IN THE SUPREME COURT OF FLORIDA

BRANDY BAIN JENNINGS,	:	
Appellant,	:	
vs.	:	Case No. 89,550
STATE OF FLORIDA,	:	
Appellee.	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR COLLIER COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
Assistant Public Defender
FLORIDA BAR NUMBER O234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

TABLE OF CITATIONS (continued)

STATEMENT OF THE CASE

On December 20, 1995, a Collier County grand jury returned an indictment charging Appellant, Brandy B. Jennings, with three counts of premeditated murder and one count of robbery. (Vol. I, pp. 20-21) The offenses allegedly occurred on November 15, 1995. (Vol. I, p. 20) The indictment charged that the three murder victims, Dorothy Siddle (who was also listed as the victim of the robbery), Vickie Smith, and Jason Wiggins, were killed by having their throats cut with a sharp object. (Vol. I, p. 20)

On the same date, the grand jury also returned a separate indictment against Charles J. Graves for the same offenses.

Among the pretrial motions Jennings filed, through counsel, was a Motion to Suppress statements he made. (Vol. I, p. 152) The Honorable William L. Blackwell heard the motion on June 27, 1996 (Vol. XII, pp.964-1044), and denied it on July 1, 1996. (Vol. I, p. 170)

Appellant also filed a Motion for Change of Venue on April 26, 1996 (Vol. I, pp. 108-113), which the court granted on May 16, 1996. (Vol. I, pp. 133-137) Venue was transferred from Collier County to Pinellas County. (Vol. I, pp. 140-141)

On July 11, 1996, the court entered an order consolidating Appellant's case with that of Graves for trial (Vol. I, pp. 183-184), but later severed the cases for trial, on September 12, 1996.

(Vol. II, pp. 326-327) The order severing the cases noted that the State had agreed to waive the death penalty in Graves' case in exchange for his withdrawal of motions he had filed for continuance of his trial. (Vol. II, p. 326)

Appellant's cause proceeded to a jury trial in Clearwater on October 28-November 1, 1996, with Judge Blackwell presiding. (Vol. VII, p. 1-Vol. XI, p. 963) On October 31, 1996, Appellant's jury found him guilty as charged on all four counts of the indictment. (Vol. IV, pp. 619-620; Vol. X, p. 835)

Penalty phase was held on November 1, 1996. (Vol. V, pp. 663-781; Vol. XI, pp. 845-963)[1] After receiving additional evidence from the State and the defense, Appellant's jury returned three recommendations by votes of ten to two that Appellant be sentenced to die in the electric chair. (Vol. IV, pp. 622-624; Vol. XI, p. 957)

On November 22, 1996, the court held the hearing mandated by Spencer v. State, 615 So. 2d 688 (Fla. 1993), at which Appellant's mother addressed the court. (Vol. VI, pp. 953-965)

Sentencing was held on December 2, 1996. (Vol. XIII, pp. 1045-1060) The court sentenced Appellant to 15 years in prison for the robbery and sentenced him to death for each of the three murders. (Vol. V, pp. 784-790, 797, 800, 803, 806, 818; Vol. XIII, p. 1058) In support of the sentences of death, the court found the

[1] For unknown reasons, the transcript of Appellant's penalty phase appears in the record on appeal twice.

following aggravating circumstances (Vol. V, pp. 784-786; Vol. XIII, pp. 1048-1051): 1. The murders were committed while Appellant was engaged or was an accomplice in the commission of the crime of robbery. 2. The crimes were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. 3. The crimes were committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification. With regard to statutory mitigating circumstances, the court found that Appellant had no significant history of prior criminal activity, and gave this some weight. (Vol. V, pp. 786-787; Vol. XIII, p. 1052) The court rejected two other statutory mitigators, that Appellant was an accomplice in the capital felonies committed by another and his participation was relatively minor, and that Appellant acted under extreme duress or under the substantial domination of another person. (Vol. V, p. 787; Vol. XIII, pp. 1052-1053) As for nonstatutory mitigation, the court found and gave substantial weight to Appellant's cooperation with law enforcement in solving this case. (Vol. V, p. 789; Vol. XIII, p. 1056) The court also found and gave some weight to Appellant's family background and deprived childhood, the disparate sentences received by his codefendant, Appellant's positive personality traits enabling the formation of strong, caring relationships with peers, and Appellant's capacity to care for and be mutually loved by children. (Vol. V, pp. 787-789; Vol. XIII, pp. 1053-1057) Finally, the court found, but gave little weight, to Appellant's good

employment history, his loving relationship with his mother, and his exemplary courtroom behavior. (Vol. V, pp. 789-790; Vol. XIII, pp. 1056-1058)

Appellant timely filed his notice of appeal to this Court on December 11, 1996. (Vol. V, p. 836)

STATEMENT OF THE FACTS

Suppression Hearing of June 27, 1996

Two witnesses testified at the hearing held before Judge Blackwell on Appellant's motion to suppress his statements to law enforcement. (Vol. XII, pp. 968-1006) Ralph Cunningham, Chief Investigator for the State Attorney's Office, Twentieth Judicial Circuit, testified for the State that he traveled to Las Vegas, Nevada, to investigate this case, arriving there on the evening of December 9 [1995]. (Vol. XII, pp. 968-969, 995) Cunningham met with detectives from the Collier County Sheriff's Office, who advised him that Appellant "didn't want to talk to anybody." (Vol. XII, pp. 995-996)

On December 10, 1995, Cunningham went to the Las Vegas City Jail to talk to Jason Graves. (Vol. XII, pp. 969-970) After speaking with Graves, as he was walking out, Cunningham observed Appellant near the booking desk, with a guard. (Vol. XII, pp. 970, 999) Appellant asked if his mother had contacted them by telephone. (Vol. XII, pp. 970-971) Cunningham responded that she had

not, but he understood she had been trying to, and Detective Crenshaw was in the process of trying to contact her, but was having some difficulties because of the difference in time zones. (Vol. XII, p. 971) Appellant said that he had talked to his mother, who advised him to talk to the authorities and tell them the truth. (Vol. XII, p. 971) Appellant went on to say that he did not want to take the blame for the killings of three people that his partner had done, that he wanted to tell his side of the story. (Vol. XII, p. 972) Appellant was taken to a small room where he was interviewed by Cunningham and Detective Rose of the Collier County Sheriff's Department. (Vol. XII, pp. 972-973) Cunningham read Appellant his Miranda rights from a card, and Appellant said that he understood his rights and wanted to tell the truth about what happened, but he did not sign a written waiver. (Vol. XII, pp. 973-975, 1000) A "pre-interview" was conducted with Appellant, which was not taped, followed by a lengthy recorded conversation with Appellant, at the beginning of which Appellant was again advised of his rights. (Vol. XII, pp. 977-978)

Cunningham interviewed Appellant again the following day, December 11, for the purpose of conducting a polygraph examination, which Appellant had agreed to take when Cunningham spoke with him on December 10. (Vol. XII, p. 985-987) Miranda warnings were again administered, and Appellant executed a written waiver. (Vol. XII, pp. 988-990) He took a polygraph examination, following which Cunningham interviewed him again. (Vol. XII, pp. 990-993)

Detective Andrew Rose of the Collier County Sheriff's Office testified for the defense that he went to Las Vegas on December 8, 1995 to investigate the Cracker Barrel homicides. (Vol. XII, pp. 1002-1003) He met Appellant at the Clark County Jail early on the morning of December 9 in order to attempt to interview him. (Vol. XII, pp. 1002, 1005-1006) Appellant was being held on a warrant from Collier County, as well as charges out of Clark County. (Vol. XII, pp. 1002-1003) Officer Crenshaw advised Appellant of his Miranda warnings from a card, and Appellant signed a waiver form, but Appellant then "said that he wanted a lawyer or something to that effect." (Vol. XII, pp. 1002-1005) Rose denied handing a Las Vegas telephone book to Appellant and saying that he could contact any lawyer he wanted to, but acknowledged asking Appellant if he wanted to see a phone book, and told Appellant that he [Rose] "could get him one," and that ended the conversation. (Vol. XII, p. 1004) Rose reported to Cunningham that Appellant did not wish to speak without a lawyer. (Vol. XII, p. 1005)

Guilt Phase

Appellant, Brandy Jennings, worked at the Cracker Barrel Restaurant in Naples as a grill cook for about 11 months. (Vol. IX, pp. 606, 609, 619) He was a marginal employee. (Vol. IX, p. 621) Appellant wanted to cross-train to become a waiter. (Vol. IX, p. 608) In order to do that, he needed to work on his appearance and his temper. (Vol. IX, p. 608) He made an effort by getting some

new clothing and cutting his hair, but his biggest drawback remained his temper, and he never was able to cross-train as he wanted. (Vol. IX, pp. 609-610) Appellant felt that one of the associate managers, Dorothy Siddle, who was responsible for doing the evaluations on the grill cooks at the time, was responsible for holding him back. (Vol. IX, p. 611) One afternoon in the break-room, Appellant said of Siddle, "I can't stand the bitch. I can't stand the sound of her voice." (Vol. IX, p. 539) One night about two weeks after he quit his job at Cracker Barrel, Appellant was in the restaurant with Jason Graves, who had also worked there. (Vol. IX, p. 610) Another associate manager, Bob Evans, was chatting with them when Dorothy Siddle began talking over the P.A. system. (Vol. IX, p. 610) Appellant remarked, "Is Dorothy here? I hate her. I even hate the sound of her voice." (Vol. IX, p. 610)

On November 15, 1995, Dorothy Siddle deactivated the alarm at the Cracker Barrel at 4:33 a.m. (Vol. IX, pp. 520-522) Donna Howell, a cook who was working the opening shift that morning, arrived at the restaurant at 4:43. (Vol. IX, pp. 527-529) She saw Dorothy Siddle's vehicle in the parking lot, which was well lit. (Vol. IX, pp. 529-530, 536) Howell rang the buzzer to be let into the restaurant, but nothing happened. (Vol. IX, p. 532) She finished smoking a cigarette, then pushed the button more vigorously. (Vol. IX, p. 532) After waiting a while longer, Howell pushed the button again, and held it. (Vol. IX, p. 534) By that time, she was concerned. (Vol. IX, p. 534) When a waitress named Judy Reidy

arrived with a cell phone, Howell used it to call the restaurant. (Vol. IX, p. 535) There was no answer, and so she called the police. (Vol. IX, p. 535) Deputies from the Collier County Sheriff's Department arrived a short period of time later and gained entry into the restaurant by breaking the window into the front door. (Vol IX, pp. 536-537)

Frank Siciliano, a road deputy with the Collier County Sheriff's Office, was dispatched to the Cracker Barrel at 5:16 and arrived at 5:21. (Vol. IX, pp. 554-556) After speaking with several employees who were standing in the parking lot, Siciliano checked the perimeter of the building for any signs of forced entry, but found none. (Vol. IX, p. 557) Siciliano contacted another deputy, John Horth, as well as one of the managers of the restaurant. (Vol. IX, pp. 557-558) After other officers arrived on the scene, Horth and Siciliano broke the front window on the door of the restaurant and entered with the other deputies. (Vol. IX, pp. 558-560, 579-580) The office door was ajar and it appeared the office had been "rummaged through." (Vol. IX, p. 559, 580) Cash boxes were lying on the floor and the safe door was open. (Vol. IX, p. 580)[2] Siciliano and Horth proceeded to the cooler, which was empty, and then to the freezer, which was in the northeast corner of the building. (Vol. VIII, pp. 268-269; Vol. IX, p. 560, 580)

[2] Associate manager Bob Evans later determined that $5,374.79 was missing from the safe. (Vol. IX, p. 602) However, a green bank bag containing $878.00 remained in the safe. (Vol. IX, p. 604, 621)

Horth opened the door while Siciliano stood in front of it with his firearm. (Vol. IX, p. 561, 581) Inside they found three bodies. (Vol. IX, p. 561) There were three footprints leading away from the cooler door. (Vol. IX, pp. 581-582) The deputies exited the building and contained the crime scene. (Vol. IX, p. 561, 581)

Sergeant Robert Browning and Corporal Joe Barber[3] subsequently arrived to gather evidence. (Vol. VIII, pp. 233-234, 340) In the parking lot of the Cracker Barrel were vehicles belonging to Dorothy Siddle, Jason Wiggins (who was a night maintenance worker for Cracker Barrel), and Vickie Smith (who was a grill cook). (Vol. VIII, pp. 243, 249-250; Vol. IX, pp. 594-595) There was a large sum of money, paper bills and rolled coins, as well as a pair of leather work gloves that were stained with what appeared to be blood, and some shoe tracks, in a sandy empty lot to the east, behind the restaurant. (Vol. VIII, pp. 243-244, 348, 351-353, 356-357, 366-367) A short distance from the rear door of the restaurant, under a bush, Barber found a Buck folding knife with a black plastic handle; the blade was closed inside the knife. (Vol. VIII, pp. 351, 356) About 400 feet from the restaurant, Barber found a nylon Buck knife case. (Vol. VIII, p. 353, 357, 360-361) Further away still, Barber located a gun deep in the grass, with the hammer

[3] During Joe Barber's testimony, an incident occurred where Ron Bowling of the state attorney's office, who was sitting at counsel table, handed one of the jurors a cough drop, prompting an unsuccessful motion for mistrial by counsel for Appellant. (Vol. VIII, pp. 341-347)

in the cocked position. (Vol. VIII, p. 353, 357) At first, Barber thought it was a Colt .45 automatic, but upon closer examination, he determined that it was a Daisy pistol, not a real firearm. (Vol. 353-354)[4]

[4] Over defense objections, Barber was permitted to display to the jury a real firearm, State's Exhibit Number 15-A, next to the Daisy air pistol. (Vol. VIII, pp. 362-363) He described them as being "almost identical." (Vol. VIII, p. 362)

Inside the restaurant, in the office, there were several plastic containers and cash on the floor, and other articles in front of the open safe. (Vol. VIII, p. 267) Browning also observed some areas of blood transfers which appeared to be partial shoe tracks leading from the freezer through the kitchen to the office. (Vol. VIII, pp. 274-277, 324)[5] There was a transfer on a rubber mat in the kitchen that was detected using a Lumilight. (Vol. VIII, pp. 278, 293) There was a sink which had a spot of blood inside it, and one on the counter above the sink, and there was a small spot of blood right below the sink on the tile floor. (Vol. VIII, pp. 285-287)[6]

Various areas of the restaurant including the office, the freezer door, the front door, counters, a table, and the full interior of the kitchen, were processed for fingerprints, but no prints belonging to Appellant or the codefendant were found. (Vol. VIII, pp. 295-297, 372)

The freezer was used by Cracker Barrel to keep its frozen foods, meats and vegetables. (Vol. VIII, pp. 298-299) They were stacked in boxes along the sides of the freezer. (Vol. VIII, p. 299) The freezer door could not be locked in such a way as to

[5] Appellant objected unsuccessfully when the prosecutor below asked Browning in which direction the tracks were headed and from where, on the grounds that the witness had not been qualified as an expert in crime scene reconstruction. (Vol. VIII, pp. 276-277)

[6] Browning did not do any tests at the scene to determine whether the areas that appeared to be blood were in fact blood. (Vol. VIII, pp. 326-327)

prevent someone who was inside from getting out. (Vol. IX, pp. 604-606 When Browning entered the freezer, the temperature was minus 12 degrees. (Vol. VIII, pp.297-298) He observed the bodies of two females and one male. (Vol. VIII, p. 298) There was blood associated with Dorothy Siddle around her shoulders and head; there was some on boxes near her, but it only went up several inches. (Vol. VIII, p. 299) Blood was also around the head and shoulders of Vickie Smith, and there were some blood smears on a couple of boxes near her at a height of approximately five feet. (Vol. VIII, pp. 299-300) There was quite a bit of blood where Jason Wiggins was located, including blood transfer on boxes approximately five and one-half feet up. (Vol. VIII, p. 300)

Dorothy Siddle's hands were bound behind her with black electrical tape and were tied very tightly. (Vol. VIII, p. 306) There was tape wrapped around Vickie Smith's left wrist. (Vol. VIII, pp. 309-310) It trailed across her back and was not wrapped around the right wrist; it appeared to have come loose. (Vol. VIII, p. 309) Jason Wiggins similarly had tape around the left wrist that was loose from the right hand. (Vol. VIII, p. 313-314)

Browning observed that the keys to the backdoor on the east side of the building were still in the locking mechanism. (Vol. VIII, pp. 321-322)

Manfred Borges, associate medical examiner for Collier County, observed Dorothy Siddle, Vickie Smith, and Jason Wiggins in the freezer at the Cracker Barrel, and subsequently, on November 16,

1995, performed autopsies on them. (Vol. VIII, pp. 380-381) The manner of death for all three was homicide, and the cause of death was "sharp force injuries." (Vol. VIII, pp. 382-383) Dorothy Siddle sustained a "gaping wound of the neck" that resulted from at least three passes with a knife. (Vol. 389-395) She was almost decapitated. (Vol. VIII, p. 403) The wound went across the right carotid artery, vagus nerve, jugular vein and spinal cord, to the vertebrae. (Vol. VIII, pp. 389-390) Siddle would have been paralyzed, and died very quickly after her spinal cord was severed. (Vol. VIII, p. 398) The wounds were consistent with the Buck knife found at the scene, or one identical to it; however, any very sharp, very study knife having the same general dimensions could have caused them. (Vol. VIII, pp. 393-394, 406)[7]

Like Dorothy Siddle, Vickie Smith's right jugular, vagus nerve, and carotid artery were cut with a very sharp instrument, and the cut went all the way back to her vertebrae. (Vol. VIII, 395-397) However, there was only one cut on the back of her spine, and her spinal cord was not cut. (Vol. VIII, pp. 397-398) Smith would have died fairly quickly from loss of blood. (Vol. VIII, p. 398, 408)

[7] Borges testified that he saw the knife at the scene, the subsequently purchased the same type of knife at Kmart or Wal-Mart, compared that with the wounds to the victims. (Vol. VIII, pp. 393-394)

Jason Wiggins, who was five feet, eight inches tall and 136 pounds, with a muscular build, suffered at least two wounds from a sharp-bladed instrument with a very strong blade. (Vol. VIII, pp. 399-400) The upper wound was a stab that went into the jugular vein and back to the vertebrae. (Vol. VIII, pp.399-400) The lower injury was a cut across the voice box. (Vol. VIII, p. 400) It would have taken anywhere from 10 seconds to a minute or two for Wiggins to bleed to death. (Vol. VIII, p. 401, 408-409)

On November 16 and 17, 1995, Danielle Martel, a dancer, saw Appellant and Jason Graves at Flirts, a "nude no-contact bar" in Fort Myers. (Vol. IX, pp. 504-505) Over the course of the two evenings, the men spent about $1,000. (Vol. IX, p. 506) Graves complained of his right knee being sore because he had been in a bike accident; he "kind of squirmed a little bit" when another dancer accidentally bumped into his knee. (Vol. IX, p. 508-509) Neither man ever threatened the other; they appeared to be enjoying themselves, and "seemed like they were just having a good time." (Vol. IX, p. 509)

On December 8, 1995, Gordon McGhie of the Las Vegas Metropolitan Police Department was on routine patrol in a marked unit when he noticed an older white Ford pickup truck with Florida plates in front of him while he was stopped at a light. (Vol. VIII, pp. 409-412) He ran an NCIC computer check on the license plate and received a "hit." (Vol. VIII, p. 411) Upon seeing from his computer that the subjects "were possibly armed and dangerous,"

McGhie requested backup and followed the vehicle. (Vol. VIII, pp. 411-412) When backup arrived, McGhie activated his red lights and siren to effect a stop. (Vol. VIII, pp. 412-413) The vehicle slowly began to pull over to the shoulder of the road and eventually came to a complete stop. (Vol. VIII, pp. 412-413) McGhie initiated a "high-risk felony car stop." (Vol. VIII, p. 413)[8] McGhie began shouting commands for the stop, telling the occupants of the vehicle to do certain things. (Vol. VIII, pp. 414-415) There was a hesitation, following which the vehicle sped off again. (Vol. VIII, p. 415) The officers gave chase, with speeds reaching approximately 85 to 95 miles per hour on the freeway, the pickup being driven "very erratic." (Vol. VIII, p. 415) Eventually, about 15 miles out at a small town called Indian Springs, the truck slowed and came to a stop on the side of the road. (Vol. VIII, p. 416) This time the men did as they were ordered, and they were secured by the officers. (Vol. VIII, pp. 416-417) Appellant was the driver, and Graves was the passenger. (Vol. VIII, p. 417)

[8] This characterization of the stop prompted Appellant to object and move to strike the entire line of questioning. (Vol. VIII, pp. 413-414)

On December 8, 1995, Ralph Cunningham, chief investigator for the State Attorney's Office, Twentieth Judicial Circuit, received word from one of his investigators, Ronnie Bowling, that Appellant and Jason Graves had been arrested in Las Vegas. (Vol. IX, pp, 435, 440-441) Cunningham flew to Las Vegas the next day and met with Collier County Detectives Andy Rose and Jay Crenshaw. (Vol. IX, pp. 441-442) On December 10, Cunningham and Rose met with Appellant at the jail in Las Vegas. (Vol. IX, pp. 442-443) Appellant weighed approximately 275 pounds; Jason Graves weighed approximately 150 pounds, and had a very skinny, slender build. (Vol. IX, p.456) Cunningham advised Appellant of his Miranda rights, and Appellant said he had spoken with his mother on the phone, who advised him to cooperate and tell the truth about what happened, and that was what he wanted to do. (Vol. IX, pp. 443-444) After Appellant told his story, Cunningham took a sworn taped statement from him. (Vol. IX, pp. 444-445)[9] Appellant said that he originally intended to cover up for his codefendant, Jason Graves, whom he had known for about three years, but he decided it was not worth it. (Vol. VI, pp. 990-991) In August of 1995 Graves was looking for a job after hurting his leg in a motorcycle accident and being fired from his job at Winn Dixie. (Vol. VI, pp. 996-997) Appellant took him to Cracker Barrel, and he was hired as a dishwasher. (Vol. VI, pp. 997-998)

[9] The court reporter did not report the contents of the tapes as they were played for the jury at Appellant's trial. (Vol. IX, pp. 449, 455) However, a transcript of the tapes appears in Volume VI of the record on appeal at pages 987-1106.

Appellant explained that he quit his job at Cracker Barrel in mid-September, 1995, after working there for 11 months, because he was not making enough money to cover his truck payment with one paycheck. (Vol. VI, pp. 993, 997) [The truck was in the name of Robert Campbell. (Vol. VI, p. 995, 1008)] Appellant did not have it switched to his name because he did not have a driver's license. (Vol. VI, p. 995)] He wanted to work as a waiter, and took customer service classes, but the people at Cracker Barrel kept telling him they did not have enough grill cooks, and so he had to remain in that position. (Vol. VI, p. 1000) Appellant complained that the people at Cracker Barrel "really disrespected" him when he first started working there, but he eventually got along with everybody. (Vol. VI, p. 998-999) [Appellant said that the people who worked at the restaurant "really were [his] friends." (Vol. VI, pp. 1015-1016)] He thought he could get a job doing stucco work for $11 an hour, but that did not work out. (Vol. VI, pp. 993, 999-1000) Appellant was able, however, to find a job doing ceramic tile work, but was soon fired or laid off. (Vol. VI, pp. 1001-1003) Graves quit his job at Cracker Barrel after Appellant did, because Appellant would not take him to work. (Vol. VI, p. 1000)

In September, Appellant bought a Buck knife with black plastic handles at Kmart. (Vol. VI, pp. 1002, 1046-1047)

In October, Appellant went to work doing day labor for Finder's Labor Pool in Naples. (Vol. VI, pp. 1003-1004, 1011) He helped Graves get a job in construction. (Vol. VI, p. 1023)

One day around the middle of October, Appellant was talking with Robert Campbell, who also worked as a grill cook at Cracker Barrel, and Campbell was talking about how easy the restaurant would be to rob, and how much money they brought in. (Vol. VI, pp. 1005-1006) Appellant was thinking this was "not a bad idea," but he could not see himself "partaking in the robbery." (Vol. VI, pp. 1006-1007) He went home, where Graves and a friend of theirs named Joe Trulio were wishing they could obtain some money, and Appellant told them what Campbell had said. (Vol. VI, pp. 1006-1008) The three discussed a plan in which they would wait in the parking lot of Cracker Barrel in mid-morning and snatch a money bag from the opening manager when he came out to leave for the bank to make the deposit, but they eventually dropped this idea. (Vol. VI, pp. 1008-1009, 1011) However, the idea of robbing the restaurant or one of the managers came up again, and in the days preceding the homicides as Appellant and Graves were "both hurtin' for money," and the two of them did go to the Cracker Barrel several times in order to carry out such a plan, but were unable to do so. (Vol. VI, pp. 1012-1021)[10] One of their ideas was to wear a mask made out of a sweater when the money bag was grabbed from the manager, but they "chickened out," and left the sweater in a bush. (Vol. VI, p. 1014) During one of these attempts, Appellant's truck became stuck in

[10] It is difficult to ascertain from Appellant's statement exactly how many times they went to Cracker Barrel intending to obtain money, and when these attempts occurred.

the woods, and Dorothy [Siddle] tried to call a towing company to assist him. (Vol. VI, pp. 1021-1022)

The Monday before the robbery, Graves bought a .45 look-alike Daisy CO2 pellet gun at Wal-Mart; he wanted to buy a .22, but the store policy was not to sell guns to anyone under 21. (Vol. VI, pp. 1027-1028) They did not discuss using the pellet gun to rob Cracker Barrel that night, but they did the next day. (Vol. VI, pp. 1029, 1031-1032) Because the Daisy pistol was "so life-like," they "wouldn't have to manhandle anybody," or hurt anyone. (Vol. VI, p. 1032) They planned to enter the restaurant through the front door, and Graves would use "the pistol to scare them." (Vol. VI, p. 1032) Graves would take the manager to open the safe while Appellant bound the other workers with tape. (Vol. VI, p. 1033) Graves would bring the manager out and Appellant would bind him as well. (Vol. VI, p. 1033) While Appellant was putting the money into a trash bag, Graves would take the employees to the walk-in cooler, where they would not be able to hear anything. (Vol. VI, p. 1033) Appellant did not want them to be hurt, because they were his friends, and they would not freeze to death in the cooler. (Vol. VI, p. 1034) Appellant and Graves would then would go out through the back door to the truck, which would be parked in the woods. (Vol. VI, p. 1032)

After visiting Brian McBride, a friend of Appellant's, on Wednesday, Appellant and Graves drove to the Cracker Barrel. (Vol. VI, pp. 1031, 1036) Appellant was trying to think what he could

use for an alibi. (Vol. VI, pp. 1034-1036) He was wearing green sweat pants, a purplish sweatshirt, and Reebok tennis shoes. (Vol. VI, pp. 1045-1046) They arrived in the woods behind the restaurant between 1:00 and 2:00 a.m. (Vol. VI, p. 1036) They sat in the truck smoking cigarettes and drinking soda until about 3:30, when they began walking toward the restaurant. (Vol. VI, p. 1036) In addition to the pellet gun, Graves may have carried in his pocket a homemade knife that had a razor blade and electrical tape that was used for scraping concrete floors to get them clean; Graves put this knife on the truck's dashboard just before they walked to the Cracker Barrel. (Vol. VI, pp. 1048-1049) As they went toward the restaurant, a car came by and they "dropped in the field." (Vol. VI, p. 1036) At that point Appellant "didn't want to go through with it. [He] was gettin' chicken." (Vol. VI, p. 1036) But they got up and went to the front of the restaurant. (Vol. VI, p. 1037) Only Jason Wiggins' truck was there. (Vol. VI, p. 1037) Dorothy Siddle arrived, and then Vickie Smith. (Vol. VI, p. 1037) Appellant told Siddle his truck was broken down, and asked her to call Tows-R-Us. (Vol. VI, p. 1037) Appellant asked if they could go inside, but Smith said that was against the rules. (Vol. VI, p. 1037) After she opened the door, Graves "rushed her," and they all went inside. (Vol. VI, p. 1037) The door was taking a long time to close, and so Appellant grabbed it from the inside with his hand. (Vol. VI, p. 1037-1038) Graves was acting "really stressed out," "scared," and "real hyper." (Vol. VI, p. 1038) Appellant had never

seen him act that way. (Vol. VI, p. 1038) They told Siddle to turn the alarm off, and she did. (Vol. VI, pp. 1038-1039) Appellant, who had put on gray and blue leather work gloves, restrained the hands of Jason Wiggins and Vickie Smith with electrical tape while Graves took Dorothy Siddle into the office to have her open the safe. (Vol. VI, p. 1040) He cut the tape off Wiggins with the big Buck knife, which he always carried. (Vol. VI, p. 1040) He also carried a nylon sheath for it. (Vol. VI, p. 1047) Graves brought Siddle back and made her lie down with the others, and Appellant bound her hands as well. (Vol. VI, pp. 1040-1042) He stood up and put his knife down by the computers, then grabbed a clear plastic trash bag and went into the office to gather up the money. (Vol. VI, p. 1041-1042) Graves was supposed to be taking the three people to the cooler at that point. (Vol. VI, p. 1041) He came into the office and began putting money into his pants. (Vol. VI, pp. 1042-1043) Appellant did not notice any blood on Graves. (Vol. VI, p. 1051) Appellant said he went back to the cooler to make sure that Graves had not put anything in there to lock the door. (Vol. VI, p. 1052) He opened the door, but they were not in there, and so he opened the freezer door, because "they had to be somewhere." (Vol. VI, p. 1101) He looked in, his foot slipped, and he saw Vickie Smith and a puddle of blood. (Vol. VI, pp. 1052-1053) Appellant got all upset. (Vol. VI, p. 1052) He closed the door and walked backed to the office. (Vol. VI, pp. 1053, 1100) The buzzer was sounding, and Appellant said, "We gotta go, we gotta get

out of here." (Vol. VI, p. 1043) They went out the back door. (Vol. VI, p. 1044) Graves tripped over a curb, and the money was falling out of his pants. (Vol. VI, p. 1044) Appellant picked up some of it and held it to his body. (Vol. VI, p. 1044) They ran toward the truck at first, then walked the rest of the way. (Vol. VI, p. 1044) Appellant drove back to the Fort Myers Inn, where he and Graves had been staying, and the manager saw him as he was pulling in. (Vol. VI, p. 1045) They took off their clothes and shoes and bundled them up, and later threw them into a canal in North Cape Coral, along with Graves's knife; he told Appellant to weight the bundle with rocks because he wanted to make sure the water got to it. (Vol. VI, pp. 1055-1056, 1060)[11] Graves also later disposed of two shirts he was wearing at another location, a mudhole, also in North Cape Coral. (Vol. VI, 00. 1064-1065) In the motel room, they counted the money, and it came to about forty-eight hundred dollars, plus about four hundred dollars in change. (Vol. VI, p. 1057-1058) [The change was later stolen out of Appellant's truck. (Vol. VI, pp. 1057-1059)] They basically divided the money evenly between them. (Vol. VI, p.1071)

After they had stayed at the Fort Myers Inn for about two days, Appellant and Graves moved to a Motel 6. (Vol. VI, p. 1065) They went to Flirts and spent $400 apiece. (Vol. VI, pp. 1066-1068)

[11] While giving his taped statement to Cunningham, Appellant drew a map to help him locate the canal. (Vol. VI, pp. 1061-1063)

Graves wanted to leave town, but Appellant did not. (Vol. VI, p. 1069) Appellant was uncomfortable being with Graves, and knew Graves would kill him when the money was gone. (Vol. VI, p. 1069)

Graves still wanted a gun, and so he bought an "SKS" and a .22 in North Fort Myers. (Vol. VI, pp. 1072-1075) He and Appellant went shooting at a shooting range two or three times. (Vol. VI, pp. 1075-1077) They then spent two or three nights in Fort Pierce, following which they set out for Oregon, where Appellant was from originally. (Vol. VI, p. 1078) They left Florida and went through Alabama, Mississippi, Louisiana, sleeping in the truck along the way. (Vol. VI, p. 1080) They were about out of money, and Graves was panhandling at rest stops. (Vol. VI, pp. 1080-1082) They continued through Texas and into New Mexico, where Graves and a man they met along the way stole two saddles, which Graves sold to a feed store. (Vol. VI, pp. 1080-1093) From New Mexico, they headed north, through Colorado, into Utah, and then on to Las Vegas, where they were arrested. (Vol. VI, pp. 1093-1094) Appellant explained that after initially pulling over for the police in Las Vegas, he took off again because he saw many guns pointed at him, and he did not want to be shot. (Vol. VI, p. 1094)

After taking Appellant's taped statement, Cunningham directed investigators to locate the canal where Appellant said various items had been dumped, as well as the mudhole into which Graves threw his shirts. (Vol. X, pp. 703-704) They were able to find the canal and recover items from it, but did not find the shirts. (Vol.

X, pp. 703-704)

Collier County Sheriff's Deputy Terrence Shea retrieved a bundle of clothing that included green sweat pants from a canal in a remote area of North Cape Coral on December 13, 1995. (Vol. IX, pp. 459-461) It took him only three minutes to find the bundle in the water. (Vol. IX, pp. 459-460)

Deputy Mike Gawlinski received the items that Shea recovered from the canal. (Vol. IX, pp. 465-466) In addition to the sweat pants, they included two sweat shirts, a pair of black jeans, some large rocks, a pair of Reebok high-top tennis shoes, a store package for a Daisy pellet gun, three unused CO2 cartridges, pellets, a store box that previously contained CO2 cartridges, a clear plastic garbage bag with knots tied in the ends, a matching pair of "little gray work-type gloves," a black nylon knife sheath, a homemade knife, "a clear plastic money bag or bank bag like the Cracker Barrel uses," three one-dollar bills, a little bag that said "Cracker Barrel" all over it, money envelopes from banks, money wrappers, traveler's checks and a money order made out to Cracker Barrel, two quarters and a penny, two Barnett Bank deposit slips that said "Cracker Barrel Country Store" on them, personal checks made out to Cracker Barrel, a pair of black size 12 work or combat boots, and two white ankle socks. (Vol. IX, pp. 467-497)

Doctor Borges examined the homemade knife found in the canal, and opined that it was not consistent with all of the wounds he observed on the victims, because it was rather flimsy, not very

sharp, and had a squared-off end, but it could have produced some of the injuries. (Vol. IX, pp. 500-502)

Ted Yeshion, senior forensic serologist with the Florida Department of Law Enforcement at the Tampa Regional Crime Laboratory, examined a number of items pertaining to this case. (Vol. X, pp. 639-657) He examined the Buck knife and its nylon case, both of which gave chemical indications for the presence of blood, but the quantities were insufficient for further analysis. (Vol. X, pp. 641-642) One of the work gloves found outside the restaurant also gave chemical indications for the presence of blood, but, again, the quantity was too small for further analysis. (Vol. X, p. 643, 654) Yeshion also examined clothing retrieved from the canal, none of which gave any chemical indications for the presence of blood. (Vol. X, pp. 649-651) The presumptive test for blood that Yeshion used did not distinguish between human blood and blood from some other source, such as an animal. (Vol. X, pp. 656-657) Yeshion compared blood taken from an area outside the freezer at the Cracker Barrel, as well as two other bloody shoe prints, and found the blood in each to match Vickie Smith's DNA profile. (Vol. X, pp. 643-646) Testing done on swabbings taken from the area of the sink gave chemical indications for the presence of blood, but no DNA profile could be obtained. (Vol. X, pp. 646-647) Yeshion also tested the soles of Vickie Smith's shoes, on which he found blood consistent with the DNA profile for Jason Wiggins, and tested the soles of Dorothy Siddle's shoes, which failed to give any chemical

indications for the presence of blood, and tested the bottom of Wiggins' shoes, on which he found blood consistent with having originated from Wiggins himself. (Vol. X, pp. 647-649)

David Grimes was an expert in the field of footwear and shoe print examination who was asked to examine certain footwear and impressions associated with this case. (Vol. X, pp. 661-665) He compared an impression on the rubber mat taken from the Cracker Barrel with the Reebok tennis shoes removed from the canal. (Vol. X, p. 666) He concluded that one of these shoes and the impression on the mat did "correspond," but the impression was not perfect, it did not show individual characteristics such as cuts, which could lead to a more definite match. (Vol. X, pp. 670-671) Grimes also compared a cast and photographs of a footwear impression found in the field east of the Cracker Barrel with the boots found in the canal, and opined that the impression was made by the left boot. (Vol. X, pp. 671-679)[12] Grimes made a third comparison between a photograph of an impression on the tile floor at Cracker Barrel, which was "a very partial and small" one, and the Reeboks, and concluded that the left tennis shoe could have made the impression. (Vol. X, pp. 679-681) The final comparison Grimes made was between a photograph of another shoe impression in the field east of the restaurant and the Reeboks. (Vol. X, pp. 681-684) He found that there was "a correspondence between" the impression and the right

[12] Grimes was permitted to state this opinion over Appellant's objection that it was a "legal conclusion." (Vol. X, p. 679)

shoe, and he was "unable to eliminate the shoe...as having made this impression." (Vol. X, p. 683)

Cunningham interviewed Appellant again the following day, December 11, 1995, at the jail in Las Vegas. (Vol. X, pp. 704, 709) This interview was not recorded. (Vol. X, p. 710)

As its next-to-last witness, the State called Angela Chainey, who was a friend of Appellant. (Vol. X, p. 699) In November of 1993, Chainey, Appellant, and some others were at his apartment "talking about money and stuff like that..." (Vol. X, pp. 700-701) Appellant said that if he ever needed any money, he could always rob someplace or somebody. (Vol. X, p. 700) Chainey said, "Well, that's stupid. You can get caught." (Vol. X, p. 700) Appellant said, "Not if you don't leave any witnesses," and made a motion across his throat. (Vol. X, p. 700) Chainey told someone from the sheriff's department about this conversation after the Cracker Barrel incident. (Vol. X, pp. 701-702)

The final witness for the prosecution was Ralph Cunningham, who was recalled. (Vol. X, pp. 703-739) On December 11, 1995, he had a further conversation with Appellant at the jail in Las Vegas that was not recorded, because he "wanted to clear up some of the inconsistencies in his prior statement..." (Vol. X, pp. 704, 710) Cunningham asked Appellant to explain how his foot tracks in blood led from the freezer to the sink to the office. (Vol. X, p. 736) Appellant said that when the door buzzer was sounding, he went to the cooler to check on the safety of the employees, to see if there

was stick in the door so that it could not be opened. (Vol. X, p. 736) He opened the cooler door, but there was nobody inside. (Vol. X, pp. 736-737) He went to the freezer; there was nothing blocking the door, but Appellant opened it to see if the people were all right. (Vol. X, p. 737) The light was on, and Appellant saw the body of Vickie Smith lying in a pool of blood. (Vol. X, p. 737) He stepped into the freezer, slipped in the pool of blood and fell, left the freezer and ran back to the office, at which time he and Graves left through the back door. (Vol. X, 737) Cunningham asked Appellant about the fact that the tracks led to the sink, but Appellant said he did not think he had washed anything at the sink. (Vol. X, pp. 737-738) With regard to his knife, in response to Cunningham's questions, Appellant said he did not know how it got outside, he thought he had left it by the computers. (Vol. X, p. 738) After a pause, Appellant said that it looked like Cunningham had a lot of evidence against him, and he said, "'I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have.'" (Vol. X, p. 738) Cunningham talked to Appellant again the next day, and he made a similar statement, such as, "'In my mind I think I'm the killer, but my heart tells me that I couldn't have killed these people.'" (Vol. X, pp. 738-739)[13]

[13] After the State concluded its case, Appellant moved for a judgment of acquittal as to the murder charges based on the State's failure to prove premeditation, which the court denied. (Vol. X, pp. 739-740) Appellant rested without putting on a case. (Vol. X, pp. 743-744)

Penalty Phase--State's Case

The State presented a single witness at the penalty phase held on November 1, 1996: Andrew Rose, a detective with the Collier County Sheriff's Office. (Vol. XI, pp. 874-881) He testified that Appellant was 26 years old at the time of the Cracker Barrel incident, and the codefendant, Graves, was 18. (Vol. XI, p. 880) In addition, over defense objections, the State was permitted to introduce into evidence during Rose's testimony two masks that were obtained from Appellant's truck when a search warrant was executed in Las Vegas. (Vol. XI, pp. 876-880)

Penalty Phase--Appellant's Case

Michael Lobdell had known Appellant for about six or seven years. (Vol. XI, pp. 882-883) They met when Appellant was working at a Mobil station, and were pretty close friends; Appellant was kind of like a bigger brother to Lobdell. (Vol. XI, pp. 883-884) Appellant was always happy-go-lucky and seemed to get along with everybody. (Vol. XI, pp. 883-884) "He never tried causing fights or anything like that[,]" and Lobdell enjoyed being with him. (Vol. XI, p. 884)

When Appellant was at Lobdell's house the day after the Cracker Barrel incident, he did not act any differently than when Lobdell knew him before. (Vol. XI, pp. 884-885)

Angela Lobdell had known Appellant as a friend for about nine

years. (Vol. XI, p. 886) Appellant's hobby was working on cars. (Vol. XI, p. 887) He was not a trouble-maker, but rather was fun-loving, and liked to have a good time. (Vol. XI, p. 887) He did not have a dominant personality when he was around a group of people, but was more playful, laid-back, and easy going. (Vol. XI, p. 887-888)

When Appellant was at Lobdell's house the day after the Cracker Barrel incident, he told her that he was on vacation, and he appeared to be someone who was on vacation. (Vol. XI, p. 888) He did not tell Lobdell anything about the murders at the restaurant; if he had, he would not have been in her house. (Vol. XI, p. 888)

Appellant had been a very good friend of Brian McBride for 11 or 12 years. (Vol. XI, p. 890) Appellant was very close to his family, and was a very, very likeable guy. (Vol. XI, p. 890) McBride had enjoyed the years he had been friends with Appellant, and cherished him. (Vol XI, p. 890)

Appellant was at McBride's residence the day before the Cracker Barrel incident, and said he was getting paid the next day. (Vol. XI, p. 891) Appellant told McBride that after he finished working on the mall in Naples, he was going to California to build a mall there. (Vol. XI, p. 891)

Rebecca Lloyd, who had two small children, had known Appellant as a close friend for approximately 10 years. (Vol. XI, p. 893) He always listened to what she had to say, and had been like her big

brother. (Vol. XI, p. 894) They tried to start out as boy-friend/girlfriend, but it did not work; they made better friends than anything. (Vol. XI, p. 894) Appellant was wonderful with children, and he loved them very much. (Vol. XI, p. 894) Lloyd's friendship with Appellant was very strong and she dearly loved him. (Vol. XI, p. 894)

Mary Hamler had known Appellant for four years; in fact, they had lived together for two and one half years. (Vol. XI, pp. 895-896)[14] Hamler had a daughter and two sons, with whom Appellant got along well. (Vol. XI, p. 896) He kept the children while Hamler worked, took them fishing, and took the middle child out it the woods in the truck. (Vol. XI, p. 897) But they were having a few minor problems, and Hamler eventually moved out. (Vol. XI, p. 897) They both sat down and cried because they loved each other, but it was not working. (Vol. XI, p. 897)

One day, Hamler and Appellant were watching a news broadcast when some robberies were discussed. (Vol. XI, pp. 898-900) Appellant said that if were ever involved in a robbery, he would not be stupid enough to stick around; he would go north. (Vol. XI, pp. 898-900)[15]

Hamler testified that when Appellant tried to advance himself

[14] Appellant talked about Hamler in his taped statement. (Vol. VI, pp. 992-995)

[15] This testimony was elicited by the State on cross-examination, over Appellant's objections. (Vol. XI, pp. 898-900)

at Cracker Barrel, on of the things they asked him to do was to cut off his ponytail. (Vol. XI, pp. 900-901) This made him very angry because of his Indian heritage. (Vol. XI, p. 901) After Appellant cut his hair, he felt that Cracker Barrel was betraying him and jerking him around and not really giving him a chance for advancement. (Vol. XI, 901)[16] The person Appellant was most angry about, because he held her responsible for jerking him around, was Dorothy Siddle. (Vol. XI, p. 904) Appellant said that one day she would get hers. (Vol. XI, p. 904)

Appellant's mother, Tawny Jennings, was the final witness at Appellant's penalty trial. (Vol. XI, pp. 904-909) Appellant was born in Oregon 27 years earlier and was her only surviving child. (Vol. XI, pp.905-906) His father was David Williams, a Sioux Indian. (Vol. XI, p. 905) As Jennings and Williams divorced when she was three months pregnant, Appellant never met his father, or even saw a picture of him. (Vol. XI, p. 905) Jennings never remarried, but did have male companions living with her from time to time. (Vol. XI, pp. 907-908)

Appellant and his mother lived in Oregon from the time he was born until 1978, when they went to Colorado. (Vol. XI, p. 906) They lived there for about a year and a half while Jennings worked on a dude ranch, then returned to Oregon when "the job ran out." (Vol. XI, p. 906) They were in Oregon for about six months, until

[16] This and subsequent testimony on cross came in over defense objections. (Vol. XI, pp. 901-904)

Jennings got a job in Gillette, Wyoming, where they stayed for about a year, until she "couldn't take the tornadoes anymore." (Vol. XI, pp. 906-907) Jennings and Appellant returned to Oregon for another year, then went to Arizona. (Vol. XI, p. 907) During this time, Jennings was more or less the sole supporter of Appellant. (Vol. XI, pp. 906-907)

Appellant attended school, and was a straight-A student, but quit high school at age 17 to take care of his mother, as she was ill and unable to pay the bills. (Vol. XI, pp. 907-908)

Brandy Jennings and his mother were very close. (Vol. XI, p. 908) They were best friends who kept nothing from each other. (Vol. XI, p. 908) Brandy was helpful to his mother, and she could not ask for any better son. (Vol. XI, p. 909)

SUMMARY OF THE ARGUMENT

The statements Appellant made to law enforcement in Las Vegas, and all evidentiary fruits of those statements, should have been suppressed. Appellant had invoked his right to counsel before he made the inculpatory statements on December 10, 1995, but no lawyer was provided, nor were any affirmative steps taken to vindicate Appellant's assertion of his right to counsel. No written waiver of rights was secured on the day Appellant gave his statements, and any purported oral waiver could not have been effective in light of the conduct of the police in failing to make any effort to assist Appellant in his desire for an attorney. The error in admitting Appellant's statements cannot be harmless, as they formed a major portion of the State's case, and other substantial incriminating evidence was derived as a direct result of the statements.

Two masks that were taken from Appellant's truck after he was stopped in Las Vegas should not have been admitted into evidence at penalty phase. They were not shown to be connected to this case in any manner, and had no relevance to the issues before the jury. They served only to suggest to the jury that Appellant and his codefendant might have been involved in other crimes, or were intending to commit other crimes using the masks. Any relevance they might have had was outweighed by this prejudicial impact.

The penalty phase was tainted further by the prosecutor's improper cross-examination of defense witness Mary Hamler, who

testified on direct about Appellant's relationship with her and her children. Appellant's comment that he if he ever committed a robbery, he would go north, and his feelings toward the Cracker Barrel and Dorothy Siddle were outside the scope of direct examination, and not relevant for the jury to consider.

The State's evidence was insufficient to support the aggravating factor of avoiding arrest. It was not clearly shown that eliminating witnesses was the dominant or only motive for the killings. The fact that Appellant and the victims knew each other, even when coupled with other facts cited by the court (that the perpetrators wore gloves but did not wear masks, and that Appellant had made some comment about not leaving witnesses in a hypothetical robbery situation some two years before the incident in question) was not enough to establish this factor. It may be that there was some resistance or attempt to escape by the victims, and the robbery simply got out of hand.

The evidence also failed to establish CCP. Although there may have been substantial planning that went into the robbery, it was not shown that there was a pre-existing plan to kill or hurt anyone. In fact, there was evidence that contradicted such a scenario; Appellant stated that his intent and that of his codefendant was merely to commit a robbery, not to hurt anybody. Again, the robbery may have simply gotten out of hand.

The codefendant in this case, Charles Jason Graves, was spared

exposure to the ultimate sanction by virtue of a deal he made with the State. Graves was just as much a participant in what happened at the Cracker Barrel as was Appellant. Graves was in on the planning, the execution, and the aftermath. He shared equally in the proceeds. He is just as culpable as Appellant, if not more so, and Appellant should receive harsher punishment than Graves. The trial judge seemed to find disparate treatment of Graves as a mitigating circumstance in his order sentencing Appellant to death. If Graves was indeed as blameworthy as Appellant, but received a lesser sentence, this should not be treated merely as a mitigating circumstance to be given "some weight" as the trial court did; it should totally preclude sentences of death for Brandy Jennings.

Appellant must be resentenced for the noncapital offense of robbery, as the sentencing guidelines scoresheet prepared in this case erroneously included victim injury points for the capital offenses of which Appellant was convicted.

ARGUMENT

ISSUE I

THE COURT BELOW SHOULD HAVE SUPPRESSED APPELLANT'S STATEMENTS TO LAW ENFORCEMENT AUTHORITIES AND ALL EVIDENCE DERIVED THEREFROM, AS THE STATEMENTS WERE OBTAINED IN VIOLATION OF APPELLANT'S RIGHT TO COUNSEL.

Prior to his trial, Appellant, through counsel, filed a motion to suppress statements he made to Florida law enforcement officials in Las Vegas, which the court below denied after a hearing. Appellant lodged contemporaneous objections to his statements coming into evidence when the State sought to introduce them at his trial, to no avail. (Vol. IX, pp. 446-448; Vol. X, pp. 704-709, 711)

Detective Andrew Rose of the Collier County Sheriff's Office acknowledged that Appellant asked for a lawyer when Rose and Detective Crenshaw attempted to question Appellant about the Cracker Barrel killings in Las Vegas on December 9, 1995. Yet, the record does not reflect that the detectives did anything whatsoever to help Appellant fulfill his expressed desire for counsel, even though Florida Rule of Criminal Procedure 3.111 places an affirmative duty upon officers who come into contact with a suspect to assist him in obtaining counsel. As counsel for Appellant pointed out at the suppression hearing, merely offering the suspect a telephone book, which is all Rose apparently did, is insufficient.

(Vol. XII, pp. 1018-1019) Rather, "to insure that confessions are freely given, article I, Section 9 of the Florida Constitution requires that, prior to questioning, the indigent accused be advised of and given the opportunity to consult with a court-appointed lawyer." Thompson v. State, 595 So. 2d 16, 18 (Fla. 1992--emphasis added). The Constitution of the United States similarly requires that an accused who has expressed his desire to deal with the police only through counsel not be subjected to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police. Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378, 386 (1981). This Court has indicated that the Florida Constitution provides even greater protections in this area for one accused of a crime than does the federal constitution. Traylor v. State, 596 So. 2d 957 (Fla. 1992). Even though Appellant invoked his right to counsel, however, none was provided before the exchange with the police the following day, December 10, 1995, which resulted in Appellant giving a lengthy, incriminating taped statement that was played for his jury. Furthermore, although there was testimony that Miranda warnings were read to Appellant before the December 10 interview, Appellant did not execute a written waiver of rights at that time, pursuant to Florida Rule of Criminal Procedure 3.111(d)-(4), which requires waivers of counsel made out of court to be "in

writing with not less than 2 attesting witnesses," who "shall attest the voluntary execution thereof." Even where a subject has initiated contact with the police after invoking his right to counsel, the State still bears the burden of proving that he knowingly and intelligently waived his right to have counsel present during the subsequent interview. Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983). Additionally, any waiver that purportedly occurred on December 10 could not have been knowing, intelligent, and voluntary in light of the dilution of Miranda that occurred the previous day when the authorities in effect told Appellant that, although he might have a right to a lawyer in the abstract, they were not going to take any steps to help him secure counsel, other than perhaps providing him with a telephone book.[17] See State v. Brown, 592 So. 2d 308 (Fla. 3d DCA 1991) (signed waiver of counsel ineffective where it came after initial violation of that right).

Although, in his order denying Appellant's motion to suppress, the court below concluded that the contact between Appellant and the "two representatives of the State [on December 10] was voluntarily initiated on the part of the Defendant and he knowing [sic], intelligently, and voluntarily waived his right to remain

[17] There is nothing in the record to suggest that Appellant was acquainted with any lawyers in Las Vegas, or that he knew anyone in Las Vegas at all.

silent and his right to counsel[,]" the order failed to come to grips with the thrust of Appellant's argument as developed above.

Under these circumstances, the State did not carry its burden of establishing that Appellant's statements to Ralph Cunningham and Andrew Rose were made freely and voluntarily, and that he knowingly and intelligently waived his rights. Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); Roman v. State, 475 So. 2d 1228 (Fla. 1985); Brewer v. State, 386 So. 2d 232 (Fla. 1980); Drake v. State, 441 So. 2d 1079 (Fla. 1983); Reddish v. State, 167 So. 2d 858 (Fla. 1964); Williams v. State, 441 So. 2d 653 (Fla. 3d DCA 1983); Fillinger v. State, 349 So. 2d 714 (Fla. 2d DCA 1977). As the court noted in Brown, supra:

> After an individual has shown that he intends to exercise his Fifth Amendment privilege, any statement taken after the invocation of that right cannot be other than the product of compulsion, subtle or otherwise.

592 So. 2d at 309. Therefore, the statements should not have come into evidence.

The error in admitting Appellant's statements at trial cannot be deemed harmless. The tape recordings, in particular, which ran for well over two hours, formed a major part of the State's case against Appellant; other evidence was circumstantial. Furthermore, what Appellant told law enforcement led directly to their recovery of additional inculpatory physical evidence from a canal in a remote area of Collier County.[18] The trial court specifically

[18] The trial court specifically referred in his sentencing

referred in his sentencing order to the "numerous physical items of evidence recovered from a canal as a result of the defendant's statement, including bank deposit packets and records of the Crackerbarrel [sic] Restaurant..." as supporting the aggravating circumstance that the murders were committed during a robbery. (Vol. V, pp. 784-785) This evidence, and any other evidence gleaned as a result of Appellant's statements, was tainted fruit of the confession, and should have been suppressed as well. See Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Appellant's statements to Cunningham and Rose in Las Vegas, as well as all evidence derived therefrom, should have been excluded pursuant to the Fifth Amendment to the Constitution of the United States and the even greater protections afforded by the Constitution of the State of Florida in Article I, Sections 9 and 16. The failure of the court below to suppress this evidence must lead to a new trial for Appellant.

---

order to the "numerous physical items of evidence recovered from a canal as a result of the defendant's statement, including bank deposit packets and records of the Crackerbarrel [sic] Restaurant..." as supporting the aggravating circumstance that the murders were committed during a robbery. (Vol. V, pp. 784-785)

ISSUE II

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT PENALTY PHASE TWO MASKS SEIZED FROM APPELLANT'S TRUCK AFTER HE WAS ARRESTED IN LAS VEGAS, AS THESE ITEMS WERE IRRELEVANT AND PREJUDICIAL.

During the testimony of the State's sole penalty phase witness, Detective Andrew Rose of the Collier County Sheriff's Office, the State introduced into evidence two masks that were taken from Appellant's truck in Las Vegas when it was searched pursuant to a warrant. (Vol. XI, pp. 876-880) Appellant objected on relevancy grounds, and the prosecutor countered that the masks were "evidence of heightened premeditation, intending to not only take care of the witnesses so that they could avoid arrest, but also avoid premeditation [sic]." (Vol. XI, p. 878) The court admitted the masks, commenting that he was inclined to agree that they had some relevance and supported the inference the State wanted to support. (Vol. XI, p. 879)

The prosecutor subsequently referred to the masks several times in his argument to the jury, as supporting both the avoid arrest aggravating factor and CCP. (Vol. XI, pp. 919-921, 923) Among other things, he said, "There was no reason to wear masks, if the witnesses were going to be eliminated and there is the proof." (Vol. XI, p. 921)

The trial court later referred to the masks in his sentencing order, using the fact that Appellant and Graves did not wear the

masks when they were in the Cracker Barrel to support his finding that the homicides were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (Vol. V, p. 785; Vol. XIII, pp. 1048-1049)

Defense counsel rightly argued that the masks had no relevance to any of the aggravating factors and should not have been admitted. "The rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely ignored." Johnson v. State, 660 So. 2d 637, 645 (Fla. 1995). "To be admissible in the penalty phase, state evidence must relate to any of the aggravating circumstances. [Citations omitted.]" Floyd v. State, 569 So. 2d 1225, 1231 (Fla. 1990). It must be "relevant to an issue properly considered in the penalty phase." Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991). The masks failed this basic test of evidentiary admissibility; despite the State's argument to the contrary, they did not tend to prove or disprove any material issue in this case. See §§90.401 and 90.402, Fla. Stat. (1995). Only by stretching the definition of "relevant evidence" beyond any reasonable bounds could the masks be said to relate to either CCP or the avoid arrest aggravator.

Although Appellant indicated in his statements to law enforcement that he and Graves had discussed wearing a mask when they snatched a money bag from one of the restaurant managers, this scheme was abandoned, and the mask made from a sweater was

discarded in a bush. Appellant did not say that the final plan to rob the Cracker Barrel, the one that was actually put into motion, involved the wearing of any type of mask. Nor was there any evidence as to when the masks were acquired. They may have been purchased after the Cracker Barrel incident. At any rate, no evidence adduced below linked the masks in any way to the instant robbery and homicides, or to any planning that preceded these crimes.

The trial court's comments when he admitted the masks indicate his acknowledgment any relevance the masks had was marginal. That they had "some relevance" that supported an "inference" does not suggest that the court found the masks to be vital, compelling evidence. At penalty phase, as at guilt phase, even relevant evidence should be excluded if its probative value is outweighed by the danger of confusion or unfair prejudice. See Mendyk v. State, 545 So. 2d 846 (Fla. 1989); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); §90.403, Fla. Stat. (1995). Such is the case here. If the masks had any tangential relevance, it was far outweighed by the danger that the jury might use the evidence the wrong way, as by inferring that the masks had been used by Appellant and Graves to commit other crimes, or that they retained the masks in order to use them in the commission of future crimes, perhaps even murders. See Watkins v. State, 516 So. 2d 1043, 1046 (Fla. 1st DCA 1987) (ski mask probably not relevant in that case, "and any relevancy

may have been outweighed by the danger of unfair prejudice insofar as the ski mask could have suggested a collateral crime").

The admission of this improper evidence tainted the penalty recommendation of Appellant's jury, and he must receive a new penalty trial as a result.

ISSUE III

APPELLANT'S PENALTY TRIAL WAS TAINTED WHEN THE PROSECUTOR ENGAGED IN IMPROPER AND PREJUDICIAL CROSS-EXAMINATION OF DEFENSE WITNESS MARY HAMLER, WHICH WAS OUTSIDE THE SCOPE OF DIRECT AND DID NOT RELATE TO ANY LEGITIMATE SENTENCING ISSUE.

The fifth defense witness at Appellant's penalty phase, Mary Hamler, told the jury on direct examination a little about her relationship with Brandy Jennings and how he was with her children. (Vol. XI, pp. 895-897) On cross-examination of this witness, the prosecutor was permitted to go outside the scope of Appellant's direct examination, to elicit testimony that had no relevance, and served only to prejudice Appellant.

The prosecutor initially elicited the fact that Appellant was good with Hamler's children, as she had testified on direct. (Vol. XI, p. 898) He then asked this very general, but rather sinister, question: "But in your relationship with Mr. Jennings, there was another side to his character too, wasn't there?" (Vol. XI, p. 898) Hamler answered, "Sometimes." (Vol. XI, p. 898) The prosecutor then asked about the incident where Appellant said that if he ever committed a robbery, he would not stick around, but would go north, which came in over defense objections. (Vol. XI, pp. 898-900) He subsequently went on to question Hamler, over objection, about his feelings toward Cracker Barrel and Dorothy Siddle. (Vol. XI, 900-904) The prosecutor later referred to Hamler's testimony about the restaurant and Siddle in urging Appellant's jury to recommend that

he die in the electric chair. (Vol. XI, pp. 933-934)

"It is well established that questions on cross-examination must relate to credibility or matters brought out on direct examination. [Citation omitted.]" Lambrix v. State, 494 So. 2d 1143, 1147 (Fla. 1986). See also, Penn v. State, 574 So. 2d 1079 (Fla. 1991); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); §90.612(2), Fla. Stat. (1995). None of these matters brought out by the State on cross were germane to the brief testimony Mary Hamler gave on direct. They did not serve in any manner to negate or contradict or modify Hamler's testimony about Appellant's relationship with her and her children. How was Appellant's comment, made at some unspecified time and place, about going north if he ever committed a robbery relevant to the evidence Hamler provided? How were his feelings about Cracker Barrel and Dorothy Siddle pertinent to his relationship with Hamler and her children?

As discussed above in Issue II, although the rules of evidence may be somewhat relaxed at penalty phase, evidence must nevertheless be relevant in order to be admissible. The State's cross of Mary Hamler did not meet this most basic test, and should not have been allowed. As defense counsel below pointed out, the prosecutor was attempting to retry the guilt phase with his cross of Hamler, but the issue of guilt had already been decided, and the testimony elicited was not relevant for any purpose. (Vol. XI, pp. 899, 901-903) It tainted the jury's 10-2 death recommendations, and Appellant must receive a new penalty trial as a result.

ISSUE IV

THE STATE FAILED TO PROVE THAT THE INSTANT HOMICIDES WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY, AND THIS AGGRAVATING CIRCUMSTANCE SHOULD NOT HAVE BEEN SUBMITTED TO APPELLANT'S JURY OR FOUND BY THE TRIAL COURT TO EXIST.

The trial court permitted Appellant's jury at penalty phase to consider in aggravation that "the crimes with [sic] which the Defendant is to be sentenced was [sic] committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (Vol. XI, p. 106) The court also found this factor to exist in his order sentencing Appellant to death, as follows (Vol. V, p. 785; Vol. XIII, pp. 1048-1049):

> 2. The crimes for which the Defendant is to be sentenced were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The evidence was undisputed that this Defendant and the co-defendant (whose trial preceded the trial of this case and who was convicted of the same crimes as this defendant) were former employees of the Crackerbarrel [sic] Restaurant. As such, they were well known to the three victims. Found in the defendant's truck when the defendants were arrested in Las Vegas, Nevada, were two pullover masks, similar to ski masks. These were not used in these crimes, nor were they discarded with the other items of apparel in the canal. The defendants disdained the use of masks in these crimes. The use of gloves by the defendants shows further support of the conclusion that these murders were committed by the defendant for the purpose of avoiding or preventing a lawful arrest. Approximately two years before these crimes, this defendant, in discussing a hypothetical robbery, said, and indicated, by

> moving his fingers across his throat, that if he robbed someone he could not be caught because he would not leave any witnesses.
>
> While the murder of Dorothy Siddle was undoubtedly motivated in part by defendant's dislike for her, the evidence, including the murders of the other two victims, makes it manifest that the dominant motive for these murders was the elimination of witnesses in order to avoid prosecution. This aggravating circumstance was proven beyond a reasonable doubt.

In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Bates v. State, 465 So. 2d 490 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Foster v. State, 436 So. 2d 56 (Fla. 1983); Riley v. State, 366 So. 2d 19 (Fla. 1978); Menendez v. State, 368 So. 2d 1278 (Fla. 1979). In fact, the State must clearly show that the dominant or only motive for the killing was the elimination of a witness. Peterka v. State, 640 So. 2d 59 (Fla. 1994); Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Jackson v. State, 575 So. 2d 181 (Fla. 1991); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Dufour v. State, 495 So. 2d 154 (Fla. 1986); Doyle v. State, 460 So. 2d 353 (Fla. 1984); Oats v. State, 446 So. 2d 90 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Perry v. State, 522 So. 2d 817 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Davis v. State, 604 So. 2d 794 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992). Even where, as here, the victims and the perpetrators knew each, this fact alone is not enough to establish the aggravator in question. Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Floyd; Caruthers. See also Jackson v. State, 575 So. 2d 181 (Fla. 1981).

With regard to the court's comments as to the masks, whether they were used or not proved nothing. It was not even established that Appellant and Graves had those masks before the episode at Cracker Barrel. Furthermore, it may be that Graves and Jennings recognized the futility of hiding behind masks from people who knew who they were, but this did not show that they killed their former coworkers in order to avoid apprehension. Nor did the fact that gloves may have been worn in order to avoid leaving fingerprints show that the three people were killed for the purpose of avoiding arrest. Certainly, most people who commit crimes want to keep from

being arrested and try not to leave too many clues to aid the police. However, it requires a quantum leap in logic to go from the wearing of gloves to the conclusion that the restaurant workers were killed in order to avoid arrest. What seems at least equally plausible as the reason why they were killed is that the robbery simply got out of hand; perhaps there was some resistance or effort to escape, as evidenced by the fact that at least two of the three victims had succeeded in getting the tape off one of their hands. Such a scenario would not prove an intended witness-elimination murder. Hansbrough. See also Jackson v. State, 502 So. 2d 409 (Fla. 1986) (where there is more than one possible explanation for the homicide, the aggravator of witness elimination has not been proven beyond a reasonable doubt, and cannot be allowed to stand). It must be remembered that Appellant told law enforcement authorities that he and Graves did not intend to hurt anyone; their only intent was to rob. This negates the court's apparent conclusion that the two men intended from the outset to kill the victims.

Finally, with regard to the court's statement that Appellant, in discussing a hypothetical robbery two years before these crimes, said that "if he robbed someone he could not be caught because he would not leave any witnesses, this is not an entirely accurate reflection of what Appellant actually said. State witness Angela Chainey testified during the guilt phase that some people were at Appellant's apartment "just talking about money and stuff like that" when Appellant remarked that if he ever needed money, he could always rob someplace or somebody. (Vol. X, p. 700) Chainey said, "Well, that's stupid. You can get caught." (Vol. X, p. 700) Appellant then said, "Not if you don't leave any witnesses." (Vol X, p. 700) Thus, Appellant did not actually say that he could not be caught because he would leave no witnesses, as the court claimed. Furthermore, Appellant's remarks, made in casual conversation some two years before the homicides, with nothing whatsoever to relate them to any contemplated robbery at the Cracker Barrel, are so remote in time and lacking in probative value that they should be totally disregarded by this Court in assessing whether any particular aggravating circumstance was proven.

The section 921.141(5)(e) aggravating circumstance was not proven. Because an inapplicable factor was not only found by the trial court, but considered by Appellant's sentencing jury, he must be granted a new penalty trial in conformity with such cases as Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) and Omelus v. State, 584 So. 2d 563 (Fla. 1991).

ISSUE V

THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS NOT PROVEN, AND THE COURT BELOW ERRED IN SUBMITTING THIS FACTOR TO THE JURY FOR ITS CONSIDERATION, AND IN USING IT IN SUPPORT OF APPELLANT'S SENTENCES OF DEATH.

One of the three aggravating circumstances found by the trial court in his sentencing order was that the instant homicides "were committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification." (Vol. V, p. 785) This factor was also submitted to Appellant's jury for its consideration during sentencing phase. (Vol. XI, pp. 950-951) The evidence was insufficient to support CCP, and it should not have been considered by the jury or found by the court.

In his finding on CCP, the court stated the following facts in support thereof (Vol. V, pp. 785-786):

> In the space of approximately ten minutes, the defendants gained entry into the Cracker Barrel Restaurant, forced Dorothy Siddle to open the safe, put all three victims on the floor, taped their hands behind them, marched them into the freezer, cleaned out the safe, cut the throats of the three victims, and fled out the back door when they heard another employee buzzing the front door for entry to work. The approximate time span was established by the testimony of an employee of the security company whose computer monitors the opening of the doors at the Cracker Barrel Restaurant and the arriving employees who buzzed the front door. The murder weapon, a large Buck folding knife, was this defendant's. While he says the co-defendant must have killed the victims, it is the defendant who told a witness two years earlier that if he committed a robbery he wouldn't be caught

> because he would leave no witnesses. This defendant's dislike for victim Dorothy Siddle, was known to several witnesses who testified to his bitterness towards her. These three murders and the robbery, occurring with the rapidity described above, manifest a plan that was carried out with ruthless efficiency. Additionally, this defendant took the time to walk from the freezer where the victims were slain to the lavatory where, from blood on the lavatory, it is obvious he washed himself and the murder weapon. Traces of blood were still on the knife when it was found although not of sufficient quantity to specifically identify the traces. His bloody footprints trace his movement and activity. The defendant admitted that he and the co-defendant had attempted to commit the robbery on several prior occasions shortly before November 15, 1996 [sic], the date of these crimes, and during these aborted attempts they had actually prevailed on victim, Dorothy Siddle, to call a towing service for defendant's truck. Finally, this defendant admitted to witness, Ralph Cunningham, that in his mind he knew he killed the three victims but his heart would not accept it.

In order for CCP to be found, the defendant must have had "a careful plan or prearranged design" to kill. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); Clark v. State, 609 So. 2d 513 (Fla. 1992); Capehart v. State, 583 So. 2d 1009 (Fla. 1991); Rogers v. State, 511 So. 2d 526 (Fla. 1987). It involves a heightened "premeditation beyond that normally sufficient to prove premeditated murder." Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). This Court has "consistently held that application of this aggravating factor requires a finding of ... a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987). See also Dolinsky v. State, 576 So. 2d 271 (Fla. 1991). The circumstance in question ordinarily applies to executions or contract murders. McCray v. State, 416 So. 2d 804 (Fla. 1982); Perry. The evidence presented by the State at Appellant's trial failed to establish that Appellant acted with the requisite state of mind during the events at the Cracker Barrel.

Who actually killed the three victims was, of course, a hotly

contested issue at Appellant's trial. In his statement to law enforcement authorities, Appellant indicated that Jason Graves must have killed them while Appellant was in the office of the restaurant, gathering money. If Graves indeed acted on his own in committing the homicides, his actions should not be attributed to Appellant. The Eighth and Fourteenth Amendments and Florida law require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the crime in comparison with the role played by his cohort. See Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); Omelus v. State, 584 So. 2d 563 (Fla. 1991).

Even if Appellant did the killings, as the court found, CCP still does not apply. The lightning strike the trial court described in his order is the antithesis of CCP as this Court described it in Preston v. State, 444 So. 2d 939, 946-947 (Fla. 1984), in which, as here, the victim's throat was cut:

> This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e.g., Jent v. State [, 408 So. 2d 1024 (Fla. 1981)] (eyewitness related a particularly lengthy series of events which included beating, transporting, raping and setting victim on fire); Middleton v. State, 426 So.2d 548 (Fla. 1982) (defendant confessed he sat with a shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. denied, --U.S.--, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983) (defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

Preston itself involved an incident in which the victim was robbed at a convenience store, forced to accompany the defendant on a mile-and-a-half journey, forced to walk at knifepoint for a considerable distance, and then killed by multiple stab wounds and

lacerations resulting in near decapitation. The instant killings involved no such extended ordeal. The fact that the homicides occurred within a relatively short time frame is as consistent with a scenario in which the robbery simply got out of hand as it with the scenario suggested by the court's order, in which the murders were planned ahead of time. Pursuant to Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), the former scenario is not consistent with CCP. Where, as here, the State relies upon circumstantial evidence to establish CCP, the defense is entitled to any reasonable inference from the evidence which tends to negate it. E.g., Geralds v. State, 601 So. 2d 1157 (Fla. 1992). See also Peavy v. State, 442 So. 2d 2002, 202 (Fla. 1983) (where homicides were occurred during commission of another offense, they were "susceptible to other conclusions than finding [that they were] committed in a cold, calculated, and premeditated manner.") Furthermore, here there was direct evidence which negated CCP, in the form of Appellant's statement to the authorities that he did not intend to hurt anyone at the restaurant; only a robbery was intended. (Vol. VI, pp. 1032, 1034)

The trial court relied upon Appellant's admission that he and Jason Graves "had attempted to commit the robbery on several prior occasions shortly before November 15, 1996, the date of these crimes..." However, in cases such as Barwick v. State, 660 So. 2d 685 (Fla. 1995), Perry v. State, 522 So. 2d 817 (Fla. 1988), Hardwick v. State, 461 So. 2d 79 (Fla. 1984) and Gorham v. State, 454 So. 2d 556 (Fla. 1984), this Court has made it clear that even extensive planning of an offense other than the homicide for which the defendant is being sentenced cannot supply the heightened calculation needed to establish CCP; the prearranged design must have been to kill, not to commit some other crime. Here, the only direct evidence as to what was intended, again, was Appellant's statement that there was no prior intent to hurt anyone; the intent was merely to commit a robbery. No matter what degree of premeditation or planning may have gone into the robbery scheme, it cannot supply the calculation necessary to support CCP.

Finally, with regard to the court's statement that Appellant "told a witness two years earlier that if he committed a robbery he wouldn't be caught because he would leave no witnesses[,]" this is

not an entirely accurate reflection of the testimony the witness actually gave. Please see discussion above under Issue III as to what the witness actually said and the lack of probative value of the alleged statement. Furthermore, to use this same evidence to support both CCP and avoid arrest smacks of prohibited doubling. See, for example, Peterka v. State, 640 So. 2d 59 (Fla. 1994) and Provence v. State, 337 So. 2d 783 (Fla. 1976) (improper to use same aspect of case to prove more than one aggravating circumstance).

For these reasons, the State failed to adduce sufficient evidence to prove the applicability of the CCP aggravating circumstance. Because an inapplicable factor was not only found by the trial court, but considered by Appellant's sentencing jury, he must be granted a new penalty trial in conformity with such cases as Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) and Omelus.

ISSUE VI

APPELLANT SHOULD NOT HAVE BEEN SENTENCED TO DEATH WHERE HIS EQUALLY CULPABLE CODEFENDANT RECEIVED LIFE SENTENCES FOR HIS PART IN THE CRACKER BARREL MURDERS.

Charles Jason Graves, who was charged with the same offenses as Appellant, was tried approximately two weeks before Appellant was tried. Graves entered a plea of no contest to the robbery charge, but was tried by a jury on the murder charges. Unlike Appellant, he was not faced with the possibility of being sentenced to death, as the State had agreed to waive the death penalty in Graves' case in exchange for his withdrawal of motions he had filed for continuance of his trial.

In Slater v. State, 316 So. 2d 539, 542 (Fla. 1975), this Court addressed the principal of equal punishment for equal culpability in capital cases as follows:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

In Slater, the defendant was the accomplice; the triggerman had entered a plea of nolo contendere to the charge of first degree murder and, in exchange, had received a life sentence. This Court reduced the sentence of death to life imprisonment. 316 So. 2d at 543.

In Craig v. State, 510 So. 2d 857, 870 (Fla. 1987),

cert.denied, 484 U.S. 1020, 108 S. Ct. 732; 98 L. Ed. 2d 680 (1988), the Court explained:

> the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision.

There, because the defendant was the planner and the instigator of the murders, rather than the accomplice, whose help had been solicited by the defendant, the disparate treatment afforded the accomplice was not a factor that required the court to accord a life sentence.

Since Slater, this Court has, on numerous occasions, reversed death sentences where an equally culpable codefendant received lesser punishment. E.g, Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989); Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988); Cailler v. State, 523 So. 2d 158 (Fla. 1988); Du Bois v. State, 520 So. 2d 269, 266 (Fla. 1988); Brookings v. State, 495 So. 2d 135, 142-143 (Fla. 1986); Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

The principles expressed in Slater and subsequent opinions of this Court are also consistent with the requirements of the United States Constitution. The Eighth and Fourteenth Amendments require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the

crime in comparison with the roles played by his cohorts. See Enmund v. Florida,458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

In the instant case, Charles Jason Graves was a full participant in the events that took place at the Cracker Barrel; his culpability is equal to that of Appellant.

The trial court addressed the disparate sentences received by Graves at some length in his sentencing order, as follows (Vol. V, pp. 787-789; Vol. XIII, pp. 1053-1056):

> 2. Disparate sentence of the co-defendant. The co-defendant, Charles Jason Graves, was tried on these same charges two weeks prior to this defendant, before the undersigned judge. The state had entered an agreement in open court to waive the death penalty for Graves in exchange for his waiver of a motion for a continuance to allow more time to adequately prepare for a trial where the death penalty was contemplated. Graves was eighteen years old at the time of the crimes. While Graves admitted to possessing what could best be called a crude, homemade knife at the crime scene (it was in evidence in both trials as were virtually all the evidentiary exhibits) the medical examiner involved in the autopsies of the victims, Dr. Borges, testified in this case that Graves' crude knife was incapable of the kinds of wounds inflicted on the victims; and further that the large Buck knife admittedly belonging to this defendant was consistent with the mortal wounds to the victims----particularly the two victims whose spines bore slashing injuries from the murder weapon. The prosecution took the same position in both trials---that this defendant wielded the knife and actually killed the three victims while Graves remained outside the freezer door with the pellet pistol which closely resemble a Colt .45 semi-automatic pistol assisting in the confinement of the victims to the freezer-

> because two of the victims were found with their hands partially freed from the electrical tape with which their hands were bound behind their backs. The evidence is consistent with the position taken by the state. The walk-in freezer contained a large quantity of stored food stacked along the walls in such a manner that there was a narrow walkway in the freezer. Blood spatter from two of the victims indicated they were standing when they received their initial throat slashes. The walkway contained most of the blood of the three victims. As described in A.1., A.2. and A.3., above, the evidence is overwhelming that this defendant wielded the knife in murdering the victims. There was only one set of bloody footprints leading from the freezer and these belonged to this defendant as evidenced by his own admissions and the testimony of a forensic expert (Mr. Grimes); the photographic comparisons and actual floor mat removed from the crime scene by investigators are inconsistent with any other possibility. As previously observed, this defendant also admitted to the killings by saying in his mind he knew he killed the victims even if his heart could not accept it. This evidence was all before the jury in the guilt phase and the penalty phase. This court judicially noticed and instructed the jury during the evidentiary portion of the penalty phase that the co-defendant could only receive a life sentence for these crimes. The state's waiver of the death penalty as to Graves, whether for the stated reason of avoiding a continuance, or because the evidence in both these cases was such that the death penalty was more problematic in the co-defendant's case, nevertheless is found by this court to be a mitigating factor. The court has given it some weight in its consideration of defendant's sentence.

Contrary to the court's assertion, the evidence that it was Appellant who cut the victim's throats was far from "overwhelming," consisting as it did of a few pieces of less-than-compelling circumstantial evidence. Furthermore, in his taped statement to

law enforcement authorities, Appellant indicated that it must have been Graves who did the actual killings; Appellant was in the office gathering money at the time. However, the trial court resolved this issue against Appellant; we will never know for certain whether the jury did likewise. Nor will we ever know what the jury that tried Charles Jason Graves would have recommended for his punishment, or what sentences the trial court would have imposed upon Graves for the murders if the court had been permitted to choose either life or death. The State foreclosed a jury recommendation as to Graves' punishment and tied the court's hands on this issue when it made the deal with Graves to waive the death penalty in exchange for Graves' agreement to drop his request that his trial be continued.

What is most interesting about the findings quoted above is that the trial judge did not conclude that Brandy Jennings was more culpable than Graves, and thus more deserving of being sentenced to death. Indeed, he seemed to conclude just the opposite by finding disparate treatment of the co-defendant as a mitigating circumstance. If Graves was less culpable than Appellant, the fact that Graves was sentenced to life, instead of death, would not constitute a mitigating factor at all. (It is similarly significant that the court informed Appellant's jury at penalty phase that the court was precluded from giving the codefendant death, and could only give him life.) However, if the court did indeed conclude that Appellant was no more culpable than Graves, he erred in only giving

this conclusion "some weight" in the sentencing process; it was entitled to controlling weight. Downs v. State, 572 So. 2d 895, 901 (Fla. 1990) ("Disparate treatment of a codefendant renders punishment disproportional if the codefendant is equally culpable. [Citation omitted.]") See also cases cited above. Thus, the court's sentencing order employed an erroneous legal standard in assessing the impact of the mitigator of "disparate sentence of the co-defendant," and is fatally flawed.

If one accepts the State's theory as to what happened at the Cracker Barrel (and thus ignores what Appellant said in his taped statement), Charles Jason Graves was no less responsible for the deaths that occurred than was Appellant. Graves was fully involved in the crimes before, during, and after their commission. He played an active role in the planning and the execution, and shared equally in the proceeds. Indeed, under the State's theory, it was Graves who made the homicides possible by holding a pellet gun that looked like a real gun on the three restaurant employees so that they would not flee. In no sense can Graves be said to be less blameworthy than Appellant for the instant events. Nor can it be said that Appellant was the "dominating force" in the homicides, such that it would be appropriate to treat him more harshly than his codefendant. Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986).

As part of its review function in capital cases, this Court must consider "the propriety of disparate sentences in order to

determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. [Citation omitted.]" Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). If the Court will closely examine the evidence as to the respective roles played by Appellant and Graves in the incident at the Cracker Barrel, the Court must conclude that Brandy Jennings is no more culpable than his codefendant, and that, pursuant to Slater, his death sentences must be reversed. Any other result will deprive Appellant of the due process of law and equal protection to which he is entitled and subject him to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 17 of the Florida Constitution.

ISSUE VII

THE COURT BELOW ERRED IN SENTENCING APPELLANT TO 15 YEARS IN PRISON FOR THE NON-CAPITAL OFFENSE OF ROBBERY WHERE THE SENTENCING GUIDELINES SCORESHEET PREPARED IN THIS CASE ERRONEOUSLY INCLUDED VICTIM INJURY POINTS FOR THE CAPITAL FELONIES FOR WHICH APPELLANT WAS ALSO BEING SENTENCED.

At the same time he sentenced Appellant to death for the three homicides at the Cracker Barrel, the court below also sentenced him to 15 years in prison for the noncapital offense of robbery. (Vol. V, pp. 790, 806; Vol. XIII, p. 1058) This was the maximum sentence available for the second-degree felony of which Appellant was convicted. §§812.13(2)(c); 775.082(3)(c), Fla. Stat. (1995). [The indictment did not allege that Appellant carried any firearm, deadly weapon, or other weapon during the robbery. (Vol. I, pp. 20-21)]

When a capital defendant is sentenced for a noncapital offense along with capital offenses, the court must base the noncapital sentence on a properly prepared sentencing guidelines scoresheet. See Pietri v. State, 644 So. 2d 1347 (Fla. 1994); Holton v. State,

573 So. 2d 284 (Fla. 1990). In this case, a scoresheet for the robbery was prepared (Vol. V, pp. 817-818), but it was incorrect.

The scoresheet includes 360 victim injury points for three deaths (120 points times three deaths). (Vol. V, p. 817) This can only be based upon the three capital felonies of which Appellant was convicted. However, Florida Rule of Criminal Procedure 3.703(d)(9) states: "Victim injury resultant from one or more capital felonies before the court for sentencing is not to be included upon any scoresheet prepared for non-capital felonies also pending before the court for sentencing. [Emphasis supplied.]" Thus, it was clearly wrong to include points on the scoresheet for the deaths in the capital felonies.

Removal of these points would result in a much lower recommended sentence for Appellant. His sentence for robbery must be reversed and this cause remanded for resentencing pursuant to a properly calculated scoresheet.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Brandy Bain Jennings, pray this Honorable Court to reverse his convictions and sentences and remand this cause for a new trial. In the alternative, Appellant asks the Court to vacate his sentences of death and to impose sentences of life in prison instead, or for a new penalty trial. Appellant also asks that his sentence for robbery be reversed and this cause remanded for resentencing, and for such other and further relief as this Court deems appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of September, 1999.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 0234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/rfm