IN THE SUPREME COURT OF FLORIDA

JAMES ARMANDO CARD,

Appellant,

CASE NO. SC00-182

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE FOURTEENTH JUDICIAL CIRCUIT
BAY COUNTY

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JAMES ARMANDO CARD, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume number. A citation to a volume will be followed by any appropriate page number. The symbol "IB" will refer to Appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The trial court granted Card a new resentencing based on the improper the procedure used in preparing the original sentencing order that sentenced Card to death. Card v. State, 652 So.2d 344 (Fla. 1995)(directing the trial court to conduct an evidentiary hearing to review the sentencing procedure used where the prosecutor rather than the judge in the original penalty phase prepared the sentencing order). Such a procedure violates this Court's holding in Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987)(holding that the trial court may not delegated to the prosecutor the responsibility of preparing the sentencing order). A new penalty phase in front of a new jury was conducted.

In the first opinion, Card v. State, 453 So.2d 17(Fla. 1984), this Court explained the facts of the murder as:

On the afternoon of June 3, 1981, the Panama City Western Union office was robbed of approximately $1,100. Blood was found in the office and the clerk, Janis Franklin, was missing. The following day, Mrs. Franklin's body was discovered beside a dirt road in a secluded area approximately eight miles from the Western Union office. Her blouse was torn, her fingers severely cut to the point of being almost severed and her throat had been cut.

As early as 6:30 on the morning of June 3, 1981, the appellant telephoned an acquaintance, Vicky Elrod, in Pensacola, Florida, and told her that he might be coming to see her to repay the $50 or $60 he owed her. At approximately 9:30 that night Vicky

Elrod met with the appellant. He took out a stack of twenty and one-hundred dollar bills and she asked if he had robbed a 7-Eleven store. He told her that he had robbed a Western Union station and killed the lady who worked there. He described scuffling with the victim, tearing her blouse and cutting her with his knife. He said he then took her in his car to a wooded area and cut her throat saying, “die, die, die." Several days after their meeting, Vicky Elrod went to the police with this information. The appellant was then arrested. Card, 453 So.2d at 18-19. The testimony at this resentencing established basically the same facts.

The responding officer, now Commander Dobos, then patrolman Dobos, with the Panama City Police Department, testified that he responded to a call to the Western Union office at 32 Oak Avenue on June 3, 1981 at 3:14 p.m. (XXVIII 31-34). There was a “quantity of blood” on the floor and furniture. (XXVIII 34,35). A cashdrawer was removed from its slot and broken. The clerk, Mrs, Franklin, was missing from the office. (XXVIII 35). Her car was still parked outside in the parking lot across from the office. (XXVIII 35).

An investigator with the Panama City Police Department, David Slusser testified that the victim was discovered the following day at 4:00 p.m. on a dirt road off Back Beach Road. (XXVIII 46, 49-50). It was 8.4 miles from the Western Union office to the dirt road and the victim’s body was approximately another 1/4 mile from the road. (XXVIII 50). The area was “heavily wooded” and there was “no residential population”. (XXVIII 50). The

investigator identified photographs of the victim (XXVIII 53-62). The victim's blouse was removed. (XXVIII 60). One of the photographs was of the victim's right hand and one of the finger's of her right hand had been "almost severed" (XXVIII 61). There were also cuts on the victim's left hand as well. (XXVIII 62).

The doctor who performed that autopsy, Dr. Kielman, had died so his prior testimony was read to the jury. (XXVIII 55, 66-78). He testified that he performed the autopsy on Janice Franklin. (XXVIII 71). She had a "very deep cut over her throat". (XXVIII 72). Her hands showed injuries. The doctor described the damage to the victim throat. He testified that there had to be considerable force used and the instrument had to be fairly sharp to go that deep. The wound was 2 ½ inches deep and almost to the spinal cord. (XXVIII 74-75). The index finger of the right hand of the victim was cut. (XXVIII 76). The medical expert testified that these were classic defense wounds caused by the person protecting themselves from an attack. (XXVIII 77).

The state's key witness, Vicki Elrod, testified that Card called her on the morning of the robbery and told her he coming to Pensacola and was to going to repay her the money that he owed her. (T. XXIX 7). That night she went to see him in his motel in Pensacola, and he pulled a "big wad of money" out of a little blue pouch and she joking asked him if he had knocked over a 7-11. (XXIX 10). Card replied that he had robbed a Western Union (XXIX 10). He also informed her that he killed the

woman there. (XXIX 10). He told her that when he first entered the Western Union office there was another man in the office, so Card left telling the victim that he would return and wanted to talk with her. (XXIX 11). He returned after the man left. He was wearing gloves and had a Bowie knife hidden in his pants. (XXIX 11,13). He went over to the safe and scuffled with the victim. (XXI 11) He pulled out the knife and cut her. (XXIX 11-12). He took over $1,000.00 (T. XXIX 12). He forced the victim into the car at knife point. (XXIX 12-13). He drove her five or six miles into a wooded area. He then told that he was not going to hurt her and that all he wanted was the money and asked her to get out of the car. (XXIX 13). As the victim was walking away, he got out of the car and quietly went behind her. (XXIX 13). The grabbed her by the hair and pulled her hair back to expose her throat. (XXIX 13). He then slit her throat with the Bowie knife to a depth of 2 ½ inches. (XXIX 13). After he slit her throat, he told the victim to “die, die die,” (XXIX 13).

Defense counsel presented the testimony of numerous members of Card’s family, including his mother, (XXIX 21); a brother-in-law (XXX 5); a ex-wife (XXX 31); his long-lost daughter (XXX 44); his niece (XXX 52) and his brother. (XXXI 5).. Defense counsel presented the testimony of a old friend. (XXX 48). Defense counsel also presented the testimony of a priest via video, the testimony of the director of Catholic Charities and the testimony of a Catholic sister. (XXIX 56 & attachment end of volume); (XXX 11); (XXX 20). Defense counsel also presented the

testimony of a professor of psychology at the University of Santa Cruz, Dr. Haney. (XXXI 30).

The jury recommended death eleven to one. (XI 2005). The trial court, in its sentencing order, found five aggravating factors:

> (1) the murder was committed while the defendant was engaged in the commission of a kidnapping § 921.145(5)(d);
>
> (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest § 921.145(5)(e);
>
> (3) the murder felony was committed for pecuniary gain § 921.145(5)(f);
>
> (4) the murder was especially heinous, atrocious, or cruel § 921.145(5)(h) and
>
> (5) The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. § 921.145(5)(i).

(XII 2248-2251). The trial court found no statutory mitigating factors. (XII 2251). The trial court found seven non-statutory mitigators:

> (1) the defendant's upbringing was "harsh and brutal" and his family background included a brutal step-father which the trial court accorded some weight;
>
> (2) the defendant has a good prison record which the trial court accorded slight weight;
>
> (3) the defendant is a practicing Catholic and made efforts for other inmates to obtain religious services which the trial court accorded some weight;

(4) the defendant was abused as a child which was considered previously which the trial court accorded some weight;

(5) the defendant served in the Army National Guard and received an honorable discharge which the trial court accorded some weight;

(6) the defendant has artistic ability which the trial court accorded little weight;

(7) The defendant as corresponded with school children to deter them from being involved in crime which the trial court accorded some weight.

(XII 2251-2252). The trial court found that the aggravating circumstances outweighed the mitigating circumstances and imposed death. (XII 2253). The trial court sentenced Card to death. (XII 2257).

SUMMARY OF ARGUMENT

ISSUE I

Appellant asserts the prosecutor made a series of improper comments in closing. The State respectfully disagrees. Most of the comments that appellant objects to on appeal were not objected to at trial. Thus, these comments are not preserved for appellate review. Furthermore, the comments were not so egregious as to vitiate the entire resentencing. Moreover, the trial court properly intervened when defense counsel objected and cured any error. Thus, the trial court properly addressed and properly handled closing arguments.

ISSUE II

Appellant argues that the trial court improperly denied his motion to recuse. He asserts that the second motion to recuse was in effect a first motion to recuse because the trial court recused itself *sua sponte* rather than actually granting the first motion to recuse. The State respectfully disagrees. First, this issue is not preserved. Moreover, while Judge Hess technically denied the motion as legally insufficient, he disqualified himself based in part on the defendant's belief that he would not be fair. Thus, the first judge was removed from the case based on the defendant's wishes and in response to the defendant's motion to disqualify. Moreover, regardless of the label attached to the removal of the first judge, the fact is that Judge Costello was a successor judge. A defendant must establish actual bias to warrant removal of a successor judge.

Additionally, the error, if any was harmless. Appellant's motion to recuse asserted that the trial court would have to judge the credibility of one of her former clients who was a potential witness. However, this witness did not testify. Thus, the trial court properly denied the motion to disqualify the successor judge.

ISSUE III

Appellant argues the trial court improperly applied the law of the case doctrine to this resentencing, improperly instructed the jury on several aggravators and improperly found several aggravators. First, the trial court's application of the law of the case doctrine was irrelevant. The trial court properly instructed the jury on these aggravators because the evidence supported them. Furthermore, because there is competent, substantial evidence fully supporting each of these aggravators, the trial court properly found them and properly relied upon them in her resentencing order. Thus, the trial court properly found the cold, calculated and premeditated, the heinous, atrocious and cruel and the pecuniary gain aggravators.

ISSUE IV

Appellant argues the trial court failed to consider certain mitigating factor and did not explain its weighting process. The State respectfully disagrees. First, this issue is not preserved because appellant did not inform the trial court that it overlooked any mitigating factor or the sentencing order did

not sufficiently explain its weighing process. Moreover, appellant's basic argument is that the trial court failed to follow the dictates of Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). However, Campbell has recently been clarified by this Court. A trial court is free now to assign no weight to an established mitigator. Additionally, the trial court here considered the proposed mitigators, it simply considered those mitigators that related to the same basic subject together. Furthermore, by not sufficiently explaining its weighting process, appellant seems to be complaining about the trial court's use of words such as "some" "slight" and "little" weight. However, these are common, readily understood and frequently used words. Thus, the trial court properly evaluated and properly weighed the mitigating evidence.

ISSUE V

Appellant asserts that the death penalty is not proportionate because of the "extent and quality" of mitigation. However, this murder is one of the most aggravated and least mitigated of crimes. This murder involved torture of the victim. The trial court found five statutory aggravators including both cold, calculated and premeditated and heinous, atrocious and cruel. Furthermore, while the trial court found seven non-statutory mitigators, none were given more than some weight. This Court has found death appropriate where there were less than the five aggravators present here. Moreover, this Court has also found the death penalty the appropriate punishment where a store clerk

is robbed and then driven away from the store into a remote location and then killed. Thus, the death penalty is proportionate.

ISSUE VI

Card asserts that this Court's precedent allowing a jury to recommend a death sentence based upon a simple majority vote should be reexamined in light of Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). The State respectfully disagrees. Apprendi is simply inapposite to the issue of whether a jury recommendation should be unanimous. Apprendi requires that a fact that is used to increase the statutory maximum be treated as an element of the crime; it did not change the jurisprudence of unanimity. Moreover, Apprendi concerns what the State must prove to obtain a conviction not the penalty imposed. Additionally, the Apprendi Court, specifically addressing capital sentencing schemes such as Florida's, stated that the holding did not effect their prior precedent in this area. Thus, the trial court properly refused to require the jury reach an unanimous recommendation.

ISSUE VII

Appellant asserts that the trial court improperly denied his request for a special jury instruction on cold, calculated and premeditated which stated that a heightened level of planning does not establish heightened premeditation. The State respectfully disagrees. The special requested jury instruction regarding premeditation is not applicable to this case. Thus,

the trial court properly gave the standard jury instruction on cold, calculated and premeditated rather than the special requested instruction.

ISSUE VIII

Appellant asserts numerous other errors, including (1) that the standard jury instruction informing the jury that their recommendation was advisory violates Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (2) that three of the aggravators used in this case: murder committed during a kidnapping, the void arrest aggravator and the pecuniary gain aggravator failed to narrow the class of person eligible for the death penalty (3) that the defendant should be allowed to present testimony regarding the effect of his execution on his family and (4) improper victim impact testimony concerning the appropriate punishment was allowed mandate reversal. The State respectfully disagrees. Issues (1), (2) and (3) have been rejected previously by this Court and appellant offers no reason for this Court to recede from its prior precedent. Moreover, the jury heard no improper victim impact evidence. Thus, the trial court properly conducted the resentencing hearing.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY FAILING TO SUA SPONTE INTERRUPT THE PROSECUTOR'S CLOSING ARGUMENTS? (Restated)

Appellant asserts the prosecutor made a series of improper comments in closing. The State respectfully disagrees. Most of the comments that appellant objects to on appeal were not objected to at trial. Thus, these comments are not preserved for appellate review. Furthermore, the comments were not so egregious as to vitiate the entire resentencing. Moreover, the trial court properly intervened when defense counsel objected and cured any error. Thus, the trial court properly addressed and properly handled closing arguments.

Presumption of correctness & the burden of persuasion

A trial court's ruling is presumed correct. Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1979)(holding that, in appellate proceedings, trial court's decision is presumed correct and appellant has burden to bring forward record adequate to demonstrate reversible error). The trial court's decision, not its reasoning, is reviewed on appeal. Caso v. State, 524 So.2d 422, 424 (Fla. 1988)(holding that a trial court's decision will be affirmed even when based on erroneous reasoning). A trial court may be "right for the wrong reason". Grant v. State, 474 So.2d 259, 260 (Fla. 1st DCA 1985); Dade County School Board v. Radio Station Wqba, City of Miami, Susquehanna Pfaltzgraff and Three Kings Parade, Inc., 731 So. 2d

638, 645 (Fla. 1999)(referring to this principle as the "tipsy coachman" rule). An appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments asserted below; rather, the appellee can present any argument supported by the record even if not expressly asserted in the lower court. Dade County School Board v. Radio Station Wqba, City of Miami, Susquehanna Pfaltzgraff and Three Kings Parade, Inc., 731 So. 2d 638, 645 (Fla. 1999)(noting that an appellee need not raise and preserve alternative grounds to assert them on appeal). However, this is not true of the appellant. The appellant must raise and preserve the exact grounds in the trial court that he asserts as error on appeal. On appeal, the appellant bears the burden of persuading this Court that the trial court's ruling is incorrect. Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963).

The standard of review

A standard of review is deference that an appellate court pays to the trial court's ruling. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. Rev. 468 (1988). There are three main standards of review: *de novo*, abuse of discretion and competent substantial evidence test. Philip J. Padovano, Florida Appellate Practice § 9.1 (2d ed. 1997). Legal questions are reviewed *de novo*. Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the legal issue. Under the de novo standard of review, an appellate court freely considers the matter anew as if no decision had

been rendered below. Questions of fact in Florida are reviewed by the competent, substantial evidence test. Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. If there is any evidence to support those findings, the findings will be affirmed. The equivalent federal fact standard of review is known as the clearly erroneous standard. Other issues are reviewed for an abuse of discretion. Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling, reversing only when the trial court ruling's was "arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). The abuse of discretion standard of review is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So.2d 191, 195 (Fla. 4th DCA 1997).

The control of the prosecutor's comments is within a trial court's discretion and the trial court's ruling will not be overturned unless an abuse of discretion is shown. Hawk v. State, 718 So.2d 159, 162 (Fla.1998)(noting that a trial court has discretion in responding to a prosecutor's improper comments during closing argument and finding no error where the court instructed the jury to disregard the prosecutor's comment that the defendant was an "amoral, vicious, cold-blooded killer");

Esty v. State, 642 So.2d 1074 (Fla. 1994)(explaining that control of the prosecutor's comments is within a trial court's discretion and finding no error where the court instructed the jury to disregard a "dangerous, vicious, cold-blooded murderer" comment and the prosecutor's warning to the jury that neither the police nor the judicial system can "protect us from people like that"); Occhicone v. State, 570 So.2d 902, 904 (Fla. 1990)(noting that a trial court has discretion in controlling opening statements). For example, a trial court may instructed the jury to disregard the comment; or admonish the prosecutor in front of the jury; the trial court can instruct the jury that the prosecutor's comment is simply incorrect. Thus, the standard of review for a trial court handling of a prosecutor's comments during opening and closing argument is an abuse of discretion.

Preservation

Many of the comments appellant now objects to on appeal were not objected to at trial and therefore, are not preserved. If these comments where so patently objectionable, why were they not objected to trial, where the trial court could have intervened and cured any error.

Appellant filed a motion for new trial rasing some of the unobjected comments as a basis for a new trial. IB at 22, n.1. However, a motion for a new trial is not a timely objection. Contemporaneous means in time to remedy the error. After the jury has reached a verdict or in this case, a death

recommendation and has been dismissed is too late to cure any improper comments by giving a curative instruction. Counsel must object during trial prior to the jury's deliberation when there is an opportunity to correct any improper influence on the verdict.

In McDonald v. State, 743 So.2d 501, 505 (Fla. 1999), this Court that the prosecutor's comments during closing, while "ill-advised" did not rise to the level of fundamental error. McDonald argued that the prosecutor made several improper comments during closing argument in the penalty phase. The prosecutor implied that the victim was gagged because he was crying out for mercy. This Court noted that the evidence did not support the argument that the victim was "begged for mercy" because there were no eyewitnesses. The Court noted that the prosecutor's "embellishment" was a prohibited appeal to the emotions of the jurors. Additionally, the prosecutor's references to the victim's knowledge of impending death came very close to prohibited "golden rule" arguments which asked the jury to place themselves in the victim's shoes that improperly appeal to the fear and emotion of the jurors. The prosecutor's remarks came during his discussion of the HAC aggravator and may have been an attempt to describe the heinousness of the crime. Id. at n.9. As this Court noted, unfortunately, defense counsel did not object to any of these comments during closing or move for a mistrial. Instead, McDonald's counsel filed a motion for new trial following the conclusion of the penalty phase which noted the alleged improper comments. The trial court denied the

motion because no contemporaneous objection had been made. The McDonald Court explained that this motion did not preserved the issue for review, and, therefore, his arguments were not cognizable on appeal.

Here, as in McDonald, the Card's motion for new trial did not preserved the issue for review. Therefore, his arguments are not cognizable on appeal. Thus, contrary to appellant's claim, the issue of the propriety of the prosecutor's comment is not preserved.

Merits

The test is whether the prosecutor's comments were so prejudicial as to vitiate the entire proceeding. Prosecutorial error alone does not automatically warrant a mistrial; court must examine the entire record and the nature of the improper comments. Kearse v. State, 25 Fla. L. Weekly S507 (Fla. 2000). To put the prosecutor's comments truly in context, this Court needs to balance the propriety of defense counsel's comments as well. A jury is just as likely to be improperly swayed to recommend life rather than death by defense counsel's improper appeals to mercy as by a prosecutor's improper comments. (XXXVIII 26,30).

Appellant asserts that the prosecutor argued that if aggravating circumstances outweighed mitigating circumstances then you vote by law must be a recommendation of the death penalty. IB at 23. There was no objection. Thus, this claim of error is not preserved. Moreover, the trial court properly

instructed the jury on aggravating and mitigating evidence. (XXXI 150-151).

Appellant also asserts that the prosecutor argued that a life recommendation violated the juror's oath or duty. IB at 23. Defense counsel did not object to any of these comments. Thus, this issue is not preserved. While this Court has condemned similar arguments, these types of comments are not misstatements of the law that could lead a jury to an erroneous legal conclusion; rather, they are the prosecutor's view of the better recommendation. If the jury does not agree, they will simply ignore the prosecutor and vote for life. Comments to the jury to not take the easy way out are perfectly proper. They are merely the corollary of standard Allen charge which this Court has approved. Thomas v. State, 748 So.2d 970, 976 (Fla. 1999)(noting that a trial court should not couch an Allen charge instruction to a jury to abandon a conscientious belief in order to achieve a unanimous position).

Appellant claims that the prosecutor improperly argued that victim evidence as a statutory aggravator. IB at 25. The prosecutor did not. The prosecutor noted that victim impact evidence doesn't "fit into this formula" and there "no way to weigh it". (XXXI 120). Defense counsel objected noting that it was not a statutory aggravator. The trial court noted there was nothing wrong with the prosecutor's comments but warned the prosecutor to be careful. Defense counsel's position was that the prosecutor cannot discuss victim impact evidence at all. The trial court observed that "why do we let it in, if he cannot

talk about it?". Defense counsel stated that such evidence "makes no sense in the statute". (XXXI 121). The trial court then reasoned that because it is not an aggravator, the prosecutor would be "better off to leave it alone" (XXXI 122). The prosecutor then explained to the jury that the trial court would not instructed them on victim impact evidence and he also couldn't give them any guidance on applying it. (XXXI 122). The prosecutor then discussed the victim as a devoted mother, her uniqueness and how she helped other people including the defendant.

First, victim impact evidence is statutory authorized as admissible as this Court has recognized. § 921.141(7), Florida Statutes (1999); Windom v. State, 656 So.2d 432, 438 (Fla. 1995); Burns v. State, 699 So.2d 646, 653 (Fla. 1997)(rejected the claim that victim impact evidence is irrelevant because it does not go to any aggravator or to rebut any mitigator). The prosecutor argued that the jury could consider but not weigh victim impact evidence and this is an accurate statement of the law. (XXXI 125). Defense counsels' objection is really an objection to the statute and this Court's holding in Windom and Burns, not an objection to the prosecutor's comments.

Appellant notes and the State agrees that prosecutor improperly argued that life without parole may not actually mean life. IB at 30. The prosecutor argued that "no one can say that he is going to serve a life sentence, No one can guarantee you (the jury) that, no one can predict that . . . you have to make the decision on what . . the law is today" (XXXI 115).

Defense counsel objected and the trial court observed: “I don’t think you should be arguing that” and “don’t argue that, that is improper”. The trial court then informed the prosecutor that she was going to tell the jury that life means life without parole because the prosecutor agreed to the waiver. The prosecutor then caught himself and stated that he was not arguing parole and would tell the jury that. Defense counsel moved for a mistrial. The trial court offered a curative instruction instead. (XXXI 116). The trial court instructed the jury:

> “Members of the jury panel, you have two recommendations to the court. One is a recommendation of the death penalty. The second one is life without the possibility of parole. That means life, natural life of a person, no parole. So you will disregard the state attorney’s last comments, please.”

The prosecutor then explained that he meant to argue that prisoners have may liberties now and prison get easier over the years and that in the future prison life would be even easier. Defense counsel renewed his objection and the trial court instructed the jury that there is no parole and no early release from a life sentence and instructed the prosecutor not to make any argument otherwise. (XXXI 117). The prosecutor then moved on. (XXXI 118).

Arguments that life without parole could change in the future are improper. Urbin v. State, 714 So.2d 411, 420 (Fla. 1998)(prosecutor improperly asserted that if defendant was sentenced to life in prison, he could still be released some day

because the law can change which invites a jury to ignore the law as it is written and to reject the only lawful alternative to the death penalty, even if they believed that to be the right recommendation, based on a fear that the defendant might someday be eligible for parole); Walker v. State, 707 So.2d 300, 314 (Fla.1997)(explaining that the possibility of future violent acts if the defendant is released on parole in the distant future is not an aggravating circumstance in Florida). However, the trial court cured any possible misimpression by informing the jury that life means just that - life with no possibility of parole. The curative instruction was as clear and as directly to the point as a curative instruction can be. It was not a generic "disregard that comment" curative instruction; rather, it was a statement directly informing the jury that the prosecutor is wrong - life means no parole. The jury could have no misimpression after this curative instruction. Thus, the trial court cured the error with this detailed curative instruction.

Card next claims that the prosecutor mislead the jury by using evidence of a plan to rob to establish a plan to murder and by using events that occurred after the murder to support the cold, calculated and premeditated aggravator. IB at 32-34. As the State explains in issue III under the cold, calculated and premeditated section, this argument is proper and not misleading. This type of evidence, *i.e.,* the gloves, can be used to establish heightened premeditation. The wearing of the gloves establishs a plan to murder not just rob and occurred

prior to the murder. Thus, this argument is not misleading; rather, it is perfectly proper.

Card asserts that the prosecutor misstated the definition of kidnapping by using the term “terrorize”. IB at 34. Card did not object to this comment. (XXXI 98). Thus, this issue is not preserved. Moreover, this is one of the statutory definition of kidnapping. § 787.01 (1)(a)(3), Fla. Stat. (1999). The State could have charged this type of kidnapping and on these facts, no doubt obtained a terrorizing kidnapping conviction.

Card argues that the prosecutor improperly denigrated the mitigating evidence. IB at 35. Appellant complains about the prosecutor analogizing the mitigating evidence to a galberry. (XXXI 96). It is perfectly proper for a prosecutor to argue that the mitigating evidence is minor and outweighed by the aggravating evidence. Indeed, this is the purpose of closing argument in a penalty phase. If a prosecutor is permitted to make such arguments, surely he is welcome to do so by using country expressions. Furthermore, the prosecutor’s observation regarding Card being raised in a stern and impoverished environment of “who hasn’t”, while an overgeneralization, is a basically a valid observation that others have suffered poverty and abuse without committing crimes.

Regarding the expert from California, the prosecutor was merely explaining that an “expert” cannot really predict future behavior any more accurately than normal non-expert. IB at 37. Card attempts to imply that the prosecutor was maligning California. He was not. He was expressing the view that

"common, ordinary people" can make a decision as to the weight that should be accorded this particular mitigator. (XXXI 107-108).

Regarding the prosecutor's comments concerning the victim's suffering, these comments in context are proper. IB at 37-38; (T. XXXI 101-103). The prosecutor repeatedly stated that "we don't know what might have been said or what she may have asked this defendant". These comments were designed to establish the heinous, atrocious and cruel aggravator. This aggravator is determined from the victim's perspective which inherently requires the prosecutor to describe the victim's suffering. The prosecutor's comment that "you and I here today cannot know what suffering she went through while she waited to either bleed to death or suffocate but we can imagine" were meant to establish that the murder was "pitiless and conscienceless" and thereby establish heinous, atrocious and cruel. (XXXI 102).

Contrary to appellant's argument, the prosecutor is not making a "show the defendant the same mercy he showed the victim" argument. IB at 39. Rather, the prosecutor is telling the jury to base their recommendation on the evidence not sympathy. Kearse v. State, 25 Fla. L. Weekly S507 (Fla. June 29, 2000)(finding as error a comment by the prosecutor to show "this Defendant the same mercy he showed Officer Parrish" but concluding that single erroneous comment was not so egregious as to require reversal).

Next, Card assert that the prosecutor telling the jury that "you are the conscience of this community" is error. IB at 40.

Defense counsel objected and moved for a mistrial. (XXXI 125-126). While several districts have found such comments impermissible, they do not explain the problem with such comments. Otero v. State, 754 So.2d 765, 770 (Fla. 3d DCA 2000)(finding comments that the jury is the conscience of the community or referring to its sense of "civic responsibility" to be improper but not warranting reversal). This Court has emphasized that the jury's recommendation is entitled to great weight because it reflects "the conscience of the community". Marshall v. State, 604 So.2d 799, 807 (Fla. 1992); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). Why is it improper for a prosecutor to tell a jury exactly how this Court views their recommendation?

Appellant also argues that the prosecutor's reference to the prior trial were improper suggestions that there was additional evidence. IB at 40, 46. Resentencings are unique. The jury knows that there was a prior trial to determine guilt or innocence. The prosecutor is limited in his presentation of the evidence and may not relitigate guilt. Thus, the references were not suggestion of additional evidence. Teffeteller v. State, 495 So.2d 744 (Fla.1986) (concluding that the mere mention of prior death sentence not prejudicial in subsequent resentencing).

Appellant claims that the prosecutor commented on the defendant right to remain silent when he the victim was hit with a severe blow but we don't know when that occurred because "he never told anybody when that occurred." (XXXI 101); IB at 43.

Defense counsel did not object. Moreover, this is a reference to the fact that the defendant told all the other details of this murder to Vicky Elrod, not a comment on the defendant's right to remain silent. The jury would have understood this as a reference to the defendant's confession to Vicky.

Harmless error

Improper comments by the prosecutor are subject to harmless error analysis. United States v. Hasting, 461 U.S. 499, 510, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (holding harmless error analysis applies to improper prosecutorial comments). An appellate court should not exercise its supervisory power to reverse a conviction when the error is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error. United States v. Hasting, 461 U.S. 499, 506, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

The jury here would have recommended death regardless of the prosecutor's comments in this case. The trial court provided curative instructions when objection were made. The jury was instructed that the closing arguments were not to be viewed as evidence and the prosecutor also stated this at the beginning of his closing argument. The jury recommendation would have been for death regardless of these comments given the nature of this murder

Del Rio v. State, 732 So.2d 1100, 1102 (Fla. 3d DCA 1999)(strongly disapproving of prosecutor comments, reporting him to Florida Bar and printing his name in the opinion but

noting that curative instructions were provided, the jury was instructed that the closing arguments were not evidence, and overwhelming evidence of the defendant's guilt made the prosecutor's comments harmless).

ISSUE II

DID THE TRIAL COURT PROPERLY DENY APPELLANT'S SECOND MOTION TO DISQUALIFY THE JUDGE? (Restated)

Appellant argues that the trial court improperly denied his motion to recuse. He asserts that the second motion to recuse was in effect a first motion to recuse because the trial court recused itself *sua sponte* rather than actually granting the first motion to recuse. The State respectfully disagrees. First, this issue is not preserved. Moreover, while Judge Hess technically denied the motion as legally insufficient, he disqualified himself based in part on the defendant's belief that he would not be fair. Thus, the first judge was removed from the case based on the defendant's wishes and in response to the defendant's motion to disqualify. Moreover, the motion to disqualify Judge Costello was legally insufficient and therefore properly denied. Additionally, the error, if any was harmless. Appellant's motion to recuse asserted that the trial court would have to judge the credibility of one of her former clients who was a potential witness. However, this witness did not testify. Thus, the trial court properly denied the motion to disqualify the successor judge.

The trial court's ruling

Defense Counsel filed a motion to disqualify Judge Hess based on a claim of *ex parte* communication between Judge Hess and Assistant State Attorney Paulk. (R. III 529-541). The prosecutor filed a memorandum opposing recusal of Judge Hess

because the *ex parte* communication concerned only a scheduling matter which would not lead a reasonably prudent person to fear that the judge would be partial and explained that Florida Code of Judicial Conduct, Canon 3 B(7)(a) contains an exception to the prohibition on *ex parte* communications for scheduling matters. (R. IV 637-639). Card filed a pro se "emergency" motion to disqualify Judge Hess also based on the *ex parte* communication claim. (R. IV 640-643). The trial court heard argument on the motion. (T. III 2303-2324). The prosecutor asserted that the motion should be denied because it was not legally sufficient. (XIII 2314-2317). Judge Hess asked if this was the first or second motion to recuse because the rule differed if the motion was a second motion to recuse. (XIII 2317). The trial court then assumed that it was the first motion to recuse and decide that if it was facially sufficient he would grant it. (XIII 2317-2318). The trial court then entered a written order entitled "order granting disqualification of judge" (R. IV 736). The trial court found that the "factual allegations are not legally sufficient to warrant granting the motion" and denied the defendant's motion. However, Judge Hess recused himself *sua sponte* because he was previously employed as an Assistant State Attorney in the same judicial circuit at the same time the defendant was originally tried and "due to the fact that defendant feels this judge will not be fair". (R. IV 736).

Before the new penalty phase jury was selected, defense counsel filed a motion to disqualify Judge Costello based on her

prior consultation while in private practice with Debra King, a potential witness. (XI 1940). The consultation allegedly involved representing Debra King in a divorce from appellant. The trial court, in her order denying the motion to disqualify, noted that she was "the successor judge and the predecessor judge was disqualified based on a motion filed by the defendant." (XI 1942). The trial court denied the motion because she had no recollection whatsoever of ever having conferred with Debra King and therefore, she could be fair and impartial. (XI 1942-1943). Debra King did not testify. (XXVIII-XXXI).

Burden of persuasion

Appellant has burden to bring forward record adequate to demonstrate reversible error. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979). Appellant has burden of establishing on the record that the motion to disqualify Judge Hess was the first motion to disqualify filed in this case, not the second or third. There were numerous judge assigned to this case over the twenty year span of this case. Judge Hess was at least the third judge assigned to this case. The record is silent as to whether Card had previously filed a motion to disqualify any of the prior judges. Reversible error cannot be predicated on a silent record.

Preservation

Appellant never made the argument to the trial court that he raises on appeal, *i.e.* that the second motion should be treated as a first motion and be automatically granted if sufficient. The trial court in her order denying the motion to disqualify explained that she was the successor judge and the predecessor judge was disqualified based on a motion filed by the defendant. If appellant disagreed with this factual observation that the previous judge was disqualified based on a motion filed by the defendant, he needed to apprise the trial court of his disagreement. Appellant did not present his legal argument to the trial court that the previous judge actually recused himself rather than being recused based on the defendant's motion and thus, she was the original judge for purposes of a motion to dismiss. While defense counsel argued that no prior judge was disqualified in this motion to correct sentencing error, it was untimely. (XII 2259). Card need to present this claim in detail to the trial court prior to the jury being sworn and reaching a recommendation to be timely. Therefore, this issue is not preserved.

The standard of review

The denial of a motion to recuse is reviewed for an abuse of discretion. Arbelaez v. State, 25 Fla. L. Weekly S586 (Fla. July 16, 2000); United States v. Wilkerson, 208 F.3d 794, 797 (9th Cir. 2000); United States v. Chandler,996 F.2d 1073, 1104 (11th Cir. 1993).

Merits

The rule of Judicial Administration governing the disqualification of trial judges, rule 2.160, provides in pertinent part:

> (d) Grounds. A motion to disqualify shall show:
> (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge;
>
> * * *
>
> (f) Determination--Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.
>
> (g) Determination--Successive Motions. If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may pass on the truth of the facts alleged in support of the motion.[1]

The rule is a sort of one free judge strike rule. The original judge may not rule on the truth of the facts alleged; rather, the original judge may rule only on the motion's legal sufficiency. The original judge should assume the facts to be true and determine, from the moving party's point of view, if

[1] Florida also has a disqualification of judge for prejudice statute, § 38.10, Florida Statutes (1999). The statute provides substantive right to seek disqualification, whereas the rule provides for the procedural process. Cave v. State, 660 So.2d 705 (1995).

those facts would lead a reasonably prudent person to fear not receiving a fair and impartial trial. Correll v. State, 698 So.2d 522, 524 (Fla.1997), *citing*, Livingston v. State, 441 So.2d 1083, 1087 (Fla. 1983). However, a successor judge is entitled to rule on the truth of facts alleged in a second motion to disqualify. Pinfield v. State, 710 So.2d 201 (Fla. 5th DCA 1998); Norris v. State, 695 So.2d 922 (Fla. 3d DCA 1997).

The original judge recused himself in response to the defendant's motion to disqualify him and based in part on the defendant's fear. One of the reasons given by the trial court in its order was that the defendant had a fear that he would not be impartial. The trial court here actually had two reasons for granting disqualification. One was that he was a former prosecutor and the other was that the defendant did not want him to preside.

Sua sponte means without prompting or suggestion. BLACK'S LAW DICTIONARY (6th ed.). It is not accurate to characterize the trial court's action as *sua sponte* recusing itself. Rather, the trial court withdrew at the prompting and suggestion of the defendant albeit for a different reason.

Regardless of the label placed on the removal of the original judge, Judge Costello was a successor judge. The statute and the rule entitled a defendant to remove the original judge based on reasonable fears but require that the defendant establish actual bias to remove a successor judge. This is exactly what happened in this case. Thus, appellant got his one free strike

of a judge and was not entitled to a second free strike of the successor judge without establishing actual bias.

Even if the motion is viewed as a first motion to disqualify, it is legally insufficient. Taking the allegations that Debra King had once consulted with the judge while the judge was in private practice about a divorce from appellant and she was now going to be a potential witness, the allegations are not sufficient to cause a reasonably prudent person to fear not receiving a fair and impartial trial. *Cf.* Arbelaez v. State, 25 Fla. L. Weekly S586 (Fla. July 16, 2000)(explaining that judge's former employment as a prosecutor in the same office at the same time the defendant was prosecuted and convicted was not legally sufficient for disqualification because it is not enough to justify a well-founded fear of prejudice). The judge did not represent Ms. King in the divorce, only consulted with her. Nor did appellant allege the Ms. King was going to be a witness for the State or even a main witness for the defense. Ms. King could have been called to testify by the defense regarding matters that were not in dispute and thus, the judge would not have to assess her credibility at all. Indeed, Ms. King being a witness in this case was speculation. Motions to disqualify based on pure speculation are not legally sufficient. Arbelaez v. State, 25 Fla. L. Weekly S586 (Fla. July 16, 2000)(concluding allegation that the trial court "may have personal knowledge and may be a material witness to facts and events" was not specific enough to establish objective rather than subjective fear that the judge may have some information); 5-H Corp. v. Padovano, 708

So.2d 244, 248 (Fla. 1997)(finding claims of judicial bias to be "speculative, attenuated, and too fanciful to warrant relief"). Thus, the motion could have been properly denied by Judge Costello as legally insufficient.

Appellant's reliance on Brown v. St. George Island, Ltd., 561 So.2d 253 (Fla. 1990), is misplaced. In Brown, one of the parties to a series of suits, Stocks, moved to disqualify the original judge and the judge denied the motion. Stocks sought a writ of prohibition which was denied. Stock filed a second motion to recuse the original judge in the first suit. Stocks then filed a second suit alleging "fraud, bias and deceit" on the part of the judge in the first suit. The original judge entered an order recusing himself from the second suit because, in view of the allegations of the complaint, he would not feel comfortable sitting as the judge. Stocks then filed a third law suit which was also assigned to the original judge. The original judge recused himself from the third suit as well. A successor judge was assigned to hear all three lawsuits. Stock moved to recuse this successor judge pursuant to § 38.10, Florida Statutes. The successor judge denied the motion. The Court noted that the legislature intended that a party should have only one unfettered right to obtain a judge's disqualification under section 38.10. The Court also noted the possibility of judge-shopping and that for this reason it was logical for the legislature to make it more difficult to obtain a second disqualification under that statute. The Brown Court held that the successor judge should be disqualified as though

he were the original judge because the original judge voluntarily recused himself.

But Brown is distinguishable. The original judge *sua sponte* recused himself based on the second lawsuit. Stocks never filed a motion to recuse in either the second or the third lawsuit, only in the first. There is no question but the motion to disqualify the successor judge was the first motion filed in the second and third suits. Here, by contrast, appellant's motion this was the second motion to disqualify filed in this one lawsuit. Moreover, in Brown the motion to disqualify was legally sufficient; whereas, here, the motion was not.

Harmless Error

While a claim that the trial court was actually biased is not subject to harmless error[2], appellant is not truly claiming actual bias. Rather, appellant is claiming a violation of the rule of judicial administration that requires disqualification of a judge based merely on filing a motion to disqualify with no claim of actual bias. Violations of such a rule are not structural error and therefore, should be subject to harmless error. The federal courts also have disqualification statutes and rules which are similar to Florida's. 28 U.S.C. § 144 & 28

[2] *See* Chapman v. California, 386 U.S. 18, 23 & n. 8, 87 S.Ct. 824, 827-28 & n. 8, 17 L.Ed.2d 705 (1966)(explaining that judicial bias is structural error that infects the entire trial and therefore, is not subject to harmless error, *citing*, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

U.S.C. § 455. Violations of the federal disqualification statute are subject to harmless error analysis. *See* Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)(holding that harmless error analysis applies to violations of § 455(a));Parker v. Connors Steel Co., 855 F.2d 1510, 1527 (11th Cir. 1988)(holding that harmless error analysis applies to violations of § 455(b));*But see* Cave v. State,660 So.2d 705, 708 (Fla. 1995)(holding that failure of original trial judge who was previously employed as an assistant state attorney in the State Attorney's Office which prosecuted Cave to recluse himself required reversal). Even if the motion is viewed as a first motion to disqualify, the denial of the motion was not prejudicial. There clearly is appearance of impropriety. The basis of the motion to disqualify Judge Costello was that she would have to weigh the credibility of a former client. However, the former client, Debra King, did not testify. (XXVIII-XXXI). The potential problem never occurred. This appearance of impropriety was conditional upon this witness testifying, when she did not testify, any appearance of impropriety disappeared. Normally the failure to grant the first motion will not be harmless because the record will not conclusively refute the claim of the appearance of impropriety. However, here the record does refutes conclusively any possible impropriety. Thus, the error, if any, was harmless.

ISSUE III

DID THE TRIAL COURT PROPERLY FIND THE COLD, CALCULATED AND PREMEDITATED, THE HEINOUS, ATROCIOUS AND CRUEL AND THE PECUNIARY GAIN AGGRAVATORS? (Restated)

Appellant argues the trial court improperly applied the law of the case doctrine to this resentencing, improperly instructed the jury on several aggravators and improperly found several aggravators. First, the trial court's application of the law of the case doctrine was irrelevant. The trial court properly instructed the jury on these aggravators because the evidence supported them. Furthermore, because there is competent, substantial evidence fully supporting each of these aggravators, the trial court properly found them and properly relied upon them in her resentencing order. Thus, the trial court properly found the cold, calculated and premeditated, the heinous, atrocious and cruel and the pecuniary gain aggravators.

The trial court's ruling

During the charge conference, the trial court suggested that because the charge conference in the first proceeding was "basically incomprehensible", they should go off record and then put on the record any objections. (XXX 75). Defense counsel agreed to this procedure. Defense counsel then put on the record that he objected to the giving of any instruction on the cold, calculated and premeditated aggravator, the heinous, atrocious and cruel aggravator and the pecuniary gain aggravator. (XXX 78). His position was that because the prosecutor was busy showing the primary motive for the murder

was the avoid arrest aggravator, that the prosecutor had not established the facts necessary to support giving the pecuniary gain aggravator jury instruction. (XXX 79). Defense counsel then acknowledged that the pecuniary gain aggravator had been found in the original sentencing order and that the Florida Supreme Court had affirmed that aggravator. (XXX 79). Defense counsel asserted that the first trial occurred prior to much of the current death penalty caselaw and that this jury heard different evidence than the first jury, "a good bit more evidence than this one because of the nature of it". (XXX 79). The prosecutor responded that this Court approved this aggravating factor in the first direct appeal and the jury heard the same evidence. (XXX 80). The trial court had a copy of the original direct appeal opinion, Card v. State, 453 So.2d 18 (Fla. 1984), and noted that this Court clearly upheld the pecuniary gain and committed in the course of a kidnapping aggravators. (XXX 80). The trial court denied the request and ruled that she was going to give the jury the instruction on the pecuniary gain aggravator. Then defense counsel presented the same argument as to the heinous, atrocious and cruel jury instruction. (XXX 80). Defense counsel asserted that there were no additional acts established "to set the crime apart from the norm" (XXX 81). The trial court ruled that she was going to give the heinous, atrocious and cruel jury instruction "based on the law of this case". Defense counsel then made the same objection as to the cold, calculated and premeditated aggravator because the heightened premediation necessary for this

aggravator was not established. (XXX 82). The prosecutor responded that this jury heard the same evidence as the first jury. The trial court ruled that it would also give the cold, calculated and premeditated instruction to the jury. (XXX 82).

Preservation

Appellant's law of the case argument is not preserved. Defense counsel did not argue that the doctrine did not apply at resentencing or inform that the trial court that she was not bound by the prior trial court's ruling in this area. Indeed, defense counsel did quite the opposite when he agreed that these aggravators had been previously found. Defense counsel objected to the jury being instructed on the pecuniary gain aggravator, the heinous, atrocious and cruel aggravator and cold, calculated and premeditated aggravator, and therefore, preserved the argument that the jury should not have been instructed on these aggravators. However, defense counsel did not object to the avoid arrest aggravator on the basis that the evidence did not support these aggravators. Defense counsel by implication admitted that the evidence was sufficient to instruct the jury on the avoid arrest aggravator when he stated that the prosecutor spent all of his time proving this aggravator instead of the other aggravators. Therefore, appellant's claim that the jury should not have been instructed on the avoid arrest aggravator is not preserved.

The standard of review

A contention that the law of the case precludes reexamination of an issue raises a pure question of law and thus, is subject to *de novo* review. Field v. Mans, 157 F.3d 35, 40 (1st Cir. 1998). Whether the factual foundation exists to support a jury instruction is reviewed for abuse of discretion. United States v. Hairston, 64 F.3d 491, 493 (9th Cir. 1995). Lastly, the standard of review for aggravators is whether competent, substantial evidence supports the trial court's findings regarding the aggravating circumstances. Way v. State, 760 So. 2d 903, 918 (Fla. 2000), *citing*, Willacy v. State, 696 So.2d 693, 695 (Fla.1997). It is not this Court task reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt because that is the trial court's job. Way, 760 So. 2d at 918.

Merits

LAW OF THE CASE & RESENTENCINGS

The State agrees that the law of the case doctrine does not apply to resentencings and the trial court was not bound by the prior trial court's ruling on aggravators. The entire point of the resentencing was to relitigate the issue of the appropriate sentence. Preston v. State, 607 So.2d 404, 409 (Fla. 1992)(explaining that the basic premise of the sentencing procedure is that the sentencer consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment which can only

be accomplished by allowing a resentencing to proceed in every respect as an entirely new proceeding). While the trial court was not bound to found the evidence supported giving jury instructions on these aggravators, it was certainly free to do so.

In Way v. State, 760 So. 2d 903, 919 (Fla. 2000), this Court found that the evidence supported the heinous, atrocious and cruel aggravator. This court rejected Way's claim that the evidence did not establish that the murder was HAC because the State failed to prove that Way intended to torture the victim or that the crime was meant to be especially painful. While the evidence must show that the victim was conscious and aware of her impending death to support this aggravating circumstance, the Court concluded that the evidence supported just such a conclusion. Way was an appeal from a resentencing. The Way Court explained that the Court's resolution of this issue regarding this aggravator during Way's original direct appeal was not dispositive because the finding of a mitigating or aggravating circumstance is not an "ultimate fact" that is binding during the resentencing proceeding. However, the Way Court noted that the Florida Supreme Court had previously rejected Way's very similar argument upon essentially the same evidence and that they once again found that competent, substantial evidence supports the trial court's finding that the heinous, atrocious and cruel aggravating circumstance applies.

The trial court, here, basically did the same thing that this Court did in Way. The trial court rejected Card's argument

because essentially the same evidence had been presented in the first proceeding. The evidence in the second proceeding supported these aggravating jury instructions just as the evidence in the first proceeding had. The trial court, as this Court did in Way, concluded that the same evidence leads to the same legal conclusion.

While the State agrees that the law of the case doctrine does not apply, that is not the actual issue here. The issue here is whether the jury should have been instructed on these three aggravators and whether there is competent, substantial evidence to support them. Regardless of the reason[3], the trial court was correct in instructing the jury on these three aggravators, *i.e.* cold, calculated and premeditated, the heinous, atrocious and cruel and the pecuniary gain aggravators. The evidence supported these aggravators and therefore, the trial court properly instructed the jury on them. While the resentencing was much more condensed than the original trial because it was a resentencing at which guilt was not an issue, the same critical evidence was presented. The state's key witness, Vicky Elrod, testified at the resentencing. She testified that Card confessed to her that he had rob a Western Union and kill a woman. Card's confession included details such as the time of

[3] A trial court may be "right for the wrong reason". Caso v. State, 524 So.2d 422, 424 (Fla. 1988)(holding that a trial court's decision will be affirmed even when based on erroneous reasoning);Dade County School Board v. Radio Station Wqba, City of Miami, Susquehanna Pfaltzgraff and Three Kings Parade, Inc., 731 So. 2d 638, 645 (Fla. 1999)(referring to this principle as the "tipsy coachman" rule).

the crime, that he tore the victim's blouse, and the amount of money taken in the robbery that only the perpetrator would know. Her testimony and the physical evidence established that the murder was cold, calculated and premeditated and heinous, atrocious and cruel and committed for pecuniary gain.

AVOID ARREST AGGRAVATOR

Appellant argues that the evidence does not support the avoid arrest aggravator. Appellant notes that a victim's ability to identify the defendant, alone, is insufficient to support this aggravator. Zack v. State, 753 So.2d 9, 20 (Fla. 2000), *citing*, Consalvo v. State, 697 So.2d 805 (Fla. 1996). However, here, there is additional evidence of this aggravator. It is "well accepted" by this Court that the avoid arrest aggravator is proper where "the victim is transported to another location and then killed." Jones v. State,748 So.2d 1012, 1027 (Fla. 1999), *citing* Hall v. State, 614 So.2d 473, 477 (Fla.1993)(stating that the avoid arrest aggravator has been "uniformly upheld" when the victim is transported to another location and then killed); Preston v. State, 607 So.2d 404, 409(Fla. 1992)(noting where a robbery victim is abducted from the scene of the crime and transported to a different location where he or she is then killed, the avoid arrest aggravator is properly found). Here, Card drove the victim over eight miles from the Western Union where the robbery occurred into a secluded wooded area off a dirt road and then slit her throat. The only reasonable

inference to be drawn from these facts, here, as in Preston v. State, 607 So.2d 404, 409 (Fla. 1992), is that the defendant kidnapped the clerk from the store and transported her to a more remote location in order to eliminate the sole witness to the crime. Thus, there is substantial, competent evidence to support and the trial court properly found the avoid arrest aggravator.

COLD, CALCULATED AND PREMEDITATED AGGRAVATOR

To establish the cold, calculated and premeditated aggravator, the State must establish that: (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) that the defendant exhibited heightened premeditation (premeditated) and (4) that the defendant had no pretense of moral or legal justification. Jackson v. State, 648 So.2d 85, 89 (Fla. 1994).

The state's key witness, Vicky Elrod, testified that Card called her on the morning of the robbery and told her he coming to Pensacola and was to going to repay her the money that he owed her. (T. XXIX 7). That night she went to see him in his motel in Pensacola, and he pulled a "big wad of money" out of a little blue pouch and she joking asked him if he had knocked over a 7-11. (XXIX 10). Card replied that he had robbed a Western Union (XXIX 10). He also informed her that he killed the woman there. (XXIX 10). He told her that when he first entered

the Western Union office there was another man in the office, so Card left telling the victim that he would return and wanted to talk with her. (XXIX 11). He returned after the man left. He was wearing gloves and had a Bowie knife hidden in his pants. (XXIX 11,13). He went over to the safe and scuffled with the victim. (XXI 11) He pulled out the knife and cut her. (XXIX 11-12). He took the money and forced the victim into the car at knife point. (XXIX 12-13). He drove her five or six miles into a wooded area. He then told that he was not going to hurt her and that all he wanted was the money and asked her to get out of the car. (XXIX 13). As the victim was walking away, he got out of the car and quietly sneeks behind her. (XXIX 13). The grabbed her by the hair and pulled her hair back to expose her throat. (XXIX 13). He then slits her throat with the Bowie knife to a depth of 2 ½ inches. (XXIX 13). After he slit her throat, he told the victim to "die, die die," (XXIX 13).

Appellant argues that the evidence does not support the cold, calculated and premeditated aggravator. Appellant claims that the trial court improperly relied on facts that only establish premeditation to commit robbery to establish the required heightened premeditation for murder and that the trial court improperly relied on facts that occurred after the murder to support premeditation. The trial court did neither. First, the fact that Card was wearing gloves but no mask to rob a victim who knew him well, establishes that Card planned to both rob and murder from the beginning of this crime. (XXXI 105). Gloves are worn to prevent detection and identification. There simply is

no point to wearing gloves to rob a victim who can easily identify you unless you intend to kill them. A plan to commit robbery is not mutually exclusive of a plan to commit murder. Gordon v. State, 704 So.2d 107, 115-116 (Fla. 1997)(rejecting a claim that the defendant was merely planning a burglary or robbery rather than a murder and affirming trial court finding of cold, calculated and premeditated when the plan was to rob and murder). The State's theory was that Card planned to both rob and murder the victim. (XXXI 104).

In Knight v. State, 721 So.2d 287, 299 (Fla. 1998), this Court held the evidence was sufficient to support the trial court's finding that the murders were cold, calculated and premeditated. Knight kidnapped the victim from his place of employment armed with a rifle. He ordered the victim to drive home, get his wife, drive to the bank and withdraw $50,000.00. He then ordered the victims to drive to an unpopulated area and shot the man and his wife. This Court observed that even if Knight did not make the final decision to execute the two victims until sometime during the journey, that journey provided an abundance of time for Knight to coldly and calmly decide to kill.

Here, as Knight, even if Card did not make the final decision to kill the victim until sometime during the journey, the journey provided an abundance of time for Card to coldly and calmly decide to kill. Card drove the victim nearly nine miles. This Court previously found this crime to involved heightened premeditation and previously rejected this same challenge to the cold, calculated and premeditated aggravator. Card v. State, 453

So.2d 17, 23-24 (Fla. 1984)(finding heightened level of premeditation where Card took the victim from the Western Union office, after having cut her fingers, transported her in his car to a secluded area eight miles away and then cut her throat because Card "had ample time during this series of events to reflect on his actions and their attendant consequences").

Appellant's reliance on Power v. State, 605 So.2d 856, 864 (Fla. 1992), is misplaced. In Power, this Court noted that the fact the defendant ate the victim's sandwich after murder did not establish heightened premeditation because it occurred after rather than before the murder.[4] While the trial court refers to disposing of the gloves, knife and wallet, it is in one sentence. The trial court relied mainly on acts that occurred before the murder. Furthermore, there is a vast difference between eating a sandwich and disposing of the instrumentalities and proceeds of a crime. Thus, there is substantial competent evidence to support and the trial court properly found the cold, calculated and premeditated aggravator.

HEINOUS, ATROCIOUS AND CRUEL AGGRAVATOR

In determining whether to apply the heinous, atrocious and cruel aggravator, a murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. Cole

[4] The State does not agree with this dicta that acts that occur after the murder cannot establish premeditation. For example, a defendant collecting on an insurance policy after the murder is an act that can be used to establish heightened premeditation although it occurs after the murder.

v. State, 701 So. 2d 845, 851 (Fla. 1997), *citing*, Kearse v. State, 662 So.2d 677 (Fla. June 22, 1995). The trial court may consider the victim's fear and emotional strain as contributing to the heinous nature of the murder. Cole v. State, 701 So. 2d 845, 851 (Fla. 1997), *citing*, Preston v. State, 607 So.2d 404, 409-10 (Fla. 1992) and Hannon v. State, 638 So.2d 39 (Fla. 1994). Even if the victim death is instantaneous, actions of the defendant preceding the actual killing may establish heinous, atrocious and cruel. Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997), *cert. denied,* 525 U.S. 892, 119 S.Ct. 212, 142 L.Ed.2d 174 (1998).

Appellant argues that the evidence does not establish that this murder was heinous, atrocious and cruel based on the rather astounding argument that if a victim's wounds are defense wounds then they are "not deliberately inflicted", and such wounds do not demonstrate a desire to inflict a high degree of pain. IB at 68. This victim did not nearly sever her own fingers - Card did that. Defense wounds occur when an attacker attempts to attack a victim and the victim naturally attempts to defend themself by raising their arms and hands. Stabbing a person is a deliberate act regardless of the victim's response. Deliberate refers to the defendant's actions and intentions, not the victim's response. Card did deliberately stab this victim - it is just that she protected even more vital portions of her body with her hands.

Furthermore, the heinous, atrocious and cruel aggravator does not requiring an intentional infliction of pain, indifference to

the victim's pain may also establish this aggravator. Moreover, heinous, atrocious and cruel is judged from the perspective of the victim. Banks v. State, 700 So.2d 363, 367 (Fla. 1997)(explaining that the HAC aggravator considers the circumstances of the capital felony from the unique perspective of the victim).

The trial court relied on the pain, trauma and terror the victim suffered during the eight mile drive from the Western Union office to the rural area with her fingers almost severed from her right hand to establish that this murder was heinous, atrocious and cruel. The defendant cut the victim's finger nearly off and drove her in that condition, *i.e.* with her hands copiously bleeding and in great pain, into an unpopulated area miles away from any medical care. State v. East, 481 S.E.2d 652, 667 (N.C. 1997)(finding "beyond intelligent debate" that murders were especially heinous, atrocious, or cruel where both victims were severely beaten and one of the victim's fingers was amputated).

Appellant also argues that the victim may not have been conscious when the fatal wound was inflicted. IB at 69. The medical testimony here was that the victim may have been rendered momentarily unconscious from blow to the back of her neck, not that the victim was unconscious when she was killed. (XXVIII 78). Moreover, the injury to her neck involved massive bruising which indicted that she was alive. Even if she was unconscious when her throat was slit, this Court has rejected that a murder cannot be heinous, atrocious and cruel when the

victim was brutally assaulted prior to being instantaneously killed.

In Beasley v. State, 2000 WL 1588020 (Fla. October 26, 2000), this Court held that the existence of defensive wounds supported a finding that the murder was heinous, atrocious and cruel. Beasley, 2000 WL 1588020 at *20. The victim had been beaten in the face and on the head with a blunt object between 15-17 times. Beasley, 2000 WL 1588020 at *3. She had numerous defensive wounds to her arms and hands. A hammer with a bloody, broken head was discovered near the body. Beasley, at *2. Beasley argued that because the victim was rendered unconscious quickly the murder was not heinous, atrocious and cruel. Beasley, at *18. The Beasley Court rejected this claim based on the multiple defensive bruises that the victim had on her arms and hands. The medical examiner testified that these were "typical defensive injuries", sustained by attempting to fend off the attack. This Court noted that the common sense inference from these defensive wounds was that the victim was alive and suffered a horrendous ordeal before her death. It was also "common sense" that it would have taken one than one blow to cause the injuries on the back of her hands. The victim "suffered pain and horrific emotional trauma". Beasley, at *18. Beasley relies heavily on Roberts v. State, 510 So.2d 885, 894 (Fla.1987), where this court had rejected a similar argument that the murder was not heinous, atrocious and cruel because the victim was not aware of his impending death. The Roberts Court concluded that severe injury to the victim's hands showed that

the victim attempted to fend off further blows. The Roberts Court noted that evidence of such defensive wounds has been held sufficient to support a finding that the murder was especially heinous, atrocious or cruel.[5]

Here, as in Beasley and the cases cited in Beasley, the victim's defensive wounds establish that the events leading up to the otherwise quick murder were heinous, atrocious and cruel. This the victim also "suffered pain and horrific emotional trauma". The trial court relied on the extensive defensive wounds to the victim's hands and the eight miles drive in that condition to establish this aggravator. Both the victim's fingers being cut and the drive in that condition undoubtedly occurred while the victim was conscious. Furthermore, here, as in Roberts, a finding that the victim was not aware of his or her impending death does not prevent the murder from being heinous, atrocious and cruel.

Additionally to the severe damage to her hands, the victim was driven in this condition to a remote location. In Preston v. State 607 So.2d 404 (Fla. 1992), this Court found the murder to be especially heinous, atrocious, or cruel. Preston robbed a convenience store. He then forced the night clerk to drive to remote location, made her walk at knifepoint through dark field

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[5] Roberts cites Wilson v. State, 493 So.2d 1019 (Fla.1986)(finding that murder was especially heinous, atrocious or cruel was supported by evidence that victim was brutally beaten while attempting to fend off blows to the head, before he was fatally shot) and Heiney v. State, 447 So.2d 210 (Fla. 1984) (murder was especially heinous, atrocious or cruel where victim received defensive wounds to hands while trying to fend off seven severe hammer blows to the head).

and forced her to disrobe. Preston then repeatedly stabbed her. The wounds to her neck resulted in her near decapitation. This Court found that the clerk suffered great fear during events leading up to her murder. Preston, 607 So.2d at 409. Fear and emotional strain may be considered even where the victim's death is almost instantaneous. Preston, 607 So.2d at 410.

Here, as in Preston, the victim suffered fear and emotional strain during the drive. This victim had to be suffering from the emotional strain of wondering if she would ever be able to use her hand again. Additionally, here, the victim suffered physical trauma from the wounds to her hands during the drive. She was also being driven away from any possible medical care which would have added anxiety to her physical pain.

Contrary to appellant's claim, the trial court did not rely on speculation to establish this aggravator. IB at 69. Rather, the trial court relied on common sense, just as this court explicitly did in

Beasley. It is simple common sense that a victim who has had her finger on her right hand nearly severed and has numerous other cuts on her left hand would be in significant pain and suffering from trauma.

Appellant's reliance on Robinson v. State, 574 So.2d 108 (Fla. 1991), is misplaced. In that case, this Court found the heinous, atrocious, or cruel aggravator is inapplicable where the evidence indicated that the defendant and his accomplice had assured the victim that they planned to release her and did not intend to kill her. Here, as in Robinson, the defendant told

the victim that he just wanted the money and that he was not going to hurt her. However, Robinson is distinguishable. While the victim in Robinson was sexually assaulted, she was otherwise was not harmed. A victim who has not been repeatedly stabbed by the perpetrator is at least somewhat likely to believe the statement that she will not be hurt and therefore, not suffer the terror of thinking she is going to die. However, a victim who has already been mutilated by the perpetrator has no such reassurance. He has every intention to hurt her and has already done so. A victim in this situation simply does not believe the statement that she will not be hurt. Card's statement that she would not be hurt was likely taken for the lie it was by this victim. Moreover, even if the victim believed Card that she would not be further harmed, the pain and trauma of having her fingers severed distinguishes this case from Robinson. Thus, the evidence supports and the trial court properly found the heinous, atrocious and cruel aggravator.

PECUNIARY GAIN AGGRAVATOR

Appellant argues that it is inconsistent to apply both the avoid arrest aggravator which requires that the sole or dominant motive for the murder be this aggravator and the pecuniary gain aggravator which also requires that the sole or dominant motive for the murder be this other aggravator. Basically, appellant is asserting that a murder cannot have two sole motives. However, appellant's argument ignores the "or dominant" modifier. Moreover, this Court has previously rejected this

claim. Thompson v. State, 648 So.2d 692, 695 (Fla. 1994)(rejecting argument that the pecuniary gain aggravator is inconsistent with the avoid arrest aggravator). Thus, the evidence supports and the trial court properly found the pecuniary gain aggravator.

Harmless Error

First, improper application of the law of the case doctrine at resentencing is subject to harmless error analysis and is harmless where the trial court basically is correct in its ruling. United States v. Crouse, 145 F.3d 786, 788 (6th Cir. 1998)(noting that the law of the case doctrine does not directly apply to resentencing; however, the district court's error in applying the doctrine was harmless because the court was basically correct in its underlying ruling). Here, the trial court was correct in its underlying ruling, *i.e.* that the jury should be instructed on the cold, calculated and premeditated, heinous, atrocious and cruel and pecuniary aggravator. Thus, the trial court's error in applying the law of the case doctrine was necessarily harmless.

Contrary to appellant's claim, this Court has repeatedly held that the trial court's improper consideration of an unsupported aggravator can be harmless error. Appellant seems to argue that any time there is any mitigation, any error in finding aggravators cannot be harmless. This Court has explained that a reversal of a death sentence is required only if this Court cannot find the error harmless beyond a reasonable doubt. If

there is no reasonable possibility that the error contributed to the sentence, the Court should affirm the death sentence.

In Zack v. State, 753 So.2d 9, 20 (Fla. 2000), this Court held that while the trial court erroneous found the avoid arrest aggravator, the error was harmless because several other aggravating factors supported the imposition of the death penalty. Without the invalid avoid arrest aggravator, there were still four other valid aggravators: prior violent felonies; pecuniary gain; heinous, atrocious, and cruel and cold, calculated, and premeditated. Because four valid aggravators existed, there was no reasonable possibility that the error contributed to the sentence. Here, the trial court found five aggravators. Appellant does not challenge the validity of the murder was committed during a kidnapping aggravator. Even if this Court finds one of the four challenged aggravators invalid, here, as in Zack, four valid aggravators remain. There is no reasonable possibility that the error in any one of the four challenged aggravators contributed to the sentence. Thus, any error in finding any one of the four aggravators is harmless.

Appellant argues that the error in giving these "extra aggravating" jury instructions that were not "legally applicable" is not harmless because the jury would not know that they were inapplicable. IB at 72. Appellant's reliance on Sochor v. Florida, 504 U.S. 527, 537-39, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992), as support for this argument is misplaced. As this Court observed in Banks v. State, 700 So.2d

363, 369 (Fla. 1997), when discussing Sochor, Sochor stands for the proposition that while a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, juries are unlikely to be able to identify flawed theories of law as reflected in incorrect jury instructions.

Sochor argued that a jury instruction was "invalid" by which he meant, as the United States Supreme Court explained, that it was unsupported by the evidence. Card asserts likewise, only he uses the term "legally inapplicable" rather than Sochor's term "invalid". Using either term, the argument is that the evidence did not support giving the jury instruction. The argument is not that the jury instruction on these aggravators are incorrect statements of the law, *i.e.* legally flawed. Rather, appellant's argument is that there is not sufficient evidence or facts to support these aggravators. But this is exactly what juries do - juries decide whether the evidence supports a conclusion, *i.e.* either guilt or the appropriate penalty. So, while juries cannot be expected to spot a flawed theory in the law in connection with the jury instruction, juries are quite capable of deciding that there is not sufficient evidence. Thus, contrary to appellant's position, if the jury is instructed on "legally inapplicable" aggravators, *i.e.* aggravators which the evidence does not support, the jury will simple not find that aggravator. Therefore, far from being inherently harmful as appellant claims, when juries are instructed on aggravator that are not supported by the evidence, the jury itself will cure the

problem by not finding that aggravator. Thus, giving jury instructions on aggravators not supported by the evidence is *per se* harmless.

ISSUE IV

DID THE TRIAL COURT PROPERLY EVALUATE THE MITIGATING EVIDENCE AND PROPERLY WEIGH THE MITIGATING EVIDENCE? (Restated)

Appellant argues the trial court failed to consider certain mitigating factors and did not explain its weighting process. The State respectfully disagrees. First, this issue is not preserved because appellant did not inform the trial court that it overlooked any mitigating factor or the sentencing order did not sufficiently explain its weighing process. Moreover, appellant's basic argument is that the trial court failed to follow the dictates of Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). However, Campbell has recently been clarified by this Court. A trial court is free now to assign no weight to an established mitigator. Additionally, the trial court here considered the proposed mitigators, it simply considered those mitigators that related to the same basic subject together. Furthermore, by not sufficiently explaining its weighting process, appellant seems to be complaining about the trial court's use of words such as "some" "slight" and "little" weight. However, these are common, readily understood and frequently used words. Thus, the trial court properly evaluated and properly weighed the mitigating evidence.

The trial court's ruling

The trial court found no statutory mitigation. (XII 2251). However, the trial court found seven non-statutory mitigators:(1) The defendant's upbringing was "harsh and brutal" and his family background included a brutal step-father which the trial court accorded some weight; (2) The defendant has a good prison record which the trial court accorded slight weight; (3) The defendant is a practicing Catholic and made efforts for other inmates to obtain religious services which the trial court accorded some weight; (4) The defendant was abused as a child which was considered previously which the trial court accorded some weight; (5) The defendant served in the Army National Guard and received an honorable discharge which the trial court accorded some weight; (6) The defendant has artistic ability which the trial court accorded little weight; (7) The defendant as corresponded with school children to deter them from being involved in crime which the trial court accorded some weight. (XII 2251-2252). The trial court found that the aggravating circumstances outweighed the mitigating circumstances and imposed death. (XII 2253).

Preservation

This issue is not preserved. While appellant filed a motion to correct sentencing error he did not assert to the trial court that it overlooked any mitigating factors or that its sentencing order did not explain its weighing process. (XII 2259-2262). Many of the "proposed" mitigating factors that appellant argues

were not considered by the trial court were not proposed as mitigators in the trial court. Most of the "proposed" mitigator were not proposed to the trial court as independent mitigators; rather, they were argued as facts or evidence that supported other mitigators. For example, appellant argues that the trial court failed to consider the fact that he obtained his GED while in prison; however, Card's obtaining a GED was presented as to the trial court as evidence of Card's adjustment to prison and that he needed the "structure . . . protection and the stability" of prison to improve himself. (XXXI 139-140). Appellant asserts that the trial court did not address Card's poor performance in school. However, appellant mentioned Card's failing the first and second grades, not being a successful student and never attending school to establish the "chaos" and lack of stability in Card's family life as a child. (XXXI 132-136). The trial court considered the defendant's family background as mitigating.

Appellant's main complaint is that the trial court failed to consider Dr. Haley's testimony regarding the consequences of Card's childhood. However, the expert testimony of Dr. Haley was presented to the trial court as evidence to support Card's family background mitigator and Card's adjustment to prison mitigator, both of which the trial court found and weighed. Indeed, the trial court considered the defendant's family background and his abuse as a child as separate mitigators and gave both some weight. Trial courts cannot be expected to read defense counsels' minds as to which mitigators are presented as

independent mitigators and which are facts used to support other mitigators. Most of the "proposed" mitigators were presented to the trial court as supporting facts for other mitigators, not as free standing mitigators. Thus, this issue is not preserved.

The only claimed "proposed" mitigator that was even arguably presented as an independent mitigator that the trial court did not consider was Card's criminal record which was significant but did not involve violent crimes. (XXVI 3001). However, Card did not object in his motion to correct the sentence to the trial court's failure to consider this non-statutory mitigator. Lucas v. State, 613 So.2d 408, 410 (Fla. 1992)(rejecting claim that trial court disregarded three possible mitigators because defendant did not list them in his memorandum). He does not specifically identify this or any other any other mitigator in his motion. Rather, the motion states: "failure to identify each and every mitigating circumstances raised by the defendant in the sentencing order". This is boilerplate language that preserves nothing. Woods v. State, 733 So.2d 980, 984(Fla. 1999)(noting that a boilerplate motion for acquittal that does not set forth the specific grounds does not preserve issue). Once again, defense counsel expects the trial court to be able to read his mind. Hence, Card's significant but non-violent criminal history is not preserved either. Thus, this entire issue is not preserved.

The standard of review

The weight assigned to a mitigating circumstance or an aggravating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. Cave v. State, 727 So.2d 227, 230 (Fla. 1998). To reverse the trial court's ruling, this Court must conclude that no reasonable person would assign that particular weight to the mitigator or aggravator. While a capital sentencer is constitutionally required to consider any mitigating evidence, it is not required to find that the mitigator exists. Additionally, while a mitigating factor need only be proven by a preponderance of the evidence, the standard of proof is a concern of the fact finder, not this court. Knight v. State, 746 So.2d 423, 436 (Fla. 1998)(noting that it is within the power of the trial court to determine whether mitigating circumstances have been established by a preponderance of the evidence). Standards of proof are trial court matters, appellate courts are concerned with the standard of review. Appellate courts are not fact finders; rather, this Court affirms the trial court's fact finding regarding mitigation if there is competent, substantial evidence to sustain those findings.

Merits

In Campbell v. State, 571 So.2d 415, 420 (Fla.1990), this Court outlined the duty of the sentencing court in evaluating the mitigating circumstances:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and

> whether, in the case of nonstatutory factors, it is truly of a mitigating nature.... The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance.

The Campbell Court had held that a sentencing court must expressly evaluate in its written order each proposed mitigating circumstance to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. Campbell, 571 So.2d at 419.

However, recently, in Trease v. State, 25 FLA. L. WEEKLY S622 (Fla. August 17, 2000), the Court partly receded from Campbell and held that though a court must weigh all the mitigating circumstances, a trial court may assign no weight to a mitigator if warranted. After Trease, a trial court is free to assign no weight to even an established mitigator.

In Foster v. State, 2000 WL 1259395 (Fla. September 7, 2000), this Court held that the trial court did in fact address the mitigating circumstances and provided sufficient written support for its evaluation. Foster offered some twenty-three nonstatutory mitigators. The trial court attached very little to no weight to these mitigators. Foster, at * 3. Foster argued that the trial court failed to consider the mitigating evidence and the trial court finding's were inadequate. Foster, at *12. This Court explained that while the trial court did not evaluate in detail each of the twenty-three nonstatutory mitigating circumstances in the exact order submitted by Foster, the court provided sufficient written grounds for its evaluation and its sentence. The trial court addressed the proffered mitigating

circumstances but did not go into the ones it deemed redundant. As an example, this Court noted that Foster submitted numerous mitigating circumstances relating to his good personality and character traits. The trial court, however, addressed the defendant's character traits as one subject in a three-paragraph subset of its analysis of the mitigating circumstances. The Foster Court concluded that written order substantially followed the dictates of Campbell. This Court noted that the trial court provided a written evaluation of both sets of aggravating and mitigating circumstances and distinguished the sentencing order from proposed mitigating circumstances. Therefore, the trial court in Foster provided an adequate written account of the evaluation of mitigating circumstances.

Here, as in Foster, written order substantially complied with the dictates of Campbell. The trial court here, as the trial court in Foster did, addressed the proffered mitigating circumstances but did not go into the ones it deemed redundant. Rather, the trial court here, as the trial court in Foster did, addressed the mitigating factors that concerned the same subject as one subject. This argument is basically a matter of style over substance. A trial court's grouping together of mitigators as a matter of good English usage should not be subject to attack. Appellant's main complaint is that the trial court failed to consider Dr. Haley's testimony regarding the consequences of Card's childhood. However, the trial court did consider the expert testimony of Dr. Haley. The trial court used this testimony as evidence to support Card's family

background mitigator, childhood abuse and Card's adjustment to prison mitigator, all of which the trial court found and weighed. Indeed, the trial court considered the defendant's family background and his abuse as a child as separate mitigators and gave both some weight. Thus, here, as in Foster, the trial court did in fact address the mitigating circumstances and provided sufficient written support for its evaluation.

One of the mitigators that appellant asserts the trial court failed to consider was the support of Card by his family and friends. However, the support of a defendant by his family and friends is not proper non-statutory mitigating evidence. Bates v. State,750 So.2d 6, 13 (Fla. 1999)(concluding trial court did not error by not considering non-statutory mitigation of a defendant's waiver of parole because it was irrelevant evidence). This speaks well of Cards' family and friends; however, it says nothing about the defendant or his character. True mitigators concern the defendant's character, not others loyalty.

One of the non-statutory proposed mitigating factors the trial court did not expressly consider was that while he had a prior criminal record, the prior convictions, including "some burglaries", were not violent crimes. (XXVI 3001). It is a statutory aggravator if the defendant was previously convicted of a felony involving the use or threat of violence to the person.[6] § 921.141(5)(b). It is a statutory mitigator for a

[6] Burglary, for purposes of capital sentencing, is not *per se* a crime involving violence or threat of violence; rather, it

defendant to have "no significant history of prior criminal activity." § 921.141(6)(a). A nonviolent criminal record may be used, as may any factor, as a nonstatutory mitigator. Brown v. State, 755 So.2d 616, 637 (Fla. 2000)(using a nonviolent criminal past as a nonstatutory mitigator).

Furthermore, by not sufficiently explaining its weighting process, appellant seems to be complaining about the trial court's use of words such as "some" "slight" and "little" weight. However, these are common, readily understood and frequently used words. There is nothing vague about these terms. Most sentencing orders in death penalty cases contain these exact terms.

Appellant's reliance on Merck v. State, 2000 WL 963825 (Fla. 2000), is misplaced. The Merck Court concluded that the trial court erred in failing to find, evaluate, or weigh Merck's use of alcohol the night of the murder and his long-term alcohol abuse which was a violation of Campbell. This Court explained that the nonstatutory mitigation section of the sentencing order must deal directly with any evidence presented to the court as nonstatutory mitigation. However, here, unlike Merck, the trial court did address the proposed statutory and non-statutory mitigators. Thus, the trial court properly evaluated and properly weighed the mitigating evidence.

Harmless error

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depends on the facts surrounding the particular burglary. Johnson v. State, 465 So.2d 499 (Fla. 1985).

Moreover, even if this court determines that the trial court should have expressly consider the defendant's non-violent but significant criminal record as a non-statutory mitigator, the trial court would have either not found Card's criminal past to be mitigating or at most assigned it merely a scintilla of weight. Brown v. State, 755 So.2d 616, 637 (Fla. 2000)(finding nonviolent criminal past as a nonstatutory mitigator but considering it of so little weight as not to outweigh even one of the aggravating factors). While a trial court' failure to consider the statutory mitigator of an insignificant criminal history could well warrant reversal for the entry of a new sentencing order, the failure to consider a significant, lengthy, albeit non-violent, criminal record does not. Bates v. State,750 So.2d 6, 13 (Fla. 1999)(concluding that the trial court's failure to address Bates' good prison record in the sentencing order was error in violation of Campbell; however, the error was harmless beyond a reasonable doubt). Appellant did not claim in the trial court and does not claim on appeal that his criminal history can possibly be deemed insignificant. The trial court's death sentence would be the same regardless of this only theorically possible and definitely trivial mitigator. The error, if any, is harmless.

ISSUE V

IS THE DEATH PENALTY PROPORTIONATE? (Restated)

Appellant asserts that the death penalty is not proportionate because of the "extent and quality" of mitigation. However, this murder is one of the most aggravated and least mitigated of crimes. This murder involved torture of the victim. The trial court found five statutory aggravators including both cold, calculated and premeditated and heinous, atrocious and cruel. Furthermore, while the trial court found seven non-statutory mitigators, none were given more than some weight. This Court has found death appropriate where there were less than the five aggravators present here. Moreover, this Court has also found the death penalty the appropriate punishment where a store clerk is robbed and then driven away from the store into a remote location and then killed. Thus, the death penalty is proportionate.

The trial court's ruling

The trial court imposed the death penalty. (XII 2252). However, trial courts normally do not address the proportionality of the death sentence because that this the function of this Court.

The standard of review

The standard of review of whether the death penalty is proportionate is *de novo.*[7] However, this Court does not reweigh the mitigating factors against the aggravating factors in a proportionality review, that is the function of the trial court. For purposes of proportionality review, this Court accepts the jury's recommendation and the trial court's weighing of the aggravating and mitigating evidence. Bates v. State, 750 So.2d 6, 12 (Fla. 1999).

Law of the case

This court already held that the death sentence in this case is proportionate in the first direct appeal. Card v. State, 453 So.2d 17 (Fla. 1984). According to this Court's death penalty jurisprudence, every case is reviewed for both the sufficiency of the evidence and for proportionality. Jennings v. State, 718 So.2d 144, 154 (Fla. 1998)(noting that although the issues were not raised by Jennings, the court is required to conduct an independent review of the sufficiency of the evidence as well as the proportionality of Jennings' death sentences). So, even though the first opinion did not directly address proportionality, this Court necessarily determined that the

[7] State v. Middlebrooks, 995 S.W.2d 550, 561, n.10 (Tenn. 1999)(noting that proportionality review is *de novo*); State v. Wyrostek, 873 P.2d 260, 266 (N. Mex. 1994)(observing that the determination of whether a death sentence is disproportionate or excessive is a question of law); State v. Hoffman, 851 P.2d 934, 943 (Idaho 1993)(stating that when making a proportionality review, state supreme court makes a *de novo* determination of whether the sentence is proportional after an independent review of the record).

death was proportionate albeit *sub silentio*. Therefore, under the law of the case doctrine, Card is prohibited from arguing that his death sentence is not proportionate because this issue has already been determined adversely to his position.

Merits

This Court reviews the propriety of all death sentences. Foster v. State, 25 Fla. L. Weekly S667 (Fla. September 7, 2000). [8] To

[8] Proportionality review is not mandated by the United States Constitution. Pulley v. Harris, 465 U.S. 37, 43, 48, 104 S.Ct. 871, 878, 79 L.Ed.2d 29 (1984); Walton v. Arizona, 497 U.S. 639, 655-656, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)(observing that proportionality review is not constitutionally required and declining to "look behind" state Supreme Court's good faith proportionality review). For this reason, federal courts do not engage in proportionality review in federal habeas. Mills v. Singletary, 161 F.3d 1273, 1282 (11th Cir. 1998)(refusing to conduct proportionality review in federal habeas corpus petitions); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1309 (9th Cir. 1996)(refusing to conduct de novo proportionality review because it is not a proper function of federal courts);Tokar v. Bowersox,198 F.3d 1039, 1052 (8th Cir. 1999)(explaining that the Constitution does not require a federal habeas court to look behind the Missouri Supreme Court's proportionality review); Roach v. Angelone, 176 F.3d 210, 216(4th Cir. 1999)(noting that a federal court would not entertain habeas petitioner's contention that the Supreme Court of Virginia incorrectly or inadequately conducted the proportionality review because proportionality review was mandated by state statute, not federal constitution, and observing that it is a well-settled proposition that the individual States are not constitutionally required to provide proportionality review of death sentences). Although this Court has implied that proportionality review is a "necessary implication" of several provisions of the State Constitution, in fact, the source of this Court's authority to engage in proportionality review is the death penalty statute, § 921.141(4), Florida Statutes. *Cf.* Tillman v. State, 591 So.2d 167 (Fla. 1991)(identifying several state constitutional

ensure uniformity, this Court compares the instant case to all other capital cases.

Here, the trial court found five aggravators and seven nonstatutory mitigators. The five aggravators were: (1) The murder was committed while the defendant was engaged in the commission of a kidnapping; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder felony was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, or cruel and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (XII 2248-2251). The trial court found no statutory mitigating factors.

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provisions which may by implication support proportionality review in capital cases but did not expressly mandate such review).

Indeed, proportionality review is not even expressly mandated by statute in Florida. Other state statutes expressly mandate such review. For example, Tennessee's death penalty statute, § 39-13-206(c)(1)(D), Tenn. Code, provides:

> In reviewing the sentence of death for first degree murder, the reviewing courts shall determine whether:
>
> * * *
>
> (D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

Idaho's review of the death sentences statute, I.C. § 19-2827, provides:

> (c) With regard to the sentence the court (the Supreme Court of Idaho) shall determine:
>
> (3) Whether the sentence of death is excessive.

(XII 2251). The trial court found seven non-statutory mitigators: (1) the defendant's upbringing was "harsh and brutal" and his family background included a brutal step-father which the trial court accorded some weight;(2) the defendant has a good prison record which the trial court accorded slight weight;(3) the defendant is a practicing Catholic and made efforts for other inmates to obtain religious services which the trial court accorded some weight; (4) the defendant was abused as a child which was considered previously which the trial court accorded some weight; (5) the defendant served in the Army National Guard and received an honorable discharge which the trial court accorded some weight; (6) the defendant has artistic ability which the trial court accorded little weight; (7) the defendant as corresponded with school children to deter them from being involved in crime which the trial court accorded some weight. (XII 2251-2252). The trial court found that the aggravating circumstances outweighed the mitigating circumstances and imposed death. (XII 2253).

The death sentence in this case is proportionate. This Court has found the death penalty proportionate in other similar cases. In Gordon v. State, 704 So.2d 107 (Fla. 1997), this Court affirmed the death penalty as proportionate for the drowning murder of a robbery victim. The evidence established the four aggravating factors: (1) murder during commission of burglary; (2) pecuniary gain; (3) heinous, atrocious, and cruel and (4) cold, calculated, and premeditated, and only minimal evidence in mitigation. In Zack v. State, 753 So.2d 9, 26 (Fla. 2000), this

Court found the death penalty proportionate where there were four valid aggravating factors: (1) the murder was committed in conjunction with a robbery, sexual battery, or burglary; (2) the murder was committed for financial gain; (3) the murder was especially heinous, atrocious, and cruel; and (4) the murder was committed in a cold, calculated, and premeditated manner and three statutory mitigators: (1) the murder was committed under an extreme mental or emotional disturbance; (2) the murder was committed under extreme duress; and (3) the defendant lacked the capacity to appreciate the criminality of his conduct which were given little weight and three nonstatutory mitigators: (1) defendant's remorse; (2) defendant's voluntary confession; and (3) the good conduct of the defendant while incarcerated.

Here, like Gordon and Zack, the four aggravating factors of: (1) murder during commission of a kidnapping; (2) pecuniary gain; (3) heinous, atrocious, and cruel and (4) cold, calculated, and premeditated are present. However, unlike Gordon or Zack, this case involves the additional aggravator of avoid arrest. There are five aggravator present her. Thus, this crime is more aggravated than either Gordon or Zack. Moreover, while the trial court found seven non-statutory mitigators, here, as in Gordon, it assigned little weight to two of the seven. The remaining five were granted some weight. Zack involved six mitigators, three of which were statutory. Here, there is one additional mitigator; however, two of the mitigator were only granted "slight" and "little" weight. Thus,

like Gordon and Zack, there is not significant mitigation in this case.

Moreover, this court has found factually similar murders to deserve the death penalty. This Court has affirmed the death penalty for cases in which the victim's throat was slit.[9] Additionally, this Court has found the death penalty the appropriate punishment where a store clerk is robbed and then driven away from the store into a remote location and then killed.[10] Appellant's reliance on Ray v. State, 755 So.2d 604

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[9] Lott v. State, 695 So.2d 1239 (Fla. 1997)(concluding death penalty sentence was proportionate where victim was slashed in throat and stabbed in back);Cole v. State, 701 So.2d 845, 856 (Fla. 1997)(affirming death penalty where court found the four aggravating factors of heinous, atrocious, and cruel, prior violent felony for contemporaneous conviction, murder committed during kidnaping, and pecuniary gain, and two nonstatutory mitigating factors of mental incapacity and deprived childhood, where defendant and accomplice killed victim by beating him in head and slitting his throat).

[10] Stevens v. State, 419 So.2d 1058 (Fla. 1982)(affirming death penalty where after the convenience store robbery, the cashier was abducted, raped and murdered); Bush v. State, 461 So.2d 936 (Fla. 1984)(affirming death penalty for where defendant kidnapped convenience store clerk after the robbery and after driving the victim thirteen miles from the store, stabbing her in the abdomen and shooting her once in the back of her head at close range where there were three aggravators: (1) previous conviction of a felony involving the use of threat of violence to the person; (2) murder committed while engaged in robbery and kidnapping; and (3) murder committed in a cold, calculated, and premeditated no mitigating circumstances); Cave v. State, 476 So.2d 180 (Fla. 1985)(affirming death penalty of one of Bush's co-perpetrators); Parker v. State, 476 So.2d 134 (Fla.1985)(affirming death penalty of another one of Bush's co-perpetrators); Herring v. State, 446 So.2d 1049 (Fla. 1984)(affirming death penalty of a murder of a convenience store clerk where there where four aggravators: (1) was previously convicted of an unrelated armed robbery; (2) committed the murder in the course of a robbery; (3) committed the murder for

(Fla. 2000) and Urbin v. State, 714 So.2d 411, 416 (Fla. 1998), is misplaced. In Ray, this Court held that the death sentence was disproportionate. Ray, 755 So.2d at 611. Ray involved coperpetrators; one received a life sentence and the other received a death sentence. The Ray Court explained that a defendant and equally culpable codefendants should receive equal punishment. Moreover, ignoring the co-perpetrator aspect of Ray, the trial court found three aggravators and this court then reduced the three to two aggravators. By contrast, here, there are five aggravators. In Urbin, this Court held that the death sentence was disproportionate. However, this Court found it "compelling" that Urbin was seventeen years old at the time of the murders. Card was in his thirties at the time of this murder. (XXXI 127). Furthermore, Urbin involved two statutory mitigators: age and Urbin's capacity to appreciate the criminality of his conduct was substantially impaired. Neither of these is present here. There are no statutory mitigators in this case. Ray and Urbin are inapposite. Thus, the penalty penalty for this most aggravated and least mitigated crime is proportionate.

Harmless Error

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the purpose of avoiding arrest and (4) committed the murder in a cold, calculated and premeditated manner but the cold, calculated and premeditated but CCP aggravator was subsequently struck down and two mitigators: (1) nineteen years of age at the time of the crime and (2) a difficult childhood and learning disabilities).

The harmless error concept does not apply to determinations of proportionality. Harmless error in sentencing usually involves an appellate court determining that the sentence imposed would have been imposed regardless of the error that occurred in the trial court. The concept is inapplicable in this context.

ISSUE VI

DID THE TRIAL COURT PROPERLY DENY THE MOTION TO REQUIRE UNANIMITY IN THE JURY'S RECOMMENDATION REGARDING THE DEATH PENALTY? (Restated)

Card asserts that this Court's precedent allowing a jury to recommend a death sentence based upon a simple majority vote should be reexamined in light of Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). The State respectfully disagrees. Apprendi is simply inapposite to the issue of whether a jury recommendation should be unanimous. Apprendi requires that a fact that is used to increase the statutory maximum be treated as an element of the crime; it did not change the jurisprudence of unanimity. Moreover, Apprendi concerns what the State must prove to obtain a conviction not the penalty imposed. Additionally, the Apprendi Court, specifically addressing capital sentencing schemes such as Florida's, stated that the holding did not effect their prior precedent in this area. The Apprendi majority specifically noted that their holding did not overrule Walton v. Arizona, 497 U.S. 639, 649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). A judge still may be the final sentencer in a death penalty case. Thus, the trial court properly refused to require the jury reach an unanimous recommendation.

The trial court's ruling

Appellant filed a written motion to require the jury's death recommendation be unanimous. (V. X 1864). Appellant asserted that due process required jury unanimity. The trial court heard various defense motions pretrial. Defense counsel acknowledged

controlling authority against him on the issue of jury unanimity but asserted that "there's a fundamental due process right to have an unanimous verdict" (V. XXI 2741). Defense counsel argued that numerous other states and the federal death penalty all required unanimous verdicts and that a unanimous verdict is required for every other decision a jury makes. The trial court denied the motion. (V. XXI 2742). The trial court also denied the motion in writing. (V. X 1983). Appellant renewed the objection at trial (XXXI 155). The trial court instructed the jury that their recommendation did not have to be unanimous. (XXXI 151).

Preservation

While appellant's due process based argument is preserved, appellant's Apprendi based argument is not preserved. Appellant did not assert that the jury rather than the jury must determine the death penalty as he now argues on appeal; he only asserted that any jury recommendation needed to be unanimous. One claim involves who should be the decision-maker; whereas, the other claim acknowledges that the judge can be the final decision maker based on the jury's unanimous recommendation. Appellant never argued that the judge could not impose the death penalty in the trial court and therefore, that part of his argument is not preserved.

The standard of review

Whether due process or the right to a jury trial is violated is reviewed *de novo*. United States v. Fria Vazquez Del Mercado, 2000 WL 1224538, *1 (10th Cir. 2000)(noting that whether a violation of a defendant's Fifth Amendment due process rights occurred is reviewed de novo).

Merits

The sentence of death statute, § 921.141(3), provides:

> Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . .

The legislature has determined that a jury recommendation of death may rest on a simple majority vote, *i.e.* seven of the twelve jurors. Way v. State, 760 So.2d 903, 924 (Fla. 2000)(Pariente, J., concurring)(noting that it is a statute that allows the jury to recommend the imposition of the death penalty based on a non-unanimous vote). This Court has consistently held that a jury may recommend a death sentence on simple majority vote.[11] The United State Supreme Court has also held that even a finding of guilt does not need to be unanimous.[12]

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[11] Thompson v. State, 648 So.2d 692,698 (Fla. 1994)(holding that it is constitutional for a jury to recommend death based on a simple majority and reaffirming Brown v. State, 565 So.2d 304, 308 (Fla. 1990); Alvord v. State, 322 So.2d 533 (Fla. 1975)(holding jury's advisory recommendation as the sentence in a capital case need not be unanimous).

[12] *Cf.* Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)(holding a conviction based on plurality of nine out of twelve jurors did not deprive defendant of due process and did not deny equal protection); Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972)(holding a

Nor does the constitution require that jurors agree on a particular theory of liability. Schad v. Arizona, 501 U.S. 624, 631, 111 S.Ct. 2491, 2497, 115 L.Ed.2d 555 (1991)(plurality opinion)(holding that due process does not require jurors to unanimously agree on alternative theories of criminal liability but declining to address whether the constitution requires a unanimous jury verdict as to guilt in state capital cases).

In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the United States Supreme Court held that due process and the right to a jury trial require that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Apprendi fired several .22-caliber bullets at the home of a black family. Apprendi pleaded guilty to possession of a firearm for an unlawful purpose. The judge sentenced Apprendi to twelve years' incarceration. The normal maximum sentence for this crime was ten years. However, a New Jersey hate crime statute doubled the maximum sentence to twenty years if the defendant committed the crime for the purpose of intimidation based on race, color, gender, handicap, religion, sexual orientation or ethnicity. The statute allowed the trial court to find biased purpose based on a preponderance of the evidence standard. Apprendi argued that due process required that the jury rather than a judge make the determination of biased purpose and that the State must

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conviction by less than unanimous jury does not violate right to trial by jury and explaining that the Sixth Amendment's implicit guarantee of a unanimous jury verdict is not applicable to the states).

prove biased purpose beyond a reasonable doubt rather than by a preponderance of the evidence. In other words, Apprendi asserted that biased purpose was an element of the crime rather than a "sentencing factor". The Apprendi Court agreed and noted that the distinction between an element of the offense and a "sentencing factor" was not made at common law. The Apprendi Court noted and relied on their recent case of Jones v. United States, 526 U.S. 227, 251, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), which construed a federal statute. In Jones, the United States Supreme Court held that "serious bodily injury" was an element of the crime rather than a sentencing factor which consist with due process and the right to a jury trial must be determined by a jury beyond a reasonable doubt.

However, the majority specifically rejects any argument that the holding in Apprendi effects the Court's prior precedent upholding capital sentencing schemes that require the judge to determine aggravating factors rather than the jury prior to imposing the death penalty. Apprendi, 120 S. Ct. at 2366, *citing,* Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). In Walton, the United States Supreme Court held that Arizona's death penalty scheme did not violate the Sixth Amendment right to a jury trial. Walton asserted that all the factual findings necessary for a death sentence must be made by a jury, not by a judge. Walton claimed that a jury must decide aggravating and mitigating circumstances. The Walton Court rejected this claim, noting that any argument that the Constitution requires that a jury impose the sentence of death

or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court. Id. *citing* Clemons v. Mississippi, 494 U.S. 738, 745, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725 (1990). The Walton Court noted that constitutional challenges to Florida's death sentencing scheme, which also provides for sentencing by the judge, not the jury, have been repeatedly rejected.[13] As the Apprendi Court explained, Walton did not involve a judge determining the existence of a fact which enhanced the crime to a capital offense; rather, in death penalty cases, the jury determined whether a capital crime had been committed. The Apprendi Court noted that it is constitutional to have the judge decided whether the maximum penalty of death or a lesser one should be imposed. Basically, because death is within the statutory maximum for first degree murder, a judge may determine the facts relating to a sentence of death just as the judge may do with any other fact within the statutory maximum.

Justice Scalia, who joined the majority opinion, also wrote a short concurrence to address certain points in the dissent. Apprendi, 120 S. Ct. at 2367. He reasoned that the dissent is unable to explain what the right to a jury trial means if it

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[13] Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam)(stating that this case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

does not mean the right to have a jury determine those facts that determine the maximum sentence. He asserts that the dissent provides no coherent alternative to this position. Justice Scalia explained that if a person commits a crime and to gets less than the statutory maximum, "he may thank the mercy of a tenderhearted judge". Thus, Justice Scalia views any fact finding by the judge within the statutory maximum as fact finding in mitigation. He also writes that a defendant's guilt "will be determined beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizen".

First, this is not the majority opinion and therefore, no part of the actual holding of Apprendi. Moreover, this statement concerning jury was clearly dicta. By this one sentence, Justice Scalia did not mean that the federal constitution requires a jury of twelve and that a jury's verdict must be unanimous in state court. Furthermore, Justice Scalia did not cite or discuss Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). Justice Thomas, who also joined the majority opinion, also wrote a concurring opinion. Apprendi, 120 S.Ct. at 2368. He reasoned that any fact the imposes or increases punishment is an element of the crime. He contrasted this with facts in mitigation. Thus, any aggravating fact must be determined by a jury but any mitigating fact may be determined by a judge.

Justice Thomas discussed capital sentencing schemes where the judge rather than the jury determines the death penalty. Apprendi, 120 S.Ct at 2380. He explained theat the death

penalty was a “unique context” where the Court has imposed special constraints on the legislature’s ability to determine which facts will lead to which punishment and to define crimes. Justice Thomas noted that the Court has prohibited legislatures from making the death penalty mandatory. Thus, the Court has “interposed a barrier” between a jury finding of a capital crime and the sentence of death. However, Justice Thomas conceded that whether these distinctions are sufficient to put capital punishment outside the Apprendi rule is a question for another day.

The dissent, written by Justice Conner and joined by three other Justices, would allow the legislature to determine which facts may be determined by the judge. The dissent also discussed Walton. Apprendi, 120 S.Ct at 2387. The dissent explained that under Arizona law, the judge, not the jury, determines if the penalty will be death based on aggravating and mitigating facts. The Apprendi dissent views the decision in Walton as allowing the judge to determine a fact that increases the penalty for first degree murder to death. In the dissent’s view, the statutory maximum for first degree murder is actually life. The dissent then reasons that if a State can remove from the jury’s province to determination of facts that make the difference between life and death, as Walton holds, then it is “inconceivable why a state cannot do the same with a determination of facts that increased the penalty by ten years as New Jersey statute did.

Appellant makes the same argument that the majority in Apprendi rejects, *i.e.* that the jury must make the final determination of death. The majority reasons that the statutory maximum is death and the trial court is determining a fact within the statutory maximum as he may constitutionally do. While the dissent views that statutory maximum for murder in the same light as appellant, *i.e.* that life is actually the statutory maximum, the dissent clearly rejects the assertion that there is anything constitutionally improper about have the judge determine fact beyond the statutory maximum. Thus, the United States Supreme Court has specifically rejected appellant's contention as to the meaning of the holding in Apprendi. Furthermore, Apprendi concerned facts that increased the penalty; facts that are within the statutory maximum may still be determined by the judge. Apprendi involved facts that increased the statutory maximum; whereas, the statutory maximum for first degree murder is death. The jury determines if the defendant is guilty of first degree murder. The judge then determines if the maximum sentence or some lesser sentence should be imposed. There is no increase in the penalty depending on some critical fact in a death penalty case as there was in Apprendi. Additionally, the death penalty is not a fact; it is a penalty. While aggravators and mitigators are factual findings, the weighing process is not a factual finding. Kearse v. State, 25 Fla. L. Weekly S507 (Fla. 2000)(stating that the weight to be given a mitigating circumstance is within the trial

court's discretion and its decision is subject to the abuse of discretion standard).

Moreover, Apprendi is inapposite because it concerned who was going to determine a fact, *i.e.* the judge or the jury, not the required composition of the jury. Apprendi simply has nothing to say regarding either the number of jurors required or the unanimity required of a jury. The holding was that due process and the right to a jury trial required that a jury make the determination of certain facts rather than the judge. Apprendi said nothing about what is a "jury". Thus, Apprendi did not effect capital sentencing in any manner and certainly did not change the jurisprudence of jury unanimity.

One State Supreme Court has held that Apprendi does not apply to capital sentencing schemes in which judges are required to find aggravating factors before imposing the death penalty. The Delaware Supreme Court, in State v. Weeks, 2000 WL 1694002 (Del. November 9, 2000), rejected a due process challenge to Delaware's bifurcated capital punishment procedure because they were "not persuaded that Apprendi's reach extends to state capital sentencing schemes in which judges are required to find specific aggravating factors before imposing a sentence of death". Id. *citing* Apprendi, 120 S.Ct. at 2366, *citing* Walton v. Arizona, 497 U .S. 639, 647-49 (1990). The Delaware Supreme Court explained that the aggravating factors set forth in § 4209 do not constitute additional elements of capital murder separate from the elements required to be established by the State in the guilt phase. The finding of an aggravating factor does not

"expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." Id *quoting* Apprendi, 120 S.Ct. at 2365.

Because jury unanimity is not required to recommend death, it necessarily follows that the trial court did not err in refusing to so instruct the jury. *Cf.* People v. Bradford, 939 P.2d 259, 352 (Cal. 1997)(explaining that because jury unanimity regarding which criminal acts the defendant had committed in order to consider them as circumstances in aggravation is not required, it follows that the trial court did not err in refusing to so instruct the jury). Thus, the trial court properly instructed the jury that a death recommendation does not have to be unanimous.

ISSUE VII

DID THE TRIAL COURT PROPERLY DENY THE SPECIAL JURY INSTRUCTION ON COLD CALCULATED AND PREMEDITATED? (Restated)

Appellant asserts that the trial court improperly denied his request for a special jury instruction on cold, calculated and premeditated which stated that a heightened level of planning does not establish heightened premeditation. The State respectfully disagrees. The special requested jury instruction regarding premeditation is not applicable to this case. Thus, the trial court properly gave the standard jury instruction on cold, calculated and premeditated rather than the special requested instruction.

The trial court's ruling

Appellant submitted a written request for a special jury instruction which stated: heightened level of planning for a robbery, even if it does exist, does not establish a heightened premeditation for murder. (R. XI 1985). The written request cited

Hardwick v. State, 461 So.2d 79 (Fla. 1984) as support. The trial court denied the request. At the charge conference, the prosecutor explained to the trial court that defense counsel had requested a special instruction on CCP. (XXX 73-74). Defense counsel explained that he wanted a special instruction based on Hardwick, which informed the jury that a heightened level of planning for a robbery does not establish a heightened premeditation for murder. (XXX 76). The prosecutor objected

because it confused robbery with murder. The trial court denied the request. Defense counsel also requested an expanded special instruction on HAC based on Cooper v. State, 336 So.2d 1133, 1141 (Fla. 1976).(R. XI 1987). At the charge conference, the trial court agreed to give this special instruction. (T. XXX 82-83). At trial, defense counsel renewed his objections to the jury instructions. (XXXI 155).

Preservation

This issue is preserved. Appellant properly submitted a written request for this special jury instruction pretrial and obtained a ruling from the trial court. Fla.R.Crim.P. 3.390(c);Gavlick v. State,740 So.2d 1212, 1213 (Fla. 2d DCA 1999)(holding the failure to file a written request for a special instruction precludes appellate review particularly where the oral request was to redefine an issue covered by the Standard Jury Instructions). Moreover, appellant properly renewed this request at the charge conference. (XXX 74,76). Accordingly, this issue is preserved. Jackson v. State, 648 So.2d 85, 90 (Fla. 1994)(finding issue of CCP jury instruction properly preserved for review where defendant objected to the form of the instruction at trial, asked for an expanded instruction which mirrored this Court's case law).

The standard of review

A trial court's ruling on whether or not to give a special jury instruction is reviewed under the abuse of discretion

standard. Shearer v. State, 754 So.2d 192, 194 (Fla. 1st DCA 2000); James v. State, 695 So.2d 1229, 1236 (Fla. 1997)(explaining that a trial court has wide discretion in instructing the jury and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal). A judgment will not be reversed for failure to give a particular jury charge where, overall, the instructions given are clear, comprehensive and correct. Shearer v. State, 754 So.2d 192, 194 (Fla. 1st DCA 2000).

Merits

Appellant asserts that this Court's holding in Davis v. State, 698 So.2d 1182, 1192 (Fla.1997) is inconsistent with this Court's holding in Castro v. State, 597 So.2d 259, 261 (Fla. 1992). These cases are not inconsistent. In Castro v. State, 597 So.2d 259, 261 (Fla. 1992), this Court explained that an instruction against doubling aggravators may be given when requested, if applicable.

In Davis v. State, 698 So.2d 1182 (Fla. 1997), *cert. denied,* 522 U.S. 1127, 118 S.Ct. 1076, 140 L.Ed.2d 134 (1998), this Court held that expanded instructions on aggravators were not required. Davis argued that the standard jury instruction on the avoid arrest aggravator was incomplete because the victim was not a law enforcement officer. Davis asserted that the jury should have been instructed that they could find this aggravator only if the State had proven beyond a reasonable doubt that the dominant or only motive for the killing was elimination of the

witness because this Court's decisions in this areas so hold. However, the Davis Court explained that not every court construction of an aggravating factor must be incorporated into a jury instruction on that aggravator. See Jackson v. State, 648 So.2d 85, 90 (Fla.1994) (qualifying that not every aggravating factor necessarily requires instruction that incorporates judicial interpretation of that factor).

In Hitchcock v. State, 755 So.2d 638 (Fla. 2000), this Court explained that the expanded jury instruction on "doubled aggravators" should only be given if applicable. Hitchcock requested the doubling instruction but he did not inform the trial court of the aggravators that he alleged would constitute doubling. Thus, this court found that the expanded special instruction did not apply. Hitchcock, 755 So.2d at 644

Here, as in Hitchcock, the expanded instruction on premeditation does not apply here. The requested jury instruction informed the jury that they were not to transfer the intent to rob to establish an intent to kill. While the requested is instruction is accurate when the State's evidence only shows a plan to rob, the instruction should not be given when, as here, the plan was to both rob and kill.

Appellant's reliance on Hardwick v. State, 461 So.2d 79 (Fla. 1984), to support the giving of this instruction is misplaced. In Hardwick, this Court held that premeditation or planning of the underlying felony cannot, in and of itself, support a finding of premeditation for murder. The Hardwick Court observed that only evidence presented that the murder involved

heightened premeditation was that Hardwick intended to rob the victim. The Hardwick Court explained that the premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue. *See also* Castro v. State, 644 So.2d 987, 991 (Fla. 1994)(while the defendant clearly planned to rob the victim, this does not show the careful design and heightened premeditation necessary to find that the murder was committed in a cold, calculated, and premeditated manner).

In Barwick v. State, 660 So.2d 685, 696 (Fla. 1995), this Court concluded that the trial court erred in finding the heightened premeditation necessary to establish the cold, calculated, and premeditated aggravator. The trial court found the murder to be cold, calculated, and premeditated. The trial court's order stated that Barwick in a calculated manner selected his victim and watched for an opportune time and that he planned his crimes. The trial court noted that he selected a knife, gloves for his hands, and a mask for his face so that he could not be identified but when struggling with the victim the mask was pulled from his face, and knowing that he could be identified, he proceeded to kill her. The trial court also observed the defendant had planned a sexual battery or burglary or robbery or all three, had armed himself to further those purposes and when a killing became necessary he killed her.

However, this Court conclude that the evidence did not demonstrate that Barwick had a careful plan or prearranged design to kill the victim. Rather, the evidence suggests that Barwick planned to rape, rob, and burglarize rather than kill. A plan to kill cannot be inferred solely from a plan to commit or the commission of another felony.

Barwick is a robbery "gone bad" case. This robbery did not go badly; rather, it went exactly as planned. The robbery plan here included a plan to murder. Barwick selected a knife, gloves for his hands, and a mask for his face so that he could not be identified but when the mask was pulled from his face, he proceeded to kill her. Here, the defendant selected a knife, gloves for his hands but did not wear a mask. Card could be identified by this victim instantaneously. The victim here knew Card and would easily identify him as the robber as he well knew. Card wore gloves. There was no reason to wear gloves if Card left an eyewitness who actually knew him personally as did this victim. Wearing gloves has no purpose where the victim can identify the perpetrator because the purpose of wearing gloves is to prevent identification. Card would not being wearing gloves unless he was planning to eliminating the witness. Furthermore, there is no purpose or reason to drive the victim to a secluded area unless it was to kill her undetected. Indeed, it is obvious that Card intended to kill the victim from the start. Here, unlike Hardwick, where the only evidence presented that the murder involved heightened premeditation was the intention to rob the victim, Card's intention was to both to

rob and to murder. Hardwick and Barwick do not prohibit the prosecution from asserting that the original plan was to both rob and murder; rather, they are prohibit the transfer of the intent to rob to the murder where there was no plan to murder. They do not apply where the original plan includes a plan to murder.

Harmless error

The error, if any, in failing to give the special instruction was harmless. The jury would have found this murder to be premeditated regardless of the omission in the jury instruction.

Monlyn v. State, 705 So.2d 1, 5 (Fla. 1997)(holding that error in giving unconstitutional cold, calculated and premeditated instruction was harmless because the facts established that the killing was CCP under any definition). Card drove the victim nearly nine miles into a secluded wooded area and then killed her. During this trip, appellant had ample opportunity to reflect on his actions and to form the heightened premeditation required to find the murder cold calculated and premeditated. The jury would have found premeditation for the murder regardless of the facts of the robbery at the Western Union office. Thus, any error in failing to give the instruction was harmless.

ISSUE VIII

DID THE OTHER ERRORS AMOUNT TO REVERSIBLE ERROR? (Restated)

Appellant asserts numerous other errors, including (1) that the standard jury instruction informing the jury that their recommendation was advisory violates Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (2) that three of the aggravators used in this case: murder committed during a kidnapping, the void arrest aggravator and the pecuniary gain aggravator failed to narrow the class of person eligible for the death penalty (3) that the defendant should be allowed to present testimony regarding the effect of his execution on his family and (4) improper victim impact testimony concerning the appropriate punishment was allowed mandate reversal. The State respectfully disagrees. Issues (1), (2) and (3) have been rejected previously by this Court and appellant offers no reason for this Court to recede from its prior precedent. Moreover, the jury heard no improper victim impact evidence. Thus, the trial court properly conducted the resentencing hearing.

The trial court's ruling

Appellant's mother testified. (XXIX 22-55). Defense counsel asked whether she wanted her son to die and she responded: "no, I definitely do not" (XXIX 52). Defense counsel asked what the impact of the defendant's execution would be on her family but the prosecutor objected because this testimony does not concern the defendant's character. (XXIX 53). The trial court sustained

the objection and defense counsel withdrew the question. (XXIX 53). During Lisa Fisher's testimony, who is Card's niece, defense counsel asked whether she wanted her uncle executed and she responded: "absolutely not" and that it would devastating. (XXX 52,58). Defense counsel requested a proffer of the possible impact of the defendant execution on the family. (XXX 60). The trial court stated that defense counsel provided a sufficient proffer. (XXX 61). During John Card's testimony, who is the defendant's brother, defense counsel sought to proffer the impact of any execution on the defendant's family. (XXXI 5, 25). Defense counsel proffered the response that it would devastate the family. (XXXI 26) The trial court prohibited such testimony. (XXXI 25).

Appellant filed motions challenging the constitutionality of the "course of a felony" aggravator, the avoid arrest aggravator and the pecuniary gain aggravator. (X 1848-1853). Appellant argued that these aggravators fail to narrow the class of defendant that are death eligible. The trial court held a hearing on the various motions, prior to the trial, at which it denied these three motions. (T. XXI). However, constitutionality of (1) the heinous, atrocious and cruel aggravator; (2) the cold, calculated and premeditated aggravator were not challenged. Moreover, appellant did not claim that the other three aggravators were overbroad or vague in his motion; merely that they did not narrow the class. Defense counsel objected to victim impact evidence in a motion and contemporaneously

objected to the husband's and the daughter's testimony. (T XXVII 81).

Preservation

Appellant's claim regarding the victim's granddaughter testimony at the Spencer hearing regarding her opinion of the proper punishment was not preserved for appellate review. Counsel did not contemporaneously object to this testimony. Thus, the granddaughter's testimony is not preserved for review.

Defense counsel objected to contemporaneously objected to the husband's and the daughter's testimony. The trial court granted defense counsel a standing objection to both of their testimony. (XXVIII 81). Thus, this issue is preserved.

The standard of review

Appellant raises two claims related to the exclusion and the admission of testimony. The standard of review for the admission of testimony is the abuse of discretion standard. *See* General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997)(stating that all evidentiary rulings are reviewed for "abuse of discretion"). Appellant also raises a claim that the jury instruction is an incorrect statement of the law. Whether a jury instruction accurately states the law is an issue of law reviewed de novo. United States v. Hopper, 177 F.3d 824, 831 (9th Cir. 1999).

Merits

Appellant argues that the standard jury instruction the jury's role in sentencing is incorrect in light of Caldwell v. Mississippi, 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). This Court has specifically rejected both claims. This Court has repeatedly held that the standard jury instruction does not violate Caldwell. Brown v. State, 721 So.2d 274, 283 (Fla. 1998)(stating the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, and does not denigrate the role of the jury); Archer v. State, 673 So.2d 17, 21 (Fla. 1996)(stating that "Florida's standard jury instructions fully advise the jury of the importance of its role.");Sochor v. State, 619 So.2d 285, 291 (Fla. 1993)(stating "Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate Caldwell.")

In Burns v. State, 699 So.2d 646 (Fla. 1997), this Court rejected the Espinosa based attack on the standard jury instruction. Burns contended that the trial judge erred in denying his request for an instruction informing the jury that its recommendation would be entitled to great weight. The trial judge instead gave the standard jury instruction. The Burns Court noted that the standard instruction has been upheld against similar attack.[14] However, Burns asserted that this

[14] See Sochor v. State, 619 So.2d 285, 291-92 (Fla. 1993); Grossman v. State, 525 So.2d 833 (Fla. 1988); Combs v. State,

Court should reconsider its position in light Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). In Espinosa, however, the Court merely recognized this Court statement that the trial court must give "great weight" to the jury's recommendation. The Burns Court explained that the standard jury instruction fully advises the jury of the importance of its role and correctly states the law. The Burns Court therefore rejected Burns' claim that the standard jury instruction is an incorrect statement of the law. Burns, 699 So.2d at 654.

Appellant then asserts that "reverse" victim impact statement should be admissible. In Burns v. State, 699 So.2d 646 (Fla. 1997), this Court rejected the exact same argument. Burns contended that the trial judge erred in excluding evidence of the potential impact of his execution on his own family. Burns proffered testimony from his sister and two daughters as to the effects his execution would have on them and their family members. Id at n.16 While Burns argued this evidence was relevant to his character and background and was therefore

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525 So.2d 853, 855-58 (Fla. 1988); Jackson v. State, 522 So.2d 802, 809 (Fla. 1988). The standard jury instruction informs the jury:

> although the final responsibility for sentencing is with the judge ... it should not act hastily or without due regard to the gravity of the proceedings, that it should carefully weigh, sift, and consider evidence of mitigation and statutory aggravation, realizing that human life is at stake, and bring to bear its best judgment in reaching the advisory sentence.

mitigating, this Court rejected the argument that this type of evidence is proper mitigation evidence. The proffered testimony went to establish that death was not an appropriate penalty because of the impact the execution would have on Burns' family. The Burns Court found that the trial court did not abuse its discretion in excluding this testimony concerning the sentence Burns' should receive. The Burns Court also rejected as meritless the contention that due process requires, in a kind of quid pro quo, the defense be allowed to introduce of this type of evidence to counterbalance the State's victim impact evidence. This Court distinguished this type of testimony from true victim impact evidence because the impact the defendant's family due to the defendant's execution does not mitigate the harm caused by the crime and thus is not relevant or statutorily authorized.

Appellant also challenges the constitutionality of (1) the heinous, atrocious and cruel aggravator; (2) the cold, calculated and premeditated aggravator; (3) the course of a felony aggravator; (4) the avoid arrest aggravator and (5) the pecuniary gain aggravator. Card asserts that all five of these aggravators are overbroad, vague and fail to narrow the class of persons eligible for the death penalty. First, aggravators are not subject to overbreadth challenges. Murder is not conduct protected by the First Amendment Only statutes that impact free speech are subject to First Amendment challenges, *i.e.* overbreadth challenges. Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources, 453 So.2d 1351, 1353 (Fla.

1984)(explaining that the overbreadth argument is clearly not appropriate because the possession and use of fish traps are not activities protected by the first amendment). Here, because the statutes at issue does not impact speech, no overbreadth challenge is possible. This Court has repeatedly rejected similar challenges to each of these aggravators. Henyard v. State, 689 So.2d 239 (Fla. 1996) (rejecting argument that HAC instruction is vague and unconstitutional); Klokoc v. State, 589 So.2d 219, 222 (Fla.1991)(rejecting claim that CCP factor in statute is unconstitutionally vague);Blanco v. State, 706 So.2d 7, 11 (Fla. 1997)(rejecting the argument that every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony because it is not automatic: the list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony and therefore, the scheme narrows the class of death-eligible defendants); Johnson v. State, 660 So.2d 637, 647 (Fla.1995)(rejecting argument that murder in the course of a felony acts as automatic aggravator); Kelley v. Dugger, 597 So.2d 262 (Fla. 1992)(rejecting claim that pecuniary gain aggravator is unconstitutionally vague).

Lastly, appellant claims that the trial court improperly allowed the victim's granddaughter to testify at the Spencer hearing regarding their opinions of the proper punishment. The victim impact statute does not permit testimony regarding the

crime, the defendant or the punishment that should be imposed. § 921.141(7), Florida Statutes (1999).

Appellant also asserts that the victim impact testimony of Cindy Brimmer and Ed Franklin regarding violates the statutory ban on victim testimony concerning opinions about the crime, the defendant or the appropriate sentence and violates due process. Ed Franklin, who was the victim's husband, testified. (XXVII 78-91). He was a cofranchisee of the Western Union business that was robbed. He established the amount of cash taken in the robbery, "a little over $1,100.00", by the receipts. (XXVII 85). Ed Franklin's victim impact testimony was one paragraph. (XXVIII 89-90). Cindy Brimmer's testimony was a scant nine pages. (XXVII 91-100). The testimony concerned the victim's movements on the day of the murder and whether her mother, the victim, knew the defendant. The State need to establish that the victim knew the defendant and could identify Card to establish premeditation and a motive for the murder. The victim impact testimony concerned her brother and his depression in the wake of their Mother's murder. (XXVII 97). She also read a statement to the jury about her mother which was a fairly typical victim impact statement. (XXVII 98-100). Neither Mr. Franklin nor Mrs. Brimmer violated the statutory ban on opinions about the crime, the defendant or the appropriate sentence. Rather, their testimony properly concerned the victim's uniqueness as an individual human being and the loss to the community from the victim's death. Not a single comments from either the husband or the daughter can be characterized as an opinion about the murder or appellant or the

punishment. Indeed, appellant does not even attempt to identify with particularity which victim impact statements were improper. If these victim impact statements violate due process, then all victim impact statements violate due process.

Harmless Error

Any error in the trial court's admission of the granddaughter's testimony was harmless error. Appellant argues that the prejudice to him is that the jury's recommendation was "predicated on unbridled passion". However, the jury did not hear the victim's granddaughter's testimony; only the trial court heard this testimony. Obviously, testimony which the jury does not hear cannot influence their recommendation. Thus, any error in the admission of the victim's granddaughter which was only heard by the trial court was harmless error. The other testimony that they did hear was proper victim impact evidence.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Steven L. Seliger, Esq., 16 North Adams Street, Quincy, FL 32351 this 21st day of November, 2000.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

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