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

****

REPLY 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, "T" will designate the trial transcript, and "ASB" will designate Supplemental Brief of Appellee.

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. The continued validity of this Court's decision Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), cert. denied, 121 S.Ct. 1752 (2001), is dependent on the outcome of Ring v. Arizona, 122 S.Ct. 865 (2002), where the U.S. Supreme Court agreed to decide whether Apprendi overrules Walton,

upon which the decision in Mills relied. Contrary to the State's argument, the statutory maximum for first degree murder is life imprisonment, unless the court makes specific findings of fact that the defendant shall be punished by death. As such, Florida's capital sentencing scheme, like the hate crimes statute reviewed in Apprendi, exposes a defendant to enhanced punishment- death rather than life imprisonment- when a murder is committed under certain circumstances but not others and, therefore, Apprendi applies to Florida's sentencing scheme. Regardless of the lack of objection or argument, fundamental error permits this Court to review this issue. It is apparent that the imposition of the death penalty in this case, under the capital sentencing scheme at issue herein, goes to the very foundation or merits of the case itself. Irrespective of specific preservation of an issue, this Court may, in any event, consider the retroactive application Apprendi, and the ensuing decision in Ring clarifying Apprendi's application to capital sentencing schemes, to this appeal because the decision(s)

(1) emanates either from this Court or the United States Supreme Court; (2) is constitutional in nature; and (3) has fundamental significance. In this case, all three criteria are satisfied. At a minimum, it would be prudent to await the decision in Ring before any final opinion is issued by this Court in this appeal.

ARGUMENT

(I)

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

The U.S. Supreme Court has held 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." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)(quoting Jones v. United States, 526 U.S. 227, 252-53 (1999)). If a defendant faces punishment beyond that provided by 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. Apprendi v. New Jersey, at 484.

The State argues that Apprendi is not applicable to Florida's capital sentencing scheme because death is the statutory maximum. (Appellee's Supplemental Brief, p. 4).

A review of the applicable statutes shows that under Section 782.04(1), Florida Statutes, murder in the first degree is a capital offense punishable as provided in Section 775.082, Florida Statutes. Section 775.082(1), Florida Statutes, provides that a person convicted of a capital felony shall be punished by death "if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole." Section 921.141(3), Florida Statutes, provides that notwithstanding the recommendation of a majority of the jury, the court shall enter a sentence of life imprisonment or death and must set forth in writing its specific findings of facts upon which the sentence of death is based within 30 days after rendition of judgment and sentence. Based on the foregoing, it is obvious that the statutory maximum for first degree murder is life imprisonment, unless the court makes specific findings of

fact that the defendant shall be punished by death. Florida's capital sentencing scheme, like the hate crimes statute reviewed in Apprendi, exposes a defendant to enhanced punishment- death rather than life imprisonment- when a murder is committed "under certain circumstances but not others." Apprendi, 530 U.S. at 484. It is apparent that Apprendi does, in fact, apply to Florida's sentencing scheme.

Florida law is contrary to the principles espoused in Apprendi. Under Florida law, the state is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase, the jury is not required to make any specific findings regarding the existence of aggravating circumstances, there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death, and the state is not required to prove the appropriateness of the death penalty beyond a reasonable doubt.

The State points out that this Court has previously rejected challenges to Florida's capital sentencing scheme. In Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), cert. denied, 121 S.Ct. 1752 (2001), this Court reasoned that Apprendi did not undermine Florida's capital sentencing scheme "[b]ecause Apprendi does not overrule Walton [v. Arizona, 497 U.S. 639 (1990)]," which upheld the constitutionality of judge sentencing in capital cases. However, the continued validity of Mills **is dependent** on the outcome of the U.S. Supreme Court's decision in Ring v. Arizona, 122 S.Ct. 865 (2002), **where the U.S. Supreme Court agreed to decide whether Apprendi overrules Walton**. Should Walton be overruled in Ring, it is obvious that the validity of the holding in Mills will be put in question. The State asserts that Ring will not affect Florida's capital sentencing scheme because Ring will only deal with judge-only sentencing. (ASB, pp. 4-5). The State makes the remarkable statement that any holding that Apprendi extends to capital sentencing schemes would

not implicate the concerns raised by Defendant in this appeal (ASB, p. 5). It is rather presumptuous for the State to suggest that the U.S. Supreme Court will limit its decision strictly to judge-only sentencing jurisdictions or extend Apprendi to capital sentencing schemes but, somehow, miraculously avoid the obvious constitutional issues raised by Defendant in this case.[1] In any event, as noted previously, **Florida's capital sentencing scheme assigns to the judge the ultimate decision to impose the penalty of death**. In Florida, the jury does not sentence any defendant to death or life imprisonment. As such, Defendant submits that any decision by the U.S. Supreme Court which undermines judge-sentencing schemes will inevitably affect Florida's capital sentencing scheme.

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[1] Should the U.S. Supreme Court extend Apprendi to capital sentencing schemes, the decisions in Schad v. Arizona, 501 U.S. 624 (1991), Johnson v. Louisiana, 406 U.S. 356 (1972), Apodaca v. Oregon, 406 U.S. 404 (1972), and Griffin v. United States, 502 U.S. 46 (1991), cited by the State, will unquestionably be affected.

It is notable, moreover, that the State does not address the potential implication of Ring for Florida in light of 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 State maintains that Defendant did not adequately preserve the record on the foregoing issue and, therefore, this Court should not consider this issue on appeal. Defendant asserts that fundamental error permits this Court to review this issue regardless of the lack of objection or argument as noted by the State. It is apparent that the imposition of the death penalty in this case, under the capital sentencing scheme at issue herein, goes to the very foundation or merits of the case itself. Irrespective of specific preservation of an issue, this Court may, in any event, consider the retroactive application Apprendi, and the ensuing decision in Ring clarifying Apprendi's application to capital sentencing schemes, to this appeal if the decision(s) (1) emanates either from this Court or the United States Supreme Court; (2) is constitutional in nature; and (3) has fundamental significance. Witt v. State, 387 So.2d 922, 929-30 (Fla. 1980). In this case, all three criteria are satisfied.

The decision in Apprendi, and the pending decision in Ring, are opinions of the U.S. Supreme Court. Those decisions are constitutional in nature. The decisions have fundamental significance. Moreover, this appeal is still pending before this Court. A decision by the U.S. Supreme Court in Ring is expected sometime this year. The ramifications of Ring could clearly affect the ultimate, irrevocable penalty for Defendant in this case. At a minimum, it would be prudent to await the decision in Ring before any final opinion is issued by this Court in this appeal.

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 Sandra S. Jaggard, Esq., Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida, 33131-2407, on this 13th day of May, 2002.

_____
J. RAFAEL RODRIGUEZ

CERTIFICATE OF COMPLIANCE

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

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J. RAFAEL RODRIGUEZ