IN THE SUPREME COURT OF FLORIDA

MARC CHRISTMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 79044

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida

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AMENDED
BRIEF OF APPELLANT

TERESA J. SOPP
Sasser & Sopp
One Harbert Center
7077 Bonneval Road, Suite 200
Jacksonville, Florida 32216-6062
Florida Bar No. 265934

(904) 296-2640

Attorney for Appellant

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STATEMENT OF THE CASE

Appellant was indicted by a Duval County Grand Jury on February 7, 1991, for two counts of first degree murder and one count of armed robbery. (R-3). Prior to trial, appellant filed the following motions attacking the constitutionality of the death penalty:

1. motion to declare section 921.141(5)(h), Florida Statutes, unconstitutional. (R-25);

2. motion to declare section 921.141, Florida Statutes, unconstitutional as applied because of arbitrariness in jury overrides and sentencing. (R-50);

3. motion to declare sections 782.04 and 921.141, Florida Statutes, unconstitutional because of treatment of mitigating circumstances. (R-76);

4. motion to declare sections 921.141 and 922.10, Florida Statutes, unconstitutional because electrocution is cruel and unusual punishment. (R-81);

5. motion to declare sections 782.04 and 921.141, Florida Statutes, unconstitutional for a variety of reasons. (R-95);

6. motion to declare section 921.141(5)(d), Florida Statutes, unconstitutional. (R- 129);

7. motion to declare section 921.141(5)(i), Florida Statutes, unconstitutional. (R-142);

Each of these motions was denied by the trial court. (R-211; R-213; R-214; R-215; R-216; R-225; R-226).

Appellant filed a motion to suppress physical evidence seized

as a result of the execution of a search warrant on January 23, 1991. (R-198). After an evidentiary hearing (T-121-245), the motion to suppress physical evidence was denied. (R-245).

Appellant filed a motion in limine concerning similar fact evidence (evidence that appellant and his co-defendant had planned a robbery of another Pizza Hut) (R-294); that motion was also denied on September 24, 1991. (R-294). Appellant also filed a motion to suppress physical evidence seized from him at the time of his arrest (R-376); that motion was also denied after evidentiary hearing. (R-411).

A jury was selected and the case was tried. During the trial, appellant purportedly made incriminating statements while in the custody of Jacksonville Sheriff's Office bailiffs. (T-1111-80). Trial counsel made an oral motion to suppress, citing violations of the Fifth and Sixth Amendments to the United States Constitution (T-1141-45). After a mid-trial hearing, the motion to suppress was denied. (T-1150). The trial court held the bailiffs were not law enforcement officers, that the statements were made freely and voluntarily , and that the defendant had initiated the statements. (T-1149-50). The defendant was tried and the jury returned verdicts of guilty as charged. (T-1264-65). An advisory sentencing proceeding was held; the defendant presented mitigating evidence. (T-1297-1480). The state presented no evidence in aggravation but relied merely on evidence presented at trial. (T-1297-1480). The jury returned an advisory recommendation of a life sentence. (T-1558). Trial counsel filed a motion for new trial (R-485); that

motion was denied. (T-1585). Sentencing was held; the mother of one of the victims testified as to the impact of her son's death on the family. (T-1587-95). The state argued at sentencing that it had proved six aggravating circumstances, and as well that it had successfully disputed that mitigating circumstances. (T-1595-1605).

The trial court had ordered a pre-sentence investigation (T-1563); trial counsel filed a motion to ignore the PSI as to the first-degree murder counts. (R-516). Trial counsel requested that the trial court ignore the PSI because it failed to properly set forth and analyze aggravation and mitigation.

STATEMENT OF THE FACTS

On the morning of January 21, 1991, two employees of the pizza Hut on Edgewood Avenue were found dead in the mens' room. (T-679). Both had been shot by a .22 caliber weapon; the store safe had been burglarized and approximately $900.00 in cash was missing. (T- ; T-94). Investigation revealed that two former employees had been the last patrons of the evening. (T-162).

Detectives obtained an arrest warrant for appellant Marc Christmas (T-125), as well as an arrest warrant for his roommate (and co-defendant), Steven Stein. (R-376). The arrest warrants, along with a search warrant for the mobile home in which the two resided, were served on January 23, 1991. (R-376; T-126). Detective Scott obtained three spent .22 caliber rifle casings from Kyle White, Christmas' and Stein's roommate. (T-909). Several items were seized from Christmas at the time of his arrest, including a green camouflage jacket, a motorcycle helmet and sales transaction documents for the motorcycle and the helmet. (T-848-50). At the time of the arrests, a loaded .38 caliber Rossi pistol was recovered from the co-defendant Stein, while Marc Christmas was unarmed. (T-856).

At a hearing on a motion to suppress the physical evidence seized as a result of the search, Detective Herb Scott testified that although he had submitted the testimony in support of the affidavit to obtain the search warrant for the residence he had not spoken directly to the persons who had provided the information. (T-125).

Firearms expert David Warniment of the Florida Department of Law Enforcement testified that he had examined two firearms and fired cartridge cases and compared them with fragments of bullets taken from the victims. (T-1094-99). Warniment testified that the fired casings found at the scene matched the fired casings taken from the residence of Stein and Christmas (T-1099); and that the most likely firearm from which the bullets and casings could have come would have been a Marlin .22 caliber rifle. Warniment also testified that he had examined state's exhibit 43, a Marlin .22 caliber rifle, and had test fired it to determine that the casings at the scene had been expelled from that firearm. (T-1103-04).

Dr. Arruza, deputy medical examiner for the Fourth Judicial Circuit, testified that she had performed the autopsies on both victims. (T-741; T-759-60). Dr. Arruza testified that both victims had been shot by the same firearm. (T-775). Dr. Arruza also testified she had been present at the scene and had examined the bodies and the blood spatter evidence.

Dr. Arruza's autopsy of victim Bobby Hood revealed five gunshot wounds inflicted from four to eight inches away. (T-741-48). Dr. Arruza retrieved four spent .22 caliber bullets -- one from the chest and three from the brain. (T-741-48). Dr. Arruza opined that at the time of the shooting, Hood had been sitting on the floor close to the wall and that the person who shot him was standing close to him and to his left. (T-756).

Dr. Arruza's autopsy of Dennis Saunders revealed four gunshot wounds, all inflicted by a .22 caliber weapon. (T-760-63). The

autopsy revealed two wounds to the neck, a fatal wound to the chest and a wound to the left thigh. (T-760-63). Dr. Arruza opined that at the time Dennis Saunders was shot, he was sitting down and was shot at a level close to the floor. (T-768). Dr. Arruza testified that because of the close range of the shots, it was very likely the person firing the shots would have gotten blood on themselves. (T-778).

During the course of the trial, appellant purportedly made incriminating statements to two bailiffs while in the holding cell behind the courtroom. (T-1112). The trial court heard a proffer of the bailiffs' testimony. (T-1113). Jeffrey Wilson testified that while appellant was in the holding cell during a court recess, he [appellant] said "that was bullshit, what they were saying out here wasn't true." (T-115). Wilson testified he told Christmas that the photographs [of the victims] were "disgusting," and that in response to the bailiff, Christmas said "they weren't so bad." (T-1115). Wilson testified he then asked Christmas who had shot the victims and that Christmas responded by saying that Stein had but that he [Christmas] was just as guilty. (T-1115-16). According to Wilson, Christmas then stated Stein had been the one to go out the backdoor of the Pizza Hut and obtain the .22 rifle. (T-1116). Christmas then purportedly told Wilson various details of the shooting in the bathroom. (T-1117).

On cross-examination during the proffer, trial counsel established that bailiff Wilson was an employee of the Jacksonville Sheriff's Office and was responsible for maintaining security for

prisoners while in court. (T-1119). Moreover, Wilson testified that during the time Christmas purportedly made the statement, Christmas was represented by counsel and that questions were in fact asked of Christmas by one of the two bailiffs. (T-1121-23).

Bailiff Jeffrey Carroll also testified similarly and stated he had in fact asked questions of Christmas. (T-1135-36). Neither of the bailiffs read Miranda warnings to Christmas prior to the questioning. (T-1121; T-1133). The trial court determined that the bailiffs were not law enforcement officers, that appellant initiated the conversations with the bailiffs and that they were freely and voluntarily made. (T-1149-50). The court allowed the testimony of the two bailiffs as to the statements to be presented to the jury. (T-1154-74).

Christmas was convicted by the jury as charged with two counts of first-degree murder and one count of armed robbery. (T-1265). The jury was convened at a later date for the advisory sentencing proceeding. (T-1295).

At the advisory hearing, Christmas presented mitigating evidence showing that he suffered from a severe personality disorder, that he was a passive, following type of person who tended to be easily led, and that he was capable of good, kind acts. Christmas presented testimony of family members, of his high school guidance counselor, of a high school teacher, and of four Department of Corrections employees.

Leonard Christmas, Marc's father, testified that Marc was twenty-one years old in January, 1991, as the time the crime was

committed. (T-1299). Mr. Christmas testified that he and Marc's mother, Cynthia, had been married for twenty years (T-1299), but were now divorced. Mr. Christmas testified that he moved his family often, beginning when Marc was around eleven or twelve, and that afterwards, Marc began getting in trouble in school. (T-1303-04). Mr. Christmas testified that although Marc was smart, he was very active and became bored with school. (T-1301-02). Mr. Christmas testified Marc had quit high school in the tenth grade, but had later gotten his G.E.D. (T-1304).

Mr. Christmas testified that while he and his wife were going through their separation and subsequent divorce, Marc was arrested, prosecuted and incarcerated. (T-1305). He also testified that for the most part, Marc was always with someone else when he got in trouble. (T-1323). Mr. Leonard Christmas testified that he had never known Marc to be a violent person or carry a weapon. (T-1309). Mr. Christmas testified as to Marc's talents and strong points:

> Marc is an artist; drawing; he liked to work with his hands. As a matter of fact, he had gotten a little cart from his friend, obtained a go cart and the go cart needed many, many parts to it and I had to go out of town and when I came back by my lawn mower was taken completely apart to fix the go cart, and I wondered how could a kid that age have done it where I had to take a manual to put the thing back together the way it was. So, he is very talented.

(T-1312-13).

Mr. Christmas testified that if Marc were to be sentenced to life in prison that he would maintain contact with his son. (T-1313).

Mary McDaniel, a special needs teacher, also testified at the advisory sentencing hearing. (T-1324). She testified that she was a relative of Marc Christmas, and that she and her family had spent a great deal of time with Marc. (T-1326-27). McDaniel testified that Marc was a child who needed a lot of attention, but that she didn't think Marc's father could provide the attention and affection that he had needed. (T-1327-28).

The defense presented testimony of Betty J. Moerings, a retired guidance counselor from Orange Park High School. (T-1333). Ms. Moerings testified that she had seen Marc Christmas during his eighth and ninth grade years while he was a student in the emotionally handicapped program. (T-1334-35). Ms. Moerings testified that Marc:

> ...could not academically excel because his emotional problems got in the way of his performance academically. He never internalized anything, he didn't think about the consequences of his actions, he wanted instant gratification and he often came to school more often to socialize than to learn.

(T-1335). Ms. Moerings also testified:

> Well, he had a short attention span for one thing and, you know, he was easily distracted and he just lived for today, what he could do today. He didn't think about tomorrow and homework and things like that, he didn't think on the future.

(T-1336). When asked if Marc was able to get the attention he needed in regular classes, Ms. Moerings responded:

> No, he was off of the system a lot of the time but he certainly would have been lost in regular class. Also, he was in special educational classes, but he attended some regular classes like P.E. and workshop, so some kinds he attended because he was main-steamed [sic].

(T-1336). Ms. Moerings also testified that Marc was definitely a

follower because he would be easily influenced to skip school or do something that was not in his own best self interest, and because other people suggested it, he would do so. (T-1337).

Jo Lee Nasworth, a teacher of emotionally handicapped children, testified that she had worked with Marc Christmas during the 1984-85 school year. Ms. Nasworth described Marc's problems:

> At that time it was my understanding that he had difficulty getting along with persons and authority figures and in regular main stream he was behind academically, he had a history of problems in school and sometimes when students have those type of problems they miss out on the regular day to day teaching and, therefore, don't learn concepts that are necessary to progress their education. It was my understanding that Marc had had a history of problems in school and he was behind in language and in mathematics.

(T-1347). Notwithstanding her interpretation of Marc's disabilities, Ms. Nasworth and Marc got along well:

> I found Marc to be a very warm friendly individual, eager to participate and listen. He was very honest with me. He told me almost from the beginning that he hated school and I understand that most of the students in my room do have that feeling because their past history in school has been very negative and very unrewarding. However, when I asked participation and when I asked that he bring materials in or to be responsible for doing certain things, he was very eager to participate and he tried and it was very difficult for him. I feel that he got along well within the classroom. I knew that once he went outside the door that may not necessarily be true.

(T-1349). Ms. Nasworth also characterized Marc as a follower because

> ... it was always as if Marc was looking for something. I didn't see him take the initiative. He would more or less observe what was happening or going on around him and he was more of a joiner than one to start or initiate an activity.

(T-1348-49).

Dr. Johann Prewett, a licensed clinical psychologist, also testified on behalf of Marc Christmas at the advisory sentencing hearing. (T-1351). Dr. Prewett testified that he is the chief of the division of research and of the psychological section at University Medical Center in Jacksonville and that he also conducts an independent private practice in Orange Park. (T-1351-52). Dr. Prewett, who has been providing direct clinical services since 1979, testified that on many occasions he provides psychological testing and evaluation services for persons charged with crimes, and that he works with Dr. Ernest Miller, a forensic psychiatrist who is the Chairman of the Department of Psychiatry. (T-1352).

Dr. Prewett testified that he conducted a clinical interview of Christmas, obtained background information and administered psychological tests in connection with his evaluation. (T-1357). Dr. Prewett explained to the jury that he had performed the following widely accepted tests on Marc Christmas:

> Wechsler Adult Intelligence Scale Test
> Woodcock-Johnson test
> Beck Depression
> Rotter incomplete sentence blanks
> Minnesota Multiphasic Personality
> Thenatic [sic] Apperception Test

(T-1357). Dr. Prewett concluded after analyzing the test results that:

> The testing suggested that he lacked self confidence and is quite sensitive to what others think about him; his underlying needs seem to revolve around feelings supported and valued by others. However, the testing suggests that he had inadequate social skills and it was quite difficult for him to meet these underlying needs of being supported and valued by others. His self concept was quite poor and it would seem to be characterized by underlying inadequacies of personality traits and a lack

> of self concept. In general his testing would suggest that his inner personal relationships he would be rather passive dependent, meaning that he would be passive dependent others [sic] and nonassertive.

(T-1359-60). Dr. Prewett explained to the jury

> Well, being passive and being dependent and being nonassertive directly implied that Mr. Christmas would tend to be a follower, not a leader, it would be quite difficult for him to assert himself in social situations.

(T-1360). Dr. Prewett also testified that Marc Christmas was not psychopathic or antisocial [sic]. (T-1361). Dr. Prewett diagnosed Marc Christmas as suffering from a personality disorder, personality problem dependent personality. (T-1361). Based upon his testing and evaluation of Marc, Dr. Prewett concluded that Marc's criminal activity would not have been done alone. (T-1365).

The defense also presented the testimony of Ora Lewis Lowery at the advisory sentencing hearing. (T-1387). Mr. Lowery testified that he was a mental health counselor in private practice in Orange Park and that he had been involved in that field since about 1981. (T-1388). Mr. Lowery, who has a masters degree, testified that he first met Marc Christmas in 1984 at Orange Park High School, and that Marc had been referred to him because of problems with his friends, conflicts with his parents and because of poor performance in school. (T-1389).

Mr. Lowery testified that the purpose of the counseling with Marc was to try to figure out what might be causing Marc's behavior and then to work with him in understanding himself as well as his mother and his father in trying to improve the communications within the family members. (T-1393). Mr. Lowery testified that on

many occasions, Marc acted without a full understanding of the consequences of his behavior -- "blindly ignoring what the consequences could be." (T-1397). Mr. Lowery also testified that as long as Marc is in a structured environment he would pretty much follow the rules and not be what you might call a troublemaker. (T-1398).

Marc Christmas also presented testimony of four persons who were associated with the Department of Corrections when he [Marc] was at Crossroads Wilderness Institution in Port Charlotte, Florida. (T-1402-51). Joseph Chestnut, who was the director of the program during Marc's tenure there, testified that Marc completed quite a few of the programs available, and received certificates in a number of areas. (T-1406). Chestnut testified that Marc was one of the first to start an on-the-job training program. (T-1406). Mr. Chestnut testified that Marc never created any major problems, that he never left the job site, he was always on the job, he went to church on the weekends and paid off his restitution. (T-1407). Chestnut also testified that Marc was not a leader, always a follower, and that he could be talked into minor rules violations by others. (T-1408). Chestnut testified that it seemed out of character for Marc to be involved in two homicides. (T-1408).

Ray Olsen also testified that he had known Marc Christmas at Crossroads Wilderness Program. (T-1415). Olsen explained Marc's talents to the jury:

> When we needed something done we could go get Marc to help get it done, I don't care if it was construction or

> fixing pipe in the place or cooking or cleaning up, if we needed something done he would volunteer and he always did a good job. The crews I had going out, I ran a group into church on Sunday mornings and usually on Sunday evenings, and I'd say about 75 or 80 percent of the time on Wednesday evenings, and I'd say Marc was on that crew 75 or 80 percent of the time if there was a way to go, and when I first started taking him I was letting one or two of the boys drive the Sunday School bus to go out and pick the kids up and Marc was one of them and when he talked with my own boys he said cancel the idea, I don't want to take that chance, but I enjoyed it. I enjoyed working on the bus and working with the kids and he was just a good kid but he was easily led astray.

(T-1417-18).

Rex Hysell, an owner of a stucco business in Port Charlotte, Florida, also testified that he had known Marc Christmas at Crossroads Wilderness Program. (T-1423). Hysell testified that Marc had worked for him through the work program at Crossroads, and that Marc "was one of the best ones that [he] had from the whole institution. (T-1424). Hysell testified that Marc was very good on the job, that he never missed a day and that he felt he could trust Marc with his business. (T-1425). Hysell considered Marc to be the kind of employee he would rehire. (T-1427).

Phillip Pressimone testified that he too had known Marc at Crossroads Wilderness Program. (T-1430-31). Pressimone testified that Marc was respectful, completed a vehicle maintenance course taught by Pressimone, and that Marc was pretty much a follower. (T-1431-33).

The defense also presented testimony of a former co-defendant of Marc Christmas, David Baxter. (T-1436). Baxter testified that as to the crime he had committed with Marc Christmas, that

he[Baxter] was the leader and that Marc Christmas was the follower. (T-1440-43). The defense also presented Joy Lovin, who testified that she had become a friend of Marc's while she worked at a Pizza Hut, and that Marc had been supportive of her and had helped her through a difficult time in her life. (T-1353).

The defense also presented testimony of Feliche Mucciolly, who testified that she was a crime prevention practitioner, and had done volunteer work at the Jacksonville Sheriff's Office. (T-1457). Ms. Mucciolly knew Marc because he used to go out with her niece. (T-1460). Ms. Mucciolly testified that she felt Marc was a person trying to get his life back together after making mistakes at an early age. (T-1461). Ms. Mucciolly testified that she could tell that Marc was definitely a follower (T-1463), and that Kimberly Brinson had pulled Marc away from her niece. (T-1464).

Tan Dalia Colon[1] testified that she had previously been a shift supervisor at a Pizza Hut Restaurant, and that Marc Christmas had visited there during that time. (T-1469). Ms. Colon described to the jury the occasion when Marc had saved a shooting victim's life by administering first aid and by keeping him out of shock until rescue units could arrive. (T-1470-72).

The final witness to present testimony in mitigation was Cynthia Clinger, Marc Christmas' mother. (T-1376). Mrs. Clinger testified that while Marc was growing up, that he had craved attention from his parents that he did not receive. (T-1477).

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[1]The Witness' correct name is actually Tandalia Colon; she uses the nickname "Tandi."

Mrs. Clinger also testified that Marc had never been a violent person and that if Marc were sentenced to life in prison that he would stand behind him. (T-1480).

The state presented no evidence to support aggravating factors, but argued that the trial testimony established the following six aggravating factors:

1. Previously convicted of another capital offense.

2. The crime was committed during the commission of a kidnapping.

3. The crime was committed for financial gain.

4. The crime was committed for the purpose of avoiding lawful arrest.

5. The crime was especially heinous, atrocious or cruel.

6. The crime was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

(T-1487-1503). The state also argued to the jury that the defense had failed to establish any meaningful mitigating circumstances, and that the aggravating circumstances clearly outweighed any mitigation. (T-1504-12).

After the advisory sentencing hearing, the jury recommended that Marc Christmas be sentenced to life in prison without the possibility of parole for twenty five years for the two counts of first degree murder. (T-1558). The case was passed for sentencing. (T-1568). At sentencing, the state presented

testimony to bolster its position regarding the bailiffs to whom the defendant had made the in-custody statements during trial. (T-1569-83). The state called bailiff Jeffrey Carroll to testify that he had conversations with Christmas before the date in question, and that those conversations had been initiated by Christmas, and that they had been friendly. (T-1569-70). The state also presented testimony of Lieutenant Richard Collins of the Jacksonville Sheriff's Office; who testified regarding various personnel procedures. (T-1571-83)

The state presented testimony of one of the victims' mothers at the sentencing hearing, and argued for the judge to override the jury's recommendation of life. The state argued that the court should disregard the mitigating circumstances presented to the jury, and that the jury had been influenced by the relative culpability of Marc Christmas versus Steven Stein. (T-1595-1603). The trial court passed the case for imposition of sentence; on November 12, 1991, the court imposed sentences life for the armed robbery and death for each of the first degree murders. (T-1614).

The trial court recited each of the aggravating factors urged by the state; without discussion or analysis, the court found each of the six to exist. (T-1619-1623). The trial court rejected Marc Christmas' mitigating circumstances, finding first that age was not a mitigating factor inasmuch as Christmas had moved out of his parents home at age 17 (T-1623-24); and second the fact that several people testified that Christmas was a follower and not a leader was not a mitigating factor. (T-1624).

The trial court found that under the circumstances the jury's recommendation of life imprisonment was unreasonable, that Christmas planned the Pizza Hut robbery with his codefendant, that he initiated the plan to eliminate the witnesses and that Christmas held the gun on the victims in the bathroom as they were shot. (T-1626). The trial court also held that virtually no reasonable person[2] could differ on the appropriateness of the death penalty and that to follow the recommendation of the jury would result in an unwarranted disparity in the sentences of the two codefendants. (T-1626). The trial court prepared a written sentencing order. (R-513-60).

[2] The record reads "attorney," but it appears as if the word "person" was what was actually said.

SUMMARY OF ARGUMENT

Appellant first argues that incriminating statements made to bailiffs while in a holding cell behind the courtroom during the trial should have been suppressed by the trial court. Appellant relies primarily of Beattie v. Estelle, 655 F. 2d 692 (5th Cir. 1981), for the proposition that state agents other than police officers must Mirandize in-custody defendants prior to questioning them. Appellant asserts that the bailiffs assigned to guard him in the holding cell should not have questioned him regarding the facts of the shooting without first warning him that he had a right to remain silent and to have counsel present.

Second, appellant asserts the trial court erred in overriding the jury recommendation of life in prison and in imposing the death penalty for the two counts of first degree murder. Appellant cites Tedder v. State, 322 So. 2d 908 (Fla. 1975), and its progeny for the proposition that "in order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So. 2d at 910. Appellant also cites to Stevens v. State, ___So. 2d___(Fla. 1991); 17 F.L.W. S. 700 (Nov. 12, 1992) (unanimous decision), to point out that a "judge cannot ignore this expression of the public will [a jury recommendation of life] except under the Tedder standard adopted in 1975 and consistently reaffirmed since then."

Appellant argues that he presented to the advisory jurors evidence upon which they could have reasonably relied in making

their recommendation of life. Appellant also asserts that the jurors reached their recommendation based upon undisputed facts presented through live witnesses, and that the jury recommendation was reasonable. Appellant also cites Gilvin v. State, 418 So. 2d 996 (Fla. 1982), Cannady v. State, 427 So. 2d 723 (Fla. 1983), and Chambers v. State, 339 So. 2d 204 (Fla. 19767), for the proposition that if there is any view of the evidence from which the jury could have reasonably recommended life, the trial court is not free to substitute its own judgment to override it.

Finally, appellant argues that the trial court erred in improperly finding aggravating circumstances and in failing to find and consider mitigating circumstances. Appellant argues that the trial court's error renders appellant's sentence unconstitutional under the fifth, sixth, eighth and fourteenth amendments to the U.S. Constitution, and under Article I, sections 9, 16 and 17 of the Florida Constitution. Appellant attacks the trial court's finding that the homicides were committed in an especially heinous, atrocious and cruel manner, noting that the homicides in this case were nearly instantaneous shooting deaths. Appellant relies on Brown v. State, 526 So.2d 903 (Fla. 1988), Teffeteller v. State, 439 So.2d 840 (Fla. 1983), Armstrong v. State, 399 So.2d 9953 (Fla. 1981), Lewis v. State, 377 So.2d 640 (Fla. 1979) and Cooper v. State, 336 So.2d 1133 (Fla. 1976), for the proposition that the killings in the instant case do not rise to the level of heinous, atrocious and cruel.

Appellant also argues that the trial court improperly found

that he had a previous conviction for a violent felony, noting that recent Florida Supreme Court interpretation of the habitual violent felony offender laws lends support to this argument. Christmas also argues that the trial court's finding that the homicides were committed in a cold, calculated and premeditated manner was erroneous in light of the fact that the trial court had based this finding on the same facts that it had based its finding that the homicides were committed to eliminate witnesses to the robbery.

ARGUMENT

ISSUE I:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS ALLEGEDLY MADE TO BAILIFFS WHILE IN CUSTODY.

Although the trial court determined that the bailiffs to whom Christmas made statements were not law enforcement officers, appellant maintains that it is not important whether the two bailiffs are "law enforcement officers." The question is whether they were "agents of the state" at the time they had their contact with appellant which resulted in statements by the defendant. The testimony of the two bailiffs established that they were employed by the Jacksonville Sheriff's Office and were charged with maintaining custody over appellant during the trial. (T-1119-21; T-1133-35). Appellant maintains also that his perception as to the role being played by these bailiffs is important in determining whether they are state agents.

In Beattie v. Estelle, 655 F.2d 692 (5th Cir. 1981), the Fifth Circuit Court of Appeals discussed the differences between custodial interrogation by a police officer, which had taken place in Miranda v. Arizona, 86 S.Ct. 1602 (1966), and custodial interrogation by a court-appointed psychiatrist which had taken place in Estelle v. Smith, 101 S.Ct. 1866 (1981). The Beattie court held as follows:

> But the particular office that the official who performs the custodial interrogation

> represents is inconsequential because Miranda was not concerned with the division of responsibility between the various state investigatory agencies but was concerned with official custodial interrogations of an accused and the use of statements obtained from an accused without an attorney in such circumstances to prove the State's case against the accused. The Miranda decision was designed to protect a putative defendant against the compulsion to incriminate himself arising from an official custodial interrogation. That compulsion can occur, however, from an interrogation conducted by a court-appointed psychiatrist as well as a police officer. The Smith decision merely recognized that a custodial court-appointed psychiatrist raised the same concerns as a custodial interrogation conducted by a police officer and therefore must be preceded by the same warnings Miranda requires a police officer to give.

655 F.2d at 699 (footnotes omitted).

In Florida the same principle caused the First District Court of Appeal to hold that a counselor for the Department of Health and Rehabilitative Services was a state agent when he questioned the defendant for his own purposes after a detective had questioned the defendant. Woods v. State, 538 So.2d 122 (Fla. 1st DCA 1989).

Cases from other jurisdictions concerning what constitutes "custodial interrogation" and what officials are "state agents" are collected in the annotation at 31 ALR 3rd 565, Sections 21 et. seq. Among the cases cited in that annotation are Commonwealth v. Chacko, 459 A. 2d 311 (Pa. 1983), and State v. Walker, 729 S.W.2d 272 (Tenn. Cr. App. 1986).

In Chacko, the Pennsylvania Supreme Court followed United States Supreme Court cases standing for the principle that the test for determining whether a suspect is being subjected to custodial

interrogation so as to necessitate Miranda warnings is whether he is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted. An individual who is already incarcerated concerning the subject of the interrogation is "in custody" for Miranda purposes. 459 A.2d at 314, citing Oregon v. Mathiason, 429 U.S. 492 97 S.Ct. 711 50 L.Ed. 2d 714 (1977), and Beckwith v. United States, 425 U.S. 341 96 S.Ct. 1612 48 L.Ed. 2d 1 (1976).

In Chacko, the director of the prison confronted an inmate with a stabbing that had occurred in the prison. He asked the inmate, "Are you involved in the incident that happened this morning?" The defendant made incriminating responses. The court quoted at length from Rhode Island v. Innis, 446 U.S. 2911 100 S.Ct. 1682, 57 L.Ed. 2d 973 1689-90 (1980):

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practice without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to

> interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

459 A.2d at 315. (emphasis in original).

In State v. Walker, supra, a prison guard who was removing the defendant from one level of cells to another asked him, "What's a young boy like you doing charged with murder? You've got your whole life ahead of you. What's a young boy like you doing mixed up with something like this?" The same officer testified that the defendant gave incriminating answers to those questions. The state maintained that the exchange was not an interrogation within the meaning of Miranda. The Tennessee Appellate Court disagreed and followed the holding of Rhode Island v. Innis, supra. The court held that the question asked by the officer would be likely to elicit a response from the defendant and it could be reasonably expected that the response would be incriminating.

The Tennessee court disagreed with the reasoning of the trial judge and the state that the custodial officers at the jail were not police officers to whom Miranda applied. The court noted that the officer was in uniform and was in charge of the defendant. The court noted that whatever his official position was, "it is clear to us that the defendant would perceive he was in a custodial atmosphere and that police action was involved." 729 S.W. 2d at 274.

In response to the argument that Miranda warnings had been

given at the time of the suspect's arrest, and therefore did not need to be given again, the Tennessee court noted that the defendant was taken into custody in December, and his statement to the officer at the jail was made in April. The court held that this lapse of time required that Miranda warnings be given anew.

In the instant case, the defendant was arrested in January, 1991, and his statements to the bailiffs were made in September, 1991. Even if the bailiffs did not intend to elicit an incriminating response from the defendant when they asked questions about his dissatisfaction with the testimony of the medical examiner and about his involvement in the shooting, they should have known that their questions were reasonably likely to elicit incriminating responses. It is also clear that from the defendant's point of view, the two bailiffs were agents of the state, and that Miranda warnings were required. Because the trial court erred in admitting the in-custody statements of Christmas into evidence, this cause must be reversed and remanded for a new trial.

ARGUMENT

ISSUE II.

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE AND IN SENTENCING CHRISTMAS TO DEATH

Under the Florida death penalty statutory scheme, a jury's recommendation of life imprisonment must be given great weight, and

> [i]n order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that ***virtually no reasonable person could differ.***

Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)(emphasis supplied). In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed. 2d 344 (1977) the defendant contended that application of Florida's post-Furman death penalty statute in his case violated the prohibition against ex post facto laws, because the crimes of which he was convicted occurred before the enactment of the statute. He claimed that at the time the offenses were committed, the trial court was without authority to override the jury's recommendation of mercy, while under the new statute a life recommendation could be (as in his case, was) overridden. The United States Supreme Court held that the ex post facto clause was inapplicable, characterizing the changes in the law as procedural and "on the whole ameliorative." Dobbert v. Florida, 432 U.S. at 292. Referring to the Tedder standard, the Court said:

> This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be

> overridden by the trial judge only under the exacting standards of Tedder. Hence, defendants are not significantly disadvantaged vis-a-vis the recommendation of life by the jury; on the other hand, unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old statute.
>
> Dobbert v. Florida, supra, 432 U.S. at 295-96

In State v. Dixon, 283 So.2d 1 (Fla. 1973), the case in this Court upheld the constitutionality of Florida's death penalty statute, it said:

> It is necessary at the outset to bear in mind that all defendants who will fact the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty -- each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

Specifically addressing the third of these safeguards, the trial court's authority to reject the jury's recommendation, this Court stated:

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in light of judicial experience.
>
> State v. Dixon, supra, at 8.

In Thompson v. State, 328 So.2d 1 (Fla. 1976), this Court wrote:

> This court is well aware that the recommendation of sentence by the jury is only advisory and is not binding on the trial court. However, the advisory opinion of the jury must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

More recently, this court has commented on the role of the jury in the death penalty sentencing scheme:

> Under Florida law, the role of the jury is one of great importance, and this is no less true in the penalty phase of a capital trial. Tedder. Juries are at the very core of our Anglo-American system of justice, which brings the citizens themselves int the decision-making process. We choose juries to serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed. A judge cannot ignore this expression of the public will except under the Tedder standard adopted in 1975 and consistently reaffirmed since then.

Stevens v. State, ___ So.2d ___ (Fla. 1991); 17 F.L.W. S.700 (Nov. 12, 1992) (unanimous decision).

This Court has said that where reasonable persons can differ over the fate of a capital defendant, it is the jury's determination, and not the judge's, which must be given effect. Provence v. State, 337 So.2d 783, 787 (Fla. 1976). This is true even if the judge's findings as to the aggravating and mitigating circumstances also appear to be reasonable or are supported by the evidence; where there is any view of the evidence from which the jury could reasonably have recommended life, the trial court is not

free to substitute its own judgment to override it. See Gilvin v. State, 418 So.2d 996 (Fla. 1982); Cannady v. State, 427 So.2d 723 (Fla. 1983); Chambers v. State, 339 So.2d. 204, 208 (Fla. 1976) (England, J. concurring). As this Court recently stated in Downs v. State, 574 So.2d 1095 (Fla. 1991):

> Under *Tedder*, a trial court errs in overriding a jury's recommendation if facts are evident from the record upon which a reasonable juror could rely in recommending life imprisonment.

574. So.2d at 1099 (citations omitted).

If mitigating evidence provides any reasonable basis upon which the jury might have relied, the trial judge must impose a life sentence in accordance with the recommendation. E.g., Bedford v. State, 589 So.2d 245 (Fla. 1991); McCrae v. State, 582 So.2d 613 (Fla. 1991); Morris v. State, 557 So.2d 27 (Fla. 1990); Harmon V. State, 527 So.2d 182 (Fla. 1988); Fead v. State, 512 So.2d 176, 178 (Fla. 1987); Ferry v. State, 507 So.2d 1337 (Fla. 1987). The fact that the sentencing judge disagrees with the jury's sentencing decision does not authorize an override and the imposition of a death sentence. Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). A jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community. Dolinsky v. State, 576 So.2d 271 (Fla. 1991); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Richardson v. State, 437 So.2d 1091 (Fla. 1983).

This court's consistent application of this standard in life recommendation cases has preserved the constitutionality of Florida's death penalty sentencing procedures. Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242, 96

S.Ct. 2690, 49 L.Ed. 2d 297 (1976). In Parker v. Duggan, __ U.S. __, 111 S.Ct. 731, __ L.Ed. 2d __ (1991), the United States Supreme Court addressed the statutory review scheme:

> We have held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted the 'crucial' protection afforded by such review in jury override cases.

111 S.Ct. at 739 (1991).

Several valid reasons justify the jury's recommendation that Christmas receive a life sentence. The trial judge's decision to override the recommendation was based solely on the trial court's re-weighing of the aggravating and mitigating circumstances, and not on any legal tenet. The decision to override was therefore erroneous. Christmas' death sentence must now be reversed for imposition of a life sentence. Numerous mitigating factors exist in this case and easily provide support for the jury's life recommendation. In such a situation, an override is improper. Jackson v. State, 599 So.2d 103 (Fla. 1992).

Christmas argued the following mitigation to the penalty phase jury:

> Through no fault of his own, Marc Christmas suffers from a lifelong disability in the form of a personality disorder. It was caused either by genetics or by his environment early in his life.
>
> Because of his disability in his early years, he had a craving for attention from his father which his father could not satisfy. He was never able to form a good father-to-son relationship.
>
> Because of his disability he is abnormally and extremely dependent upon the attention and approval of others; he is very easily led by and influenced by others.

A part of the personality disorder is that he does not recognize he has a problem, and he has not been able to learn from experience; therefore, his life has followed a pattern of seeking attention from the wrong people.

Marc Christmas' personality disorder may possibly be cured or controlled only by long-term intensive counseling, medication, or the aging process itself.

Marc Christmas would not have committed this crime alone.

In spite of his disability, Marc Christmas has impressed people throughout his life with his desire to do right:

Betty Moerrings
Joe Nazworth
Mary McDaniel
Joe Chestnut
Ray Olsen
Rex Hysell
Phil Pressimone
Lt. Feliche Mucciolly
Leonard Christmas

Shortly before this crime, Marc Christmas showed by his actions with "Tandi" Colon and by his kind treatment of Joy Lovin that he does care about others.

Marc Christmas has formed a close relationship with his younger sister; she seeks his advice about her problems, and he gives her good advice to help her avoid his own mistakes.

Marc Christmas has formed an extremely close relationship with his mother.

Marc Christmas has artistic talent, and he takes pride in his drawings.

Marc Christmas was 22 years old at the time of sentencing and was 21 at the time of the murder.

(T-1528-46).

Christmas proved this mitigation not only by presenting testimony of family members (mother, father and aunt), but by presenting responsible members of the community, including:

1. Betty Moerrings, a high school guidance counselor with

thirty years of experience in her work. (T-1332-44).

2. Jo Nazworth, a teacher of emotionally handicapped high school students with more than twelve years of experience in her work. (T-1344-51).

3. Feliche Mucciolly, a death penalty proponent and former employee of the Jacksonville Sheriff's Office for ten years. She has been the director of public services at FCCJ for ten years. (T-1456-67).

4. Ray Olsen, a former employee of the Department of Corrections and counselor/teacher at a youthful offender camp. (T-1414-22).

5. Phil Pressimone, a former employee of the Department of Corrections and counselor/teacher at a youthful offender camp. (T-1429-35).

6. Joe Chestnut, a long-time employee of the Department of Corrections, who was a former supervisor of a youthful offender camp. Mr. Chestnut currently works as a community control supervisor. (T-1402-13).

7. Rex Hysell, the owner of a stucco business who has employed youthful offender inmates and once employed Defendant.

8. Ora Lewis Lowery, a mental health counselor for many years who once counseled Marc. (T-1422-29).

9. Dr. Johann Prewett, an experienced clinical psychologist who administered psychological tests to Marc.

10. "Tandi" Colon and Joy Lovin, two acquaintances of the defendant's who were familiar with his acts of kindness.

At least one of these witnesses sacrificed a day's pay to fly to Jacksonville to testify in Marc Christmas' behalf. (T-1429). Faced with the same sort of support in Cochran v. State, 547 So.2d 928 (Fla. 1989), this Court stated:

> We note that while capital defendants often present testimony of family members and psychiatrists in mitigation, it is unusual to have classroom teachers and a police detective to testify. A jury might give the testimony of such witnesses great weight. The facts in this case, including appellant's prior conviction of a capital felony, are not so clear and convincing that no reasonable person could differ that death is the appropriate penalty.

547 So.2d at 932.

The mitigation proved by defense witnesses, and the statements of Christmas himself to bailiffs during the trial (which were adopted as true by the prosecution in its guilt phase and penalty phase arguments) were sufficient to convince the jury that the actual shooting was done by co-defendant Steven Stein, and that Christmas was the follower, not the leader. That conclusion alone supports the jury recommendation of life. Even if the state were able to prove, and the defendant admitted, that he was a participant in the robbery and killing of the victims, the jury recommendation of life is still reasonable. See Dolinsky v. State, supra.

In Barclay v. State, 470 So.2d 691 (Fla. 1985), this Court reversed a life override where Barclay had played a very significant role in the killing of his victim and had actually stabbed the victim while the co-defendant, Jacob John Dougan, shot the victim. This Court held:

> The jury apparently distinguished between Barclay and his main co-defendant, Jacob John Dougan, as evidenced by its recommendations of life imprisonment for Barclay (the follower) and death for Dougan (the leader). We hold that there was a rational basis for the jury's distinction between these co-defendants and that the trial court erred in overriding the jury's recommendation.

470 So.2d at 695.

It appears from the facts recited in Barclay and the earlier opinion in the same case at 343 So.2d 1266 that Barclay's involvement in the killing of his victim was even more significant that Marc Christmas' involvement in the killing of Bobby Hood and Dennis Saunders. Barclay was part of a group that called itself the "Black Liberation Army" whose sole purpose was to indiscriminately kill white people and start a revolution and a racial war. He, along with co-defendants, set out in a car armed with a pistol and a knife with the intent to kill a white person. Barclay repeatedly stabbed the victim with a knife, and after the murder, he, together with Dougan, made a number of tape recordings concerning the murder which they mailed to the victim's mother and to radio and television stations. If it was reasonable for Barclay's jury to recommend life for him, then it was certainly reasonable for Christmas' jury to do the same.

The jury could reasonably have based its recommendations on the defendant's age of twenty-one at the time of the killing. Cannady v. State, 427 So.2d 723 (Fla. 1983) (age of 21 could have formed reasonable basis for jury recommendation of life; override reversed by this Court); Huddleston v. State, 475 So.2d 204 (Fla. 1985) (age of 23 could have formed part of reasonable basis for

jury recommendation of life; override reversed by this Court). When there is evidence of emotional immaturity, even higher ages can be valid mitigation. See Scull v. State, 533 So.2d 1137 (Fla. 1988) (age of 24 found mitigating by trial judge who heard evidence about defendant's emotional immaturity). In the instant case such evidence existed: Christmas had an emotional handicap throughout his school years and an extremely dependent personality throughout his life.

In a recent case decided by this Court, age was held to be the only statutory mitigating factor, but similar non-statutory mitigating factors were presented at the advisory hearing through both lay and expert witnesses. In Scott v. State, 603 So.2d 1265 (Fla. 1992), a unanimous Court held that reasonable persons could find the following to be mitigation:

> (1) Scott had a difficult childhood--he was essentially abandoned by his mother as an infant and was tossed back and forth from one relative to another--one witness characterized him as a "throw-away kid;" Scott's mother and uncle physically abused him as a child; (2) Scott is mentally impaired--he suffers from adjustment disorder and attention deficit disorder; he has brain damage; he has borderline intelligence and can barely read; (3) Scott suffers from long-term drug and alcohol abuse; (4) Scott is emotionally unstable and immature--he seeks attention through tantrums and through self-destructive behavior such as cutting his arms; he is very impulsive, acting without regard to consequences; and (5) Scott has the capacity to form loving relationships--he cares about his girl-fried and their son, his grandparents, and his aunt.

603 So.2d at 1277.

The jury in this case was death qualified; the state accepted

the members of the jury without exercising all of its peremptory challenges. Every member of the jury believed in the death penalty and said he or she could impose it in the appropriate case. The jurors were intelligent, hard-working people. Ms. Zellers worked for the Duval County School Board. Ms. Davis worked as a secretary. Ms. Brewer worked for AT&T. Ms. Jordan worked for the Department of Health and Rehabilitative Services. Mr. Wilson worked for the Liberty Steel Company. Mr. Tate was a construction worker. Ms. Hayes worked for CSX as an account clerk. Mr. Mercer was a welder. Mr. Purvis was a technical inspector for Sears. Mr. Lovelace, the foreman, was a construction engineer for Batson Cook. Mr. Kellam was a stock broker for Dean Witter. Mrs. Moore was a pre-school teacher who husband was a detective for the Jacksonville Sheriff's Office. (T-348-69). The jurors paid close attention through one day of jury selection, three days of trial, and one day of penalty phase.[3] They were not forced to listen to testimony late into the night. In closing argument the prosecutor praised the jury for its attention during the trial. (T-1227-28). There exists in the record no evidence of juror misconduct or inattention

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[3]/ The record reflects the dates and times of trial as follows:

Monday, September 23, 1991 - Voir dire & Opening
Adjourn 6:30 p.m.
Tuesday, September 24, 1991 - Trial continued
10:30 a.m.-6:38 p.m.
Wednesday, September 25, 1991 - Trial continued
10:30 a.m.-6:13 p.m.
Thursday, September 26, 1991 - Trial continued
10:15 a.m.-2:35 p.m. (T-1268).
Friday, September 27, 1991 - Advisory Hearing
10:37 a.m.-7:15 p.m. (T-1565)

to the evidence. Frequent recesses were taken during the trial to help the jurors keep their attention on the evidence. No jurors complained of being unable to see or hear. Evidence was frequently displayed to the jurors at close range by means of photographs and live demonstrations by the prosecution and the witnesses. Witnesses used physical evidence directly in front of the jury box to explain their testimony to the jurors. In fact, the trial court had expressed its confidence in the ability of the jurors to follow the law:

> Mr. Chipperfield, I'm convinced I have a little more confidence in the people that hear the case, assuming we get to the penalty phase part of it that they will follow the law as I instruct them and wouldn't that be an aggravating factor and prohibiting the State from arguing about his record? I have more faith in jurors and that they will follow the law and the argument of counsel. I will deny that motion.

(T-278-79).

Christmas presented no inflammatory arguments. In fact, Christmas waived his closing argument in the guilt phase. (T-1231). In penalty phase, the prosecution did not raise a single objection to counsel's argument for life. (T-1515-48). Very few objections were raised to the prosecutor's argument for death, and the trial court's rulings on those objections did not substantially affect the prosecutor's argument. (T-1481; T-1515).

The argument for death was made by the prosecutor between 4:00 and 5:00 p.m., and the life argument was made by the defense between 5:00 and 6:00 p.m. The jurors deliberated early in the evening at a time when they were still fresh and not overworked.

(T-1565). The jury was polled, and each juror indicated that a majority of the jury made the recommendation for life. (T-1558-61).

There were no distractions during the guilt phase or penalty phase of the trial by loud spectators or participants in the trial. At the conclusion of the trial, the court praised both sides for a well-tried case. (T-1563).

The trial judge without analysis or explanation, wholly rejected the mitigating circumstances presented by appellant. (R-554-55). However, the jury could have properly relied on the significant mitigation about which Dr. Prewett testified and which was corroborated by lay testimony from friends, family, school personnel and other mental health professionals. Simply because the trial judge disagrees with the force of the mitigation presented does not preclude the jury's reasonable reliance upon such factors. See e.g., Morris; Rivers.

In Fead v. State, this Court reversed a trial judge's override of a life recommendation. Reversing the sentence, this Court said,

> The limited question we must decide is whether a jury of reasonable men and women could conclude, based on this evidence, that death is inappropriate. We are convinced that they could.

512 So.2d at 179. In Reilly v. State, 601 So.2d 222 (Fla. 1992), this court reiterated the rule of Tedder:

> ...we cannot say the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ.

601 So.2d at 224 (citations omitted).

In the instant case, it is clear that the jury was made up of reasonable men and women. It was reasonable, based on the testimony and argument presented at the advisory sentencing hearing for the jury to recommend that a life sentence be imposed for the two first degree murder counts. The trial judge, not the jury, made the inappropriate and unreasonable sentencing decision in this case. Marc Christmas should not be executed for his crime; this court must reverse the death sentences with directions to impose sentences of life imprisonment.

ARGUMENT

ISSUE III:

THE TRIAL COURT ERRED IN IMPROPERLY FINDING AGGRAVATING CIRCUMSTANCES AND IN FAILING TO FIND AND CONSIDER EXISTING MITIGATNG CIRCUMSTANCES, THEREBY RENDERING CHRISTMAS' DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

A. The Court Improperly Found That The Homicides Were Committed In An Especially Heinous, Atrocious or Cruel Manner.

The trial judge found that the "heinous, atrocious or cruel" aggravating circumstance applied to the shooting deaths in this case, and he wrote:

> The bodies of the two victims were found in the bathroom the Pizza Hut. As shift supervisors, the victims were to clean up the Pizza Hut before leaving, but no cleaning products or maintenance products were found in the bathroom with the victims. From this, the court concludes that the evidence is clear that the victims were forced into the bathroom. Victim Bobby Hood was then shot four times in the head and once in the chest at close range (within eight inches), with the bullets going in a downward path. 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 extremely cruel and heinous as he saw what happened to his friend and fellow worker Bobby Hood, as he awaited his own fate. Victim Dennis Saunders was shot four times all around the body, including in the leg, in the arm and

> in the chest, indicating that he was not going down easily.

(R-552-53).

The homicides here were nearly instantaneous shooting deaths. This court has consistently held that such killings do not qualify for the "heinous, atrocious or cruel" aggravating circumstance. E.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). Nothing about the manner of the killing suggested it was done to cause unnecessary suffering. Brown v. State, 526 So.2d at 907; Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Dixon v. State, 283 So.2d 1, 9 (Fla. 1973).

Multiple gunshots administered within minutes do not satisfy the requirements of this factor. See e.g., Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988) (victim shot three times at close range within a short period of time as he tried to escape); Lewis v. State, 377 So.2d at 646, (victim shot in the chest and then several more times as he tried to flee). Even execution-style killings do not necessarily qualify for this aggravating circumstance. See, Kampff v. State, 371 So.2d 1007 (Fla. 1979); Menendez v. State, 368 So.2d 1278 (Fla. 1979).

This is not a case where the victim suffered physically and mentally for a significant period of time before the fatal shot. See, Jackson v. State, 522 So.2d 802, 809-10 (Fla. 1988). The fact that the victim lived a few moments between the first and fatal shots does not evidence the prolonged mental suffering and terror

necessary to make a shooting death heinous, atrocious or cruel. See Brown, 526 So.2d at 906-07, n. 11 (although victim begged not to be shot just before fatal wound, this court rejected HAC circumstance). Furthermore, the fact that the victim may have suffered some pain is insufficient to separate this crime apart from the norm of first degree murders resulting from a shooting death.

The circumstances of the shooting in Brown are virtually identical to the ones here. In Brown, the victim was shot in the arm, and he said, "Please don't shoot." Brown then immediately administered the fatal shot. On these facts, this court held that the murder was not especially heinous, atrocious or cruel. 526 So.2d at 907. This court should rule as a matter of law the manner of death does not rise to the level of "heinous, atrocious and cruel," and strike the trial court's finding of that aggravating circumstance.

B. THE COURT IMPROPERLY FOUND THAT CHRISTMAS HAD A PREVIOUS CONVICTION FOR A VIOLENT FELONY.

The trial court found as an aggravating circumstance that Christmas had a previous conviction for a violent felony pursuant to Section 921.141(5)(b), Florida Statutes. (R-550). Christmas' only convictions for violent felonies were the offenses for which he was convicted in this case for crimes committed in the same criminal episode. Sec. 921.141(6)(a), Florida Statutes. However, the court concluded that each homicide conviction could enhance the other and found the aggravating circumstance of a previous conviction for violent felony:

> The crime of Murder in the First Degree is a capital felony. Marc Anthony Christmas is convicted of Murder in the First Degree for the death of Dennis Saunders and Murder in the First Degree for the death of Bobby Hood. Each conviction enhances the other and this aggravating factor is properly applied to the murder of both of the victims. Correll v. State, 523 So.2d 562 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988).

(R-550). In enacting the aggravating circumstance in section 912.141(5)(b) Florida Statutes, the legislature never intended for the circumstance to be applied where a contemporaneously committed violent felony supplies the "previous conviction." The aggravating circumstance should not have been applied in Christmas' sentencing.

Chapter 72-72, Laws of Florida, in its initial form as Senate Bill No. 465, listed two relevant aggravating circumstances:

> (b) The defendant was *previously* convicted of another capital felony or of a felony involving the use or threat of violence to the person.

> (c) ***At the time*** the capital felony was committed the defendant also committed another capital felony.

(Emphasis added.) This language was derived directly from the Model Penal Code, Section 210.6(3)(b)(c). The Commentary to the Model Penal Code, from which the language of the Florida statute was drawn, explains that the first aggravator quoted above was intended to be limited to offenses committed prior to the instant offenses;

> Paragraph (b) deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggests two inferences supporting the escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some further occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.

The second aggravator quoted above, which was eliminated from Senate Bill 465, was directed at contemporaneous killings:

> Paragraphs (c) and (d) (knowing creation of homicidal risk to many persons) apply this rationale to two cases in which the contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness. These are multiple murder and murder involving knowing creation of homicidal risk to many persons.

When the legislature subsequently eliminated paragraph (c) quoted above, it expressed its intention that the aggravator at issue only be applicable where the prior conviction was obtained in

a prior case and was not a part of the case giving rise to the capital conviction on which the defendant is being sentenced. This is a reasonable position since the legislature was focusing (1) on the issue of failed rehabilitation, i.e., the defendant was already given a second chance, and (2) the issue of propensity or future dangerousness. The interpretation of this aggravator which has allowed its application to cases involving more than one homicide does not address this historical concern and, in effect, becomes a multiple-offense aggravator rather than a failed rehabilitation/ propensity aggravator. In this regard, this court's conclusion in King v. State, 390 So.2d 315, 320 (Fla. 1980) that:

> The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance

is contradicted by the facts recited above.

Recently, this court construed the habitual offender statute concerning predicate felony convictions which contained language identical to the language found in Section 921.141(5)(b), Florida Statutes. State v. Barnes, 595 So.2d 22 (Fla. 1992). Section 921.141(5)(b), Florida Statutes provides for an aggravating circumstance if the defendant "was previously convicted of another capital felony or a felony involving the use or threat of violence to the person." The habitual offender statute in Barnes, Section 775.084(1)(a), Florida Statutes discusses the predicate felonies requirement as follows: "The defendant has previously been convicted of two or more felonies in this state." This court held in Barnes that the predicate felony convictions required for the

habitual offender statute did not require sequential convictions. However in Barnes, the convictions did arise from separate incidents and the holding did not remove the requirement that the predicate convictions arise from separate incidents. Justice Kogan, concurring specially, wrote:

> I concur with the rationale and result reached by the majority, but only because this particular defendant's felonies arose from two separate incidents. Were this not the case, I would not concur. I do not believe the legislature intended that a defendant be habitualized for separate crimes arising from a single incident, I do not read the majority as so holding today. Under Florida's complex and over-lapping criminal statutes, virtually any felony offense can give rise to multiple charges depending only on the prosecutor's creativity. Thus, virtually every offense could be habitualized and enhanced accordingly. If this is what the legislature intended, it simply would have enhanced the penalties for all crimes rather than resorting to a "back-door" method of increasing prison sentences.

Barnes, 595 So.2d at 25. Because the language used in the two statutes are identical, the legislature must have intended a previous conviction under section 921.141(5)(b) to likewise arise from a separate criminal incident.

The aggravating circumstance of a previous conviction for a violent felony was improperly found and considered in sentencing Christmas to death. He urges this court to reverse his sentence.

C. THE COURT IMPROPERLY FOUND THAT THE HOMICIDES WERE COMMITTED TO AVOID ARREST AND WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

This court has long held that two aggravating circumstances cannot be based on the same factual aspects of the case. E.g., Maggard v. State, 399 So.2d 973 (Fla. 1981); Clark v. State, 379 So.2d 97 (Fla. 1979); Provence v. State, 337 So.2d 783 (Fla. 1976). The trial judge violated this principle when he found both the premeditation and avoiding arrest aggravating circumstances based on a finding that the homicides were committed to eliminate witnesses to the robbery. (R-551-54). In support of the avoiding arrest circumstance, the court wrote,

> Dennis Saunders and Bobby Hood were killed for the purpose of the elimination of witnesses. Kyle White, the third roommate, overheard Steven Stein and co-defendant Christmas discuss their plan to rob Pizza Hut. Stein and Christmas discussed the need to eliminate any and all witnesses. Christmas initiated the plan to eliminate witnesses. Christmas was the one who had worked at the Edgewood Avenue Pizza Hut and would be recognized and identified by the employees. Christmas knew that it was the policy of Pizza Hut that if an employee is ever confronted with a robbery or placed in jeopardy, the employee is to give up the money without any resistance whatsoever. Nevertheless, Stein and Christmas discussed that they would have to kill any and all witnesses in order to ensure that they would not be identified as the robbers.

(R-551-52). Finding the premeditation aggravating circumstance, the court stated:

> Marc Anthony Christmas and his co-defendant planned to kill any and all witnesses to their planned robbery of Pizza Hut. Christmas, a former Pizza Hut employee, knew that it is Pizza Hut's policy for employees confronted

> with a robbery to give up the money without any resistance whatsoever. Despite this, Christmas and his co-defendant discussed and planned to kill all witnesses to the robbery so that they would not be identified. Christmas, not Stein, was the one the Edgewood Avenue Pizza Hut employees would know. Christmas initiated the plan to kill the witnesses. The evidence indicates that two victims were forced into the bathroom, where they were each shot four or five times in order to eliminate them as witnesses, as planned and discussed by Stein and Christmas.

(R-553-54).

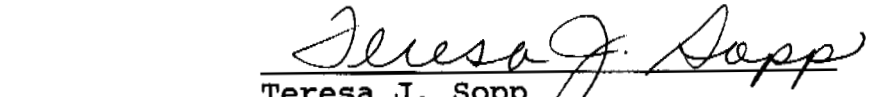
The fact of a prior plan to kill witnesses to the robbery was improperly used to establish both of these aggravating circumstances. While the facts of the homicides may factually qualify for both of the aggravating circumstances, only one can be found and weighed in the sentencing equation. Otherwise, the sentencing process is skewed in favor of death because the same aspect of the case is weighed twice. This violated Christmas' rights to due process and a fair penalty determination.

CONCLUSION

Because the trial court erred in admitting statements of appellant purportedly made to bailiff in overriding the jury's recommendation of a life sentence, and in improperly assessing the aggravating and mitigating circumstances the trial court committed error. Appellant's conviction should be reversed and this cause remanded for a new trial; in the alternative, the sentences of death should be vacated and sentences of life imposed.

Respectfully submitted,

SASSER & SOPP



Teresa J. Sopp
Attorney for Appellant
One Harbert Center
7077 Bonneval Road, Suite 200
Jacksonville, Florida 32216-6062
(904) 296-2640
Florida Bar No. 265934

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard A. Martell, Assistant Attorney General, the Capitol, Tallahassee, Florida 32301, by regular United States Mail this 9th day of December, 1992.

Teresa J. Sopp
Attorney for Appellant