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The *Evans* Case: A Sixth Amendment Challenge to Florida’s Capital Sentencing Statute

BRENDAN RYAN*

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I. INTRODUCTION: A SHAKESPEAREAN REVERSAL OF THE DISTRICT COURT

On June 20, 2011, Judge Jose Martinez of the Southern District of Florida delivered his opinion on Paul Evans’s petition for a writ of habeas corpus.¹ Evans was sentenced to death in 1999 for the 1991 mur-

* Brendan E. Ryan, J.D. Candidate 2014, University of Miami School of Law; B.A. 2008, University of Notre Dame. This article is dedicated to my grandfather, Howard F. Ryan (1907–1983), whose enduring legacy has inspired me to pursue a career in the law. I would also like to thank my advisor, Professor Peter Nemerovski, for his guidance, as well as Allyson R. du Lac, Death Penalty Law Clerk for the United States District Court for the Southern District of Florida, for introducing me to this fascinating case in the summer of 2012.

1. *Evans v. McNeil*, No. 08–14402–CIV, 2011 WL 9717450 (S.D. Fla. June 20, 2011),

der of Alan Pfeiffer in Indian River County, Florida. Having exhausted his direct and collateral appeals in state court, Evans's last hope was federal court, where he had made seventeen claims for relief. In his order, Judge Martinez denied sixteen of Evans's claims, but granted Evans's seventeenth claim, ruling that Florida's capital sentencing statute² violates the Sixth Amendment's jury trial guarantee.³ In so doing, Judge Martinez unleashed a tremor along a jurisprudential fault line that has been threatening Florida's death penalty statute since the United States Supreme Court handed down its landmark decision in *Ring v. Arizona*.⁴

The reaction to the decision was predictable. Prosecutors protested, claiming that the judge was "so far out on the limb, you can hear the branch crack."⁵ Public defenders cheered, noting that Florida's "highly convoluted" scheme for applying the death penalty "is squarely at odds with *Ring*."⁶ Death penalty opponents rejoiced, believing that the decision would "likely spark a flurry of appeals from Death Row inmates."⁷ Right-wing bloggers bristled, decrying the "[j]udicial activism" that has "left Paul Evans living comfortably in jail, and Alan Pfeiffer calling for justice from the grave."⁸ Florida's Attorney General vowed to appeal the ruling.⁹

An appeal to the Eleventh Circuit Court of Appeals came as promised, and the court published its ruling on October 23, 2012.¹⁰ In a unanimous opinion authored by Judge Edward Carnes, the court reversed the district court's grant of Evans's habeas corpus petition. In offering "Evans a spoonful of Shakespeare and a dash of Learned Hand,"¹¹ Judge

rev'd sub nom. Evans v. Sec'y, Fla. Dep't of Corrs., 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom.* Evans v. Crews, 133 S. Ct. 2393 (May 20, 2013).

2. FLA. STAT. § 921.141 (2010).

3. *See Evans*, 2011 WL 9717450, at *47–54.

4. 536 U.S. 584 (2002). The Court held that Arizona's capital sentencing statute, which committed "both capital sentencing factfinding and the ultimate sentencing decision entirely to judges," was a violation of the Sixth Amendment's jury trial guarantee. *Id.* at 608 n.6.

5. Eliot James, *State Attorney General to Appeal Ruling on Vero Beach Man's Death Sentence*, TCPALM.COM, June 23, 2011, <http://www.tcpalm.com/news/2011/jun/23/state-attorney-general-to-appeal-ruling-on-vero/?print=1>.

6. *Florida's Death Penalty Unconstitutional*, A PUB. DEFENDER, June 22, 2011, <http://a.publicdefender.com/2011/06/22/floridas-death-penalty-is-unconstitutional/>.

7. Daphne Duret, *Federal Judge Strikes Down Florida's Death Penalty*, PALM BEACH POST, June 22, 2011, <http://www.palmbeachpost.com/news/news/state-regional/federal-judge-strikes-down-floridas-death-penalty/nLTSN/>.

8. Jesse Phillips, *Justice Denied: Judge Overturns Florida Death Penalty*, FLA. POL. PRESS, June 27, 2011, <http://www.floridapoliticalpress.com/2011/06/27/12768-12768>.

9. *See James, supra*, note 5.

10. Evans v. Sec'y, Fla. Dep't of Corrs., 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom.* Evans v. Crews, 133 S. Ct. 2393 (May 20, 2013).

11. Robyn Hagan Cain, *Is Florida's Capital Sentencing Statute Unconstitutional?*,

Carnes noted that the Supreme Court has “repeatedly instruct[ed] lower courts that when one of its earlier decisions with direct application to a case appears to rest on reasons rejected in a more recent line of decisions, we must follow the directly applicable decision and leave to the high Court the prerogative of overruling its own decisions.”¹² The more recent line of cases that Judge Carnes referred to began with *Ring*, but he remarked that a string of pre-*Ring* cases¹³ specifically upheld “the advisory jury verdict and judicial sentencing component of Florida’s capital punishment statute,” and thus should be followed.¹⁴ Therefore, with no shortage of literary pizzazz, Judge Carnes set the stage for a Supreme Court appeal.

On March 18, 2013, Evans filed his petition for a writ of certiorari.¹⁵ Paul M. Smith, one of the country’s leading appellate litigators, signed the petition as Evans’s counsel of record.¹⁶ Under Rule 15 of the Rules of the Supreme Court, a brief in opposition to a petition for writ of certiorari is mandatory in capital cases.¹⁷ Florida filed its brief in opposition on April 18, 2013.¹⁸ An *amici curiae* brief in support of Evans was also filed on April 18,¹⁹ and Evans filed his reply brief shortly thereafter.²⁰ However, on May 20, 2013, the Supreme Court denied Evans’s petition.²¹ Florida’s capital sentencing statute had survived.

This Comment will discuss the Sixth Amendment concerns in Florida’s capital sentencing statute that were at issue in *Evans*. The first Part

FINDLAW.COM, Oct. 24, 2012, http://blogs.findlaw.com/eleventh_circuit/2012/10/is-floridas-capital-sentencing-stature-unconstitutional.html.

12. *Evans*, 699 F.3d at 1252.

13. *See, e.g.*, *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976).

14. *Evans*, 699 F.3d at 1256.

15. *See* Petition for Writ of Certiorari, *Evans v. Sec’y, Fla. Dep’t of Corrs.*, No. 12-1134 (Mar. 18, 2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/Petition-for-Writ-of-Certiorari-Evans.pdf>.

16. *See id.* Paul M. Smith, partner at Jenner & Block LLP in Washington D.C., has argued fourteen Supreme Court cases, most notably on behalf of the petitioners in *Lawrence v. Texas*, 539 U.S. 558 (2003), a landmark gay rights decision that invalidated Texas’s sodomy statute. JENNER & BLOCK: APPELLATE AND SUPREME COURT PRACTICE, <http://jenner.com/practices/100> (last visited Mar. 29, 2013).

17. SUP. CT. R. 15.

18. *See* Brief of Respondent Michael D. Crews, Sec’y, Fla. Dep’t of Corrs. in Opposition, *Evans*, No. 12-1134 (Apr. 18, 2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/evansBIOfinal.pdf>.

19. *See* Brief of Amici Curiae for the Nat’l Ass’n of Crim. Def. Lawyers et al. in Support of Petitioner, *Evans*, No. 12-1134 (Apr. 18, 2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/Evans.pdf>.

20. *See* Reply Brief of Petitioner Paul H. Evans, *Evans*, No. 12-1134 (Apr. 29, 2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/12-1134-Evans-Reply-Brief.pdf>.

21. *See Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

of the Comment will review the jurisprudential background of Florida's death penalty scheme. This Part will discuss the development of the modern Florida capital punishment statute, important pre-*Ring* Supreme Court decisions that validated its constitutional legitimacy, the impact of several non-death penalty Supreme Court decisions in the lead up to *Ring*, *Ring* itself, and Florida's response to *Ring*. The second Part explores the facts, the procedural history, and the district court and Eleventh Circuit decisions in *Evans*. The third Part discusses the legal analysis of the district court and the Eleventh Circuit decisions in *Evans*, and explains why this issue needs to be addressed by the Supreme Court. The fourth Part examines how effectively the facts in *Evans* elucidated the Sixth Amendment questions at issue to determine whether the Supreme Court missed a golden opportunity when it denied certiorari. The Fifth Part considers proactive steps that Florida can take to ensure that its capital sentencing procedures are constitutional under *Ring*. Finally, the sixth Part concludes that proactive reform may help save the death penalty in Florida, not usher in its demise.

II. JURISPRUDENTIAL BACKGROUND TO FLORIDA'S DEATH PENALTY STATUTE

A. *The Post-Furman Florida Statute*

In 1972, in *Furman v. Georgia*,²² the United States Supreme Court struck down all of the existing death-penalty statutes in the various states. By a 5-4 majority, the badly fragmented Court overturned the death sentences for two defendants convicted of rape and one defendant convicted of murder.²³ Three of the Justices in the majority (Justices Stewart, White, and Douglas)²⁴ held that giving the sentencer (either judge or jury) "untrammelled discretion"²⁵ to determine whether the death penalty should be imposed violated the Eighth Amendment's prohibition against "cruel and unusual" punishment.²⁶ For these Justices, it was not the death penalty itself that was cruel and unusual; rather, it was the sentencing procedures in the several states that was cruel and unusual because they promoted the arbitrary application of the death penalty.²⁷ Two of the Justices (Justices Brennan

22. 408 U.S. 238 (1972).

23. *Id.* at 239-40.

24. *Id.* at 240 (Douglas, J., concurring); *Id.* at 306 (Stewart, J., concurring); *Id.* at 310 (White, J., concurring).

25. *Id.* at 247 (Douglas, J., concurring).

26. U.S. CONST., AMEND. VIII.

27. For his part, Justice Potter Stewart concluded that the death sentences in question were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309. He continued:

and Marshall)²⁸ concurred on the grounds that all capital punishment is cruel and unusual in light of the “evolving standards of decency that mark the progress of a maturing society.”²⁹ All nine Justices filed separate opinions in support of their positions.³⁰ As a result of the Court’s decision in *Furman*, more than 600 prisoners who had been sentenced to death between 1967 and 1972 had their death sentences lifted.³¹

Given no clear guidance from the Court, the states began to reenact death penalty statutes based upon their interpretations of the various opinions in *Furman*. A total of thirty-eight states reinstated capital punishment in the years following *Furman*.³² Florida became the first state to reenact the death penalty after *Furman* on December 8, 1972,³³ and Florida’s statute served as a template for some other states in developing their own capital punishment procedures.³⁴ Florida’s capital sentencing procedure first requires that a jury unanimously convict a defendant of first-degree murder.³⁵ Then it provides for a three-step pro-

For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to death, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Id. at 309–10.

28. *Id.* at 257 (Brennan, J., concurring); *Id.* at 314 (Marshall, J., concurring).

29. *Id.* at 327 (Marshall, J., concurring).

30. *Id.* at 239–40.

31. *Recent Legal History of the Death Penalty in America: American Capital Punishment Goes to Court*, ABOUT.COM, <http://usgovinfo.about.com/library/weekly/bldeathpenalty.htm> (last visited Feb. 11, 2013).

32. See *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002). As of May, 2 2013, only thirty-two states still had the death penalty. On that date, Maryland became the sixth state in the last six years to repeal the death penalty, joining Connecticut, New Jersey, New York, New Mexico, and Illinois. Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish Death Penalty*, REUTERS.COM, May 2, 2012, <http://www.reuters.com/article/2013/05/02/us-usa-maryland-death-penalty-idUSBRE9410TQ20130502>. On November 6, 2012, voters in California rejected Proposition 34, a ballot measure that would have repealed the death penalty. Anna Almendrala, *Prop 34 Defeated: California Voters Preserve Death Penalty*, HUFFINGTONPOST.COM, Nov. 7, 2012, http://www.huffingtonpost.com/2012/11/07/prop-34-defeated-california_n_2089011.html.

33. See Ken Driggs, *A Current of Electricity Sufficient in Intensity to Cause Immediate Death: A Pre-Furman History of Florida’s Electric Chair*, 22 STETSON L. REV. 1169, 1207 (1993).

34. Today, only Alabama uses similar capital punishment sentencing procedures. See ALA. CODE § 13A-5-45 (2012). Indiana used to have a similar procedure, but it changed its death penalty statute in 2002. See IND. CODE § 35-50-2-9 (2007). Delaware modeled a new capital punishment statute after Florida’s statute in 1991, but made fundamental changes to it after the Supreme Court’s decision in *Ring* in 2002. See Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1931–32 (2012).

35. FLA. R. CRIM. P. 3.440.

cess to determine the appropriate sentence: an advisory verdict from the jury, a *Spencer* hearing, and the trial judge's sentencing order.

1. STEP ONE: THE JURY'S ADVISORY VERDICT

The first step is a separate sentencing proceeding before the trial judge and jury "to determine whether the defendant should be sentenced to death or to life imprisonment."³⁶ During the proceeding, the jury hears evidence to establish statutory aggravating factors³⁷ and statutory³⁸ or nonstatutory³⁹ mitigating factors. Aggravating circumstances must be established beyond a reasonable doubt; a fact-finder must only be "reasonably convinced" that a mitigating circumstance exists in order to consider it established.⁴⁰

After hearing the evidence, the jury deliberates before making its sentencing recommendation. First the jury must determine if one or more aggravating circumstances have been established beyond a reasonable doubt.⁴¹ If the jury finds that no aggravating circumstances were established, or that the aggravating circumstances alone do not justify the imposition of a death sentence, then the jury is instructed to recommend a sentence of life imprisonment.⁴² Next, the jury must determine if "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist."⁴³ Last, each juror weighs the aggravating and mitigating factors to decide whether to recommend a death sentence or a life sentence.⁴⁴ A simple majority of the jury voting for death is necessary for a recommendation of the death penalty.⁴⁵

36. *Id.*

37. As of 2012, there were sixteen statutory aggravating factors in Florida. FLA. STAT. § 921.141(5)(a)–(p) (2010).

38. As of 2012, there were seven statutory mitigating factors in Florida. FLA. STAT. § 921.141(6)(a)–(g).

39. FLA. STAT. § 921.141(6)(h). In 1978, the United States Supreme Court held that a sentencing court must consider all mitigating circumstances, not just those listed in a particular state statute. "The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 608 (1978).

40. *See* Stand. Jury Instrs. in Crim. Cases – NO. 96-1, 690 So. 2d 1263, 1267–68 (Fla. 1997).

41. FLA. STAT. § 921.141(2)(a).

42. *Stand. Jury Instrs. in Crim. Cases*, 690 So. 2d at 1267–68.

43. FLA. STAT. § 921.141(2)(b).

44. FLA. STAT. § 921.141(2)(c).

45. Only Florida and Delaware allow a jury to recommend the death penalty by a simple majority. *See* FLA. STAT. § 921.141; DEL. CODE ANN. tit. 11, § 4209 (2012). Delaware requires a unanimous jury finding of at least one aggravating factor in order for the judge to ultimately sentence the defendant to death. *See* Sheri Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1931 (2012). Alabama requires a super-majority (ten or more jurors) to recommend the death penalty. *See* ALA. CODE § 13A-5-45 (2012).

To understand *Ring*'s application to Florida's sentencing scheme, it is important to understand what this jury recommendation is and what this jury recommendation is not. The jury recommendation does not make a detailed factual finding on what aggravating factors exist beyond a reasonable doubt,⁴⁶ nor does it make a detailed factual finding on what mitigating factors exist with reasonable certainty.⁴⁷ The jury recommendation reflects only the number of jurors voting for the imposition of the death penalty after each juror balances the aggravating and mitigating factors that each juror found to exist.

2. STEP TWO: THE *SPENCER* HEARING

After the jury delivers its sentencing recommendation, the judge holds a *Spencer* hearing.⁴⁸ During the *Spencer* hearing, the judge must do the following:

- a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person.⁴⁹

Equipped with the jury's advisory verdict and the information gleaned from the *Spencer* proceeding, "the trial judge should then recess the proceeding to consider the appropriate sentence."⁵⁰

3. STEP THREE: JUDGE'S SENTENCING ORDER

When the judge has determined the appropriate sentence, he or she "set[s] a hearing to impose the sentence and contemporaneously file[s] the sentencing order."⁵¹ During his or her deliberations, the judge must give the jury's advisory verdict "great weight."⁵² The judge may override a jury's recommendation of a life sentence only if "the facts suggesting a sentence of death" are "so clear and convincing that virtually no reasonable person could differ."⁵³ If the judge imposes the death pen-

46. *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003).

47. *Id.*

48. *See Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

49. *Id.* at 691.

50. *Id.*

51. *Id.* Note that this hearing is separate from the *Spencer* hearing. *See id.*

52. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

53. *Id.* The last time the Florida Supreme Court affirmed a trial judge's decision to override a jury recommendation of a life sentence was in 1998. *See Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998). In that case, the jury recommended death for the defendant's murder of his wife and seven-year-old son, but recommended life for the murder of his five-year-old daughter. *Id.* at 490-91. The trial judge overrode the life sentence recommendation for the murder of the daughter. *Id.* The

alty, he or she must deliver a thorough sentencing order detailing the amount of weight that he or she assigned to each aggravating and mitigating factor supported by the evidence.⁵⁴ The judge may only consider aggravating and mitigating factors supported by "sufficient competent evidence in the record."⁵⁵ The Florida Supreme Court automatically reviews all death sentences.⁵⁶

B. *The Supreme Court Validates the Florida Statute*

The Supreme Court's first opportunity to evaluate Florida's newly developed capital punishment procedures came in 1976 with *Proffitt v. Florida*.⁵⁷ The Court held that Florida's capital punishment statute effectively addresses *Furman*'s arbitrariness concerns under the Eighth and Fourteenth Amendments, and thus "passes constitutional muster."⁵⁸ *Proffitt* did not present a Sixth Amendment claim for a right to a jury trial. However, the Court did consider Florida's procedures and the right to a jury trial in two later cases: *Spaziano v. Florida*⁵⁹ and *Hildwin v. Florida*.⁶⁰

1. *SPAZIANO V. FLORIDA*

In *Spaziano*, the defendant was convicted of first-degree murder after a trial in which the prosecution's primary witness "testified that petitioner had taken him to a garbage dump in Seminole County, Fla., where petitioner had pointed out the remains of two women he claimed to have tortured and murdered."⁶¹ During the sentencing phase of the proceeding, the jury recommended life imprisonment.⁶² Finding two aggravating circumstances,⁶³ the trial judge concluded that "notwithstanding the recommendation of the jury, . . . sufficient aggravating cir-

Florida Supreme Court affirmed the override, noting that the "facts suggesting the sentence of death for all three of these murders are clear and convincing, and as to Ana [the daughter], even more compelling." *Id.* at 494. Before *Zakrzewski*, the last time the Florida Supreme Court affirmed a trial judge's decision to override a jury recommendation of a life sentence was in 1994. See *Washington v. State*, 653 So. 2d 362 (Fla. 1994).

54. See *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990) ("The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.").

55. *Brown v. Wainright*, 392 So. 2d 1327, 1331 (Fla. 1981).

56. FLA. STAT. § 921.141(4) (2010).

57. 428 U.S. 242 (1976).

58. *Id.* at 259.

59. 468 U.S. 447 (1984).

60. 490 U.S. 638 (1989) (*per curiam*).

61. *Id.* at 450.

62. *Id.* at 451.

63. *Id.* ("The two aggravating circumstances found by the court were that the homicide was

cumstances existed to justify and authorize a death sentence[;] . . . the mitigating circumstances were insufficient to outweigh such aggravating circumstances and . . . a sentence of death should be imposed in this case.”⁶⁴ The defendant contended that allowing a judge to override a jury’s advisory verdict for life imprisonment violates the defendant’s constitutional right to a jury trial.⁶⁵ The defendant’s “fundamental premise,” however, was “that the capital sentencing decision is one that, in all cases, should be made by a jury.”⁶⁶

The Court rejected the defendant’s claim for two reasons. First, the Court noted that Florida’s capital sentencing proceeding is like a regular trial in that the “embarrassment, expense, and ordeal . . . faced by a defendant . . . are at least equivalent.”⁶⁷ Thus, the Double Jeopardy Clause “bars the State from making repeated efforts to persuade a sentencer to impose the death penalty” because of “the risk that the State, with all its resources, would wear a defendant down, thereby leading to an erroneously imposed death penalty.”⁶⁸ But, the Court continued, there is no danger of erroneously imposing the death penalty when the defendant is denied a jury trial during capital sentencing.⁶⁹ “The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer’s decision for life is final.”⁷⁰ Thus, the Court concluded that Florida’s capital sentencing proceeding is not “like a trial in respects significant to the Sixth Amendment’s guarantee of a jury trial.”⁷¹

Second, the Court observed that the Sixth Amendment has never been thought to guarantee a right to a jury determination on an individual’s sentence.⁷² “[A] capital sentencing proceeding,” the Court said, “involves the same fundamental issues involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual.”⁷³ Although the stakes are higher in a capital sentencing proceeding, the Court could find no principled reason for why this would implicate the defendant’s constitutional right to a jury

especially heinous and atrocious and that the defendant had been convicted previously of felonies involving the use or threat of violence to the person.”).

64. *Id.*

65. *Id.* at 457.

66. *Id.* at 458.

67. *Id.* (internal quotations omitted).

68. *Id.* at 458–59.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 459.

73. *Id.*

trial.⁷⁴ Thus, the Court concluded that a judge's imposition of a death sentence, despite a jury's recommendation of a life sentence, does not violate the Sixth Amendment.⁷⁵

2. *HILDWIN V. FLORIDA*

In *Hildwin*, the defendant was convicted of raping and strangling a woman in Hernando County, Florida.⁷⁶ During the sentencing proceedings, the jury unanimously recommended death.⁷⁷ In affirming the jury's recommendation, the trial judge found four aggravating circumstances: "petitioner had previous convictions for violent felonies, he was under a sentence of imprisonment at the time of the murder, the killing was committed for pecuniary gain, and the killing was especially heinous, atrocious, and cruel."⁷⁸ The defendant contended that Florida's procedures violated the Sixth Amendment because they permitted "the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment."⁷⁹

In rejecting the defendant's claim, the Court cited *McMillan v. Pennsylvania*.⁸⁰ In that case, the Court upheld a statute that required a mandatory minimum sentence if the sentencing judge found by a preponderance of the evidence that the defendant "visibly possessed a firearm."⁸¹ The *McMillan* Court noted that the statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it."⁸² This, the Court reasoned, made possession of a firearm a

74. *See id.*

75. *See id.* at 462–463.

76. *Inmate Paul Hildwin*, COMM'N ON CAP. CASES, <http://www.floridacapitalcases.state.fl.us/inmate-details.cfm?id=185> (last visited Feb. 11, 2013). In 2003, DNA test results proved that the semen and saliva found at the crime scene did not belong to Hildwin. *DNA Database Search Could Free Man on Florida's Death Row; Legal Papers Filed to Force State to Allow Search for Real Perpetrator in 1986 Murder Case*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Database_Search_Could_Free_Man_on_Floridas_Death_Row_Legal_Papers_Filed_to_Force_State_to_Allow_Search_for_Real_Perpetrator_in_1986_Murder_Case.php (last visited Feb. 11, 2013). In 2011, the DNA was matched to the victim's boyfriend, William Haverty, about whom investigators had had early suspicions. Tony Holt, *Attorney Fighting to Overturn Death Sentence in 1985 Murder*, HERNANDOTODAY.COM, Aug. 8, 2012, <http://www2.hernandotoday.com/news/hernando-news/2012/aug/08/hanewso1-attorney-fighting-to-overturn-death-sente-ar-456967/>. As of August, 2012, Hildwin remained in prison. *See id.*

77. *Hildwin*, 490 U.S. at 639.

78. *Id.*

79. *Id.*

80. 477 U.S. 79 (1986).

81. *Id.* at 81.

82. *Id.* at 87–88.

“sentencing factor,” not an element of the offense.⁸³ Because the existence of an aggravating circumstance during capital sentencing is also a sentencing factor, the *Hildwin* Court 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.”⁸⁴

Under the holdings in *Spaziano* and *Hildwin*, the Supreme Court made clear that a jury need not determine (a) whether a defendant should be sentenced to death, or (b) whether any aggravating factors exist such that the defendant is eligible to be sentenced to death. In *Walton v. Arizona*,⁸⁵ the Supreme Court explicitly upheld a capital sentencing system in which the trial judge presides over the penalty phase without *any input from a jury*.⁸⁶ The Court deliberately cited *Spaziano* and *Hildwin*,⁸⁷ making the same distinction between sentencing factors and elements of the offense that was found in *McMillan*.⁸⁸ Over the next decade, however, a surprise attack on this foundational distinction would begin to emerge in several non-death-penalty cases, culminating in the seminal case of *Apprendi v. New Jersey*.⁸⁹

C. *Apprendi v. New Jersey*

After *Walton*, the Court spent considerable time trying to differentiate between a sentencing factor (requiring no jury determination) and an element of the offense (requiring a jury determination). In *Almendarez-Torres v. United States*,⁹⁰ for example, the defendant challenged a statute that allowed for an enhanced sentence to be imposed by a judge due to a prior deportation.⁹¹ The Court held that a defendant’s prior record is a sentencing factor, and not an element of the offense.⁹² On the other hand, in *Jones v. United States*,⁹³ the Court dealt with a federal carjacking statute that provided for separate maximum penalties depending on whether serious bodily injury or death occurred.⁹⁴ The Court held that the statute created three different offenses, the elements of which must

83. *Id.* at 86.

84. *Hildwin*, 490 U.S. at 640–41.

85. 497 U.S. 639 (1990).

86. *Id.* at 643–49.

87. *Id.* at 647–48.

88. *Id.* at 648.

89. 530 U.S. 466 (2000).

90. 523 U.S. 224 (1998).

91. *Id.* at 226–27.

92. *Id.* at 235.

93. 526 U.S. 227 (1999).

94. *Id.* at 230 (The three penalties were as follows: (1) if at the time of the crime, the person was in possession of a firearm, the penalty was not more than fifteen years; (2) if serious bodily injury resulted, the penalty was not more than twenty-five years; and (3) if death resulted, the penalty was any number of years up to life.).

be proved to a jury beyond a reasonable doubt.⁹⁵ The primary difference between the two cases, the Court reasoned, was that a “prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.”⁹⁶ The elements in the carjacking statute did not share this characteristic.⁹⁷

While *Almendarez-Torres* and *Jones* represented opposite ends of the sentencing-factors/elements-of-the-offense dichotomy, the statute in *Apprendi* seemed to fall somewhere in the middle. In New Jersey, possession of a firearm for an unlawful purpose is a second-degree offense, carrying a sentence range of five to ten years.⁹⁸ However, New Jersey law also provided for “an ‘extended term’ of imprisonment if the trial judge found, by a preponderance of the evidence, that ‘[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.’”⁹⁹ This extended term of imprisonment for a “hate crime” changed the sentencing range for a second-degree offense to ten to twenty years.¹⁰⁰

In *Apprendi*, the defendant admitted to firing “several .22-caliber bullets into the home of an African-American family that had recently moved into [his] previously all-white neighborhood.”¹⁰¹ The defendant entered into a plea bargain, but “reserved the right to challenge the hate crime sentence enhancement on the ground that it violat[e]d the United States Constitution.”¹⁰² At sentencing, the trial judge held an evidentiary hearing to determine the defendant’s motive for the crime.¹⁰³ After the hearing, the trial judge concluded “that the crime was motivated by racial bias” and that the “hate crime enhancement applied.”¹⁰⁴ The judge then sentenced the defendant to a twelve-year prison term, two years more than the maximum sentence allowed without the hate crime enhancement.¹⁰⁵

Apprendi appealed, arguing that the Sixth Amendment, as applied to the states by the Fourteenth Amendment’s Due Process Clause,

95. *Jones*, 526 U.S. at 252.

96. *Id.* at 249.

97. *Id.*

98. *Apprendi v. New Jersey*, 530 U.S. 466, 468 (2000) (citing N.J. STAT. ANN. §§ 2C:39-4(a), 2C:43-6(a)(2) (West 1995)).

99. *Id.* at 468–69 (citing N.J. STAT. ANN. § 2C:44-3(e) (West 1995), *invalidated by Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

100. *Id.* at 469.

101. *Id.*

102. *Id.* at 470.

103. *Id.*

104. *Id.* at 471.

105. *Id.*

“requires that the finding of bias upon which his hate crime sentence was based . . . be proved to a jury beyond a reasonable doubt.”¹⁰⁶ The Appellate Division of the Superior Court of New Jersey upheld the statute, and the New Jersey Supreme Court affirmed.¹⁰⁷ In a 5-4 decision, the United States Supreme Court reversed.¹⁰⁸

The *Apprendi* decision threatened many states’ death penalty statutes because it put an end to the distinction between sentencing factors and elements of the offense. First, the Court observed that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.”¹⁰⁹ The Court also noted that *Almendarez-Torres* “represents at best an exceptional departure” from the historical rule enunciated in *Jones* because of the “procedural safeguards attached to any ‘fact’ of [a] prior conviction.”¹¹⁰ The Court then reconciled *Almendarez-Torres* and *Jones*, holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹¹¹ Finally, the Court concluded that “[t]he New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.”¹¹²

In his concurring opinion, Justice Thomas questioned *Walton*’s continued validity in the context of Arizona’s judge-only capital sentencing statute because of its distinction between sentencing factors and elements of the offense.¹¹³ That issue came to a head the following year in *Ring v. Arizona*.¹¹⁴

D. *The Court Goes to “Apprendi-Land” in Ring v. Arizona*

In 2003, Chief Justice Harry Anstead of the Florida Supreme Court called *Ring* the “most significant death penalty decision from the U.S. Supreme Court in the past thirty years.”¹¹⁵ In an opinion by Justice Ginsburg, the Court struck down Arizona’s judge-only capital sentenc-

106. *Id.*

107. *Id.* at 471–72.

108. *Id.* at 474.

109. *Id.* at 478.

110. *Id.* at 487–88.

111. *Id.* at 490.

112. *Id.* at 497.

113. *Id.* at 522–23 (Thomas, J., concurring).

114. 536 U.S. 584 (2002).

115. *Duest v. State*, 855 So. 2d 33, 57 (Fla. 2003) (Anstead, C.J., concurring in part and dissenting in part).

ing procedure (and overruled its holding in *Walton*) because it was “irreconcilable” with the Court’s holding in *Apprendi*.¹¹⁶ While *Ring* did not explicitly strike down Florida’s “hybrid system[],”¹¹⁷ the decision did call it into question.

1. *RING V. ARIZONA*

In *Ring*, the defendant and two others robbed an armored van in Glendale, Arizona.¹¹⁸ During the robbery, one of the vehicle’s drivers was killed.¹¹⁹ At *Ring*’s trial, the jury “deadlocked on premeditated murder, . . . but convicted *Ring* of felony murder occurring in the course of armed robbery.”¹²⁰ The evidence at trial failed to prove that *Ring* “was a major participant in the armed robbery or that he actually murdered [the victim].”¹²¹ However, after *Ring*’s trial but before his sentencing hearing, one of his co-defendants accepted a plea bargain and agreed to cooperate in *Ring*’s prosecution.¹²² During the sentencing hearing, the co-defendant testified that *Ring* was the leader of the group and actually killed the victim.¹²³ The trial judge, without any input from a jury, sentenced *Ring* to death.¹²⁴

Under Arizona’s capital sentencing statute, *Ring* could not be sentenced to death unless further findings were made.¹²⁵ After a jury convicted a defendant of first-degree murder, the statute required the trial judge to conduct, without a jury, “a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances.”¹²⁶ At the hearing’s conclusion, the judge made the factual determinations on the presence or absence of aggravating and mitigating circumstances.¹²⁷ The judge was “to sentence the defendant to death only if there were at least one aggravating circumstance and there [were] no mitigating circumstances sufficiently substantial to call for leniency.”¹²⁸ Under this procedure, the finding of an aggravating circumstance was what triggered the potential of the death penalty.¹²⁹ Thus,

116. *Ring*, 536 U.S. at 589.

117. *Id.* at 608 n.6.

118. *Id.* at 589.

119. *Id.*

120. *Id.* at 591.

121. *State v. Ring*, 25 P.3d 1139, 1152 (Ariz. 2001).

122. *Ring v. Arizona*, 536 U.S. 584, 593 (2002).

123. *Id.* at 593–94.

124. *Id.* at 594.

125. *Id.* at 592.

126. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-703(C) (2000), *invalidated by Ring v. Arizona*, 536 U.S. 584 (2002)).

127. *Id.*

128. *Id.* (internal quotations and citations omitted).

129. *See id.* at 597.

under *Apprendi*'s logic, an offense punishable by death had, as an element, the existence of at least one aggravating circumstance.¹³⁰ "The question presented," the Court said, was "whether that aggravating factor may be found by the judge . . . or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, require[d] that the aggravating factor determination be entrusted to the jury."¹³¹

In finding the Arizona procedure unconstitutional under *Apprendi*, the Court noted that the Arizona procedure was upheld in *Walton* because of the now-extinct distinction between sentencing factors and elements of the offense.¹³² *Apprendi*, Justice Ginsburg said, made the question "one not of form, but of effect. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."¹³³ Thus, the Court concluded that it must "overrule *Walton* 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."¹³⁴

2. JUSTICE SCALIA TRAVELS TO APPRENDI-LAND

Despite joining the majority, Justice Scalia filed a concurrence (joined by Justice Thomas) that is, without a doubt, *Ring*'s most memorable opinion.¹³⁵ With the kind of gusto that only he can manufacture, Justice Scalia considered the Court's Sixth Amendment and Eighth Amendment jurisprudence before concluding that Arizona's judge-only death penalty scheme violated the jury trial guarantee.¹³⁶

Ring confronted Justice Scalia "with a difficult choice."¹³⁷ On the one hand, Justice Scalia wanted to overrule the Court's decision in *Furman*.¹³⁸ Because *Furman* was the reason that Arizona had to create a new death-penalty statute that specified particular aggravating factors that must be found in order for the death penalty to be imposed, Justice Scalia was "reluctant to magnify the burdens that our *Furman* jurispru-

130. *See id.*

131. *Id.*

132. *Id.* at 598.

133. *Id.* at 602 (internal quotation and citations omitted).

134. *Id.* at 609.

135. *Id.* at 610–13 (Scalia, J., concurring).

136. *Id.*

137. *Id.* at 610.

138. *Id.* Justice Scalia cited with approval then-Justice Rehnquist's dissenting opinion in *Gardner v. Florida*, which reasoned that "the prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed." *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting).

dence imposes on the States.”¹³⁹ On the other hand, Justice Scalia also believed that

the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.¹⁴⁰

Faced with such a “quandary,” Justice Scalia admitted that at the time *Walton* was decided, he “still would have approved the Arizona scheme,” favoring “the States’ freedom to develop their own capital sentencing procedures (already erroneously abridged by *Furman*) over the logic of the *Apprendi* principle.”¹⁴¹ Since *Walton*, however, Justice Scalia noted that he had “acquired new wisdom” that caused him to reach the opposite conclusion in *Ring*.¹⁴²

Justice Scalia’s newfound wisdom in *Ring* “consist[ed] of two realizations.”¹⁴³ First, he recognized “that it is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event.”¹⁴⁴ Second, his observations since *Walton* caused him to believe that

our people’s traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man’s going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.¹⁴⁵

As a result, Justice Scalia concluded that “*whether or not* the States have been erroneously coerced into the adoption of ‘aggravating factors,’ wherever those factors exist . . . they must be found by the jury beyond a reasonable doubt.”¹⁴⁶

Finally, Justice Scalia clarified the Court’s holding while simultaneously addressing Justice Breyer’s cumbersome concurrence. Justice Breyer, who dissented in *Apprendi*,¹⁴⁷ nonetheless concurred in *Ring* because he believed that “jury sentencing in capital cases is mandated by

139. *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

140. *Id.*

141. *Id.* at 610–11.

142. *Id.* at 611.

143. *Id.*

144. *Id.*

145. *Id.* at 612.

146. *Id.*

147. *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (Breyer, J., dissenting).

the Eighth Amendment.”¹⁴⁸ Justice Scalia first noted that “today’s judgment has nothing to do with jury sentencing. What today’s decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.”¹⁴⁹ He then identified two ways in which the “ultimate life-or-death decision”¹⁵⁰ can be left to a judge without violating the Sixth Amendment: (1) by requiring that the jury find an aggravating factor during a separate sentencing phase or (2) “by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.”¹⁵¹ Justice Scalia concluded his concurrence by playfully urging Justice Breyer to accept *Apprendi*: “There is really no way in which Justice Breyer can travel with the happy band that reaches today’s result unless he says yes to *Apprendi*. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.”¹⁵²

3. EXPLICIT REFERENCES TO THE FLORIDA STATUTE IN *RING*

In striking down Arizona’s judge-only capital sentencing statute, the Court mentioned Florida’s capital sentencing statute on two occasions. First, the Court discussed Florida’s procedures during the summary of its decision in *Walton*.¹⁵³ Second, the Court called Florida’s sentencing scheme a “hybrid” system in footnote six of the majority opinion.¹⁵⁴ The context of both references to the Florida death-penalty statute is helpful in determining what effect *Ring* has on the constitutionality of the Florida statute.

In *Walton*, the Court said the following about Florida’s death sentencing procedures:

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.¹⁵⁵

In *Ring*, which overruled *Walton*, the Court said the following about Florida’s capital sentencing procedures and the *Hildwin* decision:

In *Walton v. Arizona*, we upheld Arizona’s scheme against a charge

148. *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring).

149. *Id.* at 612 (Scalia, J., concurring).

150. *Id.*

151. *Id.* at 612–13.

152. *Id.* at 613.

153. *Id.* at 598 (majority opinion).

154. *Id.* at 608 n.6.

155. *Walton v. Arizona*, 497 U.S. 639, 648 (1990).

that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors "elements of the offense"; in both States, they ranked as "sentencing considerations" guiding the choice between life and death.¹⁵⁶

Given that (a) *Apprendi* marked the end of the differentiation between sentencing considerations and elements of the offense and (b) *Ring* overruled *Walton*, the previous passage could be read to suggest that *Ring* overrules *Hildwin* and makes Florida's death penalty scheme unconstitutional.

However, while the summary of *Walton* in *Ring* might imply that Florida's procedure is an unconstitutional violation of the jury trial guarantee, footnote six of the majority opinion might cut in the opposite direction. Footnote six says that of the thirty-eight states that had capital punishment in 2002, twenty-nine "commit sentencing decisions to juries," five "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges," and four "have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations."¹⁵⁷ Arizona's system in 2002 fit into the second category, while Florida's system today fits into the third "hybrid" category.¹⁵⁸ *Ring* explicitly strikes down the death penalty statutes in the second category,¹⁵⁹ speaks favorably about the statutes in the first category,¹⁶⁰ and says nothing about the statutes in the hybrid category. By separating the hybrid category from the other two categories, the Court may have implicitly approved Florida's statute. At the very least, this separation indicates that the Court left the issue of the constitutionality of Florida's procedures for another day.

156. *Ring v. Arizona*, 536 U.S. 584, 598 (2002) (citing *Walton*, 497 U.S. at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989) (per curiam))) (internal citations omitted).

157. *Id.* at 608 n.6.

158. *Id.*

159. *Id.* at 608.

160. *Id.* ("Unlike Arizona, the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.").

E. *The Florida Supreme Court Reacts to Ring*

On March 18, 1976, Amos Lee King brutally murdered Natalie Brady in Tarpon Springs, Florida.¹⁶¹ He was sentenced to death in 1977.¹⁶² Linroy Bottoson was convicted of the 1979 murder of Catherine Alexander in Eatonville, Florida.¹⁶³ He was sentenced to death in 1981.¹⁶⁴ On October 24, 2002, their cases became inextricably linked when the Florida Supreme Court denied their petitions for habeas corpus relief pursuant to the United States Supreme Court's newly-minted decision in *Ring v. Arizona*.¹⁶⁵ After the Court declined to intervene,¹⁶⁶ Bottoson was executed on December 9, 2002,¹⁶⁷ and King was executed on February 26, 2003.¹⁶⁸

The *Bottoson* and *King* cases first became linked when the United States Supreme Court stayed their executions in early 2002.¹⁶⁹ The stays were accompanied by statements that said "that the stays would terminate automatically if certiorari was not granted."¹⁷⁰ On June 28, 2002, after the Court had issued its decision in *Ring*, it denied certiorari in both *King* and *Bottoson*.¹⁷¹ This automatically lifted the stays of execution, but the Florida Supreme Court issued new stays on July 8, 2002 so the inmates could make new Sixth Amendment arguments in light of *Ring*.¹⁷² Although the denial of relief was unanimous in both cases, the seven Florida justices issued a total of eight different opinions.¹⁷³

Both cases included short per curiam opinions that are almost entirely identical.¹⁷⁴ These opinions noted that "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute . . . and although Bottoson contends that there now are areas of 'irreconcilable conflict' in that precedent, the Court in *Ring* did

161. *King v. State*, 390 So. 2d 315, 316–17 (Fla. 1980).

162. *King v. Moore*, 831 So. 2d 143, 147–48 (Fla. 2002) (Wells, J., concurring specially).

163. *Bottoson v. State*, 443 So. 2d 692, 693 (Fla. 1983).

164. *Bottoson v. Singletary*, 685 So. 2d 1302, 1303 (Fla. 1997).

165. See generally *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002).

166. *Bottoson v. Moore*, 537 U.S. 1070 (2002); *King v. Moore*, 537 U.S. 1067 (2002).

167. *Linroy Bottoson*, CLARKPROSECUTOR.ORG, <http://www.clarkprosecutor.org/html/death/US/bottoson813.htm> (last visited Feb. 11, 2013).

168. *Amos Lee King, Jr.*, CLARKPROSECUTOR.ORG, <http://www.clarkprosecutor.org/html/death/US/king834.htm> (last visited Feb. 11, 2013).

169. See *Bottoson*, 833 So. 2d at 697 (Wells, J., concurring specially).

170. *Id.*

171. *Id.*

172. *Id.* at 696.

173. *Id.* at 695; *King v. Moore*, 831 So. 2d 143, 145 (Fla. 2002) (per curiam).

174. See *Bottoson v. Moore*, 833 So. 2d 693, 694–95 (Fla. 2002) (per curiam). See also *King*, 831 So. 2d at 144–45.

not address this issue.”¹⁷⁵ Thus, because *Ring* did not address Florida’s capital sentencing statute, the statute remains constitutional until the Supreme Court determines otherwise.¹⁷⁶ In so holding, the court cited the Supreme Court’s decision in *Rodriguez de Quijas v. Shearson/American Express*,¹⁷⁷ which held that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”¹⁷⁸ Implicit in this quote, however, was the unequivocal acknowledgement that the constitutionality of the Florida statute rests on reasons that were rejected in *Ring*. The litany of concurring opinions that followed drove this point home.¹⁷⁹

The various concurring opinions in *Bottoson* and *King* elucidated two important points. First, Justices Shaw and Pariente concurred specifically because both inmates had committed violent felonies prior to committing first-degree murder.¹⁸⁰ As discussed above, *Almendarez-Torres* held that sentence enhancements due to prior felony convictions do not require a jury determination.¹⁸¹ *Apprendi* affirmed this principle when it made its jury determination requirement mandatory for all facts leading to sentence enhancements “[o]ther than the fact of a prior conviction.”¹⁸² Thus, Justices Shaw and Pariente concluded that even if the inmates had valid claims under *Ring* for their other aggravating factors, at least one aggravating factor would remain to make them death-eligible.¹⁸³

Second, Justice Shaw disagreed with the conclusion “that the United States Supreme Court’s decision denying certiorari and lifting the stay of execution . . . constitutes either a validation of Florida’s capital sentencing statute or an approval of Bottoson’s execution.”¹⁸⁴ In *Teague v. Lane*,¹⁸⁵ the Court held that “new rules [of law] generally

175. *Bottoson*, 833 So. 2d at 695.

176. *Id.*

177. 490 U.S. 477 (1989).

178. *Bottoson*, 833 So. 2d at 695 (Fla. 2002) (citing *Rodriguez de Quijas*, 490 U.S. at 484).

179. *See, e.g., id.* at 703–10 (Anstead, C.J., concurring in result only); *id.* at 710–19 (Shaw, J., concurring in result only); *id.* at 719–25 (Pariente, J., concurring in result only).

180. *Id.* at 718–19 (Shaw, J., concurring in result only); *id.* at 722 (Pariente, J., concurring in result only); *King v. Moore*, 831 So. 2d 143, 148–49 (Fla. 2002) (Shaw, J., concurring in result only); *id.* at 149 (Pariente, J., concurring in result only).

181. *See supra* notes 90–97 and accompanying text.

182. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

183. *Bottoson v. Moore*, 833 So. 2d 693, 718–19 (Fla. 2002) (Shaw, J., concurring in result only); *id.* at 722 (Pariente, J., concurring in result only); *King*, 831 So. 2d at 148–49 (Shaw, J., concurring in result only); *id.* at 149 (Pariente, J., concurring in result only).

184. *Bottoson*, 833 So. 2d at 710 (Shaw, J., concurring in result only).

185. 489 U.S. 288 (1989).

should not be applied retroactively to cases on collateral review.”¹⁸⁶ Only cases on direct review receive retroactive application of new Supreme Court holdings in federal court.¹⁸⁷ Thus, because both *Bottoson* and *King* were on collateral review when the Court denied certiorari, the Court could not apply its decision in *Ring* to those cases.¹⁸⁸ This helps explain why there had been no serious post-*Ring* challenges to Florida’s death penalty statute in federal court before *Evans*.¹⁸⁹

III. THE EVANS CASE

A. Facts

The *Evans* case involved the 1991 murder-for-hire of Alan Pfeiffer in Vero Beach, Florida.¹⁹⁰ There were four coconspirators in Alan’s murder: Paul Evans; Connie Pfeiffer, the wife of the victim; Sarah Thomas, Evans’s girlfriend; and Donna Waddell, Evans’s and Thomas’s roommate.¹⁹¹ Thomas and Waddell, who both testified for the State, provided most of the testimony about the events surrounding the murder.¹⁹² Waddell agreed to plead guilty to second-degree murder in exchange for her testimony.¹⁹³ Thomas was not charged with any crime.¹⁹⁴ Connie Pfeiffer, who did not testify at Evans’s trial, was convicted of first-degree murder and received a life sentence.¹⁹⁵

The evidence at trial demonstrated that Connie and Alan had a “rocky” marriage, and that each was dating other people while they were married.¹⁹⁶ Motivated by the prospect of collecting on her husband’s life

186. *Id.* at 305.

187. *See id.* at 301–10.

188. *See Bottoson v. Moore*, 833 So. 2d 693, 710 (Fla. 2002) (Shaw, J., concurring in result only).

189. Just prior to *Evans*, there were two Sixth Amendment challenges in Florida federal courts to Florida’s death penalty statute that were not denied because of the retroactivity doctrine. *See Smithers v. Sec’y, Dep’t of Corrs.*, No. 8:09–cv–2200–T–17EAJ, 2011 WL 2446576 (M.D. Fla. June 15, 2011); *Grim v. Buss*, No. 3:08cv2/MCR, 2011 WL 1299930 (N.D. Fla. Mar. 31, 2011). In both cases, the district courts rejected the defendants’ *Ring* claim because one of the defendants’ aggravators was a prior violent felony. *See Smithers*, 2011 WL 2446576, at *48–49; *Grim*, 2011 WL 1299930, at *65–66. As will become clear, part of what made the *Evans* case so compelling was that Evans’s *Ring* claim was not barred by the retroactivity doctrine and that Evans was not convicted of a violent felony prior to his murder conviction. *See generally Evans v. State*, 808 So. 2d 92 (Fla. 2002).

190. *Evans v. State*, 808 So. 2d 92, 95 (Fla. 2002).

191. *Id.* Evans was nineteen at the time of the murder. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 95 n.1.

196. *Id.* at 95. Indian River County court documents reveal that Connie received a domestic violence injunction against Alan in 1988. *See Joe Callahan, Women Arrested for Alleged Hit on Husband in Vero*, OCALA STAR-BANNER, July 23, 1997, at 1A. The documents state that Alan had

insurance policy,¹⁹⁷ Connie approached several individuals about killing Alan in the weeks leading up to the murder.¹⁹⁸ After each person refused, Connie asked Waddell if she knew of anyone who would be willing to commit the murder.¹⁹⁹ Waddell suggested that Evans might be a willing triggerman.²⁰⁰ According to Thomas, Evans was to receive “a camcorder, a stereo, and some insurance money” in exchange for killing Alan.²⁰¹

At trial, the testimony established that, although all the conspirators collaborated to kill the victim, Evans was the plot’s “mastermind.”²⁰² On the morning of March 23, 1991, the conspirators arranged the Pfeiffers’ trailer to make it look like a robbery had taken place.²⁰³ After the trailer was arranged, Waddell and Evans went to Waddell’s parents’ house to steal a gun and a jar of quarters.²⁰⁴ Waddell, Evans, and Thomas then went to test-fire the gun.²⁰⁵ The conspirators then met back at the trailer to go over their alibis.²⁰⁶ “Waddell stated that Evans explained that he was going to hide behind furniture and shoot Alan when he entered the trailer.”²⁰⁷

To establish an alibi for the planned murder, Evans, Waddell, and Thomas went to the fair later that evening.²⁰⁸ At dusk, the trio returned to the Pfeiffers’ trailer so that Evans could make final preparations.²⁰⁹ Waddell and Thomas then left Evans at the trailer and returned to the fair.²¹⁰ After remaining at the fair for “one to two hours,”²¹¹ Waddell and Thomas went to the pickup site “where Evans got back into the car and said, ‘It’s done.’”²¹² Waddell testified that Evans told her that he

attacked Connie four times over a two-year period, and that on one occasion, Alan had tried to suffocate her with a pillow. *Id.*

197. *Evans v. State*, 808 So. 2d 92, 98 (Fla. 2002) (“Following the murder of her husband, Connie moved out of Vero Beach and purchased a horse farm near Ocala worth approximately \$120,000, which was the same amount as the life insurance proceeds.”).

198. *Id.* at 95–96.

199. *Id.* at 96.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* Waddell and Thomas paid for the fair with the quarters stolen from Waddell’s parents’ house. *Id.* Thomas testified that this was “to avoid having their hands stamped, so it would not look like they left the fair and later returned.” *Id.*

211. *Id.*

212. *Id.* at 96–97.

turned up the volume on the stereo to muffle the gunshots, hid behind some furniture, and shot Alan when he entered the trailer.²¹³ One of the Pfeiffers' neighbors stated that he heard gunshots between 8 p.m. and 8:30 p.m., but did not see anyone running from the trailer.²¹⁴ After the murder, Thomas, Waddell, and Evans disposed of the gun in a canal near Yeehaw Junction.²¹⁵ Then they went back to the fair to meet up with Connie.²¹⁶

Early the next morning, the Vero Beach Police Department received a call about loud music emanating from the Pfeiffers' trailer.²¹⁷ The police found the trailer's door ajar, and entered.²¹⁸ It was then that the police discovered Alan Pfeiffer's body.²¹⁹ Investigators recovered three bullets from the victim: one from his spine and two from his head.²²⁰ The police also found Alan's life insurance policies lying on the table.²²¹ The following afternoon, detectives interviewed Connie for the first time.²²² Connie was uncooperative throughout the investigation, and told investigators that she was at the fair with Waddell, Thomas and Evans on the evening of the murder.²²³ Waddell, Thomas, and Evans confirmed Connie's story.²²⁴

After the investigation went cold, the Vero Beach Police Department reopened the case in 1997.²²⁵ Investigators interviewed Thomas first, who told her version of the story and agreed to wear a wire and meet with Waddell.²²⁶ The meeting implicated Waddell, who agreed to cooperate with the police and provide a statement.²²⁷ Having procured Thomas's and Waddell's cooperation, the police arrested Connie and Evans for their involvement in Alan's murder.²²⁸

B. *Procedural History*

Evans was indicted and convicted on one count of first-degree mur-

213. *Id.* at 97.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 98.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

der.²²⁹ The trial court then conducted the requisite separate sentencing proceeding in front of the trial jury.²³⁰ By a vote of nine to three, the jury recommended a death sentence.²³¹ The trial court then held a *Spencer* hearing.²³² After considering the jury's advisory verdict and the evidence presented in the *Spencer* hearing,

[t]he trial court found the following in aggravation: (1) Evans had committed the crime for pecuniary gain (great weight); and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (great weight). The trial court found only one statutory mitigator: Evans' age of nineteen when he committed the murder (little weight).

In addition, the trial court found and gave weight to the following nonstatutory mitigators: (1) Evans' good conduct while in jail (little weight); (2) Evans' good attitude and conduct while awaiting trial (little weight); (3) Evans had a difficult childhood (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans' family loves him (very little weight).²³³

After balancing the two aggravating factors against the mitigating factors, the trial judge concluded that "the aggravation outweighed the mitigation," and sentenced Evans to death.²³⁴

On direct appeal to the Florida Supreme Court, Evans raised fourteen claims.²³⁵ The court affirmed Evans's conviction and death sentence, and the United States Supreme Court denied his petition for a writ of certiorari.²³⁶ Evans then sought post-conviction relief in state court, where he asserted six claims, "including for the first time a claim that

229. *Evans v. McNeil*, No. 08-14402-CIV, 2011 WL 9717450, at *4 (S.D. Fla. June 20, 2011), *rev'd sub nom.* *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom.* *Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

230. *Id.*

231. *Id.*

232. *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249, 1253-54 (11th Cir. 2012), *cert. denied sub nom.* *Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

233. *Evans v. State*, 808 So. 2d 92, 99 (Fla. 2002).

234. *Id.* at 99-100.

235. *See id.* at 100.

236. *Evans*, 699 F.3d at 1254 (citing *Evans v. Florida*, 537 U.S. 951 (2002)).

Florida's capital sentencing statute . . . violates the Sixth Amendment, as interpreted in *Ring v. Arizona* and *Apprendi v. New Jersey*."²³⁷ The state collateral court denied all six claims, and the Florida Supreme Court affirmed and "denied Evans' petition to it for a writ of habeas corpus. It also denied his motion for rehearing."²³⁸

On December 1, 2008, Evans filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida.²³⁹ Evans raised seventeen claims for relief, one of which argued that Florida's capital sentencing statute violated his constitutional right to a jury trial.²⁴⁰ Judge Martinez delivered his opinion on June 20, 2011.

C. *The District Court Decision*²⁴¹

After denying Evans's first sixteen claims, the district court granted Evans habeas corpus relief on his seventeenth claim, holding that the Florida death penalty scheme violated Evans's constitutional right to a jury trial.²⁴² Before doing so, however, the court had to wrestle with a threshold issue: whether *Ring* could be retroactively applied to the *Evans* case.²⁴³

1. RETROACTIVITY

As discussed above, the general rule in federal court is that new rules of procedure apply retroactively to cases on direct appeal, but not to cases on collateral appeal.²⁴⁴ In *Schiro v. Summerlin*,²⁴⁵ the Court determined that *Ring* enunciated a procedural rule, and that it therefore only applied retroactively to cases that had not become final before *Ring* was decided.²⁴⁶ Thus, the question for the district court was whether Evans's case had become final before June of 2002, the date that the Court delivered its opinion in *Ring*.

The Florida Supreme Court held in *Johnson v. State*²⁴⁷ that "a death sentence becomes final for the purposes of *Ring* once [this] Court has affirmed the conviction and sentence on direct appeal and issued the

237. *Id.* (internal citations omitted).

238. *Id.* at 1255 (citing *Evans v. State*, 995 So. 2d 933 (Fla. 2008)).

239. *Evans v. McNeil*, No. 08-14402-CIV, 2011 WL 9717450, at *6 (S.D. Fla. June 20, 2011), *rev'd sub nom.* *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom.* *Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

240. *Id.*

241. *Evans v. McNeil*, No. 08-14402-CIV, 2011 WL 9717450 (S.D. Fla. June 20, 2011).

242. *See id.* at *54.

243. *See id.* at *47.

244. *See generally supra* notes 184-89 and accompanying text.

245. 542 U.S. 348 (2004).

246. *See id.* at 355-57.

247. 904 So. 2d 400 (Fla. 2005).

mandate.”²⁴⁸ Thus, according to the Florida Supreme Court, “Evans’s death sentence became final after this Court both affirmed on direct appeal and issued mandate in February 2002. Because *Ring* was not decided until June 2002, Evans cannot rely on it to vacate his death sentence.”²⁴⁹

The district court disagreed with the Florida Supreme Court’s rule on retroactivity.²⁵⁰ It held that Evans’s death sentence did not become final until the United States Supreme Court denied certiorari on Evans’s direct appeal in October of 2002.²⁵¹ “*Ring* was decided in June of 2002, which makes it applicable to Mr. Evans’s petition.”²⁵² Thus, the court was free to evaluate Evans’s Sixth Amendment concerns using *Ring* as precedent.

2. RING ANALYSIS

The district court began addressing Evans’s jury-trial-guarantee claim by summarizing Florida’s capital sentencing statute, the application of the statute to Evans, and the relevant Supreme Court precedent, including *Walton*, *Apprendi*, and *Ring*.²⁵³ Then the court proclaimed:

While *Ring* in certain respects has a limited holding, it does clearly provide that the Constitution requires that the jury find, beyond a reasonable doubt, any aggravating factor that must be found before the death penalty may be imposed. *Implicit in this holding is that the jury’s fact finding be meaningful.* As the Florida sentencing statute currently operates in practice, the Court finds that the process completed before the imposition of the death penalty is in violation of *Ring* in that the jury’s recommendation is not a factual finding sufficient to satisfy the Constitution; rather, it is simply a sentencing recommendation made without a clear factual finding. *In effect, the only meaningful findings regarding aggravating factors are made by the judge.*²⁵⁴

Because the jury’s advisory verdict does not render a meaningful factual determination regarding aggravating factors, the court concluded that Florida’s capital sentencing procedure is, in effect, no different from the Arizona procedure in *Ring*.²⁵⁵ Thus, the court held that Florida’s scheme

248. *Evans v. State*, 995 So. 2d 933, 952 (Fla. 2008) (citing *Johnson*, 904 So. 2d at 407).

249. *Id.*

250. *See Evans v. McNeil*, No. 08–14402–CIV, 2011 WL 9717450, at *47 (S.D. Fla. June 20, 2011), *rev’d sub nom. Evans v. Sec’y, Fla. Dep’t of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom. Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

251. *See id.* (citing *Evans v. Florida*, 537 U.S. 951 (2002)).

252. *Id.*

253. *Id.* at *48–52.

254. *Id.* at *53 (emphasis added).

255. *Id.*

violates the Sixth Amendment guarantee of a jury trial.²⁵⁶

For the district court, the advisory verdict from the jury is not meaningful for two reasons. First, as discussed above, there are no specific findings of fact made by the jury.²⁵⁷ This means that the judge, defendant, and reviewing courts have no idea how the jury reached its conclusion.²⁵⁸ In delivering the advisory verdict, “[i]t is conceivable that some of the jurors did not find the existence of an aggravating circumstance, or that each juror found a different aggravating circumstance, or perhaps all jurors found the existence of an aggravating circumstance but some thought that the mitigating circumstances outweighed them.”²⁵⁹ Indeed, when the judge imposes the sentence, “[t]he defendant has no way of knowing whether or not the jury found the same aggravating factors as the judge,” and “the judge . . . may find an aggravating circumstance that was not found by the jury while failing to find the aggravating circumstance that was found by the jury.”²⁶⁰ Thus, the district court concluded that a procedure that does not control for all these variables cannot be reconciled with *Ring*.

Second, and most troubling to the district court as it applies to Evans’s case, is that there is nothing in the record to show that the “jury found the existence of a single aggravating factor by even a simple majority.”²⁶¹ In Evans, the jury received two aggravating factors to consider.²⁶² The jury returned an advisory verdict for death by a vote of nine to three.²⁶³ Thus, “it is possible that the nine jurors who voted for death reached their determination by having four jurors find one aggravator while five jurors found another. Either of these results would have the aggravator found by less than a majority of the jurors.”²⁶⁴ The district court reasoned that *Ring*, at the very minimum, held that “the defendant is entitled to a jury’s majority fact finding of the existence of an aggravating factor; not simply a majority of jurors finding the existence of any unspecified combination of aggravating factors upon which the judge may or may not base the death sentence.”²⁶⁵ If Florida’s statute cannot guarantee that even a simple majority of jurors found at least one aggra-

256. *Id.* at *54.

257. *Id.* at *53.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at *54.

262. *Id.* at *4 (“(1) Evans had committed the crime for pecuniary gain . . . ; and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification.”).

263. *Id.*

264. *Id.* at *54.

265. *Id.*

vating factor before the judge ultimately sentences the defendant to death, then the statute must be an unconstitutional violation of the jury trial guarantee.

The district court opinion also included an interesting analysis of the meaning of “maximum penalty” as enunciated in *Ring*.²⁶⁶ In Justice Quince’s concurring opinion in *Bottoson*, she suggested that *Ring* “has carved out a new meaning for the term ‘statutory maximum.’ The term statutory maximum has traditionally referred to that sentence which a state legislature or Congress has determined to be the outer limit of what can be imposed for a particular crime.”²⁶⁷ But in *Cunningham v. California*,²⁶⁸ the Supreme Court stated that “the relevant ‘statutory maximum . . . is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.’”²⁶⁹ Although Florida makes death the maximum penalty for a capital felony in a formal sense,²⁷⁰ by explicitly cross-referencing Section 921.141,²⁷¹ the effect is to make the maximum penalty for a capital offense life imprisonment, with death being an option only with the finding of an aggravating factor.²⁷² Thus, it was not *Ring* that established a new meaning for the term statutory maximum, but Florida’s capital sentencing statute itself.²⁷³

The district court’s order on the Sixth Amendment issue did not mention *Spaziano* or *Hildwin*.²⁷⁴ An appeal to the Eleventh Circuit Court of Appeals came swiftly. The Eleventh Circuit focused on the Supreme Court precedent that specifically upheld Florida’s death pen-

266. *Id.* at *53.

267. *Bottoson v. Moore*, 833 So. 2d 693, 700 (Fla. 2002) (Quince, J., specially concurring).

268. 549 U.S. 270 (2007).

269. *Id.* at 290 (quoting *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004)).

270. See FLA. STAT. § 775.082(1) (2010).

271. See § 775.082(1) (cross-referencing FLA. STAT. § 921.141 (2010)).

272. *Evans v. McNeil*, No. 08–14402–CIV, 2011 WL 9717450, at *53 (S.D. Fla. June 20, 2011), *rev’d sub nom. Evans v. Sec’y, Fla. Dep’t of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom. Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

273. Interestingly, *Furman* probably requires this type of statutory construction. The Court’s major concern in *Furman* was the arbitrary application of the death penalty. See *supra* notes 22–29 and accompanying text. The specification of statutory aggravating factors was many states’ solution to this problem. See *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). This, of course, implicated Sixth Amendment concerns, as Justice Scalia pointed out in his concurrence in *Ring*. *Id.* But some states took a different approach after *Furman*. For example, a 1974 Delaware statute called for mandatory death sentences for anyone convicted of first degree murder. See Sheri Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1929 (2012). The Supreme Court overruled these mandatory capital sentencing statutes in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), as violations of the Eighth Amendment. See *id.* Thus, Delaware was forced to change its statute, which it has done three times since 1977. *Id.* at 1929–30.

274. See *Evans*, 2011 WL 9717450, at *47–54.

alty statute, not the more recent precedent that struck down death penalty statutes in other states.

D. *The Eleventh Circuit Decision*²⁷⁵

Judge Edward Carnes is no stranger to the death penalty. Prior to being nominated and confirmed to the Eleventh Circuit Court of Appeals in 1992, he served as an assistant attorney general for the state of Alabama for seventeen years.²⁷⁶ From 1981 to 1992, he headed up the state's Capital Punishment and Post-Conviction Litigation Division.²⁷⁷ He also drafted Alabama's capital sentencing statute.²⁷⁸ Given the strong similarities between the Florida regime and the Alabama regime,²⁷⁹ it is fitting that he was charged with delivering the Eleventh Circuit's opinion.

The introduction to the opinion is as eloquent as it is suggestive of the holding to come:

Confident that he knew what the future would bring, one of Shakespeare's characters boasted that "[t]here are many events in the womb of time which will be delivered." On the subject of lower courts predicting that the Supreme Court is going to overrule one of its own decisions, however, Judge Hand cautioned against "embrac[ing] the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." The Supreme Court has made Hand's warning a clear command by repeatedly instructing lower courts that when one of its earlier decisions with direct application to a case appears to rest on reasons rejected in a more recent line of decisions, we must follow the directly applicable decision and leave to the high Court the prerogative of overruling its own decisions. As will become apparent, those instructions are dispositive of the State's appeal from the grant of habeas corpus relief in this case.²⁸⁰

275. *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom. Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

276. Richard Lacayo, *To the Bench Via the Chair*, TIME, Sept. 14, 1992, at 41.

277. *Id.*

278. *Id.*

279. "Alabama's capital sentencing scheme is much like that of Florida." *Harris v. Alabama*, 513 U.S. 504, 508 (1995). It provides for a separate sentencing proceeding before a jury. *See* ALA. CODE § 13A-5-46(a) (2012). It requires no specific findings of fact by the jury on aggravating or mitigating factors. *See* § 13A-5-46(e). After deliberation, the jury delivers an advisory verdict for life imprisonment or death. *See id.* The jury may recommend death only if ten jurors so agree. *See* § 13A-5-46(f). The judge must then deliver a detailed statement listing the aggravating and mitigating factors found and the sentence imposed. *See* § 13A-5-47(d). "While the jury's recommendation . . . shall be given consideration, it is not binding on the court." § 13A-5-47(e). Unlike Florida, Alabama judges do not need to give the jury recommendation "great weight." *See Harris*, 513 U.S. at 508–15 (quoting *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)).

280. *Evans*, 699 F.3d at 1252 (quoting William Shakespeare, *Othello*, Act I, Scene 3, lines

For the Eleventh Circuit, the union of the principle of *stare decisis* and the Supreme Court's holding in *Hildwin* outweighed any Sixth Amendment argument under the Supreme Court's reasoning in *Ring*. Thus, the federal appeals court reversed the district court's grant of "federal habeas relief to Evans on *Ring* grounds."²⁸¹

Review of Evans's *Ring* claim began with a summary of the two parties' arguments and the court's own reasoning.²⁸² For the State, the fact that a jury is instructed not to recommend the death penalty without finding at least one aggravating circumstance, and the requirement that a judge give the jury's advisory verdict "great weight," puts the Florida procedure in compliance with the Sixth Amendment and *Ring*.²⁸³ For Evans, "the district court got it right because under Florida's sentencing procedure a judge and not the jury actually finds the facts necessary to establish an aggravating circumstance."²⁸⁴ For the court, three lines of Supreme Court decisions were relevant to the case: (1) decisions that specifically upheld Florida's capital punishment statute (culminating in *Hildwin*); (2) decisions that struck down Arizona's former capital sentencing procedures (culminating in *Ring*); and (3) decisions that "instruct[] us to follow directly applicable Supreme Court decisions until that Court itself explicitly overrules them."²⁸⁵

The court then analyzed each line of cases. On the *Hildwin* line of cases, the court noted that *Hildwin* "is directly on point against Evans's contention and the district court's ruling."²⁸⁶ Furthermore, the court pointed to the Supreme Court's decision in *Harris v. Alabama*,²⁸⁷ in which the Court looked favorably upon "Florida's *Tedder* standard" as adding "a measure of protection to the jury's role in sentencing."²⁸⁸ The Florida Supreme Court's "stringent application of the *Tedder* standard" was also important to the court.²⁸⁹ On the *Ring* line of cases, the court

412-13 and *Spector Motor Serv. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting)).

281. *Id.* at 1265.

282. *See id.* at 1255-56.

283. *See id.* ("[T]he court must independently consider the aggravating and mitigating circumstances and reach its decision on the appropriate penalty, giving great weight to the jury's advisory sentence.") (citing *Ault v. State*, 53 So. 175, 200 (Fla. 2010)).

284. *Id.* at 1256.

285. *Id.*

286. *Id.* at 1258.

287. 513 U.S. 504 (1995).

288. *Evans*, 699 F.3d at 1258. The "*Tedder* standard" is the requirement that the judge give the jury's advisory verdict "great weight." *See Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

289. *Evans*, 699 F.3d at 1258. ("[T]he last time the Florida Supreme Court affirmed a trial judge's decision to sentence to death a defendant for whom the jury had not recommended a death sentence was eighteen years ago."). This is not entirely true, but the court's ultimate point still stands. *See supra* note 53. *See also Evans*, 699 F.3d at 1258 n.6.

looked at the language in *Walton* and *Ring* that “may be read to imply a retreat from the reasoning behind the *Hildwin* decision.”²⁹⁰ It also pointed to “indications in *Ring* that the Court did not mean to overrule even implicitly its *Hildwin* decision.”²⁹¹ The court then concluded that, at best, *Ring* “arguably conflicts with the *Hildwin* decision, and it arguably was implicitly overruled. That is not enough for Evans to prevail in the district court or in this court.”²⁹²

But the coup de grâce for Judge Carnes was the third line of cases. To that end, he noted that “[t]he Supreme Court has not always been consistent in its decisions or in its instructions to lower courts,” but that “[t]here are . . . some things the Court has been perfectly consistent about, and one of them is that ‘it is [that] Court’s prerogative alone to overrule one of its precedents.’”²⁹³ He also cited the same language from *Rodriguez de Quijas* that the Florida Supreme Court cited in *Bottoson* and *King*.²⁹⁴ “[E]ven if the earlier decision has ‘infirmities’ and ‘increasingly wobbly moth-eaten foundations,’” the court said, “we have always been careful to obey the supreme prerogative rule and not usurp the Supreme Court’s authority.”²⁹⁵ Thus, because of the Supreme Court’s decision in *Hildwin*, and because the Supreme Court did not explicitly overrule *Hildwin* in *Ring*, the court concluded that it must uphold the Florida capital sentencing statute.²⁹⁶

IV. AN ISSUE RIPE FOR THE SUPREME COURT

In reversing the district court’s grant of habeas corpus relief to Evans, the Eleventh Circuit decided to remain faithful to the bedrock principle of *stare decisis*.²⁹⁷ The term *stare decisis* comes from the Latin phrase *stare decisis et non quieta movere*, which means “stand by the thing decided and do not disturb the calm.”²⁹⁸ In the United States, the term has special meaning when “the thing decided” comes from the United States Supreme Court.²⁹⁹ As the Eleventh Circuit pointed out,

290. *Evans*, 699 F.3d at 1262. See *supra* notes 153–56 and accompanying text for a full explanation on the significance of *Hildwin*’s differentiation between sentencing factors and elements of the offense, and the end of this distinction in *Ring*.

291. *Evans*, 699 F.3d at 1262. See *supra* notes 157–60 and accompanying text for a full explanation of the significance of Florida’s procedures being in the “hybrid” category in *Ring*.

292. *Evans*, 699 F.3d at 1262.

293. *Id.* at 1263 (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)).

294. *Id.* See also *supra* notes 177–78 and accompanying text.

295. *Evans*, 699 F.3d at 1264 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

296. *Id.* at 1264–65.

297. *Id.* at 1263–65.

298. Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273, 274 (2001).

299. See *Evans*, 699 F.3d at 1263–65 (11th Cir. 2012).

“the Court has been perfectly consistent” in its instruction to lower courts “that ‘it is [that] Court’s prerogative alone to overrule one of its precedents.’”³⁰⁰ After *Ring*, the Florida Supreme Court decided to find “safe harbor” in the United States Supreme Court’s decisions in *Spaziano* and *Hildwin*.³⁰¹ This position was perfectly acceptable because *Ring* did not expressly overrule those cases.³⁰² In *Evans*, the Eleventh Circuit wisely followed suit.³⁰³ It should, and it will, require a Supreme Court decision to strike down Florida’s capital sentencing scheme as a violation of the jury trial guarantee.

However, the Eleventh Circuit decision also demonstrates the difficulty that courts have had in finding a principled way to reconcile *Ring* with Florida’s death-penalty procedures. In *Bottoson* and *King*, all seven justices on Florida’s Supreme Court filed separate concurring opinions apart from the short per curiam opinions.³⁰⁴ Each justice concurred for one or more of the following three reasons: (1) *Ring* did not explicitly overrule “twenty-six years” of Supreme Court precedent;³⁰⁵ (2) the Supreme Court decided to lift the stay of execution for Bottoson and King without mentioning *Ring*;³⁰⁶ and (3) each defendant had a prior violent felony aggravator, making them death-eligible anyway.³⁰⁷ Four justices expressed significant anxiety about the future of Florida’s scheme in light of *Ring*.³⁰⁸ No justice speculated as to how *Ring* and the Florida sentencing statute might coexist, other than to say that in Florida, unlike in Arizona, the “trial judge and jury jointly make the decision concerning the existence of aggravating circumstances.”³⁰⁹ The Eleventh Circuit’s decision in *Evans* offers the following in footnote eight:

A principled argument can . . . be made that the result in *Hildwin* is not inconsistent with the result in *Ring*. And that is especially true in cases like this one where no rational jury could have found the defendant guilty beyond a reasonable doubt of the murder with which he was charged without implicitly finding that at least one of the statutory aggravating circumstances existed. There was no evidence

300. *Id.* at 1263 (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)).

301. *Bottoson v. Moore*, 833 So. 2d 693, 704 (Fla. 2002) (Anstead, C.J., concurring in the result only).

302. *See id.* at 695.

303. *See Evans*, 699 F.3d at 1264–65.

304. *See generally* *Bottoson v. Moore*, 833 So. 2d 693 (2002); *King v. Moore*, 831 So. 2d 143 (2002).

305. *See, e.g., Bottoson*, 833 So. 2d at 698 (Wells, J., concurring specially).

306. *See, e.g., id.* at 697 (Wells, J., concurring specially).

307. *See, e.g., id.* at 719 (Pariente, J., concurring in result only).

308. *See id.* at 703–10 (Anstead, C.J., concurring in result only); *id.* at 710–19 (Shaw, J., concurring in result only); *id.* at 719–25 (Pariente, J., concurring in result only); *id.* at 725–35 (Lewis, J., concurring in result only).

309. *Id.* at 703 (Quince, J., specially concurring).

presented, and there could have been no rational inference from any of the evidence that was presented, that Evans committed the murder but did not do it for pecuniary gain.³¹⁰

This is hardly a principled argument for reconciling *Hildwin* and *Ring*. Rather, this is a fact-specific argument that may be true in some murders, but that fails to resolve the underlying conflict in a way that would be applicable to all murders. Thus, two of the highest courts in the land have proved to be incapable of squaring *Ring* with Florida's capital punishment procedures. Yet, more than ten years after *Ring*, Florida's statute remains unchanged.

It is for that reason that the district court's decision in *Evans*, while improper in its disregard for the principle of *stare decisis*, was nonetheless necessary. It drew attention to the "moth-eaten foundations" of *Hildwin*.³¹¹ It forced the State to bring to bear the full brunt of its legal argument on appeal to Eleventh Circuit.³¹² It helped clarify the issues for a potential grant of certiorari by the United States Supreme Court.³¹³ And it demanded certainty in an area of the law that, because of *Ring*, is anything but certain. Meanwhile, as the effect of the retroactivity doctrine on *Ring* continues to fade, an increasing number of defendants will have viable Sixth Amendment claims. As one legal blogger remarked about *Evans*, "Clearly, Judge Carnes is setting the stage for a Supreme Court appeal."³¹⁴ However, despite the invitation to weigh in, the Supreme Court denied Evans's petition for a writ of certiorari on May 20, 2013.³¹⁵

310. *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249, 1265 n.8 (11th Cir. 2012), *cert. denied sub nom. Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

311. *Id.* at 1264 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

312. On Evans's collateral appeal to the district court, the State devoted only three paragraphs in its reply brief to Evans's Sixth Amendment claim. See Brief for Respondent at 176–77, *Evans v. McNeil*, No. 08–14402–CIV, 2011 WL 9717450 (S.D. Fla. June 20, 2011), ECF No. 9, *rev'd sub nom. Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom. Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013). On appeal to the Eleventh Circuit, the State dedicated 13,930 words in its initial brief to this one issue, just seventy words shy of the 14,000 word limit imposed by the court. See Brief for Petitioner at 59, *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012) (No. 11-14498), *cert. denied sub nom. Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

313. See *supra* note 312.

314. Robyn Hagan Cain, *Is Florida's Capital Sentencing Statute Unconstitutional?*, FINDLAW.COM, Oct. 24, 2012, http://blogs.findlaw.com/eleventh_circuit/2012/10/is-floridas-capital-sentencing-statute-unconstitutional.html.

315. See Petition for Writ of Certiorari, *Evans v. Sec'y, Fla. Dep't of Corrs.*, No. 12-1134 (Mar. 18, 2013), *denied* 133 S. Ct. 2393 (May 20, 2013).

V. A GOLDEN OPPORTUNITY MISSED: WHY THE SUPREME COURT SHOULD HAVE GRANTED CERTIORARI IN *EVANS*

The Supreme Court's decision to deny certiorari depended, in part, on whether *Evans* effectively exposed the potential conflicts between *Ring* and Florida's capital punishment statute.³¹⁶ Chief Justice Anstead's concurring opinion in *Bottoson* provides a useful framework for organizing these potential conflicts for the purposes of evaluating how effectively *Evans* clarified the Sixth Amendment issues.³¹⁷ He identified five specific concerns with Florida's death penalty procedure.³¹⁸ First, Florida's scheme "relies upon [a] finding of facts determining the existence of statutory aggravators that have been made by a judge and not by a jury."³¹⁹ Second, in determining the appropriate sentence, the trial judge is "not limited to the aggravation" that was "submitted to the jury," and "is vested with the authority to override the jury's advisory recommendation."³²⁰ Third, the jury makes no "findings of fact or any actual determination of the existence of any aggravating circumstances."³²¹ Fourth, "the jury renders only an advisory recommendation as to penalty."³²² Fifth, the "advisory recommendation is not required to be unanimous."³²³

The facts in *Evans* successfully illuminated Chief Justice Anstead's first concern about judicial versus jury fact finding in Florida's sentencing statute. *Ring* expressly held that "defendants are entitled to a jury determination and findings of fact as to the existence of any aggravating factors necessary to increase their sentences."³²⁴ Florida law provides only for an advisory verdict from the jury on the appropriate sentence.³²⁵ It does not provide for specific jury findings on the existence of aggra-

316. Compare Petition for Writ of Certiorari at 22, *Evans v. Sec'y, Fla. Dep't of Corrs.*, No. 12-1134 (Mar. 18, 2013) (contending that *Evans* was the "ideal vehicle" for the Court to resolve the issue), with Brief of Respondent Michael D. Crews, Sec'y, Fla. Dep't of Corrs. in Opposition at 19, *Evans*, No. 12-1134 (Apr. 18, 2013) (contending that *Evans* was a "very poor vehicle" for the Court to resolve the issue). Florida argued, presumably rather persuasively, that *Evans* was "tangled in skein of procedural complexities, starting with the issue of whether the Florida Supreme Court's direct appeal opinion rejecting a Sixth Amendment claim is due AEDPA deference." *Id.* The validity of that assertion is beyond the scope of this article, but it is possible that the Court determined that procedural obstacles would prevent it from reaching the merits of *Evans*'s constitutional claim, and it thus decided to deny certiorari.

317. See *Bottoson v. Moore*, 833 So. 693, 704-10 (Fla. 2002) (Anstead, C.J., concurring in result only).

318. See *id.* at 704-05 (Anstead, C.J., concurring in result only).

319. *Id.* at 704.

320. *Id.* at 705.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. See FLA. STAT. § 921.141(2) (2010).

vating circumstances.³²⁶ In *Evans*, this scheme resulted in a jury considering two aggravating factors and voting nine to three in favor of death, making it “possible that the nine jurors who voted for death reached their determination by having four jurors find one aggravator while five jurors found another.”³²⁷ If no single aggravating factor received a majority vote from the jury, can the judge consider it in making the ultimate sentencing determination? *Ring* seems to hold that a judge cannot consider any aggravator that has not, at a minimum, received a majority vote from the jury.³²⁸ Thus, the facts in *Evans* effectively addressed Chief Justice Anstead’s first misgiving in *Bottoson*.

Evans did not call into question Chief Justice Anstead’s second problem in *Bottoson*. Florida law requires that a judge tell the jury what aggravating factors it may find before making its sentencing recommendation.³²⁹ However, Florida law also allows a judge to find the existence of an aggravating factor that was not presented to the jury when he or she makes the ultimate sentencing determination.³³⁰ Judges can also override a jury’s advisory verdict as long as the judge gave the advisory verdict “great weight.”³³¹ *Evans* did not include any of these factual scenarios, so the Supreme Court would have been unable to reverse the Eleventh Circuit on these grounds.

Chief Justice Anstead’s third and fourth concerns are about whether the jury’s advisory sentence (which includes a vote count) constitutes meaningful fact finding under the Supreme Court’s holding in *Ring*.³³² In his concurring opinion in *Bottoson*, he stated:

[C]ompared to our ability to review the actual findings of fact made by the trial judge, there *could hardly be any meaningful appellate review* of a Florida jury’s advisory recommendation to a trial judge since that review would rest on sheer speculation as to the basis of the recommendation, whether considering the jury collectively or the

326. *See id.*

327. *Evans v. McNeil*, No. 08–14402–CIV, 2011 WL 9717450, at *54 (S.D. Fla. June 20, 2011), *rev’d sub nom.* *Evans v. Sec’y, Fla. Dep’t of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom.* *Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

328. *See id.*

329. *See* Stand. Jury Instrs. in Crim. Cases – NO. 96-1, 690 So. 2d 1263, 1265 (Fla. 1997) (noting that the judge should “give only those aggravating circumstances for which evidence has been presented” to the jury).

330. *See, e.g., Williams v. State*, 967 So. 2d 735, 765 (Fla. 2007) (striking an aggravating factor found by the sentencing judge, not because the factor was not presented to the jury during sentencing, but because the factor was not supported by substantial evidence).

331. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (“In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.”).

332. *Bottoson v. Moore*, 833 So. 693, 705 (Fla. 2002) (Anstead, C.J., concurring in result only).

jurors individually. In other words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed.³³³

All that Evans could determine from the jury's recommendation at sentencing was that (a) at least nine jurors found at least one aggravating factor, and (b) only nine jurors decided that whatever aggravating factors they found outweighed whatever mitigating factors they found. Evans did not know if a majority of the jurors found any one aggravating factor or if any of the three jurors who voted for life imprisonment found an aggravating factor. Thus, the jury's recommendation in *Evans* illustrated Chief Justice Anstead's worry about the lack of meaningful jury fact finding in Florida's death penalty statute.

The facts in *Evans* also revealed concerns about the lack of unanimity in a jury's advisory verdict in favor of the death penalty. The district court's opinion in *Evans* acknowledged that unanimous jury verdicts are not constitutionally required in state trials.³³⁴ However, in Florida, "the requirement of unanimity has been an inviolate tenet of Florida jurisprudence since the State was created."³³⁵ In his concurring opinion in *Bottoson*, Justice Shaw noted that *Ring* made "an aggravating circumstance necessary for imposition of the death sentence . . . subject[] to the same rigors of proof as every other element of the charged offense."³³⁶ Thus, Justice Shaw concluded that "[w]hen the dictates of *Ring* are applied to Florida's capital sentencing statute, I believe our statute is rendered flawed because it lacks a unanimity requirement for the death qualifying aggravator."³³⁷ Because the jury recommended the death penalty in *Evans* by a vote of nine to three, *Evans* exposed the lack of unanimity issue as well.

Thus, *Evans* effectively exposed four of the five potential inconsistencies between *Ring* and the Florida capital sentencing procedure that Chief Justice Anstead identified in *Bottoson*. The facts in *Evans* most powerfully illuminated Chief Justice Anstead's first and third concerns, because the combination of two potential aggravating circumstances and a nine to three vote in favor of death leads to the possibility of results that cannot be reconciled with *Ring*.³³⁸ The Eleventh Circuit's decision

333. *Id.* at 708.

334. See *Evans v. McNeil*, No. 08-14402-CIV, 2011 WL 9717450, at *54 (S.D. Fla. June 20, 2011) (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)), *rev'd sub nom.* *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012), *cert. denied sub nom.* *Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

335. *Bottoson*, 833 So. 2d at 714 (Shaw, J., concurring in result only).

336. *Id.* at 715.

337. *Id.* at 718.

338. See *Evans*, 2011 WL 9717450, at *54.

in *Evans* included a fact-specific argument, which stated that no juror could have found Evans guilty of murder in the first place without also finding that he committed the murder for pecuniary gain.³³⁹ But this argument failed to recognize the fundamental disconnect between the jury's advisory verdict and the judge's sentencing determination: the judge found, and gave "great weight" to, *two aggravating factors* ("pecuniary gain" and "cruel, calculated, and premeditated") before sentencing Evans to death.³⁴⁰ It was conceivable that a majority of the jurors did not find that Evans committed the murder in a cruel, calculated, and premeditated manner, yet the judge still included that aggravating circumstance in his analysis to determine Evans's sentence. This is what cannot be reconciled with *Ring*'s requirement that "the jury find, beyond a reasonable doubt, any aggravating factor that must be found before the death penalty may be imposed."³⁴¹ While there might be future cases that more forcefully reveal the inconsistencies between *Ring* and Florida's capital sentencing scheme, *Evans* made a compelling candidate for Supreme Court review. The Court missed a golden opportunity to settle the issue once and for all.

VI. PROACTIVE COMPLIANCE WITH *RING*

When a United States Supreme Court decision calls into question the constitutionality of a state statute without expressly striking the statute down, the state does not have to wait for the Court to expressly act against the statute.³⁴² The state can take proactive steps to bring the statute in compliance with the Court's decision, thereby negating the need for judicial review.³⁴³ One way to do this is for the state legislature to revise the statute.³⁴⁴ After *Ring*, one state that employed a death penalty procedure similar to Florida's procedure did exactly that.³⁴⁵

After the Supreme Court handed down its decision in *Ring* in June of 2002, the Delaware legislature realized that its capital sentencing statute may no longer be constitutional.³⁴⁶ Prior to 1991, Delaware's procedure included a separate sentencing proceeding before the jury for the presentation of aggravating and mitigating evidence.³⁴⁷ If "the jury . . .

339. See *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249, 1265 n.8 (11th Cir. 2012), cert. denied sub nom. *Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

340. See *Evans*, 2011 WL 9717450, at *4.

341. *Id.* at *53.

342. See, e.g., *infra* notes 346–58 and accompanying text.

343. *Id.*

344. *Id.*

345. *Id.*

346. See Sheri Lynn Johnson, et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925, 1931 (2012).

347. See *id.* at 1930.

unanimously concluded that the prosecution had proven, beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance," then the jury could sentence the defendant to death.³⁴⁸ If the jury then decided to actually sentence the defendant to death (requiring a second unanimous vote), then that determination was binding on the judge.³⁴⁹ In 1991, there was a public outcry after a jury failed to impose death sentences in a highly publicized murder trial involving four defendants convicted of shooting two security guards during a robbery.³⁵⁰ In response, the Delaware legislature amended its death penalty procedures by adopting the Florida model, vesting the ultimate sentencing authority with the judge.³⁵¹ But after *Ring*, Delaware saw the writing on the wall, so its legislature made further revisions in July of 2002.³⁵²

Today, the jury's role in Delaware's capital punishment procedure is two-fold: (a) determine whether any of the statutory aggravating factors exist beyond a reasonable doubt and (b) recommend a sentence of death or life imprisonment after weighing the aggravating and mitigating factors.³⁵³ The jury must unanimously find the existence of an aggravating factor.³⁵⁴ The jury's recommendation is determined by a simple majority vote.³⁵⁵ After the jury has made its findings, the judge conducts his or her own weighing using only the aggravating factors unanimously found by the jury.³⁵⁶ "The jury's recommendation . . . shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court."³⁵⁷ The jury's recommendation is not binding on the judge's final sentencing determination.³⁵⁸

Delaware's new capital sentencing statute withstands Sixth Amendment scrutiny under *Ring*. *Ring* does not require that a jury make the final sentencing determination.³⁵⁹ All it requires is that juries make the factual findings necessary to enhance the maximum sentence for murder

348. *Id.*

349. *See id.*

350. *See id.* at 1930–31 (citing *Robertson v. State*, 630 A.2d 1084, 1086–87 (Del. 1993)).

351. *Id.* at 1931.

352. *Id.*

353. *See* DEL. CODE ANN. tit. 11, § 4209(c)(3)–(4) (2012).

354. *See* tit. 11, § 4209(d)(1).

355. *See id.*

356. *See id.*

357. *Id.*

358. *See id.*

359. *See Ring v. Arizona*, 536 U.S. 584, 612 (2002) (Scalia, J., concurring) ("the unfortunate fact is that today's judgment has nothing to do with jury sentencing"). *See generally Spaziano v. Florida*, 468 U.S. 447 (1984).

from life imprisonment to death.³⁶⁰ Under the statutory processes of both Delaware and Florida, that requires finding the existence of at least one aggravating circumstance beyond a reasonable doubt.³⁶¹ Delaware's new death penalty statute requires a unanimous jury finding of at least one aggravating factor, but vests the ultimate sentencing determination in the judge.³⁶² Florida's statute continues to vest the determination of the existence of aggravating factors *and* of the appropriate sentence in the judge.³⁶³ If Florida law, like Delaware's new capital sentencing statute, required that juries make the aggravating factor determination, then Florida law would be in compliance with *Ring*.

Some of the Justices on the Florida Supreme Court have advocated for the use of special verdict forms when the jury delivers its recommendation.³⁶⁴ Special verdict forms would "require the jury to indicate what aggravators the jury has found and the jury vote as to each aggravator."³⁶⁵ In *Bottoson*, Justice Pariente argued that special verdict forms could be mandated by the Florida Supreme Court without violating the Florida statute because nothing in the death penalty statute "precludes specific jury findings as to the existence of aggravating circumstances."³⁶⁶ Presumably, if special verdict forms were used, then a majority vote in favor of the existence of an aggravating circumstance would be considered a jury finding of that aggravating circumstance.³⁶⁷ Thus, special verdict forms would make the effect of Florida's death penalty procedure almost identical to Delaware's statute, with the only difference being that Delaware requires a unanimous jury finding on the existence of an aggravating factor.

The use of special verdict forms might make Florida's capital sentencing procedure constitutional. The United States Supreme Court has held that unanimous jury verdicts are not constitutionally required in state trials.³⁶⁸ Thus, a factual finding on the existence of an aggravating factor made by a majority of a jury might pass constitutional muster. On the other hand, *Ring* held that the Sixth Amendment guarantee of a trial

360. See *Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.").

361. See FLA. STAT. ANN. § 921.141 (2010); DEL. CODE ANN. tit. 11, § 4209 (2012).

362. See tit. 11, § 4209(d)(1).

363. See FLA. STAT. ANN. § 921.141.

364. See, e.g., *Bottoson v. Moore*, 833 So. 2d 693, 723–24 (Fla. 2002) (Pariente, J., concurring in result only).

365. *Id.* at 723.

366. *Id.* at 724.

367. *Id.* at 723 ("I would immediately require that trial courts utilize special verdicts that require the jury to indicate what aggravators the jury has found and the jury vote as to each aggravator.").

368. See generally *Apodaca v. Oregon*, 406 U.S. 404 (1972) (requiring unanimous jury verdicts in federal trials but not in state trials).

by jury applies to all the elements necessary to sentence a defendant to death for capital murder, including the aggravating factors.³⁶⁹ The use of the special verdict form would lead to differential treatment of the elements of a capital murder conviction that are provable during the guilt phase (requiring unanimity), and the aggravating factors provable at the sentencing proceeding (requiring a simple majority). Does *Ring* require that all the elements of the offense punishable by death be subjected to the same crucible of persuasion (as reflected through the proportion of the jury that believes the fact in question has been proven beyond a reasonable doubt)? Maybe. But, at a minimum, it is clear that a special verdict form would move Florida's sentencing statute closer to being in compliance with *Ring*.

Finally, Justice Scalia's concurring opinion in *Ring* provides Florida with another acceptable capital sentencing procedure under the Sixth Amendment. Toward the end of the opinion, he wrote,

[T]he unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, *by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.*³⁷⁰

By putting the "aggravating-factor determination" in the guilt phase, Florida would be able to eliminate the sentencing proceeding before the jury altogether. Florida could also retain the jury recommendation of life imprisonment or death, and the judge could still render the ultimate sentencing determination, armed only with the aggravating factors the jury found beyond a reasonable doubt. Such a procedure would be efficient, effective, and constitutional under *Ring*.

VII. CONCLUSION: PROACTIVE REFORM IN FLORIDA MAY HELP SAVE THE DEATH PENALTY

Florida's death penalty statute is at a crossroads. Created in the wake of the United States Supreme Court's seminal Eighth Amendment decision in *Furman*,³⁷¹ the statute attempted to alleviate the Court's concerns about the arbitrary application of the death penalty by creating statutory aggravating circumstances that must be present to make the

369. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

370. *Id.* at 612–13 (Scalia, J., concurring) (emphasis added).

371. See Driggs, *supra*, note 33 and accompanying text.

convicted murderer death-eligible.³⁷² Supreme Court cases such as *Proffitt*, *Spaziano*, and *Hildwin* validated Florida's capital sentencing scheme under both the Sixth and Eighth Amendments.³⁷³ The Sixth Amendment jury-trial-guarantee decisions, however, were based on a distinction between "sentencing factors" and "elements of the offense" that persisted until the Court decided *Apprendi*.³⁷⁴ That non-death-penalty case forced the Court to rethink its previous holdings in the death-penalty context.³⁷⁵ As a result, in *Ring v. Arizona*, the Supreme Court overturned its decision in *Walton* and struck down Arizona's judge-only capital sentencing statute as a violation of the Sixth Amendment's right to a jury trial.³⁷⁶ Since the *Ring* decision, Florida's "hybrid" capital sentencing process has been called into question,³⁷⁷ even though the Florida Supreme Court has consistently held that the statute does not violate the Sixth Amendment.³⁷⁸

The district court's decision in *Evans* represented the first time that a federal court interpreted Florida's capital sentencing statute in light of *Ring*.³⁷⁹ In granting Evans habeas corpus relief, the court forced the State to fully argue its case for the constitutionality of the statute on appeal to the Eleventh Circuit.³⁸⁰ Writing for a unanimous Eleventh Circuit, Judge Carnes invoked *Hildwin* and the foundational legal doctrine of *stare decisis* to reverse the district court,³⁸¹ while also recognizing that *Hildwin* may rely on reasoning (the sentencing-factors/elements-of-the-offense distinction) that had since been rejected by the Court.³⁸² The United States Supreme Court denied Evans's petition for a writ of certiorari, but more constitutional challenges will be forthcoming as the effects of the retroactivity doctrine on *Ring* continue to fade.³⁸³

Nevertheless, Florida can avert a constitutional challenge to its capital sentencing statute by simply revising the statute. A bifurcated system that mimics Delaware's new capital sentencing statute would

372. See FLA. STAT. § 921.141 (2010).

373. See *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976).

374. See generally *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam).

375. See generally *Ring v. Arizona*, 536 U.S. 584 (2002).

376. See *id.* at 609.

377. *Id.* at 608 n.6.

378. See generally, e.g., *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002).

379. See *supra* note 189 and accompanying text.

380. See *supra* note 312 and accompanying text.

381. See *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249, 1263 (11th Cir. 2012), cert. denied *sub nom.* *Evans v. Crews*, 133 S. Ct. 2393 (May 20, 2013).

382. See *id.*

383. See generally *supra* notes 184–89 and accompanying text.

suffice.³⁸⁴ So would moving the aggravating-factor determination to the guilt phase, as Justice Scalia suggested in his concurrence in *Ring*.³⁸⁵ The use of special verdict forms during the sentencing proceeding would also help improve the constitutionality of the statute.³⁸⁶ Proactive compliance with *Ring* is the best solution for Florida. If Florida does not act now, it will likely be left scrambling to amend its death penalty statute after the Supreme Court finally takes a case that challenges the statute's constitutionality.

Proponents of the death penalty may not want to consider revising the law until the Supreme Court forces them to act, but a proactive change in the law would actually secure the death penalty's future in Florida, not jeopardize it. When Connecticut repealed the death penalty in 2012, it became, at the time, the fifth state in the previous five years to do so.³⁸⁷ Upon its repeal, Governor Dannel Malloy noted that “[i]n the last 52 years, only two people have been put to death in Connecticut—and both of them volunteered for it. Instead, the people of this state pay for appeal after appeal, and then watch time and again as defendants are marched in front of the cameras, giving them a platform of public attention they don't deserve.”³⁸⁸ Waning support for the death penalty is not the result of “evolving standards of decency that mark the progress of a maturing society,”³⁸⁹ but the result of a desire to cut costs. “[H]ighly convoluted” procedures that are at odds with established Supreme Court precedent only invite stronger and more meritorious appeals, thereby increasing the cost of the system.³⁹⁰ Thus, Florida's death penalty proponents should actively support a revision to the statutory scheme that puts the aggravating-factor determination in the hands of a jury. This would make Florida's capital sentencing statute constitutional under the Supreme Court's decision in *Ring*.

384. See *supra* notes 353–63 and accompanying text.

385. See *Ring v. Arizona*, 536 U.S. 584, 610–13 (Scalia, J., concurring).

386. See *Bottoson v. Moore*, 833 So. 2d 693, 723–24 (Fla. 2002) (Pariente, J., concurring in result only).

387. David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN.COM, Apr. 25, 2012, <http://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed/index.html>.

388. *Id.*

389. *Furman v. Georgia*, 408 U.S. 238, 327 (1972) (Marshall, J., concurring).

390. *Florida's Death Penalty Unconstitutional*, A PUB. DEFENDER, June 22, 2011, <http://a.publicdefender.com/2011/06/22/floridas-death-penalty-is-unconstitutional/>.