Supreme Court of Florida

CASE NO. SC13-442

JOEL LEBRON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON DIRECT APPEAL FROM A FINAL JUDGMENT OF GUILTY AND DEATH PENALTY FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLANT'S CORRECTED AND AMENDED INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

A. Introduction:

This is a direct appeal from a final judgment of conviction and death sentence imposed by the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County. The Appellant, Joel G. Lebron (hereinafter "Lebron"), was indicted by the grand jury on May 8, 2002 along with four co-Defendants for various crimes including murder in the first degree. R.I at 110. The charges arose out of the shooting death of Ana Maria Angel (hereinafter "Ms. Angel") which occurred in April of 2002. The Defendants also were charged with other crimes including the attempted murder of Nelson Portobanco (hereinafter "Mr. Portobanco"), kidnapping of both Ms. Angel and Mr. Portobanco with a weapon, armed robbery of both of the victims, and sexual battery upon Ms. Angel. R.I. at 110-16.

The public defender was appointed to represent Lebron, but moved to withdraw based upon a certification of a conflict of interest. R.I. at 118. That motion was granted and private attorneys Rafael Rodriguez and Jeffrey Fink were appointed as special assistant public defenders. R.I at 119, 127. Defendant Lebron entered a plea of not guilty. R.I at 122. The State filed a notice of intention to seek the death penalty pursuant to Fla. R. Crim. P. 3.202. R.I at 124.

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Over the next several years, discovery ensued including the taking of dozens of depositions. *See generally* R.II-R.XVII. Motion practice included Lebron's motion for severance of trial from the other co-Defendants which was granted. R.XVII at 2903.

Defendant Lebron filed a motion to suppress statements he had made during interrogation and other statements made during what appeared to be informal conversations. R.XVII at 2927-36. The grounds for that motion included the argument that, while "police claim . . . that Defendant Lebron knowingly, intelligently, and voluntarily waived his constitutional rights to remain silent and to be interrogated without counsel present, and agreed to answer the officer's questions . . . Such questioning had already commenced and such opportunity to consult with an attorney prior to questioning no longer existed," by the time the cautionary warnings were given. R.XVII at 2931.

Other grounds for the motion included the argument that "Defendant Lebron's condition, much of which was due to the actions of the police from the time of Defendant Lebron's arrest, renders any waiver by Defendant Lebron of his constitutional rights involuntary and not knowing and intelligent." R. XVII at 2932. The motion was granted, but on appeal to the Third District Court of Appeal, the portion of that order dealing with post-*Miranda* statements was reversed.

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Defendant Lebron filed several motions seeking to declare unconstitutional Florida's death penalty statute. R. XVIII at 2939, 2948, 2968, 2974, 2978, 3018, 3026, 3035, 3059. One of those motions was Lebron's motion to bar imposition of death sentence on the ground that Florida's capital sentencing procedure is unconstitutional under *Ring v. Arizona*. R.XVIII at 2968.

B. Summary of the Facts:[1]

On April 27, 2002, the victims Angel and Portobanco, who were high school boyfriend and girlfriend, decided to go for a walk on the beach. R. CIX at 4243. They drove to Miami Beach to the southernmost point where a nightclub called Penrod's is located. R. CIX at 4243. They parked the car and walked through an access way between vegetation to get to the beach. R. CIX at 4243. It was Saturday night and the club was busy. R. CIX at 4243.

After walking on the beach for a while, the couple decided to go back to their car. R. CIX AT04245. At that time, the five co-Defendants arrived in an extended cab truck and parked near Penrod's. R. CIX at 4248. The Defendants were there looking for easy robbery victims. R. CIX at 4485. As Ms. Angel and Mr. Portobanco

[1] All facts herein are stated in the light most favorable to the State without waiving argument that much of the evidence should have been suppressed.

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left the beach, they were approached by the Defendants and forced at gunpoint to get into the truck. R. CX at 4486-87.

While they were in the back of the truck, the Defendants demanded that they turn over their property including wallets, cell phones, and jewelry. R. CX at 4490. The Defendants used Ms. Angel's ATM card to attempt to make a withdrawal from a nearby cash machine. R. CX at 4490.

As the Defendants drove the abducted couple, Ms. Angel was ordered to remove her underwear and the men engaged her in various sex acts against her will. R. CX at 4495. Three of the five Defendants, including raped and molested Angel as the driver of the truck proceeded northbound on I-95. R. CX at 4495.

Eventually, the driver pulled over to the side of I-95 and Mr. Portobanco was forced out of the truck by Lebron and another of the Defendants. R. CX at 4499. Portobanco was marched to the side of the highway near the barrier wall, and was stabbed repeatedly by the Defendant Caraballo and Lebron. R. CX at 4499. Portobanco was seriously injured, and he laid motionless on the ground pretending to be dead, until the stabbings and beatings stop. R. CIX at 4279.

Lebron and Caraballo went back to the truck, leaving Mr. Portobanco on the side of the road. R. CS at 4500. He survived his injuries and was able to make his

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way back to the travelled portion of the roadway where he stopped a passerby and reported the crime. R. CIX at 4280.

The Defendants continued to drive north with Angel in the truck until they reached Palm Beach County, where they once again pulled over to the side of the highway. R. CIX at 4275. Lebron and the Defendant Roman took Angel out of the truck, and walked her to the side of the roadway behind a wall concealed from view. Ms. Angel was forced to kneel down, where she was shot and killed by a revolver shot to the head. R. CX at 4504.

Police investigating the crime traced calls made from Mr. Portobanco's cellular telephone, which was taken from him in the robbery, to a number in Orlando. R. CIX at 4267. That number was associated with an apartment in Orlando in the name of Hector Caraballo. R. CIX at 4268. Police went to the management office of the apartment, and asked about Hector Caraballo. The leasing agent on the premises that she did not know Hector Caraballo but knew someone by the name of Victor Caraballo, the same as one of the Defendants in this case. She directed the officer to that apartment.

Police forcibly entered the apartment and located Lebron's co-Defendant Caraballo. They searched the apartment and found some of the victims' property, including Angel's purse covered with a shirt. They also found Angel's and

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Portobanco's wallets hidden in the toilet tank. In a nearby garbage dumpster, police found Angel's sandals.

While at the apartment complex where Defendant Caraballo resided, investigators encountered the co-Defendant Cesar Mena. R. CIX at 4423. Mena was the Defendant who had been driving the truck during the abduction, rape, and robbery. During that investigation, police identified as additional suspects the Defendants Jesus Roman and Joel Lebron.

Lebron's brother-in-law, Quinonez, took the police to another apartment complex nearby where they found him and Defendant Roman. The circumstances of Lebron's arrest are fully detailed in argument Argument Section I.D for brevity's sake. *See infra,* pp. 57-61. More than twenty-four hours after the investigation began, in the early morning hours of the following Monday, the police located the fifth co-Defendant Caraballo whose telephone number was linked to a call made from the victim Portobanco's cell phone.

Meanwhile, Defendant Lebron was taken to FDLE headquarters in Orlando for questioning. R. XXXII at 5000. Some two hours after his arrest and detention, Agent Hidalgo finally administered the *Miranda* rights to Lebron and handed him a standard waiver form in Spanish. R. XXXII at 4945. Lebron signed the form waiving his rights and continued talking to the investigating officers. R. XXXII:

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4945-46; State's Ex. 14 at R. XXII: 3668-69. Officers thought Lebron's statements were being tape recorded, but the recorder failed to function due to being set on the wrong setting. R. CIX at 4339. After police determined that the recording had not been made, those involved in the questioning gathered together and memorialized as many of the details of those statements as they could remember. R. CIX at 4518. LeBron told police about his involvement in the crimes, including the shooting death of Angel. R. CX at 4504.

While the investigation was going on in Orlando, including the interrogation of Defendant Lebron, an FDLE officer found Ms. Angel's body along the side of I-95. A handgun was found in Defendant Mena's apartment, which a ballistics expert testified was the weapon that fired the bullet which killed Ms. Angel. R. CIX at 4653.

Crime scene investigators examined the interior of the Ford F-150 pickup truck and found that it contained Ms. Angel's DNA and a specimen of semen. Angel's body was also examined and traces of semen were found possibly associated with Lebron. Lebron's fingerprint was found on a mirror in the truck. R. CIX at 4386-90.

The bag containing sandals found next to Lebron when he was arrested tested positive for Portobanco's blood.

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C. The Pretrial *Frye* Hearing:

The defense sought to introduce testimony of Dr. William Lambos, PhD, regarding his opinion of Lebron's mental state based upon a test called a computerized quantitative electroencephalogram, referred to throughout the proceedings as a "QEEG" study. R.LII at 8072. The State sought to exclude Dr. Lambos' testimony pursuant to *Frye v. United States*, 293 F.1013 (1923). *Id*. in a motion filed seeking to conduct a hearing pursuant to the *Frye* case, the State explained that it "challenges the reliability of the QEEG study, the procedure used, the administration by Dr. Lambos, the norms used for comparative purposes, the improper use of LORETA [low resolution brain electromagnetic tomography]" from the study. R.LII at 8072. The *Frye* hearing was conducted over two days in August of 2012. R.LXXXVIII at 1339-2041. That hearing was conducted jointly with the *Frye* hearing involving the same issue of the admissibility of the QEEG study in the case of *State v. Escobar*, F89-11887A, a case unrelated to the Lebron matter. R.LXXXVII at 1342.

At the *Frye* hearing, the State conceded that QEEG—which had been available since at least 1996 and used in the scientific community—was not a new and novel science, but contended that QEEG was not generally accepted in the scientific community for the purpose offered by the defense in the present case: to

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diagnose traumatic brain injury. R.LXXXVIII at 1355-58. Following that hearing, the trial court granted the State's motion to exclude the testimony concerning QEEG, holding that "[t]he defendant has failed to demonstrate by a preponderance of the evidence that both the underlying scientific principles and procedures for the quantitative electroencephalogram testing are generally accepted within the scientific community for evaluating patients with traumatic brain injury." R. LVIII at 9317.

D. Guilt Phase of Trial Proceedings:

The State called as a witness Ms. Angel's mother, Margarita Osorio. R. LXXI at 4140. Ms. Osorio identified her daughter's purse and clothing she was wearing on the night of her death. R. CVIII at 4147-4149. Those exhibits were introduced over Defendant's objection as the State's exhibits 1 through 4. R. CVIII at 4146-49.

Ms. Osorio testified that her daughter went out on a date with her boyfriend Nelson Portobanco at 8:00 p.m. on Saturday, April 27, 2002. R. CVIII at 4150. Ms. Angel had her cell phone with her, and was given a curfew of 12:00 midnight. R. CVIII at 4150. Ms. Osorio testified that "if she had to stay out longer, she would call me." R. CVIII at 4150.

By midnight, when Ms. Angel had not returned home, her mother started calling her, but got no answer. R. CVIII at 4151. In the early morning hours, Mr.

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Portobanco's mother and sister came to Ms. Osorio's home, picked her up, and took her to the hospital where Mr. Portobanco had been admitted. R. CVIII at 4151-52. She saw Mr. Portobanco in the hospital bed and, when asked to describe his condition she testified: "He was destroyed. He was swollen. He had been beaten up. He was very scared. And he was so bad off." R. CVIII at 4153.

Prosecution witness Jorge Gordon testified that, on the evening in question, he was working as a security guard at Penrod's nightclub on Miami Beach. R. CVIII at 4162. He identified a photograph of a white Ford 150 pickup that looked like one he saw parked in a little roadway near the nightclub that night. R. CVIII at 4165-66. That photograph was admitted into evidence as the State's exhibit #8. R. CVIII at 4167.

Mr. Gordon testified that he was questioned by police on the day after he saw the subject truck near Penrod's. R. CVIII at 4173. He told the police about seeing one young male near the truck the night before. R. CVIII at 4173. The police came by a few days later, and showed Mr. Gordon a photographic lineup. R. CVIII at 4173-74. That photographic lineup was introduced into evidence over the Defendant's objection as the State's exhibit #9. R. CVIII at 4174. Mr. Gordon identified the person in photograph #1 on exhibit #9 as the person he had seen next to the truck the night before. R. CVIII at 4175.

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Miami Beach Police Department Crime Scene Investigator Lenett Holbrook testified that she responded to a scene on the side of Interstate 95 in Boca Raton on April 29, 2002. R. CVIII at 4185. There, off of the roadway and close to the sound barrier in a bushy area, Ms. Holbrook saw a body who was identified as Ana Maria Angel. R. CVIII at 4186-89. Ms. Holbrook stayed on the scene for about four hours looking for evidence and then went to the Palm Beach County's Medical Examiner's office to observe the autopsy on Ms. Angel's body. R. CVIII at 4189.

During that autopsy Mr. Holbrook observed an "alternate light source investigation" during which investigators use as a tool that "breaks down the light into different wave lengths," allowing the investigator to see colors and shades," which detects organic material including "body fluids or trace evidence [which] will glow under certain wave lengths of light." R. CVIII at 4190-92. Ms. Holbrook detected areas of Ms. Angel's body from which she collected swabs from those locations. R. CVIII at 4192.

Ms. Holbrook identified the skirt and blouse that were removed from Ms. Angel's body during the investigation. R. CVIII at 4194-95. Ms. Angel's skirt had some significant staining on the back. R. CVIII at 4196.

Ms. Holbrook witnessed Dr. Wilson, the medical examiner, collecting rape kit evidence from Ms. Angel's body. R. CVIII at 4197. Ms. Holbrook photographed

an x-ray of Ms. Angel's head which was introduced into evidence as the State's exhibit #13. R. CVIII at 4201-02. She also witnessed Dr. Wilson open Ms. Angel's head and remove objects that "appeared to be pieces of lead. They were one projectile and several pieces of projectile fragments." R. CVIII at 4202-03. +

The State called as a witness Nelson Portobanco, the surviving victim in the case. R.CIX at 4238. On the evening of Saturday, April 27, 2002, Mr. Portobanco picked up Ms. Angel for their monthly dinner date. R.CIX at 4241. The couple went to dinner at Las Ranchos in Bayside. R.CIX at 4242. After dinner, they walked around Bayside window shopping, and then decided to go to the beach and sit around on the sand. R.CIX at 4242-43. They decided to go to the area of South Beach where Penrod's was. R.CIX at 4243.

After sitting on the beach for a while and the enjoying each other's company, they decided to leave the beach area because Ms. Angel was getting cold. R.CIX at 4244-45. They "walked back the same access road that was behind Penrod's" toward the area where are Mr. Portobanco had parked his car. R.CIX at 4246.

Along the way, Ms. Angel put her shoes back on and Mr. Portobanco saw a white pickup truck in the vicinity. R. CIX at at 4247. He saw an "individual outside of the truck standing outside of the truck standing by the front—by the hood on the passenger's side. And another individual—closer to the front passenger door."

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R.CIX at 4248. Then a third individual appeared as Mr. Portobanco and Ms. Angel resumed walking after she had put her shoes back on. R. CIX at 4248.

That third person approached Mr. Portobanco and Ms. Angel and pointed a gun at them. R. CIX at 4248. It was a dark night and Mr. Portbanco did not get a good look at the gun-wielding individual. R. CIX at 4249. He could tell that the individual with the gun was a male. *Id*. That man demanded that the couple get inside the truck using "aggressive tones." *Id*. the young couple got into the truck "[b]ecause he had a gun." *Id*.

The truck resembled the truck in the photograph that was the State's exhibit #8. R. CIX at 4250. It had a front seat and a back seat, and the couple entered the back seat of the truck along with the man with the gun. R. CIX at 4251.

Another man go into the back seat of the truck "next to her on the passenger side next to the door." R. CIX at 4253. He was behind a front seat passenger, and another person was in the driver's seat." R. CIX at 425-54. There was also another individual that got into the back seat from the driver's side "and laid on the floorboard on the passenger side." R. CIX at 4254. All of the men who got into the truck spoke Spanish. *Id*. Mr. Portobanco did not get a look at any of the individuals and he could not identify them. R. CIX at 4254-55.

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Once inside the truck, the men "demand[ed] that [the victims] give them all of [their] belongings." R. CIX at 4255. They relinquished their wallets, cell phones, and jewelry. R. CIX at 4255. Mr. Portobanco identified a photograph of the couple's wallets which was introduced into evidence over objection as the State's exhibit 19. R. CIX at 4256-57. His actual wallet was introduced into evidence as the State's exhibit 40. R. CIX at 4259.

The driver of the truck at first could not find the keys, but eventually started the truck and began driving in a northward direction. R. CIX at 4261-62. During the ride, one of the abductors "kind of identified himself as Diablo, the devil," but no one else ever identified themselves to Mr. Portobanco, to his recollection. R. CIX at 4262.

The abductors took the truck to an ATM, but were unsuccessful in their attempts to get any money because they did not have the right PIN numbers. R. CIX at 4263. They stopped at a second ATM to attempt to take money out, and then left again after that stop. R. CIX at 4263. The truck resumed travel, and Mr. Portobanco could hear one of the individuals using his cell phone making a call. R. CIX at 4262.

Mr. Portobanco identified a telephone call made at 12:48 a.m. from his cell phone to an Orlando telephone number he could not identify. R. CIX at 4267. Mr.

Portobanco testified that the owner of the telephone number that was called with his cell phone, Hector Caraballo, was a person not known to him. R. CIX at 4268.

As the truck proceeded, the abductors directed Mr. Portobanco and Ms. Angel to "recreate the kiss that they had seen" while they were walking back from the beach. R. CIX at 4269. When Mr. Portobanco refused, "they proceeded to punch [him] closed-fist over the head." R. CIX at 4269. They kept hitting him until he and Ms. Angel actually kissed. R. CIX at 4270. After that, they ordered him to touch her breasts and her vagina. R. CIX at 4270. When he refused, "[t]hey proceeded to gang rape her." R. CIX at 4270. After the men in the back seat had finished with Ms. Angel, "[t]he individual in the front seat, he wanted his turn," so they changed positions. R. CIX at 4274.

After awhile, the truck stopped and two of the men took Mr. Portobanco out of the truck. R. CIX at 4275. They proceeded down an embankment along the side of an expressway to a wall where Mr. Portobanco was directed to kneel. R. CIX at 4276-77. He refused to kneel, whereupon "[o]ne of the individuals told the other one to go get—back to the truck and get the gun, which at that point [he] decided to kneel." R. CIX at 4277. He was directed to turn his face to look at them but refused because he was afraid that, if he saw them, they would kill him. R. CIX at 4278. He turned around and never got a good look at them. *Id.*

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As soon as he started turning his head, he felt a stab wound by his eye and they proceed to stab him in the back and neck and stomp on his head. R. CIX at 4278. He was stabbed more than ten times including being slashed on this neck and having a cut on the back of his head. R. CIX at 4279. Once they started stomping on him, he "just decided to play dead hoping that they would stop," but the stomping "continued for a while" until "gradually they stopped." R. CIX at 4279. He laid there waiting and they eventually left. R. CIX at 4279.

Mr. Portobanco eventually decided to get up and was feeling in pain and was "scared and shocked." R. CIX at 4279-80. He ran back up the embankment and attempted to wave down a passing motorist. R. CIX at 4280. He saw the white truck down the road, but it took off.

Mr. Portobanco was "frantically trying to wave down a car passing by," and eventually someone decided to stop. R. CIX at 4281. He reported that he had been kidnapped and that his girlfriend was still in the truck down the road, so the person who stopped called 911. R. CIX at 4281.

Mr. Portobanco identified photographs depicting the various injuries he suffered on the night of his abduction. R. CIX at 4285. Those photographs were introduced into evidence as exhibits 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, and 52. R. CIX at 4287-92.

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The State called as a witness Edward Royal, who had been employed by the Florida Department of Law Enforcement but was, at the time of trial, retired. R. CIX at 4317. He was the lead FDLE agent in the subject case. R. CIX at 4320. Special Agent Royal went to the scene near Sample Road off I-95 and began his investigation. R. CIX at 4326. He testified that the cellular telephone bill connected with Mr. Portobanco's telephone reflected a call that had been made April 28, 2002 at 12:48 a.m. to a number associated with Hector Caraballo of Orlando, Florida. R. CIX at 4328.

The investigators met and decided to fly to Orlando with Detective Marrero. R. CIX at 4329. They went to the apartment in Orlando at 9900 Sweepstakes Lane, Apartment 8. R. CIX at 4330. Other officers at the scene had an individual in custody by the name of Victor Caraballo. R. CIX at 4331. Special Agent Royal arrested Mr. Caraballo and he was transported to Orlando FDLE headquarters. R. CIX at 4333. While there, another individual, the co-Defendant Cesar Mena, was arrested and brought to that location. R. CIX at 4333.

Thereafter, the Defendant Lebron and co-Defendant Roman also were brought to FDLE headquarters in Orlando. R. CIX at 4335.

Special Agent Royal later attempted to assist in the investigation by having a taped statement made by Mr. Lebron translated from Spanish to English and

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transcribed. R. CIX at 4339. He asked Detective Marrero to provide the tape but the tape was blank because the recorder had not worked properly. R. CIX at 4339-40. Upon learning of the inability to transcribe the statement that the investigators had thought had been recorded, Detective Special Agent Royal had contacted the senior prosecutor on the case, Abe Laeser. R. CIX at 4333. Mr. Laeser's instructions were "[t]o get together all of those people that had—investigators that have been involved in the recording of Mr. Lebron. Get them together in Orlando and have them re-create the interview as best as they could." R. CIX at 4343. That decision was made on May 13 and the meeting was held on May 15, 2002, approximately two weeks after Mr. Lebron had been interviewed. R. CIX at 4343.

The State called as a witness the fingerprint examiner who was involved in the case, Daniel Sumner. R. CIX at 4365. Mr. Sumner testified that there were no usable fingerprints on the gun that had been confiscated, but that there was a fingerprint matching Lebron's that was found on the mirror of the Ford F150 truck. R. CIX at 4386, 4390.

Thomas King testified as a prosecution witness. R. CX at 4409. Mr. King was one of the investigators for FDLE involved in the subject case. R. CX at 4410. Agent King was involved in surveillance of an apartment complex at 2418 Abbey Road in Orlando. R. CX at 4420. He was looking for the white Ford F150 and a red

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Honda vehicle that was linked to the case. R. CX at 4421. While performing surveillance, Agent King saw someone arrive in a car, walk to the front door of the apartment, knock on the door, and enter. R. CX at 4422. A few minutes later, that man and a second Hispanic male came out of the apartment, approached Agent King's car and asked what was up. R. CX at 4423. He went back into the apartment with the second individual. Agent King identified the individual as the co-Defendant Cesar Mena. R. CX at 4423.

At that point, Agent King went to the apartment, knocked on the door, and Cesar Mena answered the door. R. CX at 4424. Mr. Mena came outside and started talking with the officers, along with Beverly Suarez. R. CX at 4425. Ms. Suarez provided Agent King with a rental agreement for the white pickup truck, which was introduced into evidence as the State's exhibit 59. R. CX at 4425.

Agent King returned to the address where he had seen Cesar Mena in the early morning hours of April 29 and knocked on the apartment door. R. CX at 4436. He spoke to Beverly Suarez again, who gave the officers consent to search the apartment. *Id*. Agent King and another agent searched the apartment. R. CX at 4437. When asked what, if anything, he discovered inside the apartment, Agent King testified, over Mr. Lebron's objection of relevance and prejudice, that he "found in a small basket two knives."

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The jury was excused and the court asked the prosecutor whether he had any evidence to connect those knives found in the closet to the subject case. R. CX at 4439. The prosecution first said that he had no "forensic evidence to connect the knives," and when asked whether "someone describe[d] the knife, and the knife matched the description," the state attorney responded: "I wouldn't say that exactly, no." R. CX at 4440. The trial court offered to provide a curative instruction to the jury, whereupon defense counsel stated that such instruction would not cure the problem of the knives being found and remove the implication about the knives being involved in this case. R. CX at 4441. Thereupon, the defense moved for a mistrial, which was denied. *Id*.

At that juncture, the prosecution represented to the court that "Lebron said the knife that was used to stab Mr. Portobanco was located in a small basket inside the same closet" where a gun was hidden at Mena's home. R. CX at 4441-42. The court then overruled Lebron's objection to the testimony concerning the knives. R. CX at 4442. Agent King also discovered a jacket hanging up in the closet, which contained a handgun inside the pocket. R. CX at 4444-45.

The prosecution next called as a witness Detective Larry Marrero. R. CX at 4454. Detective Marrero was called in the early morning hours of April 28, 2002 and went to the hospital where Mr. Portobanco had been admitted. R. CX at 4457.

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Detective Marrero spoke with Mr. Portobanco and gathered evidence including the pants that Mr. Portobanco had been wearing at the time of his abduction. R. CX at 4459. Detective Marrero was assigned as the lead investigator from the Miami Beach Police Department. R. CX at 4461. He traveled with FDLE Agent Royal to Orlando to participate in the investigation. R. CX at 4461.

Detective Marrero eventually wound up at the Alhambra Apartments in Orlando where other police units including helicopters were at the location. R. CX at 4465. At that location, Detective Marrero saw the Defendant Lebron and Jesus Roman. R. CX at 4466. Detective Marrero observed articles near Lebron including "a duffel bag and some brown plastic bags like the ones you see at Publix stores—supermarkets." R. CX at 4466. Mr. Lebron and Mr. Roman were taken into custody. R. CX at 4469. The arrestees' clothing was taken from them there at the scene to preserve "trace evidence." R. CX at 4472. Mr. Lebron and Mr. Roman were transported to the FDLE station. R. CX at 4472-73.

At the station, Mr. Lebron was taken to a detective's office for questioning. R. CX at 4473. Mr. Lebron had been wrapped in sheets to conceal his nakedness, and then he was given a paper gown to wear. R. CX at 4474.

Detective Marrero obtained a tape recorder to record the interview with Mr. Lebron. R. CX at 4476. At first Detective Marrero was provided with a "tiny

microcassette" recorder, but he preferred to use a different kind of recorder so he asked for another piece of equipment. R. CX at 4476-77. He was then provided with a large recorder measuring "about twelve inches by fifteen inches [with] several dials. There was a gauge—there was actually a—like a voice-monitor gauge on it. And it was a normal cassette" rather than a microcassette. R. CX at 4477.

Agent Hidalgo advised Mr. Lebron of his *Miranda* rights in Spanish and obtained his signature on a *Miranda* form waiving those rights. R. CX at 4478-79. When asked to review what Mr. Lebron said during the interview, defense counsel stated that he "renew[ed] our motions and object to this," to which the trial court acknowledged that such objections were "[p]roperty [sic] preserved," and overruled them. R. CX at 4483.

Mr. Lebron told Detective Marrero that he and the other co-Defendants decided to travel to Miami "to party," and arrived at a club on the beach where they attempted to sneak in. R. CX at 4485. When they were unable to sneak in and decided that they did not have enough money to enter the club, they decided to commit a robbery. R. CX at 4485-86.

Mr. Lebron and Jesus Roman "went onto the beach looking for victims," and hid in the bushes along one of the trails. R. CX at 4486. While there, they saw a male and a female whom Mr. Lebron approached "with a firearm and ordered the

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male victim into the—to a truck, a nearby truck." R. CX at 4486-87. Mr. Lebron stated that he and the other co-Defendants placed the victims into the truck and entered it themselves. R. CX at 4487. "Cesar Mena was the driver. Victor Caraballo was in the front passenger seat. Joel Lebron, Nelson Portobanco, Ana Angel, [and] Hector Caraballo [were in the back seat]. Jesus Roman [was] on the floorboard [of the rear passenger compartment." R. CX at 4488.

Detective Marrero testified that Mr. Lebron said the Defendants "demanded all their property, their jewelry, their wallets, and their cell phones," and that the victims "gave their property over to them." R. CX at 4490. They attempted to withdraw cash from an ATM, but were unsuccessful. R. CX at 4490. Detective Marrero said that Mr. Lebron requested that the victims engage in sexual activity, and pushed Mr. Portobanco to the floorboard when he refused. R. CX at 4494. Then "[h]e asked the victim for her panties," and "he smelled them" and when she removed her panties he passed them around to the other occupants in the vehicle. R. CX at 4494.

Thereafter, Mr. Lebron told Detective Marrero that he and the Caraballos performed sex acts on Ms. Angel. R. CX at 4495.

Detective Marrero testified that Mr. Lebron admitted to taking Mr. Portobanco out of the vehicle along I-95, where he and Victor Caraballo stabbed and

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kicked the victim. R. CX at 4499. The two Defendants then got back into the truck and continued driving. R. CX at 4500.

After the truck left the area where they had left Mr. Portobanco, Hector Caraballo made a hand motion indicating that they had to "get rid of" Ms. Angel. R. CX at 4501. The hand motion was "like, back and forth across the throat" with his fingers. R. CX at 4501.

Thereupon, the truck was stopped again and Mr. Lebron and Jesus Roman got out of the vehicle with Ana Angel. R. CX at 4501. The Defendants took her to a sound-barrier wall where there was heavy vegetation, and "he orders her down to her knees." R. CX at 4501. There, Mr. Lebron "told Jesus Roman to move away from her" then "he pointed the firearm at the back of her head, and the weapon dry-fired." R. CX at 4502. Because the revolver only had a single bullet in it, Mr. Lebron had to pull the trigger more than once, while Ms. Angel "began to beg for her life, and told him please not to do this." R. CX at 4501. "He pulled the trigger again, it was a dry fire." R. CX at 4503. The third time he pulled the trigger, "it discharged," and "Ana fell over." R. CX at 4504.

Mr. Lebron stated that the Defendants returned to Orlando, purchased some crack cocaine and they went to the apartment complex where the Caraballos lived. R. CX at 4504. While at that apartment complex, the Defendants disposed of the

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victims' property in a garbage dumpster. R. CX at 4504. Then "they went to a car detailing place and they cleaned the vehicle inside and out . . . [because] they wanted to try to dispose or destroy any evidence that was in there." R. CX at 4505. Mr. Lebron told Detective Marrero "that the knife and the gun both were in Cesar Mena's home" in "the master bedroom closet." R. CX at 4505.

Detective Marrero testified that he asked Mr. Lebron "who he thought was most responsible," and Mr. Lebron responded "that he was the most responsible—that he had stabbed him and that he had shot her." R. CX at 4507. When he asked why he had killed Ms. Angel, Mr. Lebron responded: "I don't know. Maybe she could identify me." R. CX at 4507.

After the interview of Mr. Lebron was completed, Detective Marrero attempted to make copies of the tape he had used to record the interview, and provided them to the FDLE and other agencies. R. CX at 4515. However, on May 13, 2002, he was shocked to learn "[t]hat the tapes were blank." R. CX at 4516. Following a conversation with assistant state attorney Abe Laeser, a decision was made for the investigating officers who were present during the interview of Mr. Lebron to gather together "[t]o recount the details of the statement." R. CX at 4517. The investigators gathered together and created another set of notes which they used to write a police report. R. CX at 4518.

FBI agent Kevin Farrington testified on behalf of the State. R. CXI at 4623. Agent Farrington participated in this search of the apartment on Abby Road in Orlando and found the blue denim jacket containing a handgun. R. CXI at 4625.

The handgun was tested by Thomas Fadul, who at the time of trial was the crime laboratory manager for the Miami-Dade Police Department. R. CXI at 4627-28. Mr. Fadul tested the projectiles that were recovered from Ms. Angel's body and compared them to bullets shot from the subject pistol. R. CXI at 4631. He testified that, "within a reasonable degree of scientific certainty, this particular firearm here is the one that fired Projectile A." R. CXI at 4653.

FDLE Special Agent Eric Hernandez participated in the investigation and interview of Mr. Lebron. R. CXII at 4694-4710. Agent Hernandez corroborated the other witnesses' version of the crimes, including the abduction of the victims, the robberies and the sexual assaults upon Ms. Angel. R. CXII at 4692-4717. When asked whether he had "ever heard a suspect talk about doing the kinds of things to another victim that [he] heard Joel Lebron say he did to Ana Marie Angel," over Defendant's objection Agent Hernandez responded: "In my 25 years of a law enforcement officer, I never heard a confession like that when he talked−to the agent about the−how he and the other raped and did whatever." R. CXII at 4718. Lebron's

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counsel objected and moved to strike such testimony, which was overruled by the court. R. CXII at 4718.

Agent Hernandez then described Mr. Lebron's statements concerning the killing of Ms. Angel, including her pleas to be spared from death and other circumstances. R. CXII at 4721.

Agent Hernandez testified about the meeting held by the police officers involved in the investigation to reconstruct Mr. Lebron's statement following the discovery that the tape recorder which was being used during his interview had not recorded that statement. R. CXII at 4729. When asked by the prosecution whether, prior to going in to that meeting, he had not "put in writing and memorialized what [his] memory was of Mr. Lebron's statement," he responded as follows:

> A. Sir -- and, again, in my 25 year[s] of law enforcement career ***I never heard a statement like that one -- the one I [am] not going to forgot in my rest of my life***. For that reason, I don't took [sic] any writing or anything because I have everything in my memory. At the time, I was more fresh.

R. CXII at 4731 (emphasis added).

Following Agent Hernandez's testimony the jury was released for the night and the court acknowledged that defense counsel had reserved a motion for mistrial, stating as follows:

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> The Court: . . . . Alright. Mr. Fink, why don't we start in the back and work our way forward. And hopefully, we'll get it all in.
>
> You move for a mistrial on the question of: This was one of the – this was one of the most severe cases I had investigated. That's why I remember. Or something like that.

R. CXII at 4745.

Lebron's counsel agreed that "[t]hat was my motion." R. CXII at 4746. The trial court denied the motion for mistrial, ruling that defense counsel had opened the door to such testimony and cross examination by "challenging the ability of these individuals to remember independently." R. CXII at 4746.

At that juncture, defense counsel was permitted to argue other motions for mistrial that he had reserved previously. R. CXII at 4747. Counsel argued that the prosecutor's opening statement "ran afoul of the *Postell* issue," when the prosecutor had informed the jury that the reason police began looking for Lebron was "that Victor was in custody, Mena was in custody. At the point, you know, as a result, they knew the other people they were looking for." R. CXII at 4747. Therefore, the conclusion was inescapable that the other co-Defendants, who were not on trial with Mr. Lebron, had implicated Mr. Lebron after their capture. R. CXII at 4747-48. The court denied that motion, basing its ruling on the instruction to the jury that opening statement did not constitute evidence and stating: "I don't think it's so fundamental

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that it would have caused this Court to grant a mistrial even if this Court concluded that maybe it should not have been said." R. CXII at 4748-49.

The medical examiner who conducted the autopsy of Ms. Angel, Dr. Christopher Wilson, was called as a prosecution witness. R. CXIII at 4769. Dr. Wilson had taken tissue samples from the body, swabbed it for residue, taken nail scrapings, pubic hair and other hair samples and put the specimens in individual envelopes. R. CXIII at 4796. He testified that he placed seals on the box containing the specimens, but earlier the same day, in the presence of a witness, broke a red tape seal that was on the box "to take a look inside." R. CXIII at 4797.

When the box was moved into evidence, Mr. Lebron's counsel objected on the grounds of "chain of custody," and a "discovery violation because the product – the item was further handled while we're in trial outside of the courtroom without us being told about it." R. CXIII at 4797-4801. The prosecutor informed the court that it was he who had cut the red seal from the box, looking inside at the interior packages, which had not been touched. R. CXIII at 4803. The box was opened in the presence of Judge Thomas's judicial assistant, Andrew, so his Honor held: "I don't know what additional discovery you would need other than knowing that it was open and Andrew was present at the time that the doctor opened the box seal

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but not this package – the seals of the packages that are contained within the box." R. CXIII at 4803. Therefore, the objection to the exhibit was overruled.

Dr. Wilson testified that the cause of Ms. Angel's death was "a gunshot wound to the head." R. CXIII at 4806-07.

The State called as its witness Orange County Sheriff's Deputy Sarabia. R. CXIV at 4959. Deputy Sarabia testified, over the Defendant's renewed objection in prior motions to suppress, to the statements made by Mr. Lebron after he was taken to FDLE headquarters. R. CXIV at 4982-84.

The State called Jeffrey Johnson, who works in the forensic biology section of the Miami Police Department's Crime Laboratory. R. CXV at 5017. Mr. Johnson testified about DNA testing that he had done on samples taken on the Defendant's Mr. Portobanco and Ms. Angel. R. CXV at 5040-49. He identified DNA taken from the Ford truck rear seat which included a female portion and a male portion. Mr. Johnson testified that his analysis resulted in the determination that Nelson Portobanco could be excluded from the male portion of the DNA fraction he examined. R. CXV at 5109-10. He also could exclude Jesus Roman and Cesar Mena as being contributors to the male fraction from that seat bottom. R. CXV at 5110.

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When asked the names of those persons whose standards Mr. Johnson received "that could be included as possible contributors to the male portion of that mixture," over Defendant's objection, Mr. Johnson was able to testify that Hector Caraballo, Victor Caraballo and Joel Lebron could be possible contributors. R. CXV at 5110-11.

The parties and the court conducted a charge conference to go over the verdict form and jury instructions. R. CXV at 5128-44. Defense counsel argued that instruction 3.13, insofar as it states that "no juror has the right to violate the rules we all share" is inconsistent with Florida law. R. CXV at 5142-43. The trial court ruled that he was "giving it over objection." R. CXV at 5143.

The State rested its case and the defense reserved a motion for judgment of acquittal. R. CXVI at 5296.

The defense then called as a witness Gladys Laporte. R. CXVI at 5296. At the time the crimes in question occurred, Ms. Laporte was the live-in girlfriend of Mr. Lebron's co-Defendant, Hector Caraballo. R. CXVI at 5297. Ms. Laporte also was acquainted with the co-Defendant Cesar Mena. R. CXVI at 5298.

On the Friday before the Defendants were arrested, Ms. Laporte said, Cesar Mena came to Ms. Laporte's home unannounced. R. CXVI at 5298. "He just – he showed up." *Id*. his demeanor was angry and he said that he was angry because

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"[s]upposedly he had been ripped off [for] money and drugs." R. CXVI at 5299. He spoke with Hector Caraballo and Mr. Mena about the drug rip off and said that "[h]e wanted to go back to Miami. And he wanted to – he said he wanted to scare the guy or – and get the money or the drugs." R. CXVI at 5299-5300.

Ms. Laporte's testimony was offered by the defense to refute the prosecution's position that the purpose of the trip down to Miami was to rob innocent individuals and commit the subject crimes. R. CXVI at 5285. The testimony also was offered to establish that "Mr. Lebron was not there as part of the planning. He was not part of the planning to have this trip initiated." R. CXVI at 5285.

Following Ms. Laporte's testimony, the defense rested. R. CXVI at 5305. Defense counsel made a motion for judgment of acquittal. R. CXVI at 5311. As part of that motion for JOA, defense counsel adopted the previous motion to suppress and all previous motions, essentially arguing that the evidence to be considered in ruling on the judgment of acquittal should not include Mr. Lebron's confession and the other evidence that should have been suppressed. R. CXVI at 5312. The trial court denied the motion. *Id.*

The parties presented closing arguments. R. CXVII at 5335. During closing argument, the prosecuting attorney performed a reenactment of the murder of Ms. Angel according to the State's theory, describing Ms. Angel as kneeling with her

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fingers interlocked begging not to be killed. R. CXVII at 5359. The prosecutor then pulled the trigger on the pistol in the presence of the jury, to which Defendant objected. R. CXVII at 5359. After that the prosecutor again pulled the trigger, dry-firing the pistol for the jury and did it a third time. R. CXVII at 5360. The defense objected to all three of the reenacted trigger pulls, which objections were overruled. R. CXVII at 5360.

In his closing argument the prosecutor referred to the length of time between the Defendant's arrest and the time of trial, gesturing to those in the courtroom including Ms. Angel's mother Ms. Osorio and stating: "in this instance, it's ten and one half years after the crime that ***we're all sitting here finally waiting. Everyone.***" (Emphasis added). Defendant objected to that argument, which objection was sustained. R. CXVII at 5424-25.

Following closing arguments, the court charged the jury. R. CXVII at 5443. The jury retired to deliberate. R. CXVII at 5481. Thereupon, defense counsel moved for a mistrial on the ground that, during the prosecutor's closing argument, "he made it very clear to the jury that everyone is waiting for justice. And then he made a hand gesture toward the mother who was sitting in this courtroom. This is in direct violation of what this court decided to exercise its discretion and permit the mother to remain in this courtroom as unobtrusively as possible." R. CXVII at 5481-

82. Defense counsel also asked for "the record to reflect that although there hasn't been any obvious wailing or anything that both Mr. Fink and I have noticed that she has on occasion cried . . . what happened also is that the cameras on occasion focused on her in view of the jurors. But what made it worse was when Mr. Rubin made that allusion to the mother, which your Honor sustained our objection." R. CXVII at 5482.

Defense counsel also moved for mistrial on the ground that the cumulative effect of the errors warranted a mistrial, citing as one example of such errors that the prosecutor "pulled the trigger on the firearm in the presence of the jury three times, which is demonstration." R. CXVII at 5482-83. Counsel argued "that this was an improper demonstration to cause unfair prejudice to the Defendant by inflaming the prejudices and – [sic] of the jury when they themselves picture the situation as the prosecutor is discharging the firearm in their presence." R. CXVII at 5483.

In ruling on the motions for mistrial, the court acknowledged that he "clearly saw Mr. Rubin move his body in the direction of the family" when he stated that everyone had been waiting for this trial and the verdict. R. CXVII at 5486. That was the reason the judge sustained defense counsel's objection. *Id.* Although stating that he did not "think it was so overt that it's going to cause the jurors to totally disregard all of the law and all of the – from the jury selection to the law that we

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provided in the case," His Honor made it clear that "the record needs to reflect that I did see Mr. Rubin move his hands and body, turn his body in the direction of the family . . . at the time he made that statement." R. CXVII at 5487. The motion for mistrial was denied on that ground, with the court reserving ruling on the argument that the dry-firing of the pistol was not an improper demonstration. R. CXVII at 5488.

The jury returned a verdict of guilty on count one for first degree murder, guilty on count two of attempted premeditated first degree murder with a deadly weapon, guilty on counts three and four of kidnapping with a firearm, guilty on counts five and six of robbery with a firearm and guilty on count seven of sexual battery with a deadly weapon. R. CXVII at 5504.

E. The Penalty Phase, *Spencer* Hearing and Sentencing:

Following recess of a few days, the penalty phase proceedings commenced. R. CXVIII at 5520. The parties called witnesses and presenting arguments to the jury. Following those proceedings, the jury returned an advisory sentence recommending death by a vote of nine to three. R. LXV at 10673. The jury did not make findings of fact concerning the aggravators that were found warrant a recommendation of death. R. LXV at 10673.

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Following that verdict, a *Spencer* hearing was held on January 25, 2013. R. CXXV at 6175. At that hearing, Mr. Lebron was not invited by the court to make any statement on his own behalf. R. CXXV at 6175-6252.The parties submitted written memoranda concerning their respective positions on sentencing in lieu of closing argument at the *Spencer* hearing. R. LXXI at 11612-11643.

A *Spencer* hearing was conducted on January 25, 2013. R. MXXV at 6175-6252. Sentencing was scheduled for January 31, 2013. R. MXXVI at 6253.

At the *Spencer* hearing, the defense called as a witness Brad Fischer, PhD, a clinical forensic psychologist. R. MXXV at 6178. Dr. Fischer is a Harvard graduate who wrote a dissertation in the field of "prediction of dangerous behavior." R. MXXV at 6179. He is licensed in North Carolina as a clinical forensic psychologist. R.MXXV at 6180. Dr. Fischer examined Mr. Lebron, conducted investigation into his background, and observed that there had been no incidents of violence involving Mr. Lebron since his arrest in 2002 on the charges in question. R. MXXV at 6190. He summarized Mr. Lebron's behavior as follows: "He's a person who gets along very well. He does a very good job with laundry. He—he has no problems with officers. He has no problems with the inmates." R.MXXV at 6191. When asked whether he had "reach[ed] an overall conclusion as to Mr. Lebron's likelihood of

future danger," testified "[t]hat he will continue to behave the way he has been behaving." R.MXXV at 6191.

Dr. Fischer continued: "He's never gotten in trouble, and I don't see any reason why he would change. He's—he's a religious person." R.MXXV at 6191. Dr. Fischer, when asked whether Lebron "would have a low likelihood of future dangerousness," he answered as follows:

> A. The answer is yes from two perspectives. One is you asked me to do the evaluation, which I did, and that's my opinion.
>
> The second is that if you look at the data, all the numbers concerning the likelihood of getting disciplinaries, it's not really a high likelihood for many prisoners. But in his case, it's especially not likely.
>
> But, in other words, if you took a—even a rougher prisoner, the chance—it's usually a rare event that we're having a disciplinary, especially on a continuous basis. ***But he's that exception that falls in the none category***.

R.MXXV at 6193-94 (emphasis added).

The defense next called a corrections officer, Pedro Frade. R.MXXV at 6222. Officer Frade had been a corrections officer at Metro West Correction Facility where Mr. Lebron had been held prior to trial. R.MXXV at 6222-23. He first met Mr. Lebron about five years prior to the *Spencer* hearing. R.MXXV at 6223. His duties including supervising Mr. Lebron, feeding him, and otherwise attending to him. *Id*.

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Officer Frade described Lebron as "a unit trustee," which meant that he had been appointed by supervisors to a position of trust after analyzing his records. R.MXXV at 6223.

Officer Frade testified that someone who is violent or who had disciplinary reports would not normally be classified as a trustee. R.MXXV at 6224. Office Frade had interaction with Lebron on a daily basis, and never observed any acts of violence, problems with other inmates, or problems with corrections officers over the several years they interacted. R.MXXV at 6222.

The defense next offered into evidence an affidavit to establish the fact that, at Lebron's direction. His attorney approached the State on two separate occasions offering to plead guilty to the charges in question. R.MXXV at 633. "Those offers were not accepted by the State." *Id*. following the testimony of the two witnesses and the offer of the subject affidavit regarding the plea, Lebron's attorney asked the Court to take judicial notice of Lebron's "behavior which was without any incident during the course of the trial, particularly during the testimony, and also during the receipt of the two verdicts from the jury, including the verdict of guilty and the verdict in which the [death] recommendation was reached." R.MXXV at 6233-34. The defense asked the court to take judicial notice of "[t]he relative ages of all five Defendants, particularly the Caraballos brothers." R.MXXV at 6234.

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Thereupon, the court asked whether there was "[a]nything else from the defense." R.MXXV at 6235. Counsel responded "As to the *Spencer* hearing, no, Your Honor." R.MXXV at 6235.

At no time during the *Spencer* hearing did the trial court offer Lebron the opportunity to be heard in person. He did not speak at that hearing. R.MXXV at 6175-6252.

The parties were invited to make closing arguments in written form. R.MXXV at 6244. Prior to the sentencing hearing, the Defendant filed his Memorandum in Support of a Sentence of Life in Prison Without Parole. R.LXXI at 11612. In that memorandum, the defense argued "that imposition of a death sentence would violate Defendant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, United States Constitution, and Article I, §§2, 9, 16, 17 and 22, Florida Constitution. R. LXXI at 11623. The basis for that argument was set forth in the memorandum as follows:

> Pursuant to §921.141(2), Florida Statutes, the jury must determine "whether sufficient aggravating circumstances exist as enumerated in (5)." The defense asserts that Defendant is entitled to a jury finding pursuant to Florida law. Moreover, the United States Supreme Court *Ring v. Arizona*, 526 U.S. 584 (2002), ruled that "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact must be found by a jury beyond a reasonable doubt." Additionally, "[A]ll the facts which must exist in order to

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> subject the defendant to a legally prescribed punishment must be found by the jury." *Id*.

R. LXXI at 11623.

The State also filed a Sentencing Memorandum. R. LXXI at 11643. That memorandum addressed only the Defendant's arguments concerning the absence of aggravating factors and the presence of mitigators. The State made no argument concerning the constitutional issues raised in the Defendant's Sentencing Memorandum. R. LXXI at 11643-11661.

The court entered a Sentencing Order on January 31, 2013. R. LXXI at 11662. In that order Judge Thomas found that the State established beyond a reasonable doubt the aggravating circumstance under §921.141(5), Fla. Stat., that "the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." R. LXXI at 11664.

Next, Judge Thomas addressed the aggravating circumstance described in §921.141(5)(d), that "the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any: robbery, sexual battery, or kidnapping," holding that "[t]he evidence established the existence of this

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aggravating circumstance beyond a reasonable doubt." R. LXXI at 11665. The court assigned that aggravator great weight. *Id*.

Next, the trial court found that the State had proven beyond a reasonable doubt the aggravator set forth in §921.141(5)(e), that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest." R. LXXI at 11665. The sentencing order found that "[t]his aggravator was proved beyond a reasonable doubt and [Judge Thomas] assigns this aggravtor factor great weight." R. LXXI at 11667.

The trial court next considered whether the State had established the aggravating factor of "the capital felony was committed for pecuniary gain," pursuant to §921.141(5)(f), Fla. Stat. The trial court found "that the murder was motivated by pecuniary gain as evidenced by the Defendant's armed robbery conviction in this case." R. LXXI at 11667. In addressing whether the aggravator in question could be considered over an objection of "improper doubling" Judge Thomas ruled that it was not improper to consider the aggravator in the circumstance where "there are two or more enumerated felonies committed during the course of the murder, and one involves obtaining money and one does not involve obtaining money." R. LXXI at 11667. Noting Lebron's conviction of "armed kidnapping and armed sexual battery, crimes which do not involve obtaining money," the trial court found that it "can consider pecuniary gain as a valid aggravating circumstance,"

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found that "this aggravating [circumstance] has been established beyond a reasonable doubt by the evidence," and assigned "this aggravator some weight." R. LXXI at 11667-68.

The fifth aggravating factor considered by the trial court was whether "the capital felony was especially heinous, atrocious, or cruel," pursuant to §921.141(5)(h). R. LXXI at 11668. Although recognizing "that a murder by shooting, when it is ordinary in the sense that it is not set apart from premeditated murders, is as a matter of law 'heinous, atrocious, or cruel' within the meaning of statute providing the death penalty for this aggravator," Judge Thomas determined that all of the circumstances of this case [which were summarized] found that "[t]his murder was both merciless and unnecessarily torturous," and "conclude[d] that this aggravator was proven beyond a reasonable doubt." R. LXXI at 11669. The court assigned that aggravator great weight.

The final aggravator considered by the trial court, pursuant to §921.141(5)(h), whether "the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Judge Thomas ruled that "[t]he totality of circumstances clearly establishes this aggravating circumstance was established beyond a reasonable doubt and this Court will assign it great weight." R. LXXI at 11671.

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Judge Thomas in his Sentencing Order next considered the both statutory and non-statutory mitigating factors. R. LXXI at 11671-675. First His Honor found that "[t]here was no evidence that the defendant was under extreme duress or under the substantial domination of anyone." R. LXXI at 11672. Therefore, the court assigned that mitigator "no weight." *Id.*

Next, although finding that "[t]here is no doubt that Mr. Lebron, early in his life, suffered from a severe brain injury," in addressing the factor of "[t]he capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law [as being] substantially impaired, Judge Thomas found that "there is absolutely no evidence in this record that the brain injury contributed in any way to his behavior during the commission of this crime or any time thereafter," and found that there was "no doubt Mr. Lebron appreciated the criminality of his conduct," assigning "no weight to this mitigator." R. LXXI at 11672.

Next the court found that the mitigating circumstance of "[t]he age of the defendant at the time of the crime" as inapplicable because Mr. Lebron was "in his early twenties at the time of this murder." R. LXXI at11672. Therefore, finding that the aggravator "does not apply," the trial court "assigns it no weight." *Id*.

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Judge Thomas next addressed the non-statutory mitigating factors presented by the defense, assigning "little weight," to those mitigators "individually and collectively." Those non-statutory mitigators were summarized in the Sentencing Order as follows:

Non-Statutory Mitigating Factors

> The defense asked this Court to consider other (non-statutory) mitigating circumstances including: Joel Lebron grew up in extreme poverty; Joel Lebron witnessed extreme domestic violence in the home; Joel Lebron's father was an adulterer; Joel Lebron's father was an alcoholic; Joel Lebron witnessed extreme violence in his neighborhood; Joel Lebron grew up in one of the worst neighborhoods in Puerto Rico; Joel Lebron suffered a serious accident as a child; Joel Lebron sustained traumatic brain injury; Joel Lebron received substandard medical attention in Puerto Rico after his accident; Joel Lebron's Puerto Rico medical records show that defendant received a head CT without contrast which showed evidence of intracranial hemorrhage evidence to suggest a depressed cranial vault fracture; Joel Lebron was treated for post traumatic epilepsy at age 7; Joel Lebron suffered further head injury after his accident; Joel Lebron had few responsible male role models; Joel Lebron brain injury occurred at an important time of social development; Joel Lebron lost most of his motor skills after the accident; Joel Lebron had to be retrained to walk and use his hands; Joel Lebron walked stiffly for weeks after the accident; Joel Lebron had to wear diapers again at age 4 or 5; Joel Lebron did not receive appropriate rehabilitation during his convalescence; Joel Lebron had a poor self-image; Joel Lebron suffered hair loss; Joel Lebron grew up with constant debilitating headaches; Joel Lebron continues to suffer headaches; Joel Lebron grew up with episodic loss of consciousness; Joel Lebron was taunted at school and called monkey boy because of his neurological tick and scratching and sniffing himself; Joel Lebron missed an important part f his childhood while recuperating; Joel Lebron was referred to as the "dead one" by one of his teachers; Joel

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> Lebron lacked social skills and had trouble making friends; Joel Lebron went only to the 7th grade[;] Joel Lebron suffered physical and emotional abuse at the hands of his older brothers; Joel Lebron[‘s] father abandoned the family when Joel Lebron was 9 years old; Joel Lebron’s father was violently sodomized and burned to death; Joel Lebron had trouble doing simple tasks growing up; Joel Lebron could not learn fluent English despite classes; Joel Lebron suffered his mother’s loss shortly after moving to Florida and shortly before the incident; Joel Lebron was good with his sister’s children; Joel Lebron started using drugs again in Orlando; Joel Lebron has loss of impulse control; Joel Lebron is unable to reason abstractly due to head injury[;] Joel Lebron’s brother was fatally shot in jail; Joel Lebron’s family was dysfunctional—his brothers were convicted of serious crimes; Joel Lebron has deficits related to his frontal lobe that affects executive functioning; Joel Lebron has damaged frontal lobe; Joel Lebron had poor parental modeling; Joel Lebron had a drug abuse problem; Joel Lebron had an abnormal brain; Joel Lebron’s SPECT scan is consistent with the purported mechanism of childhood injury; Joel Lebron’s SPECT scan showed a perfusion defect in the right frontal cortex with bilateral frontal cortices; Joel Lebron has frontal lobe dysfunction; Joel Lebron would “zone out” since the accident; Joel Lebron has an extremely low probability of future dangerousness; Joel Lebron exhibited exemplary court room behavior; Joel Lebron showed some level of remorse; and after his arrest, Joel Lebron cooperated with police.

R. LXXI at 11673-75.

The Sentencing Order next addresses the issue of “proportionality.” R.LXXI at 11675. Stating that the court “had considered the totality of the circumstances of this case in comparison with other cases and sentences and reported decisions,” His Honor “conclude[d] the facts of this case militate in favor of the imposition of the death penalty,” without expressly comparing the facts of this case to any reported

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death penalty decision. R. LXXI at 11676. The order concluded by sentencing Mr. Lebron to death. R. LXXI at 11676. A judgment of conviction and sentence were rendered on February 7, 2013. R. LXXI at 11680, 11683.

F. Defendant's Motion for New Trial:

Defendant filed a motion for new trial. R. LXXI at 11688. The grounds for that motion included the argument that a new trial should be granted because "[t]he only evidence of the State's contention that Defendant Lebron fired the murder weapon killed Ms. Angel and stabbed Mr. Portobanco is [Mr. Lebron's] purported statement according to the statement of Detective Marrero." R. LXXI at 11689.

Defendant next argued that "[t]he court wrongfully and repeatedly informed the jury venire out of which the jury was chosen that they did not have the power of pardon during the guilt phase of the trial," which error "was compounded when the court later refused to modify the jury instruction, as requested by the defense, which also states that the jury cannot pardon during the guilt phase of the trial." R. LXXI at 11690-91.

SUMMARY OF THE ARGUMENT

This Court should reverse Lebron's conviction and death sentence for a variety of reasons. His post-*Miranda* statements should have been suppressed

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because his purported wavier of *Miranda* rights was involuntary and coerced. Without those statements, a judgment of acquittal should have been granted.

Lebron's death sentence must be reversed under the Supreme Court's decision in *Hurst* because the trial court erroneously failed to require the jury to make findings of the existence of aggravating circumstances.

The trial court erroneously denied Lebron's motion for mistrial based upon Agent Hernandez's statement that this was the worst crime he ever saw. The agent improperly compared this crime to the facts of other cases that the jury never learned about.

A mistrial should have been granted due to the State's violation of *Postell* during opening statement. The jury was provided with implied hearsay by the opening statement which informed the jury that police started looking for Mr. Lebron after taking co-Defendants into custody and apparently learning information from them that would be hearsay.

The trial court erred in denying a mistrial based upon the emotional effect of the victim's mother in the courtroom, as to whom the prosecutor implied a connection with the prosecution.

Lebron's death sentence must be reversed because he was not expressly informed of his right to allocate at the *Spencer* hearing.

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The trial court erroneously excluded evidence of a QEEG study under *Frye*. That evidence would have established traumatic brain injury that was relevant to Lebron's mental state.

The trial court erroneously instructed the jury so as to deprive it from its just pardon power. Florida cases recognize that juries must be instructed in such a way to permit the exercise of such power. By instructing the jury must return a verdict only under the law, that negated the jury's pardon power.

The trial court erred in denying the Defendant's motion for mistrial for the State's repeated and improper dry-firing of the revolver used to kill Ms. Angel by clicking the hammer of the revolver in the presence of the jury, the State violated the Golden Rule by instilling fear and dread into the jury.

The cumulative effect of all these errors necessitate reversal.

ARGUMENT

I.
LEBRON'S POST-*MIRANDA* STATEMENTS SHOULD HAVE BEEN SUPPRESSED BECAUSE HIS PURPORTED WAIVER OF MIRANDA RIGHTS WAS INVOLUNTARY AND COERCED

A. Introduction:

This Court should reverse Lebron's conviction because it was improperly obtained through the introduction of his inculpatory statements in violation of his

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Miranda rights. His purported waiver of those rights was ineffective because it was involuntary and coerced. Although the Third District Court of Appeal reversed Judge Thomas' order suppressing those post-*Miranda* statements, this Court has the power to determine the suppression issue in this appeal, because there was no avenue for immediate review of the Third District's erroneous ruling.

B. The Third District's Decision is Not the Law of the Case:

The State appealed the trial court's order granting Defendant Lebron's motion to suppress his pre-*Miranda* and post-*Miranda* statements as an "Order Granting Defendant, Joel Lebron's, Motion to Suppress Statements Made At The Police Station." R. XXXV at 5462. The State took a non-final appeal to the Third District Court of Appeal pursuant to Fla. R. App. P. 9.140(c)(1)(B) ("state may appeal an order . . . suppressing before trial confessions, admissions, or evidence obtained by search and seizure."). The Third District affirmed the suppression of his pre-*Miranda* statements but reversed the suppression ruling with regard to the Lebron's post-*Miranda* statements. *See* R. XLIV: 6601-10, reported at *State v. Lebron*, 979 So. 2d 1093 (Fla. 3d DCA 2008).

Following the Third District's ruling, Lebron continued to preserve his objections to the admissibility of the subject statements. Lebron anticipates that the State may contend he cannot raise any issue regarding the suppression of the tainted

post-*Miranda* statements before this Court under the law of the case doctrine. The doctrine provides that "a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." *United States v. Escobar-Urrego,* 110 F.3d 1556, 1560 (11th Cir. 1997). The dispositive question is whether the Defendant had an actual opportunity to challenge the decision.

Lebron did not have the ***opportunity*** to challenge the Third District's decision regarding the suppression issue. The only possible basis for such challenge in this Court at that time would have been by invoking this Court's original jurisdiction under Rule 9.030(a)(3), which provides: "The supreme court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction, and may issue writs of mandamus and quo warranto to state officers and state agencies. The supreme court or any justice may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge." Fla. R. App. P. 9.030(a)(3).

Prohibition is not the appropriate tool for revoking an order already entered. *See English v. McCrary,*348 So. 2d 293, 296-97 (Fla. 1977). Mandamus is typically used to require a government actor to perform a nondiscretionary duty or obligation

that he or she has a clear legal duty to perform,[2] and quo warranto is used to test a person's right or privilege arising from the state.[3] Ergo, it would not have been appropriate for Lebron to petition this Court for relief using any one of those writs.

"The purpose of a writ of habeas corpus is to inquire into the legality of a prisoner's present detention." *Wright v. State,* 857 So. 2d 861, 874 (Fla. 2003). Ergo, it would not have been appropriate for Lebron to petition for a writ of habeas corpus, or any other extraordinary writ, either. Therefore, Lebron until now did not have any actual opportunity to challenge the Third District's decision, and the law of the case doctrine is inapplicable.

Even assuming *arguendo* that the law of the case doctrine was applicable, this Court has determined it has jurisdiction in a death penalty case to "reconsider" a suppression issue decided by a District Court of Appeal on interlocutory appeal. *See Preston v. State*, 444 So. 2d 939, 942 (Fla. 1984); *see also Ross v. State*, 45 So. 3d 403 (Fla. 2010) (reversing the convictions and sentences of death of defendant on a

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[2] *See Austin v. Crosby,* 866 So. 2d 742, 743 (Fla. 5th D.C.A. 2004) (holding that mandamus may only be granted if there is a clear legal obligation to perform a duty in a prescribed manner).

[3] *See Ex parte Smith,* 96 Fla. 512, 118 So. 306 (Fla. 1928).

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suppression issue pursuant to its mandatory jurisdiction under Article V, Section 3, of the Constitution of the State of Florida).

In *Preston,* the Court noted the law of the case doctrine applied, but found "reconsideration" was warranted under the following analysis:

> We do recognize the general rule that all points of law which have been adjudicated become the "law of the case." *Greene v. Massey,* 384 So.2d 24, 28 (Fla. 1980). However, an appellate court does have the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case. *Strazzulla v. Hendrick,* 177 So.2d 1, 4 (Fla. 1965). Reconsideration is warranted only in exceptional circumstances and where reliance on the previous decision would result in manifest injustice. When the Fourth District transferred the interlocutory appeal in this case to this Court, we stated that interlocutory appeals under article V, section 3(b)(3) of the constitution are confined to orders "passing on a matter" which on final judgment would be appealable to this Court. *State v. Preston,* 376 So.2d 3, 4 (Fla. 1979). We noted that routine interlocutory orders, such as the suppression order at issue here, could be appealable to this Court if a conviction is had and a death sentence imposed. *Id.* For these reasons, we declined jurisdiction to hear the appeal at that time. We now find that we do have jurisdiction of this cause and that reconsideration of the suppression issue is proper. Section 921.141(4), Florida Statutes (1981), mandates automatic and full review of a judgment of conviction resulting in imposition of the death penalty. This Court has determined that the statute requires that "in capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial." Fla. R. App. P. 9.140(f). The interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review jurisdiction support our decision to review this issue.

Preston v. State, 444 So. 2d at 942. The same considerations apply in this case. Accordingly, the Court should consider, or reconsider, as the case may be, this issue.

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C. Standard of Review:

"[I]f a defendant confesses during a custodial interrogation, in order for the confession 'to be admissible in a criminal trial, the State must prove that the confession was not compelled, but was voluntarily made.'" *Ross v. State*, 45 So. 3d 403, 412 (Fla. 2010) (quoting *Ramirez v. State*, 739 So. 2d 568, 573 (Fla. 1999)). In *Ramirez*, this Court explained the State's "heavy burden of proof" as follows:

> The State bears the burden of proving that the waiver of the *Miranda* rights was knowing, intelligent and voluntary. *See Sliney*, 699 So. 2d at 667; *Thompson v. State*, 548 So. 2d 198, 204 (Fla. 1989). Moreover, where a confession is obtained after the administration of the *Miranda* warnings, the State bears a '"heavy burden'" to demonstrate that the defendant knowingly and intelligently waived his or her privilege against self-incrimination and the right to counsel, especially where the suspect is a juvenile. *Colorado v. Connelly*, 479 U.S. 157, 167, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986); *Fare*, 442 U.S. at 724; *Miranda*, 384 U.S. at 475; *W.M. v. State*, 585 So. 2d 979, 981 (Fla. 4th DCA 1991). The State must establish its '"heavy' burden" by the "preponderance of the evidence." *Connelly*, 479 U.S. at 167-68; *see Balthazar v. State*, 549 So. 2d 661, 661 (Fla. 1989); *W.M.*, 585 So. 2d at 983. As the United States Supreme Court has made clear, the ultimate issue of voluntariness is a legal rather than factual question. *See Miller v. Fenton*, 474 U.S. 104, 109, 88 L. Ed. 2d 405, 106 S. Ct. 445 (1985).

739 So. 2d at 575.

"'[U]nless and until [the *Miranda*] warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used

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against [the defendant].'" *Ramirez*, 739 So. 2d 573 (quoting *Miranda v. Ariz.*, 384 U.S. 436, 479 (1966)). This Court further explained in *Ross* that

> "because of the tremendous weight accorded confessions by our courts and the significant potential for compulsion--both psychological and physical--in obtaining such statements, a main focus of Florida confession law has always been on guarding against one thing--coercion. . . . The test thus is one of voluntariness, or free will, which is to be determined by an examination of ***the totality of the circumstances surrounding the confession***. This determination is to be made by the judge, in the absence of the jury, based on a multiplicity of factors, including the nature of the questioning itself."

45 So. 3d at 413-14 (quoting *Traylor v. State*, 596 So. 2d 957, 964 (Fla. 1992)) (emphasis added).

"The issue of involuntariness and coercion directly implicates the defendant's constitutional right against self-incrimination under both the Fifth Amendment and article I, section 9, of the Florida Constitution." 45 So. 3d at 423. "In reviewing such challenges, courts must remain vigilant regarding whether a defendant was given an ***actual choice*** in order to guard against the potential danger of violating a defendant's constitutional right against self-incrimination." *Id.* 419.

Accordingly, the issue for this Court to decide is not only whether the FDLE agents deliberately withheld the *Miranda* warnings in an impermissible "question first and warn later" technique under *Missouri v. Seibert*, 542 U.S. 600 (2004); but additionally whether, under the totality of the circumstances, the alleged waiver by

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Lebron was indeed voluntary, knowing, and intelligent, and whether the statements made after the waiver were "voluntary" under *Or. v. Elstad,* 470 U.S. 298 (1985), and *Ramirez*. *See Ross,* 45 So. 3d at 423.

D. Circumstances of Lebron's Tainted Post-Miranda Confession:

FDLE Agents Marrero and Hidalgo arrested Lebron on April 29, 2002 around 1:00 a.m., at an apartment complex in Orlando. R. XXXII: 4933, 4994. The Agents arrested Lebron at gunpoint, placed him against a wall, and handcuffed him. R. XXXII: 4996-97. The Agents told Lebron not to look at them. R. XXXII: 4997. Neither Agents Marrero nor Hidalgo administered the *Miranda* rights to Lebron at that point. *See* R. XXXII: 4945, ll. 20-22. Deputy Armando Sarabia, who later was present at Lebron's interrogation, was also present at his arrest. R. XXX: 4667; R. XXXII: 5002. Deputy Sarabia did not administer *Miranda* rights to Lebron. *See* R. XXXII: 4945, ll. 20-22; 5006, ll. 21-25.

Shortly after the arrest, the police had Lebron strip naked in the parking lot of the apartment complex, and took his clothes, including his underwear, and his eyeglasses from him. R. XXXII: 4935-36, 4997-99. There were helicopters flying overhead and shining their lights down on the parking lot. R. XXXII: 4998. Police vehicles also had their lights shining at Lebron when he was arrested. R. XXXII: 4998. He was then clothed only in a paper gown and handcuffed. R. XXXII: 4935-

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36. The *Miranda* rights had not been administered to Lebron at that point. *See* R. XXXII: 4945, ll. 20-22; 5006, ll. 21-25.

Agents Marrero and Hidalgo then placed Lebron near a marked unit to wait to be transferred to FDLE headquarters, at which point they allowed his brother-in-law, Quinonez, who had informed them of Lebron's location, to confront Lebron, (R. XXXII: 5000-01), though they knew Quinonez was very upset with him. *See* R. XXXII: 4931-32, 4995-96. Quinonez also informed the police that Lebron had been acting strangely since Sunday morning, that he smoked marijuana, and had problems with drinking. *See* R. XXXII: 4995. Not surprisingly, Quinonez got within five to ten feet of Lebron and shouted and cursed at him for several minutes until he was stopped. R. XXXII: 5001. The *Miranda* rights had not been administered to Lebron at that point. *See* R. XXXII: 4945, ll. 20-22; 5006, ll. 21-25.

Deputy Sarabia drove Defendant to the FDLE Regional Center in Orlando and brought him into a squad room at 2:42 a.m. on April 29th. R. XXXII: 4936-37. The *Miranda* rights still had not been administered to Lebron at that point. *See* R. XXXII: 4945, ll. 20-22. Agent Hidalgo testified that he came into contact with Lebron at headquarters, variously, at about 2:30 a.m., 2:42 a.m., or 3:00 a.m. *See* R. XXXII: 4937, 5002, 5029. Hidalgo did not reintroduce himself to Lebron, but just sat down at the table where Lebron was sitting. R. XXXII: 5003. The *Miranda* rights had not

been administered to Lebron at that point. *See* R. XXXII: 4945, ll. 20-22; 5006, ll. 21-25.

Detective Marrero arrived and found Defendant in the room with FDLE Special Agent Eric Hernandez, Agent Hidalgo, and Sarabia. R. XXXII: 5003. Within a few moments, Marrero asked for a standardized tape recorder and tapes to record a formal statement of Lebron; Hidalgo called out for Agent King to get the equipment, and King and Marrero left the room. R. XXXII: 4938-39, 5003. The *Miranda* rights still had not been administered to Lebron at that point. *See* R. XXXII: 4945, ll. 20-22; 5006, ll. 21-25.

At this point Lebron began crying. R. XXXII: 4939-40. Agent Hidalgo had been sitting at the table with Lebron for several minutes before Lebron finally cracked. R. XXXII: 4939. According to Hidalgo, Lebron just began to cry, even though he had not cried when Hidalgo had restrained him against the wall, when he was arrested, when his clothing was taken from him in the parking lot, or when Quinonez yelled at him. R. XXXII: 5004. When Lebron began crying, Hidalgo "basically told him [] that I hoped that he knew what kind of trouble he was in." R. XXXII: 4940. The *Miranda* rights had not been administered to Lebron at that point. *See* R. XXXII: 4945, ll. 20-22; 5006, ll. 21-25; 5006, ll. 21-25.

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Agent Hidalgo admitted that he prompted Lebron with the expectation that Lebron would respond, without first advising him of his *Miranda* rights. R. XXXII: 5006-07. Hidalgo had interrogated hundreds of suspects at that point in his career, and he had known to advise them of their *Miranda* rights or made sure that they had been advised of their *Miranda* rights. *See* R. XXXII: 4990-92. He was well familiar with the procedures of advising a suspect of *Miranda* rights. R. XXXII: 4991. He had received training regarding interrogation techniques, including ones that can be used to make suspects feel comfortable with him and to talk about the suspected crime and the suspect's involvement. R. XXXII: 4991-92.

As anticipated by Agent Hidalgo, Lebron responded with a full confession, including that he had been the person to injure Mr. Portoblanco, that he had been the person to shoot Ms. Angel, and that he had pulled the trigger twice and then a third time because it had not gone off the first two times. R. XXXII: 5007. Detective Marrero was entering the room with the tape recorder in hand when Lebron was making his emotional unwarned confession. R. XXXII: 5008. At that point both Agents left the room to notify other investigators that Ms. Angel was dead. R. XXXII: 5008.

No more than five minutes later, Detective Marrero returned to the squad room. R. XXXII: 4943, ll. 18-19. Special Agent Eric Hernandez and Deputy Sarabia

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were also with Lebron, with a tape recorder already on the table, by the time Agent Hidalgo returned to the squad room. R. XXXII: 4944. It was Agent Hidalgo who finally read the *Miranda* rights to Lebron from a standard FDLE *Miranda* form. *See* R. XXXII: 4945-46; State's Ex. 14 at R. XXII: 3668-69. Hidalgo did not read the introductory language at the top of the form to Lebron. R. XXXII: 5012, ll. 17-29. He did not explain the form to Lebron. R. XXXII: 5013, ll. 16-29. He did nothing to explain how Lebron's right to an attorney would work at that moment inside the FDLE headquarters in the middle of the night. R. XXXII: 5014.

Lebron had been crying continuously at the table for about thirty minutes by the time he was finally administered *Miranda* rights, and the *Miranda* form was signed by Agent Hidalgo, Deputy Sarabia, and Lebron at 3:15 a.m. *See* R. XXII: 3668-69; R. XXXII: 5016, ll. 10-13. Agent Hidalgo offered no explanation whatsoever as to why he did not wait for Lebron to compose himself before advising him of his rights. R. XXXII: 5016. Though Quinonez had informed the police of Lebron's alcohol and marijuana abuse, Agent Hidalgo did not test Lebron's blood or urine for the influence of any controlled substance before administering the *Miranda* rights. R. XXXII: 5009-10. Agent Hidalgo did not recall returning Lebron's eyeglasses, either. R. XXXII: 4999.

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Lebron was making strange facial expressions during his post-*Miranda* interview. R. XXX: 4691-92. Lebron's post-Miranda statement took an hour to an hour and a half (R. XXX: 4646), and an additional statement was elicited thereafter by Deputy Sarabia. R. XXX: 4747.

E. Lebron's Initial Unwarned Confession Was the Result of the Custodial Interrogation the FDLE Agents Subjected Him To:

"[T]he process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Ariz.*, 384 U.S. 436, 467 (1966). There is no doubt in this case that Lebron was "in custody" at the time his unwarned statements were made—indeed, he had been arrested, handcuffed, stripped naked, deprived of his ability to see vis-à-vis eyeglasses, and transported to the FDLE headquarters more than an hour before Agent Hidalgo elicited his statements. *See* R. XXXV at 5447, n.1. Ergo, there can be no question that the FDLE officers should have administered the *Miranda* warnings to Lebron "prior to ***any*** questioning." *See Ramirez*, 739 So. 2d at 576.

As to the term "interrogation" under *Miranda*, this Court has explained that the term encompasses "other words or actions, by a state agent, that a reasonable

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person would conclude are designed to lead to an incriminating response." *Id.* 573 (citing *Traylor*, 596 So. 2d at 966, n.17). "The concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *R.I. v. Innis,* 446 U.S. 291, 299 (1980). The *Miranda* Court specifically "included in its survey of interrogation practices the use of psychological ploys, such as to '[posit]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society.'" *Id.* (quoting *Miranda,* 384 U.S. at 450).

Agent Hidalgo's comment to Lebron in the midst of Lebron's emotional break-down that he "hoped that [Lebron] knew what kind of trouble he was in" (R. 919), is precisely the type of psychological ploy that posits guilt in the context of blame and social mores. The accusatory statement was reasonably likely to elicit an incriminating response from Lebron because it necessarily assumed Lebron knew of the crimes for which he had been arrested, and played some serious role in those crimes, which would subject him to a serious kind of trouble, and of which Lebron should have *something* to say.

Moreover, the measures that the FDLE agents subjected Lebron to en masse, including handcuffing him, depriving him of his clothes and eyeglasses, and

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exposing him to verbal assault by his brother-in-law after arrest, among other things, certainly "reflect a measure of compulsion above and beyond that inherent in custody itself." *See Innis*, 446 U.S. at 300. Therefore, it is clear that these techniques of persuasion "amount[ed] to interrogation." *Cf. Innis*, 446 U.S. at 299.

F. The Tactics Employed by The FDLE Officers Rose to The Level of The "Question-First Tactics" Identified in *Missouri v. Seibert*:

As demarcated by this Court in *Ross*, the first issue the Court must decide is whether the tactics employed by the FDLE officers rose to the level of the "question-first tactics" identified by the *Missouri v. Seibert* decision as effectively threatening to "thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted." *See Missouri v. Seibert,* 542 U.S. at 617. Very similar to the officer in *Missouri v. Seibert,* who testified "that he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught," 542 U.S. at 605-06, Agent Hidalgo admitted that he made the accusatory statement to Lebron with the ***express expectation*** that it would elicit a response! *See* R. XXXV at 5449. Thus, the failure to warn was certainly not "in good faith." *See Missouri v. Seibert,* 542 U.S. at 617 (Breyer, J., concurring); *compare Elstad,* 470 U.S. at 316 ("Whatever the reason for Burke's oversight, the incident had none of the earmarks of coercion.").

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Additionally, the record facts do not reasonably support a conclusion that the *Miranda* warnings given to Lebron could have served their purpose because the warning was clearly given "midstream," not barely five minutes after Agent Hidalgo elicited Lebron's unwarned confession in the midst of his apparent emotional breakdown, and while Lebron's breakdown was visibly persisting. The fact that the FDLE agents had additionally subjected Lebron to varying and continual stages of psychological trauma, from the mortification of stripping naked in the parking lot, to the exposure to verbal assault, in the two hours between his arrest and the eventual administration of his *Miranda* rights.

"[W]hen *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Ross*, 45 So. 3d at 613-14. The timing and setting of the first and the second "rounds" of interrogation occurring in the exact same place, at the exact same table, in the FDLE station house after arrest and transportation of Lebron, the continuity of various FDLE personnel, and the degree to which Agent Hidalgo's questions treated the second "round" as continuous with the first certainly indicate that the midstream *Miranda* warning in this case was ineffective. *See id.* 616.

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Indeed, the FDLE agents did not advise Lebron that his prior statement could not be used. *See* R. XXXV at 5455. The impression that the further questioning was a mere continuation of the statements would have been reasonable with regard to the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before.

"[A]llowing police to deliberately delay administering *Miranda* warnings with the hope that the defendant will confess or make inculpatory statements and then belatedly warn the defendant of the rights frustrates the prophylactic rule of *Miranda*." *Ross,* 45 So. 3d at 423. Accordingly, Lebron's post-Miranda statements were tainted, and should have been suppressed under the authority of *Missouri v. Seibert,* 542 U.S. 600 (2004).

G. Alleged Waiver Involuntary Under Totality of the Circumstances:

Notwithstanding the clear applicability of *Missouri v. Seibert* to the facts and circumstances of this case, this Court has determined it must additionally consider whether, under the totality of the circumstances, the alleged waiver by Lebron was indeed voluntary, knowing, and intelligent under *Elstad. See Ross*, 45 So. 3d at 423. A very notable difference between the circumstances of this case and those of *Elstad* is the fact that the *Elstad* defendant made his initial unwarned statement before he was arrested and escorted to the back of the police patrol car, when one of the two

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police who came to his home with a warrant for his arrest was in the living room with him, and the other was in the kitchen informing the defendant's mother of the warrant. 470 U.S. at 300-01. Lebron's initial unwarned statement was elicited by Agent Hidalgo after he had been arrested, handcuffed, transported to the FDLE facility, and subjected to significant psychological trauma that caused Lebron to actually suffer an emotional breakdown, which the FDLE agents clearly perceived and exploited.

The *Ross* Court directs the following factors of consideration here:

> (1) whether the police used improper and deliberate tactics in delaying the administration of the *Miranda* warnings in order to obtain the initial statement; (2) whether the police minimized and downplayed the significance of the *Miranda* rights once they were given; and (3) the circumstances surrounding both the warned and unwarned statements including "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." In addition, there are other circumstances to consider on a case-by-case basis, such as the suspect's age, experience, intelligence, and language proficiency.

45 So. 3d at 424.

The three factors delineated above are identified and discussed in the foregoing section. The FDLE officers' failure to give "a 'careful and thorough administration' of the *Miranda* warnings" after Lebron's emotional breakdown and

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unwarned statements could not be more apparent in this case. *See, e.g.*, *Ramirez*, 739 So. 2d at 575 ("When the police finally administered the Miranda warnings, the administration was not careful and thorough. To the contrary, there was a concerted effort to minimize and downplay the significance of the Miranda rights.").

Lebron's purported waiver of his *Miranda* rights was not "the product of free and deliberate choice rather than intimidation, coercion, or deception." *See Ramirez*, 739 So. 2d at 575. Nor was the waiver made with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* Accordingly, under the circumstances of this case it is not reasonable to find that the warnings effectively advised Lebron that he had a real choice to either provide a statement, or stop talking even though he had already provided one, and the tainted post-Miranda confession should have been suppressed in its entirety.

H. The Erroneous Admission of Lebron's Tainted Post-Miranda Statements Was Not Harmless Error:

"'The erroneous admission of statements obtained in violation of Miranda rights is subject to harmless error analysis.'" *Ross*, 45 So. 3d at 434. "The harmless error test places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that

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the error contributed to the conviction." *Wilcox v. State*, 143 So. 3d 359, 374 (Fla. 2014). Here, there was only flimsy circumstantial evidence other than Lebron's own statement to support his conviction. The error was harmful and reversal is required.

II.
LEBRON'S DEATH SENTENCE MUST BE REVERSED FOR FAILURE OF THE COURT TO REQUIRE THE JURY TO EXPRESSLY MAKE FINDINGS OF THE EXISTENCE OF ONE OR MORE AGGRAVATING CIRCUMSTANCES

This Court should reverse Lebron's death sentence and remand with instructions to impose a sentence of life imprisonment without parole. This case is controlled by the Supreme Court of the United States' decision in *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). In *Hurst*, the U.S. Supreme Court held that Florida's death penalty procedure, which does not require the jury to expressly find aggravating circumstances, violates a criminal defendant's Sixth Amendment right to trial by jury.

Upon determining that Mr. Lebron's death penalty was unconstitutionally imposed contrary to the Supreme Court's holding in *Hurst*, this Court should follow the procedure mandated by the recent amendment to section 775.082(2), Fla. Stat. The Florida Legislature, appropriately reacting to the Supreme Court's *Hurst* decision amended the statute as follows:

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> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court ***shall sentence such person to life imprisonment*** as provided in (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional.

Id. (emphasis added).

Therefore, if his conviction is upheld but the death sentence reversed, Mr. Lebron should not be subjected to new sentencing proceedings, but should receive life in prison.

III.
THE TRIAL COURT ERRONEOUSLY DENIED LEBRON'S MOTION FOR MISTRIAL BASED UPON AGENT HERNANDEZ'S STATEMENT THAT THIS WAS THE WORST CRIME HE EVER SAW

The trial court should have granted Lebron's motion for mistrial based upon Agent Hernandez's improper comparison of the egregiousness of the crime to others he had experienced over his twenty-five years of law enforcement. His testimony that he "never heard a statement like that one" given by Mr. Lebron and that he was "not going to forget in my rest of my life" improperly informed the jury that the crimes in question were the most egregious that Agent Hernandez ever had seen.

The agent's personal experience is not relevant to any of the issues in this case. At the guilt phase, it was improper for the jury to hear testimony comparing the crime to others. Lebron was unfairly prejudiced by the testimony and the mistrial should have been granted.

Defense counsel did not open the door to Agent Hernandez comparing the crime to others he had been involved with. When Lebron's counsel challenged Agent Hernandez's ability to remember all of the details from Mr. Lebron's unrecorded statement, he could simply have answered that the severity of the acts permitted him to have a good memory of them, rather than telling the jury that this was the worst crime he ever had been involved in. A mistrial should have been granted.

IV.

A MISTRIAL SHOULD HAVE BEEN GRANTED DUE TO THE STATE'S VIOLATION OF *POSTELL* DURING OPENING STATEMENT

This Court should reverse Mr. Lebron's judgment of conviction and sentence based upon the trial court's denial of his motion for mistrial made concerning the State's improper opening statement. The State in its opening had informed the jury that the reason Mr. Lebron became a suspect was because of what investigators had learned while two of his co-Defendants were in custody. He stated in opening that,

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because "Victor was in custody, Mena was in custody . . . , as a result, they [the police] knew the other people they were looking for." R.CXII at 4747.

That opening violated the prohibition against inferential hearsay forbidden by *Postell v. State* 398 So. 2d 851 (Fla. 3d DCA 1981). In *Postell*, the court held that where "the inescapable inference from testimony [concerning a tip received by police] is that a non-testifying witness has furnished the police with evidence of the defendant's guilty, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated." *Id*. at 854. This Court recognizes that it is reversible error to allow such inferential hearsay in a criminal trial. *See Keen v. State*, 775 So. 2d 263 (Fla. 2000). The conviction based upon such improper matter should be reversed.

IV.
THE TRIAL COURT ERRED IN DENYING A MISTRIAL BASED UPON THE EFFECT OF THE VICTIM'S MOTHER IN THE COURTROOM

Although Judge Thomas ruled that the deceased victim's mother, Ms. Osorio, could remain in the courtroom during trial, her presence there was unfairly prejudicial to the Defendant Lebron and a mistrial should have been granted based upon her effect on the jury. Throughout the trial the attention of the jury was drawn

to Ms. Osorio by news cameras focusing upon during various stages of the proceedings. She sat there are a pathetic figure with which the State associated itself when the prosecutor in closing argument spread his arm out gesturing to her and including her in the prosecution team by saying that, "ten and one half years after the crime that ***we're all sitting here finally waiting. Everyone.***" (Emphasis added) The prejudice to Mr. Lebron was unfair and a mistrial should have been granted as a result of the effect of Ms. Osorio's presence engendered.

V.
LEBRON'S DEATH SENTENCE MUST BE REVERSED BECAUSE HE WAS NOT EXPRESSLY INFORMED OF HIS RIGHT TO ALLOCUTE AT *SPENCER* HEARING

Following the penalty phase, the trial court conducted a hearing pursuant to *Spencer v. State* 615 So. 2d 688 (Fla. 1993). In *Spencer* this Court addressed the procedure it had established for conducting sentencing proceedings in death penalty cases by its earlier decision of *Grossman v. State*, 525 So. 2d 822 (Fla. 1988). This Court explained what it had meant to accomplish in the *Grossman* case as follows:

> We contemplated that the following procedures in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) ***afford the defendant an opportunity to be heard in person***.

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615 So. 2d at 690-91 (emphasis added). Thus, although capital defendants may not make unsworn presentations before the jury in the sentencing phase, "in Florida, capital defendants have sufficient opportunity to allocute before the judge at a *Spencer* hearing." *Troy v. State*, 948 So. 2d 635, 648 (Fla. 2006).

In the present case, the trial court erred by not expressly affording Lebron the opportunity to personally address the court by way of allocution. The trial court should have addressed Lebron personally and informed him of his right to speak on his own behalf. Such a similar right to allocution exists under the Federal Rules of Criminal Procedure. There, the court must "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii).

Courts in Florida have compared Fla. R. Crim. P. 3.720(b) to that federal rule and recognized that "[o]ur courts have read rule 3.720(b) as requiring a trial court to permit a defendant to make a statement to the court." *Jean-Batiste v. State*, 155 So. 3d 1237, 1241 (Fla. 4th DCA 2015) (noting, without distinguishing, the federal rule "providing that before imposing sentence, the court must 'address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence'").

This Court should interpret a capital defendant's right to allocution under Rule 3.720(b) and *Spencer* in the same way as the federal courts do, requiring the judge to "address the defendant personally" and advise him or her of that right. In this case, following presentation of witnesses and other evidence by Mr. Lebron's trial counsel, the court addressed only counsel only asking if there was anything further to be presented. No reference was made to Mr. Lebron's right to address the court. Counsel responded that there was nothing further, without Mr. Lebron ever being informed of his right to present a statement in mitigation.

The right of a capital defendant to allocute before sentencing is no less important than other rights of which trial court judges must personally inform all criminal defendants before they can be waived. Trial courts must personally address defendants to determine the voluntariness of waivers of rights prior to accepting guilty pleas, including "the right to be represented by an attorney at every stage of the proceeding . . . the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury, and at that trial a defendant has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to testify or be compelled to incriminate himself or herself." Fla. R. Crim. P. 3.172(c).

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This Court has long recognized the importance of trial judges personally informing defendants of the rights they have prior to recognizing the efficacy of waivers of such rights. "When a waiver is required of the defendant as to any aspect or proceeding of the trial, experience clearly teaches that ***it is the better procedure for the trial court to make inquiry of the defendant*** and to have such waiver appear of record. The matter would thus be laid to rest." *Amazon v. State*, 487 So. 2d 8, 11 n.1 (Fla. 1986) (right to be personally present at all critical stages of proceedings) (emphasis added); *see also Suarez v. State*, 481 So. 2d 1201 (Fla. 1985) (recognizing right of non-English speaking defendant to be personally informed of his or her right to a simultaneous translation of proceedings through an interpreter, unless an interpreter already has been provided); *Harris v. State*, 438 So. 2d 787, 797 (Fla. 1983) (holding that, "for an effective waiver [of the right to have the jury instructed on all lesser-included offenses], there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an ***express waiver of the right to these instructions by the defendant***, and the record must reflect that it was knowingly and intelligently made") (emphasis added).

Other Florida courts have likewise held that waivers of valuable rights in criminal trials must be made expressly by the defendant himself. *E.g., Cirio v. State*, 440 So. 2d 650 (Fla. 2d DCA 1983), in which the court reversed the defendant's

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burglary conviction following a non-jury trial because "[t]he trial court ***did not inquire of defendant personally*** as to whether he understood his right to a jury trial and whether he had voluntarily agreed to waive that right [and n]o written waiver of defendant's right to a jury trial was exceted." *Id.* (emphasis added).

Specifically, in the context of the right of allocution before sentencing, courts of other states have held that the trial court must address the defendant personally and obtain an express waiver of the right or reversal is required. The Supreme Court of Hawaii has recognized that right as follows:

> *State v. Chow* recognized the fundamental importance of a defendant's right to pre-sentence allocution.20 77 Hawai'i 241, 246-47, 883 P.2d 663, 668-69 (App. 1994). Under *Chow*, trial courts must ensure that its mandate is complied with during sentencing proceedings, particularly as it is "essential to fair treatment." *Id*. at 250, 883 P.2d at 672. Accordingly, ***"[t]rial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant" providing a personal invitation to speak prior to sentencing***. *Id*. at 248, 883 P.2d at 670 (quoting *Green v. United States*, 365 U.S. 301, 305, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961)). The right is one easily administered by the trial court by the following inquiry: "Do you, . . . [(defendant's name)], have anything to say before I pass sentence?" *Id*. at 248, 883 P.2d at 670 (alterations in original) (quoting *Green v. United States*, 365 U.S. 301, 305, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961)).

State v. Phua, 353 P.3d 1046, 1059 (Haw. 2015) (emphasis added and footnotes deleted).

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In *Chow*, the Hawaii Intermediate Court of Appeals held: "We know of no effective or adequate manner in which a defendant's right of presentence allocution may be constitutionally realized than to ***affirmatively require that the trial court make direct inquiry of the defendant's wish to address the court*** before sentence is imposed." *State v. Chow*, 883 P.3d 663, 669 (Ct. App. Haw. 1994) (emphasis added).

The courts of Kansas similarly recognize the right of the defendant to be expressly informed by the trial judge of his or her right to allocution:

> Contrary to the district court's ruling, K.S.A. 22-3424(e)(4) clearly requires the court to address the defendant personally and "ask the defendant if the defendant wishes to make a statement on the defendant's own behalf and to present any evidence in mitigation of punishment." See *State v. Heide*, 249 Kan. 723, 822 P.2d 59 (1991) (K.S.A. 22-3424[4], now K.S.A. 22-3424[e], unambiguously requires the court to advise the defendant of the right of allocution).

Soto v. State, 927 P.2d 954, 959 (Kan. Ct. App. 1996).

The Court of Appeals of Minnesota has stated:

> Bye also argues that remand is appropriate because the district court failed to afford him a chance to address the court before sentencing. Before the court pronounces sentence, it must allow the prosecutor and defense attorney an opportunity to make statements relevant to the sentence. Minn. R. Crim. P. 27.03, subd. 3. ***The court must separately offer the defendant an opportunity for allocution.*** "The court shall also address the defendant personally and ask if the defendant wishes to make a statement in the defendant's own behalf and to present any information before sentence * * *." *Id*.

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State v. Bye, No. C4-02-1080; 2003 Minn. App. LEXIS 530 (unpublished opinion filed May 6, 2003) (emphasis added); *accord State v. Young*, 610 N.W.2d 361 (Minn. App. 2000).

Ohio has the same requirement: "Crim. R. 32(A)(1) specifically provides that before imposing sentence, "the court shall . . . address the defendant personally" and inquire as to whether the defendant wishes to exercise his or her right to allocution. The rule does not merely give the defendant a right to allocution; it imposes an affirmative requirement on the trial court to 'ask if he or she wishes to' exercise that right." *State v. Campbell*, 738 N.E.2d 1178, 1188-89 (Ohio 2000).

The failure to personally address Lebron and inform him of his right of allocution deprived him of the opportunity to personally inform the court of relevant factors, such as any remorse he may feel for the crimes in question, acceptance of responsibility, and other relevant mitigating factors. Therefore, the death sentence should be reversed.

VI.
THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE OF THE QEEG STUDY UNDER *FRYE*

This Court should reverse Lebron's conviction and sentence based upon the trial court's erroneous exclusion of evidence concerning the QEEG study performed

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upon him. That study, if introduced, would have established the existence of traumatic brain injury which would have been relevant both to the guilt phase and penalty phase. That evidence would have supported Lebron's position that he had very low intellectual capacity and brain function, which would be pertinent to issues of guilt, including premeditation as well as to penalty, as a mitigating circumstance.

The standard under which a trial court's ruling under *Frye* is to be reviewed by this Court is as follows:

> The appropriate standard of review of a *Frye* issue is de novo. *See Hadden v.State*, 690 So. 2d 573, 579 (Fla. 1997). Thus, an appellate court reviews a trial court's ruling as a matter of law, rather than under an abuse-of-discretion standard. When undertaking such a review, the appellate court should consider the issue of general acceptance at the time of the appeal rather than at the time of trial. *Id; Hayes v. State*, 660 So. 2d 257, 262-64 (Fla. 1995)(finding a *Frye* test not properly applied in light of a scientific report issued after the trial); *Bundy v. State*, 471 So. 2d 9, 18 (Fla. 1985)(finding that in a case in which the trial court failed to conduct a *Frye* hearing, hypnotically refreshed testimony was not shown to be reliable at the time of appeal). An appellate court may examine expert testimony, scientific and legal writings, and judicial opinions in making its determination. *See Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993)(finding, after an examination of the relevant academic literature and case law, that sex offender profile evidence was not generally accepted).

Casaminsky v. State, 132 So. 3d 678, 702-03 (Fla. 2013).

Applying the foregoing standard, this Court should determine that the QEEG study is generally accepted in the scientific community as of the time of this appeal.

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Dr. William Lambos, a PhD neuropsychologist testified about peer reviewed studies that utilize QEEG as having been used in comparing an individual to normative databases. R. XCI at 1922. He testified that the software used in this case called NeuroGuide has been used since 2005. R.XCI at 1910. That software has been registered with the federal Food and Drug Administration. R. XCI at1911. That registration establishes the appropriateness of the NeuroGuide analysis "to be used by qualified medical or clinical professionals for the statistical evaluation of human electroencephalogram or EEG." R. XCI at1912.

Dr. Lambos identified a 400-page abstract of 795 peer-reviewed journal articles on LORETA, another software program utilized in the QEEG study. R. XCI at1914. Several of those articles, between 130 and 150 of which Dr. Lambos has read, support his sub-field which is "[t]he use of QEEG to identify disregulations of the brain that impact behavioral functioning or behavioral health issues." R. XCI at1919. The weight of the entire evidence at the *Frye* hearing established the general acceptance in the scientific community of the QEEG study protocol.

In addition to the evidence presented at the *Frye* hearing below, other courts have acknowledged the admissibility of QEEG testing in criminal cases to establish brain damage. *See Jennings v. Stephens*, 537 Fed. Appx. 326 (5th Cir. 2013). In *Pinter v. Shinseki*, No. 09-1058; 2010 U.S. App. Vet. Claims LEXIS 2353 (CT App.

Vet. Claims Dec. 10, 2010), the court reversed the Board of Veterans' Appeals decision denying veterans disability benefits to a former soldier who had sustained blows to the head and resulting concussions which he claimed led to a disability in his left arm. In holding that a VA medical examination was required to prior to denial of the veteran's claim, the court cited as evidence the fact that "the appellant underwent a quantitative electroencephalogram (EEG)/brain mapping . . . which revealed an abnormal neurophysiologic pattern and induces involuntary motor activity in the left arm and shoulder that eventually involved both arms." *Id*. at *3. Thus, the court recognized the reliability and acceptance of the QEEG procedure.

In *Sellers v. Ward*, 135 F.3d 1333 (10th Cir. 1998), the court characterized as "significant evidence the person facing death for three murders is not the person who committed the crime [as including] a quantitative electroencephalogram test (QEEG) [which] disclosed Sellers has brain damage as a result of a closed head injury suffered as a child." *Id*. at 1337. In another case recognizing the admissibility of a QEEG in a criminal case (albeit apparently discounting the weight to be given to such a study due to concessions made by the expert who performed the study and the testimony of a prosecution expert neurologist) the court noted the admissibility of such evidence by referring to the fact that "petitioner's trial counsel presented numerous witnesses, including (1) a clinical neurophysiologist who took a

quantitative EEG (qEEG) of petitioner's brain in February 2003 and testified petitioner's qEEG was abnormal." *Young v. Stephens*, No. MO-07-CA-002-RAJ; 2014 U.S. Dist. LEXIS 16007 at *106 (W.D. Tex. Feb. 10, 2014); *see also Kendall v. Colvin*, No. 2:13-cv-259 TS; 2014 U.S. Dist. LEXIS 4677 at *3 (D. Utah Jan. 13, 2014)(noting that "plaintiff underwent a procedure called quantitative electroencephalographic topographic brain mapping [which] showed a possible traumatic brain injury in the 'mild range of severity' and a possible learning disability in the 'severe range of severity.'").

Other courts citing QEEG studies as evidence of brain injury include *Smith v. Ryan*, No. cv-87-234-TUC-CKJ; 2012 U.S. Dist. LEXIS 171085 (D. Ariz. Dec. 3, 2012); *Florman-Goforth v. Astrue*, No. cv-10-2895-PJW; 2011 U.S. Dist. LEXIS 102940 at *5 (C.D. Cal. Sept. 9, 2011) (characterizing as "some objective evidence in this record of abnormal neurology . . . [plaintiff's] EEG/QEEG testing, which revealed . . . that Plaintiff's results were abnormal 'with greater than 90 percent statistical probability that she suffered from traumatic brain injury"); and *People v. Clark*, 261 P.3d 243, 275 (Cal. 2011) (citing defendant's expert testimony in first degree murder trial as "quantitative electroencephalogram (QEEG), which detects and 'maps' the brain's electrical activity.").

This Court in *Hernandez v. State*, 180 So. 3d 978 (Fla. 2015) noted evidence supporting the general acceptance of QEEG analysis including "that the veteran's administration has been using QEEG in relation to traumatic brain injury" and some universities use the proprietary QEEG program, NeuroGuide, for some purposes, but rejecting argument that defense counsel was ineffective for failing to obtain QEEG testing noting, "the relevant time frame for determining if QEEG met the test for admissibility was the time of trial (in 2007) because the issue is raised here in [sic] a claim of ineffective assistance of trial counsel." *Id*. at 1008.

Because the standard under which the admissibility of expert testimony is to be reviewed is that applicable at the time of the appeal, as opposed to the time of trial, this Court should conclude that the *Frye* standard does not apply to this appeal. Instead, the standard that should be utilized to determine the admissibility of the QEEG testing is that established by Rule 90.702 of the Florida Evidence Code. That standard abandons exclusive reliance of the "generally accepted" standard of *Frye* and permits expert testimony by a qualified expert if "based upon sufficient facts or data . . . the product of reliable principles and methods; and [t]he witness has applied the principles and methods reliability to the facts of the case." § 90.702, Fla. Stat.

Thus, although the "generally accepted" standard is still relevant to the admissibility issue, it is no longer conclusive. The courts have much greater

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flexibility in admitting expert testimony under Rule 90.702 as amended, and this Court, on *de novo* review should reverse the trial court's exclusion of the QEEG testing and testimony based thereon.

VII.
THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY SO AS TO DEPRIVE IT OF ITS PARDON POWER

Florida law recognizes the right of juries to disregard the court's instructions and "pardon" the defendant, notwithstanding conclusive evidence that would support a conviction. *See, e.g., State v. Iseley*, 944 So. 2d 227 (Fla. 2006). In Florida, juries must be instructed on lesser-included offenses, notwithstanding the lack of evidence to support such a reduced verdict, as method of permitting the jury to exercise its pardon power. *E.g., Sanders v. State*, 946 So. 2d 953 (Fla. 2006).

However, it is important to note that the defendant's right to receive a jury pardon is not limited to the right to be convicted on a lesser included offense. Instead, the law requiring instructions on a lesser included offense is just one way to preserve the jury's pardon power. *See State v. Wimberly*, 498 So. 2d 929 (Fla. 1986), in which this Court recognized that "[t]he requirement that a trial judge must give a requested instruction on a necessarily lesser included offense is ***bottomed upon*** a recognition of jury's right to exercise its 'pardon power.'" *Id*. 932 (emphasis added).

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Thus, a defendant not only has the right to instructions on a lesser included offense to preserve the jury's pardon power, that pardon power exists wholly apart from the requirement of permitting conviction on that lesser included offense. A jury may completely exercise its pardon power even outside the context of reducing the charge upon which a conviction results.

This Court should hold that the cases requiring reversal where the jury is not instructed in such a way as to permit exercise of pardon power (usually in the context of failure to instruct on lesser included offenses), applies to require reversal where the jury is expressly instructed that it may not exercise its pardon power.

During jury selection, the trial court repeatedly instructed the jury in such a way as to preclude the jury from exercising its pardon power. When the jury venire was being questioned by the court, Judge Thomas gave an example of a mother of a hungry child who "goes to Publix Super Market, and she takes a loaf of bread off of the shelf and she walks out of the store without paying for it." R.CX at 3680. Judge Thomas then continues the example as follows:

> And the State convinces you beyond a reasonable doubt that the mom took the bread without paying for it.
>
> The law says—the law says you must find the mother guilty if the State proved the case beyond a reasonable doubt. And as you're listening to the mother's stories, tears stream down your eyes because you know how tough that its. You know what that means.

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> Is there anyone who says, "Judge Thomas, I would not find that mother guilty"? Raise your hand.

R.CX at 3680.

The trial court then proceeded to repeatedly inform the jury that it had no power to return a not guilty verdict if the State had proven its case beyond a reasonable doubt, no matter what the circumstances. R.LVIII at 3682-3689. Defense counsel noted an objection to the line of questioning by the court. R. CV at 3681. However, the court continued in that line of questioning and instructions to the jury stating "that you can't make decisions based upon your emotions, based upon the fact that you feel sorry for anyone. You can't make decisions based upon you're angry at anyone. Your decision ***has to be based upon the facts and the law***." R. MV at 3683 (emphasis added).

At the end of the trial, the trial court again instructed the jury in such a way as to preclude the jury from exercising its jury pardon power, over Lebron's objection that the jury instructions should be revised to recognize that the jury had such a power. Those instructions included the following:

> There are some general rules that apply to your discussions. You must follow these rules in order to come to a lawful verdict. ***You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice.*** There is no reason for failing to follow the law in this case.

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R. MXVII at 5465 (emphasis added).

Those instructions to the jury throughout voir dire and during the jury charge more effectively deprived the jury of its pardon power than would failing to instruct the jury on a lesser included offense that the overwhelming evidence established could not be supported. Because it is reversible error to implicitly instruct the jury that it cannot exercise pardon power—by refusing to instruct on a necessarily-included lesser offense—an express instruction negating the jury's pardon power is more erroneous still. The jury having been deprived of its pardon power by the court's instructions throughout the trial, this Court should reverse should remand for a new trial.

VIII.
THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE STATE'S REPEATED AND IMPROPER AND REPEATED DRY-FIRING THE REVOLVER USED TO KILL MS. ANGEL

The trial court erroneously denied Defendant's motion for mistrial based upon the State's unfairly prejudicial demonstration of the revolver used to kill Ms. Angel. In holding the pistol and dry-firing it no less than three times, the State essentially violated the Golden Rule by literally placing the jury in the position of the victim and instilling the same sense of dread and fear that she experienced.

Experimental or demonstrative evidence, like any evidence offered at trial, should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fla. R. Evid. 90.403. The firearm demonstration in closing argument was timely objected to for being unfairly prejudicial.

The prosecution's demonstration was more prejudicial than was that of the State in *Smith v. State*, 866 So. 2d 51 (Fla. 2004), in which the prosecutor slammed a handgun onto a table with sufficient force to startle the courtroom. "Defense counsel objected and moved for mistrial, arguing that the demonstration was improper and prejudicial. A second defense counsel described the sound made as 'louder than a gunshot.' The trial court denied the motion but 'admonished the prosecutor to not repeat the action.'" *Id*. at 63. While a mistrial was not granted in Smith, the action of the prosecutor was recognized as improper by the Court. The State's dramatic demonstration here was much more prejudicial and a mistrial should have been granted.

IX.
THE CUMULATIVE EFFECT OF ALL THE ERRORS NECESSITATE REVERSAL

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Even if, in isolation, the individual errors committed during trial do not warrant reversal, the cumulative effect of all of them should entitle Mr. Lebron to a new trial. Therefore, the judgment of conviction and sentence should be reversed.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, this Court should reverse Lebron's conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by email upon Sandra S. Jaggard, Attorney General's Office, 444 Brickell Avenue,

Suite 650, Miami, FL 33131, <sandra.jaggard@myfloridalegal.com>; and Philip L. Reizenstein, Woodward and Reizenstein PA, 3191 Coral Way, Suite 109, Miami, Florida 33145-3226, <philip@miamicriminallaw.net>; on June 20, 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14 point Times New Roman and complies with the requirements of Rule 9.210.

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