IN THE SUPREME COURT OF FLORIDA

DANIEL O. CONAHAN, JR.,

Appellant,

v. **Case No. SC00-170**

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CHARLOTTE COUNTY
STATE OF FLORIDA

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The state generally accepts appellant's Statement of the Case and Facts except as to any legal conclusions drawn therein. Appellee will clarify any disagreement in the argument section of this brief.

SUMMARY OF THE ARGUMENT

Appellee would respectfully submit that any claim now argued pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000) must be deemed procedurally barred for the failure to adequately and properly object in the lower court to preserve the claim for appellate review. Additionally, appellant's claim is meritless.

ISSUE VI

WHETHER FLA. STATUTE 921.141 IS UNCONSTITUTIONAL BECAUSE IT ALLEGEDLY VIOLATES DUE PROCESS AND RIGHT TO JURY TRIAL REQUIREMENTS THAT AGGRAVATING CIRCUMSTANCES MUST BE ALLEGED IN THE INDICTMENT AND FOUND BY THE JURY TO HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT.

Mr. Conahan was charged by indictment filed on February 25, 1997 (R1, 1-20). On August 9, 1999, Conahan filed a written Waiver of Rights to Jury Trial and Declaration that He Desires a Trial by Judge Alone (R12, 2249-50). At the colloquy on August 9, Conahan testified that he voluntarily chose to have a bench trial rather than jury trial (R25, 651). He was not impaired and was in full possession of his mental faculties (R25, 652). Defense counsel confirmed that his waiver was for the guilty phase and they had not yet decided to waive a jury for penalty phase (R25, 656-657). Appellant agreed (R25, 658-662). The Court accepted the waiver of jury trial for guilt phase (R25, 665).

On August 23, 1999, Conahan elected a jury trial for penalty phase (R13, 2526). The penalty phase commenced on November 1, 1999 (R37, 2169).

In his brief Conahan states that he filed a Motion for Statement of Particulars as to Aggravating Circumstances and Theory of Prosecution in 1999(R11, 2046-54) and that the lower

court denied this motion on July 21, 1999 (R24, 637-39)(Supp. Brief, P. 2). Appellee would respectfully submit that the claim is procedurally barred; the instant argument that the Sixth Amendment requires that the jury make the findings of aggravation was not argued below in that motion. Rather, appellant argued that he should receive notice of the aggravating factors the prosecutor would use and that the defendant would be denied effective assistance of counsel without being given such notice.

Moreover, when the trial court denied this motion, it appeared that the parties were in agreement that at the conclusion of the guilt phase the state and defense could submit memoranda regarding the applicable aggravating and mitigating circumstances (R24, 638-39). Consequently, and because the statute provided notice as to the aggravators, the motion was denied (R24, 639). The defense did not later argue any unfair surprise. The instant claim is procedurally barred. Conahan is changing the bases of his complaint below (that he had insufficient notice of the aggravators and counsel would be rendered ineffective in the lack of such notice) to that argued for the first time here (that the Sixth Amendment right to jury trial requires that the jury make findings on particular aggravators). It is axiomatic that a defendant does not

preserve an issue for appellate review by changing the grounds for objection asserted in the trial court. See, generally, Steinhardt v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990); Woods v. State, 733 So. 2d 980, 984 (Fla. 1999); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993); Bradley v. State, 787 So. 2d 732 (Fla. 2001)(defendant barred from challenging burglary conviction on direct appeal for failure to preserve in the lower court).[1] The state requests that this Court continue to enforce its procedural default policy to preclude consideration on appeal of claims not adequately preserved by appropriate and timely objection in the trial court. Failure to include a plain statement that the court's decision rests on procedural bar (which constitutes an adequate and independent state ground for denial of relief) can result in the federal courts' addressing the claim and disagreeing with this Court's conclusion as to the merits of the claim. See, Harris v. Reed, 489 U.S. 255 (1989); Coleman v.

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[1] Furthermore, since the penalty phase in the instant case began in November of 1999, the defense could have asserted an "Apprendi"-type argument as the tools were available to construct the argument. Apprendi v. New Jersey, 530 U.S. 466 (2000) was foreshadowed by Jones v. United States, 526 U.S. 227 (1999), a decision announced on March 24, 1999. See, Engle v. Isaac, 456 U.S. 107, 134 (1982)("where the basis of a constitutional claim is available and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default").

Thompson, 501 U.S. 722 (1991); see also, Ylst v. Nunnamaker, 501 U.S. 797 (1991)(where the last explained state court judgment unequivocally rested on a state procedural default, that default will be honored despite subsequent unexplained rulings).

Appellant now argues that the Florida death penalty statute is facially invalid, if the United States Supreme Court grants relief to the defendant in the case of Ring v. Arizona. Appellee disagrees. Florida's statutory scheme is adequate irrespective of the Arizona scheme and, quite apart from the procedural bar urged above, this Court's prior resolution on the merits denying relief is correct and should be maintained. See, Mills v. Moore, 786 So. 2d 532 (Fla. 2001), cert. denied, _U.S._, 149 L.Ed.2d 673 (2001); King v. State/Moore, _So. 2d_, 27 Fla. L. Weekly S65 (Fla. 2002); Bottoson v. State/Moore, _So. 2d_ 27 Fla. L. Weekly S119 (Fla. 2002). The jury's participation in the sentencing proceeding was constitutionally adequate. Hildwin v. Florida, 490 U.S. 630 (1989); Spaziano v. Florida, 468 U.S. 447 (1984).

Appellant's claim on this point is both barred and meritless. Relief must be denied.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

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. Regular Mail to James Marion Moorman, Public Defender, Tenth Judicial Circuit and Paul C. Helm, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, this _____ day of May, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE