IN THE SUPREME COURT OF FLORIDA

CASE NO: 86,363

TONEY DERON DAVIS,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Plaintiff/Appellee.
_____/

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

CASE NO: 92-13193-CF
DIVISION: "CR-E"

MERIT BRIEF OF APPELLANT

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ISSUES PRESENTED

ISSUE I

Whether the trial court erred in not following the dictates of Nelson and Faretta when Davis moved to discharge his court-appointed counsel before trial commenced.

ISSUE IT

Whether the trial court erred in denying Davis' motion for judgment of acquittal on all counts in that the State's evidence was all circumstantial and it was not inconsistent with every reasonable hypothesis of innocence.

ISSUE III

Whether the evidence failed to prove beyond a reasonable doubt that Caleasha Cunningham was alive when vaginal penetration occurred, requiring a reversal of Davis' sexual battery conviction.

ISSUE IV

Whether the trial court erred in admitting victim impact evidence at penalty phase that did not meet the statutory and legal requirements for admissibility.

ISSUE V

Whether the trial court erred in considering and finding the statutory aggravating factor heinous, atrocious and cruel, on which the jury was not

instructed and on which the State presented no evidence or argument to the jury during the penalty phase.

ISSUE VT

Whether the trial court erred in finding that the statutory aggravator of heinous, atrocious and cruel was proven beyond a reasonable doubt,

ISSUE VII

Whether the trial court erred in finding that the statutory aggravating factor of murder committed during the commission of a sexual battery was proven beyond a reasonable doubt.

ISSUE VIII

Whether the trial court erred in finding that the aggravation outweighed the mitigation and therefore improperly sentenced Davis to death.

PRELIMINARY STATEMENT

Toney Davis is the Appellant in this capital case. The record on appeal consists of 34 volumes. References to the pleadings and other matters of record will be referred to by the letter “R”, while references to the transcripts will denoted by the letter "T".

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STATEMENT OF THE CASE

On December 9, 1992, Toney Davis was arrested by the Jacksonville Sheriffs Office for aggravated child abuse and capital sexual battery. (R-l). After the victim died, Davis was booked in on the additional charge of murder on December 11, 1992. (R-12). On February 25, 1993, a grand jury indicted Davis on Count I, first degree murder; Count II, aggravated child abuse; and Count III, sexual battery. (R-38, 39). On September 29, 1994, a grand jury indicted Davis on the same three counts. (R-60, 61). On December 15, 1994, a grand jury again indicted Davis on the same three counts. (R-261, 262). The public defender withdrew from Davis' case, and on January 19, 1993, private attorney Charles Adams was appointed to represent Davis.

Davis subsequently filed and/or made the following motions that are relevant to this appeal:

1. Oral motion to discharge Charles Adams as his attorney. (T-59, 68-71).

2. Motion for New Trial, which the trial court denied. (R-412, 413).

3. Motion for judgment of acquittal, which the trial court denied. (T-855-857).

4. Oral motion to discharge attorney Adams and deliver his own closing argument at guilt phase. (T-991-994).

5. Oral motion to discharge attorney Adams and deliver his own closing argument at penalty phase. (T-l 106, 1107).

Davis proceeded to trial before the Honorable L.P. Haddock. After the defense rested, and the jury was instructed on the law, the jury found Davis guilty of first-degree murder, aggravated child abuse and sexual battery as charged. (R-348-351).

Davis proceeded to the penalty phase trial, and the jury, after hearing additional evidence, recommended that the court sentence Davis to death by a vote of 11-1. (T-1143). The trial court agreed with the jury's recommendation, and in support of that sentence, it found in aggravation that:

1. Davis committed the murder while engaged in the commission of a sexual battery.

2. The murder was especially heinous, atrocious and cruel.

(R-426, 427).

In mitigation, the court found:

1. Davis was a good child, attended church, has talent as a musician, writes poetry, and participated in sports.

All other proposed mitigation was rejected by the trial court. (R-428, 429).

As to the other convictions, the trial court sentenced Davis to ten years on the aggravated child abuse, consecutive to the death sentence; and to life without the possibility of parole for 25 years on the sexual battery, consecutive to the death sentence and concurrent to the aggravated child abuse sentence. (R-431, 432).

This appeal follows.

STATEMENT OF THE FACTS

On December 9, 1992, Toney Davis was living with his girlfriend, Gwen Cunningham, and her three children, at the Seaboard Avenue Apartments in Jacksonville, Duval County, Florida. (T-485). That morning, Cunningham got her two older children off to school (T-487) and then left the apartment to run an errand, leaving her youngest child, Caleasha Cunningham, two years old, at the apartment with Davis. Cunningham testified she left at 11:45 a.m. (T-489), and Davis testified she left at noon. (T-910).

Gwen Cunningham said that when she left, Caleasha was healthy, wearing a diaper and full pajamas, with bows in her hair and was having no difficulty breathing. (T-490). She testified that there was no blood in the apartment and that she made her bed before leaving. (T-491).

After Gwen Cunningham left, Davis cooked some french fries for Caleasha; she dropped them, so he cooked some more. (T-911). Davis left the apartment at approximately 12:30 p.m. and went to a friend's apartment to use the telephone. (T-911). Davis testified that his friend Thomas Moore had arrived at the apartment for a visit at about 12:30 p.m., and Davis asked Moore to feed Caleasha the second batch of fries and watch her while Davis went to make some phone calls; Davis said he left Caleasha and Thomas Moore alone in the apartment at about 12:30 p.m. and went to make some phone calls. (T-911).

Thomas Moore testified that he arrived at the apartment at 12:30 p.m. or 12:45 p.m. and Davis answered the door with a limp, lifeless Caleasha draped over his arm. (T-536). Moore testified that Davis told him Caleasha had choked on a french fry and had an asthma attack, and asked him to go call 911. (T-537). Moore testified that he went to a pay phone, called rescue, and then returned to the apartment. (T-538,542). Moore said Davis was giving Caleasha mouth-to-mouth resuscitation on the living room floor. (T-542). Moore testified he went back outside, flagged down a police car, took the officer into the apartment, and then rescue units arrived. (T-543). Moore testified that he stayed outside the apartment, rescue left, and Gwen Cunningham drove up. He told her Caleasha had been rushed to the hospital and went to the hospital with Gwen Cunningham and another man. (T-544, 545).

Toney Davis testified that after he had left Caleasha alone with Thomas Moore for about 30 minutes, he went back to the apartment and Moore was gone. (T-912). He said he found Caleasha having a seizure or some type of breathing difficulty. He administered CPR, put her in the shower to review her, and accidentally dropped her in the shower. (T-913). Davis testified that Moore showed up at the front door and rang the bell, and Davis told Moore to go call 911. (T-913).

Davis testified that Moore returned, having called rescue, and told Davis that Caleasha had choked on french fries and acted like she was having a seizure while Davis was gone making phone calls. (T-914). Davis testified that Moore said he had gone looking for Davis because he did not know what to do. (T-914). Davis testified that

Moore then said the police might come with rescue, and Moore did not want to talk to the police because he had marijuana in his possession. (T-915). Davis testified that Moore asked him to just say that Moore arrived and called 911 for him, and Davis agreed to say that. (T-915).

At the hospital, Caleasha was first treated by a physician in the emergency room, Dr. Lucian DeNicola, who testified that Caleasha was brought in at about 1:40 p.m. (T-609). She had fully dilated pupils, blood splotches in her eyes, a bruise on her right temple and a bruise on the edge of her right eye. (T-611, 612). A CAT scan showed swelling of the brain and pools of blood in the skull, indicating significant brain injury. (T-614). The child was declared legally brain dead the next day, December 10, 1992, (T-620).

Dr. J.M. Whitworth, a pediatrician and child abuse expert, was called in by HRS and first saw Caleasha at 4:00 p.m. on December 9, 1992, at the pediatric intensive care unit of the hospital. (T-635). He noted a bruise to the left temple and a bruise on the right forehead, above the right eye, and some fresh bruising on the buttocks. (T-638,639). Dr. Whitworth then examined the genitals and testified that he saw two fresh hemorrhages on the hymen, one on either side. (T-639). He testified that those injuries indicated a penetration injury by a penis, a finger or an object. (T-644,645). He testified that for injury to occur to the hymen, the vagina must have been penetrated. (T-646).

Dr. Bonifacio Floro, the medical examiner, performed the autopsy on Caleasha at 10:00 a.m. on December 11, 1992. (T-827). He observed absolutely no injury to the vaginal area, but theorized that it could have healed very quickly. (T-834, 835). He concluded that Caleasha had suffered four separate impacts to the head, and the cause of death was cerebral hemorrhage as a result of multiple blunt traumas to the head. (T-842).

A serologist tested numerous blood stains from the apartment and Davis' clothing and testified that Type B blood was on brown carpeting, two sheets, a pillowcase, and Davis' underwear. (T-815). He could not identify any other blood on any other items that he tested. Caleasha had Type B blood, along with Gwen Cunningham, her mother, as well as 20 percent of the black population. (T-814-816). The serologist could not determine the age of any of the blood stains, (T-818, 819), nor could he determine whose Type B blood it was. (T-819).

Two detectives interviewed Toney Davis. Davis told detectives Caleasha had choked on a french fry, he tried to revive her, and he had a friend call 911. (T-706,707, 764). Davis testified that he told police that because he and Moore had agreed to it. (T-921).

SUMMARY OF THE ARGUMENT

In the case at bar, the trial court committed numerous errors, both in the trial phase and the penalty phase, each of which requires reversal.

First, the trial court erred in not holding a proper inquiry when Davis asked to discharge his court-appointed attorney. The trial court's inquiry was insufficient and furthermore it also erred in not advising Davis, after denying his motion to discharge counsel, that he had the right to fire his attorney but that the State would not be required to appoint a substitute, and that he had the right to represent himself.

Second, the trial court erred in denying Davis' motion for judgment of acquittal at the close of the State's case-in-chief on all three counts of the indictment -- murder, sexual battery and aggravated child abuse. All the State's evidence was circumstantial, and it was not inconsistent with every reasonable hypothesis of innocence, *to wit:* that someone other than Davis committed the three crimes. Therefore, the motion for judgment of acquittal on all three counts should have been granted,

Third, the State presented insufficient evidence from which any reasonable jury could find beyond a reasonable doubt that Caleasha Cunningham was alive when vaginal penetration occurred. Therefore, Davis' conviction for sexual battery must be reversed.

Fourth, the trial court erred in admitting victim impact evidence at penalty phase that did not meet the "uniqueness" requirement of the applicable Florida Statute and

case law. This error was compounded by the prosecutor's long-winded argument on victim impact in his summation to the jury at penalty phase.

Fifth, the trial court erred in considering, finding and weighing the statutory aggravating factor of heinous, atrocious and cruel, because that aggravator was never argued to the jury and the jury was specifically instructed not to consider it.

Sixth, the trial court erred in finding that the statutory aggravating circumstance of heinous, atrocious and cruel was proven beyond a reasonable doubt. The State's evidence fell far short of that mark.

Seventh, the trial court erred in finding that the statutory aggravating factor of murder committed during the commission of a sexual battery was proven beyond a reasonable doubt. Here, too, the State's evidence was inadequate to meet that burden.

Finally, the trial court erred in finding that the aggravation outweighed the mitigation. Therefore, the imposition of the death penalty upon Davis was improper, disproportionate, and arbitrary in violation of Davis' Eighth Amendment rights.

Each trial error requires reversal of Davis' convictions, and each penalty phase error requires remand for a full re-sentencing proceeding.

ARGUMENT - ISSUE I

THE TRIAL COURT ERRED IN NOT FOLLOWING THE DICTATES OF NELSON AND FARETTA WHEN DAVIS MOVED TO DISCHARGE HIS COURT-APPOINTED COUNSEL BEFORE TRIAL COMMENCED.

At a pretrial conference held before the trial judge on March 21, 1994, Davis' court-appointed defense counsel, Charles Adams, failed to appear. (T-58). The trial court continued the case for another pretrial on April 4, 1994. (T-58). Davis then asked to be heard, and the following exchange occurred between Davis and the trial court:

DAVIS: I -- like 1 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?

DAVIS: No. Not since November, I haven't even heard anything from him.

THE COURT: They're conducting all evidence in the case, serology blood tests, which is why we're not ready for trial today. But I'll make sure that he's 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....

DAVIS: I can't get in touch with him, he's put a block on his office phone, 1 can't get in touch with him.

THE COURT: What does that mean?

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

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-59-60).

The next pretrial was held on April 5, 1994, rather than April 4, and defense counsel Adams was present this time. (T-68). The trial court had Davis brought into the courtroom and said, "Okay, Mr. Davis, the last time we had you over, you had indicated that you were not happy with the way things were proceeding?" (T. 68). Davis replied, "Yes, sir," and the trial court said, "Okay, I was asking Mr. Adams about it. Mr. Adams, could you state for the record what's going on?" (T-68).

Adams then went into a narrative describing his current work on the case: an investigator interviewing witnesses and obtaining documents; a pathologist reviewing the medical and autopsy records; and attempts to get two out-of-state witnesses to Jacksonville for the trial. (T-68-69).

The trial court then turned to Davis and explained to him that the efforts Adams was making were very crucial for the defense, particularly the pathology review, and that Adams was doing "everything he can do to get your case moving along." (T-69-70). The

trial court then ended the discussion by setting the case for an additional pretrial. (T-71). The trial was later held with Adams as defense counsel, and Davis was convicted on all counts and subsequently sentenced to death.

In Nelson v. State, 274 So, 2d 256 (Fla. 4th DCA 1973), the procedures a trial court must follow when a defendant moves to discharge his court-appointed counsel before trial were set forth. First, the trial court must make an inquiry of the defendant as to the reason he wants to discharge counsel. Id. at 258. If competency is one of the defendant's reasons, then the trial court is to "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." Id. at 259, Then, if the trial court finds no such reasonable cause, it should "so state on the record and advise the defendant that if he discharges his original counsel the state may not thereafter be required to appoint a substitute." Id. The Nelson opinion made the reasons for these procedures quite clear:

> If the foregoing procedure is followed, the indigent's right to counsel will be protected and a sufficient record will be made to permit a prompt and accurate disposition of post-conviction attacks on the judgment.

Id,

A host of cases have followed Nelson and require that the trial court adhere to both of Nelson's prongs (emphasis added): f t h e d e f e n d a n t a n d h i s counsel and, if the discharge is not granted, an explanation to the defendant that if he fires his court-appointed attorney, the state will not be required to provide a substitute.

In Perkins v. State, 585 So. 2d 390 (Fla. 1st DCA 1991), the court held that the trial judge committed reversible error by not satisfying prong one of Nelson -- a sufficient examination of both counsel and the defendant. Id. at 392. In Chiles v. State, 454 So. 2d 726 (Fla. 5th DCA 1984), the court quoted the entire procedure from Nelson and reversed because the trial court failed to satisfy both prongs. Id. at 727.

Appellate courts have also repeatedly found reversible error where they found the first prong of Nelson -- the inquiry -- was sufficient, but the second prong was not. In Lewis v. State, 323 So. 2d 1205 (Fla. 4th DCA 1993), the court held:

> [W]hile the trial judge looked into counsel's competency he failed to advise the defendant of the consequences of discharging his original counsel as required. The failure to advise is error.

Id. at 1208.

In Jackson v. State, 572 So. 2d 1000 (Fla. 1st DCA 1990), the court reversed the conviction because the trial court failed to advise the defendant both that he would not be appointed a substitute if he fired his counsel and that he had the right to represent himself. Id. at 1001. Said the appellate court:

> [T]he trial court has a duty to advise a defendant that substitute counsel will not be appointed and that he has the right to represent himself. Such advice is necessary to ensure the defendant's implied right to self-representation under the sixth amendment.

Id.

In Taylor v. State, 557 So. 2d 138 (F'la. 1st DCA 1990), the court found the inquiry sufficient but then noted that the trial court's duties do not end there. The court

reversed because the trial judge failed to advise Taylor that his attorney could be discharged but the state would not be required to appoint a substitute and that Taylor had a right to self-representation. Id. at 143.

In the case at bar, the trial court failed to satisfy either prong of Nelson. When Davis said to the court on March 21, 1994, "I don't feel I'm being adequately represented, and I would like to request the court --" (T-59), he was clearly expressing his desire to discharge Adams as counsel. Moreover, it is obvious that the trial court understood Davis' words as a motion to discharge by the court's clear response that it would make sure Adams attended the next pretrial and, "if you want somebody else," then you can discuss it at that time," but I'll have to have him here." The trial court's statement that, "I will talk to you about it," pronounced that the trial judge understood its constitutional obligation and intended to conduct a Nelson hearing at the next pre-trial.

However, when the next pre-trial arrived, the trial judge's inquiry fell far short of the required standard. Although the trial court was required to examine both the defendant and the attorney, the trial court asked Davis only one question: "Mr. Davis, the last time we had you over, you had indicated that you were **not** happy with the way things were proceeding?" (T-68). When Davis answered in the affirmative, the trial court turned to Adams and had him explain "what's going on." (T-68). Davis was never asked anything else; thus, the trial court denied Davis "an opportunity to fully present

all of his allegations at that hearing." See Ventura v. State, 560 So. 2d 217, 220 (Fla. 1990). In fact, Davis did not even get an opportunity to speak.

Then, the trial court listened to Adams' description of what he was doing on the case without a single mention of what he was not doing, and lectured Davis on the hard, important work Adams was doing. (T-69-70). Clearly, the inquiry conducted by the trial court failed to satisfy prong one of Nelson.

Even if the inquiry had been sufficient, the trial court abruptly ended the hearing by setting the case for another pretrial, giving Davis no advice whatsoever as to his right to discharge Adams at the peril of having no substitute counsel appointed as well as his right to represent himself. As the appellate court concluded in Chiles, the trial judge, by his actions indicated to Davis that "his only course was to accept" Adams as his advocate. Id, at 727. Clearly, the trial court failed to satisfy the second prong of Nelson.

The trial court's actions operated to deprive Davis of his Sixth Amendment rights. As the United States Supreme Court stated in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed.2d 562 (1975):

> To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and a tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.... This allocation can be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative, An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal

> fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Id, at 573-574.

Finally, in the case at bar, it must be noted that Davis' dissatisfaction with Adams continued throughout the trial and the penalty phase of his case: at the end of all the evidence at guilt phase (T-886-893); after the defense reopened its case (T-901-903); as closing arguments were about to begin at guilt phase (T-991-995); after closing arguments (T-1022); after the jury retired to deliberate (T-1050); at the end of the evidence in penalty phase (T- 1099-1104); just before closing arguments at penalty phase (T-1106-1107); and, possibly, after the death sentence was imposed. (T-1181).[1]

Because the trial court violated Davis' Sixth Amendment rights by failing to follow **the** dictates of Nelson and Faretta, Davis' convictions **must** be reversed.

'After the trial judge imposed sentence, Davis said: "If I may, I'd like to enter a document, just to put in my file." The trial judge approved the request and instructed Davis to put the case number on it and give it to the clerk, and it would be filed. The document is missing from the Record on Appeal. Motions regarding that situation were filed along with this brief.

ARGUMENT • ISSUE II

THE TRIAL COURT ERRED IN DENYING DAVIS' MOTION FOR JUDGMENT OF ACQUITTAL ON ALL COUNTS IN THAT THE STATE'S EVIDENCE WAS ALL CIRCUMSTANTIAL AND IT WAS NOT INCONSISTENT WITH EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

At the end of the State's case in chief, Davis moved for a judgment of acquittal on all three counts on the grounds of insufficient evidence, and the trial court denied the motion as to all counts. (T-855-857). The motion should have been granted as to all three counts,

The State's case in chief is summarized as follows. Gwen Cunningham testified that on the day of Caleasha's death, she left the child alone in the apartment with Davis at 11:45 a.m. (T-489). The child appeared healthy, and there was no blood in the apartment. (T-490-491). When Cunningham returned at 1:15 or 1:25 p.m., Caleasha had been taken away in the ambulance. (T-492-493, 504). Cunningham admitted that she had sexual intercourse with Davis that morning before leaving the apartment. (T-510). Next-door neighbor Janet Cotton testified that she heard crying and thumping coming from Cunningham's apartment from noon to 12:30 p.m., and at one point, she heard a male voice, which she claimed she recognized as Davis' voice, saying, "sit down". (T-518-519). Cotton could not identify the crying child or even tell whether the child was male or female. (T-522).

Thomas Moore testified that he arrived at the apartment at 12:30 p.m. or 12:45 p.m. (T-896). Davis answered the door with Caleasha draped over his arm, limp and

lifeless, and Davis was attempting to revive her. (T-536-542). Davis told Moore to go call 911, which Moore did at 1:02 p.m., according to the dispatcher. (T-560).

Officer Phillips, the first officer on the scene, testified that the child was "completely unconscious" when he arrived, and that there was blood in several locations in the apartment. (T-572-573).

Two detectives testified that they interviewed Davis and he told the detectives the child choked on a french fry, was lifeless, and he tried to revive her without success. (T-706,764).

The first doctor to examine Caleasha at the hospital testified that she had no signs of life and breathing function could be restored only through machines. (T-612). He observed head injuries and bruising, but no vaginal bleeding. (T-611-612,616-617).

The next doctor to examine Caleasha, a child abuse expert, testified that Caleasha was already on life support when he first saw her (T-636), and he conducted a vaginal examination. He observed vaginal hemorrhages on each side of the hymen (T-639), and testified that the injuries were consistent with vaginal penetration. (T-644,645).

The coroner saw no vaginal injuries in his autopsy the next day. (T-834). The cause of death was multiple blunt traumas to the head with the cerebral hemorrhage. (T-842).

The serologist testified that there was Type B blood on some brown carpet, two sheets and a pillowcase from the west bedroom, and Davis' underwear. (T-814-815). He testified that both Caleasha and Gwen Cunningham had Type B blood, in fact, 20

percent of the black population and 11 percent of the Caucasian population have Type B blood. (T-789,815). He could not relate the blood to anybody, (T-817, 818), nor could he tell when the blood was deposited. (T-819). Numerous other blood stains he tested were inconclusive. (T-819-822).

All evidence presented by the State against Davis was circumstantial. To prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis innocence. Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991). Where the state's evidence is all circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless that evidence is inconsistent with any reasonable hypothesis of innocence. State v. Law, 559 So. 2d 187, 188 (Fla. 1989). A motion for judgment of acquittal in a circumstantial evidence trial should be granted if the prosecution fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Id.; Mungin v. State, 667 So. 2d 751, 754 (Fla. 1995).

The evidence the State presented, as outlined above, failed to exclude every reasonable hypothesis of Davis' innocence. The most obvious hypothesis of innocence was, of course, that someone other than Davis committed the three crimes of which he was convicted - murder, sexual battery and aggravated child abuse. The State did not present enough evidence that was inconsistent with this defense hypothesis; therefore, the trial court erred in denying the motion for judgment of acquittal on each of the three counts. Between Cunningham's departure at 11:45 a.m. and Thomas Moore's

arrival at approximately 12:30 to 12:45 p.m., the State presented no evidence as to who was or was not in the apartment with Caleasha. The Type B blood found in the apartment and on Davis' underwear is consistent with Caleasha, Gwen Cunningham, and 31 percent of the general population. The State's evidence was in no way inconsistent with the hypothesis that someone other than Davis battered, raped and killed the child. To support a conviction on circumstantial evidence alone, the evidence "must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused and no one else committed the offense charged." Scott v. State, 581 So. 2d 887, 893 (Fla. 1991) (quoting Hall v. State, 90 Fla. 719, 720, 107 So. 2d 246, 247 (Fla. 1925)).

Here, the only way a jury could have reasonably found the State's evidence to exclude the hypothesis is that someone other than Davis battered, raped and killed the child, was to build inference upon inference. The circumstantial evidence rule evolved in American criminal jurisprudence precisely because a criminal conviction cannot be based entirely on a series of inferences. Lee v. State, 640 So. 2d 126, 127 (Fla. 1st DCA 1994).

The State's evidence against Davis may have raised strong suspicions as to his guilt; however, "where there's smoke, there's fire" is an axiom that simply cannot be applied to a death case. As the court held in Smolka v. State, 662 So. 2d 1225 (Fla. 5th DCA 1995), "there is no doubt that the state's case against the defendant creates a

strong suspicion of guilt," "The number of suspicious circumstances is especially troubling, But suspicions cannot be the basis of a criminal conviction." Id. at 1267.

Because the state's circumstantial evidence was insufficient as a matter of law as to whether Davis was the one who committed the crimes, Davis' judgment of acquittal should have been granted as to sexual battery, aggravated child abuse and murder. Therefore, all three convictions must be reversed.

ARGUMENT - ISSUE III

THE EVIDENCE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT CALEASHA CUNNINGHAM WAS ALIVE WHEN VAGINAL PENETRATION OCCURRED, REQUIRING A REVERSAL OF DAVIS' SEXUAL BATTERY CONVICTION.

To support a conviction for sexual battery, the State must prove beyond a reasonable doubt that the victim was alive at the time the offense was committed. Jones v. State, 593 So. 2d 1234, 1237 (Fla. 1990); Owen v. State, 560 So. 2d 207, 212 (Fla. 1990). Failure by the State to prove this beyond a reasonable doubt requires reversal of a sexual battery conviction Jones at 1237.

In the case at bar, the State presented no evidence of the time sequence of the aggravated child abuse, vaginal penetration, and murder. The record is silent as to which occurred first. The record is simply devoid of any evidence that the child was alive when her vagina was penetrated. Every witness the State presented described the child as "lifeless" (R-536) or having "no signs of life." (R-612). In fact, Dr. DiNicola

admitted that when Caleasha arrived at the hospital, she "appeared to be dead," (R-618). The testimony was clear that Caleasha could not breathe on her own and had to be put on life support so a machine could inflate and deflate her lungs. (R-612, 619, 636). The medical testimony regarding the extent of her brain damage showed that she was dead more than she was alive when she was transported to the hospital, (R-614, 615).

Moreover, it was not up to the defense to prove that Caleasha was dead when the vaginal penetration occurred. It was up to the State to prove beyond and to the exclusion of every reasonable doubt **that** Caleasha was alive when the vaginal penetration occurred. Because the State failed to prove this, Davis' sexual battery conviction must be reversed.

ARGUMENT - ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE AT PENALTY PHASE THAT DID NOT MEET THE STATUTORY AND LEGAL REQUIREMENTS FOR ADMISSIBILITY.

At the penalty phase of the proceedings, after hearing argument from both sides, the trial court ruled a victim impact statement written by **Gwen** Cunningham, mother of the two-year-old victim, Caleasha, would be admitted. (T-1078). Cunningham read the following statement to the jury at penalty phase:

> Caleasha Cunningham's death has left an incredible void, strain and burden in the hearts and lives of my family and friends.

The past two-and-a-half years have been a living nightmare. All the flashbacks, cold sweats, headaches and sleepless nights. There are many times I couldn't do anything but think of all the hopes and dreams I had for my precious little girl. They are now over.

I can remember Caleasha as an infant. She was the best thing that could have happened to me and my family. Her three-year-old brother, Juan, and her two-year-old sister, Ashley, they would race to be the first one to get a clean diaper.

I would have to give the second child another task to do to keep them from being left out, They loved to bring Caleasha her bottle and sing rock-a-bye baby as I rock her to sleep.

Her big brother and big sister loved to play with her and make her laugh. They would shake a rattle and play peak-a-boo [sic] and Caleasha would just laugh and laugh and laugh.

As she got older, they would play in the yard with their puppy, Snuffles. Caleasha loved to rub her face next to Snuffles and tickle her belly. Snuffles would look our pack [sic] and pants [sic] while Caleasha would lay next to her and do the same thing.

Caleasha loved to eat at MacDonalds [*sic*] and play at the playground afterwards. She liked cheeseburger Happy Meals and most of all the toy surprises.

She also liked Chuckie Cheese, who was her favorite.

She loved to stick her face through the holes in the game with the balls and say, Mommy, Mommy, I love you. I would give her a kiss and say, I love you, Piggy. Piggy was her nickname because she loved to eat so much. Her favorite food was fried chicken.

On her first and second birthday, she had her own only personal chocolate cake. Instead of using a fork and spoon, she liked to stick her hands in it and get it all over herself.

Another favorite pastime of Caleasha's was to watch Barney at 7:00 and 8:00 in the morning and sing the famous song -- I Love You song.

She also loved to go to church. Caleasha would clap and sing along, shouting, thank you Jesus and amen when it came time to give praise.

> Her favorite church song was, I'm Just a Nobody Living to Tell Everybody About Somebody Who Can Safe [sic] Anybody.
>
> Caleasha was very special in so many ways. The memory and love Caleasha spread to family members, day care teachers, Sunday school classmates, friends and her favorite ballet teacher will always live on. She had the brightest smile, a true jewel. She will never be forgotten.
>
> The shock and the sudden death of my daughter will haunt me and my family forever. It's like a horrible pain that won't go away.
>
> Two years and two months of Caleasha's precious life and memories can never be replaced.

(T-1083-1085).

The jury recommended death 11-1, and the trial court sentenced Davis to die.

The victim impact evidence submitted to the jury deprived Davis of his due process right to a fair trial.

Section 921.141(7), Fla. Stat. (1995), allows victim impact evidence only if it is "designed to demonstrate the victim's uniqueness as an individual human being, and the resultant loss to the community's members by the victim's death." This statute was enacted in the aftermath of the U.S. Supreme Court's decision in Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed.2d 720 (1991), which held that victim impact evidence can be considered at penalty phase and that it is up to each State to make rules on the admission of such evidence. After the statute was enacted, this Court found it facially constitutional in Windom v. State, 656 So. 2d 432 (Fla. 1985), and specifically noted that the statute allows evidence regarding the victim's character only to show that

the victim was unique in the community and the loss to the community as a result of that unique person being taken away. Id. at 438.

In the case at bar, the lengthy tribute to her two year old child delivered by Gwen Cunningham sounded more like a newspaper interview or a funeral eulogy than anything else. It fell far short of the standard set out in the Florida statute and the Windom case that it address only the victim's uniqueness. 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. This victim impact statement was understandably a mother pouring her grief out to the jury. Davis' constitutional rights were ignored by this emotional and prejudicial statement.

The American Heritage Dictionary defines "unique" as "being the only one of its kind; single." It is further defined as "without an equal or equivalent; unparalleled; unusual; extraordinary." The American Heritage Dictionary 1953 (3d ed. 1992).

The fact that Caleasha's two siblings rushed to help Mom care for her, that she loved to play with her siblings and her puppy, that cheeseburgers were her favorite food, that she loved to watch "Barney," the popular purple dinosaur, and sing along with the church congregation, are clearly not characteristics which meet the dictionary definition of "unique" nor are they "unique" as contemplated by §921.141(7).

This victim impact statement was unavoidably designed to invoke sympathy and tears on the part of the jury and understandably received a reciprocal super-charged, emotional response from the jury. It is not the type of evidence, showing unique

qualities, that was contemplated in Payne, Windom, and Florida Statute § 921.141(7), and it was prejudicially far from the "brief humanizing remarks" that this Court approved in Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1994).

Finally, it must be noted that prosecutor Bledsoe, in his closing argument to the jury at penalty phase, went out of his way to capitalize on the erroneous admission of the Victim Impact Statement. In the transcript, Bledsoe's entire closing argument consists of 20 pages, and four of those pages are devoted solely to his comments regarding victim impact. (T-1108, 1125-1127).

The admission of this victim impact evidence turned the penalty phase trial of a citizen facing electrocution into a memorial service for an innocent child, and Davis' due process rights as well as his Eighth Amendment rights, were abrogated. The admission of this testimony violated the admonition **that** death-penalty proceedings must "seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner." Profitt v. Florida, 432 U.S. 242, 252-253, 96 S. Ct. 2960, 49 L. Ed.2d 913 (1976). The admission of the improper victim impact testimony in the case at bar requires that Davis' death sentence be reversed.

ARGUMENT - ISSUE V

THE TRIAL COURT ERRED IN CONSIDERING AND FINDING THE STATUTORY AGGRAVATING FACTOR HEINOUS, ATROCIOUS AND CRUEL, ON WHICH THE JURY WAS SPECIFICALLY NOT INSTRUCTED AND ON WHICH THE STATE PRESENTED NO EVIDENCE OR ARGUMENT TO THE JURY DURING THE PENALTY PHASE.

In the penalty phase, the jury listened to all the evidence, and then the State presented its closing argument. The only aggravating circumstance the prosecutor argued in **closing was that** the murder was committed during the course of a sexual battery. (T-l 114, 1119).

After both sides did their summations, the trial court instructed the jury on the law. The trial court charged:

> The aggravating circumstances that you **may** consider are limited to any of the following that are established by the evidence: The defendant in committing the crime for which he is to be sentenced was engaged, or was an accomplice in the commission of, or in the attempt to commit, or flight after committing, or attempting to commit the crime of sexual battery.

(T-1137).

No other aggravating circumstance was included in the jury instructions. The jury deliberated and returned a recommendation of death by an 11-1 vote. (T-1143).

The trial judge set a sentencing hearing for June 28, 1995, and told each side they could present sentencing memoranda prior to the hearing. (T-1147, 1148). Then, the

judge said that each side would be able to "present any matters that you think are relevant to sentencing." (T- 1148).

The State filed its sentencing memorandum on June 27, 1995 -- the day before the hearing -- and suddenly injected a second aggravating circumstance -- heinous, atrocious and cruel. (R-404-408). The State then argued HAC to the judge at the hearing, and the judge considered and found HAC to be proven by the State beyond a reasonable doubt. (R-427). The trial court weighed both HAC and course of sexual battery, as statutory aggravators, against the mitigation offered by Davis, and sentenced him to death. (R-429).

Counsel has found no case specifically addressing the error set out in this issue and it appears that this issue is one of fundamental constitutional first impression, This Court in Spencer v. State, 615 So. 2d 688 (Fla. 1993), addressed the procedure to be used in capital sentencing phase proceedings. There the Court set out a multi-stage procedure allowing the State and defendant a full and adequate opportunity to present evidence on issues properly presented to the jury upon proper instructions and available for lawful consideration by that body. Here, the record establishes that the court neither instructed the jury that it could consider HAC and the State neither presented nor argued that particular aggravating circumstance but moreover, the court's instructions specifically took consideration of HAC from the purview of the jury by its specific instruction that the only aggravating circumstance it could consider was death during the course of sexual battery.

Clearly, the Spencer opinion does not address or allow for the procedure used here wherein the Appellant was ambushed by the State's request to the trial court to consider HAC only at the court sentencing proceeding. In a somewhat analogous context the United States Supreme Court in Lankford v. Idaho, 500 U.S. 110, 114 L. Ed.2d 173, 111 S. Ct. 1723 (1991), found that the character of the hearing in which the critical evidence against the defendant was presented by the State frustrated the defendant's opportunity to make an argument before the sentencing body on the questioned issue. Likewise, the Lankford opinion supports the argument that Davis' lack of an adequate and due-process-required opportunity to address the aggravating circumstance of HAC caused the adversary process in the case at bar to malfunction.

The issue here is not one of notice but rather the Appellant's fundamental right to due process and from the presentation of the State during the penalty phase and the limiting instruction given to the jury by the trial court, the Appellant only could have reasonably assumed that evidence, argument and finding by the trial court in consideration of the appropriate sentence to impose would relate only to the one aggravating circumstance the court instructed the jury on and the only aggravating circumstance the State addressed in its evidence and argument to the jury. Had the defendant in any way been advised that the jury was instructed or be considering a death sentence based on HAC, the Appellant would have advanced arguments that addressed that factor. Lankford, 114 L. Ed.2d 173, 185. Although not specifically on point, the Lankford opinion fully supports the principle that in the case at bar the State formally

and affirmatively indicated that it would not be seeking the death penalty on HAC and the court, by specific limiting instruction, removed HAC from the jury's consideration and ultimately from its own consideration in determining the sentence to be imposed upon Mr. Davis. Logic, common sense, and the long-held principle that death cases are to be governed by procedures that jealously adhere to due process mandates that the procedure in finding HAC in the case before this Court was of a fundamentally constitutional nature and reversible error.

ARGUMENT - ISSUE VI

THE TRIAL COURT ERRED IN FINDING THAT THE STATUTORY AGGRAVATOR OF HEINOUS, ATROCIOUS AND CRUEL WAS PROVEN BEYOND A REASONABLE DOUBT.

The trial court found two statutory aggravating factors in the case at bar: that the death occurred during the course of a sexual battery and the murder was heinous, atrocious and cruel. The trial judge said in his sentencing order:

> The evidence clearly established that the murder of the two year old victim was both conscienceless or pitiless and unnecessarily torturous to the victim...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-247).

The trial court erred in finding HAC because the State presented insufficient evidence to prove this factor beyond a reasonable doubt.

In State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court set the standard for what is to be included under HAC, clearly stating that this aggravator is to be reversed for "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id. at 9. HAC is properly found "only in torturous murders - those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." McKinney v. State, 579 So. 2d 80, 84 (Fla. 1991) (quoting Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990)).

In the case at bar, no evidence was presented of torture or extreme suffering on the part of the victim. There was no testimony as to the sequence of events; the trial court's finding that Davis inflicted four blows to the child's head "until she was rendered unconscious" is utterly unsupported by the record. There was no evidence presented regarding which of the four blows was struck first, as was the case in Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995). The blow that rendered Caleasha unconscious surely could have come first.

As in Cheshire, 568 So. 2d at 912, "at best, we can only conjecture as to the exact events of the murder." Caleasha's murder could have been quick and in the heat of passion; the State did not introduce enough evidence to prove torture beyond a reasonable doubt.

Furthermore, the trial court's finding that Caleasha's ordeal lasted at least 30 minutes and that she was crying throughout is utterly unsupported in the record. Neighbor Cotton could not identify Caleasha as the crying child she heard; in fact, she couldn't tell if the crying child was male or female. In addition, Cotton never said that crying itself continued for 30 minutes; her half-hour estimate clearly applied to a combination of noises she heard coming from the apartment. Finally, to suggest that the only reason a two year old cries is because she is being tortured is ludicrous.

Because HAC was not proven beyond a reasonable doubt, the trial court erred in finding it as a statutory aggravator in the case at bar and in entering it into the weighing process of aggravation versus mitigation.

ARGUMENT - ISSUE VII

THE TRIAL COURT ERRED IN FINDING THAT THE STATUTORY AGGRAVATOR OF MURDER COMMITTED DURING THE COMMISSION OF A SEXUAL BATTERY WAS PROVEN BEYOND A REASONABLE DOUBT.

The trial court found two statutory aggravating factors, one of which was that the capital felony was committed while the defendant was engaging, or was an accomplice in, the commission of, or an attempt to commit, or flight after committing or attempting to commit, sexual battery. Said the trial judge in his sentencing order:

> 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.

(R-426-427).

The trial court erred in finding this aggravator was proven beyond a reasonable doubt because no evidence was presented as to the time sequence of blows to the head, vaginal penetration, and murder. As discussed in Issue III of this brief, pp. 20, 21, there was no evidence that the child was alive when the vaginal penetration occurred. Therefore, this aggravating factor was not proven beyond a reasonable doubt and could not be found by the trial judge or entered into the weighing or aggravation versus mitigation.

ARGUMENT - ISSUE VIII

THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATION OUTWEIGHED THE MITIGATION AND THEREFORE IMPROPERLY SENTENCED DAVIS TO DEATH.

As discussed in Issues V, VT and VII of this Brief, the two statutory aggravators the trial court found in the case at bar were invalid and unproven. Even if one of the two aggravators remained, it must be remembered that Davis established substantial mitigation - that Davis was a good child, attended church, is a talented musician, writes poetry and has participated in sports. (R-428). Death sentences supported by only one aggravating circumstance are affirmed by this Court only where nothing or very little was

established as mitigation. McKinney, 579 So. 2d at 85; Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989).

When the trial court weighs an invalid aggravating circumstance, the defendant's Eighth Amendment rights are violated. Espinosa v. Florida, SO5 U.S. _____, 112 S.Ct. 2926, 120 L.Ed.2d 854, 858 (1992). Weighing an invalid aggravator places a thumb on the aggravation side of the scale and creates the possibility of arbitrariness, inconsistency and disproportionality in the imposition of the death penalty. Socher v. Florida, 504 U.S. ,____ 112 S.Ct. 2114, 119 L.Ed.2d 326, 336 (1992). Davis suffered that exact fate.

Because the trial court improperly weighed aggravators versus mitigators, the death sentence imposed on Davis violated his Eighth Amendment rights, and the sentence must be reversed.

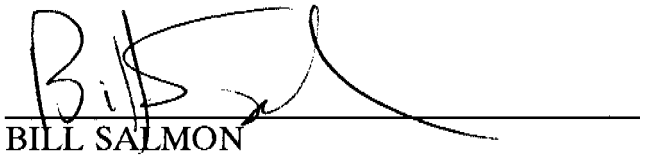
CONCLUSION

As to Issues I and II, presented, Appellant TONEY DERON DAVIS prays for reversal of all three convictions and remand with appropriate instructions to the court below.

As to Issue III, Appellant prays for reversal of his sexual battery conviction and remand with appropriate instructions to the court below.

As to Issues IV, V, VI, VII, and VII, Appellant prays for vacation of his sentence and remand to the court below for a full re-sentencing hearing.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merit Brief of the Appellant has been furnished this 25th day of July, 1996 by U.S. Mail to: Richard Martell, Office of the Attorney General, Robert A. Butterworth, State of Florida, The Capitol, Tallahassee, Florida 32399-1050.

BILL SALMON