

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1079

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LLOYD CHASE ALLEN,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

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PETITION FOR WRIT OF HABEAS CORPUS

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DAN D. HALLENBERG  
Assistant CCRC  
Florida Bar No. 0940615

KENNETH MALNIK  
Special Assistant CCRC  
Florida Bar No. 0351415

NEAL A. DUPREE CAPITAL  
CAPITAL COLLATERAL REGIONAL  
- SOUTH  
101 N.E. 3RD AVE., SUITE 400  
Ft. Lauderdale, FL 33301  
(954) 713-1284; FAX (954) 713-

COUNSEL

**COUNSEL FOR PETITIONER**

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### INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that proceedings that resulted in Mr. Allen's conviction and death sentence violated fundamental constitutional guarantees.

Citations to the record on direct appeal shall be as (R . . .) for citations to the record and (TRT . . .) for citations to the transcripts.

### JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

### REQUEST FOR ORAL ARGUMENT

Mr. Allen requests oral argument on this petition.

## PROCEDURAL HISTORY

A grand jury indicted Mr. Allen for first-degree premeditated murder (R. 4-5). He was also charged by information with kidnapping, robbery with a deadly weapon, grand theft, and grand theft of an automobile (R. 6-8). Mr. Gerod J. Hooper, an assistant public defender, represented Mr. Allen during the pre-trial and guilt-innocence portions of the capital trial.

The trial court entered judgments of acquittal for the charges of robbery with a deadly weapon and theft of the victim's ring. See Allen v. State, 662 So. 2d 323, 326 (Fla. 1995). At the conclusion of the guilt-innocence portion of the trial, the jury found Mr. Allen guilty of first-degree murder and grand theft of the automobile. See id. The jury found him not guilty of kidnapping. See id.

After the verdict was announced and prior to the start of the penalty phase proceedings, Mr. Hooper moved to withdraw from the case on the grounds that Mr. Allen wanted to waive the presentation of mitigating evidence and possibly affirmatively ask for the death penalty (TRT 661). During a subsequent colloquy regarding his desire to waive counsel, Mr. Allen made known that he intended to affirmatively ask to be executed (TRT 669, 670, 671). After conducting the colloquy with Mr. Allen, the court allowed Mr. Allen to waive counsel and exercise his

right to self-representation (TRT 662-72). The court appointed Mr. Hooper as standby counsel (TRT 673). The court then decided to order that Mr. Allen be examined for competency pursuant to rule 3.210 of the Florida Rules of Criminal Procedure (TRT 674).

Two psychologists thereafter evaluated Mr. Allen and testified at a hearing as to their findings (TRT 684-95). Mr. Allen was permitted to represent himself at this proceeding and, after stipulating to each psychologists' expertise, asked no questions of either witness (TRT 684-95). Dr. Marshall Wolfe's testimony encompassed approximately four (4) total transcript pages (TRT 684-90<sup>1</sup>). He concluded that it was his opinion that Mr. Allen was competent to proceed (TRT 688). Dr. James Holbrook's testimony encompassed less than five (5) total pages of transcript (TRT 690-95). He also concluded that Mr. Allen was competent to proceed (TRT 692-94). He also indicated without elaboration that Mr. Allen was competent to waive mitigation (TRT 695). Both experts testified that each did not know how Mr. Allen intended to proceed in the penalty phase (TRT 688, 694). In other words, neither expert knew that Mr. Allen intended to waive mitigation and ask to be executed. The trial court

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<sup>1</sup>Mr. Allen's copy of the trial transcript contained in the original record on appeal does not contain a page 689. The clerk's hand-numbered pagination appears to have been corrected and re-numbered on several occasions suggesting that the omission was a scrivener's pagination error.

thereafter concluded based on the experts' testimony that Mr. Allen was competent to proceed to the penalty phase (TRT 695).

During the penalty phase, Mr. Allen presented no evidence and specifically denied the existence of mitigation. He denied that he suffered from alcoholism or drug abuse and denied that he was an abused child. He also asserted that he was innocent of the murder and suggested that the victim had been murdered by an un-named associate Mr. Allen had summoned to help make repairs on the victim's house. However, even though he claimed he was innocent, he asked the jury to recommend the death penalty because he felt responsible and remorseful for the victim's death and because he preferred death to life in prison. See Allen at 327. The jury recommend that he be executed by a vote of 11 to 1. See id.

At the subsequent sentencing proceeding before the trial judge, Mr. Hooper again represented Mr. Allen. See Id. at 329. Mr. Hooper told the trial court that he had no mitigating evidence to present because Mr. Allen refused to cooperate in not providing Mr. Hooper with mitigating factors and because Mr. Allen repeatedly requested that he not plead for Mr. Allen's life (TRT 801); see id. at 329. Furthermore, as this Court found on direct appeal, Mr. Hooper simply did no mitigation investigation in apparent acquiescence to Mr. Allen wish to be

executed if found guilty (TRT 801-04); see Allen at 329. Unlike the penalty phase, Mr. Hooper did not move to withdraw during the sentencing hearing. See id. However, like he did at the penalty phase, Mr. Allen asked the court to order that he be executed (TRT 808). The court thereafter sentenced Mr. Allen to death (TRT 812).

On direct appeal, this Court affirmed both the convictions and the sentence of death. See Allen, 662 So. 2d 323. Mr. Allen filed a petition for writ of certiorari in the United States Supreme Court which was denied. See Allen v. Florida, 517 U.S. 1107 (1996). He subsequently filed in the trial court a motion for post-conviction relief pursuant to rule 3.850 of the Florida Rules of Criminal Procedure. The trial court summarily denied the motion and he appealed. Contemporaneously with his initial brief on appeal from the order of summary denial, Mr. Allen now files the instant petition for writ of habeas corpus.

## CLAIM ONE

THIS COURT SHOULD RE-VISIT THE ISSUE OF PROPORTIONALITY; PETITIONER'S WAIVER OF MITIGATION PRECLUDED THIS COURT FROM CONDUCTING A CONSTITUTIONALLY SUFFICIENT PROPORTIONALITY REVIEW

This Court was precluded from conducting a meaningful and constitutionally sufficient proportionality review on direct appeal due to Mr. Allen's waiver of mitigation. Appellate counsel raised this issue on direct appeal and the Court concluded that "a valid<sup>2</sup> waiver of mitigation does not preclude this Court from conducting the required proportionality review." Allen, 662 So. 2d at 331. The Court then concluded that Mr. Allen's death sentence was not disproportionate. See id. Mr. Allen respectfully contends that this Court should revisit this issue in light of this Court subsequent opinion in Muhammad v. State, 782 So. 2d 343 (Fla. 2001).

In Muhammad v. State, 782 So. 2d 343 (Fla. 2001), this Court re-visited the issue of the effect of a capital defendant's waiver of mitigation on this Court's

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<sup>2</sup>In his motion for post-conviction relief which the lower court summarily denied and which is now pending on appeal, Mr. Allen contends that he did not knowingly and voluntarily waive mitigation (see Claim III and Claim IV of his Second Amended Motion To Vacate; (PCR 814-29)).

constitutionally mandated proportionality review. In Muhammad, the Court held:

In all capital cases, this Court is constitutionally required "to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990); see e.g., Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). This case provides a perfect example of why the defendant's failure to present mitigating evidence makes it difficult, if not impossible, for this Court to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases.

Muhammad, 782 So. 2d at 364-64(emphasis added). The Court then noted that due to the defendant's waiver of mitigation, mitigation in the form of evidence of "an extremely difficult childhood" and mental health problems was never presented. See id. at 364. This Court "cannot permit this constitutional obligation [to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case and compare it with others] to be thwarted by the defendant's own actions or inactions." Muhammad at 369 (Pariente, J., specially concurring). In light of this Court's recognition that a defendant's deliberate failure to present mitigation evidence makes it "difficult, if

not impossible" for the Court to conduct an adequate proportionality review, this Court should re-visit its holding on direct appeal that Mr. Allen's waiver of mitigation did not render inadequate the Court's proportionality review. This is especially true given the abundant and compelling mitigation evidence that Mr. Allen contends was available but not presented (see PCR 821-29). See Muhammad.

## CLAIM II

### THE COURT'S DECISION TO AFFIRM THE SENTENCE OF DEATH MUST BE REVISITED IN LIGHT OF APPRENDI V. NEW JERSEY.

The Court's decision on direct appeal to affirm the sentence of death should be revisited in light of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). In Apprendi, the Supreme Court held that "[o]ther 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 protections 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. Allen submits that because the

elements relied on by the State to enhance his punishment under Fla. Stat. § 775.082(1), Fla. Stat. (1991) were not charged in the indictment and found to exist beyond a reasonable doubt by the jury, the death sentence is unconstitutional under both the United States and Florida Constitutions and violates Apprendi and the Sixth and Fourteenth Amendments.<sup>3</sup>

Florida's death penalty statute provides that the "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. Allen 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 the alleged crimes and at the time of Mr.

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<sup>3</sup>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).

Allen's 1993 trial also required the interplay of several statutes which operate independently but must be considered together to authorize Mr. Allen's punishment. Mr. Allen was sentenced in 1993 under the provisions of section 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.

§ 775.082(1), Fla. Stat. (1993). Section 921.141, 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.

§ 921.141(1), Fla. Stat. (1993). Section 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.

§ 921.141(3), Fla. Stat. (1993).

Section 775.082, the statute which applies in this case,<sup>4</sup> 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 section 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 unquestionably of constitutional significance." Id. at 2365. See also Woodson v. North Carolina, 428 U.S. 280, 305 (1976)

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<sup>4</sup>. The statute was rewritten in 1994, and now provides:

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 Supp.). See 1994 Fla. Sess. Law Serv. Ch. 94-228 (S.B. 158). Although the newer statute also poses constitutional problems under Apprendi, that statute is not at issue in these proceedings.

("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. Allen's punishment under section 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. Allen's death sentence is unconstitutional under both the United States and Florida Constitutions.

The 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.<sup>5</sup>

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5As 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.

Mr. Allen 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), *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 to the jury beyond a reasonable doubt the elements used to enhance his punishment suffers from a similar constitutional flaw. Thus, this issue should be revisited at this time.

In Mr. Allen's case, none of the Sixth Amendment and Due Process requirements identified in Apprendi were satisfied. The indictment did not give notice of the aggravating

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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 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.

circumstances on which the State would rely to attempt to establish the death penalty. The judge, and not the jury, made the specific findings authorizing imposition of the death penalty. It is impossible to know if there were any unanimous jury findings regarding the existence of any aggravating factor. The judge, and not the jury, was assigned and carried out the responsibility for determining whether any aggravating circumstance existed. Mr. Allen was therefore ineligible for the death penalty, and the sentence provided under Florida law was life imprisonment.

Mr. Allen acknowledges that this Court has held that Apprendi has not impacted Florida's sentencing scheme and has not overruled Walton. Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001) ("[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either"). See also Brown v. Moore, 26 Fla. L. Weekly S742 (Fla. Nov. 1, 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001). However, on January 11, 2002, the Supreme Court granted *certiorari* review in Arizona v. Ring, 25 P.3d 1139 (Ariz. 2001), cert. granted, 122 S.Ct. 865 (2002). In Ring, the Court is going to decide whether Walton should be overruled in light of Apprendi. The Supreme Court has also granted a stay of execution to Florida death row inmates Amos King and Linroy Bottoson, who have

presented to the Court the issue of Apprendi's impact on Florida. King v. State, 27 Fla. L. Weekly S65 (Fla. Jan. 16, 2002), stay granted, No. 01-7804 (U.S. Jan. 23, 2002); Bottoson v. State, 2002 WL 122169 (Fla. Jan. 31, 2002), stay granted, 2002 WL 181142 (U.S. Feb. 5, 2002). Thus, Mr. Allen presents this claim at this time for preservation purposes, and submits that relief is warranted.

CONCLUSION

For the reasons set forth above, Mr. Allen respectfully requests this Court to vacate his sentence of death and order the lower court to impose a life sentence. In the alternative, Mr. Allen requests this Court to remand for a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Sandra S. Jaggard, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on May 6, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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DAN D. HALLENBERG  
Florida Bar No. 940615  
Assistant CCRC-South  
101 N.E. 3rd Ave., Ste. 400  
Fort Lauderdale, FL 33301  
(954) 713-1284  
Attorney for Mr. Allen

