

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC01-192
LOWER TRIBUNAL NO. 94-498-CF**

LORAN COLE,

Petitioner,

v.

**MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,**

Respondent,

and

**ROBERT BUTTERWORTH,
Attorney General,**

Additional Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF CONTENTS</u>	ii
TABLE OF AUTHORITIES	iii
CLAIM I	
THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.	1
1. The new law announced in <u>Apprendi v. New Jersey</u> renders the Florida death penalty sentencing scheme unconstitutional as applied in Mr. Cole’s case.	1
2. Application of <u>Apprendi</u> under Florida law	9
CLAIM II	
THE PROSECUTOR’S IMPROPER PENALTY PHASE CLOSING ARGUMENT RENDERED LORAN COLE’S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.	10
ARGUMENT AS TO REMAINING CLAIMS	11
CONCLUSION AND RELIEF SOUGHT	11

CERTIFICATE OF SERVICE 12

CERTIFICATE OF COMPLIANCE 14

TABLE OF AUTHORITIES

Page

Apprendi v. New Jersey,
120 S.Ct. 2348, 2366 (2000) 3

Batie v. State,
534 So.2d 694, 695 (Fla.1988) 4

State v. Delva,
575 So.2d 643, 644-45 (Fla.1991) 11

Perez v. State,
545 So.2d 1357, 1358 (Fla. 1989) 4

Freeman v. State,
761 So.2d 1055, 1069 (Fla.2000) 6

McMillan v. Pennsylvania,
477 U.S. 79, 87-88 (1986) 8

Mills v. Moore,
2001 WL 360893 *3-4 (Fla.2001) 2

Mullaney v. Wilbur,
421 U.S. 684, 699 (1975) 7

North Carolina v. Golphin,
533 S.E.2d 168, 193-94 (N.C.2000) 5

Rusaw v. State,

451 So.2d 469, 470 (Fla.1984)	4, 5
<u>State v. Hoskins,</u> 14 P.3d 997, 1016 (Ariz.2000)	5
<u>Strickland v. Washington,</u> 466 U.S. 671, 671 (1984)	11
<u>Walton v. Arizona,</u> 497 U.S. 639, 647-49 (1990)	2
<u>Weaver v. Graham,</u> 450 U.S. 24, 27-33 (1981)	1
<u>Weeks v. State,</u> 761 A.2d 804, 806 (Del.2000)	5
<u>Witt v. State,</u> 387 So.2d 922 (Fla.1980)	8
 <u>Statutes , Rules and Other Authority</u>	
	<u>Page</u>
U.S. Const., Art. I, 10 cl.1; Fla. Const., Art X, 9, 10	2
Fla. Const. Art. X 0, 10,	2
<u>Fla. Stat</u> 775.082	3
<u>Fla. Fla.</u> 704. 011 (2) (8) (2000)	4
<u>Fla Stat.</u> 78204(1)(a)(2001)	4
<u>Fla. Stat.</u> 021.141 (1004)	4

CLAIM I

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

- 1. The new law announced in Apprendi v. New Jersey renders the Florida death penalty sentencing scheme unconstitutional as applied in Mr. Cole's case.**

Respondent asserts that the 1995 version of Florida Statute 775.082 applies to Mr. Cole's case (Response at 4)¹. Respondent's assertion would amount to an ex post facto violation of Mr. Cole's rights. This crime occurred in February of 1994, and Mr. Cole was not indicted until March 10, 1994 (RV1, 104-7). The 1995 version of 775.082 arguably makes death as the maximum penalty for a capital felony, even if no aggravating circumstances are proven. The 1994 version makes life the maximum possible sentence unless an aggravating circumstance is proven. To apply the 1995 version to Mr. Cole would enact a statute "affect[ing] [the] prosecution and punishment" for any offense previously committed and would violate the ex post facto prohibitions of the Florida Constitution and the United

¹Petitioner mistakenly cited the 1995 version of Florida Statute 785.082 in his petition for Writ of Habeas Corpus. Because the crime occurred in 1994, the 1994 version applies in Mr. Cole's case.

States Constitution. U.S. Const., Art. I, § 10 cl.1; Fla. Const., Art X, §9, §10.

Weaver v. Graham, 450 U.S. 24, 27-33 (1981).

Respondent also asserts that this Court's decision in Mills v. Moore decides this issue adversely to Mr. Cole (Response at 4-7). Mills v. Moore, 2001 WL 360893 *3-4 (Fla.2001). Mr. Cole respectfully submits that this Court interpreted the Apprendi language upholding Walton v. Arizona too broadly.

In Mills v. Moore, this Court held that because Apprendi did not overrule Walton v. Arizona, the Florida death penalty scheme was not overruled. Mills v. Moore, 2001 WL 360893 *3-4 (Fla.2001). To support this opinion, this Court relied on the language in Apprendi which states:

Finally, this Court has considered and 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.

Id. When read in conjunction with the following citation from Walton v. Arizona (“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.”), it is clear that the Apprendi Court intended to limit this statement to only those capital sentencing schemes in which, using the test outlined by the Apprendi Court, aggravating factors are sentencing factors and not elements of a crime for which death is the

maximum statutory penalty. Apprendi v. New Jersey, 120 S.Ct. 2348, 2366 (2000) citing Walton v. Arizona, 497 U.S. 639, 647-49 (1990).

Though the Apprendi majority specifically upheld the Arizona death penalty sentencing scheme addressed in Walton v. Arizona, the Court did not address the Florida death penalty scheme which is significantly different. Apprendi, 120 S.Ct. at 2366 citing Walton v. Arizona, 497 U.S. 639, 647-49 (1990). The Arizona statute upheld in Apprendi provides:

A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as determined in accordance with the procedures provided in subsections B through G of this section.

§ 13-703 Ariz. Rev. Stat. (1985)(emphasis added). Death is clearly within the maximum penalty for first degree murder in Arizona.

Contrarily, in Florida, death is not within the maximum penalty for a mere conviction of first degree murder. Mr. Cole was sentenced under Florida statute 775.082, 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 s. 921.141 results in findings by the court**

that such person shall be punished by death, and in the latter event such person shall be punished by death.

§ 775.082 Fla. Stat. (1994)(emphasis added). If the court sentenced Mr. Cole immediately after conviction, the court could only impose a life sentence. § 775.082 Fla. Stat. (1994). Therefore, in Florida, unlike Arizona, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increases the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

The fact that both Florida statutes 921.141 and 775.082 use the term “capital” felony does not make death the maximum possible penalty for a capital felony. A capital felony under Florida law is not defined in effect as a felony for which death is a possible sentence. Both capital sexual battery and first degree murder for which there are no aggravating circumstances are capital felonies even though death is never a possible punishment. Fla. Stat. 794.011(2)(a); 782.04(1)(a); Batie v. State, 534 So.2d 694, 695 (Fla.1988); Perez v. State, 545 So.2d 1357, 1358 (Fla. 1989); Rusaw v. State, 451 So.2d 469, 470 (Fla.1984). The legislature designates these crimes as capital to give them the increased stigma and burdens attached to the statutory maximum life sentence. See Batie v. State, 534 So.2d 694, 695 (Fla.1988); Perez v. State, 545 So.2d 1357, 1358 (Fla. 1989); Rusaw v. State,

451 So.2d 469, 470 (Fla.1984). Clearly, under Florida law, death is not the maximum possible penalty for a capital felony.

The statutes underlying the post-Apprendi death penalty cases this Court cited in Mills are distinguishable from the Florida death penalty statutes. Each of the other statutes make aggravating circumstances sentencing factors rather than elements of the offense because each statute states that punishment shall be death. See Del. Code Ann. tit. 11 § 636 (2000); Del. Code Ann. tit. 11 § 4209(a),(b), (c) (1975); N.C. Gen. Stat. § 14-17 (1994); N.C. Gen. Stat. § 15A-2000(a)(b)(c) (1995). Moreover, each case cited is also distinguishable. In State v. Hoskins, 14 P.3d 997, 1016 (Ariz.2000), the Apprendi issue was not briefed or argued, so the Arizona Supreme Court specifically did not address Apprendi's application, noting that Walton was precedent until the court had a chance to evaluate the Arizona death penalty scheme in light of Apprendi. In Weeks v. State, 761 A.2d 804, 806 (Del.2000), Weeks plead guilty to felony murder, establishing two aggravating circumstances. The Weeks court held that, by pleading guilty, Weeks waived his right to any jury determination of those aggravators. In North Carolina v. Golphin, 533 S.E.2d 168, 193-94 (N.C.2000), the court relied on the fact that the United States Supreme Court upheld Walton v. Arizona to hold that the trial court did not err in denying motion for notice of aggravating circumstances. However, not only

does the North Carolina statute provide that death is maximum punishment for a capital felony, it provides more Sixth and Fourteenth Amendment protections than the Florida death sentencing scheme. The statutes require a unanimous death recommendation from the jury with specific findings as to the aggravators found. N. C. Gen. Stat. § 14-17 (1994); N.C. Gen. Stat. § 15A-2000(a)(b)(c) (1995). Given the fundamental distinctions between the death penalty sentencing schemes in these states and that in Florida, these cases are not applicable.

Respondent claims these issues are procedurally barred because appellate counsel did not raise this issue on direct appeal Response at (8-14). This is a direct appeal issue which appellate counsel should have raised on direct appeal. This Court has repeatedly held that ineffective assistance of appellate counsel claims are appropriately raised in a petition for writ of habeas corpus. Freeman v. State, 761 So.2d 1055, 1069 (Fla.2000). This issue is not procedurally barred in this petition

Appellate counsel was ineffective for not raising on direct appeal that the court erred in denying Motion For Statement Of Particulars and Motion To Declare Section 921.141, Florida Statutes Unconstitutional Because Only A Bare Majority Of Jurors Is Sufficient To Recommend A Death Sentence (RV 3, 473-76; 4, 627-28; 16, 1525-26). The result in Apprendi was clearly dictated by precedent existing

at the time Mr. Cole's sentence became final, and appellate counsel failed to raise this fundamental error on appeal.

In Winship, the United States Supreme Court held, "the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In the Matter of Samuel Winship, 397 U.S. 358, 364 (1970). In Mullaney v. Wilbur, the Supreme Court extended Winship's protections to determinations of length of sentence as well as determinations of guilt and innocence. Mullaney v. Wilbur, 421 U.S. 684, 699 (1975). This was consistent with the common law notion that:

Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170].

Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51.

In McMillan v. Pennsylvania, the Supreme Court held that a Pennsylvania statute did not violate the Winship and Mullaney boundaries because it limited the sentencing judge's discretion within the available range of penalties:

Section 9712 **neither alters the maximum penalty for the crime committed** nor creates a separate offense calling for a separate penalty within the range already available to it without the special finding of visible possession of a firearm.

McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986)(emphasis added).

The precedent existing at the time of Mr. Cole's second penalty phase dictated that provisions which increase a maximum penalty for a crime committed are elements of the crime which must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. The aggravating factors in Mr. Cole's case did not comply with these standards dictated by the Sixth and Fourteenth Amendments, and the court refused to correct these errors by denying Mr. Cole's Motion For Statement Of Particulars and Motion To Declare Section 921.141, Florida Statutes Unconstitutional Because Only A Bare Majority Of Jurors Is Sufficient To Recommend A Death Sentence (RV 3, 473-76; 4, 627-28; 16, 1525-26). Appellate counsel performed deficiently by failing to raise these errors on appeal. Had appellate counsel raised these errors on appeal, this Court probably would have vacated Mr. Cole's death sentence and remanded his case for a new penalty phase.

Alternatively, this claim is properly plead in a petition for writ of habeas corpus because Apprendi is new law for which Witt v. State permits retroactive

application (RB 16-17). Witt v. State, 387 So.2d 922 (Fla.1980). In Witt, this Court held that a new law will be retroactive in post conviction appeals if it meets the following standards: the new law emanates from the United States Supreme Court or the Florida Supreme Court, the change is constitutional in nature, and it has fundamental significance. Id. at 928-30. Apprendi meets all three standards: it emanates from the United States Supreme Court, is constitutional, and it is fundamental-mandating Sixth and Fourteenth Amendment protections to statutes which previously denied them.

2. Application of Apprendi under Florida law

The critical difference between the Florida and Arizona sentencing schemes proves that the dicta in Apprendi upholding the Arizona scheme does not apply to Florida. Florida statute 775.082 clearly puts death outside the statutory maximum penalty for Apprendi analysis, and is therefore, unconstitutional as it was applied to Mr. Cole.

CLAIM II

**THE PROSECUTOR’S IMPROPER PENALTY
PHASE CLOSING ARGUMENT RENDERED
LORAN COLE’S DEATH SENTENCE
UNRELIABLE IN VIOLATION OF THE FIFTH,
SIXTH, EIGHTH, AND FOURTEENTH
AMENDMENTS TO THE UNITED STATES
CONSTITUTION AND THE CORRESPONDING
PROVISIONS OF THE FLORIDA
CONSTITUTION. APPELLATE COUNSEL WAS
INEFFECTIVE FOR FAILING TO RAISE THIS
CLAIM ON DIRECT APPEAL.**

Respondent argues that the prosecutor’s false argument was a proper comment on the evidence because Pamela Edwards testified that Paul told her his hand was broken (Response at 17). Respondent claims, “the thrust of the prosecutor’s argument was not that the hand was actually broken, and thus, it was physically impossible for Paul to use it, but was that Paul believed that it was broken, was treating it as if it was, and therefore, would not even attempt the things that he would have had done with that hand in order to slit the throat of John Edwards” (RB at 28-29). Respondent’s claim is refuted by the record.

Now is a guy with a broken hand going to get this knife out of his pocket, get it open, go back, cut John Edwards’ throat, and then get it back in his pocket, with a broken hand? Because all the evidence is he had to have done all that.

(RV 17, 1555). The prosecutor did *not* argue, “now is a guy *who believes his hand is broken* going to get this knife out of his pocket, get it open, go back, cut John Edwards’ throat, and then get it back in his pocket, with a *hand he believes is broken?*” The prosecutor falsely argued to the jury that Paul’s hand was broken and that it prevented him from committing this murder.

This false statement, combined with the prosecutor’s improper mercy argument, constituted fundamental error because it “reach[ed] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” State v. Delva, 575 So.2d 643, 644-45 (Fla.1991). With nothing but circumstantial evidence indicating that Mr. Cole, rather than Paul, actually committed the murder, the combination of the false statement and improper mercy argument probably induced the jury to recommend death rather than life. Confidence in the outcome is undermined. Strickland v. Washington, 466 U.S. 671, 671 (1984).

ARGUMENT AS TO REMAINING CLAIMS

Mr. Cole relies on argument presented in his initial Petition for Writ of Habeas Corpus regarding these issues.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Cole respectfully urges this

Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 5th day of July, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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