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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations to the state's answer brief will be indicated as "AB [page number]." Citations to Mr. Card's initial brief will be indicated as "IB [page number]." Citations to the record are in the same form as in the initial brief: "R[volume number]-[page number]."

ARGUMENT IN REPLY

ARGUMENT I

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

A. THIS ISSUE IS COGNIZABLE IN THIS APPEAL.

The state first argues that the issue of the prosecutor's improper arguments is not preserved for appeal because defense counsel did not object to some of the prosecutor's improper comments (AB 16-18). Mr. Card pointed out in his initial brief that trial counsel did not object to some of the improper arguments (IB 22). However, Mr. Card argued under this Court's precedent that counsel's failure to object to each improper argument 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 v. State, 762 So. 2d 879, 899 (Fla. 2000) ("the objected-to comments, when viewed in conjunction with the unobjected-to comments, deprived Brooks of a fair penalty phase hearing"); Ruiz v. State, 743 So. 2d 1, 7 (Fla. 1999); Whitton v. State, 649 So. 2d 861, 864 (Fla. 1994).

The state's brief does not discuss Brooks, Ruiz or Whitton. Rather, the state relies upon McDonald v. State, 743 So. 2d 501 (Fla. 1999) (AB 17-18). However, in McDonald, defense counsel did not contemporaneously object to any of the improper comments, raising objections only in a motion for new trial. 743 So. 2d at 504. Thus, McDonald does not come under the rule of Brooks, Ruiz and Whitton, which is that if objections are raised to some improper comments, all improper comments must be considered collectively, whether or not there was a contemporaneous objection. See also Martinez v. State, 761 So. 2d 1074, 1082-83 (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 v. State, 719 So. 2d 1197, 1202 (Fla. 1998) ("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); 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").

Here, Mr. Card's counsel objected to some of the improper arguments while not objecting to some others. Under Brooks and its predecessors, all of the

improper arguments must be considered in analyzing Mr. Card's claim.

B. THE PROSECUTOR'S ARGUMENTS WERE IMPROPER.

The state's brief next addresses the prosecutorial arguments (AB 18-25). The state argues that some of the arguments were not improper and that some were cured by the trial court's actions.

The State takes the position that any impropriety of the prosecutor's argument that "If [aggravators] outweigh [mitigators] then your vote by law must be a recommendation of the death penalty" (R31-119) (see IB22-23), was cured because "the trial court properly instructed the jury on aggravating and mitigating evidence" (AB 18). The fact that the trial court "instructed the jury on aggravating and mitigating evidence" is irrelevant to the impropriety of this argument. Indeed, this Court has repeatedly found this argument improper even though the trial courts in those cases presumably gave proper instructions on aggravating and mitigating evidence. See Initial Brief at 23, citing cases.

The State's brief argues the prosecutor's argument that a juror's vote for life would amount to "taking the easy way out" and would be shirking the juror's oath (R31-115-16, 119, 127-28) (see IB23-25), "are not misstatements of the law" and "are perfectly proper" (AB 19). This Court has emphatically disagreed with this position, calling such arguments "egregiously improper." Brooks, 762 So. 2d at

903-04; Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998); Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). The state's brief does not discuss these cases.

The State contends the prosecutor's arguments relying upon victim impact evidence to enhance aggravating factors and independently support a death recommendation (R31-120-25) (see IB25-29), were never made ("The prosecutor did not") or that "The prosecutor argued that the jury could consider but not weigh victim impact evidence and this is an accurate statement of the law" (AB 19-20). The state ignores the actual words of the prosecutor.

The prosecutor told the jury:

> 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. . . .

(R31-124-25) (emphasis added). The prosecutor argued that the victim's unique qualities made the offense "even more" heinous, atrocious or cruel and cold, calculated and premeditated, that the jury should compare photographs of the victim in death and in life "and weigh it against any of the mitigating" to justify a death recommendation, and that the jurors could "consider [the victim impact evidence] in light of all the other circumstances" and be justified in recommending death. The prosecutor clearly told the jury to weigh the victim impact evidence.

The State further argued that "Defense counsel's position was that the prosecutor cannot discuss victim impact evidence at all" and that the objection to the victim impact argument "is really an objection to the statute and this Court's holding in Windom and Burns, not an objection to the prosecutor's comments" (AB 19-20). This position is incorrect. Defense counsel objected that the prosecutor was inviting the jury "to weigh something that is not an aggravating factor," and that while victim impact evidence "is admissible, he is inviting them to weigh it" (R31-120). Thus, counsel agreed the victim impact evidence was admissible, but was objecting to the prosecutor's arguments that the jury should weigh it. In fact, the court directed the prosecutor not to invite the jury to weigh the victim impact evidence (R31-122), but

the prosecutor did so anyway.

The state agrees the prosecutor's argument that life without parole did not mean life was improper (AB 20-21), but contends that the trial court cured the impropriety (AB 21-22). However, the effect of such comments, as this Court has explained, is to produce "a reflexive fear" in the minds of the jurors, Urbin, 714 So. 2d at 420, a fear which is not amenable to banishment by a curative instruction. See Initial Brief at 31-32, discussing cases.

The State contends that the prosecutor's argument that a plan to rob establishes the heightened premeditation of the cold, calculated and premeditated aggravator (R31-103-05) (see IB32-34), "is proper and not misleading" because "[t]he wearing of the gloves establishes [sic] a plan to murder not just rob" (AB 22). Mr. Card's argument is not a complaint about the prosecutor's reference to gloves, but to the prosecutor's argument that "aggravated premeditation" was established because on the morning of June 3, Mr. Card "planned to rob the Western Union" and was "figuring a way to get money" (R31-103-05). That these misleading statements of the law were interspersed among other permissible arguments renders them no less misleading or improper. The state does not address this Court's holding that a plan to rob does not establish heightened premeditation for murder, or this Court's case law holding prosecutorial arguments

which mislead the jury regarding the basis for aggravating factors to be improper.

The State further contends the prosecutor's improper argument that events after the murder established heightened premeditation (R31-105) (see IB 34), was "proper and not misleading" because "[t]he wearing of the gloves . . . occurred prior to the murder" (AB 22). However, Mr. Card's argument concerns not the reference to gloves, but the prosecutor's reliance on events occurring after the murder. To support heightened premeditation, the prosecutor argued, "why did he throw his knife away and why did he throw the [wallet] away" (R31-105). These events occurred after the murder and are improper bases for heightened premeditation. See Initial Brief at 34. The state does not discuss these improper arguments.

The State's position on the prosecutor's improper description of Mr. Card's kidnapping conviction as involving "terrorizing" the victim (R31-98) (see IB 34), concludes that "this is one of the statutory definition [sic] of kidnapping" and that the state could have charged and obtained a conviction on this kind of kidnapping (AB 22). Regardless of what the state could have done, the fact remains that Mr. Card was not charged with or convicted of "terrorizing" and therefore the prosecutor's argument falsely implied that Mr. Card had been found guilty of terrorizing the victim.

Although the State concludes that the prosecutor's denigration of mitigating evidence (see IB 35-37), was "perfectly proper" (AB 23) it cites no cases for this proposition and does not discuss the cases relied upon in Mr. Card's Initial Brief.

The State perceives the prosecutor's references to the "expert from California" (see IB 37), as a complaint "that the prosecutor was maligning California" (AB 23). The real issue is that the prosecutor was attempting to exploit provincial attitudes which might lead to mistrust of an out-of-state expert. (This especially true in the post OJ Simpson trial climate). The prosecutor was using this argument to urge the jury to disbelieve or disregard the expert's testimony, not because of the expert's testimony, but because the expert came from California.

The State argues that the prosecutor's improper construction of imaginary scenarios of the victim's suffering (see IB 37-39), was legitimate because taken in their proper context, they "were designed to establish the heinous, atrocious and cruel aggravator" (AB 23). According to the state, the prosecutor was required to describe the victim's suffering in order to establish this aggravator (AB 23). Regardless of whether that proposition is correct, there is a difference between relying upon record evidence or legitimate inferences derived from the evidence to establish an aggravator and "imagining" a scenario to establish an aggravator. What the prosecutor did here was "imagine" what the victim was experiencing and urge

the jury to do the same. Constructing an imaginary scenario is improper. See Initial Brief at 39.

The State defends the prosecutor's urging the jury to look at the photographs of the victim if they felt any sympathy for Mr. Card (see IB 39-40), on the basis that "the prosecutor is telling the jury to base their recommendation on the evidence not sympathy" (AB 24). To the contrary, the prosecutor's argument was obviously an emotional appeal, not an evidentiary one, urging the jury to suppress any sympathy generated by Mr. Card's mitigating evidence by looking at photographs of the victim. In making this argument, the prosecutor plainly wanted the jury to treat Mr. Card consistent with how the victim was killed.

The state's brief does not address the improper appeal to emotion contained in the prosecutor's arguments that it had been 18 years since the murder and the jury should therefore finalize this case (see IB 40). Mr. Card relies upon his initial brief as to this contention and as to the prosecutor's improper "conscience of the community" argument (see IB 40).

Regarding the prosecutor's improper argument that the jury was not present for the original trial (see IB 40-41), the state argues that the jury knew there was a prior trial and therefore "the references were not suggestion of additional evidence" (AB 25). The state fails to examine the prosecutor's precise words, which were

that this jury "didn't hear a lot of the evidence that went on in that case back in 1982" (R31-92). The prosecutor did not simply tell the jury there was a previous trial, as the state contends, but explicitly told the jury there was "a lot of the evidence" that the jury did not hear. Interestingly, this additional evidence resulted in a 7-5 jury recommendation for death in 1982.

The state's brief does not address the prosecutor's improper arguments regarding questions he did not ask certain witnesses and other non-record matters (see IB 41-43). Mr. Card relies upon his initial brief.

The State characterizes the prosecutor's comment that Mr. Card "never told anybody" when the victim was struck on the back of the neck (see IB 43-44), as not a comment on Mr. Card's right to remain silent because "this is a reference to the fact that the defendant told all the other details of this murder to Vicky Elrod" (AB 25). This argument is nonsense. The prosecutor did not argue Mr. Card never told Elrod; he argued Mr. Card "never told anybody." Further, what Mr. Card *did* tell anyone is irrelevant to the impropriety of a comment on what he *did not* tell anyone. The argument urged the jury to consider the fact that Mr. Card "never told anybody" about the blow to the back of the victim's neck. The comment is "fairly susceptible" of being interpreted as a comment on Mr. Card's right to remain silent and so should be treated as such. See Initial Brief at 44.

C. THE STATE HAS NOT ESTABLISHED HARMLESS ERROR.

The state argues the improper prosecutorial arguments were harmless error because "[t]he jury here would have recommended death regardless of the prosecutor's comments in this case" and "[t]he jury recommendation would have been for death regardless of these comments given the nature of this murder" (AB 26). The state offers no analysis supporting these bald statements other than pointing out that the court provided some curative instructions and the jury was told arguments were not evidence (AB 26). Of course, both these latter matters are true in most of the cases in which this Court has ordered retrials or resentencings based upon prosecutorial misconduct and contribute nothing to establishing beyond a reasonable doubt that the prosecutorial misconduct in this case was harmless.

The state's argument that the jury would have recommended death regardless of the prosecutorial misconduct is not the correct harmless error test. The test of Chapman v. California, 386 U.S. 18 (1967), is the appropriate standard for determining whether a prosecutor's improper closing argument was harmless error. State v. Murray, 443 So. 2d 955, 956 (Fla. 1984). This Court has explained that the harmless error analysis focuses on the effect of the error on the fact-finder. State v. Lee, 531 So. 2d 133, 137 (Fla. 1988). This focus means:

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

Lee, 531 So. 2d at 137. Thus, this Court has explained that the harmless error test is "not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

The state's argument here is contrary to this precedent. The state baldly asserts the jury would have recommended death regardless of the prosecutorial misconduct. This is the kind of "substantial evidence" test which DiGuilio condemned. The result in Mr. Card's first trial demonstrates the prejudice. After Mr. Card was found guilty of first-degree murder, robbery and kidnapping, the State argued and the trial court agreed that five aggravators were proven. In its sentencing order, the trial found no mitigating circumstances. At this point the jury voted 7-5 in favor of a death recommendation.

In Mr. Card's second trial, the trial judge found substantial mitigation. This evidence was heard and considered by the jury and trial judge in determining what sentence to impose. A fair weighing process includes a prosecutorial closing

argument that does not infringe on Mr. Card's constitutional right to a fair trial.

The state's brief does not discuss the pervasiveness of the prosecutorial misconduct or the probable effect on the jury of such pervasive improprieties. The state's brief does not discuss the substantial, unrebutted mitigation evidence or how the prosecutorial improprieties likely impinged on the jury's consideration of that mitigation. The state has the burden to show beyond a reasonable doubt that the prosecutorial misconduct was harmless error. DiGuilio. The state has not done so. Mr. Card should be granted a resentencing.

ARGUMENT II

THE TRIAL JUDGE ERRED IN NOT RECUSING HERSELF

The state first argues that Mr. Card "has the burden of establishing on the record that the motion to disqualify Judge Hess was the first motion to disqualify in this case" because "[t]he record is silent" on this supposed question (AB 29). The fact that "the record is silent," however, answers the question. The record contains no motions to disqualify preceding the motion to disqualify Judge Hess, and the state has pointed to none.

The state next argues that this issue is not preserved because "Appellant never made the argument to the trial court that he raises on appeal, i.e. that the second motion should be treated as a first motion" (AB 29-30). The state is wrong. Appellant

argued in his motion for new trial that the court erred in "[f]ailing to recuse itself, and instead making a determination on the merits of a motion to recuse when no judge has previously been disqualified on a motion by the defense" and cited to Brown v. St. George Island, 561 So. 2d 253 (Fla. 1990), the precise case relied upon in this appeal (R11-2012).

The state cites no authority requiring Mr. Card to do more than he did. The motion to disqualify Judge Costello complied with the requirements of Rule 2.160(c), Fla. R. Jud. Admin., in that it was in writing, specifically alleged the facts and reasons relied on for disqualification, was sworn to by Mr. Card, and contained counsel's certification of good faith. As explained in Mr. Card's initial brief and herein, the court clearly erred in concluding it was a successive motion.

The state next argues that denial of a disqualification motion "is reviewed for an abuse of discretion," citing Arbelaez v. State, 25 Fla. L. Weekly S586 (Fla. July 16, 2000) (AB 30). It is true that Arbelaez's discussion of the disqualification issue concludes, "Thus, we do not find that [the circuit judge] abused her discretion in denying Arbelaez's motion to disqualify." However, in reaching that conclusion, this Court considered whether the motion to disqualify was legally sufficient, which is what appellate courts routinely do in addressing the denial of a motion to disqualify. See, e.g., Smith v. Santa Rosa Island Authority, 729 So. 2d 944, 946 (Fla. 1st DCA 1998)

("the task before us on appeal from the denial of the motion to disqualify is to determine the legal sufficiency of the motion"); Hayes v. State, 686 So. 2d 694, 695 (Fla. 4th DCA 1996) ("Our task on appeal is to determine the legal sufficiency of the motion").

The state argues that the motion to disqualify Judge Costello was a second motion to disqualify because "[t]he original judge recused himself in response to the defendant's motion to disqualify him and based on part on the defendant's fear" (AB 31-32). According to the state, "[t]he trial court here actually had two reasons for granting disqualification," one of which "was that the defendant did not want him to preside" (AB 32).

First, the state makes this argument only by deciding that certain parts of the order granting disqualification have no meaning. The order clearly states, "the factual allegations [in the defendant's motion] are not legally sufficient to warrant granting the motion" and "Defendant's Motion to Disqualify the Judge is denied as being legally insufficient" (R4-736). The order further clearly states, "this Judge recuses himself, sua sponte" and "the undersigned voluntarily recuses himself from further consideration of this cause" (R4-736). The state simply decides that because the order also states "that defendant feels this Judge will not be fair" (R4-736), the statements that the defendant's motion was legally insufficient and that the judge was

recusing himself sua sponte are extraneous. These statements, however, establish the basis for Judge Hess recusing himself.

The state's argument that Judge Hess recused himself because "the defendant did not want him to preside" also fails because this is not a legitimate basis for disqualification. In order to be legally sufficient, a disqualification motion must allege facts which would place a reasonably prudent person in fear of not receiving a fair and impartial hearing. Correll v. State, 698 So. 2d 522, 524 (Fla. 1997). An allegation that "the defendant did not want him to preside" (AB 32) or that the "defendant feels this Judge will not be fair" (R4-736), without specific facts supporting that allegation, is not a legitimate basis for disqualification. See Arbelaez; Correll; Livingston v. State, 441 So. 2d 1083 (Fla. 1983). The only legitimate basis for Judge Hess to recuse himself was the basis the judge raised sua sponte. His order of disqualification, therefore, was not based upon Mr. Card's motion--which the judge held was legally insufficient--but upon his own motion. The motion to disqualify Judge Costello should have been considered as a first motion.

The state argues, "Regardless of the label placed on the removal of the original judge, Judge Costello was a successor judge" (AB 32). The meaning of this argument is not clear. The "label placed on the removal of the original judge" is clearly significant, for it determines the standard for addressing the motion to disqualify Judge

Costello. Fla. R. Jud. Admin. 2.160(f), (g). Under Rule 2.160, the term "successor judge" has a specific meaning--i.e., that the prior judge was recused on the defendant's motion. Judge Costello was not a "successor judge" under the facts of this case just because she was a subsequent judge.

The state next argues that even if viewed as a first motion, Mr. Card's motion to disqualify Judge Costello was not legally sufficient (AB 32). According to the state, the allegations that Judge Costello had consulted with Debra King regarding a potential divorce from Mr. Card and that King was a potential witness at the resentencing are not legally sufficient because they are "speculation" (AB 33). To the contrary, Mr. Card's motion had a specific factual foundation--the judge's consultation while in private law practice with a potential witness--which was not speculative or subjective but which provided an objective basis for disqualification.

The state's argument that this factual foundation is "speculative" is itself speculative. For example, the state argues, "Nor did appellant allege the [sic] Ms. King was going to be a witness for the State or even a main witness for the defense. Ms. King could have been called to testify by the defense regarding matters that were not in dispute and thus, the judge would not have to assess her credibility at all" (AB 33). First, Mr. Card did specifically allege that King was a potential state witness (R11-1940). Until trial commenced and the state put on its witnesses, Mr. Card could

not know whether or not the state would actually call King. Further, it is entirely speculative to determine the legal sufficiency of a disqualification motion based on what King "could have" testified.

The cases cited by the state do not support the state's argument that the motion to disqualify Judge Costello was legally insufficient (AB 33). The state relies on Arbelaez v.State , 25 Fla. L. Weekly S586 (Fla. July 16, 2000), in which this Court found Arbelaez's allegations regarding the judge's "tough-on-crime" stance and former employment as a prosecutor were legally insufficient because they did not show the judge "had a personal bias or prejudice against him." (emphasis added). Thus, the Court determined that Arbelaez "presented no specific facts other than his subjective fear" regarding the judge's general attitude. In Mr. Card's case, however, the motion to disqualify was not based on the judge's general attitudes but alleged facts regarding the judge's knowledge of information directly concerning Mr. Card and a potential witness in the proceeding then before the judge. This was a concrete, objective basis for disqualification.

The state also relies on 5-H Corp. V. Padovano, 708 So. 2d 244 (Fla. 1997). There, appellant alleged the appellate court should be disqualified because the court had previously reported some actions of appellant's attorney to The Florida Bar. This Court said that disqualification could be available if it were shown that "the judge has

a personal bias or prejudice concerning a party or a party's lawyer." 708 So. 2d at 248, quoting Fla. Code Jud. Conduct Canon 3E(1)(a). However, the Court determined that such a showing had not been made because appellant had presented only an argument that the appellate judges might be biased against appellant's counsel and had not alleged "an actual factual foundation for the alleged fear of prejudice." Id. at 248-49, quoting Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986). That is, the Court determined that the disqualification motion did not allege facts indicating a bias or prejudice on the part of the appellate court which was specific to appellant, appellant's counsel or appellant's case. Here, however, Mr. Card alleged such facts--Judge Costello's prior consultation with a potential witness. These facts provided "an actual factual foundation for the alleged fear of prejudice" and were legally sufficient to require disqualification.

The state finally argues that Judge Costello's denial of the motion to disqualify was harmless error (AB 35-36). The state relies upon the federal disqualification statute and federal courts' holdings that denial of a motion to disqualify is subject to harmless error analysis. Regardless of the federal law, however, that is not the law in Florida. The state cites no Florida cases applying a harmless error analysis to denial of a motion to disqualify.

Under Florida law, "the task before us on appeal from the denial of the motion

to disqualify is to determine the legal sufficiency of the motion based on whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial proceeding." Smith v. Santa Rosa Island Authority, 729 So. 2d at 946; Hayes v. State, 686 So. 2d at 695 (same). The Smith court further explained:

> In this regard, we apply the test to be used in reviewing a motion for disqualification, as set out by the supreme court in McKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990). The court held that the facts alleged in a motion to disqualify need only show a movant's well-grounded fear that the movant will not receive a fair trial. Id. at 1334. In determining whether the allegations are sufficient, the facts must be taken as true and must be viewed from the movant's perspective. Id. Whenever an allegation is raised which questions the judge's neutrality as to one of the parties, the judge can only pass on the legal sufficiency of the allegations; if it is legally sufficient, the trial judge must grant the motion and proceed no further. Id. at 1339.

729 So. 2d at 946. This is not a harmless error analysis, but is the same analysis which the trial judge is to apply.

The state argues that denial of the motion to disqualify "was not prejudicial" because King never testified (AB 35-36). However, this is not the proper analysis of the motion. The proper analysis must accept the factual allegations as true and determine whether those allegations show a well-grounded fear from the movant's perspective that the judge will not be fair and impartial. In Smith, appellant had moved for disqualification because the trial judge's friendship with certain persons who had a financial interest in the outcome meant the judge could not fairly assess those

persons' credibility. 729 So. 2d at 946. The appellate court held that disqualification should have been granted, even though "it does not appear to us that the outcome of the proceedings below in any way rested upon the credibility of any of the individuals involved." Id. at 947. This was so, the court reasoned, because the allegations "were sufficient to lead a reasonably prudent person to believe that other rulings might be affected . . . and hence, to fear that the proceedings would not be entirely fair and impartial." Id.

Here, from Mr. Card's perspective at the time the motion to disqualify was filed and determined, the judge's prior consultation with King established a well-grounded fear that the judge would not be fair and impartial. That is the proper analysis to apply, not an analysis based upon later events which were unknown at the time the motion was filed.

ARGUMENT III

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

Most of the state's arguments as to this issue are addressed in and rebutted by Mr. Card's initial brief. This reply highlights only one of the state's erroneous arguments.

As to the trial court's reliance upon the law of the case doctrine, the state argues that trial counsel did not "inform the trial court that she was not bound by the prior trial court's ruling in this area" (AB 39). This is incorrect. At the charge conference, defense counsel argued the court should not follow the original judge's findings on aggravating factors because those findings "pre dated a good bit of the subsequent death penalties law including the case just cited and that [the previous] jury heard different evidence than this one, a good bit more evidence than this one" (R30-79). In a pretrial hearing, counsel had similarly argued that the evidence did not support some aggravators as a matter of law because "death penalty law has evolved since 1982, when this case was, was first cycled through" (R19-2698).

ARGUMENT IV

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

Most of the state's arguments as to this issue are addressed in and rebutted by Mr. Card's initial brief. This reply highlights only one of the state's erroneous arguments.

The state argues this issue is not preserved for review (AB 57-59). One of the state's arguments in this regard is that Mr. Card's motion to correct sentencing error

did not specifically identify mitigating factors overlooked by the trial court (AB 57-58, 59). In support of this argument, the state cites Lucas v. State, 613 So. 2d 408, 410 (Fla. 1992), and Woods v. State, 733 So. 2d 980, 984 (Fla. 1999) (AB 59).

This Court has never required that a capital defendant set out the trial court's failure to expressly evaluate each proposed mitigating factor in a motion to correct sentence in order to preserve the issue for review. The Court did not do so in Lucas, upon which the state relies. Rather, in Lucas, the Court stated that Lucas did not "list [the proposed mitigators] in his memorandum." 613 So. 2d at 410. That is, Lucas did not propose the mitigators that he claimed the judge ignored.[1] Here, Mr. Card did propose the mitigators.

The state also incorrectly relies on Woods, which involved the denial of a motion for judgment of acquittal. 733 So. 2d at 984. Such a motion must set forth specific grounds. Fla. R. Crim. P. 3.380(b). This is not analagous to the issue here. Mr. Card made specific requests that the court consider identified mitigating factors--i.e., he proposed the factors. He was required to do no more.

The state also argues that this issue is not preserved because the mitigating factors argued on appeal were not proposed to the trial court (AB 58-59). To the

[1]The Court nevertheless addressed Lucas's claim on the merits and did not apply a procedural bar, as the state implies.

contrary, Mr. Card quite specifically proposed each of the mitigating factors to the trial court. Mr. Card's initial brief sets forth the list of proposed mitigating factors, with detailed citations to the record. See Initial Brief at 74-75. The state does not address this list nor attempt to make any showing that any particular factor was not proposed.

ARGUMENT V

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

The state first argues that although Mr. Card's due process claim is preserved, his "Apprendi based argument is not preserved" because Mr. Card "never argued that the judge could not impose the death penalty in the trial court" (AB 75). Mr. Card is not arguing that the judge cannot impose sentence, but that the death sentence is not available to the judge without unanimous jury findings.[2] That is what Mr. Card's Motion To Require Unanimous Verdict (R10-1864-65) requested--that the jury's sentencing verdict be unanimous.

On the merits of the issue, the major flaw in the state's argument is that the state ignores how Florida's capital sentencing scheme works. The state assumes that "death is within the statutory maximum for first degree murder" (AB 79, 82) without

[2]Since this case does not involve a judge's override of a jury's life recommendation, the case does not present the issue of whether such an override is permissible under Apprendi.

attempting to demonstrate that this is correct under the Florida scheme. Mr. Card's initial brief explained that under the Florida statutory scheme death is not within the statutory maximum simply upon conviction of first degree murder. See Initial Brief at 90-91. The assumption underpinning the state's argument is invalid. See United States v. Rogers, 228 F. 3d 1318 (11th Cir. 2000) "Any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be presented to a jury and proven beyond a reasonable doubt."

The state argues that the Apprendi majority rejected the argument that "Apprendi effects [sic] the Court's prior precedent upholding capital sentencing schemes that require the judge to determine aggravating factors rather than the jury" (AB 78, citing Apprendi, 120 So. Ct. at 2366). In the discussion cited by the state, the Supreme Court says:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); id., at 709-714, 110 S. Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:
>
> > "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries

> as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge." Almendarez-Torres [v. United States], 523 U.S. [224,] 257, n.2, 118 S. Ct. 1219 [(1998)] (SCALIA, J., dissenting) (emphasis deleted).

Apprendi, 120 S. Ct. at 2366.

Under the analysis of this section of Apprendi, Walton and related cases have been overruled or, at the least, do not apply in Florida. While the Court says that Apprendi is not inconsistent with Walton, the quotation from Justice Scalia's opinion in Almendarez-Torres clearly indicates that it is, at least so far as the Florida scheme is concerned. What this quotation says is that a judge is not permitted "to determine the existence of a factor which makes a crime a capital offense"; instead, a judge can determine the penalty "once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death."

In Castillo v. United States, ___ U.S.___, 120 S. Ct. 2090 (2000) the Supreme Court was confronted with the question of whether the type of firearm use or carried during a crime of violence or drug trafficking offense was a judicial sentencing determination or a fact that must be charged and found by a jury to exist beyond a reasonable doubt. The federal statute involved, Title 28 U.S.C. Section 924 is labeled

"Penalties". The Supreme Court disregarded this labeling and found that if a particular kind of firearm enhanced Castillo's potential sentence, (in this case a machine gun) the indictment had to charge this kind of firearm and a jury had to return a verdict of guilty beyond a reasonable doubt on this fact. See Jones v. United States, 526 U.S. 227, 232 (1999)

This is crucial language in light of Florida's capital sentencing scheme. In Florida, a criminal defendant is not eligible for a death sentence simply upon conviction of first degree murder. Without additional proceedings, the judge would have to impose a life sentence. Thus, in Florida, conviction of first degree murder does not "carr[y] as its maximum penalty the sentence of death." Further, since a judge is not permitted "to determine the existence of a factor which makes a crime a capital offense," the only conclusion is that at least under Florida's capital sentencing scheme, the jury must make the findings necessary for death to be a sentencing option.

The state dismisses the discussions of Walton in Justice Thomas's concurrence and in Justice O'Connor's dissent (AB 80-81). However, these opinions are important, representing the views of five members of the Court and indicating that Apprendi is inconsistent with Walton and related cases. Justice Thomas writes separately to explain his "view that the Constitution requires a broader rule than the Court adopts." Apprendi, 120 S. Ct. at 2367. This "broader rule" is "a 'crime'

includes every fact that is by law a basis for imposing or increasing punishment." Id. at 2368. Justice Thomas further explains, "What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment . . . it is an element." Id. at 2379. Justice Thomas describes Walton as "approv[ing] a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element." Id. at 2380. Justice Thomas concludes that whether Walton and related cases can be distinguished from Apprendi is "a question for another day." Id.[3] Leaving the question "for another day" does not mean there is no question.

The dissent describes the decision in Apprendi as "a watershed change in constitutional law." 120 S. Ct. at 2380. Justice O'Connor directly states that if Apprendi is the law, Walton is not, writing:

> While the Court can cite no decision that would require its "increase in the maximum penalty" rule, Walton plainly rejects it. Under Arizona law, the fact that a statutory aggravating circumstance exists in the defendant's case "'increases the maximum penalty for [the] crime'" of first-degree murder to death. Ante, at 2355 (quoting Jones, supra, at 243,

[3]The possible distinction which Justice Thomas discusses would provide capital defendants with less protection than that provided to non-capital defendants and thus is inconsistent with due process and equal protection. Justice O'Connor's dissent points out that this possible distinction "is without precedent in our constitutional jurisprudence." 120 S. Ct. at 2388.

> n.6, 119 S. Ct. 1215). If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment. Thus, using the terminology that the Court itself employs to describe the constitutional fault in the New Jersey sentencing scheme presented here, under Arizona law, the judge's finding that a statutory aggravating circumstance exists "exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Ante, at 2359 (emphasis in original). Even Justice THOMAS, whose vote is necessary to the Court's opinion today, agrees on this point. See ante, at 2380. . . .
>
> The distinction of Walton offered by the Court today is baffling, to say the least. The key to that distinction is the Court's claim that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence. See ante, at 2366 (quoting Almendarez-Torres, 523 U.S., at 257, n.2, 118 S. Ct. 1219 (SCALIA, J., dissenting)). As explained above, that claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. . . . If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.

120 S. Ct. at 2387-88. Thus, five members of the Court have indicated that Apprendi has overruled Walton and related cases.

Finally, the state relies upon Weeks v. State, 761 A.2d 804 (Del. 2000) (AB 83). Weeks is inapposite here because Mr. Card's motion specifically requested that the jury's sentencing verdict be unanimous. This was not the issue in Weeks. Additionally, Weeks pled guilty, waiving his right to a jury determination.

REMAINING ARGUMENTS

As to arguments not addressed in this reply brief, Mr. Card relies upon his initial brief.

CONCLUSION

For the reasons stated in his initial and reply briefs, 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 FONT AND TYPE SIZE

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I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail or hand delivery this _____ day of January, 2001 to **Ms. Charmaine M. Millsaps,** Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

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