IN THE SUPREME COURT OF FLORIDA

CHARLES ANDERSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 95,773
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Seventeenth Judicial Circuit of Florida,
In and For Broward County (Criminal Division)

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PRELIMINARY STATEMENT

Appellant will rely on his previous briefs with the following addition. The following additional symbols will be used. "SAB" Supplemental Answer Brief of Appellee. "SIB" Supplemental Initial Brief of Appellant.

STATEMENT OF THE CASE

Appellant will rely on his previous briefs.

STATEMENT OF THE FACTS

Appellant will rely on his previous briefs.

ARGUMENT

THE DEATH SENTENCE VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS PURSUANT TO APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000) AND RING V. ARIZONA, _____ U.S. _____, 120 S. CT. 2348 (JUNE 24, 2002).

Appellee first argues that the issues in this case are not preserved, without any explanation or citation to the record. SAB3-4. On the contrary, as discussed in Appellant's Supplemental Brief, the issues in this case are properly preserved. SIB4.

Mr. Anderson filed a Motion for Statement of Aggravating Circumstances. IR134-138. He filed a Motion to declare Fla. Stat. 921.141 unconstitutional due to the fact that the jury's penalty recommendation is only by a bare majority. IR188-9. He filed a Motion for Statement of Particulars as to aggravating circumstances. IIR202-3. Mr. Anderson filed a Motion to Declare 921.141 unconstitutional which contained a specific objection that the jury does not make findings of aggravating circumstances. IR146-7. Oral argument was held on these motions and the trial court denied them. VIT26-30, 35-41, 46, 48, 61-63. Thus, the issues involved were raised below.

The issues involved in Apprendi and Ring constitute fundamental error which would require reversal even in the absence of an objection. Apprendi and Ring are grounded in the right to a jury trial. The right to a jury trial can only be waived by a personal waiver on the record by the defendant. State v. Upton,

658 So. 2d 86 (Fla. 1995). No such waiver took place in the current case.

Appellee then makes an argument that Ring is not "a candidate for retroactive application in collateral proceedings." SAB5. However, this is a direct appeal case and thus this argument is irrelevant to any issue in this case.

Appellee consistently asserts that Appellant is arguing that Ring requires jury sentencing. SAB7. However, Mr. Anderson never made such an argument. SIB15.

The bulk of Appellee's Brief is devoted to arguing that Florida's death-sentencing scheme differs from Arizona's. The asserted differences boil down to two:

1. Appellee says that "in Florida the statutory maximum sentence for first degree murder is death." SAB6. But the Attorney General of Arizona said exactly the same thing about the Arizona statute invalidated in Ring v. Arizona, 122 S. Ct. 2428 (2002). The United States Supreme Court dispatched that argument as follows:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by Apprendi, Arizona first restates the Apprendi majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks

> Apprendi's instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494,.... In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." Ibid.; see 200 Ariz., at 279, 25 P.3d, at 1151. The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," Apprendi, 530 U.S., at 541... (O'CONNOR, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See § 13-1105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703." (emphasis added). If Arizona prevailed on its opening argument, Apprendi would be reduced to a "meaningless and formalistic" rule of statutory drafting. See 530 U.S., at 541... (O'CONNOR, J., dissenting)."

Ring, 122 S. Ct. at 2440-2441 (emphasis added).

From the standpoint "not of form, but of effect," there is no rational way to distinguish either Florida's statutory structure or its actual functioning from Arizona's. Identically to Ariz.Rev.Stat.Ann. § 13-1105(C) and even more explicitly Fla. Stat. § 775.082 "cross-references the statutory provision" of Fla. Stat. § 921.141, requiring additional findings by a judge, not by a jury as the precondition for imposition of the death penalty (Ring, 122 S. Ct. at 2440):

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceedings held to determine sentence according to the procedure set forth

> in § 921.141 result in a finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Fla. Stat. § 775.082 (1993) (emphasis added).

2. Appellee's second attempted distinction of the Arizona procedure invalidated in Ring says that "[t]he jury's role in Florida's sentencing process is significant," SAB9, because juries render an advisory verdict as to whether the defendant should live or die. This argument ignores the explicit holding and rationale of both Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring. The teaching of those two cases is that every fact which must be found as the necessary precondition for enhancing a defendant's maximum possible sentence from imprisonment to death is required by the Sixth Amendment to be found by a jury in the same way, and for the same reasons, that the Sixth Amendment requires a jury to find every fact which is the necessary precondition for conviction of a crime. As Ring states: "Apprendi repeatedly instructs . . . that the characterization of a fact or circumstance as an `element' [of a crime] or a `sentencing factor' is not determinative of the question `who decides,' judge or jury." Ring, 122 S. Ct. at 2441.

Is Appellee seriously arguing that this Court could sustain a first-degree murder conviction based solely on a judge's written finding of premeditation or felony-murder, simply because a jury sat through the guilt trial and, at the end of the trial, before the judge retired to make his or her findings and convict the

defendant, the jury rendered an advisory verdict saying that "the defendant should be found guilty".

- without the jury making any finding of premeditation or felony murder (or of any other fact), and
- without the jury being charged that it needs to make any specific finding of fact in order to recommend conviction, and
- the jury has been specifically charged that its verdict is only advisory and will not result in the defendant's conviction, and
- there is no evidence the jury was able to achieve unanimity with respect to any single basis for its fact-free advisory verdict?

That proposition cannot survive scrutiny.

Appellee also claims that there is no basis for a requirement that the death eligibility factors be charged in the indictment. However, Apprendi itself supports this requirement.

The Court in Apprendi described its prior holding in Jones v. United States, 526 U.S. 227 (1999):

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311

> (1999), construing a federal statute. We there noted that "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." Id., at 243, n. 6, 119 S.Ct. 1215. The Fourteenth Amendment commands that same answer in this case involving a state statute.

530 U.S. at 476. (Emphasis supplied).

Appellee makes much of the fact that this case involves a jury recommendation of death. SAB14-15. Assuming arguendo, that a jury's advisory recommendation can ever satisfy Ring, it does not do so in the current case as the jury's recommendation of death was only by a vote of 8 to 4. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of twelve and verdicts in capital cases must be unanimous. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979),the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. However, it has never upheld a verdict of less than nine to three, even in a non-capital case. A recommendation of eight to four can not satisfy the Federal Constitution after Apprendi and Ring.

Florida law requires a unanimous verdict. Williams v. State, 438 So. 2d 781, 784 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3rd DCA 1992); Fla.R.Crim.P. 3.440. The eight to four recommendation is in violation of this rule.

Appellee also asserts that one of the aggravators found by the jury was based on a finding of the jury in the guilt phase. SAB15. However, the only thing found by the jury in the guilt phase was that Mr. Anderson was guilty of first degree murder without any specification of premeditation or felony-murder. III572. This does not involve a finding of any aggravating circumstance.

Appellee makes much of the fact that the trial judge found the prior violent felony aggravator and argues that this constitutes an exception to the rule of Ring and Apprendi due to the decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998). Almendarez-Torres does not control for two reasons. (1) It is questionable whether the so-called "recidivist exception" of Almendarez-Torres remains viable after Apprendi. (2) Florida law requires more than the finding of an aggravator for death eligibility. The aggravator must be sufficiently weighty to call for the death penalty. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). In the present case neither the judge nor the jury made a finding that the prior violent felony alone was sufficiently weighty to

call for the death penalty. Thus, even if the recidivist exception remains the law it does not control this case.

Justice Thomas provided the crucial fifth vote in Almendarez-Torres. In Apprendi, he states that Almendarez-Torres was incorrectly decided. 120 S. Ct. at 2378-80. A majority of the current United States Supreme Court has either dissented in Almendarez-Torres or stated that it should be overruled. Thus it is of questionable validity. Even if it does survive, it does not control this case. Fla. Stat. 921.141 requires that there be sufficient aggravating circumstances prior to a person being eligible for the death penalty. This Court emphasized this requirement in upholding the constitutionality of the Florida statute. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Even if the judge is authorized to find the prior violent felony aggravator, neither the judge nor the jury made a finding that this aggravator alone is sufficiently weighty to call for death. Thus, Ring was not satisfied.

Wherefore, Mr. Anderson's death sentence must be reversed and reduced to life imprisonment.

CONCLUSION

For the foregoing reasons, Mr. Anderson's sentence must be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Melanie A. Dale, Assistant Attorney General, 1515 North Flagler Drive, 9th floor, West Palm Beach, Florida 33401-3432 this _____ day of August, 2002.

_____
RICHARD B. GREENE
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this _____ day of August, 2002.

_____
RICHARD B. GREENE
Counsel for Appellant