IN THE SUPREME COURT OF FLORIDA

DANIEL O. CONAHAN, JR., :

Appellant, :

vs. : Case No. SC00-170

STATE OF FLORIDA, :

Appellee. :

_____:

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

# SUPPLEMENTAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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## PRELIMINARY STATEMENT

This Supplemental Brief is filed on behalf of the appellant, Daniel O. Conahan, Jr., in this capital appeal to present a significant constitutional issue overlooked by counsel when preparing the Initial Brief of Appellant: Issue VI, Section 921.141, Florida Statutes (1995), is unconstitutional because it violates the 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. Appellant continues to rely upon the issues and arguments presented in his Initial and Reply Briefs and oral argument.

## STATEMENT OF THE CASE AND FACTS

Appellant relies upon the Statements of the Case and Facts in his Initial Brief, but would call this Court's attention to the following facts which were omitted from the Initial Brief:

Count I of the indictment, charged Conahan with first-degree premeditated murder, did not allege any statutory aggravating circumstances. [V1, 1] Count II charged Conahan with first-degree felony murder during the commission of or attempt to commit kidnapping, Count III charged him with kidnapping with intent to commit or facilitate the commission of sexual battery, and Count IV charged him with sexual battery, but Counts II, III, and IV did not allege that the kidnapping and/or sexual battery constituted an aggravating circumstance pursuant to section 921.141(5)(d), Florida Statutes (1995). [V1, 1-2]

Prior to trial, defense counsel filed a motion for statement of particulars as to aggravating circumstances, seeking a statement of the aggravating circumstances upon which the state intended to rely on the ground that notice of aggravating circumstances was required by due process. [V11, 2046-54] The court heard and denied this motion on July 21, 1999. [V24, 637-39]

In its advisory sentence verdict, the jury recommended the death penalty, but the jury made no factual findings regarding proof of any statutory aggravating circumstances. [V17, 3235]

## SUMMARY OF THE ARGUMENT

Daniel O. Conahan, Jr., was sentenced to death pursuant to section 921.141, Florida Statutes (1995). The United States Supreme Court has ruled that all essential facts (other than prior convictions) necessary to enhance a sentence must be alleged in the indictment and found by the jury to have been proven beyond a reasonable doubt. Although the Court originally ruled that these requirements do not apply to capital cases, the Court has granted certiorari in an Arizona case to reconsider this question. The Court has also granted stays of execution to Florida defendants whose arguments on this issue were rejected by this Court. Assuming that the United States Supreme Court rules that these requirements do apply to state capital sentencing proceedings, section 921.141 is unconstitutional on its face because it fails to require that aggravating circumstances must be alleged in the indictment and found by the jury to have been proven beyond a reasonable doubt. This issue constitutes fundamental error. The error can never be harmless. Conahan's death sentence must be reversed.

## ARGUMENT

### ISSUE VI

SECTION 921.141, FLORIDA STATUTES (1995), IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE 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.

In Jones v. United States, 526 U.S. 227, 243 n. 6 (1999), the United States Supreme Court ruled:

> 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.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2355 (2000), the Court held that the same rule applies to state proceedings under the Fourteenth Amendment.

The Court distinguished capital cases arising from Florida[1] in Jones, at 250-51. In Apprendi, at 2366, the Court observed that it had previously

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[1] Those cases were Spaziano v. Florida, 468 U.S. 447 (1984) (rejecting argument that capital sentencing must be a jury task), and Hildwin v. Florida, 490 U.S. 638 (1989) (determination of death-qualifying aggravating facts could be entrusted to a judge following guilty verdict and death recommendation of jury).

> 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. Walton v. Arizona, 497 U.S. 639, 647-649 ... (1990)[.]

Thus, it appeared that the principles of Jones and Apprendi did not apply to state capital sentencing procedures. See Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 532 U.S. 1015 (2001).

However, the United States Supreme Court has agreed to reconsider whether Apprendi applies to state capital sentencing procedures by granting certiorari in Ring v. Arizona, 122 S.Ct. 865 (Mem.), 70 U.S. L. Weekly 3246 (U.S. Jan. 11, 2002). The Court has indicated that it expects its decision in Ring to affect Florida capital sentencing procedures by granting stays of execution to Florida death row inmates whose Apprendi arguments were rejected by this Court. See King v. State, 27 Fla. L. Weekly S65 (Fla. Jan. 16, 2002), stay granted, 122 S.Ct. 932 (U.S. Jan. 23, 2002); Bottoson v. State, No. SC02-128 (Fla. Jan. 31, 2002), stay granted, No. 01-8099 (U.S. Feb. 5, 2002).

Assuming that the United States Supreme Court rules that the due process and right to jury trial requirements of Jones and Apprendi apply to state capital sentencing procedures in Ring v. Arizona, section 921.141, Florida Statutes (1995), the statute governing the imposition of the death sentence on Daniel O. Conahan,

Jr., will be rendered unconstitutional on its face. Section 921.141 does not require that the aggravating circumstances provided therein must be alleged in the indictment and found by the jury to be proven beyond a reasonable doubt, so the statute plainly violates the requirements of Jones and Apprendi.

In Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983), this Court ruled that the facial constitutional validity of the statute under which the defendant was convicted can be raised for the first time on appeal because the arguments surrounding the statute's validity raised a fundamental error. In State v. Johnson, 616 So. 2d 1, 3-4 (1993), this Court ruled that the facial constitutional validity of amendments to the habitual offender statute was a matter of fundamental error which could be raised for the first time on appeal because the amendments involved fundamental liberty due process interests.

In Maddox v. State, 760 So. 2d 89, 95-98 (Fla. 2000), this Court ruled that defendants who did not have the benefit of Florida Rule of Criminal Procedure 3.800(b) as amended in 1999 (to allow defendants to raise sentencing errors in the trial court after their notices of appeal were filed) were entitled to argue fundamental sentencing errors for the first time on appeal. In order to qualify as fundamental error, the sentencing error must be apparent from the record, and the error must be serious, for example, a sentencing

error which affects the length of the sentence. Id., at 99-100. Defendants appealing death sentences do not have the benefit of using Rule 3.800(b) to correct sentencing errors because capital cases are excluded from the rule. Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015, 1026 (1999).

The facial constitutional validity of the death penalty statute, section 921.141, is a matter of fundamental error. The error is apparent from the record, and it is certainly serious, since it concerns the due process and right to jury trial requirements for the imposition of the death penalty. Imposition of the death penalty goes beyond the liberty interests involved in sentencing enhancement statutes, like the habitual offender statute in Johnson, to reach the defendant's due process interest in sustaining his life.

Moreover, the use of a facially invalid death penalty statute to impose a death sentence could never be harmless error. A death sentence is always and necessarily adversely affected by reliance upon an unconstitutional death penalty statute, especially when the statute violates the defendant's right to have the jury decide essential facts. See Sullivan v. Louisiana, 508 U.S. 275, 279-282 (1993) (violation of right to jury trial on essential facts is always harmful structural error); see also, Chapman v. California, 386 U.S.

18, 23-24 (1967) (requiring and explaining harmless error review); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (same).

Thus, Florida's death penalty statute, section 921.141, is unconstitutional on its face because it violates the due process and right to jury trial requirements that all facts necessary to enhance a sentence must be alleged in the indictment and found by the jury to have been proven beyond a reasonable doubt as set forth in Jones and Apprendi. The issue constituted fundamental error, and the error can never be harmless. This Court must reverse Conahan's death sentence and remand for resentencing to life.

## CONCLUSION

Appellant respectfully requests this Court to reverse the death sentence for first-degree murder and remand this case for imposition of a life sentence.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of April, 2002.

## CERTIFICATION OF FONT SIZE

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Respectfully submitted,

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