

IN THE SUPREME COURT OF FLORIDA

JAMES BELCHER,

Appellant,

v.

CASE NO. SC01-1414

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS

i

TABLE OF AUTHORITIES

ii

PRELIMINARY STATEMENT

1

ARGUMENT

1

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL BECAUSE IT DOES NOT REQUIRE AGGRAVATING CIRCUMSTANCES TO BE CHARGED IN THE INDICTMENT, DOES NOT REQUIRE SPECIFIC, UNANIMOUS JURY FINDINGS OF AGGRAVATING CIRCUMSTANCES AND DOES NOT REQUIRE A UNANIMOUS VERDICT TO RETURN A RECOMMENDATION OF DEATH.

1

CONCLUSION

5

CERTIFICATE OF SERVICE

6

CERTIFICATE OF COMPLIANCE

6

TABLE OF AUTHORITIES

PAGE(S)

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 1, 2

Cannady v. State, 427 So. 2d 723 (Fla. 1983) 4

Cox v. State, 27 Fla. Law Weekly S505
(Fla. May 23, 2002) 4

Furman v. Georgia, 408 U.S. 238 (1972) 3

Gibson v. State, 661 So. 2d 288 (Fla. 1995) 3, 4

Grossman v. State, 525 So. 2d 833 (Fla. 1982) 3, 4

Hernandez v. State, 621 So. 2d 1353 (Fla. 1993) 3, 4

Hildwin v. Florida, 490 U.S. 638 (1989) 4

Hunter v. State, 660 So. 2d 244 (Fla. 1995) 4

Johnson v. State, 393 So. 2d 1069 (Fla. 1981) 4

Layman v. State, 652 So. 2d 373 (Fla. 1995) 4

McCampbell v. State, 421 So. 2d 1072 (Fla. 1982) 4

Mills v. Moore 786 So. 2d 532 (Fla. 2001) 2

Morton v. State, 789 So. 2d 324 (Fla. 2001) 3

Odom v. State, 403 So. 2d 936 (Fla. 1981) 3

Patterson v. State, 513 So. 2d 1257 (Fla. 1987) 4

Patton v. State, 784 So. 2d 380 (Fla. 2000) 3

Ring v. Arizona, ___ U.S. ___, 122 S.Ct. 2428 (2002) . . . 1, 2, 4

State v. Dixon, 283 So. 2d 1 (Fla. 1974) 3

State v. Riechman, 777 So. 2d 342 (Fla. 2000) 4

Van Royal v. State, 497 So. 2d 625 (Fla. 1986) 4

TABLE OF AUTHORITIES

PAGE(S)

Walton v. Arizona, 497 U.S. 639 (1990) 2

STATUTES

§ 775.082, Fla. Stat. 3

§ 921.141 Fla. Stat. 3

§ 921.141(3) Fla. Stat. 3

§ 921.141(3)(b) Fla. Stat. 3

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, James Belcher, relies on his Initial Brief to reply to the State's Answer Brief with the following additions concerning Issue IV.

ARGUMENT

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL BECAUSE IT DOES NOT REQUIRE AGGRAVATING CIRCUMSTANCES TO BE CHARGED IN THE INDICTMENT, DOES NOT REQUIRE SPECIFIC, UNANIMOUS JURY FINDINGS OF AGGRAVATING CIRCUMSTANCES AND DOES NOT REQUIRE A UNANIMOUS VERDICT TO RETURN A RECOMMENDATION OF DEATH.

Since Belcher filed his initial brief, the United States Supreme Court has decided Ring v. Arizona, ___ U.S. ___, 122 S.Ct. 2428 (2002). The Court in Ring, held that the right to jury trial principles announced in Apprendi v. New Jersey, 530

U.S. 466 (2000), apply to capital sentencing proceedings. Just as the sentencing factors at issue in Apprendi had to be proven beyond a reasonable doubt to a jury, Ring holds that the aggravating circumstances that must be found to support imposing a death sentence are functionally an element of the capital offense and must be proven to a jury beyond a reasonable doubt in accordance with the Sixth Amendment. In reaching this conclusion, the Ring Court specifically overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." 122 S.Ct. at 2443. Walton was a foundation for this Court's decision in Mills v. Moore 786 So.2d 532 (Fla. 2001), in which this Court had concluded that Apprendi did not apply to capital sentencing. Now, after Ring, the issue is how the Apprendi/Ring principles impact Florida's death penalty scheme. Belcher acknowledges that this issue has been extensively briefed in Bottoson v. Moore, SC02-1455 and King v. Moore, SC02-1457, now pending argument before this Court. Belcher does, however, respond briefly to the State's Answer Brief as follows:

The State argues that Florida's capital sentencing scheme differs from Arizona's because Florida provides for a jury recommendation. Answer Brief at 48. However, that difference does not distinguish the two systems sufficiently to conclude

that Florida's survives Ring. Just as in Arizona, the judge in Florida finds the facts justifying a sentence of death and has the responsibility of actually sentencing. See, Secs. 775.082 & 921.141 Fla. Stats. In response to Furman v. Georgia, 408 U.S. 238 (1972), Florida's redesigned capital sentencing structure severely limited the jury's role in an effort to meet what was believed the primary concern in Furman -- inflamed emotions of jurors causing inappropriately imposed death sentences. See, State v. Dixon, 283 So.2d 1 (Fla. 1974). Trial judges are required to make the ultimate sentencing decision. See, Sec. 921.141(3) Fla. Stat. Trial judges are required to make the findings of fact in support of the death sentence. *Ibid*. Trial judges' sentencing orders and findings are the essential ingredient for imposing a valid death sentence. See, Sec. 921.141(3)(b) Fla. Stat.; Gibson v. State, 661 So.2d 288, 292-93 (Fla. 1995); Hernandez v. State, 621 So.2d 1353, 1357 (Fla. 1993); Grossman v. State, 525 So.2d 833, 841 (Fla. 1982). Moreover, it is the trial judges' finding and sentencing order which are the basis for this Court appellate review and proportionality decisions. See, Morton v. State, 789 So.2d 324, 333 (Fla. 2001); Patton v. State, 784 So.2d 380, 388 (Fla. 2000). The jury's role is limited to advising the trial judge of "the judgment of the community as to whether the death penalty is appropriate." See, Odom v. State, 403 So.2d 936, 942

(Fla. 1981). The jury's advisory sentence does not have to set forth findings of fact, does not have to be unanimous, and does not bind the trial judge to a sentence. See, Sec. 921.141 (2) & (3) Fla. Stat.

This Court has uniformly interpreted and applied the allocation of judge's and jury's role in the capital sentencing scheme. The jury's function in penalty phase "is not the same as the function of the jury in the guilt phase." Johnson v. State, 393 So.2d 1069, 1074 (Fla. 1981). The jury does not make findings of fact since such findings are not required. See, Cannady v. State, 427 So.2d 723, 729 (Fla. 1983); Hunter v. State, 660 So.2d 244, 252 (Fla. 1995). Hildwin v. Florida, 490 U.S. 638 (1989). The jury's role is to provide community judgment as to whether the death sentence is appropriate "without precise direction regarding the weighing of aggravating and mitigating factors." See, Cox v. State, 27 Fla. Law Weekly S505 (Fla. May 23, 2002); McC Campbell v. State, 421 So.2d 1072, 1075 (Fla. 1982). The judge, and no one else, has the mandatory responsibility to make findings of facts and to impose sentence. See, Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986); Patterson v. State, 513 So.2d 1257, 1261-63 (Fla. 1987); Grossman v. State, 525 So.2d 833, 839-40 (Fla. 1988); Hernandez v. State, 621 So.2d 1353, 1357 (Fla. 1993); Layman v. State, 652 So.2d 373, 375-76 (Fla. 1995); Gibson v. State, 661 So.2d 288,

TABLE OF AUTHORITIES

PAGE(S)

292-93 (Fla. 1995); State v. Riechman, 777 So.2d 342, 351-353
(Fla. 2000).

Belcher has been sentenced to death in accord with Florida's procedures where the judge, not the jury, makes findings of fact and the decision to impose death. This procedure is unconstitutional under the decision of Ring v. Arizona. Belcher's death sentence must be reversed.

CONCLUSION

Upon the reasons presented in this Reply Brief and the Initial Brief, Appellant asks this Court to reverse his death sentence and remand to the trial court for imposition of a sentence of life imprisonment.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by mail to Charmaine M. Millsaps, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to Appellant, James Belcher, #286173, F.S.P., on this ____ day of August, 2002.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

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