IN THE SUPREME COURT OF FLORIDA

MICHAEL SCOTT KEEN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 88,802
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

SUPPLEMENTAL BRIEF OF APPELLANT

On Appeal from the Circuit Court
of the 17th Judicial Circuit,
In and For Broward County, Florida

RICHARD JORANDBY
Public Defender

RICHARD B. GREENE
Florida Bar No. 265446
Assistant Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Michael Scott Keen

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Circuit Court. The volume of the current record or transcript will be referred to by roman numeral. The following symbols will be used:

R Record on Appeal

T Transcript on Appeal

ST Supplemental Transcript on Appeal

1R Record of Original Appeal

2R Record of Second Appeal

STATEMENT OF THE CASE

Appellant will rely on his Initial Brief herein.

STATEMENT OF THE FACTS

Appellant will rely on his Initial Brief herein.

SUMMARY OF THE ARGUMENT

1. The trial judge imposed a sentence of death over a jury's recommendation of life when the jury did not make any factfindings as to death eligibility. This violates the rights to trial by jury and to due process guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 2, 9, 16, 17, and 22 of the Florida Constitution. Jones v. United States, ___ U. S. ___, 119 S.Ct. 1215 (1999). This is especially true in the present case when all the aggravating circumstances relate to the criminal episode.

State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984) (Overruled on other grounds in State v. Gray, 654 So. 2d 552 (Fla. 1995).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY OVER A JURY RECOMMENDATION OF LIFE WHEN THE JURY DID NOT MAKE ANY FACTFINDINGS AS TO DEATH ELIGIBILITY.

The trial judge imposed a sentence of death over a jury's recommendation of life when the jury did not make any factfindings as to death eligibility. This violates the rights to trial by jury and to due process guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 2,9, 16,17, and 22 of the Florida Constitution. Jones v. United States, ___ U.S. ___, 119 S.Ct. 1215 (1999). This episode is especially true when all the aggravating circumstances relate to the criminal episode. Overfelt, supra.

In this case, the jury recommended life imprisonment and did not make any fact findings as to aggravating circumstances. XVIIT1903. The trial judge imposed the death penalty. XVIIT1916-43. The United States Supreme Court recently issued Jones, supra which left the constitutionality of this practice in serious doubt. In Jones, the Court was required to decide whether the provisions of the federal carjacking statute which established higher

penalties when the offense resulted in death or serious bodily injury set forth elements of the offense, which require a jury verdict, or are mere sentencing considerations which do not. The Court held that the provisions were elements of the offense, relying, in part on the principle of constitutional doubt:

> While we think the fairest reading of § 2119 treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view. Any doubt that might be prompted by the arguments for that other reading should, however, be resolved against it under the rule, repeatedly affirmed, that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909); see also United States v. Jin Fuey Moy, 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916).

119 S.Ct. at 1222.

The Court went on to explain that the other interpretation would raise serious constitutional questions in light of a series of United States Supreme Court decisions involving the due process clause of the Fifth and Fourteenth Amendments and the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments. Id. at 1222-24. These cases include Mullaney v. Wilbur, 421 U.S. 684 (1975) and In Re Winship, 397 U.S. 358 (1970). The court explained this danger in terms of the federal carjacking statute at

issue and the history of the Constitution:

> The terms of the carjacking statute illustrate very well what is at stake. If serious bodily injury were merely a sentencing factor under § 2119(2) (increasing the authorized penalty by two thirds, to 25 years), then death would presumably be nothing more than a sentencing factor under subsection (3) (increasing the penalty range to life). If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn.
>
> The question might well be less serious than the constitutional doubt rule requires if the history bearing on the Framers' understanding of the Sixth Amendment principle demonstrated an accepted tolerance for exclusively judicial factfinding to peg penalty limits. But such is not the history. To be sure, the scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the Framing. On the other hand, several studies demonstrate that on a general level the tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers' conception of the jury right.....
>
> In sum, there is reason to suppose that in the

> present circumstances, however peculiar their details to our time and place, the relative diminution of the jury's significance would merit Sixth Amendment concern. It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution. The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.

Id. at 1224-1226. The Court went on to discuss two capital cases from Florida and one from Arizona:

> Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), contains no discussion of the sort of factfinding before us in this case. It addressed the argument that capital sentencing must be a jury task and rejected that position on the ground that capital sentencing is like sentencing in other cases, being a choice of the appropriate disposition, as against an alternative or a range of alternatives. Id. at 459, 104 S.Ct. 3154.
>
> Spaziano was followed in a few years by Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam), holding that the determination of death-qualifying aggravating facts could be entrusted to a judge, following a verdict of guilty of murder and a jury recommendation of death, without violating the Sixth Amendment's jury clause. Although citing Spaziano as authority, 490 U.S., at 639-640, 109 S.Ct. 2055, Hildwin was the first case to deal expressly with factfinding necessary to authorize imposition of the more severe of

alternative sentences, and thus arguably comparable to factfinding necessary to expand the sentencing range available on conviction of a lesser crime than murder. Even if we were satisfied that the analogy was sound, Hildwin could not drive the answer to the Sixth Amendment question raised by the Government's position here. In Hildwin, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved. Hildwin, therefore, can hardly be read as resolving the issue discussed here, as the reasoning in Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed. 511 (1990), confirms.

Walton dealt with an argument only slightly less expansive than the one in Spaziano, that every finding underlying a sentencing determination must be made by a jury. Although the Court's rejection of that position cited Hildwin, it characterized the nature of capital sentencing by quoting from Poland v. Arizona, 476 U.S. 147, 156, 106 S.Ct. 1749, 90 L.Ed. 123 (1986). See 497 U.S. at 648, 110 S.Ct. 3047. There, the Court described statutory specifications of aggravating circumstances in capital sentencing as "standards to guide the . . . choice between the alternative verdicts of death and life imprisonment." Ibid. (quoting Poland supra, 156, 106 S.Ct. 1749 (internal quotation marks omitted)). The Court thus characterized the finding of aggravated facts falling within the traditional scope of capital sentencing as a choice between a greater and lesser penalty, not as process of raising the ceiling of the sentencing range available. We are frank to say that we emphasize this careful reading of Walton's rationale because the question implicated by the Government's position on the meaning of § 2119(2) is too significant to be decided

> without being squarely faced.
>
> In sum, the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions. This is done by construing § 2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

Id. at 1227-1228.

Justices Stevens and Scalia wrote concurring opinions in which they explicitly stated that it is unconstitutional to remove from the jury the assessment of facts which increase the maximum punishment for an offense. 119 S. Ct. at 1228-9. Justice Stevens stated:

> Like Justice SCALIA, see at 1229, I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. That is the essence of the Court's holdings in In re Winship, 399 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and Patterson v. New York 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). To permit anything less "with respect to a fact which the State deems so important that it must either be proved or presumed is impermissible under the Due Process Clause." Id. at 215 97 S.Ct. 2319. This principle was firmly embedding in our jurisprudence through

> centuries of common law decisions. See e.g. Winship, 397 U.S. at 361-364, 90 S.Ct. 1068; Duncan v. Louisiana, 391 U.S. 145, 151-156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Indeed, in my view, a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence, and also facts that must be established before a defendant can be put to death.

Concurring opinion of Stevens, J. at 1228-1229.

The death sentence in this case is clearly rendered in violation of the reasoning of the majority opinion and the concurring opinions in Jones. The dissenting opinion in Jones also supports the idea that the role of the jury in capital cases must be reexamined in light of Jones. The dissenters stated: "Reexamination of this area of our capital jurisprudence can be expected." 119 S.Ct. at 1238.

In Richardson v. United States ___ U.S. ___, 119 S.Ct. 1707 (1999), the Court was again faced with interpreting a federal criminal statute which forbids a person from "engaging in a constituting criminal enterprise". 119 S.Ct. At 1709. The Court held that a jury must find which specific violations make up a continuing series of violations. Id. The Court again relied, in part, on the principle of constitutional doubt to reach this result. Id. at 1711.

In Florida, a conviction of first degree murder alone does not

make a person eligible for the death penalty. One or more aggravating circumstances must be proven beyond a reasonable doubt and the aggravating circumstances must be sufficiently weighty to call for the death penalty. Florida Statute 921.141; State v. Dixon, 283 So.2d 1,8 (Fla. 1973); Standard Jury Instructions on Criminal Cases - Penalty Proceedings - Capital Cases F. S. 921.141. In the present case, we have no idea if the jury found that any aggravating circumstances had been proven beyond a reasonable doubt. If it did find one or more aggravating circumstances, we have no idea whether it found them sufficiently weighty to call for the death penalty. Thus, we have no idea whether the jury found that Mr. Keen is eligible for the death penalty. Indeed, all we know is that a majority of the jury felt that life is the appropriate sentence.

This error violates the right to jury trial provisions of the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendment. Jones. This practice is directly contrary to the reasoning of the concurring opinions of Justices Stevens and Scalia. They both would hold that any fact which increases the maximum punishment must be found by a jury. 119 S.Ct. at 1228-9. Here, there was no jury finding as to existence of aggravating circumstances or whether they are sufficiently weighty to call for the death penalty.

An analysis of the majority opinion in Jones shows that the procedure here is also contrary to the reasoning of the majority in Jones. The majority in Jones stated:

> The terms of the carjacking statute illustrate very well what is at stake. If serious bodily injury was merely a sentencing factor under § 2119(2) (increasing the authorized penalty by two thirds, to 25 years), then death would presumably be nothing more than a sentencing factor under subsection (3) (increasing the penalty range to life). If a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determination of guilt to the relative importance of low-level gatekeeping. In some cases, a jury finding of fact necessary for a minimum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment. It is therefore no trivial question to ask whether recognizing a unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of a jury's function to a point against which a line must necessarily be drawn.

119. S.Ct. at 1224.

It is clear that the majority is very troubled by the fact that the Government's interpretation of the carjacking statute would allow findings made by a judge alone to raise the maximum penalty from fifteen years to life. This becomes more significant when one considers the United States Supreme Court's opinion in Woodson v. North Carolina, 428 U.S. 280 (1976). The Court

discussed the need for individualized sentencing in capital cases. It stated:

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

428 U.S. at 305.

Thus, it is clear that the concerns of the Jones majority concerning raising the maximum penalty from fifteen years to life are magnified when one raises the penalty from life to death. The jury did not make any of the factfindings required for death eligibility. The death penalty is rendered in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As the Court in Jones points out, neither Spaziano, Hildwin nor Walton control this issue. Spaziano merely dealt with the broad question of whether jury sentencing is constitutionally required. It did not deal with the right to jury findings as to death eligibility. In Hildwin the jury had recommended death, thus it necessarily found the defendant death eligible. In Walton, the Court rejected the argument that every finding underlying a

sentencing determination must be found by a jury. It did not determine whether death eligibility must be found by a jury.

An analysis of Florida law shows that the death sentence in this case violates the Florida Constitution. In Blair v. State, 698 So. 2d 1210 (Fla. 1997), this Court discussed the right to a jury trial:

> RIGHT TO TRIAL BY JURY
>
> Before addressing the facts of this case, we review and reaffirm the importance of the right to trial by jury in the United States and Florida. From the outset, the earliest American colonists "cherished the right to a trial by jury." Douglas E. Lahammer, Note, The Federal Constitutional Right to Trial by Jury for The Offense of Driving While Intoxicated, 73 Minn. L.Rev. 122, 125 n. 19 (1988). As evidence of this strong statement, the right to trial by jury was incorporated into King James I's Instructions for the Government of the Colony of Virginia, 1606; the Massachusetts Body of Liberties, 1628; The Concessions and Agreements of West New Jersey, 1677; and the Frame of Government of Pennsylvania, 1682. Lloyd E. Moore, The Jury, Tool of Kings, Palladium of Liberty 97-99 (1973); Sources of Our Liberties 37, 74, 185, 217 (Richard L. Perry ed., 1959).
>
> Later, this right was of paramount importance to the Founding Fathers. Indeed, "[t]rial by jury, as instituted in England, was to the Founders and Integral part of a judicial system aimed at achieving justice." Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 Geo. Wash. L.Rev. 723, 742 (1993). According to the Founders, mindful of "royal encroachments on jury trial" and fearful of leaving this precious right to the whims of

> legislative prerogative, included protection of the right in the Declaration of Independence and included these separate provisions in the Constitution for the right to jury trial: Article III and later the Sixth and Seventh Amendments. Id. 1t 744-45. In addition, the "constitutions of the original 13 states and every state later admitted to the United States contained some form of a jury trial right." Robert P. Connelly, Note, The Petty Offense Exception and the Right to a Jury Trial, 48 Fordham L.Rev. 205, 212 n. 51 (1979). No state has ever removed the right from its constitution. Duncan v. Louisiana, 391 U.S. 145, 153-54, 88 S.Ct. 1444, 1449-50, 20 L.Ed.2d 491 (1968). The right extends equally to criminal and civil cases. See Henry H. Perritt, Jr., "And the Whole Earth Was of One Language"-- A Broad View of Dispute Resolution, 29 Vill. L.Rev. 1221, 1320 n. 554 (1984); art. I, § 17, La.Const.; art. II, § 23, Colo.Const.; art I, § 9, Wyo.Const.
>
> FLORIDA
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> In Florida, we also have always considered the right to jury trial to be an indispensable component of our system of justice. In addition to the federal constitutional mandate, our state constitution's Declaration of Rights expressly provides that the "Right of trial by jury shall be secure to all and remain inviolate." Art. I, § 22, Fla. Const. Similarly, this Court has acknowledged that "a defendant's right to a jury trial is indisputably one of the most basic rights guaranteed by our constitution." State v. Griffith, 561 So.2d 528, 530 (Fla. 1990); see also Floyd v. State, 90 So.2d 105, 106 (Fla. 1956) (stating that "right of an accused to trial by jury is one of the most fundamental rights guaranteed by our system of government.")

Blair v. State, 698 So. 2d 1210, 1212-1213 (Fla. 1997) (Footnotes

omitted.)

> Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking a jury trial for that right is fundamentally guarantied by the U. S. and Florida Constitutions.

Hollywood, Inc. v. City of Hollywood, 321 So. 2d 65, 71 (Fla. 1973).

This Court's handling of the use of a firearm to increase the degree of the offense or to enhance the defendant's sentence support a finding that the death sentence is unconstitutional in this case.

> The district court held, and we agree, "that before a trial court may enhance a defendant's mandatory sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981); But see Tindall v. State, 443 So. 2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a

> judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatary provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984) (overruled on other grounds in State v. Gray, 654 So. 2d 552 (Fla. 1995).

The reasoning of Overfelt that only the jury can be the finder of fact concerning the criminal episode supports the unconstitutionality of the death sentence in this case. Twelve of the fourteen aggravating circumstances in the Florida statute are based on the criminal episode. Fla. Stat. 921.141 (5) (c-n). The other two aggravating circumstances relate to the defendant's prior record and incarcerated status. Fla. Stat. 921.141 (5) (a-b) In the present case the only aggravating circumstances relied on concern the criminal episode itself. XVIIT1920-29. Thus, the potential death eligibility facts in this case all relate to the criminal episode and must be found by a jury pursuant to Overfelt. Assuming arguendo, that this Court does not feel that the jury override does not violate the United States and/or the Florida Constitutions pursuant to the reasonings of Jones, the death sentence in this case would violate the United States and Florida Constitution pursuant to Overfelt. It must be reversed and reduced to life

imprisonment.

CONCLUSION

Wherefore, appellant respectfully requests that this Court grant him a new trial, a resentencing, and/or reduce his sentence to life imprisonment.

Respectfully submitted,

RICHARD JORANDBY
Public Defender

RICHARD B. GREENE
Assistant Public Defender
Florida Bar No.265446
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

CERTIFICATE OF TYPEFACE

Appellant certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to David M. Schultz, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this _____ day of _____ , 1999.

_____

Attorney for Michael Scott Keen