(37)

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO. 2012CF035337A

vs.

BRADON LEE BRADLEY,
Defendant.
_____/

MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL IN LIGHT OF APPRENDI V. NEW JERSEY BECAUSE ONLY A BARE MAJORITY OF JURORS IS SUFFICIENT TO RECOMMEND A DEATH SENTENCE

The Defendant, BRANDON LEE BRADLEY, moves this Honorable Court enter its order declaring section 921.141, Florida Statutes, unconstitutional for the reasons stated below:

1. Under our state's death penalty jurisprudence, the jury's vote of seven to five favoring death is sufficient to constitute a death recommendation. State v. Steele, 921 So.2d 538, 550 (Fla.2005); Hayward v. State, 24 So.3d 17, 43 (Fla. 2009) However, of all the states which employ juries in capital sentencing, only Florida allows a death penalty recommendation by a bare majority.

3. The jury's role is advisory, Combs v. State, 525 So.2d 853 (Fla. 1988), but its advice is of considerable import. If the jury returns a death recommendation, the sentencing court is required to give it "great weight," and a life recommendation is to be followed unless "no reasonable person could differ" that only death is the appropriate sentence. Grossman v. State, 525 So.2d 833 (Fla. 1988); Tedder v. State, 322 So.2d 908 (Fla. 1975).

4. In determining guilt of a criminal charge, the United States Supreme Court has inferentially declared unconstitutionally unreliable a guilty verdict by less than a "substantial majority" of twelve jurors, Johnson v. Louisiana, 406 U.S. 356, 362; 92 S.Ct. 1620, 1625; 32 L.Ed.2d 152 (1972) (guilty verdict by nine members of twelve-person jury is a 'substantial majority' and therefore not unconstitutional). Although Johnson involved a sixth amendment (jury trial) claim, it incorporates due

process and equal protection analysis. The Defendant acknowledges that Johnson involved a State court conviction of robbery, a non-capital offense.

5. When a defendant is exposed to death as a possible punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). But instead of heightened reliability, Florida's statutory scheme invites error by using the constitutionally inadequate fact finding procedure of a bare majority verdict.

6. In Apodaca v. Oregon, 406, U.S. 404, (1972), the Court upheld verdicts of ten to two and eleven to one in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. See Burch, 441 U.S. at 136.

7. The defense recognizes that the Florida Supreme Court has rejected attacks on the statute based on lack of unanimity in the jury recommendation. State v. Steele: James v. State, 453 So.2d 786 (Fla. 1984). However, as Justice Wells noted in his concurring opinion in James, the Federal Death Penalty Act, 18 U.S.C. §§ 3591–97 (2000), requires notice to the defendant setting forth aggravating factors that the government proposes to prove as justification for a sentence of death. The federal act also requires that a decision for a death sentence be made by a unanimous jury. 18 U.S.C. §§ 3593–94 (2000). State v. Steel, 921 So.2d 538,551 (Fla. 2005).

> The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

Steel @ 550.

8. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. However, it has never upheld a verdict of less than nine to three, even in a non-capital case. See Williams v. State, 438 So 2d 781 (Fla. 1983); Jones v State, 92 So. 2d 261 (Fla. 1956).

9. Given that aggravating circumstances are essential elements that must be instructed and proved beyond a reasonable doubt, and that a jury must find beyond a reasonable doubt that death is warranted before ever reaching the weight of mitigation, under Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), a death verdict having been returned as less than unanimous, violates Due Process and the Protection Against Cruel and Unusual Punishment guaranteed by the United States and Florida Constitutions.

10. For the foregoing reasons, section 921.141, as applied, violates the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, and Article I, sections 9, 16, 17, 21 and 22 of the Florida Constitution.

WHEREFORE, the defendant moves that this Court enter its order declaring section 921.141 unconstitutional, and precluding the death penalty in this cause; and granting such other relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, Brevard County, Florida, this 8th day of November, 2013.

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