FLORIDA SUPREME COURT
500 South Duval Street
Tallahassee, Florida 32399

CASE NO.: SC19-1207
L.T. NO.: 16-1992-CF-13193-AXXX-MA

TONEY DERON DAVIS v. **STATE OF FLORIDA**

Defendant/Appellant. Appellee.

APPELLANT'S MOTION FOR REHEARING

COMES NOW, Appellant, TONEY DERON DAVIS, by and through undersigned counsel, and respectfully requests that this Court, pursuant to Fla. R. App. Pro 9.330(a)(2)(A), Rehear and/or Reconsider its August 27, 2020 Opinion affirming the lower court's order summarily denying successive 3.851 relief, and in support thereof states as follows:

INTRODUCTION

1. Toney Deron Davis will be referenced as "Mr. Davis," "Davis" or "Appellant."
2. Citations to this Court's August 27, 2020 Opinion will be referenced as "Opinion" followed by the page number, e.g. (Opinion 1.) Citations to the Record will be designated by "SPCR" and the page number, e.g. (SPCR 1.) Citations to the direct appeal Record will be designated by the volume number "R" and the page number, e.g. (1 R 1.)

I. The evidence this Court relies upon to refute *Giglio* and *Brady* materiality has been largely refuted by new evidence set forth in Mr. Davis' postconviction proceedings.

This Court's August 17, 2020 Opinion relies primarily on five points to find that Janet Cotton's recantation of her trial testimony is immaterial to Mr. Davis' case under either *Giglio* or *Brady*: 1) testimony that Davis was alone with C.C.; 2) "the bloodstain evidence"; 3) medical testimony regarding the nature of the victim's injuries; 4) "Davis's inability to explain how the victim fell or why blood was found in certain areas of the apartment"; 5) Mr. Davis' explanation concerning C.C. evolved. (Opinion 1) (citing *Davis I,* 703 So. 2d at 1059.) However, the Court's Opinion overlooks that most of these points are inaccurate or were refuted in during postconviction proceedings.

Contrary to this Court's August 27 Opinion, the bloodstain evidence and "blood in certain areas of the apartment" was never conclusively linked to C.C. or to Mr. Davis. *Davis*, 136 So. 3d at 1185. In any event, any blood of C.C. was explainable by Mr. Davis' concession that he dropped her. Additionally, Mr. Davis *has* explained why the victim fell – because she was wet from the tub when he was attempting to revive her.

Also contrary to this Court's findings, the medical evidence is subject to different interpretations, including interpretations which would support Mr. Davis's explanation of the events, thus exculpating Mr. Davis. Numerous experts agree that

the medical evidence does not support a sexual battery. (SPCR 164) (19 PCR 3479, 3482.) "[T]he best explanation for there not being any injuries was there never were any injuries…" (19 PCR 3458.) A sexual battery is especially unlikely in the face of evidence withheld from the state that C.C. suffered vaginal irritation and poor hygiene leading up to the day in question. (SPCR 167), (19 PCR 3459.)

Additionally, Dr. Ophoven has explained that C.C.'s other injuries could have been the result of an accidental drop, just as Mr. Davis explained: "Since Mr. Davis' 1995 trial, the science in this area has evolved so that it has now been shown that falls of a relatively short distance [3 feet] can cause severe, and sometimes fatal, injury in small children and toddlers." (SPCR 146.) This is supported by other biomechanical research demonstrating falls "as short as one foot can cause fracture and intracranial bleeding. (SPCR 145.)[1] Further, the retinal hemorrhaging is "not consistent with a conclusion that C.C. was violently shaken." (SPCR 146.)

Finally, as pointed out in every stage of Mr. Davis' postconviction proceedings, his story has always been the same, and he told C.C.'s mother and Ms. Williams shortly after the incident that Moore was briefly alone with the child. The only reason he did not tell rescue personnel that Mr. Moore may have harmed the

[1] If Mr. Davis accidentally dropped C.C. while trying to revive her, she would have looked normal when he returned from making his phone calls, contrary to this Court's Opinion that his claim that she appeared uninjured was "patently impossible." (Opinion 7.)

child is because Mr. Davis, himself, *did not* and *does not* know what happened to C.C. However, under a cumulative assessment of currently available evidence in this case, the most probable explanation is that C.C. suffered an asthma attack or seizure while Mr. Davis was out using the phone; Davis attempted to revive her with water in the bathtub when he returned to find her unresponsive; then, in a panic, he dropped the wet child on a hard surface, causing catastrophic injuries. Where Mr. Davis has never been granted an evidentiary hearing on numerous significant postconviction issues, including new medical testimony and a full recantation of a key state witness, no court has been able to evaluate the cumulative effect of new evidence in his case.

II. This Court overlooks the emphasis placed on Ms. Cotton's testimony by the state at trial.

The state's reliance on Cotton's testimony at trial is the best indicator of the materiality of her full recantation. *See Kyles v. Whitley,* 514 U.S. 419, 444, 115 S. Ct. 1555, 1571 (1995) ("The likely damage [of the suppressed evidence] is best understood by taking the word of the prosecutor"); *Hayes v. Brown*, 399 F.3d 972, 986 (9th Cir. 2005) ("The importance of James's testimony was underscored by the prosecution in its closing argument"); *Gathers v. United States*, 101 A.3d 1004, 1009 n.5 (D.C. 2014) ("A prosecutor's stress upon the centrality of particular evidence in closing argument tells a good deal about whether the admission of the evidence was meant to be, and was, prejudicial.")

Yet, in determining that Ms. Cotton's recantation does not establish *Giglio* or *Brady* materiality, this Court overlooked the prosecution's emphasis on Ms. Cotton's testimony at trial:

> Ms. Cotton, the next door neighbor, testified that she was familiar with Gwen Cunningham and the kids; that on the day in question she was entertaining and between 12:00 and 12:30 she heard a horrendous racket next door that included bumping and thumping, like hitting the walls, a child cry, and a man yelling, "Sit down," in a mean, stern voice. A man who she recognized the voice as being the defendant, Toney Davis.
>
> And she also told you that it went on for a half hour and stopped at 12:30. She then told you 30 minutes later rescue arrived. She told you that she told the investigators at the scene what she had heard.

(32 R 971.)

> Between 12:00 and 12:30, Janet Cotton, the next door neighbor, hears banging on the walls, child crying, defendant yelling, sit down," and it goes on for a half hour. And let me tell you something, nobody else has accounted for this half hour, not even this defendant.

(32 R 1019.) As demonstrated with this argument, the testimony was necessary to refute Mr. Davis' defense at trial that Mr. Moore could have harmed the child; or to establish that the injuries did not even occur that day.

III. CONCLUSION

Based on the foregoing and the contents of his Initial and Reply briefs, Mr. Davis respectfully requests that this Honorable Court rehear and reconsider this matter pursuant to Fla. R. App. Pro. 9.330(a)(2)(A) with respect to the particular points of law and fact that Mr. Davis has set forth above, grant his 3.851 appeal and

reverse and remand his convictions and sentence of death.

Respectfully submitted,

THE SICHTA FIRM, LLC.,

/s/ Rick Sichta

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office to capapp@myfloridalegal.com this 10th day of September, 2020.

/s/ Rick Sichta

ATTORNEY