IN THE **SUPREME COURT OF FLORIDA**

RICHARD EUGENE HAMILTON,

Appellant,

v. **CASE NO. 86,021**

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR CLAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts with the following additional facts submitted based on the issues presented.

Jennifer Smithhart, the victim Carmen Gayheart's best friend, identified photographs of the victim. (TR 374). Ms. Smithhart testified that on April 27, she was attending classes at Lake City Community College with Mrs. Gayheart and met her after class at approximately 11:15 a.m. They both got into Mrs. Gayheart's Bronco and ran errands during lunch, returning to the campus at approximately 12:15 p.m. Mrs. Gayheart was dressed in a pink T-shirt, blue jean shorts with pink trim and white socks and tennis shoes. (TR 375). Ms. Smithhart testified that they returned to campus at approximately 12:15 p.m., because Mrs. Gayheart needed to pick up her kids from the daycare center so she would only be charged half a day of child care if she got there by 12:30 p.m. No objection was raised by defense counsel with regard to Ms. Smithhart's testimony. As Mrs. Gayheart left the campus, Ms. Smithhart followed until Mrs. Gayheart drove down Highway 90 and took a left towards the daycare center. Mrs. Gayheart had said that she was going to get her kids. (TR 384-385).

Carolyn Hosford testified that she owned the Country Kids Daycare Center, a nursery where Mrs. Gayheart kept her two children. At this time defense counsel, for Mr. Wainwright, objected to the introduction of any evidence with regard to the fact that the victim had two children and argued that it was irrelevant to Wainwright's case because it was already established through the testimony of Ms. Smithhart. (TR 390). Wainwright's counsel argued that this testimony was just to elicit sympathy. (TR 391). Hamilton's defense counsel joined in Wainwright's counsel's objection. (TR 391). The court overruled the objection and Ms. Hosford completed her testimony. Mrs. Gayheart's children were at the daycare center on April 27, 1994, and were supposed to be picked up at 12:30 p.m. (TR 393). She testified that it was Mrs. Gayheart's practice to allow the kids to have lunch and pick them up between 12:00 and 12:30 p.m. Mrs. Gayheart never failed to pick up her children, however, she never came that day. The children were ultimately picked up around 5:00 p.m., by Mrs. Gayheart's husband and an aunt. (TR 394). Ms. Hosford testified that Mrs. Gayheart drove a blue Bronco. (TR 394).

Mississippi State Trooper John Leggett testified that on April 28, 1994, he saw a blue Bronco with very dark tinted windows driving in Lincoln County. (TR 400-402). He called the tag into

his dispatcher to run a check (TR 403), and observed that the driver of the blue Bronco was speeding 50 mph in a 40 mph zone. (TR 403). When Trooper Leggett attempted to stop the car, the driver tried to avoid police and a chase ensued. During the course of the chase, Trooper Leggett observed that the rear window of the Bronco was rolled down and Hamilton, the passenger, pointed a gun at him and started shooting. (TR 404-405). During the course of the five to ten minute chase, Trooper Leggett observed that Hamilton was the passenger and Wainwright was driving the Bronco. (TR 404, 409). Shots continued to be fired. Wainwright finally lost control of the Bronco and hit a tree. (TR 413-414). When Hamilton got out of the car, he was carrying a shotgun and tried to pump the gun so he could shoot at the officer. (TR 415). Trooper Leggett shot at Hamilton, hitting him. (TR 415). Wainwright also came out of the car, presumably with a weapon, and ran off into the woods. Trooper Leggett did not see Wainwright after that point. (TR 427). As a result of the exchange of gunfire, Hamilton received a grazing wound to his forehead and an upper arm wound. (TR 428).

Trooper Leggett later saw Hamilton at the jailhouse and spoke with him at the Lincoln County Jail. (TR 449). Hamilton had shaved his head and said that he was ready to meet the consequences

of his actions and had been helped by turning to the Lord. He apologized to Trooper Leggett for shooting at the officer and said that if he had not stopped they were going to kill him. (TR 450).

While awaiting trial and still in Mississippi, Hamilton acquired a diagram of the jail **and** wrote a letter to Wainwright detailing how they could plan their escape from the Lincoln County Jail. (TR 556-560, 684-686, 689-699).

While hospitalized in the Lincoln County King's Daughter's Hospital, Columbia County Sheriff's Investigator Russ Williams met with Hamilton and advised him of his constitutional rights. (TR 630-634). A taped statement was taken on April 29, 1994, and transcribed. (TR 634-635). The tape was published to the jury. (TR 637) . In summary, Hamilton stated he and Wainwright were driving a green two-door Coupe De Ville Cadillac when the water pump broke near Lake City. (TR 637-638). They drove around looking for another vehicle and saw the victim, Carmen Gayheart, come out of a Winn Dixie supermarket and followed her to her car. Wainwright, at gunpoint, forced Mrs. Gayheart into her car and Hamilton followed in the Cadillac. They ditched the Cadillac, took all the stuff from the Cadillac and put it in the Bronco and then drove off. (TR 639). Hamilton stated that he **and** Wainwright had discussed the fact that she had seen their faces and that

Wainwright said he was going to kill her. Hamilton said he wanted to let her go, but after Wainwright raped her again, Wainwright took her outside the truck, tried to strangle her to death and shot her. (TR 639). Hamilton believed that she was dead before she was shot because Wainwright strangled her with a green T-shirt. Wainwright shot her in the back of the head with a .22 caliber rifle and then dragged her body into the trees. (TR 639-640). Hamilton stated that Mrs. Gayheart kept asking what they were going to do with her and he told her that they just wanted the car and would let her go. Mrs. Gayheart told him that she had two children, a boy and a girl, ages 5 and 3, and not to hurt her. (TR 641). After they disposed of the body, they drove off and later discarded Mrs. Gayheart's clothing, jewelry and purse. Hamilton testified that he threw the .22 caliber rifle out the window not too far from the murder scene. (TR 642-644, 645).

Hamilton ultimately agreed to return to Florida to assist the police in finding Mrs. Gayheart's body. Mrs. Gayheart was found on May 2, 1994. (TR 647-649). On cross-examination by defense counsel, Investigator Williams admitted that Hamilton was the more cooperative of the two defendants (TR 653), and, that after a number of follow-up discussions with Hamilton, Hamilton agreed to return to Florida to help locate the body because the Gayheart

family wanted the body. (TR 654-656). Investigator Williams testified that overall Hamilton was cooperative in helping locate the body and subsequently attempting to locate the rifle. (TR 656, 665).

Robert Kinsey, a FDLE Special Agent, also interviewed Hamilton and following Miranda warnings obtained a statement from him. (TR 888-896). During the course of this more detailed statement to Special Agent Kinsey, Hamilton admitted that he tried to calm the victim and told her that they needed her vehicle. (TR 907). It was Hamilton who first required Mrs. Gayheart to disrobe and he sexually assaulted her in the back of the Bronco. (TR 908). When he got out, Wainwright **was** with her in the back of the Bronco for twenty minutes. When Wainwright was finished, he told her to get out of the Bronco and made her walk about ten feet from the Bronco and lay face down on the ground. (TR 908-910). Hamilton informed Agent Kinsey that he thought Wainwright was going to tie her up, however, Wainwright attempted to strangle her with a T-shirt. Hamilton believed that she was killed by strangulation. Wainwright then told Hamilton that he had 'killed her, I finally killed one." Wainwright was relieved that he had gotten one out of the way. (TR 910-911). Wainwright then took the .22 caliber rifle and shot her

twice in the head. (TR 912). Mrs. Gayheart's body was moved into the woods where Hamilton put limbs and leaves over her. (TR 912).

On cross-examination, Agent Kinsey testified that Hamilton admitted sexually battering her but stated he had no idea she would be killed. He said that Wainwright had not told him that he was going to kill her, (TR 926).

Hamilton County Sheriff Harrell Reid was called to the stand to testify that following testimony of DNA evidence,[1] Hamilton turned to him and said, "Sheriff, what's the need for all this DNA mess, we both raped her." (TR 1659).

Following the admission of fingerprint testimony, the State rested its case. (TR 1747).

Hamilton's motion for judgment of acquittal as to the armed sexual battery based on the failure to show corpus delicti independent of Hamilton's admissions, was denied. (TR 1756).

Hamilton presented a number of witnesses in the defense's case. Specifically, the defense called Dennis Givens, an inmate who was in disciplinary confinement with Wainwright. (TR 1760-1765). Wainwright bragged to Givens that he had sustained a bump

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[1] Evidence was introduced during the course of the trial regarding body fluids; DNA and blood evidence; and fingerprint evidence.

on his head as a result of a gunfight in Mississippi (TR 1765-1766), and told Givens how he kidnapped a girl in Lake City, Florida. (TR 1766). Givens said Wainwright detailed how the woman begged not to be killed because she had two young boys and that she would do anything they wanted but please don't kill her. (TR 1770). Wainwright told Givens that Hamilton raped her but he couldn't and he just wanted to shut her up. (TR 1770). Wainwright admitted to Givens that he tied a scarf around her neck and tried to strangle her but it did not work. He then punched her in the head a couple of times but he could not kill her. He finally told Hamilton to go get the gun and when Hamilton would not get the gun, Wainwright went over to the truck and got the gun and then shot her in the back of the head. Givens said Wainwright kicked her a number of times to make sure she was dead and then drug her body into the bushes and threw stuff over her. (TR 1770-1771). Givens said Wainwright bragged about finally killing someone and observed that Hamilton was a "pussy" because he did not want to kill her. (TR 1771-1772).

On cross-examination by the State, Givens also testified that Wainwright said he had killed a police officer in Mississippi and was doing twenty years for the Mississippi killing. (TR 1774). Wainwright told him that he received twenty years because

Mississippi did not have the death penalty. (TR 1774). Givens stated that he thought Wainwright was trying to impress him and bragged about the 'murders". (TR 1777-1778).

Bill Bispham was also called by the defense and testified that he was incarcerated for murder and robbery and had a cell adjacent to Wainwright. (TR 1780-1781). Wainwright also talked to him about the murders, especially how Hamilton and Wainwright broke out of prison in North Carolina. They came to Florida and, when their car broke down in Lake City, came in contact with Mrs. Gayheart. (TR 1785-1786). Bispham stated that Wainwright bragged about raping Mrs. Gayheart and that she was repeatedly raped by Hamilton and Wainwright. (TR 1787). Bispham said that Wainwright was not going to let her go because she saw their faces and that he put her in front of the car and shot her. Wainwright never mentioned to him that he had strangled her but he did admit that he was the gunman and that he was the one who covered the body in the woods. (TR 1787-1788). Hamilton did not want to kill Mrs. Gayheart but he did help hide her. (TR 1788). Wainwright told Bispham that after the murder they came up against a trooper in Mississippi. Wainwright admitted that he killed the trooper and killed the girl. (TR 1791). Bispham believed that Wainwright wanted to be a "big dog". (TR 1791).

The defense rested. (TR 1798).

On rebuttal, Robert Murphy, a prisoner in disciplinary confinement with Wainwright, was called by the State. (TR 1798). Murphy again recounted Wainwright's talking to him about the murder. The State specifically asked Murphy with regard to how the murder occurred and Murphy said Wainwright said, "I strangled her." (TR 1800). The State attempted to impeach Murphy based on a prior statement made by Murphy that Wainwright had said to him, 'We strangled her." Following discussion on whether the State could impeach this witness, the court allowed the testimony. (TR 802). The State then asked Murphy if Wainwright mentioned anything that happened after they escaped, at which point, Murphy said Wainwright said that they had "ran across some blacks -- drug dealers -- they robbed and killed them." (TR 1804). Objection was raised as to this statement, at which point the State attempted to stipulate that there were no other murders in this case. (TR 1806). A curative instruction was read to the jury by the trial court (TR 1810), specifically, "Members of the jury you are to disregard the last statement of this witness. It is not to play any part in your decision in this case."

Murphy then testified that Wainwright said had received twenty years for killing a trooper in Mississippi. (TR 1810).

Finally, the State called Mallory Daniels, a deputy sheriff investigating the death of Mrs. Gayheart, who interviewed Wainwright. (TR 1817). Following the advisement of his constitutional rights, Wainwright made a statement on May 9, 1994, to Deputy Sheriff Daniels (TR 1825), reflecting that Wainwright and Hamilton arrived in Lake City on April 27, 1994, around noon in search of a car to steal. They got to a Winn Dixie and saw the victim near her 1987 blue Bronco. (TR 1817-1818). Wainwright stated that Hamilton got out with the sawed-off shotgun and forced Mrs. Gayheart into her truck. Wainwright said this was the first time he knew about the abduction. Hamilton told him to follow them in the Cadillac. (TR 1819). They drove to a lumber yard nearby, dumped the Cadillac, removed their stuff from the car and put the guns in the Bronco. Wainwright was driving the Bronco thereafter. (TR 1819). Hamilton got into the back seat with the woman, slapped her around a bit because she was crying and then made her take her clothing off. (TR 1819-1820). Hamilton then raped her in the back seat and had her perform oral sex. They exited on State Road 6, off of I-10 and Hamilton told them to go into the wooded area so they could chill for awhile. (TR 1821). Hamilton then raped Mrs. Gayheart a second time. Although Hamilton told her they were not going to kill her, Hamilton told Wainwright they could not turn her

loose. Hamilton made her get out of the car. (TR 1822). Hamilton put a while towel over her head and then took the gun and shot her twice. Hamilton then took the body into the woods and covered her up. (TR 1822).

Wainwright told Deputy Sheriff Daniels that he never raped her and that it was Hamilton who decided to get the guns when they were in North Carolina. (TR 1824).

The court specifically inquired of Hamilton whether he was going to take the stand, at which point he declined to do so (TR 1852), and all testimony at the guilt phase ended.

At the penalty phase of Hamilton's trial, following a first-degree murder verdict, the State called no witnesses but introduced the commitment order from North Carolina dated May 11, 1989, finding Hamilton guilty of robbery with a dangerous weapon and common law robbery. (TR 2067). The State also introduced a copy of the plea from Mississippi dated September 9, 1994, where Hamilton pled guilty to aggravated assault upon a law enforcement officer. (TR 2068). The State then rested. (TR 2069).

The defense, at the penalty phase, called Donnie Simmons, Hamilton's mother's first cousin, who has known Hamilton since he was a baby. (TR 2070-2071). Hamilton was one of three children and he lived in Greenville, North Carolina, in a neighborhood

called Meadows, which was a poor section where drugs were sold. (TR 2072). Hamilton went to elementary school and attended Adcock Junior High School. Mr. Simmons testified that Hamilton's childhood was not easy due to the neighborhood and the drugs that were sold there. (TR 2073). Hamilton's father worked the night shift and his mother worked part-time, although she suffered from nervous problems and back problems. (TR 2073). It was Mr. Simmons' testimony that the family was not a very stable one since the mother was sickly and on lots of medication and the father had to work. (TR 2074). Mr. Simmons did admit, however, Hamilton received plenty of love from the parents. (TR 2074). Hamilton and his brother Timothy got into a lot of trouble (TR 2075), but Hamilton also evidenced a helpful nature in assisting his grandparents in their store. When the grandparents moved out of the neighborhood, he helped bring food and visited. (TR 2076-2077). When Hamilton was nine years old, he experienced a severe trauma when he was shot in the eye with a BB gun by another kid. (TR 2077). His eye was ultimately removed a couple of years later following a number of surgeries. (TR 2078). It was Mr. Simmons' view that prior to BB gun incident, Hamilton was a normal boy but that afterwards he got in with the wrong crowd. (TR 2079).

Timothy Hamilton, Hamilton's brother, also testified in Hamilton's behalf. Timothy Hamilton stated that he was thirty-five years old, married and had two children. Hamilton was his brother and observed that Hamilton's father was in the courtroom that day. (TR 2081-2083). The neighborhood that they grew up in was drug-infested and it was easy to get involved with the wrong crowd. (TR 2083). The family situation was dysfunctional in that no one got along and although everyone loved each other, there was never any peace and a lot of bickering. (TR 2084). Timothy Hamilton testified that his mother was in poor health and always on medication and that it was his father who provided the stability in the household. (TR 2084-2085). He observed that the kids were always getting into trouble, they used drugs and alcohol at an early age and that his brother had gotten involved in drugs and alcohol in his early teens,. (TR 2085). Timothy Hamilton noted that they ran away from home a number of times and that both of the boys were rebellious. Their sister had gotten into trouble but she managed to straighten out her life. (TR 2086).

Timothy Hamilton observed that when his brother lost his eye, he went into a depression and went off into his own world. His brother started to get into trouble with the juvenile authorities at around age eleven or twelve and he started stealing. Timothy

Hamilton characterized their childhood as sad and chaotic. (TR 2087). Timothy Hamilton admitted that he loved his brother and there had been a loving relationship between the parents. (TR 2088). He observed that his brother had good qualities and that he helped his grandparents. (TR 2088). Timothy Hamilton stated that although they both went wild, it was where they lived, specifically, the community, to blame for what they did. They had no choice as to their conduct. (TR 2089). On cross-examination, Timothy Hamilton admitted that he had changed his life around after serving seven and a half years in prison and that he now had stabilized his life, had a family and children. (TR 2090).

On redirect, Timothy Hamilton admitted that he and his brother fought with their mother and that she once had tried to shoot him and his brother. (TR 2090-2091). He observed that his mother loved him too much and that his mother caused a number of problems. She was a dominating-type person, and although he broke away from his mother, his brother never quite overcame his mother's control. (TR 2092-2095).

Finally, Ann Baker testified that she has known Hamilton since he was 17 or 18 years old when he was dating her daughter. (TR 2095-2096). After the kids broke up, she did not see him again until 1988 when he came to work for her husband in their paint

store. (TR 2098-2099). Hamilton was a good worker and very respectful. She has stayed in contact with him, even though he has been incarcerated. (TR 2099-2100). She observed that Hamilton's family was always in turmoil and not happy and did not get along. (TR 2102). Hamilton told her that he had wished her husband was Hamilton's father and that he had a lot of respect for her husband. Her husband took Hamilton fishing and they did other things together. (TR 2102-2103). She observed that Hamilton had an odd relationship with his mother and that his mother was domineering, jealous and protective of him. (TR 2104). Mrs. Baker recalled how Hamilton's mother had Mrs. Baker's daughter arrested for trespassing because she wanted to break them up. She also recounted how Hamilton's mother had Hamilton arrested for stealing her car although she had bought it for him. (TR 2104-2105). She noted that Hamilton's mother was a negative influence in his life and wanted control. She further testified that Hamilton loves his family and is a caring person and respectful. (TR 2107).

The jury returned a recommended sentence of 10-2 for the death penalty. The trial court, following sentencing, imposed the death penalty, finding the aggravating circumstances outweighed the mitigation. (TR 2217).

SUMMARY OF ARGUMENT

The trial court did not err in denying Hamilton's motion for mistrial during the course of the trial. Additionally, Hamilton cannot demonstrate harmful error on any issue raised on appeal.

The testimony of the State rebuttal witness Robert Murphy did not result in a denial of a fair trial for Hamilton. A statement regarding a collateral crime was only mentioned in passing and a curative instruction was given. Additionally, the State's attempt to impeach Murphy's prior inconsistent statement was appropriate. Should this Court determine otherwise, the State would submit any error was harmless under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The defense's attempt to portray Hamilton as an innocent person regarding the murder was subject to fair challenge on the redirect examination of Agent Kinsey.

The defense was equally not entitled to a jury instruction concerning withdrawal from the crime of murder based on Smith v. State, 424 So.2d 726 (Fla. 1983).

Hamilton's contention that the prosecutor's closing arguments at the guilt and penalty phases were improper and for the purpose of eliciting sympathy for the victim is unfounded. The remarks

were fair statements of the record evidence or inferences that could be logically drawn therefrom.

The admission of Ms. Carolyn Hosford's testimony was cumulative at worse and relevant to whether there was consent to the kidnapping at best. No error occurred and the trial court did not err in overruling Hamilton's objection.

Hamilton's right to remain silent was scrupulously honored and no constitutional violation resulted in the denial of Hamilton's motion to suppress or the admission of statements at trial.

Corpus delicti was sufficiently shown regarding the sexual battery committed by Hamilton separate and apart from his pretrial admission that he was 'a rapist not a murderer."

Terminally, no error occurred when the trial court instructed the jury on CCP based on the proposed instruction from Jackson v. State, 648 So.2d 85 (Fla. 1994).

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING HAMILTON'S MOTION FOR MISTRIAL WHEN, ON REBUTTAL, A STATE WITNESS ROBERT MURPHY INFORMED THE JURY THAT WAINWRIGHT, HAMILTON'S CODEFENDANT, ADMITTED THAT HE AND HAMILTON HAD KILLED "SOME BLACK PEOPLE" AFTER THEIR ESCAPE FROM NORTH CAROLINA, A VIOLATION OF HAMILTON'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Hamilton argues that he was denied a fair trial when, on rebuttal, Robert Murphy, a cellmate of Hamilton's codefendant, Wainwright, responded to a question:

> Q: Did he tell you that he killed anybody else?
>
> A: He did. He mentioned something about after they had escaped on the way down from wherever they had escaped from, South Carolina, or North Carolina, somewhere, that they ran across some black people, a drug dealer or whatever, they robbed and killed them. He didn't go into no detail about that. That was about it.

(TR 1803-1804).

An objection was made by defense counsel stating:

> It is testimony that the defendant was involved in a murder for which he has not been accused, for which the State has not offered any prior indication they would offer evidence.
>
> MR. DEKLE: I didn't know he was going to say that.

> MR. HUNT: But, nevertheless, he said it. If the witness has testified that the defendant was involved in another murder. It is highly improper and extremely prejudicial testimony and he was involved. The court has allowed in credible testimony related to crimes for which the defendant is not on trial. I am willing to rehash that. Now, I take it, Mr. Dekle, and what he said at face value, that he didn't know that that testimony was going to be elicited, but it has been, and the impact on the jury is the same whether it was intentional or accidental. I don't think a curative instruction will replace the impact of that testimony on the jury's minds. I ask the court to declare a mistrial.

(TR 1804-1805).

The State agreed to stipulate to the jury that no other murders had occurred, however the defense was unsatisfied with such a stipulation and the court then engaged in the following:

> THE COURT: All I can do at this point is a curative instruction, and you preserved the record. I know of no way that this could be prevented, so I'll do a curative instruction.
>
> MR. HUNT: We probably should agree to what the curative instruction is.
>
> THE COURT: The jury is not to consider evidence of any other crime that this witness has testified about.
>
> MR. DEKLE: How about this, completely disregard the last statement you just heard. Give it no part in the rendition of your verdict.

> MR. HUNT: If we have got to have a jury instruction, I guess that's as good as any.
>
> THE COURT: Just not refer to the statement but disregard the last statement by the witness.
>
> MR. HUNT: Yes, sir.

(TR 1809). The jury was returned and the court instructed the jury as follows:

> THE COURT: Members of the jury, you are to disregard the last statement by this witness. It is not to play any part in your decision in this case.

(TR 1810).

Following this curative instruction, the State then asked the witness:

> Q: Did Mr. Wainwright say he killed a state trooper in Mississippi?
>
> A: Sir?
>
> Q: Did Mr. Wainwright say he killed a state trooper in Mississippi?
>
> A: Yes, sir, he already had fifteen or twenty years for that.

(TR 1810).

While the testimony of Robert Murphy was unexpected, unintended, and unsolicited, the fact remains that, except for mentioning another incident where Wainwright was bragging about what he and Hamilton did in there travels after they escaped from

North Carolina, the entire tenure of the defense's case was an attempt to portray Wainwright as the bad guy who was telling all the inmates incarcerated with him that he was a bad man, the gunman, the guy who killed not only a lady from Lake City but a Mississippi State Trooper during a shoot-out in Mississippi. Just prior to Robert Murphy's testimony, the jury had heard the testimony of Dennis Givens and Bill Bispham, who both observed that Wainwright was trying to impress them and brag about the "murders" (TR 1777, 1778), and trying to be a "big dog" around them. (TR 1791). During the State's rebuttal, Robert Murphy was only echoing testimony that the jury had already heard by the defendant's own witnesses that Wainwright had been bragging about Hamilton and Wainwright's escape from North Carolina and the crime spree that they had engaged in culminating in their arrest in Mississippi. In fact, defense counsel perpetuated this by allowing inquiries of both Givens or Bispham regarding Wainwright's killing "a Mississippi State Trooper" and receiving twenty years for that crime when, in fact, no murder had occurred.

Defense counsel, while seeking a mistrial, acquiesced and agreed to the curative instruction ultimately given by the trial court. (TR 1809). Viewing this isolated statement in context with the defense's attempt to portray Wainwright as the bad guy who was

bragging about the crimes he committed versus Hamilton [who didn't want to shoot Mrs. Gayheart and had nothing to do with the murder, although he raped Mrs. Gayheart, helped kidnap Mrs. Gayheart and robbed Mrs. Gayheart], any comment must be viewed in the most harmless light.

The rebuttal testimony solicited by the State from Robert Murphy was nothing more than what the defense had presented through the testimony of inmates Givens and Bispham. The error was invited by the defense in its attempt to portray Wainwright as the bad actor and Hamilton as an 'insignificant participant" in this brutal crime scenario. The very decisions upon which Hamilton relies should be equally applied to the motivations of the defense in presenting its single-minded defense that Wainwright **was** out there bragging about what he had done.

While regrettable, the statement made by Robert Murphy with regard to killing drug dealers in North Carolina was a de minimus statement when placed in context with the whole trial. No further mention was made with regard to Mr. Murphy's testimony either at the guilt portion of Hamilton's trial, or the penalty phase where the State only introduced documentary evidence of Hamilton's prior violent convictions.

A mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 320 (Fla. 1979). For example, in order for a prosecutor's comment to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contributed to the conviction, be harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise. Blair v. State, 406 So.2d 1103, 1107 (Fla. 1981) . The instant circumstance is quite similar to the facts in Buenoano v. State, 527 So.2d 194 (Fla. 1988), wherein this Court held:

> Buenoano's third point on appeal questions whether the trial court improperly denied her motion for mistrial based on the gratuitous made by Mary Beverly Owens that Buenoano set fire to her own house to collect insurance proceeds. Buenoano contends this remark was irrelevant and constituted an attack on her character. Although we agree the remark was improper, given the totality of the circumstances we do not find the remark was so prejudicial as to require a mistrial. When the comment was made the trial judge sustained defense counsel's objection, but no motion for mistrial was made. Later when defense counsel moved for a mistrial, the trial court denied the motion but agreed to give a curative instruction to the jury if so requested. Defense counsel subsequently requested instruction whereupon the trial judge instructed the jury to disregard the statement made by Miss Owens. A mistrial should be

> declared only when the error is so prejudicial and fundamental that it denied the accused a fair trial. Even if the comment is objectionable, the proper procedure is to request a curative instruction from the trial judge that the jury disregard the remark. See Ferguson v. State, 417 So.2d 631 (Fla. 1982). A curative instruction was sufficient in this case to dissipate any prejudicial effect on the objectionable comment. From our evaluation of the record, Buenoano received a fair trial, and the trial judge did not abuse his discretion in denying her motion for mistrial.

527 So.2d at 198.

See also Merck v. State, 664 So.2d 939 (Fla. 1995) (no abuse of discretion in denying Merck's motion for mistrial based upon inadvertent reference by Deputy Sheriff Nester to Merck's first trial); Thompson v. State, 648 So.2d 692 (Fla. 1994) (motion for mistrial denied and curative instruction sufficient where witness for the State responded to defense counsel's questioning with a clearly hearsay-based answer that Thompson alleges were nonresponsive and prejudicial); Arbelaez v. State, 626 So.2d 169 (Fla. 1993) (mistrial not warranted following an emotional outburst by witness screaming that defendant was a murderer and a "son-of-a-bitch" in Spanish).

The record reflects that albeit defense counsel sought a mistrial with regard to Murphy's statement, he agreed to the

curative instruction that was ultimately given. The very nature of the defense's case countenanced the kind of mishap that occurred. Defense counsel's efforts were to portray Wainwright as the bad actor in this crime scenario and Hamilton as merely a 'kidnapper, robber and rapist." Defense counsel presented the testimony of two of Wainwright's jailmates to bolster the aforenoted. The State clearly believed that Murphy was going to testify the same way, that Wainwright killed a Mississippi State Trooper during the shoot-out in Mississippi. Unfortunately, Murphy was apparently aware of yet another crime scenario created by Wainwright that might have occurred immediately following Wainwright and Hamilton's escape from North Carolina. As observed in Thompson v. State, 648 So.2d at ___ (Fla. 1994):

> Thompson argues that Smith's testimony was both inadmissible hearsay and nonresponsive to the questions asked by defense counsel. He also asserts that the curative instruction was ineffective, especially as this was the only eyewitness identification testimony presented. In response, the State admits that Smith's testimony was hearsay; however, the State asserts that the error was 'invited' because Smith's hearsay statement was in response to a question asked by defense counsel. We agree with the State. . . .
>
> Although we can sympathize with the defense attorney's frustration in questioning a less than sophisticated witness, it is apparent from the record that this damaging hearsay

> response was invited by defense counsel's question. We note that the witness had already stated twice that he himself had not seen Thompson when counsel asked the question, 'When did your crew see him?' Furthermore, the defense attorney initially told the trial judge that there was no need for a mistrial and that a curative instruction would suffice. The State did not utilize a hearsay testimony at any point throughout the remainder of the trial, and we specifically note no mention of it in final argument. We find that the trial judge did not err in refusing to grant a mistrial under these circumstances.

648 So.2d at 695.

Based on Buenoano and Thompson, supra, no relief should be granted as to this issue.

ISSUE II

> WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO IMPEACH ROBERT MURPHY WITH REGARD TO AN INCONSISTENT STATEMENT MURPHY MADE TO LAW ENFORCEMENT.

During Murphy's recital of what Wainwright told him with regard to Hamilton and Wainwright's escape from North Carolina and the subsequent crimes they committed, the State expected Wainwright to say that both Wainwright and Hamilton strangled Mrs. Gayheart before she was shot. (TR 1800-1801). When Murphy testified that Wainwright said, "I strangled her", the State attempted to refresh Murphy's testimony based on an interview at the Taylor County

Correctional Institution on February 23, 1995. (TR 1801). Defense counsel objected asserting that the State was improperly impeaching its own witness. The State responded that there was a prior inconsistent statement and it was merely trying to refresh Murphy's recollection. (TR 1802). The trial court allowed further inquiry. (TR 1802).

The following colloquy then occurred:

> BY MR. DEKLE:
>
> Q: Do you remember being interviewed at that time, February 23, 1995, at the Taylor County Correctional Institution?
>
> A: By the FDLE?
>
> Q: By FDLE agents?
>
> A: Yes, sir, I remember.
>
> Q: Do you remember at that time making a statement, 'Wainwright said we strangled her, and I shot her'?
>
> A: Well, the way I explained it to the feds, or the FDLE, or whatever you call them, when they come and ask me about it, I may have, it seems like I did say 'we', but the way I told them, Wainwright was telling me that he strangled her, he was behind her and had something like in his hands or something, and from her back, in the way he explained it to me. And then that's when I went into detail about the puppy and the head and she was kicking and this and that, when he said he got the gun and shot her. So maybe I did say 'we'. I don't know.

Q: You don't know if you said 'we' or not?

A: I said maybe I did. I'm not saying I didn't. I can't remember. It was six months ago.

Q: Was your memory fresher as to what Mr. Wainwright said six months than what it is today?

A: I would imagine, yes.

Q: And at the time, wasn't it your memory that Mr. Wainwright said, 'We strangled her, and I shot her'?

A: Yes, sir.

Q: But then from the way he described it --

MR. HUNT: Judge, that's leading and arguing with the witness, and I object.

THE COURT: Sustained.

(TR 1802-1803).

Hamilton asserts that the aforecited colloquy evidences error on the part of the trial court in allowing the State to inquire of Murphy with regard to what was said. Citing to § 90.608(1), Fla.Stat. (1995), Hamilton admits that the State could impeach its own witness, however he asserts that it was error for the State to call Murphy for the purpose of impeaching him. (Appellant's Brief, pg. 25).

Clearly, the State did not call Mr. Murphy for the purpose of impeaching him. If anything, as reflected by Hamilton in his brief on page 26, "Murphy's testimony that only Wainwright strangled Gayheart differed from what the prosecutor expected him to say: That Wainwright and Hamilton had strangled her." To suggest, as Hamilton now does, that one can glean from this record that the sole purpose for calling Murphy was to impeach him is not supported by this record. Hamilton can point to no authority which supports his contention that reversal should obtain because he was denied a fair trial at this point.

Indeed, the State's attempt to impeach Murphy brought out before the jury that Wainwright likely strangled and then shot Mrs. Gayheart, supporting the defense's theory of the case. No reversible error has been demonstrated.

Citing Ivery v. State, 548 So.2d 887 (Fla. 2d DCA 1989), Hamilton further asserts that the mistake by the trial court was compounded because the court never instructed the jury that an inconsistent statement had relevancy 'only as impeachment and not to prove Hamilton's guilt." (Appellant's Brief, pg. 26). Ivery is distinguishable in that trial counsel specifically requested 'the court to instruct the jury that the evidence tending to impeach Walton was not introduced to prove the truth of the matter asserted

but only **as** evidence of Walton's lack of credibility." 548 So.2d at 888. Said request was denied. No such request occurred here. The District Court held it was error for the trial court not to instruct the jury "that Walton's prior inconsistent statement was relevant only to Walton's credibility and not as proof or evidence of the defendant's guilt" 548 So.2d at **888,** and further determined that the error could not be harmless because "the only other evidence against the defendant was circumstantial and certainly not compelling. Absent Walton's prior inconsistent statement, the evidence against the defendant will not withstand the harmless error test of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)." **548** So.2d at 888 (emphasis added).

In the instant case, the error, if **any in this case,** was harmless beyond a reasonable doubt pursuant to State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). No relief should be forthcoming as to this claim.

ISSUE III

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO ELICIT TESTIMONY FROM FDLE AGENT ROBERT KINSEY AS TO WHETHER HAMILTON HAD LIED TO OR DECEIVED THE POLICE.

Hamilton next takes issue with the State's redirect examination of FDLE Agent Robert Kinsey, concerning how truthful

and forthright Hamilton had been with police concerning the murder of Mrs. Gayheart and the subsequent location of her body.

Defense counsel elicited from Agent Kinsey on cross-examination that Hamilton had provided information with regard to the location of Mrs. Gayheart's body (TR 919); including a diagram of how to find the body (TR 919); that he had volunteered to return to Florida to help locate the body (TR 919); that although Hamilton was given his constitutional rights, he never asked to speak to an attorney (TR 921); never refused to answer any questions put to him by police (TR 921), and to the officer's knowledge, Hamilton never told him anything that was contradictory "regarding his chain of events that began with him leaving prison on the 24th . . . up to the point that he arrived at the Winn Dixie parking lot." (TR 922).

On cross-examination of Agent Kinsey, Mr. Hunt asked:

> Q: Mr. Hamilton admitted to you that he committed a sexual battery upon the victim?
>
> A: Yes, sir, he did.
>
> Q: And he also told you that Anthony Wainwright did the same thing?
>
> A: Yes, sir, he did.
>
> Q: Did he tell you that he had no plans whatsoever to kill her?

A: He indicated during the interview that he didn't realize what had eventually happened was going to happen until it did happen.

Q: In other words, he and Wainwright had not, from what he told you, had not talked about killing her?

A: That's correct.

Q: And apparently Wainwright had not announced his intention to kill her before he actually did it?

A: As I stated earlier, he said that Mr. Wainwright got out of the Bronco with a T-shirt in his hand and had Mrs. Gayheart lay face down on the ground. He did not realize that she was going to be killed until such time as Mr. Wainwright started strangling her.

Q: Did Hamilton admit to having any part in strangling her, other than what you described?

A: No, sir.

Q: Did he admit having any part in dragging her body to the point it was found?

A: No, sir. He specifically said he did not have anything to do with moving the body after she was deceased.

Q: Did he admit or tell you that he in any way aided or encouraged Mr. Wainwright to kill Mrs. Gayheart?

A: No, sir, he didn't.

Q: From what Mr. Hamilton told you, did Wainwright himself cover or attempt to cover, the body in this case before they left?

A: Yes, sir, he said he tried to put some items over the body, like some leaves and limbs and stuff like that, things that were readily available to him there in the area.

(TR 925-927).

Prior to redirect, the State asked the court to rule whether the truthfulness of defendant Hamilton was at issue. Following discussion, the court determined that questions would be permitted on redirect as to discrepancies between what Hamilton told Agent Kinsey and the facts of the case. (TR 932). Redirect commenced at (TR 932-935) without specific objection by defense counsel as to any inquiries made. Recross-examination of agent Kinsey commenced at (TR 936) and continued through (TR 942). Defense counsel was permitted, without objection, to explore with Agent Kinsey Hamilton's cooperation with the police.

It is difficult to ascertain the exact error Hamilton asserts occurred during the course of the total testimony of Agent Kinsey. A fair exchange was made with regard to direct and cross-examinations by both the State and the defense as to what Hamilton told Agent Kinsey as it related to the facts of the **case.** Contrary to Hamilton's assertion that there has been a violation of §90.404(1), Fla.Stat. (1994), the State would submit that Hamilton's good character **was** not the issue herein, rather the

questions elicited by the State on redirect and further explored on recross dealt with whether Agent Kinsey was accurate in his representation of what Hamilton told him as they related to the facts and circumstances surrounding the murder and the recovery of Mrs. Gayheart's body. Moreover, comments concerning the location of the gun and whether Hamilton accurately provided information to its location was a fair exploration of the facts and circumstances of the case. Hamilton has pointed to no authorities which suggest reversal is mandated in the instant case. The State would submit that no error occurred, however should this Court ascertain that the trial court erred in its ruling with regard to whether Hamilton's truthfulness was at issue, any error was harmless beyond a reasonable doubt. State v. DiGuilio, supra.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY, AS REQUESTED, ON THE DEFENSE THAT HAMILTON WITHDREW FROM THE PLAN TO MURDER MRS. GAYHEART.

The crux of Hamilton's argument is the trial court erred in denying Hamilton's counsel request for a jury instruction on the defense of withdrawal. Citing Hooper v. State, 476 So.2d 1253 (Fla. 1985), and especially Smith v. State, 424 So.2d 726 (Fla. 1983), Hamilton asserts that the issue "is whether there was 'any

evidence' Hamilton had withdrawn from the plan to kill Mrs. Gayheart." (Appellant's Brief, pg. 34).

Hamilton's defense at trial was not that he withdrew from a plan to kill Mrs. Gayheart, rather the evidence he presented both through cross-examination of the state witnesses and in the defense's case in chief, was that he knew nothing about any plan to kill Mrs. Gayheart and that he continually informed her during the kidnapping, rape and robbery that no harm would come to her. Clearly there is a significant distinction between an individual withdrawing from a plan to kill somebody versus an individual never contemplating a murder at all. In fact, the testimony of Investigator Williams, as well Agent Kinsey, reflects that the statements made to them by Hamilton, Hamilton said that he kept telling Mrs. Gayheart they were not going to hurt her. The testimony of Dennis Givens and William Bispham was geared to what co-defendant Wainwright said to them regarding Wainwright's role in the murder. To suggest that these statements were "evidence" to support a withdrawal by Hamilton is totally unfounded. To that end, had the trial court granted Hamilton's request for an instruction on withdrawal, nothing but confusion would have reigned.

Although Hamilton, in his brief, mentions in passing the testimony of Mallory Daniels, one of the State's rebuttal witnesses, he does not acknowledge the full extent of Deputy Sheriff Daniels testimony. Deputy Sheriff Daniels testified that he interviewed co-defendant Wainwright regarding the death of Carmen Gayheart. (TR 1817). During the course of that interview, Wainwright told Deputy Sheriff Daniels that they arrived in Lake City on April 27 around noon. They stopped at a Winn Dixie because they needed to steal another car and saw the victim driving a 1987 blue Bronco. (TR 1817-1818). Wainwright's accounting of the events leading up to Mrs. Gayheart's murder were that Hamilton got out of the car with a sawed-off shotgun and forced Mrs. Gayheart back into her car. (TR 1818). Wainwright stated that that **was** the first he knew about the abduction and Hamilton told Wainwright to follow them in the Cadillac. After transferring guns and other "stuff" into the Bronco, Wainwright drove down the Interstate. (TR 1819). Wainwright said that Hamilton got in the back seat with the woman, slapped her around because she was crying and made her take her clothes off and raped her. (TR 1819-1820). Wainwright said that Hamilton made Mrs. Gayheart perform oral sex and after the rape, it was Hamilton who told Wainwright to exit on State Road 6 and go drive into a woody area. Hamilton then raped Mrs. Gayheart

a second time. (TR 821). Mrs. Gayheart kept crying and asked if she was going to be let go at which point Hamilton told her they were not going to kill her, however he told Wainwright that they could not **turn** her loose and at some point thereafter, he took her out of the Bronco, put a towel over her head and shot her twice. (TR 1822). Wainwright said that Hamilton took her body into the woods, covered her up and removed her rings and jewelry. (TR 1822). Wainwright never admitted raping Mrs. Gayheart and told Deputy Sheriff Daniels it was Hamilton who got the guns in North Carolina. (TR 1824).

The State would submit that the instant case is identical to that of Smith v. State, 424 So.2d 726, 732 (Fla. 1983), wherein the Court held:

> Appellant contends that he is entitled to an instruction on withdrawal because his last pretrial statement, which was entered into evidence by way of police testimony, said that Copeland was the killer and that Appellant tried to talk Copeland out of killing the girl. The testimony of Hall was that Copeland and Smith both agreed to the killing. Hall's testimony made no mention of any communication of withdrawal by Appellant during the automobile trip from the motel to the murder scene. Defense counsel surely could have attempted to bring out such facts on cross-examination if Hall had heard any such renunciation.

> As was pointed out above, the evidence upon which Appellant relied in arguing that he was entitled to the instruction is his final pretrial statement. It is worthy of note that Appellant moved to suppress his pretrial statement and that the denial of his motion to suppress is made the subject of one of his points on this appeal.
>
> Appellant correctly points out that **a** defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions. (cites omitted). If there is any evidence of withdrawal, an instruction should be given. The trial judge should not weigh the evidence for the purpose of determining whether the instruction is appropriate. **Appellant's pretrial statement, however, testified to by a state witness, seems hardly sufficient to raise the issue of withdrawal in view of the above discussed facts. Without formulating any general harmless error rule regarding improper denial of instructions on defenses, we hold that here the error, if any, was harmless. . . .**

424 So.2d at 732 (emphasis added).

Unlike Smith, however, in the instant case, there was never any statement by Hamilton that he tried to talk Wainwright out of killing Mrs. Gayheart. If anything, to reiterate, Hamilton said he did not know anything about the murder. Moreover, in addition to the similar facts of Smith, Deputy Sheriff Daniels detailed to the jury the fact that Wainwright said Hamilton was the murderer. See Butler v. State, 493 So.2d 451, 452 (Fla. 1986), wherein the Court

held: 'A court should not give instructions which are confusing, contradictory, or misleading." See also Savage v. State, 588 So.2d 975, 979-980 (Fla. 1991), in rejecting the defense's requested instruction on voluntary intoxication, the Court held:

> Contrary to Savage's argument, there is insufficient evidence of intoxication in this case. Savage's self-serving statement to the detective that he had been drinking and smoking crack is unsupported by any evidence of the quantity of intoxicants that he consumed or for how long he had been consuming them. Therefore, we hold that the court did not err in refusing to give the instruction on voluntary intoxication. Cf. Bertol otti v. State, 534 So.2d 386 (Fla. 1988); Robinson v. State, 520 So.2d 1 (Fla. 1988).

588 So.2d at 979-980.

Based on the foregoing, the State would submit that no error occurred when the trial court denied the defense's request for an instruction on withdrawal.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN OVERRULING HAMILTON'S OBJECTION TO THE PROSECUTOR'S CLOSING ARGUMENTS, WHICH WERE DESIGNED TO "ELICIT SYMPATHY FOR THE VICTIM".

The first comment objected to by defense counsel occurred at the inception of the State's closing argument. Defense counsel argued that the State made an improper argument designed to appeal

to the emotions and prejudiced the jury through the following statement:

> She was kidnapped, raped, murdered. And her only crime was to stop off at a store to pick up dog food and pizza. For this sin, she lost everything. She lost her car, her clothing, her dignity and her life. The loss that concerned her the most, the loss that tormented her mind as her captors tormented her body, was the loss of her children. In those final moments of her life, that was what she talked about was her children.

(TR 1935).

The record reflects that every statement summed up in this one paragraph was based on evidence presented at trial. To suggest that the State must couch its closing argument in sanitized words is ludicrous. Hamilton admitted that he was a kidnapper and a rapist, just not a murderer. Hamilton's statement reflects that Mrs. Gayheart told them she had children and asked them not to kill her. Both Hamilton's statement and Wainwright's statement to Deputy Sheriff Daniels reveal that she was crying, concerned about her children and asked to be released. Beyond per adventure, there was no error and the trial court did not err in overruling defense counsel's objection to the aforenoted statements.

Hamilton also argues that the State erred and the trial court should have granted a mistrial or at least a curative instruction when the State argued:

> By bringing her to the point of death, you know, he assumed a little bit of the responsibility, assuming what he says is true. There was a 30-30 there. There was a 16-gauge shotgun there. If he wanted . . .

(TR 2002).

The trial court held that the instant statement was fair comment on the evidence. Based on this Court's decision in Consalvo v. State, ___ So.2d ___, 21 Fla. L. Weekly S423, 425 (Fla. 1996), no error occurred.

Hamilton next argues that the trial court should have granted his motion for mistrial when the State argued:

> He shot at John Leggett because at that time Wainwright happened to be driving and he couldn't shoot. And in the final analysis that probably dictated who shot Carmen Gayheart that first time.

(TR 2012).

Defense counsel's objection was that the State should not 'be allowed to argue that in fact the evidence as to collateral crimes is an indication of the character of the defendant and his propensity to commit crimes. Such evidence would have been proper if admitted for those purposes." (TR 2013). The trial court

determined that the statements made by the prosecutor were 'fair comments on the evidence as rebuttal argument." (TR 2015).

The record reflects that evidence was before the jury concerning the shoot-out in Mississippi and that it was Hamilton who climbed in the back of the Bronco and started shooting at Officer Leggett. Again, Hamilton seeks to sanitize his actions both at the murder scene and at the time he was arrested. It is axiomatic that in closing arguments the State may comment as to the evidence presented and draw fair inferences from that evidence in its argument to the jury.

Lastly, Hamilton points to the closing arguments made at the penalty phase of Hamilton's trial which he asserts improperly "continued to build its case for sympathy for the victim." (Appellant's Brief, pg. 42).

Put in context, the record reveals that during his closing argument at the penalty phase of Hamilton's trial, the State, in reviewing the mitigating factors that the defense presented, argued:

> The third and final mitigating circumstance is any other aspect of the defendant's character or record, and any other circumstance of the offense. And in order to prove this third mitigating circumstance, we heard from the family of Richard Eugene Hamilton. And we heard stories about his childhood. And we

> heard stories about his troubled youth. We heard stories about how he worked in a paint store and did a good job. And, you know, it occurred to me that someone else argued a mitigating circumstance very similar to that back on April 27, when Carmen Gayheart was kidnapped, and she said, 'Please don't kill me, I'm a wife and I'm a mother.'

(TR 2119). Following further discussion, the trial court agreed with the defense that a curative instruction was warranted and informed the jury: "The jury is to disregard the last statement of the prosecutor." (TR 2121). Although a curative instruction was given herein, the statements made by the prosecutor regarding Mrs. Gayheart's plea not to kill her because she was a wife and a mother, was not inappropriate comment because it properly put in context the nature of the mitigation presented by the defense.[2]

Citing Cobb v. State, 376 So.2d 230, 232 (Fla. 1979), Hamilton acknowledges that in order for a new trial to obtain, arguments must be so prejudicial "as to vitiate the entire trial." In the instant case, the comments heretofore eluded to were either proper

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[2] To the extent, on page 42 Hamilton's brief, there is any confusion as to whether, "the next thing a planned to say was Mr. Hamilton found that an insufficient mitigating circumstance to spare the life of Carmen Gayheart.", was presented to the jury, the record reflects that the jury was not present when the prosecution made these comments to the trial court. Defense counsel's objection and the trial court's curative instruction went to the statement that Carmen Gayheart asked Hamilton and Wainwright, "Please don't kill me, I'm a wife and I'm a mother."

comment on the evidence or not of such a nature as to warrant a mistrial. See Watts v. State, 593 So.2d 203 (Fla. 1992); King v. State, 623 So.2d 486, 488 (Fla. 1993), and Love v. State, 569 So.2d 807 (Fla. App. 1st DCA 1990).

Finally, in Johnson v. State, 442 So.2d 185, 188-189 (Fla. 1983), this Court found that any error eluding to a victim's family which would elicit the jury's sympathy could be harmless. See Darden v. State, 329 So.2d 287 (Fla. 1976). Based on the foregoing, the State would urge that no error occurred either at the guilt or penalty phases of Hamilton's trial attributable to the prosecutor's closing remarks. All relief should be denied as to this claim.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT MRS. GAYHEART ROUTINELY PICKED HER CHILDREN UP FROM A DAYCARE CENTER BUT DID NOT DO SO ON APRIL 27, 1994.

Miss Carolyn Hosford was called by the State and testified that she owned Country Kids Daycare Nursery and knew Carmen Gayheart. (TR 390). Defense counsel for defendant Wainwright objected to any testimony by Miss Hosford that Mrs. Gayheart had two children because it was irrelevant to Wainwright's case and

further asserted that the testimony was elicited for sympathy. (TR 390-391). Hamilton then joined in Wainwright's motion. (TR 391).

The State argued:

> MR. BLAIR: I intend for this witness to be very brief. And I am not going to ask names and ages. But the fact that she was expecting her there at 12:30 as her custom was, to be very prompt and punctual. Her testimony about expecting her at 12:30 corroborates the last witness, and establishes the time of this crime. And we think it is relevant.
>
> And I am not attempting to inflame the juries. I have not asked the ages or names of the children or anything of that nature. It is also relevant, Your Honor, as to the issue of consent. It shows the intent of Carmen Gayheart. And we do have to establish non-consent to this kidnapping.

(TR 391).

The trial court determined:

> If handled the way the State describes, it would be more probative than inflammatory. And I'll allow it along the outline I heard.

(TR 391).

Following this exchange, the State elicited from Miss Hosford that Mrs. Gayheart's children were in daycare on April 27, 1994, and they were supposed to be picked up before 12:30 p.m., the cutoff time for a half day daycare. (TR 393). Mrs. Gayheart usually dropped the children off between 8:00 and 8:30 a.m. and

would pick them up after they had their lunch between 12:00 and 12:30 p.m. Mrs. Gayheart had never failed to pick up her children, however she did not pick up the children that day. The children were picked up sometime after 5:00 p.m. by Mrs. Gayheart's husband and an aunt. (TR 393-394).

Hamilton argues that § 90.406, Fla.Stat. (1994), 'comes as close as any statutory law to addressing the problem presented by this issue":

> Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

(Appellant's Brief, pg. 49-50).

Presumably, Hamilton is arguing that because the State demonstrated that Mrs. Gayheart did not pick up her children on April 27, 1994, the only reason said testimony was brought out was to elicit sympathy, not to show that Mrs. Gayheart had a routine.

The instant testimony was relevant as evidenced by the prosecutor's argument to the trial court to show non-consent with regard to kidnapping as well as set the time for the crime. Mrs. Gayheart's activities that day were all relevant in explaining the circumstances that ultimately resulted in her demise. Moreover, as

acknowledged by Hamilton in his brief and reflected in the record, similar evidence was testified to by Jennifer Smithhart, Mrs. Gayheart's best friend, without objection by defense counsel. Miss Smithhart testified that when she and Mrs. Gayheart returned to the campus at approximately 12:15 p.m., Mrs. Gayheart said that she needed to pick up her kids from the daycare center because it was considered a half day if she got them before 12:30 p.m. (TR 383). Miss Smithhart said the last time she saw Mrs. Gayheart was when she left the campus to go pick up her two children. (TR 383). Miss Smithhart said that was their daily practice that they would follow each other off the campus as a protective measure. She last saw Mrs. Gayheart driving her Bronco down Highway 90 towards the daycare center. (TR 383-385).

While it is clear that any mention of a victim's family may invoke sympathy, the fact remains that the evidence presented herein was not elicited to evoke sympathy but rather, to set in place the time and the non-consent of Mrs. Gayheart's kidnapping. Miss Hosford's testimony at worse may be characterized as cumulative but certainly not error.

To the extent Hamilton argues that this evidence somehow may have impacted the penalty portion of his trial, the record reflects that evidence of Mrs. Gayheart's two children and their ages was

not mentioned at all by the State at the penalty portion of the trial. Rather, if anything, evidence with regard to the ages of Mrs. Gayheart's two children occurred during the guilt portion of Hamilton's trial through Hamilton's statements to police.[3] There was neither improper admission of any evidence with regard to Miss Hosford's testimony nor any improper victim impact evidence presented at the penalty phase of Hamilton's trial. Hamilton has failed to identify an error of any sort and is entitled to neither a new trial nor resentencing as to this point.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN ADMITTING SEVERAL STATEMENTS HAMILTON MADE TO THE POLICE BECAUSE THEY HAD NOT "SCRUPULOUSLY HONORED" HIS RIGHT TO REMAIN SILENT, A VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS, AND THOSE ACCORDED HIM UNDER ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION.

The main thrust of Hamilton's argument here is that the trial court erred in not suppressing statements because the police did not scrupulously honor Hamilton's right to remain silent. Pretrial, a suppression hearing was held as to the statements obtained by police from Hamilton, and as a result, all relief was

[3] Moreover, there was no attempt to redact Hamilton's statements concerning Mrs. Gayheart's cries not to kill her because she had two children.

denied. The record reveals that following Hamilton and Wainwright's arrest on April 28, 1994, they were both hospitalized at King's Daughters' Hospital in Brookhaven, Mississippi, following the wreck of the blue Bronco and the shoot-out with the police. Russ Williams, an investigator with the Columbia County Sheriff's Department, traveled to Brookhaven, Mississippi, on April 29, 1994, and interviewed Hamilton around 12:00 p.m. that day. Hamilton was advised of his Miranda warnings and signed a warnings form. He was also advised as to his rights but declined to sign a waiver of his rights form. (TR 2230-2232). No specific statement was made by Hamilton at this first contact because the police were executing a search warrant and taking "body samples." (TR 2234).

Later that day at approximately 4:23 p.m., Investigator Russ Williams again spoke with Hamilton and advised him of his constitutional rights. (TR 2234-2235). At that time, Hamilton was willing to speak with the police and in fact, following a brief untaped conversation, made a taped statement. (TR 2235). On April 30, 1994, Williams accompanied Hamilton when they returned to Florida regarding the location of Mrs. Gayheart's body. (TR 2338). Miranda warnings preceded the April 30, 1994, statement. (TR 2238).

On cross-examination, Mr. Williams testified that before going to the hospital he had been briefed by law enforcement officers regarding the circumstances of Hamilton and Wainwright's arrest. (TR 2245) . He was aware that Hamilton had been in an accident and had been shot when he first saw Hamilton. (TR 2246). Investigator Williams testified that he spoke with hospital personnel before seeing Hamilton and they indicated that it **was** okay to speak with Hamilton. (TR 2247). Investigator Williams testified that Hamilton neither requested counsel nor said he did not want to speak with the police. (TR 2253). He did admit that Hamilton seemed uncooperative about talking about the crime when he saw him around noon but that his second visit with Hamilton at 4:23 p.m., took place at the Lincoln County Jail and, at that time, Hamilton almost immediately started discussing the circumstances of the crime. (TR 2257-2260). Williams testified that he spoke briefly with Hamilton around noon on April 29; had a second discussion and then a taped interview with Hamilton on April 29 at approximately 4:30 p.m.; contacted and spoke with Hamilton and brought him back to Florida on April 30, 1994, and was present during a May 3, 1994, reinterview. (TR 2270-2271).

Bobby Kinsey testified that he interviewed Hamilton on May 3, 1994, at the Columbia County Jail in Lake City, Florida. Present

with Agent Kinsey was Russ Williams, Lieutenant Mallory Daniels and Sheriff Harrell Reid. (TR 2273). Hamilton was advised of his rights and signed the Miranda form and waiver form. (TR 2274). Agent Kinsey testified that he knew nothing about the previous statements and was present only for the May 3, 1994, statement. Additionally, he testified that he had listened to any earlier statements and the only briefing he had had was an overview of what had transpired in Mississippi. (TR 2281-2282).

Hercules Maxwell, a captain with the Department of Corrections, testified that he attended the first appearance on April 30, 1994, and at such time, Hamilton declined the assistance of counsel. (TR 2291). On May 3, 1994, he attended a second appearance where Hamilton again declined the assistance of counsel. (TR 2293).

Branson Fisher, an investigator and polygrapher with the Columbia County Sheriff's Department, testified that he contacted Hamilton out in Mississippi and gave Hamilton a polygraph examination. (TR 2301-2303). Prior to the polygraph examination, Hamilton was advised of his rights and signed a waiver form. (TR 2303).

The defense called Captain Nydam who testified that he had traveled to Mississippi to investigate the whereabouts of Carmen

Gayheart. (TR 2314). He first saw Hamilton at the hospital and was there to help assist in executing a search warrant. (TR 2319). It was Captain Nydam's view that Hamilton was not very happy and he recalled that Hamilton told them that he "didn't want to talk right then." (TR 2336). Following this statement, no further questions were asked (TR 2328), however 4 to 4-1/2 hours later, after Hamilton had been transported to the Lincoln County Jail, they interviewed Hamilton. (TR 2331-2332). At the jail, Hamilton's demeanor had changed and he was very cooperative. (TR 2332).

Hamilton was the last person called at the suppression hearing. He testified that on April 28, 1994, he was arrested in Mississippi and sustained injuries as a result of a shoot-out. (TR 2339). When he was first questioned by law enforcement officers he was shackled and there were armed guards outside his door. (TR 2340). The first officers that came to see him and advised him of his rights were Investigator Russ Williams and Captain Nydam. (TR 2341). Although he remembers them reading his rights, Hamilton testified that he could not recall signing any of the forms but did recall refusing to sign the waiver form. (TR 2342-2343) . He told the officers he wanted a lawyer. (TR 2343, 2344). During this first visit by police, codefendant Wainwright was brought into the room and Hamilton testified that he told Wainwright to say nothing

and ask for a lawyer. (TR 2345). Hamilton admitted that once he told officers he did not want to speak, nothing more was asked of him except he was shown a picture of a man and woman, presumably the victim. (TR 2345).

Further inquiry revealed that on May 3, 1994, he was again interrogated, this time by Sheriff Reid, Officer Mallory Daniels, Agent Bobby Kinsey and Investigator Russ Williams. (TR 2346). He testified that as a result of conversations with them he declined the assistance of counsel because he was told the "pros and cons" of having a lawyer and that all of his cooperation thus far would be null and void if he had lawyer. (TR 2347-2348). Hamilton testified that he never requested to speak to the police. (TR 2350).

On cross-examination, Hamilton reaffirmed that when Wainwright was brought into the room he told him not to make a statement. (TR 2353). Hamilton admitted voluntarily making a taped statement in the Brookhaven Jail (TR 2356), because he thought it was in his best interest to make the statement. (TR 2357). He admitted that he was told he was not going to get any deal whether he spoke to an attorney and he freely spoke with Branson Fisher and Agent Kinsey. (TR 2359-2360). Hamilton admitted that just prior to the polygraph examination, he had spoken with his attorney. (TR 2362).

On redirect, Hamilton testified that he was induced while in Mississippi to talk to the police because they allowed him to see his family. (TR 2363). It was Hamilton's statement that police told his family that if he cooperated he would not get the death penalty. (TR 2363). Upon further redirect examination, Hamilton observed that he had sustained head injuries in the accident and believed that he was under the influence of medication when he made his statement. (TR 2373-2375). On recross, Hamilton admitted that in spite of the accident and head injuries and medications, he was not confused about the "nature" of the crimes he committed. (TR 2377).

At no point either on April 29, April 30, or May 3, were any of Hamilton's constitutional rights violated. The trial court was correct in denying Hamilton's motions to suppress. Based on the suppression hearing, it is clear that at noon on April 29, 1994, the police ceased all conversation with Hamilton once he said he did not want to speak at that time. 4 to 4-1/2 hours later, after Hamilton had been moved from the hospital to the Lincoln County Jail and after he had been re-Mirandized, Hamilton not only waived his rights, but affirmatively made a taped statement to police regarding the kidnapping, robbery, rape and murder of Carmen Gayheart.

In Michigan v. Mosley, 423 U.S. 96 (1975), the United States Supreme Court held that the confession therein was voluntarily and rejected the argument that Miranda creates a "per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." 423 U.S. at 102-103. The Court, in Mosley, concluded:

> The admissibility of statements obtained after the person in custody has decided to remain silent depends, under Miranda, on whether his 'right to cut off questioning' was 'scrupulously honored'.

423 U.S. at 104.

The evidence introduced at the suppression hearing supports a finding that Hamilton's rights were scrupulously honored because all questioning was immediately cut off at the point when Hamilton alleges, indicated he did not want to talk to the police at that time. Only after Hamilton was moved from the hospital to Lincoln County Jail did he speak with police after further Miranda warnings were given, he waived his rights and made a taped statement.[4]

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[4] Interestingly, during the course of the suppression hearing, Hamilton indicated that he sought the assistance of counsel in Mississippi. No other witness corroborated that testimony and Hamilton has not argued as a point on appeal that he was denied his right to counsel.

In Peterka v. State, 640 So.2d 59 (Fla. 1994), this Court concluded:

> Vinson's July 18 conversation with Peterka, in which Peterka asked to speak with Purvis, did not 'taint' any subsequent statement that Peterka made. While not entirely clear, it appears that the State conceded that Peterka's July 14 and 18 statements to Vinson should be suppressed because the statements were given when Vinson reinitiated contact after Peterka stated his desire for questioning to cease. Although the State conceded this point, the record does not support the conclusion that Vinson's July 18 contact was improper. See Michigan v. Mosley (cite omitted) (invoking Fifth Amendment right to remain silent does not 'create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject'). Vinson's July 18 interrogation occurred four days after Peterka invoked his right to remain silent. Vinson read Peterka his Miranda rights again, and Peterka waived those rights. See Mosley, 423 U.S. at 106 (cite omitted) (finding police honored defendant's right to remain silent based upon several factors, including fact that questioning resumed 'only after the passage of a significant period of time' and the 'provision of a fresh set of warnings'). Moreover, even if Vinson's July 18 questioning violated Peterka's right to remain silent, no 'taint' carried over to Peterka's statements to Atkins as Peterka himself initiated this contact with the police.

640 So.2d at 67. See Zerquera v. State, 549 So.2d 189, 192 (Fla. 1989) (reversed on other grounds). See also Scott v. State, 619

So.2d 401 (Fla. 3d DCA 1993), wherein the court held that Scott's Miranda warnings were not violated when

> . . . Appellant was taken into custody at the scene in the midst of a hostile crowd he spontaneously stated, 'take me to jail, 'cause you are going to take me anyway. I don't want to talk to anyone.' The statement was made before Appellant had been advised of his Miranda rights and was not made in response to questions asked of the arresting officer.
>
> At the police station an hour and a half later, another officer advised Appellant of his constitutional rights. Appellant indicated he understood his rights and was willing to talk. He then gave a taped statement to the police.

619 So.2d at 401.

The Court held:

> Assuming, without deciding, that the Appellant invoked his right to silence at the scene of the crime, the police 'scrupulously honored' this request by waiting over an hour and a half before advising Appellant of his Miranda rights and questioning about the crime. See Muehleman v. State, 503 So.2d 310, 313-314 (Fla.), cert. denied, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987); State v. Chavis, 546 So.2d 1094 (Fla. 5th DCA 1989) (interrogation ninety minutes after the defendant said he did not want to talk right now, while eating a sandwich, was proper), cert. denied, 493 U.S. 1046, 110 S.Ct. 845, 107 L.Ed.2d 839 (1990); Wells v. State, 540 So.2d 250 (Fla. 4th DCA) (two hour passage of time between the defendant's arrest and resumption of questioning was sufficient after repeating the Miranda warnings,), review

> denied, 547 So.2d 1212 (Fla. 1989); McNicles v. State, 505 So.2d 633 (Fla. 4th DCA) (police scrupulously honored defendant's right to silence where defendant **was** not reinterrogated until after he signed waiver of rights form, forty-five minutes from time initial questioning ceased), review denied, 515 So.2d 230 (Fla. 1987). . . .

619 So.2d at 402.

Based on the foregoing, there is absolutely no basis upon which Hamilton can assert the trial court erred in denying his motion to suppress statements made.

ISSUE VIII

> WHETHER THE TRIAL COURT ERRED IN ADMITTING HAMILTON'S STATEMENTS THAT HE SEXUALLY BATTERED MRS. GAYHEART BECAUSE THE STATE FAILED TO ESTABLISH THE CORPUS DELICTI FOR THAT OFFENSE.

Hamilton next argues that there is insufficient evidence to prove corpus delicti for the sexual battery and therefore the trial court erred in admitting Hamilton's numerous statements that he sexually battered Mrs. Gayheart. While acknowledging that the proof need only be circumstantial in proving corpus delicti, State v. Allen, 335 So.2d 823 (Fla. 1976), Hamilton is suggesting that there is insufficient circumstantial evidence sub iudice to meet that requirement. Specifically, Hamilton sets out four criteria which he argues the State must prove, that the victim was over

twelve years of age or older; that the defendant committed an act upon her which constituted a sexual battery; that during the process he used or threatened to use a deadly weapon, or actually used force likely to cause serious personal injury, and that the act **was** done without her consent. Hamilton takes no issue with three of the four criteria but argues that the State failed to show that Hamilton committed an act upon her in which his sexual organ penetrated or had union with the vagina of the victim. (Appellant's Brief, pg. 58).

The record clearly reflects that sperm or semen was found on the rear seat covers of the Ford Bronco. (TR 1406, 1530-34). Blood groupings of A and 0 were also found on the seat covers and the crime lab analyst, Miss Roman, was able to type Mrs. Gayheart's blood as A and Hamilton's and Wainwright's **as** type 0. (TR 1408). DNA evidence was found on part of the seat cover but it could not definitively be determined what part of Mrs. Gayheart's body fluids it was derived. (TR 1625). The medical examiner testified that the victim was found with only a pair of shorts on and no underwear. (TR 839). Because the body was badly decomposed, the medical examiner testified she could find no evidence of spermatozoa (TR 847). Contrary to Hamilton's suggestion that the evidence only showed that Mrs. Gayheart had been in her car and

that semen stains had gotten on the seat covers, the record further reflects that Hamilton's fingerprints were found in the back seat of the Bronco.

In Barwick v. State, 660 So.2d 685 (Fla. 1995), this Court rejected Barwick's contention that he did not intend to rape Rebecca when he entered her apartment, but "that he only intended to steal something. According to Barwick, when Rebecca resisted, a struggle ensued. Barwick contends that the evidence on which the State relies is not inconsistent with his theory of events." 660 So.2d at 695. The Court observed:

> . . . The State need not conclusively rebut every possible variation of events which could be inferred from Barwick's hypothesis of innocence. Id; State v. Allen, 335 So.2d 823, 826 (Fla. 1976). Whether the evidence fails to exclude all reasonable hypothesis of innocence is for the jury to decide. (Cite omitted). We have held that 'if there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, and where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. Taylor v. State, 583 So.2d 323, 328 (Fla. 1991).

660 So.2d at 695.

The court went on to recite the facts as follows:

> . . . Barwick admitted that he had observed Rebecca sunbathing on his way home and

> subsequently returned with a knife to the apartment complex where he initially observed her. He also admits to passing by Rebecca several times and entering her apartment only after Rebecca herself had entered. Additionally, the State presented evidence showing that at the time the victim was found, the top portion of her bathing suit had been pulled up and the bottom portion had been pulled down in the back. Tests of the semen stains on the comforter found wrapped around the victim's body revealed that Barwick was within two percent of the population that could have left the stain. We find that this evidence, considered in combination and in a light most favorable to the State, is inconsistent with Barwick's theory that he entered the Wendt's apartment merely to steal something. Given the inconsistencies, a jury could have reasonably rejected Barwick's testimony denying that he attempted to rape Rebecca.

660 So.2d at 695. See also Farinas v. State, 569 So.2d 425, 430 (Fla. 1990), wherein the Court held that although there must be

> . . . independent proof of the corpus delicti to admit a confession, "'it is enough if the evidence tends to show that the crime was committed.' [Frazier v. State, 107 So.2d 16, 26 (Fla. 1958)]. Proof beyond a reasonable doubt is not mandatory." Bassett v. State, 449 So.2d 803, 807 (Fla. 1984)
>
> . . . Other than Farinas' confessions, the testimony of the victim's sister was presented at trial. She testified that Farinas leaned into the car and removed the key from the ignition. He then ordered the victim out of the car, grabbed her by the arm, and guided her to his car. At this point, the crime of burglary was completed. We reject Appellant's

> argument and concluded that this independent evidence was clearly more than adequate to establish the corpus delicti, of burglary for the introduction of a confession. . . .

569 So.2d at 430.

In Schwab v. State, 636 So.2d 3, 6 (Fla. 1994), the Court found the State had proven corpus delicti with regard to murder, sexual battery and kidnapping charges. The Court observed:

> . . . The medical examiner testified that the victim died from manual asphyxiation, most probably by strangling or smothering. The victim's nude body and the clothes that had been cut off him were found concealed in a footlocker in a remote location. (Cites omitted). A wad of tape also found in the footlocker yielded a fingerprint identified as Schwab's, Witnesses testified rented and returned the U-Haul truck. Although the victim may have gone willingly with Schwab initially, the conclusion that at some point he was held against his will is inescapable. (Cites omitted). The details in Schwab's statement correspond well with the physical evidence. Therefore, we hold that the State submitted sufficient proof of the corpus delicti, to admit Schwab's admissions that he kidnapped and raped the victim. Moreover, all of the evidence proved beyond a reasonable doubt that corpus delicti of each of the charged crimes and that Schwab committed them.

See also Burkes v. State, 613 So.2d 441 (Fla. 1993).

Terminally, the State would submit that while not unmindful that admissions may not be introduced unless there is a prima facie proof tending to show the crime was committed, in the instant case,

Hamilton's statement to Sheriff Reid **during the course of the trial, after Hamilton had heard the** DNA **and blood and fluid evidence, is admissible and not part of the confessions or admissions normally entertained under this principle.** The record reflects that Hamilton County Sheriff Harrell Reid was escorting Hamilton out of the courtroom during the course of the trial and as part of an utterance, whether excitable or not, Hamilton turned to Sheriff Reid and said, 'Sheriff, what is the need for all this DNA mess, we both raped her." (TR 1159). Absent some caselaw to the contrary, the State would submit that this particular statement would have been admissible absent any other evidence of corpus elicti to prove corpusi. Based on the foregoing, the State would submit Hamilton has demonstrated no basis upon which a new trial should be awarded.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR USING THE REVISED JURY INSTRUCTION ADOPTED BY THIS COURT.

At page 2142 through 2143, the trial court read the following jury instruction:

> And, finally, the crime for the which the defendant is to be sentenced was committed in

> a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find that the murder was cold, calculated, premeditated, and that there was no pretense of moral or legal justification.
>
> "Cold" means that the murder was a product of calm and cool reflection.
>
> "Calculated" means that the defendant had a careful plan or prearranged design to commit the murder.
>
> "Premeditated" means that the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder.
>
> A pretense of moral or legal justification is any claim of justification or excuse that though insufficient to reduce the degree of homicide, nevertheless reflects the otherwise cold and calculating nature of the homicide.

(TR 2142-2143).

The instruction given is identical to that found in Jackson v. State, 648 So.2d 85, 89, n.8 (Fla. 1994), and adopted in material part in In Re: Standard Jury Instructions in Criminal Cases, 678 So.2d 1224 (Fla. 1996).

Hamilton has cited no authority which would support his conclusion that this Court's evolutionary jury instruction for CCP found in Jackson is at all wanting.

CONCLUSION

Based on the foregoing, the State would urge this Court to affirm the judgment and sentence entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 27th day of January, 1997.

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