IN THE SUPREME COURT OF FLORIDA

BRANDY BAIN JENNINGS,

Appellant,

vs. **CASE NO. 89,550**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

On November 15, 1995, employees arriving for work at the Cracker Barrel restaurant in Naples became concerned when there was no response to the entry doorbell (R9. 527, 530-535, 556).[1] Sheriff's deputies were called to the scene, and after breaking the glass door to enter, they discovered three bodies in the freezer near the rear of the restaurant (R9. 537, 556, 561). The bodies were subsequently identified as Dorothy Siddle, an associate manager; Vicki Smith, a grill cook; and Jason Wiggins, the night maintenance man (R9. 594-595). There were bloody footsteps leading from the freezer over to a sink then back towards the office (R8. 275-277, R9. 581-582). There was also a few drops of blood in and around the sink (R8. 285, R10. 646-647).

In the office, police observed an open safe, with a bank bag containing money (not visible without opening the bag), cash drawers with money under the lids, and loose coins scattered about (R8. 267, R9. 604). Out the rear door, a trail of physical evidence lead from the restaurant, across the parking lot, towards

[1]References to the record on appeal will be designated as "R" followed immediately by the volume number, a period, space, and the page number. For example, (R3. 450) would be a cite to Volume 3, page 450 of the record.

a wooded area (R8. 348, 351-354, 367). This evidence included a folding Buck knife, found under a bush in a grassy area a short distance from the back door; a pair of tan work gloves that appeared to be stained with blood, found a little further across the parking lot in another grassy area; a large amount of coins and paper cash, found along a trail leading across the street and through a field; a Daisy air pistol that looked like a real firearm; a nylon Buck knife case; and a number of shoe prints (R8. 351-354, 367). The knife, the sheath, and the right work glove gave chemical indications for the presence of blood, but the quantity was insufficient for typing or further analysis of the blood (R10. 642-643, 647).

The evenings of November 16 and 17, the appellant and Jason Graves patronized Flirts, an adult entertainment establishment in Ft. Myers (R9. 504-505). One of the dancers from Flirts testified that Jennings and Graves spent about $1000 over the course of the two nights (R9. 506). Jennings and Graves got along well, and seemed to be enjoying themselves and having a good time; they appeared to share the money equally between them (R9. 507, 509).

The appellant and Graves were arrested near Las Vegas, Nevada on December 8, 1995 (R8. 410-417). Officer Gordon McGhie ran a routine check from the tag on the truck driven by Jennings while waiting at a traffic light in Las Vegas (R8. 410-411). When the

check revealed the occupants of the truck were possibly armed and dangerous, McGhie called for backup; when it arrived, he initiated a traffic stop (R8. 411-412). The truck pulled over, but when directed to throw out the keys, the appellant sped away (R8. 413, 417). Several police cars gave chase and the truck ultimately stopped in a small town about fifteen miles away, where the appellant and Graves were arrested without further incident (R8. 414-416).

On December 10, Jennings gave a lengthy statement to Ralph Cunningham, chief investigator for the Twentieth Circuit State Attorney's Office, and Detective Andrew Rose of the Collier County Sheriff's Office (R6. 987-1106, R9. 442, 448-452). Jennings told them that he had originally planned to cover for Jason Graves, but he had talked to his mother, decided it wasn't worth it, and wanted to give his account of what had happened (R6. 988, 990, R9. 444). The statement recounted many details of events prior to, during, and after the robbery and murders at the Cracker Barrel. The following summarizes the appellant's initial story, as told to Cunningham and Rose:

Jennings had known Jason Graves for about three years (R6. 991). He had tried to be a good influence on Graves, encouraging him to stay in school and helping him get a job as dishwasher at the Cracker Barrel (R6. 991-992, 997). Jennings had worked at

Cracker Barrel until September, 1995; he quit because he had a better job lined up (R6. 993, 997, 999). He had not been happy at Cracker Barrel; he did not make enough money to even make his truck payments, his schedule kept him from seeing much of Mary, his girlfriend, and they did not respect him, calling him a whiner when he tried to bring legitimate concerns to their attention (R6. 993, 998). However, he got along with everyone because of his sense of humor (R6. 999). Graves had only worked at Cracker Barrel briefly when Jennings quit; Graves also quit because without Jennings, he had no transportation to get to work (R6. 998, 1000). They both worked day labor and miscellaneous jobs, but there was not enough work to make the money they needed (R6. 1001-1004).

The idea to rob the Cracker Barrel was born around the middle of October, 1995, when Robert Campbell suggested to Jennings that robbing the restaurant would be an easy way to make money (R6. 1005). Campbell also worked at Cracker Barrel and owned the truck which Jennings had been driving and making payments on for some time; he was suggesting a number of ways for Jennings to get money, since Campbell wanted Jennings to be able to continue to make the payments (R6. 1005-06). The appellant needed money badly, and Campbell advised him that Cracker Barrel brought in about $5000 in change in bags through the back door, and the morning manager made a deposit each weekday morning between 9 and 10 a.m. (R6. 1005).

The appellant didn't think it was a bad idea, although he couldn't see himself "partaking in a robbery" (R6. 1006).

He talked with Jason Graves and another guy, Joe, about robbing Cracker Barrel, and they discussed using Joe's girlfriend's Ford Bronco, waiting in the parking lot for the manager to leave with the morning deposit (R6. 1007). Joe and Jason were also desperate for money. The Bronco had tinted windows, and they could pull up, and as the manager came out, Jason would jump out of the passenger side, snatch the money bag, jump back into the truck, and they would split (R6. 1009). They were going to do it on a Monday, but then Joe had to take his girlfriend to the doctor, so they rescheduled for Tuesday, but Joe had another excuse (R6. 1009). Later the appellant believed Joe had stolen a stereo out of his truck, which "just added another notch to my anger," and they never attempted to carry out this robbery as planned (R6. 1010, 1011).

About a week or two prior to Nov. 15, Jennings and Graves were driving around, and decided to rob Cracker Barrel (R6. 1012-13, 1019). Rather than have Graves grab the money, Jennings was going to do this, since he had decided that if the manager was John or Bruce, they were good sized men that would just laugh at Jason since he wouldn't have a gun (R6. 1013). It was to be a snatch and run, as planned before, but it was nighttime (R6. 1014). They got there late at night, and stayed through morning. They had taken a

mask, which Jason was going to wear; it was later found by police under a bush (R6. 1014). Ultimately, however, Jennings couldn't go through with it, because he was "gutless" or got a guilty conscience; the manager was Dorothy, and she was a friend of his, and he just couldn't grab her as planned (R6. 1013). So he chickened out - but they returned the next night to try again (R6. 1015). In fact, they went several different times, twice at night and twice in the daytime, but just couldn't go through with it (R6. 1019, 1020). He couldn't do this to his friends (R6. 1015, 1016). Once they were waiting on the front porch when Dorothy showed up, and Jennings told her his radiator hose was broken (R6. 1018). When he told Graves he couldn't grab her, Graves told him he had no balls (R6. 1018). Another time his truck was stuck, so he was thinking they wouldn't be able to get away, and he had Dorothy call a towing service for him (R6. 1020-21). Jennings left Graves by the front door and went back to the truck, which he managed to get loose, then he went to pick up Graves. Graves told him Dorothy wouldn't open the door, and Jennings was relieved she hadn't (R6. 1021).[2]

[2]Jennings initially said that Graves told him he couldn't do it, then changed his mind and said that wasn't what Graves said, Graves had said Dorothy would not open the door (R6. 1021).

On Monday, Nov. 13, Jennings and Graves went to Ft. Myers, checked into the Ft. Myers Inn, and formulated the plan that was carried out on Nov. 15 (R6. 1012). Graves' check had been mailed to the appellant's mother, who lived in Ft. Myers, so they went to visit her and pick up the check (R6. 1024-25). Graves wanted to buy a gun and they went several places trying to find one for him, ultimately purchasing a Daisy CO2 pellet gun that looked like a real .45 - the gun they subsequently used at Cracker Barrel (R6. 1027-28). They planned to use the gun to scare the employees and get inside; that way, people would just do what they said and they wouldn't have to hurt anyone (R6. 1032).

The plan was to hide the truck in the woods in back because it was conspicuous, then sit on the front porch and show the gun to get in, leaving out the back (R6. 1032). Since Graves paid for the gun with his money, he would be the one to hold it on the employees while the appellant tied them up with tape; they would have the manager open the safe before tying her up (R6. 1032-33). Then Jennings would get a trash bag from the kitchen and take it into the office to fill it with money, while Graves escorted the hostages to the cooler (R6. 1033). There was no plan to put the hostages in the freezer, as they would freeze to death, and Jennings did not want anyone to get hurt, since they were his friends (R6. 1034). Jennings knew the employees would identify

them as the robbers, so he made a point of seeing some of his friends in Ft. Myers to set up an alibi, and he and Graves would maintain after seeing the friends they drove around Ft. Myers and did not go to Naples (R6. 1034).

They got to Cracker Barrel around 1 or 2 a.m., and stayed in the truck in the woods until about 3:30 (R6. 1036). They walked over to Cracker Barrel and sat out front (R6. 1037). Jennings noticed a truck belonging to the night maintenance man, a guy named Jason, and saw Dorothy pull up (R6. 1037). He told Dorothy his truck was stuck, and she offered to call the towing service again, but he gave her someone else to call instead (R6. 1037). About that time, Vicki, one of the grill cooks, arrived (R6. 1037). Jennings asked Dorothy if they could come inside to wait since it was chilly out, but she said no, Brandy, you know the rules, and he said that was fine (R6. 1037). As Dorothy opened the door, Graves stood up and rushed her (R6. 1037). Vicki started backing away, but Jennings told her it was alright, and to go inside (R6. 1037). They all went in and Graves instructed Dorothy to turn off the alarm, which she did (R6. 1037). Jennings thought Graves was acting scared and stressed out (R6. 1038). Jason the maintenance man was sweeping; they all walked to the back and Vicki and Jason laid down (R6. 1039-40). Jennings had put on gloves and he used electrical tape to bind them (R6. 1040). Jennings used his big

Buck folding knife to cut the tape; he stated that he had always carried the knife with him, ever since he bought it, about September (R6. 1040). The knife had been in a sheath in his front pants pocket (R6. 1040).

Graves had taken Dorothy into the office to open the safe while Jennings bound Vicki and Jason (R6. 1040). As Jennings finished with Vicki, Graves brought Dorothy back and had her lay down (R6. 1040). Jennings used the tape to bind Dorothy's hands, then he set his knife down by the computers and grabbed a trash bag (R6. 1041-42). He heard Graves talking to Dorothy as he went to the office to put money into the bag (R6. 1041-42). Graves supposedly took the employees to the walk-in cooler then came to the office to help gather money, stuffing money down into his pants (R6. 1041-43). Jennings heard the front buzzer and knew they had to leave; he told Graves they had to go (R6. 1043). Graves had gotten a key for the back door from Dorothy; he unlocked the door, and they ran out the back (R6. 1041-44). Jennings was behind Graves, and it was hard for Graves to run with all the money in his pants; Graves fell and was dropping some money (R6. 1044). Jennings went back to try to help him, and they both ran, scared (R6. 1044). They got to the power lines in the field and walked so they wouldn't attract attention, then got back to their truck and drove to Ft. Myers (R6. 1044-45). They made a point of seeing the

hotel manager to help their alibi (R6. 1045).

Jennings stated that he was wearing green sweat pants, a purple sweatshirt, and white Reeboks tennis shoes (R6. 1045-46). He said the pants had small pockets, the knife or sheath could have fallen out (R6. 1046). The knife had a plastic handle and a stainless steel matte finish blade (R6. 1047). The sheath was braided nylon, like a gun holster (R6. 1047). Jennings was sure he had left the knife inside (R6. 1047). He never asked Graves if Graves had taken the knife, and claimed to be surprised when he was told it was found outside in the bushes (R6. 1047-48). He also noted that Graves had a homemade eight inch scraper, made from a razor blade for scraping floors, that had been in the truck, but he didn't know if Graves had taken it into the Cracker Barrel (R6. 1048-49). He said he had not noticed any blood on Graves and did not hear any water running (R6. 1051).

Jennings admitted that he walked back to the cooler to make sure it was not locked from the outside; he wanted to make sure the hostages would be able to get out, because he didn't want anything to happen to his friends (R6. 1051-52). But he repeatedly denied going in or looking into the cooler (R6. 1052). However, Jennings changed his story when Cunningham told him that they had his shoe tracks in the blood (R6. 1052). Then Jennings said he couldn't believe what he had seen; he opened the door and saw Vicki in a big

pool of blood (R6. 1052-53). He stepped in and his foot slipped (R6. 1053-54). The light was on, and she was right there (R6. 1053). He didn't see anyone else, didn't want to look any further (R6. 1053). This was when he got so upset and told Graves they had to go (R6. 1052).

When they got back to their motel, they took off all their clothes (R6. 1054). He had not noticed blood on his shoes or clothes, but he wanted to get rid of them in case someone had seen them (R6. 1055). He stuffed everything in his sweat pants (R6. 1054-55). Graves insisted he put the razor blade/scraper inside and put rocks in to weigh it down when thrown in a canal (R6. 1055, 1060). Graves said he wanted to make sure water got to the scraper (R6. 1060). At one point they drove around North Cape Coral and threw the clothes in a canal (R6. 1056). They also buried Graves' shirts in a mudhole, as they had forgotten to put them with the other clothes (R6. 1064). While they had been at the motel, Jennings noticed his knife was missing, but didn't say anything to Graves about it (R6. 1059). They had also counted the money (R6. 1056-57). They had about $4800 that they put in a bag; they had $500 to $600 worth of coins in a gun case that was stolen out of his truck the next day or so (R6. 1057).

Jennings said he never asked Graves what had happened, why he had killed them (R6. 1060). He was upset and did not want to know

about it or talk about it (R6. 1060). The employees were his friends and he was afraid if he talked to Graves about it, he would get mad and do something to Graves he would regret (R6. 1061).

They stayed at a Motel Six, using Jennings' name, for two days, and at the Ft. Myers Inn, using Graves' name, for two days (R6. 1065). They had also stayed at the Green Lantern in East Ft. Myers for two days (R6. 1066). While at the Motel Six, they went to Flirts and spent about $400 each over two nights on dancing girls (R6. 1066-67). They also spent one night sleeping in the truck (R6. 1068). Graves wanted to leave town, but Jennings didn't; Jennings didn't feel right going anywhere, felt uneasy and uncomfortable being with Graves, like he wasn't a friend (R6. 1069). He thought Graves would try and kill him when the money was gone (R6. 1069). They spent the money on new tires, new clothes, etc. (R6. 1070-71). They didn't really divide it up, but would take about $500 at a time and spend it together, basically sharing equally (R6. 1071). Graves had bought some guns and they went to a gun range several times (R6. 1072-77).

They went to Ft. Pierce, where Graves had friends, and spent two or three nights staying in the truck, then headed for Oregon, where Jennings was from originally (R6. 1077-78). They ran out of money shortly into their trip (R6. 1080). Jennings related some of their experiences as they headed across the country and their

ultimate arrest in Nevada (R6. 1080-95). Jennings concluded the interview by reiterating that he was not talking due to any promises or threats, but because he wanted to get this off his chest and he knew it was the right thing to do (R6. 1103). He was satisfied with the way he had been treated, and he had talked to his mom and she wanted him to cooperate and tell the truth (R6. 1103). He was anxious to return to Florida and indicated that he would not fight extradition (R6. 1103).

The appellant had worked at Cracker Barrel from about October 1994 to September 1995 (R6. 997, R9. 607). He and Graves had worked there during the times Dorothy, Vicki, and Jason Wiggins worked there, and all of the victims knew them (R9. 538, 607). Jennings was a grill cook, but wanted to be a waiter (R9. 608). He had been told he needed to work on certain things, including his basic appearance and his temper (R9. 608). He had made some effort to this end, getting new clothes and cutting his hair, but the "biggest drawback was his temper" (R9. 611). He believed that Dorothy Siddle was keeping him back, although it was not her call entirely (R9. 609, 611). He quit as a no-show, calling in one night and then coming in a few days later to say he quit (R9. 609).

The appellant had expressed animosity towards Dorothy Siddle while he worked at Cracker Barrel and after he had quit. One day in the break room, he told Donna Howell, "I can't stand the bitch.

I can't stand the sound of her voice," referring to Dorothy (R9. 539). A couple of weeks after he quit, he and Graves were eating at Cracker Barrel when Dorothy made an announcement over the public address system; the appellant asked, "Is Dorothy here? I hate her. I even hate the sound of her voice" (R9. 610). He had also told his girlfriend, Mary Hamler, regarding Dorothy that "one day she would get hers" (R5. 722).

A bundle of clothes was recovered from a canal based on the directions provided in the appellant's statement to Cunningham and Rose (R9. 459). A pair of green sweat pants had a black sweat shirt and a white T-shirt wrapped around the legs; inside the pants were rocks, a pair of black jeans, a pair of Reebok high-top tennis shoes, pellets, pellet cartridges, and a store package for a Daisy pellet gun, a pair of gray work gloves, a homemade box cutter knife, a black nylon knife sheath, bank bags with money wrappers, envelopes, deposit slips, checks, coins, and money orders from the Cracker Barrel, a pair of black work/combat size 12 boots, and two white ankle socks (R9. 470-497). Although no indications of blood were detected on these items, the ability to detect blood would have been affected by the items being submerged in water for 23 days (R10. 650).

The bloody footprints leading from the freezer to the sink matched the size, design, general wear and cut of the Reebok tennis

shoes found in the canal that had been worn by the appellant during the robbery (R10. 670-671). One of the shoe impressions in the field behind the Cracker Barrel was made by the left boot found in the canal; another impression matched the right Reebok tennis shoe (R10. 679, 683).

All three victims were killed by "sharp force injuries" (R8. 382-383). Dorothy Siddle had a gaping wound of the neck; the muscles, tissues, vein, artery and nerve were severed (R8. 389-390). There were three separate cuts indicating multiple slices through to the bone in the vertebral column (R8. 390-392). One of these cuts was a stab wound, giving an impression of the knife tip (R8. 393). Vicki Smith sustained similar injuries, but there was no stab, and no dovetail effect indicating multiple slices (R8. 395-397). Jason Wiggins had two separate injuries, the upper one being a stab that went into the neck and then across (R8. 399). Although Vicki and Jason suffered cuts to their vertebral bones, only Dorothy actually had her spinal cord cut (R8. 398, 401). Thus, whereas Dorothy's respiration would have been affected, killing her quickly, Vicki and Jason would have bled to death (R8. 398-399, 401-403). Both Vicki and Jason would have been conscious and may have been able to move for a short time after their injuries were inflicted (R8. 402-403). The murder weapon could be the large Buck knife, or something very similar to it, but the

scraper found in the canal could not have inflicted the stab wounds or the injuries to the bone (R8. 393-395, R9. 500-502).

The bodies were positioned inside the freezer with Dorothy toward the south end; Vicki around the middle, near the door; and Jason to the north (R8. 299-300). Dorothy had blood puddled around her head and shoulders area; the blood was only several inches high on the boxes of frozen food stacked in the area (R8. 298-299). Vicki also had blood around her head and shoulders, but the blood was smeared on the boxes about five feet high (R8. 299-300). Jason was also laying in a large amount of blood, with blood transfers about five and a half feet up the boxes, on both sides (R8. 300). Dorothy's hands were tied very tightly behind her back with electrical tape; Vicki and Jason had tape wrapped around their left wrists, but their right hands had gotten loose from their bindings (R8. 306, 309, 313).

The appellant had once told a friend of his, Angela Chainey, that if he ever needed money, he could rob someplace or somebody. When she commented that was stupid, you could get caught, he said "Not if you don't leave any witnesses" (R10. 700). As he said this, he made a slashing motion across his throat with his hand (R10. 700). He made similar statements to Chainey several different times (R10. 702).

When Cunningham spoke with the appellant the day after his

taped statement, the appellant admitted that in his mind, he thinks he could have killed the victims, but in his heart he didn’t think so (R10. 738). The following day he again made the same statement, repeating it several times (R10. 738).

SUMMARY OF THE ARGUMENT

I. The trial court properly denied the appellant's motion to suppress his postarrest statements to law enforcement. The trial court's findings that the appellant voluntarily initiated the conversation leading to his statements and that he knowingly, intelligently, and voluntarily waived his constitutional rights prior to making the statements are supported by the record. The appellant's assertion of a constitutional violation based on law enforcement's failure to affirmatively secure counsel for the appellant is not preserved for appellate review and is without merit.

II. The trial court did not err in admitting the masks taken from the appellant's truck into evidence during the penalty phase of the trial. The appellant's statement indicated that one of the prior attempts to rob the Cracker Barrel involved the use of a mask; the fact that the robbery was ultimately perpetrated without masks supports the state's theory that the appellant planned to kill the victims rather than leave any witnesses as part of the robbery. To the extent the appellant claims this evidence should have been excluded because its probative value was outweighed by the danger of unfair prejudice due to the suggestion that other crimes may have been committed, his argument has not been preserved for appellate review. Furthermore, any possible error in this

ruling would clearly be harmless beyond any reasonable doubt.

III. The trial court properly allowed the prosecutor to cross examine Mary Hamler as to the appellant's prior statements indicating his thoughts on committing a robbery and his feelings toward the Cracker Barrel and victim Dorothy Siddle. Since Hamler's direct examination was offered to provide evidence of the appellant's good character, the state was free to cross examine by bringing out evidence reflecting the appellant's poor character.

IV. and V. The aggravating factors of avoid arrest and cold, calculated and premeditated were clearly established on the facts of this case. The testimony below established that the appellant intended to kill the victims in order to avoid leaving witnesses to the robbery. The trial judge applied the correct rule of law for both aggravating factors, and his findings are supported by competent, substantial evidence.

VI. The codefendant's life sentence does not preclude the imposition of the death penalty on the appellant. To the extent that the appellant claims the trial judge found Jennings and Graves to be equally culpable in these offenses, his claim is not supported by the record. To the extent that the appellant claims this Court must reduce his sentence on proportionality grounds due to his codefendant's life sentence, such reduction is not necessary since the appellant was the only actual killer.

VII. The allegation of error in the scoring of victim injury points in assessing the appellant's guidelines scoresheet range for his robbery conviction has not been preserved for appellate review and is without merit. In addition, any possible error in this regard would clearly be harmless.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS.

The appellant initially challenges the admission of his postarrest statements, claiming that the court below should have granted his motion to suppress. However, the trial court's rejection of this issue is supported by the record, and the appellant is clearly not entitled to any relief.

The transcript of the suppression hearing reflects that the appellant was arrested in Las Vegas, Nevada on December 8, 1995 (R12. 994, 1002). Collier County Sheriff's Detectives Andy Rose and Jay Crenshaw first attempted to interview him about the Cracker Barrel murders in the early morning hours of Dec. 9 (R12. 1002). Det. Crenshaw advised the appellant of his Miranda rights, and the appellant initially signed a waiver form, but then invoked his rights, so the interview was terminated (R12. 1004-05). Det. Rose denied the allegation that when the appellant said he wanted a lawyer, Rose handed him a telephone book and told him to call any lawyer in Las Vegas; Rose testified that he did offer to get a phone book for the appellant (R12. 1004). The fact that the appellant would not have to pay for an attorney had been explained when Crenshaw first advised the appellant of his rights (R12.

1004).

On December 10, Det. Rose and Ralph Cunningham, the chief investigator for the state attorney's office, were at the police department to talk to the appellant's codefendant, Jason Graves (R12. 969). They walked out of the interview room after talking to Graves and observed the appellant near the booking desk (R12. 970). The appellant asked them if his mother had contacted them, and Cunningham responded that she had not, but that they knew she was trying to and Det. Crenshaw was attempting to contact her (R12. 971). The appellant then stated that he had talked to his mother, that she had advised him to talk to them and to tell the truth, and that he wanted to do so (R12. 971). The appellant indicated that he did not want to take the blame for killing the three people, his partner had killed them, and he wanted to tell his side of the story (R12. 972).

Cunningham, Rose, and the appellant proceeded to an interview room and Cunningham advised the appellant of all of his rights from a card (R12. 973-975). The appellant indicated that he understood his rights and that he wanted to talk (R12. 975). There were no threats or promises made; the appellant responded appropriately and did not appear to be under the influence of anything; and the appellant never requested an attorney or indicated any desire to stop talking (R12. 976-977). Cunningham initially conducted a pre-

interview, which was not recorded, then asked the appellant if they could take a taped statement (R12. 977-978). The appellant agreed (R12. 978). The tapes of the two to two-and-a-half hour conversation that followed were admitted at trial and played for the jury (R9. 448-456).

At the beginning of the taped portion of the interview, the appellant interrupted when Cunningham restated his rights, saying that he could save him the trouble, "I understand all my rights fully" (R6. 988, R12. 978). Cunningham explained that they knew he understood, and that he wanted to cooperate after speaking with his mother, but legally they needed to run through it; he went through all the rights again, including the fact that they would stop at any time and get him a lawyer (R6. 988, R12. 978). The appellant stated he still wanted to talk; he was put under oath and affirmed that he had not been beaten or threatened, and that he was talking because he had talked to his mother and he thought it was the best thing to do, trying to straighten his life out (R6. 989-990). The appellant proceeded to discuss some of his life history, and to recount extensively the events leading up to, during, and after the robbery and murders at the Cracker Barrel (R6. 987-1106, R12. 977).

The following day, December 11, the appellant voluntarily took a polygraph examination, after again being advised of his rights and executing a written Miranda waiver and consent to polygraph

form (R12. 985-988). The appellant did not indicate that he did not want to talk, or ask for an attorney (R12. 992). Some of the statements which the appellant made at this time were also admitted into evidence (R10. 735-739).

The appellant now claims that the trial court should have excluded his postarrest statements, alleging that the statements were obtained in violation of his constitutional rights. Although the gist of his complaint is that the police did nothing to secure counsel for him after he invoked his right to an attorney on December 9, this particular claim was never presented to the court below, and therefore has not been preserved for appellate review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The argument below was that Det. Rose had misled the appellant, by simply referring him to a phone book, into believing that he was out in Las Vegas on his own without counsel. There was no suggestion, as now asserted on appeal, that the police had an affirmative duty to secure counsel once the appellant's right to an attorney was invoked (R12. 1006-1020). Thus, that aspect of his claim is procedurally barred. Similarly, there was no contemporaneous objection below to any testimony or evidence being subject to exclusion as "fruits of the poisonous tree," so this appellate contention is also barred.

Clearly, interrogation of a defendant is permissible after the defendant has invoked his right to counsel when the defendant

initiates contact with investigating officers and knowingly, voluntarily, and intelligently waives his constitutional rights. Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362 (1994) ("But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available *or the suspect himself reinitiates conversation*," citing Edwards v. Arizona, 451 U.S. 477, 484-485, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378 (1981)(emphasis added)). The Davis Court also noted that "Nothing in Edwards requires the provision of counsel to a suspect who consents to answer questions without the assistance of a lawyer." 114 S. Ct. at 2356. See also, Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486, 492, 112 L. Ed. 2d 489 (1990) ("Edwards does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities"); Morgan v. State, 639 So.2d 6, 11 (Fla. 1994); Stein v. State, 632 So.2d 1361, 1364 (Fla.), cert. denied, 513 U.S. 834 (1994); Gilliam v. State, 514 So.2d 1098, 1100 (Fla. 1987); Bassett v. State, 449 So.2d 803, 806-807 (Fla. 1984).

Of course, a trial court's ruling on a motion to suppress comes to this Court clothed in a presumption of correctness, and the evidence and reasonable inferences and deductions derived

therefrom must be interpreted in a manner most favorable to sustaining the trial court's ruling. Rolling v. State, 695 So.2d 278, 291 (1997). The appellant in this case does not dispute the trial court's finding that he initiated contact with Rose and Cunningham, a finding which is supported by the testimony taken at the suppression hearing.

There is no legal or factual support for the appellant's assertion that his Miranda waiver was invalid because his rights were "diluted" prior to his statement when authorities "in effect" told him they would not help him secure counsel. In the first place, Det. Rose testified at the hearing that he offered a phone book to the appellant, and that the appellant had previously been told he could have an attorney even if he couldn't pay for one (R12. 1004). Furthermore, the police are not obligated to secure counsel for a defendant that invokes his right to an attorney. The appellant's claim that Florida Rule of Criminal Procedure 3.111 imposes such an obligation is without merit. That rule merely provides that a booking officer, committing the defendant to custody, must advise the defendant of his right to counsel and place him in communication with the public defender's office in the circuit in which the arrest was made, his own lawyer, or a local Lawyer Referral Service. Fla.R.Crim.P. 3.111(c). Rose and Cunningham were not booking officers, and they were not committing

the appellant to custody, so this section of the rule did not apply to them. In addition, any violation of this rule or of the technical requirement that a written waiver should be witnessed by two signatures would not be grounds for suppression, absent some identifiable harm or prejudice resulting from the violation itself, which clearly has not been shown in this case. Johnson v. State, 660 So.2d 637, 643 (Fla. 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 1550 (1996); Keen v. State, 504 So.2d 396, 400 (Fla. 1987). Of course, even a prior Miranda violation does not preclude admission of a subsequent statement which satisfies Miranda and is given voluntarily. Davis v. State, 22 Fla. L. Weekly S331, 333 (Fla. June 5, 1997).

The appellant's reliance on Traylor v. State, 596 So.2d 957 (Fla. 1992) and Thompson v. State, 595 So.2d 16 (Fla. 1992), cert. denied, 515 U.S. 1125 (1995), is misplaced. Neither case places a burden on law enforcement officers to secure counsel, as suggested by the appellant. In Thompson, the police failed to adequately advise the defendant of his right to an attorney at no cost; the impact of this failure was demonstrated by the fact that Thompson indicated in an exchange with a detective that he did not have the money to pay an attorney. In the instant case, the appellant was clearly advised and understood that he could be provided an attorney at no cost. And in Traylor, this Court acknowledged the

"indispensable role" that confessions and interrogations play in the investigation and prosecution of crimes, characterizing the state's authority to obtain freely given confessions as "an unqualified good." Traylor also reiterated that, even after the invocation of the right to counsel, a suspect remains "free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel." 596 So.2d at 966, 968.

On these facts, no basis for a granting of the appellant's motion to suppress has been demonstrated. In addition, any possible error in the admission of these statements would clearly be harmless; although the lengthy statement was an important part of the state's case, there was a great deal of evidence establishing the appellant's motive and opportunity, and other evidence placed him at the scene and in possession of a lot of cash shortly after the robbery. Furthermore, the statement was used extensively by the appellant to support his defense that his codefendant, Jason Graves, was actually the one to kill the victims. Pursuant to Section 924.051, Florida Statutes (1996), the appellant has the burden of proving that any error was prejudicial. Given the strength of the state's evidence unrelated to the appellant's confession, he has not met this burden. The appellant is not entitled to a new trial on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE MASKS TAKEN FROM THE APPELLANT'S TRUCK AT THE TIME OF HIS ARREST INTO EVIDENCE IN THE PENALTY PHASE OF THE TRIAL.

The appellant next asserts that the court below erred in permitting the state to admit two masks into evidence. During the penalty phase of the trial, Det. Rose testified that two masks were found in the appellant's truck at the time of his arrest. When the state sought to admit the masks into evidence, the defense objected, claiming that the masks were not probative of any aggravating factor, and therefore must be excluded as irrelevant. The trial judge agreed with the state that the possession of the masks, coupled with the appellant's failure to use them at the time of the robbery, supported the avoid arrest and cold, calculated and premeditated aggravating factors, and overruled the objection (R6. 694-697).

Clearly, to the extent that the appellant now alleges that the masks should have been excluded pursuant to Section 90.404, Florida Statutes, because any probative value was outweighed by the danger of unfair prejudice, this argument has not been preserved for appellate review. It was not a basis for exclusion presented to the trial court, and therefore cannot be asserted on appeal. Steinhorst, 412 So.2d at 335.

Furthermore, the court's ruling to admit this evidence was correct. In his statement to law enforcement, the appellant

described several times that he and Graves had visited Cracker Barrel, intending to rob the restaurant. On one occasion, he and Graves arrived late at night and stayed until the early morning, watching the manager open the business. According to the appellant, they had taken a mask with them, one which was later found by the police (R6. 1014). Jason was going to wear the mask and snatch the money from the manager. However, it didn't feel right, and they chickened out (R6. 1012-1015).

The evidence presented below established that the appellant and Graves took reasonable steps to insure that their identity as perpetrators of this offense would be concealed - they wore gloves during the robbery, and parked the appellant's truck in the woods behind Cracker Barrel because they knew it was conspicuous. They had considered, on a prior robbery attempt, wearing masks while snatching money from a manager. The appellant's statement established that they had a mask prior to committing the robbery and murders, and, as shown by the fact that masks were found in the truck, they could have worn masks on November 15 if they had felt it necessary. The fact that they did not wear available masks during the crime suggests a plan to insure that no eyewitnesses would be left to identify them.

The admission of penalty phase evidence is within the trial court's wide discretion. Chandler v. State, 534 So.2d 701, 703 (Fla. 1988), cert. denied, 490 U.S. 1075 (1989); King v. State, 514

So.2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). Subsection 921.141(1), Florida Statutes, permits the admission of any evidence which "the court deems relevant" or which "the court deems to have probative value." The trial court's finding of relevance in this case does not demonstrate an abuse of discretion.

Although the appellant suggests that the masks were not relevant because their use was not linked to the capital crime, it is the fact that they were not used that makes them relevant. More definitive evidence linking the appellant to the masks was not necessary. See, Suggs v. State, 644 So.2d 64, 69 (Fla. 1994) (book found in house where Suggs lived properly admitted due to similarity between wounds pictured in book and wounds on Suggs' victim), cert. denied, 514 U.S. 1083 (1995).

Furthermore, any possible error in the admission of this evidence would clearly be harmless beyond any reasonable doubt. Mendyk v. State, 545 So.2d 846, 849 (Fla. 1989), cert. denied, 493 U.S. 984 (1989). The appellant committed a brutal, triple murder in order to obtain some money which was spent before he got very far along in his trip across the country. In mitigation, his mother and some friends testified that he was a nice guy that got along with people and enjoyed life. There is no reasonable possibility that the jury's ten to two recommendation for death was improperly influenced by the fact that two ski masks were found in the back of his truck when the appellant was arrested near Las

Vegas in December. In addition, should this case be sent back for a new sentencing proceeding, the trial judge and jury could consider and apply the aggravating factor of prior violent felony conviction, which clearly applies due to the contemporaneous murders, but inexplicably was not suggested to the court by the state below. No new sentencing hearing is warranted on these facts.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR'S CROSS EXAMINATION OF DEFENSE PENALTY PHASE WITNESS MARY HAMLER.

The appellant next contends that the prosecutor should not have been permitted to question defense witness Mary Hamler about the appellant's bad character. Once again, however, no error has been demonstrated in this issue, and the appellant is not entitled to a new penalty phase proceeding.

On direct examination, Mary Hamler testified in mitigation that she had known the appellant for about four years; they had lived together most of that time; and that he got along well with her three children and took good care of them while she was at work (R5. 713-716). They had experienced some difficulties, but they had parted friends and still loved each other (R5. 715). On cross examination, Hamler stated that although the appellant was good with kids, she "sometimes saw another side of him," including his statement to her that if he ever committed a robbery, he would not stick around but would go north, and the animosity he harbored toward the Cracker Barrel and Dorothy Siddle in particular (R5. 716-718).

Clearly, once the appellant put his character in issue by presenting Hamler's testament to his positive traits, the state was entitled to bring out the other side of the appellant's nature. Johnson, 660 So.2d at 646; Wuornos v. State, 644 So.2d 1000, 1009

(Fla. 1994), cert. denied, 514 U.S. 1069 (1995). In Johnson, the defense elicited penalty phase testimony from his companion that Johnson was loving and a good father figure to their children. The state's subsequent elicitation that Johnson and his companion sometimes had violent arguments was challenged on the same basis offered here, that the testimony was beyond the scope of the direct examination, as well as evidence that allegedly constituted an improper nonstatutory aggravating factor. This Court rejected that contention, noting that "When the defense puts the defendant's character in issue in the penalty phase, the State is entitled to rebut with other character evidence, including collateral crimes tending to undermine the defense's theory." 660 So.2d at 646.

In Hildwin v. State, 531 So.2d 124, 127-128 (Fla. 1988), affirmed, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), this Court reviewed the propriety of the state's presentation of evidence about a prior sexual battery for which Hildwin had not been charged. Because a penalty phase witness had testified to Hildwin's nonviolent nature, the evidence was found to be proper rebuttal. This Court noted, "it must be remembered that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's character." 531 So.2d at 127.

The cases cited by the appellant do not compel the granting of

relief. Penn v. State, 574 So.2d 1079 (Fla. 1991), Lambrix v. State, 494 So.2d 1143 (Fla. 1986), and Steinhorst, 412 So.2d at 332, all involved situations where the defense attempted to elicit affirmative defense guilt phase evidence by cross examining state witnesses; this Court's recognition that the defense cross examination was properly restricted on the facts of those cases is irrelevant to the argument presented in this issue. The state in this case was seeking to rebut the defense testimony of the appellant's character. The fact that the challenged testimony may have reflected poorly on the defendant or even supported an aggravating factor does not preclude its admissibility, and did not taint the jury recommendation.

The trial judge below determined that the evidence of the appellant contemplating a robbery and his vindictiveness toward the Cracker Barrel showed facets of his character, which the judge noted was the focus of Hamler's direct examination. No abuse of discretion has been demonstrated by that determination, and the appellant is not entitled to a new penalty phase.

Finally, it must be noted that any possible error in the admission of this testimony would clearly be harmless beyond any reasonable doubt. The appellant's apparent willingness to consider robbery and his animosity towards both the Cracker Barrel and Dorothy Siddle were demonstrated in the guilt phase of the trial. Therefore, no harmfulness has been established. See, Harich v.

State, 437 So.2d 1082, 1086 (Fla. 1983) (finding erroneous admission of statements harmless where substantially all of the information was already before the jury in unrelated testimony), cert. denied, 465 U.S. 1051 (1984). No relief is warranted on these facts.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF AVOID ARREST.

The appellant's next two issues concern the applicability of aggravating factors found by the trial court. In this issue, the appellant contests the court's conclusion that this triple murder was committed for the purpose of avoiding arrest. However, all of the aggravating factors found by the trial court were well established, and the appellant is clearly not entitled to be resentenced.

In finding this factor to apply, the trial judge noted that the appellant and Graves were well known to the three victims; that although they had used gloves, they had declined to use masks to conceal their identity; and that the appellant had previously stated, in discussing a hypothetical robbery, that if he ever robbed anyone, he would not leave any witnesses, slashing his fingers across his throat as he did so. The sentencing order also explains that, while Dorothy Siddle's murder may have been motivated in part by the appellant's dislike for her, the evidence demonstrated that the dominant motive for all of the murders was the elimination of witnesses to the robbery. The judge's findings with regard to this factor are supported by the evidence, and the correct standard of law was applied; thus, the application of the factor should be affirmed. Willacy v. State, 696 So.2d 693, 695 (Fla. 1997) (in considering propriety of aggravating factor, task

on appeal is to review record to determine whether trial court applied the correct rule of law and whether competent substantial evidence supports its finding); Thompson v. State, 648 So.2d 692, 695 (Fla. 1994) (avoid arrest aggravating factor applies where State has shown that the sole or dominant motive for the murders was the elimination of witnesses), cert. denied, 515 U.S. 1125 (1995).

A review of factually similar cases also demonstrates that this factor was properly applied. In Stein, 632 So.2d at 1366, and Christmas v. State, 632 So.2d 1368 (Fla. 1994), this Court upheld the avoid arrest factor based on the murders of two Pizza Hut employees killed during a robbery of the restaurant. Stein was employed at a different Pizza Hut, and Christmas was previously employed at the Pizza Hut that was robbed, and was known to the victims. In planning the robbery, Stein had mentioned that there could be no witnesses. The victims were found in the restroom, shot to death. Stein later made a statement to police indicating that the murders had occurred because the robbery "went bad."

The victims in this case were restrained and posed no threat to the appellant's escape from the scene. Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986). That fact that Vicki and Jason had managed to get one hand free does not infer resistance, as they were clearly bound at some point and the deliberate slashing of their throats is not the type of injury that suggests the appellant

was merely reacting to their efforts to get free. There is no evidence that they ever physically opposed the appellant or Graves. Furthermore, even if their efforts could somehow be construed as the primary reason for their murders, the killing of Dorothy would necessarily have been to eliminate her as a witness to the other murders. Hannon v. State, 638 So.2d 39, 44 (Fla. 1994), cert. denied, 513 U.S. 1158 (1995).

The Cracker Barrel robbery could easily have been accomplished without killing the hostages. Henry v. State, 613 So.2d 429, 433 (Fla. 1992) (victims knew Henry, and had been disabled so robbery could have been effected without killing them), cert. denied, 510 U.S. 1048 (1994); Harmon v. State, 527 So.2d 182, 186 (Fla. 1988). Since the victims were bound, there was little reason to kill them other than to eliminate them as witnesses. Thompson, 648 So.2d at 695.

This Court has recognized that this factor may be proven by circumstantial evidence which infers the motive for a murder, and that direct evidence of the defendant's thought processes is not required. Preston v. State, 607 So.2d 404, 409 (Fla. 1992), cert. denied, 507 U.S. 999 (1993); Swafford v. State, 533 So.2d 270, 276 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989). The circumstances of this case include the facts that the victims knew the perpetrators; the victims were bound and secured in a freezer at the time of the killings; the defendants wore gloves to avoid

leaving fingerprints and hid their truck because it was conspicuous, but did not bother using masks to conceal their identity from the only potential witnesses; and the robbery could easily have been accomplished without harming the hostages. The only reasonable inference to be drawn from these facts is that the victims were killed in order to prevent them from identifying the appellant and Graves as the robbers. The direct evidence of the appellant's earlier indication that if he ever committed a robbery he would not leave any witnesses, accompanied by his motion of slicing his throat with his hand in a haunting demonstration of things to come, confirms the motive for the murders.

Even if this aggravating factor should not have been considered, reversal of the appellant's sentence is only required if there is a likelihood of a different sentence on remand. Peterka v. State, 640 So.2d 59, 71 (Fla. 1994), cert. denied, 513 U.S. 1129 (1995). Given the facts of this case, and the application of the prior violent felony aggravating factor that could be considered on remand, there is no likelihood of a different sentence, and any error is harmless.

This is not a case where the victims were shot instinctively, without a plan to kill them. Where there is a legal basis for an aggravating factor, this Court will not substitute its judgment for that of the trial judge. Johnson v. State, 608 So.2d 4, 11 (Fla. 1992), cert. denied, 508 U.S. 919 (1993); Occhicone v. State, 570

So.2d 902, 905 (Fla. 1990), cert. denied, 500 U.S. 919 (1991). The appellant has failed to demonstrate any error in the trial court's finding and weighing the avoid arrest aggravating factor. Therefore, he is not entitled to any relief on this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED.

The appellant's challenge to the cold, calculated and premeditated aggravating factor is similarly without merit. The evidence presented below clearly established that killing the victims was an integral part of the robbery plan. Therefore, the murders were properly characterized as cold, calculated, and premeditated.

The trial judge noted the following facts in support of this factor: the "ruthless efficiency" with which the criminal episode was completed, with the robbers forcing themselves inside, having Dorothy open the safe, binding the victims, taking them into the freezer, and cutting their throats, cleaning out the safe, and fleeing out the back accomplished in about ten minutes; advance procurement of the weapon, since the victims were killed with the appellant's large Buck knife; the appellant's dislike and bitterness toward Dorothy; the appellant's taking the time after the murders to walk to the sink to wash off himself and his knife; the prior aborted attempts shortly before November 15; and the appellant's admission to Ralph Cunningham that in his mind, he knew he had killed the victims, but his heart would not accept it. Once again, the judge's findings are supported by the evidence, and the correct standard of law was applied, compelling affirmance of the

use of this aggravator. Willacy, 696 So.2d at 695; Walls v. State, 641 So.2d 381 (Fla. 1994) (outlining four elements which must be proven to establish this factor), cert. denied, 513 U.S. 1130 (1995).

Many of the cases cited in the previous issue also demonstrate the propriety of the cold, calculated and premeditated factor. In Stein, this Court noted that CCP may be proven by facts such as the advance procurement of the murder weapon, the lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. See also, Thompson, 648 So.2d at 696; Swafford, 533 So.2d at 277. Stein also refutes the appellant's argument, presented for the first time in this appeal, that the findings of CCP and avoid arrest amounted to an improper doubling of the facts in aggravation. 632 So.2d at 1366.

This is not a case where the victims were resisting or interfering with the robbery, or were killed when the appellant panicked. Thus, application of the factor here is fully consistent with the principles adopted in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). As in Foster v. State, 679 So.2d 747, 754 (Fla. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1259 (1997), the victims had complied with all of the defendants' orders and posed no physical threat to the defendants.

In accordance with case law, the state must establish four elements to prove the CCP factor: the murder was the product of

cool, calm reflection rather than prompted by frenzy or a fit of rage; the murder must be the product of a careful plan or prearranged design; there must be "heightened" premeditation; and there must be no pretense of moral or legal justification. Lott v. State, 695 So.2d 1239, 1245 (Fla. 1997); Jackson v. State, 648 So.2d 85, 89 (Fla. 1994). In this case, the deliberate nature of the injuries inflicted and the appellant's rational decision to walk to the sink to wash off the knife before going to the office to help clean out the safe demonstrate that the appellant was calm and cool, particularly in the absence of any indication of resistance, provocation, or mental disturbance that might trigger an emotional frenzy. The efficiency noted by the trial judge illustrates the killings were "carried out as a matter of course," pursuant to a plan. Bringing the knife, using gloves but no masks, and the appellant's earlier indication that he would cut someone's throat rather than leave a witness to a robbery all support the heightened premeditation found below. No pretense of justification has been asserted, and there is absolutely no evidence of any justification in this record.

Clearly, the appellant's self-serving statement that he did not intend to kill anyone did not preclude the application of this factor. Stein, 632 So.2d at 1364. The appellant also claimed, in the same statement, that he had not been the one to kill the victims and that the victims were his friends, statements

inconsistent with the evidence and rejected by the trial judge below.

Since there is a legal basis for the finding of this aggravator, the trial court's application of the cold, calculated, and premeditated factor must stand. The appellant is not entitled to be resentenced.

ISSUE VI

WHETHER THE APPELLANT'S DEATH SENTENCE IS IMPROPER DUE TO THE IMPOSITION OF A LIFE SENTENCE ON THE APPELLANT'S CODEFENDANT.

The appellant next claims that his sentence of death was precluded by the fact that his codefendant, whom the appellant claims to have been equally culpable of these murders, received life sentences for the same offenses. However, for the reasons that follow, the codefendant's life sentences do not preclude the imposition of the death penalty on the appellant in this case.

To the extent that the appellant claims the trial judge found Jennings and Graves to be equally culpable in these offenses, his claim is not supported by the record. The judge below was never asked to determine relative culpability, he was asked to weigh in mitigation that the codefendant received a life sentence, which he did. Heath v. State, 648 So.2d 660, 665-666 (Fla. 1994) (trial judge's giving substantial weight to codefendant's life sentence not taken as determination that defendants were equally culpable), cert. denied, ___ U.S. ___, 115 S. Ct. 2618 (1995). In assessing this mitigation, the judge noted that the appellant was the actual killer, slashing the throats of the victims while Graves assisted by confining the victims to the freezer by holding the realistic-looking pellet pistol on them (R5. 788). This finding is well supported by the evidence, which the judge noted to be "overwhelming" and "inconsistent with any other possibility" as to

the issue of who actually killed the victims.

To the extent that the appellant argues this Court must reduce his sentence on proportionality grounds due to his codefendant's sentence, his argument is without merit. This Court has repeatedly upheld death sentences when codefendants that participated in the crime but did not actually kill were sentenced to less than death. See, Raleigh v. State, Case No. 87,584 (Fla. Nov. 13, 1997); Johnson v. State, 696 So.2d 317, 326 (Fla. 1997); Armstrong v. State, 642 So.2d 730, 738 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Hannon, 638 So.2d at 44; Hall v. State, 614 So.2d 473, 479 (Fla. 1993), cert. denied, 510 U.S. 834 (1993); Coleman v. State, 610 So.2d 1283, 1287-88 (Fla. 1992), cert. denied, 510 U.S. 921 (1993); Robinson v. State, 610 So.2d 1288 (Fla. 1992), cert. denied, 510 U.S. 1170 (1994); Downs v. State, 572 So.2d 895, 901 (Fla. 1990), cert. denied, 502 U.S. 829 (1991); Williamson v. State, 511 So.2d 289, 292-293 (Fla. 1987), cert. denied, 485 U.S. 929 (1988); Craig v. State, 510 So.2d 857, 870 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986), cert. denied, 511 U.S. 1100 (1994); Woods v. State, 490 So.2d 24, 27 (Fla.), cert. denied, 479 U.S. 954 (1986); Deaton v. State, 480 So.2d 1279, 1283 (Fla. 1985), cert. denied, 513 U.S. 902 (1994); Brown v. State, 473 So.2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985); Troedel v. State, 462 So.2d 392, 397 (Fla. 1984); Bassett, 449 So.2d at 808-809. In all of the above

cases, the codefendants were present during the crimes, participated at least to the extent that Graves did in this case, and were convicted of first degree murder but sentenced to less than death.

The appellant's reliance on Scott v. Dugger, 604 So.2d 465 (Fla. 1992), to demonstrate a lack of proportionality in the instant case is misplaced. First, in Scott, relief was granted based on newly discovered evidence because Scott's codefendant was sentenced to life in prison after this Court affirmed Scott's death sentence. In contrast, the appellant's sentence was imposed after the judge and jury were aware of Graves' life sentence. Therefore, Graves' sentence cannot be considered newly discovered evidence as was the codefendant's sentence in Scott. See also, Steinhorst v. Singletary, 638 So.2d 33, 35 (Fla. 1994).

Next, the codefendants in Scott were equally culpable participants. The evidence presented at trial shows that the instant case does not involve equally culpable participants. When codefendants are not equally culpable, the death sentence of the more culpable codefendant is not unequal justice when another codefendant receives a life sentence. Steinhorst, 638 So.2d at 35, citing Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986).

The trial judge expressly considered the significance of the sentences received by the codefendant in this case, and expressly

found that the evidence established that the appellant was the actual killer. As noted above, this Court has repeatedly acknowledged that a death sentence may be imposed on the actual killer when a non-killing codefendant receives a life sentence. See, Bush v. Singletary, 21 Fla. L. Weekly S455 (Fla. October 16, 1996); Cardona v. State, 641 So.2d 361 (Fla. 1994), cert. denied, 513 U.S. 1160 (1995); Colina v. State, 634 So.2d 1077 (Fla.), cert. denied, ___ U.S. ___, 115 S. Ct. 330 (1994); Mordenti v. State, 630 So.2d 1080 (Fla.), cert. denied, ___ U.S. ___, 114 S. Ct. 2726 (1994); Sims v. State, 602 So.2d 1253, 1257 (Fla. 1992), cert. denied, 506 U.S. 1065 (1993); Cook v. State, 581 So.2d 141 (Fla.), cert. denied, 502 U.S. 890 (1991); Hayes v. State, 581 So.2d 121, 127 (Fla.), cert. denied, 502 U.S. 972 (1991).

Every case cited in the appellant's brief to support his statement that this Court has "reversed death sentences where an equally culpable codefendant received lesser punishment," involves a jury override. See, Slater v. State, 316 So.2d 539 (Fla. 1975); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Spivey v. State, 529 So.2d 1088 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988); Caillier v. State, 523 So.2d 158 (Fla. 1988); DuBoise v. State, 520 So.2d 260 (Fla. 1988); Brookings v. State, 495 So.2d 135 (Fla. 1986); Malloy v. State, 382 So.2d 1190 (Fla. 1979). This is an important distinction since the focus in those cases was on whether evidence implicating a codefendant with a lesser sentence could

have provided a reasonable basis for the life recommendations. Similar arguments to those made in the above cases have been rejected where the jury has recommended death. Compare, Hoffman v. State, 474 So.2d 1178 (Fla. 1985), and Brookings. Override cases are not applicable to a proportionality analysis, since different principles are involved. Burns v. State, 22 Fla. L. Weekly S419, 421 n. 5 (Fla. July 10, 1997).

Even when the jury has recommended a life sentence, this Court has upheld death sentences where codefendants received lesser sentences. Thompson v. State, 553 So.2d 153 (Fla. 1989), cert. denied, 495 U.S. 940 (1990); Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). In Thompson, this Court reaffirmed the comment in Eutzy that every time this Court has upheld the reasonableness of a jury life recommendation possibly based, to some degree, on the treatment of a codefendant or accomplice, the jury "had before it, in either the guilt or the sentencing phase, direct evidence of the accomplice's equal culpability for the murder itself." 553 So. 2d at 158; 458 So. 2d at 759. Clearly, no such evidence is present in the instant case.

Although this Court has issued several opinions addressing this issue since the appellant submitted his brief, they do not compel the granting of relief in this case. In Hazen v. State, 22 Fla. L. Weekly S546 (Fla. Sept. 4, 1997), this Court reduced the sentence of a non-triggerman in order to be consistent with the

sentence given another non-triggerman. The triggerman in that case, Johnny Kormondy, has been returned to the trial court for another sentencing proceeding. Kormondy v. State, 22 Fla. L. Weekly S635 (Fla. Oct. 9, 1997). In Puccio v. State, Case No. 86,242 (Fla. Nov. 20, 1997), this Court reversed a trial court's determination that Puccio was more culpable than his codefendants. The facts in that case demonstrated that the codefendants played a larger role in the planning and killing of the victim, physically stabbing and beating the victim along with Puccio. Since the evidence below supports the trial court's finding that the appellant was the sole killer in this case, Puccio is clearly distinguishable.

Thus, the fact that the State ultimately waived the death penalty for Graves does not establish that the appellant is entitled to a life sentence. This Court has previously recognized that "[p]rosecutorial discretion in plea bargaining with accomplices is not unconstitutionally impermissible and does not violate the principle of proportionality." Garcia, 492 So. 2d at 368; see, Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The appellant in this case was older and larger than Graves, and it was the appellant that provided the plan, the truck, the murder knife, and the physical acts leading to the victims' deaths. It was also the appellant that carried the grudge against

Cracker Barrel.

On these facts, the appellant's sentence is clearly proportional. The court below found three aggravating circumstances: 1) during the commission of a robbery, 2) avoid arrest, and 3) cold, calculated and premeditated. The court gave some weight to the lack of significant history of prior criminal activity and to nonstatutory mitigation of family background/deprived childhood, the disparate sentence of Graves, positive personality traits and the capacity to care for and be loved by children; substantial weight to the cooperation the appellant gave to the police; and little weight to his good employment history, loving relationship with his mother, and appropriate courtroom behavior (R5. 784-790). The imposition of the death penalty is consistent with factually similar cases. See, Stein, 632 So.2d at 1367. Speculation that Graves was the actual killer, specifically rejected by the court below, does not establish that the appellant's sentence must be reduced. The fact that Graves was present and participating in the robbery does not make him equally culpable in the eyes of the law. Since the evidence clearly demonstrates that the appellant was the dominant force behind this homicide, his sentence is warranted.

ISSUE VII

WHETHER THE APPELLANT IS ENTITLED TO BE RESENTENCED ON HIS ROBBERY CONVICTION.

The appellant's final issues challenges the fifteen year sentence imposed on his robbery conviction. He asserts that the inclusion of victim injury points on his sentencing guidelines scoresheet was reversible error, mandating resentencing. However, it must be noted initially that this alleged error has not been preserved for appellate review, since it was never presented to the court below. Furthermore, unless this Court grants relief to the appellant based on his first issue (denial of motion to suppress), there is no reason to consider this issue, as any possible sentences on his first degree murder convictions would render any guidelines scoresheet error harmless since the appellant would be spending more than fifteen years in prison on the murders. Of course, even if this case was remanded for resentencing on the robbery conviction, the trial judge could depart from the guidelines based on the unscored capital convictions.

Even if this issue is considered, no error has been demonstrated. Although Florida Rule of Criminal Procedure 3.703(d)(9) states that victim injuries from capital felonies should not be included on non-capital scoresheets pending for sentencing, that rule also states "This is no way prohibits the scoring of victim injury as a result from the non-capital felonies before the court for sentencing." Thus, the provision that capital

injuries are not scored only relates to scoresheets prepared for non-capital offenses which were not related to the capital crime or which were part of the same criminal episode, but were not the offenses causing the injuries, but happen to be pending for sentencing at the same time. For example, a scoresheet for burglary may not include victim injury points since burglary is not in itself a violent crime. When, as here, the capital and non-capital offenses were part of the same criminal episode, and the force used to commit the capital offense is an element of the non-capital crime, the injuries must be scored as non-capital victim injury.

Since no error has been demonstrated, the appellant is not entitled to be resentenced for his robbery conviction.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert Moeller, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000--Drawer PD, Bartow, Florida, 33831, this _____ day of December, 1997.

COUNSEL FOR APPELLEE