IN THE SUPREME COURT OF FLORIDA

WILLIE SETH CRAIN, JR.,

Appellant,

vs. **CASE NO. SC00-661**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF HILLSBOROUGH COUNTY, STATE OF FLORIDA

AMENDED SUPPLEMENTAL ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
(813) 356-1292 (Fax)

COUNSEL FOR STATE OF FLORIDA

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

CITATIONS: Reference to the record on direct appeal will be referred to as "V" followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

The State generally accepts the Statement of the case and facts set forth in appellant's supplemental brief.

ARGUMENT SUMMARY

Appellant's specific constitutional challenges to Section 921.141 of the Florida Statutes were not made in the trial court below. As such, these arguments are now procedurally barred from review on appeal. In any case, this Court has repeatedly rejected the arguments appellant makes on appeal regarding the applicability of Apprendi v. New Jersey, 530 US 466 (2000) to Florida's capital sentencing scheme.

ARGUMENT

ISSUE

WHETHER SECTION 921.141, OF THE FLORIDA STATUTES (1997) IS UNCONSTITUTIONAL BECAUSE IT VIOLATES DUE PROCESS AND THE RIGHT TO JURY TRIAL TO THE EXTENT THAT AGGRAVATING CIRCUMSTANCES MUST BE ALLEGED IN THE INDICTMENT AND FOUND BY THE JURY. (STATED BY APPELLEE).

As noted in appellant's supplemental brief, trial counsel filed a "Motion for Findings of Fact by The Jury" prior to trial. (V-1, 83). While appellant did ask the trial court to require the jury to render findings of fact, he did not argue that the current statutory scheme was unconstitutional for failing to require the jury to set forth the aggravating circumstances it found in support of the death sentence. (V-1, 83-84). Defense counsel subsequently filed a "Motion for Statement of Particulars as to Aggravating Circumstances And The Reasons The Death Penalty Is Being Sought" on April 23, 1999. (V-1, 111-124). In this motion and memorandum of law, appellant argued that "the defense has a constitutional right to sufficient notice to prepare an adequate defense in capital sentencing proceedings" and that "this requires notice as to the aggravating circumstances on which the state will rely on in this cause." (V-1, 121). While the judge denied the motion as

case law did not require such advance notice, as a matter of professional courtesy, the prosecutor stated that he would provide the requested notice. (V-10, 1462). Consequently, the prosecutor stated that he would provide the defense with a "specific road map" as to the aggravators the State was pursuing and that "there's not gonna be any surprises." (V-10, 1462). Defense counsel did not subsequently argue that he was "surprised" or unprepared to meet the State's case in aggravation.

Appellant did not rely on Apprendi v. New Jersey, 530 US 466 (2000) in the lower court as that decision was not rendered until after his 1999 trial. This chronology, however, does not excuse his procedural default in failing to properly raise the claim below. Appellant could have urged reliance on the earlier case of Jones v. State, 526 US 227 (1999). The Apprendi Court noted that its decision "was foreshadowed by our opinion in Jones v. United States, 530 US at 476. The Court added:

> 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.
>
> (530 US at 476)

Since the tools were available to construct the argument and appellant failed to do so, he is procedurally barred from raising this claim on appeal. See Engle v. Isaac, 456 US 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").

Appellant contends that he presented his "Apprendi" claim adequately below by his motion for findings of fact by the jury and motion for notice of aggravating circumstances. (Appellant's Supplemental Brief at 7). Appellee disagrees.

The specific arguments that appellant now makes before this Court were not presented to the trial court below. As for his motion arguing for fact finding by the jury, the appellant did not assert that Florida's statutory scheme was unconstitutional. In the latter motion for statement of aggravating circumstances, appellant complained that he was not given notice of what aggravators the state intended to use, that such lack of notice undermined his right to effective assistance of counsel and due process of law. The record indicates that the defense was in fact given notice by the State of the aggravating circumstances upon which it intended to rely as a

matter of "professional courtesy."

Appellant did not present below his current contention that the Sixth Amendment right to a jury trial required that aggravators be charged in the indictment and found by the jury. Since this claim was not presented below, appellant may not initiate the claim for review here. See generally Steinhorst 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.)

This Court has consistently and regularly ruled - in a similar context - that a defendant has not adequately preserved for appellate review a claim that a jury instruction is constitutionally inadequate simply by objecting to the lack of evidentiary support for an aggravator. See Occhicone v. State, 618 So. 2d 730 (Fla. 1993); Lightbourne v. State, 644 So. 2d 54 (Fla. 1994); Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Pope v. State, 702 So. 2d 221 (Fla. 1997). The doctrine of fundamental error cannot excuse the procedural default. The trial court followed the sentencing scheme in effect for years and, under the facts of this case, the aggravators were either

not contested (prior violent felonies, age of the victim) or necessarily found by a unanimous jury (in the course of a felony).

Appellee respectfully requests this Court to continue to enforce its procedural default policy to preclude consideration on appeal of claims that were 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 a procedural bar (which constitutes an adequate and independent state ground for denial of relief) can result in the federal courts addressing the merits of the claim and disagreeing with this Court's conclusion as to the merits of the claim. See Harris v. Reed, 489 US 255 (1989); Coleman v. Thompson, 501 US 722 (1991); See also Ylst v. Nunnamaker, 501 US 797 (1991)(where the last explained state court judgment unequivocally rested on a state procedural default, that default will be handled despite subsequent unexplained rulings).

Appellee, secondarily and in the alternative, also argues that apart from the procedural default precluding review the instant claim is meritless. Mills v. Moore, 786 So. 2d 532 (Fla. 2001), cert. denied. _US_, 149 L.Ed 2d 673 (2001); King v. State/Moore, Fla. L. Weekly S65 (Fla. 2002); Bottoson v. State/Moore, 27 Fla. L. Weekly S119 (Fla. 2002). The jury's

participation in the sentencing was constitutionally adequate. Hildwin v. Florida, 490 US 630 (1989); Spaziano v. Florida, 468 US 447 (1984).

Appellant cannot obtain any relief under Apprendi, supra, because the jury in the penalty phase was instructed on the necessity of finding an aggravating circumstance beyond a reasonable doubt and appellant did not contest his prior violent felony convictions. The jury also found beyond a reasonable doubt that appellant was guilty of kidnapping Amanda and, therefore, necessarily found the in the course of a felony aggravator. Moreover, there was no question that Amanda Brown was under the age of twelve when appellant murdered her. Finally, the jury's vote for death was unanimous. Thus, in the unlikely event Apprendi might apply to Florida's capital sentencing scheme, under the particular facts of this case, appellant would not be entitled to any relief.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully submits that the verdict of the jury and decision of the trial court below should be affirmed on appeal.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
813) 801-0600
813) 356-1292 (Fax)

COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paul C. Helm, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831, on this 5th day of April, 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 STATE OF FLORIDA