IN THE SUPREME COURT OF FLORIDA

ANTHONY FLOYD WAINWRIGHT,

Appellant,

v.

CASE NO. 86,022

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

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

Guilt Phase

Jennifer Smithhart, the victim Carmen Gayheart's best friend, identified photographs of the victim. (XV 1995). 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. (XV 1996-1999). Ms. Smithhart testified that they returned to the 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 daycare if she picked her children up by 12:30 p.m. (XV 2004). No objection was raised by defense counsel regarding Ms. Smithhart's testimony. As Mrs. Gayheart left campus, Ms. Smithhart followed until Mrs. Gayheart drove down Highway 90 and took a left towards the daycare center. Mrs. Gayheart said that she was going to get her kids. (XV 2004-2006).

Carolyn Hosford was next called by the State and testified that she owned the Country Kids Daycare Center, a nursery where Mrs. Gayheart kept her two children. (XV 2011). [Defense counsel for Wainwright, objected to the introduction of any evidence with regard to the facts that the victim had two children and argued that it was irrelevant to Wainwright's case because the testimony had already been established through Ms. Smithhart's statements. (XV **2011-2012**). Wainwright's counsel argued that this testimony was just to elicit sympathy. (XV **2012-2013**). 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. (XV 2014). Ms. Hosford testified that it was Mrs. Gayheart's practice to allow for 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. (XV 2014-2015). Mrs. Hosford testified that Mrs. Gayheart drove a blue Bronco. (XV 2015).

The record further reveals that Mississippi State Trooper John Wayne Leggett testified that on April **28**, 1994, he saw a blue Bronco with very dark tinted windows driving in Lincoln County,

Mississippi. (XV 2022-2023). He called the tag into his dispatcher to run a check (XV **2024),** and observed that the driver of the Bronco was speeding 50 mph in a 40 mph zone. (XV 2024). When Trooper Leggett attempted to stop the car, the driver tried to avoid the 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. (XV **2025-2026).** During the course of the five to ten minute chase, Trooper Leggett noted that Hamilton was the passenger and Wainwright was driving the Bronco. (XV 2030-2031, 2035). Shots continued to be fired. Wainwright finally lost control of the Bronco and hit a tree. (XV **2035).** When Hamilton got out of the Bronco, he was carrying a shotgun and tried to pump the gun so he could shoot at the officer. (XV 2036). Trooper Leggett shot at Hamilton, hitting him. (XV **2037).** Wainwright also came out of the car, presumably with a weapon and ran off into the woods. Trooper did not ***see*** Wainwright after that point. (XV **2037). As** a result of the exchange of gunfire, Hamilton received a grazing wound to his forehead and an upper arm wound. (XV 2048-**2049).** Trooper Leggett testified he believed Wainwright had a gun

when he exited the Bronco, however no gun was located. (XV 2053-2054, 2061-2062).[1]

Mississippi State Trooper Carl Brown testified he heard Trooper Leggett run a tag check and heard that shots had been fired near Eva Harris School (XVI 2082-2083). Upon arrival, he observed Trooper Leggett standing over one suspect and immediately proceeded to Frontier Street to assist in the capture of the second suspect. (XVI 2084-2085). A woman flagged him down and indicated there was a man bleeding in a car nearby. (XVI 2086). It appeared that the man, Wainwright, was shot in the head and needed an ambulance. (XVI 2087). Upon arrival, Wainwright told the officer he was shot in the head and 'go ahead and shoot me you black son of a bitch. I don't have nothing to loose. Go ahead a shoot me." Wainwright then stated "I'm not the one who shot the son of a bitch. If I would have shot him I would have killed him", meaning the shoot-out with Trooper Leggett. (XVI 2087).

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[1] On cross-examination by Wainwright's counsel, Trooper Leggett stated he later saw Hamilton at the jailhouse and spoke with him at the Lincoln County Jail. (XV 2071-2072). Hamilton had shaved his head and said that he was ready to meet the consequences of his actions and had 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. (XV 2071-2072).

Trooper Brown asked if Wainwright had AIDS and Wainwright said yes. An objection was lodged as to relevancy only when the State then asked if Trooper Brown took any protective measures after Wainwright told him he had AIDS. (XVI 2088).

On cross-examination, Trooper Brown stated that Wainwright never admitted shooting at Leggett. Defense counsel solicited from Trooper Brown that Wainwright said if he had shot (Leggett) he would have killed him; Wainwright stated he, Wainwright, had nothing to loose and, that Wainwright admitted he had AIDS. (XVI 2100-2101).

Larry Foster, another Mississippi State Trooper, testified that he came into contact with Wainwright on April 28, 1994. (XVI 2104). Wainwright was not very cooperative when authorities located him and it took two officers to secure handcuffs on Wainwright. (XVI 2110). Without objection, Foster testified that Wainwright told him that he (Wainwright) had AIDS and as a result the officers took precautions by washing their hands with bleach. (XVI 2111). The sole objection based on relevancy arose when the State asked, "Why police are frequently exposed to AIDS?" (XVI 2112). The objection was overruled and Trooper Foster answered that they came into contact with blood at accident scenes, etc., and didn't always have gloves. (XVI 2112).

Sheriff Lynn Boyte testified that he first met Wainwright and Hamilton when they were incarcerated in Lincoln County Jail in Mississippi in May 1994. (XVIII 2347). During the course of their stay in the jail, Hamilton devised three attempts to get out. (XVIII 2350). On one occasion, a letter and a hacksaw was found in Hamilton's cell. The letter was from Hamilton to Wainwright and discussed why needed to get out of the jail, how they should take out the jailer and contained a diagram or map of the jail area. (XVIII 2360-2361).

Wainwright moved to suppress statements made on May 9, 11 and 20, urging that these statements were made as part of a potential plea arrangement. (XX 2577-2578). As a result of the motion to suppress, the State proffered the testimony of Sheriff Harrell Reid, who testified that on May 9, 1994, he travelled to Brookhaven, Mississippi to bring Wainwright back to Hamilton County, Florida. (XX 2581). Mississippi counsel for Wainwright told Sheriff Reid that Wainwright would cooperate and help locate the murder weapon because it would prove that Wainwright did not shoot Mrs. Gayheart. Wainwright voluntarily returned to Florida and willingly talked with authorities. (XX 2582-2583). As a result of Wainwright's willingness to talk, the authorities stated that Wainwright would have to testify truthfully and he could have

done no harm to Gayheart and he could prove it. (XX 2583). Wainwright was told that he must pass a polygraph test and he could not have, in any way, hurt Mrs. Gayheart but that anything he said could be used against him. (XX 2584). He was specifically informed that if he were not truthful, everything was off. (XX 2584). The record reflects that on May 9, at 7:15 p.m., Wainwright signed a rights form with counsel present. (XX 2584). During the course of the statement made on May 9, Wainwright at all times had the assistance of counsel, Mr. Victor Africano, present and in fact defense counsel accompanied Wainwright and the law enforcement officers when they took a trip that evening looking for the murder weapon. (XX 2584-2586). When they returned to the jail later that evening, the interview continued. Counsel was present at all times. At the end of the evening, counsel informed the authorities that they could speak with Wainwright the next day and they could go out looking for the weapon again. (XX 2586). Sheriff Reid noted that on May 10, he first had a conversation with Wainwright's lawyer before he took Wainwright, without counsel, out looking for the weapon again. (XX 2586). Defense counsel said that Wainwright would cooperate and answer questions that day. (XX 2586-2587). The next day on May 11, Wainwright contacted authorities and asked for a map of the State of Florida in order to assist him in

locating the area where the weapon had been thrown away. (XX 2587-2588). When specifically asked why they threw away Mrs. Gayheart's jewelry, Wainwright stated "We planned to kill her and we didn't want anything to be found, any jewelry to be found on her body." (XX 2588).

On May 20, Sheriff Reid, Wainwright and his counsel went to the State Attorney's Office in order to have Wainwright polygraphed. Prior to the test occurring, defense counsel Africano told the State Attorney that his client wanted to make a statement, that Wainwright admitted he raped Mrs. Gayheart. (XX 2589). Sheriff Reid testified that prior to that time, Wainwright had always maintained he had done nothing to Mrs. Gayheart. (XX 2589).

On cross-examination, Sheriff Reid proffered that he did not know anything about the circumstances prior to May 9, and that counsel was always present when he was with Wainwright with the exception of the May 10 day trip, looking for the murder weapon. (XX 2590-2594). Sheriff Reid, on redirect, testified that it was Africano who said that the polygraph examination would not take place. (XX 2598).

Following oral argument with regard to whether any of Wainwright's actions were the result of plea negotiations, the

court ruled that Wainwright's actions were in the performance stage and therefore the statements were admissible. (XX 2601).

With regard to the failure to fully disclose Wainwright's statements made to Sheriff Reid on May 10, the court found that said statements were admissible when, after the court made a sufficient inquiry as to whether any discovery violation had occurred. (XX 2602-2606). Wainwright's May 10 statement to Sheriff Reid was that, "The Defendant Hamilton told him as they were driving to the murder scene, 'You know what we have to do?', and Defendant Wainwright said, 'Yes, I know what we have to do.' When defendant Wainwright told sheriff Reid that by that he knew that they meant they had to kill her." (XX 2602).

In the presence of the jury, Mallory Daniels, an officer in the Hamilton County Sheriff's Office, testified that he interviewed Wainwright on May 9 at 7:15 p.m. Present during the interview was Investigator Bobby Kinsey, Sheriff Reid, Attorney Victor Africano and Wainwright. (XX 2611). Lt. Daniels testified that Wainwright conferred first with his counsel and then agreed to talk with the officers after he was advised of his constitutional rights. (XX 2612-2616). The statement made on May 9 was in the presence of counsel concerning the following: (XX 2617). Wainwright stated that he arrived at Cateret Correctional Institute in April 1994

where he met Hamilton. They started talking about an escape and in fact perfected their escape on April 24, 1994. Hamilton and Wainwright had help from Lori Manning who supplied a vehicle and drove them to Jacksonville, North Carolina. On the way, they stopped at a Kmart or Walmart and purchased clothing. (XX 2618). When they became aware that the police were looking for them, they hitchhiked to Newburn, North Carolina, and then stole a green Cadillac. The next day they burglarized a house and took money, a .16 gauge semi-automatic shotgun, a 30-30 rifle and a single shot .22 caliber bolt action rifle. (XX **2619-2620).** At some point after stealing the shotgun they sawed off the shotgun barrel and proceeded on to Myrtle Beach, South Carolina. (XX 2620). [The interview was stopped at this point to allow Wainwright, the police and his counsel to go out looking for the murder weapon. The interview resumed at 9:45, upon their return. (XX 2622)]. Wainwright detailed how they next went to Daytona Beach, Florida, and that evening stayed in the Cadillac behind a church. The next day they started on 1-10 until they got to Lake City, Florida. They were having problems with the car and decided they needed to get another one. They stopped at a grocery store and saw a female walk up to a **1987** Ford Bronco. Wainwright testified that Hamilton got out of the car with a sawed-off shotgun and forced Mrs.

Gayheart into the Bronco. Wainwright observed that that was the first time he knew anything about an abduction. (XX 2623-2624). Wainwright drove the Cadillac to a lumber yard and dumped it there, unloading the guns and other stuff into the Bronco. (XX 2624). They left the lumber yard with Wainwright driving, Hamilton on the passenger's side and Mrs. Gayheart on the floor next to the driver's seat. Wainwright testified that Mrs. Gayheart was crying and that Hamilton slapped her. Hamilton moved her to the back of the truck, made her remove her clothing and raped her and had her perform oral sex. When Wainwright thought he saw a roadblock, Hamilton returned to the front seat of the car and made Mrs. Gayheart clothe herself. At that point, they turned off 1-10 onto State Road 6. (XX 2625). They found a wooded area and decided to chill out for awhile. Wainwright testified that Hamilton again raped Mrs. Gayheart in the back seat of the Bronco. Although Hamilton kept telling Mrs. Gayheart that they were not going to kill her, Hamilton told Wainwright that they could not turn her loose. (XX 2626-2627). Hamilton then retrieved the .22 caliber rifle from the Bronco, placed Mrs. Gayheart on the ground and shot her in the back of the head. He reloaded and shot her again. (XX 2627-2628). Hamilton then moved Mrs. Gayheart's body to a wooded

area some fifty to seventy-five feet away. Wainwright claimed he took no part in helping Hamilton with Mrs. Gayheart. (XX 2628).

At this juncture, defense counsel objected to any testimony with regard to a sexual battery occurring since, he asserted, that the corpus delicti about the sexual battery had not been proven. Wainwright's counsel argued that an instruction should be given that the sexual battery count does not apply to Wainwright but only to Hamilton, and that there was no independent proof of the crime of sexual battery. (XX 2634-2635). Sheriff Reid testified before the jury that he brought Wainwright back to Hamilton County. Wainwright was willing to return to Florida voluntarily after he had spoken to his lawyer in Mississippi. (XX 2648-2649). On May 9, Wainwright first met with his counsel Victor Africano for about forty-five minutes and then proceeded to give a statement to the police in the presence of defense counsel. (XX 2649-2650). That same night they went out looking for the murder weapon during a break in the interview but found nothing. (XX 2651). Wainwright agreed based on counsel's advice, to go out on May 10 to look again for the weapon. Sheriff Reid testified that before he took Wainwright out on May 10, he first called Wainwright's counsel who said he did not want to go but said that they could talk to Wainwright. (XX 2652). Wainwright told Sheriff Reid that Hamilton

told him you know what we have to do. Wainwright understood that it meant "We've got to kill her." Sheriff Reid observed that this statement was a change from Wainwright's previous statement the night before which indicated that he did not know anything about what was going to happen. (XX 2654). Sheriff Reid testified on May 11 he had another conversation with Wainwright when Wainwright asked the jail staff to secure a Florida map for him. (XX 2654). Wainwright stated to Sheriff Reid that they had planned to kill her but we did not want Mrs. Gayheart's jewelry found on her. (XX 2654-2655). Sheriff Reid observed that this was the first time that Wainwright had acknowledged involvement in the murder. Although they searched a number of times, Sheriff Reid testified that they never found the weapon or clothing while they were with Wainwright. (XX 2654-2655). On May 20, Sheriff Reid transported Wainwright to the State Attorney's Office for a further interview. Wainwright met with his defense lawyer first and following that discussion, defense counsel Africano came to the door and said his client wanted to make a statement. (XX 2655-2656). Wainwright then admitted that he had sex with Mrs. Gayheart, specifically that he made her get into the back of the Bronco and he raped her. (XX 2656).

Robert Murphy, an inmate with the Department of Corrections, testified that he was confined with Wainwright and that Wainwright talked with him about why he was incarcerated. (XX 2704-2710). Wainwright told Murphy that he and Hamilton escaped from prison and had come to Florida. That they had abducted a woman and took her vehicle. Wainwright told him that Hamilton had sex with the woman but that he, Wainwright, did not. Wainwright said that he had strangled her, but she did not die, so her shot her twice in the head and then dumped her body in the woods. Wainwright told Murphy that there had been a shootout in Mississippi with the Highway Patrol, and both Wainwright and Hamilton had been shot. Wainwright was mad that Hamilton was helping police locate Mrs. Gayheart's body and observed that he would not have helped locate the body because she could not be identified based on an autopsy report he saw. (XX 2709-2710).

Gary Gunter, another DOC inmate, testified that he also had conversations with Wainwright. Wainwright talked about escaping from prison and robbing some people on his way to Lake City, Florida. In Lake City, he got a girl in a shopping center and took her to Hamilton County. Wainwright said that both Hamilton and Wainwright had sex with her and then they took a gun and shot her in the back of the head two times. (XXI 2742-2743). Gunter stated

that Wainwright bragged the entire time about the murder and shootout in Mississippi. (XXI 2744, 2775).

During the course of the trial, defense counsel complained in a motion in limine to restrict the admission of DNA evidence which was provided after defense counsel had made his opening remarks on May 18. (XXII 2851). On May 24, some six days into the trial, defense counsel complained that the State had been slow in providing discovery concerning three additional RFLP aspects of DNA and three additional LOCI. (XXII 2851). Defense counsel argued that his credibility before the jury was brought into question because during his opening remarks to the jury he mentioned three LOCI as opposed to six LOCI. (XXII 2852). As a result of the discussions concerning the additional three LOCI, the trial court allowed defense counsel a twenty-four hour continuance within which to digest the information that had been provided and permit the defense's expert an opportunity to discuss the additional evidence. (XXII 2870).

The State sought to present evidence to satisfy the Frye test, and based on the evidence presented and the arguments asserted, the trial court concluded:

> . . . The court finds that the FDLE protocol and procedures were accepted by the scientific

> community and are admissible in these proceedings.
>
> And as to genetic design, the court finds that their procedures are accepted in the scientific community, specifically relative to the PCR testing. And those results will be admitted in these proceedings.

(XXII 2987-2988).

The record further reflects (XXV 3288-3296), the circumstances surrounding Ms. Trechal's failure to appear for court proceedings on day 10 of Wainwright's trial. Ms. Trechal, as revealed by the court, ". . . at the time of voir dire, this juror was out on a one hundred and fifty dollar cash bond and had charges pending. Her court date is June 1 and that's the day of closing arguments. . ." (XXV 3291). Following further discussions with regard to her status, the trial court concluded that:

> The court understands statute 40.013, no person under any prosecution for any crime is qualified to serve as a juror, complicated by the fact the judge has set this lady for hearing on the date of closing arguments for her charges against her. And the court finds that it would in the best interests of justice to replace juror Trechal with juror no. 13, Mr. Barnstrom.

(XXV 3296).

Penalty Phase:

At the penalty portion of Wainwright's trial, the State introduced certified copies of the plea and sentence by Anthony Floyd Wainwright in Mississippi for aggravated assault upon a law enforcement officer, and further requested that the court take judicial notice of the conviction entered by the trial court on May 30, 1995, for armed robbery with a firearm, armed kidnapping with a firearm, and sexual battery while armed with a firearm of Mrs. Gayheart. (XXVIII 3665-3666). The State then rested.

The defense, at the penalty phase, called Kay Wainwright, Wainwright's mother. (XXVIII 3666-3667). Mrs. Wainwright testified that she and her husband had been married for twenty-seven years and have two children, Christa Wainwright, Wainwright's sister, and Anthony Wainwright who was twenty-four years old. (XXVIII 3667). Mrs. Wainwright testified that when Wainwright was born, he suffered from colic and was sickly with bronchitis and pneumonia during that first year. (XXVIII 3668). As a child he was very active, loved outdoors but was accident prone. She recalled that Wainwright had three head injuries and he had to have stitches to his head. He was basically a normal infant and a normal child but even in his early years he did not make friends easily. She believed he did not interact with other children or play well with other children and seemed to be a loner. He never

talked much nor opened up to his parents and spent a lot of time in his room. The family was middle class with no financial problems, however Mrs. Wainwright observed that she should have been home with her son during the early years. (XXVIII 3669-3670). Although they were a close family, there came a time when Wainwright was in the fourth grade, that he started having problems in school. Mrs. Wainwright revealed that Wainwright was a bed-wetter until he was fourteen years old and that was stressful to him. Mrs. Wainwright observed that it was a real embarassement to him and that it why he did not want to be at anybody else's house. (XXVIII 3671-3672). Wainwright was taken to his pediatrician, however the doctor said that his problem was something that he would grow out of, but he didn't. (XXVIII 3672). In fourth grade, after testing was done, it was recommended that Wainwright be put in a learning disability class, however his performance did not improve. (XXVIII **3673-3674).** More problems occurred when it became clear that Wainwright was not improving in school, yet his sister was doing very well and was very outgoing and had lots of friends. (XXVIII **3675).** Mrs. Wainwright testified that her son was taken to many doctors and to psychiatrists, however no one came up with the same answer. When she took Wainwright to Dr. Charles Boyd in Greenville, North Carolina, he told her that Wainwright was borderline mentally

retarded. (XXVIII 3676). Mrs. Wainwright said that that was the very opposite of what the school had told her because they believed he was capable of performing for his age and there was no problems with Wainwright based on the tests. Wainwright was taken to Chapel Hill to the Center for Child Behavioral and Diagnostic and was found to have a slight auditory problem. (XXVIII 3676-3677). Wainwright finally ended up as a young adult in state prison system in North Carolina for auto larceny. He was sentenced to ten years and was required to take alcohol and psychiatric counseling while incarcerated. (XXVIII 3680). Mrs. Wainwright testified that to her knowledge he was only involved in auto theft and had not engaged in any kind of physical violence. (XXVIII **3681, 3682).** Wainwright got involved with the wrong crowd and Mrs. Wainwright recalled that she was told that Anthony was a follower and that his maturity level was approximately 4 years below his age level. "Sometimes he didn't have the ability to understand the consequences of his actions at the time." (XXVIII 3682-3683). Mrs. Wainwright testified that during the time he had been incarcerated his family members were supportive of him and that he always had a home with her family. (XXVIII 3684).

Outside the presence of the jury, a discussion ensued with regard to a letter Mrs. Wainwright wrote reflecting that Wainwright

may have been sexually molested. Wainwright had instructed his counsel not to discuss the issue. (XXVIII 3686-3687).

Following closing arguments, the jury retired to deliberate its sentencing recommendation. The jury, by a majority vote of 12-0, advised and recommended to the trial court that the court impose the death penalty. (XXVIII **3739).** Sentencing occurred **on** June 12, 1995. Following further remarks by defense counsel, and the declining by Wainwright to make any statements to the trial court, the trial court sentenced Wainwright for the first-degree murder of Carmen Gayheart to death. (XXIX **3777-3791,** VII **1187-1193).**

The trial court found in aggravation, pursuant to Fla.Stat. 921.141(5), that: (a) the capital felony was committed by a person under sentence of imprisonment or placed on community control; (b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (d) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or air piracy or the unlawful throwing, placing or discharging of a destructive device or bomb; (e) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an

escape from custody; (h) that the capital felony was especially, heinous, atrocious, or cruel; and (i) that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification.

In mitigation, pursuant to the statutory mitigation found in Fla.Stat. 921.141(6): (d) that the defendant was an accomplice in the capital felony committed by another person, his participation was relatively minor.

> Finding: Although the court instructed the jury on this mitigating circumstance, and counsel for Anthony Floyd Wainwright argued this mitigating circumstance to the jury, the court finds no support for this aggravating circumstance from the evidence in this case. It is clear from the evidence that Anthony Floyd Wainwright and his co-defendant, Richard Eugene Hamilton, are equally guilty of the murder of Carmen Gayheart. In no way could the participation of Anthony Floyd Wainwright be considered relatively minor. To the contrary, evidence established that Anthony Floyd Wainwright bragged to inmate that he shot Carmen Gayheart, and bragged to one of the inmates that he also strangled Carmen Gayheart. The court gives little weight to this mitigating circumstance.

(VII 1191).

(e) The defendant acted under extreme mental duress or under the substantial domination of another person:

> Finding: Although the court instructed the jury on this mitigating circumstance, and

counsel for Anthony Floyd Wainwright argued this mitigating circumstance to the jury, the court finds no support for this mitigating circumstance from the evidence in this case. There is no evidence that either Anthony Floyd Wainwright or his co-defendant, Richard Eugene Hamilton, exercised substantial domination over the other, or in any way created an atmosphere of extreme mental duress for the other. To the contrary, Anthony Floyd Wainwright was clearly the master of his own fate and consistently made his own decisions. The court gives little weight to this mitigating circumstance.

The jury was instructed that they should consider any other aspect of the defendant's background, character or record or any other circumstances of the offense.

The defendant presented the testimony of his mother, her testimony established that the defendant grew up in a stable, middle-class home. She and the defendant's father held responsible jobs, and their marriage has endured for twenty-seven years. Although defendant had some childhood difficulties with his sister, these were not significant. His mother's testimony established the defendant was respectful of his parents and he was non-violent as a child. She testified that defendant had difficulties in school, and was placed in learning disability classes. At his mother's insistence, he was tested by school authorities, as well as private behavioral specialists hired by his parents. He was moved to several different public schools, as well as being placed in a private school by his parents. Defendant's mother testified that she did not consider her son to be retarded. Defendant's mother also testified that as a child defendant was a loner and had few friends, experiencing difficulties with

social adjustment. According to his mother, the defendant was a bed-wetter until the age of fourteen, making him embarrased to spend time or nights away from home, or have friends spend the night at his home. She also testified that the defendant was not a leader, and was easily swayed and dominated by others. His mother also testified to defendant's difficulties with the criminal justice system, and his repeated brushes with the law occasioned by his stealing automobiles.

It is, therefore, the finding that the court has considered every aspect of the defendant's background and character as revealed through the testimony of his mother. The court finds that the defendant's difficulties in school and his school adjustment problems, due in part to his problems associated with bedwetting do provide some measure of mitigation. However, the court accords them little weight as mitigating circumstances, and finds that these mitigating circumstances are outweighed by any single aggravating circumstance.

(XI 1191-1192).

SUMMARY OF ARGUMENT

Wainwright asserts nine issues for appellate view, none of which specifically challenge the validity of the death sentence imposed for the first-degree murder of Mrs. Carmen Gayheart.

Eight issues question the validity of the guilt phase of the trial. Each, however, are wanting and present no basis to overturn the murder conviction.

Wainwright argues that the statements he made were connected to plea negotiations and as such these statements were inadmissible. The record clearly bears out that the statements were admissible and were made as part of the performance stage of any agreement that if Wainwright told the truth, had nothing to do with harming Mrs. Gayheart and passed a polygraph test, the State would not seek the death penalty against him. Wainwright was not only a full participant in these crimes, but he affirmatively declined to be polygraphed, thus failing to satisfy the performance stage of the 'negotiations."

The State's slowness in providing completed DNA tests was reviewed by the trial court and as a result the defense was given a twenty-four hour continuance in order to review any impact the delay might have caused. No prejudice was shown to have occurred.

Wainwright cannot demonstrate that the trial court abused its discretion in determining how to address the discovery issue.

The joint trial with dual juries was without blemish and Wainwright can point to no prejudice that resulted from this experience.

Other crimes or acts were admitted to explain the course of this crime. The escape from North Carolina and the shoot-out in Mississippi did not become a feature of the trial.

Juror Trechal was properly excused when it became known she was not qualified to serve pursuant to 840.013, Fla.Stat. No error was committed by the trial court as to this issue.

Admissions to the jury regarding Mrs. Gayheart's "habit" retrieving her children from daycare center was admissible as was the unobjected testimony regarding Wainwright's statements to police that he had AIDS.

The corpus delict was proven for sexual battery therefore Wainwright's admissions were validly presented.

Death is the appropriate sentence in the instant case. Any sentencing errors dealing with the noncapital convictions have no impact on the appropriateness of the sentences imposed.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN ALLOWING STATEMENTS MADE BY WAINWRIGHT TO THE POLICE IN EVIDENCE AT THE TRIAL,

Wainwright first argues that the statements made to law enforcement officers on May 9, 10, 11 and 20, were all the product of "an agreement" wherein "the State would not seek the death penalty against Wainwright if (1) he did not contribute to Mrs. Gayheart's death, (2) he was truthful in his conversations with law enforcement, and (3) he passed a polygraph test. (T 2592)." (Appellant's Brief, pg. 17).

While there may have been some discussed that if Wainwright cooperated, the State may not seek the death penalty in his case, that testimony was the product of Hamilton County Sheriff Harrell Reid's testimony on cross-examination as to "the ground rules" for the May 9 statement. The record reflects the following scenario:

> Q. All right. Now, in conjunction with your understanding of the ground rules on May 9, it didn't involve the Mississippi attorney, but did involve Mr. Africano; is that right?
>
> A. Yes, sir.
>
> Q. That can cooperate, he's got to be truthful and he's got to do a couple of things, he's got to pass a polygraph test?

A. Well, the first priority was that he could not have contributed in any manner to her death.

Q. All right.

A. That was the first.

Q. And then he would have to pass a polygraph test?

A. To that, yes, sir, to be completely truthful with us and pass a polygraph test.

Q. And what does that get him then if he is completely truthful and he didn't contribute to her death and he passes a polygraph test?

A. Then the State would agree not to seek the death penalty.

Q. All right. And that was what was disclosed and discussed on May 9, 1994; isn't that true?

A. That was the -- yes, sir, that's true.

Q. All right. And as a result of those negotiations, and those ground rules, the rights form was read and the statements were then made; is that correct, on May 9?

A. Would you rephrase that, or repeat the question.

Q. After those ground rules were set out and discussed --

A. I didn't set the ground rules out, so I don't know how they got set out.

> Q. Okay. But you understand that was what the ground rules were, because you just testified about that?
>
> A. Yes, sir.

(XX 2591-2593).

On redirect, Sheriff Reid was asked the following questions:

> Q. Sheriff Reid, for the record, did Mr. Africano advise you after that conversation between you and his client on May the 20th, that he would not take a polygraph examination?
>
> A. Yes, sir, he did.
>
> Q. Were you still prepared to offer it, if he was willing to take it?
>
> A. Yes, sir.

(XX 2598).

The State, in response to defense counsel's argument that Fla.R.Crim.P. 3.172(h), controlled and that the admissions made by Wainwright were not admissible, noted that the negotiations were over:

> The understanding was clear. If he would tell the truth and pass the polygraph, he get's life. He was in the performance stage after the negotiation phase was over, and it was incumbent upon him at that point to prove that he had not contributed in any way to the death of Carmen Gayheart, and to do that he had to pass the polygraph. And everything he said and everything he did was towards the end of

> proving he did not kill Carmen Gayheart or have anything to do with her death.
>
> The case that controls is Groover v. State, with apologies to Mr. Taylor, is a Florida Supreme Court case, not a First District Court of Appeals case, which is right on point and says that when you're in the performance stage then you're out of negotiations and the rule does not apply.
>
> And specifically when the defendant is warned that anything he says can be used against him, can be used to prosecute him, as he was in this case, then that's even more reason for the statement to be admissible. The statement it admissible and should be heard by the jury. At every stage his attorney was involved in the process and was fully aware of what was going on. And there's nothing to prevent the statement from coming before the jury.

(XX 2599-2600).

The trial court concluded:

> As to the motions before the Court on the three days in ques ion, the Court finds that it was in the performance stage, and the statements will be admissible.

(XX 2601).

The court further ruled with regard to the May 10 statement which was not fully disclosed to the defendant and "that disclosure" is not a subject of review before this Court:

> If there is nothing further, the Court will proceed and allow the statement, and find that it is a procedural technical violation, which does not deprive the defendant of any other

> opportunities he would have had to rebut or confront such testimony. Therefore, that testimony will be admissible.

(XX 2606).

The facts as recited in the State's Statement of the Case and Facts reflect that Wainwright, with the aid of counsel, clearly understood that the State would not seek the death penalty if he could prove that he did not contribute to Mrs. Gayheart's death, he was truthful in his conversations with law enforcement officers and he passed a polygraph test. The record reveals that by his own admissions [other than those statements made on May 9, 10, 11 or 201, statements made to cellmates while awaiting trial reveal Wainwright was an active participant in the sexual battery and murder of Carmen Gayheart. Moreover, Wainwright refused to take a polygraph test and with the assistance of counsel admitted that he had committed a sexual battery on Carmen Gayheart. Because Wainwright failed to satisfy the performance stage of any agreement, all statements were admissible pursuant to Groover v. State, 458 So.2d 226 (Fla. 1984).

Wainwright asserts that pursuant to Stevens v. State, 419 So.2d 1058 (Fla. 1982), the trial court failed to perform the two-tier analysis for determining whether a statement is made in connection with a plea negotiation. Wainwright argues, 'had it

done so, the trial court should have found that the four different days of statements made by Wainwright should not have been admitted in the State's case-in-chief." (Appellant's Brief, pg. 19). In Groover v. State, supra, the Court specifically addressed the issue of whether a sworn statement made in fulfillment of a negotiated plea bargain versus a statement made to induce or to enhance negotiations, is a statement made in connection with a plea for purposes of Fla.R.Crim.P. 3.172(h), or 890.410, Fla.Stat. The Court, in Groover, observed:

> . . . Florida's limitation on the use of such statements is derived from the analogous federal rule and this Court has looked to judicial gloss of the federal rule in construing the state version. See, e.g., Bottoson v. State, 443 So.2d 962 (Fla. 1983); Anderson v. State, 420 So.2d 574 (Fla. 1982). Federal Rule of Criminal Procedure 11(e)(6), the federal counterpart to Florida Rule of Criminal Procedure 3.172(h), was adopted to promote plea bargaining by allowing a defendant to negotiate without waiving Fifth Amendment protection. 'The most significant factor in the rule's adoption was the need for free and open discussion between the prosecution and the defense during attempts to reach a compromise.' United States v. Davis, 617 F.2d 677, 683 (D.C. Cir. 1979) (emphasis added). This Court has applied the federal courts' narrow construction of Rule 11(e)(6) to Florida Rule of Criminal Procedure 3.172(h), by adopting the two-tier analysis from United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978), for determining whether a statement falls within the ambit of the

exclusion. . . . When an agreement has been reached, further statements cannot be made in the expectation of negotiating a plea. Nor does the policy of fostering frank discussion between prosecution and defense require extending protection to statements made in fulfillment of an agreed-to bargain.

In a strikingly similar case, United States v. Stirling, 572 F.2d 708 (2nd Cir.), cert. denied, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978), one defendant agreed to plead guilty to one charge and to testify truthfully before the grand jury in exchange for dismissal of other counts charged. He testified immediately after agreeing to the bargain and before entry of his plea. The indictment returned was unsatisfactory to him on various grounds. Therefore, he withdrew from the plea agreement and pleaded not guilty. The second circuit upheld the trial court's refusal to suppress the grand jury testimony, noting:

> The plea agreement had already been reached by the time Schultz went before the grand jury. The negotiations were over. All Schultz had to do was live up to his end of the bargain. His failure to do so justly exposed him to prosecutorial use of his grand jury testimony.

571 F.2d at 731-32. The court went on to note that the plea agreement had expressly warned Schultz that any information he provided would be used to prosecute him if he breached the plea agreement. The record clearly shows that this same warning was an express feature of the plea bargain Groover entered. We find no error in the admission of this statement.

458 So.2d at 228.

The instant case is identical to the facts in Groover. Wainwright was forewarned that anything he said could be used against him and with the assistance of counsel, he was clearly informed of what he needed to do in order to make the negotiations a reality. See also United States v. Watkins, 85 F.3d 498 C.A. 10 (Kan. 199611, wherein the court observed:

> . . . Accordingly, both the language of, and the policy underlying, Rule 11(e)(6)(d), verified that once a plea agreement is reached, statements made thereafter are not entitled to the exclusionary protection of the rule. (Cites omitted). Because the statements of Watkins at issue here were made after the plea agreement had already been finalized, they are not entitled to Rule 11(e)(6)(d)'s exclusionary protection.

85 F.3d at 500.[2]

The court, in Watkins, further dismissed Watkins' assertion that the aforenoted principle did not apply because Watkins' June 7 statements were identical to the protected statements he made at the May 19 meeting. The court observed:

> There mere fact that the statements made at the June 7 meeting were substantially identical to the statements made at the May 19 meeting does not mean that the June 7 statements are somehow covered by Rule 11(e)(6). As noted in Davis, the purpose of

---

[2] As noted in Groover, supra, Fed.R.Crim.P. 11(e)(6), is the basis for Fla.R.Crim.P. 3.172(h).

> Rule 11(e)(6), is to foster free dialogue and encourage compromise in the plea negotiation process. (Cite omitted). That purpose is not served by excluding statements made after a plea agreement has been reached. This is true whether the subsequent statements are the same as those made during the plea negotiation process or not.

85 F.3d at 500.

Lastly, Watkins argued that the plea agreement itself prohibited the use of the statements made post-plea negotiations:

> In support of his contention, Watkins points to language in the plea agreement providing that 'It is further understood that no information given by this defendant ***subsequent*** to *and* ***in*** *response* ***to*** this *agreement* will be used against him in any criminal case or investigation.' Unfortunately, Watkins failed to note that the provision he cites does not apply if 'he violates any provision of this plea agreement, in which event it is specifically understood and agreed that all information given by him or derivatives, shall be admissible into evidence in any proceeding against him.'

85 F.3d at 500. See also United States v. Lloyd, 43 F.3d 1183, 1185-1187 (8th Cir. 1994); United States v. Knight, 867 F.2d 1285 (11th Cir. 1989), and United States v. Hare, 49 F.3d 447 (8th Cir. 1995), wherein the court, in discussing the applicability of Rule 11(e)(6), observed: "We must look to the specific facts of each case and examine 'the totality of the surrounding circumstances.' 49 F.3d at 451.

Hare made statements prior to and after the plea negotiations occurred:

> The circumstances surrounding the October 14 interviews indicated to us that Hare was anxious to cooperate yet naturally concerned about the consequences of his wrongdoing. Hare was an attorney familiar with the guidelines and aware that the offenses with which he could be charged were serious. His statements were offered unconditionally in an effort to cooperate. Perhaps Hare was hopeful of improving his situation and eventually gaining a motion for substantial assistance at sentencing, but the statements cannot be said to have been made in the course of plea discussions within the meaning of the exclusionary rules because no plea bargain was offered or even contemplated at that point.
>
> The same is true for statements made during Hare's continued cooperation after October 14, **1992**, with one exception. The government entered into plea discussions with Hare on December 15, **1992**, and at that time, Hare accepted an offer which required him to continue cooperating with the government. Any statements made during this discussion would be entitled to the exclusionary protection of Rule 11(e)*(6)*(d), and Rule 410, but it appears that no statements from that meeting are at issue. Rather, Hare sought to suppress subsequent statements made and the evidence provided while he was cooperating pursuant to that agreement. The statements made after the agreement had been reached, however, cannot be said to have been made in the course of plea discussions. See Lloyd, 43 F.3d at 1186. We conclude that the district court did not clearly err by denying Hare's motion to suppress.

49 F.3d at **451.**

Wainwright clearly is entitled to no relief as to this claim. The trial court was correct in declaring that the admissions made by Wainwright were made during the performance stage of the plea negotiations. To that end, Wainwright's reliance on this Court's decision in Anderson v. State, 420 So.2d **574** (Fla. 1982), is wanting. In Anderson, this Court clearly stated that Anderson's February statements were made during plea negotiations:

> The testimony at the suppression hearing, however, established that both Anderson and his attorney believed that they were bargaining for a plea and that the senior deputy had spoken with the state attorney by telephone regarding talking with Anderson. . . On the totality of the circumstances, the deputy's disavow Anderson and his Minnesota attorney that they could finalize a plea bargain on the spot does not remove the February statement from the process of plea negotiations.
>
> The facts of this case demonstrate that Anderson actively sought to negotiate a plea agreement and did not merely make an admission. The February, thus, fits within the two-tier analysis for determining whether a discussion should be characterized as a plea negotiation. . . .

420 So.2d at 576-577.

Terminally, should this Court determine that some or all portions of the statements admitted were part of the bargaining-for

a life sentence as opposed to statements made in the performance stage following the negotiations, the harmless error doctrine applies. The record reflects that absent the statements made to authorities, Wainwright admitted to cellmates that he raped, strangled and then shot, twice in the head, Carmen Gayheart. Beyond peradventure, any error as to this claim is harmless beyond a reasonable doubt.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE RESULTS OF THE FINAL THREE DNA LOCI

The issue presented before this Court is not whether the **DNA** procedures and protocols used in the instant case are suspect, rather Wainwright's complaint is that at the time he made his opening remarks to the jury, on May 18, 1995, evidence of only three genetic **LOCI** had been provided the defense. On the afternoon of May 18, 1995, the State provided to the defense evidence of three additional genetic LOCI. Wainwright **asserts** that he was denied a fair trial because there was "no credible reason for the State to withhold knowledge as critical as this **DNA** evidence." (Appellant's Brief, pg. 25). The question before this Court then is whether the State's failure to complete **DNA** testing prior to the

commencement of trial in any way impacted upon Wainwright's ability to a fair trial. On May 24, 1995, six days after defense counsel received the additional three genetic LOCI, Wainwright's counsel argued the motion in limine, stating, in material part:

> A motion in limine, Mr. Dekle, with the DNA testimony, specifically, discovery that was provided to me at approximately 5:00 p.m. on the 18th of May, some seven hours or so after I gave an opening statement. In the opening statement, having relied on previously provided discovery, which we have complained about as being late all along, some coming in on March 20, some coming in on March 27, there were, as to Anthony Wainwright in the RFLP aspects of the DNA evidence, which comes from the FDLE Crime Lab, we have been provided with reports as to three LOCI testing having been completed, including the autorads and the procedure and protocols that was followed by Dr. Pollock in Jacksonville. That was the subject of an earlier motion.
>
> From March 27 to the beginning of the trial in this case on May 15, we received no other information in the way of discovery concerning the DNA. **Relying on that fact on May 18, when I gave my opening statement to our jury, I advised the jury to pay close attention to the credibility and the completeness and thoroughness of the DNA in that there had only been three LOCI completed, and I thought evidence which showed that the standard procedure would be for nix or even seven, that the information would then be subject to question.**
>
> **Clearly, that waa an opening statement the jury has heard. It goes to the credibility of this attorney and the defense of my client, it**

does to effective counsel, it goes to his right to confront evidence.

That afternoon, one of the employees of the state attorney's office handed me an additional documents, which I have attached as Exhibit #A. Its dated May 18. Up at the top of the document, Exhibit #A, it shows a fax transmission of the FDLE Crime Lab in Jacksonville, at 3:42 p.m. on the 18th.

Clearly this was after the jury selection, after the jury was sworn, after opening statements. It now shows six LOCI having been tested and completed, which would presume to include three additional autorads, which have not been provided to me even as of this date.

It would also presume to include a log of the procedures that were followed as to the testing of these three additional LOCI, which has not been provided as of this date. As a result, I am now looking at a DNA expert coming in who wants to testify, presumably to all six and the testing and the conclusion that my client has now moved from an already questionable figure in the population based to being one in six million. . . .

There is a note, and I would ask the court to take judicial notice, that a telephone conversation, apparently, on February 7, 1995, this is from the original procedure protocol that was provided to me in discovery from Dr. Pollock, that he had discussed this with State Attorney Blair, apparently, on the 7th and advised that there were no results yet, and the trial was the week of the 27th, and he told him he would not be able to finish by then.

So the state has been on notice that the DNA testing, to whatever it would be, would not be

> completed. Our only assumption would be the State was going to proceed with the three LOCI. And now we have six.
>
> I was not advised the morning of the opening statements that there was additional discovery forthcoming. I was not advised or interrupted in my opening statements that I am incorrect, that they know there's something corning. . . .
>
> It is unexplainable as to why all three of these tests, if they were completed sometime during the period of March 27 to May 18 in some sort of sequence, why those were not sent over and provided to the defense so that we could adequately prepare, consult with our experts.
>
> I met with Dr. Wakeland, who is going to be our witness in this case, last Thursday, Mr. Hunt and I, before trial, in Gainesville. We provided him with what we had, and prepared preliminary defense as to what we had, and relied on that coming into this case. And some of the statements that I made in opening were based upon my communications with our expert when they only had three LOCI.
>
> So I have been prejudiced by the discovery being late. . . .

(XXII 2851-2855) (emphasis added).

In response, the State asserted that defense counsel knew that there was a possibility of six DNA probes (XXII 2861-2862), and there was some dispute as to whether a continuance could not be obtained by the State, then the State would limit its evidentiary

presentation to only three probes. (XXII 2863). The trial court concluded:

> Because the amount of argument in Hamilton County at the jury selection at the beginning of this trial over there, the court feels that everyone was on notice that the State was proceeding in the DNA testing. The best solution there is that since we have this sick juror, we will deny your motion, give you twenty-four hours to prepare for the conclusion of the testing and the results of which you have.

(XXII 2869-2870).

It is unclear exactly what remedy, other than a new trial, Wainwright seeks to gain based on this issue. The record reflects that when brought to the attention of the trial court, the court determined that defense counsel was entitled to a twenty-four hour continuance within which to allow his expert Dr. Wakeland to review the additional probes provided.

Wainwright points to no record citation to reflect that after the twenty-four hour delay, he renewed his discovery complaint. Moreover, the record is totally silent **as** to why the defense elected not to call its expert, Dr. Wakeland, during the defense's case. The issue of 'prejudice" is that the jury was told during opening remarks by defense counsel that three genetic LOCI would be introduced and there should have been six, but during the course of

the trial, the State produced evidence of six genetic LOCI based on the FDLE Crime Lab results. Assuming that the issue before this Court is that the trial court erred in "not excluding" this evidence at trial (rather than granting a continuance once a "discovery" delay was identified), Wainwright has presented no basis upon which this Court can conclude the trial court abused its discretion. See State V. Schopp, 653 So.2d 1016 (Fla. 1995), where, unlike the instant case, the trial court failed to adequately inquire into what, if any, corrective measures should have been taken based on the failure of the State to include an officer on its original witness list. The court recognized, in Schopp, that:

> . . . A Richardson violation can be harmless is not intended to minimize the need for compliance with the rules of discovery; nor is it intended to diminish the importance of a thorough inquiry into alleged discovery violations by the trial court. Application of harmless error analyses in this context in no way sanctions either discovery violations or the failure to conduct a Richardson hearing when such hearing is warranted. We have repeatedly stressed that possible prejudice resulting from discovery violations is best addressed and remedied at the trial level. See, e.g., Smith; Wilcock, Richardson. Not only is the trial court better equipped to deal with the discovery violations, if the trial court determines that a party has been prejudiced by the violation there are numerous remedial sanctions that can be imposed at that

> stage of the proceedings. See Fla.R.Crim.P. 3.220(n)(I)(2). The trial court should make every effort to adequately address alleged discovery violations because proper inquiry and corrected actions by the trial court can eliminate the potential for reversal on appeal and thus avert the need for a new trial. We emphasize that the requirements set forth in Richardson and its progeny should be adhered to with the same conviction as they were when noncompliance resulted in per se reversal.

653 So.2d at 1021.

As noted in Fla.R.Crim.P. 3.220(n)(1), a party's failure to comply with an applicable discovery rule may result in requiring "the party to comply with discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing into evidence the material not disclosed, or enter such other order as it deems just under the circumstances." (Emphasis added).

In an abundance of caution, the trial court granted a twenty-four hour continuance which was within his discretion to do. & Parker v. State, 641 So.2d 369 (Fla. 1994), wherein the court held:

> Parker also argues that three discovery violations occurred. First, he claims that a continuance should have been granted because of the State's tardy disclosure of two witnesses. These witnesses' aims were disclosed two weeks prior to trial, and counsel declared he was satisfied with

> discovery after deposing them and did not object when they testified. Therefore, we see no discovery violation, and no error in denying a continuance, regarding these two minor witnesses. See Duest v. State, 462 So.2d 446 (Fla. 1985); Taylor v. State, 589 So.2d 918 (Fla. 4th DCA 1991).

641 So.2d at 373, 374.

The court found Parker's second claim, the failure to conduct a Richardson hearing concerning undisclosed grand jury reports, to be wanting and not in error. As to the third discovery violation, the court held:

> . . . After listening to the parties, the judge held that the two newest prints constituted an inadvertent discovery violation, but, since the defense had known about the color variations, that Parker had suffered no prejudice. We hold that the court conducted an adequate Richardson hearing as to the photographs and that Parker has demonstrated no reversible error regarding this issue.

641 So.2d at 374.

Likewise, in the instant case, the State would submit that no discovery violation occurred. However, even assuming for the moment Wainwright has demonstrated a discovery violation, the trial court made sufficient inquiry and to took sufficient remedial action to dispel any prejudice that may have accrued. Wainwright cannot demonstrate how the belated disclosure of additional

discovery as to DNA LOCI caused prejudice or disruption of his defense. Based on the foregoing, Wainwright is entitled to no relief as to this claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE CASE TO BE JOINTLY TRIED WITH SEPARATE JURIES

Wainwright next argues that the trial court erred in granting Wainwright's and Hamilton's motion to sever for separate trials then deciding to proceed with a joint trial with dual juries. Citing the leading case of Velez v. State, 596 So.2d 1197 (Fla. 3d DCA 1992), on the use of multiple juries at a joint trial, Wainwright, like Velez, can point to no error or prejudice which accrued to him warranting reversal of this innovative process. As observed in Velex, citing People v. Harris, 767 P.2d 619, 635 (1989):

> No court, state or federal, has held the procedure to be inherently prejudicial, nor has any court to date found specific prejudice warranting reversal in the matter before it.

596 So.2d at 1199. The court further observed:

> The two Florida courts that have addressed the issue affirmed convictions that follow the use of dual juries. Roberts v. State, 573 So.2d 964 (Fla. 2d DCA 1991); Fenney v. State, 359 So.2d 569 (Fla. 1st DCA 1978). In Fenney, the First District remarked that:

> The law is, and must be, dynamic and not static. Procedural law is no exception. Experience comes about as a result of experiment. Each trial judge has very broad discretion in the procedural conduct of trials. In the absence of demonstrated prejudice, we are loathe to disprove the novel procedure [dual juries] employed sub judice.

359 So.2d at 570. Although the use of dual juries is rife with the *potential* for error or prejudice, none occurred in the conduct of this trial. The trial court took great pain to ensure that each defendant's jury only heard evidence that was admissible against the defendant. The state, the defense, and the trial court engaged in extensive discussions regarding the implementation of safeguards surrounding the use of the dual jury system. Accordingly, we affirm the judgments of conviction.

596 So.2d at 1200.

Likewise, Wainwright can point to no basis upon which to suggest that the dual juries used caused prejudice or harm to him or that he was denied a fair trial. Indeed, the only issues that Wainwright points to are the fact that, at one point, one of the members of the Wainwright jury was excused 'because of scheduling" and in a second instance, in closing argument, the prosecution argued:

> Anthony Wainwright is guilty of first-degree murder regardless of who fired the shot,

> because Anthony Floyd Wainwright is a principle. And because he's a principle, Anthony Floyd Wainwright is responsible for everything that Richard Hamilton did, just as Richard Hamilton is responsible for everything that Anthony Floyd Wainwright did. Now bear in mind, it's not your job to determine guilt or innocence of Richard Hamilton. Another jury has already done that earlier today.

(XXVII 3562).

At this point, defense counsel objected and moved for sidebar. The court overruled the objection when the prosecution argued that the statement made did not specifically state what the verdict was. **As** such, no error occurred.

Based on the absence of any demonstrable prejudice asserted by Wainwright, there is no basis in this record to grant a new trial because dual juries were used in a joint trial. No relief should be forthcoming as to this claim.

ISSUE IV

> THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE **EVIDENCE** OF **OTHER CRIMES,** WRONGS OR ACTS

Wainwright argues that the trial court erred in approving the admission of other criminal activity committed by Wainwright to explain Wainwright's actions in the robbery, kidnapping, sexual battery and murder of Carmen Gayheart. Wainwright's argument is

two-fold. First, he asserts that other crime evidence was not relevant to any material fact at issue and second, the other criminal acts became a feature of the trial thus, any probative value was outweighed by the prejudicial effect resulting. Both assertions are without merit.

The record reflects that evidence presented as to Hamilton's and Wainwright's escape from North Carolina and how they ultimately got to Lake City where they robbed, kidnapped, sexually battered and murdered Carmen Gayheart was admitted through the statements made by Wainwright to the police and to cellmates Wainwright spoke to while awaiting trial. That evidence leading up to the time when Mrs. Gayheart was kidnapped explained, in material part, Wainwright's motive for not just stealing the Bronco and leaving a live witness. Wainwright was an escapee from North Carolina and, upon arriving in Lake City, needed to steal a car because the stolen Cadillac they had was having mechanical problems. As observed in Straight v. State, 397 So.2d 903, *908* (Fla. 1981), evidence of criminal activity not charged is admissible if relevant to an issue of material fact. Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). Likewise, testimony concerning Wainwright's attempt to

elude detection and arrest in Mississippi is equally admissible as set out in Straight v. State, 397 So.2d at 908, because:

> When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistant to lawful arrest, or other indication after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstances. (Cites omitted).
>
> We hold that the evidence of Appellant's flight from police **and** use of his gun was relevant to the issue of his guilty knowledge and thereby to the issue of guilt. Appellant was willing to use at least the threat of deadly force to try to avoid arrest. This is probative of his mental state at the time. . .

See also Jones v. State, 440 So.2d 570, 576 (Fla. 1983); Larzelere v. State, 676 So.2d 394, 404-405 (Fla. 1996); Anderson v. State, 574 So.2d 87 (Fla. 1991), and Consalvo v. State, ___ So.2d ___, 21 Fla. L. Weekly S423, 425 (Fla. 1996), wherein the court held:

> The Walker burglary was closely connected to the murder of Pezza and was part of the entire content of the crime. When the police caught Appellant burglarizing the Walker residence, they found Pezza's check on his person. It was also as a result of the Walker burglary that police placed Appellant in custody. Furthermore, Appellant was in jail for this burglary when he placed the incriminating call to his mother, and stated that the police were going to implicate him in a murder. . . .

> As discussed above, the trial court properly admitted details of the Walker burglary because it was extringently intertwined with the instant murder.

21 Fla. L. Weekly S425. See Hartley v. State, ___ So.2d ___, 21 Fla. L. Weekly S391 (Fla. 19961, and Griffin v. State, 639 So.2d 966 (Fla. 1994), holding that evidence of other crimes which are "inseparable from the crime charged" is admissible under S90.402, Fla.Stat.

Lastly, Waterhouse v. State, 429 So.2d 301 (Fla. 19831, demonstrates that the jailhouse statements made to cellmates which describe the crime spree as well as explain Wainwright's mindset leading up to the murder and then, his subsequent shoot-out with police in Mississippi, demonstrate that the "other crimes" were clearly admissible. It should be additionally noted that while defense counsel may have asserted a continuing objection to the admission of some of this testimony, in the main most of the evidence with regard to other crimes leading up to the murder and then post-murder shoot-out in Mississippi were admitted without specific objection. Therefore, any error discerned by this Court is harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Finally, Wainwright asserts that the probative value of the evidence was substantially outweighed by its prejudicial effect and the other "criminal conduct", because the escape from North Carolina and the shoot-out in Mississippi became a feature of his trial. Contrary to Wainwright's assertion, the record bears out that while references were made to the escape in North Carolina and an explanation was given with regard to the shoot-out in Mississippi, those facts were necessary to explain to the jury the facts and circumstances surrounding the murder of Carmen Gayheart. Moreover, they never became a feature of the trial. See Consalvo v. State, 21 Fla. L. Weekly at S425; Stano v. State, 473 So.2d 1282 (Fla. 1985); Smith v. State, 683 So.2d 577 (Fla. 5th DCA 1996), and Denmark v. State, 646 So.2d 754 (Fla. 2nd DCA 1994).

Based on the authorities cited herein, no relief should be forthcoming as to this claim.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN REMOVING A JUROR ON DAY TEN OF THE TRIAL

On day ten of Wainwright's trial, one of the jurors, Ms. Trechal did not appear. The record reflects there was some confusion with regard to which jury was needed to appear that day, however, following some discussion, the trial court ordered a

fifteen minute recess to locate the juror. (XXV 3289). When the court reconvened, the trial court announced that this juror had charges pending in the county court at the time of voir dire and was out of jail on a hundred and fifty dollars cash bond. Her next court date was June 1, the day of closing arguments and she would not be available to sit as a juror. (XXV 3291). The State asserted that pursuant to Fla.Stat. 40.013, Ms. Trechal was not qualified to serve as a juror and therefore an alternate juror should be seated in her place. The trial court concluded:

> The court understands statute 40.013, no person under any prosecution for any crime is qualified to serve as a juror, complicated by the fact the judge has set this lady for hearing on the date of closing arguments for her charges again her. And the court finds that it would be in the best interests of justice to replace juror Trechal with juror number 13, Mr. Barnstrom.

(XXV 3296).

In Newton v. State, 178 So.2d 341, 345 (Fla. 2nd DCA 1965), the court, in a similarly circumstanced case, held:

> After a panel and one alternative juror has been selected and sworn but before any evidence was presented it was discovered that one juror was under prosecution for a crime and was represented in the matter by Newton's appointed attorney. Apparently because he and his attorney had never met and because he erroneously assumed that the charges in question were no longer pending, this juror

> incorrectly answered certain questions reasonably designed to disclose such facts. On his motion, the trial court discharged this juror for lack of statutory qualifications and substituted an alternate. The State have successfully challenged this juror even after the panel was sworn because of his failure fully, frankly and truthfully to disclose his relationship with Newton's attorney. **While the State may have waived its rights by failing to formally challenge the juror on this or on the alternate statutory ground, such waiver did not affect the trial judge's authority or discretion to discharge the juror for lack of statutory qualifications and substitute an alternate on his own motion. Furthermore, no complaint is made here that the alternate who served was not qualified. A defendant is entitled to have only qualified jurors but he is not entitled to have any particular juror serve.**

178 So.2d at 345 (emphasis added). See also Keech v. State, 15 Fla. 591 (1976), and Nowling V. Williams, 316 So.2d 547, 550 (Fla. 1975), where the court affirmed, that:

> Seldom, if ever, will excusal of a juror constitute reversible error for the parties are not entitled to have any particular juror served. They are entitled only to have qualified jurors. No complaint is made here that the jurors who served were not qualified.

316 So.2d at 550.

Likewise, in the case at bar, Wainwright cannot argue that Ms. Trechal was qualified to serve as a juror since it was clear that she under "threat of prosecution." Moreover, he cannot point to

any record evidence to reflect that the alternate juror who sat, Mr. Barnstrom, was in any way objectionable or unqualified to sit as a juror in the Wainwright case. Based on the foregoing, no relief is warranted as to this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY THAT MRS. GAYHEART HABITUALLY PICKED HER CHILDREN UP FROM A DAYCARE CENTER, BUT ON APRIL 27, 1994, SHE DID NOT, A VIOLATION OF WAINWRIGHT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

Ms. Carolyn Hosford was called by the State and testified that she owned the Country Kids Daycare Nursery and knew Carmen Gayheart. (XV 2011). An objection was raised by Wainwright's counsel as to any testimony by Ms. Hosford that Mrs. Gayheart had two children, contending that said evidence was irrelevant to Wainwright's case and was merely being solicited for sympathy. (XV 2011-2013). The court overruled Wainwright's objection and Ms. Hosford completed her testimony.

The record reflects that Mrs. Gayheart's children were kept by Ms. Hosford and were there at the daycare center on April 27, 1994, for half a day. (XV 2014). 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 her children that day. The children were picked up sometime after 5:00 p.m., by Mrs. Gayheart's husband and an aunt. **(XV 2014-2015).**

Wainwright argues that S90.406, Fla.Stat. **(1994),** 'comes as close as any statutory law to addressing the problems 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. **38-39).**

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

The instant testimony was relevant to the court to show nonconsent with regard to the kidnapping as well as to set the timeframe for the crime. Mrs. Gayheart's activities that day were all relevant in explaining the circumstances that ultimately resulted in the robbery, kidnapping, sexual battery and her murder. Moreover, although not acknowledged by Wainwright in his brief, the record reflects that similar evidence was testified to by Jennifer

Smithhart, Mrs. Gayheart's best friend, without objection by defense counsel. Ms. 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. (XV 2004). Ms. Smithhart said the last time she saw Mrs. Gayheart was when she left the campus to go pick up her two children. (XV **2004-2006**). Ms. Smithhart said that it 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. (XV 2005-2006).

While it is clear that any mention of a victim's family may invoke sympathy, the fact remains that the evidence presented herein was solicited for a valid reason, to-wit: to set in place the time of the crime and the non-consent of Mrs. Gayheart's kidnapping. Ms. Hosford's testimony at worse may be characterized as cumulative, but certainly not error. Indeed, any error this Court may choose to assign this testimony is harmless error beyond a reasonable doubt in that similar evidence was before the jury that was not subject to objection.

To the extent Wainwright 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. There was neither improper admission of evidence with regard to Ms. Hosford's testimony nor any improper victim impact evidence presented at the penalty phase of Wainwright's trial. Wainwright has failed to identify any error and is entitled to neither a new trial nor resentencing as to this issue.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN ADMITTING ANY STATEMENTS WAINWRIGHT MADE THAT HE HAD SEXUALLY BATTERED MRS. GAYHEART BECAUSE THE STATE FAILED TO ESTABLISH THE CORPUS DELICTI FOR THAT OFFENSE

Wainwright argues that there is insufficient evidence to prove corpus delicti for the sexual battery and therefore the trial court erred in admitting Wainwright's statement 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 judice to meet that requirement. Specifically, Wainwright sets out four criteria which he argues the

State must prove, (a) that the victim was over twelve years of age or older; (b) that the defendant committed an act upon her which constituted a sexual battery; (c) that during the process he used or threatened to use a deadly weapon, or actually used force likely to cause serious personal injury, and (d) that the act was done without her consent. Wainwright takes no issue with three of the four criteria but argues that the State failed to show that Wainwright committed an act upon her in which his sexual organ penetrated or had union with the vagina of the victim. (Appellant's Brief, pg. 42-43).

The record bears out that or semen was found on the rear seat covers of the Ford Bronco. Blood groupings of A and O were found on the seat covers and the crime lab analyst Ms. Roman, was able to type Mrs. Gayheart's blood as type A and Wainwright's as type O. DNA evidence was found on part of the seat cover, however, it could not be definitively ascertained as to which body fluids it was derived. The medical examiner testified the victim was found with only a pair of shorts on and no underwear. Because the body was badly decomposed, the medical examiner testified that there was no evidence of spermatozoa. Contrary to Wainwright's suggestion that the evidence only showed that Mrs. Gayheart had been in her car and that semen stains had gotten on the rear seat covers, the record

further reflects that Wainwright's fingerprints were found in 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 needs 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 the 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. The test 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. Smith, 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 keys 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 conclude that this independent evidence was truly more than adequate to

> establish the corpus delicti of burglary or 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 was also found in the footlocker yield a fingerprint identified as Schwab's. Witnesses testified Schwab 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 admission that he kidnapped and raped the victim. Moreover, all the evidence proved beyond a reasonable doubt that corpus delicti of each of the charged crimes and that Schwab committed them.

636 So.2d at *6*. See also Burkes v. State, 613 So.2d 441 (Fla. **1993).**

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, Wainwright's statements to

cellmates besides his statements to police are independent of the kind of statements that may be introduced after proof of corpus delicti has been shown. As observed in Schwab v. State, supra, the physical evidence and the state of Mrs. Gayheart's body at the time she was found, is sufficient to demonstrate all prongs of corpus delicti for the sexual battery. Thus, no error resulted in the admission of Wainwright's statements to law enforcement authorities that he sexually battered Mrs. Gayheart in the backseat of her Ford Bronco.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN ALLOWING WAINWRIGHT'S STATEMENT TO POLICE THAT HE HAD AIDS TO BE INTRODUCED

Presumably, Wainwright is next arguing that the trial court erred in allowing testimony by Mississippi Troopers Brown and Foster concerning whether Wainwright had AIDS. The record reflects, however, that at no time did defense counsel for Wainwright object to the question as to whether Wainwright had AIDS, but rather an objection was raised as to relevancy when the State asked Trooper Brown if he took any protective measures after Wainwright told him he had AIDS. (XVI 2088). The record is quite clear that on cross-examination of Trooper Brown, defense counsel

further solicited from Trooper Brown that Wainwright said if he had shot (Leggett) he would have killed him; Wainwright stated he, Wainwright, had nothing to loose and that Wainwright admitted that he had **AIDS.** **(XVI** 2100-2101). Without any objection, Trooper Foster testified that Wainwright told him that he, Wainwright, had AIDS and as a result, the officers took precautions by washing their hands with bleach. **(XVI** 2111). The only objection with regard to Trooper Foster's testimony was a challenge as to relevancy which arose when the State asked, "Why police are frequently exposed to **AIDS?"** **(XVI** 2112). The objection was overruled and Trooper Foster answered that they came into contact with blood at accident scenes and other events and that he didn't always have gloves. (**XVI** 2112).

The issue before the court has not been properly preserved for appellate review since no objection at trial was raised, specifically, to either this line of questioning or the specific questions which bring the issue before the court. Rather, the objections that were raised as to relevancy concerned ancillary matters that had nothing to do with Wainwright's admission to the troopers that he had **AIDS.** Since the issue has not been preserved, the issue is not properly before this Court.

Moreover, even assuming for the moment said issue was specifically objected to, any error that would have accrued from the troopers' testimony that Wainwright told them he had AIDS, is de minimus in light of the facts of the case, specifically, that Wainwright and Hamilton robbed, kidnapped, sexually battered and murdered Carmen Gayheart. See State v. DiGuilio, supra.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN THE NONCAPITAL SENTENCING

The record reflects that Wainwright has not assailed any of the statutory aggravating factors found sub judice and, in fact, the record supports a finding that each of the aggravating factors had been proven beyond a reasonable doubt. The trial court considered mitigation tendered at the penalty phase of Wainwright's trial, giving appropriate weight to those mitigating factors which were developed through the testimony of Wainwright's mother. The sentencing order properly reflects, in writing, a detailed account of why the aggravating factors were proven beyond a reasonable doubt and why, upon consideration of the mitigation presented, the aggravating factors outweigh any mitigation presented and considered.

With regard to proportionality, the instant case is similar to Gore v. State, 599 So.2d 978 (Fla. 1992), and other cases where the victim has been robbed, abducted, sexually battered and subsequently murdered. The aggravation was great in comparison to the lack of any significant mitigation. **Appellee** would urge this Court to affirm the jury's recommendation of 12-0 for death and the trial court's imposition of the sentence of death in the instant case.

Wainwright argues that as to Counts 11, III and IV, specifically robbery with a firearm, kidnapping with a firearm and sexual battery on a person over the age of twelve using a firearm, the trial court erred in imposing a 25-year mandatory sentence in accordance with **775.082(1),** Fla.Stat. The record reflects that in the commitment **papers** to the Department of Corrections does reflect an "X" mark, see Vol. VII, pgs. **1156-1167,** see in particular pgs. **1160,** 1163 and **1166,** however, it is clear that those mandatory minimum "marks" under capital offenses as to Counts II, III and IV and are scrivener's errors.

With regard to the trial court retaining jurisdiction over the sentences pursuant to **§947.16(3),** Fla.Stat., it would appear that the district courts of this state have held that it is error for the trial court to retain jurisdiction over a life sentence

"because a life span is immeasurable." See Willis v. State, 447 So.2d 283 (Fla. 2nd DCA 1983). However, any error that may have accrued by the trial court retaining jurisdiction over Counts II, III and IV has no impact with regard to the appropriateness of the sentence of death imposed in the instant case and has no impact on the valid life sentences imposed on Counts 11, III and IV.

"because a life span is immeasurable." See Willis v. State, 447 So.2d 283 (Fla. 2nd DCA 1983). However, any error that may have accrued by the trial court retaining jurisdiction over Counts II, III and IV has no impact with regard to the appropriateness of the sentence of death imposed in the instant case and has no impact on the valid life sentences imposed on Counts II, III and IV.

CONCLUSION

Based on the foregoing, Appellee requests this Honorable Court affirm the convictions and sentence of death.

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. Steven Seliger, GARCIA & SELIGER, 16 N. Adams Street, Quincy, Florida 32351, this 5th day of May, 1997.

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