IN THE SUPREME COURT OF FLORIDA

TONEY DERON DAVIS,

Appellant,

v. Case #: 86,363

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State accepts Davis' rendition of the Case as put forth in his brief, except as to the following matters which were omitted.[1] On the first page of his brief, Davis asserts that he made an "[o]ral motion to discharge Charles Adams as his attorney." In fact, at no time either before, during or after his trial did he orally move to discharge his counsel. Further, at no time did he unequivocally request to represent himself either in writing or orally. A detailed accounting of the record relating to this matter will be provided in the State's argument concerning Davis' first point on appeal.

The record also reflects that the State filed two notices of "Other Crimes, Wrongs or Acts Evidence," pursuant to Sections 90.042 and 90.404(2), Florida Evidence Code (R.72-73). The first notice alleged:

> 1. On or between the 25th day of December, 1991 and the 26th day of December, 1991, in the County of Duval and the State of Florida, the defendant,

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'Appellant was the Defendant in the trial court below. Appellee, THE STATE OF FLORIDA, was the prosecution. Henceforth, Appellant will be identified as "Davis" or Defendant. Appellee will be identified as the "State". "R" will designate the Record on Appeal. "T" will designate the Trial and Penalty Phase Transcripts, including Sentencing Hearings. "SR" represents the supplemental record. "p" designates pages of Davis' brief. All emphasis is supplied unless otherwise indicated.

being a person over the age of 18, did commit a sexual battery upon or injure the sexual organs of Marlon Williams, a child under the age of 12, in an attempt to commit Sexual Battery upon sid [sic] person by placing his penis in Marlon Williams' mouth.

This incident occurred while the ***defendant was left alone babysitting the child.*** The mother was out with the child's father at the time. Additionally, ***the mother was dating the defendant.*** (R.72)

On February 10, 1995, the State announced it was abandoning the notice concerning Marlon Williams (R.304; T.91-92).

The second notice alleged:

1. On or between the 1st day of December, 1991, and the 31st day of December, 1991, in the County of Duval and the State of Florida, the defendant, did handle, fondle, or make an assault on Tammy Waller, a child under the age of 16, in a lewd, lascivious, or indecent manner, to-wit: by having Tammy Waller place her hand on his penis.

These incidents occurred when the ***defendant was left alone babysitting the child. The defendant was dating the child's mother at the time.*** (R.73)

At a Motions Hearing conducted on March 31, 1995, Detective Parker, of the Jacksonville Sheriff's Office, testified that on June ***4,*** 1992, ***Davis confessed to the molestation of Tammy Waller*** subsequent to his executing a waiver of rights form (T.134-45). The trial court found Davis' statement was voluntarily given (T.156). On

April 20, 1995, the State filed a Notice of Withdrawal as to the Tammy Waller evidence (R.305; T.189-90).

STATEMENT OF THE FACTS

A complete and accurate rendition of the facts both in the Guilt and Penalty Phases follows.

GUILT PHASE

Gwen Cunningham, **2-year-old Caleasha's** mother, testified that she met Davis while she was staying at the Ambassador Hotel, summer of 1992 (T.483-84). In September of 1992, she moved to an apartment complex located at 5342 Seaboard Avenue, Apartment 1, and Davis moved in with her (T.485). At "around 11:45" a.m., December, 9, 1992, she left Caleasha alone with Davis to retrieve a marriage certificate from her husband, who was stationed at NAS Cecil Field (T.488).

When she left, Caleasha was seated in a chair playing with her 'doll baby", combing its hair (T.489). Caleasha was fully clothed, wearing a red long sleeve pajama top, with blue bottoms, and a **diaper** underneath (T.490). Caleasha 'had small pigtails that were wrapped in ribbons all over her head (T.490)." She was healthy and happy when Gwen left (T.490).

When Gwen left, there were not "5 or so blood spots on the carpet in front of the bathroom (T.491)." There were no blood spots splattered over the toilet and sink in the bathroom (T.491). Gwen's bed was made and there were no blood spatters all over her bedroom sheets (T.491). She was not menstruating at the time (T.491). Caleasha never slept in Gwen's bed, and when she left Caleasha's bows were not there (T.492).

Gwen returned from her errand approximately an hour, or an hour and 15 minutes later (T.492). She saw detectives, yellow tape, lots of people and a news camera (T.492). Thomas Moore told her in the parking lot what Davis had told him, as did a neighbor, Ron Gordon (T.492-93). Gwen was "shocked" (T.493) Incapable of driving, Ron Gordon drove her to Baptist Hospital, with Moore accompanying them (T.493).

She met Davis at the hospital and he told her what she had already heard from Moore and Gordon, that Caleasha "had choked on a French fry, she had an asthma attack, he tried to do CPR, and save her..." (T.493-94). When Gwen **saw** Caleasha she noticed her little girl 'had a big bump on her head (T.494)." Gwen also observed "[o]ne of her eyes was half closed and the other one was open, but it was shaken out of place. She had bruises on her face

and she had red marks on the front of her chest (T.494)." Caleasha did not have these injuries when Gwen left that morning (T.494).

Gwen further testified Caleasha was not on any medication December 9th (T.495). Nor did Caleasha have vaginal bleeding prior to that date (T.495). Gwen was driven back to her apartment that night by Detective Hallam (T.495). She pointed out what her daughter had on when she left that morning (T.497). Caleasha's blue bottoms were in Gwen's bedroom, right near her bed, and her shirt was in the living room (T.497-98). Gwen's next-door neighbor was named Janet, and the walls of Janet's apartment adjoined her own (T.500). Under cross-examination, Gwen testified: 'One time [Davis] attempted to beat Caleasha, but I told him no and he didn't beat her (T.505)."

Janet Cotton, Gwen's neighbor in Apartment 2, was in her apartment the morning and afternoon of December 9, 1992 (T.514-17). She knew Gwen's three children, and her three children were friends with them (T.516). On the day of the murder, her friend, Celeste Wiley, was visiting with her until Celeste's son got out of school around 1:30 p.m. (T.517). At approximately noon, she and Celeste "heard a lot of child crying and a lot of thumping noise, because the walls were real thin (T.518)." The sounds were coming from Apartment 1, Gwen's place (T.518).

Janet heard Davis' voice 'very loud," saying, "sit down" (T.519). Davis' voice was "Mean, stern (T.519)." The banging and thumping sounded like "something was hitting the wall (T.519) ." The ruckus went on "[f]or about 30 minutes (T.519)." Thirty minutes after it ended, Rescue arrived (T.520). Under cross-examination, Janet testified that what she heard from Apartment 1 was 'like something was bamming against something," like against the wall in the living room (T.522).

Thomas Moore testified that he was currently incarcerated in Denver, Colorado, serving a six-year sentence for burglary (T.527). He met Davis, who was living with his father, and Davis' girlfriend, Gwen, at the Ambassador Hotel, August of 1992 (T.530). He socialized with them during this time, and came to know Gwen's three children, Juan, Ashley, and Caleasha (T.532-33). Gwen and Davis moved to an apartment, and he visited them a couple of times, including Thanksgiving (T.533).

On the day of the murder, Moore gave blood in the morning because he needed money (T.534-35). The Blood Bank he went to was near Gwen's apartment (T.535). After giving blood he waited for a bus about 15 minutes, and when none showed he decided to visit Gwen and Davis (T.535). He did not call first because they did not have a phone (T.536).

Moore knocked on the door of Gwen's apartment and Davis "came to the door with Caleasha draped over his left arm (T.536)." Caleasha appeared 'lifeless" (T.536). She was clad in "only a red and white shirt (T.536)." She was wearing nothing from the waist down (T.536). She "appeared to be kind of wet, like she had -- like she had took a bath with her shirt on (T.536)."

When Moore asked Davis what happened, Davis responded that "she choked on a French fry and had an asthma attack and go dial 911" (T.537). Davis appeared "surprised" by Moore's appearance (T.537). Moore went to a pay phone around the building and called 911 (T.538). He returned to the apartment and observed Caleasha was on the floor, with Davis blowing into her mouth (T.542). She was not responding (T.542). He went back outside and flagged a police officer down (T.543). He remained outside to 'let the paramedics do their job (T.543)."

Gwen pulled up five minutes after Rescue left, and he told her what had transpired (T.544). He went to the hospital with Gwen and another guy he didn't know. Gwen 'was crying and hurt, . . . like she knew something had happened, . . . real bad to her baby (T.545)." He stayed at the hospital about 15 to 20 minutes and left (T.545). Two days later he talked to Detective Hallam about what happened

(T.546). Under cross-examination, he testified that he witnessed Davis scream at Gwen's children two or three times (T.553).

Shaun Smith, 911 Dispatcher, testified he was on duty when Moore made his call (T.558-60). The recording was published to the jury (T.562-63). Moore said: 'I got a little girl, she just had **an asthma** attack (T.562-63)."

Lloyd Phillips, retired from Jacksonville Sheriff's Office, on the day of the murder **was** on patrol when he was flagged down by an excited black male, who appeared upset, and was yelling (T.566-67). It was a little after 1 p.m., maybe 1:10 or 1:15 (T.567). He entered the victim's apartment, and observed an unconscious child on the floor and Davis kneeling over her appearing to be attempting **CPR (T.571). Davis** 'seemed confused, but calm (T.572)." The child was naked from the waist down (T.572). While looking for other children, he further observed fresh blood on the bathtub, toilet and a sheet of one of the beds (T.573). He had a brief discussion with Davis after the child was placed in the rescue unit (T.574). Davis repeated his French fry story and that Caleasha's mother had gone to the Navy base (T.574). Davis indicated 'he ***was alone with the child*** (T.575)." Sgt. Phillips was taken aside by a paramedic, and based upon their conversation, he called the homicide and sex crimes unit (T.575).

Captain Wade testified that his unit was dispatched to the murder scene at 1:02 p.m. and arrived within one minute (T.584-85). Davis identified himself as the stepfather, and appeared agitated (T.586). He alleged the child was choking on a French fry (T.586). The child was supine, clad only in a top, wet head to toe, and appeared lifeless (T.587). Davis said the victim was wet because 'he put her under the shower (T.588) ." The bathtub was still running when Captain Wade arrived (T.589).

When Captain Wade asked Davis if Caleasha had drowned, Davis "appeared defensive (T.590). He was loud, abrupt, and didn't really want to answer any further questions (T.590)." Caleasha had a hematoma in the temporal area over her eye (T.590). When Captain Wade picked Caleasha up he had his hand under her bottom, and his hand became all wet (T.591). Caleasha had blood coming from her vaginal canal (T.591). The blood was clotted and there were "some striations" (T.591). Captain Wade asked Davis if she had fallen or been hurt, and Davis did not answer (T.592).

Rescue initiated CPR and Caleasha was given medication, within a minute or two she regained her pulse and blood pressure (T.593-96). There was no food in her stomach (T.597). Before Captain Wade left the murder scene for the hospital he spoke with a police officer and related his findings (T.597).

Dr. DeNicola, "a pediatric critical care physician," testified Caleasha was registered in ER at 1:40 p.m. (T.609). Her pupils were fixed and dilated, which "indicate[d] a severe degree of brain damage. It may indicate that the person is already dead (T.609-10). There were "bilateral retinal hemorrhages," or in lay terms, "big splotches of blood in both eyes," which also indicated "significant trauma to the brain (T.610)." Such injuries are caused by "brain movement, shaking and trauma (T.611)."

Caleasha had a "bruise on right temple," and a "bruise on edge of right eye" (T.612). She could not breathe on her own, and there were 'no signs of life" (T.612). A CAT scan was performed, which showed 'blood pooled in back of skull," and "swelling of the brain," another indication of 'significant brain injury" (T.614). His medical findings did not comport with Davis concocted story (T.616).

Dr. DeNicola observed Dr. Whitworth, chief of the Child Protection Team, examine Caleasha (T.617). Dr. DeNicola did not concern himself with her "vaginal injury" because it had nothing to do with the brain injury, which was "life-threatening" (T.617). Dr. DeNicola's prognosis for Caleasha at that point in time was "very poor" (T.618). The next day, December 10, 1992, he pronounced Caleasha was brain dead (T.618-20).

Dr. Whitworth testified he examined Caleasha after she had been stabilized in the Pediatric ICU at Baptist Hospital, approximately 4 p.m. (T.637). The most prominent bruise on the victim he observed was over the 'left temporal area of the face" (T.638). He also observed a 'bruise on right forehead, above right eye," retinal hemorrhages, and "fresh bruising" on the left upper buttock (T.638). His vaginal exam revealed two fresh hemorrhages, one in the three o'clock position, and one in the nine o'clock position (T.639). This was a penetration injury consistent with being cause by an adult penis or finger (T.645). Dr. Whitworth observed: "Most cases we see, we don't find evidence of semen [redacted]."

As with Dr. DeNicola, Dr. Whitworth's medical findings were not consistent with Davis' alleged alibi (T.650-51). He attended Caleasha's autopsy conducted on December 11, 1992, by the Medical Examiner, Dr. Floro (T.650). Dr. Whitworth testified: ***"Ma jor head injury. Actually larger than any other head injury that we had previously seen that was on the back of the head*** (T.650-51)." At the time of the autopsy, Caleasha's vaginal injuries 'had completely cleared and had disappeared (T.653) ." He concluded: 'This child died as a result of one or more blows to the head," and "there was clear evidence consistent with attempted penetration of

the vaginal canal (T.653)." ***Caleasha was the victim of child abuse*** (T.653). Under redirect examination, Dr. Whitworth testified that Caleasha's injuries were not consistent with being dropped and hitting the bathroom floor as Davis alleged (T.672-73).

Officer Coffee testified as to his gathering evidence at the crime scene (T.675-99).

Detective Hallam was the lead homicide investigator (T.703). He was assigned Caleasha's case at 1:25 p.m. (T.703). He went to Baptist Hospital, and his partner, Detective Conn went to the murder scene (T.703-04). Detective Hallam arrived before Rescue, so he was able to observe 'three Rescue personnel bring out a small child on a stretcher" (T.704). He also observed Davis exit the vehicle (T.704). Detective Hallam assumed Davis was a family friend or relative (T.705).

Detective Hallam identified himself, asked Davis who he was, and who the child ***was*** (T.706). Davis maintained he was the child's "stepfather" (T.706). Davis related he was babysitting Caleasha, had given her some French fries for lunch, she choked, he attempted to dislodge the fry, gave her CPR, and when that didn't work instructed a friend to call **911** (T.706). His conversation with Davis lasted only two or three minutes (T.707). Davis was excited (T.708).

Detective Hallam then spoke with Frank Rogers (T.708). Fifteen to twenty minutes later he returned to the waiting area to find Caleasha's mother, Gwen, and Moore had arrived (T.709). Gwen was very upset and was unable to communicate (T.709). Detective Hallam spoke with Moore three or four minutes, and observed that Moore appeared "concerned" (T.710). Detective Hallam communicated with the doctors, and realized Davis' story was inconsistent with their findings (T.710-11). Consequently, he called for a sexual assault doctor (T.711). He briefly saw Caleasha, and saw a bump on her forehead (T.711). After conversing with the doctors, Davis became a suspect in an aggravated child abuse case (T.712).

Detective Hallam asked Davis to accompany him to police headquarters for a further interview, and Davis agreed to go (T.712).[2] Davis **was** 22-years-old when he murdered Caleasha (T.717). He repeated his story that Caleasha choked on a French fry, he tried CPR, and held her under **a** shower (T.722). Her "diaper had fallen off while he **was** holding her under the shower (T.723)."

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[2]Before Detective Hallam testified as to this interview, the prosecutor, in an abundance of caution, proffered it, since there was no motion to suppress regarding it (T.712-716). The trial court found: "I'll find that the statement -- that *Miranda* rights were given, that the statement was freely given."

They took a break for ten or fifteen minutes, and Detective Hickson took the lead in the interview (T.725-26). Davis gave a more detailed account of the French fry story (T.726). Detective Hickson remarked to Davis that he had noticed blood on the toilet seat, top of toilet tank, and floor outside the bathroom, in the hallway (T.727). He asked Davis how the blood got there, to which Davis had no explanation (T.727). Davis had no explanation for the blood on the sheets in the bedroom he shared with Gwen either (T.727). Nor could Davis say which part of Caleasha hit the floor when he allegedly dropped her (T.727). Davis also alleged that he ***left Caleasha alone in the apartment when he went upstairs to use a neighbor's phone (T.728).***

Davis refused to make a written statement (T.729). After his second interview with Detective Hickson, he ***was*** arrested for aggravated battery and capital sexual battery (T.729). When they later learned that Caleasha had died, a murder charge was added (T.729-30).

When Detective Hallam took Gwen back to her apartment, he located Caleasha's pj top, which was wet and cut down the middle (T.734). He located the bottoms by the side of the head of the bed (T.735). Under cross-examination, Detective Hallam repeated that

Davis told him he had used Ron Gordon's phone one time and Caleasha was not with him (T.751).

Detective Hickson's testimony was consistent in every material respect with that of Detective Hallam regarding his interview of Davis (T.760). Paul McCaffrey, forensic serologist, testified Caleasha's blood type "B" was located on brown carpet, two bed sheets, a floral pillowcase, and ***Davis' underwear*** (T.814-15).

Dr. Floro, Medical Examiner, testified as to the autopsy he performed upon Caleasha on December 11, 1992 (T.826-27). Dr. Floro observed three bruises to Caleasha's forehead, cheek and the back of ear which were reddish purple, indicating they were "fairly recent bruises" (T.833). He did not observe any injury to the vagina or anal area of victim (T.834). He further observed recent bruising to Caleasha's left buttock (T.834). He testified the lack of visible injury to the hymen was not unusual since he examined Caleasha two days after Dr. Whitworth found the two fresh hemorrhages (T.639, 834).

There was "extensive hemorrhaging" to the back, left side of Caleasha's head (T.836). A bruise extended "all the way from the upper back to lower back of skull (T.836)." There were four separate impacts to her skull, right forehead temple area, left cheek bone, left ear area, and left back of head (T.837).

Caleasha's brain swelled and was forced out the back of her head where the spinal cord comes out (T.839). The medulla was squeezed and all vital centers were killed (T.839). A single fall would not account for the multiple bruising found in the head and brain of Caleasha (T.841). There **was** no indication of asthma (T.842).

'Caleasha died as a result of multiple blunt traumas to the head with cerebral hemorrhage, cerebral edema, going to coma and death (T.842). The manner of death was "homicide" (T.843). On redirect examination, Dr. Floro testified the contents found in Caleasha's stomach were not French ***fries*** (T.848).

In his defense, Davis called Ron Gordon, the upstairs neighbor whose phone he allegedly used the day of the murder (T.865-76). Gordon testified that Davis came up to his apartment at 12:30 p.m. (T.868). He stayed with Gordon around 20 minutes, which included a trip down to the Laundromat (T.869). Gordon received a phone call for Davis after he left (T.870). About 1:15 p.m. Gordon went down to the Laundromat, and saw a guy running to the phone booth to dial 911 (T.870-71). Rescue arrived, and he heard the guy tell them "the child choked on a French fry and had an asthma attack" (T.871-72). When Davis was with him from 12:30 to 12:50 p.m. Caleasha was not with him (T.872, 874). When he went down to the Laundromat at 1:15 and saw the guy run to the phone, he also ***saw***

Davis holding a child limp in his arms (T.875). Davis had a look on his face "like the cat that just swallowed the bird," in other words 'surprised" (T.875-76).

The State called Olivia Williams in rebuttal, who testified that Davis contacted her by phone between 10:00 and 10:30 a.m. (T.880). She had no further contact with him that day (T.881). When the trial court asked Davis if he wanted to testify, he related his counsel attempted to persuade him not to, but he disagreed (T.886-888) Davis also expressed his desire to have Moore recalled, which he was (T.888-89, 896). However, Moore's testimony did not add anything to what he had already testified to before (T.896-900). The trial court again inquired whether Davis wanted to testify, and when he couldn't make up his mind, granted a fifteen minute recess to do so (T.903). Davis elected to testify on his own behalf (T.904-905).

Davis altered his story to make it appear that Moore was the culprit who murdered Caleasha (T.910-19). He alleged he left Caleasha with Moore when he went to Gordon's apartment (T.910-11). When he returned to his apartment at 1 p.m., he saw Caleasha in her bedroom, on the bed, having "a seizure -- trouble breathing" (T.912). Davis took her to the living room and began CPR, when Moore rang the doorbell (T.913). He ordered Moore to call 911, and

returned to administering CPR (T.913). Significantly, **Davis *admitted under cross-examination, he was alone with Caleasha from 12:05 until 12:30 p.m.*** (T.941).[3] The State recalled Lloyd Phillips to rebut Davis' contention that the patio door was open when he returned to the apartment from Gordon's (T.951-52).

PENALTY PHASE

Before the Penalty Phase of Davis' murder trial commenced, on June **13, 1995,** the trial court established the following record:

> THE COURT: Okay. Do either of you have any live witnesses to present?
>
> MR. ADAMS: At the most, Mr. Davis' mother, Corrine Davis. She might want to make some statement.
>
> THE COURT: Okay. I gather from that, Dr. Krop would not be testifying?
>
> MR. ADAMS: No, Your Honor.
>
> THE COURT: Okay. We need to make it clear for the record; was Mr. Davis seen by Dr. Krop?
>
> MR. ADAMS: Yes, he was.
>
> THE COURT: Okay. I just didn't want there to be some snafu that he didn't get this appointment. (T.1070)

With regard to aggravation, the State relied upon:

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[3]Recall, Janet Cotton testified she heard a lot of baby crying, wall thumping, and Davis yelling in a mean voice then.

> the testimony that has been provided to this jury that proved beyond a reasonable doubt that the victim in this case, Caleasha Cunningham, suffered her injuries and died as a result of injuries inflicted while the defendant was in the commission of sexual battery. (T.1082)

The only witness called by the State was the victim's mother, Gwen Cunningham, who read her written victim impact statement (T.1082-85). Davis called his mother and father in mitigation (T.1086-98). Both parents testified under cross-examination that they provided Davis with a good moral background and a work ethic (T.1092-94, 1098). They also testified that Davis was provided a stable, happy home (T.1094, 1098).

On June 28, 1995, Davis presented further mitigation through Walter Roth, a neighbor and friend of his family (T.1155). Mr. Roth testified Davis was a "good fellow," who he never saw smoke or drink (T.1155). Under cross-examination, Mr. Roth testified he did not know Davis was a convicted felon, and if he had such information, it would influence his opinion of him (T.1156-57).

On this day, the State submitted its "Memorandum in Support of Imposition of Death Sentence," in which it called for an additional aggravating circumstance of heinous, atrocious or cruel (R.404-08). Mr. Adams argued on Davis' behalf that "the facts show that it could not be an atrocious and heinous crime (T.1160)." As support

for this argument, he pointed out that Davis was seen trying to revive Caleasha (T.1160). Mr. Bledsoe, for the State, explained the addition of the heinous factor as follows:

> I have submitted for the Court's consideration, Your Honor, an additional aggravating factor that was not presented to the jury. ***The State was taking a conservative approach in the penalty phase with the jurors***.[4] But I would submit to the Court that there is an additional and very compelling aggravating circumstance in this case. And that is the murder was especially heinous, atrocious [or] cruel under the applicable Florida law. (T.1164-65)

Even without considering the heinous, atrocious, or cruel aggravator, the jury's recommendation was still 11 to 1.

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[4]Davis' fifth issue in his brief alleges error in that the trial court considered a factor that was not presented to the jury.

SUMMARY OF THE ARGUMENT

I.

Davis' first claim is without merit. He never moved to discharge his counsel, or unequivocally requested to represent himself.

II.

The State introduced competent evidence from which the jury could have reasonably rejected Davis' theory of defense, which was that Caleasha accidentally choked to death on a French fry, and sustained injuries when attempts were made to revive her.

III.

Davis' third claim regarding whether Caleasha was alive or dead when the capital sexual battery transpired is procedurally barred. On the merits, this is an issue of fact which was decided adversely to him by the jury.

IV.

The trial court correctly exercised its discretion in admitting permissible victim impact evidence. Caleasha's mother read from a prepared written statement, which comported with Florida Statutes and case law.

V.

Davis' fifth claim is procedurally barred, in that he did not object to the introduction and consideration of the heinous, atrocious or cruel aggravator. On the merits, this Court has decided this matter adversely to Davis' current position.

VI.

Davis' rape and murder of a 2-year-old child is the epitome of the heinous, atrocious or cruel aggravating circumstance.

VII.

Davis' committed the capital sexual battery during the same criminal episode as the murder. That aggravator is applicable.

VIII.

The death sentence in this cause is proportionate when compared to other cases involving the murder of a child.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION REGARDING RETENTION OF DAVIS' COUNSEL, WHERE HE NEVER MOVED TO DISCHARGE HIM, OR UNEQUIVOCALLY REQUESTED TO REPRESENT HIMSELF.

Davis' first claim is totally devoid of merit (pp.9-15). He represents that he moved to discharge his counsel on a few occasions during the course of his trial, but the record fails to exhibit such was the case. Further, courts have long required that a request for self-representation be stated unequivocally. Davis never requested to proceed pro se. He wanted to be co-counsel.

A. ***Nelson* Inquiry**

This Court has delineated **the standard of review for motions** to dismiss trial counsel as follows:

> ***If a defendant alleges that his counsel is incompetent and requests that counsel be discharged,*** the trial court must "make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant." *Hardwick v. State, 521 So.* 2d **1071,** 1074) (Fla.) *(quoting Nelson v. State, 274 So.* 2d **256,** 259 (Fla. 4th DCA 1973), *cert. denied, 488* U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988).

Valdes v. State, 626 So. 2d **1316, 1319** (Fla. 1993). Not only must a defendant allege his counsel is incompetent and request that

counsel be discharged, "[w]ithout establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel." *Capehart* v. State, 583 So. 2d *1009* (Fla.), *cert. denied, 112* S.Ct. 955, (1992); See *also, Windom v. State, 656 So.* 2d 432, 437 (Fla. 1995); Jones v. State, 612 So. 2d *1370, 1372* (Fla. 1992), *cert. denied, 114* S.Ct. 112 (1993). "A Nelson inquiry is appropriate when an indigent defendant attempts to discharge current, and obtain new, court-appointed counsel ***prior to trial*** due to ineffectiveness." *Branch* v. State, 21 Fla. L. Weekly S497 (Fla. November 21, 1996) .

'As a practical matter, a trial judge's inquiry into a defendant's complaints of incompetence of counsel can be only as specific and meaningful as the defendant's complaint (citation omitted) ." *Lowe v. State, 650 So,* 2d 969, 975 (Fla. 1994). "To mandate withdrawal . . . the prejudice caused by continued representation must be more than de minimis, and the party seeking withdrawal bears the burden of demonstrating that substantial prejudice will result if withdrawal is not allowed." ***Schwab v. State,*** 636 So. 2d 3, 5 (Fla. 1994). Even if a defendant ***unequivocally*** requested discharge of counsel, his subsequent acceptance of counsel renders such a request moot. *Scull v. State,* 533 so. 2d 1137, 1139-41 (Fla. 1988), *cert. denied, 490* U.S. 1037

(1989). The refusal to dismiss counsel is within the trial court's discretion. *Jones. v. State, supra,* at 1373.

On the first page of his brief, Davis asserts that he made an "[o]ral motion to discharge Charles Adams as his attorney (T-59, 68-71)." A correct rendition of the facts indicates the following dialogue transpired at a pretrial hearing on March 21, 1994:

> THE DEFENDANT: If I could, could I make a statement for the record?
>
> I -- like I say, I don't feel I'm being adequately represented, and I would like to request the court --
>
> THE COURT: Have you talked to Mr. Adams about this?
>
> THE DEFENDANT: No, not since November, I haven't even heard anything from him.
>
> THE COURT: They're conducting all evidence in the case, serology blood test, which is why we're not ready for trial today. But I'll make sure that he's (Adams) here on April 4th when I have the next pretrial. I'll let you talk to him.
>
> ***If you want somebody else then, you can discuss it at that time, but I'll have to have him here. But I will talk to you*** **about** ***it.***
>
> Okay. In the meantime -- you might want to give him a call -- you don't have to stand up, I know you're attached to that chair. You might want to give him, his office a call between now and then, let him know you asked me about that, so --

THE DEFENDANT: I can't get in touch with him, he's put a block on his office phone, I can't get in touch with him.

THE COURT: What does that mean?

THE DEFENDANT: The only way I can talk, he put a block on so collect calls can't come through.

THE COURT: It's ***a*** collect call even though it's ***a*** local?

THE DEFENDANT: It's collect.

THE COURT: What are they charging?

THE DEFENDANT: A dollar fifty.

THE COURT: Really? Huh.

THE DEFENDANT: And he's blocked the phone. He won't take collect calls.

THE COURT: Okay, ***I'll call him, I'll talk to*** **him** ***about it, I will have him get in touch with you.***

Okay, April 4th for an additional pretrial. (T.59)

On April 4th, the trial court discussed with Mr. Adams his preparation for Defendant's upcoming trial (T.68-70). The trial court also explained to Davis, at length, the import of such preparation in a case such as his (T.69-71). ***At no time during this hearing did Davis move to discharge his counsel, or even request other counsel*** (T.68-71) .

Davis further represents at p.l of his brief that he made an oral motion to discharge Mr. Adams and deliver his own closing argument during the guilt phase. In fact, the record reflects the following discourse:

> MR. ADAMS: I believe Mr. Davis, at this point in time, also indicates he wants to do his closing. That's in response to Ms. Baer's argument. I just want to bring that to the attention of the Court.
>
> I don't know whether you're going to inquire or have --
>
> THE COURT: Mr. Davis, what is you request, at this point?
>
> THE DEFENDANT: ***Your Honor, just that I be*** able ***to give closing arguments,*** for the simple fact that a lot of things that weren't said today, were said previously.
>
> THE COURT: ***Mr. Davis, closing argument is not a time to testify.*** You can't get up in the guise of closing "arguments and start talking about what a witness would have said, had they been called to [the] witness stand. That's the problem with doing this at this point. You can't testify.
>
> ***I go back to the issue of whether you want to discharge your*** **attorney** ***at this point.*** If you want to discharge your attorney and represent yourself from this point forward, but you got to understand that this is a two-phase process. If you're found guilty of Count I, we're going to have a penalty phase hearing.
>
> THE DEFENDANT: Yes, I understand.
>
> THE COURT: And you're in jail, you're not going to be able to go out and get witnesses and bring in

evidence. You're certainly going to be prejudiced by discharging your attorney at this point. If you were allowed to do your closing argument, you're not going to get up there and testify. You're not subject --

THE DEFENDANT: Your Honor, ***my original request of Mr. Adams that I go into this trial as co-counsel with him.***

THE COURT: ***I don't recall that being brought to my attention. I don't remember any hearings on the point.***[5]

We can't do that, at ***this point.***

THE DEFENDANT: Yes, ***I know, Your Honor.***

THE COURT: I'll be quite frank with you, I'm concerned about what the law is. You get up on appeal and you say you didn't know what you were doing, I was involved, I should not allow you to do what you want to do. That's a whole new issue.

Mr. Adams, what do you know about this?

MR. ADAMS: ***Your Honor, I don't.*** There's been --

THE COURT: **Was *this* just *brought up to you this afternoon?***

MR. ADAMS: Yes, ***sir.***

THE COURT: Mr. Davis, had you raised this a day or two ago, I certainly could have addressed it in some orderly manner.

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[5]As previous1y delineated, the trial court is correct. At no time did Davis file a written motion or orally request to proceed ***pro se,*** much less to act as ***co-counsel.***

THE DEFENDANT: Mr. Adams indicated he didn't want to address anything that I asked him to go up there in closing, he said he didn't -- didn't want to hear what I had to say.

MR. ADAMS: That is because my approach is based on what I think the evidence has shown, and I can't debate what somebody may have said that wasn't relevant.

THE DEFENDANT: See, he's telling me that certain things aren't relevant for him to bring up. I just asked him to rebut the witnesses on the issues that the State has already brung up. How could they be irrelevant if the State already brung them up, Your Honor?

MR. ADAMS: We haven't negotiated anything about that. We talked about whatever we talk about concerning the closing argument. I just made the statement --

THE COURT: I'm going to deny your request to do your closing argument. I find; one, that it's untimely; second, there's been no showing that you're capable of doing that, at this point. (T.992-995)

At this juncture, the trial court gave Davis' counsel a ten-minute break to consult with his client as, to what matters Davis wanted him to relate in his closing argument. The trial court also instructed Davis 'to write down the areas that you want Mr. Adams to address in closing on a separate sheet of paper, file it with

the clerk so if you want to review it later, it will be there, okay (T.995) ."[6]

Finally, Davis also represents at p.1 of his brief that he made an oral motion to discharge Mr. Adams prior to closing arguments during the penalty phase. A correct rendition of what actually occurred follows:

> THE DEFENDANT: I don't think I wish to testify.
>
> THE COURT: You can testify at the sentencing hearing. As I said before, there will be a hearing just before me, without the jury, in a week or two and you can put your thoughts together and tell me at that time if you want to do it that way. Of course, only thing is, you'll be subject to cross examination.
>
> THE DEFENDANT: Right.
>
> I probably rather wait till sentencing.
>
> THE COURT: Okay.
>
> THE DEFENDANT: I'm just wondering, would it be possible for me to close, or --
>
> THE COURT: Make your closing argument here?
>
> THE DEFENDANT: Yes, sir.

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[6]Later, the trial court acknowledged it had "received the sheet up here," and that it was 'going to file it, it will be part of the record . . ." **(T.1022)**. Undersigned counsel contacted the clerk's office in Duval County and determined that this paper was not in the court file.

THE COURT: I won't permit that in absence of an order allowing Mr. Adams to withdraw.

Mr. Adams, what's your position on that?

MR. ADAMS : Well, Judge, unless there's an order withdrawing, I would prefer to just make the closing myself, as attorney of record.

THE COURT: At any stage of the proceeding where the Defendant wishes to discharge his attorney, we have to go through the inquiry and make all of that on the record, but ***we need a motion and some notice.***

Okay. I'm 'going to adhere to my earlier position, Mr. Davis. I'm not going to grant your request to discharge Mr. Adams at this point and make closing.

Like I say, you will have as much time as you want to at [the] sentencing hearing, **you can** contact any witnesses you wish to be here at that time.

Okay. Let's get the jury together and proceed with closing argument. (T.1106-07)

These facts clearly reflect that ***Davis never requested to discharge his counsel.*** Therefore, ***no Nelson inquiry was warranted.*** On April 4, 1994, Davis neither requested Mr. Adams be discharged and new counsel appointed, ***or expressed that he wanted to represent himself*** (T.68-71).[7] Davis had the opportunity at this time to

[7]A review of this hearing demonstrates that a Nelson inquiry **was** conducted even though it was not required.

fully present all of his allegations, and he did not. ***See Valdes, supra; See also, Ventura v. State, 560 So.*** 2d 217, 220 (Fla. 1990).

It was not until the **day** of his sentencing, July 18, 1995, that he filed a list of **alleged** grievances as to the manner in which his counsel conducted his defense (SR.l). However, Davis still did not move to discharge Mr. Adams (T.1175-82).

Even if a Nelson inquiry was required in this cause and the trial court failed to conduct an adequate one, which the State does not concede, ***Davis' acceptance of his counsel renders this claim moot.*** In addition, Davis never established adequate grounds for Mr. Adams' dismissal. ***See Jones, supra,*** at 1373; ***Windom, supra,*** at **437.** However, Davis never requested to discharge Mr. Adams, so there was no error.

B. *Faretta* Inquiry'

As regards the ***Faretta*** component of Davis' first claim, "...the courts have long required that **a** request for self-representation be stated **unequivocally** (citations omitted)." *Hardwick v.* ***State, supra,*** at 1074. Where there is no unequivocal request for self-representation, the defendant is "not entitled to an inquiry on the subject of self-representation under ***Faretta."***

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[8] *Faretta* ***v. California, 422*** U.S. 806, 835-36 (1975).

Id., at 1073; Watts v. State, 593 So. 2d 198, 203 (Fla.), *cert. denied, 112* S.Ct. 3006 (1992); *Bowden v. State, 588 So.* 2d 225, 229 (Fla. 1991), *cert. denied,* 112 S.Ct.1596 (1992). *'A Faretta inquiry is appropriate when* a *defendant invokes the right to act* as *counsel.* It was not appropriate where appellant asked for new counsel based on his belief that his assigned counsel was too busy." *Hill v. State,* 549 So. 2d 179, 181 (Fla. 1989).

Davis never requested to represent himself. Rather, he expressed his desire to act as ***co-counsel.*** Therefore, ***no Faretta inquiry was mandated.*** It ***was*** only after both sides had rested their cases that Davis spoke of his alleged request of Mr. Adams that he be co-counsel (T.992-95). The record reflects both the trial court's and Mr. Adams' surprise at this announcement, as well as the fact that the trial court was aware of the dictates of *Faretta:*

> THE DEFENDANT: Your Honor, ***my original request of Mr. Adams that I go into this trial as co-counsel with him.***
>
> THE COURT: ***I don't recall that being brought to my attention. I don't remember any hearings on the point.***
>
> ***We can't do that, at this point.***
>
> THE DEFENDANT: Yes, I **know,** Your **Honor.**

> THE COURT: 1'11 be quite frank with you, I'm concerned about what the law is. You get up on appeal and you say you didn't know what you were doing, I was involved, I should not allow you to do what you want to do. That's a whole new issue.
>
> ***Mr. Adams, what do you*** know ***about this?***
>
> MR. ADAMS: ***Your Honor, I don't.*** There's been --
>
> THE COURT: Was ***this just brought up to you*** this ***afternoon?***
>
> MR. ADAMS: Yes, ***sir.***
>
> THE COURT: Mr. Davis, had you raised this a day or two ago, I certainly could have addressed it in some orderly manner. (T.992-993)

However, a review of the record demonstrates that when Mr. Adams first announced Davis' desire to make the closing argument at the guilt phase, the trial court did in fact comport with the requirements of *Faretta* by advising him of the consequences of discharging his attorney at this late stage:

> THE COURT: Mr. Davis, what is your request, at this point?
>
> THE DEFENDANT: Your Honor, just that I be able to give closing arguments, for the simple fact that a lot of things that weren't said today, were said previously.
>
> THE COURT: Mr. Davis, closing argument is not a time to testify. You can't get up in the guise of closing arguments and start talking about what a witness would have said, had they been called to

[the] witness stand. That's the problem with doing this at this point. You can't testify.[9]

I go back to the issue of whether you want to discharge your attorney at this point. *If* ***you want to discharge your attorney and represent*** *yourself* ***from this point forward, but you got to understand that this*** is ***a two-phase process. If you're found guilty of Count I, we're going to have*** *a* ***penalty phase hearing.***

THE DEFENDANT: Yes, I understand.

THE COURT: ***And you're in jail,*** you're ***not going to be able to go out and get witnesses and bring in evidence. You're certainly going to be prejudiced by discharging your attorney at this point. If you were allowed to do your closing argument, you're not going to get up there and testify. You're not subject --*** (T.991-92).

The trial court ultimately resolved the matter as follows:

THE COURT: ***I'm going to deny your request to do your closing argument. I find; one, that it's untimely; second, there's been no showing that*** **you're** ***capable of doing that, at this point.***

What I'll do, Mr. Adams, Mr. Davis, if you want to, I'll take a ten-minute break. Mr. Davis, you can tell Mr. Adams what you want addressed in closing, but I'm going to require that Mr. Adams use his judgment during the closing. ... (T.994)

Davis' request to make the closing argument at his penalty phase was handled in a similar fashion (T.1106-07).

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[9]The trial court astutely observed what Davis' real intention was, not to do closing argument, but to get another crack at testifying without being subject to the State's cross examination.

The record is devoid of any request by Davis to represent himself, and he had no ***right to be co-counsel.*** ***See State*** v. Tait, ***387*** So.2d 338 (Fla. 1980). In the absence of such a request, no *Faret* ***ta hearing*** **was** ***required.*** Even if one was, the trial court did in fact conduct one. The trial court correctly exercised its discretion in denying Davis' requests to essentially testify in lieu of his counsel's closing arguments during the guilt and penalty phases of his trial.

ISSUE II

THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUPPORT DAVIS' GUILTY VERDICTS FOR THE FIRST-DEGREE MURDER OF TWO-YEAR-OLD CALEASHA CUNNINGHAM, AGGRAVATED CHILD ABUSE, AND CAPITAL SEXUAL BATTERY.

The question of whether the evidence in this cause failed to exclude Davis' reasonable hypothesis of innocence was for the jury to determine, and there was substantial and competent evidence to support its verdicts of murder in the first degree, aggravated child abuse, and capital sexual battery. Placed in other terms, the State introduced competent evidence from which the jury could have reasonably rejected Davis' theory of defense.

State v. Law, 559 So. 2d 187, 188 (Fla. 1989), succinctly delineates the standard of review for a claim of insufficient evidence in a case based upon circumstantial evidence:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. (footnote omitted) A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. *Jaramillo* v. State, 417 So. 2d 257 (Fla. 1984). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *McArthur v. State*, 351 so. 2d 972 (Fla. 1977); *Mayo* v. State, 71 so. 2d 899 (Fla. 1954). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial,

> competent evidence to support the jury verdict, we will not reverse. *Heiney v. State, 447 So.* 2d 210 (Fla.), *cert. denied, 469* U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d *237 (1984); Rose v. State, 425 So.* 2d *521* (Fla. 1982), *cert. denied,* 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), *disapproved on other grounds, Williams v. State, 488 So.* 2d 62 (Fla. 1986).

In that opinion, this Court delineated the role of the trial judge in such a case when ruling on a defendant's motion for judgment of acquittal:

> It is the trial judge's proper task to ***review*** [emphasis this Court's] the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *Spinkellink v. State,* 313 So. 2d 666, 670 (Fla. 1975), *cert. denied, 428* U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The State is not required to "rebut conclusively every possible variation" (footnote omitted) of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See Toole *v. State, 472 So.* 2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond ***a*** reasonable doubt.

Id. at 189. This Court has further opined regarding such motions:

> ...If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the

> court should submit the case to the jury. (citation omitted)

Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991).

The District Court of Appeal of Florida, Third District, has delineated an appellate court's posture regarding review of a trial court's denial of a motion for judgment of acquittal as follows:

> ...In our appellate posture, we must assume that the trier of fact "believed that credible testimony most damaging to the defendant and drew from the facts established those reasonable conclusions most unfavorable to the defendant." (citations omitted) Consequently, this court will not substitute its judgment for that of the trier of fact nor pit its judgment against those determinations of fact properly rendered by the trier of fact. ***State v. Smith, 249 so.*** 2d 16 (Fla. 1971). All conflicts and reasonable inferences therefrom are resolved to support the judgment of conviction. (citations omitted)

E.Y. v. State, 390 So. 2d 776, 778 (Fla. 3d DCA 1980). Such a motion should not be granted unless there is no legally sufficient evidence on which to base a verdict of guilt. ***Knight v. State, 392*** So. 2d 337, 339 (Fla 3d DCA 1981). This Court has further opined regarding the circumstantial evidence standard:

> ...The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. (cite omitted)

Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989).

Davis concedes in his argument as to this claim, at p.19 of his brief, "[t]he State's evidence against Davis may have raised strong suspicions as to his guilt ...." The State respectfully submits it did much more than that. The State proved beyond a reasonable doubt, as demonstrated by the jury's verdicts, that Davis was culpable of the heinous murder, aggravated child abuse, and capital sexual abuse of two-year-old Caleasha Cunningham.

Caleasha's mother, Gwen, testified that when she left Caleasha alone with Davis at approximately 11:45 a.m., December 9, 1992, Caleasha was fully clothed, healthy and happy (T.488-90). Her next-door neighbor, Janet Cotton, testified that at approximately noon, she ***"heard a lot of child crying and a lot of thumping noise,*** because the walls were real thin (T.518)." She heard ***Davis' voice 'very loud," saying, "sit down"*** (T.519). ***His voice was "mean, stern"*** (T.519) ***The banging and thumping sounded like "something was hitting the wall"*** (T.519). ***The ruckus went on "[f]or about*** 30 ***minutes"*** (T.519). Thirty minutes after it ended, Rescue arrived (T.520). Under cross-examination, Janet testified that what she heard from Apartment 1 was "like something was bamming against something," like against the wall in the living room (T.522).

Sgt. Phillips testified Davis admitted, during a short conversation with him at the murder scene, that ***"he was alone with the child"*** (T.574-75). Detective Hallam testified **Davis** told him at the hospital that he was babysitting Caleasha, had given her some French fries for lunch, she choked, he attempted to dislodge the fry, gave her CPR, and when that didn't work, instructed a friend[10] to call 911 (T.706). Subsequent to this conversation, Detective Hallam did further investigation, and realized Davis' story ***was inconsistent*** with the doctors' findings at the hospital (T.708-12). Davis became a suspect in an aggravated child abuse case, and was asked to accompany Detective Hallam to police headquarters (T.712).

At the police station, Davis repeated his story that Caleasha choked on a French fry, he tried CPR, and held her under a shower (T.722). Her "diaper had fallen off while he was holding her under the shower (T.723)." Detective Hickson remarked to Davis that he **had** noticed blood on the toilet seat, top of toilet tank, and floor outside the bathroom, in the hallway (T.727). He asked Davis how the blood got there, to which ***Davis had no explanation (T.727). Davis had no explanation for the blood on the sheets*** in the bedroom

[10]That would have been Moore.

he shared with Gwen either (T.727).[11] Nor *could Davis say which part of Caleasha hit the* floor *when he allegedly dropped her* (T.727).

After sitting through the presentation of the State's evidence against him, Davis took the stand on his own behalf, and altered his story to make it appear that Moore was the culprit who abused and murdered Caleasha (T.910-19). However, he admitted under cross-examination *he* was *alone with Caleasha from 12:05 until 12:30 p.m.*, the same time frame Janet Cotton testified she heard the "ruckus" in Gwen's apartment, including Caleasha's crying and Davis' 'mean" yelling (T.518-19, 941).

The State's evidence completely refuted Davis' absurd alibi. Dr. Floro, who performed the autopsy, testified the contents found in Caleasha's stomach were *not French fries* (T.848). Davis never explained the blood exiting Caleasha's vagina, when Captain Wade asked him about it at the murder scene (T.591-92).

As regards Davis' contention that he dropped Caleasha when he tried to revive her in the shower, it was previously related that Davis could not tell Detective Hickson which part of Caleasha hit

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[11]Paul McCaffrey, forensic serologist, testified Caleasha's blood type "B" was located upon a sample of the brown carpet in front of the bathroom, two bed sheets, a floral pillowcase, and *Davis' underwear* (T.814-15).

the floor (T.727). Dr. DeNicola testified his medical findings did not comport with Davis' story (T.616). Dr. Whitworth, who attended the autopsy, testified: "Major head injury. Actually larger than any other head injury that we had previously seen that was on the back of the head (T.650-51)." He concluded: 'This child died as a result of one or more blows to the head," and "there was clear evidence consistent with attempted penetration of the vaginal canal (T.653)." Caleasha was the victim of child abuse (T.653). He further testified upon redirect examination, that Caleasha's injuries were not consistent with being dropped and hitting the bathroom floor as Davis alleged (T.672-73). Dr. Floro's testimony further negated Davis' fabrication: "Caleasha died as a result of multiple blunt traumas to the head with cerebral hemorrhage, cerebral edema, going to coma and death (T.842)." The manner of death was "homicide" (T.843).

Davis suggests on p.18 of his brief that the "most obvious hypothesis of innocence was, of course, that someone other than Davis committed the three crimes of which he was convicted." However, he fails to take into account that it wasn't until his trial, after having the opportunity to hear the State's case against him, that he constructed a version of his alibi, which cast a shadow on Moore. At trial, for the first time, Davis alleged

that Moore was alone with Caleasha when she choked on a French fry and Moore panicked, exiting out a sliding glass door at the back of the apartment Davis shared with Gwen (T.911-14). However, Sgt. Phillips was called in rebuttal to testify that not only was the sliding glass door closed, it was ***locked,*** eliminating Moore's alleged egress from the apartment (T.950-53).

In all his statements to the police at the murder scene, hospital, and at the station, Davis never gave cause for the police to suspect Moore. Rather, he told the police on the day of the murder that he was alone with Caleasha, and he admitted at trial he was alone with her when Janet Cotton heard the commotion next-door. Davis claimed he did not reveal Moore as the culprit earlier because Moore had marijauna in his possession and he was trying to protect him (T.914). This excuse **was lame,** particularly in light of Moore's instant reaction in calling **911 at** Davis' bequest when he ***"surprised"*** Davis and saw Caleasha 'lifeless . . . draped over his left arm" (T.536-38, 913-14). Further, Detective Hallam described Moore's demeanor at the hospital as ***"concerned"*** about Caleasha's well-being (T.710). Captain Wade, on the other hand, described Davis demeanor when he asked Davis at the murder scene if Caleasha had drowned, as ***"defensive, loud,*** abrupt" and Davis did not want to answer any other questions (T.590).

There was substantial, competent evidence to support the jury's determination that Davis was guilty of all counts as charged in the indictment. The State's evidence against Davis, including his own admission that he was alone with the victim during the crucial time frame related by Ms. Cotton, **was** overwhelming, and clearly refuted Davis' account of what transpired when Caleasha was raped and murdered.

ISSUE III

WHETHER THE VICTIM WAS ALIVE OR DEAD AT THE TIME OF SEXUAL UNION WAS AN ISSUE OF FACT DETERMINED BY THE JURY ADVERSELY TO DAVIS' CURRENT POSITION, AND SAID ISSUE IS PROCEDURALLY BARRED.

Davis never raised this issue when he moved for a judgment of acquittal at the conclusion of the State's case-in-chief (T.857). His argument for acquittal on the capital sexual battery charge was:

> And is there sexual battery?
>
> Based, again, on the State's expert witnesses, there is nothing but speculation and innuendo to say that. There's only a weak implication at best.
>
> And taking into account that if there's a break in the circumstantial evidence, the link has not been proven, there is no way that this case should be given to the jury to make a decision on. (T.857)

His renewed motion for judgment of acquittal was premised on his original motion (T.884). His motion for new trial alleged: '9. The evidence was insufficient as a matter of law to convict defendant of sexual battery (T.412-13)." It is well established law that in order for an argument to be cognizable on appeal, it must be the ***specific contention*** asserted as the legal ground for objection, exception, or motion below. ***Steinhorst v. State, 412 So.*** 2d 332, 338 (Fla. 1982); ***See also,*** *Tillman* ***v. State, 471 So.*** 2d 32, 35

(Fla. 1985) ; *Bertolotti v. Dugger, 514 So,* 2d 1095, 1096 (Fla. 1987). Davis' third claim is procedurally barred for failure to raise below the specific contention he raises for the first time on appeal. It is also without merit.

"Whether the victim was alive or dead at the time of sexual union . . . is an issue of fact to be determined by the jury." *Owen* v. State, 596 So. 2d 985 (Fla. 1992), *cert. denied,* 113 S.Ct. 338 (1992). In this cause, the jury found Davis guilty of the capital sexual battery of Caleasha (R. 350; T.1060).

Janet Cotton, testified that at approximately noon, she ***"heard a lot of child crying and a lot of thumping noise,*** because the walls were real thin (T.518)." She heard ***Davis' voice "very loud," saying, "sit down"*** (T.519) . His voice was ***"mean, stern"*** (T.519) The banging and thumping sounded like "something was hitting the wall (T.519) ." ***The ruckus went on "[f]or about 30 minutes"*** (T.519). Davis, himself, admitted under cross-examination he was alone with Caleasha from 12:05 p.m. until 12:30 p.m. (T.941).

Captain Wade testified that when he picked Caleasha up ***she had blood coming from her vaginal canal*** (T.591). Dr. Whitworth testified Caleasha's vaginal exam revealed ***two fresh hemorrhages, one in the three o'clock position, and one in the nine o'clock position (T.639).*** This was a penetration injury consistent with

being ***caused by an adult penis or finger*** (T.645). "[T]here was clear evidence consistent with attempted ***penetration of the vaginal*** canal (T.653)." Caleasha was the ***victim of child abuse (T.653).***

It was for the jury to decide whether Caleasha was alive or dead at the time of the sexual battery. "[T]he ***common-sense inference*** from the facts is that Caleasha was physically and sexually abused before she died." ***See*** *Gilliam* ***v. State, 582 So.*** 2d 610, 612 (Fla. 1991). Its verdict of guilt for the capital sexual battery of Caleasha demonstrates it decided this matter adversely to Davis' current position. There was substantial and competent evidence to support this verdict. ***State v. Law, supra.***

ISSUE IV

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN ADMITTING PERMISSIBLE VICTIM IMPACT EVIDENCE.

The United States Supreme Court has held:

> We thus hold that if the State chooses to permit the admission of victim evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that ***evidence*** **about** ***the*** **victim** ***and*** **about** ***the impact of the murder on the victim's family*** is relevant to the jury's decision **as** to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, 736 (1991). "[T]his Court has held victim impact testimony to be admissible **as** long **as** it comes within the parameters of the Payne decision." (citations omitted) *Windom* ***v. State, supra,*** at 438. Since ***Windom,*** this Court has acknowledged and upheld the state's right to present victim impact evidence numerous times. See e.g., ***Branch v. State, supra; Bonifay v.*** State, 21 Fla. L. Weekly S301 (Fla. July ***11,*** 1996); ***Farina v. State,*** 21 Fla. L. Weekly S173 (Fla. April 18, 1996) ; ***Allen*** v. ***State,*** 662 So. 2d 323 (Fla. 1995).

Payne concerned the murder of a 28-year-old mother and her 2-year-old daughter.[12] The Supreme Court found the testimony of the

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[12]Miraculously, the mother's 3-year-old son survived, despite several wounds inflicted by a butcher knife that completely

maternal grandmother as to the manner in which the 3-year-old son was affected by the murders of his mother and sister to be admissible victim impact evidence. *Payne*, 115 L.Ed.2d at 728. It further found that the prosecutor's comments during closing argument on the continuing effects of the boy's experience appropriate. Such comments included:

> The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.

Payne, 115 L.Ed.2d at 729.

In *Windom*, this Court found a police officer's testimony concerning her observation about one of two sons of the victim following the murder to be admissible. *Windom v. State, supra,* at *438.* Her testimony included quoting from memory an essay the boy wrote. *Id.* This Court also found that her testimony concerning children in the community other than the victim's two sons was erroneously admitted but it was harmless error. *Id.*

However, Section 921.141(7), Fla. Stat. (1995) defines Victim impact evidence" accordingly: "Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being

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penetrated through his body from front to back.

and the resultant loss to the community's members by the victim's death." This Court subsequent to *Windom* has determined, in keeping with **Section** 921.141(7) that the testimony found to be harmless error in that cause, is in fact no error at all. In *Bonifay, **supra,*** at S303, this Court found, regarding testimony of the victim's wife and prosecutorial comment thereon, as follows:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family.

In light of the aforementioned authorities and statute, Gwen Cunningham's written statement, and the prosecutor's argument thereon, was valid "victim impact evidence," which was properly presented to the jury for its consideration.

> Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by ***a*** victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial. Just the opposite is true. Most States have enacted legislation enabling judges and juries to consider victim impact evidence. (citation omitted)

Payne, Justice O'Connor ***concurring,*** 115 L.Ed.2d at 739. Gwen confined herself to 2-year-old Caleasha's uniqueness as a human being, and the incredible loss experienced by both herself

and Caleasha's siblings by her hideous demise, and the prosecutor similarly restricted himself in his penalty phase closing argument.[13]

> "Murder is the ultimate act of depersonalization." (citation omitted) It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.

Davis argues at p.24 of his brief: 'In fact, it is an amazing stretch to say that a two year old's habits, likes and dislikes are even remotely relevant to any issue in a court of law." The depersonalization continues even after death. Caleasha's whole life was before her, he robbed her of it, and now he belittles her all too brief existence. Justice Souter, *concurring* in ***Payne, 115*** L.Ed.2d 744, opined:

> Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors," who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of

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[13]There was no mention of the loss experienced by the community by Caleasha's murder, which is not difficult to conceive when one considers one's own sense of moral outrage at this loathsome crime.

> relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.
>
> That foreseeability of the killing's consequences imbues them with direct moral relevance (citation omitted), and evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence of the risk that the defendant originally chose to run despite the kinds of consequences that were obviously foreseeable. It ***is morally both defensible and appropriate to consider such evidence when penalizing a murderer,*** like ***other criminals, in light of common knowledge and the moral responsibility that such knowledge entails.*** Any failure to take account of a victim's individuality and the effects of his death upon close survivors would thus more appropriately be called an act of lenity than their consideration an invitation to arbitrary sentencing. ***Indeed, given a defendant's option to introduce relevant evidence in mitigation,*** (citation omitted), ***sentencing without such evidence of victim impact may be seen as a significantly imbalanced process.*** (citation omitted)

If this Court should deem admission of Gwen's statement was error, which the State does not concede, then it was harmless

beyond a reasonable doubt. *Windom v. State, supra,* at 438. The murder and rape of Caleasha was so heinous as to shock the conscience of any individual, and Gwen's statement was merely cumulative to a common-sense inference that could be drawn by the jury from the evidence presented during the trial.

ISSUE V

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE, WHERE IT EXISTED BEYOND A REASONABLE DOUBT,

Davis' fifth claim is waived for failure to object to the introduction and consideration of the heinous, atrocious or cruel aggravating circumstance after the jury had returned its 11-1 recommendation. ***See Vining*** v. State, 637 So. 2d 921, 927 (Fla. 1994) (Vining complained that the trial judge considered matters not presented in open court, including depositions in the court file, the medical examiner's report, and the probate record of Caruso's estate. This Court found that the issue was ***waived*** for purposes of appellate review as ***defense counsel never objected to the court's consideration of this material.).*** In this cause, when the prosecutor announced it was seeking the heinous factor, and the circumstances he believed warranted such a finding, Davis argued only that the factor was inapplicable, not that the jury had not been allowed to consider it ***(T.1170).***

On the merits, this Court has held that a defendant's argument "that the trial court erred in finding that the murder was especially heinous, atrocious or cruel even though the jury was not instructed on this particular circumstance . . . ***to*** *be* ***without***

merit." *Hoffman* v. State, 474 So. 1178, 1182 (Fla. 1985). This Court has similarly held as to other aggravators. *See Cochran v. State, supra,* at 931 (It is permissible for the sentencing judge to receive evidence of aggravating factors not provided to the jury); *Engle v. State,* 438 So. 2d 803 (Fla. 1983), *remanded for resentencing on other grounds* (Defendant's due process rights not violated when State was permitted to argue before the trial judge at sentencing for the applicability of two aggravating factors that had not been argued before the jury.); James *v. State, 453 So.* 2d *786* (Fla.), *cert. denied, 469* U.S. 1098 (1984) ***(No*** error where court found but did not instruct jury on the felony-murder aggravator.); *Fitzpatrick v. State,* 437 So. 2d 1072, 1078 (Fla. 1983), *cert. denied, 465* U.S. 1051 (1984) (Same as concerns felony involving the use of violence to another person).

This Court has held similarly regarding evidence in general, which a trial court considered during the penalty phase, but the jury did not. *See Porter v. State, 429 So.* 2d 293, 296 (Fla.), *cert. denied,* 464 U.S. 865 (1983) (Trial court had access to deposition, which jury did not *see.); White v. State, 403 So.* 2d 331 (Fla. 1981), *cert. denied, 463* U.S. 1229 (1983)("In arriving at a conclusion contrary to the jury recommendation the trial judge noted that as a result of the [PSI] and information presented at

sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider.") (footnote omitted).

In *Engle* v. *State, supra,* at 803, this Court opined:

> ***The trial judge is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence.***

It has further opined:

> We remind the judge that, even though a jury determination is entitled to great weight, "the judge is required to make an ***independent determination,*** based on the aggravating and mitigating factors." (citation omitted)

King v. State, 623 So, 2d 486 (Fla. 1993).

Davis' argument that the trial court erred in finding the heinous, atrocious or cruel aggravator, because the jury never heard evidence or was instructed upon the same, is ***"without merit."*** *Hoffman v. State,* supra, at 1182. As this Court held in that cause: ***"We fail to see how the jury's not being instructed on this aggravating circumstance has worked to appellant's disadvantage."*** *Id.* It did not, and this Court's conclusion in *Hoffman* is equally applicable here, and it follows that any error in this cause regarding the finding of the heinous factor, was harmless beyond a reasonable doubt. *State v. DiGuilio, 491* So. 2d 1129 (Fla. 1986).

However, it is clear from the aforementioned authority there was no error.

Finally, Davis' reliance on *Lankford v. **Idaho, 500*** U.S. 110, 11 S.Ct. 1723, 114 L.Ed.2d 173 (1991) is totally misplaced, as it is clearly distinguishable from the facts in this cause. Unlike this cause, Lankford and his counsel had no notice that the judge might sentence him to death. Therefore, Lankford's counsel had no opportunity to prepare arguments at his sentencing hearing addressing the aggravating circumstances identified by the judge and his reasons for disbelieving Lankford. In essence, Lankford was ***ambushed*** by the trial judge when he was sentenced to death.

In this cause, Davis and his counsel knew the State would be seeking the additional aggravator of heinous, atrocious or cruel prior to the trial judge passing sentence on July 18, 1995, because the State raised it in its "Memorandum in Support of Imposition of Death Sentence" (R.406-07). On June 28, 1996, the prosecutor argued before the trial court those facts demonstrating this factor was applicable, and ***Mr. Adams argued on Davis' behalf why it*** was ***not*** (T.1164-70).

Davis' fifth claim is not only procedurally barred, it is devoid of merit. The trial court correctly found the heinous

factor, which was proven beyond a reasonable doubt, as the State's argument on Davis' sixth claim will demonstrate.

ISSUE VI

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR, WHERE IT WAS PROVEN BEYOND A REASONABLE DOUBT.

Davis' rape and murder of a two-year-old infant is **the epitome** of the heinous, atrocious, or cruel aggravating circumstance. Although brief,[14] the trial court's finding for this aggravator speaks volumes to Davis' unconscionable crimes against little Caleasha Cunningham:

> The evidence clearly established that the murder of the two-year-old victim was both conscienceless or pitiless and unnecessarily torturous to the victim. *Richardson* v. State, 604, So. 2d 1107, 1109 (Fla. 1992) ; *Rivera v. State, 561 So.* 2d 536, 540 (Fla. 1990). The child/victim was crying throughout her ordeal, which lasted at least thirty (30) minutes. She was alone with Defendant. The Defendant, in killing her, inflicted four (4) vicious blows to her head until she was rendered unconscious.
>
> The State has proved this aggravating factor beyond all reasonable doubt. (R.427)

This Court has opined:

> ...It is not merely the specific and narrow method in which a victim is killed which makes. a murder heinous, atrocious, or cruel; rather, it is the

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[14]Prior to its FINDINGS regarding statutory aggravating circumstances in its written order, the trial court related 3 pages of FACTS upon which those findings were **based, which of course are** clothed with a presumption of correctness (R.424-27). *Shapiro v.* State, 390 so. 2d 344 (Fla. 1980).

> ***entire set of circumstances surrounding the killing.***

Magill v. State, 386 So. 2d 1188 (Fla. 1980), cert. denied, 101 S.Ct. 1384 (1981), (*Magill* I), appeal *upon remand, 428 So.* 2d 649, *651* (Fla. 1989), *cert. denied, 104* S.Ct. 198. It has further opined:

> ...In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a ***"common-sense inference from the circumstances,"*** *Swafford v. State, 533 So.* 2d 270, *277* (Fla. 1988), *cert. denied, 489* U.S. 1100, 109 S.Ct. **1578,** 103 L.Ed.2d 944 (1989), and the common-sense inference from the facts is that the victim struggled with her assailant and suffered before she died. We find no abuse of discretion. *Grossman* v. State, 525 So. 2d 833, 841 (Fla. 1988), *cert denied,* 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989) .

Gilliam v. State, 582 *So,* 2d 610, **612** (Fla. 1991).

Davis' argument ignores the 'entire set of circumstances" surrounding Caleasha's murder, ***as*** well as the ***"common-sense inference"*** the trial judge could draw from those circumstances. He also ignores the sheer terror Caleasha must have experienced when he began to abuse her both physically and sexually. 'The ***mindset or mental anguish*** of the victim is an important factor in determining whether this aggravating circumstance applies." *Phillips* v. State, 476 So. 2d 194, 196 (Fla. 1985). 'Fear ***and emotional strain*** may be considered as contributing to the heinous

nature of the murder, even where the victim's death was almost instantaneous." ***Preston v. State, 607 So.*** 2d 404, 409-10 (Fla.), ***cert. denied, 113*** S.Ct. ***1619*** (1992); ***See also Hitchcock*** v. State, ***578 So.*** 2d ***685, 693*** (Fla.), ***cert. denied,*** 112 S.Ct. 311 (1990); *Rivera* ***v. State,*** 561 ***So.*** 2d ***536, 540*** (Fla. 1990); ***Chandler v.*** State, 534 So. 2d 701, 704 (Fla. 1988), ***cert.*** denied, 490 U.S. 1075 (1989); ***Phillips*** v. State, ***supra; Mason*** v. State, 438 So. 2d 374 (Fla. 1983), ***cert. denied 104*** S.Ct. 1330 (1984); ***Adams v. State,*** 412 So. 2d ***850*** (Fla.), *cert* ***denied,*** 103 S.Ct. 182 (1982). "Moreover, ***the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." Swafford v. State,*** supra, at 277; See ***also Preston*** v. State, ***supra,*** at 946 (Victim ***must have*** felt terror and fear as these events unfolded" [emphasis this court's]).

This Court has consistently held that the heinous factor was applicable where a child was the victim. See, ***Cardona v. State,*** 641 So. 2d 361 (Fla. 1994), ***cert. denied,*** 115 S.Ct. 1122 (1995) (Mother physically abused her son, "Baby Lollipops", over months of time to the point of his having irreversible brain damage which eventually hastened his death, as well ***as*** neglected him resulting in malnutrition and anemia.); ***Carroll v. State, 636 So.*** 2d 1316 (Fla. 1994), ***cert. denied,*** 115 S.Ct. 447 (1994) (a-year-old

girl raped and strangled when retired for the night in her own bed.); *Schwab v. State, supra* (11-year-old boy abducted, raped, and either smothered or strangled to death.); *Arbelaez v. State, 626* So. 2d 169 (Fla. 1993), cert. denied, 114 S.Ct. 2123 (1994) (5-year-old boy beaten, strangled, and thrown off 70 foot bridge to drown.) ; *Sanchez-Velasco v.* State, 570 So. 2d 908 (Fla. 1990), *cert. denied,* 111 S.Ct. 2045 (1991) (ll-year-old girl raped and strangled to death); *Rivera v.* State, 561 So. 2d 536 (Fla. 1990)(11-year-old girl abducted, raped and choked to death in open field); *Smith v. State,* 515 *So.* 2d 182 (Fla. 1987), *cert. denied,* 108 S.Ct. 1249 (1988)(8-year-old girl raped, sodomized, and severely beaten about the head with a rock.); *Atkins* v. State, 497 So. 2d 1200 (Fla. 1986)(6-year-old boy abducted, forced to perform sexual acts, beaten about the head with a blunt instrument when child threatened to tell his parents.); *Davis v. State,* 461 So. 2d 67 (Fla. 1985), *cert. denied, 473* U.S. 913 (1985)(Mother beaten over head with a pistol almost beyond recognition, one daughter tied up and shot twice, and second daughter shot once in **back** and beaten.); *Hitchcock v. State, 413 So.* 2d 741 (Fla. 1982) (13-year-old girl raped in her bedroom at 2:30 a.m., beaten and choked to death because she complained of being hurt and that she would tell her mother.); *Adams v. State,* 412 So. 2d 850 (Fla.1982), cert.

denied, 459 U.S. 882 (1982) (a-year-old girl raped, bound, and strangled to death.); ***Buford v. State, 403 So.*** 2d 943 (Fla. 1981), *cert. denied, 454 U.S. 1163* (1982) (7-year-old girl abducted from her home while asleep, brutally sexually assaulted, and killed by having concrete block dropped repeatedly on her head.); *Dobbert* ***v. State, 375 so.*** 2d 1069 (Fla. 1979), ***cert. denied, 447 U.S.*** 912 (1980) (Father physically abused his g-year-old daughter, and then killed her to prevent detection.); ***Rutledge*** *v.* State, 374 So. 2d 975 (Fla. 1979), *cert. denied, 446* U.S. 913 (1980) (Mother and oldest son, lo-years-old, literally butchered to death.); ***Morris v.*** State, 557 So. 2d 27 (Fla. 1990)(18-month-old boy died of multiple injuries due to blunt trauma at hands of mother's boyfriend. **H.A.C.** upheld but death sentence reversed owing to jury's life recommendation and extensive mitigation.); ***Smalley*** *v.* ***State, 546 so.*** 2d 720 (Fla. 1989) (Again, mother's boyfriend beat and dunked 28-month-old daughter's head in **water,** because she was ill and whining. H.A.C. 'well supported by the record," but death sentence commuted to life in view of extensive mitigation.)

Davis alleges **at** p.30 of his brief, 'no evidence **was** presented of torture or extreme suffering on the part of the victim." Given **Janet** Cotton's testimony, Davis' own admission that he **was** present when she heard the ruckus next door, and the doctors' testimony,

the ***"common-sense inference"*** is that Caleasha was physically abused and raped before she died, rendering the heinous factor clearly applicable in this cause. *Gilliam*. In addition, photographs of the victim which were admitted into evidence, are probably the best evidence demonstrating the horrific ordeal this innocent ***2-year-old*** child endured for ***30 minutes.***

Davis alleges the fact that Caleasha was administered a blow which rendered her unconscious refutes the trial court's findings as to this aggravator. This argument is fallacious, based upon Janet Cotton's testimony that Caleasha's ***'crying and a lot of thumping noise"*** transpired over a ***30 minute*** period (T.519). In Atkins v. State, ***supra,*** at 1202-03, this Court upheld the trial court's finding that the heinous factor ***was*** applicable, and included in its opinion the trial court's findings thereon, which read in pertinent part:

> There is no evidence as to when the child became unconscious so that he could suffer no further pain, nor as to when, if at all, he regained consciousness, but it is highly probable that the child suffered excruciating pain before dying. The child was abandoned while alive in a desolate area.

A similar ***"common-sense inference"*** could be drawn in this cause, particularly in view of the fact that the attacks transpired over a ***30 minute period.***

Davis also comments: "Finally, to suggest that the only reason a two year old cries is because she is being tortured is ludicrous (p.31)." The only thing ludicrous is this comment, given the fact that Caleasha was not only savagely beaten about the head but sexually abused as well during the course of 30 minutes. "[T]he shockingly evil and unnecessarily torturous murder of this [2-year-old] child was especially heinous, atrocious, and cruel as this circumstance is defined in State v. ***Dixon, 283 So. 1, 9*** (Fla. 1973)." ***Dobbert v. State, supra,*** at 1071.

Even if this court were to find that the heinous factor was improperly found in this cause, the trial court would still have found that the remaining aggravator, during the course of a capital sexual battery, outweighed neglible mitigation, thereby rendering any error harmless beyond a reasonable doubt. ***Wuornos v. State,*** 644 So. 2d 1000, 1011 (Fla. 1994). However, a review of the photographs taken of Caleasha, which were entered into evidence, demonstrates there was no error in finding this aggravator applicable to Davis' monstrous acts.

ISSUE VII

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THAT THE MURDER WAS COMMITTED WHILE DAVIS WAS ENGAGED IN THE COMMISSION OF, OR ATTEMPTING TO COMMIT, A CAPITAL SEXUAL BATTERY.

The trial court correctly applied a "***common-sense inference***" from the circumstances that Caleasha was murdered during the course of a capital sexual battery. *Swafford v. State, supra,* at 277; *Gilliam v. State, supra,* at 612; *Preston v. State, supra,* at 946. Section 921.141(5)(d) Fla. Stat. (1991) reads:

> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any . . . sexual battery . . . .

'It is a homicide committed during the perpetration of a felony, if the homicide is part of the res ***gestae*** of the felony." *Jefferson v. State,* 128 So. 2d 132, 137 (Fla. 1961); *See also, Roberts v.* State, 510 So. 2d 885, 888 (Fla. 1987), *cert. denied, 485* U.S. 943 (1988) ("Although as Roberts points out, it is clear from the record that the murder did not occur 'during' the actual sexual battery on Rimondi, the murder of Napoles and subsequent sexual battery and kidnaping of Rimondi were part of the same *criminal episode.").*

The trial court found as follows concerning the capital sexual battery during the course of the murder aggravator:

> The evidence as summarized above[15] established beyond a reasonable doubt that the Defendant, while alone with the child who was less than twelve (12) years old, forcibly penetrated her vagina. During the course of committing this crime of Sexual Battery, he inflicted fatal blows to the child. (R.426).

Again, Janet Cotton's testimony, coupled with Davis' admission that he was alone with Caleasha during the same time frame, as well as the testimony of Sgt. Phillips, Captain Wade, and Dr. Whitworth, demonstrates this circumstance was proven beyond a reasonable doubt (T.518-19, 574-75, 591-92, 597, 638-39, 645, 653, 941).

Davis' argument as to this claim is premised upon his argument made for his third claim, concerning whether Caleasha was alive or dead when her vagina was penetrated (pp.20-21). As previously delineated, this was "an issue of fact to be determined by the jury." ***Owen v. State, supra, (1992).*** The matter was determined by the jury adversely to his position. Given the jury's determination of this matter, the trial court correctly exercised its discretion in finding this aggravating circumstance was proven beyond a reasonable doubt.

Even if this Court were to find this aggravator inapplicable, without conceding as much, error would be harmless beyond a

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[15]Again, the trial court was referring to its 3 pages of FINDINGS (R.424-26).

reasonable doubt. See e.g., *Capehart* ***v. State, supra,*** **at 1014;** ***Wuornos*** *v.* ***State, supra,*** at 1011. Even in the absence of this aggravating circumstance, the trial court would still have found the remaining heinous factor outweighed negligible mitigating evidence.

ISSUE VIII

DAVIS' DEATH SENTENCE WAS PROPORTIONATE WHEN JUXTAPOSED WITH OTHER CASES INVOLVING CHILD VICTIMS.

Proportionality review as delineated by this Court is as follows:

> ...In reviewing a death sentence, this Court must consider the particular circumstances of the case on review in comparison to other decisions we have made, and then decide if death is an appropriate penalty in comparison to those other decisions.

Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995).

As demonstrated in the State's argument as to the applicability of the heinous factor to the circumstances surrounding Caleasha's horrible end, this Court has consistently held death was a proportionate sentence where the murder involved a ***child. See, Cardona v. State, supra*** (3-year-old boy, "Baby Lollipops"); Carroll v. State, *supra* (8-year-old girl raped and strangled.); ***Schwab v. State, supra*** (II-year-old boy abducted, raped, and either smothered or strangled to death.); ***Arbelaez v. State, supra*** (S-year-old boy beaten, strangled, and thrown off 70 foot bridge.); ***Sanchez-Velasco v. State, supra*** (II-year-old girl raped and strangled to death); *Rivera* ***v. State, supra*** (II-year-old girl abducted, raped and choked to death in open field); Smith *v.* ***State, supra*** (8-year-old girl raped, sodomized, and severely beaten

about the head with a rock.); *Atkins v. State,* supra (6-year-old boy abducted, forced to perform sexual acts, beaten about the head with a blunt instrument.); *Davis v. State,* supra (One daughter tied up and shot twice, and second daughter shot once in back and beaten.); *Hitchcock v. State,* (13-year-old girl raped, beaten and choked to death.); *Adams v. State, supra* (a-year-old girl raped, bound, and strangled to death.); *Buford v. State, supra* (7-year-old girl abducted, brutally sexually assaulted, and killed by having concrete block dropped repeatedly on her head.); *Dobbert v. State,* supra (Father physically abused his g-year-old daughter, and then killed her to prevent detection.); *Rutledge v. State, supra* (Mother and oldest son, IO-years-old, literally butchered to death.),

The trial court found no statutory mitigating circumstances existed (R.427). The only non-statutory mitigating circumstances it found were that Davis was "a good child, attended church, has talent as a musician, writes poetry, and participated in sports," and afforded them "some weight" (R.428-29). The trial court correctly found the aggravating circumstances outweighed the mitigating circumstances. In view of the aforementioned authorities, the fact that Caleasha was only 2-years-old when she underwent her horrific ordeal, demonstrates that Davis' execution is warranted in this cause.

CONCLUSION

Based upon the foregoing facts, authorities, and reasoning, the State respectfully requests this Honorable Court affirm Davis' convictions and sentences thereon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to BILL SALMON, Counsel for Appellant, P.O. Box 1095, Gainesville, FL, 32601, this 16th day of December, 1996.

Mark S. Dunn
MARK S. DUNN
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

TONEY DERON DAVIS,

Appellant,

v. CASE NO. 96-822

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

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INDEX TO APPENDIX

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DWAL COUNTY, FLORIDA.

CASE NO.: 92-13193-CF

DIVISION: "CR-E"

FILED
JUL 18 1995
Henry W. Cook
CLERK CIRCUIT COURT

STATE OF FLORIDA

vs.

TONEY DERON DAVIS

SENTENCING ORDER

A. PRELIMINARY STATEMENT

This Court, prior to preparing this Sentencing Order; has read and studied the opinions in the following cases::-

Campbell v. State, 571 So.2d 415 (Fla. 1990); Perez v. State, 648 So.2d 715 (Fla. 1995); Crump v. State, 654 So.2d 545 (Fla. 1995); Ferrell v. State, 653 So.2d 367 (Fla. 1995); Larkins v. State, 20 Fla. L Weekly S 228 (Fla. May 11, 1995); and Spencer v. State, 615 So.2d 688 (Fla. 1993).

This Order has been prepared in accordance with this Court's understanding of the requirements of the cases cited...

B. PROCEDURAL HISTORY

The Defendant was ARRESTED on DECEMBER 9, 1992, on the CHARGES of AGGRAVATED CHILD ABUSE AND SEXUAL BATTERY. The victim of the alleged

92/13

offenses died on December 10, 1992. An INFORMATION charging the Defendant with ONE (1) COUNT EACH of SECOND DEGREE MURDER, AGGRAVATED CHILD ABUSE, and. SEXUAL BATTERY was FILED on DECEMBER 28, 1992. The Defendant's trial attorney was appointed on JANUARY 21, 1993. The Defendant had been represented by the Office of the Public Defender from the time of his initial court appearance until JANUARY 21, 1993.

An INDICTMENT charging the Defendant with ONE (1) COUNT EACH of PREMEDITATED MURDER IN THE FIRST DEGREE, AGGRAVATED CHILD ABUSE, and SEXUAL BATTERY was returned FEBRUARY 25, 1993.. That Indictment was superseded by an INDICTMENT FILED on SEPTEMBER 29, 1994 which charged the Defendant with FIRST DEGREE FELONY MURDER, AGGRAVATED CHILD ABUSE, 'and SEXUAL BATTERY. A THIRD AND FINAL INDICTMENT was returned on DECEMBER 15, 1994. That Indictment contain& the same charges as the previous Indictment.

The Defendant was tried before this Court on MAY 8, 1995 THROUGH MAY 11, 1995. The JURY found the Defendant GUILTY of all THREE (3) COUNTS of the INDICTMENT (MURDER IN THE FIRST DEGREE, AGGRAVATED CHILD ABUSE, and SEXUAL BATTERY).. The Court ordered. a PRESENTENCE INVESTIGATION-REPORT..

The same jury reconvened on-JUNE 13, 1995, and evidence in support of aggravating factors and mitigating factors was heard, The JURY returned. an ELEVEN-TO-ONE RECOMMENDATION that the Defendant be SENTENCED to DEATH IN THE ELECTRIC' CHAIR. The Court ordered Memoranda from both counsel for the State and counsel for- the

defense.

A FURTHER SENTENCING HEARING was held on **JUNE** 28, 1995. The PRESENTENCE **REPORT** and **MEMORANDA** submitted by counsel were received. The **parties** were given the opportunity to present additional evidence and argument. The Defendant was given an opportunity to be **heard.** He declined **the opportunity.** The Court set **FINAL** SENTENCXNG for JULY **19, 1995,** but the date was CHANGED to JULY **18, 1995 with the** consent of both parties..

The Court has considered the evidence presented at both trial phases **and** the evidence **presented** at. **the** Sentencing **Hearing, and** the Court has considered the PRESENTENCE REPORT,. **along** with the MEMORANDA by counsel.

C. FACTS

The **FACTS of** this case established' **that the VICTIM was** TWO (2) **YEARS** OLD at the time she was killed.. The DEFENDANT **was** TWENTY-TWO (22) YEARS OLD at-that time.. The Defendant and the victim's mother first met. in the summer' of 1992, They lived together from September 1992 through the **date of the** Defendant's arrest on **December 9, 1992.**

On. **December 9,** 1992, at **approximately 11:45 A.M., the victim's mother left the child in** the. **care** of: **the Defendant while she ran an** errand,. **The Defendant** and child Were the **only** occupants **of** the apartment where the Defendant;, the child, and the child's mother-and siblings **resided** at **the time the child** was **killed.** The child **was in** good **health** and **without injuries** when. she was left **in the** Defendant's-sole **custody.**

Between 12:00 P.M. and 12:30 P.M.,..a **next door neighbor** heard the child **crying. The**

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neighbor also heard "thumping" noises. She also heard a "loud" and "angry" male voice saying "sit down." The witness, who had spoken with the Defendant on prior occasions, recognized the male voice as being the Defendant's voice.

An acquaintance of the Defendant and the victim's mother arrived at the apartment unexpectedly at approximately 1:00 P.M. The Defendant opened the door. The Defendant was holding- the child. She appeared to the acquaintance to be dead. The acquaintance left the apartment to call Rescue and. the police. Rescue and the police arrived shortly after 1:00 P.M.

EXAMINATIONS AND OBSERVATIONS of the child/victim at the apartment, hospital, and during the AUTOPSY REVEALED the following:

a. The child was wet.

b. Blood was in the child's mouth.

c. The child was unconscious,. but was revived before she died.. .

d. The child, who was filly clothed': when left with the Defendant, was naked from the waist down.

e.. The child had evidence of recent trauma to the head and she was bleeding from the vagina. Expert Testimony established beyond- a reasonable doubt that the vaginal bleeding was consistent with forced penetration by a penis or other object. Expert Testimony also established beyond a reasonable doubt that the child died as the result of Subdural Hemorrhage from blunt. trauma to the head. The evidence established blows were sustained by the victim to her temple, the right side of her right eye, the left buttock, and four (4) separate head . injuries were inflicted,. A' large collection of blood at the back of the child's head indicated she had sustained severe trauma to the back of the head. and such trauma was not consistent with being accidentally dropped by the Defendant,

f. The child died on December 10, 1992 as a result of multiple blows to her head.

EXAMINATION and INSPECTION of the apartment where the child was killed and the Defendant's clothing, disclosed the following:

a, A hair bow placed in the child's hair by her mother was found in the bed shared by the Defendant and the mother.

b. Blood was on the toilet seat and tank,. and on a , sheet in a bedroom, and on the floor where the child had been lying, on the sink counter, on a grocery bag, on a wash cloth, and on a blanket and pillow cases.

c. Blood Was present in the crotch region of the shorts the Defendant-was wearing and on the Defendant's underwear.

d. Blood determined to have- been the victim's blood was found to be present in the Defendant's under-wear.

D., FINDINGS

The Court now finds as follows:

1.. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOM-PLICE, IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMIT-TING OR ATTEMPTING TO COMMIT SEXUAL BATTERY.

The evidence as summarized above established beyond a reasonable doubt that the 'Defendant; while., alone with the child who was less:. than twelve (12) years old, forcibly penetrated her vagina,. During the-course of committing this crime of Sexual Battery; he inflicted fatal blows to the child.

The State has proved this aggravating factor beyond a reasonable doubt.

2. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL

The evidence clearly established that the murder of the two (2) year old victim was both conscienceless or pitiless and unnecessarily torturous to the victim. **Richardson v. State, 604 So.2d 1107,. 1109 (Fla. 1992); Rivera v. State 561 So.2d 536, 540 (Fla. 1990).** The child/victim was crying throughout her ordeal, which lasted at least thirty (30) minutes. She was alone with Defendant. The Defendant, in killing her, inflicted four (4) vicious blows to her head until she was rendered unconscious.

The State has proved this aggravating factor beyond all reasonable doubt.

None of the other aggravating factors enumerated by statute is applicable to this case and therefore, no other aggravating factors have been considered. The victim impact evidence presented by the State has not been considered;

3. STATUTORY MITIGATING FACTORS

a. The Defendant has no significant history of prior criminal activity.

Evidence of the Defendant's criminal history, which is significant, is set forth at Page 5 of the Presentence Report. The- Defendant testified to three (3) prior convictions,. The Defendant's mother testified and stated that the Defendant has a criminal history.

This mitigating factor- has not been proven.., This Court has reviewed each remaining statutory mitigating factor and now finds that no evidence has been presented to support any statutory mitigating factor, and none is found to exist.

4. NONE-STATUTORY MITIGATING **FACTORS**

The Court asked that the Defendant prepare a listing of all mitigating factors that should be considered. The listing has been received by the Court. The Court finds that the following non-statutory mitigating factors were suggested by the evidence and during argument:

a. Family background that the Defendant was a good student, a good child, attended church, has talent as a musician, writes poetry, and participated in sports.

The evidence does not establish that the Defendant was a good student. School records introduced by the Defendant indicated he was once expelled for poor attendance. When he did attend school, he often received poor grades. The other mitigation circumstances are found to exist. Collectively, the Court has given those factors some weight. in consideration of the Defendant's sentence.

b. The Defendant is a good person who does not smoke or drink.

While the evidence established that the Defendant does not smoke or drink, his prior criminal history disproves this factor and it is found not to exist. His personal habits are not relevant.

c. The Defendant is not a violent person,

The Defendant's criminal history includes a crime of violence. This factor is found not to exist,

d.. The Defendant has maintained his innocence and there is no direct evidence as to how the victim was killed..

The jury found that the Defendant's guilt was proved beyond a reasonable doubt; This

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Court has no doubt that the Defendant raped and murdered the two (2) year old child. The Defendant's expressed opinions as to the evidence is irrelevant and is neither a mitigating nor aggravating circumstance.

CONCLUSION

This Court concludes and finds that either aggravating circumstance outweighs the mitigation that has been found. The Court agrees with the jury that under the law applicable to this case, death is the appropriate and lawful penalty based on the Defendant's conviction of First Degree Murder as charged in Count I of the Indictment. Therefore, it is

ORDERED AND ADJUDGED that:

For the Murder of CALEASHA CUNNINGHAM, the Defendant, **TONEY DERON** DAVIS, is hereby sentenced to death. It. is further ordered that the Defendant is hereby committed to the custody of the **DEPARTMENT OF CORRECTIONS** of the STATE OF **FLORIDA** for execution of this sentence as provided by law.

MAY GOD HAVE MERCY ON HIS SOUL.

DONE AND ORDERED in CHAMBERS at **JACKSONVILLE, DUVAL COUNTY, FLORIDA,** THIS 18TH DAY OF JULY, 1995.

HENRY E. DAVIS, CIRCUIT JUDGE