IN THE SUPREME COURT OF FLORIDA

HENRY ALEXANDER DAVIS, :

Appellant, :

vs. : Case No. 80,972

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

# REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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## PRELIMINARY STATEMENT

Page references in this brief to the record on appeal in case number 80,972 (the instant case) are designated with the prefix "R." Page references to the record on appeal in case number 75,467 (prior appeal of Appellant's convictions and sentences) are designated with the prefix "PR."

Appellant, Henry Alexander Davis, will rely upon his initial brief in reply to the arguments presented in the State's answer brief as to Issue II.A.2., II.A.3., II.A.4. and II.C.

## STATEMENT OF THE CASE AND FACTS

Appellee's contention that, at the hearing of November 6, 1992 on the State's Motion to Preclude Defendant from Presenting Additional Evidence and Motion to Compel Discovery, "the defense abandoned its previous position of presenting evidence and argument as to the 'weight' of the relevant factors" (Brief of Appellee, page 9) is refuted by the record. Appellant's counsel argued that the trial court should consider evidence

> as it relates to aggravating and mitigating circumstances. If...if there is evidence relating to the aggravating and mitigating circumstances which were argued at the original sentencing, then clearly I think this Court can take that evidence into consideration in deciding what weight to place on those aggravating and mitigating circumstances.

(R 312) Later, defense counsel argued that the trial judge was "obligated to hear, at the very minimum, evidence relating to the mitigating circumstances that were presented before." (R 325)

Defense counsel subsequently noted that the trial court would have to decide whether he would allow evidence of new mitigating circumstances, or limit Appellant to presenting evidence as to the mitigating circumstances that were presented previously. (R 344) Counsel contended "that the very minimum that that falls clearly within the mandate of saying reweigh the aggravating and mitigating circumstances because this is evidence that directly relates to what weight the Court should give to those aggravating and mitigating circumstances." (R 344--emphasis supplied) Thus, unlike the prosecutor below, the defense did not, as Appellee asserts, change its position as to the evidence that should be received by the trial court. [As Appellee concedes in its brief at page 8, the prosecutor below initially agreed that Appellant could present evidence on the weight that the trial court should give to the aggravating and mitigating factors (R 284), but inexplicably did an about-face.] And counsel's reference to Florida Rule of Criminal Procedure 3.720 (R 315-316) was simply an attempt to provide additional authority in support of his position.

With regard to the so-called unwillingness of Appellant to discuss the witnesses and evidence he wished to present (Brief of Appellee, page 9), defense counsel took the position that the discovery rule did not apply to capital penalty proceedings (R 307-311), but that if the trial court so ordered, the defense would be "willing" to and would "supply a witness list posthaste." (R 325) As for the question of "why the additional or new evidence had not been presented at the original penalty phase hearing" (Brief of

Appellee, page 9), although the trial court raised this question, neither he nor the prosecutor directly asked defense counsel to respond it to it, nor would counsel have been in a position to do so, as he was not the attorney who represented Appellant in the prior proceedings.

Appellee's statement that the "defense conceded its reluctance to make a proffer" (Brief of Appellee, page 9) is, again, not supported by the record. Appellant's attorney referred to the necessity of making a proffer if the court was going to grant the State's motion to preclude the presentation of evidence, and later asked for the court's guidance as to how the proffer should be done. (R 351-355) Counsel clearly expressed not only his willingness, but his desire to make a proffer, and his concern about doing it right. Appellee says that "[a]t no point was a proffer made before the court ruled on the motion to preclude new evidence" (Brief of Appellee, page 9), but fails to mention that the prosecutor below objected to any proffer, and the court sustained the objection, ruling that any proffer would have to be made "subsequent to sentence." (R 345)

On page 10 of its brief, Appellee asserts that in his sentencing order of November 17, 1992, the trial court "found that the previous mitigating factors offered by Defendant were not supported by the evidence." Actually, however, the court's order is not clear in its discussion of mitigation. It does appear that the court rejected certain mitigating circumstances (under influence of extreme mental or emotional disturbance, crime committed by another

and Appellant's participation relatively minor, extreme duress or emotional domination of another person, substantial impairment of capacity to conform conduct to requirements of law) as being unsupported by the evidence. (R 444-446) After discussing these factors, the sentencing order states: "THE COURT find [sic] the mitigating circumstances offered by the Defendant did not reasonably convince the Court that mitigating circumstances exist." (R 446) The order then states, however: "Further, the Court has considered all other relevant circumstances in mitigation, i.e., the Defendant's age, schooling, family background, employment, education and health." (R 446) The order next states the court's conclusion that the aggravating circumstances "substantially outweigh the mitigating circumstances," and the death penalty should be imposed. (R 446-447) The court's discussion of the factors of Appellant's age, schooling, etc. is ambiguous. It is not clear whether the court found these factors to be unsupported by the evidence, or found them to be supported, but entitled to little mitigating weight, or exactly what the court intended by his single-sentence discussion of these matters.

At page 14 of its brief, Appellee says that Dr. Henry Dee "declined to say that Defendant was under the influence of extreme emotional or mental distress." The questions and answers as to this aspect of the proffer of Dr. Dee's testimony were as follows (R 501-502):

> Q Again based upon the same neuropsychological standard, do you have an opinion as to whether or not at the time of the offense

> Henry Davis was under the influence of extreme mental or emotional distress?
>
> A A disorder, yes. I wouldn't necessarily say distress, but disorder.
>
> Q Disturbance, I think is the word the statute uses.
>
> A Yes. I know of no evidence that he was under any particular stress, but he was certainly organically mentally disturbed.

Appellee states at page 16 of its brief that Dr. Eberto Piniero, a neurologist, said during the proffer of his testimony that "epilepsy is not brain damage in a structural sense, but is so considered in a functional sense. (R. 530)" This is inaccurate. When asked whether temporal lobe epilepsy would constitute brain damage, Dr. Piniero responded (R 530):

> I will have to say yes, although damage is a difficult term to define. If one requires structural, architectural damage as an inclusive or exclusive element, then we could say most likely. If by damage you accept neuro-electrical malfunction, then definitely he does have it.

Appellant reads Dr. Piniero's testimony as indicating that Appellant definitely has brain damage in the sense of neuro-electrical malfunction, and "most likely" has brain damage in the structural sense as well.

Appellee also says at page 16 of its brief that Dr. Piniero "was unable to say that Defendant was unable to conform his conduct to the requirements of the law at the time of the murder. (R.534)" Actually, Dr. Piniero gave the following answer in response to the question of whether he had an opinion as to whether Appellant's

ability to conform his conduct to the requirements of law was substantially impaired at the time of the offense (R 534-535):

> I don't know in this particular event. I can say that compared to the general population, this man did have elements that will diminish his responsibility, meaning he had a brain dysfunction, an encephalopathy, a learning disability, at best a borderline intelligence. And he has a long lifetime history of epilepsy, with the additional findings of electroencephalogram that we have discussed. Because he alleges complete amnesia for the event, it's very difficult for me to give you medical opinion that will be solid in that respect. I can say that indeed is possible.

Thus, Dr. Piniero indicated that Appellant's ability to conform his conduct to the requirements of law was less than that of the general population, and that it was indeed possible that his ability in this regard was substantially impaired at the time of the offense.

At page 16 of its brief, Appellee asserts: "Although the school records [of Appellant] themselves had not been admitted into evidence at the 1990 penalty phase, the mental health experts had reviewed them. (R. 135, P.R. 1339, 1440)" The record does not support Appellee's assertion. Dr. Henry Dee was asked at the original penalty phase what records he reviewed pertaining to Appellant, and he responded (R 129):

> I reviewed the records of Doctor--well, there were--I reviewed the prison records, prison medical services, neurology, neurosurgery associates, specifically Dr. Rubin in Winter Haven, and an emergency room record from Heart of Florida Hospital in which Mr. Davis was examined because he had been attacked, kicked in the forehead...

Dr. Dee said nothing about having seen Appellant's school records.

The other mental health expert who testified for the defense at Appellant's penalty trial in 1990, Dr. Thomas McClain, stated that he had reviewed a

> considerable amount of records, including the medical records that Dr. Dee mentioned this morning, plus the [sic] Dr. Dee's records, the records of Dr. Zwingelberg and the records from the State Hospital.

(R 89) Dr. McClain had also reviewed the police reports. (R 113) He said nothing about having seen Appellant's school records.

One of the State's rebuttal witnesses at penalty phase, Lynn Westby, did state that she had seen Appellant's school records, without specifying precisely which records she had seen. (PR 1440) The other rebuttal witness called by the State, Dr. Mark Zwingelberg, a psychologist, testified that he had seen reports written by Dr. Dee and Dr. Westby, as well as a report written by Dr. William Kremper (PR 1472, 1479, 1495), but said nothing about having seen Appellant's school records.

## ARGUMENT

### ISSUE I

APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS WELL AS ARTICLE I, SECTIONS 9 AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA, BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, IS APPLIED ARBITRARILY AND CAPRICIOUSLY, AND DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

With regard to the preservation question raised by Appellee, in addition to the motions Appellant filed prior to his jury trial, after remand, Appellant filed his "Motion to Prohibit Imposition of the Death Penalty," which very specifically addressed the unconstitutionality of the HAC aggravating circumstance. (R 237-242) This motion was heard by the Honorable J. Tim Strickland on October 6, 1992. (R 288-294) Defense counsel noted that the motion was filed "primarily to litigate the constitutionality of the especially heinous, atrocious, or cruel aggravating circumstance." (R 288) The court denied the motion on October 8, 1992. (R 296) Therefore, the issue raised on appeal was presented to the trial court and ruled upon.

Appellee completely misinterprets the opinion of the Supreme Court of the United States in Sochor v. Florida, 504 U.S. ____, 112 S. Ct. ____, 119 L. Ed. 2d 326 (1992) by lifting one paragraph out of context and misrepresenting it as the holding of the case. (Brief of Appellee, p. 23) Contrary to Appellee's contention, the Supreme Court did not explicitly reject Appellant's argument that

the HAC aggravating circumstance fails to genuinely limit the class of persons subject to the death penalty; quite the contrary. Sochor supports Appellant's position.

Appellee quotes the following paragraph that appears in Sochor at 119 L. Ed. 2d 339:

> Understanding the [HAC] factor, as defined in [State v.] Dixon [, 283 So. 2d 1 (Fla. 1973)], to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," we held in Proffitt v. Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976), that the sentencer had adequate guidance. See id., at 255-256, 49 L Ed 2d 913, 96 S Ct 2960 (opinion of Stewart, Powell, and Stevens, JJ.).

However, Appellee ignores the critical next paragraph, which Appellant quoted at page 44 of his initial brief:

> Sochor contends, however, that the State Supreme Court's post-Proffitt cases have not adhered to Dixon's limitation as stated in Proffitt, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the Dixon language we approved in Proffitt, but has on occasion continued to invoke the entire Dixon statement quoted above [in which this court gave its interpretation of the terms "heinous," "atrocious," and "cruel," and stated what types of capital crimes were intended to be included within these definitions], perhaps thinking that Proffitt approved it all. [Citations omitted.]

119 L. Ed. 2d at 339 [emphasis supplied]. Thus, the High Court indicated in Sochor that this Court has not always interpreted the HAC aggravating circumstance in a manner consistent with the limitations set forth in Dixon, and thus the Supreme Court's approval of the factor in Proffitt was misplaced.

On page 24 of its brief, Appellee lifts another sentence from Sochor out of context in an attempt to support its position:

> Sochor responds that the State Supreme Court's interpretation of the heinousness factor has left Florida trial judges without sufficient guidance in other factual situations, we fail to see how that supports the conclusion that the trial judge was without sufficient guidance in the case at hand.

119 L. Ed. 2d at 340. This sentence is irrelevant to Appellant's case. In his initial brief, Appellant demonstrated that this Court has shown inconsistent application of HAC in the very factual situation involved herein, that is, deaths by stabbing. Appellee again ignores the context in which the above-quoted sentence appears. Immediately prior thereto, the Court had discussed the fact that this Court has "has consistently held that heinousness is properly found if the defendant strangled a conscious victim. [Citations omitted.]" 119 L. Ed. 2d at 339-340. However valid or invalid this conclusion may be, this Court has not demonstrated the same alleged consistency where deaths by stabbing have been involved.

On page 27 of its brief, Appellee states that in Demps v. State, 395 So. 2d 501 (Fla. 1983), which Appellant discussed in his initial brief on page 45, "the trial court based its finding of the HAC factor solely on the loss to the victim (a fellow inmate with Demps) of his right to rejoin society after serving his sentence." Actually, the trial court's finding was a bit more elaborate:

> THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. "HEINOUS" MEANS EXTREMELY WICKED OR SHOCKINGLY EVIL. "ATROCIOUS" MEANS OUTRAGEOUSLY WICKED AND VILE. "CRUEL" MEANS DESIGNED TO INFLICT A HIGH DEGREE OF PAIN, UTTER

> INDIFFERENCE TO OR ENJOYMENT OF THE SUFFERING OF OTHERS; PITILESS.
>
> Defendant Demps senseless killing of his fellow inmate was extremely offensive and cruel and demonstrated total disregard for the life and safety of victim Alfred Sturgis. It was especially cruel because the victim has been denied his right to live and his right to return to society, his family and friends after payment for the crime he committed which resulted in his imprisonment; and the fact that he was an inmate does not make his life any less precious than any citizen in a free society.
>
> It is the Court's opinion there are very strong aggravating circumstances under this condition.

395 So. 2d at 505-506, footnote 5. At any rate, the exact finding rendered by the trial court in no way detracts from the opinion of this Court that the murder in Demps simply did not qualify as HAC under the parameters set forth in State v. Dixon, 283 So. 2d 1 (Fla. 1973).

## ISSUE II

THE COURT BELOW DID NOT FULFILL HIS RESPONSIBILITIES PRIOR TO RESENTENCING APPELLANT. UNDER THE CIRCUMSTANCES OF THIS CASE, THE COURT SHOULD HAVE IMPANELED A NEW JURY TO RENDER A NEW SENTENCING RECOMMENDATION, AND SHOULD HAVE RECEIVED AND CONSIDERED ADDITIONAL EVIDENCE AND ARGUMENT. FURTHERMORE, THE RECORD REFLECTS THAT THE COURT DID NOT SUFFICIENTLY ANALYZE AND WEIGH THE FACTORS INVOLVED IN THIS CASE TO PERMIT APPELLANT'S DEATH SENTENCE TO STAND.

A. Need for new jury recommendation

1. Jury instructions--aggravating circumstances

With regard to the doubling of pecuniary gain and burglary, Appellee faults trial counsel for not requesting what Appellee terms a "merger" instruction at the jury charge conference that took place on January 11, 1990. Of course, the charge conference took place long before this Court decided Castro v. State, 597 So. 2d 259 (Fla. 1992), which indicated that such an instruction should be given upon request. Trial counsel probably thought, as did the trial judge in Castro, that he was not entitled to such an instruction in light of this Court's opinion in Suarez v. State, 481 So. 2d 1201 (Fla. 1985); such an assumption would have been entirely reasonable.

On page 34 of its brief, Appellee incorrectly states that Appellant did not raise in his previous appeal that Appellant was entitled to a new sentencing hearing because the witness elimination factor was inapplicable to his case. Appellant did raise this

issue. On pages 40-42 of his initial brief in case number 75,467, Appellant argued that the aggravating circumstance of committed for the purpose of avoiding or preventing a lawful arrest should neither have been found by the trial court nor submitted to Appellant's jury. And on the conclusion page of his brief, one of the forms of relief Appellant requested was "a new penalty phase proceeding before a jury[.]" (Initial Brief of Appellant in case number 75,467, p. 49)[1] In cases such as Omelus v. State, 584 So. 2d 563 (Fla. 1991), Jones v. State, 569 So. 2d 1234 (Fla. 1990) and Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), this Court has ordered new sentencing proceedings where juries were permitted to consider inapplicable aggravating circumstances.

Defense counsel below stated fairly succinctly the reasons why the United States Constitution dictated that the court below should have impaneled a new jury in the memorandum of law that accompanied counsel's Motion to Impanel Jury (R 252-253):

> In Sochor v. Florida, 504 U.S. ____, 119 L.Ed.2d 326, 112 S.Ct. ____ (1992), the United States Supreme Court ruled:
>
> > In a weighing state like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. See Clemons v. Mississippi, 494 U.S. 738, 752, 108 L.Ed.2d 725, 110 Supreme Court 1441 (1990).

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[1] Appellant also argued in his previous appeal that the especially heinous, atrocious or cruel aggravator should neither have been found by the trial court nor submitted to the jury. (Initial Brief of Appellant in case number 75,467, pp. 43-45)

In Clemons the United States Supreme Court held that a state appellate court uphold [sic] a death sentence that is based in part on an invalid aggravating circumstance either by reweighing the aggravating and mitigating evidence or by harmless error review. Clemons at 733.

In the case at bar, the state appellate court, the Florida Supreme Court, declined to reweigh the aggravating and mitigating evidence but did conduct a harmless error review. The Florida Supreme Court was unable to say beyond a reasonable doubt that the trial judge would have imposed the death sentence without consideration of the invalid aggravating factors. Therefore, the death sentence had to be vacated. The question which remains is whether under federal or state law the trial judge can simply reweigh the evidence and impose the appropriate sentence or whether a new jury is required.

The question is succinctly answered in Espinosa v. Florida, 51 Criminal Law S 3096 (June 29, 1992). The United States Supreme Court ruled:

> We merely hold that, if 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. Id. at 3097.

The rationale behind this decision is clear. Under Tedder v. State, 322 So.2d 908 (1975), the trial judge is required to give "great weight" to the jury's sentencing recommendation. This aspect of Florida law was directly addressed when the United States Supreme Court in Proffitt found the Florida penalty phase procedure in compliance with federal constitutional mandates. The trial judge cannot now ignore state law and refuse to give great weight to the jury's recommendation in this case. Yet, by giving great weight to the jury's recommendation when the jury considered invalid aggravating circumstances results in the trial court indirectly weighing the invalid factors. This violates the Eighth Amendment to the United States Constitution.

> Therefore, since the penalty phase jury considered invalid aggravating circumstances which the trial court must indirectly weigh in deciding the appropriate penalty to impose in this case, the only means on curing the Eight Amendment error is by impanelling a new penalty phase jury which will not hear any evidence relating to nor weigh the invalid aggravating circumstances.

Whatever may have been the intention of this Court when it issued its mandate, the trial court was nonetheless required to give effect to the federal constitution by impaneling a new jury in accordance with the principles discussed above.

B. Refusal to allow additional evidence/argument in mitigation

Appellee faults Appellant for not informing the trial court at the hearing on November 6, 1992 precisely what evidence he wished to present. However, it must be remembered that the State objected to any proffer (R 345), and the court sustained the objection. The State should not now be permitted to take the inconsistent position on appeal that Appellant should have proffered the evidence he wished to present. Furthermore, Appellee claims that "the trial judge several times gave the Defendant the opportunity to explain what evidence he wished to present[,]" but does not assert that the court ever directly asked Appellant to state what that evidence was.

With regard to the matter of whether this Court affirmed the trial court's supposed finding of no mitigation (Brief of Appellee, page 49), if this Court ascertained that there was absolutely no mitigation, it is questionable that the Court would have vacated the death sentence. In cases such as Eutzy v. State, 458 So. 2d

755 (Fla. 1984), the Court has generally affirmed even though it invalidated aggravating circumstances, where there was nothing in mitigation that might lead the trial court to impose a life sentence.

At pages 52-53 of its brief, Appellee claims that one of the State's rebuttal experts at the penalty phase of Appellant's trial, Dr. Zwingelberg, testified that even to the extent that Appellant had any mental deficiency, "the type of seizure disorder he suffered from was not causally related to the murder here. (P.R. 1487)" This is an oversimplification which distorts what Zwingelberg actually said:

> I think there are times when he [Appellant] decompensates where his behavioral abilities as measured by some of these instruments are impaired. As to whether or not that is brain damage, the information is not particularly clear. There may have been a seizure disorder but just because somebody has a seizure disorder doesn't mean that that form of brain damage is going to result in them hurting somebody of that that's a mitigating factor.

(P.R. 1486-1487) Zwingelberg thus indicated that while a seizure disorder will not necessarily cause someone to hurt another, Appellant's disorder could impair his ability to control his behavior.

Appellant disagrees with Appellee's statement that during the proffer of his testimony Dr. Henry Dee "backpedalled from his original position" regarding Appellant's mental/emotional state. (Brief of Appellee, p. 53) The overall thrust of Dr. Dee's proffered testimony was that his conclusions had been fortified by

materials he reviewed subsequent to Appellant's penalty trial, namely, Dr. Vroom's report, Dr. Kohler's report, and Dr. Piniero's report. (R 490-495)

Appellee states at page 53 of its brief that Dr. Piniero "himself testified that he did not believe that the crime was committed during a seizure. (R.530) Complex goal oriented behavior, such as murder and the methodical ransacking of a house, is not possible during a seizure. (R. 535)" These statements are irrelevant. Appellee ignores the compelling evidence Dr. Piniero offered concerning the potential for increased violence in people such as Appellant who suffer from temporal lobe epilepsy. Dr. Piniero's offered further evidence that went beyond, but was consistent with, Dr. McClane's proffered testimony regarding the interictal personality problems, including aggressive behavior, that can occur between seizures or immediately after seizures, before full recovery, in people suffering from temporal lobe epilepsy. (R 465-466)

Appellee says that the proffered testimony of Dr. Richard Jones, the medical examiner, was substantially the same as it was at Appellant's trial. (Brief of Appellee, p. 57) At trial, of course, Jones did not testify regarding the critical issue of the absence of defensive wounds on the victim. (PR 891-906, R 77-81) Appellee also claims in footnote 49 on page 57 that "no cross examination was conducted at the proffer," without stating the relevance of this observation. However, it should be noted that Tom Spate of the state attorney's office did conduct cross-

examination of two of the witnesses whose testimony was proffered, James Patrick Ruise and Robert H. Self. (R 581, 591-592) This indicates that the prosecutor below could have asked questions of Dr. Jones if he wished to do so.

## ISSUE III

THE TRIAL COURT ERRED IN SENTENCING HENRY ALEXANDER DAVIS TO DEATH BECAUSE THIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS WELL AS ARTICLE I, SECTIONS 9 AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Appellee relies heavily upon Taylor v. State, 630 So. 2d 1038 (Fla. 1994) in support of its argument that Appellant's death sentence is proportional, claiming that Taylor "presents highly analogous factors." (Brief of Appellee, p. 60) However, the homicide in Taylor was much more aggravated than the instant homicide. The victim's "battered body" was found in the bedroom of her mobile home. 630 So. 2d at 1039.

> The medical examiner testified that the victim had been stabbed approximately twenty times, strangled, and sexually assaulted. The medical examiner further testified that most of the stab wound were made with a knife found at the scene of the crime, while the remaining stab wounds were made with a pair of scissors that were also found at the scene. The medical examiner stated that the victim was alive while she was being stabbed, that she was strangled with an electrical cord, and that the strangulation had occurred after the victim was stabbed.
>
> The medical examiner also testified that the victim's lower jaw had multiple fractures and that she had received several blows to the head. The examiner testified that the fractures of the victim's jaw could have resulted from being struck with a broken bottle found on the bed next to the victim, and that contusions to the victim's head were consistent with being struck by a metal bar and candlestick found at the scene. Finally, the medical examiner testified that the victim's

> breasts were bruised, and that the bruises resulted from "impacting, sucking, or squeezing" while she was alive. In the medical examiner's opinion, the victim was alive at most ten minutes from the first stabbing to the strangulation. On cross-examination, the examiner stated that he did not know whether the victim was conscious during all or any part of the attack.

630 So. 2d at 1039. Clearly, the victim in Taylor was abused and brutalized far beyond anything suffered by Joyce Ezell, who was not sexually assaulted, beaten, or strangled.

The homicide in Arango v. State, 411 So. 2d 172 (Fla. 1982) which is cited by Appellee on page 61 of its brief, likewise was much more aggravated. The victim was beaten

> with a blunt instrument many times about the head and body. Deep cuts were made on the face, causing severe hemorrhaging. The wire used in a TV remote control device was wrapped about the victim's neck, choking him. A large towel stuffed into the victim's mouth prevented his breathing. After beating and strangling him, appellant shot the victim twice in the head.

411 So. 2d at 175.

In Reichmann v. State, 581 So. 2d 138 (Fla. 1991), cited by Appellee on page 61 of its brief, unlike the instant case, the appellant made no claims regarding his death sentence, and did not present any evidence in the penalty phase. 581 So. 2d at 141.

And Freeman v. State, 563 So. 2d 73 (Fla. 1990), cited by Appellee on page 61 of its brief, is distinguishable from Appellant's case because, unlike Henry Alexander Davis, Freeman had previously been convicted of first-degree murder (as well as two other violent crimes). 563 So. 2d at 75, 77.

## CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Henry Alexander Davis, renews his prayer for the relief requested in his initial brief.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Randall Sutton, Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida 33128, (305) 377-5441, on this 11th day of April, 1994.

Respectfully submitted,

Robert F. Moeller

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

RFM/ddv