

IN THE SUPREME COURT OF FLORIDA

RONALD LEE BELL, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC00-1185

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 159089

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT 4579
(850) 487-0997 (FAX)

COUNSEL FOR APPELLEE

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FLORIDA STATUTES

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PRELIMINARY STATEMENT

Appellant, Ronald Lee Bell, Jr., was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal consists of 13 volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. Because both the record of pleadings and the trial transcript begin with page one, the page numbers of the former will be prefixed with an "R," and the latter, prefixed with a "T." "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State supplements and clarifies some of Bell's facts (IB 3-15), focusing especially upon those facts immediately surrounding the murder; the State presents them chronologically, rather than organized by witness.

Bell's primary accomplices were Renee Lincks, who was 15 years old at the time of the murder (XII-T 1042-43), and Kristel

Maestas, who was 16 years old at the time of the murder (XI-T 939, 944). Maestas was Bell's girlfriend. (X-T 722-24, XI-T 943,) Thus, Bell's age of 17 years and 10 months at the time of the murder (X-T 694) made him the oldest of the three. Bell was muscular (X-T 614, 684). Maestas was characterized as "petite" and "fairly thin" (X-T 615, 619-20). The victim, Cordell Richards, was "fairly thin". (XII-T 1078)

Maestas accused the victim of soliciting sex from her and grabbing her shoulder and pushing her against the wall when she declined, resulting in a bruise. Bell was upset about this. (See XI-T 913-16, XII-T 1058-60)

In the afternoon of February 2, 1999, Bell, Maestas, and Lincks went to Calvin Smith's home to discuss beating up the victim and possibly killing him. (XII-T 1057. See also X 723-24) A little later, Bell was focusing upon only "killing him." (XII 1057) Maestas pointed out to Bell and Lincks that she had seen the victim write out a

check for the rent for the whole month of February.
It was just said whatever happened to Cordell we
could live in the apartment for that whole month, the
rent was already paid

(XII-T 1060) That afternoon, they also discussed pawning the victim's "things" to get money while they lived in the apartment rent-free in February. (XII-T 1060-61. See also XII-T 1092-93)

On February 2, 1999, Bell provided the money at Wal-Mart to buy a "chain, a rope, and a lock" to be used for killing the victim. (XII-T 1062-63) That evening, Maestas and Lincks were in the victim's apartment, where Maestas was staying. They received

a phone call of someone purporting to be a female, but they concluded it was the victim on the phone pretending to be a female, and, as a result, they paged Bell, who came to the apartment. (XII-T 1067-75) When Bell confronted the victim, the victim denied doing anything. (XII-T 1075. See also XI-T 915-16) At that point, Bell

got upset *** [and] during the argument, Cordell kept shifting his weight towards the front door, towards the front hallway and that's when Ron grabbed him. Well, first, he [Bell] shoved him [the victim].

(XII-T 1075) Bell put the victim in a headlock, which Bell maintained until the victim was unconscious (XI-T 917-18, XII-T 1076, 1082, 1132). The victim was "flailing his arms" (XII-T 1076), "trying to keep himself from getting hurt" (XI-T 916).

When the victim passed out, Bell instructed Maestas to get a baseball bat (XI-T 917, XII-T 1077-78) and then Bell told Maestas and Lincks to hit the victim with it, which they did (XI-T 917-21, XII-T 1079-82). Bell told Lincks to "get the rope out of the car," i.e., Bell's car. Bell directed the use of a blanket to wrap up the victim and the use of rope to tie up the victim (XI-T 918, 919, XII-T 1082-86).

Bell wanted to hog tie the victim, but they were unsuccessful. (XII-T 1085-86) The victim was slipping in and out of consciousness and moaning. (XI-T 1087)

Bell backed his car to the apartment door in order to put the victim in the trunk, and Bell and Lincks carried the victim to the trunk and put him in it (XI-T 921, XII-T 1086). The victim

was still alive. (XI-T 921) Lincks and Bell washed blood off of their hands (XII-T 1087). Later, experts found blood spatter on the wall of the apartment using luminol (XI-T 841-43) and determined that the spatter originated from medium velocity impacts (normally associated with beatings and stabbings) less than three feet off the floor. (XI-T 857-74, 874)

Bell determined the wooded location where the victim would be taken and then drove the victim there in the trunk of his (Bell's) car. (XI-T 922, XII-T 1088-89) There was a subdivision under construction in the area that Bell chose and a lot of pine trees and palmettos. (XI-T 831) It was at the end of a cul de sac (Id.) and "pretty secluded," with a "few houses scattered throughout the subdivision" (Id. at 876).

They dragged the victim some through the woods, when Lincks recalled that they needed to get the victim's PIN numbers so they could clean out his bank account. They stopped and asked the victim for the numbers. (XI-T 923, XII-T 1092-93)

The victim then begged Bell, "please don't kill me" and moaned and mumbled, and Bell told Maestas to hit the victim with the baseball bat (XII-T 1093, XI-T 924-25). Bell told Maestas, "who hurt you?" (XI-T 925. See also XII-T 1082). Bell told Maestas that she was not hitting the victim hard enough with the bat, then Bell told Maestas to give the bat to Lincks, and, after Lincks hit the victim several times, Bell directed that the bat be given to him, and Bell hit the victim hard a number of times (XII-T 1094-95, XI-T 925-26). When they were hitting him, the

victim "mov[ed] his arms over his head to cover his head" (XII-T 1095)

The medical examiner testified concerning injuries due to blunt force trauma, including "complex and linear basilar fractures to the back of the skull and the underlying surface of the skull," fractures to the cheekbone area, fractures to "both orbits around the eyes," fractures to both sides of the area around the nose. (IX-T 516-17) The victim sustained six fractured ribs (IX-T 537), a fractured sternum (Id. at 537), a fractured left arm (Id. at 537-38), fractures in the area of the front teeth (Id. at 532-33). All of the fractures were consistent with being beaten with a club or bat (Id. at 520-21) The fractures to the elbow and wrist "may" represent, and were consistent with, defensive injuries, but they could be happenstance when the victim was unconscious. (Id. at 547, 551-54) "The injuries, other than the heat fracture ... [of the leg, 531-32], are all ante-mortem injuries" (Id. at 548) The facial fractures were not fatal. (Id. at 548) The complex fracture to the back of the victim's head could have resulted in the victim being knocked unconscious. (Id. at 545) The cause of death was "combined features of blunt force trauma to the head, body and upper extremities and probable chop injury to the left neck." (Id. at 540)

When, Maestas suggested burning the victim, Bell said "Yeah." (XII-T 1089) After they chained and tied the victim to a tree (XII-T 1096-97) and while the victim faded in and out of

consciousness (XII-T 1097), Bell squirted lighter fluid "all over" the victim, including his head and face; the victim was still alive and groaned (XI-T 930); the lighter fluid was then lit, resulting in the victim screaming (XI-T 929-30, XII-T 1097-98). Maestas testified that Bell lit the fluid (XI-T 929-30, 972-73), whereas Lincks testified that Maestas lit it (XII-T 1097). Bell told Calvin Smith that "He [Bell] tried to burn" the victim (X-T 731-32). Bell, Maestas, and Lincks ran away, drove away from the scene, and discarded the baseball bat, lighter fluid, and gloves they were wearing (XI-T 930-31, XII-T 1098-1101, 1104)

In the morning of February 3, Bell wanted "to make sure he was dead." Lincks testified:

Ron asked us if we wanted to go back. Kristel and I didn't want to because we said we didn't want to see the body. He asked us several times if we wanted to go back to make sure he was dead. At first we were saying no, but finally we said fine. So we drove back.

(XII-T 1107. See also XI-T 932) Bell, Maestas, and Lincks returned to the wooded location where they had left the victim beaten and in flames. (XII-T 1107, XI-T 932-33) Lincks testified that Bell drove back there in the daytime, and

Ron and I got out of the car and we heard Cordell calling for help. *** It was very faint. *** There was some construction workers working on houses on the street near the cul de sac. We could see them from the cul de sac. *** Kristel asked us what was wrong. We told her. She dind't believe us. She heard him herself. We decided to crack his neck. *** Him and I walked over to Cordell and he started to try to crack his neck. he couldn't do it. He kept saying his neck wouldn't crack. I kept trying to to tell him just put your arm - your hand on his head or whatever, crack his neck. He kept trying and it wouldn't crack. So we left and went to Target.

(XII-T 1007-1108. See also Maestas testimony at XI-T 932-33)

Bell drove to Target at about 9:45 AM (XII-T 1004-1005, XI-T 934), and Bell paid for duct tape and a meat cleaver (XI-T 935-36, IX T583-84) to finish off the victim (XII-T 1110-12, 1015). Bell returned to the wooded site and slit the throat of the victim, resulting in the victim giving a "very small shout" (X-T 732, 738, XII-T 1112. See also XI-T 936-37). Bell returned to the car and stated that he "didn't slit his throat deep enough" XII-T 1113), then returned again to the victim's location and again slit the victim's throat (XII-T 1114. See also XI-T 937-38).

Bell subsequently told his friend (X-T 750), Calvin Smith, that "he beat him up and took him out to the woods." "He tried to burn him and he had him chained up." "[H]e slit the guy's throat" (X-T 731-32, 738)

Bell pawned or sold items of the victim's, including his television and violin. (XII-T 1121-22, IX T584, X T643-44, 616-18, 689-700, 714-18, 739). When Bell pawned the victim's property, he successfully represented himself as age 18 by presenting his driver's license with a crack over the age and representing his birth year as 1980, rather than correctly as 1981. (X-T 694-96) Bell participated in getting cash for forged checks using the victim's bank checks (X-T 741-44, 772-74, XII-T 1116-17. Concerning, Bell's fingerprint on bank envelop found in Bell's car, compare XI-T 848-40 with 993-97)

Bell and Maestas returned to the victim's remote location to burn the victim's body. There, Bell poured gasoline on the

victim's body, and, with her help, lit it. (XI-T 939-40, XII-T 1125) The medical examiner testified that there was a chop injury to the left side of the victim's neck prior to being burned with gasoline. (IX-T 519-20, 530-31, 536, 539. See 526-27)

SUMMARY OF ARGUMENT

Bell's four penalty-phase issues and one guilt-phase issue pale in the face of the horrid atrocities he orchestrated and perpetrated upon the victim. As a preliminary matter concerning the penalty-phase issues, the State notes that the jury's recommendation of death was unanimous.

In ISSUE I, Bell complains that the trial court, in sentencing him to death, failed to give proper weight to his age, yet his age did not curtail his leadership role in choking the victim to unconsciousness, brutally beating the victim in the victim's apartment, wrapping the victim, while still alive, in a blanket and dumping him in the trunk of Bell's car, and transporting the victim to a wooded location, where he and his accomplices bound the victim to a tree with a chain and rope Bell had purchased for the murder and resume the beating. These events culminated in Bell pouring lighter fluid all over the victim, including his face, so that he could be burned alive.

Bell's maturity enabled him to lead his younger accomplices throughout the foregoing events and throughout the ensuing check on the victim hours later to assure that he was dead, throughout his answer to the victim's cries for help by trying to snap the victim's neck and ultimately leaving and returning to the victim to slit the victim's throat twice.

Indeed, Bell successfully represented himself as a mature eighteen-years-old when he liquidated personal property of the victim pursuant to the scheme.

Thus, Bell proved his leadership and maturity in his role as prime instigator and orchestrator of this murder. Bell proved his maturity above his 17 year and 10 month age and that he is not entitled to a reduction of his sentence because his age should be weighed more (ISSUE I) or should essentially outweigh any and all aggravating factors simply because his days outside the womb counted to two months short of 18 years when he committed the murder (ISSUE II). Bell's chronological age received all the weight to which it was entitled.

Similarly, Bell's ISSUE III complaint attacking the avoid-arrest aggravating circumstance pales when compared with the aggravators of pecuniary gain, HAC, CCP, and committed during a kidnapping and the facts underlying them. Moreover, Bell's attempts to silence the victim in the remote location, where he drove the victim shrouded in a blanket and chained the victim to a tree, and attempts to eradicate evidence by re-burning the victim's body and by dispersing the bulk of the victim's property among a number of dumpsters, do support this aggravator, meriting affirmance of the trial judge's order finding this circumstance.

Bell also raises a so-called Apprendi issue (V), but precedent now stands squarely against him.

The only guilt-phase claim (ISSUE IV) attacks an argument the prosecutor made in fair response to defense counsel's personal attack on the prosecutor's decision to seek the death penalty on Bell. In light of the egregious crime Bell perpetrated and

orchestrated, the prosecutor's decision was justified and his response in rebuttal closing was inconsequential to the verdict.

In conclusion,¹ the State respectfully submits that, to the degree that any issue was preserved, it has no merit and remains insignificant to the results of this case.

¹ Although not raised on appeal, the State discusses proportionality in ISSUE I text infra and the sufficiency of the evidence in an ISSUE IV footnote and accompanying text infra.

ARGUMENT

ISSUE I

DID THE TRIAL COURT REVERSIBLY ERR BY GIVING
SLIGHT WEIGHT TO BELL'S AGE BECAUSE IT
MISAPPREHENDED THE CONSTITUTIONAL BAR AS UNDER
AGE 16? (Restated)

Bell asserts that the trial court's sentencing order is flawed by the judge's failure to assign the correct weight to the statutory mitigating factor of Bell's age. According to Bell, the judge's comment acknowledging that, typically, this factor is entitled to more weight the closer the defendant is to the age where the death penalty is constitutionally barred, combined with erroneously placing that age at under-16 rather than under-17, demonstrates that the court applied an incorrect legal standard in assessing the weight to be given this factor. Bell is not entitled to any relief on this issue. His counsel failed to present this claim to the trial court, and, in any event, the trial court properly weighed Bell's age, and, any technical deficiency pales in contrast to the evidence of Bell's maturity, his normal upbringing and childhood, and the extremely egregious aggravating circumstances in this case.

Bell has not shown, and the State has not found where Bell provided the "benefit" of this claim to the trial court. Instead, as Bell points out (IB 23), the prosecutor informed the trial court of its misapprehension of the age from which the statutory age mitigator should be weighed (See XIII-T 1358-60). However, Bell then argues (IB 24) that the discussion concerned only the

relative treatment of Bell's accomplices, Renee Lincks, who was 15 years old at the time of the murder (XII-T 1042-43), and Kristel Maestas, who was 16 years old at the time of the murder (XI-T 939, 944). To the degree that Bell is correct, ISSUE I's claim was never brought to the attention of the trial court, thereby procedurally barring it here. See Lopez v. Singletary, 634 So.2d 1054, 1058-59 (Fla. 1993) (habeas claim that "(3) the avoid arrest aggravator was improperly found"; "allegations in these claims that appellate counsel was ineffective for not raising these issues have no merit because trial counsel did not preserve them for appeal"). Moreover, Bell's counsel was responsible for raising this matter; otherwise it was not preserved.²

² A further rationale for the raise-or-waive rule is to deter counsel from sandbagging the trial judge. See Carmichael v. State, 715 So.2d 247, 249 (Fla. 1998) ("Under his proposed scenario, however, a defendant could sit silently on this right throughout the jury selection process, await the trial's conclusion, and then--in the event of an adverse outcome--raise the issue on appeal for the first time. The price of such an "ambush"--i.e., a new trial--is prohibitively steep in terms of resources and delay--and basic fairness"); Freytag v. C.I.R., 501 U.S. 868, 111 S.Ct. 2631, 2647 (1991) (Justices Scalia, O'Connor, Kennedy, and Souter concurring in part and concurring in the judgment; "'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later--if the outcome is unfavorable--claiming that the course followed was reversible error"); Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 471 (1985) (requirement that party file objections to magistrate's report "enables the district judge to focus attention on those issues--factual and legal--that are at the heart of the parties' dispute"; "prevents a litigant from 'sandbagging' the district judge by failing to object and then appealing"); U.S. v. Taylor, 54 F. 3d 967, 972 (1st Cir. 1995) (a rationale for the contemporaneous objection rule).

Arguendo, on the merits, ISSUE I has none. By the time that the trial court finalized the sentencing order, the prosecutor had informed the trial court:

Judge, your order, I think, contains a misstatement of the law, in that after the arrest of these individuals, the [Florida Supreme] Court found that it was unconstitutional to execute a minor under the age of seventeen. You stated under the age of sixteen.

(XIII-T 1358-59) The prosecutor's follow-up discussion distinguishing Maestas' age from Bell's does not purge the information provided to the trial judge concerning the constitutional age. Juxtaposed with this knowledge was the trial judge's realization that the closer the defendant's age to the age where the death penalty is constitutionally barred, "the more weight is given to this statutory mitigator" (V-R 934). Thus, the reasonable inference that, in the context of the total circumstances of this case, the one year did not change the trial court's weight of this mitigator is substantiated by the trial court's emphasis on the absence of abuse or neglect here in its "little weight" calculus:

Although Ronald Lee Bell, Jr., at the time of this crime was two months shy of his eighteenth birthday, there is **no evidence of record that he was abused, neglected or not provided with a normal, healthy environment and supported by loving parents.**

(V-R 934) Thus, the trial judge properly found and weighed the age mitigating factor, as directed by Ellis v. State, 622 So.2d 991, 1001 (Fla. 1993) ("assignment of weight [of age mitigator] ... falls within the trial court's discretion in such cases,"

which "can be diminished by other evidence showing unusual maturity").

Shellito v. State, 701 So.2d 837, 843 (Fla. 1997), is instructive. There, although the mitigation pertained to a defendant over 18 years old, albeit slightly, the issue concerned the weight to afford the age mitigator, as here. In Shellito, the parties mistakenly referenced the defendant as one year older than his actual age:

The record reflects that, during the course of this case, both the State and Shellito's counsel referred to him as being nineteen at the time he committed the murder ...

when, in fact, the defendant was age 18. Thus, as here, the claim concerned a one-year discrepancy in determining the weight of mitigation. There, the trial court assigned "slight weight," and here "little weight." And, as here, the record indicates that the correct information was before the trial court:

however, his date of birth was presented to the judge and jury during the trial, and on a number of occasions he was properly referred to as being eighteen at the time of the murder.

701 So.2d at 843. As in Shellito, "on this record we will not second-guess his decision to accept Shellito's age in mitigation but assign it only slight weight," Id. at 844.

Johnson v. State, 696 So.2d 317 (Fla. 1997), offers further guidance. In Johnson, the trial court rejected age as a mitigating factor for a 21 year old defendant, but the trial court was under the mistaken impression that the defendant was twenty-two. This Court noted that the discrepancy, however, "does

not alter the validity and trustworthiness of the judge's decision." In the instant case, of course, there was no misunderstanding as to the defendant's age, but, for awhile, only as to the minimally relevant age at which the death penalty is constitutionally prohibited.

Moreover, contrary to Bell's position (IB 21), Urbin v. State, 714 So.2d 411, 418 (Fla. 1998), confirmed that the raw counting of chronological age is not as significant as the level of maturity and responsible judgment in considering this factor. Urbin indicated that, "**considering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age**, ... the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes."

Accordingly, for the penalty phase, rather than adduce any evidence of an abnormal childhood, defense counsel emphasized that Bell is a human being worth saving. This emphasis buttressed Bell's level of maturity, further supporting the weight the trial judge afforded to age.

Bell's father testified that he and Mrs. Bell have been married for 20 years and that Bell was born and raised in Fort Walton Beach. (XIII-T 1267). The father testified that Bell was a "youth pastor," and usher, and that Bell assumed the position of "vice president of the youth district association." (Id. at 1268) Bell "attended school regularly" (Id.), and he had maintained several jobs, "contribut[ing] to the family's money." (Id. 1269-

70) Bell "loved to work." (Id. 1269) Bell quit work to focus on his school studies. (Id. at 1271)

Bell's grandfather also testified. He related that Bell, who was an only child, would spend the weekend with him and his wife, who was a strict disciplinarian. (Id. at 1276) He testified that Bell "always" had a roof over his head and that Bell lived in a "nice neighborhood." (Id. at 1279) Although not at a level of a 21 year old, Bell had a level of maturity that allowed him to work, make money, drive his own vehicle, and care for some of his own needs. (Id. 1280)

Accordingly, rather than focusing upon any immaturity, defense counsel simply argued to the jury that under-age-18 is a statutory mitigator (XIII-T 1322). In arguing to the trial judge, defense counsel shifted the focus some but maintained the argument at a general level, not pointing to any actual immaturity of Bell's. (See VI-R 1007) Thus, the total of the treatment of defense counsel sentencing memorandum on the statutory age mitigator consisted of the following:

The defendant was a minor under the law, his age at the time of the crime was 17 years, 10 months. This was proven through the introduction of the defendant's driver's license into evidence and by testimony of the defendant's father, Ronald Bell, Sr.

(V-R 877)

Any defense tactic that would have emphasized Bell as an immature juvenile would have been patently inconsistent with evidence adduced at trial showing Bell as the leader and prime instigator in the choking, repeated beating, burning-alive, and

throat-slashing of the victim. The State elaborates at this juncture in support of the trial court's finding of "little weight," but these facts also pertain to the harmlessness of any technical deficiency in the sentencing order.

Bell's leadership role in the events of the murder was buttressed by his muscular stature (X-T 614, 684). In contrast, one of the female accomplices was characterized as "petite" and "fairly thin" (X-T 615, 619-20). Although the two females participated in the murder and occasionally contributed an idea towards it, their roles were relatively minor compared to Bell's, and the record is replete with instances showing Bell's micromanagement of the murder and other indicia of his maturity.

At Wal-Mart, **Bell provided** the money (XII-T 1062-63) to buy a "chain, a rope, and a lock" to be used for killing the victim (XII-T 1063). When **Bell decided** that it was time for the murder, **Bell put the victim in a headlock, which Bell maintained until the victim was unconscious** (XI-T 917-18, XII-T 1076, 1082, 1132). **Bell instructed** Maestas to get a baseball bat (XI-T 917, XII-T 1077-78) and then **Bell told** Maestas and Lincks to hit the victim with it, which they did (XI-T 917-21, XII-T 1079-82). **Bell directed** the use of a blanket to wrap up the victim and the use of rope to tie up the victim (XI-T 918, 919, XII-T 1082-86).

Bell not only had a car, but he used it to transport the victim to the remote scene of his death. Bell backed his car to the apartment door in order to put the victim in the trunk (XI-T 921), and Bell and Lincks carried the victim to the trunk and

stuffed him in it (XII-T 1086). **Bell determined** the wooded location where the victim would be taken and then drove the victim there in the trunk of his (Bells') car (XI-T 922, XII-T 1088-89).

In the woods, when the victim begged Bell, "please don't kill me" and moaned and mumbled, **Bell told** Maestas to hit the victim with the baseball bat (XII-T 1093, XI-T 924-25). **Bell incited** Maestas to action by reminding her, "who hurt you?" (XI-T 925. See also XII-T 1082). **Bell told** Maestas that she was not hitting the victim hard enough with the bat, then **Bell told** Maestas to give the bat to Lincks, and, after Lincks hit the victim several times, **Bell directed** that the bat be given to him, and **Bell hit** the victim hard a number of times (XII-T 1094-95, XI-T 925-26).

Bell squirted lighter fluid "all over" the victim, including his head and face; the victim was still alive and groaned (XI-T 930); the lighter fluid was then lit, resulting in the victim screaming (XI-T 929-30, XII-T 1097-98).

At Bell's insistence "to make sure he was dead," Bell, Maestas, and Lincks returned to the wooded location where they had left the victim beaten and in flames (XII-T 1107, XI-T 932-33). At the wooded location, upon hearing the victim calling for help and asking "who's there," **Bell tried to break the victim's neck** (XII-T 1107-1109, XI-T 933, X-T 736-37).

Bell drove to Target, and at about 9:45 AM (XII-T 1004-1005, XI-T 934) **Bell paid** for duct tape and a meat cleaver (XI-T 935-36, IX T583-84) to finish off the victim (XII-T 1110-12, 1015). Bell

returned to the wooded site and **Bell slit the throat of the victim**, resulting in the victim giving a "very small shout" (X-T 732, 738, XII-T 1112. See also XI-T 936-37). Bell returned to the car and **stated that he "didn't slit his throat deep enough"** XII-T 1113), then returned again to the victim's location and **again slit the victim's throat** (XII-T 1114. See also XI-T 937-38).

Bell pawned or sold items of the victim's personal property (television, violin, and perhaps computer) (XII-T 1121-22, IX T584, X T643-44, 616-18, 689-700, 714-18, 739). Bell participated in cashing forged checks using the victim's bank checks (X T 741-44, 772-74, XII-T 1116-17). This was part of a plan pre-arranged prior to the murder. (XII-T 1061-62)

Indeed, when Bell pawned the victim's property, **Bell successfully represented himself as age 18** by presenting his driver's license with a crack over the age and representing his birth year as 1980, rather than correctly as 1981. (X-T 694-96)

In contrast to the foregoing array of facts showing Bell's maturity, this Court has found an abuse of discretion with regard to the application of the age mitigating factor where there was extensive evidence of the defendant's immaturity. See Ramirez v. State, 739 So.2d 568, 582 (Fla. 1999) (error to assign "little" weight to 17-year-old defendant in light of extensive evidence of emotional, intellectual, and behavioral immaturity); Mahn v. State, 714 So.2d 391, 400 (Fla. 1998) (court erred in rejecting age mitigator for defendant who committed murder on twentieth

birthday, given compelling evidence of extensive drug abuse and lifelong mental and emotional instability).

In sum, there was overwhelming evidence that Bell, only two months shy of age 18 at the time of the murder, **acted as an adult murderer** in the events surrounding the murder. Indeed, the evidence of Bell's criminal leadership and criminal maturity comported with defense evidence of Bell's leadership position in his church. Therefore, the trial court, cognizant of the standard and emphasizing that Bell's childhood was neither neglected nor abused, did not abuse its discretion ³ in assigning "little weight" to Bell's age. Just as Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000), upheld the trial court's discretion there, indicating that "the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case," the distinctive circumstances of this case support the trial court's conclusion that the age mitigator was entitled to "little weight."

Put in terms of the definition of the abuse-of-discretion standard of review, Bell has not shown where "no reasonable person would take the view adopted by the trial judge," Elledge v. State, 706 So.2d 1340, 1347 (Fla. 1997). Bell's "mere disagreement with the force to be given [mitigating evidence] is

³ This is the general standard of review. See, e.g., Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000); Blanco v. State, 706 So.2d 7, 10 (Fla. 1997).

an insufficient basis for challenging [his] sentence," Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

Furthermore, any misconception by the court below as to the age at which the death penalty is constitutionally prohibited does not provide a reason to remand this cause for resentencing, since it is clear that any further consideration of this factor would not result in the imposition of a life sentence. Despite the court's comment on constitutionally permissible age, it is clear that the judge reasonably considered Bell's age, along with other mitigation, including the disparate treatment afforded Bell's younger accomplices; Bell's having been a good student and good prisoner with considerable family support and the support of an extended church family; Bell's church activities; Bell's gainful employment; and, Bell's help to his grandparents. However, the trial court reasonably concluded that this mitigation was outweighed by aggravating circumstances: The court found the murder (1) to be extremely heinous, atrocious and cruel (HAC); (2) cold, calculated and premeditated (CCP); (3) committed during the course of a kidnaping, (4) for pecuniary gain, and (5) to avoid arrest.

The jury's recommendation for death was unanimous (V-R 842; VII-T 1330-31).

On this record, including the applicable aggravating and mitigating circumstances and underlying facts, discussed in some detail above, in ISSUES III and IV, and in the trial judge's extensive sentencing order (V-R 921-41, attached as the Appendix

to this brief), any possible error relating to the sentencing court's failure to properly articulate the age defining the constitutional boundary for imposition of a death sentence is clearly harmless. The mitigation cannot offset the strong aggravating factors found, especially the egregious facts underlying HAC and CCP. Therefore, the State submits that this Court should affirm the sentence as imposed. See Thomas v. State, 693 So.2d 951, 953 (Fla. 1997) ("we conclude beyond a reasonable doubt that had the trial court noted in its sentencing order each mitigating circumstance proposed by Thomas the court still would have imposed the death penalty"); Lawrence v. State, 691 So.2d 1068, 1076 (Fla. 1997) ("Even assuming the trial judge failed to consider this mitigating factor, though, we find that the error was harmless because the mitigator would not have offset the three aggravators that were properly found"); Barwick v. State, 660 So.2d 685, 697 (Fla. 1995) ("Even after the cold, calculated, and premeditated factor is eliminated, five valid aggravators remain to be weighed against only minimal mitigating evidence"; "We have held that reversal of a sentence is warranted only if correction of the errors could reasonably result in a different sentence"); Armstrong v. State, 642 So.2d 730 (Fla. 1994) ("trial judge's articulation of how he considered the mitigating circumstances and aggravating circumstances is somewhat less than a model of clarity"); Wickham v. State, 593 So.2d 191, 194 (Fla. 1991) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the

sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven").

Although Bell does not dispute the proportionality of his death sentence, the State addresses it at this juncture. See Trease, 768 So.2d at 1056 ("review proportionality of death sentence even if the issue is not raised by the defendant"). Of course, a proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. See Kramer v. State, 619 So.2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts, and sentences. See Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). When factually similar cases are compared to the instant case, the proportionality of Bell's sentence is evident.

The brutality and senseless nature of this murder place it among those where the death penalty is properly imposed, even on young defendants. See Sliney v. State, 699 So.2d 662, 672 (Fla. 1997) (**19-year-old** offender who beat and stabbed a pawnshop owner to death during robbery); LeCroy v. State, 533 So.2d 750 (Fla. 1988) (**17-year-old** offender shot two people during robbery; on the murder of the second victim, three aggravators and two mitigators, including age tempered by maturity); Bonifay v. State, 680 So.2d 413 (Fla. 1996) (mitigation included "Bonifay's age at the time of the crime, **17 years old**, which the trial court gave some weight"; aggravators were murder committed in a

robbery, pecuniary gain, CCP); Walls v. State, 641 So.2d 381 (Fla. 1994) (**19-year-old** offender with no significant prior criminal history and extensive nonstatutory mental mitigation); Gamble v. State, 659 So.2d 242 (Fla. 1995) (**20-year-old** offender with childhood abuse and neglect and severe emotional problems killed landlord with claw hammer and choked him with cord during robbery), cert. denied, 116 S.Ct. 933 (1996); Hayes v. State, 581 So.2d 121 (Fla. 1991) (two aggravating factors weighed against mitigating factors of **age 18**, low intelligence, learning disabled, a product of deprived environment); Watts v. State, 593 So.2d 198 (Fla. 1992) (prior convictions, during the course of sexual battery, and pecuniary gain outweighed mitigation of defendant's age and low IQ); Kokal v. State, 492 So.2d 1317 (Fla. 1986) (**immature 20-year-old** offender beat hitchhiker with pool cue to unconsciousness then shot him in robbery). This is particularly true where, as here, there is no significant mental mitigation; Bell was a good student with the ability and potential to successfully complete high school, and had asserted his leadership in a variety of settings.

Cases where this Court has reduced death sentences on proportionality grounds for 17-year-old offenders are distinguishable. For example, Livingston v. State, 565 So.2d 1288 (Fla. 1988), involved a 17-year-old with marginal intellectual functioning and a history of severe physical abuse and neglect who shot a store clerk during a robbery. Here, Bell's intellectual functioning and childhood were otherwise normal,

Bell had been employed, quit when his job interfered with his school work, and Bell led the way through the events constituting CCP and HAC.

In Urbin v. State, 714 So.2d 411 (Fla. 1998), a 17-year-old robber shot his victim. The statutory mental mitigator of substantial impairment also applied, as well as stronger mitigation of parental abuse and neglect than that noted in Livingston. Urbin noted, 714 So.2d at 418, that Urbin's age of 17, **in combination with the other statutory and nonstatutory mitigating circumstances**, was an extremely weighty factor. In this case, Bell had been a responsible, hardworking individual who had served as vice president of his church youth district association; he did well in school, and he had been a productive member of the work force. Bell applied this maturity to leading his younger female accomplices through hours of terrorizing the victim.

Concerning proportionality, see also Jennings v. State, 718 So.2d 144 (Fla. 1998) (three aggravators including CCP; one statutory mitigator and eight nonstatutory mitigators; 18-year-old codefendant receiving life does not prevent the imposition of the death penalty on Jennings, whom the trial court found to be the actual killer and to be more culpable); Zakrzewski v. State, 717 So.2d 488, 494 (Fla. 1998) (HAC, CCP and contemporaneous murders; two statutory mitigators, ...), summarizing, Bruno v. State, 574 So.2d 76 (Fla. 1991) ("affirming the death penalty where the defendant beat the victim in the head with a crowbar,

followed by shooting the victim in the head"); Cole v. State, 701 So.2d 845 (Fla. 1997) (disparate treatment of the codefendant (Paul) receiving life even though he was a participant at the crime scene; four aggravators of HAC, pecuniary gain, committed during kidnapping, previous felony conviction; two nonstatutory mitigators; HAC was based upon multiple blows to the head, including "at least three severe blows to the head caused by a blunt instrument" and cutting the victim's throat); Gordon v. State, 704 So.2d 107 (Fla. 1997) (aggravators of "murder was committed during the commission of a burglary and robbery," pecuniary gain, HAC, CCP; mitigation of "totally unremarkable" family background very little weight, religious devotion some weight, codefendant Denise Davidson's life sentence a modest amount of weight); Lawrence v. State, 698 So.2d 1219, 1221-22 (Fla. 1997) (upheld HAC based on the defendant inflicting a "massive beating"; "Three strong aggravating circumstances [under sentence of imprisonment, HAC, CCP] are arrayed against five nonstatutory mitigating circumstances"; "this was an extraordinarily brutal crime. We find the death sentence proportionate"); Orme v. State, 677 So.2d 258 (Fla. 1996) (strangulation, "severe beating"; upheld HAC and the death sentence); Bogle v. State, 655 So.2d 1103, 1109 (Fla. 1995) (collecting HAC cases based upon bludgeoning); Whitton v. State, 649 So.2d 861 (Fla. 1994) (five aggravators, including HAC, avoid arrest, and pecuniary gain, and several nonstatutory mitigators; beating; wounds that would have caused unconsciousness did not

occur at outset of attack; HAC and death penalty upheld; proportionality claim rejected); Thompson v. State, 648 So.2d 692, 695-96 (Fla. 1994) (includes CCP and HAC; "drove the victims to an isolated area and forced them to lie on the ground"; "Swack was stabbed numerous times before he was shot. Also, both victims undoubtedly suffered great fear and terror for some time prior to their murders"); Colina v. State, 634 So.2d 1077, 1082 (Fla. 1994 (upheld HAC where defendant bludgeoned victims to death with several blows); Hall v. State, 614 So.2d 473, 479 (Fla. 1993) ("Even though Ruffin received a life sentence, the different treatment given Hall is appropriate. As noted by the trial judge, Hall was bigger and older than Ruffin and was the leader ***"); Bowden v. State, 588 So.2d 225 (Fla. 1991) (sentence affirmed where the evidence shows that the victim was brutally beaten to death with a rebar and the trial court imposed death after finding HAC and prior violent felony balanced against Bowden's abused childhood); Kight v. State, 512 So.2d 922 (Fla. 1987) ("murder occurred during the commission of a robbery ... and ... murder was especially heinous, atrocious, or cruel ... and two-non statutory mitigating circumstances: 1) Kight once apprehended a robber and 2) codefendant Hutto could not receive the death penalty because of his plea to second-degree murder"; death penalty proportionally imposed with two aggravating factors despite evidence of mental retardation and deprived childhood), disapproved on other grounds, Owen v. State, 596 So.2d 985 (Fla. 1992); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) (HAC: "did

not effect instantaneous death of the victim and that she endured torturous knowledge of her impending death with excruciating pain"); Card v. State, 453 So.2d 17 (Fla. 1984) (CCP "must rise to a level beyond that which is required for a first-degree murder conviction"; "took the victim from the Western Union office, after having cut her fingers, transported her in his car to a secluded area eight miles away, had her get out of the car, and then cut her throat").

In conclusion, ISSUE I was unpreserved, meritless, and any technical deficiency below, harmless.

ISSUE II

DID THE TRIAL COURT REVERSIBLY ERR BY SENTENCING
A DEFENDANT TO DEATH WHO WAS 17 YEARS AND 10
MONTHS OLD AT THE TIME HE MURDERED THE VICTIM?
(Restated)

Bell next alleges that his death sentence is unconstitutional because the execution of any defendant who is less than 18 years old at the time of the crime violates the cruel-and-unusual punishment provisions of the Florida and United States Constitutions.

However, Bell's leadership in orchestrating the

- brutal beating of the victim in the victim's apartment,
- stuffing the victim in a blanket and concealing him in the trunk of Bell's car,
- transportation of the victim to a remote wooded location,
- resumption of the brutal beating, including complaining that the females were not hitting the victim hard enough,
- burning the victim alive by pouring lighter fluid onto the victim, including his face,
- returning to the victim hours later to assure that he was finished off,
- slashing the victim's throat twice as he cried for help, and the
- cold liquidation of assets of the victim, while representing himself as 18 years old,

constitute precisely the type of case that justifies "society's moral outrage at particularly offensive conduct," Gregg v.

Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), in spite of a raw counting of days indicating Bell's age at 17 years and 10 months at the time of the murder.

Bell's cruel-or-unusual punishment claims pale in the face of Gregg's overarching policy applicable here. Further, to the extent Bell relies on the United States Constitution to invalidate his sentence, the United States Supreme Court has rejected this claim for defendants even younger than Bell. See Stanford v. Kentucky, 492 U.S. 361 (1989) (execution of 16-year-old offender does not violate Eighth Amendment).

Accordingly, concerning the Florida Constitution, this Court squarely rejected this exact claim in LeCroy v. State, 533 So.2d 750, 758 (Fla. 1988): "[T]here is no constitutional bar to the imposition of the death penalty on defendants who are seventeen years of age at the time of the commission of the offense." Bell has failed to offer any reasonable basis to reconsider this issue in his case. LeCroy's analysis of Florida's statutes relating to juvenile crime is applicable today, as is its conclusion that the legislature specifically intended capital punishment to be fully applicable to 17-year-old offenders.

LeCroy portended subsequent case law when it left open the question of the constitutionality of imposing a death sentence on a 16-year-old offender while rejecting a prohibition against 17-year-olds like Bell:

Whatever merit there may be in the argument that the legislature has not consciously considered and decided that persons sixteen years of age and younger may be subject to the death penalty, and that issue is not

present here, it cannot seriously be argued that the legislature has not consciously decided that persons seventeen years of age may be punished as adults.

533 So.2d at 757. LeCroy's demarcation between ages 16 and 17 remains viable today.

Thus, Bell's reliance upon Brennan v. State, 754 So.2d 1 (Fla. 1999), for a contrary result is misplaced. Although Brennan held that Florida's Constitution does not permit the execution of 16-year-old offenders, the Brennan majority did not reject LeCroy's holding or reasoning. In fact, central to the Brennan opinion is the recognition of the infrequency with which the death penalty had been imposed on 16 year olds - noted as only five defendants, including Brennan, since 1972 - combined with the fact that this Court had never upheld the death penalty for a 16-year-old offender. See 754 So.2d at 7. When the age is raised to 17, Bell concedes (IB 27) that death has been imposed on fifteen defendants, i.e., more than three times as often, and, in spite of their ages, two defendants, in addition to Bell, remain on death row. See LeCroy; Bonifay v. State, 680 So.2d 413 (Fla. 1996).

Another factor noted by the Brennan court is also inapplicable to 17 year old offender cases - the difficulty of conducting a proportionality review when no decision had ever upheld the imposition of a death sentence on a 16 year old defendant. See 754 So.2d at 10. Since this Court has affirmed death sentences for 17-year-olds, there is a basis for proportionality review, which was not available when considering the case of a 16 year

old offender. See LeCroy v. State, 533 So.2d 750 (Fla. 1988) (17-year-old offender shot two people during robbery; on the murder of the second victim, three aggravators and two mitigators, including age tempered by maturity); Bonifay v. State, 680 So.2d 413 (Fla. 1996) (mitigation included "Bonifay's age at the time of the crime, 17 years old, which the trial court gave some weight"; aggravators were murder committed in a robbery, pecuniary gain, CCP).

Moreover, raw numbers can be very misleading. Such a use ignores the multitude of factors that produced them. How many crimes of this magnitude were committed by 17-year-olds? What were all of the aggravating and mitigating factors considered in obtaining or not obtaining a death sentence on any given 17-year-old? The imposition of a death sentence on a certain 17-year-old in the face of an infrequency of death sentences on other 17-year-olds can be as much an indicator of the atypically egregious nature of this defendant's crime, and therefore the appropriateness of the death sentence in his case, as an indicator that society does not often impose death sentences on 17-year-olds.

As noted in LeCroy, the fact that more juveniles are not sentenced to death indicates "only that minors convicted of first-degree murder **tend** to exhibit immaturity or other mitigating characteristics which persuade juries and sentencing judges that the death penalty is inappropriate in their specific cases," See 533 So.2d at 757. Also, it may simply be a reflection

of the fact that most juveniles do not commit aggravated first-degree murders warranting imposition of the death penalty. The State submits that, here, Bell was sentenced to death after a 12-0 jury recommendation because of the extreme aggravation outweighing mitigation. Bell exhibited the requisite maturity and his crime warrants the death penalty.

Moreover, if anything, raw statistics suggest that society does not hesitate to sentence juveniles to death; even juveniles much younger than Bell. See Brennan; Ferrell v. State, 772 So.2d 1218 (Fla. 2000); Farina v. State, 763 So.2d 302 (Fla. 2000); Morgan v. State, 639 So.2d 6 (Fla. 1994); Brown v. State, 367 So.2d 616 (Fla. 1979) (all 16-year-old offenders sentenced to death, but reduced to life by this Court). And, as noted above, although there were only five 16-year-old defendants sentenced to death between 1972 and 1999 that figure, according to Bell, increases dramatically when the offender's age is raised to 17.

The argument that no execution since 1973 has involved a defendant who was a juvenile at the time of the crime is unpersuasive. If this Court were to adopt this reasoning, death would be cruel or unusual if imposed on anyone younger than 20, since no one less than twenty at the time of the murder has been executed in recent times. See Brennan, 754 So.2d at 17, n. 22 (Harding, J., concurring in part and dissenting in part).

Bell has shown no consensus against executing juveniles in Florida or, for that matter, across the nation. To the contrary, see Justice Harding's canvass at 754 So.2d 19 n. 25. And

legislative intent, which clearly contemplates the application of the death penalty when appropriate on the facts of an individual case on 17-year-old offenders, has been touted as the clearest objective evidence of community values, and therefore the polestar of any cruel or unusual punishment analysis. See Stanford, 492 U.S. at 368-71; §921.141, Fla. Stat.

On these facts, Bell has failed to meet his burden of establishing a constitutional bar to the imposition of the death penalty upon 17-year-old defendants. He is not entitled to a reduction of his sentence on this basis.

ISSUE III

DID THE TRIAL COURT REVERSIBLY ERR BY FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST? (Restated)

ISSUE III is not preserved, thereby procedurally barring it here. See Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997) ("argument regarding the doubling instruction was not properly preserved for review"; "At trial, Gore's argument in favor of the doubling instruction was that the prior violent felony and under sentence of imprisonment aggravators should be merged"; "on appeal he grounds his argument for the doubling instruction on two different aggravators; namely, the CCP and avoid arrest factors"); Lopez v. Singletary, 634 So.2d 1054, 1058-59 (Fla. 1993) (habeas claim that "(3) the avoid arrest aggravator was improperly found"; "allegations in these claims that appellate counsel was ineffective for not raising these issues have no merit because trial counsel did not preserve them for appeal").

In the penalty phase, defense counsel contested sufficiency of the evidence for the pecuniary-gain aggravating circumstance (XIII-T 1251-52, 1254), not the avoid-arrest aggravator. In the Spencer hearing⁴ (VI-T 1003-1010) and in a Sentencing Memorandum (V-R 876-78), defense counsel argued the weight of the mitigators, not any insufficiency of evidence of any aggravator. And, at sentencing, defense counsel failed to inform the trial

⁴ See Spencer v. State, 615 So.2d 688 (Fla. 1993).

judge of this claim (See XIII-T 1339-60). Therefore, this claim is procedurally barred.

Arguendo, on the merits, Bell contends that he killed the victim because the victim had assaulted Bell's girlfriend. Therefore, avoiding arrest was not sufficiently dominant to support this aggravating circumstance. The State disagrees. Here, the trial court applied the proper rule of law in its discussion of the "predominant motive for the murder of Cordell Richards" (V-R 923-26. Accord Id. 925), and competent substantial evidence supports the aggravating circumstance, meriting affirmance. See Willacy v. State, 696 So.2d 693, 695-96 (Fla. 1997) ("whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding").

In reviewing the evidence, the fact that the defendant had other motives for the killing, does not preclude the application of this factor. See Howell v. State, 707 So.2d 674, 681-82 (Fla. 1998) ("ample evidence was presented in support of the conclusion that witness elimination was Howell's dominant motive for the murder of Bailey"; "fact that Howell may have had other motives for murdering Bailey does not preclude the application of this aggravator"). Accordingly, "it is proper for a trial court to utilize both the pecuniary gain and avoid arrest aggravators," Thompson v. State, 648 So.2d 692, 695 (Fla. 1994).

Here, Bell was determined to minimize any evidence of his assault on the victim. He clandestinely removed the incapacitated

victim from the victim's apartment, concealing the victim in a blanket and sneaking him into the trunk of his car for removal to a remote wooded site. He returned repeatedly to the remote location where he had incapacitated the victim to assure the victim's death and eradicate evidence. He attempted to dispose of further signs of his crime by disposing of the victim's personal effects, minimizing the chance of detection by dispersing those effects among three different dumpsters.

More specifically, while Bell's and his female accomplices' preliminary discussions mentioned beating up and perhaps killing the victim due to the victim's assault on Maestas, over the next few days the motive evolved into simply killing the victim and stealing the victim's property (See XII-T 1057-61). Then, when it came time to execute the plan, Bell became preoccupied with minimizing the chances that his crime would be detected, as he incapacitated the victim with a choke-hold (XI-T 917-18, XII-T 1076, 1082, 1132) and, after having him beaten for awhile (XI-T 917-21, XII-T 1079-82):

- Directed the use of a blanket to wrap up the victim (XI-T 918, 919, XII-T 1082-86), which would conceal the victim from any onlookers;
- Backed his car to the apartment door in order to put the victim in the trunk (XI-T 921), which would minimize the distance the victim would need to be carried in view of any bystanders;

- Determined a secluded wooded location, 7.7. miles away (VI-R 997), where the victim would be taken and then drove the victim there in the trunk of his (Bells') car (XI-T 921-22, XII-T 1088-89);
- Insisted on "mak[ing] sure he was dead," and returned to the wooded location (XII-T 1107, XI-T 932-33);
- At the wooded location, upon seeing construction workers nearby and hearing the victim calling for help and asking "who's there," unsuccessfully tried to break the victim's neck (XII-T 1107-1109, XI-T 933, X-T 736-38);
- Drove to Target (XII-T 1004-1005, XI-T 934) and paid for duct tape and a meat cleaver (XI-T 935-36, IX T583-84) to finish off the victim (XII-T 1110-12, 1015);
- Drove back to the wooded site and slit the throat of the victim (X-T 732, 738, XII-T 1112. See also XI-T 936-37);
- Expressing concern that he "didn't slit the victim's throat deep enough" XII-T 1113), again returned to the victim's location and again slit the victim's throat (XII-T 1114. See also XI-T 937-38, X-T 765);
- At the victim's apartment, disposed of the victim's personal effects, such as clothes and military pins and patches, by bagging and dispersing them among three separate dumpsters (X-T 646-48, 656, 740, XII-T 1117. See also X-T 616-18);

- Returned yet again to the victim's remote location to attempt to eradicate evidence of the crime by burning the victim's body (XI-T 939-40, XII-T 1125);⁵ and,
- Knew that the victim knew him and could thereby identify him (See, e.g., XI-T 915-17).

Thus, by the time of the killing itself, Bell's dominant motive was eradicating signs of assault and torture to which he had subjected the victim. The State respectfully submits that the evidence supports the sufficiency of the avoid-arrest aggravator.

The foregoing facts stand in sharp contrast to those in Jackson v. State, 502 So.2d 409 (Fla. 1986) (cited at IB 35), where the defendant shot the victim as an instantaneous reaction to the victim grabbing the defendant during, and within, a hardware store robbery. Further, the planning; the pre-purchasing of rope and chain; the protracted and repeated concealments in the blanket, trunk, and remote location; returning to the victim's site multiple times, ultimately silencing the victim's cries for help; and, purging the victim's apartment of signs of the victim and signs of the assault on the victim, stand in sharp contrast to the "irrational frenzy" on which Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) (cited at 35) based its holding against the avoid-arrest aggravator.

⁵ It is also noteworthy that luminol was used to discover the victim's blood on the wall of the victim's apartment, where the victim was initially beaten. (See XI-T 841-43).

Also, for example, the instant facts contrast with those in Urbin v. State, 714 So.2d 411, 416 (Fla. 1998), where

Flatebo, Ambrose, and Mann all testified that Urbin shot the victim because the victim resisted the robbery attempt, a critical consistency in all of the witnesses' testimony relating Urbin's statements about the shooting.

Urbin concluded that its

factual situation more closely resembles the fatal confrontation in Cook v. State, 542 So.2d 964, 970 (Fla. 1989), wherein we found that the facts indicated that the defendant 'shot instinctively, not with a calculated plan to eliminate [the victim] as a witness.'

Here, the record is riddled with facts, bulleted above, showing Bell's determination that his acts would not be detected. Unlike Urbin, here the trial court did not err in relying upon this aggravator.

The paramount policy underlying the dominant-motive criterion for this aggravator provides guidance. It is to assure that there is distinctive evidence supporting it so that it is not applicable in all murders. Riley v. State, 366 So.2d 19, 22 (Fla. 1978), perhaps the seminal case in this area of the law, addressed Riley's argument that "every murder [of a non-officer] could be characterized as an attempt to eliminate a witness":

We caution ... that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

Here, given the facts outlined above and discussed further in the trial court's sentencing order (V-R 923-25), "[p]roof of the requisite intent to avoid arrest and detection [is] very strong."

An example of "very strong" proof is where the defendant transports the victim to a remote location to kill. Hall v. State, 614 So.2d 473, 477-78 (Fla. 1993) (collecting cases; "secluded wooded area *** body dragged further into the woods"), summarized that "we have uniformly upheld finding this aggravator when the victim is transported to another location and then killed." Here, there was not only the transport to the remote location but shrouding that transportation in a blanket, backing the car to the apartment door, and Bell's resolute determination to eradicate evidence of the murder and the victim's presence in the apartment.

In Card v. State, 453 So.2d 17, 18, 24 (Fla. 1984), the victim was assaulted in a more publicly visible location, then driven to a more remote spot about eight miles away, where she was killed. There, "appellant knew the victim and she could have identified him." Here, in addition to concealing the victim in the blanket and purging other evidence of this crime in flames and dumpsters, Bell drove the victim to a remote spot nearly eight miles away. Card held that "[i]t is clear from the record that avoidance of lawful arrest was an element involved in this murder." It is even more "clear" here.

In Martin v. State, 420 So.2d 583, 584, 585, 585 n. 3 (Fla. 1982), as here, the location(s) of initial assaults on the victim included the victim's apartment, culminating in a killing in a remote location. Martin upheld other aggravators akin to those here (e.g., HAC, committed during kidnapping), as well as

"avoiding or preventing a lawful arrest inasmuch as the defendant was destroying the chief witness in the person of his victim."

Preston v. State, 607 So.2d 404, 409 (Fla. 1992), collected cases and reasoned:

We have upheld the application of this aggravating circumstance in cases similar to this one, where a robbery victim was abducted from the scene of the crime and transported to a different location where he or she was then killed.

Here, the victim was abducted from his apartment, from which Bell intended to steal the victim's property. Applying Preston, but here considering the totality of multifaceted evidence, the "only reasonable inference to be drawn from the facts of this case is that [Bell] kidnapped [the victim] from [the victim's apartment] and transported [him] to a more remote location in order to eliminate the sole witness to the crime."

Thompson, 648 So.2d at 695, reasoned: "Once Thompson had obtained the \$1,500 check from Swack and Walker, there was little reason to kill them other than to eliminate the sole witnesses to his actions." Here, Bell and his accomplices had punished the victim for assaulting Bell's girlfriend and effectively had control over the victim's personal property and bank account, yet, as the victim cried out for help, Bell was determined to finish him.

Even if this claim had been preserved and even if the evidence did not support this aggravator, the error was harmless, given the monstrous aggravating magnitude of this murder. The protracted nature of this murder was compounded by the extreme

torture the victim underwent as Bell choked him into unconsciousness, stuffed him in the trunk of a car, where he regained consciousness, transported him to a remote location, orchestrated others to beat him with a baseball bat, and, when he was dissatisfied with their efforts, unmercifully clobbered the victim with the bat, while callously joking that he was Babe Ruth. The monstrous aggravation continued as Bell doused the victim, including the victim's face, with lighter fluid for burning him alive. The victim cried out as the lighter fluid was lit, and continued to suffer for hours where Bell and his accomplices tied and chained him to a tree with tools planned and situated well-in-advance of the murder. Hours after being torched, the victim hoped that the people he heard coming would free him from his bondage, but, as the victim cried for help, the sounds were those of Bell, who then unsuccessfully tried to break the victim's neck. Finally, after hours of beatings, bondage, and burned flesh, Bell bought a meat cleaver from a Target store, returned to the victim's site, and slit the victim's throat twice. Although Bell's murderous motives shifted, CCP endured for days, resulting in a case of extreme heinousness and cruelty coldly inflicted. See ISSUE I supra for further discussion of aggravators and supportive record cites. See also facts and record cites bulleted in ISSUE IV infra.

Accordingly, Hall v. State, 614 So.2d 473, 477-78, 478 n. 3 (Fla. 1993), alternatively held that "[e]ven if we were to hold that this aggravator should not have been found, given the strong

remaining aggravators, any error would be harmless." Unlike here, in Hall, the trial judge

considered four statutory mitigators and more than twenty items of nonstatutory mitigating evidence grouped into three general areas, i.e., mental, emotional, and learning disabilities; abused and deprived childhood; and disparate treatment of co-perpetrator.

Although Hall involved a greater numerical number of aggravating circumstances, the aggravators here are especially compelling. Moreover, the Hall aggravators included, as here, committed during kidnapping; pecuniary gain; heinous, atrocious, or cruel; and, cold, calculated, and premeditated. As in Hall, here any error was harmless. See also Doyle v. State, 460 So.2d 353, 358 (Fla. 1984) (rejected aggravator that murder was committed to avoid lawful arrest; "trial court properly found two aggravating factors and no mitigating circumstances ... death penalty was appropriate").⁶

⁶ If this Court rejects the State's preservation, merits, and harmless-error arguments, then the remedy is to remand for the trial judge to re-sentence Bell. See Bates v. State, 465 So.2d 490, 493 (Fla. 1985) ("When the evidence does not support an aggravating factor and there are mitigating circumstances to be weighed, the death sentence should be vacated and the case remanded to the trial judge for reconsideration").

ISSUE IV

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY
NOT SUA SPONTE ADMONISHING THE PROSECUTOR OR
STOPPING THE PROSECUTOR'S ARGUMENT? (Restated)

ISSUE IV claims that Bell is entitled to a new trial because the prosecutor's rebuttal guilt-phase closing argument attacked defense counsel personally. The State submits that this claim was not preserved and that, in the context of the totality of all of the prosecutor's argument, all of the jury instructions, and all of the evidence amassed against Bell, the argument was non-prejudicial and harmless. Further, the argument was a fair response to defense counsel's personalized attack on the prosecutor.

ISSUE IV is not preserved because defense counsel did not specify this claim, did not move for mistrial, and did not even secure a clear ruling his "objection." Defense counsel's "objection" merely purported to paraphrase the prosecutor's words. It failed to specify any legal theory or principle that would have required sustaining the objection or that could be the basis of reversible error. Defense counsel "objected":

Judge, I'm going to object to him arguing that I was telling the jury not to follow the law.

(XIII-T 1211) While this identifies the prosecutor's argument that is the subject of the objection, it fails to provide a legally cognizable reason on which the trial court should have sustained the objection.

Similarly, defense counsel failed to state a reason when he simply repeated that he was objecting: "Judge, I'm going to

object to that." (XIII-T 1211) And, finally, he repeated the targeted words of his objection without indicating a legal principle on which those words are improper:

Judge, my objection is that he stated to the jury that I've instructed them not to follow the law and that they cannot return a verdict to anything other than first degree murder.

(XIII-T 1211-12) Now, on appeal, Bell claims that the prosecutor's argument was an improper personal attack on defense counsel. This ISSUE IV claim is procedurally barred for lack of a contemporaneous objection that "state[s] specific grounds for reversal." See Lott v. State, 695 So.2d 1239, 1243 (Fla. 1997) ("fourth issue challenging the admission of crime scene photographs is procedurally barred due to Lott's failure to identify objectionable photographs or state **specific grounds** for reversal other than asserting that the photographs were gruesome"); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings "procedurally barred because defense counsel failed to object with the **requisite specificity** in the trial court"); Hamilton v. State, 678 So.2d 1228, 1230 (Fla. 1996) ("Because the defense did not object to this particular statement **on hearsay grounds**, that issue now is procedurally barred"; "irrelevant that on initial appeal we found similar [but preserved] hearsay from a state social worker inadmissible"); Archer v. State, 613 So.2d 446, 447-48 (Fla. 1993) ("**specific argument or ground** to be argued on appeal"); Hill v. State, 549 So. 2d 179, 181-82 (Fla. 1989) ("The

constitutional argument grounded on due process and *Chambers* was not presented to the trial court. Failure to present **the ground below** procedurally bars appellant from presenting the argument on appeal."); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (at trial, defense argued credibility as **ground** for cross-examination whereas on appeal defendant argued development of a "a viable defense theory"); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("Here defense counsel merely proffered the testimony and argued its relevance. Trial defense counsel did not present to the court the **specific argument** relied upon here that the testimony came within an exception to the hearsay rule"). See also, Nixon v. State, 572 So.2d 1336 (Fla. 1991) (motion for mistrial at the end of the prosecutor's closing argument insufficient to preserve claim that prosecutor's argument violated "Golden Rule").

Further, defense counsel failed to move for a mistrial (See XIII-T 1210-16), thereby procedurally barring this claim. See Lukehart v. State, 776 So.2d 906, 927 (Fla. 2000) ("contends that the prosecutor's closing argument was inflammatory and unsupported, is procedurally barred because it was not preserved by contemporaneous objection and motion for mistrial"); Allen v. State, 662 So.2d 323, 328 (Fla. 1995) ("Allen did not properly preserve this issue below. To preserve an allegedly improper prosecutorial comment for review, a defendant must object to the comment and move for a mistrial"); Spencer v. State, 645 So.2d 377, 383 (Fla. 1994) ("defendant need not request a curative

instruction in order to preserve an improper comment issue for appeal"; "issue is preserved if the defendant makes a timely specific objection and moves for a mistrial"); Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990) ("If counsel fails to object or if, after having objected, fails to move for a mistrial, his silence will be considered an implied waiver").⁷

Indeed, Bell has not shown where or how the trial court made a ruling to appeal here. Instead, the trial court's response was at the same vague level as defense counsel's "objection." The trial court responded to defense counsel by stating to someone, "[a]rgue whatever you want, but don't tell them to violate the law. I don't think you told them that." (XIII-T 1212) It appears that the trial court was stating that defense counsel was not arguing that the jury should not follow the law, but the trial court did not rule on the "objection," In other words, the trial court appeared to agree with defense counsel that the prosecutor incorrectly summarized defense counsel's argument, but there was no ruling on any objection concerning a personal attack, which constitutes ISSUE IV here, thereby procedurally barring this

⁷ If Bell argues in his reply brief that a motion for mistrial was not required to preserve ISSUE IV because it would have been a futile gesture, he would be incorrect. The viability of such an argument depends upon Bell showing that his objection was overruled. See Taylor v. State, 583 So.2d 323, 330 n. 4 (Fla. 1991). Here, if the trial judge ruled at all, it was on the side of defense counsel's objection, albeit a nebulous objection, agreeing that defense counsel had not misstated the law.

If the trial court erred, it was in its agreement with defense counsel; the prosecutor's argument was a fair response to defense counsel. See discussion infra.

claim. See Armstrong v. State, 642 So.2d 730 (Fla. 1994) ("trial judge reserved ruling on this issue and apparently never issued a ruling ..., this issue is procedurally barred"); Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983) ("appellant did not pursue his" objection "even though the judge did not rule on" it; "Under these circumstances, appellant has not preserved the issue for appeal"); Frazier v. State, 107 So.2d 16, 19 (Fla. 1958) ("no ruling having been secured by the defendant by the trial court as to the composition of either the grand jury or the petit jury, there is no action, request, or ruling had or made in the proceedings below properly before us for review").

If Bell claims that the prosecutor's argument was fundamental error, he would be incorrect. This comment did not "reach[] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error," Rogers v. State, 26 Fla. L. Weekly S115 (Fla. 2001). Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996), held that the "prosecutor's remarks ... fall well short of constituting fundamental error." Kilgore, 688 So.2d at 898 n. 6, provided an example "of an allegedly improper remark" from the prosecutor:

Now, the defense has tried to convince you that this is a heat of passion case. **Legally** the only thing they could stand up here and ask you to do if you want to argue heat of passion is to say this is excusable and Mr. Kilgore is excused by the law for taking Mr. Jackson's life because the heat of passion was such that there was sufficient provocation, sufficient--provocation, and it was excusable because it was an accident and misfortune. And I don't think they've even done that. I don't think in good faith

you're going to hear them stand up here and say that the heat of passion completely excuses his criminal conduct. What **I think they've argued to you is that well, look at the passion and knock it down from First Degree to Second Degree. But that's not where heat of passion comes in. Heat of passion says it's excusable if it fits that very limited scenario. Which it doesn't.**

In Kilgore and here, the complaint was based upon a comment that arguably contended that defense counsel's position was unsupported by the law. In Kilgore and here, if there was any impropriety, it did not reach a fundamental level.

The prosecutor's comment in Crump v. State, 622 So.2d 963, 971 (Fla. 1993), "characteriz[ed] the defense as an 'octopus' clouding the water in order to 'slither away.'" Crump held that any error was not fundamental and, on the merits, that "the prosecutor's comments are not so outrageous as to taint the jury's finding of guilt or recommendation of death." The prosecutor's comments here were nowhere approaching those made in Crump.

Crump reviewed the record in making its determination. Here, the prosecutor's comment was in the context of arguing that the law and the evidence support felony murder. He argued that Kristel Maestas was "telling the truth" and that Bell "orchestrat[ed] the whole deal," including burning the screaming victim alive (XIII-T 1210). Then, immediately prior to the comments targeted here, pointed to the law and argued that defense counsel's position is "not what the law says." Instead, it says that "if you return a verdict of guilty, it should be for the highest offense which has been proved beyond a reasonable

doubt." (XIII-T 1210) He continued by highlighting specific aspects of the evidence. (See Id. at 1212-13. See also prosecutor's extensive discussions of evidence at XII-T 1154-79, 1198-1200, XIII-T 1201-1210)

Accordingly, the trial court instructed the jury that it must decide the case based upon the facts and the law (See, e.g., "the evidence introduced at this trial, and it alone" at XIII-T 1228; "case must be decided only upon the evidence" at Id. 1231; "lawyers are not on trial" at Id. 1231)⁸ and that "what the attorneys say is not evidence" (XII-T 1151). There is no reason to believe that the trial jury did not follow those instructions. See Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000) ("jury is presumed to follow its instructions").

Moreover, the prosecutor's argument pales in contrast to the evidence in this case, which includes these facts immediately surrounding the murder:

- In the afternoon of February 2, 1999 (XII-T 1061), Bell discussed killing the victim (XII-T 1057-58);
- In the afternoon of February 2, 1999 (XII-T 1061), Bell discussed that "whatever happened to" the victim, he and others could stay in the victim's apartment for a month because the victim had paid the rent through February 1999 (XII-T 1060);

⁸ The prosecutor's rebuttal argument also reminded the jury that "the lawyers not on trial" (XII-T 1197).

- In the afternoon of February 2, 1999 (XII-T 1061), Bell discussed pawning the victim's property (XII-T 1061-62);
- On February 2, 1999, prior to executing the murder, Bell went into Wal-Mart with Kristel Maestas to buy a "chain, a rope, and a lock" to be used for killing the victim (XII-T 1063); Bell provided the money for this murder-tool purchase (XII-T 1062-63);
- As the victim apparently attempted to leave his apartment (XII-T 1075), Bell grabbed him and put him in a headlock, which he maintained until the victim was unconscious (XI-T 917-18, XII-T 1076, 1082, 1132);
- Bell instructed Maestas to get a baseball bat (XI-T 917, XII-T 1077-78) and then told others to hit the victim with it, which they did (XI-T 917-21, XII-T 1079-82);
- Bell directed the use of a blanket to wrap up the victim and the use of rope to tie up the victim (XI-T 918, 919, XII-T 1082-86); the victim moaned as he was being tied up (XII-T 1087);
- Bell backed his car to the apartment door in order to put the victim in the trunk (XI-T 921), and Bell and Lincks carried the victim to the trunk and stuffed him in it (XII-T 1086);
- Bell determined a wooded location where the victim would be taken and then drove the victim there in the trunk of his (Bells') car (XI-T 922, XII-T 1088-89);

- In the woods, pursuant to a prior discussion, Bell, Maestas, and Lincks asked the victim for his bank PIN numbers (XI-T 923, XII-T 1092-93);
- In the woods, when the victim begged Bell, "please don't kill me" and moaned and mumbled, Bell told Maestas to hit the victim with the baseball bat (XII-T 1093, XI-T 924-25); Bell incited Maestas to action by reminding her, "who hurt you?" (XI-T 925. See also XII-T 1082);
- In the woods, Bell told Maestas that she was not hitting the victim hard enough with the bat, then told Maestas to give the bat to Lincks, and, after Lincks hit the victim several times, directed that the bat be given to him (XII-T 1094, XI-T 926);
- When Bell had the bat, Bell pointed to the moon and stated "look, I'm Babe Ruth" and then hit the victim hard with the bat (XII-T 1094-95, XI-T 925-26);
- Bell squirted lighter fluid "all over" the victim, including his head and face; the victim was still alive and groaned (XI-T 930); the lighter fluid was then lit, resulting in the victim screaming (XI-T 929-30, XII-T 1097-98);⁹

⁹ Earlier, when Maestas suggested burning the victim, Bell said "Yeah." (XII-T 1089) Maestas testified that Bell lit the fluid (XI-T 929-30, 972-73), whereas Lincks testified that Maestas lit it (XII-T 1097). Bell told Calvin Smith that "He [Bell] tried to burn" the victim (731-32).

- After running away when the victim screamed and then driving away at some point prior to 5 AM (XII-T 1102), at Bell's insistence "to make sure he was dead," Bell, Maestas, and Lincks returned to the wooded location where they had left the victim beaten and in flames (XII-T 1107, XI-T 932-33);
- At the wooded location, upon hearing the victim calling for help and asking "who's there," Bell tried to break the victim's neck (XII-T 1107-1109, XI-T 933, X-T 736-37);
- Bell drove to Target and at about 9:45 AM (XII-T 1004-1005, XI-T 934) paid for duct tape and a meat cleaver (XI-T 935-36, IX T583-84) to finish off the victim (XII-T 1110-12, 1015);
- Bell returned to the wooded site and slit the throat of the victim, resulting in the victim sounding a "very small shout" (X-T 732, 738, XII-T 1112. See also XI-T 936-37);
- Bell returned to the car and stated that he "didn't slit his throat deep enough" XII-T 1113), then returned again to the victim's location and again slit the victim's throat (XII-T 1114. See also XI-T 937-38);
- Bell returned the meat cleaver to Target for a refund of his money (XII-T 1115-17, -T 1006-1008);
- As discussed in the plans supra, Bell lived in the victim's apartment for several weeks (X T612-15, 623-35) and pawned or sold items of the victim's personal property (television, violin, and perhaps computer) (XII-T 1121-22,

IX T584, X T643-44, 616-18, 689-700, 714-18, 739); Bell participated in getting cash for forged checks using the victim's bank checks (X T 741-44, 772-74, XII-T 1116-17).

(For identification of Bell's fingerprint on bank envelope found in Bell's car, compare XI-T 848-40 with 993-97);

- The victim's personal effects, such as clothes and military pins and patches, were packaged up and dispersed among three separate dumpsters (X-T 646-48, 656, 740, XII-T 1117. See also X-T 616-18)

It is also noteworthy, that

- Bell's muscular stature (X-T 614, 684) provided the wherewithal for physically dominating the "real skinny" victim (XI-T 946. See also XII-T 1078: "fairly thin"), pounding the life out of him, and backing-up his verbal commands to his younger and smaller female accomplices (See X-T 615, 619-20, XI-T 939, 943, XII-T 1042-43).

Accordingly, Bell engineered and micromanaged the kidnapping of the victim for the purpose of murdering him, stealing his property, and then protractedly murdering him,¹⁰ including even

¹⁰ Although not raised as an issue on appeal, the State submits the foregoing compelling evidence as far exceeding what is required for sufficiency of the evidence for the First Degree Murder and Armed Kidnapping (V-R 912, XIII-T 1238-39). See, e.g., Hawk v. State, 718 So.2d 159, 161, 161 n. 7 (Fla. 1998) (bragged about capacity to beat up old people, "numerous massive wounds to the head consistent with ... blows"; after killing, bragged about it and displayed fruits of the crime; "[e]vidence of premeditation is extensive"); Suggs v. State, 644 So.2d 64, 68-69 (Fla. 1994) ("evidence exists to support the charge that he forcibly required the victim to leave the bar"; "record supports Suggs' conviction for kidnapping"); Henry v. State, 613 So.2d

returning to the scene and silencing his cries for help. In sum, because evidence of kidnapping, felony murder, and premeditated murder was overwhelming, in the context of remedial general jury instructions and other arguments directly focusing upon the law and evidence, any deficiency in the prosecutor's argument did not taint the jury's finding of guilt or recommendation of death¹¹ and, if error, was harmless. See Walker v. State, 707 So.2d 300, 314 (Fla. 1997) ("prosecutor's remarks during the penalty phase closing argument **impugning defense counsel** and characterizing the expert witnesses as "hired guns," as well as asking the jury to put themselves in the victims' shoes and imagine their suffering"; "these discrete instances of misconduct are harmless

429, 430-32, 432 n. 10 (Fla. 1992) (robbery-arson-murder; victim whom defendant had hit in head with hammer then set on fire died next day; affirmed proceeding "on alternative theories of premeditated and felony murder"); Penn v. State, 574 So.2d 1079, 1080, 1081 (Fla. 1991) (defendant "took a hammer from the laundry room, beat his mother to death, and stole numerous items from the house"; "purchased items with his mother's credit cards and pawned items stolen from her home"; sufficient evidence of premeditation); Grossman v. State, 525 So.2d 833, 837 (Fla. 1988) (evidence indicated a motive for the killing, and the killing involved beating the victim and a single gunshot; upheld the conviction on a premeditation as well as a felony murder theories), overruled on other ground, 699 So.2d 1312; Ross v. State, 474 So.2d 1170, 1173-74 (Fla. 1985) (anger towards, and brutal beating of, victim supported premeditation); Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981) ("repeated blows" and "manual strangulation"); Jacobs v. State, 396 So.2d 713 (Fla. 1981) (defendant's accomplices placed Leonard Levinson in Levinson's Cadillac to continue getaway; "sufficient evidence to sustain her kidnapping conviction").

¹¹ If the merits are reached, this is the **standard of review**. See also Gonzalez V. State, 26 Fla. L. Weekly S317 (Fla. May 10, 2001) ("vitiates the trial or so poisons the minds of the jurors that Appellant did not receive a fair trial").

beyond a reasonable doubt"); Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994) ("all of these claims to be poorly supported by the record and of minor consequence singly or in their totality. Any error would be harmless and clearly was cured by the trial court's instructions to the jury"); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Moreover, the prosecutor's rebuttal argument attacked here was a fair response to defense counsel's personalized attack on the prosecutor in which he suggested that the jury should redress the prosecutor's violation of the constitution. As a means to even-out defense counsel's argument, the prosecutor did not taint the jury's findings and did not reach either fundamental or harmful proportions.

Thus, arguendo, because the prosecutor's argument was a reasonable response to defense counsel's attack, **the State does not concede the merits of ISSUE IV, if they are reached.** The prosecutor's argument was a fair response to defense counsel request that the jury violate the law and, therefore, proper. See, e.g., Garcia v. State, 644 So.2d 59, 63 (Fla. 1994) (comments clearly improper "when read out of context," proper as a response to the defense); Wuornos v. State, 644 So.2d 1012, 1018 (Fla. 1994) (defense opened door for "State's closing arguments urged the jury to take its role seriously even though Wuornos already had been sentenced to death in an earlier murder").

Here, one of the main themes of defense counsel's closing was that the jury should factor into its guilt decision the maximum penalty of the crime to which accomplice-Lincks¹² had pled:

... second degree murder *** is more serious than what Renee Lincks got to plead to, who in the worst case scenario will be out of prison by the time she's thirty, and the state wants to execute this man. A less serious charge than that is manslaughter. That's what Renee got to plead nolo to, not even guilty. The defense doesn't have a meat cleaver, the defense doesn't have chains, tape, ropes, gruesome pictures, blood spatter, violins, experts. We do have the Constitution, equal protection, doing the right thing, following the law. **Mr. Elmore [the prosecutor] felt apparently, that this was the right thing to do.** This wasn't premeditation, no premeditated murder, no felony murder. This was second degree murder or manslaughter, and that's two of the options you'll have, and third degree murder. You've now heard how involved Renee Lincks was in this case. She admitted she was one hundred percent involved.

(XII-T 1192-93) After arguing his perspective on the evidence for several lines of transcript, Defense counsel continued and concluded his closing argument:

The state has all this. The defense has equal protection. Ladies and gentlemen, we ask you to consider these options on the verdict form including not guilty. Consider second degree, manslaughter, third degree, and not guilty, and please remember the things that I talked to you about and the evidence as you remember it, not as I say or [the prosecutor's] about to say. I thank you very much for your attention.

(XII-T 1193-94)

¹² Maestas was the other accomplice who testified against Bell. (XI-T 911 et seq) Prior to testifying here, she had been convicted at trial of First Degree Murder and sentenced to life in prison. (V-T 934-35) Apparently at the last minute, she announced that she had decided to testify in the State's case-in-chief. (See XI-T 908: "trying to determine if she is going to proceed to testify or not")

Thus, as the prosecutor subsequently argued, defense counsel did attempt to persuade the jury to violate the instruction to find the defendant guilty of the highest offense the State proved beyond a reasonable doubt. See, e.g., Standard Jury Instructions in Criminal Cases, 665 So.2d 212 (95-2) (Fla. 1995) ("If you return a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt"); Perez v. State, 648 So.2d 715, 719, 719 n. 10 (Fla. 1995) ("rejected claim that 'trial court erred by instructing the jury that if a verdict of guilty were returned, it should be for the highest offense which had been proven beyond a reasonable doubt'").

Moreover, defense counsel not only told the jury to disregard the instruction to convict on the highest offense proved, but also **personalized the attack** by naming the prosecutor and suggesting that this prosecutor was attempting to violate Bell's constitutional rights by seeking higher charges and penalties than for Lincks. In other words, defense counsel initiated the personalization of the argument, and defense counsel argued that the prosecutor was violating constitutional equal protection. In his rebuttal argument, attacked here, the prosecutor was entitled to respond accordingly. There was no prosecutorial misconduct.

ISSUE V

DID THE TRIAL COURT REVERSIBLY ERR BY NOT
REQUIRING THE STATE TO PROVIDE NOTICE OF
AGGRAVATING CIRCUMSTANCES ON WHICH IT INTENDED TO
RELY AND BY NOT INSTRUCTING THE JURY THAT IT MUST
FIND BY A SPECIFIED BURDEN THAT THE AGGRAVATORS
WERE SUFFICIENTLY WEIGHTY? (Restated)

Bell has not shown where the claims in ISSUE V were preserved. Defense counsel filed motions below that requested the State to provide notice of aggravators (See I R85-90, R141, R158-60), but ISSUE V claims were not raised in the penalty-phase jury instruction conference (See XIII-T 1247-65), there was no objection interposed during the prosecutor's argument of the aggravators to the jury (See XIII-T 1284-1312), and, after the trial court instructed the jury, defense counsel indicated that the trial court did not omit anything (XIII-T 1330). Thus, these matters were not raised with the trial court contemporaneous to the prosecutor's reliance upon aggravating evidence in the penalty phase nor when the trial court presented aggravating circumstances to the jury via its instructions. None of ISSUE V was preserved. See Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997) (argument attacking jury instruction not the same as the one on appeal; appellate issue "was not properly preserved for review"); Phillips v. State, 705 So.2d 1320, 1322 (Fla. 1997) (regarding "instruction on the disrupt/hinder aggravator"; "objection to the applicability of a jury instruction does not preserve a claim that the instruction was vague or overbroad"); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to

death penalty proceedings "procedurally barred because defense counsel failed to object with the requisite specificity in the trial court"); State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("The only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction"), citing Armstrong v. State, 579 So. 2d 734 (Fla. 1991); Roberts v. Singletary, 626 So.2d 168 (Fla. 1993) (habeas; "record here does not reflect any objection on the grounds of unconstitutionality or vagueness of the instruction given"); Hill v. State, 549 So. 2d 179, 181-82 (Fla. 1989) ("constitutional argument grounded on due process and Chambers was not presented to the trial court. Failure to present the ground below procedurally bars appellant from presenting the argument on appeal.").¹³

¹³ The State also contests Bell's jump from discussions of Apprendi and notice and proof of aggravators (IB 42-52) to a laundry wish-list (See IB 52) without making any showing how each item on the list logically flows from the prior discussions. It should not be incumbent upon the State to speculate on the nexus and then argue against its speculations. See Bryan v. Dugger, 641 So.2d 61, 63 (Fla. 1994) ("deficiencies listed in issue nine do not allege sufficient facts to demonstrate ineffective assistance of counsel"); U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention"; "Failure to specify error or provide citations in support of an argument constitutes waiver, ... so we decline to reach the propriety of the district court's actions in this regard"); U.S. v. Dawn, 129 F.3d 878, 881 n. 3 (7th Cir. 1997) ("Dawn ... argues that sentencing on the basis of his conduct abroad would violate his due process rights because he lacked notice that he would be held responsible for that conduct"; "has left this argument undeveloped, however, and consequently we need not address it"); U.S. v. Harvey, 959 F.2d 1371, 1376 (7th Cir. 1992) ("skeletal 'argument,' which is really nothing more than an

Arguendo, on the merits, the gravamen of ISSUE V is based primarily upon Apprendi v. New Jersey, 530 U.S. 466 (2000). As a matter of law,¹⁴ Mills v. Moore, 26 Fla. L. Weekly S242, S243-44 (Fla. Apr. 12, 2001), cert. denied, 121 S. Ct. 1752 (2001), and Mann v. Moore, 26 Fla. L. Weekly S490 (Fla. July 12, 2001), have rejected Bell's position. The State tenders them as controlling precedent and Mill's rationale as sound.

Put another way, the trial court, in using standard jury instructions that have been repeatedly upheld, including vis-a-vis ISSUE V's claims, did not "palpabl[y] abuse ... [its]

assertion, does not preserve his claim that the district court erred by refusing to allow him to question"); U.S. v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (rejected a defendant's attempt to summarily adopt arguments co-defendants made; "no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

For example, Apprendi does not require unanimity; to the contrary, the United States Supreme Court has upheld less-than-unanimous guilt-verdicts. See, e.g., Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (upheld 9-3 jury verdict). See also Schad v. Arizona, 501 U.S. 624, 630, 111 S.Ct. 2491, 2496, 115 L.Ed.2d 555 (1991) (rejected argument that "that the Sixth, Eighth, and Fourteenth Amendments require a unanimous jury in state capital cases, as distinct from those where lesser penalties are imposed").

¹⁴ The presumption of correctness applies to a trial court's jury instructions, and the non-prevailing party below must establish an abuse of discretion on appeal. See, e.g., James v. State, 695 So.2d 1229, 1236 (Fla. 1997) ("wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal"); Kearse v. State, 662 So.2d 677, 681-82 (Fla. 1995) ("judge's decision regarding the charge to the jury 'has historically had the presumption of correctness on appeal'"). Here, however, as a matter of law, there is precedent directly opposite to Bell's position

discretion," Phillips v. State, 476 So.2d 194, 196 (Fla. 1985) (affirmed trial court use of then-current standard instruction on alibi). See also Stephens v. State, 26 Fla. L. Weekly S161 (Fla. March 15, 2001) ("burden of demonstrating that the trial court abused its discretion in giving standard instructions").

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence entered in this case.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to William C. McLain, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on July 23, 2001.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

By: STEPHEN R. WHITE
Attorney for State of Florida

Assistant Attorney General
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext 4579
(850) 487-0997 (Fax)

Florida Bar No. 159089
[AGO# L00-2-1089]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

Stephen R. White
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

RONALD LEE BELL, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC00-1185

INDEX TO APPENDIX

Sentencing Order (V-R 921-42)