 to forgive him, but do you really forgive? Don't you
6 really think this person did a horrible thing and should
7 be punished for it? Could counsel for the -- for the
8 State have asked that question?

9 MS. BOUR-STOKES: No. Under the ruling of this
10 case, Your Honor, it would have been entirely
11 inappropriate.

12 QUESTION: That -- that wouldn't have been
13 invited error either?

14 MS. BOUR-STOKES: No, Your Honor.

15 QUESTION: No. So the defense can put on
16 anything, and in trying to reply to it, it's not invited
17 error?

18 MS. BOUR-STOKES: But the problem --

19 QUESTION: Why?

20 MS. BOUR-STOKES: The problem in this case is
21 that Mrs. Harris' testimony was not relevant to any sort
22 of rebuttal of the defense evident -- and the Ohio Supreme
23 Court so concluded in this case that it was not proper
24 rebuttal. That Mrs. Harris' testimony was irrelevant from
25 the outset. She had nothing to offer under Ohio law that

1 was pertinent to the penalty phase.

2 QUESTION: Shouldn't have been put in then,
3 should it?

4 MS. BOUR-STOKES: Absolutely, Your Honor. And
5 Mrs. Harris was --

6 QUESTION: But having been put in, if the judge
7 let that in, why wasn't the State justified in thinking
8 the judge would let the rebuttal to it in?

9 MS. BOUR-STOKES: First of all, Your Honor,
10 since defense counsel already knew that the evidence was
11 before the jury because the VIS was admitted before they
12 ever took the stand, defense counsel had an indication
13 from the trial court that this type of evidence was going
14 to be relevant in his courtroom. So what progressed with
15 Mr. and Mrs. Harris' testimony, I think, was in direct
16 response to the fact that the trial court felt the PSI and
17 the VIS in this case was permissible under Ohio law, which
18 it is not.

19 I would like to go on to address the victim
20 impact statement and the issue raised about what Ohio law
21 allows along the lines of victim impact statement. Since
22 1968 the Ohio Supreme Court has held that victim impact
23 evidence is not allowable under Ohio law. And the Ohio
24 legislature also has made a specific finding that victim
25 impact statements are not allowable at the sentencing

1 phase of the capital case.

2 QUESTION: Now, Ms. Bour-Stokes, the Ohio
3 legislature passed a statute that provided that they were
4 not to be admitted?

5 MS. BOUR-STOKES: What happened, Your Honor, was
6 --

7 QUESTION: Well, can't you answer that yes or
8 no? Did the Ohio legislature pass a statute that said
9 they were not to be admitted?

10 MS. BOUR-STOKES: Yes, Your Honor, and in order
11 to conclude that you have to look at the legislative
12 history that went along with the statute. As the bill was
13 originally introduced into the Ohio legislature it
14 included capital murder. After discussions, floor debate,
15 that specific provision covering capital murder was taken
16 out of the statute, and the statute was passed without
17 capital murder being included.

18 QUESTION: Now, this is a statute which allow
19 victim impact testimony generally?

20 MS. BOUR-STOKES: That's correct, Your Honor,
21 allowed victim impact testimony in noncapital cases.

22 QUESTION: Allows it to be admitted or compels
23 it to be admitted if offered?

24 MS. BOUR-STOKES: Allows it to be admitted
25 should the victim's family wish to make a statement or --

1 QUESTION: It's up to the judge, but the judge
2 can say I don't allow victim impact statements? Does it
3 --

4 MS. BOUR-STOKES: That's correct, Your Honor.
5 That is correct.

6 QUESTION: Is that right? The judge can say,
7 even though there's a statute on it, the judge can say I
8 know the State says it's admissible, but that just means
9 it may be admitted, I can keep it out?

10 MS. BOUR-STOKES: First of all, there are three
11 statutes that --

12 QUESTION: See, I thought the statute was
13 compulsory, and all the State did was decline to make it
14 mandatory for capital cases, but without saying whether it
15 was admissible.

16 MS. BOUR-STOKES: No, Your Honor, I do not read
17 the statute that way at all. There are three statutes in
18 Ohio that cover victim impact. Two of them provide that
19 if the victim's family wishes, it may make a statement at
20 a plea hearing or at trial. The third section covers when
21 a victim impact statement shall be considered by the trial
22 court, and those are very limited circumstancing -- when
23 imposing -- deciding what the minimum term should be for
24 an indefinite felony, and deciding what a fine should be.
25 So in only those two cases in Ohio is it mandatory that

1 the trial court consider victim impact information.

2 And the Ohio Supreme Court in another capital
3 case has already concluded that that statute does not
4 cover capital cases, and victim impact evidence cannot be
5 admitted under that statute.

6 QUESTION: What is the Ohio statutory law right
7 now defining aggravating circumstances?

8 MS. BOUR-STOKES: There is a specific statute in
9 Ohio, Your Honor, that lists -- enumerates eight specific
10 aggravating circumstances. The type of evidence at issue
11 in this case today does not fall within any of those
12 aggravating circumstances.

13 And it's also important to know that in Ohio
14 nonstatutory aggravating circumstances may not be admitted
15 at the penalty phase. So if the evidence does not
16 constitute an aggravating circumstance or a mitigating
17 factor, it is not relevant under Ohio law. And no
18 argument can be made before this Court today that the
19 testimony in this case, either Mr. or Mrs. Harris'
20 testimony, was somehow relevant to Ohio's capital
21 statutory scheme, because it's not.

22 QUESTION: Well, the Ohio Supreme Court could
23 have reversed on that ground but didn't. I mean, that
24 isn't the issue we took this case to determine. I mean,
25 we -- the Ohio Supreme Court decided on some

1 constitutional ground, not on the ground that this
2 evidence doesn't go to any aggravating factor that Ohio
3 law allows.

4 MS. BOUR-STOKES: No, Your Honor. But in its
5 opinion the Ohio Supreme Court did discuss the jury's
6 constitutional obligation to weigh the aggravating
7 circumstances --

8 QUESTION: Oh, but we --

9 MS. BOUR-STOKES: -- and the mitigating factors.

10 QUESTION: We only look to the syllabus.

11 (Laughter.)

12 MS. BOUR-STOKES: But if there's some confusion
13 in this Court about what constitutional right means and
14 what the court meant by its syllabus, then this Court can
15 go into the text. And if this Court looks at the text and
16 looks at the analysis the court used, it did rely on the
17 jury's obligation to weigh the aggravating circumstances
18 and mitigating factors, and that this evidence somehow
19 impinged on that obligation and was impermissible under
20 Ohio law.

21 If there are no further questions, I would
22 respectfully ask that this Court affirm the decision of
23 the Ohio Supreme Court.

24 Thank you.

25 QUESTION: Are you going to argue that Booth and

1 Gathers should not be overruled?

2 MS. BOUR-STOKES: Your Honor, I do not think
3 that Booth and Gathers -- this is an appropriate vehicle
4 for a Booth and Gathers analysis because of the fact that
5 Ohio law prohibits the introduction of victim impact
6 statements.

7 QUESTION: Suppose we think that's wrong?

8 MS. BOUR-STOKES: If the Ohio Supreme Court
9 determines that under Ohio law that constitutionally can't
10 be admitted --

11 QUESTION: Suppose we reach the Booth-Gathers
12 issue?

13 MS. BOUR-STOKES: If this Court were to reach
14 the Booth and Gathers issue and decide -- and overrule
15 Booth and Gathers, the result in this case would not
16 change for two reasons. First, because --

17 QUESTION: So you don't care if we overrule
18 Booth and Gathers?

19 MS. BOUR-STOKES: Oh, I absolutely care, Your
20 Honor.

21 (Laughter.)

22 MS. BOUR-STOKES: I would prefer that this Court
23 not overrule Booth and Gathers, and I think, for all the
24 reasons that have been advanced to this Court before and
25 the policy considerations. Those cases were properly

1 decided under the Eighth Amendment and should stay in
2 force. My argument this morning is this case does not
3 give this Court an appropriate vehicle to adjudicate the
4 propriety of the Booth and Gathers decisions, (a) because
5 of the improper opinion testimony of the father in this
6 case, and because of the fact that Ohio law prohibits the
7 introduction of victim impact evidence.

8 Thank you.

9 QUESTION: Thank you, Ms. Bour-Stokes.

10 Mr. Rosenbaum, do you have rebuttal? You have 3
11 minutes remaining.

12 REBUTTAL ARGUMENT OF JONATHAN E. ROSENBAUM

13 ON BEHALF OF THE PETITIONER

14 MR. ROSENBAUM: Thank you. Mr. Chief Justice,
15 and may it please the Court:

16 I would briefly like to say that I think the
17 argument made by the respondent illustrates the one-sided
18 focus of the Booth regime. We keep hearing about Mrs.
19 Harris' testimony, Mr. Harris' testimony, and no one in
20 the court below recognized the invited error or that the
21 defense had done the exact same thing. Everything that
22 the State asked of the victim's parents in this questions
23 was in a direct -- was in direct rebuttal or was the exact
24 same question that the respondent's lawyer asked. And
25 there is a one-sidedness under the Booth regime. And the

1 penalty phase has truly become the mitigation phase
2 (inaudible).

3 QUESTION: Of course, Mr. Rosenbaum, there is --
4 isn't there also a one-sidedness in the whole business of
5 you're limited to statutory aggravating circumstances on
6 the one side, but on the other side they can use
7 nonstatutory mitigating circumstances? That's kind of
8 one-sided, too.

9 MR. ROSENBAUM: That is one-sided.

10 QUESTION: And it's probably unconstitutional,
11 too, under your argument.

12 MR. ROSENBAUM: No, I don't -- I would not go
13 that far.

14 QUESTION: Why not?

15 MR. ROSENBAUM: Because the State has
16 recognized, or you -- this Court has recognized that the
17 State has a legitimate right to rebut that, and that's
18 what the State did here. And you cannot recognize the
19 State's right to rebuttal and then chop it up, and call
20 that equal justice. And that's what I am arguing about
21 here.

22 QUESTION: Of course it's kind of one-sided that
23 they have to prove their case by a -- beyond a reasonable
24 doubt, too.

25 MR. ROSENBAUM: Well, the State of Ohio welcomes

1 that burden.

2 QUESTION: Yeah.

3 MR. ROSENBAUM: And that is fair, and that is a
4 proper part of --

5 QUESTION: Some one-sided things are okay, and
6 others are not.

7 MR. ROSENBAUM: But in this burden the State
8 should -- in meeting its burden the State should not be
9 severely handicapped. The State should be able to meet
10 victim impact testimony that the defense can put on in
11 mitigation with the actual harm caused, and include
12 victims in our system of justice.

13 Thank you.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Rosenbaum.

16 The case is submitted.

17 (Whereupon, at 11:48 a.m., the case in the
18 above-entitled matter was submitted.)

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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that
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#89-1944 - OHIO, Petitioner V. EDIBERTO HUERTAS

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of the proceedings for the records of the court.*

BY *Roger Stuart Antel*
(REPORTER)