IN THE SUPREME COURT OF FLORIDA

JOHN CHAMBERLAIN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC02-1150
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court.

References to the Trial Transcript will be denoted by two (2) numbers separated by "/". The first number is the transcript volume number and the second number is the page number of the trial transcript which will be referred to as it appears in the transcript.

STATEMENT OF THE CASE

Appellant, along with Co-Defendant's Thomas Thibault and Jason Dascott, were charged by indictment with three (3) counts of First Degree Murder with a Firearm, one (1) count of Burglary with Assault and one (1) count of Armed Robbery (R.V. III/455). Said indictment was filed on May 30, 2000 (R.V. III/457).

Specifically, the State charged Appellant and his Co-Defendant's in Count I with the death of Daniel Ketchum; Count II, that of Brian Harrison, and Count III, Charlotte Kenyan (R.V. III / 455). Counts IV & V alleged Burglary with Assault While Armed, and Armed Robbery respectively. The incidents were alleged to have occurred on November 26, 1998 (R.V. III/455).

Earlier, a Grand Jury returned a "No True Bill" on January 5, 1999 (R.V. I/100). The State filed a "Notice of Intent to Seek Death Penalty on January 28, 1999 (R.V. I/118). Appellant signed a "Waiver of Penalty Phase Jury" on November 21, 2000 (R.V. VII/1243).

Appellant's jury trial commenced on February 5, 2001 (T XVII/91). A jury was sworn and selected the following day (T VXX/639). On February 16, 2001, Appellant was convicted, as

charged, on Counts #1, #2, #3 and #5, Count #4 was JOA'd (R.V. XII/1961-1964). A motion for new trial was filed on February 22, 2001 (R.V. XII/ 1967). Said motion was denied on March 29, 2001 (R.V. XII/2004).

A "Verified Motion to Recuse" the trial judge was filed by Appellant on September 21, 2001, and subsequently denied (R.V. XII/2047, 2054). Appellant's sentencing was held on May 10, 2002 (R.V. XIII/2147, T/V XXXIV/2913). The trial court sentenced Appellant to death on Counts I, II, and III respectively, and life on Count V (R.V. XIII/2151-2152, T/V XXXIV/2931). Notice of appeal was timely filed on May 15, 2002 (R.V. XIII/2192).

STATEMENT OF FACTS

On November 26, 1998, Thanksgiving Day, the bodies of Brian Harrison, Daniel Ketchum and Charlotte Kenyan were discovered at 6507 Norton Avenue, West Palm Beach(T/V XXI/825). The three (3) victims lived at that address (T/V XXI/946). Also residing there was Amanda Ingram[1] (T/V XXI/945).

Raymond Harrison, Brian's father, was awakened at approximately 7:00 am on November 26th, by Ms. Ingram knocking on his door (T/V XXI/811). The Harrison residence was a short distance from the crime scene (T/V XXI 810). Based on what Ms. Ingram told him, Mr. Harrison immediately went to his son's house, along with Ms. Ingram and Michael Leach, a family friend and neighbor, who was called by Mrs. Harrison(T/V XXI 812, 823).

Mr. Harrison picked open the front door with a knife, and once inside saw the body of Daniel Ketchum lying by the bathroom door (T/V XXI/818). Mr. Leach discovered the other two bodies in the shower of the bathroom (T/V XXI/825). Ms. Ingram remained outside until the police arrived.

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[1] Ms. Ingram was never charged with any of the crimes alleged.

At approximately 7:04 am, units from the West Palm Beach Police Department arrived at the scene(T/V XXI/831). Officer Robert Heisser, one of the first responding units, met with Margie Harrison, Brian's mother, and was directed to the residence (T/V XXI/831, 832). After briefly speaking with Ms. Ingram, Officer Heisser, along with Officer Riddle went into the house and located the three (3) bodies (T/V XXI/837). Once the crime scene was secured, medical personnel were allowed in (T/V XXI/839).

Three (3) suspects were developed almost immediately based on statements Ms. Ingram gave police (T/V XXVIII/2025). They were, Thomas Thibault, Jason Dascott, and Appellant (T/V XXVIII/2025). Co-Defendant Thibault was a former boyfriend of Ms. Ingram (T/V XXI/950,XXVI/1788). Ms. Ingram and Mr. Thibault also sold drugs together (T/V XXVI/1788). At the time of the homicides, Ms. Ingram was the girlfriend of Brian Harrison (T/V XXI/954).

Co-Defendant Thibault supplied Ms. Ingram with drugs (T/V XXI/954). At the time, Ms. Ingram was an extensive drug user and prostitute (T/V XXI/ 1007, XXVI/1788). Late one night a few days prior to the shootings, Mr. Thibault phoned Ms. Ingram(T/V

XXI/954). Ms. Ingram had repeatedly called Mr. Thibault (T/V XXVII/1790). A verbal altercation ensued on the phone between Mr. Thibault and Brian Harrison (T/V XXI/954, XXVI/1790). Mr. Harrison was upset over Thibault's continued calling of Ms. Ingram (T/V XXI/954). Also, Mr. Thibault and Mr. Ketchum had apparently argued over the "Lake Worth Clique", a local gang that dealt in drugs and stolen property(T/V XXI/954,1020).

On November 26th, Appellant lived at home with his family(T/V XXIII/1212). Appellant took his father's car, a gold colored Lincoln, and drove to the house of Eric Pehrman (T/V XXIV/1358). Tommy Thibault lived at Eric Pehrman's house (T/V XXVI/1783). Mr. Pehrman was a known drug dealer (T/V XXI/1014, XXVII/1880). Appellant arrived at Mr. Pehrman's residence at approximately 10:00 pm, on the evening prior to the shootings (T/V XXVI/1792). Present also was Co-Defendant Jason Dascott (T/V XXIV/1425).

Appellant testified before the Grand Jury, and his testimony was moved into evidence without objection (T/V XXIV/1354). In addition, after having voluntarily surrendered to police, Appellant gave a taped statement describing his involvement in the events of November 26th (T/V XXVIII/2033).

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According to Appellant's testimony, Thomas Thibault and Jason Dascott left with him, and the three headed to a local restaurant (T/V XXIV/1358). Before reaching the restaurant, Appellant stopped for gas (T/V XXIV/1358). Mr. Thibault and Appellant got out, and Mr. Dascott stayed inside the car (T/V XXVIII/2041). As Appellant gassed the car, the tank overflowed (T/V XXIV/1358, XXVIII/2041). When Appellant opened the trunk to get a rag to wipe the car off, Mr. Thibault saw a gun lying in the trunk (T/V XXIV/1358, XXVIII/2041). The gun, a .45 caliber pistol, belonged to Appellant's father, Donald Chamberlain (T/V XXIII/1221). Mr. Thibault paid for the gas, came up behind Appellant, grabbed the gun from the trunk and ordered him into the car (T/V XXVIII/2041). Once inside, Mr. Thibault told Appellant to drive to 6507 Norton Avenue (T/V XXVIII/2046). Appellant had never been there, nor did he know the occupants (T/V XXIV/1372). Mr. Thibault appeared "flipped out", and Appellant feared he would rob him (T/V XXVIII/2043;2044).

Upon their arrival, Mr. Thibault ordered everyone out of the car at gunpoint (T/V XXVIII/2046). Mr. Thibault knocked on the door, and rushed in upon opening (T/V XXVIII/2046). Jason

Dascott and Appellant followed closely behind (T/V XXVIII/2046;2047). Once inside, Mr. Thibault rounded up the two males, (i.e.: Brian Harrison and Daniel Ketchum), and put them in the bathroom (T/V XXVIII/2047). As this occurred, Appellant, Jason Dascott, and Amanda Ingram stayed in the living room (T/V XXVIII/2048). The only thing Mr. Thibault said was, "who dies first?" (T/V XXIV/1376; XXVIII/2048).

Thomas Thibault then shot the two men in the bathroom shower (T/V XXVIII/2048). The third victim, Charlotte Kenyan, was also taken to the shower and shot by Thomas Thibault (T/V XXVIII/2048). After the shootings were done, Mr. Thibault ordered the others to take everything in the house and load it into Appellant's car (T/V XXVIII/2052). Various electronic items, including television sets, speakers and cable boxes were loaded unto Appellant's car (T/V XXVIII/2052). Once the car was fully loaded, Appellant headed home, along with Ms. Ingram and Jason Dascott (T/V XXVIII/2053). Most of the stolen items were hidden in an alleyway next to Appellant's house (T/V XXVIII/2054). Jason Dascott and Ms. Ingram all stayed with Appellant in his room (T/V XXVIII/2056). Ms. Ingram left first, followed by Mr. Dascott. Appellant, still in a state of shock,

remained locked in his room all Thanksgiving Day (T/V XXVIII/2056).

At approximately 7:00 pm that evening, Appellant was awakened by several loud bangs (T/V XXVIII/2056). Fearing it was Thomas Thibault shooting his family, Appellant fled and hid in the laundry room (T/V XXVIII/2056). Appellant acknowledged it was the police instead, executing a search warrant (T/V XXIV/1392; XXV/1631). Appellant remained hidden the entire night, then beeped his father to pick him up (T/V XXVIII/2057, XXIV/1396). Appellant went to his attorney's office whereupon he self surrendered to police (T/V XXIV/1399).

The other witnesses version of events differed significantly. Amanda Ingram testified that she was in contact with Tommy Thibault because she was a drug addict (T/V XXI/952). Earlier that evening, Ms. Ingram took several Xanax tablets, smoked pot and drank alcohol (T/V XXI/955). Under cross examination, Ms. Ingram admitted her drug use caused her to have memory lapses (T/V XXI/1011). Ms. Ingram knew Mr. Thibault for about a year, but had not met Appellant prior to the evening of the 26th (T/V XXI/950;951).

Ms. Ingram stated that on the night in question, at

approximately 3:00 am, she heard a knock on the door, and someone asking for her (T/V XXI/957,1022). Brian Harrison open the door, and there stood Thomas Thibault, Jason Dascott and Appellant (T/V XXI/957). It should be noted that Jason Dascott testified that only Thomas Thibault had knocked on the door (T/V XXIV/1433). Both he and Appellant remained in the car (T/V XXIV/1433). This version was corroborated by Mr. Thibault (T/V XXVI/1801).

Ms. Ingram introduced Mr. Thibault to Brian Harrison. Mr. Thibault apologized to Mr. Harrison, and the latter invited them in (T/V XXI/958). The parties proceeded to the living room and watched television while Mr. Ketchum showed them some of the stolen property he had acquired (T/V XXI/960). Everyone was relaxed, and sat around for twenty (20) minutes or so (T/V XXI/960). Again, both Jason Dascott and Thomas Thibault testified that everyone went directly to Ms. Ingram's bedroom where they each did a line of cocaine that Mr. Thibault had brought for Ms. Ingram (T/V XXVI/1803,1805; XXIV/1436).

Mr. Harrison and Ms. Ingram asked Thibault if he could get them additional cocaine (T/V XXI/961, XXVI/1805). Mr. Thibault told them he could get the cocaine from Eric Pehrman (T/V

XXI961,962; XXVI/1805). Mr. Thibault along with Brian Harrison, Jason Dascott, Ms. Ingram and Appellant drove to Mr. Pehrman's house (T/V XXI 952). The trip lasted fifteen minutes. Once they arrived, Mr. Thibault got out and knocked on Mr. Pehrman's door (T/V XXI/962).

Mr. Thibault testified he told Mr. Pehrman if he was interested in obtaining any stolen property. Mr. Pehrman replied that he was not(T/V 1814). Mr. Thibault brought back .5 grams worth of powdered cocaine (T/V XXI/965). The parties returned to 6507 Norton Avenue, and snorted the cocaine in the living room (T/V XXI/966).

Ms. Ingram testified that she retired to her bedroom when Mr. Ketchum put on a pornographic video(T/V XXI/966). After doing some more cocaine with Ms. Ingram, Brian Harrison returned to his room and laid down (T/V XXI/969). While Daniel Ketchum remained in the living room, Thibault, Dascott and Appellant went into Ms. Ingram's room to do more cocaine (T/V XXII/970). It was at this point that Mr. Thibault raised his shirt and showed Ms. Ingram the gun (T/V XXII/971). Ms. Ingram feared for her life when Mr. Thibault told her, "you're either with us or against us" (T/V XXII/972,974).

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Mr. Thibault wanted Ms. Ingram to open a large walk-in safe (T/V XXII/971). Earlier, Mr. Ketchum had opened the safe to show them various stolen items (T/V XXII971;972). Mr. Thibault went out to the living room and asked Ketchum to open the safe in order to see some items. When Mr. Ketchum did so, Mr. Thibault announced this was a robbery (T/V XXII/974;975). At the time, neither Mr. Dascott or Appellant did anything (T/V XXII/971). However, Ms. Ingram later saw Appellant wielding an asp (T/V XXII/975).

At this point, Appellee requested a sidebar:

> MS. SKILES: Judge, the deputy who is sitting by the jurors has an asp on him at this moment and I wanted permission from the Court to allow him to display that for purposes of asking Ms. Ingram if that is similar to the object she saw the defendant with the night, the early morning of the homicide. THE COURT: Good for the State knowing that you should ask that prior to any demonstration. MR. LERMAN: And I object to any demonstration of an object that may or may not look like what was actually used on the night of the incident. THE COURT: Well, I'm going to allow you to use a weapon like that at some point but not an actual participant in the trial. He is in here performing the function of a Correctional officer and guarding the defendant, which is his responsibility and he is standing, you know, next to the jury. That's a little too personal of an involvement but you can get

> some other officer to bring one in and display it. (T/V XXII/1123-24).

The State ultimately asked Crime Scene Investigator McCall to bring in an asp and demonstrate its use before the jury (T/V XXII/1127). Prior to the demonstration, defense counsel again renewed his objection (T/V XXII/1127). The trial court again overruled the objection and thus allowed the State to proceed (T/V XXII/1129).

Appellee asked Ms. Ingram the following:

> Q. Ms. Ingram, looking at the device that Investigator McCall is holding in his hand how is that the same or different than what you saw the defendant with in the early morning of Thanksgiving?
>
> A. It was more like it would be a knife, but instead of a blade coming, it was like a pole, thats what I remember it to be as. Q. In looking at this particular item, is this portion the pole like portion?
>
> A. Right.
>
> Q. Was it bigger or smaller if you know?
>
> A. It might have been smaller.
>
> Q. Now, that particular item, did you see what eventually happened to it?
>
> A. No, ma'am, I didn't (T/V XXII/1134).

Ms. Ingram was unsure who brought Brian Harrison out (T/V XXII/975). After Mr. Harrison was placed in the bathroom, Ms. Ingram heard scuffling noises followed by several gunshots (T/V XXII/977,978). In the meantime, both Jason Dascott and

Appellant loaded items into the car (T/V XXII/977). Mr. Thibault asked the witness if anyone else was inside the house. Ms. Ingram replied that there was, and brought Charlotte Kenyan[2] out (T/V XXII/980). Ms. Kenyan was then placed inside the bathroom and shot by Mr. Thibault (T/V XXVI/1832). The witness testified that after the shooting, Mr. Thibault appeared out of control and acted in a rage (T/V XXI/1064, XXII/1096). Both Appellant and Mr. Dascott looked to be in shock (T/V XXII/1096).

Once finished, Ms. Ingram and Jason Dascott got into Appellant's car (T/V XXI/985). Ms. Ingram saw Mr. Thibault hand the gun to Appellant, who wiped it clean and put it in the trunk (T/V XXI/985). All three left in the Lincoln. According to Ms. Ingram, Mr. Thibault left in a white pickup truck owned by Danny Ketchum (T/V XXI/986). The three proceeded directly to Appellant's house (T/V XXI/986). Appellant unloaded the televisions and put them outside under a cardboard box. The remaining items were taken inside the house (T/V XXI/987,988).

Appellant, Jason Dascott, and Ms. Ingram took some marijuana from Brian Harrison's backpack and smoked it by Appellant's pool (T/V XXI/992-994). Afterwards, all three went back into

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Appellant's bedroom (T/V XXI/994). Appellant set up a "black box" taken in the robbery installed it on his television and turned on a pornography channel (T/V XXI/988).

According to Ms. Ingram, Appellant began making sexual advances, at which point she decided to leave by going out a window (T/V XXI/995). Once outside, Ms. Ingram made her way to the house of a friend, Keith (a.k.a. Gregg) Hamilton (T/V XXI/995).

Mr. Hamilton testified that Ms. Ingram knocked on his door in the early morning of November 26th (T/V XXII/1176). Ms. Ingram asked if she could call the police, but Mr. Hamilton refused, not wanting to get involved (T/V XXII/1177). However, Mr. Hamilton later relented, and agreed to drive Ms. Ingram back to the scene of the crimes, then to Brian Harrison's parents house (T/V XXII/1178, 1181). Once there, Ms. Ingram told Mr. Harrison what happened (T/V XXI/998).

Detective Louis Penque of the West Palm Beach Police Department interviewed Ms. Ingram (T/V XXV/1630-1631). Based on her statements, a search warrant of Appellant's home was obtained (T/V XXV/1630). Detective Penque participated in the search of Appellant's home (T/V XXV1632). The search was

executed that evening, at approximately 7:00 pm (T/V XXV/1631). Appellant's family was temporarily detained (T/V XXIII/1214). Though Appellant was not located, various items taken from the crime scene were recovered (T/V XXV/1639-1647). As stated earlier, Appellant was at his house, hiding in the laundry room (T/V XXVIII/2056).

The State called Co-Defendant Jason Dascott (T/V XXIV/1419). At the time of his testimony, Mr. Dascott had already pled guilty to a reduced charge of three (3) counts of Second Degree Murder (T/V XXV/1500). The plea was entered on August 23, 2000 (T/V XVI/83). Mr. Dascott was to receive ten (10) years imprisonment, to be followed by five(5) years probation (T/V XVI/72-73; XXV/1501). As part of his plea agreement, Mr. Dascott was required to testify truthfully or else face sixty-five (65) years imprisonment (T/V XXV/1501). Mr. Dascott's actual sentencing was heard February 22, 2001 (T/V XXX/2500). The witness was sentenced according to the terms and conditions of the plea agreement[3] (T/V XXX/2506).

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[3]Specifically, the witness pled to three (3) counts of Second Degree Murder, with the State nolle prosing Counts IV and V, ten (10) years in the Department of Corrections, followed by five (5) years probation, $531.00 in court costs and three-hundred (300) community service hours (T/V XVI/72-73)

The witness testified he knew Thomas Thibault several years and was a friend of his (T/V XXIV/1422). At the time the crimes were committed, Mr. Dascott admitted he was taking cocaine, alcohol, marijuana, and pills (T/V XXV/1519). Mr. Dascott stayed with Hugo Pehrman, brother of Eric (T/V XXIV/1421). The witness had known Appellant five (5) to seven (7) months (T/V XXIV/1423).

On November 26th, Mr. Dascott was visiting Mr. Thibault. Earlier that night, Thibault talked about going to fight the people staying with Ms. Ingram (T/V XXIV/1427). Appellant was not present when Mr. Thibault made those statements (T/V XXIV/1427).

Mr. Dascott, Thibault and Appellant left together, with the understanding that Thibault was going to deliver some cocaine to Ms. Ingram (T/V XXIV/1427). Appellant was there just to give Mr. Thibault a lift (T/V XXIV/1428). Mr. Dascott remembered that they stopped at a gas station prior to their arrival at Ms. Ingram's (T/V XXIV/1129). While at the gas station, the witness did not see either Appellant or Mr. Thibault with a gun (T/V XXIV/1431). Once at the residence, Mr. Thibault got out and knocked on the door (T/V XXIV/1433). Eventually, Mr. Dascott

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and Appellant got out the car and went inside (T/V XXIV/1434-1435).

It did not appear to Mr. Dascott that there were any problems, and they all proceeded to Ms. Ingram's room. The witness testified that it was Ms. Ingram who first brought up the idea of robbing the house (T/V XXIV/1438,1544). Mr. Dascott corroborated that they made a trip to Eric Pehrman's house to get more cocaine (T/V XXIV/1440). It was then that the witness saw Appellant give Mr. Thibault the gun (T/V XXIV/1447). This occurred outside, and the witness knew it was going to be used in a robbery (T/V XXIV/1452). Mr. Dascott, Thibault and Appellant headed directly to Ms. Ingram's room, where they talked about committing the robbery (T/V XXIV/1452). It was decided that Thibault would put the three (3) victims inside the bathroom while the robbery occurred (T/V XXIV/1452-1453). Ms. Ingram told them that everything was inside the walk in safe (T/V XXIV/1452-1453).

As soon as they left Ms. Ingram's room, Mr. Dascott went to the living room and smoked some pot with Mr. Ketchum (T/V XXIV/1457). Appellant was also sitting in the living room (T/V XXIV/1458). The idea was that the witness would get Mr. Ketchum

to open the safe by asking to see some stolen items (T/V XXIV 1455).

Mr. Thibault and Ms. Ingram walked out of her bedroom and headed towards the back of the house (T/V XXIV/1458). They returned with Mr. Harrison, with Mr. Thibault holding a gun on him (T/V XXIV/1458; XXV/1565). Thomas Thibault then announced to Mr. Ketchum that this was a robbery (T/V XXIV 1458).
The witness saw Appellant wielding a weapon similar to a police baton (T/V XXIV/1459). Thomas Thibault then ordered everyone to start taking things into the car (T/V XXIV/1462). While the witness was outside, Appellant ran up and told him that Thibault was wrestling with one of the victims in the bathroom (T/V XXIV/1467).

The witness ran back inside the house, and heard the sounds of a struggle coming from the bathroom (T/V XXIV/1467). As Appellant and Mr. Dascott attempted to open the bathroom door, Mr. Dascott heard a gunshot (T/V XXIV/1468). Mr. Thibault came out and told them that he had shot one of the victims (T/V XXIV/1468). Mr. Dascott went out and remained in the car (T/V XXIV/1469). The witness testified that he did not return to the house again, but heard several more gunshots (T/V XXIV 1470).

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Jason Dascott saw Mr. Thibault hand the gun to Appellant, who wiped it clean with his t-shirt (T/V XXIV/1474). Appellant drove the witness and Ms. Ingram back to his house (T/V XXIV/1474). Mr. Dascott had never been to Appellant's house (T/V XXIV/1476). After unloading the stolen merchandise from the car, the three headed to Appellant's room (T/V XXIV/1478). The witness confirmed Ms. Ingram's testimony that they later took marijuana from Mr. Harrison's backpack and smoked it by the patio(T/V XXIV/1480).

Mr. Dascott also confirmed that Ms. Ingram left after Appellant made sexual advances (T/V XXIV/1481). During the early morning, Mr. Thibault beeped Appellant (T/V XXIV/1482). Appellant phoned Mr. Thibault, who later arrived in the alleyway by Appellant's house in a taxi (T/V XXIV/1483,1488). The three men loaded some of the stolen items, including a television, into the cab(T/V XXV/1488).

The parties got in the cab and went to the home of a friend of their's, Andy Sager (T/V XXV/1490). Once there, Mr. Thibault and Appellant brought the television inside (T/V XXV/1490). Other items were loaded into the truck of Mr. Sager's girlfriend's truck (T/V XXV/1491). Mr. Dascott eventually

walked back to Hugo Pehrman's house (T/V XXV/1491). Later that evening, the witness was picked up by a friend, Reed Cressman, who drove him to his house (T/V XXV/1495). Appellant was also present at the Cressman residence (T/V XXV/1496). It was the last time Mr. Dascott saw or spoke to Appellant (T/V XXV/1498).

Mr. Dascott was arrested for the murders on November 28, 1998 (T/V XXV/1498). Under cross examination, the witness admitted to having lied in his statement to police (T/V XXV/1502,1624). Mr. Dascott, with Thomas Thibault's approval, concocted a story that he had been kidnaped and forced at gunpoint to participate in the crimes (T/V XXV/1506; XXVII/1871). The witness grabbed everything electronic and loaded it into Appellant's car (T/V XXV/1568). Mr. Dascott also admitted that while he saw Appellant with an object similar to State's Exhibit #154, he never saw him strike anyone with it (T/V XXV/1566). The witness went on to state that it was Mr. Thibault who directed Appellant's activities(T/V XXV/1568).

Co-Defendant Thomas Thibault appeared for the State (T/V XXVI/1783). Mr. Thibault was charged with the same crimes as Appellant (T/V XXVI/1783). Earlier, on May 19, 2000, Mr. Thibault appeared before the trial court in anticipation of

entering into a plea agreement(T/V XVI/5). The plea agreement contemplated Mr. Thibault being sentenced to three (3) consecutive life sentences (T/V XVI/6;XXVII/1875). However, Mr. Thibault changed his mind, and elected instead to plead "straight up" to the trial court(T/V XVI/5,30-31;XXVII/1876). The lower court accepted Mr. Thibault's plea, and passed his case for sentencing (T/V XVI/54-55).

At the time of the shootings, Mr. Thibault was staying at Eric Pehrman's house (T/V XXVI/1783). Mr. Thibault was then on probation for Sale of Cocaine (T/V XXVI/1874). Drugs were openly bought and sold at the Pehrman residence (T/V XXVII/1880). The witness had known Appellant and Mr. Dascott for ten (10) and two (2) years respectively(T/V XXVI/1786-1787). Mr. Thibault told the jury about his previous arguments on the phone with Brian Harrison (T/V XXVI/1790). The verbal arguments occurred five (5) days prior to Thanksgiving Day (T/V XXVI/1790).

Mr. Thibault testified that Appellant arrived at Mr. Pehrman's house at approximately 10:00 pm on the night of November 25th (T/V XXVI/1792). Appellant knew nothing of Mr. Thibault's arguments with Brian Harrison (T/V XXVII/1890-91).

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According to Mr. Thibault, Appellant arrival was purely by chance (T/V XXVII/1896). Also present was Jason Dascott, who was asleep when Appellant arrived (T/V XXIV/1424;XXVI/1795). Ms. Ingram phoned, just prior to Appellant's arrival, and asked Mr. Thibault for cocaine (T/V XXVII/1895). Mr. Thibault asked Appellant for a ride so he could settle his argument with Brian Harrison (T/V XXVI/1792). The witness further told Appellant that there would probably be fighting (T/V XXVI/1794). Appellant replied that he "would have his back" (T/V XXVI/1794).

Mr. Thibault awoke Mr. Dascott, and the three (3) men left the Pehrman house between 10:00 and 11:00 pm (T/V XXVI/1794; XXVII/1895). Before getting into the car, Appellant opened the trunk and showed Mr. Thibault a gun (T/V XXVI/1797). According to Mr. Thibault, Appellant's sister was also present, and was dropped off at home prior to leaving for the Harrison residence (T/V XXVI/1795). Before arriving at the Harrison residence, the parties stopped at a gas station. The stop lasted ten (10) minutes (T/V XXVI/1796).

When the men arrived, Mr. Thibault removed his valuables, including the cocaine he brought for Ms. Ingram, and left them

in the car (T/V XXVI/1801). Mr. Thibault knocked on the door, and Brian Harrison answered (T/V XXVI/1803). The witness had never met either Brian Harrison or Danny Ketchum prior to that night (T/V XXVI/1807). Their argument resolved, Mr. Thibault motioned for the others to come in (T/V XXVI/1801-1802). Mr. Dascott and Appellant joined the others and did the cocaine in Ms. Ingram's room (T/V XXVI/1803). After finishing the cocaine, the parties went to the living room and smoked some pot (T/V XXVI/1808, 1812). It was then that Danny Ketchum mentioned he had stolen property to sell (T/V XXVI/1808).

Brian Harrison wanted to know if they could buy more cocaine (T/V XXVI/1805). The witness told him that they could get more at Eric Pehrman's house (T/V XXVI/1805). The parties decided to go, and drove to Mr. Pehrman's residence (T/V XXVI/1808-1809). Once there, Mr. Thibault got out and told the others to stay (T/V XXVI/1810). The witness stayed approximately ten to fifteen minutes talking to Mr. Pehrman, and then rejoined the others (T/V XXVI/1808).

Once they returned to Mr. Harrison's house, Mr. Thibault and Appellant stayed behind to discuss whether to bring the weapon in (T/V XXVI/1810). After coming in, the parties again went to

Ms. Ingram's room (T/V XXVI/1812). It was Ms. Ingram that told the witness about there being more pot, pills and money in the house, as well as telling him about Charlotte Kenyan (T/V XXVI/1815).

A plan was made to rob the house (T/V XXVI/1815). Mr. Thibault would get the victims into the bathroom at gunpoint, while the others emptied the residence(T/V XXVI/1815,1824). Mr. Thibault would handle the victims because he was the biggest (T/V XXVI/1815). Appellant handed Mr. Thibault the gun[4], whereupon he placed it in his pocket (T/V XXVI/1818). Mr. Thibault went out from the bedroom, and into the living room, and announced this was a robbery (T/V XXVI/1819). At the time, Mr. Ketchum was crouched in front of his television set (T/V XXVI/1819).

Mr. Ketchum appeared dazed and confused and asked what the witness was doing (T/V XXVI/1820). Appellant produced an asp, struck Mr. Ketchum in the knee and told him to do as the witness said (T/V XXVI/1820). Mr. Thibault identified State's Exhibit #154 as the item Appellant used (T/V XXVI/1821). Meanwhile, Ms. Ingram brought Brian out and told him this was a robbery (T/V

[4]The witness never saw Appellant take the gun from the trunk (T/V XXVI/1817).

XXVI/1822). Mr. Thibault put both victims inside the bathroom and closed the door behind him (T/V XXVI/1823).

Once inside, the witness ordered the two men to get in the bathtub and remove their clothing (T/V XXVI/1824). At that point, Danny Ketchum rushed the witness and shoved him into the corner of the bathroom door (T/V XXVI/1825). Mr. Thibault repeatedly struck Mr. Ketchum over the head with the gun (T/V XXVI/1825). However, Mr. Ketchum continued to overpower the witness (T/V XXVI/1826). Mr. Ketchum lifted the witness off his feet and attempted to wrest the gun from his hand (T/V XXVI/1827-1828). Mr. Thibault told Danny he would shoot him if he didn’t stop (T/V XXVI/1826).

Mr. Thibault fumbled with the gun, removed the safety, and shot Mr. Ketchum in the top of his head (T/V XXVI/1828). Mr. Ketchum went down immediately from the wound (T/V XXVI/1828). After hearing the gunshot, Appellant opened the door and asked what happened (T/V XXVI/1829). Mr. Thibault told him of the struggle and that he had shot Mr. Ketchum (T/V XXVI/1828). Ms. Ingram and Jason Dascott were also present (T/V XXVI/1828-1829).

Appellant told the witness that they had to get rid of the

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other witnesses (T/V XXVI/1830). Ms. Ingram agreed and told Mr. Thibault, “lets go get Charlotte” (T/V XXVI/1831). The witness followed Ms. Ingram to Charlotte’s bedroom (T/V XXVI/1831). The witness and Ms. Ingram forced Ms. Kenyan into the bathroom (T/V XXVI/1832). Throughout the entire episode, Mr. Harrison remained in the bathroom (T/V XXVI/1832). Mr. Thibault demanded to know where the keys to Mr. Ketchum’s truck were. Mr. Harrison told him where they were (T/V XXVI/1832).

Mr. Thibault located Mr. Ketchum’s keys, as Appellant continued to load items into the car (T/V XXVI/1832). The witness asked Ms. Ingram and Appellant, “is this what we have to do?”, Appellant replied “yes, this is what we’ve got” (T/V XXVI/1835). Mr. Thibault and Appellant then reentered the bathroom (T/V XXVI/1835). With Appellant standing next to him, Mr. Thibault fired the gun till it was empty (T/V XXVI/1835-36). Immediately afterwards, Appellant told Mr. Thibault to recover the spent casings because they may have his fingerprints (T/V XXVI/1836).

The witness examined the victims, and saw that Mr. Harrison was still alive (T/V XXVI/1837). When Mr. Thibault asked Appellant what they should do, Appellant suggested getting more

bullets (T/V XXVI/1837). Both men went back to the car, Appellant loaded another clip and handed it to Mr. Thibault (T/V XXVI/1837).

When Mr. Thibault returned to the bathroom, he found Ms. Ingram kneeling next to Mr. Harrison's body (T/V XXVI/1837). Mr. Thibault told her that they had to finish it, Ms. Ingram replied "okay" and left (T/V XXVI/1838). The witness then emptied the second clip into Mr. Harrison and Ms. Kenyan (T/V XXVI/1837).

Dr. Jacqueline Martin, Medical Examiner for Palm Beach County, performed the autopsies on the three (3) individuals (T/V XXI 847, 849). Dr. Martin testified that Daniel Ketchum died as a result of a single gunshot wound to the top of his head (T/V XXI/850). The wound was fatal, and Mr. Ketchum would have lived a few minutes at most after receiving it (T/V XXI859). Dr. Martin opined that the gun had to be atop the head of Mr. Ketchum (T/V XXI/858). Also found on Mr. Ketchum's body were a series of linear abrasions (T/V XXI/ 852).

Brian Harrison received five (5) gunshot wounds (T/V XXI/872). Dr. Martin found a bullet wound to the left arm and shoulder (T/V XXI/ 863). Mr. Harrison also suffered two chest

wounds, a bullet wound to his neck, and a shot to the right side of his head, traversing from the right back to front left sinus (T/V XXI/867). All of the wounds inflicted to Mr. Harrison, with the exception of the head shot, were not fatal (T/V XXI/864, 865, 867).

Ms. Charlotte Kenyan received a total of four (4) wounds (T/V XXI/874). All four (4) were gunshot wounds, all to her head (T/V XXI 874). The bullets were tracked left to right, and one (1) wound to the left temple had soot in it (T/V XXI/874). All four (4) shots were instantly fatal (T/V XXI/879). Ms. Kenyan's identity was established by her stepfather, John Charest (T/V XXII 1199). Under cross examination, Dr. Martin could not formulate an opinion as to the cause of Mr. Ketchum's blunt injuries (T/V XXI/888).

Richard Smith, a Crime Scene Investigator for the Palm Beach County Sheriff's Office arrived at the scene at approximately 8:00 am (T/V XXII/897). As part of his investigation, the witness recovered bullet casings and fragments from the shower stall area (T/V XXIII/927). No casings were found on the bathroom floor (T/V XXII/912).

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CSI Smith also did a videography of the crime scene and shot still pictures as well (T/V XXII/902,903). These exhibits were moved into evidence without objection (T/V XXII/898). Located on a cocktail table in the living room was a “pot pipe” (T/V XXIII/937). The pipe tested positive for marijuana (T/V XXII/ 908, 937).

The casings and bullet fragments were examined by James Thompson, a forensics firearms technician(T/V XXII/1182). A total of eleven (11) projectiles were submitted (T/V XXII 1195). Of the eleven (11), five (5) were determined to be from the same gun, three (3) fragments couldn’t be positively identified, and the remaining three (3) fragments were of no forensic value. Technician Thompson identified the firearm used as a .45 caliber automatic (T/V XXII/1187). Mr. Thibault later dismantled and destroyed the gun, and dumped the pieces into two canals (T/V XXVI/1869).

After the shootings, the parties continued to load Appellant’s car with various electronic equipment, e.g., speakers, consoles and televisions (T/V XXVI/1840). Mr. Thibault returned the gun to the Appellant (T/V XXVI/1840). When everything was loaded up, Mr. Thibault told Appellant to follow

him because he was unsure if the truck's tags were legal (T/V XXVI/1840). Ms. Ingram and Jason were already inside Appellant's car (T/V XXVI/1842). Appellant drove off, but the witness was unable to start the truck (T/V XXVI/1844).

Despite several attempts, Mr. Thibault was unable to start Mr. Ketchum's truck (T/V XXVI/1840). Not wanting to give up the items stored in the truck, Mr. Thibault unloaded the merchandise and hid it by the dumpster of a nearby apartment complex (T/V XXVI/1844). Before leaving, the witness wiped the surface areas clean of fingerprints and locked the door (T/V XXVI/1844-45). Mr. Thibault then struck off on foot, and headed back to Eric Pehrman's house (T/V XXVI/1846). It took the witness approximately forty-five (45) minutes to get there. Along the way, the witness was briefly detained by PBSO for an identification check, then allowed to proceed (T/V XXVI/1846).

Mr. Thibault stayed at Mr. Pehrman's house for a half hour (T/V XXVI/1855). Still intent on recovering the items he was forced to leave, Mr. Thibault went to Andy Seger's house (T/V XXVI/1855). While there he discussed the stolen property he'd obtained, and payment of his past cocaine debt (T/V XXVI/1856). The two men drove back to the dumpster in Mr. Seger's truck (T/V

XXVI/1856). Once there, they loaded the articles into Mr. Seger's truck and returned to his house (T/V XXVI/1856-58).

By this time, it was getting light (T/V XXVI/1857). Mr. Thibault received a page from Appellant (T/V XXVI/1858). The witness called Appellant, who told him that Ms. Ingram had left, but that Jason was still there (T/V XXVI/1859). Mr. Thibault took a cab to Appellant's house (T/V XXVI/1859). Once there, they divided the remaining items amongst themselves (T/V XXVI/1866-67). Mr. Thibault was arrested at Eric Pehrman's house on November 30th (T/V XXVI/1870). At the time, the witness was trying to flee to Mexico (T/V XXVI/1872). Mr. Thibault met with Detectives Fraser and Campbell (T/V XXVI/1872). In order to help his friend Jason Dascott, the witness told police he was in charge (T/V XXVI/1871). Mr. Thibault also phoned his mother from the police station (T/V XXVI/1873). Mr. Thibault was unaware his call was being monitored and recorded (T/V XXVIII/2072).

At trial, the State sought to introduce the tape recording and transcript of the conversation between Mr. Thibault and his mother made by police as State Exhibit #159 (T/V XXVIII/2158). Trial counsel objected to its introduction (T/V XXVIII/2157).

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The trial court overruled the objection and received said tape and transcript into evidence (T/V XXVIII/2159). The jury was admonished that the transcripts were not evidence, only the tape itself (T/V XXVIII/2159). Though some parts were inaudible, excerpts from the tape clearly mentioned Appellant's participation in the shootings (T/V XXVIII/2160-61).

The State's last witness was Detective Fraser of the West Palm Beach Police Department (T/V XXVIII/2023). Detective Fraser became involved with the case a day after the shootings occurred, November 27th (T/V XXVIII/2028). The witness spoke to Ms. Ingram, and by the end of the day had ascertained the names of the three (3) Co-defendants (T/V XXVIII/2027). Detective Fraser was present when Jason Dascott was arrested on November 28th (T/V XXVIII/2027). The Detective also spoke to and obtained the taped statement of Appellant when he self surrendered on November 29th (T/V XXVIII/2029).

During Detective Fraser's testimony, the following exchange occurred:

> Q. Detective Fraser, the noise that Defendant can be heard making on the tape, what were those noises?
>
> A. He was sniffling a little bit. He cried during the interview. Sometimes I stopped the interview to give him a break.

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Q. 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? A. I didn't go along with it. I can testify to the fact that he was crying. However, I don't believe that his– MR. LERMAN: objection. May we approach? THE COURT: Well, I'll sustain the objection. MR. LERMAN: Motion to strike. Can I approach for a minute?
THE COURT: All right.
MR. LERMAN: It's my position that he's crossed the line and that giving his opinion whether he believed or disbelieved Mr. Chamberlain's emotions were real or not real is just as much a comment on Mr. Chamberlain's credibility as just trying to tell the jury what the emotions were and that one witness testifying about either another witness' credibility or the defendant's credibility in a statement is improper. And at this time I move for mistrial.
MS. MCROBERTS: I think the witness, just as any witness, can testify about their observations of an individual but whether or not the noises, the sniffling noises appeared to be a genuine emotion as opposed to a forced–
THE COURT: I'll rule that they cross the point. There are civil attorneys who cry during closing argument and there's some speculation as to whether or not that's contrived histrionics or a device that they have learned as a skill that a speaker may learn in school. So I am going to sustain his objection and deny the mistrial. Do you want me to instruct the jury to disregard?
MR. LERMAN: Yes sir.
THE COURT: The jury is instructed to

> disregard, please, the conclusion of the officer as to his observation. Next question. (T/V XXVIII/2068-70).

The State continued its direct examination of the witness. Detective Fraser testified that he interviewed and presented a photographic lineup to Donna Garret (T/V XXVIII/2076). Donna Garret was the girlfriend of Hugo Pehrman, Eric's brother (T/V XXIII/1256-57). Ms. Garret met Appellant for the first and only time on Thanksgiving morning, 1998 (T/V XXIII/1258).

The witness testified that she received a phone call early Thursday morning from an unidentified male, she passed the phone to Mr. Pehrman, (T/V XXIII/1259). About ten (10) minutes later, Thomas Thibault, Jason Dascott and Appeared arrived (T/V XXIII/1260). The men brought televisions, radios and a backpack with them (T/V XXIII/1260). The witness left shortly afterwards for her mothers house (T/V XXIII/1261). Ms. Garret remembered seeing Appellant sitting on the couch breaking up some marijuana when her mother arrived (T/V XXIII/1264).

Ms. Garret further testified that she met with Detective Fraser in May, 2002 (T/V XXIII/1266). Detective Fraser showed her a photo lineup (T/V XXIII/1266). The witness was 100% sure of her identification of Thomas Thibault and Jason Dascott, but

only 80% certain of her identification of Appellant (T/V XXIII/1266). The State sought to introduce Ms. Garret's identification:

> Q. Did Ms. Garret, was she able to identify at all anybody in Exhibit 146C?
> A. Yes.
> MR. LERMAN: Objection, hearsay. Motion to strike.
> THE COURT: Well, I don't know. You better come up here and explain this.
> THE COURT: This is a picture of Chamberlain and she–
> MS. MCROBERTS: She said that she's 80% sure that's him.
> MR. LERMAN: She identified somebody else in the photo lineup according to her testimony in this trial as being the defendant. She identified the individual in the lower left hand corner, not Mr. Chamberlain who is in the lower right hand corner as being the individual that she saw on that day.
> MS. MCROBERTS: That doesn't go to the admissibility of what Detective Fraser did in May, 2002.
> THE COURT: Her identification of Mr. Chamberlain is at issue. I'll allow the 80% because of your claim that there's some other contrary identification elsewhere in the trial. Keep in mind you've got the live testimony of those witnesses. Let's not overkill here and go a little further. Okay? (T/V XXVIII/2081-82).

The lower court ruled that it would allow the State to recall Mr. Thibault over defense objection(T/V XXVIII/2117). Trial counsel announced that Appellant would not testify nor

present a defense (T/V XXVIII/2117). The trial court inquired of Appellant if that indeed was his intention (T/V XXVIII/2118). After hearing from Appellant, the trial court was satisfied that it was Appellant's choice not to testify (T/V XXVIII/2118). The trial court asked the State if Detective Fraser was excused (T/V XXVIII/2119). The State replied that Detective Fraser be released, with leave to recall him (T/V XXVIII/2119). The trial court agreed, directed the witness to remain in the courthouse, and recessed (T/V XXVIII/2119).

During the recess, defense counsel brought the following to the trial court's attention:

> MR. LERMAN: Before they reopen with Detective Fraser, I have a couple of questions I want to ask, ask him outside the presence of the jury Judge.
>
> THE COURT: Sure.
>
> Q. During the break you remained in the courtroom?
>
> A. Yes.
>
> Q. You spoke with either Ms. Skiles or Ms. McRoberts?
> A. Correct, Counsel.
> Q. They directed to review portions, I gather, of your deposition testimony?
>
> A. No.
> Q. No one discussed your depositions with you? A. No.

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> Q. No one discussed any or additional questions that they might want to put to you on the stand at that time?
> A. They certainly did, but they didn't talk about my depo.
> Q. What did they discuss with you?
> A. Mr. Chamberlain's testimony in a court hearing in July.
> Q. You mean the bond hearing?
> A. Yes.
> Q. And that was in the courtroom?
> A. It was over there, yeah.
>
> MR. LERMAN: I don't have anything further. (T/V XXVIII/2111-12).

Appellee stated that

> I instructed Detective Fraser that he was going to be recalled to the stand and he said what about, and I said about the court hearing of July 26th, 1999. I gave him a transcript of it and I told him to read through it and I was going to be asking about it and I would be referring to the lines and pages. If he didn't have a recollection, that I'd refer him to that document to see if it refreshed his recollection and that was the extent of it and it was done here in open court (T/V XXVIII/2123).

Defense counsel replied that "[w]ell, I do have an objection. The witness was still under oath, the State was still in the courtroom and the State shouldn't have been discussing any of his testimony or potential testimony with him until he had been released. He was the last witness to have testified in this

case and it's always been my understanding that once somebody started testifying you're not talking to them about their testimony in the midst of that testimony" (T/V XXVIII/2124).

The trial court appeared uncertain if it had made a blanket pronouncement or if the rule had been invoked (T/V XXVIII/2125-26). Ultimately, the trial court overruled defense counsel's objection (T/V XXVIII/2127). It appeared that the trial court invoked the rule on February 12th (T/V XXVI/1723). The following was said by the parties:

> MR. LERMAN: Initially, based on discussions with Ms. Skiles, not that she asked this, but I haven't invoked the rule and I know she hasn't invoked the rule, but at this point I'm asking that the rule be invoked.
>
> THE COURT: I don't think you can in the middle of the trial if the State objects. I don't know.
>
> MS. SKILES: The only clarification I would want is in reference to the family members that we have.
>
> MR. LERMAN: Absolutely not. I'm taking about telling one witness out of these groups that we're dealing with now what other witnesses have said or–
>
> MS. SKILES: Have testified in court?
>
> MR. LERMAN: Right.
>
> MS. SKILES: I don't have an objection to that, Judge
>
> THE COURT: All right. The rule is invoked by both sides, apparently, and as defined by what Mr. Lerman said. (T/V XXVI/1723-24).

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Detective Fraser's testimony was proffered, the trial court noted defense counsel's objection (T/V XXVIII/2133). With the jury present, the witness testified that Appellant stated at his July bond hearing that he did not know police were in his home (T/V XXVIII/2134). Following Mr. Thibault's re-direct, Appellee rested. Defense counsel rested, and renewed all his previous motions for mistrial(T/V XXIX/2176,2184). By stipulated agreement, the trial court JOA'd Count IV, Burglary with Assault While Armed (T/V XXIX/2184). As part of his argument for judgment of acquittal, trial counsel moved for Judgment of Acquittal as to Premeditation (T/V XXIX/2177). In support of his position, counsel quoted Makerly v. State, 26 Florida Law Weekly Supreme Court 67 (T/V XXIX/2177). The trial court denied defense counsel's motion (T/V XXIX/2177, 2182).

During the charge conference, the following transpired:

> THE COURT: So it reads Ketchum, Harrison and Kenyan were killed by a person other then (sic) John Chamberlain but both John Chamberlain and the person who killed Ketchum, Harrison and Kenyan were principals in the commission of the robbery.
>
> MR. LERMAN: If we are going to do that, and I think we should, obviously I agree with that on part two of that instruction then we probably should only give C which would be the death occurred as a consequence of and while John Chamberlain

> or an accomplice– not that one I am sorry, that we should give A, rather then (sic) B and C. MRS. SKILES: Well, Judge– MR. LERMAN: No, attempt– I mean, its robbery and its not part of escaping from the scene of a robbery it is a robbery. MRS. SKILES: Judge, the State's position is that B and C would stay because the jury could find attempting or the escaping from the immediate scene as applicable.
> MRS. SKILES: Especially in light of the fact Judge, that robbery was an ongoing event.
> THE COURT: Continuing yes, it was. I agree, objection is noted it stays in. (T/V XXIX/2197).

Defense counsel formally rested and renewed his previous motions (T/V XXIX/2222). There were no objections from either side during closing arguments. Appellee as part of her summation, brought up Mr. Thibault's taped phone conversation (T/V XXIX/2268). The jury was instructed, in part,

> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing. If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated. Felony Murder First Degree: Before you can find Defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a

> reasonable doubt: One, that Daniel Ketchum as to Count I, Brian Harrison as to Count II, and Charlotte Kenyan, as to Count III are dead. Two, that the death occurred as a consequence of and while John Chamberlain was engaged in the commission of robbery; or the death occurred as a consequence of and while John Chamberlain was attempting to commit robbery; or the death occurred as a consequence of and while John Chamberlain, or an accomplice, was escaping from the immediate scene of the robbery. Three, Daniel Ketchum as to Count I, Brian Harrison as to Count II, and Charlotte Kenyan, were killed by a person other than John Chamberlain, but both John Chamberlain and the person who killed Daniel Ketchum as to Count I, Brian Harrison as to Count II, and Charlotte Kenyan were principals in the commission of robbery. In order to convict of Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill. (T/V XXX/2417-18).

The jury found Appellant guilty as charged on Count I, II, III, and V (R.V. XXII/1961-64; T/V XXX/2484-85). The trial court polled the jury, and ordered a Pre Sentence Investigation report (T/V XXX/2489). Appellant's Allocution Hearing was ultimately heard on December 4, 2001 (T/V XXIII/2705).

Prior to sentencing Appellant, the trial court sentenced Co-Defendant Thomas Thibault (T/V XXXII/2663). Mr. Thibault was sentenced on August 31, 2001 (T/V XXXII/2663). The trial court

read from a forty-five (45) page sentencing order (T/V XXXII/2665). In part, the trial court found the following: "[i]t is Chamberlain who first says, 'it has to be done, we can't have no witnesses'...Chamberlain is consistent in his insistence in eliminating the witnesses, while the other two consider the issue...Chamberlain said 'we can't have any witnesses' (T/V XXXII/2684, 2690). In response trial counsel filed a Verified Motion to Recuse (R.V. XII/2047). Said Motion was denied on September 28, 2001 (R.V. XII/2054).

The parties appeared before the trial court for Appellant's Allocution Hearing (T/V XXXIII/2705). Defense counsel renewed his Motion to Recuse (T/V XXXIII/2708). Appellee announced that it would not call witnesses regarding the specific aggravating factors (T/V XXXIII/2711). In addition, Appellee addressed the issue of §921.141(5)(a), Florida Statutes, 1998, that the capital felony was committed by a person previously convicted of a felony and under the sentence of imprisonment (T/V XXXIII/2712). Appellee stated that she did not believe the aggravator applied (T/V XXXIII/2713). Defense counsel did not think it appropriate to admit the prior conviction into evidence

because they were not arguing no significant criminal history (T/V XXXIII/2713).

Appellee further elaborated its position by stating: “Judge my understanding was to show as to the first aggravated circumstances, it does not apply to the first aggravator. I was going to admit this in any potential rebuttal for mitigating circumstances of no prior criminal history; if the defense isn’t arguing it, then I don’t actually have to admit” (T/V XXXIII/2714). The trial court allowed it over defense objection (T/V XXXIII/2714).

According to the State, the conviction was for a Burglary of a Dwelling and petit theft that occurred in November, 1994 (T/V XXXIII/2715). Appellant violated his probation twice, and was terminated on August 27, 1998 (T/V XXXIII/2715). The trial court found said conviction to be an aggravating circumstance under §921.141(5)(a), (Sentencing Order and Findings of John Chamberlain, pp. 24).

Appellee further argued that Appellant met the following aggravating circumstances: (b) Appellant was convicted of three previous Capital Felonies; (d) Appellant was an accomplice to Murder and Robbery; (e) crime was committed to avoid arrest; (f)

committed for pecuniary gain, and (i) crimes were committed in a cold, calculated and premeditated manner (T/V XXXIII/2716-17).

Appellant's first witness was Ms. Helen Gilmore[5] (T/V XXXIII/2740). Ms. Gilmore is Appellant's great-aunt and helped raise both Appellant and his mother Marcella Chamberlain (T/V XXXIII/2746-47). The witness also has a Ph.D. in elementary education (T/V XXXIII/2749). Ms. Gilmore testified that initially, Appellant was a bright, happy child (T/V XXXIII/2749). The witness did not know Appellant's biological father, James Denig (T/V XXXIII/2741,2761). Donald Chamberlain is Appellant's step-father (T/V XXXIII/2747). This all changed when Appellant's two older cousins, Pat and Eddie Chamberlain moved in (T/V XXXIII/2751).

Appellant became more withdrawn, and Ms. Gilmore, both as a relative and a professional saw many "red flags" in Appellant's behavior (T/V XXXIII/2752-53). Things got to the point that Ms. Gilmore took Appellant to see a psychiatrist (T/V XXXIII/2758). Unfortunately, follow up care was not pursued (T/V XXXIII/2751).

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[5]It should be noted that the witness was an acquaintance of the wife of the trial judge. However, Defense counsel elected not move for recusal (T/V XXXIII/2709).

Both Appellant's mother and stepfather testified (T/V XXXIII/2760,2787). Mrs. Chamberlain stated that Appellant's biological father abused both her and Appellant (T/V XXXIII/2766). Mrs. Chamberlain and Mr. Denig separated four months after Appellant was born (T/V XXXIII/2761). She then met Mr. Chamberlain and moved to Lake Worth (T/V XXXIII/2767). The only time Appellant saw his biological father was when Mrs. Chamberlain would take him to Cape Canaveral where Mr. Denig lived (T/V XXXIII/2769).

Mr. Chamberlain married Appellant's mother, had two children together, and adopted Appellant (T/V XXXIII/2765,2776,2788). In a tragic coincidence, both Mr. Chamberlain's sister, and Mrs. Chamberlain's brother were murdered in unrelated incidents a month apart (T/V XXXIII/2769-70). As a result of these tragedies, Appellant's two older cousins Pat and Eddie Chamberlain, Mr. Chamberlain's nephews, moved in (T/V XXXIII/2769). Also, Mr. Chamberlain became an alcoholic (T/V XXXIII/2796-97).

Pat Chamberlain[6] testified that he and his brother unmercifully tormented Appellant as they grew up (T/V

[6]Eddie Chamberlain, the witness's brother, is in the Department of Corrections (T/V XXXIII/2805).

XXXIII/2808-13). The witness admitted that he and his brother took their frustrations out on Appellant (T/V XXXIII/2814). Mr. Chamberlain believed that Appellant's lack of self-esteem was due to their treatment of him (T/V XXXIII/2832). Appellant's step father characterized Appellant as submissive, passive, and a follower (T/V XXXIII/2793). The witness also acknowledged he gave little attention to his step son as he grew up (T/V XXXIII/2793).

Dr. Eugene Herman performed standard IQ tests on Appellant (T/V XXXIII/2844). Appellant had a full IQ of 111, verbal IQ of 106, and a performance IQ of 116 (T/V XXXIII/2847). Dr. John Perry, a clinical psychologist, examined and interviewed Appellant and his family (T/V XXXIII/2857). Dr. Perry concluded that Appellant was a bright and precocious child (T/V XXXIII/2860). Appellant suffered from an estranged relationship with his father (T/V XXXIII/2861). There was, clearly, alcohol abuse in Appellant's family (T/V XXXIII/2866).

However, due to the severe stresses brought on by a dysfunctional family, Appellant probably suffered from untreated depression as early as age eight (T/V XXXIII/2870-78). Appellant briefly addressed the trial court from a prepared

statement (T/V XXXIII/2896). In it, Appellant repeatedly expressed his condolences to the families of the victims, maintained his innocence, and blamed Mr. Thibault as the instigator and leader of the shootings (T/V XXXIII/2897-98).

On May 10, 2002, Appellant appeared before the trial court for sentencing (T/V XXXIII/2913). Defense counsel again renewed his motion to recuse the trial court (T/V XXXIII/2914). The trial court recited its factual findings, essentially identical to those of Mr. Thibault (T/V XXXIII/2915-2946). The assertion that Appellant had no prior significant history of criminal activity was rejected (T/V XXXIII/2928-29).

The trial court found that Appellant met the following aggravating circumstances: (b) Appellant was convicted of three previous Capital Felonies; (d) Appellant was an accomplice to Murder and Robbery; (e) crime was committed to avoid arrest; (f) committed for pecuniary gain, and (i) the crimes were committed in a cold, calculated and premeditated fashion (T/V XXXIII/2929-30). Appellant was sentenced to death on Counts I, II, III, and Life Imprisonment consecutive to any other sentence on Count V (T/V XXXIII/2931).

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SUMMARY OF THE ARGUMENT

POINT I

The trial court committed reversible error when it allowed Appellee to death qualify the jury, after Appellant had filed a Waiver of Penalty Phase Jury and Motion to Prohibit Death Qualified Voir Dire.

POINT II

The trial court committed reversible error when it failed to recuse itself for Appellant's sentencing.

POINT III

The trial court committed reversible error when it denied Appellant's motion for mistrial when it allowed Detective Fraser to render opinion testimony as to the credibility of Appellant's taped statement.

POINT IV

The trial court erred in allowing Detective Fraser to testify to the jury on Donna Garret's identification of Appellant. The error was not harmless.

POINT V

It was reversible error for the trial court to have allowed Appellee to recall Thomas Thibault to testify about his taped conversation with his mother.

POINT VI

The trial court abused its discretion when it allowed Detective Fraser to testify after having talked to Appellee during a break in his testimony. The error was not harmless.

POINT VII

The trial court committed reversible error when it denied Appellant's motions for judgement of acquittal.

POINT VIII

The trial court committed reversible error when it overruled defense counsel's objections to the jury instructions as given.

POINT IX

The death penalty is disproportionate in this case.

POINT X

The Felony Murder aggravating circumstance is unconstitutional.

POINT XI

The trial court erred when it allowed a demonstration before the jury of how Appellant could have used an asp. The error was not harmless.

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ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED APPELLEE TO DEATH QUALIFY THE JURY AFTER APPELLANT WAIVED THE JURY FOR SENTENCING

On January 28, 1999, Appellee filed a "Notice of Intent to Seek Death Penalty" (R.V. I/118). Appellant filed his "Waiver of Penalty-Phase Jury" on November 21, 2000 (R.V. III/1243). The waiver was followed by Appellant's "Motion to Prohibit Death Qualified Voir-Dire" on February 2, 2001 (R.V. VIII/1304-1306). In part, the motion argued that Appellee be precluded from asking "'death qualifying' questions of the jury during voir dire where they will not be making a recommendation as to the penalty. Because the jury will never have to deal with the issue of whether CHAMBERLAIN will live or die the voir dire process should be conducted as if no Notice of Intent to Seek death had ever been filed" (R.V. VIII/1305).

On February 2, 2002, the parties appeared before the trial court (S.T.II/10). After addressing preliminary matters, the trial court raised the issue of handling Phase II (S.T. II/30). Appellee stated her position as follows:

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> MS. SKILES: I think that the State is entitled to, to ask– I don't intend to obviously, death qualify this jury, but I do think that the State is entitled to ask the prospective jurors–and I called the Attorney General's Office also today since we were here this morning and they agree with this position that the State would be able to still ask potential jurors in a very limited fashion something– (S.R.II/31).

Appellant's position was summarized in this fashion:

> MR LERMAN: It's my position that since we waived jury or Mr. Chamberlain waived jury for the penalty phase, that, that the penalty should not be addressed in any way with this jury. The two areas that I cited in my motion was the Rule of Criminal Procedure 3.290 which states admittedly except 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. And what I argued in my motion and I will repeat here is that although it says except in capital cases, it is my position that, that at the same time the rule presupposes that the jury is going to be making a recommendation as to the penalty phase, but here they are not, and then I went on in the motion and cited the jury instruction 2.05(5) which says, your duty– this is how you would instruct. Your duty is to determine if the defendant has been proven guilty or not in accordance with the law. It is the Judge's job to determine a proper sentence if the defendant is found guilty. It is my position that this case as to voir dire should be treated no differently during voir dire than it would be if the State had already waived death for

> the guilt phase and for the penalty phase; that they should simply be told it is a first degree murder case, you are not to be concerned with the sentence in this case, it is the Court's decision how the defendant should be sentenced. (S.T.II/32-4).

After hearing further argument, the trial court made the following finding:

> THE COURT: Well, Mr. Lerman, I think your arguments are not without merit and are of some substance, however, I believe it has been the very firm policy of our laws, statutory, as well as the Supreme Court that the State gets to ventilate this business of the jurors' feelings about capital punishment...the State has indicated she is not going to make that a major thrust of her jury inquiry, but she wants to go into it and I think she can and so your objections are now of record and we leave it for an appellate court (S.R.II/43-44).

Jury selection began on February 5, 2001 (T/V XVII/91). During her jury selection, Appellee sought to strike the following jurors:

> MS. SKILES: We can do the cause. I think Ms. Williams, juror number 1 should be stricken for cause. She's made it abundantly clear she could never vote in a first phase knowing the death penalty is a possible punishment. MR. LERMAN: We're going to object to any strikes for cause that are based on their capital punishment answers based on our motion heard on Friday. So we object. THE COURT: Overrule your objection. Miss Williams is

excused for cause. MS. SKILES: The same argument for juror number 2, Miss Moscowitz. She said the same thing, she could never– THE COURT: Over the defendant's objection, Moscowitz
MS. SKILES: Do you want to talk about any cause challenges for alternates now as well?
THE COURT: To the whole world.
MS. SKILES: Well, the first alternate, ms. Dominick, she said she would hold the State to a higher burden than is required under the law and absolutely said she could not follow the law.
MR. LERMAN: Again, we object based on our earlier motion Friday that this is a perfect example of why jurors should not be told what the penalty was and shouldn't have been voir dired on the penalty. Based on our earlier motion, we object to the strike; she was aware of the penalty. THE COURT: But you don't disagree with the truth and accuracy of her representation of her answers? MR. LERMAN: Absolutely, I agree that that's what those jurors have said. THE COURT: Dominick, over your objection is excused for cause.
MS. SKILES: I think Juror number 9, Mr. Lidinisky. Basically said he could never follow the– regarding homicide, he couldn't follow the law, he couldn't do that.
MR. LERMAN: I agree thats what he said. I just object to that.
THE COURT: All right thats it for cause?
MS. SKILES: From the State, Judge.
THE COURT: Are you striking Mr. Alo for cause? MS. SKILES: I forgot about Mr. Alo, number 6. He himself, said that he had problems with following the law on principals and didn't think he could do that

> either. MR. LERMAN: Again, for the record, we object. THE COURT: All right, Alo is granted over your objection (T/V XVIII/343-345).

Defense counsel repeatedly renewed the same objection when Appellee struck Juror's Carney, Rollins, and Burger (T/V XVIII/435-436). Jurors Baccon, Slavin, and Petruzzelli were also struck for cause by Appellee for the same reason, the defense renewed his objection on each occasion (T/V XVIII/468; XVIX/544,550). At the conclusion of voir-dire, defense counsel objected to the seating of the panel (T/V XX/738). Defense counsel re-raised his motions at the close of the State's case, and in his motion for new trial (T/V XXIX/2179, 2184; R.V. XII/1968).

By failing to grant defense counsel's timely objections, Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution. Witherspoon v. Illinois, 391 U.S. 510 (1968); Davis v. Georgia, 429 U.S. 122 (1976); Gray v. Mississippi, 481 U.S. 648 (1987); Chandler v. State,442 So.2d 171 (1983); Farina v. State, 680 So.2d 392 (Fla. 1996). Reversal is required.

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It is respectfully submitted that the instant issue is properly preserved for appellate review. First, defense counsel properly objected to the jury as constituted prior to the seating of the jury. See: Franqui v. State,699 So.2d 1332, 1334 (Fla. 1997); Melbourne v. State, 679 So.2d 759, 765 (Fla. 1996). Second, the standard of review is abuse of discretion. However, the trial court's discretion is restricted by the requirements of the Florida and United States Constitutions. Farina v. State, 680 So.2d 392, 396-399, (Fla. 1996).

It must be emphasized from the onset the unique nature of the current issue. In a majority of issues arising from the denial of a cause challenge, the analysis revolves around the questions asked by the State *and the answers provided by the juror(s) in question*. E.g. Overton v. State, 801 So.2d 877 (Fla. 2001)[7]. Instead, in the case at bar, the issue presented is not a juror's actual or apparent bias, but the unnecessary and prejudicial line of questioning employed by Appellee when it raised capital punishment knowing already that the jury was not to be employed in Phase II sentencing. In summary, defense

[7]"The test to determine a juror's competency is whether the juror can set aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Overton v. State, 801 So.2d 877, 890 (Fla. 2001).

counsel did not object to Appellee's questions per-se, but rather to striking the jurors in question for cause for no reason other than their feelings on the death penalty, when the jury was waived for Phase II. Thus the jurors views on capital punishment were moot, and the trial court's granting of Appellee's cause challenges in violation of Overton, and Appellant's rights under the United States and Florida Constitutions. Reversal is required.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT APPELLANT'S MOTION TO RECUSE

On September 20, 2001, pursuant to §38.10, (Florida Statues), Appellant filed a Verified Motion to Recuse the Trial Court (R.V. XII/2047-2051). At this stage of the proceedings, Co-Defendant Thomas Thibault had already been sentenced to death

(R.V. XII/2048).[8] Appellant's allocution hearing and sentencing were heard on December 4, 2001, and May 10, 2002, respectively (T/V XXIII/2705; XXIII/2913).

In part, the motion raised the following concerns:

> 4. Judge Mounts prepared a 43 page sentencing order with a cover sheet that was signed and dated August 31, 2001. The cover sheet was entitled "Sentencing Order and Findings Thomas Thibault John Chamberlain." On pages 15 through 16 Judge Mounts quoted CHAMBERLAIN'S Grand Jury Testimony from pages 5-7, lines 23-29. During the discussion of the aggravating circumstances portion of the order, pages 22-27, the Court makes specific findings of fact regarding CHAMBERLAIN and his culpability and the existence of aggravating factors to his case in this homicide. For example on page 25

[8]Specifically, the trial court found "[i]t is Chamberlain who first says, 'it has to be done, we can't have no witnesses'...Chamberlain is consistent in his insistence in eliminating the witnesses, while the other two consider the issue...Chamberlain said 'we can't have any witnesses' (T/V XXXII/2684, 2690).

the Court states: “Chamberlain is consistent in his insistence on eliminating the witnesses while the other two consider the issue.” This, as well as other findings of fact are made in relation to CHAMBERLAIN’S conduct and sentence despite the fact that CHAMBERLAIN has neither appeared before the Court for sentencing yet nor had the opportunity to present evidence or argument to the Court at an elocution hearing.

5. Under the heading of Mitigation the Court makes a specific finding on page 30 that CHAMBERLAIN’S conduct is “roughly equal” Mr. Thibault’s. Again, this finding is made without the benefit of counsel for CHAMBERLAIN having made argument. 7. CHAMBERLAIN currently has an elocution hearing in the above styled cause set for November 14, 2001 in front of the Honorable Marvin Mounts. Clearly, Judge Mounts has

made it clear that he is predisposed to disbelieve CHAMBERLAIN or consider any of the other testimony that conflicts with Mr. Thibault's version of events; furthermore, it is clear that Judge Mounts has already determine tat (sic.) death is the appropriate sentence as it relates to CHAMBERLAIN based on the sentencing order in Mr. Thibault's case. 8. CHAMBERLAIN has a well grounded fear that he will not receive a fair sentencing hearing at the hands of the judge. Any reasonable prudent person would see that there is nothing that Defendant can do or say that would satisfy the Court that the Defendant is not as culpable as Thomas Thibault or deserving of a sentence of death in light of the Order entered in the case of Thomas Thibault and the findings and conclusions already reached by the Court without first

hearing from the Defendant. (R.V. XII/2047-2051).

On September 28, 2001, the trial court denied, without comment, Appellant's motion (R.V. XII/2054). Appellant renewed his motion at his allocution hearing, and again at his sentencing (T/V XXXIII/2705; XXXIII/2914).

The standard of review on the denial of a motion to recuse is *de novo*. Sume v. State, 773 So.2d 600, 602 (Fla. 1st DCA 2000). Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution were violated. Reversal is required.

This Court has long held the requirements for a motion to recuse a judge[9]. In Rogers v. State, 630 So.2d 513, 515 (Fla. 1993),this Court stated:

> the requirements set forth in the rule were established to 'ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding.' Livingstone v. State, 441 So.2d 1083, 1086 (Fla. 1983). The inquiry focuses on the reasonableness of the defendant's belief that he or she will not receive a fair

[9] See also: Florida Rule of Judicial Administration 2.160(C)(D)

> hearing: [A] party seeking to disqualify a judge need only show a well grounded fear that he [or she] will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling. The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the perception of his ability to act fairly and impartially ...*the ultimate inquiry is 'whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.'* Id. Rogers v. State, 630 So.2d 513, 515 (Fla. 1993). [emphasis added].

See also: Asay v. State, 769 So.2d 974 (Fla. 2000). Death penalty cases command the Court's closest scrutiny. Geralds v. State, 674 So.2d 96, 99 (Fla. 1996), quoting Cooper v. State, 336 So.2d 1133, 1138 (Fla. 1976).

Applying the aforementioned standard requires reversal. Appellant, indeed any prudent person, would have a reasonable fear of bias against them when the trial court makes the following finding in the imposition of the death penalty of Mr. Thibault:"[i]t is Chamberlain who first says, 'it has to be done, we can't have no witnesses'...Chamberlain is consistent in

his insistence in eliminating the witnesses, while the other two consider the issue...Chamberlain said 'we can't have any witnesses' (T/V XXXII/2684, 2690).

A prudent person would ask the reasonable question, 'why is the trial court bringing out my statements as justification for imposing the death penalty on another? It is uncontradicted that Thomas Thibault, and he alone, executed the victims. How can Appellant reasonably expect a fair and impartial sentencing of his own to occur when his statements were already used as a basis for the imposition of the death penalty by the trial court?' It is, therefore, respectfully submitted that no prudent, reasonable person could ever expect a fair and impartial hearing from a judge that has already relied upon his statements to justify the execution of another. Reversal is required.

POINT III

REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT DENIED APPELLANT'S MOTION FOR MISTRIAL FOLLOWING DETECTIVE FRASER'S OPINION TESTIMONY

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During the direct testimony of Detective Fraser, the following exchange occurred:

> Q. Detective Fraser, the noise that Defendant can be heard making on the tape, what were those noises?
>
> A. He was sniffling a little bit. He cried during the interview. Sometimes I stopped the interview to give him a break.
>
> Q. 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? A. I didn't go along with it. I can testify to the fact that he was crying. However, I don't believe that his– MR. LERMAN: objection. May we approach? THE COURT: Well, I'll sustain the objection. MR. LERMAN: Motion to strike. Can I approach for a minute?
>
> THE COURT: All right.
>
> MR. LERMAN: It's my position that he's crossed the line and that giving his opinion whether he believed or disbelieved Mr. Chamberlain's emotions were real or not real is just as much a comment on Mr. Chamberlain's credibility as just trying to tell the jury what the emotions were and that one witness testifying about either another witness' credibility or the defendant's credibility in a statement is improper. And at this time I move for mistrial.
>
> MS. MCROBERTS: I think the witness, just as any witness, can testify about their observations of an individual but whether or not the noises, the sniffling noises appeared to be a genuine emotion as opposed to a forced–
>
> THE COURT: I'll rule that they cross

> the point. There are civil attorneys who cry during closing argument and there's some speculation as to whether or not that's contrived histrionics or a device that they have learned as a skill that a speaker may learn in school. So I am going to sustain his objection and deny the mistrial. Do you want me to instruct the jury to disregard?
>
> MR. LERMAN: Yes sir.
>
> THE COURT: The jury is instructed to disregard, please, the conclusion of the officer as to his observation. Next question. (T/V XXVIII/2068-70).

By failing to grant defense counsel's timely motion for mistrial, Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution. Reversal is required. The standard of review for admissibility of evidence is abuse of discretion. Nardone vs. State, 798 So.2d 870, 874 (Fla. 4th DCA 2001). See also: Melendez vs. State, 700 So.2d 791 (Fla. 4th DCA 1997).

Admission of improper opinion testimony by a lay witness can constitute a basis for a new trial in a capital case. See: Thorp vs. State, 777 So. 2d 385, 395 (Fla. 2000). In Thorp, this Court stated, "[a]s a general rule, lay witnesses may not testify in the form of opinions or inferences; it is the

function of the jury to draw those inferences.", Thorp vs. State, 777 So. 2d 385, 395 (Fla. 2000).

Applying the aforementioned principle to the instant issue requires reversal. What is especially troubling is the reasoning behind Appellee's line of questioning. Appellant's taped interview of November 29th, 1998, was being played to the jury (T/V XXVIII/2029). Apparently, sounds of what Detective Fraser described as "sniffling" were audible (T/V XXVIII/2069). It must be remembered that when the interview was conducted, Appellant had just witnessed a terrible crime occur. It would be perfectly natural for this young man, as a human being, to be emotionally moved by the event. No indication was given that these extraneous sounds in any way interfered with the audio quality of the recording.

Appellee then asked the witness if "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?" (T/V XXVIII/2069). Detective Fraser replied "I didn't go along with it. I can testify to the fact that he was crying. However, I don't believe that his" (T/V XXVIII/2069). Clearly this question attempted to elicit from the witness precisely the

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type of impermissible reply that the jury heard. From the outset, Appellee would know that Detective Fraser could not read Appellant's mind to see if his tears or sobs were genuine or not. This was attempt by Appellee to portray Appellant to the jury as an insincere person, someone who's comments were not to be trusted.

It remains to determine whether the remedial measures applied by the trial court were sufficient to cure the error. First, the trial court did sustain the objection and instructed the jury to "disregard, please, the conclusion of the officer as to his observation. Next question." (T/V XXVIII/2070). It is respectfully submitted that this instruction was insufficient.

In denying Appellant's motion for mistrial, the trial court rationalized the argument as follows: "There are civil attorneys who cry during closing argument and there's some speculation as to whether or not that's contrived histrionics or a device that they have learned as a skill that a speaker may learn in school." (T/V XXVIII/2070). The trial court erred in its rationale because, as all juries in criminal cases are instructed, what the lawyers say, or do is not evidence and

should not be considered as such. Instead, this prejudicial comment was made by the detective who conducted the most critical interview of all, Appellant's initial statement.

Secondly, under the auspices of State vs. DiGuilo, 491 So.2d 1129 (Fla. 1986), this issue is subject to harmless error analysis. Again referring to this Court's opinion in Thorp:

> an exception to this rule is found in *section 90.701*, Florida Statues, which permits a lay witness to proffer testimony 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 opinion and inferences do not require a special knowledge, skill, experience, or training, Thorp vs. State, 777 So. 2d 385, 395 (Fla. 2000).

Detective Fraser's remarks failed on the first prong. Clearly, the witness's testimony was in no way curtailed or adversely impacted by not interjecting his opinion, and it certainly had a prejudicial impact on the objecting party. See

also: Ramirez vs. State, 810 So.2d 836 (Fla. 2001). Appellant's convictions should be reversed.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED THE IDENTIFICATION OF APPELLANT BY DONNA GARRET

Donna Garret was called by Appellee and testified that she met Appellant for the first and only time on Thanksgiving Day 1998 (T/V XXIII/1258). In May of 2002, the witness was interviewed by Detective Fraser and shown a photographic lineup (T/V XXIII/1266). Ms. Garret testified that she was 100% certain of her identification of Co-Defendant's Thibault and Dascott, but was only 80% sure of her identification of Appellant (T/V XXIII/1266). Nevertheless, Appellee sought to introduce Ms. Garret's identification as follows:

> Q. Did Ms. Garret, was she able to identify at all anybody in Exhibit 146C?
> A. Yes.
> MR. LERMAN: Objection, hearsay. Motion to strike.
> THE COURT: Well, I don't know. You better come up here and explain this.
> THE COURT: This is a picture of Chamberlain and she–
> MS. MCROBERTS: She said that she's 80% sure that's him.
> MR. LERMAN: She identified

> somebody else in the photo lineup according to her testimony in this trial as being the defendant. She identified the individual in the lower left hand corner, not Mr. Chamberlain who is in the lower right hand corner as being the individual that she saw on that day. MS. MCROBERTS: That doesn't go to the admissibility of what Detective Fraser did in May, 2002. THE COURT: Her identification of Mr. Chamberlain is at issue. I'll allow the 80% because of your claim that there's some other contrary identification elsewhere in the trial. Keep in mind you've got the live testimony of those witnesses. Let's not overkill here and go a little further. Okay? (T/V XXVIII/2081-82).

The trial court overruled Appellant's objection and allowed Detective Fraser to testify about Ms. Garret's identification. Appellant again raised this issue in his Motion for New Trial, Point VII, R.V. XII/1972). Due to the introduction of said identification, Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution were compromised. Reversal is required.

"Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless

presentation of cumulative evidence...", §90.403, (Fla. Statutes, 2002). In the case at bar, the trial court abused its discretion when it allowed the uncertain identification of Appellant by Ms. Garret.

Depending upon the nature of the issue involved, evidentiary rulings will be subject to either *de novo* review or an abuse of discretion review. See: Federal Standards of Review, §4.02 (1997), by: Childress and Davis. Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, rulings contrary to the evidence code, as in this case, constitutes an abuse of discretion. See: Taylor vs. State, 601 So.2d 1304, 1305 (Fla. 4th DCA 1992).

"In Neil vs. Biggers, 409 U.S. 188, 93 S.Ct.375, 34 L.Ed. 401 (1972), the Supreme Court stated that in determining whether it is necessary to suppress an in-court identification, 'the primary evil to be avoided "is the very substantial likelihood of irreparable misidentification", State vs. Britton, 387 SO.2d 556, 557 (Fla. 2nd DCA 1980). See also: Rivera vs. State, 462 So.2d 540 (Fla. 2nd DCA 1985). Ms. Garret's identification of Appellant was flawed and uncertain, hence her 80% estimation. As the trial court itself warned Appellee, "Keep in mind you've

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got the live testimony of those witnesses. Let's not overkill here and go a little further. Okay?" (T/V XXVIII/2081-82).

Furthermore, the witness had earlier misidentified another photograph as that of Appellant (T/V XXVIII/2082). It is precisely this "needless presentation of cumulative evidence" that Florida Statutes §90.403 seeks to avoid. Nor is the error harmless under State vs. DiGuilo, 491 So.2d 1129 (Fla. 1986). It is respectfully submitted that Ms. Garret's placing of Appellant along with his Co-Defendant's at her residence on the morning of the killings with the stolen items is presumptively and highly prejudicial. Reversal is required.

POINT V

THE TRIAL COURT ERRED WHEN IT ALLOWED APPELLEE TO RECALL THOMAS THIBAULT TO TESTIFY

During a recess, Appellee sought to introduce a tape recorded conversation between Co-Defendant Thibault and his mother made at the West Palm Beach Police Department (T/V XXVIII/2114). The tape recording was made without the knowledge of the parties (T/V XXVIII/2072). It should be noted the tape recording was only of Mr. Thibault, and that his mother's voice was not recorded (T/V XXVIII/2110).

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Earlier, at sidebar, Appellee informed the trial court that it wished to include prior consistent statements made by Mr. Thibault for purposes of possible cross appeal (T/V XXVIII/2100). Appellee summarized her position as follows:

> the State's position is that the Defense, through the cross examination of Tommy Thibault yesterday has put forth the argument and has expressly implied that there has been some sort of improper influence motive or recent fabrication by the witness. The statement that we are attempting to have the detective talk about was a statement made on November 30th of 1998 at the police department by Tommy Thibault. It's the one that Detective Fraser was allowed to say that there was a taped conversation that the police officer did tape of Mr. Thibault talking to his mother and Mr. Thibault was unaware of that tape. That statement and some of the things that Mr. Thibault said at that time, obviously, were made prior to any of the allegations Mr. Lerman brought up with Mr. Thibault yesterday regarding his motives or the fact that he has these letters going back and forth now after a plea with Mr. Dascott – all of that was discussed in detail in cross examination with Mr. Thibault and it's the State's position that because the Defense has raised the issue of improper influence, motive or recent fabrication, the State should not be allowed to utilize Detective Fraser who listened to those statements by the defendant at a time before the alleged improper influence, motive or recent fabrication issue developed that we should be allowed to explore that with this witness today (T/V XXVIII/2108-2109).

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Defense counsel argued that the recording was hearsay within hearsay (T/V XXVIII/2111). Counsel also objected to Appellee recalling Mr. Thibault (T/V XXVIII/2116-2117). The trial court overruled Appellant's objection (T/V XXVIII/2117). Counsel then immediately announced that Appellant would not be putting a defense on (T/V XXVIII/2117).

Appellee recalled Mr. Thibault (T/V XXVIII/2157). The witness testified that he never knew his conversation was being recorded (T/V XXVIII/2157). The tape recording was introduced and played over objection (T/V XXVIII/2159). Specific references to Appellant included "JJ was going to put them in the safe, lock them in. It's a huge walk in safe...then JJ was telling me 'we're all going to die, we're going to get the electric chair. You killed him. You killed him...there's nothing left to take, just take care of the other two'", (T/V XXVIII/2160-61). Appellee again brought up the contents of the tape recording in her closing argument (T/V XXIX/2268).

Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and

Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution were compromised. Reversal is required.

"A trial court's decision to permit a party to offer rebuttal testimony subject to abuse of discretion standard of review.", Bush v. State, 809 So.2d 107, 119(Fla. 4th DCA 2002), quoting Cruse v. State, 588 So.2d 983, 990 (Fla. 1991). Defense counsel objected to Mr. Thibault being recalled as a witness (T/V XXVIII/2117). The issue was again raised in point 5 of Appellant's Motion for New Trial (R.V. 12/1971).

"To be admissible under section §90.801(2)(b), an otherwise inadmissible prior hearsay statement must be consistent with the statement being examined at trial and must rebut a charge that the witness recently fabricated that statement." Hebel v. State,765 So.2d 143, 146 (Fla. 2nd DCA 2000). See also: Bertram v. State, 637 So.2d 258, (Fla. 2nd DCA 1994). As was argued in the Motion for New Trial, Appellant argued that while the evidence was fabricated, it was not recently fabricated, but instead was fabricated as far back as Thanksgiving 1998 (R.V. 12/1971). During the cross examination of Jason Dascott, the witness admitted to having lied in his statement to police (T/V XXV/1502,1624). Mr. Dascott, *with Thomas Thibault's approval*,

concocted a story that he had been kidnaped and forced at gunpoint to participate in the crimes (T/V XXV/1506; XXVII/1871).

Nor is the error harmless under State vs. DiGuilo, 491 So.2d 1129 (Fla. 1986). A review of the statements Mr. Thibault alleges were made by Appellant included: “JJ was going to put them in the safe, lock them in. It’s a huge walk in safe...then JJ was telling me ‘we’re all going to die, we’re going to get the electric chair. You killed him. You killed him...there’s nothing left to take, just take care of the other two’”, (T/V XXVIII/2160-61). It is respectfully argued that these statements were not harmless beyond a reasonable doubt. Therefore, reversal is required.

POINT VI

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED DETECTIVE FRASER TO CONTINUE TESTIFYING AFTER SPEAKING TO APPELLEE DURING HIS TESTIMONY

During Detective Fraser’s testimony, The trial court inquired from Appellee if Detective Fraser was excused (T/V XXVIII/2119). Appellee replied that Detective Fraser be

released, with leave to recall him (T/V XXVIII/2119). The trial court agreed, directed the witness to remain in the courthouse, then recessed (T/V XXVIII/2119).

During the recess, defense counsel brought the following to the trial court's attention:

> MR. LERMAN: Before they reopen with Detective Fraser, I have a couple of questions I want to ask, ask him outside the presence of the jury Judge.
>
> THE COURT: Sure.
>
> Q. During the break you remained in the courtroom?
>
> A. Yes.
>
> Q. You spoke with either Ms. Skiles or Ms. McRoberts?
>
> A. Correct, Counsel.
>
> Q. They directed to review portions, I gather, of your deposition testimony?
>
> A. No.
>
> Q. No one discussed your depositions with you? A. No.
>
> Q. No one discussed any or additional questions that they might want to put to you on the stand at that time?
>
> A. They certainly did, but they didn't talk about my depo.
>
> Q. What did they discuss with you?
>
> A. Mr. Chamberlain's testimony in a court hearing in July.
>
> Q. You mean the bond hearing?
>
> A. Yes.
>
> Q. And that was in the courtroom?
>
> A. It was over there, yeah.
>
> MR. LERMAN: I don't have anything further. (T/V XXVIII/2111-12).

-

Appellee stated that

> I instructed Detective Fraser that he was going to be recalled to the stand and he said what about, and I said about the court hearing of July 26th, 1999. I gave him a transcript of it and I told him to read through it and I was going to be asking about it and I would be referring to the lines and pages. If he didn't have a recollection, that I'd refer him to that document to see if it refreshed his recollection and that was the extent of it and it was done here in open court (T/V XXVIII/2123).

Defense counsel replied that "[w]ell, I do have an objection. The witness was still under oath, the State was still in the courtroom and the State shouldn't have been discussing any of his testimony or potential testimony with him until he had been released. He was the last witness to have testified in this case and it's always been my understanding that once somebody started testifying you're not talking to them about their testimony in the midst of that testimony" (T/V XXVIII/2124).

The trial court appeared uncertain if it had made a blanket pronouncement or if the rule had been invoked (T/V XXVIII/2125-26). Ultimately, the trial court overruled defense counsel's objection (T/V XXVIII/2127). It appeared that the trial court

invoked the rule on February 12th (T/V XXVI/1723). The following was said by the parties:

> MR. LERMAN: Initially, based on discussions with Ms. Skiles, not that she asked this, but I haven't invoked the rule and I know she hasn't invoked the rule, but at this point I'm asking that the rule be invoked.
>
> THE COURT: I don't think you can in the middle of the trial if the State objects. I don't know.
>
> MS. SKILES: The only clarification I would want is in reference to the family members that we have.
>
> MR. LERMAN: Absolutely not. I'm taking about telling one witness out of these groups that we're dealing with now what other witnesses have said or–
>
> MS. SKILES: Have testified in court? MR. LERMAN: Right. MS. SKILES: I don't have an objection to that, Judge
>
> THE COURT: All right. The rule is invoked by both sides, apparently, and as defined by what Mr. Lerman said. (T/V XXVI/1723-24).

Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution were compromised. Reversal is required. The standard of review for cases involving violations of the rule of sequestration is abuse of discretion, See: Cadavid vs. State, 416 So.2d 1156,1158 (Fla. 3rd DCA 1982). The rule of

sequestration is codified in §90.616(1), (Fla. Stat. 2002) as follows:

> 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)

Ehrhardt explains that "[i]n order to avoid a witness coloring his or her testimony by hearing the testimony of another, any party may invoke the rule of sequestration of the witnesses after which the trial judge will ordinarily exclude all prospective witnesses from the courtroom. If a witness cannot hear other witnesses testify before being called, fabrication, inaccuracy and collusion are discouraged", Ehrhardt, Florida Evidence §90.616(1) (2002 Edition). It is well established law in Florida that discussion by counsel with a witness concerning his testimony is a violation of the sequestration rule. E.g.: Acevedo vs. State, 547 So.2d 296 (Fla. 3rd DCA 1989).

In the case at bar, the trial court invoked the rule at the request of defense counsel on February 12th (T/V XXVI/1723). Detective Fraser testified on February 14, 2001 (T/V

XXVIII/2021). It is uncontroverted that Appellee did discuss Detective Fraser's upcoming testimony as follows:

> I instructed Detective Fraser that he was going to be recalled to the stand and he said what about, and I said about the court hearing of July 26th, 1999. I gave him a transcript of it and I told him to read through it and I was going to be asking about it and I would be referring to the lines and pages. If he didn't have a recollection, that I'd refer him to that document to see if it refreshed his recollection and that was the extent of it and it was done here in open court (T/V XXVIII/2123).

It is respectfully submitted that this is not harmless error under State vs. DiGuilo, because the witness testified that Appellant stated at his July bond hearing that he did not know police were in his home, which contradicted his earlier statement (T/V XXVIII/2134; (T/V XXIV/1392; XXV/1631). Reversal and new trial are required.

POINT VII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL

This Court has laid down the standard for reversing the denial of a motion for judgment of acquittal as follows: "the

trial court's finding denying a motion for judgment of acquittal will not be reversed on appeal if there is competent substantial evidence to support the jury's verdict." Rogers v. State, 783 So.2d 980, 988 (Fla. 2001), quoting Orme v. State, 677 So.2d 258, 262 (Fla. 1996). Because a general verdict form was used, the evidence must support either premeditated murder or felony murder Rogers, 677 So.2d, supra. citing Jones v. State, 748 So.2d 1012,1024 (Fla. 1999), (citing Mungin v. State, 689 So.2d 1026, 1029-30 (Fla. 1995)).

In the case at bar, the trial court denied Appellant's motions for judgment of acquittal (T/V XXIX/2177, 2182). Appellant renewed said motion in his motion for new trial (R.V. XII/1973). The trial court denied the motion for new trial (R.V. XII/2004). Both denials violated Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution.

The instant case is replete with contradictory testimony and evidence. Indeed, the one element that all the witnesses involved agreed on was that it was Thomas Thibault, and he alone, that shot the three (3) victims (T/V XXVIII/2048;

XXII/972-974; XXIV/1468; XXVI/1828). Ms. Ingram, who according to both Mr.'s Thibault and Dascott was an active participant/instigator of the crimes was never charged with anything (T/V XXIV/1452; XXVI/1825). Ms. Ingram even brought Charlotte Kenyan from her bedroom to the bathroom for execution(T/V XXVI/1815; XXVI/1831). Not surprisingly, Ms. Ingram failed to mention this during her testimony.

All the eye witnesses admitted to being heavy drug users, and indeed took copious amounts of drugs on the night in question (T/V XXI/955,1011;XXI/992-94; XXV/1519; XXVI/1803). Mr. Thibault and Mr. Dascott admitted to fabricating their statements to police (T/V XXV/1506; XXVII/1871). Mr. Dascott entered a plea agreement with the State that exposed him to sixty-five (65) years imprisonment (T/V XXV/1501). Except for Mr. Thibault, the other witnesses were agreed that he was the one directing things and giving orders (T/V XXIV/1376; XXVIII/2048; XXI/1064; XXII/1096; XXIV/1462).

There was a conspicuous lack of objective, physical evidence in the case. The actual firearm used to commit the murders was never recovered[10]. While there was some testimony about

[10]According to Mr. Thibault, the gun was destroyed (T/V XXVI/1869).

Appellant using an asp like device on Daniel Ketchum, the medical testimony could not determine what caused the abrasions on the victim's body (T/V XXI/888; XXVI/1820). None of these discrepancies were minor or harmless under State vs. DiGuilo, 491 So.2d 1129 (Fla. 1986). Rather, these discrepancies and contradictions showed the inherent flaws in the witnesses case were so serious that the trial court committed reversible error in allowing the case to go to the jury.

POINT VIII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT INCORRECTLY INSTRUCTED THE JURY ON FELONY MURDER

In part, Appellant's indictment reads as follows:

> on or about the 26th day of November in the year of our Lord One Thousand Nine Hundred and Ninety-Eight, did unlawfully from a premeditated design to effect the death of a human being, kill DANIEL KETCHUM, a human being by shooting him, and in the commission of said offense did use and have in their possession a handgun,... (R.V. III/455).

The identical language tracks Counts II and III, for the murder of Bryan Harrison and Charlotte Kenyan respectively. During Appellant's charge conference, the following transpired:

-

> THE COURT: So it reads Ketchum, Harrison and Kenyan were killed by a person other then (sic) John Chamberlain but both John Chamberlain and the person who killed Ketchum, Harrison and Kenyan were principals in the commission of the robbery.
>
> MR. LERMAN: If we are going to do that, and I think we should, obviously I agree with that on part two of that instruction then we probably should only give C which would be the death occurred as a consequence of and while John Chamberlain or an accomplice– not that one I am sorry, that we should give A, rather then (sic) B and C. MRS. SKILES: Well, Judge– MR. LERMAN: No, attempt– I mean, its robbery and its not part of escaping from the scene of a robbery it is a robbery. MRS. SKILES: Judge, the State's position is that B and C would stay because the jury could find attempting or the escaping from the immediate scene as applicable.
> MRS. SKILES: Especially in light of the fact Judge, that robbery was an ongoing event.
> THE COURT: Continuing yes, it was. I agree, objection is noted it stays in. (T/V XXIX/2197).

The trial court instructed the jury, in part, as follows:

> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing. If a person has a premeditated design to kill one person and in attempting to kill that person actually

> kills another person, the killing is premeditated. Felony Murder First Degree: Before you can find Defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt: One, that Daniel Ketchum as to Count I, Brian Harrison as to Count II, and Charlotte Kenyan, as to Count III are dead. Two, that the death occurred as a consequence of and while John Chamberlain was engaged in the commission of robbery; or the death occurred as a consequence of and while John Chamberlain was attempting to commit robbery; or the death occurred as a consequence of and while John Chamberlain, or an accomplice, was escaping from the immediate scene of the robbery. Three, Daniel Ketchum as to Count I, Brian Harrison as to Count II, and Charlotte Kenyan, were killed by a person other than John Chamberlain, but both John Chamberlain and the person who killed Daniel Ketchum as to Count I, Brian Harrison as to Count II, and Charlotte Kenyan were principals in the commission of robbery. In order to convict of Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill. (T/V XXX/2417-18).

Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution were violated. Reversal is required. It is acknowledged that this Court has previously addressed and denied this issue. Appellant would respectfully urge this Court to

recede from its earlier decision in Knight v. State, 338 So.2d 201, 204 (Fla.1973), and hold that it is improper, as in the case at bar, that it is improper for the State to pursue conviction through felony murder when the indictment charges only felony murder.

POINT IX

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE

"As we have stated time and again, death is a unique punishment. See: Urbin v. State, 714 So.2d 411, 416 (Fla. 1998) (quoting Porter v. State, 564 So.2d 1060 (1990); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991); State v. Dixon, 283 So.2d 1, 7 (Fla.1973). *Accordingly the death penalty must be limited to the most aggravated and least mitigated of first degree murders.* See Dixon, 283 So.2d at 7. In deciding whether death is the appropriate penalty, this Court must consider the totality of the circumstances in the instant case in comparison to the facts of other capital cases and in light of those other decisions. See Urbin, 714 So. 2d at 416 (quoting Tillman, 591 So.2d at 169). *It is not merely a comparison between the number of*

aggravating and mitigating factors. See Porter, 564 So.2d at 1064.", Larkins v. State, 739 So.2d 90, 92-93, (Fla. 1999), [emphasis added]. See also: Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), "Any review of the death penalty in a particular case must begin with the premise that death is different." See also: Kormondy v. State, 2003 Fla. LEXIS 173; 28 Fla. L. Weekly S 135 (February 13, 2003). It is respectfully submitted that the evidence presented in the instant case did not support any of the aggravating factors found by the trial court. Therefore, Appellant's death sentence must be vacated. "A mitigating circumstance is broadly defined as 'any aspect of a defendant's character or record and any of the circumstances of the offense' that reasonably may serve as a basis for imposing a penalty less than death.", Rogers v. State, 783 So.2d 980, 995 (Fla. 2001), quoting Campbell v. State, 571 So.2d 415, 419 (Fla.1990).

As was adduced at his allocution hearing, Appellant started life as a child of a broken home (T/V XXXIII/2761,2766). Nonetheless, Appellant was a bright, happy child (T/V XXXIII/2749). However, Appellant's life took an unfortunate and dramatic change for the worse when his two cousins came to live

with him (T/V XXXIII2751). These two cousins, i.e., Pat and Eddie Chamberlain, were themselves victims following the unfortunate murder of their mother (T/V XXXIII/2769-70). Again, Appellant's tragedy was further compounded by the unrelated murder of his uncle at essentially the same time (T/V XXXIII/2769-70).

It was uncontradicted at trial that Appellant was unmercifully tormented by his older cousins (T/V XXXIII/2808-13). Donald Chamberlain, Appellant's step father, freely admitted to being an alcoholic and to essentially ignore Appellant as he grew up (T/V XXXIII/2793,2796,2797). Helen Gilmore, Appellant's great-aunt and a PhD in elementary education was concerned enough with the "red flags" she saw in Appellant's change of behavior to take him for professional guidance (T/V XXXIII/2758).

However, family indifference again caused Appellant's problems to go untreated (T/V XXXIII/2751).

In a prescient statement, Donald Chamberlain described his step-son as "submissive, passive and a follower" (T/V XXXIII/2793). However, the trial court gave this mitigator slight weight. Secondly, the trial court failed to consider the

possibility of rehabilitation. "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger,526 So.2d 900, 902 (Fla.1998); Holsworth v. State, 522 So.2d 348, 354-355 (Fla.1988). Evidence as to the possibility of rehabilitation is so important that its exclusion requires reversal Simmons v. State, 419 So.2d 316, 320 (Fla. 1982); Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987). In conclusion, this mitigation is not insubstantial, nor is it the "least mitigated of first degree murders.", State v. Dixon, 283 So.2d 1, 7 (Fla.1973). Secondly, as part of his findings justifying the imposition of the death penalty, the trial court found that the murders were committed in a cold, calculated and premeditated fashion (T/V XXXIII/2929-30). It is respectfully submitted that the trial court committed reversible error in finding the CCP aggravator. "'The focus of the CCP aggravator is the manner of the killing, not the target.'", Doorbal v. State, 2003 Fla. LEXIS 107; 28 Fla. L. Weekly S 108 (January 30,2003), quoting Bell v. State, 699 So.2d 674, 678 (Fla. 1997). "Four elements must be satisfied to support a finding of CCP. The murder must have been the product of cool

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and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage.

Furthermore, the murder must have been the product of a careful plan or prearranged design to commit murder before the fatal incident. The murder must also have resulted from heightened premeditation–i.e., premeditation over and above what is required for unaggravated first-degree murder. And finally, there must not have been any pretense of legal or moral justification for the murder." Doorbal v. State, 2003 Fla. LEXIS 107; 28 Fla. L. Weekly S 108,(January 30,2003).

Applying the above test requires reversal in the case at bar. The murders were anything but the product of a cool, calm reflection. Instead, they were the product of panic and frenzy. First, Thomas Thibault, the sole shooter, committed the first murder, i.e., the triggering event, of Daniel Ketchum as a result of Ketchum's struggles with him. Second, there was no time for the type of heightened premeditation mandated for the finding of the CCP aggravator. An *ad hoc* decision was made, with Ms. Ingram as a prime instigator and Thomas Thibault as the man with the gun making the decisions. Therefore, Appellant's

sentences must be vacated and his case remanded for re-sentencing.

POINT X

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE §921.141 (5)(D) IS UNCONSTITUTIONAL

The felony murder aggravating circumstance (Florida Statute 921.141 (5) (d) violates both the Florida and United States Constitutions. The use of this aggravator renders Appellant's death sentence unconstitutional under Article I, § 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. This is a pure issue of law which the Court reviews *de novo*. Appellant acknowledges that this Court has previously rejected this issue.

In the instant case, Appellant signed a Waiver of Penalty Phase Jury (R.V. VII/1243). Appellant also filed a Motion to Prohibit Death Qualified Voir Dire (R.V. VIII/1304). In its Sentencing Order, the trial court found that each of the six (6) aggravating factors in §921.141(5) were proven beyond a reasonable doubt. Aggravating circumstance (5)(d) states as follows:

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> the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or attempting to commit, any robbery, sexual battery, arson, burglary, kidnaping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb. §921.141, (Florida Statutes).

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. §784.04(1)(2) 2.

This aggravating circumstance violates both the United States and Florida Constitutions. Under the Eight and Fourteenth Amendments an aggravating circumstance must comply with two (2) requirements before it is constitutional. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. State, 456 U.S. 410 (1982). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra.

The felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony murder qualifies for this aggravator. It also provides no reasonable method to justify the death

penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not, as in this case, the actual killer, or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation". See: §921.141(5)(i) (Fla. Stat.). Rogers v. State, 511 So.2d 526 (Fla. 1987).

It is illogical to make a person, i.e. Appellant, who does not kill and or intend to kill automatically eligible for the death penalty while a person who kills with a premeditated design is not automatically eligible for the death penalty. This aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra. It also violates Article I, § 2, 9, 16, and 17 of the Florida Constitution.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitutions, and/or the federal constitution. State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979); Engberg v. State, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W. 2d 317, 341-347 (Tenn. 1992). It is respectfully submitted that

this Court should declare the instant aggravator unconstitutional pursuant to the Eighth Amendment and Article I, Section 17 of the Florida Constitution. The error in the instant case is harmful. Reversal for re-sentencing is required.

POINT XI

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO DEMONSTRATE THE USE OF AN ASP WHEN THE OBJECT WAS NOT CLEARLY IDENTIFIED BY THE WITNESS

During the testimony of Ms. Ingram, the following exchange occurred:

> MS. SKILES: Judge, the deputy who is sitting by the jurors has an asp on him at this moment and I wanted permission from the Court to allow him to display that for purposes of asking Ms. Ingram if that is similar to the object she saw the defendant with the night, the early morning of the homicide. THE COURT: Good for the State knowing that you should ask that prior to any demonstration. MR. LERMAN: And I object to any demonstration of an object that may or may not look like what was actually used on the night of the incident. THE COURT: Well, I'm going to allow you to use a weapon like that at some point but not an actual participant in the trial. He is in here performing the function of a Correctional officer and guarding the defendant, which is his responsibility and he is standing, you know, next to the jury. That's a little too personal of an involvement but you can get

> some other officer to bring one in and display it. (T/V XXII/1123-24).

The State ultimately asked Crime Scene Investigator McCall to bring in an asp and demonstrate its use before the jury (T/V XXII/1127). Prior to the demonstration, defense counsel again renewed his objection (T/V XXII/1127). The trial court again overruled the objection and thus allowed the State to proceed (T/V XXII/1129).

Appellee asked Ms. Ingram the following:

> Q. Ms. Ingram, looking at the device that Investigator McCall is holding in his hand how is that the same or different than what you saw the defendant with in the early morning of Thanksgiving?
>
> A. It was more like it would be a knife, but instead of a blade coming, it was like a pole, thats what I remember it to be as. Q. In looking at this particular item, is this portion the pole like portion? A. Right.
>
> Q. Was it bigger or smaller if you know? A. It might have been smaller. Q. Now, that particular item, did you see what eventually happened to it? A. No, ma'am, I didn't (T/V XXII/1134).

It is respectfully submitted that the preceding demonstration of a device not properly identified by the witness constitutes an abuse of discretion by the trial court, violating

Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution.

In Florida, "[d]emonstrative aids and exhibits may be used during trial as an aid to the jury understanding a material fact or issue. The demonstrative evidence must be an accurate and reasonable reproduction of the object involved. The evidence is subject to a §90.403 balancing.", Ehrhardt, Florida Evidence, §401.1 (2002 Edition). Florida Statute 90.403 provides in part that "[r]elevant evidence is inadmissable if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence...", (90.403, Florida Statute, 2001).

The standard of review for admissibility of evidence is abuse of discretion. Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA, 2001), See also: Melendez v. State, 700 So.2d 791 (Fla. 4th DCA, 1997). However, a trial court's discretion is limited by the rules of evidence. See: Taylor v. State, 601 So.

2d 1304, 1305, (Fla. 4th DCA 1992). Nardone 798 at supra. See also: Ramirez v. State, 810 So.2d 836 (Fla. 2001).

What was clear from Ms. Ingram's testimony was that the object she allegedly saw Appellant holding, was not the asp that Investigator McCall wielded before the jury. This in and of itself is not surprising, as Ms. Ingram by her own admission was taking copious amounts of illegal drugs that resulted in memory loss (T/V XXI/1011). Again, the object Ms. Ingram described on the stand was "It was more like it would be a knife, but instead of a blade coming, it was like a pole, thats what I remember it to be as." (T/V XXII/1134). Ms. Ingram's identification of the object allegedly carried by Appellant was inaccurate, and the trial court abused its discretion in allowing Appellee to proceed with a highly prejudicial demonstration. Reversal is required.

CONCLUSION

For the foregoing reasons, Mr. Chamberlain's convictions and

sentences must be reversed, and his cause remanded to the lower court for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Georgina Jimenez-Orosa, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401, by courier this _____ day of , 2003.

Of Counsel

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12- point Courier New type, a fond that is not spaced proportionally.

Attorney for John Chamberlain

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