IN THE SUPREME COURT OF FLORIDA

MARC CHRISTMAS,

Appellant,

v. CASE NO. 79,044

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, to the extent that such is supported by the record and not argumentative. Because, however, the Statement of Facts set forth in the Initial Brief is largely incomplete, the State would supplement with the following:

Marc Christmas had formally been employed as a cook at the Pizza Hut on Edgewood Avenue, the site of the instant murders, in the winter of 1990; at this time, Appellant became acquainted with one of the victims in this case, Bobby Hood (R 727, 652). Christmas apparently left the employment of Pizza Hut after three to four months, but continued a romatic relationship with the then-manager of that restaurant, Kim Brinson (R 727). In later 1990, Brinson suggested that Christmas move into a trailer occupied by Steven Stein and Kyle White, two employees of another Pizza Hut on Lem Turner Boulevard (R 893).

White testified that, approximately two weeks before the murders, he had overheard a conversation between Stein and Christmas. He initially heard Christmas say, ". . . the least people that know the better", and Stein reply, "He's cool. We can trust him." (R 931). When White asked what was going on, Christmas stated that they were planning to rob the Pizza Hut on Lem Turner Boulevard, and asked White about the security system there (R 931-932). White stated that there was a motion detector by the front door, and that there was not any way to beat it. Appellant then stated that he could get the alarm code and key to the back door from his girlfriend, Kim Brinson (R 932-933).

White stated that the alarm code would do no good, as the alarm company would call to confirm any report, and Christmas would not have the correct identification number (R 933). Also, given Stein's employment at the restaurant, White cogently advised, "You don't shit where you eat." (R 1002-1003).

Christmas then suggested that they rob and kill the restaurant manager when he made the deposit at the bank (R 933). White pointed out that the bank was in a busy, exposed location, not suitable for a robbery (R 933). Appellant then stated that he knew that there was an alarm system at the Pizza Hut on Edgewood Avenue, where he had used to work (R 934); Stein asked White whether they could get in without being detected, by simply hiding in the bathrooms at closing time (R 934-935). White stated that it was a policy to check the restrooms before closing (R 935). Appellant then said he knew which bank the Edgewood Branch used, and that they could "hit" the manager when he went to make the deposit (R 935). White testified that both Stein and Christmas stated that they could not leave any witnesses (R 938), and specifically stated that Christmas had been the first person to broach the subject of killing anyone (R 1034). White said that he had told the two that there was no need to kill anyone, in that Pizza Hut policy was not to resist a robbery and to cooperate and to hand over the money (R 936). At this point, Christmas asked if he could borrow White's motorcycle to check out the route between the Pizza Hut and the bank, and White refused, terminating the conversation (R 936-937).

White testified that, on Sunday, January 20, 1991, he had gone to work, and had arrived back at the trailer at around 4:00 p.m. (R 897). At this time, he found Appellant, Stein and Stein's girlfriend, Christine Moss, present (R 897). He stated that at around 9:15 or 9:30, Appellant and Stein had left the trailer (R 897). Christine Moss stated that at this time, Christmas had been wearing a green camouflage jacket, blue jeans and desert boots (R 809-810). Appellant told Moss and White that he was going to his father's house in Hilliard to sell Stein's rifle to him (R 898-899, 812); both White and Ms. Moss observed Stein carrying the .22 caliber Marlin rifle (R 812, 899). Because neither Stein nor Christmas had transportation of their own, they borrowed Ms. Moss' car (R 804-805); Ms. Moss stated that Kyle White often gave Stein a ride on his motorcycle, in that Stein did not know how to operate a motorcycle, whereas Christmas, who did, often borrowed the cycle himself (R 805, 906). Both Ms. Moss and Kyle White stated that, at this point in time, Christmas was unemployed and had no money (R 803-804, 895, 900); Stein, in contrast, was still employed as a cook at the Pizza Hut on Lem Turner Boulevard (R 802-803, 896). According to Christine Moss, Christmas and Kyle White did not get along, because Christmas was his own man, and Stein was a follower (R 837).

Ronald Burrough, a cook at the Edgewood Avenue Pizza Hut, testified that Appellant and Stein came into the restaurant at approximately 10:30 that night; the establishment was to close at 11:00 p.m. (R 642-643). Burrough stated that, at this time,

Christmas had been wearing a camouflage jacket and blue jeans (R 646). The witness testified that Christmas had talked with one of the victims, Bobby Hood, and that they had talked about the fun which they used to have when Appellant had worked there (R 651-652); Kimberly Brinson testified that Appellant and Bobby Hood knew each other (R 1042-1043). Christmas also asked Hood if the manager was around and when he would be back (R 652). Burrough stated that Appellant and Stein had a pizza and some beverages (R 653). Because Bobby Hood knew Appellant, he did not charge him for the beverages (R 654). The witness testified that Christmas and Stein were the last customers in the restaurant, and that Bobby Hood had begun closing while they were still there, putting the chairs up on the tables and sweeping the floor (R 655). When Burrough went to clock out, Appellant was still talking to Bobby Hood, and the witness noted that Appellant was holding his unpaid guest check (R 656). When Burrough exited, Stein followed him out, and Christmas locked the door behind them (R 657). As the young man rode off on his bicycle, he saw Stein fumbling around in a parked car, putting something in his jacket (R 658).

Christine Moss and Kyle White testified that Appellant and Stein returned to the trailer between 11:30 and midnight (R 813, 901). At this time, neither had the .22 caliber rifle (R 813, 901); Stein told Ms. Moss that they had sold the rifle to Christmas' father for one hundred dollars ($100.00), and that Christmas was "holding" the money for him (R 814, 838). Shortly after arriving, Appellant and Stein, as well as Moss and White,

drove to the Pizza Hut on Lem Turner Boulevard to see Kim Brinson, who was cleaning the ovens (R 815, 903). Brinson testified that Appellant gave her a fifty dollar ($50.00) bill in celebration of her birthday that day, and stated that it was not usual for him to have that kind of money (R 1042); Christmas told her that he had gotten the money as a "late Christmas present" from his father (R 1042). Appellant also told her that, after visiting his father, he and Stein had gone to the Pizza Hut on Edgewood Avenue for pizza and beer; Christmas stated that Bobby Hood had "bought" (R 1044). Appellant told Ms. Brinson that Hood had told him that he was going to go to school to become a paralegal, so that he could make a difference in the world (R 1044). Appellant also stated that he had not had to pay the bill, because as he had been waiting to do so, a black man had come in trying to pay with a large bill, and Hood had told Christmas not to worry about it (R 1044). Appellant claimed that the black male was still present when he and Stein left the restaurant (R 1045).

The four did not remain at the Lem Turner Pizza Hut for very long, and then proceeded to a convenience store, where Christmas purchased beer, chips and cigarettes (R 818, 903). At this time, Christine Moss noted that there was still a quarter of a tank of gas in the car (R 817). She stated that this was the same amount of gasoline which had been in the car at the time that she had lent it to Stein and Christmas earlier in the evening, and noted that a trip to Hilliard, where Christmas' father lived, would have required more gasoline (R 817);

Appellant's father, Leonard Christmas, testified that Appellant and Stein had not visited him on the night of January 20, and that he had never purchased a gun from them (R 841-845). The four then returned to the trailer where they "partied" (R 819, 905).

The next day, Christine Moss went out with Appellant and Stein (R 821). At this time, Appellant purchased several items for Moss' young son, and also bought breakfast (R 821-822); according to Moss, Stein seemed to have no money of his own, and borrowed from Appellant (R 822-823). Ms. Moss was present when Christmas bought a motorcycle helmet for two hundred dollars ($200.00) in cash, as well as the motorcycle itself (R 822); the receipt for the motorcycle helmet, however, indicated that it had cost one hundred and thirty two fifty ($132.50) (R 853). Christmas also purchased Kyle White's spare motorcycle helmet (R 905). That night, White and Christmas went to dinner, and White noticed a fifty dollar bill and several twenty dollar bills in Appellant's wallet when he paid for the meal (R 908). When Appellant was arrested on January 23, 1991, a bill of sale for the motorcycle was found in his wallet (R 853). The purchase price was listed as sixteen hundred and twenty dollars ($1,620.00), with five hundred dollars ($500.00) having been paid as a down payment; Christmas was listed as the purchaser (R 852-853). Christmas also had a hundred and eight dollars ($108.00) in cash on his person (R 854).

Following his arrest, Christmas was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d

694 (1966) (R 876-879). After signing a waiver form, Appellant stated that he did not know anything about the robbery and murder at the Pizza Hut (R 880). Detective Thorwart then asked Christmas if he had been to the restaurant on January 20 (R 880). Appellant replied that he and Stein had in fact had dinner there and had seen Bobby Hood (R 880). Christmas claimed that they had gotten there at around 8:30, and that as he was about to pay the bill, a black male had come up to the counter asking for change for a fifty dollar ($50.00) bill (R 881). Bobby Hood allegedly advised this person that the safe would not be opened for another ten minutes, and Hood told Appellant that he would take care of the bill; Appellant and Stein then left (R 881-882). Christmas stated that when they left, the black male was still there, and that another black male was playing the pinball machine (R 882-883). Christmas stated that he had gotten the money to buy the motorcycle by selling his Camaro, which did not run, to David Baxter, an individual living in Marietta (R 884).[1] Christmas denied planning any robbery of the Pizza Hut on Edgewood Avenue (R 885). The State also introduced statements which Christmas made to Kim Brinson and to Joy Lovent. Appellant told Ms. Lovent that, while he had been present at the Pizza Hut on the night of the incident, he had left after eating a pizza (R 1072). In addition to his other statements to Ms. Brinson, Appellant also

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[1] Appellant called David Baxter as a witness at the penalty phase (R 1436-1451). Baxter testified that, at that time, he had not seen Christmas since being arrested in Orange County in October of 1990, and, indeed, that he had been in continuous custody since that time (R 1443-1446). Accordingly, it would seem clearly impossible for him to have purchased a vehicle from Appellant in January of 1991.

told her that, while he had been present during a robbery at the Pizza Hut, he had not killed Hood or Saunders (R 1051-1052).

When the morning crew had arrived at the Pizza Hut on Edgewood Avenue on January 21, 1991, they had found a grisly sight. The outside door was unlocked, and there was blood right outside the main doorway; additionally, there were droplets of blood two to three feet apart leading, in a straight line, toward the men's room (R 670, 686). There was a puddle of blood underneath the inner door to the men's room, and, inside the bathroom itself, the bodies of the two victims (R 687). Bobby Hood's body was found lying against the wall of the bathroom (R 693). He had been shot five times, at close range (R 742). The medical examiner found powder burns or stipling on wounds to the left side of the forehead, the temple, the jaw, the left side of the head and the left side of the chest; most of the wounds indicated that the shots had been fired at a downward angle and from a distance of four to eight inches (R 742-753). Doctor Arruza testified that Bobby Hood had been shot while sitting on the floor, and while the shooter had been standing close and to the left of him (R 756).

The medical examiner stated that the other victim, Dennis Saunders, had been shot four times (R 760); Saunders' body was found lying face down underneath the sink area (R 693). Saunders' wounds were more varied than those of Hood. Thus, while he suffered a gunshot wound to the base of the neck which had been fired from a close range (R 761), there were no powder burns found in regard to the gunshot wounds to the right side of

his neck, right side of his chest and to the left thigh (R 760-767). Doctor Arruza testified that, given the upward direction of some of these shots, it appeared that Saunders had been shot initially while in a sitting position, but that he had later been shot while moving around (R 768). Due to the presence of transfer blood on Saunders' body, in places where he had not sustained a wound, the medical examiner stated that Saunders had been shot after Bobby Hood (R 770, 778-779).

On the morning after the murder, the safe was found open, with one key in the lock; two keys were required to open the safe (R 720). Although there were some rolls of coins in the safe, nine hundred and eighty dollars ($980.00) in currency was missing (R 722). The Pizza Hut manager, Loretta Horn, testified that the store's policy was that bank deposits were to be made in the morning, not at night, and that the safe was not to be opened while customers were in the store (R 724, 729). Ms. Horn also testified that a guest check, found on the counter near the register, was unpaid (R 725-726). Subsequently, a lab analyst testified that Appellant's fingerprints were on this check (R 791). Additionally, a quantity of spent cartridge shells were found in the bathroom (R 687-688). These shells, as well as others removed from the victims' bodies, were later compared to spent cartridges found near Appellant's trailer; the lab analyst concluded that all had been fired from the same firearm (R 1098). In July of 1991, Kim Brinson contacted the police and led them to the site where Appellant and Stein had disposed of the rifle (R 886-888, 1052-1055). The lab analyst testified that this rifle

had been the murder weapon (R 1104). Additionally, Kyle White gave the police a set of keys to the door and the safe of the Pizza Hut at Lem Turner Boulevard, which Kim Brinson had left at the trailer, and which he had found in Appellant's bedroom (R 939, 1046, 1085-1086).

During the course of the trial, the judge declared a recess shortly after the testimony of Dr. Arruza, the medical examiner (R 799). Christmas was then taken to a holding cell by two of the part-time unsworn civilian bailiffs, Jeffery Carroll and Vincent Hall (R 1156). While Hall used the restroom, Carroll sat in a chair next to the holding cell (R 1156). At that point, Christmas said, "That was bullshit", in that what the witnesses had said was simply not true (R 1156). Carroll stated that the photographs which the medical examiner had utilized during her testimony had been disgusting (R 1156). When Appellant replied, Carroll asked Christmas who shot the victims; Appellant replied, "Who do you think?" (R 1158). When Carroll said that he thought that Stein had done it, Christmas said, "You're right. If he hadn't shot him, I would have because I'm just as guilty as he is." (R 1159); Hall testified that Appellant said, "You're right. If he wouldn't have shot him, I was going to shoot him anyhow. I'm just as much to blame as he is." (R 1166).

The bailiffs testified that Christmas then proceeded to critique and correct the testimony which had already been admitted; Christmas said that the State "had it all wrong" and that they did not know how it had happened (R 1167). Thus, Appellant stated that, in fact, the door had not been locked

behind Stein when he went out to the car to retrieve the rifle (R 1159, 1167). Christmas stated that he had used Stein's .38 caliber revolver to hold the victims at bay and to force them to the back of the restaurant (R 1159, 1169). He, however, denied taking them into the bathroom (R 1159). In any event, Appellant stated that, when they all were in the bathroom, he had stood by the stalls and, at gunpoint, forced the victims to lie face down on the floor (R 1160, 1169). Appellant stated that the medical examiner's testimony had been "bullshit", in that the victims had not been sitting up when shot (R 1160, 1170). Christmas then told the bailiffs that Stein had had the rifle pointed at the two victims, but that when he went to shoot, the safety had still been on (R 1160, 1170). At this point, Dennis Saunders, "knowing he was about to be shot", reached up for the rifle, and Stein took the safety off and began shooting (R 1160, 1170-1171).

The defense presented fifteen (15) witnesses at the penalty phase. Both of Appellant's parents, Leonard Christmas and Cynthia Clinger, testified (R 1298-1323; 1475-1480). Leonard Christmas testified that he had been married to Appellant's mother for twenty years, and that the two had divorced several years ago; Appellant was born in 1969, making him twenty-one years old when arrested for this crime (R 1299). The witness stated that Appellant had been "very active" when he was growing up and had been smarter than the rest of the kids (R 1301). Mr. Christmas testified that he got along well with Appellant, and that Marc had been a very loving child (R 1302). Mr. Christmas testified that he had done the best that he could in raising

Appellant and had made an effort to be at home on nights and weekends to be with him (R 1303, 1314-1320). The witness testified that Appellant had begun to get into trouble as a teenager, when he broke some windows (R 1304, 1316). When he was fourteen, Appellant stole a watch at school (R 1316). Appellant's father testified that he did his best to explain to Appellant that what he had done was wrong (R 1317). Appellant, however, then proceeded to break into a house in Orange Park, and was sentenced by the juvenile authorities to Jacksonville Marine Institute (R 1317). Mr. Christmas stated that he had again tried to explain to Marc the wrongfulness of his conduct, but that Appellant had committed another burglary after his release from Jacksonville Marine Institute (R 1317-1318). Appellant's father testified that, at this point, he had had a close relationship with his son, but that an estrangement began, which lasted for approximately one year (R 1305-1306).

Given these problems, Appellant's parents arraged for him to have counseling with an individual named Ora Lowery (R 1306). Appellant, however, continued to commit burglaries, and was sent to the juvenile facility in Marianna (R 1318-1319). After being released, Appellant committed another burglary, this time stealing some firearms; after Appellant violated his community control, he was sent to state prison (R 1319). When he was released from prison, Appellant lived on his own at age seventeen and supported himself (R 1321-1322). Appellant, however, committed another burglary in Punta Gorda and was sent to prison again (R 1320). Appellant obtained his job at the Edgewood

Avenue Pizza Hut, while he was on work release as part of this sentence (R 1320-1321). Mr. Christmas stated that, at this time, he and Appellant became very close and that Appellant opened up to him; the witness stated that Appellant had seemed serious about changing (R 1309). Mr. Christmas testified that he also had a daughter, Lanice, who was several years younger than Appellant, and who had never gotten into any trouble with the law (R 1315-1316).

Appellant's mother testified that Appellant and his father were not very close while Appellant was growing up, in that they "didn't do a lot of things together" (R 1476); she stated that Appellant needed more attention from his father than he could provide (R 1477). She confirmed that the family had gotten counseling through Ora Lowery (R 1477). Mrs. Clinger stated that she and Appellant had a "close", but not "real close" relationship, and that Appellant and his sister got along very well (R 1478). Asked to explain the trouble that Marc Christmas had gotten into in his life, his mother stated that he had never given her any problems, but that he needed "extra attention" (R 1479-1480). A second counsin, Mary McDaniel, testified that she had known Appellant during the first nine years of his life (R 1326); regular contact ceased after both families moved (R 1329). Ms. McDaniel said that, although she had never observed any problems when Appellant had visited her home, Appellant's mother had told her that he was hyperactive (R 1327). Ms. McDaniel felt that Appellant did not receive the attention or affection from his father which he needed, and further pointed out that Leonard

Christmas himself had likewise not received enough attention from his own father (R 1328). She stated, however, that there was no question that Leonard Christmas loved his son, but that he "couldn't physically be involved." (R 1328-1329).

The defense called Ora Lowery, a mental health counselor, who had met with Christmas in 1984, for approximately six months (R 1387-1388, 1398); the witness stated that he was not a psychologist, in that he did not have a doctorate (R 1389). Mr. Lowery believed that he had met with Appellant or members of his family three to four times a month between the fall of 1984 and March of 1985 (R 1393, 1398); he stated that he had lost track of Appellant after that time, and especially after Appellant had been sent to Jacksonville Marine Institute (R 1396, 1400-1401). Mr. Lowery testified that Christmas had "caring and concerned parents", who tried to help him to the best of their abilities (R 1400). Asked about Appellant's underlying problems, Mr. Lowery, who also testified that he had lost his original notes (R 1393), replied,

> Well, that is a tough part when you get a youngster like Marc because psychology is good at identifying specific problems and people and labeling people and putting terms on them to describe them but not very good at coming up for the real reason as to what is going on. The thrust of the finding by Mr. Wilson [another counselor] was primarily the conflict within the family could be causing some of the things that were happening at the time. My gut feeling was more that it perhaps was in the biochemical area or in the area of how the brain functions that might have gone awry due to something over the years, possibly genetic likely and that that was causing Marc to be a person that most people would stop and say no, I'm not going to do this, he would possibly go the other step.

(R 1395).

Mr. Lowery testified that he did not feel that the counseling had accomplished its goal, although he was not sure what further treatment was needed (R 1396). The only specific observation that he could make was that Appellant "would do things with not the complete understanding of the way the consequences might be." (R 1397).

The defense also called two of Christmas' former teachers (R 1332-1351). Betty Moerings testified that she had been Appellant's counselor in 1984, when he had been in the ninth grade (R 1334); she stated that she had not seen Appellant since 1985 (R 1341). Although Marc Christmas was part of the emotionally handicapped program, he had an IQ of 99 and was adjudged to be of average intelligence (R 1335); Ms. Moerings testified that Appellant had a short attention span and was easily distracted (R 1336). The witness stated that she constantly urged Appellant to try harder and to improve his behavior, but that he would soon fall back (R 1337). In her opinion, based upon her observations of Appellant in 1984 and 1985, Christmas was a follower, and not a leader (R 1342, 1337). Jo Lee Nasworth was Appellant's ninth grade teacher in 1984 and 1985 (R 1346); she, likewise, had not seen Appellant since 1985 (R 1349). Christmas had been placed in her class for the emotionally handicapped due to his problems with school and authority figures (R 1347). She found Appellant to be very warm and friendly to her and willing to accept responsibility when asked (R 1347-1348); she also testified that Christmas was a

follower, in that he was a "joiner" rather than one to initiate the activity (R 1347).

The defense called five witnesses who had known Appellant while he was an inmate at the Crossroads Wilderness Institute in 1987 and 1988, a special facility for youthful offenders (R 1402-1451). Joseph Chestnut, the former director of the program, testified that Appellant had not given him any major problems and had made restitution to the victims of his burglary (R 1406-1407). The witness stated that Christmas had been committed to the facility for two years in July of 1987, as a result of a burglary and grand theft in Clay County (R 1409); apparently, in May of 1988, Appellant left the facility for the residential portion of the program (R 1410). Chestnut stated that Christmas was a follower and not a leader, although he also stated that Appellant had enough self-control to stay out of trouble (R 1408, 1412). The witness, however, was forced to acknowledge that the program of rehabilitation at Crossroads Wilderness Institute had not been successful, in that Appellant was returned to prison in 1989 for another burglary (R 1410). Phillip Pressimore, a former vocational instructor at the facility, testified that Appellant had been a good and cooperative student (R 1429-1432). The witness stated that he had known Christmas for about a year, and that Appellant was "more of a follower" (R 1433). Another former counselor, Ray Olson, offered comparable testimony (R 1414-1422), contending that Appellant was a "good kid", but "easily led" (R 1417-1418); on cross examination, he stated that Appellant was able to exercise self-control (R 1412). Rex Hysell had employed

Appellant in his construction business as part of the work program at Crossroads Wilderness Institute (R 1424). He testified that Appellant was a hard worker, and had worked for him for approximately four months (R 1424-1428); he stated that Appellant had the potential to earn an honest living (R 1428). The defense also called David Baxter, who had been an inmate at Crossroads Wilderness Institute for about three months with Appellant in 1987 (R 1436-1437). He stated that the two had become friends, and that he had come to visit Appellant in Charlotte County, after both of them had been released (R 1438-1440); at this time, Appellant had been living on his own and earning a living (R 1440). Baxter testified, however, that he was a "bad influence" on Christmas, in that, shortly after his arrival, Appellant quit his job and began smoking marijuana (R 1442); Appellant, Baxter and Baxter's companion, Warfield, committed three burglaries, eventually being caught (R 1442, 1448). Although Baxter stated that Appellant was a "follower", he also testified that Christmas was "a pretty willing participant" (R 1443, 1448).

Three character witnesses testified for Appellant (R 1452-1475). Joy Lovin testified that she had known Appellant since slightly before his arrest, and that he had helped her through a difficult time (R 1452-1453). She also testified, however, that she knew Kyle White and Steven Stein as well, and that Christmas had never let himself be either intimidated or pushed around by either one of them (R 1455). Felichie Muccioliolly, a crime prevention practitioner, testified that she knew Appellant in the

latter part of 1990 when he dated her niece (R 1459-1460); she stated that, in her opinion, he was "definitely a follower", in that he was "trying to please everyone." (R 1463). Tan Colon testified that she was a former employee of the Pizza Hut on Lem Turner Boulevard, and that at one time in the summer or fall of 1990, she saw Appellant assist a patron who had been shot in front of the store (R 1470).

The defense also called a clinical psychologist, Dr. Johann Prewett (R 1351-1387); Dr. Prewett had testified twice before, apparently both times for the defense (R 1370-1372). At the request of defense counsel, Dr. Prewett had administered a battery of psychological tests to Appellant, including the Wechsler Adult Intelligence Scale Test (WAIS), the Woodcock Johnson Test for Academic Achievement, and to measure personality, the Beck Depression, Rotter Incomplete Sentence Test, Thematic Aperception and Minnesota Multiphasic Personality (MMPI) Tests (R 1357). Dr. Prewett also conducted a clinical interview and obtained background information (R 1356); he acknowledged on cross examination, however, that he had not read the police reports and that Christmas never described to him the events of this murder (R 1376). The psychologist testified that the testing indicated that Appellant had poor self-concept and was dissatisfied with himself (R 1359). Dr. Prewett stated that Appellant was "quite sensitive" to what others thought of him, and that his interpersonal relationship were rather passive-dependent and nonassertive (R 1359-1360). The psychologist stated that this implied that Christmas would "tend" to be a

follower, in that it would be difficult for him to assert himself in social situations (R 1360). Dr. Prewett testified that he would characterize Christmas' personality problem as a dependent personality (R 1361). He stated that this condition made it difficult for Christmas to learn from experience, and that it would be uncharacteristic for him to engage in criminal conduct alone (R 1365-1366).

Dr. Prewett also testified that Appellant was legally sane, competent and that he knew right from wrong (R 1364). Significantly, Dr. Prewett testified that Christmas had known that what he was doing was wrong at the time that he committed the robbery and murder (R 1377); the psychologist also testified that Appellant had been sane at that time, as well (R 1377-1378). Dr. Prewett testified that he had detected no evidence of a thought disorder, and that Appellant seemed to be oriented, in good touch with reality and non-delusional (R 1383). He also testified that Appellant's personality profile did not reflect psychopathic or anti-social personality characteristics (R 1361). Dr. Prewett testified that Appellant's condition was not an uncommon one (R 1373). The psychologist stated that in some situations, Appellant would have the ability to say no to a suggestion that he kill one of his friends (R 1374), and, during cross examination, the following exchange took place:

> Q: All right. Now, Doctor, you are of the opinion that this defendant with a dependent personality would not have been actively involved, is that a fair statement? You would believe that the defendant was not actively involved in this crime and that he had a rather dependent role?

A: I wouldn't say that he was not actively involved in the crime. More what I think the testimony was that it would be unlikely that he would be involved in that kind of situation by himself.

Q: You wouldn't think it would be his idea?

A: I wouldn't be able to guess at whose idea it was.

Q: All right. So, as a result of your evaluation of him it's entirely possible that he could have been the one who originated it and was the main mover, is that correct?

A: My tests would suggest not the name mover, but wouldn't reflect on who was the major mover.

Q: I understand, but he could have been?

A: My testing wouldn't say one way or the other.

(R 1382).

As to the actual sentences of death imposed, the State disagrees with Appellant's representation that the trial court "without discussion or analysis", found six aggravating circumstances to apply (Initial Brief at 17). The judge's eighteen (18) page sentencing order is detailed in the extreme (R 513-560).[2] In his order, Judge Wiggins set forth his findings of fact, including those in regard to Christmas' criminal record, and made a specific finding, pursuant to Jackson v. State, 575 So.2d 181 (Fla. 1991), to the effect that Christmas intended that the victims be killed and was a major participant in the robbery, evincing a reckless disregard for human life (R 513-550, 555-557). The court likewise set forth in detail its findings in

[2] The record on appeal is, however, misnumbered, in that it skips from page 519 to page 550.

support of the six (6) aggravating circumstances found - that the homicides had been committed by one with prior convictions for crimes of violence, §921.141(5)(b), Fla.Stat. (1991); that the homicides had been committed while Christmas was engaged in a kidnapping, §921.141(5)(d), Fla.Stat. (1991); that the homicides had been committed for purposes of avoiding arrest, §921.141(5)(e), Fla.Stat. (1991); that the homicides had been committed for pecuniary gain, §921.141(5)(f), Fla.Stat. (1991); that the murder of Dennis Saunders was heinous, atrocious or cruel, §921.141(5)(h), Fla.Stat. (1991),[3] and that the homicides were committed in a cold, calculated and premeditated manner, §921.141(5)(i), Fla.Stat. (1991) (R 550-554).

Judge Wiggins also discussed the only two mitigating circumstances submitted to the jury - that of age, §921.141(6)(g), Fla.Stat. (1991), and that involving "any other aspect of the defendant's character or record and any other circumstance of the offense." (R 1552). Defense counsel never argued that the other statutory mitigating circumstances, such as extreme mental or emotional distress, §921.141(6)(b), Fla.Stat. (1991), relatively minor participation of an accomplice, §921.141(6)(d), Fla.Stat. (1991), duress or substantial domination by another, §921.141(6)(e), Fla.Stat. (1991), and substantial impairment of the defendant's ability to appreciate the criminality of his conduct, §921.141(6)(f), Fla.Stat. (1991),

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[3] As in the companion appeal, Stein v. State, Florida Supreme Court Case No. 78,460, the State, based upon the wording of the sentencing order, takes the position that this aggravating circumstance was found only as to the sentence imposed for the murder of Dennis Saunders. See Point III, infra.

applied in this case, and, without objection, these mitigating circumstances were never submitted to the jury (R 1515-1557). Judge Wiggins concluded that the statutory mitigating circumstance relating to age was not applicable, given the fact that Appellant had left home at seventeen, lived on his own for four years and been in prison twice (R 554); the judge likewise found Christmas' dependent personality disorder and alleged status as a follower not to be mitigating (R 554-555). The judge found that there were "sufficient and great aggravating circumstances" to justify the sentences of death (R 555). In regard to the jury's recommendation, the judge found:

> The Court finds that under the circumstances, the jury's recommendation of life imprisonment is unreasonable. Marc Anthony Christmas planned the Pizza Hut robbery with his co-defendant. He initiated the plan to eliminate the witnesses, the witnesses would know Christmas and not Stein, and Christmas held a gun on the victims in the bathroom as they were shot by Stein.
>
> Further, the co-defendant, Steven Stein, was sentenced to death for these murders. Based on the totality of the circumstances in this case, virtually no reasonable person could differ on the appropriateness of the death penalty for Marc Anthony Christmas, and following the recommendation of the jury would result in an unwarranted disparity in sentences.

(R 557).

SUMMARY OF ARGUMENT

Appellant presents three (3) points on appeal, one in regard to his two convictions of first-degree murder, and two in regard to his sentences of death. Christmas' sole attack upon his convictions is that the lower court erred in admitting statements which he made to two of the part-time bailiffs who provided courtroom security during the trial; Appellant contends that this was error, in that the bailiffs did not advise Christmas of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In denying Appellant's motion to suppress, the judge specifically found that Christmas had initiated the conversations and that he had not been interrogated "in any manner"; these findings are supported by the record, and fully support the trial court's denial of relief. Miranda warnings were not required in this case, given the fact that there was no interaction of custody and official interrogation, and Christmas volunteered the statements. To the extent that any error was demonstrated, it was unquestionably harmless, given the fact that overwhelming evidence existed against Christmas and the statements themselves were, to an extent, exculpatory.

In sentencing Christmas to death, the judge found that six aggravating circumstances applied; on appeal, Christmas challenges only two, and further contends that two overlap. These contentions are without merit. The court correctly found that Christmas had a prior conviction for a crime of violence, given the contemporaneous murder of two victims, and, further, that the murder of Dennis Saunders was especially heinous,

atrocious or cruel, given the fact that this victim experienced extreme mental anguish watching his friend and co-worker be gunned down. The aggravating circumstances in regard to the homicide having been committed to avoid arrest and in a cold, calculated and premeditated manner do not overlap, in that separate facts support each factor. Death is the appropriate sentence in this case, given the overwhelming aggravation and comparatively insignificant mitigation. Christmas and his co-defendant, Steven Stein, executed two Pizza Hut employees in cold blood, so that they could steal the proceeds of the cash register and buy a motorcycle, something which Christmas, but not Stein, knew how to operate; Christmas had previously worked with one of the victims, and planned not only the robbery, but also specifically to eliminate any witnesses.

The primary point on appeal relates to the fact that the death sentences in this case are the result of jury overrides. The State respectfully suggests that the sentencing judge did not err in overriding the jury's recommendations of life, and that, under the prevailing standard, the facts supporting the death penalty are so clear and convincing that no reasonable person could differ. Although the defense presented a number of witnesses at the penalty phase, the judge, in light of his experience, correctly concluded that the evidence presented, even if fully credited, did not present a reasonable basis for a life sentence. In contrast to many jury overrides, the defendant in this case came from a caring and loving family, has an average IQ, suffers from no significant mental or emotional problem which

would affect his capacity to conform his conduct to the requirements of the law, and was cold sober at the time of these murders. Christmas was tried separetly from his co-defendant, Stein, who likewise received a sentence of death, and the jury in this case had no reasonable basis to premise a sentence of life based upon any difference in culpability between the defendants. The jury's recommendation of life was truly unreasonable, and the judge was correct in concluding that following such recommendation would lead to an unwarranted disparity in sentence. The instant convictions and sentences of death should be affirmed in all respects.

ARGUMENT

POINT I

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE ADMISSION OF CHRISTMAS' STATEMENTS TO THE BAILIFFS

As his sole attack upon his convictions, Appellant contends that he is entitled to a new trial, because the trial court erred in admitting into evidence statements which he made to two of the part-time bailiffs who acted as security during his trial. Christmas contends that the bailiffs were "agents of the State", and that "his perception as to the role played by these bailiffs is important in determining whether they are State agents." (Initial Brief at 22). Appellant maintains that the bailiffs should have advised him of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and relies upon one Florida case, Woods v. State, 538 So.2d 122 (Fla. 1st DCA), cert. denied, 545 So.2d 1369 (Fla. 1989), as well as several out-of-state cases, such as Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), Commonwealth v. Chacko, 459 A.2d 311 (Pa. 1983), and State v. Walker, 729 S.W.2d 272 (Tenn.Cir.App. 1986). Appellee would contend that Appellant's reliance upon these cases is misplaced, and that Appellant's convictions should be affirmed in all respects.

Before proceeding to the merits, it is necessary to briefly review the events below. At the beginning of the afternoon session of court on September 25, 1991, the prosecutor advised the court that, during the lunch recess, the State had learned that Christmas had made incriminating statements to certain court

personnel (R 1065); defense counsel indicated that he had learned of this event within the last half hour (R 1066). After the presentation of additional testimony, the judge recessed proceedings, so that defense counsel could speak with the two bailiffs, Jeffery Carroll and Vincent Hall (R 1112). When court reconvened, defense counsel moved to suppress the statements, on Fifth and Sixth Amendments grounds (R 1112-1113). At this point, the testimony of the two bailiffs was proffered (R 1113-1141).

Jeffery Carroll testified that he had been employed as a bailiff for the last three months (R 1118-1119). He had been hired by the Jacksonville Sheriff's Office, who paid his salary (R 1119). The witness stated that his duties were to maintain security in the courtroom, and to also maintain security over prisoners who were brought to and from the detention center to appear in court (R 1119). Carroll specifically testified that he was not a sworn deputy for the sheriff's department, an auxilliary police officer or a law enforcement officer; he had not applied to the police academy and no one had asked him to obtain information from Appellant (R 1114, 1118). The witness stated that, on the previous day, he and another bailiff, Vincent Hall, had transported Appellant to a holding cell, during a recess called after the testimony of Dr. Arruza (R 1114-1115). While Hall used the restroom, Carroll sat in a chair outside the cell, and Christmas, without any prompting, stated, "That was bullshit. What they were getting at there wasn't true." (R 1115). Carroll, at this point, stated that he had said that the pictures which had been used were disgusting and sick; Christmas

had replied, "They weren't so bad" (R 1115-1122). Carroll then testified that he had asked Appellant who shot the victims, and Appellant had, in turn, asked him, "Who do you think shot him?" (R 1115-1116). The bailiff stated that he had responded that he thought that Stein had done it (R 1116). Appellant then remarked that he was right, adding that if Stein had not shot the victims, he would have, "because he was just as guilty as Stein was." (R 1116). Appellant then began to critique the State's case, pointing out that, in fact, the door had not been locked behind Stein when he went out to the car to get the rifle (R 1116). Christmas also said that he had used Stein's .38 revolver to move the victims to the back of the restaurant (R 1116). Appellant stated that he had held the gun on the victims in the bathroom, and that it had been "bullshit" that they had been sitting at the time that they were shot, in that Christmas himself had forced them to lie on their stomachs (R 1117). Christmas stated that Stein had held his rifle on the victims, but that when he had pulled the trigger, the safety had still been on; Dennis Saunders had reached up for the gun, knowing that he was about to be shot, and Stein had then begun shooting (R 1117).

Anthony Vincent Hall likewise testified that he was a bailiff, employed by the Jacksonville Sheriff's Office, and that he had been so employed for the last six months (R 1124-1125). He stated that he was not a sworn officer, and did not carry a gun or wear a police uniform; he stated that he was not a law enforcement officer and had not applied to the police academy (R 1125). Hall also testified that he and Carroll wore

identification badges, labeled, "Jacksonville Sheriff's Office." (R 1132). The witness further stated that neither he nor Carroll had arrest powers (R 1138). Hall stated that he had been in the restroom when Carroll and Appellant had begun talking, and that the first thing that he had heard was Carroll asking Appellant who had shot whom (R 1127). As to Appellant's statements, Hall's testimony essentially mirrors that of Carroll (R 1127-1130). Hall did testify, however, that Appellant had had prior "casual" conversations with the bailiffs, about matters unrelated to the case (R 1131). He also stated that, while Appellant had been in the holding cell during this conversation, the door had been left open and Appellant was not handcuffed or shackled at the time (R 1133, 1138). The witness testified that he had also had a conversation with Appellant that very morning (R 1130). This conversation took place in the courtroom itself, apparently while there were other persons present (R 1136-1138). The conversation apparently began with a discussion of how to make whiskey in jail, and Appellant voluntarily participated in this conversation (R 1137-1139). Hall stated that at this point, harkening back to the prior conversation, he had asked Appellant why Bobby Hood had not run when Stein shot the other victim; Appellant stated that Bobby Hood was "slow mentally" (R 1137-1139).[4]

Following the presentation of this proffered testimony, the two sides presented argument, in regard to the admissibility of

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[4] The State did not seek to introduce any statements from this second conversation, and no evidence in this regard was ever submitted to the jury, no doubt due to Judge Wiggins' ruling that he could not be sure who initiated the exchange (R 1150).

the statements (R 1141-1149). Defense counsel contended that Appellant's statements had been the result of custodial interrogation, and that he should have been advised of his rights under Miranda; defense counsel also argued that the statements had been obtained in violation of Christmas' right to counsel (R 1141-1142). Additionally, the defense suggested that admission of the statements would "shock the conscience" and violate due process (R 1143). The State contended that the statements were freely and voluntarily made, and that the bailiffs were not law enforcement officers or agents of the State (R 1145-1146); the prosecution, pointing out that the bailiffs were unsworn and lacked arrest powers, contended that what had occurred was the equivalent of a civilian encounter, such that Miranda was inapplicable (R 1147-1148). At the conclusion of the arguments, Judge Wiggins announced his findings:

> THE COURT: Okay. The court finds that the officers involved, Mr. Jeff Carroll and Mr. Tony Hall were not law enforcement officers, they are not deputy sheriffs, they are hourly paid civilian employees, they have no uniform, they are not licensed or authorized to carry a firearm, they are not working for the State Attorney's Office, and the court finds that the defendant was not interrogated in any manner and to suggest so is an exaggeration by anyone's part. From the testimony that was presented here in the courtroom the defendant initiated the conversations; the bailiffs in this case, both Mr. Hall and Mr. Carroll have never as long as they have worked in my courtroom have never had this issue come up, they have never brought this in court or to any courtroom that I'm aware of the statements that any defendants have made. The court finds that the defendant's statements were freely and voluntarily made, that no promises or any inducements were made, and that the defendant clearly in the testimony that was presented

> initiated these conversations; he was not asked about the conversations until he brought it up and he was discussing it and he was explaining how it happened and the defendant himself was asking questions of the bailiffs as to what their opinions were and what they thought some of the facts that happened inside the Pizza Hut were. It is clear that this defendant initiated it and that these statements are admissible.

(R 1149-1150).

Following the judge's ruling, the State presented Carroll and Hall as its final witnesses (R 1154-1174). The two repeated much of the same testimony as that proffered, although the judge excluded, on relevancy grounds, Appellant's remark to the effect that the pictures which the medical examiner had used "hadn't been that bad" (R 1157-1158). The record indicates that defense counsel did not renew any objection to the testimony of witness Carroll, but that he did object to Hall's testimony, based on the arguments made during the proffer (R 1164-1165). The court indicated that it would adhere to its prior ruling (R 1165).

After Appellant's conviction, Christmas contended in his motion for new trial that the court had erred in admitting the testimony of the bailiffs (R 491), and, on October 11, 1991, filed a supplemental memorandum on the subject, to which were attached certain exhibits, including the sheriff's department's rules concerning the bailiffs (R 504-515).[5] A hearing was held on the motion on October 21, 1991, at which Jeffery Carroll and

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[5] Interestingly, defense counsel also filed a pre-sentencing memorandum in support of a life sentence, in which he contended that Christmas' statement to the bailiffs, which indicated that he was not the triggerman, had provided a reasonable basis for the jury's life recommendation (R 498).

Lt. Collins testified (R 1568-1583). Carroll testifed that he was twenty years old, and that, prior to the statements at issue, Christmas had initiated a number of other discussions with him (R 1569-1570). Collins testified that he was the commanding officer for the courtroom bailiffs, of which there were one hundred and twenty nine (129); he affirmed that the bailiffs were civilians, and that they were not sworn law enforcement officers (R 1572). Collins also stated that the bailiffs did not have arrest powers and had received no law enforcement training; their duties were to maintain courtroom decorum, and not to investigate crimes (R 1573-1574). The bailiffs were paid on an hourly basis, and did not work regular hours (R 1575-1576). Lt. Collins specifically testified that the duties of the part-time bailiffs did not involve interrogating any suspect or defendant (R 1576). Following brief argument of counsel, the court denied Appellant's motion for new trial (R 1584-1585).

As noted, it is Appellant's position that admission of his statements was error, in that the bailiffs should first have advised Christmas of his rights under Miranda v. Arizona. Initially, it must be remembered that a trial court's ruling on a motion to suppress comes to this Court with a presumption of correctness, and that this Court should interpret the evidence and reasonable inferences and deductions therefrom in a manner most favorable to sustaining the trial court's ruling. See, e.g., Henry v. State, 18 F.L.W. S33 (Fla. December 24, 1992); Jones v. State, 18 F.L.W. S11, 12 (Fla. December 17, 1992); Johnson v. State, 608 So.2d 4, 9 (Fla. 1992); Savage v. State,

588 So.2d 975, 978-979 (Fla. 1991); Medina v. State, 466 So.2d 1046, 1409-1050 (Fla. 1985). In this case, Judge Wiggins denied Appellant's motion to suppress, after making specific findings (R 1149-1150). The judge expressly found: (1) that the bailiffs were not law enforcement officers; (2) that they were not working for the State Attorney's Office; (3) that Christmas was not interrogated "in any manner"; (4) that Christmas "initiated the conversations", and (5) that the statements were freely and voluntarily made (R 1149-1150). These findings are supported by the evidence, and Appellant has failed to demonstrate reversible error in regard to this point on appeal.

By its express terms, Miranda applies to custodial interrogation, which the Court defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id., 384 U.S. at 445. The United States Supreme Court likewise re-affirmed the principle that volunteered of any kind, which are freely and voluntarily made, were not banned by the Fifth Amendment, and that their admissibility "is not affected by our ruling today." Id., 384 U.S. at 479. By way of example, the Court observed:

> There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make.

Id. (footnote omitted).

While, of course, the importance of the Miranda holding, and the requirement of advisement of rights, cannot be overstated, the

fact remains that, as the United States Supreme Court has itself consistently recognized, the scope of Miranda is not unlimited. See, e.g., Roberts v. United States, 445 U.S. 552, 561-562, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980) (Miranda "exception" does not apply outside of the context of the "inherently coercive custodial interrogations for which it was designed"); Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (Miranda not applicable to meeting between defendant and probation officer); Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (Miranda not applicable to roadside questioning of motorist detained pursuant to traffic stop).

One of the most recent decisions on this subject is Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990), in which the Court held that an undercover government agent was not required to give Miranda warnings to an incarcerated inmate who made incriminating statements to him. In language highly appropriate to the instant case, the Court held:

> We reject the argument that Miranda warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.

Perkins, 496 U.S. at 298.

The Court then went on to emphasize that the key consideration in determining the necessity for Miranda warnings was the presence, or absence, of compulsion or coercion, in that the warnings were meant to preserve the defendant's rights "during incommunicado interrogation . . . in a police-dominated atmosphere", such atmosphere generating "inherently compelling pressures which work to undermine the individual's will to resist and compel him to

speak where he would not otherwise do so freely." Perkins, 496 U.S. at 297 (quoting Miranda). The Court succinctly stated that the premise of Miranda was "that the danger of coercion results from the interaction of custody and official interrogation," and re-affirmed that statements which were freely and voluntarily made without any compelling influences were, of course, admissible. Perkins, 496 U.S. at 298. In the case before it, the Court found the complete absence of compulsion, in that Perkins had simply "boasted about" his criminal exploits to "impress his fellow inmates"; as the Court cogently concluded, "He spoke at his own peril."[6]

Apellee would respectfully submit that, as in Perkins, Miranda warnings were not required in the situation sub judice, in that there was a complete absence of coercion or compulsion, stemming from the "interaction" between "custody" and "official interrogation". Initially, there was no "official interrogation". As Judge Wiggins expressly found, Christmas "was not interrogated in any manner", and "initiated the conversations" (R 1149-1150). The testimony is unrebutted that Christmas spontaneously stated to Jeffery Carroll, in apparent reference to the immediately preceding testimony of Dr. Aruzza, that "that was bullshit", and that "what they were saying out [t]here wasn't true" (R 1115). Appellee submits that, Appellant

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[6] The Court held that because Perkins had not known that the person to whom he was speaking was a government agent, he had not felt compelled to speak where he would not have otherwise. The Court noted, however, "The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official, but we do not have occasion to explore that issue here." Perkins, 496 U.S. at 300.

unquestionably initiated this conversation, and that his opening remark certainly represented a desire on his part to discuss his own case. Cf. Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Futher, because Christmas' statements were not only freely and voluntarily made, but also volunteered, they were not the product of "custodial interrogation", as the term is used in Miranda. Cf. United States v. Washington, 431 U.S. 181, 188, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977) ("Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.").

Although the circumstances are not completely identical, this case, as did Perkins, similarly involves a defendant choosing to boast about his criminal exploits and speaking, quite literally, "at his own peril". Cf. Franco v. State, 376 So.2d 1168, 1169 (Fla. 3rd DCA 1979), cert. denied, 386 So.2d 636 (Fla. 1980) (Fourth Amendment does not protect wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not repeat it). No view of the record would support any finding that Christmas was coerced or compelled into making admissions which "he would not otherwise have made," cf. Miranda, 384 U.S. at 468, by any governmental action. Cf. Colorado v. Connelly, 479 U.S. 157, 171, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) ("The sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion."). Rather, for reasons best known to himself, Christmas simply chose to critique and correct the State's version of events to two

individuals with whom he had, apparently, developed a friendly rapport. The fact that those two individuals wore a badge or drew an hourly salary from the sheriff's department played no part in his decision to do so. Despite opposing counsel's best efforts to transform Jeffery Carroll and Vincent Hall into "agents of the State", the fact remains that they were "non-coercive" "agents" without any arrest power or any duties involving investigation or interrogation. The cases relied upon by Appellant for reversal are completely distinguishable.

Christmas relies upon one Florida case, Woods v. State, 538 So.2d 122 (Fla. 1st DCA), cert. denied, 545 So.2d 1369 (Fla. 1989), one federal case, Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), and two cases from other states, Commonwealth v. Chacko, 459 A.2d 311 (Pa. 1983), and State v. Walker, 729 S.W.2d 272 (Tenn.Cir.App. 1986); it should immediately be noted that in both Chacko and Walker, any error was deemed to be harmless. In Woods, the defendant was arrested for molesting a child and taken to the police station. A detective read Woods his Miranda rights, and questioned him until the defendant terminated the interview by asking for a lawyer. An HRS investigator, who by law was required to interview Woods, then went to the locked interview room and began interrogating him, until Woods broke down and made several admissions; it would appear that the detective specifically asked the HRS investigator to interview Woods. The first district concluded that admission of Woods' statements had been error, in that his invocation of his right to remain silent had clearly not been "scrupulously honored", under

Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). The court also found that the HRS investigator had been acting as "an agent of law enforcement", when he "reinitiated interrogation" and failed to present fresh Miranda warnings when he questioned Woods about "the same crime which had been the subject of the initial interrogation after which the right to silence had been invoked." Woods, 538 So.2d at 123. The first district was clearly correct in its resolution of the case, and Woods, in fact, is an instructive case for purposes of comparison. The evidence is uncontraverted sub judice that Carroll and Hall had absolutely no powers of arrest or duties of investigation or interrogation; they were not asked by the prosecution to interview Christmas or to obtain any information from him. As noted earlier, there was no interrogation, and Christmas himself initiated the entire discussion; there was, of course, also a complete absence of coercion.[7] Accordingly, Woods provides no basis for relief, and the other precedents relied upon by Appellant also involve clear instances of interrogation initiated by State agents, in which the defendant was compelled to make statements which he would not otherwise have made.

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[7] Additionally, while Christmas' formal arrest on the charges had occurred almost eight months previously, it should still be noted that upon his arrest, Christmas was advised of his rights under Miranda, and chose to waive them (R 876-880). Christmas then gave an exculpatory version of the events in question, in which he stated that he had not been present when the murders occurred, and it would not appear that he ever expressly invoked his right to silence or to counsel during any interview with law enforcement personnel.

Battie, like Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), involved custodial interrogation by a court-appointed psychologist; additionally, in Hargrave v. State, 427 So.2d 713, 715, n.8 (Fla. 1983), this Court stated that it found Battie "to be neither persuasive nor of precedential value." Chacko involved a situation in which a prison inmate was called to the office of a prison official and asked point-blank whether he had been involved in a recent stabbing incident; the Pennsylvania Supreme Court held that Chacko should have been advised of his Miranda rights beforehand, but concluded that admission of the statement, in which Chacko admitted the stabbing, was harmless. In Walker, the defendant was in custody awaiting trial, when a custodial officer said to him, "What's a young boy like you doing charged with murder?"; the defendant then admitted, for the first time, that he, and not his accomplice, had killed the victim. The Tennessee court concluded that the defendant had, under Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), been subjected to interrogation, and that he should have first been advised of his rights under Miranda; the court concluded, however, that any error was harmless, and likewise found any violation of Walker's Sixth Amendment rights, under Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), to be harmless, as well. These cases are distinguishable, although it is worth noting that Appellant's claimed error is clearly subject to a harmless error analysis.

Appellee would contend that this case, in fact, bears great similarity to two other capital cases decided by this Court, Garcia v. State, 492 So.2d 360 (Fla. 1986), and Christopher v. State, 583 So.2d 642 (Fla. 1991). Garcia involved an admission made by a defendant, in custody for the offense at issue, to a police driver. This Court held as follows:

> While being transported from one jail to another, appellant engaged in conversation with the police driver. No Miranda warnings were given. However, contrary to appellant's suggestion, the officer driver did not engage in the functional equivalent of questioning (citation omitted). The officer involved was not assigned to investigations or to the Garcia case. He was assigned full time to transporting prisoners and was not a trained interviewer or interrogator. The record indicates the conversation was desultory, pursued by appellant, and had lapsed for a period of ten minutes or so when the appellant spontaneously stated that the state didn't have any witnesses because he and his partners didn't leave any. The driver did not respond to nor follow up on this admission. Under the circumstances we approve the ruling admitting this statement.

Id., at 365.

Garcia is significant because this Court, in resolving the issue before it, did not solely focus upon whether Garcia had been "in custody" or whether the police driver had been an "agent of the State". Rather, this Court noted that the driver had no duties of investigation or interrogation, and that the defendant had simply made a "spontaneous" statement to him; obviously, these observations apply to the case at bar, as well. While it would appear that the part-time bailiffs in this case participated in the discussion to a greater extent than did the police driver in Garcia, Appellee would respectfully suggest that such fact is not

determinative. While, under other circumstances, the question, "Who shot the victim?", could be said to compel a response, such plainly did not occur sub judice. Christmas' jocular comeback was, "Who do you think?". Far from assuming a confrontational or accusatorial tone, the bailiff replied that he thought that Christmas' co-defendant, Stein, had done the shooting.[8] Just as in Garcia, Christmas simply chose to confide in the wrong people.

Christopher likewise involved a situation in which a defendant, "in custody", made incriminating statements to law enforcement officers. In Christopher, the defendant had been arrested in Tennessee for a Florida murder; at such time, he had been interrogated and made a confession which was later ordered suppressed. Two days later, he was taken to the airport for the flight back to Florida. At this time, he asked a Florida detective what would happen to his girlfriend. When the officer replied that she would be returned to her mother, Christopher stated that if he had not been caught, he would have killed one more person. This Court held that Christopher's statement was properly admitted, despite the absence of Miranda warnings, in that the statement had been volunteered, and had not been made during interrogation. In contrast to Garcia and the case at bar, it should be noted that the statements in Christopher were made to a law enforcement officer whose specific duty was to

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[8] Miranda states that one of the common techniques of interrogation is for "the police to display an air of confidence in the suspect's guilt"; "the interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it." Miranda, 384 U.S. at 451. Obviously, the bailiffs in this case did not conduct themselves in this fashion.

investigate crime and to interrogate Christopher; additionally, Christopher, unlike Christmas, had previously sought to invoke his right to silence and/or counsel in a prior confession, given only two days before the statement at issue. Christopher is comparable to other Florida cases which have upheld the admission of volunteered statements by defendants to police officers, trustees and jailers. See, e.g., Holston v. State, 208 So.2d 98 (Fla. 1968) (Miranda rights not required, in regard to admission which incarcerated defendant volunteered to jail trustee who "was not a law enforcement officer"); Ashley v. State, 265 So.2d 685, 690 (Fla. 1972) (Miranda not violated by admission of statement which defendant volunteered to jailer; statement was spontaneous and "made to person who was not acting in the capacity of an interrogator, but who just happened to be present and about the performance of his duties as jailer when the Appellant made the statement of his own volition."); Endress v. State, 462 So.2d 872 (Fla. 2nd DCA 1985) (Miranda not violated by admission of statements which incarcerated defendant made to visiting police officer, where detective was personal friend of defendant and did not interrogate defendant about the case); Endress v. Dugger, 880 F.2d 1244 (11th Cir. 1989), cert. denied, 495 U.S. 904, 110 S.Ct. 1923, 109 L.Ed.2d 287 (1990) (same case). On the basis of such precedents, especially Garcia, Christopher and Ashley, it is clear that reversible error has not occurred sub judice.

Perhaps the closest case factually, however, is from out of state. People v. Ashford, 265 Cal.App.2d 673, 71 Cal.Rptr. 619 (Cal.Ct.App. 1968), also involved a situation in which a

defendant chose to confide his criminality to a courtroom bailiff mid-trial. The circumstances are virtually identical to the case at bar. During a noon recess, the defendant told the bailiff that the State witness who had just finished testifying had been "a liar", and proceeded to add other comments. The State, as here, called the bailiff to testify at trial. On appeal, Ashford contended that this testimony was wrongfully admitted, "because he was not admonished, nor did he expressly waive his right to have counsel present," as required by Miranda v. Arizona, supra. The California appellate court rejected this argument, holding that the defendant had initiated the conversation, and noting that, at most, the bailiff had initially greeted Ashford with, "How's it going, Ashford?"; because the statements had not been the product of custodial interrogation, Miranda did not bar their admission. The same holding can be made here, and Appellee would rely on Ashford, as well as other comparable decisions from other jurisdictions.

In People v. Corporan, 564 N.Y.2d 775 (A.D. 1 Dept.), appeal denied, 570 N.Y.2d 492 (N.Y. 1991), several detainees had been in a holding cell, when a police officer, as per routine, called out the name and charge of each inmate during roll call. When the officer called out the defendant's name, and the fact that he was charged with murder, Corporan replied, "I killed a court officer. He'll never humiliate me again." While the State would suggest that the atmosphere in that holding cell was undoubtedly more coercive than it was in the case sub judice, the New York court found that Miranda had not been violated, in that the defendant

had made a spontaneous statement which was not the product of custodial interrogation. Ashford and Corporan dictate that the instant convictions be affirmed. See also Bazzell v. State, 250 A.2d 674 (Md.Ct.Spec.App. 1969) (Miranda did not bar admission of statements made by defendant to police sergeant who brought lunch to his cell, even though defendant had previously invoked his rights; defendant's admissions had been volunteered and occurred during the course of a "general conversation" such as not to be the product of "custodial interrogation"); State v. Denton, 752 P.2d 537 (Wash.App. 1990) (Miranda did not bar admissions which defendant made to police officer in telephone call, initiated by defendant, where defendant responded to detective's question, "Did you do it?"; no readvisement of rights necessary, despite fact that defendant had previously invoked right to counsel, and defendant's initiation of phone call found also to be waiver of rights under Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)); Rankin v. State, 541 So.2d 577 (Ala.Cir.App. 1988) (Miranda did not bar admission of statements which defendant made to police dispatcher, who called him in hospital room and asked what happened; dispatcher, who had not been hired as a law enforcement officer, talked to defendant as "personal friend"); Roberts v. United States, 441 F.2d 1162 (5th Cir.), cert. denied, 403 U.S. 936, 91 S.Ct. 2269, 29 L.Ed.2d 716 (1971) (Miranda did not bar admissions which defendant made to police officer in courthouse corridor, where officer was personal friend of defendant and not engaged in interrogation regarding offense); United States v. Thomas, 475 F.2d 115 (10th Cir. 1973) (Miranda

did not bar admission of statements which defendant made to federal marshals who were transporting him between courts, where defendant volunteered statements and no interrogation occurred).

What all of these cases have in common is that they reject the narrow approach endorsed by Christmas, i.e., focusing solely upon whether the defendant was "in custody"[9] and/or whether the bailiffs should be considered "agents of the State"; the courts

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[9] While, at first blush, the issue of custody would seem to be open to little debate, Appellee would note that some jurisdictions have rejected the notion that every incarcerated defendant is automatically "in custody" for purposes of Miranda. Thus, in Cervantes v. Walker, 589 F.2d 424 (9th Cir. 1978), the Ninth Circuit declined to read Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), as requiring such holding, finding that such approach would "torture [Miranda] to the illogical position of providing greater protection to a prisoner than to his non-imprisoned counterpart." Cervantes, 589 F.2d at 427. Rather, following the holding of Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), the court held that incarcerated persons need only be advised of Miranda if, due to a change in circumstances, additional impositions had been placed on their freedom of movement, at the time of any questioning. Other courts have chosen to follow Cervantes in this regard. See, e.g., United States v. Conley, 779 F.2d 970 (4th Cir. 1985); Leviston v. Black, 843 F.2d 302 (8th Cir.), cert. denied, 488 U.S. 865, 109 S.Ct. 168, 102 L.Ed.2d 138 (1988); United States v. Willoughby, 860 F.2d 15 (2nd Cir. 1988), cert. denied, 488 U.S. 1033, 109 S.Ct. 846, 102 L.Ed.2d 978 (1989).

Appellee would respectfully contend that such approach has merit, and, to the extent that Young v. State, 234 So.2d 341 (Fla. 1970), which was decided prior to Mathiason holds to the contrary, it should be re-examined. In this case, Christmas was not subject to greater restraints on his liberty at the time that he made these statements. The bailiffs had previously transported him to and from court (R 1131), and it is doubtful that this was his first experience with a holding cell. Bailiff Hall testified that, while Appellant was in the cell, the door had been left open, and he was not handcuffed or shackled at the time (R 1133-1134, 1138); additionally, his attorneys were "right outside." (R 1122). While Christmas was not "free to leave", he was not subject to additional coercive restraints on his liberty. Accordingly, under Cervantes and Conley, the element of custody was missing, and for that reason as well, Miranda warnings were not necessary.

instead looked to whether the purposes of Miranda itself would be furthered by suppressing the evidence. In this case, no purpose would be served by holding that civilian bailiffs are required to read Miranda to an incarcerated defendant who, for reasons best known to himself, chooses to spontaneously make admissions to them; there, of course, has been no showing that the bailiffs in this case, who lacked any law enforcement training, even knew what Miranda was. There was, in this case, absolutely no coercion or compulsion exerted upon Christmas due to the interaction of custody and "official interrogation."

Christmas, like the inmate in Perkins, considered himself among friends; in contrast to the situation in such cases as Walls v. State, 580 So.2d 131 (Fla. 1991), there was absolutely no deception on the part of State agents in this regard. There was testimony that he and the bailiffs, who were close in age to him, had had a number of prior amicable conversations on various topics (R 1131-1132); there was also, significantly, testimony that after this conversation took place, Christmas felt confident enough to yet again discuss this murder with Vincent Hall, while the two were in the courtroom, the next morning, with other persons present (R 1136-1138). Far from being depressed or nervous, Christmas "laughed and joked around", according to Carroll (R 1162). Just as the police are not required, under Miranda itself, to stop a person who comes into the police station, or who calls such location, to offer a confession, Miranda, 384 U.S. at 479, it is likewise not incumbent upon courtroom personnel, who are not trained as law enforcement

officers and who lack training or responsibility for interrogation or investigation, to stop a defendant who chooses to unburden himself to them; this is especially true in the case of a defendant like Christmas, who by virtue of his prior record and prior waiver of Miranda in this case, was unquestionably more aware of his rights, than were the bailiffs. The statements at issue were not the product of custodial interrogation, and denial of Appellant's motion to suppress, on the basis of Miranda v. Arizona, was not error.

To the extent that this Court disagrees, Appellee would suggest that any error sub judice was harmless beyond a reasonable doubt under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); as noted, two of the cases relied upon by Christmas found harmless error in regard to the claim complained of on appeal. See also Alvord v. Dugger, 541 So.2d 598 (Fla. 1989) (admission of confession made following defective Miranda warnings harmless error); Jones v. State, 332 So.2d 615, 619 (Fla. 1976) (where evidence of guilt is overwhelming, even constitutional error can be harmless); Sullivan v. State, 303 So.2d 632, 637 (Fla. 1974) (same). In this case, the evidence against Christmas was overwhelming, and he stood absolutely no chance of acquittal; defense counsel wisely conceded, in opening statement, Christmas' presence at the Pizza Hut and participation in the robbery, and offered no closing argument (R 637-639). Christmas' fingerprint was found on the unpaid guest check at the restaurant, and Ronald Burrough testified that Appellant and Stein had been the only persons left in the Pizza Hut on the night of the murder, other

than the victims (R 791, 642-643); Christmas subsequently bought a motorcycle, which he but not Stein could operate, with the proceeds of the robbery (R 852-853). In addition to the statement to the bailiffs, Christmas made a number of contradictory statements to law enforcement officers and to other private individuals, and told Kim Brinson the location of the murder weapon (R 876-885, 1051-1052, 1071). Further, the unrebutted testimony of Kyle White left the jury in no doubt as to Christmas' intent upon entering the Pizza Hut. White testified that Appellant and Stein had had a lengthy conversation in regard to which Pizza Hut they should rob, and both defendants agreed that no witnesses would be left behind, with Christmas initiating the idea of killing anyone (R 933-936). Admission of Appellant's statement to the bailiffs was essentially icing on the cake, and after the jury had already heard more than sufficient evidence to convict Christmas under both theories of liability advocated. In its closing argument, the State contended that Christmas was guilty of both felony murder and premeditated murder regardless of the statement (R 1219).

Further, under the particular circumstances of this case, admission of the statement was, in all likelihood, not disadvantageous to the defense. In his statement, of course, Christmas boasted that, while he had been present when the victims were shot, he had not actually shot them. Under the facts already before the jury, this was the most favorable view of the evidence which could be taken, in regard to Christmas. In "admitting" to this fact, Christmas hardly made himself appear

more culpable than the jury might otherwise have found him to be, given the fact that his guilt was a foregone conclusion. This statement, however, was used to maximum benefit by the defense at the penalty phase, when defense counsel, citing to Christmas' statement to the bailiffs, reassured the jury that their guilt phase verdict had been "right" (R 1522). Defense counsel, of course, continued to approach the case as if Christmas, as "evidenced" by his statements, had not fired the fatal shots, and later specifically urged the judge to follow the jury's life recommendation, which, he argued, was "reasonable", in light of Christmas' statement that he had not been the triggerman (R 498). Under all of the circumstances of this case, any error in admission of these statements was harmless. Cf. Traylor v. State, 596 So.2d 957 (Fla. 1992). The instant convictions should be affirmed in all respects.[10]

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[10] Should this Court conclude, however, that admission of the statements mandates reversal of Appellant's convictions, Appellee would respectfully contend that, upon retrial and resentencing, Christmas should not be entitled to "keep" the jury's recommendation of life, and that the holding of Wright v. State, 586 So.2d 1024 (Fla. 1991), is inapplicable. In Wright, this Court held, as a general principle, that double jeopardy precluded a defendant, who successfully challenged on appeal his convictions of murder and sentence of death following a jury override, from facing a new jury at any subsequent sentencing, where the prior life recommendation had been "reasonable". As will be discussed in Point II, infra, the instant life recommendation is not reasonable. The State also contends, however, that because the statements which were admitted at the guilt phase could, and most likely did (as defense counsel asserted), contribute to the jury's recommendation of life, Christmas may not enjoy the benefit of this unreasonable "tainted" life recommendation, should any resentencing occur. If, as Appellant now argues, the statement should not have been admitted, then all parties must return to square one. The State would also note that Wright is completely at odds with such prior decisions of this Court as Brown v. State, 473 So.2d 1260, 1271 (Fla. 1985), Spaziano v. State, 433 So.2d 508, 511-512 (Fla.

POINT II

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S ADVISORY RECOMMENDATIONS OF LIFE IMPRISONMENT AND IN IMPOSING TWO SENTENCES OF DEATH

Appellant contends that Judge Wiggins erred, under the standard set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975), in overriding the jury's advisory recommendations of life imprisonment and in imposing two sentences of death. Christmas argues that the evidence presented at the penalty phase, especially that in regard to his age at the time of the murders (21) and the fact that he suffered from a "dependent personality syndrome", justified the jury's verdict. While it is true that the defense did present numerous witnesses at the penalty phase, quality of that evidence, and not quantity, should be the focus. The judge, the statutory sentencer, was correct in concluding that, in light of his judicial experience, the jury's recommendation was not reasonable, and that, if followed, would lead to "an unwarranted disparity in sentences." (R 559). Reversible error has not been demonstrated, and the instant sentences of death should be affirmed in all respects.

Appellant is correct in observing that, under this Court's precedents, more than a disagreement between judge and jury

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1983), approved, Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), Cannady v. State, 427 So.2d 723, 729-730 (Fla. 1983), and Douglas v. State, 373 So.2d 895, 896-897 (Fla. 1979), all of which rejected the notion that a jury's recommendation of life constituted an "acquittal" for double jeopardy purposes; Wright is also inconsistent with the subsequent decision of this Court in Preston v. State, 607 So.2d 404 (Fla. 1992), which reaffirmed the "clean slate" rule as to resentencing.

authorizes a jury override. See, e.g., Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). This case, however, does not represent an instance in which the judge simply chose to find less than credible mitigating evidence which the jury could reasonably have relied upon. Cf. Cheshire v. State, 568 So.2d 908 (Fla. 1990) (jury override improper where judge rejected out-of-hand evidence which jury might reasonably have relied upon); Carter v. State, 560 So.2d 116 (Fla. 1990) (jury override improper, where jury, as opposed to judge, might have found psychiatric testimony concerning defendant's incurable organic brain damage and extensive intoxication at time of murder to be credible); Holsworth v. State, 522 So.2d 348 (Fla. 1988) (jury override improper, where, although judge disbelieved testimony of expert, to the effect that defendant had borderline personality and used PCP on the night of the murder, the jury might have reasonably credited such testimony).

Rather, the State would contend that this case does not represent a simple difference of opinion between judge and jury. Even if all of the evidence presented in mitigation below is credited at face value, the jury's recommendation remains unreasonable. As in Marshall v. State, 604 So.2d 799, 806 (Fla. 1992), the mitigation sub judice simply "pales in significance", when weighed against the strong aggravation, see also Robinson v. State, 17 F.L.W. S635 (Fla. October 15, 1992); of course, even the presence of valid mitigation does not absolutely preclude a jury override. See Pentecost v. State, 545 So.2d 861, 863, n.3 (Fla. 1989); Burch v. State, 522 So.2d 810, 813 (Fla. 1988). In

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), this Court held that one of the advantages of our trifurcated capital sentencing structure was that the judge would be the actual sentencer, and the sentence imposed would be "viewed in light of judicial experience", as opposed to the mere product of unchanneled emotion. Appellee respectfully suggests that this case underscores the wisdom of the Legislature's choice, in that while the evidence presented in mitigation might have had surface appeal to a layman, the judge, who knows the law, was able to afford it the weight which it deserved, and, in doing so, impose a sentence which was truly proportionate.

Because there are over one hundred decisions from this Court in jury override cases, it is not feasible to discuss them all. Simply put, the State's position is that this case, with its substantial evidence of aggravation and comparitively insignificant evidence in mitigation, bears the most resemblance to those cases in which this Court has affirmed the judge's override of a jury's recommendation of life. See, e.g., Robinson, supra; Coleman v. State, 18 F.L.W. S28 (Fla. December 24, 1992); Zeigler v. State, 580 So.2d 127 (Fla. 1991); Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988); Engle v. State, 510 So.2d 881 (Fla. 1987); White v. State, 403 So.2d 331 (Fla. 1981). For the most part, the cases relied upon by Christmas are distinguishable on the basis that the evidence presented in mitigation, which could have presented a reasonable basis for the jury's recommendation of life, was much more substantial than that presented sub judice. See, e.g., Stevens v. State, 17

F.L.W. S700 (Fla. November 12, 1992) (override improper, where defendant presented evidence, inter alia, to the effect that he was not present when murder occurred, that he was "heavily abused" as child, that he was intoxicated on night of murder and felt remorse); Scott v. State, 603 So.2d 1275 (Fla. 1992) (override improper, where defendant presented evidence, inter alia, to the effect that he was abandoned by mother as infant, that he was brain damaged and borderline intelligence and that he suffered from long-term drug and alcohol abuse); Reilly v. State, 601 So.2d 222 (Fla. 1992) (jury override improper, where defendant presented evidence, inter alia, that he was borderline mentally retarded and brain damaged with IQ of 80). As will be discussed below, Christmas' proffered mitigation was of quite a different character and quality than the substantial, compelling mitigation introduced in Stevens, Scott, Reilly or the other cases of this Court in which overrides have been disapproved. In this case the facts supporting the sentences of death are so clear and convincing that virtually no reasonable person could differ, and the instant jury overrides should be affirmed on the basis of Tedder, supra.

In the Initial Brief, Appellant identifies the following areas of potential mitigation: (1) age; (2) the fact that he suffers from dependent personality syndrome; (3) the fact that, in ninth grade, he was placed in a class for the emotionally handicapped; (4) the fact that his father did not spend enough time with him when he was growing up; (5) the fact that he is allegedly a follower and not a leader, and (6) generalized

mitigation, including the fact that he has artistic talent, that he loves his sister and that he once aided a shooting victim. It is the State's position that each of these mitigating factors, whether considered alone or in their totality, fails to present a reasonable basis for the jury's recommendation of life. Each area of mitigation will now be addressed.

Age was the only statutory mitigating circumstance which was submitted to the jury; defense counsel specifically waived any reliance upon the mitigating circumstance relating to lack of significant criminal history, under §921.141(6)(a), and never requested that the jury be instructed on those mitigating circumstances relating to mental state, i.e., §§921.141(6)(b) & (f), or those in regard to relatively minor participation in an offense committed by a co-defendant or duress or domination by another, §§921.141(6)(d) & (e) (R 1269-1274). In his sentencing order, Judge Wiggins found that Appellant's age of twenty-one was not mitigating, given the fact that Christmas had left home at seventeen, lived on his own for four years and served time in prison (R 554).

The State suggests that the judge was correct. As this Court held in Echols v. State, 484 So.2d 568, 575 (Fla. 1985), a case in which the jury override was approved, age is "simply a fact", and is only entitled to any significant weight if it is linked with some other characteristic of the defendant, such as immaturity. See also Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984) (". . . age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his

ability to take responsibility for his own acts and to appreciate the consequences from them."). In this case, Christmas' age was not linked with any other characteristic, such as immaturity or lack of ability to take responsibility for his own actions; as the sentencer correctly held, Christmas had essentially lived on his own for the last four years. This case is distinguishable from those relied upon by Appellant, such as Scott v. State, supra, Huddleston v. State, 475 So.2d 204 (Fla. 1985), or Cannady v. State, 427 So.2d 723 (Fla. 1983). In each of these cases, the defendant's age was linked with some other significant characteristic to "ameliorate the enormity of his guilt." See Scott (override improper in case of nineteen year old defendant, who had had difficult childhood, suffered from brain damage and alcohol and drug abuse and had borderline intelligence); Cannady (override improper in case of twenty-one year old defendant, in light of defendant's lack of significant criminal history and drug use at time of offense); Huddleston (jury override improper in case of twenty-three year old defendant, in light of defendant's lack of significant criminal history, history of drug abuse and fact that defendant under considerable stress at time of murder).

This Court has, indeed, often overturned jury overrides in cases in which the defendant has been a minor, has lacked a significant criminal history, and, in some cases, has presented other mitigation in regard to an abused childhood or substance abuse at the time of the offense. See, e.g., Hegwood v. State, 575 So.2d 170 (Fla. 1992) (override improper, where defendant

seventeen years old, mentally deficient and suffered impoverished childhood influenced by mother); Freeman v. State, 547 So.2d 125 (Fla. 1989) (override improper, where defendant twenty-two years old, of dull-normal intelligence and had history of child abuse; additionally, jury had specifically rejected theory of premeditated murder, convicting only of felony murder); Brown v. State, 526 So.2d 903 (Fla. 1988) (override improper, where defendant eighteen years old, had borderline IQ and history of substance abuse; psychiatrist testified that both mental mitigators applied); Amazon v. State, 487 So.2d 8 (Fla. 1986) (override improper, where defendant nineteen years old, was "emotional cripple", had emotional maturity of "one year" and took drugs on night of murder); Norris v. State, 429 So.2d 688 (Fla. 1983) (override improper, where defendant nineteen years old, suffered from drug abuse and was intoxicated at time of murder; jury convicted only of felony murder); Neary v. State, 384 So.2d 881 (Fla. 1980) (override improper, where defendant eighteen years old, slow learner and co-defendant might have been more culpable); Thompson v. State, 328 So.2d 1 (Fla. 1976) (override improper, where defendant seventeen years old, lacked criminal record and victim may have precipitated murder). These cases, like Scott, Huddleston and Cannady, are distinguishable in that Christmas, unlike the defendants above, cannot link his age with any other factor which would truly mitigate his guilt.

This Court has, of course, recognized that there is no per se rule which pinpoints a particular age as automatic for mitigation. See Peek v. State, 395 So.2d 492, 498 (Fla. 1980).

This principle applies in jury overrides, in that this Court has affirmed jury overrides in cases in which the defendant has been as young as twenty years old. See, e.g., Thomas v. State, 456 So.2d 454 (Fla. 1984) (jury override affirmed, in double homicide, where defendant twenty years old and lacked significant criminal history); Mills v. State, 476 So.2d 172 (Fla. 1985) (jury override affirmed, where defendant twenty-two and lacked significant criminal history); Porter v. State, 429 So.2d 293 (Fla. 1983) (jury override affirmed, where defendant twenty-two and lacked significant criminal history); Hoy v. State, 353 So.2d 826 (Fla. 1977) (same). In this case, Christmas was twenty-one at the time of these murders, and, additionally, in contrast to such cases as Mills or Porter, in which the overrides were approved, or Cannady and Thompson, in which the overrides were disapproved, does have a significant history of prior criminal activity. As the jury learned, through the cross-examination of Appellant's father, Christmas had an extensive history of prior arrests, and incarcerations, for burglary, resulting in a number of incarcerations (R 1304-1321). In his sentencing order, Judge Wiggins set forth in detail Appellant's criminal record, which included three grand thefts, two burglaries and one violation of community control (R 517-550).[11] As will be demonstrated infra, Christmas suffered from no mental or emotional problem which would have affected his ability to take responsibility for his

[11] While defense counsel objected to certain portions of the presentence investigation report, it would appear that Christmas never disputed the accuracy of the portion setting forth his prior record (R 516-525, 1605-1606).

own actions. Cf. Eutzy, supra. Accordingly, Christmas' age does not present a reasonable basis for the jury's recommendation of life.

The next factor to consider is the fact that, according to the defense expert, Dr. Johann Prewett, Christmas suffered from "dependent personality syndrome" (R 1361). It is important to note exactly what this condition does, and does not, entail. Thus, according to the defense expert, one with this syndrome would have poor self-concept and would be dissatisfied with one's self (R 1359); additionally, those with this syndrome would be "quite sensitive to the opinions of others" (R 1359-1360). Christmas' condition made it difficult for him to learn from experience, and additionally would "imply" that Appellant "would tend" to be a follower, and not a leader (R 1360). Dr. Prewett conducted a battery of psychological tests, and had interviewed Christmas and obtained background information; he stated, however, that he had never read the police reports in this case and that Appellant had never described to him what had happened during the course of the crime (R 1376). This is a sum total of any mental or psychological condition which could mitigate Appellant's guilt.

Dr. Prewett testified that Christmas was sane, competent and knew right from wrong (R 1364); significantly, the expert specifically testified that Appellant had known at the time of the murders that was he was doing was wrong (R 1377-1378). The defense expert likewise testified that he had detected no existence of any thought disorder or delusion, and that

Appellant's personality profile did not reflect psychopathic or anti-social personality characteristics (R 1361, 1383); the defense expert likewise stated that Christmas seemed to be oriented, in good touch with reality and non-delusional (R 1383). Dr. Prewett testified that, in some situations, Christmas would have the ability to reject a course of action suggested by another, despite his desire for their approval, and that, in regard to the crime at issue, he could not say that Appellant had not in fact been "the main mover" (R 1374, 1382). Dr. Prewett stated that Appellant's condition was "not uncommon" (R 1373).

Appellee respectfully suggests that the condition which Appellant suffers from is relatively minor, and does not provide a reasonable basis for a life sentence. The fact that Christmas may be "quite sensitive to the opinions of others" and/or "craves the attention or goodwill of others" hardly represents, as the defense expert himself conceded, an "uncommon" condition; Appellee would respectfully suggest that such character trait is shared by virtually all of those in politics or the entertainment industry. To find that this condition justifies a life sentence would do a grave disservice to those with legitimate mental disorders which truly impair their ability to conform their conduct to the requirements of the law or to appreciate the criminality of their conduct. Cf. Savage v. State, 588 So.2d 975 (Fla. 1991) (jury override improper, in light of evidence that drug and alcohol abuse coupled with organic brain syndrome produced personality disorder which substantially impaired defendant's capacity to appreciate the criminality of his acts);

McCrae v. State, 582 So.2d 613 (Fla. 1991) (jury override improper, in light of evidence that defendant suffered from temporal lobe epilepsy, a brain disorder involving seizures which commonly result in purposeless activity and physical violence; such condition would result in extreme mental or emotional distress and would render the defendant unable to appreciate the criminality of his conduct); Downs v. State, 574 So.2d 1095 (Fla. 1991) (jury override improper, in light of evidence that due to mental impairment and emotional state, defendant suffered from extreme emotional disturbance and had impaired capacity to appreciate criminality of his own actions); Ferry v. State, 507 So.2d 1373 (Fla. 1987) (jury override improper, in light of evidence that defendant suffered from paranoid schizophrenia, which constituted extreme mental or emotional distress which impaired defendant's capacity to conform his conduct to the requirements of the law).

Here, it should be noted that Dr. Prewett never testified that either mental mitigator applied. Further, he never explained what part, if any, this condition played in the homicide; indeed, it must be noted that he would not seem to even have been in any position to offer such opinion, given the fact that he had not read the police reports and Christmas had never admitted to him the circumstances of this crime (R 1376). An interesting case for comparison is Thompson v. State, 553 So.2d 153 (Fla. 1989), in which the jury override was affirmed. In Thompson, the defense presented an expert who testified that the defendant suffered from organic brain damage and that, as a

result, his ability to conform his conduct to the requirements of the law was substantially impaired. The sentencing judge rejected this testimony, noting that the expert had not received many background materials, including the police reports, and further noting that his testimony was contradicted by that of other witnesses, to the effect that the defendant had not acted as if he suffered from any impairment. This Court approved the sentencer's rejection of this proposed mitigation in Thompson, and affirmed the override.

Appellee would suggest that the defendant in Thompson presented a more compelling case for life than did the defendant sub judice. At least the defense expert in Thompson testified that the defendant suffered from a significant mental disorder, i.e., organic brain damage, which had impaired his capacity at the time of the murder; this testimony, if credible, could have provided a reasonable basis for a life recommendation. Here, the defense expert simply offered an opinion that Christmas suffered from a relatively inconsequential "syndrome", and failed to relate such to the defendant's culpability for the crime; even if all of Dr. Prewett's testimony is accepted, it still provides no reasonable basis for a life sentence. Dr. Prewett could not state with any certainty that Christmas had not been in fact "the major mover" in these offenses, and, of course, he never expressly testified that Christmas had been dominated by Stein or that he had committed this offense in order to earn the approval of Stein or any other person.

Dr. Prewett's testimony, and its implications, was rebutted by both state and defense witnesses. Joy Lovin, a defense witness, testified that she knew Christmas, Stein and Kyle White, and that Appellant was not intimidated in the least by the other two, acting, in fact, like "his own man" (R 1455). The State, of course, presented uncontraverted evidence in regard to Appellant's eager participation in the planning of this crime, and it must be noted that Appellant had more reason to commit these murders, given the fact that he, unlike Stein, was known by Bobby Hood, one of the victims; additionally, Appellant would seem to have pocketed all of the proceeds of this crime and have used the majority of them to purchase a motorcycle, something which he, but not Stein, could operate. Dr. Prewett's testimony was, in the final analysis, nothing more than psychobabble, and the judge's rejection of it, and override of the jury's life recommendation, was not error.

The State would likewise suggest that the testimony of Ora Lowery, or that of Appellant's high school teacher and counselor, does not provide a reasonable basis for a sentence of life. Mr. Lowery, a mental health counselor, had last seen Appellant in 1985, six years prior to the murders, and had lost his original notes concerning the counseling (R 1393). Lowery's testimony is largely unintelligible, and contains no specific diagnosis of Appellant's problems; the most that he could say was that Appellant did things "with not the complete understanding of the way the consequences might be" (R 1379), hardly an unusual trait among adolescents. Betty Moerings and Jo Nasworth testified that

they had been, respectively, Christmas' counselor and teacher in 1984-1985, when he was in the ninth grade. Both witnesses testified that Appellant had been placed in a class for the emotionally handicapped, apparently due to the fact that he "had difficulty getting along with people and authority figures", was behind academically and had "problems in school" (R 1347); neither witness had seen Appellant since 1985 (R 1341, 1349). Appellant's "problems", however, were not due to lack of intelligence, in that he had an IQ of 99 and was of average intelligence; indeed, Ms. Moerings testified that ten more points might properly be added to Christmas' score (R 1335). Ms. Moerings testified that she constantly urged Appellant to try harder and to apply himself, but that, after promising to do so, he would soon fall back (R 1337). Ms. Nasworth testified that Appellant was, at times, willing and able to accept responsibility when asked (R 1347-1348).

Appellee respectfully suggests that, to find that the above constitutes a reasonable basis for a life recommendation would, again, be insulting to those defendants with genuine intellectual deficits and/or mental retardation. Cf. Craig v. State, 585 So.2d 278 (Fla. 1991) (jury override improper, where defendant was mentally handicapped, had IQ of 54, and had thought processes of eight year old child); Morris v. State, 557 So.2d 27 (Fla. 1990) (override improper, where defendant had IQ of 75 and was borderline retarded); Cochran v. State, 547 So.2d 928 (Fla. 1989) (override improper, where defendant had IQ of 70, crippling emotional problems and severe learning disability; defendant's

teacher testified, however, that he wanted to learn and was motivated in class); Thompson v. State, 456 So.2d 444 (Fla. 1984) (override improper, where defendant had IQ of between 50 and 70 and was mildly retarded). Here, Appellant had average intelligence and simply chose not to use it; his problems were behavioral in nature, and unlike the defendant in Cochran, it does not appear that he ever tried to apply himself.[12] Appellant's father testified Christmas' criminality began when he was in school and that he stole a watch in the gymnasium (R 1316); shortly afterwards, Appellant began committing burglaries and was sent to a juvenile facility (R 1317). Appellee respectfully suggests it is highly questionable the extent to which Appellant's juvenile delinquency or "problems with authority figures" is mitigating. Cf. Routly v. State, 590 So.2d 397, 401-402 (Fla. 1991) (fact that defendant vandalized school property and stole from other students might reasonably not be considered mitigating and would not make jury's recommendation reasonable). This Court has approved overrides in circumstances comparable to this. Cf. Robinson v. State, 17 F.L.W. S635, 636 (Fla. October 15, 1992) (defendant's low IQ did not provide reasonable basis for jury's life recommendation because such "did not impair his judgment or actions"). Appellant's placement in a class for the emotionally handicapped

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[12] Appellant's father testified that Christmas was smarter than the other children, and that he had problems in school because he was bored (R 1301-1302).

in the ninth grade provides no reasonable basis for a life recommendation sub judice.

Appellee takes a similar position, in regard to the fact that Appellant's father apparently did not spend enough time with Christmas as he would have liked. Such fact hardly makes Christmas unique, and certainly fails to ameliorate the enormity of his guilt. The evidence is uncontraverted that Leonard Christmas was a caring and loving father, and that any absence from home was not only temporary, but was job-related and not due to negligence (R 1302, 1314, 1328, 1400). To equate this fact with child abuse, and to predicate a sentence of life upon it, would, again, do a great disservice to those defendants who have suffered true mental or physical abuse in their lives. Cf. Stevens, supra (override improper where, inter alia, defendant repeatedly abused and even shot by father); Scott, supra (override improper where, inter alia, defendant abandoned by mother and "tossed around" between various relatives); Buford v. State, 570 So.2d 923 (Fla. 1990) (override improper where, inter alia, defendant lived in squalor and was repeatedly beaten by alcoholic parents); Holsworth, supra (override improper where, inter alia, defendant came from broken home and was abused by parents). It should be noted that while Appellant's second cousin, Mary McDaniel, offered the opinion that Appellant had craved the attention of his father but not received such, she also testified that Appellant's father, Leonard Christmas, had suffered from a similar deprivation of paternal attention in his own youth (R 1331). It should be noted that Leonard Christmas

has never committed a double homicide. The above does not constitute a reasonable basis for a life sentence.

The next factor to be considered is the testimony from various defense witnesses to the effect that, in their opinion, appellant was more of a follower, as opposed to a leader; this testimony was offered from Appellant's teacher and counselor (R 1337, 1349), as well as various former correctional counselors who had come into contact with Christmas when he was an inmate at the Crossroads Wilderness Institute in 1987 and 1988 (R 1408, 1417-18, 1433). Presumably, this testimony would relate to any disparity in sentence between Appellant and Stein, although it must be noted that defense counsel never argued that the statutory mitigating circumstances, in regard to Appellant's participation in an offense committed by another or Appellant's having been under extreme duress or dominance of another, §§921.141(6)(d) & (e), applied. This testimony likewise does not present a reasonable basis for a life recommendation sub judice.

Even if, some years in the past, Christmas had struck various lay persons as more of a follower, such fact has little, if any, bearing upon his culpability for this offense, especially when, as noted, his own mental health expert could not state with any certainty that Christmas had not been "major mover" in this crime (R 1382). There is simply no reasonable view of this record which could lead a reasonable jury to conclude that Christmas was so less culpable than Stein that a life sentence was warranted. As noted earlier, the uncontradicted testimony of Kyle White was to the effect that both Christmas and Stein

planned the robbery of the Pizza Hut, with both expressing the intention that no witnesses be left alive, and with Appellant initiating the notion that murder was necessary (R 933-9, 1034). Further, because Appellant had previously worked with Bobby Hood, he had the greatest motive to eliminate Hood as a witness (R 727, 652); there is no evidence that Stein knew Bobby Hood. Additionally, it would seem that Christmas was in possession of all of the proceeds of this robbery, and that he most benefited from it, in that the primary purchase was that of a motorcycle, which Christmas, but not Stein, could operate (R 805, 900). Finally, and most significantly, there is absolutely no testimony offered that Stein or Kyle White was "the leader" or that either dominated appellant. Indeed, defense witness Joy Lovin expressly testified that Christmas was not intimidated by Stein or White and that he was "his own man" (R 1455).

Appellant relies upon two precedents of this Court, Barclay v. State, 470 So.2d 691 (Fla. 1985) and Dolinsky v. State, 576 So.2d 271 (Fla. 1991), in which this Court reversed the jury overrides at issue, finding that the jury could reasonably have based its recommendation upon the relative participation in the offense of the defendant vis-a-vis his co-defendant. In Barclay, the defendant, and his co-defendant Dougan, were tried together, and no doubt during the course of this joint trial, the jury heard evidence which could reasonably have led them to conclude that Dougan was the more culpable of the two. As noted, the jury

in this case heard no evidence which could lead to the reasonable conclusion that Stein was more culpable.[13]

In Dolinsky, the jury had before it evidence that another individual had "masterminded the operation and played the primary role"; the jury also knew that this individual had not been apprehended, or punished, for this crime and that another participant, who had testified against Dolinsky, had received only probation. The jury in this case heard no such similar information and could not reasonably base its recommendation of life upon any belief that any co-defendant, of equal or greater culpability, had received a lesser sentence. As such, this case is clearly distinguishable from a number of cases like Barclay and Dolinsky, in which this Court has reversed the sentence of death, based upon a finding that the jury's distinction between co-defendants is reasonable. See, e.g., Jackson v. State, 599 So.2d 103 (Fla. 1992)(jury override improper where, inter alia, jury could have found that co-defendant, who received life sentence, was equally culpable); Bedford v. State, 589 So.2d 245 (Fla. 1991) (jury override improper where, inter alia, jury could reasonably have concluded that co-defendant instigated entire crime and Bedford was "taking the fall" for him); Fuente v. State, 549 So.2d 652 (Fla. 1989)(jury override improper, where jury could reasonably have concluded that co-defendants, who

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[13] In the original opinion, Barclay v. State, 343 So.2d 1266, 1271 (Fla. 1977), this Court held that the promise of "Equal Justice Under Law", "carved over the doorway of the United States Supreme Court building in Washington", "would have a hollow ring if the sentences of those who commit "equal" crimes were not "equal" as well. Regardless of the fate of Elwood Barclay as an individual, this principle obviously endures.

received immunity, were at least as culpable); Pentecost v. State, supra, (jury override improper where, intra alia, jury could reasonably have believed that disparate treatment of equally culpable co-defendants justified life sentence); Harmon v. State, 527 So.2d 182 (Fla. 1988)(jury override improper where, inter alia, jury could reasonably concluded that a co-defendant, who pled to a lesser offense and testified against defendant, had received disparate treatment); Caillier v. State, 523 So.2d 158 (Fla. 1988)(jury override improper, in contract killing, where actual killer received life and testified against defendant); Wasko v. State, 505 So.2d 1314 (Fla. 1987)(jury override improper where, inter alia, jury could have found co-defendant, who entered plea to lesser offense, equally culpable); Brookings v. State, 495 So.2d 135 (Fla. 1986)(jury override improper where, inter alia, jury could have concluded that two co-defendants, who pled to lesser offense and/or received immunity and who testified defendant, received disparate treatment); Herzog v. State, 439 So.2d 1372 (Fla. 1983)(same); McCampbell v. State, 421 So.2d 1072 (Fla. 1982)(same, where, inter alia, three co-defendants pled to reduced charges and testified against defendant); Stokes v. State, 403 So.2d 377 (Fla. 1981)(same, where, inter alia, jury learned that dominant participant in murder had received immunity); Malloy v. State, 382 So.2d 1190 (Fla. 1979)(same, where, inter alia, jury learned that three other participants in crime, whom jury could have regarded as equally culpable, had received immunity).

It should be noted that, interestingly in all the above cases, the co-defendant receiving the allegedly disparate treatment actually testified before the jury, and the jury was aware of whatever sanction had, or had not, been imposed against that individual; obviously, nothing of that nature occurred sub judice, inasmuch as Stein never testified, and the jury in this case was never specifically advised of his conviction and sentence of death. Further, it should be noted that this Court has also rejected arguments that the alleged disparate treatment of a co-defendant provided a reasonable basis for the jury's recommendation of life, and, in fact, has affirmed jury overrides comparable to that sub judice. See, e.g. Thompson, supra, (fact that accomplices receive lesser sentences or immunity not reasonable basis for life recommendation, where defendant "was in charge"); Engle v. State, 510 So.2d 881 (Fla. 1987) (jury override affirmed, despite defendant's argument that co-defendant was the actual killer and more culpable; no reasonable basis for jury to conclude that co-defendant was the more dominant); Craig v. State, 510 So.2d 857 (Fla. 1987)(jury override approved, even where co-defendant, who actually shot victim, received life sentence); Brown v. State, 473 So.2d 1260 (Fla. 1985)(jury override approved, even where defendant claimed that co-defendant, who pled to lesser offense, was equally culpable); Eutzy, supra, (jury override affirmed, where jury could not have reasonably concluded that co-defendant, who received probation, was equally culpable); Routly v. State, 440 So.2d 1257 (Fla. 1983)(same, where State's witness, who received immunity, was not

equally or more culpable than defendant); Bolender v. State, 422 So.2d 833 (Fla. 1982)(jury override affirmed, where defendant was leader and organizer of crimes and no evidence that co-defendant, who received life, had participated in murders). These cases, especially, Engle and Craig dictate that Christmas' sentences of death should be affirmed.

Additionally, two other cases have great applicability sub judice. In Miller v. State, 415 So.2d 1262 (Fla. 1982) as occurred here, the defendant and his co-defendant, William Jent, were tried separately; Jent's jury recommended death, whereas Miller's recommended life. The judge, who apparently presided over both trials, overrode the jury's recommendation in Miller's case, finding that there was no substantial difference in their participation in the crime and that disparity in sentence would be unwarranted. This Court agreed, and Miller certainly supports Judge Wiggins' similar conclusion in this case. Additionally, in White v. State, 403 So.2d 331 (Fla. 1981), the defendant was one of four persons involved in a multiple homicide; one of them, Adolphus Archie, the "wheelman", pled to reduced charges and testified for the State. White was tried separately from the other two, Marvin Francois and John Ferguson; White's jury recommended life. On appeal to this Court, White contended that his sentence of death was disproportionate, given the fact that he had not killed the victims. This Court rejected his argument, noting, on the one hand that Adolphus Archie's participation in the offense had been notably less than that of White, and, on the other hand, taking judicial notice that Francois and Ferguson had

received death recommendations and sentences from their jurys. This Court held that such precedents as Malloy v. State, supra and Slater v. State, 316 So.2d 539 (Fla. 1975) were distinguishable, given the fact that the two participants in White's case who done the actual shooting had received death. Appellee would likewise ask this Court to take judicial notice that Christmas' co-defendant, Steven Stein, received a death sentence in this case and that, more importantly, Christmas' sentence of death is not disproportionate.

Appellant also argues that the jury's recommendation of life may have been reasonably based upon their belief that Christmas was not the triggerman. The only evidence which would support such belief was Appellant's statement to the bailiffs, in which he contended that Stein had actually shot the victims; of course, in Point I, supra, Appellant contends that this statement should never have been admitted, and that he is entitled to a new trial in which it will be omitted. Appellant's suggestion must be rejected. Even if Christmas were not the triggerman per se, such fact would not render the jury's recommendation reasonable or preclude imposition of a death sentence following a jury recommendation of life. White and Craig are the best proof of this. As noted, in White, the defendant was unquestionably not the triggerman, yet this Court affirmed the judge's override of the jury's life recommendation, based upon a finding that he was not less culpable than the two individuals who had actually committed the crimes, and who had received sentences of death. In this case, it is clear that Christmas always contemplated and

fully intended that the victims in this case be killed. Even if his statement to the bailiffs is credited, it is likewise clear that he assisted Stein in every respect that he could; indeed, in his statement, Christmas stated that he would have shot the victims himself if it had been necessary and, further said, quite correctly, that he was "just as guilty" as Stein (R 1159, 1162, 1166, 1171). Under the facts of this case, Christmas' death sentence is not disproportionate.

Likewise, in Craig, where the defendant was unquestionably not the triggerman, this Court affirmed the judge's override of the jury's recommendation of life, and specifically rejected the defendant's argument that the judge had been bound by the jurors' life recommendation on the basis that the co-defendant, Schmidt, who had actually done the shooting, had received life. This Court stated,

> ...even though Schmidt did the actual shooting of Eubanks, appellant as an aider and abettor was a principal, guilty of the murder to the same degree as if he had wielded the weapon himself. The fact that Schmidt did the shooting does not in any way detract from the blameworthiness of appellant for this aggravated, premeditated murder. Craig, 510 So.2d at 870.

This Court, as it did in White, distinguished Malloy on the basis that Craig had been "the prime mover" with regard to this murder, and further observed that,

> ...appellant's legal responsibility for the murder of Eubanks was not secondary to but was fully equal to that of Schmidt. In addition, there was evidence to show that appellant was the planner and instigator of both murders. Craig, 510 So.2d at 870.

In this case, even if Christmas were not in fact the triggerman, his legal responsibility was certainly not secondary to that of Stein, and from the testimony of Kyle White, the record is clear that Christmas was a "main mover" and instigator of the instant murders. Accordingly, the instant sentences of death should be affirmed.

Given the evidence presented at trial, and the jury's verdict concerning Christmas, it would not have been reasonable for them to have premised any recommendation of life upon a belief that he was less culpable than Stein. This is not an instance in which the defendant's liability for the crimes has been vicarious. Cf. Stevens, supra, (jury override improper where, inter alia, defendant not present when murder occurred); Goodwin v. State, 405 So.2d 170 (Fla. 1981)(same); Smith v. State, 403 So.2d 933 (Fla. 1981)(same); Barfield v. State, 402 So.2d 377 (Fla. 1981)(same, where inter alia, some other participants in crime received immunity). Additionally, this case does not represent an instance in which the jury, by acquitting the defendant of premeditated murder, may have distinguished between co-defendants or indicated a belief in the lesser culpability of one participant. Cf., Hawkins v. State, 435 So.2d 44 (Fla. 1983)(jury override improper, where jury convicted defendant only of felony murder, after defendant testified that co-defendant had actually committed crime and that he was under duress exerted by co-defendant; additionally, evidence presented in regard to defendant's relative youth and lack of significant criminal history); Spivey v. State, 529

So.2d 1088 (Fla. 1988)(jury override improper where, by acquitting defendant of premeditated murder, jury indicated that it considered two co-defendants, who had received lesser sentences, "primary motivators" in contract murder). Here, by special verdict, the jury specifically indicated that it had convicted Christmas not only of felony murder, but also of premeditated murder as well (R 1265, 420, 422). The fact that Appellant, by virtue of his statement to the bailiffs, seemed to deny actual commission of this crime, does not preclude a jury override, given the fact that it would not be reasonable to conclude that Christmas had played no part in these double homicides. See, Engle, supra; Coleman, supra; (possibility that defendant not actual killer not reasonable basis for life recommendation).

This Court's recent decision, Cooper v. State, 581 So.2d 49 (Fla. 1991) is distinguishable. In Cooper, the defendant and one Ellis committed a robbery and, during the flight therefrom, a deputy was shot; when the two were apprehended, Ellis fired at another police officer and was killed. Cooper testified that Ellis had shot the deputy, and the jury, by a tie vote, recommended a life sentence. This Court held that the override was improper, and that the jury might have credited Cooper's testimony. There was also additional non-statutory mitigation presented in regard to Cooper's history of alcohol abuse, remorse and prospects for rehabilitation. In this case, as previously noted, there are no other significant mitigating factors. Further, even if Christmas' statement to the bailiffs is

credited, it is clear that he, unlike Cooper, fully intended to participate in the offense and intended that the victims be killed. Additionally, the jury in Cooper may have been concerned that Ellis, by virtue of his death, was never brought to justice for his part in this offense. In conclusion, the judge in this case overrode the jury's recommendation of life out of a justified desire for equal justice. Cf. Miller, supra; Slater v. State, 316 So.2d at 542)("Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be."). Disparity of sentence and/or relative culpability of co-defendants provides no reasonable basis for a life sentence in this case, and the instant jury override should be affirmed in accordance with such cases as Miller, White, Craig, and Engle.

The only remaining mitigation is that which the State would characterized as "generalized", i.e., the fact that Christmas has artistic talent, loves his family and once assisted a wounded person. Appellee respectfully suggests that virtually any defendant facing a sentence of death can find someone somewhere to say something good about him, and that the above does not provide a reasonable basis for a life sentence in this case. This Court, in other jury override cases, especially those involving multiple homicides, has previously affirmed sentences of death under comparable circumstances. See, e.g., Coleman, supra, (jury override proper, where defendant presented evidence to the effect that he had close family ties, supported his mother, had athletic potential and had been raised in an

impoverished area); Robinson, supra, (jury override approved, where defendant presented evidence in regard to close family ties, support of mother and fact that he was not abused); Marshall, supra, (jury override affirmed, where defendant presented evidence that his father loved him, he had done well in school until led astray by his brother and his mother had failed to discipline him); Zeigler, supra, (jury override approved, where defendant presented evidence as to good deeds and active participation in church and community; judge found defendant "no more good or compassionate than society expects of an average individual"); Torres-Arboledo, supra (jury override approved, where defendant presented evidence as to high intelligence and capacity for rehabilitation).

As in the above cases, the non-statutory mitigation presented by Christmas was "miniscule" and "pales in significance" when contrasted with the overwhelming aggravation and the circumstances of this cold-blooded double homicide. It should also be noted that, in contrast to some cases in which the jury override has been overturned, Christmas presented absolutely no evidence to suggest that he was under the influence of any drug or of alcohol at the time of this homicide. Cf. Stevens, supra (override improper where, inter alia, defendant intoxicated on day of murder); Wright v. State, 586 So.2d 1024 (Fla. 1991)(jury override improper where, inter alia, defendant under influence of alcohol and drugs at time of murder); Fead v. State, 512 So.2d 176 (Fla. 1987)(jury override improper where, inter alia, defendant presented evidence that he was intoxicated

at time of murder). To the contrary, the evidence is uncontradicted that Christmas was cold sober when he participated in these crimes. Additionally, in contrast to the other cases in which this Court has found an override unjustified, Christmas has expressed absolutely no remorse for his part in the victims' murders. Cf. Stevens, supra (jury override improper where, inter alia, defendant expressed remorse for the crime); Wright, supra (same); Cochran, supra (same)[14]. Indeed, if one credits Christmas' statement to the bailiff, Appellant was anything but remorseful for what he had done.

In conclusion, it would appear that as in Coleman, supra, the jury's recommendation of life was based, essentially, upon sympathy. This Court recognized in Spaziano v. State, 533 So.2d 508 , 512 (Fla. 1983), approved, Spaziano v. Florida, 468 U.S.

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[14] In his brief, Appellant relies upon Cochran for the proposition that the jury in this case could have attached great significance to the fact that Christmas was able to call teachers and former correctional counselors to testify on his behalf at the penalty phase, one of whom "sacrificed a day's pay to fly to Jacksonville to testify in Mark Christmas' behalf" (Initial Brief at 34). Appellant's reliance upon Cochran is misplaced. In Cochran, this Court, correctly, noted that it was unusual to have police officers, as well as classroom teachers, testify on behalf of a defendant. Appellee would respectfully submit that the presence of classroom teachers at capital penalty phases has become more common than in 1985, when Cochran was tried; additionally, the teachers in this case did not offer testimony comparable to that introduced in Cochran, i.e., to the effect that the defendant had a low IQ, learning disability or strong motivation to succeed, despite obstacles. Further, the police officers in Cochran, testified that the defendant had expressed remorse for what he had done. As noted above, Christmas presented no comparable testimony of remorse, instead choosing to boast about his accomplishments. While a number of former correctional counselors did testify as to Christmas' comparatively good behavior while at CWI, it should still be noted that their attempts at rehabilitation obviously failed. Neither their testimony, nor their occupation, presented a reasonable basis for the jury's recommendation of life.

447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), that to allow a jury's recommendation to become binding would violate Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See, also, Graham v. Collins, ___ U.S. ___, 113 S.Ct. 892 (January 25, 1993)(Thomas J. concurring)("To withhold the death penalty out of sympathy for a defendant who is a member of a favored group is no different from a decision to impose the penalty on the basis of negative bias..."). In this case, the sentencing judge correctly concluded that the jury's recommendation of life was unreasonable and would result in an unwarranted disparity in sentencing. Because the facts supporting the death penalty are so clear and convincing that no reasonable person could differ, the instant sentences of death should be affirmed in all respects.

POINT III

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO CHRISTMAS' TWO SENTENCES OF DEATH, WHICH ARE SUPPORTED BY VALID AGGRAVATING CIRCUMSTANCES

As noted below, Judge Wiggins found six (6) aggravating circumstances applicable, in regard to Christmas' two sentences of death. On appeal, Appellant does not challenge the judge's finding that the homicides had been committed during a kidnapping, under §921.141(5)(d), or that they had been committed for pecuniary gain, under §921.141(5)(f). He does, however, challenge two of the other aggravating circumstances, and further contends that another two overlap. Each of Appellant's contentions will now be addressed.

(A) The Sentencer's Finding that the Murder of Dennis Saunders was Especially Heinous, Atrocious or Cruel was not Reversible Error.

Christmas contends that it was error for Judge Wiggins to have found this aggravating circumstance applicable, given the fact that the homicides were "nearly instantaneous shooting deaths" (Initial Brief at 42). The State disagrees, but would note that it is Appellee's position that this aggravating circumstance was found only in regard to the sentence imposed for the murder of Dennis Saunders. The State takes this position due to the language of the sentencing order itself, which includes the following findings:

> . . . From the evidence presented it appears that Bobby Hood was shot and killed before Dennis Saunders. The amount of mental anguish that Mr. Saunders must have gone through before his execution was cruel and heinous as he saw what happened to his friend

and fellow worker Bobby Hood, as he awaited his own fate.

(R 553).

The sentencing order contains no comparable finding as to the mental anguish suffered by Bobby Hood, and, accordingly, the State would contend that this aggravating circumstance was not found as to his murder.

While it is true that the victims in this case were dispatched through gunfire, such fact does not render the instant aggravating circumstance inapplicable. This Court has consistently upheld the finding of this aggravating factor in cases involving multiple victims, and multiple shootings, where it has been clearly established that at least one of the victims suffered mental anguish, awaiting his (or her) own fate. Thus, in Garcia v. State, 492 So.2d 360, 367 (Fla. 1986), this Court affirmed the finding of this aggravating circumstance under a comparable circumstance. Garcia involved the robbery of a farm market, and the victims were forced to lie prone on the floor, prior to being executed one by one. This Court held that the "fear and emotional strain which the victims endured as they awaited execution" constituted a proper basis for this aggravating circumstance. Likewise, in Steinhorst v. State, 412 So.2d 332, 339-340 (Fla. 1982), which involved multiple homicides by shooting, this Court again upheld the finding of this aggravating factor, and quoted the judge's sentencing order in which he wrote, "The first victim suffered the least and the last suffered the most;" the later victims had seen the firearms "which would be the instruments of execution," as well as the

bodies of their friends, and felt "the hope of survival vanish." See also Henderson v. State, 463 So.2d 196 (Fla. 1985) (aggravating circumstance properly found in multiple homicide by shooting, where victims "could see what was happening and obviously experienced extreme fear and panic while awaiting their own fate"); Francois v. State, 407 So.2d 885, 890 (Fla. 1981) (aggravating circumstance properly found in multiple homicide by shooting, "on the basis of the mental anguish inflicted on the victims as they waited for their single 'executions' to be carried out").

In determining the applicability of this aggravating circumstance, the sentencer may apply a common sense inference from the circumstances. See Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991). In this case, Judge Wiggins, as was his prerogative, credited the testimony of the medical examiner, Dr. Arruza, as to the order in which the victims were killed, over any contrary suggestion by Christmas himself in his statement to the bailiffs.[15] Dr. Arruza testified that, while Bobby Hood had been shot several times at close range, and apparently while at rest, Dennis Saunders' wounds had been more varied, in that, he had been shot while moving (R 768). Dr. Arruza testified that she had found four gunshot wounds, but that, apparently, only one

[15] Even in Christmas' scenario, however, it is clear that Dennis Saunders had an awareness of his own impending death. Appellant told the bailiffs that Stein had pointed the rifle at the victims and pulled the trigger; at this point, the victims were lying face down on the floor, as Christmas likewise held a gun on them (R 1160). The safety on Stein's rifle, however, was still on, and, at this point, Saunders, "knowing he was about to get shot," grabbed for the gun, according to Appellant (R 1160, 1170-1171).

had been fired at close range, that to the victim's shoulder (R 762); the other wounds were to Saunders' neck, chest and thigh. Those to the neck and chest were at a downward angle, whereas those to the shoulder and thigh were at an upward angle (R 760-767). The medical examiner testified that Saunders had first been shot while stationary, but that the subsequent wounds had been inflicted while he was moving (R 768); Saunders' body was found underneath the sink area of the bathroom (R 693). The most significant fact was that Saunders had transfer blood on him, in places where he had not himself sustained wounds; Dr. Arruza stated that Saunders must have picked up the blood from the floor, and that some of the blood splatters on his body had come from Bobby Hood (R 770, 778-779). She stated that, in her opinion, Bobby Hood had been shot first (R 778-779).

In light of this testimony, Judge Wiggins did not err in finding that the murder of Dennis Saunders was especially heinous, atrocious or cruel, in that it was pitiless and unnecessarily torturous to the victim. Cf. Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). Dennis Saunders was knowingly subjected to extreme anguish, as he not only helplessly contemplated his own execution, but also watched the cold-blooded murder of his friend and co-worker, Bobby Hood. This case is comparable to those cited above - Garcia, Steinhorst, Henderson and Francois - and the instant aggravating circumstance should be approved. To the extent, however, that this Court disagrees, any error in the finding of this aggravating circumstance was harmless beyond a reasonable doubt, under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Although this case represents a jury override, this Court has previously affirmed other death sentences, arising from overrides, in which the sentencer's wrongful finding of an aggravating circumstance has been adjudged to be harmless error. See, e.g., Coleman v. State, 18 F.L.W. S28, 30 (Fla. December 24, 1992) (revised opinion) (wrongful finding of aggravating circumstance harmless error in jury override case, where no reasonable likelihood existed that court would have concluded that the mitigating evidence outweighed the remaining aggravators); Robinson v. State, 17 F.L.W. S635, 636 (Fla. October 15, 1992) (revised opinion) (same); Mills v. State, 476 So.2d 172, 178 (Fla. 1985) (jury override affirmed, where two aggravating circumstances stricken); Brown v. State, 473 So.2d 1260, 1271 (Fla. 1985) (jury override affirmed, where one aggravating circumstance stricken); Eutzy v. State, 458 So.2d 755 (Fla. 1984) (same); Lusk v. State, 446 So.2d 1038 (Fla. 1984) (same); Bolender v. State, 422 So.2d 833 (Fla. 1982) (jury override affirmed, where two aggravating circumstances stricken); White v. State, 403 So.2d 331 (Fla. 1981) (jury override affirmed, where three aggravating circumstances stricken); Johnson v. State, 393 So.2d 1069 (Fla. 1980) (jury override affirmed, where one aggravating circumstance stricken). Because of the strong evidence in aggravation in this case, and the minimal mitigation submitted, no reasonable likelihood exists that the sentencing judge would have concluded that the mitigating circumstances outweighed those in aggravation, should this factor not have been found. The instant sentences of death should be affirmed in all respects.

(B) The Sentencer's Finding that Christmas had a Prior Conviction for a Crime of Violence was not Error.

Appellant next contends that Judge Wiggins erred in finding that, due to Christmas' contemporaneous conviction for the murder of two victims, he had a prior conviction for a crime of violence, under §921.141(5)(b); Christmas relies upon Model Penal Code, and State v. Barnes, 595 So.2d 22 (Fla. 1992), which involves the habitual offender statute. These arguments are unpersuasive. This Court has consistently held that this aggravating circumstance is applicable in cases involving contemporaneous convictions for the murder of multiple victims. See, e.g., Jones v. State, 18 F.L.W. S11, 13 (Fla. December 17, 1992); Zeigler v. State, 580 So.2d 127, 129 (Fla. 1991); Pardo v. State, 563 So.2d 77, 80 (Fla. 1990); LeCroy v. State, 533 So.2d 750, 755 (Fla. 1988); Correll v. State, 523 So.2d 562, 568 (Fla. 1988). Further, in Ruffin v. State, 397 So.2d 277, 282-283 (Fla. 1981), this Court specifically rejected any analogy between the capital sentencing statute and that involving habitual offenders, noting, "The purpose of considering previous violent convictions in capital cases differs from the purpose of the habitual offender statute." The instant sentences of death should be affirmed in all respects.

(C) The Sentencer's Finding that the Homicides were Committed in a Cold, Calculated and Premeditated Manner and for Purposes of Avoiding Arrest was not Error.

Appellant next argues that Judge Wiggins erred in finding both that the homicides had been committed for purposes of avoiding arrest, under §921.141(5)(e), and that they were

committed in a cold, calculated and premeditated manner, under §921.141(5)(i). Christmas does not argue that either aggravating factor lacks evidentiary support, something which would be a fruitless endeavor, in light of the evidence indicating not only the careful planning of the murders, but also Christmas' own statements to the effect that no witnesses could be left behind. Cf. Wickham v. State, 593 So.2d 191 (Fla. 1992). Rather, it is Appellant's position, under such precedents as Provence v. State, 337 So.2d 783 (Fla. 1976), that it was error for the sentencer to have found both aggravating circumstances, in that, allegedly, they are premised upon the same facts. Accordingly, Christmas asks that one factor be stricken.

This argument is without merit. As this Court recently reiterated in Fotopoulos v. State, 608 So.2d 784, 793 (Fla. 1992), citing to Echols v. State, 484 So.2d 568, 575 (Fla. 1985), there is no reason why the facts in a given case may not support multiple aggravating factors, as long as they are not mere restatements of each other. The two aggravating circumstances sub judice are not mere restatements of each other. That under §921.141(5)(e) obviously focuses upon the defendant's motivation for the crime, whereas that under §921.141(5)(i) not only focuses upon heightened premeditation, but also upon the manner in which the crime has been committed. See, e.g., Swafford v. State, 533 So.2d 270, 277 (Fla. 1988) (cold, calculated and premeditated aggravating circumstance may be supported by evidence showing advance procurement of murder weapon, lack of resistance or provocation and appearance of killing carried out as matter of

course). Further, this Court has approved the finding of these two aggravating circumstances under comparable conditions, see Remeta v. State, 522 So.2d 825 (Fla. 1988) (both aggravating circumstances properly found, in case where defendant murdered convenience store clerk during robbery and later stated that he "took out the witness"), and has previously rejected similar "doubling" arguments. See, e.g., Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986) (both aggravating circumstances can co-exist if supported by the evidence). The instant sentences of death should be affirmed in all respects.

(D) The Instant Sentences of Death are Proportionate.

Although Appellant has not specifically raised this issue, the State would briefly address the issue of proportionality. This case bears great similarlity to Cook v. State, 581 So.2d 141 (Fla. 1991), in which the defendant and two accomplices robbed a Burger King and murdered two of the employees, as well as to Jones v. State, 411 So.2d 165 (Fla. 1982), and Meeks v. State, 339 So.2d 186 (Fla. 1976), both of which involved convenience or liquor store robberies, in which the victims were systematically executed. While, as noted, Appellant presented a quantity of what can be considered mitigation, its quality was not impressive or substantial. At most, Christmas demonstrated that, in his view, his father had not spent enough time with him when he was growing up, and that, in light of his "dependent personality syndrome," he craved the attention and goodwill of others, factors which neither distinguish him from the general populace nor truly mitigate the instant double homicide. Cf. Eutzy, 458

So.2d at 759 (mitigating circumstance must, in some way, ameliorate the enormity of the defendant's guilt); Lucas v. State, 568 So.2d 18, 23 (Fla. 1990) (same). Additionally, while there was testimony from individuals who had known Appellant earlier in his life, to the effect that he seemed to be a "follower" and not a leader, the evidence is uncontraverted that Christmas was a willing, eager and active participant in the crimes at issue; it should be remembered that the purpose of the crime was to secure funds to purchase a motorcycle, something which Stein did not know how to operate, but that Appellant did.[16] The instant sentences of death should be affirmed in all respects.

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[16] Christmas' sentence of death is also proportionate in comparison with Stein's. The only difference between the two, as to the findings in aggravation, is that in the instant case, Judge Wiggins found that the homicide had been committed during a kidnapping, and for pecuniary gain; in the Stein case, the court found that the murders had been committed during a robbery, and omitted a specific finding of pecuniary gain, which would, in any event, have overlapped. While Appellant does not specifically attack the finding in regard to kidnapping, the State would suggest that such factor is supported by the evidence, and appropriate under Faison v. State, 426 So.2d 963 (Fla. 1983). See also Dowdell v. State, 415 So.2d 144 (Fla. 1st DCA 1982), cert. denied, 429 So.2d 5 (Fla. 1983); Fitzpatrick v. State, 437 So.2d 1072, 1076 (Fla. 1983); Ferguson v. State, 533 So.2d 763 (Fla. 1988). To the extent that this Court disagrees, however, Appellee would contend that the record supports a finding that the homicide was committed during the course of a robbery, such factor to merge with that involving pecuniary gain; the jury independently convicted Christmas of robbery (R 432), and this Court may consider the existence of this aggravating factor in its proportionality review, even if it has not been expressly found by the sentencer. See, e.g., Cannady v. State, 18 F.L.W. S67, 69-70 (Fla. January 14, 1993); Echols v. State, 484 So.2d 568, 576 (Fla. 1985).

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant convictions and sentences of death should be affirmed in all respects.

Respectfully submitted

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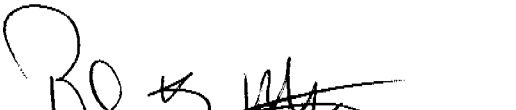
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Teresa J. Sopp, Esq., Sasser & Sopp, One Harbert Center, 7077 Bonneval Road, Suite 200, Jacksonville, Florida 32216-6062, this 22 day of February, 1993.



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