IN THE SUPREME COURT OF FLORIDA

CHARLES D. DONALDSON, :

Appellant, :

vs. : CASE NO. 88,205

STATE OF FLORIDA, :

Appellee. :

_____/

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Pages in the initial brief shall be referred to as IB#. Pages in the State's answer brief shall be referred to as AB#. Pages in the record shall be referred to in conformity with the style used in the initial brief.

REPLY TO STATEMENT OF CASE AND FACTS

The State erroneously characterized both the initial brief and the record by saying "Donaldson claims that Cisneros was sentenced to twelve years' imprisonment (initial brief at 96), but there appears to be no record support for that statement." AB3 n.2. Donaldson correctly said Cisneros got a "12-year sentence recommendation." IB96. This fact is borne out by Defense Exhibit AA, the plea agreement dated February 8, 1996.

REPLY ARGUMENT

Appellant fully relies on his initial brief and responds below to only certain claims made by the State.

I: WHETHER THE TRIAL COURT DENIED DONALDSON HIS CONSTITUTIONAL RIGHT TO TESTIFY IN THE GUILT PHASE.

Neither case law nor logic support the State's claim of procedural bar. See AB7. Donaldson asked to reopen the case to permit him to testify and the judge ruled against him. That's all the law requires. What more could Donaldson have done to preserve the issue?

The State quotes Rock v. Arkansas, 483 U.S. 44, 55 (1987) for the proposition that "legitimate interests" may prevent a defendant from testifying at his own trial. But in the very next sentence following the quoted passage, Rock held

> restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve.

Id. (emphasis supplied). The ruling here was arbitrary and disproportionate when weighed against the fundamental right at issue, especially when a man's life hung in the balance.

The State says the jury's death recommendation demonstrates Donaldson's testimony was not compelling. See AB8. However, the State's argument overlooks the fact that Donaldson was denied the right to testify as to guilt, whereas the recommendation came after jurors heard all the additional, contested aggravating circumstance evidence in the penalty phase.

The State says the jury got the standard instruction on a defendant's not testifying. See AB9 n.3. The instruction said "The defendant has exercised a fundamental right by choosing not to be a witness." V27T1183. Donaldson did choose to be a witness, but the judge refused him that right.

II: WHETHER EVIDENCE PREDICATED ON TESTIMONY OF ADMITTED LIARS WAS SUFFICIENT TO SUSTAIN CONVICTIONS OF KIDNAPPING, AGGRAVATED CHILD ABUSE, AND FIRST-DEGREE MURDER.

This issue attacks the failure to adhere to legal requirements, not the "credibility of the witnesses," AB12, so the State's list of citations is irrelevant. The State apparently misapprehends the issue and urges this Court to do the same. In so doing, the State ignores the very heart of the argument raised by Donaldson regarding aggravated child abuse. The State purports to quote the statutory requirements, see AB 12-13, but the unattributed language does not even appear in the statutes. The State then summarily dismisses Donaldson's authorities merely by calling them "factually distinguishable." AB13. A reasoned analysis and recent case law, however, supports Donaldson.

The aggravated child abuse charge in this case alleged two separate theories under sections 827.03, Florida Statutes (1993).[1] One theory was aggravated battery under subsection 827.03(1)(a), and the other theory was willful torture under subsection 827.03(1)(b). The aggravated battery theory of

[1] Section 827.03, Florida Statutes (1993) provides:

827.03 Aggravated child abuse.—
(1) "Aggravated child abuse" is defined as one or more acts committed by a person who:
(a) Commits aggravated battery on a child;
(b) Willfully tortures a child;
(c) Maliciously punishes a child; or
(d) Willfully and unlawfully cages a child.
(2) A person who commits aggravated child abuse is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

aggravated child abuse under subsection 827.03(1)(a) necessarily embraces the battery[2] and aggravated battery[3] statutes. Thus, aggravated child abuse under subsection 827.03(1)(a) required proof that

> (1) the victim was a child;
> and
> (2) the accused
> (a) actually and intentionally touched or struck another person against that person's will, or
> (b) intentionally caused bodily harm;
> and
> (3) the accused
> (a) caused great bodily harm, permanent disability, or permanent disfigurement; or
> (b) used a deadly weapon in committing the battery.

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[2] Section 784.03, Florida Statutes (1993), provides:

> 784.03 Battery.—
> (1) A person commits battery if he:
> (a) Actually and intentionally touches or strikes another person against the will of the other; or
> (b) Intentionally causes bodily harm to an individual.
> (2) Whoever commits battery shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

[3] Section 784.045, Florida Statutes (1993), provides:

> 784.045 Aggravated battery.—
> (1)(a) A person commits aggravated battery who, in committing battery:
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
> 2. Uses a deadly weapon.
> (b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.
> (2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The batteries in this case were (1) the independent act of Wengert striking Campbell; (2) Sykosky's murder of Campbell; and (3) Sykosky's murder of Head. Donaldson is not culpable for Wengert's independent battery on Campbell; Wengert did not cause her great bodily harm or permanent injury; and Wengert did not commit the battery with a deadly weapon. So the State's theory against Donaldson under subsection 827.03(1)(a) rests solely on Sykosky's shooting of Head and Campbell, the core offenses charged in the felony first-degree murder charges. Legislation and constitutional law prevent the State from prosecuting the aggravated child abuse under these circumstances.

The newest in the relevant line of cases is Anderson v. State, 220 Fla. L. Weekly S300 (Fla. May 29, 1997), where this Court just construed section 775.021(4)(b)(2), Florida Statutes (1991), to hold that two charges cannot be sustained when both charges are degree variants of the same crime. The murder and the aggravated child abuse charged under subsection 827.03(1)(a) are degree variants of the same aggravated battery under the present facts. See also State v. Crumley, 512 So. 2d 183 (Fla. 1987) (striking separate convictions for aggravated battery and aggravated battery on law enforcement officer).

Moreover, the elements of aggravated child abuse under subsection 827.03(1)(a) are lesser included offenses to the felony and premeditated first-degree murder charges in this case. See In re Standard Jury Instructions -- Criminal Cases, 603 So. 2d 1175, 1250-51 (Fla. 1992). Therefore, the aggravated child abuse charges under subsection 827.03(1)(a) must fall under the

weight of section 775.021(4)(b)(3), Florida Statutes (1993), which prevents multiple convictions for "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." Laines v. State, 662 So. 2d 1248 (Fla. 3d DCA 1995) (striking dual convictions for second-degree murder and aggravated battery arising from the same lethal attack), review denied, 670 So. 2d 940 (Fla. 1996).

Moreover, double jeopardy does not permit dual convictions for felony murder and the underlying felony defined by subsection 827.03(1)(a) because the underlying felony is itself the commission of the lethal crime. U.S. Const. amends. V, XIV; art. I § 9, Fla. Const. This is not like other double jeopardy claims where the underlying felony is not the murderous crime itself, such as theft, robbery, or burglary. See, e.g., Boler v. State, 678 So. 2d 319 (Fla. 1996).

In sum, the aggravated child abuse charges under subsection 827.03(1)(a) prosecuted an illegal theory in this case. Donaldson contests the sufficiency of the willful torture theory, but even if evidence of that theory was sufficient, the convictions of aggravated child abuse based on a legal and an illegal theory cannot stand under due process guarantees of the United States and Florida Constitutions. See Griffin v. United States, 502 U.S. 46 (1991); Mills v. Maryland, 486 U.S. 367 (1988); Yates v. United States, 354 U.S. 298 (1957); Stomberg v. California, 283 U.S. 359 (1931).

With respect to aggravated kidnapping, the State relies on two easily distinguishable cases. In Bedford v. State, 589 So.

2d 245, 251-52 (Fla. 1991), cert. denied, 503 U.S. 1009 (1992), the victim had been transported, confined in a vehicle, and bound and gagged with duct tape. Bedford also gave a statement indicating the kidnapping had been planned in advance. In Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993), Sochor removed the victim the a parking lot and drove her to a secluded spot to avoid detection, assaulted her, and pinned her to the ground while she screamed for help. Nothing like those facts occurred here. See IB at 54-55.

III: WHETHER THE ERRONEOUS INTRODUCTION AND FEATURING OF A PRIOR CONVICTION FOR ACCESSORY AFTER THE FACT, COMBINED WITH IMPROPER PROSECUTORIAL ARGUMENT, FAILURE TO INSTRUCT, AND IMPROPER JUDICIAL FINDINGS, GAVE UNLAWFUL CONSIDERATION TO NONSTATUTORY AGGRAVATION AND DOUBLE CONSIDERATION TO THE PRIOR VIOLENT/CAPITAL FELONY AGGRAVATOR, THEREBY SKEWING THE WEIGHING PROCESS IN VIOLATION OF DONALDSON'S RIGHTS.

The State proposes that evidence erroneously admitted to implicate Donaldson in a prior murder is "harmless." AB14. No errors ever could be more harmful to a capital defendant.

A. All accessory after the fact evidence was inadmissible.

The State omits any reference to the analysis and authorities raised in the initial brief. Effectively the State's argument would have this Court unconstitutionally enlarge the meaning of sections 921.141(5)(b) and 777.03, Florida Statutes (1993), to embrace criminal conduct never before considered within those statutes. See, e.g., Bouie v. Columbia, 378 U.S. 347 (1964).

The State cites three inapposite cases in asking this Court not to look at the habitual offender statute for an analogous

definition of violent crimes. See AB 14 n.4. Preston v. State, 444 So. 2d 939 (Fla. 1984), dealt with notice. Ruffin v. State, 397 So. 2d 277 (Fla.), cert. denied, 454 U.S. 882 (Fla. 1981), dealt with the finality of the prior conviction. McRae v. State, 395 So. 2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041 (1981), dealt with the distinction between an adjudication, and a withheld adjudication. Also, McRae pleaded guilty to a violent offense (assault with intent to commit murder). None of these cases bear on whether the Legislature defined a crime as violent. Moreover, unlike these cases, Donaldson pleaded to a non-violent offense and was adjudicated for committing a non-violent offense.

The State asserts that the trial prosecutor alleged "one of Donaldson's current attorneys had questioned Kasten at length in the deposition." AB17. But the prosecutor was wrong and he misled the judge, as the record proves conclusively. See IB at 65 & App.10-11; State Exhibit 23.

The State asserts that State v. Green, 667 So. 2d 756 (Fla. 1995), should not be applied to penalty proceedings, but it fails to give any legitimate reason. See AB18 n.5.; see also AB26. There is no reason. The same discovery, impeachment, truth finding, and confrontation processes present in a guilt proceeding are at issue when jurors hear penalty evidence. The policies underlying Green apply equally here.

The State asserts that Kasten's hearsay statements were admissible because he was not the victim. See AB17-18. A hearsay declarant's status as a witness or victim is irrelevant to whether Donaldson had a fair chance to rebut the hearsay.

The State claims the statements of Robinson and Smith were not unduly prejudicial because investigator Vinson did not believe them. See AB18 n.7. If the State did not want the jury to believe the egregious prejudicial content of those statements, it would never have introduced them in the first place. Moreover, the investigator's disbelief of those statements minimizes whatever legally probative value they had, thus making undue prejudice of those statements that much greater when properly weighed against their lack of probative value.

B. The whole weighing process was skewed by argument and findings that double-counted this one circumstance.

The State relies on Sims v. State, 444 So. 2d 922 (Fla. 1983), cert. denied, 467 U.S. 1246 (1984), for the proposition that the judge merely committed harmless error. See AB22. Sims, however, holds an error is reversible when it "interferes with the mandated process of weighing the circumstances." 444 So. 2d at 926. The instructions and findings here went to a separate, additional, enumerated aggravating circumstance where no separate enumerated circumstance exists. Even if some of the evidence had been admissible, jurors were openly misled by the prosecutor and the judge to believe they could find more in aggravation than the law allows, an error compounded by the prosecutor making the collateral crime the feature of the penalty phase. Those errors of necessity interfered with the jury's weighing process. The additional circumstance obviously affected the judge's decision, as evinced by the sentencing order in which he separately enumerated and relied upon that factor. Moreover, Sims is

factually distinguishable because Donaldson established much mitigation, whereas Sims proved none. It is also doubtful Sims would be decided the same way today given the evolution of capital jurisprudence.

The State relies on a string cite of cases for the proposition that the weighing process is not a numbers game. See AB22. Donaldson agrees. It is a weighing process. And when the scale is impermissibly tipped on the side of death by allowing consideration of an improper aggravating circumstance, or undue consideration of an extra aggravating circumstance, the weighing process is rendered unreliable. That is especially true here given the compounded errors embraced within Issue III.

IV: WHETHER THE COURT ERRONEOUSLY PERMITTED THE STATE TO INTRODUCE THE HEARSAY, DISCOVERY DEPOSITION TESTIMONY OF CISNEROS TO PROVE SYKOSKY WAS THE TRIGGERMAN, DESPITE THE FACT THAT BOTH PARTIES STIPULATED SYKOSKY WAS THE TRIGGERMAN, THE DEFENSE HAD NO ADEQUATE OPPORTUNITY TO REBUT THE DEPOSITION, AND THE STATE OPENLY KNEW THE DEPOSITION HAD BEEN PERJURED.

The State appears to take the position that no error is committed when a judge permits the State to introduce the hearsay statement of a non-testifying co-defendant in the penalty phase. However, this Court rejected that argument in Gardner v. State, 480 So. 2d 91, 94 (Fla. 1985). There, a co-defendant made a hearsay statement to a police officer, and the officer recounted that statement in court. The co-defendant did not testify. This Court reversed, finding the admission of that hearsay violated Gardner's due process and confrontation rights. See also Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. denied, 104 S. Ct. 1430 (1984). There is nothing in this record to indicate any

indicia of reliability in a perjured hearsay statement made under these circumstances.

Also noteworthy is the State's omission to respond regarding the unethical actions of its trial prosecutor.

V: WHETHER THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL WAS PROPERLY INSTRUCTED AND FOUND.

The State appears to argue an erroneous proposition that an accused's state of mind is irrelevant to HAC. See AB29-30. However, this Court repeatedly has held to the contrary, reversing many HAC findings because of the accused's state of mind. See cases cited in IB83-86.

The State bases its harmless error analysis on a comparison between the number of aggravators and mitigators in this case and in other cases. See AB31-32. That is a curious analysis given that the State in Issue III argued it is improper to compare numbers of aggravators and mitigators in death penalty cases. See AB22. Of course, the State's analysis here is wrong. The State has the burden of proving beyond a reasonable doubt that the two errors in finding perhaps the most weighty aggravator, HAC, as to both murders, did not contribute to the jury's recommendations. See Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). That is hardly possible in this case both independently, and cumulatively with other errors.

VI: WHETHER THE INSTRUCTIONS AND FINDING OF COLD, CALCULATED, AND PREMEDITATED WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION WERE ERRONEOUS.

The State makes an unsupportable procedural bar claim. AB34. Donaldson proposed instructions containing the necessary correct language, V13R2574-75, V14R2649-50, objected to the State's instruction, got an adverse ruling, and the judge said he would give the standard instruction. V30T1644. Donaldson then lodged a standing objection to the instruction the judge chose to give. V30T1650. There is nothing more Donaldson could have done or should have done to preserve the issue.

The State discards Donaldson's pretense argument merely by calling the authorities supporting him "factually distinguishable." AB38. But the State fails to suggest any reasons why those cases are "distinguishable." A recent case, Bell v. State, 22 Fla. L. Weekly S485 (Fla. July 17, 1997), is inapposite because the evidence unequivocally showed Bell committed the murders when neither any real threat nor any reasonable perception of a threat existed, and he had planned the revenge killing for months. Here, however, Donaldson was living it a virtual state of siege, constantly under the very real threat of armed attacks from a variety of people including Head and Campbell.

VIII: WHETHER THE JUDGE ERRED BY FAILING TO ADMIT EVIDENCE OF NONSTATUTORY MITIGATION, TO INSTRUCT ON NONSTATUTORY MITIGATION, AND TO FIND AND WEIGH A SUBSTANTIAL VARIETY OF NONSTATUTORY MITIGATION.

The State says much requiring response regarding the evidence of his refusal to accept the government's plea offer.

First, the State makes another unsupportable procedural bar argument similar to the one in Issue I. See AB7. Donaldson

offered the evidence, the State objected, the judge ruled adversely to Donaldson and excluded his evidence. No law requires more to preserve an issue for appeal.

Second, the State argues for strict adherence to the rules of evidence regarding section 90.410, Florida Statutes (1993). See AB40-41. Paradoxically, the State also argues that the rules of evidence are relaxed in the penalty phase. See AB25. The State should not be permitted to make such self-serving self-contradictions. This Court many times has said the State and defense operate on an even playing field, but the State wants the field slanted in one direction.

Third, the State's argument is procedurally defaulted because the State did not make this statutory argument below, nor did the judge rule on the statute's application. See V29T1575-83; Dupree v. State, 656 So. 2d 430, 432 (Fla. 1995) (State procedurally barred from raising hearsay exception on appeal when State did not argue that exception in trial court); see also Wike v. State, 22 Fla. L. Weekly S483, 485 (Fla. July 17, 1997) (procedural bar applied to State); Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (same).

Fourth, constitutional rights trump evidentiary rules where the two conflict, and Donaldson had the constitutional right to present mitigating evidence. U.S. Const. amends. VI, VIII, XIV; art. I, §§ 2, 9, 17, Fla. Const.

Fifth, the State opened the door to introduction of evidence of a plea offer by introducing evidence of the pleas in the

MaHugh incident. What's good for the goose is good for the gander.

IX: WHETHER THE DEATH SENTENCES WERE DISPROPORTIONATE CONSIDERING THAT DONALDSON WAS NOT THE TRIGGERMAN, THE TRIGGERMAN GOT LIFE, OTHER ACCOMPLICES GOT LENIENT TREATMENT, THE MURDERS AROSE FROM A STATE OF SIEGE MENTALITY, NUMEROUS AGGRAVATING CIRCUMSTANCES SHOULD NOT HAVE BEEN FOUND, AND MUCH MITIGATION EXISTED.

The State's cases are inapposite because each involves multiple aggravating circumstances with little or no mitigation, whereas Donaldson's authorities are applicable in that here there is only one valid aggravator, and substantial mitigation was proved.

CONCLUSION

For the reasons stated above and in the initial brief, this Court should reverse and order judgment of acquittal. Alternatively, this Court should remand for a new trial. Alternatively, this Court should vacate the death sentences and remand for imposition of life sentences. Alternatively, this cause should be remanded for new penalty proceedings before a new jury panel.

CERTIFICATE OF SERVICE

I certify that a copy of this reply brief of appellant has been furnished by delivery to Barbara J. Yates, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301, and a copy has furnished by mail to appellant Charles Donaldson, on this __ day of_____, 1997.

Respectfully submitted,

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