IN THE SUPREME COURT OF FLORIDA

THEWELL HAMILTON, :

Appellant, :

v. : CASE NO. 78,576

STATE OF FLORIDA, :

Appellee. :

_____/

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the lower court's clerk's record will be designated with the prefix "R" followed by the page number. Similar references with the prefixes "Tr" and "SR" will be used for the transcript of the trial and the supplemental record filed in this case.

All of the trial exhibits, except a firearm, were lost before the commencement of this appeal. Although a number of the photographic exhibits were reconstructed at a hearing held on February 4, 1994, via copies which were available.

STATEMENT OF THE CASE AND FACTS

(1) 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 13) Hamilton's first trial in this case resulted in his convictions as charged and two death sentences. (R 299-303, 321-325) On appeal, this Court reversed his convictions for a new trial. Hamilton v. State, 547 So.2d. 630 (Fla. 1989). At the second trial held on November 13 through November 18, 1989, Hamilton was again found guilty as charged of the two murders. (R 467) The jury returned a recommendation of death by a vote of seven to five. (R 468, Tr 853) However, before sentencing, the presiding judge, Circuit Judge W. Fred Turner, granted Hamilton's request for a new penalty phase trial. (R 493) The State appealed the order (R 494), and this Court reversed and remanded the case for sentencing. State v. Hamilton, 574 So.2d 124 (Fla. 1991). Before the remand for sentencing, Judge Turner retired. Circuit Judge Clinton Foster was assigned to the case. (R 540)

Prior to sentencing, Hamilton objected to being sentenced by a substitute judge who had not presided over the guilt or penalty phases of the trial. (R 569-571) He asked for a new penalty phase trial with a new jury. (R 572-573) Judge Foster denied the motion, stating that he had read the transcript of

the trial and was sufficiently familiar with the case to impose sentence. (Tr 880-886)

On August 5, 1991, Judge Foster adjudged Hamilton guilty and sentenced him to death. (R 575-584) The court found two aggravating circumstances: (1) the homicides were especially heinous, atrocious or cruel; and (2) the homicides were committed in a cold, calculated and premeditated manner. (R 582) In mitigation, the court found and considered four circumstances: (1) Hamilton had no significant history of prior criminal activity; (2) Hamilton's age at the time of the offenses; (3) the blood alcohol level of Madeleine Hamilton at the time of her death; and (4) Hamilton's military record and his good character. (R 582)

Hamilton filed his notice of appeal to this Court on September 3, 1991. (R 586)

(2) Facts -- Guilt Phase

Thewell Hamilton grew up in the southern part of Alabama, dropped out of school at age 17 and joined the Air Force. (Tr 651-652). After four years, he transferred to the Army and retired from the military with 20 years of service. (Tr 652). He married Hedwig Hamilton, whom he had met in Germany, in 1968. (Tr 652). Thewell returned to Alabama and worked for the Michelin Tire Company as a machinery mechanic. (Tr 652). He worked there eight years, until the time of his arrest. (Tr 652) While working at the tire company, Thewell met Madeleine Luposello, another employee at the company. Thewell and

Madeleine had an affair which led to Thewell's divorce from Hedwig, although he and Hedwig remained good friends. (Tr 643-644) Thewell and Madeleine married and moved to the Esto area in northern Holmes County. (Tr 385, 653) Madeleine's son from a previous marriage, Michael Luposello, lived with them as did the two children born to Madeleine after her marriage to the Thewell. (Tr 653). Madeleine was terminated from her job with the tire company. (Tr 660-661)

Lucille Watson lived across the dirt road from the Hamiltons. (Tr 386). On September 18, 1986, between 7:30 and 8:00 p.m., Watson walked outside of her house. (Tr 386). She heard a gunshot. (Tr 386) She then heard two more gunshots. (Tr 386-387). The shots came from the Hamiltons' residence. (Tr 387) Watson did not see anyone come in or go out of the residence at that time. (Tr 387). Between the first shot and the second shot, she remembered a pause. (Tr 387). When she heard the last shot, Watson saw a streak of fire at the Hamiltons' house. (Tr 388). After the last shot, Watson heard the sound of pellets hitting the roof of a shed in her yard. (Tr 388).

At 7:37 p.m. on the same day, Mike Taylor of the Holmes County Ambulance Service received a call. (Tr 372-373, 383-384). Taylor said the male caller asked for an ambulance to come to his house because, "some son-of-a-bitch had come in and killed my whole family." (Tr 382). Along with another EMT, Wayne Carnley, Taylor drove the ambulance to the Hamilton residence. (Tr 374). They arrived at the small frame house at 7:51

p.m. (Tr 374-375) Sheriff's deputies arrived within two minutes of Taylor's arrival at the residence. (Tr 378, 397-398). Inside the residence, Taylor found the bodies of Madeleine Hamilton and Michael Luposello. Madeleine's body was lying in the kitchen area between the kitchen and the livingroom area of the small house. (Tr 377). Michael was lying in the livingroom. (Tr 377). Both had been shot with a shotgun. (Tr 479, 485) Thewell Hamilton was also present, and Taylor described him as emotionless. (Tr 375) Shortly after the officers arrived, Thewell was kneeling beside Madeleine's body and embracing her. (Tr 378-379). Thewell wore a shirt which had blood and flesh splattered on the front and back. (Tr 426-427) The blood on the back was lower than the shoulder and was not smeared. (Tr 426-427) Hamilton also wore house slippers. (Tr 427-428) Taylor testified that upon hearing Thewell's voice, he recognized his voice to be the same one making the call for the ambulance. (Tr 381-382).

Investigator Eric Adams asked Thewell what had happened. (Tr 432) Hamilton told Adams that he was in the bedroom with the children when he heard loud voices and gunshots. (Tr 432) When he heard someone exit the back door, Hamilton left the children and found his wife and stepson. (Tr 432) Hamilton mentioned that Madeleine's ex-husband had made threats toward them in the past. (Tr 432) Adams said he smelled alcohol coming from Hamilton at the time of the statement. (Tr 433)

Adams and FDLE crime scene analyst, Laura Rousseau, testified to the findings made a the scene. (Tr 396, 449) They

testified using photographs and charts depicting the crime scene diagrams of the residence. The charts, introduced as State Exhibits No. 1-A and 1-B, were lost. (SR 89) A copy of one of the charts was introduced during the hearing to reconstruct the exhibits. (SR 70-80, 89) However, it could only be identified as a copy of one of the two exhibits, but not which of the two it was. (SR 70-80, 89) A large amount of blood was found in the kitchen and livingroom area of the house. (Tr 405-411) Blood was spattered over the walls and cabinets in the kitchen. (Tr 405, 407, 411) There were footprints in blood, one set consistent with someone wearing slippers and the other from a shoe. (Tr 414, 462-464) The prints consistent with slippers were found in front of the sofa, leading away from Madeleine's body toward Michael's. (Tr 467-468) Similar prints were found in the kitchen. (Tr 405-406) A bloody shoe print was located just inside the utility room door. (Tr 405) Four or five shoe prints were found on the steps leading outside. (Tr 443) Neither Madeleine nor Michael were wearing shoes. (Tr 414) Madeleine had blood on the bottoms of her feet, but the bottoms of Michael's feet were clean. (Tr 414) The blood found in the kitchen area appeared to have drag marks through it. (Tr 410-413) Thewell's clothes which had blood on them that he wore that night were seized. (Tr 426-428)

Investigators found a .16 gauge, double-barrel shotgun and fired and unfired shotgun shells at the residence. (Tr 455-457, 459-461). The shotgun was located outside, lying underneath a van. (Tr 423-424, 444, 465-466). No usable latent fingerprints

were on the gun. (Tr 509-513). One unfired shotgun shell was found inside the van and additional unfired shells were inside a dresser drawer in Michael's bedroom. (Tr 459-461). A total of four fired shells were found in the kitchen/dining area of the house during the investigation. (Tr 455-457) Ballistics testing showed that the expended shells were fired from the .16 gauge shotgun. (Tr 523-528). The expended shells were all Remington Peters brand, 16 gauge, number six shot. (Tr 528-529). Number six size lead pellets were found in both bodies which are consistent with the size shots originally loaded in the expended shotgun shells. (Tr 530-531, 532-533). Two power waddings from the expended shells were found, one in the kitchen and another under a chair in the livingroom. (Tr 545, 458) Additionally, the power wadding recovered from the body of Michael was consistent with a type of power wadding which would have been loaded in the fired shotgun shells. (Tr 531). Shotgun pellets were found in the carpet near Michael's head. (Tr 458) Adams said pellet holes were present in the wall around the livingroom window and there appeared to be pellet holes through the screen. (Tr 415-416) This window is in a straight line with the Watson residence across the road and about 300 feet away. (Tr 417) Watson's calf shed was between her house and the Hamiltons' residence. (Tr 417-418)

Doctor William Sybers performed autopsies on both Madeleine and Michael. (Tr 477). He testified to the jury using photographic slides which were admitted in evidence over defense objections. (Tr 477-478). These slides were among the

lost court exhibits which could not be reconstructed (SR Vol. II, 89-92). Sybers opined that Madeleine was shot three times with a shotgun. (Tr 479). He found an entrance wound to the right leg, one to the left leg, and a third to the chest. (Tr 479). Both of the wounds to the legs were in the back, calf section of the leg. (Tr 479, 481-484). Sybers concluded that two shots made the two wounds to the back of the legs. (Tr 482). The shot to the back of the right leg did not go through the leg. (Tr 482). On cross-examination, Sybers noted that the x-rays of Madeleine's legs showed only eight pellets in the left leg and three or four pellets in the right leg. (Tr 494-495). Sybers used photographic slides of an x-ray of both legs to make his point. (Tr 482-483). This slide is unavailable since it is one of the lost trial exhibits which could not be reconstructed. (SR Vol. II, 89-92). Sybers was also of the opinion that the shots to the leg occurred before the shot to the chest based on blood flow patterns left on the body. (Tr 477-479). He concluded that Madeleine was either sitting or standing at the time of the shot to her chest. (Tr 478-479). The shot to the legs would have knocked her down but would not have caused death. (Tr 483). The shot to the chest destroyed her heart and caused death. (Tr 480). Sybers did not do a drug screening on Madeleine since there was no urine. (Tr 497). He did not do a blood test for drugs. (Tr 497). He did find Madeleine's blood alcohol level to be .014, the equivalent of two cans of beer. (Tr 504).

Michael Luposello suffered two gunshots wounds. (Tr 485). The first shot was to the chest. (Tr 485). Sybers concluded it was the first wound because of the amount of blood in the chest cavity. (Tr 485). The second shot was to the head behind the right ear and penetrated the brain causing death within seconds. (Tr 485). Consequently, the chest shot would have occurred first because the heart would have continued to beat, pumping blood into the chest cavity. (Tr 485-486). Sybers further concluded that Michael was upright at the time of the chest shot (Tr 485-487), and he would have been alive at the time of the head shot, since the shot to the chest did not hit the heart. (Tr 488). Sybers was of the opinion that Michael was probably conscious at the time of the shot to the head. (Tr 488).

Investigator Eric Adams obtained a tape recorded statement from Thewell at the county jail on October 16, 1986. (Tr 577-578)[This tape recording was introduced as State's Exhibit No. 19, which has been lost (SR Vol. II, 90-91); a transcript appears at Tr 543-555] At this interview, Hamilton asked Adams to investigate further for the perpetrator of the crimes. (Tr 544-548) Hamilton mentioned some neighbors who frequently used drugs and caused disturbances. (Tr 545-548) Hamilton said the shotgun was used for hunting and belonged to him and Michael. (Tr 548) Adams turned the interview to the subject of Hamilton's actions on the day of the crimes. (Tr 550) Hamilton said that upon hearing the shot, he came out, struggled with someone and took the gun away. (Tr 554-555) He tried to help

Madeleine and Michael. (Tr 555) He picked up the gun and put it underneath the van to keep the gun away from the children. (Tr 553-554) When Adams asked Hamilton why his son, who was two-years-old, made a comment about Hamilton having shot the victims, Hamilton explained his son must have opened the bedroom door and seen him with the gun. (Tr 553-554) During the interview, Hamilton also mentioned Madeleine's ex-husband, Gus Luposello, since he had threatened to kill Madeleine and Michael. (Tr 551-552)

Bernard Luposello, Madeleine's ex-husband, testified. (Tr 608) He said he was in Washington, D.C., without transportation, on September 19, 1986. (Tr 608-609) His truck had to be repaired and it also had been impounded. (Tr 610) Luposello said he lacked the money at that time to get the truck returned. (Tr 610)

During the defense case, Thewell's aunt, Genavieve Giddens, testified to Thewell's good character and her observations of Madeleine's erratic behavior. (Tr 620-625) She said that Thewell had always been a gentle, nonviolent person. (Tr 621, 624-625) Giddens had also seen Madeleine several times, the last time the month before her death. (Tr 622) Madeleine became extremely upset over minor incidents. (Tr 622) Giddens said she gave one the children a cookie and Madeleine reacted "as if I had given him a lighted dynamite." (Tr 622) Another time, Madeleine became hysterical when Michael received a busy signal on the telephone when trying to confirm a reservation

for a camp site. (Tr 622) Giddens said she suspected Madeleine was on drugs of some kind. (Tr 623-624)

An employee at the Michelin Tire Company, Joseph Hastings, testified about his experiences working with Madeleine. (Tr 635-638) They attended a machinists course through work at the junior college. (Tr 636) The students frequently worked on projects as a group. (Tr 637-638) His impression was that Madeleine was a moody person. (Tr 637) She could be friendly one day and too angry to speak to anyone the next. (Tr 637-638) Hasting testified, that Madeleine "would be a rough bastard." (Tr 638)

Hedwig Hamilton, Thewell's ex-wife, testified they were married for 15 years. (Tr 642) She describe Thewell as a good man (Tr 642), and she never knew him to be violent toward anyone during their marriage. (Tr 642-642) After the divorce, she and Thewell remained friends. (Tr 642) Thewell would check on Hedwig occasionally. (Tr 644) In the afternoon of September 19, 1986, the day of the homicides, Thewell stopped at her house in Alabama to pick up some insurance documents or car tags. (Tr 640-641) He drank one beer while he was there and left by 5:00 or 6:00 p.m. (Tr 645)

Thewell Hamilton testified in his own defense. (Tr 651) He detailed his actions the afternoon and evening of the shootings. (Tr 651-675) After leaving work around 3:45 p.m., Thewell stopped at two hardware stores to buy lumber for his carport. (Tr 654-655) Then, he drove to his ex-wife's house to pick up some insurance papers or an automobile tag. (Tr 655-

656) Thewell explained that he worked in Alabama and still maintained an Alabama tag and driver's license. (Tr 655-656) He used his ex-wife's address. (Tr 655-656) He also would stop by her house to pay her alimony and occasionally assisted her performing an odd job. (Tr 656) The 6:00 p.m. news was on television when Thewell left her house. (Tr 658) Less than an hour later, Thewell arrived home. (Tr 658) He kissed Madeleine and the small children, and he and Michael fed the hogs. (Tr 658-659)

Madeleine and Michael continued an argument when Thewell and Michael returned. (Tr 659) They argued a lot. (Tr 659) Thewell said he usually sided with Michael, but he did not interfere in these disagreements between Michael and his mother. (Tr 659, 663) During this time, Madeleine suffered from a drug problem. (Tr 660-662, 678-679) Thewell said she started taking a prescription drug which seemed to help her mood. (Tr 660) However, she began using other drugs as well which caused a problem. (Tr 660) She was fired from her job because of absence. (Tr 660-661) Once, Thewell called the sheriff's office to seek help in finding out who was supplying Madeleine with drugs. (Tr 678) He had come home from work and found her naked from the waist down. (Tr 678) Michael had covered her with a blanket and said two men in a truck had brought her home that way. (Tr 679) When taking drugs, Thewell said Madeleine was quick to anger. (Tr 661-662) Although Madeleine argued with Michael, Thewell never saw her hit Michael. (Tr 662)

While Madeleine and Michael argued that evening of the shooting, Thewell took the small children to a bedroom to put them to bed. (Tr 663) He was in the bedroom when he heard a two gunshots within a few seconds of each other. (Tr 663, 694-697) Thewell did not leave the children in the bedroom immediately. (Tr 663, 697-698) They were crying and scared. (Tr 663) After calming them a moment, Thewell left the bedroom. (Tr 663) When he entered the hallway, he saw Michael on the floor with blood on him. (Tr 664) He then saw Madeleine in the kitchen area near the cabinets holding the shotgun. (Tr 664) As he entered the livingroom/dining area, he heard a door slam. (Tr 664) He walked up to Madeleine and snatched the gun from her. (Tr 665) She did not let go of the gun and they both spun around. (Tr 666-667) Thewell had grabbed the barrel and pointed it down as he also grabbed the stock end of the firearm. (Tr 667) The gun discharged striking Madeleine in the legs. (Tr 667-668) Thewell said his finger must have hit the trigger on the old shotgun causing it to fire. (Tr 666-668) He was in shock. (Tr 668) He helped Madeleine across the kitchen to the sofa in the living area of the house. (Tr 668) This area of the small house was not a great distance. (Tr 668-670) She sat down on the end of the sofa. (Tr 671) Thewell lay the shotgun down on the dining table and the shotgun discharged again striking Madeleine. (Tr 671-672) He tried to help her, but realized his efforts would be futile. (Tr 672-673) Thewell checked Michael and then tried to telephone for help. (Tr 673) Every time he picked up the telephone, someone else on the party line

was using the phone. (Tr 673) He asked a woman on the line to call for help. (Tr 673-674) Before the ambulance arrived, Thewell took the shotgun outside to keep it out of sight of the children. (Tr 676)

Dr. Gary Gene Cumberland, a forensic pathologist, reviewed the autopsy report on Madeleine, reviewed Syber's testimony, and examined the photographic slide prepared during the autopsy. (Tr 721-723) He differed with Sybers on two points. First, Cumberland rendered an opinion that the wounds to Madeleine's legs were by a single shot rather than two. (Tr 725-726) Although he could not exclude the possibility that the wounds were the result of two shots, his professional opinion was the one shot caused the wounds. (Tr 725-729) Second, contrary to Syber's testimony that a test for drugs could not be performed because no urine was available, Cumberland testified that drug testing could be performed using blood or vitreous fluid from the eyeball. (Tr 723-724)

The State presented one rebuttal witness, Eric Adams. (Tr 732) He was asked if there was any blood found on the sofa in the livingroom. (Tr 732) Adams testified he saw blood on the arm sofa. (Tr 732) The prosecutor introduced a photograph of the sofa as State's exhibit no. 34. (Tr 732-733) The witness used the photograph to show where he found the blood. (Tr 733) Exhibit no. 34 is one of the lost trial exhibits which could not be reconstructed for this appeal. (SR Vol. II, 91)

(3) Motion to Suppress Statements

Hamilton moved to suppress the statement he gave to Investigator Eric Adams on October 16, 1986, on the grounds that it was obtained in violation of his right to counsel during custodial interrogation. The court heard the motion during trial and relied on the taped statement and the testimony of Eric Adams and Hamilton. (Tr 555-579) The court denied the motion. (Tr 579)

Adams questioned Hamilton three different times. The first was a brief interview the night of the shootings at the crime scene before Hamilton was a suspect. (Tr 432) Hamilton was arrested later the same night, 8:30 p.m., September 19, 1986. (R 4) At 5:47 a.m. on September 20th, Adams questioned Hamilton a second time. (R 275-291) This tape recorded statement was not introduced at trial, but a transcript is contained in the record. (R 275-291) The third interview occurred on October 16, 1986, the day after the grand jury returned an indictment. (R 13)(Tr 543) Hamilton's statement at this interview produced the statement which he moved to suppress. (Tr 543-577) At the time of this interview, Hamilton was represented by counsel, Russell Cole. (R 4)

The October 16th interview began as the result of Hamilton's written request on October 14th asking Investigator Adams to come to the jail to speak to him. (Tr 543-544, 564, 568) Adams read Hamilton his Miranda rights and reminded him that a lawyer had been appointed to represent him. (Tr 544) Hamilton acknowledged his rights and said he wished to talk to Adams

without his lawyer present. (Tr 544) Hamilton then talked to Adams about continuing the investigation and suggested possible suspects or sources of information. (Tr 545-549) He told Adams about some people who lived nearby who were rowdy, frequently drunk and fighting. (Tr 545-546) Hamilton said his wife had visited these people and thought about reporting them for neglect of their children. (Tr 545) Additionally, Hamilton told Adams about a mentally retarded man who walks around the neighborhood. (Tr 545-546) After hearing Hamilton's request to investigate these two possibilities for a suspect, Adams said that he would be glad to check these sources. (Tr 549)

After the discussion about Hamilton's request for Adams to continue to investigate for a suspect, Adams changed the focus of the conversation to Hamilton's observations and actions on the night of the homicides. (Tr 549) Adams questions leading to the subject change and Hamilton's responses were as follows:

> Q. Yes, sir. I'll be glad to do that. But let me ask you, if you don't mind ...
>
> A. Yes, sir.
>
> Q. You know the Grand Jury met yesterday?
>
> A. Yes, sir.
>
> Q. You heard it on the radio? You know they indicted you?
>
> A. Yes, sir.
>
> Q. Ah, you 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?

> Did ... did ... tell me again what happened that night.

(Tr 549-550) Hamilton's immediate response was to inform Adams that his lawyer had told him not to talk to anyone about this subject. (Tr 550) Adams replied with "ok." (Tr 550) Hamilton then told Adams why he did not want to talk about the subject which was his belief that Adams had lead him to answers during the first interview after his arrest. (TR 550) The exchange was as follows:

> A. Well, Mr. Cole told me not to talk to anyone on it.
>
> Q. OK.
>
> A. 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.
>
> Q. Mmm.
>
> A. I just followed whatever you said. You know, you said, "you did this and you did that."

(Tr 550) Instead of honoring Hamilton's request to stop questioning on the events of the night of the homicide and for counsel, Adams launched into a series of questions about the prior statement Hamilton gave which then progressed to a full interrogation on the subject. (Tr 550-555) Adams' first question after Hamilton's request not to talk was:

> Q. Well, but you don't remember telling me that you and your wife were struggling over the gun?

(Tr 550-551)

(4) Facts -- Penalty Phase

The State presented no additional evidence during the penalty phase of the trial. (Tr 821) Hamilton testified himself and presented testimony from his brother, Dean Hamilton. (Tr 822, 826)

Thewell testified about his offer to donate his heart to a boy who needed a heart to survive. (Tr 823-824) While imprisoned, Thewell heard a news account about the 11-year-old boy and his family. (Tr 823) Thewell called the correctional officer lieutenant and told him about his willingness to donate his heart. (Tr 824) The lieutenant told him to write the Colonel in charge. (Tr 824) The letter Thewell wrote was admitted as Defense exhibit no. 2. (Tr 822-825) In response, the Colonel said he could not grant such a request and advised Thewell to allow the hospital to handle the matter. (Tr 825) Thewell prayed for the boy. (Tr 825) Praying was part of his Christian faith which he had practiced for a long time. (Tr 825-826)

Dean Hamilton is Thewell's younger brother and works for a major oil company. (Tr 826-827) He described Thewell as "one of the kindest, gentlest people I've been around." (Tr 827) Thewell was generous to a fault and would sometimes allow people to take advantage of him. (Tr 827) He was shy and "catered to the feelings of other people, more so than thinking of himself." (Tr 827) Dean said, "A person couldn't ask for a greater brother." (Tr 827)

The jury recommended a death sentence by a vote of seven to five. (Tr 853-854)

SUMMARY OF ARGUMENT

1. Hamilton moved to suppress the statement he gave to a sheriff's investigator on the grounds that it was obtained in violation of his rights to remain silent and his right to counsel during custodial interrogation. Hamilton initiated the interview with the detective, but he reasserted his right to remain silent and right to counsel during the interview. The officer failed to honor Hamilton's reassertion of these rights and continued to question him about the night of the homicides. The statements obtained as the result of this continued questioning should have been suppressed. Hamilton's constitutional rights were violated. Amends. V, VI, XIV, U.S. Const.; Art. I, Secs. 9, 16 Fla. Const. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966); Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Traylor v. State, 596 So.2d 957 (Fla. 1992).

2. In the first trial of this case, the State introduced the testimony an HRS caseworker who testified that Shaun, Hamilton's two-year-old son, said his father shot his mother and Michael. On appeal, this Court held the testimony was inadmissible hearsay and unreliable. Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989). At this second trial, the prosecutor again tried to introduce the testimony of the HRS caseworker. The trial court denied the request and excluded the evidence. Investigator Eric Adams obtained a tape recorded statement from Hamilton after his arrest. Investigator Adams asked Hamilton

to explain why his son said Hamilton shot his mother and Michael. The prosecutor, during his closing argument quoted from the taped statement in such a manner as to suggest the statement Shaun allegedly made was substantive evidence. This argument and use of the statement was improper and violated Hamilton's rights to due process and a fair trial.

3. In the first appeal of this case, this Court reversed for a new trial, but also addressed the applicability of the heinous, atrocious or cruel and the cold, calculated and premeditated aggravating circumstances. This Court concluded that the evidence did not prove these circumstances beyond a reasonable doubt because there was nothing to show the circumstances or motive for the killings; the court was left with nothing but speculation. Hamilton v. State, 547 So.2d at 633-634. The evidence presented in this second trial did not give any greater explanation of the events surrounding the shooting which would support the HAC and CCP aggravating circumstances. However, the trial court again found these two circumstances as the only aggravating circumstances present in the case to support a death sentence. These aggravating circumstances were not proven beyond a reasonable doubt.

4. The death sentences imposed in this case are disproportionate to the offenses committed. No valid aggravating circumstance exists to support a death sentence. Furthermore, the evidence suggests that the homicides resulted from a heated domestic dispute -- the type of crime for which a death sentence is inappropriate.

5. Circuit Judge Fred W. Turner presided over Hamilton's trial. He granted Hamilton's post-trial motion for a new penalty phase trial. The State successfully appealed that order, and this case was remanded for sentencing. Judge Turner retired before the remand and was unavailable to sentence Hamilton. Circuit Judge Clinton Foster was assigned the case. Hamilton objected to Judge Foster imposing sentence because he did not personally hear the penalty phase of the trial. After denying Hamilton's request for a new penalty phase trial, Judge Foster imposed a death sentence. In sentencing Hamilton to death without personally hearing and evaluating the testimony of the witnesses as heard by the jury, Judge Foster violated Hamilton's constitutional rights and the sentence is improper. Corbett v. State, 602 So.2d 1240 (Fla. 1992).

6. The sentencing judge failed to exercise his independent sentencing authority and gave undue deference to the jury's recommendation of death. In the sentencing order, the judge stated "there is no lawful reason why the recommendation of the jury as to the Defendant's penalty should not be accepted." The court erroneously afforded too much weight to the jury's recommendation of death. Ross v. State, 384 So.2d 1269 (Fla. 1980). Rather than exercising his own independent judgment in imposing sentence, the judge merely reviewed the case for a legal reason not to follow the death recommendation.

7. Only two aggravating circumstances were presented for the jury's consideration in making a sentencing recommendation. First, the court instructed on the heinous, atrocious or cruel

aggravating circumstance using an instruction identical to the one held unconstitutionally vague in Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Second, the court instructed the jury on the cold, calculated and premeditated aggravating circumstance. This Court recently held that the standard instruction as used here suffers the same constitutional vagueness problems as the HAC instruction in Espinosa. Jackson v. State, 19 Fla. Law Weekly S215 (Fla. 1994). As a result, the only aggravating circumstances presented to the jury were defined using unconstitutionally vague instructions in violation of the United States and Florida Constitutions. Although no objection to these instructions were made, their use in this case, where the only aggravating circumstances available were presented to the jury with the unconstitutionally vague instructions, constitutes fundamental error which is reversible without objection in the trial court.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING HAMILTON'S MOTION TO SUPPRESS STATEMENTS OBTAINED DURING CUSTODIAL INTERROGATION AFTER HAMILTON ASSERTED HIS RIGHT TO REMAIN SILENT, TO STOP FURTHER QUESTIONING AND TO HAVE ADVICE OF COUNSEL.

Hamilton moved to suppress the statement he gave to Investigator Eric Adams on October 16, 1986, on the grounds that it was obtained in violation of his rights to remain silent and his right to counsel during custodial interrogation. Although Hamilton initiated the interview with Adams, he reasserted his right to remain silent and right to counsel during the interview. Adams failed to honor Hamilton's reassertion of these rights and continued to question him about the night of the homicides. The statements obtained as the result of this continued questioning should have been suppressed. Hamilton's constitutional rights were violated. Amends. V, VI, XIV, U.S. Const.; Art. I, Secs. 9, 16 Fla. Const. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966); Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Traylor v. State, 596 So.2d 957 (Fla. 1992). This Court must now reverse this case for a new trial.

Adams questioned Hamilton three different times. The first was a brief interview the night of the shootings at the crime scene before Hamilton was a suspect. (Tr 432) Hamilton was arrested later the same night, 8:30 p.m., September 19,

1986. (R 4) At 5:47 a.m. on September 20th, Adams questioned Hamilton a second time. (R 275-291) This tape recorded statement was not introduced at trial, but a transcript is contained in the record. (R 275-291) The third interview occurred on October 16, 1986, the day after the grand jury returned an indictment. (R 13)(Tr 543) Hamilton's statement at this interview produced the statement which he moved to suppress. (Tr 543-577) At the time of this interview, Hamilton was represented by counsel, Russell Cole. (R 4)

The October 16th interview began as the result of Hamilton's written request on October 14th asking Investigator Adams to come to the jail to speak to him. (Tr 543-544, 564, 568) Adams read Hamilton his Miranda rights and reminded him that a lawyer had been appointed to represent him and that the grand jury had just indicted him for the murders. (Tr 544) Hamilton acknowledged his rights and said he wished to talk to Adams without his lawyer present. (Tr 544) Hamilton then talked to Adams about continuing the investigation and suggested possible suspects and sources of information. (Tr 545-549) He told Adams about some people who lived nearby who were rowdy, frequently drunk and fighting. (Tr 545-546) Hamilton said his wife had visited these people, and she thought about reporting them for neglect of their children. (Tr 545) Additionally, Hamilton told Adams about a mentally retarded man who walks around the neighborhood. (Tr 545-546) Hearing Hamilton's request to investigate these two possible suspects, Adams said that he would be glad to check these sources. (Tr 549)

After the discussion about Hamilton's request for Adams to continue to investigate other suspects, Adams changed the focus of the conversation to Hamilton's observations and actions on the night of the homicides. (Tr 549) Adams' questions leading to the subject change, and Hamilton's responses, were as follows:

> Q. Yes, sir. I'll be glad to do that. But let me ask you, if you don't mind ...
>
> A. Yes, sir.
>
> Q. You know the Grand Jury met yesterday?
>
> A. Yes, sir.
>
> Q. You heard it on the radio? You know they indicted you?
>
> A. Yes, sir.
>
> Q. Ah, you 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? Did ... did ... tell me again what happened that night.

(Tr 549-550) Hamilton's immediate response was to inform Adams that his lawyer had told him not to talk to anyone about this subject. (Tr 550) Adams replied with "ok." (Tr 550) Hamilton then told Adams why he did not want to talk about the subject which was his belief that Adams had lead him to answers during the first interview after his arrest. (TR 550) The exchange was as follows:

> A. Well, Mr. Cole told me not to talk to anyone on it.

> Q. OK.
>
> A. 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.
>
> Q. Mmm.
>
> A. I just followed whatever you said. You know, you said, "you did this and you did that."

(Tr 550) Instead of honoring Hamilton's request to stop questioning on the events of the night of the homicide and for counsel, Adams launched into a series of questions about the prior statement Hamilton gave which then progressed to a full interrogation on the subject. (Tr 550-555) Adams' first question after Hamilton's request not to talk was:

> Q. Well, but you don't remember telling me that you and your wife were struggling over the gun?

(Tr 550-551)

Both the United States and Florida Constitutions mandate that interrogating police officers immediately cease questioning any time the questioned person indicates, in any manner, that he no longer desires to answer questions. Amends. V, VI, XIV U.S. Const.; Art. I, Sec. 9, 16 Fla. Const.; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966); Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Traylor v. State, 596 So.2d 957 (Fla. 1992). The

United States Supreme Court explained the requirements of Miranda on this point in Michigan v. Mosley,

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means ... to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored ...." [citation omitted] The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." [citation omitted] Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."

423 U.S. at 103-104; see, also, Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987), cert., denied, 484 U.S. 1077 (1988); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), modified on other grounds, 781 F.2d 185 (11th Cir.), cert., denied, 479 U.S. 909 (1986); Henry v. State, 574 So.2d 66 (Fla. 1991).

As soon as Investigator Adams attempted to shift the conversation away from Hamilton's request to investigate other suspects by further questions about what occurred the night of the crime, Hamilton told Adams that his lawyer told him not to talk. This communicated that he did not want to talk about that subject. The right to cut off questioning can be invoked in any manner which can reasonably be interpreted as an

invocation of a person's right to remain silent. Mosley. Instead of scrupulously honoring the cut off of questioning, Adams continued the interrogation. The first verbal response to Hamilton after this assertion of his rights was another question about the night of the homicides. Adams ignored what Hamilton said to him and proceeded with the interrogation as if Hamilton had said nothing about not talking further about the subject. Adams' actions and continued questioning violated Hamilton's constitutional rights, and Hamilton's later statements should have been suppressed.

In addition to failing to honor Hamilton's right to cut off further questioning and assertion of his right to remain silent, Investigator Adams also failed to honor Hamilton's statement as a reassertion of his right to counsel. The United States and Florida Constitutions require that all questioning of an in custody defendant cease when he asserts his right to counsel during custodial interrogation. Amends. V, VI, IX, U.S. Const.; Art. I, Sec. 9, 16 Fla. Const.; Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966); Traylor v. State, 596 So.2d 957 (Fla. 1992); Kyser v. State, 533 So.2d 285 (Fla. 1988); Long v. State, 517 So.2d 664 (Fla. 1987); Smith v. State, 492 So.2d 1063 (Fla. 1986). No other form of questioning is permitted, unless the defendant voluntarily initiates further questioning about the subject of the offense. Ibid. If the request is equivocal, or seems to be a desire to talk and have counsel at the same time, inquiry may

be made solely to the issue of clarifying the equivocal request for counsel.[1] Art. I, Sec. 9 Fla. Const.; e.g., Martinez v. State, 564 So.2d 1071 (Fla. 1990); Long, 517 So.2d 664; Smith, 492 So.2d 1063. Moreover, once a defendant asserts his right to counsel, there can be no valid waiver of his rights without the actual presence of counsel. Minnick v. Mississippi, ___ U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); Traylor, 596 So.2d 957.

The detective here failed to honor Hamilton's request. Once Hamilton advised Adams that his lawyer told him not to talk further on the subject Adams raised, this was a reassertion of his right to counsel. Assuming arguendo that the comment could be deemed equivocal concerning an assertion of the need for counsel, the detective's inquiry was limited to clarifying Hamilton's statement. Martinez, Long. Although Hamilton initiated the contact with Adams without counsel's presence, Hamilton's response revoked that contact and waiver of counsel. Furthermore, Adams' questioning went beyond the scope of

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[1]Appellant is aware of the recent United States Supreme Court ruling in Davis v. United States, ___ U.S.___ Case No. 92-1949 (June 6, 1994), which held there was no federal constitutional impediment to continued interrogation of a person in custody who makes an ambiguous or equivocal request for counsel. However, this Court has held that when such an equivocal reference to counsel is made, a police officer is limited to questions aimed at clarifying the equivocal reference. Martinez v. State, 564 So.2d 1071 (Fla. 1990). Justice Souter, writing a concurrence in Davis v. United States, in which three additional justices joined, would have followed this Court's position that limiting a police officer to clarifying questions is the reasonable and appropriate one.

Hamilton's reason for contacting Adams. Hamilton wanted to communicate information about other suspects to be investigated. When Adams changed the subject, Hamilton immediately invoked his counsel's advice not to talk and told Adams why he did not want to talk. Adams should have heeded this comment as a reassertion of Hamilton's right to counsel, as well as his invoking his right to remain silent. The subsequent statement was illegally obtained.

Hamilton's statements about the night of the homicide, which were later used at trial, were taken in violation of his constitutional rights. This Court must correct the error by affording him a new trial.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ARGUE AS SUBSTANTIVE EVIDENCE UNRELIABLE HEARSAY EVIDENCE OF ALLEGED STATEMENTS MADE BY HAMILTON'S TWO-YEAR-OLD SON WHICH THIS COURT HELD INADMISSIBLE ON THE FIRST APPEAL OF THIS CASE.

In the first trial of this case, the State introduced the testimony of the HRS caseworker who took Hamilton's two-year-old son, Shaun, from the home after the shootings. The caseworker testified that Shaun said his father shot his mother and Michael. Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989). On appeal, this Court held the testimony was inadmissible hearsay since Shaun's alleged statements did not qualify as an excited utterance exception and were unreliable. Ibid. This Court wrote,

> ...This [excited utterance] exception allows the admission of hearsay testimony where a statement relating to a startling event is made while the declarant is under the stress of excitement caused by the event. See, State v. Jano, 524 So.2d 660 (Fla. 1988). It is central to the reliability of the statement that the declarant not have time to reflect on the event before making the "excited utterance." Jackson v. State, 419 So.2d. 394, 396 (Fla. 4th DCA 1982). Here, at least two and one-half hours elapsed between the shootings and Shaun's statement. He had ample opportunity while at the scene of the shootings to overhear deputies, investigators, and several other people state that opinion. This time lapse renders Shaun's statement unreliable and thus inadmissible under the excited utterance exception....

547 So.2d at 633.

At this second trial, the prosecutor again sought to introduce the testimony of the HRS caseworker regarding the

statements. (Tr 595-604) He argued that he could establish that only one and a half hours elapsed between the shootings and the statements. (Tr 596) The trial court denied the request and excluded the evidence in accord with this Court's holding. (Tr 601-603)

Investigator Eric Adams obtained a tape recorded statement from Hamilton while he was incarcerated after his arrest and just after the grand jury returned an indictment. (Tr 580-592) During the questioning, Investigator Adams asked Hamilton to explain why his son said Hamilton shot Madeleine and Michael:

> Q. Well, let me ask you this question here. Why is it your son keeps saying that you shot his momma and Michael?
>
> A. Because, like I told you he saw me when ... when they came through. And, ah, that what he said when he came through the door. 'Cause, you know, I had picked the gun up to take it out of the house.
>
> Q. You picked the gun up to take it out of the house?
>
> A. Well, when he said that I was picking the guns up. When he saw me with the gun is when he said that. So I took it out of the house. I was afraid the guy was still out there.
>
> Q. Well if he was still out there why did you put it under the van?
>
> A. My son said, uh, because he seen that, he said, "Daddy you killed mommie." It happened so fast you know.

(Tr 590-591)

The prosecutor, during his final closing summation to the jury, argued:

> Something interesting in that statement. 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?

(Tr 782) Defense counsel objected on the grounds that the statement was not in evidence. (Tr 782) The trial judge ruled the prosecutor was allowed to quote from the taped statement. (Tr 782-783)

Although the prosecutor did quote from the taped statement, he did so in such a manner as to suggest the statement Shaun allegedly made was substantive evidence. As this Court has said, a prosecutor is not permitted to circumvent the orders of the court excluding evidence, by using a backdoor method to present the evidence under the guise of some other purpose other than substantive, and then argue the evidence as substantive evidence of guilt. Jackson v. State, 498 So.2d 906, 909 (Fla. 1986); see, also, Perry v. State, 356 So.2d 342, 344 (Fla. 1st DCA), cert. denied, 364 So.2d 889 (Fla. 1978). Investigator Adams asked Hamilton why his son made the comment. Hamilton merely explained that the boy may have seen him with the gun which prompted him to make the statement. However, there is nothing to indicate that Adams or Hamilton ever heard Shaun make the statement. There is nothing to indicate where Adams received his information. No source is mentioned. This was the rankest of hearsay. Furthermore, this Court previously held Shaun's statements to a HRS worker unreliable and

inadmissible. Hamilton, 630 So.2d at 633. Yet, the prosecutor argued the alleged statement as substantive evidence of Hamilton's guilt. This violated the order of the trial judge excluding the alleged statement as substantive evidence. Furthermore, the prosecutor violated the holding of this Court in the first appeal of this case. Ibid.

The prosecutor's argument and use of the statement was improper and violated Hamilton's rights to due process and a fair trial. Amends. V, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const. Hamilton urges this Court to reverse his case for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN FINDING AND CONSIDERING IN THE SENTENCING PROCESS THE HEINOUS, ATROCIOUS OR CRUEL AND THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

In the first appeal of this case, this Court, although reversing for a new trial, also addressed the applicability of the heinous, atrocious or cruel and the cold, calculated and premeditated aggravating circumstances. This Court wrote:

> Although the trial court provided a detailed description of what may have occurred on the night of the shootings, we believe that the record is less than conclusive in this regard. Neither the state nor the trial court has offered any explanation of the events of that night beyond speculation. Nonetheless, the court found that the crimes were heinous, atrocious, or cruel and that they were committed in a cold, calculated manner with a heightened sense of premeditation. There is no basis in the record for either of these findings. Aggravating circumstances must be proven beyond a reasonable doubt. The degree of speculation present in this case precludes any resolution of that doubt.

Hamilton v. State, 547 So.2d at 633-634.

The evidence presented in this second trial did not give any greater explanation of the events surrounding the shooting which would support the HAC and CCP aggravating circumstances. Nevertheless, the trial court again found these two circumstances as the only aggravating circumstances present in the case to support a death sentence. (R 580-582) In his sentencing order, the trial judge made the following findings, which acknowledged the lack of evidence of the events surrounding the

shootings, and then summarily found the HAC and CCP factors. (R 580-582)

> 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. Sybris[sic], 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, 16 gage[sic] 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. Sybris's[sic] 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 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 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.

(R 580-581) These findings are again based on speculation and do not support either of the aggravating circumstances. Neither circumstance was proven beyond a reasonable doubt. Hamilton should not have sentenced to death. His death sentence is unconstitutional and must be reversed. Amends. V, VI, VIII, XIV U.S. Const.; Art. 1 Secs. 9, 16, 17 Fla. Const.

A. Heinous, Atrocious Or Cruel Circumstance Improper

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court defined the aggravating circumstance provided for in Section 921.141 (5)(h), Florida Statutes and said it applies to

> ...those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Ibid at 9. Later, in Cheshire v. State, 568 So.2d 908 (Fla. 1990), this Court elaborated on the definition of the HAC aggravating circumstance:

> The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

568 So.2d at 912.

The trial court's finding the existence of this circumstance in this case is wrong. These homicides were nearly instantaneous shooting deaths, and 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). Nothing about the manner of the killing suggested it was done to cause unnecessary suffering. Bonifay v. State, 626 So.2d 1310 (Fla. 1993); Santos v. State, 591 So.2d 160 (Fla. 1991); 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); Bonifay v. State, 626 So.2d 1310, (victim shot once before defendant entered store to rob it, then shot twice while he was lying on the floor begging for his life).

This is not a case where gunshot victims 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). Although there was no evidence about the exact time interval between the shots, nothing indicated a significant amount. The neighbor across the street testified that she heard three shots all within a brief time. (Tr 386-388) In his sentencing order, the trial judge merely speculated about the sequence of the shots and the impact differences in the order of shots may have had on the victims. (R 581) The fact that the victim may have briefly suffered some pain before death is insufficient to separate this crime apart from the norm of first degree murders resulting from a shooting death. See, Bonifay; Santos. Nothing about the manner of the killing suggested it was done with the intent to cause unnecessary suffering.

These homicides were not especially heinous, atrocious or cruel, and the trial court erred in finding and considering this factor in sentencing.

B. Cold, Calculated And Premeditated Circumstance Improper

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). This Court recently outlined in Jackson v. State, ___ So.2d ___, 19 Fla. Law Weekly S215 (Fla. 1994), the elements which must be established before the CCP circumstance is proved:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers, 511 So.2d at 533; and that the defendant exhibited heightened premeditation (premeditation), Id.; and that the defendant had no pretense of moral or legal justification. Banda v. State, 536 So.2d 221, 224-25 (Fla. 1988), cert., denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

Jackson, 19 Fla. Law Weekly at S217.

Contrary to the judge's finding, the CCP factor was not proven beyond a reasonable doubt. This aggravating circumstance should not have been considered in sentencing.

Initially, there is no evidence that these homicides were the "product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." Jackson, at S217. Although there is lack of evidence here of motive and circumstances surrounding the homicides, killings during a family dispute typically do not qualify for this aggravating

circumstance because of the heated emotions usually involved. 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).

Second, there is no evidence of a careful plan or pre-arranged design to kill. No motive was established. The court's sentencing order noted that the "record is devoid of any evidence which in any way attempts to explain or justify the killings." (R 580) 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 were multiple shots fired and that the double-barreled shotgun would have been reloaded during the shootings. (R 581) 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. This Court has mentioned the fact that the

defendant reloaded his gun when approving the premeditation circumstance in other cases. Phillips v. State, 476 So.2d 194 (Fla. 1985); Lara v. State, 464 So.2d 1173 (Fla. 1985). However, in 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 had 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. In fact, in the first appeal of this case, the fact of multiple shots from a double-barreled shotgun was before this Court and, nevertheless, this Court concluded that the CCP factor was not proven. Hamilton, 547 So.2d 630, 633. The circumstance should not have been considered in the sentencing process.

ISSUE IV

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. Hamilton urges this Court to remand his case for imposition of a life sentence.

First, no valid aggravating circumstance exists to support a death sentence. Florida's death penalty sentencing procedure requires at least one aggravating circumstance before a defendant is legally eligible for a death sentence. Sec. 921.141 Fla. Stat. See, e.g., Elam v. State, 19 Fla. Law Weekly S175 (Fla. 1994); Richardson v. State, 604 So.2d 1107 (Fla. 1992); Thompson v. State, 565 So.2d 1311 (Fla. 1990); Banda v. State, 536 So.2d 221 (Fla. 1988); Amoros v. State, 531 So.2d 1256 (Fla. 1988); Kampff v. State, 371 So.2d 1007 (Fla. 1979). Since the heinous, atrocious or cruel and the premeditation aggravating circumstances were improperly found, see, Issue III, supra., insufficient aggravating circumstances exist to support the death sentences. Richardson, 604 So.2d at 1109; Amoros, 531 So.2d at 1260-1261. These were the only aggravating circumstances used to support the death sentences. (R 580-584) Consequently, with no aggravating circumstances proven beyond a reasonable doubt, the death sentences are not legally imposed.

Second, the evidence suggests that the homicides resulted from a heated domestic dispute -- the type of crime for which a death sentence is inappropriate even if aggravating circumstances are present. 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). Although there is a lack of evidence about the circumstances of the shootings, the evidence does suggest that these murders occurred during the course of a domestic argument. Thewell Hamilton testified about an argument between Madeleine and Michael which may have prompted the shootings.(Tr 659-663) But, even disregarding Hamilton's version of the events, the circumstantial evidence is consistent with a heated family fight resulting in the killings. First, there was evidence of difficulties between Madeleine and her son, Michael. (Tr 659-663) Second, witnesses testified to Madeleine's volatile temper. (Tr 620-634, 635-638) Third, Thewell had a reputation for nonviolence and had no history of violent behavior. (Tr 620-625, 639-643) Fourth, Thewell cared for his family, including a special relationship with his stepson, Michael. (Tr 653) Fifth, there was no motive to kill established. Sixth, there was no evidence of a planned murder. Seventh, there was some evidence that both Thewell and Madeleine had been drinking alcohol at the time of the shootings. (Tr 656-660) Furthermore, Thewell testified that Madeleine was abusing various drugs. (Tr 659-660) Dr. Sybers found alcohol in Madeleine's system, but he did not perform a drug test. (Tr 497-498) The trial court considered Madeleine's blood alcohol level as a mitigating circumstance. (R 582)

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, at worst, "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 and Article I, Sections 9, 17 of the Florida Constitution. He asks this Court to reduce his sentences to life imprisonment.

ISSUE V

THE SENTENCING JUDGE, WHO DID NOT PRESIDE OVER THE GUILT AND PENALTY PHASES OF THE TRIAL, ERRED IN SENTENCING HAMILTON, SINCE HE DID NOT PERSONALLY HEAR THE TESTIMONY OF THE WITNESSES AND WAS NOT PRESENT AT THE TIME THE JURY HEARD THE EVIDENCE PERTINENT TO THE SENTENCING DECISION.

Circuit Judge Fred W. Turner presided over Hamilton's trial. He granted Hamilton's post-trial motion for a new penalty phase trial. (R 493) The State successfully appealed that order, and this case was remanded for sentencing. (R 494) State v. Hamilton, 574 So.2d 124 (Fla. 1991). Judge Turner retired before the remand and was unavailable to sentence Hamilton. Circuit Judge Clinton Foster was assigned the case. Hamilton objected to Judge Foster imposing sentence because he did not personally hear the penalty phase of the trial. (R 569-573) (Tr 880-886) Judge Foster stated that he had read the transcript of the trial and was prepared to impose sentence. (Tr 885-886) He noted that he "would be in much the same position as an appellate court in reviewing ... the transcripts to see whether or not of record there was sufficient aggravating or mitigating circumstances to either confirm or depart from the the recommendation of the jury ...." (Tr 885) After denying Hamilton's request for a new penalty phase trial, Judge Foster imposed sentence. (Tr 887-895) In sentencing Hamilton to death without personally hearing and evaluating the testimony of the witnesses as heard by the jury, Judge Foster violated Hamilton's constitutional rights under the Sixth, Eighth

and Fourteenth Amendments as well as Article I Sections 9, 16 and 17 of the Constitution of the State of Florida.

In Corbett v. State, 602 So.2d 1240 (Fla. 1992), this Court addressed an identical situation. The trial judge in Corbett, after presiding over the trial and penalty phase, died before sentencing Corbett. A substitute judge denied Corbett's request for a new penalty phase proceeding. After reviewing the record of the case, the substitute judge sentenced Corbett to death. On appeal, this Court held that the sentencing judge in a capital case must have also heard the same penalty phase evidence as the jury which recommended the sentence. Consequently, a substitute judge in a capital case, who does not hear the penalty phase evidence at the same time as the jury, must impanel a new jury and conduct a new penalty phase trial before sentencing. This Court based its decision on the unique responsibilities of the sentencing judge in a capital case. Reversing for a new penalty phase trial before a new jury, this Court wrote,

> We find that a judge who is substituted before the initial trial on the merits is completed and who does not hear the evidence presented during the penalty phase of the trial, must conduct a new sentencing proceeding before a jury to assure that both the judge and jury hear the same evidence that will be determinative of whether a defendant lives or dies. To rule otherwise would make it difficult for a substitute judge to overrule a jury that has heard the testimony and the evidence, particularly one that has recommended the death sentence, because the judge may only rely on a cold record in making his or her evaluation. We conclude that fairness in this difficult area of death penalty pro-

> ceedings dictates that the judge imposing the sentence should be the same judge who presided over the penalty phase proceeding.

602 So.2d at 1244. This Court later applied Corbett where a new judge is substituted in a resentencing proceeding. Craig v. State, 620 So.2d 174 (Fla. 1993).

Hamilton's death sentence, like the ones in Corbett and Craig, were improperly imposed. He asks this Court to vacate his sentence and to remand for a new penalty phase trial before a new jury.

ISSUE VI

THE TRIAL COURT ERRED IN INCORRECTLY AFFORDING THE JURY'S RECOMMENDATION OF DEATH UNDUE DEFERENCE AND IN USING A SENTENCING STANDARD WHICH MERELY DETERMINED IF THERE EXISTED ANY REASON NOT TO ACCEPT THE JURY'S RECOMMENDATION RATHER THAN EVALUATING THE FACTS AND REACHING AN INDEPENDENT SENTENCING DECISION.

The sentencing judge failed to exercise his independent sentencing authority and gave undue deference to the jury's recommendation of death. In the sentencing order, after making his findings regarding the aggravating and mitigating circumstances, the sentencing judge stated:

> The court has considered and weighed the aggravating circumstances and the mitigating circumstances and finds that the mitigating circumstances do not outweigh the aggravating factors collectively or individually, and that there is no lawful reason why the recommendation of the jury as to the Defendant's penalty should not be accepted.

(R 584) (emphasis added)

The trial court applied an erroneous legal standard regarding the weight to be afforded a jury's recommendation of death. While a jury's recommendation of death should be given due consideration, it can 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.

A statement the judge made prior to sentencing further evidences the judge's misconception about his duties as a sentencing judge in a capital case. During argument on the objection to the judge sentencing as a substitute judge who had merely read the transcripts and not presided over the trial, the court asked defense counsel the following:

> THE COURT: Mr. Adams, this Court would be in much the same position as an appellate court in reviewing the, the transcript to see whether or not of record there was sufficient aggravating circumstances to either confirm or depart from the recommendation of the jury, wouldn't it?

(Tr 885) The judge did not see his duty as one of independently evaluating the propriety of a sentence of death. He viewed his responsibility to be one of mere review of the jury's recommendation for a legal basis to either accept or reject it. This Court has spoken to the significant difference between an appellate court's function of review versus the sentencing judge's responsibility to actually impose sentence. E.g., Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). In this case, the trial judge failed to realize he was acting as sentencer, not a reviewing court.

Based on the sentencing Judge's own statements, it is apparent that he gave too much deference to the jury's recommendation and failed to use his independent judgment in imposing sentence. Hamilton's death sentence has been imposed in violation of the Eighth and Fourteenth Amendments and Article I, Sections 9, 16 & 17 of the Florida Constitution. This Court must reverse the death sentences.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING HAMILTON TO DEATH, SINCE THE JURY WAS GIVEN UNCONSTITUTIONALLY VAGUE INSTRUCTIONS ON THE ONLY AGGRAVATING CIRCUMSTANCES WHICH THE STATE ASSERTED, THEREBY TAINTING THE RELIABILITY OF THE SENTENCING PROCESS AND RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

Hamilton's jury was instructed on two aggravating circumstances for its consideration in making a sentencing recommendation. (Tr 848) However, both instructions used have been declared unconstitutionally vague and misleading to the jury. First, the court instructed on the heinous, atrocious or cruel aggravating circumstance provided for in Section 921.141(5)(h), Florida Statutes as follows:

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

(Tr 848) The court's instruction was identical to the one held unconstitutionally vague in Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Second, the court instructed the jury on the cold, calculated and premeditated aggravating circumstance provided for in Section 921.141(5)(i), Florida Statutes using the standard jury instruction as follows:

> 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.

(Tr 848) This Court recently held that this instruction suffers the same constitutional vagueness problems as the HAC instruction in Espinosa. Jackson v. State, 19 Fla. Law Weekly

S215 (Fla. 1994). These instructions on both HAC and CCP were so vague they failed to give sufficient guidance to the jury to make a determination regarding the presence or absence of the aggravating circumstances. Espinosa; Jackson. As a result, the only aggravating circumstances presented to the jury were defined using unconstitutionally vague instructions in violation of the United States and Florida Constitutions. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

These instructions were wrongly given to the jury. However, there were neither objections to the instructions nor requested substitute instructions. (Tr 851) This Court has held that without such objections or requests, the constitutional error in giving these vague instructions are procedurally barred from appellate review. Jackson; Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992). But, in this case, where the vague instructions affected the only aggravating circumstances presented, the jury's decision as to Hamilton's eligibility for a death sentence was impacted, as well as the jury's decision to select Hamilton as qualifying for the ultimate punishment. Since the only aggravating circumstances available were presented to the jury with unconstitutionally vague instructions, the erroneous instructions affected the foundation of the sentencing process and constitute fundamental error. See, Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970) ("`Fundamental error', which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action."); State v.

Johnson, 616 So.2d 1, 3 (Fla. 1993) (fundamental error must be "basic to the judicial decision under review and equivalent to a denial of due process."); Stewart v. State, 420 So.2d 862, 863 (Fla. 1982) (regarding jury instructions, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict")

The United States Supreme Court in Tuilaepa v. California, ___ U.S. ___ (1994)[55 CrL 224, 2245], reiterated the constitutional requirements in capital sentencing of a two tiered process: an eligibility determination followed by a selection decision:

> Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a pro- portionate punishment. Coker v. Georgia, 433 U.S. 584 (1977). To render a defendant eligible for the death penalty in a homicide case, we have indicated that he trier or fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. See, e.g., Lowenfield v. Phelps, 484 U.S. 231, 244-246 (1988); Zant v. Stephens, 462 U.S. 862, 878 (1983). The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). Lowenfield, supra, at 244-264. As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. See Arave v. Creech, 507 U.S. ___, ___ (1983)(slip op., at 10)("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the

> death penalty, the circumstance is constitutionally infirm"). Second, the aggravating circumstance may not be unconstitutionally vague. Godrey v. Georgia, 446 U.S. 420, 428 (1980); see Arave supra, at ___ (slip op., at 7)(court "must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer") (quoting Walton v. Arizona, 497 U.S. 639, 654 (1990)).

55 CrL at 2245 (emphasis added). The Tuilaepa Court went on to explain that the eligibility decision fits the crime within a defined classification, while the selection decision requires individualized sentencing broad enough to accommodate relevant mitigating evidence.

In this case, Hamilton's jury was given two aggravating circumstances as "eligibility" factors -- CCP and HAC. Without a valid finding of one of these circumstances Hamilton could not be lawfully sentenced to death. Yet, the jury was given instructions which failed to satisfy either of the requirements noted in Tuilaepa: they were unconstitutionally vague, and they could have been understood by the jury as applying to every murder. As a result, the jury's discretion was not guided by objective factors as required by the Eighth Amendment. Instead, the instructions given were so open-ended as to allow an arbitrary and unguided sentencing decision.

Under Florida's capital sentencing scheme, the jury and the judge are co-sentencers. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); see, Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L.Ed.2d (1992). "If the jury's recommendation, upon which the trial judge must rely, results from a

unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987). See, Espinosa, 120 L.Ed.2d at 859 (. . . . "[I]f a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances"). Therefore, Hamilton's death sentence does not meet the Eighth Amendment's standards of reliability. See, e.g., Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Zant v. Stephens, 462 U.S. 862, 884-85, 103 S.Ct. 2733, 77 L.Ed.2d (1983); Caldwell v. Mississippi, 472 U.S. 320, 329-30, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987).

Under the circumstances of this case, Hamilton's eligibility for a death sentence, and the legality of the sentence itself, turned on the issue upon which the constitutionally defective instructions were given. As presented in Issue III, supra., the facts presented did not prove the HAC or CCP circumstances. Therefore, the jury improperly found one or both of these circumstances, even though not factually supported, because of the vague and misleading jury instructions. A death sentence based on a jury recommendation tainted by an unconstitutionally vague instructions on the only arguably applicable aggravating factors is absolutely basic to the decision under review, and amounts to a denial of due process. The error is fundamental, and can be remedied on appeal without an objection below. Sanford v. Rubin. Moreover, since without

the CCP or HAC finding appellant would be ineligible for a death sentence, the error involves a claim of "actual innocence" of the death penalty as delineated in Sawyer v. Whitley, 505 U.S. ___, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992){The Sawyer Court also noted with approval the Eleventh Circuit's statement in Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991) that "a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body." 120 L.Ed.2d at 285, n. 15 (emphasis in Johnson opinion)}. Imposition of a procedural bar to block consideration of the constitutional issue in this context is inappropriate.

The court improperly gave the jury unconstitutionally vague instructions on the HAC and CCP aggravating circumstances. Since these two aggravating circumstances were the only two factors used to support the sentence of death, the error is correctable in this appeal even though there was no objection to the instruction in the trial court. Furthermore, since the evidence did not support these aggravating circumstances, it is entirely likely that the jury was mislead into finding one or both of these factors because of the faulty instructions. This Court must reverse this case for a new penalty phase trial with a new jury.

CONCLUSION

For the reasons presented in Issues I and II, Thewell Hamilton asks this Court to reverse his convictions for a new trial. Alternatively, in Issues III through VII, Hamilton asks this Court to reverse his death sentences for imposition of life sentences or a new penalty phase trial with a new jury.

Respectfully submitted,
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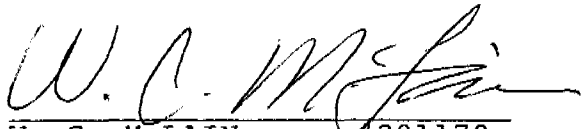

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Mr. Richard Martell, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Thewell Hamilton, on this 28 day of September, 1994.

W. C. McLAIN