IN THE SUPREME COURT OF FLORIDA

JOHN CALVIN TAYLOR, II,

Appellant,

v. Case No. **SC96,959**

STATE OF FLORIDA,

Appellee.
_____/

AMENDED SUPPLEMENTAL BRIEF OF APPELLANT

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AMENDED SUPPLEMENTAL BRIEF OF APPELLANT

SUMMARY OF ARGUMENT

The indictment did not provide Taylor or the jury notice as to which aggravators the State was seeking to prove. And, although the trial court instructed the jury on aggravating circumstances, the jury was not instructed to make any specific findings as to the aggravators argued by counsel and instructed by the court, nor did it report any such findings. The jury also was not instructed that it must find by some burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty. Nor was the trial court required to find by any burden that the aggravating factors were of sufficient weight to warrant the death sentence. These factors individually and in combination violated Taylor's rights to due process and to

his protection against cruel and/or unusual punishment under the state and federal constitutions. See Apprendi v. New Jersey, 120 S. Ct. 2348 (2000).

ARGUMENT

Point I

THE IMPOSITION OF THE DEATH SENTENCE ON TAYLOR FAILED TO MEET THE REQUIREMENTS OF APPRENDI V. NEW JERSEY, AND THEREFORE VIOLATED HIS RIGHTS TO DUE PROCESS AND PROTECTION AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT.

Appellant asks this Court to declare sections 782.04 and 921.141, Florida Statutes (1997), unconstitutional because they fail to meet the requirements set forth in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). Appellant acknowledges this Court held in Mills v. Moore, 786 So. 2d 532 (Fla. 2001), that Apprendi does not apply to Florida's capital sentencing scheme, relying on dictum in Apprendi suggesting the due process jury-finding requirement applicable to non-capital punishment determinations had not been held to apply to judge-sentencing in capital cases. The United States Supreme Court recently granted certiorari to consider this precise issue in State v. Ring, 25 P.3d 1139 (Ariz. 2001), cert. granted, 122 S. Ct. 865 (Jan. 11, 2002). Additionally, the Supreme Court issued a stay of execution in a Florida case on this question

pending the decision in Ring. See Amos King v. Florida, 2002 WL 85116 (U.S. Fla.)(Jan. 23, 2002). Accordingly, appellant asks this Court to revisit this issue and hold that Apprendi does apply to Florida's capital sentencing scheme and renders it unconstitutional.

The indictment did not provide Taylor or the jury notice as to which aggravators the State was seeking to prove. Under the Florida statutes, the jury is not instructed to make any specific findings as to the three aggravators argued by counsel and instructed by the trial court. The jury is not instructed that it must find by some burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty. The trial court is not required to find by any burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to warrant the death sentence. These factors individually and in combination violated Taylor's rights to due process and to his protection against cruel and/or unusual punishment. See Amends. VIII, XIII, XIV, U.S. Const.; Art. I, ss. 9, 17, Fla. Const.; Apprendi v. New Jersey, 120 S. Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984).

The United States Supreme Court held in Apprendi that due process requires that a jury be apprised of all statutory

elements on which the State relies to increase an individual's punishment, and the jury must find each of those elements proved beyond a reasonable doubt:

> 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 the same answer in this case involving a state statute.

Apprendi, 120 S. Ct. at 2355.

The due process requirements applied in Apprendi require all of the following in a capital case:

* The State must provide notice of the aggravating circumstances in the charging document;

* The State must withhold those alleged circumstances until a jury validly determines guilt of capital murder beyond a reasonable doubt;

* After guilt is determined, the sentencing court must instruct the jury as to the elements of all contested aggravating circumstances, each of which must be proved beyond a reasonable doubt;

* The sentencing court must instruct the jury to find beyond a reasonable doubt that the defendant is death-eligible;

* The sentencing court must instruct the jury to find, beyond a reasonable doubt after weighing the mitigators, that death is the appropriate punishment;

* The sentencing court must require the jury to make specific written findings and present those findings to the court and the parties; and

* The sentencing court must instruct the jury that its findings have to be unanimous.

Because sections 782.04 and 921.141, Florida Statutes, fail to meet these requirements, they are unconstitutional. Because these requirements were not satisfied here, the sentencing procedure in this case was fundamentally flawed.[1] The death sentence should be vacated and the cause remanded for a new jury sentencing.

Under Florida law, statutory aggravating circumstances actually define which crimes are potential death penalty cases. See, e.g, State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Each aggravating circumstance is comprised of separate and distinct elements under Florida law, and each element must be found by the cosentencers to have been proved beyond a reasonable doubt. See e.g., Jackson v. State, 648 So. 2d 85 (Fla. 1994). Likewise, Florida law establishes that a conviction of first-degree murder is not the determinant to

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[1]This issue was raised below in Motion to Dismiss Section 782.04 & 921.141, Florida Statutes, Unconstitutional for a Variety of Reasons, I 103, 114-115, which was denied. I 602.

make a person eligible for the death penalty. Instead, sentencers must find at least one aggravating circumstance proved beyond a reasonable doubt before determining that a defendant is eligible for the death penalty. The sentencers then must determine whether the aggravators are of sufficient weight to warrant a death sentence. If so, the sentencers then must weigh the aggravating circumstances against all mitigation reasonably believed to have been found to reach the ultimate issue of whether life imprisonment or death should be imposed.

Essential facts defined by statute are elements of an offense that must be individually instructed to the finders of fact, and must be proved to them beyond a reasonable doubt. See, e.g., In re Winship, 397 U.S. 358 (1970); State v. Harbaugh, 754 So. 2d 691 (Fla. 2000). Apprendi applied the same principle to punishment determinations that involve juries as fact finders, holding that all statutory elements on which the State relies to punish an individual must be presented to those juries, and the juries must find each of those elements proved beyond a reasonable doubt to satisfy due process, precisely the same as with elements of an offense. There is no principled reason why similar requirements should not apply to each aspect of death sentence determinations in

Florida, in which juries play a pivotal role in finding facts, applying the law to those facts, and making ultimate recommendations that requires great weight.

The New Jersey statutory mechanism found unconstitutional in Apprendi is remarkably similar to the capital sentencing scheme in Florida. Apprendi concerned the interplay of four statutes: (1) The first statute, N.J. Stat. Ann. § 2C:39-4(a) (West 1995), defined the elements of the underlying offense of possession of a firearm for an unlawful purpose; (2) The second statute, N.J. Stat. Ann. § 2C:43-6(a)(2) (West 1995), established that the offense is punishable by imprisonment for "between five years and 10 years;" (3) The third statute, N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000), defined additional elements required for punishment of possession of a firearm for an unlawful purpose when committed as a "hate crime;" (4) The fourth statute, N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 2000), extended the authorized additional punishment for offenses to which the hate crime statute applied. See Apprendi, 120 S. Ct. at 2351. Each statute is independent, yet the statutes must operate together to authorize punishment. The Court held that under the due process clause, all essential findings separately required by both the underlying offense statute and the statute defining the

elements of punishment had to be charged, tried, and proved to the jury beyond a reasonable doubt.

Florida's capital sentencing scheme also requires the interplay of four statutes: (1) Section 782.04(1)(a), Florida Statutes (1993), defines the capital crime of first-degree murder, and the only elements it contains are those necessary to establish premeditated or felony first-degree murder; (2) Section 782.04(1)(b), Florida Statutes (1993), provides that when the elements of section 782.04(1)(a) have been proved, the requirements of section 921.141, Florida Statutes (1995), apply; (3) Section 775.082(1) establishes the penalty for first-degree murder as life imprisonment, or death if the elements of section 921.141 are satisfied; (4) Section 921.141(5) sets forth the essential facts that cosentencers must consider, find proved beyond a reasonable doubt, and weigh in reaching a recommended verdict and sentence. Each statute is independent, yet the statutes must operate together to authorize Taylor's punishment.

In each sentencing scheme, separate provisions of law define elements of proof required for guilt, and the elements of proof required to impose the maximum authorized punishment. Each scheme requires the interplay of distinct provisions of law to reach the ultimate punishment determination. There is

no material distinction between the operation of the two statutory schemes, except, of course, that the New Jersey scheme in Apprendi was not as gravely punitive as the death penalty statutory scheme at issue here.

The rationale employed by the Court in Apprendi fits here as well. Proof of each element of an aggravating circumstance is often "hotly disputed," just as the bias issue for sentencing in Apprendi. See Apprendi, 120 S. Ct. at 2354-55. This is especially true for those aggravators that apply to the offense itself (HAC, CCP, pecuniary gain, felony murder, witness elimination), which involve a perpetrator's mental state, facts peculiarly within the exclusive province of the jury when a jury is a fact-finder and cosentencer. See Apprendi, 120 S. Ct. at 2364 (noting that a defendant's intent in committing a crime, relied upon in sentencing, is as close as one might hope to come to a core criminal offense "element").

An additional violation of Apprendi is the fact that the jury's verdict in support of death can be by a vote as low as 7 to 5. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system in which verdicts in serious felonies must be by at least nine votes out of twelve. 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. See Burch, 441 U.S. at 136. The United States Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. Florida law requires unanimity in a capital case. See, e.g., Williams v. State, 438 So. 2d 781 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956). Given that aggravating circumstances are essential elements that must be instructed and proved beyond a reasonable doubt, and that a jury must find beyond a reasonable doubt that death is warranted before ever reaching the question of mitigation, under Apprendi a death verdict of as little as 7 to 5 violates due process and the protection against cruel and/or unusual punishment guaranteed by the United States and Florida Constitutions.

The indictment in this case is defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that the aggravating factors are sufficiently weighty to call for the death penalty. State v. Harbaugh, 754 So. 2d 691 (Fla. 2000), is instructive. The Court found that when potentially harmful punishment-related facts are alleged in a charging document,

the defendant's due process rights are protected by bifurcating the proceeding and withholding the presentation of the sentence-related charges and facts until the guilt determination is made. Harbaugh recognizes that punishment-related facts must be charged, presented to a jury, and proved beyond a reasonable doubt, in a separate punishment determination proceeding. That rule also is consistent with State v. Overfelt, 457 So. 2d 1385 (Fla. 1984):

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981). But see Tindall v. State, 443 So. 2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

Overfelt, 457 So. 2d at 1387; see also Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA 1999); Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993); Peck v. State, 425 So. 2d 664 (Fla. 2nd DCA 1983).

Accordingly, this Court should find sections 782.04 and 921.141, Florida Statutes, unconstitutional for failure to meet the requirements of Apprendi. Because these requirements were not satisfied here, Taylor's sentencing was fundamentally flawed. His death sentence should be vacated and the cause remanded for a new jury sentencing.

CONCLUSION

Appellant respectfully requests this Honorable Court to vacate his death sentence and remand for resentencing before a new jury.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **CHARMAINE M. MILLSAPS**, Assistant Attorney General, Department of Legal Affairs, The Capital, Tallahassee, FL 32399-1050, and to appellant, **JOHN CALVIN TAYLOR, II**, #J12116, Florida State Prison, Post Office Box 181, Starke, FL 32091-0181, on this ____ day of February 2002.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Fla. R. App. P. 9.210(a)(2), this brief was typed in Courier New 12 point.

_____
NADA M. CAREY