IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

vs.

CASE NO.: SC00-1042

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the clerk's record will be designated with the prefix "R" followed by the volume and page number. The transcript will be similarly designated with the prefix "T." An appendix is attached to this brief containing a copy of the penalty phase trial transcript, the sentencing hearing before the judge, counsels' sentencing memoranda and the trial court's sentencing and written order. References to the appendix will be designated with the prefix "App."

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

On May 26, 1998, an Escambia County grand jury returned an indictment charging Timothy Lee Hurst with first degree murder for the death of Cynthia Harrison. (R1:1-2) The indictment alleged both premeditation and felony murder with robbery as the underlying felony. (T1:1-2) Hurst proceeded to a jury trial on March 20, 2000. (T1:1) On March 23, 2000, the jury found Hurst guilty as charged. (R3:448; T5:942) A penalty phase trial commenced and ended on afternoon of that same day, and the jury recommended a death sentence by a vote of eleven to one. (T5:946-1002)(App. A) The trial court set the sentencing hearing for April 17, 2000, and the sentencing for April 26, 2000. (T5:1003; R3:465, 468)(App. B)

Circuit Judge Joseph Q. Tarbuck sentenced Timothy Hurst to death on April 26, 2000. (R3:468-495)(App. B) In the sentencing order (App. D), the court found three aggravating circumstances: (1) the homicide was committed during a robbery; (2) the homicide was especially heinous, atrocious and cruel; and (3) the homicide was committed to avoid or prevent arrest. (R3:482-485)(App.D) In mitigation, the court listed ten factors in the sentencing order and found as follows: (1) The defendant acted under the

substantial dominion of another person -- the court rejected and gave the factor no weight. (R3:485-486)(App.D)

(2) The capacity of the defendant was substantially impaired -- the court found no evidence of substantial impairment and gave the factor little weight. (R3:486-487)(App. D)

(3) The defendant exhibited good conduct throughout the trial -- the court found the factor established but gave it little weight. (R3:487)(App. D)

(4) The defendant has a good family background -- the court rejected and gave the factor no weight. (R3:487)(App. D)

(5) The defendant has no prior criminal history -- the court found the factor and gave it moderate weight.(R3:487)(App. D)

(6) The defendant contributed to the community by assisting his church and neighbors -- the court found the factor "has not been established to any appreciable degree" and gave the factor little weight. (R3:487)(App. D)

(7) The defendant maintained regular church attendance -- the court found the factor "has not been established to any appreciable degree" and gave the factor little weight. (R3:488)(App. D)

(8) The defendant lacks future dangerousness -- the court rejected on the basis that no evidence was presented and gave the factor no weight. (R3:488)(App. D)

(9) The defendant assisted his mother and father and cared for younger siblings -- the court found the factor and gave it moderate weight. (R3:488)(App. D)

(10) The age of the Defendant, 18 years-old at the time of the offense -- the court stated "the Defendant's age should not be considered as a mitigating factor and to this the Court will give very little weight." (R3:488)(App. D)

Hurst filed a motion for new trial which the trial court denied. (R3:497-500) Hurst filed his notice of appeal to this Court on May 8, 2000. (R3:501)

Facts -- Prosecution's Case

The body of Cynthia Harrison was discovered on the morning of Saturday, May 2, 1998, inside the freezer at the Popeye's Restaurant where she worked as an assistant manager. (T2:211, 220-223, 233-235, 241-243) Harrison's body was on some boxes inside the freezer. (T2:233, 242) Her hands were bound behind her back with black electrical tape, and she also had tape over her mouth. (T2:242-243) She had numerous stab wounds to her body. (T2:242) The floor in the rear of the restaurant where the freezer was located was wet as if it had been washed. (T2:253, 271; T4:656) A utility box cutter was found on a baker's rack which proved to have blood stains consistent with Harrison's blood inside the handle of the

cutter. (T2:244; T4:623-625) Although box cutters were used in the restaurant, the cutter found was not the same type as the ones used. (T2:389-391) The safe was unlocked and bank deposit slips were on the floor. (T2:221) A bank deposit prepared from the previous day's receipts and a plastic box containing $375 in small bills and change, which should have been in the safe, were not there. (T2:223-224, 339) The door to the restaurant was locked with automatic locks, and they had to be opened with a key. (T2:208-209, 211, 337) The manager and the two assistant managers were the only persons who had a key to the restaurant and the combination to the safe. (T2:332-333) A small window at the drive-through was unlocked. (T2:221)

Dr. Michael Berkland, an associate medical examiner, arrived at the restaurant and began his examination of the body. (T4:653-655) He found over 60 incised and stab wounds on the body. (T4:657-658) Based on his observations of blood at the scene, he concluded that the wounds were inflicted after Harrison was inside the main freezer. (T4:658, 667) These wounds were consistent with having been caused by the box cutter found at the scene. (T4:655-656) Berkland found wounds to the back of the head, the face, neck, chest and arms. (T4:661-664) The wounds contributing to the cause of death were the ones to the neck, which cut the trachea and

jugular vein, and the ones to the chest, which perforated the lung. (T4:665-666) Berkland rendered an opinion that the wounds were all administered within one to two minutes. (T4:665-666) He concluded that Harrison survived for less than fifteen minutes. (T4:665-670)

Cynthia Harrison was scheduled to work at 8:00 a.m. on the morning of May 2, 1998, with the responsibility to open the restaurant for the day. (T2:331) Timothy Hurst was also to work at 8:00 a.m. (T2:331) Anthony Brown, was to arrive for work at 9:00 a.m. (T2: 207) Another assistant manager, Tonya Crenshaw, planned to arrive at the restaurant at 10:30 a.m. (T2:220) Brown arrived early for work, between 8:05 and 8:15 a.m. (T2:212-213) He found the door locked, and he waited outside the restaurant. (T2:209) Brown did not see Timothy Hurst that day or Hurst's car. (T2:210, 212-213) Brown stated that a delivery truck arrived about five minutes after he did. (T2:212-213) Although the driver of the truck, Raymond Curtis, did not testify, the State and the defense stipulated in the defense case that he would have testified that he arrived at 8:10 a.m. (T4:716) Janet Pugh, who worked at a Popeye's in another part of town, telephoned the Popeye's where Harrison worked at 7:55 a.m., and spoke to Harrison to inform her to expect the delivery truck which had just left the Popeye's where Pugh worked. (T2:285-290) Pugh and Harrison spoke for about four or

five minutes. (T2: 290) Another employee, Anthony Brown knew as Andre, arrived around 10:00 a.m. (T2:213-214) Tonya Crenshaw arrived at 10:30 a.m., and she found the two employees and the truck driver waiting outside the restaurant. (T2:220-221) Crenshaw opened the door, and she and the truck driver found Harrison's body. (T2:222-223)

David Kladitis knew and remembered Cynthia Harrison from his experience as a customer at Popeye's. (T2:291-292) On the morning of May 2, 1998, Kladitis was in a parking lot around 7:20 a.m. waiting for a feed store to open. (T2:292-293, 295) He saw Cynthia Harrison driving down Palafox road. (T2:292-293) They saw each other and exchanged waves. (T2:292-293, 295-296) Kladitis noticed that the vehicle behind Harrison's was a large, blue sedan driven by a black male. (T2:293) After hearing on the news that Harrison had been killed, Kladitis contacted the sheriff's department.(T2:293, 295) Investigator Donald Nesmith showed Kladitis photographs of four automobiles, and Kladitis picked the photo of Timothy Hurst's car, a Grand Marquis. (T2:293-294, 296-297; T3:516, 518-520)

Carl Hess worked at the Wendy's restaurant located near the Popeye's restaurant. (T2:299) Hess knew Cynthia Harrison. (T2:299) At 7:00 a.m. on May 2, 1998, Hess began cleaning the parking area

outside Wendy's. (T2:300) Between 7:00 and 8:30 a.m., Hess saw Harrison arrive at Popeye's. (T2:300) Between 7:30 and 8:30 a.m., Hess saw a man drive up to Popeye's in a blue Ford Taurus. (T2:301) He parked the car on the side of the building in a space near the pay telephone. (T2:301) The man was about six feet tall and weighed between 280 and 300 pounds. (T2:303) He wore a Popeye's uniform shirt and blue pants. (T2:302-303) He also wore a baseball cap facing backwards. (T2:302) The man banged on the glass window until someone let him inside. (T2:303) Hess did not again see the man. (T2:303) Hess recognized the man as someone he had seen working at Popeye's. (T2:304) The man had also submitted a job application at Wendy's at one time. (T2:304) Hess remembered the name as Timothy Hudson. (T2:305) Hess identified Timothy Hurst in court as the man he saw. (T2:305-306)

Lee-Lee Smith and Timothy Hurst were friends, and they lived in the same neighborhood. (T3:395-396) At the time of the homicide, Lee-Lee was fifteen-years-old and lived at home with his parents. (T3:371-372) On the morning of Saturday, May 2, 1998, Timothy came to Lee-Lee's house about 8:30 a.m. (T3:396) Timothy carried a clear container with money in it, and he told Lee-Lee that it came from Popeye's. (T3:396-397) Lee-Lee hid the money in his room. (T3:398) According to Lee-Lee, Timothy stated the previous Friday night that

he was going to rob Popeye's. (T3:396) Timothy allegedly told Lee-Lee that he cut and killed the manager and put her in the freezer. (T3:397, 400) Timothy had spots of blood on his brown khaki pants, and Lee-Lee washed them in the washing machine.(T3:399, 412) Since the dryer did not work, Timothy dried the pants by ironing them. (T3:398) Lee-Lee threw Timothy's socks and shoes he had been wearing in the garbage can. (T3:399-400) In addition to the clear container of money, Timothy also had a lady's wallet including identification and a bank bag. (T3:398-399,417-421) Lee-Lee also threw the bank bag and wallet in the garbage can behind his house. (T3:399-400, 421) Later that morning, Timothy, Lee-Lee, and Timothy's brother, Jermaine, went to Wal-Mart where Timothy bought a pair of shoes for $30. (T3:401) Sales records at Wal-Mart reflected a purchase of shoes that morning at 10:10 a.m. for $31.97. (T3:484-487) They also went to a pawn shop where Timothy saw rings he wanted to purchase. (T3:402) After returning to Lee-Lee's house where he obtained $300 to $500, Timothy returned to the pawn shop and bought three rings for $300. (T3:402-403, 432-433) Robert Little, operator of the USA Pawn Shop, stated that a heavy-set, black man bought three rings the morning of May 2, 1998, sometime after 10:00 a.m. for approximately $300. (T3:487-491) The man paid in cash. (T3:491, 495) Little later identified a

photograph of Timothy Hurst as the man who purchased the rings. (T3:491, 502-504)

Lee-Lee's parents, Eunease and Lee Ernest Smith, had been out of town on the weekend of the homicide. (T2:371) Upon returning on Sunday, they learned that the police wanted to speak to Lee-Lee. (T2:372) Eunease Smith looked through Lee-Lee's room. (T2:372) She found a cookie can and a clear box both containing money at the top of the closet. (T2:373-374) She called the police and turned the containers over to them. (T2:377) Investigators interviewed Lee-Lee and searched the garbage can in the yard. (T3:500-501, 518, 572)

Investigators searched the garbage can and retrieved several items of evidence. (T3:572-597) Among the items found inside the garbage can were a black leather coin purse with Cynthia Harrison's driver's license, a First Union bank bag marked with "Popeye's" and "Cynthia." (T3:573) Inside the bank bag, Hallmark found a deposit slip, two socks which appeared to have blood stains, a sheet of notebook paper marked "Lee Smith, language lab", keys and a pencil. (T3:573-581) On the back of the language lab paper were several numbers added and one number was the same and the amount on the deposit slip. (T3: 446-449) Lee-Lee Smith handed the investigators a pair of shoes which appeared to have blood stains on them. (T3:499-500)

Investigator Donald Nesmith interviewed Timothy Hurst, and Hurst related his activities on the day of the homicide and consented to a search of his car. (T3:516, 520-542, 549, 561) Timothy awoke around 7:30 a.m. and left his house at 7:45 a.m. (T3:523) He had car trouble, and it stopped on Untreiner Street. (T3:523) Timothy managed to get his car running enough to reach his the house of his friend, Andre.(T3:524) He asked Andre to use his telephone, but Andre's mother was using the phone at the time. (T3:524) Timothy went across the street and used a pay phone at an E-Z Serve next to the ballpark. (T3:524-525) He called Popeye's, spoke to Cynthia and told her he would not be able to come to work. (T3:526) Cynthia's voice did not sound normal. (T3:527-529) Timothy thought her voice had a "scary tone" and he also heard whispering in the background. (T3:527-529) Cynthia did not ask Timothy for any reasons why he could not come to work. (T3:529) Timothy thought that was unusual. (T3:529)

Timothy went to Lee-Lee's house, arriving at 8:00 a.m. (T3:530) The two of them returned to Timothy's house, where Timothy changed out of his work clothes. (T3:530-531, 535-536) Timothy agreed to take his younger brother and his friend to the pawn shop. (T3:530-531) All four -- Timothy, his brother, his brother's friend, and Lee-Lee -- went to the USA Pawn shop across

from Wal-Mart. (T3:530-531) Since the younger boys thought someone had to be 18 years-old to purchase items at the pawn shop, Timothy bought two necklaces for them using his brother's money. (T3:532-533) After the pawn shop trip, Timothy and Lee-Lee then went to the Timothy's cousin's apartment. (T3:533-534) Timothy estimated the time he arrived there as between 8:00 and 8:20 a.m. (T3:534) His mother called him at the apartment between 1:00 and 1:30 p.m. and told him the police were looking for him. (T3:534)

Investigators took a new pair of size 14 shoes with a sales ticket and three rings from the Hurst's home. (T3:502-503, 542-543) They also took the black tennis shoes and tan pants that Timothy wore at the time. (T3:544, 558-561) Robert Little from the USA Pawn Shop identified photographs of the rings as the ones he sold. (T3:490-491, 502-503)

Michael Williams was a friend of Timothy Hurst's. (T2:320) The night before Timothy was arrested, he allegedly made a statement to Michael Williams about the homicide. (T2:321) Timothy allegedly told Williams that he had an argument with a woman and she retaliated. (T2:321) Timothy said he hit her and cut her with a box cutter. (T2:321) Hurst then said he tied her up and put her in the freezer. (T2:321) Timothy said he did not want the woman to see his face. (T2:322) Williams said on an earlier occasion, he heard

Timothy Hurst and Lee-Lee Smith talking about a plan to rob Popeye's. (T2:322) Williams did not take this conversation seriously since they were high at the time. (T2:322)

Anthony Williams spent time in the same cell with Timothy Hurst after Hurst's arrest. (T2:356) Anthony Williams' father is Michael Williams' grandfather's brother. (T2:360) Hurst allegedly discussed the Popeye's murder while in the cell. (T2:358) He said he participated in the homicide, but someone else was also with him when the crime occurred. (T2:358) Anthony Williams said that Hurst did not identify the person. (T2:358) On cross-examination, defense counsel confronted Williams with a deposition in which he had stated that Hurst identified Lee-Lee and Mike Williams as being involved in the crime. (T2:362-363)

Willie Griffin, Jr. spent time in the Escambia County jail with Timothy Hurst, but he was in federal prison at the time of his testimony. (T2:363-364) Griffin said he had a conversation with Hurst about the murder case. (T2:365) Griffin said he asked Hurst if he dreamed or thought about the incident. (T2:365) Hurst allegedly said, "I did that swine and "F" the rest of them." (T2:365) Hurst also said that something was wrong with her mentally, and they did not get along. (T2:365) Griffin admitted on

cross-examination that when he approached the police with this information he never mentioned the Popeye's murder. (T2:369)

Willie Williams knew Timothy Hurst. (T2:352) They were in Derrick Clark's car on April 29, 1998. (T2:352-354) Timothy was playing with a box cutter found in Clark's car, and he accidentally cut Williams with the cutter. (T2:352-353) Williams never again saw that box cutter. (T2:354-354) Williams said that the box cutter was similar to the one shown to him which was found at the homicide scene, but it was not the same one. (T2:354-356)

A search of Hurst's car revealed two types of electrical tape. (T3:477, 481-484) In the trunk, investigators found a roll of older tape which could not have been the source of the tape used to bind the victim. (T3:484; T4:739) Some tape used to splice speaker wiring in the car was of a different type. (T3:481-484; T4:735-739) This was the same type of tape found on the victim, but there were no unique characteristics from which to conclude if the tape actually came from the same source. (T3:479-484; T4:735-739)

Jack Remus, a serology expert, examined and tested several items of evidence for the presence of blood. (T4:620-652) On the box cutter found at the scene, Remus found traces of blood and DNA typing showed the blood was consistent with that of Cynthia Harrison. (T4:623-625) He found no blood on the tan work pants

seized from Hurst. (T4:621-622) There were no traces of blood found on floor mats, a steering wheel cover, and a brake pedal from Hurst's car. (T4:646-648) A pair of blue pants taken from Lee-Lee Smith house also tested negative for traces of blood. (T4:626) Shoes obtained at Lee-Lee Smith's house had positive chemical reactions for traces of blood, but the quantity was too small for DNA typing. (T4:625-626) Socks retrieved from Lee-Lee Smith's house had blood stains which proved to be consistent with the DNA of Cynthia Harrison. (T4:626-628)

Paul Norkus, a fingerprint examiner with FDLE, compared various latent fingerprints found on items of evidence. (T4:607-620) He found four of Lee-Lee Smith's fingerprints on the bank bag found in the trash can behind Lee-Lee Smith's house. (T4:611) Timothy Hurst's fingerprints were on the deposit slip found inside the bag. (T4:610-611) The plastic storage box had two fingerprints belonging to Lee-Lee Smith. (T4:611)

Facts -- Defense Case

Hurst presented several witnesses who saw him on the day of the homicide. Willie Bright, the father of Andre Cary, who also worked at the Popeye's, saw Timothy Hurst on the morning of the homicide between 7:30 and 9:00 a.m. (T4:694-698) Timothy walked up to Bright, who was standing in his yard, and asked to see Andre.

(T4:696-697) Andre was still asleep since he did not go to work until 10:00 a.m. (T4:697) Timothy wanted to use the telephone, and Bright believed that he did use to telephone. (T4:696-697) Timothy remained at Bright's house about 15 to 20 minutes. (T4:699) Bright left to take Andre to work at 9:40 a.m., which was about one hour after he saw Timothy. (T4:698-699) Andre testified that Timothy did wake him up that morning because he wanted to use the telephone because he was having problems with his car. (T4:708-709) Andre remembered that Timothy wore his work clothes, and he did not see any blood on Timothy's clothes. (T4:704-705)

Aldwin Dees was friend of Timothy's and lived in the same neighborhood as Timothy and Lee-Lee Smith. (T4:717-718) Aldwin said that Timothy came to his house between 8:30 and 9:30 a.m. on the morning of homicide. (T4:718) Timothy knocked on the door and asked to use the telephone. (T4:718-719) Aldwin handed the cordless telephone outside to Timothy and told him to knock on the door when he finished. (T4:719)

Bertha Bradly, Timothy Hurst's mother, stated that she woke Timothy up for work at 7:40 a.m. on May 2d, 1998. (T5:792-793) Timothy was scheduled to work at Popeye's that morning. (T5:793) She next saw Timothy outside putting a battery in his car. (T5:794) The car had problems, and Timothy charged the battery out of the

car almost everyday. (T5:794-795) Bradley did not know exactly when Timothy left the house, but she saw him again between 8:30 and 9:00 a.m. back at home.(T5:795-796) There were three other boys present, her other son, Jermaine, and his friend, Anthony, and Lee-Lee Smith. (T5:796) Bradley asked Timothy why he was not at work. (T5:796) Timothy said he had problems with the car. (T5:796) He still wore his work clothes -- a Popeye's shirt, tan pants, and black shoes.(T5:797) She did not see any blood on his clothes. (T5:797) The four boys all left together. (T5:797-797) Later in the day, police officers asked for Timothy, and Bradley called him at her brother's house.(T5:798-799)

Jermaine Bradley, Timothy's brother, said he saw Timothy around 8:30 a.m. on May 2, 1998. (T4:766) Jermaine was at home and his friend, Anthony Williams, was also present. (T4:765) Timothy was coming back home when Jermaine saw him, and he still wore his work clothes, a Popeye's shirt, tan pants and black shoes. (T4:766-767) There was no blood on Timothy's clothes. (T4:767) Lee-Lee Smith was with Timothy. (T4:767) Around 9:50 a.m., all four boys went to Wal-Mart. (T4:767) Only Timothy and Lee-Lee went inside, and Timothy bought a pair of shoes. (T4:767-769) Then, all four of them went to the USA Pawn across the street. (T4:769-770) Timothy bought two necklaces for Jermaine and Anthony using money Anthony

had with him. (T4:769-771) They returned home shortly after 10:00 a.m. (T4:771) Timothy and Lee-Lee then left the house together. (T4:771) Marie Hurst, who was Timothy's aunt, and two cousins, Patti Hurst and Lola Hurst, saw Timothy at their house the morning of May 2, 1998, starting at 10:00 to 10:30 a.m. (T4:777-779, 782-783, 787-788) Timothy remained at there house for some time, because he was waiting for his uncle to come home to help him repair his car. (T4: 779, 783-784, 787-789)

Larry Smith, a defense investigator, testified about distances and the ability of someone to see the distance between the Popeye's door and the parking lot of the Wendy's across the street. (T4:750-763) Smith measured the distance between Timothy's house and Popeye's at 3.6 miles. (T4:761) He attempted to determine the shortest route and drove it several times. (T4:761-762) Depending on traffic, his driving time was between seven and eight minutes. (T4:762) Smith also measured the distance between the Wendy's parking lot and the door at Popeye's at approximately 140 feet. (T4:751-758) Smith had a known person stand near the Popeye's door while he remained in the Wendy's parking area. (T4:757) Smith stated he was unable to see the person sufficiently to identify him. (T4:757)

Derrick Clarke owned the car in which Hurst and Willie Williams were riding when Hurst accidentally cut Williams with a box cutter. (T4:728-729) The box cutter belonged to Clarke. (T4:729) Clarke said he never saw the box cutter after the incident. (T4:723) Police officers showed Clarke a photograph of a box cutter which was of the same type as the box cutter he owned. (T4:729-730) However, Clarke said the box cutter in the photograph was not his because his was a lighter gray color. (T4:730-731)

Edward Egee, a fingerprint examiner, stated that he examined 18 latent fingerprints from the crime scene. (T4:740-741) His conclusions were that none of these latent prints matched those of Timothy Hurst. (T4:740-745)

Leanne Hodge, a lab analyst with FDLE, compared the electrical tape recovered from the victim, the tape from the wiring of Hurst's car and the roll of tape found in the car. (T4:734-739) She excluded the roll of tape from Hurst's car as the source of the tape found on the victim based on the age and condition of the roll. (T4:739) Using the tape from the wiring from the car was of the same type as the tape removed from the victim, but Hodge's examination of the cut ends of the tape did not result in any matches. (T4:738-739)

Facts -- Prosecution's Rebuttal

Investigator Donald Nesmith testified that he spoke to Derrick Clarke about the incident where Timothy Hurst accidentally cut a friend with a box cutter. (T5:812) Nesmith showed Clarke a photograph of the box cutter found at the Popeye's crime scene. (T5:812) Clarke told him that the box cutter involved in the accidental cutting was the same shape and looked like the same one shown to him in the photograph. (T5:812)

Nesmith also testified to a driving time estimate he measured between the Popeye's and Timothy Hurst's house. (T5:813-814) He started driving from Hurst's house at 8:11 a.m. on a Saturday morning and was able to reach Popeye's in eight minutes. (T5:813-814)

Investigator John Sanderson testified that he and Investigator Nesmith determined that it was possible to accurately see and identify a person standing at the door to the Popeye's from across the street in the Wendy's parking lot. (T5:815-816) Sanderson said that he stood in the parking lot of Wendy's and was able to see and identify Nesmith as he stood at the door to Popeye's. (T5:815-816)

Closing Argument

In his closing argument, the prosecutor told the jurors that they could infer from the evidence that Timothy Hurst did not commit this crime alone. (T5:912) He stated:

> Did somebody help Timothy Hurst commit the crime as Anthony Williams said? There's evidence from which you can infer that. You've got the facts and figures on that piece of paper showing it's perfectly divided by three. You've got somebody wearing a size 18 shoe, which, of course is Hurst. You've got Hurst with the box cutter. You've got Hurst following the victim. You've got Hurst going inside, Carl Hess saw him. Then you've got the sliding door opened, drive through opened, somebody's handing something to somebody outside. Could be.
>
> Then you've got two different types of socks. He says, well, you know, if Hurst was wearing those socks, they ought to be soaked through this shoe. Maybe Hurst wasn't wearing those socks. Maybe one person was wearing the calf-length socks. Maybe another person was wearing ankle-length socks. Hurst was wearing his shoes. Anthony Williams said Hurst said he did it but somebody was with him. Was it Lee-Lee? Could be.

(T5:912-913)

Penalty Phase And Sentencing

The State presented no additional evidence relevant to aggravating circumstances or in rebuttal of mitigating circumstances. (T5:963-983)(App. A) Cindy Harrison's sister, Tricia Poleto, was the only witness the State called, and her testimony related solely to victim impact evidence. (T5:963-970) There were three defense witnesses presented to testify in mitigation --

Timothy Hurst's parents, Timothy and Bertha Bradley, and his sister, Sequester Hurst.(T5:970-983) (App. A)

Bertha Bradley testified about Timothy Hurst's background. (T5:970-976) She said he was a good child, and he had never before been arrested or had any kind of criminal charges. (T5:971) He went to church regularly and helped around the house. (T5:971) Timothy had learning difficulties. (T5:971-972) Although he had average grades, he was not able to learn like the other children his age. (T5:972) Timothy was slower than the other children. (T5:972) His emotional and intelligence level was not at age level. (T5:972) Bradley said that even though Timothy was 18 years-old at the time of the homicide, his emotional age was more like that of a ten or eleven-year-old. (T5:975) Bradley stated that Timothy was never treated by a psychiatrist or psychologist. (T5:976)

Timothy has a submissive personality. (T5:972-976) He sought approval from relatives and friends. (T5:972-973) He followed them around and would do whatever they told him to do in an effort to make friends. (T5:972-973) Bertha Bradley said that Lee-Lee Smith was such a friend. (T5:973) She said that Timothy followed Lee-Lee's lead in almost everything, and he did anything Lee-Lee said to do. (T5:973-974)

Sequester Hurst said that Timothy was a good brother. (T5:977-980) She said he was loyal to his family and friends. (T5:980) He went out of his way to please them. (T5:980) They played games together, and he was a happy person. (T5:979) Timothy liked to joke around and sometimes acted goofy. (T5:979) Sequester never saw Timothy angry or get into a fight. (T5:979) When their mother worked outside of the home, Sequester and Timothy cared for the younger children. (T5:978) Timothy was given a little more authority because he was a year older. (T5:977-979) Timothy was a little slower than the other children his age, and even though he tried, he was always a little behind them. (T5:979)

Timothy's father, Tim Bradley, testified that Timothy was slower than his peers. (T5:982) However, he never knew Timothy to be violent or exhibit a temper. (T5:982) Timothy was involved in church, and he would help at the church and assist neighbors. (T5:981-982) The family also conducted Bible studies at home. (T5:981)

The jury recommended a death sentence. (T5:1002; R3:450) Neither the prosecution or defense presented additional evidence to the court. (R3:465-481) (App. B) Counsel did submit written sentencing memoranda.(R3:451-453, 456-464)(App. C) The court

imposed a death sentence on April 26, 2000. (R3:468-481, 482-489) (App. B & D)

SUMMARY OF ARGUMENT

1. The trial court improperly found the aggravating circumstance that the homicide was committed to avoid arrest. Initially, the State never urged the finding of the circumstance to either the jury or the trial judge. No notice was given to the Defense or the State that the court had this circumstance under consideration in this case. At the actual imposition of sentence was the first time the factor was mentioned as the trial court read its sentencing order into the record. Hurst was deprived of his constitutional rights to notice and an opportunity to defend. Additionally, even if consideration of this factor was properly before the trial court, the evidence failed to support a finding of the circumstance. See, Art. I, Secs. 2, 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const.

2. The trial court abused its discretion in failing to properly find and weigh mitigating factors presented in this case. Hurst's age of 18 years, his intellectual deficits and emotional immaturity, his good family background, his good character and his religious participation were rejected or improperly minimized. This skewed the sentencing weighing process and his death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla.

Const.; Amends. V, VIII, XIV, U.S. Const. Hurst asks this Court to reverse his death sentence.

3. This Court's proportionality review requires the evaluation of the totality of the circumstances and a comparison of the case to other capital cases to insure the death sentence does not rest on facts similar to cases where the death sentence has been disapproved. Such a review in Hurst's case demonstrates the case is not one of the most aggravated and least mitigated. Hurst's death sentence is disproportionate and it must be reversed for a life sentence. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VIII, XIV U.S. Const.

4. No pleading filed before the trial and sentencing proceeding in this case provided Hurst or the jury notice as to which aggravators the State was seeking to prove. Two aggravators were argued by counsel. The trial court instructed the jury on those two aggravators. The jury reported no specific findings as to the aggravators. The jury was not instructed that it must find by some burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty, and the jury reported no such finding. The trial court found three aggravators, including one that had not been argued or instructed. The trial court did not state a finding by any burden, no less

beyond a reasonable doubt, that the aggravators were of sufficient weight to warrant the death sentence. These factors individually and in combination render imposition of the death sentence in this case a fundamental violation of Hurst's rights to due process and to his protection against cruel and/or unusual punishment. See Amends. VIII, XIV, U.S. Const.; Art. I, secs. 9, 17, Fla. Const.; Apprendi v. New Jersey, 120 S. Ct. 2348 (2000).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST BECAUSE THIS AGGRAVATING CIRCUMSTANCE WAS NEVER PRESENTED TO THE JURY OR JUDGE VIA ARGUMENT OR INSTRUCTION AND BECAUSE THE EVIDENCE DOES NOT SUPPORT THE EXISTENCE OF THE CIRCUMSTANCE.

A. The Court's Finding This Aggravating Circumstance Without Notice To The Defense And Without Presentation Of This Sentencing Factor To The Jury Violated Due Process

The trial judge found the avoiding arrest aggravating circumstance without any notice to either the Defense or the State that this aggravating factor was to be considered in this case. At no time during this case did the State assert that this aggravating circumstance should be found. The prosecution did not present evidence relevant to this factor during the penalty phase of the trial. (T5:963-970)(App. A) The prosecution did not request a jury instruction on this aggravating circumstance, and the trial judge did not give such an instruction. (T5:954-957, 983-985, 988)(App. A) The prosecution did not argue for the circumstance during its summation to the jury during penalty phase. (T5:990)(App. A) The prosecution did not assert this aggravating circumstance in its sentencing memorandum or oral presentation to the court at sentencing. (R3:456-464, 466, 469)(App. B & C) For the first time in this case, this aggravating circumstance was

mentioned when the court announced sentence and stated that the court found the aggravating factor to exist and gave it great weight. (R3:473-474, 485)(App. B & D) Indeed, the Court acknowledged, at that time, that the State had not argued this factor. (R3:473, 485)

Hurst was deprived of notice and the opportunity to defend against the applicability of the avoiding arrest aggravating circumstance. This Court has stated that it would not find, or allow a trial court to find, an aggravating circumstance which the State did not timely seek and upon which the jury was not instructed. See, Hamilton v. State, 678 So.2d 1228, 1232 (Fla. 1996); Cannady v. State, 620 So.2d 165, 170 (Fla. 1993); see, also, Craig v. State, 685 So.2d 1224, 1230 (Fla. 1996)(error for trial judge on a resentencing to consider uncharged aggravating circumstances when the judge was bound to follow jury's life recommendation rendered in the absence of those circumstances). The trial court's finding the avoiding arrest circumstance in this case, where the State had never argued or presented the circumstance to the jury or court, violated Hurst's right to due process and right to present a defense to imposition of a death sentence. Art. I, Secs. 2, 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.; Apprendi v. New Jersey, 120 S.Ct. 2348

(2000); Hamilton, 678 So.2d 1228; Cannady, 620 So.2d 165; Craig, 685 So.2d 1224. (See, also, Issue IV, *infra*, for further discussion of the applicability of Apprendi in this case.)

B. Even If This Factor Was Properly In Issue, The Court Improperly Found This Aggravating Circumstance Because It Was Not Legally Or Factually Supported.

Assuming for argument that the trial court did have the avoiding arrest aggravating circumstance before it, the court's reasons for finding the circumstance are not factually or legally supported. See, Sec. 921.141 (5)(e) Fla. Stat. In the sentencing order, the court wrote:

> 3. The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.
>
> While not argued by the State, it is apparent that there was no need for the Defendant to kill the victim just to obtain the money from the safe. The victim knew the Defendant inasmuch as both the victim and the Defendant were employed at Popeye's. The Defendant could have taken the money and fled leaving the victim unharmed. Therefore, one can only conclude that the killing of the victim was for the sole purpose of avoiding arrest for the robbery. Accordingly, to this aggravating circumstance the Court will give great weight.

(R3:485)(App.D)

For an aggravating circumstance to be affirmed on appeal, there must be substantial competent evidence upon which the trial court could find the existence of the circumstance proved beyond a

reasonable doubt. See, Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). When the proof relies on circumstantial evidence, the circumstances must consistent with the existence of the circumstance and inconsistent with any reasonable hypothesis that the circumstance does not exist. See, Geralds v. State, 601 So.2d at 1163; Eutzy v. State, 458 So.2d 755, 758 (Fla. 1984). The avoiding arrest aggravating circumstance is proved, when the victim is not a law enforcement officer, only if the evidence establishes avoiding or preventing an arrest as a dominant motive for the homicide. See, Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1976). Evidence in this case does not meet these requirements. The trial court's findings failed to prove the avoiding arrest circumstance.

The two reasons the trial court relied upon to find the aggravator simply do not factually or legally support the finding. First, the court noted that there was no need to kill the victim to obtain the money from the safe and the defendant could have fled without harming the victim. (R3:485)(App. D) A determination that the killing did not need to occur does not prove the homicide was committed to avoid arrest. The trial court cannot rely on speculation or the process of elimination to conclude the evidence

supported avoiding arrest as a dominate motive for the crime. See, e.g., Scull v. State, 533 So.2d 1137 (Fla. 1988); Geralds v. State, 601 So.2d 1157; Robertson v. State, 611 So.2d 1228 (Fla. 1992). There must be positive proof that the dominant motive was to eliminate a witness in order to avoid arrest. *Ibid.* In this case, no such positive proof exists. Second, the court noted that the victim knew Hurst. (R3:485)(App. D) The fact that the victim knew the perpetrator does not prove the killing was motivated to avoid arrest. See, Jennings v. State, 718 So.2d 144 (Fla. 1998); Geralds v. State, 601 So.2d 1157 (Fla. 1992); Perry v. State, 522 So.2d 817 (Fla. 1988); Floyd v. State, 497 So.2d 1211 (Fla. 1986). In fact, Hurst's knowing the victim and alleged statements Hurst made to others suggests the motive for the crime may have been personal animosity. (T2:321, 365) According to Michael Williams, Hurst said he killed the victim after an argument. (T2:321) Willie Griffin testified that Hurst said that he did not get along with the victim. (T2:365) Consequently, the State's evidence suggested a motive for he homicide other that witness elimination to avoid arrest. This may have been the exact reason the prosecutor did not pursue this aggravating circumstance.

The conclusion that the dominate motive for the homicide was to avoid arrest does not follow from the two facts the trial court

used. A trial court "...may not draw 'logical inferences' ...when the State has not met its burden." Roberstson v. State, 611 So.2d 1228, 1232 (Fla. 1992). Hurst's death sentence was unconstitutionally imposed based on this aggravating circumstance. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

C. The Improper Inclusion Of This Aggravating Circumstance In The Sentencing Process Was Not Harmless

Initially, Hurst contends that the improper inclusion of an aggravating circumstance without affording the Defense notice of its use and an opportunity to defend can never be harmless error. This is tantamount to a sentencing proceeding in the absence of the defendant and counsel. See, Jackson v. State, 767 So.2d 1156 (Fla. 2000); Reese v State, 728 So.2d 727 (Fla. 1999). Such a process is fundamentally flawed and prejudice to the sentencing determination must be presumed.

This Court conducts a harmless error analysis when an invalid aggravating circumstance has been included in the sentencing weighing process in the trial court. The question is whether it can be determined beyond a reasonable doubt that the improper inclusion of the invalid aggravating circumstance did not affect the sentencing decision. See, State v. DiGuilio, 491 So.2d 1129

(Fla. 1986). In this case, the answer to that question is "no."

First, in the trial judge's own words, this avoiding arrest aggravating circumstance was given "great weight." (R3:485)(App. D) While the court also found two other aggravating circumstances, the avoiding arrest circumstance was one-third of the aggravation used to weigh against the mitigation. Second, the court found six mitigating factors in this case to which he gave varying degrees of weight. (R3:485-488)(App. D) Moreover, there was additional mitigation which the court should have found and weighed. See, Issue II, *infra*. Given this mitigation and the degree of weight afforded to the avoiding arrest circumstance, the trial court's sentencing weighing decision could have been different without the improper avoiding arrest factor in the equation.

ISSUE II

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO FIND AND PROPERLY CONSIDER AND WEIGH STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES.

Introduction

The trial court abused its discretion in failing to properly find and weigh mitigating factors presented in this case. Hurst's age of 18 years, his intellectual deficits and emotional immaturity, his good family background, his good character and his religious participation were rejected or improperly minimized. This skewed the sentencing weighing process and his death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VIII, XIV, U.S. Const. Hurst's asks this Court to reverse his death sentence.

Legal Standards

In a capital case, the trial court and this court are constitutionally required to consider any mitigating evidence found anywhere in the record. Amends. V, VIII, XIV, U.S. Const.; Parker v. Dugger, 498 U.S. 308 (1991); Art. I Secs. 9, 17, Fla. Const.; e.g., Santos v. State, 591 So.2d 160 (Fla.1991); Campbell v. State, 571 So.2d 415 (Fla.1990), *receded from in part*, Trease v. State, 768 So.2d 1050 (Fla. 2000); Rogers v. State, 511 So.2d 526 (Fla.1987). This Court addressed the duties of the sentencing court

to find and consider mitigation in Rogers v. State, 511 So.2d 526. Acknowledging the command of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court defined the trial judge's duties as follows:

> ...we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534. The Court must either find or reject a mitigating circumstance based on evidence in the record. Once a mitigator is found, the sentencing judge can reasonable exercise its discretion in assigning the weight to be afforded to a mitigating circumstance. See, Trease v. State, 768 So.2d 1050 (Fla. 2000). In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court reiterated the duties outlined in Rogers and added the requirement that the trial court fully explain with clarity its evaluation of each mitigating factor in its sentencing order.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court stated that a trial court has the discretion to reject a mitigating circumstance asserted by a capital defendant. However, the trial court can reasonably exercise that discretion only where the record contains competent substantial evidence refuting the mitigating circumstance:

> A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Cook v. State, 542 So.2d 964, 971 (Fla.1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance); see also Pardo v. State, 563 So.2d 77, 80 (Fla.1990) (this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

Nibert, 574 So.2d at 1062. (This Court, in Nibert, concluded that the trial court had improperly rejected mitigating circumstances based on Nibert's mental condition).

A. The Trial Court Abused Its Discretion In Rejecting Timothy Hurst's Age As A Statutory Mitigating Circumstance.

Age of the defendant is a statutory mitigating circumstance which must be appropriately considered in the sentencing weighing process. See, Sec. 921.141 (6) (g), Fla. Stat. A defendant's youth, particularly when he is in the teenage years, is a significant factor in mitigation. See, Urbin v. State, 714 So.2d 411 (Fla. 1998). As this Court stated, evaluation of the age mitigating factor must recognize "the patent lack of maturity and responsible judgment that underlies the mitigation of young age." Ibid. at 418. A death sentence is constitutionally prohibited for defendants who were under the age of 17 at the time of the crime. Brennan v. State, 754 So.2d 1 (Fla. 1999). This mitigating factor becomes stronger "the closer the defendant is to the age where the death penalty is constitutionally barred." Urbin, 714 at 418. Additionally, this Court has held that the age statutory mitigating circumstance must be found and afforded weight to defendants who 17 at the time of the crime. Ellis v. State, 622 So.2d 991 (Fla. 1993).

The trial court wrote the following about Timothy Hurst's age of 18 at the time of the crime:

> 10. The age of the Defendant.

> The Defendant was 18 years of age when he murdered the victim. The Defendant was legally an adult and he owned his own car and was employed. Under the circumstances, the Defendant's age should not be considered as a mitigating factor and to this the Court will give very little weight.

(R3:488) (App. D) This order is ambiguous in treating Hurst's age as a proposed mitigating circumstance. The court stated that Hurst's age should not be considered a mitigating factor, and then, the order appears to give "little weight" to the circumstance. At the outset, the court's order should be remanded for clarification. See, Campbell, 571 So.2d 415. However, whether the court rejected age as a mitigating factor or found age and minimized the weight, the court abused its discretion since its evaluation of the factor was not reasonably based on the evidence in the record. Discretion must be exercised reasonably on the evidence before the court and not on speculation; a trial judge's rejection of a mitigating circumstance must be based competent substantial evidence in the record. Nibert, 574 So.2d at 1062.

Although Hurst's age is beyond the age for a constitutional bar to the death penalty, Brennan, and barely over the age where the age factor must be, found and given considerable weight as a matter of law, Urbin; Ellis the teachings of these principles

about the mitigation which should be afforded to teenage years applies. The evidence shows that Hurst was intellectually slow and emotionally immature. Nevertheless, the trial court rejected Hurst's age as a mitigator because the court concluded that Hurst was "legally an adult and he owned his own car and was employed." (R3:488)(App. D) While the court's bare statement of facts is accurate, the record hardly shows that Hurst was functioning as a mature adult. Hurst was chronologically a legal adult. (T5:975) His job, however, was one at a fast food restaurant. (T 2:330-334) He still lived at home with his parents. (T5:792-793) His mother still had to awaken him at times to insure he got to work. (T5:792-793) Hurst's car was a trouble-prone, old car. (T5:794-795, 975) Additionally, as his mother, father and sister testified, Hurst was intellectually and emotionally slow. (T5:972, 975, 979, 982) His mother concluded that Timothy's emotional maturity was that of someone ten or eleven years-old. (T5:975) This record evidence refutes, rather than supports, the trial court's conclusion that Hurst was legally, emotionally and intellectually functioning as an adult.

B. The Court Used An Incorrect Legal Standard In Rejecting Hurst's Good Family Background As A Mitigating Circumstance.

The family background of a capital defendant is always a factor that a sentencing judge is legally required to consider. Sec. 921.141 (6)(h) Fla. Stat.; Art. I, Sec. 9, 17, Fla. Stat.; Amends V, VIII, XIV U.S. Const.; Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). In Eddings, the United States Supreme Court reversed a death sentence for resentencing where the trial court and the state appellate court refused to consider evidence of the defendant's family background. The Eddings Court wrote:

> We now apply the rule in Lockett to the circumstances of this case. The trial judge stated that "in following the law," he could not "consider the fact of this young man's violent background." App 189. There is no dispute that by "violent background" the trial judge was referring to the mitigating evidence of Eddings' family history. From this statement, it is clear that the trial judge did not evaluate the evidence and mitigation and find it wanting as a matter of fact, rather he found that as a *matter of law* he was unable to even consider the evidence.

Eddings, 455 U.S. at 113. The state appellate court agreed with the trial court. The United States Supreme Court found the limitations placed on the consideration of the defendant's family background violative of the Eighth and Fourteenth Amendments:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violate the rule in Lockett. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings, 455 U.S. at 113-114.

In this case, the trial court committed the same error condemned in Eddings. The court applied the wrong legal standard to reach a conclusion that Timothy Hurst's good family background was not a source of possible mitigation the court could even consider and gave it no weight. The court wrote:

> 4. The Defendant has a good family background. The fact that the Defendant may have a good family is not a mitigating factor that should be considered by this Court and to this the Court will give no weight.

(R3:487)(App. D) The order's express terms excludes from the court's consideration good family background as evidence of mitigation. Just as the state courts in Eddings, the trial judge, here, excluded from his consideration, *as a matter of law,*

that evidence of Hurst's good family background could provide mitigation.

Since a good family background is a mitigating factor the court must legally consider, Hurst's death sentence has been unconstitutionally imposed. His death sentence must be vacated and remanded for the trial judge to consider the factor.

C. The Court Abused Its Discretion In Minimizing As Mitigating Circumstances Hurst's Contribution To The Community Through Assistance To His Church And Neighbors And Hurst's Church Attendance And Bible Study.

A sentencing judge has the discretion to assign the weight to the mitigating circumstances established as appropriate based on the evidence. Trease, 768 So.2d 1050. However, the court is not free to reject, without reason, unrefuted testimony concerning mitigating evidence. Nibert, 574 So.2d 1059. The trial court in this case minimized the weight afforded these mitigating circumstance because only Hurst's family members testified in support of the factors. The court wrote:

> 6. The Defendant's contribution to the community was good in that he assisted his church and he assisted his neighbors during their time of need.
>
> The only evidence offered by the Defendant in support of this factor was the testimony of Defendant's parents and sister. No one else from the community or the church testified. Accordingly, this Court is of the

> opinion this mitigating factor has not been established to any appreciable degree and to this factor the Court will give little weight.

(R3:487)(App.D)

> 7. The Defendant maintained regular church attendance and involved himself in weekly Bible study.
>
> Again, only Defendant's family members testified as to this factor. There was no corroborating evidence from the pastor of Defendant's church or the Bible teacher. Accordingly, this Court is of the opinion this mitigating circumstance has not been established to any appreciable degree and to this factor the Court will give little weight.

(R3:488)(App.D)

While the court has the authority to make credibility findings concerning a witness's testimony in assessing the weight to be given the testimony, this is not what the court did in this case. The State did not impeach or rebut the testimony offered by Hurst's parents and sister. (T5:970-983)(App. A) Additionally, the court never stated any reason why the testimony was not credible other than there were no additional witnesses testifying to the same facts. (R3:487-488) (App. D) There is nothing in the record or the court's order explaining why the testimony should be disbelieved or given reduced weight. (T5:970-983)(App. D) The trial court abused its discretion in its

evaluation of the testimony and its assessment of the weight to be afforded the mitigation.

The trial court's minimizing the weight of these mitigating factors has rendered Hurst's death sentence unconstitutional. Hurst asks this Court to reverse the sentence.

ISSUE III

THE TRIAL COURT ERRED IN SENTENCING HURST TO DEATH BECAUSE A DEATH SENTENCE IS DISPROPORTIONATE.

This Court's proportionality review requires the evaluation of the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. E.g., Urbin v. State, 714 So.2d 411, 416-417 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Proportionality review in this case demonstrates that this case does not involve one of the most aggravated and least mitigated of murders. See, Urbin, 714 So.2d at 416; State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Hurst's death sentence is disproportionate and must be reversed. Art. I, Sec. 9, 16, 17, Fla. Const.; Amends. V, VIII, XIV, U.S. Const.

The Aggravation

The aggravation exiting in this case is not sufficient to preclude a determination that the death sentence is disproportionate. Two aggravating circumstances are present -- first, the homicide was committed during a robbery and second the homicide was especially heinous, atrocious and cruel. (R3:482-

483)(App. D) These two aggravating factors do not raise this case to one of the most aggravated. This Court has reversed death sentences imposed for murders committed during a robbery, burglary or for pecuniary gain. See, e.g., Williams v. State, 707 So.2d 683 (Fla. 1998); Clark v. State, 609 So.2d 513 (Fla. 1992); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983). Even the complete absence of mitigating factors has not changed this result. Rembert, 445 So.2d at 340. The addition of the heinous, atrocious and cruel circumstance does not change this case to one of the most aggravated. This Court has held that the HAC aggravating factor does not preclude a reversal of a death sentence on proportionality grounds. See,e.g., Robertson v. State, 699 So.2d 1343 (Fla. 1997); Morgan v. State, 639 So.2d 6 (Fla. 1994); Nibert v. State, 574 So.2d 1059 (Fla. 1990).[1]

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[1] This Court has reversed death sentences on proportionality grounds in several cases containing a serious aggravating circumstance such as heinous atrocious and cruel, cold calculated and premeditated or even a prior homicide conviction. See, Almeida v. State, 748 So.2d 922 (Fla. 1999)(prior murder); Jorgenson v. State, 714 So.2d 423 (Fla. 1998)(prior murder); Knowles v. State, 632 So.2d 62 (Fla. 1993)(contemporaneous murder); Maulden v. State, 617 So.2d 298 (Fla. 1993)(contemporaneous murder); Larkin v. State, 739 So.2d 90 (Fla. 1999)(prior manslaughter); Cooper v. State, 739

The Mitigation

The mitigation in this case is substantial. Timothy Hurst was 18 years-old at the time of the crime. (R3: 488)(App. D) See, Issue II A, *supra*. His parents and sister testified that Timothy had always been mentally slow and had difficulty learning as well as his peers. (T5:972, 979, 982)(App. A) Timothy's mother stated that his emotionally maturity was that of a ten or eleven year-old. (T5:975) (App. A) She also stated that Timothy sought approval from friends and relatives, and he was a follower. (T5:972-974) (App. A) Although the trial court did not find the statutory mitigating circumstance of substantially impaired capacity, Sec. 921.141(6)(f), Fla. Stat., the court did find and give some weight to Hurst's mental impairment. (R3:486-487)(App. D)[2] Hurst has no prior criminal history of any kind, and the

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So.2d 82 (Fla. 1999)(CCP); Snipes v. State, 733 So.2d 1000 (Fla. 1999) (CCP); Puccio v. State, 701 So.2d 858 (Fla. 1997)(CCP and HAC); Robertson v. State, 699 So.2d 1343 (Fla. 1997)(HAC); Sager v. State, 699 So.2d 619 (Fla. 1997)(HAC); Voorhees v. State, 699 So.2d 602 (Fla. 1997)(HAC); Morgan v. State, 639 So.2d 6 (Fla. 1994)(HAC); Kramer v. State, 619 So.2d 274 (Fla. 1993)(HAC); DeAngelo v. State, 616 So.2d 440 (Fla. 1993)(CCP); Klokoc v. State, 589 So.2d 222 (Fla. 1991)(CCP); Penn v. State, 574 So.2d 1059 (Fla. 1990)(HAC); Farinas v. State, 569 So.2d 425 (Fla. 1990)(HAC); Blakely v. State, 561 So.2d 560 (Fla. 1990)(HAC and CCP); Smalley v. State, 546 So.2d 720 (Fla. 1989)(HAC); Ross v. State, 474 So.2d 1170 (Fla. 1985)(HAC).

[2] The trial court noted in its sentencing order on this point

trial court found this statutory mitigating circumstance. (R3:487)(App. D), Sec. 921.141, (6)(a) Fla. Stat. Timothy Hurst did not act alone in the crime. The prosecutor ackowledged in his closing argument that the jury could infer from the evidence that Hurst did not act alone. (T5:912-913)

Comparable Cases

Hurst's case involves two aggravating circumstances, HAC and robbery. (R3:482-483)(App. D) As to mitigation, the court found the statutory mitigating circumstance of no history of prior criminal activity. (R3:487)(App. D) The court also gave weight to other mitigation: Hurst's impaired mental capacity; his good conduct in court; his contribution to the community; his participation in church; his contribution to his family; and his age of 18-years-old at the time of the crime. (R3:486-488)(App.D) Additionally, as presented in Issue II, *supra*, other mitigation was either not considered or improperly evaluated based on the evidence. When Hurst's case is compared to others in which this Court has reversed the death sentence as disproportionate, it

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that no mental health expert testified to support this proposed mitigating circumstance. (R3:486)(App. D) Hurst's trial counsel never had Hurst examined by a mental health professional. (R2: 312)(Transcript of pretrial hearings where counsel advised the court that he did not see the need for a mental health expert to examine Hurst)

becomes apparent that the death sentence cannot stand in this case.

In Snipes v. State, 733 So.2d 1000 (Fla. 1999), this Court held the death sentence disproportionate for a case with two aggravating cirucmstances -- cold, calculated and premeditated and pecuniary gain. Although others were involved in the crime, Snipes was the actual shooter in this planned murder where the victim was shot three times in his home. In mitigation, the trial court found one statutory mitigating circumstance that Snipes was 17-years-old. There were also nonstatutory mitigating circumstnces relevant to Snipe's abusive and dysfunctional family, his alcohol use and his good character. The jury had recommended a death sentence by an 11 to 1 vote.

In Urbin v. State, 714 so.2d 411 (Fla. 1998), there were two aggravating circumstences: (1) a previous conviction for a violent felony (armed robbery, armed kidnapping, armed home invasion burglary); and (2) homicide occured during an armed robbery. Urbin shot the victim of a robbery when he tried to resist. The mitigation consisted of Urbin's age of 17, evidence of imparied capcity, and parental neglect. The jury recommended death. This Court reversed Urbin's death sentence as disproportionate.

In Williams v. State, 707 So.2d 683 (Fla. 1998), the trial court found two aggravating circumstances: (1) pecuniary gain and (2) under sentence of imprisonment, based on Williams' escape status from a secure juvenile facility out of state where he was housed for a robbery. This Court disapproved of the second aggravating circumstance, leaving only the pecuniary gain factor. Williams shot an intended robbery victim eight times in the street in front of the victim's home. Mitigation included the statutory mitigator of age based on Williams' age of 18-years. Nonstatutory mitigation included Williams' good conduct in jail, his pursuit of education and relgious studies in jail, and capacity for rehabilation. The jury recommended death. This Court held the death sentence disproportionate.

Hurst's death sentence is disproportionate, and he asks this Court to reverse his death sentence.

ISSUE IV

IMPOSITION OF THE DEATH SENTENCE IN THE ABSENCE OF NOTICE OF THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED OR OF JURY FINDINGS ON THE AGGRAVATORS AND DEATH ELIGIBILITY, VIOLATES DUE PROCESS AND THE PROTECTION AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT.

No pleading filed before the trial and sentencing proceeding in this case provided Hurst or the jury notice as to which aggravators the State was seeking to prove. Two aggravators were argued by counsel. (T5: 990) (R3:456-464)(App. A & C) The trial court instructed the jury on those two aggravators. (T5: 983-985) (App. A) The jury reported no specific findings as to the aggravators. (T5:1002)(App. A) The jury was not instructed that it must find by some burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty, and the jury reported no such finding.(T5:983-1002)(App.A) The trial court found three aggravators, including one that had not been argued or instructed. (R3:470-464, 482-489)(App.B & D)(See, Issue I, *supra*) The trial court did not state a finding by any burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to warrant the death sentence. (R3:469-480, 482-489)(App. B & D) These factors individually and in combination render imposition of the death sentence in this case a fundamental violation of Hurst's rights

to due process and to his protection against cruel and/or unusual punishment. See Amends. VIII, XIV, U.S. Const.; Art. I, secs. 9, 17, Fla. Const.; Apprendi v. New Jersey, 120 S. Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984).

The United States Supreme Court recently held that due process requires that a jury be apprised of all statutory elements on which the State relies to increase an individual's punishment, and the jury must find each of those elements proved beyond a reasonable doubt:

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n.6, 119 S. Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 120 S. Ct. at 2355. Apprendi should compel this Court to reevaluate the role of the jury in Florida capital sentencing,

and to apply Apprendi's due process requirements to capital sentencing.

Under Florida law, statutory aggravating circumstances actually define which crimes are potential death penalty cases. See, e.g, State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Each aggravating circumstance is comprised of separate and distinct elements under Florida law, and each element must be found by the cosentencers to have been proved beyond a reasonable doubt. See e.g., Jackson v. State, 648 So. 2d 85 (Fla. 1994). Likewise, Florida law establishes that a conviction of first-degree murder is not the determinant to make a person eligible for the death penalty. Instead, sentencers must find at least one aggravating circumstance proved beyond a reasonable doubt before determining that a defendant is eligible for the death penalty. The sentencers then must determine whether the aggravators are of sufficient weight to warrant a death sentence. If so, the sentencers then must weigh the aggravating circumstances against all mitigation reasonably believed to have been found to reach the ultimate issue of whether life imprisonment or death should be imposed.

Essential facts defined by statute are elements of an offense that must be individually instructed to the finders of fact, and must be proved to them beyond a reasonable doubt. See, e.g., In re Winship, 397 U.S. 358 (1970); State v. Harbaugh, 754

So. 2d 691 (Fla. 2000). Apprendi applied the same principle to punishment determinations that involve juries as factfinders, holding that all statutory elements on which the State relies to punish an individual must be presented to those juries, and the juries must find each of those elements proved beyond a reasonable doubt to satisfy due process, precisely the same as with elements of an offense. There is no principled reason why similar requirements should not apply to each aspect of death sentence determinations in Florida, in which juries play a pivotal role in finding facts, applying the law to those facts, and making ultimate recommendations that requires great weight.

The New Jersey statutory mechanism found unconstitutional in Apprendi is remarkably similar to the capital sentencing scheme in Florida. Apprendi concerned the interplay of four statutes. (1) The first statute, N.J. Stat. Ann. § 2C:39- 4(a) (West 1995), defined the elements of the underlying offense of possession of a firearm for an unlawful purpose. (2) The second statute, N.J. Stat. Ann. § 2C:43-6(a)(2) (West 1995), established that the offense is punishable by imprisonment for "between five years and 10 years." (3) The third statute, N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000), defined additional elements required for punishment of possession of a firearm for an unlawful purpose when committed as a "hate crime." (4) The fourth statute, N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 2000), extended the

authorized additional punishment for offenses to which the hate crime statute applied. See Apprendi, 120 S. Ct. at 2351. Each statute is independent, yet the statutes must operate together to authorize Apprendi's punishment. The Court held that under the due process clause, all essential findings separately required by both the underlying offense statute and the statute defining the elements of punishment had to be charged, tried, and proved to the jury beyond a reasonable doubt.

Florida's capital sentencing scheme also requires the interplay of four statutes. (1) Section 782.04(1)(a), Fla. Stat. (1993), defines the capital crime of first-degree murder, and the only elements it contains are those necessary to establish premeditated or felony first-degree murder. (2) Section 782.04(1)(b), Fla. Stat. (1993), provides that when the elements of section 782.04(1)(a) have been proved, the requirements of section 921.141, Fla. Stat. (1995), apply. (3) Section 775.082(1) establishes the penalty for first-degree murder as life imprisonment, or death if the elements of section 921.141 are satisfied. (4) Section 921.141(5) sets forth the essential facts that cosentencers must consider, find proved beyond a reasonable doubt, and weigh in reaching a recommended verdict and sentence. Each statute is independent, yet the statutes must operate together to authorize Hurst's punishment.

In each sentencing scheme, separate provisions of law define elements of proof required for guilt, and the elements of proof required to impose the maximum authorized punishment. Each scheme requires the interplay of distinct provisions of law to reach the ultimate punishment determination. There is no material distinction between the operation of the two statutory schemes, except, of course, that the New Jersey scheme in Apprendi was not as gravely punitive as the death penalty statutory scheme at issue here.

The rationale employed by the Court in Apprendi fits here as well. Proof of each element of an aggravating circumstance is often "hotly disputed," just as the bias issue for sentencing in Apprendi. See Apprendi, 120 S. Ct. at 2354-55. The aggravator found by the judge despite the fact that it was not sought -- avoiding arrest/witness elimination -- involves a perpetrator's mental state, facts peculiarly within the exclusive province of the jury when a jury is a fact-finder and cosentencer. See Apprendi, 120 S. Ct. at 2364 (noting that a defendant's intent in committing a crime, relied upon in sentencing, is as close as one might hope to come to a core criminal offense "element."). All of the aggravators in this case, including those instructed and not instructed, directly relate to the offense itself, as opposed to proof of a conviction of an unrelated crime committed at a

different time. See Apprendi, 120 S. Ct. 2366.[3] The different punishments available due to the finding of essential sentencing facts is another consideration the Court found compelling to warrant the strict application of due process to punishment determinations. See Apprendi. 120 S. Ct. at 2354.

The indictment in this case is defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that the aggravating factors are sufficiently weighty to call for the death penalty. State v. Harbaugh, 754 So. 2d 691 (Fla. 2000), is instructive. The Court found that when potentially harmful punishment-related facts are alleged in a charging document, the defendant's due process rights are protected by bifurcating the proceeding and withholding the presentation of the sentence-related charges and facts until the guilt determination is made. Harbaugh recognizes that punishment-related facts must be charged, presented to a jury, and proved beyond a reasonable doubt, in a separate punishment determination proceeding. That rule also is consistent with State v. Overfelt, 457 So. 2d 1385 (Fla. 1984):

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[3]Even to the extent that a prior conviction might be excluded under Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Apprendi opinion contains a strong suggestion that Almendarez-Torres might have been wrongly decided and may be overruled. See Apprendi, 120 S. Ct. at 2378-80 (Thomas, J., concurring).

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981). But see Tindall v. State, 443 So. 2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

Overfelt, 457 So. 2d at 1387; see also Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA 1999); Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993); Peck v. State, 425 So. 2d 664 (Fla. 2nd DCA 1983).

Apprendi acknowledged that the due process jury finding-requirement applicable to non-capital punishment determinations has not been held to apply to judge-only capital sentencing schemes:

> Finally, this Court has previously 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. Walton v. Arizona, 497 U.S. 639, 647-649, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); id., at 709-714, 110 S. Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:
>
> > 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 cited cases 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 that 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. Almendarez-Torres, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting) (emphasis deleted).
>
> See also Jones v. United States, 526 U.S. 227, 250-251, (1999) (THOMAS, J., concurring).

Apprendi, 120 S. Ct. at 2366.

There is logic in Apprendi's distinction of Walton v. Arizona, 497 U.S. 639 (1990). The heart of Apprendi is the

jury's role and responsibility in determining whether contested essential facts have been proved beyond a reasonable doubt to satisfy statutory legal requirements for guilt and punishment. When a jury is not even involved in the fact-finding process, as in Arizona's capital sentencing scheme construed in Walton, there is no need to consider whether and to what extent jury instructions, jury burdens, and jury findings come in to play. Thus, the Court's decision in Walton, as understood in Almendarez-Torres and Apprendi, applied to judge-only sentencing jurisdictions, if in fact Walton is still good law.[4]

The limitation of Walton acknowledged in Apprendi necessarily means Walton does not apply to Florida's sentencing scheme, where a jury plays a pivotal role in the life-or-death determination.

Walton attempted to harmonize the Court's decision with its prior approval of Florida's sentencing scheme, but that rationale is no longer valid. See Lambrix v. Singletary, 520 U.S. 518 (1997); Espinosa v. Florida, 505 U.S. 1079

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[4]It should also be noted that while a majority in Apprendi suggested that Walton was distinguishable, four justices strongly suggested that Walton in fact had been overruled, see Apprendi, 120 S. Ct. at 2387-89 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Breyer and Kennedy, JJ.), and a fifth Justice expressly left the door open to overruling Walton on another day, see Apprendi, 120 S. Ct. at 2380 (Thomas, J., concurring).

(1992). In Walton, the Court said Arizona's judge-only sentencing scheme is like Florida's sentencing scheme because in both states the judge is the sentencer. The only distinction, the Court found, was that in Florida the judge first gets nonbinding input from the jury, with no findings of fact, thereby providing virtually no assistance to the judge:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes 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.

However, the Court subsequently discarded that distinguishing analysis of Florida law in Espinosa, where the Court reconsidered Florida's sentencing scheme and determined that Florida actually uses two sentencers, both of whom must properly find facts and apply the law:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death,

> see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971, 108 S. Ct. 1249, 99 L. Ed. 2d 447 (1988); Grossman v. State, 525 So. 2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

Espinosa, 505 U.S. at 1081-82 (emphasis supplied). The Court underscored that distinction of Florida law in Lambrix, where the Court explained that "In Espinosa, we determined that the Florida capital jury is, in an important respect, a cosentencer with the judge." Lambrix, 520 U.S. at 528. Lambrix then applied that understanding of Florida law to clarify that in a state where a jury and a judge share responsibility for the death determination, both must consider only lawfully introduced facts, lawfully enacted aggravating circumstances, and lawful aggravation instructions. That rule, the Court said, was a new rule of law not in existence at the time Walton was decided. See Lambrix, 520 U.S. at 529.

Thus, Walton does not control the issue under Florida's three-phase, cosentencing capital sentencing scheme. Rather, in a State where the jury equally shares with the judge the responsibility of determining death eligibility by

finding facts and weighing statutorily defined aggravating and mitigating circumstances, the State constitutionally must fully advise the defendant and the jury of the sentencing factors, the elements, and the burdens associated therewith. See Apprendi.

Accordingly, due process requires at a minimum:

- The State must provide notice of the aggravating circumstances in the charging document;
- The State must withhold those alleged circumstances until a jury validly determines guilt of capital murder beyond a reasonable doubt;
- After guilt is determined, the sentencing court must instruct the jury as to the elements of all contested aggravating circumstances, each of which must be proved beyond a reasonable doubt;
- The sentencing court must instruct the jury to find beyond a reasonable doubt that the defendant is death-eligible;
- The sentencing court must instruct the jury to find, beyond a reasonable doubt after weighing the mitigators, that death is the appropriate punishment;
- The sentencing court must require the jury to make specific written findings and present those findings to the court and the parties; and
- The sentencing court must instruct the jury that its findings have to be unanimous.

Because these requirements were not satisfied, the resentencing procedure in this case was fundamentally

flawed. The death sentence should be vacated and the cause remand for a new jury sentencing.

CONCLUSION

Based on the foregoing reasons, Timothy Hurst asks this Court to vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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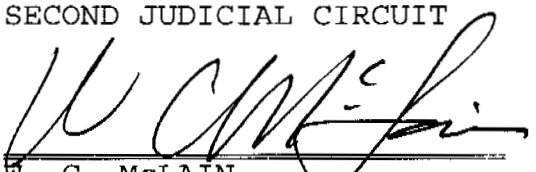

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Curtis M. French, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, Timothy L. Hurst, #124559, F.S.P., P.O. Box 181, Starke, Florida, 32091, on this 31 day of January, 2001.

W. C. McLAIN

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief has been prepared using Courier New, 12 point, a font which is not proportionally spaced.

W. C. McLAIN