IN THE

Supreme Court of Florida

LINROY BOTTOSON, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. SC02-1455 Death Penalty Appeal Ninth Judicial Circuit

CORRECTED AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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1. Statement of the Case and Course of Proceedings Below.

For purposes of this brief *amici* will accept the statement of the case and course of proceedings as tendered by the parties.

2. Statement of the Facts.

For purposes of this brief *amici* will accept the statement of the facts as tendered by the parties.

D. SUMMARY OF ARGUMENT.

The Florida death penalty sentencing scheme is unconstitutional on its face as it violates the Sixth Amendment guarantee that all essential elements must be found to exist by jury.

E. ARGUMENT AND CITATIONS OF AUTHORITY.

The decisions in *Ring v. Arizona*, — U.S. —, 122 S.Ct. 2428, — L.Ed.2d. — (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), have roots in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).[1] *See Ring v. Arizona*, — U.S. —, 122 S.Ct. 2428, — L.Ed.2d —, 2002 WL 1357257, at p. 8. In *Gaudin* the Supreme Court of the United States gave an indication of the importance of the right to have a jury determine every element of an offense.

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law;" and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The Supreme Court of the United States has held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277- 278, 113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182 (1993). "The right to have a jury make the ultimate

[1]Interestingly the United States Supreme Court had reversed nine consecutive decisions from the Ninth Circuit. *Gaudin* was affirmed and was the only circuit court opinion holding "materiality" was a jury question under the false statements act, 18 U.S.C. § 1001.

determination of guilt has an impressive pedigree." *Gaudin, supra*, 515 U.S. at 510. Blackstone described "trial by jury" as requiring that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors…." 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (emphasis added). Justice Story wrote that the "trial by jury" guaranteed by the Constitution was [*Gaudin, supra*, 115 S.Ct. at 2314] "generally understood to mean … a trial by a jury of twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had." 2 J. Story, *Commentaries on the Constitution of the United States* 541, n.2 (4th ed. 1873) (emphasis added and deleted). This right was designed "to guard against a [*Gaudin, supra*, 515 U.S. at 511] spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." *Id.*, at 540-541. *See also Duncan v. Louisiana*, 391 U.S. 145, 151-154, 88 S.Ct. 1444, 1448-1450, 20 L.Ed.2d 491 (1968) (tracing the history of trial by jury).

The court noted in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), it had held that the 12-person requirement to which Justice Story referred is not an indispensable component of the right to trial by jury. But in so doing the

court emphasized that the jury's determination of ultimate guilt is indispensable. The "essential feature of a jury," the court said, is "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen … [in] that group's determination of guilt or innocence." *Id.*, at 100, 90 S.Ct., at 1905.

The government in *Gaudin* argued the element of "materiality" in a false statement prosecution under 18 U.S.C. § 1001, was a "legal" question for the judge alone to decide. The Supreme Court characterized the issue as analogous to a "mixed question of law and fact." *Gaudin, supra*, 515 U.S. at 512, 115 S.Ct. at 2314, and tracing its history of precedent from *Sparf*[2] to *Sullivan*,[3] concluding that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Gaudin, supra*, 515 U.S. at 514, 115 S.Ct. at 2315-16. "The more modern authorities the Government cites also do not support its concept of the criminal jury as mere factfinder." *Id.*

The court went on to cite *Court of Ulster County v. Allen*, 442 U.S. 140, 156, 99 S.Ct. 2313, 2324, 60 L.Ed.2d 777 (1979). Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on

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[2]*Sparf v. United States*, 156 U.S. 51, 15 S.Ct. 273, 39 L.Ed. 343 (1895).

[3]*Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

The State of Florida in a joint amicus brief to the United States Supreme Court in *Ring* recited a restricted view of a Sixth Amendment law (restricted to death penalty cases). [2002 WL 730734]. But the analysis makes clear the implications of *Ring*.

In 1976, the United States Supreme Court considered together five post-*Furman*[4] capital sentencing systems, including Florida. The *Proffitt*[5] Court fully noted that, "[t]he sentencing authority in Florida [is] the trial judge …." 428 U. S., at 251. The *Proffitt* Court further understood that the trial judge had to make the finding of an aggravating circumstance. *See id.*, at 250. As noted in *Barclay v. Florida*, 463 U.S. 939, 954, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), "the Florida statute … requires the sentencer [*i.e.*, the judge] to find at least one valid aggravating circumstance before the death penalty may even be considered …." "[*T*]*he trial judge must make three separate determinations in order to impose the death sentence*: (1) that at least one statutory aggravating circumstance has been proved beyond a reasonable doubt.…" *Id.*, at 961 (Stevens, J., concurring) (emphasis added). With this understanding of what the sentencing phase in Florida required, *Proffitt* held that it was constitutionally permissible for this function to be performed by the judge

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[4]*Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[5]*Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)

rather than the jury. 428 U. S., at 252.

The Supreme Court addressed a Sixth Amendment challenge in *Spaziano v. Florida*, 468 U. S. 447, 458, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), a year after the clarification of the Florida system in *Barclay, supra*. Spaziano's jury returned a general recommendation of life imprisonment by majority vote, *see id.*, at 451, meaning that there was no jury finding of any aggravating circumstance. The court rejected the claim that the Sixth Amendment required it be done by a jury. *See id.*, at 459. The court further noted it had already upheld the Florida system twice and then upheld it a third time. *Id.*, at 464-465.

Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam) addressed the issue. "This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida." *Id.*, at 638 (emphasis added). *Hildwin* further noted that this holding was necessarily included in the holding of *Spaziano*. *See id.*, at 640. The *Hildwin* opinion was joined by seven Justices, including Justice Stevens, author of the *Spaziano* dissent. Justices Brennan and Marshall stated their continuing objection to the death penalty, *id.*, at 641 (Brennan, J., dissenting), and to summary disposition. *Id.* (Marshall, J., dissenting). *Clemons v. Mississippi*, 494 U. S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), rejected,

"Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." Aggravating circumstances serve the same function in Mississippi as they do in Florida. At least one aggravating circumstance must be found which must be "weighed" against the mitigating circumstance. *See Stringer v. Black*, 503 U.S. 222, 229, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

The *amici* argument in *Ring* was, "The practice of requiring a trial judge to find aggravating circumstances in order to impose capital punishment was not only affirmed by this Court in *Walton v. Arizona*[6] but developed in response to *Furman v. Georgia* and this Court's subsequent Eighth Amendment jurisprudence." [2002 WL 730734]. The United States Supreme court has specifically held "*Walton* and *Apprendi*[7] are irreconcilable.… Accordingly, we overrule *Walton* to the extent it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring v. Arizona, supra*, [2002 WL 1357257, at p. 10].

Perhaps prophetically the Supreme Court cites to *Walton* (*see* 497 U.S. at 647-649), where a most interesting discussion of Florida law is found. Walton's first

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[6]*Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

[7]*Apprendi v. New Jersey*, 530 U.S. 466 [full cite] (2000).

argument was that every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme could be constitutional only if a jury decided what aggravating and mitigating circumstances are present in a given case and the trial judge then imposed sentence based on those findings. The court noted that contrary to Walton's assertion, however: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725 (1990). The court went on:

> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In *Hildwin*, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 640-641, 109 S.Ct., at 2057.

The distinctions *Walton* attempted to draw between the Florida and Arizona statutory schemes were not persuasive. "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence

of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 3054, 111 L.Ed.2d 511 (1990).

Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the *Ring* court found the statutory scheme unconstitutional. "A Florida trial court has no more assistance" of the jury with respect to the findings of fact as to the aggravating and mitigating circumstances than do judges in Arizona. And in Florida, as in Arizona, the recommendation of the jury is not binding on the sentencer.

F. CONCLUSION

It is beyond question that during the penalty phase of a first degree murder prosecution in Florida, the finding of an aggravating circumstance exposes "the defendant to a greater punishment than authorized by the jury's verdict" in the guilt phase. *Ring v. Arizona, supra*, p.13 (J. Kennedy, concurring). When a finding has this effect, *Apprendi* makes it clear, it cannot be reserved for the judge. *Id.*

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that the Amicus Curiae Brief of Florida Association of Criminal Defense Lawyers in Support of Appellant complies with the type-volume limitation. The number of words in the brief is 4616.

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APPENDIX

TO

CORRECTED AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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QUESTION: I want to hear your answer. Now, please go ahead.

MS. NAPOLITANO: Well, the jury is involved in this case. The jury is a protector in this case. This was an indicted case, indicted for first degree murder. That went to the grand jury. It was then presented to the petit jury. They made the determination about the felony murder. They weighed the evidence. They knew or were on notice that this was a death case. The jury right was embraced here, just as it was pre-*Furman*. The only difference is the post-*Furman* addition of the sentencing factors.

QUESTION: No. The difference is that the individual juror does not have to take the individual responsibility of saying I as a human being have decided that this person should be sentenced to death. Now, that's quite a difference.

MS. NAPOLITANO: Your Honor, even under petitioner's argument, an addition – and a – and a juror may not have to make that decision because even petitioner's argument says, we just want them to find a fact.

QUESTION: That's true.

MS. NAPOLITANO: We still say it's okay for the judge –

QUESTION: I – I grant you that. That's why –

MS. NAPOLITANO: So, go ahead and do the weighing and so forth.

QUESTION: I – I – you're quite right on that. That's why I want to see what the answer to the full argument is on your part.

MS. NAPOLITANO: Well, the answer is that the jury here is embraced and is performing the function of juries that has come down from colonial times or pre-colonial times. There's nothing different. The jury has to find intent to kill. The jury has to find a death. The jury has to find causation. The instructions are the same to the jury.

QUESTION: But it could make all those findings and it would not authorize the death penalty.

MS. NAPOLITANO: Excuse me?

QUESTION: It could make all those findings that you just recited, and yet the law of Arizona would not permit the imposition of the death penalty.

MS. NAPOLITANO: The jury verdict at that case, under that part of our statute, would say that the maximum death penalty is death. But you're right, Justice. It can't be enforced until the judge conducts the second sentencing hearing.

QUESTION: Unless the judge makes an additional finding of fact.

MS. NAPOLITANO: He must find an aggravating fact and then he can find – weigh those against the mitigators and make the determination as to whether death is the appropriate punishment.

But again, this is part of the process this Court has dictated to the States to determine which of the worst murders deserve the worst penalty.

QUESTION: General Napolitano, the – the expanded argument that Justice Breyer is – is suggesting, which – which isn't urged by Mr. Hurwitz, is really an Eighth Amendment argument rather than a Sixth Amendment argument, isn't it? That is, the fact that the jury should also be required to do the weighing and to make the final determination that this person deserves the death penalty. That's not a Sixth Amendment argument; it's an Eighth Amendment.

MS. NAPOLITANO: I think it could be construed as an Eighth Amendment argument, yes, Your Honor.

And – and as I said at the beginning of my argument, this whole situation, this whole statute derives from *Furman* and from the Eighth Amendment. It does not implicate the Sixth Amendment or the concerns that were expressed in *Apprendi*. And let me, if I might, go to the *stare decisis* part of my argument, because it's not just the cases you listed, Your Honor, that I think would be implicitly overruled, but let me give you a list: *Proffitt v. Florida*, *Spaziano*, *Cabana v. Bullock*, which does allow the –

QUESTION: But do you think it's perfectly clear – you cite a couple of Florida cases – that if the Florida advisory jury made the findings of fact that would be – make them

– the defendant eligible for the death penalty, that that case would be covered by the decision in this case?

MS. NAPOLITANO: Yes, and I think it's important to understand how the Florida system works under Florida law. What happens is after conviction, the jury hears a separate sentencing proceeding.

QUESTION: Correct.

MS. NAPOLITANO: And it comes out with really a unitary form, and all that form says is life or death. It does not specify which aggravating facts the jury may have found or which mitigating facts the jury may have found. And then the trial judge takes that form –

QUESTION: But supposing it did just to – just to go with me on the – on the hypo.

MS. NAPOLITANO: Okay.

QUESTION: Supposing, as a part of the procedure, the judge did require the jury to accompany its recommendation with a finding of fact as to the aggravating circumstance. Would that then be covered by this case?

MS. NAPOLITANO: I think it would, Your Honor, because you're still allowing the judge to make the final determination. And if the judge is able to disagree on the facts –

QUESTION: But that's the Eighth Amendment issue. The judge is making the final determination but not necessarily – but it would be supported by a jury finding that was sufficient to authorize the death penalty.

MS. NAPOLITANO: In this case, the jury finding of first degree felony murder authorized the death penalty. The question was, could it be imposed and what is the – what is the way to do –

QUESTION: It doesn't authorize it without an additional finding by the judge.

MS. NAPOLITANO: It authorizes the judge to go forward and conduct a separate sentencing hearing.

QUESTION: In some – in some States, it's my understanding that the jury simply makes a finding that the aggravating circumstances outweigh the mitigating circumstances without specifying either. Now, would that be affected, at least by Justice Breyer's argument?

MS. NAPOLITANO: I think it – it could conceivably. I mean, I – you know, what we're dealing with here is a very difficult –

QUESTION: But – but isn't it clear that the aggravating circumstances could not outweigh the mitigating circumstances unless there were a finding of at least one aggravating circumstance?

MS. NAPOLITANO: Yes.

QUESTION: Which in turn –

MS. NAPOLITANO: But you could have –

QUESTION: – would make him eligible for the death penalty.

MS. NAPOLITANO: I – yes, Your Honor, but you could have the situation such as a State like Florida where the judge doesn't know what aggravating circumstance was found, and you're still –

QUESTION: Well, he doesn't know which is found, but he knows that one is found. It seems to me if you say that's not enough, then you are making the Stewart Eighth Amendment argument, aren't you?

MS. NAPOLITANO: Yes. And – and the – the problem there is if the Eighth – if an aggravating circumstance is found by a jury and the judge doesn't know what it is, and the judge still has to go through all of the evidence and do the weighing as to what weight that aggravating circumstance should find versus the mitigating, the basic – one basic question is, well, what is the function of the jury there anyway?

What is the protection the Sixth Amendment is providing to a defendant there?

And I would suggest that a defendant such as *Ring* and such as a defendant in Florida

has already received all the protections that the Sixth Amendment entitles him or her to. And all that is going on here is a narrowing process where the judge's discretion is actually being narrowed in sentencing, not broadened. In *Apprendi*, you could actually say the discretion was being broadened, the same as in *Jones*, but it is being narrowed.

QUESTION: Yes, but it's narrowed to the extent that he now knows he must make an additional – one single additional finding of fact in order to put this man to death, which is – the jury has not made that finding of fact.

MS. NAPOLITANO: Well, yes, Your Honor, at a – at a statutory level in Arizona that is absolutely true.

QUESTION: Would you tell me how one would explain to a citizen that you can't get 5 years added on to your sentence unless the jury makes the critical finding, but you can be put to death with the judge making the critical finding?

MS. NAPOLITANO: Because, Your Honor, the – the difference is what is the source of the punishment. Where does it come from? What is the source of the sentencing at issue? And in the prior situation, in a – in a non-death penalty case, what the Court has been doing and what *Apprendi* does is expand the range of the jury trial. But what the Court has not done is expand the Eighth Amendment protections that it – that it incorporated onto the original elements of first degree murder for death penalty cases and say not only are these Eighth Amendment issues, now we're going to even transfer it further and make them Sixth Amendment issues. And – and the implications are large.

QUESTION: It seems to me that you're making a novel application of the principle we've repeated several times, that death is different.

MS. NAPOLITANO: Death is different.