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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant Ronald Lee Bell, Jr., relies on the initial brief to respond to the arguments presented in the State's answer brief with the following additions:

ARGUMENT

ISSUE I
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

The State asserts that this error is procedurally barred from review because trial counsel did not preserve this issue via an

objection to the court's sentencing order. (Answer Brief at 12-13) This Court has never required an objection in the trial court to errors appearing in a trial judge's order imposing a death sentence for purposes of preserving the errors for review on direct appeal. The State has cited no cases holding such a proposition. (Answer Brief at 12-13) Additionally, this Court implicitly recognized that objections to errors in orders imposing death are not required in adopting revisions to Fla. R. Crim. P. 3.800. Amendments To Florida Rules Of Criminal Procedure 3.111(e) and 3.800, 761 So.2d 1015 (Fla. 1999). In adopting a revision to Rule 3.800(b), providing procedures for correcting unobjected to sentencing errors in noncapital cases prior to and pending appeal, this Court specifically included language making the rule inapplicable to death penalty cases. The protections of the rule were deemed not needed in capital cases because this Court has not required objections to errors in the sentencing order to perfect appellate review. To now change the law to require objections to orders imposing death and to continue to exclude death penalty cases from the Rule 3.800 (b) procedures would create the anomalous situation of procedures which afforded greater protections to those sentenced in noncapital cases than to those sentenced to the most severe sanction of death. Such a situation would violate due process and equal protection principles. The State's assertion that an

objection below to the trial court's sentencing order was necessary to preserve errors in that order is without merit.

On the merits, the State argues that this case should be treated as cases where the trial court made a mistake of fact as to the age of the defendant. In Shellito v. State, 701 So.2d 837 (Fla. 1997), the trial court mistakenly thought Shellito was 19 rather that 18 years old, but this Court approved the trial court's order giving the age mitigator slight weight. In Johnson v. State, 696 So.2d 317 (Fla. 1997), the trial court thought the defendant was 22 rather than 21 years old, but this Court approved the trial court's rejection of the age mitigator. Unlike the trial court's error in this case, the trial courts in Shellito and Johnson made ***mistakes of fact*** in making discretionary rulings which this Court deemed harmless to the discretionary decision. The trial court in Bell's case made ***mistakes of law*** in making a weighing decision he was legally required to perform.

Significantly, both Shellito and Johnson were legally adults and were beyond the age where the age mitigator must be found given weight. See, Ellis v. State, 622 So.2d 991 (Fla. 1993)(statutory mitigating circumstance of age must be found and afforded weight to defendant's who are 17 years old). Bell was 17 years old, and the trial court was legally bound to find and give weight to the age mitigating circumstance. *Ibid.* In addition to being beyond the age where the age mitigator must be found, Shellito and Johnson

were two years and five years, respectively, beyond the age where a death sentence is constitutionally barred. See, Brennan v. State, 754 So.2d 1 (Fla. 1999)(death sentence prohibited to those younger than 17 years old) Ron Bell was within months of the constitutional bar to a death sentence.

The trial court's mistake of law that the constitutional bar was for those younger than 16 years of age materially impacted the consideration of the age mitigator in Bell's case. Rather than viewing Bell as being within months of the constitutional bar, the court viewed Bell as being close to two years beyond that legal limit. Since the trial court must afford greater weight to the age mitigator based on the nearness to the age of the constitutional bar, the mistake of law the court made in this case can not be deemed immaterial. See, Urbin v. State, 714 So.2d 411 (Fla. 1998).

ISSUE V

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE 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.

The State has urged that this Court's decision in Mills v. Moore,786 So.2d 532 (Fla. 2001), is controlling. In Mills, this Court relied on State v. Weeks, 761 A.2d 804 (Del. 2000) and held that Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply to Florida's capital sentencing scheme. Appellant urges this Court to

reconsider the issue because the Court in Mills superficially applied language in Apprendi to hold Walton v. Arizona, 497 U.S. 639 (1990), as the controlling law, totally overlooking relevant law that distinguishes Florida's sentencing scheme from Walton in light of Apprendi: Lambrix v. Singletary, 520 U.S. 518 (1997), and Espinosa v. Florida, 505 U.S. 1079 (1992). Appellant notes that a court in Indiana has ruled that Indiana's death penalty law is unconstitutional under Apprendi. Indiana, like Florida, has a statutory scheme where the jury makes a sentencing recommendation which in not binding on the judge. (A copy of the Indiana court's order is attached as an appendix to this brief)

Initially, Weeks provides no reasoned basis to compel this Court to follow it. First, Weeks assumed that Apprendi may apply, but finding that a guilty plea waived his right to make the claim. "By his plea of guilty, Weeks waived his right to a jury determination of the facts underlying those statutory aggravating factors and, in contrast to Apprendi, subjected himself to the maximum penalty without further factual findings." 761 A.2d at 806. Second, reliance in Weeks on the judge's finding in aggravation to avoid the implications of Apprendi effectively gave short shrift to the role of the jury in Delaware's sentencing scheme. Whether or not that was appropriate as matter of Delaware law, the same cannot be done in Florida, where the United States

Supreme Court in Lambrix expressly recognized the that the Florida penalty jury plays a substantial role as a co-sentencer.

In Lambrix, the United States Supreme Court candidly acknowledged that it previously had misunderstood Florida law with respect to the jury's substantial role as a co-sentencer. The Court said the recognition it ultimately and correctly reached in Espinosa v. Florida, 505 U.S. 1079 (1992), Sochor v. Florida, 504 U.S. 527 (1992), and Lambrix was "in considerable tension with" the Court's previous view, wherein the Court always had regarded the trial judge as the sentencer irrespective of the jury's role. See Lambrix, 520 U.S. at 533-34. Thus, the Court has acknowledged that it's reliance on Florida law in support of its decision in Walton v. Arizona, 497 U.S. 639 (1990), was based on what was at the time the Court's self-admittedly erroneous view of Florida law.

Lambrix is pivotal to this issue, yet Lambrix was never mentioned in Mills, and to Appellant's knowledge it was not even argued to this Court in Mills. Mills applied -- and misapplied -- dictum in Apprendi to say that it did not apply to capital sentencing. The opinion in Mills itself quoted the language from Apprendi that contains the distinguishing fact:

> 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. 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 or her to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Mills, 786 So.2d at 536. (emphasis supplied) (quoting Apprendi, 120 S. Ct. at 2366, which in turn quoted Walton). Apprendi's reliance on Walton expressly took into consideration only those capital sentencing schemes in which the jury plays no role in the sentencing determination. Because, as the Court in Lambrix came to recognize, the jury plays a pivotal role in making findings in aggravation, this Court must take Lamrbix into account and reconsider Mills in that light.

Because Walton does not control, the dictum in Apprendi does not apply to Florida's sentencing scheme. In fact, the only U.S. Supreme Court case that even warrants some attention is Hildwin v. Florida, 490 U.S. 638 (1989). However, Hildwin suffers from the same misunderstanding the U.S. Supreme Court made in its pre-Espinosa cases. Nothing in Hildwin, or its predecessors, suggest that the Court understood or appreciated the role of the jury in capital sentencing in Florida. Instead, Hildwin was decided on a sixth amendment issue as the Court understood the sentencing

process to operate -- with the judge as the sentencer. Hildwin also did not address the jury-based fourteenth amendment due process grounds that underpins much of the analysis in Apprendi.

Moreover, Hildwin did not survive Apprendi in so far as Hildwin rested on the now disavowed distinction between sentencing factors and guilt factors. The Court in Hildwin relied on Macmillan v. Pennsylvania, 477 U.S. 79 (1986), for the proposition that "the existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.'" Hildwin, 490 U. S at 640-41 (quoting Macmillan, 477 U.S at 86). The "sentencing factor" rationale underlying Macmillan is no longer a constitutionally valid distinction.

Another fact not addressed in Hildwin is the role of the death recommendation vis-a-vis the role of the aggravating circumstances as defined in Florida law. The Florida sentencing scheme essentially turns both the aggravating circumstances and the jury's penalty recommendation into essential facts that the judge must consider in making the ultimate sentencing decision. Once a jury has found the defendant guilty of all the elements of an offense that carries as its penalty the sentence of death, the defendant is guilty of a capital offense but is not yet "eligible" for the death penalty. In a separate penalty proceeding, a jury must determine four things: (1) whether any aggravating circumstances exist beyond

a reasonable doubt; (2) whether one or more of the proven aggravating circumstances is of sufficient weight to make the defendant death eligible; (3) whether any mitigating circumstances were proved to exist by a preponderance of the evidence; and (4) whether death is the appropriate punishment under the totality of the circumstances after weighing the aggravating circumstances against the mitigating circumstances. Only after the jury has made findings against the defendant after completing the first two steps has the defendant crossed the threshold and become eligible for the death penalty. When all four steps are completed, the trial judge must engage in the same four steps, limited by the jury's findings. Hildwin treats the jury's recommendation as the one and only essential fact arising from the jury's penalty deliberations. But, the jury is a co-sentencer responsible both for finding the aggravating circumstances proved beyond a reasonable doubt, and for weighing them. When the jury is given this dual responsibility as co-sentencer, the jury's conclusion as to each is equally important. Hildwin addressed only the latter responsibility, that of the weight the jury gave in the conclusory form of its recommendation. Hildwin did not fully address and gauge the jury's role or contemplate the constitutional gravity of the jury's findings as to the other essential sentencing facts, the aggravating circumstances.

Mills also was wrong for relying on the denial of certiorari in Weeks v. Delaware, 121 S. Ct. 476 (2001), as precedential authority. Denial of discretionary review has no precedential weight at all, both under federal law, see House v. Mayo, 324 U.S. 42 (1945), and Florida law, see Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983).

One last omission in the Mills opinion is the Florida Constitution. That document provides independent grounds upon which to base reversal, and this Court has interpreted it to be of primary concern and to provide greater due process protection than rights afforded by the United States Constitution. See, e.g., Traylor v. State, 596 So. 2d 957 (Fla. 1992) (recognizing primacy of art. I, §§ 9, 16, Fla. Const.); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (rejecting the constitutional precedent of Moran v. Burbine, 475 U.S. 412 (1986), and applying article I section 9 of the Florida Constitution); Jones v. State, 92 So. 2d 261 (Fla. 1956) (on rehearing granted) (holding that unanimous verdict in criminal cases is required by the right to a fair and impartial trial guaranteed by Florida Constitution's, formerly under article I, section 11, Fla. Const. (1885), and now under article I, section 16, Fla. Const. (1968 revision)). The principles discussed in Apprendi, which have their roots in the common law, are deeply rooted in the Florida Constitution as well.

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Ronald Lee Bell, Jr., asks this Court to reverse his judgement and sentence and remand his case for a new trial. Alternatively, Bell asks this Court to reduce his death sentence to life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to James W. Rogers, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, Ronald Bell, #P10751, U.C.I., on this ____ day of October, 2001.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font require- ments of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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