IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	Def. ID# 0207003810
v.	:	
LINDA L. CHARBONNEAU,	:	
Defendant.	:	

MEMORANDUM OPINION

Motion for Recusal - Denied

Certification denied by Supreme Court: June 19, 2006
Date Decided: September 8, 2006

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Stokes, J.

Linda L. Charbonneau ("Defendant") has moved to have this judge recuse himself from further participation in this case. Defendant argues that this judge's impartiality might reasonably be questioned and cites to sentences in this Court's Findings After Penalty Hearing ("FAPH"). The FAPH was issued on June 4, 2004, after Defendant's convictions in this Court on April 21, 2004. Our Supreme Court overturned those convictions and the sentence on March 1, 2006.

The history of this case involves the reversal and remand of this Court's April 21, 2004, decision and subsequent findings. The case was remanded back to this Court and this judge. In light of the assertions Defendant has made, this judge has re-examined the earlier opinion as well as the statements Defendant cited in the FAPH. The re-examination satisfies this judge that, employing any test that may be applicable in determining the basis for a judge to recuse himself, there is no basis to do so here. For the reasons set forth herein, Defendant's Motion is denied.

BACKGROUND

Defendant was convicted by a jury on April 21, 2004, of two offenses of Murder in the First Degree, 11 *Del. C.* §636; two offenses of Conspiracy in the First Degree, 11 *Del. C.* 513(1); and Possession of a Deadly Weapon During the Commission of a Felony, 11 *Del. C.* §1447(a). The victims were John Charbonneau ("John Charbonneau") and William H. Sproates ("Sproates"), who were killed on or about September 23, 2001, and October 17, 2001, respectively.

In both the guilt and penalty phases of the trial, the jury found the existence of three statutory aggravating factors. Looking at the circumstances surrounding the murder of John Charbonneau, it determined that the aggravating circumstances outweighed the

mitigating circumstances by a vote of 10 – 2. Looking at the circumstances surrounding the murder of Sproates, the jury determined the aggravating circumstances outweighed the mitigating circumstances by a vote of 9 – 3. The jury recommended the death penalty for Linda Charbonneau's crimes.

After reviewing the record, the factual findings of the jury, and giving weight to the jury recommendation of the death penalty, this Court sentenced Defendant. On June 4, 2004, this Court issued a FAPH. The Court concluded that the appropriate sentence for Defendant's convictions of Murder in the First Degree of John Charbonneau and Sproates, respectively, was death by lethal injection. This sentence was so ordered.

On March 1, 2006, the Delaware Supreme Court reversed the convictions in this case in *Charbonneau v. State*, 2006 WL 476996 (Del. Supr.), and remanded the case for re-trial. Defendant's pertinent argument on appeal to the Supreme Court surrounded the testimony of her co-conspirators, Mellisa Rucinski ("Mellisa"), and Willie Tony Brown ("Brown"). Specifically, the reversal of Defendant's convictions was based on the denial of her motion *in limine* requesting the admission into evidence of Brown's plea and proffer for the purposes of impeaching Mellisa and creating reasonable doubt about the State of Delaware's ("the State") case.

The case was remanded back to the Superior Court without instruction by the Supreme Court as to whether the judge who had originally presided over it should rehear it. The custom in Delaware is for a remanded case to return to the original Superior Court judge, absent an order to the contrary. *See Matter of Will of Stotlar*, 1985 WL 4782, *1 (Del. Ch.) ("It would also be contrary to the Delaware tradition that the same judge hears a case on remand after a reversal on appeal, even where the trial judge initially sentenced the defendant to death."). Defendant has now made a Motion for

Recusal ("Motion") based on Delaware Judges' Code of Judicial Conduct, Canon 3(C). Defendant's Motion is based on the argument that "the Court has, necessarily, decided a number of issues in the case, and the ultimate issue which necessarily requires recusal."[1] The issues Defendant alleges have already been decided are taken from the wording of the FAPH and are enumerated in Defendant's Motion. Defendant also notes that the wording of the FAPH creates an appearance of impropriety.

In ruling on the Motion, this Court was faced with possible conflicting precedent on the issue of disqualification of a judge that gave room for pause. *See Flonnory v. State*, 778 A.2d 1044 (Del. 2001) and *Garden v. State*, 815 A.2d 327 (Del. 2003). As such, the Court sent a Certificate of Questions of Law to the Supreme Court asking for disposition on the following two questions:

> (1) Notwithstanding the trial judge's subjective belief that he is free of bias or prejudice, is there an objective appearance of bias as a matter of law sufficient to cause doubt about his impartiality?
> (2) If there is not an objective appearance of bias sufficient to cause doubt about his impartiality, are there unusual circumstances in this case which would warrant reassignment to another judge as a matter of judicial administration?[2]

After considering the above questions, in light of the particular circumstances of this case, the Supreme Court, in an Order dated June 19, 2006, refused decision on the certified questions. The Supreme Court determined that important and urgent reasons did not exist to justify deviating from the ordinary appellate process available to the parties in this case.[3]

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[1] Defendant's Motion For Recusal dated April 24, 2006, p.2.
[2] Certificate of Questions of Law, June 2, 2006, p.4.
[3] Supreme Court Order No. 280, 2006 dated June 19, 2006.

STANDARD OF REVIEW

Defendant moves for recusal under the Delaware Judges' Code of Judicial Conduct. The Code says, in pertinent part, in Canon 3(C) that a "judge should disqualify himself… in a proceeding in which the judge's impartiality might reasonably be questioned…." The current jurisprudence on this issue stems in large part from the decision of our Supreme Court in *Los v. Los*, 595 A.2d 381 (Del. 1991). In *Los*, at 383, the Court said:

> The requirement that judges be impartial is a fundamental principle of the administration of justice. To that end, rules of disqualification have evolved to ensure that no judge shall preside in a case in which he is not disinterested and impartial. As a matter of due process, a litigant is entitled to neutrality on the part of the presiding judge but the standards governing disqualification also require the appearance of impartiality.

Los then went on to establish the two-part test in which judges were to engage when faced with a claim of personal bias or prejudice under Canon 3 C(1). A judge must first, "as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party." *Id.* at 384-5. The second part of the test requires an objective analysis of whether there is a situation that, actual bias aside, there is an appearance of bias sufficient to cause doubt as to the judge's impartiality. *Id.* at 385. Recusal is required for situations in which there is either a subjective belief that the judge cannot proceed or there is an appearance of bias sufficient to cause doubt as to the judge's impartiality.

DISCUSSION

Defendant asserts that this Court already has decided "a number of issues," as well as the "ultimate issue" in this case, which "necessarily requires" a recusal.[4]

[4] Defendant's Motion For Recusal dated April 24, 2006, p.2.

Defendant lists eight examples of the "conclusions that the Court drew with respect to evidence that was strongly contested by the defendant" (presumably these are the "number of issues").[5] However, Defendant does not specify what she considers the "ultimate issue." Careful reading of the Motion provides two possibilities: (1) that the "Court has concluded that any testimony which Willie Brown, a likely defense witness in the re-trial, [provides] would be perjury,"[6] and (2) that the Court has drawn conclusions regarding Linda Charbonneau and her "perceived 'masterminding' of this criminal enterprise."[7] It seems, therefore, that in order to fully understand the issues surrounding this Motion for Recusal, it is important to discuss the events surrounding this Court's decision on Defendant's motion *in limine* concerning the plea and proffer of Brown, as well as the wording of the FAPH.

A. Denial of Motion *in Limine*

The State has asserted that it was faced with an ethical dilemma when it determined that Brown was not telling the truth. It decided, therefore, it could not call him as a witness. The defense was aware of the conflicts between Brown and Mellisa's proffers, and had planned to use the discrepancies to discredit both witnesses. However, by not calling Brown as a witness and also not accepting Brown's plea deal before Defendant's trial, the State effectively made it impossible for the defense to introduce the conflicting accounts to the jury.

The Supreme Court does not dispute, at base, that the State may have found itself faced with an ethical dilemma due to the fact that it had two witnesses, both of whom were bound by plea agreements "contingent on their providing truthful proffers and truthful testimony at Linda's trial," who gave conflicting versions of the murders.

[5] *Id.* at p.3.
[6] *Id.*
[7] *Id.*

Charbonneau, at *1. It would clearly taint the trial to allow the State to present two witnesses with inconsistent versions of the same events and assert that both versions are true.

The Supreme Court did, however, find the State's handling of this ethical dilemma problematic. The State was ethically obligated to evaluate the testimony of both Mellisa and Brown and determine which of the versions it believed to be true. After making the determination that Brown's testimony would constitute perjury, the State correctly called only Mellisa to the stand. At this point, however, if the State's ethical dilemma was actually solved, as the State's actions assert it was, it is clear to the Supreme Court that the State had two options. Either it could have: (i) withdrawn Brown's plea agreement, which was contingent on his "truthful" proffer; or (ii) changed the contingency basis of the original agreement, accepted his plea, and brought Brown before the Court for sentencing. *See Charbonneau*, at *10. Following either one of these two courses of action would have allowed the trier of fact a more complete picture of the events surrounding the murders, and would not have taken the task of determining the credibility of witnesses away from the jury.

Neither of these options apparently occurred to the State. When looking at the issues involved, the Supreme Court found that the State came to the conclusion that there were only two possible options:

> According to the State, the "ethical dilemma" resulting from their belief left the prosecutors with few viable options: (i) call Brown and "ask him about [John's] death and maybe either don't ask him anything about the Sproates death or just ask him a general question, 'Did you participate in the killing and transportation of the body and burial of Sproates?,' and sit down and let the defense have at him," or (ii) not call Brown at all. The State ultimately decided not to call Brown, despite having listed him as a potential witness twelve days before opening statements were to begin and despite having waited until four days before scheduled opening statements to disclose its so-called "ethical dilemma."

Id. at *4 (footnote omitted).

There does not seem to be any dispute that Brown has actual knowledge of the events that took place in autumn of 2001; however, there have been questions raised regarding his credibility and the veracity of his proffer and possible testimony. In deciding the original motion *in limine*, this Court considered Brown's possible testimony under the analysis of *Potts v. State*, 458 A.2d 1165 (Del. 1983) and *Johnson v. State*, 604 A.2d 417 (Del. 1991). Relying on these precedents, the Court denied the motion *in limine*. As the Supreme Court notes in its decision, the reliance on these precedents was misplaced.

Nonetheless, in order to evaluate Defendant's argument in its entirety, it is important to completely discuss this Court's reasoning for its decision on Defendant's *motion in limine*. The Supreme Court ruled that the result of denying the motion *in limine* was that this Court "essentially determined as fact the State's unilateral determination about Brown's and Mellisa's respective credibility." *Charbonneau*, at *1. The Supreme Court determined further that denying the motion excluded evidence relevant to the credibility of one of the two State's primary fact witnesses. The result of this action was to remove from the ultimate finder of fact the opportunity to decide which of the two State's witnesses was more credible. In essence, the Supreme Court felt that the effect of denying the motion amounted to an endorsement of the State's view of the disputed facts. *See Charbonneau*, at *6. Therefore, regardless of this judge's reasons for the denial of the motion, "the result was to undermine confidence that the defendant received a fair trial." *Id.* at *1.

Although this judge's reasoning process in denying the motion *in limine* is immaterial to the Supreme Court's final determination, it is necessary to the Motion at

hand. When ruling on the motion *in limine*, this Court did not make a value judgment on the veracity of Brown's version of the events surrounding the two murders. It is clear from the record that this Court relied on *Johnson* when it "concluded that any probative value of the fact of Brown's plea and the facts proffered in support thereof was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or wasting time." *Charbonneau*, at *5. Assuming Brown's proffer was true, it was not favorable to Defendant. Brown accused Defendant of killing John Charbonneau. There appeared to be obvious prejudice as the jury would regard the issue of Defendant's guilt or innocence as settled. Consequently, when the proffer was looked at in conjunction with the prejudice that *Johnson* presupposes regarding co-defendant testimony, it seemed to this Court that the prejudicial effect outweighed any probative value.

Therefore, although the veracity of Brown's testimony was the cause of the State's ethical dilemma and thus the impetus for the motion *in limine*, the motion itself was not decided with the presumption that Brown's testimony would be false. On the contrary, one basis for the decision was, as explained above, that under *Johnson*, *presuming that Brown's testimony was deemed true*, its introduction to the jury would result in prejudice against Defendant that substantially outweighed the testimony's probative value. This Court was aware of the State's view that Brown's testimony would be perjury, but the truthfulness or not of Brown's testimony was not important. *Presuming that Brown's testimony was deemed false,* the knowing use of perjured testimony – an option prohibited to the State – likewise raises concerns about the integrity of the evidence when sought to be introduced by a defendant. *See Johnson v.*

State, 587 A.2d 444, 447 (Del. 1991), *citing Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173 (1959). Either scenario warranted its inadmissibility.

This Court noted these conclusions in its FAPH. It first explained why Brown's testimony would not have been helpful if true, writing, "[f]rom the Court's perspective Brown's testimony would not have been helpful as he accused the defendant of attacking John Charbonneau and he claimed Rucinski participated in the death of William Sproates."[8] In *Johnson*, our Supreme Court upheld the Superior Court's decision to deny the admission of a co-defendant's guilty plea, even though the defendant was arguing for the admission, because the prejudicial effect to Johnson of admitting the evidence substantially outweighed its probative value. In making this ruling, our Supreme Court cited the 11th Circuit case of *United States v. McLain*, 823 F.2d 1457, 1464-65 (11th Cir.1987) and noted its holding that "in most cases, the admission of a codefendant's guilty plea will substantially affect the defendant's right to a fair trial because the jury may regard the issue of the defendant's guilt or innocence as settled." *Johnson*, 604 A.2d at 417.

Therefore, this Court felt that if the jury had found Brown's testimony to be true, the trial would be tainted by its prejudicial effects. This Court then went on to explain why it felt Brown's testimony would also not have been admissible if it was not true, because, in that case, its admission would have tainted the trial. This Court also noted this second scenario in the FAPH. After first explaining that the testimony was unhelpful to Defendant and inadmissible under *Johnson* if true, this Court concluded by stating, "[o]n the other hand, any perjured testimony would have tainted the trial."[9]

[8] Findings After Penalty Hearing, dated June 4, 2006, p.13.
[9] Findings After Penalty Hearing, dated June 4, 2006, p.13.

The Supreme Court has ruled that this Court's reliance on the precedent set by *Johnson* and *Potts* was misplaced under the facts of this particular case. Given the Supreme Court's interpretation of the case, as iterated in *Charbonneau*, this Court understands the conclusion that even though the motion *in limine* was denied without judgment as to Brown's veracity, the *effect* of denying the motion was that it "essentially determined as fact the State's unilateral determination about Brown's and Mellisa's respective credibility," at *1, by removing that issue from the jury. *See also id.* at *8 ("It was error for the trial judge to accept the State's contention (and essentially find as fact) that Brown (not Mellisa) was lying and then to remove that issue from the jury.").

This Court had never heard Brown testify personally to any of the issues in this case before the denial of the motion *in limine*. As such, at the time of the motion the Court had no basis to make credibility determinations. During the original trial, the Court had its first opportunity to make a credibility determination about Brown, but the exercise of his Fifth Amendment privilege prevented him from testifying substantively about the issues relating to the murders with which Defendant was charged. Accordingly, this Court has never had the occasion to make any substantial credibility determinations about Brown. This is important to note because the circumstances of this case make it likely that Brown will be a witness at the rehearing.[10]

[10] Even assuming, *arguendo*, that this Court had made rulings concerning the veracity of Brown's testimony, there is precedent that recusal would not be necessary. In *State v. Barnett*, 1997 WL 358019, *1 (Del. Super.), the Court, after noting that the testimony of the State's witnesses was "inconsistent at best," was presented with a motion for recusal. In response, the Court wrote:

> The Court is satisfied that the appearance of bias does not exist. The Court noted that the factual events surrounding Defendant's arrest, as relayed by the State's witnesses, were described in an inconsistent manner. While the Court was concerned with the inconsistencies in the officers' testimony, the Court's concern was raised as a result of information elicited during the trial. The Court was not exposed to extrajudicial sources and the testimony is part of the trial record. Throughout the course of the trial, the Court remained impartial, even after the discovery of the inconsistencies. The Court's concern with respect to the inconsistent testimony of the police officers is not sufficient to require the Court's disqualification as to further proceedings regarding this case.

Other jurisdictions have come to the same conclusion. In *State v. Little*, 431 P.2d 810, 813 (Or. 1967), the Oregon Supreme Court, in ruling on a motion for a change of judge, citing the Ninth Circuit, ruled that:

The Supreme Court's decision that remanded this case back to Superior Court ruled that:

> When the State refused to call Brown as a witness and the trial judge permitted Brown to assert his Fifth Amendment right not to testify for the defense, Linda's motion *in limine* should have been granted. It was reversible error not to admit Brown's plea agreement and proffer into evidence under D.R.E. 804(b)(3) as declarations against penal interest made by an unavailable witness.

Id. at 13. This finding by the Supreme Court does not create any bias against Defendant when she returns to the same trial judge in Superior Court.

Subjectively, this judge believes that he is free of any bias or prejudice against Defendant. Specifically, the trial judge believes that he is free of any bias or prejudice that arose from the decisions he made concerning Brown, the veracity of his plea agreement and proffer, and any of the testimony which surrounds the denied motion *in limine*. From an objective standpoint, the law is beyond question that "a judge is not required to disqualify himself because of adverse rulings in the same or prior proceedings." *Los*, at 385. Further, it is well-settled that, "[t]o be disqualified the alleged bias or prejudice of the judge 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" *Id.* at 384. It is clear that the issues surrounding the remanding of this case do not require recusal.

> The opinion of the trial judge, after hearing the testimony, that the testimony of witnesses favorable to the defendant was not worthy of belief is not evidence of prejudice. "The unfavorable opinion of a party or witness which a hearing officer or a trial judge may entertain as a result of evidence received in a prior and connected hearing involving that individual is not 'bias' in the invidious sense. It is in effect, a judicially-determined finding which may properly influence such office or judge in a supplemental proceeding involving the penalty or punishment to be assessed or the grace to be extended." *MacKay v. McAlexander*, 268 F.2d 35, 29 (9th Cir. 1959). Accord, *Huntingdon v. Crowley*, 414 P.2d 382, 393 (1966).

B. Findings After Penalty Hearing

As initially noted, Defendant claims that this Court has already decided "a number of issues," as well as the "ultimate issue" in this case, and this "necessarily requires" a recusal.[11] Defendant supports this assertion by noting various phrases from the FAPH. Defendant's Motion lists eight examples (the "number of issues") of the "conclusions that the Court drew with respect to evidence that was strongly contested by the defendant."[12] However, Defendant does not specify what she considers the "ultimate issue." Her motion provides two possibilities: (1) that the "Court has concluded that any testimony which Willie Brown, a likely defense witness in the re-trial, [provides] would be perjury,"[13] and (2) that the Court has drawn conclusions regarding Linda Charbonneau and her "perceived 'masterminding' of this criminal enterprise."[14]

This Court does not believe that the listed issues, or the support Defendant provides for them, sustain Defendant's conclusion that "the decision to grant recusal in this case is clear." Each of the noted issues must be looked at in turn, and then the cumulative effect of the issues must be analyzed from an objective standpoint to decide if, individually, or as a whole, they create an appearance of impropriety. The Court will first look at each of the two alleged "ultimate" issues before discussing the others.

(1) Willie Brown's Testimony

The Court will assume first that Defendant feels that the ultimate issue in the case is this judge's mind-set regarding any testimony by Willie Brown. Defendant asserts that this judge already has "concluded that any testimony which Willie Brown, a likely

[11] Defendant's Motion For Recusal dated April 24, 2006, p.2.
[12] *Id.* at 3.
[13] *Id.*
[14] *Id.*

defense witness in the re-trial, [provides] would be perjury."[15] In support of this allegation Defendant provides a quote from the FAPH in which this Court stated:

> From the Court's perspective Brown's testimony would not have been helpful as he accused the defendant of attacking John Charbonneau and he claimed Rucinski participated in the death of William Sproates. On the other hand, any perjured testimony would have tainted the trial. [16]

Defendant's Motion emphasizes the word "perjured" in the above quotation. It is clear that she feels that the Court's use of that word demonstrates that this judge has made a value judgment on the veracity of Brown's testimony. Defendant is mistaken.

First, from a subjective standpoint, this judge is certain that he does not have any bias concerning Brown or any testimony which he may offer. This judge is confident that his prior ruling on the motion *in limine* will not stand in the way of his ability to fairly perform his judicial duties during a re-hearing, free of bias or prejudice.

Second, from an objective standpoint, the quotation must be taken as a whole.[17] When taken in its totality, as discussed earlier in this opinion, the quote explicitly avoids any value judgment and clearly presents two alternate possibilities for Brown's testimony. The first possibility is that the testimony is truthful and was not admissible as part of this judge's evaluation that the prejudice outweighed the probative value. The second possibility, clearly distinguished from the first, and laid out as an opposing possibility by the use of the phrase "on the other hand," is that the testimony is perjury and, therefore, was likewise inadmissible. The clear intent of the Court in this quotation was to explicitly show that a value judgment on Brown's testimony was unnecessary due to the circumstances of the case, and accordingly, that one was not made. Regardless of

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[15] *Id.*

[16] Findings After Penalty Hearing, dated June 4, 2004, p.13

[17] *See, Williams v. Reed*, 6 S.W.3d 916 (Mo. Ct. App. W.D. 1999), and *Metz v. Metz*, 61 P3d 383 (Wyo. 2003) (The fair meaning of any remark made by the trial judge must be interpreted in light of the context in which it was made.).

its truth, the Court felt that Brown's proffer and possible testimony was inadmissible and therefore refused to allow its introduction.

The use of arguments in the alternative is a common tool for judges. However, simply pointing out that perjured testimony would taint a trial does not imply that this Court has determined that Brown's testimony would be perjury. In *Charbonneau v. State*, the Supreme Court notes:

> While we agree that neither side could have presented perjured testimony for its truth, the dissent fails to note that the defense could have used Brown's proffer for other purposes; i.e., impeachment-a fact the trial judge recognized.

Charbonneau, at *20. This statement of the Supreme Court is very similar to this judge's statement in the FAPH. It is implicit in the reasoning above that the Supreme Court has not concluded that Brown's testimony would have been perjury, but simply noted that, even if it had been, it would have been admissible for impeachment purposes.

As this case is re-heard, it will be necessary for the jury to hear the testimony of Brown, Mellisa and any other witnesses, and make value judgments on any conflicting testimony. It is not a unique situation in the judicial system to have a group of co-defendants whose stories are not exactly the same. In fact, it is not surprising when a group of co-defendants all give recitations of a crime which do not overlap at all. Were this not true, there would be no need for a fact finder to determine which of the versions is most credible. In the present case, on re-trial, a new jury will be determining the credibility of all the witnesses, including both Mellisa and Brown, for the first time. It also may be necessary, should the case proceed to a penalty phase, that the trial judge will have to make determinations about the credibility of the witnesses. Should this circumstance arise, this judge will be charged with looking at the case anew, and drawing his conclusions from the facts and relevant evidence of the re-trial, and not from any

irrelevant or prejudicial information from the last trial. This judge is certain that he will be able to perform this task, weigh the credibility of all the witnesses without any undue bias or prejudice, and not be hindered in the performance of his judicial duties.

The Court's duty to separate relevant and competent evidence from the irrelevant and incompetent is one that is raised peripherally in relation to the testimony of Willie Brown. However, any issues surrounding this particular duty of the Court will be explored below, in relation to Defendant's other possible assertion of the "ultimate conclusion" that has already been decided by this Court.

(2) Linda Charbonneau

The Court's statement that Defendant was the "mastermind" of this criminal enterprise is the other possibility Defendant asserts as the "ultimate conclusion" already decided by this Court.[18] In support of this statement, Defendant cites the following phrase from the FAPH:

> As the leader, instigator, and mastermind, the defendant has more culpability than Brown and Rucinski. They were her agents. She has more, not less, responsibility for these murders. The plea agreements and involvement of the co-defendants in these crimes do not provide defendant with a safe harbor. [19]

Defendant argues that "given the conclusions which the Court has drawn regarding Linda Charbonneau and her perceived 'masterminding' of this criminal enterprise, at the very least it does not appear that the Court cannot square these conclusions with the presumption of innocence with which she is now reunited."[20] This Court can only assume that Defendant meant to infer that it *appears* that the Court cannot square its conclusions with a presumption of innocence. However, the Court agrees with Defendant's conclusion in the way that it is written: that there is no problem reconciling

[18] Defendant's Motion For Recusal dated April 24, 2006, p.2.
[19] Findings After Penalty Hearing, dated April 4, 2004, p.14.
[20] Defendant's Motion For Recusal dated April 24, 2006, p.3.

its previous conclusions and the presumption of innocence with which Defendant is now reunited.

In support of her Motion, Defendant states that, "at the very least, it appears that recusal is required under part two of the *Stephenson* [sic] test."[21] In *Stevenson v. State*, 782 A2d 249, 251 (Del. 2001), our Supreme Court ruled as follows:

> On the expanded record now before us, we conclude that the trial judge's contact with the victim in this case, coupled with the judge's request for assignment of the murder cases-a request apparently made before indictment and not disclosed on the record of the proceedings in the Superior Court-created an unacceptable appearance of impropriety. In view of the trial judge's personal and independent role in the imposition of the death penalty under Delaware law, including the rendering of a victim impact assessment, the trial judge's individual actions undermined the appearance of fairness which is a prerequisite for the imposition of capital punishment.

Defendant asserts that her case is analogous to *Stevenson* because in her case "the Court has made specific conclusions regarding not only the defendant's guilt but the credibility of her co-defendants who will almost certainly testify."[22] Further, Defendant goes on to assert that "there is no doubt of the Court's strength of opinion concerning the complicacy [sic] of the defendant as shown in the Sentencing Order."[23] Defendant's final argument is that "the problem here is the Court's conclusions concerning factual issues and most importantly the role of the defendant are [sic] antithetical to the presumption of innocence which the defendant once again possesses. With all respect to the Court, the aforementioned conclusions also create an appearance of impropriety."[24]

The Court must first note that the precedent, upon which Defendant relies, encompasses a situation which is vastly different from the one in this case. In *Stevenson*, the Supreme Court reached two distinct conclusions which, when taken together in the

[21] Defendant's Motion For Recusal dated April 24, 2006, p.3.
[22] *Id.*
[23] *Id.*
[24] *Id.*

unique circumstances of that case, it felt created an appearance of impropriety that warranted the recusal of that trial judge. The Supreme Court clearly stated, "we conclude that the trial judge's contact with the victim in this case, *coupled* with the judge's request for assignment of the murder cases - a request apparently made before indictment and not disclosed on the record of the proceedings in the Superior Court - created an unacceptable appearance of impropriety." *Stevenson*, at 251 (emphasis added). It is clear the reasons the Supreme Court cited as creating an appearance of impropriety when coming to its conclusions were taken together and in conjunction with the fact that the request for the case was not made on the record, a fact which is given particular importance. Further, the strength of the Court's opinion concerning the complicity of the defendant in *Stevenson* is based on the trial judge's comments which carried a tone of personal insult, which is not the case here. A careful reading of *Stevenson* shows that it does not provide support for Defendant's position.

Notwithstanding Defendant's lack of relevant precedent, the Court will consider each of her arguments. Taking each of Defendant's arguments surrounding the alleged "ultimate conclusion" that this Court has drawn regarding her being the "mastermind," the Court notes that there are essentially three separate arguments asserted under this rubric: (i) the strength of the Court's conclusions weighs on the appearance of impropriety, (ii) the Court has made specific conclusions regarding the credibility of her co-defendants, and (iii) the Court has made specific conclusions on factual issues and the role of Defendant, which relate to Defendant's guilt. These will be looked at in turn.

(i) Strength of conclusions

Generally, "the fact that strong language is used in a ruling does not indicate bias." 48A C.J.S. Judges §264. *See also Obert v. Republic Western Ins. Co.*, 190 F. Supp

2d 279 (D.R.I. 2002) (The fact that a judge uses strong language in a ruling does not indicate bias). Notwithstanding, this first assertion is more relevant when looking at the cumulative effect of the eight separate, asserted conclusions, which Defendant quotes from the FAPH, when discussed as a whole. This analysis is completed under (3) below. A separate analysis of this issue is therefore not necessary in relation to the alleged "ultimate conclusion" being discussed here.

(ii) Conclusions on the credibility of co-defendants

The second assertion is simply a reiteration of Defendant's argument that this Court already has pre-determined that any testimony of Brown would be perjury. That issue has been adequately explained earlier in this opinion and need not be revisited here.

(iii) Conclusions on factual issues and the role of the defendant

The final assertion regarding this "ultimate conclusion" argument is that the Court already has made specific conclusions on factual issues which relate to Defendant's guilt. Defendant asserts that these conclusions are antithetical to the presumption of innocence she now possesses and create an appearance of impropriety.

This Court is unable to imagine a case in which, at the completion of both the guilt and penalty phases, the presiding judge has not made necessary conclusions on factual issues which relate to the defendant's guilt. In both the civil and criminal realms, judges are routinely required to reach conclusions on culpability, liability, and guilt, which a higher court sometimes reverses. For a judge to be forced to recuse himself or herself from a case because a higher court reversed the judge's decisions would require a new judge to preside over every remanded case. This is clearly not the law in our State or any other.

It is well settled in Delaware that participation in a prior trial does not create bias *per se*. This issue was discussed at length in *State v. Manley*, in which the court stated:

> Adverse rulings, in and of themselves, will seldom, if ever, constitute a valid *per se* basis for disqualification on the ground of bias. The mere fact that a judge rules against a party on a motion is not sufficient to meet the objective standard for recusal. The bias envisioned by Canon 3(C)(1)(a) is not created merely because the judge has made adverse rulings during the course of a proceeding.

State v. Manley, 2004 WL 2419138 (Del. Super), *citing In re Wittrock,* 649 A.2d 1053, 1054, (*citing Liteky v. United States,* 510 U.S. 540, (1994)); *Weber v. State*, 547 A.2d 948 (Del. 1988); and *Baxter v. State*, 788 A.2d 130 (Del. 2002). It is for this reason that it is standard custom and practice in Delaware that when a case is remanded back to the court below, absent specific instructions to the contrary, the case is returned to the same trial judge who presided over it initially.

It is not at all unusual for a judge to be tasked with the responsibility of separating relevant and competent evidence from the irrelevant and incompetent. This is the clear province of judges in the administration of their official duties. In every case where a judge has excluded evidence that was ruled improperly obtained or heard any case on remand, the judge is expected to rule without giving weight to judicially irrelevant evidence. As The Delaware Trial Handbook states explicitly, in §3.9, this foundation of our judicial system is predicated on a presumption that our judges are sophisticated enough to rely only on relevant evidence:

> In a non-jury trial, strictness as to the rules governing admissibility of evidence is not as great as in jury trials, since the judge is better able than a jury to separate the relevant and competent evidence from the irrelevant and incompetent. The judge should ordinarily receive all evidence that is not clearly inadmissible….There is a presumption that the judge disregarded the incompetent evidence and decided the matter from a consideration of competent evidence only.

David L. Finger & Louis J. Finger, Delaware Trial Handbook (1999) (Footnotes and citations omitted).

The "presumption" referred to in the quotation above is one of the cornerstones of our legal system and remains true of judges in jury trials as well. Both the impartiality and the competency of judges are equally important to the public confidence in which our legal system relies. This is true in Delaware and throughout the country, and is perhaps summed up best in the following paragraph written by the Ohio Court of Appeals in *Bowery v. Chandler*, in a case denying a motion for a new trial based on the grounds of jury misconduct:

> To accept appellant's argument that the juror's testimony somehow fatally taints any other valid reason for granting a new trial is to find the trial judge incapable of separating cause from effect, prejudicial evidence from evidence which is not prejudicial, and relevant evidence from evidence which is not relevant. *For better or worse, our judicial system presumes judges to be capable of disregarding irrelevant or prejudicial information when making decisions. Standard trial procedure requires trial judges to rule on the admissibility of allegedly prejudicial, irrelevant, or unreliable evidence on a regular and continuing basis. On appeal, it is presumed that the trial court will reject incompetent or prejudicial evidence and consider only competent and relevant evidence. See State v. White* (1968), 15 Ohio App. 2d 146. When ruling on a motion for new trial involving multiple theories, the trial judge is called upon to exercise similar skills, and we believe a similar presumption should be made.

Bowery v. Chandler, 1984 WL 4362, *2 (Ohio Ct. App.) (emphasis added).

Despite Defendant's assertions, the situation in which this judge now finds himself in is not at all unique. Defendant seems to recognize this initially in her Motion, as she wrote, "[t]he following is a list of findings contained in the June 4, 2004, Order demonstrating that the Court has, *necessarily*, decided a number of issues in the case...."[25] It was clearly required by statute for this Court to make the findings it did when

[25] Defendant's Motion For Recusal dated April 24, 2006, p.2 (emphasis added).

sentencing Defendant.[26] Moreover, the Principles of Professionalism for Delaware Judges, which is intended to be followed by all judges in the state, provides, in Principle 7., that:

> To the extent possible, a judge should give all issues in controversy deliberate, informed, impartial and studied analysis and consideration and explain, when necessary, the reasons for the decisions of the court.

Further, this is a capital case that resulted in a death sentence, as was the case in *Capano v. State*, 781 A.2d 556, 666 (Del. 2001), where our Supreme Court noted that, "[d]eath cases are different from other cases and require heightened sensitivity to the finality of the punishment and scrupulously fair process in the penalty phase." *Capano* also quotes Justice O'Connor, noting that:

> Because sentences of death are "qualitatively different" from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

Capano v. State, 781 A.2d at 666 n.479.

Our Supreme Court noted further in *Barrow v. State*, 749 A.2d 1230, 1249 (Del. 2000), quoting the United States Supreme Court:

> The imposition of the death penalty requires scrupulous adherence to the constitutional standards that authorize its use. One of the most important of these standards is that there be "a nexus between the punishment imposed and the defendant's blameworthiness." *Thompson v. Oklahoma,* 487 U.S. 815, 853, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (O'Connor, J., concurring in the judgment). This requirement springs from the recognition that execution is "unique in its severity and

[26] The law provides that if a jury has been impaneled and if it has found the existence of at least on statutory aggravating circumstance beyond a reasonable doubt, the Court "after considering the findings and recommendation of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist." 11 *Del.C.*§4209(d)(1). Otherwise a sentence of life imprisonment shall be imposed without benefit of parole or any other reduction. 11 *Del.C.* §4209(d)(2).

> irrevocability." *Gregg v. Georgia,* 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In light of the heightened scrutiny death penalty cases demand, combined with the necessary record that must be created showing the facts relied on and the statutory determinations made by a sentencing judge which are constitutionally required, it is impossible for this Court, or any other, to make and explain the conclusions that are necessarily involved in a capital sentence without drawing some inferences about the defendant. Defendant's argument in this case places trial judges in an untenable position. On the one hand, they are required by *Barrow* to explain the nexus between the punishment imposed and the blameworthiness of the defendant, but on the other hand, they must be careful not to draw conclusions as to the culpability of the defendant.

As was the case in *Weber*, what makes the position particularly difficult here, is that in her Motion to Recuse, Defendant specifically refuses to allege that this judge has a bias[27], stating:

> Canon 3(C) states that a "…judge should disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned." The rule goes on to list a number of situations to which this rule **<u>may</u>** apply. None of these four examples is applicable to the case at bar. [28]

However, the crux of Defendant's Motion on this issue is that, "the Court's conclusions concerning factual issues and most importantly the role of the defendant are antithetical to the presumption of innocence which the defendant once again possesses."[29] These two positions are difficult to reconcile.

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[27] "Weber's motion did not allege that the judge was personally biased against him." *Weber v. State*, 547 A.2d 948 (Del. 1988).

[28] Defendant's Motion For Recusal dated April 24, 2006, p.2. (The first of the four situations listed in the Canon which Defendant avers is not applicable is: "(a) The judge has a personal bias or prejudice concerning a party, or a personal knowledge of disputed evidentiary facts concerning the proceeding.").

[29] Defendant's Motion For Recusal dated April 24, 2006, p.3.

Because Defendant specifically declines to aver any personal bias, the only possible basis she may assert for this judge's recusal revolves around a judicial bias. As Judge Gallagher notes in *Sand v. Martin*, 1982 WL 35819, *1 (Del.Fam.Ct.), another case where no personal bias was alleged:

> [T]he bias must be a personal one, not judicial. A mere allegation of "judicial bias" is not a sufficient ground for recusal. *United States v. Falcone,* 505 F.2d 478 (3rd Cir.1974), *cert. denied* 420 U.S. 955, 95 S.Ct. 1338, 43 L.Ed.2d 432 (1975). Any bias developed during the trial is judicial bias, and is not personal bias. *United States v. Hall, supra.* To be sufficient for a judge to be disqualified from a case, that bias must also "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.,* 384 U.S. 563, D.C.Ct.App., 393 A2d 132 (1978). Additionally, the alleged bias of a judge must be of such a degree as to interfere with the assurance that the litigants are afforded a fair and impartial trial. *Bumpus v. Uniroyal Tire Co. Div. of Uniroyal, Inc.,* 385 F.Supp. 711 (E.D.Pa.1974).
>
> In the case before the Court, petitioner alleges that this judge cannot render a fair and impartial decision based on the evidence before him. However, petitioner offers no evidence to show a personal bias on the part of the judge. There is similarly no evidence to show that alleged bias has a source originating "outside the four corners of the courtroom." *United States v. Hall, supra.* Nor is there evidence to show that any of the statements made or actions taken by this judge were in other than a judicial capacity.

Due to the fact that Defendant has explicitly denied the possibility of a personal bias, this Court must assume that Defendant feels that the adverse ruling this judge made in the penalty phase of the preceding trial creates a judicial bias. However, the law is clear that "in order to succeed with [a] claim [of bias], defendants must show that this judge has a personal bias against the defendants, not a judicial bias." *State v. Manley*, 2004 WL 2419138, *16 (Del. Supr.). This issue already was discussed previously in this opinion, further quoting *Manley*, when it notes:

> Adverse rulings, in and of themselves, will seldom, if ever, constitute a valid *per se* basis for disqualification on the ground of bias. The mere fact that a judge rules against a party on a motion is not sufficient to meet the objective standard for recusal. The bias envisioned by Canon

> 3(C)(1)(a) is not created merely because the judge has made adverse rulings during the course of a proceeding.

State v. Manley, 2004 WL 2419138 (Del. Super), *citing In re Wittrock,* 649 A.2d 1053, 1054, (*citing Liteky v. United States,* 510 U.S. 540, (1994)); *Weber v. State*, 547 A.2d 948 (Del. 1988); and *Baxter v. State*, 788 A.2d 130 (Del. 2002).

This finding shows that the conclusions drawn by this Court in relation to the FAPH do not provide, by themselves, a reason for recusal. Therefore, any reason that may exist for the recusal of this judge must be based on whether the cumulative effect of the statements found in the FAPH create an appearance of impropriety which would warrant recusal.

As noted above, Defendant peripherally raised the issue of bias in relation to the Court's dealings with Brown. Although not specifically alleged by Defendant, it is implied that she feels this Court is biased in its view of Brown's testimony and proffer. This argument has no basis. This judge has had only scant opportunity to personally judge the credibility of Brown and has not made any judgments on the veracity of any possible testimony that he may provide. Further, as with Defendant, any bias that Defendant even asserts is of a judicial nature, not of a personal nature. As a result, there is no reason for this judge to recuse himself based on this assertion.

(1) "Other issues"

Defendant's final argument is that the cumulative effect of the following six citations from the FAPH, combined with the two previously discussed relating to the possible "ultimate issue" in this case, establish an objective appearance of impropriety which results in the necessity of this judge's recusal. The remaining citations from the FAPH are:

(i) "Eventually, she formulated a plan to kill him. In the fall of 2000, Linda Charbonneau had Mellisa Rucinski ask her husband, John Rucinski, to kill John Charbonneau." p.4
(ii) "Linda Charbonneau and Mellisa Rucinski enlisted Brown in the plan to kill Charbonneau." p.5
(iii) "After the murder, Linda Charbonneau gained access to John Charbonneau's bank account where social security checks continued to be deposited. The defendant gave John Charbonneau's MAC card and P.I.N. information to Rucinski who withdrew money and shared it with defendant." p.7
(iv)"After learning about Sproates' questions, concerns, and activities, Linda Charbonneau decided to kill him to hide the John Charbonneau murder….Her words became his death warrant." p. 8
(v) "The State proved that John Charbonneau's murder was motivated by defendant's greed." p.11
(vi)"The defendant chose death for John Charbonneau. ……The defendant chose death for William Sproates." p.15

Defendant avers that these citations are examples of "conclusions that the Court drew with respect to evidence that was strongly contested by the defendant."[30]

There is no question that any adverse conclusions made by this Court or the jury in the preceding case fall under the rubric of evidence that Defendant strongly contested. This is presumably also true in most cases where the ruling is not in favor of the defendant. It is therefore not surprising that, "[i]t has been observed that Canon 3 C concerning the disqualification of a judge to sit in a case is the most litigated section of the Code of Judicial Conduct." *Weber v. State,* 547 A.2d 948, 951 (Del. 1988). However, "[j]udges are not automatically obligated to recuse themselves based on allegations of bias or because 'they ruled strongly against a party in the first hearing.'" *Beck v. Beck*, 766 A.2d 482, 484-5 (Del. 2001) (citing *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 237 (1947). S*ee also United States v. Sammons*, 918 F.2d 592 (6th Cir. 1990) ("The standard is an objective one, hence, the judge need not recuse himself based on the 'subjective view of a party' no matter how strongly that view is held."). The Supreme Court goes on to note in *Weber v. State*, 547 A.2d at 952, that:

[30] Defendant's Motion For Recusal dated April 24, 2006, p.3.

> This Court has held that the bias envisioned by Canon 3C(1) is not created merely because the trial judge has learned facts or made adverse rulings during the course of a trial. *Steigler v. State,* Del.Supr., 277 A.2d 662, 668 (1971). Other courts have held a judge is not precluded *per se* from further participation in the same case even if on appeal it has been remanded for a new trial or resentencing. *E.g., United States v. Hollis,* 718 F.2d 277, 280 (8th Cir.1983) (resentencing), *cert. denied,* 465 U.S. 1036, 104 S.Ct. 1309, 79 L.Ed.2d 707 (1984); *United States v. Baylin,* 696 F.2d 1030, 1042-43 (3d Cir.1982) (resentencing); *McFadden v. State,* 402 A.2d 1310, 1315 (Md.Ct.Spec.App.1979) (retrial); *Commonwealth v. Conner,* 384 A.2d 1192, 1193 (Pa.1978) (per curiam) (resentencing). *See Nerison v. Solem,* 715 F.2d 415, 416-17 (8th Cir.1983) (trial before judge who had accepted guilty plea that had been subsequently vacated), *cert. denied,* 464 U.S. 1072, 104 S.Ct. 983, 79 L.Ed.2d 220 (1984); *State v. Walker,* 166 A.2d 567, 573 (N.J.1960) (trial before judge who had accepted *non vult* plea and denied writ of habeas corpus).

On the same point, the Court of Chancery has noted:

> If a judge who rules against a party can successfully be labelled prejudiced for that reason, then the Court of Appeals would never be able to remand a case for further action by the judge who initially decided it. It should be self-evident that adverse rulings in themselves do not create judicial partiality. *See, e.g.*, *United States v. Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976); *Honneus v. United States*, 425 F. Supp. 164, 166 (D. Mass. 1977). Otherwise, 'there would be almost no limit to disqualification motions and the way would be opened to a return to 'judge shopping,' a practice which has been for the most part condemned.' *Blizard v. Fielding*, 454 F. Supp. at 321, quoting *Lazofsky v. Sommerset Bus Co., Inc.*, 389 F. Supp. 1041 (E.D.N.Y. 1975).

Matter of West, 1987 WL 18824, *1 (Del. Ch.).

Although Defendant, in her Motion, cites *Stevenson v. State*, in which the Supreme Court deemed that recusal of the trial judge was necessary, as analogously supporting her reasoning, this Court feels that this case is more akin to the follow up to the *Stevenson* case. After remand, defendants Stevenson and Manley moved for the recusal of the subsequent trial judge, based on statements he made in his opinion denying their motions for post conviction relief. The statements made by the subsequent trial judge are very similar to those found in the FAPH. They are conclusions drawn from the

facts of the case. When taken in context, they give no evidence of personal bias or animosity.

In *State v. Manley v. Stevenson*, 2004 WL 2419138, at *2-3 (Del. Super.), the Court wrote:

> The defendants premise their recusal motions on four discrete portions from this judge's opinion denying their motions for post conviction relief and holding the penalty hearing would proceed, citing these passages:
>
> 1. In fact, the *Swan* Court distinguished that case from *Chance* by noting that there was "no credible argument, as in *Chance,* that Warren's death was an unintended consequence of either Swan's or (co-defendant) Norcross' actions." The same can be said about the evidence in this case.
> 2. The evidence conclusively showed a planned and intentional killing in which two persons, these defendants, participated. *Chance,* therefore, is inapplicable to the facts of this case.
> 3. The evidence was overwhelming.
> 4. There is a key element of the record in this case which both defendants ignore or have chosen not to address. Whatever infirmities the Supreme Court found with the original trial judge's penalty decision, the fact remains that before his sentencing decision was made, the jury unanimously found beyond a reasonable doubt that four statutory aggravating factors existed.
>
> The defendants contend these statements, when viewed in light of the fact-finding this judge would have to make in the new penalty hearing, establish an objective impropriety that means this judge should not preside over that hearing. Defendants argue that the Due Process Clause of the Fourteenth Amendment incorporates their right to judicial proceedings presided over by a neutral and detached judge. They continue that the Delaware Code of Judicial Conduct implements this constitutional guarantee and that disqualification is required when the impartiality of the Court might be reasonably questioned.

As was the case in *Manley*, Defendant claims here that this judge has created a scenario where there is an appearance of personal bias sufficient to cause doubt about this judge's impartiality. Essentially, Defendant claims this judge cannot objectively be viewed as a neutral and detached fact finder at the new trial because of the above statements quoted from his FAPH.

As Judge Herlihy surmised in *Manley*, the question then left for this Court is:

> [W]hether the record, when viewed objectively, reasonably supports the [Defendant's] claims of the appearance of prejudice or bias. The recusal inquiry becomes whether, when considered objectively, the [eight] cited instances in the [June 4, 2004 FAPH], either individually or collectively, display a deep-seated antagonism towards [Defendant] that would make fair judgment impossible. In order to succeed with this claim, [Defendant] must show that this judge has a personal bias against [her], not a judicial bias.

Before considering the objective appearance, the Court first will turn its attention to whether this judge subjectively believes he can proceed to preside over the penalty hearing free of bias or prejudice towards Defendant. As already discussed previously in this opinion, this judge finds nothing in his previous decisions or in his dealings with this case that would prevent him from fairly and impartially performing his judicial duties. Defendant's motion for recusal does not alter this judge's belief that he is disinterested and impartial. This judge finds therefore that, as a matter of subjective belief, he can proceed to preside at a new trial free of bias and prejudice towards Defendant and without partiality regarding any of the witnesses.

Being satisfied that the Court has passed the subjective test regarding recusal, the Court now must analyze whether there is an objective appearance of this judge's personal bias sufficient to cause doubt as to the judge's impartiality to a reasonable person. As in *Manley*, Defendant has claimed that this judge created a scenario where he cannot be objectively viewed as a neutral and detached fact finder at her retrial because of portions of language used in his FAPH. As noted, Defendant has pointed to a total of eight instances in the FAPH where she believes the words of this judge establish an objective appearance of impropriety.

In order to objectively determine the effect of this Court's statements in the FAPH, the statements must be compared to similar language which previously has been

evaluated by our Supreme Court, in conjunction with a totality of the circumstances of this case in comparison to other similar cases. Two of the eight quoted passages cited by Defendant already have been discussed at length in this opinion. Therefore, each of the six remaining quotes, (i) - (vi) above, will be discussed, and then an assessment of the cumulative effect of all the quoted statements also must be determined.

The Court will look first at the four statements numbered (i), (ii), (iii) and (v) above. These statements all relate to the details surrounding Defendant's alleged involvement in the murder of John Charbonneau. The statements were made in the context of the FAPH, which was written after a jury found Defendant guilty of the murder of John Charbonneau. The jury also found three statutory aggravating factors, and that the aggravating circumstances outweighed the mitigating circumstances surrounding this murder. Each of these four statements is a conclusion of fact that can be inferred from the jury's decisions.

The State asserted three statutory aggravating circumstances for each murder. The factors were: (1) Defendant's course of conduct resulted in the death of two persons where the deaths were the probable consequences of Defendant's conduct, (2) Defendant caused or directed another to commit the murder, and (3) the murder was premeditated and the result of substantial planning. The jury returned a verdict establishing the first statutory aggravator. The jury also found unanimously and beyond a reasonable doubt for the other two statutory circumstances.

Cited quote (i)[31] above is a direct inference from the jury's determination that the murder was premeditated and the result of substantial planning as well as support for the finding that Defendant caused or directed another to commit the murder. This Court's

[31] "Eventually, she formulated a plan to kill him. In the fall of 2000, Linda Charbonneau had Mellisa Rucinski ask her husband, John Rucinski, to kill John Charbonneau."

determination on this issue was drawn from the finder of fact combined with the testimony given. On re-trial, this issue necessarily will be reviewed by a new jury. That jury will make the factual determinations which this Court will consider. There is nothing in the above quote that indicates that this judge will not be able to consider the evidence of the new trial and the findings of a new jury as will be necessary on retrial.

Similarly, cited quote (ii) above[32] is support for the jury's finding that Defendant caused or directed another to commit the murder. This determination by the Court was also the result of the available testimony combined with the conclusion drawn by the finder of fact in this case. This issue also will be reheard by a new finder of fact on retrial and the Court will draw its conclusions from the factual determinations of that jury.

The third cited statement[33] again was drawn from the testimony available to this judge and, as with the first two statements above, provides support for the jury determination that Defendant caused or directed another to commit the murder. This statement provides a possible motive for Mellisa to have participated in the scheme. It inferred that Defendant was made privy to the victim's MAC card and P.I.N. As with the other statements, this quote is dependant on a jury determination of Defendant's guilt. As such, there is no reason why this judge will not be able to impartially consider the evidence in a new trial as well as the findings of a new jury.

The fourth of these statements follows the third, and states that, "the State proved that John Charbonneau's murder was motivated by defendant's greed." The State in this case relied upon a non-statutory aggravating factor, alleging Defendant's selfish and

[32] "Linda Charbonneau and Mellisa Rucinski enlisted Brown in the plan to kill Charbonneau."
[33] "After the murder, Linda Charbonneau gained access to John Charbonneau's bank account where social security checks continued to be deposited. The defendant gave John Charbonneau's MAC card and P.I.N. information to Rucinski who withdrew money and shared it with defendant."

greedy motivation for the murder John Charbonneau. There was evidence presented at trial that Defendant removed possessions from the Charbonneau house, as well as the assertion that the escalating ill will between Defendant and the victim surrounded property disputes. This Court's conclusion was drawn from the substantial evidence presented at the trial and as such, does not amount to a personal bias which requires recusal.

Of Defendant's remaining two quotations, number (iv),[34] provides the State's motive for the murder of William Sproates. This quotation also follows logically from the jury's finding that the murder was premeditated and the result of substantial planning. The jury found this statutory factor beyond a reasonable doubt and unanimously. Any recitation by this judge of the jury's factual findings does not amount to a bias or prejudice which requires recusal.

The last quotation cited by Defendant, number (vi) above[35], is the only possible conclusion that this judge could make given the conclusions the finder of fact in this trial presented to him. The jury found Defendant guilty on both murder counts. Under any possible theory of murder in the first degree, the jury had to conclude that Defendant chose death for both victims. If this judge had come to a different conclusion than the one presented here, he necessarily would have had to disregard the conclusions of the finder of fact. This statement was clearly a recitation of the findings made by the jury in the case, and does not provide any reason for recusal.

By citing this last quote from the FAPH, Defendant is essentially asserting that no judge may ever hear a case like this upon remand. Following Defendant's logic leads to no other conclusion. If a judge, as was the case here, upholds the ultimate conclusion

[34] "After learning about Sproates' questions, concerns, and activities, Linda Charbonneau decided to kill him to hide the John Charbonneau murder….Her words became his death warrant."
[35] "The defendant chose death for John Charbonneau. …… The defendant chose death for William Sproates."

made by a jury, then he or she has presented an appearance of bias if the case is remanded. On the other hand, if a judge were to nullify the jury verdict and present a different one, then clearly that judge would create an even greater appearance of bias. No judge is allowed to simply sentence a defendant in a capital case without explaining his or her reasoning because a judge is required by statute to give appropriate weight to the recommendations of the jury and explain all rulings in its findings after penalty hearing. Under any possible scenario, Defendant's assertion here is that no judge can hear a capital case on remand.[36] Defendant has cited no precedent for this conclusion because this is simply not the law in our State.

Providing quotations in a sentencing order of the jury's undeniable conclusions cannot possibly result in an appearance of bias. This Court could find no precedent of necessary judicial rulings forming the basis for an appearance of bias or impropriety.[37] A new trial requires a new jury, which necessitates fresh conclusions. This judge, or any other, is capable of accepting the conclusions of a new jury as well as ignoring any

[36] The Fifth Circuit, in *United States v. Mizell*, 88 F.3d 288, 300 (1996), was asked to establish such a mandatory rule in a case with similar circumstances, noting "we also decline Mizell's invitation to establish a mandatory rule of disqualification when a judge has made findings of the kind attacked in this case. We feel the current rules for discretionary recusal provide adequate security for a defendant's right to an impartial judge."

[37] However, there is ample precedent in both this jurisdiction and others, as related throughout this opinion, that judicial rulings do not form the basis for an appearance of bias or impropriety. Notably, in *Mizell*, the Fifth Circuit stated:

> The grounds for recusal that Mizell asserts consist of judicial rulings which the district judge was *required* to make. *See* U.S.S.G. § 3C1.1; *United States v. Crowell,* 60 F.3d 199, 204 (5th Cir.1995) (stating that the district court has a duty to take an active role in evaluating a plea agreement once it has been disclosed to the court). We hold that to the extent that the district judge formed any opinion about Mizell's case based on his findings made pursuant to U.S.S.G. §§ 3C1.1, 6B1.2(a), and FED.R.CRIM.P. 11(e), it was a proper and appropriate opinion acquired in the course of judicial proceedings, in reliance on information learned during the proceedings. *See Crowell,* 60 F.3d at 204 (stating that the court's "evaluation [of a plea agreement] may include a consideration of the punishment allowable under the agreement, as compared to the punishment appropriate for the defendant's conduct as a whole"). Moreover, the district judge's rulings did not display such deepseated animosity towards Mizell, so as to render his fair judgment impossible upon her retrial.

evidence from a previous trial which remand has made irrelevant. Our Supreme Court has said as much in *Jackson v. State*, 684 A.2d 745, 753 (Del. 1996), stating:

> It is part of a trial judge's normal role to rule upon the admissibility of contested evidence. In the event a judge declares certain evidence to be inadmissible, the judge is expected to exclude that evidence as a factor in any further decision making process. To require a judge to disqualify himself or herself from further participation in a case where the judge acts as a gatekeeper for the admissibility of evidence would impose an unreasonable and totally impracticable standard. A conscientious application of the subjective test by a judge faced with a recusal motion based on exposure to inadmissible evidence in the same proceeding will, in most cases, provide sufficient protection from bias. Knowledge of the content of these tapes alone does not create the appearance of bias and we find no basis to conclude that the trial judge should have recused himself from further participation in the sentencing process. *Weber v. State,* Del.Supr., 547 A.2d 948, 951-52 (1988) (judge not disqualified *per se* by prior participation).

This judge can both understand and appreciate that Defendant has been reunited with a presumption of innocence and preside over a new trial for her without bias or prejudice.

This Court finds that none of the quotations from the FAPH that Defendant cites in her Motion, when looked at individually, in relation to the facts and circumstance surrounding this case, create an appearance of bias or impropriety that would warrant the recusal of this judge. Even looking at the listed quotations without any knowledge of the facts of the case, a reasonable observer would not find recusal was warranted. Our Supreme Court ruled in *Beck v. Beck*, 766 A.2d 482, 484-5, (Del. 2001), that, "[j]udges are not automatically obligated to recuse themselves based on allegations of bias or because 'they ruled strongly against a party in the first hearing.'" (quoting *NLRB v. Donnelly Garment Co.,* 330 U.S. 219, 237, 67 S.Ct. 756, 91 L.Ed. 854 (1947)). *See also Los,* 595 A.2d at 384 ("Where the basis for the alleged disqualification is a claim, under Canon 3 C(1), that the judge 'has a personal bias or prejudice concerning a party,' no *per se* or automatic disqualification is required."). *See also Weber,* 547 A.2d at 952 n.9

("There is no general rule that a judge is disqualified *per se* because of an adverse decision in a former case involving entirely different and unrelated criminal charges against the same party.").[38]

FINAL ANALYSIS

In order to comprehensively complete the objective test, this Court finally must consider whether the totality of Defendant's assertions, when taken together with the particular circumstances of this case, provide an objective appearance of impropriety which requires recusal. As the Supreme Court ruled in *Stevenson*, "any inquiry into the question of whether a judge's impartiality might reasonably be questioned is case specific." *Stevenson*, at 258. Quoting the Third Circuit Court of Appeals, our Supreme Court wrote in *Stevenson*, that "in determining whether a judge had the duty to disqualify him or herself, our focus must be on the reaction of the reasonable observer." *Id. In this case, as was the case in Manley*, "[a] mythical objective observer, knowing and understanding all the relevant facts, the record and the context of the alleged offending sentences, would not believe that this judge has a bias or prejudice against the defendants." *Manley*, at *12.

This judge did not volunteer to take this case nor did he solicit to be assigned the case.[39] Prior to the appointment to handle this case, this judge did not have any contact with Defendant, the co-defendants, the witnesses, or the victims of the crime. When this

[38] The Sixth Circuit similarly ruled in *United States v. Sammons*, 918 F.2d 592 (6th Cir.1990), that "[t]he standard is an objective one, hence, the judge need not recuse himself based on the 'subjective view of the party' no matter how strongly that view is held."

[39] In *Stevenson*, the Supreme Court ruled, at 252, that: "One of the ways to establish an appearance of impropriety is to attempt to determine if the trial court requested the trial or if it was assigned the case randomly."

case was remanded back to the Superior Court, the Supreme Court did not advise that a different judge hear the case.[40]

When the Supreme Court has felt that a new judge was required in the case for reasons of fairness, or the appearance of fairness, it has not hesitated to remand the case with specific instructions. For example, in *Beck*, the Court wrote:

> We suggest therefore that, in considering the judicial assignment on remand, the Chief Judge of the Family Court should determine whether: (a) the concerns discussed above outweigh any administrative inefficiencies in assigning a different judge on remand, and (b) the assignment of a different judge in this case "is advisable to preserve the appearance of justice."

776 A.2d at 485.

In *Flonnory*, another case in which a remand was ordered, without any motion for recusal first being made, the Supreme Court said:

> Since the first claim of error raised by Flonnory required his convictions to be reversed, we have decided not to address his other claims of error in this appeal. We have concluded, however, that a different judge should be assigned to preside at Flonnory's new trial. We have absolutely no doubt that the original trial judge could fairly and impartially preside at Flonnory's new trial. If Flonnory's new trial proceeds to another penalty phase, however, the public's confidence in the impartial administration of justice would be enhanced if Flonnory were not sentenced by a judge who had previously decided that a death sentence was the appropriate punishment for Flonnory's conduct.

778 A 2d at 1057.

As has been discussed at length in this decision, "to be disqualified, the alleged bias or prejudice of the judge 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" *Manley*, at *4, *citing United States v. Grinnel Corp.*, 684 U.S.

[40] This was not true in *Manley*, at *10, where the Supreme Court remanded the case back to a new judge, ruling that, "to *correct any appearance of impropriety that occurred through the personal participation of the trial judge in the sentencing process, we have no alternative but to order a new penalty hearing to be conducted by a different judge who, in turn, will be required to consider, anew, the recommendation of a jury.*

563, 583 (1996), *citing Berger v. United States*, 225 U.S. 22, 31, (1921). Furthermore, Delaware courts have cited federal rulings noting that, "while 'a judge's participation in a given case may on occasion form the basis for a finding of bias,' *Blizard v. Fielding*, 454 F. Supp. at 321, a judge is presumed to be impartial, and the party seeking disqualification bears the *substantial burden* of proving otherwise. *State v. Freeman*, 478 F. Supp. 33, 35 (D. Ida. 1979)." *Matter of West*, 1987 WL 18824, *1 (Del. Ch.) (emphasis added). It seems likely that had the Supreme Court felt that there was an issue of bias that would warrant recusal, the case would have been remanded with specific instructions that it be heard by a new judge.

Likewise, many other jurisdictions also have decided that the criteria for showing bias must originate outside of the four walls of the courtroom, and that the burden is on the defendant to show evidence of bias in a way that had not been done in this case. *See generally, United States v. Harrill*, 91 Fed. Appx. 356 (C.A.5.Tex. 2004) (ruling District Court's remarks during sentencing about defendant's credibility was based on evidence and events that occurred over the course of the judicial proceeding and did not constitute grounds for recusal under a provision requiring disqualification when impartiality might reasonably be questioned); *Lambert v. State*, 743 N.E.2d 719 (Ind. 2001) (ruling that post-conviction judge's statements made during sentencing in petitioner's original trial – which post-conviction judge also presided over – concerning petitioner's character and circumstances of his crime, were not evidence of disqualifying bias. Such statements were part of a judge's judicial function, and the probing of petitioner's character and circumstances of his crime was mandated by Eighth Amendment considerations. U.S.C.A. Const.Amend. 8. And also ruling that emotional language in describing petitioner's character and crime did not demonstrate personal, disqualifying bias or

prejudice outside of the judicial function); *State v. Ferguson*, 20 S.W.3d 485 (Mo. 2000) (finding trial court's remarks during sentencing that the defendant deserved the death penalty more than any other case that judge had ever seen and that the judge's blood boiled when he saw the pictures of the victim did not establish disqualifying bias.); *State v. Ortiz*, 981 P.2d 1127 (Haw. 1999) (ruling trial judge's comments referring to defendant as "menace to society" and observing that defendant had devoted his life to "a pursuit of financial and material gain through crime," during sentencing of defendant for conviction of second-degree theft did not warrant disqualification of judge from presiding over subsequent retrial, especially in light of the fact that the comments were necessary under court procedures for the imposition of an extended term sentence.); *State v. Ross*, 974 P.2d 11 (Haw. 1998) (ruling that trial judge's statements, at defendant's sentencing: that defendant had been arrogant rather than contrite, had made dilatory motions, and had not been credible when testifying, did not establish trial judge's bias, as basis for disqualification. Such observations were unbiased and were properly incorporated into trial judge's explanation of sentencing decision.); *State v. Simmons*, 955 S.W.2d 729 (Mo. 1997) (finding trial judge's comments in sentencing order expressing reasons for agreeing with jury's recommendation of death sentence for two murders did not reveal bias, nor did they warrant disqualifying judge from presiding over postconviction proceeding.); *Hollins v. State*, 679 N.E. 2d 1305 (Ind. 1997) (ruling trial judge's comments on coldness of defendant, his lack of remorse, and his proclivity to kill again were consistent with considerations required to be taken into account by judge in determining defendant's sentence for murder, and did not reflect disqualifying bias or prejudice against defendant.); *State v. Rhoades*, 809 P.2d 455 (1991) (finding that the circumstances were insufficient to warrant disqualification of the trial judge when, in a murder trial, the

defendant had previously been convicted of murder by a jury over which the same judge had presided and that same trial judge had sentenced the defendant to death, having made detailed findings of fact during the sentencing phase, including that the defendant was morally vacant, devoid of conscience, and had a propensity to commit murder.); *State v. Walker*, 944 P.2d 762 (Nev. 1997) (finding in a murder prosecution that there was no bias where the trial judge excluded the prior sworn guilty plea statements of a co-defendant which represented a legitimate concern for the reliability of evidence brought before the jury).

All evidentiary facts known to this judge are taken from his participation in this trial and are a matter of record. The record contains evidence both favorable and unfavorable to Defendant. Further, it is established that "previous contact between the judge and a party or adverse rulings in the same proceeding does not require automatic disqualification." *Manley*, at *4, *citing Steigler v. State*, 227 A.2d 662, 668 (Del. Super. 1971). There is no extrajudicial source for this judge's knowledge. Whatever disputed facts that exist are in the record of the prior trial including inconsistencies of witnesses testifying at that trial. Our Supreme Court ruled on more than one occasion that "a trial judge's rulings alone almost never constitute a valid per se basis for disqualification on the ground of bias." *Limehouse v. Steak & Ale Restaurant Corp.*, 850 A.2d. 302 (Table), 2004 WL 1280400, *2, (Del. 2004), *citing Weber,* 547 A.2d 952; *Liteky v. United States*, 510 U.S. 540 (1994). This case is not the exception.

There is further jurisprudence from outside Delaware that the statements in this case do not amount to an appearance of bias which requires a recusal. The most comprehensive and compelling of these cases is the United States Supreme Court ruling

in *Liteky v. United States*, 510 U.S. 540. The Court ruled in that case, with Justice Scalia writing for the majority, that:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *In re J.P. Linahan, Inc.,* 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Liteky v. United States, 510 U.S. 540, 551-2 (1994). The logic asserted by the Supreme Court in *Liteky*, has been cited and followed for over a dozen years in a host of other jurisdictions, including Delaware.

This judge believes that a reasonable person, knowing all the relevant facts, would not harbor any doubts about this judge's impartiality.

In addition to the body of jurisprudence, there are ample policy reasons that require this judge remain on the case. In *Beck*, when remanding the case to a different judge, the Supreme Court noted "it appears unlikely that a different judge would have to engage in duplicative fact-finding or require substantial time to learn the circumstances of the case." *Beck*, 776 A.2d at 485. The same is not true here, where, as the Supreme Court noted, "[t]he facts of this case are complex." *Charbonneau*, at *2. A new judge would have to spend a substantial amount of time on duplicative fact findings.[41]

[41] In this case, the Defendant challenged six rulings on appeal. Four of these rulings were upheld. *See Charbonneau*, at *1 ("Therefore, although we uphold the trial judge's other rulings challenged on this appeal, we reverse the conviction on the ground that the trial judge's denial of the motion *in limine* fatally undermined the fairness of the trial."). Contrary to Defendant's assertions, this judge's familiarity with the case is a basis

Further, as Vice Chancellor Strine noted in *Reeder v. Del. Dept. of Insurance*, 2006 WL 510067, *17 (Del. Ch.):

> The Supreme Court also has noted that there is a compelling policy reason for a judge not to disqualify himself or herself unnecessarily, and in the absence of genuine bias, a litigant should not be permitted to "judge shop." In that regard, it is also recognized that judges who too lightly recuse shirk their official responsibilities, imposing unreasonable demands on their colleagues to do their work and risking the untimely processing of cases.[42]

This logic was also employed in *Matter of Will of Stotlar*, where the Vice Chancellor noted:

> Quite frankly, I would be happy to disqualify myself from this case or find some other way to avoid hearing this matter. Will contests which pit family member against family member are probably the most disagreeable type of case which the court is called upon to hear. Particularly distasteful is the prospect of listening to witnesses who have already testified in a prior proceeding.
>
> If I disqualified myself, however, I would be abrogating my responsibility. The only knowledge I have of this matter is that which I heard in the courtroom during a vigorously contested trial in which all parties were represented by competent counsel and in which all the witnesses were subject to cross-examination.
>
> For me to disqualify myself merely because I ruled against Mr. Stotlar in a related matter would establish a very dangerous precedent which, if carried to its logical conclusion, would prevent a judge who ruled against a movant for summary judgment from hearing the trial on the merits. Cf. *Steigler v. State,* Del.Supr., 277 A.2d 662 (1971). It would also likely lead other litigants to file meritless motions for disqualification in order to forum shop for a judge who they perceive would be more likely to rule in their favor.
>
> It would also be contrary to the Delaware tradition that the same judge hears a case on remand after a reversal on appeal, even where the trial judge initially sentenced a defendant to death.

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for her Motion to be denied.

[42] *See also Reeder*, n. 85, "This policy of not recusing unless necessary is sometimes referred to as the duty to sit, and traditionally has been viewed as somewhat in tension with the duty to avoid the appearance of impropriety."; *Reeder*, n.86. *See* M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Proprietary Standard,* 7 J.App. Prac. & Process 45, 56 (2005). n 85; *See Del. R.C. Jud. Conduct,* Canon 3(A)(2) ("A judge *should* hear and decide matters assigned, unless disqualified ····") (emphasis added); *United States v. Snyder,* 235 F.3d 42, 46 (1st Cir.2000) (noting an erroneous recusal may be prejudicial in some circumstances and that "the unnecessary transfer of a case from one judge to another is inherently inefficient and delays the administration of justice"); *Camacho v. Autoridad de Telefonos de Puerto Rico,* 868 F.2d 482, 491 (1st Cir.1989) (noting that the judicial system would be "paralyzed" were standards for recusal too low.").

> Mr. Stotlar has not alleged any facts which would support a claim of bias or prejudice against him by me. The fact that he was the loser in a prior proceeding before me is not grounds for disqualification.
>
> A trial judge has a duty to hear cases assigned to him unless some reasonable factual basis to doubt his impartiality or fairness is shown by some kind of probative evidence. *Blizard v. Frechiette,* 1st Cir., 601 F.2d 1217 (1979). None has been shown here.

Matter of Will of Stotlar, 1985 WL 4782, *1-2 (Del. Ch.).

Superior Court Judges are necessarily tasked with presiding over capital cases. This exercise of their judicial duties is never undertaken without an understanding of the seriousness of the task before them. In Delaware, the judge, by making the final decision in the penalty phase, becomes the conscience of the community.[43] No judge approaches these grave charges with enthusiasm, and no judge relishes the burden of a capital case. However, all judges understand the oath that was taken when they were placed in this position of trust, and would no more shirk from their responsibilities than they would make light of them.

In this regard, in *Los,* our Supreme Court ruled:

> While we find no abuse of discretion in the refusal to recuse in this case, we note that there is a compelling policy reason for a judge not to disqualify himself at the behest of a party who initiates litigation against a judge. In the absence of genuine bias, a litigant should not be permitted to "judge shop" through the disqualification process. The orderly administration of justice would be severely hampered by permitting a party to obtain disqualification of a judge through the expedient of filing suit against him. *Smith v. Smith,* 115 Ariz. 299, 564 P.2d 1266 (1977).

Los v. Los, 595 A.2d at 385. A similar policy reason is created here, that the orderly administration of justice would be severely hampered by permitting a party to obtain disqualification of a judge because of an adverse ruling.

[43] *See Stevenson v. State*, 782 A.2d 251

Considering the foregoing, the Defendant, Linda Charbonneau's, Motion for Recusal is denied.

IT IS SO ORDERED.