

IN THE SUPREME COURT OF FLORIDA

RONALD LEE BELL, JR.,

Appellant,

vs.

CASE NO.: SC00-1185

STATE OF FLORIDA,

Appellee.

_____ /

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

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>PAGE (S)</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	18
ARGUMENT	21
<u>ISSUE I</u>	
THE TRIAL COURT ERRED IN FAILING TO GIVE PROPER CONSIDERATION AND WEIGHT TO BELL'S AGE OF 17 AT THE TIME OF THE CRIME, SINCE THE COURT APPLIED AN INCORRECT LEGAL STANDARD IN THE WEIGHING PROCESS BASED ON THE COURT'S INACCURATE BELIEF THAT THE CONSTITUTIONAL BAR TO EXECUTING JUVENILES APPLIED ONLY TO THOSE UNDER THE AGE OF 16.	21
<u>ISSUE II</u>	
THE TRIAL COURT ERRED IN SENTENCING BELL TO DEATH SINCE A DEATH SENTENCE FOR OFFENDERS UNDER THE AGE OF 18 IS UNCONSTITUTIONAL UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.	25
<u>ISSUE III</u>	
THE TRIAL COURT ERRED IN IMPROPERLY CONSIDERING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.	32
<u>ISSUE IV</u>	
THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR DURING HIS REBUTTAL CLOSING ARGUMENT TO ACCUSED DEFENSE COUNSEL OF TELLING THE JURY NOT TO FOLLOW THE LAW.	38
<u>ISSUE V</u>	
IMPOSITION OF THE DEATH SENTENCE IN THE ABSENCE OF NOTICE OF THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED OR OF JURY FINDINGS ON THE AGGRAVATORS AND DEATH ELIGIBILITY, VIOLATES DUE PROCESS AND THE PROTECTION AGAINST CRUEL AND/OR UNUSUAL PUNISHMENT.	42
CONCLUSION	53
CERTIFICATE OF SERVICE	54
CERTIFICATE OF COMPLIANCE	54

TABLE OF AUTHORITIES

PAGE(S)

CASES

<u>Allen v. State</u> , 636 So. 2d 494 (Fla. 1994)	25-28
<u>Almendarez-Torres v. United States</u> , 523 U.S. 224 (1998)	46, 49
<u>Amazon v. State</u> , 487 So. 2d 8 (Fla. 1986)	35
<u>Apprendi v. New Jersey</u> , 120 S. Ct. 2348 (2000)	passim
<u>Bonifay v. State</u> , 680 So. 2d 413 (Fla. 1996)	27
<u>Brennan v. State</u> , 754 So. 2d 1 (Fla. 1999)	21, 22, 26-28, 30
<u>Brooks v. State</u> , 762 So. 2d 879 (Fla. 2000)	19, 38, 40, 41
<u>Bryant v. State</u> , 744 So. 2d 1225 (Fla. 4th DCA 1999)	48
<u>Ellis v. State</u> , 622 So. 2d 991 (Fla. 1993)	21
<u>Espinosa v. Florida</u> , 505 U.S. 1079 (1992)	50, 51
<u>Eutzy v. State</u> , 458 So. 2d 755 (Fla. 1984)	33
<u>Ferguson v. State</u> , 417 So. 2d 639 (Fla. 1982)	23
<u>Floyd v. State</u> , 497 So. 2d 1211 (Fla. 1986)	37
<u>Geralds v. State</u> , 601 So. 2d 1157 (Fla. 1992)	32, 33, 37
<u>Gibbs v. State</u> , 623 So. 2d 551 (Fla. 4th DCA 1993)	48
<u>Gordon v. State</u> , 704 So. 2d 107 (Fla. 1997)	22
<u>Hall v. State</u> , 614 So. 2d 473 (Fla. 1993)	36
<u>In re Winship</u> , 397 U.S. 358 (1970)	44
<u>Jackson v. State</u> , 502 So. 2d 409 (Fla. 1986)	35
<u>Jackson v. State</u> , 648 So. 2d 85 (Fla. 1994)	43
<u>Jennings v. State</u> , 718 So. 2d 144 (Fla. 1998)	37
<u>Jones v. United States</u> , 526 U.S. 227 (1999)	49
<u>Lambrix v. Singletary</u> , 520 U.S. 518 (1997)	50, 51

TABLE OF AUTHORITIES

PAGE (S)

<u>LeCroy v. State</u> , 727 So. 2d 236 (Fla. 1999)	27
<u>Menendez v. State</u> , 368 So. 2d 1278 (Fla. 1979)	19, 32, 33
<u>Mines v. State</u> , 390 So. 2d 332 (Fla. 1980)	23
<u>Peck v. State</u> , 425 So. 2d 664 (Fla. 2nd DCA 1983)	48
<u>Perry v. State</u> , 522 So. 2d 817 (Fla. 1988)	32, 37
<u>Preston v. State</u> , 607 So. 2d 404 (Fla. 1992)	36
<u>Ramirez v. State</u> , 739 So. 2d 568 (Fla. 1999)	27
<u>Riley v. State</u> , 366 So. 2d 19 (Fla. 1976)	19, 32, 33
<u>State v. Dixon</u> , 283 So. 2d 1 (Fla. 1973)	32, 43
<u>State v. Harbaugh</u> , 754 So. 2d 691 (Fla. 2000)	44, 47
<u>State v. Overfelt</u> , 457 So. 2d 1385 (Fla. 1984)	20, 42, 47, 48
<u>Stephens v. State</u> , 27 Fla. L. Weekly S161 (Fla. March 15, 2001)	22
<u>Urbin v. State</u> , 714 So. 2d 411 (Fla. 1998)	21, 22
<u>Walton v. Arizona</u> , 497 U.S. 639 (1990)	49-51

STATUTES

§ 775.082(1), Fla. Stat.	45
§ 782.04(1)(a), Fla. Stat. (1993)	45
§ 782.04(1)(b), Fla. Stat. (1993)	45
§ 921.141, Fla. Stat. (1995)	45
§ 921.141(5), Fla. Stat.	45
§ 921.141(5)(e), Fla. Stat.	19, 32
§ 921.141 (6)(g), Fla. Stat.	21

TABLE OF AUTHORITIES

PAGE (S)

CONSTITUTIONS

Amend. V, U.S. Const.	18-20, 22, 25, 32, 38
Amend. VI,, U.S. Const.	20, 38
Amend. VIII, U.S. Const.	18-20, 22, 25, 32, 38, 42
Amend. XIV, U.S. Const.	18-20, 22, 25, 32, 38, 42
Art. I, Sec. 16, Fla. Const.	18-20, 22, 32, 38
Art. I, Sec. 17, Fla. Const.	18-20, 22, 25, 38, 42
Art. I, Sec. 9, Fla. Const.	18-20, 22, 25, 32, 42

OTHER

NAACP Legal Defense Fund, <i>Death Row USA</i> , January 1, 2001	27, 28
Streib, <i>The Juvenile Death Penalty Today: Death Sentences For Juvenile Crimes</i> , <i>January 1, 1973-December 31, 2000.</i>	27

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

References to the clerk's record will be designated with the prefix "R" followed by the volume and page number. The transcript will be similarly designated with the prefix "T." The transcript volumes are double numbered. One is a sequential numbering which begins with the record and goes through the transcript volumes. The second number begins with the transcript volumes and continues to the end. References to the transcript will use the second number. The page numbering in the record and transcript are separate. An appendix is attached to this brief and references to it will be designated with the prefix "App."

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

On April 1, 1999, an Okaloosa County grand jury returned an indictment charging Ronald Bell, Jr., Kristel Rose Maestas, and Renee K. Lincks with first degree murder (count one) and armed kidnaping (count two). (R1:1-3) The alleged victim of both charges was Cordell S. Richards, and the crimes allegedly occurred on February 2 and 3, 1999. (R1:1-3) Bell pleaded not guilty on May 3, 1999. (R1:22) Bell proceeded to a jury trial, and the jury found him guilty as charged on March 17, 2000. (R5:845-846) (T7:1238-1239) After the penalty phase of the trial held the following day, the jury recommended a death sentence for Bell by a vote of 12 to 0 on March 18, 2000. (R5:842) (T7:1331)

A sentencing hearing before the judge was held on April 17, 2000. (R6:995-1010) On May 15, 2000, Circuit Judge Thomas T. Remington sentenced Ronald Lee Bell, Jr., to death for the murder and to life imprisonment for the kidnaping. (R5:912-942) (T1339-1359) The court found five aggravating circumstances: (1) the homicide was committed during a kidnaping; (2) the homicide was committed to avoid arrest; (3) the homicide was committed for pecuniary gain; (4) the homicide was heinous, atrocious or cruel; and (5) the homicide was cold, calculated and premeditated. (R5:921-932) (App. A) In mitigation, the court found one statutory and seven nonstatutory mitigating circumstances: (1) Bell's age of

17-years-old at the time of the crime was a statutory mitigating circumstance and given "little weight" (R5:933-934) (App. A); (2) disparate treatment of co-defendants Renee Lincks and Kristel Maestas was given "little weight" (R5:934-936) (App. A); (3) Bell was a good student was given "little weight" (R5:397) (App. A); (4) Bell was a model prisoner while awaiting trial was given "very little weight" (R5:937) (App. A); (5) Bell has a good family support system was given "little weight." (R5:937-938) (App. A); (6) Bell was active in church was given "slight weight." (R5:938) (App. A); (7) Bell was gainfully employed, had the potential to finish high school and further education, and performed volunteer work was given "some weight." (R5:938-939) (App. A); (8) Bell has a very supportive extended church family was given "little weight." (R5:939-940) (App. A)

Bell filed his notice of appeal to this Court on May 22, 2000. (R5:945)

Facts -- Guilt Phase

Martin Stone attempted to contact his friend, Cordell Richards, for a couple of weeks without success. (T4:609-612) Stone's attempts included telephone calls, e-mails, and trips to Cordell's apartment and work place. (T4:610-612) On February 13, 1999, Stone asked the police for assistance, and Officers John Douma and Mike Nichols went to Cordell's apartment to perform a welfare check. (T4:612-614, 623-626) Sergeant Bruhn and Stone

arrived a few minutes later. (T4:625) Douma and Nichols had tried, without success, to obtain the attention of anyone who might be in the apartment by pounding on the doors and windows. (T4:624-627) Officer Nichols noticed a window was ajar, and Officer Douma entered the apartment through the window. (T4:626)

When Douma entered the apartment, he found himself in a room which appeared to be used for storage. (T4:626-627) Douma left that room and went into the common living areas and opened the door for Nichols and Bruhn. (T4:627-628) A bedroom door was locked with a deadbolt and had a towel stuffed under the door. (T4:628-629) The officers beat on the door and a young, black male opened the door. (T4:629-630) He identified himself as Ronald Lee Bell. (T4:630) A young woman, Kristel Maestas, was in a sleeping bag on the floor of the bedroom. (T4:631-634) Both Bell and Maestas appeared to be just waking up. (T4:631-634, 636) Bell said he did not know anything about Cordell Richards. (T4:629-631, 637-638) Maestas said she subleased a room from Richards, but she had not seen him since earlier in the week. (T4:633)

On March 4, 1999, the decomposing body of Cordell Richards was found in a wooded area at the end of a cul-de-sac in an undeveloped portion of a housing subdivision in Okaloosa County. (T3:498-503, 507-510, 562-566; T5:813-815, 989-992, 996) The partially skeletonized and burned remains were tied to a tree with a chain and a rope. (T3:509- 512;T5:830-832) Various items of evidence,

including clothing, a blanket, a chain, a rope, tape and the soil under the body which smelled of gasoline, were recovered for later examination. (T3:513-516, 523-531; T5:831-840) Dr. Michael Berkland examined the remains at the scene and performed the autopsy. (T3:505-561) He found the body to be in an advanced state of decomposition and there were no internal organs to examine. (T3:516) There were multiple fractures to the head -- the result of blunt force trauma. (T3:516-517) Additionally, Berkland found fractures to the shoulder blade, the sternum, the ribs, the lower part of the upper arm and to the wrist. (T3:520-521) These wounds were consistent with the victim having been beaten with a club. (T3:520-521) The burn patterns on the remains lead Berkland to the opinion that the burning was post-mortem. (T3:517-520) Charring of the bone on the left side of the neck indicated to Berkland that there had been an injury to the tissue that cleared a path for the fire to the bone in the neck. (T3:519-520, 530-531, 539) Berkland concluded the cause of death to be a combination of blunt force trauma and a probable chop injury to the left neck. (T3:540-541)

In the early part of February 1999, Donald and Robin Burden took their daily walk which passed by the cul-de-sac where the body was found. (T4:674-678) They saw three individuals and a car in the cul-de-sac. (T4:678-679) The car was a small brown or tan vehicle, such as an Escort or K-car, with a window broken out on the back right side. (T4:679) A board of some type had been used to

replace the window. (T4:679) The back of the car was open. (T4:678) When shown a photograph of Bell's car, a 1988 Ford Escort with the right rear window broken out, Donald Burden said the car he saw was similar, but he was not certain that was the vehicle. (T4:679-680, 687) The car drove passed the Burdens. (T4:681-683) Donald Burden said the three persons he saw were a black male, a white female and, he thought, the third was a white male. (T4:680) He did not get a clear view of all three individuals. (T4:680, 687) At trial, Burden said he thought the black male was driving, but he admitted that he had earlier said the black male was in the back seat. (T4:683, 688)

Kristel Maestas testified that she, Ron Bell, Jr., and Renee Lincks participated in the homicide of Cordell Richards. (T5:910-988) At the time she testified, Maestas had been convicted of first degree murder for the death of Richards. She said she decided to testify hoping she might gain some benefit in any future clemency petition. (T5:980-982) Maestas related the following in her testimony:

Ron and Kristel had been dating for a few months at the time of the homicide. (T5:943) Ron was 17-years-old and a high school senior living with his parents. (T5:943-944) Kristel was 16-years-old and had been kicked out of her parents' house. (T5:944) They loved each other, and Ron helped Kristel find a place to stay. (T5:944) Through a newspaper advertisement for roommates, Kristel

and Ron met Cordell Richards, and Kristel moved into Richards' extra bedroom in his apartment. (T5:911-912, 944) After Kristel moved into the apartment, Richards began to proposition her for sex. (T5:913-915, 945) Richards would come into Kristel's room wearing only bikini underwear allegedly just to talk. (T5: 913, 946-948) When Kristel refused his first requests, Richards would just leave. (T5:948) On one occasion when Kristel said "no" to his request for sex, Richards grabbed her shoulders and pushed her against the wall. (T5:913, 948-949) She began to cry. (T5:913) Richards pushed Kristel against the wall a second time, and she hit her head. (T5:914) Apparently, Richards then realized what he was doing and left the room. (T5:914-915,950-951) Kristel said Ron found out about Richards' attack when he saw bruises on Kristel's back. (T5: 951-952) He was upset that she had been hurt. (R5:952) Ron bought a deadbolt lock for the bedroom door in the apartment to give Kristel more privacy. (T5:954-955) A friend, Renee Lincks also agreed to stay the night with Kristel in the apartment. (T5: 952-955)

The very night Kristel and Renee were together at the apartment, Cordell Richards asked both of them if they wanted to sleep together with him in his room. (T5:952-953) Renee called her friend, Demetrius Modley, who picked them up from the apartment. (T5:953) Ron later took both girls back to the apartment. (T5:953) Ron also left a baseball bat with the girls at

the apartment. (T5:954) Later, Richards called the two girls from his bedroom to the telephone in Kristel's bedroom. (T5:955-966) He pretended to be a woman, his girlfriend. (T5:956) Kristel and Renee were upset. (T5:953) They paged both Ron and Demetrius Modley. (T5:957) Ron responded to the apartment to help. (T5:957-958)

When Ron entered the apartment, he confronted Richards about his behavior toward the girls. (T5:915, 958) The girls came out of the bedroom. (T5:959) Kristel saw Ron and Richards start pushing each other. (T5:916, 959) Neither one had a weapon. (T5:959) Ron placed Richards in a choke hold, and Richards lost consciousness. (T5:917) Ron told Renee to get the bat, and Renee gave the bat to Kristel. (T5:917-918, 960-961) Kristel hit Richards in the legs with the bat. (T5:918) She said she did not remember hitting Richards anywhere but his legs. (T5:919-920, 962-963) She did not know how blood got on the apartment walls. (T5:919-920) However, she did see blood coming from Richards' head when she was swinging the bat. (T5:962-963) Ron directed Renee to get a rope out of his car and a blanket from the bed. (T5:918-919, 964-965) They tied Richards, rolled him in the blanket and placed him in the back of Ron's car. (T5:919,921, 965-967) Ron drove the car to a wooded area off a cul-de-sac in Okaloosa County. (T5:922)

Ron, Renee and Kristel carried Richards, who was now conscious but still rolled in the blanket, into the woods. (T5: 922-923, 969-

971) Renee said something about PIN numbers to Richards' bank account. (T5:923) Kristel said there had never been any discussion in her presence about PIN numbers. (T5:923) Ron had Kristel shone the flashlight in Richards' face, and Renee asked Richards for the PIN numbers. (T5:923-924) Kristel, Renee and Ron then alternated hitting Richards with the baseball bat. (T5:924-926) When Kristel hit Richards, Ron reminded her that Richards had hurt her. (T5:925) At one point, Richards asked Ron not to kill him. (T5:925) Since Renee was not hitting Richards hard enough, Ron took the bat and hit Richards really hard and made the comment that he was Babe Ruth. (T5:925-926) They carried Richards further into the woods and tied and chained him to a tree. (T5:927-928) Richards again asked not to be killed as they tied him. (T5:928) Kristel said Renee suggested setting Richards on fire. (T5:972-973) Ron then poured lighter fluid on Richards and set him on fire. (T5:929-930) Kristel said she ran to the car at that point. (T5:930)

Ron and Kristel returned to the scene two additional times. (T5:931-941) After daylight, Ron, Kristel and Renee returned to be sure Richards was dead. (T5:932, 976) As they entered the woods, they could hear Richards calling out. (T5:932-933) Ron and Renee continued to the tree where Richards was chained, but Kristel did not go. (T5:933, 976) After a couple of minutes, Ron and Renee returned, and Renee said Ron had tried without success to break Richards' neck. (T5:933-934, 976) They drove to a Target store and

purchased a meat cleaver and duct tape. (T5:934-936, 977) Again, they drove to Richards' location. (T5:936, 978) Ron and Renee went back into the woods. (T5:936-937) Kristel said they returned after about five minutes, and she saw blood on the cleaver. (T5:936-937) Renee questioned whether Ron had cut Richards' throat far enough, and Ron returned to the tree. (T5:938, 979) About a week later, Ron, Kristel and Kristel's younger sister, April Maestas, returned to Richards' body. (T5:938-939, 979) At this time, Ron doused the body with gasoline and set it on fire. (T5:940-941)

Renee Lincks also testified about the homicide. (T6:1040-1133) The State allowed her to plead guilty to manslaughter for a sentence of fifteen years in exchange for her testimony. (T6:1041) She testified about her version of the homicide as follows:

Renee Lincks was 15-years-old and friends with Ron Bell and Kristel Maestas. (T6:1042-1043) She spent time with them often in the late part of 1998 and early 1999. (T6:1044-1045) Renee did not get along with her mother, and she decided to leave home for a time. (T6:1045) She spent one night at the home of a friend, Demetrius Modley. (T6:1045) Kristel was then staying at Cordell Richards' apartment, and she asked Richards if Renee could stay there as well. (T6:1046-1049) He agreed. (T6:1047-1049) Ron helped Renee move some of her belongings to the apartment. (T6:1046-1047) Renee said that based on Richards' comments to her when she was at the apartment, Kristel had lead him to believe that the two of them

were bi-sexual. (T6:1049) Renee played along with the story. (T6:1049) Richards suggested the two girls could both sleep with him in his room. (T6:1049) Renee became uncomfortable because of these remarks, and she called her friend Modley to pick her up. (T6:1051-1055) The next night, February 2, 1999, Renee went back to the apartment and spent the night, since Ron was staying the night at the apartment with her and Kristel. (T6:1055-1056)

Renee said that Ron discussed beating up or killing Cordell Richards. (T6:1058-1061) He said he was angry about Richards' sexual advances toward Kristel and the incident when Richards physically assaulted Kristel leaving bruises on her back when she refused to have sex with him. (T6:1058) Kristel told Renee that Richards had also exposed himself to her. (T6:1058-1059) Renee said she did not believe Ron when he said he wanted to kill Richards. (T6:1060) Kristel said that she saw Richards pay the February rent and that whatever happened, they could stay in the apartment through the month. (T6:1060) There was also a discussion about pawning Richards' property. (T6:1061) Kristel and Ron went to Wal-Mart to buy some personal items. (T6:1062) They returned with the items, along with a rope, a chain and a lock which they said would be used when they killed Richards. (T6:1063) They went to see a friend of Ron's, Calvin Smith, and Ron talked to him about helping to kill Richards. (T6:1064) Ron told them that Calvin said he did not think he could sneak out of the house that night. (T6:1064)

They also went to Demetrius Modley and asked him to assist, and he said he might help beat someone up, but not kill him. (T6:1065-1066) Modley said he would page them later, but he never did. (T6:1065-1066) Ron, Kristel and Renee returned to Richards' apartment around midnight. (T6:1066) Ron left, but he told the girls to page him if anything happened. (T6:1067)

After Ron left, the girls received a telephone call from Richards. (T6:1068) Kristel answered the call and the caller said it was Heather, Richards' girlfriend. (T6:1068) The caller asked the girls to kiss each other. (T6:1068) Kristel figured out the caller was Richards and they determined the call came from Richards' telephone line. (T6:1068-1069) Kristel went to Richards' bedroom and angrily confronted him. (T6:1069-1072) Kristel returned to her bedroom, locked the door and paged Ron. (T6:1072-1073) Richards came to the bedroom door and apologetically asked to talk to them. (T6:1073) A short time later, Renee heard Ron's voice outside the bedroom door. (T6:1073-1074)

Kristel told Ron about Richards' telephone call, and Ron became angry and confronted Richards about his harassment of the girls. (T6:1075) Richards began moving toward the front door and Ron grabbed him and shoved him. (T6:1075-1076) Ron placed Richards in a headlock. (T6:1076) Richards could not speak. (T6:1076) Ron told Renee to get the baseball bat. (T6:1076) Renee handed the bat to Kristel. (T6:1078) Kristel began hitting Richards in the legs.

(T6:1079-1080) She also hit him in the temple, knocking Richards' glasses off and causing some bleeding. (T6:1081-1082) Ron continued his choke hold and Richards lost consciousness. (T6:1082) They tied up Richards, wrapped him in a blanket and placed him in Ron's car. (6:1083-1087) They drove to a wooded area at the end of a cul-de-sac. (T6:1087-1090)

When they reached the wooded area, Kristel suggested they kill Richards by burning him. (T6:1089) One of them found a can of cigarette lighter fluid in Ron's car. (T6:1089) The three of them began dragging Richards into the woods. (T6:1091) Renee asked Ron about getting the PIN number to Richards' bank account. (T6:1092) They pulled the blanket off of Richards' head and asked him for the number. (T6:1092) He gave them four numbers and asked not to be killed. (T6:1093) Ron became upset and told Kristel to hit Richards with the baseball bat. (T6:1093) All three took a turn hitting Richards with the bat. (T6:1094-1096) They continued into the woods and chained Richards to a tree. (T6:1097) Ron poured lighter fluid on Richards and Kristel lit him on fire. (T6:1097-1098) Ron, Kristel and Renee then ran and drove away. (T6:1098-1099)

Later in the morning, after daylight, Ron, Kristel and Renee drove back to the woods where Richards was located. (T6:1107) Kristel remained in the car. (T6:1107-1108) Ron and Renee entered the woods. (T6:1107-1108) They heard Richards faintly calling for help. (T6:1107-1108) There were construction workers at a house not

too far from the cul-de-sac. (T6:1108) Ron and Renee went to Richards. (T6:1108) Ron tried to break Richards' neck, but he was unable to do so. (T6:1108-1109) They left and drove to a Target Store where they bought a meat cleaver and duct tape. (T6:1110-1111) When they returned to Richards, Ron cut Richards' throat. (T6:1112-1114) Later that night, Ron's friend, Calvin Smith, came over and helped forge checks on Richards' account. (T6:1116-1117) Renee said the next day, they tried to pawn some of Richards' property. (T6:1117-1118) A few days later, they successfully pawned a TV and violin. (T6:1121-1122)

Calvin Smith, Ron's friend, testified with a promise from the prosecutor that he would not be arrested for forgery. (T4:720-770) He said in early February 1999, Ron asked him to help fight someone who tried to rape Ron's girlfriend, Kristel. (T4:723) Kristel was staying at the man's apartment in Spanish Villa. (T4:723) Ron came to Calvin's mother's house where Calvin lived late one night. (T4:725-727) Ron told him about the attack this man made on Kristel and that he wanted help in beating the man up. (T4:728-729) Calvin was not interested in participating. (T4:729) He told Ron he would have to get permission from his mother to leave the house. (T4:729) He left as if to ask his mother, but he never went to her room. (T4:729) Calvin then told Ron his mother would not let him leave the house. (T4:729-730) Ron left. (T4:730) The next day, Ron told Calvin that they had beaten the man, chained him to a tree, tried

to burn him and finally, Ron cut the man's throat. (T4:732) Calvin went to the apartment later during the day and helped Ron forge checks on Richards' account. (T4:733-745) He identified a check he forged which had been retrieved from bank records of Richards' account. (T4:741, 770-775)

Timothy Rex, a pawn shop employee, testified that his records showed that Ron Bell has sold a violin to the shop in February 1999. (T4:689-693) Rex admitted he made a mistake entering into the purchase agreement because Bell was not 18-years-old. (T4:964-695) Rex also testified that his records showed a TV was pawned on February 6, 1999, for a Thomas Baldwin. (T4:697-698) Thomas Baldwin testified that he was a friend of Ron Bell's and helped him pawn the TV. (T4:706-712) The TV and violin were identified as property of Cordell Richards'. (T4:617-618; 714-719)

Penalty Phase And Sentencing

The State presented no additional evidence at the penalty phase of the trial. (T7:1266) Bell presented two witnesses and school and jail records. (T7:1266-1284) His witnesses were his father, Ronald Bell, Sr., and his grandfather, Austin David Bell, Jr. (T7:1266, 1275)

Ronald Bell, Sr., is the youth pastor at Greater Peach Missionary Baptist Church in Fort Walton Beach. (T7:1267-1268) His son, Ron Bell, Jr., was then eighteen-years-old and had lived in the community and attended public schools his entire life.

(T7:1267) Rev. Bell said that his son was active in the church -- he served as an usher, sang in the choir and was vice president of the youth district association. (T7:1267-1268) Ron was a senior at Choctawhatchee High School, and he had planned to join the Air Force and to study to be an electrician after graduation. (T7:1269) Ron held part-time employment and assisted the family finances by purchasing his own clothes and other items. (T7:1269-1271) Rev. Bell said that other than normal teenage behaviors there had been no conduct problems with his son. (T7:1273-1274) Ron's grandfather and Rev. Bell's father, Austin Lee Bell, spent a lot of time with Ron, and Ron would go to his grandfather's house to visit regularly. (T7:1268)

Austin Lee Bell was also a minister and pastor of St. John Missionary Baptist church in Florala, Alabama. (T7: 1275) Ron spent weekends with his grandparents on a regular basis. (T7:1276) His grandmother was a strict disciplinarian, and Ron would have to follow her rules. (T7:1276) During those visits, Ron would attend his grandfather's church and participate in the youth activities. (T7:1276) Austin Bell described his grandson as a typical teenager. (T7: 1278)

The trial court held a Spencer hearing on April 17, 2000. (R6:995) At this hearing, the State presented one witness, Investigator Stan Griggs, who testified about distances and driving times from the victim's apartment to the location of the body and

from that location to the Target Store. (R6:996-1000) The State and the Defense then presented argument concerning the penalty. (R6:1000-1010)

On May 15, 2000, Circuit Judge Thomas T. Remington pronounced a death sentence. (T7:1339-1360) After Judge Remington read the sentencing order, the prosecutor advised the court that the order contained a misstatement of law. (T7:1358) Specifically, the prosecutor told the court that the constitutional bar to executing juveniles applied to persons under the age of 17 years, rather than 16 years as the Court stated in its order. (T7:1359) The prosecutor noted that a death sentence was, therefore, legally precluded for either Maestas or Lincks. (T7:1359) The judge said he would make a written amendment to the order. (T7:1359) In the written order, the judge made a handwritten correction to the order where reference was made to the prosecutor's inability to pursue a death sentence for Maestas or Lincks. (R5:938) (App. A) There was no discussion about the court's use of the incorrect legal principle when evaluating the age mitigating circumstance; (T7:1359) Additionally, the judge made no correction to the written order in the section dealing with the age mitigating circumstance. (R5:933-934) (App. A)

SUMMARY OF ARGUMENT

1. The trial court found Ronald Bell's age of 17-years-old at the time of the crime as a statutory mitigating circumstance. However, the court assigned the circumstance "little weight." In reaching his weighing decision, the judge expressly relied on his erroneous understanding of the law that the constitutional bar to executing juveniles was limited to persons under the age of 16 years. The trial court acknowledged that this Court has stated that the age mitigating factor is entitled to more weight the closer the person's age is to the age of a constitutional prohibition to execution. Since the constitutional bar to execution of juveniles is for those persons under the age of 17, not age 16 as the trial court assumed, the trial court's sentencing decision is legally and factually flawed. Bell's death sentence has been imposed in violation of his rights to due process and to be free from cruel and/or unusual punishment. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VIII, XIV, U.S. Const.

2. Bell filed a motion asking the trial court to declare that a death sentence was unconstitutional when applied to persons under the age of 18 years at the time of the crime. The trial court denied the motion. This motion should have been granted, since the execution of someone who was under the age of 18 years at the time of the crime has been unusual in the State of Florida and contrary to the policies treating children different than adults.

Since Bell was 17-years-old at the time of the offense, the death sentence now imposed on him constitutes a violation of Article I Sections 9 and 17 of the Florida Constitution and Amendments V, VIII and XIV of the United States Constitution.

3. Ronald Bell's motive to kill was anger over Cordell Richards' sexual harassment of Kristel and Richards' assault on her when she rebuffed his sexual advances. Bell killed in anger to avenge his girlfriend. Killing Richards to avoid arrest was not Bell's dominant motive. The aggravating circumstance provided for in Section 921.141(5)(e) Florida Statutes, that the homicide was committed for the purpose of avoiding arrest, is applicable in cases where the victim is not a police officer only where the dominant motive for the crime was to eliminate the victim as a witness. See, e.g., Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1976). No such dominant motive exists, and the trial court erred in finding and weighing this aggravating circumstance in the sentencing process. Bell's death sentence has been imposed in violation of the United States and Florida Constitutions. Amends. V, VIII, XIV, U. S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

4. A prosecutor is not permitted to personally attack defense counsel during closing argument to the jury. See, e.g., Brooks v. State, 762 So.2d 879, 904-905 (Fla. 2000). The prosecutor in this case personally attacked Bell's defense counsel

which now warrants this Court's reversing this case for a new trial. In his rebuttal closing argument during guilt phase, the prosecutor accused defense counsel of telling the jury not to follow the law. Defense counsel's argument had merely expressed a view that the facts did not support a first degree murder verdict. Defense counsel objected to the prosecutor's unfounded and improper attack, but the trial court did not admonish the prosecutor or stop the argument. Bell's right to due process and fair trial was violated. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const.

5. No pleading filed before the trial and sentencing proceeding in this case provided Bell or the jury notice as to which aggravators the State was seeking to prove. The trial court instructed the jury on aggravating circumstances. However, the jury reported no specific findings as to the aggravators. The jury was not instructed that it must find by some burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty, and the jury reported no such finding. These factors individually, and in combination, render imposition of the death sentence in this case a fundamental violation of Bell's rights to due process and to his protection against cruel and/or unusual punishment. See Amends. VIII, XIV, U.S. Const.; Art. I, secs. 9, 17, Fla. Const.; Apprendi v. New Jersey, 120 S. Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FAILING TO GIVE PROPER CONSIDERATION AND WEIGHT TO BELL'S AGE OF 17 AT THE TIME OF THE CRIME, SINCE THE COURT APPLIED AN INCORRECT LEGAL STANDARD IN THE WEIGHING PROCESS BASED ON THE COURT'S INACCURATE BELIEF THAT THE CONSTITUTIONAL BAR TO EXECUTING JUVENILES APPLIED ONLY TO THOSE UNDER THE AGE OF 16.

Age of the defendant is a statutory mitigating circumstance which must be appropriately considered in the sentencing weighing process. See, Sec. 921,141 (6) (g) Fla. Stat. A defendant's youth, particularly when he is in the teenage years, is a significant factor in mitigation. See, Urbin v. State, 714 So.2d 411 (Fla. 1998). As this Court stated, evaluation of the age mitigating factor must recognize "the patent lack of maturity and responsible judgment that underlies the mitigation of young age." Ibid. at 418. A death sentence is constitutionally prohibited for defendants who were under the age of 17 at the time of the crime. See, Brennan v. State, 754 So.2d 1 (Fla. 1999). This mitigating factor becomes stronger "the closer the defendant is to the age where the death penalty is constitutionally barred." Urbin, 714 So.2d at 418. Additionally, this Court has held that the age statutory mitigating circumstance must be found and afforded weight to defendants who are 17 at the time of the crime. See, Ellis v. State, 622 So.2d 991 (Fla. 1993).

The trial court found Ronald Bell's age of 17-years-old at the time of the crime as a statutory mitigating circumstance. (R5:933-934) (App. A) However, the court assigned the circumstance "little weight." (R5:934) In reaching his weighing decision, the judge expressly relied on his erroneous understanding of the law that the constitutional bar to executing juveniles was limited to persons under the age of 16 years. (R5:934) The court acknowledged that this Court has stated that the age mitigating factor is entitled to more weight the closer the person's age is to the age of a constitutional prohibition to execution. (R5:934) Urbin v. State, 714 So.2d at 718. Since the constitutional bar to execution of juveniles is for those persons under the age of 17, Brennan v. State, 754 So.2d 1, not age 16 as the trial court assumed, the trial court's sentencing decision is legally and factually flawed. Bell's death sentence has been imposed in violation of his rights to due process and to be free from cruel and/or unusual punishment. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VIII, XIV U.S. Const.

On review of a trial court's sentencing order, this Court typically applies an abuse of discretion standard to the lower court's assignment of weight to mitigating circumstances. See, Stephens v. State, 27 Fla. L. Weekly S161 (Fla. March 15, 2001); Gordon v. State, 704 So.2d 107 (Fla. 1997). However, the sentencing order in this case is not entitled to such deference,

since the trial judge was laboring under an erroneous legal standard when finding and weighing Bell's age as a mitigating circumstance. See, Ferguson v. State, 417 So.2d 639 (Fla. 1982); Mines v. State, 390 So.2d 332 (Fla. 1980). The trial judge wrote the order as follows:

B. The defense asserts that the age of the defendant at the time of the crime is a mitigating factor. (Section 921.141(6)(g)). Clearly, the evidence at trial established that Ronald Bell, Jr., was seventeen years and ten months of age at the time these crimes were committed. This evidence of age was clearly established through the introduction of the defendant's driver's license into evidence and by the testimony of the defendant's father, Ronald Bell, Sr.

As a general rule the closer the defendant is to the age where the death penalty is constitutionally barred, under the age of 16 when committing the crime, the more weight age is given as a statutory mitigator. The age factor additionally becomes important when there is an extensive history of parental neglect, abuse or lack of guidance.

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.

For the foregoing reasons this Court gives the age of the defendant little weight.

(R5:933-934) (App. A) Since the trial court relied on an erroneous legal assumption that the death penalty was constitutionally barred for persons under the age of 16 rather than under the age of 17, the court's finding and weighing decision regarding this mitigating circumstance is legally flawed.

Bell is aware that the prosecutor advised the court, during the hearing when the court announced sentence, of the correct legal

principle that the constitutional bar execution is set at under the age of 17. (T7:1358-1360) However, the prosecutor did so in reference to the court's discussion about the constitutional bar as it applied to the co-defendants, Renee Lincks and Kristel Maestas. (R5:936) The judge hand wrote a correction in the sentencing order at the point of this discussion. (R5:936) No correction was made to the order regarding the age mitigator. (R5:933-934) The court never acknowledged that the error also affected the decision about the weight afforded the age mitigator. (R5:933-934) (T7:1359-1360) Nothing in the record indicates that the trial judge in any way reconsidered the finding and weighing of the age mitigator using the corrected legal principle. (R5:933-934) (T7:1359-1360)

The trial court improperly weighed the age mitigating circumstance using an erroneous legal standard that the constitutional bar to executing juveniles was for persons under the age of 16 instead of under the age of 17. This error affected the sentencing decision, and Bell's death sentence must be reversed for resentencing.

ISSUE II

THE TRIAL COURT ERRED IN SENTENCING BELL TO DEATH SINCE A DEATH SENTENCE FOR OFFENDERS UNDER THE AGE OF 18 IS UNCONSTITUTIONAL UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Bell filed a motion asking the trial court to declare that a death sentence was unconstitutional when applied to persons under the age of 18 years at the time of the crime. (R2:395; R3:435) The trial court denied the motion. (R3:502) This motion should have been granted, since the execution of someone who was under the age of 18 years at the time of the crime has been unusual in the State of Florida and contrary to the policies treating children different than adults. Since Bell was 17-years-old at the time of the offense, the death sentence now imposed on him constitutes a violation of Article I Section 9 and 17 of the Florida Constitution and Amendments V, VIII and XIV of the United States Constitution.

In Allen v. State, 636 So.2d 494 (Fla. 1994), this Court held that a death sentence for someone who was under the age of 16 years at the time of the crime was cruel or unusual punishment because of the small number of death sentences imposed on persons of that age and the apparent public sentiment against imposition of such a sentence. This Court noted that in the 50 years preceding its opinion there had been only two death sentences imposed on persons for crimes committed when under the age of 16, and both cases had been reversed on appeal. *Ibid.* at 497.

Later, in Brennan v. State, 754 So.2d 1 (Fla. 1999), this Court applied the same reasoning as used in Allen to conclude that a death sentence for a person who was under the age of 17 at the time of the crime was likewise unconstitutional as cruel or unusual punishment. In reaching this holding, this Court wrote:

In reaching our decision in Allen, we relied on article I, section 17 of the Florida Constitution, and not on either the Eight Amendment of the United States Constitution or the United States Supreme Court's decision in Thompson v. Oklahoma, 487 U.S. 815, 838, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), which held that execution of a defendant who was fifteen at the time of the crime was prohibited by the Eighth Amendment of the United States Constitution.[Footnote omitted]

Brennan asserts that our reasoning in Allen compels the same result here. We agree. In this case, the defendant presented the trial court with unrefuted data that at least since 1972, more than a quarter of a century ago, no individual under the age of seventeen at the time of the crime has been executed in Florida. In fact, our research reveals that the last reported case where the death penalty was imposed and carried out on a sixteen-year-old defendant was Clay v. State, 143 Fla. 204, 196 So. 2d 462 (1940), over fifty-five years ago. Since 1972, the death penalty has been imposed on only four defendants, other than Brennan, who were sixteen at the time of the crime. For each of the three defendants whose appeals have already been decided, the death sentence was vacated. See Farina v. State, 680 So. 2d 392, 398-99 (Fla. 1996); Morgan v. State, 639 So. 2d 6, 8 (Fla. 1994); Brown v. State, 367 So.2d 616, 625 (Fla. 1979). This case is virtually identical to Allen both because of the infrequency of the imposition of the death penalty on juveniles age sixteen at the time of the crime and because, since 1972, each death sentence imposed on a

defendant who was sixteen at the time of the crime has been overturned by this Court. Thus, we agree that our decision in Allen interpreting the Florida Constitution compels the finding that the death penalty is cruel or unusual if imposed on a defendant under the age of seventeen.

Brennan, 754 So.2d at 7-8.

The same reasoning, as expressed in Allen and Brennan, applied in this case leads to the conclusion that a death sentence for persons under 18-years-old at the time of the crime is unconstitutional. A death sentence is infrequently imposed in this state upon persons who were 17-years-old at the time of the crime, and any such sentence is rarely affirmed in the courts. Since 1973, there have been no executions in Florida of persons who were under the age of 18 years at the time of the offense. See, Victor Streib, *The Juvenile Death Penalty Today: Death Sentences For Juvenile Crimes, January 1, 1973-December 31, 2000.*; NAACP Legal Defense Fund, *Death Row USA*, January 1, 2001. (App. B & C) During the same time period, there have been fifteen individuals sentenced to death for crimes they committed when 17-years-old. *Ibid.* At this time, only two of these death sentences have survived appellate review. *Ibid.*; Bonifay v. State, 680 So.2d 413 (Fla. 1996); LeCroy v. State, 727 So.2d 236 (Fla. 1999). Including Ronald Bell, Jr., and one person whose case has been reversed for a new trial [Ramirez v. State, 739 So.2d 568 (Fla. 1999)], there are only four individuals housed on Florida's death row for crimes

committed when they were 17-years-old. See, NAACP Legal Defense Fund, *Death Row USA*, January 1, 2001. These numbers are a reflection of society's sentiment against imposition of the death penalty on juvenile offenders. As this Court did for 15 and 16 year-olds in Allen and Brennan, Bell asks this Court to declare that death is an unconstitutional penalty for 17-year-old offenders as well.

As additional grounds, Bell also asks this Court to reconsider the reasoning Justice Anstead offered in his concurring opinion in Brennan that society has already drawn the line between childhood and adulthood for most purposes at age 18, and the application of a death sentence to a person under the legal age of adulthood for most other purposes is a violation of cruel or unusual punishment. Brennan, 754 So.2d at 11, Anstead, J., specially concurring. The fact, that for most other purposes, the age of 18 years, or older, has been the established point of legal adulthood demonstrates society's standards concerning rights and responsibilities of children. Society has drawn the line between childhood and adulthood at 18-years-old, and the same line should be used when determining if the ultimate sentencing option can be constitutionally imposed. In part, Justice Anstead wrote:

I concur in the majority opinion and note that soundness of its reasoning based upon our controlling precedent in Allen v. State, 636 So. 2d 494 (Fla. 1994) [footnote omitted] Not only is the reasoning of the majority sound, but its impact on the status quo is virtually

nil based upon Florida's long record of not executing children. I write separately, however, because of my belief in any equally compelling alternative basis for the majority's holding that a child of sixteen may not be constitutional subjected to the death penalty.

In the present instance we are asked to draw a constitutional line, below which the State will not be allowed to take a child's life as punishment for a crime. [footnote omitted] For many that line-drawing will be focused on precise ages and the identification of specific values in our society that would tip the scales one way or another in finally settling on a precise age at which we as a society would permit the taking of human life by the State. Others would merely defer to the legislative branch and there would be no constitutional line-drawing to be done. See concurring and dissenting op. At 14 (Harding, C.J., concurring in part, dissenting in part) ("[T]he better way to decide the issue ... is to examine whether the legislature has spoken on the subject.")

However, I believe the question to be less complicated and far more logically framed in terms of how our society has traditionally valued and defined its children and assessed their maturity for purposes of prescribing their rights and responsibilities in society. Using that framework of analysis, I would conclude that based upon the enormous value we place on our children, and our historically consistent treatment of children differently from adults for virtually all legal purposes, but especially for purposes of assessing responsibility and meting out punishment for criminal acts, that the constitutional line should be drawn at age seventeen(17). [footnote omitted] This is a line we have already purposefully drawn between childhood and adulthood, and we should stand by that well-established line in deciding that we cannot constitutionally permit the execution of our children. This line, in both the way

it has served as a common denominator in past line-drawing exercises, and the way it has met the test of time, is a far more reliable measure than any other alternative produced under the exigencies of the actual case being decided. This line, in fact, measures very real differences, in expectations and accountability.

While we have sometimes raised the line upwards, as, for example, in making a policy decision that persons under twenty-one years of age are presumptively not sufficiently mature to consume alcohol, we can look back objectively to a consistent and abiding recognition that a person only becomes sufficiently mature to accept the responsibilities and privileges of adulthood and full citizenship at age eighteen. A list of instances where we have invoked this line is too lengthy to catalog here, but their existence and underlying premise are matters of common knowledge. [footnote omitted]

It is no coincidence, for example, that we use the age of eighteen as the cutoff for child dependency and for the legal requirement of parents to take care of their children, as well as a dividing line for a countless number of other legal distinctions based upon a firmly established public policy of placing limitations upon and extending special protections to the young and immature. This line is consistent with our traditional attitudes toward children as we have explicitly recognized them generally, and most particularly by our maintenance of a separate juvenile justice system based upon the premise that our children should be treated differently. The line we have drawn between children and adults also represents our determination not to give up on our children, a determination that is obviously at odds with the death penalty, a penalty that totally rejects any value in the continuation of life for a convicted defendant.

Brennan, 754 So.2d at 11-13, Anstead, J., specially concurring.

For the above reasons, Bell asks this Court to declare that a death sentence is unconstitutional when imposed on persons under the age of 18 years at the time of the crime. The death sentence imposed on Bell, who was 17-years-old at the time of the crime, must be reversed.

ISSUE III

THE TRIAL COURT ERRED IN IMPROPERLY CONSIDERING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

Ronald Bell's motive to kill was anger over Cordell Richards' sexual harassment of Kristel and Richards' assault on her when she rebuffed his sexual advances. Bell killed in anger to avenge this assault on his girlfriend. Killing Richards to avoid arrest was not Bell's dominant motive. The aggravating circumstance provided for in Section 921.141(5)(e) Florida Statutes, that the homicide was committed for the purpose of avoiding arrest, is applicable in cases where the victim is not a police officer only where the dominant motive for the crime was to eliminate the victim as a witness. See, e.g., Perry v. State, 522 So.2d 817 (Fla. 1988); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1976). No such dominant motive exists, and the trial court erred in finding and weighing this aggravating circumstance in the sentencing process. Bell's death sentence has been imposed in violation of the United States and Florida Constitutions. Amends. V, VIII, XIV U. S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

For an aggravating circumstance to be affirmed on appeal, there must be substantial competent evidence upon which the trial court could find the existence of the circumstance proved beyond a reasonable doubt. See, Gerald v. State, 601 So.2d 1157, 1164 (Fla. 1992); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). When the

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

In finding that the homicide was committed to avoid arrest, the trial judge wrote:

B. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody. (Section 921.141(5)(e) Florida Statutes). Circumstantial evidence can be used to prove avoiding or preventing a lawful arrest aggravator without direct evidence of the offender's thought process. Further, the Florida Supreme Court has uniformly upheld finding this aggravator when the victim is transported to another location and killed. Hall v. State, 614 So.2d 473 (Fla. 1993); Preston v. State, 607 So.2d 404 (Fla. 1992).

There are several factors which suggest the defendant's predominate motive for the murder of Cordell Richards was the elimination of Richards as a witness thus avoiding lawful arrest:

- 1) After being choked and beaten with a baseball bat in his apartment, Cordell Richards hands and feet were tied and he was wrapped in a blanket and transported in the

trunk of Bell's car to a secluded wooded location 7.7 miles away.

2) Upon arriving at the secluded wooded cul-de-sac, Cordell Richards was dragged through the woods, beaten again with the baseball bat, and chained to a tree. Before chaining the victim to this tree, Bell and his co-defendants beat the victim with a baseball bat and demanded that he give them the pin number to his bank account. It is obvious that the defendant and co-defendants had previously discussed looting the victim's bank account, because, Renee Lincks testified that while they were beating Richards in the woods she reminded Bell to get Richards' pin numbers. After the victim kept repeating the same four numbers, Bell and his co-defendants chained the victim to the tree. They then poured lighter fluid on the victim and set him on fire. Later in the morning of February 3, 1999, Bell and the co-defendants drove back to the wooded area to "make sure the victim was dead". When they discovered that Cordell Richards was still alive and calling for help, Bell tried to break Richard's neck, then drove to the Target Store where they purchased a meat cleaver and duct tape. The duct tape was placed over Richards' mouth and Ron Bell, Jr., slashed Richards' throat. There was absolutely no reason to kill Cordell Richards except Bell's fear that someone might find Richards alive and Bell and his co-defendants activities, their kidnaping and their attack on Richards, would be reported by Richards.

3) Cordell Richards had known Ron Bell, Jr. and Krystal Maestas for several weeks and had been introduced by name to Renee Lincks. Thus, Bell knew that Cordell Richards could identify them.

4) Renee Lincks testified that when they returned to the wooded area that morning of February 3, 1999, that Cordell Richards could be heard calling for help. Bell then tried to break Cordell Richards' neck, and ultimately cut his throat. Lincks stated during her

testimony that Bell did this because "we could see construction workers on the rooftop nearby". There can be no doubt that the dominant motive for Bell was avoiding arrest when they returned to find Richards still alive and calling for help. Bell and his co-defendants drove to the Target Store and purchased two items -- a meat cleaver and a roll of duct tape. Both items were obviously purchased for the express purpose of silencing and eliminating Cordell Richards.

5) The totality of the matters raised in paragraphs 1 through 4 above show that the defendant's predominant motive for murdering Cordell Richards was to make sure that Bell and his co-defendants were not arrested for the kidnaping and the looting of the victim's bank account.

This aggravator has been proven beyond a reasonable doubt.

(R922-925) (App. A)

Initially, the court never even addressed Ron Bell's real motive in this crime -- his anger over Richards' behavior and assault on Kristel and his desire to avenge the wrong perpetrated on Kristel. Assuming for argument that avoiding arrest was one motive involved in the offense, the law requires this to be the dominant motive for the killing in order to support the aggravating circumstance. See, Jackson v. State, 502 So.2d 409 (Fla. 1986) (avoiding arrest only one of several explanations for the murder); Amazon v. State, 487 So.2d 8 (Fla. 1986) (evidence killing was to avoid arrest inconclusive where victim killed as she call neighbor for help during a burglary and where the defendant allegedly told the detective he killed to avoid arrest). Any such

motive to avoid arrest which may have existed was not the dominant one for Ron Bell.

The court's findings fail to support the factor for other reasons as well. First, the court relied on the transporting of the victim to a secluded area. This fact does not establish a dominant motive to avoiding arrest where, as in this case, other direct evidence establishes a motive. Hall v. State, 614 So.2d 473 (Fla. 1993) and Preston v. State, 607 So.2d 404 (Fla. 1992), upon which the trial court relied, are distinguishable because in both of those cases there was no other reasonable motive to be inferred from the circumstantial evidence. In fact, this Court in both Hall and Preston, noted that the inference of an avoiding arrest motive from the transporting of the victim was applicable where the evidence left no other reasonable inference and there was no direct evidence of a different motive:

... this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offenders's thought processes. [citation omitted]

Preston, 607 So.2d at 409. Contrary to the circumstances in Preston and Hall, there is other direct evidence establishing a different motive in this case. Both Maestas and Lincks testified that Bell was angry and referred to Richards' assault on Maestas during discussions with Lincks and during the course of the attack on Richards. (T5:915-916, 925; T6:1057-1058, 1075)

A second reason the trial court relied upon was that the victim knew Bell, Maestas and Lincks. However, this Court has held that the mere fact that the victim knew the perpetrator does not establish the dominant motive needed to find the avoiding arrest aggravator. See, Jennings v. State, 718 So.2d 144 (Fla. 1998); Geralds v. State, 601 So.2d 1157 (Fla. 1992); Perry v. State, 522 So.2d 817 (Fla. 1988); Floyd v. State, 497 So.2d 1211 (Fla. 1986). Again, this is especially true where other evidence supports a different primary motive for the crime.

The third reason the trial court noted is that there were construction workers nearby who may have heard Richard's call for help. This existence of the workers was a fact which developed long after Bell's motive to kill in this case. Certainly, this later fact, injected well into the process of the crime, cannot become the dominant motive for the killing which was already in progress.

The avoiding arrest aggravating circumstance was improperly found and considered in the sentencing weighing process. Bell's death sentence must be reversed for resentencing.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR DURING HIS REBUTTAL CLOSING ARGUMENT TO ACCUSED DEFENSE COUNSEL OF TELLING THE JURY NOT TO FOLLOW THE LAW.

A prosecutor is not permitted to personally attack defense counsel during closing argument to the jury. See, e.g., Brooks v. State, 762 So.2d 879, 904-905 (Fla. 2000). The prosecutor in this case personally attacked Bell's defense counsel which now warrants this Court's reversing this case for a new trial. In his rebuttal closing argument during guilt phase, the prosecutor accused defense counsel of telling the jury not to follow the law. (T7:1210-1212) Defense counsel had merely argued that the facts supported less than a first degree murder conviction and that Bell's co-defendant, Renee Lincks, had pleaded guilty to manslaughter. His argument expressed a view that the facts did not support a first degree murder verdict. (T6:1180-1194) Defense counsel objected to the prosecutor's unfounded and improper attack, but the trial court did not admonish the prosecutor or stop the argument. (T7:1210-1212) Bell's right to due process and fair trial was violated. Art. I, Secs.16, 9, 17 Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const.

The prosecutor's argument and the colloquy between the court and counsel proceeded as follows:

He said Renee Lincks -- and this is really the defense, y'all, please give Ron Bell what Renee got. Did you hear it in Mr. Gontarek's argument? He threw in not guilty too, but he knows, he knows. That's why he's up here admitting, hey, we can't fight the facts because the facts are the facts. So please, please give Renee

-- give Ron the same thing Renee got. Please don't follow the law. Please do not follow the law.

(T7:1211)

Defense counsel objected, and counsel and the court proceeded as follows:

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

COURT: All right, let's move to another area.

ELMORE: If you do find him guilty of manslaughter and false imprisonment, you know you're not following the law. These facts prove first degree murder.

GONTAREK: Judge, I'm going to object to that.

COURT: Move to another area, please.

ELMORE: Judge, I'll be glad to discuss that objection. The law and the facts prove first degree murder not manslaughter, and that's my argument.

GONTAREK: According to the law they can --

COURT: Both of you come up, please.

(SIDE BAR CONFERENCE)

COURT: What's your objection?

GONTAREK: Judge, my objection is he has 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.

COURT: Argue whatever you want, but don't tell them to violate the law. I don't think you told them that.

(END OF SIDE BAR CONFERENCE)

ELMORE: If you return a verdict of guilty of manslaughter and false imprisonment like he's begging you to do, you will not have followed the law. It's

that simple. You all know it, everybody here knows it....

(T7:1211-1212)

Recently, in Brooks v. State, 762 So.2d 879, this Court reaffirmed the principle that a prosecutor is prohibited from personal attacks on defense counsel. During the penalty phase closing arguments, the prosecutor in Brooks, made an attack on defense counsel similar to the one made in this case against Bell's counsel. Ruling that the trial court abused its discretion in allowing the prosecutor to continue such argument, this Court discussed the case, in part, as follows:

Finally, Brooks argues that the prosecutor's references to both Brooks' counsel and Brown's counsel constituted an attack on them personally and on their credibility, with the import of the comments being that "criminal defense lawyers," and these lawyers in particular, are unworthy of belief. Brooks argues that the trial court abused its discretion in overruling the defense objection that the prosecutor's statement was a personal attack. We agree.

As a precursor to discussing the mitigating circumstances to be considered, the prosecutor stated the following:

I'd like to make this comment to you: During opening statement of the guilt part of the trial, and during closing arguments of the guilt part of the trial, about a week and a half ago, those two criminal defense lawyers got up here and they told you that the evidence would show you that the defendants were not guilty of murder and aggravated battery, and they looked you straight in the eye when they told you that. And I would submit to you that the evidence that came out during the trial proved to you beyond a reasonable doubt that the defendants were guilty of first-degree murder and aggravated battery.

The evidence produced at trial disproved what those two criminal defense lawyers argued to you.

* * * *

Thereafter, the prosecutor continued:

I submit to you that the evidence that you heard during the guilt part of the trial did not support what the defense lawyers argued to you. They argued to you that the defendants were not guilty, and that's what the evidence, they claim, supported a verdict of. The evidence did not support what they argued to you, and I would submit to you that I expect them to get up here and argue to you that the law and the evidence that you've heard will support a recommendation of life. I'm going to submit to you that, if you look at all the evidence that's been presented to you in this case and you listen carefully to the law, that, once again, the evidence and the law will not support--is not going to support what those two criminal defense lawyers are going to argue to you.

Brooks, 762 So.2d at 904.

Just as the prosecutor in Brooks told the jury that defense counsel lied to them, the prosecutor in Bell's case also accused the defense lawyer of lying the to jury about the law and the facts. The prosecutor's continued argument that the defense counsel improperly told the jury not to follow the law was an unfounded attack on defense counsel which prejudiced Bell's case. This argument should have been stopped, and the trial court abused its discretion in failing to do so. Since this action did not occur, Bell's remedy is now a new trial.

ISSUE V

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

No pleading filed before the trial and sentencing proceeding in this case provided Bell or the jury notice as to which aggravators the State was seeking to prove. The trial court instructed the jury on aggravating circumstances. (T7: 1324-1326) However, the jury reported no specific findings as to the aggravators, (R5:842) (T7:1331-1333) The jury was not instructed that it must find by some burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty, and the jury reported no such finding. (T7:1324-1333) These factors individually, and in combination render, imposition of the death sentence in this case a fundamental violation of Bell's rights to due process and to his protection against cruel and/or unusual punishment. See Amends., VIII, XIV, U.S. Const.; Art. I, secs. 9, 17, Fla. Const.; Apprendi v. New Jersey, 120 S. Ct. 2348 (2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984).

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

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

Apprendi, 120 S. Ct. at 2355. Apprendi should compel this Court to reevaluate the role of the jury in Florida capital sentencing, and to apply Apprendi's due process requirements to capital sentencing.

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

must weigh the aggravating circumstances against all mitigation reasonably believed to have been found to reach the ultimate issue of whether life imprisonment or death should be imposed.

Essential facts defined by statute are elements of an offense that must be individually instructed to the finders of fact, and must be proved to them beyond a reasonable doubt. See, e.g., In re Winship, 397 U.S. 358 (1970); State v. Harbaugh, 754 So. 2d 691 (Fla. 2000). Apprendi applied the same principle to punishment determinations that involve juries as fact finders, holding that all statutory elements on which the State relies to punish an individual must be presented to those juries, and the juries must find each of those elements proved beyond a reasonable doubt to satisfy due process, precisely the same as with elements of an offense. There is no principled reason why similar requirements should not apply to each aspect of death sentence determinations in Florida, in which juries play a pivotal role in finding facts, applying the law to those facts, and making ultimate recommendations that requires great weight.

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

(West Supp. 2000), defined additional elements required for punishment of possession of a firearm for an unlawful purpose when committed as a "hate crime." (4) The fourth statute, N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 2000), extended the authorized additional punishment for offenses to which the hate crime statute applied. See Apprendi, 120 S. Ct. at 2351. Each statute is independent, yet the statutes must operate together to authorize Apprendi's punishment. The Court held that under the due process clause, all essential findings separately required by both the underlying offense statute and the statute defining the elements of punishment had to be charged, tried, and proved to the jury beyond a reasonable doubt.

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

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

The rationale employed by the Court in Apprendi fits here as well. Proof of each element of an aggravating circumstance is often "hotly disputed," just as the bias issue for sentencing in Apprendi. See Apprendi, 120 S. Ct. at 2354-55. Aggravators the judge found in this case involves a perpetrator's mental state, facts peculiarly within the exclusive province of the jury when a jury is a fact-finder and cosentencer. See Apprendi, 120 S. Ct. at 2364 (noting that a defendant's intent in committing a crime, relied upon in sentencing, is as close as one might hope to come to a core criminal offense "element."). All of the aggravators in this case directly relate to the offense itself, as opposed to proof of a conviction of an unrelated crime committed at a different time. See Apprendi, 120 S. Ct. 2366.¹ The different

¹Even to the extent that a prior conviction might be excluded under Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Apprendi opinion contains a strong suggestion that Almendarez-Torres might have been wrongly decided and may be overruled. See Apprendi, 120 S. Ct. at 2378-80 (Thomas, J., concurring).

punishments available due to the finding of essential sentencing facts is another consideration the Court found compelling to warrant the strict application of due process to punishment determinations. See Apprendi. 120 S. Ct. at 2354.

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

The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981). But see Tindall v. State, 443 So. 2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter

properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

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

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

Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); id., at 709-714, 110 S. Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:

Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement

to jury trial on all the elements of the charge. Almendarez-Torres, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting) (emphasis deleted).

See also Jones v. United States, 526 U.S. 227, 250-251, (1999) (THOMAS, J., concurring).

Apprendi, 120 S. Ct. at 2366.

There is logic in Apprendi's distinction of Walton v. Arizona, 497 U.S. 639 (1990). The heart of Apprendi is the jury's role and responsibility in determining whether contested essential facts have been proved beyond a reasonable doubt to satisfy statutory legal requirements for guilt and punishment. When a jury is not even involved in the fact-finding process, as in Arizona's capital sentencing scheme construed in Walton, there is no need to consider whether and to what extent jury instructions, jury burdens, and jury findings come in to play. Thus, the Court's decision in Walton, as understood in Almendarez-Torres and Apprendi, applied to judge-only sentencing jurisdictions, if in fact Walton is still good law.²

The limitation of Walton acknowledged in Apprendi necessarily means Walton does not apply to Florida's

²It should also be noted that while a majority in Apprendi suggested that Walton was distinguishable, four justices strongly suggested that Walton in fact had been overruled, see Apprendi, 120 S. Ct. at 2387-89 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Breyer and Kennedy, JJ.), and a fifth Justice expressly left the door open to overruling Walton on another day, see Apprendi, 120 S. Ct. at 2380 (Thomas, J., concurring).

sentencing scheme, where a jury plays a pivotal role in the life-or-death determination.

Walton attempted to harmonize the Court's decision with its prior approval of Florida's sentencing scheme, but that rationale is no longer valid. See Lambrix v. Singletary, 520 U.S. 518 (1997); Espinosa v. Florida, 505 U.S. 1079 (1992). In Walton, the Court said Arizona's judge-only sentencing scheme is like Florida's sentencing scheme because in both states the judge is the sentencer. The only distinction, the Court found, was that in Florida the judge first gets nonbinding input from the jury, with no findings of fact, thereby providing virtually no assistance to the judge:

The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton, 497 U.S. at 648.

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

Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing

recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971, 108 S. Ct. 1249, 99 L. Ed. 2d 447 (1988); Grossman v. State, 525 So. 2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

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

Thus, Walton does not control the issue under Florida's three-phase, cosentencing capital sentencing scheme. Rather, in a State where the jury equally shares with the judge the responsibility of determining death eligibility by finding facts and weighing statutorily defined aggravating and mitigating circumstances, the State constitutionally must

fully advise the defendant and the jury of the sentencing factors, the elements, and the burdens associated therewith.

See Appendi.

Accordingly, due process requires at a minimum:

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

Because these requirements were not satisfied, the resentencing procedure in this case was fundamentally flawed. The death sentence should be vacated and the cause remand for a new jury sentencing.

CONCLUSION

Upon the forgoing reasons and authorities, Ronald Lee Bell, Jr., asks this Court to reverse his judgment and sentence and remand his case for a new trial. Alternatively, Bell asks this Court to reduce his death sentence to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Curtis M. French, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, Ronald Lee Bell, Jr., DC #P10751, U.C.I., P.O. Box 221, Raiford, Florida, 32083, on this ____ day of April, 2001.

W. C. McLAIN

CERTIFICATE OF COMPLIANCE

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

W. C. McLAIN