IN THE SUPREME COURT OF FLORIDA

JOHN CALVIN TAYLOR II,

Appellant,

CASE NO. SC96,959

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLEE'S SUPPLEMENTAL ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, JOHN CALVIN TAYLOR II, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "SB" will refer to appellant's supplemental brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

The jury recommended death by a 10 to 2 vote. (V 847).

SUMMARY OF ARGUMENT

Taylor asserts that his death sentence violates the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Taylor has failed to preserve any *Apprendi* issue for appeal. Furthermore, *Apprendi* does not apply to capital sentencing. And even if *Apprendi* applies to capital sentencing, the requirements of *Apprendi* 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. Taylor cannot present a valid *Apprendi* challenge to Florida's death penalty statutes. Taylor had a jury at sentencing. A 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. Taylor's jury then recommended death by a 10 to 2 vote. In Florida, only override cases present even the possibility of an *Apprendi* violation. Only a defendant in a jury override case has any basis to raise an *Apprendi* challenge to Florida's death penalty statute. Thus, the death penalty imposed in this case does not violate *Apprendi*.

ARGUMENT

ISSUE I

DOES *APPRENDI* APPLY WHEN THE JURY RECOMMENDS DEATH? (Restated)[1]

Taylor asserts that his death sentence violates the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Even if *Apprendi* applies to capital sentencing, the requirements of *Apprendi* 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. Taylor cannot present a valid *Apprendi* challenge to Florida's death penalty statutes. Taylor had a jury at sentencing. A 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. Taylor's jury then recommended death by a 10 to 2 vote. In Florida, only override cases present even the possibility of an *Apprendi* violation. Only a defendant in a jury override case has any basis to raise an *Apprendi* challenge to Florida's death penalty statute. Thus,

[1] Taylor frames the *Apprendi* claim as a due process and cruel and unusual punishment issue. *Apprendi* involved the due process clause right to a reasonable doubt standard of proof and the Sixth Amendment right to a jury trial, not the Eighth Amendment prohibition on cruel and unusual punishment.

the death penalty imposed in this case does not violate *Apprendi*.

The standard of review

Whether the right to a jury trial is violated is reviewed *de novo*. *United States v. Harris*, 244 F.3d 828, 829 (11th Cir. 2001)(holding that the applicability of *Apprendi* is a pure question of law reviewed *de novo*);*United States v. Arellano-Rivera,* 244 F.3d 1119, 1127 (9th Cir.2001)(concluding that whether the district court violated the constitutional rule expressed in *Apprendi* is a question of law reviewed *de novo*). Hence, the standard of review is *de novo*.

Preservation

This issue is not preserved. Taylor did not object at trial to judge sentencing or assert that the jury alone must decide the sentence.[2] Such challenges, like other constitutional

[2] While *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), had not been decided at the time of the trial, the federal precuror to *Apprendi, Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), had been decided. *Jones* held in a federal carjacking case 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. *Jones*, 526 U.S. at 243 n.6. All *Apprendi* did was apply the *Jones* standard to state cases. Taylor could have argued that *Jones* overruled in *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) and *Walton v. Arizona*, 497 U.S. 639 (1990). Moreover, even before *Jones*, Taylor could have asserted that the Sixth Amendment was violated judge sentencing.

challenges to statutes, must be preserved. *Cf. McGregor v. State*, 789 So.2d 976, 977 (Fla. 2001)(holding that petitioner did not properly preserve the *Apprendi* issue for appellate review); *Hertz v. State*, 803 So.2d 629, 647 (Fla. 2001)(holding that a constitutional challenge to the victim impact statute in a capital case was not preserved because Hertz did not file any motion concerning the constitutionality of the statute in the trial court). Taylor did not present the same argument to the trial court that he presents to this court on appeal. Thus, his *Apprendi* claim is not preserved.

Taylor did file a motion to declare § 782.04 and § 921.141 unconstitutional. (I 103). Taylor argued that the state constitution and due process required notice of the particular aggravating circumstances and that the weighing process be proven beyond a reasonable doubt. (103-105). The trial court denied this motion. (IV 602). However, Taylor filed a motion for a statement of aggravating circumstances. (II 244-247). The trial court granted Taylor's motion for a statement of aggravating circumstances.(IV 599).[3] Thus, Taylor is precluded from raising any lack of notice claim. It is only his claim that due process requires that the weighing of aggravators and mitigators be proven at the beyond a reasonable doubt standard that is properly preserved.

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[3] Undersigned counsel could not located the State's statement of particular aggravators in the record in the record on appeal. However, if counsel did not actually receive the statement of particular aggravating circumstances as required by the trial court's order, he should have moved to enforce the order in the trial court not raise the issue on appeal.

Merits

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

This Amendment requires a jury trial to determine guilt, not punishment. Traditionally, a determination of the appropriate punishment was a function of the judge, not a function of the jury. As the United States Supreme Court observed in *Spaziano v. Florida*, 468 U.S. 447, 459 (1984), the Sixth Amendment never has been thought to guarantee a right to a jury trial on the issue of punishment.

In *Apprendi*, the Supreme Court held that, "[o]ther 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 proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63. However, the *Apprendi* Court noted that its holding did not apply to capital cases because the statutory maximum in a capital case is death. The *Apprendi* Court explained that once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. *Apprendi*, 530 U.S. at 496, 120 S.Ct. at 2366. Thus, the *Apprendi* Court did not overrule *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), which upheld Arizona's death penalty statute providing

for judge-only death sentencing. Basically, because death is within the statutory maximum for first degree murder, a judge may determine the facts relating to a sentence of death just as the judge may do with any other fact within the statutory maximum.[4]

The dissent, written by Justice O'Connor and joined by three other Justices, would allow the legislature to determine which facts may be determined by the judge. The dissent also discussed *Walton*, noting that under Arizona law, the judge, not the jury, determines the penalty. *Apprendi*, 120 S.Ct at 2387. But the dissent, in contrast with the majority, concluded that the statutory maximum for first degree murder is actually life. The dissent reasoned that if a State can remove from the jury's province to determination of facts that make the difference between life and death, as *Walton* holds, then it is "inconceivable why a state cannot do the same with a determination of facts that increased the penalty by ten years". Thus, the dissent clearly rejected the assertion that there is anything constitutionally improper about have the judge determine facts that would increase the punishment beyond the statutory maximum.

Thus, at least four members of the majority and all four dissenters in *Apprendi*, albeit for different reasons, would

[4] Justice Thomas, who joined the majority opinion, also wrote a concurring opinion proffering additional principles supporting the result reached by the majority, and likewise distinguishing capital cases. *Apprendi*, 120 S.Ct. at 2368 et seq. However, Justice Thomas stated that whether these distinctions are sufficient to put capital punishment outside his announced principles is a question for another day.

agree that the constitution does not prohibit a state from allowing a judge to find the facts necessary to impose a death sentence.

Taylor asserts that *Apprendi* applies to capital cases because the statutes at issue are similar and that aggravators, like the biased purpose at issue in *Apprendi*, are "hotly disputed". All this is irrevelant. *Apprendi* did not hold that certain types of statutes involve facts that must be considered elements or that "hotly disputed" facts are elements. The holding of *Apprendi* was that any fact that increases the penalty for a crime beyond the statutory maximum must be treated as an element. Critical to *Apprendi* was whether the fact increased the statutory maximum. If the fact does not increases the penalty beyond the statutory maximum, the fact may be treated as a *McMillan* "sentencing factor" and be decided by the judge alone. *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). Hence, because death is within the statutory maximum, as this Court held in *Mills v. Moore*, 786 So.2d 532 (Fla. 2001), a judge may impose a death sentence without the jury.

In *Mills v. Moore*, 786 So.2d 532 (Fla. 2001), this Court held that *Apprendi* did not apply to capital cases. Mills argued that the statutory maximum was life, not death. Mills asserted that only after further proceedings was death a possible sentence and that unless and until the judge holds a separate hearing, life was the only possible sentence. This Court rejected this argument, noting that according to the plain language of the

statutes, the statutory maximum was "clearly death." *Mills*, 786 So.2d at 538.

In *State v. Ring*, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 122 S.Ct. 865 (January 11, 2002), the Arizona Supreme Court held that the statutory maximum for first degree murder in Arizona is life. The *Ring* Court explained that in Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict; rather, it is only after a subsequent sentencing hearing, at which the judge alone acts as fact finder regarding aggravating circumstances, that a defendant may be sentenced to death. *Ring*, 25 P.3d at 1151. The United State Supreme Court certiorari. The question presented in *Ring* is: "Whether *Walton v. Arizona* should be overruled in light of this court's subsequent holding, in *Apprendi v. New Jersey*, that for the legislature to remove from jury assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed violates defendant's Sixth Amendment right to jury trial?"

The issue in *Ring* is limited to the constitutionality of state death penalty statutes where sentencing is limited to judges only and no jury is involved. *Ring* will not determine the constitutionality of Florida's death penalty statute. Arizona's and Florida's death penalty statutes differ. In Arizona, no jury is involved in the penalty phase; whereas, in Florida, a jury is involved in the penalty phase and makes a sentencing recommendation. As the United State Supreme Court has recognized, the jury is a co-sentencer in Florida. *Lambrix v. Singletary*, 520 U.S. 518, 528, 117 S.Ct. 1517, 1525, 137 L.Ed.2d

771 (1997)(citing *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)). Florida's death penalty statute is jury plus judge sentencing, not judge only sentencing.[5]

Furthermore, *Ring* cannot affect the holding in *Mills* because they involve different state statutes. Arizona's and Florida's death penalty statutes both require a separate penalty phase at which aggravating circumstances must be established before a death sentence may be imposed. Both Mills and Ring made the same argument; namely, that because a separate proceeding is required at which aggravating circumstances are established, the statutory maximum for first degree murder is life, not death. However, this Court, in *Mills*, following the logic of *Apprendi*, held that death is the statutory maximum for first degree murder. Hence, because the Florida Supreme Court has held that death is within the statutory maximum for first-degree murder, in line with the reasoning of the *Apprendi* majority, *Ring* has no import for Florida capital sentencing.

Furthermore, this Court's holding in *Mills* that death is the statutory maximum is historically more accurate than the Arizona Supreme Court's holding in *Ring*. Both the common law and the more recent legislative history in the wake of *Furman* support this Court's holding that death is the statutory maximum.

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[5] Only the five states with 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 directly challenged in *Ring*. Brief in Ring at 38 & n.36. Ring limited his attack on Florida's death penalty scheme to override cases. Brief at n.16.

CAPITAL SENTENCING AT COMMON LAW

It is commonly asserted that, at common law, the "mandatory" punishment for all felonies was death. In fact, capital punishment was not mandatory. For certain capital felonies, a judge, using the concept of benefit of clergy, could sentence a defendant to imprisonment, branding, confiscation of goods, whipping or banishment instead of death.[6] *In re Shannon B.*, 22 Cal.App.4th 1235, 1240, 27 Cal.Rptr.2d 800, 803 (1994), citing, 1 Joseph Chitty, The Criminal Law, 666-674 (2d ed. 1826). Benefit of clergy originally meant that the defendant was a member of the clergy and as such was exempt from secular liability. However, the concept subsequently developed into a means for avoiding the harshness of the death penalty. It was extended in the fourteenth century to anyone who could read,[7] and then in 1706 to everyone. By the early nineteenth century, benefit of clergy was available to all first time offenders for

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[6] 18 Eliz., ch. 7, §§ II-III (1576); Transportation Act of 1718, 4 Geo. I, ch. 11. England banished these felons to the Colonies - first to America and then, after the American Revolution to Botany Bay in Australia. From 1718 until 1776, 30,000 to 50,000 felons were banished or "transported", mainly to Maryland and Virginia, rather than being put to death. ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718-1775, 27 (1987). In 1779 Parliament abolished branding and prescribed whippings or fines instead. The Penitentiary Act, 1779, 19 Geo. 3, ch. 74

[7] This is the origin of the term "neck verse", the ability to read the bible, usually Psalm 51:1, kept one's neck out of the noose. DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE 440 (1999).

all felonies except those felonies which were explicitly made non-clergyable by statute. Thus, the punishment for many capital felonies was discretionary, with a wide variety of sanctions available other than death, which was "left to the wisdom of the court." *In re Shannon B.*, 22 Cal.App.4th 1235, 1240, 27 Cal.Rptr.2d 800, 803 (1994), citing, 1 Joseph Chitty, The Criminal Law, 711 (2d ed. 1826); See also 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, ch. 13 (1883).

Nor was imposition of less than a death sentence a rare occurrence. Indeed, the majority of defendants convicted of certain capital felonies were imprisoned or banished.[8] It was

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[8] Before the Transportation Act in 1718, estimates are that sixty percent of defendants convicted of clergyable felonies were branded and imprisoned rather than being put to death and after the Act, seventy percent were banished rather than being put to death. MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750 -1850 , at 20 (1978); J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660 -1800 , at 538, 546, 560 (1986). From 1718-1769, while nearly 70% of convicted felons were transported to America, only 15.5% were hanged with the remainder being given even lesser punishments. ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES 1718-1775, 21 (1987). One law review provides a table of Capital Sentences and Executions at the Lancaster Assizes:

Time Period	1774-75	1781-82	1786-87	1791-92
# of Death Sentences	6	8	21	15
# of Executions	0	1	9	8

George Fisher, *The Birth of the Prison Retold*, 104 Yale L.J. 1235, 1274 (1995). For a famous example, Ben Jonson, the playwright and poet, killed an actor; he claimed benefit of clergy, was branded on the thumb and had his goods confiscated

the judge, rather than the jury, who determined if a defendant was entitled to benefit of clergy. David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. Chi L. Sch. Roundtable 475, 481-482 (1995)(describing the development of the concept of benefit of clergy and noting that a judge who wished to banish a defendant convicted of a clergyable felony could choose to apply the literacy requirement strictly and find that the defendant was not literate and thus not entitled to benefit of clergy).[9] So, often the judge decided who lived and who died at common law and at the time the Sixth Amendment was adopted.[10]

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rather than being put to death. The most famous American example is the Boston Massacre trial. In 1770, British soldiers shot into a crowd of Americans killing five. Eight of the soldiers were tried. Most were acquitted but two were convicted of manslaughter. John Adams, the second president, was the defense attorney. John Adams pled benefit of clergy to avoid the death penalty for his clients. See the Massachusetts Supreme Court Historical Society website at http://www.sjchs-history.org/massacre.html for a detailed history of the trial.

[9] Juries did, on occasion, become involved in decisions regarding benefit of clergy. Second offenders were not entitled to benefit of clergy and therefore, factual disputes arose regarding the identity of a defendant as first offender. *State v. Carroll*, 2 Ired. 257 (N.C. 1842)(holding that defendant convicted of grand larceny who prayed for benefit of clergy but the prosecutor argued he was not entitled to such a benefit because he had been convicted previously had a right to a trial by a jury as to his identity where he claimed that he was not the same person previously convicted)

[10] The First Congress prohibited benefit of clergy for federal defendants. 1 Stat. 118-19, sec. 29 (1790). However, from 1790 to 1897, more capital defendants were pardoned than were put to death. In 1829, the President issued a report, in response to a House Resolution, documenting that there had been 118 federal capital convictions in this time frame. H.R. Rep.

FURMAN

In 1838, Tennessee abolished mandatory capital sentencing and moved to unfettered discretion. *Woodson v. North Carolina*, 428 U.S. 280, 291 (1976)(explaining the historical development of discretionary capital sentencing among the states). By 1897, the federal government abolished mandatory capital sentencing and moved to unfettered discretion.[11] By the turn of the last century, twenty-two jurisdictions, likewise, had adopted unfettered discretion in capital sentencing. *Woodson*, 428 U.S. at 291; John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 151 (1986).

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court held that the Eighth Amendment prohibited arbitrary or capricious imposition of the death penalty. Since *Furman*, the United States Supreme Court has insisted on channeling and limiting a sentencer's discretion in imposing the death penalty to minimize the risk of arbitrary

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No. 53-545 (1894). Of these, forty-two offenders had been executed and sixty-four had been pardoned. Thus, executive pardons meant that even federal capital offense were not actually mandatory in the sense of being the actual punishment. In the States, the concept of benefit of clergy continued. *Commonwealth v. Posey*, 8 Va. (4 Call) 109, 124 (1787)(discussing the limits of benefit of clergy in a capital arson case).

[11] Act of Jan. 15, 1897, ch. 29, 29 Stat. 487 (1898). This Act allowed the jury to qualify their verdict by adding "without capital punishment." *Winston v. United States*, 172 U.S. 303 (1899)(explaining that this Act committed the decision over whether the defendant should live or die to the sound discretion of the jury, and of the jury alone).

and capricious action. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980)(quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976))(opinion of Stewart, Powell and Stevens, JJ.); *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). Thus, there is an Eighth Amendment limit on the power of a capital sentencer.

When *Furman* was decided in 1972, forty-one jurisdictions had discretionary capital punishment. *Spaziano v. Florida*,468 U.S. 447, 472 (1984)(Stevens, J. dissenting). Of these, thirty-nine jurisdictions, including Arizona and Florida, had jury sentencing.

Spaziano,468 U.S. at 472(Stevens, J. dissenting). From 1872 to 1972, in Florida, a jury decided whether a defendant lived or died. *Spaziano v. Florida*, 468 U.S. 447, 474 (1984)(Stevens, J. dissenting). In response to *Furman*, the Florida legislature amended the death penalty statute to provide for a jury recommendation but with final discretion resting with the judge. *Spaziano*, 468 U.S. at 470, 474. (Stevens, J. dissenting)(describing Florida death penalty statute as an unusual "trifurcated" procedure involving a determination of guilt or innocence by the jury, an advisory sentence by the jury but the actual sentence imposed by the trial judge). From 1901 to 1973 in Arizona, a jury decided whether a defendant lived or died. *Adamson v. Ricketts*, 865 F.2d 1011, 1024 (9th Cir. 1988)(en banc)(citing A.R.S. of 1956 Sec. 13-453(A); A.R.S. of 1955 Sec. 13-453; Ariz.Code of 1939 Sec. 43-2903; Rev.Code of Ariz. of 1928 Sec. 4585; A.R.S. of 1913, 13 Penal Code Sec. 173; Ariz. Penal Code of 1901 Sec. 174). In response to *Furman*, the

Arizona legislature amended the death penalty "to remove the deficiencies described by the *Furman* decision." *Adamson*, 865 F.2d at 1024 & n.19, quoting *State v. Murphy*, 555 P.2d 1110, 1111 (Ariz. 1976). The responsibility for deciding whether a defendant would receive a sentence of life or death was taken from the jury and reassigned to the judge. *Adamson*, 865 F.2d at 1024-1025.[12]

In response to *Furman*, States adopted a number of procedures to address the Eighth Amendment concerns of this Court, including bifurcated proceedings; adoption of the Model Penal Code's aggravating circumstances scheme and judge sentencing. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143 (1986)(noting that thirty-five states enacted new legislation in response to *Furman* including a table of these statutes and opining that all of this legislation, including the special circumstances death penalty statutes, were modeled on the Model Penal Code's death penalty provision, § 210.6). All five states whose death penalty statutes are being challenged in *Ring*, *i.e.*, Arizona, Colorado, Idaho, Montana and Nebraska, as well as Alabama and Florida, adopted judge sentencing as a response to this Court's concerns

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[12] The holding in *Adamson* was that the Arizona sentencing scheme violated the Sixth Amendment right to a jury trial. *Adamson v. Ricketts*, 865 F.2d 1011, 1023-1029 (9th Cir. 1988)(en banc). However, as the Ninth Circuit recognized in *Adamson v. Lewis*, 955 F.2d 614 (9th Cir. 1992)(en banc), the United States Supreme Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990), overruled this holding.

in *Furman*. John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 28 U. MIAMI L. REV. 143 643, 645 (1990)(explaining that the problem created by the Model Penal Code's aggravating circumstance scheme did not arise until four states, i.e., Arizona, Idaho, Montana, and Nebraska, patterned their capital sentencing procedures on that provision in legislation adopted in response to *Furman*).

Furthermore, there is no doubt that death was the statutory maximum punishment for capital murder in states with capital punishment prior to *Furman*. It is only the addition of the concept of aggravating circumstances to these state's death penalty statutes that raises the issue of the statutory maximum. Thus, historically, in every capital punishment state, death was the statutory maximum.[13]

AGGRAVATORS AS ELEMENTS

Aggravators are not elements of the offense; rather, they are guidelines for capital sentencing. *Poland v. Arizona*, 476 U.S. 147, 156, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986)(explaining that aggravating circumstances are not separate penalties or offenses but rather are standards to guide the making of the choice between the alternative verdicts of death and life

[13] Florida viewed a life recommendation from a jury as a recommendation of mercy within the statutory maximum. This is clear from the title of the statute being challenged in *Furman*. The Florida Statute being challenged in *Furman* was § 921.141, Florida Statutes (1971), which was entitled "Recommendation of Mercy".

imprisonment.). While, according to *Apprendi*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, aggravating circumstances do not increase the statutory maximum. Rather, they are constitutionally mandated guidelines created for Eighth Amendment sentencing purposes. While the death penalty cannot be imposed in the absence of aggravating circumstances, the purpose of this requirement is to narrow the class of defendant who receive the death penalty, not to increase the punishment. It is not historically accurate to view aggravators as increasing the penalty to death; rather, it is the absence of aggravators that lowers the penalty to life. Sentencing considerations required by the Eighth Amendment cannot be classified as elements of the offense. Aggravators are as designed as limits on either a judge or a jury. They are limitations on discretion, not sentence enhancers. Aggravators are a toggle within the statutory maximum. Thus, aggravators are not traditional elements.

NOTICE OF AGGRAVATORS, WRITTEN FINDINGS & UNANIMITY

Taylor presents a list of alleged *Apprendi* requirements such as notice of the aggravators, specific written jury findings and jury unanimity. *Apprendi* did not mention any of these concerns. Neither notice of aggravators, nor written findings nor jury unanimity was discussed in *Apprendi*. No view of *Apprendi* supports this laundry list.

As to notice of the aggravators in the indictment, Taylor asserts that *Apprendi* requires that a capital defendant be given notice of the particular aggravating circumstances that the State intends to prove at the penalty phase. However, the particular aggravators do not have to be pled in the indictment. The *Apprendi* Court specifically declined to address the omission in the indictment of biased purpose because it was not asserted. *Apprendi*, 530 U.S. at 477, n.3, 120 S.Ct. at 2355, n.3. More importantly, the Grand Jury Clause of the Fifth Amendment does not apply to the States. *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884)(holding, in a capital case, that States are not required to indict). States do not have to charge by indictment. They may charged by information even in a capital case. The federal Constitution is silent on what must be in an indictment because the federal Constitution does not require any indictment in a state prosecution. Only the Due Process Clause's notice requirements apply to the States.

A defendant in a capital case has notice that the State is seeking the death penalty, and that is all the due process clause requires. Charging documents were critical at common law because that was the sole limit on trial by surprise. The charging document was the sole notice of or information about the case a criminal defendant had. In modern times, charging documents are of marginal importance. With modern discovery practices, it is impossible for a criminal defendant to lack the notice required by due process. A defendant has extensive notice of the prosecution's case. Defendants know the name of

every witness the State may call to testify and may dispose those witness. A defendant knows every piece of evidence the State intends to use at trial. Florida has the most extensive criminal discovery in the nation. *O'Callaghan v. State,* 429 So.2d 691, 695 (Fla.1983)(holding defendant is not prejudiced from State proceeding under felony murder theory where indictment charged only premeditated murder because of the reciprocal discovery rules, the defendant had full knowledge of both the charges and the evidence that the state would submit at trial and noting that this "is much more information than he would have received in almost any other jurisdiction, federal or state"). Florida, and most states with modern discovery practices, more than comply with the due process notice requirement. Due process notice is simply not an issue in a state with our type of discovery.

Moreover, because aggravators are akin to alternative theories of liability, notice of particular aggravators is not required. Just as charging first degree murder in the indictment is sufficient notice of a felony murder theory, that the State is seeking death is sufficient notice of aggravators. *Gudinas v. State*, 693 So.2d 953, 964 (Fla. 1997)(rejecting the claim that the State may not pursue a felony murder theory when the indictment charged premeditated murder citing *Bush v. State*, 461 So.2d 936, 940 (Fla.1984)(explaining that the defendant was not prejudiced by not knowing the specific theory upon which the state would proceed). The North Carolina Supreme Court has rejected a similar claim. *State v. Golphin*, 533 S.E.2d 168,

193-94 (N.C. 2000)(concluding that *Apprendi* does not affect prior holdings that an indictment need not contain the aggravating circumstances the State will use), *cert. denied*, 523 U.S. 931, 121 S.Ct. 1379, 149 L.Ed.2d 305 (2001). Thus, *Apprendi* has no import for State's charging practices in capital cases and States need only give notice thorough some document that it intends to seek the death penalty to satisfy due process, not which particular aggravators it intends to rely on.

It is solely state law that requires capital cases be charged by indictment. Art. I § 15(a); Fla.R.Crim.P. 3.140(a)(1); *Lowe v. Stack*, 326 So.2d 1 (Fla. 1974)(noting that first degree murder requires an indictment rather than an information).[14] Taylor makes no state law based argument in his supplemental brief. This Court has consistently held that the particular aggravating circumstances do not have to be included in the indictment or provided in a statement of particulars. *Tafero v. State*, 403 So.2d 355 (Fla. 1981)(holding that the State is not

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[14] Article I, Section 15(a) of the Florida Constitution, provides:

> No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

The rule of criminal procedure governing indictments and informations of capital crimes, Rule 3.140(a)(1), provides:

> An offense that may be punished by death shall be prosecuted by indictment.

required to inform the defendant, prior to trial, as to the specific aggravating circumstances which State intends to prove, citing *Menendez v. State*, 368 So.2d 1278 (Fla. 1979) and *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978)).[15]

As to written findings, the *Apprendi* Court did not require that the jury make a written finding of biased purpose. *Apprendi* merely required that the fact of "biased purpose" be submitted to the jury like any other element. *Apprendi* did not hold or imply that each element of a crime requires a written finding by the jury. Moreover, the judge, who is a co-sentencer, made written findings. As to jury unanimity, this Court has rejected a claim that *Apprendi* requires an unanimous jury recommendation. *Card v. State*, 26 Fla. L. Weekly S670 (Fla. 2001)(rejecting an argument that *Apprendi* requires an unanimous jury verdict because "this Court consistently had held that a capital jury may recommend a death sentence by a bare majority vote."). *Apprendi* is simply inapposite to the issue of whether a jury recommendation should be unanimous. *Apprendi* involved what facts a jury must decide, not the question of what constitutes a "jury". *Apprendi* requires that a fact that is used to increase the statutory maximum be treated as an element of the crime; it did not change the jurisprudence of unanimity. *Apprendi* concerned who should be the decision-maker, not whether a jury of seven is a jury. *Apprendi* simply has nothing to say

[15] Taylor should have had actual notice of the aggravators in this case. As noted previously, the trial court granted Taylor's motion for a statement of aggravating circumstances (IV 599). See footnote 3 and companion text.

regarding either the number of jurors required or the unanimity required of a jury.

The sentence of death statute, § 921.141(3), provides:

> Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . .

The legislature has determined that a jury recommendation of death may rest on a majority vote, *i.e.* seven of the twelve jurors. *Way v. State*, 760 So.2d 903, 924 (Fla. 2000)(Pariente, J., concurring)(noting that it is a statute that allows the jury to recommend the imposition of the death penalty based on a non-unanimous vote). This Court has consistently held that a jury may recommend a death sentence on simple majority vote.[16] The United State Supreme Court has also held that even a finding of guilt does not need to be unanimous.[17] Nor do jurors have to agree in the particular aggravators just has they are not required to agree on the particular theory of liability. *Schad v. Arizona*, 501 U.S. 624, 631, 111 S.Ct. 2491, 2497, 115 L.Ed.2d

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[16] *Thompson v. State*, 648 So.2d 692,698 (Fla. 1994)(holding that it is constitutional for a jury to recommend death based on a simple majority and reaffirming *Brown v. State*, 565 So.2d 304, 308 (Fla. 1990); *Alvord v. State*, 322 So.2d 533 (Fla. 1975)(holding jury's advisory recommendation as the sentence in a capital case need not be unanimous).

[17] *Cf. Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (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, 92 S.Ct. 1628, 32 L.Ed.2d 184 (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).

555 (1991)(plurality opinion)(holding that due process does not require jurors to unanimously agree on alternative theories of criminal liability but declining to address whether the constitution requires a unanimous jury verdict as to guilt in state capital cases). Thus, *Apprendi* did not change the jurisprudence of jury unanimity.

AGGRAVATORS & STANDARDS OF PROOF

One of the major concerns of the *Apprendi* Court was the legislature's ability to circumvent the beyond a reasonable doubt standard of proof constitutionally required by *In re Winship*, 397 U.S. 358 (1970). *Apprendi*, 530 U.S. at 490, n.16. A legislature could lower the standard of proof from beyond a reasonable doubt to a mere preponderance by labeling any fact as a sentencing factor rather than an element. The *Apprendi* Court noted that the "reasonable doubt" requirement has a vital role in our criminal procedure. *Apprendi*, 530 U.S. at 484. Indeed, as Justice Scalia observed in his dissent in *Monge*, a state could, before *Apprendi*, enact only one offense, akin to simple battery then authorize a series of "sentencing enhancements", such as whether the victim died, that would enhance the crime to first degree murder. All of these enhancements would be determined by a judge at the preponderance of the evidence standard bypassing the right to a jury trial with requirement of proof beyond a reasonable doubt. *Monge v. California*, 524 U.S. 721, 738 (1998)(Scalia, J., dissenting)(concluding that if the protections extended to criminal defendants by the Bill of

Rights can be so easily circumvented, then those rights are "vain and idle enactments."). The judge, in many ways, is merely the conduit by which the legislature lowers the standard of proof. *Apprendi* can be viewed more standard of proof case than as a right to a jury trial case. Indeed, the *Apprendi* Court framed the issue as a due process issue, not a jury trial issue. *Apprendi*, 530 U.S. at 469 (stating that the question presented is whether Due Process . . . requires that a factual determination authorizing an increase in the maximum prison sentence . . . be made by a jury on the basis of proof beyond a reasonable doubt).

However, this concern is not present with capital sentencing aggravators. In most (perhaps all) States, including Florida, aggravators must be proven beyond a reasonable doubt. *Rogers v. State*, 783 So.2d 980, 992-993 (Fla. 2001)(stating that aggravator must be proven beyond a reasonable doubt, citing *Geralds v. State*, 601 So.2d 1157, 1163 (Fla. 1992)).[18] There are

[18] Most states and the federal death penalty statute require that the existence of an aggravating circumstance be proven beyond a reasonable doubt. 18 U.S.C. § 3593(c); 21 U.S.C. § 848(j); Ark. Code Ann. § 5-4-603(a)(1) (Michie 1993); Cal. Penal Code § 190.4(a) (West 1988); Ga. Code Ann. § 17-10-30(c) (Supp.1996); Kan. Stat. Ann. § 21-4624(e) (1995); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1990); La. Code Crim. Proc. Ann. art. 905.3 (West Supp.1997); Md. Code Ann., Crim. Law § 413(d) (Supp.1996); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030 (West Supp.1997); N.H. Rev. Stat. Ann. § 630:5 III (1996); N.J. Stat. Ann. § 2C:11- 3c(2)(a) (West 1995); N.M. Stat. Ann. § 31-20A-3 (Michie 1994); N.Y. Crim. Proc. Law § 400.27 11(a) (McKinney Supp.1997); N.C. Gen. Stat. § 15A-2000 (1996); Ohio Rev. Code Ann. § 2929.03(D)(1) (Anderson 1996); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp.1997); Or. Rev. Stat. § 163.150 (Supp.1994); 42 Pa. Cons. Stat. Ann. § 9711(c)(iii) (West 1982 & Supp.1996); S.C. Code Ann. §

no Due Process Clause concerns with the standard of proof applicable to aggravators. Legislatures are not attempting circumvent the strictures of *In re Winship* in capital sentencing. So, one of the main concerns of *Apprendi* is not present with aggravators.

Furthermore, even if *Apprendi* is extended to capital cases, the higher "beyond a reasonable doubt" standard of proof would be applied to findings in aggravation, not to the weighing process. The weighing process is not fact-finding; rather, it is a balancing process carried out after the facts are found. *Borchardt v. State*, 786 A.2d 631, 637-654, 653, n.6 (Md. App. 2001)(rejecting a claim that, pursuant to *Apprendi*, due process requires a determination that the aggravating circumstances outweigh any mitigating circumstances to be made beyond a reasonable doubt and not by a mere preponderance of evidence and explaining that if the weighing is treated as an element then it would have to be alleged in the charging document which is "a task that can never be attained"). Prior to *Apprendi*, courts that had addressed the standard of proof required by the weighing process also reasoned that the beyond a reasonable doubt standard did not apply because weight is not a fact.[19]

16-3-20(c) (Law. Co-op. Supp.1996); S.D. Codified Laws § 23A-27A-5 (Michie 1988); Tenn. Code Ann. § 39-13- 204(f)(1) (Supp.1996); Tex. Crim. P. Code Ann. § 37.071 (West Supp.1997); Va. Code Ann. § 19.2-264.4C (Michie 1995); Wyo. Stat. Ann. § 6-2- 102(d)(i)(A) (Michie Supp.1996).

[19] *Whisenhant v. State*, 482 So.2d 1225, 1235 (Ala. Crim. App. 1982), aff'd, 482 So.2d 1241, 1245 (Ala. 1983)(observing that while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable

Apprendi requires that the jury find certain facts beyond a reasonable doubt. A jury found the existence of at least one aggravating circumstance was proven beyond a reasonable doubt. Both the jury and the judge found aggravating circumstances at the highest standard of proof. Thus, Taylor's penalty phase met the requirements of *Apprendi*.

RECIDIVIST AGGRAVATORS

Not only did Taylor have a jury that recommended death but two of the aggravators that the judge relied on are exempted from the holding in *Apprendi*. *Apprendi* explicitly exempted recidivist factual findings from its holding. *Apprendi*, 530 at 490, 120 S.Ct. at 2362-63 (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).[20] Thus, a

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doubt or preponderance standard, . . . the relative weight is not); *People v. Rodriguez*, 726 P.2d 113, 144 (Cal. 1986) (observing the sentencing function is inherently moral and normative, not factual); *State v. Sivak*, 674 P.2d 396, 401 (Idaho 1983)(observing weighing process not susceptible to proof); Moore v. State, 479 N.E.2d 1264, 1281 (Ind. 1985) (observing weight not fact, but "balancing process"); *State v. Bolder*, 635 S.W.2d 673, 684 (Mo. 1982) (en banc) (observing not a factual determination, but "a more subjective process"); *Johnson v. State*, 731 P.2d 993, 1005 (Okla. App. 1987)(observing not factual, but a "balancing process"); *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983) (distinguishing proof of facts from the weighing of facts).

[20] 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

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 and the "under sentence of imprisonment" aggravator. Both of these aggravators are recidivist aggravators. Recidivist aggravators may be found by the trial court even if *Apprendi* is extended to capital cases.

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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.

CONCLUSION

The State respectfully requests that this Honorable Court 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 to Nada Carey, Esq., Leon County Courthouse, Suite 401 301 South Monroe Street, Tallahassee, FL 32301 this 25th day of March, 2002.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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