IN THE SUPREME COURT OF FLORIDA

CHARLES ANDERSON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

_____/

CASE NO. 95,773

L.T. 94-15182 CF-10A

APPELLEE'S AMENDED SUPPLEMENTAL ANSWER BRIEF

ON DIRECT APPEAL FROM THE CIRCUIT COURT
BROWARD COUNTY, FLORIDA
DANIEL TRUE ANDREWS, CIRCUIT COURT JUDGE

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PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as "Appellant" or "Defendant." Appellee, the State of Florida, was the prosecution below and will be referred to herein as "Appellee" or the "State." Reference to the record on appeal will be by the symbol "R," to the transcripts will be by the symbol "T," reference to any supplemental record or transcripts will be by the symbols "SR[vol.]" or ST[vol.]," and reference to Appellant's brief will be by the symbol "IB," followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Appellee relies upon her Answer Brief herein.

SUMMARY OF THE ARGUMENT

There is no support for the claim that Florida's capital sentencing statute is constitutionally infirm as inconsistent with the Sixth Amendment right to a jury trial. Ring v. Arizona, 122 S. Ct. 2428 (2002), provides no basis for consideration of this claim because this Court (unlike the Arizona Supreme Court) has previously recognized that the statutory maximum sentence for first degree murder is death. However, even if this court reaches the merits of the claim, the determination would not be retroactive. Furthermore, even if this court recedes from all of it's prior Sixth and Eighth Amendments decisions, any error is harmless where the jury has

recommended death and the aggravators fall outside the scope of Apprendi/Ring. Florida's sentencing scheme passes constitutional muster because it requires the jury to participate in the penalty phase.

ARGUMENT

THE DEATH SENTENCE DOES NOT VIOLATE THE UNITED STATES AND FLORIDA CONSTITUTIONS, AND APPRENDI V. NEW JERSEY, 530 U.S. 466(2000), AND RING V. ARIZONA, 120 S. CT. 2348 (2002), DO NOT APPLY TO FLORIDA'S CAPITAL SENTENCING SCHEME. (RESTATED).

Appellant argues that his death sentence violates Apprendi v. New Jersey, 520 U.S. 466 (2000). This claim has been raised and rejected by this court. In Mills v. Moore, 786 So. 2d 532 (Fla. 2001) this court found that the rule announced by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000) requiring any fact increasing penalty for a crime beyond the prescribed statutory maximum to be submitted to jury and proved beyond reasonable doubt, does not apply to the state capital sentencing scheme. Furthermore, this court has found that Apprendi does not apply in a capital sentencing scheme because death is the statutory maximum sentence upon conviction for murder. Spencer v. State, SC. No. 00-1051, 2002 WL 534441 (Fla. April 11, 2002); Bottoson v. State, 27 Fla. L. Weekly s119 (Fla. Jan 31, 2002); King v. State, 808 So. 2d 1237 (Fla. 2002); Card v. State, 803 So. 2d 613 (Fla. 2001). Florida's capital sentencing statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976).

As a preliminary matter, Appellant's claim is not properly preserved for appellate review. It is well established that for an issue to be preserved for appeal, it

must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). In the instant case, appellant never argued below that his sentence must be decided by the jury, nor did he argue that the trial judge could not make the necessary findings to support the imposition of the death sentence. Therefore, this claim is not properly before this court.

Moreover, the recent decision of the U.S. Supreme Court in Ring v. Arizona, 122 S. Ct. 2445 (2002) is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Anderson's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case.

The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue had found that Apprendi is not retroactive. See, e.g., McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of Apprendi has, likewise, determine that the decision is not retroactive. Whisler v. State, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury). Anderson's argument that Ring presents a case of fundamental significance is not persuasive. The

fact that the question accepted for review in Ring presented potential far-reaching implications does not mean that the ultimate opinion issued meets the Witt standard of fundamental significance. Since, as will be seen, Ring has little or no impact on capital sentencing in Florida, it is not a case of fundamental significance. Clearly, Ring does not demonstrate that any "obvious injustice" occurred on the facts of this case.

Furthermore, Ring does not apply to Florida's death penalty scheme. The Arizona statute at issue in Ring is different from Florida's death sentencing statute:

> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum penalty he could have received was life imprisonment.

Ring v. Arizona, 122 S.Ct. at 2437. Under Arizona law, the determination of death eligibility takes place during the penalty phase proceedings, and requires that an aggravating factor exists. This Court has previously recognized that the statutory maximum for first degree murder in Florida is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore,

800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Ring, at *13; Mullaney v. Wilbur, 421 U.S. 684 (1975)

Moreover, contrary to Appellant's claim, Ring does not require jury sentencing in capital cases, rather it involves only the requirement that the jury find the defendant death-eligible. Id. at n.4. A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. Notably, the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). It quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). Ring, at *9, n.4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death

sentence.

Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. Ring, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge); Ring, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, *i.e.*, one aggravator, at either the guilt or penalty phase. Tuilaepa v. California, 512 U.S. 967, 972 (1994)(observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). So, once a jury has found one aggravator, the constitution is satisfied, the judge may do the rest. We know this is true because the Court in Apprendi held, and reaffirmed in Ring, that a prior violent felony aggravator satisfied the Sixth Amendment; therefore, no further jury consideration is necessary once a qualifying

aggravator is found.

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in Ring which suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." Ring, at *18 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. Anderson unfairly criticizes state law for requiring judicial participation in capital sentencing, but does not identify how judicial findings after a jury recommendation can interfere with the right to a jury trial. Any suggestion that Ring has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

The jury's role in Florida's sentencing process is also significant. Section 921.141, Florida Statutes, states:

> **(1) Separate proceedings on issue of penalty.--** Upon conviction or adjudication of guilt of a defendant of

> a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...
>
> **(2) Advisory sentence by the jury.**--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. The jury's role is so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. Espinosa v. Florida, 509 U.S. 1079 (1992).

Furthermore, to the extent that Anderson claims the death penalty statute is unconstitutional for failing to require juror unanimity, or the charging of the

aggravating factors in the indictment, or special jury verdicts, Ring provides no support for his claims. These issues are expressly not addressed in Ring, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. Sweet v. Moore, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); Cox v. State, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002) (noting that prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from Proffitt v. Florida, 428 U.S. 242 (1976)).

As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." Mills, 786 So. 2d at 537. The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of Anderson's claims.

In addition, Ring affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. See Ring at *14; Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). Anderson's argument,

suggesting that the jury role in Florida's capital sentencing process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. When the jury recommends death, it necessarily finds an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth Amendment as construed in Ring. To the extent that Ring suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element" would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. Anderson asserts that the jury must determine death to be the appropriate sentence, but nothing in Ring supports Anderson's speculation that the ultimate sentencing determination is an additional "element" which must be proven beyond a reasonable doubt.

Moreover, to the extent that Anderson claims that Ring requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of federal cases, which have wholly different procedural requirements, to Florida's capital sentencing scheme. Of

course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. Apprendi, 530 U.S. at 477, n.3 (2000); Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). This distinction, standing alone, is dispositive of the indictment claim, at least as far as Anderson relies on federal cases. For example, in United States v. Allen, 247 F.3d 741, 764 (8th Cir. 2001), the Court of Appeals based its decision that the statutory aggravating factors under the Federal Death Penalty Act do not have to be contained in the indictment exclusively on Walton v. Arizona, which, of course, Ring overruled. It is hardly surprising that the United States Supreme Court remanded Allen for reconsideration in light of Ring.

The United States Supreme Court elaborated on Apprendi in Harris v. United States, which was released on the same day as Ring. In Harris, the Court described the holding in Apprendi in the following way:

> Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.

Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002). In light of that plain statement by the United States Supreme Court, which speaks volumes in the interpretation of Ring, there is no basis for relief of any sort.

Therefore, Ring has no effect on prior decisions upholding Florida's capital

sentencing scheme. However, should there be any question about the correctness of this conclusion, Florida juries routinely "authorize" the imposition of the death penalty by recommending that a death sentence be imposed, as in the instant case.

Additionally, the requirements of Apprendi and Ring were met in this case. Apprendi requires a jury rather than a judge make the determination of certain facts and that those facts be proven beyond a reasonable doubt rather than by the preponderance standard. Both requirements were met. The jury recommended a death sentence and the aggravators were proven beyond a reasonable doubt. Anderson cannot present a valid Apprendi challenge to Florida's death penalty statutes. Anderson had a jury at sentencing. The jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Anderson's jury then recommended a death sentence by an 8 to 4 vote. A capital defendant who has had a jury recommend death simply cannot claim that his right to a jury trial was violated. There can be no violation of the right to a jury trial under these facts. Thus, the death penalty imposed in this case does not violate Apprendi.

Moreover, not only did Anderson have a jury that recommended death but one of the aggravators that the judge relied on was found by the jury in the guilt phase. In this case, the trial court found the prior violent felony aggravating circumstance (R.

932-956). The judge's finding of the prior violent felony aggravator is exempted from the holding in Apprendi. Apprendi explicitly exempted recidivist factual findings from its holding. Apprendi, 530 U.S. at 490 (holding, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).[1] Thus, a trial court may make factual findings regarding recidivism. Walker v. State, 790 So.2d 1200, 1201 (Fla. 5th DCA 2001)(noting that Florida courts, consistent with Apprendi's language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to an Apprendi). Here, the trial court found the prior violent felony aggravator. This is a recidivist aggravators. Recidivist aggravators may be found by the judge even in the wake of Ring. Ring, 122 S.Ct. 2445 at n.4 (noting that none of the aggravators at issue related to past convictions and that therefore the holding in Almendarez-Torres v. United

[1] The *Apprendi* majority noted that it is arguable that *Almendarez-Torres* was "incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Apprendi* at 489, 120 S.Ct. 2348. However, contrary to this observation, exempting recidivism from the holding in *Apprendi* is logical. The Sixth Amendment guarantees the right to a jury trial, not two. Any defendant, who is a recidivist, has already had a jury find the underlying facts of conviction at the higher standard of proof. The judge, in a recidivist sentencing situation, is merely taken judicial notice of the prior jury's verdict. A defendant is entitled to one jury trial, not two.

States, 523 U.S. 224(1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged). Therefore, the prior violent felony aggravator may be found by the judge even in the wake of Ring. Hence, the death sentence should be affirmed.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this honorable Court to **AFFIRM** Appellant's conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Supplemental Answer Brief," has been furnished by U.S. mail, postage prepaid, to: RICHARD B. GREENE, Assistant Public Defender, 15th Judicial Circuit, 421 Third Street/6th Floor, West Palm Beach, Fl., 33401 on this _____ day of _____, 2002.

_____
Melanie A. Dale

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 14 point Times New Roman.

_____
Melanie Ann Dale