IN THE SUPREME COURT OF FLORIDA

LIONEL MILLER,)
)
)
Appellant,)
)
vs.) CASE NUMBER SC08-287
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
444 Seabreeze Blvd. Suite 210
Daytona Beach, Florida 32118
(386) 252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

LIONEL MILLER,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC08-287
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE DEFENDANT WAS DENIED A FAIR TRIAL BASED ON THE TRIAL COURT ERRED IN GRANTING THE STATE'S CAUSE CHALLENGE OF VENIREMAN EDDINGTON BY ERRONEOUSLY RULING THAT EDDINGTON WAS NOT DEATH-QUALIFIED

Initially, the state contends that this particular issue was not preserved at trial. After questioning the juror, the state set forth their argument on their cause challenge. (X 79) The trial court then asked defense counsel for his response. Defense counsel stated on the record:

> MR. HENDERSON: The fact that it would be difficult for him is not gonna preclude him from being a fair and impartial juror. I believe he said he could follow the law given the framework that was provided to him and the instructions, he believed he could be fair and impartial in the case. And it should be difficult to impose the death penalty. But he did not say that it would be difficult to follow the law. So I see a distinction in those -- in those two and I submit that there's no proper challenge for cause under these circumstances and to strike Mr. Edgington is a denial for a right to a fair and impartial trial under the Sixth and Fourteenth Amendments.

(X 80) The trial court then cited appropriate case law and excused Juror Eddington for cause. (X 80-81) Defense counsel did not challenge the judge's ruling further. Anything further would have been a useless act.

After the twelve jurors and one alternate had been picked, court recessed for the day. At that point, the trial court observed that defense counsel appeared to want to say something:

> MR. HENDERSON(defense counsel): Yes, Your Honor. I certainly don't want to surprise the Court, but when it comes time to ask whether we accept the jury, I'm going to renew my objection about all prior motions, everything that's out there and, again, I'm requesting a written ruling from the Court so I don't want to surprise the Court with that. That will be my position.
>
> THE COURT: You won't surprise me. That's the same song you've been singing. I'm used to it. All the ones that you don't have written rulings on that are - - or already made and there's nothing in writing, I'll get rulings, but I've been in the same place you've been all week.

MR. HENDERSON (defense counsel): I understand.

(XII 544-45) Appellant submits that all of the above was substantially sufficient to preserve this issue. The trial court was apprized of the grounds for appellant's argument regarding the granting of the state's cause challenge.

When court reconvened the next day, the trial court never asked if each side accepted the jury. Instead, after seating one additional alternate, excusing one juror for medical reasons, and seating an alternate in his place, the trial court simply ordered the jury sworn. (XIII 554-84, 591-92) Hence, defense counsel never specifically accepted the jury panel, as so many lawyers automatically do so frequently. Therefore, appellant certainly did not affirmatively waive any of his prior objections. This issue has been preserved for appellate review.

As this Court recently reiterated in ***Murray v. State***, 3 So.3d 1108, (2009):

> "For an issue to be preserved for appeal, it must be presented to the lower court, and the specific legal argument or ground to be argued on appeal must be part of that presentation." Doorbal v. State, 983 So.2d 464, 492 (Fla.2008); see also Farina v. State, 937 So.2d 612, 628 (Fla.2006) ("To preserve an issue, '[f]irst, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third ... 'it must be the specific contention asserted as a legal ground for the objection ... below.' ") (quoting Harrell v. State, 894 So.2d 935, 940 (Fla.2005)). "All trial errors ... must be preserved for appeal by making a contemporaneous objection." Capron v. State, 948 So.2d 954, 956 (Fla. 5th DCA 2007). While no magic words are

> needed to make a proper objection, the articulated concern must be "sufficiently specific to inform the court of the perceived error." State v. Stephenson, 973 So.2d 1259, 1262 (Fla. 5th DCA 2008); see Williams v. State, 414 So.2d 509, 511-12 (Fla.1982).

As for the merits, the state seems to take the position that Adolf Hitler, Osama Bin Laden , and other purveyors of genocide should somehow be excluded from death-eligible cases. Unlike many jurors, juror Eddington found life to be sacred. Eddington believed that the death penalty should be reserved for only the most deserving candidates. Although Hitler and Bin Laden were the only names mentioned, juror Eddington undoubtedly would have been able to consider the death penalty for other heinous crimes such as serial killers, infant rape followed by a tortuous death, and other horrible crimes. Eddington clearly stated on the record that he could follow the law. The state's cause challenge should have been denied.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE DEFENDANT WAS DENIED A FAIR TRIAL BASED ON MILLER'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE FACTS THAT MUST BE FOUND TO IMPOSE IT WERE NOT ALLEGED IN THE CHARGING DOCUMENT NOR WERE THEY UNANIMOUSLY FOUND TO EXIST BEYOND A REASONABLE DOUBT BY A 12-PERSON UNANIMOUS JURY.

The State created a straw man and soundly defeated arguments not made by Appellant. However, the State has not addressed nor can it lawfully refute the arguments presented in Point II of the Initial Brief.

The main premise of the State's reframed issue is that "***Apprendi v. New Jersey***, 530 U.S. 466 (2000) and ***Ring v. Arizona***, 536 U.S. 584 (2002), do not apply to Florida's capital sentencing scheme." (AB at 17). How can that be? Under the Supremacy Clause[1] decisions of the United States Supreme Court apply in all states. They apply in Florida.

---

[1] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." Art. VI, paragraph 2, United States Constitution.

Because this Court has never addressed the arguments made by Miller, the State cited cases that rejected arguments that addressed the aggravating circumstances contained in §921.141(5), Florida Statutes. The issues here, however, are not at all based on particular aggravating circumstances or even that portion of the statute. The issues here hinge on the statutory findings that are required to be made under §§ 775.082 and 921.141(3), Florida Statutes, when the death penalty is imposed on a person who has already been convicted of first-degree murder. The cases relied on by the State are wholly inapposite because every one addresses claims that the indictment must allege and/or the jury must find the aggravating circumstances set forth in §921.141(5), Florida Statutes.. The State has done a splendid job of compiling cases that reject those arguments. However, those are not Appellant's arguments. They will be repeated once more lest there be some residual doubt about what Miller argues and has argued.

Appellant contends here as he did below that before the death penalty can be lawfully imposed under § 775.082 and 921.141(3), Florida Statutes, due process requires that the indictment allege, and a unanimous twelve person jury find beyond a reasonable doubt, that (a) "*sufficient* aggravating circumstances exist as enumerated in subsection (5)" and that (b) "*insufficient* mitigating circumstances exist that outweigh the aggravating circumstances." Under ***Apprendi***, due process

requires that those findings (a and b) be alleged in the indictment and made by a unanimous jury beyond a reasonable doubt because under §921.141(3), Florida statutes, those findings must be made to impose a death sentence *after* a person has been convicted of first-degree murder. Without those findings, the death penalty cannot lawfully be imposed. These are not difficult concepts to grasp.

The State and Appellant agree that review of this purely legal issue on appeal is *de novo*. The *de novo* analysis begins with a specific holding from the United States Supreme Court:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other 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*. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Apprendi, 530 U.S. 466, 690 (2000) (Emphasis added). That holding applies in Florida in non-capital cases. ***State v. Sigler***, 967 So.2d 835 (Fla. 2007). The reason that ***Apprendi*** did not initially apply to capital cases anywhere was that it expressly excluded capital cases from its analysis. For that reason many

decisions from this Court initially rejected arguments that the ***Apprendi*** analysis applied to capital cases. E.g., ***Mills v. Moore***, 786 So.2d 532, 537 (Fla. 2001) ("Therefore, on its face, ***Apprendi*** is inapplicable to this case.") That exception no longer exists because the United States Supreme Court later squarely held that ***Apprendi*** *does* apply to capital cases:

> Although "'the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]' ... [o]ur precedents are not sacrosanct." (Citations omitted). "[W]e have overruled prior decisions where the necessity and propriety of doing so has been established." (Citation omitted). We are satisfied that this is such a case. ;F3;F3
> For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647-649, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury.

Ring v. Arizona, 536 U.S. 584, 608-609 (2002).

The remainder of ***Ring*** is taken up with the ***Apprendi*** analysis of *Arizona's* death penalty statutes. That analysis has no substantive bearing on Florida's statutes because they are materially different. Simply said, the pertinent part of

Ring insofar as the *de novo* analysis performed here is that ***Ring*** applied ***Apprendi*** to capital cases. Therefore, this issue hinges upon whether a finding in addition to what was found by the jury to convict a defendant of first degree murder must be made to impose a death sentence in Florida. The answer is yes because §775.082 and §921.141(3), Florida Statutes, require that two findings be made.

The State glosses over ***Blakely v. Washington***, 542 U.S. 296 (2004) by claiming that "it just reaffirmed the Court's previous rulings in ***Apprendi*** and ***Ring***." (AB at 18). Not so. The Court explained why the statutory maximum punishment in Florida after a conviction of first degree murder is NOT the death penalty and why due process applies to §§921.141(3)(a)&(b):

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See *Ring, supra,* at 602, 122 S.Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi, supra,* at 483, 120 S.Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi, supra,* at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop,*

> *supra*, § 87, at 55, and the judge exceeds his proper authority.

Blakely v. Washington, 542 U.S. 296, 303-304 (2004).

The State ultimately relies on ***State v. Dixon***, 283 So.2d 1 (Fla. 1973). (AB at 2-25). When ***Dixon*** was decided all possible arguments and constitutional issues were not addressed. The inability of the State to provide a single case that addresses the arguments made demonstrate that the specific arguments repeatedly made by Miller to the trial court and to this Court have not been squarely presented before by other defendants. Appellate courts will not address arguments not made. The constitutional errors committed here could and should have been easily corrected below when the timely and specific objections were made. The errors cannot now be deemed "harmless" because, over timely and specific objection, the grand jury did not allege that Miller was subject to the death penalty and the petit jury did not unanimously determine Miller's eligibility for the death penalty. This Court does not have the authority to rewrite legislation. If the statute is unconstitutional as written, it should be struck down. If it is unconstitutional as applied, it must be correctly applied. Either way, Miller's death penalty must be reversed and the matter remanded for imposition of a life sentence without possibility of parole.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE STATEMENT WHERE ***MIRANDA*** WARNINGS WERE DEFICIENT REGARDING APPELLANT'S RIGHT TO FREE COUNSEL ONCE QUESTIONING BEGAN.

Appellant relies on the argument and authorities set forth in the Initial Brief.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY AND SPECIFIC OBJECTIONS WHEN WITNESSES REFERRED TO THE FACT THAT THE MURDER OCCURRED ON EASTER SUNDAY, AND THAT THE VICTIM'S SON IS A LAWYER, BOTH IRRELEVANT AND PREJUDICIAL CIRCUMSTANCES, RESULTING IN A DEPRIVATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Appellant relies on the argument and authorities set forth in the Initial Brief.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF CONFUSING, IRRELEVANT, AND PREJUDICIAL DETAILS OF A PRIOR VIOLENT FELONY DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL AND RENDERING HIS DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

Appellant relies on the argument and authorities set forth in the Initial Brief.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, OVER TIMELY AND SPECIFIC OBJECTION, ON THE WITNESS ELIMINATION AGGRAVATING CIRCUMSTANCE WHERE IT WAS NOT SUPPORTED BY ANY QUANTUM OF EVIDENCE AND WAS ULTIMATELY REJECTED BY THE TRIAL COURT.

Appellant relies on the argument and authorities set forth in the Initial Brief.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate appellant's convictions and sentences and remand for a new trial as to Points I, III and IV. As for Point II, this Court should vacate appellant's death sentence and remand for the imposition of life imprisonment without the possibility of parole. In the alternative, this Court should declare Florida's capital sentencing scheme to be unconstitutional. As for Points V and VI, this Court should vacate appellant's death sentence, remand for a new penalty phase, or for imposition of a life sentence.

Respectfully submitted,
JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
444 Seabreeze Blvd., Suite 210
Daytona Beach, FL 32118
(386) 252-3367
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Assistant Attorney General Lisa Marie Lerner, 1515 N. Flagler Drive, West Palm Beach, FL 33401 and mailed to Mr. Lionel Miller, #025171, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 28th day of July, 2009.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER