IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

vs.

CASE NO.: SC00-1042

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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PRELIMINARY STATEMENT

Appellant, Timothy Lee Hurst, relies on his Initial Brief to reply to the State's Answer Brief with the following additions concerning Issue IV:

ARGUMENT

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE IMPOSITION OF THE DEATH SENTENCE IN THE ABSENCE OF NOTICE OF THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED OR OF JURY FINDINGS ON THE AGGRAVATORS AND DEATH ELIGIBILITY, VIOLATES DUE PROCESS AND THE PROTECTION AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT.

A. The United States Supreme Court did not preclude the application of Apprendi to capital cases

Relying on Walton v. Arizona, 497 U.S. 639 (1990), the State argues that Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), has no

application to capital cases. However, the United States Supreme Court did not preclude the application of Apprendi to capital sentencing. Apprendi is a jury case, and the Apprendi majority distinguished the jury-based due process requirements from judge-only capital schemes like the one in Walton. Walton is readily distinguishable, since Florida's sentencing scheme involves both the jury and judge as cosentencers. See, Lambrix v. Singletary, 520 U.S. 518 (1997); Espinosa v. Florida, 505 U.S. 1079 (1992).

One Justice of the Apprendi majority specifically said that notwithstanding Walton, the application of Apprendi to capital cases in general "is a question for another day," see Apprendi, 120 S. Ct. at 2380 (Thomas, J., concurring). Four other Justices said it is apparent that Apprendi and Walton cannot be reconciled, and that Walton will be overruled. See Apprendi, 120 S. Ct. at 2387-89 (O'Connor, J., dissenting, with Rehnquist, C.J., and Kennedy and Breyer, JJ.).

All nine of the Justices appear to agree that the core holding of Apprendi is that facts essential to the infliction of the punishment must be charged, tried, and found by jurors to have been proved beyond a reasonable doubt. In other words, but for jurors actually finding the facts essential to the infliction of the statutorily authorized maximum punishment -- in this case aggravating circumstances -- that punishment cannot be imposed. It is not enough under Florida's death penalty scheme for a jury to

find the defendant guilty of a capital crime; the same jury must also find the person guilty of the separately tried aggravating circumstances.

This view of the holding in Apprendi is further supported by the Court's subsequent decision in McCloud v. Florida, No. 006289 (U.S. Jan. 8, 2001) (McCloud V), a case that dealt with victim injury points and apparently had nothing to do with statutory maximums.

An information charged McCloud with, in relevant part, "sexual battery ... by oral, anal, or vaginal penetration by *or union with*, the sexual organ of another, to wit: the Defendant's penis, and in the process thereof used physical force and violence not likely to cause serious personal injury."[1] McCloud v. State, 23 Fla. L. Weekly D2469 (Fla. 5th DCA Nov. 6, 1998) (McCloud I) (italics in original). The Legislature defined that offense as a second-degree felony. See § 794.011(1)(h), (5), Fla. Stat. (1995).

At trial, "proof of penetration was not required for conviction and the evidence of penetration versus mere union was in conflict." McCloud v. State, 741 So. 2d at 512, 513 (Fla. 1999), 24

[1.] The date of the crime was omitted from the reported decisions. However, the Florida Department of Corrections reports that the crimes occurred on October 4, 1996. See http://www.dc.state.fl.us/ActiveInmates/InmateForm.asp?From=list (visited Jan. 26, 2001). The guidelines applicable to McCloud would have been those under the 1994 or 1995 amended versions, depending on the application of Heggs v. State, 759 So. 2d 620 (Fla. 2000).

Fla. L. Weekly D153 (Fla. 5th DCA Jan. 19, 1999) (McCloud II). The jury found McCloud guilty but made no specific finding of penetration. Ibid. At sentencing, the trial court made a finding of penetration as authorized by the victim injury sentencing statutes, see sections 921.0011(7) and 921.0014(1), Florida Statutes (1995), and scored victim injury points for penetration rather than a lesser amount of points for sexual contact. See McCloud I. Using the penetration points to increase the available sentence, the court sentenced McCloud to imprisonment for eight years and nine months for the second-degree felony.[2] On appeal, McCloud challenged the assessment of victim injury points for penetration, rather than the lesser number for sexual contact, because there had been no specific jury finding of penetration. See McCloud I.

At first, the Fifth District agreed with McCloud and reversed the scoring of victim injury points under the sentencing statutes because there had been no specific finding of penetration. See McCloud I. The State sought rehearing, and the Fifth District granted that motion, holding as follows:

> ...no distinction is made in the statute or rule between point assessment for penetration and all other aspects of score sheet point assessment. The *Bradford* [*v. State*, 23 Fla. L. Weekly D2577 (Fla. 1st DCA 1998)] court did not

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[2] The sentence was omitted from the District Court's opinions. However, the DOC reports the sentence in its public web site.Seehttp://www.dc.state.fl.us/ActiveInmates/InmateForm.asp?From=list (visited Jan. 26, 2001).

> even find it objectionable for the court to score points for possession of a firearm during the commission of the offense, even though the jury made no finding that the defendant had done so. We are doubtful about this method of adjudication in a criminal case, especially given the proliferation of point assessment categories but, at least as to the category of "victim injury,'" we will not recognize a special requirement of a jury finding to support a point assessment for penetration. Consistent with *Lawman* [*v. State*, 720 So. 2d 1105 (Fla. 2d DCA 1998)], we will allow this to be determined by the court.

McCloud II, 741 So. 2d at 513, 24 Fla. L. Weekly at 153 (on rehearing granted).

McCloud moved for rehearing en banc, and the Fifth District granted that motion, concluding that the panel's rehearing decision had been correct. See McCloud v. State, 741 So. 2d 512 (Fla. 5th DCA 1999) (on rehearing en banc), 24 Fla. L. Weekly D2220 (Fla. 5th DCA Sept. 24, 1999) (McCloud III). The en banc court held that victim injury points, even when factually contested, are merely a "'sentencing factor', not an element of the offense." McCloud III, 741 So. 2d at 514. The en banc court then held that "all issues pertaining to the assessment of points on the score sheet are to be determined by the court, not the jury." McCloud III, 741 So. 2d at 512-13. The en banc court held that the decision as to whether there had been "sexual penetration" to warrant the scoring of "victim injury" points was merely a judge-only sentencing determination that due process did not require to be specifically alleged, tried, or found by a jury to have been proved beyond a reasonable doubt. See 741 So. 2d at 512-13. Accordingly, and

without regard to whatever the maximum sentence may have been, "a jury finding of penetration as a predicate for scoring penetration as victim injury on a score sheet for purpose of determining a sentence" is not required. See 741 So. 2d at 515.

In so holding, the Fifth District specifically relied on the three U.S. Supreme Court decisions that Apprendi distinguished and found inapplicable. See McCloud III, 741 So. 2d at 514 (relying on Macmillan v. Pennsylvania, 477 U.S. 79 (1986), Jones v. United States, 526 U.S. 227 (1999), and Almendarez-Torres v. United States, 523 U.S. 224 (1998)). The dissent took issue with the en banc majority's application of Macmillan, Jones, and Almendarez-Torres, and took a position consistent with what the U.S. Supreme Court later decided in Apprendi. See McCloud III, 741 So. 2d at 515-17 (Harris, J., dissenting).[3]

This Court denied review of McCloud III. See McCloud v.

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[3]. The dissent in McCloud III said that penetration was a statutory element of the definition of the offense, that its application as an "enhancer" was authorized by rule and not by statute; and that as an element it had to be charged and proved; that it was charged but the general verdict did not establish that it had been found; and that permitting the judge to find an element the jury did not say it found would be impermissible. With respect to Judge Harris, he is wrong to state that the victim injury point "enhancer" was authorized only by rule. In fact, it was a substantive sentencing element expressly established by the Legislature in section 921.0014. Only the procedure for its application was set forth in the Florida Rules of Criminal Procedure. See generally Smith v. State, 537 So. 2d 982 (Fla. 1989). The fact that it was also an alternative element of the definition of the offense does not matter as long as it is a substantive statutory element used to increase the punishment.

State, 767 So. 2d 458 (Fla. 2000) (McCloud IV). The United States Supreme Court then granted McCloud's petition for certiorari, vacated McCloud III, and remanded to the Fifth District for reconsideration in light of Apprendi.

As demonstrated above, there is no indication whatsoever that the "statutory maximum for the charged crime" had anything to do with the Fifth District's decision or analysis in McCloud III, and consequently, with the U.S. Supreme Court's decision to vacate in McCloud V. Neither the sentence imposed, nor the actual statutory maximum applicable to McCloud, were even mentioned in the panel, en banc, or dissenting opinions. Moreover, McCloud's sentence of eight years and nine months was nowhere near the statutorily authorized maximum punishment of 15 years' imprisonment for a second-degree felony under sections 794.011(5) and 775.082, Florida Statutes (1995), and McCloud was seeking a reduction of sentence on appeal.

Because the statutorily authorized maximum sentence had nothing to do with the outcome in McCloud III, it must have been immaterial to the United States Supreme Court when the Court vacated McCloud III. Instead, what the Court must have found troubling was the change in McCloud's sentence based upon an essential sentencing fact unsupported by a specific jury finding. After all, that was the point McCloud argued all along, and it was the fundamental point the Fifth District decided. The decision to

reverse McCloud III thereby indicates that the U.S. Supreme Court's concern after Apprendi is with the application of any fact essential to imposition of sentence when that fact had not been charged, tried, and demonstrated by the verdict to have been proved to a jury's satisfaction beyond a reasonable doubt.

The State's position is that the jury did all the statute required, and that by returning a death recommendation upon receiving the instructions required by the statute, the jurors necessarily found at least one aggravator proved beyond a reasonable doubt. While we do know that collectively a majority of the jurors -- by some unknown burden[4] -- found that death was the appropriate punishment, we do not know, and we cannot presume to know, as the State seems to presume, whether a majority of jurors found any one aggravating circumstance to have been proved beyond a reasonable doubt.

When a jury returns a bare recommendation, neither the judge as co-sentencer, the defendant, nor the reviewing court, know for certain whether a majority of the jurors found any one aggravator to exist beyond a reasonable doubt if more than one aggravator was instructed and argued. For example, if the jury produces a 10-2

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[4]. The burden in unknown because Florida law does not instruct jurors to adhere to even a minimal burden before recommending death. The only "burden" jurors are given is that a mere majority needs to vote for death. See Standard Jury Instructions in Criminal Cases, 690 So.2d 1263, 1264 (Fla. 1996)

death recommendation in a two aggravator case, five jurors could have found the first aggravator and a different five could have found the second aggravator, with the groups of five joining together to make a death recommendation even though no one aggravator had been found by majority vote. Unless we know for a fact that the requisite number of jurors agreed on a single aggravator, no aggravating circumstance can be deemed to have been proved to the jury beyond a reasonable doubt.

The judge as co-sentencer should not be permitted to find each aggravator proved unless the judge knows that the jury likewise found each aggravator proved. Thus, even in the absence of a unanimity requirement, Florida's jury-based death penalty process does not comply with the fair trial and due process requirements discussed in Apprendi because we do not have any way of assuring that the jury actually found any one aggravator, no less all of the charged aggravators, proved beyond a reasonable doubt.

Schad v. Arizona, 501 U.S. 624 (1991) offers no help to the State's position. Schad addresses two alternate theories of guilt, not separate essential facts necessary to impose a death sentence. The number, type, and weight of aggravating circumstances has always played a dispositive role in capital sentencing in Florida. The weighing process itself is not reliable if we don't know the components that the co-sentencers lawfully were permitted to weigh. To accept the State's position would be to hold that the jury (and

later, the judge), are permitted to weigh against the accused an aggravating circumstance that a majority of the jurors may have rejected. That defeats the principle of Apprendi and undermines the entire process.

A careful reading of Schad also demonstrates reliance on it in this context is wholly misplaced. The plurality opinion in Schad rested on the historical assumption that the means or manner by which a crime was committed did not matter so long as the crime occurred. See Schad, 501 U.S. at 631. Nonetheless, the plurality recognized that in some contexts "differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated" separately. See Schad, 501 U.S. at 633. Justice Scalia, whose concurrence provided the controlling fifth vote,[5] stressed the importance of the historical practice as the polestar guiding the decision. See Schad, 501 U.S. at 648-50 (Scalia, J., concurring). Thus, he suggested, for new, novel, or otherwise distinguishable situations, where there is no substantial history of practice specifically allowing jurors to split their rationales, the Schad process would not constitute the "process" to which a defendant is "due."

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[5] Hence, his opinion is especially important. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994) ("As Justice O'Connor supplied the fifth vote in Caldwell, and concurred on grounds narrower than those put forth by the plurality, her position is controlling.") (citing authorities).

In Richardson v. United States, 526 U.S. 813 (1999), the Court applied the limitation forecast in Schad. Schad had been convicted of operating a continuing criminal enterprise, wherein one element was that the defendant committed a "continuing series of violations." The Court reversed, holding that statutory and constitutional principles compelled the jury to find each "violation" beyond a reasonable doubt. The Court found as an unacceptable risk the possibility that the jury would treat violations as alternative means, thus permitting the jury to avoid discussion of the specific factual details of each violation. Also unacceptable was the risk that unless jurors are required to focus upon specific factual detail, they will fail to do so, "simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." See Richardson, 526 U.S. at 819. Finally, the Court relied on Schad to hold that "the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." Richardson, 526 U.S. at 820.

The Florida death penalty statute provides an example of one of the limitations foreshadowed in Schad and applied in Richardson, where there is no long historical precedent, and where the "means" or "manner" in which a crime occurred makes all the difference in the world, the difference between life and death. Aggravating

circumstances -- essential facts of punishment -- cannot be found in the alternative any more than can be essential elements of a crime. They must be found by a jury to have been beyond a reasonable doubt, and the jury must regard them to be of sufficient weight to warrant a death sentence, before an individual is death eligible. As demonstrated above, we cannot know with certainty, under Florida's statutory scheme, whether a majority of the jurors found any one aggravating circumstance proved beyond a reasonable doubt. Even if a reviewing court were to conclude that the jury must have found a particular aggravator, there would still be no way to presume in a case where more than one aggravator was at issue, that the jury found any other aggravator, or that the jury found any one aggravator to be of sufficient weight to warrant death.

In the death penalty context, fairness and certainty cannot be conclusively established in the absence of specific jury findings in aggravation. The present statutory scheme, facially and as applied here, does not satisfy the fair trial and due process requirements of Apprendi.

B. No precedent compels a departure from Apprendi and this Court should reconsider Mills v. Moore.

In Mills v. Moore, 26 Fla. L. Weekly S242 (Fla. April 12, 2001), this Court relied on State v. Weeks, 761 A.2d 804 (Del. 2000) and held that Apprendi does not apply to Florida's capital sentencing scheme. Appellant urges this Court to reconsider the

issue because the Court in Mills superficially applied language in Apprendi to hold Walton v. Arizona, 497 U.S. 639 (1990), as the controlling law, totally overlooking relevant law that distinguishes Florida's sentencing scheme from Walton in light of Apprendi: Lambrix v. Singletary, 520 U.S. 518 (1997), and Espinosa v. Florida, 505 U.S. 1079 (1992).

Initially, Weeks provides no reasoned basis to compel this Court to follow it. First, Weeks assumed that Apprendi may apply, but finding that a guilty plea waived his right to make the claim. "By his plea of guilty, Weeks waived his right to a jury determination of the facts underlying those statutory aggravating factors and, in contrast to Apprendi, subjected himself to the maximum penalty without further factual findings." 761 A.2d at 806. Second, reliance in Weeks on the judge's finding in aggravation to avoid the implications of Apprendi effectively gave short shrift to the role of the jury in Delaware's sentencing scheme. Whether or not that was appropriate as matter of Delaware law, the same cannot be done in Florida, where the United States Supreme Court in Lambrix expressly recognized the that the Florida penalty jury plays a substantial role as a co-sentencer.

In Lambrix, the United States Supreme Court candidly acknowledged that it previously had misunderstood Florida law with respect to the jury's substantial role as a co-sentencer. The Court said the recognition it ultimately and correctly reached in

Espinosa v. Florida, 505 U.S. 1079 (1992), Sochor v. Florida, 504 U.S. 527 (1992), and Lambrix was "in considerable tension with" the Court's previous view, wherein the Court always had regarded the trial judge as the sentencer irrespective of the jury's role. See Lambrix, 520 U.S. at 533-34. Thus, the Court has acknowledged that it's reliance on Florida law in support of its decision in Walton v. Arizona, 497 U.S. 639 (1990), was based on what was at the time the Court's self-admittedly erroneous view of Florida law.

Lambrix is pivotal to this issue, yet Lambrix was never mentioned in Mills, and to Appellant's knowledge it was not even argued to this Court in Mills. Mills applied -- and misapplied -- dictum in Apprendi to say that it did not apply to capital sentencing. The opinion in Mills itself quoted the language from Apprendi that contains the distinguishing fact:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. For reasons we have explained, the capital cases are not controlling:
>
> > "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is 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 . . . . The person who is charged with actions that expose him or her to the death penalty has an absolute

> entitlement to jury trial on all the elements of the charge."

Mills, 26 Fla. L. Weekly at S243-244 (emphasis supplied) (quoting Apprendi, 120 S. Ct. at 2366, which in turn quoted Walton). Apprendi's reliance on Walton expressly took into consideration only those capital sentencing schemes in which the jury plays no role in the sentencing determination. Because, as the Court in Lambrix came to recognize, the jury plays a pivotal role in making findings in aggravation, this Court must take Lamrbix into account and reconsider Mills in that light.

Because Walton does not control, the dictum in Apprendi does not apply to Florida's sentencing scheme. In fact, the only U.S. Supreme Court case that even warrants some attention is Hildwin v. Florida, 490 U.S. 638 (1989). However, Hildwin suffers from the same misunderstanding the U.S. Supreme Court made in its pre-Espinosa cases. Nothing in Hildwin, or its predecessors, suggest that the Court understood or appreciated the role of the jury in capital sentencing in Florida. Instead, Hildwin was decided on a sixth amendment issue as the Court understood the sentencing process to operate -- with the judge as the sentencer. Hildwin also did not address the jury-based fourteenth amendment due process grounds that underpins much of the analysis in Apprendi.

Moreover, Hildwin did not survive Apprendi in so far as Hildwin rested on the now disavowed distinction between sentencing factors and guilt factors. The Court in Hildwin relied on

Macmillan v. Pennsylvania, 477 U.S. 79 (1986), for the proposition that "the existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.'" Hildwin, 490 U. S at 640-41 (quoting Macmillan, 477 U.S at 86). The "sentencing factor" rationale underlying Macmillan is no longer a constitutionally valid distinction.

Another fact not addressed in Hildwin is the role of the death recommendation vis-a-vis the role of the aggravating circumstances as defined in Florida law. The Florida sentencing scheme essentially turns both the aggravating circumstances and the jury's penalty recommendation into essential facts that the judge must consider in making the ultimate sentencing decision. Once a jury has found the defendant guilty of all the elements of an offense that carries as its penalty the sentence of death, the defendant is guilty of a capital offense but is not yet "eligible" for the death penalty. In a separate penalty proceeding, a jury must determine four things: (1) whether any aggravating circumstances exist beyond a reasonable doubt; (2) whether one or more of the proven aggravating circumstances is of sufficient weight to make the defendant death eligible; (3) whether any mitigating circumstances were proved to exist by a preponderance of the evidence; and (4) whether death is the appropriate punishment under the totality of the circumstances after weighing the aggravating circumstances

against the mitigating circumstances. Only after the jury has made findings against the defendant after completing the first two steps has the defendant crossed the threshold and become eligible for the death penalty. When all four steps are completed, the trial judge must engage in the same four steps, limited by the jury's findings. Hildwin treats the jury's recommendation as the one and only essential fact arising from the jury's penalty deliberations. But, the jury is a co-sentencer responsible both for finding the aggravating circumstances proved beyond a reasonable doubt, and for weighing them. When the jury is given this dual responsibility as co-sentencer, the jury's conclusion as to each is equally important. Hildwin addressed only the latter responsibility, that of the weight the jury gave in the conclusory form of its recommendation. Hildwin did not fully address and gauge the jury's role or contemplate the constitutional gravity of the jury's findings as to the other essential sentencing facts, the aggravating circumstances.

Mills also was wrong for relying on the denial of certiorari in Weeks v. Delaware, 121 S. Ct. 476 (2001), as precedential authority. Denial of discretionary review has no precedential weight at all, both under federal law, see House v. Mayo, 324 U.S. 42 (1945), and Florida law, see Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983).

One last omission in the Mills opinion is the Florida

Constitution. That document provides independent grounds upon which to base reversal, and this Court has interpreted it to be of primary concern and to provide greater due process protection than rights afforded by the United States Constitution. See, e.g., Traylor v. State, 596 So. 2d 957 (Fla. 1992) (recognizing primacy of art. I, §§ 9, 16, Fla. Const.); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (rejecting the constitutional precedent of Moran v. Burbine, 475 U.S. 412 (1986), and applying article I section 9 of the Florida Constitution); Jones v. State, 92 So. 2d 261 (Fla. 1956) (on rehearing granted) (holding that unanimous verdict in criminal cases is required by the right to a fair and impartial trial guaranteed by Florida Constitution's, formerly under article I, section 11, Fla. Const. (1885), and now under article I, section 16, Fla. Const. (1968 revision)). The principles discussed in Apprendi, which have their roots in the common law, are deeply rooted in the Florida Constitution as well.

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Appellant, Timothy Lee Hurst, asks this Court to vacate the death sentence and remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to James W. Rogers, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, on this ____ day of June, 2001.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

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