IN THE SUPREME COURT OF FLORIDA

RICHARD EUGENE HAMILTON,

Appellant,

v.

CASE NO. 86,021

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR HAMILTON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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STATE OF FLORIDA,

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REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING HAMILTON'S MOTION FOR MISTRIAL AFTER A STATE WITNESS TOLD THE JURY THAT WAINWRIGHT ADMITTED TO HIM **THAT** HE AND HAMILTON **HAD** KILLED "**SOME** BLACK PEOPLE' AFTER THEIR ESCAPE, A VIOLATION OF THIS DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The State has three, maybe four, arguments on this issue: **1.** Murphy said nothing the jury had not already heard through Hamilton's witnesses (Answer Brief at pp **22-23). 2.** Defense counsel agreed to a curative instruction (Answer brief at pp. 22, **25-26). 3.** Whatever error occurred was harmless. (Answer Brief at **pp.** 23.) Significantly, t has agreed that Murphy's tale that Wainwright **and** Hamilton murdered other people in North Carolina was "regrettable." (Answer Brief at p. 23) It was more than that, it was reversible error, **and** none of its rationalizations can cover "the tremendous probative value" this evidence had

with its "overwhelmingly convincing power" to establish Hamilton's murderous character in the minds of the jury. Paquette v. State, 528 So. 995,996 (Fla. 5th DCA 1988).

1. Murphy said nothing new.

The State on page 23 of its brief claims "the rebuttal testimony solicited by the State from Robert Murphy was nothing more than what the defense had presented through the testimony of inmates Givens and Bispham. Hardly. Neither of those witnesses revealed that Wainwright and Hamilton had murdered anyone else days before the charged homicide. To the contrary, they focussed exclusively on Wainwright's bragging about what he had done in the killing of Mrs. Gayheart. Their testimony specifically aided Hamilton's defense that he wanted nothing to do with killing her. For example, Givens related that Wainwright told the Defendant "to get the gun." But "Hamilton wouldn't get the gun.. . . He said Hamilton was a pussy. Because he didn't kill the girl." (13 R 1771) Bispham confirmed that story. "He said Mr. Hamilton would not get out of the vehicle, that he didn't want to have any part to do with that. . . . He was against killing her." (13 R 1788-89) They made no reference to any earlier murders, and what they said can, in no way, be considered to have opened the door to Murphy's testimony.

The State argues that the error was invited by the defense in its attempt to portray Wainwright as the bad actor and Hamilton as an "insignificant participant" in this brutal crime scenario." "The very nature of the defense's case countenanced the kind of mishap that occurred." (Answer Brief at pp. 23, 26) Significantly, it never defended Murphy's faux pas at trial. Instead the prosecutor recognized his error, and tried to backpedal as quickly

as possible. "I was quite surprised by what he said." (T 1805) It cannot now argue that Hamilton "invited" Murphy's testimony because it never presented that claim to the trial court. Issues ignored at trial will be ignored on appeal, even when argued by the State as the Appellee. Clark v. State, 363 *So.* 2d 331 (Fla. 1978) (To be preserved, issues raised on appeal must be objected to at the trial level.); Cannady v. State, 620 *So.* 2d 165 (Fla. 1993); Dupree v. State, 656 so. 2d 430 (Fla. 1995) (Issues not raised by the State at the trial level cannot be raised on appeal.)

Accepting the State's argument, moreover, would signal a fundamental shift in the adversary process. That is, the State claims that Hamilton, by raising a legitimate defense that Wainwright committed the murder after he had withdrawn from the criminal acts, somehow "invited" the prosecution's witness to allege the pair had murdered other people. If such were true, the State would have a free reign to romp all over any Defendant who ever questioned the State's case. Neither the law or the facts presented here support that claim.

Thompson v. State, 648 *So,* 2d 692, 694-95 (Fla. 1994), which the State relied on (Answer Brief at pp. 25-27), contrasts well with this case. Defense counsel asked a state witness if he had seen Thompson on the day of the murder. He responded that he had not but his work crew had. Pushing the matter further, counsel asked when that had happened. The supervisor said, "They was working at the office when they seen Mr. Thompson go in there and carry Mr. Swack and Ms Nancy. They said he had a gun in his pocket." Id. at 695. This court found any error "invited by defense counsel's question. We note that the witness had already stated twice that he himself had not seen Thompson when counsel asked the question,

'When did your crew see him?' Additionally, counsel never asked for a mistrial, agreeing that a curative instruction adequately cured any problem his questioning had created."

Here, we have no similar persistent questioning by defense counsel. The prosecution "invited" Murphy's response, not Hamilton. Moreover, unlike Thompson's lawyer, this Defendant's attorney, asked for a mistrial and rejected a curative instruction as erasing the prejudice (13 R **1806).**

In **Merck** v. State, **664 *So.*** 2d 939 (Fla. 1995), relied on by the State on page 25 of its brief, a deputy sheriff, when cross-examined by Merck, inadvertently referred to the Defendant's first **trial.** This allusion, very brief, forgettable, and of questionable prejudice, stands in glaring contrast to Murphy's response to the State's inquiry that Hamilton had murdered other people only **a** few days before his latest killing. That evidence, though brief, once lodged in the mind had explosive, damning prejudice.

2. Hamilton agreed to a curative instruction.

The State, on pages **22** and **25-26** of its brief, suggests that "Defense counsel, while seeking a mistrial, acquiesced and agreed to the curative instruction ultimately given by the trial court. (TR 1809). Not so. Only after the court had denied the motion for mistrial did Hamilton's lawyer wistfully note that **"If** we have got to have a jury instruction, **I** guess that's as good **as** any." (13 R 1809). **As** acquiescence means, Hamilton's lawyer, merely "agreed" to the inevitable. By then, he knew the court had refused his request for a mistrial, ***so*** all he could do was go along for the ride.

The State cites this court's opinion in Buenoano v. State, 527 *So.* 2d **194** (Fla. 1985) to support its argument on this point, but that case provides no comfort for it. (Answer Brief at pp. **24-25.)** There, the Defendant created a cottage industry of poisoning the men she had lived with and claiming the money from their life insurance polices after they died. During the trial for the murder of Buenoano's first husband, an acquaintance **of** Buenoano improperly told the jury that the Defendant had admitted she had set fire to her house to collect the insurance. While improper, no one thought the allegation particularly egregious, especially when contrasted with her more deadly plots. Defense counsel objected **to** the comment, but he never asked for a mistrial, requesting only that the court give the **jury** the curative instruction he had provided the court, which it did. In light of the far more sinister evidence the state legitimately produced showing her murderous designs, the corrective guidance quickly and effectively snuffed out the prejudice created by the arson hearsay.

Buenoano provides no comfort to the State in this case. Murphy never alleged Wainwright and Hamilton had committed some "petit" crime such as arson at some unspecified time in the past; he claimed the pair had committed other murders only days before their latest homicide. This revelation had much greater immediate and pervasive impact that the arson allegation did in Buenoano. Hamilton's lawyer recognized the damning impact because unlike counsel in the earlier case, he immediately objected to Murphy's claim, asked for a mistrial, and objected to the court giving a curative instruction. "I don't think . . . [a] curative instruction is going to cure it." **(13-R** 1806) This error not only infected the guilt phase, it contaminated the jury's penalty phase deliberations. "Quite

frankly, I think any reasonable jury that has in the back of its minds that the accused not only committed the murder for which he has been found guilty, if that comes down to the case, but also was involved in another murder, that is one of the strongest aggravating circumstances that the State could ever present." (13 R 1807). Accord Thompson, cited above.

3. Whatever error occurred was harmless.

The State, on page 23 of its brief, makes the amazing claim that "While regrettable, the statement made by Robert Murphy with regard to killing drug dealers in North Carolina was a de minimus statement when placed in context with the whole trial." De minimus? The State's witness would have been hard pressed to have said something more "de maximus" to Hamilton's defense than to have alleged he had committed other murders.

The State relies on this court's opinion in Arbelaez v. State, 626 So. 2d 169 (Fla. 1993) to support its harmlessness claim. In that case, Arbelaez threw a five year old boy off a bridge because his mother had rejected him and was, in fact, seeing another man. At he trial the woman, obviously distraught, told the Defendant he was a murderer and a "son of a bitch" in Spanish. The trial court not only asked the bilingual jurors what they had heard, it gave a curative instruction to the panel and further asked them if they could disregard the witness' comment. Each juror, individually, promised to do so.

Arbelaez has no controlling precedence here. The mother's understandable outburst was affirmatively, swiftly, and thoroughly minimized by the trial court. In this case, we have only an anemic general announcement by the court to "disregard the last statement by this

witness. It is not to play any part in your decision in this case." (13 R 1810) We have no inquiry, as done in the earlier case, that the jurors would ignore Murphy's testimony of an earlier murder.

Thus, what Murphy said, "While regrettable," (Answer Brief at p. 23) and unintentionally elicited, so damaged Hamilton's character and withdrawal defense as to raise a significant doubt of the fairness of the Defendant's trial. The prosecutors here had no bad, evil, or conspiratorial motives when they called Murphy. Yet, there are times when things happen, through no fault of anyone, that turn a well prosecuted and defended trial into one that needs to start over again. That happened here. The prejudice of Murphy's revelation only naturally tainted any jury deliberations.

This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN ALLOWING THE STATE TO IMPEACH **ITS** OWN WITNESS WHEN HE HAD NOTHING SUBSTANTIVE TO SAY OTHER THAN HIS IMPEACHED TESTIMONY, **A** VIOLATION OF HAMILTON'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The State's argument on this point seems to be that the Second District Court of Appeals' decision in Ivery v. State, 548 So. 2d **887** (Fla. 2d **DCA** 1989), which Hamilton relied on in his Initial Brief, controls.[1] Specifically, in that case, counsel asked for but was refused a limiting instruction on the **use** of inconsistent statements, and the evidence against Ivery was weak. Relying on that ruling, the State declares by fiat. "In the instant case, the error, if any in this case, was harmless beyond a reasonable doubt pursuant **to** State v. DiGuilio, 491 ***So.*** 2d 1129 (Fla. 1986)." (Appellee's brief. Emphasis in State's brief.) The citation to DiGuilio has particular resonance here because besides stating the standard of review the State has carried none of its burden to show the error harmless. That case clearly laid it on the State's shoulders, and it cannot sluff it **off** with a boilerplate conclusion.

As to the merits of Hamilton's complaint, the State says nothing other than what was just quoted. Like it did at trial, it persists on appeal in using Murphy's impeached evidence as substantive proof. "Indeed, the State's attempt to impeach Murphy brought **out** before the jury that Wainwright likely strangled and then shot Mrs. Gayheart, supporting the defense's

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[1] It also characterizes his argument as "it **was** error for the State to call Murphy for the purpose **of** impeaching him." **Answer** Brief at p. 29. There **is** more to his argument. "[T]he State could not call Murphy so it could present its impeaching evidence before the **jury** as substantive **proof.**" Initial Brief at **p. *25.***

theory **of** the case." (Answer Brief at p. **30.)** The State used the impeachment in other, substantive ways, but that quote clearly indicates the prosecution still does not understand it cannot use impeaching evidence for substantive purposes.

The State says that, contrary to what Hamilton asserted in his brief, it did not call Murphy just to impeach him (Answer Brief at **p. 30).** Maybe not, but that is all it did with that witness. That the court allowed the prosecutor to use his testimony of substantive evidence was error. Murphy's testimony implicated Hamilton in the Gayheart murder far more directly and intimately than any other testimony. Until he testified, no one had even suggested that the Defendant had strangled the victim. This rebuttal witness did, and it was damning evidence, weakening Hamilton's withdrawal defense that was further destroyed by subsequent court rulings **and** State arguments. (See **Issues IV** and V). **As** such, the court's error in letting the State "impeach" Murphy without any instruction limiting the use of that discrediting evidence likely had some effect on the **jury's** verdict and death recommendation. Contrary to the State's claim, such error could not have been harmless beyond all reasonable doubts.

ISSUE IV

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY, AS REQUESTED, ON THE DEFENSE THAT HAMILTON WITHDREW FROM THE PLAN TO MURDER MRS. GAYHEART, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL,

In his Initial Brief Hamilton made three points: 1) The defense of withdrawal is legitimate as a matter of law. **2.** He presented sufficient evidence for the court to have given the requested instruction on it. **3.** If not, or in addition, the prosecutor argued against the defense in its closing, and the court, because of that, should have instructed the jury on that defense.

The State, in its Answer Brief, has several claims requiring a reply. 1. Hamilton's defense was not one of withdrawal, but a lack of knowledge of Wainwright's intentions. (Answer Brief at p. **36).** 2. The evidence showed he never withdrew. **3.** Any instruction on withdrawal would have been confusing, contradictory, or misleading (Answer Brief at pp **39-40.**

Significantly, the State makes no defense of its position below that this court had "invented" the defense. It accepts this Court's opinion in Smith v. State, **424** *So.* 2d **726** (Fla. 1983), a decision it sneered at below (14-T 1906-1909). Indeed, as defense counsel noted at the charge conference, the prosecutor "is unhappy with the law and any instruction that might be given to support this defense." (14-T 1921)

1. Hamilton's defense was lack of intent, now withdrawal.

The problems, though, continued. At the charge conference, the State claimed there was, "Not one stinking piece of testimony that he said, "Don't kill her." (14-T 1921) (See also, Answer Brief at p. 39.) First, he did present "one stinking piece **of** evidence." "And according to what Wainwright told you, was Hamilton in favor **of** killing her or against killing her? He was against killing her." (13 T 1789) (See also Initial Brief at pp **35-36** for other "stinking"pieces **of** evidence.)

Second, in response to the State's charge conference argument, Hamilton replied then, and now, "The testimony was he was against killing her, and there's no particular magic words. He has to make his position clear." **(14-T** 1921) Indeed, by using **an** "any evidence" standard in measuring if a particular instruction should be read, this court has signaled a liberal, lenient approach to giving jury instructions. ***So,*** in this case, under that standard, the Defendant presented enough evidencejustifying his requested instruction on the defense of withdrawal.

Now the State says Hamilton's defense was that he never intended to kill Gayheart, and that is significantly different from "withdrawing from plan to kill somebody.. . . ." (Answer Brief at p. **36)** Not so. His defense was withdrawal from the murder as the proposed jury instruction clearly announced: "To establish the defense of withdrawal from the crime of murder. . ." **(14-T 3872)**

Hamilton readily admitted he had raped, robbed, and kidnaped Gayheart, and each of those crimes could have supported a conviction for felony murder. Section 782.04, Fla. Stats. (1994) They could if the resulting murder was causally connected to them. Such

would not be the case if Hamilton had told Wainwright he wanted nothing to do with the victim's murder, or by his actions refused to go along with the homicide. That is, he could not be liable under a felony murder theory because he had withdrawn from the criminal enterprise. That was his defense, and he presented evidence to support that theory.

2. The evidence never showed he withdrew.

The State argues, on page 36 of its brief, 'To suggest that these statements were 'evidence'to support a withdrawal by Hamilton is totally unfounded." It then presents its version of what happened to show why that is true. While that summary may be a good jury argument, the State on appeal has missed the point of the Defendant's argument. The inquiry is whether there is "any evidence" to support giving the requested instruction. As noted in the Initial brief at p. 35, "Of course, the evidence justifying the instruction may have been weak or contradicted, but that does not matter." When viewed in the light most favorable to giving the instruction, the inquiry focusses on whether he presented "any evidence" justifying giving the instruction. It is not, as the State's recitation of the facts on pages 37 and 38 of its brief indicates, whether that evidence is believable or contradicted.

3. Any instruction on withdrawal would have been confusing, etc.

Hamilton's requested instruction accurately stated the law as this court announced it in Smith, cited above. It was not confusing. Of course, it may have provided a defense contrary to what the State argued happened, and if defends the court's ruling for that reason then it has a fundamental problem with the adversary system, not simply the particular issue raised here.

On page 40 **of** its brief, the State relies on this court's opinion in Savage v. State, 588 ***So.*** 2d 975 (Fla. 1991) that a Defendant's "self serving statement" of his intoxication without some supporting evidence he was drunk provides insufficient evidence justifying a voluntary intoxication instruction. **It** relied on Smith, for the same thing. (Answer brief at pp. **38-39.)** Savage and Smith, while good law, provide no help **for** the State here because Hamilton presented evidence from several witnesses, including some who testified for the State, to **support** his withdrawal defense. See Initial Brief at pp. **35-36.** His proof included much more than an unsupported statement that he had withdrawn from Wainwright's design to murder Gayheart.

Finally, the **State** made no answer *to* Hamilton's argument that the court should have given the requested withdrawal instruction after the State had attack the defense of withdrawal during its closing arguments.

Because it has no answer to that issue and what it said regarding the other points Hamilton has raised its argument lacks any convincing power, this court should reverse the trial court's judgment and sentence and remand **for** a new trial.

ISSUE V

THE COURT ERRED IN OVERRULING SEVERAL OF HAMILTON'S OBJECTIONS TO THE PROSECUTOR'S CLOSING ARGUMENT, WHICH WAS DESIGNED TO ELICIT SYMPATHY FOR THE VICTIM, A VIOLATION OF THIS DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

In his Initial Brief, Hamilton argued that the trial court had erred in finding the following argument a "fair comment" on the evidence:

> By bringing her to the point of death, you know, he assumed a little bit of the responsibility, assuming what he says is true. There was a 30-30 there. There was a .16 gauge shotgun there. If he wanted--
>
> MR. **HUNT:** I have an objection and I'd like to be heard at the bench.. . . Judge, Mr. Dekle argued to the jury that the Defendant has affirmative duties to take actions to prevent the killing in this case. That's not the law. It is an unfair comment on the evidence. It is an implication that the law requires that the defendant actually and physically prevent the killing in this case. That's not the law. . , . the Court has refused erroneously in my view giving the instruction on withdrawal. To compound that error to allow the State to argue that the defendant had the duty not only to withdraw, but also to go forward and prevent the killing, is wrong.

(T 2002).

The State responded by noting that if withdrawal existed as a defense-a position it logically could not take since it had successfully argued it was not (See ISSUE IV) - Hamilton had a duty to prevent the homicide **(15** T **2003-2004).**

On appeal, the State argued "Based on this Court's decision in Consalvo v. State, _*So.* **2d–, 21** Fla. **L.** Weekly **S** 423,425 (Fla. 1996), no error occurred." (Answer Brief at

p. **42)** It should have said more because that case provides no support for the trial judge's ruling.

In Consalvo the Defendant objected to the prosecutor's closing argument rebutting a defense claim that the victim had not been murdered but had committed suicide. He complained that the prosecutor had set up a "strawman" then knocked it down. This court rejected that argument, noting that: "The appellant effectively opened the door to prosecutorial comment on suicide since the testimony elicited by defense counsel on cross-examination suggested a potential suicide defense." Id. at 425.

Such never happened here. Indeed, the Court, at the State's request, refused to allow Hamilton to argue any withdrawal defense when it denied his request for a jury instruction on withdrawal. That error is the crux of **ISSUE** IV. Hamilton never opened any door because the court refused to give him the **key** to it. Instead, what happened here is **akin** to the "strawman" tactic Consalvo objected to. The State raised the forbidden defense then knocked it down. And Hamilton could say nothing to rebut it. Such argument, that Hamilton "assumed a little bit **of** the responsibility" was improper and may have led the jury to believe he had the burden to prove his innocence. Id. Bayshore v. State, **437** ***So.*** 2d **198** (Fla. **3d DCA 1983).**

This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VI

THE **COURT ERRED IN ADMITTING THE TESTIMONY THAT MRS. GAYHEART HABITUALLY PICKED HER CHILDREN UP FROM A DAY CARE CENTER, BUT** ON **APRIL 27, 1994 SHE DID** NOT, **A VIOLATION OF HAMILTON'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.**

As mentioned in the Summary of the Arguments in the Initial Brief (p. 10), **"Anyone** familiar with the facts of this case can only naturally be revolted by what happened and angry at the Defendants for what they allegedly did." With emotions running ***so*** close to the surface, the State had to steer an especially careful course to avoid having the jury being swept to dangerous shoals by its presentation of the evidence. **Ms.** Hosford's day care testimony was one of several rocks the trial hit, **and** any fairness it may have tried to reach was dashed by her testimony.

First, the day care testimony was unnecessary because, as the State noted in its Answer brief, when **Mrs.** Gayheart picked up her children had already been mentioned (Answer brief at p. **48).** Second, the relevance **of Mrs.** Hosford's testimony to nonconsent was especially weak in light of the uncontroverted evidence that Wainwright used a shotgun to force the victim into the Defendants' Cadillac **(7-T 904).** Moreover, that she failed to show **up** 12:30 does not tend **to** prove **a** lack of consent **for** the reasons argued in the Initial Brief at pp. 50-51. Habit evidence has relevance to corroborate other evidence of routine practice. It lacks probative value to show something was amiss because the habit was not followed on a particular occasion.

Because the State had already established approximately when Mrs. Gayheart was kidnaped by an earlier witness, who had mentioned in passing the victim's need to pick up her children, whatever relevance Ms. Hosford's testimony had faded into insignificance in light of the strong emotional undercurrent that surfaced when she took the stand.

This court should reverse the court's judgment and sentence and remand for a new trial.

CONCLUSION

Based on the arguments presented here, the **Appellant,** Richard Hamilton, respectfully **asks** this Honorable Court to reverse the **trial** court's judgment and **sentence** and remand for a new trial or reverse the trial court's sentence **of** death and remand for a **new** sentencing hearing.

Respectfully submitted,

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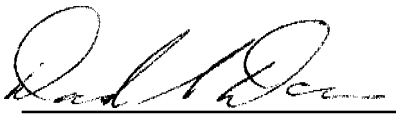

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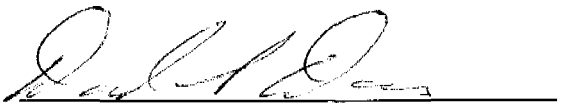
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, RICHARD EUGENE HAMILTON, #123846, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 27th day of February, 1996.



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