IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-01 2864

JUAN DAVID RODRIGUEZ,

Appellant,

v.

MICHAEL M. MOORE

Respondent

REPLY TO STATE'S RESPONSE TO PETITION FOR HABEAS CORPUS

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CLAIM I

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

1.IMPROPER PROSECUTORIAL ARGUMENT AT MR. RODRIGUEZ' PENALTY PHASE

In his habeas petition, Mr. Rodriguez raised a number of issues relating to properly preserved prosecutorial misconduct which appellate counsel unreasonably failed to raise on Mr. Rodriguez' direct appeal. The State contends that this issue was raised, and therefore cannot constitute ineffective assistance. However, as the record of the lower court proceedings s clearly reflects, there were several prejudicial instances if improper prosecutorial argument that appellate counsel did not raise. The State's reliance on Thompson v,. State, 759 So. 2d 650, 657 Fla. 2000), is misplaced in this context. In Thompson this Court found that appellate counsel had actually raised the issues under question, and that "Petitioner's contention that the point was inadequately

argued merely exereses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner" Thompson at 657. Failing to set forth adequate arguments, for an issue raised on direct appeal as was the case in Thompson is a completely different omission than failure to assert any argument based on specific instances of misconduct.

In the instant case, the prosecutor's entire closing argument consisted of a deliberate and inflammatory attempt to rouse the jury's emotions in favor of a death sentence. Appellate counsel merely raised one instance of prosecutorial misconduct relating to the prosecutors' comment that Mr. Rodriguez appeared to be sleeping. However, as Mr. Rodriguez noted in his habeas petition there were numerous other instances of prejudicially improper comment that were not raised. Each of those instances constitutes separate error. Moreover, the cumulative effect of such errors was not presented at all, to Mr. Rodriguez' substantial prejudice. While Thompson dealt with inadequate argument , the instant case relates

to failure to raise meritorious issues at all. Thompson therefore does not control this failure, and the individual preserved issues should be considered both individually and cumulatively.

The State concedes that the trial prosecutor's urging the jury that to recommend life would be "the easy way out" was improper, but concedes that this "brief remark" was harmless. Response at 16. However the State fails to make mention of the context within which this remark was based. Prosecutor Kastrenakis told the jury

> [by Mr. Kastrenakis] Y o u a l l individually tool your oaths to follow the law and render a verdict that is in accordance with the law and the evidence. Just because you now have the chance to individually vote doesn't mean that you should take the easy way out and vote for something that isn't legal. Because I'm going to tell you the easy thing to do is to go back in there and vote for life. It's the easy thing to do.
>
> [by Mr. Kalisch] Objection.
>
> [by the Court] Overruled.
>
> [Kastrenakis] And in this case it would not be the legal thing to do.

[Kalisch] Objection

[The Court] Overruled

(R. 1841- 1842)(emphasis added).

At this point Kastrenakis was arguing that the law required a death sentence, and to take the"easy way" out would be a violation of the law. Contrary to the State's contention, this assertion that the law required a death sentence is not a mere exhortion to follow the law but a gross misstatement that sought to confuse and inflame. This is not only improper, but highly prejudicial. The State's contention that the prosecutor's characterization of a death verdict as " the only legal thing to do" is not preserved is not borne out by the record, and in the context of his other improper remarks is highly misleading and prejudicial.

The State similarly mischaracterizes the remarks made by Kastrenakis regarding their role as "members of the community". Given his prior exhortation that the jury had a duty to vote for death because "it was the only legal

thing to do" and that to do other wise would be to "take the easy way out", this remark rises to much more than a mere statement of the controlling case law as the State infers. Rather it represents a challenge to the more inflamed instincts of the jury to send a message to the community that they did not "take the easy way out" to Mr. Rodriguez' substantial prejudice.

These improper arguments, together with the mischaracterization of the evidence of Dante Perfumo and the improper victim impact argument should be considered both individually and cumulatively, yet the State completely omits to counter Mr. Rodriguez' arguments relating to the cumulative prejudice ensuing to Mr. Rodriguez. The record reflects that the courtroom atmosphere was extremely highly charged. The jury had witnessed not only Mr. Rodriguez' bizarre courtroom behavior but also the prosecutors's inflammatory references thereto.[1] The Court completely failed to check

[1] Contrary to the State's assertion , this Court did not reject appellate counsel's argument as to the

or admonish Kastrenakis for his improper behavior, which only served to heighten the inflammation for the jury's passions. Judge Carney completely evaded his duty to ensure that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. en banc 1985). The totality of the improper comments made to by Kastrenakis and the Court's laissez -faire attitude resulted in a complete breach of the "...obligation that the trial is fundamentally fair in all respects. Gore v. State, 719 So. 2d,1197, 1202 (Fla. 1998). See also Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990)

Appellate counsel was ineffective for failing to raise the

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impropriety of this comment, but merely did not find it standing alone to be prejudicial in this context.This Court acknowledged that:

> [T]he prosecutor's reference to the fact that the defendant appeared to be sleeping during closing arguments was clearly improper. The defendant's demeanor off the witness stand is not a proper subject for argument and in some cases may be unduly prejudicial"

Rodriguez v. State 609 So. 2d 493 (Fla. 1992).

issue of prosecutorial misconduct as it relates to the aforementioned specific comments as well as the cumulative effect of them. Relief is warranted.

2. FAILURE TO ENSURE A COMPLETE RECORD.

The State asserts that Mr. Rodriguez has not alleged specific errors that occurred during the untranscribed portions of his capital trial and for this reason, the claim should be denied. The State attempts to draw support from this Court's opinion in Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla 1993). However,

the situation as it pertains to Mr Rodriguez can be distinguished firstly because in Ferguson, the defendant had subsequently managed to obtain a transcript of at lest a part of the missing record. The other untranscribed materials were not of the same magnitude as those which are missing from the record of Mr. Rodriguez' capital trial. Whereas in the Ferguson case, the missing transcripts concerned a charge conference and a discussion as to whether the defendant would testify, Mr. Rodriguez is missing inter alia transcripts of the arguments of the motion to suppress , and several motion in limine. Failure to have those precluded andy appellate argument that Mr. Rodriguez' statement was improperly obtained or

set before the jury, and precluded any further development of post convictIon claims relating to ineffective assistance of trial couNsel pre trial. Moreover the fact that appellate counsel specifically requested transcriptions for the pretrial motions hearings clearly shows that counsel intended to pursue claims based thereon. Ferguson is therefore factually distinct form the instant case and relief is warranted.

CLAIM III

ThE CONSTITUTIONALITY OF THE FIRST DEGREE MURDER INDICTMENT MUST BE REVISITED IN LIGHT OF APPRENDI V. NEW JERSEY

The State claims that Mr. Rodriguez' Apprendi[2] claim should be rejected due to procedural bar. However, as noted in his petition, Mr. Rodriguez, through counsel has consistently raised the issue of the constitutionality of the death penalty statute in Florida. It was raised in Mr. Rodriguez' direct appeal, and his Rule 3.850 motion and the appeal from the denial thereof. The plain language of Mr. Rodriguez' petition suggests that this issue is being revisited in light of Apprendi, rather than raised for the first time herein. Thus the issue is not procedurally barred.

The State also argues that the issue should be denied based on this Court's holding in Mills v. State, 286 So 2d 532 (Fla 2001) and Mann v, Moore, 794 So. 2d 595 (Fla. 2001). However, the State ignores the fact that the

[2] Apprendi v. New Jersey, 530 U.S. 486 (2000)

Apprendi Court addressed whether its decision impacted "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." Apprendi, 120 S.Ct. at 2366 (citing Walton v. Arizona, 497 U.S. 639 (1990)). The Apprendi majority held that the capital cases falling under the Walton-type of scheme (*i.e.* judge sentencing states), "are not controlling," citing Justice Scalia's dissent in Almendarez-Torres v. United States, 523 U.S. 224 (1998):

> 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 cases cited 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 the maximum penalty, rather than a lesser one, ought to be imposed . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Apprendi, 120 S.Ct. at 2366 (citing Almendarez-Torres, 523 U.S. at 257 n.2 (Scalia, J., dissenting). While the

majority decision in Apprendi suggested that Walton was distinguishable, four justices strongly suggested that Walton had in fact been overruled, Apprendi, 120 S.Ct. at 2387-89 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Breyer and Kennedy, J.J.), and a fifth justice explicitly left the door open to reexamining the continuing validity of Walton for another day. Id. at 2380 (Thomas, J., concurring). The Apprendi majority's distinction of Walton, as the dissenters suggested, is illogical and at odds with the new rule of law announced by the Apprendi majority.[3]

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[3]As Justice O'Connor observed in Apprendi, Walton

> [r]e[lied] in part on our decisions rejecting challenges to Florida's capital sentencing scheme, which also added that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Walton, [497 U.S.] at 648 (quoting Hildwin v. Florida, 490 U.S. 638, 640-641 (1989) (per curiam)).

Apprendi v. New Jersey, 530 U.S. at 537 (O'Connor, J. dissenting). In Walton itself, the Court found that:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory scheme are not

Mr. Rodriguez submits that the Court's previous rejection of his challenge to the first degree murder indictment be revisited in light of Apprendi. This Court's jurisprudence has rejected of this argument is premised on the United States Supreme Court's decision in Schad v. Arizona, 501 U.S. 624 (1991). See Mendyk v. Dugger, 592 So. 2d 1076, 1081 (Fla. 1992). In Schad, the Court held that conviction premised on alternative theories of premeditated and felony murder was not violative of due process. However, Mr. Rodriguez submits that this matter is ripe for reconsideration in light of the rule discussed in Apprendi and the issues now taken on certiorari in Arizona v. Ring, 25 P. 3d 1139 (Ariz. 2001),

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> persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton, 497 U.S. at 648.

cert. granted, 122 S. Ct. 865 (2002). If the Sixth and Fourteenth Amendments are violated under the New Jersey scheme in Apprendi, then Florida's failure to require the State to charge and prove the underlying elements of either premeditated or felony murder suffers from a similar constitutional flaw. Thus, this issue should be revisited at this time.

Mr. Rodriguez submits that the constitutionality of Florida' death penalty statute should be revisited in light of Apprendi. In Apprendi, the Supreme Court held that "[o]there than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. The constitutional underpinnings of the Court's holding are the Sixth Amendment right to trial by jury, as well as the Fourteenth Amendment right to due process. Id. at 2355 ("At stake in this case are constitutional projections of surpassing importance: the proscription of any deprivation of liberty without `due process of law,'

Amdt. 14, and the guarantee that `[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6"). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Id. (quotation omitted). Mr. Rodriguez submits that the failure by the trial court in his case to require that the elements relied on by the State to enhance Mr. Rodriguez' punishment under Fla. Stat. § 775.082 be charged and found beyond a reasonable doubt by the jury. This was not done, and the result is that Mr. Rodriguez' death sentence is unconstitutional under both the United States and Florida Constitutions and violates Apprendi and the Sixth and Fourteenth Amendments.[4]

Florida's death penalty statute provides that the

[4]The United States Supreme Court will hear oral arguments in April 2002 regarding the application of Apprendi to capital cases. Arizona v. Ring, 25 P. 3d 1139 (Ariz. 2001), *cert. granted*, 122 S. Ct. 865 (2002).

"narrowing" of death eligible persons occurs at the penalty phase. See Proffitt v. Florida, 428 U.S. 242 (1976). As this Court has explained, "[t]he aggravating circumstances of Fla. Stat. § 921.414(6), F.S.A., actually define those crimes-when read in conjunction with Fla. Stat. §§ 782.04(1) and 794.01(1), F.S.A. - to which the death penalty is applicable in the absence of mitigating circumstances." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Thus Mr. Rodriguez was not eligible for the death penalty simply upon his conviction of first degree murder.

The version of Florida's capital punishment statute in place at the time of Mr. Rodriguez' 1990 trial also required the interplay of several statutes which operate independently but must be considered together to authorize Mr. Rodriguez' punishment. Mr. Rodriguez was sentenced in 1990 under the provisions of §775.082 (1), Fla. Stat., which provided:

> A person who has been convicted of a capital felony **shall be punished by life imprisonment** and shall be required to serve no less than 25 years

> before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in §921.141 results in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Fla. Stat. §921.141 (1979), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence" provided:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082.

Fla. Stat. §921.141(3) further provided in pertinent part:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . .
> If the court does not make the finding requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

§ 775.082, the statute which applies in this case,[5]

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[5]. The statute was rewritten in 1994, and now provides:

clearly sets out a scheme whereby the statutory maximum penalty for capital crimes is life imprisonment *unless* the court, after holding a separate and distinct proceeding under §921.141, makes findings of fact that establish the defendant is death-eligible. Thus, Florida's statute unambiguously "describe[s] an increase beyond the maximum authorized statutory sentence," Apprendi, 120 S.Ct. at 2365 n.19. It cannot be seriously debated that the "differential" between a sentence of life imprisonment with the possibility of parole after 25 years and a sentence of death "is

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> A person who has been convicted of a capital felony shall be punishable by death if the proceedings held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punishable by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

§ 775.082 (1), Florida Statutes (1994 Sap.). See 1994 Fla. Sis. Law Serv. Cs. 94-228 (S.B. 158). Although the newer statute also poses constitutional problems under Apprendi, that statute is not at issue in these proceedings.

unquestionably of constitutional significance." Id. at 2365. See also Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

Under Apprendi and consistent with due process and the Sixth Amendment right to trial by jury, the elements relied on by the State to enhance Mr. Rodriguez' punishment under § 775.082 had to be charged and found beyond a reasonable doubt by the jury. This was not done, and the result is that Mr. Rodriguez' death sentence is unconstitutional under both the United States and Florida Constitutions.

CONCLUSION

Mr. Rodriguez submits that relief is warranted in the form of a new direct appeal. As to those claims not

discussed in the Reply to State's Response to Mr. Rodriguez' Petition for Writ of Habeas Corpus, Mr. Rodriguez relies on the arguments set forth in his Petition and on the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing reply has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard Esq. Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, Fl 33131; on this 12th day of March, 2002.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(l), Fla. R. App. P.

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