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SECOND CIRCUIT REVIEW

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The Constitutionality of the Federal Death Penalty Act

IN THIS MONTH'S column, we report on a recent decision by the U.S. Court of Appeals for the Second Circuit in which the court upheld the constitutionality of the Federal Death Penalty Act.

In *United States v. Fell*,[1] the Second Circuit, in a unanimous opinion authored by Chief Judge John Walker, held that because the Federal Rules of Evidence are not constitutionally required it is permissible, as mandated by the Federal Death Penalty Act, for the government to introduce evidence of so-called "aggravating circumstances" during the penalty phase of a capital trial that would be otherwise inadmissible under the Federal Rules of Evidence. In so ruling, the court reversed the district court (Chief Judge of the U.S. District Court of Vermont William K. Sessions III, D-Vt.), which — citing the Supreme Court's decision in *Jones*, *Apprendi* and *Ring*[2] — had held that admission of such evidence violated a defendant's Fifth Amendment right to due process and Sixth Amendment right to confrontation.

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Background

Defendant Donald Fell was indicted on multiple counts in connection with an alleged murder. Two of those counts, alleging carjacking and kidnapping, were charged as capital crimes.

The Federal Death Penalty Act (FDPA), codified at 18 USC §§3591 et seq., is applicable to all federal offenses for which a death sentence is possible. The FDPA, like all currently existing capital statutes, establishes a bifurcated proceeding. First, there is a trial at which a defendant's guilt or innocence is determined. Then, if the defendant is convicted of a capital crime, there is a separate hearing, known as the "penalty phase," to set sentence. For a person to be sentenced to death under the FDPA, the jury must find, unanimously and beyond a reasonable doubt, that at least one statutorily defined "aggravating" factor exists and that all aggravating factors, both statutory and nonstatutory, sufficiently outweigh all "mitigating" factors such that a death sentence is justified.

Section 3593(c) of the FDPA provides that Federal Rules of Evidence do not apply during the penalty phase of a capital trial. Thus, under the FDPA, "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."

Prior to trial, the government gave notice that if Mr. Fell were ultimately convicted on a capital count the government would at the penalty phase seek to introduce an out-of-court statement by Mr. Fell's deceased co-defendant that, in the government's view, tended to establish the existence of certain aggravating factors. The government conceded that the statement would be inadmissible under the Federal Rules of Evidence. Mr. Fell moved for a declaration that the FDPA was, among other reasons, unconstitutional inasmuch as it would allow the introduction of otherwise inadmissible evidence.

The district court granted Mr. Fell's motion, finding that the FDPA's "direction to ignore the rules of evidence when considering information relevant to death penalty eligibility is a violation of the Due Process Clause of the Fifth Amendment and the rights of confrontation and cross-examination guaranteed by the Sixth Amendment." In reaching its decision, the district court relied heavily on the "*Jones*, *Apprendi*, *Ring* trilogy," which "forces the examination of the death-eligibility determination in a new light."[3]

Building on *Jones* and *Apprendi*, *Ring* declared Arizona's death penalty statute to be unconstitutional. Under the invalidated statute, a judge — rather than jury — made the penalty phase determination that aggravating factors sufficient to warrant the death penalty were present. This procedure

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violated the principle, articulated in *Apprendi*, that "[i]f 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." Though *Ring* was decided exclusively on Sixth Amendment grounds, *Jones*, which is quoted with approval in *Ring*, makes clear that the right to due process is similarly implicated. Thus, according to *Jones*, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[4]

In *Fell*, the district court concluded that "the FDPA cannot withstand constitutional scrutiny through the lens of the *Jones, Apprendi, Ring* line of decisions." Those decisions, said the district court, "have profound implications for the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantees of confrontation and cross-examination." Whereas matters relating to sentencing had previously been viewed as distinct from those relating to guilt, the *Jones, Apprendi* and *Ring* decisions constitute a tacit acknowledgment that "the line between guilt and punishment has become blurred." Insofar as *Jones, Apprendi* and *Ring* require that questions of fact relevant to a sentencing — like questions of fact relevant to guilt — be submitted to a jury for determination beyond a reasonable doubt, by their logic, said the district court, those decisions compel "recognition that the fundamental rights of confrontation and cross-examination and an evidentiary standard consistent with the adversarial nature of the proceeding must be afforded" in a capital trial's penalty phase.[5]

This conclusion, said the district court, was reinforced by the Supreme Court's oft-reiterated recognition of the "acute need for reliability in capital sentencing proceedings." The FDPA's relaxed evidentiary standard for penalty phase proceedings undermines this goal, said the district court. By suspending the Federal Rules of Evidence, and the corresponding right to confront adverse witnesses, the FDPA allows factual determinations regarding a defendant's eligibility for death to be based on "proof by unreliable and otherwise untested evidence" such as the hearsay statement that the government intended to introduce against Mr. Fell. The right to cross-examine witnesses is, the district court noted, an integral component of due process whose absence "calls into question the ultimate integrity of the fact-finding process." Consequently, the district court concluded, "the FDPA, which bases a finding of eligibility for imposition of the death penalty on information that is not subject to the Sixth Amendment's guarantees of confrontation and cross-examination, nor to rules of evidentiary admissibility guaranteed by the Due Process Clause to fact-finding involving offense elements, is unconstitutional."[6]

The Second Circuit

The Second Circuit reversed the district court's ruling, ignoring in substantial part and flatly rejecting in other part the district court's analysis.

But, before reaching the merits of the case, the Second Circuit first considered whether it had jurisdiction to hear the government's appeal of the district court's decision. Insofar as the district court had dismissed the portion of the indictment enumerating the aggravating circumstances that the government intended to prove, the court had little trouble concluding that it had jurisdiction pursuant to 18 USC §3731, which "permits an immediate appeal of any district court decision that, inter alia, dismisses any part of a criminal indictment." The trickier jurisdictional question was whether Mr. Fell's motion, and thus the appeal from the district court's ruling thereon, was ripe for adjudication. After all, the Second Circuit noted, "the defendant has not been tried, let alone convicted; thus, he may never be subjected to a penalty phase in which the government has sought to introduce the challenged evidence."[7] Nonetheless, the court concluded that the issue was ripe, both because it presented a purely legal issue and because the defendant had — for a variety of practical reasons[8] — a legitimate interest in resolving prior to trial the question of whether he might face the death penalty if convicted.

Having determined that it had jurisdiction, the Second Circuit proceeded to the merits of the case. After briefly summarizing the district court's decision, the Second Circuit analyzed the "flaws" it perceived in the district court's reasoning. At no point in its analysis did the Second Circuit mention, let alone thoroughly examine, *Jones, Apprendi* or *Ring*, the three Supreme Court cases upon which the district court had relied.

Rather, the Second Circuit skipped directly to the issue of reliability in capital sentencing. The court began by expressing its full agreement with the district court that " 'heightened reliability' is essential to the process of imposing a death sentence." What the district court failed to acknowledge, said the Second Circuit, "is that the Supreme Court has also made clear that in order to achieve such 'heightened reliability,' *more* evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors."[9] According to the Second Circuit, increasing the amount of evidence admitted at sentencing promotes, as is required by the Supreme Court, the "individualized determination" of whether a particular defendant deserves the death penalty.

The Second Circuit chastised the district court for having "effectively equated [the Federal Rules of Evidence (FRE)] with a defendant's Constitutional Rights." Rather than being constitutionally required, the Federal Rules of Evidence are, the Second Circuit emphasized, a statutory creature that Congress may, subject to basic constitutional limitations, alter or abolish as Congress sees fit. Thus, because "the FRE establish neither the floor nor the ceiling of constitutionally

permissible evidence," the FDPA's relaxed evidentiary standard for penalty phase proceedings is not per se unconstitutional.[10]

According to the Second Circuit, the FDPA's evidentiary standard "satisfies constitutional requirements" because it "provides a level of protection that ensures that defendants receive a fundamentally fair trial." The Second Circuit found that the FDPA — which permits evidence to be excluded "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury" — actually affords greater protection to a defendant than would the Federal Rules of Evidence because under Fed. R. Evid. 403 evidence may be excluded only "if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[11]

In sustaining the FDPA's constitutionality, the Second Circuit emphasized the trial judge's role as "gatekeeper of constitutionally permissible evidence." Thus, said the Second Circuit, under the FDPA's balancing test "it remains for the court, in the exercise of its judgment and discretion, to ensure that unconstitutional evidence otherwise admissible under applicable evidentiary rules is excluded from trial."[12]

Open Issues

The Second Circuit's decision in *Fell* is notable in several respects. Perhaps most striking in light of the decision below is the court's failure to address *Ring* and its implications for sentencing under the FDPA. As the district court recognized, *Ring,* in conjunction with *Jones* and *Apprendi,* firmly establishes that penalty phase fact finding is, to some degree at least, subject to the strictures of the Fifth and Sixth amendments. To what degree remains an open question — a question that the Second Circuit chose not to discuss in *Fell*.

In upholding the constitutionality of the FDPA despite the fact that it permits the government to introduce an out-of-court statement by a declarant not subject to cross-examination, the Second Circuit implicitly found that the Sixth Amendment right to confrontation does not attach in the penalty phase of a capital trial. Rather than guarantee a capital defendant the right of confrontation, and rather than subject penalty phase evidence to the rigors of cross-examination, the Second Circuit has instead endorsed a discretionary balancing test.

This result is particularly remarkable in light of the Supreme Court's decision in *Crawford*,[13] which was issued just one week after the Second Circuit's decision in *Fell*. *Crawford,* which was not a capital case, concerned the admissibility at trial of an out-of-court statement by a declarant not subject to cross-examination. The trial court, applying the balancing test set forth in *Roberts*,[14] held the statement admissible because (in the trial court's view) it possessed indicia of reliability. The Supreme Court reversed, expressly overruling *Roberts*. "The *Roberts* test," said the Supreme Court, "allows a jury to hear evidence untested by the adversary process, based on a mere judicial determination of reliability." This, the court held, violated the Sixth Amendment right to confrontation. The right to confrontation was, the court said, a "bedrock procedural guarantee" that knew no substitute. The court rejected *Roberts* as embodying an "open-ended balancing test[]" that "replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one." Writing for the Court, Justice Antonin Scalia observed: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[15]

Given the acknowledged need for 'heightened reliability' in the capital sentencing context, and given *Ring's* extension of Sixth Amendment guarantees to penalty phase proceedings, it is unclear whether the Second Circuit's decision in *Fell* will prove a lasting one. *Fell* is, after *Quinones*,[16] the second time in two years that the Second Circuit has reversed a district court's declaration that the FDPA is unconstitutional. The Second Circuit will undoubtedly have to revisit the issue in the years to come. As the district court observed in its decision below, "[c]apital punishment is under siege."[17]

(1) No. 02-1638, 2004 WL 377314 (2d Cir. March 2, 2004).

(2) *Jones v. United States,* 527 US 373 (1999); *Apprendi v. New Jersey,* 530 US 466 (2000); *Ring v. Arizona,* 536 US 584 (2002).

(3) *United States v. Fell,* 217 FSupp2d 469, 473, 490 (D. Vt. 2002).

(4) *Jones,* 527 US at 243 n.6, quoted in *Ring,* 536 US at 600.

(5) 217 FSupp2d at 474, 482, 485, 489.

(6) Id. at 476 (quoting *Monge v. California,* 524 US 721, 732 (1998)), 486 (quoting *Ohio v. Roberts,* 448 US 56, 64 (1980)), 489, 490.

(7) 2004 WL 377314, at *2.

(8) The court recognized that a defendant facing the death penalty may, in order to save his life, be more inclined to enter a plea agreement than one who is not, and that at trial a defendant facing capital charges "may be forced into trial tactics that are designed to avoid the death penalty but that have the consequence of making conviction more likely." The court also recognized that jury selection in a capital case differs from that in a normal case, both because persons conscientiously opposed to the death penalty are excluded from capital juries and because the government receives relatively more peremptory challenges in a capital trial. Id. at *3.

(9) Id. at *6 (emphasis in original).

(10) Id. at *7-8.

(11) Id. at *8 (quoting FedREvid 403) (emphasis in original). In finding that the FDPA evidentiary standard affords greater protection than the Federal Rules of Evidence, the Second Circuit disregarded the fact that Fed. R. Evid. 403 is but one of many rules and that the Federal Rules of Evidence, subject to certain exceptions, bar hearsay. See Fed. R. Evid. 802.

(12) Id.

(13) *Crawford v. Washington,* No. 02-9410, 2004 WL 413301 (March 8, 2004).

(14) *Ohio v. Roberts,* 448 US 56 (1980).

(15) 2004 WL 413301, at *5-19.

(16) *United States v. Quinones,* 313 F3d 49 (2d Cir. 2002).

(17) 217 FSupp2d at 490.