64 pages

IN THE SUPREME COURT OF FLORIDA

BERNELL HEGWOOD,

Appellant/Defendant,

vs.

STATE OF FLORIDA,

Appellee/Plaintiff.

_____/

CASE NO. ~~77~~ 72,336
Circuit No. 87-10559CF

APPELLANT'S INITIAL BRIEF

A Death Penalty Appeal from the Circuit Court of the Seventeenth Judicial Circuit, Honorable Thomas M. Coker, Jr.

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PRELIMINARY STATEMENT

The Appellant, BERNELL HEGWOOD, was the Defendant is a criminal prosecution in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida. The Appellee is the State of Florida. In this brief the parties will be referred to as: the Appellant will be referred to as Bernell, and the Appellee will be referred to as the State, prosecution or prosecutor. The record will be referred to by volume and page number.

STATEMENT OF THE CASE

The Appellant, BERNELL HEGWOOD, herein appeals his conviction, judgment, and sentences for three counts of first degree murder and one count of robbery with a firearm. (Vol. 15, p. 2985-2989) Bernell was represented by Carlos Rodriguez, as Special Public Defender, and the State was represented by State Attorney Michael J. Satz. After a trial by jury, Bernell was convicted of three counts of first degree murder and one count of armed robbery. The jury returned an advisory sentence as to each of the three counts of first degree murder. As to each count, the jury recommended a sentence of life imprisonment without possibility of parole for 25 years. (Vol. 15, p. 2951-2954) Bernell's motion for judgment of acquittal after verdict, motion for new trial, and motion for arrest of judgment after verdict were denied. (Vol. 15, p. 2995-2998, 3000) The trial court overrode the jury's recommendation. Bernell was sentenced to death as to each of the three counts of first degree murder. As

to the offense of armed robbery, he was sentenced to life in prison consecutive to the three death sentences. (Vol. 15, p. 2991-2994)

STATEMENT OF THE FACTS

Motion to Suppress Statements

On Saturday, May 23, 1987, homicide detectives Walley and Ciani went to the scene of the murders, a Wendy's restaurant located at the corner of Sunrise Boulevard and N.E. 4th Avenue, Fort Lauderdale. (Vol. 1, p. 142-143, 191) They saw the three victims, William Schmidt, the manager, Michael Peters, and Sharon Reeseman, employees, dead from gunshot wounds. Schmidt's body was found in his office. Peters' body was found in the men's restroom, and Reeseman's body was found in the women's restroom. The Wendy's restaurant remained closed pending the murder investigation.

Three days after the murders, the owners of the restaurant called a meeting of the employees to discuss re-opening the restaurant. The police had no clues as to the perpetrator(s). Fingerprints had been found inside the restaurant. In an effort to identify the fingerprints, Detectives Walley and Ciani wanted to obtain fingerprints from the employees. They attended the employees' meeting and asked the employees to voluntarily submit to fingerprinting. (Vol. 1, p. 144-193) With a computer printout of the employees supplied by the owners, role was taken. They were given a fingerprint card, instructed to sign the card, and to take it to the

technician to be fingerprinted. Bernell was given a card; however, he walked toward the door. Walley stopped him. Bernell said, "I can't be fingerprinted because my card is destroyed." Walley gave him a new card and he was fingerprinted. (Vol. 1, p. 145-146, 194)

The next day, Ciani received a call from a road patrol officer who said that "Beverly Williams" wanted to talk to him about the Wendy's murders. He agreed to meet with her. However, when he arrived at the prearranged meeting place, he realized that "Beverly Williams" was really Annie Broadway, a Wendy's employee. (Vol. 1, p. 149) She was very upset. She said that she had something to tell him. She said her son, Bernell, had admitted committing the murders and robbing the restaurant. She did not want Bernell harmed. She wanted to remain anonymous. (Vol. 1, p. 150-151)

Ciani took Annie to the police station where she gave a sworn statement. Based upon her sworn statement, Ciani and Walley obtained an arrest warrant. (Vol. 1, p. 195) Ciani began looking for Bernell. Marvin Broadway, Bernell's brother, told Ciani that Bernell had taken the bus to Hammond, Louisiana. (Vol. 1, p. 152)

That same evening, Sgt. Dykes of the Hammond Police Department received a telephone call from Bernell's aunt, a local resident. She said that Annie had called stating that Bernell was traveling to Hammond by bus and was armed and dangerous. Sgt. Dykes was called because he is Bernell's uncle and has known him since birth. (Vol. 1, p. 110-111) Sgt. Dykes also received a teletype from the Fort Lauderdale Police Department

requesting that Bernell be arrested.

The Hammond police learned the bus Bernell was riding would arrive later that evening. The bus was surveilled into the city. (Vol. 1, p. 112) When the passengers got off the bus, Sgt. Dykes identified Bernell. Bernell was told to lay face down on the ground. As Bernell lay on the ground, he was frisked, hand-cuffed, and advised of his Miranda warnings. (Vol. 1, p. 113-114) Sgt. Narretto of the Hammond Police Department transported him to the police station. He had no conversation with Bernell while in transit. (Vol. 1, p. 129-130) At the police station, as part of the booking process, he orally advised Bernell of his Miranda warnings and filled out a written advisement of rights form. (Vol. 1, p. 132)

Ciani and Walley arrived in Hammond the next afternoon. First, they interviewed Leontina Haynes, Bernell's girlfriend. (Vol. 1, p. 154) Walley and Ciani, accompanied by Lt. Raacke of the Hammond Police Department, took Bernell to an empty courtroom to interview him. A written Miranda warnings form was executed. (Vol. 1, p. 157) Walley took a taped statement which lasted approximately 17 minutes. After the tape was turned off, Walley told Bernell that he was lying. (Vol. 1, p. 160, 205-208) Walley told Bernell that he had spent a considerable amount of time investigating the murders. He told Bernell that he had talked to his mother, Annie, and to Leontina. Bernell hung his head down and sat quite for a few minutes.

He talked to Bernell even though he received no verbal response from him. Walley said he would have talked to him for

ever how long it took for him to give a statement. Bernell doubted that Walley had talked with his mother. Walley showed him a portion of the transcript of his mother's statement. (Vol. 2, p. 234-235) He told him that shoe prints had been found inside the restaurant which he felt would match his shoes. He told Bernell these things to convince him to tell the truth. (Vol. 2, p. 224) Walley was aware that Bernell had been detained for 16 hours and not allowed to speak with his family before he interviewed him. (Vol. 2, p. 213)

Walley asked him if had used Marvin's gun to commit the murders. He said, "Yes." Walley asked him what happened. Bernell gave an oral statement which was <u>not</u> tape recorded. Bernell was emotional, upset, and crying during the oral statement.

After giving the oral statement, Bernell was emotionally drained. A crowd of news media personnel had gathered outside the courtroom. A decision was made to move Bernell to a quite location. (Vol. 1, p. 165-169; Vol. 2, p. 210) As they were leaving the courtroom, Bernell grabbed Walley. He said, "I'm sorry. I didn't mean to do it. Please don't let them hurt me. Don't let them kill me." (Vol. 2, p. 211) Walley put his arms around him. He asked Bernell what he meant. Bernell said he didn't want the people in the jail, police officers or anybody to kill him for what he had done. They sat down for a few minutes until Bernell calmed himself. (Vol. 2, p. 211)

Bernell was moved to the detective division for the purpose of taking a second tape recorded statement. Bernell said

he wanted to talk to his mother before giving the second tape recorded statement. (Vol. 2, p. 212, 233) An attempt was made to reach Annie, but she was not at the motel where she was staying. Bernell spoke with his brother, Marvin.

During the second tape recorded statement, Bernell's voice was very subdued. He did not sound the same as he had on the first tape recorded statement. (Vol. 2, p. 237-238)

The next day, Sgt. Dykes was telephoned at home by Detective Giannobolie of the Hammond Police Department. He wanted Dykes, Bernell's uncle, to intercede so that Bernell would give a statement. Dykes went to the police station. Present were Detectives Walley and Ciani, Bernell's attorney, Michael Nunnery, and Bernell. Bernell gave a third tape recorded statement. (Vol. 1, p. 117-118) His attorney, Nunnery, admonished him to tell the truth. Bernell said he was scared and afraid what would happen if the truth came out. Bernell then gave his statement implicating his mother, Annie, in the murders. (Vol. 1, p. 123-125)

The trial court denied the motion to suppress statements. (Vol. 2, p. 245)

Motion to Dismiss Re: Prosecutorial Misconduct

The defense moved to dismiss the case on the grounds of prosecutorial misconduct stemming from an allegation that a witness who gave testimony favorable to the defense was pressured to change his testimony. (Vol. 15, p. 2891-2893)

David Burke is employed at an insurance company next door to the restaurant. He gave an oral discovery deposition

concerning what, if any, knowledge he had about the events before the murders. On the morning of the murders, he arrived at work at approximately 7:00 a.m. As he parked his car, he saw a black man and a white man having a conversation at the rear of the restaurant. He said he believed he saw Schmidt, the manager, standing at the back door. (Vol. 2, p. 256-258) After making this statement at the deposition, the State Attorney asked Walley to re-interview Burke. (Vol. 2, p. 256) Walley contacted Burke the day after his deposition. Burke changed his testimony to say he was not sure whether he had seen Schmidt. (Vol. 2, p. 260) (emphasis added)

At the evidentiary hearing, Burke acknowledged several times during his deposition that he had said he had seen Schmidt at the back door of the restaurant talking to two individuals, a white male and black male. (Vol. 2, p. 265) Burke remembered that when he arrived at work he saw Schmidt at the back door with a black man and a white man. The afternoon of the murders, the police took a statement from him at his home. After the police took his statement, he could not remember whether he had told them he had seen Schmidt at the door. Burke said he could not be 100% sure that he had seen Schmidt that morning, but to the best of his recollection he had. (Vol. 2, p. 268-270)

Walter LaGraves, Chief Investigator of the State Attorney's Office, was with Walley when he re-interviewed him. Burke was simply unsure as to whether he had seen Schmidt the morning of the murders. (Vol. 2, p. 273) Detective Magnifesta of the Fort Lauderdale Police Department interviewed Burke the

afternoon of the murders. Magnifesta asked Burke whether he had seen Schmidt that morning. He replied, "No." (Vol. 2, p. 276-279)

The defense argued that the case should be dismissed on the grounds of prosecutorial misconduct because of the pressures put on Burke to change his testimony. Burke's testimony was favorable to the extent that it placed two other persons, neither of them matching the description of Bernell, at the scene shortly before the murders. The trial court denied the motion. (Vol. 2, p. 284)

State's Case-In-Chief

Wendell Nunez, the assistant manager of the restaurant, closed the restaurant the night before the murders. The floors were scrubbed after closing. He collected the money and put the Friday night receipts in a bank bag inside the safe. He did not work the next day. (Vol. 6, p. 1120-1129)

Roqual Wilkes worked at the restaurant and had been on a leave of absence. The night before the murders, she telephoned Nunez and asked if she could start back to work. He told her to come in the next morning at 8:00 a.m. Because it was raining Saturday morning, she was late to work. She arrived at about 9:45 a.m. and saw other employees sitting outside the restaurant. Marvin Broadway, Bernell's brother, arrived at the restaurant. After sitting outside the restaurant for a while, the employees got into a car and drove around. When they returned to the restaurant, it was still not open. She was with the group of employees who flagged down the police. (Vol. 6, p. 1033-1043)

Latonya Rozier was scheduled to work at the restaurant that morning. She woke up late and telephoned the restaurant at 9:20 a.m. to tell them she would be late. There was no answer. When she arrived at the restaurant, her co-workers were sitting outside the restaurant. She and the others knocked on the windows but there was no response. She drove around with the other workers in an employee's car. When they returned and saw the restaurant still not open for business, they flagged down the police. (Vol. 5, p. 918-928)

Patrol officers Narducci, Foulstick, and Grassi went to the restaurant. They entered the restaurant and discovered the three bodies. They secured the premises to await personnel from the detective division and the crime scene investigation division. (Vol. 4, p. 774-792)

Detectives White, Hirsch, Hill, Kutten, and Doughty processed the crime scene. (Vol. 5, p. 936-944, 958-961, 971-972; Vol. 7, p. 1365-1372, 1383-1409) The most significant evidence was retrieved by Hill. He processed the floor for shoe prints. Using fingerprint powder, he dusted the floor. A number of shoe prints were revealed, which he photographed. (Vol. 7, p. 1385) He found a shoe print on the cover of a vinyl notebook, and a shoe print on a box of scouring pads. He preserved the prints by spraying them with clear acrylic. (Vol. 7, p. 1385-1395) Later, after Florida Department of Law Enforcement shoe print expert, Earnest Hamm, had identified some of the shoe prints, he returned to the restaurant. He and Hamm re-enacted the shoe print patterns by placing life size photographs on the floor. (Vol. 8, p. 1408-1409)

Three days after the murders, the owners of the restaurant scheduled an employees meeting at the restaurant to discuss re-opening the restaurant. Nunez, the assistant manager, went to Bernell's house the day before the meeting to tell Bernell, Annie, and Marvin about the meeting. Bernell did not act unusual. In fact, Bernell showed him where some of other employees lived. (Vol. 6, p. 1175-1179)

Detective Walley attended the employees' meeting. He asked the employees to voluntarily submit to fingerprinting to assist the police in identifying fingerprints found at the scene. While the employees were being fingerprinted he saw Bernell walk out the door. He asked where he was going. Bernell showed him his fingerprint card which was crumbled. Bernell said he could not be fingerprinted because he card was bent. Bernell was given another card and fingerprinted. (Vol. 9, p. 1681-1692) Annie and Marvin were fingerprinted. (Vol. 6, p. 1156) Bernell told Nunez that he was in a hurry to leave, because he had an interview for another job. He told Nunez that he wanted to be fingerprinted first so he could leave for the interview. (Vol. 6, p. 1157-1159) The last time that Bernell had worked at the restaurant was two days before the murders. He had gone home sick with the flu. (Vol. 6, p. 1175)

The day after the employees' meeting, Nunez went to Annie's house to see if she was coming back to work. Annie and Marvin were at the house. Annie got into his car. As they drove around she told him that Bernell had robbed the Wendy's. Nunez telephoned the detectives to verify her statement. When they

verified that she had spoken with them, he drove her home. (Vol. 6, p. 1180-1182)

None of the workable latent fingerprints were identified as Bernell's. (Vol. 8, p. 1460-1480) The physical evidence found at the murder scene connecting Bernell to the scene was the shoe print evidence. Hamm, the Florida Department of Law Enforcement court qualified footwear expert, examined the shoe print evidence. In excess of 50 shoe prints were found at the scene. Hamm opined as follows:

(1) that the shoe print found on the scouring pad box was made by the shoe Bernell was wearing when he was arrested;

(2) that the shoe print on the cover of the vinyl notebook was made by the shoe that Bernell was wearing when he was arrested; and

(3) that three other shoe prints found in the working area of the restaurant were made by the shoe that Bernell was wearing when he was arrested. (Vol. 10, p. 1971; Vol. 11, p. 2004-2005, 2013, 2024)

The vinyl notebook and the scouring pad box were found in or about the office where Schmidt's body was found. Hamm identified 58 footprints as being made by a Converse shoe. Forty-one of the 58 shoe prints could have been made with Bernell's shoe, or another shoe from the same mold. (Vol. 11, p. 2024)

Dr. Dominguez, the associate medical examiner opined as follows:

(1) that Schmidt died of multiple gun shot wounds;

(2) that Peters died of a result of a gun shot wound to the right forehead and that the gun was fired about an inch from his head; and

(3) that Reeseman died from a gun shot wound to the

head and that the gun was about an inch from her head when it was fired.
(Vol. 7, p. 1316)

Concerning the proceeds from the robbery, the State introduced the following evidence When Bernell was arrested the police seized a partial roll of nickels, a pound of marijuana, $52.00 in U.S. Currency, and a box containing jewelry. The wrapper on the roll of nickels was identified as being the same kind used by Barnett Bank where the restaurant had its account. (Vol. 6, p. 1053, 1108, 1110, 1116) The street selling price of the marijuana was estimated at $750.00 to $1,000.00. (Vol. 7, p. 1345-1349) The day Bernell left for Hammond he and Morris Grim bought $200.00 worth of "crack" cocaine. Bernell paid for it with $20.00 bills. Bernell showed Grim the pound of marijuana which he said he bought for $600.00. (Vol. 6, p. 1008-1017)

The payroll manager for Wendy's introduced business records which reflected that Bernell started to work on March 16th and worked a total of 50 days. The last check he received was May 15th. When he left for Hammond, he was owed $153.00. He earned a total of $833.82 working for Wendy's. (Vol. 7, p. 1304-1311) Robert Moorman, a jeweler, valued the jewelry Bernell purchased the day of the murders at in excess of $225.00. (Vol. 9, p. 1622-1625) The State contended that Bernell had not earned enough money to pay his rent and buy the "crack" cocaine, marijuana, clothing, and jewelry.

Dennis Grey, a Broward County Sheriff's Office firearms expert, examined Marvin's gun and determined that it was operable. He opined that the bullets removed from the deceased bodies were the same type that the pistol would fire. However,

he was unable to make an exact match. (Vol. 9, p. 1641-1650)

Leontina Haynes:

In April, 1987, Haynes, Bernell's girlfriend, came from Hammond to live with Bernell. She and Bernell shared a room at Glen Hegwood's house. Glenn is Bernell's uncle. Annie and Marvin also lived at the house. (Vol. 5, p. 804-810)

The morning of the murders, she and Bernell woke up around 6:00 a.m. Around 7:00 a.m., she feel asleep on the couch. Around 9:00 a.m. Bernell woke her up and told her to call her mother. She went to the pay phone at the convenience store across the street. She telephoned her mother. When she returned, she saw Annie coming out of Glenn's room. Bernell told her to call her grandmother. She returned to the store and called her grandmother; however, her grandmother was not home so she spoke to her uncle. She discussed coming back to Hammond. These calls were corroborated by telephone company records. (Vol. 5, p. 811-817; Vol. 7, p. 1301)

When she returned, Bernell told her he had something to tell her that she would find out about sooner or later. She said she didn't want to know. He said he was going to tell her anyway. He took her to their bedroom and showed her the money. He said he robbed Wendy's and shot three people. After Schmidt opened the safe, he told Schmidt he was sorry and shot him. He then went to the bathrooms and shot Peters and Reeseman. She saw the money in a bank bag and Marvin's gun lying on the table. (Vol. 5, p. 819-822) He cautioned her not to tell anyone.

Marvin went to work that morning. When he returned, he said three people had been shot. This was the first time she had heard about the shootings other than from Bernell. (Vol. 5, p. 827)

That afternoon, she and Bernell went shopping. He bought her jewelry and clothing. He bought jewelry and clothing for himself. (Vol. 5, p. 829)

On Tuesday, 3 days after the murders, they packed and left for Hammond. Bernell packed his clothes in a blue duffel bag. (Vol. 5, p. 834-836) When the bus stopped in Alabama they telephoned Marvin. Marvin told Bernell the police were looking for him. Bernell told Leontina he didn't want to be killed by no white man, but did not explain what he meant. (Vol. 5, p. 839-840)

On cross examination, she admitted to numerous lies in her five earlier sworn statements. She accounted for her lies by explaining that she had epilepsy which effected her memory, that she was scared, and that she did not want to be involved. (Vol. 5, p. 864-870) She admitted to being pregnant with Bernell's baby. (Vol. 5, p. 846)

On cross examination she admitted that before the murders Bernell had won money from Annie and Marvin in a card game. Before the murders, Annie bragged about stealing money from the cash register. Annie talked about robbing Wendy's and taking money from the safe when it was open. (Vol. 5, p. 883-885) (emphasis added)

On cross examination she said that Annie did not like

Bernell and had often said that she wished he had never been born. Annie loved money more than anything. She and Bernell often quarreled. (Vol. 5, p. 887-891)

On cross examination she admitted that the morning of the murders Marvin was smoking "rock" cocaine with a white female she described as a "hippie". The first time she saw Annie that Saturday morning was after the murders had been committed, and Annie was "high". (Vol. 5, p. 895-898)

Marvin Broadway:

At the end of April 1987, Marvin traveled from Hammond to Fort Lauderdale to live with his uncle, Glenn Hegwood, Annie, Bernell, and Leontina. The morning of the murders, Bernell woke him up and said he had killed three people. Bernell showed him a bucket with Wendy's writing on it containing money. Bernell had Marvin's gun which he had purchased a short time before for $50.00. (Vol. 7, p. 1204-1207) Marvin took the gun and hid it in the backyard. Bernell paid him $50.00 for use of the gun. (Vol. 7, p. 1212-1218) Bernell said that when he shot Schmidt, the body was jumping around like he did not want to die. So he shot him two or three more times. (Vol. 7, p. 1222) Marvin helped Bernell open the bank bag with a pair of scissors and helped him count the money. (Vol. 7, p. 1224-1225) Later that day Bernell went shopping with his girlfriend and returned with jewelry and clothing. (Vol. 7, p. 1237) Weeks after Bernell's arrest, he turned his gun over to the police and showed them where Bernell had hidden money in the wall of the house.

Annie Broadway:

Bernell is her oldest child. In the Spring of 1987, she moved from Hammond, Louisiana to Fort Lauderdale to live with her brother, Glenn. (Vol. 8, p. 1492) A short time later Bernell, Leontina, and Marvin moved in with her at Glenn's house. (Vol. 8, p. 1492)

Bernell, Marvin and Annie all worked at Wendy's for a minimum hourly wage. Each paid Glenn a weekly fee to live at the house ranging from $25.00 to $50.00 per week. (Vol. 8, p. 1496-1497)

The day before the murders, Bernell was home sick with the flu. However, Annie worked the evening before the murders. After she got off work, she told Bernell that if he was feeling okay that Schmidt wanted him to work the next day. (Vol. 8, p. 1499) That night, she went out with her boyfriend, Fred Singletary, to a bar. When she returned home, Bernell and Leontina were still up. Because Glenn was out of town, she slept in his room. Singletary came home with her, but because she was intoxicated she does not remember what time he left. (Vol. 8, p. 1501-1505)

Marvin woke her up the next morning to go to work. Nursing a hang-over, she said that she would go later. (Vol. 8, p. 1505-1506) When she got up Bernell and Leontina were at the house. Leontina had been crying. Bernell said she was upset because her mother wanted her to come home because of her epileptic seizures. Bernell said he would take her home next week. (Vol. 8, p. 1507)

As Annie was leaving for work, Bernell asked her if she

wanted to telephone an aunt living in Louisiana. Bernell said he would give her the money for the telephone call. They walked across the street to the pay phone at the convenience store. She telephoned Wendy's to say she was going to be late, but got no answer. (Vol. 8, p. 1508-1510)

After using the telephone, she went back to the house. Leontina was upset. Bernell told her to come into his room because he had something to tell her. He told her that he had robbed the restaurant. She didn't believe him. He showed her money under his mattress and in the closet. She asked who was at the store. Bernell replied, "Schmidt." Annie said that Schmidt would report him to the police. Bernell replied that he had shot Schmidt, and co-workers, Peters and Reeseman. (Vol. 8, p. 1510-1513) Bernell said that Schmidt asked him not to hurt him, but he shot him. Peters and Reeseman did not know what happened. (Vol. 8, p. 1513-1514)

As they were talking, a neighbor interrupted the conversation. Marvin came home and confirmed Bernell's statements. Upset, she began drinking heavily. (Vol. 8, p. 1514-1515)

Bernell and Leontina left to go shopping at the mall. Later that evening, they returned with jewelry and clothing they had purchased. (Vol. 8, p. 1516)

Upset, the next two days she stayed at friends' houses. (Vol. 8, p. 1515-1519) On Tuesday afternoon she, Bernell and Marvin went to the restaurant for an employees' meeting. Bernell told the manager he had to leave for a job interview. (Vol. 8,

p. 1522) After the meeting she went to a local bar and began drinking. Bernell came to the bar. Bernell said something had happened during the fingerprinting at the restaurant and that he was going to leave town. He said he wanted to buy some marijuana. He gave her $600.00 to buy some marijuana from man in a white van. She went across the street and got into the van. She then drove to her house. She gave Leontina a bag containing marijuana and told her to hide it. She then returned to the bar. Bernell asked if everything went okay, and she replied, "yes." (Vol. 8, p. 1522-1537)

She drank a while longer and then went home. The newspaper had a telephone number to call with information about the murders. She called a number of times but kept getting an answering machine. Unsuccessful, she spent the night at a friend's house. (Vol. 8, p. 1539)

On Wednesday morning when she returned home, Bernell and Leontina had moved out. Marvin said that they had gone to Louisiana by bus. (Vol. 8, p. 1541)

She contacted a road patrol officer and said she wanted to talk to the detectives about the murders. She made arrangements to meet Detective Ciani. (Vol. 8, p. 1544) She met with Detective Ciani and told him about Bernell's involvement. However, she lied to him about when Bernell had confessed to the crime. She lead him to believe that Bernell had just told her, instead of telling him that Bernell had told her about it days before. (Vol. 8, p. 1548-1552)

Concerning Annie's character, motive, and bias for testifying, the following evidence was adduced. She had

previously been convicted of the federal offense of mail fraud for which she was incarcerated for 10 months. She was also convicted of a state court offense involving fraudulent checks for which she was imprisoned for one year. (Vol. 8, p. 1545-1548) Wendy's and other concerned business' had offered a reward totaling in excess of $30,000.00. Annie admitted that she knew about the reward before contacting Detective Ciani. She admitted that she had applied for the reward. (Vol. 8, p. 1545, 1576) She said that she had lied to Detective Ciani about when Bernell had made his statements, because she was afraid of being charged as an accessory. (Vol. 8, p. 1573-1574) She admitted that she had threatened Bernell's trial counsel with a slander suit. Contrary to Leontina's testimony, she denied ever discussing the subject of robbing Wendy's, or that she had stolen money from the cash register. (Vol. 8, p. 1571, 1589)

Fred Singletary corroborated Annie's statement that she had a date with him the night before the murders. He also had a date with her the night after the murders. The night after the murders she mentioned the robbery and said she was glad to be alive. (Vol. 9, p. 1606-1618)

Detective Walley:

Walley described going to the restaurant the day of the murders. Three days later he attended the employees meeting. He asked the employees to submit to voluntary fingerprinting in order that they might be used to eliminate prints found at the scene. While the employees were being fingerprinted, Bernell started to walk out the door. Walley asked him where he was

going. He showed him his fingerprint card. Bernell said he could not be fingerprinted because his card was bent. Walley got him another card and he was fingerprinted. (Vol. 9, p. 1692)

The next afternoon he took a sworn tape recorded statement from Annie Broadway. Pursuant to that statement, he obtained a arrest warrant for Bernell. The next day he traveled to Louisiana.

When he arrived in Louisiana he first interviewed Leontina Haynes, Bernell's girlfriend. He and Walley, accompanied by Lt. Raacke of the Hammond Police Department took Bernell to an empty courtroom to interview him. He orally advised Bernell of his Miranda warnings. A written Miranda warnings form was executed. Then a tape recorded statement was taken. (Vol. 9, p. 1700-1707)

Bernell's first statement (tape recorded):

The morning of the murders he walked to work in the rain. When he got to the restaurant, Reeseman was waiting outside. Schmidt arrived and let them in. He told Schmidt that he was not feeling well and would not be able to work the entire day. He went to the men's room to dry off. While in the men's room, he heard someone knocking loudly on the door. He heard Schmidt open the door. He came out of the bathroom. As he walked down the hall, he heard Schmidt pleading with someone not to hurt him. A voice asked for money. He heard Reeseman say, "What do you want me to do? What do you want me to do?" Schmidt said that he and Reeseman were the only ones there. Bernell hid in a closet. He heard two shots. He heard four more shots. The

alarm went off. He stayed in the closet for a while. He went to the women's room and saw Reeseman lying on the floor. He looked into the men's room but did not see anyone. He saw Schmidt lying in his office shot. As he left the store, he saw a bag with money and picked it up. Scared, he went home. He denied knowing that Marvin had bought a gun. He denied owning a gun or that anyone in his family had a gun. He denied telling anyone about the murders when he went home. He did not call the police, because he was scared that he would be implicated. (Vol. 9, p. 1708-1733)

Bernell's second statement (oral, not tape recorded):

The tape recorder was turned off. Walley told Bernell that he was lying. Walley told Bernell he had spent a considerable amount of time investigating the murders. He told Bernell he had talked to his mother, Annie, and to Leontina. Walley talked to Bernell even though he received no verbal response from him. Bernell doubted that Walley had talked with his mother. Walley showed him a portion of the transcript of his mother's statement. Walley told him shoe prints had been found inside the restaurant which he felt would match his shoes. Walley asked him if he had used Marvin's gun to commit the murders. Bernell hung his head and said, "yes." (Vol. 9, p. 1733-1734; Vol. 10, p. 1862-1865)

Bernell said he rode his bike to work that morning in the heavy rain. Schmidt arrived and let them inside the restaurant. He went to the bathroom to dry off. He had Marvin's gun in his pocket. He started playing with the gun in the

bathroom. He pointed the gun at Peters and it went off. He was scared he would be charged with murder. He left the restroom and looked for Reeseman. He opened the door to the women's room, saw her, and shot her. He went to the office and saw Schmidt sitting at his desk. He shot Schmidt three or four times. He took the money out of the safe and put it in a garbage bag. He said he got about $900.00 plus change. He used some of the money to buy the marijuana that was in his duffel bag when he was arrested. (Vol. 9, p. 1735-1737)

After giving the oral statement, Bernell was emotionally drained. A crowd of news media personnel had gathered outside the room. A decision was made to move Bernell to a quite location. As they were leaving the room, Bernell grabbed Walley. He said, "I am sorry. I didn't mean to do it. Please don't let them hurt me. Don't let them kill me." Walley put his arms around him. He asked Bernell what he meant. Bernell said he didn't want the people in jail, police officers or anybody to kill him for what he had done. They sat down for a few minutes while Bernell calmed himself. (Vol. 9, p. 1737-1738)

Bernell's third statement (tape recorded):

A second tape recorded statement was taken in the detective bureau a short time after the oral statement. This statement corresponds with the oral statements set forth above, but is in more detail. He said he carried the gun a lot of places. He was playing with it when he accidentally shot Peters. He killed Reeseman and Schmidt because he was afraid of being charged with murder for killing Peters. The bank bag containing

the money was on the desk. He took the money merely as an after thought. He did not go to Wendy's with the intent to rob it. He admitting telling his mother, Annie about the shooting. He admitted that the shoes he was wearing when he was arrested were the ones he wore the day of the killings. (Vol. 9, p. 1743-1766)

Bernell's fourth statement (tape recorded):

The day after the two tape recorded statements and oral statement, Bernell gave another tape recorded statement. Present at that statement was his attorney, Michael Nunnery. (Vol. 9, p. 1767-1779) On his way to work he got soaked by the heavy rain. Already sick with the flu, he told Schmidt that he wanted to go home. His mother, Annie came to the door of the restaurant. Schmidt let her in. Bernell got his bicycle and left for home. As he was leaving, he noticed a white van in the parking lot.

About an hour later, his mother came home. She was "high" on drugs. She said some people came to the restaurant. She said she hid in the closet. She said she heard shots. Bernell said in his first statement he adopted his mother's story because he didn't want her to get into trouble. He had put himself in her place to protect her. (Vol. 9, p. 1786-1787)

She then told him that he had killed the people at Wendy's. He was shocked. She showed him a brown bag containing money. She wanted to know where he got it. She accused him of killing the people at Wendy's to get money. She was acting crazy. She was trying to convince him that he had committed the crime. He believed that his mother and brother, Marvin, were involved in the murders. (Vol. 9, p. 1788)

Nonetheless, he confessed to the crime to protect his mother. He said that his three earlier statements were a lie. He said that after talking with his attorney and family members he decided to tell the truth. (Vol. 10, p. 1829-1838)

The Defendant's motion for judgment of acquittal at the close of the State's case was denied. (Vol. 11, p. 2040-2041)

Defense Case

The first item introduced into evidence was a transcript of Bernell's fourth and last statement. (Vol. 11, p. 2058)

The owner of the restaurant testified that Wendy's offered a $10,000.00 reward and that the reward was increased to $36,000.00 by offers from other companies. Two different attorneys contacted him on behalf of Annie Broadway making a claim for the money. (Vol. 11, p. 2065-2067) He said that the reward had not been paid, because it was continent upon a conviction. (Vol. 11, p. 2068-2069)

Shortly after 9:00 a.m. the morning of the murders, Steven Paley was driving past the restaurant. A car pulled out of the restaurant parking lot, cut him off, and headed eastbound at a high rate of speed. Later, when he had heard what had happened at the restaurant, he contacted the police and gave them this information. The car is described as a Datsun model B-210, which was repainted a bright green. He driver of the car was a black male. A composite sketch was done by the Sheriff's Office. The driver of the car was not Bernell. (Vol. 11, p. 2077-2082)

Shortly after 7:00 a.m. the morning of the murders,

David Burke, an employee of USA Insurance, which is next door to Wendy's arrived at work. As he parked his car, he saw two people at the back of the restaurant. One was a black man, and the other was a white man. He was not sure whether Schmidt was also at the back door. (Vol. 11, p. 2087-2092)

Walter LaGraves, chief investigator of the State Attorney's Office was called to show that Annie, Marvin and Leontina had rehearsed their testimony many times. LaGraves spoke with Marvin a dozen times, to Leontina eight or nine times, and to Annie a dozen times. Contrary to the owner of Wendy's testimony, Annie had told him she was not interested in the reward. (Vol. 11, p. 2105-2107)

Mary Davis, Bernell's cousin, has known Annie for 20 years. Familiar with Annie's reputation for truth and veracity, she testified that Annie had a reputation of being a "liar". Annie bragged to her that she had turned in Bernell to get the reward money. (Vol. 11, p. 2131-2133)

Sgt. Dykes of the Hammond Police Department, Bernell's uncle, was one of the officers that arrested him. Familiar with Annie's reputation for truth and veracity, he opined that she was "unreliable." (Vol. 11, p. 2178)

Michael Mawhinny, an investigator for the State Attorney's Office, contacted an inmate in the Broward County Jail, George Turner. Turner gave him an oral statement concerning his knowledge of the murders. Later when defense counsel attempted to take a deposition from Turner he refused. However, Turner agreed to view a photographic line up and

identified Annie Broadway's picture. (Vol. 12, p. 2210-2216)

George Turner was called as a witness. Before his testimony was put before the jury, Turner said he did not want his picture in the newspaper. He refused to testify claiming he didn't know anything about the Wendy's murder.

The last witness to testify in the presence of the jury was George Turner. The court had a discussion with Bernell, outside the presence of the jury, to determine whether or not he wanted to be a witness. Bernell said, "no." The defense rested. The previous motion for judgment of acquittal and motions for mistrial were renewed, and denied. (Vol. 12, p. 2240)

State's Rebuttal Evidence

The State called a number of witnesses to rebut the inference of investigator Mawhinny and Turner's testimony that Annie Broadway was involved in the murders. Investigator Nelson testified that Turner said he met Annie in March or April of 1987. Nelson's investigation revealed that Turner was incarcerated in New Jersey during that time period. Nelson went on to relate that Turner had told him that Annie had solicited Herbert Jackson and him to help her commit the robbery. He said this meeting took place at Lillian Miller's house. Nelson's investigation determined that Miller did not meet Turner until September, 1987. Nelson's investigation revealed that Turner and Jackson were cell mates. Nelson's investigation revealed that Jackson was incarcerated from 1977 until March 1987. Defense counsel objected to this hearsay and opinion testimony and moved to strike it. The motion was denied. (Vol. 12, p. 2245-2249)

Lt. Scarola testified that Turner was incarcerated in New Jersey from January 1987 through late April 1987. (Vol. 12, p. 2257) Edward Barcliff, a New Jersey corrections officer, testified that Turner was released into the custody of the Broward County Sheriff's Office on April 27, 1987. (Vol. 12, p. 2261-2267) Michael Corbett, a detective with the Broward County Sheriff's Office, testified that he transported Turner from New Jersey to the Broward County Jail. (Vol. 12, p. 2269) Lt. Quigley, a corrections officer with the Broward County Sheriff's Office, testified that Turner was held in the Broward County Jail from April 28, 1987 until he was turned over to the United States Marshall on June 23, 1987. (Vol. 12, p. 2274)

Lillian Miller confirmed that she did not meet Turner until September 1987. (Vol. 12, p. 2280)

Sheryl Dulla, a records custodian with the Department of Corrections, testified that George Jackson was incarcerated from 1979 until March 1987.

The State rested, and the defense offered no sur rebuttal.

Evidence the Jury was Prohibited from Hearing

There was no question that Schmidt, Reeseman, and Peter's had been murdered. The only question is whether Bernell was the perpetrator. The jury was obviously concerned about the sufficiency of the State's proof that Bernell was the perpetrator. During its deliberation, the jury requested the following evidence:

(1) All three taped statements and transcripts of

statements by the Defendant.

(2) All photographs in evidence (no aerials).

(3) All charts made by Mr. Hamm of footprint evidence and Wendy's interior.

(4) Transcript of testimony of Marvin, Annie and Leontina. (Vol. 15, p. 2984; Vol. 13, p. 2432-2433)

Before trial, the State moved in limine to restrict evidence the Defendant would seek to introduce either on cross examination of the State's witnesses, or through defense witnesses and exhibits. Some of the areas of inquiry which the court limited before trial were:

(1) There shall be no reference to any alleged drug use or involvement in alleged drug transactions concerning any witness from said allegations concerning usage or transactions which occurred at a time prior to the offenses alleged in the above-styled cause.

(2) There shall be no reference to any alleged acts of misconduct prior to the date alleged in the indictment.

(3) There shall be no reference by any characterizations concerning any witnesses or other persons as a person engaged as a big time drug dealer or words of like effect.

(4) There shall be no reference to any charges or investigations either past or pending concerning Gary Ciani, as the State at this time states it does not plan to call Gary Ciani in its case in chief. (Vol. 15, p. 2927-2928)

The trial court deferred ruling on the State's request to prohibit inquiry into whether any witness has previously been a witness in a criminal prosecution, and whether any witness could be referred to as a paid informant, or informant, or words of like effect concerning any matter unrelated to the charged offenses. (Vol. 15, p. 2927-2928)

Defense counsel argued as follows. The State contended that Bernell made his mother buy him a pound and a half of marijuana with the proceeds from the robbery. Defense counsel countered that Annie, an experienced drug dealer and drug user, had contacts with drug dealers such that she was not afraid to purchase drugs. (Vol. 4, p. 696-705)

After Annie's direct examination, defense counsel proffered certain questions to her. She admitted that she had previously purchased pills and cocaine. She admitted to having previously brokered drug transactions for profit in 1980 and 1981. She said she had bought cocaine as recently as four months before the murders. However, at the time of the murders she was abstaining from cocaine and was only drinking whiskey.

She admitted to being a key witness in an earlier murder case in which she was involved. In 1983 she was traveling with Common Sparks, who had robbed a number of banks. As they were pulling into the parking lot of a convenience store, a deputy sheriff stopped their car. Sparks told her that the deputy was not going to arrest him. He told her to get out of the car because he didn't want her to get hurt. She got out and Sparks shot and killed the deputy. Sparks then fled the scene. She reported Sparks, received a reward of $300.00, and no charges were brought against her. (Vol. 8, p. 1554-1567)

The Defendant sought to introduce the testimony of Detective Walley's partner, Detective Ciani, to question the fidelity of the statements taken from Bernell. Defense counsel wanted to elicit the fact that Ciani was being investigated by a special prosecutor pertaining to the allegations of a witness

that Ciani induced him to change his testimony in a murder case. Defense counsel sought to elicit from Ciani that he had been charged with a felony offense in federal court relating to the sale of a machine gun. Ciani pled to a reduced charge, a misdemeanor, with the condition that he resign from the police department. (Vol. 11, p. 2047)

Brady Evidence/Newly Discovered Evidence

On the evening of Friday, February 5, 1989, the defense rested its case. (Vol. 12, p. 2238-2240) The Court reconvened Monday, February 8, 1989 with the State presenting its rebuttal witnesses. (Vol. 12, p. 2241)

On Friday evening, February 5th, Nellie Burgess contacted the Fort Lauderdale Police Department. At approximately 8:00 p.m. Detective Walley received a call at his house relating that Nellie Burgess called the police station with information about the murders. Walley went to the police station to telephone Burgess so he could tape record the conversation. He tape recorded their conversation which lasted 15 to 20 minutes. He then proceeded to the courthouse to see if the trial was still in session. He contacted the State Attorney at home at 11:00 p.m. (Vol. 13, p. 2457-2461)

The tape recorded statement that Walley took contained the following information. Burgess, a black female, is a 37 year old correctional officer employed at the federal prison in Miami. As she drove eastbound on Sunrise Boulevard approaching Wendy's, two men ran out in front of her. Both appeared to have guns. They appeared to put the guns in a gym bag. She described the

two black males she saw as follows. One was dark, very skinny like a "junkie", six feet tall wearing black sweat pants with a red stripe down the side, with a baggy blue sweater and dirty white sneakers. His hair was uncombed and he walked stooped shouldered. The other was a light skinned, very muscular black man. He was wearing a white shirt, denim pants. His hair was cut very short and appeared to be growing a beard. Walley asked her if she had seen Bernell's picture on television or in the newspaper. She replied she could not determine whether the face she had seen on television was one of the people she had seen until she had an opportunity to see him face to face. Walley concluded the conversation by telling her that he was going to get ahold of the State Attorney and Bernell's attorney. (Vol. 13, p. 2462-2491)

Walley telephoned Burgess the next night, Saturday, and asked her to come to the police department Sunday to view a photographic line-up. She came to the police department Sunday morning, February 7th, and met with Detective Williams. He too took a tape recorded statement. As she drove eastbound on Sunrise Boulevard, two men ran from the Wendy's parking lot in front of her car. Both appeared to have guns. One of them was carrying a paper bag and the other a gym bag. Later that day when she again passed by the Wendy's, she saw police cars at the restaurant. Williams showed her a photographic line-up. She said that the photographs 4 and 5 look familiar. She said photograph number 4 looked like the muscular man, but she did not positively identify the photo. She said that she knew photograph

number 5 was Bernell because she had seen him on television. She said that the man she saw looked similar to Bernell except his hair was knotty, he had a darker complextion, and was very dirty.

On Monday morning, Detective Williams told the State Attorney about his meeting with Burgess. The State Attorney told him to tell defense counsel. On Monday morning as court was reconvening for the State to present its rebuttal witnesses, Williams told defense counsel Burgess' name and telephone number. Defense counsel was not given a copy of Burgess' tape recorded statement or a transcript of the statement. Instead, Williams informed defense counsel that Burgess had seen two people outside the restaurant with a gun and that she was 98% sure that one of them was Bernell. (Vol. 13, p. 2497-2501) (emphasis added)

On Monday morning February 8th, the State presented eight rebuttal witnesses. (Vol. 13, p. 2245-2284) That concluded the evidence. The court informed the jury that it would eat lunch in the jury room while the court took up some legal matters. The court informed the jury that they would reconvened at 1:00 p.m. for closing arguments. (Vol. 13, p. 2284-2285) The court then considered legal matters with both attorneys. The court reconvened at 1:00 p.m. with a jury instruction conference. (Vol. 13, p. 2292-2298) Immediately upon conclusion of the jury instruction conference, closing argument began. (Vol. 13, p. 2299-2390) Immediately after closing arguments, the trial court instructed the jury. (Vol. 12, p. 2394-2400; Vol. 13, p. 2401-2427) Immediately after jury instructions, the jury retired to deliberate. (Vol. 13, p. 2429) The jury deliberated into the evening of February 8th. Unable to reach a verdict, the

jury was sequestered and instructed to return the following morning, February 9th, at 8:00 a.m. (Vol. 13, p. 2437) The only recess taken after defense counsel was given Burgess' name was after both sides had rested. That recess was a short lunch break before the jury instruction conference and closing arguments. When the court recessed for the day, the jury had been deliberating for hours.

After the jury reconvened to deliberate the next morning, defense counsel had an opportunity to review the transcript of Burgess' statement which he had received during the middle of closing argument. (Vol. 13, p. 2445) After reviewing the transcript, he requested that the court reconvene. He moved the court to conduct a Richardson hearing as to why this favorable evidence was not more timely disclosed. The court took the motion under advisement and indicated that it wanted to hear from Detectives Williams and Walley. (Vol. 13, p. 244-2450)

Before the court reconvened to hear the matter relating to Burgess' undisclosed testimony, the jury arrived at a verdict. (Vol. 13, p. 2450) Before the verdict was read, defense counsel again moved for a mistrial on the grounds that Burgess' favorable testimony had been withheld and/or untimely disclosed. The court declined to rule on the motion. The verdicts were returned. (Vol. 13, p. 2450-2452)

Defense counsel again raised the question of the suppression of Burgess' testimony and/or the untimely disclosure of her testimony at his motion for new trial. Defense counsel noted that Burgess' live testimony during the penalty phase was

very exculpatory. Counsel argued that her testimony, as evidenced by its impact at the penalty phase, would have influenced the jury's verdict. (Vol. 16, p. 2927) The court denied the motion for new trial. (Vol. 16, p. 3000)

Death Penalty

The State did not call any witnesses at the penalty phase as proof of the statutory aggravating circumstances. The State relied upon the evidence adduced at trial to support what, if any, aggravating circumstances were applicable.

In contrast, the defense called a number of witnesses. The first witness called was Nellie Burgess, the federal corrections officer from Miami. On the morning of the murders, she drove to Fort Lauderdale to meet friends. As she drove eastbound on Sunrise Boulevard she saw the Wendy's sign ahead and decided to stop to get something to eat. However, as she slowed to pull into the restaurant, she saw it was closed. Her attention was drawn to the Wendy's parking lot. Two men were running. They ran directly in front of her car. She almost hit them. They looked directly at her. Both appeared to have guns. They were carrying a paper bag and a gym bag. One was a heavy set, muscular weighing between 190 an 220 pounds. The other man was slender with a darker completion. His hair was not combed. He was wearing black pants with a red stripe down the side and a bulky blue sweater. She signed the back of Bernell's picture the day of photo line-up because he resembled one of the persons she saw. However, now seeing him in person he was not one of the men she saw outside of Wendy's. (Vol. 13, p. 2532-2551)

Brenda Hegwood, Bernell's cousin, testified that Annie and Bernell did not get along. Annie bragged to her about getting the reward money and moving to California. (Vol. 13, p. 2553-2556)

Mary Davis, Bernell's cousin, said Bernell was ashamed of his mother because of her heavy drinking, drug usage, and the way she lived her life.

Dr. Glenn Caddy, a court appointed clinical forensic psychologist, along with Dr. Barbara Winter, evaluated and tested Bernell on three different occasions for a total of nine hours. After examining Bernell, Dr. Caddy was absolutely confused with the specifics as to what happened. He was confused as to the dynamics between Bernell, his mother, and Marvin. Bernell took the position that I am not going to tell you what I know, but I know something about the crime and the only thing I am going to tell you is that I didn't do it. Dr. Caddy could not persuade him that his behavior was suicidal. (Vol. 13, p. 2575)

Dr. Caddy gleaned that Bernell grew up in a family were manipulation and dishonesty were standard operating procedure. Bernell said his mother told him she was going to take him out of this world and maybe she would be able to to with his incident. Bernell was ashamed of his mother because of her heavy drinking, drug usage, and solicitation of his friends for sex in order to get money for drugs and whiskey. Because of his mother's conduct, Bernell depended on other relatives for stability in his life. When he moved from Louisiana to be with Annie, it was very destructive for him.

Lt. Quigley, a corrections officer at the Broward

County Jail, testified that Bernell presented no disciplinary problem while incarcerated and that he had adapted very well to incarceration.

Mable Hegwood, Annie's sister, said that Annie was a terrible mother never providing her children with food, clothing or lodging. Annie did not have a reputation for telling the truth. In contrast, Bernell was a very loving, giving child who was against drugs. (Vol. 14, p. 2610-2620)

Mildred Lloyd, Annie's sister, said that Annie's reputation for truthfulness was poor and that she was a known liar. Annie would frequently desert the family and it was left to Bernell to care for his younger brothers. (Vol. 14, p. 2622-2624)

Rita Broadway, Bernell's stepmother, opined that Annie had a reputation for lying. (Vol. 14, p. 2632)

Annie Broadway apologized for everything that happened. She said that Bernell was not a bad child. (Vol. 14, p. 2636)

Bernell's school records were introduced. (Vol. 14, p. 2646)

Defense counsel attempted to introduce a number of sworn statements, affidavits, or depositions. Defense counsel tried to introduce the transcript of the sworn statement of George Turner, the deposition of Sgt. Dykes, Bernell's uncle, letters from Leontina Haynes to Bernell, and Annie Broadway's testimony from the Sparks murder trial. (Vol. 14, p. 2608, 2627, 2645) The jury did not consider these items.

The State called Detective Williams to rebut Burgess' testimony. He said that she told him she was 98% sure that

Bernell was one of the people she saw that morning. Williams acknowledged that he had not told defense counsel that the description she gave did not match Bernell. Defense counsel pointed out that the statement attributed to her that she was 98% sure that Bernell was one of the persons she saw did not appear in the sworn statement that he took from her. (Vol. 14, p. 2648-2656) (emphasis added)

The prosecutor argued the following aggravating circumstances:

(1) The Defendant has been previously convicted of another capital offense or a felony involving the use or threat of violence to some person.

(2) The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

(3) The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody.

(4) The crime for which the Defendant is to be sentenced was committed for financial gain.

(5) The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (Vol. 14, p. 2659-2667; Vol. 15, p. 2931)

Defense counsel objected to the first aggravating circumstances citing Wasko v. State, 505 So.2d 1314 (Fla. 1987) and Patterson v. State, 513 So.2d 1257 (Fla. 1987). Defense counsel argued that aggravating circumstances number 2 and number 4 were the same. The State countered that the jury had a right to consider whether one or the other applied. Defense counsel

argued that the aggravating circumstance that the killings were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification was not applicable and should not be argued. (Vol. 13, p. 2513-2514) The court denied all of the objections to aggravating circumstances. (Vol. 13, p. 2516)

As to each of the three counts of first degree murder, the jury recommended a sentence of life imprisonment. (Vol. 15, p. 2951-2954) The court overrode the jury's recommendation and sentenced Bernell to death as to each murder. The trial court concluded that the jury's life recommendation was predicated upon a 6 to 6 vote. (Vol. 16, p. 3006) However, the jury was never poled concerning their vote. (Vol. 14, p. 2756) During their advisory sentence deliberation, the jury asked what sentence to recommend if there was a 6 to 6 vote. The court replied, "In order for there to be a recommendation for the death penalty, it must be made a majority of the jury. There are 12 jurors, right?" (Vol. 14, p. 2707) The court then told the jury to retire and further deliberate on their recommendation. The court's conclusion that the final vote was 6 to 6 is adduced from the question, as opposed to any official polling of the jury.

The court found five aggravating circumstances as follows:

> (1) That at the time of the crime for which the Defendant is to be sentenced, he had been previously convicted of another capital offense, or a felony involving the use of violence to some person.
>
> (2) That the crime for which the Defendant is to be sentenced was committed while the Defendant was

engaged in the commission of a robbery.

(3) That the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) That the crime for which the Defendant is to be sentence was committed for pecuniary gain.

(5) That the crime for which the Defendant is to be sentence was especially heinous, atrocious or cruel.

(6) 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. (Vol. 16, p. 3006-3010) (emphasis added)

The court found that the murder of Schmidt was especially heinous, atrocious or cruel. However, the jury was not instructed to consider this aggravating circumstances. (Vol. 15, p. 2931) The State Attorney agreed that it should not be considered by the court. Nonetheless, the court used it as basis for imposing the death penalty. (emphasis added)

The court found one statutory mitigating circumstance, the age of Bernell at the time of the crime. (Vol. 16, p. 3009) However, the court found that this circumstance should not apply. The court found no non-statutory mitigating circumstances. (Vol. 16, p. 3010) The appendix contains a copy of the sentencing order.

SUMMARY OF ARGUMENT

Bernell has raised issues relating to both guilt and punishment. After the State had rested its case-in-chief and while the defense was presenting its case, a Federal correctional

officer called the police. She related that she had passed by the restaurant the day of the murders. She almost struck two men running from the restaurant with guns. Neither of the men were Bernell. The police knew that Bernell's defense was reasonable doubt/someone else committed the murders. The police knew they had an obligation to disclose this new, exculpatory evidence, which added fuel to the fire of reasonable doubt.

Initially, the police dragged their feet in gathering the evidence. Once it was gathered, they mislead defense counsel into believing the testimony was <u>inculpatory.</u> By the time defense counsel discovered the exculpatory nature of the testimony, the jury was already deliberating. The jury returned a verdict before a hearing was held concerning the untimely disclosure of the evidence. The prosecution having achieved its conviction, the court denied the motion for new trial leaving this Court to wrest with the question of the eleventh hour witness with exculpatory testimony.

Concerning punishment, this Court must again deal with the question of a jury override. In dealing with the propriety of punishment, the Court must deal with sub-issues relating to heinous, atrocious, and cruel as an aggravating circumstance, and the applicability of the cold, calculated, premeditated aggravating circumstance. Neither of which are applicable in light of the United States Supreme Court's pronouncement, and this Court's interpretations.

POINT 1

THE SUPPRESSION OF, OR UNTIMELY DISCLOSURE OF BRADY EVIDENCE DENIED THE APPELLANT A FAIR TRIAL.

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that irrespective of good or bad faith, suppression by the prosecution of evidence favorable to a defendant who has requested it violates due process where such evidence is material to either guilt or punishment. The Brady holding imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence that is materially favorable to the accused, either as direct or impeaching evidence. Brady is not a rule of discovery; it is rule of fairness and minimum prosecutorial obligation. United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979); United States v. Campagnulo, 592 F.2d 852, 859 (5th Cir. 1979). The obligation to disclose is measured by the character of the evidence, not the character of the prosecutor. United States v. Agurs, 427 U.S. 97, 110 (1976).

The Agurs decision, which amplified Brady, articulated three distinct types of situations in which the Brady doctrine applies. The defense need only demonstrate that the prosecutor suppressed material evidence favorable to the defendant in order to establish a violation. If the exculpatory evidence creates a reasonable doubt that did not otherwise exist, then reversal is necessary. Agurs, supra at 112.

The duty of disclosure extends not only to the individual prosecutor but to his office. That duty also extends to person working as a part of the prosecution team or intimately

connected with the prosecution's case, even if not employed by the prosecutor's office. Investigative officers are part of the prosecution, their taint on the trial is no less if they, rather than the prosecutor, are guilty of non-disclosure. United States v. Morell, 524 F.2d 550 (2nd Cir. 1975); United States v. Butler, 567 F.2d 885 (9th Cir. 1978); United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973).

There are two general categories of material required to be disclosed under the Brady rule; (1) material which tends to be exculpatory, and (2) material which may used to impeach or discredit the prosecution witnesses. In defining what constitutes exculpatory material, courts have held that the failure by the prosecution to disclose the existence of an eye witness whose testimony, developed by skilled counsel, could have induced reasonable doubt was reversible error. Grant v. Allbredge, 498 F.2d 376 (2nd Cir. 1974).

In this case, the exculpatory nature of Burgess' testimony is best determined by her two tape recorded statements and live testimony, as opposed to Detective Walley and Williams' second hand recitation. Burgess, a thirty-seven year old black female who is a federal correctional officer at the Federal Prison in Miami, came forward with exculpatory evidence. In her first tape recorded statement to Detective Walley, she related the following. As she drove eastbound on Sunrise Boulevard approaching the scene of the murders, two men ran out in front of her. Both appeared to have guns. They appeared to put the guns in a gym bag. She described the two black males she saw as

follows. One was dark, very skinny like a "junkie", six feet tall wearing black sweat pants with a red stripe down the leg, with a baggy blue sweater and dirty white sneakers. His hair was uncombed and he walked stooped shouldered. The other was a light skinned, very muscular black man. He was wearing a white shirt, denim pants. His hair was cut very short and he appeared to be growing a beard. Walley was curious as to whether either of the men were Bernell. She replied that she had seen Bernell's picture on television; however, she could not determine whether the face she had seen on television was one of the two men until she had an opportunity to see Bernell face to face. Walley concluded the conversation by telling her he was going to advise both the prosecutor and defense counsel of her testimony.

While a defendant does not have to prove the non-disclosure was intentional, there is ample evidence to suggest the police dragged their feet in pursuing and disclosing this evidence. When Burgess telephoned, the trial was coming to a conclusion. Walley, the lead investigator, was a key State witness. He had presented all three of Bernell's tape recorded statements and Bernell's oral statement to the jury. He was the last witness to testify before the State rested its case. He knew at the time Burgess called that the defense was presenting its witnesses. When she did not immediately and positively identify Bernell as one of the two men she had seen, Walley was in no hurry to have her view a live line-up. Walley waited until the next evening, Saturday night, to get back in touch with her. Instead of immediately traveling to her for purposes of showing her a photographic line-up, Walley merely

scheduled her an appointment the next day, a Sunday, with Detective Williams.

The next day, Sunday, Williams also tape recorded his conversation with her. She related the following. As she drove eastbound on Sunrise Boulevard, two men ran from the Wendy's parking lot in front of her car. Both appeared to have guns. One of the them was carrying a paper bag and the other a gym bag. When she looked at the photographic line-up, photographs 4 and 5 looked familiar. She said that photograph number 4 looked like the muscular man, but she did not positively identify the photo. She said that she knew photograph number 5 was Bernell because she had seen him on television. She said one of the men looked similar to Bernell, except his hair was knotty, he had a darker complexion, and he was very dirty.

At this juncture, both Walley and Williams, knew that the men she had described did not fit the physical description of Bernell. In her statement to Walley, the dark, very skinny junkie-like figure did not match Bernell's description. Nor did the light skinned very muscular black man with close cropped hair match Bernell's description. In her statement to Williams, when she actually viewed a photograph of Bernell, she said that one of the men looked similar to Bernell, except his hair was knotty, he had a darker complexion and he was very dirty.

When trial reconvened the next day, Monday, the session began with the State presenting its rebuttal witnesses. The police knew they had to disclose Burgess to defense counsel. As court was reconvening, Williams gave defense counsel Burgess'

name and telephone number. He informed defense counsel that Burgess had seen two people outside the restaurant with a gun and that she was 98% sure that one of them was Bernell. However, at this time, he did not give defense counsel a copy of Walley's tape recorded conversation with Burgess, or a copy or transcript of the statement he took from Burgess. It is important to note that Williams' statement to defense counsel that Burgess was 98% sure that one of the persons she saw was Bernell did not appear in the sworn statement he took from her. (Vol. 14, p. 2648-2656) If a copy of her statements had been immediately provided, defense counsel would have immediately known that Williams' representation was not true. Instead, relying on Williams' representation, defense counsel proceeded ahead. Common sense tells us that defense counsel would not have rushed to get hold of Burgess if he was under the impression that she would inculpate his client.

After Williams' misleading statements to defense counsel, the trial reconvened. The State presented eight rebuttal witnesses. This concluded all the evidence. The jury was given a lunch recess in the jury room, while the defense and prosecution took up legal matters outside the presence of the jury. The court took a short recess and then reconvened in order that the prosecution and defense could complete the jury instruction conference. Immediately after the conclusion of the jury instruction conference, closing arguments began. Immediately after closing arguments, the court instructed the jury and they retired to deliberate. (Vol. 13, p. 2284-2285, 2292-2298, 2299-2390, 2394-2400; Vol. 14, p. 2401-2429)

During the middle of closing arguments, defense counsel was given a transcript of Burgess' statement. Defense counsel was trying this case alone. He had no co-counsel or assistant. He could not have been expected to read Burgess' statement at a critical time, such as closing argument. After the jury had retired to deliberate, defense counsel then had an opportunity to read and digest the significance of Burgess' statement. After reviewing her statement, he requested that the court reconvene for the purpose of conducting a Richardson type hearing as to why this favorable evidence was not more timely disclosed. The court deferred the matter awaiting the arrival of Detectives Walley and Williams. Before the court reconvened to hear this matter, the jury arrived at its verdict.

Without question, Burgess' testimony was material to the issue of guilt, and created a reasonable doubt that otherwise did not exist. Burgess, a law enforcement officer, was driving by the restaurant at a time contemporaneous with the murders. As she slowed to pull into the restaurant, she saw it was closed. Her attention was drawn to the restaurant parking lot. Two men were running. They ran directly in front of her car. She almost hit them. They looked directly at her. Both appeared to have guns. They were carrying a paper bag and a gym bag. Most importantly, neither of the two men she saw was Bernell. (Vol. 13, p. 2532-2551)

In conclusion, Detectives Walley and Williams suppressed, or did not timely disclose evidence they knew would be favorable to Bernell. Remember, the police knew that Bernell

was asserting a defense that someone else perpetrated the robbery/murders. David Burke, the insurance man, had given a pretrial discovery deposition that he had seen a black man and a white man at the rear of the restaurant talking with Schmidt, the manager, shortly before the murders. Walley, at a pretrial motion to dismiss, had already been accused with tampering with Burke's testimony. Walley contacted Burke the day after his deposition. After Walley's contact with Burke, Burke was unsure whether he had seen Schmidt. (Vol. 2,p. 260) Walley, as the lead investigator, was aware of Stephen Paley's testimony. Paley was driving by the restaurant at a time contemporaneous with the murders. A car pulled out of the restaurant parking lot, cut him off, and headed eastbound at a high rate of speed. The car was driven by a black male. From Paley's description the police prepared a composite sketch. The driver of the car was not Bernell. (Vol. 11, p. 2077-2082) Knowing this, the police did not want to add fuel to the fire of reasonable doubt by bringing forth testimony from a law enforcement officer, Burgess, that explicitly and in detail suggested that Bernell was not the perpetrator. Or, evidence supportive of the defense theory that the crime by committed by more than one person, a theory that was contrary to the police and prosecution's theory that Bernell was the lone perpetrator.

Because Burgess' testimony was suppressed, or not timely disclosed, and because defense counsel was mislead into believing that Burgess' testimony was extremely inculpatory, Bernell's conviction should be reversed and this cause remanded for a new trial.

POINT 2

THE 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.

A mistrial should be granted when a specific fundamental or prejudicial error has occurred and the error is such in nature as will vitiate the result. A mistrial should be granted when the error committed is prejudicial to a substantial right of the defendant. Perry v. State, 200 So.2d 525 (Fla. 1941).

Defense counsel was given a transcript of Burgess' statement during the middle of closing argument. (Vol. 13, p. 2445) Immediately upon the conclusion of closing arguments, the trial court instructed the jury, and they retired to deliberate. (Vol. 12, p. 2394-2400; Vol. 13, p. 2401-2429) After the jury had retired to deliberate, was the first time defense counsel had a meaningful opportunity to read and digest Burgess' statement. After viewing the transcript, he requested the court reconvene. He moved the court for a mistrial because of the untimely disclosure of this favorable evidence. The court denied the motion.

Without question, Burgess' testimony that she had seen two armed men running from the store, neither of them Bernell, was material, favorable evidence. The trier of fact should have been allowed to hear this evidence in the guilt phase. To deny the trier effect the opportunity to consider this evidence at the guilt phase is fundamental or prejudicial error effecting the

substantial right of the accused to present favorable evidence. As such, the motion for mistrial should have been granted.

In the alternative, the court should have granted the motion for new trial. Fla.R.Crim.P. 3.600(a)(3) sets forth a two-prong test in determining whether a new trial should be granted. First, would the new material evidence probably change the verdict? Second, could the defendant have discovered the evidence with reasonable diligence? Considering the second prong of the test first, there is no reason to believe that defense counsel could have discovered Burgess' testimony with reasonable diligence. Burgess was a law enforcement officer living and working in South Dade County. Fifty miles and 2 million people separated her from the scene of the murder or persons involved. But for her voluntarily coming forward, there would have been no way for anyone connected with the case, police, prosecution or defense, to have reason to believe she possessed material evidence.

In Jackson v. State, 416 So.2d 10 (Fla. 3rd DCA 1982), the defendant was given a new trial based on newly discovered evidence which consisted of the exculpatory testimony of two additional witnesses. Likewise, in Webb v. State, 336 So.2d 416 (Fla. 2nd DCA 1976), the defendant was granted a new trial on the grounds of newly discovered evidence. After the first day of trial, the defendant learned of two new witnesses. The next day, before closing argument, the defendant sought to reopen his case to present their testimony. The defendant in a one-on-one situation was accused of selling drugs to an undercover officer.

The defendant presented witnesses' that the drug transaction could not have occurred after 10:00 p.m. The prosecution countered that the sale occurred before 10:00 p.m. The two new witnesses, undercover agents working in concert with the agent, could have completely ruled out the possibility of any sale having occurred before 10:00 p.m. The court determined that the testimony of these new witnesses, in light of their employment by the police department, could have been given considerable weight by the jury, such that their testimony could have effected the outcome of the trial.

Compare, Burgess, a credible law enforcement officer, testified that at a time contemporaneous with the murders she was driving by the restaurant. As she slowed to turn into the restaurant parking lot, two men ran from the direction of the parking lot in front of her car. She almost hit them. They looked directly at her. Both appeared to have guns. They were carrying a paper bag and a gym bag. Upon seeing Bernell face to face, she was sure that neither of the men were Bernell. (Vol. 13, p. 2532-2551) In accord with Webb, it cannot be concluded that her testimony could not have effected the outcome of the trial.

The State may seek refuge with the argument that it put forward in Perry v. State, 395 So.2d 170 (Fla. 1980). There, the evidence was discovered not after trial, but before closing arguments in the guilt phase. The court in holding that the new evidence would probably not have changed the verdict, did not address the issue of the timelines of the new trial request. While Burgess' testimony was discovered before the conclusion of

the trial, the exculpatory nature of her testimony could not have become readily apparent until defense counsel was given a transcript of her statement. The transcript was given to defense counsel during the middle of closing argument. Hardly, a time when he could make meaningful use of it. Particularly considering that immediately after closing arguments, the court instructed the jury and sent them out to deliberate. If the State raises the technicality of timeliness (ie. it was not newly discovered after trial), it should be rejected for the reason that, ". . . the achievement of the ends of justice-which is paramount, in deed the exclusive interest which concerns us - requires that a jury hear the witness in question before the defendant may be convicted and imprisoned (or sentenced to death) for the crime with which he is charged. Jackson v. State, supra at 10.

POINT 3

THE JURY RECOMMENDED A LIFE SENTENCE AS TO EACH COUNT OF FIRST DEGREE MURDER. THE COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION AND IMPOSING THE DEATH PENALTY.

"In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). ". . . Only when there are no 'valid' mitigating factors discernible from the record upon which the jury could have based its recommendation is an override warranted". Fead v. State, 512 So.2d 176 (Fla. 1987); Ferry v.

State, 507 So.2d 1373 (Fla. 1987). The process of weighing aggravating and mitigating circumstances is not a mere tabulation. The record must be void of any valid mitigating circumstances before the trial court is justified in overriding the jury's recommendation. Brown v. State, 473 So.2d 1260, 1270 (Fla. 1985). Within this analytical framework, the record contains several valid mitigating factors upon which the jury could have relied in reaching its recommendation. As a result, the trial court's decision to override the life recommendation is improper.

First, the jury may consider the treatment accorded accomplices. There was sufficient evidence presented to establish a reasonable belief in the minds of the jurors that Bernell did not act alone in committing the murders. Three persons were shot at separate and distinct locations within the building. Is it reasonable to assume that Bernell was acting alone? When the shooting started would one or more of the victims have escaped or attempted to escape? It is reasonable to assume that the victims were held at bay by one or more persons in different locations in the building. Further, Bernell's first and last tape recorded statements allude to other participants, his mother and other persons unidentified. The theory of multiple participants is buttressed by the testimony of Steven Paley, David Burke, and Nellie Burgess. Paley testified that contemporaneous with the time of the killings, a car drove out of the restaurant parking lot at a high rate of speed. The car was driven by an unidentified black male, not Bernell. (Vol.

11, p. 2077-2082) Burke testified that shortly before the murders he believes he saw the victim talking to an unidentified black male and an unidentified white male. (Vol. 11, p. 2087-2092) Burgess testified that at a time contemporaneous with the killings, she was driving by the restaurant. She slowed to pull into the restaurant, but noticed it was closed. Two men ran directly in front of her car. She almost hit them. They looked directly at her. Both appeared to have guns. They were carrying a paper bag and a gym bag. Neither of the men were Bernell. (Vol. 13, p. 2532-2551)

Second, the jury may consider non-statutory mitigating evidence relating to a defendant's background and character. There was sufficient evidence to establish a reasonable belief in the minds of the jurors that Bernell grew up in an atmosphere of drunkenness, drug abuse, and deprivation of life's basics, food, clothing, and lodging. Mable Hegwood, and Mildred Lloyd, Bernell's aunts, testified that Bernell's mother frequently deserted the family and left the children without adequate food, clothing, or lodging. Concerning Bernell's character, Mildred Hegwood opined that he was a very loving, giving child who was against drugs. (Vol. 14, p. 2610-2624)

Third, the jury may consider as a non-statutory mitigating circumstance a defendant's adaptation to incarceration. Evidence that a defendant will not pose a danger if spared, but incarcerated, must be considered as a mitigating circumstance. Skipper v. South Carolina, 476 U.S.___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Lt. Quigley's uncontradicted testimony was sufficient to establish a reasonable belief in the minds of

the jurors that Bernell had adapted well to incarceration and presented no disciplinary problem if spared.

The jury may consider as a non-statutory mitigating circumstance any relevant mitigating evidence. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Based upon Dr. Caddy's testimony the jury may have reasonably believed 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 elicit drugs, and free sex were commonplace. (Vol. 13, p. 2575)

There was ample mitigating evidence upon which the jury could have relied. Based upon that evidence, the jury, as reasonable men and women, could conclude that death was inappropriate. In accord with this Court's ruling in other jury-override cases, Bernell's sentences of death should be vacated and his cause remanded for imposition of life sentences in accord with the jury's recommendation.

POINT 4

THE COURT ERRED IN HOLDING THE MURDER OF SCHMIDT WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

First, the Oklahoma statutory scheme of aggravating circumstances is substantially similar to Florida's. See Oklahoma Statute, Title 21, Section 701.12 as compared to Florida Statute 921.141(5). The Oklahoma statute lists eight aggravating circumstances, and five of the eight are identical to five of Florida's aggravating circumstances. One of the identical

aggravating circumstances is that the killing was "especially heinous, atrocious or cruel". In Maynard v. Cartwright, 108 S.Ct. 1853 (1988), the United States Supreme Court affirmed the Tenth Circuit Court of Appeals that the statutory aggravating circumstance that the killing was "especially heinous, atrocious, or cruel" did 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-ended discretion which was held invalid in Furman v. Georgia, 405 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d. 346 (1972). In light of this decision, this aggravating circumstance cannot be relied upon in support of a death sentence.

Notwithstanding this pronouncement of the United States Supreme Court, the State cannot rely upon this aggravating circumstance. The Florida case law holds that the State must prove beyond a reasonable doubt that the homicide was a pitiless crime which was unnecessarily torturous to the victim; extremely wicked, shocking or evil; outrageously wicked and vile; and designed to inflict a high degree of pain with utter indifference to, or enjoyment of the suffering of the victim. The finding of this aggravating circumstances was predicated upon the testimony of Annie Broadway. Broadway attributed the following statement to Bernell. That Schmidt asked him not to hurt him, but he shot him anyway. (Vol. 8, p. 1513-1514) The medical examiner opined that Schmidt died of multiple gun shot wounds. The evidence was consistent with Schmidt receiving the wounds in rapid succession and dying immediately.

The fact that Schmidt asked Bernell not to hurt him, but Bernell shot him anyway, is similar to the situation in Amoros v. State, 531 So.2d 1256 (Fla. 1988). The victim made a futile attempt to save his life by running to the rear of the apartment; however, he was trapped at the back door. He was shot three times at close range, the shots having been fired within a short time of each other. Amoros v. State, supra at 1260. Schmidt's death would be similar to the circumstances in Lewis v. State, 377 So.2d 640 (Fla. 1979), where the victim was shot in the chest and several more times as he attempted to flea. There was simply no evidence that Schmidt languished in fear of impending death.

Third, the court erred in considering and finding this statutory aggravating circumstance. In rendering its advisory sentence, the jury was not instructed to consider as an aggravating circumstance that Schmidt's murder was especially heinous, atrocious, or cruel. (Vol. 15, p. 2931) When this was brought to the court's attention at the sentencing hearing, the State Attorney agreed that this aggravating circumstance should not be considered by the court. (Vol. 14, p. 2755) The State Attorney then argued that there were four aggravating circumstances. (Vol. 14, p. 2776) Notwithstanding the State Attorney's concession that consideration of this aggravating circumstance was improper, the court predicated the death sentence for Schmidt's murder on this aggravating circumstance.

The court may not use as justification for a jury override a statutory aggravating circumstance that the jury was not asked to consider. Consider, if the State believes it

has multiple aggravating circumstances, then it could ask that the jury consider all but one statutory aggravating circumstance. Then, if the jury fails to recommend a sentence of death, the State can use this unconsidered aggravating circumstance as a trump card to justify overriding the jury's error in judgment. The practical effect is that the State or court by withholding a "knockout punch" will always have a reason to override.

The court's consideration of this aggravating circumstance was improper and it cannot be relied upon to support a death sentence. The court's reliance upon this aggravating circumstance was an important consideration in assessing a death sentence. Therefore, the court's reliance cannot be deemed harmless error, such that it can be concluded that mere elimination of this aggravating circumstance would still result in a death sentence. If this Court determines that the court's override was justified then Bernell's cause should be remanded for a new sentencing hearing eliminating this aggravating circumstance from the court's consideration.

POINT 5

THE COURT ERRED IN FINDING THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Bernell challenges the court's finding that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This aggravating circumstance focuses more on the defendant's state of mind than on the method of killing, and ordinarily applies to those murders which are characterized as executions or contract

murders, although that description is not intended to be all inclusive. Cannaday v. State, 427 So.2d 723 (Fla. 1983); Johnson v. State, 465 So.2d 499 (Fla. 1985), cert. denied 106 S.Ct. 186, 88 L.Ed.2d 155 (1986). This aggravating circumstance requires a calculation which includes a careful plan or prearranged design. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, __ U.S. __ , 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). In Rogers this Court in refining the analytical framework for interputating this aggravating circumstance stated:

> ". . . we know our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. . . Webster's Third International Dictionary at 315 (1981) defines the word 'calculate' as 'to plan the nature of beforehand; think out . . . to design, prepare or adapt by aforethought or careful plan.' (Rogers v. State, supra at 805)

In Harmond v. State, 527 So.2d. 182 (Fla. 1988), the murder occurred during the commission of an armed robbery. During the armed robbery, Harmond's co-defendant spoke his name. Frightened, Harmond killed the victim. In this case, there is not a scintilla of evidence that Bernell went to the restaurant with a careful, prearranged, calculated design to kill anyone. As in Harmond there is every reason to believe the killings were a spontaneous act.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court found this aggravating circumstance inapplicable. Fitzpatrick robbery plan was as follows. "His plan called for him to take a hostage from the real estate office, march the hostage up the street to a bank, and then rob the bank using the

hostage as a shield. The plan called for (him) to escape into the crowd, get lost in the post-robbery confusion, and then take a bus home." Fitzpatrick v. State, supra at 810. However, Fitzpatrick's plan went awry at the real estate office. Before he could leave the office with his hostage the police were called. Fitzpatrick panicked and locked himself in a room with three hostages.

When the police arrived, one officer knocked on the door of the room where Fitzpatrick was holding the hostages. Fitzpatrick fired a shot which almost struck the officer. A second officer pointed a gun at Fitzpatrick's head through a partition near where he was standing. Surprised, he whirled and fired, shooting the deputy in the head. Other shots were fired in the an attempt to disarm Fitzpatrick and other persons were wounded, but not mortally.

This Court concluded that the circumstances of cold, calculated and premeditated were absent. This Court concluded that he actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer. Fitzpatrick v. State, supra at 812.

Compare, in this case, Bernell's actions were also those of a seriously emotionally disturbed man-child. In his second tape recorded statement, Bernell says that he was playing with the gun in the bathroom when it discharged killing Peters. Frighten, panicked and in an emotional frenzy, he immediately killed Reeseman and Schmidt.

In Hamblen v. State, 527 So.2d 800 (Fla. 1988), there

was no evidence that Hamblen had a conscious intent of killing the victim when he decided to rob the store. It was only after he became angred when she pressed the alarm button that he decided to kill her. This Court concluded, "Hamblen's conduct was more akin to a spontaneous act taken without reflection. While the evidence unquestionably demonstrates premeditation, we are unable to say it meets the standards of heightened premeditation and calculation required to support this aggravating circumstance." Hamblen v. State, supra at 527. Bernell's statements, the only explanation as to how, why, and the manner of the murders, suggest that his conduct was a spontaneous act taken without reflection.

The court erred in finding this aggravating circumstance. The court placed great emphasis on this aggravating circumstance as evidenced by its written finding and its oral pronouncement. (Vol. 16, p. 3008) It cannot be concluded that with the elimination of this aggravating circumstance that a sentence of death would have been imposed.

POINT 6

THE COURT ABUSED ITS DISCRETION IN LIMITING DEFENSE COUNSEL'S CROSS EXAMINATION OF THE STATE'S KEY WITNESS, BERNELL'S MOTHER.

The Sixth Amendment guarantees an accused the right to confront and cross examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The trial court has broad discretion in limiting the scope of cross examination. Yet, when the gravamen of the State's case is a witness from the criminal milieu, wide latitude should be allowed

on cross examination. Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447 (1953); United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975). "...(It is a) well recognized fact that a drug addict is inherently a perjurer where his own interests are concerned, it is manifest that either some corroboration of his testimony should be required, or it should be received with suspicion and acted upon with caution." Fletcher v. United States, 158 F.2d 321, 322 (D.C. Cir. 1946). The purpose of cross examination is to show that the witness is not as unbiased and disinterested as it appears on the surface. United States v. Hodnett, 737 F.2d 828 (5th Cir. 1976). In reviewing a trial court's limitations on cross examination, an appellate court must determine whether the trial court imposed unreasonable limits on cross examination such that a reasonable jury might have received a significantly different impression of a witness' credibility had defense counsel pursued his proposed line of cross examination. If the appellant meets that burden, the appellate court must determine whether the error was harmless. See Delaware v. Van Arsdall, ___ U.S. ___, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

The prosecution wanted the jury to have the impression that Annie Broadway had her problems in the past. But she moved to Florida with her two sons to turn her life around. Then Bernell went crazy. Single-handedly on an otherwise unremarkable rainy morning, he became one the most infamous mass murders in South Florida history. After his crime spree he forced her to buy him drugs. When she could no longer live with

the his shame, she reported him to the police. In support of this impression, the court restricted cross examination as follows:

> (1) There shall be no reference to any alleged drug use or involvement in alleged drug transactions concerning any witness from said allegations concerning usage or transactions which occurred at a time prior to the offenses alleged in the above-styled cause.
>
> (2) There shall be no reference to any alleged acts of misconduct prior to the date alleged in the indictment.
>
> (3) There shall be no reference by any characterizations concerning any witnesses or other persons as a person engaged as a big time drug dealer or words of like effect. (Vol. 15, p. 2927-2928)
>
> (4) She could not be characterized a paid informant, or informant, or words of like effect.
>
> (5) Nor, could it be brought up that Annie, an experienced drug dealer and drug user, had contacts with drug dealers such that she was not afraid to purchase drugs. In fact she had bought them recently. (Vol. 4, p. 696-705)

Most importantly her prior involvement in a murder case could not be mentioned. According to her, she was merely a traveling companion with a bank robber who decided to avoid arrest by shooting and killing a police officer. She was not involved and only ran because the bank robber did not want her hurt. She performed her civic duty. She reported him and received a reward. (Vol. 8, p. 1554-1567)

Then a mere four years later, she is merely the roommate and co-worker of a fast food restaurant robber, her son instead of her traveling companion, who decides to avoid arrest by killing three people. Contrary, to Leontina Haynes'

testimony, she is not involved. Again she does her civic duty. She reports the culprit and applies for a reward. Query: Does she become a cooperative witness out of fear of detection?

The real Annie Broadway should have been exposed to the jury. After all she was the witness who solved the case. She was the witness to brought her son, Marvin, into the fold as a cooperative witness. It is upon her statements, the prosecution and court concluded that Schmidt begged for his life. Any restriction on the cross examination of this "black widow" cannot be deemed harmless error.

Accordingly, Bernell's convictions should be reversed and his cause remanded for a new trial.

CONCLUSION

Burgess' testimony is material and exculpatory. Whether this Court characterizes Burgess' testimony as untimely disclosed Brady evidence, or newly discovered evidence, the bottom line is it could have effected the outcome of the trial. In accord with Jackson, the ends of justice, which is the paramount concern, mandates that Burgess' testimony be considered by the trier of the fact in the guilt phase. The trier of fact should be exposed to the real Annie Broadway, the Machiavellian mother who avoids the police dragnet and seeks profit from rewards. Based on these errors, Bernell's convictions should be reversed and this cause remanded for a new trial.

However, should this Court uphold his convictions, the status of the law concerning jury overrides, the improprieties in

assessing aggravating circumstances, and the improprieties in considering mitigating circumstances, mandates that his death sentences be set aside and a life sentence imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the was mailed to Assistant Attorney General, Joan Fowler, 111 Georgia Avenue, Suite 204, West Palm Beach, FL. 33401 this 29th day of June, 1989.

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(Hegl)