THE SUPREME COURT OF FLORIDA

HOWARD AULT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC07

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit in and For Broward County, Florida [Criminal Division]

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Criminal Division of Circuit Court of the Seventeenth Judicial Circuit, In and for Broward County, Florida. In this brief, the parties will be referred to as they appear before the Court.

"R" indicates the record on appeal

"T" indicates the transcripts.

"SR" indicates the supplemental record on appeal.

SUMMARY OF THE ARGUMENT

Pro se motions to disqualify a trial judge should not be treated as a nullity. The trial court erred in denying Appellant's motion to disqualify the trial judge.

ARGUMENT

POINT XIX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE TRIAL JUDGE.

Appellant pro se filed a sworn motion to disqualify the trial judge on the basis that the judge had was hostile and threatened Appellant R338-341. The trial court refused to address the motion and ruled that since Appellant was represented by counsel, and his counsel was not adopting the motion, the pro se motion to disqualify was a nullity SR190[1] . This was error.

Generally, a pro se motion is a nullity when the defendant is represented by counsel. However, there are exceptions to this general rule, one exception is where the defendant pro se moves to discharge counsel or represent himself. Logan v. State, 846 So. 2d 472 (Fla. 2003). This court has never addressed the legal question whether a pro se motion to disqualify a trial judge is a nullity where the defendant is represented by counsel.

Because the present issue of whether a pro se motion to disqualify is a nullity is a pure legal question the standard of review is de novo. The answer to the question

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[1] Appellant asked that his pro se motion to represent himself be heard before the motion to disqualify SR192. The trial court ruled that until Mr. Polay was removed as counsel the pro se motion could not be heard SR192. Appellant responded that was why he wanted the motion to represent himself to be heard first SR193. The trial court

should be uniform and not arbitrarily apply to some defendants who file such a motion while not applying to other defendants in precisely the same situation.

In Florida pro se motions to disqualify the trial judge that were not adopted by defense counsel have been recognized by appellate courts as not constituting a nullity. See Knarich v. State, 866 So. 2d 165, 167 (Fla. 2d DCA 2004)(Knarich filed pro se motion to disqualify the trial judge which his trial counsel did not join - trial court and appellate court reviewed and ruled on the motion); Turner v. State, 598 So. 2d 187 (Fla. 1st DCA 1992)(pro se motion not adopted by counsel was reviewed and ruled upon).

It would be arbitrary to refuse to entertain pro se motions to disqualify where in other cases such as Knarich and Turner the motions have been entertained - especially in a capital case. See Elledge v. State, 346 So. 2d 998 (Fla. 1977)(death penalty cases require a heightened standard of due process);Gregg v. Georgia, 428 U.S. 153, 187 (1976)(plurality - "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed").

The right to be free from a biased judge is a structural right which should not be subverted by counsel. See Chapman v. California, 318 U.S. 18, 23, 87 S. Ct. 824 n. 8 (1967)(recognizing that deprivation of counsel and a biased judge are two structural

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replied that Appellant can't direct the order motions were to be heard SR193.

errors and thus never harmless). There is a difference between not needing a defendant's consent to decide a tactical matter and affirmatively waiving a structural right that the defendant affirmatively seeks. For example, defense counsel could not waive a defendant's pro se motion to discharge counsel that was based on a belief counsel was ineffective so as to cause a deprivation of counsel - a structural error. Likewise, defense should not be able to waive a defendant's pro se motion to disqualify a trial judge that believed he was biased- structural error. Both pro se motion must be entertained despite the fact that the trial counsel does not join in the motions.

The instant case is a capital sentencing. This court has repeatedly made clear that in a capital sentencing the defendant is the "captain of his ship" and he makes the decisions. See Boyd v. State, 910 So. 2d 167, 190 (Fla. 2005); Grim v. State, 841 So. 2d 455, 461 (Fla. 2003)("all competent defendants have a right to control their own destinies" thus allowing defendant to waive mitigation over defense counsel's objection). If a defendant has the right to decide over defense counsel's objection what evidence is presented in a capital sentencing - he certainly should have the right to complain about a structural error (whether it be biased judge or counsel).

This was Appellant's first motion to disqualify the trial court. The standard of review is de novo. Zuchel v. State, 824 So. 2d 1044 (Fla. 4th DCA 2002). In ruling on the motion to disqualify, the facts alleged in the motion are to be taken as true. Id. The

facts must be looked at from the movant's perspective. Marshall v. Bockstein, 789 So. 2d 455 (Fla. 4th DCA 2001). The issue is whether the facts alleged in the motion would cause a reasonably prudent person to fear that he might not receive fair treatment by the trial judge. Zuchel v. State, 824 So. 2d 1044 (Fla. 4th DCA 2202)

In this case Appellant's October 5, 2005 motion to disqualify explains that on September 27, 2008 (R336)after a court hearing he was returned to court and became angry and made some disparaging remarks R337. Appellant then alleged in his motion the trial court became angry and threatened that Appellant would spend the rest of his life in prison:

> Said Honorable Judge was now angry and made an open threat towards the defendant saying (You better remember where your at Ault!) After a short pause said Judge then further stated (That's where you will spend the rest of your life!)

R338. It is well-settled that hostile comments by a trial judge create a well-founded fear that the judge may not be impartial E.g., State v. Alzate, 972 So. 2nd 226 (Fla. 3d DCA 2007). It is also well-settled that intemperate comments are sufficient to require disqualification:

> "A judge should be patient, dignified and courteous to litigants, ... lawyers, and others with whom he deals in his official capacity..." Fla. Bar Code Jud. Conduct, Canon 3(A)(3)(1991). When a trial judge leaves the realm of civility and directs base vernacular towards an attorney or litigant in open court, there are sufficient grounds to require disqualification. See e.g., Lamendola v. Grossman, 439 So.

2d 960 (Fla. 3d DCA 1983); Brown v. Rowe, 96 Fla. 289, 118 So. 9 (1928);

Olszewska v. Ferro, 590 So. 2d 11 (Fla. 3d DCA 1971).

The facts of the motion must be looked at from the movant's perspective. Marshall v. Bockstein, (Fla. 4th DCA 2001). The comments at bar reflect a hostility and are sufficient to create a well-founded fear on Appellant's part. This cause must be reversed and remanded for a new penalty phase.

CONCLUSION

Appellant requests this Court to reverse the death sentences and to remand for appropriate proceedings.

Respectfully submitted,

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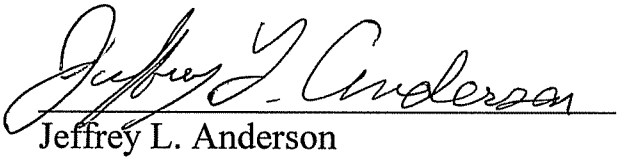

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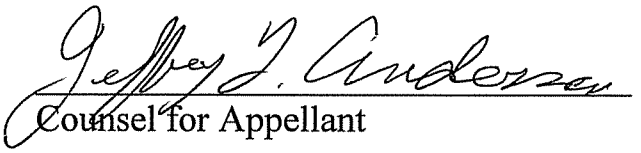
CERTIFICATE OF SERVICE

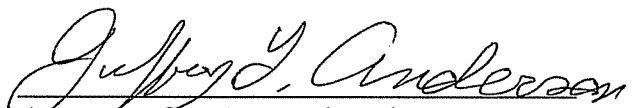
I HEREBY CERTIFY that a true copy of the Initial Brief has been furnished by courier to Leslie Campbell, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida, 33401-3432, and by U. S. Mail to Appellant, this 18th day of August, 2009.



Counsel for Appellant

CERTIFICATE OF FONT COMPLIANCE

Counsel certifies that this brief was prepared with Times New Roman 14-point font.



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