SUPREME COURT OF FLORIDA

LUIS CABALLERO
Appellant,

vs.

STATE OF FLORIDA
Appellee.

CASE NO: SC01-651

Lower Tribunal No: 95-15295CF10C

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This Reply Brief submitted on behalf of Appellant Luis Caballero will serve as rebuttal argument only as to Points IV and VI of Appellant's Initial Brief and the State's Reply Brief. As to all facts and the remaining arguments raised in the Initial Brief, Appellant rests and relies on that Brief as if fully set forth herein.

REBUTTAL ARGUMENT
AS TO
POINT IV INITIAL BRIEF

POINT IV

THE TRIAL COURT ERRED IN RULING THAT ADMISSION OF TESTIMONY AS TO THE CODEFENDANT'S CONVICTION OF SECOND DEGREE MURDER AND LIFE SENTENCE WOULD "OPEN THE DOOR" TO ADMISSION OF THE CODEFENDANT'S HEARSAY CONFESSION TO THIS CRIME MINIMIZING HIS PARTICIPATION AND INCULPATING DEFENDANT AS THE RINGLEADER

In the instant case the State relied entirely on the truthfulness of Appellant's statement to establish his guilt of first degree murder. Other than Appellant's own statements to the police, the State introduced only evidence that the deceased was bound and that the corpse was dumped, but no evidence that was done solely or primarily by Appellant and not equally by the co-defendant Brown. In addition, there was fingerprint evidence tying Appellant to possessions of the victim, but

that testimony equally tied the co-defendant Brown to possessions of the victim. Because the State relied on the truthfulness of Appellant's statements to prove his guilt at trial, it was reversible error for the court below to refuse to permit Appellant to rely on the truthfulness of his own statement as to his culpability *vis a vis* the co-defendant Brown in the penalty phase. Appellant's statements admitted at trial consistently averred that the co-defendant was as culpable or more culpable than Appellant himself.

At the penalty phase Appellant sought to introduce the fact that after a separate trial the co-defendant Isaac Brown was convicted of second degree murder and sentenced to life imprisonment. Appellant was entitled to argue to the jury in the penalty phase that if they accepted the truth of his statements as to his guilt they should also accept the truth of his same statement when he stated that Isaac Brown was as culpable as he, if not more so. Since the jury had already relied on the truthfulness of Appellant's own statements, Appellant certainly had an absolute due process right to have this penalty phase jury informed that the co-defendant, who those same statements showed was equally culpable, was convicted of a lesser charge.

The State here relies on *Shere v. State*, 27 Fla. L. Weekly S752 Sept. 12,(2002) and *Steinhorst v. Singletary*, 638 So.2d 33 (Fla. 1994) to support its argument that there can never be a true or proper proportionality comparison by this Court in cases where co-defendants are convicted of different degrees of murder. However, those cases are inapposite. In *Shere*, this Court considered the post conviction *habeas corpus* claim of ineffective assistance of appellate counsel for failing to raise the co-defendant's lesser sentence on direct appeal. In that case at trial a detective was permitted to testify, apparently without objection, that the co-defendant gave a statement to the police accusing Shere of firing the first shots, which statement directly contradicted Shere's statement. 27 Fla. L. Weekly at S752. Clearly, this is exactly the kind of hearsay testimony generally held inadmissible under *Bruton v. United States*, 391 U.S. 123 (1968). Nevertheless, it came into evidence at Shere's trial and was therefore record evidence suggestive of different culpability of Shere and his co-defendant, a factor entirely missing in the instant case.

Here, the question is <u>no</u>t whether this Court can always or never consider an analysis of relative culpability if co-defendants are convicted of different crimes.

The question here is whether the critical constitutional principle that equally culpable co-defendants should be treated alike will be given effect at the penalty phase of a capital murder trial. Appellant maintains that fairness and due process require it. See *Scott v. Dugger*, 604 So.2d 465 (Fla. 1992).

Further, the State's reliance on *Steinhorst v. Singletary*, 638 So.2d 33 (Fla. 1994) is misplaced. Unlike the instant case, Steinhorst petitioned for *habeas corpus* relief on the ground that his death sentence was disproportionate and violated due process and equal protection when compared to life sentences received by his co-defendants. However, in denying relief this Court noted that:

> [t]he evidence presented at trial shows that the instant case does not involve equally culpable participants. Steinhorst shot and killed one person when the victims stumbled upon the smuggling operation. Steinhorst and Hughes then left the scene with one dead and three living persons. Witnesses testified that Steinhorst said he had taken care of the other victims. Unlike Steinhorst, Hughes testified on his own behalf at trial and said that Steinhorst was the one who actually shot the victims. Hughes was convicted of second degree murder after giving this exculpatory testimony. 638 So. 2d at 35 (emphasis added).

In the instant case, by contrast, there was no evidence presented at Appellant's trial that the co-defendant Brown was not equally culpable as

Appellant's statement characterized him. In the absence of any reliable evidence presented to this jury at the guilt phase to contradict the truth of Appellant's statements upon which the State relied, this Court cannot determine otherwise. The procedural and evidentiary posture of this case is wholly unlike either *Shere* or *Steinhorst*.

Here Appellant sought to inform the penalty phase jury that had not tried the co-defendant that Brown was convicted by another jury of second degree murder and sentenced to life for his role in these events. Appellant was precluded from that course and from then making the argument that Appellant's own statements - which the jury previously found truthful - would warrant no greater punishment since he was no more culpable than the co-defendant, by the trial court's erroneous ruling *in limine*. The trial court erroneously ruled that introducing the co-defendant Brown's conviction and sentence would "open the door" and permit the State to play the tape of Brown's confession claiming Appellant to be more culpable than Brown.

The co-defendant Brown's statement that Appellant was more culpable was clearly inadmissible hearsay, as noted in the initial Brief, and, contrary to the trial

court's ruling it could not come into evidence through a tape recording. Only if the State were prepared to call Brown as a witness could the statement come in, because only in that way could Appellant's constitutional right to confrontation and cross examination be vindicated.

The State claims that the trial court's ruling was neither erroneous nor an abuse of discretion and should be upheld because the State could introduce Brown's taped confession to prevent Appellant from "misleading" the jury. State's Brief p. 28. The State is wrong. The State's theory throughout this trial was that Appellant's confession was truthful. Appellant sought only to argue to the jury that they consider that his confession was truthful, just as the State argued throughout, as to his and Brown's relative culpability.

Further, the trial court's error in precluding the evidence of the co-defendant's conviction and sentence was harmful, fundamental error because it eliminated any possibility that this jury could even consider if equally culpable defendants would be treated alike. As noted above, Appellant had an absolute right to put the truthfulness of his confession before this jury. If the State believed that some aspect of the confession it relied upon for conviction was unworthy of belief,

the State had the option to then put that issue properly before the jury by calling Brown as a witness, thereby subjecting him to the crucible of cross examination and letting this jury determine whether Appellant or Brown - or both or neither was telling the truth when each claimed that the other was more culpable and whether each deserved the same penalty. Particularly since *Shere* and *Steinhorst* appear to stand for the proposition that this Court will not look to proportionality or relative culpability where co-defendants are convicted of different degrees of murder, it is that much more important that the jury's right to consider that claim be protected. Since under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 122 S. Ct. 2445 (2002) the jury is to be the fact finder, the jury's right to hear all relevant evidence is clearly paramount.

The trial court's ruling in *limine* that proof of Brown's conviction would open the door to hearsay forced Appellant to choose between his fundamental right to have the jury consider whether he and the co-defendant were equally culpable and if so, should equally culpable co-defendants receive identical punishment on the one hand, or his fundamental right to confront and cross examine the witnesses against him, on the other hand. As established in Appellant's Initial Brief, this was

harmful error and warrants a new sentencing hearing, at which Appellant will have the opportunity to present all relevant evidence on the issue of sentence. Given the fact that this jury failed to reach an unanimous recommendation, recommending death only by a vote of 8 to 4, and given the extensive mitigation evidence presented here, due process of law requires that Appellant be afforded a full and fair penalty phase at which he is enabled to present all relevant evidence and make all arguments to the jury which flow from that evidence.

REBUTTAL ARGUMENT AS TO POINT VI
FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant is cognizant of this Court's plurality decision in *Bottoson v. Moore*, 27 Fla. L. Weekly S 891 (Oct. 24, 2002), declining to hold that the United States Supreme Court decision in *Ring v. Arizona*, 122 S. Ct. 2428 (2002) renders Florida's capital sentencing scheme unconstitutional on its face. Appellant submits that this issue warrants being revisited in the instant case, together with the issue that Florida's capital sentencing scheme is unconstitutional as applied to this

Appellant.

First, the State claims that Appellant has failed to preserve this issue. The State is wrong. Appellant moved prior to trial to declare Fla. Stat. Sec. 921.141 unconstitutional for the reasons set forth in *Apprendi v. New Jersey* and *Ring v. Arizona*, and to dismiss the indictment on the ground that the trial court had discretion to override the jury's tendered sentence recommendation. All appellant's relevant motions were denied by the trial court. R. Vol I, pp. 116-120, 133-139, 140-150, Vol II, pp. 332-335.

Further, Appellant submits that this issue is preserved and ripe for review because *Apprendi* and *Ring* in fact constitute a fundamental and significant change in the law. Those cases also establish a significant impact on Florida law and thereby reveal that Appellant has sustained an obvious injustice on the individual facts of this case, and should be applied to this case under *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

In the present case the jury voted 8 to 4 to recommend death as its advisory sentence. Not only did the jury not reach an unanimous recommendation, but it provided no finding of facts to establish that it found <u>any</u> one aggravating

circumstance warranted death beyond a reasonable doubt.

The State's claim that the dictates of *Ring* are met by virtue of the fact that the jury here found Appellant guilty of felonies, and thus felony murder, beyond a reasonable doubt at the guilt phase, is wrong. Capital sentencing in Florida has always been grounded in the due process requirement that the death penalty is reserved for only the most aggravated of all first degree murders. Only after a first degree murder conviction is rendered will a jury consider penalty and recommend an answer to the question of whether that murder is sufficiently aggravated to warrant recommending the imposition of death. This Court has long held that the mere fact that a killing occurs during the course of commission of a felony does not automatically make death the presumptively correct punishment even though the commission of the felony is an eligible aggravating factor. Therefore, it is clear that merely finding the existence of an eligible aggravating circumstance in the guilt cannot be constitutionally the equivalent of the required jury weighing of aggravators and mitigators under the *Apprendi - Ring* standard of beyond a reasonable doubt and unanimity.

The State claims that judicial "findings" after a jury recommendation cannot

in any way interfere with Appellant's right to a jury trial apparently because Appellant got "two bites at the apple" to secure a life sentence. See State's Brief pp. 43-44. The State's argument conveniently overlooks the fact that what is at issue here is not "judicial findings" but rather a death sentence imposed not by an unanimous jury bound to the reasonable doubt standard but by a single judge. Thus, even though four reasonable jurors found that Appellant's actions deserved only a life sentence, the trial judge took that second bite of the apple to impose the death penalty. Appellant submits that under the reasoning of the United States Supreme Court in both *Apprendi and Ring*, the trial court's sentence of death denied him his fundamental right to a jury trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Celia Terenzio, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401 this _____ day of December, 2002.

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210(a)(2), Appellant hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

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