IN THE SUPREME COURT OF FLORIDA



THEWELL E. HAMILTON,

Appellant,

v.

CASE NO. 72,502

STATE OF FLORIDA,

Appellee.

_____/

# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

Thewell Hamilton relies on his initial brief to reply to the State's answer brief except for the following additions:

## ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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.

The State first contends that no reversible error occurred, since the defense did not expend a peremptory challenge on the juror who should have been excused for cause. (State's brief, page 5) This argument overlooks the prejudice resulting from the improper denial of a cause challenge -- the reduction in the number of peremptory challenges available. Moore v. State, 525 So.2d 870 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985). In Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981), which this Court cited with approval in Hill, the court

directly addressed this point and held that a peremptory challenge need not be expended on the juror in question in order to establish reversible error:

> At the time the defendant challenged the prospective juror for cause, he had three remaining peremptory challenges. Following the denial of his challenge for cause of this prospective juror, he did not utilize any of his remaining peremptory challenges against her. Instead, he exercised his peremptory challenges against other prospective jurors to the point that all peremptory challenges were exhausted. For this reason, the state contends the defendant did not preserve the matter for appellate review arguing that he was first required to have exercised his peremptory challenge against the particular juror and then exhaust any remaining peremptory challenges and, following that, again renew his challenge for cause to the juror who was allegedly biased. We can find no support for such a position. Instead, we find the general rule to be that it is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause since it has the effect of abridging the right to exercise peremptory challenges. [citations omitted]

Leon, 396 So.2d at 205.

Next, the State argues that the trial judge had the discretion to resolve any ambiguity in the juror's responses and this Court should not disturb those findings. This position is without merit. First, it is apparent on the record that the trial judge was not even applying the correct legal standard. In denying the cause challenge, the judge said,

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

(TR 56) The legal issue to be resolved was not merely whether the juror said she could put aside any opinion. Instead, the question was whether "there [was] a basis for any reasonable doubt as to [the] juror's possessing that state of mind which will enable [her] to render an impartial verdict." Singer v. State, 109 So.2d 7, 24 (Fla. 1959). A juror's statement that he can fairly render a verdict does not answer the the question. As this Court said in Hill,

> In Singer, we reaffirmed the proposition that the "statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence." [Singer] at 22. (quoting Olive v. State, 34 Fla. 203, 206, 15 So. 925, 926 (1894)). In other early cases this Court stated that "jurors should if possible be not only impartial, but beyond even the suspicion of partiality," O'Conner v. State, 9 Fla. 215, 222 (1860), and that "[i]f there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused." Johnson v. Reynolds, 97 Fla. 591, 598 121 So. 793, 796 (1929).

Hill, 477 So.2d at 555-556. Consequently, the trial judge was required to view the totality of the juror's responses and decide if a reasonable doubt as to the juror's ability to be impartial existed. The court here did nothing more than use a single statement, made in response to the trial judge's leading questions, as a talismanic answer to the question.

Assuming for argument, that the trial judge did use the correct legal standard, a reading of the entire voir dire of the Juror Smith demonstrates the manifest error of the court's

ruling. (See, initial brief, pages 18-21 for a transcript of the Juror Smith's responses) The juror consistently adhered to the opinion concerning guilt she derived from the news media. She candidly admitted to the opinion. She admitted that it would take evidence to remove the opinion from her mind. Furthermore she never yielded her opinion, even under the judge's leading questions. After making the statement to the judge that she would base her decision on the law and the evidence, Juror Smith reaffirmed her opinion and presumption of guilt. The analysis and admonitions found in Singer concerning juror's responses are pertinent and controlling here:

> It is difficult for any person to admit that he is incapable of being able to judge fairly and impartially. We think Mr. Shaw on voir dire examination did as much as he could to honestly express that he was of such a state of mind, consciously or subconsciously, that he was not sure he could render a verdict without being influenced by the opinion he had formed from what he had read and heard about the case and because of knowing the decedent's family.
>
> Nor do we feel that his subsequent statements, in response to questions from the trial judge, that he was competent to serve as a juror were sufficient to overcome the effect of what he had previously said as to his state of mind.
>
> There is such a reasonable doubt as to the impartiality of Mr. Shaw and his being able to render a verdict on the evidence and law given at the trial free of the influence of his opinions and prejudices that we feel he should have been excused from the jury when challenged for cause by the defense.....

Singer, 109 So.2d at 24-25. Like Juror Shaw in Singer, Juror Smith should have been excused for cause.

ISSUE IV

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT 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 State argues that Swafford v. State, 533 So.2d 270 (Fla. 1988) and Troedel v. State, 462 So.2d 392 (Fla. 1984), mandate the affirmance of the heinous, atrocious or cruel aggravating circumstance. However, these cases are easily distinguishable. In both, significant evidence that the murders were carried out in a manner designed to torment the victims existed. The victim in Swafford was abducted by a stranger, transported to an isolated area, sexually abused, and finally, shot several times in the torso and extremities in a manner designed to promote suffering. In Troedel, the victims were killed in their home during a burglary and robbery. Troedel shot both victims after confining them in a bathroom. The trial court found only one murder to be heinous, atrocious or cruel because medical evidence indicated the shots were designed to inflict suffering -- one shot to each thigh, one shot to the finger and two shots to the head.

There is no evidence here showing that the murders were committed in a torturous manner. The State points solely to

the two wounds to Madeline Hamilton's legs to justify the finding. First, the evidence was in dispute as to the number of shots required to produce those wounds. Hamilton admitting shooting Madeline in the legs during a struggle for the gun. He said one shot struck both legs. (V-TR 46-51) Furthermore, only a small number of pellets were found in one leg. (TR 444) A single shot tore the muscle away from the first leg (TR 444), and the small number of stray pellets could have then caused the wound to the second leg. Defense counsel demonstrated this fact to the jury during closing argument using the medical examiner's x-rays. (V-TR 81-82, 89-91, 130-132) A single shot to both legs is also consistent with the four expended shells found at the scene. (TR 322, 329-330, 392-394) Second, even if two separate shots were involved, this does not prove the shots were designed to produce suffering. The circumstances here are not a stranger killing dispassionately during some other felony. This is an instance of domestic violence during a family argument.

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 State cites Swafford v. State, 533 So.2d 270 (Fla. 1988), to support its position that the mere fact of reloading a weapon qualifies a homicide for the premeditation aggravating circumstance. (State's brief, page 15) Swafford, however, does

not stand for that proposition, since that case involved significant other evidence of a prearranged plan to kill. No evidence of a prearranged plan to kill exists in this case. The reloading of the shotgun was the only fact the trial judge found which tended to support the circumstance. (R 182-183)(A 4-5) The State concedes that it failed to prove a motive for the murders and relies solely on the reloading of the gun to justify the court's finding. (State's brief, page 16) Standing alone, that fact is simply insufficient.

On page 16 of the answer brief, the State asserts that lack of remorse can be a factor in deciding if a murder is cold, calculated and premeditated. Initially, this is a patently improper and irrelevant consideration. Pope v. State, 441 So.2d 1073 (Fla. 1983). Interestingly, the State concedes that lack of remorse is an improper consideration when answering Issue VI. (State's brief, pages 19-20) Second, there was no evidence of lack of remorse. The only suggestion of lack of remorse appeared as the unfounded opinion of the PSI preparer. (See Initial Brief, Issue VI)

## CONCLUSION

For the reasons presented in the initial brief and this reply brief, Thewell Hamilton asks this Court to reverse his judgments for a new trial, or alternatively, to reduce his death sentences to life imprisonment.

Respectfully Submitted,

MICHAEL E. ALLEN
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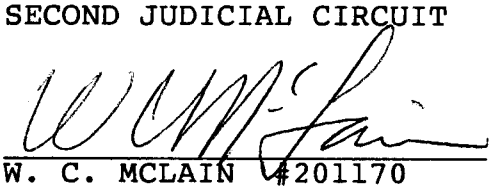

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida; and a copy has been mailed to appellant, Thewell E. Hamilton, at his last known address, on this 14th day of March, 1989.

W. C. MCLAIN