IN THE SUPREME COURT OF FLORIDA

THEWELL E. HAMILTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 72,502

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT IN AND
FOR HOLMES COUNTY, FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont)

TABLE OF CITATIONS (cont)

PRELIMINARY STATEMENT

The record on appeal consists of seven volumes. Volumes I and II are actually bound as a single volume and contain the pleadings and other documents from the circuit court's file. References to these volumes will be preceded with the prefix "R." Volumes III through VII contain the transcript of the trial and sentencing. References to these volumes will be preceded with the prefix "TR." However, Volume V is out of order and is separately numbered. References to pages from this volume will be designated with the prefix "V-TR." The material contained in Volume V chronologically follows page 569 of Volume VII. Finally, in Volume IV, two pages are numbered 303. These will be designated 303a and 303b in this brief.

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On October 15, 1986, a Holmes County grand jury returned an indictment charging Thewell E. Hamilton with two counts of first degree murder for the shooting deaths of his wife, Madeleine Hamilton, and his stepson, Michael Luposello. (R 6) He pleaded not guilty (R 11) and proceeded to a jury trial commencing on February 29, 1988. (R 110) The jury found him guilty as charged on March 4, 1988, and after hearing additional evidence on the same day, the jury recommended deaths sentences for both murders. (R 131, 132) The trial judge ordered a presentence investigation report. (R 114, 163-179)

Circuit Judge Dedee S. Costello adjudged Hamilton guilty and sentenced him to death on April 7, 1988. (R 158-162, 180-184) (A 1-7) The court found three aggravating circumstances applied to the homicide of Michael Luposello: (1) that Hamilton had a previous conviction for a violent felony based on the contemporaneous conviction for the murder of Madeleine Hamilton; (2) that the homicide was especially heinous, atrocious or cruel; and (3) that the homicide was committed in a cold, calculated and premeditated manner. (R 181-184) (A 3-5) As to the murder of Madeleine Hamilton, the court found two aggravating circumstances: (1) that the homicide was especially heinous, atrocious or cruel; and (2) that the homicide was cold, calculated and premeditated. (R 181-184) (A 3-5) In mitigation, the court found one statutory circumstance and three nonstatutory mitigating circumstances: (1) that Hamilton

had no substantial history of criminal activity; (2) that Hamilton had served honorably in the armed forces; (3) that Hamilton was known as a nonviolent person; (4) that Hamilton was not known to drink alcohol to excess. (R 183) (A 5)

Hamilton timely filed his notice of appeal to this Court on May 2, 1988. (R 185)

Facts--Guilt Phase

Thewell Hamilton, his wife, Madeleine, his 15-year-old stepson, Michael Luposello, and his two young children, Shannon and Shaun, lived in a small house in the Esto area of Holmes County. (TR 311-312) Lucille Watson lived across the dirt road and about a one hundred yards away. (TR 312-314) On the evening of September 19, 1986, Watson heard two gunshots and saw a flash from the Hamilton's house. (TR 312-313) She also heard something which sounded like pellets hit the tin roof of the calf shed located in front of her house. (TR 312-313) Watson did not perceive anything out the ordinary, and she did not call law enforcement. (TR 314-315) The Holmes County Ambulance Service received a call at 7:30 p.m., and Mike Taylor, an EMT, took the call. (TR 297-298, 308) According to Taylor, the male caller said, "Some son-of-a-bitch has come in here and killed my entire family." (TR 301) Taylor and the ambulance arrived at the Hamilton residence between 7:30 and 8:00, just about the same time as Investigator Eric Adams and Deputy Kenneth Tate. (TR 321,538, 541) After talking to

Thewell Hamilton at the scene, Taylor believed Hamilton to be the one who called the ambulance service. (TR 298-301, 308-309)

Inside the residence, Adams and Taylor found the bodies of Madeleine and Michael. Madeleine was in the hallway between the kitchen and living room area. Michael was in the living room. (TR 297-298, 321-327) Both had been shot with a shotgun. (TR 438-439) Adams first saw Thewell Hamilton as he knelt beside the body of his wife and talked to Deputy Tate. (TR 326-327) Thewell had blood on the front and back of his shirt and on his house slippers. (TR 370-371) Adams also detected an odor of alcohol. (TR 371-372) Adams asked Tate to take Thewell to the bedroom. (TR 538) There, Tate saw the two children -- Shannon, the baby, was in her crib, and Shaun, who was 2 1/2, was on a cot. (TR 538-539) The children also had blood on them but were not injured. (TR 540) Hamilton held and comforted his children. (TR 542) Tate did not talk to them. (TR 541-542) Later, Derit Godwin, an HRS social worker, removed the children from the house. (TR 545-547) Adams briefly interviewed Hamilton in the bedroom. (TR 327-328)

According to Investigator Adams' trial testimony, Hamilton told him that Madeleine's ex-husband, Gus Luposello, committed the homicides. (TR 328) Hamilton allegedly said that he was in the bedroom with the children. He heard scuffling, yelling and then gunshots. When he came out of the bedroom, he found the victims. (TR 328) In Adams written report, he related the statement differently. (TR 378) Adams wrote that Madeleine's ex-husband had recently been released from prison and had

threatened Madeleine and Michael. (TR 378) He had threatened to "get rid of them." (TR 378) The name Gus Luposello was not mentioned in the report. (TR 378) Gus Luposello testified at trial that he was in Washington, D.C. without any means of transportation at the time of the homicides. (TR 486-497)

Crime scene analysts from FDLE assisted Investigator Adams in processing the crime scene. (TR 329, 387, 406) A significant amount of blood was found in the living room and kitchen areas of the house. (TR 322) In the kitchen, blood was spattered all over the walls and cabinets. (TR 322) Two sets of footprints were in the blood. (TR 324-325) Bare feet made one and house slippers made the second. (TR 324-325, 359) Thewell was wearing slippers which were covered with blood and had blood on the edges and soles. (TR 359-360) Madeleine was barefooted and had blood on the tops and bottoms of her feet. (TR 360) Michael was also barefooted, but the bottoms of his feet were clean. (TR 360) Both sets of prints appeared in the hallway area which joined the kitchen and living room. (TR 322, 360) Also, from the way in which the blood on the floor of the hallway was disturbed, Investigator Adams concluded that a struggle may have taken place there. (TR 322-323, 360) Bloody shoe prints were on the carpet between the hallway and Michael's body. (TR 361) No bloody barefoot prints were in that area. (TR 361) A barefoot print in blood was found underneath Madeleine's body. (TR 404-405) A bloody shoe print was found on the doorstep leading into the utility room which adjoined the kitchen. (TR 322)

Investigators found a sixteen gauge, double barrel shotgun and fired and unfired shotgun shells at the residence. (TR 329-330, 364, 368, 391-402, 413-414) The shotgun was located outside, lying in the dirt underneath a van which was parked approximately 75 feet from the house. (TR 368-369,413-414) No usable latent fingerprints were on the the gun. (TR 410-412) One unfired shotgun shell was inside the van. (TR 398) Additional unfired shells were inside a dresser drawer in Michael's bedroom. (TR 364, 399-400) A total of four fired shells were found during the investigation. (TR 322, 329-330, 392-394) Ballistics testing showed that the shells were fired from the sixteen gauge shotgun. (TR 471) The fired and unfired shells were of the same make and type. (TR 475-476) Number six size lead pellets were found in the carpet beside Michael's head and in both bodies. (TR 397, 470-477) Pellet holes penetrated a window in the living room. (TR 362)

Dr. William Sybers performed autopsies on both victims. (TR 438) He found three gunshot wounds on Madeleine Hamilton. (TR 438, 442) She had a wound in the calf area of each leg. (TR 443-446) The wound to the left leg was produced at an angle which tore the calf muscle away. (TR 444) Only a few lead pellets remained in that leg. (TR 444) Sybers estimated that the shot was fired from about four feet away. (TR 446) A back to front shot caused the wound to the right leg. (TR 443) Sybers found pellets in the right leg, and based on the spreading of the pellet wounds, he estimated that the shot was fired from a distance of eight or nine feet. (TR 443) These wounds

would have knocked the victim down. (TR 454) Madeleine Hamilton also received a shotgun wound to the chest. (TR 438, 444-445, 454) This wound destroyed her heart and would have caused death in seconds. (TR 454) The shot was fired from a distance of two to four feet. (TR 444-445) Based on blood flow pattern on her thigh, Sybers concluded that the victim was in an upright position at the time of the shot. (TR 442) Smeared blood stains on the victims knees and lower legs lead Sybers to conclude that she was on her knees at one point. (TR 443) Michael Luposello received two wounds, one to the chest and one to the head. (TR 447) Blood stains on the victim's legs indicated that he was upright at the time of the shot to the chest. (TR 447) Sybers said the chest shot occurred first because of the amount of blood in the chest cavity. (TR 448) The victim was still alive at the time of the head shot because of the bleeding along the path of the wound. (TR 448-449) The chest shot was from a distance of three to five feet, and the head shot was from a distance of about four feet. (TR 449-450) Sybers found that Madeleine Hamilton had a blood alcohol level of .04. (TR 453) Because there was no urine in the body, Sybers could not perform a drug screen. (TR 456-457)

Investigator Adams called HRS for assistance with Thewell Hamilton's small children. (TR 543) Derit Godwin arrived at the residence at 9:05 p.m. (TR 545) He spoke to Hamilton, who asked him to take care of his children, Shaun and Shannon. (TR 556) When Godwin first saw them, the children were playing on the floor and showing little emotion. (TR 556) Godwin and

another social worker, Karen Leitner, took the children away. (TR 548) About an hour later while in the car, Shaun, who was 2 1/2 years old, said, "Momma dead, Michael dead, Daddy shot Mommy and Michael." (TR 554) Godwin said Shaun repeated the statement four to six times over a two hour period. (TR 554) The trial judge allowed Godwin to testify to the statements, over defense objections, under the excited utterance exception to the hearsay rule. (TR 525-536, 549-553) Shaun did not testify at trial.

On October 16, 1986, Investigator Adams interviewed Hamilton at the county jail. (TR 517-518) Hamilton had sent a request form asking to see Adams. (TR 517) Adams tape recorded the interview. (TR 517-518) (State's Exhibit No. 19 is transcribed at TR 502-512) Even though he knew he had been indicted, Hamilton wanted Adams to investigate further for the perpetrator. (TR 503-506) Hamilton asked Adams to investigate some of his neighbors who frequently used drugs and caused disturbances. (TR 503-505) Adams asked Hamilton about the shotgun and his activities that evening. (TR 506-512) Hamilton said the gun belonged to him and Michael. (TR 506) They used it for hunting. (TR 506) At the time of the shooting, Hamilton said he was in the bedroom with his children. (TR 512) He came out, struggled with someone and took the gun away. (TR 512) Then, he tried to help his wife and Michael. (TR 511) He picked up the gun and put it underneath the van in order to keep if out of sight of his children. (TR 511) Shaun apparently opened the bedroom door and saw Hamilton with the gun. (TR

511) Hamilton said this must be the reason for Shaun's statements about his having done the shootings. (TR 511) Hamilton explained that he mentioned Gus Luposello as a suspect because Luposello had threatened to kill Michael and Madeleine. (TR 509) Hamilton denied arguing with his wife between 5:30 and 6:00 because he did not arrive home until around 7:00 p.m. (TR 509-510)

Thewell Hamilton testified as his only witness during the guilt phase of the trial. (V-TR 6-67) On the day of the homicides, Hamilton left his job in Dothan, Alabama, at 3:30; bought some building materials; stopped at his ex-wife's house about some insurance matters and drove home. (V-TR 15-18) He arrived home just before 7:00 p.m. (V-TR 15-18) Madeleine and Michael were arguing. (V-TR 17-18) Thewell thought Madeleine was particularly upset, and he thought she may have been drinking or taking drugs. (V-TR 18) About a month earlier, she had used some drugs and reacted to the point that Thewell and Michael had to hold her down on the couch. (V-TR 18) Since Michael had returned from living away from home for three months, his arguments with his mother had become more intense. (V-TR 16-17) Thewell said he used take Michael's side in these arguments, and he had a real close relationship with him. (V-TR 9-10, 16-17) However, since Michael was not his son, Thewell stopped becoming involved in the arguments. (V-TR 16-17) Consequently, when he observed the argument on the day of the homicides, he took his small children away to play in the bedroom. (V-TR 20)

While in the bedroom, Hamilton heard a gunshot which was followed a few seconds later by a second. (V-TR 20, 55) He was scared. (V-TR 20) Because of the children, he hesitated a minute before leaving the bedroom. (V-TR 20-23, 55-56) When he walked out, he saw Michael on the living room floor with blood on him. (V-TR 21) Madeleine was standing near the kitchen with the 16 gauge shotgun in her hands. (V-TR 22-23) The gun was sometimes kept in the kitchen or storage room because it was used to shoot squirrels from a tree in the backyard. (V-TR 14) Thewell snatched the gun away from her by the barrel. (V-TR 22) Madeleine turned around and Thewell accidentally discharge the gun. (V-TR 22, 31-33, 46-48) He said he did not know the gun was loaded and when he grabbed it, he automatically moved his hand to the trigger area where he must have bumped it. (V-TR 46-48) The shot struck her legs. (V-TR 51) They both moved toward the living room area where Madeleine fell. (V-TR 49-53) As Thewell knelt to help his wife, the gun discharged again, striking her in the chest. (V-TR 49-54) Only two shots were fired, and Hamilton did not reload the shotgun. (V-TR 42, 46) He tried to help Michael and Madeleine, and then, after several attempts to obtain an opening on his party line, he telephoned the sheriff's office. (V-TR 35-36, 39-40) Hamilton said he never had the chance to call the ambulance service. (V-TR 39-40)

Hamilton explained his October 16th request of Investigator Adams to search for a perpetrator. (V-TR 24-25, 62-69) At that time, Hamilton said he just could not accept the fact that

Madeleine had shot her son. (V-TR 24-25) He was in shock because of the shootings and believed that a another person must have been involved. (V-TR 24-25) He also said he has trouble remembering things due to an injury he received during a mortar attack in Viet Nam. (V-TR 26-27) He spent over a month in the hospital in Japan. (V-TR 27) Hamilton retired from the Army with 20 years of service. (V-TR 7)

Penalty Phase and Sentencing

The State presented no additional evidence at penalty phase. (TR 573) Hamilton presented testimony from his brother, sister and ex-wife. (TR 574-589) Dean Hamilton, Thewell's younger brother, testified about their relationship and Thewell's nonviolent personality. (TR 574-579) He said that Thewell was born in Silacogga, Alabama, and was 51 years old. (TR 576) Thewell retired from the Army after 20 years of service and he was injured while in Viet Nam. (TR 577) Dean said he and his brother were quite close for several years after Thewell's military service. (TR 577) Thewell worked for the Michelin Tire Corporation in Dothan, Alabama. (TR 578) Dean said Thewell was always a kind, gentle person. (TR 579) He said that they had maintained close contact since Thewell left the military. (TR 577) Dean said Thewell did not abuse alcohol. (TR 569) Cheryl Hamilton, Thewell's younger sister, testified that Thewell did not drink to excess and she had never known him to be violent or abusive. (TR 587-589) Finally, Hedrick Hamilton, Thewell's ex-wife, testified about their

relationship. (TR 580-585) She said they met in Germany and were married a for fifteen years. (TR 581-583) After their divorce, they maintained a friendship. (TR 581-582) She said he was never violent or abusive of her or anyone else. (TR 583-586)

Prior to sentencing, the court ordered a presentence investigation. (R 163-179) (TR 608) Defense counsel objected to the PSI, since it contained inaccurate facts, conclusions and opinions from law enforcement personnel, relatives of the victims and others. (TR 610) The trial court imposed a death sentence for each murder. (R 180-184) (TR 617-618)

SUMMARY OF ARGUMENT

1. Hamilton was forced to trial with a biased juror when the trial judge denied his challenge for cause. Because of exposure to pretrial publicity, Juror Pamela Smith had formed an opinion regarding guilt. She said it would take some evidence to the contrary to change her opinion. Counsel exhausted his peremptory challenges and asked for more. The court denied the request, and Pamela Smith served on jury. Denial of the cause challenge forced Hamilton to trial with this biased juror in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

2. Admitting the hearsay testimony, the trial judge deprived Hamilton of his right to confrontation as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The court allowed an HRS social worker to testify to statements Hamilton's 2 1/2-year-old son made indicating that Hamilton shot his wife and stepson. His son did not testify. Defense counsel objected on hearsay grounds. However, the court admitted the testimony under the excited utterance exception to the hearsay rule. This ruling was incorrect because the State failed to establish a sufficient predicate that the child was under the stress or excitement of the event at the time of the statements or that the statements were trustworthy.

3. Hamilton objected to the prosecutor's use of peremptory challenges to excuse black prospective jurors. The court ruled that Hamilton had no standing to object under State v. Neil,

because he is white. Both the United States and Florida Constitutions gives white defendants standing to object to discrimination in jury selection. Every defendant is entitled to a jury fairly selected from cross section of the community. Additionally, as a policy matter, every defendant has the right to object to racial discrimination in the selection of juries in order to preserve the integrity of the judicial process.

4. The trial court improperly found two aggravating circumstances -- that the homicides were cold, calculated and premeditated and committed in an especially heinous, atrocious or cruel manner. The murders were shootings deaths during an intra-family argument. There was no evidence of a prearranged design to kill. Furthermore, the deaths occurred within minutes of the first shots fired, and nothing indicated that the manner of death was designed to inflict unnecessary pain.

5. The death sentences imposed in this case are disproportional. Initially, the aggravating circumstances simply do not support a death sentence. Only one of the three aggravating circumstances used in sentencing for the death of Michael Luposello was valid. Neither of the two aggravating circumstances used in sentencing for the murder of Madeleine Hamilton was valid. Both statutory and nonstatutory mitigating circumstances are present. Furthermore, the homicides resulted from a heated domestic argument which is the type of crime for which a death sentence is inappropriate.

6. Judge Costello ordered a presentence investigation report prior to sentencing. It contained improper and

irrelevant comments and opinions from law enforcement personnel, the preparer of the PSI and Madeleine Hamilton's parents. These comments were irrelevant, nonstatutory aggravating circumstances which should not have been considered in sentencing. The judge considered the PSI and made reference to it in her sentencing order. Use of this irrelevant material tainted the sentencing process in violation of the Eighth and Fourteenth Amendments.

7. The trial judge used an improper legal standard to consider the jury's death recommendation in sentencing. In her sentencing order, the trial judge began her analysis with the proposition that the the jury's recommendation of death could not be overstressed. While the jury's recommendation is to be given considerable weight, it can be overstressed. Hamilton's death sentence is now based on the court's use of an erroneous standard and must be reversed.

8. The trial court should not have read the standard penalty phase jury instruction which told the jury that the sentencing decision was solely the judge's responsibility. An instruction stressing the importance of the jury's recommendation should also have been given. The instruction as read improperly diminishes the role of the jury in violation of the Eighth and Fourteenth Amendments. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING A DEFENSE CHALLENGE FOR CAUSE TO A PROSPECTIVE JUROR WHO HAD FORMED AN OPINION AS TO GUILT ON THE BASIS OF MEDIA COVERAGE OF THE CASE PRIOR TO TRIAL.

Thewell Hamilton was forced to trial with a juror who had already formed an opinion on the issue of guilt. During jury selection, the court and counsel questioned prospective jurors individually about their exposure to pretrial publicity. Pamela Smith said she had formed an opinion regarding guilt and it would take some evidence to change her mind. (TR 52-56) Defense counsel challenged her for cause, but the trial judge denied the challenge. (TR 56) Counsel exhausted his peremptory challenges and asked for additional ones. (TR 186) The court denied the request. (TR 186) Pamela Smith served as juror at trial. (R 110, TR 122) Denial of the cause challenge forced Hamilton to trial with a biased juror in violation of his rights under the Sixth and Fourteenth Amendments. He now urges this Court to reverse and remand his case for a new trial.

This Court, in Singer v. State, 109 So.2d 7 (Fla. 1959), set forth the standard to be applied when a prospective juror's competency to serve has been challenged:

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused

> on motion of a party, or the court on its own motion.

Ibid. at 23-24; accord, Moore v. State, 525 So.2d 870 (Fla 1988); Hill v. State, 477 So.2d 553 (Fla. 1985). A juror must unequivocally express his ability to be fair and impartial on the record. Moore v. State; Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). Merely expressing an ability to to control any bias or prejudice is insufficient. Singer v. State; Leon v. State, 396 So.2d 203, 205 (Fla. 3rd DCA 1981), rev. denied, 407 So.2d 1106 (Fla. 1981). Moreover, a juror's statement that he has the appropriate state of mind and will follow the law is not determinative of the question of his competence to serve. Singer, 109 So.2d at 24; Graham v. State, 470 So.2d 97, 98 (Fla. 1st DCA 1985); Leon, 396 So.2d at 205. Finally, when a defendant exhausts his peremptory challenges, the improper denial of a cause challenge compels a reversal for a new trial. See, Moore v. State, 525 So.2d at 873; Hill v. State, 477 So.2d at 556; Leon, 396 So.2d at 205; Auriemme, 501 So.2d at 43. Applying these principles here demonstrates the trial court's reversible error in denying the challenge for cause to Juror Smith.

When questioned, Juror Smith candidly and unequivocally admitted that she had a preconceived opinion of guilt based on her reading and viewing of media accounts about the crime. (TR 53-54) Furthermore, she said that she would have to hear evidence to convince her to abandon that opinion. (TR 53) Although Smith did say she would try to follow the court's

instructions to decide the case on the evidence presented in court, she never relinquished her preconceived opinion about guilt. (TR 55-56) The entire exchange proceeded as follows:

> STATE: Q. Mrs. Smith, you indicated in the courtroom that you have some knowledge about this case?
>
> A. All I know is what I read in the newspaper and have seen on TV.
>
> Q. When was it that you read it in the newspaper?
>
> A. Right after it happened.
>
> Q. Have you read the newspaper recently about it?
>
> A. Yes sir, I read it the other day. I read it in the Advertiser.
>
> Q. From what you have read in the paper or seen on TV, have you formed an opinion as to the guilt or the innocence of the defendant?
>
> A. Yes I have.
>
> Q. Okay, Judge Costello will tell you later on that every defendant that comes into the courtroom comes in with the presumption of innocence, that we have to presume him to be innocent. Would it take some evidence put forward by anyone to remove from your mind the opinion that you have as to the guilt or innocence?
>
> A. Yes, I am sure it would. It just seems logical from what I have read and what I saw on television.
>
> Q. But you are telling us that from what you have seen and what you have heard you have already formed an opinion as to whether he is guilty or not guilty?
>
> A. Yes.
>
> Q. And the Court, if the Court instructs you that you were only to base your

decision as to his guilt or innocence on what you hear in the courtroom and forget about what you saw on television and read in the newspaper, could you do that?

A. Well, I suppose I would try.

Q. Could you be a little more definite?

A. Yes sir.

Q. That's supposing I'll try?

A. Well what I am saying is that I have never done this before but with all due respect to the law and whatever is present, I would be fair about it is the only thing I could say. I would do what I was asked to do by the Court.

Q. Do you understand that sometimes what we read in the newspaper is not exactly the truth, that sometimes it doesn't happen that way?

A. Yes sir, I know that.

Q. If you got to the courtroom and you heard testimony that conflicts with what you read in the newspaper, could you base your decision on what you hear in the courtroom and forget about the newspaper?

A. Yes sir.

Q. Okay, I don't have any further questions.

DEFENSE: Your Honor, I don't have any questions.

COURT: Okay, let me ask a question.

Q. Mrs. Smith, do you feel that, if I tell you that you have, what you have to do here is listen to only what you hear in this courtroom, what you hear from the witness stand, the arguments that the lawyers tell you and the law that I give you, do you feel that you could base your decision on that?

A. Yes mam.

COURT: Is there any doubt in your mind that you would be able to do that?

A. No mam there wouldn't be any doubt.

COURT: By reading what your read in the paper and seeing what was on television, do you feel that, that you have already made a decision.?

A. Well, by reading what I read in the paper and seeing on TV it seems to me it's presumed, you get like a preliminary idea but what I am saying is, who am I to judge, I'm not one the one in charge and you know, just whatever.

COURT: Yes mam, I understand.

A. But whatever I am called on to do, I will do my best to do it, I will do it to the best of my knowledge. Like I said, you know, all I have is knowledge, all I have you know is the things I heard from the TV and read in the paper, so whatever.

COURT: Is your opinion so fixed that it would require something to change it or could you go in with an open mind, put aside that opinion and listen to the evidence and the law and decide the case that way?

A. Yes I could do that.

DEFENSE: Q. Mam, you have an opinion that at this point as to his guilt or innocence, am I correct?

A. Yes sir.

Q. No further questions.

COURT: Okay, thank you, Mrs. Smith.

DEFENSE: Your Honor, I move to challenge for cause.

COURT: That's denied. I think she said she could put aside any opinion she has and base her verdict solely on the evidence and that law.

(TR 53-56) (emphasis added)

Juror Smith was not competent to serve as an impartial juror. The trial judge's contrary ruling was premised on Smith's statement, in response to the court's leading questions, that said she would decide the case on what she heard in court. (TR 56) As stated in Singer v. State, such a statement from a juror does not decide the issue:

> ...a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so.

109 So.2d at 24. The totality of Juror Smith's responses belie the accuracy of her statement about her abilities. While Smith apparently wanted to please the court and be a good juror, she also continued to express that she had an opinion on the issue of guilt. Her answer to defense counsel's last question reaffirmed that she maintained such an opinion. (TR 56) Hamilton had the right to jurors who were not so burdened. Pamela Smith should have been excused for cause.

The trial court erred in denying Hamilton's challenge for cause which allowed an incompetent juror to serve. Hamilton's rights under the Sixth and Fourteenth Amendments to due process and a fair and impartial jury have been violated. This Court must reverse the case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING AN HRS SOCIAL WORKER TO TESTIFY, UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE, TO STATEMENTS ALLEGEDLY MADE BY HAMILTON'S 2 1/2-YEAR-OLD SON THAT HAMILTON SHOT THE VICTIMS.

The trial judge allowed an HRS social worker, Derit Godwin to testify to statements Hamilton's 2 1/2-year-old son, Shaun, made indicating that Hamilton shot his wife and stepson. Defense counsel objected on hearsay grounds. (TR 525-536, 549-553) However, the court admitted the testimony under the excited utterance exception to the hearsay rule. (TR 525-536, 549-553) Shaun did not testify. This ruling was wrong because the State failed to establish a sufficient predicate that the child was under the stress or excitement of the event at the time of the statements or that the statements were trustworthy. See, Sec. 90.803(2) Fla. Stat.; State v. Jano, 524 So.2d 660 (Fla. 1988). Admitting the hearsay testimony deprived Hamilton of his right to confrontation as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. His convictions must now be reversed for a new trial.

In State v. Jano, this Court noted three requirements for the application of the excited utterance exception to the hearsay rule:

> The excited utterance exception is not a new theory of Florida evidence but rather one of a group of exceptions subsumed under the old term of "res gestae." State v. Johnson, 382 So.2d 765 (Fla. 2d DCA 1980); 1 F. Read, Read's Florida Evidence 693 (1987). The essential elements necessary to fall within the excited utterance

> exception are that (1) there must be an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; (3) the statement must be made while the person is under the stress of excitement caused by the event. Jackson v. State, 419 So.2d 394 (Fla. 4th DCA 1982).

Jano, 524 So.2d at 661. The reliability of such evidence is premised on the declarant's making the statements before having the time to reflect. See, Jano; Jackson v. State, 394 So.2d 394, 396 (Fla. 4th DCA 1982). Therefore, the length of time between the startling event and the statements is an important factor. While there are no set time limits,

> "...an accurate rule of thumb might be that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process."

Jano, 524 So.2d at 662, quoting E. Cleary, McCormick on Evidence sec. 297 at 856 (3rd ed. 1984). Moreover, the declarant must still be in a state of excitement as the result of the event. Merely becoming excited, again, when making the statement is insufficient. Jano, 524 So.2d at 663. Shaun Hamilton's statements to Derit Godwin did not meet these requirements. The evidence should have been excluded.

Shaun's statements were made almost three hours after the shooting, and he was not stressed or excited at the time. The shooting occurred before 7:30 p.m., since the ambulance service received a call at that time. (TR 296-297) Investigator Adams and Deputy Tate arrived between 7:30 and 8:00. (TR 321, 541)

Deputy Tate saw the children at approximately 8:00, when he took Thewell Hamilton to the bedroom. (TR 541) Tate said the younger child, Shannon, was in her crib whimpering a little, but Shaun was simply lying on a cot. (TR 539) Shaun made no statements. (TR 539, 541) Investigator Adams called HRS for assistance with the children. (TR 543) Derit Godwin arrived at the residence at 9:05 p.m. (TR 545) He spoke to Hamilton, who asked him to take care of his children. (TR 556) When Godwin first saw the children, "[t]hey were playing on the floor showing little emotion." (TR 556) Godwin and another social worker, Karen Leitner, took the children away. (TR 548) About an hour later, while in the car, Shaun said, "Momma dead, Michael dead, Daddy shot Mommy and Michael." (TR 554) Godwin said Shaun repeated the statement four to six times over the next hour before Godwin left the children around 11:00. (TR 547, 554-556) When questioned about Shaun's behavior while in his presence, Godwin said he showed little emotion. (TR 547)

> Q. Did you notice anything unusual about the way Shaun acted or reacted?
>
> A. For a child that age, that child showed very little emotion. He wasn't afraid of me, he just showed very little emotion whatsoever.
>
> Q. Did you get any indications as to whether he seemed to be upset about anything?
>
> A. As far as emotions go, he showed very little emotion to me.

(TR 547)

In Lyles v. State, 412 So.2d 458 (Fla. 2d DCA 1982), the trial judge allowed a deputy to testify to statements a four-year-old girl made identifying her stepfather as the perpetrator of a sexual battery. She made the statement several hours after the sexual battery and after undergoing a physical examination. There was no evidence that the girl was upset or excited. She did not testify at trial. Rejecting the state's contention that the statement was admissible as an excited utterance, the district court held that the state had failed in its burden to establish the necessary predicate for the hearsay exception:

> Additionally, the burden is upon the state to lay a proper predicate for the admission of such testimony by showing either by the child's condition or by her own testimony that special circumstances exist. Since Heather did not testify at the trial, it was incumbent upon the state to show by Heather's condition that she did not have an opportunity to reflect or deliberate. The state failed to meet its burden in the case sub judice.
>
> There was no testimony to show that Heather was dazed, excited, or hysterical, or that she was anything other than calm. The statement was not made until several hours after she had been returned to her home and was not made to her mother or grandmother, but brought out by interrogation. According to her grandfather, she was normal and playing in the yard at the time the police officer came to investigate the incident. The doctor who examined her stated that she was not visibly upset and was in fact withdrawn.

Ibid. at 460. The State likewise failed to establish the necessary predicate in this case. Shaun Hamilton made his statements almost three hours after the shootings. He was calm

and playing on the floor when Derit Godwin arrived at the residence. Godwin testified that Shaun showed very little emotion. While Shaun's statements were spontaneous, there was no evidence that he was upset or excited.

The First District Court in Salter v. State, 500 So.2d 184 (Fla. 1st DCA 1986), reached a similar conclusion regarding testimony from a Child Protection Team counselor about a five-year-old girl's report of a sexual battery. These statements to the counselor occurred several hours after the incident, and there was no evidence that the girl was in an excited condition. Holding that the trial judge erred in admitting the statements, the appellate court said,

> The state argues that the statement was admissible nevertheless under the excited utterance exception to the hearsay rule. See Sec. 90.803(2), Fla. Stat. (1985). However, the child's statement to the counselor was made several hours after the incident and the state failed to demonstrate that it was made when the child was still in an "excited" state of mind and before she had an opportunity to reflect or deliberate. [citations omitted]

Ibid. at 186. The State also failed to meet its burden in this case.

While the court in Salter ruled the admission of the hearsay harmless because it was repetitious of properly admitted testimony, such is not the case here. The prosecution's case was circumstantial with no direct evidence about the facts of the shooting. Shaun's statements were admitted for the truth of their content with the implication, not proof, that Shaun actually witnessed the shootings. Other than the

physical evidence at the scene, the state had nothing, besides Shaun's statements, linking Thewell Hamilton to the shootings. Thewell testified at trial that he shot Madeleine. However, he denied shooting Michael and said that Madeleine first shot Michael. Furthermore, using Shaun's statement that "Daddy shot Mommy and Michael" (TR 554), the prosecutor devised the theory that Madeleine was shot first and Michael second. (V-TR 121-122) In her sentencing order, the trial judge accepted this sequence of events and even quoted Shaun's statements. (R 180-181) The hearsay had a critical impact in this case and a new trial is required.

ISSUE III

THE TRIAL COURT ERRED IN RULING THAT HAMILTON, WHO IS WHITE, LACKED STANDING TO OBJECT TO THE STATE'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES AGAINST BLACK PROSPECTIVE JURORS IN VIOLATION OF ARTICLE I, SECTION 16, OF THE FLORIDA CONSTITUTION AND AMENDMENTS SIX AND FOURTEEN OF THE UNITED STATES CONSTITUTION.

The question presented here is whether a white defendant has standing to object to the State's discriminatory use of peremptory challenges to exclude blacks from jury service. Both the United States and Florida Constitutions answer the question affirmatively. Although this Court has not yet spoken directly on the subject, the question is before this Court in Kibler v. State, Case No. 70,067, on discretionary review of the decision of the Fifth District. Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987). Hamilton, who is white, had standing to object, and the trial judge erred in ruling that he did not.

Defense counsel objected and asked the court to require the prosecutor to give a reason for his peremptory challenge against the only black prospective juror in the venire. (R 185) The State argued that Hamilton had no standing to object because he is white, and the court denied defense counsel's request. (R 186) The argument and ruling proceeded as follows:

> DEFENSE: Your Honor, I also object to the State using a preemptory [sic] challenge without giving some specific reason of why the juror was excused. It was the only black that has been called in this whole jury proceeding so far today and I think it looks prejudice on its face and the young man, I think, to call him by name, Flowers, anyway he is gainfully employed. He has no

bad background indicated in this examination and obviously to be excused other than the fact that he is black.

COURT: Mr. Register.

STATE: Your Honor, the defendant in this case is white. I don't believe that he has the right to have me explain on the record my reasons for excusing anyone until it becomes an issue. It's obvious the defendant is not black, he's white. I don't think he's entitled in this case to have the State explain its reason.

COURT: How is it, Mr. Adams, that he should explain that on the record. The law states that the defendant is entitled to a jury of his, of his peers.

DEFENSE: Correct, Your Honor. He is entitled to a jury of his peers. He is allowed to have a jury of his peers and we finally get one black out of a hundred

COURT: Well, I am going to deny that motion.

(R 185-186)

The Fifth District Court of Appeal held that a white defendant has no standing to object to a prosecutor's deliberate use of peremptory challenges to exclude blacks from his jury. Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987). The court wrote that the question had been settled -- as far as the federal constitution was concerned -- in Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Although this Court's decision in State v. Neil, 457 So.2d 481 was specifically based on the state constitution, the Fifth District Court majority reasoned that had Batson been available at the time Neil was decided, it would have provided the basis

for opinion. Judge Orfinger wrote in a concurring opinion that he would not have reached the standing question and was not confident that this Court would "embrace the more restricted test of Batson v. Kentucky." He acknowledged that in Castillo v. State, 466 so.2d 7 (Fla. 3d DCA 1985), approved in part, quashed in part, 486 So.2d 565 (Fla. 1986), the court noted that the question of whether a defendant may protest the systematic exclusion of an identifiable group other than his own from the jury had been answered in the affirmative in Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).

Kibler is incorrectly decided for two reasons. First, this Court would not necessarily have been swayed by Batson, had it been decided earlier, to base Neil on the federal constitution. This Court should not now bind itself to an interpretation of the federal constitution when answering a right clearly founded upon the Florida Constitution. Second, Kibler misinterpreted Batson as settling the standing issue under the federal constitution. When Batson is carefully read in light of related cases which directly address standing, it is apparent that the federal constitution also affords white defendants standing to complain.

This Court's decisions in Neil and State v Slappy, 522 So.2d 18 (Fla. 1988), evidence this Court's strong desire to eliminate discrimination in jury selection. The goal is broader than merely protecting the individual litigant. As stated in Slappy,

> One would think it unnecessary to point out again, as did the court in Batson v. Kentucky, 476 U.S. 79, 87-88 (1986) (citation omitted) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)), that "[d]iscrimination within the judicial system is [the] most pernicious." It would seem equally self-evident that the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being--to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large.
>
> The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws.

Slappy, 522 So.2d at 20.

This policy is protected by the tools given in Neil to both the defense and the prosecution. 457 So.2d at 486-487. Were the evil limited to the protection of the defendant and his racial group, alone, the prosecution would not need the authority to object. This Court correctly recognized the expanse of the discrimination problem and fashioned a remedy broad enough to cure the ill. Giving the same tools to any defendant, regardless of his race, will only further enhance the protection of the goal of eliminating prejudice from the judicial system. Moreover, every defendant, regardless of race, has a right to a jury fairly selected from a cross section of the community. Based on the Florida Constitution,

this Court should hold that a white defendant has standing to object to discrimination in jury selection.

In State v. Neil, this Court cited three state court decisions that had dealt with the issue of peremptory challenges and race. One of those decisions, People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S.2d 739 (1981) did not decide the standing question presented here. The two others did and both allow a defendant of any race to raise the issue. In People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748, 764 (1978) the Court cited Peters v. Kiff and Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), as resolving the standing question. Similarly in Commonwealth v. Soares, 387 N.Ed.2d 499, 517 (Mass. 1979), the court specifically held that common group membership of the defendant and those jurors excluded is not a prerequisite to assertion of the right.

The United States Constitution also gives a white defendant the right to object to discrimination against blacks in jury selection. Batson v. Kentucky, does state that in order to make a prima facie case of purposeful discrimination in jury selection, "The defendant must initially show that he is a member of a racial group capable of being singled out for differential treatment." 106 S.Ct. at 1722. However, the Batson court was not faced with a standing issue. The court's statement on standing is dicta because James Batson is black. There was no need to decide the issue, and the Court gave no explanation for the position stated.

In 1972 the U.S. Supreme Court was directly faced with a standing issue. Unlike Batson, the Court in Peters v. Kiff, 407 U.S. 493, decided a claim by a petitioner who was not black that blacks were excluded from his jury. After finding that the jury selection system was discriminatory, the Court held that the defendant had standing regardless of his race. In reaching this conclusion, the Court said,

> If it were possible to say with confidence that the risk of bias resulting from the arbitrary action involved here is confined to cases involving Negro defendants, then perhaps the right to challenge the tribunal on that ground could be similarly confined. The case of the white defendant might then be thought to present a species of harmless error.
>
> But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.
>
> * * * *
>
> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

407 U.S. at 498-500. (footnotes omitted)

Three years later, the Court faced a similar standing question in Taylor v. Louisiana, 419 U.S. 522. A male defendant argued that the systematic exclusion of women from the venire deprived him of his right to a fair trial by a jury of a representative segment of the community. Justice White, writing for seven members of the Court relied in part on Peters

v. Kiff, to hold that a male defendant has standing to challenge the systematic exclusion of females from his jury.

Batson v. Kentucky, appears to contradict Peters and Taylor on the question of standing. However, a careful reading of the cases shows a consistency and a foundation for ruling that a white defendant has standing. Recently, a Texas appellate court analyzed this facial contradiction and reached this result. Seubert v. State, Nos. 01-86-00057 & 01-86-00059 (Tex. Ct.App. 1st Dist. 1988). After discussing the federal authorities, the Texas court harmonized them upon recognizing that Batson was an equal protection case while Peters involved due process and Taylor the Sixth Amendment. The Seubert court stated:

> Swain v. Alabama, 380 U. S. 202 (1965), plainly recognized the right here in issue, but placed an impossible burden on defendants to prove a violation. "All Batson did was give defendants a means of enforcing this prohibition." Allen v. Hardy, 106 S.Ct. 2878, 2883 (1986) (Marshall, J., dissenting). Batson created a new remedy, not a new right. Batson requires the defendant to show that he belongs to the excluded class. This is a reasonable requirement for a defendant claiming denial of equal protection on the basis of race, and Batson was squarely grounded on the equal protection clause of the 14th Amendment. This was the narrowest basis on which to decide Batson because the defendant there was black.
>
> * * * *
>
> Appellant is white; therefore, he was not denied equal protection when [the black juror] was struck. He cannot meet that requirement of Batson, but he need not do so because he also asserted a denial of due process of law, see, Peters v. Kiff, and a Sixth Amendment violation, see, Taylor v. Louisiana, 419 U. S. 522, 538 (1975).

> Batson established a remedy for black defendants claiming denial of equal protection. To apply its "same race" or "membership" requirement to deny relief in this case would require us to ignore contrary holdings in Peters v. Kiff, Taylor v. Louisiana, Ballard v. United States [329 U. S. 187 (1946)], and Thiel v. Southern Pac. Co.[328 U. S. 217 (1946)]. We decline to do so.

Seubert, slip opinion at pages 6-7.

There is no legitimate policy goal served by limiting the application of the Neil decision to black defendants. All persons, including Thewell Hamilton, are entitled to be tried by a fair and impartial jury selected from an cross section of the community. The trial court erred in ruling that Hamilton lacked standing to object to the exclusion of blacks from his jury. This Court must reverse this case for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING AND CONSIDERING IN THE SENTENCING PROCESS AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

A.

The Trial Court Should Not Have Found And Considered As An Aggravating Circumstance That The Homicides Were Especially Heinous, Atrocious Or Cruel.

The trial judge found that both homicides were committed in an especially heinous, atrocious or cruel manner. In her sentencing order, the judge wrote,

> The capital felonies for which the defendant is to be sentenced were wicked, evil, atrocious and cruel (F.S. 921.141 (5) (h)). The Medical Examiner testified that Madeleine Hamilton was shot three times with a shotgun. The first two shots were fired into the backs of her legs and she was knocked down by the force of the shots. One of the shots caused a huge part of Madeleine's calf to be blown away. After being shot in the legs and suffering severe pain, Madeleine was able to struggle with the defendant but was unable to stop him from shooting her again and killing her.
>
> The Medical Examiner testified that the first shot in Michael's chest did not result in instant death. This shot knocked Michael onto the floor where he lay, alive, for minutes. The testimony established that Michael lay on the floor bleeding and in pain until the defendant re-loaded his shotgun and fired a fatal shot into Michael's head from a distance of four feet.
>
> The aggravating circumstance has been clearly established as to each count of the Indictment.

(R 182) (A 3-4)

These homicides were nearly instantaneous shooting deaths. This Court has consistently held that such killings do not

qualify for the heinous, atrocious or cruel aggravating circumstance. E.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). Although there was no evidence about the exact time interval between the first and the fatal shots, nothing indicated a significant amount. Nothing about the manner of the killing suggested it was done to cause unnecessary suffering. Brown v. State, 526 So.2d at 907; Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Dixon v. State, 283 So.2d 1, 9 (Fla. 1973). Multiple gunshots administered within minutes do not satisfy the requirements of this factor. See, e.g., Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988) (victim shot three times at close range within a short period of time as he tried to escape); Lewis v. State, 377 So.2d at 646, (victim shot in the chest and then several more times as he tried to flee). This is not a case where the victim suffered physically and mentally for a significant period of time before the fatal shot. See, Jackson v. State, 522 So.2d 802, 809-810 (Fla. 1988). The fact that the victims may have suffered some pain is insufficient to separate this crime apart from the norm of first degree murders resulting from a shooting death. These homicides were not especially heinous, atrocious or cruel, and the trial court erred in finding and considering this factor in sentencing.

B.

The Trial Court Erred In Finding And Considering As An Aggravating Circumstance That The Homicides Were Committed In A Cold, Calculated And Premeditated Manner.

The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See,e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d. 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed--one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be "...a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987).

In finding the premeditation aggravating factor, the trial judge stated:

> 3. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification (F.S. 921.141 (5) (i)).
>
> The defendant was not under the influence of any mood altering substance nor was there any evidence that the shootings were done in the heat of any sudden passion. The explanations of the defendant have been conflicting and the testimony at trial does not agree with the physical evidence nor the Medical Examiner's testimony. The defendant's statement in the pre-sentence

> investigation denied that he fired the fatal shot to his wife, which he admitted to the jury.
>
> The murder weapon is a double-barreled shotgun with a two shot capacity. To fire more than two shots from this gun, it must be opened, the spent shell casings removed, new shells inserted and then closed. The physical evidence does not unerringly establish the order of the shootings. It was established beyond a reasonable doubt that five shots were fired into the two victims. The defendant had to re-load the shotgun at least two times, giving him ample time to think about his actions and realize their consequences.
>
> The Court finds that the defendant's actions greatly exceed the premeditation required of first degree murder verdicts and this aggravating circumstance is clearly established for each count of the Indictment.

(R 182-18) (A 4-5) Contrary to the judge's finding, the required heightened degree of premeditation was not proven beyond a reasonable doubt. This aggravating circumstance should not have been considered in sentencing.

Initially, there is no evidence of a plan to kill. As this Court held in Rogers, the crime must be calculated, which involves a plan or prearranged design to kill. 511 So.2d at 533. No motive was established, and a plan to kill cannot be inferred from this lack of evidence; a mere suspicion is insufficient. LLoyd v. State, 524 So.2d 396, 403 (Fla. 1988); see, also, Gorham v. State, 454 So.2d 556, 559 (Fla. 1984) (physical evidence held not determinative of the premeditation aggravating factor and no other evidence existed); Drake v. State, 441 So.2d 1079 (Fla. 1983) (victim found bound, stabbed eight times with no other evidence of the circumstances of the

killing held not to establish premeditation factor). The trial judge improperly concluded a plan to kill existed merely because there was no evidence of sudden passion at the time of the shootings. (R 182-183) (A 4) However, there was no evidence of a plan to kill either, and in fact, a heat of passion killing during the course of a family argument is the more reasonable inference from the circumstantial evidence. Killings during a family dispute typically do not qualify for this aggravating circumstance. See, Garron v. State, 528 So.2d 353, 360-361 (Fla. 1988); Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Herzog v. State, 439 So.2d 1372 (Fla. 1983).

The trial judge also referred to the fact of multiple shots and that the double-barreled shotgun would have been reloaded during the shootings. (R 183) (A 4-5) On several occasions, this Court has rejected the premeditation circumstance even though the victim suffered several gunshot wounds. E.g., Caruthers v. State, 465 So.2d 496 (Fla. 1985) (victim shot three times); Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim shot seven times). Furthermore, the fact of reloading the gun, alone, does not make the homicide cold, calculated and premeditated. In two cases, this Court mentioned the fact that the defendant reloaded his gun when approving the premeditation circumstance. Phillips v. State, 476 So.2d 194 (Fla. 1985); Lara v. State, 464 So.2d 1173 (Fla. 1985). However, in both of those cases, significant other evidence indicating a prearranged plan and motive to kill existed. Ibid. These cases were also decided before this Court receded from Herring v. State,

446 So.2d 1049 (Fla. 1984), in Rogers. Rogers, 511 So.2d at 533. Language in Herring suggested that the firing of a second shot after the victim was incapacitated was sufficient to satisfy the proof needed. 446 So.2d at 1057. Multiple shots and the reloading of a firearm, without more, does not prove the premeditation aggravating circumstance. The circumstance should not have been considered in the sentencing process.

ISSUE V

THE TRIAL COURT ERRED IN SENTENCING HAMILTON TO DEATH BECAUSE A DEATH SENTENCE IS DISPROPORTIONAL TO THE CRIMES COMMITTED.

The death sentences imposed in this case are disproportionate to the offenses committed. First, the only valid aggravating circumstance does not support a death sentence. See, Amoros v. State, 531 So.2d 1256 (Fla. 1988); Kampff v. State, 371 So.2d 1007 (Fla. 1979). And, second, the evidence indicates that the homicides resulted from a heated domestic dispute -- the type of crime for which a death sentence is inappropriate. E.g., Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Blair v. State, 406 So.2d 1103 (Fla. 1981).

Since the heinous, atrocious or cruel and the premeditation aggravating circumstances were improperly found, see, Issue IV, supra., insufficient aggravating circumstances exist to support the death sentences. These were the only aggravating circumstances used in sentencing for the murder of Madeleine Hamilton. (R 181-182) (A 3-5) Consequently, with no aggravating circumstances present, that death sentence is not legally imposed. Sec. 921.141, Fla. Stat.; e.g., Amoros v. State, 531 So.2d at 1261.; Kampff v. State, 371 So.2d at 1010.; Dixon v. State, 283 So.2d 1, 9 (Fla. 1973). Only one of the three aggravating circumstances found regarding the murder of Michael Luposello was properly found -- Hamilton had a previous conviction for a violent felony based on the contemporaneous conviction for the murder of Madeleine. (R 181-182) (A 3) Sec.

921.141 (5) (b), Fla. Stat. While a contemporaneous murder conviction can support this aggravating circumstance, see, LeCroy v. State, No. 69,484 (Fla. Oct. 20, 1988); Craig v. State, 510 So.2d 857, 868 (Fla. 1987), it carries little weight. Standing alone, such a circumstance cannot justify a death sentence. This is particularly true, here, since it must be weighed against four mitigating circumstances, including the statutory one that Hamilton had no significant history of prior criminal activity. (R 183) (A 5) Sec. 921.141 (6) (a), Fla. Stat.; see, Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988). The aggravating circumstance does not outweigh the mitigating circumstances, and the death sentence was improperly imposed.

These murders occurred during the course of a domestic argument. Thewell Hamilton testified about an argument between Madeleine and Michael which prompted the shootings. But, even disregarding Hamilton's version of the events, the circumstantial evidence demonstrates that a heated family fight must have prompted the killings. First, there was evidence of difficulties between Madeleine and her son, Michael. Second, there was no motive to kill established. Third, there was no evidence of a planned murder. Fourth, Thewell had a reputation for nonviolence and had no history of violent behavior. Fifth, Thewell cared for his family, including a special relationship with his stepson, Michael. Sixth, there was some evidence that both Thewell and Madeleine had been drinking alcohol at the time of the shootings.

This Court has held death sentences disproportional in similar cases. In Garron v. State, 528 So.2d 353, for instance, the defendant shot and killed his wife and stepdaughter and tried to shoot a second stepdaughter during an argument. Reversing the death sentence as disproportional, this Court described the case as a "passionate, intra-family quarrel" and said,

> In Wilson v. State, 493 So.2d 1019 (Fla. 1986), this Court stated that when the murder is a result of a heated domestic confrontation, the penalty of death is not proportionally warranted. See Ross v. State, 474 So.2d 1170 (Fla. 1985); Blair v. State, 406 So.2d 1103 (Fla. 1981). The record shows that this is clearly a case of aroused emotions occurring during a domestic dispute. While this does not excuse appellant's actions, it significantly mitigates them.

Garron, 528 So.2d at 361. In Wilson v. State, 493 So.2d 1019, a fight erupted when the defendant's stepmother told him to stay out of the refrigerator. The defendant beat her with a hammer and also beat his father when he came to intervene. During the fight, the defendant also stabbed his five-year-old cousin with a pair of scissors. His stepmother obtained a pistol, which the defendant took away from her. He shot his father in the head, pursued his stepmother, emptying the pistol and inflicting several wounds. His father and cousin died. This Court reduced the murder conviction for the cousin's death to second degree murder and held that the death sentence for the murder of the father was disproportional:

> We find it significant that the record also reflects that the murder of Sam

> Wilson, Sr. was the result of a heated, domestic confrontation and that the killing, although premeditated, was most likely upon reflection of a short duration. See, Ross v. State, 474 So.2d at 1174. Therefore, although we sustain the conviction for the first-degree, premeditated murder of Sam Wilson, Sr. and recognize that the trial court properly found two aggravating circumstances while finding no mitigating circumstances, we conclude that the death sentence is not proportionately warranted in this case. [citations omitted]

493 So.2d at 1023. The crimes committed here, like the ones in Garron and Wilson, were "the result of a heated, domestic confrontation" and "most likely upon reflection of a short duration." Ibid. Just as defendants in those cases, Thewell Hamilton does not deserve a death sentence.

Thewell Hamilton's death sentences are disproportional. His sentences violate the Eighth and Fourteenth Amendments to the United States Constitution. He urges this Court to reduce his sentences to life imprisonment.

ISSUE VI

THE TRIAL COURT ERRED IN CONSIDERING A PRESENTENCE INVESTIGATION REPORT CONTAINING VICTIM IMPACT INFORMATION AND IRRELEVANT EVIDENCE AND OPINIONS CONCERNING NONSTATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Judge Costello ordered a presentence investigation report prior to sentencing. It contained improper and irrelevant comments and opinions from law enforcement personnel, the preparer of the PSI and Madeleine Hamilton's parents. (R 164-176) These comments were irrelevant, nonstatutory aggravating circumstances which should not have been considered in sentencing.

The preparer of the PSI interviewed Madeleine's parents and wrote:

> Victim's Statement:
> None due to both victims being deceased as a result of the instant offense. In situations such as this, there are many victims which, include the defendant's children as well as the defendant's immediate family, and the victim's immediate family. The instant offense received extensive media coverage, as this type of offense strikes at the very heart of the criminal justice system, as it is one of the most difficult type of offense to deal with.
>
> Andre and Marie Lacroix were interviewed. The Lacroixes are victim, Madeliene Hamilton's parents. They are also the maternal grandparents to the victim, Michael Luposello. Both generally expressed great loss due to losing a daughter and grandson. They related that as far as they knew, Thewell and Madeliene got along great, as did the whole family. It was not unusual for Thewell to take Michael hunting and they also assisted each other in doing gardening work. They never knew him to

mistreat Michael and had no knowledge until after the fact, that Madeliene had marital problems. They knew of one occasion back in 1983 when the defendant left her for approximately one month after their marriage, and no one knew where he was. His wife was pregnant with Shawn at the time. When he returned to his wife, they asked him where he had been, and he stated he couldn't remember. However, they verified that the defendant was working everyday.

The Lacroixes stated they had no doubt in their minds that the defendant did the killings and stated that his statement, that Madeliene killed her son, was untrue due to the fact that their daughter couldn't kill anything. They further stated that Madeliene hated guns and didn't know how they worked. It was noteworthy the that the Lacroixes indicated that two weeks before the murder, Thewell came over and said Gus Luposello was coming and not to tell Madeliene. Apparently Gus had called Michael. The Lacroixes indicated that had Luposello not been detained in Washington, D.C., he would have been in the Holmes County area at the time the offense occurred. It is noteworthy that originally when questioned about the murders, Hamilton did indicate that Luposello could have conducted the killings.

The Lacroixes indicated that their daughter adored her son and were the best of "buddies." She treated him as a companion but was upset with him during this period of time. Michael had gone to visit his half-brother and did not want to come back. She related that Madeliene made her son come back and this presented problems. They related that Michael was only 14 years of age and if he had stayed with his half-brother, he would not have gotten any discipline. This was the basic reason that Madeliene insisted on his return.

The Lacroixes verified that Madeliene's first marriage to Gus Luposello was full of problems and abuse. Luposello mistreated her and, as a result, they got involved heavily. When their daughter married the second time to the defendant, apparently

> Madeliene did not want to involve them in any problems and, therefore, basically hid any marital difficulties from them.

(R 167-168)

The Lacroixes' feelings about the crime, opinions on the evidence and information concerning Madeleine's background and character was irrelevant victim impact information. This material should not have been considered in sentencing. Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987); Grossman v. State, 525 So.2d 833 (Fla. 1988); Patterson v. State, 513 So.2d 1257 (Fla. 1987). Moreover, the preparer's personal opinions about the impact of the crime on the community was inflammatory and improper. (R 167) See, Jackson v. State, 498 So.2d 906, 910 (Fla. 1986) (character of the victim and the crime's impact on the community improperly considered in finding the crime to be heinous, atrocious or cruel).

Throughout the PSI, the opinions of law enforcement officers on the evidence and their speculative theories of the case are used. (R 165) The evidence at trial was circumstantial. Thewell Hamilton's testimony provides the only evidence of the circumstances surrounding the shootings. While the jury found Hamilton guilty of shooting both victims, nothing demonstrates that the order of the shooting occurred as Investigator Adams speculated. Nothing demonstrates who was shot first, Madeleine or Michael. Nevertheless, the PSI preparer adopted the investigator's theories and wrote them as fact:

> Reconstructing the crime scene revealed that Hamilton approached the kitchen area to where his wife was located. She was apparently washing dishes at the kitchen sink. The defendant approached from behind with the shotgun and shot her twice from behind, with one shot in each leg. He at that time emptied the gun and proceeded from the kitchen to the central hallway area where the living room area was visible as well as the kitchen. He at that time began reloading the shotgun. The wife crawled toward her husband for it was apparent that he was at that time preparing to shoot the step-son. She managed to get to the defendant, pulled herself up on the couch in a standing manner, and a struggled apparently ensued. She was apparently knocked down and the defendant went to the middle of the living room. It is noteworthy that the living room door had been nailed shut for quite sometime and therefore there was nowhere for the step-son to escape without going over the defendant. While the defendant was in the middle of the living room with the shotgun, he shot the step-son in the chest area from close range and then turned and shot his wife in the chest area. After the step-son was shot, he stood over the coffee table holding onto it until he fell to the floor. The defendant at that time stepped over his decease wife, went back through the hallway toward the back of the house and found some extra shells, reloaded his shotgun, came back into the living room, and again shot his step-son in the back of the head. It was at this time that the defendant notified the authorities, after which Investigator Adams was called to the scene.

(R 165) The trial judge adopted much of this speculative theory of the circumstances in her findings of fact:

> The evidence at trial established beyond a reasonable doubt that on the night of September 19, 1986, the defendant at his home with his wife and their two young child [sic] and his stepson, armed himself with a double-barreled shotgun. The defendant entered the kitchen and fired two shots into the backs of Madeleine's legs.

> The shots knocked her to the floor and blew flesh and blood over a large portion of the kitchen. During these shots, Michael was apparently in the adjoining living room.
>
> The defendant then retreated to an area where the living room and dining room adjoined and re-loaded the shotgun. During this time Madeleine either dragged herself or crawled towards the defendant, finally reaching the living room area. Michael was trapped in the living room with no way out.
>
> The defendant fired a fatal shot into Madeleine's chest. He then turned the gun on Michael and fired, striking the young teenager in the chest. As Michael lay on the floor bleeding but still alive, the defendant re-loaded the shotgun for the second time and fired a shot into Michael's head causing his death.

(R 180-181) (A 1-2) These findings simply do not comport with the evidence adduced at trial. See, Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986) (when remanding for resentencing, this court noted difficulty reconciling the judge's findings with the record).

Finally, after interviewing Hamilton, the PSI preparer personally concluded that Hamilton lacked remorse for the crime. (R 179) Lack of remorse is never a valid sentencing consideration, and the opinion should not have been included and considered in the sentencing process. Pope v. State, 441 So.2d 1073 (Fla. 1983).

The consideration of a PSI fraught with inaccurate facts, opinions and conclusions, as well as irrelevant victim impact information, tainted the sentencing process. Hamilton's death sentence has been imposed in violation of the Eighth and Fourteenth Amendments, and this Court must reverse for a resentencing proceeding.

ISSUE VII

THE TRIAL COURT ERRED IN GIVING UNDUE WEIGHT TO THE JURY'S RECOMMENDATION OF DEATH, THEREBY SKEWING THE SENTENCING WEIGHING PROCESS.

The trial court applied an erroneous legal standard regarding the weight to be afforded a jury's recommendation of death. In the sentencing order, the trial judge made the following statement regarding her reasons for imposing the death sentence:

> The Jury has recommended death as to both counts. That recommendation should be given great weight. The importance of the recommendation cannot be overstressed.

(R 181) (A 2) While a jury's recommendation of death should be given due consideration, it can, indeed, be overstressed. Ross v. State, 384 So.2d 1269 (Fla. 1980). A recommendation of life is to be given great weight and not overturned absent compelling reasons, Tedder v. State, 322 So.2d 908 (Fla. 1975), but the same is not true for a recommendation of death. Ross, at 1274-1275. With a recommendation of death, the trial judge is bound to exercise his own independent judgment in imposing sentence. Ibid.

Based on the sentencing court's statements, it is apparent that the court gave too much deference to the jury's recommendation and failed to use its independent judgment in imposing sentence. Hamilton's death sentence has been imposed in violation of the Eighth and Fourteenth Amendments and must be reversed.

ISSUE VIII

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS WHICH DIMINISH THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See,Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, ___ U.S. ___ (case no. 87-121 March 7, 1988) A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471,

1489-1490 (11th Cir.), on rehearing, 844 F.2d 1446 (11th Cir. 1988).

The trial court read the standard penalty phase instructions to the jury. In part, those instructions stated:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge . However, it is your duty to fall[sic] the law now given you by the Court and to render the Court an advisory sentence....

(TR 599) The instruction is incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely its responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance. Tedder. The instruction failed to advise the jury of the importance of its recommendation. The instruction failed to mention the requirement that the sentencing judge give the recommendation great weight. Finally, the instruction failed to mention the special significance of a life recommendation under Tedder. The instruction violates Caldwell. Hamilton realizes that this Court has ruled unfavorably to this position. E.g., Combs v. State, 525 So.2d 853 (Fla. 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, he asks this Court to reconsider this ruling and reverse his death sentence.

CONCLUSION

For the reasons presented in Issues I through III, Thewell Hamilton asks this Court to reverse his judgements with direction to grant him a new trial. Alternatively, for the reasons presented in Issues IV through VIII, he asks that his death sentences be reduced to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida on this 21 day of December, 1988.

W. C. MCLAIN #201170