

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

THOMAS THIBAUT,

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Appellant,

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vs.

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CASE NO. SC01-2508

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STATE OF FLORIDA,

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Appellee.

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**APPELLANT’S REPLY BRIEF**

On Appeal from the Circuit Court of the  
Fifteenth Judicial Circuit, In and For Palm  
Beach County, Florida (Criminal Division)

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## **PRELIMINARY STATEMENT**

Appellant will rely on his previous brief with the following addition. The following additional symbols will be used: “AB” Answer Brief of Appellee; “IB” Supplemental Initial Brief of Appellant.

## **STATEMENT OF THE CASE**

Appellant will rely on his previous briefs.

## **STATEMENT OF THE FACTS**

Appellant will rely on his previous briefs.

## ARGUMENT

### POINT I

#### **THE DEATH SENTENCE VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS PURSUANT TO APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000) AND RING V. ARIZONA, 122 U.S. 2428 ( 2002).**

Appellee first argues that the issues in this case are not preserved. AB8-9. On the contrary, as discussed in Appellant’s Supplemental Brief, the issues in this case are properly preserved. IB 18.

Mr. Thibault filed a Motion To Elect and Justify Aggravating Circumstances. R388-389. He filed a Motion for Statement of Particulars As to Aggravating Circumstances. R 367-378. Mr. Thibault filed a Motion For Findings Of Fact By The Jury which contained a specific objection that the jury does not make findings of aggravating circumstances. R 331-332. The trial court denied the motions. T 72. Thus, the issues involved were raised below.

The issues involved in Apprendi and Ring constitute fundamental error which would require reversal even in the absence of an objection. Apprendi and Ring are grounded in the right to a jury trial. The right to a jury trial can only be waived by a personal waiver on the record by the defendant. State v. Upton, 658 So. 2d 86 (Fla. 1995). No such waiver took place in the current case.

Appellee then makes an argument that Ring is not “a candidate for retroactive application in collateral proceedings.” AB10. However, this is a direct appeal case and thus this argument is irrelevant to any issue in this case.

Appellee consistently asserts that Appellant is arguing that Ring requires jury sentencing. AB12. However, Mr. Thibault never made such an argument.

The bulk of Appellee's Brief is devoted to arguing that Florida's death-sentencing scheme differs from Arizona's. Appellee says that "the statutory maximum sentence for first degree murder in Florida is death." AB11. But the Attorney General of Arizona said exactly the same thing about the Arizona statute invalidated in Ring v. Arizona, 122 U.S. 2428 (2002). The United States Supreme Court dispatched that argument as follows:

In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by Apprendi, Arizona first restates the Apprendi majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks Apprendi's instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494,.... In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." Ibid.; see 200 Ariz., at 279, 25 P.3d, at 1151. The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," Apprendi, 530 U.S., at 541... (O'CONNOR, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See § 13-1105(C) ("First degree murder is a class I felony and is punishable by death or life imprisonment as provided by § 13-703." (emphasis added). If Arizona prevailed on its opening argument, Apprendi would be reduced to a "meaningless and formalistic" rule of statutory drafting. See 530 U.S., at 541... (O'CONNOR, J., dissenting)."

Ring, 122 U.S. 2428 (emphasis added).

From the standpoint "not of form, but of effect," there is no rational way to distinguish either Florida's statutory structure or its actual functioning from Arizona's. Identically to Ariz.Rev.Stat. Ann. § 13-1105(C) and even more explicitly Fla. Stat. § 775.082 "cross-references the statutory provision" of Fla. Stat. § 921.141, requiring

additional findings by a judge, not by a jury as the precondition for imposition of the death penalty (Ring):

A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in a finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Fla. Stat. § 775.082 (1993) (emphasis added).

Fla. Stat. 921.141 requires that there be sufficient aggravating circumstances prior to a person being eligible for the death penalty.

Appellee also claims that there is no basis for a requirement that the death eligibility factors be charged in the indictment. However, Apprendi itself supports this requirement.

The Court in Apprendi described its prior holding in Jones v. United States, 526 U.S. 227 (1999):

The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.

Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Id., at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands that same answer in this case involving a state statute.

530 U.S. at 476. (Emphasis supplied).

Appellee argues that the trial judge found the prior violent felony aggravator and argues that this constitutes an exception to the rule of Ring and Apprendi due to the decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998). Almendarez-Torres does not control in this matter for two reasons. (1) It is questionable whether the so-called “recidivist exception” of Almendarez-Torres remains viable after Apprendi. (2) Florida law requires more than the finding of an aggravator for death eligibility. The aggravator must be sufficiently weighty to call for the death penalty. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). In the present case the judge did not make a finding that the prior violent felony alone was sufficiently weighty to call for the death penalty. Thus, even if the recidivist exception remains the law, it does not control this case.

Justice Thomas provided the crucial fifth vote in Almendarez-Torres. In Apprendi, he stated that Almendarez-Torres was incorrectly decided. 120 S. Ct. at 2378-80. A majority of the current United States Supreme Court has either dissented in Almendarez-Torres, or stated that it should be overruled. Thus it is of questionable validity. Even if it does survive, it does not control this case. Fla. Stat. 921.141 requires that there be sufficient aggravating circumstances prior to a person being eligible for the death penalty. This Court emphasized this requirement in upholding the constitutionality of the Florida statute. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Even if the judge is authorized to find the prior violent felony aggravator, there was no finding that this aggravator alone is sufficiently weighty to call for death. Thus, Ring was not satisfied. Appellant would further urge this Honorable Court to reject the reasoning of Almendarez-Torres based on the Florida Constitution.

The State also argues that this Court has decided Mr. Thibault’s claim adversely to him in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002). However, the decision in

Bottoson was announced before the United States Supreme Court issued its opinion in Sattazahn v. Pennsylvania, \_\_\_ U.S. \_\_\_, 123 S. Ct. 732 (2003). Shattazahn undermines the central premise of Bottoson, that death is the maximum penalty for first degree murder in Florida.

In Sattazahn the jury reported that it was deadlocked 9 to 3 for life imprisonment. Under Pennsylvania law the judge was required to impose a sentence of life. The defendant appealed and received a new trial. He was sentenced to death on retrial. The issue before the United States Supreme Court was whether the defendant had been acquitted of the death penalty for double jeopardy purposes. The majority of the Court held that he had not. The four dissenters stated that he had been acquitted of the death penalty. The majority opinion was written by Justice Scalia. Justices Rehnquist, O'Connor, Kennedy and Thomas joined Parts I, II, and IV of the opinion. Justices Rehnquist and Thomas joined Part III of the opinion.

Part III of the opinion directly challenges the underlying assumptions of Bottoson; that death is the maximum punishment for first degree and that a non-unanimous penalty verdict satisfies Ring and Apprendi.

Our decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), clarified what constitutes an "element" of an offense for purposes of the Sixth Amendment's jury trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact -- no matter how the State labels it -- constitutes an element, and must be found by a jury beyond a reasonable doubt. Id. at 482-484, 490.

Just last Term we recognized the import of Apprendi in the context of capital-sentencing proceedings. In Ring v. Arizona, 536 U.S. \_\_\_ (2002) [15 Fla. L. Weekly Fed. S464a], we held that aggravating circumstances that make a defendant eligible for the death penalty "operate as `the functional equivalent of an element of a greater offense.'" Id., at \_\_\_ (slip op. at 23) (emphasis added). That is to say, for purposes of the Sixth Amendment's jury-trial guarantee,

the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances”: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. *Id.*, at \_\_\_\_ (slip op., at 22-23).

We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment’s jury-trial guarantee and what constitutes an “offense” for purposes of the Fifth Amendment’s Double Jeopardy Clause. Cf. *Monge v. California*, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting) (“The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence” not only “delimits the boundaries of...important constitutional rights, like the Sixth Amendment right to trial by jury,” but also “provides the foundation for our entire double jeopardy jurisprudence”). In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that “acquittal” on the offense of “murder plus aggravating circumstance(s).” Thus, *Rumsey* was correct to focus on whether a factfinder had made findings that constituted an “acquittal” of the aggravating circumstances; but the reason that issue was central is not that a capital-sentencing proceeding is “comparable to a trial,” 467 U.S., at 209 (citing *Bullington*, *supra*, at 438), but rather that “murder plus one or more aggravating circumstances” is a separate offense from “murder” simpliciter.

## B.

For purposes of the Double Jeopardy Clause, then, “first-degree murder” under Pennsylvania law--the offense of which petitioner was convicted during the guilt phase of his proceedings--is properly understood to be a lesser included offense of “first-degree murder plus aggravating circumstance(s).” See *Ring*, *supra*, at \_\_\_\_ (slip op., at 22-23). Thus, if petitioner’s first sentencing jury had unanimously concluded that Pennsylvania failed to prove

any aggravating circumstances, the conclusion would operate as an “acquittal” of the greater offense--which would bar Pennsylvania from retrying petitioner on that greater offense (and thus, from seeking the death penalty) on retrial. Cf. Rumsey, supra, at 211.

Sattazahn, supra.

Part III of the opinion explicitly rejects the assumptions of Bottoson. It is true that only three members of the Court joined Part III of the opinion. The four dissenters had no reason to speak to this issue. Justice Kennedy wrote nothing about this aspect of the opinion. Justice O’ Connor was a dissenter in Apprendi and Ring and continues to feel that those cases were wrongly decided. However, she did seem to recognize that if a verdict is required then it must be “a unanimous verdict”. Id. at S28. This Honorable Court must revisit Bottoson in light of Sattazahn.

## **POINT II**

### **IMPOSITION OF THE DEATH SENTENCE WITHOUT A VALID WAIVER OF JURY ADVISORY VERDICT VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2, 9, 15, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION**

Appellee argues that Griffin v. State , 820 So.2d 906 (Fla. 2002), controls this issue. However, the State ignores the fact that this Court's decision in Griffin was announced prior to the decision of the United States Supreme Court in Ring. In Griffin, this Court equated the consideration of the waiver of the advisory jury to the determination of the validity of a plea. Ring is grounded in the right to a jury determination of penalty issues.. The right to a jury trial can only be waived by a personal waiver on the record by the defendant. State v. Upton, 658 So. 2d 86 (Fla. 1995). No such waiver took place in the current case. The teaching of Ring certainly undermines the basis of this Court's decision in Griffin, and requires a revisiting of the holding in that case.

**CONCLUSION**

For the foregoing reasons, Mr. Thibault's sentence must be reversed.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. mail to Debra Rescigno, Office of the Attorney General, 1515 North Flagler Drive, 9<sup>th</sup> Floor, West Palm Beach, Florida 33401 this 28<sup>th</sup> day of February, 2003.

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MARK WILENSKY  
Counsel for Appellant

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately this 28<sup>th</sup> day of February, 2003.

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MARK WILENSKY  
Counsel for Appellant