IN THE SUPREME COURT OF FLORIDA

BERNELL HEGWOOD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 72,336

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant, Bernell Hegwood, was the defendant below and will be referred to herein as Appellant for these proceedings. The State of Florida was the plaintiff below and will be referred to herein as Appellee or the State. The record on appeal will be referred to herein as "RA" followed by the appropriate page number in parentheses. The transcript will be referred to herein as "TR" followed by the appropriate page number in parentheses. "AB" will be used to refer to Appellant's Initial Brief.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the statement of the case and facts presented by Appellant with the following exceptions. The salient facts relating to the six issues presented on appeal follow.

I. Facts Pertaining to Points I and II

On Friday, February 5, 1987, the defense rested its case. (TR 2237, 2240). At that time, the defense renewed its motion for mistrial and sought a judgment of acquittal. (TR 2238). The trial court inquired of Mr. Hegwood personally as to whether he and his counsel had discussed whether he, Hegwood, should take the stand and testify. Bernell Hegwood personally informed the court that he had decided not to take the stand and that he had discussed this matter with his counsel. The trial court denied the motion for judgment of acquittal and denied Hegwood's motion for mistrial. (TR 2240). The court reconvened Monday, February 8, 1987, at which time the State commenced presentation of rebuttal evidence. The court again personally inquired of Mr. Hegwood of whether he still was in agreement that he should not take the stand and testify. (TR 2244). At this juncture, the State commenced to call a number of rebuttal witnesses. (TR 2245-2284). No surrebuttal was presented, however, the defense renewed all previous motions. (TR 2285). Closing arguments commenced (TR 2300-2390), and instructions to the jury were given. The jury, prior to deliberating, requested certain pieces of evidence be submitted to them (TR 2432), at which point deliberations commenced .

At this point, defense counsel, outside the presence of the jury, requested a mistrial bottomed on the fact that he had just received information that a witness, Nellie Burgess, came to his attention the day before. Specifically, defense counsel stated that Detective Williams had informed him the morning before that a witness had made initial contact with the State on Friday, three days earlier. Nellie Burgess said that she was driving by Wendy's the day of the murder and saw two males with guns near the restaurant. (TR 2444-2445). She apparently told Detective Walley, who she initially contacted, that she saw an individual with a gun who could have been Bernell Hegwood at approximately 7:15 a.m., the morning of the murder. Defense counsel indicated that during closing arguments he received copies of the police reports and had been informed of this witness earlier in the day. Based on what he believed to be delay tactics by the State, defense counsel requested a **Richardson** hearing to ascertain whether any discovery violations had occurred. (TR 2445). The State concurred that a **Richardson** hearing should take place (TR 2447), however, prior to the commencement of the **Richardson** hearing, the jury sent back word that a verdict had been reached. (TR 2450).

At the **Richardson** hearing, the State first called Michael Walley, a Ft. Lauderdale police officer, who testified that he received a call on Friday, February 5, at approximately 8:00 p.m., from Nellie Burgess. (TR 2457-2460). Upon completion of the call, Officer Walley left his home and returned to the courthouse in an effort to contact State and defense counsel

regarding the call. When he arrived, the trial had adjourned and he finally was able to contact the State Attorney at approximately 11:00 p.m., that evening. (TR 2461). Officer Walley made arrangements for Detective Williams to meet with Nellie Burgess the next evening, Saturday, February 6.

Officer Walley taped the telephone conversation with Nellie Burgess on February 5, which was played for the trial court. (TR 2462). The conversation revealed that Nellie Burgess saw two men near the Wendy's the day of the murder. She was 80% sure she saw guns in both the black men's hands. She described one of the black men as having a slight build about eighteen or nineteen years of age, wearing black sweat pants, a big blue sweater and white sneakers. (TR 2476-2479). The other black man was larger and more muscular with a lighter skin tone approximately twenty years of age. He was wearing white clothing and denim pants. (TR 2479-2480). Ms. Burgess stated the reason she could identify the men was because they ran in front of her car as she drove by the Wendy's. (TR 2483). Although she recognized Appellant when she saw him on television at the time of his arrest in Louisiana, she did not call police until nine months later during the trial. (TR 2485). Ms. Burgess explained she was near the Wendy's that morning because she was trying to find out where they were going to have a Bobby Rydell concert. (TR 2486). She could not remember, however, whether the concert actually occurred the next day or the next week. (TR 2487).

Detective Walley told Ms. Burgess that he was going to contact both attorneys for the State and the defense and that

they would probably want to talk with her. Her telephone conversation concluded approximately 8:30 p.m. on February 5, 1987. (TR 2491).

On cross-examination, Officer Walley testified that he gave a copy of the taped statement to the prosecution at approximately 8:00 or 8:30 a.m., Monday morning, February 8, 1987. He did not contact the defense lawyer earlier because he had no way of knowing how to contact him. (TR 2492-2493).

Detective Robert Williams of the Ft. Lauderdale Police Department next was called and testified that he took a sworn statement from Nellie Burgess on Sunday, February 7, at 8:45 a.m. In her sworn statement, Nellie Burgess stated that on May 23, 1987, she was traveling eastbound at sunrise to check out a concert site when she approached an intersection near the Wendy's in Ft. Lauderdale. She saw two black males, both carrying guns, run in front of her car. (TR 2494-2495). She thought nothing of the incident until she drove by later that morning and saw police surrounding the Wendy's . She stated that she first drove by the Wendy's at approximately 6:45 or 7:00 a.m. She further identified Bernell Hegwood from a photo line-up as one of the individuals who she saw leaving the Wendy's. (TR 2495). When asked, she said she was 98% sure that Bernell Hegwood was one of the individuals she saw leaving the Wendy's. She stated that Bernell looked exactly like the guy except his complexion was lighter and his hair was not knotty. (TR 2496).

Detective Williams first spoke with the State Attorney Monday morning, February 8, 1987, and Mike Satz told him to go

tell defense counsel about the taped statement. At approximately 9:30 or 10:00 a.m., that same Monday morning, Detective Williams told defense counsel of Nellie Burgess' statement and informed him about the photo line-up identification. (TR 2498). On cross-examination, Detective Williams again stated that Burgess told him she was virtually positive Bernell Hegwood was outside Wendy's that morning. Although he did not have his police reports at that time, he later turned over his police reports to the State Attorney and defense counsel. (TR 2500-2501).

The State, during argument at the **Richardson** hearing, explained that, in fact, Nellie Burgess would have been a prosecution witness but for the fact that she had waited nine months between the time of the murder and the time of the trial to come forward and explain what she saw. Moreover, her times were wrong, but the State asserted that her testimony thus far had been that she was 98% sure that Bernell Hegwood was the person she saw. (TR 2505).

The trial court concluded no **Richardson** violation had occurred nor was a mistrial in order. (TR 2506). On February 10, 1987, the day following the **Richardson** hearing, the court again noted that he did not believe that there was a discovery violation nor were Bernell Hegwood's constitutional rights violated. (TR 2507).

In a motion for new trial filed February 15, 1988, defense counsel argued that a new trial should be granted because:

> The court erred in failing to hold an adequate **Richardson** inquiry and denying the defendant's motion for a mistrial based on the testimony of Nellie Burgess who was a

> late witness in the case. Nellie Burgess, during her testimony at the penalty phase, indicated that the defendant was not one of the two men she had seen outside the Wendy's before the murders with guns. The jury never considered her testimony for purposes of deciding a verdict in the case. Defense counsel was told by Detective Bob Williams on Monday, February 8, in the morning, that his witness had identified the defendant as one of the gunmen. Defendant did not receive a transcript at that time and only received a transcript later that day. In fact, Nellie Burgess' testimony was totally different than what Detective Bob Williams had represented and her testimony was material and would have influenced the jury verdict had counsel had adequate opportunity to develop same.

(TR 2997).

II. Penalty Phase - Points III-V

The State did not call any witnesses at the penalty phase of these proceedings. (TR 2532). The defense first called Nellie Burgess. (TR 2532). Ms. Burgess testified that she was a corrections officer for Dade County and that on May 23, 1987, she was driving in the early morning hours in Ft. Lauderdale, Florida. She drove by a Wendy's at approximately 6:45 or 7:00 a.m., because she wanted something to eat. The Wendy's was dark with no lights on inside. At this point, she observed two men running from the general location of the Wendy's and she observed further that they both had weapons. Because they ran right in front of her car, she indicated that she thought they were going to kill her. (TR 2534-2536). She initially contacted the Ft. Lauderdale police on February 5, at approximately 8:00 p.m., and after several conversations with the police she finally gave a sworn statement on Sunday, two days later. (TR 2538). Ms.

Burgess saw two black men, on slender and one muscular, running from the Wendy's. She was 80% sure that she saw guns in both their hands. One was slender which she later identified as being Bernell Hegwood. (TR 2539-2541). She stated, however, that when she saw Bernell Hegwood in person, she did not believe that was the man she saw because, although his facial features were the same, Bernell Hegwood's skin color was much lighter and his fair was different. (TR 2541). When shown the photograph of Bernell Hegwood from two days earlier, she said that was the picture she had seen at the line-up and had identified as one of the men leaving Wendy's. (TR 2542). On cross-examination, Ms. Burgess admitted that she waited nine months before she contacted the police about what she saw. (TR 2544). Ms. Burgess remembered that it was a beautiful day the morning she drove past the Wendy's, the sky was clear and she remembered seeing the red sky at sunrise. (TR 2546). She recalled telling Detective Williams that she was 98% sure that the person she saw was Bernell Hegwood. (TR 2548).

The defense next called Brenda Hegwood, Appellant's aunt. (TR 2553). She testified that she had lived for a while with Bernell and his mother Annie Broadway in Hamilton, Louisiana. She stated that Annie Broadway was not a good mother and she did not show and love towards her children. (TR 2554). She further testified that she never found any drugs around the house and she loved Bernell. (TR 2555). Bernell never complained to her that they were poor nor that they needed money. She further stated that Annie told her that Annie Broadway and Marvin Broadway

(Bernell's brother), would move to California with the reward money. Brenda Hegwood recalled that Bernell would take care of his younger brothers and that Annie Broadway was always out with her friends. (TR 2556-2557).

Mary Davis next testified that Annie was a heavy drinker and that periodically she would get made at Bernell and throw him out of the house. (TR 2562). Although she never saw Annie use drugs she knew that Bernell was ashamed of his mother's behavior. Bernell wanted his mother to shape up. On a number of occasions, Bernell would leave home and go to his grandmother's house. Mary Davis said that she had seen Annie Broadway intoxicated, cursing loudly and acting in a disgusting manner. (TR 2564-2565).

Dr. Glenn Caddy was next called. He was qualified as a clinical psychologist and testified that he had interviewed Appellant on three separate occasions totaling a nine hour period. Although he found Appellant competent and sane, he also observed him for the sentencing portion of Appellant's trial. (TR 2569-2570). Dr. Caddy readily admitted that he was confused about what had happened with regard to the robbery and murder at Wendy's and he felt that in his discussions with Bernell, Appellant was playing games with him. (TR 2574). Dr. Caddy observed that Bernell lived in an environment that was full of dishonesty and manipulation. He observed that Appellant liked to play games with the doctor and that he was unable to break down the walls surround Bernell Hegwood. (TR 2577). Appellant told him that he could not get along with his mother. Dr. Caddy believed that Bernell wanted to be loved but that his

relationship with his mother was profoundly disruptive. Apparently, Bernell also did not get along with his brother Marvin and he spent much of his time trying to keep Marvin out of trouble. Appellant told Dr. Caddy that his mother preferred Marvin to Bernell. (TR 2580-2581). Appellant apparently felt his father was an honorable man but Dr. Caddy observed that there was emotional abuse as a result of the split between Bernell's mother and father. (TR 2584). Bernell told him that his mother started using drugs when he was seven or eight years old. Dr. Caddy observed that all of the dynamics were there to show how to raise a bad child. (TR 2585). He further observed that Bernell was a normal kid except with regard to his mother. Bernell **did not** fit into any psychiatric/psychological profile. (TR 2586). Appellant apparently wanted his mother's love but he did not respect her. (TR 2589).

On cross-examination, Dr. Caddy admitted that he really only spent four to five hours talking with Appellant and he never spoke to any members of Bernell's family prior to the morning of the hearing. (TR 2590-2591). He knew nothing about Appellant's father's background nor could he remember where he lived. (TR 2591). In summary, Dr. Caddy only spoke with family members fifteen to twenty minutes prior to the penalty proceedings and admitted that most of the information he received came from Appellant and the conversations the doctor had with Appellant. (TR 2593). Dr. Caddy did not know nor speak to Appellant's girlfriend, Leontine Haynes, nor did he know that she was pregnant with Appellant's child. He admitted that Appellant

played games with him and never did level with him. Dr. Caddy never spoke to Appellant's mother, Annie Broadway, and he never listened to any of the tapes of Appellant's confessions to the murder. (TR 2595-2597).

Detective Charles Quigley was called and testified that Appellant had no prison disciplinary problems. (TR 2606).

At this point, defense counsel attempted to introduce into evidence statements by Leontine Haynes, Larry Dukes and George Turner. (TR 2609).

Mabel Hegwood, Appellant's aunt, stated that Bernell's mother and father were separated and that Annie had been living with Otto Jones. (TR 2611). Appellant, because of his mother's disinterest, took care of his younger brothers (TR 2614), and although she never saw Annie take drugs, she hung around with a lot of people who did. (TR 2614-2615). She testified that Annie does not tell the truth nor was she a loving mother. (TR 2616-2618). Apparently, she believed Appellant was against drugs and that she loved him. (TR 2620-2621).

Mildred Lloyd, sister to Annie Broadway, said she spoke with Annie Broadway about obtaining the reward and turning Bernell in to the police. She stated that Annie would tell stories and that Beanie, Appellant's nickname, watched out for his brothers when Annie was not around. (TR 2625). Vernell Broadway, Appellant's father, had not seen Bernell in about a year and a half. (TR 2628). He testified that he loved his son and that he did not believe that he could commit these murders. (TR 2631). Rita Broadway, Appellant's step-mother, recalled that Appellant took

care of his brothers and had never known him to do anything harmful. (TR 2633).

Annie Broadway, Appellant's mother, was called by the defense and testified that Bernell was not a bad kid and she did not know what caused this to happen. (TR 2635). On cross-examination by the State, she said she tried to raise her children the best she could and that she had been working since she was sixteen. She divorced her husband in 1983 and that Bernell and his brothers were taken care of by her ex-husband while she was in jail. After prison, the children came to live with her, first Appellant and then Marvin. She admitted that she had a bad drug problem in 1981 and 1982, using uppers and downers and that she tried to get help by going to a rehab center in Hammond, Louisiana. (TR 2637-2638). She admitted that she lived with Otto Jones for a while and he paid the rent. (TR 2637). She admitted that she did not get along with her sisters and said that the family had turned on her since this had happened. This was especially so after she told Mildred about the reward. (TR 2640). Annie Broadway said that she attempted to get the reward to pay Nathan Turner to represent her son. (TR 2641). On redirect, Annie Broadway admitted that her drug problems continued until 1986 and that she sold drugs in Hammond, Louisiana, but not in Ft. Lauderdale, Florida. (TR 2642-2643). Defense was not permitted to ask her any questions about the Sparks murder where she received a reward for turning in her boyfriend. (TR 2645). The court further disallowed the admission of letters between Bernell and his girlfriend or

transcript of Harry Dangerfield's testimony. (TR 2645). The defense admitted Appellant's school records and then rested. (TR 2646-2647).

In rebuttal, the State called Detective Williams who testified that he first became involved in the Bernell Hegwood case on Sunday, February 7, when he met with Nellie Burgess. (TR 2648-2649). Detective Williams showed Ms. Burgess a photo line-up at which time she identified a picture of Bernell and said that that was the skinny person who she had seen leaving the Wendy's the morning of the murder. (TR 2650). Detective Williams testified that he told defense counsel about Burgess and the line-up, Monday morning, February 8, and informed defense counsel of the sworn statement taken of Ms. Burgess. He further informed defense counsel that a transcript would be forthcoming later that day. (TR 2651). No further witnesses were called, however, the taped statement of Nellie Burgess was admitted into evidence. (TR 2658).

The court personally inquired of Appellant whether he had made the decision not to testify at the penalty phase and whether any other witnesses were to be called. (TR 2700). Following deliberations, the jury returned a life recommendation on each of the four counts charged. (TR 2709). Sentencing was postponed until March 29, 1988.

The trial court, in his sentencing order dated that same day, found five statutory aggravating factors, one statutory mitigating factor and no non-statutory mitigating factors applicable. Specifically, the court found that (a) at the time

of the crime for which the defendant is to be sentenced he had been previously convicted of another capital offense; or of a felony involving the use of violence to some person; (b) that the crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission of a robbery; (c) that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest; (d) that the crime was especially heinous, atrocious or cruel; and (e) that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (TR 3006-3008). The trial court found that Appellant's age at the time of the crime was a mitigating factor, however, he observed:

> This mitigating circumstance does apply in this case. However, an analysis of the Florida Supreme Court opinions on this aggravating circumstance would seem to indicate that age alone is not the test of this statutory mitigating circumstance, and that all the circumstances of the offense, and the manner in which it was committed should be considered. With these factors in mind, this circumstance should not apply in this case. The court finds that if this circumstance applies in this case, it clearly does not outweigh the aforementioned aggravating circumstances. See **Cooper v. State**, 492 So.2d 1059 (Fla. 1986); **Deaton v. State**, 480 So.2d 1279 (Fla. 1985).

(TR 1009).

The court further observed that:

> Mercy has been urged because the defendant is but a "child." To that the court would respond, that by employing that definition of "child," Michael Peters and Sharon Reeseman were also but "children" as they were shown no mercy by the defendant. Head shots are not calculated to injure or maim. How can we

ever know the fear or share the terror that Michael and Sharon felt as they were stalked and executed, to forever silence their potential testimony?

As to non-statutory mitigating circumstances, the court has heard testimony from family members and others, as well as the psychologist, Dr. Caddy.

We have heard the unkind things said of the defendant's mother and that the defendant had been a good and obedient child, and had experienced an unfortunate childhood. The mother and others who may have contributed to the defendant's childhood were not, however, on trial here.

Mercy has also been urged because the defendant was subjected to that impoverished, deprived and disturbed childhood, and that he was striking back at a society which impoverished, deprived and disturbed him. To this the court responds, the defendant did not strike back at society, or at those who impoverished, deprived or disturbed him; he struck back at Bill Schmidt, Michael Peters and Sharon Reeseman. People with whom he had worked and who had befriended him.

The court therefore rejects this purported mitigating evidence.

Based upon the preceding opinions of fact and it be the opinion of this court there are sufficient aggravating circumstances existing to justify the sentence of death, and this court after weighing the aggravating and mitigating circumstances, being of the additional opinion that no mitigating circumstances, statutory or non-statutory, exist to outweigh the aggravating circumstances, it is therefore

the sentence of this court, that you, Bernell Hegwood, be sentenced to death . . .

(TR 1009-3010).

III. Motion in Limine Matters - Point VI

The record reflects that the State's motion in limine filed January 26, 1988 (TR 2927-2928), was specifically addressed as to each paragraph. (TR 696-711). Therein, following a lengthy discussion, the court granted the State's motion in limine regarding: whether references should be made to the defendant's lack of any arrest or conviction for a crime; any reference to the juvenile witnesses in this cause; any reference to any arrest of any witnesses not connected with this case; any reference to any alleged drug use or involvement in alleged drug transactions concerning any witness occurring prior to the murders; any reference to any opinion of the witnesses concerning what another witness thinks an individual may have done; any reference to any alleged acts of misconduct prior to the date of the murders; any reference to the characterization concerning any witness as a big time drug dealer; any reference to alleged wrongdoing on the part of any witness at a time distant to the charges in the instant murder, and any references to any charges or investigations, either past or pending, concerning Gary Ciani since Gary Ciani will not be a witness in the State's case in chief. The court deferred ruling on the admission of evidence regarding self-service statements made by Bernell Hegwood; or references to any witnesses having previously been a witness in another criminal matter unrelated to this cause and reference to any characterization of any witness or other person in this cause as a paid informant or an informant.

SUMMARY OF ARGUMENT

The record reflects neither an insufficient **Richardson** hearing or a **Brady** violation occurred at trial thus denying Appellant a fair trial. Based on the testimony of Nellie Burgess, Appellant was also not entitled to the granting of his motion for mistrial or new trial.

Moreover, the trial court did not err in granting the State's pretrial motion in limine. Appellant has failed to sustain his assertion that the trial court abused its discretion in granting said motion.

As to the three issues concerning the penalty of death imposed for the murders of Sharon Reeseman, Michael Peters and William Schmidt, the trial court properly found the murders of each to be cold, calculated and premeditated without any pretense of moral or legal justification. Moreover, the murder of William Schmidt was heinous, atrocious or cruel in that Mr. Schmidt begged for and struggled for his life, but to no avail.

Terminally, based on the five statutory aggravating factors found (three of which are unchallenged), and the one statutory mitigating factor found (age-17), and no non-statutory mitigation, the jury override satisfies the mandates of **Tedder v. State**, 322 So.2d 908 (Fla. 1975).

ARGUMENT

ISSUE I

WHETHER THE SUPPRESSION OF OR UNTIMELY DISCLOSURE OF **BRADY** EVIDENCE DENIED THE APPELLANT A FAIR TRIAL

Appellant first asserts that "because Burgess' testimony was suppressed, or not timely disclosed, and because defense counsel was misled into believing that Burgess' testimony was extremely inculpatory, Bernell's conviction should be reversed in this cause and remanded for a new trial. (AB 47). Appellee disagrees. Even a casual reading of this trial record demonstrates that no **Brady** nor discovery violation occurred.

While couched in terms of a **Brady v. Maryland**, 373 U.S. 83 (1963), violation, the record reflects that at trial and on the motion for new trial filed on Appellant's behalf, the issue was whether there was a discovery violation and whether there was a sufficient **Richardson** hearing with regard to any discovery violation. Whether asserted as a **Brady** or a **Richardson** violation is of no moment, in that, in neither instance a violation occurred. The record reflects that defense counsel was informed of Ms. Nellie Burgess' testimony at approximately 10:00 a.m., Monday, February 8, 1987. The information was provided counsel prior to the recommencement of trial at which time the State was to commence presentation of rebuttal witnesses. Defense counsel was informed that a Nellie Burgess had come forward on Friday, February 5, 1987, when she placed a call to the Ft. Lauderdale Police Department at approximately 8:00 p.m. As a result of her taped telephone conversation with the Ft. Lauderdale police,

arrangements were made for Detective Williams to meet with her on the weekend to further explore her possible testimony. During the weekend she gave a taped statement and identified Appellant as one of the individuals she saw the morning of the robbery near the Wendy's. On Monday morning, prior to the commencement of proceedings, defense counsel was informed of Nellie Burgess' existence and given her telephone number and address. Detective Williams informed defense counsel that Ms. Burgess had seen two black men near the Wendy's at approximately 6:45 to 7:00 a.m., the morning of the murder and that she was 98% sure one of the persons she saw was the defendant, Bernell Hegwood. Later that day, defense counsel received a transcript of Ms. Burgess' sworn statement which revealed that although she selected Bernell Hegwood's picture from a photo line-up, she observed that the person she saw had the same facial features but had darker skin and a different hair style. On Tuesday, February 9, 1987, after the State had ended rebuttal, after renewed motions had been discussed with regard to a judgment of acquittal, after closing argument by both the State and the defense, and after the jury was instructed and sent out to deliberate, defense counsel moved for a mistrial bottomed on the fact that he had **just** received information regarding Nellie Burgess. He demanded a **Richardson** hearing. (TR 2444-2445).

Before the **Richardson** hearing could he held, the jury returned guilty verdicts on all counts. (TR 2451). The jury was then removed and the **Richardson** hearing commenced. Two witnesses were called on behalf of the State, Officer Michael Walley and

Detective Robert Williams of the Ft. Lauderdale Police Department. Each detailed their experience with Nellie Burgess and what they did between February 5, and February 8, 1987. At the close of the State's presentation, the prosecution tendered that one of the reasons why Nellie Burgess was not called on behalf of the State was because she waited nine months between the time of the crime and the trial to come forward. Moreover, the prosecutor indicated that her times were wrong since she claims she saw two men carrying guns near the Wendy's between 6:45 and 7:00 a.m. and, in fact, testimony at trial revealed that Sharon Reeseman had spoken to Roqual Wilkes at 8:00 a.m., Saturday, May 23, 1987 (when Ms. Wilkes called to tell Sharon she would be late for work and was going to wait **until it stopped raining**). (TR 1036-1037).

Appellant has elevated his "insufficient" **Richardson** hearing claim into to a **Brady** violation. As evidenced by a recital of the aforementioned facts surrounding the disclosure of Nellie Burgess' testimony, neither a **Richardson** violation nor a **Brady** violation occurred. In a similarly circumstanced case, **Waterhouse v. State**, 522 So.2d 341 (Fla. 1988), this Court observed:

> Waterhouse alleges that the prosecution violated the requirements of **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose the availability of two possibly exculpatory witnesses until the eve of trial, as well as failing to disclose information which would impeach the credibility of one of the State's chief witnesses against Waterhouse. In the first set of circumstances, the prosecution had in its possession the names of two witnesses who placed the victim, leaving the

> bar on the night of the attack, with another man who had previously been accused of rape. The prosecution was aware of the availability of these two witnesses, but claims not to have known the information they possessed was exculpatory to Waterhouse. He states that when he did become aware of the nature of this evidence, he immediately disclosed it to Waterhouse . . .
>
> In **Brady**, the United States Supreme Court held that the prosecution is required to disclose all evidence that is favorable to the accused. There is no question that this includes evidence which affects a witness' credibility as well as evidence tending to negate the defendant's guilt. **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The court stated that the proper standard for determining a **Brady** violation is whether there is a reasonable probability that the result would have been different. The term reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. See **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3383.

522 So.2d at 342-343.

This Court denied relief on Waterhouse's **Brady** claim finding that there was no such undermining of confidence of the outcome in Waterhouse's case. The court further observed that because Waterhouse had knowledge but declined to act upon that knowledge, there was no showing of prejudice by the "non-disclosure or late disclosure of the information." See also **Cooper v. State**, 336 So.2d 1133, 1137-38 (Fla. 1976); **Zeigler v. State**, 402 So.2d 365, 372 (Fla. 1981), and **Banda v. State**, 536 So.2d 221 (Fla. 1988).

In the instant case, the trial court conducted a **Richardson** hearing and determined that neither a violation of discovery nor harm occurred to Appellant. There has been no showing that the trial court abused its discretion in ascertaining that no violations occurred. In **Antone v. State**, 410 So.2d 157 (Fla. 1982), the court observed:

> The next issue raised concerns a violation of our criminal rules of discovery. We recognize that under Florida Rule of Criminal Procedure 3.220, the prosecutor is required to disclose to defense counsel the names and addresses of all persons known to the prosecutor to have "information which may be relevant to the offense charge, and to any defense with respect thereto." Our rule of discovery is a procedural rule which requires reciprocal action by the defendant as well as the prosecution, and it has been approved by the United States Supreme Court. **Williams v. Florida**, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). The purpose of this procedural discovery rule is to make our criminal justice system more efficient by avoiding multiple adversarial pretrial evidentiary hearings previously used by defense to obtain discovery information.
>
> The issue on this point is whether the failure to disclose the name of a witness Bruns was so prejudicial that it requires a vacation of the judgment and sentence. Although the trial judge found that Bruns' name should have been made known to the defense under our procedural rule, we find that the Appellant was not prejudiced in his defense by the lack of this information. We note that a person making the statement was dead at the time of the trial and that Antone denied at the trial ever having known him. Under the circumstances of this case, we find neither a constitutional violation of the **Brady** doctrine nor prejudice to Appellant by the procedural violation of our discovery rules.

Antone v. State, 410 So.2d at 162.

As well in **Bryan v. State**, 533 So.2d 744 (Fla. 1988), the defendant asserted that the trial court erred in failing to conduct a hearing in accordance with **Richardson v. State**, 246 So.2d 771 (Fla. 1971). After discussing at length facts surrounding the **Richardson** hearing, this Court observed:

> . . . Appellant argues that the trial judge did not conduct an adequate **Richardson** hearing and that he was severely prejudiced

> by the failure of the State to provide the tape. We disagree. The judge inquired fully into the dispute and obviously concluded that the prosecutor had offered the tape to the defendant and that there had been no discovery violation . . .

Bryan v. State, 533 So.2d at 748.

Similarly, in **Duest v. State**, 462 So.2d 446 (Fla. 1985), this Court found that based on the facts contained in the record "the trial judge fully complied with the mandates of **Richardson.** There was no abuse of discretion in the decision of the trial judge to permit the two state rebuttal witnesses to testify." 462 So.2d 448. In **Banda v. State**, 536 So.2d 221, 223 (Fla. 1988), the court found:

> . . . Appellant contends that the State prejudiced the defense by failing to transmit a timely witness list containing the name of a key State witness. The record reveals that the court below conducted a proper inquiry under **Richardson v. State**, 246 So.2d 771 (Fla. 1971), determined that the State's tardiness was inadvertent and found that the State had taken all steps necessary to remedy any prejudice to the defense. We can find no abuse of discretion and must sustain the court below on this issue . . .

See also **Tafero v. State**, 403 So.2d 355, 360 (Fla. 1981), and **Zeigler v. State, supra.**

Based on the foregoing, it is clear the trial court did not abuse its discretion in determining that following a **Richardson** inquiry, no discovery or "**Brady** violation" occurred.

ARGUMENT

ISSUE II

WHETHER THE TRIAL COURT SHOULD HAVE GRANTED A MISTRIAL, OR IN THE ALTERNATIVE A NEW TRIAL SO A JURY COULD CONSIDER THE EXCULPATORY NATURE OF BURGESS' TESTIMONY IN THE GUILT PHASE

During jury deliberations on February 9, 1987, defense counsel informed the court **for the first time** that he had been given information the day before regarding Nellie Burgess' testimony. Although he also received a transcript of her testimony, he argued to the court he did not have an opportunity to fully digest its contents until the next day. As a result, the instant motion for mistrial, based on a discovery violation, was asserted. In the alternative, Appellant also argues that he should have been entitled to a new trial because the "violation" committed was prejudicial to Appellant. Appellee would disagree and submits that as discussed in Issue I on appeal, neither a discovery violation occurred nor did prejudice accrue to Appellant which undermined the integrity of the trial results. Appellant has cited no authority which supports a conclusion that the trial court abused its discretion when he determined that no prejudice resulted.

As an alternative argument, Appellant argues a new trial should have been granted because the testimony of Nellie Burgess had significant impact on the defense. Citing Florida Rule of Criminal Procedure 3.600, Appellant argues that a two-prong test exists to determine whether a new trial should be granted. Specifically, would the "new material evidence probably change

the verdict?", and second, "could the defendant have discovered the evidence with reasonable diligence?" (AB 49).

It is axiomatic that to warrant the granting of a new trial on "new material evidence", it must appear that the new evidence was discovered after trial, the due diligence was exercised to obtain and present it at trial, that it is material to an issue - that it goes to the merits of the case, and that it is not cumulative and therefore would produce a different result. **Harvey v. State**, 87 So.2d 582 (Fla. 1956); **McVeigh v. State**, 73 So.2d 694 (Fla. 1954). Moreover, a trial judge has wide discretion in granting or denying a motion for new trial based on grounds of "newly discovered evidence." Said decision will not be overturned unless there has been an abuse of discretion shown. **Clark v. State**, 379 So.2d 97 (Fla. 1979).

Nellie Burgess' testimony would not have impacted the outcome of the trial. Her testimony, like others presented in behalf of the defendant, was a shotgun attack on the State's case. In light of Appellant's confessions, not only to police but to his family members, and the physical evidence that placed Appellant at the scene of the crime, Nellie Burgess' observance of two black men with guns at 6:45 or 7:00 a.m., presumably on the day of the murder, was negligible. **Francois v. State**, 407 So.2d 885 (Fla. 1981); **Perry v. State**, 395 So.2d 170 (Fla. 1980), and **Clark v. State**, 379 So.2d 97 (Fla. 1979). Relief should be denied. Appellant's reliance on **Jackson v. State**, 416 So.2d 10 (Fla. 3rd DCA 1982), and **Webb v. State**, 336 So.2d 416 (Fla. 2nd DCA 1976), is unfounded. Each are distinguishable from the factual scenario **sub judice**.

Based on the foregoing, Appellant's second point on appeal is groundless.

ARGUMENT

ISSUE III

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE AND IMPOSING THE DEATH PENALTY

Appellant next argues that based on **Tedder v. State**, 322 So.2d 908 (Fla. 1975), and **Fead v. State**, 512 So.2d 176 (Fla. 1987), the trial judge's override of the jury's recommendation of life cannot stand. The record reflects that the trial court found five statutory aggravating factors applicable and one statutory mitigating factor; to-wit: age (Appellant was seventeen years old at the time of the crime), and no non-statutory mitigating evidence. Appellant points to a number of factors from which he draws speculation as to why the jury (presumably in a six-six vote), recommended life. Specifically, he argues (a) that the jury could have considered the treatment accorded accomplices; (b) that the jury could have considered non-statutory mitigating evidence relating to defendant's background and character - specifically, "Bernell grew up in an atmosphere of drunkenness, drug abuse, and deprivation of life's basics, food, clothing and lodging, and that Bernell was a very loving, giving child who was against drugs; and (c) that Appellant could adapt well to incarceration.

Appellant also points to the testimony of Dr. Caddy with regard to Appellant's mental and emotional deficiency based on his upbringing, specifically, because of his mother's conduct. As to each, Appellee would disagree especially in light of this Court's "close jury vote" concept (**Alvin v. State**, ____ So.2d

____, Case No. 71,637, (Decided September 14, 1989)), the jury's recommendation of life does not violate **Tedder**. Based on the facts submitted, the evidence was so clear and convincing the virtually no reasonably person could differ. **Tedder v. State**, 322 So.2d at 910.

The trial judge, in his sentencing order, found:

> As to the statutory mitigating circumstances, only one may be applied to this case, as herein before noted.
>
> Mercy has been urged because the defendant is but a "child." To that the court would respond, by employing that definition of "child," Michael Peters and Sharon Reeseman were also but "children" and they were shown no mercy by the defendant. Head shots are not calculated to injure or maim. How can we ever know the fear and shear terror that Michael and Sharon felt as they were stalked and executed, to forever silence their potential testimony?
>
> As to non-statutory mitigating circumstances, the court has heard testimony from family members and others, as well as the psychologist, Dr. Caddy.
>
> We have heard the unkind things said of the defendant's mother and that the defendant had been a good and obedient child, and had experienced an unfortunate childhood. The mother and others who may have contributed to the defendant's childhood were not, however, on trial here.
>
> Mercy has also been urged because the defendant was subjected to that impoverished, deprived and disturbed childhood, and that he was striking back at a society which impoverished, deprived and disturbed him. To this the court responds, the defendant did not strike back at society, or at those who impoverished, deprived or disturbed him; he struck back at Bill Schmidt, Michael Peters and Sharon Reeseman. People with whom he had worked and who had befriended him.

> The court therefore rejects this purported mitigating evidence.

(TR 3009).

In that same vein, there is no logical way this jury could have voted life because of the treatment accorded accomplices. First of all, there were no accomplices in this case. Hegwood's confessions to the police, his girlfriend, his mother and his brother, all reflect that he **singularly** went to Wendy's the morning of May 23, 1987. Based on a variety of reasons (depending upon which statement one chooses to believe), Appellant admitted that he first shot Michael Peters and then proceeded execution-style to shoot Sharon Reeseman and Bill Schmidt. Clearly, as this Court observed in **Fuente v. State**, ____ So.2d ____, Case No. 69,196 (Decided September 14, 1989), this is not the kind of case where a jury's recommendation could reasonably be based on the apparent disparate treatment accorded accomplices. As noted in **McCampbell v. State**, 421 So.2d 1072 (Fla. 1982); **Brookings v. State**, 495 So.2d 135 (Fla. 1986); **Pentecost v. State**, 545 So.2d 861 (Fla. 1989), and **Caillier v. State**, 523 So.2d 159 (Fla. 1988), disparate treatment accorded equally culpable accomplices could have served as the basis for a jury's recommendation of life. Certainly, a similar result cannot obtain herein by any possible stretch of the imagination.

Appellant points to the fact that the defense provided a number of theories of multiple participants based on the testimony of Steven Paul, David Burke and Nellie Burgess. A review of each of the witnesses testimony reflects that none dealt with the possibility of accomplices but rather the

defense's theory that someone other than Bernell committed the murders. Appellant's logic as to this particular "non-statutory mitigating factor" is fatally flawed. Note: **Marek v. State**, 492 So.2d 1055, 1058 (Fla. 1986).

Appellant also points to his background and character as a basis upon which the jury could have reasoned life was an appropriate sentence. The theory of the State's case was bottomed on an attack against Appellant's mother and brother regarding their character and their conduct. Throughout the trial and the penalty phase, Annie Broadway's maternal instincts were assailed and her sexual "promiscuity" and drug abuse repeatedly mentioned to the jury. In contrast, Brenda Hegwood, Appellant's cousin, said that Appellant took care of his younger brothers. (TR 2556). She could not believe her aunt, Annie Broadway, sought the reward money for turning in Bernell. She noted that Annie was not a good mother nor did she have any love towards her children. (TR 2554). Mary Davis said that Bernell was ashamed of his mother's behavior, and then proceeded to inform the jury that Annie Broadway would get made at Bernell and put him out of the house. She testified that Annie drank and that although she never saw Annie use drugs, she had seen Annie intoxicated, cursing loudly and acting in a disgusting manner. (TR 2562, 2565). Mabel Hegwood, Annie Broadway's sister and Appellant's aunt, told that Bernell's mother and father had separated when he was a young boy and that Annie Broadway lived with other men, in particular one Otto Jones. She testified that Appellant took care of his brothers and that although she never

saw Annie take drugs, she kept bad company. (TR 2611-2614). She also mentioned that she "somehow" knew that Appellant was against drugs. (TR 2620). Mildred Lloyd testified that Appellant was her nephew and that Beanie, Appellant, watched out for his brothers, when Annie was not around. (TR 2625). She detailed how Annie told stories and played games with people. She said Appellant was a good person. (TR 2624). Vernell Broadway, Appellant's father, loved his son and did not believe that he could have killed anyone. (TR 2631). Rita Broadway, Appellant's step-mother, said she had never known Bernell to do anything harmful and that he took care of his brothers. (TR 2633). Even Annie Broadway took the stand and testified that Appellant had never been a bad kid and she just did not know what happened. (TR 2635). She also testified about her drug habit for which she had tried to get help. (TR 2642-2643). On cross, she said that she raised her children the best she could and that she had been divorced from her husband since 1983. She admitted having a drug problem and admitted living with other men. (TR 2638-2639). She further testified that her family had turned on her since the Wendy's murders presumably because she had tried to get the reward money for turning Bernell in. She explained her reason for seeking the reward, was to get money to pay an attorney, Nathan Turner, to assist Bernell in his defense. (TR 2640-2641).

The defense also called Dr. Glenn Caddy, a clinical psychologist, who testified that Bernell was competent and sane at the time of the crime. He saw Appellant on at least three occasions and believed that during those periods of time,

Appellant was playing games with him. (TR 2574). Dr. Caddy testified that Appellant clearly lived in an environment that was dishonest and manipulative. This was evidence by Appellant's continuing to play games with the doctor. (TR 2576-2577). Appellant admitted not getting along with his mother and Dr. Caddy reasoned that Bernell really wanted to be loved but he had a love/hate relationship with his mother which was a "profoundly disruptive relationship." (TR 2580). Appellant apparently did not get along with his brother and Annie Broadway liked Marvin best. (TR 2581). Dr. Caddy summed it all up by testifying that Bernell was a normal kid except when it came to Annie Broadway. Dr. Caddy said that Bernell does not fit into any recognized psychological profile and that in many ways, Bernell acted as a responsible adult. (TR 2586-2589). On cross-examination, Dr. Caddy admitted that he had **not** spoken to any of the family members except for fifteen minutes prior to his testimony at trial. Therefore, all information given him resulted from the four to five hours he actually spent with Appellant. Dr. Caddy knew nothing about Bernell's girlfriend, Leontine Haynes, or the fact that she was pregnant. (TR 2595). He never spoke to Annie Broadway nor did he ever listen to the taped confessions by Appellant. (TR 2596-2597). Most importantly, Dr. Caddy testified that Appellant never levelled with him and continued to play games throughout the four or five hours he spoke with him. (TR 2596).

In coursing through one of this Court's most recent decisions regarding jury recommendation of life and the propriety

of the override, **Cochran v. State**, ____ So.2d ____ (Fla. 1989), 14 F.L.W. 406, it is interesting to note the contrasts between the instant case and that of **Cochran** with regard to whether the trial judge **sub judice** violated **Tedder v. State, supra.** In **Cochran**, the court found a plethora of mitigating evidence to support the jury's life recommendation. Therein, the mitigating evidence showed, due to a long-standing mental deficiency (IQ of 70), "Cochran was likely to become emotionally disturbed under stress and substantially impaired in the ability to conform his conduct to the law." 14 F.L.W. at 407. The court was also impressed with the fact that former teachers testified that Cochran had a history of "crippling emotional problems and a severe learning disability", and that despite this disability, Cochran "wanted to learn to read and was highly motivated in class." Apparently, Cochran evidenced some remorse with regard to the shooting and was confused about the shooting. This was evidenced by Detective Glenn's testimony that "Cochran was crying throughout his statement and appeared remorseful." Moreover, as to family background, apparently Cochran was under great pressure to raise money to support his child. Evidence was tendered that Cochran "was deeply depressed at the time of the murder because the mother of his child had broken off the relationship and had prevented him from seeing the baby."

> Much of this testimony was accepted by the trial court as mitigating evidence. The trial court also properly found that Appellant's age at the time of the crime, eighteen, was a mitigating factor. See §921.141(g), Florida Statutes (1985).

14 F.L.W. at 407.

In contrast, the mitigation relating to Bernell Hegwood can be summed up in one sentence. Bernell Hegwood, a seventeen year old, underprivileged/good person who cared for his younger brothers, was normal in all respects except that he did not get along with his mother and did not like what she did. Balancing this best scenario of mitigating evidence, against the five statutory aggravating factors found, there is no question that the facts "suggesting death" are "so clear and convincing that virtually no reasonable person" could or should differ.

The trial court, mindful of Appellant's age, found this as a statutory mitigating factor but, observed that the weight to be given this mitigating factor should be minimal due to the fact that in many respects, Bernell Hegwood operated as an adult. Note: **Cooper v. State**, 492 So.2d 1059, 1062-63 (Fla. 1986). Moreover, the trial court, in reviewing all of the non-statutory mitigating evidence presented, found that much of the evidence had nothing to do with the nature of the crime or character of the defendant but rather attemptepd to malign Appellant's mother for not being a "good mother." Appellant was normal but for the love/hate relationship with his mother which, Dr. Caddy's own words, did not equate to any recognized psychological maladjustment. Moreover, the court correctly observed that while Appellant may have been the product of an impoverished background, Appellant struck out against the people with whom he worked and co-workers likely to be in his same shoes. The trial court rightfully rejected the non-statutory mitigating evidence.

Just as this court observed in **Cochran v. State**, 14 F.L.W. at 408, that one particular aggravating factor "does not and cannot automatically nullify a jury's life recommendation," it is also true that Appellant's age should not be the overriding factor in reviewing the trial judge's weighing process of the aggravating versus the mitigating evidence at bar. Unlike **Cochran**, Appellant, while youthful, had normal intelligence and acted "normal" for his years. Indeed, evidence reflects that because of his mother's lack of responsibility, Appellant acted more like an adult, in that, he took care of his brothers and had a job and "appeared responsible." It would be error to assess "greater weight" because of Appellant's age to the only statutory mitigating circumstance applicable. See: **LeCroy v. State**, 533 So.2d 750 (Fla. 1988)(17); **Swafford v. State**, 533 So.2d 270 (Fla. 1988); **Eutzy v. State**, 458 So.2d 755 (Fla. 1984); **Garcia v. State**, 492 So.2d 360 (Fla. 1986)(20); **Echols v. State**, 484 So.2d 568 (Fla. 1985)(58), and **Agan v. State**, 445 So.2d 326 (Fla. 1983(54), and **Cooper v. State, supra.**

Appellant also argues that the jury may have considered as mitigating evidence Bernell Hegwood's ability to adapt to incarceration. In those instances where this particular non-statutory mitigating factor became the plausible excuse for justifying the vacation of a jury override, evidence of adaptability was really not the factor but rather, rehabilitation. There is no evidence in this record that Appellant would be anything other than a normal prisoner, based on Dr. Caddy's assessments that Bernell was normal except for his

relationship with his mother. However, there is nothing in this record to reflect that he would be a good candidate for rehabilitation either. **Holsworth v. State**, 522 So.2d 348 (Fla. 1988). See especially **Torres-Arboledo v. State**, 524 So.2d 403 (Fla. 1988) (wherein evidence that the defendant would be an excellent candidate for rehabilitation not so important that reasonable people would give it such weight that it would outweigh the aggravating factors presented).

Terminally, Appellant, in a catch-all paragraph, argues that the jury, in considering any relevant mitigating evidence, could have based the life recommendation on Dr. Caddy's testimony that "Bernell was mentally or emotionally deficient because of his upbringing. Bernell grew up in a family where his mother hated him and where he was consistently the subject of manipulation and dishonesty. Alcohol abuse, use of illicit drugs, and free sex were commonplace." (AB 54). None of the aforementioned circumstances were proven. Dr. Caddy testified based on his conversations with Appellant that Appellant was playing games with him. As this Court has noted in **Hill v. State**, 515 So.2d 176 (Fla. 1987), information directed toward the character of witnesses (Bernell's mother) rather than the defendant himself, should be given little weight or even no weight in ascertaining whether a jury override is appropriate.

Based on the foregoing, the facts **sub judice** "suggesting a sentence of death [are] so clear and convincing that virtually no **reasonable** person could differ." See **Brown v. State**, 473 So.2d 1260 (Fla. 1985).

ARGUMENT

ISSUE IV

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE MURDER OF WILLIAM SCHMIDT WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

Appellant next argues that pursuant to **Maynard v. Cartwright**, 108 S.Ct. 1853 (1988), the statutory aggravating circumstance that the killing was "especially heinous, atrocious or cruel" does not adequately "inform jurors what they must find to impose the death penalty, and as a result leaves the sentencer with the kind of open end discretion which was held invalid in **Furman v. Georgia**, 405 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." (AB 55). Appellee would disagree. Indeed, **Smalley v. State**, ____ So.2d ____ (Fla. 1989), 14 F.L.W. 342, puts to rest any assertion that this particular aggravating circumstance is invalid.

Appellant also argues that it was error for the trial court to find this statutory aggravating circumstance since the jury was not instructed as to this aggravating circumstance. The prosecution agreed that since the jury was not so instructed, the State would not argue to the jury the appropriateness of this aggravating circumstance. In **Cochran v. State**, 14 F.L.W. at 407, this Court opined that:

> Under our law, it was proper for the trial court to take into consideration Appellant's previous conviction in the Arbelaez case, even though that conviction was not presented to the jury. [cites omitted] This circumstance, however, does not alter this court's responsibility to review the sentence under the **Tedder** standard. When the sentencing judge is presented with evidence

> not considered by the jury, the jury's recommendation still retains great weight. Although this court has upheld jury overrides in cases where the trial court had before it evidence in aggravation not considered by the jury, we found in each case that death was imposed consistently with **Tedder.** See **Spaziano; Porter; White.**

Appellee would submit that where the jury was not instructed as to a particular aggravating factor, said factor necessarily is not unavailable to the sentencer, the trial judge. See **Hoffman v. State**, 474 So.2d 1178 (Fla. 1985), wherein the court observed:

> Hoffman also argues that the trial court erred in finding that the murder was especially heinous, atrocious or cruel even though the jury itself was not instructed on this particular aggravating circumstance. We fail to see how the jury's not being instructed on this aggravating circumstance has worked to Appellant's disadvantage and therefore find this argument to be without merit.

476 So.2d at 1182.

Halfheartedly, Appellant also argues that an aggravating factor of heinous, atrocious or cruel was not applicable regarding the death of William Schmidt. Appellant is wrong. The record reflects that two people, Sharon Reeseman and Michael Peters, were killed in an execution-style manner. The third victim, Williams Schmidt, suffered four gunshot wounds. Based on the medical examiner's testimony, one wound was a defensive wound, piercing Schmidt's left forearm. (TR 1333). A second wound, to the back of the skull, was a near contact wound but apparently not fatal. (TR 1334). The third and fourth wounds suffered could have been fatal, one being a non-contact wound to the right cheek of Schmidt's face and a second non-contact wound

to Schmidt's chest. (TR 1324-1327). Based on the facts as Appellant told them, apparently, Appellant entered the office where William Schmidt was located and the Wendy's safe was located and shot Schmidt. Based on his statements to his mother, Annie Broadway, Schmidt begged him not to hurt him but Appellant shot him anyway. Based on the medical examiner's report, Schmidt suffered at least one defensive wound, and based on the crime scene report, a struggle occurred in the office. See **Cooper v. State**, 492 So.2d at 1062 (HAC valid where victims were acutely aware of impending death and were helpless. A gun pointed at the head of one victim misfired; another pleaded for his life).

The trial court, in finding this particular aggravating circumstance applicable as to Mr. Schmidt's murder, observed:

> This aggravating circumstance does apply in this case as to the murder of William Schmidt, as the defendant indicated in a statement to his mother that William Schmidt begged for his life prior to his being executed by the defendant. See **Jones, supra; Parker v. State**, 476 So.2d 134 (Fla. 1985).

(TR 3008).

This Court observed in **Blanco v. State**, 452 So.2d 520, 526 (Fla. 1984), that the aggravating circumstance of heinous, atrocious or cruel applies to "those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or pitiless crime which is unnecessarily torturous to the victim."

In the instant case, as in **Parker v. State**, 476 So.2d 134 (Fla. 1985); **Zeigler v. State**, 402 So.2d 365 (Fla. 1981); **White**

v. State, 403 So.2d 331 (Fla. 1981), see also **White v. Wainwright**, 632 F.Supp. 1140 (S.D. Fla. 1986), **aff'd**, 809 F.2d 1478, **cert. denied**, 108 S.Ct. 20 (1987); **Huff v. State**, 495 So.2d 145 (Fla. 1986); **Phillips v. State**, 476 So.2d 194 (Fla. 1985); **Roberts v. State**, 510 So.2d 885 (Fla. 1987), and **Jones v. State**, 411 So.2d 165 (Fla. 1982) (where this Court upheld HAC where a defendant ignored the pleas to be spared by the victim and shot him at point-blank range, execution-style), the finding by the trial court that the aggravating factor of heinous, atrocious or cruel was applicable to the case **sub judice** is valid.

There can be no mechanical litmus test for determining whether this aggravating circumstance is applicable, because it is not merely the specific and narrow method in which the victim is killed that makes a crime heinous, atrocious or cruel. Rather, the entire set of circumstances surrounding the murder should be viewed. **McGill v. State**, 428 So.2d 649 (Fla. 1983). This Court has observed in **Phillips v. State**, 476 So.2d 194, 196 (Fla. 1985), that the mindset or mental anguish of the victim is an essential and important factor in determining the application of this factor. However, the helpless anticipation of impending death need **not** go on for hours. See **Clark v. State**, 443 So.2d 973, 977 (Fla. 1983); **Routly v. State**, 440 So.2d 1257 (Fla. 1983), and **Scott v. State**, 494 So.2d 1134 (Fla. 1986). In the instant case, William Schmidt pled for his life and struggled for his life. As in **Jones, supra**, the trial court's finding that this murder was heinous, atrocious or cruel is justified.

Appellant's sole reliance on the case of **Amoros v. State**, 531 So.2d 1256 (Fla. 1988), is misplaced. In **Amoros**, this Court found that the aggravating factor heinous, atrocious or cruel was not applicable where the defendant did not know the victim and shot the victim two minutes after entering the premises. The victim was probably not the target of Amoros because he went there to confront his girlfriend who just happened to be staying with the victim.

Based on the foregoing, Appellee would urge this Court to affirm the finding of heinous, atrocious or cruel in the instant case.

ARGUMENT

ISSUE V

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER

Appellant next argues that the murder were not committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. A review of Appellant's confessions wherein he admits to the murders reflects that (even if you believe that he "accidentally" killed Michael Peters in the bathroom), he said he had to shoot Bill Schmidt and Sharon Reeseman because they would know what he had done. The instant case represents cold, calculated and premeditated execution-type killing, and the trial court so found:

> This aggravating circumstance does apply in this case. The physical evidence and the defendant's own statements indicate that following the initial murder, he sought out all witnesses and executed them. The victims in this case were coworkers of the defendant who were executed merely because they had the misfortune to have had come to work on time on May 23, 1987, and to have been at there place of employment when the defendant committed an armed robbery of the restaurant. Having been unfortunate enough to be present at the time the defendant sought to rob the Wendy's for whom he worked, they were then gunned down and executed in a cold, calculated and premeditated manner by the defendant, and most certainly without any pretense of moral or legal justification whatsoever.

(TR 3008).

Indeed, Dr. Dominguez's medical report reflects that as to Sharon Reeseman and Michael Peters, they were murdered execution-style, one bullet to the back of the head. The record also

reflects that Appellant went to the restaurant armed with his brother's gun. His girlfriend testified that the night before the murder, Appellant was playing with a gun, practicing loading and unloading it. The record also reflects that the weapon carried five rounds and in fact, based on the number of gunshot wounds fired in the restaurant, Appellant had to reload the gun between shootings. This case is clearly distinguishable from **Rogers v. State**, 511 So.2d 526 (Fla. 1987), especially where, as here, there was advance procurement of the weapon, there was lack of resistance or provocation and the killings were carried out as a matter of course-execution style. See **Swafford v. State**, 533 So.2d 270, 277 (Fla. 1988); **Remeta v. State**, 522 So.2d 825 (Fla. 1988) (defendant planned robbery in advance and planned to leave no witnesses); **Melendez v. State**, 498 So.2d 1258 (Fla. 1986); **Jackson v. State**, 498 So.2d 406 (Fla. 1986); **Huff v. State, supra; Dufour v. State**, 495 So.2d 154 (Fla. 1986) (defendant's announcement of an intent to commit murder and a subsequent execution-style shooting sufficiently established an aggravating factor); **Kokal v. State**, 492 So.2d 1317 (Fla. 1986), and **Burr v. State**, 466 So.2d 1051, 1054 (Fla. 1985) (where the court observed that the trial judge's finding that the defendant had a pattern of shooting store clerks during commission of robberies and that the position of the victim's body, indicated that victim was shot in the back of the head while kneeling down, supported the conclusion that the murder was committed in the manner of an execution), **Eutzy v. State, supra**, and **Cooper v. State**, 492 So.2d at 1062.

The authorities cited by Appellant are either not applicable or reliance is misplaced. For example, in **Hamblen v. State**, 527 So.2d 800 (Fla. 1988), Hamblen stated that he was only in the store to rob and that when the victim set off a silent alarm he got mad and shot her. Pursuant to **Rogers v. State, supra**, this particular aggravating factor was inappropriate therein. In **Fitzpatrick v. State**, 527 So.2d 809 (Fla. 1988), while Fitzpatrick had a well though out plan as to how he was going to rob a bank, his plans were to use his hostages as a means of escape, he apparently never intended to murder them.

The murders of William Schmidt, Sharon Reeseman and Michael Peters, beyond a shadow of a doubt, were cold, calculated and premeditated. Based on the foregoing, the trial court's finding that the murders were committed in such a manner.

ARGUMENT

ISSUE VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, ANNIE BROADWAY

Lastly, Appellant argues that the trial court erred in limiting the scope of cross-examination of Annie Broadway. Specifically, what he sought to elicit was testimony unrelated to "one of the most infamous mass-murders in South Florida history." (AB 61). The State, pretrial, filed a Motion in Limine to restrict testimony regarding prior criminal conduct of Annie Broadway, in particular her drug usage or whether she was a drug dealer, whether she was a paid informant for the police and any misconduct she may have performed prior to this murder. Appellee would submit, based on the record that was presented with regard to Annie Broadway's drug use, her reputation for truthfulness, whether she was a good mother, whether she was of loose moral character, whether she had been involved as an informant, and other matters which would fall within the motion in limine, any restriction was harmless error if error at all.

In **Coxwell v. State**, 361 So.2d 148, 152 (Fla. 1978), the court held:

> Our conclusion here should not be construed to suggest that the scope of cross-examination is wholly without bounds, nor that a discretionary curtailment of the inquiry before it exceeds those limits can never be harmless error if no prejudice can be demonstrated. We only hold that where a criminal defendant in a capital case, while exercising his Sixth Amendment right to confront and cross-examine the witnesses

> against him, inquiries of a key prosecution witness regarding matters which are both germane to the witnesses testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error . . .

While limitation on cross-examination must be carefully guarded, cross-examination is not unrestricted and the relevancy of the limitation is important. Moreover, unless there is a demonstration that the trial court, in exercising his discretion, abused it, the ruling will stand. **Maycock v. State**, 284 So.2d 411 (Fla. 3rd DCA 1973); **Nelson v. State**, 395 So.2d 176 (Fla. 1st DCA 1980). Moreover, where cross-examination is sufficient to explore a witnesses credibility with regard to the limited cross-examination materials, any error perceived will be deemed harmless error. **Duncomb v. State**, 237 So.2d 86 (Fla. 3rd DCA 1970); **Ackerman v. State**, 372 So.2d 215 (Fla. 1st DCA 1979); **Hansborough v. State**, 509 So.2d 1081 (Fla. 1987); **Morgan v. State**, 415 So.2d 6 (Fla. 1982), and **Antone v. State**, 382 So.2d 1205 (Fla. 1980).

Finally, in **Steinhorst v. State**, 412 So.2d 332, 337-339 (Fla. 1982), this Court, in minute detail, discussed the limitations therein of cross-examination of a state's witness. One of the reasons cited dealt with the fact that much of the information sought to be elicited through cross-examination was material substantially put to the jury through other witnesses. The court further noted:

> . . . while the defense had the right to question Capo as to the whole of the conversation he spoke of on direct examination, [cites omitted] and as to the

> factual background of the conversation, to question him generally about his role in the marijuana smuggling operation would have been to engage in a general attack on his character. Direct examination had pertained to the conversation and had touched on the background and the occasion for it, but the court below was correct in preventing the cross-examination from either going beyond the scope of direct or becoming, under the guise of impeachment, a general attack upon the character of the witness.

412 So.2d at 338.

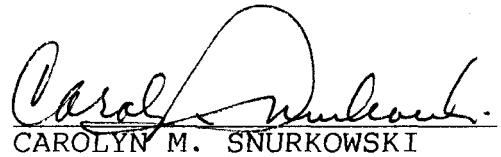
Based on the foregoing, Appellee would submit that Appellant has demonstrated no error with regard to the State's motion in limine granted pretrial. Appellant's assertion that "the real Annie Broadway should have been exposed to the jury," was a general attack as to Annie Broadway and not relevant to the fact that Appellant confessed to the murder to her and in said confession stated that Bill Schmidt begged for his life. Having cited no compelling authority, Appellant's assertion is without merit.

CONCLUSION

Based on the above argument and citations of authority, Appellee would respectfully submit that this Honorable Court should affirm the judgments and convictions in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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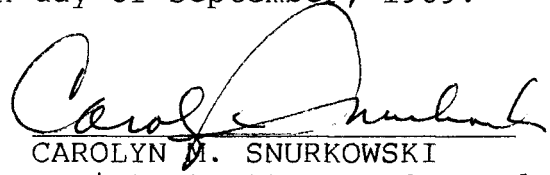
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. H. Dohn Williams, Jr., Esq., Post Office Box 1722, New River Station, Ft. Lauderdale, Florida 33302, this 19th day of September, 1989.



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