Winter 2011

The Importance of Federal Habeas Review as a Means to Challenge Florida's Death Penalty Sentencing and Drug Possession Statutes

Donna L. Eng
University of Florida Levin College of Law, eng@law.ufl.edu

THE IMPORTANCE OF FEDERAL HABEAS REVIEW as a Means to Challenge Florida's Death Penalty Sentencing and Drug Possession Statutes

by Donna L. Eng, ESQ.

Two Federal courts have recently issued opinions declaring two Florida criminal statutes unconstitutional. In *Shelton v. Secretary, Dept. of Corrections*, No. 6:07–cv–839–Orl–35–KRS, 2011 WL 3236040 (M.D. Fla. July 27, 2011), the United States District Court for the Middle District of Florida granted a petition for writ of habeas corpus based upon a finding that the statute under which Shelton was convicted, Florida section 893.13, is unconstitutional because it requires no proof of mens rea. Earlier in the summer, in *Evans v. McNeil*, No. 08-14402-CIV-JEM (S.D. Fla. June 20, 2011) (DE 21, pgs. 77-94),[1] the United States District Court for the Southern District of Florida declared Florida's death penalty scheme[2] unconstitutional because it permits a jury to recommend a death sentence based on majority (but not unanimous) vote, and because the jury is not required to make written findings as to the aggravators relied on in support of the recommended sentence. According to the Court, such aspects of Florida's death penalty scheme violate *Ring v. Arizona*, 536 U.S. 584 (2002).[3]

In the *Shelton* Order, the Court noted that in 2002, when the Florida Legislature enacted Florida's Drug Abuse Prevention and Control Law, Florida became the only State in the nation to eliminate the mens rea element of a drug offense.[4] The District Court observed that even though strict liability criminal offenses have been found to pass constitutional muster in certain instances, no strict liability offense with penalties as harsh as those in Florida section 893.13 has ever been upheld under Federal law.[5] Subsequent to the issuance of the *Shelton* Order, various courts around the State have considered the issue. While some Judges, most notably Judge Milton Hirsch in Miami Dade County have had the courage to declare Florida section 893.13 unconstitutional based upon the reasoning of the *Shelton* Order, other Judges in the counties of Martin, St. Lucie, and Indian River, have declined to do so.[6]

Surprisingly, on September 28, 2011, in the case of *State v. Luke Jarrod Adkins, et al.*, No. 2D11-4559, Florida's Second District Court of Appeal issued a Certified Order Requiring Immediate Resolution by the Florida Supreme Court, wherein the Second District requested the Supreme Court to immediately decide the constitutionality of the statute. On October 12, 2011, the Supreme Court accepted jurisdiction. *See State v. Luke Jarrod Adkins et al.*, SC11-1878. According to the Supreme Court docket, briefing is to be concluded on November 23, 2011, and oral argument is set for December 8, 2011.

A recent article[7] published in *The Florida Bar News* highlights the importance of Federal habeas review against the backdrop of *Evans*. As noted in the article, *Evans* is the first case where **any** court has ever declared Florida's death penalty scheme unconstitutional in light of *Ring*. Since *Ring* was decided in 2002, the Florida Supreme Court has had ample opportunity to declare the scheme unconstitutional. A review of the numerous death penalty opinions issued subsequent to *Ring* shows that several Justices have either stated their reservations as to the continued application of Florida's death penalty statute in light of *Ring*, or have directly stated that Florida's death penalty scheme violates *Ring*.[8] However, because such Justices have not been able to form a majority on the Court, the Court continues to affirm th e imposition of death sentences.[9] Where lower courts have independently tried to conform to the principles of *Ring*, such as by requiring specialized verdict forms listing the aggravators relied upon by the jury, the Florida Supreme Court has ruled that such actions constitute error.[10]

Although the Criminal Law Section

of The Florida Bar has recently endorsed undertaking a review of Florida's death penalty scheme,[11] Florida's Legislature has, to this point, failed to address the constitutional deficiencies of the statute despite having had numerous opportunities to do so. Why not just review the death penalty statute to ensure compliance with *Ring*, especially after repeated requests by Justices on the Florida Supreme Court to at least study the issue?[12] Instead of keeping the only fact finding body it had in existence on the issue, the Commission on Capital Cases, the Florida Legislature instead chose to cease funding the Commission in budget negotiations.[13] Ironically, Governor Rick Scott signed his first death warrant as Governor on the last day of the Commission's existence.[14]

The likelihood of being able to change Florida's death penalty scheme, at least on the State level, appears to be extremely low. The Governor continues to sign death warrants, stating that Judge Martinez's decision in *Evans* is not binding.[15] Although several Justices have called on the Legislature to amend the death penalty statute, the Court is itself unable to declare the statute unconstitutional. The Legislature, as a whole, likewise refuses to address the issue. Even chances of amending the death penalty jury instructions to comply with *Ring* appear to be low. Calls for reform by Justices Anstead, Lewis and Pariente have been rejected, and the majority of the Court has gone so far as to reject any assertion that *Ring* requires unanimous jury findings on aggravators and mitigators.[16]

The importance of Federal habeas review of Florida's death penalty and drug possession statutes should become apparent in light of the current legal and political landscape surrounding Florida's death penalty scheme. When a State is unable to independently comply with the mandates of the Unites States Constitution, the citizens of that State have no option other than to seek redress in Federal court.

Nevertheless, no discussion of Federal habeas review would be complete without an acknowledgment of how difficult it can be to prevail on the merits of a petition in any court, much less in the United States Court of Appeals for the Eleventh Circuit. For example, even though the ruling in *Evans* has been appealed to the Eleventh Circuit,[17] the fact remains that in 2004, the United States Supreme Court ruled that *Ring* announced a procedural, rather than substantive, change in the law, such that *Ring* does not apply retroactively to cases already final on direct review,[18] and the Eleventh Circuit continues to adhere to the Supreme Court's ruling.[19] However, because Florida remains an outlier state[21] with regard to both the drug possession statute, section 893.13, and the death penalty statute, section 921.141, Florida's criminal defense attorneys may have no option other than to continue to challenge the constitutionality of those sections in Federal habeas proceedings. After all, if the State of Florida is unable to guarantee its citizens the protections that are afforded by the United States Constitution, what other option is there?

[1] The opinion has not been published on Westlaw. Although the Order may be accessed through the Southern District's CM/ECF system, a link to the opinion may also be found on my blog, *Florida Criminal Appeals Attorney Law*, at http://appealattorneylaw.com. It should be noted that since the date of the issuance of the opinion, the style of the case has been changed to *Evans v. Tucker*.

[2] *See* Fla. Stat. §775.082(1); Fla. Stat. §921.141(1), (2), (3).

[3] *See Evans v. McNeil*, No. 08-14402-CIV-JEM (S.D. Fla. June 20, 2011) (DE 21, pgs. 77-94).

[4] *See Shelton*, 2011 WL 3236040 at *2.

[5] *See Id.* at *6-*8.

[6] *See* Elliott Jones, Federal Judge's Decision

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DONNA L. ENG, Esq., was admitted to the Florida Bar in 1997. She served three years as an Assistant State Attorney in the Seventeenth Judicial Circuit, three years as an Assistant Attorney General in the Criminal Appeals Division of the Attorney General's West Palm Beach office, and nearly eight years as a Law Clerk for the United States District Court for the Southern District of Florida. She opened Donna Eng, P.A., in May 2011. Her firm website can be found at www.englawpa.com.

"The judge is unavailable. He's preparing for a sentencing hearing."

Could Result in Dismissal of Drug Cases in Indian River, St. Lucie and Martin Counties, http://www.tcpalm.com, August 29, 2011.

[7] *See* Gary Blankenship, "AG Bondi Asks Federal Judge to Reconsider Death Penalty Ruling," *The Florida Bar News*, August 1, 2011.

[8] *See Bottoson v. Moore*, 833 So. 2d 693, 703, 710, 719, 725 (Fla. 2002) (Anstead, C.J., *concurring*; Shaw, J., *concurring*; Pariente, J., *concurring*; Lewis, J., *concurring*); *King v. Moore*, 831 So. 2d 143, 149 (Fla. 2002) (Pariente, J., *concurring*); *Butler v. State*, 842 So. 2d 817, 835 (Fla. 2003) (Anstead, C.J., *concurring*; Pariente, J., *concurring*); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (Anstead, C.J., *concurring*); *Windom v. State*, 886 So. 2d 915, 935 (Fla. 2004) (Cantero, J., *concurring specially*); *Johnson v. State*, 904 So. 2d 400, 418 (Fla. 2005) (Anstead, J., *concurring in part and dissenting in part*); *Marshall v. Crosby*, 911 So. 2d 1129, 1142 (Fla. 2005) (Anstead, J., *dissenting*).

[9] *See Windom*, 886 So. 2d at 932 (noting that in every post-conviction appeal where *Ring* claims were raised and discussed, the Court has determined on the merits that *Ring* did not warrant a reversal of the death sentence) (Pariente, J., *concurring specially*); *Johnson*, 904 So. 2d at 406 (noting that in every post-conviction appeal where *Ring* is raised, "[w]e repeatedly have denied such requests for clear lack of merit, while reserving judgment on whether *Ring* even affects Florida law or applies retroactively to postconviction cases."); *Marshall*, 911 So. 2d at 1134-1135 ("... this Court relies on the United States Supreme Court's admonition that lower courts should 'follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (*citation omitted*); *Baker v. State*, No. SC09–549, 2011 WL 2637418, *16 (Fla. July 7, 2011) ("This Court has repeatedly and consistently rejected claims that Florida's capital sentencing scheme is unconstitutional under *Ring* ....")

[10] *See State v. Steele*, 921 So. 2d 538, 539 (Fla. 2005) (reversing trial court's order, and subsequent affirming opinion of 2nd DCA, because the trial court's order departed from essential requirements of law; trial court ruled that it would submit to the jury a penalty-phase interrogatory verdict form requiring jurors to specify each aggravator found and the vote for that aggravator; trial court's subsequent order ruled that the jury would be required to find each aggravator by majority vote). *See also Lebron v. State*, 982 So. 2d 649, 665 (Fla. 2008) (finding that trial court's use of special verdict forms was harmless error); *Lebron*, 982 So. 2d. at 671 ("Unfortunately, instead of encouraging the use of these special verdict forms, the majority in *Steele* foreclosed their use.") (Pariente, J., *concurring*); *Franklin v. State*, 965 So. 2d 79, 102 (Fla. 2007) (noting that a trial court departs from the essential requirements of law by using penalty phase special verdict forms detailing aggravators relied on by jury).

[11] *See* Gary Blankenship, "Criminal Law Section Supports Review of Death Penalty Process," *The Florida Bar News*, October 15, 2011.

[12] *See Steele*, 921 So. 2d at 548 (requesting the Florida Legislature "to revisit the [death penalty] statute to require some unanimity in the jury's recommendations.") *See Id.* at 550, 552 (Wells, J., *concurring*) (Pariente, C.J., *concurring in part and dissenting in part*); *Coday v. State*, 946 So. 2d 988, 1024 (Fla. 2006) (Pariente, J., *concurring in part and dissenting in part*).

[13] *See* Gary Blankenship, "AG Bondi Asks Federal Judge to Reconsider Death Penalty Ruling," *The Florida Bar News*, August 1, 2011. It should be noted that recently, HB 4051 was introduced in an attempt to eliminate the death penalty altogether. The bill is in the Criminal Justice Subcommittee as of October 3, 2011. A companion bill, SB 1898, died in Committee in May of 2011. *See* Jan Pudlow, "Measure Would Eliminate the Death Penalty," *The Florida Bar News*, October 15, 2011.

[14] *See Id.*

[15] *See Id.*

[16] *See Franklin*, 965 So. 2d at 103-105 (Pariente, J., *concurring*) (*citing Globe v. State*, 877 So. 2d 663, 680 (Fla. 2004) *(Pariente, J., concurring specially)*); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 610-611 (Fla. 2009) (Pariente, J., *concurring specially*).

[17] A review of the CM/ECF docket in *Evans v. McNeil*, now styled as *Evans v. Tucker*, No. 08-14402-CIV-JEM, shows that Evans filed a notice of appeal on October 14, 2011. Although the notice may be accessed through the Southern District's CM/ECF system, a link to the notice may also be found on my blog, *Florida Criminal Appeals Attorney Law*, at http://appealattorneylaw.com.

[18] *See Schriro v. Summerlin*, 542 U.S. 348, 353-358 (2004).

[19] *See Cave v. Sec'y for Dept. of Corrections*, 638 F.3d 739, 755 (11th Cir. 2011).

[20] In the *Shelton* order, Judge Scriven noted that Florida is now the only State that does not require proof of mens rea for drug possession under section 893.13. *See Shelton*, 2011 WL 3236040 at *2. Florida is now the only State that continues to allow the death penalty to be imposed on a mere majority vote of the jury. *See* Gary Blankenship, AG Bondi Asks Federal Judge to Reconsider Death Penalty Ruling, *The Florida Bar News*, August 1, 2011. *See also Steele*, 921 So. 2d at 548-549 (discussing changes already made in other States' death penalty schemes); *Coday*, 946 So. 2d at 1024 (Pariente, J., *concurring in part and dissenting in part*) (*same*).