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IN THE SUPREME COURT OF FLORIDA

THEWELL HAMILTON,

Appellant,

v. Case No.: 78,576

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the trial court, will be referred to in this brief as the state. Appellant, THEWELL HAMILTON, the defendant in the trial court, will be referred to in this brief as Hamilton. References to the record on appeal in Hamilton v. State, 547 So. 2d 630 (Fla. 1989), Hamilton's first direct appeal to this Court, will be noted by the symbol "OR"; references to the instant record on appeal will be noted by the symbol "R"; references to the transcript of Hamilton's resentencing will be noted by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

In Hamilton v. State, 547 So. 2d 630 (Fla. 1989), Hamilton's first direct appeal to this Court, this Court reversed and remanded the case for a new trial on all issues.[1] In the guilt phase, this Court found error in the trial court's failure to excuse a partial juror, the trial court's admission of an HRS caseworker's testimony that the two year old son of Hamilton had said that his father had killed Madeline Hamilton and Michael Luposello,[2] and the trial court's denial of the opportunity for Hamilton to object about the excusal of black jurors. In the penalty phase, this Court found error in the trial court's findings that the murders were especially heinous, atrocious, or cruel (HAC), and were committed in a cold, calculated and premeditated manner (CCP): "Aggravating factors must be proven beyond a reasonable doubt. The degree of speculation

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[1] These included: (1) denial of a cause challenge on a juror who had an opinion as to guilt based on media coverage; (2) testimony of an HRS caseworker regarding a statement by Hamilton's two year old son; (3) finding that Hamilton did not have standing to object to state's use of peremptory challenges; (4) aggravating circumstances not proven beyond a reasonable doubt; (5) disproportionate death sentence; (6) consideration of PSI; (7) undue weight to jury's recommendation; and (8) jury instructions which diminished responsibility of jury's role.

[2] On this point, the Court found the error harmless and stated that, by itself, it did not constitute reversible error. 547 So. 2d at 633.

present in this case precludes any resolution of that doubt." Id. at 633-34.

At Hamilton's retrial, Mike Taylor, an emergency medical technician (EMT), testified that, on September 19, 1986, he received a telephone call at 7:37 p.m. from Hamilton[3] regarding a shooting (T 373). After stating that "some son-of-a-bitch had come in and killed [his] whole family," Hamilton gave directions to his house (T 374, 382). Taylor and his partner entered the house through the garage and back door to the kitchen (T 375). Upon entering the kitchen, Taylor saw blood splattered on the floor, cabinets, and in the living room (T 376). A young white male, Michael Luposello, Hamilton's stepson, and middle aged white female, Madeline Hamilton, Hamilton's wife, appeared to be injured (T 376). Madeline Hamilton was lying in the kitchen "almost in the divider between the living room and the kitchen" and Michael Luposello was in the living room (T 377). Hamilton was present and spoke with Taylor (T 377). Hamilton evidenced no emotions while Taylor was present, but this changed once police officers arrived (T 378). Hamilton then embraced Madeline (T 379) and started explaining what had happened (T 381).

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[3] Taylor testified that he recognized Hamilton's voice as the caller's voice when he heard Hamilton speak with police officers at the scene (T 381).

Lucille Watson, an "across-the-road" neighbor, testified that, around 7:30 - 8:00 p.m. on September 19, 1986, she opened her door to allow her dog to exit, and heard three shots from the direction of the Hamiltons' home (T 386-87). She saw no one leave the Hamiltons' house while she watched (T 387). Watson heard a pause between the first and second shot, and saw a "blast or streak of fire" with the third shot she heard (T 387-88). After the third shot, she heard pellets hit her calf shed (T 388).

Operations Officer Eric Adams testified that, on September 19, 1986, he had received a call about the shootings (T 398). Adams testified that he observed a large amount of blood in the kitchen on the shelves and floor, blood and flesh on the ceiling and floor, and flesh and pellets embedded in the cabinets (T 405-07). Adams also saw bloody footprints and slipper prints in the house (T 406, 443), shoe prints on the outside steps (T 443), shotgun waddings in the kitchen (T 409-10), evidence of dragging, and casings and shells (T 411, 441-42). Adams recalled that Madeline Hamilton had no shoes on but her body (including her feet) was covered in blood; Michael Luposello had no shoes on and only had blood on the tops of his feet (T 414). Hamilton wore high top slippers which had blood on them (T 415, 428), pants, and a shirt with blood and flesh on it (T 426).

In the living room, Adams observed a table with a bloody handprint, blood and flesh on the walls, pellets embedded in the wall, and pellet holes in the screen (T 415). Although there was a door in the living room, it had been nailed shut (T 416). Adams testified that Lucille Watson's home was in a "straight line" direction, with no obstructions, from the living room window of the Hamilton's home, a distance of about 300 feet (T 417).

Adams located shotgun shells in Michael's and the master bedroom (T 420), and "some weapons and a shotgun in a box" in the closet of the master bedroom (T 422). Jerry Aldridge recovered a double barreled shotgun from underneath a van parked in the yard (T 423). Hamilton told Adams that he had been in the back bedroom with the two younger children when he heard loud voices and gunshots (T 432). Because he was frightened, Hamilton did not leave the back room until he heard some one leave the house (T 432). Hamilton also related that his wife's ex-husband had made some threats about getting rid of them (T 432).

FDLE Crime Scene Analyst Laura Russo testified that Hamilton's slippers could have made the bloody prints -- one by the right arm of Madeline Hamilton, and the other two leading away from Madeline toward Michael -- in the house (T 464).

Medical Examiner William Sybers noted the blood flow pattern down Madeline Hamilton's right thigh, indicating that she was either sitting or standing in an upright position when shot in the leg, so that the blood flowed under her shorts (T 479). Dr. Sybers opined that Madeline had been shot three times -- once in the chest, once in the right leg, and once in the left (T 479-82). Dr. Sybers noted that tissue and hair would be carried with the shot that left the body (T 484).

Regarding Michael Luposello, Dr. Sybers found two gunshot wounds -- one above the neck behind the right ear, and one in the chest (T 485). He opined that the chest shot occurred first (T 485), and that the victim "lived some time after the shot" (T 487). Nothing about the chest wound "would have made him unconscious" (T 488). Dr. Sybers concluded that the shot to Michael's neck was the actual cause of death (T 500). Although Michael could have eventually died from the chest wound, the shot to the neck "intervened and caused his death sooner" than the shot to the chest alone would have caused death (T 500).

FDLE fingerprint expert Paul Narcus testified that he found no fingerprints on the double barreled shotgun found under a van in Hamilton's yard (T 513). FDLE firearms expert David Williams testified that "all four shot shells were fired in this State's Exhibit No. 11 shotgun," the one

found under the van (T 528). The four shells, found in Hamilton's kitchen, were all Remington Peters, 16 gauge, no. 6 shot (T 528-29). Williams examined the lead shot recovered from Michael Luposello's chest and Madeline Hamilton's legs, and concluded that they were no. 6 shot and were consistent with the shells fired from the shotgun (T 530, 533). Williams stated that the wadding found at the scene was consistent with the type of wadding used in the shells found in Hamilton's kitchen (T 532). Williams also stated that it would be possible for someone to observe a flash from the shotgun, particularly at night (T 535). Williams concluded that the shot into Madeline Hamilton's chest had been fired at a distance of five feet (T 537).

Outside the presence of the jury, the court listened to the tape of Hamilton's October 16, 1986 statement to Adams (T 543). After hearing his rights, Hamilton said that he had tried to determine who might have killed his wife and stepson, and thought it might be a retarded neighbor or some disgruntled neighbors that Madeline wanted to report to the health department (T 545-46). Hamilton said the shotgun belonged to his family and that he had had it for some time (T 548). Hamilton then stated that he had heard on the news that the grand jury had indicted him for first degree murder (T 549). In response, Adams asked: "[Y]ou know that if we hadn't had some pretty good evidence they wouldn't have

indicted you? Now I realize it must be kind of hard for you to sit there and even think about doing something like that, but have you thought about what happened that night?" (T 550). Hamilton responded: "Mr. Cole told me not to talk to anyone on it." (T 550). Adams stated "OK." (T 550). Hamilton then stated:

> And, uh . . . the reason, I don't you know . . . I was in shock. And that . . . that terrible thing just went through, and all that. Seeing your wife and stepson on the floor and all that. I didn't . . . I mean, you brought me in here and you told me that I, you know, did this . . . and in other words, I was in such a shock that I didn't care.

(T 550). Adams responded: "Mmm." (T 550). Hamilton continued: "I just followed whatever you said. You know, you said, 'you did this and you did that.'" (T 550).

Adams asked Hamilton if he remembered telling Adams that he and his wife had struggled over the shotgun on the night in question (T 550-51). Hamilton answered: "Somebody." (T 551). Adams told Hamilton he had said it was his wife (T 551). Hamilton explained: "Well, I was in shock. I was . . . I was out of my mind. I'd been sitting there on that hard bench all night long. I'd worked all day the day before, since early that morning . . . early in the morning." (T 551). Hamilton remembered telling Adams that he thought Gus Luposello had committed the murders, based on

a threatening call he had received (T 551). Adams told Hamilton that he had spoken with Carl Luposello,[4] who had stated that, at 5:30 p.m. on the night in question, he had been speaking with his Michael on the telephone and overheard Hamilton and Madeline arguing "real loud" in the background (T 552). Hamilton said he did not get home that night until 7:00 p.m., because he had stopped by his ex-wife's house in Dothan, Alabama, and had not left there until after 6:00 p.m. (T 552-53).

Adams then asked why Hamilton's two year old son said that Hamilton had shot Madeline and Michael (T 553). Hamilton explained that his son saw him with the gun when Hamilton picked up it to get it out of the house because (1) he was afraid that the perpetrator was outside, and (2) he wanted it out of his son's sight (T 554).

Defense counsel objected to the tape on the grounds that the statement was not voluntarily rendered and that Hamilton was represented by counsel. Specifically, counsel argued that, if a defendant has appointed counsel, counsel "should at least be consulted as to his desire of whether or not he wants the police to interview his client in their investigation." (T 556). The court found that Hamilton

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[4] Carl Luposello was Michael's brother (R 682), and Bernard C. Luposello was Michael's father (R 609).

initiated the conversation voluntarily and that the statement would be admitted (T 560).

Thewell Hamilton testified briefly that he had requested to speak with Adams, but recalled that, "[a]t that time . . . [he] had a problem with his head" (T 561). Adams recalled two written requests by Hamilton to speak with Adams (T 568). Adams recalled Hamilton stating that he felt fine, and Adams thought Hamilton looked to be in control of his faculties (T 569-70). The court then brought the jury in, Adams testified as to the same information, and the tape was played to the jury (R 248-53; T 577-92).

The court removed the jury again so that the prosecutor could be heard regarding admission of the statement of Hamilton's 34 month old son that Hamilton killed Madeline Hamilton and Michael Luposello (T 595). The court ruled that the statement would not be admissible (T 603). Bernard C. Luposello, Michael Luposello's father and Madeline Hamilton's ex-husband, testified that, on September 19, 1986, the date on which Michael and Madeline were killed, he was in Washington, D.C., waiting for his truck to be repaired so that he could return to Florida (T 609).

In the defense case, Genavieve Parker Giddens, Hamilton's aunt, testified that Hamilton had always been a sweet, gentle person (T 621). Giddens stated that, during

an August 1986 visit by the Hamilton family to her house, Madeline seemed very erratic and high strung (T 622-23). Joseph Hastings testified that he worked at Michelin Tires and became acquainted with Hamilton, who also worked there (T 635). Hastings recalled Madeline Hamilton from school as being a moody person (T 637).

Hedwig Hamilton, Hamilton's ex-wife, testified that she and Hamilton had been married for 15 years, and divorced for six (T 640). Hedwig Hamilton said she had sought a divorce because Hamilton became involved with Madeline Luposello (T 643-44); despite this, she and Hamilton remained good friends (T 642) and Hamilton routinely stopped by to visit her (T 644-45). She recalled that, on the night in question, Hamilton had visited her house in Dothan to pick up insurance papers or car tags (T 641). Before leaving, Hamilton told her that he had to get to Graceville to get some dog food before Sears closed (T 641-42). Hedwig Hamilton recalled Hamilton arriving at her house around 4:00 p.m., and leaving after an hour or so (T 645-46). She remembered Hamilton as a good provider who "always came home from work like he was supposed to" (T 642).

Hamilton testified that he dropped out of high school to enlist in the armed services, where he remained for over 20 years (T 652). After retiring from the Army, Hamilton worked for Michelin Tires about eight years (T 652).

Hamilton recalled his stepson Michael as very smart, an altar boy, a helper around the house, kind, and not a drinker or drug user (T 653). On the day in question, Hamilton worked until 3:30 p.m., went to several different hardware stores, and visited his ex-wife (T 654-55). Hamilton remembered leaving his ex-wife's house around 6:00 p.m., driving through Graceville, and then going home, the whole trip taking less than an hour (T 657-58). After arriving at his home, Hamilton fed the hogs and entered the house (T 658). Madeline was arguing with Michael, as she did frequently (T 659). Hamilton said that Madeline was a drinker and was on prescription drugs (T 659-60).

When Hamilton saw that Michael and Madeline were arguing, he took the two younger children in the back bedroom (T 663). The next thing Hamilton remembered was hearing a couple of gunshots (T 663). He tried to quiet the children, locked the bedroom door, and came out to see what had happened (T 663). Hamilton said the lights were out but the television was on (T 664). He said he saw Michael on the floor with blood on him, and saw Madeline in the kitchen with a shotgun (T 664). Hamilton heard the pantry room door slam, but did not see anyone (T 664). Hamilton snatched the shotgun out of Madeline's hand, but it fired because the barrel got caught (T 666). This shot hit Madeline, who was standing by the kitchen sink, in the legs (T 668). Hamilton

helped her to the sofa (T 668). Hamilton then attempted to place the gun on the table when it went off the second time, hitting Madeline in the chest (T 671).

Hamilton acknowledged the evidence that Madeline had been shot three times, the fact that the shotgun had to be reloaded to shoot again, and that Hamilton never loaded or reloaded the shotgun that day (T 672). Hamilton stated that he never "got through" for emergency help on the night in question, due to his party line being in use (T 673). Hamilton said that, because his younger children had gotten out of the back bedroom, he took the gun outside (T 677).

Hamilton recounted an incident several months prior to the murders, when he called the sheriff's department because he found his wife, naked from the waist down, sitting on the couch (T 678). Hamilton could tell that Madeline had taken too many drugs (T 679). After talking with Michael, Hamilton learned that Madeline had gone off with a couple of guys; when they returned her, she was naked from the waist down, and one of the guys threw her jeans out of the rear of the pick up truck (T 679). On cross examination, Hamilton admitted that he had not said anything at his previous trial about this incident (T 687).

Gary Gene Cumberland, an assistant medical examiner, testified that, despite Sybers's testimony, it was possible

to test for drugs in a deceased person's body even if there was no urine (T 724). Cumberland opined that, although there were three wounds to Madeline Hamilton, the wounds to her legs could have been caused by one shotgun blast (T 725). Cumberland admitted that he had not examined the victims' bodies (T 723). The defense rested, and the state called Adams as a rebuttal witness (T 731). Adams testified that he saw some blood on the sofa arm where Hamilton said that Madeline sat, but not on the cushion (T 732-33). The jury returned a guilty verdict (T 814).

In the penalty phase, the state presented no additional evidence (T 821). The defense called Hamilton, who testified that he had attempted to donate his own heart to a child who needed a heart (T 823-25). Harold Dean Hamilton, Hamilton's brother, testified that Hamilton was kind, gentle, and great brother (T 827).

Although the state argued, without defense objection, the existence of three aggravating factors -- contemporaneous felony conviction, HAC, and CCP (T 834) -- the trial court instructed the jury on only two aggravating circumstances:[5]

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[5] The charge conference was not transcribed and is not a part of the record on appeal (SR 8).

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel;
>
> 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.

(T 848).[6] The trial court also instructed the jury regarding mitigating factors -- no significant history of prior criminal activity; murder committed while Hamilton was under extreme mental or emotional disturbance; Hamilton acted under extreme duress or under substantial domination of another; Hamilton's age; and any other aspect of Hamilton's character or record (T 849). The jury returned seven to five advisory verdicts (R 468, T 853).

Before the trial court imposed sentence, defense counsel moved for a new trial on the basis that alternate juror Kevilly brought unauthorized materials[7] into the jury room (T 854-56). The trial court granted this motion as to a new sentencing proceeding only (T 874). The state appealed this order in State v. Hamilton, 574 So. 2d 124 (Fla. 1991) (R 543-62). This Court concluded that the magazines were irrelevant to the legal and factual issues of

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[6] These instructions were given in November 1989 (R 817).

[7] Two magazines -- "Musclecar Classics" and "Musclecar Review." (R 37-38, FSC Case No. 72,502).

this case, their potential for prejudice slight, and any error harmless, and reversed the order.

On remand, because retrial Judge Turner had retired, Judge Foster presided (T 880). In July 1991, defense counsel filed two motions, objecting to Hamilton's sentencing by Judge Foster and seeking a new penalty phase (R 569-73). At the August 1991 hearing on these motions, defense counsel noted that all evidence had been lost for over a year (T 882). Judge Foster denied the motion for a new penalty phase, holding that, under **Fla. R. Crim. P.** 3.700(c), he had the authority to proceed with sentencing based on his review of the transcripts of the guilt and penalty phases (T 886-87). Judge Foster reviewed the evidence (T 890-92); found two aggravating factors -- HAC and CCP (T 892); considered four mitigating circumstances -- no significant history of prior criminal activity, age, blood alcohol level of victim Madeline Hamilton, and Hamilton's military record and previous good character (T 892), while finding that five mitigating circumstances were inapplicable (T 893); found that the mitigating circumstances did not outweigh the aggravating factors (T 894); and imposed sentences of death (T 894).

On direct appeal to this Court, this Court granted a defense motion to return the record to the circuit court for the addition of numerous missing items; granted a defense

motion for an order directing the court reporter to complete transcription; granted a defense motion for an order compelling the court reporter to complete transcription; denied a defense motion to locate the exhibits in this case, but ordered the circuit court to file a statement that a box of exhibits had been lost and to reconstitute the record; and granted a second defense motion to compel the court reporter to complete transcription. The trial court held a hearing pursuant to this last order (SR 1-17). This Court then denied a defense motion to have this case remanded for a new trial based on the loss of the trial exhibits, but relinquished its jurisdiction to the trial court for reconstruction of the record (SR 19).

On January 21, 1994, the trial court conducted a hearing pursuant to this Court's order (SR 98-139). On February 4, 1994, the trial court continued the hearing to reconstruct the record (SR 26-81). Subsequently, the court entered an order reconstructing the record (SR 89-92).

This Court denied a second defense motion to remand this case for a new trial based on the lack of trial exhibits, without prejudice to Hamilton to argue how the lack of exhibits called for a new trial. Hamilton submitted his initial brief on September 28, 1994, and this answer brief follows.

SUMMARY OF THE ARGUMENT

Issue I is procedurally barred for two reasons. One, the law of the case doctrine precludes consideration of issues which could have been raised in a prior appeal. Second, counsel below objected on different grounds than those raised in this appeal. In any event, the manner in which Adams took Hamilton's October 1986 statement is fully consonant with state and federal law.

Issue II is also procedurally barred, because counsel below did not object to the portion of the tape that referred to the statement of Hamilton's two year old son when it was played to the jury. Counsel instead waited to object when the prosecutor referred to it in his closing argument. In any event, the prosecutor's argument was proper as it referred to an item previously admitted into evidence without defense objection.

As to Issue III, the trial court properly found that HAC and CCP existed at Hamilton's second sentencing. The state presented more detailed testimony of these factors through Adams, Sybers, and Williams which proved these factors beyond a reasonable doubt. As to Issue IV, Hamilton's death sentence is proportionate to death sentences affirmed by this Court in cases involving similar facts and a similar balancing of aggravating and mitigating factors.

As to Issue V, although Judge Foster did not conduct a new penalty phase upon inheriting the case after the state's appeal to this Court, Hamilton may not rely on Corbett, based on Ferguson's holding that Corbett should not be applied retroactively. As to Issue VI, the trial court applied the proper standard in sentencing Hamilton to death, as it fully examined the record and independently weighed aggravation against mitigation. Issue VII is procedurally barred, because Hamilton failed to object to the HAC and CCP jury instructions below.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT CORRECTLY DENIED HAMILTON'S MOTION TO SUPPRESS HIS OCTOBER 16, 1986 STATEMENT TO INVESTIGATOR ADAMS.

Initially, this issue appears to be barred by the law of the case doctrine. Although Hamilton challenged his statements at his first trial, he did not raise a suppression issue in his first direct appeal to this Court. Instead, Hamilton has waited until this, his second direct appeal, to claim that his October 1986 statement should not have been admitted at his retrial.

This Court has consistently held that the law of the case doctrine applies to bar consideration of issues which could have been presented in a prior appeal. This Court noted in Rogers v. State, 23 So. 2d 154 (Fla. 1945): "Nothing is presented here which we thing warrants us in departing from our opinion and judgment in that case which became the law of the case insofar as it determine all the issues which were presented, or which might have been presented at that time." Id. at 155 (emphasis supplied). More recently, this Court reaffirmed this principle in Strazzulla v. Hendrick, 155 So. 2d 1 (Fla. 1965), observing that the law of the case principle existed to avoid reconsideration of points which were, or should have been,

adjudicated in a former appeal of the same case; and that its purpose was to lend stability to judicial decisions, to avoid piecemeal appeals, and to bring litigations to an end as expeditiously as possible. See also Airvac, Inc. v. Ranger Ins. Co., 330 So. 2d 467 (Fla. 1976) (the law of the case doctrine is applicable to issues which could have been, but were not, raised). Because Hamilton could have raised this issue in his prior appeal to this Court, this Court should refuse to address it at this juncture.

This issue is procedurally barred for yet another reason. Below, defense counsel objected to the tape only on the grounds that the statement was not voluntarily rendered and that Hamilton was represented by counsel. Specifically, counsel argued that, if a defendant has appointed counsel, counsel "should at least be consulted as to his desire of whether or not he wants the police to interview his client in their investigation." (T 556). The court found that Hamilton initiated the conversation voluntarily and held that the statement would be admitted (T 560).

Based on defense counsel's limited objection below, and his new argument on appeal that Adams failed to honor Hamilton's right to cease further questions, to honor Hamilton's assertion of his right to remain silent, and to honor Hamilton's statement as a reassertion of his right to counsel, this Court should deem this issue procedurally

barred. This Court has held consistently that, for an issue to be preserved properly for appellate review, the appellate arguments must be the same as the arguments raised in the lower court. Peterka v. State, 640 So. 2d 59 (Fla. 1994); Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990); Jackson v. State, 451 So. 2d 458 (Fla. 1984), cert. denied, 488 U.S. 871 (1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

In the event this Court reaches the merits of this issue, it is well aware that a trial court's ruling on a motion to suppress comes to this Court with a presumption of correctness, and that this Court should interpret the evidence and all reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. Johnson v. State, 438 So.2d 774 (Fla. 1983); McNamara v. State, 357 So. 2d 410 (Fla. 1978). Here, the trial court ruled correctly that Hamilton initiated the October 16, 1986 conversation with Adams.[8]

On October 14, 1986 (T 581), Hamilton submitted a written request for Adams to speak with him (T 564, 568). On October 16, 1986, Adams read Hamilton his Miranda[9] rights, and then permitted Hamilton to proceed (T 581).

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[8] Although there is a written motion to suppress (R 96), this March 1987 motion concerned only Hamilton's September 20, 1986 statement, not the October 1986 statement.

[9] Miranda v. Arizona, 384 U.S. 436 (1966).

Hamilton said that he had tried to determine who might have killed his wife and stepson, and thought it might be a family that Madeline wanted to "turn . . . in to . . . the Health Department" or a retarded neighbor (T 582-83). Hamilton asked Adams to check into these suspects, and Adams agreed (T 584).

Hamilton said the shotgun belonged to his family and that he had had it for some time (T 585). Hamilton then stated that he had heard on the news that the grand jury had indicted him for first degree murder (T 586). In response, Adams asked: "[Y]ou know that if we hadn't had some pretty good evidence they wouldn't have indicted you? Now I realize it must be kind of hard for you to sit there and even think about doing something like that, but have you thought about what happened that night?" (T 587). Hamilton responded: "Mr. Cole told me not to talk to anyone on it." (T 587). Adams said "OK." (T 587). Hamilton then stated:

> And, uh . . . the reason, I don't you know . . . I was in shock. And that . . . that terrible thing just went through, and all that. Seeing your wife and stepson on the floor and all that. I didn't . . . I mean, you brought me in here and you told me that I, you know, did this . . . and in other words, I was in such a shock that I didn't care.

(T 587). Adams responded: "Mmm." (T 587). Hamilton continued: "I just followed whatever you said. You know, you said, 'you did this and you did that.'" (T 587).

Adams asked Hamilton if he remembered telling Adams that he and his wife had struggled over the shotgun on the night in question (T 587). Hamilton answered: "Somebody." (T 587). Adams told Hamilton he had said it was his wife (T 588). Hamilton explained: "Well, I was in shock. I was . . . I was out of my mind. I'd been sitting there on that hard bench all night long. I'd worked all day the day before, since early that morning . . . early in the morning." (T 588). Hamilton remembered telling Adams that he thought Gus Luposello had committed the murders, based on a threatening call he had received (T 588). Adams told Hamilton that he had spoken with Carl Luposello, who had stated that, at 5:30 p.m. on the night in question, he had been speaking with his Michael on the telephone and overheard Hamilton and Madeline arguing "real loud" in the background (T 589). Hamilton said he did not get home that night until 7:00 p.m., because he had stopped by his ex-wife's house in Dothan, Alabama, and had not left there until after 6:00 p.m. (T 589-90).

Adams then asked why Hamilton's two year old son said that Hamilton had shot Madeline and Michael (T 590). Hamilton said that his son saw him with the gun when Hamilton picked up it to get it out of the house because he was afraid that the perpetrator was outside and wanted the gun out of his son's sight (T 591-92).

The evidence clearly shows that Adams took Hamilton's statement in a manner fully consonant with Traylor v. State, 596 So. 2d 957 (Fla. 1992). There, this Court held: "Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present, although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel." Id. at 966 (emphasis supplied). The record here is clear that Hamilton himself requested the interview with Hamilton several weeks after having been appointed counsel, and that, after mentioning counsel during his interview with Adams, reinitiated the conversation. The record also wholly belies Hamilton's claim that "[t]he first verbal response to Hamilton after this assertion of his rights was another question about the night of the homicides." Initial Brief at 29. When Hamilton said that his lawyer had said not to speak to anyone about the night in question, the first verbal response from Adams was "OK." (R 251; T 587). Hamilton then reinitiated conversation by explaining his previous actions, thereby waiving any assertion of his right to remain silent.

The most that can be said about Hamilton's statement that "Mr. Cole told me not to speak to anyone on it" is that Hamilton was asserting his right to remain silent about the

details of the murders. Adams's response of "OK" shows that this request was honored. It cannot be said, however, that Hamilton's statement was the equivalent, unequivocal or otherwise,[10] of "I want Mr. Cole here before I say anything else." Hamilton knew he had a lawyer when he requested an interview with Adams in writing on October 14, 1986, because the trial court appointed Mr. Cole to represent Hamilton on September 22, 1986 (R 5).

Hamilton relies on Martinez v. State, 564 So. 2d 1071 (Fla. 1990), where Martinez was arrested, taken to a police substation, and twice advised of his Miranda rights. Later that same day, Martinez was taken to the police station, where he was again advised of his Miranda rights. Martinez orally confessed to a murder, after which a taped statement was taken. At the beginning of the tape, Martinez was advised of his Miranda rights for the fourth time, and again stated that he understood them. During the taped statement, a deputy advised Martinez that he had the right to have counsel present during questioning, and that, if he did not have the money for a lawyer, the county would pay for it. Martinez asked, "But what about if I don't have any money?" The deputy then asked only if Martinez understood his rights

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[10] In its June 1994 decision, Davis v. United States, 114 S. Ct. 2350 (1994), the United States Supreme Court held that law enforcement officials may continue questioning a suspect until he or she clearly and unambiguously requests a lawyer.

and if he wanted to talk to him. Martinez responded that he did, and confessed. This Court concluded that Martinez's response "displayed his uncertainty as to whether he was entitled to counsel during the interrogation." 564 So. 2d at 1074. Martinez is not persuasive precedent here, where Hamilton asserted his right to remain silent, which he subsequently waived. Hamilton at no time displayed any uncertainty about being represented by counsel, and never requested that his counsel be present.

Hamilton also misrepresents the holdings of both Traylor and Minnick v. Mississippi, 498 U.S. 146 (1990), in citing them for the proposition that, once a defendant asserts his right to counsel, he cannot waive his rights without counsel being present. Minnick states that Edwards v. Arizona, 451 U.S. 477 (1981), "does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities." 112 L. Ed. 2d at 499 (emphasis supplied). Traylor follows this reasoning: "Once the right to counsel has been invoked, any subsequent waiver during a police-initiated encounter in the absence of counsel during the same period of custody is invalid, whether or not the accused has consulted with counsel earlier." 596 So. 2d at 966 n.14 (emphasis supplied). In the instant case, there simply is no

legitimate claim that Adams initiated the October 16, 1986, conversation, or that he reinitiated the discussion after Hamilton mentioned Mr. Cole. Thus, the situation warned about in Minnick and Traylor -- police initiated conversations in the absence of counsel -- is not at issue here.

In any event, any error in admitting Hamilton's October 16, 1986 statement was harmless. The state proved that the victims had been shot by the gun found under the van on Hamilton's property; that the footprints found near the body of Madeline Hamilton could have been made by Hamilton's slippers; that no one had been seen leaving the Hamilton residence immediately after the shots had been fired; and that Hamilton was at home during the relevant time periods. See Traylor, 596 So. 2d at 973. Because it is clear beyond a reasonable doubt that any error in admitting the statement would not have affected the jury's verdict, any error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING HAMILTON'S OBJECTION TO THE STATE'S COMMENT DURING CLOSING ARGUMENT REGARDING THE STATEMENT BY HAMILTON'S TWO YEAR OLD SON.

The trial court, in the exercise of its discretion, controls the comments made in closing arguments, and this Court has held repeatedly that the trial court's rulings on these matters will not be overturned unless a clear abuse of discretion is shown. Hooper v. State, 476 So. 2d 1253, 1257 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986); Davis v. State, 461 So. 2d 67, 70 (Fla. 1984). Here, the trial court did not abuse its discretion in overruling Hamilton's objection, because the portion of the state's closing argument at issue was nothing more than a comment on evidence which had been admitted without defense objection.

During closing argument, the prosecutor argued:

> The defendant called Eric Adams and was questioned by Eric Adams -- saying the guy is still out there. If the guy was still out there, why did you put it (meaning the gun) under the van? The defendant said: "My son said, . . . because he seen that . . . my son said, and he is a little one; 'Daddy, you killed Mommy.'" Isn't it sad?

(T 782). Defense counsel objected: "Objection, Your Honor. He is reading that statement and waving it at the jury to influence this jury and it is not in evidence." (T 782). The court held:

> I believe it is the tape. The rule is, the Counselor can paraphrase it -- can quote from the evidence or they can paraphrase the evidence of they can draw a reasonable inference from the evidence. And I don't find this portion to be objectionable -- reading from the transcript of the tape -- because the tape is in evidence itself.

(T 782). After the objection and ruling, the prosecutor did not mention the two year old's statement again (T 783-84).

Interestingly, when Hamilton's taped statement was played for the jury, defense counsel never objected to the questions and answers concerning the statement by Hamilton's two year old son. As shown in the previous issue, defense counsel objected to the tape only on the grounds that Hamilton's statement was not rendered voluntarily and defense counsel should have been contained before any such statement. Thus, despite the facts that (1) the tape was admitted into evidence, (2) defense counsel objected to none of its contents, and (3) defense counsel waited until the prosecutor's closing argument to object to comments regarding an item duly admitted into evidence, Hamilton now considers the issue sufficiently preserved to present it on appeal.

By remaining silent when the tape was played, during which the two year old's statement was mentioned, Hamilton should be deemed to have waived any subsequent objection on

this point. See Clark v. State, 363 So. 2d 331, 335 (Fla. 1978) ("If the defendant fails to object . . . his silence will be considered an implied waiver."). Hamilton had the opportunity to object to the tape, voiced two grounds, and certainly could have raised other points had he believed them to be erroneous at that time. This is tantamount to inviting error -- remaining silent on this point when the tape was played, asking the trial court to correct this "problem" at an untimely juncture, and then expecting this Court to find it to be reversible error. See Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983); Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974) (where a trial court has extended to counsel an opportunity to cure an error and counsel fails to take advantage of the opportunity, such error is invited and will not warrant reversal on appeal).

Should this Court reach the merits of this claim, the trial court ruled correctly in overruling Hamilton's objection. Case law is replete that the proper purpose of closing argument is to review the evidence and draw logical inferences. See Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985) (Proper closing arguments "review the evidence . . . and explicate those inferences which may reasonably be drawn from the evidence."); Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982) ("Wide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is

allowed to advance all legitimate arguments.") (citations omitted). Here, the prosecutor did nothing more than refer to a passage from Hamilton's taped statement which had been admitted into evidence without defense objection.

In any event, any error on this point was harmless. The prosecutor's reference to the statement of Hamilton's two year old son was limited and placed in the context of Hamilton's statement to Adams. Because it is clear beyond a reasonable doubt that any error on this point would not have affected the jury's verdict, any error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue III

WHETHER THE TRIAL COURT CORRECTLY FOUND THAT THE HEINOUS, ATROCIOUS OR CRUEL AND COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTORS WERE ESTABLISHED BEYOND A REASONABLE DOUBT.

Hamilton claims that, because the evidence presented at his retrial did provide any greater explanation of the events surrounding the murders than the evidence presented at the first trial, the state once again failed to prove the HAC and CCP aggravating circumstances beyond a reasonable doubt. Initial Brief at 36. Although Hamilton does not cite to Santos v. State, 629 So. 2d 838 (Fla. 1994), in support of this claim, the state acknowledges it.

In Santos v. State, 591 So. 2d 160 (Fla. 1991), this Court struck both the HAC and CCP aggravating factors, holding that: (1) because the killings arose from a domestic dispute, CCP had not been proven beyond a reasonable doubt; and (2) the murders happened too quickly and with no suggestion that Santos intended to inflict harm to support HAC. On remand, the state conceded that CCP did not exist and that two mitigating factors existed. Nevertheless, the trial court found that CCP and only one mitigating factor existed. On appeal, this Court reduced the sentence to life imprisonment because the state adduced no new evidence at the resentencing, the state conceded the existence of two mitigating factors and the nonexistence of

CCP, and the trial court exceeded its discretion. Based on significant differences between Santos and the instant case, the Santos result is not mandated here. It is true that, at Hamilton's retrial, the state called essentially the same witnesses as those at the first trial, i.e., Taylor, Watson, Adams, Russo, Sybers, Narcus, Williams, and Luposello.[11] The state also presented no additional evidence at Hamilton's second penalty phase proceeding. However, the record clearly shows that Williams, Sybers, and Adams presented much more detailed testimony which supported the finding of the HAC and CCP aggravating factors at Hamilton's resentencing.

At Hamilton's first trial, Sybers testified that Madeline Hamilton had been shot three times -- once in the back of the right let, once in the back of the calf of the left leg, and once in the left chest, and that Michael Luposello had been shot twice -- once behind the right ear and once on the front left chest (OR 438-39). Sybers pointed to the blood pattern on Madeline's right thigh, showing that, because it ran in a vertical direction, Madeline was either standing or kneeling when shot in the leg (OR 442). Sybers stated that Madeline was shot in the chest at a distance of more than two feet, but less than

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[11] Absent were Operations Officer Tate and HRS caseworker Godwin.

four (OR 446). Sybers opined that the shots to the legs would have caused Madeline pain and caused her to fall down, but that "she would be awake and not unconscious from this" (OR 446) and would not have caused her death (OR 454); these leg shots were done at a distance of about four feet (OR 446). Sybers concluded that the shot to Madeline's chest caused her death; because the shot literally destroyed her heart, she would have died within seconds (OR 454).

Regarding Michael, Sybers pointed out a blood pattern on the leg showing that Michael had been in an upright position when shot (OR 447). Sybers testified that Michael had been shot in the chest first (OR 448); Michael lived for several minutes after this shot before being shot in the head (OR 454). Sybers concluded that the shot to Michael's head would have caused unconsciousness and death (OR 448).

At Hamilton's second trial, Sybers showed the downward blood flow pattern on Madeline's leg, and stated that this established that she was in an upright position when shot (T 478). Sybers testified that Madeline had been shot three times -- once to the left leg, once to the right, and once to the chest -- and that the shot to her chest killed her (T 479-80). Sybers opined that the shots to Madeline's legs were delivered at a distance of about eight feet (T 480). Sybers stated that, based on shot dispersion, "there [was] no way with that four inches of tissue removed, that this

leg could have been shot first, and [the bullet path] then gone back down to a small size." (T 482). Sybers testified that the shots to Madeline's legs did not fracture the bones, but did sever small arteries that would have caused a lot of bleeding; these shots, however, were not the cause of her death (T 483).

Sybers pointed to the downward blood flow pattern on Michael's side, and a smear pattern that showed Michael was on his knees at some point (T 485). Sybers stated that Michael lost a lot of blood from the chest wound, which occurred before the shot to the head (T 485). Sybers opined that Michael would have lived "some time" after the chest wound (T 487-88); in fact, Sybers said that the shot to Michael's head intervened and caused his death sooner than the chest wound would have (T 500). Sybers stated: "He would have been alive and probably conscious as I say, this [shot to the chest] did not hit his heart. He may well have been knocked down but there is nothing here that would have made him unconscious. He may [have] eventually become unconscious from the loss of blood." (T 488). Sybers also believed that Michael would have been aware of what was happening (T 488). The head shot would have caused death in seconds, and was rendered at a distance of less than eight feet (T 485-87).

At Hamilton's first trial, Williams did not testify regarding any distances, but testified about the gun itself, casing and waddings, and reloading (OR 469-79). At Hamilton's second trial, however, Williams testified about the location of the shells (T 529), how the shells must be manually removed for reloading (T 534), how the shotgun had to be reloaded before four shots could be fired (T 534-35), and that the gun was located about five feet away from Madeline when fired (T 536-37).

In Hamilton v. State, 547 So. 2d 630 (Fla. 1989), the trial court entered the following written order in support of its imposition of the death penalty:

> Thewell Hamilton was charged by Indictment with two counts of murder in the first degree for the murder of his wife, Madeleine, and his fifteen year old stepson, Michael Luposello. The defendant was vigorously represented by Robert Adams, an extremely capable and experience[d] criminal defense attorney, tried by a jury and found guilty as charged on both counts of the indictment. After hearing additional evidence and deliberating, the jury rendered an advisory sentence recommending death with a vote of seven to five (7 to 5) for the death of Madeleine and eight to four (8 to 4) for the death of Michael. This Court agrees with the recommendation.
>
> The evidence at trial established beyond and to the exclusion of every reasonable doubt that on the night of September 19, 1986, the defendant at his home with his wife and their two young children 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 apparently was 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.

The defendant then took the shotgun outside the home, hid it underneath a van, and returned into the home, and called the police. When HRS officials arrived to take the defendant's two young children away from the scene, both children were uninjured but were covered in blood. The defendant's older child told the HRS worker, "Daddy shoot Mommie. Daddy shoot Michael. Mommie dead, Michael dead."

The jury has recommended death as to both counts. That recommendation should be given great weight. The importance of the recommendation cannot be overstressed. This Court is well aware that the procedure to be followed is not a mere counting "X" number of aggravating circumstances and "Y" number of mitigating circumstances, but rather a reasoned judgment and weighing process as to which factual situations require

the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances.

After studying, considering and weighing all the evidence in this case, the Court makes the following findings of fact as to the statutory aggravating circumstances and further finds that these are the only statutory aggravating circumstances that exist:

1. The defendant was previously convicted of another capital offense (F.S. 921.141(5)(b)). This Court finds this aggravating circumstance to exist under the contemporaneous convictions rule as set forth in Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 . . . (1984); King v. State, 390 So. 2d 315 (Fla. 1980), cert. denied, 450 U.S. 989 . . . (1981); Lucas v. State, 376 So. 2d 1149 (Fla. 1979), and Wasko v. State, 505 So. 2d 1314 (Fla. 1987). As to the murder of Michael Luposello, the Court finds the defendant to have been previously convicted of the capital offense of the murder of Madeleine Hamilton.

2. 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 crawl or drag herself away from the kitchen. Before the third and fatal shot was fired into her chest, 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.

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 his 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 circumstances is clearly established for each count of the indictment.

(OR 321-25).[12]

At Hamilton's resentencing, Judge Foster entered the following written findings:

> In this case the Defendant killed two members of his household, his wife, and his step-son, whom he had a moral and legal obligation to protect and defend. The record is devoid of any evidence which in any way attempts to explain or justify the killings.
>
> The testimony of Dr. Syb[ers], the medical examiner, established that Madeline Hamilton was shot three times with a shotgun at close range, and that Michael Luposello was shot twice at close range with a shotgun. The evidence established that the gun used in the killings was a double barrel[ed], 16 ga[u]ge shotgun, and that it was fired five times. The evidence was sufficient to establish that the first shot hit Madeline Hamilton in her legs, not killing her, and that she was aware of the attack and her impending death.
>
> Dr. Syb[ers]'s testimony established that Michael Luposello was shot twice having been shot first in the chest and subsequently in the back and that the first shot did not kill him and within reasonable medical certainty did not

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[12] Entered by the Honorable Dedee S. Costello on April 7, 1988.

render him unconscious and he was aware of the attack and his impending death.

The evidence established that the murder weapon could not have been fired more than two times without the expended shells being extracted and it being reloaded. It is unclear whether the two shots fired into the body of Michael Luposello was prior to or after the shots fired into the body of Madeline Hamilton. If Michael Luposello was shot first, then the gun would have had to be reloaded two times before the third shot was fired into the body of Madeline Hamilton. If Madeline Hamilton was shot first, then the Defendant would have had to have reloaded the gun two times before the second shot was fired into Michael Luposello. This assumes that the Defendant finished shooting one victim before proceeding to the other. However, the Defendant may have shot one victim one time and then proceeded to shoot the second victim and, then returned to the first victim. Either way, the Defendant would have had to stop, extract the shells from the murder weapon, and reload it after it was fired two times. The evidence outlined above establishes a heightened premeditation beyond a reasonable doubt and made the killings especially heinous and atrocious and established that the killings were committed in a cold, calculated and premeditated manner.

* * * *

This Court has reviewed the entire transcript of the guilt and penalty phase of the Defendant's trial. The evidence clearly and convincingly establishes beyond and to the exclusion of any reasonable doubt that the Defendant in a cold, calculated, premeditated, and methodical manner killed his wife and step-son. The evidence is sufficient to establish that the victims may and probably did remain conscious after being shot the first

> time, aware of what was going on around them and of their impending execution by the Defendant. . . .

(R 580-84).

Based on the additional testimony by Adams, Sybers, and Williams at Hamilton's second sentencing, the state proved HAC and CCP beyond a reasonable doubt. Hamilton had had the shotgun for some time and had ample ammunition in his home. Hamilton first shot his wife Madeline twice in the legs. These shots, according to the medical examiner, would have been painful, caused a lot of blood loss, and would have knocked Madeline off her feet, but would not have killed her. Madeline lived for some time after that, dragging herself a distance. After reloading the shot gun, Hamilton then Madeline in the chest at close range, destroying her heart.

Hamilton then turned to his stepson Michael, who had seen Hamilton kill his mother and who could not escape from the living room due to the living door being nailed shut and Hamilton blocking the exit through the kitchen. Hamilton's first shot to his stepson Michael was in the chest, as Michael stood in front of the living room window. Because neighbor Lucille Watson's home was in a "straight line" direction from this window, this shot delivered the pellets that hit her calf shed. This first shot, according to the

medical examiner, did not kill Michael, as his heart continued to beat for a time after the shot. As Hamilton reloaded the shotgun, Michael lay on the floor, aware and conscious. Long before the shot to Michael's chest would have killed him, Hamilton fired again into Michael's head, killing him.

Thus, the medical examiner's testimony clearly established that, after the first shots, both victims continued to live and were aware of more shots to come. Adams's testimony established that Michael was Hamilton's second victim and witnessed the murder of his mother. FDLE firearms expert Williams established that Hamilton would have had to reload twice to deliver all the shots found on the victims. Williams also showed that all spent shells had to have been manually removed for reloading to take place.

In Zeigler v. State, 580 So. 2d 127 (Fla. 1991), this Court affirmed a finding of HAC by the trial court based on the victim's having been shot twice, which did not kill him, and having been beaten on the head. In King v. State, 436 So. 2d 50 (Fla. 1983), this Court affirmed a finding of HAC based on facts that King struck the victim in the face with a steel bar, which did not render her unconscious, and returned, after finding a pistol, to shoot her in the face and back of the head, which killed her. See also Hargrave v. State, 366 So. 2d 1 (Fla. 1978) (victim shot twice in

chest, then in head). Contrast Clark v. State, 609 So. 2d 513 (Fla. 1992) (fatal shot came almost immediately after shot to chest); Richardson v. State, 604 So. 2d 1107 (Fla. 1992) (victim shot in heart, lost consciousness, and died moments later); Robinson v. State, 574 So. 2d 108 (Fla. 1991) (victim shot in head, lost consciousness immediately, died within seconds); Maggard v. State, 399 So. 2d 973 (Fla. 1981) (victim died quickly from single gunshot blast), cert. denied, 454 U.S. 1059 (1982).

This Court also has affirmed findings of the heinous, atrocious, or cruel aggravating factor in cases like this one, where the victims were family members and one victim witnessed another victim's death. See Gaskin v. State, 591 So. 2d 917 (Fla. 1991).

Concerning CCP, the state proved that Hamilton possessed the gun and ammunition in his home prior to the killings; had to reload twice to deliver the number of shots found on the victims; had to manually remove the spent shells before loading new ones; and had a calm appearance when police officers and emergency technicians arrived on the scene. There was no evidence that either of the victims had tried to resist. This Court has upheld findings of CCP in similar cases. See Cruse v. State, 588 So. 2d 983 (Fla. 1991), cert. denied, 112 S. C. 2949 (1992); Swafford v. State, 533 So. 2d 270 (Fla. 1988), cert. denied, 489 U.S.

1100 (1989); Phillips v. State, 476 So. 2d 194 (Fla. 1985), cert. denied, 125 L. Ed. 2d 697 (1993).

If this Court disagrees, the erroneous finding of CCP was harmless beyond a reasonable doubt. Given the strength of the evidence supporting the remaining aggravating circumstances -- HAC and contemporaneous capital conviction -- and the lack of mitigating circumstances,[13] there is no reasonable possibility that the sentencing court would have given a lesser sentence without CCP. See Sochor v. State, 619 So. 2d 285 (Fla. 1993); Maqueira v. State, 588 So. 2d 221 (Fla. 1991), cert. denied, 112 S. Ct. 1961 (1992); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied 112 S. Ct. 955 (1992); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

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[13] The trial court stated only that it "considered" four mitigating circumstances (R 582).

Issue IV

WHETHER HAMILTON'S DEATH SENTENCE IS PROPORTIONATE TO OTHER DEATH SENTENCES UNDER SIMILAR FACTS.

In reviewing a death sentence, this Court "looks to the circumstances revealed in the record in relation to those present in other death penalty cases to determine whether death is appropriate." Watts v. State, 593 So. 2d 198 (Fla. 1992). Hamilton's death sentence is proportionate to death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances.

In Gaskin v. State, 591 So. 2d 917 (Fla. 1991), Gaskin murdered a husband and wife. The wife witnessed the killing of her husband before being killed herself. The trial court found four aggravating factors -- (1) CCP; (2) HAC; (3) contemporaneous felony/capital convictions; and (4) committed during a robbery/burglary -- and two mitigating factors -- (1) under extreme mental or emotional disturbance; and (2) deprived childhood.

In King v. State, 436 So. 2d 50 (Fla. 1983), King hit the victim, his girlfriend, in her forehead with a steel bar, which did not kill or render her unconscious. King then went to another room, secured a pistol, returned, and shot the victim in her face and the back of her head. The

trial court found three aggravating circumstances -- (1) prior violent felony conviction; (2) HAC; and (3) CCP -- and nothing in mitigation.

In Hargrave v. State, 366 So. 2d 1 (Fla. 1978), Hargrave shot the victim in his head after rendering him helpless with two shots to his chest. The trial court found three aggravating factors -- (1) committed during robbery; (2) avoid arrest; and (3) HAC -- and three mitigating factors -- (1) no significant history of criminal activity; (2) personality defect; and (3) age.

In the present case, the testimony of Adams, Sybers, and Williams established beyond a reasonable doubt that Chaky committed the instant murders in a cold, calculated, and premeditated manner; that the murders were especially heinous, atrocious, or cruel; and that Chaky had been convicted of a contemporaneous capital felony. The trial court found HAC and CCP in aggravation, and "considered," but did not find, two statutory and two nonstatutory mitigating factors (R 582). Because Hamilton's death sentences are proportionate to those imposed in similar cases, this Court should affirm them.

Hamilton claims that, because the HAC and CCP aggravating factors were improperly found, see Issue III, no valid aggravating circumstances exist to support the death

sentences imposed in this case. Initial Brief at 44. The record, however, reveals proof beyond a reasonable doubt of another aggravating circumstance -- contemporaneous capital conviction -- which had been found by the trial court in Hamilton's first sentencing and which this Court did not disturb on direct appeal. The prosecutor submitted this aggravating factor to the trial court in the penalty phase and argued it to the jury (T 834), but the trial court did not find it in aggravating and the charge conference is not a part of the record on appeal. Compare Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990); contrast Cannady v. State, 620 So. 2d 165 (Fla. 1993) (the aggravating factor not found by the trial court was not submitted to the jury or to the court).

In Echols v. State, 484 So. 2d 568 (Fla. 1985), cert. denied 479 U.S. 871 (1986), this Court held that the three aggravating factors found by the trial court were established beyond every reasonable doubt, but added that

> the record shows . . . as a fourth aggravating factor [the fact] that appellant had been previously convicted of robbery with a firearm and armed burglary with assault. . . . We cannot determine whether the trial judge overlooked this fourth aggravating factor or was uncertain as to whether convictions for crimes committed concurrently with the capital crime could be used in aggravating. However, we note its presence in accordance with our responsibility to review the entire

> record in death penalty cases and the well-established rule that all evidence and matters appearing in the record should be considered which support the trial court's decision. . . .

Id. at 576-77. Because this Court did not disturb the trial court's finding of the contemporaneous conviction in aggravation in Hamilton's first direct appeal, and because the state proved this factor beyond a reasonable doubt, this Court should consider this factor as supportive of the trial court's decision to impose the death sentences.

Hamilton also contends that the evidence in this case shows that the murders resulted from a domestic dispute. Initial Brief at 44. The facts in this case do not establish "a case of aroused emotions occurring during a domestic dispute." Garron v. State, 528 So. 2d 353, 361 (Fla. 1988). The only evidence of a dispute on the night in question was Hamilton's own self serving testimony that Madeline and Michael were quarrelling when he arrived home that night, and the testimony of other witnesses who stated that Madeline exhibited moody and erratic behavior on occasion. Contrast Blakely v. State, 561 So. 2d 560, 561 (Fla. 1990) (Blakely bludgeoned his wife to death with a hammer "as the result of a long-standing domestic dispute" over finances and her treatment of his children from a previous marriage); Garron, 528 So. 2d at 361 (Garron's shooting of his stepdaughter could not have been committed

in a cold, calculated, and premeditated manner because the facts evidenced "a passionate, intra-family quarrel, not an organized crime or underworld killing."); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (killing of the victim was "the result of a heated, domestic confrontation").

Issue V

WHETHER JUDGE FOSTER PROPERLY SENTENCED HAMILTON, WHERE JUDGE TURNER, NOT JUDGE FOSTER, PRESIDED OVER THE SENTENCING HEARING.

Because Judge Turner had retired when this case returned to the lower court for resentencing, defense counsel filed two motions, objecting to Hamilton's sentencing by Judge Foster and seeking a new penalty phase (R 569-73). Judge Foster denied the motion for a new penalty phase, concluding that he had the authority, under **Fla. R. Crim. P.** 3.700(c), to sentence Hamilton based on his own review of the transcripts of both the guilt and penalty phases (T 886-87). Judge Foster then reviewed the evidence (T 890-92); found two aggravating factors -- HAC and CCP (T 892); considered four mitigating circumstances -- no significant history of prior criminal activity, age, blood alcohol level of victim Madeline Hamilton, and Hamilton's military record and previous good character (T 892), while finding that five mitigating circumstances were not supported (T 893); found that the mitigating circumstances did not outweigh the aggravating factors (T 894); and imposed a sentence of death (T 894).

Hamilton claims that Judge Foster erred in sentencing him to death without conducting a new sentencing proceeding, pursuant to Corbett v. State, 602 So. 2d 1240 (Fla. 1992).

Initial Brief at 49. Hamilton relies dispositively on Corbett without informing this Court that Corbett issued in 1992, and Hamilton was resentenced in August 1991. The state acknowledges both Corbett and Craig v. State, 620 So. 2d 174 (Fla. 1993), but submits that these cases are of little help to Hamilton, based on language in Ferguson v. Singletary, 632 So. 2d 53, 55-56 (Fla. 1993). There, this Court held that Corbett was not a fundamental change in law and should not be applied retroactively. Because Hamilton was resentenced prior to the issuance of Corbett, Hamilton can point to no error in Judge Foster's handling of the sentencing proceeding.

Issue VI

WHETHER THE TRIAL COURT PROPERLY CONSIDERED THE JURY'S RECOMMENDATION AND EMPLOYED THE PROPER STANDARD IN SENTENCING HAMILTON TO DEATH.

Hamilton claims that the trial court failed to use its independent sentencing authority and employed the wrong legal standard in imposing the death sentences. Initial Brief at 51. Specifically, Hamilton argues that, by stating in the written sentencing order that "there [was] no lawful reason why the recommendation of the jury as to the Defendant's penalty should not be accepted" (R 584), the court gave undue influence to the jury's recommendation of death.

Hamilton lifts this sentence out of context. The record makes completely evident that the trial court conducted a full examination of the record, and independently weighed the mitigating circumstances against the aggravating circumstances to conclude that death was the appropriate penalty.

Moreover, Hamilton neglects to direct this Court's attention to Hall v. State, 614 So. 2d 473 (Fla. 1993), where this Court addressed an identical issue. In agreeing with the jury's recommendation of death, the Hall trial court wrote: "It is only is rare circumstances that this court could impose a sentence other than what is recommended

by the jury, although the court obviously has the right, in appropriate circumstances, to exercise its prerogative of judicial override." Id. at 477. Hall argued on appeal that the "rare circumstances" language showed that the court employed the wrong standard in considering the jury's recommendation. This Court found that the judge had applied the proper standard: "This judge recognized that the final decision as to penalty was his and conscientiously weighed and discussed the aggravating and mitigating evidence and made his decision based on the evidence." Id. Because the record in the instant appeal shows that the trial court conscientiously reviewed the evidence and weighed the aggravation against the mitigation, this Court should find that the trial court employed the proper standard.

Issue VII

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE HAC AND CCP AGGRAVATING CIRCUMSTANCES.

Hamilton claims that his jury received constitutionally inadequate instructions on the HAC and CCP aggravating factors. Regardless of the actual instructions below,[14] these claims are procedurally barred because Hamilton failed to object to them in the lower court, a point which Hamilton himself concedes -- Initial Brief at 54. See Jackson v. State, 19 Fla. L. Weekly S219 (Fla. Apr. 21, 1994); Hodges v. State, 619 So. 2d 272 (Fla. 1993); Melendez v. State, 612 So. 2d 1366 (Fla. 1992); Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992); Sochor v. State, 580 So. 2d 595 (Fla. 1991). Further, in Sochor v. Florida, 119 L. Ed. 2d 326 (1992), the United States Supreme Court expressly honored this procedural bar, thereby conclusively putting to rest any notion that this claim is fundamental in nature.

If this Court determines otherwise, any error committed by the trial court was harmless. There is no reasonable possibility that the giving of the challenged HAC instruction contributed to the jury's recommendation of death. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Under any definition of the terms, the state proved HAC

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[14] (R 848).

beyond a reasonable doubt. Slawson v. State, 619 So. 2d 255 (Fla. 1993); Thompson v. State, 619 So. 2d 261 (Fla. 1993). As shown in Issue III, the evidence in this case shows that Michael Luposello was forced to watch Hamilton kill his mother, as Michael was trapped in the living room with no available exit. Hamilton shot Madeline twice in her legs. While Hamilton reloaded, Madeline tried to drag herself away. Hamilton then shot her in the chest, killing her. Hamilton next turned his attention to Michael, shooting him in the chest. As Michael lay conscious on the floor, Hamilton reloaded the gun and shot Michael in the head. Compare Gaskin v. State, 591 So. 2d 917 (Fla. 1991).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Hamilton's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLAIN, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of January, 1995.

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