IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 93,994

DANIEL LUGO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****
***

A CAPITAL APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR
DADE COUNTY

CRIMINAL DIVISION

****
***

AMENDED SUPPLEMENTAL BRIEF OF APPELLANT

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INTRODUCTION

Appellant was the Defendant in the trial court and Appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal, and "T" will designate the trial transcript.

STATEMENT OF JURISDICTION

This Court has appeal jurisdiction in this case. Defendant was sentenced to death. Rule 9.030(a)(1)(A)(i), Florida Rules of Appellate Procedure, provides that the Florida Supreme Court has jurisdiction of final orders of courts imposing sentences of death. See also Section 921.141(4), Florida Statutes.

STATEMENT OF THE CASE

Defendant Daniel Lugo was charged by Indictment with numerous counts.[1] In particular, it was alleged that

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[1] These counts were: conspiracy to commit racketeering (RICO), in violation of Section 895.03(4), Florida Statutes [**Count I**]; one count of racketeering (RICO), in violation of Section 895.03(3), Florida Statutes [**Count II**]; two counts of first degree murder, in violation of Sections 782.04(1) and 777.011, Florida

Daniel Lugo joined various other defendants between

Statutes [**Counts III & IV**]; two counts of kidnapping, in violation of Section 787.01 and 777.011, Florida Statutes [**Counts V & VI**]; one count of attempted extortion, in violation of Sections 836.05, 770.04 and 777.011, Florida Statutes [**Count VIII**]; two counts of grand theft auto, in violation of Sections 812.014(2)(c)6 and 777.011, Florida Statutes [**Counts IX & XV**]; one count of attempted first degree murder, in violation of Sections 782.04(1), 777.04, 775.087 and 777.011, Florida Statutes [**Count X**]; one count of armed kidnapping, in violation of Section 787.01 and 777.011, Florida Statutes [**Count XI**]; one count of armed robbery, in violation of Sections 812.13(2)(a)(b) and 777.011, Florida Statutes [**Count XII**]; one count of Burglary of a Dwelling, in violation of Sections 810.02(3) and 777.011, Florida Statutes [**Count XIII**]; one count of grand theft second degree, in violation of Sections 812.014(1)(2)(b) and 777.011, Florida Statutes [**Count XIV**]; one count of possession of removed identification plate, in violation of Sections 319.30(5)(b) and 777.011, Florida Statutes [**Count XVI**]; one count of first degree arson, in violation of Sections 806.01(1) and 777.011, Florida Statutes [**Count XVII**]; one count of extortion, in violation of Sections 836.05 and 777.011, Florida Statutes; eight counts of money laundering, in violation of Sections 896.101(2)(a) and 777.011, Florida Statutes [**Counts XIX through XXVII**]; six counts of forgery, in violation of Sections 831.01 and 777.011, Florida Statutes (**Counts XXVIII, XXXI, XXXIV, XXXVII, XL, XLIII**]; six counts of uttering a forged instrument, in violation of Sections 831.02 and 777.011, Florida Statutes [**Counts XXX, XXXIII, XXXVI, XXXIX, XLII and XLV**]; and one count of conspiracy to commit a first degree felony, to wit: abduction and/or robbery and/or extortion, in violation of Sections 812.13, 787.01, 836.05, 777.04(4)(b) and 777.011, Florida Statutes [**Count XLVI**]. (R. 61-111).

October, 1994, and June, 1995, in committing the aforementioned crimes against two separate sets of victims: Krisztina Furton and Frank Griga, and Marcello Schiller and Diana Schiller. Defendant was found guilty on all counts. (R. 4330-4338). After the penalty phase, the jury returned an advisory verdict. The court sealed the verdict. (R. 4731; T. 13161-13164). On June 11, 1998, the court published the jury's verdict. The jury recommended the death sentence by a vote of 11-1 on both counts of first degree murder. (R. 4751; R. 4753-4754; T. 13173-13176). The trial court, thereafter, issued its sentencing order. (R. 5493-5514; T. 13245-13278). The court imposed the death penalty on Counts III and IV. (R. 5512; T. 13279).

At trial, the state did not provide notice of the aggravating circumstances on which it intended to rely in seeking the death penalty; the jury did not make specific written findings with respect to each aggravating circumstance submitted; the jury instructions were not altered to reflect that the trial court could **not** override

a jury verdict of life imprisonment; the jury was not instructed that aggravating circumstances must be found unanimously and beyond a reasonable doubt; and the jury was not instructed that it can sentence the defendant to death only if it has agreed unanimously on the existence of at least one aggravating circumstance and only if it finds unanimously and beyond a reasonable doubt that such aggravating circumstances outweigh the mitigating circumstances.

Defendant filed initial and reply briefs in this appeal. This Court entertained oral argument on Defendant's appeal on August 30, 2001. The decision in this appeal is pending.

ISSUES PRESENTED

(I)

WHETHER DEFENDANT'S SENTENCES OF DEATH VIOLATED APPRENDI V. NEW JERSEY AND SHOULD, THEREFORE, BE VACATED

SUMMARY OF ARGUMENT

Defendant's sentences of death violated the U.S. Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), and should, therefore, be vacated. This Court has previously rejected challenges to Florida's capital sentencing scheme based on Apprendi, reasoning that "[b]ecause Apprendi does not overrule Walton [v. Arizona, 497 U.S. 639 (1990)]," which upheld the constitutionality of judge sentencing in capital cases, "the basic scheme in Florida is not overruled either." Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), cert. denied, 121 S.Ct. 1752 (2001). However, the U.S. Supreme Court recently agreed in Ring v. Arizona, 122 S.Ct. 865 (2002), to decide whether Apprendi overrules Walton. The validity of the holding in Mills is, therefore, dependent

on the outcome of Ring. The potential implication of Ring for Florida is underscored by the fact that the U.S. Supreme Court has stayed two Florida executions in which the defendants specifically presented the question whether Apprendi overrules Walton, Hildwin v. Florida, 490 U.S. 638 (1989)(per curiam), and Spaziano v. Florida, 468 U.S. 447 (1984). Bottoson v. Florida, 27 Fla.L.Weekly S119 (Fla. Jan. 31, 2002), stay granted, No. 01-8099, (U.S. Feb. 5, 2002); King v. Florida, 27 Fla.L.Weekly S65 (Fla. Jan. 16, 2002), stay granted, No. 01-7804, (U.S. Jan. 23, 2002). The stays in Bottoson and King, therefore, reflect the view of the U.S. Supreme Court that Ring may indeed have significant implications for the constitutionality of Florida's capital sentencing scheme, and consequently, directly impact Defendant's appeal herein.

Florida's capital sentencing scheme, like the hate crimes statute at issue in Apprendi, exposes a defendant to enhanced punishment--death rather than life imprisonment--when a murder is committed "under certain circumstances but not others." 530 U.S. at 484. However,

Florida law fails to comply with the Sixth Amendment and Due Process requirements of Apprendi. Section 921.141, Florida Statutes, is, therefore, facially unconstitutional under Apprendi and Defendant's sentence of death should be vacated. Even if Section 921.141, Florida Statutes, is not facially unconstitutional, it was unconstitutional as applied to Defendant because the trial court did not implement minimal substantive and procedural protections in his capital jury penalty phase to comport with the requirements in Apprendi.

ARGUMENT

(I)

DEFENDANT'S SENTENCES OF DEATH VIOLATED APPRENDI V. NEW JERSEY AND SHOULD, THEREFORE, BE VACATED

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the U.S. Supreme Court held that "it is unconstitutional for a legislature to remove from the jury assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)(quoting Jones v. United States, 526 U.S. 227, 252-53 (1999)). Grounding its decision both in the traditional role of the jury under the Sixth Amendment and principles of due process, the High Court made clear that

> "[i]f a defendant faces punishment beyond that providedby statute when an offense is committed under certain circumstances but not others...it necessarily follows that the defendant should not ---at the moment the state is put to proof of those circumstances--- be deprived of protections that have, until that point unquestionably attached." Id. at 484.

These essential protections include (1) notice of the government's intent to establish facts that will enhance the defendant's sentence, (2) determination by a jury that (3) such facts have been established by the government beyond a reasonable doubt. Id. at 490; Jones, 526 U.S. at 231.

This Court has previously rejected challenges to Florida's capital sentencing scheme based on Apprendi, reasoning that "[b]ecause Apprendi does not overrule Walton [v. Arizona, 497 U.S. 639 (1990)]," which upheld the constitutionality of judge sentencing in capital cases, "the basic scheme in Florida is not overruled either." Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), cert. denied, 121 S.Ct. 1752 (2001). The U.S. Supreme Court recently agreed in Ring v. Arizona, 122 S.Ct. 865 (2002), however, to decide whether Apprendi overrules Walton. The validity of the holding in Mills is therefore dependent on the outcome of Ring.

The potential implication of Ring for Florida is underscored by the fact that the U.S. Supreme Court has

stayed two Florida executions in which the defendants specifically presented the question whether Apprendi overrules Walton, Hildwin v. Florida, 490 U.S. 638 (1989)(per curiam), and Spaziano v. Florida, 468 U.S. 447 (1984). Bottoson v. Florida, 27 Fla.L.Weekly S119 (Fla. Jan. 31, 2002), stay granted, No. 01-8099, (U.S. Feb. 5, 2002); King v. Florida, 27 Fla.L.Weekly S65 (Fla. Jan. 16, 2002), stay granted, No. 01-7804, (U.S. Jan. 23, 2002). The standard for granting a stay of execution pending disposition of a petition for certiorari includes the requirement that there be a significant possibility that the Court will reverse the decision below. Barefoot v. Estelle, 463 U.S. 880, 895 (1983). The stays in Bottoson and King, therefore, reflect the view of the U.S. Supreme Court that Ring may indeed have significant implications for the constitutionality of Florida's capital sentencing scheme, and consequently, directly impact Defendant's appeal herein.

The views of several justices on the United States Supreme Court create serious doubt whether Walton, or the

Florida cases on which it was based,[2] can ultimately be reconciled with Apprendi. See Apprendi, 530 U.S. at 521 (Thomas, J., concurring) ("Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide-as, previously, it freely could

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[2] As Justice O'Connor observed in Apprendi, Walton

> [r]el[lied] in part on our decisions rejecting challenges to Florida's capital sentencing scheme, which also added that "`the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" Walton, [497 U.S.] at 648 (quoting Hildwin v. Florida, 490 U.S. 638, 640-641 (1989) (per curiam)). Apprendi v. New Jersey, 530 U.S. at 537 (O'Connor, J. dissenting).

In Walton itself, the Court found that:

> "The distinctions Walton attempts to draw between the Florida and Arizona statutory scheme are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Walton, 497 U.S. at 648.

and did, - that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."); Apprendi, 530 U.S. 538 (O'Connor, J., dissenting) ("If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today."); Jones v. United States, 526 U.S. 227, 272 (1999)[3] (Kennedy, J., dissenting) ("If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death"). Although Justice Stevens

[3] Jones v. United States, 526 U.S. 227 (1999), "foreshadowed" the holding in Apprendi. Apprendi 530 U.S. at 476.

distinguished Walton in Apprendi, he has previously made clear his view that the right to a jury should "appl[y] with special force to the determination that must precede a deprivation of life," Spaziano, 468 U.S. at 482-83 (Stevens,J., dissenting); see also Jones, 526 U.S. at 253 (Stevens,J., concurring)(noting that Walton should be "reconsidered in due course" in light of Court's holding of defendant's entitlement to jury determination of facts that increase maximum sentence).

Other Courts have similarly expressed doubt whether Apprendi can possibly be reconciled with Walton. See State v. Ring, 25 P.3d 1139, 1151 (Ariz 2001), cert. granted, 122 S.Ct. 865 (2002) ("While the state is correct in noting that neither Jones nor Apprendi overruled Walton, we must acknowledge that both cases raise some question about the continued viability of Walton"); United States v. Promise, 255 F.3d 150, 159-60 (4th Cir.2001)(en banc) (characterizing the continued authority of Walton in light of Apprendi as "perplexing, if not baffling" and a "conundrum") (quoting Apprendi, 530 U.S. at 538

(O'Connor,J.,dissenting)); Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001), petition for cert. filed, 69 U.S.L.W. 3763(U.S. May 23, 2001)(No.00-1775)(noting that Apprendi "may raise some doubt about Walton"); People v. Kaczmarek, 741 N.E.2d 1131, 1142 (Ill.App. 2000)("while it appears Apprendi extends greater constitutional protections to noncapital, rather that capital defendants, the Court has endorsed this precise principle, and we are in no position to secondguess that decision here"). Indeed, one federal circuit judge found this irreconcilability so intolerable that he refused to consider Walton authoritative, reasoning that the Apprendi Court failed to articulate a "majority position about the continued viability of Walton". Hoffman, 236 F.3d at 547 (Pregerson, J., concurring separately).

Florida's capital sentencing scheme is indistinguishable from the New Jersey statutory mechanism found unconstitutional in Apprendi. Apprendi involved the interplay of four statutes. The first statute, N.J.Stat.Ann. Section 2C:39-4(a)(West 1995), defined the

elements of the underlying offense of possession of a firearm for an unlawful purpose. The second statute, N.J. Stat.Ann Section 2C:43-6(a)(2)(West 1995), established that the offense is punishable by imprisonment for "between five and 10 years." The third statute, N.J. Stat.Ann. Section 2C:44-3(e)(West Supp. 2000), defined additional elements required for punishment of possession of a firearm for an unlawful purpose when committed as a "hate crime". The fourth statute, N.J. Stat.Ann. Section 2C:43-7(a)(3)(West Supp. 2000), extended the authorized additional punishment for offenses to which the hate crime statute applied. <u>See</u> <u>Apprendi</u>, 530 U.S. at 469-70. Each statute is independent, yet operated together to authorize Apprendi's punishment. The Court in <u>Apprendi</u> held that under the due process clause, all essential findings separately required by both the underlying offense statute <u>and</u> the statute defining the elements of punishment had to be charged, tried, and proved to the jury beyond a reasonable doubt.

Florida's capital sentencing scheme also involves the interplay of several statutes: (1) Section 782.04(1)(a), Florida Statutes, defines the capital crime of first-degree murder, and the only elements it contains are those necessary to establish premeditated or felony first-degree murder; (2) Section 782.04(1)(b), Florida Statutes, provides that when the elements of section 782.04(1)(a) have been proved, the requirements of Section 921.141, Florida Statutes (1992), apply to determine sentence; (3) Section 775.082(1), Florida Statutes, provides that a defendant convicted of first degree murder is to be punished by life imprisonment unless "the procedure set forth in Section 921.141 results in findings by the court that such person shall be punished by death"; and (4) Section 921.141(3), Florida Statutes, sets forth the findings that must be made by the trial court to support a sentence of death, including whether there are "sufficient aggravating circumstances", as set forth in Section 921.141(5), Florida Statutes. The court must find the existence of at least one aggravating factor beyond a

reasonable doubt, before the defendant is eligible for the death penalty, see State v. Dixon 283 So.2d 1, 9 (Fla. 1973)(aggravating circumstances set forth in section 921.141(5) "actually define those crimes...to which the death penalty is applicable in the absence of mitigating circumstances"); Blanco v. State, 706 So.2d 7, 13 (Fla. 1997)(Anstead, J., concurring specially) ("Under Florida's death penalty scheme, a convicted defendant cannot qualify for the death sentence unless one or more statutory aggravators are found to exist in addition to the conviction for first degree murder"). The court must then determine whether the mitigating circumstances are sufficient "to outweigh the aggravating circumstances". Section 921.141(3), Florida Statutes.

Florida's capital sentencing scheme, like the hate crimes statute at issue in Apprendi, thus exposes a defendant to enhanced punishment--death rather than life imprisonment--when a murder is committed "under certain circumstances but not others." 530 U.S. at 484. However,

Florida law fails to comply with the Sixth Amendment and Due Process requirements of Apprendi because:

1. it does not require that aggravating circumstances be charged in the indictment or that the state otherwise provide notice of the aggravating circumstances on which it intends to rely in seeking the death penalty, see, e.g., Vining v. State, 637 So.2d 921, 927 (Fla. 1994);
2. it does not require the jury to make any written findings as to the existence of aggravating circumstances, see, e.g., Pooler v. State, 704 So.2d 1375, 1381 (Fla. 1997); Fotopolous v. State, 608 So.2d 784, 794 n.7 (Fla. 1992);
3. it does not require the jury's verdict, which is only "advisory" in any event, to be unanimous, see Section 921.141(2)(a) &(3), Fla. Stat;
4. the statute improperly shifts the burden to the defense to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist", section 921.141(2)(b) &(3)(b), Fla. Stat; and
5. the trial court can impose a sentence of death even when the jury has recommended life, section 921.141(3) Fla. Stat.

Section 921.141, Fla. Stat., is, therefore, facially unconstitutional under Apprendi and Defendant's sentence of death should be vacated.

Even if Section 921.141, Fla. Sta., is not facially unconstitutional, it was unconstitutional as applied to Defendant because the trial court did not implement the following minimal substantive and procedural protections in his capital jury penalty phase:

1. The state did not provide notice of the aggravating circumstances on which it intends to rely in seeking the death penalty;
2. The jury did not make specific written findings with respect to each aggravating circumstance submitted;
3. The jury instructions were not altered to reflect that the trial court could **not** override a jury verdict of life imprisonment.
4. The jury was not instructed that a particular aggravating circumstance must be found unanimously and beyond a reasonable doubt;
5. The jury was not instructed that it can sentence the defendant to death only if it has agreed unanimously on the existence of at least one aggravating circumstance and only if it finds unanimously and beyond a reasonable doubt that

such aggravating circumstances outweigh the mitigating circumstances.

The foregoing measures would have been required to protect Defendant's rights to due process, to a fair trial by jury, to equal protection of the laws, and to protection against cruel and/or unusual punishment under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2,9,16,17 and 22 of the Florida Constitution.

CONCLUSION

Daniel Lugo respectfully requests that this Honorable Court enter an order reversing his sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Lisa A. Rodríguez, Esq., Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida, 33131-2407, on this 30th day of April, 2002.

____

J. RAFAEL RODRIGUEZ

CERTIFICATE OF COMPLIANCE

Appellant states that the size and style of type used in his amended supplemental brief is Courier 10cpi, 12 point font.

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J. RAFAEL RODRIGUEZ