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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,  
Appellant,

v.

CASE NO. 75,717

THEWELL EUGENE HAMILTON,  
Appellee.

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

INITIAL BRIEF OF APPELLANT

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**PRELIMINARY STATEMENT**

Thewell E. Hamilton was the defendant below and will be referred to herein as Hamilton or defendant. The State of Florida was the prosecution below and will be referred to herein as Appellant or the State. References to the record on appeal will be referred to by the symbol "R" followed by the appropriate page number in parantheses.

### (A) Statement of the Case

Thewell Hamilton came up for retrial on two counts of first degree murder following this Honorable Court's decision in **Hamilton v. State, 547 So.2d 630 (Fla. 1989)**.

Once again, Hamilton was convicted on both counts (R 1), and once again the advisory jury suggested two sentences of death (R 2).

Defense counsel sought and obtained a mistrial after objecting to the presence of unauthorized material in the jury room (R 14, 15, 34). The mistrial was limited by the Court to the penalty phase (R 34).

The State appealed.

### (B) Statement of the Facts

The defense objected to the presence, in the jury room (during the penalty phase deliberations), of a "Musclecar Classics" magazine (R 37), and a "Musclecar Review" magazine (R 38). The magazines did not address any issue pertaining to the trial and were the personal property of a juror named Kevilly (R 16).

Mr. Kevilly brought the magazines simply for reading material to pass the time (R 16) and to help ensure that he would not discuss the case with other jurors (R 16).

Defense counsel (objected) that the magazines were "provocative", particularly as to a "blond in a bathing suit" on page 28 (R 17). **No** evidence was offered that any juror other than Mr. Kevilly saw the magazines, or that the magazines had any impact on the case.

The trial judge, three months later, simply granted the motion for mistrial to avoid the possibility of reversal on appeal (R 35), not prejudice to the defense (R 35).

This appeal followed. See State v. **McGough**, 14 F.L.W. 192 (Fla. 2nd DCA 1989) (State may appeal mistrial order based on juror misconduct).

### SUMMARY OF ARGUMENT

The trial court, in an overreaction intended solely to "avoid reversal" without regard to the facts and circumstances of the case, abused its discretion in granting the defendant's motion for mistrial.

A juror, who was not sequestered, brought two "car magazines" from home for reading material while on jury duty. The magazines did not address an issue or party on trial. No one was shown to have read or relied upon these magazines as part of their decision making process. In fact, no one other than Mr. Kevilly read the magazines at all.

Absent any showing of contact with the magazines and/or resulting prejudice, a mistrial should not have been granted.

## ARGUMENT

### ISSUE

#### THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR MISTRIAL

Judge Turner granted the defendant, Mr. Hamilton, a mistrial simply to avoid the prospect of reversal and not due to any "prejudice" or other legitimate ground for such extraordinary relief.

The record shows us that juror Kevilly subscribes to and reads car restoration magazines. Mr. Kevilly receives these magazines at home. Mr. Kevilly was not sequestered.

From these basic facts, we can presume that Mr. Kevilly's contact with these "provocative" magazines would have transpired during this trial whether he physically carried the magazines to court or not. Furthermore, since the magazines contained no information pertaining to the trial, Kevilly could have read them even if he had been sequestered.

The issue, however, was not "reading". The only issue was the physical presence of these magazines - unread - in the jury room during deliberations. The magazines were simply present. No one read, discussed or relied upon them in making a decision as to Hamilton's sentence.

It is submitted that Judge Turner erred, under these facts, in simply granting a mistrial in order to avoid the possibility of reversal. This defensive reaction on the court's part was totally unrelated to the facts and circumstances of the case.

The prospects for reversal were, in fact, virtually nil under our facts. Absent some showing that the jury read or saw



these magazines and that their decision was influenced by them, any "error" caused by their mere presence was harmless. **Doutre v. State**, 14 F.L.W. 635 (Fla. 1st DCA 1989); **United States v. Steele**, 785 F.2d 743 (9th Cir. 1986); **White v. State**, 462 So.2d 52 (Fla. 1st DCA 1984); **United States v. Dynalectric Co.**, 859 F.2d 1559 (11th Cir. 1988).

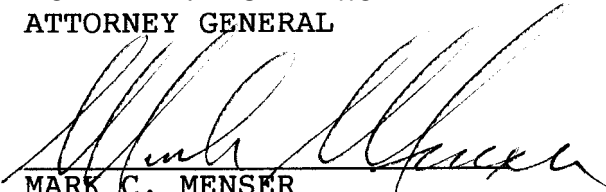
The trial court overreacted, and erred, in granting a mistrial.

#### CONCLUSION

The order granting the defendant's motion for mistrial should be reversed.

Respectfully submitted,

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