IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC02-1150

JOHN CHAMBERLAIN,

Appellant,

- vs. -

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, Jr.
Attorney General
Tallahassee, Florida

DEBRA RESCIGNO
Assistant Attorney General
Florida Bar No. 0836907
1515 N. Flagler Drive
Suite 900
West Palm Beach, Fl 33401
(561) 837-5000

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellant, defendant in the trial court below, will be referred to as "Appellant", "Defendant" or "Chamberlain". Appellee, the State of Florida, will be referred to as the "State". References to the record will be by the symbol "R", to the transcript will be by the symbol "T", to any supplemental record or transcript will be by the symbols "SR" or "ST", and to Thibault's brief will be by the symbol "IB".

STATEMENT OF THE CASE AND FACTS

The State accepts Chamberlain's Statement of the Case and Facts subject to the following additions, deletions and corrections below and in the Argument section.

The facts surrounding the murders of Bryan Harrison, Charlotte Kenyan and Daniel Ketchum are found in the testimony of Chamberlain's co-defendants, Thomas Thibault and Jason Dascott, and in the testimony of Amanda Ingman. Their testimony conflicts with Chamberlain's version of events, presented to the jury through his grand jury testimony and taped statement, both of which were admitted into evidence.

Co-defendant, Thomas Thibault, explained that his business associate[1], Amanda Ingman, had been out of town for awhile and

[1] Thibault explained that he and Amanda made money together selling drugs or through prostitution (T XXVII 1788).

when she returned contacted him (T XXVII 1789-90). It was November, 1998, and Amanda told him that she was living at a house on Norton Ave. in West Palm Beach, Florida (T XXVII 1788-90). They spoke on the phone about four times during November, but when Thibault called Amanda about five (5) days before Thanksgiving, he got into an argument with Amanda's boyfriend, who answered the phone (T XXVII 1789-90). The boyfriend would not let him speak with Amanda, telling him that she was asleep (T XXVII 1790). At the time, Thibault was living at Eric Pherman's house, which he admitted was a drug house, a place where people would come to buy, sell and use drugs (T XXVII 1783, XXVIII 1880). Additional calls were made between the men, each trash talking the other (T XXVIII 1889-90). On the Wednesday night before Thanksgiving, Chamberlain, whom Thibault had known for over 10 years, but only saw every month or so, had stopped by Eric's house at about 10 p.m. (T XXVII 1786-87, 1792).

Thibault told Chamberlain about the arguments he had with Amanda's boyfriend and asked for a ride to Amanda's house to settle the dispute (T XXVII 1792-93). Chamberlain had his father's Lincoln Mark VII (T XXVII 1792). Chamberlain knew there would be fighting but said it was "no problem" that "he had his back." (T XXVII 1793-94). Thibault woke up co-defendant

Jason Dascott to go along (T XXVII 1794). Thibault had known Dascott for approximately two (2) years and saw him daily (T XXVII 1787). Jason already knew about the arguments, he was present when they took place (T XXVII 1795). Thibault agreed, on cross-examination, that he was also going there to sell Amanda cocaine (T XXVIII 1904).

On the way over to Amanda's house, they stopped at a gas station and Chamberlain showed Thibault a gun that was in the trunk (T XXVII 1797). They pulled up across the street from Amanda's house and Thibault told Chamberlain and Dascott to stay in the car (T XXVII 1799). Thibault went to the front door, Bryan answered it and Amanda came walking up behind him (T XXVII 1801). The argument was amicably resolved at the door (T XXVII 1801). Thibault went back to the car and told Chamberlain and Dascott that it was okay, they were going to "party" and smoke weed with them (T XXVII 1802). Thibault did not see the gun on Chamberlain at this point (T XXVII 1802). Once inside, they began talking about cocaine, Amanda asked if he brought it, and they went into her room where she proceeded to cut up the cocaine and put out lines for everyone (T XXVII 1803-05). While they were in Amanda's room, Danny barged in, but then said it was okay for them to be there, that everything was okay (T XXVII 1807).

Danny then tried to sell them electronic equipment, TV's, VCR's that he had (T XXVI 1808). Bryan asked to buy more cocaine so they decided to go back to Eric's house to get some more cocaine (T XXVII 1805-06). Thibault explained that he was interested in the big TV and wanted to discuss it with Eric (T XXVII 1808). Thibault, Chamberlain, Dascott, Amanda and Bryan then went to Eric's house, but only Thibault went inside (T XXVII 1809-08). When they arrived back at the Norton residence, Bryan was the first to exit the car and enter the house. The remaining passengers discussed whether Chamberlain should bring his weapon inside (T XXVII 1810). Thibault told him he didn't need it (T XXVII 1811).

According to Thibault, he had the idea to rob the TV at Eric's but Eric had told him to not do anything stupid (T XXVII 1814). They went into Amanda's room and at that point she told them that these guys were aggravating her (T XXVII 1814). The conversation escalated into a plan to rob them (T XXVII 1811-12, 1814). Amanda informed them that Bryan and Daniel had drugs, money, and other items in the house and walk-in safe (T XXVII 1814-15). She also told them that Charlotte, who was asleep in the back bedroom, had money (T XXVII 1815). The plan to rob them was discussed in-depth (T XXVII 1815). They decided to use the gun that Chamberlain produced, Thibault would carry it

because he was bigger (T XXVII 1815-16).

Amanda told them that she would distract Bryan (T XXVII 1818-19). They decided to distract Danny by asking him about a TV he had offered to sell them (T XXVII 1818). While Danny was on the ground trying to hook up the TV, Thibault pulled out the gun, and ordered him into the bathroom (T XXVII 1820). Danny looked at him dazed and confused and Chamberlain pulled out an asp and hit him in the knee (T XXVII 1820). Thibault described the asp as having a black handle, being about 10-12 inches long when closed and about 3 feet long when extended out (T XXVII 1820). Bryan was also put in the bathroom (T XXVII 1823).

The plan was for Amanda, Dascott and Chamberlain to load up the car while Thibault had Danny and Bryan in the bathroom (T XXVII 1824). Once in the bathroom, Thibault told Danny and Bryan to take off their clothes and get in the shower (T XXVII 1825). Danny protested, rushed Thibault and a struggle ensued (T XXVII 1825-27). Thibault struck him in the head several times with the gun but Danny wouldn’t let go, he picked Thibault up and slammed him against the wall (T XXVII 1826-27). Thibault feared that Danny was going to overpower him, so he took off the safety clip and pulled the trigger (T XXVII 1827). Amanda and Chamberlain came running to the bathroom and asked why he shot (T XXVII 1829). Chamberlain then told him that he had to get

“rid of the witnesses” and that witnesses were going to get them caught (T XXVII 1830). Thibault asked Amanda what she wanted to do and she shook her head, she wasn’t sure (T XXVII 1830). Chamberlain then repeated that they had to get rid of other witnesses (T XXVII 1830). Thibault said it was up to you Amanda and she said “go ahead, get rid of them” (T XXVII 1830). Amanda then told him that they needed to go get Charlotte, who was sleeping in the back bedroom (T XXVII 1831).

Charlotte was violently awakened by Amanda and Thibault and brought into the bathroom (T XXVII 1831). She was forced to walk over Danny’s body and to get into the shower with Bryan (T XXVII 1831-32). While they were getting Charlotte, Chamberlain continued to clear out the house (T XXVII 1831). Thibault then asked Chamberlain and Amanda for the final time if they were going to get rid of the witnesses and Chamberlain said “yes” and agreed to go back into the bathroom with him (T XXVII 1835). Chamberlain stood side by side with Thibault in the bathroom while he emptied a clip into Bryan and Charlotte (T XXVII 1835). Chamberlain picked up the spent casings afterwards (T XXVII 1836). When Thibault noticed that Bryan was still alive, he told Chamberlain that they couldn’t leave him like that and Chamberlain responded “let’s go get more bullets.” (T XXVII 1837). They retrieved another clip from Chamberlain’s trunk and

fired that clip into Charlotte and Bryan (T XXVII 1837-39).

Danny's white pick-up truck had been loaded up with items because Chamberlain's Lincoln was full. Thibault was going to drive the white truck and told Chamberlain to wait until the truck started, but Chamberlain took off immediately (T XXVII 1840-41). Dascott and Amanda were in the car with Chamberlain (T XXVII 1842-43). When the truck wouldn't start, Thibault hid the items in surrounding bushes and walked back to Eric's house (T XXVII 1843-44). Thibault later retrieved the items with a friend, picked up Chamberlain at his house and together they transported all the items to a Hugo Pherman's house. Thibault, Dascott and Chamberlain were arrested within days of the murders.

Jason Dascott testified that they were going to Amanda's to settle the argument and for Thibault to sell Amanda cocaine (T XXVI 1427-28). He agreed that Chamberlain drove them over to the house in his father's Lincoln, that they stopped for gas on the way over and that Thibault went to the door alone at first (T XXVI 1429-33). Dascott further corroborated that Bryan and Amanda answered the door, that the dispute was settled at the door and that he and Chamberlain were invited inside (T XXVI 1434-35). Dascott agreed that they went to Amanda's bedroom upon entering so that Thibault could deliver the cocaine (T XXVI

1436-37). Bryan came in the room once or twice but wasn't hanging out with them (T XXVI 1437).

According to Dascott they discussed the robbery before returning to Eric's house to buy more cocaine. He said that Amanda told them that there were drugs and stolen property in the house and wanted them to rob the house (T XXVI 1438). No one objected to the robbery (T XXVI 1438). Dascott agreed that they drove back to Eric's house because Bryan wanted to buy more cocaine and that Bryan and Amanda accompanied them on the drive (T XXVI 1439-40). Upon returning from Eric's, Bryan and Amanda exited the car first and went in the house. Thibault and Chamberlain had a conversation about the gun and Dascott saw Chamberlain hand Thibault the gun (T XXVI 1446-48). Chamberlain had a name for the gun (T XXVI 1450). When the three re-entered the house, they went back into Amanda's room and had another conversation about the robbery (T XXVI 1452). He agreed the plan was for Thibault to put the victims in the bathroom while he and Chamberlain stole their stuff (T XXVI 1452-53). He was supposed to ask Danny to see something in order to get him to open the safe (T XXVI 1454). While he and Danny were in the living room, Bryan came out with Thibault holding a gun to his back (T XXVI 1458). Amanda was with him (T XXVI 1458). Thibault told both Danny and Bryan to get into the bathroom (T XXVI

1458).

Dascott agreed that Chamberlain had a chrome police baton, but he did not see him hit anyone with it (T XXVI 1459-60). He also agreed that they heard a struggle in the bathroom and then a gunshot (T XXVI 1467-68). When Thibault came out, he knows that Chamberlain said something but doesn't remember what he said (T XXVI 1469). At that point, Dascott went to the car and never went back in to the house (T 1469-70). While sitting in the car he saw Chamberlain loading up more items and heard 5-7 more gunshots (T XXVI 1470-71). He also saw Chamberlain go to the trunk and then back into the house and then heard more gunshots (T XXVI 1471-72). Thibault never pointed the gun at him and never threatened to kill him if he didn't participate (T XXVI 1473). Right before they left, Amanda jumped in the front seat of Chamberlain's car (T XXVI 1474). He, Amanda and Chamberlain went back to Chamberlain's house and he agrees that Amanda left after a while.

Amanda Ingman testified that she moved into Bryan's house in Oct. 1998, about 3 weeks before the murders (T XXII 945). She and Bryan had been dating a little over a month when she moved in (T XXII 946). She knew Thibault from when she had lived in West Palm Beach before (T XXII 949). Amanda also knew Dascott but had never met Chamberlain before that day (T XXII

950-51). She agreed that she contacted Thibault about a week after she moved in (T XXII 952), she wanted to touch base with him and maybe get a drug hook-up. She also agreed that there was a fight a few days before Thanksgiving when Thibault called (T XXII 955).

The night of the murders, she, Bryan and Danny had done Xanax bars (pills), alcohol and marijuana (T XXII 956). At about 3:30 a.m., there was a knock on the door, it was Thibault, Chamberlain and Dascott (T XXII 957). Bryan had answered the door, Thibault apologized and they visited for 20-25 minutes (T XXII 960). She and Bryan then asked for some cocaine and Thibault decided they could take a trip to Eric Pherman's house (T XXII 961). She agrees that Thibault went into the house, alone, to purchase the cocaine, the rest of them remained in car (T XXII 965).

Amanda stated that they returned to her house and did lines of cocaine in living room. She went into her room when Danny put on porno tapes (T XXII 966). Bryan came in, they did more cocaine and then returned to the living room. Bryan then went to bed because he wasn't feeling well and she also went to bed (T XXII 969). According to Amanda, Thibault, Dascott and Chamberlain later joined her in her bedroom and they were snorting lines (T XXII 970). Thibault lifted his shirt and

showed her a gun that was in his waistband (T XXII 971). He told her they were going to rob the place and neither Chamberlain nor Dascott seemed shocked, but they weren't saying anything (T XXII 971). Danny had earlier opened the safe to show them something (T XXII 972). Although Thibault wasn't threatening anyone in the room, he told Amanda "you are either with me or against me" and she was in fear of her life (T XXII 972-74).

Amanda got Danny to open the safe, Thibault announced "this is a robbery," and walked Danny into the bathroom (T XXII 975-76). Either Dascott or Chamberlain retrieved Bryan, she's not sure who, and she wasn't sure who brought Charlotte out (T XXII 975-76). Amanda did see Chamberlain holding a spindly type metal stick at least two times, but wasn't sure when it was (T XXII 975-76). Dascott and Chamberlain were taking VCR's TV's, and other merchandise and putting it in the car (T XXII 977). There were no threats, yelling or anything like that going on at the time that the car was being loaded up (T XXII 977). Amanda heard scuffling or fighting in the bathroom and then heard gunshots (T XXII 977-78). While the scuffling was occurring, Chamberlain and Dascott were asking where more items were and she told them (T XXII 978).

Amanda was in a state of shock (T XXII 979). She was

confused about the first and second shots and when Charlotte was brought into the bathroom (T XXII 979). She remembers hearing someone say “no witnesses” but doesn’t remember who said it(T XXII 981). Amanda agreed that she left in Chamberlain’s car with him and Dascott, they were in shock about what happened, couldn’t believe it, he wasn’t supposed to kill them (T XXII 987). They went back to Chamberlain’s house, he unloaded the items and hid them around his home (T XXII 988). Amanda stated that they smoked some weed on his patio and she left once Chamberlain put on a porno channel and made sexual advances at her (T XXII 988-95). She walked to a friend’s house who didn’t want to get involved but who agreed to drive her to Bryan’s parents’ house (T XXII 996). Amanda stated that Thibault never pointed the gun at Chamberlain or Dascott (T XXII 1116).

Chamberlain’s grand jury testimony and taped statement to police were in sharp contrast to the testimony of his co-defendants and Amanda. According to Chamberlain, he, Dascott and Thibault were on their way to Havana’s to get something to eat (T XXV 1358, XXIX 2040-47). He stopped at a gas station and was filling up his tank when it overflowed (T XXV 1358, XXIX 2040-47). He opened the trunk to get a rag and Thibault grabbed his gun and basically “kidnapped” him, ordering him to drive to the house (T XXV 1358, XXIX 2040-47). Chamberlain claimed that

Thibault was waiving the gun at all of them, asking “who wants to die first.” (T XXV 1358, XXIX 2048). Thibault shot three of them and then threatened to kill Chamberlain’s family if he told (T XXV 1358).

The police executed a search warrant at Chamberlain’s parents’ home on Thanksgiving night. Chamberlain admitted that he was hiding in a cubbyhole in the laundry room and claimed he thought it was Thibault banging down the front door and coming to murder he and his family. Thibault originally had a plea deal with the State for three consecutive life sentences in exchange for his guilty pleas to the three murders (T XVI 3-27). The deal also required him to testify truthfully at any trials against Chamberlain, Disced, and/or Amanda. Thibault gave an extensive Statement in May, 2000, in anticipation of the plea. However, Thibault decided to not go through with the plea and ended up pleading “straight up” to the court three months later (T XVI 32-54). His sentencing was deferred until after the trial of his co-defendants. Disced pled guilty to 3 counts of second degree murder on November 20, 2000, pursuant to a negotiated plea (T XVI 63-87). In exchange for his truthful testimony against his co-defendants, he was sentenced to 10 years imprisonment followed by 5 years probation. Chamberlain went to trial in February, 2001. On August 31, 2001, several

months after Chamberlain was convicted, Thibault was sentenced to death for all three murders (T XXIII 2663-2704).

Chamberlain's sentencing hearing was held on December 4, 2001 (T XXIV 2707-2907). Chamberlain presented testimony from his great-aunt, mother, father, cousin, and two psychologists (Drs. Herman and Perry) in support of mitigation. Chamberlain sought the following mitigation: (1) defendant was an accomplice with a minor role; (2) extreme duress or substantial domination of another person; (3) family background/abuse by cousins; (4) family background/parental neglect; (5) rehabilitation; (6) remorse; (7) disparate treatment compared with co-defendant, Jason Disced. (RAII 2126-32). The trial court considered the above in addition to: (1) no significant prior criminal activity; (2) capacity to appreciate criminality of conduct/ability to conform conduct to requirements of law; (3) Chamberlain's age; (4) other factors in Chamberlains background (XIII 2173, 2178-81, 2184-88; T35 2925-31).

The trial court determined six aggravators applied to the case: (1) under supervision of Department of Corrections; (2) prior violent felony for contemporaneous homicides; (3) felony murder (robbery); (4) avoid arrest; (5) pecuniary gain; and (6) CCP . The trial court found no statutory mitigators, but found two non-statutory mitigating factors: (1) family

background/abuse by cousins (slight weight) and (2) other mitigation (some weight). After assessing the aggravation found beyond a reasonable doubt and weighing it against the two mitigators found established, the trial court imposed a death sentence for each victim and a life sentence for the robbery. (XIII 2174-75, 2186-89; T35 2931).

SUMMARY OF THE ARGUMENT

Point I: The trial court did not abuse its discretion by denying Chamberlain's "Motion to Prohibit the State from Death-Qualifying the Jury." Even though Chamberlain waived his jury for sentencing, this remained a "capital" case where a death sentence was still a possible penalty and therefore, it was constitutionally permissible for the State to "death qualify" the jury. Moreover, the State conducted only a limited "death qualification" in this case, geared toward uncovering jurors who could not render a verdict or follow the law in the guilt phase because death was a possible punishment. All nine jurors who were excused for cause were properly excused based on their inability to return a verdict and follow the law in the guilt phase.

Point II: The trial judge did not abuse his discretion by denying Chamberlain's motion to recuse/disqualify the trial judge, filed seven (7) months **after** Chamberlain's convictions, but prior to his sentencing phase hearing. The motion was legally insufficient as it did not comply with the technical requirements of rule 2.160, Florida Rules of Judicial Administration and the facts alleged would not create a reasonable, well-founded fear that Chamberlain would not receive a fair sentencing hearing.

Point III: The trial court did not abuse its discretion by denying Chamberlain's motion for mistrial after sustaining the defense's objection to a lay opinion by Detective Fraser regarding whether Chamberlain's demeanor matched his crying at the time he gave his statement. The argument is not preserved, the testimony was admissible and there is no doubt that Chamberlain was not denied a fair trial.

Point IV: The trial court properly allowed Detective Fraser to testify regarding an out-of-court identification of Chamberlain made by witness Donna Garrett. Donna Garrett testified at trial and was subject to cross-examination. As such, her out-of-court identification of Chamberlain was admissible. Even if error, it was harmless.

Point V: The trial did not abuse its discretion by allowing the State to recall witness Thomas Thibault in its case-in-chief. This argument is not preserved for review and it was permissible for the State to recall the witness to rebut a charge of improper motive, influence or recent fabrication.

Point VI: The trial court did not abuse its discretion by allowing Detective Fraser to be recalled after discussing his future testimony with the State during a recess. It is permissible to do so and no prejudice was shown.

Point VII: The trial court did not err in denying

Chamberlain's motion for judgment of acquittal on the theories of felony-murder and premeditation.

Point VIII: The trial court properly instructed the jury on both premeditated and felony murder.

Point IX: The death sentence is proportional.

Point X: The felony-murder aggravator is constitutional.

Point XI: The trial court did not abuse its discretion by allowing the use of a demonstrative aid at trial.

POINT I

THE TRIAL COURT PROPERLY DENIED CHAMBERLAIN'S MOTION TO PROHIBIT A "DEATH-QUALIFIED" VOIR DIRE." (RESTATED)

Chamberlain's first contention is that the trial court abused its discretion by denying his "Motion to Prohibit the State from Death-Qualifying the Jury." (R VIII 1304-06, IB 51). He asserts it was error to "death qualify" the venire because he had already waived the jury for penalty phase and therefore, it should not have been informed about the possible sentencing options as it would not be deciding whether to impose the death penalty. Allowing the State to "death qualify" the jury, Chamberlain contends, resulted in nine jurors being excused for cause.

This Court will find the trial court properly denied Chamberlain's motion as this is a "capital" case where the death penalty was a possible penalty which, in fact, was imposed. Because a death sentence was an option, it was constitutionally permissible for the State to "death qualify" the jury. Moreover, the State conducted a limited "death qualification" in this case, geared toward uncovering jurors who could not render a verdict or follow the law in the guilt phase because death was a possible punishment. All nine jurors were properly excused for cause based on their inability to return a verdict and

follow the law in the guilt phase.

In support of his "Motion to Prohibit the State from Death-Qualifying the Jury," Chamberlain relied upon rule 3.390(a), Florida Rules of Criminal Procedure, which states "**[e]xcept in capital cases**, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial." He acknowledges that the rule expressly omits **capital cases**, but argues this case should have been treated like any other criminal case once he waived the jury for the penalty phase. The problem with Chamberlain's argument is two-fold.

First, as the State noted below (ST II 37), this is a capital case and Chamberlain was facing the possibility of a death sentence from the judge. The fact Chamberlain decided to remove the jury from the sentencing process did not automatically make this "like any other criminal case." Rather, it remained a capital case despite his actions. The Supreme Court has held that "the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." Lockhart v. McCree, 476 U.S. 162, 173 (1986). "Indeed, any group 'defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case [ ] may be excluded from jury service without contravening

any of the basic objectives of the fair-cross-section requirement.'" San Martin v. State, 705 So.2d 1337, 1343 (Fla. 1997), citing Lockhart at 176-77. Thus, because this was a capital case, it was constitutionally permissible to "death qualify" the jury.

The jury was entitled to know that death was a possible sentence. In Florida, the only time the State is not entitled to "death qualify" the jury is when the death penalty may not be imposed as a matter of law. Lark v. State, 617 So.2d 782 (Fla. 1st DCA 1993); Reed v. State, 496 So.2d 213 (Fla. 1st DCA 1986); Baker v. State, 760 So.2d 1085 (Fla. 5th DCA 2000)(rejecting defendant's argument trial judge reversibly erred by allowing State to death qualify jury since co-defendant was shooter because State never conceded that it had no basis to seek the death penalty and it was debatable who was more culpable party which could not be known until all trial evidence was received). Here, the death penalty could clearly be imposed as a matter of law and in fact, was imposed.

Second, Chamberlain's argument fails to take into consideration the possibility that Chamberlain could change his mind and decide he wanted a jury for his penalty phase. Had that happened and the State had not "death qualified" the jury, it would have been forced to proceed to sentencing not knowing

whether it had an impartial jury. Similarly, there is a chance that even if the jury had not been "death qualified" some of the jurors would have known that death was an option because this was a first-degree murder case and it could have influenced their decision without the State knowing. The State has the same right as the defendant to an impartial jury.

Moreover, it is clear the State conducted a **limited** "death qualification" in this case, restricting its questioning to whether the venire could return a verdict/follow the law in the guilt phase knowing the death penalty was a possible sentence. The venire was told at the outset, by the judge, "[t]his is a **capital crime**, if the jury convicts of the capital crime or crimes, there is a second proceeding to determine penalty and this jury will not be involved in that particular proceeding but more will be explained to you about that later." (T XVII 98-99). When asked by the court whether anyone felt they could not serve as a juror (T XVII 119), prospective juror Hess volunteered that she felt very strongly that she would have a great deal of difficulty with the penalty phase (T XVII 129). The court then re-iterated that the jury would not be involved in the penalty phase and asked whether Ms. Hess felt that she could not be involved in the trial phase because of her strong views on capital punishment (T XVII 129-30). Ms. Hess agreed that she

could not because of her strong views against capital punishment (T XVII 130). Ms. Hess later noted that she had already formed a fairly strong opinion that the defendant was guilty and she had a conflict because of her views against capital punishment (T XVII 212-14). Ms. Hess understood that the jury would not be determining sentencing but knew that the consequences of what the jury does will bear on the outcome (T XVII 214-15). She didn't know whether she could be fair, said she probably could vote for guilt knowing death was a possible penalty but didn't want to put herself in that position (T XVII 215). Ms. Hess was then excused (T XVII 216).

Prospective juror Williams likewise agreed that she could not serve because she doesn't believe in capital punishment (T XVII 183). After Hess was excused, the State had explained to the venire that this was a capital case but that the jury would not be deciding the punishment, it would only be deciding whether the defendant committed the crimes (T XVII 235). The decision regarding what punishment to impose was up to the judge and the State explained the only two possible penalties were life without the possibility of parole or death (T XVII 235-36). The State then asked the venire what its feelings were about the death penalty (T XVII 236). Prospective jurors Moskowitz and Williams agreed that they could not return a guilty verdict

knowing that the judge could impose the death sentence (T XVII 238-39). Both felt it would be very hard for them to reach a verdict knowing the possible punishment (T XVII 239-41, XVIII 286). Ms. Dominick indicated that she would not follow the law because she would have to be absolutely certain to reach a guilty verdict (T XVII 241, XVIII 286).

Defense counsel also questioned the venire about the death penalty (T XVIII 289-303). When Ms. Moskowitz was asked whether she could sit on the case if the death penalty wasn't an option, she indicated that she **could not** because she was an emotional person and didn't think she could listen to the evidence; she was uncomfortable with the facts she had heard to that point (T XVIII 300). She didn't think she would be comfortable siting even in a DUI case, explaining that she didn't want to sit in judgment of others on criminal matters (T XVIII 301-02). Ms. Williams explained that she could probably sit on a criminal case but couldn't deal with one where the only penalties were life in prison or death (T XVIII 303). When asked by defense counsel what if she didn't know what the potential penalties were, Ms. Williams explained she would know once they said it was first-degree murder (T XVIII 303).

Thereafter, the State moved to strike jurors Williams and Moskowitz for cause, noting they had made it abundantly clear

that they could not vote for guilt, knowing the death penalty was a possible punishment (T XVIII 342-43). Defense counsel objected to any strikes based on their views on capital punishment due to his motion(T XVIII 343). The court overruled the objections and struck both Williams and Moskowitz (T XVIII 343). Also, the State moved to strike juror Dominick for cause because she would hold the State to a higher burden of proof and would not follow the law knowing that death was a possible penalty (T XVIII 343). Defense counsel agreed to those facts, but objected based on its motion to not death qualify the jury (T XVIII 3444). The objection was overruled and Dominick struck (T XVIII 344).

Jurors Carney, Rollins, Burger, Baccon, Salvin, and Petruzzelli were likewise excused for cause. All six explained, in response to questioning by both the State and defense, that they could not vote or follow the law in the guilt phase knowing that the death penalty was a possible sentencing option for the judge (T XVIII 373-79, 382-84, 406, 414-20, 435-36, 446, 455-60, 468, 495-97, 507-08, 530, 543-44, 550).

Chamberlain admits that his argument is not directed at the cause challenges themselves (IB 51-52), and indeed he has not asserted or shown that the trial court abused its discretion in

excusing the individual jurors for cause.[2] Rather, his argument is directed to the fact that the jurors were death-qualified which led them to make the statements. However, as already noted this was a capital case allowing the State to "death-qualify" the jury. Further, it is undisputed that the jurors who were excused all said they could not follow the law in the guilt phase knowing death was a possible penalty. The Supreme Court noted in Lockhart that not all prospective jurors who oppose the death penalty are subject to removal for cause in capital cases; "only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case." San Martin at 1343, citing Lockhart at 176. The standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412,

[2] A trial court's decision on whether or not to strike a juror for cause is reviewed for abuse of discretion. Kearse v. State, 770 So. 2d 1119 (Fla. 2000) (noting that a trial court has great discretion when deciding whether to grant or deny a challenge for cause, recognizing that the trial court has a unique vantage point because the trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record, and concluding that it is the trial court's duty to determine whether a challenge for cause is proper).

424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). All of these jurors were properly excused.

Moreover, even assuming arguendo, that this Court finds error, it was harmless. The jury who sat was impartial and Chamberlain has made no showing to the contrary. The record supports that the jurors who sat all expressed an ability to follow the law despite their personal feelings about the death penalty. Further, Chamberlain's argument at trial that a "death qualified' jury is more conviction prone has been repeatedly rejected by this court. See Owen v. State, 596 So.2d 985, 987 (Fla. 1992); Patten v. State, 467 So.2d 975 (Fla. 1985). Finally, had the trial court denied the cause challenges, the State could have struck them with peremptories. San Martin, at 1343. See also Morrison v. State, 818 So.2d 432 (Fla. 2001); Walls v. State, 641 So. 2d 381, 386 (Fla. 1993).[3]

POINT II

THE TRIAL COURT PROPERLY DENIED CHAMBERLAIN'S MOTION TO RECUSE/DISQUALIFY ITSELF. (RESTATED)

Chamberlain argues that the trial judge abused his discretion by denying Chamberlain's motion to recuse/disqualify

[3] The State recognizes that in Chandler v. State, 442 So. 2d 171, 173-175 (Fla. 1983) and Farina v. State, 680 So. 2d 392 (Fla. 1996), this Court refused to apply a harmless error analysis to the erroneous grant of a cause challenge.

the trial judge, filed seven (7) months **after** Chamberlain's convictions, but prior to his sentencing phase hearing. As grounds for recusal, the motion points solely to the trial judge's Sentencing Order in co-defendant Thomas Thibault's case,[4] alleging that the trial court improperly made findings regarding Chamberlain's behavior in imposing the death penalty on Thibault. Chamberlain argues that he had a reasonable, well-founded fear that he would not receive a fair sentencing hearing because of the findings the judge made in Thibault's case. This Court will find that the motion was properly denied as legally insufficient.

The State agrees that this Court's most recent pronouncement set the standard of review of an order denying a motion for disqualification as de novo. Barnhill v. State, 834 So.2d 836, 842-43 (Fla. 2002), citing MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1335 (Fla. 1990)(stating legal sufficiency of a motion to disqualify is purely a question of law). See also Sume v. State, 773 So. 2d 600 (Fla. 1st DCA

[4] Thibault had a negotiated plea with the State to plead guilty in exchange for three life sentences; however, he backed out of that deal at the last minute (T XVI 3-27). Three months later, Thibault pled "straight up" to the Court, which accepted his guilty plea (T XVI 32-54). At Thibault's request, his sentencing was deferred until August 31, 2001, after co-defendant Chamberlain's trial and co-defendant Disced's plea (T XVI 63-87).

2000)("[a]lthough the matter has apparently not been addressed in the Florida case law, we conclude that an order denying a motion for disqualification is reviewable by the de novo standard of review."). However, in Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000), this Court applied the abuse of discretion standard to a motion to disqualify and found that the trial judge had not "abused her discretion in denying Arbelaez's motion to disqualify". Federal courts also review a judge's decision not to recuse himself for abuse of discretion. U.S. v. Bailey, 175 F.3d 966, 968 (11th Cir. 1999); U. S. v. Bremers, 195 F.3d 221, 226 (5th Cir. 1999).

Nonetheless, even if this Court applies the de novo standard of review to the instant case, a review of the record indicates that Chamberlain's motion to disqualify was legally insufficient. As this Court is well aware, section 38.10, Florida Statutes (2003) "gives litigants the substantive right to seek disqualification of a judge," Barnhill, at 842, while rule 2.160(c)-(f), Florida Rules of Judicial Administration, "sets forth the procedures to be followed in the disqualification process." Id. While the purpose of rule 2.160 is "to ensure public confidence in the integrity of the judicial system," caution must be taken "to prevent the disqualification process from being abused for the purpose of judge-shopping,

delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983).

Here, it is clear Chamberlain's motion is legally insufficient. First, it does not contain a certificate of good faith by Chamberlain's attorney, as required by subsection (c) of rule 2.160 ("[a] motion to disqualify shall be in writing and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to by the party by signing the motion under oath or by a separate affidavit. **The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith**"). See Parsons v. Motor Homes of America, Inc., 465 So.2d 1285, 1290 (Fla. 1st DCA 1985)(noting motion to disqualify was legally insufficient, in part, because it was not accompanied by a certificate of counsel that the motion was made in good faith).

Second, the motion is untimely. Subsection (e) of rule 2.160 requires that a motion to disqualify be made within "a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion." Here, it was co-defendant, Thomas Thibault's Sentencing Order which Chamberlain alleges contains findings that made him fear he

would not receive a fair and impartial sentencing proceeding. However, Thibault's Sentencing Order was entered and read at Thibault's sentencing hearing on August 31, 2002. Chamberlain did not follow the instant motion until September 20, 2001, twenty days after the facts became known to him. Consequently, his motion is untimely and is legally insufficient. See T/F Systems, inc. v. Malt, 814 So.2d 511 (Fla. 4th DCA 2002)(holding that motion to disqualify which was not filed until two months after judge's allegedly disqualifying conduct was untimely); Asay v. State, 769 So.2d 974 (Fla. 2000)(time for defendant to file motion to disqualify trial judge began to run from time remarks were made during original trial); Crespo v. Crespo, 762 So.2d 568 (Fla. 3d DCA 2000)(untimely filing of motion to disqualify, well beyond ten day period was sufficient reason to deny the motion).

Finally, the motion was legally insufficient because the facts alleged therein would not place a reasonably prudent person in fear of not receiving a fair and impartial trial. In order to decide whether a motion for disqualification is legally sufficient, "[a] determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983); Hayes v. State, 686 So.2d

694, 695 (Fla. 4th DCA 1996). The asserted facts must be "reasonably sufficient" to create a "well-founded fear" in the mind of a party that he will not receive a fair trial. Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986). "[S]ubjective fears . . . are not 'reasonably sufficient' to justify a 'well-founded fear' of prejudice when they are based simply on prior adverse rulings." Fischer, at 242. See also Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992).

Here, Chamberlain's allegations of bias or prejudice are based solely on the trial judge's comments in the co-defendant's, Thibault's, Sentencing Order. Specifically, Chamberlain points to three findings by the trial judge as giving rise to his well-founded fear of not receiving a fair trial. The trial court noted: (1) "[i]t is Chamberlain who first says 'it has to be done, we can't have no witnesses'"; (2) "Chamberlain is consistent in his insistence on eliminating the witnesses while the other two consider the issue"; and (3) "Chamberlain said we can't have any witnesses." (IB 58, XXXII 2684, 2690). The above-cited portions of the Order are direct quotes from Thomas Thibault's statement. Thibault had pled guilty and therefore, the only facts available to the trial judge were from Thibault's 200+ page Statement given in

anticipation of the plea. More importantly, however, the same testimony was elicited at Chamberlain's trial from Thibault. Thibault testified that it was Chamberlain who first said that they had to "get rid of the witnesses," that witnesses were going to get them caught (T XXVII 1830). Twice more, Chamberlain repeated that they had to get rid of other witnesses(T XXVII 1830, 1835). Thibault's Setencing Order was not issued until seven (7) months **after** Chamberlain's convictions, after a jury had agreed with Thibault's version of events. Chamberlain's participation in these murders was interwoven with Thibault's. The trial judge could not write the Sentencing Order without referring to both.

Chamberlain's assertions reflect nothing more than subjective fears on his part based on an adverse ruling against his co-defendant. Prior adverse rulings are not a sufficient basis to warrant a recusal. See Williams v. State, 689 So. 2d 393 (Fla. 3rd DCA 1997) (no error in denying motion for recusal based on adverse ruling); Brown v. St. George Island, Ltd., 561 So. 2d 253, 257 n.7 (Fla. 1990) (judge not subject to disqualification "simply because of making an earlier ruling in the course of a proceeding which had the effect of rejecting the testimony of a moving party").

Here, it was necessary for the court to make findings in

support of its decision to sentence co-defendant Thibault to death. The comments upon which Chamberlain's motion was based do not suggest the trial judge harbored any bias or prejudice against the defendant. See Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995) (fact that judge makes adverse ruling is not sufficient basis for establishing prejudice); Dragovich v. State, 492 So. 2d 350 (Fla. 1986) (finding without showing of some actual bias or prejudice so as to create reasonable fear that fair trial cannot be had, affidavits supporting motion to disqualify are legally insufficient). There has been no showing that Appellant would not receive a fair and impartial penalty phase before this judge. It must be presumed that the judge would comply with the applicable law in determining the appropriateness of the sentence and in making evidentiary objections during the proceedings. Dragovich, 492 So. 2d at 353. Because Appellant's subjective fears are insufficient to require the disqualification of a trial judge, this Court should affirm.

POINT III

THE TRIAL COURT PROPERLY DENIED CHAMBERLAIN'S MOTION FOR MISTRIAL. (Restated).

Chamberlain argues that the trial court abused its discretion by denying a mistrial after sustaining Chamberlain's objection to Detective Fraser's following testimony:

> PROSECUTOR: Detective Fraser, the noise that Defendant can be heard making on the tape, what were those noises?
> DETECTIVE FRASER: He was sniffling a little bit. He cried during the interview. Sometimes I stopped the interview to give him a break.
> PROSECUTOR: And the sniffling or the crying noise the defendant made, did you observe his demeanor to see whether or not his demeanor matched the crying or sniffling noise?
> DETECTIVE FRASER: I (sic) didn't go along with it. I can testify to the fact that he was crying. However, I don't believe that his —

(T XXIX 2068).

Fraser's answer was cut off by the defense objection, which was sustained (T XXIX 2068). Defense counsel then asked for a mistrial, arguing that Fraser's opinion about whether he believed Chamberlain's emotions were real constituted an impermissible comment on Chamberlain's credibility (T XXIX 2069). The State responded that the detective, just like any other witness, could testify about his observations (T XXIX 2069). The court sustained the objection to the testimony, but denied a mistrial (T XXIX 2069-70). It then instructed the jury "to disregard, please, the conclusion of the officer as to his observation." (T XXIX 2070).

"A ruling on a motion for a mistrial is within the sound discretion of the trial court and should be 'granted only when it is necessary to ensure that the defendant receives a fair

trial.'" Rivera v. State, 2003 WL 22097461 (Fla. Sept. 11, 2003), citing Gore v. State, 784 So.2d 418, 427 (Fla. 2001). Further, "[t]he use of a harmless error analysis under State v. DiGuilio, 491 So.2d 1129 (Fla.1986), is not necessary where 'the trial court recognized the error, sustained the objection and gave a curative instruction.'" Rivera, citing Gore, 784 So.2d at 428. See also Smithers v. State, 826 So.2d 916, 930 (Fla.2002). On appeal, Chamberlain argues that Fraser's testimony constitutes improper opinion testimony by a lay witness; however, this issue has not been preserved. Defense counsel did not object to the testimony on the ground that it was improper lay opinion, but rather, on the ground that it constituted an impermissible comment on Chamberlain's credibility. As such, Appellant cannot raise this argument for the first time on appeal. See Tillman v. State, 471 So.2d 32 (Fla. 1985)(specific legal argument presented on appeal must have been presented to the trial court below); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Even if this Court decides to address the issue, it is without merit. The trial court did not abuse its discretion in denying a mistrial because such was not necessary to ensure that Chamberlain received a fair trial. To begin with, Fraser never actually gave his full opinion because his answer was cut off by

the defense objection. Thus, the only statement made was to the effect that Chamberlain's crying didn't go along with his demeanor. Although the judge sustained defense counsel's objection in an abundance of caution, it is clear that Fraser's testimony was permissible lay opinion testimony pursuant to section 90.701, Florida Statutes (2000). Section 90.701 permits a lay witness to testify in the form of an inference and opinion where:

> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

Both prongs of section 90.701 are satisfied here. Fraser's testimony did not require specialized skill, training or knowledge. Further, he could not have readily, and with equal accuracy and adequacy, communicated to the jury what he perceived-- that Chamberlain's demeanor did not go along with his crying-- without testifying in terms of inferences or opinions. There was no other way for Fraser to adequately convey what he perceived to the jury. See Zack v. State, 753 So.2d 9 (Fla. 2000) (holding that it was proper, under section

90.701, for witness to testify as to her "impression" of the defendant's relationship with his step-father because witness had observed them interact over a period of time).

Further, lay opinion testimony is admissible under section 90.701 to prove mental state or condition. See Strausser v. State, 682 So. 2d 539, 541 (Fla. 1996) (affirming admission of lay witness' opinion relating to defendant's mental state); The Florida Bar v. Clement, 662 So.2d 690, 697 (Fla. 1995)(holding that a non-expert witness may testify to an opinion about mental condition if the witness had adequate opportunity to observe the matter or conduct); Cruse v. State, 588 So.2d 983, 990 (Fla. 1991)(holding it was error to exclude the testimony of a neighbor concerning defendant's mental condition); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990) (affirming admission of lay witnesses' opinions relating to defendant's state of intoxication or lack thereof). Consequently, Fraser's comment that Chamberlain's demeanor did not match his crying was a permissible opinion about Appellant's mental state or condition.

Appellant's reliance upon Thorp v. State, 777 So.2d 385, 395 (Fla. 2000), is misplaced. In Thorp, this Court found it was impermissible for the State to elicit opinion testimony from the defendant's cellmate about what the defendant "meant" when he

admitted to the cellmate that he (defendant) “did a hooker” and expected to be charged with murder. This Court noted that “[t]he exact meaning of [the defendant’s] words and the inferences that could be drawn from them . . . were matters for the jury to consider . . . there was no need to resort to testimony concerning [the cellmate’s] interpretation of [the defendant’s] words. Concluding that the error was harmful, this Court reasoned that the cellmate’s opinion testimony that the defendant’s statement that he "did a hooker" meant that he killed her effectively turned the defendant’s admission of involvement in a crime into a murder confession. Because the defendant never confessed to murdering the victim, but only admitted to having sexual intercourse her, it could not be said that the error did not affect the jury's verdict.

Thorp is inapplicable here because Detective Fraser was not asked to give his "interpretation" of what Chamberlain. Rather, he was asked, as an eyewitness to Chamberlain’s taped statement, to explain the noises that the jury heard on the tape, which necessarily included Appellant's mental state as he was making his statement. While lay opinion about a defendant's intent or motive is not admissible, testimony about the defendant’s mental state or condition is admissible. The trial court did not abuse its discretion by denying the motion for mistrial because, as

already noted, the testimony was admissible. As such, Chamberlain was not denied a fair trial.

POINT IV

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY FROM DETECTIVE FRASER REGARDING AN IDENTIFICATION MADE BY DONNA GARRETT IN HIS PRESENCE (RESTATED).

Chamberlain claims the trial court erred by admitting testimony from Detective Fraser regarding an identification made by State witness Donna Garrett.[5] According to Chamberlain, the

[5] At first blush, the Initial Brief seems to be challenging the admission of the identification testimony by Donna Garrett herself (IB 63); however, a close reading of it shows he is citing to Detective Fraser's testimony and therefore is objecting to Detective Fraser's testimony regarding the identification made by Donna Garrett (IB 63-64, T XXIX 2079-80). Assuming arguendo that Chamberlain is also challenging the identification testimony by Donna Garrett, herself, the State notes that issue has not been preserved for appellate review because it was not objected to below (T XXIV 1269-70). See Archer v. State, 613 So.2d 446 (Fla. 1993); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Even if this Court were to address the merits, it is clear that the admission of Donna Garrett's identification does not constitute fundamental error. The fact that Donna Garrett was only 80% sure of her identification goes to the **weight** of her testimony, not its **admissibility**. Further, the Biggers case cited by Chamberlain (IB 65), is a test for determining the legality of an out-of-court identification. The two-part test is: (1) did the police use any unnecessarily suggestive procedures and (2) if so, whether, considering all the circumstances, the suggestive procedures gave rise to a substantial likelihood of irreparable misidentification. Thomas v. State, 748 So.2d 970, 981 (Fla. 1999). Here, there is a complete absence of any evidence indicating that the police used any suggestive procedures and Chamberlain has not pointed to any. Instead, the sum total of his argument is that Donna Garrett's identification was inadmissible because she was only 80% sure of her

testimony was inadmissible because it was a flawed and uncertain identification. This Court will find that Detective Fraser's testimony was admissible under section 90.801(2)(c) as an out-of-court identification made by a witness and even if inadmissible, any error was harmless.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Zack v. State, 753 So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981). Here, Detective Fraser's testimony regarding the out-of-court identification of Chamberlain made by Donna Garrett, prior to trial, after viewing a photograph of Chamberlain was properly admitted.

In Florida, when a witness identifies an individual before trial, the out-of-court identifications, made after perceiving the person, are excluded from the definition of hearsay by section 90.801(2)(c)[6] and therefore, are admissible as

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identification. However, as already noted, that fact goes to the **weight**, not the **admissibility** of her testimony.

[6] Section 90.801(2)(c) states:
(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the

substantive evidence. See also State v. Freber, 366 So.2d 426, 427 (Fla. 1978) (holding that testimony concerning a prior, out-of-court identification, from a witness who observes the identification, is admissible as substantive evidence of identity, even if the identifying witness is unable to identify the defendant at trial); Charles W. Ehrhardt, Florida Evidence, section 801.9, at 662 (2000). Section 90.801(2)(c) applies even if the witness fails to make an in-court identification, or confirm the prior identification was made. Id; see Brown v. State, 413 So.2d 414, 415 (Fla. 5th DCA 1982)(holding it "makes no difference whether the witness admits or denies or fails to recall making the prior identification"); A.E.B. v. State, 818 So.2d 534, 535-36 (Fla. 2d DCA 2002)(same). Rather, all that is required by the rule is that the witness who made the identification testify at trial and be subject to cross-

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statement is;

(a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition.

(b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; or

(c) **One of identification of a person made after perceiving the person.**

examination.

Under section 90.801(2)(c), both the person making the identification and any witnesses who were present when the identification occurred, may testify as to the identification. See Freber, at 427-28; Miller v. State, 780 So.2d 277, 281 (Fla. 3d DCA 2001), J. Cope (concurring) (noting statements identifying defendant were admissible as substantive evidence under section 90.801(2)(c)); Lewis v. State, 777 So.2d 452 (Fla. 4th DCA 2001)(police officer's testimony concerning the victim's out-of-court identification of the defendant as his assailant was non-hearsay under section 90.801(20(c) and thus, admissible); Lopez v. State, 716 So.2d 301, 304 n.3 (Fla. 3d DCA 1998)(noting that the witness's sworn statement reiterating his identification of defendant in the photo line-up was independently admissible as a non-hearsay statement of identification under section 90.801(2)(c).

Further, there is no requirement that the identification occur immediately after the event. See Henry v. State, 383 So.2d 320 (Fla. 5th DCA 1980)(holding father of 12 year-old sexual battery victim was allowed to testify to his daughter identified defendant, in his presence, two months after the attack when she happened to see him on the street); Ferreira v. State, 692 So.2d 264 (Fla. 5th DCA 1997) (holding photographic

identification of defendant by victim about a week after crime was sufficiently close in time to be considered reliable). "[O]ne of the reasons for admitting section 90.801(2)(c) identification statements as non-hearsay is that the 'earlier, out-of-court identifications are believed to be more reliable than those made under the suggestive conditions prevailing at trial.'" Lewis, 777 So.2d at 454.

It is section 90.801(2)(c) that makes identifications from a photo line-up admissible as substantive evidence. Here, the witness who made the out-of-court identification, Donna Garrett, testified at trial and was subject to cross-examination. She testified that at about 7:05-7:10 a.m., Thanksgiving morning, Thibault, Chamberlain and Dascott showed up at her house, with TV's and other electronic equipment, to see her former boyfriend, Hugo Pherman(T XXIV 1259-61). She was later shown a photo line-up by Detective Fraser and testified that she was 80% sure of her identification of Chamberlain (T XXIV 1266-70). Her mother, brother, and former boyfriend, also present, all positively identified Chamberlain as one of the men at her house that Thanksgiving morning (T XXIV 1285-1301, 1301-17, 2082-88). As such, Detective Fraser's testimony regarding her out-of-court identification was admissible and the fact that she was only 80% sure goes to the weight of her testimony, not its admissibility.

Moreover, even if it was error to admit Detective Fraser's testimony, any error was harmless. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). As already noted, her mother, brother, and former boyfriend, all positively identified Chamberlain, 100%, as one of the men at her house this morning. They all testified at trial and Detective Fraser testified about their out-of-court identifications.

POINT V

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO RECALL ITS WITNESS, THOMAS THIBAULT, TO REBUT A CHARGE OF IMPROPER INFLUENCE, MOTIVE, AND/OR RECENT FABRICATION. (Restated).

The trial court did not abuse its discretion by allowing the State to recall its witness, Thomas Thibault, to admit a tape recording of a telephone conversation he had with his mother, shortly after his arrest, which was offered to rebut the defense theory of improper influence, motive and/or recent fabrication. See Frazier v. State, 761 So.2d 337, 340 (Fla. 4th DCA 1999)(courts have repeatedly recognized that the trial court has discretion to grant or deny a request to recall a witness). See also Perkins v. State, 704 So.2d 619, 620 (Fla. 4th DCA 1997); Louisy v. State, 667 So.2d 972, 973 (Fla. 4th DCA 1996).

Although the standard of review for allowing a witness to

be "recalled" is the same as that for allowing "rebuttal" testimony, the State notes that Chamberlain improperly cites to the standard of review for **rebuttal** witnesses (IB 68). It is clear that Thibault was a **"recalled"** witness, not a "**rebuttal**" witness because the State had not yet rested its case-in-chief when Thibault was recalled.[7] Chamberlain asserts that, prior to Thibault being recalled, defense counsel had informed the court that the defendant would not be testifying and that it would not be presenting any evidence (IB 67-68). However, that does not change the fact that the State had not yet rested its case and consequently, Thibault was a "**recalled**" witness.

Further, Chamberlain's argument on appeal, that the tape recording does not qualify as non-hearsay under section 90.801 (2)(b), because he did not attack Thibault's story as a **recent** fabrication, but rather, as one that he and the other co-defendants fabricated **shortly after the murders**, is not preserved for appellate review as it was not raised below. The State first sought to introduce the substance of the taped telephone conversation between Thibault and his mother through Detective Fraser (T XXIX 2072-73). Fraser was asked what Thibault told his mother regarding who brought the gun and

[7] The State did not rest its case-in-chief until after Thibault testified (T XXIX 2166l).

defense counsel objected on hearsay grounds. The trial court sustained the objection and the State argued at sidebar that the defense had repeatedly argued that Thibault, Dascott and Amanda had recently fabricated their stories, alleging that the three got together subsequent to Thibault's arrest and "concocted this story to -- to make their stories match; [that] they have been writing letters back and forth, they've been friends, [and] they've been speaking to each other (T XXIX 2073). The State maintained that because there had been that allegation, it had the right to elicit Thibault's prior consistent statements to rebut the fabrication defense (T XXIX 2073).

Defense counsel responded that the State had the "opportunity to do that directly through Mr. Thibault," and that Thibault had already testified to that (T XXIX 2074). Defense counsel noted that Thibault and Dascott had already admitted to concocting a story to clear Dascott of responsibility. Thereafter, outside the presence of the jury, the State cited several cases holding that when defense counsel impeaches a witness by suggesting that the witness fabricated their trial testimony after negotiating a favorable plea deal or had an improper motive in testifying after getting a plea, the state is entitled to present prior consistent statements by the witness, made before the plea deal (T XXIX 2106-10). See Anderson v.

State, 574 So.2d 87 (Fla. 1991)(holding that State was entitled to introduce prior consistent statements of witness after defense counsel attempted to impeach witness by suggesting that she fabricated her trial testimony after negotiating a favorable plea); DuFour v. State, 495 So.2d 154 (Fla 1986)(holding that prior consistent statement made before plea negotiation was admissible to rebut charge of improper motive); Chandler v. State, 702 So.2d 186 (Fla. 1997)(holding allegation that witness's trial testimony was motivated by appearance on television program allowed State to introduce prior sworn statement made before television show); Kelley v. State, 486 So.2d 578 (Fla. 1986)(holding that where defense cross-examined witness about several crimes for which he had been given immunity in exchange for his testimony, an inference of improper motive arose and State was allowed to introduce consistent statement made prior to the grant of immunity).

The trial court then inquired whether Thibault had been asked specifically about what he said in the conversation with his mother (T XXIX 2111). Defense counsel's recollection was that the State went over statements Thibault made in the conversation on re-direct, but in a general way, the State did not go over the conversation word for word (T XXIX 2111-12). The court then asked whether defense counsel was saying that the

State could have gone over the conversation word for word with Thibault, which defense counsel **agreed** it could have:

> THE COURT: I'm interrupting you again, I apologize. But you're saying if they didn't clearly do it during this examination they could have done it because he was their witness on the stand and there was conversation and it would have been admissible as his conversation.
>
> MR. LERMAN: Had they done it in better form maybe than they did with him there, that could have been a slightly different situation, but they didn't to the detailed extent I think their question is referring to. And they didn't play the tape for him. They didn't hand him a copy of the transcript but they certainly went over to some extent and they didn't go over it in detail at their peril.
>
> THE COURT: **And in any event, they could recall him because they have not rested.**
>
> MR. LERMAN: **They could, although he's not --.**

(T XXIX 2112-13).

Thus, defense counsel agreed that the State could introduce the tape through Thibault, but argued that since the State had failed to do so on re-direct of Thibault, it had forfeited that right. Significantly, when the court pointed out that the State could **recall** Thibault because it had not rested, defense counsel **agreed that it could** (T XXIX 2113). However, once the State announced that it would be recalling Thibault to introduce the

tape recording, defense counsel objected (T XXIX 2116-17). Defense counsel did not provide any argument in support of its objection and did not allege, as Chamberlain now has on appeal, that the tape recording did not qualify as non-hearsay under section 90.801 (2)(b) because Thibault was not attacked as having **recently** fabricated the story, but rather, as fabricating it with his co-defendants **shortly after the murders** (T XXIX 2116-17). Even when the trial court later asked whether there was any additional legal argument as to the admissibility of the tape recording, defense counsel did not raise this or any other legal argument (T XXIX 2149).

As such, this issue is not preserved for appellate review because the trial court was not given an opportunity to pass on the issue before admitting the tape recording. The fact that Chamberlain later raised the argument in a motion for new trial does not preserve the issue. There was nothing the trial court could do about it after the fact. See Card v. State, 803 So.2d 613, 620 (Fla. 2001)(holding that defendant who raised an objection in a motion for new trial did not preserve it; the objection that the judge should have decided recusal motion as initial judge was waived by the failure to raise it when the judge ruled on the motion as a successor judge or when the order was entered prior to the commencement of trial).

Even if this Court were to address the merits, it is clear that the evidence was properly admitted and even if improperly admitted, any error was harmless. Under section 90.801 (2)(b),[8] Florida Statutes (1997), a "prior consistent statement" **is not hearsay** and is admissible as substantive evidence if the declarant testifies at trial, is subject to cross examination concerning the statement and the statement is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication, **or** is one of identification of a person made after perceiving the person. In

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[8] Section 90.801(2) states:

> A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
>
> (b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; or
>
> (c) One of identification of a person made after perceiving the person.

this case, defense counsel brought out, on cross-examination of Thibault, that he had negotiated a plea, in May 2000, originally agreeing to three life sentences in exchange for his testimony against his co-defendants. Although Thibault subsequently rejected the plea, he ultimately pled “straight up” to the court just three months later in August, 2000. Thibault’s sentencing had been deferred until **after** his testimony in this case and Thibault admitted he was hoping the trial judge would sentence him to life.

Thibault’s consistent statements, in the tape recorded conversation with his mother, were made just a few days after the murders and prior to any plea negotiation. Consequently, they were properly admitted to rebut the charge of improper influence or motive or motive to falsify his testimony or fabricate it. Pagan v. State, 830 So.2d 792 (Fla. 2002)(holding tape recording of conversation between two state witnesses, containing prior consistent statements as to one witness' testimony, was not hearsay, where recording was admitted to rebut defense claim that witness at issue had recently fabricated his testimony in response to state's offer of plea agreement and influence of media coverage; witness had been questioned by defense counsel concerning his motive in testifying and his belief that lying to save one's life was

justifiable, and had admitted that he had initially lied to police in order to protect defendant and had lied under oath in a separate proceeding for protective order); Rodriguez v. State, 609 So.2d 493, 500 (Fla. 1992)(defense counsel's reference to a plea agreement with the state during cross-examination was sufficient to create an inference of improper motive to fabricate); Jackson v. State, 599 So.2d 103, 107 (Fla. 1992) (taped statement admissible to rebut the inference codefendant had a motive to fabricate in light of agreement to testify against Jackson); Alvin v. State, 548 So. 2d 1112, 1114 (Fla. 1989) (tape recording of statement made by witness to police shortly after he was stopped by police was admissible in murder prosecution to rebut inference that witness had fabricated story implicating defendant because State granted him immunity in exchange for his testimony).

The only argument Chamberlain raises on appeal is that the tape recording does not qualify as non-hearsay under section 90.801 (2)(b) because he did not attack Thibault's story as a **recent** fabrication, but rather, as one that he and the other co-defendants fabricated **shortly after the murders.** First, this has no effect on the admissibility of the statement to rebut the charge of improper influence or motive or motive to testify falsely. As such, Bertram v. State, 637 So.2d 258 (Fla. 2d DCA

1994), and Hebel v. State, 765 So.2d 143 (Fla. 2d DCA 2000), wherein the only defense was that the allegations were fabricated, are inapplicable. Here, the defense was clearly improper motive, influence or motive to falsify. Second, the plea deal which defense counsel was claiming gave rise to the improper motive in this case was entered into almost 1 year before trial; thus, the motivation to change testimony could not be "recent" in this case. Finally, even if the admission of prior consistent statements was limited to recent fabrications, which the State claims it is not, the term "recent" is used in reference to the sequence of the statements and is not a statute of limitations on the admissibility of such statements. See Chandler v. State, 702 So.2d 186 (Fla. 1997)(wherein this Court affirmed the admission of evidence to rebut a charge of recent fabrication where the prior consistent statement was made years before the trial).

Finally, even if this Court finds it was error to admit the taped statement, the error is harmless beyond a reasonable doubt. See Chandler at 197-99 (finding admission of Kristal Mays' prior statement **harmless** where the record showed that the jury was made aware early on that Mays had cooperated with the police and recognizing that although the statement may have bolstered Mays' credibility, the jury had ample information from

which to assess Mays' credibility and weigh her testimony accordingly). Similarly, here, the jury was made aware of Thibault's negotiated plea and the fact that he was still awaiting sentencing. It was also made aware of Dascott's negotiated plea and the fact that Amanda was not charged. The jury was able to assess all of this in determining credibility. No relief is warranted.

POINT VI

THE TRIAL COURT PROPERLY ALLOWED DETECTIVE FRASER TO BE RECALLED AND TESTIFY AFTER HE DISCUSSED HIS FUTURE TESTIMONY WITH THE STATE DURING A RECESS (RESTATED).

Chamberlain argues that the trial court abused its discretion by allowing Detective Fraser to be recalled after discussing his future testimony with the State during a recess. This Court will find that the trial court did not abuse its discretion by allowing Fraser to be recalled and testify. See Cadavid v. State, 416 So.2d 1156, 1158 (Fla. 3d DCA 1982)(holding that an abuse of discretion must be shown in order to reverse a trial court for allowing a witness to remain in the courtroom).

As Chamberlain points out, after Detective Fraser finished testifying, the State released him, with leave to recall him and the trial court took a recess. Upon returning from the recess, the State noted that it wanted to recall Detective Fraser and

defense counsel indicated he needed to question Detective Fraser. Detective Fraser was then questioned by defense counsel, outside of the presence of the jury, and the questioning revealed that Detective Fraser had remained in the courtroom during the recess and during that time discussed with the State that he would be recalled to testify about Chamberlain's testimony at his bond hearing. Detective Fraser noted that he had been given a transcript of that bond hearing to review.

The State agreed that it had forgotten to ask Fraser about Chamberlain's testimony at his bond hearing which was inconsistent with Chamberlain's taped statement. The State instructed Detective Fraser that he would be recalled and gave him a transcript of the July 26th, 1999 bond hearing and told him to read it through, that he would be asked about it. Defense counsel objected, arguing that he had invoked the rule and therefore, counsel for the State should not have been talking to the witness. The State replied that the rule refers to one witness discussing that his/her own or another witness' testimony with another witness, not with the attorney. The State noted that if there's a question about whether Detective Fraser's recalled testimony was influenced, that could be brought out on cross-examination.

In overruling the objection, the court noted that it had not instructed the witness that he could not speak to either lawyer without the other lawyer being present. The rule had not been invoked by the defense until after Dascott's testimony, the previous week, and they agreed to not discuss any witness's testimony with any future witnesses. That rule was not violated by the State's conversation with Detective Fraser.

Chamberlain argues that the discussion between Detective Fraser and the State violated the rule of sequestration, contained in section 90.616, Florida Statutes (2003), which states:

> (1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).
>
> (2) A witness may not be excluded if the witness is:
> (a) A party who is a natural person.
> (b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative.
> (c) A person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause.
> (d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.

The purpose of the rule is to prevent witnesses from hearing or consulting with each other about their testimony. It is clear that the rule was not violated in this case by the State informing Detective Fraser that it intended to recall him to discuss Chamberlain's testimony at his bond hearing and directing Fraser to review the transcript of the bond hearing. "It is undisputed that an attorney may talk to a witness about the testimony the witness will give, and that the witness's credibility should not be challenged on the basis of the discussion." Kingery v. State, 523 So.2d 1199, 1204 (Fla. 1st DCA 1988), citing Fla.Std.Jury Instr. (Crim.) 2.05-7.

The same argument Chamberlain raises was rejected by the Fifth District in Nieves v. State, 739 So.2d 125 (Fla. 5th DCA 1999). In that case, the state presented Greg Scala, a forensic firearm examiner with the Florida Department of Law Enforcement, during its case. Scala was testifying when the court recessed at 5:30 p.m. and was to resume testifying the following day. The next morning defense counsel asked whether the prosecutor had discussed Scala's testimony with Scala in the interim. The prosecutor admitted he had asked Scala questions about the information and questions he was going to ask the following morning. The defendant, Nieves, argued that the discussion violated the rule of sequestration and Scala's testimony should

have been disallowed.

The Fifth District disagreed, reasoning that the rule of sequestration does not prohibit an attorney from talking with a witness about the testimony he or she will give in a future court appearance. The court further noted that Nieves had failed to established prejudice because after the defense objection, the court had asked whether the defense wanted to go into further detail, but defense counsel declined stating: "I just don't think it's appropriate to permit Mr. Scala to further testify...." Because defense counsel was given the opportunity to question Scala and the prosecutor to determine specifically what had been discussed, but declined to do so, the court concluded it was unable to establish prejudice.

Similarly, here, there was no violation of the rule of sequestration because all the State discussed with Detective Fraser was his future testimony, i.e., the general subject of what he would be questioned about upon recall. Moreover, Chamberlain cannot establish prejudice because, despite being notified by the court that he could bring out the discussion between Detective Fraser and the State on cross-examination, defense counsel failed to do so. As such, any alleged error is harmless.

Acevedo v. State, 547 So.2d 296 (Fla. 3d DCA 1989), relied

upon by Chamberlain, is factually inapposite. In that case, the assistant state attorney met with his two main witnesses, a police officer and an informant, during the lunch break on the first day of trial, and discussed with them an inconsistency in their testimony. The Third District correctly held that the prosecutor's discussion with the two witnesses violated the rule of sequestration. The holding in Acevedo is clearly based on the fact that the two witnesses were being consulted with together and were told about an inconsistency between their testimony. This is precisely what the rule was intended to prevent and is not what happened in this case.

Significantly, although the rule of sequestration was violated, the court found no reversible error because the discussion was brought out on cross-examination of the informant and argued to the jury. The court found no abuse of discretion in the trial court's conclusion that the prosecutor's conduct was harmless. Here, in addition to the fact that the rule was not violated, any alleged violation would be harmless because defense counsel failed to bring out the conversation on cross-examination.

POINT VII

THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE FIRST-DEGREE MURDER CHARGE (RESTATED).

Chamberlain asserts that the trial court erred by denying his motion for judgment of acquittal on the felony-murder and premeditated murder charges. This Court will find that there was sufficient evidence on both theories to send the case to the jury.

A de novo standard of review applies to motions for judgment of acquittal. Pagan v. State, 830 So.2d 792 (Fla. 2002). This Court has repeatedly reaffirmed the general rule, established in Lynch v. State, 293 So.2d 44 (Fla.1974), that a motion for judgment of acquittal will not be granted unless there is no legally sufficient evidence upon which a jury could base a verdict of guilty. See Morrison v State, 818 So.2d 432 (Fla. 2002); Gordon v. State, 704 So.2d 107, 112 (Fla. 1997). "In moving for a judgment of acquittal, a defendant admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Darling v. State, 808 So.2d 145, 155 (Fla. 2002).

Further, the denial of a motion for judgment of acquittal will not be reversed on appeal if there is competent, substantial evidence to support the jury's verdict. See Darling, 808 So.2d at 155 (a "claim of insufficiency of the evidence cannot prevail where there is substantial and competent

evidence to support the verdict and judgment."); Pagan,("[g]enerally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence."); Terry v. State, 668 So.2d 954, 964 (Fla.1996)(same). "If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." Pagan, citing Banks v. State, 732 So.2d 1065 (Fla. 1999).

Chamberlain argues on appeal that there was insufficient evidence of premeditated and felony murder because this case "is replete with contradictory testimony and evidence." (IB 75).[9] However, it is fundamental **a motion for judgment of acquittal**

[9] At trial and in his motion for new trial, Chamberlain also argued that he was entitled to a judgment of acquittal because the State's evidence was not inconsistent with his theories of defense, which were that Thibault acted independently and that Chamberlain was forced to participate in the robbery under duress by Thibault. However, the State is required to rebut the defendant's theory of defense only when the State's evidence is wholly circumstantial. See Pagan. The evidence establishing premeditation and felony murder in this case was **direct**, not circumstantial evidence. As such, the State was not required to rebut Chamberlain's theory of defense. See Conde v. State. Moreover, the direct evidence in this case does rebut Chamberlain's "independent actor" and "duress" defense. The jury is free to disbelieve the defendant's version of events when the State presents evidence conflicting with that theory. DeAngelo v. State, 616 So.2d 440 (Fla. 1993); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Hampton v. State, 549 So. 2d 1059, 1061 (Fla. 4th DCA 1989).

cannot be granted based on evidentiary conflict or witness credibility. Darling at 155. Rather, conflicts in the evidence and the credibility of the witnesses is a matter to be resolved by the jury. Id. at 155; see Davis v. State, 425 So.2d 654, 655 (Fla. 5th DCA 1983) (the fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury); Lynch v. State, 293 So.2d 44, 45 (Fla. 1974) (holding that where reasonable minds may differ as to proof of ultimate fact, courts should submit the case to the jury).

Here, there is **direct** evidence of both premeditation and felony murder. Chamberlain's three co-defendant's, each of whom were involved in the crimes and had direct knowledge of them, testified against him at trial. Thibault testified that all four of them (he, Dascott, Chamberlain and Amanda) decided to commit the robbery and planned how they would do it. Dascott agreed that it was something they all did together. Although Amanda claimed that Thibault forced her to participate in the robbery, she agreed that the three men were acting in concert. The plan was to put the victims in the bathroom until the house and walk-in safe were cleaned out and then put the victims in the walk-in safe.

All of the participants agreed as to how the plan was

carried out. Thibault pulled the gun on Danny, while he was in the living room trying to hook up a TV. Thibault announced it was a robbery and ordered Danny into the bathroom. When Danny asked what was going on, Chamberlain hit him on the knee with an asp. Bryan was brought into the living room by Amanda and complied with Thibault's demand to go into the bathroom. While Thibault held Danny and Bryan at gunpoint in the bathroom, Chamberlain, Dascott and Amanda carried out TV's, VCR's, and other items to the car and searched the house for money and drugs. In self-defense, Danny "rushed" Thibault and a struggle between the two ensued. Thibault tried to subdue Danny by striking him in the head with the gun but to no avail. Thibault had the gun pointed at Danny's head and told him he would shoot if he didn't let go. When Danny continued to pin Thibault against the wall, lifting him off his feet, Thibault pulled the trigger killing Danny instantly.

Upon hearing the gunfire, Chamberlain and Amanda came running toward the bathroom door. Chamberlain started to tell Thibault that they had to get "rid of the other witnesses, that witnesses were going to get them caught." Thibault asked Amanda what she thought and she shook her head, indicating that she wasn't sure. Chamberlain repeated that they had to get rid of the witnesses. Thibault told Amanda it was up to her and she

said “go ahead” and get rid of the other witnesses. Charlotte, who was sleeping in a back bedroom, was then violently awakened and dragged into the bathroom. She was forced to walk over Danny’s dead body and sit with Bryan in the shower stall. Chamberlain and Dascott continued packing the car while Amanda and Thibault brought Charlotte into the bathroom. Before going back into the bathroom, Thibault asked Chamberlain and Amanda “if this was what they were going to do” and Chamberlain said “yes”, that what we have to do. Chamberlain agreed to go into the bathroom with Thibault and stood by his side as he emptied a clip into Charlotte and Bryan. Afterwards, Chamberlain picked up the bullet casings because they had his fingerprints on them. Bryan was still alive and Thibault didn’t want to leave him like that so he and Chamberlain went out to Chamberlain’s car, retrieved another clip and emptied it into Bryan and Charlotte.

The **direct** evidence supports sending the case to the jury on both premeditated and felony murder. The testimony of Thibault, Dascott and Amanda is undisputed that Chamberlain intended to commit the robbery and took part in carrying it out. It is also undisputed that three murders occurred during the course of that robbery. As such, there is sufficient evidence of felony murder to send the case to the jury. Further, this Court has defined premeditation as “a fully formed conscious

purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla. 1991). There is no minimum amount of time required to form premeditation; all that is needed is enough time to permit reflection and that may be only a few seconds. Here, Thibault's testimony is an admission of his fully formed conscious purpose and intention to kill. Thibault pleaded with Danny to stop struggling with him and warned him before firing the gun that he would shoot if Danny didn't stop. Chamberlain is guilty as a principal. Regarding Charlotte and Bryan, it was Chamberlain who first said that they had to get rid of the other witnesses and who continued to insist that they get rid of them during the discussion about what to do. He stood by Thibault's side as Thibault emptied the first clip into Bryan and Charlotte, picked up the casings thereafter and then went with Thibault to retrieve the second clip and again stood by his side as he emptied that clip into Bryan and Charlotte. It cannot be seriously contended that there was not sufficient evidence of premeditation to send the case to the jury.

POINT VIII

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON BOTH PREMEDITATED AND FELONY MURDER

(Restated).

It is Chamberlain's contention that the trial court reversibly erred by instructing the jury on both premeditated and felony-murder when the indictment charged only premeditated murder. Chamberlain's claim lacks merit.

The State's first argument is that Chamberlain has failed to preserve this issue for appeal. Chamberlain did not argue below that the trial court could not instruct the jury on both premeditated and felony-murder because the indictment charged only premeditated murder. Instead, the transcript pages he cites (IB 77-78) show that he argued, during the charge conference, that the court should only give the 2a part of the felony-murder instruction, not the 2a, 2b and 2c parts (T XXX 2196). The felony-murder instruction reads, in part, as follows:

> Before you can find the defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:
> 1. (Victim) is dead.
> 2. a. [The death occurred as a consequence of and while (defendant) was engaged in the commission of (crime alleged).]
> b. [The death occurred as a consequence of and while (defendant) was attempting to commit (crime alleged).]
> c. [The death occurred as a consequence of and while (defnedant), or an accomplice, was escaping from the immediate scene of (crime alleged).]
> 3. a. [(Defendant) was the person who

> actually killed (victim).]
> b. [(Victim) was killed by a person other than (defendant); but both (defendant) and the person who killed (victim) were principals in the commission of (crime alleged).]

The State pointed out that the court could eliminate **3a** because Chamberlain was not the shooter (T XXX 2195-96). Defense counsel agreed and then argued that the court should eliminate **2b** and **2c** and only give **2a** (T XXX 2196-97). The State objected, noting that **2b** and **2c** should stay because the jury could find attempting or escaping from the scene as applicable, especially in light of the fact that the robbery was an ongoing event (T XXX 2197). The trial court agreed with the State and decided to give **2a**, **2b** and **2c**. Thus, the only challenge Chamberlain raised to the felony murder instruction was to instructing on **2b** and **2c**. He did not argue that the instruction, as a whole, should not be given because the indictment charged only premeditated murder. As such, he cannot raise the argument for the first time on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Turning to the merits, Chamberlain acknowledges that this Court rejected this very same argument thirty years ago in Knight v. State, 338 So.2d 201, 204 (Fla. 1973), but asks this Court to recede from that decision. In Knight, this Court held

that the State could prosecute under both theories– premeditated murder and felony murder– even though the indictment charged only premeditated murder. This Court has continually adhered to that position and has rejected claims identical to those raised by Chamberlain as recently as two years ago, in Woodel v. State, 804 So.2d 316, 322 (Fla. 2001), wherein the Court held "'[w]e have repeatedly rejected claims that it is error for a trial court to allow the State to pursue a felony-murder theory when the indictment gave no notice of the theory.'" Id. at 322, citing Gudinas v. State, 693 So.2d 953, 964 (Fla. 1997). Chamberlain has not presented anything which calls into question the Florida Supreme Court's finding that such a method of charging first-degree murder is proper. See, Valdez v. State, 728 So. 2d 736, 739 (Fla. 1999) (rejecting claim of constitutional error arising from custom of charging with general indictments of premeditated first-degree murder and prosecuting under alternate theories of felony or premeditated murder); Gudinas, 693 So. 2d 953, 964 (Fla.) (rejected claims that it is error for court to permit State to pursue a felony murder theory when the indictment gave no notice of the theory), cert. denied, 522 U.S. 936 (1997); Armstrong v. State, 642 So. 2d 730, 737 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995) (same); Lovette v. State, 636 So. 2d 1304 (Fla. 1994)(same);

Bush v. State, 461 So. 2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986) (same). Affirmance is required.

POINT IX

THE DEATH SENTENCE IS PROPORTIONAL

(Restated)

Chamberlain makes the sweeping allegations that the evidence in his case does "not support any of the aggravating factors found by the trial court" (IB 80), but only specifically challenges the finding of CCP (82-83). He also complains the trial court gave insufficient weight to the non-statutory mitigation arising from the abuse Chamberlain took from his cousins ("abuse by cousins") while growing up and "failed to consider the possibility of rehabilitation." (IB 81-82). Based upon these allegations, Chamberlain requests a re-sentencing. A review of the sentencing order will establish that the death sentences for the triple homicide committed during the course of a robbery is proportional[10] and should be affirmed.

Because Chamberlain has combined in one point challenges to the aggravation, mitigation, and proportionality, three standards of review are at issue. As will be explained more

[10]The death sentence of co-defendant, Thomas Thibault, was reversed for a new penalty phase. Thibault v. State, 850 So. 2d 485 (Fla. 2003). Re-sentencing is not anticipated until March 2004.

fully below, the trial court's factual findings are reviewed for substantial competent evidence, the determination of the weight given a mitigator is discretionary, and proportionality is within this Court's purview.

Whether an aggravator exists is a factual finding reviewed under the competent, substantial evidence test.[11] When reviewing aggravators on appeal, it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," Alston v. State, 723 So. 2d 148, 160 (Fla. 1998) quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). See Caballero v. State, 851 So. 2d 655, 661 (Fla. 2003); Harris v. State, 843 So. 2d 856, 866 (Fla. 2003); Hildwen v. State, 727 So. 2d 193, 196 (Fla. 1998).

In Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990),

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[11]Under the competent, substantial evidence test, the appellate court pays overwhelming deference to the court's ruling. If there is any evidence to support the factual findings, the lower court's decision will be affirmed. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) (recognizing judge, sitting as fact finder, has superior vantage point).

established standards for reviewing mitigation: (1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review; (2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and, (3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000) (observing whether mitigator exists and weight assigned are matters within sentencer's discretion); Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding, though court must consider all mitigation, it may assign it "little or no" weight); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (explaining court may reject claim mitigator was proven if record contains competent substantial evidence to support rejection).

Proportionality review is conducted by this Court and is a consideration of the totality of the circumstances in a case compared with other capital cases to ensure uniformity. Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Terry v. State, 668 So. 2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful,

deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6 (Fla. 1999).

Initially it must be noted Chamberlain's challenge to the finding of aggravation, with the exception of his challenge to the CCP aggravator, is not pled properly. Chamberlain fails to explain where the trial court erred or to present his allegation in anything more than a single sentence conclusion. As such, the issue should be found waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived). However, for this Court's convenience, the State will address the aggravation found in this case.

After putting forth factual findings related to -- the planning and execution of the robbery and homicides along with Chamberlain's mental status, the alleged disparity in treatment respecting other local murder cases, Chamberlain's assessment of the evidence used for conviction and evaluation of mitigation--

(T35 2914-29), the trial court determined six aggravators applied to the case: (1) under supervision of Department of Corrections (§921.141(5)(a)); (2) prior violent felony for contemporaneous homicides (§921.141(5)(b)); (3) felony murder (robbery) (§921.141(5)(d)); (4) avoid arrest (§921.141(5)(e)); (5) pecuniary gain (§921.141(5)(f)); and (6) CCP (§921.141(5)(i)). Chamberlain sought seven factors in statutory and non-statutory mitigation.[12] The trial court found no statutory mitigators, but found two non-statutory mitigating factors: (1) family background/abuse by cousins (slight weight) and (2) other mitigation (some weight). After assessing the aggravation found beyond a reasonable doubt and weighing it against the two mitigators found established, the trial court imposed a death sentence for each victim and a life sentence for the robbery. (RXIII 2174-75, 2186-89; T35 2931).

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[12]Chamberlain sought the following: (1) defendant was an accomplice with a minor role (§921.141(6)(d)); (2) extreme duress or substantial domination of another person (§921.141(6)(e)); (3) family background/abuse by cousins (§921.141(6)(h)); (4) family background/parental neglect; (5) rehabilitation (§921.141(6)(d)); (6) remorse (§921.141(6)(d)); (7) disparate treatment compared with co-defendant, Jason Dascott (§921.141(6)(d)). (RXII 2126-32). The trial court considered the above in addition to: (1) no significant prior criminal activity (§921.141(6)(a)); (2) capacity to appreciate criminality of conduct/ability to conform conduct to requirements of law; (3) Chamberlain's age (§921.141(6)(g)); (4) other factors in Chamberlains background (§921.141(6)(h)). (RXIII 2173, 2178-81, 2184-88; T35 2925-31).

Under Supervision of Department of Corrections-Although the State did not seek the aggravator of "under supervision of Department of Corrections" (§921.141(5)(a) (TXXXIV 2712-16), the trial court found this mitigator (RXIII 2176). The State offered the fact Chamberlain had been convicted of a prior offense, but was no longer under supervision, as rebuttal to Chamberlain's anticipated argument he had no significant prior criminal history (TXXXIV 2712-16; SRII 42).[13] Should this Court strike the factor, the death sentences remain appropriate. Any reliance the trial court placed on the factor is harmless as will be evident from the balance of the argument.

Prior Violent Felony-The jury convicted Chamberlain of three counts of first-degree murder and one count of robbery (RXII 1961-64). In his Memorandum in Support of Life Sentence, Chamberlain conceded this aggravator was established based upon the three contemporaneous first-degree murder convictions (RXII 2123). Nonetheless, he challenges the court's finding of this aggravator, but fails to identify a basis for this Court striking the aggravator.

The trial court concluded, Chamberlain "stands convicted of

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[13]A Pre-sentence Investigation ("PSI") was ordered in this case and provided to the parties. Should this Court order the PSI transmitted, this information is reflected on pages four and nine.

three counts of First Degree Murder and Robbery. They are contemporaneous convictions because they were obtained prior to sentencing." (R13 2176).

> This Court has repeatedly held that where a defendant is convicted of multiple murders, arising from the same criminal episode, the contemporaneous conviction as to one victim may support the finding of the prior violent felony aggravator as to the murder of another victim. [c.o] Accordingly, we determine that the lower court correctly found that the conviction as to Mrs. Brunt aggravated the conviction as to Mrs. Flegel, and vice versa.

Francis v. State, 808 So. 2d 110, 136 (Fla. 2001) (citations omitted); Johnson v. State, 720 So.2d 232, 237 (Fla. 1998) (affirming contemporaneous convictions for robbery with firearm and attempted murder qualified as prior violent felony aggravator); Mahn v. State, 714 So.2d 391, 399 (Fla. 1998) (noting prior violent felony aggravator established by contemporaneous convictions of two other homicides); Windom v. State, 656 So.2d 432, 440 (Fla.) (stating "contemporaneous convictions prior to sentencing can qualify as previous convictions in multiple conviction situations"), cert. denied, 516 U.S. 1012 (1995). Based upon Chamberlain's contemporaneous murder convictions, the aggravator was proven beyond a reasonable doubt as found by the trial court. This challenge is meritless.

Felony Murder and Pecuniary Gain-Here, again, Chamberlain agreed in his Memorandum in Support of Life Sentence the felony murder and pecuniary gain aggravators were proven (RXII 2123). He has not given a basis for this Court to find otherwise.

The record provides that Chamberlain was convicted by the jury of robbery in this case (RXII 1964; R13 2176). The transcript is replete with discussions of the plan to rob the victims and the collection of everything (drugs, money, and electronic equipment) that could be taken from the victims' home as reported by Amanda, Dascott, and Thibault (TXXI 971-78, 983, 988, 991-92, 1045-49, 1051; TXXIV 1438, 1447, 1452-53, 1455, 1458-59, 1462, 1478-80, 1488, 1491, 1544, 1565, 1568; TXXVII 1787, 1810, 1815, 1818-20, 1822-24, 1832, 1840, 1844).

In the sentencing order, the court noted the defendants discussed "robbing [the victims] and taking everything they had because Amanda [Ingman] started indicating other things that were in the house that [they] weren't aware of," and that the defendant's "discussed the robbery in depth and devised a plan to accomplish it" by using the gun Chamberlain provided, the plan was to "get the goods out of the house." (RXIII 2156-57) The victims were to be held at gun point in the bathroom by Thibault while Chamberlain, Dascott, and Amanda "emptied the house." Once that was accomplished, the victims were to be put

in the safe which would have been emptied by that time. (RXIII 2157). It was the trial court's conclusion that "[t]hey are pecuniary-gain driven and painstaking to see that they get all of the property" including televisions, game consoles, speakers, remote controls, and radios. (RXIII 2166). Chamberlain had Bryan's knapsack which contained money and drugs (RXIII 2166-67). Following these facts, the trial court found the felony murder aggravator for the robbery conviction and pecuniary gain. The court recognized "[w]hile there is some doubling or merging with robbery, it is clear that gain was a predominant factor. It is not incidental to the fact of robbery." (RXIII 2176-77). The court's findings are supported by substantial competent evidence and there was acknowledgment of the merging of the factors.

As noted in Barnhill v. State, 834 So. 2d 836, 851 (Fla. 2002), "[g]enerally, when a homicide occurs during the course of a robbery, the court cannot find both that the homicide was committed during the course of a robbery and that the homicide was committed for pecuniary gain. Doubling of aggravating circumstances is improper where the circumstances refer to the "same aspect" of the crime." See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976). Here, the court recognized "there is some doubling or merging" of these factors (RXIII 2177). However, to

the extent the order may be read as finding both aggravators and not merging them, this Court may merge the felony murder and pecuniary gain aggravators and conduct a proportionality review based upon the remaining factors. Barnhill, 834 So.2d at 854. Such will be analyzed further in the proportionality review section below.

Avoid Arrest-The trial court found the avoid arrest aggravator. In discussing the facts, the court highlighted the evidence that Chamberlain supplied the car, .45-caliber hand gun, and ammunition for the instant crimes. Also found was that Thibault displayed the gun to Danny and ordered him to the bathroom. Likewise Bryan was commanded to enter the bathroom. To ensure compliance from Danny, Chamberlain struck his knee with an asp. Once these victims were in the bathroom, Thibault entered to guard the door while the other accomplices removed valuables from the home. With respect to the death of Danny, the first victim, the court quoted from Thibault's testimony in which he averred that once Danny rushed him, shoving him against the wall and off his feet, he struck Danny several times in the head and pled with Danny to stop. Thibault warned Danny he would be shot if he did not stop. Because Danny did not desist and realizing Danny could overpower him, Thibault pulled the trigger, shooting Danny in the skull and killing him instantly.

(RXIII 2157-58; TXXVII 1815, 1820, 1822-28; SR 74-78, 82-85).

Following Danny's murder, Thibault, Amanda, and Chamberlain discussed what to do next. According to Thibault, Chamberlain's was the first to say "get rid of the other witnesses" because witnesses would get them caught. This was repeated twice more. Amanda agreed stating, "go ahead and get rid of the other witnesses." Towards this goal, Charlotte was awakened and ordered to the shower where Bryan awaited. Once she was in the bathroom, having stepped over Danny's body, Thibault asked for confirmation that the victims' should be killed. Chamberlain responded, "Yes, that's what we've got" and agreed to accompany Thibault to the bathroom and stood by him as Thibault emptied his gun into Bryan and Charlotte. Once the shooting stopped, Chamberlain collected the spent casing because they contained his fingerprints. Noting Bryan was still alive, Thibault and Chamberlain discussed what to do next. Chamberlain suggested they get more bullets as he had another clip in the car. Returning with the clip for Thibault, Chamberlain reloaded the weapon, cocked it, and gave it to Thibault before they returned to the bathroom. Thibault unloaded the second clip into Bryan and Charlotte. (RXIII 2158-63; TXXVII 1822-25, 1830, 1832, 1835-39; SR 107-09).

As part of the analysis of the crimes, the court discussed

heightened premeditation, avoid arrest, felony murder, and pecuniary gain together. The court found in part: "The final two homicides are remarkable because they are methodical. They are performed in a systematic way. The decision to take life is clearly present in the minds of all three (Thibault, Chamberlain, and Ingman) at the time of the killings." It was Chamberlain who first suggested the killing and elimination of the witnesses and remained insistent on this course of action. He accompanied Thibault to the bathroom to complete the murders. (R13 2163-65). It was the trial court's conclusion that "[w]hat is revealed here is a calculated plan to eliminate that begins with debate, consumes appreciable time and is conducted with the two men (Thibault and Chamberlain) acting in concert. It is concrete and heightened, and it all takes place during a continuing robbery that is a virtual marathon of taking." (R13 2165-66). Later in his order, the trial court concluded: "Chamberlain provides transportation and the gun. He initiates the idea of witness elimination, and it is he who directs, prods and encourages Thibault in the final executions. (RXIII 2185). The above findings are supported by the trial testimony of Thibault including the statement "JJ (Chamberlain) was telling me that **we are all going to die, going to get the electric chair**. You killed him. **You killed him**. He said there's

nothing left to take. **Just take care of the other two** (inaudible)." (TXXVII 1822-28, 1830-39; TXXIX 2161) (emphasis supplied). It must be remembered that Danny and Bryan could have identified their assailants. Amanda knew Thibault and it was she who contacted him at Eric's house upon returning to live in West Palm Beach. There had been several telephone arguments between Thibault and Bryan, arising from Thibault calling for Amanda. These argument included discussion about the Lake Worth Clique to which Thibault belonged. Further, the victims and assailants had partied together for hours that night, knew where each other lived, and knew acquaintances of each. Neither masks nor gloves were not worn by the assailants.

Farina v. State, 801 So. 2d 44, 54 (Fla. 2001) provides:

> The avoid arrest/witness elimination aggravating circumstance focuses on the motivation for the crimes. [] Where the victim is not a police officer, "the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for the killing was to eliminate a witness," and "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." [] However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.
>
> In other cases, this Court has found it significant that the victims knew and could

> identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator ... we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant.

Farina, 801 So. 2d at 54 (citations omitted).

Under Preston v. State, 607 So. 2d 404, 409 (Fla. 1992):

> ... in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. [c.o.] However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.

See Foster v. State, 778 So. 2d 906, 918 (Fla. 2000) (noting avoid arrest aggravator can be supported by circumstantial evidence). Also, a defendant's own words may prove the aggravator. Guzman v. State, 721 So. 2d 1155, 1160 (Fla. 1998). See Nelson v. State, 850 So. 2d 514, (Fla. 2003) (agreeing avoid arrest aggravator proven where defendant noted he killed victim because he was scared victim would call the police); Jennings v. State, 718 So. 2d 144, 151 (Fla. 1998) (finding avoid arrest aggravtor where defendant was known to victims, game prepared with weapons, held the victims in a confined area, discussed

killing them, and committed the murders in a methodical fashion); Sliney v. State, 699 So. 2d 662 (Fla. 1997) (affirming avoid arrest aggravator where defendant testified accomplice told him "Sliney would have to kill the victim because '[s]omebody will find out or something'"); Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996) (finding avoid arrest aggravator in part based upon evidence defendant killed victim when she struggled and screamed she would call police); Walls v. State, 641 So. 2d 381, 390 (Fla. 1994) (finding confession in which defendant admitted victim was killed so there would be no witnesses was direct evidence supporting avoid arrest aggravator); Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988) (holding avoid arrest aggravator proven where defendants discussed beforehand need to kill victims to avoid detection); Cave v. State, 476 So. 2d 180, 188 (Fla. 1985) (agreeing avoid arrest aggravator established based upon fact victim was kidnapped from store and taken thirteen miles to rural area and killed), cert. denied, 476 U.S. 1178 (1986).

The case facts support the avoid arrest aggravator for each victim. Even though Danny's murder occurred during a struggle, it was Thibault's intent to eliminate Danny as a witness. As already noted, Danny could identify Thibault and seek retribution. Thibault's mind-set was that it was either him or

Danny as they struggled and Thibault threatened Danny to stop or he would kill him. Such is similar to Jennings, 718 So. 2d at 151 and Consalvo, 697 So. 2d at 819. In Jennings, one of the defendants was known to his victims, the robbery assailants came armed with weapons, they placed the victims in a confined space and methodically slit their throats them after discussing killing the victims. Consalvo is instructive as the aggravator was established from the fact the victim awakened to Consalvo, a man she knew, in her apartment and when he did not leave when she confronted him he killed her as she threatened to call the police. Consalvo, 697 So.2d at 819.

Danny had prior contact with his assailants who did not hide their identities and was confined in a small bathroom at gun point prior to the murder. See Farina, 801 So. 2d at 54 (reasoning avoid arrest may be established where victim could identify defendant coupled with fact defendant did not hide identity by wearing gloves or a mask, defendant made incriminating comments, victim offered resistance, victim was confined, or victim posed a threat to defendant). Additionally, although held at gunpoint, Danny charged Thibault and fought with him for the gun. In response, Thibault threatened Danny with death and when Danny persisted, Thibault shot him in the head. To the extent that these facts do not establish the

aggravator, such is harmless as will be addressed in the proportionality section below.

For the murders of Charlotte and Bryan there is ample evidence the killings were to eliminate the witnesses. Chamberlain suggested the killings when asked what should be done. He expressed his fear at being caught and at receiving the death penalty. The assailants discussed whether or not to kill the witnesses. (TXXVII 1830-39; XXIX 2161). Almost as moral support, Chamberlain accompanied Thibault into the bathroom and stood by him as the victims were shot. Chamberlain's words and actions establish this aggravating factor. Farina, 801 So. 2d at 54; Guzman v. State, 721 So.2d 1155, 1160 (Fla. 1998); Sliney v. State, 699 So. 2d 662 (Fla. 1997) (affirming avoid arrest aggravator where defendant testified accomplice told him "Sliney would have to kill the victim because '[s]omebody will find out or something'").

Cold Calculated and Premeditated - The trial court found CCP. The court discussed the circumstances surrounding each murder including the warning Thibault gave Danny before shooting him once in the head and the methodical manner in which Charlotte was awakened and taken to the bathroom and Thibault, with Chamberlain standing next to him, fired upon Charlotte and Bryan. Following this, Chamberlain and Thibault reloaded the

gun and emptied another clip into the victims. (RXIII 2158-64, 2166). The record supports the CCP aggravator based upon testimony establishing that Danny knew his assailants and could identify them and that Danny's murder was precipitated by Thibault holding the gun to Danny's head, telling him he would shoot if Danny did not stop fighting and lifting him off the floor, and when Danny did not comply, shooting him once in the head. Danny died instantly. (RXIII 2158). Following this murder, the accomplices determined the other victims had to be killed. Toward this end, Thibault and Chamberlain awakened the sleeping Charlotte, moved her to the bathroom where Bryan was secured and methodically shot them by emptying the entire clip of the .45 caliber handgun Chamberlain had supplied to Thibault. As support, Chamberlain stood shoulder to shoulder with Thibault as he fired at the cowering Charlotte and Bryan. When it was obvious Bryan survived the first salvo, but unclear whether Charlotte remained alive, Thibault and Chamberlain returned to Chamberlain's car to obtain more ammunition. Again they re-entered the bathroom and emptied the second clip into these victims. These facts have record support (TXVII 1815, 1820, 1822-28, 1830-39; TXXXIX 2161; SR 74-78, 82-85).

Farina, quoting Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994), is again instructive:

> In order to establish the CCP aggravator, the evidence must show
>
> > that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.
>
> [c.o.] While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." [c.o.] The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." [c.o.] However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.

Farina, 801 So. 2d at 53-54 (citations omitted). “[T]he State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill." Bell v. State, 699 So. 2d 674, 677 (Fla. 1997). This Court has affirmed a CCP finding where the defendant has obtained a weapon in advance, lacked provocation to kill, murdered the victim in an isolated area, and stole the victim’s belongings. See

Nelson, 748 So. 2d at 244 (affirming CCP where defendant discussed need to kill victim, lured him to remote site, where victim was killed to avoid detection and to get car for a trip); Jennings, 718 So.2d at 151-52 (finding CCP where defendant put victims in the freezer, cleaned out the safe, and cut victims' throats, washed blood from his hands, and escaped through the back door as another employee was coming in front).

As the trial court found here, there was a "calculated plan to eliminate that begins with debate, consumes appreciable time and is conducted with the two men acting in concert. It is concrete and heightened, and it all takes place during a continuing robbery ...." (R XIII 2165-66). Without question, such facts establish CCP for the murders of Charlotte and Bryan. However, to the extent that CCP has not been established for Danny's murder such is harmless as will be addressed in the proportionality section.

Mitigation of Family Background/Abuse by Cousins - Chamberlain complains that the trial court gave this mitigator only slight weight. In finding and weighing the mitigator, the trial court reasoned:

> There are some factors in the defendant's background that are mitigating in nature. There was some abuse by his cousins and the testimony is that they introduced him to criminal conduct. On the other hand he sought their company. He wanted to be with

> them and did not appear to have other friends. At some point their relationship became brotherly and currently it is described as loving and affectionate. This is mitigation of some weight which I rank as slight.

(RXIII 2178-79). This analysis comports with Campbell, 571 So. 2d at 419-20. The court assessed whether the offered evidence was truly mitigating in nature, whether it had been proven, and the appropriate weight assignment.

Based upon the time of the abuse and the evolution of the relationship between the cousins from adversarial to loving by the time of the crime, only slight weight was given the mitigation. It cannot be said that no reasonable person would have assigned only slight weight to this aggravator. Hence, there has been no abuse of discretion. See Quince v. State, 414 So. 2d 185, 187 (Fla. 1982) (noting it is not abuse of discretion to assign reduced weight to proven mitigation based upon contradictory evidence); Elledge v. State, 706 So. 2d 1340, 1347 (Fla. 1997) (finding trial court did not abuse its discretion in assessing weight to mitigators because reviewing Court could not "say that no reasonable person would give this circumstance [different] weight in the calculus of this crime"); accord Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990) (opining "discretion is abused only where no reasonable man would take the view adopted by the trial court.").

Mitigation of Rehabilitation - In his Memorandum in Support of Life Sentence, Chamberlain pointed to Dr. Perry's testimony to establish the rehabilitation mitigator and his notation that Chamberlain had a high IQ, encouraged his sister, and conformed his conduct to the jail rules (RXII 2131-32; TXXXIV 2890-92). The trial court made the following findings throughout the sentencing order. "While a reading of [Chamberlain's] statement at the Allocution hearing reflects defiance intertwined with his denial [of responsibility] it was delivered with restraint and appropriate respect. It should be considered with his statement to the Grand Jury." (RXIII 2173). "Dr. Eugene Herman testified that Mr. Chamberlain's full scale IQ was in the high average range; his verbal IQ was in the average range; his performance IQ was in the high average range; his verbal comprehension index was in the average range and his perceptual organization index was in the superior range." (RXXX 2179-80).

> Dr. John Perry interviewed his employers. They reported he was a good employee, a good kid, always respectful; never showed any signs of behavior problems; always did what he was told; always a yes, Sir, no Sir, type of individual; always on time and conscientious about his work and school. They never had a problem with him, and he was well adjusted. He had started to turn his life around. He obtained his GED and enrolled in the community college.

(RXIII 2180). The trial court rejected the statutory mitigation

of no significant history of prior criminal activity and found and gave some weight to "[t]he existence of other factors in the Defendant's background that would mitigate against th imposition of the death penalty...." TXIII 2181).

While the trial court did not identify these factors as reflecting rehabilitation potential, they discuss similar issues pointed out by Chamberlain in his sentencing memorandum as supporting rehabilitation. Hence, it cannot be said that the trial court did not take rehabilitation into consideration and give it some/slight weight (RXIII 2181, 2188-89). Chamberlain's reference to Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1998), Holsworth v. State, 522 So.2d 348, 354-55 (Fla. 1988, Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982) and Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987) do not require a new sentencing. In each, the trail court either refused to consider any non-statutory evidence Cooper, 526 So. 2d at 901-02; Simmons, 419 So. 2d at 320; Valle, 502 SO. 2d at 1226; or this Court was assessing the basis for the jury=s life recommendation in light of the many mitigating circumstances presented by the defense. Holsworth, 522 So.2d 354-55. Here as it is clear the trial court did not bar Chamberlain from introducing the rehabilitation evidence (T XXXIV 2890-92), but in fact considered the evidence although not clearly entitling it

rehabilitation. (R XIII 2181, 2188-89).

However, to the extent that it is unclear that the trial court considered and weighed the rehabilitation mitigator, such is harmless in light of the strong aggravation in this case. Miller v. State, 770 So. 2d 1144, 1150 (Fla. 2000) (holding error in not finding and giving weight to long-term alcohol and substance abuse non-statutory mitigator was harmless given the weighty aggravators of prior violent felony and felony murder (robbery). In Asay v. Moore, 828 So. 2d 985, 991-92 (Fla. 2002), this Court declined to find fundamental error in the state habeas corpus context for appellate counsel's failure to challenge the trial court's error in not identifying, finding, and weighing non-statutory mitigation related to **potential for rehabilitation**, receipt of GED while incarcerated, family relationships, helpful to family and fellow inmates, employment, good/kind to children, and that the defendant was under the influence of alcohol at the time of the crime. This conclusion was made in light of the three strong aggravators of murder committed while on parole, prior violent felony, and CCP. Asay, 828 So. 2d at 991-92. Because of the strong aggravation and weak mitigation in this case, any alleged error is harmless. However, the proportionality review conducted below will assume the rehabilitation aggravator was found and given slight/some

weight.

Proportionality-Should this Court conclude that the aggravator of "under supervision" is unsupported, each death sentence remains supported by valid aggravators. The death sentence for Danny's murder will be addressed separately from the murders of Charlotte and Bryan as they were killed at different times and under different circumstances.

With respect to Danny (first murder victim) should this Court strike the avoid arrest and CCP aggravators, the death sentence is proportional in light of the mitigation of slight/some weight of family background/abuse by cousins and rehabilitation. See Shellito v. State, 701 So. 2d 837, 845 (Fla. 1997) (affirming death sentence in a shooting death where court properly found two aggravators, PVF and pecuniary gain/felony murder (robbery) and non-statutory mitigation of alcohol abuse, mildly abusive childhood, difficulty reading, and learning disability); Heath v. State, 648 So. 2d 660, 666 (Fla. 1994) (affirming death sentence based on PVF and felony murder (robbery) aggravators even though there were three mitigators of extreme mental or emotional disturbance, good character, and life sentence for co-defendant). As is evident from the following, should all of the aggravation apply to Danny as well as Charlotte and Bryan, the death penalty for Danny would be

equally proportional.

With respect to Charlotte and Bryant, four valid aggravators remain (1) prior violent felonies (contemporaneous murders); (2) felony murder (robbery) merged with pecuniary gain, (3) avoid arrest, and (4) CCP. These contain three of the most weighty aggravating factors. See Sweet v. State, 810 So. 2d 854, 857, 866 n.1 (Fla. 2002) (noting "prior violent felony" and "avoid arrest" were strong aggravators); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) (recognizing presence of prior violent felony aggravator as "the most serious" aggravator present in the case and stating that, while CCP was not present, it is one of the "most serious aggravators set out in the statutory sentencing scheme"). The trial court's weighing of these aggravators against the two mitigators of slight/some weight properly concluded the aggravation out weighed the mitigation and the decision to impose the death penalty should be affirmed as proportional. See Spann v. State, 2003 WL 1740646, (Fla. 2003) (finding sentence proportional based on prior violent felony ("PVF"), felony murder (kidnapping); avoid arrest; pecuniary gain; and CCP against no statutory and six non-statutory mitigators); Rimmer v. State, 825 So. 2d 304 (Fla. 2002) (affirming death sentence for triple homicide with under sentence of imprisonment, PVF, felony murder, avoid arrest, CCP

and several non-statutory mitigators); Philmore v. State, 820 So. 2d 919, 925 (Fla. 2002) (affirming death sentence based upon aggravation of PVF, CCP, and pecuniary gain and eight non-statutory mitigators); Hurst v. State, 819 So. 2d 689, 701-02 (Fla. 2002) (affirming death sentence for robbery of fast food restaurant with aggravation of HAC, avoid arrest, felony murder (robbery) and three statutory and four non-statutory mitigators); Jennings v. State, 718 So. 2d 144 (Fla. 1998) (upholding death sentence for triple murder of Cracker Barrel employees during a robbery by slitting their throats based upon three aggravators of felony murder (robbery), avoid arrest, and CCP outweighing mitigation of no significant criminal history, deprived childhood, co-defendant received life, cooperation with police, good employment history, loving relationship with mother, positive personality traits, capacity to care for and be loved by children, exemplary courtroom behavior); Sliney v. State, 699 So. 2d 662 (Fla. 1997) (finding death penalty proportional where murder committed during robbery of pawn shop was committed to avoid arrest and two statutory mitigators along with several non-statutory factors); Brown v. State, 721 So. 2d 274 (Fla. 1998) (affirming death sentence defendant murdered victim during a robbery and there were four aggravators including PVF, felony murder (robbery) merged with pecuniary

gain, HAC, and CCP along with two non-statutory mitigators of an abusive family background and drug and alcohol abuse); Bush v. State, 682 So.2d 85 (Fla. 1996) (execution style murder of clerk, three aggravators, PVF, felony murder, and CCP - no mitigation); Alston v. State, 723 So.2d 148, 153 (Fla. 1998) (car jacking and execution style murder four aggravators, felony murder, avoid arrest, HAC, CCP) The three death sentences for the triple homicide should be affirmed.

POINT X

THE FELONY MURDER AGGRAVATING FACTOR IS CONSTITUTIONAL (restated)

Chamberlain asserts that the felony murder aggravator is unconstitutional under the U.S. and Florida constitutions because "[e]very person convicted of felony murder qualifies for this aggravator", thus, it does not narrow the class of persons eligible for the death penalty. Likewise, Chamberlain maintains that the aggravator does not reasonably justify the imposition of the death sentence "in comparison to other persons convicted of first degree murder." (IB 85) While Chamberlain acknowledges that the claim has been rejected repeatedly by this Court, he points to cases form three state supreme courts and requests this Court declare the aggravator unconstitutional.

The State submits that the aggravator is constitutional. See, Blanco v. State, 706 So. 2d 7, 11 (Fla 1997), because it

does narrow the class of persons eligible for the death penalty as the underlying felonies identified in section 921.141(5)(d) as qualifying felonies for the aggravating factor are more limited than those which expose a person to a conviction for first degree murder under section 782.04(1)(a)(2), Florida Statutes (1998). Chamberlain's death sentence should be affirmed.

Chamberlain has not preserved this argument. He points to his waiver of a penalty phase jury (R7 1243) and his motion to prohibit death qualification of the jury (R8 1304), but he does not allege that he challenged the constitutionality of the felony murder aggravator at issue here. Because Chamberlain failed to raise the constitutionality of the statute at trial, it has not been preserved for appeal. Archer v. State, 613 So.2d 446 (Fla. 1993); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

However, should this Court reach the issue, constitutional challenges to a statute are reviewed de novo. See City of Miami v. McGrath, 824 So.2d 143, 146 (Fla. 2002); Dep't of Ins. v. Keys Title & Abstract Co., 741 So. 2d 599, 601 (Fla. 1st DCA 1999), review denied, 710 So. 2d 158 (Fla. 2000) (stating trial court's decision on constitutionality of statute is reviewed de novo because it presents pure issue of law). There is a strong

presumption the statute is constitutionally valid. See McGrath, 824 So.2d at 146. This Court will find that Florida law is settled that the felony murder aggravator is constitutional.

Chamberlain's reliance upon State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); and State v. Middlebrooks, 840 S.W. 2d 317, 341-47 (Tenn. 1992) is misplaced as these cases are distinguishable from Florida's capital sentencing scheme. In Engberg, the Supreme Court of Wyoming found the felony murder aggravating factor did not narrow the class of death eligible defendants because the robbery led to two aggravators, i.e. pecuniary gain and felony murder. Also, the statute identifying the aggravator included two underlying felonies not included in the felony murder statute relied upon for a first-degree murder conviction, thus, increasing, not narrowing the class of persons upon whom a death sentence may be imposed. Conversely, there is no doubling of aggravators permitted in Florida and the felony murder aggravator contains fewer felonies than the first-degree murder statute. See Blanco, 706 So. 2d at 11.

In Tennessee the enumerated felonies for the felony murder statute for conviction and aggravation mirror each other. Middlebrooks, 840 S.W.2d at 341 (noting felonies under first-degree murder and felony murder aggravator identical) and in

North Carolina, the underlying crimes for the felony murder aggravating factor expand upon the felonies constituting a basis for a first-degree murder conviction. Cherry, 257 S.E.2d at 567 (identifying aircraft piracy and unlawful throwing placing or discharging of destructive device an enumerated felony for the felony murder aggravator but not in the statute making felony murder first-degree murder). Hence, there is no narrowing of the class of persons eligible for the death penalty. That is not the case in Florida.

The felonies itemized in section 782.04(1)(a)(2) are greater than those listed in section 912.141(5)(d), thus, as reasoned in Blanco, 706 So. 2d at 11, Florida's felony murder aggravator narrows the class of persons selected for the death sentence.

> Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. *See Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *See generally White v. State*, 403 So.2d 331 (Fla. 1981).

Blanco, 706 So.2d at 11 (footnotes omitted). See Holland v.

State, 773 So. 2d 1065, 1073 (Fla. 2001).

As recognized by Justice Wells in his concurrence in Blanco:

> Florida's death penalty statute was upheld against this challenge as to its validity under the United States Constitution in *Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir.1989), *cert. denied*, 497 U.S. 1032, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990), in which the court stated:
>
> To the extent that Bertolotti challenges the use of felony murder as an aggravating circumstance, he attacks a decision firmly within the discretion of the Florida legislature. The Florida statute was adjudged constitutional in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)....
>
> Bertolotti, 883 F.2d at 1528, n. 22 (citation omitted).

Blanco, 706 So. 2d at 11 (Wells, J., concurring). Thus, Florida narrows the class of persons who may get the death penalty by reducing the number of felonies which would qualify as an underlying felony for the felony murder aggravator. See, Walton v. State, 847 So.2d 438, 443-44, n.4 (Fla. 2003); Lynch v. State, 841 So.2d 362, 378 (Fla. 2003); Francis v. State, 808 So.2d 110 (Fla. 2001); Floyd v. State, 808 So. 2d 175, 186 (Fla. 2002); Hudson v. State, 708 So. 2d 256, 262 (Fla. 1998); Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000); Johnson v. State, 660 So. 2d 637, 647-48 (Fla. 1995); Hunter v. State, 660 So. 2d 244, 253 & n.11 (Fla. 1995).

This comports with Lowenfield v. Phelps, 484 U.S. 231 (1988) as reasoned in Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989), cert. denied, 497 U.S. 1032 (1990).

> In *Lowenfield*, the petitioner had been convicted of a death-eligible murder under a statute that required the jury to find that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." 484 U.S. at ----, 108 S.Ct. at 554. The only aggravating circumstance found by the jury to justify the death penalty was that "the offender knowingly created a risk of death or great bodily harm to more than one person"; the statute and the aggravating circumstance were "interpreted in a 'parallel fashion' " under state law. *Id*. Rejecting the petitioner's assignment of error, the Supreme Court noted that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." *Id*.
>
> The *Lowenfield* reasoning applies to the instant case: Florida may narrow the class of death-eligible defendants at either the guilt phase or the penalty phase of capital trials. Moreover, consistent with the judge's instructions, *see supra* Part II.C.2, the jury could have found Bertolotti guilty of felony murder and yet still not have concluded that the parallel aggravating circumstance justified the imposition of capital punishment; nor need the sentencing judge have agreed with the jury's determination that felony murder had been proven beyond a reasonable doubt. *Cf. supra*

> Part II.B.1 (judge did not agree with jury's finding that burglary and sexual battery had been proven beyond a reasonable doubt). In no sense did the jury's verdict of felony murder automatically predestine the judge's imposition of Florida's highest penalty. *See Adams*, 709 F.2d at 1447[22].
>
> _____
>
> [22] To the extent that Bertolotti challenges the use of felony murder as an aggravating circumstance, he attacks a decision firmly within the discretion of the Florida legislature. *Gregg v. Georgia*, 428 U.S. 153, 176, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976) (plurality opinion of Stewart, Powell & Stevens, JJ.) (determinations of appropriate sentencing considerations are "peculiarly questions of legislative policy"). The Florida statute was adjudged constitutional in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion of Stewart, Powell & Stevens, JJ.).

Bertolotti, 883 F. 2d at 1527-28.

As noted above, section 782.04 enumerates the felonies which may be used to establish first-degree murder under a felony murder theory[14]. Under section 921.141(5)(d), the felonies which

[14]The fifteen underlying felonies are: (a) trafficking offense prohibited by s. 893.135(1), (b) arson, (c) sexual battery, (d) robbery, (e) burglary, (f) kidnapping, (g) escape, (h) aggravated child abuse, (i) aggravated abuse of an elderly person or disabled adult, (j) aircraft piracy, (k) unlawful throwing, placing, or discharging of a destructive device or bomb, (l) carjacking, (m) home-invasion robbery, (n) aggravated stalking, and (o) murder of another person.

expose a defendant to the felony murder aggravator are fewer[15], thus, Florida's death penalty statute narrows the class of persons eligible for capital sentencing. Such meets the constitutional requirements under Zant v. Stevens, 462 U.S. 862, 878 (1983) (holding to be found constitutional, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

POINT XI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE SHOW AMANDA INGMAN AN ASP, AS A DEMONSTRATIVE AID (RESTATED).

Chamberlain's last point is that the trial court abused its discretion by allowing the State to show witness Amanda Ingman, an asp, as a demonstrative aid, to determine whether it looked like the one she saw Chamberlain holding the night of the murders.

The admissibility of evidence is within the sound discretion

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[15]The nine qualifying felonies for the felony murder aggravator are: robbery, sexual battery, aggravated child abuse, abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement, arson, burglary, kidnapping, aircraft piracy, and unlawful throwing, placing, or discharging of a destructive device or bomb.

of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Zack v. State, 753 So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981). The State submits that the trial court properly allowed demonstration of the asp because it aided the jury's understanding and was an accurate and reasonable reproduction of the item involved. See Brown v. Shiver, 550 So.2d 527, 528-29 (Fla. 1st DCA 1989).

Amanda Ingman was the first to testify that she saw Chamberlain holding a spindly type metal stick at least two times, but wasn't sure when it was (T XXII 975-76). Amanda described the weapon as having a black handle like a spear (T XXIII 1132). It looked like it could be a knife, but instead of having a blade , it had a pole sticking out (T XXIII 1133). The trial court allowed crime scene investigator Jack McCall to hold up his asp for Amanda to look at and she was asked whether what she saw looked like that (T XXIII 1134). Amanda repeated that what she saw looked more like a knife but with a pole where the blade would be (T XXIII 1134). Also, the one she saw was smaller than what they were showing her (T XXIII 1134).

Chamberlain asserts that because the asp that was

demonstrated was not an exact reproduction of what Amanda saw, it was highly prejudicial to do a demonstration with it. Use of the asp as a demonstrative aid was not error; however, in any event, any alleged error is harmless since a chrome police friction lock baton was retrieved at Eric Pherman's house and submitted into evidence as State's Exhibit 154 (T XXV 1335). Sgt. John Cover testified that he found it at Eric Pherman's house (T XXV 1333-34). Exhibit 154 is smaller in length and width than the demonstrative aid used (T XXV 1343-45). This corroborates Amanda's testimony wherein she stated that the one she saw was smaller than the demonstrative aid and did not identify it as looking like the one she saw Chamberlain holding. Moreover, both Thibault and Dascott were shown Exhibit 154 and testified that it looked identical to what Chamberlain used that night (T XXVII 1821, T XXVI 1459-60).

Thus, the jury was able to view the asp that looked identical to what Chamberlain used that night so that any misconception that could have been created by the bigger asp was erased. Based, on the foregoing, affirmance is required on this point.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, Jr.
Attorney General
Tallahassee, Florida

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Debra Rescigno
Assistant Attorney General
Florida Bar No. 0836907
1515 N. Flagler Drive
Suite 900
West Palm Beach, FL 33401-3432
(561) 837-5000

Counsel for Appellee

Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief" has been furnished to Greg Lerman, 330 Clematis Street, Suite 209, West Palm Beach, Fl. 33401 this 29th day of September, 2003.

_____
Debra Rescigno
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with

12 point Courier New type, a font that is not spaced proportionately.

_____
DEBRA RESCIGNO
Assistant Attorney General