IN THE SUPREME COURT OF FLORIDA

CASE NO. SC93994

DANIEL LUGO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State relies upon its statement of case and facts contained in its initial answer brief in this matter, with the following additions:

Prior to trial, Defendant adopted codefendant Doorbal's motion to declare Florida's capital sentencing scheme unconstitutional because the jury was not required to be unanimous in its recommendation.[1] (R. 2619-24) It does not appear that this motion was ever argued or ruled upon.

During the penalty phase charge conference, Defendant did not request any modifications to the standard jury instructions. (T. 13065-86) Defendant did not object to the instructions as read. (T. 13156-57)

[1] The Motion that was adopted can be found at pages 1355-57 of the record in codefendant Doorbal's appeal, Florida Supreme Court case no. SC93988.

SUMMARY OF THE ARGUMENT

Defendant's *Apprendi* claim is unpreserved. Moreover, it is without merit, as death is the statutory maximum for a capital offense in Florida. Further, *Apprendi* does not require special jury findings or unanimity.

ARGUMENT

I. THE *APPRENDI* CLAIM IS UNPRESERVED AND WITHOUT MERIT.

Defendant asserts that Florida's capital sentencing scheme violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000). He claims this is so because the State is not required to charge the aggravating circumstances in the indictment, the jury is not required to make specific written findings of which aggravating circumstances it found to exist, the jury is not required to return an unanimous recommendation, defendants are required to show that sufficient mitigating circumstances exist to outweigh the aggravating circumstances and the jury's recommendation can be overriden. However, this issue is unpreserved and meritless.

To preserve a claim regard an alleged defect in a charging document, a defendant must move to dismiss the indictment based on that alleged defect. *See Hart v. State*, 761 So. 2d 334 (Fla. 4th DCA 1998). An objection to the form of a jury instruction must be made and an alternative jury instruction must be specifically proposed to preserve a claim that the jury instructions were defective. *See* Fla. R. Crim. P. 3.390(d); *Overton v. State*, 801 So. 2d 877, 901 (Fla. 2001); *Watson v. State*, 651 So. 2d 1159, 1164 (Fla. 1994). Moreover, a defendant must argue a written motion to the trial court and obtain a

ruling thereon to preserve the issue raised in that motion. *See Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001); *Armstrong v. State*, 642 So. 2d 730, 740 (Fla. 1994).

Here, Defendant never claimed that the indictment was defective because the aggravating circumstances were not charged. He did not request a special penalty phase verdict form so that the jury could specifically find aggravating circumstances. He did not object to the penalty phase jury instructions on the weighing process or jury overrides. While he did file a motion to adopt codefendant Doorbal's motion to require a unanimous jury recommendation and the motion to adopt was granted, he never argued that motion to the trial court and did not receive a ruling on that motion. As such, none of these issues are preserved.

Even if the issue was preserved, Defendant would still not be entitled to any relief. In *Apprendi*, the Court held that any fact, other than a prior conviction, that increases the statutory maximum must be proven to the jury beyond a reasonable doubt. However, the statutory maximum for first degree murder in Florida is death. *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001). As such, *Apprendi*, by its own terms, does not apply to Florida's capital sentencing scheme.

The granting of certiorari in *Ring v. Arizona*, 122 S. Ct.

865 (2002), does not change this result. The issue raised in *Ring* is limited to the constitutionality of state death penalty statutes where sentencing is done by judges alone without input, or recommendation, from a jury. *Ring* will not determine the constitutionality of Florida's death penalty statute which differs substantially from Arizona's. In Florida, a jury is involved in the penalty phase of the defendant's trial, and it makes a sentencing recommendation which is given great weight by the judge. As the United States Supreme Court has recognized, in Florida, the jury is a co-sentencer. *Lambrix v. Singletary,* 520 U.S. 518, 528 (1997)(citing *Espinosa v. Florida*, 505 U.S. 1079 (1992)). Florida's death penalty statute is jury plus judge sentencing, not judge only sentencing.[2] As such, there is no reason for this Court to reconsider *Mills*, and Defendant's convictions and sentences should be affirmed.

Further, any holding that *Apprendi* extended to capital sentence schemes would not implicate the concerns that Defendant raises. The issue in *Apprendi* was who was empowered to make a determination of a factor that increased a statutory maximum and

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[2] Only the five states that have judge-only sentencing, *i.e.*, Arizona, Colorado, Idaho, Montana and Nebraska, are being directly challenged in *Ring*. The four states with jury recommendations - Alabama, Delaware, Florida and Indiana - are not being so challenged. Brief in *Ring* at 38 n.36.

what burden of proof applied. As such, any requirement of unanimity or specific findings was not implicated. In fact, a jury is not required to be unanimous regarding why or if a defendant is guilty. *Schad v. Arizona*, 501 U.S. 624 (1991)(plurality opinion)(holding that due process does not require jurors to unanimously agree on alternative theories of criminal liability); *Johnson v. Louisiana*, 406 U.S. 356 (1972)(holding a conviction based on plurality of nine out of twelve jurors did not deprive defendant of due process and did not deny equal protection); *Apodaca v. Oregon*, 406 U.S. 404 (1972)(holding a conviction by less than unanimous jury does not violate right to trial by jury and explaining that the Sixth Amendment's implicit guarantee of a unanimous jury verdict is not applicable to the states). A jury is also not required to specify which theory of guilt it found. *Cf. Griffin v. United States*, 502 U.S. 46 (1991). As such, any decision regarding the extension of *Apprendi* to capital sentencing would not implicate the concerns that Defendant raises. His convictions and sentences should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to J. Rafael Rodriguez, 6367 Bird Road, Miami, Florida 33155, this 3rd day of May 2002.

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SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-

point font.

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SANDRA S. JAGGARD
Assistant Attorney General