IN THE SUPREME COURT OF FLORIDA

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

REPLY 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.

References and notations to Appellee's Answer Brief will be designated as "AB", followed by the appropriate page number.

STATEMENT OF THE CASE

Appellant will rely on the Statement of the Case as set forth in his Initial Brief.

STATEMENT OF FACTS

Appellant will rely on the Statement of the Case as set forth in his Initial Brief.

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

The gist of Appellee's argument on this issue is, first, that "[b]ecause a death sentence was an option, it was constitutionally permissible for the State to 'death qualify' the jury (A/B 17). Appellee does not dispute that Appellant gave abundant notice of his intention not to avail himself of the jury for the penalty phase of his trial. However, the proper question to ask is whether the trial court, by denying Appellant's Motion to Prohibit a Death Qualified Voir-Dire, and allowing Appellee to strike the jurors it did, amount to reversible error.

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It is respectfully submitted that this question was answered in Buchanan v. Kentucky, 483 U.S. 402 (1987). Specifically, in Footnote Sixteen the Court stated:

> there is no reason to revisit the issue whether social science literature conclusively shows that 'death qualified' juries are 'conviction-prone', although petitioner spends much effort in citing studies to that effect. See Brief for Petitioner 21-25. Most of those studies also were before the Court in McCree, see 476 U.S. at 169-170, nn. 4, 5; the Court's discussion of them there, see id., at 168-171, need not be repeated here. In any event, just as it was assumed in McCree that the studies were 'both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more 'conviction prone' than 'non-death-qualified juries", id., at 173

(emphasis added), we make similar assumption here.

Secondly, Appellee argued that "Chamberlain's argument fails to take into consideration the possibility that Chamberlain could change his mind and decide he wanted a jury for his penalty phase" (A/B 19). This argument is flawed for two obvious reasons. First, if that were so, then an accused could never opt to waive a penalty phase jury, and secondly, in the case at bar; Appellant did not change his mind. Reversal is required.

POINT II

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

It is Appellee's contention that the instant point on appeal should not be heard by the Court because Appellant's Motion to Recuse failed to meet some of the technical requirements of §2.160(c)& (e), Fla. R. Jud. Admin. (AB-27). It is respectfully submitted that Appellee's position is wrong.

First, "[w]hether the motion is 'legally sufficient' is a question of law. It follows that the proper standard of review is *de-novo*.", Barnhill v. State, 834 So.2d 836, 843 (Fla. 2002), quoting McKenzie v. Super Kids Department Store Inc., 565 So.2d 1332,1335 (Fla. 1990). This then being the case, the Court should be allowed to fully hear and decide the issue on its merits.

Second, the main case that Appellee relies on, Parsons v. Motor Homes of America, (465 So. 2d 1285 (Fla. 1st DCA 1985)is distinguishable. Parsons is a breach of warranty case involving a motor home. Parsons, 465 So. 2d at 1287. The case at bar is a Capital Case. 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).

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The actual basis for the recusal in Parsons dealt with a perceived violation of Canon 2 of the Code of Judicial Conduct, as the Plaintiff was running for the presiding judge's seat Parsons, supra. at 1290.

Certainly the lack of the attorney's certificate of good faith in that circumstance can hardly compare to the instant cause decrying the predisposition of the trial court to have Appellant put to death. Furthermore, slight delays in the ten day rule are permissible due to holidays[1]. See: Stockstill v. Stockstill, 770 So.2d 191 (Fla. 5th DCA 2000). Finally, Appellant would include this Court's recent decision in Roberts v. State, 840 So.2d 962 (Fla. 2002), Rehearing Denied March 13, 2003 to his earlier argument on the present point on appeal.

[1] The Labor Day weekend transpired between the issuance of the lower court's sentence on Thibault and the filing of Chamberlain's motion.

POINT III

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

Appellant relies on his Initial Brief for further argument on this point.

POINT IV

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

Appellant relies on his Initial Brief for further argument on this point.

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POINT V

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

Appellant relies on his Initial Brief for further argument on this point.

POINT VI

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED DETECTIVE FRASER TO CONTINUE

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TESTIFYING AFTER SPEAKING TO APPELLEE DURING HIS TESTIMONY

Appellant relies on his Initial Brief for further argument on this point.

POINT VII

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

Appellant relies on his Initial Brief for further argument on this point.

POINT VIII

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

Appellant relies on his Initial Brief for further argument on this point.

POINT IX

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE

Appellant respectfully draws the Court's attention to its recent decision in Thibault v. State, 850 So.2d.485,(Fla. 2003). Thomas Thibault was a Co-Defendant of Appellant, and the actual shooter. Mr. Thibault was sentenced to death following an open plea to the trial court. Thibault, 850 So.2d at 485.

This Court reversed Thibault's death sentence, and remanded his case for a new penalty phase, Thibault, at 847. in so doing, the Court held:

> *the record must affirmatively show that the defendant voluntarily and intelligently waived the right to have a sentencing jury render its opinion on the appropriateness of*

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> *the death penalty,* granted him by the express provision of §921.141 F.S., Thibault *at 486, [emphasis in the original]*

In addition, the same is conceded by Appellee in Footnote #10 (AB/64). Should Thibault not receive a death sentence in his penalty phase, then Appellant's death penalty becomes untenable. In all other respects, Appellant re-raises the arguments on this point filed in his Initial Brief.

POINT X

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

Appellant relies on his Initial Brief for further argument on this point.

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

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Appellant relies on his Initial Brief for further argument on this point.

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 Debra Rescigno, Esq., Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, by U.S. Mail this 2nd day of January, 2004.

Gregg S. Lerman, Esq.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

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

_____
Gregg S. Lerman, Esq.
Attorney for Appellant