IN THE SUPREME COURT OF FLORIDA

JAMES ARMANDO CARD, SR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NUMBER: SC 00-182

APPEAL FROM SENTENCE OF DEATH, CIRCUIT COURT FOR THE 14TH JUDICIAL CIRCUIT BAY COUNTY, FLORIDA LOWER TRIBUNAL NO: 81-518

INITIAL BRIEF OF APPELLANT

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Statement of the Case

(i) Nature of the Case

This is an appeal from a Bay County circuit court order imposing a death sentence on Mr. Card for the first-degree murder of Janice Franklin. This Court has jurisdiction pursuant to Rule 9.030(a)(1)(a)(i), Fl. R. App. Pr.

(ii) Course of proceedings and disposition in the lower tribunal

A Bay County grand jury indicted Mr. Card for the first-degree murder, robbery and kidnapping of Janice Franklin in 1981. Mr. Card pled not guilty. After a jury trial, Mr. Card was found guilty as charged on each count. (The trial had been moved to Okaloosa County). At the completion of the penalty phase, the jury recommended by a vote of 7-5 that Mr. Card be put to death for the murder. On January 28, 1982, the

trial court imposed a death sentence on the first-degree murder conviction. The judge sentenced Mr. Card to consecutive life prison terms on the robbery and kidnapping convictions. On direct appeal, the Court affirmed the convictions and death sentence. Card v. State, 453 So. 2d 17 (Fla. 1984)

(a) First round of post-conviction proceedings

On June 3, 1986, Mr. Card filed his first post-conviction motion pursuant to Rule 3.850, Fl. R. Cr. P. The trial court denied the motion. This Court affirmed the denial and denied an independent state habeas petition. Card v. State, 497 So.2d 1169 (Fla. 1986).

Mr. Card filed a federal habeas petition in the U. S. District Court for the Northern District of Florida. This petition was denied. On appeal, the Eleventh Circuit affirmed in part and remanded to the district court for further proceedings. Card v. Dugger, 911 F. 2d 1494 (11th Cir. 1990) The district judge again denied relief, and the Eleventh Circuit affirmed. Card v. Singletary, 963 F. 2d 1440 (11th Cir. 1992) The U. S. Supreme Court denied review. 114 S. Ct. 121 (1993)

(b) Second round of post-conviction proceedings.

Mr. Card filed a second post-conviction motion pursuant to Rule 3.850, Fl. R. Cr. P. on March 9, 1992. The trial court denied the motion. On appeal, this Court affirmed in part and remanded for an evidentiary hearing. Card v. State, 652 So. 2d

344 (Fla. 1995) The trial court held an evidentiary hearing and ordered that Mr. Card's sentence of death be vacated and that a new sentencing hearing be held. (R8-1367) Ultimately, the trial judge decided that the sentencing hearing would include a new jury. (R10-1724)

(c) Resentencing Trial.

This new sentencing proceeding resulted in a jury vote of 11-1 recommending death. (R11-2005) A new trial motion filed by the defense (R11-2012) and later supplemented (R11-2037) was denied. (R12-2247) The trial court then imposed a sentence of death.(R12-2248) From this final judgment, Mr. Card filed a timely notice of appeal. (R12-2277)

(iii) Statement of the Facts

(a) State Case

In June of 1981, Ed Franklin ran a refrigeration and air conditioning business from the back of the Western Union office at 32 Oak Avenue in Panama City. (R28-79, 33) The Western Union business was out front and Franklin's wife, Janice, ran the counter service for Western Union. (R28-80) She also helped her husband by answering the phone for his business. They had been at that location for 10 years. (R28-80) Janice Franklin was 41 years old. (R28-97)

Shortly before 3:00 p.m. on June 3rd, Mrs. Franklin spoke to her daughter

Cindy. They both were getting ready to watch General Hospital and Cindy expected to talk with her mother after the program was over. (R28-93) When Cindy called, her mother did not answer. (R28-93) About that time, two Panama City police officers were dispatched to the Western Union office. (R28-33) One officer, George Dobos, got there at 3:14 p.m., and did not see anyone. (R28-34) The front door was not locked so he secured the building. (R28-38, 34)

Inside the office, Dobos saw a lot of blood on the floor and furniture and the furniture was in a state of disarray. (R28-34) The teletype machine was on and a timeclock was overturned. (R28-42, 43) The safe located behind the counter was open and the cash drawer was removed from its slot and lay broken on the floor. (R28-35) The Franklins kept the money in the cash drawer, not the safe. (R28-87) There was no currency in the drawer. (R28-41) Later it was determined that $1,197.00 was missing. (R28-49) There was blood on the floor and on some of the items behind the counter. (R28-35) The television set above the safe was on. (R28-40) The back door was locked and bolted; Dobos concluded that no one had left that way. (R28-35) There was a set of footprints made in blood leading toward the front door. (R28-41)

The police determined that Janice Franklin was missing from the store. (R28-47) Her car was still in the parking lot across the street. (R28-47) Franklin's purse was hanging from a shelf inside the store but her wallet was missing. (R28-42) Franklin's

husband confirmed that his wife kept a wallet in her purse. (R28-88)

Also inside the Western Union office was an Easter card tacked on the wall; the card was signed by James Car. (R28-55) Janice and Cindy Franklin knew Card from his doing business at the Western Union. Cindy's mother told her that Card was the person who had sent her the Easter card that was posted on the wall. (R28-94)

Mrs. Franklin's body was found the next day (June 4th) at about 4:00 p.m. by an officer employed by the Game and Freshwater Fish Commission. (R28-49) She was not wearing any shoes and there was a bloody white cloth or napkin draped over her arm. (R28-49) She was not wearing a blouse but was wearing a bra. (R28-60) The body was found on a dirt road off Back Beach Road, about 8.5 miles from the Western Union building. The area was heavily wooded and had a single dirt road. There were no houses in that area. To get there from the Western Union, one would travel west on Highway 98, across the Hathaway Bridge and then drive on Back Beach Road for 2.2 miles to the dirt road. The body was about 1/4 mile off Back Beach Road. (R28-51)

Dr. Edmund Kielmon, the deputy medical examiner for the First Judicial Circuit, had died before the resentencing trial. (R28-66) His testimony from the prior trial was read to the jury. (R28-66) Dr. Kielmon did an autopsy on June 5th. (R28-71) A visual examination of the body revealed a very deep cut on the front of the throat that was

maggot infested. (R28-72) Mrs. Franklin was wearing a bra and blue pants and had rings on her left hand. (R28-72)

The throat wound was inflicted in a horizontal position from her right to left by a very sharp instrument. This would suggest the killer was left handed. The wound was 6-7 inches in length, 2 ½ inches deep. (R28-74, 75) The doctor opined that cutting was done by a person behind Mrs. Franklin. (R28-77) There were three slash marks on the fingers of her right hand and there appeared to be something like a stab wound on the back of this hand. (R28-76) One finger was almost severed. (R28-61) Her left hand also had cuts on the fingers. (R28-62, 76) The wounds to her hands looked like classic defense wounds, incurred while Mrs. Franklin was trying to protect herself from an attack with a knife. (R28-77) Mrs. Franklin also had a severe bruise on the back of her neck. (R28-78)

In June of 1981, Vicky Elrod lived in Pensacola. (R29-4) She was 28 years old and a friend of James Card. (R29-5, 17) She met him as a man named Mike Johnson about a year before. (R29-6) On June 3, 1981 Card called her at her home early in the morning. (R29-6) At the time, Card was living with his wife and three children. (R29-6) Card called her from Panama City to tell her he was coming to Pensacola to talk with her. She had loaned him a small amount of money in the past for gas and he told her he was going to pay her back. When she asked him not to come, Card told her he

would speak to her later. (R29-7)

At about 5:30 p.m., Card called her back. He told her he was coming to Pensacola and that it was very important that he talk with her. He told her he might be leaving Panama City. Again, Elrod told Card not to come. (R29-8) Later that night, Elrod got still another call from Card. Card said he had come to Pensacola and was staying at the Days Inn Motel. (R29-9) Card told her he would come to her house or she could meet him at the motel. She agreed to meet with him at the motel. It was now about 10:00 p.m. (R29-9)

At the motel, Card paid her the money he owed her. He took the money out of a blue pouch that had $100 and $20 bills. When she jokingly asked him if he had robbed a 7-11 store, he told her no, he had done something much more serious. (R29-10) Card told her he had robbed a Western Union store and killed the woman clerk with a knife. (R29-10) Card said the robbery happened about 3:00 p.m. (R29-10) Card said that he went into the Western Union armed with a Bowie knife in his pants and wearing rubber gloves. (R29-11) When he first went into the store, there was someone else present so he told the clerk he would come back later. (R29-11) When Card went back the second time, he went to the safe where he fought with the clerk. He then pulled a knife on her and told her to go outside. (R29-11) Card said he cut the clerk with his knife and tore her blouse. He got about $1,000; (R29-12) Card told

Elrod the money came from the safe. (R29-16)

Card took the woman at knifepoint about five or six miles away to a wooded area. (R29-13) When they got there, Card asked the woman to get out of the car, telling her he was not going to hurt her. As she was walking away, Card snuck up behind her, grabbed her by the hair, pulled her neck back and cut her throat. (R29-13) After he cut her throat, using his right hand, he told her to "die, die, die." (R29-13, 16) Card told Elrod that this was the first time he killed for money and he enjoyed it. (R29-14) He then cleaned up the knife and tossed it where no one could find it. (R29-14) Card said he knew the woman that he killed and that he and his wife had sent her an Easter card. The card was on the bulletin board inside the Western Union. (R29-14)

Card was arrested five days after Mrs. Franklin was reported missing June 3rd. (R28-51) While there was blood found in Card's car, the blood type did not match Mrs. Franklin's. (R28-63)

(b) <u>Defense Case</u>

James Card was the son of Gloria and Frank Card. (R29-27) His mother (now is Chenoweth) was born from Italian parents who came to this country in 1916. (R29-22, 23) The family stock was hardworking and religious, believing in the Catholic faith. (R29-23) In 1941, Gloria married Frank and divorced him five years later. She had two children with Frank (Sandra and John) and was pregnant with James at the time

of the separation and subsequent divorce. (R29-27) Frank Card always denied that James was his son (R29-54) and never had any contact with his children until they were teenagers. (R29-53)

A year after the divorce from Frank Card, Gloria married Darrell Scripter. (R29-30) Gloria had three additional children with Scripter. (R29-33) These were difficult times for the family; Scripter was cruel to the children. He clearly favored his own children and refused to be a father to Frank's children. (R29-37) He physically abused his wife and the kids. Scripter would physically abuse her in the children's presence. (R31-15) One time, Scripter threw a glass at her and hit her in the face. One of the children got a gun to shoot Scripter but another child intervened. (R29-36) In addition, he refused to contribute economically to the family. (R29-30) This meant Gloria had to work all of the time, often holding two jobs. She did not get to spend much time with her children. (R29-32)

James' older brother was John Card. (R31-5) Scripter was the adult male around as he and James grew up. John described Scripter as an evil man. (R31-6) Three examples were given to illustrate the point. James was diagnosed with a disease that was caused by drinking too much milk that affected his knees and ability to walk. (R29-37) The doctor advised James not to do any walking. Knowing this, Scripter left James and his mother at the doctor's office and they had to walk 15 miles to get home.

Once there, Scripter made James get down on his knees and dig a hole with a teaspoon. The doctor had also cautioned James about kneeling. (R29-38)

James loved animals very much. (R29-42) He was given a pet calf and he grew very attached to it. One day, Scripter shot and killed the calf and made James watch. (R31-20) The children thought Scripter was going to shoot them next. (R31-20) James was devastated when his animal got killed. (R29-34)

To teach James how to swim, Scripter simply threw James into a fast flowing river. James almost drowned as a result. (R31-24)

James and John were the objects of physical beatings on a daily basis; sometimes Scripter would use his fist, sometimes an open hand. Scripter's weapon of choice, however, was a leather belt with a brass hook buckle. Oftentimes Scripter's blows would be aimed at the children's heads. (R31-7-8) James would try to protect his older brother from the beatings by talking to Scripter, but Scripter responded by focusing his wrath on James. (R31-8) It got so bad at one point that John asked James to shoot Scripter, but James would not do it. (R31-9) These beatings were not for disciplinary purposes; the children sincerely believed that Scripter would kill them by beating them to death. (R31-9) The kids tried to tell people about their precarious situation but no one would listen. (R31-9)

With Scripter, the family first lived in a dangerous tenement project. (R31-11)

John took it upon himself to set a fire and burn their house up. (R31-12) The family then lived in a motel on skid row in Eureka, California until their grandmother paid for them to move into a real house. (R31-11) James was 4-5 years old. There was often not enough food for everyone and food was primarily supplied by the grandmother. (R31-12) John admitted that he would steal food to help feed the family. (R31-13) Any money Scripter got would be used for his own benefit to gamble, drink and pay for women. (R31-15) In large measure the kids were forced to take care of each other (R31-17) because their mother could not.

Sometimes the children could not go to school because they did not have clothes. When James got some new clothes from his grandmother, Scripter responded by beating him. Scripter had a particular dislike for James. (R31-19)

After years of marriage, Gloria divorced Scripter. (R29-39) She was a single parent for about two years and then married Dick Taylor. (R29-39) Unlike Scripter, Taylor was good to her and the children. (R29-39)(R31-16) James was in a car accident with Mr. Taylor and suffered a head injury. (R29-41) It was not the only one he had; he also fell off a tree on his head and knocked unconscious. (R31-20) After a short marriage, Dick Taylor died abruptly. (R31-16; R29-40) The children were uniformly upset because Taylor had been a real father to them. (R31-16; R29-40-41)

After Taylor died, Gloria remarried Scripter. (R29-41) Not surprisingly, the children were very unhappy. After a brief respite from violence, Scripter started it all over again. (R31-16)

In October of 1975, James married Linda Graybill. (R30-32) She met James through his mother and she instantly fell in love with him. (R30-32) Linda could tell that James and his mother were close and loved each other very much. (R30-32) By the time of the marriage, James' real father was back. Frank denied that James was his child, saying that Gloria had been sleeping with someone else at the time she became pregnant with James. (R30-22) Frank also denigrated James in front of her and their child. (R30-32) James very much wanted his father to be proud of him but Frank either ignored him or told James how great John was but that James was nothing. (R30-32)

Linda thought the relationship between James and his father had a profound impact on James. It explained why James had a difficult time with self-esteem and why James so wanted to impress others that he would make up stories. (R30-33, 34) One exaggeration involved James claiming he served during the Vietnam War. This was not true. (R31-22) He did serve in the Arizona National Guard and was honorably discharged from that unit. (R29-43) Another time, her parents had loaned them some money to fix their car. James took the money and lost it gambling; Linda then left him. She then got a phone call from the hospital telling her that James had been shot by

someone else. Apparently after an investigation, the police concluded that James had shot himself. (R30-34-35)

James worked hard as a truck driver to earn a living but was not very successful. (R30-36) When he thought Linda was seeing another man, he cut himself with a knife and ended up in the psychiatric ward of the Veterans Administration hospital. (R30-37) James could not handle rejection. (R30-35) After an incident with their child, Linda felt she had to divorce him. She did think that like everyone but his mother, she had given up on James. (R30-39) Linda's brother Robert Graybill enjoyed being with James. In his presence, James was hyper and had a high energy level. (R30-7) James could make Robert laugh and they enjoyed common pursuits, such as music. (R30-6) Robert could tell that James truly loved his sister. (R30-7) James wanted to be a part of the Graybill family and when it did not work out, James was very unhappy. (R30-8) Robert also picked up on James' need to have people think he was important; that he mattered. (R30-10)

Neither Linda or Robert nor Linda and James' daughter had seen James since 1978. (R30-41); (R30-5) The daughter, Dawn Castro, was now an adult. (R30-44) She had no memory of her father but had been looking for him for sometime. She found him two months before the trial and she wants to establish and maintain that connection. (R30-45) Linda wanted her daughter to know her father. (R30-42)

Dennis Cunningham had known James for over 30 years as a good friend. (R30-47-48) In July of 1972, Cunningham and his wife and two children were on vacation when a car accident claimed the life of his wife, Twila. Cunningham felt like his life was over. (R30-49) During the next couple of years, James supported Cunningham emotionally as well as helping with the chores and kids. Cunningham believed that he owed James a great debt and he wanted to convey from this experience what kind of man James Card was and could be. (R30-50)

Lisa Fischer was James' niece; James is her uncle. (R30-52) Growing up, James doted on her; they were very close. She had fond memories of their times together. (R30-53) After her mother was killed in the accident, James would keep in touch with her and name it a point to stop in and see her whenever he was driving his truck. (R30-54) Lisa was proud of the present relationship she had with her uncle and he encouraged her with her education and life goals. (R30-57) Lisa described James as a compassionate man. (R30-58) James' oldest sister Sandra, who was Lisa's mother, was killed by a drunk driver in 1973. (R30-52-53) Sandra's death devestated James. (R30-56)

After James was arrested and convicted of the murder of Janice Franklin, he was sentenced to prison. In 1984, he got his GED. (R29-52) James also began both physical and letter contact with Catholic Church clergy. Father Joe Maniangat met

James at Florida State Prison in December 1983 through his prison ministry. (R29-5) Since that time, he has met with him on a regular basis. (R29-5) James participates in religious ceremonies and is a beautiful artist. (R29-7) Father Maniangat knew that James got along well with other prisoners. (R29-7) He thought James was a man of deep faith and commitment in his relationship with God. (R29-9) The Father believed James could function well in a prison setting. (R29-11)

William Treney is the director of Catholic Charities Bureau for the Diocese of St. Augustine. (R30-11) This diocese includes Florida State Prison. (R30-12) More than 12 years ago, James began writing and Tierney reciprocated. (R30-13) Based on this contact, Tierney thought that James had deep religious convictions and was a spiritual person. (R30-16) Over time, Tierney had noticed an improvement in James' quality of thought. (R30-15) He thought that James could make a contribution to other prisoners if he were allowed to live. (R30-17)

Charlotte Shea is a Catholic sister and a member of the Dominican Sisters Mission located in Freemont, California. She is the director of development and public relations. (R30-20) Her first contact with James was in 1986. She learned that James had attended the school the mission ran when he was a child for about six months. (R30-21) James wrote the children in classes at the school and provided samples of his artwork. (R30-22) He would also share his religious feelings and

sympathies with the adult members of the mission. (R30-24) She believed that James was making a very positive contribution to society with his hundreds of letters to the children, the sisters at the mission and his artwork. James was making the choice to help others. (R30-26)

Craig Haney is a professor of psychology at the University of California at Santa Cruz. He is also a graduate of Stanford Law School, but does not practice. (R31-31) Haney was asked by the defense to perform two tasks - first to analyze and evaluate James' social history and to look at his background to understand or explain James' social history and to look at his background to understand or explain James' life choices. Second, Haney was asked to evaluate James' ability to adjust to a lifetime in prison. (R31-34) To perform these tasks, Haney reviewed a variety of records of James' life, including school, medical, juvenile and prison records. In addition, he talked to James' and to people who knew him. (R31-36)

Haney evaluates what he learns about the person to see how it affects their behavior as an adult. He identified risk factors that James encountered as a child to help understand James criminal behavior. (R31-37)

(1) <u>Poverty, economic survival.</u> Because James' mother worked all of the time to financially support the family, little time was left for parenting. The mother had a large number of young children to support; at one time there were many children

under the age of 6. (R31-40, 44) This risk factor was moderate to severe in James' life. (R31-64)

(2) Abandonment. For a child, the loss of a parent is the loss of the significant figure in their life. James was not only abandoned by his father prior to birth, his father rejected him again later in life. There was no replacement father figure who loved James, provided guidance and was actively involved in his life. (R31-41) This factor was severe in James' life. (R31-64)

(3) Instability. Growing up, children need stability and predictability and to be governed by a set of rules imposed by adults who care about him. James had none of this. (R31-42) This risk factor was moderate in James' life. (R31-64)

(4) Neglect. Children need structure in their life to help make sense of the world. In the Card family, the older children took on this role for the younger children. (R31-47) With the mother working all the time and the fathers either being absent or so abusive that the kids tried to avoid them, it was kids raising kids. (TR31-48) This factor was severe in James' life. (TR31-64)

(5) Emotional abuse. James was singled out for special abuse from Scripter. Scripter would verbally trash James, consistent with what Frank Card did to his son. The only contact James had with his natural father was Frank criticizing and insulting him. The rest of the time, Frank just ignored his son. (R31-49) This risk factor was

severe in James' life. (R31-64)

(6) <u>Physical abuse.</u> The physical beating by Scripter of James was sadistic in nature and consistent with how Scripter treated James in general. Recall the incidents of making James walk home 15 miles from the doctor and then get on his knees and dig a hole with a spoon, after the doctor cautioned James about walking and kneeling. This risk factor was severe in James' life. (R31-64)

This abuse, along with its emotional counterpart, affects a person throughout his life. (R31-51) The first six years of a child's life are very important to his development as an adult. (R31-63)

These risk factors have long term consequences. (R31-52) A person feels worthless and valueless as a human being. He has a difficult time controlling behavior which often shows up by getting in trouble at school. The person is desperate for attention and love and wants someone, anyone, to care about him. (R31-54) In school as a child, James is described as nervous and restless. This reflects that he came to school fearful about what would happen to him. (R31-56) The fact that James got in trouble in school at an early age was indicative of the trouble James was having at home. (R31-58) It was predictable that James would use and abuse drugs and alcohol. (R31-59) He had a hard time establishing and keeping relationships. (R31-61)

Haney also believed that James could successfully adapt to a life in prison. He

had no problems while locked up as a juvenile or in the adult prison system in California. (R31-69-70) Even under the highly restrictive conditions of James' imprisonment in Florida, he had an extraordinarily good record. (R31-76) In 18 years, James had received only five (5) relatively minor disciplinary reports. (R31-72) The prison regimen gave James the structure he lacked in the outside world. (R31-77) James' age of 52 was also in his favor. He did not pose a physical threat to anyone else. (R31-78)

Finally, James was active in filling his time with meaningful projects. (R31-80) He devotes a substantial amount of time to his artwork, which is universally praised. He is committed to his religion and communicates with others on the outside world. (R31-80) James handles his grievances with the prison system generally through proper channels, instead of resorting to violence. (R31-85) James understands that prison is punishment and has no particular joy from being locked up. (R31-82) However as a lifer, he is likely to do better because he understands the prison is his home until he dies and he has an investment in making the most of the situation. (R31-81) Ultimately James agreed that if the jury recommended life, he would be sentenced to life in prison without any possibility of parole.

SUMMARY OF THE ARGUMENT

This appeal raises a variety of challenges to both the death sentence itself and

the process by which it was imposed. The primary arguments detail the complete and utter disregard of this Court's frequent warnings about prosecutorial misconduct during closing argument. This Court has attached much significance to this phase of the capital sentencing trial because of its critical importance in ensuring a reasoned response to a first-degree murder. The prosecutor in this case, Alton Paulk, respeatedly and premeditatively crossed the line of proper argument drawn in the sand by this Court. No effort on his part was spared in inflaming and misleading the jury to convince it to make a death recommendation. More than once the trial judge sought to reign in Mr. Paulk's words but Mr. Paulk chose to ignore those limitations. The closing argument, considered by itself, requires reversal of the death sentence.

Mr. Card also challenges the trial judge's decision not to remove herself from the case. The judge believed the effort to remove her followed a successful defense effort to remove the original judge assigned to the case after remand by this Court. The trial judge was mistaken because the initial judge did not remove himself as a result of the defense motion; he removed himself on his own volition. In fact, he found the initial defense effort was legally insufficient. The trial judge reviewed the recusal motion on its merits; this was error.

The trial judge found aggravators for which there was not sufficient evidence and did not find mitigation that was uncontroverted and supported by the greater

weight of the evidence. The judge improperly allowed victim impact evidence and did not permit Mr. Card's jury to know about his two consecutive life sentences. These incorrect findings skewed the weighing process; this was compounded by the trial judge's use of vague and indeterminate terms to describe the weight assigned to mitigators. In addition, the trial judge gave an incomplete CCP instruction. Viewed appropriately, this case does not deserve death; it is not one of the most aggravated and least mitigated.

The process used to sentence Mr. Card to death is constitutionally infirm because the jury was not required to make unanimous findings about the applicability of any aggravating factor or the sentence itself. The existence of one aggravating factor found beyond a reasonable doubt by a unanimous jury is a prerequisite to Mr. Card being eligible for a death sentence. The trial judge did not allow the jury to do its constitutionally mandated work.

Finally, the trial judge committed a variety of instruction and evidence errors which interfered with a reliable process, including the role of the jury; the exclusion of relevant evidence about the effect of the execution on Mr. Card's family; and the constitutionality of the aggravators.

ARGUMENT 1

THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT

WAS PERMEATED WITH IMPROPER AND INFLAMMATORY COMMENTS, WHICH TAINTED THE JURY'S RECOMMENDATION AND RENDERED THE SENTENCING PROCEEDING FUNDAMENTALLY UNFAIR.

The prosecutor's penalty phase closing argument contains numerous examples of misconduct which this Court has consistently and repeatedly condemned as improper. See, e.g., Brooks v. State, 25 Fla. L. Weekly S417 (Fla. May 25, 2000); Urbin v. State, 714 So.2d 411 (Fla. 1998); Garron v. State, 528 So. 2d 353 (Fla. 1988). The prosecutorial misconduct deprived Mr. Card of a reliable, individualized and fair sentencing proceeding under this Court's precedents and under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Card should be granted a resentencing.

Defense counsel objected to some of the prosecutor's improper arguments and did not object to others.[1] However, counsel's failure to object to each improper argument at the time it was made does not preclude this Court's review because the cumulative effect of the objected-to and unobjected-to comments deprived Mr. Card of a fair penalty phase hearing. See Brooks, 25 Fla. L. Weekly at 423; Ruiz v. State,

[1] Although counsel failed to object to some of the arguments, counsel filed a Supplemental Motion For New Trial after obtaining a transcript of the prosecutor's argument in which counsel identified many of the unobjected-to arguments (R-2037-42). Thus, counsel did provide the trial court an opportunity to rule on these other objections.

743 So. 2d 1, 7 (Fla. 1999); Whitton v. State, 649 So. 2d 861, 864 (Fla. 1994).

A. THE PROSECUTOR MISLED THE JURY AS TO THE LAW

1. Jury Must Recommend Death If Aggravation Outweighs Mitigation

The prosecutor made numerous arguments which were incorrect statements of the law. The prosecutor told the jury that if aggravating factors outweighed mitigating factors, the jury must recommend death: "If [aggravators] outweigh [mitigators] then your vote by law must be a recommendation of the death penalty" (R31-119). This argument is identical to arguments which this Court has repeatedly held to be improper. Brooks, 25 Fla. L. Weekly at 423; Urbin, 714 So. 2d at 421 n.12; Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996)("a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors"); Garron, 528 So. 2d at 359 & n.7 (misstatement of law to argue "that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty").

2. A Vote For Life Violated The Jurors' Oath

The prosecutor also misled the jury by arguing that a vote for life would be "taking the easy way out," would mean that the vote did not count and would thus be shirking the jurors' oath to render a true verdict:

> What I'm trying to say, it is too easy to accept the argument, too easy for you to go in and say let's let the judge do it. It is too easy to fall into that, well, gee, he's going to serve the rest of his life in jail.

. . . .

> Now, each of you when you were asked, you were asked whether or not you believed in the death penalty, whether you could impose the death penalty in an appropriate case. And your answer was, yes, you could. I'm going to ask you to do that, ask you to vote that way. But I'm going to warn you before you get back in there, what I want to warn you of is don't fall into the belief of letting George do it. And by that, what I mean is make your vote count because it will be easy for you to get back there and say, okay, Mr. So and So, I remember he was, he said he could vote for it, I'm going to let him vote for it and I'll vote for life. Or it really won't make any difference what I or how I vote because the judge will make the final decision anyway. Don't fall into that. Do not fall into that. Make your vote count. Don't let George do it.
>
> . . . .
>
> You were sworn an oath to render a true verdict, make a recommendation to this court. You've answered questions saying you could do it. You had the intestinal fortitude to do it. I ask you to do it. Make that recommendation.
>
> One thing you need to know, a 6 to 6 vote means he gets life. It takes a majority of you, majority of the 12 that will deliberate to make a recommendation of death. That's why it is important not to let George do it. You look at these factors and if you're satisfied right here in your heart that those five aggravating factors outweigh those other three mitigating factors then your verdict should be and your recommendation should be for death. Judge can't do it for you, I can't do it for you and the victim's family can't do it for you. You, the jury finalize this after 18 years.

(R31-115-16, 119, 127-28). This Court condemned a nearly identical argument in Brooks, calling it "egregiously improper." 25 Fla. L. Weekly at 424. Such arguments are improper because they imply that a vote for life is irresponsible and a violation of

a juror's lawful duty. Urbin, 714 So. 2d at 421 (prosecutor improperly argued, "my concern is that some of you may be tempted to take the easy way out . . . and just vote for life"); Garron, 528 So. 2d at 359 (prosecutor improperly argued, "it is your sworn duty . . . to come back with a determination that the defendant should die for his actions").

3. Victim Impact Evidence Supported Aggravating Factors And Death Recommendation

The prosecutor argued that the victim impact evidence supported aggravating factors and independently warranted a death recommendation. The prosecutor began this argument:

> One other thing, and the law that the judge is really not going to give you much instruction on it and that's victim impact evidence. It doesn't fit in this formula and there is not way that you can weigh it. But I suggest to you that you can and that's with the gum balls and the galberries come in --

(R31-120). Defense counsel objected that the prosecutor was inviting the jury "to weigh something that is not an aggravating factor", and the court directed the prosecutor not to invite the jury to weigh the victim impact evidence (R31-120-21, 122). The prosecutor then continued his argument, and despite the court's instruction that he not tell the jury to weigh the victim impact evidence, he did just that:

> Victim impact evidence. The judge is not going to give you any instruction on that. And I don't know that I can give you any instruction

> on how to apply it. And, in fact, I'm sort of limited in how I can argue it. You can consider it and I can argue it. Victim impact. You heard it. What is the unique qualities of Janis Franklin during her life time.
>
> . . . .
>
> That is the best evidence of what impact she had on the community, and her death had as a result to the community. This man knowing that, which I submit to you makes it even more vile, more wicked, more cold and more calculated, that this unique individual who had contributed, who had done so much for children and even apparently him that he would render her to this.
>
> . . . .
>
> You can take those photographs of her in death and you compare it to the photograph in life. . . . But you take that photograph in comparison with what he did and rendered out there on that two lane rut road, you can take that and weigh it against any of the mitigating he's got and you're justified in returning the death penalty.
>
> . . . .
>
> You weigh them. And you can't weigh victim impact. Don't know what to do with it but I do know this, that you do, you do consider it. Do you consider it in light of all of the other circumstances, the aggravating and mitigating and when you're through you will not only be justified but warranted in recommending a sentence of death. . . .

(R31-122-125).

Thus, despite the court's ruling, the prosecutor told the jury that the victim's unique qualities "make[] it even more vile, more wicked, more cold and more calculated" (R31-124). That is, the prosecutor argued that the victim's unique qualities supported the heinous, atrocious or cruel and cold, calculated and premeditated

aggravating factors. Despite the court's ruling, the prosecutor told the jurors that a comparison of photographs of the victim in death and in life would justify a death recommendation (R31-124). The prosecutor also told the jurors that they could consider the victim impact evidence in light of all the other evidence and be justified in recommending death (R31-125). Even though telling the jurors they could not weigh victim impact evidence, the prosecutor told them to do just that--to use victim impact to support aggravators and to justify a death sentence.

This argument was improper. This Court has upheld the admissibility of victim impact evidence under Section 921.141(7), Fla. Stat. (1993). See Bonifay v. State, 680 So. 2d 413 (Fla. 1996); Windom v. State, 656 So. 2d 432 (Fla. 1995). The victim impact statute provides:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.

Section 921.141(7), Fla. Stat. (1993). Victim impact evidence is limited to that which is specified as relevant in this statute. Windom, 656 So. 2d at 438. This Court upheld the admissibility of victim impact evidence because "[w]e do not believe that the procedure for addressing victim impact evidence, as set forth in the statute,

impermissibly affects the weighing of the aggravators and mitigators which we approved in State v. Dixon, 283 So. 2d 1 (Fla. 1973)." Windom, 656 So. 2d at 438. Victim impact evidence "is not admitted as an aggravator." Id.

Just as the definition of relevant victim impact evidence is circumscribed by the statute, the argument which can be based upon this evidence is similarly circumscribed. The statute states that the prosecution "may introduce, and subsequently argue, victim impact evidence" and then defines victim impact evidence. The definition of the evidence also defines the argument which can be based upon that evidence. That definition does not include arguing that the evidence supports aggravating factors or independently justifies a death sentence, which are precisely the arguments made by the prosecutor in Mr. Card's case.

In Zack v. State, 753 So. 2d 9, 22 (Fla. 2000), the prosecutor argued that victim impact evidence presented in that case was intended to show that the victim was unique, that she was loved, and that her loss was a loss to the community. The prosecutor then argued, "You'll give that weight whatever you feel is appropriate, but you are entitled to hear that." This Court rejected the appellant's challenge to this argument, saying, "There is no suggestion here that this evidence, in and of itself, showed another aggravating factor." However, in Mr. Card's case, the prosecutor did argue that the victim impact evidence supported aggravating factors and independently

warranted a death sentence.

In Kearse v. State, 2000 WL 854156 (Fla. June 29, 2000), this Court approved providing the jury a special instruction regarding victim impact evidence, saying:

> The language of the instruction given here mirrors this Court's explanation of the boundaries of victim impact evidence and the language in the victim impact evidence statute. Moreover, the instruction given helped to guide the jury's consideration of the victim impact evidence, including that the evidence could not be viewed as an aggravating circumstance. Thus, the court did not err in giving this special instruction.

2000 WL 854156 at 12 (footnotes omitted).

The prosecutor's argument regarding victim impact evidence in Mr. Card's case exceeded the boundaries of the victim impact statute, deprived Mr. Card of a fair penalty phase hearing, and resulted in the unlimited and unchanneled imposition of death, contrary to the Eighth and Fourteenth Amendments to the United States Constitution. Contrary to the statute and to this Court's interpretation of that statute, the prosecutor argued that the victim impact evidence supported aggravating factors and independently justified a death sentence. At the least, the argument confused the jurors. At the most, the argument urged the jurors to weigh improper factors on death's side of the scale.

4. Life Without Parole Did Not Mean Life

Before the penalty phase, Mr. Card waived any objections to being sentenced

under the statute providing for life without parole as the alternative to the death sentence (R28-3-12). The state agreed Mr. Card could enter this waiver (R28-4-5). Thus, the jury was instructed that the two sentencing choices were life without the possibility of parole or death (R31-153).

However, in closing, the prosecutor argued that the jury should not recommend life because there was no guarantee Mr. Card would serve a life sentence:

> I anticipate [defense counsel] is probably going to say, hey, no sense to put him to death because it is life and he will just be in prison. And so, therefore, you ought to vote life. And it will be easier for you to do that than it will be to vote for and recommend the death penalty. But there is one thing I want to do and that is this doctor who was up here trying to predict everything, we are making decisions on what is today, not what is going to be in the future. And there is nobody can say that life is going, that he is going to serve a life sentence. No one can guarantee you that. No one can predict that.

(R31-115). Defense counsel objected, and the court admonished the prosecutor, "Don't argue that. That is improper and I will tell them that it means life without parole because you agreed to his waiver" (R31-116). The defense motion for mistril was denied, and the court gave a curative instruction telling the jury that life without parole meant no parole and to disregard the prosecutor's comments (Id.).

Although defense counsel's objection was sustained and the court provided a curative instruction, the prosecutor proceeded with this argument again:

Is he really going to spend the rest of his life in jail. We started out in the

> penal system with penitentiaries, then they became prisons and if you notice now today they are correctional institutions. And you've heard some of the liberties that they have and it gets easier as it goes. What's it going to be like 10 or 15 years from now, nobody know, we cannot predict the future.
>
> [Defense counsel]: Your Honor, I renew the objection and renew the motion.
>
> THE COURT: Again, there is no parole. There is no early release from the sentence on a life sentence. And, Mr. Paulk, don't make an argument otherwise, please.

(R31. 117).

This Court has condemned this identical argument. In Urbin, the prosecutor "improperly asserted that if Urbin was sentenced to life in prison, he could still be released some day because 'We all know in the past laws have changed. And we all know that in the future laws can change.'" 714 So. 2d at 420. Such an argument, the Court explained, urges the jury to disregard the law and to ignore the only lawful alternative to the death penalty "based on a reflexive fear" that the defendant might one day be paroled. Id. See also Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989) (improper to argue that defendant might be paroled before serving a 25-year minimum mandatory term if he received a life sentence because such argument is a misstatement of the law).

Although the court provided curative instructions to the jury regarding this

argument in Mr. Card's case, those instructions did not alleviate the effect of the prosecutor's arguments. The effect of such comments, as this Court has explained, is to produce "a reflexive fear" in the minds of the jurors. Such a fear is not amenable to banishment by a curative instruction. See Redish v. State, 525 So. 2d 928, 931 (Fla. 1st DCA 1988) (prosecutor made two improper remarks in closing and trial court gave curative instructions; appellate court held that in light of the prosecutor's repeated misconduct, the court could not say the curative instructions "were sufficient to dissipate the statements' prejudicial effect").

In Garron, this Court discussed six instances of improper argument by the prosecutor during the penalty phase. 528 So. 2d at 358. In four of the six instances, the trial court gave a curative instruction. Id. at 358 nn. 5, 8, 9 & 10. This Court nevertheless determined that the improper comments required resentencing, stating, "While it is true that instructions to disregard the comments were given, it cannot be said that they had any impact in curbing the unfairly prejudicial effect of the prosecutorial misconduct." Id. at 359.

5. Planning A Robbery Proves Heightened Premeditation

At the charge conference, the defense requested a special instruction regarding the cold, calculated and premeditated aggravator informing the jury that a heightened level of planning for a robbery does not establish the heightened premeditation required

for this aggravator (R30-76). The defense cited Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984), for this proposition (R11-1985). The prosecutor did not disagree that Hardwick was a correct statement of the law, but objected to requested instruction (R30-76). The court denied the requested instruction (Id.).

In closing argument, however, even though he had acknowledged that Hardwick correctly stated the law, the prosecutor then argued that the planning of the robbery established the heightened premeditation necessary to support the cold, calculated and premeditated aggravator:

> What evidence is there of aggravated premeditation to this case.
>
> > Early morning on June 3rd, Vicki Elrod gets a phone call from this defendant here and says Ms. Elrod, Vicki, I got some money for you, I want to come over there and pay you back that money you loaned me. This is early in the morning. . . . He had this time planned to rob the Western Union.
> >
> > . . . .
> >
> > I have him charged with a heightened premeditated, that is starting at 6:00 in the morning figuring a way to get money. A place that he knew well that he could get money and the patterns was the Western Union.

(R31-103-05).

This argument was an incorrect statement of the law, and the prosecutor knew it from the charge conference discussion. Misstating the law during closing argument is improper. Brooks; Urbin; Garron. At a capital penalty phase, a prosecutor may not

tell the jury that certain facts support an aggravating factor when the law states that those kind of facts cannot be used to support the aggravating factor. In Rhodes v. State, 547 So. 2d 1201, 1205-06 (Fla. 1989), the prosecutor argued that the fact that the victim's body was transported from the site where she was killed to another site supported the heinous, atrocious or cruel aggravating factor. This Court found the argument improper and misleading because caselaw held that a defendant's actions after the victim's death cannot support this aggravator.

6. Events After The Murder Prove Heightened Premeditation

The prosecutor also mislead the jury by arguing that events occurring after the murder supported heightened premeditation. The prosecutor argued: "He knew that if he's going to rob that place he's got to dispose of her, if he didn't, if he wasn't going to kill her then why was he trying to wear gloves and why did he throw his knife away and why did he throw the [wallet] away" (R31-105). Events occurring after the murder cannot support CCP. Power v. State, 605 So. 2d 856, 864 (Fla. 1992). Arguments which mislead the jury about the legal standards for finding aggravators are improper. Rhodes.

7. Misstating The Definition Of Kidnapping

The prosecutor told the jury that "kidnapping is taking somebody against their will for purposes of terrorizing" (R31-98). This is an incorrect definition of Mr.

Card's kidnapping conviction, which was charged as being incident to and in the course of the robbery. The prosecutor's argument therefore created a false impression that a previous jury had found Mr. Card guilty of terrorizing the victim.

8. Denigration Of Mitigation Evidence

The prosecutor's argument also denigrated the mitigating evidence. The prosecutor began his argument by telling the jurors they should assign weights to the aggravating and mitigating factors, and that the weights to be assigned were comparable to the galberry and the gumball (R31-96). The galberry, which "has no value whatsoever," was to be used to weigh mitigation (Id.). While this approach may not be objectionable in theory, the prosecutor then went on to use his assignment of weights to thoroughly denigrate the mitigating evidence. In discussing the aggravating factors, the prosecutor assigned each factor a weight of 100 to 200 (R31. 96-102). The prosecutor then asked how much weight the mitigating evidence that Mr. Card was a good prison inmate should get in comparison to these weighty aggravators and answered that the good inmate evidence should receive a weight of 10 (R31-106-07).

The prosecutor mocked the mitigation evidence regarding Mr. Card's childhood, arguing, "I'm sure he grew up in an impoverished family. So, who hasn't," and "I'm sure he had stern parental guidance. Who hasn't" (R31-108-09). Ultimately, the prosecutor argued evidence regarding Mr. Card's family background should

receive a weight of only 10 or 20 (R31-113). The mitigation evidence regarding Mr. Card's childhood was unrebutted.

The prosecutor also mocked Mr. Card's Catholicism, calling it a "jailhouse religion" (R31-114). All of the witnesses who discussed Mr. Card's religion, including a priest and a nun, testified his commitment to his religion was sincere (R29-8, 12, 14 [of deposition attached at end of volume]; R30-14, 26). The record contains no evidence whatsoever rebutting this testimony.

As to the mitigation evidence regarding Mr. Card's societal contributions and art work while in prison, the prosecutor urged the jury to compare those to a photograph of the deceased victim (R31-118). Thus, the prosecutor argued, the weight given to Mr. Card's art work and societal contributions should be a 10 (R31-118). The prosecutor even questioned, "does any of this over here mitigate against the death penalty. Does any of it really have any weight?" (R31-118).

These arguments were improper. The prosecutor's assigning minimal weights to the mitigating evidence was tantamount to the arguments this Court condemned in Brooks, where the prosecutor characterized the mitigating circumstances as "flimsy," "phantom" and "excuses." 25 Fla. L. Weekly at 425. These arguments were particularly improper in light of the fact that the state presented no evidence to rebut the mitigation and that the trial court found and gave weight to many of these mitigating

factors. See Urbin, 714 So. 2d at 422 n.14. Further, the argument that the evidence regarding Mr. Card's art work and societal contributions while in prison did not mitigate at all or have any weight was tantamount to telling the jury not to consider that evidence, contrary to the Eighth Amendment. Hitchcock v. State, 755 So. 2d 638, 642-43 (Fla. 2000) (error for prosecutor to argue that certain mitigating circumstances "are not mitigating in this case, at all").

9. The Doctor From California

The prosecutor several times referred to the fact that the defense expert was from California, attempting to denigrate the expert's testimony: "we heard from an expert from California" (R31-106); "We really didn't need that doctor to come all the way from California to tell us how we should weigh that" (R31-108). This was improper. Where the expert was from has nothing to do with the expert's credentials or believability. Pippin v. Latosynski, 622 So. 2d 566 (Fla. 1st DCA 1993).

B. THE PROSECUTOR INJECTED FEAR, PASSION AND PREJUDICE INTO THE JURY'S DELIBERATIONS.

This Court has repeatedly cautioned against prosecutors injecting "elements of emotion and fear into the jury's deliberations." Urbin, 714 So. 2d at 419 (quoting King v. State, 623 So. 2d 486 (Fla. 1993); Garron, 528 So. 2d at 359; Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). However, that is precisely what the prosecutor here

did.

In arguing the heinous, atrocious or cruel aggravating factor, the prosecutor invited the jury to imagine the victim's thoughts during the ride from the Western Union store to the woods, although he admitted there was no evidence on this subject. The prosecutor began this theme by saying, "we can't imagine what [the victim] thought about" during this ride (R31-101), but himself imagined that when she was allowed to get out of the car, this "[gave] her another ray of hope" (R31-101).

More egregiously, however, the prosecutor then went on to concoct an imaginary scenario of what the victim experienced just before her death:

> You and I here today again cannot know what suffering she went through while she waited to either bleed to death or suffocate. But we can imagine it.

(R31-102).

This scenario was not based upon the evidence. The medical examiner testified that the victim's neck wound indicated that the assailant snuck up on the victim, with the victim being unaware of what was going to happen (R28-77). The medical examiner further testified that the blunt force injury on the back of the victim's neck occurred while she was alive and possibly rendered her unconscious (Id.). There was no evidence of a prolonged period of dying. Thus, the medical evidence did not support the prosecutor's imaginary scenario in which the victim's neck was cut while

she was conscious such that she waited to bleed to death or suffocate.

It is improper to construct imaginary scenarios of the victim's death in closing argument. In Urbin, this Court explained:

> We also note that the prosecutor, as in Garron, went far beyond the evidence in emotionally creating an imaginary script demonstrating that the victim was shot while "pleading for his life." We find that, as in Garron, the prosecutor's comments constitute a subtle "golden rule" argument, a type of emotional appeal we have long held impermissible.

Urbin, 714 So. 2d at 421. Here, as in Urbin, the prosecutor's argument was a "golden rule" argument which asked the jurors to imagine what the victim experienced and thus to put themselves in her place.

The prosecutor also appealed to fear and emotion by arguing that if the jurors felt any sympathy for Mr. Card, they should look at the photographs of the victim:

> And if you're going to have any sympathy for the defendant, every time that wells up inside of you somebody in that juryroom, show each other these photographs. Any time sympathy starts creeping into your mind for this defendant, pick up these photographs.

(R31-127). This argument is similar to that condemned in Urbin, where the prosecutor argued that if the jury was inclined to show the defendant mercy, they should show him the same amount of mercy he showed the victim. 714 So. 2d at 421. This Court described this argument as "blatantly impermissible," id., and did the same with a similar argument in Brooks, 25 Fla. L. Weekly at 423. See also Rhodes, 547 So. 2d

at, 1206 (finding same mercy argument improper because it was "an unnecessary appeal to the sympathies of the jurors calculated to influence their sentence recommendation"); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (error for prosecutor to ask jury to show defendant "as much pity as he showed his victim").

The prosecutor again appealed to emotion by repeatedly emphasizing that it had been 18 years since the murder: "We are here now for you, 18 years later, to make a recommendation to this judge" (R31-92); "He's been in [prison] for 18 years" (R31-118). The final sentence of the prosecutor's argument was: "You, the jury, finalize this after 18 years" (R31-128). These arguments were clearly an emotional appeal to the jury to bring about justice at last.

Further appealing to fear and emotion, the prosecutor argued that the jury was the conscience of the community (R31-125). Defense counsel objected and moved for a mistrial (R31-126). The court denied the mistrial and overruled the objection (Id.). This argument was improper. Otero v. State, 754 So. 2d 765, 770 (Fla. 3d DCA 2000); Birren v. State, 750 So. 2d 168, 169 (Fla. 3d DCA 2000).

C. THE PROSECUTOR ARGUED MATTERS OUTSIDE THE RECORD

The prosecutor began his argument by telling the jurors that they were not the jury which convicted Mr. Card back in 1982, so this jury "didn't hear a lot of the

evidence that went on in that case back in 1982" (R31-92). This comment suggested to the jury that the prosecutor knew additional evidence which the jury did not hear and invited the jury to speculate about that unpresented evidence.

Later, in discussing the testimony of defense expert Haney that Mr. Card had been a good prisoner, the prosecutor commented, "You know, I didn't ask him this question but I wanted to so bad because I know that he . . . would not have answered it favorably to me" (R31-107). The question the prosecutor wanted to but did not ask Dr. Haney was "isn't it to this defendant's benefit, to his favor that knowing this day is going to happen that he is going to be a good inmate" (Id.). There was no evidence whatsoever in the record that Mr. Card somehow divined that he would one day have a resentencing proceeding and was therefore a good prisoner in anticipation of that day. Since the question was never asked, there was no answer to it in the record, and the prosecutor's argument simply invited the jury to speculate about the answer.

Also regarding the good prisoner mitigation, the prosecutor told the jury, "Of course we don't know how many disciplinary write-ups he wrote against the staff" (R31-106). There was no evidence in the record regarding Mr. Card writing disciplinary reports against the prison staff. The prosecutor's argument invited the jury to speculate as to matters for which there was no evidence and consider Mr. Card a bad prisoner without any evidence to support that proposition. Along this same line,

the prosecutor argued that Mr. Card did not receive a college degree, a good government award or any good behavior certificate while in prison (id.), without any evidence that those degrees would have been available to Mr. Card and, in fact, knowing full well that no such certificates exist for death row prisoners or could be obtained.

When arguing about the mitigation evidence regarding Mr. Card's miserable childhood, the prosecutor argued that evidence should not be given much weight because one of the prospective jurors who was not selected to serve on the jury had said she would not give such evidence much weight (R31-109). The defense objected to this comment, and the court sustained the objection (Id.).

Again, regarding the mitigating evidence of Mr. Card's miserable childhood, the prosecutor returned to the theme of questions not asked. The prosecutor argued, "I wanted to ask every one of the witnesses that testified about that cruel family that they lived in and that was how come John was not a convicted robber and murderer and kidnapper," and "How come the sister, I believe her name was Sandra, why isn't she a convicted robber, why isn't she a convicted kidnapper or murderer" (R31-109). In fact, his sister had been killed by a drunk driver in 1973. Since the prosecutor did not ask the witnesses these questions, there was no evidence in the record about whether or not Mr. Card's siblings had been in trouble with the law. Maybe they had; maybe

they had not. But the prosecutor's argument asked the jury to speculate as to the answers to questions not asked. Argument is limited to the evidence presented, not to evidence that might have been presented but was not.

The prosecutor also expressed his personal opinion regarding Mr. Card's relationship with the members of the Catholic church who testified on his behalf, stating, "Is he using these people. I get the feeling that, yes, he is" (R31-114).

A prosecutor "may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty." Ruiz, 743 So. 2d at 4. A prosecutor may not refer to matters not in evidence. Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994). Here, the prosecutor repeatedly referred to questions not asked and made arguments based upon supposed evidence which was not in the record. A prosecutor also may not "express his personal opinion on the merits of the case or the credibility of witnesses." Ruiz, 743 So. 2d at 4; Pacifico, 642 So. 2d at 1184.

D. THE PROSECUTOR COMMENTED ON MR. CARD'S RIGHT TO REMAIN SILENT.

While discussing the heinous, atrocious or cruel aggravating factor, the prosecutor argued, "somewhere in this process [the victim] is hit across here with a very, very severe blow. We don't know when that occurred. He never told anybody

when that occurred" (R31-101). The blow the prosecutor is referring to is the blow to the back of the victim's neck which the medical examiner testified occurred while the victim was alive and may have caused unconsciousness. Rather than acknowledging the medical examiner's testimony, however, the prosecutor argued that Mr. Card should have told someone when that blow occurred. This argument was a direct comment on Mr. Card's invocation of his right to remain silent.

The exercise of legal rights may not be used to enhance aggravating factors. Bertolotti, 476 So. 2d at 133, citing, Pope v. State, 441 So. 2d 1073 (Fla. 1983). A prosecutor's comment on the defendant's exercise of the right to remain silent violates the United States Constitution. Griffin v. California, 380 U.S. 609 (1965). "If the comment is 'fairly susceptible' of being interpreted by the jury as a comment on the defendant's exercise of his right to remain silent it will be treated as such." Jackson v. State, 522 So. 2d 802, 807 (Fla. 1988). Here, the prosecutor's comment was more than "fairly suceptible" of being interpreted as a comment on Mr. Card's silence--the prosecutor directly stated that Mr. Card "never told anybody" about the blow to the back of the victim's neck. The prosecutor's comment violated due process.

E. MR. CARD IS ENTITLED TO RESENTENCING

The prosecutorial misconduct in this case did not consist of one or two isolated remarks. In about forty pages of transcript, which include several bench conferences,

the prosecutor injected numerous and repeated improprieties into his argument. As this Court said in Urbin, "many of these instances of misconduct are literally verbatim examples of conduct we have unambiguously prohibited in Bertolotti, Garron, and their progeny." 714 So. 2d at 411. Here, as in Garron, the prosecutor's improper arguments "were so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy." 528 So. 2d at 358. The prosecutor's misconduct is particularly troubling in a capital case "where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects." Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998).

Although defense counsel did not object to all of the improper comments, the cumulative impact of the improprieties requires reversal. See Brooks, 25 Fla. L. Weekly at 426 ("the objected-to comments, when viewed in conjunction with the unobjected-to comments, deprived Brooks of a fair penalty phase hearing"); Martinez v. State, 2000 WL 766454 at 7 (Fla. 2000) ("it is appropriate to consider both the preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt"); Gore, 719 So. 2d at 1202 ("In considering reversal, we must look to the totality of the improper questions and comments by the prosecutor," including those to which no objection was made); Whitton v. State, 649 So. 2d 861 (Fla. 1994)(even though no objection made to first two improper

comments, reviewing court must consider all three comments in its harmless error analysis because harmless error test requires examination of entire record); Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991) (in case with multiple errors, court must determine whether the cumulative effect of the errors denied defendant a fair and impartial trial); Alvord v. Dugger, 541 So. 2d 598, 601 (Fla. 1989) (harmless error analysis must review errors "both individually and collectively").

The prosecutor's arguments in Mr. Card's case were as or more egregious and numerous as those this Court condemned in Brooks. "Due process requires that fundamental fairness be observed in each case for each defendant." Gore, 719 So. 2d at 1203. Mr. Card is entitled to the same relief as this Court granted in Brooks.

This classically text book inappropriate closing argument cannot be viewed in isolation. It had its genesis in the prosecutor's opening statement. The prosecutor began by telling the jury that it "won't hear the guilty evidence because "as the Judge has told you, it is irrelevant and immaterial now as to his guilt." (R28-21) Of course, all of the evidence presented by the State was in some measure designed to reconvict Mr. Card. The prosecutor then told the jury that it "won't hear the detailed evidence and . . . the investigation that the officers performed." (R28-21) This suggested to the jury that the state had even more evidence of Mr. Card's guilt than the jury would hear, a theme the prosecutor returned to in his closing argument. The prosecutor presaged

his incorrect argument on the law of the aggravators by telling the jury that "if I mistake the law, then please forgive me, again, because you will consider the law that comes from the Judge and not from me . . ." He did not take his own advice.

Given the numerous and highly improper prosecutorial arguments, it cannot be said beyond a reasonable doubt that the improper argument did not affect the jury's decision, and therefore the lower court erred in failing to grant counsel's motions for mistrial and motion for new trial. See Goodwin v. State, 751 So. 2d 537 (Fla. 1999). The prosecutor's comments deprived Mr. Card of a fundamentally fair penalty phase hearing and rendered the jury's recommendation unreliable. Mr. Card is entitled to a new penalty phase hearing before a new jury.

ARGUMENT 2

THE TRIAL JUDGE ERRED IN NOT RECUSING HERSELF

Prior to the resentencing trial, Mr. Card filed a motion to disqualify Judge Costello from sitting in the case. (R11-1940-1941) The basis of the request was that Judge Costello had represented Debra King in her divorce from Mr. Card. As soon as the defense learned of this representation and the possibility that King would be a state witness, the defense filed its motion to disqualify Judge Costello.

Judge Costello denied the motion. (R11-1942-1943) In doing so, she found that she was the "successor judge and the predecessor judge was disqualified based on a

motion filed by the defendant." This was wrong. The history is as follows. This Court reversed an order from the circuit court denying Mr. Cards second motion for post-conviction relief. Card v. State, 652 So. 2d. 344 (Fla. 1995) This Court remanded the case to the circuit court to conduct an evidentiary hearing on the issue of the State's involvement in the preparation of the order sentencing Mr. Card to death in 1982. On remand, the case was assigned to Glenn L. Hess, a circuit judge for the Fourteenth Judicial Circuit. Prior to the hearing ordered by this Court, the defense filed a motion to disqualify Judge Hess. (R3-529) There was a serious question at that time about whether the lawyers assigned to the case from the Capital Collateral Office (CCR) could represent Mr. Card.

At a hearing on the motion to disqualify, the State argued that Judge Hess could rule on the motion without a hearing based on its legal sufficiency. (R13-2307) The defense argued that the motion the lawyer had filed was legally insufficient because it was not verified by Mr. Card. (R13-2311) Mr. Card had filed a pro se motion to disqualify Judge Hess that was verified. The State argued that the substance of the motions, Judge Hess' admitted contacts with the prosecutor, was not sufficient to warrant recusal. (R13-2314-2316)

Judge Hess determined that he should not sit as the judge in this case but not as a consequence of Mr. Card's request. Judge Hess ruled "that the factual allegations

are not legally sufficient to warrant granting the motion." (R4-736) Judge Hess went to find, on his own that he would disqualify himself because (1) Mr. Card "feels this Judge will not be fair" and (2) that he worked for the State Attorney's office at the time Mr. Card was tried and resentenced. Judge Hess recused himself "sua sponte." (R4-736) The Chief Judge of the Fourteenth Judicial Circuit then reassigned Mr. Card's case, "upon the Court's own motion..." (R5-750) It is clear from the historical record that Judge Costello's factual finding that Judge Hess was disqualified based on a motion filed by Mr. Card is in error. Judge Hess removed himself from the case sua sponte, meaning "of his own will or motion; voluntarily; without prompting or suggestion." Black's Law Dictionary, Revised Fourth Edition (1968).

This distinction is important because first time disqualification motions are governed by Rule 2.160(f), Fl. R. Jud. Ad. Successive motions are governed by Rule 2.160(g), Fl. R. Jud. Ad. and Section 38.10, Florida Statutes. Judge Costello used the successor rule to deny the motion. In doing so, she specifically addressed the merits of the motion and determined (in a double negative way) that she would be fair and impartial; this is proper only if Judge Costello's characterization of the motion to disqualify could properly be labeled a successor motion. See Quince v. State, 732 So. 2d. 1059, 1062 (Fla. 1999) A trial judge has a very different role in a first motion to disqualify. At that point, a judge may only pass on the legal sufficiency of the motion.

Berkowitz v. Reiser, 625 So. 2d. 971 (Fla. 2d DCA 1993) A first time motion is legally sufficient is there are facts alleged in the motion that would put a reasonably prudent person in fear of not receiving a fair and impartial trial. Barwick v. State, 660 So. 2d 685 (Fla. 1995)

Section 38.10, Florida Statutes reads in pertinent part:

> Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another shall be designated... However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he or she does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

In Brown v. St. George Island, Ltd., 561 So. 2d. 253, 256 (Fla. 1990), Gene Brown and John Stocks were litigants over some real property. The case was assigned to Judge Cooksey who tried the case and ruled in favor of Brown. After the judgment, Stocks moved to disqualify Judge Cooksey. The judge denied the motion and the First

District refused to intervene. Soon after, Stocks filed another motion to recuse Judge Cooksey from involvement in any further proceedings. Stocks then filed a lawsuit attacking the judgment entered in favor of Brown by accusing the judge of "fraud, blas, and deceit." When this lawsuit was assigned to Judge Cooksey, he removed himself because of allegations of the complaint. Judge Costello (the same judge involved in this case) was assigned to Stocks' lawsuit. This case was ultimately decided against Stocks.

Judge Cooksey then entered an order removing himself as the judge in the original case because he did not "feel comfortable proceeding further in the case even though the allegations were untrue." Stocks and Brown generated a third lawsuit that was assigned to Judge Cooksey. He took himself off that case as well. This Court then assigned a retired judge, John Rudd, to handle the pending cases. Stocks then filed a motion to disqualify Judge Rudd from the two cases, claiming the judge had made deragotory comments about Stocks during a hearing held in the first case. Judge Rudd denied the motion. On appeal, Stocks argued that the motion to disqualify Judge Rudd should be treated as a first motion; Brown argued that the motion should be treated as a successive one.

> Finally, Stocks argues that the latter portion of section 38.10 does not apply to the disqualification of Judge Rudd because no judge in either case had been previously disqualified on his suggestion pursuant to the

> first portion of section 38.10. The record supports this contention. In suit I, Stocks originally moved to disqualify Judge Cooksey, invoking the provisions of both sections 38.02 and 38.10, but this motion had been denied. By denying prohibition, the First District Court of Appeal confirmed the correctness of this ruling. It would be unrealistic to conclude that Judge Cooksey then decided to recuse himself because Stocks thereafter filed a subsequent unsworn motion for recusal grounded upon the remarkable proposition that because Stocks had unsuccessfully tried to get him recused in the past, Judge Cooksey must now be prejudiced against him. It is obvious that Judge Cooksey recused himself in both suits I and III because of the allegations directly impugning his integrity which were contained in the complaint filed in suit II. A voluntary disqualification does not bring into play the second portion of section 38.10. Thus, it is necessary to analyze Stocks' motions to disqualify Judge Rudd under the first portion of section 38.10.

Judge Hess' decision to remover himself was voluntary. Therefore, Judge Costello should have treated the motion to disqualify her as a first one and should not have passed on the merits of the motion but only evaluated it for its legal sufficiency. Judge Costello "was forbidden to pass on the truthfulness of the facts alleged. Attempts to refute the charges of partiality exceed the scope of inquiry and alone establish grounds for disqualification." J & J Industries v. Carpet Showcase, 723 So. 2d. 281, 283 (Fla. 2d DCA 1998).

ARGUMENT 3

THE TRIAL COURT ERRED IN FINDING AND INSTRUCTING THE JURY UPON SEVERAL AGGRAVATING CIRCUMSTANCES WHERE THE LEGALLY REQUIRED ELEMENTS OF THOSE AGGRAVATORS WERE NOT

ESTABLISHED.

The trial court erred in finding the aggravating circumstances discussed below because the elements of these aggravators which are required by this Court's precedent were not established. Since the legally required elements were not present, the court also erred in allowing the jury to consider these aggravators. Further, the lower court erred in applying the law of the case doctrine in denying Mr. Card's motions that the jury not be instructed on certain aggravators. This error is discussed first, followed by a discussion of the specific aggravators.

A. THIS COURT IS REQUIRED TO REVIEW THE APPLICATION OF THE AGGRAVATING FACTORS WITHOUT REGARD TO THE AFFIRMANCE OF MR. CARD'S PRIOR DEATH SENTENCE, AND THE LOWER COURT ERRED IN APPLYING THE LAW OF THE CASE DOCTRINE IN RULING ON MR. CARD'S OBJECTIONS TO AGGRAVATING FACTORS.

The circuit court granted Mr. Card a resentencing based upon his Fla. R. Crim. P. 3.850 claim that the original sentencing judge had allowed the state to prepare the sentencing order (See R8. 1367-68). Initially, the court indicated Mr. Card would receive a resentencing before a judge only, without a jury, because resentencing had been ordered based upon the sentencing order (Id.). However, the parties soon agreed that because the original trial judge was not available, the resentencing would also include a new jury (R17. 2601-10; R18-2620). See Fla. R. Crim. P. 3.700(c)(2);

Craig v. State, 620 So. 2d 174, 176 (Fla. 1993).

Although Mr. Card was to receive a new penalty phase before a new judge and jury, the court made several rulings on defense motions based upon this Court's decision in Mr. Card's original direct appeal. Since Mr. Card's resentencing was an entirely new proceeding, the lower court erred in relying upon the law of the case doctrine. This error deprived Mr. Card of a reliable and individualized resentencing proceeding.

During the charge conference, the defense objected to the jury being instructed on the pecuniary gain, heinous, atrocious or cruel, and cold, calculated and premeditated aggravators because the state had not met its burden of showing the legal elements of these aggravators (R30-78-79, 80-81, 82). Defense counsel acknowledged that these aggravators had been found by the original judge and affirmed by this Court on direct appeal, but argued that those findings predated much of the case law regarding these factors and that the prior jury had heard much more evidence on the factors than the present jury had heard (Id.). The state responded that this Court had affirmed application of these factors, the present jury had heard the same evidence as the prior jury, and the law had not changed substantially (R30-80, 82). The court quoted portions of this Court's direct appeal opinion, ruled that the only reason the case was being retried was because the previous judge did not prepare his own

sentencing order, ruled that the retrial had nothing to do with the previous evidence, and denied the defense motions based on law of the case (R30-80, 81, 82).

A resentencing is "a completely new proceeding, separate and distinct, from [the] first sentencing." King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990). A sentencing factor found in the prior sentencing "is not an 'ultimate fact' that collateral estoppel or the law of the case would preclude being rejected on resentencing." Id. at 358-59. A resentencing "should proceed de novo on all issues bearing on the proper sentence which the jury recommends be imposed. A prior sentence, vacated on appeal, is a nullity." Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986). "After all, it is this sentence and not any prior one which may be carried out." Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982).

In King and in Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993), this Court determined that a resentencing judge's refusal to find mitigating factors found by the original sentencing judge was not error. It follows that if a resentencing judge may reject mitigating factors found in a prior sentencing, a resentencing judge may also reject aggravating factors found in a prior sentencing.

In Preston v. State, 607 So. 2d 404, 407-09 (Fla. 1992), and Phillips v. State, 705 So. 2d 1320, 1322 (Fla. 1997), the Court rejected arguments that law of the case principles barred a resentencing judge from finding aggravating factors not found by

the original sentencing judge. It follows that if a resentencing judge may find aggravating factors not found in a prior sentencing, the judge may also reject aggravating factors found in a prior sentencing.

The lower court's reliance upon law of the case in rejecting defense arguments at Mr. Card's resentencing violated due process and Mr. Card's right to a reliable and individualized sentencing proceeding. Once a resentencing has been ordered, "the full panoply of due process considerations attach." State v. Scott, 439 So. 2d 219, 220 (Fla. 1983).

The United States Constitution requires "an informed, focused, guided, and objective inquiry into the question whether [a defendant] should be sentenced to death." Proffitt v. Florida, 428 U.S. 242, 259 (1976). This Court is now constitutionally required to review the application of aggravating factors in reviewing the propriety of the death sentence. See Proffitt v. Florida; Amendments V, VIII, XIV, U.S. Const. Cf. Parker v. Dugger, 498 U.S. 308 (1991).

B. FOUR OF THE FIVE AGGRAVATING FACTORS UPON WHICH THE JURY WAS INSTRUCTED AND WHICH THE TRIAL COURT FOUND ARE LEGALLY INAPPLICABLE.

The state must prove each element of an aggravating factor beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Such proof cannot be supplied by inference unless the evidence is inconsistent with any reasonable hypothesis that

might negate the aggravating factor. Woods v. State, 733 So. 2d 980, 991 (Fla. 1999); Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992). "[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden." Clark v. State, 443 So. 2d 973, 976 (Fla. 1983). A trial court may not rely on speculation to provide proof of an aggravating circumstance. Hartley v. State, 686 So. 2d 1316, 1323-24 (Fla. 1996); Hamilton v. State, 547 So. 2d 630, 633-34 (Fla. 1989). These general principles, as well as the principles guiding application of the specific aggravating factors discussed below, were not followed in Mr. Card's case.

1. Avoiding Arrest

In a case not involving the murder of a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Zack v. State, 753 So. 2d 9, 20 (Fla. 2000); Urbin v. State, 714 So. 2d 411 (Fla. 1998); Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996). The state must prove that the sole or dominant motive for the killing was to eliminate a witness. Jennings v. State, 718 So. 2d 144, 151 (Fla. 1998); Consalvo, 697 So. 2d at 819; Geralds, 601 So. 2d at 1164. "The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance." Davis v. State, 604 So. 2d 794, 798 (Fla. 1992). Speculation that witness elimination was the dominant motive behind the

murder is not sufficient. Jennings, 718 So. 2d at 151; Consalvo, 697 So. 2d at 819; Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). The fact that the defendant did not have to murder the victim in order to accomplish a monetary goal is insufficient to establish that the defendant's dominant motive was to avoid arrest. Zack, 753 So. 2d at 20. The mere fact that the victim knew and could identify the defendant is not sufficient to prove this aggravator. Zack, 753 So. 2d at 20; Consalvo, 697 So. 2d at 819; Geralds, 601 So. 2d at 1164; Davis, 604 So. 2d at 798.

Here, the trial court found this aggravator based solely on the fact that Mr. Card was acquainted with the victim:

> The evidence showed that the dominant motive for the kidnapping and the murder was the elimination of the only witness to the crime of robbery. The defendant was acquainted with the victim and in fact, he had sent her an Easter card which was still on the wall of her office in June when this robbery and murder occurred.

(R12. 2249).

Likewise, the prosecutor's argument to the jury focused on the fact that the victim knew Mr. Card:

> Was it used to prevent lawful arrest. What did he do. He knew her, he was acquainted with her. You heard the evidence. He went in there in broad daylight, not secretly. He robbed her of the money, he took her at knife point to the woods. . . . He was doing this to save his own skin.
>
> . . . .

> [T]o prevent a lawful arrest. This man who knew her, who she had befriended, who he had sent a card to. Went to that place knowing full well he was going to rob it. Knowing full well she was going to be a witness. Knowing full well that she could identify him. Knowing full well that he wasn't going to be able to get away with it. Knowing full well he had to kill her. What did he do. He took her to the woods away from everyone and did exactly what this aggravating circumstance, to prevent his own arrest, to aid and assist his escape he destroyed a human being. He didn't have to. He would have been found guilty of robbery, not guilty of kidnapping, robbery, and first degree murder. He made that choice. He did it. It was to destroy a witness that could identify him. . . .

(R31. 97-99).

Clearly, the court and prosecutor relied upon a legally insufficient basis to support this aggravator--that Mr. Card and the victim were acquainted. Zack, 753 So. 2d at 20; Consalvo, 697 So. 2d at 819; Geralds, 601 So. 2d at 1164; Davis, 604 So. 2d at 798. The prosecutor relied upon another legally insufficient basis for this aggravator--that "he didn't have to" kill the victim to accomplish the robbery. Zack, 753 So. 2d at 20. This aggravator was legally inapplicable.

Further, in addition to holding that avoiding arrest applies only when the sole or dominant motive for the murder was avoiding arrest, this Court has held that the pecuniary gain aggravator applies only if the state proves that pecuniary gain was the sole or dominant motive for the murder. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). It is therefore inconsistent to apply both pecuniary gain and avoid arrest in the

same case. But see Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994). Applying two aggravators which both require a showing of a sole or dominant motive renders the death sentencing process vague and overbroad, and fails to genuinely narrow the class eligible for the death penalty. Stringer v. Black, 112 S. Ct. 1130 (1992); Zant v. Stephens, 103 S. Ct. 2733, 2743 (1983).

2. Cold, Calculated and Premeditated (CCP)

Three elements of CCP which require proof beyond a reasonable doubt are that the homicide (1) was "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage (cold)," (2) resulted from the defendant's "careful plan or prearranged design to commit murder before the fatal incident (calculated)," and (3) was committed after "heightened premeditation (premeditated)." Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). Heightened premeditation is "premeditation over and above what is required for unaggravated first-degree murder." Walls v. State, 641 So. 2d 381, 388 (Fla. 1994).

"A plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995), quoting Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

> 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.

Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984); Gorham v. State, 454 So. 2d 556, 559 (Fla. 1984).

Further, events occurring after the murder cannot support a finding of CCP. In Power v. State, 605 So. 2d 856, 864 (Fla. 1992), the trial court found CCP based in part upon the fact that after the murder, the defendant ate the sandwich the victim had prepared for lunch. This Court rejected this basis for CCP, saying, "the eating of the victim's sandwich, an event that occurred after the commission of the murder, cannot sustain the necessary finding of heightened premeditation before the murder." See also Rhodes v. State, 547 So. 2d 1201, 1205-06 (Fla. 1989) (defendant's actions after victim's death cannot support HAC).

Here, the defense argued that the evidence did not support the "heightened premeditation" element of CCP and that therefore the jury should not be instructed on CCP (R30-82). The defense also requested that the jury be instructed that premeditation of a robbery does not establish heightened premeditation of a murder (R30-76). The court overruled the defense objection based on law of the case and denied the requested instruction (R30-76, 82). The trial court found CCP (R12-2250-51).

The court's findings on CCP rely upon several impermissible bases. The first five sentences of the findings rely upon planning of the robbery in order to establish heightened premeditation:

> This case involved heightened premeditation in that the defendant called Vicki Elrod the morning of the murder and told her that he would be visiting her and bringing her some money later on that day. He had all day to plan his attack. He wore gloves. He armed himself with a knife. He hid the knife inside his pants.

(R12-2250). The facts related in these five sentences indicate only the planning of a robbery, and do not specifically indicate planning of a murder. This is an insufficient basis for this aggravator under Barwick, Geralds, Hardwick and Gorham. In Barwick, the trial court relied upon facts very similar to those relied upon in Mr. Card's case, finding the defendant "planned his crimes, selected a knife, gloves for his hands, and a mask for his face. . . . The defendant had planned [other felonies], had armed himself to further those purposes and when a killing became necessary, . . . he killed her." 660 So. 2d at 696. This Court concluded that heightened premeditation had not been established because "the evidence presented does not demonstrate that Barwick had a careful plan or prearranged design to kill the victim. . . . Here, the evidence suggests that Barwick planned to rape, rob, and burglarize rather than kill." Id. (citations omitted).

The sixth sentence of the court's findings on CCP is a summary of events:

"After he robbed Ms. Franklin, he kidnaped [sic] her, removed her from the scene, murdered her and disposed of the only witness to his crime" (R12-2250-51). This summary points to no evidence of calm reflection, careful planning, prearranged design or heightened premeditation. Jackson. These events could just as well have resulted from snap decisions as from any planning. The only direct evidence of Mr. Card's plans was his statement to Elrod that he told the victim on the drive to the woods that he was not going to hurt her, but just wanted the money (R29-13).

When evidence regarding an aggravator is circumstantial, the aggravator cannot be based upon inference unless the evidence is inconsistent with any reasonable hypothesis that might negate the aggravator. Woods, 733 So. 2d at 991; Geralds, 601 So. 2d at 1163-64. Here, the only direct evidence indicates Mr. Card did not have a plan to kill the victim. The circumstantial evidence is consistent with the reasonable hypothesis that the events did not result from a plan, but from spontaneous decisions.

The seventh sentence of the court's findings on CCP rely upon efforts to conceal evidence after the murder: "He disposed of the gloves, the knife and Ms. Franklin's wallet which could have connected him to the crime and would have been evidence against him" (R12-2251). Since CCP involves planning before the murder, reliance upon events occurring after the murder is impermissible under Power.

The eighth sentence of the court's findings on CCP speculates as to what could

have been going through Mr. Card's mind during the events: "There was more than sufficient time for the defendant to reflect on the seriousness of his acts, to plan his attacks and to realize what could occur if he were discovered" (R12-2251). A trial court may not rely on speculation to support an aggravator. Hartley, 686 So. 2d at 1323-24; Hamilton, 547 So. 2d at 633-34.

The prosecutor's argument to the jury relied upon the same impermissible matters to support CCP. Although he acknowledged during the charge conference that planning a robbery does not establish heightened premeditation (R30-76), the prosecutor's closing argument focused on just those facts. The prosecutor argued CCP was supported by Mr. Card telling Elrod he would bring her money later in the day, which meant Mr. Card had "planned to rob the Western Union" (R31-103-104). The prosecutor argued that Mr. Card wore gloves, armed himself with a knife, concealed the knife, and left the Western Union the first time he went in because another person was there (R31-104). According to the prosecutor, these facts meant Mr. Card "ha[d] sufficient time to plan it" and had been "figuring a way to get money" since early in the morning (R31-104-05). All of these arguments relied upon planning of a robbery, which is not a legally sufficient basis for finding CCP. Barwick; Geralds; Hardwick; Gorham. As this Court determined in Barwick, matters such as procuring a weapon and wearing gloves do not establish CCP.

The prosecutor also based his argument on improper speculation and upon events occurring after the murder, arguing: "He knew that if he's going to rob that place he's got to dispose of her, if he didn't, if he wasn't going to kill her then why was he trying to wear gloves and why did he throw his knife away and why did he throw the [wallet] away" (R31-105). Speculation and events occurring after the murder cannot support CCP. Hartley; Hamilton; Power.

The state's evidence failed to prove the elements of CCP beyond a reasonable doubt. The trial court erred in instructing the jury on this legally inapplicable factor and erred in finding and weighing this factor.

3. Heinous, Atrocious or Cruel (HAC)

To establish HAC, it is not sufficient to show that the victim suffered great pain, or did not die immediately.[2] HAC is proper "only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another."

[2] In Brown v. State, 526, So. 2d 903 (Fla. 1988), this Court refused to find find HAC in the murder of a police officer, even though the defendant took the officer's gun and shot him despite his pleas not to do so. In Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979), HAC was not applied even though the victim was shot in the chest, attempted to flee, and was shot again in the back. In Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993), the Court rejected HAC although the victim was shot twice and did not die, but begged for his life, and was then shot twice more.

Brown v. State, 721 So. 2d 274, 277 (Fla. 1998). Rejecting HAC in Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), this Court held, "the crime must be both conscienceless or pitiless and unnecessarily torturous" for HAC to apply.

Accordingly, the Court has required a showing that the defendant intended to inflict a high degree of pain or suffering in order to establish HAC. Hamilton v. State, 678 So. 2d 1228 (Fla. 1996); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991). In Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993), the Court held that HAC was not established because there was no evidence the defendant "intended to cause the victim unnecessary and prolonged suffering."[3]

This Court has also required that the murder was both physically and mentally torturous to the victim. Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991). Thus, the Court has held that the state must prove the victim was conscious during the events. In DeAngelo v. State, 616 So. 2d 440, 442-43 (Fla. 1993), the Court rejected the state's cross-appeal challenging the trial court's failure to find HAC because the

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[3] This Court's decisions on the necessity of intent as an element of HAC have been conflicting. In Guzman v. State, 721 So. 2d 1155, 1160 (Fla. 1998), the Court held that "[t]he intention to inflict pain on the victim is not a necessary element of the aggravator," if the state proves utter indifference. But in numerous other cases, the Court has held that HAC may not properly be found where there is no evidence that the defendant "intended to subject the victim to any prolonged or torturous suffering." Buckner v. State, 714 So. 2d 384, 389 (Fla. 1998); Hamilton; Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995); Bonifay; Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993); Santos.

trial court found the state had failed to prove the victim was conscious during the attack. Likewise, in Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984), the Court held the facts did not support HAC, reasoning, "[w]hen a victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of heinousness."

Here, the defense objected to the jury being instructed on HAC because the evidence failed to satisfy the definition of HAC (R30-81). The court overruled the objection based on law of the case (R30-81).

The trial court applied HAC, finding:

> The defendant entered the Western Union run by Ms. Franklin and her family. The defendant armed himself with a knife, attacked Ms. Franklin and while she attempted to restrain him and defend herself, the fingers on both of her hands were severely cut. Her hands were bleeding, several fingers on her right hand were almost completely severed from her hand and her blouse was torn. While suffering from the shock of the loss of blood and the pain from the cuts, Ms. Franklin was forced into a car and driven eight miles to an isolated area and forced to leave the car. Although she was promised she would not be harmed further, the defendant approached her from behind, grabbed her hair, pulled her head back and slit her throat. The cut to the throat was two and one-half inches deep. It also severed her windpipe and her esophagus and even cut into the bone itself. The defendant stood over her watching her bleed. This crime was particularly wicked and vile since Ms. Franklin knew her attacker, had to suffer during the long drive from the wounds to her hands and must have been traumatized and terrorized during this whole process. She was grabbed from behind and suffered the final vicious attack by this defendant. The defendant told Vicki Elrod that he even enjoyed it.

(R12-2249-50).

The wounds to the victim's hands do not establish HAC. The medical examiner testified that these wounds were defensive wounds, made when the victim grabbed the knife (R28-77). The trial court recognized that these wounds occurred "while [the victim] attempted to restrain him and defend herself" (R12-2249). These wounds were not deliberately inflicted by Mr. Card and therefore do not demonstrate a "desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Brown.

Nor does the drive to the woods establish HAC. During that drive, Mr. Card told the victim he was not going to hurt her, but just wanted the money (R29-13). The fact that Mr. Card attempted to reassure the victim indicates he had no "desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Brown. Rather, Mr. Card's statement to the victim indicates he did not want the victim to be afraid.

Further, the trial court relied upon speculation to determine that the victim was mentally tortured, saying, the victim "must have been traumatized and terrorized during this whole process" (R12-2250). A court may not rely upon speculation to support an aggravator. Hartley; Hamilton.

Finally, the state did not establish beyond a reasonable doubt that the victim was

aware of what was happening or even conscious when the neck wound was inflicted. The medical examiner testified that when the neck wound was inflicted, the assailant was behind the victim, and that the neck wound was the type where the victim is unaware of what is going to happen (R28-77).

The medical examiner also testified that the victim had a wound on the back of her neck which was a very severe bruise, with the tissues underneath the wound being very widely hemorrhagic (R28-78). The hemorrhaging indicated that this injury occurred while the victim was alive (Id.). Therefore, the medical examiner testified, it was possible the victim was struck so severely on the back of the neck that she was rendered momentarily unconscious (Id.).

In light of the medical examiner's testimony, the state did not prove beyond a reasonable doubt that the victim was aware of her impending death or conscious when the fatal wound was inflicted. The trial court made no finding that the victim was aware of what was going to happen or conscious at the time the neck wound was inflicted. Thus, the state did not prove the elements of HAC.

4. Pecuniary Gain

This aggravator applies only if the dominant or sole motive for the murder is pecuniary gain. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Here, the trial court applied this aggravator, finding:

> $1,197.00 was stolen from the Western Union office. The Court knows that it is improper to double aggravating factors, however, this murder was committed during the course of a kidnapping, not just a robbery so it is appropriate to consider the pecuniary gain involved in the kidnapping.

(R12-2249).

First, the court made no finding that the dominant or sole motive for the murder was pecuniary gain. Further, in addition to holding that pecuniary gain applies only when the sole or dominant motive for the murder was pecuniary gain, this Court has held that the avoid arrest aggravator applies in a case not involving the murder of a law enforcement officer only if the state proves that avoiding arrest was the sole or dominant motive for the murder. Jennings v. State, 718 So. 2d 144, 151 (Fla. 1998). It is therefore inconsistent to apply both pecuniary gain and avoid arrest in the same case. But see Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994). Applying two aggravators which both require a showing of a sole or dominant motive renders the death sentencing process vague and overbroad, and fails to genuinely narrow the class eligible for the death penalty. Stringer v. Black; Zant v. Stephens.

C. THE ERRONEOUS CONSIDERATION OF LEGALLY INAPPLICABLE AGGRAVATORS WAS NOT HARMLESS ERROR.

When any one or more of the aggravators discussed above is invalidated, the state cannot show beyond a reasonable doubt that the erroneous consideration of the

aggravator or aggravators was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1989). Mr. Card presented a substantial case in mitigation and, despite the fact that the trial court's sentencing order did not address all of this mitigation, the court did find Mr. Card had established seven mitigating factors (R12-2251-52). Further, the court's sentencing order states, "the Court does find that the aggravating factors clearly outweigh all the mitigating factors combined" (R12-2252). This statement indicates that the court relied upon all of the aggravating factors to impose death, and thus there is no way to tell beyond a reasonable doubt that elimination of even one aggravator would not affect the sentencing decision. DiGuilio.

The state likewise cannot show beyond a reasonable doubt that consideration of one or more invalid aggravators did not contribute to the jury's death recommendation. See Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, Sochor v. Florida, 112 S. Ct. 2114, 2119 (1992); DiGuilio. The jury was overbroadly instructed on aggravating factors, an error which fails to genuinely narrow the class of persons eligible for the death penalty. Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988); Zant v. Stephens. The jury had no way to know that one or more of the aggravators upon which it was instructed were legally inapplicable. See Sochor, 112 S. Ct. at 2122 ("a jury is unlikely to disregard a theory flawed in law"). It therefore must be presumed that the jury found and relied upon these inapplicable aggravators.

Espinosa, 112 S. Ct. at 2928. The jury's weighing process was thus skewed in favor of death. Stringer. Since there was unrebutted evidence of mitigating factors in the record, see Argument 4, the state cannot show beyond a reasonable doubt that the errors in instructing the jury on legally inapplicable aggravators was harmless. DiGuilio. Because the trial court and jury relied upon one or more inapplicable aggravators, Mr. Card should be granted a resentencing before a jury.

ARGUMENT 4

THE TRIAL COURT ERRED BOTH LEGALLY AND FACTUALLY IN ITS EVALUATION OF MITIGATING FACTORS BY FAILING TO EVALUATE EACH MITIGATING FACTOR PROPOSED BY THE DEFENSE AND BY FAILING TO EXPLAIN ITS WEIGHING PROCESS.

In a capital case, "the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Skipper v. South Carolina, 476 U.S. 1, 2 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982). Both the trial court and this Court are constitutionally required to consider any mitigating evidence found anywhere in the record. Parker v. Dugger, 498 U.S. 308 (1991).

This Court has defined the trial court's duty to find and consider mitigation. Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). In Campbell v. State, 571 So. 2d 415 (Fla. 1990), the Court delineated the trial court's obligations in evaluating

mitigating factors:

> 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 must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. . . . 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.

Campbell, 571 So. 2d at 419 (citations and footnotes omitted). The written evaluation requirement of Campbell "cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of" and is not satisfied unless "it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the death penalty." Walker v. State, 707 So. 2d 300, 319 (Fla. 1997). Thus, in addition to addressing whether mitigating factors are factually established, the sentencing order must also explain the reasoning for the trial court's weighing of the mitigators. Merck v. State, 25 Fla. L. Weekly S584 (Fla. July 13, 2000); Hudson v. State, 708 So. 2d 256, 259-60 (Fla. 1998).

A mitigating factor need only be proved by a preponderance of the evidence. Campbell, 571 So. 2d at 419 (quoting Fla. Std. Jury Inst. (Crim.)). Accordingly, a trial court must find that a mitigating factor has been proved if it is supported by a

reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Further, while it is within the trial court's discretion to determine the relative weights given to established mitigators, "some weight must be given to all established mitigators." Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995).

In Mr. Card's case, the trial court's sentencing order failed to satisfy Campbell and its progeny. First, the court failed to expressly evaluate each mitigating factor proposed by the defense. Second, the court failed to provide a thoughtful and comprehensive analysis of the weighing process.

In penalty phase closing argument and in the sentencing argument before the court, defense counsel proposed the following mitigating factors:

> (1) Mr. Card's family history of poverty, abandonment, instability, neglect, abuse and extreme cruelty (R31-131, 132, 133, 134, 135-36, 143-44; R26-2998);
>
> (2) a childhood such as Mr. Card endured has numerous, permanent effects on a person's development and ability to conform to societal norms, as Dr. Haney explained (R26-2999);
>
> (3) Mr. Card's exemplary behavior in prison where he received only five disciplinary reports in 18 years of incarceration (R31-132, 139-40; R26-2999);
>
> (4) Mr. Card's poor performance in school due to his unstable home life (R31-135);
>
> (5) Mr. Card's honorable discharge from the Army National Guard (R31-136);
>
> (6) Mr. Card's essential core of goodness as illustrated by his being a good friend, by his former wife's belief in him as a good person and by his family's

support of him (R31-137, 144; R26-3001);

(7) Mr. Card's attempts to improve himself by obtaining a GED while in prison (R31-139; R26-2999);

(8) Mr. Card's positive contribution of writing to school children telling them to think about the choices they make in life (R31-140-41);

(9) Mr. Card's art work (R31. 141, 144; R26. 3000);

(10) Mr. Card's sincere and genuine religious faith (R31. 142; R26. 2999);

(11) Mr. Card's efforts to improve access to religious sacraments for other prisoners (R31-142-43; R26-3000);

(12) the probability that Mr. Card would continue to adapt well to prison life based on his past prison behavior and current age of 52 (R31-144; R26-3000);

(13) Mr. Card's lack of prior violent crimes (R26-3001).

The court's sentencing order discussed nonstatutory mitigating factors as follows:

> The existence of any factors in the defendant's background that would mitigate against the imposition of the death penalty. The defendant has asked the Court to consider the following:
>
> a. Family background: The defendant's parents separated before he was born and he was a member of a large family which grew over the years. His father refused to acknowledge his paternity. The defendant lived with a brutal step-father for several years and after the mother divorced him, she married another man who was by all accounts a good father to the children and a decent individual. After his death, the mother remarried the brutal step-father. The Court considers this in mitigation and finds that his upbringing was harsh and brutal, so some weight is given to this factor in mitigation.

> b. Good prison record: The Court finds that the defendant has achieved a good prison record on death row. However, slight weight is given to this as a factor in mitigation.
>
> c. Religious beliefs: The Court finds that the defendant is a practicing Catholic and made efforts to obtain religious services for other death row inmates and grants some weight to this in mitigation.
>
> d. Abuse of the defendant as a child: The abuse of the defendant as a child is also involved in the family background factor and the Court does give some weight to this.
>
> e. Good military record: The Court finds that the defendant received an Honorable Discharge from the Army National Guard of Arizona. Some weight is given to this factor.
>
> f. Artistic abilities: Testimony shows that the defendant has artistic abilities, but little weight is given to this as a mitigating factor.
>
> g. Correspondence with school children: The Court finds that the defendant has attempted through correspondence to deter young children being involved in crime in their future and the Court gives some weight to this factor.

(R12-2251-52).

A. PROPOSED MITIGATING FACTORS OMITTED FROM THE ORDER

The trial court's order does not discuss at all the following mitigating factors proposed by the defense: the expert testimony regarding the permanent consequences of a childhood such as Mr. Card experienced, Mr. Card's poor school performance,

the support of Mr. Card's friends and family, Mr. Card's efforts to improve himself by obtaining his GED, expert testimony on the probability that Mr. Card's good prison behavior would continue, or Mr. Card's lack of a history of prior violent crimes. Perhaps the most notable omission from the sentencing order is any discussion of Dr. Haney's extensive testimony regarding how a background like Mr. Card's permanently affects a person's development and ability to conform to societal norms.

Dr. Haney studies social factors which lead to criminal behavior and also studies prisoners' adjustment to incarceration (R31-33). Dr. Haney identified numerous risk factors in Mr. Card's childhood which permanently affected Mr. Card's ability to conform to societal norms. Dr. Haney further explained how and why these risk factors affect a person's development. In Mr. Card's life, these factors include poverty (R31-38-40), abandonment by his natural father (R31-40-42), instability in the family structure (R31-42-43), severe neglect to the extent that there was no real parenting (R31-47-49), emotional abuse by Mr. Card's stepfather and natural father (R31-49-50), and physical abuse by the stepfather which approached the sadistic (R31-50-52). Dr. Haney rated the extent to which each of these risk factors was present in various phases of Mr. Card's childhood (R31-62). In Mr. Card's early childhood, poverty was moderate to severe, abandonment was severe, instability was

moderate, neglect was severe, and physical and emotional abuse were severe (R31-63-64). When Mr. Card's mother was married to Mr. Taylor, the environment was relatively positive, but after Taylor died and the mother remarried Scripter, the risk factors went back to severe (R31-65).

Dr. Haney explained that the link between the risk factors he described and developmental consequences is well established (R31-52). In Mr. Card's life, these risk factors are linked to developmental consequences such as feelings of worthlessness, misbehavior resulting from never learning impulse control, poor school performance, and substance or alcohol abuse (R31-52-60). The risk factors Dr. Haney identified in Mr. Card's life are also linked to long term consequences, including an inability to form stable relationships and personal instability (R31-60-61).

The sentencing order also does not address Dr. Haney's testimony about the probability that Mr. Card would continue to exhibit good adjustment to prison. Dr. Haney testified both as to Mr. Card's past adjustment to prison and as to the probability of continued good adjustment in the future. The trial court addressed the former in the sentencing order, but omitted the latter. Dr. Haney testified that he has studied adjustment to incarceration all around the country and has reviewed the records of thousands of prisoners (R31-75). According to Dr. Haney, Mr. Card's prison record is extraordinary (R31-75-76). Dr. Haney then explained that Mr. Card's

extraordinary adjustment would continue in the future based on the facts that Mr. Card is 52 years old, well past the age of being a problem, that Mr. Card does not pose a danger because he is slightly built and does not intimidate others, that Mr. Card has medical problems, that Mr. Card has had no disciplinary write-ups involving weapons, that Mr. Card fills his time with meaningful activities, and that Mr. Card would be serving a life sentence (R31-76-81).

The trial court's order does not address any of the expert testimony on risk factors and their consequences offered by Dr. Haney and does not address Dr. Haney's testimony that Mr. Card's good prison adjustment will continue. These proposed mitigating factors were supported by a reasonable quantum of competent, uncontroverted evidence. Likewise, the other proposed mitigating factors omitted from the sentencing order--Mr. Card's poor school performance, the support of Mr. Card's friends and family, Mr. Card's efforts to improve himself by obtaining his GED, and Mr. Card's lack of a history of prior violent crimes--were also supported by a reasonable quantum of competent, uncontroverted evidence. The trial court's failure to expressly evaluate each of the proposed mitigating factors which were supported by the preponderance of the evidence precludes meaningful review of the sentencing order and requires that the death sentence be vacated. Merck; Hudson; Walker; Ferrell; Campbell.

B. THE ORDER'S LACK OF CLARITY AS TO THE WEIGHING PROCESS

Further, the trial court's order is very unclear as to the weight attached to the mitigating factors the court found to exist and does not "explain the reasoning for the trial court's weighing of nonstatutory mitigation." Merck, 25 Fla. L. Weekly at S584. The court said the factors were given "some weight," "slight weight" or "little weight." Is "some" more or less than "slight" or "little"? Is "slight" more or less than "some" or "little"? Is "little" more or less than "some" or "slight"?

The difficulty presented by use of these vague, undefined terms is apparent when one considers the family background mitigator and the correspondence with school children mitigator. The court assigned both of these mitigators "some" weight. However, the evidence underlying the family background mitigator was far more extensive, involved a much longer period of Mr. Card's life and addressed the formative forces in Mr. Card's life. Based on this evidence, the court found that Mr. Card's upbringing was "harsh and brutal." This Court has recognized that an abusive childhood can be an important mitigating factor. See, e.g., Campbell; Nibert. Here, the trial court gave this factor "some" weight, but there is no way to determine from the sentencing order what "some" means, or whether the "some" weight given the family background mitigator is the same as the "some" weight given to the

correspondence with school children mitigator.

The court also gave "some" weight to the good prison record mitigator. Again, it is impossible to determine what "some" means here. Good prison behavior "necessarily implies a potential for rehabilitation and productivity in a prison setting," Kramer v. State, 619 So. 2d 274, 276 n.1 (Fla. 1993), which "unquestionably" is a "significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). The court found as a matter of fact that Mr. Card had established the mitigating factor of good prison behavior, but the court's order is unclear as to what weight or significance the court attached to that factor. This Court has held as a matter of law that good prison behavior establishes a "significant factor in mitigation," but there is no way to know here whether the trial court followed that law.

Although the trial court found some nonstatutory mitigating factors, the court did not explain its reasoning for the weights assigned to these factors nor how these mitigating factors were weighed against the aggravating factors. The court only said, "the Court does find that the aggravating factors clearly outweigh all the mitigating factors combined" (R12-2252). The court's failure to provide a detailed, thoughtful and comprehensive analysis of its weighing process also precludes meaningful review of the sentencing order and requires the death sentence be vacated. Merck; Hudson; Walker; Ferrell.

ARGUMENT 5

THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE

This Court reviews each death sentence for both internal and external proportionality. First, this Court looks to the facts and circumstances of the case to determine if the death sentence should stand. Ray v. State, 755 So. 2d. 604, 611 (Fla. 2000). If so, this Court compares the "totality of the circumstances in a case and compares it with other capital cases to ensure uniformity in application." Mansfield v. State, 758 So.2d. 636, 647 (Fla. 2000). In each instance, this Court has stressed "that the death penalty is reserved for 'the most-aggravated and unmitigated of most serious crimes'." State v. Dixon, 283 So. 2d. 1, 7 (Fla. 1973); Deangelo v. State, 616 So. 2d. 440, 443 (Fla. 1993).

Viewed apporpriately, this case involves Mr. Card robbing the Western Union where Mrs. Franklin worked, taking Mrs. Franklin about eight miles to a deserted area off Back Beach Road in Panama City, and then killing her by slitting her throat from behind. While it was a terrible crime, it certainly is not one of the most aggravated. The trial judge broke down the crime into its components and came up with five aggravators. Two of these aggravators involve conduct for which Mr. Card was convicted at his first trial for the substantive crimes - kidnapping and robbery. Whether

the remaining aggravator apply has been challenged in separate arguments in this brief.

In any event, this case is definitely not among the least mitigated. The trial court's order recognizes the extent and quality of mitigation offered on behalf of Mr. Card. This has been previously detailed in the Statement of the Facts and other Arguments. It is undisputed that Mr. Card was brought into this world under brutish conditions that became more brutal while he was in his developmental years. Mr. Card suffered from a panoply of terroristic attacks against his body and soul. He grew up under conditions that no child should suffer. This child was beaten, humiliated, ignored, and starved - both for food and love. The effect of these deprivations on Mr. Card, the adult, was intimately detailed by Dr. Haney. In spite of all this horror, Mr. Card has maintained a commitment to humaness in his own life and others. Expressed through his artwork, his caring, his religion, his letters, Mr. Card has shown that this is a life that should not be taken artificially.

In Ray v. State, 755 So. 2d. 604 (Fla. 2000), Ray and his cousin Roy Hall robbed the stateline Liquor Store located near the Florida-Georgia line. In preparation for this robbery, the cousins armed themselves with any number of firearms and ammunition. This firepower included a Davis Industries 380 pistol, a SKS 7.62 milimeter rifle and magazine, a 9 milimeter Berretta pistol, and a M-1 carbine semiautomatic rifle. The cousins robbed the store and then stole a car from one of the

employees. The cousins left the store in the stolen vehicle which they abandoned in a prearranged location and picked up their original vehicle. Soon after, the vehicle developed some mechanical problems and they had to stop the car to try and fix it. While out of the car and trying to find the problem, deputy sheriff Lindsey approached them. Lindsey called for backup and then a shootout occurred resulting in the death of deputy Lindsey. Other law enforcement reached the scene as Roy and Hall were leaving in their vehicle. Ultimately, they were stopped and arrested. Hall had been shot multiple times; Ray was uninjured.

The investigation showed that deputy Lindsey was killed by shots fired from a M-1 rifle; Ray's fingerprint was found on the rifle. Ray testified positive for gunshot residue; Hall tested negative. Ray's palm prints were found on the hood of deputy Lindsey's car.

Ray and Hall were convicted of first-degree murder. The jury recommended life imprisonment for Hall and the judge sentenced him accordingly. The jury recommended death for Ray. "Ray presented evidence of his low I.Q., his stable family life and his passive and compliant role in the roberry." The judge found three aggravators, one statutory mitigator - no significant criminal history, and five nonstatutory mitigators: (1) Ray has an I.Q. of 75; (2) Ray showns signs of depression; (3)Ray's father suffers from depression and Ray's family has a history

low intelligence; (4) Ray might have brain damage because he was born prematurely; and (5) Ray was a loving husband and caring father to his three children. The judge sentenced Ray to death.

This Court found the death sentence internally disproportionate because it viewed the evidence as indicating that Ray was no more culpable in the death of deputy Lindsey than Hall. In addition, and more significant to Mr. Card's case, this Court also found that Ray's sentence of death was externally disproportionate.

> Without comparison to Hall's sentence, the impostion of the death penalty in this case is still disproportionate. The trial court found substantial nonstatutory mitigating factors. In contrast, it found three aggravating factors, two of which we combine based on improper doubling. Futhermore, Ray's criminal history was scant. Under a proportionality analysis a death sentence is not appropriate in this case, as this is not one of the most aggravated and least mitigated of first-degree murders.

In Urbin v. State, 714 So. 2d. 411, 416 (Fla. 1998) Urbin and two others planned out the robbery of the first person who left Harley's Rack and Cue pool room. This effort failed. The three of them waited for the next person to walk out; this was Jason Hicks. Urbin followed Hicks armed with a gun; the other two men drove around the back of the pool room where they heard three shots. When the three men reunited, Urbin told them that he had robbed Hicks by getting Hicks out of his car, placing him on the ground and putting the gun to his head. When Urbin went to get

money out of Hicks' pocket, Hicks got up and tried to run away. It was then Urbin shot and killed Hicks. Hicks died from gunshot wounds; he also had cuts to his face that were consistent with being struck with a gun.

Urbin was convicted of first-degree murder. At the penalty phase, the judge found Urbin had previously been convicted of a violent felony; the murder was committed for pecuniary gain (and during a robbery) and it was committed to avoid arrest. (On appeal, this Court struck this final aggravator.) For mitigation, the judge gave varying consideration to Urbin's age; that his capacity to appreciate his criminal conduct or conform his conduct to the requirements of law was substantially impaired; the absence of Urbin's father; Urbin's substance abuse problem; Urbin's mother being in prison; that Urbin had dyslexia and finally Urbin's work history. This Court reversed the death sentence because of an external proportionality review.

In doing so, this Court recognized the fact that Urbin was 17 years at the time of the homicide, that he suffered from extensive parental abuse and neglect and that parental behavior had profound influences on this child while he was growing up. It is true that Mr. Card is substantially older but the connection between the crime and developmental factors is clear. See Nibert v. State, 574 So. 2d. 1059,1062 (Fla. 1990). Although this Court's proportionality review is often viewed through the prism of counting number of aggravators versus number of mitigators, this is not the way it is

designed to work.

> Proportionality review "requires a discrete analysis of the facts," Terry v. State, 668 So. 2d. 954, 965 (Fla. 1996), entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. We underscored this imperative in Tillman v. State, 591 So. 2d. 167 (Fla. 1991):
>
> > We have described the "proportionality review" conducted by this Court as follows:
> >
> > > Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.
> >
> > Porter v. State, 564 So. 2d. 1060, 1064 (Fla. 1990).
>
> The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17. Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.
>
> > ...Thus proportionality review is a unique and highly serious function of this

> Court, the purpose of which is to foster uniformity in death-penalty law.
>
> Id. at 169 (alterations in original) (citations and footnote omitted). As we recently reaffirmed, proportionality review involves consideration of "the totality of the circumstances in a case" in comparison with other death penalty cases. Sliney v. State, 699 So. 2d. 662, 672 (Fla. 1997) (citing Terry, 668 So. 2d. at 965).

ARGUMENT 6

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO REQUIRE UNANIMOUS VERDICT

In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the Supreme Court held, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. Under the analysis set forth in Apprendi, the trial court erred in denying the defense Motion To Require Unanimous Verdict (R10-1864-65). Defense counsel argued that "there's a fundamental due process right to have a unanimous verdict" and that not requiring a unanimous verdict was "fundamentally wrong, it violates numerous sections of both the State and Federal Constitutions" (R21-2741-42). The court denied the motion (R21-2742; R10-1893).

Under Fla. R. Crim. P. 3.440, a jury verdict on a criminal charge must be unanimous. Since jury unanimity has long been the practice in Florida, "It is therefore

settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). However, in capital cases, this Court has approved allowing the jury to recommend a death sentence based upon a simple majority vote. See, e.g., Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). The Court has also not required jury unanimity as to the existence of specific aggravating factors. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990).

In light of Apprendi, the Court should reexamine the majority vote practice in jury capital sentencing and require jury unanimity, including but not limited to the existence of any aggravating factors and as to the recommended sentence. Apprendi requires "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." This means that facts which increase the penalty beyond the statutory maximum are treated as elements of the crime.

An examination of the particulars of the Florida capital sentencing process shows that a death sentence is "beyond the prescribed statutory maximum" and therefore "must be submitted to a jury." Under Sec. 782.04(1)(a), Fla. Stat. (1999), a first-degree murder conviction is punishable as provided in Sec. 775.082, Fla. Stat. This section provides:

> A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

Sec. 775.082, Fla. Stat. (1999).

A Florida capital defendant is not eligible for the death sentence upon conviction for first-degree murder; without more, the court would only be able to impose life. Sec. 775.082, Fla. Stat. This is so because the Florida capital sentencing statute requires the state to prove at least one aggravating factor beyond a reasonable doubt before the defendant is eligible for a death sentence. Sec. 921.141(2)(a), (3)(a), Fla. Stat. (1999). Thus, under Florida law, the death sentence is not within the "statutory maximum" sentence discussed in Apprendi, but is only available after additional findings are made.

Florida law has long respected the jury's role in the finding of a fact that increases the maximum penalty of a particular crime. For instance, a jury deciding a robbery case is told that

> The punishment provided by law for the crime of robbery is greater if "in the course of committing the robbery" the defendant carried some kind of weapon. An act is "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission. Therefore, if you find the defendant guilty of robbery, you must then consider whether the State has further proved those aggravating circumstances and reflect this in your verdict.

Fla. Standard Jury Instructions (1998 Edition), pg. 220. The jury is then provided with choices about the kind of weapon and told that no greater sentence can be imposed unless the jury unanimously finds the defendant carried some particular weapon. See also the crimes of burglary, pg. 196-197; trespass, pg. 204; theft, because the value of the loss affects the penalty, pg. 211; drugs, pg. 305, 308, 311, 317.

Under Apprendi's reasoning, aggravating factors in the Florida scheme are elements of the charge and should be decided by a unanimous jury. As Apprendi explained, the important consideration is the effect of the factor rather than whether the legislature placed the factor in the definition of the crime or within sentencing provisions. 120 S. Ct. at 2364-66. "[T]he relevant inquiry is one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id. at 2365. Thus, even if a death sentence appears to be within the statutory maximum allowed under Florida law, under Apprendi's reasoning, the legislature's placement of aggravating factors in a sentencing provision exceeds the state's "authority to define away facts necessary to constitute a criminal offense." Id. at 2360. Apprendi's discussion of prior cases indicates this decision can be made only upon consideration of the particulars of the state law involved and the effect of the factor at issue. See, e.g., 120 S. Ct. at 2360-61

& n.13 (distinguishing McMillan v. Pennsylvania, 477 U.S. 79 (1986)); Id. at 2366 (distinguishing Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

Apprendi has overruled Walton v. Arizona, 497 U.S. 639 (1990), and related cases. See 120 S. Ct. at 2380 (Thomas, J., concurring) (question whether Walton has been overruled is left open); Id. at 2387-88 (O'Connor, J., dissenting) (majority decision inconsistent with Walton). Even if Walton and cases related to it have not been overruled, Apprendi's reasoning establishes that Walton does not apply to the particulars of Florida's capital sentencing scheme. 120 S. Ct. at 2364-66.

Mr. Card's right to jury unanimity was violated by the lower court's denial of the Motion To Require Unanimous Verdict. Deprivation of this right violates due process. Flanning; Hicks v. Oklahoma, 447 U.S. 343 (1980). This Court should order a jury resentencing.

ARGUMENT 7

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUESTED INSTRUCTION ON COLD, CALCULATED AND PREMEDITATED.

At the charge conference, the defense requested the following special instruction regarding CCP: "Heightened level of planning for a robbery, even if it does exist, does not establish a heightened premeditation for murder" (R11-1985). Counsel based this request on Hardwick v. State, 461 So. 2d 79 (Fla. 1984) (Id.; R30-76). The state

objected to the instruction, but "[did not] disagree with the statement of the law" (R30-76). The court denied the request (Id.).

The requested instruction correctly stated the law. In applying CCP, "[a] plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995), quoting Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

> 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.

Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984); Gorham v. State, 454 So. 2d 556, 559 (Fla. 1984).

The court erred in denying the requested instruction. The instruction correctly stated the law and would have properly advised the jury. In Castro v. State, 597 So. 2d 259, 261 (Fla. 1992), this Court held that an instruction prohibiting doubling aggravators should be given when requested. However, in Davis v. State, 698 So. 2d 1182, 1192 (Fla. 1997), the Court rejected a challenge to the denial of a requested instruction further defining the avoid arrest aggravator and held, "not every court construction of an aggravating factor must be incorporated into a jury instruction defining that aggravator." Castro and Davis are inconsistent, contrary to due process.

If a capital defendant may request a doubling instruction--which is based upon this Court's construction of the capital sentencing statute--a capital defendant should also be permitted to request an instruction on an aggravator based on this Court's construction of the capital sentencing statute.

Denial of the requested instruction in Mr. Card's case left the jury without proper guidance as to what it must find in order to apply CCP. See Espinosa v. Florida; Maynard v. Cartwright; Godfrey v. Georgia, 446 U.S. 420 (1980). The lack of guidance renders the death sentencing process vague and overbroad, and fails to genuinely narrow the class eligible for the death penalty. Stringer v. Black; Cartwright; Zant v. Stephens; Godfrey.

ARGUMENT 8

OTHER ERRORS DEPRIVED MR. CARD OF A FAIR, RELIABLE AND INDIVIDUALIZED SENTENCING PROCEEDING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Other errors deprived Mr. Card of a fair, reliable and individualized sentencing proceeding. Since this Court has previously ruled adversely to Mr. Card's position on these issues, the arguments are stated briefly below.

Mr. Card filed a Motion In Limine And Objection To Standard Jury Instruction arguing that portions of the jury instructions which refer to the jury as advisory, which

call the jury's verdict a recommendation and which state that sentencing rests with the judge violate Caldwell v. Mississippi, 472 U.S. 320 (1985) (R10-1856-57; R21-2740-41). The court denied the motion (R21-2741). This was error under Caldwell and Espinosa v. Florida, 112 S. Ct. 2926 (1992). But see Burns v. State, 699 So. 2d 646, 654 (Fla. 1997).

Defense counsel several times attempted to ask Mr. Card's family members what effect Mr. Card's execution would have on his family and proffered the expected answers (R29-52-53; R30-60-61; R31-25). The state objected that these questions did not address Mr. Card's background, character and record, and the court sustained the objections (Id.). However, these questions did address Mr. Card's background, character and record because the family members' feelings about Mr. Card's death were based upon their knowledge of his background and character. Preclusion of this evidence violated Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny. But see Burns, 699 So. 2d at 654.

Mr. Card challenged the constitutionality of the following aggravating factors: heinous, atrocious or cruel, cold, calculated and premeditated, course of a felony, avoid arrest and pecuniary gain (R10-1848-53; R11-2746-48). Mr. Card argued these aggravators were overbroad, vague and failed to narrow the class of persons eligible for death (Id.). The court denied the motions (R11-2747-48). This was error.

Espinosa v. Florida; Sochor v. Florida; Stringer v. Black; Maynard v. Cartwright; Zant v. Stephens; Godfrey v. Georgia.

The United States Supreme Court and this Court have authorized the State to present evidence generically known as victim-impact. Payne v. Tennessee, 501 U.S. 808 (1991); Hitchcock v. State, 673 So. 2d 859 (Fla. 1996); Section 921.142(8), Florida Statutes (1997) Three categories of information are contemplated by victim-impact evidence: (1) the victim's character; (2) the impact of the murder on survivors; and (3) opinions by survivors about the defendant, the crime and the proper punishment. Payne permits only evidence for the first two categories, not the third.

The State was allowed to present evidence of the impermissible third category at the Spencer hearing before the trial judge. Over objection, Mrs. Franklin's granddaughter, Courtney Brimmer told the judge that Mr. Card had it easy in prison the past 18 years, able to do artwork and communicate with his family. Ms. Brimmer then said that she would rather die a quick and easy death in the electric chair rather than be killed the way her grandmother was. (R26-2997)

The two family members who testified at trial - Mrs. Franklin's husband Ed Franklin and daughter, Cindy Brimmer - both spent considerable time talking about Mrs. Franklin. In doing so this trial became more about Mrs. Franklin's family and what happened to them after her murder than it did on a reasoned decision about

whether Mr. Card should live or die. This use of victim impact evidence violates the due process of the Fourteenth Amendment because it rendered the sentencing decision fundamentally unfair. Payne, 501 U.S. at 825. Mrs. Franklin did not deserve to be murdered and her family left without a wife and mother. Yet, "it is just as great a crime to kill the most hardened criminal as it is to kill the most upright and illustrious citizen of the land . . ." Ice v. Commonwealth, 667 S.W. 2d 671 (Ky. 1984); Benge v. Commonwealth, 97 S.W. 2d 54, 56 (Ky. 1936) The decision by the jury to recommend life or death was predicated on unbridled passion. The failure to eliminate this evidence was error.

When Mr. Card was sentenced in 1982, he received consecutive life sentences on robbery and kidnapping. When Mr. Card received a new sentencing trial for his conviction on first-degree murder, the convictions and sentences on the robbery and kidnapping convictions remained undisturbed. At the sentencing trial, the State introduced the prior jury's decisions finding Mr. Card guilty of robbery and kidnapping. The judge precluded the defense from introducing evidence that Mr. Card had received life sentences for those crimes.

Under other circumstances, this Court has rejected such a presentation. Marquard v. State, 641 So.2 d 54, 57-58 (Fla. 1994) In that case, the defendant attempted to argue in penalty about a "hypothetical" sentence Marquard could receive

for a separate robbery conviction. This Court upheld the exclusion of this argument because the only issue was the proper sentence on the murder. See also Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1991); Franqui v. State, 699 So. 2d 1312, 1326 (Fla. 1997); San Martin v. State, 705 So. 2d 1337, 1349 (Fla. 1997) The critical difference between Mr. Card's case and those others is that Mr. Card's consecutive life sentences were not "hypothetical". These were sentences that Mr. Card was serving at the time of his resentencing trial and would continue to serve. This evidence was relevant to Mr. Card's "record," Lockett v. Ohio, and to the jury's determination of the appropriate sentence for the murder.

CONCLUSION

For the reasons stated in his initial brief, Mr. Card requests either (1) a reversal of his sentence of death and imposition of a life sentence in its stead or (2) reversal of his death sentence with instructions to hold a new sentencing hearing with a newly empaneled jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail or hand delivery this _____ day of August, 2000 to **Mr. Richard**

Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

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